

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY  
Court of Common Pleas

Honorable Brooks P. Goldsmith

Case No. 2011-CP-16-135

Amanda and Michael Griggs.....Appellant,

v:

Nationstar Mortgage LLC,.....Respondent.

RECORD ON APPEAL

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OCT 22 2012

**SC Court of Appeals**

## INDEX

Order of Judge Brooks P. Goldsmith dated June 7, 2012.....	2
Order of Judge Brooks P. Goldsmith dated July 20, 2012 and filed July 27, 2012...9	
Complaint filed March 8, 2011 .....	10
Answer dated April 15, 2011 .....	26
Amanda and Michael Griggs' Motion to Compel and Award Expenses Pursuant to Rule 37 filed September 30, 2011 .....	32
Nationstar Mortgage, LLC's Motion for Judgment on the Pleadings of the dated February 1, 2012 .....	42
Amanda and Michael Grigg's Response to Defendant's Motion for Judgment on the Pleadings filed May 3, 2012 .....	61
Amanda and Michael Griggs' Motion to Alter or Amend Judgment filed June 20, 2012 .....	74
Nationstar Mortgage, LLC's Response to Plaintiffs' Motion to Alter or Amend Judgment .....	91
Transcript of May 29, 2012, hearing regarding Nationstar's Motion for Judgment on the Pleadings.....	105
Certificate of Compliance .....	134
Certificate of Counsel .....	135



State of South Carolina  
The Circuit Court of the Sixth Judicial Circuit

BROOKS P. GOLDSMITH  
JUDGE

POST OFFICE BOX 2227  
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E-MAIL: bgoldsmithj@sccourts.org

June 11, 2012

Hon. Scott B. Suggs  
Clerk of Court, Darlington Co.  
P.O. Box 1177  
Darlington SC 29540

RE: *Amanda & Michael Griggs v. Nationstar Mortgage, LLC*  
Case No. 2011-CP-16-00135

Dear Mr. Suggs:

Enclosed please find an original *Order Granting Defendant's Motion for Judgment on the Pleadings* signed by Judge Goldsmith on June 5, 7012 that I am forwarding to you for filing purposes.

By copy of this letter, I am providing a copy of same to all parties.

Thank you for your assistance in this matter.

Sincerely,

Dana E. Stogner  
Administrative Assistant  
to Brooks P. Goldsmith  
Enclosures

- cc: Childs Cantey Thrasher, Esquire (via facsimile) (1-803-779-1767)
- cc: Patrick J. McLaughlin, Esquire (via facsimile) (1-843-669-5150)
- cc: Christopher S. Anulewicz, Esquire (via facsimile) (1-404-261-3656)

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF DARLINGTON ) Civil Action No. 2011-CP-16-135

AMANDA and MICHAEL GRIGGS, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 NATIONSTAR MORTGAGE, LLC, )  
 )  
 Defendant. )

MOTION FOR JUDGMENT ON THE PLEADINGS

**ORDER  
 GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

This matter comes before the Court on Defendant Nationstar Mortgage, LLC's Motion for Judgment on the Pleadings as to Plaintiffs' March 8, 2011 Complaint. Based on review of the Complaint, the Motion for Judgment on the Pleadings filed by Defendant on February 1, 2012, Plaintiffs' responsive brief filed on May 2, 2012, the relevant case law, and the arguments of counsel at oral argument held on May 29, 2012, the Court ORDERS and FINDS as follows:

**I. Standard**

"A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." Sapp v. Ford Motor Co., 386 S.C. 143, 146 (2009). As discussed below, construing the Complaint in a light most favorable to the Plaintiffs, this Court determines the facts alleged and the inferences reasonably deducible from the pleadings do not entitle the plaintiff to relief on any theory of the case. Bradshaw v. Anderson County, 388 S.C. 257, 262 (2010) (internal punctuation omitted).

## II. Findings of Fact and Conclusions of Law

### A. Count One - Plaintiffs' claim for Defamation Per Se

State defamation claims are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681h(e), except as to false information furnished with "malice or willful intent to injure." See Beattie v. NationsCredit Financial Servs. Corp. 69 Fed. Appx 585, 589 (4th Cir. 2003); Ross v. FDIC, 625 F.2d 808, 813 (4th Cir. 2010). Plaintiffs' Complaint does not allege facts that would show that NationStar acted with "malice or willful intent to injure." See Beattie, 69 Fed. Appx. at 598; Ross 625 F.2d at 813. This claim, therefore, fails as a matter of law.

Plaintiffs' argue that because they title their claim "defamation per se," malice is presumed. However, South Carolina law only recognizes five instances in which defamation per se applies. Defamation "is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Goodwin v. Kennedy, 347 S.C. 30, 36 (2001). Plaintiffs' Count One does not fall into any of the five enumerated categories, and therefore fails to state a claim for defamation per se.

Accordingly, no issue of fact exists as to Count One (Defamation Per Se) that if raised would entitle Plaintiffs to judgment if resolved in their favor. Therefore, judgment on the pleadings is proper.

**B. Counts Two, Three, and Four - Plaintiffs' claims for Noncompliance with the Fair Credit Reporting Act, 15 U.S.C.S. 1681 et seq., Breach of Contract, and Breach of Contract Accompanied by Fraudulent Act**

During the May 29, 2012 oral argument, Plaintiffs consented and agreed that Counts Two, Three and Four should be dismissed. Therefore, judgment on the pleadings is proper as to these counts.

**C. Count Five - Plaintiffs' claim for Tortious Interference with Perspective Contract**

To state a viable claim for intentional interference with prospective contract, a plaintiff must plead: (a) intentional interference with prospective contractual relations; (b) for an improper purpose or by improper methods; and (c) resulting in injury. See Crandall Corp. v. Navistar Int'l Transp. Corp. 395 S.E.2d 179 (1990). Setting aside whether Plaintiffs were damaged, which is unclear from their Complaint, the Complaint fails to plead two required elements. First, Plaintiffs' Complaint fails to allege that NationStar intentionally interfered with, or knew of, any prospective contractual relations that Plaintiffs had or might have.

Second, Plaintiffs failed to allege that NationStar engaged in any improper methods. A non-inclusive list of improper methods recognized under South Carolina law may be found in Santoro v. Schülthess, 384 S.C. 250, (2009), including: those means that are illegal or independently tortious; violence; threats or intimidation; bribery; unfounded litigation; fraud, misrepresentation, or deceit; defamation; duress; undue influence; misuse of inside or confidential information; breach of a fiduciary relationship; violation of established standard of trade or a profession; unethical conduct; or sharp dealing, overreaching, or unfair competition. Id. at 266. The Fourth Circuit held, after extensive analysis, that reporting to a credit agency, even erroneously, does not in and of itself fall into these categories, or violate South Carolina or

federal law. See also Beattie v. NationsCredit Financial Servs. Corp. 69 F.3d Appx 585, 589 (4th Cir. 2003). Thus, Plaintiffs' Complaint fails to meet this second requirement.

Moreover, NationStar is entitled to report delinquent payments and the exercise of that right cannot be the basis for an intentional interference claim. See Galliard v. Fleet Mortgage Corp. 880, F. Supp. 1085, 1089 (D.S.C. 1995) (a party who exercises a right in good faith cannot be liable for exercising that right). There is no allegation of bad faith, even if NationStar erroneously reported Plaintiff's credit (which is disputed), and Plaintiffs claims fail for this reason as well. United Education Distributors v. Educational Testing, 564 S.E. 2d 324, 328 (2002); Santoro v. Schulthess, 384 S.C. 250, 266 (2009).

Accordingly, no issue of fact exists as to Count Five (Tortious Interference with Prospective Contract) that if raised would entitle Plaintiffs to judgment if resolved in their favor, and, therefore, judgment on the pleadings is proper.

**D. Count Six - Plaintiffs' claim for Violation of the South Carolina Unfair Trade Practices Act ("SCUPTA")**

Plaintiff contends that NationStar's allegedly false reporting of credit information to a credit reporting agency violates SCUPTA. The Fourth Circuit in Beattie v. Nations Credit Manufacture, 69 Fed. Appx. 585 (4th Cir. 2003), specifically rejected this argument.

To state a SCUPTA claim, Plaintiff must establish: (a) that defendant engaged in an unlawful trade practice; (b) that plaintiff suffered actual ascertainable damages as result of the unlawful trade practice; and (c) that the unlawful trade practice engaged in by defendant had an adverse effect on the public interest. In Beattie, Plaintiff alleged that NationsCredit "engaged in an unlawful trade practice by falsely reporting to credit bureaus that their mortgage was in foreclosure," and that Plaintiffs were denied credit based upon such false reporting. Beattie, 69 Fed. Appx. at 587. Beattie held that under SCUPTA, an "unlawful trade practice" was one that

was “immoral, unethical or oppressive” under South Carolina law. *Id.* at 588. The Fourth Circuit specifically held that negative credit reporting “cannot be seen as immoral, unethical or oppressive ....” under South Carolina law. *Id.*

Moreover, specific facts must be alleged that show an actual harm to the public—not just to the Plaintiffs. See Beattie v. Nations Credit Manufacture, 69 Fed. Appx. 585 (4th Cir. 2003); Noak v. Enterprises, Inc. v. Country Corner Interiors, 290 S.C. 475 (1986); Columbia East Assoc. V. Bi-Lo, 299 S.C. 515, 522 (1989). Plaintiffs contend that NationStar falsely reported their credit on numerous occasions. While this allegation is belied by the pleadings, even if true, Plaintiff presents no pleadings that others were actually or could actually be harmed. This failure shows that the alleged damage is to Plaintiffs individual, not the public at large.

Accordingly, no issue of fact exists as to Count Six (Violation of the South Carolina Unfair Trade Practices Act S.C. Code Ann. § 39-5-10 *et seq.*) that if raised would entitle Plaintiffs to judgment if resolved in their favor, and judgment on the pleadings is proper.

**E. Count Seven - Plaintiffs' claim for Negligent Misrepresentation**

Because this claim is based on credit reporting, it is explicitly preempted barred by the Fair Credit Reporting Act, 15 U.S.C. 1681h(e). Moreover, Plaintiffs have failed to plead the required elements of a negligent misrepresentation claim under South Carolina law. A plaintiff in a negligent misrepresentation action must prove: (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. Brown v. Stewart, 348 S.C. 33, 42 (2001). Plaintiffs do not plead any facts to show that (a) NationStar had a pecuniary interest in making the alleged

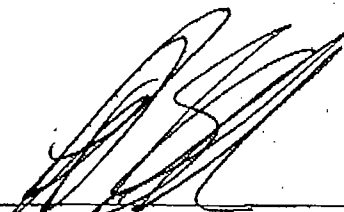
statements, (b) that NationStar breached the duty by failing to exercise reasonable care, (c) that Plaintiffs justifiably relied on the representation, or (d) that Plaintiffs suffered a pecuniary loss. Failure to plead these facts is fatal to Plaintiffs' negligent misrepresentation claim.

Accordingly, no issue of fact exists as to Count Seven (Negligent Misrepresentation) that if raised would entitle Plaintiffs to judgment if resolved in their favor, and judgment on the pleadings is proper.

### III. Conclusion

FOR THE FORGOING REASONS, Defendant's Motion for Judgment on the Pleadings is hereby GRANTED in total. Plaintiffs' entire Complaint is hereby DISMISSED WITH PREJUDICE.

AND IT IS SO ORDERED.



---

The Honorable Brooks P. Goldsmith  
Circuit Court Judge, 6th Judicial Circuit

*Lancaster*  
Darlington, South Carolina  
JUNE 7, 2012

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DARLINGTON )

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT

Amanda and Michael Griggs, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
Nationstar Mortgage, LLC, )  
 )  
Defendant. )  
\_\_\_\_\_ )

CASE NO: 2011-CP-16-135

**ORDER DENYING  
MOTION TO RECONSIDER**

This matter came before the Court on Plaintiffs' *Motion to Alter or Amend Judgment* dated June 19, 2012 wherein Plaintiffs request this Court reconsider that certain Order dated June 7, 2012.

After careful consideration of said motion and memoranda submitted by the parties, the Court finds there is no basis for granting the motion and, therefore, Plaintiffs' *Motion to Alter or Amend Judgment* dated June 19, 2012 is hereby denied.

AND IT IS ALL SO ORDERED.

July 20, 2012  
Lancaster SC

  
\_\_\_\_\_  
BROOKS P. GOLDSMITH, PRESIDING JUDGE  
FOURTH JUDICIAL CIRCUIT

2012 JUL 27 PM 12:00  
SCOTT B. SUGGS  
CLERK OF COURT  
DARLINGTON COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA )

COUNTY OF DARLINGTON )

Amanda and Michael Griggs )

Plaintiff(s) )

vs. )

Nationstar Mortgage, LLC )

Defendant(s) )

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011-CP - 16-

FILED 2011 MAR 8 10 13 5

(Please Print)

Submitted By: Patrick J. McLaughlin

Address: Wukela Law Firm, PO Box 13057, Florence, SC 29504-3057

SC Bar #: 73675

Telephone #: 843-669-5634

Fax #: 843-669-5150

Other:

E-mail: patrick@wukelalaw.com

FILED 2011 MAR - 8 PM 2:53 SCOTT B. SURGEON CLERK OF COURT/RMC DARLINGTON COUNTY, S.C.

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint. This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Breach of Contract (140)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20-CP-...
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)

- Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Other (799)
Administrative Law/Relief: Reinstate Driver's License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Commission (990), Employment Security Comm (991)

- Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (610)

Submitting Party Signature: [Signature]

Date: March 7, 2011

TRUE CERTIFIED COPY, Scott B. Surgeon CLERK OF COURT/RMC DARLINGTON COUNTY, S.C.

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton, Horry,  
Jasper, Lexington, Pickens (Family Court Only), Richland, Union and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.  
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DARLINGTON )  
  
Amanda and Michael Griggs, )  
 )  
 ) Plaintiffs, )  
 )  
vs. )  
 )  
Nationstar Mortgage, LLC, )  
 )  
 ) Defendant. )  
\_\_\_\_\_ )

IN THE CIRCUIT COURT FOR  
THE FOURTH JUDICIAL CIRCUIT  
CIVIL ACTION: 2011-CP-16-\_\_\_\_\_

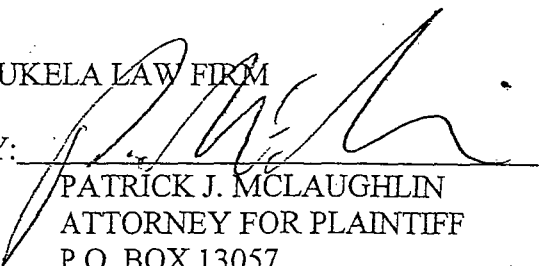
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SUMMONS FOR RELIEF  
COMPLAINT SERVED  
(JURY TRIAL DEMANDED)

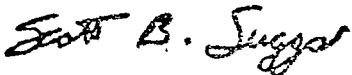
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2011 MAR -8 PM 2:53  
SCOTT B. SUGGS  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices at 403 Second Loop Road, Florence, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

WUKELA LAW FIRM  
BY:   
PATRICK J. MCLAUGHLIN  
ATTORNEY FOR PLAINTIFF  
P.O. BOX 13057  
FLORENCE, SC 29504-3057  
TELEPHONE: 843-669-5634  
FACSIMILE: 843-669-5150

Florence, South Carolina  
March 7, 2011.

TRUE CERTIFIED COPY,  
  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 Amanda and Michael Griggs, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Nationstar Mortgage, LLC, )  
 )  
 Defendant. )  
 )

IN THE CIRCUIT COURT FOR  
 THE FOURTH JUDICIAL CIRCUIT  
 CIVIL ACTION: 2011-CP-16-

110

**COMPLAINT**

**(JURY TRIAL DEMANDED)**

2011 MAR -8 PM 2:53  
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 CLERK OF COURT/RMC  
 DARLINGTON COUNTY, S.C.

The Plaintiffs, Amanda and Michael Griggs, by and through her undersigned counsel, hereby makes the following claims and allegations:

**JURISDICTION:**

1. That the Plaintiffs are a citizens and a residents of the County of Darlington, State of South Carolina.
2. That the Plaintiff is informed and believes that the Defendant Nationstar Mortgage , LLC (hereinafter "Nationstar"), at all times relevant to this action, was duly organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of South Carolina.
3. That the Defendant Nationstar is subject to personal jurisdiction in South Carolina in that it transacts business in South Carolina and in that it entered into a contract in South Carolina.

**FACTUAL ALLEGATIONS:**

4. That on or about April 15, 2010, the Plaintiffs suffered a residential home fire which burned their home. At the time of the fire, two notes were against the property, said notes being held by Ditech and Defendant Nationstar.

**TRUE CERTIFIED COPY,**  
*Scott B. Jugger*  
 CLERK OF COURT/RMC  
 DARLINGTON COUNTY, S.C.

5. On or about April 16, 2010, the Plaintiffs contacted Defendant Nationstar requesting a payoff amount for the Nationstar note, as they had been directed to do by their insurance carrier. Upon this request for a payoff amount the Plaintiffs were given a payoff amount of \$182,604.80 and told that their account would be frozen so it would not continue to accrue interest.
6. On or about April 23, 2010, the Plaintiffs received the fire loss check from their insurance company. As is customary, the check was made out to the Plaintiffs and both Ditech and Defendant Nationstar as note holders. The Plaintiffs contacted Ditech and Defendant Nationstar to see how they would go about getting the check endorsed. Defendant Nationstar demanded a check made payable solely to them. The Plaintiffs went back to their insurance company and went through the process of getting checks re-issued to satisfy this demand from Defendant Nationstar.
7. On or about April 29, 2010, the Plaintiffs received the divided insurance checks described in paragraph six (6) and promptly contacted Defendant Nationstar. Defendant Nationstar informed the Plaintiffs that they would send the Plaintiffs a payoff statement and the Plaintiffs were to return the statement along with the insurance check.
8. On or about May 4, 2010, the Plaintiffs received a payoff statement from Defendant Nationstar. However, the payoff statement the Plaintiffs received was for "Jose Ortiz," and individual who appeared to reside in Miami, Florida. The Plaintiffs promptly contacted Defendant Nationstar and informed them of this problem.
9. Subsequent to the Plaintiffs informing Defendant Nationstar of the mistaken payoff statement described in paragraph eight (8), Defendant Nationstar faxed the Plaintiffs another payoff statement for their loan. However, this payoff statement was for a different payoff amount than the amount Defendant Nationstar had originally provided the Plaintiffs and for which the Plaintiffs had

secured a check from their insurance company. The "new" payoff amount was for \$184,535.50. After contacting Defendant Nationstar about the discrepancy, the Plaintiffs were told to go ahead and forwarded the insurance check in the amount of \$182,604.80 with the payoff statement and that Defendant Nationstar would try to fix the discrepancy. Defendant Nationstar received this payment on or about May 12, 2010.

10. On or about May 17, 2010, the Plaintiffs attempted to secure financing to begin the construction of their new home. As part of their attempt to secure financing, a credit report was run on the Plaintiffs. The results of that report showed the Plaintiffs as having been late with their payments to Defendant Nationstar several times. This information was false. The Plaintiffs had not been late with payments. This false negative credit reporting was going to hinder the Plaintiffs ability to secure low interest financing for their new home construction. As such, the Plaintiffs immediately contacted Defendant Nationstar and demanded the false credit reporting be corrected.

11. On or about May 26, 2010, the Plaintiffs received yet another payoff amount from Defendant Nationstar, despite the fact that they had already sent full payment in to Defendant Nationstar as described in paragraph nine (9). This third payoff amount was \$185,310.48.

12. On or about May 28, 2010, having not yet heard that the false credit reporting had been corrected, the Plaintiffs once again contacted Defendant Nationstar and notified them of the harm the false credit reporting was causing them. Defendant Nationstar suggested that instead of using the insurance payment to payoff the loan, the Plaintiffs could use it to finance their new construction. Defendant Nationstar directed the Plaintiffs to contact Defendant Nationstar's loss-draft department.

13. With a builder waiting and wishing to begin construction as soon as possible on a home, the Plaintiffs followed up on Defendant Nationstar's suggestion. The Plaintiffs were sent a packet by

Defendant Nationstar and told to fill the packet out and return it. Defendant Nationstar told the Plaintiffs that within 48 hours of receiving the packet, Defendant Nationstar would send drafts for funds out to the Plaintiffs. At that time, the Plaintiffs asked if it was okay to give their builder the go ahead to begin construction. Defendant Nationstar instructed the Plaintiffs that it was okay to have their builder start, but that anything over the amount of the insurance settlement would have to be covered by the Plaintiffs. Based on Defendant Nationstar's assurances, the Plaintiffs paid their builder the difference between the insurance settlement amount and the contract on their new home in order to get construction started. The Plaintiffs also made all payments on their loan with Nationstar, including the June payment.

14. On or about May 31, 2010, the Plaintiffs contacted Defendant Nationstar to inquire about the status of their checks for construction. At this time, Defendant Nationstar notified the Plaintiffs that they would not be receiving any checks, because their loan had already been processed for payoff.

15. On or about June 10, 2010, the Plaintiffs received correspondence from Defendant Nationstar informing them that the false credit reporting had been corrected.

16. On or about June 15, 2010, the Plaintiffs ran their credit report to confirm that the false credit reporting described in paragraph ten (10) had been corrected. Seeing that the false credit report had been corrected and having been told by Defendant Nationstar that there was no construction money on the way, the Plaintiffs sought alternative financing of their new home construction.

17. On or about July 9, 2010, the Plaintiffs were notified that they have been approved with Bank of America for a VA Home loan with an interest rate of 4.9%.

18. On or about July 16, 2010, Bank of America contacted the Plaintiffs and told them that their loan was being turned down because of late payment history being reported by Defendant Nationstar.
19. On or about July 19, 2010, Plaintiff Michael Griggs and his boss, Diane Sigmon, attempted to contact Defendant Nationstar to rectify this matter. They were eventually referred to an agent/employee of Defendant Nationstar named "Elliot." Elliot told them he would have to look into the matter and call them back.
20. On or about July 28, 2010, the Plaintiffs were contacted by Elliot who notified the Plaintiffs that Defendant Nationstar had once again corrected their false credit reporting against the Plaintiffs. Elliot then offered the Plaintiffs two options. First, the Plaintiffs could leave their loan in payoff mode, but that some documents were "missing" and that the Plaintiffs would have to furnish those "missing" documents to finish the payoff. The second option was that the Plaintiffs could accept their insurance settlement back to rebuild with. This second option was the same "solution" Defendant Nationstar had proposed as described in paragraph twelve (12) and thirteen (13) above, which the Plaintiffs had already tried once. Desperate to secure financing since they had already told their builder to begin (as described in paragraph 13), the Plaintiffs accepted the second option and were once again faxed a packet which was filled out and sent back to Defendant Nationstar. The Plaintiffs completed the packet and faxed it back Defendant Nationstar.
21. On or about August 4, 2010, the Plaintiffs contacted Defendant Nationstar to check on the status of their construction checks. Defendant Nationstar informed the Plaintiffs that they were missing documents from the packet that had been sent in. The Plaintiffs re-faxed the packet described in paragraph twenty (20).
22. On or about August 20, 2010, the Plaintiffs received notice from Nationstar that they were

in default on their loan for the months of May, June and July.

