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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Judge

Case No.: 2012-CP-40-7313

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FEB 24 2014

SC COURT OF APPEALS

Cynthia Hall; Ronald R. Ballentine,

Respondents,

v.

Green Tree Servicing, LLC, f/k/a Green Tree
Financial Servicing Corp.,

Appellant.

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
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Honorable Alison Renee Lee, Circuit Judge

Case No.: 2012-CP-40-7313

Cynthia Hall; Ronald R. Ballentine,

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v.


Green Tree Servicing, LLC, f/k/a Green Tree
Financial Servicing Corp.,

Appellant.

CERTIFICATE OF COUNSEL

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

February 21, 2014


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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007313

Cynthia Hall

Green Tree Servicing LLC

Ronald R Ballentine

Green Tree Financial Servicing Corp

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol Nonsule); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

RICHLAND COUNTY
 FILED
 JAN 23 2013
 AM 11:32
 JEANETTE W. MCBRIDE
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 day of June, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Brian L. Boger

Suzanne G. Grigg

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Cynthia Hall; Ronald R. Ballentine,
Plaintiffs,

v.

Green Tree Servicing, LLC, f/k/a Green
Tree Financial Servicing Corp.,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2012-CP-40-7313

ORDER

2013 JUN - 3 AM 11:32
RICHLAND COUNTY
FILED
JEANNETTE N. McBRIDE
C.C.P. & G.S.

This matter came before the Court on January 30, 2013, on the Motion to Dismiss pursuant to Rule 12(b)(1), SCRCF, or, in the Alternative, to Stay Pending Mandatory Arbitration filed by Defendant Green Tree Servicing LLC, f/k/a Green Tree Financial Servicing Corp. ("Green Tree"). Present at the hearing were Brian Boger, Esquire, and Jessie White, Esquire, counsel for Plaintiffs Cynthia Hall and Ronald R. Ballentine ("Plaintiffs"), and Rick Mendoza, Esquire, and Kyle Brannon, Esquire, counsel for Green Tree. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Green Tree's Motion to Dismiss is **GRANTED in part.**

FACTS

On or about July 6, 1999, Plaintiffs executed and delivered to Green Tree a contract under which Green Tree provided financing to Plaintiffs to enable them to purchase a 1999 Redman Manufactured Home ("the Contract"). The Contract provides the following provision with respect to arbitration:

ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL

a. Dispute Resolution. Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instrument relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration, reference, or trial by a judge as provided below. A controversy involving only a single claimant or claimants who are related or asserting claims arising from a single transaction, shall be determined by arbitration as described by below. . . **YOU AND I AGREE AND UNDERSTAND THAT WE ARE GIVING UP THE RIGHT TO TRIAL BY JURY, AND THERE SHALL BE NO JURY WHETHER THE CONTROVERSY OR CLAIM IS**

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**DECIDED BY ARBITRATION, BY JUDICIAL REFERENCE,
OR BY TRIAL BY A JUDGE.**

b. Arbitration. Since this Contract touches and concerns interstate commerce, an arbitration under this Contract shall be conducted in accordance with the United States Arbitration Act (Title 9, United States Code)

Plaintiff stopped making monthly payments under the Contract, constituting a default. On May 16, 2012, Green Tree repossessed the manufactured home and on June 11, 2012, Green Tree sold the home. On October 30, 2012, Plaintiffs filed a Complaint against Green Tree alleging four causes of action: (1) Breach of Contract; (2) Violation of Claim and Delivery Proceedings, S.C. Code Ann. § 15-69-10, *et seq.* (Rev. 2005); (3) Violation of Notification Provisions, S.C. Code Ann. § 36-9-601, *et seq.* (Rev. 2003); and (4) Unjust Enrichment. Green Tree filed its Motion to Dismiss, or, in the Alternative, to Stay Pending Mandatory Arbitration on November 29, 2012.

DISCUSSION

Green Tree claims this Court lacks subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCPP, because each claim in Plaintiff's Complaint is subject to binding arbitration. "Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 372-73 (1997). This Court lacks subject matter jurisdiction over the Breach of Contract claim and Unjust Enrichment claims because they are subject to arbitration. This Court has subject matter jurisdiction over Plaintiffs' Violation of Claim and Delivery Proceedings and Violation of Notification Provisions claims because they are not subject to binding arbitration.

There is no question that arbitration is favored in South Carolina. *See McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 359, 577 S.E.2d 472, 485 (Ct. App. 2003). Any "ambiguities as to the scope of the arbitration clause itself [should be] resolved in favor of arbitration." *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 714 (Ct. App. 2002)(quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989)). "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit." *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005)(citing *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)).

Plaintiffs' Complaint alleges Green Tree failed to remit proper notification pursuant to S.C. Code Ann. § 36-9-601, *et seq.* or follow procedures set forth by statute before engaging in self-help

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remedies. Because Green Tree repossessed and sold Plaintiffs' manufactured home, the following paragraph of the Contract is applicable:

d. Self-Help, Foreclosure, and Provisional Remedies. The provisions of this paragraph shall not limit any rights that you or I may have to exercise self-help remedies such as set-off or repossession, to foreclose by power of sale . . . before, after or during the pendency of any arbitration Neither the obtaining nor the exercise of any such remedy shall serve as a waiver of the right of either you or me to demand that *the related or any other dispute* or controversy be determined by arbitration as provided above. (Emphasis added).

Plaintiffs contend their claim against Green Tree for failure to provide reasonable notification prior to repossession of the home are not "related" or "other disputes" as provided in the Contract because they are statutorily based; therefore, they are beyond the scope of mandatory arbitration. Plaintiffs further claim that whether they were denied reasonable notification is a question for this Court to determine and the interests of justice and judicial economy would suffer if Plaintiffs' claims are severed from the violations and forced into a foreign forum. Green Tree claims the Contract permits recovery through remedies such as repossession and disposition of the collateral while coextensively protecting Green Tree's right to demand arbitration as to all other claims.

Plaintiffs' Violation of Claim and Delivery Proceedings and Violation of Notification Provisions claims are statutorily based. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). Under the Federal Arbitration Act (FAA), "statutory claims may be the subject of an arbitration agreement . . ." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628. There is no provision in the arbitration agreement that indicates Plaintiffs agreed to arbitrate statutory claims. Therefore, Plaintiffs' Violation of Claim and Delivery Proceedings and Violation of Notification Provisions claims are not subject to arbitration.

This Court finds Plaintiffs' Breach of Contract and Unjust Enrichment claims arise out of or are related to the Contract. The Contract states that all controversies or claims arising out of or relating to the Contract involving a single claimant, or claimants who are related or asserting claims from a single transaction shall be resolved by arbitration. This is an action where the Plaintiffs are related and are asserting claims arising from a single transaction. Cynthia Hall is Ronald Ballentine's daughter and the claims arise from a transaction involving the same manufactured home.

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Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' Breach of Contract and Unjust Enrichment claims because those claims are subject to mandatory arbitration.

Plaintiffs further challenge the validity of the arbitration clause on the basis that it is unconscionable. Plaintiffs claim they entered into a consumer credit transaction with Green Tree without knowingly and intelligently understanding their rights and obligations under the agreement. Plaintiffs contend: (1) they were inexperienced persons who did not possess the business judgment necessary to be aware of the implications of an arbitration clause; (2) they did not have an attorney present to explain the agreements; and (3) Green Tree is a highly experienced lender and/or servicer with vastly superior bargaining power. Plaintiffs rely on the Consumer Protection Code, S.C. Code Ann. § 37-1-101, *et seq.*, which was enacted to "further consumer understanding of the terms of credit transactions . . ." S.C. Code Ann. § 37-1-102.

"The trial court should determine the threshold validity of the arbitration agreement." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 667 (2007); *See* S.C. Code Ann. § 15-48-20. The Plaintiffs claim, pursuant to Section 36-2-302, that because the arbitration clause is unconscionable, this Court should allow Plaintiffs to present evidence as to the issues involved in this lawsuit rather than submit them to arbitration. Section 36-2-302(2) provides that when it is claimed or appears that a clause is unconscionable, "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." This Section does not permit *all* claims in the lawsuit to be heard by the Court; rather, it permits the Court to hear evidence on the issue of unconscionability as it relates to the arbitration clause.

"Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). A court may refuse to enforce or limit the application of an arbitration clause, in whole or in part, if it finds as a matter of law that the clause was unconscionable at the time it was made. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

Plaintiffs essentially argue the Contract is an adhesion contract. Where evidence suggests "that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature," the presumption in favor of arbitration clauses will be substantially weakened. *Id.* at 26, 644 S.E.2d at 669. "[A]n adhesion contract is a standard form contract offered on a 'take-

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it-or-leave-it' basis with terms that are not negotiable." *Id.* at 26-27, 644 S.E.2d at 669-70. However, even if the Contract is an adhesion contract, it is not unconscionable *per se*. See *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 395, 395-96, 498 S.E.2d 898, 902 (Ct. App. 1998). The "standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations." *Id.* (quoting *Goodwin v. Ford Motor Credit Co.*, 970 F.Supp. 1007, 1015 (M.D. Ala. 1997)). Therefore, without other evidence of unconscionability, the arbitration clause will not be invalidated solely on the basis there is an adhesion contract.

To support their claim that the arbitration clause is unconscionable, Plaintiffs argue Green Tree is a highly experienced lender and/or servicer with vastly superior bargaining power. "[A] finding of unconscionability simply cannot be based on the mere fact that one party to the contract is larger than the other." *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991). "Inequality in bargaining power alone will not invalidate an arbitration agreement." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541 n. 5, 542 S.E.2d 360, 365 n. 5. (2001). A party has a duty to read a contract and learn of its contents before signing it. See *Burwell v. South Carolina Nat. Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986)(citing *J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924)). In this case, Plaintiffs failed to present evidence of inequality in bargaining power or oppressive provisions in the agreement. The fact that Green Tree is a larger or more experienced party is not alone sufficient to invalidate the arbitration clause.

