THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Master-In-Equity

Appellate Case No. 2014-002590
Circuit Court Case No. 2011-CP-10-2946

Brent E. Bentrim, ... Appellant,

v.

Wells Fargo Bank, N.A., ... Respondent.

BRIEF OF RESPONDENT

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II. Is Bentrim's request to overturn *Bank of America v. Draper* properly before the Court when the lower court did not base any of its orders on the decision and Wells Fargo does not rely on the holding as an additional sustaining ground?

III. Did the lower court properly grant summary judgment as to ten of Bentrim's seventeen causes of action?

STATEMENT OF THE CASE

This case involves an attempt by the Appellant, Brent E. Bentrim ("Bentrim"), to nullify a Negotiable Promissory Note ("Note") and Mortgage which he executed in favor of First Union National Bank ("First Union") in 2002. The lower court found that the Respondent, Wells Fargo Bank, N.A. ("Wells Fargo"), as successor in interest to First Union, is the holder of the Note. The court also granted summary judgment as to ten of Bentrim's seventeen causes of action.

Bentrim filed a *pro se* complaint against Wells Fargo on April 25, 2011. (R. pp. 28-36; Complaint). Wells Fargo answered on May 27, 2011. (R. pp. 37-40; Answer). Wells Fargo moved to amend its answer. By this point, Bentrim had retained counsel who specifically consented to the amendment, including the addition of counterclaims for foreclosure and suit on the promissory note. (R. p. 16; Consent Order). Wells Fargo filed its amended answer and counterclaims on May 8, 2012. (R. pp. 41-54; Amended Answer and Counterclaims). In his reply, Bentrim admitted that he signed the Note and Mortgage. (R. p. 55; Reply, ¶¶ 64-65).

Wells Fargo moved for summary judgment on September 19, 2012. (R. pp. 123-138; Motion for Summary Judgment). After a hearing, Judge R. Markley Dennis, Jr. dismissed Bentrim's claims for breach of contract and violation of the Truth in Lending Act. (R. pp. 18-22;

Order Granting, in Part, and Denying in Part, Defendant's Motion for Summary Judgment). Bentrim did not move to reconsider nor did he appeal this order.

The parties then referred the case to Master-In-Equity Mikell R. Scarborough by a Consent Order of Reference filed November 13, 2012. (R. pp. 23-24; Consent Order of Reference).[1]

Bentrim filed a motion to amend on November 1, 2013, seeking to add fourteen new causes of action. (R. p. 139; Motion to Amend). The motion was granted without hearing, and Wells Fargo timely filed an answer to the amended complaint, again with counterclaims for foreclosure and suit on the promissory note. (R. pp. 84-111; Wells Fargo's Counterclaims and Answer to Amended Complaint). Bentrim filed a reply to the counterclaims, again admitting that he signed the Note and Mortgage. (R. p. 113; Answer to Counterclaim, ¶¶ 8-9).

At a hearing on April 28, 2014, the lower court inspected the original Note and concluded that, "as of the date of this hearing, . . . Wells Fargo holds the original Note, and the Note is payable to its predecessor in interest, First Union National Bank." (R. p. 4, lines 3-4; Order). At a subsequent hearing on June 9, 2014, and in the corresponding Order filed October 28, 2014, the lower court denied Bentrim's motion to reconsider the ruling that Wells Fargo is the holder of the Note and elaborated on that prior ruling: "Wells Fargo is the holder of the Note as a matter of law and a holder in due course of the Note as a matter of law. Further, even if Wells Fargo was not the holder, it would still qualify as a 'person entitled to enforce' as defined in S.C. Code Ann. § 36-3-301." (R. p. 7, lines 12-15; Order).

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[1] Judge Scarborough was already familiar with this particular loan. Bentrim's previous failures to make timely payments led to foreclosure actions filed in 2005, 2007 and 2009. (R. pp. 679-705; 2005 Complaint (Case No. 2005-CP-10-4814); R. pp. 706-738; 2007 Complaint (Case No. 2007-CP-10-3933; R. pp. 739-757; 2009 Complaint (Case No. 2009-CP-10-4700)). Judge Scarborough presided over both the 2005 and 2009 foreclosures.

In its October 28, 2014 Order, the lower court also addressed Wells Fargo's previously filed Motion for Summary Judgment (R. pp. 237-246; Motion for Summary Judgment) and granted summary judgment as to ten of Bentrim's seventeen causes of action.[2] (R. p. 9, lines 3-20, Order).

On December 1, 2014, following the denial of his motion to reconsider, Bentrim timely filed a Notice of Appeal of the holder issue. (R. p. 122; Notice of Appeal).

Bentrim filed a separate motion to reconsider that section of the October 28, 2014 Order which addressed the court's summary judgment rulings. On January 26, 2015, the Court entered an Order reaffirming summary judgment as to ten of Bentrim's causes of action. (R. pp. 11-12; Order Denying Defendant's Motion for Summary Judgment).

Bentrim timely appealed the summary judgment rulings on March 5, 2015. (R. p. 121; Second Notice of Appeal). The two appeals were consolidated with consent of the parties and by Order of this Court dated March 26, 2015.

