

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1320 Main Street / 17th Floor / Columbia, SC 29201  
Tel: 803.799.2000 Fax: 803.255.5944  
www.nelsonmullins.com

Brian M. Barnwell  
Tel: 803.255.9233  
Fax: 803.255.5944  
brian.barnwell@nelsonmullins.com

September 7, 2018

**Hand Delivered**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

**RECEIVED**

SEP 07 2018

SC Court of Appeals

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:

Pursuant to Rule 208(b)(7), SCACR, Appellant Quicken Loans Inc. (“Quicken Loans”) hereby files this supplemental citation letter. The decisions of the United States District Court for the District of South Carolina in the following matters:

- *Boone v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2018 WL 806658 (D.S.C. Feb. 9, 2018), *reh’g denied by* 2018 WL 3222609 (D.S.C. July 2, 2018);
- *Messex v. Quicken Loans, Inc.*, No. 2:15-cv-04773-JMC, 2018 WL 1015076 (D.S.C. Feb. 22, 2018), *reh’g denied by* 2018 WL 3359018 (D.S.C. July 10, 2018);
- *Mosley v. Quicken Loans, Inc.*, No. 1:16-cv-00383-JMC, 2018 WL 1240249 (D.S.C. Mar. 9, 2018), *reh’g denied by* 2018 WL 3342680 (D.S.C. July 9, 2018)
- *Mosley v. Quicken Loans, Inc.*, No. 1:16-cv-00384-JMC, 2018 WL 1240250 (D.S.C. March 9, 2018), *reh’g denied by* 2018 WL 3342681 (D.S.C. July 9, 2018)

are hereby brought to the attention of the Court. These orders are attached hereto for the Court’s convenience.

Hand Delivered  
September 7, 2018  
Page 2

These decisions relate to the issue of whether Quicken Loans Inc. complied with S.C. Code Ann. § 37-10-105(C) when it originated the subject mortgage loan.

Very truly yours,

A handwritten signature in cursive script that reads "Brian M. Barnwell". The signature is written in black ink and is positioned above a horizontal line.

Brian M. Barnwell

BMB:bb

Enclosures

cc: C. Bradley Hutto, Esquire  
Steven W. Hamm, Esquire  
Daniel W. Williams, Esquire  
Charles L. Dibble, Esquire  
Warren R. Herndon, Jr., Esquire  
Carolyn Grube Lybarker, Esquire  
Kelly H. Rainsford, Esquire

2018 WL 806658

Only the Westlaw citation is currently available.

United States District Court, D.  
South Carolina, Orangeburg Division.

Thelma BOONE, Plaintiff,  
v.  
QUICKEN LOANS, INC., Defendant.  
Vance L. Boone, Plaintiff,  
v.  
Quicken Loans, Inc., Defendant.

Civil Action No. 5:15-cv-04772-JMC,  
Civil Action No. 5:15-cv-04843-JMC

Signed 02/09/2018

**Attorneys and Law Firms**

Charles Bradley Hutto, Williams and Williams,  
Orangeburg, SC, Daniel Webster Williams, Bedingfield  
and Williams, Barnwell, SC, Steven W. Hamm, C. Jo  
Anne Wessinger Hill, Richardson Plowden and Robinson,  
Columbia, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham  
Ross Billings, Benjamin Rush Smith, III, Nelson Mullins  
Riley and Scarborough, Columbia, SC, for Defendant.

**ORDER AND OPINION ORDER AND OPINION**

J. Michelle Childs, United States District Judge

\*1 In these consolidated actions, Plaintiffs Thelma Boone and Vance L. Boone (together "Plaintiffs") filed the above-captioned actions against Defendant Quicken Loans, Inc. ("Defendant" or "Quicken Loans") alleging claims for violation of the South Carolina Attorney Preference Statute ("SCAPS"), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. *T. Boone v. Quicken Loans, Inc.*, C/A No. 5:15-cv-04772-JMC, ECF No. 1-1 at 9 ¶¶ 8-13 (D.S.C. Nov. 30, 2015) ("*Boone 1*"); *V. Boone v. Quicken Loans, Inc.*, C/A No. 5:15-cv-04843-JMC, ECF No. 1-1 at 10 ¶¶ 8-13 (D.S.C. Dec. 4, 2015) ("*Boone 2*").

This matter is before the court on Plaintiffs' and Defendant's Cross-Motions for Summary Judgment pursuant to Rule<sup>1</sup> 56 of the Federal Rules of Civil Procedure. (ECF Nos. 88, 91 (*Boone 1*); ECF Nos. 86, 89 (*Boone 2*)). The parties oppose each other's Motions respectively. (ECF No. 100, 105 (*Boone 1*); ECF Nos. 98, 103 (*Boone 2*)). For the reasons set forth below, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiffs' Motion for Summary Judgment.

**I. RELEVANT BACKGROUND  
TO PENDING MOTIONS**

Quicken Loans "is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances." *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). "Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan." *Id.*

On or about September 13, 2012, Thelma Boone provided information by telephone to Quicken Loans' mortgage banker for purposes of completing a loan application to refinance the mortgage on Plaintiffs' residence located at 226 River Drive, Rowesville, South Carolina.<sup>2</sup> (ECF No. 88-5 at 3 ¶¶ 4-5 (*Boone 1*); ECF No. 86-5 at 3 ¶¶ 4-5 (*Boone 2*)). As a result of the information provided by Thelma Boone, Quicken Loans generated loan application documents that were sent to Plaintiffs to review and sign. (*Id.*) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the "AIPC"). (*Id.*; see also ECF No. 1-1 at 13 (*Boone 1*); ECF No. 1-1 at 14 (*Boone 2*)). Based on the information provided by Thelma Boone, Quicken Loans sent Plaintiffs an AIPC that was prepopulated with the following relevant information (in bold):

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

\*2 (a) I select **I/We will not use the services of legal counsel.**

Borrower **Vance L. Boone**

Date Borrower **Thelma Boone**

Date

Borrower Date Borrower Date

(b) Having been informed of this right, and having no preference, I asked for assistance from the

Not Applicable

lender and was referred to a list of acceptable attorneys. From that list I select

Not Applicable

Borrower Date Borrower Date

Not Applicable

Not Applicable

Borrower Date Borrower Date

(ECF No. 1-1 at 13 (Boone 1); ECF No. 1-1 at 14 (Boone 2).)

(ECF No. 54 (Boone 1); ECF No. 53 (Boone 2).) Quicken Loans then moved for summary judgment on March 31, 2017. (ECF No. 88 (Boone 1); ECF No. 86 (Boone 2).) On that same day, Plaintiffs filed their Cross-Motions for Summary Judgment. (ECF No. 91 (Boone 1); ECF No. 89 (Boone 2).)

On September 17 and 18, 2012, Plaintiffs signed the loan application documents and the AIPC. (ECF No. 88-5 at 3 ¶ 6 (Boone 1); ECF No. 86-5 at 3 ¶ 6 (Boone 2).) Plaintiffs then sent the signed loan application documents to Quicken Loans by telefax on September 17, 2012, and the AIPC to Quicken Loans on September 19, 2012. (ECF Nos. 1-1 at 13 & 88-7 (Boone 1); ECF Nos. 1-1 at 14 & 86-7 (Boone 1).) On October 19, 2012, Thelma Boone had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 88-5 at 3-4 ¶ 7 (Boone 1); ECF No. 86-5 at 3-4 ¶ 7 (Boone 1).) On October 25, 2012, Plaintiffs met with attorney Justin Tapp of McDonnell & Associates, P.A. and signed a disclosure form agreeing to the terms of McDonnell & Associates' representation at the loan closing. (ECF No. 88-8 at 3-4 ¶ 7 (Boone 1); ECF No. 86-8 at 3-4 ¶ 7 (Boone 2).) On October 26, 2012, Plaintiffs completed their loan closing. (ECF No. 88-8 at 3 ¶ 4 (Boone 1); ECF No. 86-8 at 3 ¶ 4 (Boone 2).)

The court heard argument from the parties on the instant Motions at a hearing on December 5, 2017. (ECF No. 147 (Boone 1); ECF No. 144 (Boone 2).)

II. JURISDICTION

\*3 The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Plaintiffs and Quicken Loans, and the amount in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2 (Boone 1); ECF No. 1 at 2 (Boone 2).) Quicken Loans is a corporation organized under the laws of Michigan with its principal place of business in Detroit, Michigan. (ECF No. 1-2 at 3 ¶ 5 (Boone 1); ECF No. 1-2 at 3 ¶ 5 (Boone 2).) Plaintiffs are both citizens and residents of Orangeburg County, South Carolina. (ECF No. 1-1 at 8 ¶ 1 (Boone 1); ECF No. 1-1 at 9 ¶ 1 (Boone 2).) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with DMTAC's representation. (ECF No. 1 at 3-7 (Boone 1); ECF No. 1 at 3-7 (Boone 2).)

On October 15, 2015, Plaintiffs filed Complaints against Quicken Loans in the Court of Common Pleas for Orangeburg County, South Carolina alleging violation of the SCAPS.<sup>3</sup> (ECF No. 1-1 at 10 ¶ 12 (Boone 1); ECF No. 1-1 at 9 ¶ 12 (Boone 2).) After Quicken Loans removed the cases to this court (ECF No. 1 (Boone 1); ECF No. 1 (Boone 2)) and they were consolidated (ECF No. 44 (Boone 1); ECF No. 43 (Boone 2)), the parties engaged in and completed discovery on March 1, 2017.

### III. LEGAL STANDARD

Summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if proof of its existence or non-existence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248–49 (1986). A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 434 (4th Cir. 2011).

In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123–24 (4th Cir. 1990). The non-moving party may not oppose a motion for summary judgment with mere allegations or denial of the movant’s pleading, but instead must “set forth specific facts” demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(e); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). All that is required is that “sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Anderson*, 477 U.S. at 249.

### IV. ANALYSIS

#### A. The Parties’ Arguments

##### 1. *Plaintiffs*

In their respective Motions for Summary Judgment, Plaintiffs assert that Quicken Loans violates section 37-10-102 by failing “to ascertain the preference of the South Carolina borrower that results in the attorney at the closing table not being selected by the borrower, a practice that deprives the South Carolina borrower of a statutorily guaranteed right.” (ECF No. 91-1 at 10 (*Boone 1*); ECF No. 89-1 at 10–11 (*Boone 2*)). Specifically, Plaintiffs assert that asking the question “Will the borrower select legal counsel to represent them in this transaction?” does not satisfy the statute which “mandates that the creditor

‘... must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters related to the closing of the transaction....’ ” (ECF No. 91-1 at 11 (*Boone 1*); ECF No. 89-1 at 11 (*Boone 2*)). Quicken Loans “must do more than disclose to the borrower; the lender must elicit certain specific information from the borrower.” (ECF No. 105 at 5 (*Boone 1*); ECF No. 103 at 5 (*Boone 2*)). In this regard, Quicken Loans’ “form fails to ascertain the preference of the borrower if it is already prepopulated with ‘I/we will not use the services of legal counsel.’ ” (ECF No. 105 at 6 (*Boone 1*); ECF No. 103 at 6 (*Boone 2*)). Accordingly, Plaintiffs argue that Quicken Loans’ form “violates the statute and operates as an illegal waiver of the right to be represented by any attorney, much less the consumer’s choice of legal counsel.” (ECF No. 91-1 at 16 (*Boone 1*); ECF No. 89-1 at 16 (*Boone 2*)).

##### 2. *Quicken Loans*

\*4 In its Motion for Summary Judgment, Quicken Loans asserts that the purpose of the SCAPS is “to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrower’s preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction[.]” (ECF No. 88 at 13 (*Boone 1*); ECF No. 86 at 13 (*Boone 2*) (citing *Davis v. NationsCredit Fin. Servs. Corp.*, 484 S.E.2d 471, 472 (S.C. 1997))). Quicken Loans further asserts that “a lender substantially complies with section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information.” (ECF No. 88 at 14 (*Boone 1*); ECF No. 86 at 14 (*Boone 2*) (citing *Davis*, 484 S.E.2d at 472).) Based on the foregoing, Quicken Loans argues that it complied with the SCAPS because it “clearly and prominently disclosed to Plaintiffs that they had the right to express a preference for an attorney and gave them numerous opportunities to express a preference.” (*Id.*) In support of its argument, Quicken Loans points out that the AIPC required Plaintiffs to sign acknowledging that they “have been informed by the lender that I (we) have a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of this loan.” (ECF No. 1-1 at 13 (*Boone 1*); ECF No. 1-1 at 14 (*Boone 2*)).

Additionally, Quicken Loans argues that it has satisfied the safe harbor provisions of section 37-10-102 as to Plaintiffs by providing written notice of the preference

information on the AIPC within one business day. (ECF No. 88 at 21 (*Boone 1*); ECF No. 86 at 21 (*Boone 2*)).

#### B. The Court's Review

Plaintiffs bring their actions pursuant to the SCAPS, which provides in pertinent part:

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

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

The creditor may comply with this section by:

(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or

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

S.C. Code § 37-10-102(a) (2017). Plaintiffs assert Quicken Loans violated the SCAPS in the following particulars:

The Attorney/Insurance Preference Form utilized by Quicken is essentially the form recommended by the Department of Consumer Affairs.<sup>4</sup> It is what Quicken does with the form before it is presented to the borrower that runs afoul of the law. The pre-populated Attorney/Insurance Preference Form is in and of itself violative of the very statute that the underlying form is intended to facilitate. By effectively foreclosing the borrower's choice when taking the loan application—the very first step in a real-estate-secured loan

transaction—Quicken closes the door on the consumer and taints the entire process that follows. This alone is sufficient to warrant a ruling as a matter of law and the entry of summary judgment.

(ECF No. 91-1 at 17 (*Boone 1*); ECF No. 89-1 at 17 (*Boone 2*)).

Neither Plaintiffs nor Quicken Loans have cited, and the court has not located, a South Carolina appellate court case addressing this precise issue.<sup>5</sup> “Thus, as a federal court sitting in diversity, the [c]ourt must predict how the South Carolina Supreme Court would decide the issue.” *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, C/A No.: 4:16-cv-03666-RBH, 2017 WL 2216298, at \*5 (D.S.C. May 19, 2017) (citing *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002) (“As a federal court sitting in diversity, we have an obligation to apply the jurisprudence of South Carolina's highest court, the South Carolina Supreme Court. But in a situation where the South Carolina Supreme Court has spoken neither directly nor indirectly on the particular issue before us, we are called upon to predict how that court would rule if presented with the issue.” (internal footnote and citations omitted))). “In predicting a ruling by the South Carolina Supreme Court, [the Court] may also consider, inter alia: restatements of the law, treatises, and well considered dicta,” *id.*, “as well as the practices of other states.” *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272 (4th Cir. 2004) (internal quotation marks omitted)). While it does not appear that this specific issue has been addressed by the South Carolina appellate courts, the South Carolina Supreme Court has reasoned in construing this provision that “[o]ur construction of legislative intent flows from the clear language of the statute ...” and that such intent is to protect borrowers. *King v. Am. Gen. Fin., Inc.*, 687 S.E.2d 321, 325 (S.C. 2009).

<sup>5</sup> The SCAPS requires the lender to ascertain the preference of the borrower as to legal counsel. “‘[A]scertain’ means ‘to render certain or definite ... to clear of doubt or obscurity ... to find out by investigation.’” *Parker v. Cty. of Oxford*, 224 F. Supp. 2d 292, 295 (D. Me. 2002) (quoting *Black's Law Dictionary* 114 (6th ed. 1990)); see also *Morgan v. Huntington Ingalls, Inc.*, 879

F.3d 602, 609 (5th Cir. 2018) (“ ‘Ascertain’ means ‘to make certain, exact, or precise’ or ‘to find out or learn with certainty ...’ [t]hus, ‘ascertain’ requires ‘a greater level of certainty....’ ”) (citation omitted). In considering the requirements of the SCAPS, the court observes that the parties have not presented any dispute of fact regarding Quicken Loan’s attorney preference procedure in this matter. Therefore, the matter is ripe for summary judgment.

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiffs’ attorney preference in compliance with the SCAPS. First, an agent of Quicken Loans expressly asked Thelma Boone if Plaintiffs will “select legal counsel to represent them in this transaction.”<sup>6</sup> After receiving Thelma Boone’s response that Plaintiffs did not have counsel of preference, Quicken Loans (1) sent Plaintiffs an AIPC that advised them that they “have a right to select legal counsel to represent [the]m[ ] in all matters of this transaction relating to the closing of this loan” and (2) prepopulated the AIPC with the statement “I/We will not use the services of legal counsel.” (ECF No. 1-1 at 13 (*Boone* 1); ECF No. 1-1 at 14 (*Boone* 2).) Upon their receipt of the AIPC, Plaintiffs reviewed it, signed it and faxed the document back to Quicken Loans.<sup>7</sup> There is no evidence before the court that Plaintiffs had any questions about the content of the AIPC. Thereafter, Plaintiffs had approximately five weeks (from September 19, 2012, to October 25, 2012) before the loan closing on October 26, 2012, to express an attorney preference to Quicken Loans. Not only did Plaintiffs not do this,<sup>8</sup> but Thelma Boone met with counsel chosen by Quicken Loans (Justin Tapp) the day before the closing and did

not voice any displeasure with his performance.<sup>9</sup> In this regard, Plaintiffs’ assertion of no preference is their preference. Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did “ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ...” in compliance with the SCAPS.<sup>10</sup> Accordingly, the court **GRANTS** Quicken Loans’ Motion for Summary Judgment and **DENIES** Plaintiffs’ Motion for Summary Judgment.

