

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early III, Circuit Judge

Appellate Case No. 2018-002068

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SC Court of Appeals

Wells Fargo Bank, N.A.,.....Respondent,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department
of Revenue; Linda Lawrence Bowen; Defendants,

Of whom Michael G. Morgan is the.....Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA**IN THE COURT OF COMMON PLEAS****COUNTY OF AIKEN****CASE NO. 2015-CP-02-2849****WELLS FARGO BANK, N.A.****PLAINTIFF,****v.****MICHAEL G. MORGAN; MARGARET H.
FITCH, M.D.; ERIC J. OLIG; SOUTH
CAROLINA DEPARTMENT OF REVENUE;
LINDA LAWRENCE BOWEN,****DEFENDANTS.****ORDER GRANTING PLAINTIFF
WELLS FARGO BANK, N.A.'S
MOTION TO DISMISS DEFENDANT MICHAEL
G. MORGAN'S AMENDED COUNTERCLAIM**

This matter came before the Court at a hearing on June 11, 2018 on Plaintiff Wells Fargo Bank, N.A.'s ("Wells Fargo") Motion to Dismiss Defendant Michael G. Morgan's ("Morgan") Amended Counterclaim. Stacie C. Knight argued the motion for Wells Fargo, and Taylor M. Smith argued the motion for Morgan. In addition, the parties submitted memoranda of law prior to the hearing. After due consideration, the Court GRANTS the Motion.

I. BACKGROUND

This is a contested foreclosure action that arises out of Morgan's failure to repay a \$1.3 million loan he obtained from Wells Fargo's predecessor, Wachovia Mortgage, FSB, in April 2008. Complaint, ¶ 18, 23; Amended Answer ¶ 18.

In his Original Answer and Counterclaim, filed on February 4, 2016, Morgan alleged a violation of the South Carolina Attorney Preference Statute, S.C. Code, § 37-10-102, that occurred at his loan's closing in April 2008. Morgan's Amended Answer and Counterclaim, filed on May 4, 2018, also alleges a violation of the Attorney Preference Statute. According to

Morgan, (1) an unidentified individual “falsified and forged [his] signature” on unspecified “documents relating to the application for and origination” of his loan, (2) an unidentified individual engaged in unspecified acts of “concealment,” and (3) he was “depriv[ed] of his right to choose his own, unconflicted counsel to represent him at the closing of the mortgage loan” and “no attorney licensed to practice law in South Carolina supervised the closing of the mortgage loan.” Amended Counterclaim, ¶¶ 40-41, 43, 45. Morgan seeks unspecified damages and attorneys’ fees, along with a declaration that his mortgage loan is “void or unenforceable.” *See id.*, Prayer for Relief.

II. STANDARD OF REVIEW

A circuit court may dismiss a counterclaim it fails to allege facts sufficient to constitute a cause of action. *See* S.C. R. Civ. P. 12(b)(6). “The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief.” *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 617, 698 S.E.2d 879, 882 (Ct. App. 2010) (quotations and citation omitted). The Court may sustain the dismissal when “the facts alleged in the complaint do not support relief under any theory of law.” *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

The statute of limitations is an affirmative defense. Generally, an affirmative defense may not be asserted in a Rule 12(b)(6) motion to dismiss unless the allegations of the complaint demonstrate the existence of the affirmative defense. *See Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). However, “[m]ost courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and

realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense.” *Id.* (citations omitted). As explained below, in the present case, even if the Court takes everything in Morgan’s pleading as true, it is apparent that the Amended Counterclaim is barred by the applicable statute of limitations and should be dismissed with prejudice.

III. LAW/ANALYSIS

The Attorney Preference Statute, S.C. Code, § 37-10-102, provides:

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

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

The creditor may comply with this section by:

- (1) including the preference information on or with the credit application ... or
- (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared.

The statute of limitations for claims under the Attorney Preference Statute is found in S.C. Code, § 37-10-105(A), which provides:

If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. ***No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C).*** The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any

pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(emphasis added). “[S]ubsection (C),” S.C. Code § 37-10-105(C), apparently contains a “relaxed statute of limitations,”¹ and provides that “[a]n action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.” However, because Morgan’s allegations fail to state a claim for unconscionability, he cannot take advantage of its longer limitations period.

In order to proceed under § 37-10-105(C), Morgan must properly allege either (1) substantive unconscionability—that the loan transaction itself is unconscionable, or (2) procedural unconscionability—that it was induced by unconscionable conduct. *See, e.g., Boone v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2016 WL 3552025, at *4 (D.S.C. June 30, 2016). An unconscionable transaction is one that contains “terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); *see also Centura Bank v. Cox*, No. 2004-UP-348, 2004 WL 6331130, at *3 (Ct. App. May 25, 2004) (same). For conduct to qualify as unconscionable inducement, it must be “an affirmative misrepresentation or active deceit.” *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 277 (4th Cir. 2016). Morgan does not adequately allege any of these things.

First, Morgan does not allege that any of his loan’s terms were so oppressive that no reasonable person would have accepted the agreement. Thus, Morgan does not allege substantive unconscionability as a matter of law. *See, e.g., Mosley v. Quicken Loans, Inc.*, No.

¹ *See Greene v. Household Fin. Corp.*, No. 3:02-2436-17, Order Granting Defendant’s Motion for Summary Judgment at 9 (D.S.C. Jan. 12, 2004).

1:16-cv-00384-JMC, 2016 WL 3551999, at *4 (D.S.C. June 30, 2016); *see also* *Boone*, 2016 WL 3552025, at *5; *O'Neal v. Quicken Loans, Inc.*, No. 1:15-cv-03712-JMC, 2016 WL 3569402, at *6 (D.S.C. June 30, 2016).

Nor does Morgan adequately allege procedural unconscionability. First, the Court finds that Morgan's conclusory allegations of forgery by an unidentified individual on unspecified loan documents, and of unidentified acts of "concealment," are insufficiently pled as a matter of law. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient); *see also Hartsel v. Selective Ins. Co. of S.C.*, No. 2011-UP-226, 2011 WL 11734337, at *3 (Ct. App. May 18, 2011) (rejecting conclusory allegations in support of breach of fiduciary duty claim). Indeed, these allegations sound in fraud and accordingly are subject to S.C. R. Civ. P. 9(b),² which provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In order to allege fraud, the following elements must be alleged with particularity: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *King v. Oxford*, 282 S.C. 307, 311, 318 S.E.2d 125, 127 (Ct. App. 1984). "A complaint is fatally defective if it fails to allege all nine elements of fraud. Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (citation omitted). Here, among other things, Morgan not identify the person who allegedly forged

² *See Chewning v. Ford Motor Co.*, 346 S.C. 28, 36, 550 S.E.2d 584, 588 (Ct. App. 2001).

documents or “concealed” information from him, nor does he identify the particular documents he claims were forged. Moreover, because Morgan does not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo did or did not do, he does not allege reliance. Thus, his allegations of forgery and concealment are insufficient to bring his claim within S.C. Code, § 37-10-105(C).

Morgan also argues that his claim comes within the exception set forth in S.C. Code, § 37-10-105(C) because his loan was closed without an attorney and because he was “depriv[ed] of [his] right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue.” Amended Counterclaim, ¶ 45. Essentially, Morgan argues that the alleged violation of the Attorney Preference Statute renders his loan unconscionable and unenforceable. The Court does not agree.

First, there is no private right of action for the alleged unauthorized practice of law. *See, e.g., Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007). Accordingly, any claims based on such an allegation necessarily fail as a matter of law. *See id.* (affirming dismissal of breach of fiduciary duty claim based upon the alleged unauthorized practice of law); *see also Hambrick v. GMAC Mortg. Corp.*, 6370 S.C. 118, 123-25, 634 S.E.2d 5, 8-9 (Ct. App. 2006) (affirming dismissal of complaint when charges of unauthorized practice of law were the basis for alleged causes of action because only the South Carolina Supreme Court can determine what constitutes the unauthorized practice of law).

Second, the South Carolina Supreme Court has held that the alleged unauthorized practice of law cannot render a mortgage unenforceable unless that mortgage was recorded after August 8, 2011. *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012); *Matrix Fin. Servs. Corp. v. Frazier*, 394 S.C. 134, 140, 714 S.E.2d 532, 535

(S.C. 2011). Here, it is undisputed that the mortgage at issue was recorded in 2008. Complaint, ¶ 18; Amended Answer, ¶ 18. Thus, as a matter of law, the alleged unauthorized practice of law cannot support Morgan's Counterclaim, which seeks to prohibit Wells Fargo from enforcing the mortgage. *See Deutsche Bank Nat'l Trust Co. v. Booms*, No. 2015-UP-097, 2015 WL 793201, at *1 (Ct. App. Feb. 25, 2015) (affirming circuit court's rejection of unclean hands defense based upon alleged unauthorized practice of law because the subject mortgage was recorded before August 8, 2011).

Finally, the Court finds that an alleged violation of the Attorney Preference Statute cannot support a procedural unconscionability claim. Morgan presented the Court with only one decision, from Lexington County, permitting such a claim to proceed. *Nationstar Mortg. LLC v. Fowler*, No. 2013-CP-32-1482, Order Denying Motion to Dismiss Cross-Claim and Third-Party Complaint (Lexington Cty. Dec. 12, 2013). On the other hand, Wells Fargo cited numerous decisions from the U.S. District Court for the District of South Carolina rejecting procedural unconscionability claims based upon alleged violations of the Attorney Preference Statute. *See, e.g., Mosley*, 2016 WL 3551999, at *3-4 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute); *Boone*, 2016 WL 3552025, at *5 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute and applying the three-year statute of limitations to the claim). Wells Fargo also pointed to *Deutsche Bank Nat'l Trust Co. v. Booms*, 2015 WL 793201. There, although the South Carolina Court of Appeals did not directly address the issue, it held that the circuit court did not err in holding that the subject note and mortgage were not unconscionable, even though the lender violated the Attorney Preference Statute.

The Court finds the federal decisions to be better-reasoned, and *Booms* suggests that suggests that the South Carolina appellate courts would agree. In addition, accepting Morgan's argument would eviscerate the three-year statute of limitations generally applicable to attorney preference violations. If Morgan is correct, then every loan with an attorney preference violation is necessarily unconscionable and thereby subject to the longer limitations period in S.C. Code, § 37-10-105(C). However, it is well-established that South Carolina courts "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). To construe the statutes in the manner suggested by Morgan would render the three-year limitations period in § 37-10-105(A) meaningless. Accordingly, the Court rejects Morgan's proffered construction.

Finally, Morgan's procedural unconscionability claim fails for the simple reason that he does not allege inducement. As set forth above, Morgan does not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo did or did not do. Therefore, the Court finds Morgan has not stated a procedural unconscionability claim. *See, e.g., Boone*, 2016 WL 3552025, at *5 ("The facts as alleged indicate that Plaintiff applied for the loan with Defendant. There is no allegation that Plaintiff chose to apply for the loan based on statements made, or conduct, by Defendant regarding Plaintiff's ability to choose an attorney for closing. Therefore, Plaintiff has not stated a claim for unconscionable inducement."); *Hosey v. Quicken Loans, Inc.*, No. 1:17-cv-02060-JMC, 2018 WL 1471891, at *5 (D.S.C. Mar. 26, 2018) (same).

IV. CONCLUSION

It is undisputed that Morgan's loan closed in April 2008 and that Morgan first filed his claim under S.C. Code, § 37-10-102 in February 2016. For the foregoing reasons, the Court finds that the claim is subject to the three-year statute of limitations contained in § 37-10-105(A), and that it was time-barred as of April 2011.

Accordingly, it is therefore hereby ORDERED that Wells Fargo's Motion to Dismiss Morgan's Amended Counterclaim is GRANTED, and Morgan's Amended Counterclaim is dismissed WITH PREJUDICE.

AND IT IS SO ORDERED.

Date: _____

The Honorable Doyet A. Early, III
Circuit Judge



Aiken Common Pleas

Case Caption: Wells Fargo Bank NA VS Michael G Morgan , defendant, et al
Case Number: 2015CP0202849
Type: Order/Dismissal

So Ordered

s/D.A. Early III 2136

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STATE OF SOUTH CAROLINA**COUNTY OF AIKEN****IN THE COURT OF COMMON PLEAS****Case No. 2015-CP-02-2849****Wells Fargo Bank, N.A.,****Plaintiff,****vs.****Michael G. Morgan; Margaret H. Fitch,
M.D.; Eric J. Olig; South Carolina
Department of Revenue; Linda Lawrence
Bowen;****Defendants.****ORDER**

This matter comes before me upon Defendant Michael G. Morgan (hereinafter “Morgan”)’s motion that asks the court to reconsider the order filed August 24, 2018, that granted the Plaintiff (hereinafter “Wells Fargo”)’s motion to dismiss Morgan’s counterclaim in this foreclosure case. The court is persuaded that the decision to dismiss the counterclaim was premature and that a decision on the merits of that claim should be made on a fully developed factual record. Further, as Morgan’s motion to reconsider noted, in its previous order the court applied the heightened standard of pleading for fraud to Morgan’s amended answer and counterclaim, and that standard is not applicable to the counterclaim alleged.

In this mortgage foreclosure action, Morgan’s counterclaim asserts the violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney-preference statute, with regard to the subject mortgage loan. Morgan’s counterclaim also asserts that he is entitled to the enhanced penalties for that violation under S.C. Code Ann. § 37-10-105(C), which is applicable where the mortgage loan is unconscionable or was induced by unconscionable conduct.

The court ruled that dismissal was proper on the basis that the counterclaim was barred by the statute of limitations and on the basis that Morgan had not pled sufficient facts to constitute

unconscionability or inducement by unconscionable conduct. Having reviewed Morgan's amended answer and counterclaim in the light most favorable to him, taking all his factual allegations as true and drawing all reasonable inferences in his favor, the court concludes that Morgan did allege facts sufficient to state a violation of S.C. Code Ann. § 37-10-102 and facts sufficient to state that the loan was induced by unconscionable conduct. There is no dispute that Morgan alleges the failure to ascertain his preference as to counsel to represent him in the closing of the mortgage loan and that Morgan alleges that no attorney supervised the closing. Morgan also alleges that, without his knowledge or permission, falsified and forged documents were submitted and used in connection with the origination of that mortgage loan.

These circumstances could be construed to constitute inducement of the loan by unconscionable conduct. In discussing unconscionability, our Supreme Court has said that "[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). The court finds some merit to Morgan's contention that there is no litmus test or list of elements for unconscionability. Indeed, at the hearing on the motion to reconsider, Wells Fargo's counsel acknowledged that the law in this area is not thoroughly developed. Accordingly, anything that speaks to the fundamental fairness of the origination and closing of the subject mortgage loan is relevant to whether the loan was induced by unconscionable conduct.

Morgan alleges facts from which a factfinder could conclude that the loan was originated based on false information and forged documents submitted without his knowledge. Morgan also alleges that the loan was closed without the supervision of an attorney. Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of

interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. See Doe, 585 S.E.2d at 777-78; Buyers Service, 292 S.C. at 431-32. "[C]losing a [mortgage] loan without the supervision of an attorney constitutes the unauthorized practice of law." Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011). A primary purpose of requiring a lawyer to supervise a mortgage loan closing is to protect the mortgage loan customer, who typically lacks familiarity with the mortgage lending process and is not in a position to know whether something is wrong with the loan or the closing documents. See Doe, 585 S.E.2d at 777-78; Buyers Service, 292 S.C. at 431-32. Accordingly, whether a mortgage loan closing was supervised by an attorney speaks to the fundamental fairness of the process and to whether customer's entry into the mortgage loan was the product of an informed, meaningful choice. This is consistent with the principle that "[t]he unauthorized practice of law is inherently prejudicial[.]" Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013); accord Matrix, 714 S.E.2d at 534.

As part of the South Carolina Consumer Protection Code, the purpose of S.C. Code Ann. §§ 37-10-102 and -105 is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). The court must, accordingly, interpret S.C. Code Ann. § 37-10-105 consistently with that purpose, i.e., liberally in

favor of consumer protection. In light of this, the court determines that Morgan's allegations of falsification and forgery, particularly when coupled with his allegation that the mortgage loan was closed through the unauthorized practice of law, without an attorney present to protect Morgan, could be construed to constitute inducement of the subject mortgage loan through unconscionable conduct under S.C. Code Ann. § 37-10-105(C).

The other basis on which the court dismissed Morgan's counterclaim was the statute of limitations. The determination that Morgan has alleged facts sufficient to invoke S.C. Code Ann. § 37-10-105(C) disposes of this as a basis for dismissal. The statute of limitations under S.C. Code Ann. § 37-10-105(C) provides that "[a]n action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt[.]" and Wells Fargo does not contend that the mortgage loan has matured. Also, as pointed out in the motion to reconsider, the statute of limitations would not bar a counterclaim that merely alleged violation of the attorney preference statute without any unconscionability. While the statute of limitations for bringing an action for violation of the attorney preference statute is usually three years from the date of the violation, this "does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action." S.C. Code Ann. § 37-10-105(A). This foreclosure action is an action to collect a debt brought against Morgan by Wells Fargo, so Morgan could raise a violation of S.C. Code Ann. § 37-10-102 in this case without regard to how much time has passed since the violation.

Additionally, Morgan's counsel noted to the court that, while there is no published appellate opinion concerning S.C. Code Ann. § 37-10-105(C), there is a case pending in the Court of Appeals, Quicken Loans, Inc. v. Wilson, App. Case No. 2016-001214, that may produce some

precedent concerning what constitutes inducement by unconscionable conduct under S.C. Code Ann. § 37-10-105(C). Given the unsettled posture of the law in this area, Morgan's counterclaim should not be dismissed at the 12(b)(6) stage but should be dealt with on its merits after the development of a factual record. See Garner v. Morrison Knudsen Corp., 318 S.C. 223, 226, 456 S.E.2d 907, 909 (1995) (novel issues "should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss"); Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980) ("[a] novel issue . . . is best decided in light of the testimony to be adduced at trial").

Morgan's counsel also suggested at the hearing that this case be referred to the master-in-equity, as neither party has demanded a jury trial. "Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." Rule 71(a), SCRCF. The court finds that reference to the master-in-equity is proper and warranted.

Accordingly, it is therefore hereby ORDERED that:

- 1) The court hereby reconsiders and reverses the dismissal of Morgan's counterclaim;
- 2) This action is hereby referred to the Honorable M. Anderson Griffith, Master-in-Equity for Aiken County, pursuant to Rule 53(b), SCRCF; and
- 3) Morgan shall pay the master-in-equity's reference fee.

And IT IS SO ORDERED.

The Honorable Doyet A. Early, III
Circuit Judge



Aiken Common Pleas

Case Caption: Wells Fargo Bank NA VS Michael G Morgan , defendant, et al
Case Number: 2015CP0202849
Type: Order/Other

So Ordered

s/D.A. Early III 2136

Electronically signed on 2018-10-29 10:52:36 page 6 of 6 .

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
CASE NO. 2015-CP-02-2849

WELLS FARGO BANK, N.A.

PLAINTIFF,

v.

MICHAEL G. MORGAN; MARGARET H.
FITCH, M.D.; ERIC J. OLIG; SOUTH
CAROLINA DEPARTMENT OF REVENUE;
LINDA LAWRENCE BOWEN,

DEFENDANTS.

**ORDER DENYING
DEFENDANT'S MOTION TO RECONSIDER**

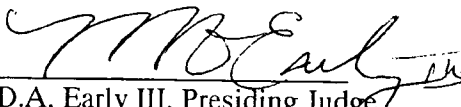
This matter came before this court on September 4, 2018 on Defendant Michael G. Morgan's (hereinafter "Defendant") Motion to Reconsider the Court's August 24, 2018 Order Granting Plaintiff Wells Fargo Bank, N.A.'s (hereinafter "Plaintiff") Motion to Dismiss Defendant's Amended Counterclaim. A hearing was held on October 16, 2018. Andrew S. Radeker appeared for Defendant and Stacie C. Knight appeared for Plaintiff.

After carefully conserving the record, arguments of counsel, and proposed orders submitted by counsel, the Court Stands by its prior ruling dismissing Defendant's Amended Counterclaim.

Therefore, the Court respectfully denies Defendant's Motion to Reconsider.

AND IT IS SO ORDERED.

October 30 2018
Bamberg, South Carolina


D.A. Early III, Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Wells Fargo Bank, N.A.,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s)

vs.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen;

Defendant(s)

Submitted By: Robert P. Davis (SC Bar #74030), Andrew W. Montgomery (SC Bar #79893); John J. Hearn (SC Bar # 6635); Kevin T. Brown (SC Bar # 064236); Nikole Halliwanger (SC Bar # 70491); Jason D. Wyman (SC Bar # 100271)
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2015-CP-02-02849

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

DOCKETING INFORMATION (Check all that apply)

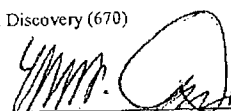
*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☐ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver Warranty(160)
☐ Employment Discrim (170)
☐ Employment (180)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20__-NI-_____
☐ Notice/File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Libel (380)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☒ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Sexual Predator (510) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Pre-suit Discovery (670) | | |

Submitting Party Signature:



Date: 12/11/15

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

C O P Y LMC
ORIGINAL FILED
DEC 02 2015
4:15pm
AIKEN COUNTY
CLERK OF COURT

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

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

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

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

022054-00034

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

STATE OF SOUTH CAROLINA

AIKEN COUNTY

Wells Fargo Bank, N.A.,

Plaintiff

vs.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig;
South Carolina Department of Revenue; Linda Lawrence
Bowen;

Defendant.

