

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen , Circuit Court Judge

Appellate Case No. 2016-001616

RECEIVED

AUG 29 2016

SC Court of Appeals

Alan F. McNeal And
Adrienne McNeal,

Appellants,

v.

Ocwen Loan Servicing,
LLC, and Nationstar
Mortgage, LLC,

Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Trial Court erred in dismissing the cause of action with prejudice named Fraud for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC.
2. Whether the Trial Court erred in dismissing the cause of action with prejudice named Violation of the Fair Debt Collection Practices Act for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC.
3. Whether the Trial Court erred in dismissing the cause of action with prejudice named Breach of Contract with Fraudulent Intent for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC.
4. Whether the Trial Court erred in dismissing with prejudice the cause of action named Unfair Trade Practices Act for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC.
5. Whether the Trial Court erred in dismissing with prejudice the causes of action against Ocwen for failure of the Appellants' First Amended Complaint to comply with South Carolina Rules of Civil Procedure: Rule 8, SCRPC.
6. Whether the Trial Court erred in dismissing the causes with prejudice of action against Ocwen for failure of the Appellants' First Amended Complaint to comply with South Carolina Rules of Civil Procedure: Rule 9, SCRPC.
7. Whether the Trial Court committed an abuse of discretion in making findings of fact that (1) the breach of contract claim is limited to the prepayment provision of the note and (2) that mortgagee must be provided written notice of prepayment since neither were based upon information admitted into evidence or so stated in the McNeals' pleadings.

8. Whether the Trial Court erred in dismissing the causes of action with prejudice against Ocwen thus not allowing the Appellants the opportunity to amend their Complaint.

STATEMENT OF THE CASE

Appellants, Alan F. McNeal and Adrienne McNeal ("McNeals"), filed their original Complaint on May 29, 2015. Then, Nationstar Mortgage, LLC ("Nationstar") filed a Notice of Removal and Ocwen Loan Servicing, LLC ("Ocwen") consented to the removal. (Nationstar and Ocwen are collectively referred to as "Defendants") The case was then remanded to the Court Of Common Pleas, 14th Judicial Circuit by order of the Honorable Sol Blatt, Jr., Senior United States District Judge, dated October 26, 2015.

Nationstar and Ocwen filed motions to dismiss in this case with the Court Of Common Pleas, 14th Judicial Circuit on November 3, 2016 and November 2, 2016, respectively.¹

McNeals filed their First Amended Complaint on November 13, 2015, within the time allowed for filing an amended Complaint without the Court's permission.

Nationstar subsequently filed Defendant Nationstar Mortgage LLC's Memorandum of Law in Support of Its Motion to Dismiss on January 13, 2016.

McNeals filed Plaintiffs' Reply and Revised Brief in Opposition to Defendants' Motions to Dismiss on January 29, 2016.

¹ Ocwen's first motion to dismiss was the same motion to dismiss it had filed in Federal Court which was based upon Federal Rules of Civil Procedure, but subsequently Ocwen filed an Amended Memorandum in Support of Motion to Dismiss by Defendant Ocwen Loan Servicing, LLC based upon the law of South Carolina on February 2, 2016.

Ocwen filed an Amended Memorandum in Support of Motion to Dismiss based upon the law of South Carolina on February 2, 2016.

Having been previously served Ocwen's Amended Memorandum, the McNeals filed their Plaintiffs' Reply Brief to Ocwen's Amended Memorandum in Support of Its Motion to Dismiss on February 2, 2016.

A hearing on the motions to dismiss was held before the Hon. Marvin H. Dukes, III on February 2, 2016 ("Hearing"), followed by a subsequent telephone hearing on February 15, 2016.

McNeals filed their Brief on Waiver of the Requirement of Tender on February 12, 2016. Ocwen in turn filed Defendant Ocwen Loan Servicing, LLC's Brief in Response to Plaintiff's Brief on Waiver of the Requirement of Tender on February 17, 2016.

A second telephone hearing was held on March 4, 2016.

The original order on the Motions to Dismiss was signed by the Hon. Marvin H. Dukes, III on April 19, 2016, and filed with the Clerk of Courts of Beaufort County, SC on the same date.

The McNeals filed their Plaintiffs' Motion for Reconsideration Pursuant to SCRPC 52 and 59 of an Order Granting Motion to Dismiss By Defendant, Nationstar Mortgage, LLC as to All Causes Of Action and Partially Granting and Partially Denying Motion to Dismiss by Defendant Ocwen Loan Servicing, LLC and Request For Findings of Fact pursuant to SCRPC 52 and 59 on April 29, 2016, and supplemented by the filing of a Supplemental Memorandum of Law in

Support of Motion for Reconsideration and for Findings of Fact filed on June 20, 2016, but sent to Judge Dukes via email on June 16, 2016.

A third telephone hearing was held on June 17, 2016.

On July 6, 2016, the Hon. Marvin H. Dukes, III signed an Amended Order Granting Motion To Dismiss By Defendant Nationstar Mortgage, LLC As To All Causes Of Action And Partially Granting And Partially Denying Motion To Dismiss By Defendant Ocwen Loan Servicing, LLC (hereinafter referred to as "Amended Order of Dismissal") and it was filed and notice given to McNeals on the same date.

Appellants timely filed a Notice of Appeal on August 4, 2016.

**STATEMENT OF FACTS AS ALLEGED IN MCNEALS' FIRST AMENDED
COMPLAINT ²**

On or about May 6, 2006, Appellants, Alan and Adrienne McNeal, executed a note to purchase and construct their primary residence. ("Subject Property") The construction was completed and the McNeals moved into their home. (McNeals' First Amended Complaint pages 3 and 4)

The McNeals defaulted in the payment of the loan because of the downturn in the economy which hurt the McNeals' home construction business. (McNeals' First Amended Complaint page 6)

On February 16, 2011, Ocwen filed a foreclosure lawsuit against the McNeals in the Court Of Common Pleas, 14th Judicial Circuit, in cause number

² The Statement of Facts is a limited recitation of the allegations made in the McNeals' First Amended Complaint and is modified only to take into account the portion of the order dismissing Nationstar which portion is not appealed.