23. On or about August 23, 2010, the Plaintiffs contacted Elliot about the default notice and was told by Elliot that the default notice had been corrected

24. On or about August 27, 2010, having received no further communication regarding their construction checks, the Plaintiffs applied with another bank in an effort to try to refinance their Nationstar loan. The Plaintiffs were denied, once again because Defendant Nationstar was falsely reporting late payments against the Plaintiffs credit history.

25. On or about August 28, 2010, the Plaintiffs contacted Elliot again to complain about their situation. Elliot explained to the Plaintiffs that they would have make the July and August payments before their history could be corrected, despite the fact that Nationstar had told the Plaintiffs that their loan was "in payoff" for much of that time. Under protest, the Plaintiffs made those payments because they knew of no other way to resolve their situation.

26. On or about September 8, 2010, Defendant Nationstar informed the Plaintiffs that the false credit reporting against the Plaintiffs had been corrected. This was the third time the Plaintiffs had been so informed.

27. Subsequent to the events described above, and in an effort to mitigate their damages, the Plaintiffs did finally succeed in refinancing their loan, albeit with Defendant Nationstar. That refinancing was for \$187,500 at a 5.25% interest rate. The Plaintiff is informed and believes \$7500.00 of that amount was for closing costs on the loan.

**FOR A FIRST CAUSE OF ACTION  
(Defamation Per Se)**

28. That paragraphs one (1) through twenty-seven (27) are hereby incorporated herein as if

completely repeated herein verbatim.

29. The Defendant Nationstar did publicize libelous and slanderous per se statements to third party credit reporting agencies, by inaccurately reporting that the Plaintiffs had failed to timely make payments on their loan. Defendant Nationstar's actions have also caused these statements to be published to any third party who obtains information from these credit reporting agencies.

30. The Defendant Nationstar knew or should have known such statements were false.

31. That as a direct and proximate result of the above set out acts and omissions of Defendant Nationstar, the Plaintiffs have suffered damages as hereinafter set out.

**FOR A SECOND CAUSE OF ACTION**

**(Noncompliance with the Fair Credit Reporting Act, 15 U.S.C.S 1681 *et seq.*)**

32. That paragraphs one (1) through thirty-one (31) are hereby incorporated herein as if completely repeated herein verbatim.

33. That the Defendant Nationstar has statutory duties under the Fair Credit Reporting Act to:

- a. Not report information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate. 15 U.S.C.S. §1681s-2(a)(1)(A).
- b. Not furnish any information relating to a consumer to any consumer reporting agency if the Defendant was notified by the consumer that specific information was inaccurate and the information is, in fact, inaccurate. 15 U.S.C.S. §1681s-2(a)(1)(B)(i) and (ii).
- c. To promptly notify the consumer reporting agency that the information provided was inaccurate and to not thereafter furnish to the agency any of the information that remains incomplete or inaccurate. 15 U.S.C.S. §1681s-2(a)(2)(B).

- d. Conduct an investigation with respect to the disputed information and if the investigation finds the information reported was inaccurate, promptly notify each consumer reporting agency to which the Defendant provided the inaccurate information and provide any correction necessary to make the information provided by the Defendant accurate. 15 U.S.C.S. §1681s-2 (a)(8)(E) (i) thru (iv) and 15 U.S.C.S. §1681s-2(b)(1).
- e. Provide notice of any negative reporting to the consumer. 15 U.S.C.S. §1681s-2(a)(7).
- f. Properly investigate and correct disputed incorrect information reported. 15 U.S.C.S. §1681s-2(a)(8)(E) and §1681s-2(b).

34. That Defendant Nationstar has negligently and willfully breached the duty listed in paragraph thirty-three (33) by reporting information they knew or had reasonable cause to believe was inaccurate.

35. That the Defendant Nationstar has negligently and willfully breached the duty listed in paragraph thirty-three (33) by reporting information after the Plaintiffs notified Defendant Nationstar of the inaccuracy of their payment history and loan status and that their payment history and loan status were, in fact, not accurate.

36. That the Defendant Nationstar has negligently and willfully breached the duty listed in paragraph thirty-three (33) by failing to notify the consumer reporting agency that the information provided was inaccurate and failing to not thereafter furnish to the agency any of the information that remains incomplete or inaccurate.

37. That the Defendant Nationstar has negligently and willfully breached the duty listed in paragraph thirty-three (33) by failing to conduct an investigation with respect to the disputed information and if the investigation finds the information reported was inaccurate, promptly notify

each consumer reporting agency to which the Defendant Nationstar provided the inaccurate information and provide any correction necessary to make the information provided by Defendant Nationstar accurate.

38. That as a direct and proximate result of the above set out acts and omissions of Defendant Nationstar, the Plaintiffs have suffered damages as hereinafter set out.

**FOR A THIRD CAUSE OF ACTION**  
**(Breach of Contract)**

39. That paragraphs one (1) through thirty-one (38) are hereby incorporated herein as if completely repeated herein verbatim.

40. The note described above between the Plaintiffs and Defendant Nationstar represent a binding agreement between the Plaintiffs and Defendant Nationstar. Said agreement was for Defendant Nationstar to provide financing and loan servicing for the Plaintiffs' home as mortgagee, with the Plaintiffs to make timely payments and meet other obligations required of them as the mortgagors.

41. That the Plaintiffs did meet all their obligations under the contract, not the least of which was making timely payments and securing insurance settlement proceeds in a timely fashion to satisfy their mortgage after the fire described in paragraph four (4).

42. That Defendant Nationstar breached the agreement by unjustifiably failing to perform the contract. Specifically, Defendant Nationstar failed to adequately service the Plaintiffs' mortgage, repeatedly reporting false credit history information against the Plaintiffs.

43. That as a direct and proximate result of the above set out acts and omissions by Defendant Nationstar, the Plaintiffs have suffered damages as hereinafter set out.

**FOR A FOURTH CAUSE OF ACTION**  
**(Breach of Contract Accompanied by Fraudulent Act)**

44. That paragraphs one (1) through forty-three (43) are hereby incorporated herein as if completely repeated herein verbatim.

45. The note described above between the Plaintiffs and Defendant Nationstar represent a binding agreement between the Plaintiffs and Defendant Nationstar. Said agreement was for Defendant Nationstar to provide financing and loan servicing for the Plaintiffs' home as mortgagee, with the Plaintiffs to make timely payments and meet other obligations required of them as the mortgagors.

46. That Defendant Nationstar breached the agreement by unjustifiably failing to perform the contract. Specifically, but not limited to, Defendant Nationstar's failure to adequately service the Plaintiffs' mortgage by repeatedly reporting false credit history information against the Plaintiffs, failing to provide the Plaintiffs with accurate payoff amounts and statements, and failing to timely process paperwork related to the Plaintiffs account.

47. That Defendant Nationstar committed said breach with fraudulent intent and by fraudulent acts.

48. That as a direct and proximate result of the above set out acts and omissions by Defendant Nationstar, the Plaintiffs have suffered damages as hereinafter set out.

**FOR A FIFTH CAUSE OF ACTION**  
**(Tortious interference with Prospective Contract)**

49. That paragraphs one (1) through forty-eight (48) are hereby incorporated herein as if completely repeated herein verbatim.

50. That there was a reasonable probability that the Plaintiffs would have realized contractual relations for new financing without Defendant Nationstar's false credit reporting. Specifically, but not limited to, the facts as alleged in paragraphs ten (10), seventeen (17) and eighteen (18) above.

51. That Defendant Nationstar intentionally interfered with the Plaintiffs' potential contractual relations.

52. That Defendant Nationstar's purposes in interfering with the Plaintiffs' prospective contracts were improper.

53. That Defendant Nationstar's methods in interfering with the Plaintiffs' prospective contracts were improper.

54. That as a direct and proximate result of the above set out acts and omissions by Defendant Nationstar, the Plaintiffs have suffered damages as hereinafter set out.

**FOR A SIXTH CAUSE OF ACTION**

**(Violation of the South Carolina Unfair Trade Practices Act S.C. Code Ann. §39-5-10 *et seq.*)**

55. That paragraphs one (1) through fifty-four (54) are hereby incorporated herein as if completely repeated herein verbatim.

56. That Defendant Nationstar has engaged in unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade and commerce. Specifically, but not limited to, Defendant Nationstar's acts and omissions as pled in paragraphs five (5), nine (9), eleven (11) through fifteen (15), twenty (20) through twenty-two (22), and twenty-four (24) through twenty-six (26).

57. That Defendant Nationstar's acts and omissions as pled above violate S.C. Code Ann. §39-5-20.

58. That Defendant Nationstar's acts and omissions as pled above are offensive to public policy and are capable of repetition.

59. That as a direct and proximate result of the above set out acts and omissions by Defendant Nationstar, the Plaintiffs have suffered damages as hereinafter set out.

**FOR A SEVENTH CAUSE OF ACTION**  
**(Negligent Misrepresentation)**

60. That paragraphs one (1) through fifty-nine (59) are hereby incorporated herein as if completely repeated herein verbatim.

61. That Defendant Nationstar made false representations to the Plaintiffs. Specifically, but not limited to the false representations made by Defendant Nationstar in paragraphs five (5), nine (9), eleven (11) through fifteen (15), twenty (20) through twenty-two (22), and twenty-four (24) through twenty-six (26).

62. That Defendant Nationstar had a pecuniary interest in making these statements.

63. That Defendant Nationstar owed a duty of care to see that they communicated truthful information to the Plaintiffs.

64. That Defendant Nationstar breached that duty by failing to exercise due care.

65. That the Plaintiffs justifiably relied on the representations.

66. That the Plaintiffs suffered pecuniary loss as a direct and proximate result of their reliance on Defendant Nationstar's representations.

67. That as a direct and proximate result of the above set out acts and omissions by Defendant Nationstar, the Plaintiffs have suffered damages as hereinafter set out.

**DAMAGES**


68. That as a direct and proximate result of the above set out acts and omissions of the Defendant, the Plaintiff was damaged in the following particulars to-wit:

- a. Actual and consequential damages;
- b. Future damages;
- c. Embarrassment, Humiliation, emotional distress and anguish;
- d. Injury to reputation;
- e. Injury to creditworthiness;
- f. Attorney's fees and costs.
- g. Treble damages pursuant to S.C. Code Ann. §39-5-140.

69. The Plaintiff also believes that she is entitled to punitive damages as the Court may award.

WHEREFORE, the Plaintiff seeks judgment against the Defendant Nationstar for actual and consequential damages, future damages, treble damages, as well as punitive damages, along with such other relief that the Court deems appropriate.

WUKELA LAW FIRM

BY:   
PATRICK J. MCLAUGHLIN  
ATTORNEY FOR PLAINTIFF  
PO BOX 13057  
FLORENCE, SC 29504-3057  
Telephone: 843-669-5634  
Facsimile: 843-669-5150

Florence, South Carolina

March 7, 2011

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Amanda and Michael Griggs,

Plaintiff(s)

vs.

Nationstar Mortgage, LLC

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011-CP-160135

**DEFENDANT'S ANSWER AND  
AFFIRMATIVE DEFENSES.**

COMES NOW, Nationstar Mortgage, LLC ("Nationstar"), the Defendant in the above styled civil action, and hereby responds to the Plaintiffs', Amanda and Michael Griggs', Complaint and shows this Honorable Court as follows:

**JURISDICTION:**

1. Defendant is without sufficient information to answer the allegations contained in Paragraph 1, therefore the allegations are denied, and strict proof thereof is demanded.
2. Defendant admits it is authorized to transact business in South Carolina and subject to the jurisdiction of this Honorable court, any remaining allegations in paragraphs 2 and 3 are denied, and strict proof thereof is demanded.

**FACTUAL ALLEGATIONS:**

3. Defendant admits that on or about April 15, 2010 it held a note against certain real property owned by the Plaintiffs. Defendant is without sufficient information to answer the remaining allegations contained in Paragraph 4, therefore the allegations are denied and strict proof thereof is demanded.

4. At this time, Defendant is without sufficient information to answer the allegations contained in paragraph 5 through 26, therefore the allegations are denied and strict proof thereof is demanded.

5. With regard to paragraph 27, Defendant admits that the Plaintiffs refinanced their original loan with Defendant for a principal amount of \$187,500.00 at an interest rate of 5.25% with closing costs of \$7,500.00. However, Plaintiffs' assertion that they sought to mitigate their damages is a legal conclusion which Defendant is not required to either admit or deny. To the extent a response is required; Defendant denies the same and demands strict proof thereof.

**FOR A FIRST CAUSE OF ACTION**  
**(Defamation Per Se)**

6. Defendant denies the allegations in paragraphs 29, 30 and 31, and demands strict proof thereof.

**FOR A SECOND CAUSE OF ACTION**  
**(Noncompliance with the Fair Credit Reporting Act, 15 USC 1681 et. seq.)**

7. Defendant denies the allegations in paragraphs 33 through 38, and demands strict proof thereof.

**FOR A THIRD CAUSE OF ACTION**  
**(Breach of Contract)**

8. With regard to paragraph 40, Defendant states that the Note and Mortgage speak for themselves. Therefore, Defendant shall be deemed to deny the facts and allegations as characterized by the Plaintiffs in paragraph 40.

9. Paragraphs 41, 42, and 43 do not contain factual allegations, but instead legal conclusions which Defendant is not required to either admit or deny. To the extent a

response is required; Defendant denies any allegations therein, and demands strict proof thereof.

**FOR A FOURTH CAUSE OF ACTION**  
**(Breach of Contract Accompanied by Fraudulent Act)**

10. With regard to paragraph 45, Defendant states that the Note and Mortgage speak for themselves. Therefore, Defendant shall be deemed to deny the facts and allegations as characterized by the Plaintiffs in paragraph 45.

11. Defendant denies the allegations in paragraphs 46, 47 and 48, and demands strict proof thereof.

**FOR A FIFTH CAUSE OF ACTION**  
**(Tortious Interference with Prospective Contract)**

12. Defendant denies the allegations in paragraphs 50 through 54, and demands strict proof thereof.

**FOR A SIXTH CAUSE OF ACTION**  
**(Violations of the South Carolina Unfair Trade Practices Act S.C. Code Ann. §39-5-10 et. seq.)**

13. Defendant denies the allegations in paragraphs 56 through 59, and demands strict proof thereof.

**FOR A SEVENTH CAUSE OF ACTION**  
**(Negligent Misrepresentation)**

14. Defendant denies the allegations in paragraphs 61 through 67, and demands strict proof thereof.

**DAMAGES**

15. Defendant denies the Plaintiffs were damaged as alleged in paragraph 68, and demands strict proof of such damage. Defendant further denies that Plaintiffs are entitled to punitive damages.

**FOR A FIRST AFFIRMATIVE DEFENSE**

Defendant asserts that Plaintiffs' Complaint fail to state claims upon which relief can be granted and therefore should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A SECOND AFFIRMATIVE DEFENSE**

Defendant asserts the defenses of waiver, estoppel, recoupment and setoff.

**FOR A THIRD AFFIRMATIVE DEFENSE**

Defendant asserts the defense that any error or violation that may have occurred in this case was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such an error.

**FOR A FOURTH AFFIRMATIVE DEFENSE**

Defendant asserts the defense that any violation that may have occurred was de minimus or technical in nature, and Defendant has substantially complied with all applicable statutes and regulations.

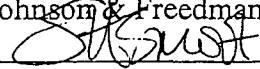
WHEREFORE, DEFENDANT, Nationstar Mortgage, LLC prays as follows:

- (a) That the Plaintiffs' Complaint be dismissed and all charges cast against Plaintiffs;
- (b) That this honorable Court enter judgment against Plaintiffs and in favor of Defendant on all Counts;
- (c) That Defendant be entitled to recover costs and attorneys' fees for having to defend against this Complaint; and
- (d) That Defendant have such other and further relief as this honorable Court deems just and proper.

**SIGNATURE ON NEXT PAGE**

This 15<sup>th</sup> day of April, 2011.

Johnson & Freedman, LLC



---

Summer H. Smoot,

S.C. Bar No.: 80700

ATTORNEYS FOR THE DEFENDANT

1587 Northeast Expressway

Atlanta, GA 30329

(770) 234-9181 (Telephone)

(770) 329-8023 (Facsimile)

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Amanda and Michael Griggs,

Plaintiff(s)

vs.

Nationstar Mortgage, LLC

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011-CP-160135

**CERTIFICATE OF SERVICE FOR  
DEFENDANT'S ANSWER AND  
AFFIRMATIVE DEFENSES.**

The undersigned does hereby certify that on the 15<sup>th</sup> day of April, 2011, a copy of the Defendant's Answer and Affirmative Defenses for the above captioned case, was sent via first-class mail via United States Postal Service to the following address:

Patrick J. McLaughlin, Esq.  
Attorney for Plaintiffs  
PO Box 13057  
Florence, SC 29504

Dated: April 15<sup>th</sup>, 2011.

Johnson & Freedman, LLC



Summer H. Smoot,  
S.C. Bar No.: 80700  
ATTORNEYS FOR THE DEFENDANT  
1587 Northeast Expressway  
Atlanta, GA 30329  
(770) 234-9181 (Telephone)  
(770) 329-8023 (Facsimile)



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 Amanda and Michael Griggs, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Nationstar Mortgage, LLC, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 Civil Action No. 2011-CP-16-135

**MOTION TO COMPEL  
 AND AWARD EXPENSES  
 PURSUANT TO RULE 37**

2011 SEP 30 PM 1:03  
 SCOTT B. SUGGS  
 CLERK OF COURT/R.O.D.  
 DARLINGTON COUNTY, S.C.

**FILED**

COMES NOW the Plaintiffs, by and through the undersigned attorney, seeking an Order from this Court compelling discovery and awarding expenses pursuant to Rule 37 of the South Carolina Rules of Civil Procedure. On or about April 29, 2011, the Plaintiffs served the Defendant with written Interrogatories and Requests to Produce. Via responses dated June 30, 2011, the Defendant partially responded to the Plaintiffs' discovery requests. Specifically, the Defendant objected to several of the Plaintiffs' discovery requests. Those requests and the Defendant's objections are listed below.

In making this motion, Plaintiffs' counsel notifies the Court that by his signature below, he has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in this motion, pursuant to Rule 26 of the South Carolina Rules of Civil Procedure.

**DISCOVERY BEING SOUGHT**

1) **Discovery Issue No. 1:** Interrogatory No. 10: In regards to the Defendant's Third Affirmative Defense, list with specificity the procedures the Defendant reasonably adapted to

avoid such occurrences they claim were "bona fide error" in this particular case. The Plaintiffs are specifically requesting:

- a. a full and complete payment history which shows not only the actual payments from the Plaintiffs being due and received, but also showing which payments the Defendants did not properly record, improperly reported or whatever other incidents led to what the Defendant asserts were "bonafide errors".
- b. detailed description of how the alleged "bonafide errors" were discovered, what was done to correct the alleged "bonafide errors," what was done to make sure that the alleged "bonafide errors" were corrected, and what was done to prevent the alleged "bonafide errors" from occurring again.
- c. A detailed description of the procedures the Defendant asserts were reasonably adapted to protect against such alleged "bonafide errors." This description should include when the procedures were adapted, who was in charge of insuring the procedures were followed, documentation memorializing whether or not such procedures were followed, and a listing of every time these procedures were not followed OR failed to prevent the same or similar type of "bonafide errors" that are alleged in the current complaint, going back a minimum of five (5) years prior to April 15, 2010.

Response: Defendant objects to this interrogatory to the extent it seeks information which is confidential, proprietary, or otherwise privileged, including but not limited to the internal policies and procedures of Defendant. Further, although Defendant's affirmative defenses are not an admission of improper conduct or errors on the part of the Defendant, Defendant believes that if any

errors occurred they were the result of miscommunication and misunderstanding, perhaps by both parties. As such, any errors that occurred were bonafide errors and not the result of negligence or willful intent.

2) **Discovery Issue No. 2:** Interrogatory No. 11: In regards to the Defendant's Fourth Affirmative Defense, explain with specificity how any violations that occurred were simply de minimus or technical in nature as well as listing with specificity how the Defendant has substantially complied with all applicable statutes and regulations.

Response: Defendant objects to this interrogatory on the grounds that it is vague, overly broad and unduly burdensome and fails to specify the statute(s) which the Plaintiffs assert has/have been violated by the Defendant. However, subject to said objection, see Defendant's response to Interrogatory No. 10 above regarding the benefit of the final refinancing package which the Plaintiffs benefitted from. The refinanced loan modified the original note and mortgage and served as a novation, thereby voiding any claims regarding the previous loan.

3) **Discovery Issue No. 3:** Interrogatory No. 16: For each lawsuit brought against the Defendant within the past seven (7) years involving similar causes of action, state the name, civil action/docket number of the lawsuit, the jurisdiction and venue in which such action is or was pending, the disposition of such action, and the names, addresses and telephone numbers of attorneys who represent or represented the parties asserting the claims against the Defendant.

Response: Defendant objects to this interrogatory on the grounds that it seeks information which is not reasonably calculated to lead to the discovery of admissible evidence, and therefore irrelevant. Further, Defendant objects on the grounds that the interrogatory is unduly burdensome as the information sought is a matter of public record and is equally available to both parties.

4) **Discovery Issue No. 4:** Interrogatory No. 17: State with specificity the net worth, gross earnings and profit of the Defendant for the five (5) years prior to April 15, 2010.

Response: Defendant objects on the grounds that the interrogatory is unduly burdensome as the information sought is reported publically and is equally available to both parties.

5) **Discovery Issue No. 5:** Request to Produce No. 10: A copy of each and every document that memorializes Defendant's standards, rules, procedures and/or internal policies governing the handling of payoffs, credit reporting, correcting credit report information.

Response: Defendant objects to this request on the grounds that it seeks information or documents which are confidential or proprietary or otherwise privileged.

6) **Discovery Issue No. 6:** Request to Produce No. 17: A copy of any internal reports, studies, and/or memorandum detailing the payment history average of all the Defendant's residential home loans. Specifically, the Plaintiffs request the information which would document how the Plaintiffs' payment history rates in comparison to all other residential home loan customers of the Defendant. Plaintiffs specifically request any such documents which would contain such information.

Response: Defendant objects to this request to the extent it seeks information or documents which are work-product, subject to the attorney-client privilege, or other privileged. Defendant further objects to this request to the extent it seeks information or documents which are confidential and proprietary.

