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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Court Judge

Case No. 2007-CP-38-00196 and 2007-CP-38-0201
Appellate Case No. 2014-001634

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SC Court of Appeals

First Citizens Bank and Trust Company, Inc., ... Appellant/Respondent,

v.

Clyde B. Livingston, Technico Marketing & Distribution,
Inc., B. Livingston and Charlotte V. Livingston, American
First Federal, Inc., Citibank South Dakota, N.A., Branch
Bank and Trust Company of South Carolina, G&G Rentals,
Miller Communications, Wells Fargo Bank, N.A., ...

Defendants,

Of whom Clyde B. Livingston is the Respondent/Appellant,

And

First Citizens Bank and Trust Company, Inc., ... Appellant/Respondent.

v.

Clyde B. Livingston, American First Federal, Inc., Citibank
South Dakota, N.A., Branch Bank and Trust Company of
South Carolina, G&G Rentals, Miller Communications,
Wells Fargo Bank, N.A., ...

Defendants,

Of whom Clyde B. Livingston is the Respondent/Appellant.

RECORD ON APPEAL- VOLUME II

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STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Community Resource Bank, N.A., *et al.*,

☒ Plaintiff

v.

Clyde B. Livingston, *et al.*,

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO:

2007-CP-38-0196

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED
CLERK OF COURT
RECORD
MINUTES

2012 OCT 19 PM 2:33

Plaintiff's Attorney: Louise M. Johnson, Bar No. 16586 Haynsworth Sinkler Boyd, P.A. Post Office Box 11889 Columbia, SC 29211-1889 phone: (803) 779-3080 fax: (803) 765-1243 e-mail: cjohnson@hsblawfirm.com.		Defendant's Attorney: <i>Winnya B. Clark</i> CLERK OF COURT	
ORANGEBURG COUNTY, SOUTH CAROLINA			
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Summary Judgment			
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II: Motion/Order Type			
☐ Written motion attached ☐ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
<i>[Signature]</i> Signature of Attorney for ☒ Plaintiff / ☐ Defendant		October 18, 2012 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00			
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other: ☐			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE: _____	
		CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

Case No. 2007-CP-38-196

Community Resource Bank, N.A., f/k/a
Orangeburg National Bank;

Plaintiff,

vs.

Clyde B. Livingston, Technico
Marketing & Distribution, Inc., B.
Livingston and Charlotte V. Livingston,
American First Federal, Inc., Citibank
South Dakota, N.A., Branch Banking and
Trust Company of South Carolina, G&G
Rentals, Miller Communications, Inc.,
Wells Fargo Bank, N.A.,

Defendant.

**COMMUNITY RESOURCE BANK, N.A.,
f/k/a ORANGEBURG NATIONAL BANK'S
MOTION FOR SUMMARY JUDGMENT
ON DEFENDANT CLYDE B.
LIVINGSTON'S COUNTERCLAIMS**

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Winnys B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

Pursuant to Rule 56, SCRCP, Plaintiff Community Resource Bank, N.A., f/k/a Orangeburg National Bank ("Plaintiff") moves for summary judgment on the Remaining Counterclaims (as defined herein) of defendant Clyde B. Livingston ("Livingston"). Certain recent rulings from the Supreme Court of South Carolina and the South Carolina Court of Appeals provide new legal bases for granting the Plaintiff's Motion for Summary Judgment on Livingston's Remaining Counterclaims (as defined herein). This motion ("Motion") is based upon the pleadings, applicable statutory and case law, and excerpts from the deposition testimony of defendant Livingston, taken on September 11, 2008. All deposition excerpts cited herein are attached collectively as Exhibit 1.

PROCEDURAL HISTORY

On February 16, 2007, Plaintiff commenced this action to foreclose a second mortgage on

that certain real estate located at 260 North Brookside, Orangeburg, South Carolina ("Mortgaged Property"). The mortgage secures a Home Equity Line agreement in the original principal amount of Fifty Seven Thousand and No/100 (\$57,000.00) Dollars ("Note") executed on November 9, 2000. Plaintiff seeks judgment against Livingston for any deficiency remaining after foreclosure.

On or about March 26, 2007, Livingston filed an answer and counterclaim, and asserted the following causes of action against Plaintiff: 1) Plaintiff's alleged violation of the South Carolina Consumer Protection Code, S.C. Code Ann. §§ 37-1-101, *et seq.* ("SCCPC"); 2) Plaintiff's alleged breach of contractual obligations to Livingston; 3) Plaintiff's alleged violation of the Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.* ("SCUTPA"); and 4) libel for Plaintiff's alleged publication of false information about Livingston in the subject foreclosure action.

On May 15, 2007, the Clerk of Court for Orangeburg County entered a Mandatory Order of Reference, referring the case to the Orangeburg County Master in Equity. On August 1, 2007, Livingston filed a Motion for Summary Judgment as to Plaintiff's claims ("Livingston's MSJ"), a Motion to Amend Answer ("Motion to Amend"), and a Motion to Quash Ex parte Order of Reference ("Motion to Quash"). A hearing on Livingston's MSJ and Motion to Amend occurred before the Court on December 3, 2007. The Court issued an Order Denying Livingston's MSJ on December 19, 2007 ("December 19th Order"). However, in an order dated December 11, 2007, the Court granted Livingston's Motion to Amend, return Livingston's counterclaims triable by jury to the circuit court, and retained jurisdiction of the foreclosure action. These rulings were formalized by Order of the Court entered December 11, 2007 ("December 11th Order").

On or about December 21, 2007, Livingston filed a Motion to Reconsider both the

December 19th Order and the December 11th Order, and a hearing on his motion was held before the Court on June 24, 2008. On August 5, 2008, The Honorable O. Davie Burgdorf issued an order denying Livingston's Motion to Reconsider and clarifying the December 11th Order as follows:

- i. [Livingston's] motion to amend is granted;
- ii. Plaintiff's foreclosure action and [Livingston's] counterclaims are hereby severed;
- iii. Plaintiff's foreclosure remains in the jurisdiction of the Master in Equity for Orangeburg County;
- iv. [Livingston's] amended answer and counterclaim asserts counterclaims on which he has the right to a trial by jury, and [Livingston's] counterclaims are returned to the circuit court;
- v. [Livingston's] counterclaims shall be heard and concluded prior to the proceeding of Plaintiff's foreclosure action; and
- vi. Plaintiff's foreclosure action is stayed pending the resolution of the Defendant's counterclaims.

Pursuant to a consent order among the parties, on January 31, 2008, Plaintiff was granted leave to amend its Complaint. Plaintiff filed and served its Amended Complaint on or about May 1, 2009, which included a new allegation that Plaintiff had timely sent Livingston a Notice of Default for subject loan. Livingston timely filed an Answer and Counterclaim to Amended Complaint ("Counterclaim") and asserted the following additional Counterclaim: Plaintiff's alleged violation of 15 U.S.C. § 1635 ("TILA") and Regulation Z § 226.23 (12 C.F.R. § 226.23) ("Reg. Z").

Plaintiff previously filed a Motion for Summary Judgment ("Plaintiff's MSJ") on Livingston's counterclaims. On May 24, 2010 The Honorable Diane S. Goodstein issued an Order Granting Summary Judgment in Part and Denying Summary Judgment in Part as follows:

- i. Plaintiff's MSJ was granted for the following of Livingston's

counterclaims: 1) Plaintiff's alleged violations of 15 U.S.C. § 1635 ("TILA") and Regulation Z § 226.23 (12 C.F.R. § 226.23), and 2) relief under S.C. Code Ann. § 37-5-202 for Plaintiff's alleged violation of S.C. Code Ann. § 37-5-110 or 37-5-110.

ii. Plaintiff's MSJ was denied for the following of Livingston's counterclaims: 1) Plaintiff's alleged violations of the South Carolina Consumer Protection Code ("Attorney Preference Statute"), 2) Plaintiff's alleged breach of contractual obligations to Livingston, 3) libel for Plaintiff's alleged publication of false information about Livingston in the subject foreclosure action, and 4) Plaintiff's alleged violations of the South Carolina Unfair Trade Practices Act.

Accordingly, the remaining counterclaims ("Remaining Counterclaims" or, individually "Remaining Counterclaim") are the following: 1) Plaintiff's alleged violations of the South Carolina Consumer Protection Code ("Attorney Preference Statute"), 2) Plaintiff's alleged breach of contractual obligations to Livingston, 3) libel for Plaintiff's alleged publication of false information about Livingston in the subject foreclosure action, and 4) Plaintiff's alleged violations of the South Carolina Unfair Trade Practices Act.

STANDARD OF REVIEW

A motion for summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; *see also Tupper v. Dorchester Cty*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). The evidence and all reasonable inferences that may be

drawn must be viewed in the light most favorable to the non-moving party, see *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988), and the moving party has the burden of establishing the absence of a genuine issue of material fact. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004). "If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created and [summary judgment] is properly granted." *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

ARGUMENT

I. LIVINGSTON'S COUNTERCLAIM FOR PLAINTIFF'S ALLEGED VIOLATIONS OF THE SOUTH CAROLINA ATTORNEY PREFERENCE STATUTE IS WITHOUT MERIT.

The Attorney Preference Statute provides in pertinent part:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for personal, family or household purpose:

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . .

The creditor may comply with this section by:

- (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
- (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

S.C. Code Ann. § 37-10-102(a).

The SCCPC, which includes the Attorney Preference Statute, shall be liberally construed and applied to promote its underlying purposes and policies. See S.C. Code Ann. § 37-1-102(1) (setting forth the purposes of the SCCPC). In *Davis v. NationsCredit Fin. Servs.*, 326 S.C. 83,

484 S.E.2d 471 (1997), the South Carolina Supreme Court held that "a lender substantially complies with [the Attorney Preference Statute] if the borrower receives a clear and prominent disclosure of the statutorily required information. 326 S.C. at 86, 484 S.E.2d 472. The South Carolina Supreme Court has also held that "the closing of a loan without attorney supervision constitutes the unauthorized practice of law." *BAC Home Loan Servicing, L.P. v. Kinder*, Op. No. 27146 (S.C. Sup. Ct. filed July 25, 2012) (citing *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011)). Furthermore, "engaging in [the unauthorized practice of law] would preclude a lender from retaining equitable relief." *Id.* However, the Court also held that its ruling would only apply to instruments filed after the opinion in *Matrix* was issued, which was on August 8, 2011. *BAC Home Loan Servicing*, Op. No. 27146 (S.C. Sup. Ct. filed July 25, 2012). Thus, a lender is not precluded from equitable relief with regard to any instruments filed before August 8, 2011, even if an attorney were not present at the closing of the loan.

The undisputed facts reveal that Plaintiff complied with the Attorney Preference Statute by providing a clear and prominent disclosure of Livingston's preference rights. Specifically, on November 6, 2000, Plaintiff provided Livingston with a document entitled Borrower's Preference as to Legal Counsel and Insurance Agent ("Attorney Preference Form"), which advised Livingston of his right to select an attorney. A true copy of the Attorney Preference Form is attached hereto as **Exhibit 2**. It should be noted that in his deposition testimony, Livingston identified his signature on the Attorney Preference Form and admitted that he signed the document. (Livingston Dep. 65:2-10.) The fact that Livingston elected to proceed to the closing of the subject loan without retaining an attorney does not mean that Plaintiff did not comply with its requirements under the Attorney Preference Statute.

However, even if there were no attorney present at the closing at issue, the Defendant still has no cause of action for violations of the Attorney Preference Statute because the mortgage at issue was filed well before August 8, 2011. Livingston's mortgage was filed on November 15, 2000. Based on the standard set forth by the Supreme Court of South Carolina in *Matrix* and clarified in *BAC Home Loan Servicing*, the Plaintiff's Motion as to Livingston's Remaining Counterclaim for Plaintiff's alleged violation of South Carolina's Attorney Preference Statute should be granted as a matter of law because the mortgage at issue was filed before August 8, 2011.

II. LIVINGSTON FAILED TO PROPERLY PLEAD, MUCH LESS PROVE, ANY BREACH OF CONTRACT BY PLAINTIFF.

Livingston's claim of breach of contract is precluded because he is in default on the underlying Note and Mortgage. *Parks v. Lyons*, 219 S.C. 40, 64 S.E.2d 123 (1951). Livingston did not meet his obligations on the Note and Mortgage because he failed to make payments as they became due. In fact, Livingston admitted that he is not current on the Note and Mortgage. (Livingston Dep. 21:6-8.) Moreover, he has not demonstrated that he was, at the appropriate time, able, ready, and willing to carry out such obligations.

Furthermore, the only factual basis Livingston provides for his counterclaim for breach of contractual obligations by Plaintiff is that "Plaintiff failed to satisfy conditions precedent to the bringing of this action as foresaid." (Counterclaim ¶ 48). Livingston's Counterclaim fails to set forth any specific facts regarding what 'condition precedent' that Plaintiff allegedly did not satisfy. He further asserts that he "has not been able to avail himself of the agreed-upon credit line per the terms of the Home Equity Line document," but does not specify (1) the terms that he claims were breached; (2) how and when the alleged terms were breached; and (3) how he has not been able to avail himself of the credit line. (Counterclaim ¶ 49).

To successfully bring an action for breach of contract, a plaintiff must identify the event that allegedly caused him damage. Livingston's counterclaim and discovery is devoid of any evidence suggesting that Plaintiff breached any contract with Livingston in any way. He has not plead or produced any evidence of any breach by Plaintiff, and cannot rest on mere allegations to survive summary judgment.

Although the facts in a summary judgment motion are construed in the light most favorable to the non-moving party, the non-movant must point to specific facts showing that there is a genuine issue for trial, rather than resting on the assertions of its pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party fails to make a showing sufficient to establish the existence of an element of its case, and on which it will bear the ultimate burden of proof at trial, there can be no genuine issue of material fact because the failure of proof concerning an essential element of the case renders all of the facts immaterial. *Celotex*, 477 U.S. at 322-23. In that event, the moving party is entitled to judgment as a matter of law. Because Livingston has failed to identify any alleged contract term that was breached, much less produce any substantial evidence of a breach, Plaintiff is entitled to summary judgment on Livingston's counterclaim for breach of contract.

In the event that Livingston is contending Plaintiff failed to send him a notice of default, and that the alleged omission constitutes an unsatisfied condition precedent to the filing of this action, the Counterclaim is without merit, as set forth in Part I above.

To the extend that Livingston's breach of contract Remaining Counterclaim is based on the invalidity of the Mortgage due to Plaintiff's alleged violation of the Attorney Preference Statute, Livingston's breach of contract Remaining Counterclaim is also without merit because of the recent holdings of South Carolina Court's regarding the Attorney Preference Statute. The

underlying Mortgage is valid regardless of whether or not an attorney was present because it was filed before August 8, 2011. It is undisputed that Livingston signed the Note and Mortgage, and also undisputed that Livingston was behind on his payments. Thus, Plaintiff did not breach any contract with Livingston by failing to advance further funds under the Note or by commencing this action.

III. LIVINGSTON FAILED TO PROVE ANY VIOLATION OF THE UNFAIR TRADE PRACTICES

Livingston alleges that "[a]ctions of the Plaintiff" have violated the SCUTPA. Livingston fails to mention a single action which may have violated SCUTPA, although he claims that such actions are capable of repetition and that Livingston suffered damages because of those actions. (Counterclaim ¶¶ 51-55).

The SCUTPA makes unfair or deceptive acts or practices in the conduct of any trade or business illegal. In South Carolina, to establish a violation of SCUTPA, Livingston would have to prove that the Plaintiff committed "unfair or deceptive acts or practices in the conduct of any trade or commerce" and that those "acts or practices have the potential for repetition." *Hollman v. Woolfson*, 683 S.E.2d 495, 499 (S.C. 2009) (citing S.C. Code Ann. § 39-5-20; *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004)). "The potential for repetition may be proven by showing: (1) the same kind of actions occurred in the past, thus making it likely they will continue to occur absence deterrence; or (2) the defendant's procedures created a potential for repetition of the unfair and deceptive acts." *Id.* (citing *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004)). Conduct which only affects the parties to the transaction provides no basis for a SCUTPA claim. *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

Livingston's claim under the SCUTPA is deficient on its face, as Livingston set forth no

facts in support of the claim, thus demonstrating no affect on Livingston, and much less any potential for repetition. It could be argued that Livingston's own words defeats his counterclaim of a SCUTPA violation. In his deposition testimony, Livingston declares that he "didn't think [the bank] did anything out of their normal business practices and [he] would assume that they're not in the business of deceiving people." (Livingston Dep. 44:1-5.) Further, in *Carrington Mortgage Services, LLC v. Riley*, the United States Bankruptcy Court for the District of South Carolina held that the Defendant had no claim under SCUTPA, and the Defendant in that case also failed to "set forth specific allegations regarding conduct he claims violates the act." No. 09-4740-DD, slip op. at 17-20 (Bankr. Ct. D.S.C. filed Sept. 25, 2012). While that case is not binding on this Court, it does demonstrate the standard that baseless claims under SCUTPA should fail as a matter of law.

It appears that Livingston is attempting to rely on the facts he asserted under his SCCPC claim to provide a factual basis for his SCUTPA claim, even though those facts, which are denied, would be insufficient to support a cause of action under the SCUTPA even if they were true. To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact on the public interest. *Id.* If the allegedly unfair or deceptive act has the potential for repetition, then it can affect the public interest. *Daisy Outdoor Advertising Co., Inc. v. Abbott*, 473 S.E.2d 47 (1996). Livingston cannot establish that any of the Plaintiff's actions with respect to the subject loan have the potential to impact the public interest, as the financial status of the Livingston at the time of the loan and the size of the loan are specific facts, unique to the two parties of the contract. Therefore, any alleged breach of the contract between Livingston and Plaintiff would be a private wrong. The party seeking to recover under the SCUTPA must prove the potential for repetition. *See Crany v. Djebelli*, 496 S.E.2d 21 (1998). The potential for

repetition must be real and substantial as opposed to a hypothetical possibility that the act would be repeated. *Id.* (emphasis added). The SCUTPA is unavailable to address a private wrong. *Noack Enterprises Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 351 S.E.2d 347 (Ct. App. 1986)

Nowhere in the SCUTPA counterclaim do Livingston allege that any injury to the public interest has occurred, or state the manner in which Plaintiff's alleged unfair and deceptive acts or practices have or could impact the public interest. Plaintiff's transparent and prospective allegation that Plaintiff's alleged unfair or deceptive acts are offensive to public policy and have the potential for repetition utterly fails to satisfy the SCUTPA's public impact requirement.

Accordingly, Livingston's counterclaim for unfair trade practices should be dismissed.

IV. LIVINGSTON'S CLAIM FOR LIBEL FAILS BECAUSE PLEADINGS ARE ABSOLUTELY PRIVILEGED.

Libel is a form of defamation, and in order to show libel Livingston would have to prove that "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002) (citing *Holtzschetter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998) (Toal, J. concurring). In the Defendant's Counterclaim, there is no factual basis as to how any of the above elements are satisfied.

The Plaintiff never made a false or defamatory statement regarding Livingston. Livingston admitted that he is not current on the Note and Mortgage (Livingston Dep. 21:6-8), and this is the reason that the Plaintiff commenced this foreclosure action. Furthermore, pleadings are absolutely privileged in South Carolina. Allegations contained in a *lis pendens* or a complaint can not be deemed libelous. *Pond Place Partners, Inc., et al v. Poole et al*, 351 S.C. 1, 567 S.E.2d 881 (Ct.

App. 2002). Thus, no cause of action for libel exists for the publication of the Plaintiff's Complaint, and Livingston's Remaining Counterclaim should be dismissed.

Furthermore, the Plaintiff did not commit libel because the underlying Mortgage is not void, and the Plaintiff filed this foreclosure suit in good faith. Because the Mortgage was filed before August 8, 2011 and is not in violation of the Attorney-Preference Statute, and Livingston was not making payments on the Note and Mortgage, the Plaintiff commenced this action. Harming the reputation of Livingston is completely unrelated to the present suit.

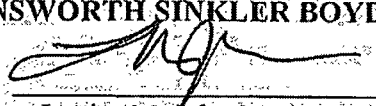
CONCLUSION

Based on the foregoing, Plaintiff is entitled to summary judgment as to all of Livingston's Remaining Counterclaims.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

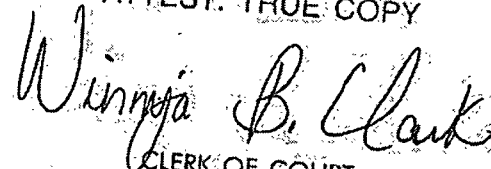
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Attorneys for Community Resource Bank,
N.A., f/k/a Orangeburg National Bank

ATTEST: TRUE COPY


CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

October 18, 2012

1 identification purposes).

2 Q: Okay. I'm going to hand you Plaintiff's
3 Eleven. If you could take a look at that
4 document. I'll ask you if you recognize that.
5 Is that your signature? Actually, there are two
6 signatures, are both of those your signatures?

7 A: Both of them are my signatures.

8 Q: Okay. Oh, I need to identify the document.
9 It's entitled borrower's preference as to legal
10 counsel and insurance agent, dated 11/6/2000.
11 All right. We're at Plaintiff's Twelve.

12 (Plaintiff's Exhibit Number Twelve was marked for
13 identification purposes).

14 Q: I ask you to look at this. It's entitled equal
15 credit authorization disclosure, Orangeburg
16 National Bank. There's a signature and a date
17 of 11/9/2000. Is that your signature?

18 A: Yes, ma'am.

19 (Plaintiff's Exhibit Number Thirteen was marked for
20 identification purposes).

21 Q: Plaintiff's Thirteen entitled government
22 monitoring form dated 11/9/2000, is that your
23 signature?

24 A: Yes.

25 (Plaintiff's Exhibit Number Fourteen was marked for

1 MR. RADEKER: Same objection.

2 A: I don't remember.

3 Q: Okay. Are you current on your first mortgage
4 on Brookside?

5 A: I don't think so.

6 Q: Are you current on the mortgage to Community
7 Resource on the rental house property?

8 A: I'm not current on anything right now.

9 Q: Okay. What was the Riggs Street property loan
10 for? What did you borrow the money for?

11 A: To buy ... to buy wait a minute. To buy
12 the property.

13 Q: Okay. The first mortgage on Brookside, what
14 did you borrow the money in that one for?

15 A: To buy the property.

16 Q: Can you remember when you bought that Brookside
17 property?

18 A: About 29 ... no, about 29 years ago. Somewhere
19 in that neighborhood.

20 Q: Okay. All right. I want to now ask you to
21 look at some documents and what I'm going to do
22 is give a copy to the court reporter and ask
23 her to mark it for identification as
24 Plaintiff's One. I'm going to give a copy to
25 your lawyer.

1 know, I certainly don't think they did anything
2 out of their normal business practices and I
3 would assume that they're not in the business
4 of deceiving people.

5 Q: Anything they did that you think was unfair to
6 you?

7 A: There was probably something at the time, but,
8 you know, time heals those things and you tend
9 to ... you know, I do remember that at some
10 point in time that I got real upset with Mark
11 Tremier to the point that I thought about going
12 to the president of the bank and asking for
13 another loan officer. You know, I felt like we
14 had gotten to the point that, you know, we
15 couldn't, you know, communicate and ...

16 Q: And I know you can't ... you're having a hard
17 time remembering specifics, but can you
18 remember any details about any communications
19 that actually brought you to that point? Can
20 you remember any specifics about it?

21 A: Not right off the top of my head. I just
22 can't.

23 Q: Okay. Do you remember if at the closing of
24 this rental property loan, or when you borrowed
25 the money, did you get any cash directly from

CLYDE B LIVINGSTON 260 N BROOKSIDE ORANGEBURG, SC 29115	ORANGEBURG NATIONAL BANK 791 BROUGHTON STREET, SW ORANGEBURG, SC 29115	Date Mailed or Delivered <u>11/06/2000</u> Date Application is Received or Prepared <u>11/06/2000</u> Date Returned to Lender _____ Reference Number <u>2703618</u>
BORROWER'S NAME AND ADDRESS "You" and "We" includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS "Lender" includes the lender, its successor and assigns.	

BORROWER'S PREFERENCE AS TO LEGAL COUNSEL AND INSURANCE AGENT

This form is to be completed and returned to the lender as part of your loan application.

Under South Carolina law, you have the right to request the use of any qualified legal counsel to represent you in all matters relating to the closing of this loan, and the use of any qualified insurance agent to furnish any required insurance in connection with the mortgage.

The types of insurance required in a transaction of this nature are: _____

☐ You have been informed by the lender that flood insurance may be required in connection with this transaction, and that you have the right to select an insurance agent to provide any required flood insurance. The lender has not yet determined whether flood insurance will be required. If it is determined that flood insurance is required in connection with this mortgage transaction, the lender will send you written notice along with a form for documenting your preference for insurance agent.

If you have preferences as to the use of a particular attorney or insurance agent, complete the appropriate section (a) below. If you do not have a preference as to the use of a particular attorney or insurance agent, the lender will provide you with a list of qualified attorneys and insurance agents from which you can choose. Indicate your choice(s) in sections (b).

ATTORNEY

We have been informed by the lender that we have a right to select legal counsel to represent us in all matters of this transaction relating to the closing of the loan.

(a) We select:
HORGER BARNWELL & REID
ORANGEBURG, SC 29115

(b) Having been informed of this right, and having no preference, we asked for assistance from the lender and were referred to a list of acceptable attorneys. From that list we select:

INSURANCE AGENT

We have been informed by the lender that we have a right to select an insurance agent to furnish the required insurance in connection with this mortgage transaction.

(a) We select:
Prudential

(b) Having been informed of this right, and having no preference, we asked for assistance from the lender and were referred to a list of acceptable insurance agents. From that list we select:

CHANGE IN PREFERENCE: You may change your attorney or insurance agent preference by notifying the lender in writing of your new preference. You must sign and date any change of preference notice. Failure to provide the Lender with your preference information in a timely manner may result in a delay in your closing.

We have executed this document and we acknowledge receipt of a copy of this document on NOVEMBER 6, 2000

[Signature]
 Borrower's Signature **CLYDE B LIVINGSTON** (Date) _____
 Borrower's Signature _____ (Date) _____

[Signature]
 Borrower's Signature **CLYDE B LIVINGSTON** (Date) _____
 Borrower's Signature _____ (Date) _____

2002 OCT 19 PM 2:34
 FILED FOR RECORD
 WINNIE S. CLARK
 CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Community Resource Bank, N.A., et al.,

☒ Plaintiff

v.

Clyde B. Livingston, et al.,

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2007-CP-38-0201

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Louise M. Johnson, Bar No. 16586
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
phone: (803) 779-3080 fax: (803) 765-1243
e-mail: cjohnson@hsblawfirm.com

Defendant's Attorney:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

December 17, 2012
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE:

ATTEST: TRUE COPY

Winnia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

CLERK'S VERIFICATION

Collected by: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

Case No. 2007-CP-38-201

Community Resource Bank, N.A., f/k/a
Orangeburg National Bank,

Plaintiff,

vs.

Clyde B. Livingston, American First
Federal, Inc., Citibank South Dakota,
N.A., Branch Banking and Trust Company
of South Carolina, G&G Rentals, Miller
Communications, Inc., Wells Fargo Bank,
N.A.,

Defendant.

**COMMUNITY RESOURCE BANK, N.A.,
f/k/a ORANGEBURG NATIONAL BANK'S
MOTION FOR SUMMARY JUDGMENT
ON DEFENDANT CLYDE B.
LIVINGSTON'S COUNTERCLAIMS**

ATTEST: TRUE COPY

Winnysa B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

Pursuant to Rule 56, SCRPC, Plaintiff Community Resource Bank, N.A., f/k/a Orangeburg National Bank ("Plaintiff") moves for summary judgment on the counterclaims of defendant Clyde B. Livingston ("Livingston"). This motion is based upon the pleadings, applicable statutory and case law, and excerpts from the deposition testimony of defendant Livingston, taken on September 11, 2008. All deposition excerpts cited herein are attached collectively as **Exhibit 1**.

PROCEDURAL HISTORY

On February 13, 2007, Plaintiff commenced this action to foreclose a second mortgage on that certain real estate located at 116 Gold Drive, Orangeburg, South Carolina ("Mortgaged Property"). The mortgage secures a Note in the original principal amount of Thirty Thousand Five Hundred and No/100 (\$30,500.00) Dollars ("Note") executed on November 29, 2000. Plaintiff seeks judgment against Livingston for any deficiency remaining after foreclosure.

On or about November 28, 2007, Livingston filed an amended answer and counterclaim, and asserted the following causes of action against Plaintiff: 1) Plaintiff's alleged breach of contractual obligations to Livingston; and 2) Plaintiff's alleged violation of the Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.* ("SCUTPA"). Plaintiff timely filed a Reply to Livingston's amended answer and counterclaims.

On May 15, 2007, the Clerk of Court for Orangeburg County entered a Mandatory Order of Reference, referring the case to the Orangeburg County Master in Equity. On or about August 9, 2007, Livingston filed a Motion to Amend Answer ("Motion to Amend"), and a Motion to Quash Ex parte Order of Reference ("Motion to Quash"). On or about November 5, 2007, a Consent Order was entered whereby Livingston was granted leave to amend his Answer with the Court retaining jurisdiction over the foreclosure action. By order dated December 11, 2007, and entered December 14, 2007 ("December 14th Order") the Court returned to the circuit court Livingston's counterclaims triable by jury but expressly retained jurisdiction of the foreclosure action.

On or about December 21, 2007, Livingston filed a Motion to Reconsider the December 11th Order, and a hearing on his motion was held before the Court on June 24, 2008. On August 5, 2008, The Honorable O. Davie Burgdorf issued an order denying Livingston's Motion to Reconsider and clarifying the December 14th Order as follows:

- i. [Livingston's] motion to amend is granted;
- ii. Plaintiff's foreclosure action and [Livingston's] counterclaims are hereby severed;
- iii. Plaintiff's foreclosure remains in the jurisdiction of the Master in Equity for Orangeburg County;
- iv. [Livingston's] amended answer and counterclaim asserts counterclaims on which he has the right to a trial by jury, and [Livingston's] counterclaims are returned to the circuit court;
- v. [Livingston's] counterclaims shall be heard and concluded prior to the

- proceeding of Plaintiff's foreclosure action; and
- vi. Plaintiff's foreclosure action is stayed pending the resolution of the Defendant's counterclaims.

STANDARD OF REVIEW

A motion for summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; *see also* *Tupper v. Dorchester Cty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). The evidence and all reasonable inferences that may be drawn must be viewed in the light most favorable to the non-moving party; *see Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988); and the moving party has the burden of establishing the absence of a genuine issue of material fact. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004). "If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created and [summary judgment] is properly granted." *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

ARGUMENT

I. LIVINGSTON FAILED TO PROPERLY PLEAD, MUCH LESS PROVE, ANY BREACH OF CONTRACT ACCOMPANIED BY A BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING.

Livingston's claim of breach of contract or covenant of good faith and fair dealing is precluded because he is in default on the underlying Note and Mortgage, and he has failed to set forth the required elements to establish such cause of action. *Parks v. Lyons*, 219 S.C. 40, 64 S.E.2d 123 (1951). Livingston did not meet his obligations on the Note and Mortgage because he failed to make payments as they became due. In fact, Livingston admitted that he is not current on the Note and Mortgage, regardless of any alleged representations made by Plaintiff, which

Plaintiff expressly denies. (Livingston Dep. 21:6-8.) Moreover, he has not demonstrated that he was, at the appropriate time, able, ready, and willing to carry out such obligations owed to Plaintiff.

Furthermore, the only factual basis Livingston provides for his counterclaim for breach of contractual obligations by Plaintiff is "Plaintiff's inconsistent representations to Defendant Livingston concerning the amount it claims it is owed on the debt subject of this action." (Counterclaim ¶ 18). Livingston's Counterclaim fails to set forth any specific facts regarding what 'inconsistent representations' that Plaintiff allegedly made. He does not specify (1) the terms that he claims were breached or what specific representations were made; (2) how and when the alleged terms were breached or when the alleged representations were made and by whom; and (3) how the Plaintiff allegedly breached the covenant of good faith and fair dealing. (Counterclaim ¶ 32).

To successfully bring an action for breach of contract accompanied by a breach of the covenant of good faith and fair dealing, a plaintiff must identify the event that allegedly caused him damage. Livingston's counterclaim and discovery is devoid of any evidence suggesting that Plaintiff breached any contract with Livingston in any way. He has not plead or produced any evidence of any breach by Plaintiff, and cannot rest on mere allegations to survive summary judgment.

Although the facts in a summary judgment motion are construed in the light most favorable to the non-moving party, the non-movant must point to specific facts showing that there is a genuine issue for trial, rather than resting on the assertions of its pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party fails to make a showing sufficient to establish the existence of an element of its case, and on

which it will bear the ultimate burden of proof at trial, there can be no genuine issue of material fact because the failure of proof concerning an essential element of the case renders all of the facts immaterial. *Celotex*, 477 U.S. at 322-23. In that event, the moving party is entitled to judgment as a matter of law. Because Livingston has failed to identify any alleged contract term that was breached, much less produce any substantial evidence of a breach, Plaintiff is entitled to summary judgment on Livingston's counterclaim for breach of contract accompanied by a breach of good faith and fair dealing.

Accordingly, this Counterclaim is without merit.

II. LIVINGSTON FAILED TO PROVE ANY VIOLATION OF THE UNFAIR TRADE PRACTICES ACT

Livingston alleges that "[a]ctions of the Plaintiff" have violated the SCUTPA. Livingston fails to mention a single action which may have violated SCUTPA, although he claims that such actions are capable of repetition and that Livingston suffered damages because of those actions. (Counterclaim ¶¶ 34-39).