Plaintiffs further argue they lacked a meaningful choice upon entering into the Contract with Green Tree. To determine whether there was lack of meaningful choice, "courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. In *Simpson*, the plaintiff signed a contract that included an arbitration clause and the South Carolina Supreme Court concluded the plaintiff suffered an absence of meaningful choice. The Court based its conclusion on several factors; including the fact the contract involved the purchase of an automobile, which is "a necessity . . . intended for use as [plaintiff's] primary transportation, which is critically important in modern society." *Id.* at 26, 644 S.E.2d at 663. The Court further found the plaintiff lacked sufficient business judgment and that factor, coupled with the lack of meaningful choice, rendered the arbitration agreement unconscionable. *Id.* at 27, 644 S.E.2d at 663.

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The Contract between Green Tree and Plaintiffs was to finance a manufactured home, which is considered a necessity. However, Plaintiffs failed to present any evidence, by way of affidavit or otherwise, to support their allegations that they did not understand the agreements, did not have an attorney present, and lacked the business judgment and sophistication necessary to understand the implications of the provisions. Because Plaintiffs failed to meet their burden of establishing that the arbitration agreement is unconscionable, the arbitration agreement is valid and enforceable and the Breach of Contract and Unjust Enrichment claims should proceed to arbitration.


Plaintiffs further claim that even if the arbitration clause is valid, the arbitration clause provides for forum selection. The arbitration provision provides that claims arising out of or relating to the Contract "shall, if requested by either [party], be determined by arbitration, reference, or trial by judge as provided below." Plaintiffs claim this provision allows them to elect to seek relief through the judicial system and have their claims heard by a trial judge.

The provision Plaintiffs rely upon applies to claims that are not submitted to arbitration. In this case, because Plaintiffs are related and asserting claims arising from a single transaction, a non-jury trial is unavailable.

ORDER

For the reasons state above, it is therefore **ORDERED** that the Motion to Dismiss pursuant to Rule 12(b)(1), SCRPC, or, in the Alternative, to Stay Pending Mandatory Arbitration filed by Defendant Green Tree Servicing LLC, f/k/a Green Tree Financial Servicing Corp. is **GRANTED in part** and Green Tree's Breach of Contract and Unjust Enrichment claims are to proceed to arbitration pursuant to the Contract.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
May 31, 2013

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Cynthia Hall; Ronald R. Ballentine,)
)
 Plaintiffs,)
)
 v.)
)
 Green Tree Servicing LLC, f/k/a)
 Green Tree Financial Servicing Corp.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 CASE NO: 2012-CP-40-

COMPLAINT
 (JURY TRIAL DEMANDED)

JEANETTE W. MERRIDGE
 C.C.P. & S.
 2012 OCT 30 AM 11:13
 RICHLAND COUNTY
 FILED

The Plaintiffs above-named, complaining of the Defendant herein, would respectfully show unto this Honorable Court as follows:

PARTIES AND VENUE

1. Plaintiff Cynthia Hall, (hereafter referenced as "Plaintiff Hall"), is a citizen and resident of the State of South Carolina, Richland County.
2. Plaintiff Ronald R. Ballentine, (hereafter referenced as "Plaintiff Ballentine"), is a citizen and resident of the State of South Carolina, Richland County.
3. Plaintiffs are informed and believe that Defendant Green Tree Servicing LLC, (hereafter referenced as "Defendant"), is a limited liability company organized and existing under the Laws of the United States and is authorized to do business in the State of South Carolina.
4. As the Plaintiff(s) are located in Richland County, and as the Defendant does business throughout the State of South Carolina, the Plaintiffs are informed and believe that venue is proper in this Court.

5. Plaintiffs are informed and believe that this Court has jurisdiction over the parties and claims contained herein.

GENERAL FACTUAL ALLEGATIONS

6. Plaintiffs incorporate herein the above allegations as if same were set forth verbatim.
7. On March 12, 1999, Plaintiff Hall (then Cynthia Lynn Jeffcoat) was granted title to real estate of the real property by her father, Plaintiff Ballentine, as grantor for consideration.
8. The above referenced property being located at 1050 Ballentine Road, Blythewood, South Carolina 29016 and recorded in the Office of the RMC/ROD for Richland County in Book D1290 at Page 951.
9. On or around June 10, 1999, Plaintiff Hall filled out a License Application for a mobile home, listing herself and Plaintiff Ballentine as the co-owners.
10. Upon information and belief, in or around July 1999, Plaintiffs entered into a credit and sale agreement, (hereafter referenced as the "Agreement"), through which they obtained a loan from Defendant for the purchase of a mobile home to be located on Plaintiff Hall's aforementioned real property at 1050 Ballentine Road.
11. Upon information and belief, by the terms of the Agreement, Defendant loaned Plaintiffs in an amount of approximately \$68,000.000 with an adjustable interest rate, and Plaintiff Hall, as primary obligor with Plaintiff Ballentine as secondary obligor, was to make monthly payments to Defendant.
12. Pursuant to the terms of the Agreement, Plaintiff Hall purchased private insurance through Foremost in order to cover the collateralized mobile home, (hereafter

referenced as the "Subject Property"), until the account that was secured by the collateral was paid off.

13. In or around July 2011, Plaintiff Hall called Foremost insurance company in order to update her account so that it was no longer on an automatic withdrawal, however, unbeknownst to Plaintiffs, said insurance was mistakenly cancelled altogether due, upon information and belief, to a miscommunication.
14. In or around October 2011, Plaintiffs received a letter from Defendant notifying them that Defendant had purchased placement insurance coverage.
15. During March 2012, the tenants who had been leasing and providing rent on the Subject Property to Plaintiff Hall moved out.
16. Plaintiff Hall and her husband began to undertake renovations on the Subject Property in preparation for their daughter to move in as the next tenant including, but not limited to, replacement of the flooring, purchase of a new water heater, and significant yard work, all of which occurred during the months of March 2012 through June 2012.
17. While said renovations were underway, Plaintiff Hall and her husband were spending time in and out of the Subject Property, and their daughter began moving in personal belongings.
18. Although neither Plaintiffs nor the daughter were yet permanently residing in the Subject Property during the above described renovation period, Plaintiffs and the daughter were acting on the intention of her doing so and at no point was the Subject Property abandoned.

19. On or around June 20, 2012, Plaintiff Hall received a phone call from Fairfield Electric seeking to verify that power was to be disconnected from the Subject Property. During this conversation, Plaintiff Hall was informed that someone had purchased the Subject Property and had called Fairfield Electric in order to disconnect Plaintiff's service.
20. Immediately thereafter, Plaintiff Hall called Defendant to inquire into the matter and, upon information and belief, was assured by an agent of Defendant, named Joseph Salas, that no one was coming to take the Subject Property.
21. Upon further information and belief, during the above described conversation, Joseph Salas offered to Plaintiff Hall that she could pay off the mortgage on the Subject Property by making a payment of approximately nine thousand dollars and 00/100 cents (9,000.00). Plaintiff Hall responded that she would need to check with her 401K about getting the money out and that it would take a minimum of fourteen days in order to do so.
22. On or around June 21, 2012, Plaintiff Hall received a phone call from a neighboring cousin who informed her that a truck was on her property and that someone appeared to be trying to physically take the Subject Property.
23. Plaintiff Hall's husband immediately went to the location of the Subject Property while Plaintiff Hall called the Richland County Sheriff's department.
24. Upon information and belief, police officers arrived at the scene but explained to Plaintiff and her husband that they were unable to prevent the Subject Property from being taken because it was a civil matter.

25. Meanwhile Plaintiff Hall also called Defendant, who informed her for the first time that the Subject Property had in fact been sold and that Plaintiffs had no choice but to allow the purported buyer who was then present to take it.
26. Upon information and belief, Defendant claimed that the Subject Property was sold on May 13, 2012 and that Notice of Private Sale was given on May 17, 2012, however, Plaintiffs dispute that such notice, or any notice at all, was ever provided to or received by either Plaintiffs as co-owners in accordance with the laws of the State of South Carolina.
27. The Subject Property was physically removed from Plaintiff Hall's real property at 1050 Ballentine Road by the purported buyer against the Plaintiffs' will and upon their objection on June 21, 2012.
28. Surprisingly, on or around June 25, 2012, Plaintiff Hall received a fax from the aforementioned agent, Joseph Salas, which stated that in regards to their previously discussed proposal, the current payoff on the account was thirty-two thousand, eight hundred seventy three dollars, and 49/100 cents (32,873.49), but that Defendant would accept nine thousand, eight hundred sixty two dollars, and 00/100 cents (9,862.00) as settlement in full on the account if received by June 30, 2012.
29. Upon information and belief, Plaintiffs were not in default, but even if they had become temporarily behind on payments, Plaintiffs were consistent in making payments and communicating with Defendant if and when a problem in doing so arose.

30. Upon information and belief, Plaintiffs dispute that Defendant was entitled to take and sell the Subject Property, but even if Defendant possessed that right, it did not act in accordance with the laws of South Carolina.

FOR A FIRST CAUSE OF ACTION
Breach of Contract

31. Plaintiffs incorporate herein the above allegations as if same were set forth verbatim.
32. Plaintiffs entered into the Agreement with Defendant, such agreement manifested by words, oral or written, or by conduct for the purchase of the Subject Property.
33. Defendant and/or its agents made an offer for the sale of the Subject Property and the offer was accepted by Plaintiffs, resulting in a meeting of the minds.
34. Valuable consideration was exchanged by Defendant in the form of a loan to Plaintiffs and secured by Plaintiffs' repayments of said loan on the Subject Property.
35. Plaintiffs have performed and continue to perform their obligations under the contract.
36. In every contract, including the Agreement herein and above described, there is an implied covenant of good faith and fair dealing.
37. Defendant has breached and continues to breach this duty as indicated and alleged above through its actions including, but not limited to, selling the Subject Property without proper notice or entitlement and misrepresenting the status of Plaintiffs' account pursuant to the Agreement.
38. As a direct and proximate result of said breach, Plaintiffs suffered damages and Plaintiffs are informed and believe that they are entitled to damages including, but

not limited to, actual, incidental, consequential and special damages in an amount to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION
Violation of Claim and Delivery Proceedings
(S.C. Code Ann. § 15-69-10, et seq.)