7) **Discovery Issue No. 7:** Request to Produce No. 18: All documents or tangible things referring to or relating to Defendant's policies and procedures regarding loan applications, credit reporting, erroneous credit reporting correction, payoff statements and procedures related to

insurance payoffs as a result of fires.

Response: Defendant objects to this request to the extent it seeks information or documents which are work-product, subject to the attorney-client privilege, or other privileged. Defendant further objects to this request to the extent it seeks information or documents which are confidential and proprietary.

8) **Discovery Issue No. 8:** Request to Produce No. 19: All documents referencing the net worth, gross earnings and profit of the Defendant for the five (5) years prior to April 15, 2010.

Response: Defendant objects to this request on the grounds that it is overly burdensome as the information is reported publically and therefore, equally available to both parties.

### ARGUMENT

As to Discovery Issue No. 1. The Defendant specifically pled an affirmative defense claiming that any error or violation that may have occurred in this case was not intentional and was the result of a bonafide error in attempting the maintenance procedures reasonably attached to avoid such error. The discovery requested through Interrogatory No. 10 is reasonably calculated to lead to relevant evidence by which this claimed affirmative defense could be shown to be more or less likely to be true. In short, the Defendant cannot claim a defense and then seek to deny the Plaintiffs' discovery of information which would allow the Plaintiffs to investigate the defense as claimed by the Defendant. As such, the Plaintiffs request that the Court compel the discovery of this information.

As to Discovery Issue No. 2. The Defendant claims that any violation which may have occurred was de minimus or technical in nature and that the Defendant has substantially complied

with all statutory regulations. Yet, when asked to specifically explain how any violations were de minimus or technical, the Defendant is nonresponsive. Further, when asked to explain with specificity which applicable statutes and regulations they have substantially complied with, the Defendant is once again nonresponsive.

In other words, the Defendant is saying that any violations were simply inconsequential and/or technical mistakes and seems to be asserting some type of protection through alleged compliance with laws. However, the Defendant refuses to explain how they arrived at these affirmative defenses while also refusing to designate which applicable statutes and regulations they are asserting they are in compliance with. Once again, it is impossible for the Plaintiffs to investigate such a generalized blanket defense, while the Defendant refuses to provide information related to such defense. As such, the Plaintiffs request that the Court compel the discovery of this information.

**As to Discovery Issue No. 3.** The Defendant seems to be asserting affirmative defenses which claim that any violations were simple mistakes and that they have procedures and systems in place to protect against said mistakes. The Plaintiffs are entitled to this information, which is reasonably calculated to uncover whether or not there have been similar instances of other people suffering from the same “mistakes” that the Plaintiffs allege, at the hands of the Defendant.

To the extent that the question may be too overly broad, the Plaintiffs would revise their request to seek information of any lawsuits within the past seven years related to causes of action from “mistakes” which occurred in the billing, payment crediting, or credit reporting of customers by Defendant Nationstar. As such, the Plaintiffs request that the Court compel the discovery of this information.

As to Discovery Issue No. 4. The Plaintiffs have asserted and are informed and believe that they may be entitled to punitive damages in this matter. As such, the Defendant's ability to pay is relevant and discoverable information. As a corporation, the Plaintiffs are informed and believe that Defendant Nationstar has easy access to the information sought concerning their net worth, gross earnings and profit, as such information is routinely kept and disseminated to boards of directors, shareholders, financial institutions, etc. by corporations.

The Plaintiffs argue that it is disingenuous for the Defendant to assert that production of this information is burdensome, and the Plaintiffs argue that the Defendant can more easily and quickly obtain this information. As such, the Plaintiffs request that the Court compel the discovery of this information.

As to Discovery Issue No. 5. Having asserted in their Third Affirmative Defense, the maintenance of procedures to avoid such errors that are asserted in this Complaint, the Defendant now seeks to deny the Plaintiffs the right to discover what the Defendant's actual policies and procedures are. Once again, it is difficult to understand how the Defendant can assert a defense on one hand and deny the Plaintiffs the right to investigate that defense on the other. As such, the Plaintiffs request that the Court compel the discovery of this information.

As to Discovery Issue No. 6. This issue is similar to Discovery Issue No. 5, except that now the Defendant also asserts that this information is somehow work product and subject to the attorney-client privilege or "other privilege." The Plaintiffs are informed and believe that the information requested should be information which the Defendant has or has accumulated in their ordinary course of business.

If the Defendant is truly saying that they do not have any such information or documents

other than information or documents which have been prepared as the result of litigation, the Plaintiffs would argue that the very admission is proof of negligence in the operation of their business. In other words, the Plaintiffs are informed and believe that this is exactly the type of information that reasonable companies in the business of loaning money and/or servicing loans would generate and use in the practice of servicing their customers and assuring that the types of situations which led to this lawsuit do not occur. As such, the Plaintiffs believe they are entitled to this information and ask that the Court compel the discovery of this information.

As to Discovery Issue No. 7. See the arguments for Discovery Issues No. 5 and 6.

As to Discovery Issue No. 8. See the argument for Discovery Issue No. 4.

#### AWARD OF EXPENSES

Having made the arguments above to compel discovery, the Plaintiffs would also ask that the Court award the Plaintiffs with the expenses of having to bring this Motion to Compel, to include the costs of filing the Motion as well as reasonable attorney's fees incurred by the Plaintiffs in bringing this motion. The Plaintiffs request this award based on the fact that the Plaintiffs' counsel conducted a phone conference with opposing counsel on September 20, 2011. Although it appeared that the parties would be able to resolve some of these outstanding discovery issues, it was made clear to Plaintiffs' counsel that any discovery of the Defendant's internal policies, procedures, etc. would have to be compelled. This is despite the fact that Plaintiffs' counsel indicated that the Plaintiffs would be willing to enter into a confidentiality agreement to help assuage the Defendant's concerns about public dissemination of any proprietary material and information.

The Plaintiffs are informed and believe that such general policy of forcing opposing parties to compel such discovery denotes a prima facie case of bad faith in regards to discovery. As such the

Defendant should bear the expenses associated with the Plaintiffs being forced to compel this discovery.

### CONCLUSION

Having made the arguments above, the Plaintiffs respectfully request that the Court issue an order compelling the discovery requested and granting the Plaintiffs and available reasonable expenses to include attorney's fees and costs in this matter pursuant to Rule 37(c)(2)(D).

Respectfully submitted,

WUKELA LAW FIRM

  
PATRICK J. MCLAUGHLIN

Attorney for Plaintiffs

P.O. Box 13057

Florence, SC 29504-3057

843-669-5634

Florence, South Carolina

September 30, 2011

FILED  
2011 SEP 30 PM 11:03  
SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.



Gallivan, White & Boyd, P.A.  
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February 1, 2012

Scott B. Suggs  
Darlington County Clerk Of Court  
1 Public Square, Room B-4  
Darlington, South Carolina 29532

Re: Amanda and Michael Griggs v. Nationstar Mortgage, LLC  
Darlington County Case No. 2011-CP-16-0135  
GWB File No. 7063-1

Dear Mr. Suggs:

Please find enclosed for filing the original and a copy of the Motion for Judgment on the Pleadings in the above-referenced matter. Please file the original and return the clocked copy to me in the enclosed envelope. We have also enclosed the filing fee in the amount of \$25.00.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you have any questions or concerns.

GALLIVAN, WHITE & BOYD, P.A.

Childs Cantey Thrasher

Direct Dial: 803-724-1717

Email: cthrasher@gwblawfirm.com

CCT/ssl  
Enclosures  
cc:  
Patrick J. McLaughlin  
Wukela Law Firm  
P.O. Box 13057  
Florence, SC 29504-3057

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF DARLINGTON )

Amanda and Michael Griggs )

CASE NO. 2011-CP-16-0135 )

Plaintiff )

v. )

Nationstar Mortgage, LLC )

**MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET**

Defendant )

**Check box above indicating submitting party**

<u>Name and address of plaintiff's attorney</u> Patrick J. McLaughlin Wukela Law Firm P.O. Box 13057 Florence, SC 29504-3057	<u>Name and address of defendant's attorney</u> John T Lay, Jr. Gallivan, White & Boyd, P.A. P.O. Box 7368 Columbia, SC 29202 Phone: 803-779-1833 Fax:
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- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion for Judgment on the Pleadings

Estimated Time Needed: 30 Minutes Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

*Patrick J. McLaughlin*  
Signature of Attorney for  Plaintiff/  Defendant

February 1, 2012  
Date submitted

**SECTION III: Motion Fee**

PAID - AMOUNT: \$25.00

- EXEMPT:  Rule to Show Cause in Child or Spousal Support
- (check reason)  Domestic Abuse or Abuse and Neglect
- Indigent Status  State Agency v. Indigent Party
- Sexually Violent Predator Act  Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication  Motion for Execution (Rule 69, SCRCPP)
- Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions  
Name of Court Reporter: \_\_\_\_\_
- Other: \_\_\_\_\_

**JUDGE'S SECTION**

Motion Fee to be paid upon filing of the attached order.

Other: \_\_\_\_\_

JUDGE \_\_\_\_\_  
CODE: \_\_\_\_\_ DATE: \_\_\_\_\_

**CLERK'S VERIFICATION**

DATE FILED

Collected by: \_\_\_\_\_  
(print name)

MOTION FEE COLLECTED: \_\_\_\_\_

CONTESTED - AMOUNT DUE: \_\_\_\_\_

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

AMANDA AND MICHAEL GRIGGS,

Plaintiffs,

v.

NATIONSTAR MORTGAGE, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS  
FOR THE  
FOURTH JUDICIAL CIRCUIT

Civil Action Number 2011-CP-16-0135

**MOTION FOR JUDGMENT  
ON THE PLEADINGS**

**MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure, Defendant NationStar Mortgage, LLC ("NationStar") moves for judgment on the pleadings as to all claims asserted by Amanda and Michael Griggs (collectively "Plaintiffs") showing the Court as follows:

**I. INTRODUCTION**

Plaintiffs' Complaint is based entirely on their contention that NationStar erroneously reported Plaintiffs' delinquent mortgage payments to credit reporting bureaus. Even assuming, for purposes of this Motion, that NationStar *erroneously* reported Plaintiffs' delinquent payments, Plaintiffs' fail to raise any issue of fact that would entitle Plaintiffs to judgment if resolved in Plaintiffs' favor. Plaintiffs' state law defamation claims are preempted by federal statute. Plaintiffs' Fair Credit Reporting Act ("FCRA") claims fail because the provision they seek relief under provides no public right of action. Plaintiffs' negligent misrepresentation, breach of contract, and breach of contract accompanied by fraudulent act claims fail because: (a) Plaintiffs waived those claims when they entered a new contract with NationStar; and (b) Plaintiffs fail to plead the required elements of those claims. Likewise, Plaintiffs failed to plead the required elements of their South Carolina Unfair Trade Practices Act claim. Plaintiffs'

tortious interference with prospective contract claim fails because Plaintiffs plead no facts to suggest NationStar: (a) intended to interfere with Plaintiffs' prospective contracts; (b) improperly interfered; or (c) caused Plaintiffs any injury. Accordingly, Plaintiffs' entire Complaint should be dismissed.

## II. RELEVANT FACTUAL BACKGROUND

Defendant NationStar holds a mortgage note on Plaintiffs' property. See Plaintiffs' Complaint, ¶ 4. On or about April 15, 2010, Plaintiffs suffered a residential home fire. Id. On or about April 16, 2010, Plaintiffs requested a payoff amount from NationStar for insurance purposes. Id. ¶ 5. NationStar provided the payoff amount as of that date, \$182,604.80. Id. On April 23, 2010, Plaintiffs received a check from their insurance company made out to Plaintiffs, NationStar, and the holder of another mortgage on the property, non-party Ditech. Id. ¶ 6. NationStar requested a check payable solely to NationStar, and Plaintiffs requested the same from their insurance company. Id. Plaintiffs received the payoff check to NationStar from their insurance company on April 29, 2010, and contacted NationStar. Id. ¶ 7. NationStar agreed to send a payoff statement to Plaintiffs, and requested Plaintiffs return that payoff statement with the payoff check. Id. On May 4, 2010, Plaintiffs received a payoff statement for another loan, apparently mistakenly sent to Plaintiffs by NationStar. Id. ¶ 8. NationStar immediately faxed Plaintiffs the correct payoff amount upon learning of the mistake. Id. ¶ 9. The new payoff amount, calculated a month after the initial calculation, was \$184,535.50. Id. NationStar requested that Plaintiffs send the payoff check for \$182,604.80 to NationStar, which Plaintiffs did on May 12, 2010. Id.

On May 17, 2010, Plaintiffs attempted to secure financing for the construction of their new home. Id. ¶ 10. During their refinancing attempts, Plaintiffs reviewed their credit report

and learned that several late payments were reported by NationStar to credit bureaus. Id. Plaintiffs contend that these reports were incorrect, and informed NationStar of their belief. Id. On May 28, 2010, apparently unable to secure financing, Plaintiffs contacted NationStar and NationStar suggested Plaintiffs could use their insurance payment to finance their new construction instead of using it to payoff their loan to NationStar. Id. ¶ 12. Plaintiffs agreed with NationStar's suggestion, and contacted the appropriate department within NationStar. Id. At Plaintiffs' request, NationStar sent Plaintiffs a packet of documents to be completed before NationStar could release the payoff funds back to Plaintiffs. Id. ¶ 13. Plaintiffs allegedly asked NationStar at that time if it "was okay" to have their builder start work on their new home, even though Plaintiffs had no financing or funds to pay the builder. Id. NationStar allegedly told the Plaintiffs they could have the builder start, but would have to pay the builder any difference between the insurance payoff check proceeds and the final cost of their new home construction. Id. On May 31, 2010, NationStar informed Plaintiffs that their loan had already been processed for payoff and returning the insurance payoff funds was no longer available. Id.

On or about June 10, 2010, Plaintiffs began applying for financing with other lending institutions and, during the application process, noted that the delinquent payment notices NationStar sent to credit reporting bureaus had been removed from their credit report. Id. ¶ 15. Despite the fact that NationStar had the negative credit reporting removed from Plaintiffs' credit report in June, Plaintiffs were allegedly denied financing by two banks in July and August of 2010. Id. ¶¶ 18, 24.

### **III. ARGUMENT AND CITATION TO AUTHORITY**

Rule 12(c) of the South Carolina Rules of Civil Procedure permits judgment on the pleadings when the complaint fails to state facts sufficient to constitute a cause of action. "A

judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." Sapp v. Ford Motor Co., 386 S.C. 143, 146 (2009). "The reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Bradshaw v. Anderson County, 388 S.C. 257, 262 (2010) (internal punctuation omitted). As discussed below, Plaintiffs fail to allege facts that entitle them to relief on any theory of the case, and, therefore, their entire Complaint should be dismissed.

**A. Plaintiffs' Defamation Claim is Preempted by Federal Law.**

State defamation claims are preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"):

No consumer may bring an action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency... except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h(e). Plaintiffs do not allege that NationStar acted with malice or willful intent to injure, and their claims therefore fail as a matter of law. Further, nothing suggests NationStar reported Plaintiffs' delinquent payments for any reason other than NationStar believed Plaintiffs were delinquent in their payments. Such facts do not support a finding of malice. See Beattie, 69 Fed. Appx. at 591 (finding no malice where banking institution reported plaintiff's mortgage in foreclosure to a credit bureau when the lending institution incorrectly believed the account was in foreclosure.). Accordingly, Plaintiffs' First Cause of Action for Defamation Per Se should be dismissed.

**B. Plaintiffs Fail to State a Claim Under FCRA.**

In Plaintiffs Second Cause of Action, Plaintiffs contend that NationStar violated FCRA by submitting inaccurate payment history to credit reporting agencies and not correcting those inaccurate submissions. Specifically, Plaintiffs contend that NationStar violated several enumerated sections of 15 U.S.C. § 1681s-2(a) and (b). See Complaint at ¶ 33. But subsection (a) of 15 U.S.C. § 1681s does not provide a private cause of action and Plaintiffs have failed to assert any facts that would allow a claim under subsection (b). Accordingly, Plaintiffs' Second Cause of Action should be dismissed.

It is well-settled that “there is no private right of action against a furnisher of information of any alleged violation of 15 USC § 1691s-2(a).” Doloff v. Wachovia Bank, No. 2:11-0427-MBS-BM, 2011 U.S. Dist. LEXIS 70323 at \*5 (D.S.C. June 7, 2011); accord 15 U.S.C. § 1681s-2(d) (limits of liability); Saunders v. Branch Banking and Trust Co. of Virginia, 526 F.3d 142, 149 (4<sup>th</sup> Cir. 2008) (no private cause of action under subsection (a)); Beattie v. Nations Credit Financial Services Corp., 69 Fed. Appx. 585, 589 (4<sup>th</sup> Cir. 2003) (same). Because Plaintiffs have no private cause of action under 15 U.S.C. § 1691s-2(a), this claim should be dismissed.

While 15 U.S.C. § 1691s-2(b) does provide a private cause of action, Plaintiffs' Complaint fails to set forth a cognizable claim. Subsection (b) requires a person who furnishes information to a credit reporting agency to take certain actions enumerated in subsections (b)(1)(A)-(D), “[a]fter receiving notice pursuant to [15 USC § 1681i(a)(2)] of a dispute with regard to the correctness or accuracy of any information provided by a person to a consumer reporting agency . . . .” (emphasis added). Importantly, 15 U.S.C. § 1681i(a)(2) provides:

(A) In general. Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), ***the agency shall provide notification of the dispute to any person who provided any item of***

*information in dispute*, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.

(B) Provision of other information. *The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer* or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

There is no allegation in the Complaint that the Plaintiffs ever complained to a consumer reporting agency about credit history supplied by NationStar. There is similarly no allegation that a consumer reporting agency provided statutory notice to NationStar of a dispute.<sup>1</sup> Plaintiffs' 15 U.S.C. § 1681s-2(b) therefore fails.

Absent statutory notice from a consumer reporting agency, NationStar was not required to take any action set forth in 15 USC § 1681s-2(b). See Young v. Equifax Credit Info. Servs., Inc., 294 F.3d 631, 639-40 (5<sup>th</sup> Cir. 2002) (consumer reporting agency must give notice for § 1681s-2(b) obligations to be triggered); Kinel v. Sherman Acquisition II, LP, No. 05 Civ. 3456 (RCC)(THK), 2006 U.S. Dist. LEXIS 97073 (S.D.N.Y. February 28, 2006) (§ 1681s-2(b) requirements only arise if “furnisher is told by credit reporting agency that consumer’s information was disputed, as opposed to being told by consumer directly”); Whisenant v. First Nat’l Bank & Trust Co., 258 F. Supp. 2d 1312, 1316-17 (N.D. Ok. 2003) (same). Because Plaintiffs fail to articulate any facts that could support a 15 USC § 1681s-2(b) claim, it should be dismissed.

**C. Plaintiffs’ Breach of Contract Claim Fails.**

In Plaintiffs' Third Cause of Action, Plaintiffs vaguely contend that NationStar breached a contract with them by failing to adequately service Plaintiffs' mortgage by reporting false credit

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<sup>1</sup> While NationStar disputes this contention, Plaintiffs state only that they made a complaint to NationStar, not to a credit reporting agency. See, e.g., Complaint at ¶¶ 16, 20, 35.

history to credit reporting agencies. See Complaint at ¶ 42. If this is the alleged breach, then Plaintiffs' claim is preempted. See Section A, supra. Plaintiffs' breach of contract claim also fails because (a) they waived it by refinancing his loan with NationStar, and (b) they fail to identify any contractual provision that was allegedly violated.

Plaintiffs' Complaint admits that they refinanced their NationStar loan after the alleged breaches occurred. See Complaint at ¶ 27. This refinancing eliminated the old indebtedness, constitutes a novation of the prior contract, and bars Plaintiffs' breach of contract claims. As set forth below, it also bars any of Plaintiffs' other claims arising prior to the refinancing.

Where a borrower refinances a loan and executes a new security agreement this constitutes a novation of the old agreement. See In re: Connelly, C/A No. 08-01715-JW, 2008 Bankr. LEXIS 4108 at \*\*7-10 (Bankr. S.C. June 26, 2008) (shows intent of parties for new agreement); see also Callaham v. Ridgeway, 138 S.C. 10 (1926). When a borrower renegotiates and executes a modification or refinancing of an existing loan document, that borrower waives any claims or defenses that might have been asserted prior to the execution of the new agreement. See Adam v. Wells Fargo Bank, N.A., No. ELH-09-2387, 2011 U.S. Dist. LEXIS 96604 at \*\*50-51 (D. Md. August 26, 2011) (citing cases); The Resolution Trust Corporation v. Palmetto Fort of Mt. Pleasant A Limited Partnership, 831 F. Supp. 510, 515-16 (D.S.C. 1993) ("it is well settled that the renewal of a note with the knowledge of defenses to the original document estops the obligors and operates as a waiver of any right to subsequently assert those defenses"; "executing the Modifications Agreements . . . forecloses defendants' right to assert their defenses and counterclaims"). As his Complaint shows, by refinancing his loan with NationStar, Plaintiffs waived any claims under the old mortgage documents or otherwise. See Adam, 2011 U.S. Dist. LEXIS 96604 at \* 51 (assuming the modification took binding effect, the

parties' agreement to the Modification would operate as a waiver of the parties' alleged prior breaches). Accordingly, Plaintiffs' breach of contract claim, as well as the remainder of their claims arising prior to the August 28, 2010 refinancing, should be dismissed because they were waived by the refinancing.

Plaintiffs' breach of contract claim should also be dismissed because Plaintiffs fail to identify any section of a contract that NationStar allegedly breached. Plaintiffs only say that "NationStar breached the agreement by unjustifiably failing to perform the contract. Specifically, Defendant NationStar failed to adequately service the Plaintiffs' mortgage, repeatedly reporting false credit history information against the Plaintiff." Complaint at ¶ 42. Plaintiffs point to no provision in any contract regarding this issue and he does not say how these unidentified provisions were breached. Accordingly, Plaintiffs' Third Cause of Action fails for this reason as well. See Sims v. Allstate Ins. Co., C.A. No. 04-23259-CMC, 2006 U.S. Dist. LEXIS 18592 (D.S.C. April 5, 2006) (where plaintiff could not show specific contractual provision alleged to have been breached dismissal was proper).

**D. Plaintiffs' Breach of Contract Accompanied by Fraudulent Act Claim Fails.**

Plaintiffs' Fourth Cause of Action for Breach of Contract Accompanied by Fraudulent Act fails because Plaintiffs cannot show a breach of contract as set forth above. See Carolina Truck & Equip., Inc. v. Volvo Trucks of North America, Inc., 492 F.3d 484, 495 (4<sup>th</sup> Cir. 2007) (citing Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606, 612 (S.C. 2002)) (must have breach of contract to sustain breach of contract accompanied by a fraudulent act claim).