The SCUTPA makes unfair or deceptive acts or practices in the conduct of any trade or business illegal. In South Carolina, to establish a violation of SCUTPA, Livingston would have to prove that the Plaintiff committed "unfair or deceptive acts or practices in the conduct of any trade or commerce" and that those "acts or practices have the potential for repetition." *Hollman v. Woolfson*, 683 S.E.2d 495, 499 (S.C. 2009) (citing S.C. Code Ann. § 39-5-20; *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004)). "The potential for repetition may be proven by showing: (1) the same kind of actions occurred in the past, thus making it likely they will continue to occur absence deterrence; or (2) the defendant's procedures created a potential for repetition of the unfair and deceptive acts." *Id.* (citing *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004)). Conduct which only affects the parties to the transaction provides no

basis for a SCUTPA claim, *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

Livingston's claim under the SCUTPA is deficient on its face, as Livingston set forth no facts in support of the claim, thus demonstrating no affect on Livingston, and much less any potential for repetition. It could be argued that Livingston's own words defeats his counterclaim of a SCUTPA violation. In his deposition testimony, Livingston declares that he "didn't think [the bank] did anything out of their normal business practices and [he] would assume that they're not in the business of deceiving people." (Livingston Dep. 44:1-5.) Further, in *Carrington Mortgage Services, LLC v. Riley*, the United States Bankruptcy Court for the District of South Carolina held that the Defendant had no claim under SCUTPA, and the Defendant in that case also failed to "set forth specific allegations regarding conduct he claims violates the act." No. 09-4740-DD, slip op. at 17-20 (Bankr. Ct. D.S.C. filed Sept. 25, 2012), a copy of which is attached hereto as **Exhibit 2**. While that case is not binding on this Court, it does demonstrate the standard that baseless claims under SCUTPA should fail as a matter of law.

It appears that Livingston is attempting to rely on the facts he asserted under his SCCPC claim to provide a factual basis for his SCUTPA claim, even though those facts, which are denied, would be insufficient to support a cause of action under the SCUTPA even if they were true. To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact on the public interest. *Id.* If the allegedly unfair or deceptive act has the potential for repetition, then it can affect the public interest. *Daisy Outdoor Advertising Co., Inc. v. Abbott*, 473 S.E.2d 47 (1996). Livingston cannot establish that any of the Plaintiff's actions with respect to the subject loan have the potential to impact the public interest, as the financial status of the Livingston at the time of the loan and the size of the loan are specific facts, unique to the two

parties of the contract. Therefore, any alleged breach of the contract between Livingston and Plaintiff would be a private wrong. The party seeking to recover under the SCUTPA must prove the potential for repetition. *See Crany v. Djebelli*, 496 S.E.2d 21 (1998). The potential for repetition must be **real and substantial** as opposed to a hypothetical possibility that the act would be repeated. *Id.* (emphasis added). The SCUTPA is unavailable to address a private wrong. *Noack Enterprises Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 351 S.E.2d 347 (Ct. App. 1986)

Nowhere in the SCUTPA counterclaim do Livingston allege that any injury to the public interest has occurred, or state the manner in which Plaintiff's alleged unfair and deceptive acts or practices have or could impact the public interest. Plaintiff's transparent and prospective allegation that Plaintiff's alleged unfair or deceptive acts are offensive to public policy and have the potential for repetition utterly fails to satisfy the SCUTPA's public impact requirement.

Accordingly, Livingston's counterclaim for unfair trade practices should be dismissed.

CONCLUSION

Based on the foregoing, Plaintiff is entitled to summary judgment as to all of Livingston's Counterclaims.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By:


Louise M. Johnson

Post Office Box 11889
Columbia, SC 29211-1889
(803) 779-3080 Tel.
(803) 765-1243 Fax

Attorneys for Community Resource Bank, N.A.

December 17, 2012

1 MR. RADEKER: Same objection.

2 A: I don't remember.

3 Q: Okay. Are you current on your first mortgage
4 on Brookside?

5 A: I don't think so.

6 Q: Are you current on the mortgage to Community
7 Resource on the rental house property?

8 A: I'm not current on anything right now.

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20 Q: Okay. All right. I want to now ask you to
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22 is give a copy to the court reporter and ask
23 her to mark it for identification as
24 Plaintiff's One. I'm going to give a copy to

25 ATTEST: TRUE COPY

your lawyer.

Wingja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA
CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

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25 the money, did you get any cash directly from

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-04740-dd

Adversary Proceeding Number: 11-80115-dd

ORDER

The relief set forth on the following pages, for a total of 20 pages including this page, is hereby ORDERED.

FILED BY THE COURT
09/25/2012



Entered: 09/26/2012

A handwritten signature in black ink, appearing to read "D. R. Duncan", is written over a horizontal line.

David R. Duncan
US Bankruptcy Judge
District of South Carolina

ATTEST: TRUE COPY
A handwritten signature in black ink, appearing to read "Winnie B. Clark", is written over the text.
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re:

Charles E. Riley,

Debtor.

Carrington Mortgage Services, LLC, servicer
for Deutsche Bank National Trust Company, as
Trustee for Carrington Mortgage Loan Trust,
Series 2005-NC1 Asset Backed Pass-Through
Certificates,

Plaintiff,

v.

Charles E. Riley, W. Ryan Hovis,

Defendants.

C/A No. 09-4740-DD

Adv. Pro. No. 11-80115-DD

Chapter 7

ORDER

ATTEST: TRUE COPY

Wingja B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

This matter is before the Court on the adversary complaint filed by Carrington Mortgage Services, LLC, servicer for Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust, Series 2005-NC1 Asset Backed Pass-Through Certificates ("Plaintiff") on July 13, 2011 against Charles E. Riley ("Defendant Riley") and W. Ryan Hovis ("Trustee"), seeking an order allowing its claims and determining that Plaintiff's claimed security interest in real property and insurance proceeds is valid and has priority over Defendant Riley's exemption claim and Trustee's interest. Defendant Riley filed an answer and counterclaim for violation of the South Carolina Unfair Trade Practices Act on August 29, 2011. Trustee filed an answer on October 3, 2011. Plaintiff filed a reply to Defendant Riley's counterclaim on September 22, 2011. The Court entered an initial scheduling order on October 17, 2011. After numerous

motions,¹ extensions of discovery deadlines, and amendments to the parties' pleadings, a trial was held on July 24, 2012. The Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In December 2004, Defendant Riley and Tessa Spigner executed and delivered two notes and mortgages to New Century Mortgage Corporation ("New Century").² The mortgaged property was Defendant Riley's residential property located at 34 Crossbow Lakes Court, Columbia, South Carolina. Ms. Spigner has an interest in the real property but is not otherwise involved in these proceedings. New Century filed a chapter 11 bankruptcy case on April 2, 2007 in the United States Bankruptcy Court, District of Delaware. In October 2007, New Century assigned the notes and mortgages to Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust, Series 2005-NCI Asset Backed Pass-Through Certificates ("Deutsche Bank"), and the assignments were recorded on October 30, 2007, and November 13, 2007, respectively.³

The mortgages executed by Defendant Riley and Ms. Spigner required them to maintain insurance on the property. However, the mortgagors failed to do so, and effective July 17, 2007, Plaintiff, as it was permitted to do under the terms of the mortgages, obtained an insurance policy.

¹ Plaintiff filed a Motion for Summary Judgment on January 18, 2012, to which Trustee objected on February 2, 2012. A hearing was held on a motion to extend deadlines set forth in the Court's scheduling order and a motion to amend answer on January 31, 2012. At that hearing, the Motion for Summary Judgment was discussed, and the parties agreed no hearing should be held on the Motion for Summary Judgment until after the amended answer and reply were filed, at which time the parties could file additional motions for summary judgment. The Court informed the parties that it believed based on the record already established that there were material issues of fact and that it would be necessary to proceed to trial. No further summary judgment motions were filed. Since no formal ruling was ever entered on the Motion for Summary Judgment, the Court now denies that motion.

² The notes and mortgages were admitted into evidence as Plaintiff's Exhibits A, B, D, and E.

³ The assignments were admitted into evidence as Plaintiff's Exhibits C and F.

on the residence through Safeco Insurance ("Safeco").⁴ Defendant Riley purchased a casualty insurance policy from Nationwide Insurance Company ("Nationwide") on July 23, 2007. Plaintiff was listed as a loss payee on the Nationwide policy. On August 1, 2007, a fire destroyed the residence. On August 9, 2007, Plaintiff cancelled the Safeco policy and subsequently requested that Safeco retroactively adjust the cancellation date to July 23, 2007, the effective date of the Nationwide insurance policy purchased by Defendant Riley.⁵

Defendant Riley and Ms. Spigner's first mortgage with New Century contains the following clause relating to insurance:

5. Property insurance.

Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

⁴ Plaintiff obtained an insurance policy on the residence prior to the date of the assignments from New Century.

⁵ Two letters to Ms. Spigner and Defendant Riley were admitted into evidence as Defendant Riley's Exhibit 7. The first of those letters, dated September 11, 2007, provided notice that the Safeco policy had been cancelled effective August 9, 2007. The second letter, dated September 19, 2007, states that the cancellation date was adjusted to July 23, 2007.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property; if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

Plaintiff's Exhibit B. The second mortgage states:

5. Hazard Insurance

Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and such other hazards as Lender may require and in such amounts and for such periods as Lender may require.

The insurance carrier providing the insurance shall be chosen by Borrower subject to approval by Lender, provided that such approval shall not be unreasonably withheld. All insurance policies and renewals thereof shall be in a form acceptable to Lender and shall include a standard mortgage clause in favor of and in a form acceptable to Lender. Lender shall have the right to hold the policies and renewals thereof, subject to the terms of any mortgage, deed of trust or other security agreement with a lien which has priority over this Mortgage.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

If the Property is abandoned by Borrower, or if Borrower fails to respond to Lender within 30 days from the date notice is mailed by Lender to Borrower that the insurance carrier offers to settle a claim for insurance benefits, Lender is authorized to collect and apply the insurance proceeds at Lender's option either to restoration or repair of the Property or to the sums secured by this Mortgage.

Plaintiff's Exhibit E.

Plaintiff commenced a foreclosure action against Defendant Riley on November 16, 2007. Plaintiff and Defendant Riley subsequently entered into a forbearance agreement, but Defendant Riley defaulted on that agreement and the case was returned to the state court's active docket. The foreclosure was stayed due to Defendant Riley's bankruptcy filing on June 29, 2009. Plaintiff's initial proofs of claim, filed as to the first mortgage on August 27, 2009 and as to the second mortgage on November 6, 2009 indicate that the amounts of arrearage on the first and second mortgages at the time of the filing of the bankruptcy petition were \$82,611.44 and \$27,160.84, respectively.⁶ The proofs of claim indicate a lien on real estate and contain the following notation: "Carrington also claims an interest in the funds in the checking account with Bank of America. (These funds were proceeds from a check made payable to both Charles E. Riley and Carrington Mortgage Services, LLC)." The total secured claim is for nearly \$400,000.

⁶ Plaintiff's original proofs of claim and the first amended proofs of claim, filed September 23, 2009 as to the first mortgage and May 6, 2010 as to the second mortgage, were admitted into evidence as Defendant Riley's Exhibit 16.

Defendant Riley commenced litigation against Safeco and Nationwide in state court in 2008, seeking a determination that the insurance policies overlapped, that he alone was entitled to recover from Nationwide, and that Plaintiff was entitled to recover from Safeco. The state court granted summary judgment both to Safeco and Nationwide, finding that Safeco's policy was not in effect at the time the fire occurred, and that even if it had been, an "escape clause" in the policy which provided that the insurance policy would not apply if other insurance was in place prevented recovery from Safeco.⁷ With respect to Nationwide, the court found that the Nationwide policy provided coverage for the fire loss and that the language of Nationwide's policy required it to make the check payable to Carrington as a joint payee and that Defendant Riley had no grounds for arguing that the check should be payable to him only; thus, it found that the check issued to both Defendant Riley and Plaintiff was proper.⁸

On September 11, 2007, Nationwide issued a check for the fire loss in the amount of \$289,000, jointly payable to Defendant Riley and Plaintiff. The check was not cashed before it became stale, and Nationwide issued another check on May 5, 2009 for the same amount, again jointly payable to Defendant Riley and Plaintiff. That check was deposited into a Bank of America account on May 11, 2009 and contained the signature of Defendant Riley and a stamped indorsement, "Carrington Mortgage for Deposit Only."⁹

Defendant Riley filed his chapter 13 bankruptcy petition on June 29, 2009, and was assigned case number 09-04740-dd. On motion of Joy Goodwin, the chapter 13 trustee assigned to Defendant Riley's bankruptcy case, Defendant Riley's chapter 13 case was involuntarily

⁷ The Order Granting Safeco's Motion for Summary Judgment was admitted into evidence as Plaintiff's Exhibit H and Defendant Riley's Exhibit 18. It was filed in the state court action on March 24, 2009.

⁸ The Order Granting Nationwide's Motion for Summary Judgment was admitted into evidence as Plaintiff's Exhibit G and Defendant Riley's Exhibit 18. It was entered in the state court action on March 24, 2009.

⁹ A copy of the check with Defendant Riley's and Plaintiff's indorsements was admitted into evidence as Plaintiff's Exhibit K.

converted to chapter 7 on December 14, 2009.¹⁰ After Defendant Riley's case was converted, Trustee was appointed as the chapter 7 trustee in Defendant Riley's chapter 7 case. The United States Trustee commenced an adversary proceeding against Defendant Riley on January 28, 2010, seeking to deny Defendant Riley's discharge based on misrepresentations made in his Schedules and Statements, and after Defendant Riley failed to respond, an Order Denying Discharge and Default Judgment Denying Discharge were entered on March 17, 2010.

Defendant Riley's Summary of Schedules filed on July 13, 2009 reflects total assets of \$136,925 and total liabilities of \$478,220; thus, Defendant Riley was insolvent when he filed his bankruptcy case. Defendant Riley's amended Statement of Financial Affairs ("SOFA"), filed on August 10, 2009, while his case was still pending under chapter 13, lists \$478,000 as "2007 income from insurance company due to house fire. \$190,000 went to home contractor to begin rebuilding." Separately, the SOFA lists \$289,000 as "2009 funds from insurance company to build house. Note: \$100,000 listed on Schedule B. Remaining amount has been distributed to builder." Schedule B, filed July 13, 2009, lists \$100,000 in a checking account with Bank of America. Schedule B states, "Note: all funds are from insurance proceeds to build a house." Defendant Riley's Schedule C claims an exemption in "checking with BOA" of \$51,450 under S.C. Code § 15-41-30(A)(1), the homestead exemption.¹¹ At some point prior to Defendant Riley's bankruptcy filing, he opened a certificate of deposit with Bank of America in the amount

¹⁰ Joy Goodwin, the chapter 13 trustee appointed in Defendant Riley's chapter 13 case, brought the Motion to Convert to Chapter 7 on December 1, 2009. Defendant Riley filed a Motion to Dismiss his chapter 13 case on December 3, 2009 and filed a Reply to Ms. Goodwin's Motion to Convert on December 11, 2009. The Court entered an Order Granting Motion to Convert and Denying Motion to Dismiss on December 15, 2009, and entered a Supplemental Order on Motion to Convert on December 21, 2009.

¹¹ No objection to this claimed exemption was filed, but a Consent Order was entered on September 8, 2010 indicating that there is an issue regarding the exemption and that an adversary proceeding will be filed to resolve issues regarding Carrington's lien and Defendant Riley's claimed exemption.

of \$136,750.¹² Those funds, which the parties stipulated can be traced to the insurance policy proceeds, are the subject of this action.

Defendant Riley testified during his bankruptcy case that he received a check in the amount of \$198,000 from Nationwide in 2007 for the contents of his home that were destroyed in the fire. He further testified that he received a second check for the damage to the house on May 5, 2009, in the amount of \$289,000. This Court previously determined that this testimony is not consistent with Defendant Riley's representations in his SOFA.¹³ At the trial in this matter, Defendant Riley testified that after the home burned, due to pressure from the neighborhood homeowners' association, he paid \$45,000 to a demolition company to have it tear down the remaining structure, and that demolition was completed. Defendant Riley testified that he then found a flyer in his mailbox providing the name and telephone number of a contractor offering to construct a new home. Defendant Riley testified that he contacted the contractor and paid him between \$75,000 and \$80,000 to begin construction of the home. Defendant Riley testified that a few weeks later, he was unable to find or contact the contractor, and no progress had been made on a new home.

Despite making numerous arguments in the various pleadings filed in this adversary proceeding, the parties focused largely on a few points throughout the trial. Plaintiff did not

¹² It appears that this \$136,750 is the same money that Defendant Riley's Schedules listed as \$100,000 in a checking account with Bank of America.

¹³ "These disclosures [of 2007 and 2009 income in the SOFA] are not consistent with Debtor's testimony that he received \$198,000 in 2007 and \$289,000 in 2009." Supplemental Order on Motion to Convert Case to Chapter 7, docket #72, Case No. 09-04740-dd (December 21, 2009). In the same Order, the Court stated: "The Court now finds that the Debtor's actions in this case have reached the level of egregious conduct warranting the denial of Debtor's Motion to Dismiss. Debtor is a serial filer. This is Debtor's third bankruptcy filing since November of 2006. Both of Debtor's previous cases were dismissed without any dividend being paid to Debtor's unsecured creditors. Additionally, Debtor's conduct in this case demonstrates a pattern of continued abuse of the bankruptcy system. Debtor has been uncooperative with the Trustee in as much as he has failed to provide documents in a timely manner or in some cases, not at all. Debtor claims to have paid \$90,000 to a builder for the reconstruction of his residence, but will not disclose the name of this builder. Debtor's testimony regarding how he spent \$198,000 he received for the contents of his house lacked credibility. He claims that the money was spent on clothes and otherwise, without elaboration. Further, Debtor's testimony regarding his receipt of the \$289,000 insurance check, Carrington's endorsement of that check, and his deposit lacks credibility."

produce any witnesses but argued that the notes, mortgages, and assignments are facially valid and establish Plaintiff's perfected lien on Defendant Riley's real property, that the state court had previously found that Plaintiff has an interest in the insurance proceeds, and that therefore Plaintiff is entitled to the funds being held by Trustee. Defendant Riley focused largely on his contention that the assignments of the notes and mortgages from New Century to Plaintiff were not valid because they were signed by Frank Mercado, who Defendant Riley argues was a "robo signer" and did not have authority to sign on New Century's behalf. In further support of this argument, Defendant Riley introduced into evidence as Exhibit 4 and Exhibit 5 reports completed by Michael J. Missal, the examiner in New Century's bankruptcy case in the District of Delaware. The reports detail certain problem practices in the mortgage industry in general, as well as specific issues with New Century's business practices. As a result of this, Defendant Riley argued that Plaintiff does not have standing to bring this action. Defendant Riley also argued that Plaintiff had not satisfied its burden of proof because it did not produce a witness to establish that Frank Mercado had authority to sign on New Century's behalf. Defendant Riley conceded at trial that even if he was successful in establishing that the assignment of the notes and mortgages to Plaintiff were not valid, he still owes New Century or its successor. The amount of Plaintiff's claim was not contested, other than as discussed below, and therefore Defendant Riley concedes that he owes a mortgagee, whoever that may be, \$320,191.42 on the first mortgage and \$76,394.81 on the second mortgage. Finally, Defendant Riley argued that Plaintiff's proof of claim as to the second mortgage should be disallowed because Plaintiff filed a Form 1099-C in 2008 showing that Defendant Riley and Ms. Spigner's debt to Plaintiff, in the amount of \$74,080, had been cancelled.¹⁴ However, Defendant Riley's credit report and the

¹⁴ A copy of the Form 1099-C as to Ms. Spigner was admitted as Defendant Riley's Exhibit 1, and a copy of a Wage and Income Transcript for Defendant Riley was admitted as Defendant Riley's Exhibit 2. A copy of Defendant

Form 1099-C are the only evidence presented in support of this argument; those documents are not dispositive, and there is no evidence that the note has been satisfied.

Trustee contends that the certificate of deposit is not subject to any lien or, if there is a lien, his status under 11 U.S.C. § 544 is superior to any lien. He seeks to distribute the funds to unsecured creditors.

The parties failed to reserve any evidentiary objections in their Pre-Trial Order, and as a result, all exhibits introduced by either Plaintiff or Defendant Riley were admitted into evidence, despite both parties' contention that they had not agreed to admission of all exhibits. Defendant Riley introduced twenty exhibits, many of which were not relied on by Defendant Riley in the presentation of his case.¹⁵ Defendant Riley relied heavily on Exhibit 14, the deposition of Frank Mercado, Jr., in support of his argument that Mr. Mercado did not have authority to execute documents on New Century's behalf. In addition to the documents identified above as Plaintiff's

Riley's Equifax credit report showing a balance of \$0 on the second mortgage was introduced as Defendant Riley's Exhibit 3.

¹⁵ Those exhibits admitted into evidence but not relied on by Defendant Riley at trial are as follows:

Exhibit 8-Stipulation Among New Century Mortgage Corporation, Carrington Mortgage Services LLC and Symantec Corporation Authorizing Assumption and Assignment of Software License, from New Century's bankruptcy case in the District of Delaware, Case No. 07-10416 (KJC).

Exhibit 9-Second Amended and Restated Asset Purchase Agreement between Carrington Capital Management, LLC, Carrington Mortgage Services, LLC, New Century Financial Corporation, and New Century Mortgage Corporation, dated May 21, 2007.

Exhibit 10-Response to Substantive Objection by New Century Liquidating Trust to Carrington Securities L.P.'s Claims for Forced Liquidation of Certain Loans, from New Century's bankruptcy case in the District of Delaware, Case No. 07-10416 (KJC).

Exhibit 11-Order Approving Sale of New Century's Servicing Business to Plaintiff and Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, from New Century's bankruptcy case in the District of Delaware, Case No. 07-10416 (KJC).

Exhibit 12-Motion of Deutsche Bank National Trust Company, as Trustee c/o Ocwen Loan Servicing, LLC for Relief from Automatic Stay under Section 362 of the Bankruptcy Code, from New Century's bankruptcy case in the District of Delaware, Case No. 07-10416 (KJC).

Exhibit 13-Form 8-K dated August 25, 2005, for Carrington Mortgage Loan Trust Series 2005-NC1 Asset Backed, Pass-Through Certificates, Series 2005-NC1, File No. 333-113636-34.

Exhibit 15-Releases of Mortgages/Deeds of Trust for parties not involved in this case, notarized by Frank Mercado, Jr.

Exhibit 17-Summary Structural Evaluation of 34 Crossbow Lakes Court, Columbia, SC, prepared by Chao and Associates, Inc., August 2008.

Exhibit 19-Prospectus for Carrington Mortgage Loan Trust Series 2005-NC1, filed on February 2, 2005.

Exhibit 20-Defendant Riley's insurance policy with Nationwide.

exhibits, Plaintiff also introduced into evidence its foreclosure complaint, filed in the Court of Common Pleas for Lexington County,¹⁶ Defendant Riley and Ms. Spigner's answer to the foreclosure complaint,¹⁷ and a portion of a deposition taken of Defendant Riley.¹⁸

CONCLUSIONS OF LAW

I. Debtor's Standing to Challenge Proofs of Claim and Contest Note and Mortgage Assignments

"The general rule in the Fourth Circuit is that a Chapter 7 debtor only has standing if it can be demonstrated that he has a pecuniary interest in the distribution of his assets among his creditors." *Anderson v. Simchon et al (In re S. Textile Knitters, Inc.)*, No. 98-07203-W, Adv. No. 99-80026-W, 1999 WL 33485638, at *3 (quoting *Willemain v. Kivitz*, 764 F.2d 1019, 1022-23 (4th Cir. 1985)). See also *Willemain v. Kivitz*, 764 F.2d 1019, 1022-23 (4th Cir. 1985) (quoting *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 706-07 (8th Cir. 1979)). Because an insolvent debtor does not stand to receive any funds from the administration of his estate, he has no pecuniary interest in such administration and therefore lacks standing to object to the validity of proofs of claim filed in his bankruptcy case. See *Willemain*, 764 F.2d at 1022-23; *In re Miller*, No. RWT 10cv2466, 2011 WL 3758712, at *3 (D. Md. Aug. 24, 2011); *In re Walker*, 356 B.R. 834, 848 (Bankr. S.D. Fla. 2006); *In re Lapointe*, 39 B.R. 80 (Bankr. W.D. Ky. 1984). "[I]t is the trustee's job, not the debtor's, to examine proofs of claim and to object to the allowance of any claim that is improper." *Walker*, 356 B.R. at 848. Defendant Riley is an insolvent chapter 7 debtor and has no standing to challenge Plaintiff's proofs of claim.

¹⁶ Exhibit I

¹⁷ Exhibit J

¹⁸ Exhibit L

As to the mortgage assignment issue, this Court has recently held that a borrower may not attack the validity of assignments of his loan due to his status as a third party to the assignment. *In re McFadden*, 471 B.R. 136, 161 (Bankr. D.S.C. 2012). Defendant Riley argues against this precedent and attempts to attack the assignment of his notes and mortgages from New Century to Plaintiff as invalid because Mr. Mercado, who signed the assignment on behalf of New Century, was a "robo signer." In support of this argument, Defendant Riley makes reference to Mr. Mercado's deposition in which he testified that he considered himself to be a vice president of New Century "in name only", that he never received compensation from New Century, that he was signing documents which were pre-filled out, and that he was unsure of the significance of the documents he was signing. Defendant Riley ascribes great significance to the fact that Mr. Mercado is not listed as a vice president of New Century in Exhibit 5, the bankruptcy examiner's report from New Century's bankruptcy case in the District of Delaware.

First, while the bankruptcy examiner's report does contain a listing of "key personnel" at New Century, the report never purports to contain an exhaustive list of all officers of New Century. Second, and more importantly, Mr. Mercado also testified as follows:

Q:¹⁹ I think you testified already that you believed you had been delegated authority to act on behalf of New Century; is that correct?

A: Yes.

Q: And did you believe that your actions were binding on New Century?

A: Yes.²⁰

Because he is insolvent and because he is a borrower, Defendant Riley does not have standing to object to Plaintiff's proofs of claim or to attack the assignment of his notes and

¹⁹ Questions asked by Mr. Whitt, Plaintiff's counsel.

²⁰ Exhibit 14, Deposition of Frank Mercado, pg 44, line 9 to line 15.

mortgages from New Century to Plaintiff. Even if Defendant Riley did have such standing, the evidence he presented in an attempt to show Mr. Mercado did not have authority to sign on New Century's behalf was wholly insufficient. No dispute exists regarding the validity of the notes and mortgages, and Defendant Riley has not produced evidence sufficient to call into question the validity of the assignment of the notes and mortgages. Plaintiff is the proper party to this action and has standing to assert its claims before this Court.

II. Equitable Lien

Plaintiff claims an equitable lien in the funds in Defendant Riley's Bank of America certificate of deposit account.²¹ An equitable lien arises under South Carolina law if three requirements are satisfied: "(1) a debt owed from one person to another, (2) specific property to which the debt attaches, and (3) express or implied intent for the property to serve as security for payment of the debt." *In re Lloyd*, 458 B.R. 295, 300 (Bankr. D.S.C. 2011) (citing *In re Houston*, 409 B.R. 799, 811 (Bankr. D.S.C. 2009)). Other well-established equitable principles must also be considered in determining the existence of an equitable lien. *Horry County v. Ray*, 674 S.E.2d 519, 524 (S.C. Ct. App. 2009). South Carolina courts have repeatedly held that if a mortgage requires the mortgagor to maintain insurance on the mortgaged property, the mortgagee has an equitable lien on insurance proceeds resulting from a property loss. *Knapp v. Victory Corp.*, 302 S.E.2d 330, 331 (S.C. 1983); *Blackwell v. State Farm Mut. Auto. Ins. Co.*, 118 S.E.2d 701, 704 (S.C. 1961) (citing *Farmers' & Merchants' Nat'l Bank of Lake City v. Moore*, 133 S.E. 913 (S.C. 1926); *Swearingen v. Hartford Fire Ins. Co.*, 29 S.E. 722 (S.C. 1898); 47 A.L.R. 1001; Annotation, 92 A.L.R. 559 (1934)). Both the first and second mortgage

²¹ These funds are now in the control of Trustee.

executed by Defendant Riley contain clauses requiring Defendant Riley to maintain insurance on the property, and the Nationwide policy listed Plaintiff as a loss payee.²²

South Carolina law recognizes, upon proper proof, an equitable lien on insurance proceeds in favor of a mortgagee. South Carolina law also provides that an equitable lien arises following the entry of a judgment recognizing its existence. *Lloyd*, 458 B.R. at 300 (citing *In re Houston*, 409 B.R. 799, 811 (Bankr. D.S.C. 2009)); *First Fed. Sav. & Loan Ass'n v. Bailey*, 450 S.E.2d 77, 81 (S.C. Ct. App. 1994) ("An equitable lien is a mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered."). The cases the Court has found which hold that a mortgagee has an equitable lien on insurance proceeds all involve a contract between the mortgagor and mortgagee requiring that the mortgagor maintain insurance. See *Knapp v. Victory Corp.*, 302 S.E.2d 330 (S.C. 1983) (holding, in a dispute between first and second mortgagee regarding entitlement to insurance proceeds, that because both mortgages required the mortgagor to maintain insurance on the property, both mortgagees had a claim to the proceeds and that the first mortgagee was entitled to recover a portion of the proceeds to the extent of the insured amount, with the second mortgagee to recover the remainder); *Blackwell v. State Farm Mut. Auto. Ins. Co.*, 118 S.E.2d 701 (S.C. 1961) (holding that a bank holding a chattel mortgage on an automobile damaged in a collision had an equitable lien in insurance proceeds because the mortgage required mortgagor to insure the vehicle and

²² Plaintiff relied heavily on the Rooker-Feldman doctrine in his pleadings and his argument at trial, arguing that the state court orders granting summary judgment to Nationwide and Safeco were entitled to preclusive effect. The Rooker-Feldman doctrine prevents lower federal courts from considering "issues actually presented to and decided by a state court" or "constitutional claims that are inextricably intertwined with questions ruled upon by a state court." *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 196 (4th Cir. 2002) (quoting *Phyller v. Moore*, 129 F.3d 728, 731 (4th Cir. 1997)). Under the doctrine, the federal court does not have jurisdiction if considering the federal claim would be equivalent to undertaking appellate review of the state court's decision. *Id.* (quoting *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 202 (4th Cir. 1997)). The state court decisions determined that Plaintiff had an interest in the Nationwide insurance proceeds; however, Plaintiff was not a party to the litigation, which construed the provisions of an insurance contract concerning coverage, policy overlap, and the effect of a mortgage clause. The issue in the state court litigation was not the existence of an equitable lien. Therefore, it is not necessary for the Court to examine or discuss the Rooker-Feldman doctrine further.

name mortgagee as a loss payee), *Cromer v. Cromer*, 360 S.E.2d 528 (S.C. 1987) (holding, where two brothers were involved in a partnership operating a business in a barn and one brother purchased insurance on the barn, which later burned, that the partner who did not purchase insurance had an equitable lien because the insurance was taken out for the benefit of the partnership and therefore, the insurance company was jointly and severally liable to both brothers). See also *Swearingen v. Hartford Ins. Co.*, 29 S.E. 722 (S.C. 1898); *Lewis v. Aynor Farm Ctr.*, 348 S.E.2d 537 (S.C. Ct. App. 1986); *Freshwater v. Colonial Prod. Credit Assoc.*, 334 S.E.2d 142 (S.C. Ct. App. 1985). Thus, the mortgagee's entitlement to insurance proceeds resulting from a property loss is akin to and arises from a contract right or expectation. In a case involving a mortgagor and mortgagee, an equitable lien can arise by virtue of the parties' rights and obligations under their contract. The rule requiring the entry of a judgment before an equitable lien is recognized benefits third parties who are not parties to the contract.

Plaintiff has the burden of proof as to each element of a cause of action to establish an equitable lien. Defendant Riley clearly owes a debt to Plaintiff. The debt is secured by a mortgage in Defendant Riley's real property. The mortgage requires Defendant Riley to maintain certain insurance coverage, and South Carolina has extended a lien to the proceeds paid under an insurance policy following damage to or destruction of the collateral. Thus, the debt and attachment elements are satisfied.

The failing of Plaintiff's case rises from the third element and other equitable considerations. The evidence presented regarding Defendant Riley and Plaintiff's intent consisted of the mortgage language requiring insurance, the Nationwide insurance policy, and the Nationwide check payable to Defendant Riley and Plaintiff. No other evidence of intent was offered. The mortgage provisions and policy fit squarely with Plaintiff's plea for an equitable

lien. The check and its indorsement do not. Plaintiff has the burden of proof on the issue of the parties' intent, and its proof is deficient.

Throughout the course of this litigation, counsel for Plaintiff has asserted that Plaintiff's indorsement was forged and has implied that the forged indorsement was executed by Defendant Riley. Plaintiff's counsel has consistently represented to the Court that Plaintiff would provide proof of this at trial. However, the only document presented to the Court on this issue was an affidavit from a senior vice president of Plaintiff attached to the complaint. Plaintiff had no witness at trial to testify regarding Plaintiff's indorsement practices. Other than the affidavit and Plaintiff's counsel's statements to the Court, which are not evidence, the record is silent regarding Plaintiff's indorsement, and the indorsement is valid on its face. The parties' pre-trial stipulation of facts remaining to be litigated expressly acknowledges the dispute over "[t]he facts that resulted in the insurance proceeds finally arriving in a CD account at Bank of America that was seized by the Trustee." The Court is left to speculate as to the meaning of the insurance proceeds check and the otherwise unexplained indorsement. The mortgage provisions supplied authority for Plaintiff retaining and administering the funds, yet the funds were in the possession of Defendant Riley. Plaintiff is not aided by the Court's earlier finding that Defendant Riley's statements regarding the indorsement were not credible.²³ In his previous testimony, Defendant Riley did not concede anything factually, and in fact vehemently maintained that he did not place Plaintiff's indorsement on the check. Even if Defendant Riley's legal theories concerning

²³ See Supplemental Order on Motion to Convert Case to Chapter 7, docket #72, Case No. 09-04740-dd (December 21, 2009). At the hearing on the Motion to Convert, Defendant Riley testified that Plaintiff sent him the check by mail, he sent it back to Plaintiff's loss mitigation department, where it was signed and mailed back to him to cash. In response to further questioning regarding the timing of the issuance and deposit of the check, Defendant Riley testified that after the check was issued on May 5th and mailed to him, he sent the check by overnight mail to Plaintiff, and Plaintiff sent it back by overnight mail, such that he was able to deposit the check on May 11. Defendant Riley testified that he did not sign Plaintiff's indorsement on the check but did not know who did.

insurance law are not well-supported. Plaintiff must independently meet its burden of proof on the issue of the intent of the parties.

Plaintiff has not established its equitable lien in the insurance proceeds. The funds are incontrovertibly property of Defendant Riley's bankruptcy estate. The Court need not consider Trustee's contention that his section 544 powers preempt Plaintiff's claim of a lien. The funds are available for administration by Trustee. Despite reserving the right to argue the issue of Defendant Riley's entitlement to an exemption in the funds in a previous consent order, the parties did not present any argument relating to the exemption during the trial of this adversary proceeding. The issue of Defendant Riley's claim of an exemption is now ripe for consideration. Trustee is directed to file his objection to Defendant Riley's exemption, if any, within thirty (30) days from the entry of this Order. Following a response, if any, the matter will be set for hearing.

