THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2018-001449

Court of Common Pleas Case No. 2018-CP-32-00079

FLINT EQUIPMENT COMPANY,..... Respondent,

v.

NORTH EDISTO LOGGING, INC
and PAUL GUNTER,..... Appellants

BRIEF OF RESPONDENT

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RESPONDENT'S BRIEF

COMES NOW FLINT EQUIPMENT COMPANY, Respondent in the above-styled appeal, and pursuant to SCACR Rule 208(b), files its Brief of Respondent. For the reasons more fully set forth herein, Respondent seeks an Order affirming the Trial Court's grant of its Motion to Dismiss Appellants' Counterclaims.

I. STATEMENT OF THE ISSUES ON APPEAL.

1. Did the Trial Court err in concluding that a breach of the implied duty of good faith and fair dealing is only actionable if there is also a breach of an express term of the contract?

2. Did the Trial Court err in concluding that Appellants were required to plead their readiness to perform when pursuing counterclaims based on breach of contract, where Appellants have otherwise failed to demonstrate their performance under the contract?

3. Did the Trial Court err in dismissing Appellants' class action claims before discovery had been conducted?

II. STATEMENT OF THE CASE.

On January 9, 2018, Respondent Flint Equipment Company ("Flint") filed a Verified Complaint against Appellants North Edisto Logging, Inc. and Paul Gunter (collectively, "North Edisto" or Appellants) for failure to pay a repair invoice in the amount of $10,483.53. (R___). On or about February 26, 2018, Appellants filed their unverified Answer and Counterclaims admitting they requested the repairs and that Respondent provided them. (R___). However, Appellants raised counterclaims. Respondent filed a Motion to Dismiss Appellants' counterclaims on March 28, 2018. (R___). On May 8, 2018, the same day set for hearing on Respondent's Motion, Appellants filed their Brief in Opposition to Respondent's Motion to Dismiss. (R___).The hearing was conducted on May 8, 2018, at the Lexington County Judicial Center before Hon. Jocelyn Newman, Circuit Judge. (R___). On July 2, 2018, the Trial Court entered an Order granting Respondent's Motion to Dismiss Appellants' Counterclaims. (R___). On August 1, 2018, Appellants filed a Notice of Appeal of that Order and served Respondent via US Mail that same day. (R___).

III. STATEMENT OF THE FACTS.

On or about November 19, 2010, Appellants executed and entered into a Credit Application with Respondent. (Respondent's Complaint, ¶¶ 5-7; Appellants' Answer and Counterclaims, ¶ 4; Order Granting Plaintiff's Motion to Dismiss Defendants' Counterclaims ("Order"), p. 1; R___). Pursuant to the terms of the Application, Respondent agreed to provide Appellants goods and services. (Respondent's Complaint, ¶ 8; Appellants' Answer and Counterclaims, ¶ 5; Order, p. 1; R___). In approximately April 2017, Appellants requested services and/or repairs of Appellants' 753J Feller Buncher. (Respondent's Complaint, ¶ 9;

Appellants' Answer and Counterclaims, ¶ 6; Order, p. 1; R___). Respondent provided Appellants with certain goods and services related to Appellants' 753J Feller Buncher. (Respondent's Complaint, ¶ 10; Appellants' Answer and Counterclaims, ¶ 6; Order, p. 1; R___). On or about May 15, 2017, Respondent issued an invoice in the amount of $10,483.53 to Appellants. (Respondent's Complaint, ¶¶ 11-13; Appellants' Answer and Counterclaims, ¶¶ 6-7; Order, p. 1; R___). The invoice became due and payable on or about June 10, 2017. (Respondent's Complaint, ¶¶ 14-15; Appellants' Answer and Counterclaims, ¶ 7; Order, p. 1; R___). Appellants contend that the invoice for the repairs contained charges that were "inflated and improper." (Appellants' Answer and Counterclaims, ¶ 7; R___).