## V. CONCLUSION

\*6 Upon careful consideration of the entire record and the parties’ arguments, the court hereby **GRANTS** Quicken Loans’ Motion for Summary Judgment and **DENIES** Plaintiffs’ Motion for Summary Judgment. *T. Boone v. Quicken Loans, Inc.*, CIA No. 5:15-cv-04772-JMC, ECF Nos. 88, 91; *V. Boone v. Quicken Loans, Inc.*, CIA No. 5:15-cv-04843-JMC, ECF Nos. 86, 89. As a result of the foregoing, all remaining pending motions are **DENIED AS MOOT**. *T. Boone v. Quicken Loans, Inc.*, CIA No. 5:15-cv-04772-JMC, ECF Nos. 113, 114; *V. Boone v. Quicken Loans, Inc.*, CIA No. 5:15-cv-04843-JMC, ECF Nos. 111, 112.

**IT IS SO ORDERED.**

### All Citations

Slip Copy, 2018 WL 806658

### Footnotes

- 1 The court observes that from this point forward, “Rule” refers to the Federal Rules of Civil Procedure.
- 2 Plaintiffs had prior experience with the loan application process having refinanced the mortgage on their residence a total of nine times: “in 1991 with National Bank of South Carolina; in 1996, 1999, 2001, and 2003 with CPM Federal Credit Union; and in 2011, 2011, 2012, and 2015 with Quicken Loans.” (ECF No. 88 at 3 (*Boone* 1); ECF No. 86 at 3 (*Boone* 2); see also ECF No. 88-1 at 7 ¶ 11 (*Boone* 1); ECF No. 86-1 at 7 ¶ 11 (*Boone* 2).)
- 3 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to their attorney preference claims, Plaintiffs also alleged their entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 44 (*Boone* 1); ECF No. 43 (*Boone* 2).)
- 4 See Admin. Interpretation No. 10.102(a)-9301 (S.C. Dep’t Consumer Affairs Sept. 7, 1993).
- 5 Additionally, neither Plaintiffs nor Quicken Loans has requested certification of this issue to the South Carolina Supreme Court.
- 6 Q. Did you [Thelma Boone] express a preference for an attorney?  
A. No. (ECF No. 88-3 at 33:1–3 (*Boone* 1); ECF No. 86-3 at 33:1–3 (*Boone* 2).)

- 7 Q. Is that your [Thelma Boone] signature under Item 1?  
A. Yes.  
Q. Did you [Thelma Boone] sign it to confirm that it was correct?  
A. Yes. (ECF No. 88-3 at 33:4-8 (*Boone* 1); ECF No. 86-3 at 33:4-8 (*Boone* 2).)
- 8 Q. Did you [Thelma Boone] have an attorney that you wanted to close this loan at the time?  
A. No. (*Id.* at 14-16 (*Boone* 1); *Id.* at 14-16 (*Boone* 2).)  
Q. Did you [Vance Boone] express a preference for an attorney to close the loan?  
A. No, sir. (ECF No. 88-2 at 12:6-8 (*Boone* 1); ECF No. 86-2 at 12:6-8 (*Boone* 2).)  
Q. Did you [Vance Boone] talk to any other attorneys about representing you in the loan closing?  
A. No, sir. (*Id.* at 12-14 (*Boone* 1); *Id.* at 12-14 (*Boone* 2).)
- 9 Q. Did the attorney [Tapp] who closed the loan do a good job at the closing?  
A. Yes, I guess. (ECF No. 88-3 at 30:9-12 (*Boone* 1); ECF No. 86-3 at 30:9-12 (*Boone* 2).)
- 10 As a result of this finding, the court will not address whether Quicken Loans has satisfied the safe harbor provisions of the SCAPS.

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KeyCite Blue Flag – Appeal Notification  
Appeal Filed by BOONE v. QUICKEN LOANS, INC., 4th Cir., August 2, 2018

2018 WL 3222609

Only the Westlaw citation is currently available.

United States District Court, D.  
South Carolina, Orangeburg Division.

Thelma BOONE, Plaintiff,  
v.  
QUICKEN LOANS, INC., Defendant.  
Vance L. Boone, Plaintiff,  
v.  
Quicken Loans, Inc., Defendant.

Civil Action No.: 5:15-cv-04772-JMC,  
Civil Action No.: 5:15-cv-04843-JMC

Signed 07/02/2018

#### Attorneys and Law Firms

Charles Bradley Hutto, Williams and Williams, Orangeburg, SC, Daniel Webster Williams, Beddingfield and Williams, Barnwell, SC, Steven W. Hamm, C. Jo Anne Wessinger Hill, Richardson Plowden and Robinson, Columbia, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham Ross Billings, Benjamin Rush Smith, III, Nelson Mullins Riley and Scarborough, Columbia, SC, for Defendant.

#### ORDER AND OPINION

J. Michelle Childs, United States District Judge

\*1 In these consolidated actions, Plaintiffs Thelma Boone and Vance L. Boone (together “Plaintiffs”) filed the above-captioned actions against Defendant Quicken Loans, Inc. alleging claims for violation of the South Carolina Attorney Preference Statute (“SCAPS”), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. *T. Boone v. Quicken Loans, Inc.*, C/A No. 5:15-cv-04772-JMC, ECF No. 1-1 at 9 ¶¶ 8–13 (D.S.C. Nov. 30, 2015) (“*Boone 1*”); *V. Boone v. Quicken Loans, Inc.*, C/A No. 5:15-cv-04843-JMC, ECF No. 1-1 at 10 ¶¶ 8–13 (D.S.C. Dec. 4, 2015) (“*Boone 2*”).

This matter is before the court on Plaintiffs' Motions to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 156 (*Boone 1*); ECF No. 153 (*Boone 2*)). Specifically, Plaintiffs seek to alter or amend the Orders entered on February 9, 2018 (ECF No. 154 (*Boone 1*); ECF No. 151 (*Boone 2*)) (the “February Orders”), in which the court granted Quicken Loans' Motions for Summary Judgment and denied Plaintiffs' Motions for Summary Judgment. (ECF Nos. 88, 91 (*Boone 1*); ECF Nos. 86, 89 (*Boone 2*)). Quicken Loans opposes Plaintiffs' Motion to Alter or Amend asserting that they should be denied. (ECF No. 157 at 2 (*Boone 1*); ECF No. 154 at 2 (*Boone 2*)). For the reasons set forth below, the court **DENIES** Plaintiffs' Motion to Alter or Amend.

#### I. RELEVANT BACKGROUND TO PENDING MOTION

Quicken Loans “is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances.” *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). “Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan.” *Id.*

On or about September 13, 2012, Thelma Boone provided information by telephone to Quicken Loans' mortgage banker for purposes of completing a loan application to refinance the mortgage on Plaintiffs' residence located at 226 River Drive, Rowesville, South Carolina.<sup>1</sup> (ECF No. 88-5 at 3 ¶¶ 4–5 (*Boone 1*); ECF No. 86-5 at 3 ¶¶ 4–5 (*Boone 2*)). As a result of the information provided by Thelma Boone, Quicken Loans generated loan application documents that were sent to Plaintiffs to review and sign. (*Id.*) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the “AIPC”). (*Id.*; see also ECF No. 1-1 at 13 (*Boone 1*); ECF No. 1-1 at 14 (*Boone 2*)). Based on the information provided by Thelma Boone, Quicken Loans sent Plaintiffs an AIPC that was prepopulated with the following relevant information (in bold):

\*2 1. I (We) have been informed by the lender that I (we) have a right to select legal counsel to represent

me(us) in all matters of this transaction relating to the closing of this loan.

(a) I select **I/We will not use the services of legal counsel.**

Borrower **Vance L. Boone**

Date

Borrower **Thelma Boone**

Date

Borrower

Date

Borrower

Date

(b) Having been informed of this right, and having no preference, I asked for assistance from the

lender and was referred to a list of acceptable attorneys. From that list I select

**Not Applicable**

**Not Applicable**

Borrower

Date

Borrower

Date

**Not Applicable**

**Not Applicable**

Borrower

Date

Borrower

Date

(ECF No. 1-1 at 13 (Boone 1); ECF No. 1-1 at 14 (Boone 2).)

On September 17 and 18, 2012, Plaintiffs signed the loan application documents and the AIPC. (ECF No. 88-5 at 3 ¶ 6 (Boone 1); ECF No. 86-5 at 3 ¶ 6 (Boone 2).) Plaintiffs then sent the signed loan application documents to Quicken Loans by telefax on September 17, 2012, and the AIPC to Quicken Loans on September 19, 2012. (ECF Nos. 1-1 at 13 & 88-7 (Boone 1); ECF Nos. 1-1 at 14 & 86-7 (Boone 1).) On October 19, 2012, Thelma Boone had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 88-5 at 3-4 ¶ 7 (Boone 1); ECF No. 86-5 at 3-4 ¶ 7 (Boone 1).) On October 25, 2012, Plaintiffs met with attorney Justin Tapp of McDonnell & Associates, P.A. and signed a disclosure form agreeing to the terms of McDonnell & Associates' representation at the loan closing. (ECF No. 88-8 at 3-4 ¶ 7 (Boone 1); ECF No. 86-8 at 3-4 ¶ 7 (Boone 2).) On October 26, 2012, Plaintiffs completed their loan closing. (ECF No. 88-8 at 3 ¶ 4 (Boone 1); ECF No. 86-8 at 3 ¶ 4 (Boone 2).)

On October 15, 2015, Plaintiffs filed Complaints against Quicken Loans in the Court of Common Pleas for Orangeburg County, South Carolina alleging violation of the SCAPS.<sup>2</sup> (ECF No. 1-1 at 10 ¶ 12 (Boone 1); ECF No. 1-1 at 9 ¶ 12 (Boone 2).) After Quicken Loans removed the cases to this court and they were consolidated, the parties engaged in and completed discovery on March 1, 2017. Quicken Loans then moved for summary judgment

on March 31, 2017. (ECF No. 88 (Boone 1); ECF No. 86 (Boone 2).) On that same day, Plaintiffs filed their Cross-Motions for Summary Judgment. (ECF No. 91 (Boone 1); ECF No. 89 (Boone 2).) After the court entered the February Order, Plaintiffs moved to alter or amend judgment on March 9, 2018. (ECF No. 156 (Boone 1); ECF No. 153 (Boone 2).)

## II. JURISDICTION

The court has jurisdiction over these matters pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Plaintiffs and Quicken Loans, and the amount in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2 (Boone 1); ECF No. 1 at 2 (Boone 2).) Quicken Loans is a corporation organized under the laws of Michigan with its principal place of business in Detroit, Michigan. (ECF No. 1-2 at 3 ¶ 5 (Boone 1); ECF No. 1-2 at 3 ¶ 5 (Boone 2).) Plaintiffs are both citizens and residents of Orangeburg County, South Carolina. (ECF No. 1-1 at 8 ¶ 1 (Boone 1); ECF No. 1-1 at 9 ¶ 1 (Boone 2).) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with Plaintiffs' representation. (ECF No. 1 at 3-7 (Boone 1); ECF No. 1 at 3-7 (Boone 2).)

## III. LEGAL STANDARD AND ANALYSIS

\*3 In the February Orders, the court made the following observations in granting Quicken Loans' Motions for Summary Judgment:

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiffs' attorney preference in compliance with the SCAPS. First, an agent of Quicken Loans expressly asked Thelma Boone if Plaintiffs will "select legal counsel to represent them in this transaction."<sup>3</sup> After receiving Thelma Boone's response that Plaintiffs did not have counsel of preference, Quicken Loans (1) sent Plaintiffs an AIPC that advised them that they "have a right to select legal counsel to represent [the]m[ ] in all matters of this transaction relating to the closing of this loan" and (2) prepopulated the AIPC with the statement "I/ We will not use the services of legal counsel." (ECF No. 1-1 at 13 (Boone 1); ECF No. 1-1 at 14 (Boone 2).) Upon their receipt of the AIPC, Plaintiffs reviewed it, signed it and faxed the document back to Quicken Loans.<sup>4</sup> There is no evidence before the court that Plaintiffs had any questions about the content of the AIPC. Thereafter, Plaintiffs had approximately five weeks (from September 19, 2012, to October 25, 2012) before the loan closing on October 26, 2012, to express an attorney preference to Quicken Loans. Not only did Plaintiffs not do this,<sup>5</sup> but Thelma Boone met with counsel chosen by Quicken Loans (Justin Tapp) the day before the closing and did not voice any displeasure with his performance.<sup>6</sup> In this regard, Plaintiffs' assertion of no preference is their preference. Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did "ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ..." in compliance with the SCAPS. Accordingly, the court **GRANTS** Quicken Loans' Motion for Summary Judgment and **DENIES** Plaintiffs' Motion for Summary Judgment.

(ECF No. 154 at 9–10 (Boone 1); ECF No. 151 at 9–10 (Boone 2).) Plaintiffs seek to alter or amend the foregoing pursuant to Rules 52 and 59.

#### A. Applicable Standard under Rule 59(e)<sup>7</sup>

\*4 Rule 59 allows a party to seek an alteration or amendment of a previous order of the court. Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may "alter or amend

the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of these three grounds in order to obtain relief. *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 285 (4th Cir. 2012). The decision whether to reconsider an order under Rule 59(e) is within the sound discretion of the district court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). A motion to reconsider should not be used as a "vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind." *Lyles v. Reynolds, C/A No. 4:14-1063-TMC*, 2016 WL 1427324, at \*1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)).

#### B. The Parties' Arguments

In their Motion, Plaintiffs focus their arguments on explaining why they disagree with the court's February Order. First, they state their disagreement with the court's conclusion that (1) "an agent of Quicken Loans expressly asked Thelma Boone any questions about her preference as to legal counsel" and/or (2) "Quicken Loans received any response from Thelma Boone prior to the dispatch of the prepopulated forms to her and Vance Boone." (ECF No. 156 at 2 (Boone 1); ECF No. 153 at 2 (Boone 2).) Next, Plaintiffs contend that even though they did not state an attorney preference, the SCAPS requires that a "lawyer must be counsel selected by the borrower," which Quicken Loans' attorney preference procedure fails to provide for a borrower. (*Id.* at 5 (Boone 1); *Id.* at 5 (Boone 2).) Finally, Plaintiffs express their dismay that the court's February Orders' language did not mimic the substantive findings contained in the Order entered denying Quicken Loans' Motion to Dismiss.<sup>8</sup> (*Id.* at 7 (quoting ECF No. 44 at 4–6) (Boone 1); *Id.* at 7 (quoting ECF No. 53 at 4–6) (Boone 2).)

Quicken Loans opposes Plaintiffs' Motion arguing that "[t]he Court's factual findings are supported by the undisputed evidence in the record" and "Plaintiffs offer no new evidence in support of their request." (ECF No. 157 at 2, 3 (Boone 1); ECF No. 154 at 2, 3 (Boone 2).) Quicken Loans further argues that Plaintiffs have failed to cite to any legal support for their claim that "the borrower must always have a preference for an attorney." (*Id.* at 6

(*Boone* 1); *Id.* at 6 (*Boone* 2).) Finally, as to the exhibit that was attached to Plaintiffs' Motion (*see* (ECF No. 156-1 (*Boone* 1); ECF No. 153-1 (*Boone* 2) )), Quicken Loans asserts that “[t]he Court should reject Plaintiffs' filing of the Department’s amicus brief<sup>9</sup> because it is in direct contravention of the Court’s Order and is an improper attempt to refashion their argument and expand the record at the 59(e) stage.” (ECF No. 157 at 8 (*Boone* 1); ECF No. 154 at 8 (*Boone* 2).)

### C. The Court’s Review

\*5 Plaintiffs do not reference either an intervening change in controlling law or new evidence previously unavailable. Based on its review of Plaintiffs' filings (ECF Nos. 156, 158 (*Boone* 1); ECF Nos. 153, 155 (*Boone* 2) ), the court can only conclude that Plaintiffs are seeking to alter or amend the February Orders on the basis that the court’s decisions were either clear error of law or resulted in a manifest injustice to Plaintiff. Clear error occurs when the reviewing court “is left with the definite and firm conviction that a mistake has been committed.” *United States v. Harvey*, 532 F.3d 326, 336 (4th Cir. 2008) (internal quotation marks omitted); *see also United States v. Martinez–Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) (“[C]lear error occurs when a district court’s factual findings are against the clear weight of the evidence considered as a whole.”) (internal quotation marks omitted); *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 n.5 (4th Cir. 1983) (explaining that a district court’s factual finding is clearly erroneous if “the finding is against the great preponderance of the evidence”) (internal quotation marks omitted). Manifest injustice occurs where the court “has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension....” *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (citations omitted).

In the February Order (ECF No. 154 (*Boone* 1); ECF No. 151 (*Boone* 2) ), the court cited to appropriate substantive case law and provided specific reasoning to support its decisions to find that Quicken Loans did ascertain Plaintiffs' preference as to legal counsel in accordance with the SCAPS. Moreover, in contrast to its Orders on

Quicken Loans' Motions to Dismiss (ECF No. 44 (*Boone* 1); ECF No. 43 (*Boone* 2) ), the court did not have to rely solely on Plaintiffs' allegations and was able to reference specific testimony from Plaintiffs' depositions leading to the conclusion that there was no genuine issue as to any material fact and that Quicken Loans was entitled to judgment as a matter of law.