III. South Carolina Unfair Trade Practices Act

Defendant Riley's complaint asserts a counterclaim against Plaintiff pursuant to the South Carolina Unfair Trade Practices Act ("Act") and requests treble damages. The Act is found at S.C. Code § 39-5-10 et seq. and provides, in relevant part:

- (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
- (b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

S.C. Code § 39-5-20 (1976). Defendant Riley's counterclaim does not set forth specific allegations regarding the conduct he claims violates the Act. Instead, Defendant Riley merely states, "The actions of the Plaintiff, above-described, constitute unfair and deceptive acts and practices in the conduct of trade and commerce, as prohibited by the South Carolina Unfair

Trade Practices Act, § 39-5-10 et seq. [sic] and are knowing and willful violations thereof." Defendant Riley's Amended Answer, docket # 34, at pg. 7. At trial, as discussed above, Defendant Riley presented evidence that Mr. Mercado, a vice president of New Century, was a "robo signer" and further, that New Century engaged in improper conduct relating to its mortgage loans, which were later assigned to Plaintiff. Defendant Riley did not make any specific allegations with respect to Plaintiff's conduct.

In order to establish a cause of action under the Act, the claimant must establish that the defendant engaged in unfair or deceptive acts or practices affecting the public interest while conducting any trade or commerce. *Hollman v. Woolfson*, 683 S.E.2d 495, 499 (S.C. 2009) (citing S.C. Code § 39-5-20(a), *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (2004)). A claimant can establish that the acts complained of have an impact on the public interest by establishing that such acts or practices have the potential for repetition. *Id.* (citing *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (2004)). "The potential for repetition may be proven by showing: (1) the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) the defendant's procedures created a potential for repetition of the unfair and deceptive acts." *Id.* (citing *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (2004)).

Defendant Riley introduced into evidence a report by the bankruptcy examiner appointed in New Century's bankruptcy case. The report detailed problems with New Century's business practices and procedures, as well as the mortgage industry in general. Defendant Riley also introduced Mr. Mercado's deposition, in which he testified regarding his duties as a signatory for New Century. Thus, although probably not sufficient to establish a claim under the Act, Defendant Riley did present evidence tending to show that New Century engaged in improper

acts which affected the public and were frequently repeated. The problem, however, is that all of this evidence related to New Century and not Plaintiff. No evidence was presented to show Plaintiff engaged in any unfair or deceptive acts or practices. Defendant Riley did not establish a cause of action under the South Carolina Unfair Trade Practices Act as to Plaintiff and cannot prevail on his counterclaim. Finally, to the extent a cause of action under the Act does exist and has merit, it belongs to the bankruptcy estate, is subject to administration by Trustee, and is not available to Defendant Riley.

CONCLUSION

For the reasons set forth above:

1. Plaintiff's proofs of claim are allowed as secured claims with liens attaching only to the real property;
2. Trustee is entitled to administer the funds from the Bank of America certificate of deposit for the benefit of creditors; and
3. Defendant Riley did not establish a claim under the South Carolina Unfair Trade Practices Act and is not entitled to damages or other relief on his counterclaim.

Trustee is ordered to file his objection to Defendant Riley's exemption, if any, within thirty (30) days from the date of entry of this Order.

AND IT IS SO ORDERED.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

Case No. 2007-CP-38-196

Community Resource Bank, N.A., f/k/a
Orangeburg National Bank,

Plaintiff,

vs.

Clyde B. Livingston, Technico Marketing &
Distribution, Inc., B. Livingston and
Charlotte V. Livingston, American First
Federal, Inc., Citibank South Dakota, N.A.,
Branch Banking and Trust Company of South
Carolina, G&G Rentals, Miller
Communications, Inc., Wells Fargo Bank,
N.A.,

Defendant.

FILED FOR RECORD
CLERK OF COURT
ORANGEBURG COUNTY
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Wingja B. Clark
CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

**PLAINTIFF'S MOTION TO STRIKE DEFENDANT CLYDE B. LIVINGSTON'S JURY
DEMAND AND FOR ENTRY OF AN ORDER OF REFERENCE**

Pursuant to Rule 53, SCRPC, Community Resource Bank, N.A., f/k/a Orangeburg National Bank ("Plaintiff") moves for an order striking the jury demand of Defendant Clyde B. Livingston ("Livingston") and for an order referring Defendant's counterclaims ("Counterclaims")¹ to The Honorable Olin Davie Burgdorf, Master in Equity for Orangeburg County.

INTRODUCTION

This case is an action to foreclose a second mortgage on that certain real estate located at 260 North Brookside, Orangeburg, South Carolina. The mortgage secures a Home Equity Line

¹ Livingston's Counterclaims were severed from Plaintiff's foreclosure action ("Foreclosure"), and the Foreclosure was referred to the Master in Equity for Orangeburg County by Order entered August 5, 2008.

agreement in the original principal amount of Fifty Seven Thousand and No/100 (\$57,000.00) Dollars ("Note") executed on November 9, 2000. Plaintiff seeks judgment against Livingston for any deficiency remaining after foreclosure.

In his answer, Livingston asserted various Counterclaims against the Plaintiff. Pursuant to an Order entered May 24, 2010, Plaintiff was granted summary judgment as to certain of Livingston's Counterclaims. However, the following Counterclaims of Livingston remain pending before this Court: 1) Plaintiff's alleged violations of the South Carolina Consumer Protection Code ("Attorney Preference Statute"), 2) Plaintiff's alleged breach of contractual obligations to Livingston, 3) libel for Plaintiff's alleged publication of false information about Livingston in the subject Foreclosure, and 4) Plaintiff's alleged violations of the South Carolina Unfair Trade Practices Act (collectively, "Remaining Counterclaims").

For the reasons hereinafter discussed, Plaintiff submits that Livingston's Remaining Counterclaims are either permissive and/or equitable. Consequently, Livingston is not entitled to a jury trial, and Livingston's jury trial request should be stricken and this action be referred to the Master in Equity for final adjudication.

ARGUMENT

A. LIVINGSTON'S REMAINING COUNTERCLAIMS ARE NOT COMPULSORY AND/OR ARE EQUITABLE, SO HE HAS NO RIGHT TO A JURY TRIAL ON THE REMAINING COUNTERCLAIMS.

"A mortgage foreclosure is an action in equity," *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) (citing *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964)), and "there is no right to a trial by jury for equitable actions," *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997); see also Rule 71(a), SCRPC ("Actions to foreclose liens... shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule

53.”). In an equitable action, a right to a jury trial on a counterclaim exists only if the counterclaim is legal and compulsory. [emphasis added] *C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986); *Mortgage Electronic Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (2009). If a counterclaim in an equitable action is also equitable or if it is permissive, no right to a jury trial on the counterclaim exists. *Crewe v. Blackmon*, 289 S.C. 229, 233, 345 S.E.2d 754, 757 (Ct. App. 1986) (“There is no constitutional right to a jury trial for a non-compulsory counterclaim for damages asserted in an equitable action.”).

In a foreclosure action, compulsory counterclaims are necessarily only those claims that relate to the plaintiff's ability to enforce the note and mortgage at issue. See *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (2012) (holding that a counterclaim for violation of the Attorney Preference statute is permissive because such violation, “would not affect the enforceability of the note and mortgage.”); See also, e.g., *North Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 905 (1989) (holding that a counterclaim alleging a breach of two oral agreements was permissive in the foreclosure action because the agreements “do not affect the enforceability of the note”); *Advance Int'l, Inc. v. North Carolina Nat'l Bank of South Carolina*, 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994) (finding that the second mortgagee's claims of fraud, negligence, and unfair trade practices against the first mortgagee were not compulsory counterclaims in a prior foreclosure action by the first mortgagee). Claims that do not relate to the plaintiff's ability to enforce the note and mortgage at issue are permissive. *Id.*

In the present case, the Livingston has asserted certain legal counterclaims against the Plaintiff. However, Livingston's Remaining Counterclaims which are legal in nature in no way

affect the validity or enforceability of the note or the mortgage that Plaintiff is seeking to foreclose. Consequently, Livingston's Remaining Counterclaims for Attorney Preference violation, libel, and Unfair Trade Practices are permissive, and Livingston is not entitled to a jury trial on said claims; and, in fact, by asserting these claims in this action, Livingston has waived his right to a jury trial on these Remaining Counterclaims.

Additionally, Livingston is not entitled to a jury trial on his breach of contract claim because it is equitable in nature. The damages alleged by Livingston in his breach of contract claim are for "having to defend this action, in that he has not been able to avail himself of the agreed-upon credit line per the terms of the Home Equity Line document." Therefore, the corresponding relief is only equitable in nature, as Livingston is merely seeking to require Plaintiff to allegedly comply with the underlying contract being foreclosed. Such specific-enforcement type claim is equitable which is to be decided by the Master in Equity in the underlying Foreclosure action. *See Smith* at 496, 497.

Furthermore, Livingston's claim for damages for the alleged breach by Plaintiff is governed by the holding set forth in *Collier v. Green* which states that counterclaims such as Livingston's breach of contract claim that are asserted in a foreclosure action are equitable and to be tried by a court of equity. 244 S.C. 367, 137 S.E.2d 277 (1964). The *Collier* Court specifically held that:

Nor is the nature of the action changed by reason of the fact that the defendants have, in their answers, set up defenses and counterclaims based upon alleged misrepresentations in the transaction upon which the plaintiff's note and pledge are predicated. The questions raised by these defenses and counterclaims directly affect the validity of the plaintiff's lien and the question as to the amount due upon the debt secured by the lien. Where, in actions of foreclosure, defendant sets up a defense and/or a counterclaim affecting the consideration and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its

equity side.

Id. at 280.

Accordingly, Livingston's Remaining Counterclaim for breach of contractual obligations is equitable, and Livingston is not entitled to a jury trial on said equitable claim.

B. THE CASE SHOULD BE REFERRED TO THE 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." This case is an action for foreclosure that does not involve legal claims on which a jury trial is permitted, and thus the case, including Livingston's Remaining Counterclaims, should be referred to the Master in Equity.

CONCLUSION

Based on the foregoing, Plaintiff prays that the Court strike Livingston's jury trial request, and refer Livingston's Remaining Counterclaims to the Master in Equity for final adjudication.

Respectfully submitted,

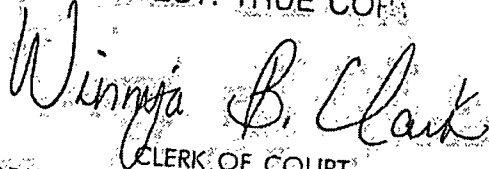
HAYNSWORTH SINKLER BOYD, P.A.

By:


Louise M. Johnson

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(803) 779.3080 Tel
(803) 765.1243 Fax

Attorneys for Community Resource Bank,
N.A., f/k/a Orangeburg National Bank

ATTEST: TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

January 4, 2013

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Community Resource Bank, N.A., et al.,
☒ Plaintiff

CASE NO.
2007-CP-38-0201

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Clyde B. Livingston, et al.,
☐ Defendant

Plaintiff's Attorney:
Louise M. Johnson, Bar No. 16586
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
phone: (803) 779-3080 fax: (803) 765-1243
e-mail: cjohnson@hsblawfirm.com

Defendant's Attorney:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Strike Jury Demand

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

January 7, 2012
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT (check reason):
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court, or,
reduced to writing from motion made in open court pursuant to instructions
Name of Court Reporter:
☐ Other:

ATTEST: TRUE COPY

Wynne B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

- ☐ MOTION FEE COLLECTED:
☐ CONTESTED - AMOUNT DUE:

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

Case No: 2007-CP-38-201

Community Resource Bank, N.A., f/k/a
Orangeburg National Bank,

Plaintiff,

vs.

Clyde B. Livingston, American First Federal,
Inc., Citibank South Dakota, N.A., Branch
Banking and Trust Company of South
Carolina, G&G Rentals, Miller
Communications, Inc., Wells Fargo Bank,
N.A.,

Defendant

ATTEST: TRUE COPY

Winnys B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

**PLAINTIFF'S MOTION TO STRIKE DEFENDANT CLYDE B. LIVINGSTON'S JURY
DEMAND AND FOR ENTRY OF AN ORDER OF REFERENCE**

Pursuant to Rule 53, SCRCP, Community Resource Bank, N.A., f/k/a Orangeburg National Bank ("Plaintiff") moves for an order striking the jury demand of Defendant Clyde B. Livingston ("Livingston") and for an order referring Defendant's counterclaims ("Counterclaims")¹ to The Honorable Olin Davie Burgdorf, Master in Equity for Orangeburg County.

INTRODUCTION

This case is an action to foreclose a first priority mortgage on that certain real estate located at 116 Gold Drive, Orangeburg, South Carolina. The mortgage secures a Note in the original principal amount of Thirty Thousand Five Hundred and No/100 (\$30,500.00) Dollars ("Note") executed on November 29, 2000. Plaintiff seeks judgment against Livingston for any

¹ Livingston's Counterclaims were severed from Plaintiff's foreclosure action ("Foreclosure"), and the Foreclosure was referred to the Master in Equity for Orangeburg County by Order entered August 5, 2008.

deficiency remaining after foreclosure.

On or about November 28, 2007, Livingston filed an amended answer and counterclaim, and asserted the following causes of action against Plaintiff: 1) Plaintiff's alleged breach of contractual obligations to Livingston; and 2) Plaintiff's alleged violation of the Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.* ("SCUTPA"). Plaintiff timely filed a Reply to Livingston's amended answer and counterclaims.

For the reasons hereinafter discussed, Plaintiff submits that Livingston's Counterclaims are either permissive or equitable. Consequently, Livingston is not entitled to a jury trial, and Livingston's jury trial request should be stricken and this action be referred to the Master in Equity for final adjudication.

ARGUMENT

A. LIVINGSTON'S COUNTERCLAIMS ARE NOT COMPULSORY AND/OR ARE EQUITABLE, SO HE HAS NO RIGHT TO A JURY TRIAL ON HIS COUNTERCLAIMS.

"A mortgage foreclosure is an action in equity," *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) (citing *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964)), and "there is no right to a trial by jury for equitable actions," *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997); see also Rule 71(a), SCRCP ("Actions to foreclose liens ... shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53."). In an equitable action, a right to a jury trial on a counterclaim exists only if the counterclaim is legal and compulsory. [emphasis added] *C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986); *Mortgage Electronic Sys. Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (2009). If a counterclaim in an equitable action is also equitable or if it is permissive, no right to a jury trial on the counterclaim exists. *Crewe v.*

Blackmon, 289 S.C. 229, 233, 345 S.E.2d 754, 757 (Ct. App. 1986) ("There is no constitutional right to a jury trial for a non-compulsory counterclaim for damages asserted in an equitable action.").

In a foreclosure action, compulsory counterclaims are necessarily only those claims that relate to the plaintiff's ability to enforce the note and mortgage at issue. See *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (2012) (holding that a counterclaim for violation of the Attorney Preference statute is permissive because such violation, "would not affect the enforceability of the note and mortgage."); See also, e.g., *North Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 905 (1989) (holding that a counterclaim alleging a breach of two oral agreements was permissive in the foreclosure action because the agreements "do not affect the enforceability of the note"); *Advance Int'l, Inc. v. North Carolina Nat'l Bank of South Carolina*, 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994) (finding that the second mortgagee's claims of fraud, negligence, and unfair trade practices against the first mortgagee were not compulsory counterclaims in a prior foreclosure action by the first mortgagee). Claims that do not relate to the plaintiff's ability to enforce the note and mortgage at issue are permissive. *Id.*

In the present case, the Livingston has asserted a legal counterclaims against the Plaintiff for alleged violation of the Unfair Trade Practices Act. However, said Counterclaim, which is legal in nature, in no way affects the validity or enforceability of the note or the mortgage that Plaintiff is seeking to foreclose. Consequently, Livingston's Counterclaim for Unfair Trade Practices is permissive, and Livingston is not entitled to a jury trial on said claim; and, in fact, by asserting this claim in this action, Livingston has waived his right to a jury trial on this Counterclaim.

Additionally, Livingston is not entitled to a jury trial on his breach of contract claim because it is equitable in nature. The damages alleged by Livingston in his breach of contract claim are for "having to defend this action." Therefore, the corresponding relief is only equitable in nature.

Furthermore, Livingston's claim for damages for the alleged breach by Plaintiff is governed by the holding set forth in *Collier v. Green* which states that counterclaims such as Livingston's breach of contract claim that are asserted in a foreclosure action are equitable and to be tried by a court of equity. 244 S.C. 367, 137 S.E.2d 277 (1964). The *Collier* Court specifically held that:

Nor is the nature of the action changed by reason of the fact that the defendants have, in their answers, set up defenses and counterclaims based upon alleged misrepresentations in the transaction upon which the plaintiff's note and pledge are predicated. The questions raised by these defenses and counterclaims directly affect the validity of the plaintiff's lien and the question as to the amount due upon the debt secured by the lien. Where, in actions of foreclosure, defendant sets up a defense and/or a counterclaim affecting the consideration and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side.

Id at 280.

Accordingly, Livingston's Remaining Counterclaim for breach of contractual obligations is equitable, and Livingston is not entitled to a jury trial on said equitable claim.

B. THE CASE SHOULD BE REFERRED TO THE MASTER IN EQUITY.

Rule 53(b), SCRCF, 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." This case is an action for foreclosure that does not involve legal claims on which a jury trial is permitted, and thus the case, including Livingston's Counterclaims, should be

referred to the Master in Equity.

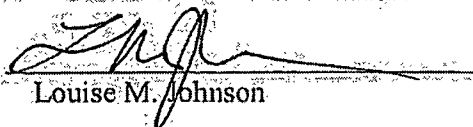
CONCLUSION

Based on the foregoing, Plaintiff prays that the Court strike Livingston's jury trial request, and refer Livingston's Counterclaims to the Master in Equity for final adjudication.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By:


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Attorneys for Community Resource Bank,
N.A., f/k/a Orangeburg National Bank

January 7, 2013

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CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

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December 30, 2013

Via US Mail and Electronic Mail (rwingard@orangeburgcounty.org)

The Honorable James B. Jackson, Jr.
P.O. Box 9000
Orangeburg, SC 29116-09000

RE: First Citizens Bank and Trust Company, Inc. v. Clyde B. Livingston, Tochiico Marketing & Distribution, Inc., B. Livingston and Charlotte V. Livingston, American First Federal, Inc. Citibank South Dakota, Branch Banking and Trust Company of South Carolina, G&G Rentals, Miller Communications, Inc. and Wells Fargo Bank, N.A.
Civil Action No. 2007-CP-38-00196

First Citizens Bank and Trust Company, Inc. v. Clyde B. Livingston, American First Federal, Inc., Citibank South Dakota, Branch Banking and Trust Company of South Carolina, G&G Rentals, Miller Communications, Inc. and Wells Fargo Bank, N.A.
Civil Action No. 2007-CP-38-00201
Our File 00689/01777

Dear Judge Jackson:

Thank you for your time and attention to this matter. Per your instructions at the December 11, 2013 hearing in the above-referenced matter, I am writing on behalf of First Citizens Bank to provide supplemental authority in support of its motions for (1) summary judgment as to Livingston's counterclaims and, in the alternative, (2) to strike Livingston's demand for a jury trial.

The counterclaims related to the Home Equity Line of Credit ("HELOC") on Brookside Drive are (1) violation of the attorney-preference statute; (2) breach of contract; (3) violation

The Honorable James B. Jackson, Jr.

December 30, 2013

Page 2

of the South Carolina Unfair Trade Practices Act ("UTPA"); and (4) libel. The only counterclaims related to the loan on the Gold Drive property are for (1) breach of contract and (2) violation of the UTPA.

At the December 11 hearing, it became clear that the alleged unauthorized practice of law ("UPL") claims and defenses previously asserted by Livingston were no longer at issue in light of the Supreme Court's recent rulings on this matter. However, three alleged wrongful acts were raised by counsel for Livingston in opposition to summary judgment that had not been previously addressed in the briefing of this matter. However, as set forth below, none of these alleged wrongful acts are sufficient to allow Livingston's counterclaims to survive summary judgment.

Attorney-Preference Statute and UTPA

First, Livingston claims the attorney-preference Statute was violated because the attorney-preference form was signed at closing for the HELOC loan on his Brookside Drive home. No claim for violation of the attorney-preference statute has been asserted with regard to the Gold Hill Drive property. However, regardless of which property is at issue, this claim is barred by the Statute of Limitations.

The South Carolina attorney-preference statute provides that "[n]o debtor may bring an action for a violation of this chapter *more than three years after the violation occurred.*" S.C. Code Ann. § 37-10-105(A) (emphasis added). Under the plain language of the statute, a violation of the attorney-preference statute occurs, if at all, at the closing of the loan when a borrower's preference for legal counsel has not been ascertained. Accordingly, a claim for violation of the attorney-preference statute must be brought within three years from the date of the closing. While not binding on this Court, I have enclosed as *Exhibit 1* and *Exhibit 2* two recent trial court orders dismissing borrower's counterclaims for violation of the attorney-preference statute when the claim was brought more than three years after the closing. *See Ex. 1* at ¶ 4; *Ex. 2* at ¶ 15.

In this case, it is undisputed that the HELOC loan on the Brookside property was closed on or about November 9, 2000. The loan on the Gold Drive rental property was closed on or

The Honorable James B. Jackson, Jr.

December 30, 2013

Page 3

about November 29, 2000. The counterclaim alleging violation of the Attorney-Preference Statute was not filed until on or about November 28, 2007. Therefore, Livingston's claims for violation of the Attorney-Preference Statute should be dismissed.

Similarly, Livingston's UTPA claim should be dismissed because it bootstraps his time-barred attorney-preference claim. Specifically, Livingston's counsel claimed that the UTPA claim should survive based on testimony from a retired First Citizens employee, Linda O'Dell. Livingston's counsel argued that O'Dell's testimony substantiated a claim that it was the Orangeburg National Bank's¹ ("Bank's") practice in 2000 to complete the attorney-preference form at closing. Therefore, like his attorney-preference claim, Livingston's UTPA claim also is time-barred.

The UTPA also contains a three year statute of limitations. *See* S.C. Code Ann. § 39-5-150. In this case, Livingston would have been on notice of the existence of an attorney at the time of the closing, as well as his right to select an attorney as indicated on the Attorney-Preference form, as of the time of the closing in November of 2000. However, Livingston did not bring his UTPA claim until November 28, 2007, long after the statute of limitations had run. Therefore, Livingston's UTPA claim should be dismissed along with his claim for violation of the Attorney-Preference statute. *See, e.g.*, Ex. 1 at ¶ 7 (dismissing UTPA claim based on time-barred attorney-preference claim).

Moreover, the record shows Ms. O'Dell testified that the Bank's practice was to have the attorney-preference form executed prior to closing, in accordance with the requirements of the attorney-preference statute. Ms. O'Dell testified the Bank typically would have the attorney-preference form executed prior to closing because the Bank would need to know which lawyer to contact in order to schedule the closing. *See* Dep. Trans. of Linda G. O'Dell, attached in relevant part as *Exhibit 3*. Consistent with this testimony by Ms. O'Dell, the signed attorney-preference form was dated November 6, 2000, the same date as the loan application, and identified Horger Barnwell & Reid as Livingston's preferred counsel. It is undisputed that Samuel Reid from Horger Barnwell & Reid examined the title to the mortgaged

¹ These loans were closed by Orangeburg National Bank, which was later renamed Community Resource Bank and subsequently merged with First Citizens.

The Honorable James B. Jackson, Jr.

December 30, 2013

Page 4

property prior to the loan closing on November 9, 2000, further corroborating Ms. O'Dell's testimony and the signed attorney-preference form.

Therefore, even if the UTPA claim was not time-barred, the testimony of Ms. O'Dell relied on by Livingston, the documents signed by Livingston, and the involvement of the lawyer Livingston selected all demonstrate that the Bank complied with the requirements of the attorney-preference statute. Further, this information establishes that the Bank's practice was to comply with the attorney-preference statute and the UTPA claim should be dismissed.

Breach of Contract

Second, while Livingston does not assert the bank breached any contract related to Gold Drive, he does claim the bank breached its contract with him by failing to disburse money as required by the HELOC note. Livingston does not claim that the bank breached its contract with regard to the loan on the Gold Drive property. In any event, Livingston's breach of contract claims are barred by the three year statute of limitations applicable to contract claims. S.C. Code Ann. § 15-3-530(1).

The HELOC note indicates that the available credit to Livingston was \$57,000. Livingston claims that \$45,000 was initially disbursed at the closing in November 2000 and he was promised he would be advanced the remaining \$12,000 on the HELOC line of credit after he painted his home. Livingston further testified that he had the house painted and then verbally asked for the additional money, but was told it could not be advanced. The relevant portion of his deposition testimony on this point is attached here as *Exhibit 4*.

Viewing the facts in a light most favorable to Livingston, he knew at the time he signed the HELOC agreement that the note was for \$57,000 but he was not being allowed to access but \$45,000. At the latest, Livingston was on notice of this claim once his house was painted and he again requested the money soon after the closing in November 2000. Therefore, Livingston's claim related to disbursement of the remaining \$12,000 should be dismissed as time-barred because he signed the HELOC agreement in November 2000 and his counterclaim was not filed until November 2007.

The Honorable James B. Jackson, Jr.

December 30, 2013

Page 5

Libel

Third, Livingston claims that the Bank made inaccurate reports to credit reporting agencies. As an initial matter, the record contains absolutely no evidence that either of the loans at issue were reported to credit reporting agencies. Moreover, Livingston's own testimony establishes that he was having financial problems prior to these foreclosure actions, and public records show judgments against Livingston in the hundreds of thousands of dollars dating back to at least 2001. *See Exhibit 5*. This is significant because Livingston has come forward with no evidence to substantiate a claim that he suffered any damage to his credit because of credit reporting related to these two loans. As such, Livingston has failed to meet his burden under Rule 56 to defeat summary judgment.

In addition, to the extent Livingston's libel claim is based upon credit reporting, it is preempted by the Fair Credit Reporting Act ("FCRA"). The FCRA provides avenues under federal law for consumers to correct their credit and generally preempts any state laws "with respect to any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies" 15 U.S.C. § 1681t(b)(1)(F). Further, 15 U.S.C. § 1681(h)(e) specifically prohibits the kind of defamation claim asserted in this case by Livingston:

No consumer may bring any action or proceeding in the nature of defamation . . . with respect to the reporting of information against . . . any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

Therefore, the FCRA preempts Livingston's libel claim unless he can show the Bank reported "false information furnished with malice or willful intent to injure" Livingston. *Id.*; *see also Barnhill v. Bank of Am., N.A.*, 378 F. Supp. 2d 696, 704-05 (D.S.C. 2005) (holding

The Honorable James B. Jackson, Jr.

December 30, 2013

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libel claim only survived motion to dismiss to the extent Plaintiff alleged malice).

While no reported South Carolina case addresses what constitutes malice in the context of credit reporting violations, the Fourth Circuit has applied South Carolina law in addressing this issue. In an unpublished opinion, the Fourth Circuit affirmed summary judgment to the lender and held that a lender reporting a foreclosure contested by the borrower did not act with malice under South Carolina law because, in the lender's view, the report was accurate. *Nations Credit Fin. Servs. Corp. v. Beattie*, 69 Fed. Appx. 585, 590 (June 27, 2003) (attached as Exhibit 6).

In this case, it is undisputed that Livingston did not pay make payments on the loan as agreed. Subsequent to foreclosure being filed, Livingston asserted legal defenses. As noted above, Livingston has not come forward with any evidence to show that these loans were reported. Even if these loans were reported to credit reporting agencies, however, the Bank would have reported that the loans were delinquent and, ultimately, in foreclosure. As in the *Beattie* case, the Bank would have done so believing the reports were accurate. Therefore, any alleged credit reporting could not have been done with malice as required to maintain an action for libel, as the well-reasoned decision in *Beattie* explains. Livingston's libel claim therefore should be dismissed.

Motion to Strike the Jury Demand

Based on the above, all of Livingston's remaining counterclaims in both actions should be dismissed. To the extent they are not dismissed, then Livingston's request that his counterclaims be decided by a jury should be denied. By Order dated August 5, 2008, this Court previously ruled that the counterclaims should be severed from the foreclosure action and determined by a jury. However, the Court at that time did not have the benefit of the clear articulation of Livingston's claims offered by his counsel at the hearing on December 11 or decisions from the Supreme Court on this issue decided since that time. Therefore, the Court should resolve this motion based on the information provided at the December 11 hearing and in light of recent case law directly on point as to this issue.

The Honorable James B. Jackson, Jr.
December 30, 2013
Page 7

For a defendant to be entitled to a jury trial on counterclaims asserted in a foreclosure action, they must relate to enforceability of the note and mortgage. See *Wells Fargo Bank N.A. v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (2012). In this case, none of Livingston's counterclaims relate to the enforceability of the note and mortgage.

First, *Smith* expressly holds that an alleged violation of the attorney-preference statute does not relate to enforceability of the note, and a defendant asserting such a claim as a counterclaim in a foreclosure action is not entitled to a jury trial. *Id.* Of note, *Smith* was decided after this Court previously ruled on Livingston's request for a jury trial. In light of *Smith*, however, it is clear that Livingston is not entitled to a jury trial on his claim for violation of the attorney preference statute. Similarly, Livingston is not entitled to a jury trial on his UTPA claim because it is based solely on the alleged repeated violations of the attorney preference statute.

Second, as to the breach of contract claim, the sole basis for this claim is that the Bank refused to disburse amounts available pursuant to the HELOC loan documents. This allegation plainly is not related to enforceability of the notes and mortgages. In fact, Livingston is claiming he should have been given even more money pursuant to the HELOC agreement. Like with the alleged attorney preference violation, the only damages available are money damages. Therefore, Livingston's breach of contract claim is not related to the enforceability of the note and mortgage, and he is not entitled to a jury trial on this claim.

Third, Livingston's libel claim is based solely on alleged inaccurate credit reporting. Whether the Bank provided accurate information to credit bureaus plainly does not affect enforceability of the note and mortgage. As such, Livingston is not entitled to a jury trial on this claim either.

Therefore, based on the above, each of Livingston's counterclaims should be dismissed. However, to the extent any of Livingston's counterclaims survive, they should be referred to the Master-in-Equity because he does not have the right to a jury trial on these claims.

The Honorable James B. Jackson, Jr.
December 30, 2013
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Thank you again for the opportunity to submit this additional information, and we will be happy to provide whatever other information that you may require.

Very truly yours,



Erik T. Norton

cc: Andrew S. Radeker, Esq.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
CitiMortgage Inc.

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-40-4942

Dennis R. Gadson, Jacqueline L. Gadson, Heritage Woods
Corp. and Heritage Property Owners Association, Inc.

PLAINTIFF(S)

DEFENDANT(S)

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 and heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Voluntary Dismissal); ☐ Rule 43(k), SCRPC (Settled); ☐ Other Dismissed without prejudice
- ☐ 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

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 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
		\$
		\$
		\$

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: Re Hood

Judge Code: 2164

Date: June 17, 2013

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of June, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Sarah B. Nielsen

ATTORNEY(S) FOR THE PLAINTIFF(S)

Tameika Issac Devine

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeannette W. McBride

EXHIBIT

1

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CitiMortgage, Inc.

Plaintiff,

VS.

Dennis R. Gadson, Jacqueline L.
Gadson, Heritage Woods Corp. and
Heritage Property Owners Association,
Inc.,

Defendants.

Civil Action No. 2012-CP-40-4942

ORDER

RICHLAND COUNTY
FILED
2013 JUN 25 PM 1:52
JEANETTE W. McBRIDE
C.C.P. & G.S.

BEFORE THE COURT is the Motion to Dismiss Answer and Counterclaim filed by Plaintiff, CitiMortgage, Inc. ("Plaintiff") on October 18, 2012, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was held on March 20, 2013 at 3:30 PM, with Sarah B. Nielsen, Esquire present for Plaintiff Tameika Isaac Devine, Esquire present for Defendants Dennis R. Gadson and Jacqueline L. Gadson ("Defendants"). After hearing the arguments of the parties and after consideration of the written submissions, the Court finds as follows:

1. Plaintiff instituted the above-referenced action by filing a Summons and Complaint for foreclosure on July 19, ~~2011~~²⁰¹², seeking to foreclose on a Note in the original principal amount of One Hundred Thirty Nine Thousand One Hundred and 00/100 (\$139,100.00) Dollars, which is secured by a Mortgage on certain real property known as 1180 Rockwood Road, Columbia, SC 29209. In response to the Complaint for foreclosure, Defendants filed an Answer and Counterclaim on August 13, 2012, asserting the following causes of action: (1) violation of S.C. Code Ann. § 37-10-

102, (2) breach of contract, (3) violation of the Real Estate Settlement Procedures Act ("RESPA"), (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), (5) unconscionable conduct, (6) intentional infliction of emotional distress, and (7) violation of the Fair Credit Reporting Act ("FCRA"). Plaintiff's Motion to Dismiss the seven counterclaims is the subject of this Order.

2. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim and should be granted if the claim does not set forth sufficient allegations entitling the party to relief. *Williams v. Condon*, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001). Although the court must accept the allegations of the claim, it is not permitted to read into the claim unalleged facts. *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Rather, the "motion must be granted if the facts and inferences reasonably deducible from them show that the [defendants] could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 650-51, 492 S.E.2d 272, 274-75 (Ct. App. 1997).

3. After considering the oral arguments and the written briefing, this Court GRANTS Plaintiff's Motion for the reasons outlined herein.