STATEMENT OF FACTS

The relevant facts are undisputed. Bentrim is a financial advisor. (R. p. 1056; June 9, 2014 Tr. 60:2-4). He began his career at Merrill Lynch in 1996 and then transferred to First Union Securities in 2000. (R. p. 772; Bentrim Depo. 9:15-10:8; R. p. 774; Bentrim Depo. 18:11-19). First Union Securities became Wachovia Securities when the merger between First Union and Wachovia occurred and Bentrim worked for Wachovia Securities until he left that employment in March of 2002. (R. p. 772; Bentrim Depo. 9:25-10:8). Bentrim purchased a home at 10 Nicholson Street in Charleston in 2000 with a purchase-money mortgage from Bank

[2] The lower court initially granted summary judgment on an eleventh claim for violation of the South Carolina Unfair Trade Practices Act but later reversed that ruling. That claim is not a part of this appeal.

of America. (R. p. 774; Bentrim Depo. 20: 1-25). In 2002, he refinanced his home by borrowing $182,700 from his employer, First Union. (R. p. 775; Bentrim Depo. 21:12-20; R. p. 1306; Satisfaction of Bank of America Mortgage at Book 412, Page 295; R. p. 983; April 28, 2014 Tr. 34:2-20).

As part of the refinance, Bentrim executed a Note to First Union in the amount of $182,700.00, together with interest, on March 12, 2002. (R. pp. 1115-1118; Note; R. p. 30; Complaint, ¶ 9). The Note was secured by a Mortgage, also executed on March 12, 2002, and recorded in the Charleston County Registry in Mortgage Book C402 at Page 182. (R. pp. 1148-1153; Mortgage; R. p. 30; Complaint, ¶ 8).

At the time of the re-finance, Bentrim also had an equity line from First Union. (R. p. 64; Amended Complaint, ¶ 9). Bentrim used the proceeds from the new First Union loan to satisfy the Bank of America purchase-money mortgage in full and also to substantially pay down the First Union equity line. (R. p. 1307; Settlement Statement; R. p. 983; April 28, 2014 Tr. 34:1-20). To document the pay down of the equity line Bentrim entered into a Modification Agreement whereby the available credit for the equity line was reduced from $49,000 to $10,000. (R. p. 709; 2007 Complaint, ¶ 8; R. pp. 725-727; 2007 Complaint, Exhibit C).

Bentrim admits that he signed the March 12, 2002 Note and Mortgage in favor of First Union National Bank. (Initial Brief of Appellant, p. 2; R. p. 181; Plaintiff's Answers to Requests for Admission, ¶ 1; R. p. 973-974; April 28, 2014 Tr. 24:23-25:1). Further, he admits that he has made no payments on this loan since 2009. (R. p. 781; Bentrim Depo. 48:14-22).

Wells Fargo has physical possession of the original Note and has brought it to court on multiple occasions. Judge Scarborough inspected the Note. (R. p. 1063; Oct. 16, 2014 Tr. 5:14-24; R. p. 1043; June 9, 2014 Tr. 5:4-7). The Note is made payable to First Union National Bank.

There are no endorsements on the Note or allonges to the Note. (R. p. 1043; June 9, 2014 Tr. 6:4-11; R. p. 1115-1118, Note).

First Union merged with Wachovia Bank, N.A., which in turn merged with Wells Fargo Bank, N.A. (R. p. 1286; Lost Note Affidavit of Tracy Thomas, ¶ 5; R. p. 772; Bentrim Depo. 9:25-10:4). Bentrim acknowledges the occurrence of these bank consolidations and admits that Wells Fargo is the successor in interest to First Union. (R. p. 772; Bentrim Depo. 9:25-10:4; R. p. 1043; June 9, 2014 Tr. p. 7:17-19).

Similarly, Bentrim does not dispute that the Note has always been serviced by Wells Fargo or its predecessor entities. (Initial Brief of Appellant, p. 12: "Bentrim contends [that] . . . at all times [Wells Fargo] was merely a loan servicer. . . .").

STANDARD OF REVIEW

This Court reviews grants of summary judgment under the same standard that is applied at the trial level. *Foster v. Foster*, 384 S.C. 380, 383, 682 S.E.2d 312, 313 (Ct. App. 2009). Summary judgment should be issued when the evidence collectively shows 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." Rule 56(c), SCRCP. Courts agree that "[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

ARGUMENTS

Bentrim signed a Note and Mortgage in favor of First Union. Through a series of bank mergers, First Union became Wells Fargo. Bentrim refuses to make payments to Wells Fargo on the grounds he received the loan from First Union, not Wells Fargo. The lower court rejected this position, finding Wells Fargo is the holder of the note. Bentrim does not receive a windfall simply because First Union and Wells Fargo merged banks.

I. Wells Fargo is the holder of the note as a matter of law.

The lower court correctly ruled that Wells Fargo is the "holder" of the Note. This ruling is wholly supported by two undisputed facts: 1) Wells Fargo is in physical possession of the Note, and 2) the Note is payable to First Union, a predecessor in interest to Wells Fargo. Bentrim asserts that Wells Fargo cannot enforce the Note because it is not specifically made payable to Wells Fargo. While he would undoubtedly like to see his debt obligation erased, his argument defies logic and is not supported by either the Uniform Commercial Code or the National Bank Act.

The Note is a negotiable instrument governed by the UCC. The UCC provides the definition of a "holder":

> 'Holder' means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank.

S.C. Code Ann. § 36-1-201(20) (Rev. 2003).[3]

[3] The definition of "holder" has remained essentially the same since 1991. The definition, however, was "reorganized for clarity" in 2014. S.C. Code Ann. § 36-1-201(20), Official Comment (Supp. 2014). It now reads: "'Holder' means: (A) the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession . . . ." For purposes of this analysis, it makes no difference which version of the definition is used.