Further, Plaintiffs fail to allege any facts suggesting fraud by NationStar, let alone facts sufficient under SCRCP 9(b) to establish fraud. Plaintiffs support their fraud claim solely by contending (without factual support) that "Defendant NationStar committed said breach with

fraudulent intent and with fraudulent acts.” Complaint at ¶ 48. This is not enough. In order to meet the requirements of SCRPC 9(b), fraud allegations must be “stated with particularity” and must be “supported ... with sufficient facts to satisfy the requirements of Rule 9(b).” Hansen v. DHL Lab, Inc. 316 S.C. 505, 512, 450 S.E. 2d 624, 628 (1994); accord McNair v. Rainsford, 339 S.C. 332, 358-59, 502, 499 S.E.2d 488, 502 (1998) (dismissing breach of contract accompanied by fraudulent act where specific facts supporting claim were not pled).

To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: “(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach.”

Rotec Services v. Encompass Services, 359 S.C. 467, 470, 597 S.E. 2d 881, 883 (Ct. App. 2004). Here, Plaintiffs plead no facts supporting a claim that NationStar acted with fraudulent intent in breaching a contract or that it conducted some fraudulent act in its breach. Accordingly, Plaintiffs’ Fourth Cause of Action for Breach of Contract by Fraudulent Act is due to be dismissed. See Rotec Services, 359 S.C. at 470-71, 597 S.E. 2d at 883; McNair, 339 S.C. at 358059, 499 S.E. 2d at 502.

**E. Plaintiffs Fail to Plead the Required Elements of Tortious Interference with Prospective Contract.**

To establish a cause of action for tortious intentional interference with prospective contractual relations, a plaintiff must show: (a) intentional interference with prospective contractual relations; (b) for an improper purpose or by improper methods; and (c) resulting in injury. Crandall Corp. v. Navistar Int’l Transp. Corp., 395 S.E.2d 179 (1990). Plaintiff can establish none of the three required elements.

1. NationStar did not intentionally interfere with Plaintiffs' prospective contract relations.

NationStar in good faith exercised its legal right to report delinquent payments, and such behavior cannot form the basis of an intentional interference claim. Galliard v. Fleet Mortgage Corporation, 880 F. Supp. 1085, 1089 (D.S.C. 1995) (“A party who in good faith exercises a legal right affords no basis for an action by the second party for intentional interference with contract despite the fact that it may cause a third party not to perform a contract.”). Plaintiffs plead no facts suggesting NationStar at any time acted in bad faith, and their claims therefore fail as a matter of law.

Further, NationStar contends it reported Plaintiffs' delinquent payments because those payments were delinquent. Even if NationStar did *erroneously* report Plaintiffs' delinquencies, Plaintiffs plead no facts suggesting NationStar knowingly reported inaccurate information, an element they must show. “Generally there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party.” United Educational Distributors, LLC v. Educational Testing Service, 564 S.E.2d 324, 328 (2002); see also Santoro v. Schulthess, 384 S.C. 250, 266 (2009) (noting that to sustain a cause of action for intentional interference with prospective contractual relations plaintiff must show defendant *knowingly* made inaccurate statements). Here, there is no evidence to suggest NationStar sought to do anything other than report what NationStar believed to be delinquent account information.

2. NationStar did not utilize improper methods.

Reporting delinquent payments to a credit bureau – even if the report is erroneous – is not an “improper method” for purposes of interference with prospective contractual relations claims under South Carolina law. Recognized methods of improper interference include:

- those means that are illegal or independently tortious;
- violence;
- threats or intimidation;
- bribery;
- unfounded litigation;
- fraud, misrepresentation, or deceit;
- defamation;
- duress;
- undue influence;
- misuse of inside or confidential information;
- breach of a fiduciary relationship;
- violation of established standard of trade or a profession;
- unethical conduct; or
- sharp dealing, overreaching, or unfair competition.

Santoro v. Schulthess, 384 S.C. 250, 266 (2009) (citing Love v. Gamble, 316 S.C. 203 (1994)).

Reporting delinquent payments to credit bureaus falls into none of the categories listed above.

Plaintiffs make no allegations that NationStar engaged in violence, threats of intimidation, bribery, unfounded litigation, duress, undue influence, misuse of confidential information, breach of fiduciary relationship, violation of established trade practice, unethical conduct, sharp dealing, overreaching, or unfair competition. Plaintiffs' allegations that NationStar's credit reporting falls under any three remaining possibilities, illegal or tortious behavior, fraud, or defamation, is unfounded.

The "means" Plaintiffs allege NationStar employed are not independently illegal or tortious. See Beattie v. NationsCredit Financial Services Corporation, 69 Fed. Appx. 585, 589

(4th Cir. 2003) (noting that reporting delinquent accounts to credit bureaus – even erroneously – violates no common law, legislative enactments, or constitutional provisions under South Carolina or federal law). As discussed above in Section E, NationStar committed no fraudulent act. Reporting to credit bureaus cannot form the basis of a defamation action pursuant to FRCA. See 15 U.S.C. § 1681h(e) (“No consumer may bring an action or proceeding in the nature of defamation.”). Defendants did not engage in any acts that satisfy the “improper means” element of a tortious interference with prospective contract claim.

3. NationStar’s actions caused no injury to plaintiffs.

To state an intentional interference with prospective contracts claim “usually require[s] the aggrieved party to have been unsuccessful in acquiring an expected contract due to a third party’s intentional and wrongful actions.” *Id.* (quoting Egrets Pointe Townhouses Prop. Owners Ass’n v. Fairfield Cmty., Inc., 870 F. Supp. 110, 116 (D.S.C. 1994)). As discussed above, NationStar’s actions were not intentional or wrongful. Moreover, plaintiffs’ claims fail because defendant’s actions – even if wrongful – caused no harm to plaintiffs. “A claim for prospective interference cannot stand where the plaintiff is able to consummate a contract with another party.” BCD LLC v. BMW Manufacturing Company LLC, 360 Fed. Appx. 428, 435 (4th Cir. 2010). Plaintiffs consummated a new contract with NationStar, and therefore suffered no damages. *Id.*

Accordingly, Plaintiffs’ Fifth Cause of Action for Tortious Interference with a Prospective Contract should be dismissed.

F. Plaintiffs Fail to Plead the Required Elements of a Claim Under the South Carolina Unfair Trade Practices Act.

“In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual,

ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.” Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir. S.C. 1998) (citing S.C. Code Ann. § 39-5-140; Daisy Outdoor Advertising Co., Inc. v. Abbott, 322 S.C. 489, 473 S.E.2d 47, 49 (1996)).

1. NationStar did not engage in an unlawful trade practice.

Faced with facts similar to those at issue here, the Fourth Circuit affirmed the District of South Carolina’s grant of summary judgment on SCUTPA claims asserted against a defendant bank. Beattie v. NationsCredit Financial Services Corporation, 69 Fed. Appx. 585 (4th Cir. 2003). In Beattie, NationsCredit mistakenly sent the plaintiff’s loan to its “internal foreclosure department,” and consequently reported negatively on plaintiff’s credit report. Id. at 587. Plaintiff brought claims under the SCUTPA, alleging that “NationsCredit engaged in unlawful trade practice by falsely reporting to credit bureaus that their mortgage was in foreclosure,” and alleged that plaintiffs were denied credit based on this false reporting. Id. The Fourth Circuit noted that under South Carolina law a trade practice is “unfair when it is offensive to public policy or when it is immoral, unethical, or oppressive,” and defined public policy as the policy “created by applicable common law determinations, legislative enactments or constitutional provisions.” Id. at 588 (internal punctuation and citations omitted). The Fourth Circuit held that the negative credit reporting “cannot be seen as immoral, unethical or oppressive... [and] it is not wholly unreasonable for NationsCredit to believe... that reference of the defaulted loan to its internal foreclosure department had placed the account ‘in foreclosure.’” Id. at 589.

Turning to whether NationsCredit’s actions violated public policy, the Fourth Circuit specifically analyzed the provisions of the Fair Credit Reporting Act. Id. The Court identified one possible provision, 15 U.S.C. § 1681s-2(a)(1)(A). That provision states that a supplier of

information to a credit bureau “shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate.” The Fourth Circuit held, however, that § 1681s-2(a)(1)(A) may be enforced only by federal and state agencies and officials, and does not provide a private right of action. Id. The Beattie plaintiff therefore failed to state a claim under SCUTPA. Id. Because negative credit reporting does not constitute an “unlawful trade practice” under South Carolina law, the claims asserted in Beattie, and the claims asserted in this case, fail as a matter of law. Id.

2. Plaintiffs suffered no actual, ascertainable damages as a result of NationStar's alleged use of an unlawful trade practice.

On or about May 17, 2010, Plaintiffs discovered allegedly false credit reporting by NationStar for late payment. See Complaint, ¶ 10. Plaintiffs allegedly contacted NationStar “immediately” and demanded correction. Id. On June 15, 2010, Plaintiffs ran their credit report to confirm that the corrections were made. Id. ¶ 16. “Seeing that the false credit report had been corrected and having been told by NationStar that there was no construction money on the way, Plaintiffs sought alternative financing of their new home construction. Id. On or about July 9, 2010, Plaintiffs were allegedly notified that they had been approved by Bank of America for a VA home loan with an interest rate of 4.9%. Id. ¶ 17. On July 16, 2010, Bank of America allegedly contacted Plaintiffs and told them their loan was denied because of late payment history with NationStar. Id. 18. On or about August 28, 2010, Plaintiffs allegedly applied for financing at an unidentified bank and were allegedly denied because of NationStar’s negative credit reporting.

Taking Plaintiffs’ allegations as true, the negative credit reporting by NationStar was corrected on June 15, 2010. Plaintiffs did not apply for credit with Bank of America or the other

unnamed bank until after the corrections were made. Based on Plaintiffs' pleading, no causal connection exists between the alleged negative credit reporting and Plaintiffs' failure to secure financing from other sources.

3. The alleged unlawful trade practice engaged in by NationStar had no adverse impact on the public interest.

To state a claim under SCUTPA, in addition to showing an unfair act and damages caused by that act, Plaintiffs must allege "facts demonstrating that these acts or practices adversely affect the public." Noack Enterprises, Inc. v. Country Corner Interiors, 290 S.C. 475 (1986). "This adverse affect on the public must be proved by *specific facts*." Jefferies v. Phillips, 316 S.C. 523 (1994) (emphasis added). "Without proof of specific facts disclosing that ... members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a speculative [claim] of adverse public impact and that will not suffice for a recovery under the UPTA." Id. at 527 (citing Daisey Outdoor Advertising Co. v. Abbott, 322 S.C. 489 (1996)) (brackets in original).

Simply reciting that the alleged negative credit reporting is "offensive to public policy and capable of repetition," fails to satisfy Noack's requirements. Columbia East Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 522 (1989) (holding that alleging unfair acts impact the public interest was not enough to sustain a claim under SCUTPA without evidentiary support).

Therefore, Plaintiffs Sixth Cause of Action for Violations of the South Carolina Unfair Trade Practices Act fails and should be dismissed.

G. Plaintiffs Fail to State a Claim for Negligent Misrepresentation.

In Plaintiffs' Seventh Cause of Action, Plaintiffs allege a claim against NationStar for negligent misrepresentation. By reference to certain paragraphs of their Complaint, Plaintiffs appear to contend that NationStar "negligently misrepresented" (a) the payoff amount of

Plaintiffs' loan, (b) that Plaintiffs' account would be placed in "payoff status", (c) that Plaintiffs could either use insurance proceeds toward paying off their loan or toward reconstruction of their home, and (d) that their credit report had been corrected.<sup>2</sup> See Complaint at ¶ 61 (referring to Complaint ¶¶ 5, 9, 11-15, 2-22, and 24-26). As set forth below, Plaintiffs' negligent misrepresentation count should be dismissed.

First, as set forth above, Plaintiffs waived this and their other claims when they refinanced their loan with NationStar. Second, the facts underlying Plaintiffs' misrepresentation claims seem to be the same as their breach of contract claim.

As a matter of law, if the duty owed arises merely from the agreement of the parties, breach of the duty does not create a cause of action for negligent conduct. Where the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.

Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 376, 404 S.E. 2d 912, 917-18 (1991) (dismissing negligent misrepresentation claim where duties regarding representations arose contractually). Accordingly, to the extent Plaintiffs contend that NationStar owed a contractual duty to them regarding servicing and resolution of their loan, Plaintiffs cannot maintain a negligent misrepresentation claim. Id.

Third, Plaintiffs fail to plead facts sufficient to support a negligent misrepresentation claim.

A plaintiff in a negligent misrepresentation action, must prove (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

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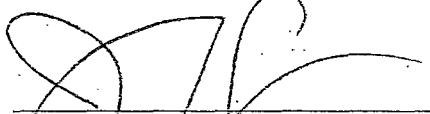
<sup>2</sup> Any claim based upon reporting to the credit agency is preempted by FCRA as set forth herein.

Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (S.C. Ct. App. 2001). Here, Plaintiffs contend that certain representations were false. While Plaintiffs make conclusory legal statements in their Seventh Cause of Action, Plaintiffs do not plead any facts to show that (a) NationStar had a pecuniary interest in making the alleged statements, (b) that NationStar breached the duty by failing to exercise reasonable care, (c) that Plaintiffs justifiably relied on the representation, or (d) that Plaintiffs suffered a pecuniary loss. Failure to plead these facts is fatal to Plaintiffs' negligent misrepresentation claim and it should be dismissed.

#### IV. CONCLUSION

For the foregoing reasons, Defendant NationStar is entitled to judgment on the pleadings as to all counts of Plaintiffs' Complaint.

GALLIVAN, WHITE & BOYD, P.A.



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Columbia, South Carolina  
2/1, 2012

*Attorneys for Defendant NationStar Mortgage, LLC*

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CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA )  
COUNTY OF DARLINGTON )  
IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2011-CP-16-0135

Amanda and Michael Griggs, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
Nationstar Mortgage, LLC, )  
)  
Defendant. )

PLAINTIFFS' RESPONSES  
TO DEFENDANT'S  
MOTION FOR JUDGMENT  
ON THE PLEADINGS

The Plaintiffs, in response to Defendant's Motion for Judgment on the Pleadings, move for an order dismissing the Defendant's Motion for Judgment on the Pleadings. Plaintiffs' grounds are as follows:

**I. FACTUAL BACKGROUND**

TRUE CERTIFIED COPY  
See Plaintiffs  
Ed B. Sugar  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

Defendant Nationstar holds a mortgage note on Plaintiffs' property. Id. See Plaintiffs Complaint, ¶ 4. On or about April 15, 2010, Plaintiffs suffered a residential home fire. Id. On or about April 16, 2010, Plaintiffs requested a payoff amount from Nationstar for insurance purposes. Id. ¶ 5. Nationstar provided the payoff amount as of that date, \$182,604.80. Id. On April 23, 2010, Plaintiffs received a check from their insurance company made out to Plaintiffs, Nationstar, and the holder of another mortgage on the property, non-party Ditech. Id. ¶ 6. Nationstar requested a check payable solely to Nationstar, and Plaintiffs requested the same from their insurance company. Id. Plaintiffs received the payoff check to Nationstar from their insurance company on April 29, 2010, and contacted Nationstar. Id. ¶ 7. Nationstar agreed to send a payoff statement to Plaintiffs, and requested Plaintiffs return that payoff statement with the payoff check. Id.

On May 4, 2010, Plaintiffs received a payoff statement from Nationstar. However, that payoff statement was for “Jose Ortiz.” Plaintiffs promptly notified Nationstar of this problem. Defendant Nationstar subsequently faxed the Plaintiffs another payoff statement for the loan. However, this payoff statement was for a payoff amount of \$184,535.50. The Plaintiffs were told to forward the insurance check in the amount of \$182,604.80 with the payoff statement and that Nationstar would try to fix the discrepancy. See Plaintiffs’ Complaint, ¶ 8 and 9.

Eventually, Plaintiffs received a third payoff amount from Nationstar in the amount of \$185,310.48. See Plaintiffs’ Complaint, ¶ 11.

On or about May 17, 2010, the Plaintiffs began attempting to secure financing so that they could begin construction on a new home. During these attempts to secure the financing, credit reports were run and the Plaintiffs learned that Nationstar was reporting that the Plaintiffs had been late several times with their mortgage payments. This information was false, and the Plaintiffs immediately contacted Nationstar and demanded the false credit reporting be corrected. See Plaintiffs’ Complaint, ¶ 10.

What followed for the Plaintiffs was a 3-4 month odyssey during which Nationstar issued false credit reporting information against the Plaintiffs, causing the Plaintiffs to lose out on lower interest rates and eventually forcing the Plaintiffs into a position where they were compelled to refinance their loan with Nationstar in order to complete the construction on their home. See Plaintiffs’ Complaint, ¶ 12-27.

## **II. STANDARD OF REVIEW**

Rule 12(c) of the South Carolina Rules of Civil Procedure permits judgment on the pleadings when the complaint fails to state facts sufficient to constitute a cause of action. “A judgment on the

pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." Sapp v. Ford Motor Co., 386 S.C. 143, 146 (2009). "The reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Bradshaw v. Anderson County, 388 S.C. 275, 262 (2010) (internal punctuation omitted).

### III. ARGUMENT

#### A. Plaintiffs' Defamation Claim Presents a Genuine Issue of Material Fact and is Not Preempted by Federal Law

Plaintiffs' Defamation Claim is actionable *per se*, is not subject to an affirmative defense of privilege and none have been alleged by the Defendant. Therefore, the defamation alleged by the Plaintiffs is presumed to have been made with common law malice resulting in general damages.

The Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA") states that a, "consumer may bring an action or proceeding in the nature of defamation...or negligence with respect to the reporting of information against...a consumer reporting agency" when information furnished by such an agency is "furnished with malice or willful intent to injure such consumer."

"The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm cause by the publication." Murray v. Holnam, Inc., 344 S.C. 129 at 139 (2001). "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Id.

“If defamation is actionable per se, then under common law principles, the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages.” Murray at 142. “Common Law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff’s rights.” Id.

“That the appellant believed the charges to be true did not justify it in publishing them in an improper and unjustified manner or with improper and unjustified motives. Proof that they were published in such manner and with such motives would constitute sufficient proof of malice, or malice in fact. It is not necessary that evidence must be offered of malignity or ill will, nor that those facts should be found. The time, place, and other circumstances of the preparation and publication of defamatory charges, as well as the language of the publication itself, are admissible evidence to show that the false charge was made with malice.” Id. citing Fulton v. Atlantic Coast Line R.R., 220 S.C. 287 (1951).

“However, even if the [defamation] is actionable per se, if the communication is privileged, the plaintiff must prove actual malice.” Id. Common law actual malice, “is established only if ‘the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff’s rights.’” Beattie v. Nations Credit Fin. Servs. Corp., et al. 69 Fed. Appx. 585 at 591 (4th Cir. 2003) citing Murray. “Common law actual malice, that is ‘the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference toward plaintiff’s reports.’” “Actual malice requires that at the time of the defendant’s act or omission he was conscious or chargeable with consciousness of his wrongdoing. Id. at 144. “Malice may be proved by direct or circumstantial evidence.” Id. “Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury.” Id.

In the case at bar, the Defendant seeks to shift the burden of proving malice to the Plaintiffs by misapplying the District Court's analysis of Murray in the Beattie case. The Plaintiffs have stated a cause of action for "Defamation Per Se". See Pls.' Compl. at ¶¶ 28-31. The Defendant has not alleged an affirmative defense of privilege in response. See Def's. Answer and Aff. Defs. As such, a presumption exists that the defendant acted with common law malice. There has been no burden shift by the assertion of the affirmative defense of privilege and as such, viewing the facts in a light most favorable to the Plaintiffs, their first cause of Action for Defamation Per Se should not be dismissed.

It is clear from the complaint that the Plaintiffs allege the Defendant repeatedly falsely reported negative credit information about them, despite having actual knowledge that such negative credit information was false. For some reason, the Defendant's motion seems to overlook this fact, treating the false negative reporting as one incident and arguing that the Plaintiffs have not pled that the Defendant acted in bad faith, knowingly reported inaccurate information or utilized improper methods. (See Motion, p. 10-11). The Plaintiff argues the repeated reporting of false negative credit information as laid out in the complaint satisfies all of those pleading requirements. The complaint alleges the following concerning the false negative reporting:

**-FIRST INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:** On or about May 17, 2010, the Plaintiffs became aware of the first instance of false negative credit reporting and immediately brought it to the Defendant's attention, demanding it be corrected. (Compl. ¶ 10).

-On or about May 28, 2010, the Plaintiffs once again contacted the Defendant, stressing the need to correct the false negative credit reporting. (Compl. ¶ 12).

-On or about June 10, 2010, the Plaintiffs received correspondence from the Defendant informing them that the false negative credit reporting (the first instance) had been corrected. (Compl. ¶ 15). The Plaintiffs confirmed this by running a credit

report on or about June 15, 2010. (Compl. ¶ 16).

**-SECOND INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:** On or about July 16, 2010, the Plaintiffs were informed that a BOA loan they had previously been approved for was being turned down due to false negative credit reporting by the Defendant. (Compl. ¶ 18).

-On or about July 19, 2010, Plaintiff Michael Griggs and his boss contacted the Defendant to try to rectify the issues with the false negative credit reporting. They eventually spoke to an agent/employee of the Defendant named "Elliot" who told them he would look in to the matter. (Compl. ¶ 19).

-On or about July 28, 2010, Elliot contacted the Plaintiffs and notified them that the Defendant had, for a second time, corrected the false negative credit reporting against the Plaintiffs. (Compl. ¶ 20).

**-THIRD INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:** On or about August 27, 2010, the Plaintiffs once again sought to secure financing with another bank and were denied because the Defendant was falsely reporting negative credit information about the Plaintiffs. (Compl. ¶ 24).

-On or about September 8, 2010, the Defendant informed the Plaintiffs that the false negative credit reporting against them had once again been corrected.

In short, the Plaintiffs has pled that the Defendant repeatedly reported false negative credit information about them, even when they had the actual knowledge that such information was false. Such actions are not preempted by the Fair Credit Reporting Act as the Defendant claims. The complaint as pled alleges facts sufficient to constitute both common law malice and actual malice.

**B. Plaintiffs' Claim for Violation of the SCUTPA is valid and presents a genuine issue of material fact**

Plaintiff has properly alleged facts sufficient to constitute a genuine issue of material fact that is rightfully a question for a jury.

**a. Defendant acted in an unfair and deceptive manner.**

"In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the

defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283 (4th Cir. S.C. 1998).

Plaintiffs' claim against the Defendant for violation of SCUTPA is rooted in the Defendant's repetitious employment of deceptive acts or practices. "It is in the public interest generally to prevent the use of false and misleading statements in the conduct of business... and actual deception need not be shown; a finding of a tendency to deceive and mislead will suffice. And... the Fourth Circuit Court of Appeals held that the requisite capacity to deceive could be found without evidence that anyone was actually deceived." State ex rel. McLeod v. Brown, 278 S.C. 281 (1982).