4. Defendants' first counterclaim is for alleged violation of the attorney-preference statute in relation to a purported 2003 loan modification. (Ans. & Countercl. at ¶¶ 9-13.) This Court finds the claim legally deficient for three reasons. First, the claim is time-barred. The attorney-preference statute is subject to the three-year statute of limitations in Subsection (A) of the remedies statute, Section 37-10-105. See S.C. Code Ann. § 37-10-105(A) (outlining statute of limitations as "three years after the

violation occurred").¹ Because Defendants' allegation relates to an alleged 2003 loan modification, any attorney-preference claim must have been asserted in 2006, thereby rendering the current claim time-barred. On that basis alone, the claim is subject to dismissal. Second, to the extent Defendants claim the 2003 loan modification was conducted without an attorney present, this Court finds that Defendants have failed to state facts sufficient to constitute a cause of action because the conduct complained of would constitute the unauthorized practice of law—not an attorney-preference violation. In South Carolina, there is no private right of action for the unauthorized practice of law. See *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 496, 560 S.E.2d 612, 622 (2002); *Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007). Without a private right of action, Defendants cannot seek to recover for the unauthorized practice of law by asserting an attorney-preference claim. Finally, the 2003 loan modification did not trigger the attorney-preference statute because a modification does not give rise to a closing as required by S.C. Code Ann. § 37-10-102. The plain language of the attorney-preference statutes relates to the "closing of the transaction." S.C. Code Ann. § 37-10-102(a). Necessarily then, the attorney-preference notice requirement only arises where a closing occurs. In South Carolina, precedent is clear that a closing occurs only where there is a conveyance or transfer of an interest in real property. See *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). A loan modification changes only the terms of the loan, *i.e.*, interest rate, loan term, or payment amount and does not impact the pre-existing mortgage

¹ Defendants fail to plead any unconscionable conduct as defined in and required by S.C. Code Ann. § 37-5-108, thereby rendering the statute of limitations in S.C. Code Ann. § 37-10-105(C) inapplicable to this cause of action.

securing the Note. On that additional basis, this Court holds that the attorney-preference statute is not triggered in relation to the alleged 2003 loan modification.

5. Defendants' second claim for breach of contract relates to a purported 2009 trial modification plan. (Ans. & Countercl. at ¶¶ 14-19.) Because the claim relates only to a "trial" modification, as outlined in the pleading and conceded by Defendants during the hearing, this Court follows the consensus of opinion and finds that the allegations do not give rise to the existence of a contractual relationship as a matter of law. In South Carolina, "common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (Ct. App. 1989). The existence of a "trial" modification, without any allegation that the loan was permanently modified, fails to meet this standard. The term "trial" itself signifies there would be a subsequent and final agreement between the parties and, therefore, during the "trial" all essential and material terms of the agreement were not finalized. *See id.* Additionally, because the contractual relationship between the parties is necessarily the Note and Mortgage, Defendants failure to identify a provision of those documents allegedly breached by CitiMortgage is fatal to their claim. *See Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 328-29, 574 S.E.2d 502, 507-08 (Ct. App. 2002). Therefore, Defendants' breach of contract claim, as alleged, is legally deficient.

6. Defendants' third claim is for alleged violation of the RESPA, specifically that CitiMortgage failed to respond to unspecified writings related to the servicing and administration of their loan. (Ans. & Countercl. at ¶¶ 20-25.)

CitiMortgage argued that these allegations were insufficient to allege submission of a qualified written request as defined by the RESPA, 12 U.S.C. § 2605(e)(1)(A), and that Defendants did not properly plead the actual damages requirement. During the hearing, Defendants conceded they did not allege specifics as to actual damages in their pleading stating only that such damages should be proven at trial. Without a specific allegation as to the actual damages sought in the pleading, as required by the cases interpreting this statutory scheme, this Court finds the RESPA claim fatally flawed and dismissal is proper. See *Ginn v. CitiMortgage, Inc. (In re Ginn)*, 465 B.R. 84, 95-96 (Bankr. D.S.C. 2012); *Nix v. Tavernier (In re Nix)*, No. 10-01103, 2012 Bankr. LEXIS 13, at *38-39 (Bankr. D.S.C. Jan. 5, 2012). Having ruled in favor of Plaintiff on the actual damages requirement, this Court does not reach the qualified written request argument.²

7. Defendants' fourth claim for violation of the SCUTPA is both time-barred and subject to a statutory exemption and, therefore, must be dismissed. While the claim itself is devoid of factual allegations, it necessarily incorporates the alleged 2003 loan modification and, on that basis, is time-barred in the same respect as the attorney-preference claim. See S.C. Code Ann. § 39-5-150; *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (The "statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for wrongful conduct"). Here, Defendants would

² This Court also notes that Plaintiff relied on two compelling documents in its memorandum in support of motion to dismiss related to a purported qualified written request and response. While this Court may consider these documents at the Rule 12(b)(6) stage pursuant to the South Carolina Supreme Court's holding in *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009), it does not reach this argument due to Defendants' failure to satisfy the actual damages requirement outlined in the statute. However, a cursory review of the documents evidences that if the May 1, 2012 letter is that relied upon by Defendants in asserting the RESPA claim, the May 12, 2012 response by Plaintiff appears to meet the requirements of 12 U.S.C. § 2605(e)(2)(C). During the hearing on this argument Defendants admitted that if the response is valid, they would not have a claim for damages against Plaintiff.

have been on notice of the existence of an attorney when signing the loan modification agreement—or lack thereof—in 2003. Reasonable minds cannot differ on this fact and, therefore, the claim is barred by the three-year statute of limitations. Additionally, this Court finds that Plaintiff, as a loan servicer, operates within a highly regulated industry, given the existence of the Home Affordable Modification Program, Dodd-Frank Wall Street Reform and Consumer Protection Act, and other state and federal statutes, and, is therefore exempt from liability under the SCUTPA. *See* S.C. Code Ann. § 39-5-40(a).

8. Defendants' fifth claim seeks recovery for alleged unconscionable debt collection. (Ans. & Countercl. at ¶¶ 31–36.); S.C. Code Ann. § 37-5-108. Plaintiff argued, and this Court agrees, that a necessary prerequisite to bringing a claim for unconscionable debt collection in civil court is the filing of a complaint with the South Carolina Department of Consumer Affairs and allowing the administrative process to attempt resolution prior to court involvement. *See* S.C. Code Ann. § 37-5-108(6). Here, the Answer and Counterclaim fails to include any allegation related to the administrative remedies requirement. (*See generally* Ans. & Countercl.) Moreover, during the hearing, Defendants failed to state or allege that they had complied with the administrative remedies requirement and simply stated they had no argument in response. Therefore, this Court finds that by failing to plead compliance with Section 37-5-108(6), Defendants fail to plead an essential prerequisite to bringing the claim and Plaintiff is entitled to dismissal as a matter of law.

9. Defendants' sixth counterclaim is for intentional infliction of emotional distress. (Ans. & Countercl. at ¶¶ 37–39.) The entire claim encompasses three paragraphs alleging only that the undefined conduct was "willful and intentional and

intended to inflict emotional distress" on Defendants. (*Id.*) For purposes of pleading the claim, this is patently insufficient. In South Carolina, an intentional infliction of emotional distress claim has a high pleading standard and requires allegations of "conduct was so extreme and outrageous as to exceed all possible bounds of decency" and distress "so severe that no reasonable person could be expected to endure it." *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 401, 596 S.E. 2d 42, 48 (2004). Defendants' pleading, as outlined above, simply does not meet this standard and must be dismissed. *Dye v. Gainey*, 320 S.C. 65, 69, 463 S.E.2d 97, 99 (Ct. App. 1995) ("Even viewing the allegations of the complaint in the light most favorable to [the non-moving party], as we are required to do in this instance, we agree with the trial judge that she fails to state a cause of action for intentional infliction of emotional distress.").

10. Finally, Defendants' claim for violation of the FCRA relates to the Plaintiff's alleged failure to accurately report the status of their account with the credit bureaus. (Ans. & Countercl. at ¶¶ 40-44.) Plaintiff argues that while furnishers of information do have a duty to accurately report pursuant to 15 U.S.C. § 1681s-2(a), this duty does not give rise to a cause of action for Defendants. This Court agrees. The statute specifically provides that there is no private right of action for borrowers for violation of the duty to accurately report because violation of such duty is enforced "exclusively" by government officials. 15 U.S.C. § 1681s-2(d); *Freeman v. Equifax, Inc.*, No. 6:12-845, 2012 U.S. Dist. LEXIS 89477, at *6 (D.S.C. Jun. 28, 2012) (It is well-established that "no private right of action exists for a violation of [Section 1681s-2(a)] of the FCRA, and that these duties instead can be enforced only by government officials."). Moreover, Defendants acknowledged during the hearing that a private cause

of action may not exist for their claim and, instead, they sought only the opportunity to present related testimony at the final foreclosure hearing. This Court finds that such response evidences there is no claim for damages for the conduct complained of and, instead, such action is more appropriately addressed by an affirmative defense. Because Defendants allege only Plaintiff breached the duty to accurately report, this claim is subject to dismissal, with prejudice.

NOW, THEREFORE, for the reasons outlined herein, the Court hereby GRANTS Plaintiff's Motion to Dismiss and Defendants' counterclaims are dismissed, with prejudice. This ruling relates only to those claims for affirmative relief by Defendants against Plaintiff and does not impact Defendants' ability to argue any properly pled affirmative defenses outlined in the Answer and Counterclaim by way of subsequent dispositive motion or at the final foreclosure hearing.

IT IS SO ORDERED, this 18th day of JUNE 2013.

Re Hood

The Honorable Robert E. Hood
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CitiMortgage, Inc.,

Civil Action No. 2010-CP-02-1712

Plaintiff,

VS.

Jeffery Ronell Toole, Green Financial
Services Corp., and the South Carolina
Department of Motor Vehicles,

Defendants.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Liz Garland, Clerk of Court of Common Pleas and General
Sessions, County of South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office this

ORDER

FEB 27 2012

330
Jan

Liz Garland
C.C.C.P. & G.S., Aiken County, S.C.

Deputy Clerk

BEFORE THE COURT is the Motion to Amend Reply to Amended Answer, Setoff and Counterclaim, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, and Motion for Summary Judgment on Defendant Jeffery Ronell Toole ("Defendant")'s counterclaims pursuant to Rule 56 of the South Carolina Rules of Civil Procedure; both filed by Plaintiff CitiMortgage, Inc. ("Plaintiff"). After the hearing held on Monday, February 6, 2012, at 9:30 AM and consideration of Plaintiff's written motions, memorandums, and oral arguments, the Court finds that under the circumstances of this case it is appropriate to grant leave to amend and also to grant summary judgment in favor of Plaintiff on Defendant's counterclaims.

BACKGROUND

1. On or about October 30, 2000, Defendant made, executed and delivered to Associates Home Equity Services, Inc. a Note ("Note") in the amount of \$54,887.27, secured by a Mortgage on certain real property situated at 108 Thompson Avenue #B, North Augusta, SC 29841 and a 1994 Fleetwood Mobile Home ("Mortgage"). Subsequently, Associates Home Equity Services, Inc. merged into

EXHIBIT

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CitiFinancial Mortgage Company, Inc., which then merged into CitiMortgage, Inc., the Plaintiff in this action.

2. Defendant's loan included an Agreed Rate Reduction Rider (the "Rider"), which provided for a four-tier interest rate adjustment if the Defendant complied with its terms. The first-tier is a .50% interest rate reduction if Defendant makes twelve full monthly payments in a row without ever during that time being or becoming thirty or more days contractually delinquent. These payments are defined by the Rider as "On Time Payments." The second-tier states that if Defendant makes twelve additional On Time Payments, his interest rate is reduced by another .50%. The third-tier similarly requires twelve additional On Time Payments and, if those payments are made, grants an interest rate reduction of .75%. The final, fourth-tier reduction requires twelve On Time Payments and allows for a final interest rate reduction of 1%. Overall, the total interest rate reduction allowed by the Rider is 3.25%.

2. Plaintiff filed a Complaint for foreclosure against Defendant on July 23, 2010. In response, Defendant filed an Answer, Setoff and Counterclaim on August 25, 2010, followed by an Amended Answer, Setoff and Counterclaim on August 27, 2010, asserting three counterclaims, (1) breach of contract accompanied by fraudulent act, (2) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), (3) violation of the attorney preference statute, and an affirmative defense of waiver, laches, and estoppel.

3. Plaintiff filed a Reply on September 27, 2010, followed by a Motion to Amend and Amended Reply to Answer, Setoff and Counterclaim on

November 2, 2011. Plaintiff filed a Motion for Summary Judgment on Defendant's counterclaims on December 12, 2011.

4. A hearing was held on both motions on February 6, 2012. At the hearing, Plaintiff was represented by Sarah B. Nielsen, Esquire. Counsel for Defendant did not appear, but was provided with notice of the scheduled hearing by letter from Plaintiff's counsel sent February 1, 2012, in addition to notice provided by the Clerk of Court. Based on the briefing provided to the Court and the oral argument presented at the hearing, this Court finds that justice requires leave to amend Plaintiff's pleading and Defendant will not be prejudiced by the same. Further, as outlined below, this Court finds that no genuine issue of material fact exists as to Defendant's counterclaims and, therefore, Plaintiff is entitled to judgment as a matter of law.

APPLICABLE LAW

5. Rule 15(a) provides that a pleading may be amended by leave of the court and that "leave shall be freely given when justice so requires and does not prejudice any other party." S.C. R. Civ. P. 15(a). The motion to amend is addressed to the sound discretion of the trial judge and the party opposing the amendment bears the burden of establishing prejudice. *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296 (2004).

6. A motion for summary judgment should be granted where the court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific

facts showing that there is a genuine issue for trial.” *Hedgepath v. AT&T Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)) (internal quotes omitted and emphasis in original). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Id.* at 355, 559 S.E.2d at 336. Reliance on allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRCP. Further, “[a] party cannot escape summary judgment on the mere hope that something may develop at trial.” *Champion Int’l Corp. v. Eubanks*, 291 S.C. 395, 398, 353 S.E.2d 880, 882 (Ct. App. 1987).

ANALYSIS AND CONCLUSIONS

7. This Court finds that Plaintiff may amend its Reply to Amended Answer, Setoff and Counterclaim, pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure and grants leave for the same. The Amended Reply to Amended Answer, Setoff and Counterclaim does not materially alter Plaintiff’s responses to the allegations raised in the Amended Answer, Setoff and Counterclaim but, instead, adds additional defenses discovered during the course of the litigation.

8. Additionally, Defendant is not prejudiced by the amended pleading because he was provided with notice of the new defenses and could have refuted them at any point between the time the Motion to Amend was filed, on November 2, 2011, and the hearing held on February 6, 2012. *See Stanley*, 357 S.C. at 174, 592 S.E.2d at 298 (noting that the prejudice envisioned by Rule 15 is a lack of notice of the new issue and a lack of opportunity to refute it).

NOW, THEREFORE, finding Defendant is not prejudiced by the Amended Reply to Amended Answer, Setoff and Counterclaim, this Court hereby grants Plaintiff's Motion to Amend and adopts the Amended Reply to Amended Answer, Setoff and Counterclaim attached as Exhibit "A" to the Motion to Amend as the operative pleading in this case.

9. After having granted Plaintiff's Motion to Amend, this Court heard Plaintiff's Motion for Summary Judgment on Defendant's counterclaims pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

10. Plaintiff moved for summary judgment on Defendant's three counterclaims and one affirmative defense, to the extent it sought damages from Plaintiff, on the basis that the applicable statutes of limitation bar Defendant's claims, Defendant cannot and has not come forward with evidence to establish compliance with the terms of the Rider, and the terms of the Note and Mortgage refute Defendant's affirmative defense.

11. The breach of contract accompanied by fraudulent act and SCUTPA counterclaims are based on Defendant's allegation that he complied with the terms of the Rider, but was not given an interest rate reduction on the loan. Pursuant to the terms of the Rider, Defendant was required to make "twelve consecutive full monthly payments in a row without ever during that time being or becoming thirty or more days contractually delinquent," in order to be eligible for the interest rate reductions. Based on the evidence presented by Plaintiff, Defendant has not made twelve consecutive monthly payments within the three year period preceding the filing of the Complaint for foreclosure—July 2007 through July 2010.

12. Specifically, between July 2007 and July 2010, Defendant only made eight payments that qualify as consecutive; one of which was not a "full" payment. After making the eight consecutive monthly payments between September 29, 2007, and March 7, 2008, the payment history evidences two additional payments on April 30, 2008, that were returned for insufficient funds. Defendant then made three consecutive monthly payments on June 19, 2008, followed by two later payments that were returned for insufficient funds on September 5, 2008. Based on the foregoing, this Court finds that Defendant did not satisfy the terms of the Rider because he did not make twelve On Time Payments. Therefore, Defendant was not entitled to an interest rate reduction at any point between July 2007 and the present, and Plaintiff is entitled to judgment as a matter of law on the breach of contract accompanied by fraudulent act and SCUTPA counterclaims.

13. This Court also finds that Defendant cannot rely on any payments made prior to July 2007, as any claims related to payments made prior to that date are barred by the applicable statutes of limitation. To the extent Defendant's counterclaims for breach of contract accompanied by fraudulent act and the SCUTPA rely on alleged consecutive monthly payments prior to July 2007, those claims fail as a matter of law. See S.C. Code Ann. § 15-3-530(1) (three year statute of limitations for breach of contract claim); *Wilson Group v. Quorum Health Resources*, 880 F. Supp. 416, 424 (D.S.C. 1995) ("Although a cause of action for breach of contract accompanied by a fraudulent act has elements of contract and tort, it is considered contractual in nature."); S.C. Code Ann. § 39-5-150 ("No action may be brought under this title [SCUTPA] more than three years after discovery of the unlawful conduct which is the subject of the suit.").

14. Based on Plaintiff's compliance with the terms of the Rider, Defendant's failure to comply therewith, and the applicable statutes of limitation, this Court grants summary judgment in favor of Plaintiff on Defendant's breach of contract accompanied by fraudulent act and SCUTPA claims.

15. Defendant's third counterclaim for alleged violation of the attorney-preference statute, S.C. Code Ann. § 37-10-102, is also barred by the statute of limitations. Defendant seeks damages and attorneys' fees pursuant to South Carolina Code Section 37-10-105, which provides that "[n]o debtor may bring an action for a violation of this chapter more than three years after the violation occurred." S.C. Code Ann. § 37-10-105(a).²

16. The closing of Defendant's loan took place on October 30, 2000, and that is the date on which a violation would have "occurred." Having failed to assert a claim prior to October 30, 2003, Defendant's counterclaim for violation of the attorney-preference statute is time-barred and this Court grants summary judgment in favor of Plaintiff.

17. Defendant's fourth counterclaim, which seeks actual and punitive damages, is captioned as a claim for laches, waiver, or estoppel. It states that Plaintiff waived its right to accelerate the balance due and commence foreclosure by delaying institution of the foreclosure action. This Court finds that Defendant improperly characterizes this defense as a counterclaim and, therefore, cannot recover any damages under this theory. See, e.g., *Circle Square Co. v. Atlantis Development Co.*, 267 S.C. 618, 628, 230 S.E.2d 704, 708 (1976) ("Although there are technical differences in the

¹ To the extent Defendant seeks setoff, he cannot recover against Plaintiff because it is not the "person violating this chapter," as outlined in S.C. Code Ann. § 37-10-105(a).

² This statute of limitations applies to all actions commenced after May 2, 1997.

7/9/80

doctrine of laches, waiver and estoppel, . . . all are affirmative defenses, and the burden of proof to establish the elements . . . is on the party who seeks to be protected by such a defense.").

18. Defendant claims that his last payment was made in April 2010 and, therefore, his delinquency does not exceed twelve months. Further, he claims that if he is more than twelve months contractually delinquent, Plaintiff waived its right to accelerate the balance due and commence foreclosure. Neither of these allegations is supported by the evidence before this Court and there is no genuine issue of material fact for trial on this defense. This Court grants summary judgment in favor of Plaintiff on Defendant's claim for laches, waiver, and estoppel because Defendant has not established a genuine issue of material fact for trial in that he cannot establish the elements of the defenses.

20. Most importantly, the defenses of laches, waiver, and estoppel, all require "some showing of material prejudice to the party asserting the defense from the act or neglect of the party against whom it is asserted." *Bailey v. Lyman Printing & Finishing Co.*, 245 S.C. 13, 22, 138 S.E.2d 410 414 (1964). Defendant was not prejudiced by any delay on the part of Plaintiff in instituting the foreclosure action because he was allowed to continue to reside on the property while not making timely or sufficient loan payments. Further, the only evidence before this Court establishes that Defendant remains more than twelve months contractually delinquent.

21. Finally, the plain terms of the Note, to which both Plaintiff and Defendant are parties, states that Plaintiff has the right to "declare the entire unpaid amount . . . immediately due and payable" and it may "delay enforcing [its] rights under

this loan agreement without losing them." Therefore, the terms of the Note specifically account for any delay in bringing the foreclosure action. This Court finds that Plaintiff acted within the bounds of the Note in bringing the foreclosure action and is not barred by the doctrines of laches, waiver, or estoppel.

NOW, THEREFORE, the Court hereby grants Plaintiff's Motion for Summary Judgment on Defendant's counterclaims, finding Defendant has not come forward with a material fact for trial and Plaintiff is entitled to judgment was a matter of law.

CONCLUSION

The Court concludes that it is appropriate to grant Plaintiff's Motion to Amend and enter the Amended Reply to Amended Answer, Setoff and Counterclaim as the operative pleading in this action. Also, the Court concludes that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Plaintiff is entitled to summary judgment on Defendant's counterclaims. Therefore, the Court hereby GRANTS Plaintiff's Motion to Amend and Motion for Summary Judgment and DISMISSES Defendant's counterclaims, with prejudice.

IT IS SO ORDERED, this 22nd day of February, 2012.



The Honorable Edgar W. Dickson
Second Judicial Circuit

Orangeburg
- Aiken, South Carolina

Feb. 22, 2012

9/15 *Ed*

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for CitiMortgage, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

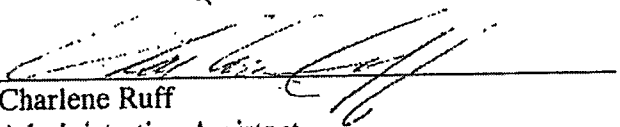
Pleadings: **PROPOSED ORDER**

Counsel Served:

William F. Able, Esquire
Post Office Box 1971
Irmo, SC 29063

The South Carolina Department of Motor Vehicles
10311 Wilson Blvd.
Blythewood, SC 29016

Green Financial Services Corp.
1100 Landmark Towers, 345 St. Peter Street
St. Paul, MI, 55102-1639



Charlene Ruff
Administrative Assistant

February 20, 2012

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for CitiMortgage, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

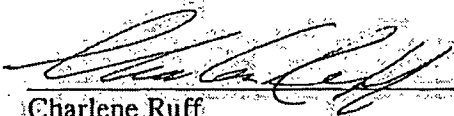
Pleadings: ORDER SIGNED BY JUDGE DICKSON

Counsel Served:

William F. Able, Esquire
Post Office Box 1971
Irmo, SC 29063

The South Carolina Department of Motor Vehicles
10311 Wilson Blvd.
Blythewood, SC 29016

Green Financial Services Corp.
1100 Landmark Towers, 345 St. Peter Street
St. Paul, MI, 55102-1639



Charlene Ruff
Administrative Assistant

February 24, 2012

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

CitiMortgage, Inc.

Plaintiff,

vs.

Jeffery Ronell Toole, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CASE NO.: 2010-CP-02-1712

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Sarah B. Nielsen, Bar No. 78384

Address:

Nelson Mullins, P.O. Box 11070, Columbia, SC
29211

Phone: 803.779.2000 Fax 803.256.7500

E-mail: sarah.nielsen@nelsonmullins.com Other:

Defendant's Attorney:

William F. Able, Bar No. _____

Address:

P.O. Box 1971, Irmo, SC 29063

Phone: 803.476.2545 Fax _____

E-mail: billable@aol.com Other: _____

☐ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☒ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/ ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ **Form Motion/Order**

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/ ☒ Defendant

February 24, 2012

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$** _____

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions.

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED - AMOUNT DUE: \$** _____

**AKEN COUNTY
CLERK OF COURT**

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) C/A #: 07-CP-38-196

Community Resource Bank, N.A.,)
f/k/a Orangeburg National)
Bank,)

Plaintiffs,)

v.)

Clyde B. Livingston; Technico)
Marketing & Distribution,)
Inc.; B. Livingston and)
Charlotte V. Livingston;)
American First Federal Inc.)
Citibank South Dakota, N.A.;)
Branch Banking and Trust of)
South Carolina; G&G Rentals;)
Miller Communications, Inc.;)
Wells Fargo Bank, N.A.,)

Defendants.)

COPY

DEPOSITION OF
LINDA G. O'DELL

Thursday, September 11, 2008
2:18 p.m. - 2:50 p.m.

The deposition of LINDA G. O'DELL, taken on behalf of the Defendants at the law offices of Bryant, Fanning and Schuler, 358 St. Paul Street, Orangeburg, South Carolina, on the 11th day of September, 2008 before Carla S. Dominick, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896
ROA_00586

EXHIBIT

3

1 selected to be their lawyer?

2 A: After you had your appraisal and the approval,
3 then you would ask him who he would like for
4 his attorney.

5 Q: Okay. I'd like to have this marked as
6 Defendants Exhibit Seven. I'll hand a copy of
7 this to Ms. Johnson. This has been shown to
8 you.

9 (Defendants Exhibit Number Seven was marked for
10 identification purposes).

11 Q: Ma'am, you're looking at a copy of what's just
12 been marked as Defendants Exhibit Seven to this
13 deposition. It's labeled borrower's preference
14 as to legal counsel and insurance agent. Is
15 this one of the documents that you would have
16 ... that Clyde Livingston would have signed
17 when he met with you to sign the loan
18 origination documents?

19 A: Yes, sir.

20 Q: And that would have been at the meeting that
21 he'd have with you to sign the note and the
22 mortgage, etcetera, is that correct?

23 A: It's probably signed before it was closed.

24 Q: Okay. And what tells you that?

25 A: So I would know who the attorney was and who he

1 had his insurance with.

2 Q: And is that information that you needed to know
3 before the loan was closed?

4 A: Oh, yes.

5 Q: All right. I'm going to put this in as
6 Defendants Exhibit Eight. I hand a copy of
7 this to Ms. Johnson.

8 MS. JOHNSON: Thank you.

9 (Defendants Exhibit Number Eight was marked for
10 identification purposes).

11 Q: Showing you a copy of what's been marked as
12 Defendants Exhibit Eight to this deposition,
13 could you look at that for me and when you're
14 done, let us know what that is?

15 A: It's a right of rescision. He has the right to
16 change his mind within three days.

17 Q: Okay. And how normally would y'all deal with
18 getting this form completed in the loan
19 origination process?

20 A: That's signed at closing.

21 Q: Okay. So this is signed completed at closing
22 and put in the file and the borrower would just
23 later let you know?

24 A: The money is not disbursed until the three days
25 is up

STATE OF SOUTH CAROLINA

) COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

) C/A #: 07-CP-38-196

Community Resource Bank, N.A.,)
f/k/a Orangeburg National)
Bank,)

Plaintiffs,)

v.)

Clyde B. Livingston; Technico)
Marketing & Distribution,)
Inc.; B. Livingston and)
Charlotte V. Livingston;)
American First Federal Inc.;)
Citibank South Dakota, N.A.;)
Branch Banking and Trust of)
South Carolina; G&G Rentals;)
Miller Communications, Inc.;)
Wells Fargo Bank, N.A.,)

Defendants.)

COPY

DEPOSITION OF

CLYDE B. LIVINGSTON

Thursday, September 11, 2008
10:11 a.m. - 12:21 p.m.

The deposition of CLYDE B. LIVINGSTON, taken on behalf of the Plaintiffs at the law offices of Bryant, Fanning and Schuler, 358 St. Paul Street, Orangeburg, South Carolina, on the 11th day of September, 2008 before Carla S. Dominick, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT

4

1 Q: Okay. This will be Plaintiff's Ten. It's
2 entitled balloon loan disclosure. It says
3 11/13/2000. Do you recognize this document?

4 (Plaintiff's Exhibit Number Ten was marked for
5 identification purposes).

6 A: No, ma'am.

7 Q: Okay.

8 A: What is this on? This is the ...

9 Q: Did you borrow \$57,000 on your Brookside in
10 2000 from Community Resource or Orangeburg
11 National?

12 A: I think what I got was \$40,000 or \$45,000,
13 somewhere in that neighborhood. And it was a
14 conversation, as well as I remember or seems
15 like the loan officers changed, it started out
16 with one loan officer and another one is the
17 one that, you know, we finally got the paper.
18 And the appraisal, it was approved ... this is
19 the first time I've ever seen this document
20 because I asked about it one time and was, you
21 know, everybody acted like they didn't know
22 what I was talking about. So you asked me
23 while ago if there was anything the bank did
24 wrong. This, if they did anything wrong, might
25 be what they did wrong. We went in there to

1 get a \$60,000 line of credit. The appraiser
2 that did the appraisal on the house ... see,
3 the line of credit's based on the appraised
4 value, less the first mortgage, times the
5 percentage or something like that, I believe.
6 Anyway, he said if the house were painted, it
7 would appraise for this, but it's in bad need
8 of paint, and, therefore, I'm only going to
9 appraise it for this. Well, it was supposed to
10 be worked out when I got the house painted that
11 I would be able to get the rest of the money.

12 Q: When you say the rest, you mean \$60,000?

13 A: Well, it looks like it was \$57,000.

14 Q: Oh.

15 A: I remembered \$60,000, but \$57,000 is pretty ...
16 you know, pretty close to that. I do remember
17 that that's probably one of the things that I
18 started getting aggravated with Mark Tremier
19 about is that he acted like something like
20 this, he didn't know what I was talking about,
21 but you showing me something in black and white
22 that shows that my memory wasn't completely
23 faulty when I brought it up.

24 Q: I'm still not real clear, but could you please
25 explain a little more that you said you went in

1 to borrow the \$57,000 or \$60,000 ...

2 A: Right.

3 Q: ... and they said it needed some paint. So
4 tell me what happened after that.

5 A: Well, we had to get ... well, the guy ... the
6 appraiser, he talked to them back and forth and
7 they said, okay, we'll let Clyde have the
8 \$45,000. And I thought the paperwork was done
9 for it to go up higher. I thought \$60,000, but
10 this says \$57,000. I'm not going to argue over
11 \$3,000. Anyway, when I got the house painted
12 and went back and said something about it, I
13 was told that, you know, well, the line of
14 credit was done for \$45,000, I believe it was
15 somewhere in that neighborhood, and that's what
16 it was. And there wasn't any extra, you know,
17 that could be borrowed.

18 Q: So are you saying that you only received ...
19 tell me how much money you received from this
20 loan, to your knowledge.

21 A: Well, it was no less than \$40,000 and no more
22 than \$45,000. Between \$40,000 and \$45,000.
23 See, Linda O'Dell was the person that this loan
24 ... the conversation started with.

25 ~~(Plaintiff's Exhibit Number Eleven was marked for~~



Orangeburg County First Judicial Circuit Public Index



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Switch View

American first federal VS Clyde B Livingston , defendant, et al

Case Number:	2003CP3800066	Court Agency:	Common Pleas	Filed Date:	01/17/2003
Case Type:	Common Pleas	Case Sub Type:	Debt Collections 110	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Solicitor / Master In Equity G S And C P		
Disposition:	Ended by Non Jury	Disposition Date:	08/26/2004	Disposition Judge:	Solicitor / Master In Equity G S And C P
Original Source Doc:		Original Case #:			
Judgment Number:	20041083	Court Roster:			

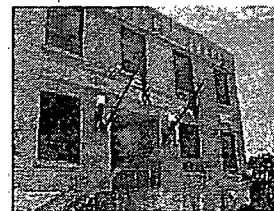
Case Parties	Judgments	Tax Map Information	Associated Cases	Actions	Financials		
For:	American first federal	Against:	Livingston, Clyde B	Judg. Amount:	\$136,847.51	Judgment Date:	08/26/2004
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							
For:	American first federal	Against:	Bright white paper co	Judg. Amount:	\$136,847.51	Judgment Date:	08/26/2004
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							

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Bb & t VS Clyde Livingston

Case Number:	2004CP3800096	Court Agency:	Common Pleas	Filed Date:	01/21/2004
Case Type:	Common Pleas	Case Sub Type:	Debt Collections 110	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Williams, James C. Jr.		
Disposition:	Default Uncontested	Disposition Date:	04/13/2004	Disposition Judge:	Williams, James C. Jr.
Original Source Doc:		Original Case #:			
Judgment Number:	20040470	Court Roster:			

Case Parties	Judgments	Tax Map Information	Associated Cases	Actions	Financials
For:	Bb & t	Against:	Livingston, Clyde	Judg. Amount:	\$32,344.14
Description:	Judgment/Judgment	Disposition:		Disp. Date:	
Notes:	None			Judgment Date:	04/13/2004
				Date Entered/Last Changed	08/29/2008
					08/29/2008
Judgment Details					
Claims Code		Detail Desc.		Detail Amount	Detail Date
None					

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Switch View

G&G RENTALS VS. CLYDE LIVINGSTON

Case Number:	060816	Court Agency:	Central Region Magistrate	Filed Date:	07/24/2006
Case Type:	Civil	Case Sub Type:	Summons & Complaint	File Type:	
Status:	Judgment	Assigned Judge:	Doremus, Peggy D		
Disposition:	Default Judgment	Disposition Date:	09/13/2006	Disposition Judge:	Doremus, Peggy D
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties

Click the  icon to show associated parties.