Wells Fargo is the holder because it is the "person who is in possession of" the Note and the Note is, in effect, "issued" to it. While the name "Wells Fargo" does not appear on the Note, the Note is payable to First Union, and Wells Fargo, by operation of federal law, is deemed to be the same corporation as First Union. When national banks merge, the successor bank *becomes* the predecessor bank in the eyes of the law. When First Union and Wachovia merged, the consolidated entity known as Wachovia was deemed to be the same company as its predecessor in interest, First Union. Similarly, after merging with Wachovia, Wells Fargo is deemed to be the same bank as Wachovia. Further, all property interests, including promissory notes, were transferred to and vested in Wells Fargo without any type of transfer, such as endorsement. Therefore, due to these bank consolidations, a promissory note made payable to First Union is the equivalent of a promissory note made payable to Wells Fargo.

The National Bank Act provides as follows:

> The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association **shall be deemed to be the same corporation** as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation **without any deed or other transfer**. The consolidated national banking association, upon the consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, and receiver, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the consolidating banks or banking associations at the time of consolidation, subject to the conditions hereinafter provided.

12 U.S.C. § 215(e) (emphasis added). South Carolina has a parallel banking statute to the same effect. S.C. Code Ann. § 34-3-850 (Supp. 2014).

While there is no South Carolina case law directly on point, courts across the country have uniformly held that, following a merger of national banks, the successor bank is deemed the holder of promissory notes previously made payable to one of the consolidating banks. *See In Re Yopp*, 720 S.E.2d 769, 775 (N.C. App. 2011) (under North Carolina law, successor becomes legal holder of former bank's promissory notes); *Fidelity Tax, L.L.C v. Hall*, No. 12AP–923, slip op. at 3–4 (Ohio App. July 18, 2013) (successor bank becomes holder of promissory note following merger under both Ohio and federal law); *In Re N.C. Deed of Trust*, 719 S.E.2d 207, 210–11 (N.C. App. 2011) ("[T]he evidence of the merger between LaSalle and Bank of America is competent evidence that Bank of America is the holder of the Loan Documents"); *Premier Bank v. Diagle*, 599 So. 2d 503, 504–05 (La. App. 1992) (successor bank in merger becomes holder of prior bank's promissory notes under 12 U.S.C. § 215); *Valley Nat'l Bank v. Chaim*, 984 N.Y.S.2d 635, 635, 2014 WL 30712 (N.Y. Sup. Ct. 2014) (under 12 U.S.C. § 215, successor bank acquires rights to prior bank's notes and mortgages); *Berkshire Bank v. Hartford Club*, No. HHDCV136042955S, 2014 WL 565173, at *4 (Conn. Super. Ct. Jan. 13, 2014) (successor bank is holder of note following merger with another bank because it gains title to prior bank's instruments); *Capital One, N.A. v. Finmar Assocs.*, No. 3403–11, 2013 WL 3242525, at *4 (N.J. Super. Ct. App. Div. June 28, 2013) (under both state and federal law, successor bank is holder of prior bank's notes following merger); *In re Rodriguez*, No. 11-BK-18847-RGM, 2015 WL 403968, at *2 (E.D. Va. Jan. 29, 2015) ("On November 1, 2009, World [Savings Bank] merged with Wachovia Bank, N.A. Wachovia subsequently merged with Wells Fargo Bank, N.A. Under 12 U.S.C. § 215(e), Wells Fargo became the holder of the Note upon which this case is based.").

The unspoken result of Bentrim's argument is that the Note is *not enforceable by any party* and he receives a windfall in the form of a cancelled debt obligation. The law is not to be construed in a manner that would award a party an undue windfall. *See Williamson v. U.S. Fire Ins. Co.*, 314 S.C. 215, 218, 442 S.E.2d 587, 588 (1994) (explaining that public policy does not favor windfalls); *see also Edwards v. Columbia, S.C., Teachers Fed. Credit Union*, 276 S.C. 89, 275 S.E.2d 879 (1981). The UCC and 12 U.S.C. § 215(e) work together to prevent the illogical outcome of Bentrim's argument. Neither Bentrim nor any other former customers of First Union should have their debts forgiven simply because First Union merged with Wachovia and Wachovia with Wells Fargo.[4]

Wells Fargo's status as holder gives it the right to enforce the Note: "The holder of an instrument whether or not he is the owner may . . . enforce payment in its own name." S.C. Code Ann. § 36-3-301 (Rev. 2003). Accordingly, the lower court was correct in ruling that Wells Fargo is the holder and entitled to enforce the Note. [5]

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[4] Since federal law and state law do not conflict in this instance, preemption is not an issue here; but, if it were, federal law would prevail. By virtue of the Supremacy Clause of the United States Constitution, "[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Federal courts have determined that 12 U.S.C. § 215 preempts state law in matters concerning appointment of successor fiduciaries and general fiduciary duties. *See NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1497 (5th Cir. 1990). It follows that, if the operation of 12 U.S.C. § 215(e) makes a successor bank the holder of the prior bank's instruments, then that result preempts a contrary result under UCC Article 3.