2011-C P-07-00781 (hereinafter referred to as "Foreclosure Lawsuit") seeking a deficiency judgment in which Ocwen alleged it was the present lien holder. (McNeals' First Amended Complaint page 5)

On April 11, 2011, Ocwen's attorney filed an affidavit of default against the McNeals. (McNeals' First Amended Complaint page 7)

Without a court order, Ocwen, in a letter dated January 4, 2012, stated it wanted an inspection of the Subject Property, but instead, Ocwen used the opportunity to change the locks and "winterize" the home. (McNeals' First Amended Complaint page 8)

Sometime in February 2012, Mr. McNeal spoke with a representative of Ocwen and asked her if he could list the Subject Property for sale with a real estate agent. He told Ocwen's representative that he would be willing to invest money and his time to improve and freshen up the Subject Property to make it presentable for sale. Ocwen's representative agreed with Mr. McNeal's plan to improve and freshen up the Subject Property to prepare it for sale and for the McNeals to list the Subject Property for sale with a real estate agent. Relying upon the representations of Ocwen's representative, the McNeals spent over \$3,500.00 and Mr. McNeal's time and energy preparing the Subject Property for sale. (McNeals' First Amended Complaint page 8)

On March 18, 2012, the McNeals entered into a listing agreement with Ballenger Realty to offer the Subject Property for sale. (McNeals' First Amended Complaint page 8)

Within 10 days or so from the McNeals signing the listing agreement, Ocwen changed the locks again, and the realtor was unable to show the Subject Property to a prospective buyer whom she had taken to the Subject Property. (McNeals' First Amended Complaint page 8)

In April 2012, the McNeals obtained a cash offer from George B. and Judith B. Utter to purchase the Subject Property for \$530,000.00 which the McNeals accepted. The sales and purchase agreement was dated April 12, 2012 ("Sale") and was set to close on May 14, 2012 (hereinafter referred to as the "Closing Date"). The net proceeds from the Sale would have produced enough net proceeds to have paid the McNeals' obligations pursuant to the Note and Mortgage in full. The McNeals hired Brandon Smith, an attorney licensed to practice law in South Carolina, to help them get the sale approved by Ocwen. It was necessary to get Ocwen's approval because the Foreclosure Lawsuit and the Lis Pendens filed by Ocwen were intended to prevent the sale of the Subject Property without Ocwen's approval. (McNeals' First Amended Complaint page 9, paragraph 40, & page 11, paragraph 47)

On or about April 25, 2012, Brandon W. Smith submitted a package of information necessary to obtain Ocwen's approval of the sale including proof the buyers had sufficient cash to pay the purchase price and closing costs. Ocwen never asked for more information. (McNeals' First Amended Complaint page 9)

On May 3, 2012, Ocwen filed a certificate of service in the Foreclosure Lawsuit for a "Notice of Denial of Loan Modification or Other Means of Loss Mitigation" claiming the document had been served on the McNeals, but no such

form appears in the Clerk of Courts of Beaufort County records of the Foreclosure Lawsuit, and the McNeals have not located such a document in their papers regarding the Foreclosure Lawsuit. (McNeals' First Amended Complaint page 9 and 10)

Ocwen informed the McNeals, through a telephone conversation with Brandon W. Smith, their attorney, their sale would not be approved unless the price was increased, but Ocwen's personnel refused to specify by how much the price must be increased to obtain Ocwen's approval. (McNeals' First Amended Complaint page 10)

Ocwen officially refused to permit the sale from occurring by letter dated June 5, 2012. This violated the provision in the Note allowing prepayment without penalty. (McNeals' First Amended Complaint page 10)

In a desperate attempt to save the sale, the McNeals obtained an appraisal of the Subject Property from a certified, reputable appraiser, who valued the Subject Property at \$470,000.00. This appraisal was sent to Ocwen by Brandon W. Smith, but Ocwen never made a response or commented on the appraisal despite attempts to communicate with Ocwen about the real value of the Subject Property and to save the \$530,000.00 cash Sale. (McNeals' First Amended Complaint page 10)

The buyers, who had agreed to purchase the Subject Property for \$530,000.00 in cash, were still ready, willing, and able to close the sale of the Subject Property, and they provided Ocwen proof they had the funds to pay cash for the purchase of the Subject Property. They significantly extended the time in

which to close the sale until August 2012, finally giving up only after a substantial period of time passed after Ocwen refused to allow the sale to proceed. Then and only then did they ask for their earnest money to be returned and cancelled the contract. (McNeals' First Amended Complaint pages 10 and 11)

The sales price of \$530,000.00 would have resulted in net proceeds sufficient to have paid in full the obligations owed pursuant to the Note and Mortgage. Furthermore, if the charges for force-placed insurance had been reasonable, bona fide, and/or fair, the net proceeds available to the McNeals would have been even greater. (McNeals' First Amended Complaint page 11)

Ocwen failed to notify the court that Ocwen had prevented the McNeals from selling the Subject Property as a means of loss mitigation as it was required to do pursuant to the South Carolina Supreme Court's Administrative Order 2011-05-02-01 issued on May 2, 2011 ("Administrative Order")³. This failure was a misrepresentation to the court to allow Ocwen and Nationstar to continue to pursue the Foreclosure Lawsuit without having to address with the court the consequences of Ocwen's refusal to allow the Sale to be consummated. (McNeals' First Amended Complaint page 14)

From the time Ocwen blocked the Sale for \$530,000.00 to pay off the note and mortgage in full, until Ocwen ceased being the servicer of the loan, Ocwen continued to charge the McNeals interest, force-placed insurance premiums, and other fees and expenses. (McNeals' First Amended Complaint pages 16, 21, 28, 34, and 37)

³ In re Mortg. Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011)

Until Ocwen surrendered servicing of the loan to Nationstar, Ocwen wrongfully reported to various credit reporting agencies the foreclosure and the delinquent payments which became due after the time when the cash sale for \$530,000.00 would have closed. (McNeals' First Amended Complaint page 19)

It is believed that Nationstar began servicing the Note and Mortgage sometime in May or June 2013 as a result of the sale and assignment of the servicing contract by Ocwen, and the purchase and acceptance of the assignment by Nationstar on or about May 31, 2013. (McNeals' First Amended Complaint pages 11 and 12)

Some eight (8) months later, Nationstar substituted itself as Plaintiff in place of Ocwen in the Foreclosure Lawsuit on January 28, 2014. (McNeals' First Amended Complaint page 12)

On March 27, 2014, almost two (2) years after Ocwen wrongfully prevented the consummation of the Sale of the Subject Property for \$530,000.00, Nationstar asked for and received a default judgment. It was not until May 5, 2014, that Nationstar held the foreclosure sale, selling the Subject Property to itself at a price of \$367,736.80. Shortly thereafter, Nationstar⁴ sold the Subject Property to Freddie Mac which then allegedly became the owner of the Subject Property. (McNeals' First Amended Complaint pages 14 and 15)

Thereafter, Ocwen, Nationstar, or some other servicer for Freddie Mac placed the Subject Property for sale with a realtor, and on or about March 23, 2015, sold the Subject Property for \$464,500.00 in a real estate market much

⁴ McNeals' First Amended Complaint incorrectly referred to the party as Ocwen. (page 14, paragraph 58)

improved from the year of 2012 when the McNeals had the house sold for \$530,000.00 in cash. (McNeals' First Amended Complaint page 20)

When Ocwen refused to allow the Sale to be consummated, it breached the terms of the Note and Mortgage because the proceeds would have been sufficient to pay the McNeals' obligations pursuant to the Note and Mortgage in full. That is, as of the Closing Date, or no later than June 5, 2012, no further interest would accrue on the Note or Mortgage obligations, the McNeals had no obligation to provide property insurance on or upkeep to the Subject Property, and the McNeals had no other continuing obligations pursuant to the Note or Mortgage. (McNeals' First Amended Complaint pages 20 and 21)