39. Plaintiffs incorporate herein the above allegations as if same were set forth verbatim.
40. Defendant sought to recover the Subject Property from Plaintiffs by immediate delivery.
41. Upon information and belief, Defendant neither initiated an action for recovery with the Court nor claimed immediate delivery by affidavit at the time of issuing the summons.
42. In an action for claim and delivery, "an affidavit *must* be made" (emphasis added) pursuant to Section 15-69-30 by the claimant demonstrating that it has a legal interest in or right to possession of the property at issue and that the party in current possession is wrongfully detaining said property.
43. Furthermore, pursuant to Section 15-69-110, if the claimant is seeking immediate delivery or dispossession, it must demonstrate by additional affidavit that either: (1) the party in current possession effectively waived their right to a preseizure hearing, voluntarily, intelligently and knowingly waived in writing; or (2) that the property at issue is in imminent danger of destruction or concealment by the party in current possession.
44. Where the claimant does not seek immediate delivery upon either of the above described affidavits pursuant to Section 15-69-110, it must serve the party in current

- possession, by and through the Sheriff, the basic affidavit under Section 15-69-30 in addition to a notice of the right to a preseizure hearing pursuant to Section 15-69-50.
45. As Section 15-69-70 explains, “[t]he purpose of the preseizure hearing is to protect the [party in current possession’s] use and possession of property from arbitrary encroachment, and to prevent unfair or mistaken deprivations of property.” Therefore, in such instance, the claimant may only take action in immediate delivery after the hearing and only upon a finding by the Court that immediate delivery is appropriate.
46. Upon information and belief, Plaintiffs did not waive their right to a preseizure hearing, and even if they appeared to have, any such waiver was not effective.
47. Upon information and belief, the Subject Property was neither in danger of damage or destruction by Plaintiffs nor abandoned pursuant to Section 6-1-150.
48. Upon information and belief, Defendant failed to comply with the requisite formalities in undertaking an action in claim and delivery and, as such, Plaintiffs were entitled to have remained in possession of the Subject Property until the appropriate procedures were followed pursuant to Section 15-69-50.
49. Plaintiffs are informed and believe that, in light of due process considerations, they are entitled to an opportunity for hearing on repossession of the Subject Property.
50. Plaintiffs are further informed and believe that they are entitled to damages in an amount determined by the trier of fact to reflect the value of loss suffered as a result of Defendant’s wrongful actions.

FOR A THIRD CAUSE OF ACTION
Violation of Notification Provisions
(S.C. Code Ann. § 36-9-601, et seq.)

51. Plaintiffs incorporate herein the above allegations as if same were set forth verbatim.
52. Upon information and belief, Defendant's interest in the Subject Property falls within the definition of a "security interest" under Section 1-201 and is therefore subject to the South Carolina provisions of the Uniform Commercial Code, ("Code" hereafter), as enacted.
53. Upon information and belief, Defendant had a right to possession and disposition of the Subject Property pursuant to Section 36-9-609, however, said right must be exercised in good faith by adherence to the procedures outlined in the Code including, but not limited to, providing Plaintiffs with notice.
54. The Code provides that prior to the exercise of rights pursuant to Section 36-9-609, Defendant must have sent Plaintiffs "a reasonable authenticated notification of disposition" of the Subject Property under Section 36-9-611(b).
55. Whether a notification is reasonable is a question of fact, but the comments to Section 36-9-611 state the determination depends upon such factors as: (1) the manner in which it is sent; (2) its timeliness, and (3) its contents.
56. The timeliness of a notification is generally reasonable under Section 36-9-612 if it is sent far enough in advance of the date of a public sale *or the date after which a private sale is to be held* such that a notified person could be expected to act. (emphasis added).
57. Furthermore, Section 36-9-611(c) requires that such notification must have been sent to both Plaintiff Cynthia Hall, as "debtor," and Plaintiff Ballentine, as "secondary obligor."

58. Upon information and belief, Defendant was required to provide Plaintiffs with reasonable notification pursuant to Section 36-9-601, et seq., and even if Defendant believed that Plaintiffs had abandoned the Subject Property it was still obligated to provide such notice under the Code.
59. Upon information and belief, Plaintiffs neither received a reasonable authenticated notification of disposition nor specifically and knowingly waived their right to notice under the Code.
60. Upon information and belief, Defendant failed to comply with the requirements of the Code in exercising its rights thereunder, and, as such, Plaintiffs are entitled to recover damages in an amount to be determined by the trier of fact for loss suffered by Defendant's noncompliance, as well as statutory damages as this Court determines to be applicable under the Code.

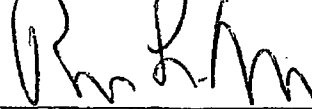
FOR A FOURTH CAUSE OF ACTION
Unjust Enrichment

61. Plaintiffs incorporate herein the above allegations as if same were set forth verbatim.
62. Upon information and belief, Plaintiffs conferred a benefit upon the Defendant in the form of the Subject Property and/or its value as sold.
63. Upon information and belief, Defendant realized that the benefit was conferred and has retained the benefit under conditions that are inequitable without providing its value.
64. Plaintiffs are informed and believe that they are entitled to restitution in the amount by which Defendant has been unjustly enriched as determined by this Court.

WHEREFORE, the Plaintiffs, having set forth the above allegations against the Defendant, would respectfully request from this Honorable Court the following relief:

- A. As to the First Cause of Action, for the Court or a Jury to find that Defendant breached the contract, for actual damages, and for reasonable costs and attorney's fees;
- B. As to the Second Cause of Action, for a post-seizure hearing on the Subject Property, for the Court or a Jury to find that Defendant failed to execute the requisite undertakings pursuant to Section 15-69-10, et seq., of the South Carolina Code of Laws, for actual damages, and for reasonable costs and attorney's fees;
- C. As to the Third Cause of Action, for the Court or a Jury to find that Defendant violated the notice provisions of Section 36-9-601, et seq., of the South Carolina Code of Laws, for actual damages, for statutory damages, and for reasonable costs and attorney's fees;
- D. As to the Fourth Cause of Action, for the Court or a Jury to find that Defendant was unjustly enriched, for restitution of the benefit conferred, and for reasonable costs and attorney's fees;
- D. For such other and further relief as this Court deems appropriate.

LAW OFFICES OF BRIAN L. BOGER



Brian L. Boger
Attorney for Plaintiffs
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Brian@brianboger.com

October 30, 2012
Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Cynthia Hall; Ronald R. Ballentine,
Plaintiffs,

Case No. 2012-CP-40-7313

vs.

Green Tree Servicing LLC, f/k/a Green Tree
Financial Servicing Corp.,
Defendant.

**DEFENDANT'S MOTION TO DISMISS,
OR, IN THE ALTERNATIVE, TO STAY
PENDING MANDATORY
ARBITRATION**

2012 NOV 28 AM 4:31
FILED
RICHLAND COUNTY
JEANETTE BRIDE
C.C.P. CLERK

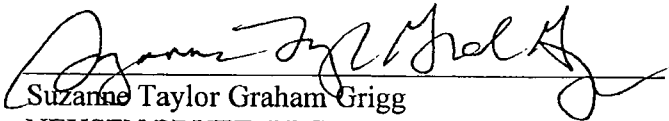
Defendant Green Tree Servicing, LLC, f/k/a Green Tree Financial Servicing Corp. ("Green Tree") moves, pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and (b)(6), for an order of the Court to dismiss the Complaint for want of subject matter jurisdiction and failure to state a cause of action for which relief can be granted. Alternatively, Green Tree moves the Court, pursuant to the Federal Arbitration Act, 9 U.S.C. § 2, *et seq.*, to stay Plaintiff's Complaint pending mandatory arbitration on the grounds that there exists an agreement to arbitrate between Green Tree and the Plaintiff, as evidenced by that certain Retail Installment Contract, Security Agreement, Waiver of Trial by Jury and Agreement to Arbitration or Reference or Trial by Judge Alone (the "Contract") entered into by the Plaintiffs and the Defendant. Specifically the contract provides, in part:

ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL

a. **Dispute Resolution.** Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instrument relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration, reference, or trial by a judge as provided below. A controversy involving only a single claimant, or claimants who are related or asserting claims arising from a single transaction, shall be determined by arbitration as described below. . . . **YOU AND I AGREE AND UNDERSTAND**

**THAT WE ARE GIVING UP THE RIGHT TO TRIAL BY JURY,
AND THERE SHALL BE NO JURY WHETHER THE
CONTROVERSY OR CLAIM IS DECIDED BY ARBITRATION,
BY JUDICIAL REFERENCE, OR BY TRIAL BY A JUDGE.**

This Motion is based upon the pleadings and record in this case, the applicable law and such other materials as may be submitted before or at the hearing of this Motion.



Suzanne Taylor Graham Grigg
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

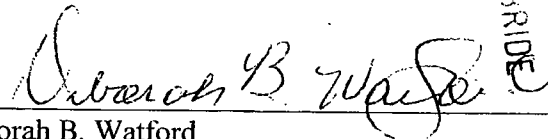
Attorneys for Defendant Green Tree Servicing,
LLC

November 29, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANT'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY PENDING MANDATORY ARBITRATION** has been served upon the following counsel of record for the Plaintiff by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below 29th day of November, 2012.

