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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Judge

Appellate Case No. 2020-001490
Common Pleas Case No. 2020-CP-14-00023

New Residential Mortgage, LLC, ... Plaintiff,

v.

Todd S. Crawford, Tricia L. Crawford, William T. Geddings, Jr., Jane U. Geddings, and USAA
Federal Savings Bank, ... Defendants,

Of Whom William T. Geddings, Jr. and Jane U. Geddings are the Appellants-Respondents,
and

New Residential Mortgage LLC is the Respondents-Appellant,
and USAA Federal Savings Bank is the Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CLARENDON

FOR THE THIRD JUDICIAL CIRCUIT

CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

v.

Todd S. Crawford; Tricia L. Crawford;
William T. Geddings, Jr.; Jane U. Geddings;
and USAA Federal Savings Bank;

Defendant.

ORDER

This matter is before the Court pursuant to Plaintiff, New Residential Mortgage, Inc.'s ("New Residential") Motion for Judgment on the Pleadings as to Defendants, William T. Geddings, Jr. and Jane U. Geddings' ("Geddings") Counterclaims; Defendant, USAA Federal Savings Bank's ("USAA FSB") Motion for Judgment on the Pleadings as to the Geddings' Cross-claims; and New Residential's Motion to Strike Jury Demand and for Order of Reference. The motions were heard on August 19, 2020 with counsel for the parties in attendance via Webex videoconferencing. Having reviewed the pleadings as well as the briefs and other materials submitted by the parties, having heard the arguments of counsel, and being otherwise fully informed and advised, the Court finds as follows:

A party is entitled to judgment on the pleadings if the plaintiff "fail[s] to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). The motion must be denied, however, if the facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case. *Id.* A motion under Rule 12(c) admits the

well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. *Firemen's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co.*, 302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990).

This matter arises out of a 2007 mortgage loan transaction between Todd S. Crawford and Tricia L. Crawford (the “Crawfords”) and USAA FSB. In 2013, the senior mortgage was assigned to Green Tree Servicing, LLC, now known as Ditech Financial LLC. In 2018, the Crawfords conveyed the property to the Geddings subject to the existing mortgage. In December 2019, the senior mortgage was assigned to New Residential, which brought the instant action seeking foreclosure on January 15, 2020. The Geddings filed their Answer, Counterclaim, and Crossclaim on January 27, 2020, and filed an Amended Answer, Counterclaim, and Crossclaim on April 27, 2020.

The Court finds the Geddings have failed to state a claim for negligence. The Geddings allege that prior to their ownership of the subject real property, the mortgagee took steps to secure the property but then allowed it to deteriorate. However, the Geddings lack standing to maintain a negligence claim based on alleged harms that occurred prior to them gaining ownership of the property in 2018. Furthermore, the Geddings cannot show that New Residential or USAA FSB owed them a duty to maintain the property, where they did not own the property at the time the alleged negligence occurred.

Next, the Court finds that the Geddings fail to state a claim for violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”). The Geddings assert this claim based on allegations of misconduct in the course of the mortgage loan transaction. Although the Geddings’ ownership of the property is subject to the 2007 mortgage, the Geddings are not parties to the loan, nor have they assumed the obligation to pay the loan debt since taking ownership of the property

in 2018. The absence of an agreement to assume the mortgage debt refutes the Geddings' argument that they have "stepped into the shoes" of the Crawfords and can assert claims for unfair trade practices allegedly arising from the Crawfords' loan transaction. Because they are not the obligors for the mortgage loan, the Geddings lack standing to bring their claims under SCUTPA.

The Court finds that the Geddings have stated a valid claim for relief as to their counterclaim for Unjust Enrichment, and will deny New Residential and USAA FSB's motions for judgment on the pleadings as to this claim.

The Geddings' sole remaining counterclaim and crossclaim for Unjust Enrichment is an equitable cause of action. The Geddings are therefore not entitled to trial by jury as of right, and the Court finds that it is appropriate to strike the jury demand and refer this matter to the Clarendon County Master in Equity.

IT IS THEREFORE ORDERED:

A. The motions for judgment on the pleadings are GRANTED as to the Geddings' counterclaims against New Residential and cross-claims against USAA FSB for negligence and violation of the South Carolina Unfair Trade Practices Act, and these claims are hereby dismissed.

B. The motions for judgment on the pleadings are DENIED as to the Geddings' counterclaim against New Residential and cross-claim against USAA FSB for unjust enrichment.

C. The motion to strike the Geddings' jury demand is GRANTED. This case shall be referred to the Honorable Joseph K. Coffey, Clarendon County Master in Equity, for further proceedings and for entry of final judgment pursuant to Rule 53 of the South Carolina Rules of Civil Procedure.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE TO FOLLOW]



Clarendon Common Pleas

Case Caption: New Residential Mortgage Llc VS Todd S Crawford , defendant, et al

Case Number: 2020CP1400023

Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	CASE NO.: 2020-CP-43-00023
	)	
New Residential Mortgage, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	ORDER DENYING DEFENDANTS
	)	WILLIAM T. GEDDINGS AND JANE U.
Todd S. Crawford, Tricia L. Crawford,	)	GEDDINGS MOTION TO RECONSIDER
William T. Geddings, Jr., Jane U. Geddings,	)	
and USAA Federal Savings Bank,	)	
	)	
Defendants.	)	

Defendants' motion to reconsider is DENIED. This case arises out of a 2007 mortgage loan transaction on property located at 1051 Doral Drive, Manning, S.C. The Complaint alleges that the Defendant Todd Crawford executed and delivered to USAA Federal Savings Bank a promissory note and Defendants Todd and Tricia Crawford executed a mortgage on the property to secure the note. The mortgage was recorded on July 18, 2007. The mortgage was then assigned to Ditch Financial (formerly Green Tree Servicing, LLC), then to Plaintiff New Residential Mortgage, LLC. The Crawfords conveyed the property to Defendants William T. Geddings, Jr., and Jane U. Geddings by Quitclaim Deed executed August 25, 2018 and recorded at Book 1003, Page 2652 in the Office of the Clarendon County Register of Deeds.

The Geddings filed an Answer, Counterclaim, and Crossclaim against New Residential and USAA Federal Savings Bank.

In the Geddings' claim for damages under the South Carolina Unfair Trade Practices Act, they allege misconduct in the mortgage loan transaction between USAA and the Crawfords, including: attorney preference violations, engaging in the unauthorized practice of law by allowing the closing without the Crawfords being represented by a South Carolina attorney,

failing to timely bring a foreclosure action, attempting to foreclose an invalid lien, and failing to protect and preserve the property. The question before the court is therefore whether a subsequent purchaser who takes the property by quitclaim deed subject to a recorded mortgage, but does not assume the mortgage, can assert the borrower's defenses against the lender. This court holds they cannot.

When a grantee takes property subject to a mortgage, but does not assume the mortgage, he is not personally obligated to the mortgagee. The mortgagee cannot hold the grantee liable for payments on the debt, nor can he seek a deficiency judgment against the grantee if the property sells at foreclosure for less than the mortgage balance. See generally 101 ALR 281; 111 ALR 1114. In fact, in this case Plaintiff initially sought a deficiency judgment against Defendant Todd Crawford only (which Plaintiff later waived) and did not seek a deficiency against the Geddings.

Absent an assumption of the mortgage, personal liability on the debt remains with the Crawfords, and the Geddings cannot assert the Crawfords' defenses for them. As to the allegations of unfair trade practices pertaining to alleged irregularities in the mortgage loan transaction between USAA and the Crawfords, the Geddings lack standing to assert those defenses.

The Geddings also allege USAA and New Residential violated the UTPA by failing to communicate with them to resolve the lien on the property, and by improperly assigning the note and mortgage to Green Tree without notifying them. The court finds that the Geddings were not parties to the note and mortgage, and the mortgage companies therefore had no duty whatsoever to communicate with them regarding the Crawfords' debt.

As to the Geddings' claim for negligence, whether the alleged negligence occurred before or after the Crawfords quitclaimed the property to the Geddings, the mortgage companies owed no duty to preserve the property for the Geddings at any time. The provision in the mortgage which allows the mortgage company to protect and preserve the property is for the protection of the mortgagee's interest, and does not create a duty for them to safeguard the property for the borrower. Even if such a duty existed, the court finds the Geddings have no standing to assert any alleged negligence that occurred prior to their purchase of the property. Moreover, the court fails to see how the Geddings could have suffered any damages for deterioration of the property that occurred prior to their purchase of the property. If the property was in a state of neglect at the time the Geddings purchased the property, then the condition of the property would be readily apparent to any buyer and would be reflected in the purchase price. After the Geddings purchased the property, the mortgage company had no obligation to maintain the property for the Geddings' benefit.

This court's previous order dismissing the Geddings' causes of action for negligence and unfair trade practices is silent as to whether the dismissal was with prejudice. Pursuant to Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019), the dismissal is WITHOUT PREJUDICE and the Geddings have thirty (30) days from the date of this order to amend their pleadings.

IT IS SO ORDERED.

Kristi F. Curtis, Circuit Court Judge

This ____ day of _____, 2020.

_____, South Carolina



Clarendon Common Pleas

Case Caption: New Residential Mortgage Llc VS Todd S Crawford , defendant, et al

Case Number: 2020CP1400023

Type: Order/Amend

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

New Residential Mortgage LLC

Plaintiff,

-vs-

Todd S. Crawford, Tricia L. Crawford,
William T. Geddings Jr., Jane U.
Geddings and USAA Federal Savings
Bank,

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO.:

**SUMMONS
(Mortgage Foreclosure)
Non-Jury
(Deficiency Judgment Demanded)**

3523.0130

TO THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, Crawford & von Keller, LLC., PO Box 4216, Columbia, SC 29240, within thirty (30) days after 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 answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for a judgment by default granting the relief demanded in the Complaint.

**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) RESIDE(S), AND/OR TO PERSON UNDER SOME LEGAL
DISABILITY, INCOMPETENTS AND PERSONS CONFINED AND ACTIVE
MILITARY MEMBERS:**

YOUR ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a Guardian *ad Litem* within thirty (30) days after service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff.

___s/B. Lindsay Crawford, III___
B. Lindsay Crawford, III (SC Bar# 6510)
Theodore von Keller (SC Bar# 5718)
Sara C. Hutchins (SC Bar# 72879)
B. Lindsay Crawford, IV (SC Bar# 101707)
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Attorneys for Plaintiff

Columbia, South Carolina

January 15, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

New Residential Mortgage LLC

Plaintiff,

-vs-

Todd S. Crawford, Tricia L. Crawford,
William T. Geddings Jr., Jane U. Geddings
and USAA Federal Savings Bank,

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO.

COMPLAINT
(Mortgage Foreclosure)
Non-Jury
(Deficiency Judgment Demanded)

3523.0130

The Plaintiff, complaining of the Defendants above-named, would respectfully show unto this Honorable Court:

1. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
2. That the 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.
3. The loan is not applicable for the Home Affordable Modification Program as that program sunset on December 31, 2016.
4. That the real property hereinafter described, which is the subject of this action, is situated and located in Clarendon County, South Carolina.
5. That some interest in or lien upon such real property is held or may be claimed by the Defendants herein.
6. That on or about June 21, 2007, for value received, Todd S. Crawford executed and delivered to USAA Federal Savings Bank a certain promissory note, in writing, according to the

terms and conditions set out therein, by which said maker promised to pay to USAA Federal Savings Bank the sum of \$224,000.00, together with interest thereon at the rate of 6.375% per annum.

7. That in order to better secure the payment of the said note and debt, in accordance with the terms and conditions thereof, the said Todd S. Crawford and Tricia L. Crawford executed and delivered on June 21, 2007 a mortgage, of real estate to Mortgage Electronic Registration Systems Inc as nominee for USAA Federal Savings Bank, its successors and assigns, covering the following described property:

All of that certain lot of land with dwelling and improvements thereon situated a short distance Southeast of the Town of Manning in School District No. 2 of Clarendon County, South Carolina being more particularly delineated and described according to a plat thereof made by DuValle W. Elliott, RLS dated December 18, 1992 and recorded in Plat Book 45 at page 33 of the records of Clarendon County whereon said lot is shown as Lot No. 73 on said plat; Pursuant to Section 30 5 250 of the Code of Laws of South Carolina (1976), reference to said plat is hereby craved for the particulars of the boundaries, metes, courses, and/or distances of the property delineated thereon. This property is known as 1051 Doral Drive, Manning, South Carolina.

This is the same property conveyed to Todd S. Crawford and Tricia L. Crawford by Deed of Brois I. Bronfine and Maria Bronfine by and through their Attorney in Fact, John Mathis, dated June 20, 2007, and recorded July 18, 2007 in Book A667 at Page 118 & 119 in the Office of the Register of Deeds for Clarendon County. Thereafter, Todd S. Crawford and Tricia L. Crawford conveyed said property to William T. Geddings Jr. and Jane U. Geddings by deed dated August 25, 2018 and recorded September 7, 2018 in Book 1003 at Page 2652.

TMS #: 188-05-03-003

8. That on July 18, 2007, said mortgage was recorded in the Office of the Register of Deeds for Clarendon County Book 756 at Page 160.

9. That the said Mortgage Electronic Registration Systems Inc as nominee for USAA Federal Savings Bank assigned said mortgage unto Green Tree Servicing LLC by Assignment of

Mortgage dated October 8, 2013, and recorded in the Office of the Register of Deeds for Clarendon County Book 999 at Page 39 on October 18, 2013.

10. That the said Ditech Financial LLC fka Green Tree Servicing LLC assigned said mortgage unto New Residential Mortgage LLC by Assignment of Mortgage dated December 19, 2019, and recorded in the Office of the Register of Deeds for Clarendon County Book 1136 at Page 1500 on December 20, 2019. By virtue of said assignment, the Plaintiff in this action is the mortgagee/beneficiary of record.

11. That said mortgage evidences and secures the repayment of money advanced by the mortgagee to, or on behalf of, the mortgagor and constitutes a first lien on the mortgaged premises.

12. Pursuant to a Title to Real Estate executed on or about August 25, 2018, Todd S. Crawford and Tricia L. Crawford conveyed to William T. Geddings Jr. and Jane U. Geddings all of the rights, title and interest in the real property at issue. Said Title to Real Estate was filed in Clarendon County on September 7, 2018 Book 1003 at Page 2652.

FOR A FIRST CAUSE OF ACTION
(Mortgage Foreclosure)

13. The Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

14. That according to the terms and conditions of said Note and Mortgage, it is provided that, in the event of default in the payment of any installment when due, the entire principal and accrued interest shall at once become due and payable at the option of the holder.

15. That the monthly payments due on said Note and Mortgage are in default since August 1, 2013; that the conditions of said Note and Mortgage have been broken; that the Plaintiff elects to and does, declare the entire balance of said indebtedness due and payable; that the principal

balance as of said default date is \$205,368.77; that also due and owing is interest as provided at the rate set forth in the Note; that also due are late charges and the costs and disbursements of this action, including attorney's fees.

16. That it has become and is necessary for the Plaintiff to employ legal counsel to prosecute this action; and that a reasonable fee for the services of the Plaintiff's counsel should, according to the terms of said note and mortgage, be added to the amount of the mortgage debt.