The McNeals suffered actual damages as described herein. These damages have been caused by and, where applicable, proximately caused by, Ocwen by the conduct described herein. Further, if necessary, the McNeals allege Ocwen has caused, and where appropriate proximately caused, damages to the McNeals by its refusal to allow them to consummate the Sale, its continuing to charge interest, fees, costs, insurance premiums and taxes after the Closing Date for the \$530,000/00 Sale, but no later than June 5, 2012. (McNeals' First Amended Complaint page 21)

These damages include, but are not limited to, loss of the net proceeds from the Sale and consequential damages, and other actual and consequential damages, including pain and suffering, lost income, shame, ridicule, humiliation, emotional distress, attorney's fees and costs, and other damages in an amount

to be determined by the jury at the trial of the case. (McNeals' First Amended Complaint page 21)

ARGUMENTS⁵

The trial court erroneously dismissed with prejudice causes of action pled by the McNeals against Ocwen because the McNeals pled facts sufficient to constitute causes of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC and complied with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRPC because the McNeals stated facts entitling them to relief, put Ocwen on notice of what it would face at trial, stated a prayer or demand for judgment for relief, and complied with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRPC. The trial court's order of dismissal of the causes of action described in this appeal should be reversed and rendered.

The First Amended Complaint states all of the elements of such causes of action and all facts to entitle the McNeals to the relief they requested and stated valid claims for relief. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006)

In addressing the requirements of South Carolina Rules of Civil Procedure: Rule 8(f), SCRPC, the South Carolina Supreme Court stated "Pleadings are to be liberally construed to do substantial justice to all parties. It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on

⁵ The McNeals are not appealing the portion of the Order of Dismissal of Nationstar or the causes of action for negligence, wrongful foreclosure, slander of title, or declaratory judgment made against Ocwen.

trial." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573-574, 743 S.E.2d 778, 785 (2013)

The McNeals have alleged sufficient facts, including inferences which may be drawn from the facts pled, which viewed in the light most favorable to the McNeals, would entitle them to the relief they requested.⁶

In that vein, the McNeals submit that:

a. "Under Rule 12(b)(6), SCRCP, ... the trial court must base its ruling solely on allegations set forth in the Complaint."

b. "If the facts and inferences drawn from the facts alleged in the Complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper."

c. "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the Complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief."

d. "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory."

⁶ McNeals' First Amended Complaint also satisfies the requirements of South Carolina Rules of Civil Procedure: Rule 8 and 9, SCRCP as further discussed below. Where known, the time and place is always stated with specificity, and where the time is unknown, it is estimated.

e. "Furthermore, the Complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action."

Spence v. Spence, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006).

I. **The Trial Court erred in dismissing the cause of action named Fraud for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC and for failure to comply with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRPC because the McNeals stated facts sufficient to constitute a cause of action for fraud and stated facts entitling them to relief, put Ocwen on notice of what it would face at trial, stated a prayer or demand for judgment for relief, and complied with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRPC.**

By Ocwen's personnel stating to the McNeals' attorney that the Sale for \$530,000.00 in cash would be blocked by Ocwen but that the McNeals could seek approval at a higher price, Ocwen identified and limited its objections to the Sale to one issue: the Sale price was not for enough money to satisfy Ocwen even though the Sale would have produced enough net proceeds to have paid the McNeals' obligations in full. Ocwen made no other objection to the Sale. (McNeals' First Amended Complaint pages 9 & 10, paragraphs 41 thru 47)

At that moment, Ocwen made misrepresentations and committed unfair and deceptive acts. The first and most fundamental misrepresentations made by

Ocwen occurred when it blocked the \$530,000.00 cash Sale. Ocwen misrepresented the amount owed because Ocwen misrepresented that the Sale would not produce enough net proceeds to pay off in full the McNeals' obligations pursuant to the Note and Mortgage. By telling the McNeals' attorney that the proposed sale would not be allowed to occur but that the McNeals could request a sale at a higher price which might be allowed by Ocwen, several untrue statements and inferences were made. (McNeals' First Amended Complaint page 10) First, Ocwen misrepresented the balance required to pay off the McNeals obligations pursuant to the Note and Mortgage. Second, in addition to misrepresenting the loan balance, Ocwen misrepresented its right to require a sale price higher than the one required to pay off the balance owed by the McNeals, and third, Ocwen misrepresented its right to reject a sale, the net proceeds of which, would be sufficient to pay off the balance owed by the McNeals.⁷

Owen's other misrepresentations and demonstrations of its bad faith are shown: by Ocwen's refusing to inform the McNeals, through their attorney Brandon W. Smith, what price would be necessary to receive Ocwen's approval for a sale of the Subject Property; (McNeals' First Amended Complaint pages 10) by Ocwen's continuing to charge the McNeals interest, force-placed insurance premiums, and other fees and expenses after blocking the Sale; (McNeals' First Amended Complaint pages 10, 16, 21, 28, 34, and 37) by Ocwen's continuing to

⁷ Ocwen also breached the terms of the Note and Mortgage and waived the right of tender. But the breach of contract issue will be discussed more with respect to the cause of action named Breach of Contract with Fraudulent Intent in this brief at page

report to credit reporting agencies that the McNeals' home was being foreclosed upon and that their payments, that became due after blocking the Sale, were delinquent; (McNeals' First Amended Complaint page 19, paragraphs 71) by Ocwen never informing the trial court that it blocked the Sale of the Subject Property that would have paid all of the McNeals' obligations in full; (McNeals' First Amended Complaint page 14, paragraphs 56); and by Ocwen's refusing to respond or communicate on the appraisal despite attempts to communicate with Ocwen about the real value of the Subject Property and to save the Sale for \$530,000.00 in cash. (McNeals' First Amended Complaint page 10)

The McNeals satisfy the requirement in their cause of action for fraud by alleging elements and facts of fraud as follows:

(1) a representation (McNeals' First Amended Complaint pages 22 thru 25);

(2) the representations' falsity (McNeals' First Amended Complaint pages 22 thru 25);

(3) its materiality (McNeals' First Amended Complaint pages 22 thru 25);

(4) the speaker's knowledge of its falsity (McNeals' First Amended Complaint page 25);

(5) his intent that it should be acted upon by the person [hearer] (McNeals' First Amended Complaint page 25);

(6) the hearer's ignorance of its falsity (McNeals' First Amended Complaint page 25);

(7) his [hearer's] reliance on its truth (McNeals' First Amended Complaint page 25);

(8) his [hearer's] right to rely thereon (McNeals' First Amended Complaint page 25);

(9) and his consequent and proximate injury (McNeals' First Amended Complaint pages 21 and 26).⁸

Mut. Sav. & Loan Ass'n v. McKenzie, 274 S.C. 630, 633, 266 S.E.2d 423, 425 (1980)

Ocwen, in its Amended Memorandum in Support of Motion to Dismiss by Defendant Ocwen Loan Servicing, LLC (herein after referred to as "Ocwen's Memorandum") asked for dismissal of the fraud cause of action on the following grounds:⁹

1. Ocwen claims that McNeals' allegations in paragraphs 78, 95 thru 100 of the McNeals' First Amended Complaint were conclusory statements and characterizations. (Ocwen's Memorandum page 13) But these allegations are the necessary elements of fraud, and these allegations are themselves statements of fact and are supported by other statements of fact as incorporated and set forth

⁸ These allegations are expanded upon by the other factual allegations incorporated into this cause of action. (Paragraph 77, pg 22 of McNeals' First Amended Complaint)

⁹ Even though the Honorable Trial Court did not specify the reasons for its ruling, Ocwen's grounds for dismissal were based upon specific points.

in the McNeals' First Amended Complaint, (McNeals' First Amended Complaint page 22, paragraph 77) and as set forth in this section of this brief.