Appellants admit the requested repairs were performed by Respondent. (Appellants' Answer and Counterclaims, ¶ 6; R___). However, Appellants allege shock and surprise that they would have to pay for the requested repairs. (Appellants' Answer and Counterclaims, ¶ 6; R___). Appellants contend that Respondent performed the repairs without informing Appellants that the repairs were not under warranty. (Appellants' Answer and Counterclaims, ¶ 6; R___). As a result, Appellants assert that no amount is due for the repairs. (Appellants' Answer and Counterclaims, ¶¶ 7, 9; R___). Appellants also assert that some internal figures contained in the paperwork documenting Appellants' purchase of *unrelated* equipment were inconsistent with those provided to Appellants' financing lender, John Deere Financial. (Appellants' Answer and Counterclaims, ¶¶ 12-13, 15-17; R___). Although Appellants admit that the overall price for the unrelated equipment remained the same, Appellants seek class action certification to investigate the alleged inconsistency. (Appellants' Answer and Counterclaims, ¶¶ 13, 15-17; R___).

Appellants assert that Respondent's conduct in repairing the 753J Feller Buncher "constitutes a breach of contract in that it violates [Respondent's] duty of good faith and fair dealing under the alleged revolving credit contract between the parties." (Appellants' Answer and Counterclaims, ¶¶ 18-20; R___). And, Appellants assert that Respondent's documents concerning the sale of two unrelated pieces of equipment also "constitutes a breach of contract in that it violates [Respondent's] duty of good faith and fair dealing under the [*sic*] each of the loan contracts originated by Flint and subsequently assigned to John Deere Financial." (Appellants' Answer and Counterclaims, ¶¶ 21-23; R___).

IV. STANDARD OF REVIEW.

Rule 8(a) of SCRCP provides that a counterclaim shall contain "a short and plain statement of the facts showing that the pleader is entitled to relief." While there are no technical forms of pleadings, each averment of a pleading shall be simple, concise, and direct. SCRCP 8(e)(1). The elementary purpose of a pleading is "to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574 (2013) (citing S.C. Nat'l Bank v. Joyner, 289 S.C. 382, 387, (Ct. App. 1986)); see also Langston v. Niles, 265 S.C. 445, 455 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.").

The Court may dismiss a claim where the movant demonstrates a "failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 121 (Ct. App. 2006) (Internal quotations omitted). The disposition of a motion to dismiss "must be based solely on the allegations set forth in the counterclaim." Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 424 (Ct. App.

2001). "The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." Hambrick, 370 S.C. at 122. Thus, "[t]he question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief." Laidlaw Transit, Inc., 348 S.C. at 424.

Dismissal of an action pursuant to Rule 12(b)(6) is appealable. S.C. Code Ann. §§ 14–3–330(1) & (2)(c) (Supp. 2000). Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court. See O'Laughlin v. Windham, 330 S.C. 379, 382, (Ct. App. 1998) ("The grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law.") (citing Stiles v. Onorato, 318 S.C. 297 (1995)); Williams v. Condon, 347 S.C. 227, 233 (Ct. App. 2001).

V. ARGUMENT.

A. RESPONDENT'S RESPONSE TO APPELLANTS' ARGUMENT 1.

The Trial Court did not err in concluding that a breach of the implied duty of good faith and fair dealing is only actionable if there is also a breach of an express term of the contract.

While every contract includes an implied covenant of good faith and fair dealing that neither party will do anything to impair the right of the other to receive the benefits of the agreement, Episcopal Church in S.C. v. Church Ins. Co. of Vermont, 993 F. Supp. 2d 581, 593 (D.S.C. 2014), there is no independent cause of action separate from a claim for breach of contract for the implied covenant of good faith and fair dealing. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473 (Ct. App. 2004). Thus:

> whenever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied that the cooperation will be given.

> [Furthermore,] [w]hen one undertakes to accomplish a certain result he agrees by implication to do everything to accomplish the result intended by the parties.... Moreover, there is an implied undertaking in every contract on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Burdette v. Turner, No. 2004-UP-059, 2004 WL 6248985, at *4 (S.C. Ct. App. Jan. 29, 2004)(quoting 17A Am. Jur. 2d Contracts § 380 (2003)). "[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277 (1995). Further, there is no breach of an implied covenant of good faith and fair dealing in the absence of a contract or privity of contract between the parties. Burdette, 2004 WL 6248985, at *4.