[5] Section 36-3-301 was amended in 2008 to recognize that "enforcement is not limited to holders." S.C. Code Ann. § 36-3-301, Official Comment (Supp. 2014). Wells Fargo, because it is the holder, is also a "person entitled to enforce" under the new version of the statute. ("'Person entitled to enforce' an instrument means (i) the holder of the instrument . . . ,"). Further, even if Wells Fargo were not the holder, it would still be entitled to enforce the Note under the new version of the statute as "a nonholder in possession of the instrument who has the rights of a holder" since, under the National Bank Act, Wells Fargo "hold[s] and enjoy[s] all

II. Bentrim's attempt to overturn *Draper* is not properly before the Court.

Bank of America, N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013), established that a loan servicer has standing to initiate a foreclosure action on behalf of the owner of the loan. Bentrim "contends that not only should the Court of Appeals decline to extend *Draper* to the appeal at bar, but that it should overturn the case entirely." (Initial Brief of Appellant, p. 14). *Draper*, however, is not properly before the Court. The lower court's rulings in this case rest on Wells Fargo's status as a holder, not servicer, and for purposes of this appeal, Wells Fargo is not relying on the *Draper* holding as an additional sustaining ground.

Bentrim acknowledges the lower court did not rely on *Draper*, yet he urges the Court to overturn the case because he "believes Wells Fargo will argue *Draper*'s application as an additional sustaining ground." (Initial Brief of Appellant, p. 13). Bentrim's supposition - which is incorrect - does not give him standing to argue against *Draper* in this appeal. An appellate court may consider an additional sustaining ground when "the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000). Bentrim, of course, is not the "party who prevailed in the lower court." As such, he may only address an issue if it is first raised by Wells Fargo as an additional sustaining ground.

There is therefore no reason for this Court to address *Draper*. If the Court were to do so, however, it should uphold its prior opinion. The *Draper* decision comports with the vast majority of decisions from courts across the country which have addressed the issue of whether a servicer has standing to bring a foreclosure. *See, e.g., Greer v. O'Dell*, 305 F.3d 1297, 1301

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rights of property . . . in the same manner and to the same extent as such rights . . . were held or enjoyed" by First Union and Wachovia. 12 U.S.C § 215(e).

(11th Cir. 2002) ("[T]he sole issue before us is whether a loan servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services. We answer this question in the affirmative."); *J.E. Robert Co., Inc. v. Signature Prop's, LLC*, 71 A.3d 492, 500 (Conn. 2013) (loan servicer is entitled to enforce the note it services) (collecting cases); *Green Tree Serv. LLC v. Sanders*, No. 2005-CA-000371-MR, 2006 WL 2033668, at *3–4 (Ky. Ct. App. July 21, 2006) (servicer of a mortgage loan is a real party in interest in a foreclosure action); *U.S. Bank Nat'l Ass'n v. Gunn*, 31 F. Supp. 3d 636, 639–40 (D. Del. 2014) (servicer is a real party in interest in cases where the loan serviced is the subject of litigation); *In re Neals*, 459 B.R. 612, 617 (Bankr. D.S.C. 2011) ("[T]here is a general view, which has been accepted in this jurisdiction and others, that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage.").[6]

In the event the Court believes Bentrim's arguments regarding *Draper* warrant appellate review, Wells Fargo respectfully requests that the Court establish a supplemental briefing schedule allowing it, as well as any interested third parties, to fully address Bentrim's unusual request.

III. Summary judgment was properly entered for ten of Bentrim's causes of action.

A. There is no need for additional discovery because the facts relevant to the lower court's rulings are not disputed.

Throughout his opening brief, Bentrim makes the argument that he should be allowed more time for discovery before summary judgment is considered. Requests for more discovery, however, do not operate as a cure-all when a plaintiff's claims are defective as a matter of law.

[6] As Bentrim's theories of liability have evolved, so has his position on *Draper*. He previously acknowledged to Judge Scarborough in open court that a servicer has the right to bring a foreclosure action. (R. p. 899; Feb. 10, 2014 Tr. 15:3-4: "We concede Mr. Laney's point that a servicer can bring a claim.").

Instead, summary judgment can be forestalled only when the additional requested discovery bears on dispositive issues. *See, e.g.*, *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional *relevant* evidence and that the party is 'not merely engaged in a "fishing expedition."'" (quoting *Baughman v. AT&T Co.*, 306. S.C. 101, 112, 410 S.E.2d 537, 544 (1991))) (emphasis added); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009) (affirming summary judgment despite the appellant's claim for more discovery because "on appeal, Guinan fails to demonstrate further discovery would uncover additional *relevant* evidence or create a genuine issue of material fact") (emphasis added); *see also Wieters v. Roper Hosp., Inc.*, 58 F. App'x 40, 44 (4th Cir. 2003) (affirming summary judgment despite the submission of a Rule 56(f) affidavit because the nonmovant had failed to explain how the additional requested discovery "will be useful in resisting summary judgment").

In this regard, "[a] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (quoting *Baughman*, 306. S.C. at 116, 410 S.E.2d at 546). This legal principle underscores the fundamental defect in Bentrim's request for more discovery here. There is no dispute that Wells Fargo is the successor in interest to First Union, by way of merger with Wachovia, or that the Note is made to First Union without any subsequent endorsements or allonges. No amount of discovery can change these dispositive facts. *See Powell v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008) (reiterating the "overarching rule of civil procedure" that "whatever doesn't make any difference, doesn't matter" (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987))).

Similarly, the lower court granted summary judgment on ten of Bentrim's causes of action because the discovery of additional evidence could not salvage those claims. The Court should reject Bentrim's attempt to unnecessarily prolong this matter with additional discovery that cannot alter the lower court's unavoidable conclusions.