Upon review of the instant Motions, the court observes that Plaintiffs' arguments add very little new substantive argument to what they have already presented on the aforementioned issues. (*See, e.g.*, ECF Nos. 91, 105, 106 & 149 (*Boone* 1); ECF No. 89, 103, 104 & 147 (*Boone* 2).) A Rule 59(e) motion should not be used as an opportunity to rehash issues already ruled upon because a litigant is displeased with the result. *See Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993) (stating that “mere disagreement does not support a Rule 59(e) motion”); *see also Consulting Engrs, Inc. v. Geometric Software Solutions & Structure Works LLC*, 2007 WL 2021901, at \*2 (D.S.C. July 6, 2007) (“A party’s mere disagreement with the court’s ruling does not warrant a Rule 59(e) motion, and such motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted.”). In this regard, the court is not persuaded that entry of the February Orders resulted in the commission of either clear error of law or manifest injustice. Accordingly, the court must deny Plaintiffs' Motions to Alter or Amend Judgment.

## IV. CONCLUSION

For the reasons set forth above, the court hereby **DENIES** Plaintiffs Thelma Boone and Vance L. Boone’s Motions to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 156 (*Boone* 1); ECF No. 153 (*Boone* 2).)

**IT IS SO ORDERED.**

### All Citations

Slip Copy, 2018 WL 3222609

Footnotes

- 1 Plaintiffs had prior experience with the loan application process having refinanced the mortgage on their residence a total of nine times: "in 1991 with National Bank of South Carolina; in 1996, 1999, 2001, and 2003 with CPM Federal Credit Union; and in 2011, 2012, and 2015 with Quicken Loans." (ECF No. 88 at 3 (*Boone* 1); ECF No. 86 at 3 (*Boone* 2); see also ECF No. 88-1 at 7 ¶ 11 (*Boone* 1); ECF No. 86-1 at 7 ¶ 11 (*Boone* 2).)
- 2 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to their attorney preference claims, Plaintiffs also alleged their entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 44 (*Boone* 1); ECF No. 43 (*Boone* 2).)
- 3 Q. Did you [Thelma Boone] express a preference for an attorney?  
A. No. (ECF No. 88-3 at 33:1-3 (*Boone* 1); ECF No. 86-3 at 33:1-3 (*Boone* 2).)
- 4 Q. Is that your [Thelma Boone] signature under Item 1?  
A. Yes.  
Q. Did you [Thelma Boone] sign it to confirm that it was correct?  
A. Yes. (ECF No. 88-3 at 33:4-8 (*Boone* 1); ECF No. 86-3 at 33:4-8 (*Boone* 2).)
- 5 Q. Did you [Thelma Boone] have an attorney that you wanted to close this loan at the time?  
A. No. (*Id.* at 14-16 (*Boone* 1); *Id.* at 14-16 (*Boone* 2).)  
Q. Did you [Vance Boone] express a preference for an attorney to close the loan?  
A. No, sir. (ECF No. 88-2 at 12:6-8 (*Boone* 1); ECF No. 86-2 at 12:6-8 (*Boone* 2).)  
Q. Did you [Vance Boone] talk to any other attorneys about representing you in the loan closing?  
A. No, sir. (*Id.* at 12-14 (*Boone* 1); *Id.* at 12-14 (*Boone* 2).)
- 6 Q. Did the attorney [Tapp] who closed the loan do a good job at the closing?  
A. Yes, I guess. (ECF No. 88-3 at 30:9-12 (*Boone* 1); ECF No. 86-3 at 30:9-12 (*Boone* 2).)
- 7 The court observes that Rule 52(b) is inapplicable because this action did not go to trial. *See id.*; see also *State Farm Mut. Auto. Ins. Co. v. Medgyesy, C/A No. 6:12-CV-00044-MGL*, 2014 WL 11511695, at \*1 (D.S.C. May 12, 2014) ("Rule 52(b) is a trial rule that is not applicable in a summary judgment proceeding' or on a motion to dismiss in a habeas proceeding.") (quoting *Orem v. Rephann*, 523 F.3d 442, 451 n.2 (4th Cir. 2008) ).
- 8 In its June 30, 2016 Order, the court observed as follows:  
The legislative intent of the attorney preference statute is to protect borrowers by giving them the option to select their own counsel to assist them during the closing of the transaction. In protecting borrowers, the statute requires that lenders like Defendant ascertain Plaintiff's attorney preference. The facts as alleged by Plaintiff indicate that Defendant provided Plaintiff with a form where the attorney preference portion was already filled in, then required Plaintiff to sign the form. (ECF No. 1-1 at 9 ¶ 8-9.) Plaintiff further alleges that she was not allowed to choose an attorney to represent her in the transaction. (*Id.* at ¶ 12). If the facts as alleged by Plaintiff are true, it is hard to imagine how Defendant could have ascertained Plaintiff's preference for an attorney if Defendant essentially told Plaintiff what her preference was by providing her with an already completed form. If the facts as alleged are true, they would seem to support Plaintiff's allegation that she was deprived of a meaningful choice in selecting her attorney for this transaction.  
(ECF No. 44 at 6 (*Boone* 1); ECF No. 43 at 6 (*Boone* 2).)
- 9 The South Carolina Department of Consumer Affairs ("DCA") filed an Amicus Curiae Brief in the matter of *Quicken Loans, Inc. v. Wilson*, App. Case No. 2016-001214 (S.C. Ct. App.). In the brief, the DCA asked that the appellate court "uphold the Special Referee's ruling that Quicken violated the attorney preference statute." (ECF No. 156-1 at 16 (*Boone* 1); ECF No. 153-1 at 16 (*Boone* 2).)

2018 WL 1015076

Only the Westlaw citation is currently available.  
United States District Court, D.  
South Carolina, Charleston Division.

Travis MESSEX, Plaintiff,  
v.  
QUICKEN LOANS, INC., Defendant.

Civil Action No. 2:15-cv-04773-JMC  
|  
Signed 02/22/2018

**Attorneys and Law Firms**

Charles Bradley Hutto, Williams and Williams, Orangeburg, SC, Daniel Webster Williams, Bedingfield and Williams, Barnwell, SC, Steven W. Hamm, C. Jo Anne Wessinger Hill, Richardson Plowden and Robinson, Columbia, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham Ross Billings, Benjamin Rush Smith, III, Nelson Mullins Riley and Scarborough, Columbia, SC, for Defendant.

**ORDER AND OPINION**

J. MICHELLE CHILDS, United States District Judge

\*1 Plaintiff Travis Messex filed the above-captioned action against Defendant Quicken Loans, Inc. alleging claims for violation of the South Carolina Attorney Preference Statute (“SCAPS”), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. *T. Messex v. Quicken Loans, Inc.*, C/A No. 2:15-cv-04773-JMC, ECF No. 1-1 at 9 ¶¶ 8–13 (D.S.C. Nov. 30, 2015).

This matter is before the court on Plaintiff’s and Quicken Loans’ Cross-Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (ECF Nos. 79, 82.) The parties oppose each other’s Motions respectively. (ECF Nos. 90, 95.) For the reasons set forth below, the court **GRANTS** Quicken Loans’ Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

**Borrower Travis Messex**

Borrower

**I. RELEVANT BACKGROUND TO PENDING MOTIONS**

Quicken Loans “is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances.” *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). “Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan.” *Id.*

\*2 In or around November 28, 2012, Teresa Messex, Plaintiff’s wife, provided information to Quicken Loans for purposes of completing a loan application to refinance the mortgage on the Messexes’ residence located at 136 Messex Lane, Saint George, South Carolina.<sup>1</sup> (ECF Nos. 79-3 at 4, 79-1 at 23:10–27:25 & ECF No. 79-5 at 3 ¶ 5.) At all times relevant to this transaction, Teresa Messex had Plaintiff’s permission to conduct his business, which authorization was conveyed by Plaintiff to Quicken Loans. (ECF No. 79-2 at 6:15–24 & 7:11–16; ECF No. 79-1 at 25:17–26:8.) As a result of the information provided by Teresa Messex, Defendant generated loan application documents that were made available to Plaintiff and his wife to review via Quicken Loans’ internet web portal. (ECF No. 79-5 at 3 ¶ 5.) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the “AIPC”). (*Id.*; see also ECF No. 1-1 at 9 ¶ 8.) Based on the information provided by Teresa Messex, the AIPC was prepopulated with the following relevant information (in bold):

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

(a) I select **I/We will not use the services of legal counsel.**

| Borrower | Date | Borrower | Date |
|----------|------|----------|------|
| Borrower | Date | Borrower | Date |

(b) Having been informed of this right, and having no preference, I asked for assistance from the lender and

**Not Applicable**

was referred to a list of acceptable attorneys. From that list I select

**Not Applicable**

Borrower

Date

Borrower

Date

**Not Applicable**

**Not Applicable**

Borrower

Date

Borrower

Date

(ECF No. 1-1 at 13.)

On November 29, 2012, Teresa Messex, with Plaintiff's permission/authorization, electronically signed the loan application documents and the AIPC and transmitted them to Quicken Loans via its internet web portal. (*Id.*; see also ECF Nos. 79-1 at 25:2-8 & 27:18-24; ECF No. 79-2 at 6:15-7:16; ECF No. 79-5 at 3 ¶ 6.) On January 10, 2013, Teresa Messex had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 79-5 at 3 ¶ 7.) On January 22, 2013, Plaintiff and his wife signed a disclosure form agreeing to be represented by Scotty Sheriff of the law firm McDonnell & Associates, P.A. at the loan closing and completed their loan closing. (ECF No. 79-8 at 3 ¶ 4-4 ¶ 8 & 6-8.)

On October 19, 2015, Plaintiff filed a Complaint against Quicken Loans in the Court of Common Pleas for Dorchester County, South Carolina alleging violation of the SCAPS.<sup>2</sup> (ECF No. 1-1 at 9 ¶ 12.) After Quicken Loans removed the case to this court (ECF No. 1), the parties engaged in and completed discovery on March 1, 2017. (ECF No. 49.) Quicken Loans then moved for summary judgment on March 31, 2017. (ECF No. 79.) On that same day, Plaintiff filed his Cross-Motion for Summary Judgment. (ECF No. 82.)

The court heard argument from the parties on the instant Motions at a hearing on December 5, 2017. (ECF No. 136.)

## II. JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Plaintiff and Quicken Loans, and the amount

in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2.) Quicken Loans is a corporation organized under the laws of Michigan with its principal place of business in Detroit, Michigan. (ECF No. 1-2 at 3 ¶ 5.) Plaintiff is a citizen and resident of Dorchester County, South Carolina. (ECF No. 1-1 at 8 ¶ 1.) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with Defendant's representation. (ECF No. 1 at 3-7.)

## III. LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248-49 (1986). A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 434 (4th Cir. 2011).

\*3 In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990). The non-moving party may not oppose a motion for summary judgment with mere allegations or denial of the movant's pleading, but instead must "set forth specific facts" demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(e); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). All that is required is that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge

to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249.

#### IV. ANALYSIS

##### A. The Parties' Arguments

###### 1. *Plaintiff*

In his Motion for Summary Judgment, Plaintiff asserts that Quicken Loans violates section 37-10-102 by failing "to ascertain the preference of the South Carolina borrower that results in the attorney at the closing table not being selected by the borrower, a practice that deprives the South Carolina borrower of a statutorily guaranteed right." (ECF No. 82-1 at 10–11.) Specifically, Plaintiff asserts that asking the question "Will the borrower select legal counsel to represent them in this transaction?" does not satisfy the statute which "mandates that the creditor '... must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters related to the closing of the transaction....'" (*Id.*) Quicken Loans "must do more than disclose to the borrower; the lender must elicit certain specific information from the borrower." (ECF No. 95 at 4.) In this regard, Quicken Loans' "form fails to ascertain the preference of the borrower if it is already prepopulated with 'I/we will not use the services of legal counsel.'" (*Id.* at 5.) Accordingly, Plaintiff argues that Quicken Loans' form "violates the statute and operates as an illegal waiver of the right to be represented by any attorney, much less the consumer's choice of legal counsel." (ECF No. 82-1 at 16.)

###### 2. *Quicken Loans*

In its Motion for Summary Judgment, Quicken Loans asserts that the purpose of the SCAPS is "to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrower's preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction[.]" (ECF No. 79 at 12 (citing *Davis v. NationsCredit Fin. Servs. Corp.*, 484 S.E.2d 471, 472 (S.C. 1997))). Quicken Loans further asserts that "a lender substantially complies with section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information." (*Id.* (citing *Davis*, 484 S.E.2d at 472).) Based on the foregoing, Quicken Loans argues that it complied with the SCAPS because it "clearly

and prominently disclosed to Plaintiff that he had the right to express a preference for an attorney and gave him numerous opportunities to express a preference." (*Id.*) In support of its argument, Quicken Loans points out that the AIPC required Plaintiff to sign acknowledging that he has "been informed by the lender that I (we) have a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of this loan." (ECF No. 1-1 at 13.)

Additionally, Quicken Loans argues that it has satisfied the safe harbor provisions of section 37-10-102 as to Plaintiff by providing written notice of the preference information on the AIPC within one business day. (ECF No. 79 at 18.)

##### B. The Court's Review

\*4 Plaintiff brings his action pursuant to the SCAPS, which provides in pertinent part:

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

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

The creditor may comply with this section by:

(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or

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

S.C. Code § 37-10-102(a) (2017). Plaintiff asserts Quicken Loans violated the SCAPS in the following particulars:

The Attorney/Insurance Preference Form utilized by Quicken is essentially the form recommended

by the Department of Consumer Affairs.<sup>3</sup> It is what Quicken does with the form before it is presented to the borrower that runs afoul of the law. The pre-populated Attorney/Insurance Preference Form is in and of itself violative of the very statute that the underlying form is intended to facilitate. By effectively foreclosing the borrower's choice when taking the loan application—the very first step in a real-estate-secured loan transaction—Quicken closes the door on the consumer and taints the entire process that follows. This alone is sufficient to warrant a ruling as a matter of law and the entry of summary judgment.

(ECF No. 82-1 at 17.)

Neither Plaintiff nor Quicken Loans have cited, and the court has not located, a South Carolina appellate court case addressing this precise issue.<sup>4</sup> “Thus, as a federal court sitting in diversity, the [c]ourt must predict how the South Carolina Supreme Court would decide the issue.” *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, C/A No.: 4:16-cv-03666-RBH, 2017 WL 2216298, at \*5 (D.S.C. May 19, 2017) (citing *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002) (“As a federal court sitting in diversity, we have an obligation to apply the jurisprudence of South Carolina's highest court, the South Carolina Supreme Court. But in a situation where the South Carolina Supreme Court has spoken neither directly nor indirectly on the particular issue before us, we are called upon to predict how that court would rule if presented with the issue.” (internal footnote and citations omitted))). “In predicting a ruling by the South Carolina Supreme Court, [the Court] may also consider, inter alia: restatements of the law, treatises, and well considered dicta,” *id.*, “as well as the practices of other states.” *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272 (4th Cir. 2004) (internal quotation marks omitted)). While it does not appear that this specific issue has been addressed by the South Carolina appellate courts, the South Carolina Supreme Court has reasoned in construing this provision that “[o]ur construction of

legislative intent flows from the clear language of the statute ...” and that such intent is to protect borrowers. *King v. Am. Gen. Fin., Inc.*, 687 S.E.2d 321, 325 (S.C. 2009).

\*5 The SCAPS requires the lender to ascertain the preference of the borrower as to legal counsel. “‘[A]scertain’ means ‘to render certain or definite ... to clear of doubt or obscurity ... to find out by investigation.’” *Parker v. Cty. of Oxford*, 224 F. Supp. 2d 292, 295 (D. Me. 2002) (quoting *Black's Law Dictionary* 114 (6th ed. 1990)); see also *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 609 (5th Cir. 2018) (“‘Ascertain’ means ‘to make certain, exact, or precise’ or ‘to find out or learn with certainty ...’ [t]hus, ‘ascertain’ requires ‘a greater level of certainty....’”) (citation omitted). In considering the requirements of the SCAPS, the court observes that the parties have not presented any dispute of fact regarding Quicken Loan's attorney preference procedure in this matter. Therefore, the matter is ripe for summary judgment.

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiff's attorney preference in compliance with the SCAPS. First, Teresa Messex had permission from Plaintiff<sup>5</sup> to convey to an agent of Quicken Loans that Plaintiff would not use the services of preferred legal counsel to represent him in this transaction. After receiving Teresa Messex's response that Plaintiff did not have counsel of preference, Quicken Loans (1) sent Plaintiff an AIPC that advised him that he has “a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan” and (2) prepopulated the AIPC with the statement “I/We will not use the services of legal counsel.” (ECF No. 1-1 at 13.) Upon receipt of the AIPC, Teresa Messex reviewed it, discussed it with Plaintiff,<sup>6</sup> electronically signed it<sup>7</sup> and electronically transmitted the document back to Quicken Loans.<sup>8</sup> There is no evidence before the court that Plaintiff had any questions about the content of the AIPC. *Cf. Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 12 (S.C. 2005) (“[A] competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress.”) (citations omitted). Thereafter, Plaintiff had approximately seven weeks, from November 29, 2012, to before the loan closing on January 22, 2013, to express an attorney preference to

Quicken Loans, which he did not do. Moreover, Plaintiff has not voiced any displeasure with counsel chosen by Quicken Loans (Scotty Sheriff).<sup>9</sup>

Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did “ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ...” in compliance with the SCAPS.<sup>10</sup> Accordingly, the court **GRANTS** Quicken Loans' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

\*6 Upon careful consideration of the entire record and the parties' arguments, the court hereby **GRANTS** Quicken Loans' Motion for Summary Judgment (ECF No. 79) and **DENIES** Plaintiff's Motion for Summary Judgment. (ECF No. 82.) As a result of the foregoing, all remaining pending motions are **DENIED AS MOOT**. (ECF Nos. 103, 104.)