The Plaintiffs have alleged that paragraphs five, nine, eleven through fifteen, twenty through twenty-two, and twenty-four through twenty-six specifically constitute such "deceptive acts in the conduct of trade and commerce" and that each and every allegation or assertion found in paragraphs one through fifty-four are incorporated into the cause of action for violation of the South Carolina Unfair Trade Practices Act. Pls.' Compl. at ¶¶ 55-56. The facts and allegations therein are sufficient to show unfair and deceptive methods used by Defendant. Such acts include falsely reporting the Plaintiffs to credit agencies for failure to timely pay sums due **a minimum of three times**.

The Plaintiff has pled that this false negative reporting took place even after the Defendant knew that the information they were reporting was false and was repeatedly occurring. Additionally, the Plaintiffs have pled that the Defendant created a situation through the false negative reporting and other mishandlings of their account wherein the Plaintiffs were, as a practical matter, coerced in to refinancing their loan with the Defendant.

Construing the facts alleged in the complaint in the light most favorable to the Plaintiffs presents material questions of fact as to whether or not the Defendant has acted in an unfair and deceptive manner.

- b. Plaintiffs suffered actual, ascertainable damages as a result of Defendant's use of unlawful trade practices.

As described above, the Plaintiffs have alleged several instances of negative reporting done by the Defendant including instances after the initial correction was made in June 15, 2010. The Plaintiff has also pled that the Defendant repeatedly mishandled the Plaintiffs' attempts to actually payoff their loan. (see Compl. at ¶¶ 7, 8, 9, 10, 11, 12, 13, 14, 16, 20-25). The Plaintiffs have pled allegations arguing that they were basically forced in to refinancing with the Defendant. The Plaintiffs pled allegations that they were "desperate to secure financing" after the false reporting had sabotaged their previously approved loan with Bank of America, paid July and August payments "under protest" because they saw no other way to resolve the situation and in an effort to "mitigate their damages" finally refinanced their loan with the Defendant. (See Compl. at ¶¶ 17, 18, 20, 25 and 27).

The Plaintiffs have pled that they lost a 4.9% VA Home loan through Bank of America and were forced to refinance at 5.25% with the Defendant, along with paying \$7500.00 in closing costs. (See Compl. at ¶¶ 17, 18 and 27). The difference in interest rates and the associated costs are actual, ascertainable and significant damages which resulted from the unfair and deceptive acts employed by the Defendant.

- c. The unlawful trade practice engaged in by the Defendant is capable of repetition and is therefore impactful on the public interest.

"South Carolina law regards the public interest prong of the UTPA inquiry as satisfied by

evidence of a potential for repetition of the unfair or deceptive act.” Daisy Outdoor Adver. Co. v. Abbot, 322 S.C. 489, 495 (S.C. 1996). “Prior case law makes very clear that evidence of a potential for repetition, generally speaking, in and of itself establishes the required public impact.” Id. at 496. South Carolina courts have long held that the ability to illustrate the existence of unfair or deceptive practices capable of repetition satisfies the public impact prong of an UTPA review. In Daisy, the South Carolina Supreme Court details instances where private wrongs have been held to negatively impact the public interest due to their potential for repetition. That line of cases begins with Noack Enters., Inc. v. Country Corner Interiors, 290 S.C. 475 (Ct. App. 1986). The Noack Court held, “proof of the potential for repetition of a defendant’s actions satisfies the public interest requirement of UTPA.” Daisy citing Noack at 480. The sale of mislabeled peach trees and the breach of an express warranty in Haley Nursery Co. v. Forrest, 298 S.C. 520 (S.C. 1989), was held to be a violation of the UTPA. Daisy at 493-94 citing Haley, (holding that the *potential* for repetition by publication of alleged misrepresentations to consumers satisfied the public interest prong) (emphasis added); the sale of an automobile which included a misrepresentation by sellers agent to buyer, Dowd v. Imperial Chrysler-Plymouth, Inc., 298 S.C. 439 (Ct. App. 1989) (holding that training a salesperson to deceive customers made the potential for repetition in violation of public interest apparent); and the padding of a repair bill in Barnes v. Jones Chevrolet Co., 292 S.C. 607 (Ct. App. 1987) (holding that the padding of a repair bill satisfied the UTPA’s public interest requirement because of the potential for repetition that existed). “Noack Enterprises, as well as Haley Nursery, Dowd and Jones Chevrolet make clear that South Carolina law regards the public interest prong of the UTPA inquiry as satisfied by evidence of a potential for repetition of the unfair or deceptive act.” Daisy at 495.

The South Carolina Supreme Court has also held that unfair or deceptive acts in the course of business practices that are a direct result of the type of business being transacted satisfies the UTPA's public interest prong. In York v. Conway Ford Inc., 325 S.C. 170 (S.C. 1997), the Plaintiff alleged a violation of the UTPA when he learned that a vehicle which was sold "like new" was damaged in an accident prior to the sale. See York. The Court held that unfair and deceptive practices on the part of the dealer, Conway Ford Inc., were capable of repetition, holding "Conway Ford is in the business of selling cars," and "certainly the alleged acts or practices have the potential for repetition." York at 173.

The Defendant is in the business of providing homeowner loans to finance the purchase or construction of homes in South Carolina. Not only is it clear from the facts alleged in the complaint that the Defendant did repeat acts and/or failures to act which the Plaintiffs allege are unfair and deceptive, but given the nature of the Defendants business, these acts and/or failures to act are capable of repetition and impactful on the public interest.

C. **Plaintiffs' claims are not barred by the fact that the Plaintiffs refinanced their loan through the Defendant.**

The Plaintiffs' complaint clearly alleges that the Plaintiffs felt compelled to refinance their loan through the Defendant due to the Defendant's actions. As the Plaintiffs allege in the complaint, the Plaintiffs did not consider refinancing with the Defendant until the Defendant suggested refinancing on or about May 28, 2010. That suggestion was made in response to the Plaintiffs contacting the Defendant to complain about the fact that the Defendant's false negative credit reporting against the Plaintiffs had not yet been corrected. (See Compl. at ¶¶ 10 & 12). Additionally, this suggestion to refinance came after the Defendant had supplied the Plaintiffs with

three different payoff amounts/statements. (See Compl. at ¶¶ 5, 8, 9 and 11).

As the complaint alleges, the Plaintiffs had, at the time of this suggestion to refinance with the Defendant, been without a home for almost a month and half. They had a builder ready to begin and were understandably eager to start construction on their new home. Therefore, the Plaintiffs agreed to refinance with the Defendant under the assurance that within 48 hours of receiving a completed packet, the Defendant would send drafts for funds to the Plaintiffs. The Plaintiffs specifically asked if they could tell their builder to begin and were told by the Defendant that it was okay to tell the builder to start. Based on these assurances, the Plaintiffs agreed to refinance their loan with the Defendant. (See Compl. at ¶¶ 13). However, as is pled in the complaint, those assurances made by the Defendant proved false. The refinanced loan was not completed until January 18, 2011.

The Defendant claims that the fact that the Plaintiffs eventually refinanced their loan with the Defendants bars the Plaintiffs Breach of Contract claims, as well as “any of Plaintiffs’ other claims arising prior to the refinancing.” For this argument to prevail, the Defendant would have to show that the Plaintiffs waived their rights to any such claim. The Adam v. Wells Fargo Bank, N.A. case that the Defendant cites has, within it, caselaw citing explaining what would be required. “A party waives a contractual right by intentionally relinquishing the right...” Adam, No. ELH-09-2387, 2011 U.S. Dist LEXIS 96604, citing La Belle Epoque, LLC v. Old Europe Antique Manor, LLC, 405 Md. 194, 213 (2008) (emphasis added). “Once there has been a novation, with a substantial concession by the party accused of committing a fraud..., the novation represents an informal settlement between the parties for any fraud and implies, as a matter of law, a waiver of any claim to fraud.” Adam, citing Holder v. Maaco, 644 F.2d 310, 312-313 (4<sup>th</sup> Cir. 1981) (applying Maryland

law) (emphasis added). Further, “given the highly factual nature of the waiver inquiry, it is an uncommon case in which the issue can be resolved by summary judgment.” Adam citing Hovnanian Land Investment Group, LLC v. Annapolis Towne Center at Parole, LLC, \_\_\_ Md. \_\_\_, No. 71, Sept. Term 2010 (filed July 20, 2011).

In other words, the law does not simply bar the Plaintiffs from pursuing their claims because the Plaintiffs refinanced their loan with the Defendant. The Defendant would have to show that it was the intention of the Plaintiffs to relinquish their rights and that the Defendants provided a substantial concession, or consideration, for the Plaintiffs relinquishing such rights. In neither their Answer nor Motion for Judgment on the Pleadings, do the Defendants allege that the Plaintiffs intended to relinquish such rights nor that the Defendant offered any substantial concession for such relinquishment. In the discovery provided to date, the Plaintiffs are unaware of any written terms in the refinancing agreement that purports to describe such relinquishment or concession from the Defendant. Even if there were such language, the Plaintiffs would argue that such language would represent ambiguity arising in the agreement, as the Plaintiffs never intended to relinquish any such rights, and that ambiguities arising within a contract must be construed against the drafter. That rule applies with particular force in cases involving a contract of adhesion. Similar financing agreements have routinely been considered contracts of adhesion in South Carolina and the Plaintiffs would argue that this particular agreement was certainly such, as the facts as alleged in the complaint make clear that the Plaintiffs felt they had no choice but to refinance their loan with the Defendants in order to complete their home. Southern Atlantic Financial Svcs, Inc. v. Donna F. Middleton, 349 S.C. 77 (2002).

Even if the Court were to grant the Defendants motion, the Plaintiffs would request leave to

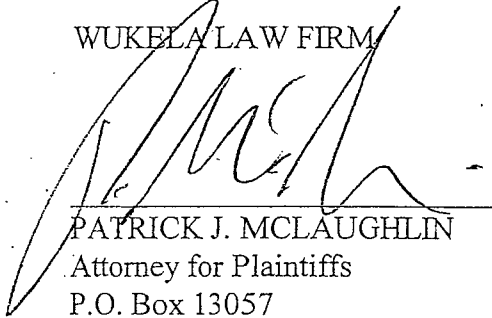
amend their complaint. "Ordinarily, permission will be given to amend a pleading demurred to, if objection can be obviated and in such case it is proper to sustain demurer with leave to amend."

Page v. North Carolina Mutual Life Ins. Co., 207 S.C. 277 (1945).

**CONCLUSION**

Based on the argument presented above, the Plaintiffs argue that they have adequately pled the causes of action of their complaint and ask that the Court dismiss the Defendant's motion. In the alternative, the Plaintiffs request leave to amend their complaint to protect those causes of action the Court may find do not survive the Defendant's motion.

WUKELA LAW FIRM



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Attorney for Plaintiffs

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Facsimile: 843-669-5150

Florence, South Carolina

May 2, 2012

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SCOTT B. SMITH  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT

COUNTY OF DARLINGTON )

CASE NO.: 2011-CP-16-0135

Amanda and Michael Griggs )

MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET

Plaintiff, )

vs. )

Nationstar Mortgage, LLC, )

Defendant. )

Plaintiff's Attorney:

Patrick J. McLaughlin, Bar No. 73675

Address:

P.O. Box 13057, Florence, SC 29504-3057

Phone: 843-669-5634 Fax 843-669-5634

E-mail: patrick@wukelalaw.com Other: \_\_\_\_\_

Defendant's Attorney:

John T. Lay, Jr., Bar No. 64526

Address:

P.O. Box 7368, Columbia, SC 29202

Phone: 803-779-1833 Fax 810-779-1767

E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Plaintiffs' Motion to Alter or Amend Judgment

Estimated Time Needed: 30 minutes

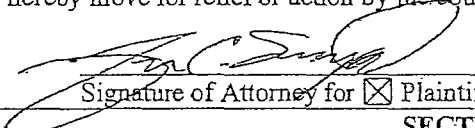
Court Reporter Needed:  YES /  NO

SECTION II: Motion/Order Type

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

  
Signature of Attorney for  Plaintiff /  Defendant

6/19/2012

Date submitted

SECTION III: Motion Fee

PAID - AMOUNT: \$ \_\_\_\_\_

EXEMPT:

(check reason)

Rule to Show Cause in Child or Spousal Support

Domestic Abuse or Abuse and Neglect

Indigent Status  State Agency v. Indigent Party

Sexually Violent Predator Act  Post-Conviction Relief

Motion for Stay in Bankruptcy

Motion for Publication  Motion for Execution (Rule 69, SCR 69)

Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

Other: Motion to Alter or Amend Judgment

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.

Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

CLERK'S VERIFICATION

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

MOTION FEE COLLECTED: \$ \_\_\_\_\_

CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

TRUE CERTIFIED COPY

CLERK OF COURTS  
DARLINGTON COUNTY, SC

SCOTT B. SUGGS  
CLERK OF COURTS  
DARLINGTON COUNTY, SC  
2012 JUN 20 AM 11:28

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 Amanda and Michael Griggs, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Nationstar Mortgage, LLC, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 FOURTH JUDICIAL CIRCUIT  
 CIVIL ACTION NO. 2011-CP-160135

PLAINTIFFS' MOTION TO  
 ALTER OR AMEND JUDGMENT

FILED  
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 CLERK OF COURT  
 DARLINGTON COUNTY, S.C.

This matter comes before the Court on Plaintiff's Motion to Alter or Amend Judgment pursuant to Rule 59 SCRPC. This matter came before the court on Defendant's Motion for Judgment on the pleadings in the Darlington Court of Common Pleas on May 29, 2012.

**FACTUAL BACKGROUND**

Defendant Nationstar holds a mortgage note on Plaintiffs' property. See Plaintiffs' Complaint, ¶ 4. On or about April 15, 2010, Plaintiffs suffered a residential home fire. Id. On or about April 16, 2010, Plaintiffs requested a payoff amount from Nationstar for insurance purposes. Id. ¶ 5. Nationstar provided the payoff amount as of that date, \$182,604.80. Id. On April 23, 2010, Plaintiffs received a check from their insurance company made out to Plaintiffs, Nationstar, and the holder of another mortgage on the property, non-party Ditech. Id. ¶ 6. Nationstar requested a check payable solely to Nationstar, and Plaintiffs requested the same from their insurance company. Id. Plaintiffs received the payoff check to Nationstar from their insurance company on April 29, 2010, and contacted Nationstar. Id. ¶ 7. Nationstar agreed to send a payoff statement to Plaintiffs, and requested Plaintiffs return that payoff statement with the payoff check. Id.

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 CLERK OF COURT  
 DARLINGTON COUNTY, S.C.

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On May 4, 2010, Plaintiffs received a payoff statement from Nationstar. However, that payoff statement was for "Jose Ortiz." Plaintiffs promptly notified Nationstar of this problem. Defendant Nationstar subsequently faxed the Plaintiffs another payoff statement for the loan. However, this payoff statement was for a payoff amount of \$184,535.50. The Plaintiffs were told to forward the insurance check in the amount of \$182,604.80 with the payoff statement and that Nationstar would try to fix the discrepancy. See Plaintiffs' Complaint, ¶ 8 and 9.

Eventually, Plaintiffs received a third payoff amount from Nationstar in the amount of \$185,310.48. See Plaintiffs' Complaint, ¶ 11.

On or about May 17, 2010, the Plaintiffs began attempting to secure financing so that they could begin construction on a new home. During these attempts to secure the financing, credit reports were run and the Plaintiffs learned that Nationstar was reporting that the Plaintiffs had been late several times with their mortgage payments. This information was false, and the Plaintiffs immediately contacted Nationstar and demanded the false credit reporting be corrected. See Plaintiffs' Complaint, ¶ 10.

What followed for the Plaintiffs was a 3-4 month odyssey during which Nationstar issued false credit reporting information against the Plaintiffs, causing the Plaintiffs to lose out on lower interest rates and eventually forcing the Plaintiffs into a position where they were compelled to refinance their loan with Nationstar in order to complete the construction on their home. See Plaintiffs' Complaint, ¶ 12-27.

On May 29, 2012, the parties appeared before the Court for oral argument of Plaintiff's Motion to Compel and Defendant's Motion for Judgment on the Pleadings. At that time, the parties informed the Court that they had executed a Consent Confidentiality Order which they believed

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would resolve the outstanding discovery issues subject to the Plaintiff's Motion to Compel. Argument proceeded on the Defendant's motion.<sup>1</sup> An order was signed by the Court on June 7, 2012 granting the Defendant's motion. That order was served on the parties via correspondence sent via facsimile on June 11, 2012. This motion timely follows pursuant to Rule 59 of the SCRCP.

### I. STANDARD OF REVIEW

Rule 12(c) of the South Carolina Rules of Civil Procedure permits judgment on the pleadings when the complaint fails to state facts sufficient to constitute a cause of action. "A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor." Sapp v. Ford Motor Co., 386 S.C. 143, 146 (2009). "The reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Bradshaw v. Anderson County, 388 S.C. 275, 262 (2010) (internal punctuation omitted).

Furthermore, "a judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Russell v. Columbia, 305 S.C. 86 (1991) citing Brown v. United Insurance Co. of America, 268 S.C. 254 (1977). "When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment." Id. citing Crowe v. Domestic Loans, Inc., 242 S.C. 310 (1963). "Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever." Id. citing

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<sup>1</sup> The parties mistakenly forgot to submit the consent order to the Court at the motions hearing and had agreed to the Plaintiff forwarding that order to the administrative judge. However, the Court's order granting the Defendant's motion for judgment on the pleadings came before that was accomplished. If the Court were to grant the Plaintiff's motion to

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Baldwin v. Sanders, 266 S.C. 394 (1976). “Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties.” Id. citing Manning v. Dial, 271 S.C. 79 (1978). “Further, a judgment on the pleading is considered to be a drastic procedure by our courts.” Id. citing U.S. Casualty Co. v. Hiers, 233 S.C. 333 (1958).

## II. ARGUMENT

### A. Plaintiffs’ Defamation Claim Presents a Genuine Issue of Material Fact and is Not Preempted by Federal Law

The Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (“FCRA”) states that a, “consumer may bring an action or proceeding in the nature of defamation...or negligence with respect to the reporting of information against...a consumer reporting agency” when information furnished by such an agency is “furnished with malice or willful intent to injure such consumer.”

“The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm cause by the publication.” Murray v. Holnam, Inc., 344 S.C. 129 at 139 (2001). “A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Id.

State defamation claims are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681h(e), except as to false information furnished with “malice or willful intent to injure.” Beattie v. Nationscredit Financial Servs. Corp. 69 Fed. Appx. 585, 589 (4<sup>th</sup> Cir. 2003); Ross v. FDIC, 625 F.2d 808, 813 (4<sup>th</sup> Cir. 2010), emphasis added. While the Court’s order cites the Ross case, the

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alter or amend, the Plaintiff would submit that consent order so that discovery could continue.

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Plaintiff believes the Court has overlooked important distinctions between the two cases. In Ross, the genesis of the false reporting was that Ross had been mistakenly listed as being responsible for a loan her estranged husband was responsible for. However, in Ross the Court noted that the record was “replete with evidence that WaMu made a regrettable but honest mistake and took action to remedy this error once Ross brought it to WaMu’s attention.” Further, the Ross court noted that the mistake was caused by WaMu’s efforts to comply with Ross’ wishes, which the court noted presented “a unique and rather complicated set of circumstances.” Ross at 815.

Neither is the case here. In contrast to the Ross case, there is no evidence in the record to support that the actions or failures to act by Nationstar were “honest mistakes” for which Nationstar took action to remedy. Despite claiming such in their answer (see Third and Fourth Defenses of Defendant’s Answer), Nationstar refused respond to discovery requests meant to investigate these affirmative defenses. The Plaintiff should be allowed the discovery the Defendant would be required to respond to in light of the consent confidentiality order. Absent that discovery, there is none of the “evidence” in the record the Ross court had to support judgment on the pleadings of the Plaintiff’s defamation claim.

It is clear from the complaint that the Plaintiffs allege the Defendant repeatedly falsely reported negative credit information about them, despite having actual knowledge that such negative credit information was false. For some reason, the Defendant’s motion seems to overlook this fact, treating the false negative reporting as one incident and arguing that the Plaintiffs have not pled that the Defendant acted in bad faith, knowingly reported inaccurate information or utilized improper methods. (See Motion, p. 10-11). The Plaintiff argues the repeated reporting of false negative credit information as laid out in the complaint satisfies all of those pleading requirements. The complaint

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alleges the following concerning the false negative reporting:

**-FIRST INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:** On or about May 17, 2010, the Plaintiffs became aware of the first instance of false negative credit reporting and immediately brought it to the Defendant's attention, demanding it be corrected. (Compl. ¶ 10).

-On or about May 28, 2010, the Plaintiffs once again contacted the Defendant, stressing the need to correct the false negative credit reporting. (Compl. ¶ 12).

-On or about June 10, 2010, the Plaintiffs received correspondence from the Defendant informing them that the false negative credit reporting (the first instance) had been corrected. (Compl. ¶ 15). The Plaintiffs confirmed this by running a credit report on or about June 15, 2010. (Compl. ¶ 16).

**-SECOND INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:** On or about July 16, 2010, the Plaintiffs were informed that a BOA loan they had previously been approved for was being turned down due to false negative credit reporting by the Defendant. (Compl. ¶ 18).

-On or about July 19, 2010, Plaintiff Michael Griggs and his boss contacted the Defendant to try to rectify the issues with the false negative credit reporting. They eventually spoke to an agent/employee of the Defendant named "Elliot" who told them he would look in to the matter. (Compl. ¶ 19).

-On or about July 28, 2010, Elliot contacted the Plaintiffs and notified them that the Defendant had, for a second time, corrected the false negative credit reporting against the Plaintiffs. (Compl. ¶ 20).

**-THIRD INSTANCE OF FALSE NEGATIVE CREDIT REPORTING:** On or about August 27, 2010, the Plaintiffs once again sought to secure financing with another bank and were denied because the Defendant was falsely reporting negative credit information about the Plaintiffs. (Compl. ¶ 24).

-On or about September 8, 2010, the Defendant informed the Plaintiffs that the false negative credit reporting against them had once again been corrected.

In short, the Plaintiffs has pled that the Defendant repeatedly reported false negative credit information about them, even when they had the actual knowledge that such information was false. Such actions are not preempted by the Fair Credit Reporting Act as the Defendant claims. The

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complaint as pled alleges facts sufficient to constitute actual malice. Additionally, there is no evidence to support judgment on the pleadings, as there is no evidence that the false credit reporting was an “honest mistake” or that proper remedial action was taken as there was in Ross. Similarly, the false credit reporting in the present case was not born from “unique” and “complicated” circumstances the Plaintiffs caused. The Plaintiffs were victims of a house fire, an unfortunate but not uncommon occurrence that businesses like Nationstar have to deal with. If Nationstar had in fact “maintenance of procedures reasonably adapted to avoid such an error” and “substantially complied with all applicable statutes and regulations,” (see Third and Fourth Affirmative Defenses of Answer) there is no logical reason why they would have falsely reported inaccurate credit information against the Plaintiffs three times.