Brian L. Boger, Esquire
1331 Elmwood Ave., Suite 210
Columbia, South Carolina 29201



Deborah B. Watford
Secretary to Suzanne Taylor Graham Grigg
NEXSEN PRUET, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202

2012 NOV 29 PM 4:32
JENNIFER W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Cynthia Hall; Ronald R. Ballentine,)
 Plaintiff,)
 vs.)
)
 Green Tree Servicing LLC, f/k/a Green Tree)
 Financial Servicing Corp.,)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 5TH JUDICIAL CIRCUIT
 CASE NO.: 2012-CP-40-7313

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

JEANETTE W. BRIDGES
 C. C. P. & S. C. J.
 2012 NOV 29 PM 4:31
 RICHLAND COUNTY
 FILED

Plaintiff's Attorney: Brian L. Boger, Bar No. _____ Address: 1331 Elmwood Avenue, Ste. 210, Columbia, SC 29201 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Suzanne Taylor Graham Grigg, Bar No. 70681 Address: P.O. Drawer 2426, Columbia, SC 29202 Phone: 803-771-8900 Fax 803-253-8277 E-mail: sgrigg@nexsenpruet.com 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

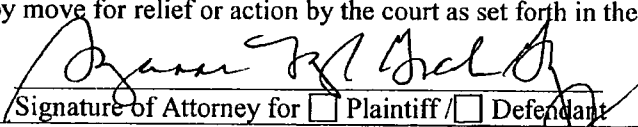
Nature of Motion: Defendant's Motion to Dismiss, or, in the Alternative, to Stay Pending Mandatory Arbitration

Estimated Time Needed: 10 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 Date submitted 11/29/12

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, SCRPC)
 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

Collected by: _____ Date Filed: _____

MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

{

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Cynthia Hall; Ronald R. Ballentine,)
)
 Plaintiffs,)
)
 v.)
)
 Green Tree Servicing LLC, f/k/a)
 Green Tree Financial Servicing Corp.,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS

CASE NO: 2012-CP-40-07313

MEMORANDUM IN OPPOSITION TO
 PLAINTIFF'S MOTION TO DISMISS
 OR, IN THE ALTERNATIVE, TO STAY
 PENDING MANDATORY
 ARBITRATION

2013 JAN 22 PM 1:36
 JENNIFER W. McBRIDE
 C.C.P. & C.S.
 RICHLAND COUNTY

The Plaintiffs above-named ("Plaintiffs" hereinafter) respond to Defendant Green Tree ("Defendant" hereinafter) Motion to Dismiss or, in the alternative, to Stay Pending Mandatory Arbitration as follows:

I. FACTUAL ALLEGATIONS

The instant motion before this Court is one responding to the Plaintiffs' Complaint filed against Defendant on October 30, 2012. In the Complaint, Plaintiffs allege violations of claim and delivery proceedings, violations of notification provisions under the South Carolina Consumer Code, breach of contract, and unjust enrichment. The Plaintiffs' claims arise from a consumer transaction between Plaintiffs and Defendant concerning property purchased in and located within Richland County. In particular, Plaintiffs complain that Defendant disposed of their property without proper notice as required under South Carolina law. Plaintiffs additionally complain that the Defendant's actions constitute a breach of contract and have resulted in unjust enrichment. Accordingly, Plaintiffs are informed and believe this Court to be the proper forum to hear their valid claims for relief.

II. STANDARD OF REVIEW

The South Carolina Supreme Court delineated the following standards of review for motions such as the ones before this Court:

“It is well settled that issues relating to subject matter jurisdiction may be raised at any time. Subject matter jurisdiction refers to the court’s power to hear and determine cases of the general class to which the proceedings in question belong.” *Bardoon Properties v. Eidolon Corp.*, 326 S.C. 166, 168-69, 485 S.E.2d 371, 372 (1997). “Subject matter jurisdiction is met if the case is brought in the court which has the authority and power to determine the type of action at issue.” *Washington v. Whitaker*, 317 S.C. 108, 115, 451 S.E.2d 894, 898 (1994).

“Initially, we note that in deciding a motion to dismiss pursuant to 12(b)(6), SCRCPL, the trial court should consider only the allegations set forth on the face of the plaintiff’s complaint and a 12(b)(6) motion should not be granted if ‘facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.’ *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). *See also Kennedy v. Henderson*, 289 S.C. 393, 346 S.E.2d 526 (1986) (where there is cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits, a demurrer should be denied where novel issues are present or are involved); *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (1967).” *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999).

III. ARGUMENT

A. SUBJECT MATTER JURISDICTION EXISTS IN THIS COURT

The South Carolina Constitution declares that “[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided

by law.” S.C. Const. art. V, §11. This Court has the authority and power to hear the Plaintiffs’ civil claims against Defendant as set forth in the Complaint, attached as **Exhibit “A.”** Therefore, upon information and belief, subject matter jurisdiction has been met and the Defendant’s motion to dismiss pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(1) should be denied.

B. THE COMPLAINT CONTAINS SUFFICIENT FACTUAL ALLEGATIONS TO ENTITLE PLAINTIFFS TO RELIEF

The Plaintiffs allege, among other claims, that Defendant violated the notification provisions of South Carolina Code Ann. § 36-9-601, et seq. (hereinafter referred to as the “Code”). In particular, the Complaint sets forth violations of the statutory requirement that a creditor exercise its rights to possession and disposition of collateral in good faith by adherence to the procedures outlined in the Code, including, but not limited to, providing Plaintiffs with “a *reasonable* authenticated notification” prior to acting upon any such right in the subject collateral. S.C. Code Ann. §§ 36-9-609, 36-9-611 (emphasis added).

The Code treats the reasonableness of a notification as a question of fact for a court or competent jury to determine by taking into consideration such factors as: (1) the manner in which the notification is sent; (2) the timeliness of the notification; (3) the contents of the notification; as well as any facts and circumstances giving rise to the notification. S.C. Code Ann. § 36-9-611, comments. Plaintiffs have spelled out in detail the pertinent facts and circumstances giving rise to the present action and have incorporated those allegations by reference into each cause of action thereafter. See **Exhibit “A,”** ¶¶ 6 - 30. Specifically, Plaintiffs dispute that notice was provided by Defendant prior to disposition of the subject collateral and, in fact, Plaintiffs allege that the only form

of notification received came through a third party, which was emphatically denied by an agent of Defendant upon Plaintiffs further inquiry. See **Exhibit "A,"** ¶¶ 19 - 21.

Plaintiffs are informed and believe that the Complaint, viewed in the light most favorable to Plaintiffs, and with every doubt resolved in their behalf, states facts sufficient to form a valid claim for relief. The Complaint contains factual allegations and inferences reasonably deducible therefrom that entitle Plaintiffs to relief as to each of the causes of action contained therein. Moreover the Complaint is sufficient to "entitle [Plaintiffs] to any relief on *any theory* of the case," even if not the precise form of relief Plaintiffs initially supposed they were entitled. *Mr. G v. Mrs. G*, 320 S.C. 305, 311, 465 S.E.2d 101, 105 (Ct. App. 1995) (Dissent, Hearn, J.).

Therefore, upon information and belief, the Defendant's motion to dismiss pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6) cannot be sustained and should be denied accordingly.

C. THE NATURE OF THE PLAINTIFFS CLAIMS NECESSITATE RELIEF FROM A COURT OF COMPETENT JURISDICTION

The Plaintiffs' claims against Defendant arise directly from the manner by which Defendant exercised its rights to repossession and disposition of the subject property. Pursuant to that certain Retail Installment Contract, Security Agreement, Waiver of Trial by Jury and Agreement to Arbitration or Reference or Trial be Judge Alone (hereinafter referred to as the "Contract," attached as **Exhibit "B"**), and the laws of South Carolina, Defendant was required to provide Plaintiffs with reasonable notification prior to engaging in self-help remedies. Upon Plaintiffs information and belief, not only did Defendant fail to remit proper notification, but Defendant also failed to follow the statutorily delineated channels in exercising its rights. The Defendant's violations in carrying

out these procedures and in disposing of the Plaintiffs property form the heart of the Plaintiffs' Complaint. Due to the Defendant's actions, Plaintiffs were deprived of an opportunity to appear before the court in any capacity as Defendant obtained its relief.

The Contract contains an arbitration agreement designating that certain claims between Plaintiffs and Defendant are to be determined by arbitration. See **Exhibit "B."** The Contract also carves out an exception to the mandate of arbitration for a party to exercise its rights in the form of self-help remedies such as repossession. *Id.* This exception further retains a party's right "to demand that the related or any other dispute or controversy be determined by arbitration." *Id.* Accordingly, Defendant will argue that the Contract permits the recovery of relief such as repossession and disposition of collateral, while co-extensively protecting its right to demand arbitration as to all other claims. However, the Plaintiffs' claims against Defendant are not merely "*related*" or "*other*" disputes that may be subject to mandatory arbitration; rather, the Plaintiffs complain of the ways by which Defendant exercised its rights to relief, a task which only this Court can truly determine.

Upon information and belief, the Plaintiffs' claims are beyond the scope of an arbitration demand by Defendant because they are inherently connected to the actions it took in repossession. The Defendant's failure to properly follow the legal channels in obtaining its relief should, upon information and belief, be addressed as well as enforced within those same legal channels. The interests of justice and judicial economy would suffer a disservice if resolution of the Plaintiffs' claims are severed from the offending violations and forced into a foreign forum for evaluation. Therefore, Plaintiffs respectfully urge that this Court deny the Defendant's motion in the alternative to stay pending mandatory arbitration and maintain the Plaintiffs' Complaint to be heard at trial.

D. THE ARBITRATION CLAUSE IS INVALID ON THE GROUNDS OF UNCONSCIONABILITY

The South Carolina Supreme Court has determined the trial court to be the proper forum for determining the enforceability of an arbitration clause in a contract between parties where one party challenges the validity of the arbitration provision on the grounds of unconscionability. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 668 (2007). The role of courts in the arbitration context is supported by the general provisions of the South Carolina Uniform Arbitration Act (UAA) and consistent with the objectives of the Federal Arbitration Act (FAA). *Id.* The UAA charges the courts with the responsibility of determining whether or not an agreement to arbitrate actually exists once it has been called into question by one of the parties to the contract. S.C. Code Ann. § 15-48-20, et seq.

Defendant asserts that Plaintiffs' claims arising from the Contract and underlying collateral must be determined by arbitration. Although Defendant cites to specific language in the Contract to demonstrate the Plaintiffs' agreement to arbitrate, "there can be no 'clear and unmistakable' evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. The Plaintiffs challenge as to the enforceability of the arbitration clause as an agreement between the parties undercuts the force of the plain language standing alone and places resolution of this disagreement with the court. Therefore, upon information and belief, since Plaintiffs challenge the existence of a true agreement and the validity of the arbitration clause on the grounds of unconscionability, as described more fully below, this Court should hear evidence on these issues rather than submit them to arbitration. S.C. Code Ann. § 36-2-302(2).