**IT IS SO ORDERED.**


**All Citations**

Slip Copy, 2018 WL 1015076

**V. CONCLUSION**

**Footnotes**

- 1 Plaintiff and his wife had prior experience with the loan application process having refinanced the mortgage on their residence a total of nine times with six different lenders. (ECF No. 79 at 2.)
- 2 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to his attorney preference claim, Plaintiff also alleged his entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 39.)
- 3 See Admin. Interpretation No. 10.102(a)-9301 (S.C. Dep't Consumer Affairs Sept. 7, 1993).
- 4 Additionally, neither Plaintiff nor Quicken Loans has requested certification of this issue to the South Carolina Supreme Court.
- 5 Q. Do you remember what you [Plaintiff] talked about [with Quicken Loans] during that one phone call?  
A. No. Pretty much just giving them my wife authorization over everything.  
Q. Okay.  
A. Since my name was on it, they had to have authorization. (ECF No. 79-2 at 8:17-23.)
- 6 Q. Do you remember talking about any of the application process with your wife [Teresa Messex] for the Quicken Loans loan?  
A. Yes. We had talked about it.  
Q. What did you talk about?  
A. It's been so long. I know we talk about everything. She just does the final. Q Okay.  
A. Everything we do, we talk about. (ECF No. 79-2 at 6:21-7:4.)
- 7 Q. So if she signed your name to any of these documents, do you have any reason to think they are incorrect for any reason?  
A. No. (*Id.* at 7:7-10.)
- 8 Q. Was your wife [Teresa Messex] authorized by you to fill out this paperwork?  
A. Yes. (ECF No. 79-2 at 6:15-17.)
- 9 Q. Okay. Assuming he [Scott Sheriff] was, were you okay with him—?  
A. Yes. (*Id.* at 9:12-14.)
- 10 As a result of this finding, the court will not address whether Quicken Loans has satisfied the safe harbor provisions of the SCAPS.

 KeyCite Blue Flag – Appeal Notification  
Appeal Filed by TRAVIS MESSEX v. QUICKEN LOANS  
INCORPORATED, 4th Cir., August 14, 2018  
2018 WL 3359018

Only the Westlaw citation is currently available.

United States District Court, D.  
South Carolina, Charleston Division.

Travis MESSEX, Plaintiff,  
v.  
QUICKEN LOANS, INC., Defendant.

Civil Action No. 2:15-cv-04773-JMC  
|  
Signed 07/10/2018

#### Attorneys and Law Firms

Charles Bradley Hutto, Williams and Williams,  
Orangeburg, SC, Daniel Webster Williams, Beddingfield  
and Williams, Barnwell, SC, Steven W. Hamm, C. Jo  
Anne Wessinger Hill, Richardson Plowden and Robinson,  
Columbia, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham  
Ross Billings, Benjamin Rush Smith, III, Nelson Mullins  
Riley and Scarborough, Columbia, SC, for Defendant.

#### ORDER AND OPINION

J. Michelle Childs, United States District Judge

\*1 Plaintiff Travis Messex filed the above-captioned action against Defendant Quicken Loans, Inc. alleging claims for violation of the South Carolina Attorney Preference Statute (“SCAPS”), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. *T. Messex v. Quicken Loans, Inc.*, C/A No. 2:15-cv-04773-JMC, ECF No. 1-1 at 9 ¶¶ 8–13 (D.S.C. Nov. 30, 2015).

This matter is before the court on Plaintiff’s Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 145.) Specifically, Plaintiff seeks to alter or amend the Order entered on February 22, 2018 (ECF No. 143) (the “February Order”), in which the court granted Quicken Loans’ Motion for Summary Judgment and denied Plaintiff’s Motion for Summary Judgment. (ECF

Nos. 79, 82.) Quicken Loans opposes Plaintiff’s Motion to Alter or Amend asserting that it should be denied. (ECF No. 146 at 2.) For the reasons set forth below, the court **DENIES** Plaintiff’s Motion to Alter or Amend.

#### I. RELEVANT BACKGROUND TO PENDING MOTION

Quicken Loans “is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances.” *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). “Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan.” *Id.*

In or around November 28, 2012, Teresa Messex, Plaintiff’s wife, provided information to Quicken Loans for purposes of completing a loan application to refinance the mortgage on the Messexes’ residence located at 136 Messex Lane, Saint George, South Carolina.<sup>1</sup> (ECF Nos. 79-3 at 4, 79-1 at 23:10–27:25 & ECF No. 79-5 at 3 ¶ 5.) At all times relevant to this transaction, Teresa Messex had Plaintiff’s permission to conduct his business, which authorization was conveyed by Plaintiff to Quicken Loans. (ECF No. 79-2 at 6:15–24 & 7:11–16; ECF No. 79-1 at 25:17–26:8.) As a result of the information provided by Teresa Messex, Defendant generated loan application documents that were made available to Plaintiff and his wife to review via Quicken Loans’ internet web portal. (ECF No. 79-5 at 3 ¶ 5.) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the “AIPC”). (*Id.*; see also ECF No. 1-1 at 9 ¶ 8.) Based on the information provided by Teresa Messex, the AIPC was prepopulated with the following relevant information (in bold):

\*2 1. I (We) have been informed by the lender that I (we) have a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of this loan.

(a) I select **I/We will not use the services of legal counsel.**

~~Borrower~~ ~~Travis Messex~~ ~~Date~~

~~Borrower~~ ~~Date~~

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

~~Not Applicable~~

~~Borrower~~ ~~Date~~

~~Not Applicable~~

~~Borrower~~ ~~Date~~

Date (ECF No. 1-1 at 13.)

On November 29, 2012, Teresa Messex, with Plaintiff's permission/authorization, electronically signed the loan application documents and the AIPC and transmitted them to Quicken Loans via its internet web portal. (*Id.*; see also ECF Nos. 79-1 at 25:2-8 & 27:18-24; ECF No. 79-2 at 6:15-7:16; ECF No. 79-5 at 3 ¶ 6.) On January 10, 2013, Teresa Messex had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 79-5 at 3 ¶ 7.) On January 22, 2013, Plaintiff and his wife signed a disclosure form agreeing to be represented by Scotty Sheriff of the law firm McDonnell & Associates, P.A. at the loan closing and completed their loan closing. (ECF No. 79-8 at 3 ¶ 4-4 ¶ 8 & 6-8.)

On October 19, 2015, Plaintiff filed a Complaint against Quicken Loans in the Court of Common Pleas for Dorchester County, South Carolina alleging violation of the SCAPS.<sup>2</sup> (ECF No. 1-1 at 9 ¶ 12.) After Quicken Loans removed the case to this court (ECF No. 1), the parties engaged in and completed discovery on March 1, 2017. (ECF No. 49.) Quicken Loans then moved for summary judgment on March 31, 2017. (ECF No. 79.) On that same day, Plaintiff filed his Cross-Motion for Summary Judgment. (ECF No. 82.) After the court entered the February Order, Plaintiff moved to alter or amend judgment on March 22, 2018. (ECF No. 145.)

~~II-JURISDICTION~~

~~Borrower~~ ~~Date~~

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Plaintiff and Quicken Loans, and the amount in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2.) Quicken Loans is a corporation organized under the laws of Michigan with its principal place of business in Detroit, Michigan. (ECF No. 1-2 at 3 ¶ 5.) Plaintiff is a citizen and resident of Dorchester County, South Carolina. (ECF No. 1-1 at 8 ¶ 1.) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with Defendant's representation. (ECF No. 1-at-3-7.)

~~Not Applicable~~

~~Borrower~~ ~~Date~~

~~Not Applicable~~

~~Borrower~~ ~~Date~~

III. LEGAL STANDARD AND ANALYSIS

\*3 In the February Order, the court made the following observations in granting Quicken Loans' Motion for Summary Judgment:

The SCAPS requires the lender to ascertain the preference of the borrower as to legal counsel. " '[A]scertain' means 'to render certain or definite ... to clear of doubt or obscurity ... to find out by investigation.' " *Parker v. Cty. of Oxford*, 224 F. Supp. 2d 292, 295 (D. Me. 2002) (quoting *Black's Law Dictionary* 114 (6th ed. 1990) ); see also *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 609 (5th Cir. 2018) (" 'Ascertain' means 'to make certain, exact, or precise' or 'to find out or learn with certainty ...' [t]hus, 'ascertain' requires 'a greater level of certainty....' ") (citation omitted). In considering the requirements of the SCAPS, the court observes that the parties have not presented any dispute of fact regarding Quicken Loan's attorney preference procedure in this matter. Therefore, the matter is ripe for summary judgment.

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiff's attorney preference in compliance with the SCAPS. First, Teresa Messex had permission from Plaintiff<sup>3</sup> to convey to an agent of Quicken Loans that Plaintiff would not use the services of preferred legal counsel to represent him in this transaction. After receiving Teresa Messex's response

that Plaintiff did not have counsel of preference, Quicken Loans (1) sent Plaintiff an AIPC that advised him that he has “a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan” and (2) prepopulated the AIPC with the statement “I/We will not use the services of legal counsel.” (ECF No. 1-1 at 13.) Upon receipt of the AIPC, Teresa Messex reviewed it, discussed it with Plaintiff,<sup>4</sup> electronically signed it<sup>5</sup> and electronically transmitted the document back to Quicken Loans.<sup>6</sup> There is no evidence before the court that Plaintiff had any questions about the content of the AIPC. *Cf. Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 12 (S.C. 2005) (“[A] competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress.”) (citations omitted). Thereafter, Plaintiff had approximately seven weeks, from November 29, 2012, to before the loan closing on January 22, 2013, to express an attorney preference to Quicken Loans, which he did not do. Moreover, Plaintiff has not voiced any displeasure with counsel chosen by Quicken Loans (Scotty Sheriff).<sup>7</sup>

Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did “ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ...” in compliance with the SCAPS. Accordingly, the court **GRANTS** Quicken Loans' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

(ECF No. 143 at 8–10.) Plaintiff seeks to alter or amend the foregoing pursuant to Rules 52 and 59.

#### A. Applicable Standard under Rule 59(e)<sup>8</sup>

\*4 Rule 59 allows a party to seek an alteration or amendment of a previous order of the court. Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may “alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice.” *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of

these three grounds in order to obtain relief. *Loren Data Corp. v. GXS, Inc.*, 501 Fed.Appx. 275, 285 (4th Cir. 2012). The decision whether to reconsider an order under Rule 59(e) is within the sound discretion of the district court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). A motion to reconsider should not be used as a “vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind.” *Lyles v. Reynolds, C/A No. 4:14-1063-TMC*, 2016 WL 1427324, at \*1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) ).

#### B. The Parties' Arguments

##### 1. Plaintiff

In his Motion, Plaintiff first re-expresses his contention that the SCAPS requires that a “lawyer must be counsel selected by the borrower,” which Quicken Loans' attorney preference procedure fails to provide for a borrower. (ECF No. 145 at 2–3.) He then states his disagreement with the conclusions reached by the court based upon its review of testimony provided by Plaintiff and Quicken Loans' Rule 30(b)(6) witness, Jeremy Potter. (ECF No. 145 at 4–6.)

Next, Plaintiff explains again why Quicken Loans' attorney preference procedure fails to ascertain the preference of the borrower. (*See id.* at 7–9.) Referencing Quicken Loans' AIPC, Plaintiff asserts that the form is deficient under the SCAPS because “1. The form in fact does not indicate a choice of ‘no preference’ as the section reserved for this event, l(b), contains the prepopulated language ‘Not Applicable,’ and 2. The form did not provide the borrowers a choice of attorney, as their signatures appear under the prepopulated statement ‘I/We will not use the services of legal counsel,’ an option, unbeknownst to the Plaintiff, that is not available pursuant to South Carolina law.” (*Id.* at 7.) Further, Plaintiff wonders how the AIPC ascertains the preference of the borrower since it (1) is not a writing completed “in the borrower's own handwriting,” (2) is “already completed when the borrower receives it” and (3) is unable to be substantiated by evidence submitted in violation of the parole evidence rule. (*Id.* at 8–9.)

Finally, Plaintiff expresses his dismay that the court's February Order's language did not mimic the substantive findings contained in the Order entered denying Quicken

Loans' Motion to Dismiss.<sup>9</sup> (*Id.* at 10–11 (quoting ECF No. 39 at 4–6).)

## 2. *Quicken Loans*

\*5 Quicken Loans opposes Plaintiff's Motion arguing that "[t]he Court's factual findings are supported by the record" and "Plaintiff offered no evidence to dispute the facts at summary judgment and still has not in [ ]his motion." (ECF No. 146 at 3.) Quicken Loans further argues that Plaintiff has failed to cite to any legal support for his claim that "it is legally impossible for a borrower to not have a preference" for an attorney. (*Id.* at 5–8.) Additionally, Quicken Loans argues that Plaintiff has failed to cite to any legal support for his claims that (1) a written record of the borrower's choice is mandatory pursuant to both the SCAPS and the federal Truth-in-Lending Act, 15 U.S.C. §§ 1601–1667f, or that (2) the parole evidence rule only allows consideration of written evidence. (*Id.* at 8–10.) Finally, as to the exhibit that was attached to Plaintiff's Motion (*see* ECF No. 145-1), Quicken Loans asserts that "[t]he Court should reject Plaintiff's filing of the Department's amicus brief<sup>10</sup> because it is in direct contravention of the Court's Order and is an improper attempt to refashion their argument and expand the record at the 59(e) stage." (ECF No. 146 at 10.)

## C. The Court's Review

Plaintiff does not reference either an intervening change in controlling law or new evidence previously unavailable. Based on a review of Plaintiff's filings (ECF Nos. 145, 147), the court can only conclude that Plaintiff is seeking to alter or amend the February Order on the basis that the court's decision was either a clear error of law or resulted in a manifest injustice to Plaintiff. Clear error occurs when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F.3d 326, 336 (4th Cir. 2008) (internal quotation marks omitted); *see also United States v. Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) ("[C]lear error occurs when a district court's factual findings are against the clear weight of the evidence considered as a whole.") (internal quotation marks omitted); *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 n.5 (4th Cir. 1983) (explaining that a district court's factual finding is clearly erroneous if "the finding is against the great preponderance of the evidence")

(internal quotation marks omitted). Manifest injustice occurs where the court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension...." *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (citations omitted).

Upon review of the instant Motion, the court observes that Plaintiff's arguments add very little new substantive argument to what he has already presented on the aforementioned issues. (*See, e.g.*, ECF Nos. 82, 95 & 96.) A Rule 59(e) motion should not be used as an opportunity to rehash issues already ruled upon because a litigant is displeased with the result. *See Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993) (stating that "mere disagreement does not support a Rule 59(e) motion"); *see also Consulting Engr's, Inc. v. Geometric Software Solutions & Structure Works LLC*, 2007 WL 2021901, at \*2 (D.S.C. July 6, 2007) ("A party's mere disagreement with the court's ruling does not warrant a Rule 59(e) motion, and such motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted."). In the February Order (ECF No. 143), the court cited to appropriate substantive case law and provided specific reasoning to support its decision to find that Quicken Loans did ascertain Plaintiff's preference as to legal counsel in accordance with the SCAPS. Moreover, in contrast to its Order on Quicken Loans' Motion to Dismiss (ECF No. 39), the court did not have to rely solely on Plaintiff's allegations and was able to reference specific communications between the parties leading to the conclusion that there was no genuine issue as to any material fact and that Quicken Loans was entitled to judgment as a matter of law. The reference to specific communications is pertinent here.

\*6 In *Boone*, the South Carolina Supreme Court referenced borrower-lender communications when it observed that "the borrower speaks on the telephone with a licensed mortgage banker employed by Quicken Loans [ ]and [e]ach borrower is informed that he or she has the right to select legal counsel to represent him or her in the transaction and asked whether he or she has a preference as to a specific attorney." *Boone*, 803 S.E. 2d at 709. In reaching its decision in this matter, the court focused on Plaintiff's aforementioned testimony in addition to the declaration and testimony

of Jeremy Potter, Quicken Loans' Rule 30(b)(6) witness, who stated that the Quicken Loans' mortgage banker is required to get an answer from a prospective borrower to the following question in order to proceed through the loan application program: "Will the borrower select legal counsel to represent them in this transaction?" (ECF No. 141-5 at 9:3-10:9.) Both in the February Order and the *Boone* opinion, there is an emphasis placed on evidence regarding the communications between Quicken Loans and the borrower. In considering the special referee's order and the DCA's amicus brief from the *Wilson* case, neither document purports to consider evidence regarding the parties' communications to be pertinent to a determination of whether the lender ascertained the attorney preference of the borrower.<sup>11</sup> In this regard, the court does not perceive that the South Carolina Supreme Court would require trial court's to determine whether a borrower's attorney preference was ascertained in a vacuum wherein relevant testimony by the borrow and lender's representative were disregarded.<sup>12</sup> *Cf. Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("Statutory

language, however, "cannot be construed in a vacuum."). In this regard, the court is not persuaded that entry of the February Order resulted in the commission of either clear error of law or manifest injustice. Accordingly, the court must deny Plaintiff's Motion to Alter or Amend Judgment.

#### IV. CONCLUSION

For the reasons set forth above, the court hereby **DENIES** Plaintiff Travis Messex's Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 145.)

