THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070
Appellate Case No. 2016-001214

Quicken Loans, Inc., ... Appellant,

v.

Wayne D. Wilson; Calvin O. Wilson, III; Any other Heirs-at-law or Devisees of Ezekiel (Ellen) T. Wilson, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank..... Respondents.

QUICKEN LOANS INC.'S SUPPLEMENT TO ITS RETURN IN OPPOSITION TO THE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS' MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

Quicken Loans Inc. ("Quicken Loans") hereby supplements its Return in Opposition to the South Carolina Department of Consumer Affair's (the "Department") Motion for Leave to Appear as Amicus Curiae. On October 3, 2017, the Department conditionally filed its amicus brief.

As noted for the Court in the initial Opposition, the Department's brief now confirms that it is attempting to use the appellate court's amici provisions to circumvent the normal adjudicative process that governs the Department. Further, the Department attempts to weigh in on the law as a legal expert which is improper for many reasons, including that the Special Referee considered

none of what the Department attempts to thrust before this Court. Moreover, the Department's brief relies heavily on information that is not in the record on appeal. The Department is not a proper amicus curiae as contemplated by the rules for these reasons, and its motion to appear as one should be denied.

ARGUMENT[1]

I. The Department's motion should be denied because it attempts to circumvent the administrative, adjudicative process through improper use of the amicus rules and injects legal opinions not considered by the circuit court.

The Department's conditional brief is improper. It should be rejected.

First, the Department does not act as an amicus. Instead, it attempts to adjudicate an issue that is reserved for the administrative law court by seeking an advisory opinion from this Court on issues now pending before it involving *other parties*. *See* S.C. Code Ann. § 37-6-414(A) (stating that any person aggrieved "by the [Department's] administrator's determination *is entitled* to a contested case hearing before the Administrative Law Court" (emphasis added)). The Department's motion and brief freely admit it seeks a determination of issues now before it concerning other parties. (Dept.'s Mot. p.3 (stating the Department's interest in this case is because "[s]everal matters are currently pending before the Department pertaining to compliance with S.C. Code Ann. Section 37-10-102"); *see also* Dept.'s Br. pp. 4-5 & 14 (discussing the Department's actions in unrelated cases concerning Section 37-10-102). The advisory opinion sought by the Department should not, and indeed cannot, be issued by this Court. *See O'Shields*

[1] This supplemental brief is limited to the procedural issue of why the Department's motion should be denied. If the Court, grants the Department's motion, Quicken Loans respectfully requests the Court to allow it thirty days following that order to file a substantive response to the Department's brief.

v. McLeod, 257 S.C. 477, 482, 186 S.E.2d 408, 409 (1972) ("The courts of this State . . . are without authority to issue advisory opinions.").

Second, the Department seeks to testify as to the law through its brief. This is also improper. The Court is to decide the law. For instance, the Department opines that Quicken Loans' conduct was unconscionable under South Carolina law. (Dept. Br. pp. 15-17.) This is contrary to the South Carolina District Court's holding that no claim for unconscionability can stand based on Respondent's allegations. *See e.g. Mosley v. Quicken Loans, Inc.*, No. 1:16-cv-00384, 2016 WL 3551999, at *4 (D.S.C. June 30, 2016) (holding alleged attorney preference violations does not support a finding of unconscionability). Additionally, third-parties should not be allowed to use the guise of amicus curiae to offer what amounts to expert opinion on fact intensive issues like unconscionability, especially at the summary judgment stage. *See Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) ("[A]n amicus who argues facts should rarely be welcomed.").

Moreover, the Department adopts Respondent's argument that a violation of the self-enforcing non-waiver statute, S.C. Code Ann. § 37-5-107(1), gives rise to unconscionability remedies under Section 37-5-105(C). (Dept. Br. pp. 17-21.) No South Carolina court or agency has ever issued an opinion endorsing such a position. It is contrary to the plain language of the relevant statutes as well as the decision cited above. It simply is not the law in South Carolina. The Department is taking Respondent's incorrect argument and trying to give it an air of legitimacy by affixing its name to it.

Third, the Department's brief is nothing more than improper "testimony" that was not before the circuit court and cannot be injected into the straightforward procedural issues presented to this Court. Issues or arguments not raised below cannot be raised for the first time on appeal.

James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010) (holding issues not raised before trial court cannot be raised for the first time on appeal by amici). In fact, the Department's position proves an essential argument on appeal—the Special Referee should have allowed discovery. Respondent now seeks to use the Department's filing as evidence on appeal—the very thing not permitted below.