Name	Address	Race	Sex	Date Of Birth	Party Type	Party Status	Last Updated
G&g Rentals					Plaintiff		07/24/2008
Livingston, Clyde					Defendant		07/24/2008

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
	TRANSCRIPT OF JUDGEMENT	Filing		09/13/2006 -00:00	09/13/2006 -00:00	
	LAST DAY TO RESPOND	Filing		09/06/2006 -00:00	09/06/2006 -00:00	
	SERVED	Filing		08/07/2006 -00:00	08/07/2006 -00:00	
	SENT TO OCSO	Filing		07/25/2006 -00:00	07/25/2006 -00:00	
	ISSUED	Filing		07/24/2006 -00:00	07/24/2006 -00:00	
G&g Rentals	Converted Civil Cost	Filing		07/24/2006 -00:00	09/13/2006 -00:00	
G&g Rentals	Converted Civil Cost	Filing		07/24/2006 -00:00	09/13/2006 -00:00	

Financials

Summary

Fine/Costs:	\$80.00	Total Paid for fine/costs:	\$80.00	Balance Due:	\$0.00
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Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
-------------	-----------	--------	---------------	------------------

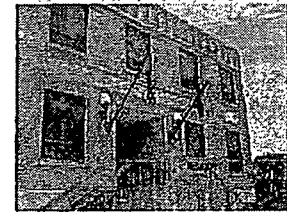
Civil Filing Fee County 44% / 100%	CVFFCN	\$55.00		\$55.00
SCJD Filing Fee Proviso \$50 / \$25	SCJDPV	\$25.00		\$25.00
Payments				
Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
07/24/2006	23261	MAG2	PY	\$80.00

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Switch View

Miller communications inc VS Original rapid , defendant, et al					
Case Number:	2005TR3800204	Court Agency:	Common Pleas	Filed Date:	07/27/2005
Case Type:	Judgment	Case Sub Type:	Trans From Summary	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Judgment	Disposition Date:	07/27/2005	Disposition Judge:	Clerk Of Court C P, G S, And Family Court
Original Source Doc:		Original Case #:			
Judgment Number:	20050865	Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials							
For:	Miller communications inc	Against:	Original rapid	Judg. Amount:	\$1,989.45	Judgment Date:	07/27/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MAG						
Judgment Details:							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Miller communications inc	Against:	Livingston, Clyde	Judg. Amount:	\$1,989.45	Judgment Date:	07/27/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MAG						
Judgment Details:							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							

CHSWeb 6.1

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Orangeburg County First Judicial Circuit Public Index



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Switch View

G & g rentals VS Clyde Livingston

Case Number:	2006TR3800550	Court Agency:	Common Pleas	Filed Date:	09/21/2006
Case Type:	Judgment	Case Sub Type:	Trans From Summary	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Judgment	Disposition Date:	09/21/2006	Disposition Judge:	Clerk Of Court C P, G S, And Family Court
Original Source Doc:		Original Case #:			
Judgment Number:	20061084	Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

For:	G & g rentals	Against:	Livingston, Clyde	Judg. Amount:	\$6,240.00	Judgment Date:	09/21/2006
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008
Notes:	MAG/WILLIAMSON						
Judgment Details:							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							

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Switch View

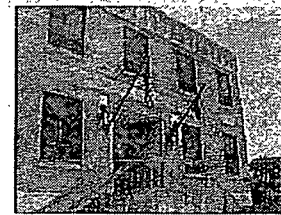
AUTOMATED BUSINESS SYSTEMS VS Clyde LIVINGSTON					
Case Number:	2009CP3802040	Court Agency:	Common Pleas	Filed Date:	12/22/2009
Case Type:	Common Pleas	Case Sub Type:	Transcript Judg 740	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Judgment	Disposition Date:	12/22/2009	Disposition Judge:	Clerk Of Court C P, G S, And Family Court
Original Source Doc:		Original Case #:			
Judgment Number:	2009CP3802040	Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials							
For:	AUTOMATED BUSINESS SYSTEMS	Against:	LIVINGSTON, Clyde	Judg. Amount:	\$5,930.00	Judgment Date:	12/22/2009
Description:	Judgment/Transcript	Disposition:		Disp. Date:		Date Entered/Last Changed	12/22/2009 --
Notes:	None						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							

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Bright white paper co VS Postnet of orangeburg , defendant, et al

Case Number:	2001TR3800298	Court Agency:	Common Pleas	Filed Date:	03/20/2001
Case Type:	Judgment	Case Sub Type:	Trans From Summary	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Judgment	Disposition Date:	03/20/2001	Disposition Judge:	Clerk Of Court C P, G S, And Family Court
Original Source Doc:		Original Case #:			
Judgment Number:	20010328	Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

For:	Bright white paper co	Against:	Postnet of orangeburg	Judg. Amount:	\$784.22	Judgment Date:	03/20/2001
Description:	Judgment/Judgment	Disposition:	Satisfied Or Cancelled	Disp. Date:	07/30/2003	Date Entered/Last Changed	08/29/2008
Notes:	MAG						

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
None			

For:	Bright white paper co	Against:	Summers, J Steve	Judg. Amount:	\$784.22	Judgment Date:	03/20/2001
Description:	Judgment/Judgment	Disposition:	Satisfied Or Cancelled	Disp. Date:	07/30/2003	Date Entered/Last Changed	08/29/2008
Notes:	MAG						

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
None			

For:	Bright white paper co	Against:	Livingston, Clyde B	Judg. Amount:	\$784.22	Judgment Date:	03/20/2001
Description:	Judgment/Judgment	Disposition:	Satisfied Or Cancelled	Disp. Date:	07/30/2003	Date Entered/Last Changed	08/29/2008
Notes:	MAG						

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
None			



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Bank of america VS Clyde B Livingston, defendant, et al					
Case Number:	2002CP3800246	Court Agency:	Common Pleas	Filed Date:	02/28/2002
Case Type:	Common Pleas	Case Sub Type:	Debt Collections 110	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Williams, James C. Jr.		
Disposition:	Default Uncontested	Disposition Date:	06/05/2002	Disposition Judge:	Williams, James C. Jr.
Original Source Doc:		Original Case #:			
Judgment Number:	20020674	Court Roster:			

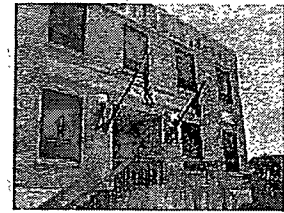
Case Parties Judgments Tax Map Information Associated Cases Actions Financials							
For:	Bank of america	Against:	Livingston, Clyde B	Judg. Amount:	\$4,008.93	Judgment Date:	06/05/2002
Description:	Judgment/Judgment	Disposition:	Satisfied Or Cancelled	Disp. Date:	08/13/2002	Date Entered/Last Changed	08/29/2008
Notes:	None						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Bank of america	Against:	Rudd, Aaron H	Judg. Amount:	\$4,008.93	Judgment Date:	06/05/2002
Description:	Judgment/Judgment	Disposition:	Satisfied Or Cancelled	Disp. Date:	08/13/2002	Date Entered/Last Changed	08/29/2008
Notes:	None						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Bank of america	Against:	A c rentals	Judg. Amount:	\$4,008.93	Judgment Date:	06/05/2002
Description:	Judgment/Judgment	Disposition:	Satisfied Or Cancelled	Disp. Date:	08/13/2002	Date Entered/Last Changed	08/29/2008
Notes:	None						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							

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American first federal VS Clyde B Livingston , defendant, et al

Case Number:	2003CP3800066	Court Agency:	Common Pleas	Filed Date:	01/17/2003
Case Type:	Common Pleas	Case Sub Type:	Debt Collections 110	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Solicitor / Master In Equity G S And C P		
Disposition:	Ended by Non Jury	Disposition Date:	08/26/2004	Disposition Judge:	Solicitor / Master In Equity G S And C P
Original Source Doc:		Original Case #:			
Judgment Number:	20041083	Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

For:	American first federal	Against:	Livingston, Clyde B	Judg. Amount:	\$136,847.51	Judgment Date:	08/26/2004
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
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None

For:	American first federal	Against:	Bright white paper co	Judg. Amount:	\$136,847.51	Judgment Date:	08/26/2004
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
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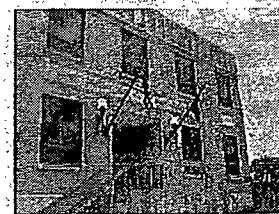
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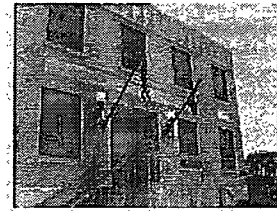
Switch View					
Citibank south dakota VS Clyde B Livingston					
Case Number:	2003CP3801545	Court Agency:	Common Pleas	Filed Date:	12/16/2003
Case Type:	Common Pleas	Case Sub Type:	Debt Collections 110	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Williams, James C. Jr.		
Disposition:	Default Uncontested	Disposition Date:	03/31/2004	Disposition Judge:	Williams, James C. Jr.
Original Source Doc:		Original Case #:			
Judgment Number:	20040412	Court Roster:			

Case Parties	Judgments	Tax Map Information	Associated Cases	Actions	Financials
For:	Citibank south dakota	Against:	Livingston, Clyde B	Judg. Amount:	\$19,477.36
Description:	Judgment/Judgment	Disposition:		Disp. Date:	
Notes:	None			Judgment Date:	03/31/2004
				Date Entered/Last Changed	08/29/2008
Judgment Details					
Claims Code	Detail Desc.	Detail Amount	Detail Date		
None					

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Mortgage electronic reg , plaintiff, et al VS Clyde B Livingston , defendant, et al					
Case Number:	2005CP3800930	Court Agency:	Common Pleas	Filed Date:	09/06/2005
Case Type:	Common Pleas	Case Sub Type:	Foreclosure 420	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Solicitor / Master In Equity G S And C P		
Disposition:	Ended by Non Jury	Disposition Date:	12/09/2005	Disposition Judge:	Solicitor / Master In Equity G S And C P
Original Source Doc:		Original Case #:			
Judgment Number:	20051382	Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

For:	Mortgage electronic reg	Against:	Livingston, Clyde B	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg	Against:	Orangeburg national bank	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg	Against:	Scdr	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg	Against:	American first federal	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:					

				Disp. Date:		Date Entered/Last Changed:	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg.	Against:	Bright white paper co	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed:	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg.	Against:	Technico marketing & dist	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed:	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg.	Against:	Citibank south dakota	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed:	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg.	Against:	Branch banking & trust	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed:	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							
For:	Mortgage electronic reg.	Against:	Miller communications	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed:	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:	Livingston, Clyde B	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed:	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							

Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:	Orangeburg national bank	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:	Scdr	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:	American first federal	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:	Bright white paper co	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:	Technico marketing & dist	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:	Citibank south dakota	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Wells fargo bank	Against:		Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005

		Branch banking & trust					
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.		Detail Amount		Detail Date		
None							
For:	Wells fargo bank	Against:	Miller communications	Judg. Amount:	\$22,848.30	Judgment Date:	12/09/2005
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	08/29/2008 -- 08/29/2008
Notes:	MASTERS REPORT						
Judgment Details							
Claims Code	Detail Desc.		Detail Amount		Detail Date		
None							

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69 Fed.Appx. 585

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1) United States Court of Appeals, Fourth Circuit.

Jerry N. BEATTIE; Judith F. Beattie, Plaintiffs-Appellants,

v.

NATIONS CREDIT FINANCIAL SERVICES CORPORATION; Bank of America, formerly known as Nationsbank, N.A.; Nations Credit Manufactured Housing Corporation, Defendants-Appellees, and

C & S Family Credit, Incorporated;
C & S Sovran Credit Corporation;
Interlink Mortgage Services, Defendants.
National Association of Consumer Advocates, Amicus Supporting Appellants.

No. 02-1744. | Argued Feb. 26, 2003. | Decided May 27, 2003. |
Decided on Rehearing June 27, 2003.

Mortgagors sued mortgagee and its parent corporation for, inter alia, alleged violation of South Carolina Unfair Trade Practices Act (SCUTPA), libel, and negligence. The United States District Court for the District of South Carolina, Margaret B. Seymour, J., granted mortgagee's summary judgment motion. Mortgagors appealed. The Court of Appeals held that: (1) mortgagee was not exempt from liability under SCUTPA; (2) mortgagee did not engage in "unlawful trade practice" under SCUTPA; (3) mortgagors failed to establish public interest element of SCUTPA claim; (4) absence of evidence that mortgagee acted with malice when it allegedly reported to credit reporting agencies that mortgage was in foreclosure precluded its liability for libel pursuant to Fair Credit Reporting Act (FCRA); and (5) mortgagee was not liable in negligence.

Affirmed.

*586 Appeal from the United States District Court for the District of South Carolina, at Greenville. Margaret B. Seymour, District Judge. (CA-00-2005-6-24).

Attorneys and Law Firms

ARGUED: Alton Lamar Martin, Jr., Clarkson, Walsh, Rheney & Turner, P.A., Greenville, South Carolina, for Appellants. William Stevens Brown, V, Nelson, Mullins, Riley & Scarborough, L.L.P., Greenville, South Carolina, for Appellees. **ON BRIEF:** Wes A. Kissinger, Clarkson, Walsh, Rheney & Turner, P.A., Greenville, South Carolina, for Appellants.

Before NIEMEYER and TRAXLER, Circuit Judges, and C. ARLEN BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Opinion

Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

Jerry and Judith Beattie ("Beatties") brought this diversity action against the Bank of America and its subsidiary NationsCredit Financial Services Corporation ("NationsCredit") for, among other things, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), libel, *587 and negligence. The district court¹ granted NationsCredit's motion for summary judgment, and the Beatties appeal. We affirm.

I.

On December 17, 1993, the Beatties entered into a home loan agreement with NationsCredit in which the debt, evidenced by a promissory note, was secured by a mortgage on the Beatties' residence in Greenville, South Carolina. Several of the loan statements the Beatties received in 1999 did not reflect specific account activity, such as transactions from the prior month. However, the statements did show a decrease in the balance due on the loan. They claim to have made repeated attempts, by telephone and in writing, to contact

EXHIBIT

6

NationsCredit about the status of their account, but they did not receive a response.

On October 11, 1999, the Beatties received, from Interlink Mortgage Services, a copy of a Lost Mortgage Satisfaction affidavit ("LMS")² signed by NationsCredit's vice president Robert Hardman. The LMS, filed with the Greenville County, South Carolina Register of Deeds on September 8, 1999, indicated that the Beatties' mortgage was satisfied. Even so, the Beatties concede that they have never paid all of the amounts due on the loan. Armed with notice of this filing, they stopped making monthly payments. Despite the filed LMS, NationsCredit attempted to collect the debt and informed the Beatties that their mortgage was in default. At some point after the LMS was filed, NationsCredit sent the Beatties' account to its internal foreclosure department.³ The Beatties deposed James Bright who had denied them credit based on his review of the Beatties' credit report. This report, he stated, revealed that their mortgage with NationsCredit was "in foreclosure."⁴ The Beatties filed the present action against NationsCredit on June 23, 2000.

II.

We review de novo the district court's decision to grant NationsCredit's motion for summary judgment, and we view the evidence in the light most favorable to the nonmoving party. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir.2002).

A.

[1] The Beatties argue that the district court erred in granting NationsCredit summary judgment on their SCUTPA claim. NationsCredit counters that it is exempt from SCUTPA liability. Section 39-5-40(a) of the SCUTPA provides that the Act does not apply to "[a]ctions or transactions permitted under laws administered *588 by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." In its initial order granting NationsCredit's motion for summary judgment, the district court held that the company was exempt. However, in response to the Beatties' motion for reconsideration, the court held that NationsCredit was not exempt because it had failed to show that its attempts to collect on the Beatties' account,

after an LMS was filed, were required by or permitted under a statute or agency regulation.

The South Carolina Supreme Court has stated that this exemption "is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." *Ward v. Dick Dyer & Assocs., Inc.*, 304 S.C. 152, 403 S.E.2d 310, 312 (1991). The *Ward* court indicated that the exemption is not meant to exclude every activity regulated by another agency or statute, rather it is meant to ensure that companies are not subjected to lawsuits for following an agency regulation or statute. *Id.* Therefore, NationsCredit is not protected from lawsuits for "general activity." See *id.* There is no indication that a statute or agency regulation requires or permits NationsCredit to pursue collection and foreclosure activities on accounts purportedly satisfied by an LMS affidavit. Therefore, NationsCredit is not exempt from liability under the SCUTPA. Accordingly, we address the merits of the Beatties' claim that NationsCredit violated the Act.

The SCUTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20(a). In order to succeed on a SCUTPA claim, the Beatties must show:

- (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.

Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir.1998). The Beatties contend that NationsCredit engaged in an unlawful trade practice by falsely reporting to credit bureaus that their mortgage was in foreclosure. They also claim that they were damaged by this false report because they were denied credit by Mr. Bright. Finally, they assert that NationsCredit's false reporting had an adverse impact on the public interest.

The parties focused their attention, both in their briefs and at oral argument, on the third element of the analysis, the adverse impact on the public interest. We conclude, however, that the Beatties have failed to establish both the first and third requirements of their SCUTPA claim.

1.

[2] Under South Carolina law, a trade practice is "unfair" when it is "offensive to public policy or when it is immoral, unethical, or oppressive." *Johnson v. Collins Entertainment Co., Inc.*, 349 S.C. 613, 564 S.E.2d 653, 665 (2002) (quoting *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105, 108 (1989), *rev'd in part on other grounds* by 309 S.C. 263, 422 S.E.2d 103 (1992)). We assume the "public policy" referred to by the South Carolina Supreme Court is that policy created by applicable common law determinations, legislative enactments or constitutional provisions. *See Johnson*, 564 S.E.2d at 666.

The Beatties do not direct our attention to any specific common law, statutory or *589 constitutional violation that might amount to an "unlawful trade practice," apparently relying upon what they perceive to be the general unfairness of inaccurate credit reporting. *See, e.g., Havird*, 149 F.3d at 291 & n. 2. Thus, we must consider the facts "surrounding the transaction and its impact on the market place" in determining whether or not a particular occurrence is unfair under the SCUTPA. *Young*, 396 S.E.2d at 108. After reviewing the record, we find as a matter of law that the Beatties have failed to establish the "wrongfulness of the defendant's actions." *Williams-Garrett v. Murphy*, 106 F.Supp.2d 834, 845 (D.S.C.2000). Assuming for the sake of argument that NationsCredit actually reported that the Beatties' mortgage was in foreclosure, such a communication cannot be seen as being immoral, unethical or oppressive. Indeed, although the words are clearly susceptible to interpretations to the contrary, it is not wholly unreasonable for NationsCredit to have believed, if it did so, that reference of the defaulted loan to its internal foreclosure department had placed the account "in foreclosure."

Notwithstanding the above analysis and in an effort to fully and fairly consider the Beatties' claim, we conducted our own search for potentially actionable public policy language that might support the finding of a SCUTPA-defined unlawful trade practice. Our quest revealed only one subsection of the Fair Credit Reporting Act ("FCRA") that might arguably suffice. That portion of the Act states that a supplier of information to a credit bureau "shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A). However, as out-lined in more detail

below, on the facts of this case, the FCRA does not provide the Beatties with a private cause of action. More specifically, this particular statutory language may be enforced only by federal and state agencies and officials, 15 U.S.C. § 1681s 2(d), and the prohibition appears to apply only to malicious and willfully intentional acts, transgressions neither alleged nor demonstrated in this litigation. *See* 15 U.S.C. § 1681h(e). Accordingly, the Beatties have failed to establish that NationsCredit engaged in "an unlawful trade practice" as required by *Havird*.

2.

[3] We now evaluate the "public interest" element. Specific facts are required to prove an adverse impact on the public interest. *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21, 23 (1994). South Carolina law states that "the public interest prong of the [SCUTPA] inquiry [is] satisfied by evidence of a potential for repetition of the unfair or deceptive act." *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47, 50 (1996) (emphasis added). Thus, the Beatties must "alleg[e] and prov[e] facts" that demonstrate that NationsCredit's unfair practices, if any, have the potential for reiteration. *Id.* at 49. This may be done either by showing that similar unfair activities occurred in the past, making it more likely that they will occur in the future absent deterrence, or by showing that NationsCredit's procedures create a potential for repetition. *Id.* at 51.⁵

The Beatties produced the pleadings in a similar case, *Patricia W. McCain v. NationsCredit Financial Services Corp.*, No.2000-CP-23-6932, filed in the South Carolina Court of Common Pleas for *590 Greenville County on November 22, 2000, in support of the proposition that NationsCredit's unfair trade practices have a potential for reoccurrence. McCain alleged that NationsCredit, after an LMS was filed, falsely reported to credit reporting agencies that her mortgage was in foreclosure. The district court held that the *McCain* case was irrelevant to the Beatties' case⁶ and rejected the "potential for repetition" argument. We agree with the result reached by the district court but apply slightly different reasoning.

The Federal Rules of Civil Procedure state that

[w]hen a motion for summary judgment is made and supported ... an adverse party may not rest upon

the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed.R.Civ.P. 56(e). Thus, the bare allegations of McCain's complaint offered without further evidentiary support did not establish an adverse impact on the public interest and were not sufficient to withstand NationsCredit's factually supported request for summary judgment. Accordingly, the Beatties failed to prove that NationsCredit violated the SCUTPA and the district court properly granted Nations Credit's motion for summary judgment on this issue.

B.

[4] The district court granted NationsCredit's motion for summary judgment on the Beatties' libel claim, stating that they failed to prove that NationsCredit submitted false information to consumer reporting agencies "with malice or willful intent," as required by the FCRA, 15 U.S.C. § 1681h(e).⁷ The Beatties contend that their credit report was false and libelous because "the statements were published with such recklessness as to show a conscious indifference toward [their] rights." *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909, 914 (1968) (defining actual malice). The Beatties essentially argue that NationsCredit should not have reported their account as being in foreclosure to the credit reporting agencies because the account was only being reviewed by NationsCredit's foreclosure department and no foreclosure action had been filed.

Even assuming that the credit report actually listed the mortgage as in foreclosure, a fact that is, as earlier indicated, only adopted for purposes of the summary judgment motion, NationsCredit did not report the alleged foreclosure "with malice" because, as we have noted, such a "591" report was, at least in NationsCredit's view, accurate. "Malice" is established only if "the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights." *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743, 750 (2001). There is simply no such evidence. The district court properly granted summary judgment in favor of NationsCredit on this issue.

C.

[5] The Beatties also claim that NationsCredit was negligent in reporting the purported foreclosure to the credit bureaus. "To prevail in an action for negligence, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damages to plaintiff proximately resulting from the breach of duty." *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271, 275 (2001). The district court dismissed the Beatties' negligence claim, holding that, since the relationship between the Beatties and NationsCredit arises from contract, they cannot bring a tort claim without showing that NationsCredit had a duty independent of its contractual commitments. See *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995) ("In most instances, a negligence action will not lie when the parties are in privity of contract.") To overcome this obstacle, the Beatties claim an independent duty existed under the FCRA.

In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910, 914 (1988).

The Beatties do not specify which parts of the FCRA they rely upon. It appears, however, that they attempt to invoke subsections (a) and (b) of 15 U.S.C. § 1681s-2. But, under the facts alleged and proffered, they are protected by neither section. Although NationsCredit had a general duty under subsection (a) to report accurate information, 15 U.S.C. § 1681s-2(a)(1)(A), the Beatties make no argument that they complained to NationsCredit about the "in foreclosure" language prior to filing this lawsuit, if they did so at that time, 15 U.S.C. § 1681s-2(a)(1)(B). Furthermore, 15 U.S.C. § 1681s-2(c) and (d) limit enforcement of subsection (a) to "Federal agencies and officials and ... State officials." Likewise, subsection (b) is not applicable to the Beatties because this portion of the FCRA imposes a duty on Nations

Credit only after receiving notice that the Beatties filed a dispute with a credit reporting agency, challenging the accuracy of a credit report. 15 U.S.C. § 1681i(a)(2). It is uncontroverted that the Beatties did not dispute the accuracy of the reports. Also, as we have stated previously, the information NationsCredit reported to the credit bureaus was accurate since the Beatties' account was "in foreclosure" because it had been referred to NationsCredit's foreclosure department. Therefore, the Beatties have failed to show that the FCRA provides an actionable duty independent of the loan contract.

[6] The Beatties also attempt to establish that NationsCredit was negligent for failing to provide detailed receipts for payments made on the mortgage, as required *592 by the South Carolina Consumer Protection Act ("SCCPA"), South Carolina Code Annotated § 37-3-302. The district court found that NationsCredit violated the SCCPA by failing to provide details of previous payments. However, the court also

determined that the Beatties did not suffer any actual damages from this violation. We agree with this assessment. Since the Beatties failed to prove that they suffered any damages as a result of NationsCredit's breach of duty under the SCCPA, the district court properly dismissed the negligence claim.

III.

The district court appropriately granted NationsCredit's motion for summary judgment. We affirm.

AFFIRMED.

Parallel Citations

2003 WL 21480586 (C.A.4 (S.C.))

Footnotes

- 1 The Honorable Margaret B. Seymour, United States District Judge for the District of South Carolina.
- 2 A "Lost Mortgage Satisfaction" is an affidavit that the creditor (mortgagee) files with the county indicating that the original mortgage was lost. This particular affidavit further provided that the debt secured by the lost mortgage was satisfied and the mortgage cancelled.
- 3 NationsCredit indicates that the LMS was filed in error, so the Beatties' mortgage was listed as delinquent in NationsCredit's records. This delinquency status resulted in the collection activities.
- 4 Although Mr. Bright testified that the Equifax credit report he reviewed indicated that the Beatties' mortgage with NationsCredit was in foreclosure, there is no additional evidence to support this contention. The Equifax credit report in the record does not mention a foreclosure. Also, the Trans Union credit report in the record only states that the mortgage was delinquent, not in foreclosure.
- 5 The South Carolina Supreme Court specifically held that these are not the only ways to show a potential for repetition. *Daisy*, 473 S.E.2d at 51.
- 6 The district court's decision that knowledge of the existence of the *McCain* case, standing alone, was irrelevant is seemingly based on an interrogatory presented to NationsCredit by the Beatties, which asked NationsCredit to list any actions brought against the company for improper billing, improper late fees, or billing errors. NationsCredit did not report the *McCain* case, and the Beatties filed a motion for sanctions. The district court denied this motion, saying that the *McCain* case did not allege improper billing or fees. In granting NationsCredit's motion for summary judgment on the Beatties' SCUTPA claim, the district court stated that "there were no specific factual allegations of improper billing, improper late fees, or billing errors in the *McCain* action that would tend to show that the facts supporting the *McCain* action would be relevant to the within action."
- 7 "[N]o consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, ... except as to false information furnished with malice or willful intent to injure such consumer." 15 U.S.C. § 1681h(e) (emphasis added).

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Clyde B. Livingston; Technico Marketing
& Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,

Defendants.

STATE OF SOUTH CAROLINA

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and Wells Fargo Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-38-196

RESPONSE TO PLAINTIFF'S
DECEMBER 30, 2013, SUBMISSION
CONCERNING ITS MOTIONS FOR
SUMMARY JUDGMENT AND TO
STRIKE JURY DEMAND

CASE NO. 2007-CP-38-201

Defendant Clyde B. Livingston (hereinafter "Defendant Livingston"), hereby submits this memorandum response to the Plaintiff's December 30, 2013, submission in support of its motions for summary judgment as to counterclaims and to strike Defendant Livingston's jury demand in the above-captioned action. Defendant Livingston also notes his oral arguments

advanced to the Court at the December 11, 2013, hearing on the instant motions. He also thanks the Court for its gracious extension of until today of his time to respond to the Plaintiff's submission and thanks opposing counsel for his consent to that extension.

SUMMARY JUDGMENT STANDARD

Under South Carolina law, "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA,

Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). "If triable issues exist, those issues must go to the jury." Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

STATUTES OF LIMITATION GENERALLY

Most at-law claims in this State have a three-year statute of limitations under S.C. Code Ann. § 15-3-530. South Carolina follows the discovery rule with regard to that statute. See S.C. Code Ann. § 15-3-535. "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

A defense that a claim is barred by a statute of limitations is an affirmative defense. Eldridge v. Eldridge, 398 S.C. 113, 120, 728 S.E.2d 24, 27 (2012); Arant v. Kressler, 327 S.C. 225, 228 n. 1, 489 S.E.2d 206, 208 n. 1 (1997); Glenn v. Sch. Dist. No. Five of Anderson Cty., 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Turner v. Milliman, 381 S.C. 101,

110, 671 S.E.2d 636, 641 (Ct. App. 2009). Only "when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination become[] a matter of law[.]" Id.

ATTORNEY PREFERENCE STATUTE

A person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005).

In pertinent part, S.C. Code Ann. § 37-10-102 provides:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

The creditor may comply with this section by:

- (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
- (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

Providing a borrower with an attorney preference form at closing *always* violates this section. That is what Defendant Livingston's deposition, taken in the light most favorable to him, establishes is what occurred here. He testified that a form indisputedly signed at closing and the supposed, pre-typed attorney preference form appeared to have been signed on the same day.

A statute in the same chapter as the attorney preference statute, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, states:

A) If 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. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, *except as set forth in subsection (C)*. The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) 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) 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;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

(b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and

(c) attorney's fees and costs.

An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

(D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

(Emphasis added.)

In Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35 (2013), the Court of Appeals held that a mortgagee was barred from enforcing, at law or in equity, any rights it might otherwise have had that arose from a note and mortgage, because the mortgage loan was closed through the unauthorized practice of law. The court noted that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[,]” noting that the reason for requiring lawyers to supervise mortgage loan closings “is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.” Id. at 76. The Supreme Court

favorably cited this passage from Coffey in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), which noted that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." Where there is an attorney preference violation and the closing of a loan without the supervision of a duly licensed attorney, the transaction "was induced by unconscionable conduct[.]" Also, the Plaintiff's unilateral imposition of conditions on credit at odds with the note was unconscionable conduct.

Also, the purpose of §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). With that in mind, Defendant Livingston points the Court to S.C. Code Ann. § 37-5-205, which provides that a debtor may *always* raise a violation of the Consumer Protection Code in a case where he is defending a claim on the debt brought against him, regardless of whether the statute of limitations for a claim based on the violation would ordinarily have run.

UNFAIR TRADE PRACTICES

The statute of limitations for a cause of action for violation of the Unfair Trade Practices Act is even more accommodating than most. The Act provided that "[n]o action may be brought under this article more than three years after *discovery* of the unlawful conduct which is the subject of the suit." S.C. Code Ann. § 39-5-150 (emphasis added).

The Plaintiff argues that Defendant Livingston must have discovered that the Plaintiff was denying him the credit to which he was entitled under the line of credit at the time that he met the Plaintiff's unilaterally imposed conditions and the Plaintiff still would not extend him the

credit. For one thing, the record does not establish when that was. Further, the Plaintiff was committing this wrong during the entire time during which Defendant Livingston was entitled to the credit and did not receive it, which probably brought this time period within three years of the filing of this action. Accordingly, the Plaintiff has failed to meet its burden to establish the statute of limitations bars this claim.

BREACH OF CONTRACT

Much of the reasoning above concerning the Plaintiff's Unfair Trade Practices Act argument also applies to Defendant Livingston's breach of contract claim, and it is incorporated here.

LIBEL

The Honorable Diane S. Goodstein addressed Defendant Livingston's libel claim in an order (which granted a summary judgment motion by the Plaintiff in part and denied it in part) filed June 14, 2010, in this action as follows:

Turning to Defendant Livingston's libel counterclaim, the Court concludes that there are sufficient facts in the record such that there is a genuine issue of material fact concerning this claim. To prove libel, a claimant must show publication by the adverse party of a false statement about the claimant having a defamatory meaning, with knowledge of the statement's falsity or with reckless or negligent disregard thereof, and presumed damages or special damages. See Parker v. Evening Post Publishing Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994). The deposition of Linda O'Dell shows that the Plaintiff likely engaged in credit reporting concerning the delinquency of the loan subject of this action. If the underlying transaction is void for illegality, as Defendant Livingston claims, then the credit reporting was false. White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342 (2004) ("general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions"). Further, viewed in the light most favorable to Defendant Livingston, the Plaintiff damaged his credit

by reporting this information when it knew of the facts that made the transaction tainted with illegality.

Defendant Livingston's deposition testimony that now he has "no credit" also points to the existence of a genuine issue of material fact as to whether the Plaintiff's credit reporting has harmed his credit. Simply because a person has already had some injury (whether from his own fault or another's) does not allow a tortfeasor to go scot free for injuring him some more. Also, the Plaintiff's unilateral imposition of extra terms on the line of credit at issue provides a basis for finding the loan illegal independent of the unauthorized practice of law.

Further, statutory preemption of a common law claim is an affirmative defense. Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Cl. App. 1997). It, thus, must be *proven* by the Plaintiff in order for the Plaintiff to succeed on it at summary judgment.

South Carolina federal district court has found, and the Fourth Circuit has implied, that the Fair Credit Reporting Act does not preempt common law claims, and certainly not those founded upon acts done with malice. Beattie v. Nations Credit Financial Services Corp., 69 Fed. Appx. 585, 586 (4th Cir. 2003); Barnhill v. Bank of America, N.A., 378 F.Supp.2d 696 (D.S.C. 2005). "Malice" in this context is knowledge of the statements' falsity or reckless disregard for their truth or falsity. See id. The Plaintiff was aware of how it originated this loan and that it did not honor its own unilaterally imposed side-terms concerning the credit limit. It did not have to know what the effect of those acts was, just that they happened. "It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready, and willing to so perform it." Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951); accord 17A Am. Jur 2d Contracts §§ 704, 719, 737-38; 740; Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, §§ 19-18, 19-19, 19-21.

MOTION TO STRIKE JURY DEMAND

As the Plaintiff points out in its submission, the Honorable O. Davie Burgdorf, in an unappealed ruling, determined that Defendant Livingston has the right to a jury trial on his counterclaims in this action. Accordingly, this is the law of the case, and the Plaintiff would be stuck with this result even if it were wrong. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013).

Moreover, it is not wrong. Not too long ago, the Court of Appeals issued its opinion in Plantation Fed. Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013). In that case, Plantation Federal Bank brought a mortgage foreclosure action, Gray answered, and, after the matter had been referred to the master-in-equity, "Gray amended her answer and asserted five counterclaims: breach of contract, breach of fiduciary duty, fraud, violations of the South Carolina Unfair Trade Practices Act, and tortious interference with economic opportunities." Id. The master bifurcated the case and ruled that the bank's foreclosure claim would be heard first, before a jury trial on the counterclaims. Id. Gray appealed, contending "her actions are compulsory legal counterclaims and that there are factual issues common to both claims." Id.

The Court of Appeals agreed with Gray, noting as follows:

Gray's counterclaims, which are compulsory, rest on her allegations, inter alia, that Bank "wrongfully, unlawfully, intentionally, willfully, and illegally declared Gray to be in default and/or . . . accelerated the balance due on the note and mortgage[.]" fraudulently induced Gray into executing the note and mortgage, and intentionally "frustrated [Gray's] ability to comply with the terms and conditions on her part to be performed." These allegations all involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of Gray's defenses to the foreclosure action, including unclean hands.

Because we find that Bank's equitable claim and Gray's legal counterclaims share common questions of fact, Gray's counterclaims must be tried first[.]

Id.

Here, as in Plantation Federal, common questions of fact underlie counterclaims and defenses to the Plaintiff's claim that could defeat any ability of the Plaintiff to enforce the note and mortgages at issue. Id. Operative facts underlying the counterclaims for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and violation of S.C. Code Ann. § 37-10-102 are also operative facts underlying the unclean hands and illegality defenses to the Plaintiff's foreclosure claim. These are at-law claims and are compulsory under the Plantation Federal analysis.