**IT IS SO ORDERED.**

#### All Citations

Slip Copy, 2018 WL 3359018

#### Footnotes

- 1 Plaintiff and his wife had prior experience with the loan application process having refinanced the mortgage on their residence a total of nine times with six different lenders. (ECF No. 79 at 2.)
- 2 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to his attorney preference claim, Plaintiff also alleged his entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 39.)
- 3 Q. Do you remember what you [Plaintiff] talked about [with Quicken Loans] during that one phone call?  
A. No. Pretty much just giving them my wife authorization over everything.  
Q. Okay.  
A. Since my name was on it, they had to have authorization. (ECF No. 79-2 at 8:17-23.)
- 4 Q. Do you remember talking about any of the application process with your wife [Teresa Messex] for the Quicken Loans loan?  
A. Yes. We had talked about it.  
Q. What did you talk about?  
A. It's been so long. I know we talk about everything. She just does the final.  
Q. Okay.  
A. Everything we do, we talk about. (ECF No. 79-2 at 6:21-7:4.)
- 5 Q. So if she signed your name to any of these documents, do you have any reason to think they are incorrect for any reason?  
A. No. (*Id.* at 7:7-10.)
- 6 Q. Was your wife [Teresa Messex] authorized by you to fill out this paperwork?  
A. Yes. (ECF No. 79-2 at 6:15-17.)
- 7 Q. Okay. Assuming he [Scott Sheriff] was, were you okay with him—?  
A. Yes. (*Id.* at 9:12-14.)
- 8 The court observes that Rule 52(b) is inapplicable because this action did not go to trial. *See id.*; *see also State Farm Mut. Auto. Ins. Co. v. Medgyesy*, C/A No. 6:12-CV-00044-MGL, 2014 WL 11511695, at \*1 (D.S.C. May 12, 2014) ("Rule 52(b) is a trial rule that is not applicable in a summary judgment proceeding' or on a motion to dismiss in a habeas proceeding.") (quoting *Orem v. Rephann*, 523 F.3d 442, 451 n.2 (4th Cir. 2008) ).

9 In its June 30, 2016 Order, the court observed as follows:

The legislative intent of the attorney preference statute is to protect borrowers by giving them the option to select their own counsel to assist them during the closing of the transaction. In protecting borrowers, the statute requires that lenders like Defendant ascertain Plaintiff's attorney preference. The facts as alleged by Plaintiff indicate that Defendant provided Plaintiff with a form where the attorney preference portion was already filled in, then required Plaintiff to sign the form. (ECF No. 1-1 at 9 ¶¶ 8-9.) Plaintiff further alleges that he was not allowed to choose an attorney to represent him in the transaction. (*Id.* at ¶ 13). If the facts as alleged by Plaintiff are true, it is hard to imagine how Defendant could have ascertained Plaintiff's preference for an attorney if Defendant essentially told Plaintiff what his preference was by providing him with an already completed form. If the facts as alleged are true, they would seem to support Plaintiff's allegation that he was deprived of a meaningful choice in selecting his attorney for this transaction.

(ECF No. 39 at 5-6.)

10 The South Carolina Department of Consumer Affairs ("DCA") filed an Amicus Curiae Brief in the matter of *Quicken Loans, Inc. v. Wilson*, App. Case No. 2016-001214 (S.C. Ct. App.). In the brief, the DCA asked that the appellate court "uphold the Special Referee's ruling that Quicken violated the attorney preference statute." (ECF No. 145-1 at 19.)

11 In its amicus brief, the DCA identified only the following evidence as worthy of consideration: (1) forms like Quicken Loans' AIPC; (2) "[a]n email from the borrower to the lender choosing the attorney or insurance agent"; (3) "[a]n email from another party such as the borrower's real estate agent;" and (4) "[c]ompany system notes entered by the lender's employee." (ECF No. 145-1 at 9.)

12 The court observes that Plaintiff's citation to the parole evidence rule to prohibit consideration of the communicative evidence is also neither persuasive nor supported by cited caselaw.

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2018 WL 1240249

Only the Westlaw citation is currently available.

United States District Court, D.  
South Carolina, Aiken Division.

Tyrone MOSLEY, Plaintiff,

v.

QUICKEN LOANS, INC., Defendant.

Civil Action No.: 1:16-cv-00383-JMC

Signed 03/09/2018

**Attorneys and Law Firms**

C. Jo Anne Wessinger Hill, Steven W. Hamm, Richardson Plowden and Robinson, Columbia, SC, Charles Bradley Hutto, Williams and Williams, Orangeburg, SC, Daniel Webster Williams, Bedingfield and Williams, Barnwell, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham Ross Billings, Benjamin Rush Smith, III, Nelson Mullins Riley and Scarborough, Columbia, SC, for Defendant.

**ORDER AND OPINION**

J. MICHELLE CHILDS, United States District Judge

\*1 Plaintiff Tyrone Mosley filed the above-captioned action against Defendant Quicken Loans, Inc. alleging claims for violation of the South Carolina Attorney Preference Statute ("SCAPS"), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. (ECF No. 1-1 at 7 ¶ 5-8 ¶ 12.)

This matter is before the court on Plaintiff's and Quicken Loans' Cross-Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (ECF Nos. 71, 74.) The parties oppose each other's Motions **s/Tyrone Mosley**

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\_\_\_\_\_  
Borrower Tyrone Mosley

\_\_\_\_\_  
Borrower

respectively. (ECF Nos. 82, 87.) For the reasons set forth below, the court **GRANTS** Quicken Loans' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**I. RELEVANT BACKGROUND  
TO PENDING MOTIONS**

Quicken Loans "is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances." *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). "Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan." *Id.*

On January 23, 2013, Plaintiff provided information to Quicken Loans for purposes of completing a loan application to refinance the mortgage on his primary residence located at 225 Bennett Street, Williston, South Carolina 29853.<sup>1</sup> (ECF Nos. 71-1 at 11:6-22, 71-3 at 2 & 71-5 at 3 ¶ 5.) As a result of the information provided by Plaintiff, Defendant generated loan application documents that were made available to Plaintiff via Quicken Loans' internet web portal. (ECF No. 71-5 at 3 ¶ 5.) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the "AIPC"). (*Id.*; see also ECF No. 1-1 at 8 ¶ 11.) Based on the information provided by Plaintiff, the AIPC was prepopulated with the following relevant information (in bold):

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

(a) I select **I/We will not use the services of legal counsel.**

\_\_\_\_\_  
Date Borrower Date

\_\_\_\_\_  
Date Borrower Date

(b) Having been informed of this right, and having no preference, I asked for assistance from the

**Not Applicable**

lender and was referred to a list of acceptable attorneys. From that list I select

**Not Applicable**

| Borrower              | Date | Borrower              | Date |
|-----------------------|------|-----------------------|------|
| <b>Not Applicable</b> |      | <b>Not Applicable</b> |      |
| Borrower              | Date | Borrower              | Date |

(ECF No. 71-6 at 2.)

On January 23, 2013, Plaintiff electronically signed the loan application documents and the AIPC and transmitted them to Quicken Loans via its internet web portal. (*Id.*; see also ECF No. 71-5 at 3 ¶ 6.) On April 1, 2013, Plaintiff had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 71-5 at 3 ¶ 7.) Thereafter, Plaintiff was contacted by attorney Stacey E. (Pope) Besser (“Besser”) and they discussed issues relevant to the closing. (ECF No. 71-8 at 3 ¶ 6.) On April 5, 2013, Plaintiff signed a disclosure form agreeing to the terms of Besser’s representation at the loan closing and closed the loan. (ECF No. 71-8 at 3 ¶ 7, 4–5.)

\*2 On November 11, 2015, Plaintiff filed a Complaint against Quicken Loans in the Court of Common Pleas for Barnwell County, South Carolina alleging violation of the SCAPS.<sup>2</sup> (ECF No. 1-1 at 9 ¶ 12.) After Quicken Loans removed the case to this court (ECF No. 1), the parties engaged in and completed discovery on March 1, 2017. (ECF No. 36.) Quicken Loans then moved for summary judgment on March 31, 2017. (ECF No. 71.) On that same day, Plaintiff filed his Cross-Motion for Summary Judgment. (ECF No. 74.)

The court heard argument from the parties on the instant Motions at a hearing on December 5, 2017. (ECF No. 128.)

## II. JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Plaintiff and Quicken Loans, and the amount

in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2.) Quicken Loans is a corporation organized under the laws of Michigan with its principal place of business in Detroit, Michigan. (ECF No. 1-3 at 3 ¶ 5.) Plaintiff is a citizen and resident of Barnwell County, South Carolina. (ECF No. 1-1 at 7 ¶ 1.) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with Defendant’s representation. (ECF No. 1 at 3–10.)

## III. LEGAL STANDARD

Summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if proof of its existence or non-existence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248–49 (1986). A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 434 (4th Cir. 2011).

In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990). The non-moving party may not oppose a motion for summary judgment with mere allegations or denial of the movant’s pleading, but instead must “set forth specific facts” demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(e); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). All that is required is that “sufficient evidence supporting the claimed factual

dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249.

#### IV. ANALYSIS

##### A. The Parties' Arguments

###### 1. *Plaintiff*

In his Motion for Summary Judgment, Plaintiff asserts that Quicken Loans violates section 37-10-102 by failing "to ascertain the preference of the South Carolina borrower that results in the attorney at the closing table not being selected by the borrower, a practice that deprives the South Carolina borrower of a statutorily guaranteed right." (ECF No. 74-1 at 10–11.) Specifically, Plaintiff asserts that asking the question "Will the borrower select legal counsel to represent them in this transaction?" does not satisfy the statute which "mandates that the creditor '... must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters related to the closing of the transaction....'" (*Id.* at 11.) Quicken Loans "must do more than disclose to the borrower; the lender must elicit certain specific information from the borrower." (ECF No. 88 at 2.) In this regard, Quicken Loans' "form fails to ascertain the preference of the borrower if it is already prepopulated with 'I/we will not use the services of legal counsel.'" (ECF No. 87 at 5.) Accordingly, Plaintiff argues that Quicken Loans' form "violates the statute and operates as an illegal waiver of the right to be represented by any attorney, much less the consumer's choice of legal counsel." (ECF No. 74-1 at 16.)

###### 2. *Quicken Loans*

\*3 In its Motion for Summary Judgment, Quicken Loans asserts that the purpose of the SCAPS is "to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrower's preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction[.]" (ECF No. 71 at 10 (quoting *Davis v. NationsCredit Fin. Servs. Corp.*, 484 S.E.2d 471, 472 (S.C. 1997))). Quicken Loans further asserts that "a lender substantially complies with section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information." (*Id.* at 11 (quoting *Davis*, 484 S.E.2d at 472).) Based on the

foregoing, Quicken Loans argues that it complied with the SCAPS because it "clearly and prominently disclosed to Plaintiff that he had the right to express a preference for an attorney and gave him numerous opportunities to express a preference." (*Id.*) In support of its argument, Quicken Loans points out that the AIPC required Plaintiff to sign acknowledging that he has "been informed by the lender that I (we) have a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of this loan." (ECF No. 71-6 at 2.)

Additionally, Quicken Loans argues that it has satisfied the safe harbor provisions of section 37-10-102 as to Plaintiff by providing written notice of the preference information on the AIPC within one business day. (ECF No. 71 at 15.)

##### B. The Court's Review

Plaintiff brings his action pursuant to the SCAPS, which provides in pertinent part:

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

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

The creditor may comply with this section by:

(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or

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

S.C. Code § 37-10-102(a) (2017). Plaintiff asserts Quicken Loans violated the SCAPS in the following particulars:

The Attorney/Insurance Preference Form utilized by Quicken is

essentially the form recommended by the Department of Consumer Affairs.<sup>3</sup> It is what Quicken does with the form before it is presented to the borrower that runs afoul of the law. The pre-populated Attorney/Insurance Preference Form is in and of itself violative of the very statute that the underlying form is intended to facilitate. By effectively foreclosing the borrower's choice when taking the loan application—the very first step in a real-estate-secured loan transaction—Quicken closes the door on the consumer and taints the entire process that follows. This alone is sufficient to warrant a ruling as a matter of law and the entry of summary judgment.

(ECF No. 74-1 at 17.)

Neither Plaintiff nor Quicken Loans have cited, and the court has not located, a South Carolina appellate court case addressing this precise issue.<sup>4</sup> “Thus, as a federal court sitting in diversity, the [c]ourt must predict how the South Carolina Supreme Court would decide the issue.” *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, C/A No.: 4:16-cv-03666-RBH, 2017 WL 2216298, at \*5 (D.S.C. May 19, 2017) (citing *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002) (“As a federal court sitting in diversity, we have an obligation to apply the jurisprudence of South Carolina's highest court, the South Carolina Supreme Court. But in a situation where the South Carolina Supreme Court has spoken neither directly nor indirectly on the particular issue before us, we are called upon to predict how that court would rule if presented with the issue.” (internal footnote and citations omitted))). “In predicting a ruling by the South Carolina Supreme Court, [the Court] may also consider, inter alia: restatements of the law, treatises, and well considered dicta,” *id.*, “as well as the practices of other states.” *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272 (4th Cir. 2004) (internal quotation marks omitted)). While it does not appear that this specific issue has been addressed by the South Carolina appellate courts, the South Carolina Supreme Court has reasoned

in construing this provision that “[o]ur construction of legislative intent flows from the clear language of the statute ...” and that such intent is to protect borrowers. *King v. Am. Gen. Fin., Inc.*, 687 S.E.2d 321, 325 (S.C. 2009).

\*4 The SCAPS requires the lender to ascertain the preference of the borrower as to legal counsel. “[A]scertain” means ‘to render certain or definite ... to clear of doubt or obscurity ... to find out by investigation.’” *Parker v. Cty. of Oxford*, 224 F. Supp. 2d 292, 295 (D. Me. 2002) (quoting *Black's Law Dictionary* 114 (6th ed. 1990)); see also *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 609 (5th Cir. 2018) (“ ‘Ascertain’ means ‘to make certain, exact, or precise’ or ‘to find out or learn with certainty ...’ [t]hus, ‘ascertain’ requires ‘a greater level of certainty....’ ”) (citation omitted). In considering the requirements of the SCAPS, the court observes that the parties have not presented any dispute of fact regarding Quicken Loan's attorney preference procedure in this matter. Therefore, the matter is ripe for summary judgment.

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiff's attorney preference in compliance with the SCAPS. First, an agent of Quicken Loans asked Plaintiff if he would be using “the services of preferred legal counsel.” (ECF No. 71-5 at 3 ¶ 5.) After receiving Plaintiff's response that he did not have counsel of preference, Quicken Loans (1) sent Plaintiff an AIPC that advised him that he has “a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan” and (2) prepopulated the AIPC with the statement “I/We will not use the services of legal counsel.” (ECF No. 71-6 at 2.) Upon receipt of the AIPC, Plaintiff reviewed it, electronically signed it and electronically transmitted the document back to Quicken Loans. (*Id.*) There is no evidence before the court that Plaintiff had any questions about the content of the AIPC. *Cf. Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 12 (S.C. 2005) (“[A] competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress.”) (citations omitted). Thereafter, Plaintiff had approximately ten weeks, from January 23, 2013, to before the loan closing on April 5, 2013, to express an attorney preference to Quicken Loans, which he did not do. Moreover, Plaintiff did not voice any disagreement with the attorney (Besser)

representing him or question her actions as counsel.<sup>5</sup> (ECF No. 71-8 at 3 ¶ 8 (“If Mr. Mosley had raised any concerns about my (Besser) representation of him in the transaction before or during the closing, I (Besser) would have stopped the transaction.”))

Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did “ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ...” in compliance with the SCAPS.<sup>6</sup> Accordingly, the court **GRANTS** Quicken Loans' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

## V. CONCLUSION

Upon careful consideration of the entire record and the parties' arguments, the court hereby **GRANTS** Quicken Loans' Motion for Summary Judgment (ECF No. 71) and **DENIES** Plaintiff's Motion for Summary Judgment. (ECF No. 74.) As a result of the foregoing, all remaining pending motions are **DENIED AS MOOT**. (ECF Nos. 95, 96.)

**IT IS SO ORDERED.**

### All Citations

Slip Copy, 2018 WL 1240249

### Footnotes

- 1 Plaintiff had prior experience with the loan application process having refinanced various properties. (See, e.g., ECF No. 71-1 at 4:7–18.)
- 2 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to his attorney preference claim, Plaintiff also alleged his entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 26.)
- 3 See Admin. Interpretation No. 10.102(a)-9301 (S.C. Dep't Consumer Affairs Sept. 7, 1993).
- 4 Additionally, neither Plaintiff nor Quicken Loans has requested certification of this issue to the South Carolina Supreme Court.
- 5 Q. When you say “she,” that's Stacey Pope [Besser]?  
A. Right.  
Q. Do you recall if you asked any questions during the closing?  
A. No, I didn't ask any questions. (ECF No. 71-1 at 13:10–14.)
- 6 As a result of this finding, the court will not address whether Quicken Loans has satisfied the safe harbor provisions of the SCAPS.

KeyCite Blue Flag – Appeal Notification  
Appeal Filed by TYRONE MOSLEY v. QUICKEN LOANS INC., 4th Cir., August 9, 2018

2018 WL 3342680

Only the Westlaw citation is currently available.

United States District Court, D.  
South Carolina, Aiken Division.

Tyrone MOSLEY, Plaintiff,  
v.  
QUICKEN LOANS, INC., Defendant.