Both state and federal public policy support a presumption in favor of the validity of arbitration agreements; however, arbitration falls within the principles of contract law and is thus available only upon agreement by the contracting parties. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999); *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. The court will apply general contract principles of state law when determining the enforceability of an arbitration clause. *Id.* Further, the court will apply the same contract principles of state law whether the UAA or the FAA may govern.

Under South Carolina law, “unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). Moreover, in the context of arbitration agreements, the trial court’s analysis of unconscionability should focus on whether the arbitration clause is properly drafted to achieve “an unbiased decision by a neutral decision-maker.” *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). The court may refuse to enforce an arbitration clause, in whole or in part, if it finds as a matter of law that any such clause in a contract was unconscionable at the time it was made. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

Where one of the contracting parties lacks a meaningful choice in agreeing to arbitrate, the fundamental fairness of the bargaining process and the underlying purposes of the South Carolina Consumer Protection Code are placed in jeopardy. *Id.* at 25, 669. Where there exists evidence to suggest “that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature,” the presumption in favor of arbitration clauses will be substantially weakened. *Id.* at 26, 669. Although adhesion contracts are not per se unconscionable, under South

Carolina law they are defined as “a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable” and, therefore, are subject to “considerable skepticism” by the court. *Id.* at 26-27, 669-670.

In the present case, Plaintiffs entered into a consumer credit transaction with Defendant for the purchase of property without knowingly and intelligently understanding their rights and obligations under the agreement. Plaintiffs were inexperienced private persons who did not possess the business judgment necessary to be aware of the implications of an arbitration clause. By contrast, Defendant is a highly experienced lender and/or servicer that conducts its business on a national scale and with vastly superior bargaining power. Upon information and belief, Plaintiffs were not provided any bargaining tools at all because the transaction with Defendant involved an adhesion contract. Defendant knew or should have known that Plaintiffs lacked a meaningful choice upon entering into the agreement, yet Defendant subjected Plaintiffs to a one-sided deal nevertheless. Plaintiffs possessed neither the ability to negotiate an agreement with Defendant at an arms-length nor the presence of a lawyer to provide assistance in the matter. Although the freedom to contract is a fundamental principle of contract law, the courts retain the discretion to declare provisions within a contract unenforceable on the grounds of unconscionability. Under the circumstances described above, the court, upon information and belief, should not ignore the inconspicuous nature of an arbitration clause in light of its consequences, especially when drafted by the superior party with a pattern of transacting agreements to the disadvantage of private consumers.

Both state and federal public policy also support a presumption in favor of consumer protection. 15 U.S.C. 1601, et seq., and S.C. Code Ann. § 37-1-101, et seq. The underlying purposes of the Consumer Protection Code envision improving the consumer’s ability to understand the nature and significance of transactions which they enter into with merchant dealers and lenders. S.C. Code

Ann. § 37-1-102. Additionally, the objectives of the Consumer Protection Code seek to establish fair and economically sound consumer credit practices while ultimately protecting the consumer from potential disingenuousness on the part of the dealer or lender. *Id.* These consumer protection concerns, coupled together with Plaintiffs' rights in obtaining a trial and the absence of a meaningful choice in agreeing to arbitrate claims, suggest that the issues involved in the instant action are intricate and legally significant matters of law best resolved by this Court. Therefore, upon information and belief, the Defendant's motion in the alternative to stay pending mandatory arbitration should be denied.

**E. EVEN IF THE ARBITRATION AGREEMENT IS VALID, THE ARBITRATION
CLAUSE ITSELF PROVIDES FOR FORUM SELECTION**

Pursuant to the arbitration provision within the Contract:


“Any controversy or claim between or among [Plaintiffs] and [Defendant] or [their] assignees arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, *if requested by either [party]*, be determined by arbitration, reference, *or trial by a judge* as provided below.” (emphasis added).

Plaintiffs elected to seek relief through the judicial system and requested their claims be submitted to trial by filing the present action with this Court. Thus, Plaintiffs are in compliance with the language of the arbitration clause. Defendants drafted the arbitration clause, and specifically provided that this type of remedy would be available to Plaintiffs. Therefore, upon information and belief, the Defendant's motion in the alternative to stay pending mandatory arbitration should be denied.

IV. CONCLUSION

The Defendant's Motion to Dismiss, or, In the Alternative, to Stay Pending Mandatory Arbitration should be denied. This Court has subject matter jurisdiction over the matter and Plaintiffs have alleged sufficient factual allegations to support a valid claim for relief and, therefore, a motion dismissing Plaintiffs' claims is inappropriate. Plaintiffs are within their rights under the terms of the Contract to seek relief from this Court. Furthermore, Plaintiffs have challenged the enforceability of the arbitration agreement on the grounds of unconscionability and, therefore, this Court is the proper forum to resolve this gateway issue. Accordingly, the Plaintiffs respectfully request that this Court deny the Defendant's Motion to Dismiss, or, in the Alternative, to Stay Pending Mandatory Arbitration.

LAW OFFICES OF BRIAN L. BOGER



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William F. Schumacher, IV
Kristen A. Washburn
Jessie A. White
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1331 Elmwood Ave., Suite 210
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Phone: 803-252-2880

January 22, 2013

COLUMBIA, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Cynthia Hall; Ronald R. Ballentine,

Plaintiffs,

vs.

Green Tree Servicing LLC, f/k/a Green Tree
Financial Servicing Corp.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-40-7313

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS,
OR, IN THE ALTERNATIVE, TO STAY
PENDING MANDATORY
ARBITRATION**

Defendant Green Tree Servicing LLC f/k/a Green Tree Financial Servicing Corp. ("Green Tree") submits this Memorandum of Law in Support of its Motion to Dismiss pursuant to Rule 12(b)(1), SCRPC. However, in the event that this Court decides not to dismiss this action, Green Tree moves to stay this action pending mandatory arbitration pursuant to the Federal Arbitration Act, 9 USC §2, et. seq.

FACTS

On or about July 6, 1999, the Plaintiffs executed and delivered to Green Tree that certain *Retail Installment Contract, Security Agreement, Waiver of Trial by Jury and Agreement to Arbitration or Reference or Trial by Judge Alone* (the "Contract"). Pursuant to the terms of the Contract, Green Tree provided financing to the Plaintiffs to enable them to purchase a 1999 Redman Manufactured Home, VIN # 14002562AB (the "Home"). The Contract provides the following provision with respect to arbitration:

ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL

a. Dispute Resolution. Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instrument relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort,

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shall, if requested by either you or me, be determined by arbitration, reference, or trial by a judge as provided below. A controversy involving only a single claimant, or claimants who are related or asserting claims arising from a single transaction, shall be determined by arbitration as described below. . . . **YOU AND I AGREE AND UNDERSTAND THAT WE ARE GIVING UP THE RIGHT TO TRIAL BY JURY, AND THERE SHALL BE NO JURY WHETHER THE CONTROVERSY OR CLAIM IS DECIDED BY ARBITRATION, BY JUDICIAL REFERENCE, OR BY TRIAL BY A JUDGE.**

b. Arbitration. Since this Contract touches and concerns interstate commerce, an arbitration under this Contract shall be conducted in accordance with the United States Arbitration Act (Title 9, United States Code), notwithstanding any choice of law provision in this Contract. The Commercial Rules of the American Arbitration Association ("AAA") also shall apply. The arbitrator(s) shall follow the law and shall give effect to statutes of limitation in determining any claim. Any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s). The award shall be final. Judgment upon the award may be entered in any court having jurisdiction, and no challenge to entry of judgment upon the award shall be entertained except as provided by Section 10 of the United States Arbitration Act or upon a finding of manifest injustice.

The Contract clearly provides that all controversies or claims arising out of or relating to the Contract involving only a single claimant, or claimants who are related or who are asserting claims from a single transaction, shall be resolved by binding arbitration.

Thereafter, the Plaintiffs stopped making the monthly payments under the terms of the Contract, constituting a default under the Contract. On or about January 16, 2012, Green Tree sent written notice of the default to Plaintiff Cynthia Hall ("Plaintiff Hall") in accordance with and conforming to state law. On or about May 16, 2012, Green Tree repossessed the Home, and, on or about May 17, 2012, Green Tree sent written notice of the repossession and Green Tree's plan to sell the Home at a date more than 15 days from the date of the May 17, 2012, letter. On or about June 11, 2012, Green Tree sold the Home.

On October 30, 2012, the Plaintiffs filed their Complaint against Green Tree alleging four causes of action: (1) Breach of Contract; (2) Violation of Claim and Delivery Proceedings (S.C. Code Ann. § 15-69-10, *et seq.*); (3) Violation of Notification Provisions (S.C. Code Ann. § 36-9-601, *et seq.*); (4) and Unjust Enrichment. Green Tree filed its Motion to Dismiss, or, in the Alternative, to Stay Pending Mandatory Arbitration on November 29, 2012.

DISMISSAL PURSUANT TO RULE 12(B)(1), SCRCP

Pursuant to Rule 12(b)(1), SCRCP, this Court lacks subject matter jurisdiction over the Plaintiffs' Complaint because each claim in the Plaintiffs' Complaint is subject to binding arbitration. The Contract states that all controversies or claims arising out of or relating to the Contract involving only a single claimant, or claimants who are related or who are asserting claims from a single transaction, shall be resolved by binding arbitration. Each of the Plaintiffs' claims either arise out of or are related to the Contract. Furthermore, this is an action where the Plaintiffs are related¹ and are asserting claims arising from a single transaction. Therefore, this Court lacks subject matter jurisdiction over the Plaintiffs' Complaint because the Plaintiffs' claims are subject to mandatory arbitration.

**IN THE ALTERNATIVE, THIS ACTION SHOULD BE STAYED, PENDING
MANDATORY ARBITRATION**

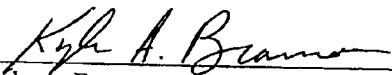
There is no question that arbitration is favored in South Carolina. *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 359, 577 S.E.2d 482, 485 (Ct.App.2003). Further, any ambiguities concerning the scope of an arbitration clause should be resolved in favor of arbitration. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 714 (Ct.App. 2002) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989)). Arbitration is a matter of contract. *Chassereau v. Global Sun Pools, Inc.*, 363 S.C.