Further, the instant counterclaim for violation of § 37-10-102 is compulsory, even under the Wells Fargo v. Smith analysis.¹ 398 S.C. at 495-96, 499. Here, the counterclaim for violation of the preference statute states facts, borne out by the record, that the loan at issue was induced by unconscionable conduct. Accordingly, if and when the counterclaim succeeds, relief available on this counterclaim includes the non-enforcement or limited enforcement of the notes and mortgages at issue. S.C. Code Ann. § 37-10-105(C). This meets the Wells Fargo v. Smith analysis for whether a claim is compulsory.

¹ There does appear to be conflict between the analysis used in Wells Fargo v. Smith and that used in Plantation Federal. To the extent that conflict is material to the outcome of the instant motions, Defendant Livingston points out that Plantation Federal is the more recent decision, which thus controls to the extent of such a conflict.

Respectfully submitted,



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ATTORNEY FOR DEFENDANT
CLYDE B. LIVINGSTON

Columbia, South Carolina
January 16, 2014

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company, Inc., etc.,

☐ Plaintiff

v.

Clyde B. Livingston, Et Al.,

☒ Defendant

5/6/14 006910777
JTM/ETN/HCS/tmL
IN THE COURT OF COMMON PLEAS

CASE NO.

2007-CP-38-196

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:

, Bar No.

Address:

phone: fax:

e-mail: other:

Defendant's Attorney:

Andrew S. Radeker, Bar No. 73743

Address:

P. O. Box 50143, Columbia, SC 29250

phone: (803) 779-2211 fax: (803) 779-6700

e-mail: drewradeker@mindspring.com other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider

Estimated Time Needed: 20 min. (unless heard on briefs) Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

May 2, 2014

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: 25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court, or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

**First Citizens Bank and Trust Company,
Inc.,**

Plaintiff,

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Charlotte V. Livingston; American First
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Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-38-196

MOTION TO RECONSIDER

CASE NO. 2007-CP-38-201

YOU WILL PLEASE TAKE NOTICE that Defendant Clyde B. Livingston moves before this Court pursuant to Rules 52 and 59, SCRCP, as well as pursuant to all other applicable law, for an Order reconsidering, altering, clarifying, or amending Order of the Honorable James B.

Jackson, Jr. filed April 17, 2014¹, which granted summary judgment in the Plaintiff's favor as to Defendant Livingston's claim for violation of South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* in the above-captioned action, on the grounds shown in the attached memorandum, which is incorporated herein by reference as if here set forth verbatim.

Pursuant to Rule 11, SCRPC, there is no duty of consultation prior to this motion, as this is a motion to reconsider and such consultation would have served no useful purpose.

Respectfully submitted,



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ATTORNEY FOR DEFENDANT
CLYDE B. LIVINGSTON

Columbia, South Carolina
May 2, 2014

¹ The undersigned received written notice of the entry of this Order on April 23, 2014.

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

**First Citizens Bank and Trust Company,
Inc.,**

Plaintiff,

vs.

**Clyde B. Livingston; Technico Marketing
& Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,**

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

**First Citizens Bank and Trust Company,
Inc.,**

Plaintiff,

vs.

**Clyde B. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,**

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-38-196

**MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER**

CASE NO. 2007-CP-38-201

Defendant Clyde B. Livingston (hereinafter "Defendant Livingston"), hereby submits this memorandum in support of his motion to reconsider the grant of summary judgment as to his claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA") in the above-captioned action. Defendant Livingston also notes his

oral arguments advanced to the Court at the December 11, 2013, hearing as well as his arguments set forth in the memorandum response previously submitted in connection with the motions subject of that hearing.

An action for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA"), lies where there is a violation of the UTPA (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the plaintiff. *See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). To recover under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered damages as a result. *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

The South Carolina Supreme Court has stated that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest[.]" though the Court has never held that showing potential for repetition is the *only* way to prove impact on the public interest. *Crary v. Djebelli*, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). The Court has "specifically declined" to hold that such potential for repetition must be demonstrated by any particular means and has stated that "each case must be evaluated on its own merits." *Id.*

Never has a South Carolina appellate court held that repetition or potential for repetition is a necessary element of a UTPA cause of action; rather, our courts have held that showing potential for repetition is *one way* in which a party can satisfy the public interest requirement. *Id.* Here, however, we have both evidence of actual repetition in the past and an impact on the public interest that would exist regardless of whether potential for repetition exists. Ms. O'Dell's

deposition testimony, along with Mr. Reid's, shows that it was this bank's practice regularly to close non-purchase mortgage loans without an attorney for the borrower present.

A person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). Even an isolated instance of this would impact the public interest, and a regular practice of it certainly would. In Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35 (2013), the Court of Appeals noted that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" noting that the reason for requiring lawyers to supervise mortgage loan closings "is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." Id. at 76. The Supreme Court favorably cited this passage from Coffey in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011).

A bank closing a loan through the unauthorized practice of law is an unfair or deceptive act in the conduct of trade of commerce that affects the public interest. It is no mere breach of contract, and its regular practice is certainly not a mere breach of contract. It is more than a "deliberate or intentional breach of a valid contract[.]" Columbia East Assocs. V. Bi-Lo, 299 S.C. 515, 386 S.E.2d 259, 263 (Ct. App. 1989).

The cases discussing a lack of liability under the UTPA for a mere breach of contract, even an intentional one, focus on the isolated nature of a breach of contract under typical

circumstances, which makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs., 299 S.C. at 522; S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). That does not, however, mean that the presence of a contractual relationship between the parties and a breach of that contract by one of them will rule out liability of the breaching party under the UTPA. In a case against a group of landlords where evidence was presented showing other, different lease violations with different tenants than the plaintiffs, the landlords tried to make that very argument, and the Court of Appeals rejected it. Burbach v. Investors Mgmt. Corp. Intl., 326 S.C. 492, 496-97, 484 S.E.2d 119, 121 (Ct. App. 1997). The court held that "the conduct of the landlords is capable of repetition. '[U]nfair or deceptive acts or practices in the conduct of trade or commerce have an impact on the public interest if the acts or practices have the potential for repetition.'" Id. at 497 (quoting Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 480, 351 S.E.2d 347, 350-51 (Ct. App. 1986)). The court went on to note that "[t]he problems experienced by the Burbachs are not isolated events. At least several other tenants experienced similar problems. Clearly, the landlords' behavior is capable of repetition." Id.

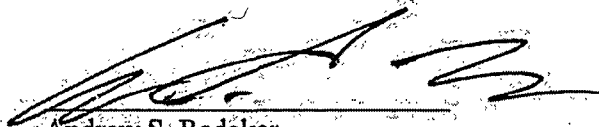
When the "mere breach of contract"/"intentional breach of contract" cases discuss the principle at issue, they state that the UTPA "is not available to redress a private wrong *where the public interest is unaffected*" and that "a deliberate or intentional breach of a valid contract, *without more*, does not constitute a violation of the Unfair Trade Practices Act." Columbia East Assocs., 299 S.C. at 522 (emphasis added). Proving the "more[.]" to prove that the public interest is affected, can be done by showing potential – just *potential* – for repetition. Crary v.

Djebelli, 329 S.C. at 388; Noack Enterprises, 290 S.C. at 480. Given that there is evidence here of actual repetition, this has been more than satisfied.

The bank's failure to honor the oral agreement is tied to its suppression of Defendant Livingston's right to be represented by an attorney at the closing. If Defendant Livingston had had a competent lawyer there, such a side agreement never would have been made.

The Court should reconsider its ruling on this issue and undo its grant of summary judgment on this claim.

Respectfully submitted,



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ATTORNEY FOR DEFENDANT
CLYDE B. LIVINGSTON

Columbia, South Carolina
May 2, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

First Citizens Bank and Trust Company,
Inc., as successor in interest to
Community Resource Bank, N.A., f/k/a
Orangeburg National Bank,

Plaintiff,

vs.

Clyde B. Livingston, American First
Federal, Inc., Citibank South Dakota,
N.A., Branch Banking and Trust
Company of South Carolina, G&G
Rentals, Miler Communications, Inc.,
Wells Fargo Bank, N.A.,

Defendants.

Civil Action No. 2007-CP-38-00201

First Citizens Bank and Trust Company,
Inc., as successor in interest to
Community Resource Bank, N.A., f/k/a
Orangeburg National Bank,

Plaintiff,

vs.

Clyde B. Livingston, Technico Marketing
& Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First
Federal, Inc., Citibank South Dakota,
N.A., Branch Banking and Trust
Company of South Carolina, G&G
Rentals, Miler Communications, Inc.,
Wells Fargo Bank, N.A.,

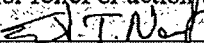
Defendants.

Civil Action No. 2007-CP-38-00196

ATTEST
J. J. [Signature]
CLERK OF COURT
ORANGEBURG, SC

Plaintiff's Attorney
Erik T. Norton
Tara C. Sullivan
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Defendant's Attorney
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☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: MOTION FOR RECONSIDERATION	
Estimated Time Needed: 20 minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order	
I hereby move for relief or action by the court as set forth in the attached order.	
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant	May 14, 2014 Date submitted
SECTION III: Motion Fee	
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason)	
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

First Citizens Bank and Trust Company,)
Inc., as successor in interest to)
Community Resource Bank, N.A., f/k/a)
Orangenburg National Bank,)

Plaintiff,)

vs.)

Clyde B. Livingston, American First)
Federal, Inc., Citibank South Dakota,)
N.A., Branch Banking and Trust)
Company of South Carolina, G&G)
Rentals, Miler Communications, Inc.,)
Wells Fargo Bank, N.A.,)

Defendants.)

Civil Action No. 2007-CP-38-00201

FILED FOR
2014 APR 10 PM 4:00
CLERK OF COURT
ORANGEBURG COUNTY

First Citizens Bank and Trust Company,)
Inc., as successor in interest to)
Community Resource Bank, N.A., f/k/a)
Orangenburg National Bank,)

Plaintiff,)

vs.)

Clyde B. Livingston, Technico Marketing)
& Distribution, Inc.; B. Livingston and)
Charlotte V. Livingston, American First)
Federal, Inc., Citibank South Dakota,)
N.A., Branch Banking and Trust)
Company of South Carolina, G&G)
Rentals, Miler Communications, Inc.,)
Wells Fargo Bank, N.A.,)

Defendants.)

Civil Action No. 2007-CP-38-00196

ATTEST
H. J. Jorgensen
CLERK OF COURT
ORANGEBURG COUNTY

PLAINTIFF'S MOTION PURSUANT TO S.C. R. CIV. P. 52 AND 59(e) REGARDING
ORDER DATED APRIL 10, 2014.

Pursuant to S.C. R. Civ. P. 52 and 59, First Citizens Bank and Trust Company, Inc., as successor in interest to Community Resource Bank, N.A., f/k/a Orangeburg National Bank ("First Citizens," "the bank" or "Plaintiff"), requests that this Court reconsider, alter, amend and/or clarify its Order dated April 10, 2014, granting summary judgment in part, denying summary judgment in part, and denying First Citizens' demand for a bench trial and to strike Defendant Clyde B. Livingston's ("Livingston") demand for a jury trial ("Order"). The undersigned counsel for Plaintiff received written notice of entry of the Order on May 5, 2014, and this Motion is therefore timely filed. First Citizens respectfully requests that the Court reconsider its rulings partially denying First Citizens' motion for summary judgment and its demand for a bench trial by the court in equity, reverse those rulings, and expressly rule on all of First Citizens' arguments in its favor, including those that present questions ripe for review that the Court did not expressly address. Among the issues that the Court should reconsider are:

(1) denial of the motion for summary judgment as to Livingston's breach of contract counterclaim based on the statute of limitations;

(2) denial of the motion for summary judgment as to Livingston's attorney preference counterclaim based on the time limitations for bringing such a claim found in S.C. Code Ann. § 37-10-105;

(3) denial of the motion for summary judgment as to Livingston's libel counterclaim based on (a) preemption by the Fair Credit Reporting Act and (b) failure by Livingston to come forward with evidence to create a genuine issue of material fact as to whether these loans were ever reported to credit reporting agencies or whether he was ever harmed by the alleged reduction in his credit score related to the loans at issue; and

(4) denial of First Citizens' demand for a bench trial before the Master-in-Equity and request to strike the jury demand.

The grounds supporting First Citizens' arguments as to each issue for the Court to reconsider are set forth below, expressly incorporating by reference its motions, with attachments, the several memoranda of law (supplemental or otherwise), with attachments, filed by First Citizens in this matter, the arguments made at the hearings before this Court, and such other and further pleadings, motions, and affidavits in the Record and considered by this Court in deciding this motion.

BREACH OF CONTRACT

Plaintiff sought summary judgment as to the breach of contract claim based on the three-year statute of limitations. (Order 4-5). The Order denied summary judgment as to Livingston's breach of contract counterclaim because the Court ruled it could not determine when the statute of limitations began to run based on the record before it. (*Id.* at 5). Specifically, the Court held that, "viewed in the light most favorable to Defendant Livingston, the evidence tends to show that Orangeburg National Bank, predecessor-in-interest to the Plaintiff, unilaterally imposed an unwritten condition on making the entire \$57,000.00 of the subject line of credit available to Defendant Livingston, limiting him to \$45,000.00 (in contradiction of the written agreement document) unless and until he repainted his house." (*Id.* at 4-5). The Court further ruled that it could not determine when Defendant Livingston repainted his house and requested the additional money, and therefore could not determine when the statute of limitations began to run. (*Id.* at 5).

However, accepting the Court's view of the facts in the light most favorable to Livingston as correct for purposes of this motion, then the statute of limitations began to run at

the time the loan was closed in the year 2000. The South Carolina Court of Appeals has succinctly explained the standard for determining when the statute of limitations runs as a matter of law:

Therefore, the limitations period "begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto."

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party *might* exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory developed.

A key element in the reasonable diligence test is "notice." The fact that an injured party may not comprehend the full extent of the damage is immaterial. . . . Under section 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. This is an objective, not a subjective, determination.

When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.

Gibson v. Bank of Am., N.A., 383 S.C. 399, 405-07, 680 S.E.2d 778, 782 (Ct. App. 2009)

(emphasis in original) (citations omitted).

In this case, Livingston was on notice that a right of his had been invaded or some claim against another party might exist when Orangeburg National Bank did not disburse the money Livingston claims he was entitled to at closing, but instead "imposed an unwritten condition on making the entire \$57,000.00 of the subject line of credit available to Defendant Livingston, limiting him to \$45,000.00 (in contradiction of the written agreement document) unless and until he repainted his house." Livingston's own deposition testimony, which was

attached to Plaintiff's supporting memorandum and is attached here again as Exhibit A, establishes that the Plaintiff imposed the alleged "unilateral condition" in contradiction of the loan documents at the time the loan was closed.

Based on the facts as set forth in the Order denying summary judgment as to Livingston's breach of contract claim, Livingston was on notice of the alleged breach of the loan documents at the time the loan was closed on or about November 9, 2000, and the statute of limitations began to run at that time. Livingston did not file his counterclaims until November 28, 2007, long after the statute of limitations had run.

Therefore, First Citizens is entitled to summary judgment as to the breach of contract counterclaim by Livingston and asks the Court to reconsider its ruling because the Order is internally inconsistent on the point of Livingston's knowledge based on his own allegations and testimony.

ATTORNEY PREFERENCE VIOLATION

First Citizens sought summary judgment as to Livingston's claim for violation of the attorney preference statute, S.C. Code Ann. § 37-10-102, based on the time restrictions set forth in S.C. Code Ann. § 37-10-105. Both of these sections are under Chapter 10 of the Consumer Protection Code, entitled "Miscellaneous Loan Provisions." The Order denies the request, while limiting the nature of the relief that may be sought. (Order 5-9).

In denying the request for summary judgment, the Order notes that Section 37-10-105 bars any actions for violations of Chapter 10 after the scheduled maturity date of the debt. (Id. at 7). The Order rightly finds that Livingston's actions were brought long after the loans at issue matured, which should bar any action under Chapter 10, including Livingston's action under Section 37-10-102. (Id. at 8). However, the Order erroneously relies on Section 37-5-

205 to find that "a debtor may *always* raise a violation of the Consumer Protection Code, as a setoff against the debtor's obligation in a case where he is defending a claim on the debt brought against him, regardless of whether the statute of limitations for a claim based on the violation would ordinarily have run." (Id. at 9).

Section 37-5-205 by its express terms should not be applied to save Livingston's attorney-preference statute brought under Chapter 10 of the Consumer Protection Code for multiple reasons. Section 37-5-205 states:

Refunds or penalties to which the debtor is entitled pursuant to this part may be set off against the debtor's obligation, and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this subdivision.

(emphasis added) Section 37-5-205 is contained in Part 2 of Chapter 5 of the Consumer Protection Code, and its application is limited by its plain language to refunds or penalties found in Part 2 and the time limits found in Chapter 5. Consequently, Section 37-5-205 cannot have any effect on claims or time limits found in Chapter 10 of the Consumer Protection Code.

The Order therefore incorrectly applied Section 37-5-205 to override the time limits found in Chapter 10, which bar Livingston's attorney-preference claim brought under Chapter 10. Moreover, Section 37-5-205's express terms permit only defenses to suits on obligations, not counterclaims like the one asserted here by Livingston. Consequently, the counterclaim should be eliminated from this action (which also further exemplifies, based on this Court's conclusions, why no jury trial rights are implicated in this action).

First Citizens therefore is entitled to summary judgment as to the attorney-preference counterclaim by Livingston and asks the Court to reconsider its ruling.

LIBEL

This Court's order should also be altered and/or amended with respect to the conclusion that the Order of Judge Goodstein regarding Livingston's libel claim could not be "countermanded" (Order 11). This ruling is incorrect and again relies on a legal doctrine not applicable in the current matter.

This Court cited portions of Judge Goodstein's order denying First Citizens' prior summary judgment motion in part. (Id. at 10). The South Carolina Supreme Court has consistently held that the denial of a motion for summary judgment decides nothing about the merits of the case and simply indicates that the case should proceed to trial in some respect. Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). Further, "if the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial." Crosswell Enter., Inc. v. Arnold, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992).

Moreover, the very holding this Court reaches with respect to the portion of Judge Goodstein's order denying First Citizens' prior summary judgment motion in part has been expressly rejected by the South Carolina Supreme Court. See Smith v. Breedlove, 377 S.C. 415, 421, 661 S.E.2d 67, 70 (2008). ("The fact that a different trial [court] previously denied a motion for summary judgment does not preclude the moving party from renewing its motion once new evidence is gathered."). First Citizens properly moved a second time for summary judgment and the prior order denying another motion for summary judgment was in no way binding on this Court. The Court must alter its order and expressly address First Citizens' arguments and should do so in favor of First Citizens.

With regard to the merits of Livingston's libel claim, it should be dismissed because (1) the Fair Credit Reporting Act ("FCRA") preempts the claim in this case and (2) Livingston has come forward with no evidence to substantiate damages related to credit reporting. The Order rightly notes that the FCRA preempts the libel claim unless First Citizens reported the loan to credit reporting agencies with malice. (Order 11). However, the Order ignores persuasive case law from the Fourth Circuit expressly holding that a bank reporting a loan to a credit reporting agency while maintaining a contested action for foreclosure is not malice as a matter of law. See Nations Credit Fin. Servs. Corp. v. Beattie, 69 Fed. Appx. 585, 590 (4th Cir. June 27, 2003) (attached hereto as Exhibit B). Therefore, Livingston's libel counterclaim should be dismissed as a matter of law because it is preempted by the FCRA.

In addition, the only evidence referenced in the Order as evidence of a genuine issue of material fact as to damages incurred by Livingston based on credit reporting is Livingston's testimony that he has "no credit." (Order 10). This is insufficient as a matter of law to maintain an action for damages based on credit reporting. First, even though this case has been pending since 2008, Livingston did not come forward with any evidence that these loans were, in fact, reported to credit reporting agencies. The Record contains no credit reports or any other evidence to show First Citizens reported the loans at issue or that any reporting of these particular loans caused a decline in Livingston's credit rating. As evidenced by the multiple judgments against Livingston, any variety of reasons might exist for Livingston's alleged poor credit and his bald statement, by itself, that he has "no credit" cannot create a genuine issue of material fact as to any alleged credit reporting by First Citizens.

Further, a decrease in credit score alone is insufficient proof of actual damages. See Bachrach v. TD Bank, et al., Civ. No. 2010-CP-07-1516 (S.C. Ct. Comm. Pleas July 1, 2011).

(order granting summary judgment under FCRA because decrease in credit score is not actual damages) (citing Young v. Harbor Motor Works, Inc., No. 07-31, 2008 U.S. Dist. LEXIS 111909, at *14 (N.D. Ind. Jan. 27, 2009); Slack v. Suburban Propane Partners, L.P., No. 10-2548, 2010 U.S. Dist. LEXIS 98602, at *21-22 (D.N.J. Sept. 21, 2010)), attached hereto as Exhibit C. Instead, a Plaintiff must show "actual damages that he suffered as a consumer flowing from the alleged decrease in credit score such as that he was denied credit, lost credit, had his credit limits lowered, or was required to pay a high interest rate for credit." Young, at *13. Moreover, without some showing that the alleged lowered credit score was utilized to deny credit or the like to Livingston, no basis exists to presume any injury to Livingston's reputation.

Therefore, First Citizens is entitled to summary judgment on Livingston's libel claim because it is preempted to the FCRA. To the extent it is not preempted by the FCRA, Livingston has failed to meet his burden to come forward with evidence creating a genuine issue of fact because no evidence exists that these particular loans were reported to credit reporting agencies. Further, Livingston has come forward with no evidence to show that any alleged reduction in his credit score caused him legally cognizable damages. For all of these reasons, this Court should reconsider its Order and grant summary judgment as to Livingston's libel claim.

JURY TRIAL

First Citizens demanded a bench trial in this matter and moved to strike the jury demand and refer the case to the Master-in-Equity. The Order denied this request based solely on its finding that a prior decision by Master-in-Equity O. Davie Burgdorf on December 11,

2007, and August 4, 2008, regarding what causes of action in this matter should be tried by jury is the "law of the case." (Order 12-13). This finding is clear error, however.

First, the "law of the case" doctrine has no application to the instant action. Thus far no final and/or appealable order has issued from this Court respecting mode of trial issues. The orders of Judge Burgdorf cited by this Court for the proposition that the issues concerning the right to a jury trial on counterclaims has been finally decided were orders arising from Livingston's motions to (1) amend his answer and counterclaims and (2) reconsider the Order permitting amendment of the complaint. Such orders cannot, as a matter of law, be deemed to be the law of the case or a final order capable of immediate appellate review—an order permitting an amendment to a pleading is not immediately appealable. Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (order allowing amendment of a pleading found not to be immediately appealable); see also Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (order denying motion to amend pleadings not immediately appealable). Hence, First Citizens could not have previously appealed the order relied upon by this Court and it is not the law of the case. The law of the case doctrine only arises when a party abandons an issue on appeal. Hudson v. Lancaster Convalescent Ctr., 754 S.E.2d 486, 490 (2014) ("Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.") (internal citations and quotations omitted). Stated otherwise for example, should First Citizens take an appeal now on the issues decided by this Court and not raise a challenge to this Court's determination on mode of trial, the failure to challenge the ruling would then be the law of the case but only then. First Citizens, however, will fully protect its rights to timely seek review

of this Court's order. Accordingly, the correct application of the law is summed up in our Supreme Court's recent decision in Bone:

The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so. Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal.

Bone v. United States Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012). First Citizens has had no opportunity to appeal the issue this Court contends the Master decided on whether First Citizens is entitled to a bench trial as a matter of law.

Second, notwithstanding the point above, this Court heard the present motions in the Court of Common Pleas sitting as a Special Circuit Judge. Therefore, this Court would not be "countermanding" or reversing another judge's order. This Court is not bound by an order from the Master-in-Equity (Judge Burgdorf) and can reject or modify the order of a Master. See, e.g., North Charleston Land Corp. v. North Charleston, 281 S.C. 470, 471, 316 S.E.2d 137 (1984) (demonstrating the procedural history of a special circuit judge rejecting the analysis of a master-in-equity). As a result, the cases relied on by this Court regarding countermanding another judge have no application to the Court's consideration of whether Livingston's counterclaims give rise to jury trial rights and whether First Citizens is entitled to a bench trial by right in this foreclosure proceeding.

Third, a change in circumstances during the course of a case can always impact whether the right to a jury trial exists. For example, dismissal of legal counterclaims at any point in a case can alter the nature of the case such that it becomes equitable only and therefore eliminate the right of a party to a jury trial. In this case, the state of the law changed after Judge Burgdorf's orders, and this Court should consider the merits of First Citizens' arguments

in light of the decision rendered by the South Carolina Supreme Court in Wells Fargo v. Smith, 398 S.C. 487, 730 S.E.2d 328 (2012).

Therefore, this Court should expressly address the merits of First Citizens' arguments as to whether the right to a jury trial exists in this case and find that First Citizens is entitled to a bench trial before the Master-in-Equity. As set forth in First Citizens' previously filed supporting memorandum, the Supreme Court expressly held in Smith that a borrower like Livingston asserting a counterclaim for violation of the attorney preference statute in a foreclosure action is not entitled to a jury trial. First Citizens also is entitled to a bench trial on Livingston's other counterclaims under the law as articulated by Smith and as explained below.

No jury trial can be had in this matter. In a foreclosure action, the counter-claimant defendant is not entitled to any jury trial. The statutory foreclosure regime was adopted by the South Carolina General Assembly as a means for determining property rights—through bench trials.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). The right to proceed in the proper mode of trial is a substantial right, and a court should not erroneously require a party to proceed before a jury in an equity case. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Conversely, a jury trial right does not arise in connection with a case to be tried within the equitable jurisdiction of the court. Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978).

A foreclosure action is an equitable action. Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). Further, "[w]here in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side." Id. at 371, 137 S.E.2d at 280; see also Byrn v. Walker, 275 S.C. 83, 267 S.E.2d 601, (1980) (counterclaims in a foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature). In Collier, the assignee of a mortgage brought a foreclosure action against the mortgagor. Id. at 368, 137 S.E.2d at 278. The mortgagor admitted to execution and delivery of the note and mortgage but alleged that the assignment was fraudulent and sought a jury trial on that issue. Id. at 369, 137 S.E.2d at 279. In affirming the trial court's order referring the entire case to the master in equity, the Supreme Court initially noted that a foreclosure is an action in equity and concluded that the nature of the action does not change to one at law by virtue of the fact that the defendant asserts counterclaims related to the amount due on the loan. Id. at 371, 137 S.E.2d at 280. As support for its decision, the High Court cited to its prior opinions in foreclosure cases holding that where the defenses and counterclaims bear primarily upon the amount due, the entire case, including the defenses and counterclaims, remains one in equity. Id. at 371-372, 137 S.E.2d at 280 (citations omitted). If a defendant could convert an equitable foreclosure action to an action at law simply by artfully pleading any defense to the debt as a counterclaim, then the plaintiff's right to an order of reference in foreclosure actions would be completely eviscerated resulting in an improper mode of trial in every foreclosure action. Thus, where a defendant asserts counterclaims in a foreclosure action that go to the plaintiff's right to foreclose or challenge the amount due upon the debt secured by the

mortgage, the counterclaims are merely part and parcel of the equitable action, and a defendant has no right to a jury trial on such claims. Id.

Moreover, the South Carolina Supreme Court has rejected attempts by litigants to "earn" the right to a jury trial in an equitable action. In Rosenbaum v. S-M-S 32, the plaintiff purchased real property at a tax sale and filed an action to clear title pursuant to S.C. Code Ann. § 12-61-20. The defendant answered by way of general denial and asserted a counterclaim for trespass to try title, seeking damages for trespass and demanding a jury trial. 311 S.C. 140, 141, 427 S.E.2d 897, 897 (1993). The circuit court struck the counterclaim because the plaintiff had asserted an equitable claim seeking a remedy via a non-jury process expressly provided by statute for purchasers at tax sales. Id. at 141-142, 427 S.E.2d at 897. The Supreme Court affirmed the circuit court's decision, holding that the defendant could not "evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed to thwart the reasonable and practical implication of Chapter 61." Id.

In the instant action, each of the claims bears only upon the amount due—this Court's order demonstrates this reality. Under Collier, therefore, the counterclaims do not change the character of this equitable action to one at law, and the defendants have no right to a jury trial on any issue.

Furthermore, under the Supreme Court's decision in Rosenbaum, a party may not "earn" the right to a jury trial in this equitable foreclosure action by styling the allegations as legal counterclaims. Like the plaintiff in Rosenbaum, the bank brought this action pursuant to a statutory scheme created by the legislature that provides for a non-jury trial. Specifically, S.C. Code Ann. § 29-3-610 to -790 provides a procedure by which a mortgagor may foreclose in an equitable action decided by the court. SCRPC 71 also provides that foreclosure actions

"shall be tried by the court, and shall ordinarily be referred to a master." This codified a process established by the Act of 1791, which integrated the actions of foreclosure and the action for deficiency after sale into one equitable action, without the right to a jury trial. See McConnell, et al. v. Barnes, et al., 142 S.C. 112, 140 S.E. 310 (1927). Therefore, consistent with Rosenbaum, this Court should not permit the Defendants to evade the statutory scheme created by the Legislature for resolving foreclosure actions. The request for a jury trial should be stricken and the bank's demand for a bench trial should be granted. Defendants are merely trying to "earn" a right to a jury trial where none exists.

Hence, any purported right to a jury trial the defendants claim to have fails because: 1) they are not legally entitled to for additional reasons noted herein and/or 2) they waived their right to a jury trial by bringing the cause of action as a counterclaim in this foreclosure action. The above inquiry should end the analysis, and the Court should determine this entire proceeding, counterclaims and defenses included, is an equitable action. However, an examination of the particular defenses and counterclaims may also be called for as in more recent times our courts have stated that "[i]f the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." N.C. Federal Savings and Loan Ass'n v. DAV Corp., 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989) (citing C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). If a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. See id.; Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims, holding, "[i]f the complaint is equitable and the counterclaim is legal and permissive, the

defendant waives his right to a jury trial"). Because foreclosure proceedings are equitable proceedings in South Carolina, Defendants have no right to a jury trial on any claim asserted in this action that is not both legal and compulsory. Wells Fargo Bank v. Smith, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012). Should the Court decide that it is necessary to examine each of Defendants' claims to determine whether it is permissive or compulsory and legal or equitable, the outcome is the same: Defendants have no right to a jury trial.

Further, this Court's ruling on Livingston's attorney preference claim as pled in the amended answer and counterclaims demonstrates that no jury trial rights exist in the instant action and how the purported claims only relate to the amount due. This Court determined that Livingston could only receive a setoff for any penalty recovered for the alleged attorney preference violation. (Order at 9). Moreover, given that Livingston has indisputably verified the validity of the original loan documents and receipt of loan funds, this Court's ruling on setoff should hold true for any other surviving causes of action and this entire matter should be referred to the Master-in-Equity. The ruling captures the true equitable nature of Livingston's counterclaims and this action. See W. M. Kirkland, Inc. v. Providence Washington Ins. Co., 264 S.C. 573, 580, 216 S.E.2d 518, 521 (1975) (stating that a setoff belongs to the inherent power of a court in the exercise of its equitable jurisdiction).

Based on the above, to the extent any of Livingston's counterclaims survive summary judgment on reconsideration by this Court, the Order should be amended to find that Livingston is not entitled to a trial by jury on any of his counterclaims and First Citizens is entitled to a bench trial before the Master-in-Equity.

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f/k/a Orangeburg National Bank

Columbia, South Carolina

May 14, 2014.

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) C/A #: 07-CP-38-196

Community Resource Bank, N.A.,)
f/k/a Orangeburg National)
Bank,)

Plaintiffs,

v.

Clyde B. Livingston, Technico)
Marketing & Distribution,)
Inc.; B. Livingston and)
Charlotte V. Livingston;)
American First Federal Inc.;)
Citibank South Dakota, N.A.;)
Branch Banking and Trust of)
South Carolina; G&G Rentals;)
Miller Communications, Inc.;)
Wells Fargo Bank, N.A.,)

Defendants.

COPY

DEPOSITION OF

CLYDE B. LIVINGSTON

Thursday, September 11, 2008
10:11 a.m. - 12:21 p.m.

The deposition of CLYDE B. LIVINGSTON, taken on behalf of the Plaintiffs at the law offices of Bryant, Fanning and Schuler, 358 St. Paul Street, Orangeburg, South Carolina, on the 11th day of September, 2008 before Carla S. Dominick, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT

A

1 Q: Okay. This will be Plaintiff's Ten. It's
2 entitled balloon loan disclosure. It says
3 11/13/2000. Do you recognize this document?

4 (Plaintiff's Exhibit Number Ten was marked for
5 identification purposes)

6 A: No, ma'am.

7 Q: Okay.

8 A: What is this on? This is the ...

9 Q: Did you borrow \$57,000 on your Brookside in
10 2000 from Community Resource or Orangeburg
11 National?

12 A: I think what I got was \$40,000 or \$45,000,
13 somewhere in that neighborhood. And it was a
14 conversation, as well as I remember or seems
15 like the loan officers changed, it started out
16 with one loan officer and another one is the
17 one that, you know, we finally got the paper.
18 And the appraisal, it was approved ... this is
19 the first time I've ever seen this document
20 because I asked about it one time and was, you
21 know, everybody acted like they didn't know
22 what I was talking about. So you asked me
23 while ago if there was anything the bank did
24 wrong. This, if they did anything wrong, might
25 be what they did wrong. We went in there to

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1 get a \$60,000 line of credit. The appraiser
2 that did the appraisal on the house ... see,
3 the line of credit's based on the appraised
4 value, less the first mortgage, times the
5 percentage or something like that, I believe.
6 Anyway, he said if the house were painted, it
7 would appraise for this, but it's in bad need
8 of paint, and, therefore, I'm only going to
9 appraise it for this. Well, it was supposed to
10 be worked out when I got the house painted that
11 I would be able to get the rest of the money.

12 Q: When you say the rest, you mean \$60,000?

13 A: Well, it looks like it was \$57,000.

14 Q: Oh.

15 A: I remembered \$60,000, but \$57,000 is pretty ...
16 you know, pretty close to that. I do remember
17 that that's probably one of the things that I
18 started getting aggravated with Mark Tremier
19 about is that he acted like something like
20 this, he didn't know what I was talking about,
21 but you showing me something in black and white
22 that shows that my memory wasn't completely
23 faulty when I brought it up.

24 Q: I'm still not real clear, but could you please
25 explain a little more that you said you went in

1 to borrow the \$57,000 or \$60,000 ...