Appellants do not assert the requisite independent, free-standing cause of action for breach of an express term of the contract. They only incorrectly claim breach of contract by breach of the implied duty of good faith and fair dealing. In the absence of a separate claim for breach of contract, Appellants' implied covenant claim cannot stand alone.

1. Respondent could not breach its duty of good faith and fair dealing under the contract to repair Appellants' 753J Feller Buncher, as pled.

Assuming *arguendo* that Appellants' implied covenant claim could stand, Appellants admit that Respondent made the requested repairs. (Appellants' Answer and Counterclaims ¶ 6; R___). Appellants do not allege that Respondent intentionally and purposely did anything to prevent them from carrying out their part of the agreement, or do anything which would destroy or injure their rights to receive the fruits of the contract. In fact, Appellants stand to be unjustly enriched by $10,483.53, as the value of the received repairs, if their debt under the contract

remains unsatisfied. Because Appellants suffered no damage and received the fruits of the contract (the requested repairs were performed), Respondent did not breach the implied covenant of good faith and fair dealing. See Burdette, 2004 WL 6248985, at *4. As such, Respondent has done what the contract gives it the right to do; Appellants have alleged no impairment of rights; and Appellants' claims fail.

2. Respondent could not breach its duty of good faith and fair dealing under the contracts for sale of the unrelated 853M and 843L Feller Bunchers, as pled.

As admitted by Appellants and illustrated in those Exhibits "A" and "B" attached to Appellants' Answer and Counterclaim, John Deere Financial was the ultimate lender on the loan transactions. (Appellants' Answer and Counterclaims, ¶¶ 12, 13, and 22, Ex. "A," "B"; R___). Contrary to Appellants' assertion that Respondent "originated" and "subsequently assigned" the loans to John Deere Financial, Exhibits "A" and "B" to the Answer and Counterclaims illustrate that the loan contract was solely between John Deere Financial and Appellants. Respondent merely provided information to Appellants and John Deere Financial. Respondent was not a party to Appellants' loan documents with John Deere Financial. As such, no privity of contract exists between Respondent and Appellants as to the loan contracts. Privity of contract between Respondent and Appellants existed only as to the invoices. Because no privity of contract exists between Respondent and Appellants as to the loan contracts, no implied covenant of good faith and fair dealing exists, and no breach thereof occurred. Burdette, 2004 WL 6248985, at *4.

Even assuming *arguendo* that privity of contract did exist between Respondent and Appellants as to the John Deere Financial and North Edisto loan contracts, Appellants fail to allege that Respondent intentionally and purposely did anything to prevent them from carrying

out their part of the agreement, or do anything which would destroy or injure their rights to receive the fruits of the contract. In fact, Appellants simply allege that the numbers between the invoice and the loan contracts differ, but the total amount of both remained the same. (Appellants' Answer and Counterclaims, ¶ 13; R___). John Deere Financial approved the loan transactions. (Appellants' Answer and Counterclaim, Exhibit "B"; R___). Because Appellants suffered no damage and received the fruits of the contracts (the equipment and financing), Respondent did not breach the implied covenant of good faith and fair dealing. See Burdette, 2004 WL 6248985, at *4.

3. RoTec controls the analysis and its holding directly contravenes Appellants' position.

Admittedly puzzling to Respondent, Appellants appear to argue in their Initial Brief to this Court that the cases cited by the Trial Court are inapplicable because the facts of those involved two causes of action – 1) for the breach of the contract, and 2) for breach of the duty of good faith and fair dealing. According to Appellants, those cases differ from the facts here because Appellants have asserted a single cause of action for breach of contract. Appellants make the nonsensical argument that the contract was breached *by* Respondent's breach of the implied covenant of good faith and fair dealing. Appellants' mischaracterization of RoTec would transform the implied duty of good faith and fair dealing into an independent, express term of the contract. Semantics aside, this is not the law in South Carolina, nor any of the other jurisdictions the RoTec Court surveyed.