¹ Cynthia Hall is Ronald Ballentine's daughter. (Compl. ¶ 7).

628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005) (citing *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). The Plaintiffs executed the Contract, all of their claims arise out of the Contract, and the Plaintiffs are related and are asserting claims arising from a single transaction. Therefore, there is no question that all claims in the Plaintiffs' Complaint should be stayed pending mandatory arbitration.

CONCLUSION

For the foregoing reasons, Green Tree respectfully requests that this honorable Court dismiss the Plaintiffs' Claims pursuant to Rule 12(b)(1), SCRCP. However, in the event that this Court decides not to dismiss this action, Green Tree moves to stay this action pending mandatory arbitration, for the foregoing reasons, pursuant to the Federal Arbitration Act, 9 USC §2, et. seq.



Kyle A. Brannon (S.C. Bar # 100550)
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Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

Attorneys for Defendant
Green Tree Servicing LLC, f/k/a Green Tree
Financial Servicing Corp.

January 22, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Cynthia Hall and Ronald R. Ballentine,
Plaintiffs,

Case No. 2012-CP-40-7313

vs.

Green Tree Servicing LLC, f/k/a Green Tree
Financial Servicing Corp.,
Defendant.

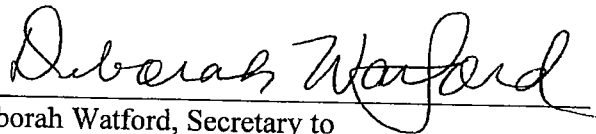
CERTIFICATE OF SERVICE

2013 JAN 24 PM 12:51
JEANETTE W. BOBDE
C.C.P. & I.S.

FILED

This is to certify that a copy of the foregoing *Memorandum in Support of Defendant's Motion to Dismiss, or, in the Alternative, to Stay Pending Mandatory Arbitration* has been served upon the following counsel of record for the Plaintiff by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 24th day of January, 2013.

Brian L. Boger, Esquire
1331 Elmwood Ave., Suite 210
Columbia, South Carolina 29201



Deborah Watford, Secretary to
Suzanne Taylor Graham Grigg
Kyle A. Brannon
NEXSEN PRUET, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202

Attorneys for Defendant Green Tree Servicing, LLC

SOUTH CAROLINA [REDACTED] 523

RETAIL INSTALLMENT CONTRACT, SECURITY AGREEMENT, WAIVER OF TRIAL BY JURY AND AGREEMENT TO ARBITRATION OR REFERENCE OR TRIAL BY JUDGE ALONE (Contract)

MH VARIABLE RATE CONTRACT

BUYER(S): NAME: CYNTHIA JEFFCOAT
 NAME: RONALD R. BALLENTINE
 NAME: _____

LOAN P. AN:	<u>99</u>
OFFICE NUMBER:	<u>34</u>
LOAN SOURCE NO.:	<u>96</u>
ACCT. NO.:	<u>523</u>
FUNDING CODE:	_____

BUYER'S ADDRESS: 1070 BALLENTINE ROAD CITY: BLYTHEWOOD COUNTY: RICHLAND STATE: SC ZIP: 29061
 PHONE: (803) 691-1760 & SEC. #(S): 1214

PROPOSED LOCATION OF MANUFACTURED HOME: 1050 BALLENTINE RD, BLYTHEWOOD, SC 29016

"I," "me," "myself" or "my" mean all persons who sign this Contract as buyer or co-buyer, jointly and severally, and "you" or "your" mean the Seller and any assignee. This Contract will be submitted to the Creditor indicated below, at a local office and, if approved, it will be assigned to that Creditor. On the date of this Contract, I buy from you on a credit sale basis the manufactured home described on page 2, together with furnishings, equipment, appliances and accessories included in the manufactured home at the time of purchase (called "Manufactured Home").

CREDITOR: GREENPOINT CREDIT CORP.

PROMISE TO PAY: I promise to pay you at such address as you may direct the Unpaid Balance shown on page 2 of this Contract (Item 5) with interest at the initial rate of 9.00 % per year. The interest rate I will pay will change in accordance with the provisions of this Contract. I will pay this amount in installments as shown in the payment schedule, or as recomputed due to changes in the interest rate, until the Unpaid Balance is fully paid. If, on 06/11/29, I still owe any amount under this Contract, I will pay such amount in full on that date, which is called the "Maturity Date." Each monthly payment will be applied as of its scheduled due date. If no interest rate is disclosed above, the initial interest rate is the Annual Percentage Rate shown below.

INTEREST RATE: My initial interest rate may not be based on the index used to make later adjustments. My interest rate may change 12 months after my first payment is due and every 12 months thereafter based on movements in the monthly average yield on United States Treasury securities adjusted to a constant maturity of one year, as made available by the Federal Reserve Board, which is the index rate. My interest rate cannot increase or decrease by more than 2.00 % at any interest rate change or by more than 5.00 % over the term of the Contract. The interest rate will equal the index rate in effect 45 days before the interest rate change date plus a margin of 3.00 % (rounded to the NEAREST 1/8 of one percentage point) unless the interest rate caps limit the amount of change in the interest rate. If this index rate is no longer available, you may choose a new index that is based upon comparable information.

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments	Total Sale Price
The cost of my credit as a yearly rate (which is subject to change): <u>9.77</u> %	The dollar amount the credit will cost me (which is subject to charge): <u>\$ 226,302.60</u>	The amount of credit provided to me or on my behalf: <u>\$ 54,989.00</u>	The amount I will have paid after I have made all payments as scheduled (based on the current Annual Percentage Rate which is subject to change): <u>\$ 272,291.60</u>	The total cost of my purchase on credit (which is subject to change) including my down payment of: <u>\$ 14,000.00</u>
			See #7 (page 2)	Total Pay. + Comp. Payment

See Contract terms for additional information about nonpayment, default, required repayment in full before the scheduled date, and prepayment refunds and penalties.

Prepayment:	Number of Payments	Amount of Payment	When Payment is Due
My payment schedule will be	<u>12</u>	<u>\$ 442.46</u>	Monthly, beginning <u>JULY 11</u> 19 <u>99</u>
	<u>348</u>	<u>\$ 476.96</u>	Monthly, beginning <u>JULY 11</u> 19 <u>2000</u>
		<u>\$.00</u>	Monthly, beginning _____ 19 _____
		<u>\$.00</u>	Monthly, beginning _____ 19 _____

Security: I give you a security interest in the goods or property being purchased.
Late Charge: If a payment is more than 15 days late, I will be charged 5 % of the unpaid amount of each payment, not to exceed \$ 5.00.
Variable Rate: My Contract contains a variable rate feature. Disclosures about the variable rate feature have been provided to me earlier.
Assumption: Someone buying my Manufactured Home may, under certain circumstances, be allowed to assume the remainder of the Contract on the original terms.
Estimates: All numerical disclosures except the late payment disclosures are estimates.

The above disclosures are based on terms in effect on the date this Contract is signed. If the interest rate changes, actual Amount of Payments, Annual Percentage Rate, Finance Charge and Total of Payments will be more or less than disclosed above.

Handwritten initials: CB

R 0040

Description of Manufactured Home:

TRADE NAME: REDMAN HOVES

MODEL: PARKER SC

YEAR: 1999 NEW: X USED: _____

LENGTH: 80 ft

WIDTH: 24 ft

SERIAL NUMBERS: 14C-C2562AB

ITEM	SERIAL NUMBER

ITEM	SERIAL NUMBER

ADDITIONAL ACCESSORIES AND FURNISHINGS: HEAT PUMP
STEPS

SKIRTING

06-199

ITEMIZATION OF AMOUNT FINANCED

- Cash Price (including Sales Tax of \$ 450.00): \$ 68,069.00
- Cash Down Payment: \$ 14,000.00
 - Trade-In (Year, Make, Model):
Length _____ Width _____
Gross Value \$ _____ Liens \$ _____
(Seller to pay off)
Net Trade-In Value \$.00
- Total Down Payment \$ 14,000.00
- Unpaid Balance of Cash Price (1 minus 2) \$ 54,069.00
- Amounts paid to others on my behalf:
 - To Insurance Companies:
 - Property Insurance \$ 915.00
 - Credit Life Insurance \$.00
 - To Public Officials:
 - Certificate of Title \$ 5.00
 - _____ \$.00
 - To Creditor:
 For: _____ \$.00
 - To: _____
For: _____
\$.00
 - To: _____
For: _____
\$.00
 - To: _____
For: _____
\$.00
 - To: _____
For: _____
\$.00
- Total (a - b + c + d + e + f + g + h) \$ 920.00
- Unpaid Balance (3 plus 4) \$ 54,989.00
- Prepaid Finance Charge \$.00
- Amount Financed (5 minus 6) \$ 54,989.00

*I understand and agree that a portion of certain of these amounts may be retained by you or your affiliate.

INSURANCE

PROPERTY INSURANCE: Property Insurance on the Manufactured Home is required for the term of this Contract. I have the right to choose the person through whom it is obtained. By marking the appropriate line below, I elect to buy the coverage indicated from you for the term and premium shown, and I want it financed on this Contract.

Type of Insurance	Term	Premium
<input checked="" type="checkbox"/> Physical Damage Coverage BROAD FORM	<u>24</u> MOS	\$ <u>915.00</u>
_____	_____	\$ _____

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED UNLESS INDICATED IN THE PROPERTY INSURANCE SECTION ABOVE.

CREDIT LIFE INSURANCE: CREDIT LIFE INSURANCE IS NOT REQUIRED FOR THIS CONTRACT OR A FACTOR IN ITS APPROVAL. IT WILL NOT BE PROVIDED UNLESS I SIGN BELOW AND AGREE TO PAY THE ADDITIONAL COST. If I elect Credit Life Insurance, the name(s) of the proposed insuree(s) are:

Proposed Insured _____
Proposed Insured _____
(Only spouse can be insuree jointly.)

This insurance may not pay off all of my debt, and the exact amount of coverage is shown on my policy or certificate. My signature indicates my election to obtain Credit Life Insurance coverage for the term and premium shown:

Type of Coverage	Term	Premium
<input type="checkbox"/> Single	_____	\$ _____
<input type="checkbox"/> Joint	_____	\$ _____
_____	_____	Date _____
_____	_____	Date _____

(If joint coverage is desired, both proposed insureds must sign.)