IN THE CIRCUIT COURT FOR THE
SECOND
JUDICIAL CIRCUIT

CERTIFICATE OF EXEMPTION
FROM ADR

DOCKET NO.

2015-CP-02-02849

I certify that this action is exempt from ADR because:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is forfeiture proceeding brought by the State;
- ☒ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

COPY LMC
ORIGINAL FILED
DEC 02 2015
4:15 pm
AIKEN COUNTY
CLERK OF COURT

Plaintiff/Attorney(s) for Plaintiff(s)

Robert P. Davis (SC Bar #74030), Andrew W. Montgomery (SC Bar #79893), John J. Hearn (SC Bar # 6635); Kevin T. Brown (SC Bar # 064236); Ashley M. Wheeling-Goodson (SC Bar # 101423); Nikole Haltiwanger (SC Bar # 70491); Jason D. Wyman (SC Bar # 100271)

Rogers Townsend & Thomas, PC
220 Executive Center Drive, Suite 109
Post Office Box 100200
Columbia, SC 29202
(803) 744-4444

Defendant/Attorney(s) for Defendant(s)

Date: ~~November 30~~, 2015

December 1
022054-00034

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Wells Fargo Bank, N.A.,

Plaintiff,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric
J. Olig; South Carolina Department of Revenue;
Linda Lawrence Bowen;

Defendant(s).

(022054-00034)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2015-CP-0202849
2015-LP-02-00602

LIS PENDENS
Deficiency Judgment Demanded

COPY LMC
ORIGINAL FILED

DEC 02 2015
4:15pm
AIKEN COUNTY
CLERK OF COURT

NOTICE IS HEREBY GIVEN THAT an action has been or will be commenced in this Court upon complaint of the above-named Plaintiff against the above-named Defendant(s) for the foreclosure of a certain mortgage of real estate given by Michael G. Morgan to Wachovia Mortgage, FSB dated April 25, 2008, and recorded in the Office of the RMC/ROD for Aiken County on May 6, 2008, in Mortgage Book RB 4201 at Page 1737. Wells Fargo Bank, N.A. is successor by merger to Wachovia Mortgage, FSB

The premises covered and affected by the said mortgage and by the foreclosure thereof were, at the time of the making thereof and at the time of the filing of this notice, described as follows:

ALL that certain piece, parcel or lot of land, with the improvements thereon, containing 2.06 acres, more or less, located in the Southwestern Section of the City of Aiken, Aiken County, South Carolina, between and adjoining South Boundary Avenue and First Street and West of and adjoining Chesterfield Street, and being shown and designated on that certain plat prepared for John Ellis by Jones and Murph, P. L. Surveyors, dated September 1, 1988, and recorded in Book 520, page 224, Aiken County Records, and being bounded, now or formerly, and measuring, more or less, as follows: on the NORTH by South Boundary Avenue, 247.0 feet; EAST by Chesterfield Street, 363.8 feet; SOUTH by First Street 250.7 feet; and WEST by property now or formerly of Terfloth, 359.4 feet. Reference is made to said plat for a more complete and accurate description of said property.

The improvements thereon being commonly known as 415 South Chesterfield Street, Aiken, South Carolina 29801.

This being the same subject property conveyed to Michael G. Morgan from Harbour Capital Corporation by deed dated July 30, 2002 and recorded August 7, 2002 in Deed Book 2226 at Page 251 in the Office of Register Deeds for Aiken County.

Property Address: 415 Chesterfield St S
Aiken, SC 29801

TMS# 105-12-05-003



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Robert P. Davis (SC Bar #74030)
John J. Hearn (SC Bar # 6635)
Haltiwanger (SC Bar # 70491)

220 Executive Center Drive
Columbia, SC 29210

Andrew W. Montgomery (SC Bar #79893)
Kevin T. Brown (SC Bar # 064236)Nikole
Jason D. Wyman (SC Bar # 100271)

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina

~~November 30, 2015~~

December 1

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Wells Fargo Bank, N.A.,

Plaintiff,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric
J. Olig; South Carolina Department of Revenue;
Linda Lawrence Bowen;

Defendant(s).

(022054-00034)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2015-CP-02-02849

SUMMONS
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Demanded

C O P *LMC*
ORIGINAL FILED

DEC 02 2015
4:15pm
AIKEN COUNTY
CLERK OF COURT

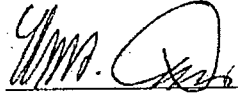
TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an order of reference or that the Court may issue a general order of reference of this action to a master in equity/special referee, pursuant to Rule 53, of the South Carolina Rules of Civil Procedure.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by Wells Fargo Bank, N.A..



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Robert P. Davis (SC Bar #74030)
John J. Hearn (SC Bar # 6635)
Haltiwanger (SC Bar # 70491)

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Columbia, South Carolina

~~November 30~~, 2015

December 1

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Wells Fargo Bank, N.A.,

Plaintiff,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric
J. Olig; South Carolina Department of Revenue;
Linda Lawrence Bowen;

Defendant(s).

(022054-00034)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2015-CP-02-02849

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE

Deficiency Judgment Demanded

C O P Y *LMC*
ORIGINAL FILED

DEC 02 2015
4:15 pm
AIKEN COUNTY
CLERK OF COURT

Plaintiff alleges:

GENERAL ALLEGATIONS

1. This is an action for the foreclosure of a mortgage upon certain real estate in Aiken County, South Carolina.

2. Pursuant to S.C. Code Section 33-15-101(b)(8) Plaintiff is a corporation or other legal entity collecting debts and / or enforcing mortgages, security interests or other rights in property securing debts.

3. Plaintiff has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure.

4. The Plaintiff's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program ("HMP"), but the subject loan is not eligible for modification because the Servicer has been unable to establish right party contact and has satisfied the Reasonable Effort Solicitation standard required by the Treasury Department.

5. The premises covered and affected by the said mortgage and by the foreclosure thereof is described as follows:

ALL that certain piece, parcel or lot of land, with the improvements thereon, containing 2.06 acres, more or less, located in the Southwestern Section of the City of Aiken, Aiken County, South Carolina, between

and adjoining South Boundary Avenue and First Street and West of and adjoining Chesterfield Street, and being shown and designated on that certain plat prepared for John Ellis by Jones and Murph, P. L. Surveyors, dated September 1, 1988, and recorded in Book 524, page 224, Aiken County Records, and being bounded, now or formerly, and measuring, more or less, as follows: on the NORTH by South Boundary Avenue, 247.0 feet; EAST by Chesterfield Street, 363.8 feet; SOUTH by First Street 250.7 feet; and WEST by property now or formerly of Terfloth, 359.4 feet. Reference is made to said plat for a more complete and accurate description of said property.

The improvements thereon being commonly known as 415 South Chesterfield Street, Aiken, South Carolina 29801.

This being the same subject property conveyed to Michael G. Morgan from Harbour Capital Corporation by deed dated July 30, 2002 and recorded August 7, 2002 in Deed Book 2226 at Page 251 in the Office of Register Deeds for Aiken County.

Property Address: 415 Chesterfield St S
Aiken, SC 29801

TMS# 105-12-05-003

6. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.

7. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of South Carolina Code Section 15-35-840.

8. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the Mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

9. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth below, or some part thereof, but that such interests or liens are junior and subsequent to the lien of the Plaintiff's Mortgage, or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. Margaret H. Fitch, M.D., by virtue of a mortgage given by Michael G. Morgan in the amount of \$250,000.00, dated May 7, 2009, and recorded June 9, 2009 in Book RB 4260 at Page 2247. Also including any other liens they may have.

B. Eric J. Olig, by virtue of a judgment against Michael Morgan

in the amount of \$1,685.75, dated September 11, 2012 and recorded on October 12, 2012 in Judgment Roll No. 2012-CP-02-02520. Also including any other liens they may have.

C. Margaret H. Fitch, M.D., by virtue of a judgment against Michael G. Morgan in the amount of \$422,281.48, dated September 19, 2012 and recorded on September 19, 2012 in Judgment Roll No. 2011-CP-02-01051. Also including any other liens they may have.

D. The South Carolina Department of Revenue by virtue of a Tax Lien, including but not limited to, a lien against Michael Morgan; Tax Lien No.: 3-51026612-2; Dated: April 13, 2009; Recorded: April 21, 2009; in the amount of \$15,609.90; in Judgment Roll No. SL-09-82089

E. Linda Lawrence Bowen, by virtue of a judgment against Michael G. Morgan in the amount of \$112,300.00, dated February 18, 2013 and recorded on February 19, 2013 in Judgment Roll No. 2013-CP-02-424. Also including any other liens they may have.

FOR A FIRST CAUSE OF ACTION
(Reformation)

10. The Plaintiff incorporates the allegations of Paragraphs 1-9 herein.

11. Heretofore, on or about April 25, 2008, Michael G. Morgan made, executed and delivered a certain Adjustable Rate Note ("Note") in the principal sum of \$1,300,000.00, payable in monthly installments.

12. In order to secure the payment of the Note according to the terms and conditions thereof, Michael G. Morgan made, executed and delivered unto Wachovia Mortgage, FSB a certain real estate Mortgage covering the previously described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

13. The Mortgage was signed, witnessed and probated April 25, 2008; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Aiken County on May 6, 2008, in Mortgage Book RB 4201 at Page 1737. Wells Fargo Bank, N.A. is successor by merger to Wachovia Mortgage, FSB

14. The legal description as shown on said Mortgage and described in Paragraph 5, is incorrect in its identification of plat reference. Upon review of the recorded documents related to the subject property, Plaintiff is informed and believes that the legal description should read as follows:

ALL that certain piece, parcel or lot of land, with the improvements thereon, containing 2.06 acres, more or less, located in the Southwestern Section of the City of Aiken, Aiken County, South Carolina, between and adjoining South Boundary Avenue and First Street and West of and adjoining Chesterfield Street, and being shown and designated on that certain plat prepared for John Ellis by Jones and Murph, P. L.

Surveyors, dated September 1, 1988, and recorded in Book 520, page 224, Aiken County Records, and being bounded, now or formerly, and measuring, more or less, as follows: on the NORTH by South Boundary Avenue, 247.0 feet; EAST by Chesterfield Street, 363.8 feet; SOUTH by First Street 250.7 feet; and WEST by property now or formerly of Terfloth, 359.4 feet. Reference is made to said plat for a more complete and accurate description of said property.

The improvements thereon being commonly known as 415 South Chesterfield Street, Aiken, South Carolina 29801.

This being the same subject property conveyed to Michael G. Morgan from Harbour Capital Corporation by deed dated July 30, 2002 and recorded August 7, 2002 in Deed Book 2226 at Page 251 in the Office of Register Deeds for Aiken County.

15. Plaintiff is informed and believes it is entitled to reformation of its Mortgage so as to correct the plat reference in the legal description on the Mortgage to read as described in Paragraph 14.

FOR A SECOND CAUSE OF ACTION
(Foreclosure of Mortgage)

16. The Plaintiff incorporates the allegations of Paragraphs 1-15 herein.

17. This cause of action is for the foreclosure of the Mortgage described above.

18. Heretofore, on or about April 25, 2008, Michael G. Morgan made, executed and delivered a certain Adjustable Rate Note ("Note") in the principal sum of \$1,300,000.00, payable in monthly installments.

19. In order to secure the payment of the Note according to the terms and conditions thereof, Michael G. Morgan made, executed and delivered unto Wachovia Mortgage, FSB a certain real estate Mortgage covering the previously described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

20. The Mortgage was signed, witnessed and probated April 25, 2008; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Aiken County on May 6, 2008, in Mortgage Book RB 4201 at Page 1737. Wells Fargo Bank, N.A. is successor by merger to Wachovia Mortgage, FSB

21. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a first lien on the mortgaged premises.

22. Any notice required by the terms of the Note and Mortgage or by state or federal laws has been given to the applicable Defendant(s).

23. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for June 15, 2011, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and

that there is due on the Note and Mortgage as of June 15, 2011, the principal sum of \$1,334,347.63, with interest from May 15, 2011, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

24. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is such sum as the Court may find appropriate.

25. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

26. Pursuant to South Carolina Code Sections 29-3-650 and 29-3-660, Plaintiff specifically demands or reserves its right to a personal or deficiency judgment, unless heretofore or hereafter released, against the Notemaker(s) hereby obligated for the above-described debt.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters and set forth herein and:

- (1) Under the direction of this Court, grant reformation of the Plaintiff's Mortgage.
- (2) Direct the RMC/ROD to annotate the public records to reflect ownership of the Mortgage in the Plaintiff.
- (3) Ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.
- (4) Declare Plaintiff's Mortgage a first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes or insurance premiums which may be due and have been advanced by the Plaintiff, with reasonable attorney's fees, and for the costs of this action.
- (5) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.
- (6) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.
- (7) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:
 - First, to the costs and expenses of the within action and sale;
 - Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and
 - Third, to the distribution of any surplus pursuant to Rule 71, SCRCP.

(8) Issue an order directing the Sheriff of Aiken County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary.

(9) Order such other and further relief as may be just and proper.



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Robert P. Davis (SC Bar #74030)
John J. Hearn (SC Bar # 6635)
Haltiwanger (SC Bar # 70491)

Andrew W. Montgomery (SC Bar #79893)
Kevin T. Brown (SC Bar # 064236) Nikole
Jason D. Wyman (SC Bar # 100271)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
~~November 30, 2015~~

December 1

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Wells Fargo Bank, N.A.,

Plaintiff,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric
J. Olig; South Carolina Department of Revenue;
Linda Lawrence Bowen;

Defendant(s).

(022054-00034)

IN THE COURT OF COMMON PLEAS

DOCKET NO. *2015-CP-02-02849*

NOTICE OF FORECLOSURE INTERVENTION
Deficiency Judgment Demanded

COPY lmc
ORIGINAL FILED

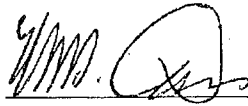
DEC 02 2015
4:15pm
AIKEN COUNTY
CLERK OF COURT

PLEASE TAKE NOTICE THAT pursuant to the South Carolina Supreme Court Administrative Order 2011-05-02-01, you may have a right to Foreclosure Intervention.

To be considered for any available Foreclosure Intervention, you may communicate with and otherwise deal with the Plaintiff through its law firm, Rogers Townsend & Thomas, PC.

Rogers Townsend & Thomas, PC represents the Plaintiff in this action. Our law firm does not represent you. Under our ethical rules, we are prohibited from giving you any legal advice.

You must submit any requests for Foreclosure Intervention consideration within 30 days from the date you are served with this Notice. **IF YOU FAIL, REFUSE, OR VOLUNTARILY ELECT NOT TO PARTICIPATE IN FORECLOSURE INTERVENTION, THE FORECLOSURE ACTION MAY PROCEED.**



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

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Columbia, South Carolina

November 30, 2015

December 1

COPY

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-02-2849

Wells Fargo Bank, N.A.,

Plaintiff,

vs.

Michael G. Morgan; Margaret H. Fitch,
M.D.; Eric J. Olig; South Carolina
Department of Revenue; Linda Lawrence
Bowen;

Defendants.

ANSWER AND COUNTERCLAIM
(JURY TRIAL DEMANDED)

C O P Y
ORIGINAL FILED
FEB 04 2016 1248
AIKEN COUNTY
CLERK OF COURT

Defendant Michael G. Morgan (hereinafter "Morgan") in answer to the Plaintiff's Complaint and as counterclaim, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Complaint, Morgan admits the same to the extent that the Complaint states a cause of action for mortgage foreclosure.

3. Answering the allegations of paragraphs 2 and 3 of the Complaint, Morgan admits, upon information and belief, that the Plaintiff is a corporation and claims to be the owner of the note and mortgage at issue.

4. Answering the allegations of paragraph 4 of the Complaint, Morgan admits that the loan's servicer is a participant in the Home Affordable Modification program, but Morgan denies the remaining allegations of the paragraph.

5. Answering the allegations of paragraph 5 of the Complaint, Morgan admits the same to the extent it accurately states the content of the mortgage document at issue.

6. Answering the allegations of paragraph 6 of the Complaint, Morgan admits that he owns property subject of this lawsuit.

7. Answering the allegations of paragraph 7 of the Complaint, Morgan admits the same.

8. Answering the allegations of paragraph 8 of the Complaint, Morgan admits the Plaintiff requests what it requests but denies the Plaintiff is entitled to what it requests.

9. Answering the allegations of paragraph 9 of the Complaint, Morgan denies the validity of any such claimed liens against his property.

10. Answering the allegations of paragraph 10 of the Complaint, Morgan notes that no answer to this paragraph is necessary.

11. Answering the allegations of paragraph 11 of the Complaint, Morgan admits the same and further alleges that this was a "Pick-a-Payment" note.

12. Answering the allegations of paragraph 12 of the Complaint, Morgan admits the same upon information and belief.

13. Answering the allegations of paragraph 13 of the Complaint, Morgan admits the same to the extent they are consistent with the public record.

14. Answering the allegations of paragraph 14 of the Complaint, Morgan lacks sufficient knowledge or information to form a belief as to the truth or falsity of the same.

15. Answering the allegations of paragraph 15 of the Complaint, Morgan lacks sufficient knowledge or information to form a belief as to the truth or falsity of the same.

16. Answering the allegations of paragraph 16 of the Complaint, Morgan notes that no answer to this paragraph is necessary.

17. Answering the allegations of paragraph 17 of the Complaint, Morgan admits the same to the extent that the complaint states a cause of action for the foreclosure of a mortgage.

18. Answering the allegations of paragraph 18 of the Complaint, Morgan admits the same upon information and belief.

19. Answering the allegations of paragraph 19 of the Complaint, Morgan admits he signed a mortgage document but denies a mobile home was subject thereof.

20. Answering the allegations of paragraph 20 of the Complaint, Morgan admits the same upon information and belief.

21. Answering the allegations of paragraph 21 of the Complaint, Morgan admits the same upon information and belief.

22. Answering the allegations of paragraph 22 of the Complaint, Morgan denies the same.

23. Answering the allegations of paragraph 23 of the Complaint, Morgan denies the same.

24. Answering the allegations of paragraph 24 of the Complaint, Morgan admits that a law firm was hired to bring this lawsuit, likely by the Plaintiff.

25. Answering the allegations of paragraph 25 of the Complaint, Morgan denies the same.

26. Answering the allegations of paragraph 26 of the Complaint, Morgan admits the Plaintiff demands what it demands but denies the Plaintiff is entitled to what it demands.

27. No answer to the prayer in the Complaint is required.

28. Morgan notes that he desires and is interested in foreclosure intervention.

FOR A SECOND DEFENSE
(Dismissal – Rule 12(b)(6))

29. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

30. The Complaint fails to state facts sufficient to constitute a cause of action, especially one for reformation.

31. The Complaint or part thereof should be dismissed.

FOR A THIRD DEFENSE
(Rules 12(b)(8) and 13(a), SCRCP)

32. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

33. There is a pending action against The Plaintiff, Wells Fargo Bank, N.A. (hereinafter “Wells Fargo”) that was commenced prior to the commencement of this action in which the claim sought to be asserted by Wells Fargo is required to be brought as a counterclaim. See Rules 12(b)(8) and 13(a), SCRCP.

34. This action should be dismissed.

FOR A FOURTH DEFENSE
(Unclean Hands)

35. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

36. Wells Fargo (and its predecessor in interest) has engaged in such conduct with respect to the matters subject of his claims as to make its hands unclean with regard to its claims.

37. This conduct includes, but is not necessarily limited to, what is stated in this pleading.

38. This conduct by Wells Fargo relates directly to the subject matter of this action.

39. Wells Fargo's said conduct has proximately caused Morgan prejudice and injury.

FOR A FIFTH DEFENSE
(Wells Fargo's Prior Breach of Contract)

40. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

41. The mortgage loan subject of this case was created as a "pick-a-payment" option note.

42. The "pick-a-payment" option note program was a program in which the original creditor was a participant as a lender and through which the original creditor made multiple mortgage loans, including the subject loan to Morgan.

43. Under this program, "pick-a-payment" option notes and the so-called disclosures concerning the same by the original creditor were deceptive and illegal, as further described below.

44. Such deceptive and illegal notes and disclosures included those for the mortgage loan involved in this case.

45. The "pick-a-payment" option notes involved in that program, including the note subject of this case, violated the Federal Truth in Lending Act, 15 U.S.C. § 1601, et seq. ("TILA"); because of the original creditor's failure to comply with required disclosure requirements, such failure including, but not necessarily being limited to, the failure to disclose clearly and conspicuously what the interest rate was on which the payments listed in certain so-called "disclosures" provided to Morgan and others was different from the actual interest rate charged and relating to the payments listed and in the failure to disclose clearly and conspicuously that, if borrowers like Morgan follow the payment schedule provided to them by their lender, this would result in negative amortization that was certain not to pay down the principal on the pick-a-payment loans.

46. The original creditor purposefully failed to disclose to Morgan and other borrowers of "pick-a-payment" option notes the actual interest rate upon which the payment schedule was

based, in an effort to mislead and deceive them into believing they were getting a loan with a fixed interest rate with payments they could afford that would cover both interest and principal.

47. In fact, the payment amounts given on the payment schedules for "pick-a-payment" loans did not include an amount sufficient to pay any principal at all and only covered a portion of the interest accruing on the loans.

48. The payment schedule does not mention negative amortization and makes it seem that the payments would cover both principal and interest.

49. The statement made in certain so-called "disclosures" for "pick-a-payment" loans that "from time to time" negative amortization "may occur" was a deceptive and misleading statement. The so-called "disclosures" did not inform borrowers that following the payment schedule provided would certainly result in negative amortization. Instead, it was made to appear that making payments according to the schedule would result in there being no negative amortization.