17. Pursuant to §37-3-105, *South Carolina Code of Laws* (1976 as amended), the mortgage lien, which is subject to this action, is a first lien on real estate and is not a '*consumer loan*' for the purposes of the South Carolina Consumer Protection Code. Any notices of right to cure have been given as required.

18. That the Plaintiff has advanced and/or may advance certain sums for taxes and insurance and for inspecting and/or securing the subject property, which sums, according to the terms of said mortgage, should be added to the amount of the mortgage debt.

19. That the Defendant, USAA Federal Savings Bank, may have or claim to have an interest in the subject property by virtue of a mortgage given by Todd S. Crawford and Tricia L. Crawford to USAA Federal Savings Bank in the original amount of \$56000.00, dated June 21, 2007, and recorded on July 18, 2007, in the Office of the Register of Deeds for Clarendon County Book 756 at Page 176. Said mortgage is junior and subordinate to the lien of the Plaintiff herein.

20. That the Defendants, William T. Geddings Jr. and Jane U. Geddings, may have or claim to have an interest in the subject property by virtue of a Title to Real Estate executed on or about August 25, 2018, Todd S. Crawford and Tricia L. Crawford conveyed to William T. Geddings Jr. and Jane U. Geddings all of the rights, title and interest in the real property at issue. Said Title to

Real Estate was filed in Clarendon County on September 7, 2018 Book 1003 at Page 2652. Said interest is junior and subordinate to the lien of the Plaintiff herein.

21. That the Plaintiff has the right to seek a deficiency judgment against Todd S. Crawford. That in the event that the net amount realized by the Plaintiff upon the sale of the subject property is insufficient to pay in full the total indebtedness of the Plaintiff, including costs of collection, the Plaintiff demands a personal judgment against said Defendant(s) in the amount of such deficiency.

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

Find that the Plaintiff's Mortgage be declared a first lien and that the Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes, insurance premiums and/or inspection or securing expenses, which may have been paid, a reasonable sum as attorney's fees and the costs of this action; and

That the Plaintiff's real property be sold under the direction of this Court, that the equity of redemption be barred, and that the proceeds of sale be applied as follows:

First, to the costs and expenses of the within action and sale, and

Second, to the payment and discharge of the amount due on the Plaintiff's note and mortgage, together with attorney's fees and costs as aforesaid, and

Third, the surplus, if any, be distributed pursuant to Rule 71 of the South Carolina Rules of Civil Procedure; and

That the Plaintiff be awarded a deficiency judgment against the Defendant(s), Todd S. Crawford, in the event that the proceeds of the sale of the collateral property are insufficient to pay in full the indebtedness, including costs of collection; and

That the Court issue an Order directing the Sheriff to place the successful purchaser at the foreclosure sale in possession of the subject real property, and all persons claiming thereunder and the removal therefrom of all furnishings, fixtures and items not subject to the lien of the Plaintiff's Mortgage, which personal property, if not removed shall be deemed abandoned and shall be removed by the Plaintiff or its agents from the Mortgaged Property by placing said property on the public street or highway or by any other means, including by force if necessary; and

An Order granting the appointment of a receiver should it become necessary, to secure and supervise the rental of the property to be foreclosed with the authority to take possession thereof and collect rents, issues and profits thereon during the pendency of this action and to hold the same as further security for Plaintiff's debt; and

An Order be entered for reimbursement of all costs of inspecting and securing the property incurred by the Plaintiff as a result of the delinquency; and

The Defendant(s), and all persons whomever claiming by and through said Defendant(s), be forever barred of right, title and interest, of, in and to the Mortgaged Property and Collateral, and each and every part thereof; and

For such other and further relief as may be just and proper.

___s/B. Lindsay Crawford, III___
B. Lindsay Crawford, III (SC Bar# 6510)
Theodore von Keller (SC Bar# 5718)
Sara C. Hutchins (SC Bar# 72879)
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Columbia, South Carolina
January 15, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	CASE No: 2020-CP-14-00023
 New Residential Mortgage, LLC	)	
Plaintiff,	)	
VS	)	<u>AMENDED</u> ANSWER, COUNTERCLAIM
	)	AND CROSS-CLAIM OF WILLIAM T.
Todd S. Crawford, Tricia L. Crawford,	)	GEDDINGS, JR. AND JANE U. GEDDINGS
William T. Geddings, Jr., Jane U. Geddings,	)	And
and USAA Federal Savings Bank,	)	THIRD PARTY COMPLAINT
	)	(Jury Trial Demanded)
Defendants	)	
Jane U. Geddings and William T. Geddings,	)	
Jr.,	)	
Third Party Plaintiffs	)	
v.	)	
Green Tree Servicing LLC, n/k/a Ditech	)	
Financial LLC,	)	
Third Party Defendant	)	

COMES NOW THE ABOVE NAMED DEFENDANTS, William T. Geddings, Jr. and Jane U. Geddings, by and through the undersigned attorney and responds to the allegations of the Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. The Defendants will refer collectively to and only to Defendant William T. Geddings, Jr. and Jane U. Geddings unless otherwise specified herein.
2. The Defendants deny each and every allegation not hereinafter specifically admitted, qualified, modified or explained and demand strict proof thereof.

3. The Defendants are without sufficient information to form a belief as to the truth or falsity of the allegations of paragraph 1 of the Plaintiff's Complaint but do not contest such allegation.

4. The Defendants deny the allegations of paragraphs 2 and 3 of the Plaintiff's Complaint and demand strict proof thereof. Further details are provided in later Defenses below.

5. The Defendants admit the allegations of paragraphs 4, 5, 6, 7, 8 and 9 of the Plaintiff's Complaint.

6. The Defendants admit the allegations of paragraph 10 of the Plaintiff's Complaint to the extent it is alleged that a document assigning the mortgage to the Plaintiff is recorded in the Office of the Register of Deeds for Clarendon County but denies any implication of the validity of that mortgage or the validity of a lien as a result of that mortgage and demands strict proof thereof.

7. The Defendants deny the allegations of paragraph 11 of the Plaintiff's Complaint and demand strict proof thereof.

8. The Defendants admit the allegations of paragraph 12 of the Plaintiff's Complaint.

9. The Defendants are informed and believe no further response is necessary to paragraph 13 of the Plaintiff's Complaint.

10. The Defendants are without sufficient information to form a belief as to the truth or falsity of the allegations of paragraphs 14, 15, 16, 17, 18 and 19 of the Plaintiff's Complaint and therefore must deny same and demand strict proof thereof.

11. The Defendants admit the allegations of paragraph 20 of the Plaintiff's Complaint except as to any implication or allegation that the Defendants' ownership rights are junior or subordinate to the interests of the Plaintiff or any other Defendant.

12. The Defendants are without sufficient information to form a belief as to the truth or falsity of the allegations of paragraph 21 of the Plaintiff's Complaint and therefore must deny same and demand strict proof thereof. The Defendants are informed and believe that Defendants Todd S. Crawford and Tricia L. Crawford filed a bankruptcy action in the State of Georgia on March 21, 2014 and the Plaintiff's debt was among the debts included in that bankruptcy. The effect of that bankruptcy on the debt or lien claimed by the Plaintiff are unknown to the Defendants as the Defendants were not a party to that action. The Defendants do note that no reference to the Bankruptcy action was filed in the Office of the Register of Deeds for Clarendon County.

FOR A SECOND DEFENSE

13. The Defendants repeat the allegations of the First Defense as fully as if set forth herein verbatim.

14. The Defendants are informed and believe that Todd S. Crawford and Tricia L. Crawford did not acquire full legal ownership of the subject property until the deed was recorded in the Office of the Clarendon County Register of Deeds on July 18, 2007 regardless of the deed being dated prior to that time.

15. The Defendants are informed and believe that when Todd S. Crawford and Tricia L. Crawford executed the mortgages referenced in the Plaintiff's Complaint, both the mortgage which the Plaintiff now seeks to foreclose and the mortgage purported to be held by USAA Federal Savings Bank, on June 21, 2007, neither Crawford actually owned the subject property.

16. Since Todd S. Crawford and Tricia L. Crawford did not own the property on June 21, 2007, they could not execute a valid mortgage on the property.

17. The Defendants are therefore informed and believe that the Plaintiff and Defendant USAA Federal Savings Bank do not hold a valid, enforceable mortgage on the subject property.

In the alternative, the delay in the Plaintiff, or its predecessors, in recording the mortgage should operate to bar any attempt to enforce said mortgage.

FOR A THIRD DEFENSE

18. The Defendants repeat the allegations of the First and Second Defenses as fully as if set forth herein verbatim.

19. When Todd S. Crawford and Tricia L. Crawford (hereinafter referred to as Crawfords) failed to make timely payment on any obligation to the original creditors USAA Federal Savings Bank or Green Tree Servicing LLC, it was prior to March 21, 2014. The exact date is unknown to the Defendants and will need to be determined through the discovery process.

20. Crawfords filed for bankruptcy protection in the State of Georgia in case 14-10632-WHD and listed both mortgage debts in their filing.

21. Defendant Green Tree Servicing, LLC appeared in that bankruptcy and requested, and received, permission from the Bankruptcy Court to proceed with an action under state law to foreclose the mortgage. This was done in a Consent Order dated June 13, 2014.

22. Defendant USAA Federal Savings Bank, LLC never sought nor received any relief from the Bankruptcy Court.

23. On July 14, 2014 the Bankruptcy Court issued a discharge to the Crawfords.

24. On August 1, 2014, the Trustee executed a “Notice of Proposed Abandonment or Disposition of Property” which included the subject property.

25. The Defendants are informed and believe that any attempt by the Plaintiff or by Defendant USAA Federal Savings Bank or by Green Tree Servicing, LLC should be barred by the equitable doctrine of laches.

26. The Defendants are informed and believe that any obligation or debt owned by the Crawfords, whether secured by any lien or not, to the Plaintiff or its predecessors in interest or to USAA Federal Savings Bank or Green Tree Servicing, LLC should be deemed discharged as a result of the bankruptcy action.

FOR A THIRD DEFENSE AND BY WAY OF COUNTERCLAIM AND CROSS-CLAIM
AND THIRD PARTY COMPLAINT

27. The Defendants repeat the allegations of the First and Second Defenses as fully as if set forth herein verbatim.

28. The Defendants are informed and believe that Green Tree Servicing LLC now known as Ditech Financial LLC is a duly organized Limited Liability Company organized in the state of Delaware, authorized to transact business in South Carolina and regularly engaging in business transactions in South Carolina and Clarendon County.

29. The Defendants are informed and believe that subsequent to the purchase of the mortgage lien and note by Green Tree Servicing, LLC, said entity changed its name to Ditech Financial LLC and is currently known by that name. The Defendants are informed and believe that Green Tree Servicing LLC and Ditech Financial LLC are the same entity so all references to Green Tree Servicing LLC should also be read to include Ditech Financial LLC. Because the Assignment of Mortgage was to Green Tree Servicing LLC, that name will be used in this document.

30. The Defendants are informed and believe that upon the Crawfords vacating the subject property, USAA Federal Savings Bank and/or Green Tree Servicing, LLC took possession of the property.

31. The Defendants are informed and believe that this attempt to secure the property occurred between August 1, 2013 and March 21, 2014.

32. While USAA Federal Savings Bank and/or Green Tree Servicing LLC had possession of the property and were responsible for the security of the property, as well as the upkeep or maintenance of the property, the property suffered several damage and deterioration. Said damage and deterioration includes, but is not limited to the following:

- a. One of the HVAC units was stolen;
- b. The other HVAC unit was ruined when the line leaked and allowed air and moisture into the system
- c. Water and moisture accumulated under the house severely damaging the underside of the home, the flooring and other wood beneath the house;
- d. The roof was damaged in a storm. USAA Federal Savings Bank or Green Tree Servicing LLC received payment for the damages but failed to properly or completely repair the roof;
- e. Carpets in the home were ruined;
- f. Vandals broke into the home and wrote on the walls and other surfaces;
- g. Pipes developed leaks such that when water was turned back on, water poured out of several walls;
- h. The pond on the property grew stagnant and was infested with duckweed and watermill;
- i. A deck built outside the home rotted and created a nuisance and hazard;
- j. An above ground pool rotted and deteriorated creating a breeding ground for vermin as well as a nuisance and hazard;

- k. Appliances were stolen or ruined;
 - l. Insects and other vermin built nests in the home;
 - m. Hardwood flooring was damaged or destroyed;
 - n. Lawn and grounds were unkempt and overgrown although neighbors would sometimes mow the lawn to avoid the unsightly neglected appearance that was hampering the value of surrounding homes.
33. The Defendants are informed and believe that USAA Federal Savings Bank and/or Green Tree Servicing LLC contracted with third parties to provide security, repairs and supervision of the subject property but that such services were performed negligently, if they were performed at all.
34. The Defendants are informed and believe that USAA Federal Savings Bank and/or Green Tree Servicing LLC acted in a willful and reckless manner which caused the property to become uninhabitable and greatly diminish any value of the property.
35. The Defendants purchased the subject property from the Crawfords by deed recorded in the Office of the Register of Deeds for Clarendon County on September 7, 2018 in Deed Book 1003 at Page 2652.
36. The Defendants began making repairs to the property and have spent in excess of Seventy-Five Thousand (\$75,000.00) Dollars improving the property and returning it to good and habitable condition.
37. The Defendants attempted to communicate with the purported mortgage holders several times and received no response.
38. The Defendants note that the Plaintiff recorded its assignment on December 20, 2019 and filed this action less than a month later so the Defendants had no opportunity to become

aware of the Plaintiff's existence or attempt to contact the Plaintiff. Prior to filing this action, the Plaintiff did not attempt to contact the Defendants although Plaintiff was obviously aware of Defendants' ownership interest in the subject property.

39. The Defendants are informed and believe that they are entitled to an offset or credit for their costs and expenses in improving the property and preserving it as well as for damages caused by the negligence of the Plaintiff and/or USAA Federal Savings Bank or Green Tree Servicing, LLC, their agents and employees.

40. The Defendants are informed and believe that they are entitled to, and hereby do, request a jury trial to determine the appropriate amount of damages owed by the Plaintiff or USAA Federal Savings Bank or Green Tree Servicing, LLC to the Defendants. Said damages to include actual damages and punitive damages.

FOR A FOURTH DEFENSE AND BY WAY OF COUNTERCLAIM AND CROSS-CLAIM
AND THIRD PARTY COMPLAINT

41. The Defendants repeat the allegations of the First, Second and Third Defenses as fully as if set forth herein verbatim.

42. The Defendants are informed and believe that even if the Court should determine that the Plaintiff or USAA Federal Savings Bank or Green Tree Servicing, LLC have a valid lien against the subject property and grant a request to foreclose that lien, the Defendants are entitled to judgment against one or both of these parties under the doctrine of *quantum meruit* and/or unjust enrichment.

43. The Defendants are informed and believe that they are entitled a jury trial and hereby demand same. .

FOR A FIFTH DEFENSE AND BY WAY OF COUNTERCLAIM AND CROSS-CLAIM
AND THIRD PARTY COMPLAINT

44. The Defendants repeat the allegations of the First, Second, Third, and Fourth Defenses as fully as if set forth herein verbatim.

45. The Defendants are informed and believe that the Plaintiff or its predecessors, as well as Defendant USAA Federal Savings Bank or Green Tree Servicing LLC are in violation of Section 39-5-10, *et seq*, of *The Code of Laws of South Carolina*, 1976, as amended, also known as the “Unfair Trade Practices Act” by engaging in unfair trade acts or practices or by engaging in deceptive trade acts or practices while in the conduct of trade or commerce.