As such, the Plaintiffs respectfully request that the Court alter or amend its judgment to allow the Plaintiffs to pursue their defamation cause of action.

**B. Plaintiffs’ Claim for Tortious Interference with Prospective Contract is valid and presents a genuine issue of material fact**

As the Court notes in the June 7, 2012 order, to state a viable claim for intentional interference with prospective contract, a plaintiff must plead: (a) intentional interference with prospective contractual relations; (b) for an improper purpose or by improper methods; and (c) resulting in injury. Crandall Corp. v. Navistar Int’l Transp. Corp., 395 S.E.2d 179 (1990).

First, the complaint clearly pleads that the Plaintiffs suffered injury. As paragraphs seventeen (17) and twenty-seven (27) show, the Plaintiffs have pled specific monetary loss. Specifically, the Plaintiffs have pled that they lost a 4.9% VA Home loan through Bank of America and were forced to refinance at 5.25% with the Defendant, along with paying \$7500.00 in closing costs. (See Compl.

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at ¶¶ 17, 18 and 27). The difference in interest rates and the associated costs are actual, ascertainable and significant damages incurred by the Plaintiffs due to Nationstar's tortious interference with the Plaintiffs' prospective contract.

The complaint also clearly alleges Nationstar engaged in improper methods. First and foremost, the complaint alleges defamation and negligent misrepresentation against Nationstar, both of which would be improper methods pursuant to Santoro v. Schulthess, 384 S.C. 250 (2009).

Secondly, the allegations contained in the complaint support that Nationstar's actions and/or failures to act created duress which tortiously interfered with the Plaintiff's prospective contract. As paragraphs twelve (12) and thirteen (13) allege, Nationstar failed to timely correct the false credit reporting and then "suggested" the Plaintiffs refinance with them. Assuring the Plaintiffs that drafts would be sent out within 48 hours of receiving the packet to refinance, Nationstar instructed the Plaintiffs that it was okay to have their builder start.

The complaint specifically pleads that the Plaintiffs relied on these assurances in starting the construction on their new home (see paragraph 13). Later, once their builder had begun construction and once Nationstar was again falsely reporting inaccurate information against the which prohibited the Plaintiffs from securing financing from other lenders, the Plaintiffs again accepted the option of refinancing with Nationstar. In doing so, the Plaintiffs specifically pled that they were "desperate to secure financing since they had already told their builder to begin" (see paragraph 20). The complaint also alleges the Plaintiffs made payments "under protest" because "they knew of no other way to resolve their situation." (see paragraph 25). The Plaintiffs' complaint clearly alleges that the Plaintiffs felt compelled to refinance their loan through the Defendant due to the Defendant's action and/or failures to act. As the Plaintiffs allege in the complaint, the Plaintiffs did not consider

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refinancing with the Defendant until the Defendant suggested refinancing on or about May 28, 2010.

That suggestion was made in response to the Plaintiffs contacting the Defendant to complain about the fact that the Defendant's false negative credit reporting against the Plaintiffs had not yet been corrected. (See Compl. at ¶¶ 10 & 12). Additionally, this suggestion to refinance came after the Defendant had supplied the Plaintiffs with three different payoff amounts/statements. (See Compl. at ¶¶ 5, 8, 9 and 11).

As the complaint alleges, the Plaintiffs had, at the time of this suggestion to refinance with the Defendant, been without a home for almost a month and half. They had a builder ready to begin and were understandably eager to start construction on their new home. Therefore, the Plaintiffs agreed to refinance with the Defendant under the assurance that within 48 hours of receiving a completed packet, the Defendant would send drafts for funds to the Plaintiffs. The Plaintiffs specifically asked if they could tell their builder to begin and were told by the Defendant that it was okay to tell the builder to start. Based on these assurances, the Plaintiffs agreed to refinance their loan with the Defendant. (See Compl. at ¶¶ 13). However, as is pled in the complaint, those assurances made by the Defendant proved false. The refinanced loan was not completed until January 18, 2011.

"A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Russell v. Columbia, 305 S.C. 86 (1991) citing Brown v. United Insurance Co. of America, 268 S.C. 254 (1977). "When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment." Id. citing Crowe v. Domestic Loans, Inc., 242 S.C. 310 (1963). "Moreover, a complaint is sufficient if it states any

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cause of action or it appears that the plaintiff is entitled to any relief whatsoever.” Id. citing Baldwin v. Sanders, 266 S.C. 394 (1976). “Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties.” Id. citing Manning v. Dial, 271 S.C. 79 (1978). “Further, a judgment on the pleading is considered to be a drastic procedure by our courts.” Id. citing U.S. Casualty Co. v. Hiers, 233 S.C. 333 (1958).

Given the above, the Plaintiffs argue that the allegations contained within the Complaint constitute “issues[s] of fact... which, if resolved in favor of the plaintiff, would entitle [them] to judgment.” Id. Plaintiffs also argue that the Court’s decision to dismiss the Plaintiffs’ complaint was a “drastic procedure” that did not construe the pleadings “liberally so that substantial justice [was] done between the parties.” See Id. Therefore, under the appropriate standard, it would appear that Plaintiffs’ claim for Tortious Interference with Prospective Contract entitles them to at least some relief and should survive. See Generally Baldwin.

As such, the Plaintiffs respectfully request that the Court alter or amend its judgment to allow the Plaintiffs to pursue their tortuous interference with prospective contract cause of action.

**C. Plaintiffs’ Claim for Violation of the SCUTPA is valid and presents a genuine issue of material fact**

Plaintiff has properly alleged facts sufficient to constitute a genuine issue of material fact that is rightfully a question for a jury.

**a. Defendant acted in an unfair and deceptive manner.**

“In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice, and (3) that the unlawful

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trade practice engaged in by the defendant had an adverse impact on the public interest.” Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283 (4th Cir. S.C. 1998).

Plaintiffs’ claim against the Defendant for violation of SCUTPA is rooted in the Defendant’s repetitious employment of deceptive acts or practices. “It is in the public interest generally to prevent the use of false and misleading statements in the conduct of business... and actual deception need not be shown; a finding of a tendency to deceive and mislead will suffice. And... the Fourth Circuit Court of Appeals held that the requisite capacity to deceive could be found without evidence that anyone was actually deceived.” State ex rel. McLeod v. Brown, 278 S.C. 281 (1982).

The Plaintiffs have alleged that paragraphs five, nine, eleven through fifteen, twenty through twenty-two, and twenty-four through twenty-six specifically constitute such “deceptive acts in the conduct of trade and commerce” and that each and every allegation or assertion found in paragraphs one through fifty-four are incorporated into the cause of action for violation of the South Carolina Unfair Trade Practices Act. Pls.’ Compl. at ¶¶ 55-56. The facts and allegations therein are sufficient to show unfair and deceptive methods used by Defendant. Such acts include falsely reporting the Plaintiffs to credit agencies for failure to timely pay sums due a minimum of three times.

The Plaintiffs have pled that this false negative reporting took place even after the Defendant knew that the information they were reporting was false and was repeatedly occurring. Additionally, the Plaintiffs have pled that the Defendant created a situation through the false negative reporting and other mishandlings of their account wherein the Plaintiffs were, as a practical matter, coerced in to refinancing their loan with the Defendant.

Further, the Plaintiffs have pled Nationstar made false representations to the Plaintiffs (see Negligent Misrepresentation Cause of Action in Complaint, also addressed below in this motion). It

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should be noted that such action is separate and distinct from any claims of defamation arising from the false reporting of inaccurate credit information against the Plaintiffs.

Construing the facts alleged in the complaint in the light most favorable to the Plaintiffs presents material questions of fact as to whether or not the Defendant has acted in an unfair and deceptive manner.

**b. Plaintiffs suffered actual, ascertainable damages as a result of Defendant's use of unlawful trade practices.**

As described above, the Plaintiffs have alleged several instances of negative reporting done by the Defendant including instances after the initial correction was made in June 15, 2010. The Plaintiff has also pled that the Defendant repeatedly mishandled the Plaintiffs' attempts to actually payoff their loan. (see Compl. at ¶¶ 7, 8, 9, 10, 11, 12, 13, 14, 16, 20-25). The Plaintiffs have pled allegations arguing that they were basically forced in to refinancing with the Defendant. The Plaintiffs pled allegations that they were "desperate to secure financing" after the false reporting had sabotaged their previously approved loan with Bank of America, paid July and August payments "under protest" because they saw no other way to resolve the situation and in an effort to "mitigate their damages" finally refinanced their loan with the Defendant. (See Compl. at ¶¶ 17, 18, 20, 25 and 27).

The Plaintiffs have pled that they lost a 4.9% VA Home loan through Bank of America and were forced to refinance at 5.25% with the Defendant, along with paying \$7500.00 in closing costs. (See Compl. at ¶¶ 17, 18 and 27). The difference in interest rates and the associated costs are actual, ascertainable and significant damages which resulted from the unfair and deceptive acts employed by the Defendant.

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c. The unlawful trade practice engaged in by the Defendant is capable of repetition and is therefore impactful on the public interest.

South Carolina law regards the public interest prong of the UTPA inquiry as satisfied by evidence of a potential for repetition of the unfair or deceptive act." Daisy Outdoor Adver. Co. v. Abbot, 322 S.C. 489, 495 (S.C. 1996). "Prior case law makes very clear that evidence of a potential for repetition, generally speaking, in and of itself establishes the required public impact." Id. at 496. South Carolina courts have long held that the ability to illustrate the existence of unfair or deceptive practices capable of repetition satisfies the public impact prong of an UTPA review. In Daisy, the South Carolina Supreme Court details instances where private wrongs have been held to negatively impact the public interest due to their potential for repetition. That line of cases begins with Noack Enters., Inc. v. Country Corner Interiors, 290 S.C. 475 (Ct. App. 1986). The Noack Court held, "proof of the potential for repetition of a defendant's actions satisfies the public interest requirement of UTPA." Daisy citing Noack at 480. The sale of mislabeled peach trees and the breach of an express warranty in Haley Nursery Co. v. Forrest, 298 S.C. 520 (S.C. 1989), was held to be a violation of the UTPA. Daisy at 493-94 citing Haley, (holding that the *potential* for repetition by publication of alleged misrepresentations to consumers satisfied the public interest prong) (emphasis added); the sale of an automobile which included a misrepresentation by sellers agent to buyer, Dowd v. Imperial Chrysler-Plymouth, Inc., 298 S.C. 439 (Ct. App. 1989) (holding that training a salesperson to deceive customers made the potential for repetition in violation of public interest apparent); and the padding of a repair bill in Barnes v. Jones Chevrolet Co., 292 S.C. 607 (Ct. App. 1987) (holding that the padding of a repair bill satisfied the UTPA's public interest requirement because of the potential for repetition that existed). "Noack Enterprises, as well as

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Haley Nursery, Dowd and Jones Chevrolet make clear that South Carolina law regards the public interest prong of the UTPA inquiry as satisfied by evidence of a potential for repetition of the unfair or deceptive act." Daisy at 495.

The South Carolina Supreme Court has also held that unfair or deceptive acts in the course of business practices that are a direct result of the type of business being transacted satisfies the UTPA's public interest prong. In York v. Conway Ford Inc., 325 S.C. 170 (S.C. 1997), the Plaintiff alleged a violation of the UTPA when he learned that a vehicle which was sold "like new" was damaged in an accident prior to the sale. See York. The Court held that unfair and deceptive practices on the part of the dealer, Conway Ford Inc., were capable of repetition, holding "Conway Ford is in the business of selling cars," and "certainly the alleged acts or practices have the potential for repetition." York at 173.

The Defendant is in the business of providing homeowner loans to finance the purchase or construction of homes in South Carolina. Not only is it clear from the facts alleged in the complaint that the Defendant did repeat acts and/or failures to act which the Plaintiffs allege are unfair and deceptive, but given the nature of the Defendants business, these acts and/or failures to act are capable of repetition and impactful on the public interest.

As such, the Plaintiffs respectfully request that the Court alter or amend its judgment to allow the Plaintiffs to pursue their violation of SCUTPA cause of action.

**D. Plaintiffs' Claim for Negligent Misrepresentation is valid and presents a genuine issue of material fact**

The Plaintiffs' claim for Negligent Misrepresentation is not barred by the FCRA, as the allegations concerning this claim arise contain more than false credit reporting. Specifically, the

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complaint references paragraphs five (5), nine (9), eleven (11) through (15), twenty (20) through twenty-two (22) and twenty-four (24) through twenty-six (26). The majority of allegations complained in those paragraphs involve statements, actions and failures to act by Nationstar regarding payoff and refinancing a loan with Nationstar. While there may be some allegations in these paragraphs dealing with false credit reporting, the nature in which the allegations are referenced concerns Nationstar's false statements to the Plaintiffs which led the Plaintiffs begin construction on their new home and ultimately refinance with Nationstar after Nationstar's actions and/or failures to act had closed other options to the Plaintiffs.

The notion that the complaint does not plead Nationstar had a pecuniary interest or that the Plaintiffs did not suffer pecuniary loss is wrong. Nationstar admits in their answer that the Plaintiffs refinanced a loan for \$187,500.00 at 5.25%, while paying \$7,500.00 in closing costs. (see ¶ 5 of Answer). The Plaintiffs have alleged making several payments before that refinancing and after notifying Nationstar of the fire loss and being informed their loan was in "payoff." (see ¶¶ 5-9, 14, 20, 22 and 25). It is axiomatic that Nationstar enjoyed pecuniary benefits from this while the Plaintiffs suffered pecuniary harm. Further, it stands to reason that had Nationstar exercised due care, they would not have continually falsely reported inaccurate credit reporting history against the Plaintiffs, now would they have instructed the Plaintiffs that they could begin construction while Nationstar continued to show their loan as "under payoff."

Quite simply, Plaintiffs argue it is error to dismiss their negligent misrepresentation claim before they have even had an opportunity to investigate Nationstar's claims to have maintained procedures to avoid such errors and their substantial compliance with all applicable statutes and regulations (as claimed in Nationstar's Third and Fourth Affirmative Defenses). Granting judgment

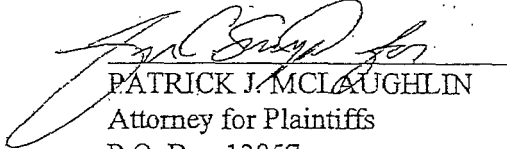
on the pleadings at this stage is the Court flipping the standard of review and taking the allegations in the light most favorable to the moving party. The court would, in essence, be saying that since Nationstar alleges they exercised reasonable care they are entitled to judgment on the pleadings. That is not the standard of review.

As such, the Plaintiffs respectfully request that the Court alter or amend its judgment to allow the Plaintiffs to pursue their negligent misrepresentation cause of action.

**CONCLUSION**

Based on the arguments presented above, the Plaintiffs respectfully request that the Court alter or amend its judgment on the pleadings in favor of the Defendant.

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June 19, 2012

FILED  
2012 JUN 20 AM 11:28  
SCOTT A. SUGGS  
CLERK OF COURT/RO. D.  
DARLINGTON COUNTY, S.C.



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July 11, 2012

The Honorable Scott B. Suggs  
Darlington County Clerk Of Court  
1 Public Square, Room B-4  
Darlington, South Carolina 29532-3213

Re: Amanda and Michael Griggs v. Nationstar Mortgage, LLC  
Darlington County Case No. 2011-CP-16-0135  
GWB File No. 7063-1

Dear Mr. Suggs:

Please find enclosed for filing the original and a copy of defendant Nationstar Mortgage, LLC's Response to Plaintiffs' Motion to Alter or Amend Judgment in the above-referenced matter. Please file the original and return the clocked copy to me in the enclosed envelope.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you have any questions or concerns.

GALLIVAN, WHITE & BOYD, P.A.

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 AMANDA and MICHAEL GRIGGS, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 NATIONSTAR MORTGAGE, LLC, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 FOR THE  
 FOURTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2011-CP-16-135

**NATIONSTAR MORTGAGE, LLC'S  
 RESPONSE TO PLAINTIFFS' MOTION  
 TO ALTER OR AMEND JUDGMENT**

**RESPONSE TO PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT**

Defendant Nationstar Mortgage, LLC ("Nationstar") responds to Amanda and Michael Griggs' (collectively "Plaintiffs") Motion to Alter or Amend Judgment showing the Court as follows:

**I. INTRODUCTION**

On February 1, 2012, Nationstar filed a South Carolina Rule of Civil Procedure 12(c) Motion for Judgment on the Pleadings and Brief in Support thereof seeking to dismiss all counts of Plaintiff's Complaint. Plaintiffs filed a response brief on May 2, 2012. After full briefing, the Court heard oral argument from the Parties on May 29, 2012. At oral argument, Plaintiffs conceded that Counts Two, Three and Four of their Complaint were due to be dismissed. After reviewing the briefs and hearing oral argument, the Court dismissed the remainder of Plaintiff's claims on June 7, 2012 by written order.

Plaintiffs now request that the Court "alter or amend" its June 7, 2012 Order to reinstate their claims for defamation (Count One), tortious interference with prospective contract (Count Five), alleged violations of the South Carolina Unfair Trade Practices Act (Count Six), and negligent misrepresentation (Count Seven), but fail to present articulable reasons why the Court

should do so. Plaintiffs make no new arguments in support of their position that they did not advance either in their briefing or at oral argument and that the Court has not already rejected. As set forth in Nationstar's prior briefing, at oral argument and herein, the claims Plaintiffs seek to reinstate fail to state a claim for which relief can be granted and were properly dismissed. The Court should accordingly deny Plaintiffs' motion to alter or amend its judgment.

## II. RELEVANT FACTUAL BACKGROUND

Defendant Nationstar holds a mortgage and security deed on Plaintiffs' property. See Plaintiffs' Complaint, ¶ 4. On or about April 15, 2010, Plaintiffs suffered a residential fire. Id. On or about April 16, 2010, Plaintiffs requested a payoff amount from Nationstar for insurance purposes. Id. ¶ 5. Nationstar provided the payoff amount as of that date, \$182,604.80. Id. On April 23, 2010, Plaintiffs received a check from their insurance company made out to Plaintiffs, Nationstar, and the holder of another mortgage on the property, non-party Ditech. Id. ¶ 6. Nationstar requested a check payable solely to Nationstar, and Plaintiffs requested the same from their insurance company. Id. Plaintiffs received the payoff check to Nationstar from their insurance company on April 29, 2010, and contacted Nationstar. Id. ¶ 7. Nationstar agreed to send a payoff statement to Plaintiffs, and requested Plaintiffs return that payoff statement with the payoff check. Id. On May 4, 2010, Plaintiffs received a payoff statement for another loan, apparently mistakenly sent to Plaintiffs by Nationstar. Id. ¶ 8. Nationstar immediately faxed Plaintiffs the correct payoff amount upon learning of the mistake. Id. ¶ 9. The new payoff amount, calculated a month after the initial calculation, was \$184,535.50. Id. Nationstar requested that Plaintiffs send the payoff check for \$182,604.80 to Nationstar, which Plaintiffs did on May 12, 2010. Id.

On May 17, 2010, Plaintiffs attempted to secure financing for the construction of their new home. Id. ¶ 10. During their refinancing attempts, Plaintiffs reviewed their credit report and learned that several late payments were reported by Nationstar to credit bureaus. Id. Plaintiffs contend that these reports were incorrect, and informed Nationstar of their belief. Id. This issue was corrected by Nationstar by June 10, 2010. Id. ¶ 15.

On May 28, 2010, apparently unable to secure financing, Plaintiffs contacted Nationstar and Nationstar suggested Plaintiffs could use their insurance payment to finance their new construction instead of using it to payoff their loan to Nationstar. Id. ¶ 12. Plaintiffs agreed with Nationstar's suggestion, and contacted the appropriate department within Nationstar. Id. At Plaintiffs' request, Nationstar sent Plaintiffs a packet of documents to be completed before Nationstar could release the payoff funds back to Plaintiffs. Id. ¶ 13. Plaintiffs allegedly asked Nationstar at that time if it "was okay" to have their builder start work on their new home, even though Plaintiffs had no financing or funds to pay the builder. Id. Nationstar allegedly told the Plaintiffs they could have the builder start, but would have to pay the builder any difference between the insurance payoff check proceeds and the final cost of their new home construction. Id. On May 31, 2010, Nationstar informed Plaintiffs that their loan had already been processed for payoff and returning the insurance payoff funds was no longer available. Id.

Plaintiffs contend that they applied for a loan with Bank of America that they were denied on July 16, 2010 because of late payment credit history. Id. at ¶ 18. As it did previously, Nationstar investigated and corrected the issue. Id. at ¶¶ 19-23. Plaintiffs decided on July 28, 2010 to refinance their home with Nationstar, which they did on September 8, 2010, and to use the insurance proceeds to rebuild their home. Id. ¶¶ 20 and 27. After deciding to refinance with Nationstar, Plaintiffs allegedly investigated refinancing their home with an unidentified bank

which was denied because of late credit history. *Id.* at ¶ 24. Plaintiffs reported this to Nationstar and it was corrected. *Id.* at ¶¶ 24, 26.

### III. ARGUMENT AND CITATION TO AUTHORITY

The Court correctly dismissed Plaintiffs' Complaint for failing to state a claim for which relief could be granted pursuant to South Carolina Rule of Civil Procedure 12(c). As previously found by the Court, Plaintiffs' defamation and negligent misrepresentation claims are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. 1681, et. seq., and Plaintiffs' Complaint fails to set forth allegations to support their remaining claims under South Carolina law. Plaintiffs' motion to alter or amend the judgment simply rehashes Plaintiffs' prior discredited arguments and it should be denied.

#### A. Plaintiffs' Defamation Claim is Still Preempted by Federal Law.

Plaintiffs make no new argument in support of their defamation claim in their motion to amend the judgment. State defamation claims are preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). This is black letter law. The applicable provision follows:

No consumer may bring an action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency... except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h(e). As the Court has already found, Beattie v. Nationscredit Financial Servs. Corp., 69 Fed. Appx. 585 (4th Cir. 2003) and Ross v. FDIC, 625 F.2d 808, 815 (4<sup>th</sup> Cir. 2010) are controlling and involve facts very similar to those before the Court. Both of these cases state that under the facts pled, Plaintiffs' defamation claim is preempted because Plaintiff has failed to allege any facts sufficient to show that Nationstar acted with malice or willful intent to injure Plaintiffs.

Plaintiffs point to no error of the Court on this ground and point to no allegations in their Complaint sufficient to support an inference of malice or intent to injure under the law. Rather, Plaintiffs' entire argument to alter the Court's judgment with respect to their defamation claim is based on one line in the Ross opinion.