50. The "pick-a-payment" loans had a payment cap of 7.5 percent, meaning that a borrower would only see his or her payment rise by a maximum of 7.5 percent each year. Lenders in the "pick-a-payment" program failed to disclose these loans' true cost to their customers, including Morgan, that resulted from the effect of the payment cap.

51. The "pick-a-payment" note subject of this case provided that the lender would apply payments to principal and interest.

52. The "pick-a-payment" note subject of this case was at all times an adhesion contract, that is, it was offered on a take-it-or-leave-it basis in which the borrower, Morgan, had no negotiating power or input into the language of the note and the original creditor held all the bargaining power and drafted the note completely.

53. All ambiguities in the note must be construed against Wells Fargo and its predecessor(s) in interest.

54. Wells Fargo and its predecessor(s) in interest did not apply even timely and correctly made payments under the note to principal.

55. A class action was brought concerning these "pick-a-payment" loans. That class action was designated as In re: Wachovia Corporation "Pick-a-Payment" Mortgage Marketing and Sales Practices Litigation, Case No. 3:09-md-02015-RS, in the United States District Court for the Northern District of California.

56. Wells Fargo settled that class action.

57. A copy of the order that granted final approval of the class action settlement is attached hereto as Exhibit A and is incorporated herein by reference as if here set forth verbatim.

58. Morgan was and is a member of Settlement Class C as described in the settlement order.

59. Morgan refinanced with a \$1,300,000.00 "pick-a-payment" home mortgage loan in April of 2008.

60. Largely due to expenses related to Morgan's divorce, the loan went into default.

61. As part of the settlement of the class action, Wells Fargo agreed to implement a loan modification program and make mortgage loan modifications under that program available to Settlement Class C members (hereinafter "class members").

62. Wells Fargo agreed that it would first evaluate whether class members qualified for a modification under the Home Affordable Modification Program. If a class member did not qualify for a modification under HAMP or chose not to accept a HAMP modification, Wells Fargo agreed in the settlement that it would consider the class member for a modification under a modification program called Mortgage Assistance Program 2 (hereinafter "MAP2R") and, if the class member

qualifies for a modification under MAP2R, Wells Fargo agreed that it would offer the class member a MAP2R modification.

63. MAP2R modifications have a number of features that have great benefit to a class member, such as waiver of accrued interest and other charges, forgiveness of principal, and interest rate reduction.

64. In order to qualify for a modification under the MAP2R program, a class member's loan must be in default or in imminent danger of default, the class member's home must have little or no equity, and the class member's income must be sufficient to make monthly payments after Wells Fargo modifies the mortgage loan by reducing its interest rate, increasing its term, and/or reducing its principal balance.

65. Morgan and his mortgage loan meet all of these conditions.

66. At all times material to this case, Morgan has qualified for a MAP2R modification that would benefit him significantly.

67. The accrued interest that would be waived under a MAP2R modification of Morgan's home mortgage loan would be over \$274,000.00.

68. Morgan received a small payment of \$178.04 from the class action settlement, however, he did not receive the primary benefit for which he had agreed to drop his claim against Wells Fargo — a MAP2R modification.

69. Wells Fargo has consistently refused to offer Morgan a MAP2R modification.

70. Morgan's experience is not unique. Wells Fargo has consistently failed to uphold its promises under the class action settlement and has consistently failed to offer modifications to qualified class members.

71. As a regular practice, Wells Fargo has used an inconsistent and improper standard in denying class members the modifications to which they are entitled under the settlement.

72. Wells Fargo has used an inconsistent and improper standard in denying a modification to Morgan:

73. In 2013, Morgan applied for a modification. Wells Fargo determined that his monthly income was \$17,021.35, enough to make the monthly payments under a MAP2R modification, but appraised his home at a wildly inflated \$2,300,000.00 value in order to justify denying the modification request.

74. Wells Fargo knew the house was not worth anywhere close to \$2,300,000.00.

75. In 2014, Morgan applied again for a modification. This time, Wells Fargo appraised his house at a still inflated value of \$1,500,000.00. (Also, nothing had occurred that would account for the discrepancy between this value and the \$2,300,000.00 value Wells Fargo assigned to the house the previous year.) While Morgan's income had not changed significantly, Wells Fargo incorrectly determined his monthly income to be \$5,613.37 and used that as the basis to deny Morgan a modification.

76. Wells Fargo knew that Morgan's income was significantly larger than that and knew that he could afford the payments under a MAP2R modification. Wells Fargo knew that Morgan's home was worth significantly less than \$1,500,000.00.

77. In 2015, Morgan applied again for a modification. Wells Fargo appraised Morgan's home at a still inflated \$1,200,000.00. (Again, nothing had occurred that would account for the discrepancy between this value, the \$2,300,000.00 value Wells Fargo assigned to the house, and the \$1,500,000.00 value Wells Fargo assigned to the house.) Once again, Morgan's income had

not changed significantly, but Wells Fargo incorrectly determined that his monthly income was \$2,518.07 and used that as the basis to deny Morgan a modification.

78. Wells Fargo knew that Morgan's income was significantly larger than that and knew that he could afford the payments under a MAP2R modification. Wells Fargo knew that Morgan's home was worth significantly less than \$1,200,000.00.

79. In Morgan's case and in many others, as a part of what is now its standard practice, Wells Fargo has ignored its promises to modify "pick-a-payment" mortgage loans.

80. Wells Fargo has done so because it is profitable for it to do so. Wells Fargo's defaulted "pick-a-payment" mortgage loan portfolio totaled \$45,002,000,000.00 on December 31, 2014, and generated more than \$2,200,000,000.00 in profits for that year. In that context, the cost of litigation and payment of multimillion dollar fines is hardly a deterrent to modification abuse.

81. Wells Fargo breached its contract with Morgan to modify the subject loan before the breach by Morgan that Wells Fargo alleges.

82. Wells Fargo's prior breach bars it from recovery in this action.

FOR A SIXTH DEFENSE
(Illegality)

83. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

84. If the court determines it to be just, fair, and lawful, particularly in light of Wells Fargo's breach of the settlement agreement, Morgan should be allowed to raise and prevail on matters arguably settled in the settlement agreement.

85. Wells Fargo, is (or at least claims to be) the successor in interest to Wachovia Mortgage, FSB in and to the note and mortgage subject of this case.

86. Wells Fargo is subject to any and all claims and defenses Morgan has against Wachovia Mortgage, FSB concerning the note, mortgage, and loan subject of this case.

87. The mortgage loan subject of this action was created as a "pick-a-payment" option note.

88. The "pick-a-payment" option note program was a program in which Wachovia Mortgage, FSB was a participant as a lender and through which Wachovia Mortgage, FSB made multiple mortgage loans, including the subject loan to Morgan.

89. Under this program, "pick-a-payment" option notes and the so-called disclosures concerning the same by Wachovia Mortgage, FSB were deceptive and illegal, as further described below in this answer and counterclaim.

90. Such deceptive and illegal notes included the one involved in this case.

91. The note and mortgage subject of this case are void and/or unenforceable due to their illegality.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

92. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

93. All counterclaims asserted in this action are also asserted as defenses to the extent permitted by law.

94. The class action settlement agreement constitutes a contract between Wells Fargo and Morgan.

95. Morgan has performed under that contract.

96. Wells Fargo has not performed its obligations under that contract and has breached the same, as described above.

97. Morgan has sustained damages as a direct and proximate result of Wells Fargo's breach of the contract.

98. Morgan is entitled to an order of specific performance enjoining Wells Fargo to accurately apply the MAP2R analysis to his mortgage loan and offer him a MAP2R modification based on the accurate application of the MAP2R program.

99. Morgan is further entitled to judgment against Wells Fargo for damages.

FOR A SECOND COUNTERCLAIM
(Breach of Contract Accompanied by Fraudulent Act/Intent)

100. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

101. The breach of the class action settlement contract by Wells Fargo was done with its fraudulent intent with regard to the breach and was accompanied by its fraudulent act or acts with regard to the breach, as described above.

102. Morgan is entitled to recover actual damages, punitive damages, and the costs of this action from Wells Fargo as a result of Wells Fargo's breach of contract accompanied by fraudulent act.

FOR A THIRD COUNTERCLAIM
(Fraud)

103. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

104. Wells Fargo represented to the class members, including Morgan, that it would apply the MAP2R program to their loans, do so accurately, and offer modifications under that program to those class members who met its requirements.

105. This representation was false, and Wells Fargo knew it was false at the time it was made. Wells Fargo had no intention of honoring its promise to modify loans such as Morgan's.

106. Wells Fargo intended that the class members, including Morgan, act upon this representation, which was material to the class members' decision to drop their claims against Wells Fargo.

107. Relying on the truth of Wells Fargo's representation and not knowing it was false, the class members, including Morgan, dropped their claims in the class action suit.

108. The class members, including Morgan, had no reason to know the representation was false and had the right to rely on the truth of the representation.

109. Morgan has sustained damages as a consequent and proximate result of Wells Fargo's false representation.

110. Morgan is entitled to a judgment against Wells Fargo for actual and punitive damages as a result of Wells Fargo's fraud.

FOR A FOURTH COUNTERCLAIM
(Negligent Misrepresentation)

111. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

112. Wells Fargo falsely represented to the class members, including Morgan, that it would apply the MAP2R program to their loans, do so accurately, and offer modifications under that program to those class members who met its requirements.

113. Wells Fargo had a monetary interest in making this false representation.

114. Wells Fargo owed Morgan a duty of care to see that it communicated truthfully with him.

115. Wells Fargo breached this duty by communicating falsely with Morgan. This was a failure to exercise due care and was negligence.

116. Wells Fargo's misrepresentation was willful or reckless.

117. Wells Fargo knew that it did not intend to modify Morgan's loan.

118. Justifiably, Morgan relied on Wells Fargo's representation.

119. As a result of Wells Fargo's representations that it would modify the loan, Morgan dropped his claims in the class action suit.

120. Morgan has sustained damages as a direct and proximate result of his reliance on Wells Fargo's representation.

121. Morgan is entitled to recover actual damages, punitive damages, and the costs of this action from Wells Fargo as a result.

FOR A FIFTH COUNTERCLAIM
(Violation of Unfair Trade Practices Act)

122. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

123. Actions of Wells Fargo, including, but not necessarily limited to, those stated in this complaint, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. These acts offended public policy, which favors and encourages honesty and fair dealing in commerce; and which discourages deception and misrepresentation and discourages financial institutions from lying to their customers about whether their loans will be modified. These acts were immoral, oppressive, unscrupulous, and substantially injured Morgan.

124. Wells Fargo knew or should have known that these actions were violations of the Unfair Trade Practices Act and constituted unfair and deceptive acts in trade or commerce.

125. These actions have an impact upon the public interest and are capable of repetition, including, but not necessarily limited to, in that Wells Fargo is a large financial institution with many mortgage loan customers and, further, Wells Fargo has actually repeated with many class members what it has done with Morgan. Wells Fargo has actually engaged in similar conduct, on a large scale, to how it has treated Morgan.

126. Morgan has suffered damages as a direct, consequent, and proximate result of these actions of Wells Fargo.

127. Morgan is entitled to a judgment against Wells Fargo for treble damages, reasonable attorney's fees, and costs.

FOR A SIXTH COUNTERCLAIM
(Violation of Attorney Preference Statute with Unconscionability)

128. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim:

129. With respect to the closing of the mortgage loan subject of this case, the original creditor did not comply with the attorney preference or insurance preference provisions of S.C. Code Ann. § 37-10-102.

130. No attorney licensed to practice law in South Carolina supervised the closing of the mortgage loan.

131. Instead, Wells Fargo had one person sent to Morgan's house with the closing documents.

132. The loan subject of the mortgage was induced by unconscionable conduct, such conduct including, but not limited to, the unauthorized practice of law and the deprivation of Morgan's right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue.

133. Further, the loan itself was unconscionable, as described above.

134. For each violation of S.C. Code Ann. § 37-10-102, Morgan is entitled to recover damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code, including all available relief under S.C. Code Ann. § 37-10-105.

FOR A SEVENTH COUNTERCLAIM
(Violation of Truth-in-Lending Act)

135. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim:

136. This case involves a consumer credit transaction subject of the Federal Truth in Lending Act, 15 U.S.C. § 1601, et seq. ("TILA"), Regulation Z § 226.23 (12 C.F.R. § 226.23), and the official staff commentary of the Federal Reserve Board of Governors.

137. Wachovia Mortgage, FSB and Wells Fargo are creditors as defined by Regulation Z.

138. Morgan is a consumer as defined by Regulation Z.

139. The "pick-a-payment" option notes involved in that program, including the note subject of this case, violate TILA because of the lender's failure to comply with required disclosure requirements, such failure including, but not necessarily being limited to, the failure to disclose clearly and conspicuously what the interest rate was on which the payments listed in certain so-called "disclosures" provided to Morgan and others was different from the actual interest rate charged and relating to the payments listed and in the failure to disclose clearly and conspicuously that, if borrows like Morgan follow the payment schedule provided to them by their lender, this would result in negative amortization that was certain not to pay down the principal on the pick-a-payment loans.

140. Wachovia Mortgage, FSB purposefully failed to disclose to Morgan and other borrowers of "pick-a-payment" option notes the actual interest rate upon which the payment schedule was based, in an effort to mislead and deceive them into believing they were getting a loan with a fixed interest rate with payments they could afford that would cover both interest and principal.

141. In fact, the payment amounts given on the payment schedules for "pick-a-payment" loans did not include an amount sufficient to pay any principal at all and only covered a portion of the interest accruing on the loans.

142. The payment schedule does not mention negative amortization and makes it seem that the payments would cover both principal and interest.

143. The statement made in certain so-called "disclosures" for "pick-a-payment" loans that "from time to time" negative amortization "may occur" was a deceptive and misleading statement. The so-called "disclosures" did not inform borrowers that following the payment schedule provided would certainly result in negative amortization. Instead, it was made to appear that making payments according to the schedule would result in their being no negative amortization.

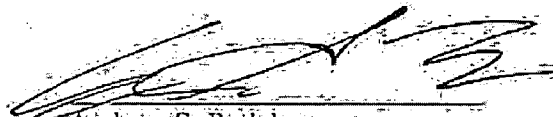
144. The "pick-a-payment" loans had a payment cap of 7.5 %, meaning that a borrower would only see his or her payment rise by a maximum of 7.5 % each year. Lenders in the "pick-a-payment" program failed to disclose these loans' true cost to the borrowers, including Morgan, that resulted from the effect of the payment cap.

145. These TILA violations entitle Morgan to recover from Wells Fargo all available statutory remedies (including, but not limited to, rescission), damages, penalties, and attorneys' fees.

WHEREFORE, Morgan prays for the Court to:

- (a) Issue an Order dismissing the Complaint with prejudice;
- (b) Deny Wells Fargo the relief it seeks in this action;
- (c) Declare the notes(s) and mortgage(s) subject of this action to be void or unenforceable;
- (d) Issue such Order or Orders as will facilitate the rescission of the note and mortgage subject of this action;
- (e) Enter judgment for Morgan for actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (f) Enter judgment for Morgan reasonable attorney's fees;
- (g) Enter judgment for Morgan the costs and expenses of this action; and
- (h) Grant Morgan such other and further relief as the court deems just and proper.

Respectfully submitted,



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Columbia, South Carolina
February 1, 2016

E-filed 5/17/2011

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE WACHOVIA CORPORATION "PICK-A-
PAYMENT" MORTGAGE MARKETING AND
SALES PRACTICES LITIGATION

Case No. 5:09-md-02015-JF

ORDER (1) GRANTING FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT; (2) ADDRESSING
OBJECTIONS; (3) DENYING
MARCELLA ROSE'S MOTION TO
INTERVENE; (4) APPROVING
SERVICE PAYMENTS TO CLASS
REPRESENTATIVES; AND (5)
AWARDING ATTORNEYS' FEES
AND COSTS

On April 29, 2011, the Court conducted a hearing with respect to the following motions and objections: (1) motion of named Plaintiffs and Defendants for final approval of class action settlement; (2) objections of Michael Hargett, Marcella Rose, and others; (3) Marcella Rose's motion to intervene; (4) request for service payments to class representatives; and (5) motion of class counsel for an award of attorneys' fees and costs. The Court has considered the documents filed in connection with these motions and objections as well as the oral argument presented at

Case No. 5:09-md-02015-JF

ORDER (1) GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT ETC.
(JFLC2)

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1 the hearing. The Court finds and concludes as follows:

2 **I. FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

3 This multi-district litigation concerns Defendants' "Pick-a-Payment" mortgage loans,
4 which permitted borrowers to select and make a minimum payment amount for a limited time
5 and subject to certain conditions. Borrowers could choose to make: (1) a fully-amortizing
6 30-year interest and principal payment such that the loan would be satisfied in the traditional
7 30-year term; (2) a fully-amortizing 15-year interest and principal payment such that the loan
8 would be satisfied in a 15-year term; (3) an "interest-only payment"; or (4) a lesser, "minimum
9 payment." When a payment was insufficient to pay the interest owed, unpaid interest was added
10 to the loan balance and the outstanding loan balance increased. Plaintiffs allege that the loans
11 violated the federal Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and various state
12 laws, because the relevant loan documents failed to make adequate disclosures regarding the
13 certainty of negative amortization, the actual payment schedules, the interest rates on which these
14 schedules were based, and the full terms of the parties' legal obligations.

15 In August 2007, Lead Plaintiffs' counsel filed a putative class action in this Court,
16 *Mandrigues v. World Savings, Inc., et al.*, Case No. 5:07-cv-04497-JF. *Mandrigues* was litigated
17 vigorously for several years, during which time the United States Judicial Panel on Multidistrict
18 Litigation transferred to the undersigned for coordinated pretrial proceedings numerous other
19 "Pick-a-Payment" class actions and single-plaintiff actions. After extensive motion practice and
20 the completion of briefing with respect to Plaintiffs' motion for class certification and the parties'
21 cross-motions for summary judgment, the parties reached settlement with the assistance of Judge
22 John K. Trotter (Ret.). On December 16, 2010, following a hearing, the Court granted
23 preliminary approval of the settlement, certified three classes for settlement purposes, and
24 appointed class representatives and class counsel.

25 The settlement classes comprise individuals who entered into "Pick-a-Payment" loans
26 with Defendants between August 1, 2003 and December 31, 2008. Settlement Class A consists
27
28

1 of borrowers who no longer hold their "Pick-A-Payment" loans¹; Settlement Class B consists of
 2 borrowers who still hold their loans and are not in default; and Settlement Class C consists of
 3 borrowers who still hold their loans and are in default. Under the terms of the settlement,
 4 Defendants will pay \$50 million to the class. The entire amount of the settlement fund, less
 5 service payments to class representatives in a maximum total amount of \$125,000 (discussed
 6 below), will be distributed on a *pro rata* basis to Settlement Class A members who have
 7 submitted timely, valid claim forms and to Settlement Class B and C members who have not
 8 excluded themselves from the settlement. Because the settlement fund will be divided on a *pro*
 9 *rata* basis, no unclaimed portion of the fund will remain after distribution. In the event that a
 10 class member fails to cash his or her check within ninety days after issuance despite a required
 11 reminder notice from the settlement administrator, the funds from uncashed checks will be used
 12 to offset administration and notice expenses; any remaining funds will be distributed by means of
 13 a *cypres* fund to non-profit organizations.

14 In addition to paying \$50 million to the class, Defendants will implement a loan
 15 modification program available to qualified Settlement Class C members and to qualified
 16 Settlement Class B members who are in "imminent default." Eligible class members first will be
 17 considered for the federal Home Affordable Modification Program ("HAMP"). If the class
 18 member does not qualify under HAMP or elects not to accept a HAMP modification, the member
 19 will be considered for Defendants' new loan modification program, Mortgage Assistance
 20 Program 2 ("MAP2R"). The goal of the MAP2R program is to reduce a class member's "DTI"²
 21 to thirty-one percent or less. In order to accomplish this, Defendants will apply a series of steps
 22 such as waiver of accrued interest and other charges, forgiveness of principal, and reduction in
 23 interest rate. Once a DTI of thirty-one percent is reached, the loan will be converted into a fully-

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¹ Settlement Class A includes borrowers who paid off their loans by selling their homes, by refinancing, or by other means. Borrowers who lost their homes as a result of foreclosure are excluded from the class.

² "DTI" is the ratio of the class member's first-lien monthly mortgage obligations to his or her gross monthly income.

1 amortizing loan and the negative amortization feature will be eliminated. Class members who do
 2 not qualify for HAMP or MAP2R modifications will receive a written explanation of the reasons
 3 for denial. Class counsel will be copied on all such denials and will follow up with Defendants
 4 to ensure that the loan modification program is functioning as intended. This Court will retain
 5 continuing jurisdiction to interpret and enforce the settlement agreement. Plaintiffs' expert
 6 values the benefit to the class conferred by the loan modification program in the range of \$839
 7 million to \$2.7 billion. The loan modification program will remain in place through June 2013.

8 Eligible Settlement Class B and C members who are unable to qualify for modifications
 9 under HAMP or MAP2R guidelines but who qualify for short-sale or deed-in-lieu of foreclosure
 10 under the Home Affordable Foreclosure Alternatives ("HAFA") guidelines will be offered
 11 incentive payments of at least \$1,500 for a short-sale or deed-in-lieu of foreclosure.
 12 Additionally, Defendants will pay \$1 million for class notices and claims administration costs,
 13 and up to \$25 million in attorneys' fees and costs. These latter items – incentive payments,
 14 administration costs, and attorneys' fees and costs – will be paid separately by Defendants and
 15 will not diminish the \$50 million settlement fund.