2. Ocwen claims that Ocwen had no duty to allow the Sale as alleged in paragraphs 80 and 81 of McNeals' First Amended Complaint. (Ocwen's Memorandum page 14) But Ocwen misconstrues the nature of the allegations as they are described on pages 13 thru 15 of this brief. These allegations describe with particularity the misrepresentations made by Ocwen concerning its right to deny prepayment, the balance owed on the Note and Mortgage, and Ocwen's right to require a higher sales price for the Subject Property when the current Sale net proceeds would have been sufficient to pay off all of the McNeals' obligations.

3. Ocwen claims that there is no cause of action for violation of or failure to comply with the Administrative Order (Order No. 2009-05-22-01)¹⁰ (herein after described as the "Administrative Order") as alleged in paragraphs 82 and 88 of McNeals' First Amended Complaint. (Ocwen's Memorandum page 14) While it may be argued that the Administrative Order does not create a cause of action, it establishes standards of conduct and the requirement of good faith. Violation of the terms of this order could be, and in this case were, misrepresentations. Ocwen represented it complied with this order when it did not. (McNeals' First Amended Complaint pages 9 & 10, paragraph 42, and pages 23 and 24, paragraphs 82 and 88)

¹⁰ Also cited as In re Mortgage Foreclosure Actions, 396 S.C. 209, 209, 720 S.E.2d 908 (2011)

4. Ocwen claims that Ocwen was a real party in interest (Ocwen's Memorandum page 13). But the McNeals alleged that Ocwen misrepresented its status by stating it was the lien holder when it was a servicer. (McNeals' First Amended Complaint page 22, paragraph 79)

5. Ocwen claims the fraud allegations made in McNeals' First Amended Complaint in paragraphs 84, 90 thru 93 were compulsory counterclaims and barred by *Res Judicata* (Ocwen's Memorandum page 14). Since the trial court did not base its Amended Order of Dismissal on South Carolina Rules of Civil Procedure: Rule 13, SCRPC and did not rule in favor of Ocwen on this point with respect to the breach of contract claim, it is assumed it did not rule in Ocwen's favor on this point since all of the causes of action are based upon facts which occurred after the McNeals were served with the pleading in the Foreclosure Lawsuit and their time to answer had passed.¹¹

II. The Trial Court erred in dismissing the cause of action named Violation of the Fair Debt Collection Practices Act for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC and for failure to comply with South Carolina Rules

¹¹ The Honorable Trial Court did not base its Amended Order of Dismissal on South Carolina Rules of Civil Procedure: Rule 13, SCRPC. That said, the claims in this lawsuit are based solely upon acts and omission which occurred after the McNeals were served with the summons in the Foreclosure Lawsuit and their time to answer had expired. (McNeals' First Amended Complaint, page 7, paragraph 34) South Carolina Rules Civil Procedure: Rule 13(a), SCRPC reads "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." (*emphasis added*)

of Civil Procedure: Rules 8 and 9, SCRPC because the McNeals stated facts sufficient to constitute a cause of action for violation of the Fair Debt Collection Practices Act and stated a valid claim for relief, put Ocwen on notice of what it would face at trial, stated a prayer or demand for judgment for relief, and complied with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRPC.

The McNeals satisfy the Requirement in their cause of action for violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, ("FDCPA") by alleging that:

1. Ocwen is a debt collector (McNeals' First Amended Complaint page 5, paragraph 21, page 12, paragraph 52, page 15, paragraph 59, and page 27, paragraph 105),

2. The McNeals are consumers (McNeals' First Amended Complaint pages 3 & 4. Paragraph 11 thru 13, and 15, page 5, paragraph 20, page 27, paragraph 105),

3. Ocwen used communication as defined by the act (McNeals' First Amended Complaint page 7, paragraphs 28 thru 34, page 8, paragraphs 36 & 37, pages 9 & 10, paragraphs 42 thru 44),

4. Ocwen violated the Fair Debt Collection Practices Act (McNeals' First Amended Complaint page 7 & 8, paragraphs 33 & 34, pages 8 thru 11, paragraphs 37 thru 46, page 17, paragraph 64, page 19, paragraph 71, page 20,

paragraph 74, pages 22 thru 25, paragraphs 79 thru 93, and page 27, paragraph 106) and

5. The McNeals were entitled to recover actual damages in addition to the statutory penalty, costs of the action, and attorney's fees established by the court. (McNeals' First Amended Complaint pages 11, paragraph 47, page 16, paragraph 61, page 21, paragraphs 75 & 76, page 27, paragraph 107)

Neild v. Wolpoff & Abramson, L.L.P., 453 F. Supp. 2d 918, 924 (E.D. Va. 2006); Even under Federal Rules of Civil Procedure, Rule 9(b), this pleading is sufficient as per Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008).

Ocwen requested the dismissal of the cause of action based upon the Fair Debt Collection Practices Act (15 U.S.C. §1692) claiming the allegations are "completely devoid of details," asking: (Ocwen's Memorandum pages 4 & 5)

1. What misleading statements were used? Ocwen's misleading statements were misrepresentations about the amount owed, about Ocwen's right to block a sale that would pay off all amounts owed,¹² about Ocwen's right to require the property to be sold for more money even though the Sale would have paid off the amounts owed (McNeals' First Amended Complaint pages 8 thru 11, paragraphs 37 thru 46), about the escrow statements that were designed

¹² In finding that the breach of contract claim survived the motion to dismiss, the trial court was required to have determined that Ocwen waived its right of tender. (McNeals' Brief on Waiver of the Requirement of Tender pages 3 thru 5; Transcript of Hearing p. 10, lines 11-13; page 30, lines 7-9; page 33 line 18 to page 42, line 8; and page 64, line 12 to page 65, line 7; and Defendant Ocwen Loan Servicing, LLC's Brief in Response to Plaintiff's Brief on Waiver of the Requirement of Tender pages 5 thru 7.

to and did mislead the McNeals as to the amounts necessary to bring the account current (McNeals' First Amended Complaint page 17, paragraph 64), about the wrongful reporting to credit card companies (McNeals' First Amended Complaint page 19, paragraph 71), about the McNeals' right to prepay the loan, Ocwen's filing with the court an untrue statement of compliance with the Administrative Order, about the amount owed on a monthly basis, and the amount of the escrow payments. (McNeals' First Amended Complaint pages 22 thru 25, paragraphs 79 thru 93, and page 27, paragraph 106).