46. The Defendants are informed and believe that the Plaintiff, or its predecessors, and/or Defendant USAA Federal Savings Bank and/or Green Tree Servicing LLC engaged in one or more of the following unfair or deceptive trade acts or practices:

- a. Conducting a loan and seeking a mortgage on real property in South Carolina without allowing the borrower to choose a South Carolina attorney as required by Section 37-10-102 of *The Code of Laws of South Carolina*, 1976, as amended;
- b. Aiding, assisting or engaging in the unauthorized practice of law by allowing, encouraging or requiring the placement of a mortgage on South Carolina real property without the borrowers being represented by a South Carolina attorney;
- c. Failing to take proper action to protect real property left in their care or purportedly pledged as security for a loan;
- d. Failing to properly communicate with the owners of real property attempting to resolve a purported lien on real property;

- e. Failing to begin legal action in a timely manner in order to preserve the asset pledged, or purported to be pledged, as security;
- f. Attempting to foreclose a lien which the lender knew, or should have known, was invalid;
- g. Improperly transferring a purported debt and purported security interest from Green Tree Serving LLC to the Plaintiff after notice from the Defendants of the Defendants' desire to resolve any lien without providing notice to the Defendants;
- h. Such other and further misconduct, false, unfair or deceptive acts or violations of RESPA (Real Estate Settlement Procedures Act) as may be identified through the litigation discovery process.

47. The Defendants are informed and believe that the conduct engaged in by the Plaintiff, or its predecessors, and/or USAA Federal Savings Bank and/or Green Tree Servicing LLC has occurred in the past, may occur in the future and poses a risk to the public.

48. The Defendants are informed and believe that they are entitled to request, and hereby do request, a jury trial on these issues.

49. The Defendants are informed and believe that for the violation of the Unfair Trade Practices Act, the Defendants are entitled to judgment against the Plaintiff and/or USAA Federal Savings Bank and/or Green Tree Servicing LLC for actual damage, treble damages, punitive damages and their costs and attorney's fees.

50. The Defendants are informed and believe that regardless of whether or not the claim for violation of the Unfair Trade Practices Act succeeds, the Defendants are entitled to an Order of the Court declaring the purported liens of the Plaintiff and/or USAA Federal Savings Bank and/or Green Tree Servicing LLC to be invalid and void as a result of their violation of proper real

estate mortgage closing procedures, including but not limited to, allowing the borrower choice of attorney and having the closing handled by a licensed South Carolina attorney.

WHEREFORE, having fully responded to the Plaintiff's Complaint and set forth their own Counterclaims and Cross-Claims, the Defendants hereby pray that the Court enquire into the matters alleged and issue its Order dismissing the Plaintiff's Complaint and granting the Defendants the relief requested above.

GEDDINGS LAW FIRM, PA

S/ W. T. Geddings, Jr.
W. T. Geddings, Jr.
Attorney for the W. T. Geddings, Jr.
Attorney for Jane U. Geddings
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21st day of April, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

v.

Todd S. Crawford; Tricia L. Crawford;
William T. Geddings, Jr.; Jane U. Geddings;
and USAA Federal Savings Bank;

Defendant.

**NEW RESIDENTIAL MORTGAGE,
LLC'S REPLY AND AFFIRMATIVE
DEFENSES TO AMENDED
COUNTERCLAIMS**

Plaintiff, New Residential Mortgage, LLC ("Plaintiff") files this reply to the counterclaims asserted by Defendants, William T. Geddings, Jr. and Jane U. Geddings ("Defendants") in their Amended Answer, Counterclaim, and Crossclaim ("Amended Answer and Counterclaim"), and states as follows:

1. Paragraphs 1 - 13 of the Amended Answer and Counterclaim make no factual allegations material to Defendants' counterclaims and no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraphs 1 - 13.

2. Paragraph 14 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 14.

3. Paragraph 15 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 15.

4. Paragraph 16 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 16.

5. Paragraph 17 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 17.

6. Paragraph 18 of the Amended Answer and Counterclaim states no new factual allegations and no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 18.

7. With respect to the allegations in Paragraph 19 of the Amended Answer and Counterclaim, Plaintiff states that Todd S. Crawford and Tricia L. Crawford have failed to make the payment due for August 1, 2013 and all subsequent payments for the subject mortgage. Except as stated herein, Plaintiff denies the allegations in Paragraph 19.

8. With respect to the allegations in Paragraph 20 of the Amended Answer and Counterclaim, Plaintiff states that the records of the United States Bankruptcy Court for the Northern District of Georgia speak for themselves, and denies any allegations inconsistent therewith.

9. With respect to the allegations in Paragraph 21 of the Amended Answer and Counterclaim, Plaintiff states that the records of the United States Bankruptcy Court for the Northern District of Georgia speak for themselves, and denies any allegations inconsistent therewith.

10. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 22 of the Amended Answer and Counterclaim.

11. With respect to the allegations in Paragraph 23 of the Amended Answer and Counterclaim, Plaintiff states that the records of the United States Bankruptcy Court for the Northern District of Georgia speak for themselves, and denies any allegations inconsistent therewith.

12. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 24 of the Amended Answer and Counterclaim and therefore denies such allegations.

13. Paragraph 25 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraph 25.

14. Paragraph 26 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff states that orders issued in bankruptcy action referenced in Paragraph 26 speak for themselves and denies any allegations inconsistent therewith.

15. Paragraph 27 of the Amended Answer and Counterclaim states no new factual allegations and no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 27.

16. With respect to the allegations in Paragraph 28 of the Amended Answer and Counterclaim, upon information and belief, Plaintiff admits that Ditech Financial LLC is a limited liability company organized in Delaware and authorized to transact business in South Carolina. Defendant lacks sufficient knowledge or information to form a belief as to the remaining allegations in Paragraph 28, and therefore denies such allegations.

17. With respect to the allegations in Paragraph 29 of the Amended Answer and Counterclaim, upon information and belief, Plaintiff admits that the entity formerly known as Green Tree Servicing, LLC changed its name and is now known as Ditech Financial LLC.

18. Paragraph 30 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraph 30.

19. With respect to the allegations of Paragraph 31 of the Amended Answer and Counterclaim, Plaintiff states that upon information and belief, in 2013 the prior mortgage servicer or its vendor took steps to secure and preserve the property after it was determined to be vacant. Except as stated herein, Plaintiff denies the allegations of Paragraph 31.

20. Plaintiff denies the allegations of Paragraph 32 of the Amended Answer and Counterclaim to the extent it alleges that Plaintiff or any prior mortgage servicer “had possession of the property and w[as] responsible for the security of the property, as well as the upkeep or maintenance of the property.” Upon information and belief, Plaintiff admits that the subject property was damaged at an unknown point in time, but denies that the prior mortgage servicer received insurance proceeds for such damage. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 32, and therefore denies such allegations.

21. Plaintiff denies the allegations of Paragraph 33 of the Amended Answer and Counterclaim.

22. Plaintiff denies the allegations of Paragraph 34 of the Amended Answer and Counterclaim.

23. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 35 of the Amended Answer and Counterclaim, and therefore denies such allegations.

24. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 36 of the Amended Answer and Counterclaim, and therefore denies such allegations.

25. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 37 of the Amended Answer and Counterclaim, and therefore denies such allegations.

26. With respect to the allegations in Paragraph 38 of the Amended Answer and Counterclaim, Plaintiff states that the Assignment of Mortgage recorded December 20, 2019 in Book 1136, Page 1500 in the office of the Clarendon County Register of Deeds and the pleadings filed in the above-styled action speak for themselves, and denies any allegations inconsistent therewith. Plaintiff denies the allegations of Paragraph 38 to the extent they assert that Plaintiff was obliged to contact persons other than the mortgagors prior to filing this foreclosure action. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 38, and therefore denies such allegations.

27. Paragraph 39 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraph 39.

28. Paragraph 40 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 40.

29. Paragraph 41 of the Amended Answer and Counterclaim states no new factual allegations and no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 41.

30. Plaintiff denies the allegations in Paragraph 42 of the Amended Answer and Counterclaim.

31. Paragraph 43 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraph 43.

32. Paragraph 44 of the Amended Answer and Counterclaim states no factual allegations and no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraph 44.

33. Paragraph 45 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 45.

34. Plaintiff denies the allegations against Plaintiff in Paragraph 46 of the Amended Answer and Counterclaim. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 46, and therefore denies such allegations.

35. Plaintiff denies the allegations in Paragraph 47 of the Amended Answer and Counterclaim.

36. Paragraph 48 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraph 48.

37. Plaintiff denies the allegations in Paragraph 49 of the Amended Answer and Counterclaim.

38. Paragraph 50 of the Amended Answer and Counterclaim states a legal conclusion to which no response is required. To the extent a response is required, Plaintiff denies the allegations in Paragraph 50.

39. Plaintiff denies that Defendants are entitled to the relief requested in their prayer for relief. Plaintiff denies each and every allegation not expressly admitted.

**FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

Defendants' Amended Answer and Counterclaim fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)**

Defendants have failed to mitigate their damages, and Defendants' claims for damages against Plaintiff should be reduced accordingly.

**THIRD AFFIRMATIVE DEFENSE
(Equitable Lien)**

Plaintiff is entitled to an equitable lien on the subject property to the extent of funds paid to Defendants or paid to discharge prior liens on the subject property.

**FOURTH AFFIRMATIVE DEFENSE
(Equitable Subrogation)**

Plaintiff is equitably subrogated to the rights of all prior lienholders whose liens were discharged by proceeds from the subject mortgage loan.

**FIFTH AFFIRMATIVE DEFENSE
(Statute of Limitations)**

Defendants' claims are barred, in whole or in part, by the statute of limitations.

**SIXTH AFFIRMATIVE DEFENSE
(Standing/Real Party in Interest)**

Defendants are not parties to the subject mortgage loan and lack standing to raise some or all of the counterclaims asserted in the Amended Answer and Counterclaim.

**SEVENTH AFFIRMATIVE DEFENSE
(Lack of Duty)**

Plaintiff owes Defendants no actionable duty.

**EIGHTH AFFIRMATIVE DEFENSE
(Proximate Cause)**

Plaintiff's acts or omissions are not the proximate cause of any injury suffered by Defendants.

**NINTH AFFIRMATIVE DEFENSE
(Comparative Negligence)**

Any apportionment of liability to Plaintiff must be reduced by the comparative fault of Defendants, their predecessors in title, or other parties.

**TENTH AFFIRMATIVE DEFENSE
(Assumption of Risk)**

Any liability in this action is barred, in whole or in part, by Defendants' assumption of the risk of loss. The subject mortgage instrument expressly disclaims liability on the part of the mortgagee for the matters alleged in this action. Defendants took their interest in the subject property subject to the terms of the subject mortgage. Furthermore, Defendants knew or should have known of the condition of the subject property when they took their interest therein.

**ELEVENTH AFFIRMATIVE DEFENSE
(Waiver and Estoppel)**

Defendants have, by their conduct, waived or are estopped from seeking the relief prayed for in their counterclaims.

**TWELFTH AFFIRMATIVE DEFENSE
(Constitutionality of Punitive Damages Award)**

The imposition of punitive damages demanded in this action is barred, in whole or in part, as it would violate provisions of the United States and South Carolina Constitutions requiring substantive and procedural due process of law and prohibiting excessive fines and punishments.

**THIRTEENTH AFFIRMATIVE DEFENSE
(Reservation of Additional Affirmative Defenses)**

Plaintiff reserves the right to assert additional affirmative defenses to Defendants' counterclaims should grounds for additional defenses become known.

WHEREFORE, having fully responded to the allegations contained in Defendants' Amended Answer and Counterclaim, Plaintiff prays as follows:

- (a) That Defendants' counterclaims be dismissed, with costs awarded to Plaintiff; and
- (c) For such other and further relief as the Court deems just and proper.

Submitted May 12, 2020.

/s/ G. Benjamin Milam
 G. Benjamin Milam (SC Bar No. 80311)
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Attorney for Plaintiff New Residential Mortgage, LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLAREDON	)	
	)	CASE NO.: 2020-CP-14-00023
New Residential Mortgage, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	USAA FEDERAL SAVINGS BANK'S
Todd S. Crawford, Tricia L. Crawford, William T.	)	ANSWER TO PLAINTIFF'S
Geddings, Jr., Jane U. Geddings, and USAA	)	COMPLAINT AND
Federal Savings Bank,	)	ANSWER TO CROSSCLAIM BY
	)	WILLIAM T. GEDDINGS, JR AND
Defendants	)	JANE U. GEDDINGS
	)	
Jane U. Geddings and William T. Geddings, Jr.,	)	
	)	
Third Party Plaintiffs	)	
	)	
v.	)	
	)	
Green Tree Servicing, LLC n/k/a Ditech Financial	)	
LLC,	)	
	)	
Third Party Defendants	)	

TO: ALL ATTORNEYS OF RECORD

Defendant USAA Federal Savings Bank ("USAA FSB") answers Plaintiff's Complaint and responds to the Amended Answer, Counterclaim and Crossclaim of William T. Geddings and Jane U. Geddings ("Crossclaim") as follows:

1. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 1, 2, and 3 of Plaintiff's Complaint.
2. USAA FSB admits the allegations in Paragraphs 4, 5, 6, 7, 8, and 9 of Plaintiff's Complaint.

3. Upon information and belief, USAA FSB admits the allegations in Paragraph 10 of Plaintiff's Complaint.

4. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 11 of Plaintiff's Complaint.

5. Upon information and belief, USAA FSB admits the allegations in Paragraph 12 of Plaintiff's Complaint.

FOR ANSWER TO
PLAINTIFF'S FIRST CAUSE OF ACTION
(Mortgage Foreclosure)

6. The responses to the foregoing allegations of Plaintiff's Complaint are incorporated as if fully restated herein.

7. USAA FSB states that the document referenced in Paragraphs 14 of Plaintiff's Complaint speaks for itself, and USAA FSB denies any contrary or inconsistent representations.

8. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 15, 16, 17, and 18 of Plaintiff's Complaint.

9. For response to Paragraph 19 of Plaintiff's Complaint, USAA FSB admits that it has an interest in the subject property by virtue of a mortgage dated June 21, 2007 given by Todd S. Crawford and Tricia L. Crawford in the amount of \$56,000. The allegations in Paragraph 19 pertaining to priority of liens are legal conclusions to which no response is required. Any other allegations, whether express or implied, contained in Paragraph 19 of Plaintiff's Complaint are denied.

10. Upon information and belief, USAA FSB admits the allegations in Paragraph 20 of Plaintiff's Complaint.

11. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 21 of Plaintiff's Complaint.

FOR RESPONSE TO THE CROSS-CLAIMANTS' FIRST DEFENSE

12. Paragraphs 1 – 12 of the Crossclaim contain no factual allegations for which a response is required. To the extent a response is required, all such allegations are denied.

FOR RESPONSE TO THE CROSS-CLAIMANTS' SECOND DEFENSE

13. The responses to the foregoing allegations of the Crossclaim are incorporated as if fully restated herein.

14. USAA FSB responds that Paragraph 14 of the Crossclaim is a legal conclusion to which no response is required. To the extent a response is required, such paragraph is denied.