B. The Consumer Protection Code does not apply to Bentrim's loan.

The lower court correctly granted summary judgment on Bentrim's claim alleging a violation of S.C. Code Ann. § 37-5-108 (Rev. 2015), part of the South Carolina Consumer Protection Code. This section "applies to actions or other proceedings to enforce rights arising from consumer credit sales, consumer leases, *consumer loans*, and consumer rental-purchase agreements." S.C. Code Ann. § 37-5-102 (emphasis added). "Consumer loan" is a defined term under the statute. S.C. Code Ann. § 37-3-104. Importantly, however, the term "does not include a loan secured by a first lien *or equivalent security interest in real estate*." S.C. Code Ann. § 37-3-105 (emphasis added). Therefore, as a matter of law, Section 37-5-108 does not apply to a first mortgage real estate loan or its equivalent.

While Bentrim's Mortgage is technically a second lien, it is difficult to imagine a security interest more "equivalent" to a first lien than the Mortgage in question. At the time of the 2002 closing, Bentrim had a purchase-money mortgage from Bank of America in first lien position and an equity line from First Union as a second lien. Bentrim used the new $182,700 loan from First Union to completely satisfy the Bank of America purchase-money mortgage and to substantially pay down the First Union equity line. The parties' Modification Agreement reduced the available credit from $49,000 to $10,000. The equity line then assumed first lien position, while the new Mortgage took second position. In most cases, a new lender would have insisted on a subordination of the equity line to its mortgage. However, given the minimal

amount of the equity line and the fact that it held both loans, there was no practical reason for First Union to require a subordination agreement. In practical effect, the First Union Mortgage replaced the Bank of America purchase money mortgage and is the equivalent of a first lien.

In interpreting a statute, courts must ascribe meaning to all parts of the statute. *State ex rel. McLeod v. Nessler*, 273 S.C. 371, 373, 256 S.E.2d 419, 420 (1979). If the word "equivalent" found in Section 37-3-105 is to have any meaning at all, Bentrim's loan is the equivalent of a "loan secured by a first lien" and, therefore, is not a "consumer loan." Accordingly, the Consumer Protection Code does not apply to his loan, and summary judgment was appropriate on this cause of action.

C. The undisputed evidence fails to support several elements of Bentrim's fraud causes of action.

The lower court properly granted summary judgment as to Bentrim's three fraud-based causes of action: fraud (sixth cause of action); constructive fraud (seventh cause of action), and mail fraud (sixteenth cause of action). The nine elements of fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. *M. B. Kahn Const. Co. v. S.C. Nat. Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). For constructive fraud, proof of actual intent to deceive is not required. *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 350, 108 S.E.2d 414, 424 (1959). To the extent South Carolina recognizes a civil cause of action for mail fraud, its elements mirror those of common law fraud. *Gentry v. Yonce*, 337 S.C. 1, 8, 522 S.E.2d 137, 141, n.8 (1999). Failure to prove any element of fraud is fatal to the action and proper grounds

for summary judgment. *Robertson v. First Union Nat. Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002).

Bentrim's Initial Brief sets forth six specific acts which he contends constitute fraud on the part of Wells Fargo. A brief analysis of these allegations demonstrates why summary judgment was proper:

1. "[C]laiming holder status in the 2007 and 2009 foreclosure actions."

Prior to the instant action, Bentrim's failure to make timely payments on this loan led Wachovia to file foreclosure actions in 2005, 2007 and 2009. The 2005 and 2007 actions were dismissed after Bentrim reinstated the loans ahead of the foreclosure sales. The 2009 foreclosure was dismissed when no attorney appeared for Wachovia at the final hearing. (R. p. 27; September 12, 2006 Stipulation of Dismissal for 2005-CP-10-4814; R. p. 25; December 21, 2007 Order Dismissing 2007-CP-10-3933; R. p. 26; July 7, 2010 Order Dismissing 2009-CP-10-4700). The complaints in the 2007 and 2009 cases alleged that Wachovia was the holder of the Note and Mortgage. Wachovia's allegation does not give rise to a cause of action for fraud. As an initial matter, Wachovia *was* the holder so the representation was true.[7] Second, even if it

[7] Bentrim states repeatedly, but inaccurately, in his Initial Brief that Wells Fargo "sold the Note." In actuality, Wachovia did not sell the note. Rather, Wachovia sold a beneficial interest in the loan to its wholly-owned subsidiary, The Money Store Service Corporation. (R. p. 1294; Wakefield Affidavit, ¶¶ 3-4). The undisputed facts in the record demonstrate that Wells Fargo and its predecessor entities have held the Note at all times and the Note itself was never transferred. (R. p. 1286; Lost Note Affidavit, ¶ 5). These are factual matters and not the proper subject of expert testimony. Even so, Bentrim's expert affidavits, at most, conclude that the sale of the participation interest constitutes a sale of the "loan" and do not purport to establish a transfer of the commercial paper. These irrelevant "opinions" cannot overcome this case's actual undisputed facts or the lower court's summary judgment rulings. *See generally* 49 C.J.S. *Judgments* § 330 (2009) (explaining that "mere general statements and opinions by an expert are insufficient to controvert a movant's properly presented evidence on a motion for summary judgment"); *see also Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.").

were not true, Bentrim took no action in reliance on the allegation and suffered no resulting damage. The matters were never adjudicated, foreclosure never occurred and, at all times, Bentrim maintained possession of the house. Further, to the extent he paid money to reinstate the Mortgage, he will be given credit for the amount paid in any foreclosure action.[8]

2. "Representing to Bentrim that it was the owner of his mortgage when it was not."