16 The Court finds the settlement to be "fundamentally fair, adequate and reasonable" as is
 17 required under Federal Rule of Civil Procedure 23(e) and applicable Ninth Circuit authority. *See*
 18 *Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000); *Officers for Justice v. Civil*
 19 *Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982). "Assessing a settlement proposal
 20 requires a district court to balance a number of factors: the strength of the plaintiffs' case; the
 21 risk, expense, complexity, and likely duration of further litigation; the risk of maintaining a class
 22 action status throughout the trial; the amount offered in settlement; the extent of discovery
 23 completed and the stage of the proceedings; the experience and views of counsel; . . . and the
 24 reaction of the class members to the proposed settlement." *Mego Financial*, 213 F.3d at 458.
 25 The district court also must satisfy itself that the settlement is not the product of collusion among
 26 the negotiating parties. *Id.*

27 Although Plaintiffs' pleadings survived a number of motions to dismiss, given the
 28 evolution of case law regarding claims such as those at issue here, there is no guarantee that

1 Plaintiffs would have prevailed on summary judgment or at trial. This case is complex, both
2 because of the conglomeration of multiple lawsuits from throughout the country and because of
3 the large number of class members; trial likely would have been protracted. Defendants have
4 offered a substantial amount of money in settlement, and the loan modification program provides
5 significant benefits to the class, as described above. Extensive discovery has been completed –
6 numerous depositions have been taken, and more than 15,000 pages of documents have been
7 produced. Plaintiffs' counsel, who are experienced attorneys, believe that the settlement is
8 extremely favorable to the class. Approximately 516,000 notices were delivered by direct mail to
9 class members, but only a very small percentage objected or opted out, as is discussed more fully
10 below. The settlement was reached after lengthy, arms-length negotiations overseen by Judge
11 Trotter, a nationally known and respected mediator.

12 The Court also concludes that notice of settlement to the class was adequate and satisfied
13 all requirements of Federal Rule of Civil Procedure 23(e) and due process. Class members
14 received direct notice by United States mail, and additional notice was given by publication on
15 the Internet and in *USA Today*. These were the best practicable means of informing class
16 members of their rights and of the settlement's terms. *See Silber v. Mabon*, 18 F.3d 1449, 1453-
17 54 (9th Cir. 1994) (affirming district court's conclusion that notice by direct mail and publication
18 was best practicable notice).

19 The Court concludes that final certification of the settlement class is appropriate. The
20 four prerequisites of Rule 23(a) are met: the proposed settlement class includes hundreds of
21 thousands of borrowers (numerosity); all class members obtained similar "Pick-a-Payment" loans
22 (commonality); the named class representatives entered into "Pick-a-Payment" loans, and their
23 claims are reasonably coextensive with those of the class as a whole (typicality); and class
24 counsel are experienced and qualified to conduct the litigation, and there is no evidence of
25 collusion (adequacy). The class is adequately defined and clearly ascertainable – class members
26 are individuals who obtained "Pick-a-Payment" mortgage loans from Defendants between
27 August 1, 2003 and December 31, 2008. Finally, common questions of law or fact predominate,
28 as all class members would have to demonstrate that the "Pick-a-Payment" mortgages violated

1 federal and/or state laws. *See* Fed. R. Civ. P. 23(b)(3).

2 Finally, the Court concludes that Plaintiffs' attorneys are experienced and able, and fairly
3 and adequately have represented and will continue to represent the interests of the class. *See* Fed.
4 R. Civ. P. 23(g). Accordingly, Plaintiffs' attorneys will be appointed as class counsel for
5 purposes of certification of the settlement class.

6 II. OBJECTIONS

7 As noted above, 516,000 notices were delivered by direct mail to class members, but only
8 thirty-six timely objections to the settlement were received. This is an objection rate of .007%.³
9 Only 456 class members — .08% — requested exclusion.⁴ This positive response from the class
10 weighs strongly in favor of approving the settlement, despite the dissatisfaction of some
11 individuals. *See Churchill Village, LLC v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004)
12 (affirming district court's approval of settlement where forty-five of 90,000 class members
13 objected to the settlement, and 500 class members opted out). However, as the Court noted at the
14 hearing, even one valid objection would be sufficient to show that the settlement is not in the
15 best interests of the class. Accordingly, the objections will be addressed as follows.

16 A. Difficulty Navigating the Loan Modification Program

17 A number of class members expressed concern about their ability to navigate the loan
18 modification program. Some related their own negative experiences in detail. As it has
19 expressed on the record a number of times, the Court is particularly concerned with ensuring that
20 the loan modification program actually will work as outlined in the settlement agreement. In the
21 months prior to the final approval hearing, the Court has referred a number of inquiries to class

23 ³ Five of the thirty-six objections were received from individuals who also opted out of
24 the settlement. Class members who opt out lack standing to object to a settlement. *See In re*
25 *Vitamins Antitrust Class Actions*, 215 F.3d 26, 28-29 (D.D.C. 2000). If these five objections are
excluded, the objection rate is .006%.

26 ⁴ Seven additional class members made oral requests for exclusion at the hearing. Those
27 requests were granted on the record. An eighth class member, Mr. Vega, made an oral request
28 for exclusion, which was granted, but he subsequently submitted a note to chambers requesting
that he be permitted to remain in the class. If the seven additional individuals are considered,
then .09% of class members have been excluded from the settlement.

1 counsel, who have committed to ongoing involvement in the loan modification process. Class
2 counsel represented that during the sixty days prior to the final approval hearing they assisted
3 thirty to forty class members in obtaining loan modifications. Class counsel also stated on the
4 record that they would be happy to speak with any class member about his or her loan
5 modification efforts. Moreover, the Court expressly has retained jurisdiction over this matter.
6 The Court concludes that these are the best safeguards that realistically could be expected in this
7 type of settlement.

8 It should be noted that not every class member will be entitled to loan modification.
9 Class counsel confirmed at the hearing that they have reviewed certain denials which were
10 consistent with the terms of the settlement. To the extent that some individuals wish that class
11 counsel had held out for a more favorable program, this type of "should have done better"
12 objection routinely is rejected. *See, e.g., Linney v. Cellular Alaska Partn.*, 151 F.3d 1234, 1242
13 (9th Cir. 1998).

14 **B. Whether the Loan Modification Program Confers a Benefit upon the Class**

15 Certain objectors contend that the loan modification program does not confer a benefit
16 upon the class because California and other states have entered into Assurances with Defendants
17 which provide for the identical relief. The Court notes that most of the loans at issue in this case
18 were executed in California, and that California did not enter into an Assurance until after the
19 motion for preliminary approval was filed. The MAP2R program thus was a significant benefit
20 when it was negotiated. More importantly, the state attorney general settlements do *not* give
21 individual borrowers a private right of enforcement. The instant settlement is binding and
22 enforceable, and class members may assert their individual rights under the settlement
23 agreement. Finally, only ten states have entered into Assurances with Defendants; the settlement
24 agreement makes the loan modification program an option to class members in the other forty
25 states.

26 **C. Adequacy of Class Notice**

27 Other objectors assert that the class notice was inadequate because it did not disclose how
28 much money each class member would receive under the settlement. It was impossible for the

1 notice to disclose precisely how much money each class member would receive, because
2 although members of Class B and C will receive checks automatically, members of Class A must
3 file claim forms in order to receive a distribution. Because class counsel could not predict how
4 many claim forms would be submitted, they could not predict the amount that will be distributed
5 to each class member.

6 **D. Distribution of Funds Derived from Uncashed Checks**

7 Some objectors challenge the use of undistributed settlement funds to pay administration
8 costs, claiming that this would result in a windfall to Defendants, who otherwise would have to
9 pay administration costs out of pocket. Because the *entire* \$50 million will be distributed to class
10 members on a *pro rata* basis, the only funds at issue are funds from checks that class members
11 fail to cash within ninety days. The administrator is obligated to send out reminder notices with
12 respect to uncashed checks. Accordingly, the amount of money at issue is likely to be quite
13 small. Class counsel assert, and the Court has no reason to doubt, that the cost of redistributing
14 such funds to class members likely would exceed the amount of the funds themselves. Class
15 counsel also point out that in large class actions the administration costs often come out of the
16 funds set aside for distribution to the class. Because Defendants have agreed to pay
17 administration costs of up to \$1 million in this case, separate and apart from the \$50 million set
18 aside for distribution to the class, and given the likelihood that the amount of money in question
19 is likely to be negligible, the Court concludes that there is nothing inherently unfair in permitting
20 funds derived from unclaimed checks to be used for administrative expenses.

21 **E. Argument That Class B Members Should Receive More Benefits Than Class A and**
22 **Class C Members**

23 One class member has expressed dissatisfaction with the fact that all class members are
24 treated equally under the settlement agreement. In her view, an individual who made all her loan
25 payments should be treated more favorably than an individual who defaulted on a loan. While
26 the Court recognizes the frustration that must lie behind such an argument, the Court cannot
27 agree that the settlement's equal treatment of all class members renders the settlement unfair.
28

F. Mr. Hargett's Objection Regarding Potential Deficiency Judgments

Class member Michael Hargett, an attorney proceeding *pro se* in this matter, filed more than 200 pages of documents objecting to the settlement. He raises a number of the points discussed above, but his primary concern is the possibility that Defendants will pursue deficiency judgments against class members. However, Defendants' recent responses to requests for admission ("RFAs") propounded by Mr. Hargett alleviated this concern. Mr. Hargett read into the record Defendants' responses to a number of RFAs in which Defendants stated that as a general business practice they do not pursue deficiency judgments in connection with foreclosure proceedings involving Pick-a-Payment loans secured by the borrower's primary residence. Based upon those assurances, Mr. Hargett withdrew his objections.⁵

G. Ms. Jones's Objections

Alberta Jones appeared telephonically at the hearing. She expressed generalized concerns regarding the settlement, and she requested leave to opt out of the class. Class counsel responded by noting that Ms. Jones is not a class member, as she obtained her Pick-a-Payment loan prior to the start of the class period. After the hearing, Ms. Jones filed documents suggesting that she believes that she should be a class member. Based upon the redacted copy of Ms. Jones's adjustable rate mortgage note that was submitted by Defendants, it is clear that Ms. Jones obtained her loan on May 23, 2003, which is outside the class period of August 1, 2003 through December 31, 2008. Because Ms. Jones is not a class member, she has no standing to raise objections, *see In re Vitamins Antitrust Class Actions*, 215 F.3d at 28-29, and her request to opt out is moot.

H. Ms. Rose's Objection Re Nondisclosure Of NPV Formula

Marcella Rose, whose motion to intervene is addressed below, additionally filed an objection to the settlement based upon Defendants' failure to disclose their "net present value" or "NPV" formula. The NPV formula compares the expected economic outcome of the loan with

⁵ At the hearing, class counsel acknowledged Mr. Hargett's contributions and requested leave to compensate him. The Court recognized that Mr. Hargett contributed a great deal to the final approval process and directed class counsel to submit an administrative motion regarding the compensation issue.

1 and without the proposed modification. The calculation depends in part upon the current value
 2 of the property securing the loan. The NPV formula has been disclosed to class counsel, who are
 3 satisfied. Defendants have offered to disclose the NPV formula to the Court *in camera*. The
 4 Court concludes that Defendants are not required to disclose their NPV formula to class
 5 members; the loan modification program is laid out in detail in the settlement agreement –
 6 Defendants need not disclose every aspect of their methodology in order to render the settlement
 7 fair and adequate.

8 III. MOTION TO INTERVENE

9 Ms. Rose also has filed a motion to intervene. She presently is litigating a separate
 10 lawsuit, *Rose v. Wachovia*, in the Central District of California. That lawsuit asserts a number of
 11 claims that are unrelated to the failure disclose negative amortization at loan origination. Ms.
 12 Jones argues that her Central District complaint could be read broadly enough that there would
 13 be some overlap between that suit and this one. She also contends that she should be permitted
 14 to intervene in the instant action in order to represent individuals who were “forced” to sell their
 15 homes in order to pay off their loans.

16 In the Ninth Circuit, there are four requirements for intervention as of right under Federal
 17 Rule of Civil Procedure 24(a)(2): “(1) the application for intervention must be timely; (2) the
 18 applicant must have a ‘significantly protectable’ interest relating to the property or transaction
 19 that is the subject of the action; (3) the applicant must be so situated that disposition of the action
 20 may, as a practical matter, impair or impede the applicant’s ability to protect that interest; and (4)
 21 the applicant’s interest must be inadequately represented by the existing parties in the lawsuit.”

22 *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996) (citation omitted).

23 Alternatively, a court may grant permissive intervention under Rule 24(b) if there is an
 24 independent ground for jurisdiction, the motion to intervene is timely, and a common question of
 25 law or fact exists. *Southern Calif. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). Even
 26 if the threshold requirements for permissive intervention are met, a court has discretion to deny
 27 permissive intervention. *Id.*

28 These requirements are not satisfied here. The application for intervention is untimely.

As noted above, this action has been litigated vigorously for almost four years. The instant settlement is the product of months-long, arms-length negotiations. Ms. Rose's application, filed on the eve of the final approval hearing, simply is too late. The bulk of Ms. Rose's legal claims appear to be unrelated to the claims that are the subject of the instant action. To the extent that Ms. Rose is a Class A member, her interests are represented in this action. While she attempts to carve out a group of class members who have been "forced" to sell their homes in order to pay off their loans, the Court understands that borrowers who ended up with Pick-a-Payment loans often felt financial pressure to either sell their homes, or to refinance the loans. The Court is at a loss to discern a legally significant difference between those who chose to sell and those who chose to refinance.

If Ms. Rose believes that a better deal may be struck with Defendants, she is free to opt out and try her luck with her own lawsuit. At the hearing, the Court granted Ms. Rose's alternative request to opt out of this settlement.

IV. SERVICE PAYMENTS TO CLASS REPRESENTATIVES

Courts often award service payments to class representatives in compensation for shouldering significant burdens during the litigation: retaining counsel, producing documents, responding to written discovery, and conferring with counsel. *See, e.g., Mego Financial*, 213 F.3d at 463 (9th Cir. 2000) (approving incentive awards of \$5,000 to each of two class representatives in a settlement of \$1.725 million). The Court concludes that the proposed incentive payments, ranging between \$2,500 and \$14,250 per named plaintiff and totaling \$125,000, are appropriate.

V. ATTORNEYS' FEES AND COSTS

"Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (2002). The benchmark award is twenty-five percent of the recovery obtained, "with 20-30% as the usual range." *Id.* Although the twenty-five percent benchmark rate is a starting point for analysis, it may be inappropriate in some cases. *Id.* at 1048. "Selection of the benchmark or any other rate must be supported by findings that take into account all of the

1 circumstances of the case.” *Id.* Relevant circumstances include the results achieved for the
2 class, the risk to class counsel, benefits to the class other than the cash settlement fund, market
3 rates for contingency fee retainers, and the burdens assumed by class counsel during the
4 representation. *Id.* at 1048-50. The lodestar method may be used as a cross-check of the
5 percentage method. *Id.* at 1050.

6 Class counsel request an award of \$25 million. Defendants have agreed to pay attorneys’
7 fees and expenses of up to \$25 million separate and apart from the class fund of \$50 million and
8 administrative costs up to \$1 million. If the Court were to consider only these cash components
9 of the settlement, counsel request approximately one-third of the recovery. However, the loan
10 modification component of the settlement confers a significant additional benefit on the class.
11 Class counsel present the opinion of Yale Law Professor Jonathan Macy, who estimates that the
12 value of the loan modification component is in excess of \$800 million and possibly as high as
13 \$2.7 billion. If these figures are even remotely accurate, then \$25 million is far less than the
14 twenty-five percent benchmark commonly awarded in this circuit. A lodestar cross-check
15 supports an award of \$25 million. Counsel have documented hourly fees in excess of \$11
16 million. Thus an award of \$25 million would require application of a multiplier of 2.2, which is
17 well within the acceptable range. *See, e.g., Vizcaino*, 290 F.3d at 1051 (approving multiplier of
18 3.65).

19 The Court recognizes that class counsel assumed substantial risks and burdens in
20 representing Plaintiffs in this action. Numerous “Pick-a-Payment” class actions and single-
21 plaintiff actions have been rolled into the original case for coordinated pretrial proceedings. The
22 case has been vigorously contested; extensive discovery has been conducted; several motions
23 have been heard, and several more have been briefed. Class counsel have committed to render
24 continuing aid to class members who are attempting to obtain loan modifications. In the Court’s
25 opinion, class counsel comported themselves in a capable and professional manner throughout
26 the case, and they obtained an excellent result for the class. Accordingly, the Court has no
27 hesitation in awarding attorneys’ fees and costs in the amount of \$25 million.

VI. ORDER

- (1) The motion for final approval of the class action settlement is GRANTED;
- (2) The objections to the settlement are OVERRULED;
- (3) Marcella Rose's motion to intervene is DENIED;
- (4) The proposed service payments to class representatives are APPROVED; and
- (5) The motion for attorneys' fees and costs in the amount of \$25 million is GRANTED.

DATED: 5/17/2011


JEREMY FOGEL
United States District Judge

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-02-2849

Wells Fargo Bank, N.A.,

Plaintiff,

vs.

Michael G. Morgan; Margaret H. Fitch,
M.D.; Eric J. Olig; South Carolina
Department of Revenue; Linda Lawrence
Bowen;

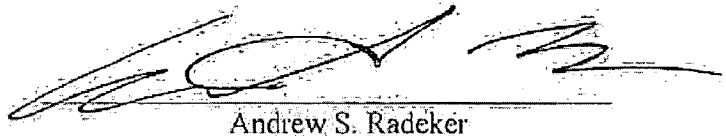
Defendants.

CERTIFICATE OF SERVICE

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A.,
Attorneys for Defendant Michael G. Morgan, do hereby certify that I, on the 1st day of February,
2016, served the foregoing document in the above-captioned action by depositing the same in the
U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Robert P. Davis, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

Christopher M. Towery, Esq.
Womble Carlyle Sandridge & Rice, LLP
1727 Hampton St.
Columbia, SC 29201



Andrew S. Radeker

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AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-02-2849

Wells Fargo Bank, N.A.,

Plaintiff,

vs.

Michael G. Morgan; Margaret H. Fitch,
M.D.; Eric J. Olig; South Carolina
Department of Revenue; Linda Lawrence
Bowen;

Defendants.

AMENDED ANSWER
AND COUNTERCLAIM

Defendant Michael G. Morgan (hereinafter "Morgan") in answer to the Plaintiff's Complaint and as counterclaim, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.
2. Answering the allegations of paragraph 1 of the Complaint, Morgan admits the same to the extent that the Complaint states a cause of action for mortgage foreclosure.
3. Answering the allegations of paragraphs 2 and 3 of the Complaint, Morgan admits, upon information and belief, that the Plaintiff is a corporation and claims to be the owner of the note and mortgage at issue.

4. Answering the allegations of paragraph 4 of the Complaint, Morgan admits that the loan's servicer is a participant in the Home Affordable Modification program, but Morgan denies the remaining allegations of the paragraph.

5. Answering the allegations of paragraph 5 of the Complaint, Morgan admits the same to the extent it accurately states the content of the mortgage document at issue.

6. Answering the allegations of paragraph 6 of the Complaint, Morgan admits that he owns property subject of this lawsuit.

7. Answering the allegations of paragraph 7 of the Complaint, Morgan admits the same.

8. Answering the allegations of paragraph 8 of the Complaint, Morgan admits the Plaintiff requests what it requests but denies the Plaintiff is entitled to what it requests.

9. Answering the allegations of paragraph 9 of the Complaint, Morgan denies the validity of any such claimed liens against his property.

10. Answering the allegations of paragraph 10 of the Complaint, Morgan notes that no answer to this paragraph is necessary.

11. Answering the allegations of paragraph 11 of the Complaint, Morgan admits the same.

12. Answering the allegations of paragraph 12 of the Complaint, Morgan admits the same upon information and belief.

13. Answering the allegations of paragraph 13 of the Complaint, Morgan admits the same to the extent they are consistent with the public record.

14. Answering the allegations of paragraph 14 of the Complaint, Morgan lacks sufficient knowledge or information to form a belief as to the truth or falsity of the same.

15. Answering the allegations of paragraph 15 of the Complaint, Morgan lacks sufficient knowledge or information to form a belief as to the truth or falsity of the same.

16. Answering the allegations of paragraph 16 of the Complaint, Morgan notes that no answer to this paragraph is necessary.

17. Answering the allegations of paragraph 17 of the Complaint, Morgan admits the same to the extent that the complaint states a cause of action for the foreclosure of a mortgage.

18. Answering the allegations of paragraph 18 of the Complaint, Morgan admits the same upon information and belief.

19. Answering the allegations of paragraph 19 of the Complaint, Morgan admits he signed a mortgage document but denies a mobile home was subject thereof.

20. Answering the allegations of paragraph 20 of the Complaint, Morgan admits the same upon information and belief.

21. Answering the allegations of paragraph 21 of the Complaint, Morgan admits the same upon information and belief.

22. Answering the allegations of paragraph 22 of the Complaint, Morgan denies the same.

23. Answering the allegations of paragraph 23 of the Complaint, Morgan denies the same.

24. Answering the allegations of paragraph 24 of the Complaint, Morgan admits that a law firm was hired to bring this lawsuit, likely by the Plaintiff.