Fourth, the Department wholly adopts Respondent's position that Quicken Loans' use of a disclosure form violated the Attorney Preference Statute. The Department adopts this position despite acknowledging that it is possible for a creditor to comply with the statute via methods other than the disclosure form. (Dept. Br. p.14.) Again, complete discovery was not permitted in the underlying matter, and there is ample evidence in the record to create genuine issues of fact as to whether Quicken Loans complied with the statute via the disclosure form and other means. (Appellant's Br. pp. 17-21.) If the Department were truly appearing as a friend of the Court, it would want a complete factual record to be created through discovery before reaching premature conclusions on compliance. Instead, the Department improperly attempts to advocate on behalf of Respondent. *See Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) ("Amicus Curiae is a Latin phrase for 'friend of the court' as distinguished from an advocate before the court.").

Because the Department's conditional brief merely adopts Respondent's arguments and argues for summary judgment against Quicken Loans, it is not a proper amicus curiae brief. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse."). The briefing on this appeal closed on January 11, 2017 but now, more than *nine months later*, the Department is attempting to re-open the

briefing process to gain an advantage in other matters before it. It would be unjust to force Quicken Loans to spend the time and money to respond to the Department's brief this late in the appeal concerning those other issues and parties. The Department's motion should be denied.

II. The Department's motion should be denied because its brief relies on information not in the record on appeal.

Rule 213 states that an amicus curiae brief "*shall* be limited to argument of the issues on appeal as presented by the parties." Rule 213, SCACR (emphasis added). Additionally, an "appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. The Department's brief does not comply with these rules because the following portions rely upon issues not briefed by the parties and/or that are not in the record on appeal:

- On page 3, the Department states it has issued "more than one hundred Administrative Interpretations." These interpretations are not identified in the brief, are not in the record on appeal, and were not briefed by the parties.

- On pages 4-5, the Department discusses evidence that it and/or the Board of Financial Institutions-Consumer Finance Division ("CFD") gathered and considered in other, unrelated cases involving the Attorney Preference Statute. These cases are not identified by the Department, nothing from, or about, these cases is in the record on appeal, and issues pertaining to them were not briefed by the parties.

- On pages 7-8, 13, and 15 the Department discusses Administrative Interpretation ("A.I.") 10.102(a)-9301. The parties did not brief any issues concerning A.I. 10.102(a)-9301, and in any event, it is not relevant to this appeal.

- On page 10, the Department discusses its "experiences" with closings occurring prior to 1996. Nothing pertaining to the Department's pre-1996 closing "experiences" is in the record on appeal, and these experiences were not briefed by the parties.

- On pages 12-13, the Department speculates about what the Wilsons knew or did not know concerning their loan closing and consumer rights. The Department does not cite to anything in the record on appeal to support these speculations because there is none. Discovery was not completed in this case.

- On page 14, the Department again references evidence from other, unrelated investigations while arguing that Quicken Loans violated the statute. Nothing

concerning these investigations is in the record on appeal, and they were not briefed by the parties.

- On pages 16-17, the Department makes generalizations concerning unspecified borrowers and lenders. It also speculates about what Quicken Loans and the Wilsons did and thought during the subject loan's origination. None of these generalizations or speculations are supported by citations to the record on appeal.

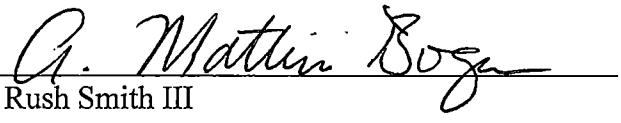
The Court should deny the Department's motion because its brief does not comply with the South Carolina Appellate Court Rules. *See* Rules 210(h) and 213, SCACR; *see also James*, 390 S.C. at 193, 701 S.E.2d at 732. In the alternative, the Court should strike the above referenced portions of the Department's brief.

CONCLUSION

For the foregoing reasons, and the reasons in Quicken Loans' return, the Court should deny the Department's motion. In the alternative, the Court should strike the above listed portions of the Department's brief or order it to file an amended brief that complies with Rules 213 and 210(h).

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Columbia, South Carolina
October 12, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070
Appellate Case No. 2016-001214

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v.

Wayne D. Wilson; Calvin O. Wilson, III; Any other Heirs-at-law or Devisees of Ezekiel (Ellen) T. Wilson, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank,..... Respondents.

PROOF OF SERVICE

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

Pleadings:

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October 13, 2017

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals
P.O. Box 11629
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RE: Quicken Loans, Inc. v. Wayne D. Wilson, et al.
Civil Action No. 2015-CP-06-00070
Appellate Case No. 2016-001214
Our File No. 42677/01510

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Quicken Loans Inc.'s Supplement to its Return in Opposition to the South Carolina Department of Consumer Affairs' Motion for Leave to Appear as Amicus Curiae in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this pleading.

Very truly yours,

A. Mattison Bogan

AMB:lpw
Enclosures
cc: C. Bradley Hutto, Esquire
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