15. USAA FSB denies the allegations in Paragraphs 15, 16, and 17 of the Crossclaim.

FOR RESPONSE TO THE CROSS-CLAIMANTS' THIRD DEFENSE

16. The responses to the foregoing allegations of the Crossclaim are incorporated as if fully restated herein.

17. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 19 of the Crossclaim.

18. For answer to Paragraphs 20, 21, 22, 23, and 24 of the Crossclaim, USAA FSB responds that the records maintained by the U.S. Bankruptcy Court for the Northern District of Georgia speak for themselves, and USAA FSB denies any contrary or inconsistent representations.

19. USAA FSB responds that Paragraphs 25 and 26 of the Crossclaim are legal conclusions to which no response is required. To the extent a response is required, USAA FSB denies the allegations in Paragraphs 25 and 26 of the Crossclaim.

FOR RESPONSE TO THE CROSS-CLAIMANTS' THIRD DEFENSE AND CROSS CLAIM

20. The responses to the foregoing allegations of the Crossclaim are incorporated as if fully restated herein.

21. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations in Paragraphs 28 and 29 of the Crossclaim.

22. USAA FSB denies the allegations in Paragraph 30 of Plaintiff's Complaint.

23. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 31 of the Crossclaim.

24. USAA FSB denies the allegations in Paragraphs 32, 33, and 34 of the Crossclaim.

25. USAA FSB lacks knowledge or information sufficient to admit or deny the allegations in Paragraphs 35, 36, 37, and 38 of the Crossclaim.

26. USAA FSB denies the allegations in Paragraphs 39 and 40 of the Crossclaim.

FOR RESPONSE TO THE CROSS-CLAIMANTS' FOURTH DEFENSE AND CROSS CLAIM

27. The responses to the foregoing allegations of the Crossclaim are incorporated as if fully restated herein.

28. USAA FSB denies the allegations in Paragraph 42 of the Crossclaim.

29. Paragraph 43 of the Crossclaim does not require a response.

FOR RESPONSE TO THE CROSS-CLAIMANTS' FIFTH DEFENSE AND CROSS CLAIM

30. The responses to the foregoing allegations of the Crossclaim are incorporated as if fully restated herein.

31. USAA FSB denies the allegations in Paragraphs 45, 46, and 47 of the Crossclaim, including all sub-parts thereto.

32. Paragraph 48 of the Crossclaim does not require a response.

33. USAA FSB denies the allegations in Paragraphs 49 and 50 of the Crossclaim, including all sub-parts thereto.

BLANKET DENIAL

34. Any allegation contained in Plaintiff's Complaint or the Geddings Defendants' Crossclaim, whether express or implied, not expressly admitted or otherwise responded to herein is denied.

FOR A FIRST DEFENSE
(Failure to State a Claim)

35. The Crossclaim fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6).

FOR A SECOND DEFENSE
(Comparative Negligence)

36. The Cross-claimants' claims and damages, if any, are barred, or should be reduced, by their own contributory and comparative negligence and recklessness.

FOR A THIRD DEFENSE
(Statute of Limitations/Repose)

37. The Cross-claimants' alleged damages are barred by the applicable statute of limitation and/or statute of repose.

FOR A FOURTH DEFENSE
(Acts of Others)

38. The Cross-claimants' claims against USAA FSB are barred, in whole or in part, by intervening acts, negligence, or intentional conduct of others.

FOR A FIFTH DEFENSE
(Lack of Standing)

39. The Cross-claimants lack standing to complain of the acts alleged and are not real parties in interest to assert such claims.

FOR A SIXTH DEFENSE
(Punitive Damages)

40. The Cross-claimants are not entitled to recover punitive damages under any cause of action because Defendant's alleged actions were not willful, wanton, or reckless.

41. Any award of punitive damages against USAA FSB will violate the rights guaranteed by the constitution of the United States for the following reasons:

a. Any award of punitive damages violates the prohibition against excessive fines found in the Eighth Amendment to the Constitution of the United States as applied to the States by way of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

b. Any award of punitive damages violates the guarantee of due process found in the Fourteenth Amendment of the Constitution of the United States because the lack of objective guidelines upon which a jury might base its award and further, that such guidelines as do exist are arbitrary and void for vagueness.

42. Any award of punitive damages against the USAA FSB will violate rights guaranteed to this USAA FSB by the Constitution of the South Carolina for the following reasons:

a. Any award of punitive damages violates the prohibition against excessive fines found in Article I Section XV of the Constitution of South Carolina.

b. Any award of punitive damages violates the guarantee of due process found in Article I, Section III of the Constitution of South Carolina because of the lack of objective

guidelines on which a jury might base its award and further that such guidelines as do exist are arbitrary and void for vagueness.

FOR A SEVENTH DEFENSE
(Laches, Wavier, Estoppel)

43. The Crossclaims are barred by the doctrines of laches, waiver and/or estoppel.

FOR AN EIGHTH DEFENSE
(Mitigation of Damages)

44. The Cross-claimants had an obligation to mitigate their damages but have failed to do so.

FOR AN NINTH DEFENSE
(No Privity)

45. No contract or agreement exists between USAA FSB and the Cross-claimants, and USAA FSB did not enter into a contract or agreement for the benefit of the Cross-claimants, and as a result, the Cross-claimants may not recover under any theory against USAA FSB.

FOR AN TENTH DEFENSE
(No Duty)

46. USAA FSB owes no duty to the Cross-claimants.

FOR AN ELEVENTH DEFENSE
(Equitable Lien)

47. To the extent that any lien interest is deemed invalid, which is denied, USAA FSB is entitled to an equitable lien and/or subrogation.

FOR A TWELTH DEFENSE
(Additional Defense Reservation and Non-Waiver)

48. USAA FSB hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

JURY DEMAND

49. USAA FSB demands a trial by a jury of twelve on all issues so triable.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the USAA Federal Savings Bank respectfully prays that the Court:

- a. Grant judgment in favor of USAA FSB;
- b. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 27th day of May 2020.

FREEMAN MATHIS & GARY

/s/ W. Shawn Bingham
Shawn Bingham
South Carolina Bar No. 103944
*Attorneys for Defendant USAA Federal
Savings Bank*

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STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS

CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

vs.

**Todd S. Crawford; Tricia L. Crawford;
 William T. Geddings, Jr.; Jane U.
 Geddings; and USAA Federal Savings
 Bank,**

Defendants.

**SECOND AMENDED ANSWER,
 COUNTERCLAIM, AND CROSS-CLAIM
 (JURY TRIAL DEMANDED)**

Defendants William T. Geddings and Jane U. Geddings (hereinafter “the Defendants”), in answer to the Plaintiff’s complaint, as counterclaim, and as cross-claim against Defendant USAA Federal Savings Bank, answer and allege 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, the Defendants do not have sufficient knowledge or information to form a belief as to the same.

3. Answering the allegations of paragraphs 2 and 3 of the complaint, the Defendants deny the same.

4. Answering the allegations of paragraph 4 of the complaint, the Defendants deny the same.
5. Answering the allegations of paragraph 5 of the complaint, the Defendants deny the same.
6. Answering the allegations of paragraph 6 of the complaint, the Defendants deny the same.
7. Answering the allegations of paragraph 7 of the complaint, the Defendants deny the same.
8. Answering the allegations of paragraph 8 of the complaint, the Defendants deny the same.
9. Answering the allegations of paragraph 9 of the complaint, the Defendants deny the same.
10. Answering the allegations of paragraph 10 of the complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the same.
11. Answering the allegations of paragraph 11 of the complaint, the Defendants deny the same.
12. Answering the allegations of paragraph 9 of the complaint, the Defendants admit the same.
13. No separate answer is needed to paragraph 13 of the complaint.
14. Answering the allegations of paragraph 14 of the complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the same.
15. Answering the allegations of paragraph 15 of the complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the same.

16. Answering the allegations of paragraph 16 of the complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the same.

17. Answering the allegations of paragraph 17 of the complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the same.

18. Answering the allegations of paragraph 18 of the complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the same.

19. Answering the allegations of paragraph 19 of the complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the same.

20. Answering the allegations of paragraph 20 of the complaint, the Defendants admit that they own the subject property as a result of the conveyance from the Crawfords alleged in the paragraph, and the Defendants do not have sufficient knowledge or information to form a belief as to the remaining allegations of the paragraph.

21. Answering the allegations of paragraph 21 of the complaint, the Defendants deny the same.

22. All counterclaims asserted in this action are also asserted as defenses to the extent permitted by law, and vice-versa.

FOR A SECOND DEFENSE
(Dismissal – 12(b)(6), SCRCP)

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

24. The complaint fails to state facts sufficient to constitute a cause of action.

25. The complaint fails to allege that conditions precedent to foreclosure of the subject mortgage have been met.

26. The complaint should be dismissed.

FOR A THIRD DEFENSE
(Abandonment)

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

28. When Todd S. Crawford and Tricia L. Crawford failed to make timely payment on any obligation to the original creditors USAA Federal Savings Bank or Green Tree Servicing LLC, that would have been before March 21, 2014. The exact date is unknown to the Defendants and will need to be determined through the discovery process.

29. Crawfords filed for bankruptcy protection in the State of Georgia in case 14-10632-WHD and listed both mortgage debts in their filing.

30. Defendant Green Tree Servicing, LLC appeared in that bankruptcy and requested, and received, permission from the Bankruptcy Court to proceed with an action under state law to foreclose the mortgage. This was done in a Consent Order dated June 13, 2014.

31. Defendant USAA Federal Savings Bank, LLC never sought nor received any relief from the Bankruptcy Court.

32. On July 14, 2014 the Bankruptcy Court issued a discharge to the Crawfords.

33. On August 1, 2014, the Trustee executed a "Notice of Proposed Abandonment or Disposition of Property" which included the subject property.

34. Despite this, no one took any action to attempt to foreclose the subject mortgage until the filing of the summons and complaint in this case.

35. These circumstances evince an intention by the owner of the mortgage subject of this action to abandon the mortgage.

36. The mortgage subject of this action has been abandoned.

FOR A FOURTH DEFENSE
(Unclean Hands)

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

38. The Plaintiff 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.

39. This conduct includes, but is not necessarily limited to, taking possession of the subject property and then damaging it and failing to maintain it, as well as acting as though the subject mortgage had been abandoned and then attempting to foreclose it.

40. This conduct by the Plaintiff relates directly to the subject matter of this action.

41. The Plaintiff's said conduct has proximately caused the Defendants prejudice and injury, including, not necessarily limited to, loss of use of the subject property and diminishment in value of the subject property.

42. Unclean hands bars the Plaintiff's claim.

FOR A FIFTH DEFENSE
(Laches)

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

44. The Plaintiff (and/or, as applicable, its predecessor(s) in interest) delayed in the bringing of this foreclosure action.

45. This delay was unreasonable in length.

46. The unreasonable length of this delay prejudiced the Defendants, who took action (including, but not limited to, in improving the subject property).

47. Laches bars the Plaintiff's claim.

FOR A SIXTH DEFENSE
(Failure to Mitigate Damages)

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

49. The Plaintiff has failed to take reasonable steps to mitigate its damages in this case.

FOR A FIRST COUNTERCLAIM AND CROSSCLAIM
(Negligence/Recklessness)

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

51. The Defendants are informed and believe that Green Tree Servicing LLC now known as Ditech Financial LLC is a duly organized Limited Liability Company organized in the state of Delaware, authorized to transact business in South Carolina and regularly engaging in business transactions in South Carolina and Clarendon County.

52. The Defendants are informed and believe that subsequent to the purchase of the mortgage lien and note by Green Tree Servicing, LLC, said entity changed its name to Ditech Financial LLC and is currently known by that name. The Defendants are informed and believe that Green Tree Servicing LLC and Ditech Financial LLC are the same entity so all references to Green Tree Servicing LLC should also be read to include Ditech Financial LLC. Because the Assignment of Mortgage was to Green Tree Servicing LLC, that name will be used in this document.

53. The Defendants are informed and believe that upon the Crawfords vacating the subject property, USAA Federal Savings Bank and/or Green Tree Servicing, LLC took possession of the property.

54. These attempts to take possession and acts of taking possession continued past the time that the Defendants became the owners of the subject property.

55. While USAA Federal Savings Bank and/or Green Tree Servicing LLC had possession of the property and were responsible for the security of the property, as well as the upkeep or maintenance of the property, the property suffered several damage and deterioration. Said damage and deterioration includes, but is not limited to the following:

- a. One of the HVAC units was stolen;
- b. The other HVAC unit was ruined when the line leaked and allowed air and moisture into the system
- c. Water and moisture accumulated under the house severely damaging the underside of the home, the flooring and other wood beneath the house;
- d. The roof was damaged in a storm. USAA Federal Savings Bank or Green Tree Servicing LLC received payment for the damages but failed to properly or completely repair the roof;
- e. Carpets in the home were ruined;
- f. Vandals broke into the home and wrote on the walls and other surfaces;
- g. Pipes developed leaks such that when water was turned back on, water poured out of several walls;
- h. The pond on the property grew stagnant and was infested with duckweed and watermill;
- i. A deck built outside the home rotted and created a nuisance and hazard;
- j. An above ground pool rotted and deteriorated creating a breeding ground for vermin as well as a nuisance and hazard;
- k. Appliances were stolen or ruined;
- l. Insects and other vermin built nests in the home;

m. Hardwood flooring was damaged or destroyed;

n. Lawn and grounds were unkempt and overgrown although neighbors would sometimes mow the lawn to avoid the unsightly neglected appearance that was hampering the value of surrounding homes.

56. USAA Federal Savings Bank and/or Green Tree Servicing LLC failed to use reasonable care in securing and maintaining the property.

57. This failure proximately caused the Defendants to sustain damages.

58. The Defendants are informed and believe that USAA Federal Savings Bank and/or Green Tree Servicing LLC contracted with third parties to provide security, repairs and supervision of the subject property but that such services were performed negligently, if they were performed at all.

59. The Defendants are informed and believe that USAA Federal Savings Bank and/or Green Tree Servicing LLC acted in a willful and reckless manner which caused the property to become uninhabitable and greatly diminish any value of the property.

60. The Defendants purchased the subject property from the Crawfords by deed recorded in the Office of the Register of Deeds for Clarendon County on September 7, 2018 in Deed Book 1003 at Page 2652.

61. The Defendants began making repairs to the property and have spent in excess of Seventy-Five Thousand (\$75,000.00) Dollars improving the property and returning it to good and habitable condition.

62. The Defendants attempted to communicate with the purported mortgage holders several times and received no response.

63. The Defendants are informed and believe that they are entitled to an offset or credit for their costs and expenses in improving the property and preserving it as well as for damages caused by the negligence of the Plaintiff and/or USAA Federal Savings Bank or Green Tree Servicing, LLC, their agents and employees.

64. The Defendants are informed and believe that they are entitled to, and hereby do, request a jury trial to determine the appropriate amount of damages owed by the Plaintiff or USAA Federal Savings Bank or Green Tree Servicing, LLC to the Defendants. Said damages to include actual damages and punitive damages.

FOR A SECOND COUNTERCLAIM AND CROSSCLAIM
(Unjust Enrichment)

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

66. The Defendants conferred upon the Plaintiff and USAA the benefit of the improvements and repairs they made to the subject property, which increased the value of the Plaintiff and USAA's collateral.