2 A: Right.

3 Q: ... and they said it needed some paint. So
4 tell me what happened after that.

5 A: Well, we had to get ... well, the guy ... the
6 appraiser, he talked to them back and forth and
7 they said, okay, we'll let Clyde have the
8 \$45,000. And I thought the paperwork was done
9 for it to go up higher. I thought \$60,000, but
10 this says \$57,000. I'm not going to argue over
11 \$3,000. Anyway, when I got the house painted
12 and went back and said something about it, I
13 was told that, you know, well, the line of
14 credit was done for \$45,000, I believe it was
15 somewhere in that neighborhood, and that's what
16 it was. And there wasn't any extra, you know,
17 that could be borrowed.

18 Q: So are you saying that you only received
19 tell me how much money you received from this
20 loan, to your knowledge.

21 A: Well, it was no less than \$40,000 and no more
22 than \$45,000. Between \$40,000 and \$45,000.
23 See, Linda O'Dell was the person that this loan
24 ... the conversation started with.

25 ~~(Plaintiff's Exhibit Number Eleven was marked for~~

69 Fed.Appx. 585

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1). United States Court of Appeals, Fourth Circuit.

Jerry N. BEATTIE; Judith F. Beattie, Plaintiffs-Appellants,

v.

NATIONS CREDIT FINANCIAL SERVICES CORPORATION; Bank of America, formerly known as Nationsbank, N.A.; Nations Credit Manufactured Housing Corporation, Defendants-Appellees, and

C & S Family Credit, Incorporated;
C & S Sovran Credit Corporation;
Interlink Mortgage Services, Defendants.
National Association of Consumer Advocates, Amicus Supporting Appellants.

No. 02-1744. | Argued Feb. 26, 2003. | Decided May 27, 2003. |
Decided on Rehearing June 27, 2003.

Mortgagors sued mortgagee and its parent corporation for, inter alia, alleged violation of South Carolina Unfair Trade Practices Act (SCUTPA), libel, and negligence. The United States District Court for the District of South Carolina, Margaret B. Seymour, J., granted mortgagee's summary judgment motion. Mortgagors appealed. The Court of Appeals held that: (1) mortgagee was not exempt from liability under SCUTPA; (2) mortgagee did not engage in "unlawful trade practice" under SCUTPA; (3) mortgagors failed to establish public interest element of SCUTPA claim; (4) absence of evidence that mortgagee acted with malice when it allegedly reported to credit reporting agencies that mortgage was in foreclosure precluded its liability for libel pursuant to Fair Credit Reporting Act (FCRA); and (5) mortgagee was not liable in negligence.

Affirmed.

West Headnotes (6)

[1] Antitrust and Trade Regulation

⊕ Persons and Transactions Covered

Mortgagee was not exempt from liability under South Carolina Unfair Trade Practices Act (SCUTPA) based on its pursuit of collection and foreclosure activities on account that purportedly was satisfied by affidavit of lost mortgage satisfaction, inasmuch as provision of Act exempting actions or transactions permitted by state law or under laws administered by state or federal regulatory bodies did not protect mortgagee from lawsuits for general activity, and there was no indication that statute or regulation permitted challenged conduct. S.C.Code 1976, § 39-5-40(a).

1 Cases that cite this headnote

[2] Antitrust and Trade Regulation

⊕ Communications, Representations, and Notices; Debtor's Response

Credit Reporting Agencies

⊕ Liability for False Information

Mortgagee did not engage in "unlawful trade practice" under South Carolina Unfair Trade Practices Act (SCUTPA) when it allegedly reported to credit bureaus that mortgage was in foreclosure, inasmuch as it was not wholly unreasonable for mortgagee to believe that reference of defaulted mortgage loan to its internal foreclosure department had placed account in foreclosure, and therefore such communication could not be seen as immoral, unethical, or oppressive. S.C.Code 1976, § 39-5-20(a).

Cases that cite this headnote

[3] Antitrust and Trade Regulation

⊕ Weight and Sufficiency

Mortgagors failed to establish public interest element of claim against mortgagee for engaging in unlawful trade practice under South Carolina Unfair Trade Practices Act (SCUTPA).

which required evidence showing potential for repetition of unfair or deceptive act, when mortgagors merely produced pleadings in similar case, in that bare allegations in that case's complaint, offered without further evidentiary support, did not establish adverse impact on public interest. S.C.Code 1976, § 39-5-20(a).

1 Cases that cite this headnote

[4] Libel and Slander

➤ Discharge of Duty to Others or to Public and Common Interest in Subject-Matter

Absence of evidence that mortgagee acted with malice when it allegedly reported to credit reporting agencies that mortgage was in foreclosure, after defaulted mortgage loan had been referred to mortgagee's internal foreclosure department, precluded mortgagee's liability for libel pursuant to Fair Credit Reporting Act (FCRA). Consumer Credit Protection Act, § 610(e), as amended, 15 U.S.C.A. § 1681h(e).

1 Cases that cite this headnote

[5] Credit Reporting Agencies

➤ Liability for False Information

Mortgagors failed to establish that mortgagee owed them independent duty of care under Fair Credit Reporting Act (FCRA), so as to support mortgagee's liability, under South Carolina law, for alleged negligence in reporting to credit bureaus that mortgage was in foreclosure, although mortgagee had general duty under FCRA to report accurate information, mortgagors did not claim that they complained to mortgagee about "in foreclosure" language prior to bringing action, so as to trigger duties that would arise upon receipt of notice of dispute, enforcement of general duty to report accurate information was limited to federal agencies and state officials, and information reported was accurate in mortgagee's view. Consumer Credit Protection Act, §§ 611(a)(2), 623(a)(1)(A, B), (c, d), as amended, 15 U.S.C.A. §§ 1681i(a)(2), 1681s-2(a)(1)(A, B), (c, d).

10 Cases that cite this headnote

[6] Mortgages

➤ Dealings and Transactions Between Parties

Mortgagee could not be held liable in negligence to mortgagors for breaching its duty under South Carolina Consumer Protection Act (SCCPA) to provide mortgagors with details of past mortgage payments when mortgagors did not suffer any actual damages from violation. S.C.Code 1976, § 37-3-302.

Cases that cite this headnote

*586 Appeal from the United States District Court for the District of South Carolina, at Greenville. Margaret B. Seymour, District Judge. (CA-00-2005-6-24).

Attorneys and Law Firms

ARGUED: Alton Lamar Martin, Jr., Clarkson, Walsh, Rheney & Turner, P.A., Greenville, South Carolina, for Appellants. William Stevens Brown, V, Nelson, Mullins, Riley & Scarborough, L.L.P., Greenville, South Carolina, for Appellees. ON BRIEF: Wes A. Kissinger, Clarkson, Walsh, Rheney & Turner, P.A., Greenville, South Carolina, for Appellants.

Before NIEMEYER and TRAXLER, Circuit Judges, and C. ARLEN BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Opinion

Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

Jerry and Judith Beattie ("Beatties") brought this diversity action against the Bank of America and its subsidiary NationsCredit Financial Services Corporation ("NationsCredit") for, among other things, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), libel, *587 and negligence. The district court granted NationsCredit's motion for summary judgment, and the Beatties appeal. We affirm.

I.

On December 17, 1993, the Beatties entered into a home loan agreement with NationsCredit in which the debt, evidenced by a promissory note, was secured by a mortgage on the Beatties' residence in Greenville, South Carolina. Several of the loan statements the Beatties received in 1999 did not reflect specific account activity, such as transactions from the prior month. However, the statements did show a decrease in the balance due on the loan. They claim to have made repeated attempts, by telephone and in writing, to contact NationsCredit about the status of their account, but they did not receive a response.

On October 11, 1999, the Beatties received, from Interlink Mortgage Services, a copy of a Lost Mortgage Satisfaction affidavit ("LMS")² signed by NationsCredit's vice president Robert Hardman. The LMS, filed with the Greenville County, South Carolina Register of Deeds on September 8, 1999, indicated that the Beatties' mortgage was satisfied. Even so, the Beatties concede that they have never paid all of the amounts due on the loan. Armed with notice of this filing, they stopped making monthly payments. Despite the filed LMS, NationsCredit attempted to collect the debt and informed the Beatties that their mortgage was in default. At some point after the LMS was filed, NationsCredit sent the Beatties' account to its internal foreclosure department.³ The Beatties deposed James Bright who had denied them credit based on his review of the Beatties' credit report. This report, he stated, revealed that their mortgage with NationsCredit was "in foreclosure."⁴ The Beatties filed the present action against NationsCredit on June 23, 2000.

II.

We review de novo the district court's decision to grant NationsCredit's motion for summary judgment, and we view the evidence in the light most favorable to the nonmoving party. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir.2002).

A.

[1] The Beatties argue that the district court erred in granting NationsCredit summary judgment on their SCUTPA claim. NationsCredit counters that it is exempt from SCUTPA liability. Section 39-5-40(a) of the SCUTPA provides that the Act does not apply to "[a]ctions or transactions permitted under laws administered *588 by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." In its initial order granting NationsCredit's motion for summary judgment, the district court held that the company was exempt. However, in response to the Beatties' motion for reconsideration, the court held that NationsCredit was not exempt because it had failed to show that its attempts to collect on the Beatties' account, after an LMS was filed, were required by or permitted under a statute or agency regulation.

The South Carolina Supreme Court has stated that this exemption "is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." *Ward v. Dick Dyer & Assocs., Inc.*, 304 S.C. 152, 403 S.E.2d 310, 312 (1991). The *Ward* court indicated that the exemption is not meant to exclude every activity regulated by another agency or statute, rather it is meant to ensure that companies are not subjected to lawsuits for following an agency regulation or statute. *Id.* Therefore, NationsCredit is not protected from lawsuits for "general activity." See *id.* There is no indication that a statute or agency regulation requires or permits NationsCredit to pursue collection and foreclosure activities on accounts purportedly satisfied by an LMS affidavit. Therefore, NationsCredit is not exempt from liability under the SCUTPA. Accordingly, we address the merits of the Beatties' claim that NationsCredit violated the Act.

The SCUTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a). In order to succeed on a SCUTPA claim, the Beatties must show

- (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.

Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir.1998). The Beatties contend that NationsCredit engaged in an unlawful trade practice by falsely reporting to credit bureaus that their mortgage was in foreclosure. They also claim that they were damaged by this false report because they were denied credit by Mr. Bright. Finally, they assert that NationsCredit's false reporting had an adverse impact on the public interest.

The parties focused their attention, both in their briefs and at oral argument, on the third element of the analysis, the adverse impact on the public interest. We conclude, however, that the Beatties have failed to establish both the first and third requirements of their SCUTPA claim.

1.

[2] Under South Carolina law, a trade practice is "unfair" when it is "offensive to public policy or when it is immoral, unethical, or oppressive." *Johnson v. Collins Entertainment Co., Inc.*, 349 S.C. 613, 564 S.E.2d 653, 665 (2002) (quoting *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105, 108 (1989), *rev'd in part on other grounds* by 309 S.C. 263, 422 S.E.2d 103 (1992)). We assume the "public policy" referred to by the South Carolina Supreme Court is that policy created by applicable common law determinations, legislative enactments or constitutional provisions. *See Johnson*, 564 S.E.2d at 666.

The Beatties do not direct our attention to any specific common law, statutory or *589 constitutional violation that might amount to an "unlawful trade practice," apparently relying upon what they perceive to be the general unfairness of inaccurate credit reporting. *See, e.g., Havird*, 149 F.3d at 291 & n. 2. Thus, we must consider the facts "surrounding the transaction and its impact on the market place" in determining whether or not a particular occurrence is unfair under the SCUTPA. *Young*, 396 S.E.2d at 108. After reviewing the record, we find as a matter of law that the Beatties have failed to establish the "wrongfulness of the defendant's actions." *Williams-Garrett v. Murphy*, 106 F.Supp.2d 834, 845 (D.S.C.2000). Assuming for the sake of argument that NationsCredit actually reported that the Beatties' mortgage was in foreclosure, such a communication cannot be seen as being immoral, unethical or oppressive. Indeed, although the words are clearly susceptible to interpretations to the contrary, it is not wholly unreasonable for NationsCredit to

have believed, if it did so, that reference of the defaulted loan to its internal foreclosure department had placed the account "in foreclosure."

Notwithstanding the above analysis and in an effort to fully and fairly consider the Beatties' claim, we conducted our own search for potentially actionable public policy language that might support the finding of a SCUTPA-defined unlawful trade practice. Our quest revealed only one subsection of the Fair Credit Reporting Act ("FCRA") that might arguably suffice. That portion of the Act states that a supplier of information to a credit bureau "shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A). However, as out-lined in more detail below, on the facts of this case, the FCRA does not provide the Beatties with a private cause of action. More specifically, this particular statutory language may be enforced only by federal and state agencies and officials, 15 U.S.C. § 1681s-2(d), and the prohibition appears to apply only to malicious and willfully intentional acts, transgressions neither alleged nor demonstrated in this litigation. *See* 15 U.S.C. § 1681h(e). Accordingly, the Beatties have failed to establish that NationsCredit engaged in "an unlawful trade practice" as required by *Havird*.

2.

[3] We now evaluate the "public interest" element. Specific facts are required to prove an adverse impact on the public interest. *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21, 23 (1994). South Carolina law states that "the public interest prong of the [SCUTPA] inquiry [is] satisfied by evidence of a potential for repetition of the unfair or deceptive act." *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47, 50 (1996) (emphasis added). Thus, the Beatties must "alleg[e] and prov[e] facts" that demonstrate that NationsCredit's unfair practices, if any, have the potential for reiteration. *Id.* at 49. This may be done either by showing that similar unfair activities occurred in the past, making it more likely that they will occur in the future absent deterrence, or by showing that NationsCredit's procedures create a potential for repetition. *Id.* at 51.⁵

The Beatties produced the pleadings in a similar case, *Patricia W. McCain v. NationsCredit Financial Services Corp.*, No.2000-CP-23-6932, filed in the South Carolina

Court of Common Pleas for *590 Greenville County on November 22, 2000, in support of the proposition that NationsCredit's unfair trade practices have a potential for reoccurrence. McCain alleged that NationsCredit, after an LMS was filed, falsely reported to credit reporting agencies that her mortgage was in foreclosure. The district court held that the McCain case was irrelevant to the Beatties' case⁶ and rejected the "potential for repetition" argument. We agree with the result reached by the district court but apply slightly different reasoning.

The Federal Rules of Civil Procedure state that

[w]hen a motion for summary judgment is made and supported ... an adverse party may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed.R.Civ.P. 56(e). Thus, the bare allegations of McCain's complaint offered without further evidentiary support did not establish an adverse impact on the public interest and were not sufficient to withstand NationsCredit's factually supported request for summary judgment. Accordingly, the Beatties failed to prove that NationsCredit violated the SCUTPA and the district court properly granted NationsCredit's motion for summary judgment on this issue.

B.

[4] The district court granted NationsCredit's motion for summary judgment on the Beatties' libel claim, stating that they failed to prove that NationsCredit submitted false information to consumer reporting agencies "with malice or willful intent," as required by the FCRA, 15 U.S.C. § 1681h(e).⁷ The Beatties contend that their credit report was false and libelous because "the statements were published with such recklessness as to show a conscious indifference toward [their] rights." *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909, 914 (1968) (defining actual malice). The Beatties essentially argue that NationsCredit should not have reported their account as being in foreclosure to the credit reporting agencies because the account was only being reviewed by

NationsCredit's foreclosure department and no foreclosure action had been filed.

Even assuming that the credit report actually listed the mortgage as in foreclosure, a fact that is, as earlier indicated, only adopted for purposes of the summary judgment motion, NationsCredit did not report the alleged foreclosure "with malice" because, as we have noted, such a *591 report was, at least in NationsCredit's view, accurate. "Malice" is established only if "the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights." *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743, 750 (2001). There is simply no such evidence. The district court properly granted summary judgment in favor of NationsCredit on this issue.

C.

[5] The Beatties also claim that NationsCredit was negligent in reporting the purported foreclosure to the credit bureaus. "To prevail in an action for negligence, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damages to plaintiff proximately resulting from the breach of duty." *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271, 275 (2001). The district court dismissed the Beatties' negligence claim, holding that, since the relationship between the Beatties and NationsCredit arises from contract, they cannot bring a tort claim without showing that NationsCredit had a duty independent of its contractual commitments. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995) ("In most instances, a negligence action will not lie when the parties are in privity of contract."). To overcome this obstacle, the Beatties claim an independent duty existed under the FCRA.

In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910, 914 (1988).

The Beatties do not specify which parts of the FCRA they rely upon. It appears, however, that they attempt to invoke subsections (a) and (b) of 15 U.S.C. § 1681s-2. But, under the facts alleged and proffered, they are protected by neither section. Although NationsCredit had a general duty under subsection (a) to report accurate information, 15 U.S.C. § 1681s 2(a)(1)(A), the Beatties make no argument that they complained to NationsCredit about the "in foreclosure" language prior to filing this lawsuit, if they did so at that time, 15 U.S.C. § 1681s-2(a)(1)(B). Furthermore, 15 U.S.C. § 1681s-2(c) and (d) limit enforcement of subsection (a) to "Federal agencies and officials and ... State officials." Likewise, subsection (b) is not applicable to the Beatties because this portion of the FCRA imposes a duty on NationsCredit only after receiving notice that the Beatties filed a dispute with a credit reporting agency, challenging the accuracy of a credit report. 15 U.S.C. § 1681i(a)(2). It is uncontroverted that the Beatties did not dispute the accuracy of the reports. Also, as we have stated previously, the information NationsCredit reported to the credit bureaus was accurate since the Beatties' account was "in foreclosure" because it had been referred to NationsCredit's foreclosure department. Therefore, the Beatties have failed to show that the FCRA provides an actionable duty independent of the loan contract.

[6] The Beatties also attempt to establish that NationsCredit was negligent for failing to provide detailed receipts for payments made on the mortgage, as required *592 by the South Carolina Consumer Protection Act ("SCCPA"), South Carolina Code Annotated § 37-3-302. The district court found that NationsCredit violated the SCCPA by failing to provide details of previous payments. However, the court also determined that the Beatties did not suffer any actual damages from this violation. We agree with this assessment. Since the Beatties failed to prove that they suffered any damages as a result of NationsCredit's breach of duty under the SCCPA, the district court properly dismissed the negligence claim.

III.

The district court appropriately granted NationsCredit's motion for summary judgment. We affirm.

AFFIRMED.

Parallel Citations

2003 WL 21480586 (C.A.4 (S.C.))

Footnotes

- 1 The Honorable Margaret B. Seymour, United States District Judge for the District of South Carolina.
- 2 A "Lost Mortgage Satisfaction" is an affidavit that the creditor (mortgagee) files with the county indicating that the original mortgage was lost. This particular affidavit further provided that the debt secured by the lost mortgage was satisfied and the mortgage cancelled.
- 3 NationsCredit indicates that the LMS was filed in error, so the Beatties' mortgage was listed as delinquent in NationsCredit's records. This delinquency status resulted in the collection activities.
- 4 Although Mr. Bright testified that the Equifax credit report he reviewed indicated that the Beatties' mortgage with NationsCredit was in foreclosure, there is no additional evidence to support this contention. The Equifax credit report in the record does not mention a foreclosure. Also, the Trans Union credit report in the record only states that the mortgage was delinquent, not in foreclosure.
- 5 The South Carolina Supreme Court specifically held that these are not the only ways to show a potential for repetition. *Daisy*, 473 S.E.2d at 51.
- 6 The district court's decision that knowledge of the existence of the *McCain* case, standing alone, was irrelevant is seemingly based on an interrogatory presented to NationsCredit by the Beatties, which asked NationsCredit to list any actions brought against the company for improper billing, improper late fees, or billing errors. NationsCredit did not report the *McCain* case, and the Beatties filed a motion for sanctions. The district court denied this motion, saying that the *McCain* case did not allege improper billing or fees. In granting NationsCredit's motion for summary judgment on the Beatties' SCUTPA claim, the district court stated that "there were no specific factual allegations of improper billing, improper late fees, or billing errors in the *McCain* action that would tend to show that the facts supporting the *McCain* action would be relevant to the within action."
- 7 "[N]o consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information

to a consumer reporting agency, ... except as to false information furnished with malice or willful intent to injure such consumer."
15 U.S.C. § 1681h(e) (emphasis added).

End of Document

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

David A. Bachrach,

Plaintiff,

Civil Action No. 2010-CP-07-1516

vs.

DEFENDANT CFB'S PROPOSED
ORDER FOR SUMMARY
JUDGMENT

TD Bank, N.A., Successor by Merger
with Carolina First Bank, and Blair
Witkowski d/b/a HHM Partners, LLC
f/k/a HHM Construction Company a/k/a
HHM Associates,

Defendants,

vs.

TD Bank, N.A. Successor by Merger
with Carolina First Bank,

Third-Party Plaintiff,

vs.

Brian Atkinson, individually and d/b/a
Empire Custom Homes, Inc., Chad
McCue, individually and d/b/a Empire
Custom Homes, Inc., Shane Allison,
individually and d/b/a Allison Appraisal
Company

Third-Party Defendants.

11 JUL - 1 PM 12:44
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter comes before the Court by way of a Motion for Summary Judgment by TD Bank, N.A. Successor by Merger with Carolina First Bank ("CFB") as to Plaintiff's claims for Civil Conspiracy, violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681 - 1681w ("FCRA"), and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann § 39-5-10 et seq ("UTPA"). A hearing was held on these

EXHIBIT

C

Motions on June 7, 2011, in Beaufort County, South Carolina. After considering the motions, memoranda, affidavits, oral arguments and other information presented by counsel for the parties, the Court hereby GRANTS summary judgment as to Plaintiffs' claims for civil conspiracy, violation of UTPA, and violation of FCRA, with leave to file the FCRA claim only as set forth below, and finds as follows:

1. This action arises out of a construction loan that Plaintiff obtained from CFB to build multiple residences in Beaufort County, South Carolina. Plaintiff contracted with Third-Party Defendant Empire Construction Homes ("Empire"), a construction company owned and operated by Third-Party Defendants Chad McCue ("McCue") and Brian Atkinson ("Atkinson"), to build one or more of the residences.

2. Further, accepting Plaintiffs' allegations as true for purposes of this Rule 56 Motion, CFB employee Blair Witkowski ("Witkowski") engaged in fraudulent activities by misapplying loan proceeds and making improper payments from client accounts. See generally Amended complaint ¶ 14.

3. Plaintiff asserted claims that CFB conspired with Witkowski, violated the FCRA and violated the UTPA.

4. It is well established in South Carolina that a corporation cannot conspire with itself, its agents or its employee. McClain v. Pactiv Corp., 360 S.C. 480, 486, 602 S.E.2d 87, 90 (Ct. App. 2004) (dismissing civil conspiracy claim that corporation conspired with employee).

5. In this case, Plaintiff alleges that CFB conspired with its employee, Witkowski. See Amend. Comp. ¶ 56. However, a claim alleging that a corporation

conspired with its employee is clearly prohibited under the authorities cited above. Therefore, CFB is entitled to summary judgment as to Plaintiff's civil conspiracy claim.

6. Furthermore, the Court finds that to sustain a civil conspiracy claim "[o]ne must plead acts in furtherance of the conspiracy that are separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." See Cricket Cove Venture, LLC v. Gilland, 390, S.C. 312, 324-325, 701 S.E.2d 39, 46 (Cl. App. 2010).

7. In this case, Plaintiff's civil conspiracy claim merely alleges the same wrongdoing as in his other causes of action, and Plaintiff has come forward with no evidence of any separate and distinct act in furtherance of the conspiracy.

8. Therefore, this Court finds that CFB is entitled to summary judgment as to Plaintiff's civil conspiracy claim.

9. Plaintiff further alleges that CFB violated the FCRA, which requires that Plaintiff prove that he notified a credit reporting agency ("CRA") of the dispute, that the CRA notified CFB, and that CFB failed to investigate or rectify the disputed charge:

"To prevail on a FCRA claim against a furnisher of information, the [plaintiff] must prove they notified a credit reporting agency of the dispute, his credit reporting agency then notified the furnisher of information, and the furnisher of information failed to investigate or rectify the dispute charge." In *Biesel*, the court dismissed a claim identical to Plaintiff's, because the plaintiff in that case had not notified a consumer reporting agency of the dispute. The court held that the defendant's "FCRA duties are triggered only after the complaining party has disputed the credit information with a credit reporting agency and the credit reporting agency has notified the furnisher of information.

Fryfogle v. First Nat. Bank of Greencastle, No. 6:07-cv-00035, 2009 WL 700161, *5 (W.D.Va. March 17, 2009) (emphasis added) (citations omitted).

10. In this case, the Court finds that Plaintiff has not pleaded, and has not come forward with any evidence as required under Rule 56, that he notified the credit reporting agency or that the credit reporting agency notified CFB. See generally Amend. Comp. ¶ 28-43. Instead, Plaintiff merely alleges that he asked CFB to take action to remove the negative credit report. Id. at ¶ 36. Plaintiff's affidavit submitted in opposition to the Motion for Summary Judgment similarly fails to allege that the credit reporting agency notified CFB.

11. CFB's duties as a furnisher of credit information are "triggered only after the Plaintiff reports a dispute to a consumer credit reporting agency, and the agency notifies the Defendant of the dispute." Fryfogle, 2009 WL 700161 (citing cases).

12. Because the record is devoid of evidence that any credit reporting agency notified CFB of the dispute, CFB is entitled to summary judgment as to Plaintiffs' FCRA claim.

13. Further, a decrease in credit score alone is insufficient proof of actual damages under the FCRA. See Young v. Harbor Motor Works, Inc., No. 07-31, 2008 U.S. Dist. LEXIS 111909, at *14 (N.D. Ind. Jan 27, 2009); Slack v. Suburban Propane Partners, L.P., No. 10-2548, 2010 U.S. Dist. LEXIS 98602, at *21-22 (D.N.J. Sept. 21, 2010). Instead, a Plaintiff must show "actual damages that he suffered as a consumer flowing from the alleged decrease in credit score such as that he was denied credit, lost credit, had his credit limits lowered, or was required to pay a high interest rate for credit." Young, at *13.

14. In this case, Plaintiff has failed to come forward with any evidence of damages related to the decrease in his credit score such as those examples provided in Young.

15. Therefore, CFB is entitled to summary judgment as to Plaintiffs' FCRA claim. However, because discovery is ongoing, Plaintiff is granted leave to re-file his FCRA claim if he subsequently comes forward with evidence sufficient to meet his burden under Rule 56 to sustain his FCRA claim, including evidence that the credit reporting agency notified CFB of the dispute and that Plaintiff has actual damages flowing from the alleged decrease in credit score.

16. Plaintiff also alleges a cause of action against CFB for violating the UTPA by failing to uncover the alleged fraud committed by Witkowski and by negligently handling Plaintiffs' construction loan. See generally Amended Complaint.

17. However, a Plaintiff may not maintain an action for violation of the UTPA where the conduct only affects the parties to the transaction, and does not affect the public interest. Robertson v. First Union Nat'l Bank, 350 S.C. 339, 351, 565 S.E.2d 309, 315 (Ct. App. 2002).

18. In Robertson, the Court of Appeals found that the UTPA allegations at issue, involving inflated appraisals, did not affect the public interest and was not capable of repetition because, among other things, the Court could "think of no logical reason why Bank would make it a *practice* to intentionally make loans for an amount in excess of the collateral's value and risk substantial losses in the event of default." Id. at 351, 565 S.E.2d at 315.

19. Similarly, in this case, the Court finds that there is no logical reason that CFB would make it a practice to make loans to unqualified persons on uncollateralized property, as has been alleged by Plaintiff. See Amended Complaint ¶¶ 45, 57. Moreover, CFB would have no incentive to permit an employee to disburse construction loan funds to himself in such a way as to leave CFB undercollateralized on a defaulted loan, again as alleged by Plaintiff. Id.

20. Therefore, this court finds that CFB is entitled to summary judgment as to Plaintiff's UTPA claim.

WHEREFORE, this Court finds that CFB is entitled to summary judgment because Plaintiff's pleadings and the record before the Court cannot sustain the causes of action and therefore, it is,

ORDERED, ADJUDGED AND DECREED that CFB's Motion for Summary Judgment as to Plaintiff's claims against it is hereby GRANTED, with Plaintiff being granted leave to refile his FCRA claim under the terms set forth above.

AND IT IS SO ORDERED.


The Honorable Carmen Tevis Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

Beaufort County, South Carolina

7-1, 2011.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Master in Equity

RECEIVED

JUL 25 2014

SC Court of Appeals

Case No. 2007-CP-38-0196

and

Case No. 2007-CP-38-0201

First Citizens Bank and Trust Company, Inc., as as
successor in interest to Community Resource Bank,
N.A., f/k/a Orangeburg National Bank,.....

Appellant,

v.

Clyde B. Livingston, at al.,.....

Respondent,

NOTICE OF APPEAL

First Citizens Bank and Trust Company, Inc. ("First Citizens") hereby timely
appeals from the following two orders of the Honorable James B. Jackson, Jr. in the
above matter: The Order (1) Granting in Part and Denying in Part Plaintiff's Motion for
Summary Judgment and Plaintiff's Motion to Strike Jury Demand dated April 10, 2014
and filed April 17, 2014 and the Order (2) Denying Motion for Reconsideration dated
July 2, 2014 and filed July 9, 2014. Copies of the Orders are attached hereto. Appellant
received written notice of entry of the order filed on July 9, 2014, on July 11, 2014.

<signature line on next page>

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Columbia, South Carolina

July 25, 2014

Other Counsel of Record:

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Harrison & Radeker, P.A.

PO Box 50143

Columbia, SC 29250

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-38-00196 and
2007-CP-38-00201

First Citizens Bank and Trust Company	vs	Clyde B Livingston, et al
PLAINTIFF(S)		DEFENDANT(S)
Submitted by: Master-In-Equity Judge		Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Lfllgant

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

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

This order ☐ ends ☐ does not end the case.

Additional information for the Clerk:

Winnifred B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

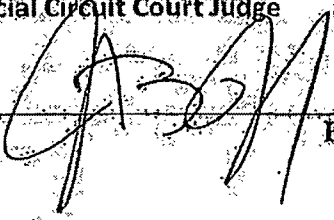
INFORMATION FOR THE JUDGMENT INDEX

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.

Special Circuit Court Judge 	Judge's Code: 2097	Date: April 9, 2014
--	-----------------------	------------------------

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)		ATTORNEY(S) FOR THE DEFENDANT(S)
		CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Clyde B. Livingston; Technico Marketing
& Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Clyde B. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-38-196

ORDER GRANTING SUMMARY
JUDGMENT IN PART, DENYING
SUMMARY JUDGMENT IN PART,
AND DENYING PLAINTIFF'S
MOTION TO STRIKE JURY DEMAND

FILED FOR RECORD
CLERK OF COURT
ORANGEBURG COUNTY
APR 17 PM 1:12

CASE NO. 2007-CP-38-201

ATTEST: TRUE COPY

Wingy B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

This matter comes before me upon the motions of the Plaintiff seeking summary judgment as to Defendant Livingston's remaining counterclaims in the above-captioned action and seeking that Defendant Livingston's demand for a jury trial be stricken, thereby demanding referral to the Master-in-Equity for a bench trial in accordance with S.C. Code Annotated § 29-3-

CR3M #1
ROA_00673

10 *et seq.* This motion was heard on December 11, 2013. Erik T. Norton, Esquire, attended the hearing on behalf of the Plaintiff. Andrew S. Radeker, Esquire, attended the hearing on behalf of Defendant Livingston. The Court requested post-hearing briefing from the parties whose counsel attended the hearing, and both those parties submitted briefs.

This case was brought as a foreclosure action, seeking foreclosure of a mortgage given in the year 2000 by Defendant Livingston to Orangeburg National Bank to secure a home equity line of credit. Some of Defendant Livingston's counterclaims were already disposed of by Order of the Honorable Diane S. Goodstein filed June 14, 2010, which ruled on a motion of the Plaintiff for summary judgment as to the counterclaims. The remaining counterclaims are for violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney-preference statute, for breach of contract, for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and for libel. As further explained below, the Court grants the Plaintiff's summary judgment as to the Unfair Trade Practices Act counterclaim, denies the summary judgment motion as to the other remaining counterclaims, and denies the Plaintiff's motion to strike Defendant Livingston's jury demand.

SUMMARY JUDGMENT STANDARD

Under South Carolina law, "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). "If triable issues exist, those issues must go to the jury." Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

BREACH OF CONTRACT

As to this counterclaim, the Plaintiff's motion for summary judgment centers on an argument that the three-year statute of limitations on a breach of contract claim had run at the time this claim was brought. Most at-law claims in this State, including a claim for breach of contract, have a three-year statute of limitations under S.C. Code Ann. § 15-3-530. South Carolina follows the discovery rule with regard to that statute. See S.C. Code Ann. § 15-3-535. "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

A defense that a claim is barred by a statute of limitations is an affirmative defense. Eldridge v. Eldridge, 398 S.C. 113, 120, 728 S.E.2d 24, 27 (2012); Arant v. Kressler, 327 S.C. 225, 228 n. 1, 489 S.E.2d 206, 208 n. 1 (1997); Glenn v. Sch. Dist. No. Five of Anderson Cty., 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Turner v. Millman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009). Only "when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination . . . become[] a matter of law[.]" Id.

Here, viewed in the light most favorable to Defendant Livingston, the evidence tends to show that Orangeburg National Bank, predecessor-in-interest to the Plaintiff, unilaterally imposed an unwritten condition on making the entire \$57,000.00 of the subject line of credit available to Defendant Livingston, limiting him to \$45,000.00 (in contradiction of the written

agreement document) unless and until he repainted his house. Defendant Livingston testified that he repainted the house and informed the bank of that, but the bank would not then allow him to borrow on the credit line beyond \$45,000.00.

The Plaintiff argues that the statute of limitations on the breach of contract claim began to run at the closing (and thus ran more than three years before this action was brought); however, the Court disagrees. The statute of limitations period on this claim could not have begun to run until the bank had received information that Defendant Livingston had painted his house and then refused to allow him to borrow on the credit line beyond \$45,000.00. There is nothing in the record that tells the Court when it was that those events happened. Accordingly, the Plaintiff has not established the burden it carries to show as a matter of law that the statute of limitations on this claim has run.