25. Answering the allegations of paragraph 25 of the Complaint, Morgan denies the same.

26. Answering the allegations of paragraph 26 of the Complaint, Morgan admits the Plaintiff demands what it demands but denies the Plaintiff is entitled to what it demands.

27. No answer to the prayer in the Complaint is required.

28. Morgan notes that he desires and is interested in foreclosure intervention.

FOR A SECOND DEFENSE
(Dismissal – Rule 12(b)(6))

29. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

30. The Complaint fails to state facts sufficient to constitute a cause of action, especially one for reformation, and the Complaint or part thereof should be dismissed.

FOR A THIRD DEFENSE
(Counterclaims as Defenses)

31. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

32. All counterclaims asserted in this action are also asserted as defenses to the extent permitted by law.

FOR A FOURTH DEFENSE
(Unclean Hands)

33. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

34. Wells Fargo (and its predecessor in interest) has engaged in such conduct with respect to the matters subject of his claims as to make its hands unclean with regard to its claims.

35. This conduct includes, but is not necessarily limited to, what is stated in this pleading.

36. This conduct relates directly to the subject matter of this action.

37. This conduct has proximately caused Morgan prejudice and injury.

FOR A FIRST COUNTERCLAIM
(Violation of Attorney Preference Statute with Unconscionability)

38. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

39. With respect to the closing of the mortgage loan subject of this case, the original creditor did not comply with the attorney preference or insurance preference provisions of S.C. Code Ann. § 37-10-102.

40. Agents of the original creditor (Wells Fargo or its predecessor in interest), without the knowledge or permission of Morgan, falsified and forged Morgan's signature on documents relating to the application for and origination of the subject mortgage loan.

41. Agents of the original creditor (Wells Fargo or its predecessor in interest) knew that others, without the knowledge or permission of Morgan, falsified and forged Morgan's signature on documents relating to the application for and origination of the subject mortgage loan, yet they permitted this and went through with making the loan anyway.

42. All of this occurred without Morgan's knowledge.

43. No attorney licensed to practice law in South Carolina supervised the closing of the mortgage loan.

44. Instead, the original creditor (Wells Fargo or its predecessor in interest) had one person sent to Morgan's house with the closing documents, and only this person was present with Morgan at Morgan's signing of closing documents for this loan.

45. The loan subject of the mortgage was induced by unconscionable conduct, such conduct including, but not limited to, the following:

- a. The unauthorized practice of law;
- b. The deprivation of Morgan's right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue;
- c. Forgery and falsification of documents; and
- d. Concealment of that forgery and falsification from Morgan.

46. For each violation of S.C. Code Ann. § 37-10-102, Morgan is entitled to recover all relief available under S.C. Code Ann. § 37-10-105, including the provided under S.C. Code Ann. § 37-10-105(C), damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code.

WHEREFORE, Morgan prays for the Court to:

- (a) Issue an Order dismissing the Complaint with prejudice;
- (b) Deny Wells Fargo the relief it seeks in this action;
- (c) Declare the notes(s) and mortgage(s) subject of this action to be void or unenforceable;
- (d) Enter judgment for Morgan for all relief available under S.C. Code Ann. § 37-10-105, including under S.C. Code Ann. § 37-10-105(C);
- (e) Enter judgment for Morgan reasonable attorney's fees;
- (f) Enter judgment for Morgan the costs and expenses of this action; and
- (g) Grant Morgan such other and further relief as the court deems just and proper.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

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ATTORNEY FOR DEFENDANT

MICHAEL G. MORGAN

Columbia, South Carolina
May 10, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CASE NO. 2015-CP-02-2849

WELLS FARGO BANK, N.A.

PLAINTIFF,

v.

MICHAEL G. MORGAN; MARGARET H.
FITCH, M.D.; ERIC J. OLIG; SOUTH
CAROLINA DEPARTMENT OF REVENUE;
LINDA LAWRENCE BOWEN,

DEFENDANTS.

PLAINTIFF

WELLS FARGO BANK, N.A.'s
MOTION TO DISMISS DEFENDANT MICHAEL
G. MORGAN'S ANSWER AND COUNTERCLAIM

Pursuant to Rules 9(b) and 12(b) of the South Carolina Rules of Civil Procedure, Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") moves to dismiss Defendant Michael G. Morgan's ("Morgan") Fourth, Fifth, and Sixth Defenses, and all of his Counterclaims. In support of this Motion, Wells Fargo shows the Court as follows:

1. This dispute arises out of Morgan's failure to repay a \$1.3 million "Pick-a-Payment" mortgage loan he obtained from Wells Fargo's predecessor, Wachovia Mortgage, FSB, in 2008. Complaint, ¶ 18; Answer and Counterclaim, ¶¶ 18, 59. Morgan has not made a payment on the loan since May 2011. Complaint, ¶ 23; *see also* Answer and Counterclaim, ¶ 60 (admitting the default).

2. The Pick-a-Payment loan allowed the borrower to select and make a minimum payment for a limited time and subject to certain conditions. In particular, for each payment period, the borrower could select from up to four payment options: (1) a fully-amortized, 30-year principal and interest payment; (2) a fully-amortized, 15-year principal and interest payment; (3)

an interest-only payment; and (4) a lesser, minimum payment. When a payment was insufficient to pay the interest owed, unpaid interest was added to the loan balance and the outstanding loan balance increased (“negative amortization”).

3. The Pick-a-Payment loan product was the subject of a federal multidistrict litigation proceeding, *In re: Wachovia Corp. “Pick-a-Payment” Mortgage Marketing and Sales Practices Litigation*, Case No. 09-md-2015-RS, pending in the United States District Court for the Northern District of California (the “Class Action”). Answer and Counterclaim, ¶ 55. The plaintiffs in the Class Action alleged that Wells Fargo’s predecessor violated the federal Truth-in-Lending Act (“TILA”) and other laws by, *inter alia*, failing to adequately disclose the loan’s negative amortization feature. Wells Fargo denied the allegations.

4. In December 2010, in order to avoid years of protracted and expensive litigation, the parties in the Class Action agreed to settle all claims relating to the origination of Pick-a-Payment loans. Answer and Counterclaim, ¶ 56; Declaration of Stacie C. Knight (“Knight Decl.”), Exhibit A.¹

5. Pursuant to the resulting Agreement and Stipulation of Settlement of Class Action (the “Class Action Settlement Agreement”), the parties agreed to certify three Settlement Classes, and Wells Fargo paid \$50 million for the benefit of all Settlement Class Members, plus \$25 million in attorneys’ fees. Knight Decl., Exhibit A, §§ V, VI.A., VI.B. Wells Fargo also made a loan modification available to certain qualifying Settlement Class Members who still had

¹ The Court can consider the documents attached to this declaration because they are referenced throughout Morgan’s Answer and Counterclaim and Morgan bases his claims upon them. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.”).

their Pick-a-Payment mortgage loans. *Id.*, § VI.E. The loan modification program ended on June 30, 2013. *Id.*

6. In exchange for the benefits Wells Fargo made available to Settlement Class Members, Settlement Class Members released all claims relating to the origination of their loans. Specifically, Settlement Class Members “fully, finally, and completely release[d] and forever discharge[d]”:

the Alleged Claims and any and every actual or potential known or unknown claim, liability, right, demand, suit, matter, obligation, damage, loss or cost, action or cause of action, of every kind and description that the Releasing Party [including Mr. Morgan] has or may have...in the Lawsuit, the Related Actions, any other case consolidated in the Lawsuit, or in any other action or proceeding in this Court, or any other court, administrative venue, tribunal or arbitration or other forum, regardless of the type or amount of relief or damages claimed, against [Wells Fargo] arising out of the Alleged Claims, the origination of the Settlement Class Member’s Pick-a-Payment mortgage loan, the manner in which the Defendants applied the Settlement Class Member’s payments to principal and interest, negative amortization, the Pick-a-Payment mortgage loan’s potential for negative amortization, the disclosure of the Pick-a-Payment mortgage loan’s potential for negative amortization, and the disclosure of the manner in which payments would be applied to principal and interest.

Knight Decl., Exhibit A, § V(A). The Settlement Agreement defines “Alleged Claims” as

claims that [Wells Fargo] violated TILA, state unfair competition laws, state unfair and deceptive trade practices statutes, and state consumer protection laws; breached the terms of the Parties’ contracts; engaged in fraudulent misrepresentations or omissions; and breached the implied duty of good faith and fair dealing in connection with the Plaintiffs’ Pick-a-Payment mortgage loans by failing to adequately disclose the loans’ potential for negative amortization, providing Borrowers with inaccurate payment schedules, failing to disclose the interest rates on which those payment schedules were based, and failing to disclose the terms of the Parties’ legal obligations, entitling them to damages, statutory penalties, restitution, punitive damages, interest, attorneys’ fees, costs, injunctive relief, and other legal or equitable relief under state and federal law.

Id., § 1.6.

7. The United States District Court for the Northern District of California approved the Class Action Settlement Agreement in its entirety on May 17, 2011, and the agreement

became effective on September 1, 2011 (the “Effective Date”), after the Ninth Circuit Court of Appeals dismissed the final remaining appeal of the May 17, 2011 Final Approval Order and the mandate was docketed in the court. Answer and Counterclaim, Exhibit A; Knight Decl., Exhibit B.

8. Pursuant to the terms of the Class Action Settlement Agreement, upon the Effective Date, Settlement Class Members who did not timely opt-out of the Settlement Class released all claims that fell within the scope of the release. Knight Decl., Exhibit A, § V. Further, pursuant to Section XIV of the Settlement Agreement, upon the Effective Date, every Settlement Class Member was “*permanently barred and enjoined from initiating, asserting, and/or prosecuting any Alleged Claim(s) against any Released Entity in any court, tribunal, forum, or proceeding.*” (emphasis added).

9. Regarding its enforcement and interpretation, the Class Action Settlement Agreement provides: “The Parties agree that the Court² shall retain exclusive and continuing jurisdiction over the Lawsuit, the Parties, Settlement Class Members, and the Settlement Administrator in order to interpret and enforce the terms, conditions, and obligations under this Agreement.” Knight Decl., Exhibit A, § XIV.B. The Class Action Settlement Agreement further provides: “Any action seeking directly or indirectly to challenge, modify, construe, obtain relief from, extend, limit, or enforce this Agreement shall be commenced and maintained only by the Court.” *Id.*, § XVII.F.1. Finally, in its May 17, 2011 Final Approval Order, the court held

² “Court” is defined as “the United States District Court for the Northern District of California, the Honorable Jeremy F. Fogel, currently presiding, or any other court that obtains competent jurisdiction of the Lawsuit.” Knight Decl., Exhibit A, § 1.15.

that it would “retain continuing jurisdiction to interpret and enforce the settlement agreement.” Answer and Counterclaim, Exhibit A at 4.

10. Morgan admits that he was a Settlement Class Member in the Class Action, that he did not opt-out of the settlement, and that he accepted his settlement payment. Answer and Counterclaim, ¶¶ 58, 68.

**MORGAN CANNOT PURSUE HIS
CLASS ACTION-RELATED CLAIMS IN THIS COURT**

11. In his Answer and Counterclaims, Morgan alleges that Wells Fargo breached the Class Action Settlement Agreement by failing to offer him a loan modification in 2013, 2014, and 2015. Answer and Counterclaim, ¶¶ 73-82. Based on those allegations, Morgan purports to assert an unclean hands defense (Fourth Defense), a “prior breach of contract” defense (Fifth Defense) and counterclaims for breach of contract (First Counterclaim), fraudulent breach of contract (Second Counterclaim), fraud (Third Counterclaim), negligent misrepresentation (Fourth Counterclaim), and unfair trade practices under S.C. Code, § 39-5-10, *et seq.* (Fifth Counterclaim). Answer and Counterclaim, ¶¶ 35-82, 92-127. He also alleges that his loan is “illegal” and “unenforceable” (Sixth Defense) and violated TILA (Seventh Counterclaim) because his loan disclosures did not adequately disclose the loan’s potential for negative amortization. Answer and Counterclaim, ¶¶ 83-91, 135-145.

12. Because those defenses and counterclaims purport to challenge Wells Fargo’s performance under the Class Action Settlement Agreement and/or allege the very same conduct covered by the release in the Class Action Settlement Agreement, Morgan cannot pursue them in this Court. Instead, he must pursue them in federal district court in the Northern District of California.

**MORGAN RELEASED HIS ORIGATION-BASED CLAIMS
AND IS BARRED FROM PURSUING THEM IN ANY FORUM**

13. Morgan's "illegality" defense and his TILA Counterclaim—both of which purport to challenge the sufficiency of the loan disclosures he received at closing—are barred by the Class Action Settlement Agreement's release. By not opting out of the settlement, Morgan is bound by its terms, and he accordingly released:

claims that [Wells Fargo] violated TILA, state unfair competition laws, state unfair and deceptive trade practices statutes, and state consumer protection laws; breached the terms of the Parties' contracts; engaged in fraudulent misrepresentations or omissions; and breached the implied duty of good faith and fair dealing in connection with the Plaintiffs' Pick-a-Payment mortgage loans by failing to adequately disclose the loans' potential for negative amortization, providing Borrowers with inaccurate payment schedules, failing to disclose the interest rates on which those payment schedules were based, and failing to disclose the terms of the Parties' legal obligations, entitling them to damages, statutory penalties, restitution, punitive damages, interest, attorneys' fees, costs, injunctive relief, and other legal or equitable relief under state and federal law.

Knight Decl., Exhibit A, §§ 1.6, V(A).

14. Further, pursuant to Section XIV of the Settlement Agreement, upon the Effective Date, every Settlement Class Member—including Morgan—was "permanently barred and enjoined from initiating, asserting, and/or prosecuting any Alleged Claim(s) against any Released Entity in any court, tribunal, forum, or proceeding."

15. Pursuant to those provisions, Morgan cannot pursue his illegality defense or his TILA Counterclaim. Those claims are covered by the release, and he is prohibited from pursuing them in any forum.

**MORGAN'S CLAIMS REGARDING
LOAN MODIFICATION APPLICATIONS HE
SUBMITTED AFTER JUNE 30, 2013 FAIL AS A MATTER OF LAW**

16. As set forth above, Morgan claims that Wells Fargo breached the Class Action Settlement Agreement and committed fraud, negligent misrepresentation, and unfair trade

practices by not giving him loan modifications in 2013, 2014, and 2015. Answer and Counterclaim, ¶¶ 73-78, 92-127. However, the loan modification program under the Class Action Settlement Agreement expired by its own terms on June 30, 2013. Knight Decl., Ex. A, § VI.E.

17. As a matter of law, Wells Fargo could not have breached the Class Action Settlement Agreement when it was no longer in effect.

18. Further, as a matter of law, Wells Fargo had no obligation to consider Morgan for a loan modification after June 30, 2013. Accordingly, Morgan cannot pursue any claims relating to loan modification applications that happened after that date.

MORGAN'S FRAUDULENT BREACH OF CONTRACT, FRAUD, AND NEGLIGENT MISREPRESENTATION CLAIMS DO NOT COMPLY WITH RULE 9(b)

19. Morgan's Second, Third, and Fourth Counterclaims for fraudulent breach of contract, fraud, and negligent misrepresentation do not comply with Rule 9(b), which requires those claims to be pled with particularity.

MORGAN'S FRAUDULENT BREACH OF CONTRACT, FRAUD, AND NEGLIGENT MISREPRESENTATION CLAIMS ARE BARRED BY THE ECONOMIC LOSS RULE

20. In his Second, Third, and Fourth Counterclaims, Morgan purports to assert tort claims for fraudulent breach of contract, fraud, and negligent misrepresentation—all based on Wells Fargo's alleged statements and conduct under the Class Action Settlement Agreement. Answer and Counterclaim, ¶¶ 100-121. Those claims are barred by the economic loss rule, which prohibits tort claims that are based upon duties arising under a contract.

MORGAN'S UNFAIR TRADE PRACTICES CLAIM FAILS AS A MATTER OF LAW

21. In his Fifth Counterclaim, Morgan purports to assert a claim under South Carolina's Unfair Trade Practices Act, S.C. Code § 39-5-10 *et seq.* (the "Act"). First, because

that claim is derivative of his other meritless claims for relief, it fails for the same reasons those claims do.

22. Second, it is well-established that a breach of contract or negligence cannot, as a matter of law, constitute an unfair trade practice under the Act.

23. Finally, Morgan has not alleged, and indeed, cannot allege, that Wells Fargo's alleged conduct has an adverse impact on the public interest.

MORGAN'S SIXTH COUNTERCLAIM IS TIME-BARRED³

24. In his Sixth Counterclaim, Morgan alleges a violation of the South Carolina Attorney Preference Statute, S.C. Code § 37-10-102, that occurred at his loan's closing in 2008. Answer and Counterclaim, ¶¶ 128-134. Claims under the Attorney Preference Statute are subject to a three-year statute of limitations that begins to run on the date the violation occurred. S.C. Code § 37-10-105(A).

25. Because Morgan alleges a violation that occurred at his loan's closing in April 2008,⁴ any attorney preference claim was time-barred as of April 2011. Because Morgan did not file the claim until February 2016, it is time-barred.

In support of this Motion, Wells Fargo relies on the pleadings on file with the Court, and the Affidavit of Stacie C. Knight and the exhibits attached thereto, served contemporaneously herewith. In addition, Wells Fargo may serve a memorandum of law on all parties in accordance with the South Carolina Rules of Civil Procedure.

Wells Fargo reserves the right to assert additional grounds for this Motion.

³ In the absence of the release, Morgan's TILA claim likewise would be barred by TILA's one-year statute of limitations. *See* 15 U.S.C. § 1640(e).

⁴ *See* Answer and Counterclaim, ¶ 59 (admitting his loan closed in April 2008).

This 16th day of March 2018.

/s/ Stacie C. Knight

Stacie C. Knight

(S.C. Bar No. 77968)

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CASE NO. 2015-CP-02-2849

WELLS FARGO BANK, N.A.

PLAINTIFF,

v.

MICHAEL G. MORGAN; MARGARET H.
FITCH, M.D.; ERIC J. OLIG; SOUTH
CAROLINA DEPARTMENT OF REVENUE;
LINDA LAWRENCE BOWEN,

DEFENDANTS.

PLAINTIFF
WELLS FARGO BANK, N.A.'S
MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") moves to dismiss Defendant Michael G. Morgan's ("Morgan") Amended Counterclaim. In support of this Motion, Wells Fargo shows the Court as follows:

1. This dispute arises out of Morgan's failure to repay a \$1.3 million mortgage loan he obtained from Wells Fargo's predecessor, Wachovia Mortgage, FSB, in 2008. Complaint, ¶ 18; Answer and Counterclaim, ¶¶ 18, 59. Morgan has not made a payment on the loan since May 2011. Complaint, ¶ 23; *see also* original Answer and Counterclaim, ¶ 60 (admitting the default).

2. In his Amended Counterclaim, Morgan alleges a violation of the South Carolina Attorney Preference Statute, S.C. Code § 37-10-102, that occurred at his loan's closing in 2008. Original Answer and Counterclaim, ¶¶ 128-134; Amended Counterclaim, ¶ 39.

3. Claims under the Attorney Preference Statute are subject to a three-year statute of limitations that begins to run on the date the violation occurred. S.C. Code § 37-10-105(A). Because Morgan alleges a violation that occurred at his loan's closing in April 2008, any attorney preference claim was time-barred as of April 2011. Because Morgan originally filed the claim in February 2016, it is time-barred.

4. Morgan cannot avoid the three-year statute of limitations by claiming that his loan was "unconscionable." See S.C. Code, § 37-10-105. Morgan alleges that his loan "was induced by unconscionable conduct, such conduct including, but not limited to, the unauthorized practice of law and the deprivation of Morgan's right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue, forgery and falsification of documents, and concealment of that forgery and falsification from Morgan." Amended Counterclaim, ¶ 45. However, those allegations are insufficient under South Carolina law. See, e.g., *Deutsche Bank Nat'l Trust Co. v. Booms*, No. 2015-UP- 097, 2015 WL 793201 (S.C. Ct. App. Feb. 25, 2015); *Boone v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2016 WL 3552025 (D.S.C. June 30, 2016); *Centura Bank v. Cox*, No. 2004-UP-348, 2004 WL 6331330 (S.C. Ct. App. May 12, 2004).

For the foregoing reasons, Wells Fargo Bank, N.A. requests that the Court dismiss Morgan's Amended Counterclaim.

In support of this Motion, Wells Fargo may serve a memorandum of law on all parties in accordance with the South Carolina Rules of Civil Procedure. Wells Fargo reserves the right to assert additional grounds for this Motion.

This 21st day of May 2018.

/s/ Stacie C. Knight

Stacie C. Knight
(S.C. Bar No. 77968)

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-02-2849

Wells Fargo Bank, N.A.,

Plaintiff,

vs.

Michael G. Morgan; Margaret H. Fitch,
M.D.; Eric J. Olig; South Carolina
Department of Revenue; Linda Lawrence
Bowen;

Defendants.

MOTION TO RECONSIDER

YOU WILL PLEASE TAKE NOTICE that Defendant Michael G. Morgan (hereinafter "Mr. Morgan") moves before this court pursuant to Rules 52(b) and 59(e), SCRCP, as well as pursuant to all other applicable law, in the above-captioned action for an order that reconsiders, alters, clarifies, and/or amends the order filed August 24, 2018¹, that granted the Plaintiff (hereinafter "Wells Fargo")'s motion to dismiss Mr. Morgan's counterclaim in this case.