Finding the Ross plaintiff's North Carolina state-law defamation claims to be preempted, the Ross Court noted that the record was "replete with evidence that WaMu made a regrettable but honest mistake [regarding a report to credit agencies] and took action to remedy this error once Ross brought it to WaMu's attention." Id. at 815. Plaintiffs contend this language distinguishes the present case from Ross. Plaintiffs are wrong. Based on Plaintiffs' own pleadings, Nationstar, like the defendant in Ross, took action to remedy any mistakes as soon as they were brought to Nationstar's attention. See Complaint, ¶¶ 15 & 16; 18 & 20; 22 & 23; 24 & 26. Accordingly, Plaintiffs fail to plead malice, or any facts suggesting malice, and their defamation claim are therefore preempted.

Plaintiffs do not allege that Nationstar acted with malice or willful intent to injure, and their claim therefore fails as a matter of law. Although Plaintiffs argue in their briefing that they somehow constructively plead malice, the text of the Complaint deeply undercuts these arguments. Plaintiffs' contend that Nationstar erroneously reported on their credit three times, that three times Plaintiffs complained to Nationstar, and that three times Nationstar changed the credit reporting – even when Plaintiffs were admittedly in arrears. See Complaint, ¶¶ 15 & 16; 18 & 20; 22 & 23; 24 & 26. This is precisely the type of "regrettable but honest mistake" followed by "action to remedy this error" that occurred in the Ross case. Plaintiffs simply have not pleaded malice, and their claim was correctly dismissed.

Tellingly, Plaintiffs again completely ignore Beattie v. Nationscredit Financial Servs. Corp., 69 Fed. Appx. 585 (4th Cir. 2003). In Beattie, the plaintiffs contended that Nationscredit erroneously reported their home was in foreclosure. Id. at 587. The plaintiffs also claimed to have “made repeated attempts, by telephone and in writing, to contact Nationscredit about the status of their account, but they did not receive a response.” Id. Here, Nationstar not only responded to Plaintiffs’ inquiries, it actually changed the relevant credit reports. If the actions of the Beattie defendant did not rise to the level of malice, the actions of Nationstar certainly do not constitute malice here.

The Beattie defendant’s actions did not rise to the level of malice because “the report was at least in [the defendant]’s view, accurate.” Id. at 590-591. The same is true here. Nowhere do Plaintiffs allege that Nationstar knowingly reported false information and this is fatal to their claim. In fact, at least with regard to one such reporting, Plaintiffs admit they missed two payments, and further admit that once these payments were made Nationstar changed the applicable credit report. See Complaint ¶¶ 25-26. According to Plaintiffs’ own pleadings, the credit reporting Nationstar made was accurate “at least in [Nationstar]’s view.” Id. Therefore, as in Beattie, Plaintiffs fail to plead malice, and their defamation claim is preempted.

**B. Plaintiffs Fail to Plead the Required Elements of Tortious Interference with Prospective Contract.**

Plaintiffs make no new arguments that save their tortious interference with prospective contract claim, they simply reiterate the ones the Court has already considered and rejected. To establish a cause of action for tortious interference with prospective contractual relations, a plaintiff must show: (a) intentional interference with prospective contractual relations; (b) for an improper purpose or by improper methods; and (c) resulting in injury. Crandall Corp. v. Navistar Int’l Transp. Corp., 395 S.E.2d 179 (1990). As discussed in Nationstar’s previous

briefing, Plaintiffs fail to plead *all three* requirements. Rather, Plaintiffs' Complaint is simply a legal claim without any supporting allegations.

As this Court properly found, the action Plaintiffs contend that Nationstar engaged in, improper credit reporting, is not a recognized "improper method" that will support a claim for intentional interference with prospective contract. See Beattie, 69 Fed. Appx. at 589 (noting that reporting delinquent accounts to credit bureaus – even erroneously – violates no common law, legislative enactments, or constitutional provisions under South Carolina or federal law). Plaintiffs do not address this point.

Rather, Plaintiffs attempt to contend that the credit reporting at issue is "defamation," "negligent misrepresentation," and "duress." This Court already correctly ruled that Plaintiffs have not stated a claim for "defamation" or "negligent misrepresentation." Accordingly, Plaintiffs reliance on these claims, without explaining how they relate to their tortious interference claim, is in error.

Further, Plaintiffs' Complaint does not plead the required elements of duress:

(1) the coerced party must show that he has been the victim of a wrongful or unlawful act or threat, (2) such act or threat must be one which deprives the victim of his unfettered will, (3) as a direct result the coerced party must be compelled to make a disproportionate exchange of values or give up something for nothing, (4) the payment or exchange must be made solely for the purposes of protecting the coerced party's business or property interests, and (5) the coerced party must have no adequate legal remedy.

Troutman v. Facetglas, Inc., 281 S.C. 598, 316 S.E.2d 424 (S.C. Ct. App. 1984). Plaintiffs have not pleaded that Nationstar threatened them in any way, or that Nationstar committed an unlawful act, because they cannot. At the end of the day, the Complaint *still* alleges improper credit reporting, and under South Carolina law improper credit reporting *still* cannot form the basis of an intentional interference with prospective contract claim. Beattie is squarely on point, and credit reporting – even erroneous credit reporting – is not an "improper method" as a matter

of South Carolina law. Plaintiffs' intentional interference with prospective contracts claim was correctly dismissed, and should so remain.

C. Plaintiffs Fail to Plead the Required Elements of a Claim Under the South Carolina Unfair Trade Practices Act.

Plaintiffs once again completely ignore the first element<sup>1</sup> they are required to plead to sustain an unfair trade practices claim under South Carolina law, namely that Nationstar engaged in an unlawful trade practice. Beattie once again provides the rule.

In Beattie, NationsCredit mistakenly sent the plaintiff's loan to its "internal foreclosure department," and consequently reported negatively on plaintiff's credit report. Id. at 587. Plaintiff brought claims under the South Carolina Unfair Trade Practices Act ("SCUTPA"), alleging that "NationsCredit engaged in unlawful trade practice by falsely reporting to credit bureaus that their mortgage was in foreclosure," and alleged that plaintiffs were denied credit based on this false reporting. Id. The Fourth Circuit noted that under South Carolina law a trade practice is "unfair when it is offensive to public policy or when it is immoral, unethical, or oppressive," and defined public policy as the policy "created by applicable common law determinations, legislative enactments or constitutional provisions." Id. at 588 (internal punctuation and citations omitted). The Fourth Circuit held that the negative credit reporting "cannot be seen as immoral, unethical or oppressive... [and] it is not wholly unreasonable for NationsCredit to believe... that reference of the defaulted loan to its internal foreclosure department had placed the account 'in foreclosure.'" Id. at 589.

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<sup>1</sup> "In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir. S.C. 1998) (citing S.C. Code Ann. § 39-5-140; Daisy Outdoor Advertising Co., Inc. v. Abbott, 322 S.C. 489, 473 S.E.2d 47, 49 (1996)).

Turning to whether NationsCredit's actions violated public policy, the Fourth Circuit specifically analyzed the provisions of the Fair Credit Reporting Act. *Id.* The Court identified one possible provision, 15 U.S.C. § 1681s-2(a)(1)(A). That provision states that a supplier of information to a credit bureau "shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate." The Fourth Circuit held, however, that § 1681s-2(a)(1)(A) may be enforced only by federal and state agencies and officials, and does not provide a private right of action. *Id.* The Beattie plaintiff therefore failed to state a claim under SCUTPA. *Id.* Because negative credit reporting does not constitute an "unlawful trade practice" under South Carolina law, the claims asserted in Beattie, and the claims asserted in this case, fail as a matter of law. *Id.* For the second time, Plaintiffs do not attempt to address this issue because they cannot. As such, Plaintiffs' motion should be denied.

**D. Plaintiffs Fail to State a Claim for Negligent Misrepresentation.**

Plaintiffs negligent misrepresentation claim is preempted<sup>2</sup> by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") for the same reasons their defamation claim is preempted. Apparently conceding this, Plaintiffs now appear to contend that the basis of their negligent misrepresentation claim includes, "Nationstar's false statements to the Plaintiffs which led the Plaintiffs begin construction of their new home and ultimately refinance with Nationstar

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<sup>2</sup> 15 U.S.C. § 1681h(e) provides:

No consumer may bring an action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency... except as to false information furnished with malice or willful intent to injure such consumer.

after Nationstar's actions and/or failures to act closed other options to the Plaintiffs." See Brief, p. 15. This argument is specious.

The only "other options" Plaintiffs allege were closed to them in the Complaint are Plaintiffs' alleged efforts to refinance their debt with banks other than Nationstar. Plaintiffs claim that two other banks turned down their loan applications "because of the late payment history being reported by Defendant Nationstar," and "because Defendant Nationstar was falsely reporting late payments against the Plaintiffs credit history." See Complaint ¶¶ 18 & 24. These claims by their very terms arise from credit reporting and are thus preempted.

Plaintiffs' last-ditch effort to save their complaint is to claim that when Nationstar informed Plaintiffs that they had the option of using their insurance payment to finance their new construction instead of paying off their debt to Nationstar, this somehow rose to actionable negligent misrepresentation. This argument makes little sense. Plaintiffs do not allege that Nationstar did not send their insurance payment back to them to pay their builder, or that they were unable to pay their builder. The Complaint acknowledges that Plaintiffs did receive insurance funds to pay their builder, and that they did in fact pay him from those funds. See Complaint at ¶¶ 20, 27. Having used those funds to pay the builder, Plaintiff refinanced their debt with Nationstar, as alleged in the Complaint. See Complaint at ¶ 27. Plaintiffs could *and in fact did* use their insurance payment to pay for their new construction, so Nationstar's representation was true. Without a false representation, Plaintiffs' claim for negligent misrepresentation fails. Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (S.C. Ct. App. 2001).

Even if Plaintiffs had pleaded an actionable misrepresentation, which they did not, Plaintiffs' claim also fails because any duty Nationstar owed Plaintiffs arose from the agreement

between the parties. When the duty between parties stems solely from a contractual relationship, as here, a negligent misrepresentation claim must fail:

As a matter of law, if the duty owed arises merely from the agreement of the parties, breach of the duty does not create a cause of action for negligent conduct. Where the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.

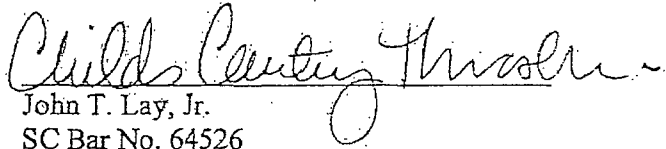
Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 376, 404 S.E. 2d 912, 917-18 (1991) (dismissing negligent misrepresentation claim where duties regarding representations arose contractually). Plaintiffs did not plead that Nationstar owes Plaintiffs a duty arising from any source other than the contract between the parties. Beattie v. Nationscredit Financial Servs. Corp., 69 Fed. Appx. 585 (4th Cir. 2003) (upholding grant of summary judgment as to negligence claim based on improper credit reporting because Plaintiffs failed to identify a duty owed by their bank other than one arising from the agreement between the parties). Plaintiffs' negligent misrepresentation claim, therefore, fails for this same reason.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Alter or Amend Judgment should be denied.

[Signature on Following Page]

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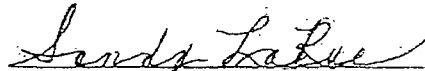
STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON  
AMANDA AND MICHAEL GRIGGS,  
Plaintiffs,  
v.  
NATIONSTAR MORTGAGE, LLC,  
Defendant.

IN THE COURT OF COMMON PLEAS  
FOR THE  
FOURTH JUDICIAL CIRCUIT  
Civil Action Number: 2011-CP-16-0135

**CERTIFICATE OF SERVICE**

The undersigned employee of Gallivan, White & Boyd, P.A., does hereby certify that I have served all counsel in this action with a copy of the pleading listed below by depositing same in the United States Mail, first class postage prepaid, to the address indicated below.

<u>PLEADING:</u>	Nationstar Mortgage, LLC's Response to Plaintiffs' Motion to Alter or Amend Judgment
<u>COUNSEL SERVED:</u>	Patrick J. McLaughlin Wukela Law Firm 403 Second Loop Road P.O. Box 13057 Florence, SC 29504-3057

  
Sandy LaRue  
Paralegal

Columbia, South Carolina  
July 11, 2012

STATE OF SOUTH CAROLINA )  
 ) COURT OF COMMON PLEAS  
COUNTY OF DARLINGTON ) 2011-CP-16-0135

AMANDA AND MICHAEL GRIGGS )  
 ) PLAINTIFF )  
 vs. ) TRANSCRIPT OF RECORD )  
 )  
NATIONSTAR MORTGAGE LLC )  
 ) DEFENDANT )

May 29, 2011  
Darlington, South Carolina

B E F O R E:

THE HONORABLE BROOK P. GOLDSMITH, JUDGE.

A P P E A R A N C E S:

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HATTIE O. GORDON  
Circuit Court Reporter

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I N D E X

Colloquy . . . . . 4  
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EXHIBITS

NO EXHIBITS WERE MARKED OR ADMITTED INTO THE RECORD

Colloquy

COLLOQUY

1  
2 MR. ANULEWICZ: Yes, Judge. My name is Chris  
3 Anulewicz, and I represent Nationwide Mortgage along with  
4 Ms. Childs Trasher. And currently before the Court is  
5 Defendant's, Nationwide Mortgage, motion for judgment on  
6 the pleadings.

7 THE COURT: Okay. Go ahead.

8 MR. ANULEWICZ: There was also a motion to compel.  
9 We got an order by consent order where we think we have  
10 resolved discovery issues, and both of us have signed that  
11 and are ready to present to Your Honor.

12 MR. McLAUGHLIN: It's a consent protective order with  
13 regards to production of some documents.

14 THE COURT: Okay. Motion on the pleadings.

15 MR. ANULEWICZ: Yes, sir, Judge. Again, my name is  
16 Chris Anulewicz, and I represent the defendant in this  
17 case, Nationwide Mortgage. We're here today on the  
18 defendant's motion for judgment on the pleadings. I have  
19 spoken with Mr. McLaughlin before Court this morning and  
20 there are three things that we can agree on.

21 The first is that Counts Two, Three and Four, those  
22 are the three things, are due to be dismissed. So that --  
23 we're not going to argue those, but those are due to be  
24 dismissed. Is that right, Mr. McLaughlin?

25 MR. McLAUGHLIN: Right. That would -- Patrick

Colloquy

1 McLaughlin for the plaintiff, Your Honor. That would be  
2 the violation of the Fair Credit Reporting Acts, the  
3 breach of contract, and the breach of contract accompanied  
4 by fraudulent act. And so I have consented those being  
5 dismissed.

6 THE COURT: Okay.

7 MR. ANULEWICZ: And, Judge, we are here today -- in  
8 April of 2010 the plaintiff in this case, Mr. Michael  
9 Griggs, his house burned down, and it was a total loss.  
10 At the time that his house burned down there was a note  
11 and a mortgage that was being carried by my client,  
12 Nationstar Mortgage. After the house burned down in April  
13 Mr. Griggs received a check from his insurance company and  
14 the check was for about \$182,000.

15 And at that point in time the plaintiff in didn't no  
16 whether or not that check was going to be used to pay off  
17 the existing mortgage or whether it was going to be used  
18 by Mr. Griggs to construct a new home and he would just  
19 continue under the existing mortgage with Nationstar.  
20 Those are the two options.

21 At the very beginning I think there was an  
22 understanding or the way it was going was that it was  
23 going to pay off the Nationstar mortgage. It ended up  
24 that the plaintiff made the election on July the 28th that  
25 he was going to use those proceeds to pay his contractor

## Colloquy

1 and rebuild the house. There was a couple -- there was a  
2 back and forth over exactly what the pay off amount was,  
3 but those were again the two options.

4 On June the 15th, between the time of the fire, April  
5 the 10th, and the time that the plaintiff made the  
6 election on July 28th; that is Paragraph 20 of the  
7 complaint, a couple things occurred that are in the  
8 complaint.

9 The first is that on or about June 15th the plaintiff  
10 checked his credit report, and when he checked his credit  
11 report he contends that there was an erroneous report by  
12 my client saying that he was late on a payment. He called  
13 Nationstar, according to the complaint, and Nationstar  
14 fixed it. And that was taken off his credit report. So  
15 that went away.

16 The next thing that happened, according to the  
17 complaint, is that on or around July the 16th the  
18 plaintiff contends that he went to Bank of America and  
19 tried to get a refinancing or other loan. And then at  
20 that point in time he was turned down for that refinancing  
21 because there was a negative credit report put there by  
22 Nationstar. He called Nationstar. Nationstar said we  
23 will work on it. We will figure it out.

24 On July the 28th, as I've said before, the plaintiff  
25 and Nationstar came to an agreement, according to

1 Paragraph 20 of the complaint. And by the way, I have  
2 copies of the complaint and both of our motions, if Your  
3 Honor would like. The plaintiff said, "No. We are going  
4 to pay off the contractor, and we'll continue under the  
5 existing mortgage with Nationstar."

6 The next event in the complaint is that in August the  
7 27th the plaintiff says, apparently, he was still trying  
8 to get another refinancing, and there was still a ding on  
9 his credit report. He called Nationstar. It says that  
10 some unidentified bank turned him down.

11 On September of 2010 the plaintiff prenegotiated and  
12 refinanced his mortgage with my client, Nationstar. So  
13 there is a refinancing at that time. The plaintiff's  
14 entire complaint -- there were seven counts. Now there  
15 are four, is based entirely upon the alleged negative  
16 credit reporting that resulted in plaintiff's failure to  
17 get Bank of America loans in July and the unidentified  
18 loan in August of 2010.

19 THE COURT: Okay.

20 MR. ANULEWICZ: We believe, Judge, that all the  
21 plaintiff's claims are due to be dismissed. The first  
22 claim in Count One of the complaint is a defamation claim.  
23 Now, Judge, defamation claims are expressly preempted by  
24 the Fair Credit Reporting Act, and that's at 16 U.S.C.  
25 1681(H), Subsection A. Congress passed the Fair Credit

## Colloquy

1 Reporting Act and said that when you've got an injury that  
2 involves negligence, defamation or invasion of privacy  
3 that those claims are explicitly preempted by federal law.  
4 And the Federal Fair Credit Reporting Act allows other  
5 remedies when those types of events occur.

6 What it specifically says is that, "No consumer may  
7 bring an action -- no consumer may bring an action or  
8 proceeding in the nature of defamation, invasion or  
9 privacy or negligence with regards to the reporting of  
10 information against any person who furnishes information  
11 to a consumer reporting agency, that would be my client,  
12 except as to false information which is furnished with  
13 malice or full intent to injure."

14 So in order to get around that preemption bar the  
15 plaintiff has to plead and show a malice or willful intent  
16 to injury. Those, as the Court's have held in Ross v.  
17 F.D.I.C, and I've got a copy of that case for Your Honor,  
18 is 625 Federal Second, 808. The case is exactly on point.  
19 It says that it has to be truly malicious in order to for  
20 over that bar. It is a very high bar.

21 Under South Carolina law malice has -- will only be  
22 established if the defendant acted in a reckless, wantonly  
23 indifferent way to harm plaintiff's rights. And there are  
24 two cases, Judge, that are square on point. The first  
25 case as I mentioned is a case called Ross v. F.D.I.C.

## Colloquy

1 That case is not cited in our brief, and I do have a copy  
2 for the Court, if I can approach.

3 THE COURT: Sure.

4 MR. ANULEWICZ: Thank you. And I'm also going to  
5 give the Court a copy of the other case upon which we are  
6 relying which we also say is exactly on point with this  
7 case. It's the Batey case. Thank you. In both Batey and  
8 Ross the plaintiff contended that a reporting to a  
9 federal -- to a credit reporting agency -- Batey, he was  
10 reported one time and had an inability to get a long.  
11 That's exactly what happened in this case. But failure,  
12 that false reporting did not rise to the level of malice  
13 or willful intent to injure.

14 In the Ross case the problem -- this is another  
15 Fourth Circuit case, the Ross case said in that case that  
16 the plaintiff had a problem that didn't get fixed right  
17 away. Here, you will remember on June 15th the plaintiff  
18 complained. It got fixed, and apparently there was  
19 another instance that didn't get fixed right away.

20 The Fourth Circuit in that case, addressing the  
21 preemption argument said that even if we were to indulge  
22 Ross' unsupported inference, and this is at Page 816, Ross  
23 may -- unsupported inference failure to fix it right away  
24 or multiple failures is malice. Ross is still not create  
25 a genuine issue of fact or malice. All that would be

## Colloquy

1 shown is that the bank acted negligently with report to  
2 reporting activities. Banks make mistakes which include  
3 errors in the records.

4 And while we would hope that these errors would be  
5 held to a minimum and corrected the first time that they  
6 are brought to the bank's attention, the failure to do so  
7 does not necessarily arise to malice. At worst the bank  
8 needed a couple of tries to fully remedy its mistake.  
9 This may be taken as evidence of a weakness or  
10 unreasonableness of procedure, but no malice can be  
11 derived from it.

12 And it quotes a couple of other cases that talk about  
13 when there is no malice. Judge, we respectfully believe  
14 both Batey and in Ross, they're talking about this  
15 preemption. Batey arising from a South Carolina case.  
16 Ross from North Carolina. Both definitions of malice are  
17 the same in both. They are exactly on point, and they say  
18 that the federal law applies; that you cannot assert a  
19 defamation claim. I think the plaintiff recognizes this,  
20 and in his brief tries to say, 'well, you can infer  
21 malice, Judge. You can infer malice because I have pled  
22 malice per se. But the problem is he hasn't.

23 Malice per se in South Carolina is five things and  
24 five things only. It is the commission of a crime of  
25 moral turpitude, a contraction of a loathsome disease,

1 adultery, unchastity, or the unfitness in one's business  
2 or profession. That's the Goodwin v. Kennedy case, 347 SC  
3 30. None of those things exist here. This is not a  
4 malice -- this is not a defamation per se case. The  
5 preemption bar applies and the defamation claim should be  
6 dismissed.

7 I'm going to next address, Judge, Count Six of the  
8 complaint. That's because that's the other count that he  
9 addresses in his -- plaintiff addresses in their brief,  
10 and that is the South Carolina Unfair Deceptive Trade  
11 Practices Act. Again, Judge, we think that the Batey case  
12 controls. In the Batey case and in this case the South  
13 Carolina Unfair and Deceptive Trade Practices Act is going  
14 to apply only if you have three things:

15 The first thing is that the defendant engaged in an  
16 unlawful trade practice. That's Number One.

17 Number Two is that the plaintiff suffered actual  
18 damage with regard to this trade practice, and.

19 Number Three, is that the unlawful trade practices  
20 engaged in had an adverse affect on the public interest.

21 Both Batey and we today addressed Prongs One and  
22 Three. Is reporting to a credit reporting agency, even if  
23 erroneously, is that an unfair trade practice. Number  
24 One:

25 And, Number Two, is there an affect on the public as

## Colloquy

1 a result of this. Batey examined this specifically under  
2 South Carolina law, and it said, "Reporting to a credit  
3 reporting agency is not immoral, unethical or oppressive  
4 under South Carolina law," and that's what it has to be in  
5 order to be an unfair trade practice.