ATTORNEY-PREFERENCE VIOLATION

The testimony in record is consistent that there was no lawyer, representing Livingston or otherwise, present at the closing of the credit line mortgage. The Plaintiff relies on a attorney preference form signed by Defendant Livingston with a pre-typed date indicating execution prior to closing and argues that this shows compliance with the attorney preference statute even despite the non-attendance of a lawyer at the closing. The Plaintiff further argues that this claim is barred by the statute of limitations.

A person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Somerville, 362 S.C. 191, 607 S.E.2d 707 (2005).

In pertinent part, S.C. Code Ann. § 37-10-102 provides:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

The creditor may comply with this section by:

(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or

(2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

Providing a borrower with an attorney preference form at closing *always* violates this section. That is what Defendant Livingston's deposition, taken in the light most favorable to him, establishes is what occurred here. He testified that a form indisputably signed at closing and the attorney preference form with the pre-typed date appeared to have been signed on the same day.

A statute in the same chapter as the attorney preference statute, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, states:

A) If 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. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, *except as set forth in subsection (C)*. The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) 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) 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;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

(b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and

(c) attorney's fees and costs.

An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

(D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

(Emphasis added.)

Per the terms of the line of credit agreement document, the credit line matured in 2005. The Plaintiff initiated the instant action on or about February 15, 2007. Livingston subsequently asserted his counterclaims on or about November 28, 2007, well after the loan matured. However, important to the outcome of the Plaintiff's summary judgment motion is that the Plaintiff brought the instant action against Defendant Livingston, not the other way around.

Defendant Livingston argues that this claim falls under S.C. Code Ann. § 37-10-105(C), and the Court agrees. In Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35 (2013), the Court of Appeals held that a mortgagee was barred from enforcing, at law or in equity, any rights it might otherwise have had that arose from a note and mortgage, because the mortgage loan was closed through the unauthorized practice of law. The court noted that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" noting that the reason for requiring lawyers to supervise mortgage loan closings "is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." *Id.* at 76. The Supreme Court favorably cited this passage from Coffey in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), which noted that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." Where there is an attorney preference violation and the closing of a loan without the supervision of a

duly licensed attorney, the transaction "was induced by unconscionable conduct[.]" Also, the Plaintiff's unilateral imposition of conditions on credit at odds with the note could be seen by a reasonable factfinder as unconscionable conduct.

Also, the purpose of §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). With that in mind, Defendant Livingston points the Court to S.C. Code Ann. § 37-5-205, which provides that a debtor may *always* raise a violation of the Consumer Protection Code, or at least a violation of Chapter 5 of the Consumer Protection Code, as a setoff against the debtor's obligation in a case where he is defending a claim on the debt brought against him, regardless of whether the statute of limitations for a claim based on the violation would ordinarily have run. The language of S.C. Code Ann. § 37-10-105(C) refers to a statute in Chapter 5 of the Consumer Protection Code, S.C. Code Ann. § 37-5-108 with regard to whether a transaction was unconscionable. It seems that Chapter 5 of Title 37, including S.C. Code Ann. § 37-5-205, does apply to a right of action under S.C. Code Ann. § 37-10-105. Accordingly, the Court must deny the Plaintiff's motion for summary judgment as to this claim; however, the Court notes that the effect of Defendant Livingston prevailing on this claim may only be to reduce debt owed by him to the Plaintiff and not to affirmatively obtain any judgment against the Plaintiff above that amount, as that would violate the statute of limitations.

LIBEL

The Honorable Diane S. Goodstein addressed Defendant Livingston's libel claim in an order (which granted a summary judgment motion by the Plaintiff in part and denied it in part) filed June 14, 2010, in this action as follows:

Turning to Defendant Livingston's libel counterclaim, the Court concludes that there are sufficient facts in the record such that there is a genuine issue of material fact concerning this claim. To prove libel, a claimant must show publication by the adverse party of a false statement about the claimant having a defamatory meaning, with knowledge of the statement's falsity or with reckless or negligent disregard thereof, and presumed damages or special damages. See Parker v. Evening Post Publishing Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994). The deposition of Linda O'Dell shows that the Plaintiff likely engaged in credit reporting concerning the delinquency of the loan subject of this action. If the underlying transaction is void for illegality, as Defendant Livingston claims, then the credit reporting was false. White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342 (2004) ("general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions"). Further, viewed in the light most favorable to Defendant Livingston, the Plaintiff damaged his credit by reporting this information when it knew of the facts that made the transaction tainted with illegality.

Judge Goodstein did not address Plaintiff's arguments advanced for the first time here that the Fair Credit Reporting Act ("FCRA") preempted the libel claims, or that Defendant Livingston had not come forward with evidence to show that he the loans at issue had been reported to credit reporting agencies or did damage to his credit in light of existing judgments against Defendant Livingston. Defendant Livingston counters by arguing that his deposition testimony that now he has "no credit" points to the existence of a genuine issue of material fact as to whether the Plaintiff's credit reporting has harmed his credit. He argues that merely because a person has already had some injury (whether from his own fault or another's) does not

allow a tortfeasor to escape liability for injuring him further. He further argues that the Plaintiff's unilateral imposition of extra terms on the line of credit at issue provides a basis for finding the loan to be illegal, independent of the unauthorized practice of law. As to preemption, Defendant Livingston argues that a South Carolina federal district court has found that the Fair Credit Reporting Act does not preempt common law claims founded upon acts done with malice, citing Barnhill v. Bank of America, N.A., 378 F.Supp.2d 696 (D.S.C. 2005). He argues that "malice" in this context is knowledge of the statements' falsity or reckless disregard for their truth or falsity. The thrust of Defendant Livingston's argument concerning malice and preemption is that the Plaintiff knew it had not complied with the terms of the agreement and that it could not lawfully report Defendant Livingston to credit reporting agencies as delinquent when the Plaintiff was the first to breach the agreement.

The undersigned believes that he lacks authority to countermand Judge Goodstein's decision and declines to do so. See Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) (holding that a trial judge cannot over rule an order from another trial judge).

UNFAIR TRADE PRACTICES

To recover under the South Carolina Unfair Trade Practices Act, a party must show: (1) the opposing party engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the claimant suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). Defendant Livingston argues that there is a genuine issue of material fact as to when the statute of limitations period on this claim began to run, and the Court agrees with that, in accordance with the discussion above about the breach of contract claim. That, however, does not save Defendant

Livingston's Unfair Trade Practices Act claim from summary judgment. Because the acts subject of this claim are not unfair and deceptive acts in trade or commerce that affected the public interest, the Plaintiff's motion for summary judgment on this counterclaim is granted. See Beattie v. Nations Credit Financial Services Corp., 69 Fed. Appx. 585, 586 (4th Cir. 2003) (finding no evidence of any unfair or deceptive act that violated the public interest).

In a light favorable to Defendant Livingston, the record indicates that the bank simply reneged on its own agreement with Defendant Livingston by refusing him access to the remainder of his credit line. These actions are not immoral or offensive to public policy. Further, in a typical case where a contract is breached, there will be no effect on the public interest. The isolated nature of a breach of contract under typical circumstances makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989); S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). As Defendant Livingston has failed to adduce evidence tending to show satisfaction of the first two elements of an Unfair Trade Practices claim, the Plaintiff's motion for summary must be granted as to this claim.

JURY TRIAL

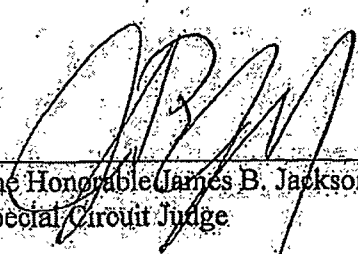
The Honorable O. Davie Burgdorf, in unappealed rulings on Defendant Livingston's Motion for Summary Judgment and to Amend in the form of Orders dated December 11, 2007 and August 4, 2008, determined that Defendant Livingston has the right to a jury trial on his counterclaims in this action. Plaintiff argues that Judge Burgdorf did not have the benefit of Defendant Livingston's clear articulation of damages provided after this hearing, nor did Judge

Burgdorf have the benefit of the decision rendered by the Supreme Court of South Carolina in Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 730 S.E.2d 328 (2012). However, I find that Judge Burgdorf's ruling is the law of the case, and the Plaintiff would be stuck with this result even if it were wrong. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013). As the Court is without authority to countermand Judge Burgdorf's decision in this regard, this point bears no further analysis. See Charleston County DSS, 317 S.C. at 288. Accordingly, the Plaintiff's motion to strike Defendant Livingston's jury demand and refer the case to the master-in-equity is denied.

Accordingly, it is therefore hereby ORDERED that:

1. The Plaintiff's motion for summary judgment as to Defendant Livingston's counterclaim for violation of the Unfair Trade Practices Act is granted;
2. The Plaintiff's motion for summary judgment as to Defendant Livingston's remaining counterclaims is denied; and
3. The Plaintiff's motion to strike Defendant Livingston's jury demand and for a bench trial before the Master-in-Equity is denied.

And IT IS SO ORDERED.


The Honorable James B. Jackson, Jr.
Special Circuit Judge

Orangeburg, South Carolina

April 10, 2014

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-38-00196

and

CASE NO. 2007-CP-38-00201

11/11/14 11:11
JTM
ETN
TCS fml6

First Citizens Bank and Trust Company, Inc.	Clyde B. Livingston, et al
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Master-In-Equity Judge	
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

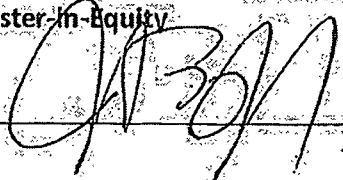
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

Order denying both Motions for Reconsideration

This order ☐ ends ☐ does not end the case.		
TEST: TRUE COPY Wingia B. Clark CLERK OF COURT		
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.

Master-in-Equity 	Judge's Code: 3077	Date: July 7, 2014
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For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
Erik T. Norton	Andrew S. Radeker
	CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA,)
)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS
C. A. NO. 2007-CP-38-00196

ATTEST: TRUE COPY

C. A. NO. 2007-CP-38-00201

Wynne B. Clark
CLERK OF COURT
ORANGEBURG COUNTY

First Citizens Bank and Trust Company,)
Inc.)

Plaintiff,)

vs.)

Clyde B Livingston, et al,)

Defendants.)

ORDER DENYING
MOTIONS TO RECONSIDER

FILED
APR 17 2014
CLERK OF COURT
ORANGEBURG COUNTY

This matter comes before the Court on a Motion filed by the Plaintiff for the Court to reconsider its denial of Summary Judgment on the counterclaims filed by the Defendant

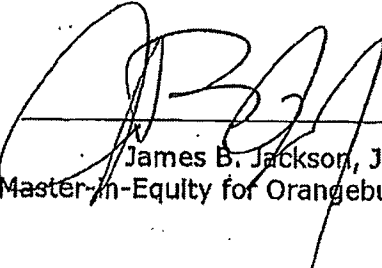
Clyde B. Livingston, alleging Breach of Contract, Violation of Attorney Preference Statute and denying Plaintiff's Motion to Strike Defendant Livingston's demand for to a jury trial. The Court has reconsidered its original decision in this matter and has read the memorandum of law and accompanying case materials provided by Eric Norton, attorney for the Plaintiff. For the reasons set forth in the original Order issued by this Court dated April 10, 2014, and recorded on April 17, 2014, I am denying the Plaintiff's Motion for Reconsideration. I believe that my original Order is the correct decision in these matters. Additionally, Andrew Radeker, attorney for defendant Clyde B Livingston, also filed a motion for reconsideration asking the Court to reconsider its decision in granting summary judgment as to their counterclaim for Unfair Trade Practice. I have considered all of his arguments and materials submitted and for the reasons set forth in the Court's original Order, I am denying the Defendant's Motion for

GT #1

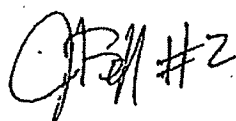
ROA_00688

Reconsideration. The Court feels that all of these matters were correctly decided in its original Order.

IT IS THEREFORE ORDERED that the Motions for Reconsideration filed by both the Plaintiff and the Defendant, Clyde B. Livingston, are hereby denied for the reasons set forth in the Court's original Order dated April 10, 2014, and recorded on April 17, 2014.


James B. Jackson, Jr.
Master-in-Equity for Orangeburg County

Orangeburg, S.C.
July 2, 2014

 #2

ROA_00689

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Master in Equity

RECEIVED

JUL 25 2012

SC Court of Appeals

Case No. 2007-CP-38-0196

and

Case No. 2007-CP-38-0201

First Citizens Bank and Trust Company, Inc., as as
successor in interest to Community Resource Bank,
N.A., f/k/a Orangeburg National Bank,.....

Appellant,

v.

Clyde B. Livingston, at al.,.....

Respondent,

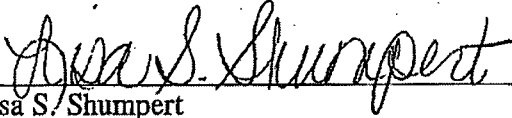
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins
Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served
all counsel in this action with a copy of the document(s) hereinbelow specified by
mailing a copy of the same by United States Mail, postage prepaid, to the following
address(es):

Document(s): Notice of Appeal

Counsel Served:

Andrew S. Radeker, Esquire
Harrison & Radeker, P.A.
PO Box 50143
Columbia, SC 29250



Lisa S. Shumpert

July 25, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; Technico Marketing & Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.;
Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller
Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

And

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.;
Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller
Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of Clyde B. Livingston is the.....Respondent/Appellant.

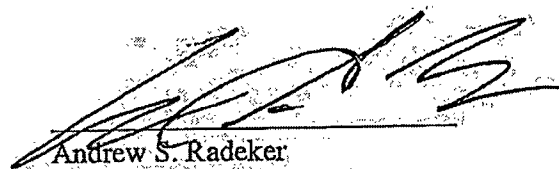
NOTICE OF CROSS-APPEAL

Clyde B. Livingston (hereinafter "Appellant") appeals from the order of the
Honorable James B. Jackson, Jr., filed April 17, 2014, that granted the
Appellant/Respondent's motion for summary judgment as to Appellant's Unfair
Trade Practices Act claim, and the order of Honorable James B. Jackson, Jr., filed
July 9, 2014, that denied Appellant's motion to reconsider that order. Copies of these
orders are attached hereto. Appellant received written notice of the entry of the first

of these orders on April 23, 2014, and received written notice of the second of these orders on July 11, 2014.

July 29, 2014

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

Other Counsel of Record:

Erik T. Norton, Esq.
Nelson Mullins Riley & Scarborough LLP
P.O. Box 11070
Columbia, South Carolina 29201
Attorney for Respondent

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Clyde B. Livingston; Technico Marketing
& Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Clyde B. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-38-196

ORDER GRANTING SUMMARY
JUDGMENT IN PART, DENYING
SUMMARY JUDGMENT IN PART,
AND DENYING PLAINTIFF'S
MOTION TO STRIKE JURY DEMAND

FILED FOR RECORDED
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC
2007 APR 17 PM 1:12

CASE NO. 2007-CP-38-201

ATTEST: TRUE COPY

Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

This matter comes before me upon the motions of the Plaintiff seeking summary judgment as to Defendant Livingston's remaining counterclaims in the above-captioned action and seeking that Defendant Livingston's demand for a jury trial be stricken, thereby demanding referral to the Master-in-Equity for a bench trial in accordance with S.C. Code Annotated § 29-3-

Q3M #1

10 *et seq.* This motion was heard on December 11, 2013. Erik T. Norton, Esquire, attended the hearing on behalf of the Plaintiff. Andrew S. Radeker, Esquire, attended the hearing on behalf of Defendant Livingston. The Court requested post-hearing briefing from the parties whose counsel attended the hearing, and both those parties submitted briefs.

This case was brought as a foreclosure action, seeking foreclosure of a mortgage given in the year 2000 by Defendant Livingston to Orangeburg National Bank to secure a home equity line of credit. Some of Defendant Livingston's counterclaims were already disposed of by Order of the Honorable Diane S. Goodstein filed June 14, 2010, which ruled on a motion of the Plaintiff for summary judgment as to the counterclaims. The remaining counterclaims are for violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney-preference statute, for breach of contract, for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and for libel. As further explained below, the Court grants the Plaintiff's summary judgment as to the Unfair Trade Practices Act counterclaim, denies the summary judgment motion as to the other remaining counterclaims, and denies the Plaintiff's motion to strike Defendant Livingston's jury demand.

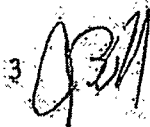
SUMMARY JUDGMENT STANDARD

Under South Carolina law, "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues," Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). "If triable issues exist, those issues must go to the jury." Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

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BREACH OF CONTRACT

As to this counterclaim, the Plaintiff's motion for summary judgment centers on an argument that the three-year statute of limitations on a breach of contract claim had run at the time this claim was brought. Most at-law claims in this State, including a claim for breach of contract, have a three-year statute of limitations under S.C. Code Ann. § 15-3-530. South Carolina follows the discovery rule with regard to that statute. See S.C. Code Ann. § 15-3-535. "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

A defense that a claim is barred by a statute of limitations is an affirmative defense. Eldridge v. Eldridge, 398 S.C. 113, 120, 728 S.E.2d 24, 27 (2012); Arant v. Krössler, 327 S.C. 225, 228 n. 1, 489 S.E.2d 206, 208 n. 1 (1997); Glenn v. Sch. Dist. No. Five of Anderson Cty., 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009). Only "when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination . . . become[] a matter of law[.]" Id.

Here, viewed in the light most favorable to Defendant Livingston, the evidence tends to show that Orangeburg National Bank, predecessor-in-interest to the Plaintiff, unilaterally imposed an unwritten condition on making the entire \$57,000.00 of the subject line of credit available to Defendant Livingston, limiting him to \$45,000.00 (in contradiction of the written

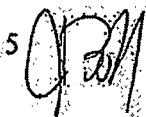
agreement document) unless and until he repainted his house. Defendant Livingston testified that he repainted the house and informed the bank of that, but the bank would not then allow him to borrow on the credit line beyond \$45,000.00.

The Plaintiff argues that the statute of limitations on the breach of contract claim began to run at the closing (and thus ran more than three years before this action was brought); however, the Court disagrees. The statute of limitations period on this claim could not have begun to run until the bank had received information that Defendant Livingston had painted his house and then refused to allow him to borrow on the credit line beyond \$45,000.00. There is nothing in the record that tells the Court when it was that those events happened. Accordingly, the Plaintiff has not established the burden it carries to show as a matter of law that the statute of limitations on this claim has run.

ATTORNEY-PREFERENCE VIOLATION

The testimony in record is consistent that there was no lawyer, representing Livingston or otherwise, present at the closing of the credit line mortgage. The Plaintiff relies on a attorney preference form signed by Defendant Livingston with a pre-typed date indicating execution prior to closing and argues that this shows compliance with the attorney preference statute even despite the non-attendance of a lawyer at the closing. The Plaintiff further argues that this claim is barred by the statute of limitations,

A person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005).

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In pertinent part, S.C. Code Ann. § 37-10-102 provides:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose:

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

The creditor may comply with this section by:

(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or

(2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

Providing a borrower with an attorney preference form at closing *always* violates this section. That is what Defendant Livingston's deposition, taken in the light most favorable to him, establishes is what occurred here. He testified that a form indisputedly signed at closing and the attorney preference form with the pre-typed date appeared to have been signed on the same day.

A statute in the same chapter as the attorney preference statute, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, states:

A) If 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

6. 

dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, *except as set forth in subsection (C)*. The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) 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) 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;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

(b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and

(c) attorney's fees and costs.

An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

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(D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

(Emphasis added.)

Per the terms of the line of credit agreement document, the credit line matured in 2005. The Plaintiff initiated the instant action on or about February 15, 2007. Livingston subsequently asserted his counterclaims on or about November 28, 2007, well after the loan matured. However, important to the outcome of the Plaintiff's summary judgment motion is that the Plaintiff brought the instant action against Defendant Livingston, not the other way around.

Defendant Livingston argues that this claim falls under S.C. Code Ann. § 37-10-105(C), and the Court agrees. In Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35 (2013), the Court of Appeals held that a mortgagee was barred from enforcing, at law or in equity, any rights it might otherwise have had that arose from a note and mortgage, because the mortgage loan was closed through the unauthorized practice of law. The court noted that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" noting that the reason for requiring lawyers to supervise mortgage loan closings "is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." *Id.* at 76. The Supreme Court favorably cited this passage from Coffey in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), which noted that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." Where there is an attorney preference violation and the closing of a loan without the supervision of a

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duly licensed attorney, the transaction "was induced by unconscionable conduct[.]" Also, the Plaintiff's unilateral imposition of conditions on credit at odds with the note could be seen by a reasonable factfinder as unconscionable conduct.

Also, the purpose of §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). With that in mind, Defendant Livingston points the Court to S.C. Code Ann. § 37-5-205, which provides that a debtor may *always* raise a violation of the Consumer Protection Code, or at least a violation of Chapter 5 of the Consumer Protection Code, as a setoff against the debtor's obligation in a case where he is defending a claim on the debt brought against him, regardless of whether the statute of limitations for a claim based on the violation would ordinarily have run. The language of S.C. Code Ann. § 37-10-105(C) refers to a statute in Chapter 5 of the Consumer Protection Code, S.C. Code Ann. § 37-5-108 with regard to whether a transaction was unconscionable. It seems that Chapter 5 of Title 37, including S.C. Code Ann. § 37-5-205, does apply to a right of action under S.C. Code Ann. § 37-10-105. Accordingly, the Court must deny the Plaintiff's motion for summary judgment as to this claim; however, the Court notes that the effect of Defendant Livingston prevailing on this claim may only be to reduce debt owed by him to the Plaintiff and not to affirmatively obtain any judgment against the Plaintiff above that amount, as that would violate the statute of limitations.

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LIBEL

The Honorable Diane S. Goodstein addressed Defendant Livingston's libel claim in an order (which granted a summary judgment motion by the Plaintiff in part and denied it in part) filed June 14, 2010, in this action as follows:

Turning to Defendant Livingston's libel counterclaim, the Court concludes that there are sufficient facts in the record such that there is a genuine issue of material fact concerning this claim. To prove libel, a claimant must show publication by the adverse party of a false statement about the claimant having a defamatory meaning, with knowledge of the statement's falsity or with reckless or negligent disregard thereof, and presumed damages or special damages. See Parker v. Evening Post Publishing Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994). The deposition of Linda O'Dell shows that the Plaintiff likely engaged in credit reporting concerning the delinquency of the loan subject of this action. If the underlying transaction is void for illegality, as Defendant Livingston claims, then the credit reporting was false. White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342 (2004) ("general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions"). Further, viewed in the light most favorable to Defendant Livingston, the Plaintiff damaged his credit by reporting this information when it knew of the facts that made the transaction tainted with illegality.

Judge Goodstein did not address Plaintiffs arguments advanced for the first time here that the Fair Credit Reporting Act ("FCRA") preempted the libel claims, or that Defendant Livingston had not come forward with evidence to show that he the loans at issue had been reported to credit reporting agencies or did damage to his credit in light of existing judgments against Defendant Livingston. Defendant Livingston counters by arguing that his deposition testimony that now he has "no credit" points to the existence of a genuine issue of material fact as to whether the Plaintiff's credit reporting has harmed his credit. He argues that merely because a person has already had some injury (whether from his own fault or another's) does not

allow a tortfeasor to escape liability for injuring him further. He further argues that the Plaintiff's unilateral imposition of extra terms on the line of credit at issue provides a basis for finding the loan to be illegal, independent of the unauthorized practice of law. As to preemption, Defendant Livingston argues that a South Carolina federal district court has found that the Fair Credit Reporting Act does not preempt common law claims founded upon acts done with malice, citing Barnhill v. Bank of America, N.A., 378 F.Supp.2d 696 (D.S.C. 2005). He argues that "malice" in this context is knowledge of the statements' falsity or reckless disregard for their truth or falsity. The thrust of Defendant Livingston's argument concerning malice and preemption is that the Plaintiff knew it had not complied with the terms of the agreement and that it could not lawfully report Defendant Livingston to credit reporting agencies as delinquent when the Plaintiff was the first to breach the agreement.

The undersigned believes that he lacks authority to countermand Judge Goodstein's decision and declines to do so. See Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) (holding that a trial judge cannot over rule an order from another trial judge).

UNFAIR TRADE PRACTICES

To recover under the South Carolina Unfair Trade Practices Act, a party must show: (1) the opposing party engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the claimant suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). Defendant Livingston argues that there is a genuine issue of material fact as to when the statute of limitations period on this claim began to run, and the Court agrees with that, in accordance with the discussion above about the breach of contract claim. That, however, does not save Defendant

Livingston's Unfair Trade Practices Act claim from summary judgment. Because the acts subject of this claim are not unfair and deceptive acts in trade or commerce that affected the public interest, the Plaintiff's motion for summary judgment on this counterclaim is granted. See Beattie v. Nations Credit Financial Services Corp., 69 Fed. Appx. 585, 586 (4th Cir. 2003) (finding no evidence of any unfair or deceptive act that violated the public interest).

In a light favorable to Defendant Livingston, the record indicates that the bank simply reneged on its own agreement with Defendant Livingston by refusing him access to the remainder of his credit line. These actions are not immoral or offensive to public policy. Further, in a typical case where a contract is breached, there will be no effect on the public interest. The isolated nature of a breach of contract under typical circumstances makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989); S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). As Defendant Livingston has failed to adduce evidence tending to show satisfaction of the first two elements of an Unfair Trade Practices claim, the Plaintiff's motion for summary must be granted as to this claim.

JURY TRIAL

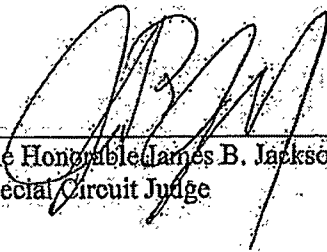
The Honorable O. Davie Burgdorf, in unappealed rulings on Defendant Livingston's Motion for Summary Judgment and to Amend in the form of Orders dated December 11, 2007 and August 4, 2008, determined that Defendant Livingston has the right to a jury trial on his counterclaims in this action. Plaintiff argues that Judge Burgdorf did not have the benefit of Defendant Livingston's clear articulation of damages provided after this hearing, nor did Judge

Burgdorf have the benefit of the decision rendered by the Supreme Court of South Carolina in Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 730 S.E.2d 328 (2012). However, I find that Judge Burgdorf's ruling is the law of the case, and the Plaintiff would be stuck with this result even if it were wrong. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013). As the Court is without authority to countermand Judge Burgdorf's decision in this regard, this point bears no further analysis. See Charleston County DSS, 317 S.C. at 288. Accordingly, the Plaintiff's motion to strike Defendant Livingston's jury demand and refer the case to the master-in-equity is denied.

Accordingly, it is therefore hereby ORDERED that:

1. The Plaintiff's motion for summary judgment as to Defendant Livingston's counterclaim for violation of the Unfair Trade Practices Act is granted;
2. The Plaintiff's motion for summary judgment as to Defendant Livingston's remaining counterclaims is denied; and
3. The Plaintiff's motion to strike Defendant Livingston's jury demand and for a bench trial before the Master-in-Equity is denied.

And IT IS SO ORDERED.


The Honorable James B. Jackson, Jr.
Special Circuit Judge

Orangeburg, South Carolina

April 10, 2014

STATE OF SOUTH CAROLINA,)

COURT OF COMMON PLEAS

C. A. NO. 2007-CP-38-00196

COUNTY OF ORANGEBURG)

and

C. A. NO. 2007-CP-38-00201

First Citizens Bank and Trust Company,)
Inc.)

Plaintiff,)

vs.)

Clyde B. Livingston, et al,)

Defendants.)

ORDER DENYING

MOTIONS TO RECONSIDER

ATTEST: TRUE COPY

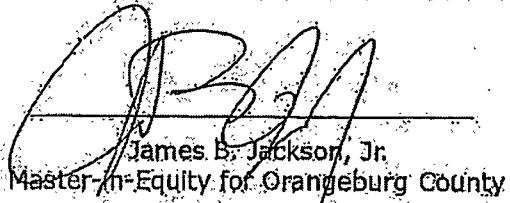
Wynne B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

This matter comes before the Court on a Motion filed by the Plaintiff for the Court to reconsider its denial of Summary Judgment on the counterclaims filed by the Defendant Clyde B. Livingston, alleging Breach of Contract, Violation of Attorney Preference Statute and denying Plaintiff's Motion to Strike Defendant Livingston's demand for to a jury trial. The Court has reconsidered its original decision in this matter and has read the memorandum of law and accompanying case materials provided by Eric Norton, attorney for the Plaintiff. For the reasons set forth in the original Order issued by this Court dated April 10, 2014, and recorded on April 17, 2014, I am denying the Plaintiff's Motion for Reconsideration. I believe that my original Order is the correct decision in these matters. Additionally, Andrew Radeker, attorney for defendant Clyde B. Livingston, also filed a motion for reconsideration asking the Court to reconsider its decision in granting summary judgment as to their counterclaim for Unfair Trade Practice. I have considered all of his arguments and materials submitted and for the reasons set forth in the Court's original Order, I am denying the Defendant's Motion for

GT #1

Reconsideration. The Court feels that all of these matters were correctly decided in its original Order.

IT IS THEREFORE ORDERED that the Motions for Reconsideration filed by both the Plaintiff and the Defendant, Clyde B. Livingston, are hereby denied for the reasons set forth in the Court's original Order dated April 10, 2014, and recorded on April 17, 2014.


James B. Jackson, Jr.
Master-in-Equity for Orangeburg County

Orangeburg, S.C.
July 2, 2014

 #2

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

**Community Resource Bank, N.A., f/k/a
 Orangeburg National Bank,**

Plaintiff,

vs.

**Clyde B. Livingston; Technico Marketing
 & Distribution, Inc.; B. Livingston and
 Charlotte V. Livingston; American First
 Federal Inc.; Citibank South Dakota,
 N.A.; Branch Banking and Trust
 Company of South Carolina; G&G
 Rentals; Miller Communications, Inc.;
 Wells Fargo Bank, N.A.**

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2007-CP-38-196

**AFFIDAVIT OF
 CLYDE B. LIVINGSTON**

FOR RECORD
 CLERK
 OF COURT
 ORANGEBURG, SC

MAR 15 A 10:29

Personally appeared before me Clyde B. Livingston, who, first being duly sworn, deposes
 and says as follows:

1. I am a defendant in the above-captioned action. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. The loan subject of this action was closed in the Broughton Street office of Orangeburg National Bank, which became known as Community Resource Bank. No attorney was present at that closing.
3. Orangeburg National Bank never provided me with any form to sign in advance of the closing selecting any attorney to represent me or informed me of my right to be represented in the closing by an attorney of my own choosing.
4. No one was present at that closing except for one bank employee, who I believe was Mark Trimmier, and myself. I never later appeared before either Mark Trimmier or Linda O'Dell and acknowledged that I had signed the mortgage.

ATTEST: TRUE COPY

ORANGEBURG COUNTY COURT
 SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Court Judge

Case Nos. 2007-CP-38-0196 and Case No. 2007-CP-38-0201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company, Inc., ... Appellant/Respondent,

v.

Clyde B. Livingston, Technico Marketing & Distribution,
Inc., B. Livingston and Charlotte V. Livingston, American
First Federal, Inc., Citibank South Dakota, N.A., Branch
Bank and Trust Company of South Carolina, G&G
Rentals, Miller Communications, Wells Fargo Bank, N.A.,...

Defendants,

Of whom Clyde B. Livingston is the Respondent/Appellant,

And

First Citizens Bank and Trust Company, Inc., ... Appellant/Respondent,

v.

Clyde B. Livingston, American First Federal, Inc.,
Citibank South Dakota, N.A., Branch Bank and Trust
Company of South Carolina, G&G Rentals, Miller
Communications, Wells Fargo Bank, N.A., ...

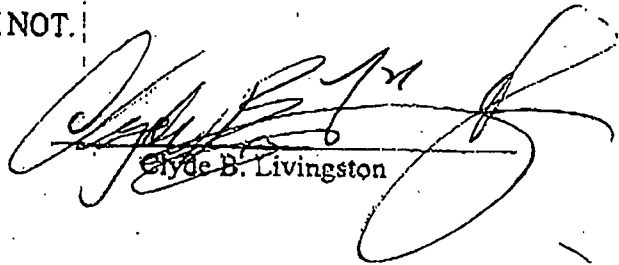
Defendants,

Of whom Clyde B. Livingston is the Respondent/Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

FURTHER AFFIANT SAYETH NOT.



Clyde B. Livingston

SWORN to before me this

10 day of March, 2010.

Scarlett B. Watkinson (L.S.)

Notary Public for South Carolina

My Commission Expires: July-24-2011

(S)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Court Judge

RECEIVED

JUN 26 2015

SC Court of Appeals

Case Nos. 2007-CP-38-0196 and Case No. 2007-CP-38-0201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company, Inc., ... Appellant/Respondent,

v.

Clyde B. Livingston, Technico Marketing &
Distribution, Inc., B. Livingston and Charlotte V.
Livingston, American First Federal, Inc., Citibank South
Dakota, N.A., Branch Bank and Trust Company of South
Carolina, G&G Rentals, Miller Communications, Wells
Fargo Bank, N.A., ... Defendants,

Of whom Clyde B. Livingston is the Respondent/Appellant,

And

First Citizens Bank and Trust Company, Inc., ... Appellant/Respondent,

v.

Clyde B. Livingston, American First Federal, Inc.,
Citibank South Dakota, N.A., Branch Bank and Trust
Company of South Carolina, G&G Rentals, Miller
Communications, Wells Fargo Bank, N.A., ... Defendants,

Of whom Clyde B. Livingston is the Respondent/Appellant.

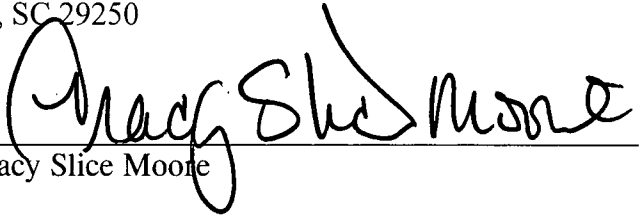
PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley &
Scarborough LLP, attorneys for Appellant/Respondent, do hereby certify that I have
served all counsel in this action with a copy of the document(s) hereinbelow specified

by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document(s): RECORD ON APPEAL
CERTIFICATION OF COMPLIANCE, RULE 210(G),
SCACR

Counsel Served: Andrew S. Radeker, Esquire
Harrison & Radeker, P.A.
PO Box 50143
Columbia, SC 29250



Tracy Slice Moore

June 25, 2016