For the same reasons, this representation does not give rise to claims based on fraud: it was true, Bentrim did not rely, and Bentrim suffered no damage.[9]

3. "The misleading and fraudulent Lost Note Affidavit."

Bentrim refers to the Lost Note Affidavit executed by Wells Fargo employee Tracey Thomas on February 7, 2012. (R. pp. 1285-1192; Lost Note Affidavit). Prior to Bentrim's filing this lawsuit in 2011, Wachovia brought three foreclosure actions against Bentrim. In the last foreclosure action, Brock & Scott PLLC represented Wachovia. At the time Bentrim initiated this lawsuit in 2011, Wells Fargo was unable to locate the original Note. Thomas executed the Lost Note Affidavit in the belief that the original was lost. (R. pp. 850-854; Thomas Depo. 112:19 – 125:13). Brock & Scott later contacted Wells Fargo and informed it that the original

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[8] While he contested Wachovia's right to foreclose in the previous actions, Bentrim tacitly admits that Wachovia had the right to collect his previous payments on the Note since he admits Wachovia was the servicer of the loan.

[9] Bentrim's Initial Brief inappropriately cites to a 2011 Office of the Comptroller of the Currency Consent Order and a 2012 Consent Judgment. The matters are clearly irrelevant. The OCC Order states that it does not give individual borrowers like Bentrim "any legal or equitable right, remedy or claim." (R. p. 1204; OCC Order, p. 27, ¶ 10). Courts across the country have ruled that the OCC order cannot be used as a defense to a foreclosure action. *See, e.g., Green v. Bank of Am. Corp.*, 530 F. App'x 426, 430 (6th Cir. 2013); *Hersh v. CitiMortgage, Inc.*, 2:13-CV-1344, 2013 WL 6858443 (W.D. Pa. Dec. 30, 2013); *Anderson v. Deutsche Bank Nat. Trust Co.*, 13-CV-12854, 2014 WL 988994 (E.D. Mich. Mar. 13, 2014). Similarly, by its very terms, the 2012 Consent Judgment unambiguously states that it cannot "constitut[e] evidence against Defendant [*i.e.* Wells Fargo]." (R. p. 1212, line 16; Consent Judgment, p. 2). The Court should not credit Bentrim's improper reliance on these irrelevant materials.

Note was still in its possession. (R. p. 966; April 28, 2014 Tr. p. 17:5-18). The Lost Note Affidavit accurately sets forth the terms of the Note and states that Wells Fargo had made a diligent search but was unable to locate the Note. (R. pp. 1285- 1286; Lost Note Affidavit ¶ 3).

The Lost Note Affidavit cannot constitute fraud. At the time Thomas signed the affidavit, she believed the averments regarding the lost Note in the affidavits were true. Only later would she find that the Note had been in the possession of Wells Fargo's previous attorneys. To constitute fraud, the allegedly fraudulent statements must be false at the time they were made. *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 440, 339 S.E.2d 142, 146 (Ct. App. 1985) ("The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date."). Moreover, the purpose of the Lost Note Affidavit was to serve as a substitute for the original Note. Bentrim could not have relied on the Lost Note Affidavit - it was simply a recitation of the terms from the original Note. Similarly, the Lost Note Affidavit, which was produced during the pendency of the lawsuit, could not have caused Bentrim any damages.

4. "The attempt to pass off copies of the Note from the real estate closing file as the Note."

Bentrim is presumably referring to the production of a copy of the Note during discovery. As an initial matter, the South Carolina Rules of Evidence specifically allow for the use of duplicates. S.C. Rule Ev. 1003. Further, these allegations, even viewed in the light most favorable to Bentrim, fail to meet the elements of a fraud claim. Because the document was produced during litigation, the allegedly fraudulent Note was *not* relied on by Bentrim, it was *not* in any way material to any decision made by him, and it caused *no* damages. *See M. B. Kahn*, 275 S.C. at 384, 271 S.E.2d at 415 (stating the elements of a fraud claim). There is no scintilla of evidence in the record to suggest otherwise.

5. "[R]epeated averments that the Loan had not been sold."

As an initial matter, the loan has *not* been sold. Rather, a beneficial interest in the loan was sold, giving the purchaser rights to benefits such as income. (R. p. 1294; Wakefield Affidavit, ¶ 3). Regardless, Bentrim is again complaining about the actions of Wells Fargo's attorneys during the course of this litigation. These allegations, even viewed in the light most favorable to Bentrim, cannot state a cause of action for fraud. Again, because the "averments" were made during litigation, they were not relied on by Bentrim and caused no damages. *See M. B. Kahn*, 275 S.C. at 384, 271 S.E.2d at 415 (stating the elements of a fraud claim).

6. Wells Fargo "provided false and misleading account statements to Bentrim."

This is the crux of Bentrim's claim - he disputes the amount owed under the Note. What should have been a simple request by Bentrim for an accounting turned into a series of demonstrably irrelevant arguments and four years of litigation. The lower court requested and reviewed the entire accounting history of the Note and Mortgage and determined that there was no evidence in the record to suggest that Wells Fargo knowingly provided false bank statements to Bentrim. (R. p. 976; Hearing Transcript April 28, 2014, p. 27: 9-24).

In summary, there is not a scintilla of evidence in the record to support Bentrim's claims for fraud, constructive fraud or mail fraud, and summary judgment was therefore appropriate on these causes of action.