In support of its holding, the RoTec Court looked to its sister jurisdiction of Georgia for guidance. RoTec Services, Inc., 359 S.C. at 471-472. The RoTec Court examined the case of Stuart Enters. Int'l, Inc. v. Peykan, Inc., 252 Ga. App. 231 (2001), which held "[t]he covenant to

perform in good faith is not an independent contract term. It is a doctrine that modifies the meaning of all explicit terms in a contract, preventing a breach of those explicit terms *de facto* when performance is maintained *de jure*." Stuart Enters. Int'l, Inc., 252 Ga. App. at 234. In adopting that reasoning for South Carolina, the RoTec Court found that the holding was in accord with the law of other jurisdictions that have addressed the question. RoTec Services, Inc., 359 S.C. at 472 (citing Baxter Healthcare Corp. v. O.R. Concepts, Inc., 69 F.3d 785, 792 (7th Cir. 1995), Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167 (8th Cir. 1987), Designers N. Carpet, Inc. v. Mohawk Indus., Inc., 153 F.Supp. 2d 193, 196 (E.D.N.Y. 2001)). Thus, Appellants' position directly conflicts with the reasoning behind the RoTec decision. As Appellants fail to point to any express term of the contract that was breached by Respondent (whether in Respondent's repair invoice or the John Deere Financial/North Edisto loan agreements), the Trial Court did not err in dismissing these claims.

B. RESPONDENT'S RESPONSE TO APPELLANTS' ARGUMENT 2.

The Trial Court did not err in concluding that Appellants were required to plead their readiness to perform.

"It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready and willing so to perform it." Parks v. Lyons, 219 S.C. 40, 48 (1951).

Appellants' do not allege that they have performed or were able, ready and willing to perform. Instead, Appellants make the bald allegation that "Plaintiff's conduct as outlined above constitutes a breach of contract in that it violates Plaintiff's duty of good faith and fair dealing." (Appellants' Answer and Counterclaims, ¶¶ 19, 22; R___). Appellants admit that they asked

Respondent to provide repairs and that Respondent in fact made the repairs, (Appellants' Answer and Counterclaims, ¶ 6; R___), but do not allege their own performance. As such, they cannot recover damages, and their counterclaims fail.

Appellants cite to no legal authority that would excuse their failure to comply with this requirement. Rather, Appellants posit the unsupported notion that a purchaser's disagreement over the value of goods and services rendered excuses their duty to satisfy the debt. Appellants' arguments here are absurd. Pretermitting Respondent's position that $10,483.53 is more than a fair price to rebuild the machine's engine on site after Appellants submerged it in a swamp, Appellants have not even alleged they are able, ready and willing to pay a fair price by their own reckoning. As Appellants have not alleged their own required performance for the contract on which they now pursue claims under, the Trial Court did not err in dismissing these claims.

C. RESPONDENT'S RESPONSE TO APPELLANTS' ARGUMENT 3.

The Trial Court did not err in dismissing Appellants' class action claims.

1. Appellants' class action literally fails to state a cause of action.

Appellants state their "First Counterclaim against Flint Equipment Company" in Paragraphs 15, 16, and 17 of their Answer and Counterclaim. These paragraphs purport to state a claim for "Class Action." However, there is literally no cognizable cause of action. A class action, in and of itself, is not a cause of action. A class action must state an underlying cause of action, which would serve as the basis of the Class Action. Because Appellants' Counterclaim lacks any such cause of action, it must fail.

2. Breach of the implied duty of good faith and fair dealing is not a basis for the Class Action.

As set forth above, under South Carolina law, there is no independent cause of action for breach of the implied duty of good faith and fair dealing. Assuming that Appellants intend such claims to serve as the causes of action for the Class Action, the Appellants' Counterclaim fails to state a claim. Even if this was an issue of first impression for this Court, which it is not, the Trial Court's dismissal would still be warranted. When a dispute is not to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion the dismiss. Happy Rabbit v. Alpine Utilities, Inc., No. 2010-UP-558, 2010 WL 10088255 at *2 (S.C. Ct. App. Dec. 23, 2010).