C.B.T.O.

ADDITIONAL TERMS AND CONDITIONS

VARIABLE RATE:

- a. **Monthly Payment Changes.** My monthly payment amount will change each time my interest rate is adjusted. The monthly payment amount will fully amortize the remaining unpaid balance at the adjusted interest rate in equal monthly payments over the remaining term of this Contract.
- b. **Notice of Interest Rate and Monthly Payment Changes.** You will send me notice of an adjustment in the interest rate and monthly payment at least 25 days before the adjustment. This notice will contain information about the index rate, interest rate, payment amount and remaining unpaid balance.
- c. **Conversion to Fixed Rate.** I may choose to convert this Contract to a fixed rate Contract at any time beginning ZERO years from the date of this Contract and ending 30 years from the date of this Contract. In order to convert to a fixed rate, I must not be in default under the terms of this Contract, I must notify you in writing of my desire to convert to a fixed rate, I must execute a revision agreement and I must pay a nonrefundable conversion fee. The new fixed interest rate will be your standard fixed interest rate for a comparable Contract on the date that you receive my written notification. The new fixed rate will take effect on the "Conversion Date," which shall be my next payment due date that is at least 30 days after your timely receipt of a revision agreement signed by all Borrowers together with a nonrefundable conversion fee of \$ 200.00. The new fixed rate and the Conversion Date are subject to change if my revision agreement and fees are received after the date specified in the revision agreement. My new payment amount will be effective with the first payment following the Conversion Date.

SECURITY INTEREST: I grant you a security interest under the Uniform Commercial Code in (1) the Manufactured Home and in all goods that are or may hereafter by operation of law become accessions to it, (2) all appliances, machinery, equipment and other goods furnished with the Manufactured Home (whether or not installed or affixed to it) including but not limited to the items listed as "Additional Accessories and Furnishings" on page 1 of this Contract, (3) any refunds of unearned insurance premiums financed in this Contract, (4) any substitutions or replacements of the foregoing, and (5) all proceeds of such Manufactured Home and accessions, and of any Additional Accessories and Furnishings. This security interest secures payment and performance of my obligations under this Contract, including any additional debt arising because of my failure to perform my obligations under this Contract and includes any contractual extensions, renewals or modifications. My execution of this Contract constitutes a waiver of my personal property and homestead exemption rights to the personal property herein described. I will sign and deliver to you whatever financing statements and other documents you deem necessary to allow you to perfect your security interest in any personal property and fixtures. I agree that you may file this security instrument or a reproduction thereof in the real estate records or other appropriate index as a financing statement for any of the items specified above. Any reproduction of this security instrument or any other security agreement or financing statement, and any extensions, renewals, or amendments thereof, shall be sufficient to perfect a security interest with respect to such items.

PREPAYMENT: I MAY PREPAY THIS CONTRACT IN FULL OR IN PART AT ANY TIME WITHOUT PENALTY. IF I MAKE A PARTIAL PREPAYMENT, THERE WILL BE NO CHANGE IN THE DUE DATES OR AMOUNTS OF MY MONTHLY PAYMENTS, UNLESS YOU AGREE IN WRITING TO THOSE CHANGES.

PROPERTY INSURANCE:

- a. **Minimum Coverage.** I am required to provide physical damage insurance coverage protecting the Manufactured Home for the term of this Contract against loss by fire, hazards included within the term "extended coverage" and any other hazards, including flood, for which you require insurance, in an amount equal to the lesser of the actual cash value of the Manufactured Home or the remaining unpaid balance I owe from time to time on this Contract (the "Minimum Coverage"). The insurance policy will contain a loss payable clause protecting you (as your interest may appear), and provide for a 10-day notice of cancellation to you. Unless you consent in writing, I shall not add any additional loss payee to the insurance policy. I have the right to choose the person through whom the property insurance policy is obtained. If my insurance coverage expires or is cancelled prior to payment in full of this Contract, I must obtain no less than the Minimum Coverage at my expense for the remaining term of this Contract. Should I fail to maintain the Minimum Coverage, you may, but are not obligated to, obtain insurance coverage. I agree that any insurance you purchase may be for the protection of only your interest in the Manufactured Home, may not fully protect me in the event of a loss, and may be for such reasonable period as you determine. If you decide, in your sole discretion, to obtain insurance, you will notify me of that fact and that the cost, plus interest at the Contract rate, will be added to my debt. I will repay such amount during the term of the policy in the manner requested by you. I understand that the insurance premiums may be higher if you must purchase the insurance than might be the case if I had purchased the insurance, and that you may purchase the insurance from an affiliated company which may receive a profit for this service.

C.B.D.

b. **Assignment and Application of Insurance Proceeds.** I hereby grant and assign to you the proceeds of any and all insurance coverage on the Manufactured Home, including any optional coverage, such as earthquake insurance, which in type or amount is beyond the Minimum Coverage. In the event of a loss to the Manufactured Home, I shall give prompt notice to you and the insurance carrier. If I fail to promptly notify or make proof of loss to the insurance carrier, you may do so on my behalf. All physical damage insurance proceeds, including proceeds from optional coverage, shall be applied to restoration or repair of the Manufactured Home, unless you and I agree otherwise in writing or unless such restoration or repair is not economically practical or feasible, or your security interest would be lessened. If such restoration or repair is not practical or feasible, or your security interest would be lessened, you shall apply the insurance proceeds to the remaining unpaid balance of this Contract, whether or not then due, and give me any excess. I authorize any insurer to pay you directly. I hereby appoint you as my limited attorney-in-fact to sign my name to any check, draft, or other document necessary to obtain such insurance payments.

LATE CHARGE: I agree to pay a late charge for late payment as set forth on the front of this Contract. Only one late charge will be made on any delinquent installment regardless of the period for which that installment remains in default. After this Contract matures, whether by acceleration or otherwise, I will not be charged a late charge.

RETURNED CHECK CHARGES: I will pay you \$25 (or such higher amount as allowed by law) if any check given to you is not honored because of insufficient funds or because no such account exists.

EVENTS OF DEFAULT: I will be in default under this Contract if: (a) I fail to make any payment when due; (b) I fail to timely make rental payments, or to pay other charges and assessments, relating to the real property and/or facility on which the Manufactured Home is located; (c) I violate restrictive covenants, rules or regulations relating to the real property and/or facility where the Manufactured Home is located; (d) I fail to keep the Manufactured Home in good repair and condition, as you may reasonably determine; (e) I remove the Manufactured Home from the address shown on this Contract unless I notify you in advance and receive your written consent; (f) I sell or attempt to sell or to transfer any beneficial interest in the Manufactured Home without first obtaining your written consent; (g) I allow the Manufactured Home to become part of any real estate without first obtaining your written consent; (h) I encumber or abandon the Manufactured Home or use it for hire or illegally; (i) I fail to promptly pay any taxes and other liens and encumbrances on the Manufactured Home or on the real property on which it is located, if this is my responsibility; and/or (j) I fail to do anything else which I have promised to do under this Contract.

NOTICE OF DEFAULT: If any of the above specified Events of Default have occurred, you may do whatever is necessary to correct my default. You will, except as set forth below, first give me a Notice of Default and Right to Cure Default before you accelerate payment of the remaining unpaid balance I owe you or repossess or foreclose on any property which secures this Contract. The Notice will tell me what my default is and how I can cure it. You are not required to send me this Notice when (1) you have already given me a Notice relating to a prior default under this Contract, (2) I have abandoned or voluntarily surrendered the Manufactured Home, (3) my default consists of an Event of Default other than my failure to make a payment when due, or (4) other extreme circumstances exist which could jeopardize the Manufactured Home.

REMEDIES UPON DEFAULT: If I do not cure the default, you may do either or both of the following at the end of the notice period, as allowed by applicable law: (a) you can require me to immediately pay you the entire remaining unpaid balance due under this Contract plus accrued interest or (b) you can repossess the Manufactured Home pursuant to the security interest I give you under this Contract. If you are not required to send me the Notice of Default and Right to Cure Default, you will have these rights immediately upon my default. Once you get possession of the Manufactured Home you will sell it. If the amount from the sale, after expenses, is less than what I owe you, I will pay you the difference except as otherwise provided by law. All remedies are cumulative and you may enforce them separately or together in any order you deem necessary to protect your security.

ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL:

a. **Dispute Resolution.** Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration, reference, or trial by a judge as provided below. A controversy involving only a single claimant, or claimants who are related or asserting claims arising from a single transaction, shall be determined by arbitration as described below. Any other controversy shall be determined by judicial reference of the controversy to a referee appointed by the court or, if the court where the controversy is venued lacks the power to appoint a referee, by trial by a judge without a jury, as described below. **YOU AND I AGREE AND UNDERSTAND THAT WE ARE GIVING UP THE RIGHT TO TRIAL BY JURY, AND THERE SHALL BE NO JURY WHETHER THE CONTROVERSY OR CLAIM IS DECIDED BY ARBITRATION, BY JUDICIAL REFERENCE, OR BY TRIAL BY A JUDGE.**

b. **Arbitration.** Since this Contract touches and concerns interstate commerce, an arbitration under this Contract shall be conducted in accordance with the United States Arbitration Act (Title 9, United States Code), notwithstanding any choice of

law provision in this Contract. The Commercial Rules of the American Arbitration Association ("AAA") also shall apply. The arbitrator(s) shall follow the law and shall give effect to statutes of limitation in determining any claim. Any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s). The award of the arbitrator(s) shall be in writing and include a statement of reasons for the award. The award shall be final. Judgment upon the award may be entered in any court having jurisdiction, and no challenge to entry of judgment upon the award shall be entertained except as provided by Section 10 of the United States Arbitration Act or upon a finding of manifest injustice.