2. Ocwen asks what amounts were unauthorized? These unauthorized amounts were: the amount which Ocwen illegally charged in its continuation of charges for interest, force-placed insurance premiums, and other charges after the Sale would have closed or the Sale was blocked; (page 20, paragraph 74) the difference between the higher sales price which would have been required by Ocwen minus the sales price of \$530,000.00 which would have paid off the McNeals' obligations in full; (McNeals' First Amended Complaint pages 8 thru 11, paragraphs 37 thru 46), the amount owed according to the escrow statements which were designed to and did mislead the McNeals as to the amounts necessary to bring the account current; (McNeals' First Amended Complaint page 17, paragraph 64), the total amount owed by the McNeals; the amount owed by the McNeals on a monthly basis; and the amount of the escrow payments. (McNeals' First Amended Complaint pages 22 thru 25, paragraphs 79 thru 93, and page 27, paragraph 106).

3 Ocwen asks what unfair means did Ocwen use to collect the debt? Without repeating the McNeals' factual allegations, please see the discussion of these unfair means made in paragraphs 1. and 2. directly above. These unfair means included Ocwen use of letters sent by the United States Postal Service, and use of telephone conversations, and filing of false documents in the Foreclosure Lawsuit. (McNeals' First Amended Complaint page 10, paragraphs 43 & 44 and pages 9 & 10, paragraph 42)

4. Ocwen asks what allegations were directed at Ocwen? Virtually every paragraph of the factual statements begins with the name of the party claimed to have committed or failed to have performed an act. (McNeals' First Amended Complaint pages 22 thru 25 as incorporated into the Fair Debt Collection Practices Act claims on page 26)

Ocwen also complained that it is not put on fair notice of what is being claimed against it, but the above referenced pled facts show that claim is not credible.

Other issues that could have been, but were not, raised by Ocwen are discussed in the following cases:

For support of the claim that the telephone calls to the McNeals' attorney qualify for complaint pursuant to the Fair Debt Collection Practices Act, see Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1302 & 1303 (11th Cir. 2015)

In Robinson v. Managed Accounts Receivable Corp., 654 F. Supp. 2d 1051, 1058 (C.D. 2009) the court stated that a phone call from a debt collector which imparts incorrect information may be the basis for a claim pursuant to FDCPA.

The Court also stated that a Complaint need not specify the provision of the FDCPA which is violated as long as sufficient facts are alleged to show the claimant is entitled to relief. *Id.*

"A proper reading of the statutory text dictates that a debt collector's communications with a consumer's attorney, including those communications required by 15 U.S.C. § 1692c, are subject to §§ 1692d-1692f of the Act to the same extent as a debt collector's communications with the consumer himself." Miljkovic v. Shafritz & Dinkin, P.A., at 1302 & 1303 (McNeals' First Amended Complaint pages 9 thru 10)

"... [D]ocuments submitted to a court in the course of judicial proceedings to collect on a debt fall within the ambit of "litigating activities" and the requirements of FDCPA. Miljkovic v. Shafritz & Dinkin, P.A., at footnote 8 on page 1303 (McNeals' First Amended Complaint page 11)

III. The Trial Court erred in dismissing the cause of action named Breach of Contract with Fraudulent Intent for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC and for failure to comply with South Carolina Rules of Civil Procedure:

Rules 8 and 9, SCRPC because the McNeals stated facts sufficient to constitute a cause of action for Breach of Contract with Fraudulent Intent and stated facts entitling them to relief, put Ocwen on notice of what it would face at trial, stated a prayer or demand for judgment for relief, and complied with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRPC.

The McNeals satisfy the Requirement in their cause of action for breach of contract with fraudulent intent by alleging elements and facts of (1) a breach of contract, (2) fraudulent intent relating to the breaching of the contract and not merely to its making which is normally proved by circumstances surrounding the breach, and (3) a fraudulent act accompanying the breach. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985) The Floyd Court continued by stating, "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." Floyd, 287 S.C. at 53-54, 336 S.E.2d at 503-04 However, there is no specific rule about the amount of time occurring between the breach and the fraudulent conduct. The only rule is "the two must be coexisting, logically connected, and the one must be attendant upon the other." Bradley v. Metro. Life Ins. Co., 162 S.C. 303, 160 S.E. 721, 725 (1931) Proof of fraudulent intent may or may not involve false representations. The fraudulent act is any act characterized by dishonesty in fact or unfair dealing. Ball v. Canadian Am.

Express Co., 314 S.C. 272, 276, 442 S.E.2d 620, 623, (Ct. App. 1994); Harper v. Ethridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986)

In Perry v. Green, 313 S.C. 250, 252, 437 S.E.2d 150, 151 (Ct. App. 1993), the court found fraudulent intent when a seller refused to deliver to a buyer a horse's registration papers and blocked the buyer's attempts to prove payment and perfect a horseman's lien.

In the McNeals' case, Ocwen blocked the McNeals from consummating the Sale and thereby breached the terms of Note with fraudulent intent by:¹³

a. Misrepresenting its rights by blocking the Sale which would have paid off the full balance of the McNeals' obligations and would have required Ocwen to release its *lis pendens* and dismiss the Foreclosure Lawsuit; (McNeals' First Amended Complaint pages 8 thru 11, paragraphs 37 thru 47)

b. Misrepresenting the balance owed by the McNeals on the Note and Mortgage, and Ocwen's right to require the sale of the property for more than was required to pay off the obligations owed by the McNeals by stating the McNeals could make another request to sell the Subject Property at a higher price; (McNeals' First Amended Complaint page 10, paragraphs 43 & 44)

c. Misrepresenting, and demonstrating Ocwen's dishonesty in fact and unfair dealing, by

(i) refusing to state what price would be acceptable to get Ocwen's approval for a sale of the Subject Property and refusing to communicate

¹³ Ocwen officially refused to permit the sale from occurring by letter dated June 5, 2012. This violated the provision in the Note allowing prepayment without penalty. (McNeals' First Amended Complaint page 10, paragraphs 44)

about the appraisal sent to Ocwen by the McNeals' attorney; (McNeals' First Amended Complaint pages 10 & 11, paragraphs 43 thru 47);

(ii) Continuing to charge the McNeals for interest, force-placed insurance, maintenance, and other charges that would not have accrued if the Sale had been completed; (McNeals' First Amended Complaint page 16, paragraphs 62, pages 20 & 21, paragraphs 74 & 75, pages 28 & 29, paragraph 111) and