Civil Action No.: 1:16-cv-00383-JMC

Signed 07/09/2018

**Attorneys and Law Firms**

C. Jo Anne Wessinger Hill, Steven W. Hamm, Richardson Plowden and Robinson, Columbia, SC, Charles Bradley Hutto, Williams and Williams, Orangeburg, SC, Daniel Webster Williams, Bedingfield and Williams, Barnwell, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham Ross Billings, Benjamin Rush Smith, III, Nelson Mullins Riley and Scarborough, Columbia, SC, for Defendant.

**ORDER AND OPINION**

J. Michelle Childs, United States District Judge

\*1 Plaintiff Tyrone Mosley filed the above-captioned action against Defendant Quicken Loans, Inc. alleging claims for violation of the South Carolina Attorney Preference Statute (“SCAPS”), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. (ECF No. 1-1 at 7 ¶ 5–8 ¶ 12.)

This matter is before the court on Mosley’s Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 138.) Specifically, Mosley seeks to alter or amend the Order entered on March 9, 2018 (ECF No. 135) (the “March Order”), in which the court granted Quicken Loans’ Motion for Summary Judgment and denied Mosley’s Motion for Summary Judgment. (ECF Nos. 71, 74.) Quicken Loans opposes Mosley’s Motion to

Alter or Amend asserting that it should be denied. (ECF No. 140 at 2.) For the reasons set forth below, the court DENIES Mosley’s Motion to Alter or Amend.

**I. RELEVANT BACKGROUND TO PENDING MOTIONS**

Quicken Loans “is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances.” *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). “Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan.” *Id.*

On January 23, 2013, Mosley provided information to Quicken Loans for purposes of completing a loan application to refinance the mortgage on his primary residence located at 225 Bennett Street, Williston, South Carolina 29853.<sup>1</sup> (ECF Nos. 71-1 at 11:6–22, 71-3 at 2 & 71-5 at 3 ¶ 5.) As a result of the information provided by Mosley, Quicken Loans generated loan application documents that were made available to Mosley via Quicken Loans’ internet web portal. (ECF No. 71-5 at 3 ¶ 5.) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the “AIPC”). (*Id.*; see also ECF No. 1-1 at 8 ¶ 11.) Based on the information provided by Mosley, the AIPC was prepopulated with the following relevant information (in bold):

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

(a) I select **I/We will not use the services of legal counsel.**

s/Tyrone Mosley

Electronically signed on 1/23/2013 4:15:46 PM

Borrower Tyrone Mosley

Date

Borrow

Borrower

Date

Borrow

(b) Having been informed of this right, and having no preference,

I asked for assistance from the lender and was referred to a list of acceptable attorneys. From that list I select

Not Applicable

Borrower \_\_\_\_\_ Date \_\_\_\_\_

Not Applicable

Borrower \_\_\_\_\_ Date \_\_\_\_\_

(ECF No. 71-6 at 2.)

\*2 On January 23, 2013, Mosley electronically signed the loan application documents and the AIPC and transmitted them to Quicken Loans via its internet web portal. (*Id.*; see also ECF No. 71-5 at 3 ¶ 6.) On April 1, 2013, Mosley had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 71-5 at 3 ¶ 7.) Thereafter, Mosley was contacted by attorney Stacey E. (Pope) Besser ("Besser") and they discussed issues relevant to the closing. (ECF No. 71-8 at 3 ¶ 6.) On April 5, 2013, Mosley signed a disclosure form agreeing to the terms of Besser's representation at the loan closing and closed the loan. (ECF No. 71-8 at 3 ¶ 7, 4-5.)

On November 11, 2015, Mosley filed a Complaint against Quicken Loans in the Court of Common Pleas for Barnwell County, South Carolina alleging violation of the SCAPS.<sup>2</sup> (ECF No. 1-1 at 9 ¶ 12.) After Quicken Loans removed the case to this court (ECF No. 1), the parties engaged in and completed discovery on March 1, 2017. (ECF No. 36.) Quicken Loans then moved for summary judgment on March 31, 2017. (ECF No. 71.) On that same day, Mosley filed his Cross-Motion for Summary Judgment. (ECF No. 74.) After the court entered the March Order, Mosley moved to alter or amend judgment on April 6, 2018. (ECF No. 138.)

**II. JURISDICTION**

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Plaintiff and Quicken Loans, and the amount in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2.) Quicken Loans is a corporation organized under the laws of Michigan with

its principal place of business in Detroit, Michigan. (ECF No. 1-3 at 3 ¶ 5.) Plaintiff is a citizen and resident of Barnwell County, South Carolina. (ECF No. 1-1 at 7 ¶ 1.) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with

Not Applicable

Defendant's representation. (ECF No. 1-1 at 3-10.) Borrower \_\_\_\_\_ Date \_\_\_\_\_

Not Applicable

Borrower \_\_\_\_\_ Date \_\_\_\_\_

**III. LEGAL STANDARD AND ANALYSIS**

In the March Order, the court made the following observations in granting Quicken Loans' Motion for Summary Judgment:

The SCAPS requires the lender to ascertain the preference of the borrower as to legal counsel. " '[A]scertain' means 'to render certain or definite ... to clear of doubt or obscurity ... to find out by investigation.' " *Parker v. Cty. of Oxford*, 224 F. Supp. 2d 292, 295 (D. Me. 2002) (quoting *Black's Law Dictionary* 114 (6th ed. 1990) ); see also *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 609 (5th Cir. 2018) (" 'Ascertain' means 'to make certain, exact, or precise' or 'to find out or learn with certainty ...' [t]hus, 'ascertain' requires 'a greater level of certainty....' ") (citation omitted). In considering the requirements of the SCAPS, the court observes that the parties have not presented any dispute of fact regarding Quicken Loan's attorney preference procedure in this matter. Therefore, the matter is ripe for summary judgment.

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiff's attorney preference in compliance with the SCAPS. First, an agent of Quicken Loans asked Plaintiff if he would be using "the services of preferred legal counsel." (ECF No. 71-5 at 3 ¶ 5.) After receiving Plaintiff's response that he did not have counsel of preference, Quicken Loans (1) sent Plaintiff an AIPC that advised him that he has "a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan" and (2) prepopulated the AIPC with the statement "I/ We will not use the services of legal counsel." (ECF No. 71-6 at 2.) Upon receipt of the AIPC, Plaintiff reviewed it, electronically signed it and electronically transmitted the document back to Quicken Loans. (*Id.*) There is no evidence before the court that Plaintiff had any questions about the content of the AIPC. *Cf. Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 12 (S.C. 2005) ("[A] competent person usually is

presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress.”) (citations omitted). Thereafter, Plaintiff had approximately ten weeks, from January 23, 2013, to before the loan closing on April 5, 2013, to express an attorney preference to Quicken Loans, which he did not do. Moreover, Plaintiff did not voice any disagreement with the attorney (Besser) representing him or question her actions as counsel.<sup>3</sup> (ECF No. 71-8 at 3 ¶ 8 (“If Mr. Mosley had raised any concerns about my (Besser) representation of him in the transaction before or during the closing, I (Besser) would have stopped the transaction.”).)

\*3 Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did “ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ...” in compliance with the SCAPS. Accordingly, the court **GRANTS** Quicken Loans' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

(ECF No. 135 at 8–9.) Mosely seeks to alter or amend the foregoing pursuant to Rules 52 and 59.

#### A. Applicable Standard under Rule 59(e)<sup>4</sup>

Rule 59 allows a party to seek an alteration or amendment of a previous order of the court. Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may “alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice.” *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of these three grounds in order to obtain relief. *Loren Data Corp. v. GXS, Inc.*, 501 Fed.Appx. 275, 285 (4th Cir. 2012). The decision whether to reconsider an order under Rule 59(e) is within the sound discretion of the district court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). A motion to reconsider should not be used as a “vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind.” *Lyles v. Reynolds, C/A No. 4:14-1063-TMC*, 2016 WL 1427324, at \*1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)).

#### B. The Parties' Arguments

##### 1. *Mosley*

In his Motion, Mosley first expresses his disagreement with the court's “prediction” in the March Order as to how the South Carolina Supreme Court would decide the attorney preference issue. (See ECF No. 135 at 10.) More specifically, Mosely argues that the court should have allowed itself to be persuaded by (1) the special referee's decision in *Quicken Loans, Inc. v. Wilson et al.*, Appellate Case No. 2016-001214 (S.C. Ct. App.) and (2) the South Carolina Department of Consumer Affairs' (“DCA”) Amicus Curiae Brief also filed in *Wilson*.<sup>5</sup> (ECF No. 138 at 3–6.) In his order, the special referee “conclude[d] as a matter of law that Quicken, in prepopulating the form, eviscerates the very purpose of § 37-10-102 and renders it meaningless ... Quicken fails to ascertain the borrower's attorney preference under the statute ... [and] Quicken's action also constitutes an attempt to elicit a waiver, which is expressly not permissible under the code.” (ECF No. 74-9 at 9.) In its brief, the DCA asked that the appellate court “uphold the Special Referee's ruling that Quicken violated the attorney preference statute.” (ECF No. 138-1 at 19.)

\*4 Next, Mosley explains again why Quicken Loans' attorney preference procedure fails to ascertain the preference of the borrower. (See ECF No. 138 at 7–9.) Referencing Quicken Loans' AIPC, Mosley asserts that the form is deficient under the SCAPS because “1. The form in fact does not indicate a choice of ‘no preference’ as the section reserved for this event, l(b), contains the prepopulated language ‘Not Applicable,’ and 2. The form did not provide the borrowers a choice of attorney, as their signatures appear under the prepopulated statement ‘I/We will not use the services of legal counsel,’ an option, unbeknownst to the Plaintiff, that is not available pursuant to South Carolina law.” (ECF No. 138 at 7.) Further, Mosley wonders how the AIPC ascertains the preference of the borrower if it is (1) not completed “in the borrower's own handwriting” and (2) is “already completed when the borrower receives it.” (*Id.* at 8, 9.)

Finally, Mosley expresses his dismay that the court's March Order's language did not mimic the substantive findings contained in the Order entered denying Quicken

Loans' Motion to Dismiss.<sup>6</sup> (*Id.* at 9–10 (quoting ECF No. 26 at 7–8).)

## 2. *Quicken Loans*

Quicken Loans opposes Mosley's Motion arguing that the special referee's order and the DCA's amicus brief from the *Wilson* case are not "binding or persuasive authority regarding the interpretation of the attorney preference statute" and lack any true predictive value. (*See* ECF No. 140 at 3–7.) In support of its argument, Quicken Loans points out that the special referee's conclusion relies on findings that directly contradict the South Carolina Supreme Court's holdings in *Boone* regarding unconscionability and the unauthorized practice of law as they relate to Quicken Loans' attorney preference procedure. (*Id.* at 4–5.) Further, Quicken Loans asserts that pronouncements by the DCA lack the force of law and serve only as an interpretation of a statute.<sup>7</sup> (*Id.* at 6–7, 14–15.)

Finally, Quicken Loans argues that Mosley has failed to cite to any legal support for his claims that (1) the borrower must always have a preference for an attorney, (2) a written record of the borrower's choice is mandatory pursuant to the federal Truth-in-Lending Act, 15 U.S.C. §§ 1601–1667f, or (3) the parole evidence rule only allows consideration of written evidence. (*Id.* at 8–13.)

## C. The Court's Review

Mosley does not reference either an intervening change in controlling law or new evidence previously unavailable. Based on a review of Mosley's filings (ECF Nos. 138, 142), the court can only conclude that Mosley is seeking to alter or amend the March Order on the basis that the court's decision was either a clear error of law or resulted in a manifest injustice to Mosley. Clear error occurs when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F.3d 326, 336 (4th Cir. 2008) (internal quotation marks omitted); *see also United States v. Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) ("[C]lear error occurs when a district court's factual findings are against the clear weight of the evidence considered as a whole.") (internal quotation marks omitted); *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 n.5 (4th Cir. 1983) (explaining that a district court's factual finding is clearly erroneous if "the finding

is against the great preponderance of the evidence") (internal quotation marks omitted). Manifest injustice occurs where the court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension...." *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (citations omitted).

\*5 Upon review of the instant Motion, the court observes that Mosley's arguments add very little new substantive argument to what he has already presented on the aforementioned issues. (*See, e.g.*, ECF Nos. 74, 87 & 88.) A Rule 59(e) motion should not be used as an opportunity to rehash issues already ruled upon because a litigant is displeased with the result. *See Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993) (stating that "mere disagreement does not support a Rule 59(e) motion"); *see also Consulting Eng'rs, Inc. v. Geometric Software Solutions & Structure Works LLC*, 2007 WL 2021901, at \*2 (D.S.C. July 6, 2007) ("A party's mere disagreement with the court's ruling does not warrant a Rule 59(e) motion, and such motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted."). In the March Order (ECF No. 135), the court cited to appropriate substantive case law and provided specific reasoning to support its decision to find that Quicken Loans did ascertain Mosley's preference as to legal counsel in accordance with the SCAPS. Moreover, in contrast to its Order on Quicken Loans' Motion to Dismiss (ECF No. 26), the court did not have to rely solely on Mosley's allegations and was able to reference specific communications between the parties leading to the conclusion that there was no genuine issue as to any material fact and that Quicken Loans was entitled to judgment as a matter of law. The reference to specific communications is pertinent here.

In *Boone*, the South Carolina Supreme Court referenced borrower-lender communications when it observed that "the borrower speaks on the telephone with a licensed mortgage banker employed by Quicken Loans [ ] [and] [e]ach borrower is informed that he or she has the right to select legal counsel to represent him or her in the transaction and asked whether he or she has a preference as to a specific attorney." *Boone*, 803 S.E. 2d at 709. In reaching its decision in this matter, the court focused on Mosley's aforementioned testimony in

addition to the declaration and testimony of Jeremy Potter, Quicken Loans' Rule 30(b)(6) witness, who stated that the Quicken Loans' mortgage banker is required to get an answer from a prospective borrower to the following question in order to proceed through the loan application program: "Will the borrower select legal counsel to represent them in this transaction?" (ECF No. 133-5 at 9:3-10:9.) Both in the March Order and the *Boone* opinion, there is an emphasis placed on evidence regarding the communications between Quicken Loans and the borrower. In considering the special referee's order and the DCA's amicus brief from the *Wilson* case, neither document purports to consider evidence regarding the parties' communications to be pertinent to a determination of whether the lender ascertained the attorney preference of the borrower.<sup>8</sup> In this regard, the court does not perceive that the South Carolina Supreme Court would require trial court's to determine whether a borrower's attorney preference was ascertained in a vacuum wherein relevant testimony by the borrow and lender's representative were disregarded.<sup>9</sup> *Cf. Roberts v.*

*Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("Statutory language, however, "cannot be construed in a vacuum.>"). In this regard, the court is not persuaded that entry of the March Order resulted in the commission of either clear error of law or manifest injustice. Accordingly, the court must deny Mosley's Motion to Alter or Amend Judgment.

#### IV. CONCLUSION

For the reasons set forth above, the court hereby **DENIES** Plaintiff Tyrone Mosley's Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 138.)

**\*6 IT IS SO ORDERED.**

#### All Citations

Slip Copy, 2018 WL 3342680

#### Footnotes

- 1 Mosley had prior experience with the loan application process having refinanced various properties. (See, e.g., ECF No. 71-1 at 4:7-18.)
- 2 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to his attorney preference claim, Plaintiff also alleged his entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 26.)
- 3 Q. When you say "she," that's Stacey Pope [Besser]?  
A. Right.  
Q. Do you recall if you asked any questions during the closing?  
A. No, I didn't ask any questions. (ECF No. 71-1 at 13:10-14.)
- 4 The court observes that Rule 52(b) is inapplicable because this action did not go to trial. See *id.*; see also *State Farm Mut. Auto. Ins. Co. v. Medgyesy*, C/A No. 6:12-CV-00044-MGL, 2014 WL 11511695, at \*1 (D.S.C. May 12, 2014) ("Rule 52(b) is a trial rule that is not applicable in a summary judgment proceeding' or on a motion to dismiss in a habeas proceeding.") (quoting *Orem v. Rephann*, 523 F.3d 442, 451 n.2 (4th Cir. 2008) ).
- 5 Mosley supplements his argument with a discussion of the DCA's role as "the sole state agency designated by the General Assembly to construe and provide official legal interpretations of the Consumer Protection Code, which includes the attorney insurance preference statute." (ECF No. 138 at 4.) He cites to language in *Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 677 S.E.2d 580 (S.C. 2009), wherein the South Carolina Supreme Court observes that it defers to the DCA's "findings where there is no compelling reason to reject it." *Id.* at 594.
- 6 In its June 30, 2016 Order, the court observed as follows:  
The legislative intent of the attorney preference statute is to protect borrowers by giving them the option to select their own counsel to assist them during the closing of the transaction. In protecting borrowers, the statute requires that lenders like Defendant ascertain Plaintiff's attorney preference. The facts as alleged by Plaintiff indicate that Defendant provided Plaintiff with a form where the attorney preference portion was already filled in, then required Plaintiff to sign the form. (ECF No. 1-1 at 8 ¶ 8-9.) Plaintiff further alleges that he was not allowed to choose an attorney to represent him in the transaction. (*Id.* at ¶ 13). If the facts as alleged by Plaintiff are true, it is hard to imagine how Defendant could have ascertained Plaintiff's preference for an attorney if Defendant essentially told Plaintiff what his preference was by

providing him with an already completed form. If the facts as alleged are true, they would seem to support Plaintiff's allegation that he was deprived of a meaningful choice in selecting his attorney for this transaction.

(ECF No. 26 at 8.)