6 Based upon its extensive review of South Carolina law  
7 the Court -- the Fourth Circuit said that reporting to a  
8 credit -- trade, even if erroneous; that reporting to a  
9 credit agency does not fall within that category and is  
10 not in and of itself an unfair trade practice. Because it  
11 is not an unfair trade practice, since that is what is  
12 being alleged here, they cannot have an unfair trade  
13 practices claim.

14 The other thing that the Batey case had that we found  
15 here is that there is no harm to the public at large. In  
16 order for there to be harm to the public at large  
17 plaintiff would have to present evidence or show that not  
18 just he was harmed but everybody was harmed. And nothing  
19 in the complaint, nowhere, does it say that anybody other  
20 than plaintiff had a problem here.

21 Now, the plaintiff says it wasn't corrected right  
22 away, it happened on a couple of different occasions to  
23 me, but under the cases, Judge, that simply is not enough,  
24 and based on those two things it's not an unfair trade  
25 practice under South Carolina law. There is no public

## Colloquy

1 harm. The Batey case is on point, and the -- that claim  
2 should be dismissed.

3 And, again, just been reference the plaintiff in his  
4 complaint does not address the first argument which is  
5 that it's not an unfair trade practice. They focus only  
6 on the second which is the public harm.

7 The next claim, Judge, should be dismissed is Count  
8 Five. Count Five is the tortious interference with the  
9 contract. In order to prove that plaintiff has to show  
10 three things:

11 One is an intentional interference with respect to  
12 contractual relations for an improper purpose by improper  
13 methods in a resulting injury. There are no allegations  
14 anywhere in the complaint that support that claim.

15 With regard to the first instance, the intentional  
16 interference with respective contracts, there is no intent  
17 that is alleged factually anywhere in the complaint to say  
18 that anyone at Nationstar and who, what, when, where and  
19 why, that interfered with a specific contract that the  
20 plaintiff is trying to get. That is not pled in the  
21 complaint.

22 The second thing that is not pled is that the alleged  
23 interference was done by improper means, and as we just  
24 said in the Batey case the Court specifically held that  
25 reporting to a credit reporting agent, even erroneously,

## Colloquy

1 is not improper means. That would not supply the improper  
2 means by which to have a tortious interference claim. I  
3 would also cite the Court to United Education  
4 Distributors, 564 SE 2d 324 for that proposition. And  
5 because they cannot show an intentional interference and  
6 because they cannot show improper means that count is also  
7 due to be dismissed.

8 The last count the plaintiff has, and again, we've  
9 conceded Counts Two, Three and Four. The last count is  
10 Count Seven which is negligent misrepresentation. The  
11 negligent misrepresentation claim is due to be dismissed,  
12 first of all, for the same reason that the defamation  
13 counts are due to be dismissed because defamation and  
14 negligence are explicitly barred and preempted by the Fair  
15 Credit Reporting Act and by the cases that I've already  
16 cited, Your Honor. I won't go over them again. And by  
17 the express language of that statute.

18 The other reason that the negligent misrepresentation  
19 claim should be dismissed is that in order to prove it the  
20 plaintiff's got to show a false representation; that the  
21 defendant, my client, had a pecuniary interest in making a  
22 false claim; that he owed a duty of care of communications  
23 to the plaintiff; that it breached it's duty by failing to  
24 exercise the care; that plaintiff relied on those  
25 statements, and that plaintiff suffered pecuniary interest

Colloquy

1 as a result. The plaintiff hasn't pled those things. He  
2 hasn't pled reliance. He hasn't pled that my client had  
3 anything to gain from all of this. He didn't say he  
4 justifiably was relied. He hadn't said all of the other  
5 things that he needs to in order to make that claim.

6 To the extent that he would come back and say, "Well,  
7 you have a duty because you are a contractual partner with  
8 me," he doesn't plead duty. But to the extent that he  
9 comes back and says, "You have a contractual obligation,"  
10 then his claim is barred as well because if the duty  
11 arises from some kind of contract then the Courts are  
12 clear. Either you have a contract claim or you have a  
13 negligent misrepresentation claim. And so for all those  
14 three reasons the plaintiff's negligent misrepresentation  
15 claim is also due to be dismiss.

16 And, Judge, the final thing that we talked about in  
17 our brief is -- and I know Nationstar is waiving their  
18 argument. We will rely on our brief for that, but  
19 essentially that argument is that after knowing all these  
20 facts, after having been aware of them he renegotiated his  
21 contract with us. We entered into a new contract with  
22 him, and when he did that knowing of all these things it  
23 was a waiver of all the additional claims. And we will  
24 just rely on our brief for that. Thank you, Judge.

25 THE COURT: Let's me ask you a quick question. Do I

Colloquy

1 have a copy of your brief?

2 MR. ANULEWICZ: Let me give you a copy, sir. I've  
3 got a copy of our brief, plaintiff's brief.

4 MR. McLAUGHLIN: My response.

5 MR. ANULEWICZ: Response. I'm sorry.

6 MR. McLAUGHLIN: My response was filed, Your Honor,  
7 so there is one in the file, but I do have an extra copy  
8 that I can pass up.

9 MR. ANULEWICZ: Here is this complaint, our motion  
10 and the plaintiff's reply.

11 THE COURT: I see the plaintiff's responses to  
12 defendant's motion for judgment on the pleadings.

13 MR. ANULEWICZ: Yes, sir.

14 THE COURT: Oh, I see. The motion is a brief.

15 MR. ANULEWICZ: Yes, sir.

16 THE COURT: I got you.

17 MR. ANULEWICZ: Yes, sir. Thank you.

18 THE COURT: Be glad to hear from you.

19 MR. McLAUGHLIN: Thank you. May it please the Court.  
20 Your Honor, the one thing I will take a little bit of  
21 issue with is I think it was a little bit more when my  
22 colleague got up and explained kind of the fact situation.  
23 It was a little bit more than he had a fire and then he  
24 decided to make a payoff of these folks. There is an  
25 extensive history, and it's well documented in the

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1 complaint as well as some of the documents in plaintiff's  
2 responses to defendant's motion for summary judgment about  
3 how long and all the stuff my clients went through.

4 Judge, the fire took place on April 15th 2010, and I  
5 don't think there is any contention that my clients  
6 promptly notified their insurance company as well as  
7 Nationstar that this fire had happened, and they tried to  
8 get their payoff amount. In the complaint there are  
9 several different instances of Nationstar giving my  
10 clients the wrong payoff amount. Paragraph Five, they  
11 were told that the payoff amount was \$182,604.80.

12 They get their fire loss check. They wind up talking  
13 Nationstar. Nationstar wants their check cut immediately  
14 to them. So my clients have to go through that hoop, get  
15 another check cut because there was another mortgage  
16 holder on it. So that's one step they had to go through.

17 By April 29th they get this divided insurance check.  
18 On May the 4th 2010 they receive a payoff statement from  
19 Nationstar, and this payoff statement is made out to  
20 somebody named Jose Ortiz, and -- who appeared to live in  
21 Miami, Florida. So they call Nationstar, and they say,  
22 "Hey, you sent us the wrong payoff statement." Nationstar  
23 then faxes them another payoff statement for the loan. Of  
24 course, this one is now for a different amount.

25 Now keep in mind, Your Honor, they've notified Nation

Colloquy

1 star that they had a fire. They've been told that their  
2 loan has been put into fire loss. In other words nothing  
3 is supposed to be happening with it while they try to get  
4 their payoff amount. The new payoff statement they get,  
5 in Paragraph Nine, is \$184,535. After they contact  
6 Nationstar about this discrepancy now in the amount they  
7 were told to go ahead and forward the insurance check that  
8 had been cut in the amount of \$182,000 and some odd  
9 dollars, go ahead and forward that to Nationstar and  
10 Nationstar would try to fix the discrepancy.

11 Nationstar received that payment on May 12th 2010.  
12 On May 17th 2010 my folks go and start trying to get a new  
13 loan. So they intended to pay off their loan with  
14 Nationstar and then go out and get a new loan to start  
15 constructing their -- start construction of their new  
16 home. What happened was as part of trying to secure  
17 financing they were told that a credit report was -- they  
18 wound up having a credit record run on them. And that  
19 showed that they had late payments with Defendant  
20 Nationstar, and that's on Page 10 in the complaint, Your  
21 Honor.

22 In that paragraph we specifically plead that that  
23 information was false; that they had not been late in  
24 payments, and that this false negative credit reporting is  
25 going to hinder by client's ability to secure low interest

Colloquy

1 financing for their new home. they immediately contacted  
2 Nationstar and demanded that that false credit reporting  
3 be removed. That's one instance right there, Judge, and  
4 that was on May 17th that my folks found out about it.

5 On May 26th 2010, this is after they have already  
6 forwarded their payoff amount to Nationstar, they get  
7 another payoff amount from Nationstar and this time it's  
8 in the amount of \$185,000 -- \$185,310.48.

9 On May 28th 2010, so two days after, they get this  
10 now third payoff information from Nationstar they haven't  
11 heard anything about this first instance of false credit  
12 reporting so they contact Nationstar and they tell them,  
13 'listen, this is keeping us from being able to get new  
14 financing'. Nationstar suggests it this time. So we've  
15 got two -- we've got the errors of giving wrong payoff  
16 amounts and the errors of reporting them falsely, okay.

17 So at this time Nationstar suggests that instead of  
18 using the money to pay off the loan why don't you guys  
19 just refinance it through us. So my folks are intending  
20 to get a loan from somebody else. Nationstar has now made  
21 two errors, and now Nationstar is saying, "Instead of  
22 taking your business somewhere else why don't you guys  
23 just stay with us." And that's in Paragraph 12 of the  
24 complaint.

25 At the time, Your Honor, my folks had already had

1 somebody lined up to build it, and so they're getting  
2 anxious. It sound like a good idea to them, and so they  
3 accept that offer from Nationstar. This is Paragraph 13  
4 of the complaint. And we specifically plead in there that  
5 we had a builder, they were waiting for the builder to  
6 start. They talked to Defendant Nationstar about this new  
7 solution that Nationstar had proposes and Nationstar said,  
8 "We'll send you a packet. You guys just fill it out.  
9 Within 48 hours of receiving it we will be able to send  
10 out drafts." That, once again, Paragraph 13.

11 The plaintiff specifically asked if it was okay to  
12 give the builder the go ahead for construction. Defendant  
13 Nationstar instructed the plaintiffs that it was okay to  
14 have the building start, but that anything over the amount  
15 of the insurance settlement would have to be covered by  
16 the plaintiffs. Based on Defendant Nationstar's  
17 assurances the plaintiffs paid the difference between the  
18 insurance settlement amount and the contracting on the new  
19 home in order to get the construction started.

20 So then we move on to May 31st 2010 And the  
21 plaintiffs contacted Nationstar because they hadn't heard  
22 anything about their checks. They went ahead and accepted  
23 the representations of Nationstar to go ahead and start  
24 this construction. They haven't gotten any checks. They  
25 filled out their packets and sent it in, and they haven't

Colloquy

1 seen anything. So Paragraph 14 we specifically plead that  
2 they contacted Nationstar again and are asking what's  
3 going on with the checks.

4 Well, this time Nationstar tells them, "Well, you're  
5 not going to be receiving any checks. Your loan is in  
6 payoff." So we have another error at this time which is  
7 again harming my clients. On June 10th 2010 the  
8 plaintiffs receive correspondence from Defendant  
9 Nationstar informing them that the false credit reporting  
10 had been corrected. So that's the first instance of false  
11 credit reporting. Okay, so now they're finally being told  
12 we've got that fixed.

13 So it's our contention that they admit that there was  
14 false credit reporting that one time and that they went in  
15 and fixed it. And that is Paragraph 15. On June 15th  
16 2010, this is when my clients first ran a credit report to  
17 check and make sure it was fixed, and they saw that it had  
18 been corrected. And having been told by Defendant  
19 Nationstar that there was no money on the way my  
20 clients -- you've got to remember they've been told now  
21 that you guys aren't going to be getting any checks. Your  
22 loan is in payoff.

23 My guys have already told the contractor to start  
24 construction on their house so they're worried what's  
25 going on now that the false credit reporting has been

Colloquy

1 corrected they basically say, to heck with Nationstar.  
2 We'll just go back out and try to get us another company  
3 to finance us. And that's what they do, Judge. On  
4 Paragraph 17 on July 9th 2010 plaintiffs were notified  
5 that they had been approved by Bank of America for a V.A.  
6 home loan with an interest rate of 4.9 percent. So they  
7 put all that behind them. They went out and got  
8 themselves a loan they got at 4.9 percent.

9           Unfortunately right after, July 16th 2010, and pled  
10 in Paragraph 18, Bank of America contacts the plaintiffs  
11 and tells them that their loan is being turned down  
12 because of late payment history by Defendant Nationstar.  
13 We now have what we contend is a separate second instance  
14 of false credit reporting because before they went to Bank  
15 of America and even go through all this they went and  
16 checked, they ran their credit report and they saw where  
17 it had been fixed. It wasn't showing any late payments.

18           So, now, July 16th 2010, it would appear that that's  
19 not the case. On July 19th 2010 my clients who works for  
20 the school district over here was so upset that he had  
21 gone in and talked to his boss about taking a week off to  
22 try to get -- in other words I've got to take time off to  
23 try to straighten this all out. And his boss over there  
24 at the school district, once he explained to him, said,  
25 "well, listen, let's me and you see if we can figure this

1 out." They got on the phone. They contacted Nationstar  
2 out in Houston. Wound up talking to someone in the  
3 corporate offices up there. Eventually got transferred to  
4 someone by the name of Elliott and complained to Elliott  
5 about this. And this is in Paragraph 19. Well, Elliott  
6 says, 'let me look into this. Let me see what we can do.

7 In Paragraph 20, on July 28th 2010 the plaintiffs are  
8 called back by Elliott who notifies them that they have --  
9 that Nationstar has now once again corrected false  
10 information against them. We would contend that shows  
11 that means that we have two instances of false credit  
12 reporting going against my client.

13 Then they talk about what to do going forward, and as  
14 pled in Paragraph 20 my clients say that Elliott offered  
15 them two options:

16 Number One, was that they could leave their loan in  
17 payoff mode. Remember, it wasn't supposed to be in payoff  
18 mode. It was supposed to be in refinancing mode, but  
19 apparently, that didn't work out. So they are told they  
20 could leave it in payoff mode but that some documents were  
21 missing and that plaintiffs would have to furnish those  
22 missing documents in order to complete the payoff.

23 The second option was that the plaintiffs could  
24 accept the insurance settlement back. The second option  
25 is the solution basically that Nationstar had proposed and

1. described in Paragraph 12 -- Paragraphs 12 and 13 and pled  
2 in this paragraph, Paragraph 20, Judge. Desperate to  
3 secure financing since they had already told their builder  
4 to begin; the plaintiff accepted the second option and  
5 were once again faxed a packet which was filled out and  
6 sent back to Defendant Nationstar. The plaintiffs  
7 completed the packet and faxed it back to them.

8         So, Your Honor, this idea that my clients  
9 willfully -- that they chose to enter into this  
10 arrangement, and therefore waives some type of, you know,  
11 claim that they had is just wrong. The way we plead it we  
12 believe it shows that Defendant Nationstar basically held  
13 a gun to those folk's head and forced them into  
14 refinancing with them. And that they costed them that  
15 previous loan through Bank of America at 4.9 percent.

16         What happened was we go through, and Your Honor, I  
17 won't belabor the point going through this whole thing  
18 again and again, but there is a third instance where there  
19 is once again alleged that -- where we once again allege  
20 that there was false credit reporting. And that third  
21 instance took place on or about August 27th 2010; and  
22 that's in Paragraph 24. And the plaintiffs once again  
23 sought to secure financing with another bank and were  
24 denied. And the defendant was falsely reporting -- they  
25 were denied because the defendant was reporting negative

1 credit information about the plaintiffs.

2 On or about September 8th 2010 the defendant informed  
3 the plaintiffs that the false reporting, once again, had  
4 been corrected. So that's three time. So, Your Honor,  
5 this goes beyond the one instance or the two instances  
6 that we talked about in these federal cases that  
7 Nationstar wants to cite. This is the pattern of not only  
8 false credit reporting against my folks. It's a pattern  
9 of false credit reporting against them costing them better  
10 interest rates. And that in the idea that Nationstar  
11 doesn't benefit from that is ridiculous because Nationstar  
12 kept them as a customer.

13 They were force eventually into staying we this  
14 company because they couldn't find anybody else. They had  
15 already told their contractor to start building their new  
16 home. They've got a contractor wanting money. They're  
17 not going to be able to get into their new home until they  
18 pay their contractor. So they were basically forced into  
19 this. They were forced to have a higher interest rate.

20 The multiple instances of this false credit  
21 reporting, the negligent misrepresentation by Nationstar  
22 about payoff amounts, about, yeah, you can go ahead and  
23 start your construction. Yeah, don't worry about it. We  
24 will sent you that packet. You sent it to us, and in 48  
25 hours we'll will be cutting checks. Those are all false,

1 negligent misrepresentations that either harmed my client  
2 or they relied on and it wound up harming them in a  
3 situation where they were forced to basically stay in  
4 business with these guys.

5       And there is obviously a pecuniary interest. They  
6 take payments and get interest off of it. And so, Your  
7 Honor, I would argue that the Unfair Trade Practices Act;  
8 that certainly falls within what the act is supposed to  
9 do. The public policy of it is whether or not things can  
10 be repeated. Not only were these things repeated on my  
11 clients, but if this isn't the type of case a plaintiff is  
12 allowed to bring under the Unfair Trade Practices Act  
13 against a defendant on it's not going to -- Nationstar  
14 could do this to other customers and to other members of  
15 the public here in South Carolina.

16       And that's what I believe the Unfair Trade Practices  
17 Act was meant to protect us from. And I believe I touched  
18 on negligent mis representation aspect of it. And I also  
19 believe Your Honor understands the theory behind the  
20 tortious interference with the right of contract?

21       THE COURT: Right.

22       MR. McLAUGHLIN: --- with the Bank of America loan  
23 that my folks lost out on.

24       THE COURT: All right, sir. Thank you, Mr.  
25 McLaughlin.

Colloquy

1 MR. ANULEWICZ: Judge, very, very briefly. I think  
2 that Mr. McLaughlin readily complained about what I said  
3 which is you have one instance there in June where that  
4 was a false credit reporting that was fixed. There is  
5 another alleged one in August. I'm sorry. In July that  
6 they worked on and one in August. Now, he said some stuff  
7 that gets pretty far afield in this complaint.

8 And the first one is that somebody said they would  
9 cut him a check within 48 hours. I don't see that in  
10 there. The other thing, they had a gun to their head.  
11 There was no gun to their head. Nationstar had an  
12 existing mortgage with these people that they were  
13 responsible for paying off. And according to his own  
14 complaint, Paragraph 20, and what it says is that the  
15 Plaintiff's accepted the second option and will once again  
16 fax packet to be filled out for the defendants.

17 They had agreed to the option where they would just  
18 continue under the existing loan with Nationstar and that  
19 they would use the money instead to rebuild their house.  
20 Now, judge, he says that Nationstar had some grand scheme:

21 Number One, that's nowhere pled in the complaint.

22 Number Two, what is pled in the complaint is with the  
23 agreed financing by Nationstar it's at a lower rate. So  
24 Nationstar wouldn't hold a gun to their head or hold a gun  
25 to their head under the existing contract at a higher

1 rate. That is a ridiculous argument.

2 And with regard to the remainder, Judge, Mr.  
3 McLaughlin touches on the Unfair Deceptive Trade Practices  
4 Act, this claim as I said before does not rise to the  
5 level of Batey. 100 percent, A one point.

6 With regards to the preemption of Ross and the Batey  
7 case, exactly the same facts. 100 percent on point.

8 And for the remainder of the claims, Negligence  
9 barred by Fair Credit Reporting Act, clear. And also  
10 doesn't plead the requisite elements. Each and every one  
11 of the claims plus the facts in the complaint, no matter  
12 how emphatically they are presented, they do not rise to  
13 the level of claims of South Carolina law. Thank you,  
14 Judge.

15 THE COURT: Thank you, sir. All right. I'm take  
16 this mater under advisement and be in touch.

17 MR. McLAUGHLIN: Thank you, Your Honor.

18 MR. ANULEWICZ: Thank You.

19 END OF TRANSCRIPT OF RECORD

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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY  
Court of Common Pleas

Honorable Brooks P. Goldsmith

Case No. 2011-CP-16-135

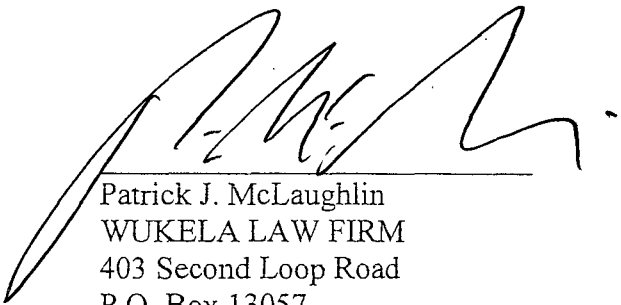
Amanda and Michael Griggs.....Appellant,

v.

Nationstar Mortgage, LLC,.....Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Record On Appeal to the best of my knowledge complies with the August 13, 2007 order of the South Carolina Supreme Court, in that there are no personal data identifiers included in the Record On Appeal, or they have been redacted where necessary.



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Oct. 18

, 2012

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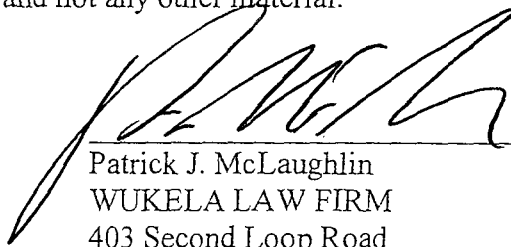
Nationstar Mortgage, LLC.....Respondent.

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that this Record On Appeal contains all material proposed to be included by any of the parties and not any other material.



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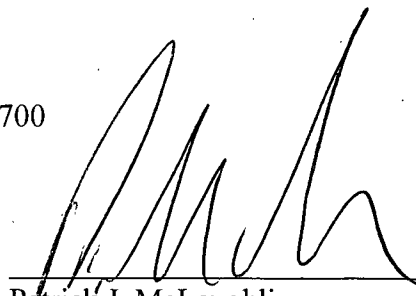
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I certify that I have served a copy of the Record on Appeal on all parties by depositing a copy of it in the United States Mail, postage prepaid, on October 11, 2012, addressed to Respondent's attorneys of record.

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