(iii) Continuing to report to credit reporting agencies that the McNeals home was being foreclosed upon and that their payments, due after Ocwen blocked the Sale, were delinquent; (McNeals' First Amended Complaint page 19, paragraphs 71)

d. Never informing the trial court of its blocking of the Sale of the Subject Property for \$530,000.00 that would have paid all of the McNeals' obligations in full; (McNeals' First Amended Complaint page 14, paragraphs 56)

e. After giving the McNeals permission to list the property for sale, Ocwen filed documents with the Trial Court in the Foreclosure Lawsuit falsely claiming it complied with the Administrative Order; (McNeals' First Amended Complaint pages 8, paragraph 37 and pages 9 & 19 paragraph 42)

f. After giving the McNeals permission to list the property for sale, Ocwen changed the locks and prevented a showing of the Subject Property by a realtor; (McNeals' First Amended Complaint page 8) and

g. Ocwen's refusal to respond or communicate on the appraisal despite attempts to communicate with Ocwen about the real value of the Subject Property and to save the Sale. (McNeals' First Amended Complaint page 10)

Ocwen's request to dismiss the cause of action based upon the Unfair Trade Practice Act is that the allegations should be dismissed because: (Ocwen's Memorandum pages 14 & 15)

1. Ocwen claims it had no duty to allow the sale. But Ocwen had a duty to allow prepayment. By blocking the Sale and demanding a higher sales price when the Sale would have produced sufficient net proceeds to pay all obligations, Ocwen made several misrepresentations and its actions tended to show a tender would not be accepted and thus, waived its right of tender. Sterling Dev. Co. v. Collins, 309 S.C. 237, 241-42, 421 S.E.2d 402, 405 (1992) McCall Co. v. Hobbs-Henderson Co., 138 S.C. 435, 136 S.E. 762, 763 (1927) and Humble Oil & Ref. Co. v. De Loache, 297 F. Supp. 647, 654 (D.S.C. 1969)

However, the Trial Court has already found against Ocwen on this point by not dismissing the breach of contract claim.

Ocwen did not base its motion to dismiss on the only two elements remaining for the allegation of a cause of action for breach of contract with fraudulent intent. Those allegations are fraudulent intent, relating to the breaching of the contract and not merely to its making, which is normally proved

by circumstances surrounding the breach, and a fraudulent act accompanying the breach.¹⁴

The McNeals made the allegations of the last two elements as set out on pages 25 thru 27 of this brief.

2. Ocwen claims the charges were made according to the terms of the Note and Mortgage. But the charges were not made according to the terms of the Note or Mortgage because when Ocwen blocked the Sale, waived its right of tender, and prevented prepayment of the McNeals' obligation so that no other charges for interest, force-placed insurance premiums, maintenance and inspection fees relating to the Subject Property could accrue, but Ocwen continued charging them. Other charges that were unauthorized include: the amount owed according to the escrow statements which were designed to and did mislead the McNeals as to the amounts necessary to bring the account current (McNeals' First Amended Complaint page 17, paragraph 64), the amounts of the escrow payments, (McNeals' First Amended Complaint pages 22 thru 25, paragraphs 79 thru 93, and page 27, paragraph 106) and the amounts for premiums of force-placed insurance. (McNeals' First Amended Complaint page 11, paragraph 47)

¹⁴ In finding that the breach of contract claim survived the motion to dismiss, the trial court was required to have determined that Ocwen waived its right of tender. (McNeals' Brief on Waiver of the Requirement of Tender pages 3 thru 5; Transcript of Hearing. p. 10, lines 11-13; page 30, lines 7-9; page 33 line 18 to page 42, line 8; and page 64, line 12 to page 65, line 7; and Defendant Ocwen Loan Servicing, LLC's Brief in Response to Plaintiff's Brief on Waiver of the Requirement of Tender pages 5 thru 7.

3. Ocwen claims the McNeals' causes of action were barred by Res Judicata and were compulsory counterclaims based upon South Carolina Rules of Civil Procedure: Rule 13, SCRCP which were rejected by the trial court when it did not dismiss the breach of contract claim and because these claims are based upon facts which accrued after the McNeals' answer was due in the Foreclosure Lawsuit.

IV. The Trial Court erred in dismissing the cause of action named Unfair Trade Practices Act for failure of the Appellants' First Amended Complaint to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRCP and for failure to comply with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRCP because the McNeals stated facts sufficient to constitute a cause of action for violation of Unfair Trade Practices Act and stated facts entitling them to relief, put Ocwen on notice of what it would face at trial, stated a prayer or demand for judgment for relief, and complied with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRCP.

The McNeals satisfy the Requirement in their cause of action for unfair trade practices by alleging elements and facts supporting a claim of violation of South Carolina's Unfair Trade Practices Act sections 39-5-10 thru 150.¹⁵ Among other things the McNeals alleged:

a. Ocwen's activities of servicing a mortgage loan constituted a trade or commerce as defined by South Carolina Code Ann. section 39-5-10, et seq.

¹⁵ McNeals' First Amended Complaint pages 40 thru 49, paragraphs 150 thru 185.

(as amended), (McNeals' First Amended Complaint page 16, paragraphs 62, pages 20 & 21, paragraphs 74 & 75, pages 28 & 29, paragraph 111, and page 33, paragraph 127)

The terms "trade" and "commerce" "include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situated, and include any trade or commerce directly or indirectly affecting the people of this State." Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)

b. Ocwen's actions have a real and substantial potential for repetition and affect the public interest setting forth past behavior of the Defendants and the consent orders agreed to by Ocwen and the fact that Ocwen still conducts the same business activity as complained about by the McNeals. (McNeals' First Amended Complaint page 16, paragraphs 62, pages 20 & 21, paragraphs 74 & 75, pages 28 & 29, paragraph 111)

The South Carolina Supreme Court found that the fact the company "remains in the same business and faced the same opportunities to repeat the conduct" is sufficient to satisfy the requirement for showing a potential for repetition. York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) and cited by Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998) and

c. Ocwen's commission of the specific unfair and deceptive acts and practices include Ocwen's: misrepresentation of the balance owed by the McNeals, misrepresentation of the McNeals' right to prepay the obligations pursuant to the Note and Mortgage without penalty; refusal and prevention of the McNeals from prepaying their obligations; filing false, misleading, and incomplete documents in the Foreclosure Lawsuit; misrepresentation of its rights and obligations and those of the McNeals pursuant to the Note and Mortgage by among other things demanding the McNeals sell the Subject Property for more than was required to pay all amounts owed by the McNeals; misrepresentation of themselves as the lien holder in the Foreclosure Lawsuit; misrepresentation to Mr. McNeal that Mr. McNeal had Ocwen's permission to place the Subject Property for sale, when in fact Ocwen had no intention of allowing the McNeals to sell the Subject Property for its fair market value or for a sum sufficient to pay the amounts owed pursuant to the Note and Mortgage in full; failing to notify the court in which the Foreclosure Lawsuit was pending that it had prevented the McNeals from selling the Subject Property as a means of loss mitigation pursuant to South Carolina Supreme Court's Administrative Order 2011 - 05 - 02 - 01 issued on May 2, 2011, and therefore, a misrepresentation to the Trial Court and to the McNeals of its compliance with said administrative order; misrepresentation of its right to recover a deficiency judgment; misrepresentation of the amounts owed on a monthly basis pursuant to the Note and Mortgage; misrepresentation of the amounts owed for escrow payments; and misrepresentation to the McNeals of the reasonable cost of property insurance.