Grounds for this motion include the following:

1. In this mortgage foreclosure action, Mr. Morgan's counterclaim asserted the violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney-preference statute, with regard to the subject mortgage loan. Mr. Morgan's counterclaim also asserted that he was entitled to the enhanced penalties for that violation under S.C. Code Ann. § 37-10-105(C). The court ruled that dismissal was proper on the basis that the counterclaim was barred by the statute of limitations and on the basis that Mr. Morgan had not pled sufficient facts to constitute

¹ The Defendant received written notice of the entry of this order on the day it was filed, through an email sent by the e-filing notification system. As yesterday, September 3, was Labor Day, this motion is timely.

unconscionability or inducement by unconscionable conduct. The court's decision was incorrect.

2. Mr. Morgan did plead sufficient facts to state a claim under S.C. Code Ann. § 37-10-105(C), as discussed below. But the court's determination that Mr. Morgan's counterclaim claim is barred under a statute of limitations defense would be incorrect regardless of whether that particular subsection is involved. The following language from S.C. Code Ann. § 37-10-105(A), quoted in Mr. Morgan's memorandum, plainly notes that a violation of the attorney preference statute, S.C. Code Ann. § 37-10-102, may be raised by a defendant in a collection proceeding, such as this foreclosure, regardless of whether a claim for that violation would otherwise be barred by the statute of limitations:

No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. **This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.**

S.C. Code Ann. § 37-10-105(A) (emphasis added.)

3. Plainly, Mr. Morgan is the defendant debtor asserting this violation in this action to collect a debt. His assertion of the violation of the attorney preference statute is not, and cannot be, time-barred. Id. It was error for the court to conclude otherwise.
4. Accordingly, his counterclaim would survive even if it did not allege unconscionability or inducement by unconscionable conduct – because it has a

defensive function even at its most barebones, and it is not time-barred. Id. The amended answer and counterclaim alleges that “[a]ll counterclaims asserted in this action are also asserted as defenses to the extent permitted by law.”

5. Mr. Morgan’s counterclaim does allege sufficient facts that, when taken as true and with all reasonable inferences therefrom drawn in his favor, allege unconscionability or inducement by unconscionable conduct.
6. The purpose of S.C. Code Ann. §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). The court must, accordingly, interpret S.C. Code Ann. § 37-10-105 consistently with that purpose, i.e., liberally in favor of consumer protection.
7. Especially in light of this principle, Morgan’s amended answer and counterclaim certainly does allege unconscionability or inducement by unconscionable conduct.
8. The order in this case takes a very narrow view of what constitutes unconscionability. That is error. In discussing unconscionability, our Supreme Court has said that “[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). Many factors have been used to assess unconscionability; it is not a one-size-fits-all inquiry.

9. At issue in this case is a South Carolina mortgage loan. Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. Id. The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005).
10. "The unauthorized practice of law is inherently prejudicial[.]" Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013); accord Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011). "[C]losing a [mortgage] loan without the supervision of an attorney constitutes the unauthorized practice of law." Matrix, 714 S.E.2d at 534.
11. The closing of a South Carolina mortgage loan without its supervision by a licensed South Carolina attorney, particularly where the customer is not given any opportunity to select an attorney to represent him, is inducement of the loan by unconscionable conduct under S.C. Code Ann. § 37-10-105(C). That is what the amended answer and counterclaim alleges in this case. That is simply consistent with existing precedent under Coffey and Matrix.
12. Further, Mr. Morgan's amended answer and counterclaim alleges that many of his loan documents were falsified and his signature forged – all without his knowledge. He was deprived of a meaningful choice in entering into the subject mortgage loan.

Perhaps more importantly for our purposes, that is something that the court could conclude or infer based on what he alleged.

13. The order's reliance on the standard for pleading a fraud claim is misplaced and, indeed, confusing. *Inducement* and *fraud* are not the same things. The court's application of the standard for pleading a fraud claim to a different kind of claim was error, as was its evaluation of whether Mr. Morgan pled facts to support the elements of fraud. Respectfully, the court confused Mr. Morgan's claim with a fraud claim, which has different elements and a different pleading standard.
14. It was further error for the court to rely, as it did throughout the order, on trial-level and unpublished opinions, treating them as though they were precedent. To do so is error. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554-56, 813 S.E.2d 292, 297-99 (Ct. App. 2018); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997).
15. Plus, the order (which was drafted by Wells Fargo's counsel) shows that the court has very much misapprehended Mr. Morgan's argument. On page six of the order, the court writes that "[e]ssentially, Morgan argues that the alleged violation of the Attorney Preference Statute renders his loan unconscionable and unenforceable." That is not at all what Mr. Morgan argues, as noted above.
16. At no point was Mr. Morgan contending that there is a private right of action for the mere unauthorized practice of law or that the mere unauthorized practice of law renders this loan unenforceable. Rather, the unauthorized practice of law is unconscionable conduct, and, when it is coupled with an attorney preference violation, that is something brings a claim within the ambit of S.C. Code Ann. §

37-10-105(C). As noted above, one does not need to make new law to recognize this, as this is simply consistent with existing law.

17. The court erred in dismissing the counterclaim with prejudice. When a dismissal is done “under Rule 12(b)(6) for failure to state a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint” or, as in this case, counterclaim. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006); accord Dockside Assn. v. Detyens, Simmons & Carlisle, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988). There was no reason for the court to deviate from applying these same principles here.
18. Also, as discussed above, Mr. Morgan’s claim plainly has a defensive function, and the court should either rule it should not have been dismissed as a defense or clarify that it was not.
19. Further, Mr. Morgan hereby incorporates as if here set forth verbatim all of the arguments made in his previously filed memorandum and other filings in this case, all of the arguments made at the hearing on Wells Fargo’s motion to dismiss.

Upon information and belief, consultation with opposing counsel concerning the substance of this motion would not have served any useful purpose.

Respectfully submitted,

/s/ Andrew S. Radeker

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ATTORNEYS FOR DEFENDANT
MICHAEL G. MORGAN

Columbia, South Carolina
September 4, 2018

1 State of South Carolina) In the Court
2 County of Aiken) Of Common Pleas

3
4 Docket Number: 2015CP02002849

5
6 Wells Fargo Bank NA,)
Plaintiff,)
7)
8 vs.) Transcript of Record
9)
10 Michael G. Morgan,)
Defendant.)

11
12 June 11, 2018
13 Aiken, South Carolina

14
15 B E F O R E:

16 The Honorable Doyet A. Early III, Judge.

17
18 A P P E A R A N C E S:

19 Stacie C. Knight, Esquire
20 Attorney for the Plaintiff

21 Taylor M. Smith IV, Esquire
22 Attorney for the Defendant

23
24 Brenda J. Sigwald, Circuit Court Reporter
To The Honorable Doyet A. Early III
25 P.O. Box 206, Jackson, South Carolina 29831

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(REPORTER'S NOTE: There were no exhibits
entered during this hearing.)

1 THE COURT: All right. This is -- you are Ms.
2 Knight?

3 MS. KNIGHT: Yes, Your Honor, for Wells Fargo.

4 THE COURT: Good morning. How are you?

5 MS. KNIGHT: Good, how are you?

6 THE COURT: What's the 704 area code?

7 MS. KNIGHT: Charlotte.

8 THE COURT: Charlotte?

9 MS. KNIGHT: Yes, sir.

10 THE COURT: How's everything in Charlotte?

11 MS. KNIGHT: Hot. Just like here.

12 THE COURT: I'm sure.

13 All right. Your name, sir?

14 MR. SMITH: I'm Taylor Smith here for Drew Radeker;
15 he's on vacation, Your Honor; for the defendant, Mr.

16 Morgan. And Columbia is definitely hotter than Charlotte.

17 MS. KNIGHT: I won't disagree.

18 THE COURT: All right. This is a motion for what,
19 ma'am? To dismiss?

20 MS. KNIGHT: Yes, sir, a motion to dismiss on the
21 defendant counterclaim primarily on the statute of
22 limitation grounds.

23 THE COURT: All right. Let me see your memo,
24 please.

25 MS. KNIGHT: Sure, Your Honor, I have a notebook

1 I'll hand up. It's got the memo and all the cases and --

2 THE COURT: I'll take that.

3 MS. KNIGHT: Our memo is at Tab 3. I provided a
4 copy of this notebook to Mr. Smith as well.

5 THE COURT: And Mr. Smith you represent which
6 defendant?

7 MR. SMITH: Mr. Michael Morgan, Your Honor.

8 THE COURT: Michael Morgan?

9 MR. SMITH: Yes, sir. She's correct, Your Honor.
10 This is a motion to dismiss our counterclaim in this matter
11 and our amended counterclaim.

12 MS. KNIGHT: Correct.

13 THE COURT: Well, it's a rather substantial loan,
14 1.3 million.

15 MS. KNIGHT: That's correct, Your Honor, a \$1.3
16 million loan with no payments since 2011. Foreclosure was
17 filed back in 2015. It was taken off the active docket so
18 the parties could do the foreclosure mediation, loan
19 modification process. While that was going on, Mr. Morgan
20 filed a separate complaint in federal court alleging
21 various wrongdoing.

22 That litigation went on for roughly a year. Prior
23 to the eve of the hearing, he voluntarily dismissed that
24 case without prejudice, and so we're back here with an
25 active foreclosure case trying to get this foreclosure

1 moving.

2 THE COURT: And in the foreclosure case, he has
3 filed counterclaims; is that correct?

4 MS. KNIGHT: Correct.

5 THE COURT: And you are moving to dismiss his
6 counterclaim?

7 MS. KNIGHT: Yes, sir.

8 THE COURT: And the counterclaims were for what?

9 MS. KNIGHT: The counterclaim is one claim for a
10 violation of the attorney preference statute, Your Honor.
11 It's 37-10-102. It's in Tab 4 of the notebook. And
12 essentially this is a statute that requires a creditor to
13 give the borrower notice of his or her right to choose on
14 attorney to close the loan.

15 THE COURT: That is correct and can foreclosure go
16 on with that attached? Or is that --

17 MS. KNIGHT: Well, one of the claims for relief
18 that he is seeking under the counterclaim is to declare the
19 mortgage void and unenforceable because of the alleged
20 attorney preference violation, which he claims is
21 unconscionable conduct.

22 So our motion is twofold. There's a three-year
23 statute of limitations for an alleged violation of the
24 attorney preference statute and it runs from the date of
25 the violation. This loan closed in 2008, so under that

1 three-year statute, this claim is long time barred.

2 THE COURT: When did he file his counterclaim?

3 MS. KNIGHT: He originally filed this counterclaim
4 -- if the amended counterclaim was filed about a month ago,
5 I think the original counterclaim was filed in 2016. So
6 it's untimely under any --

7 THE COURT: So either one of them's alledgedly
8 beyond the statute.

9 MS. KNIGHT: Correct.

10 THE COURT: 2016 counterclaim.

11 MS. KNIGHT: I believe that's correct. Mr. Smith
12 can tell me if I'm wrong.

13 MR. SMITH: That's my understanding, Your Honor.

14 MS. KNIGHT: In order -- they're trying to get
15 around the three-year statute by claiming that the loan was
16 unconscionable. There's a provision in 37-10-105, which is
17 in Tab 5 of the notebook that says, The three-year statute
18 of limitations applies to attorney preference violations
19 unless the loan was either induced by unconscionable
20 conduct or has a substantive unconscionability, contains
21 unconscionable terms. And --

22 THE COURT: Wasn't there a case law out of that
23 that says failing to comply with the statute is
24 unconscionable conduct?

25 MS. KNIGHT: Your Honor, I -- Mr. Smith cited one

1 case in his brief out of Lexington County that denied a
2 motion to dismiss on that ground, but that's the only case
3 I've found.

4 THE COURT: Is that a recorded case in Court of
5 Appeals, the Supreme Court, or --

6 MS. KNIGHT: It's a circuit court opinion, Your
7 Honor. Every case I've found has said that simply alleging
8 a violation of the attorney preference statute is not
9 unconscionable conduct that would bring the case within the
10 extended limitations bar. And that makes sense, Your
11 Honor, if you think about it. Why would you have a
12 three-year statute of limitations for an attorney
13 preference violation if you could just turn around and say,
14 well, it's unconscionable, so therefore, I get this longer
15 statute of limitations. It would make that three-year
16 statute completely you superfluous. So simply alleging a
17 violation of the attorney preference statute does not make
18 a loan unconscionable.

19 Your Honor, we've cited several opinions in our
20 brief. The overwhelming majority -- in fact, all of the
21 cases I have seen have said that that is insufficient to
22 plead an unconscionable transaction. The one case that
23 Mr. Smith cited in the brief is the only other one I've
24 seen.

25 I did find a case from Court of Appeals from 2015.

1 It's in Tab 19. It's an unreported decision, but it's the
2 Deutsche Bank versus Boone case and it suggests that simply
3 pleading an attorney preference statute violation is not
4 enough to make a loan unconscionable. So we would argue
5 that an allegation that the attorney preference statute
6 preference was violated cannot override the three-year
7 statute of limitations for that claim. The claim's
8 therefore time barred.

9 THE COURT: It's simply just an allegation or is it
10 supported with a factual basis other than --

11 MS. KNIGHT: In the complaint? No, just, you
12 violated my attorney preference rights. They have some
13 conclusory allegations in there saying that unidentified
14 documents were not signed by him and someone forged them;
15 but no specific allegations of what documents they're
16 talking about. But again, the claim boils down to an
17 allegation that Mr. Morgan wasn't notified properly of his
18 rights to select an attorney to close the loan.

19 THE COURT: And you're telling me that if that were
20 correct proved that the loan would be invalid?

21 MS. KNIGHT: Well, that's what they're alleging,
22 but that is not the law in South Carolina. Under the
23 timing here. So there is a line of cases, I'm sure Your
24 Honor is aware, the Matrix line of cases that holds if the
25 loan is closed without an attorney, then the lender is

1 basically -- has unclean hands. But that case law only
2 applies to mortgage loans that were made before the --
3 after the date of those opinions. And this one was in
4 2008. So under Matrix Capital and its progeny, it cannot
5 fall within that perspective rule that the Supreme Court
6 announced in Matrix.

7 Now, of course, we don't concede that the attorney
8 preference statute is violated, but for purposes of this
9 motion, we take his allegations as true.

10 THE COURT: Thank you.

11 All right. Mr. Smith? Why is it outside -- is it
12 outside the statute? Do you concede that?

13 MR. SMITH: The situation we're talking about here
14 is unconscionable. So we're looking here at that
15 exception. The statute --

16 THE COURT: The exception doesn't apply if you're
17 outside of the statute.

18 MR. SMITH: That's correct, Your Honor. And our
19 counterclaim was, in fact, made three years after the
20 closing of this loan, so if the exception does not apply,
21 Your Honor, it is a matter of law as stated in the
22 complaint --

23 THE COURT: Tell me why I should apply
24 unconscionability of the statute which would keep you
25 outside -- keep you in the case, not out of the case?

1 MR. SMITH: Your Honor, if this were merely a not
2 filing the correct paperwork or an attorney at closing, I
3 think we'd have a bunch more difficult argument to make
4 here regarding unconscionability. But if you look at the
5 allegations for our counterclaim, Your Honor, specifically
6 I point you to paragraphs 40 through 42 in this case. You
7 can see that these -- this original credit in this case,
8 Wells Fargo, plaintiff, did without even the knowledgeable
9 permission of Mr. Morgan, falsify and forge these documents
10 that happened at closing.

11 So not only was there not an attorney at closing,
12 but, in fact, there was no opportunity for which he could
13 even review these things. And I believe as to one of the
14 things that you saw when you first looked at this, that
15 number: 2008, 1.3 million. You can look at it and
16 incorporate all of the complaint as to what we're
17 discussing here in our counterclaim and interpret all of
18 that together to say that looking at the allegations of the
19 complaint, we either said that it was true or not true,
20 which you can look at our amended answer and counterclaim
21 to see that and incorporate that into what our counterclaim
22 is suggesting here, which is that those terms are, on their
23 face something --

24 THE COURT: Well, let me ask you this, did you
25 originally answer to 2000 -- strike that.

1 When was the suit brought?

2 MS. KNIGHT: The original foreclosure action was
3 filed in 2015.

4 THE COURT: And what, did you file a counterclaim
5 in 2015?

6 MR. SMITH: Your Honor I honestly don't know. I'm
7 here for Drew Radeker here. I'm not sure.

8 MS. KNIGHT: I believe, Your Honor, that the
9 original answer and counterclaim was filed in 2016 and
10 there were no claims that anything was falsified or forged.

11 THE COURT: Then there was an amended counterclaim?

12 MS. KNIGHT: Correct, which was just filed -- what
13 happened -- I don't want to get too into the weeds here,
14 but Mr. Morgan filed a counterclaim that had a bunch of
15 allegations that we claimed were covered by a release in a
16 separate litigation. And so instead of getting a ruling on
17 that motion, he decided to amend and drop all of those
18 allegations and --

19 THE COURT: Clean it up a little bit?

20 MS. KNIGHT: Correct.

21 THE COURT: All right. Go ahead.

22 MR. SMITH: So, Your Honor, here, as I said, when
23 you interpret the conscionability here, this is under --
24 and she's right about the attorney preference statute, but
25 we're looking here at forgery. We're looking at facts that

1 suggest that this is, in fact, something that only comes
2 into contest is unclean hand, but would be in the case that
3 you could look at that and say that as a matter of public
4 policy when the statute's trying to force you without an
5 attorney at closing, this would be one where you would look
6 at the statute and what it provides and say this agreement
7 may not necessarily be enforced as a matter of law in South
8 Carolina.

9 So, Your Honor, looking at our counterclaim and
10 looking at what we have alleged here and incorporating all
11 those points that have been denied and/or admitted pursuant
12 to what they have said is in this document, which under
13 these allegations, we don't say we even had the opportunity
14 to aide and examine at the closing in this case. This is
15 something that we're alleging is not only an unauthorized
16 practice of law, but brings it outside of the three-year
17 statute of limitations because this is something that we
18 would not as a matter of law want to see.

19 THE COURT: So your guy walks in on a 1.3 million
20 loan and just signs, he doesn't read, doesn't do anything?

21 MR. SMITH: He doesn't sign it either, Your Honor.
22 If you look at our --

23 THE COURT: They signed it for him?

24 MR. SMITH: They forged his signature. That's the
25 allegations to this counterclaim. So, Your Honor, that's

1 what we're dealing with in this case and as a matter of
2 law, we have to take what is alleged in our counterclaim
3 for purposes of this and in my belief, looking at, as she
4 pointed out correctly, the lack of appellate court case law
5 in this State, that we look at our attached order of Judge
6 Russo, this is out of Lexington County, that when
7 allegations suggest that there was an attorney preference
8 violation, it can survive a motion to dismiss. It can go
9 into this unconscionable --

10 THE COURT: Was that order appealed?

11 MR. SMITH: In that case, Your Honor. I don't
12 believe it was. I'd have to check. I know it --

13 THE COURT: Well, it's not binding.

14 MR. SMITH: That's correct, Your Honor.

15 THE COURT: Neither is my order binding on them.

16 Well, it's an interesting proposition you both have
17 presented. Why don't we -- you want to do proposed orders
18 for me? Would that --

19 MS. KNIGHT: Sure, Your Honor.

20 THE COURT: And how long do you think -- since it's
21 so hot and humid in Charlotte, how long would it take you?

22 MS. KNIGHT: End of the week, or --

23 THE COURT: I can give you a little bit longer.

24 MR. SMITH: Can you give us a little bit longer,
25 Your Honor? Drew Radeker is on vacation this week so I'm

1 jumping on this headlong.

2 MS. KNIGHT: That's fine.

3 THE COURT: 30 days?

4 MS. KNIGHT: Oh, sure.

5 MR. SMITH: That will be fine.

6 THE COURT: Who do you practice with?

7 MR. SMITH: Harrison Radeker and Smith, Your Honor.

8 I practice with Drew Radeker in Columbia, Your Honor.

9 THE COURT: All right. Let's send me proposed
10 orders within 30 days.

11 MS. KNIGHT: Thank you, Your Honor.

12 MR. SMITH: Thank you very much.

13 * * * * * END OF TRANSCRIPT * * * * *

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1 State of South Carolina)

2 County of Aiken)

Certificate of Reporter

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6 I, Brenda J. Sigwald, Official Court Reporter for
7 the Second Judicial Circuit of the State of South Carolina,
8 do hereby certify that the foregoing is a true, accurate,
9 and complete Transcript of Record of the proceedings had
10 and evidence introduced in the trial of the captioned case,
11 relative to appeal, in the Court of Common Pleas in and for
12 the State of South Carolina on the 11th day of June 2018.

13 I FURTHER CERTIFY that I am neither kin, counsel,
14 nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal at Aiken County, this 18th day of January, 2019.

17
18
19
20
21 *Brenda J. Sigwald*

22 Brenda J. Sigwald,
23 Court Reporter and Notary Public
24 For the State of South Carolina
25 My commission expires
January 4, 2020

1 State of South Carolina) In the Court
2 County of Aiken) Of Common Pleas
3
4 Docket Number: 2014CP0202849
5
6 Wells Fargo, NA,)
7 Plaintiff,)
8 vs.) Transcript of Record
9 Michael G. Morgan,)
10 Defendant.)

11
12 October 15, 2018
13 Aiken, South Carolina
14

15 B E F O R E:

16 The Honorable Doyet A. Early III, Judge.
17

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

19 Stacie C. Knight, Esquire
20 Attorney for the Plaintiff

21 Andrew Radeker, Esquire
22 Attorney for the Defendant

23
24 Brenda J. Sigwald, Circuit Court Reporter
25 To The Honorable Doyet A. Early III
P.O. Box 206, Jackson, South Carolina 29831

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(REPORTER'S NOTE: There were no exhibits
entered during this hearing.)