67. Plaintiff and USAA realized this benefit.

68. This benefit was conferred under circumstances that make it unjust for the Plaintiff and USAA to retain the value of the benefit without paying the value of it. The circumstances include those under which a reasonable person would have believed that the Plaintiff and USAA had abandoned their mortgages on the subject property.

69. It is unjust for Plaintiff and USAA to retain the value of the benefit without paying the value of it.

70. The Defendants are entitled to recover the value of the benefit from Plaintiff and USAA.

FOR A THIRD COUNTERCLAIM AND CROSSCLAIM
(Unfair Trade Practices)

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

72. Actions of the Plaintiff and USAA, including, but not necessarily limited to, those stated in this pleading, 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 mortgage institutions from taking possession of mortgaged property without consent and without taking reasonable efforts to maintain such property.

73. These acts were immoral, oppressive, unscrupulous, and substantially injured the Defendants.

74. The Plaintiff and USAA 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.

75. These actions have an impact upon the public interest and are capable of repetition, including, but not necessarily limited to, in that the Plaintiff and USAA hold many mortgages and, further, the Plaintiff and USAA have repeated with many other customers what they have done in this case.

76. The Plaintiff and USAA followed their policies and procedures with regard to their actions in this case.

77. The Defendants have suffered damages as a direct, consequent, and proximate result of these actions of the Plaintiff and USAA.

78. The Defendants are entitled to a judgment against the Plaintiff and USAA for treble damages, reasonable attorney's fees, and costs.

FOR A FOURTH COUNTERCLAIM
(Violation of Attorney Preference Statute)

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

80. 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.

81. The original creditor did not ascertain the borrowers' preference as to the attorney to represent them in the closing of the mortgage loan.

82. Further, the terms of the subject loan were and are unconscionable, including its extremely high interest rate.

83. The subject loan was induced by unconscionable conduct.

84. For each violation of S.C. Code Ann. § 37-10-102, the Plaintiff is liable for all relief available under S.C. Code Ann. § 37-10-105, including that 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, the Defendants pray for the court to:

- (a) Issue an order dismissing the Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action;
- (c) Enter judgment for the Defendants for actual damages, punitive damages, and all applicable statutory penalties;
- (d) Enter judgment in favor of the Defendants for reasonable attorney's fees, if and as applicable;

- (e) Enter judgment for the Defendants for the costs and expenses of this action; and
- (f) Grant the Defendants such other and further relief as the court deems just and proper.

Respectfully submitted,

/s/ Andrew S. Radeker
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ATTORNEY FOR GEDDINGS DEFENDANTS

Columbia, South Carolina
November 6, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

v.

Todd S. Crawford; Tricia L. Crawford;
William T. Geddings, Jr.; Jane U. Geddings;
and USAA Federal Savings Bank;

Defendant.

**NEW RESIDENTIAL MORTGAGE,
LLC'S MOTION FOR JUDGMENT
ON THE PLEADINGS AS TO
AMENDED COUNTERCLAIMS**

Plaintiff, New Residential Mortgage, LLC ("New Residential"), pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure, moves for judgment on the pleadings as to each of the counterclaims asserted against New Residential in Defendants William T. Geddings, Jr. and Jane U. Geddings' (the "Geddings") Amended Answer, Counterclaim, and Cross-Claim ("Amended Answer and Counterclaim") and as grounds therefore states as follows:

1. This matter arises out of the foreclosure of a June 21, 2007 mortgage ("Mortgage") secured by real property located at 1051 Doral Drive, Manning South Carolina ("Property"). The Property was previously owned by Todd S. Crawford and Tricia L. Crawford (the "Crawfords"). On August 25, 2018, the Crawfords conveyed the property to the Geddings by quitclaim deed. (*See* Complaint ¶ 12; Answer and Counterclaim ¶ 8.)

2. On December 19, 2019, Ditech Financial LLC ("Ditech") assigned the Mortgage to New Residential. (*See* Complaint ¶ 10; Answer and Counterclaim ¶ 6).

3. New Residential filed the Complaint in this action on January 15, 2020. The Geddings filed their initial Answer, Counterclaim, and Cross-Claim on January 27, 2020. On April

27, 2020, the Geddings filed an Amended Answer, Counterclaim and Cross-Claim and Third Party Complaint. In their amended pleading, the Geddings assert counterclaims for negligence, unjust enrichment, and violations of the South Carolina Unfair Trade Practices Act.

4. The Geddings' cause of action for negligence fails to state a claim on which relief can be granted because it fails to allege any negligent act or omission by New Residential, or any basis to hold New Residential vicariously liable for the alleged acts of others prior to the December 2019 assignment of the Mortgage. The allegations additionally fail to show that New Residential (or any other party) owed the Geddings a duty to safeguard the Property, and Section 9 of the Mortgage expressly disclaims such a duty.¹ See *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003) ("An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.").

5. The Geddings' cause of action under the South Carolina Unfair Trade Practices Act likewise fails to state a claim because the allegations do not show that New Residential committed an unfair or deceptive act in the conduct of trade or commerce, or that the Geddings have suffered monetary or property loss as a result of any such act. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012) (describing elements of an unfair trade practices claim). To the extent the unfair trade practices claim is predicated on alleged events prior to the December 2019 assignment of the Mortgage, such allegations are not addressed to New Residential.

¹ A copy of the recorded Mortgage is attached as Exhibit A. The Court may take judicial notice of the Mortgage on a Rule 12(c) motion because it is a matter of public record whose authenticity has been admitted in the Geddings' Answer. (See Complaint ¶¶ 7-8, Amended Answer and Counterclaim ¶ 5.); SCRE 201. Additionally, the Geddings cite the execution and recording of the Mortgage as a basis for their claims. (Amended Answer and Counterclaim ¶¶ 15, 46). 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.")

6. In addition to the foregoing defects, the Geddings' are not the mortgagors for the Mortgage and did not acquire ownership of the Property until August 2018. The Geddings therefore are not real parties in interest and lack standing to assert claims for negligence and unfair trade practices based on alleged events prior to 2018.

7. The Geddings' claims for negligence and unfair trade practices are also barred by the statute of limitations to the extent they concern events more than three years prior to filing.

8. The Geddings' claim for unjust enrichment fails to state a claim upon which relief may be granted because they fail to allege facts showing that any benefits to New Residential were non-gratuitously conferred.

WHEREFORE, for the reasons stated herein, Plaintiff, New Residential Mortgage, LLC respectfully requests that this Court issue an order dismissing each of the Geddings' counterclaims with prejudice, and such other and further relief as the Court deems proper.

Respectfully submitted, this 12th day of May, 2020.

/s/ G. Benjamin Milam
G. Benjamin Milam (SC Bar No. 80311)
BRADLEY ARANT BOULT CUMMINGS LLP
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Attorney for Plaintiff New Residential Mortgage, LLC

Return To:

Prepared By:

Scott Nelson
10750 McDermott Freeway
San Antonio, TX 78288

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MORTGAGE

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "**Security Instrument**" means this document, which is dated **June 21, 2007**, together with all Riders to this document.

(B) "**Borrower**" is **Todd S. Crawford** and **Tricia L. Crawford**

Borrower is the mortgagor under this Security Instrument.

(C) "**MERS**" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the mortgagee under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS Form 3041 1/01

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VMP Mortgage Solutions, Inc.

(D) "Lender" is **USAA Federal Savings Bank**

Lender is a **Federally Chartered Savings Bank**
organized and existing under the laws of the **United States of America**
Lender's address is **10750 McDermott Frwy, San Antonio, TX 78288**

(E) "Note" means the promissory note signed by Borrower and dated **June 21, 2007**
The Note states that Borrower owes Lender **Two Hundred Twenty Four Thousand And** Dollars
Zero/100

(U.S. \$ **224,000.00**) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **July 01, 2037**

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☐ Other(s) [specify]

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used

in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the

County of Clarendon :

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

See Attached Exhibit "A"

Parcel ID Number: 188-05-03-003
1051 Doral Drive
Manning
("Property Address"):

which currently has the address of
[Street]
[City] , South Carolina 29102-8823 [Zip Code]

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns,) and to the successors and assigns of MERS, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

[Redacted]

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Initials: *ma*

Form 3041 1/01

PL

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be

in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the



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lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

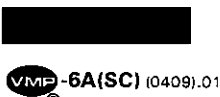
10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

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(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

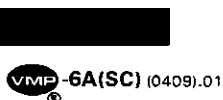
In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

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12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

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16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

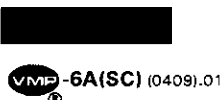
18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA



requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

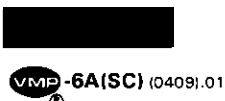
22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon Payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

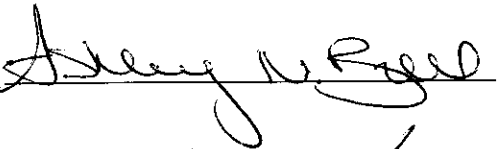
26. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to 150% of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

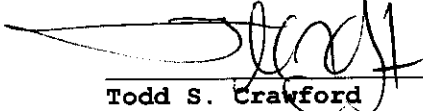


Initials: BL
de

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:




Todd S. Crawford (Seal)
-Borrower




Tricia L. Crawford (Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower



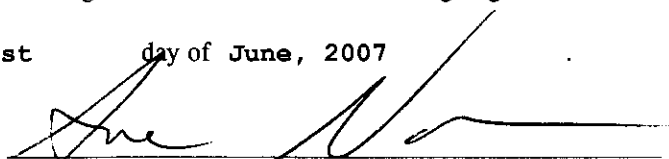
STATE OF SOUTH CAROLINA, Sumter

I, Anne Numan
Todd S. Crawford and Tricia L. Crawford

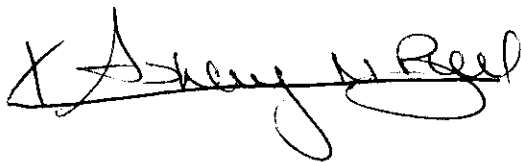
County ss:
do hereby certify that

personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 21st day of June, 2007


Notary Public for South Carolina

My Commission Expires: 10-29-09



Attachment "A"

All of that certain lot of land with dwelling and improvements thereon situated a short distance Southeast of the Town of Manning in School District No. 2 of Clarendon County, South Carolina being more particularly delineated and described according to a plat thereof made by DuValle W. Elliott, RLS dated December 18, 1992 and recorded in Plat Book 45 at page 33 of the records of Clarendon County whereon said lot is shown as Lot No. 73 on said plat; Pursuant to Section 30 5 250 of the Code of Laws of South Carolina (1976), reference to said plat is hereby craved for the particulars of the boundaries, metes, courses, and/or distances of the property delineated thereon. This property is known as 1051 Doral Drive, Manning, South Carolina.

This is the same property conveyed to Todd S. Crawford and Tricia L. Crawford by Deed of Brois I. Bronfine and Maria Bronfine by and through their Attorney in Fact, John Mathis, dated June ____, 2007 and recorded June 18, 2007 in Book A667 at page 118; 119 in the Office of the Register of Deeds for Clarendon County.

000124968
 FILED, RECORDED, INDEXED
 07/18/2007 02:42:24PM
 Bk:00756 Pg:00160
 RecFee:22.00 St Fee:0.00
 Co Conv Fee:0.00 Pages:16
 R M C DEPARTMENT CLARENDON CO
 Beulah G. Roberts, Clerk of Court

000124968 B:00756 P:00175

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

v.

Todd S. Crawford; Tricia L. Crawford;
William T. Geddings, Jr.; Jane U. Geddings;
and USAA Federal Savings Bank;

Defendant.

**NEW RESIDENTIAL MORTGAGE,
LLC'S MOTION TO STRIKE JURY
DEMAND AND FOR ORDER OF
REFERENCE TO MASTER IN
EQUITY**

Plaintiff, New Residential Mortgage, LLC ("New Residential"), pursuant to Rule 39(a) of the South Carolina Rules of Civil Procedure, moves to strike the jury demand of Defendants, William T. Geddings, Jr. and Jane U. Geddings (the "Geddings") and for an order of reference to the Master in Equity for Clarendon County, on the grounds that the Geddings are not entitled to a jury trial as a matter of right.

1. In this action, Plaintiff seeks the foreclosure of real property located at 1051 Doral Drive, Manning, South Carolina ("Property") due to Defendants, Todd S. Crawford and Tricia L. Crawford's failure to make payments due on a \$224,000.00 promissory note ("Note") executed by the Crawfords and secured by a first mortgage ("Mortgage") encumbering the Property. The Geddings are the current owners of the Property pursuant to a quitclaim deed executed by the Crawfords.

2. In their Amended Answer filed April 27, 2020, the Geddings have served counterclaims against Plaintiff for negligence, unfair trade practices, and unjust enrichment.

3. “Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial.” *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 96, 800 S.E.2d 488, 491–92 (Ct. App. 2017). The defendant in a foreclosure action is entitled to a jury trial on her counterclaims “only if the counterclaims are legal *and* compulsory.” *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015) (emphasis added). Thus, where the defendant brings permissive counterclaims in the foreclosure action, the defendant waives her right to jury trial on those claims. *Id.* at 296, 109-10; *N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989).

4. A compulsory counterclaim “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim,” whereas, a permissive counterclaim does not. *See* Rule 13(a)-(b), SCRCF. In a foreclosure action based on failure to make payments under a promissory note secured by a mortgage, a counterclaim may only be considered compulsory where the subject of the counterclaim bears a logical relationship to the enforceability of the note. *See DAV Corp.*, 298 S.C. at 518-19, 381 S.E.2d at 905-06; *see also Carolina First Bank*, 414 S.C. at 296, 778 S.E.2d at 109-10.

5. The Geddings’ counterclaims for negligence and unfair trade practices do not bear a logical relationship to the enforceability of the Note and Mortgage, and are therefore permissive. The Geddings’ counterclaim for *quantum meruit* or unjust enrichment seeks equitable relief. Because each of the counterclaims is either equitable or permissive, the Geddings are not entitled to a jury trial as a matter of right.

WHEREFORE, Plaintiff, New Residential Mortgage, LLC requests that the Court enter an order striking the Defendants, William T. Geddings, Jr. and Jane U. Geddings’ jury demand and

referring this matter to the Master in Equity.

/s/ G. Benjamin Milam
G. Benjamin Milam (SC Bar No. 80311)
BRADLEY ARANT BOULT CUMMINGS LLP
214 N. Tryon Street, Suite 3700
Charlotte, NC 28202
Telephone: (704) 338-6000
Facsimile: (704) 332-8858
bmilam@bradley.com

Attorney for Plaintiff New Residential Mortgage, LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLAREDON	)	
	)	CASE NO.: 2020-CP-14-00023
New Residential Mortgage, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	USAA FEDERAL SAVINGS BANK'S
Todd S. Crawford, Tricia L. Crawford, William T.	)	MOTION FOR JUDGMENT ON THE
Geddings, Jr., Jane U. Geddings, and USAA	)	PLEADINGS ON CROSSCLAIM BY
Federal Savings Bank,	)	WILLIAM T. GEDDINGS, JR. AND
	)	JANE U. GEDDINGS
Defendants	)	
	)	

To: All Counsel of Record

Defendant USAA Federal Savings Bank ("USAA FSB") moves for judgment on the pleadings on the Amended Answer, Counterclaim and Crossclaim of William T. Geddings and Jane U. Geddings (collectively the "Geddings"). In support of its motion, USAA FSB offers the following memorandum of law.