(McNeals' First Amended Complaint pages 8 thru 11, paragraphs 36 thru 47, pages 22 thru 23, paragraphs 78 thru 82, pages 23, paragraphs 84, pages 24 thru 25, paragraphs 88, and 90 & 91, and 93)

"An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006); and

d. Ocwen's unfair and deceptive acts caused the McNeals to suffer a monetary or property loss of the net proceeds from the Sale, as well as other damages. (McNeals' First Amended Complaint pages 11, paragraph 47, page 16, paragraph 61, page 21, paragraphs 75 & 76, page 27, paragraph 107, pages 48 & 49, paragraph 185)

Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

V. The Trial Court erred in dismissing the causes of action against Ocwen for failure of the Appellants' First Amended Complaint to comply with South Carolina Rules of Civil Procedure: Rule 8, SCRPC.

"Claims for Relief. A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled."

First sentence of South Carolina Rules of Civil Procedure: Rule 8(a), SCRPC

"Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."
South Carolina Rules of Civil Procedure: Rule 8(e)(1), SCRPC

As described in previous sections of this brief related to specific causes of action, the McNeals' First Amended Complaint contains specific factual allegations, details the dates of events though sometimes estimated, cites specific statutes where statutes are involved, alleges the court's jurisdiction (McNeals' First Amended Complaint's on pages 1 thru 3 and 5), shows that the McNeals are entitled to the relief they request, and states prayers for relief. (McNeals' First Amended Complaint pages 21, paragraph 75 & 76, page 26, paragraph 101 & n 102, page 27, paragraphs 107, pages 37 & 38, paragraphs 139 & thru 141, page 50)

The principal purpose of pleadings is to inform a party of the claims, both legal and factual, that the party will be required to face at trial, but pleadings are to be liberally construed to do justice to all parties. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573-574, 743 S.E.2d 778, 785 (S.C. 2013)

The McNeals' allegations contain statements of every element of each cause of action which are supported by factual statements that show the McNeals are entitled to the relief they requested.¹⁶

¹⁶ Specific reference is made to the discussion in Arguments I thru V, pages [redacted] where South Carolina Rules of Civil Procedure: Rule 8, SCRPC compliance is discussed in more detail.

VI. The Trial Court erred in dismissing the causes of action against Ocwen for failure of the Appellants' First Amended Complaint to comply with South Carolina Rules of Civil Procedure: Rule 9, SCRPC.

Capacity of a party is not necessary to aver. South Carolina Rules of Civil Procedure: Rule 9(a), SCRPC However, the McNeals did aver that Ocwen acted as a loan servicer. (McNeals' First Amended Complaint page 5, paragraph 21, page 12, paragraph 52, page 15, paragraph 59, and page 27, paragraph 105)

South Carolina Rules of Civil Procedure: Rule 9(b), SCRPC requires averments of fraud to be stated with particularity. The McNeals did so as

follows:¹⁷

a. Misrepresenting its rights by blocking the Sale which would have paid off the full balance of the McNeals' obligations and would have required Ocwen to release its *lis pendens* and dismiss the Foreclosure Lawsuit (McNeals' First Amended Complaint pages 8 thru 11, paragraphs 37 thru 47);

b. Misrepresenting the balance owed by stating the McNeals could make another request to sell the Subject Property at a higher price (McNeals' First Amended Complaint page 10, paragraphs 43 & 44);

c. Misrepresenting, and demonstrating Ocwen's dishonesty in fact and unfair dealing, by Ocwen's

(i) refusing to state what price would be acceptable to get Ocwen's approval for a sale of the Subject Property and refusing to communicate

¹⁷ Rule 9(b) of the Federal Rules of Civil Procedure, which reads the same in substance to South Carolina Rule 9(b), SCRPC, does not apply to the Fair Debt Collection Practices Act claims. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008).

about the appraisal sent to Ocwen by the McNeals' attorney. (McNeals' First Amended Complaint pages 10 & 11, paragraphs 43 thru 47);

(ii) continuing to charge the McNeals for interest, force-placed insurance, maintenance, and other charges that would not have accrued if the Sale had been completed; (McNeals' First Amended Complaint page 16, paragraphs 62, pages 20 & 21, paragraphs 74 & 75, pages 28 & 29, paragraph 111)

(iii) continuing to report to credit reporting agencies that the McNeals home was being foreclosed upon and that their payments, due after Ocwen blocked the Sale, were delinquent (McNeals' First Amended Complaint page 19, paragraphs 71);

d. never informing the trial court of its blocking of a sale of the Subject Property that would have paid all of the McNeals' obligations in full; (McNeals' First Amended Complaint page 14, paragraphs 56)

e. giving the McNeals permission to list the property for sale and then changing the locks and preventing a showing of the Subject Property by a realtor; and (McNeals' First Amended Complaint page 8, paragraph 39)

f. giving the McNeals permission to list the property for sale, and then filing documents with the court falsely claiming it complied with the Administrative Order; (McNeals' First Amended Complaint page 8, paragraph 39, pages 9 & 10 paragraph 42, and page 23, paragraph 82)¹⁸ and

¹⁸ Further discussion on this point is made in the section about the McNeals allegations of fraud in Arguments, Section I of this brief beginning on page

g. refusing to respond or communicate with the McNeal's or their attorney about the appraisal submitted by the McNeals to Ocwen despite attempts to communicate with Ocwen about the real value of the Subject Property and to save the Sale. (McNeals' First Amended Complaint page 10)

These misrepresentations as a direct, and proximate cause, resulted in the McNeals suffering damage and injury. (McNeals' First Amended Complaint page 26)

Conditions precedent are generally alleged. South Carolina Rules of Civil Procedure: Rule 9(c), SCRCP (McNeals' First Amended Complaint page 2, paragraph 9)

The pleading of a judgment is specifically referenced by style, case number, and court. South Carolina Rules of Civil Procedure: Rule 9(e), SCRCP (McNeals' First Amended Complaint page 5, paragraph 21)

Dates and places, where important for jurisdiction, are specifically given for all relevant acts or omissions. Places are not otherwise important except for jurisdiction of the court and to identify the McNeals' residence that was subject to foreclosure. The place of the McNeals' residence was described by a formal legal description and the Foreclosure Lawsuit was filed in Beaufort County, SC. South Carolina Rules of Civil Procedure: Rule 9(f), SCRCP (McNeals' First Amended Complaint page 4, paragraph 17, and page 5, paragraph 21)

Other portions of South Carolina Rules of Civil Procedure: Rule 9, SCRCP do not apply to this case.