Further, no privity of contract existed between Respondent and Appellants as to the loan contracts between Appellants and John Deere Financial. Thus, no breach of the implied duty of good faith and fair dealing occurred.

3. Appellants have failed to state sufficient facts to state a claim that meet the five prerequisites of Rule 23.

Rule 23, SCRCP, provides the following prerequisites for a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable [Numerosity], (2) there are questions of law or fact common to the class [Commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [Typicality], (4) the representative parties will fairly and adequately protect the interests of the class [Adequacy], and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

The proponent of a class action bears the burden of proving the existence of each prerequisite. Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20-21 (2003). The failure to satisfy even one prerequisite is fatal. Id.

To establish Numerosity, a party must show that "the class is so numerous that joinder of all members is impracticable." Rule 23, SCRCP. Appellants' Counterclaims contain no such allegation. Appellants have not pleaded the identity of any other potential class member. Rather, they state that they need "extensive discovery to identify potential members[,]" (Appellants' Answer and Counterclaim ¶ 16; R___). The failure to satisfy the numerosity prerequisite is fatal to the cause of action for a class action. S.C. Dep't of Revenue, 353 S.C. at 21.

"To establish Commonality, a party must show that there are questions of law or fact common to the class ... this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together." S.C. Dep't of Revenue, 353 S.C. at 21 (2003) (internal citations and quotations omitted). First, as set forth more fully above, Appellants' Counterclaim shows no questions of law at all. Second, Appellants have failed to allege any law or facts common to a potential class. The case arises out of Appellants' failure to pay Invoice No. W15860 in the amount of $10,483.53 for repairs Flint made to Appellants' John Deere 753J Feller Buncher. (Respondent's Complaint, ¶ 9, 13, and Exhibit "2"; R___). There is certainly no commonality as to that central issue, and the Counterclaim asserts no common issues binding the proposed class together. The predominant issue in this case is analysis of the individual repair invoice between Flint and North Edisto. This case does not arise out of purchase contracts and loan agreements for unrelated equipment. (See Appellants' Answer and Counterclaims, Ex. "A" and "B"; R___). By introducing these issues into the case, Appellants

destroy any basis for commonality. First, the purchase agreement between Flint and North Edisto for unrelated equipment has no bearing on whether Appellants must pay for the repairs it requested. These purchase agreements attached to Appellants' Answer and Counterclaims do not even concern the 753J Feller Buncher that Respondent repaired. Second, the loan agreements are between John Deere Financial and Appellants – Flint is not even a party to the loan agreements. The failure to satisfy the commonality prerequisite is fatal to the cause of action for a class action. S.C. Dep't of Revenue, 353 S.C. at 21.

There is no Typicality. The Counterclaims contain no allegations that the Appellants claims or defenses are typical of the claims or defenses of the purported class. Because the case arises out of the repairs made to Appellants' Feller Buncher, the case will focus on that individualized proof, and typicality is not present. Appellants' defenses to payment for repairs are completely atypical to the purported class. Appellants have not plead any relationship between its defenses to payment for repairs and its implied covenant/class action claims. The same arguments that show no commonality show no typicality. The failure to satisfy this prerequisite is fatal to the cause of action for a class action. S.C. Dep't of Revenue, 353 S.C. at 21.

As the Trial Court found, there is no Adequacy. Appellants have not shown that the representative parties will fairly and adequately protect the interests of the class. Appellants have not even plead this, irrespective of the opportunity to conduct "extensive" discovery. In fact, Appellants are not ideal class representatives. They are Respondent's debtors and currently owe Respondent in excess of $11,000.00. Appellants' interest is in avoiding paying a legitimate debt, which is not a dispute common to any other class member. Appellants' Answer and

Counterclaims appear to be an attempt to make the litigation so costly that Respondent gives up on its legal rights against Respondent. Further, as discussed above, no privity of contract existed between Respondent and Appellants in regard to the loan contracts. Therefore, because Appellants have no legal basis for recovery, they are not adequate class representatives.