7 Additionally, Quicken Loans asserts that the court should strike the DCA's amicus brief from the docket because its filing was "in direct contravention of the Court's Order and is an improper attempt to refashion their argument and expand the record at the 59(e) stage." (ECF No. 140 at 13–14.)

8 In its amicus brief, the DCA identified only the following evidence as worthy of consideration: (1) forms like Quicken Loans' AIPC; (2) "[a]n email from the borrower to the lender choosing the attorney or insurance agent"; (3) "[a]n email from another party such as the borrower's real estate agent," and (4) "[c]ompany system notes entered by the lender's employee." (ECF No. 138-1 at 9.)

9 The court observes that Mosley's citation to the parole evidence rule to prohibit consideration of the communicative evidence is also neither persuasive nor supported by cited caselaw.

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2018 WL 1240250

Only the Westlaw citation is currently available.

United States District Court, D.  
South Carolina, Aiken Division.

Tyrone MOSLEY, Plaintiff,

v.

QUICKEN LOANS, INC., Defendant.

Civil Action No.: 1:16-cv-00384-JMC

Signed 03/09/2018

**Attorneys and Law Firms**

C. Jo Anne Wessinger Hill, Steven W. Hamm, Richardson Plowden and Robinson, Columbia, SC, Charles Bradley Hutto, Williams and Williams, Orangeburg, SC, Daniel Webster Williams, Bedingfield and Williams, Barnwell, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham Ross Billings, Benjamin Rush Smith, III, Nelson Mullins Riley and Scarborough, Columbia, SC, for Defendant.

**ORDER AND OPINION**

J. Michelle Childs, United States District Judge

\*1 Plaintiff Tyrone Mosley filed the above-captioned action against Defendant Quicken Loans, Inc. alleging claims for violation of the South Carolina Attorney Preference Statute (“SCAPS”), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. (ECF No. 1-1 at 7 ¶ 5–8 ¶ 12.)

This matter is before the court on Plaintiff’s and Quicken Loans’ Cross-Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (ECF Nos. 68, 71.) The parties oppose each other’s Motions **s/Tyrone Mosley**

respectively. (ECF Nos. 81, 86.) For the reasons set forth below, the court **GRANTS** Quicken Loans’ Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

**I. RELEVANT BACKGROUND TO PENDING MOTIONS**

Quicken Loans “is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances.” *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). “Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan.” *Id.*

On May 24, 2013, Plaintiff provided information to Quicken Loans for purposes of completing a loan application to refinance the mortgage on his primary residence located at 225 Bennett Street, Williston, South Carolina 29853.<sup>1</sup> (ECF Nos. 68-1 at 21:14–25, 68-3 at 2 & 68-5 at 3 ¶ 5.) As a result of the information provided by Plaintiff, Defendant generated loan application documents that were mailed to Plaintiff for his review and signature. (ECF Nos. 68-1 at 29:15–18 & 68-5 at 3 ¶ 5.) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the “AIPC”). (*Id.*; *see also* ECF No. 1-1 at 8 ¶ 11.) Based on the information provided by Plaintiff, the AIPC was prepopulated with the following relevant information (in bold):

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

(a) I select **I/We will not use the services of legal counsel.**

**5-28-13**

|                               |      |          |      |
|-------------------------------|------|----------|------|
| Borrower <b>Tyrone Mosley</b> | Date | Borrower | Date |
| Borrower                      | Date | Borrower | Date |

(b) Having been informed of this right, and having no preference,

I asked for assistance from the lender and was referred to a list of

acceptable attorneys. From that list I select

**Not Applicable**

**Not Applicable**

|          |      |          |      |
|----------|------|----------|------|
| Borrower | Date | Borrower | Date |
|----------|------|----------|------|

**Not Applicable**

**Not Applicable**

|          |      |          |      |
|----------|------|----------|------|
| Borrower | Date | Borrower | Date |
|----------|------|----------|------|

(ECF No. 68-6 at 2.)

On May 28, 2013, Plaintiff signed the loan application documents and the AIPC. (*Id.*; see also ECF No. 68-5 at 3 ¶ 6.) Plaintiff returned the signed loan application documents and AIPC to Quicken Loans on May 29, 2013. (ECF No. 68-5 at 3 ¶ 6.) On August 26, 2013, Plaintiff had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 68-5 at 3 ¶ 7.) Thereafter, Plaintiff was contacted by the law firm McDonnell & Associates, P.A. "to introduce the firm, discuss the closing, confirm the scheduled closing date and location, and inform him [Plaintiff] that he needed to have a witness present." (ECF No. 68-8 at 3 ¶ 6.) On August 30, 2013, Plaintiff met with attorney Andrew Thompson of McDonnell & Associates and signed a disclosure form agreeing to the terms of McDonnell & Associates' representation at the loan closing. (ECF No. 68-8 at 3 ¶ 7, 6-8.) Afterwards, Plaintiff completed his loan closing. (ECF No. 68-1 at 25:1-26:3.)

\*2 On November 11, 2015, Plaintiff filed a Complaint against Quicken Loans in the Court of Common Pleas for Barnwell County, South Carolina alleging violation of the SCAPS.<sup>2</sup> (ECF No. 1-1 at 8 ¶ 12.) After Quicken Loans removed the case to this court (ECF No. 1), the parties engaged in and completed discovery on March 1, 2017. (ECF No. 36.) Quicken Loans then moved for summary judgment on March 31, 2017. (ECF No. 68.) On that same day, Plaintiff filed his Cross-Motion for Summary Judgment. (ECF No. 71.)

The court heard argument from the parties on the instant Motions at a hearing on December 5, 2017. (ECF No. 127.)

**II. JURISDICTION**

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Plaintiff and Quicken Loans, and the amount in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2.) Quicken Loans is a corporation organized under the laws of Michigan with its principal place of business in Detroit, Michigan. (ECF No. 1-3 at 3 ¶ 5.) Plaintiff is a citizen and resident of Barnwell County, South Carolina. (ECF No. 1-1 at 7 ¶ 1.) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with Defendant's representation. (ECF No. 1 at 3-11.)

**III. LEGAL STANDARD**

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248-49 (1986). A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 434 (4th Cir. 2011).

In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990). The non-moving party may not oppose a motion for summary judgment with mere

allegations or denial of the movant's pleading, but instead must "set forth specific facts" demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(e); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). All that is required is that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249.

#### IV. ANALYSIS

##### A. The Parties' Arguments

###### 1. *Plaintiff*

In his Motion for Summary Judgment, Plaintiff asserts that Quicken Loans violates section 37-10-102 by failing "to ascertain the preference of the South Carolina borrower that results in the attorney at the closing table not being selected by the borrower, a practice that deprives the South Carolina borrower of a statutorily guaranteed right." (ECF No. 71-1 at 10–11.) Specifically, Plaintiff asserts that asking the question "Will the borrower select legal counsel to represent them in this transaction?" does not satisfy the statute which "mandates that the creditor '... must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters related to the closing of the transaction....'" (*Id.* at 11.) Quicken Loans "must do more than disclose to the borrower; the lender must elicit certain specific information from the borrower." (ECF No. 86 at 4.) In this regard, Quicken Loans' "form fails to ascertain the preference of the borrower if it is already prepopulated with 'I/we will not use the services of legal counsel.'" (*Id.* at 5.) Accordingly, Plaintiff argues that Quicken Loans' form "violates the statute and operates as an illegal waiver of the right to be represented by any attorney, much less the consumer's choice of legal counsel." (ECF No. 71-1 at 16.)

###### 2. *Quicken Loans*

\*3 In its Motion for Summary Judgment, Quicken Loans asserts that the purpose of the SCAPS is "to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrower's preference as to the legal counsel employed to represent the debtor in all matters

relating to the closing of the transaction[.]" (ECF No. 68 at 11 (quoting *Davis v. NationsCredit Fin. Servs. Corp.*, 484 S.E.2d 471, 472 (S.C. 1997))). Quicken Loans further asserts that "a lender substantially complies with section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information." (*Id.* (quoting *Davis*, 484 S.E.2d at 472).) Based on the foregoing, Quicken Loans argues that it complied with the SCAPS because it "clearly and prominently disclosed to Plaintiff that he had the right to express a preference for an attorney and gave him numerous opportunities to express a preference." (*Id.* at 11–12.) In support of its argument, Quicken Loans points out that the AIPC required Plaintiff to sign acknowledging that he has "been informed by the lender that I (we) have a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of this loan." (ECF No. 68-6 at 2.)

Additionally, Quicken Loans argues that it has satisfied the safe harbor provisions of section 37-10-102 as to Plaintiff by providing written notice of the preference information on the AIPC within one business day. (ECF No. 68 at 14–16.)

##### B. The Court's Review

Plaintiff brings his action pursuant to the SCAPS, which provides in pertinent part:

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

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

The creditor may comply with this section by:

(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or

(2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a

form distributed by the administrator, the form is in compliance with this section.

S.C. Code § 37-10-102(a) (2017). Plaintiff asserts Quicken Loans violated the SCAPS in the following particulars:

The Attorney/Insurance Preference Form utilized by Quicken is essentially the form recommended by the Department of Consumer Affairs.<sup>3</sup> It is what Quicken does with the form before it is presented to the borrower that runs afoul of the law. The pre-populated Attorney/Insurance Preference Form is in and of itself violative of the very statute that the underlying form is intended to facilitate. By effectively foreclosing the borrower's choice when taking the loan application—the very first step in a real-estate-secured loan transaction—Quicken closes the door on the consumer and taints the entire process that follows. This alone is sufficient to warrant a ruling as a matter of law and the entry of summary judgment.

(ECF No. 71-1 at 17.)

Neither Plaintiff nor Quicken Loans have cited, and the court has not located, a South Carolina appellate court case addressing this precise issue.<sup>4</sup> “Thus, as a federal court sitting in diversity, the [c]ourt must predict how the South Carolina Supreme Court would decide the issue.” *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, C/A No.: 4:16-cv-03666-RBH, 2017 WL 2216298, at \*5 (D.S.C. May 19, 2017) (citing *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002) (“As a federal court sitting in diversity, we have an obligation to apply the jurisprudence of South Carolina's highest court, the South Carolina Supreme Court. But in a situation where the South Carolina Supreme Court has spoken neither directly nor indirectly on the particular issue before us, we are called upon to predict how that court would rule if presented with the issue.” (internal footnote and citations omitted))). “In predicting a ruling by the South Carolina Supreme Court, [the Court] may also consider, inter alia: restatements of

the law, treatises, and well considered dicta,” *id.*, “as well as the practices of other states.” *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272 (4th Cir. 2004) (internal quotation marks omitted)). While it does not appear that this specific issue has been addressed by the South Carolina appellate courts, the South Carolina Supreme Court has reasoned in construing this provision that “[o]ur construction of legislative intent flows from the clear language of the statute ...” and that such intent is to protect borrowers. *King v. Am. Gen. Fin., Inc.*, 687 S.E.2d 321, 325 (S.C. 2009).

\*4 The SCAPS requires the lender to ascertain the preference of the borrower as to legal counsel. “‘[A]scertain’ means ‘to render certain or definite ... to clear of doubt or obscurity ... to find out by investigation.’” *Parker v. Cty. of Oxford*, 224 F. Supp. 2d 292, 295 (D. Me. 2002) (quoting *Black's Law Dictionary* 114 (6th ed. 1990)); see also *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 609 (5th Cir. 2018) (“‘Ascertain’ means ‘to make certain, exact, or precise’ or ‘to find out or learn with certainty ...’ [t]hus, ‘ascertain’ requires ‘a greater level of certainty....’”) (citation omitted). In considering the requirements of the SCAPS, the court observes that the parties have not presented any dispute of fact regarding Quicken Loan's attorney preference procedure in this matter. Therefore, the matter is ripe for summary judgment.

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiff's attorney preference in compliance with the SCAPS. First, an agent of Quicken Loans asked Plaintiff if he would be using “the services of preferred legal counsel.” (ECF No. 68-5 at 3 ¶ 5.) After receiving Plaintiff's response that he did not have counsel of preference, Quicken Loans (1) sent Plaintiff an AIPC that advised him that he has “a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan” and (2) prepopulated the AIPC with the statement “I/We will not use the services of legal counsel.” (ECF No. 68-6 at 2.) Upon receipt of the AIPC, Plaintiff reviewed it, signed it and sent the document back to Quicken Loans. (*Id.*) There is no evidence before the court that Plaintiff had any questions about the content of the AIPC. Cf. *Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 12 (S.C. 2005) (“[A] competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature

was obtained by misrepresentation, fraud, forgery, or duress.”) (citations omitted). Thereafter, Plaintiff had approximately fourteen weeks, from May 24, 2013, to before the loan closing on August 30, 2013, to express an attorney preference to Quicken Loans, which he did not do. Moreover, Plaintiff did not voice any disagreement with the attorney (Andrew Thomas) representing him or question his actions as counsel.<sup>5</sup> (ECF No. 68-8 at 4 ¶ 8 (“Mr. Mosley did not have any questions during the closing ... [and] if he had raised any concerns about my (Thomas) representation of him in the transaction before or during the closing, I (Thomas) would have stopped the transaction and notified the lender.”).)

Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did “ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ...” in compliance with the SCAPS.<sup>6</sup> Accordingly, the court **GRANTS** Quicken Loans' Motion for Summary

Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

## V. CONCLUSION

Upon careful consideration of the entire record and the parties' arguments, the court hereby **GRANTS** Quicken Loans' Motion for Summary Judgment (ECF No. 68) and **DENIES** Plaintiff's Motion for Summary Judgment. (ECF No. 71.) As a result of the foregoing, all remaining pending motions are **DENIED AS MOOT**. (ECF Nos. 94, 95.)

**\*5 IT IS SO ORDERED.**

All Citations

Slip Copy, 2018 WL 1240250

### Footnotes

- 1 Plaintiff had prior experience with the loan application process having refinanced various properties. (See, e.g., ECF No. 68-1 at 11:7–18.)
- 2 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to his attorney preference claim, Plaintiff also alleged his entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 26.)
- 3 See Admin. Interpretation No. 10.102(a)-9301 (S.C. Dep't Consumer Affairs Sept. 7, 1993).
- 4 Additionally, neither Plaintiff nor Quicken Loans has requested certification of this issue to the South Carolina Supreme Court.
- 5 Q. Were you okay with McDonnell and Associates closing that second Quicken Loans mortgage at their office?  
A. Yes. (ECF No. 68-1 at 27:21–24.)  
Q. Did you have any questions during that closing?  
A. No. (*Id.* at 28:14–16.)
- 6 As a result of this finding, the court will not address whether Quicken Loans has satisfied the safe harbor provisions of the SCAPS.

KeyCite Blue Flag – Appeal Notification  
Appeal Filed by TYRONE MOSLEY v. QUICKEN LOANS INC., 4th Cir., August 9, 2018

2018 WL 3342681

Only the Westlaw citation is currently available.

United States District Court, D.  
South Carolina, Aiken Division.

Tyrone MOSLEY, Plaintiff,

v.

QUICKEN LOANS, INC., Defendant.

Civil Action No.: 1:16-cv-00384-JMC

Signed 07/09/2018

**Attorneys and Law Firms**

C. Jo Anne Wessinger Hill, Steven W. Hamm, Richardson Plowden and Robinson, Columbia, SC, Charles Bradley Hutto, Williams and Williams, Orangeburg, SC, Daniel Webster Williams, Bedingfield and Williams, Barnwell, SC, for Plaintiff.

Allen Mattison Bogan, Carmen Harper Thomas, Graham Ross Billings, Benjamin Rush Smith, III, Nelson Mullins Riley and Scarborough, Columbia, SC, for Defendant.

**ORDER AND OPINION**

J. Michelle Childs, United States District Judge

\*1 Plaintiff Tyrone Mosley filed the above-captioned action against Defendant Quicken Loans, Inc. alleging claims for violation of the South Carolina Attorney Preference Statute (“SCAPS”), S.C. Code § 37-10-102 (2017), in the context of a mortgage loan closing. (ECF No. 1-1 at 7 ¶ 5–8 ¶ 12.)

This matter is before the court on Mosley’s Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 136.) Specifically, Mosley seeks to alter or

amend the Order entered on March 9, 2018 (ECF No. 134) (the “March Order”), in which the court granted Quicken Loans’ Motion for Summary Judgment and denied Mosley’s Motion for Summary Judgment. (ECF Nos. 68, 71.) Quicken Loans opposes Mosley’s Motion to Alter or Amend asserting that it should be denied. (ECF No. 137 at 2.) For the reasons set forth below, the court DENIES Mosley’s Motion to Alter or Amend.

**I. RELEVANT BACKGROUND  
TO PENDING MOTION**

Quicken Loans “is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances.” *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017). “Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan.” *Id.*

On May 24, 2013, Mosley provided information to Quicken Loans for purposes of completing a loan application to refinance the mortgage on his primary residence located at 225 Bennett Street, Williston, South Carolina 29853.<sup>1</sup> (ECF Nos. 68-1 at 21:14–25, 68-3 at 2 & 68-5 at 3 ¶ 5.) As a result of the information provided by Mosley, Quicken Loans generated loan application documents that were mailed to Mosley for his review and signature. (ECF Nos. 68-1 at 29:15–18 & 68-5 at 3 ¶ 5.) In addition to the loan application package, Quicken Loans included an Attorney/Insurance Preference Checklist (the “AIPC”). (*Id.*; see also ECF No. 1-1 at 8 ¶ 11.) Based on the information provided by Mosley, the AIPC was prepopulated with the following relevant information (in bold):

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

(a) I select **I/We will not use the services of legal counsel.**

s/Tyrone Mosley

5-28-13

|                               |      |          |      |
|-------------------------------|------|----------|------|
| Borrower <b>Tyrone Mosley</b> | Date | Borrower | Date |
| Borrower                      | Date | Borrower | Date |

(b) Having been informed of this right, and having no preference, I asked for assistance from the

lender and was referred to a list of acceptable attorneys. From that list I select

**Not Applicable**

**Not Applicable**

|          |      |          |      |
|----------|------|----------|------|
| Borrower | Date | Borrower | Date |
|----------|------|----------|------|

**Not Applicable**

**Not Applicable**

|          |      |          |      |
|----------|------|----------|------|
| Borrower | Date | Borrower | Date |
|----------|------|----------|------|

(ECF No. 68-6 at 2.)