VII. The Trial Court committed an abuse of discretion in making findings of fact that (1) the breach of contract claim is limited to the prepayment provision of the note and (2) that mortgagee must be provided written notice of prepayment since both findings of fact were not based on information admitted into evidence or so stated in the McNeals' pleadings.¹⁹

The Trial Court's findings of fact are as follows:

"The Court finds based on the filings and arguments of the parties that there is only one contractual provision at issue: The prepayment provision of the Note dated May 16, 2006. The Note provides in relevant part, at Paragraph 4, that the borrower "may make a full Repayment or partial Prepayment without paying a Prepayment charge." (Am. Compl. paragraph 109, Plaintiff's Reply Brief To Ocwen's Amended Memorandum In Support of Its Motion To Dismiss p. 3). The Note further provides that the mortgagee must be notified in writing when said payments are made. *Id.*"

(Amended 'Order Granting Motion To Dismiss By Defendant Nationstar Mortgage, LLC As To All Causes Of Action And Partially Granting And Partially Denying Motion To Dismiss By Defendant Ocwen Loan Servicing, LLC page 2 (hereinafter referred to as "Order of Dismissal")

While the McNeals' briefs and statements at the hearing indicated they were basing their breach of contract claim on the prepayment provision of the Note, the trial court's findings of fact are not appropriate because they attempt to bind the McNeals to this one claim which inappropriately limits the McNeals' right to conduct discovery and amend their pleadings. South Carolina Rules of Civil Procedure: Rule 15, SCRCP, and South Carolina Rules of Civil Procedure: Rules 26 thru 37, SCRCP. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493

¹⁹ The McNeals only alleged one provision of the Note in their breach of contract claim, but they did not state it was the only provision for which breach of contract could ever be made.

S.E.2d 826 (1997) and Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998).

Findings of fact are unnecessary in an order pursuant to South Carolina Rules of Civil Procedure: Rules 12(b)(6), 8, 9, and 13(a), SCRPC and South Carolina Rules of Civil Procedure: Rule 52(a), SCRPC. Further, there was no evidence introduced or admitted into evidence upon which the court could make the finding of fact that, "The Note further provides that the mortgagee must be notified in writing when said payments are made." This finding of fact is not based upon information admitted into evidence or stated in the McNeals' First Amended Complaint or in its replies, briefs, or memoranda made in response to Ocwen's motion to dismiss.²⁰ Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997) and Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998)

Regarding the finding of fact that there exists a requirement of notice, the Honorable Trial Court notated an "*Id.* page 2 of the Order of Dismissal. It seems to be referencing paragraph 109 of the McNeals' First Amended Complaint and page 3 of Plaintiff's Reply Brief To Ocwen's Amended Memorandum In Support of Its Motion To Dismiss."²¹ The undersigned could not find any statement in these referenced portions of the McNeals' pleadings that made such a statement and does not know of any other portion of the McNeals' pleadings that does.

²⁰ The undersigned has not found this statement in any of the McNeals' pleadings or the Transcript.

²¹ The "*Id.*" seems to reference the citation stated earlier in the Honorable Trial Court's findings of fact which is stated as, "Am. Compl. paragraph 109, and Plaintiff's Reply Brief To Ocwen's Amended Memorandum In Support of Its Motion To Dismiss p. 3".

VIII. The Trial Court abused its discretion in dismissing the causes of action against Ocwen with prejudice and not allowing the Appellants the opportunity to amend their Complaint when a failure to properly plead may be corrected by amendment. South Carolina Rules of Civil Procedure: Rule 15, SCRPC

The court should not have dismissed the McNeals' claims with prejudice. "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice." Spence, 368 S.C. at 129, 628 S.E.2d at 881 If the Trial Court or this court finds any technical problems with the manner in which the causes of action or the facts alleged or that the allegations of fact are unclear, the Trial Court should have given, and this court should grant, the McNeals an opportunity to request an amendment to their First Amended Complaint. *Id* pages 130 and 881 & 882

CONCLUSION.

The Trial Court erred by dismissing the causes of action made the basis of the appeal because of the Appellants' failure in their Plaintiffs' First Amended Complaint to state facts sufficient to constitute causes of action pursuant to South Carolina Rules of Civil Procedure: Rule 12(b)(6), SCRPC and to comply with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRPC. The Trial Court erred because the McNeals stated facts sufficient to constitute the causes of action, stated facts entitling them to relief, put Ocwen on notice of what it would face at trial, stated a prayer or demand for judgment for relief, and

complied with South Carolina Rules of Civil Procedure: Rules 8 and 9, SCRCP, and these causes of action should not have dismissed with prejudice. The McNeals respectfully request that this Court grant the relief sought herein, inquire into these matters, and reverse the Trial Court's dismissal of the causes of action of fraud, violation of the Fair Debt Collection Practices Act, Breach of Contract with Fraudulent Intent, and violation of the Unfair Trade Practices Act claimed against Ocwen.

WILLIS LAW OF SOUTH CAROLINA
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Telephone No: (843) 342-2392

By: _____



Terence A. Willis
S.C. State Bar No. 101429
Attorney for Appellants

August 26, 2016
Hilton Head Island, S.C.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen , Circuit Court Judge

Appellate Case No. 2016-001616

Alan F. McNeal And
Adrienne McNeal,

Appellants,

v.

Ocwen Loan Servicing,
LLC, and Nationstar
Mortgage, LLC,

Respondents.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on Ocwen Loan Servicing, LLC by depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2016, addressed to its attorneys of record, Sean A. O'Connor, Finkel Law Firm LLC, 4000 Faber Place Drive | Suite 450, North Charleston, South Carolina 29405 and Michael W. Smith, Baker Donelson, 200 South Orange Avenue, Suite 2900, Orlando, FL 32801, and on Nationstar Mortgage, LLC by depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2016, addressed to its attorneys of record, Trent M. Grisson and Robert A. Muckenfuss, McGuire Woods LLP, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202.

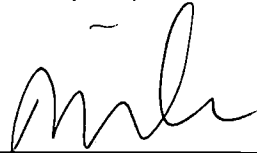
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August 26, 2016

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The Honorable Jenny Abbott Kitchings
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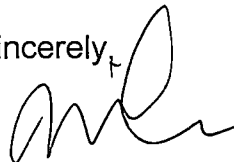
Re: Appellate Case No. 2016-001616
Alan F. McNeal and Adrienne McNeal, Appellants vs.
Ocwen Loan Servicing, LLC and Nationstar Mortgage LLC,
Respondents
Our File No. 60117-1

Dear Ms. Kitchings:

Enclosed for filing is the following:

- (1) Appellants' Initial Brief,
- (2) Appellants' Designation Of Matter To Be Included In The Record On Appeal, and
- (3) Proof of service of the Appellants' Initial Brief and Appellants' Designation Of Matter To Be Included In The Record On Appeal.

Sincerely,



Terence A. Willis
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Attorney for Appellants

Letter to The Honorable Jenny Abbott Kitchings
August 26, 2016
Page 2

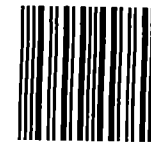
cc: Mr. Trent M. Grisson and Mr. Robert A. Muckenfuss
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Charlotte, NC 28202

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Finkel Law Firm LLC
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