D. The filing of pleadings, including a *lis pendens*, is absolutely privileged and cannot form the basis for a claim of slander of title.

The Amended Complaint clearly states that the slander of title cause of action is based on Wells Fargo's alleged wrongful filing of the previous foreclosure complaints and accompanying *lis pendens*. (R. p. 78; Amended Complaint, ¶ 115: "Based on the foregoing, Defendant and/or its predecessors in interest, *by virtue of filing improper foreclosure actions and*

lis pendenses . . . ."). As explained in great detail by this Court in a previous decision, all pleadings, including a *lis pendens*, are protected from slander of title claims by an absolute privilege. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). This is different from a situation in which a party wrongfully files an invalid lien. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012) (filing of a null mortgage); *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995) (wrongfully recording a lien - *as opposed to filing a pleading* - can be actionable as slander of title). Summary judgment was correct because Bentrim's slander of title claim is barred by the absolute privilege afforded pleadings.

E. Bentrim's payments to Wells Fargo cannot constitute conversion.

Bentrim asserts that S.C. Code Ann. § 36-3-420 supports his claim for conversion. This argument misinterprets the statute. Section 36-3-420 states:

> The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. **An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument** or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

This code section generally applies to those instances when negotiable instruments are stolen or forged. Of course, neither situation applies to Bentrim's Note. More to the point, the statute specifically prohibits a conversion action by the "issuer" of a negotiable instrument. An "issuer" is defined by the UCC as a "maker or drawer of an instrument." S.C. Code Ann. § 36-3-105 (Rev. 2003). In this case, Bentrim is the maker of the instrument. Accordingly, the statute he cites - rather than support a conversion action - actually bars his conversion claim under the UCC. This conclusion is affirmed by the case he cites. *See Halifax Corp. v. Wachovia Bank*, 268

Va. 641, 656, 604 S.E.2d 403, 410 (2004) (plaintiff who issued the checks was barred from bringing a conversion action).

Summary judgment on the conversion claim was appropriate based on the common law too. Bentrim alleges that Wells Fargo converted his payments by failing to properly account for the amounts owed. (R. p. 79; Amended Complaint, ¶ 117). Under South Carolina law, these allegations cannot support a claim for conversion. The only funds which Wells Fargo received from Bentrim were payments on the subject loan. "There can be no conversion where there is a mere obligation to pay a debt. Thus, where there is merely the relationship of debtor and creditor, an action based on conversion of the funds representing the debt is improper." *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1978). In *Owens*, the Supreme Court explained that "the overwhelming authority is that money on deposit in a bank cannot be the subject of conversion *unless it was intended to be kept separate or constituted a specific intact fund.*" *Id.* (emphasis added). There is no evidence in the record that Bentrim's payments were intended to be kept separate or constituted a specific intact fund. The lower court's grant of summary judgment was correct.

F. There is no independent cause of action for breach of the implied covenant of good faith and fair dealing.

Bentrim wrongly claims that breach of the implied covenant of good faith and fair dealing is an independent cause of action. His breach of contract claim was dismissed with prejudice by order of Judge Dennis on November 20, 2012. (R. p. 18, lines 8-9; Order dated Nov. 20, 2012). Bentrim did not file a Rule 59 motion or appeal the order. With no pending cause of action for breach of contract, the law does not support a stand-alone cause of action for breach of the implied covenant of good faith and fair dealing. *See RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (holding that

the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract). According, summary judgment was correct on this cause of action.

G. There is no evidence of special damages to support the civil conspiracy claim.

The elements of a civil conspiracy are "(1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006) (granting summary judgment when not all elements of conspiracy claim were met). Reviewing the record in the light most favorable to Bentrim, he fails to meet the requirement of special damages.

In order to prove special damages, Bentrim must show that "the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint." *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167–68, 708 S.E.2d 218, 222–23 (Ct. App. 2011). In this case, however, the conspiracy cause of action simply regurgitates those allegations found throughout the seventeen-count Amended Complaint (R. pp. 63-83; Amended Complaint). In the conspiracy count, Bentrim alleges that Wells Fargo, together with Wachovia Retail Credit Servicing, Inc. and an unknown party, conspired to: (1) "charg[e] and collect[] improper compensation from [him]," and (2) "assert[] liability against [him] where no liability existed." (R. p. 80; Amended Complaint, ¶ 120). In other words, Bentrim alleges that Wells Fargo charged him too much and also should not have charged him at all. These same allegations are found throughout the "Factual Allegations" section of the Amended Complaint, and the "Factual Allegations" are then re-stated and re-alleged for each of the seventeen causes of action. An examination of several causes of action demonstrates the overlap between the conspiracy claim and the rest of the Amended Complaint:

- Bentrim's claim for negligence alleges "improper . . . servicing, and accounting." (R. p. 73; Amended Complaint, ¶ 69).

- Bentrim's claim for conversion alleges the bank "accept[ed] payments from [Bentrim] when Wachovia was not the owner of the Note." (R. p. 76; Amended Complaint, ¶ 87).

- Bentrim's fraud, constructive fraud, and mail fraud claims in the Amended Complaint make no particularized allegations apart from the shared "Factual Allegations," but according to his Initial Brief they rely on allegations that Wells Fargo or its predecessors improperly "claim[ed] holder status in the 2007 and 2009 foreclosure actions"; "represented[ed] to Bentrim that it was the owner of the mortgage when it was not"; and "provid[ed] false and misleading fraudulent and misleading account statements to Bentrim." (Initial Brief of Appellant, p. 46).
- Bentrim's Fair Debt Collection Practices Act claim alleges that Wells Fargo made "false, misleading and deceptive assertions regarding [his] indebtedness and [Wells Fargo's] right to pursue collection, including the character and amount of the alleged debt." (R. p. 81; Amended Complaint, ¶ 125).