\*2 On May 28, 2013, Mosley signed the loan application documents and the AIPC. (*Id.*; see also ECF No. 68-5 at 3 ¶ 6.) Mosley returned the signed loan application documents and the AIPC to Quicken Loans on May 29, 2013. (ECF No. 68-5 at 3 ¶ 6.) On August 26, 2013, Mosley had a telephone conversation with a Quicken Loans' representative to discuss the details of the loan closing, including who would be in attendance. (ECF No. 68-5 at 3 ¶ 7.) Thereafter, Mosley was contacted by the law firm McDonnell & Associates, P.A. "to introduce the firm, discuss the closing, confirm the scheduled closing date and location, and inform him [Mosley] that he needed to have a witness present." (ECF No. 68-8 at 3 ¶ 6.) On August 30, 2013, Mosley met with attorney Andrew Thompson of McDonnell & Associates and signed a disclosure form agreeing to the terms of McDonnell & Associates' representation at the loan closing. (ECF No. 68-8 at 3 ¶ 7, 6-8.) Afterwards, Mosley completed his loan closing. (ECF No. 68-1 at 25:1-26:3.)

On November 11, 2015, Mosley filed a Complaint against Quicken Loans in the Court of Common Pleas for Barnwell County, South Carolina alleging violation of the SCAPS.<sup>2</sup> (ECF No. 1-1 at 8 ¶ 12.) After Quicken Loans removed the case to this court (ECF No. 1), the parties engaged in and completed discovery on March 1, 2017. (ECF No. 36.) Quicken Loans then moved for summary judgment on March 31, 2017. (ECF No. 68.) On that same day, Mosley filed his Cross-Motion for Summary Judgment. (ECF No. 71.) After the court entered the March Order, Mosley moved to alter or amend judgment on April 6, 2018. (ECF No. 136.)

## II. JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) based on Quicken Loans' allegations that there is complete diversity of citizenship between Mosley and Quicken Loans, and the amount in controversy herein exceeds the sum of Seventy-Five Thousand (\$75,000.00) Dollars, exclusive of interest and costs. (ECF No. 1 at 2.) Quicken Loans is a corporation organized under the laws of Michigan with its principal place of business in Detroit, Michigan. (ECF No. 1-3 at 3 ¶ 5.) Mosley is a citizen and resident of Barnwell County, South Carolina. (ECF No. 1-1 at 7 ¶ 1.) Moreover, the court is satisfied that the amount in controversy exceeds \$75,000.00 in accordance with Defendant's representation. (ECF No. 1 at 3-11.)

## III. LEGAL STANDARD AND ANALYSIS

In the March Order, the court made the following observations in granting Quicken Loans' Motion for Summary Judgment:

The SCAPS requires the lender to ascertain the preference of the borrower as to legal counsel. " '[A]scertain' means 'to render certain or definite ... to clear of doubt or obscurity ... to find out by investigation.' " *Parker v. Cty. of Oxford*, 224 F. Supp. 2d 292, 295 (D. Me. 2002) (quoting *Black's Law Dictionary* 114 (6th ed. 1990) ); see also *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 609 (5th Cir. 2018) (" 'Ascertain' means 'to make certain, exact, or precise' or 'to find out or learn with certainty ...' [t]hus, 'ascertain' requires 'a greater level of certainty....' ") (citation omitted). In considering the requirements of

the SCAPS, the court observes that the parties have not presented any dispute of fact regarding Quicken Loan's attorney preference procedure in this matter. Therefore, the matter is ripe for summary judgment.

Upon review, the court is persuaded that Quicken Loans did ascertain Plaintiff's attorney preference in compliance with the SCAPS. First, an agent of Quicken Loans asked Plaintiff if he would be using "the services of preferred legal counsel." (ECF No. 68-5 at 3 ¶ 5.) After receiving Plaintiff's response that he did not have counsel of preference, Quicken Loans (1) sent Plaintiff an AIPC that advised him that he has "a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan" and (2) prepopulated the AIPC with the statement "I/ We will not use the services of legal counsel." (ECF No. 68-6 at 2.) Upon receipt of the AIPC, Plaintiff reviewed it, signed it and sent the document back to Quicken Loans. (*Id.*) There is no evidence before the court that Plaintiff had any questions about the content of the AIPC. *Cf. Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 12 (S.C. 2005) ("[A] competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress.") (citations omitted). Thereafter, Plaintiff had approximately fourteen weeks, from May 24, 2013, to before the loan closing on August 30, 2013, to express an attorney preference to Quicken Loans, which he did not do. Moreover, Plaintiff did not voice any disagreement with the attorney (Andrew Thomas) representing him or question his actions as counsel.<sup>3</sup> (ECF No. 68-8 at 4 ¶ 8 ("Mr. Mosley did not have any questions during the closing ... [and] if he had raised any concerns about my (Thomas) representation of him in the transaction before or during the closing, I (Thomas) would have stopped the transaction and notified the lender."))

\*3 Based on the foregoing, the court predicts that the South Carolina Supreme Court would conclude that Quicken Loans did "ascertain ... the preference of the borrower as to [ ] legal counsel ... relating to the [instant] closing ..." in compliance with the SCAPS. Accordingly, the court **GRANTS** Quicken Loans' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

(ECF No. 134 at 8–9.) Mosely seeks to alter or amend the foregoing pursuant to Rules 52 and 59.

#### A. Applicable Standard under Rule 59(e)<sup>4</sup>

Rule 59 allows a party to seek an alteration or amendment of a previous order of the court. Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may "alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of these three grounds in order to obtain relief. *Loren Data Corp. v. GXS, Inc.*, 501 Fed.Appx. 275, 285 (4th Cir. 2012). The decision whether to reconsider an order under Rule 59(e) is within the sound discretion of the district court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). A motion to reconsider should not be used as a "vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind." *Lyles v. Reynolds, C/A No. 4:14-1063-TMC*, 2016 WL 1427324, at \*1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)).

#### B. The Parties' Arguments

##### 1. *Mosley*

In his Motion, Mosley first expresses his disagreement with the court's "prediction" in the March Order as to how the South Carolina Supreme Court would decide the attorney preference issue. (*See* ECF No. 134 at 10.) More specifically, Mosely argues that the court should have allowed itself to be persuaded by (1) the special referee's decision in *Quicken Loans, Inc. v. Wilson et al.*, Appellate Case No. 2016-001214 (S.C. Ct. App.) and (2) the South Carolina Department of Consumer Affairs' ("DCA") Amicus Curiae Brief also filed in *Wilson*.<sup>5</sup> (ECF No. 136 at 3–6.) In his order, the special referee "conclude[d] as a matter of law that Quicken, in prepopulating the form, eviscerates the very purpose of § 37-10-102 and renders it meaningless ... Quicken fails to ascertain the borrower's attorney preference under the statute ... [and] Quicken's action also constitutes an attempt to elicit a waiver, which is expressly not permissible under the code." (ECF No. 71-9 at 9.) In its brief, the DCA asked that the appellate court "uphold the Special Referee's ruling that Quicken violated the attorney preference statute." (ECF No. 136-1 at 19.)

\*4 Next, Mosley explains again why Quicken Loans' attorney preference procedure fails to ascertain the preference of the borrower. (See ECF No. 136 at 7–9.) Referencing Quicken Loans' AIPC, Mosley asserts that the form is deficient under the SCAPS because “1. The form in fact does not indicate a choice of ‘no preference’ as the section reserved for this event, 1(b), contains the prepopulated language ‘Not Applicable,’ and 2. The form did not provide the borrowers a choice of attorney, as their signatures appear under the prepopulated statement ‘I/We will not use the services of legal counsel,’ an option, unbeknownst to the Plaintiff, that is not available pursuant to South Carolina law.” (ECF No. 136 at 7.) Further, Mosley wonders how the AIPC ascertains the preference of the borrower if it is (1) not completed “in the borrower’s own handwriting” and (2) is “already completed when the borrower receives it.” (*Id.* at 8, 9.)

Finally, Mosley expresses his dismay that the court’s March Order’s language did not mimic the substantive findings contained in the Order entered denying Quicken Loans' Motion to Dismiss.<sup>6</sup> (*Id.* at 9–10 (quoting ECF No. 26 at 4–6).)

## 2. Quicken Loans

Quicken Loans opposes Mosley’s Motion arguing that the special referee’s order and the DCA’s amicus brief from the *Wilson* case are not “binding or persuasive authority regarding the interpretation of the attorney preference statute” and lack any true predictive value. (See ECF No. 137 at 3–7.) In support of its argument, Quicken Loans points out that the special referee’s conclusion relies on findings that directly contradict the South Carolina Supreme Court’s holdings in *Boone* regarding unconscionability and the unauthorized practice of law as they relate to Quicken Loans' attorney preference procedure. (*Id.* at 4–5.) Further, Quicken Loans asserts that pronouncements by the DCA lack the force of law and serve only as an interpretation of a statute.<sup>7</sup> (*Id.* at 6–7, 14–15.)

Finally, Quicken Loans argues that Mosley has failed to cite to any legal support for his claims that (1) the borrower must always have a preference for an attorney, (2) a written record of the borrower’s choice is mandatory pursuant to the federal Truth-in-Lending Act, 15 U.S.C.

§§ 1601–1667f, or (3) the parole evidence rule only allows consideration of written evidence. (*Id.* at 8–13.)

## C. The Court’s Review

Mosley does not reference either an intervening change in controlling law or new evidence previously unavailable. Based on a review of Mosley’s filings (ECF Nos. 136, 138), the court can only conclude that Mosley is seeking to alter or amend the March Order on the basis that the court’s decision was either a clear error of law or resulted in a manifest injustice to Mosley. Clear error occurs when the reviewing court “is left with the definite and firm conviction that a mistake has been committed.” *United States v. Harvey*, 532 F.3d 326, 336 (4th Cir. 2008) (internal quotation marks omitted); see also *United States v. Martinez–Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) (“[C]lear error occurs when a district court’s factual findings are against the clear weight of the evidence considered as a whole.”) (internal quotation marks omitted); *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 n.5 (4th Cir. 1983) (explaining that a district court’s factual finding is clearly erroneous if “the finding is against the great preponderance of the evidence”) (internal quotation marks omitted). Manifest injustice occurs where the court “has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension....” *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (citations omitted).

\*5 Upon review of the instant Motion, the court observes that Mosley’s arguments add very little new substantive argument to what he has already presented on the aforementioned issues. (See, e.g., ECF Nos. 71, 86 & 87.) A Rule 59(e) motion should not be used as an opportunity to rehash issues already ruled upon because a litigant is displeased with the result. See *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993) (stating that “mere disagreement does not support a Rule 59(e) motion”); see also *Consulting Eng’rs, Inc. v. Geometric Software Solutions & Structure Works LLC*, 2007 WL 2021901, at \*2 (D.S.C. July 6, 2007) (“A party’s mere disagreement with the court’s ruling does not warrant a Rule 59(e) motion, and such motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted.”). In the March Order (ECF No. 134), the court cited to appropriate substantive case law and provided specific

reasoning to support its decision to find that Quicken Loans did ascertain Mosley's preference as to legal counsel in accordance with the SCAPS. Moreover, in contrast to its Order on Quicken Loans' Motion to Dismiss (ECF No. 26), the court did not have to rely solely on Mosley's allegations and was able to reference specific communications between the parties leading to the conclusion that there was no genuine issue as to any material fact and that Quicken Loans was entitled to judgment as a matter of law. The reference to specific communications is pertinent here.

In *Boone*, the South Carolina Supreme Court referenced borrower-lender communications when it observed that "the borrower speaks on the telephone with a licensed mortgage banker employed by Quicken Loans [ ]and [e]ach borrower is informed that he or she has the right to select legal counsel to represent him or her in the transaction and asked whether he or she has a preference as to a specific attorney." *Boone*, 803 S.E. 2d at 709. In reaching its decision in this matter, the court focused on Mosley's aforementioned testimony in addition to the declaration and testimony of Jeremy Potter, Quicken Loans' Rule 30(b)(6) witness, who stated that the Quicken Loans' mortgage banker is required to get an answer from a prospective borrower to the following question in order to proceed through the loan application program: "Will the borrower select legal counsel to represent them in this transaction?" (ECF No. 132-5 at 9:3-10:9.) Both in the March Order and the *Boone* opinion, there is an emphasis placed on evidence regarding the communications between Quicken Loans

and the borrower. In considering the special referee's order and the DCA's amicus brief from the *Wilson* case, neither document purports to consider evidence regarding the parties' communications to be pertinent to a determination of whether the lender ascertained the attorney preference of the borrower.<sup>8</sup> In this regard, the court does not perceive that the South Carolina Supreme Court would require trial court's to determine whether a borrower's attorney preference was ascertained in a vacuum wherein relevant testimony by the borrow and lender's representative were disregarded.<sup>9</sup> *Cf. Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("Statutory language", however, "cannot be construed in a vacuum."). In this regard, the court is not persuaded that entry of the March Order resulted in the commission of either clear error of law or manifest injustice. Accordingly, the court must deny Mosley's Motion to Alter or Amend Judgment.

#### IV. CONCLUSION

For the reasons set forth above, the court hereby **DENIES** Plaintiff Tyrone Mosley's Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. (ECF No. 136.)

**\*6 IT IS SO ORDERED.**

#### All Citations

Slip Copy, 2018 WL 3342681

#### Footnotes

- 1 Mosley had prior experience with the loan application process having refinanced various properties. (See, e.g., ECF No. 68-1 at 11:7-18.)
- 2 A plaintiff enforces a violation of the SCAPS through S.C. Code § 37-10-105(A). In addition to his attorney preference claim, Plaintiff also alleged his entitlement to relief under S.C. Code §§ 37-10-105, -108, based on unconscionability. The court dismissed this claim on June 30, 2016. (ECF No. 26.)
- 3 Q. Were you okay with McDonnell and Associates closing that second Quicken Loans mortgage at their office?  
A. Yes. (ECF No. 68-1 at 27:21-24.)  
Q. Did you have any questions during that closing?  
A. No. (*Id.* at 28:14-16.)
- 4 The court observes that Rule 52(b) is inapplicable because this action did not go to trial. See *id.*; see also *State Farm Mut. Auto. Ins. Co. v. Medgyesy*, C/A No. 6:12-CV-00044-MGL, 2014 WL 11511695, at \*1 (D.S.C. May 12, 2014) ("Rule 52(b) is a trial rule that is not applicable in a summary judgment proceeding" or on a motion to dismiss in a habeas proceeding.") (quoting *Orem v. Rephann*, 523 F.3d 442, 451 n.2 (4th Cir. 2008) ).
- 5 Mosley supplements his argument with a discussion of the DCA's role as "the sole state agency designated by the General Assembly to construe and provide official legal interpretations of the Consumer Protection Code, which includes

the attorney insurance preference statute.” (ECF No. 136 at 4.) He cites to language in *Lexington Law Firm v. S.C. Dept of Consumer Affairs*, 677 S.E.2d 580 (S.C. 2009), wherein the South Carolina Supreme Court observes that it defers to the DCA’s “findings where there is no compelling reason to reject it.” *Id.* at 594.

6 In its June 30, 2016 Order, the court observed as follows:

The legislative intent of the attorney preference statute is to protect borrowers by giving them the option to select their own counsel to assist them during the closing of the transaction. In protecting borrowers, the statute requires that lenders like Defendant ascertain Plaintiff’s attorney preference. The facts as alleged by Plaintiff indicate that Defendant provided Plaintiff with a form where the attorney preference portion was already filled in, then required Plaintiff to sign the form. (ECF No. 1-1 at 8 ¶¶ 8-9.) Plaintiff further alleges that he was not allowed to choose an attorney to represent him in the transaction. (*Id.* at ¶¶ 13). If the facts as alleged by Plaintiff are true, it is hard to imagine how Defendant could have ascertained Plaintiff’s preference for an attorney if Defendant essentially told Plaintiff what his preference was by providing him with an already completed form. If the facts as alleged are true, they would seem to support Plaintiff’s allegation that he was deprived of a meaningful choice in selecting his attorney for this transaction.

(ECF No. 26 at 5–6.)

7 Additionally, Quicken Loans asserts that the court should strike the DCA’s amicus brief from the docket because its filing was “in direct contravention of the Court’s Order and is an improper attempt to refashion their argument and expand the record at the 59(e) stage.” (ECF No. 137 at 13–14.)

8 In its amicus brief, the DCA identified only the following evidence as worthy of consideration:

(1) forms like Quicken Loans’ AIPC; (2) “[a]n email from the borrower to the lender choosing the attorney or insurance agent”; (3) “[a]n email from another party such as the borrower’s real estate agent;” and (4) “[c]ompany system notes entered by the lender’s employee.” (ECF No. 136-1 at 9.)

9 The court observes that Mosley’s citation to the parole evidence rule to prohibit consideration of the communicative evidence is also neither persuasive nor supported by cited caselaw.