1 THE COURT: All right. Give me a caption or
2 something --

3 MS. KNIGHT: Your Honor, I can pass up a notebook.

4 THE COURT: That will be fine.

5 You got a caption, ma'am?

6 THE COURT REPORTER: I do, yes, sir.

7 THE COURT: All right. This is the defendant's
8 motion to reconsider my earlier order wherein I dismissed
9 the case, it was a 12(b)6, wasn't it?

10 MR. RADEKER: Yes, Your Honor, you dismissed Mr.
11 Morgan's counterclaim. So this is --

12 THE COURT: Counterclaim. That's correct.

13 MR. RADEKER: -- a motion to reconsider that order.

14 THE COURT: Be glad to hear from you.

15 MR. RADEKER: Thank you, Your Honor. Drew Radeker
16 for Michael Morgan. Respectfully, we take some issue with
17 Your Honor's decision to dismiss Mr. Morgan's counterclaim,
18 which alleges a violation of what's known as the attorney
19 preference statute and also alleges that that was done
20 through the inducement of -- accompanied by inducement of
21 loan through unconscionable conduct. Your Honor, in
22 looking at the Court's order, there seemed to be two bases
23 on which the Court --

24 THE COURT: One of them is statute of limitations,
25 right?

1 MR. RADEKER: So one was on statute of limitations,
2 yes, sir.

3 THE COURT: You say the statute that I cited and
4 relied upon, this was a -- the end of the statute sort of
5 gets you around that?

6 MR. RADEKER: So, yes.

7 THE COURT: That's a real legal way of saying it.

8 MR. RADEKER: So -- but essentially you're right;
9 is that there's language in that statute that says in an
10 action that is like a debt collection action that is
11 brought against the person who's asserting a claim that
12 there's been a violation of the attorney preference
13 statute. And this would apply regardless of whether there
14 was any unconscionability or unconscionable conduct. But
15 despite the fact that the statute of limitations would have
16 prevented that had the action been brought --

17 THE COURT: Well, the language you're talking about
18 says, this subsection does not bar a debtor from asserting
19 a violation of this statute in an action to collect a debt
20 which was brought more than three years from the date of
21 incurrence of the violation. In other words, it has to be
22 brought within three years of violating the attorney
23 preference act; is that correct?

24 MR. RADEKER: So ordinarily, yes. That's the
25 statute under subsection A. That's correct, Your Honor.

1 THE COURT: Did the violation occur within the
2 three years? The alleged violation?

3 MR. RADEKER: So 2008 is when that happened. So
4 this's no question we're beyond three years. The question
5 becomes is that given that that language is in here and
6 this is asserted from a defensive posture in an action to
7 collect that debt is, you know, can it be barred by the
8 statute of limitations because that language says that it's
9 not. Now --

10 THE COURT: Well, if they had never sued you, you
11 would not have raised this or you could have raised it
12 within the statutory period. You're saying now if you get
13 sued on the debt, you're allowed to assert it even
14 notwithstanding the fact that more than three years have
15 gone by since the violation?

16 MR. RADEKER: Yes, Your Honor, I'm saying that
17 because that's, respectfully, that's what the statute says.
18 And the statute says that you can do that.

19 Now, in that -- the plaintiff's opposition to this
20 motion, they put in their memorandum lots -- you can see in
21 the pleading they label this as a counterclaim and look at
22 what we asked for. Also in our pleading, we note that
23 anything we raise as counterclaim is also asserted by way
24 of defense, which the plaintiff has left out of their
25 memorandum in opposition to this motion. And that language

1 has to do with what the ultimate effect is of prevailing on
2 the contention that they violated the attorney preference
3 statute. And so I would note that. And that doesn't have
4 anything to do with whether there was inducement by
5 unconscionable conduct.

6 Now, we also -- we did plead facts from which we
7 could show that we do allege inducement by unconscionable
8 conduct in this case. First of all, what the statute says
9 is, and a loan is induced by unconscionable conduct. It
10 doesn't speak to any particular way in which that is to
11 happen or anything like that. Just getting the loan made,
12 if there is unconscionable conduct involved, that invokes
13 another subsection of the remedy statute, subsection C, and
14 that's the beefed up one, the one that has pretty hefty
15 remedies associated with it. And clearly if we've alleged
16 a claim like that, I think the Court would agree that the
17 statute of limitations would not apply because the statute
18 of limitations under that subsection is the maturity date
19 of the loan, which is 2038. And so we're definitely not
20 within that.

21 And what did we allege? We allege that this loan
22 was closed not only without Mr. Morgan getting any
23 opportunity to select an attorney to represent him in the
24 closing of it, but it was closed by the person who wasn't a
25 lawyer without attorney supervision as is required by South

1 Carolina law.

2 And the case law in this state says that the
3 unauthorized practice of law is inherently prejudicial both
4 to the people involved and to the public.

5 THE COURT: I read that in your memorandum.

6 MR. RADEKER: And so -- thank you.

7 And so you know like the narrow vision which is
8 proposed by the plaintiffs and which the Court ultimately
9 adopted in signing their proposed order in this case. This
10 isn't a litmus test, a check off the elements for what
11 constitutes unconscionability. Unconscionability speaks to
12 a fundamental unfairness in the transaction. Given that
13 the reason we require attorney supervision of mortgage loan
14 closings in South Carolina is so that the borrower can be
15 informed of their rights and to make sure they're not doing
16 anything to take advantage, doing anything hinky toward --
17 to use a legal term -- in this.

18 Given that that is there, if you close the loan
19 without any attorney supervision, I'd say that can't
20 constitute unconscionable conduct. And in light of the
21 standard, both under the consumer protection code which
22 called for liberal construction and on a motion to dismiss,
23 the Court can look at those facts and say we're entitled to
24 everything that we've pled in this, being assumed to be
25 true, and every inference that can be drawn from that.

1 THE COURT: I'm well aware of what the standard is
2 on a 12(b)6.

3 MR. RADEKER: So -- thank you, Your Honor. And I
4 know that Your Honor is.

5 In addition we've alleged here that the people who
6 closed this loan falsified documents, forged Mr. Morgan's
7 signature on that. That is a deprivation of any meaningful
8 choice on his behalf to go into the loan. Mr. Morgan might
9 argue, well, he got exactly the loan that he applied for.
10 Well, if the stuff in his application wasn't his
11 application, really wasn't the things that he said and he
12 really didn't get the loan he applied for.

13 So they did deprive him of his meaningful choice.
14 Further, the lawyer's there to make sure that he does have
15 a meaningful choice to go through with that case.

16 THE COURT: Thank you.

17 MR. RADEKER: And so we'd say that in light of that
18 we'd ask Your Honor to reconsider this.

19 Also, Your Honor, applied the heightened pleading
20 standard for fraud to our claim. We didn't plead a fraud
21 claim and we respectfully note that the Court is holding us
22 to a standard for this that is inapplicable and higher than
23 the actual standard that we have. Your Honor's order
24 recites that we didn't plea several elements of fraud.
25 Well, we don't have to. That's not what we're trying to

1 prove. And so we'd note that -- we'd ask Your Honor to
2 reconsider on that basis as well.

3 Further in the order, numerous unpublished
4 appellate, circuit court, and federal district court
5 opinions are relied upon as, treated as though they are
6 precedent in the order, and we note that our courts in
7 South Carolina specifically said that that's not to be
8 done. I would posit that the reason that the plaintiff
9 relied so heavily on such unpublished, for lack of a better
10 word, authorities in this, is that there really is no
11 precedential authority for their position in this state.

12 Further, it was error for the Court to dismiss this
13 with prejudice. There's South Carolina case law that
14 indicates that a dismissal like this should normally be
15 done without prejudice and with an opportunity for the
16 pleading to amend their pleadings. So we would say if you
17 want to stand by your position to dismiss it, to allow us
18 to have that.

19 Also the Court should clarify, particularly given
20 the language that is in 37-10-105(a) as to whether this is
21 being dismissed purely as a counterclaim, being dismissed
22 in its defensive function as well or otherwise. So we'd
23 note that.

24 Also, finally, something that was not mentioned in
25 our filing because we didn't know about purely at the time,

1 but does speak to authority on this. There's a case that's
2 pending right now in Court of Appeals. Oral argument has
3 been had, quicken loans versus Wilson, no opinion has been
4 issued yet. I strongly suspect that when that opinion
5 comes out, it may speak to issues that are involved here.
6 And so on the general line of cases that indicate that
7 where there is something that hasn't been expressly spoken
8 to by a Court, where there is a novel issue, it's better
9 for that to be decided on a fully developed trial record.
10 Given the lack of jury demand by any party in this case, I
11 would think what we would urge Your Honor to do is to
12 reconsider, let this counterclaim stand and refer it to the
13 master in equity and he can hash out any of the issues.

14 THE COURT: Thank you.

15 MR. RADEKER: Thank you.

16 THE COURT: Yes, ma'am?

17 MS. KNIGHT: Thank you, Your Honor. I'll be brief.

18 This loan, as Mr. Radeker said, was closed in 2008.
19 It's a \$1.3 million loan. His client has not made a
20 payment in over seven years, has continued to live in the
21 property. The first time there was any allegation made of
22 any improprieties of the closing of this loan were after my
23 client instituted its given right to foreclose on this
24 property.

25 Now, Mr. Radeker concedes that under the three-year

1 statute, his claim is barred. There's no excuse there. So
2 he has to come up with a way to get around it. In the
3 opposition to the motion that we filed, they only argued
4 that unconscionability exception applies.

5 Now, after the Court has granted our motion to
6 dismiss, they are here today with a brand new argument that
7 they didn't make before, which is that actually, no, we're
8 entitled to take advantage of this other statute because
9 this is a defense by way of recoupment of the sale.

10 A counterclaim is not a recoupment or a sale. They
11 are completely different things. So I submit, Your Honor,
12 that the exception in 37-10-105(a), which talks about the
13 statute of limitations not applying when the claim is
14 raised as a defense or a set off, it doesn't apply here
15 because he's seeking affirmative monetary relief from my
16 client, as well as a declaration that this million dollar
17 loan is unenforceable and invalid and that my client has no
18 rights to recover the money that his client had borrowed.

19 And so for that reason, that first exception does
20 not apply and in any event it is not properly before the
21 Court. They could have raised it before and they didn't.

22 Second of all regarding --

23 THE COURT: Give me some dates, please. The loan
24 was taken out when?

25 MS. KNIGHT: In 2008.

1 THE COURT: No payment was ever made on it?

2 MS. KNIGHT: No, sir, I think payments were made
3 sporadically for about a three-year period. He would get
4 behind, he would catch up. He would get behind, he would
5 catch up. We went through several years of trying to get
6 this borrower qualified for a loan modification.
7 Unfortunately, he did not -- sometimes had no income, other
8 times had insufficient income to service this debt. So the
9 foreclosure eventually was filed in 2015.

10 THE COURT: Hold on. Residential loan or
11 commercial loan or --

12 MS. KNIGHT: A residential loan in Aiken, Your
13 Honor.

14 THE COURT: So you filed just a regular foreclosure
15 action?

16 MS. KNIGHT: Correct. And then what happened was,
17 the case was stayed for the Court ordered -- foreclosure
18 avoidance process to get this borrower through the loan
19 modification process. He didn't qualify.

20 While that foreclosure was stayed, Mr. Morgan went
21 out, pro se, and filed another lawsuit in federal court
22 against my client, making all kinds of allegations about
23 this loan, including that -- which is for background --
24 there was a big class action settlement agreement that he
25 was part of. He said that the bank hadn't complied with

1 that. That case wound it's way through the courts for
2 about a year and it eventually, right on the eve of our
3 motion of judgment on our pleadings, he took a voluntary
4 dismissal without prejudice and then we're back here, end
5 of story.

6 So, I mean, my client wants to move forward with
7 the foreclosure. Mr. Morgan has tried to throw up all
8 kinds of roadblocks to stop that from happening. Including
9 now the allegation that the loan is unconscionable because
10 it was closed without an attorney and he wasn't given the
11 right to select an attorney.

12 We have a signed attorney preference form with Mr.
13 Morgan's signature on it. He claims now that it wasn't
14 his, but that form does exist. The allegations now that he
15 didn't get the loan that he wanted, that's not in the
16 pleadings. There's no allegation that he did not get the
17 loan that he wanted. That he didn't apply for this loan;
18 that he didn't get the rate that he wanted; that he didn't
19 get the amount of loan that he wanted, that's not alleged.
20 So -- and he hasn't alleged that any of the terms of the
21 loan are so gross or desperate that it would shock the
22 conscience.

23 So that's the first prong of unconscionability.
24 There's no substantive unconscionability alleged here.

25 Regarding procedural unconscionability, Your Honor,

1 Mr. Radeker is right, there's not a lot of case law on this
2 issue here in South Carolina. Below, Mr. Radeker submitted
3 a single court opinion from a trial court in Lexington
4 County that he urged the Court to follow. We submitted the
5 contrary authorities that we were able to locate saying
6 that an attorney preference violation, which necessarily
7 gives rise to a claim that a loan was closed without an
8 attorney, cannot support an unconscionability claim under
9 the consumer protection code because allowing that
10 allegation to eviscerate the statute of limitations would
11 mean that any time somebody alleges that there's an
12 attorney preference violation, there is no statute of
13 limitations for this claim which would completely wipe out
14 the three year statute of limitations to begin with.

15 So reading the statute in that way to render one
16 part of it superfluous is not the way that Courts construct
17 statutes. We have cited in our brief and in our brief
18 below -- and they take issue with the fact that the Court
19 adopted our order, but you instructed both sides to submit
20 an order and they did not do so, nor did they submit
21 objections to the order that we submitted.

22 But we cited the overwhelming weight of authority
23 supports our position and there is no, no case law in their
24 brief supporting their argument that the claimed attorney
25 preference violation, when he doesn't allege that he took

1 the loan out based on anything that Wells Fargo did or did
2 not do, can render a loan procedurally unconscionable.

3 So for that reason, Your Honor, your order was
4 correct and we urge you to uphold it.

5 THE COURT: Thank you.

6 Anything, briefly in reply in.

7 MR. RADEKER: Very briefly, Your Honor, I would say
8 I've heard a whole lot of argument about basically stuff
9 that didn't relate anything to the issues that are subject
10 to this motion. I wanted to say this, I wasn't at the
11 previous hearing on this. Another lawyer in my firm argued
12 that.

13 THE COURT: Well, why didn't that other lawyer send
14 me a proposed order?

15 MR. RADEKER: Because I was -- what I was going to
16 say is I wasn't aware of any instruction to submit a
17 proposed order or I would have.

18 THE COURT: I give everybody that instruction.

19 MR. RADEKER: In any event, speaking to one thing
20 that they said substantively, might have something to do
21 with that and that's recoupment and the counterclaims are
22 completely different. They're not completely different.
23 Usually the context in which recoupment comes up is where
24 there's an acid meaning of the creditors position with
25 regard to that debt. And the debtor has a claim that is

1 based on the conduct of the original creditor. And the
2 recoupment law says that when it's available recoupment can
3 be used essentially to cut down up to 100 percent of that
4 acid needs claim as a creditor, but not to then recover
5 monetary relief against that acid meaning above that.

6 And so I --

7 THE COURT: Is your goal to pursue your
8 counterclaim and hopefully whoever hears it will rule that
9 they violated the attorney preference and it wasn't
10 conscionable, therefore, he doesn't owe the bank anything?

11 MR. RADEKER: Yes. That'd be our -- that's --

12 THE COURT: Thank you.

13 MR. RADEKER: Thank you.

14 THE COURT: All right. Listen carefully. Proposed
15 orders within 10 days.

16 MR. RADEKER: Certainly, Your Honor.

17 THE COURT: You acknowledge it now?

18 MR. RADEKER: I heard it now, yes, Your Honor.

19 THE COURT: Thank you.

20 MS. KNIGHT: Thank you, Your Honor.

21 * * * * * END OF TRANSCRIPT * * * * *

1 State of South Carolina)

2 County of Aiken)

Certificate of Reporter

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6 I, Brenda J. Sigwald, Official Court Reporter for
7 the Second Judicial Circuit of the State of South Carolina,
8 do hereby certify that the foregoing is a true, accurate,
9 and complete Transcript of Record of the proceedings had
10 and evidence introduced in the trial of the captioned case,
11 relative to appeal, in the Court of Common Pleas in and for
12 the State of South Carolina on 15th day of October 2018.

13 I FURTHER CERTIFY that I am neither kin, counsel,
14 nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal at Aiken County, this 18th day of January, 1019.

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21 Brenda J. Sigwald

22 Brenda J. Sigwald,
23 Court Reporter and Notary Public
24 For the State of South Carolina
25 My commission expires
January 4, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CASE NO. 2015-CP-02-2849

WELLS FARGO BANK, N.A.

PLAINTIFF,

v.

MICHAEL G. MORGAN; MARGARET H.
FITCH, M.D.; ERIC J. OLIG; SOUTH
CAROLINA DEPARTMENT OF REVENUE;
LINDA LAWRENCE BOWEN,

DEFENDANTS.

PLAINTIFF

WELLS FARGO BANK, N.A.'s
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS DEFENDANT MICHAEL
G. MORGAN'S AMENDED COUNTERCLAIM

Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") submits this Memorandum of Law in Support of its Motion to Dismiss Defendant Michael G. Morgan's ("Morgan") Amended Counterclaim.

I. BACKGROUND

This dispute arises out of Morgan's failure to repay a \$1.3 million mortgage loan he obtained from Wells Fargo's predecessor, Wachovia Mortgage, FSB, in 2008. Complaint, ¶ 18; Original Answer and Counterclaim, ¶¶ 18, 59. Morgan has not made a payment on the loan in over seven years. Complaint, ¶ 23; *see also* Original Answer and Counterclaim, ¶ 60 (admitting the default). Nonetheless, Morgan has taken endless steps to prevent Wells Fargo from exercising its right to foreclose, including his latest action on May 10, 2018, when he filed an Amended Answer and Counterclaim. In the Amended Counterclaim, Morgan alleges a violation of the South Carolina Attorney Preference Statute, S.C. Code, § 37-10-102, that occurred at his loan's closing in 2008. Amended Answer and Counterclaim, ¶ 39. Morgan seeks unspecified

damages and attorneys' fees, along with a declaration that his mortgage loan is "void or unenforceable." *See id.*, Prayer for Relief.

S.C. Code, § 37-10-102 provides:

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

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

The creditor may comply with this section by:

- (1) including the preference information on or with the credit application ... or
- (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared.

Despite the fact that his loan file contains evidence of compliance with these provisions, Morgan claims that "the original creditor did not comply with" § 37-10-102. Amended Answer and Counterclaim, ¶ 39. According to Morgan, (1) an unidentified individual "falsified and forged [his] signature" on unspecified "documents relating to the application for and origination" of his loan, (2) an unidentified individual engaged in unspecified acts of "concealment," and (3) he was "depriv[ed] of his right to choose his own, unconflicted counsel to represent him at the closing of the mortgage loan" and "no attorney licensed to practice law in South Carolina supervised the closing of the mortgage loan." *Id.*, ¶¶ 40-41, 43, 45.

As demonstrated herein, Morgan's allegations fail as a matter of law, and his claim under § 37-10-102 is time-barred. Accordingly, the Court should dismiss Morgan's Counterclaim with prejudice.

II. ARGUMENT

Claims under the Attorney Preference Statute are subject to a three-year statute of limitations that begins to run on the date the violation occurred. S.C. Code § 37-10-105(A). Because Morgan alleges a violation that occurred no later than his loan's closing in April 2008, any attorney preference claim was time-barred as of April 2011.

In an apparent attempt to avoid the statute of limitations bar, Morgan alleges that his loan “was induced by unconscionable conduct” in violation of S.C. Code, § 37-10-105(C). Amended Answer and Counterclaim, ¶¶ 45-46. Section 37-10-105(C) apparently contains a “relaxed statute of limitations,”¹ and provides that “[a]n action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.” However, because Morgan's allegations fail to state a claim under § 37-10-105(C), he cannot take advantage of its longer limitations period.

In order to proceed under § 37-10-105(C), Morgan must properly allege either (1) substantive unconscionability—that the loan transaction itself is unconscionable, or (2) procedural unconscionability—that it was induced by unconscionable conduct. *See, e.g., Boone v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2016 WL 3552025, at *4 (D.S.C. June 30, 2016). An unconscionable transaction is one that contains “terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 472 S.E.2d 242, 245 (S.C. 1996); *see also Centura Bank v. Cox*, No. 2004-UP-348, 2004 WL 6331130, at *3 (S.C. Ct. App. May 25, 2004) (same). For conduct to qualify as unconscionable inducement, it must be “an affirmative

¹ *See Greene v. Household Fin. Corp.*, No. 3:02-2436-17, Order Granting Defendant's Motion for Summary Judgment at 9 (D.S.C. Jan. 12, 2004).

misrepresentation or active deceit.” *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 277 (4th Cir. 2016). Morgan alleges none of these things.

First, Morgan does not allege that any of his loan’s terms were so oppressive that no reasonable person would have accepted the agreement. Thus, Morgan does not allege substantive unconscionability as a matter of law. *See, e.g., Mosley v. Quicken Loans, Inc.*, No. 1:16-cv-00384-JMC, 2016 WL 3551999, at *4 (D.S.C. June 30, 2016); *see also Boone*, 2016 WL 3552025, at *5; *O’Neal v. Quicken Loans, Inc.*, No. 1:15-cv-03712-JMC, 2016 WL 3569402, at *6 (D.S.C. June 30, 2016).