Appellants have further failed to allege facts to support damages. Rule 23, SCRCP, states that "in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class." The amount in controversy means "the value of the object to be gained by the suit." Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 331 (1991). In the absence of alleging damages, Appellants have failed to state a claim. What's more, Rule 23, SCRCP, requires the amount in controversy to exceed $100.00 per member of a class or a damage amount; Appellants failed to satisfy this threshold burden. Appellants did not even allege that *their own* damages are in excess of $100.00. Appellants admit the overall amount to purchase the equipment did not change. (Appellants' Answer and Counterclaims, ¶¶ 13, 15-17; R___). Appellants received $10,483.53 worth of requested repairs that they now refuse to pay for. (Appellants' Answer and Counterclaims, ¶¶ 6-7; Order, p. 1; R___). Appellants cannot point to a single provision within their Answer and Counterclaims that, taken as true, would show they have suffered $100.00 in damages. Appellants did not allege this because they simply have not suffered $100.00 in damages, nor has any other "potential members" of Appellants' identified classes. The failure to satisfy the amount in controversy prerequisite is fatal to the cause of action for a class action. S.C. Dep't of Revenue, 353 S.C. at 21.

Appellants' argument that it is premature to dismiss their class action claims fails on several fronts. Their position ignores the decisions that state just the opposite – that class allegations may be dismissed prior to discovery when discovery will not "alter the central defect in th[e] class claim." Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 949 (6th Cir. 2011); Rikos v. Proctor & Gamble Co., 2012 WL641946, at *4 (S.D. Ohio Feb 28, 2012); Sanders v. Apple, Inc., 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009); Thompson v. Merck & Co., No. C.A. 01–1004, 2004 WL 62710, at *5 (E.D. Pa. Jan. 6, 2004); see also Fejzulai v. Sam's West, Inc., 205 F.Supp. 3d 723 (D.S.C. 2016) (granting motion to dismiss class action claims where no development of case could change lack of cause of action); Schwartz v. Pella Corp., Nos. 2:14–mn–00001–DCN, 2:14–cv–00556–DCN, 2014 WL 7264948 (D.S.C. Dec. 18, 2014) (granting, in part, motion to dismiss class action claims prior to discovery). Where there is no South Carolina law as to a specific procedural issue, "we look to the construction placed on the Federal Rules of Civil Procedure" since South Carolina's "Rules of Procedure are based on the Federal Rules." Newsome Chevrolet-Buick, 304 S.C. at 330. Consistent with these holdings, no amount of discovery can remedy Appellants' failure to state a claim that would form the basis of their class action, or their failure to plead facts necessary to pursue a class action under Rule 23, SCRCP. Thus, discovery will not alter these central defects in Appellants' claims here.

Most of the above cited decisions were discussed at length in Respondent's initial Motion to Dismiss, Subpart B(4), and are again addressed *infra*. Although the Trial Court did not cite to these decisions in its Order, they nevertheless were considered and form the foundation of the Court's reasoning here. In short, there is nothing improper about dismissal of Appellants' class

action claims "at an early stage" of litigation when the purported class action so plainly lacks any one essential element as plead. S.C. Dep't of Revenue, 353 S.C. at 20-21.

4. Appellants' Class Action claim should also be stricken under SCRCP Rule 12(f) and as permitted under Rule 23(d)(1).

"As soon as practicable, after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Rule 23(d)(1), SCRCP. Under these circumstances—where Appellants' own allegations render certification of a class an impossibility—an Order striking Appellants' class allegations is an appropriate remedy. See Rikos, 2012 WL641946, at *3 ("[C]lass action allegations may be stricken prior to motion for class certification where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met); Sanders, 672 F. Supp. at 990 ("Where the complaint demonstrates that a class action cannot be maintained on the facts alleged, a defendant may move to strike class allegations prior to discovery."); Thompson, 2004 WL 62710, at *5 ("[P]laintiffs argue that this court lacks authority to strike class action allegations from the complaint until after the plaintiffs have filed a motion for class certification. We do not agree.").