- Bentrim's Consumer Protection Code claim alleges that Wells Fargo made "false, misleading and deceptive assertions regarding [Bentrim's] indebtedness and [Wells Fargo's] right to pursue collection, including the character and the amount of the alleged debt." (R. p. 81; Amended Complaint, ¶ 128).

These claims may vary somewhat in the wording, but they make the same allegations as the conspiracy claim. Because the claim for conspiracy fails to allege acts "separate and independent" from the other claims, it must fail.

Not surprisingly, Bentrim's claim for "special damages" related to the alleged conspiracy is vague and non-specific. Dismissal of a claim for civil conspiracy is appropriate when "a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim . . . ." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009). Special damages cannot be generally alleged, but instead must "be specifically stated" to avoid dismissal. Rule 9(g), SCRCP; *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 99, 399 S.E.2d 19, 21 (Ct. App. 1990) (discussing Rule 9(g)); *AJG Holdings*, 392 S.C. at 168, 708 S.E.2d at 223 ("Special damages

must be properly pled, or the claim for civil conspiracy will be dismissed."). The Amended Complaint simply alleges that Wells Fargo "and its co-conspirators caused special harm and damages to Plaintiffs under South Carolina law." (R. p. 80; Amended Complaint, ¶ 121). It provides no explanation of what those special damages actually are. In response to Wells Fargo's interrogatories, Bentrim produced a Statement of Damages, which states that the alleged damages resulting from conspiracy are "to be determined by the trier of fact but no less than $100,000." (R. p. 1304; Statement of Damages, line E). This response lacks sufficient details and fails to satisfy South Carolina law. Accordingly, Judge Scarborough properly granted summary judgment on Bentrim's conspiracy claim.

H. Wells Fargo is not liable under the Fair Debt Collection Practices Act because it was deemed to have originated the debt.

Bentrim readily admits that First Union originated the Note and Mortgage. Further, he admits that Wells Fargo is the servicer of the loan. These undisputed facts are sufficient to uphold summary judgment.

A "debt collector," as defined by the Fair Debt Collection Practices Act, is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts . . . ." 15 U.S.C. § 1692a(6). There are six categories of exceptions to the definition. The term "debt collector" does not include: "(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (ii) concerns a debt which was originated by such person." First Union is Wells Fargo's predecessor in interest. Therefore, to the extent Wells Fargo is attempting to a collect a debt, the debt was originated "by such person," and Wells Fargo is not a "debt collector" under the statute. *See* 12 U.S.C. § 215(e) (when national banks merge, a successor bank in deemed to be the same bank as the predecessor bank).

Further, as explained in great detail by numerous courts, the statute does not apply to loan servicers. *See, e.g., Reese v. JPMorgan Chase & Co.*, 686 F. Supp. 2d 1291, 1311 (S.D. Fla. 2009); *Casault v. Fed. Nat'l Mortgage Ass'n*, 915 F. Supp. 2d 1113, 1126 (C.D. Cal. 2012); *Belin v. Litton Loan Servicing, LP*, No. 8:06–cv–760–T–24EAJ, 2006 WL 1992410, at *2 (M.D.Fla. July 14, 2006); *Warren v. Countrywide Home Loans, Inc.*, 342 F. App'x 458, 460–61 (11th Cir.2009); *Foxx v. Ocwen Loan Servicing, LLC*, No. 8:11-CV-1766-T-17EAK, 2012 WL 2048252, at *3 (M.D. Fla. June 6, 2012). Because Wells Fargo and its predecessors serviced the loan at all times, it cannot be liable under the FDCPA.

Wells Fargo is not a debt collector under the statute, and the lower court was therefore correct to grant summary judgment as to Bentrim's claim for violation of the FDCPA.

CONCLUSION

In this case, Bentrim presents a labyrinth of technical, but ultimately irrelevant, arguments based on the UCC in an attempt to erase his just debt obligation. The correct analysis, on the other hand, is simple and straightforward. Bentrim signed the promissory Note in 2002 in favor of First Union, which became the holder of the Note. First Union merged with Wachovia, which in turn merged with Wells Fargo. Wells Fargo and First Union, by operation of federal law, are deemed to be the same corporation. Wells Fargo has physical possession of the original Note, and there are no endorsements on or allonges to the Note. As such, Wells Fargo is the holder of the Note and entitled to enforce its provisions.

The lower court also granted summary judgment on ten of Bentrim's seventeen claims. In each instance, the lower court considered the evidence in the light most favorable to Bentrim and concluded, based on standard legal principles, that these ten claims should fail as a matter of law.

Therefore, Wells Fargo respectfully submits that the lower court's rulings are correct and should be affirmed.

Respectfully submitted,

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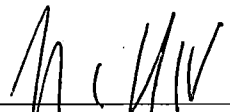

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March 7, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Master-In-Equity

Appellate Case No. 2014-002590
Circuit Court Case No. 2011-CP-10-2946

Brent E. Bentrim, ... Appellant,

v.

Wells Fargo Bank, N.A., ... Respondent.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

The undersigned counsel certifies that his Final Brief complies with Rule 211(b).

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March 7, 2016

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

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