INTRODUCTION

Judgment on the pleadings is appropriate as to all allegations contained in the crossclaim against USAA FSB. The Geddings have failed to allege any issue of fact sufficient for a court to rule in their favor on their claims of negligence, unjust enrichment, and violations of the Unfair Trade Practices Act. The Geddings' entire cause of action against USAA FSB is predicated on the incorrect assumption that USAA FSB was the holder of the Mortgage made the basis of this suit between August 1, 2013 and March 21, 2014. Amended Answer and Crossclaim ¶ 31. But this is simply not true. Well before August 1, 2013, USAA FSB had transferred the mortgage to GMAC. See Exhibit A. Regardless, even if USAA FSB were the holder of the mortgage, it is still factually and legal impossible for USAA FSB to be liable to Geddings as alleged because it would have

owed no duty to the Geddings, a *later* purchaser of the property. Simply put, none of the allegations by the Geddings can possibly add up to any recognizable relief against USAA FSB. As such, this Court should grant the motion for judgment on the pleadings.

FACTS ALLEGED

This case began as a foreclosure on a June 21, 2007 mortgage on a property located at 1051 Doral Drive, Manning, South Carolina. Compl. ¶ 13-21. The Complaint alleges that, on June 21, 2007, Defendant Todd S. Crawford executed and delivered to USAA FSB a promissory note in the amount of \$224,000, and Todd S. Crawford and Tricia L. Crawford executed a mortgage on the property in order to secure the note. Compl. ¶¶ 6-7. On October 18, 2013, the mortgage was assigned to Ditech Financial, LLC, formerly known as Green Tree Servicing, LLC. Compl. ¶ 9. On August 25, 2018, Todd and Tricia Crawford conveyed the property to Defendants William T. Geddings Jr. and Jane U. Geddings (collectively “Geddings”). Compl. ¶ 12. Ditech Financial LLC assigned the mortgage to Plaintiff New Residential Mortgage LLC on December 19, 2019. Compl. ¶ 10. New Residential filed its mortgage foreclosure action on January 15, 2020.

On April 27, 2020, the Geddings filed an Amended Answer, Counterclaim, Crossclaim, and Third-Party Complaint. As against USAA FSB, the Geddings alleged counts of negligence, unjust enrichment/quantum meruit, and violations of the South Carolina Unfair Trade Practices Act. These allegations cannot survive, and the Court should grant USAA FSB’s motion for judgment on the pleadings.

ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

After pleadings are closed but significantly early so as not to delay trial, a party may move for judgment on the pleadings. S.C. R. Civ. P. 12(c). Any party may move for a judgment on the pleadings under South Carolina Rule of Civil Procedure 12(c). *Sapp v. Ford Motor Co.*, 386 S.C.

143, 146, 687 S.E.2d 47, 49 (2009). “A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff’s favor.” *Id.*

When considering a motion under Rule 12(c), “courts may consider a document that the defendant attaches to its motion to dismiss if the document ‘was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity.’” *CACI Int’l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 154, (4th Cir. 2009). Moreover, trial courts are permitted to consider documents incorporated by reference into a complaint but not actually attached thereto. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

B. Judgment on the Pleadings is Appropriate for The Geddings’ Negligence Claim

The Geddings’ negligence claim fails to state a claim on which relief may be granted as to USAA FSB, and judgment on the pleadings is the appropriate remedy. Indeed, the Geddings negligence claim must fail for four reasons: (1) USAA FSB had no duty to the Geddings with respect to the condition of the property; (2) the terms of the mortgage explicitly disclaim any duty on the part of USAA FSB; (3) the Geddings did not own the property before August 2018 and lack standing to assert any claim for damage to the condition of the property before August 2018; and (4) the damages alleged by the Geddings occurred outside of the limitations period.

“To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach.” *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). The existence of a legal duty owed by Defendant to Plaintiff is an essential element of a negligence claim. *Bishop v. S.C. Dept. of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). “Without a duty, there is no actionable

negligence.” *Doe v. Batson*, 345 S.C. at 322, 548 S.E.2d at 857. Whether a duty exists is a question of law. *Id.*

The Geddings allege that the Crawfords vacated the property between August 1, 2013 and March 21, 2014. They maintain that during this time USAA FSB and/or Green Tree took possession of the property, and the property suffered damage and deterioration. Amended Answer and Crossclaim ¶¶ 31, 32. However, it is factually and legally impossible for USAA FSB to be liable to Defendants as alleged in their current live pleading because USAA FSB was not the servicer of the Crawford’s first mortgage during the time frame described in the crossclaim. USAA FSB had already transferred the mortgage in question to GMAC and could have had no role in the events alleged to have occurred on the property during this time. See Exhibit “A”.

Even if this fact were ignored, however, the Geddings’ crossclaims must fail because even if USAA FSB had been the Crawfords’ mortgagee at the time, which it was not, it would have owed no duty to maintain the physical condition of the property. In general, the relationship between a mortgagor and mortgagee is one of debtor and creditor. *See Brown v. C&S Real Estate Servs*, 314 S.C. 463, 467-68, 445 S.E.2d 463, 466 (1994). USAA FSB did not owe any duty to the then-owners of the property, the Crawfords, much less to the then-unascertained future owners, the Geddings, to maintain the condition of the property. The Geddings have not alleged and cannot explain what duty they were owed as the *future* purchaser of the property. Indeed, the duty to investigate or inspect the physical condition of a piece of property for the purposes of confirming the statements made by a seller are placed “squarely on the shoulders of the buyer.” *See generally Chastain v. Hiltabidle*, 381 S.C. 508, 519-520, 673 S.E.2d 826, 832 (2009) (real estate licensee is not obligated to inspect the condition of the property); S.C. Code Ann. § 27-50-80. The Geddings

had an obligation to inspect the property prior to acquiring it from the Crawfords¹; USAA FSB has no duty to the Geddings regarding the condition of the property.

Moreover, the terms of the mortgage completely disclaim any duty of USAA FSB to maintain the condition of the property. Indeed, paragraph 9 of the mortgage provides that, if the borrower fails to perform the covenants contained in the mortgage, abandons the property, or if a legal proceeding that may affect USAA FSB's position is instituted, then the

Lender [USAA FSB] may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the property... Securing the property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangers conditions, and have utilities turned on or off. Although lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

(Exhibit "B" – Mortgage).²

Beyond the terms of the mortgage, the Geddings were not the mortgagors of the property, and did not acquire the property until they took title via quitclaim deed in August 2018. Thus, the Geddings lack standing to assert a cause of action for negligence for events that occurred before August 2018.

Finally, the Geddings allege that damage to the property occurred between August 1, 2013 and March 21, 2014. As such, even if USAA FSB had a duty to the Geddings, which it expressly

¹ Presumably the Geddings *did* inspect the property before purchasing it and paid consideration that accounted for both the condition of the property and the existing encumbrances on the property. They knowingly took the property subject to existing liens, and likely paid a discount because of those liens, yet had no intent to satisfy such liens. They have unclean hands.

² This mortgage document was incorporated into Plaintiff's complaint. See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). In addition, the Court may take judicial notice of the Mortgage because it is a matter of public record and the Geddings have admitted the authenticity of the mortgage in their Amended Answer and Crossclaim. (Compl. ¶ 7, Amended Answer and Crossclaim ¶ 5).

did not, the three-year statute of limitations bars Geddings' claims. S.C. Cod. § 15-3-530(1), (3) and/or (4).

As noted, USAA FSB was not the servicer of the mortgage during the relevant period, but even if it had been, it would have owed no duty to the Geddings as a future purchaser of the property to maintain the physical condition of the property. Thus, USAA FSB is entitled to judgment on the pleadings on the Geddings' negligence claims.

C. USAA FSB is entitled to Judgment on the Pleadings on the Geddings' Claim of Unjust Enrichment

The Geddings have made no allegations of fact that could support a claim for unjust enrichment/quantum meruit. As such, judgment on the pleadings is appropriate on the Geddings unjust enrichment claim.

“Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.” *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994).

The Geddings have not alleged any facts to sustain their unjust enrichment claim. Indeed, the entirety of the Geddings' allegations are that “[t]he Defendants [Geddings] are informed and believe that even if the Court should determine that the Plaintiff or USAA FSB Federal Savings Bank or Green Tree Servicing, LLC have a valid lien against the subject property and grant request to foreclose that lien, the Defendants are entitled to judgment against one or both of these parties under the doctrine of *quantum meruit* and/or unjust enrichment.” Amended Answer and Crossclaim, ¶ 42.

The Geddings have not alleged any facts that, if true, would show any benefit conferred on USAA FSB. Similarly, the Geddings have failed to allege facts that, if true, would show that USAA

FSB realized any benefit allegedly conferred upon it by the Geddings. Finally, the Geddings have failed to allege any facts that would show that USAA FSB retained a benefit under conditions that make it unjust for USAA FSB to retain such benefit without paying its value. To the contrary, the Geddings' allegations directly refute any claim that USAA FSB was unjustly enriched; they admit that USAA FSB assigned the mortgage on October 8, 2013, nearly five years before they purchased the property and made improvements thereon. It is therefore impossible that the Geddings could have conferred any benefit upon USAA FSB.

Finally, the Geddings have unclean hands because they almost certainly paid a discount for the property based on both its condition at the time they purchased it and the existing liens on the property, yet had no intent to satisfy such liens.

D. USAA FSB is Entitled to Judgment on the Pleadings on the Geddings' Claim Under the South Carolina Unfair Trade Practices Act

“To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).” *RFT Mgmt. Co., LLC v. Tinsley & Adams, LLP*, 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (S.C. Ct. App. 2006)). The Geddings have failed to allege facts sufficient for a court to find in their favor, and judgment on the pleadings is appropriate on the Geddings' South Carolina Unfair Trade Practices Act (“UTPA”) claims. Additionally, even if the Geddings had sufficiently alleged such facts, their claims against USAA FSB would be barred by the applicable three-year statute of limitations under S.C. Code Ann. § 39-5-150.

First, the Geddings have not alleged that any of the allegedly unfair or deceptive acts listed in the crossclaim affected the public interest. “An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace.” *Noack*

Enterprises, Inc. v. Country Corner Interiors, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 349-350 (1986). South Carolina courts have consistently rejected speculative claims of adverse public impact. *Omni Outdoor Advert. v. Columbia Outdoor Advert.*, 974 F.2d 502, 507 (4th Cir. 1992). “While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest which is a prerequisite to any recovery under the UTPA. Were the rule otherwise, every ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act.” *Id.* Here, all the acts or omissions alleged are specific to one piece of real property and have no effect whatsoever on the public interest.

Moreover, the Geddings have not alleged any unfair or deceptive acts that were committed by USAA FSB. “A trade practice is ‘unfair’ when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is deceptive when it has a tendency to deceive.” *Adams v. G.J. Creel & Sons*, 320 S.C. 274, 279, 465 S.E.2d 84, 86 (1995). “Generally, an unfair trade practice involves a *misrepresentation* made to a consumer.” *Wingard v. Exxon Co., U.S.A.*, 819 F. Supp. 497, 506 (Dist. S.C. 1992) (emphasis supplied). Mere negligence or inattention “is simply not the kind of deceptive practice the statute was intended to reach.” *Clarkson v. Orkin Exterminating Co.*, 761 F.2d 189, 191 (4th Cir. 1985). Far from being immoral, unethical, or oppressive, the acts or omissions alleged by the Geddings against the various entity defendants are unremarkable aspects of holding and enforcing a mortgage on real property. Regardless, by the Geddings’ own admission, USAA FSB assigned the mortgage to Green Tree Financial on October 8, 2013 and did not hold the mortgage to the subject real property at the time that they purchased the property on August 25, 2018. Amended Answer and Crossclaim ¶ 5. While this admission alone is sufficient to defeat the Geddings’ claims against USAA FSB, as Exhibit “A” shows, USAA FSB transferred the servicing of the mortgage to GMAC Mortgage right after the prior owners, the Crawfords, closed on the house.

Likewise, the Geddings have not alleged that they suffered monetary or property loss as a result of any alleged unfair or deceptive acts by USAA FSB. The acts wrongly attributed to USAA FSB in the crossclaim are alleged to have occurred long before the Geddings' assumption of the title to the property via quitclaim deed in August 2018. Even if it is assumed that certain damages were incurred before the Geddings took possession of the property, they "cannot piggyback on injuries suffered by others." *Omni Outdoor Advertising*, 974 F.2d at 507.

Finally, no action may be brought under the UTPA more than three years after the discovery of the unlawful conduct that is subject to suit. S.C. Code Ann. § 39-5-150. Even if the Geddings had sufficiently alleged that they suffered an injury as a result of an unfair or deceptive act committed by USAA FSB, which they have not, their claims would nonetheless be foreclosed by their admission that USAA FSB assigned the mortgage to Green Tree Financial on October 8, 2013, nearly five years before they purchased the property and far outside of the statute of limitations. Amended Answer and Crossclaim ¶ 5.

CONCLUSION

Because the Geddings have failed to allege any facts that would entitle a Court to find in their favor, USAA FSB is entitled to judgment on the pleadings.

This 4th day of August 2020.

FREEMAN MATHIS & GARY

/s/ W. Shawn Bingham
Shawn Bingham
South Carolina Bar No. 103944
Attorneys for Defendant USAA FSB
Federal Savings Bank

100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339
770-818-9090
sbingham@fmglaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically submitted the foregoing USAA FSB'S
MOTION FOR JUDGMENT ON THE PLEADINGS to the following counsel of record:

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Manning, S.C. 29102

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This 4th day of August 2020.

FREEMAN MATHIS & GARY

/s/ W. Shawn Bingham
Shawn Bingham
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STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS

CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

vs.

**GEDDINGS' MOTION
TO RECONSIDER**

**Todd S. Crawford; Tricia L. Crawford;
William T. Geddings, Jr.; Jane U.
Geddings; and USAA Federal Savings
Bank,**

Defendants.

YOU WILL PLEASE TAKE NOTICE that Defendants William T. Geddings and Jane U. Geddings (hereinafter “the Geddings”) move before this court pursuant to Rules 52 and 59, SCRCP, for an order reconsidering, altering, amending, and/or clarifying the order filed September 3, 2020¹, that granted the Plaintiff’s motion to strike the Geddings’ jury demand in the above-captioned action, referred this action to the master-in-equity, and granted in part the Plaintiff and Defendant USAA’s motions for judgment on the pleadings.

The Geddings so move on the following grounds:

1. Except as to the denial of the motion for judgment on the pleadings as to the Geddings’ claim for unjust enrichment, the court’s decision in the subject order is wrong.
2. The court appears to have applied an incorrect standard. The order states that the standard on a motion for judgment on the pleadings does not “admit” inferences drawn in the non-movant’s favor from the allegations of the pleadings. That is not

¹ Since September 13, 2020, was a Sunday, this motion is timely. Rule 6, SCRCP.

correct. The standard of whether a motion for judgment on the pleadings should be granted is the same as for a motion under Rule 12(b)(6), SCRCP. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). In deciding a motion for judgment on the pleadings, the court may not consider matters outside the content of the non-moving party's pleadings. See Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234. A judgment on the pleadings is proper only where there is no issue of fact raised by the non-moving party's pleadings that would entitle the non-moving party to judgment if those issues were resolved in his favor. Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47, 49 (2009). The court must deny a motion for judgment on the pleadings if, when viewed in the light most favorable to the non-moving party, and with every doubt resolved in his favor, "the facts alleged [in the non-moving party's pleadings] *and inferences reasonably deducible therefrom* would entitle the [non-moving party] to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995) (emphasis added); accord Sapp, 687 S.E.2d at 49; Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

3. When the correct standard is applied and all reasonable inferences are drawn in favor of the Geddings, it becomes plain that the Plaintiff and Defendant USAA were not entitled to the judgment on the pleadings they received.
4. The Geddings have standing to maintain their claims with regard to damage done to the subject real property by the Plaintiff and/or Defendant USAA.