- c. **Judicial Reference or Trial by a Judge.** If requested by either you or me, any controversy or claim under subparagraph (a) that is not submitted to arbitration as provided in subparagraph (b) shall be determined by reference to a referee appointed by the court who, sitting alone and without jury, shall decide all questions of law and fact. You and I shall designate to the court a referee selected under the auspices of the AAA in the same manner as arbitrators are selected in AAA-sponsored proceedings. The referee shall be an active attorney or retired judge. If the court where the controversy is venued lacks the power to appoint a referee, the controversy instead shall be decided by trial by a judge without a jury.
- d. **Self-Help, Foreclosure, and Provisional Remedies.** The provisions of this paragraph shall not limit any rights that you or I may have to exercise self-help remedies such as set-off or repossession, to foreclose by power of sale or judicially against or sell any collateral or security, or to obtain any provisional or ancillary remedies from a court of competent jurisdiction before, after or during the pendency of any arbitration under subparagraph (b) above. Neither the obtaining nor the exercise of any such remedy shall serve as a waiver of the right of either you or me to demand that the related or any other dispute or controversy be determined by arbitration as provided above.

ATTORNEY FEES: If I prevail in any legal action or arbitration proceeding which is commenced in connection with the enforcement of this Contract or any instrument or agreement required under this Contract, or in connection with any dispute relating to this Contract, you will pay my reasonable attorney fees, court costs and necessary disbursements incurred in connection with such action or proceeding, as determined by the court, the referee, or the arbitrator(s) in accordance with the law. If you prevail in any such action or proceeding, or in the exercise of any self-help remedy as described above, I will pay any reasonable fees imposed on you by an attorney who is not your salaried employee, not to exceed 15% of the unpaid debt, together with court costs and necessary disbursements to the full extent permitted by law.

OTHER TERMS AND CONDITIONS: I agree: (a) to pay with my monthly installments, if requested by you to do so, the estimated amount necessary to pay yearly taxes, assessments and insurance premiums that will become due within the next twelve-month period; (b) to pay you a transfer fee if I sell the Manufactured Home, unless such fee is prohibited by law; (c) to pay interest at the Contract rate on the remaining unpaid balance plus accrued interest, from the date of maturity until paid in full; (d) to reimburse you, immediately upon your demand, with interest at the Contract rate, the amount of funds you actually advance on my behalf to correct my default; and (e) that if I am married, and residing in a community property state, both my community property and separate property will be liable for all payments due under this Contract.

ASSIGNMENT: You may assign this Contract to any person or entity. All rights granted to you under this Contract shall apply to any assignee of this Contract.

CREDIT INFORMATION: You may investigate my credit history and credit capacity in connection with opening and collecting my account and share information about me and my account with credit reporting agencies. You may sell or otherwise furnish information about me, including insurance information, to all others who may lawfully receive such information. You may furnish specific information about the Manufactured Home and any insurance policies on the Manufactured Home to any insurance agent to enable such agent to quote premiums to me and solicit my insurance business.

WAIVER: Waiver of any default shall not constitute a waiver of any other default. No term of this Contract shall be changed unless in writing and signed by one of your officers. This Contract is the entire agreement between us and I agree that no oral or implied representations have been made to induce me to enter into this Contract.

VALIDITY: Wherever possible each provision of this Contract shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Contract shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Contract. This Contract shall be of no effect until and unless signed by me and you. In no event shall any charge under this Contract exceed the highest amount allowed by applicable law. If any excess charge is received, such excess shall be refunded or applied to the amount due.

GOVERNING LAW: Each provision of this Contract shall be construed in accordance with and governed by the laws of the state of South Carolina, provided that to the extent you have greater rights or remedies under Federal law, such choice of state law shall not be deemed to deprive you of such greater rights and remedies under Federal law.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

YOU AND I HAVE READ AND FULLY UNDERSTAND THIS CONTRACT, INCLUDING THE PARAGRAPH CALLING FOR RESOLVING DISPUTES BY ARBITRATION, REFERENCE, OR TRIAL BY A JUDGE, AND NOT BY JURY TRIAL, AND AGREE THAT THIS CONTRACT SETS FORTH OUR ENTIRE AGREEMENT AND THAT NO OTHER PROMISES HAVE BEEN MADE.

Notice to Consumer: It is a violation of law for any person involved in the sale of the property covered by this Contract, or the lending of money on the security of such property, to require or attempt to require the buyer to purchase insurance covering the property from any particular insurance company or agent, and any such violation or attempted violation should be reported to: Chief Insurance Commissioner, Department of Insurance, State of South Carolina, Columbia, South Carolina 29240. If insurance on the manufactured home is purchased through the Seller or Lender incident to this purchase contract and such insurance is subsequently canceled with refund of the unearned premium for the insurance going to the Seller or Lender, it is a requirement of the law that any such refund shall be applied to any installment payment then due or to the next payment or payments to become due and such refund may not lawfully be required to be applied to the final payments. Any provision in this Contract or any other agreement to the contrary is void under the law. However, if the Contract so provides, such refund may be used to purchase substitute insurance. Any premium held by the insurance company for a policy year beyond the current policy year is entirely unearned and is required to be returned to the buyer or credited to the buyer's account in full, without respect to whether the buyer ordered the cancellation or the company causes the cancellation. As to refund of unearned premium for the portion of the premium for the present policy year only, if the buyer ordered the cancellation, refund of the unearned premium for that portion shall be on the pro-rata basis.

NOTICE TO THE BUYER: 1. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. 2. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN. 3. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE WITHOUT PENALTY.

ACCEPTED: The foregoing Contract is hereby assigned under the terms of the Assignment below

TED PARKER HOME SALES, INC.

SELLER:

SELLER'S ADDRESS: 2485 BROAD STREET EXT.

SUMMER, SC 291500000

SELLER'S SIGNATURE

SELLER'S TITLE: General Manager

I AGREE TO ALL THE TERMS ON ALL PAGES OF THIS RETAIL INSTALLMENT CONTRACT AND ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF THIS CONTRACT.

BUYER(S) SIGNATURE(S)

Cynthia Selford

Ronald R. Ballentine

RONALD R. BALLENTINE

DATE OF THIS CONTRACT: 7-6-99

ASSIGNMENT BY SELLER

TO CREDITOR INDICATED ON PAGE 1 ("Creditor")

With respect to this retail installment contract ("Contract") signed by one or more buyers ("Buyer"), SELLER represents and warrants that: (1) Buyer's credit statement submitted herewith is completely accurate unless otherwise specified; (2) Buyer was legally competent to contract at the time of Buyer's execution of this Contract; (3) this Contract arose from the bona fide sale of the merchandise described in this Contract; (4) the down payment was made by Buyer in cash unless otherwise specified and no part thereof was loaned directly or indirectly by Seller to Buyer; (5) any trade-in, or other consideration, received as any part of the down payment is accurately described on page 2 and has been valued at its bona fide value, and any amount owed on such trade-in or other property is accurately described on page 2 and has been paid off by Seller prior to or contemporaneously with the assignment of this Contract to Creditor; (6) there is now owing on this Contract the amount set forth herein; (7) this Contract and any guaranty submitted in connection herewith is in all respects legally enforceable against each purported signatory thereof; (8) Seller has the right to assign this Contract and thereby to convey good title to it; (9) in the event of any claim or defense asserted by any Buyer, or any heirs or assigns of Buyer, with respect to the Manufactured Home or other property or consideration transferred pursuant to this retail installment contract, Seller agrees that it will indemnify and hold Creditor harmless from all such claims and defenses as well as from all costs reasonably incurred by Creditor in connection therewith, including but not limited to reasonable attorney fees and court costs; and (10) in accordance with the Fair Credit Reporting Act, Seller has notified Buyer that this Contract is to be submitted to Creditor.

For value received, Seller hereby assigns to Creditor all its rights, title and interest in this Contract and the property which is the subject matter hereof and authorizes Creditor to do everything necessary to collect and discharge same. All the terms of any existing written agreements between Seller and Creditor governing the purchase of Contracts are made a part hereof by reference, it being understood that Creditor relies upon the above warranties and upon said agreements in purchasing this Contract.

GreenPoint Credit

7/13/99

Cynthia J. DeLoach
Worldwide Collection

Account # 623

Customers (s):

During an internal review of our files, we discovered that we failed to disclose or inaccurately disclose the items listed below on your account. To correct the errors(s), we are making the following disclosures as they are applicable for your contract:

Heat pump serial # was not disclosed to you. It should have been disclosed as

H-050465-P

_____ was not disclosed to you. It should have been disclosed as

_____ was not disclosed to you. It should have been disclosed as

Payment due date was incorrectly disclosed to you as 7-11-99 7-11-00

It should have been disclosed as 12 at \$447.46 due 8/13/99 & 348 remaining payments estimated at \$476.96 8/13/2000.

maturity date was incorrectly disclosed to you as 6-11-29

It should have been disclosed as 7-13-29

_____ was incorrectly disclosed to you as _____

_____ has been disclosed as _____

If you have any questions, please contact us at the telephone number listed below.

J. Baldwin

GreenPoint Credit Corp.

RECEIVED

FEB 24 2014

SC Court of Appeals

File
Information Security Classification: Public
www.gpc.com (811/7799)
Brookfield Pkwy, Suite 102 (29607)
Box 2568
Columbia, SC 29602-2568
Tel: 281-0018 • (800) 722-7747 • (800) 550-1734 • Fax (800) 922-7445

R 0046



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Judge

Case No.: 2012-CP-40-7313

Cynthia Hall; Ronald R. Ballentine,

Respondents,

v.

Green Tree Servicing, LLC, f/k/a Green Tree
Financial Servicing Corp.,

Appellant.

PROOF OF SERVICE

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Attorneys for the Appellant

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FEB 24 2014

SC Court of Appeals

I, Deborah Watford, hereby certify that on February 24, 2014, I served one copy of the Record on Appeal submitted by the Appellant, Green Tree Servicing, LLC f/k/a Green Tree Financial Servicing Corp., on counsel for the Respondents, Cynthia Hall and Ronald R. Ballentine, via electronic mail and United States Mail, postage pre-paid, and addressed as follows:

Brian L. Boger, Esquire
1331 Elmwood Avenue, Suite 210
Columbia, South Carolina 29201

*Attorneys for the Respondents
Cynthia Hall and Ronald R. Ballentine*



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Columbia, South Carolina

February 24, 2014

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FEB 24 2014

SC Court of Appeals