The United States Supreme Court has acknowledged, "[s]ometimes the issues are plain enough from the pleadings . . . and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the [class] certification question." Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982). Here, the impossibility of the case proceeding is plain enough on the pleadings. If the specific grounds upon which the Trial Court ruled were not enough, the class allegations should nevertheless be stricken pursuant to Rule 12(f), SCRCP. "A motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP." Grazia v. S.C.

State Plastering, LLC, 390 S.C. 562, 567 (2010). Thus, the standards outlined above apply equally to a motion to strike under Rule 12(f), SCRCP. See id. A motion to strike under Rule 12(f), SCRCP, is appropriate for insufficient defenses or any immaterial or impertinent matter. Rule 12(f), SCRCP. Because Appellants' allegations are insufficient and no class exists for certification, Appellants' class allegations are immaterial, impertinent and should be stricken pursuant to Rule 12(f), SCRCP.

This issue is not merely academic. Absent dismissal, the parties and Court will be compelled to devote significant time and expense to class discovery, class certification briefing, and class certification hearings before even getting to the merits of the legitimate legal issues involved in this case. To prevent the imposition of this needless burden on itself and the parties, the Trial Court correctly dismissed Appellants' class allegations. See 35A C.J.S. Fed. Civ. P. § 469 ("Rule 12(f) reflects an inherent power of the courts to reduce pleadings, to expedite the administration of justice, and . . . ensure prompt disposition of legal actions"); Id. at § 470 ("The motion to strike . . . saves the time and money that would be spent litigating spurious issues that will not affect the outcome of a case . . . ."). Furthermore, because Respondent is not a party to the loan contracts, Appellants have failed to join an indispensable party to their counterclaims. John Deere Financial must be joined if the Court permits the class allegations to continue. Rules 12 and 19, SCRCP. Therefore, Respondent respectfully requests the Court to affirm the Trial Court's dismissal of Appellants' class allegations.

D. AN ADDITIONAL RESPONSE TO APPELLANTS' ARGUMENTS.

Should this Court find Respondent's foregoing arguments are not conclusive as to these issues, Respondent respectfully requests this Court to affirm the Trial Court's ruling on any ground appearing on the record as provided by SCACR Rule 220(c).

VI. CONCLUSION.

Respondent respectfully requests the Court to affirm the Trial Court's Order dismissing each and every counterclaim asserted by Appellants in their Answer and Counterclaims; and that the Court grant such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 16th day of October, 2018.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. Jocelyn Newman, Circuit Court Judge

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Court of Common Pleas Case No. 2018-CP-32-00079

FLINT EQUIPMENT COMPANY,..... Respondent,

v.

NORTH EDISTO LOGGING, INC
and PAUL GUNTER,..... Appellants

PROOF OF SERVICE

I certify that I have served the Brief of Respondent on the Appellants listed above by depositing a copy of it in the United States Mail, postage prepaid, on October 16, 2018, addressed to their attorney of record, D. Randolph Whitt, 344 Blossom View Ct., West Columbia, SC 29170.

RESPECTFULLY SUBMITTED this 16th day of October, 2018.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

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October 16, 2018

Via FedEx

Ms. Jenny Kitchings, Clerk
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Columbia, Southe Carolina 29201

RE: Flint Equipment Company v. North Edisto Logging, Inc., and Paul Gunter, Individually
Appellate Case No. 2018-001449
MCDR Client No.: 12359.059

Dear Ms. Kitchings,

In connection with the above referenced matter, enclosed please find the original and one (1) copy of the *Brief of Respondent* and the original and one (1) copy of the *Designation of Matter to be Included in the Record on Appeal.* Please file the originals, conform the copies, and return the conformed copies to us in the enclosed, postage prepaid envelope.

Should you have any questions or concerns, please let us know.

Yours Truly,

MOORE, CLARKE, DuVALL & RODGERS, P.C.

M. Drew DeMott

Enclosures
MDD: rlm
cc: Flint Equipment Company
D. Randolph Whitt

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