5. The court ruled that the Geddings could not maintain causes of action based on conduct of the Plaintiff (or a predecessor) or Defendant USAA that occurred before the Geddings became the owners of the subject property. The court's order appears to take the position that these claims are based totally on conduct that predates the Geddings' ownership of the subject property.
6. First, with regard to damage to the property done before the date of the deed to the Geddings, the Geddings stand in the shoes of the mortgagors, with whom they are in privity (as they also are with the Plaintiff and Defendant USAA) and from whom they have received their rights related the subject property. Indeed, the Plaintiff's complaint alleges that "[p]ursuant to a Title to Real Estate executed on or about August 25, 2018, Todd S. Crawford and Tricia L. Crawford conveyed to William T. Geddings Jr. and Jane U. Geddings all of the rights, title and interest in the real property at issue." This includes rights related to the property's mortgages and rights arising from damage to the property. "'Privity' denotes [a] mutual or successive relationship to the same rights of property. . . . South Carolina courts have equated privity with standing." Fabian v. Lindsay, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014) (internal citations and quotation marks omitted). Further, it is foreseeable that tortiously damaged property will be conveyed to a new owner, who will thus bear damage proximately caused by the tort. See id. at 485 (foreseeability of harm to a person is factor in assessing whether a tortfeasor has duty to that person). In Skipper v. Perrone, the Court of Appeals of South Carolina decided an issue before it in such a way that can only rest on the truth of the proposition that a grantee of property that has been previously tortiously damaged

may maintain an action against the damaging party for the damage. 674 S.E.2d 510, 513 (Ct. App. 2009).

7. The movants, who bore the burden of showing the court why judgment on the pleadings should be granted, never presented the court with any authority to the effect that a grantee of property that has been previously tortiously damaged cannot maintain an action against the damaging party for the damage.
8. The Plaintiff and Defendant USAA (and all applicable predecessors) owed duties to the owners of the subject property with regard to taking possession of the subject property. 54A Am.Jur.2d Mortgages § 255; 59 C.J.S. Mortgages § 398; see Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 291 (2019); Vaughan v. Town of Lyman, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847 (Ct. App. 1997). They are not relieved of the consequences of their violation of such duties merely because that ownership status has been transferred to someone else. See Skipper, 674 S.E.2d at 513.
9. Second, it is by no means clear from the pleadings that all property-damaging acts subject of the Geddings' claims for negligence and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, occurred before the Geddings became the owners of the property. The Geddings' pleadings do not so state, and if the Geddings are allowed to make an evidentiary record at trial, that record will contain factual evidence of such acts occurring *after* the conveyance to the Geddings. In deciding that the Geddings' claims in this regard are wholly based on conduct occurring before the Geddings owned the property, the court drew an

inference in favor of the parties that had moved for judgment on the pleadings. Under the applicable standard, that was an impermissible inference. Sapp, 687 S.E.2d at 49; Stiles, 318 S.C. at 300; Toussaint, 292 S.C. at 416.

10. The court's order seems to treat the Geddings' Unfair Trade Practices claim as though it is wholly based on the way that the mortgage was originated and closed, but that is not the sole basis for this claim. This claim is also based what the Plaintiff and/or Defendant USAA did and did not do in taking possession of the property at issue.
11. In addition, whether the Plaintiff and/or Defendant USAA owed the Geddings a duty is immaterial to whether the Geddings pled a claim for violation of the Unfair Trade Practices Act. Duty is not an element of an Unfair Trade Practices claim. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).
12. "[T]he [Unfair Trade Practices Act] 'should be given a liberal construction.'" McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People's Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)). Mortgage servicing and foreclosure-related acts fall within this broad construction. See id.
13. The South Carolina Supreme Court has stated that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest" but also that this is not the only way to demonstrate an adverse impact on the public interest. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). Indeed, the state Supreme Court has "specifically declined" to

hold that such potential for repetition must be demonstrated by any particular means and has stated that “each case must be evaluated on its own merits.” Id.

14. Just as the improper mortgage account charges at issue in Beneficial Financial I, Inc. v. Windham, Op. No. 5753 (S.C. Ct. App. filed Aug. 5, 2020) (Shearouse Adv. Sh. No. 30 at 32, 39-41), violated the Unfair Trade Practices Act and demonstrated impact on the public interest, even without evidence that Beneficial had repeated the conduct, so, too, does the badly botched maintenance of the property at issue here show the requisite “adverse effect on the public interest.” Crary, 329 S.C. at 388.
15. The court’s order does not address the claim for violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney preference statute. The Geddings were right about their argument on that claim, and the court should have recognized that they pled a claim for violation of the attorney preference statute coupled with inducement by unconscionable conduct. This was not pled under a separate heading, but that is not a reason for the court’s order not to have recognized the allegations supporting this claim. A motion for judgment on the pleadings cannot be properly granted where the non-moving party’s allegations and the facts reasonable inferable therefrom would entitle the non-movant “to any relief on any theory of the case.” Stiles, 318 S.C. at 300.
16. Rather than dismissing the Geddings’ claims, the court should have permitted the Geddings to amend their pleading in order to cure any defects. Our Supreme Court recently noted that “[u]nder Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to

amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.” Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). This applies to counterclaims. See Charleston County School Dist. v. Laidlaw Transit Inc., 348 S.C. 420, 424, 559 S.E.2d 362 (Ct. App. 2001) (motion to dismiss standard applies equally to counterclaims and complaints). Given that the standards for a motion for judgment on the pleadings and a motion to dismiss under Rule 12(b)(6), SCRCP, are the same, this principle applies to motions for judgment on the pleadings, as well.

17. Because the court dismissed the Geddings’ at-law claims, the court granted the motion to strike the Geddings’ jury demand and refer this action to the master-in-equity without analysis of whether the Geddings pled compulsory at-law claims entitling them to a jury trial. The Geddings did so, and the court should reconsider and change its decision to strike the jury demand and refer this action.
18. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action. Further, the Geddings specifically incorporate into this motion by reference all arguments they made at the hearing on the motions that produced the aforesaid order and their previous memoranda in this case.

Pursuant to Rule 11, SCRCP, the undersigned certifies that there would have been no useful purpose in consultation with opposing counsel in an attempt to resolve the matter subject of this motion.

Respectfully submitted,

/s/ Andrew S. Radeker

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Columbia, South Carolina
September 14, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

COURT OF COMMON PLEAS

NEW RESIDENTIAL MORTGAGE)

PLAINTIFF,)

v.)

TODD S. CRAWFORD,)
ET. AL.)

DEFENDANTS.)

TRANSCRIPT OF RECORD
20-CP-14-00023
ZOOM HEARING

August 19, 2020

B E F O R E :

THE HONORABLE KRISTI P. CURTIS, JUDGE

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

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(There were no exhibits submitted.)

1 THE COURT: So I see that we have
2 several motions. It doesn't really matter to me
3 what order we go in. Most of these are for New
4 Residential, Mr. — is it Mr. Milam?

5 MR. MILAM: Milam, Yes, Your Honor.

6 THE COURT: Am I pronouncing that,
7 correctly?

8 MR. MILAM: Yes, Your Honor.

9 THE COURT: Sir, we'll start with you
10 on New Residential's motions.

11 MR. MILAM: Thank you, Your Honor.
12 And would you like me to argue the motion for
13 judgment on the pleadings first and then give Mr.
14 Radeker a chance to respond before going on with
15 our motion to strike the hearing to amend?

16 THE COURT: Sure.

17 MR. MILAM: So we've, again, filed a
18 motion for judgment on the pleadings. New
19 Residential originally filed an answer in this
20 case. We decided to move for judgment on the
21 pleadings because the Geddings indicated that they
22 wanted to seek extensive discovery, and we
23 believed it was appropriate to test the pleadings
24 because we don't believe that the counterclaims
25 state a claim.

1 This case involves a 2007 mortgage
2 loan to Todd and Tricia Crawford, who are
3 defendants in this case but are not a part of the
4 counterclaim. The Geddings, who have filed a
5 counterclaim, are not parties to the mortgage.
6 They are not obligated to make any payment on the
7 note, and they were named in the foreclosure
8 action solely because they acquired the property
9 by quitclaim deed from the Crawfords in 2018.

10 We've attached the mortgage instrument
11 to our motion for judgment on the pleadings, and
12 it's appropriate for the Court to take judicial
13 notice of the mortgage at the pleading stage
14 because it is relied on by the Geddings in their
15 counterclaims and there's no dispute as to the
16 authenticity of the recorded mortgage. As it
17 relates to the counterclaim, the mortgage says
18 that the borrowers have the duty to maintain,
19 repair, and preserve the property. The mortgage
20 gives the lender the right, but not the
21 obligation, if the borrowers fail to maintain the
22 property. The lender can go in, secure the
23 property, preserve, and maintain it; but it
24 expressly disclaims any liability or any
25 obligation of the lender to do so.

1 This -- the 2007 mortgage was
2 originated by USAA. It was subsequently
3 transferred to Ditech Financial, LLC. While
4 Ditech had the mortgage, the Crawfords left the
5 property vacant and Ditech went in and took steps
6 to preserve the property. The Geddings acquired
7 their interest in the property in 2018 by
8 quitclaim deed to the Crawfords and in December of
9 2019, less than a year ago, New Residential was
10 assigned the mortgage from Ditech; and I want to
11 underscore that fact that New Residential did not
12 acquire an interest in this loan until December of
13 2019.

14 There are some overarching defects
15 with regards to the counterclaims and then I can
16 get into the specifics of each individual claim.
17 One problem is that the Geddings are attempting to
18 assert claims against New Residential by lumping
19 several parties together when the individual acts
20 they're alleging are things that supposedly
21 happened prior to December 19 when New Residential
22 acquired the mortgage. In other words, they're
23 alleging claims against New Residential that are
24 based on acts that are supposedly have been done
25 by other parties. The Geddings have argued for a

1 concept that is not part of South Carolina law,
2 but they have argued that when a mortgage is
3 assigned to a new lender, that that lender becomes
4 vicariously liable for all of the claims that the
5 borrower would have had against the previous
6 assignor. We've cited the Rosemond case, which
7 says that that's not true. That at common law, if
8 a debt is assigned the assignee takes the benefits
9 and not the burdens of the obligation and the
10 debtor, and continue to assert equities and
11 defenses against the debt, against the obligation,
12 but it cannot assert an affirmative claim against
13 the assignee.

14 As to both the negligence and unfair
15 and deceptive trade practices claim, that is what
16 the Geddings are doing by bringing these
17 counterclaims. They're asking the Court to award
18 damages against New Residential based on
19 allegations against other parties; and under the
20 Rosemond case, we believe they have every right to
21 assert defenses but not affirm the claim.

22 The other overarching issue is that
23 the Geddings are attempting to assert allegation
24 based on things that happened before they acquired
25 their interest in the property. In other words,

1 they're trying to assert rights and claims on
 2 behalf of the Crawfords from whom they accepted a
 3 quitclaim deed. In order to have standing, the
 4 Geddings have to show that they have actually been
 5 injured in some way, and we don't believe that
 6 they have alleged actual injury where they only
 7 acquired the property in 2018. There is no
 8 allegation, no reason offered in the counterclaim
 9 to show that the Geddings could not, did not, take
 10 the condition of the property into account when
 11 they accepted a quitclaim deed for it; that they
 12 could not or did not take the mortgage into
 13 account when they accepted it, a quitclaim deed
 14 for this property. So we don't believe they have
 15 standing to assert matters that relate to the
 16 mortgage contract, which they're not parties, or
 17 damages that they say occurred to the property
 18 before the actual lien.

19 As to the specific claims that the
 20 Geddings have alleged, for negligence they have to
 21 show at the outset that New Residential performed
 22 some negligent act. They have not shown any act
 23 by New Residential against the property. Now as
 24 to acts that occurred before New Residential was
 25 assigned the mortgage, even as to those

1 allegations there is no facts shown to show the
2 creation of a duty by the lender to preserve and
3 protect the property. They have not shown that
4 Ditech, for example, had any obligation or assumed
5 any obligation to preserve and protect the
6 property and prevent its deterioration. Now Mr.
7 Radeker has pointed to the assumption doctrine,
8 the undertaker doctrine, which says that even if
9 you don't have a duty at common law you can assume
10 it; and that's certainly true if someone assumes
11 an obligation to provide services for another
12 party. If someone had promised the Crawfords or
13 the Geddings that they would take steps to
14 preserve the property, they could assume that
15 obligation. That allegation isn't in the
16 counterclaim. There's nothing here that is
17 inconsistent with what the mortgage did go under
18 the right to be which is go in and take steps to
19 protect its owner. That does not involve
20 providing services that would assume a duty to the
21 Geddings or leave it to the Crawfords.

22 As to the unfair and deceptive trade
23 practices claim, similarly, their -- the bulk of
24 allegations in that claim relate to things that
25 happened prior to December of 2019. As to

1 anything that happened with origination, the
2 statute of limitations would bar that claim.
3 Mr. -- the Geddings have pointed to the discovery
4 rule; but it is on the face of the counter-- if on
5 the face of the counterclaim that shows it's time
6 barred, then it's appropriate at the pleading
7 stage to dismiss the claim. And in this case the
8 allegation or origination was that no attorney
9 closed the loan, and we believe that allegation is
10 not true; but if the allegation were true, that's
11 something that is open and obvious. The Crawfords
12 would have known whether an attorney closed the
13 loan or not; there's no discovery needed. So any
14 claim based on the allegation that no attorney
15 closed the loan would have been barred long before
16 this action occurred back in 2010.

17 The -- there are several acts that,
18 again, relate to the matters that would be before
19 December of 2019. The only act that's alleged
20 against New Residential specifically is that it
21 filed this foreclosure act. And as we pointed
22 out, a foreclosure action is not in the conduct of
23 trade or commerce. It -- trade or commerce is
24 defined in the statute as advertising, offering
25 for sale, or distribution of any services,

1 property, or other things of value. In the
2 Accordia Pharmacy case, in federal court Judge
3 Herlong found that filing a lawsuit does not fall
4 under the unfair trade practices statute. We
5 think a good reason for that, if filing a lawsuit
6 that the defendant disputes for the ground for
7 unfair trade practice claim, then it would be
8 filed as a counterclaim in every single lawsuit.
9 Because there has been no unfair trade practice
10 alleged against New Residential, we ask the Court
11 to dismiss that claim.