Nor does Morgan adequately allege procedural unconscionability. First, Morgan’s conclusory allegations of forgery by an unidentified individual on unspecified loan documents, and of unidentified acts of “concealment,” are insufficient as a matter of law. *See Jones v. Gilstrap*, 343 S.E.2d 646, 648 (S.C. Ct. App. 1986) (a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient); *see also Hartsel v. Selective Ins. Co. of S.C.*, No. 2011-UP-226, 2011 WL 11734337, at *3 (S.C. Ct. App. May 18, 2011) (rejecting conclusory allegations in support of breach of fiduciary duty claim).

Morgan’s allegations that his loan was closed without an attorney and that he was “depriv[ed] of [his] right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue” also fail. South Carolina courts—including the South Carolina Court of Appeals—repeatedly have held that such allegations cannot support a procedural unconscionability claim as a matter of law.

First, because there is no private right of action for the alleged unauthorized practice of law, *see, e.g., Franklin v. Chavis*, 640 S.E.2d 873, 877 (S.C. 2007), any claims based on such an allegation fail as a matter of law. *See id.* (affirming dismissal of unfair trade practices claim

based upon the alleged unauthorized practice of law); *see also Hambrick v. GMAC Mortg. Corp.*, 634 S.E.2d 5, 8-9 (S.C. Ct. App. 2006) (affirming dismissal of complaint when charges of unauthorized practice of law were the basis for alleged causes of action because only the South Carolina Supreme Court can determine what constitutes the unauthorized practice of law).

Second, the South Carolina Supreme Court has held that the alleged unauthorized practice of law cannot render a mortgage unenforceable unless that mortgage was recorded after August 8, 2011. *See BAC Home Loan Servicing, L.P. v. Kinder*, 731 S.E.2d 547, 550 (S.C. 2012); *Matrix Fin. Servs. Corp. v. Frazier*, 714 S.E.2d 532, 535 (S.C. 2011). Here, it is undisputed that the mortgage at issue was recorded in 2008. Thus, as a matter of law, the alleged unauthorized practice of law cannot support Morgan's Counterclaim, which seeks to prohibit Wells Fargo from enforcing the mortgage. *See Deutsche Bank Nat'l Trust Co. v. Booms*, No. 2015-UP-097, 2015 WL 793201, at *1 (S.C. Ct. App. Feb. 25, 2015) (affirming circuit court's rejection of unclean hands defense based upon alleged unauthorized practice of law because the subject mortgage was recorded before August 8, 2011).

Finally, courts routinely reject procedural unconscionability claims based upon alleged violations of the Attorney Preference Statute. *See Booms*, 2015 WL 793201, at *2 (circuit court did not err in holding that the note and mortgage were not unconscionable even though the lender violated the Attorney Preference Statute); *Mosley*, 2016 WL 3551999, at *3-4 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute); *Boone*, 2016 WL 3552025, at *5 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute and applying the three-year statute of limitations to the claim). This Court should do the same.

Indeed, accepting Morgan's argument would eviscerate the three-year statute of limitations applicable to attorney preference violations. If Morgan is correct, then every loan with an attorney preference violation is unconscionable and is thereby subject to the longer limitations period in S.C. Code, § 37-10-105(C). South Carolina courts "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). But to construe the statutes in the manner suggested by Morgan would render the three-year limitations period in § 37-10-105(A) meaningless. Accordingly, the Court should reject his proffered construction, and hold that his Counterclaim is time-barred.

Finally, Morgan's procedural unconscionability claim fails for the simple reason that he does not allege inducement. Indeed, Morgan does not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo did or did not do. The lack of any such allegations is fatal to any procedural unconscionability claim. *See, e.g., Boone*, 2016 WL 3552025, at *5 ("The facts as alleged indicate that Plaintiff applied for the loan with Defendant. There is no allegation that Plaintiff chose to apply for the loan based on statements made, or conduct, by Defendant regarding Plaintiff's ability to choose an attorney for closing. Therefore, Plaintiff has not stated a claim for unconscionable inducement."); *Hosey v. Quicken Loans, Inc.*, No. 1:17-cv-02060-JMC, 2018 WL 1471891, at *5 (D.S.C. Mar. 26, 2018) (same).

III. CONCLUSION

For all these reasons, Wells Fargo Bank, N.A. requests that the Court dismiss Morgan's Amended Counterclaim with prejudice.

This 7th day of June 2018.

/s/ Stacie C. Knight

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(S.C. Bar No. 77968)

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-02-2849

Wells Fargo Bank, N.A.,

Plaintiff,

vs.

**Michael G. Morgan; Margaret H. Fitch,
M.D.; Eric J. Olig; South Carolina
Department of Revenue; Linda Lawrence
Bowen;**

Defendants.

**DEFENDANT MORGAN'S
MEMORANDUM OF LAW IN
SUPPORT OF DENIAL OF
PLAINTIFF'S MOTION TO DISMISS
MORGAN'S COUNTERCLAIM**

Defendant Michael G. Morgan (hereinafter "Mr. Morgan") submits this Memorandum of Law in Support of Denial of Plaintiff's Motion to Dismiss Defendant Morgan's Counterclaim.

Wells Fargo argues a statute of limitations would bar Mr. Morgan's Counterclaim for violation of S.C. Code Ann. § 37-10-102. In pertinent part, S.C. Code Ann. § 37-10-102, typically called the attorney preference statute, provides:

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

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

The creditor may comply with this section by:

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

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

A statute in the same chapter, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, stating:

A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, *except as set forth in subsection (C)*. The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action:

(1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

(b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and

(c) attorney's fees and costs.

An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

(D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

(Emphasis added.)

Wells Fargo does not claim that this was brought after the scheduled maturity date of Mr. Morgan's loan. As discussed below, the counterclaim sets out a claim for violation of the attorney preference statute coupled with an unconscionable transaction and its inducement by unconscionable conduct. Accordingly, the statute of limitations for actions purely seeking relief under S.C. Code Ann. § 37-10-105(A) is no bar to Mr. Morgan's claim. S.C. Code Ann. § 37-10-105(A)&(C).

Wells Fargo owns the note and mortgage subject of the loan involved and is, through a series of mergers, the original creditor who made that loan. Complaint ¶¶ 2-5, 19-21. However,

Wells Fargo, as the original creditor, did not comply with the attorney preference or insurance preference provisions of S.C. Code Ann. § 37-10-102. See Amended Answer and Counterclaim ¶¶ 38-46.

The purpose of §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992).

At issue in this case is a South Carolina mortgage loan. Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. Id. The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005).

In Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013), the Court of Appeals noted that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" noting that the reason for requiring lawyers to supervise mortgage loan closings "is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." The Supreme Court of South Carolina favorably cited this passage from Coffey in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), which

reaffirmed that “closing a loan without the supervision of an attorney constitutes the unauthorized practice of law.”

The closing of a South Carolina mortgage loan without its supervision by a licensed South Carolina attorney, particularly where the customer is not given any opportunity to select an attorney to represent him, is inducement of the loan by unconscionable conduct under S.C. Code Ann. § 37-10-105(C). The undersigned is not aware of any South Carolina appellate opinions that analyze S.C. Code Ann. § 37-10-105(C), but a South Carolina circuit court ruling supports this reading of South Carolina law. (See attached order of the Hon. Thomas A. Russo in Nationstar v. Fowler.)

The question on a motion to dismiss a counterclaim is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. Charleston County School Dist. V. Laidlaw Transit Inc., 348 S.C. 420, 559 S.E.2d 362 (S.C. App. 2001)(rehearing denied, certiorari denied).

Viewed in the light most favorable to Mr. Morgan, his allegations have indeed stated a counterclaim for violation of the attorney preference statute with unconscionability. Consequently, Plaintiff’s Motion to Dismiss Mr. Morgan’s counterclaim must be denied.

Respectfully submitted,

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Columbia, South Carolina
 June 8, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CASE NO. 2015-CP-02-2849

WELLS FARGO BANK, N.A.

PLAINTIFF,

v.

MICHAEL G. MORGAN; MARGARET H.
FITCH, M.D.; ERIC J. OLIG; SOUTH
CAROLINA DEPARTMENT OF REVENUE;
LINDA LAWRENCE BOWEN,

DEFENDANTS.

PLAINTIFF

WELLS FARGO BANK, N.A.'S OPPOSITION TO
DEFENDANT'S MOTION TO RECONSIDER

Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") submits this Opposition to Defendant Michael G. Morgan's Motion to Reconsider.

Morgan's Motion to Reconsider is the latest maneuver in his years' long effort to prevent foreclosure, even though he has not made a payment on his mortgage loan in over seven years. However, contrary to the title of his motion, Morgan is not actually asking the Court to "reconsider" a previous ruling. Rather, Morgan asks the Court to reconsider his allegations under a never-before-advanced theory that his counterclaim is actually a "defense by recoupment or set-off." But asking the Court to reconsider a prior ruling on the basis of a new legal theory (which, in any event, is based on a blatant mischaracterization of Morgan's pleading) is not a proper basis for seeking reconsideration under South Carolina law. *See, e.g., MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641(2003) ("[a] party cannot raise an issue for the first time in a Rule 59(e), SCRPC motion").

In any event, Morgan's arguments are contrary to the facts and the law. The Court should reject Morgan's improper effort to resurrect a time-barred counterclaim that the Court rightly put to rest when it granted Wells Fargo's Motion to Dismiss with prejudice. The Motion to Reconsider should be denied.

ARGUMENT

I. As a Matter of Law, "Reconsideration" of a New Theory Must Be Denied.

In the Motion, Morgan argues that what he labeled a "counterclaim" is actually a "defense by recoupment or set-off" that is not time-barred under S.C. Code, § 37-10-105(A). Motion at ¶¶ 2-4. Morgan never made this argument in his opposition to Wells Fargo's Motion to Dismiss or at oral argument on June 11, 2018. Instead, he argued that because his "counterclaim sets out a claim for violation of the attorney preference statute coupled with an unconscionable transaction and its inducement by unconscionable conduct," the three-year statute of limitations does not apply. *See* Opposition at 3.

Morgan's attempt to advance an entirely new argument at this stage underscores the flaws in his Motion. He does not want a second bite of the apple; he wants to throw out the apple and chose another. Motions for reconsideration, however, are not vehicles to introduce new arguments that could have been advanced earlier in the case (let alone reimagined theories that are not supported by the pleading). *See, e.g., MailSource*, 356 S.C. at 374, 588 S.E.2d at 641 ("[a] party cannot raise an issue for the first time in a Rule 59(e)" motion); *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008 ("a party cannot use a motion to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not"); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1999) (same). For this reason alone, the Motion should be denied.

II. Morgan's Counterclaim Is Not "A Matter of Defense By Recoupment or Set-Off."

In any event, the Court should reject Morgan's attempt to rewrite his pleading in order to avoid a plain limitations bar. His May 10, 2018 Amended Answer and Counterclaim included the following:

FOR A FIRST COUNTERCLAIM (Violation of Attorney Preference Statute with Unconscionability)

In that First Counterclaim, Morgan sought affirmative relief from Wells Fargo and the Court: "damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code" and "all relief available under S.C. Code Ann. § 37-10-105"—including a declaration that his mortgage loan is "void or unenforceable." Amended Answer and Counterclaim, ¶ 46. That "First Counterclaim" is what Wells Fargo successfully moved to dismiss.

As the South Carolina Supreme Court has explained, "recoupment" and "set-off" are distinct from counterclaims. "Recoupment" and "set-off" are equitable defenses that can only result in the reduction of the plaintiff's claims—not an affirmative judgment for money or other relief for the defendant. *See Brasington Tile Co., Inc. v. Worley*, 327 S.C. 280, 284, 491 S.E.2d 244, 246 (1997) (recognizing that a set-off and a counterclaim are distinct and have different mutuality requirements); *W.M. Kirkland, Inc. v. Providence Washington Ins. Co.*, 264 S.C. 573, 216 S.E.2d 518 (1975) ("It is essential to remember, however, that a counterclaim is distinguishable from a set-off, a counterclaim being statutory while set-off belongs to the inherent power of a court in the exercise of its equitable jurisdiction."); *Mullins Hosp. v. Squires*, 233 S.C. 186, 197, 104 S.E.2d 161, 166 (1958) ("Recoupment, unlike counterclaim, may result only in the reduction of the plaintiff's claim, and not in affirmative money judgment"). Here, Morgan's belated attempt to recast what he labeled a "First Counterclaim" as "as a matter of

defense by way of recoupment or set-off¹ is belied by his own pleading, which sought significant monetary relief from Wells Fargo and an order declaring his \$1.3 million mortgage loan unenforceable. Morgan's new argument is disingenuous, contrary to the law, and the Court should reject it.

III. Morgan's Own Pleading Demonstrated That His First Counterclaim Was Time-Barred.

The Court should reject Morgan's remaining arguments, which merely repeat the arguments he already made and that the Court already rejected.²

First, Morgan argues that he adequately alleged "unconscionability or inducement by unconscionable conduct," Motion, ¶ 7, thereby allowing him to take advantage of S.C. Code, § 37-10-105(C), which apparently contains a "relaxed statute of limitations." *Greene v. Household Fin. Corp.*, No. 3:02-2436-17, Order Granting Defendant's Motion for Summary Judgment at 9 (D.S.C. Jan. 12, 2004). However, in order to proceed under § 37-10-105(C), Morgan must have properly alleged either (1) substantive unconscionability—that his loan transaction itself is unconscionable, or (2) procedural unconscionability—that it was induced by unconscionable conduct. S.C. Code, § 37-10-105(C). Morgan did neither.

Regarding substantive unconscionability, South Carolina courts have long held that an unconscionable transaction is one that contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's*

¹ Wells Fargo disputes that a foreclosure, which seeks to enforce a security interest, qualifies as "debt collection" under S.C. Code, § 37-10-105(A). And, if a foreclosure is not "debt collection," then Morgan cannot take advantage of § 37-10-105(A) in any event.

² Morgan's complaint that the dismissal order "was drafted by Wells Fargo's counsel" falls on deaf ears. At the conclusion of the hearing on June 11, 2018, the Court instructed both parties to submit proposed orders within thirty days. Morgan elected not to do so, nor did he submit any objections to the proposed order Wells Fargo submitted on July 11, 2018.

Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996). Morgan's First Counterclaim, his Opposition to Wells Fargo's Motion to Dismiss, and his Motion to Reconsider are entirely silent on this issue. Thus, the Court rightly held that Morgan did not allege substantive unconscionability as a matter of law.

Regarding procedural unconscionability, Morgan acknowledges that he was required to allege an "absence of meaningful choice" on his part. *See* Motion, ¶ 8. He also acknowledges that there are "[m]any factors ... used to assess [procedural] unconscionability." *Id.* However, he never addresses those "many factors" under South Carolina law, which include taking advantage of the borrower's inability to protect his interests because of "physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors." S.C. Code, § 37-5-108(4).

Instead, Morgan argues that "the unauthorized practice of law is unconscionable conduct, and when it is coupled with an attorney preference violation, that is something brings [sic] a claim within the ambit of S.C. Code Ann. § 37-10-105(C). Motion, ¶ 16. Notably, he does not cite a single case supporting his position, and he ignores the many contrary cases Wells Fargo cited in its brief. *See, e.g., BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012) (the alleged unauthorized practice of law cannot render a mortgage unenforceable unless it was recorded after August 8, 2011); *Deutsche Bank Nat'l Trust Co. v. Booms*, No. 2015-UP-097, 2015 WL 793201, at *2 (S.C. Ct. App. Feb. 25, 2015) (circuit court did not err in holding that the note and mortgage were not unconscionable *even though the*

lender violated the Attorney Preference Statute and the loan was not closed by an attorney);³ *Mosley v. Quicken Loans, Inc.*, No. 1:16-cv-00384-JMC, 2016 WL 3551999, at *3-4 (same); *Boone, v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2016 WL 3552025, at *5 (same).

Nor does Morgan point the Court to any allegations suggesting inducement, which is a required element of his procedural unconscionability claim under South Carolina law. *See* S.C. Code, § 37-10-105(C) (“If the court finds as a matter of law that the agreement or transaction is unconscionable ... at the time it was made, or was *induced* by unconscionable conduct ...”) (emphasis added). As Wells Fargo showed in its Motion to Dismiss, Morgan simply does not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo did or did not do. The lack of any such allegations is fatal to any procedural unconscionability claim. *See, e.g., Boone*, 2016 WL 3552025, at *5 (“The facts as alleged indicate that Plaintiff applied for the loan with Defendant. There is no allegation that Plaintiff chose to apply for the loan based on statements made, or conduct, by Defendant regarding Plaintiff’s ability to choose an attorney for closing. Therefore, Plaintiff has not stated a claim for unconscionable inducement.”); *Hosey v. Quicken Loans, Inc.*, No. 1:17-cv-02060-JMC, 2018 WL 1471891, at *5 (D.S.C. Mar. 26, 2018) (same).

Morgan also does not address the Court’s conclusion that his interpretation would eviscerate the three-year statute of limitations applicable to attorney preference violations. As the Court concluded, “[i]f Morgan is correct, then every loan with an attorney preference

³ Contrary to Morgan’s argument, the Court did not treat *Booms* and the other cases Wells Fargo cited as “precedent.” Motion, ¶ 14. For example, as the Court noted in its order, *Booms* only “*suggests*” that the South Carolina appellate courts would agree” that Morgan’s argument is contrary to law. Order at 8 (emphasis added). In any event, Morgan’s complaint about the Court’s citation to “trial-level and unpublished opinions” is quite curious, given that his Opposition to Wells Fargo’s Motion to Dismiss urged the Court to follow a single, unreported decision from the Lexington County Court of Common Pleas.

violation is unconscionable and is thereby subject to the longer limitations period in S.C. Code, § 37-10-105(C).” Order at 8. The Court continued: “South Carolina courts “‘will not construe a statute in a way which leads to an absurd result or renders it meaningless.’ To construe the statutes in the manner suggested by Morgan would render the three-year limitations period in § 37-10-105(A) meaningless. Accordingly, the Court rejects Morgan’s proffered construction.” *Id.* (quoting *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)). The Court should treat Morgan’s silence on this issue as a concession.

IV. Dismissal With Prejudice Was Warranted.

Nor did the Court err in dismissing Morgan’s counterclaim with prejudice. “When the complaint shows affirmatively that plaintiff is not entitled to relief in any view of the case,” dismissal with prejudice is proper. *Portman v. Garbade*, 337 S.C. 186, 190-91, 522 S.E.2d 830, 833 (1999). Because Morgan’s counterclaim is time-barred, he is not entitled to any relief under any view of the case. Dismissal with prejudice was proper.

CONCLUSION

For all these reasons, Wells Fargo Bank, N.A. requests that the Court deny Morgan’s Motion to Reconsider.

This 10th day of October 2018.

/s/ Stacie C. Knight

Stacie C. Knight
(S.C. Bar No. 77968)

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Charlotte, North Carolina 28202
(704) 350-7700
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Attorneys for Plaintiff
Wells Fargo Bank, N.A.

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Recipients

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Common Pleas

Aiken

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Document(s) Submitted: Order/Other Order/Other

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Taylor Meriwether Smith, IV for Michael G
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Stacie Corbett Knight for Wells Fargo Bank NA

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Official File Stamp: 11-02-2018 01:44:11 PM
Court: CIRCUIT COURT
Common Pleas
Aiken
Case Caption: Wells Fargo Bank NA VS Michael G Morgan ,
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Document(s) Submitted: Order Denying Def's Motion to Reconsider
Order/Other
Filed by or on behalf of: Shadell Parks

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Drew Radeker

From: Early, Doyet A. Law Clerk (Gaillard Dotterer) <dearlylc@sccourts.org>
Sent: Monday, November 5, 2018 12:01 PM
To: Knight, Stacie C.
Cc: Drew Radeker; Taylor Smith
Subject: Re: Wells Fargo Bank v. Michael G. Morgan, 2015CP022849 - Motion to Reconsider - hearing
Attachments: image003.jpg; image005.png

Drew and Stacie,

The order that was electronically signed was signed in error. The order filed on Friday is the correct order. The motion to reconsider is denied. Please let me know if you have any further questions.

Thank you,
Gilly Dotterer

Sent from my iPhone

On Nov 5, 2018, at 11:19 AM, Knight, Stacie C. <SKnight@winston.com<mailto:SKnight@winston.com>> wrote:

Good morning Gilly,

I represent Wells Fargo in this matter. I have copied counsel for Defendant Morgan on this email.

Last Monday, Judge Early entered an order granting Mr. Morgan's motion to reconsider. On Friday, however, he entered an order denying the motion to reconsider. I've attached both orders here for easy reference.

Can you let us know which order Judge Early intended to enter as his ruling on the motion?

Thank you,

Stacie Knight

Stacie C. Knight

Winston & Strawn LLP

D: +1 704-350-7712

sknight@winston.com<mailto:sknight@winston.com>

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<image003.jpg>

From: Knight, Stacie C.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early III, Circuit Judge

Appellate Case No. 2018-002068

Wells Fargo Bank, N.A., ... Respondent,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department
of Revenue; Linda Lawrence Bowen; Defendants,

Of whom Michael G. Morgan is the Appellant;

CERTIFICATE OF COUNSEL

I certify that the record on appeal contains all material proposed to be included
by any of the parties and not any other material.

Respectfully submitted,

RECEIVED

JAN 13 2020

SC Court of Appeals

Andrew S. Radeker
S.C. Bar No. 73743
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Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

December 23, 2019