12 The final counterclaim alleged by the
13 Geddings is for unjust enrichment. The Geddings
14 say that they have alleged each element of the
15 unjust enrichment claim; but as we pointed out in
16 our brief, they are missing one. They allege that
17 there was a benefit in New Residential, but what
18 they don't allege is that the benefit was
19 non-gratuitous. You cannot as a volunteer provide
20 a benefit to someone voluntarily and then sue them
21 for unjust enrichment. As per the cases that we
22 have cited, it has to be either something that
23 under which the defendant promised consideration
24 for or otherwise induced the plaintiff in the
25 unjust enrichment claim to provide those services

1 to provide that benefit. That's the allegation
2 that's entirely missing from the counterclaim as
3 we believe that judgment on the pleadings is
4 appropriate as to that claim too.

5 Now, finally, in the brief Mr. Radeker
6 has argued that there is a fourth claim under the
7 attorney preference statute. I've reviewed the
8 amended complaint. There is no fourth claim under
9 the attorney preference statute. That statute is
10 cited in support of the unfair trade practices.
11 But if the Geddings want to assert a new claim
12 under the, under that statute, they would need to
13 file or move for leave to file a new amended
14 complaint. They cannot do that because the
15 attorney preference statute says that the debtor
16 may bring a claim under the statute, and neither
17 of the Geddings are debtors under the mortgage
18 conduct. For all these reasons we ask the Court
19 to grant judgment on the pleadings.

20 THE COURT: Thank you, Mr. Milam.

21 Mr. Radeker, do you want to respond,
22 sir?

23 MR. RADEKER: I do, because I don't
24 want their motion for judgment on the pleadings to
25 be granted. All right, taking a look at this, as

1 with most dispositive motions what you've heard is
2 pretty much everything construed in a light most
3 favorable to the movant, rather than to the
4 nonmoving party; but interestingly, what you've
5 also heard are some propositions of law advocated
6 that are directly contrary to what South Carolina
7 law is. The Geddings are parties to the mortgage
8 having received all of the Crawfords' right and
9 title and interest into the real property by
10 virtue of deed by the Crawfords to them. They
11 stand in the shoes that the Crawfords occupied
12 with regard to the mortgage, and it's real
13 interesting.

14 THE COURT: Exercise, I mean, there's
15 no assignment to them. They didn't assume the
16 mortgage. They just moved into the property,
17 correct?

18 MR. RADEKER: Well, they were deeded
19 the Crawfords' interest in the property, and I
20 guess I would say ---

21 THE COURT: Not assigned -- there's no
22 assumption of the mortgage?

23 MR. RADEKER: There's no assumption of
24 mortgage document or anything that I'm aware of,
25 and it's not pled in any event if it is out there

1 somewhere. But it's interesting that the
2 plaintiff would argue that they're not parties to
3 the mortgage because if they're not parties to the
4 mortgage, then they couldn't enforce the mortgage
5 against their interest in this property. So they
6 are the right people who could assert the claims
7 they've asserted in this case. Also, the claims
8 certainly lie against an assignee from a
9 predecessor. That's totally consistent with South
10 Carolina law. An assignee of a mortgage takes its
11 subject to all of the infirmities, the claims and
12 defenses against its predecessor. And it's
13 interesting that they cite the Rosemond case
14 saying that such a claim can't be asserted against
15 them when Rosemond said is directly to the
16 contrary, is that it can. It can be asserted and
17 up to cut down entirely, the new plaintiff, the
18 assignee plaintiff's claim.

19 All right. As to undertaking a duty,
20 when they -- the mortgage says that they don't
21 have to take possession of the property, but it
22 doesn't say that they don't owe any duty to anyone
23 once they do. It's consistent with the law
24 generally. We cited sections from CJS and AmJur
25 to this effect, that a mortgagee in possession

1 owes a duty to adequately maintain the property
2 and to refrain from injuring it. The pleadings
3 allege that that's what happened here with regard
4 to New Residential's predecessor.

5 THE COURT: Case law says that that
6 duty is owed to a subsequent purchaser?

7 MR. RADEKER: So, Your Honor, there
8 isn't any case law that I was able to find either
9 way on that question, but there's no case law that
10 supports the plaintiff's position on it either.
11 And it makes perfect sense that when someone
12 tortiously injures some real property, that they
13 could be sued by a grantee of that property for
14 the tortious injury that they did; and the
15 Geddings have suffered an injury because their
16 property has been injured.

17 THE COURT: Well, didn't they buy
18 that -- I mean, they knew the condition of the
19 property when they purchased it so, I mean,
20 presumably the purchase price would have reflected
21 the condition of the property at the time they
22 purchased it.

23 MR. RADEKER: I don't know whether
24 they did know the condition of the property when
25 they purchased it, and the pleadings don't say so.

1 And so I would note that were Your Honor to infer
2 that, well, they knew the condition of the
3 property when they purchased it and then argue and
4 then rule that that constitutes a defense for
5 them, what the Court would be doing would be
6 drawing an inference in favor of the moving party,
7 rather than in favor of the nonmoving party
8 consistently withstanding. Now the facts may bear
9 out something different. Like, but we're not
10 talking about what the facts will ultimately bear
11 out; we're talking about what the pleadings say.

12 As to the idea that these claims are
13 barred by the statute of limitations, yes, the
14 attorney preference statute claim, that is pled
15 under the same heading as unfair trade practices
16 act claim. One is to amend and assert it
17 separately; we're happy to do that. Indeed, if
18 Your Honor finds that we've stated any facts from
19 which we could assert a claim, that's what the
20 Skydive case indicates that Your Honor should do.

21 But in any event, as to an attorney
22 preference statute violation, that can always be
23 raised in any action to collect a debt; and since
24 the Geddings stand in the shoes of the Crawfords,
25 they're appropriate parties to raise it. When

1 discovery rule moment happened with regard to the
2 discovery rule applicable claims in this case is
3 not entirely clear at all. It's certainly not
4 clear from the pleadings and so that's not a
5 matter that can be decided on the basis of what
6 the pleadings say. That would have to be decided
7 on the basis of a factual record, either at
8 summary judgment or at trial later. There's part
9 of the -- it's clearly what is alleged in the
10 facts here would constitute a claim for violation
11 of the attorney preference statute coupled with
12 inducement of the loan by unconscionable conduct
13 because it's pled that they deprived the Crawfords
14 of the right to have an attorney to represent them
15 in the closing of the loan and that consistently
16 with other cases ---

17 THE COURT: Can I ask, how do the
18 Geddings have standing to raise attorney
19 preference violation if they weren't, they weren't
20 parties to that contract?

21 MR. RADEKER: Because they stand in
22 the shoes of the Crawfords by virtue of their ---

23 THE COURT: According to what
24 authority?

25 MR. RADEKER: So, Your Honor, I guess

1 I would say that because they have received all of
2 their right title and interest in the property. I
3 don't have a case to cite for you, but ---

4 THE COURT: That subsequent purchaser
5 now has the right to come back and claim attorney
6 preference violation for time in memorial with no
7 limitation to how long you have to bring that
8 claim?

9 MR. RADEKER: That's not what I'm
10 arguing. What I am saying is that in the --is
11 that there's no time bar to raising one from a
12 defensive posture as a counterclaim in an action
13 that's brought to collect the debt. And where the
14 subsequent grantee has become a party to the
15 mortgage by virtue of receiving all right, title,
16 and interest are their predecessor in it, then
17 they're in that relationship with the
18 then-plaintiff in the case, so yes, they can raise
19 it. It doesn't mean that the Geddings could go
20 out and bring an affirmative lawsuit on this
21 today; they might not be able to. But that's not
22 the posture that this case is in, so that's not
23 what we are talking about.

24 As to the unjust enrichment claim,
25 they said there's no non-gratuitous interest

1 conferred. Really what the elements are, the
2 elements that they're talking about as phrased by
3 our supreme court is that a benefit was conferred
4 on the other party under circumstances which make
5 it inequitable for them to retain their value.
6 Here, the mortgagee may be a predecessor of New
7 Residential, has been acting like they abandoned
8 this property. And what the Geddings did was they
9 went in and greatly raised the value of its
10 collateral under those circumstances and now it's
11 inequitable for them to retain the value of that.
12 And so whether that's ultimately determined by a
13 finder of fact that constitute unjust enrichment,
14 that's for a finder of fact to confirm; but it
15 could be, and that's what gets us past the motion
16 that's based on the pleading.

17 Under the unfair trade practices act,
18 I point the Court to the very new Beneficial
19 versus Windham case that we sent up with our
20 memorandum noting that where they're in the
21 business of personal loans and mortgages that a
22 claim could lie there. Here they said, you know,
23 what the Geddings allege is that the mortgagee
24 went in, took possession of the property, and then
25 didn't take care of it. That's a repealable

1 action based on the status of the plaintiff or
2 their predecessor, and they're bound to their
3 claims too because they took what they have
4 subject to those claims. That could be construed
5 to constitute an unfair or deceptive trade
6 practice because it could be, then we would say
7 that Your Honor would be in error were you to
8 grant this motion for judgment on the —

9 THE COURT: Okay. Thank you.

10 MR. RADEKER: That's all I have on
11 that.

12 THE COURT: All right. Mr. Bingham, I
13 don't know if you want to add anything.

14 MR. BINGHAM: I do, Your Honor, and I
15 appreciate the opportunity. Your Honor, I
16 represent USA Federal Savings Bank in this
17 lawsuit. They — we were one of the named, one of
18 the defendants in the foreclosure action, and then
19 the Geddings, defendants filed a crossclaim
20 against us as well. We are similar to New
21 Residential. We didn't have an interest in the
22 property at any relevant time. We — except for
23 we're on the back end — we're on the front end;
24 they're on the back end. We originated the
25 mortgage, and it's undisputed in the pleadings

1 that on August 8th, 2013, we assigned the mortgage
2 to Greentree Financial, a/k/a Ditech. The
3 allegations of the attempt to secure the property
4 in plaintiff's complaint is August 1st, 2013,
5 through March 21st, 2014.

6 The Geddings purchased the property on
7 August 25th, 2018. This is all admitted in their
8 pleadings. So, you know, I think, I think
9 Mr. Milam did a good job on the merits of their
10 complaint, and I don't really need to revisit the
11 merits; but I do need to say that regardless of
12 the merits, none of this stuff applies to USAA
13 because, you know, plaintiffs -- USAA is no, you
14 know, going back to the Rosemond case, USAA is not
15 an assignee of the mortgage. The -- none of the
16 case law would apply to USAA because long before
17 the plaintiffs took possession of the property
18 USAA had assigned the mortgage. And by the way,
19 USAA has not sued the plaintiff so, no, these
20 claims are not asserted defensively against USAA.

21 At the time USAA had the property the
22 Geddings were, as the Court touched on, an
23 unascertained future owner of the property, future
24 purchaser of the property. Whatever happened
25 whenever Greentree or Ditech took, allegedly took

1 possession of the property, you know, that -- they
2 would -- the plaintiffs were not, were not in
3 possession. If that -- even if those were valid
4 claims, the claims would belong not to the
5 Geddings, but to the Crawfords who owned the
6 property at the time. Any devaluation of the
7 property would occur during their ownership as the
8 Court touched on, and not during the Geddings'
9 ownership of the property. So if anybody had a
10 claim it would be the Crawfords, but the claims
11 themselves being dubious; but if anybody had a
12 claim it would be the Crawfords and not the
13 Geddings.

14 And the claims as well that, going
15 back to the statute of limitations issue, USAA
16 assigned these claims, this mortgage, long before,
17 well beyond three years before the -- this law--
18 these crossclaims are brought, well more than
19 three years before the Geddings took possession of
20 the property. These -- if you read the -- if you
21 look at the allegations of alleged damages to the
22 property they occurred allegedly by, at the hands
23 of some mortgage company that took possession of
24 the property. A great many of them are open and
25 obvious things that any reasonable person would

1 notice and so the discovery rule doesn't help the
2 merit.

3 I will refer the Court to one of our
4 supreme court cases, Fremantle versus Preston 398
5 SC 186. It talks about how the discovery rule is
6 applied and the statute of limitations in the, in
7 terms of -- it doesn't mean that the plaintiffs
8 are, that the claimant is aware of every single
9 injury or every single detail. It just means that
10 they were on notice that they might have a claim,
11 and clearly they did here. Again, going back to
12 -- I mean, I think Mr. Milam really touched on a
13 lot of the points that I would touch on so I'm
14 trying not to tread that same ground here and
15 waste everyone's time. But again, as the Court
16 pointed out, whatever rights were assigned with
17 the property the -- these alleged property torts
18 don't -- there's, there's no authority saying that
19 they would run with the property. In fact, the
20 Crawfords, to the extent that these were valid
21 claims would still be, would still have the claims
22 here so it would -- if it were true that what the
23 Geddings are arguing here, if it were true that --
24 but we, the USAA would be subject potentially to
25 double liability from both of them. There's no

1 reason to think that these claims to the extent
2 that they were valid, which they're not, would not
3 still be vested in the Crawfords. So the bottom
4 line here is that USAA assigned property long
5 before any of the events alleged in the complaint
6 occurred. There maybe was an overlap of just a
7 few days between when the Geddings themselves
8 allege that this alleged taking or entering the
9 property by some mortgage provider occurred and
10 af-- only a few days had elapsed after USAA had
11 assigned that mortgage and that's undisputed.

12 The attorney preference statute,
13 again, from the plaintiff's own brief it's clear
14 that that only, that cause of action to the extent
15 there would be one would be, would be vested in
16 the debtor, solely in the debtor. And plaintiff's
17 admit other, in other portions of their brief,
18 that they are not the debtors, they are not the
19 mortgagees, I mean, mortgagors, of the property.
20 So that would not apply either.

21 Unjust enrichment, USAA assigned the
22 mortgage back in 2013. They bought it in 2018.
23 They're alleging they were, that they were, that
24 we were unjustly enriched because they did work on
25 the property; but again, we did not have that

1 mortgage at the time they purchased the property
2 so that's impossible. And I think that the
3 Uniform Trade Practices Act has been, has been
4 addressed; and clearly they're not showing any
5 acts of deception on the part of any of the
6 parties. They're not -- they haven't -- by their
7 definition of effect on the public interest, it
8 would apply to virtually any injury that ever
9 happened, that it would have some effect on the
10 public interest and plaintiff's -- and then the
11 Geddings, I'm sorry, are -- it's clearly their,
12 their definition of their application of this
13 particular statute would apply to virtually any
14 tort claim out there so there would be no
15 limitation, and clearly, the statute does impose
16 limitation. And they have no right to complain
17 about an attorney preference, the attorney
18 preference statute, when they were not involved at
19 all in the origination of the mortgage. To the
20 extent that claim still exists, that would belong
21 to the Crawfords as well. That's all I have, Your
22 Honor.

23 THE COURT: Okay. Thank you.

24 MR. RADEKER: Your Honor, if I might
25 speak to that I'll make it very brief. In

1 response to that, I'll largely just incorporate as
2 to the points Mr. Bingham raised. My argument
3 against Mr. Milam's motion made on behalf of the
4 plaintiff except for this. USAA has a mortgage on
5 this property to this date. I point Your Honor to
6 Paragraph 19 of the complaint. USAA holds the
7 second mortgage on this property now, and so
8 what's alleged in the counterclaim is that either
9 New Residential's predecessor for USAA came in and
10 took possession of the property. And most of
11 USAA's motion is based on the idea that, well, we
12 just don't have anything to do with this thing;
13 and that's not supported by what's here at all.
14 It's like they've forgotten about the fact that
15 they hold the second mortgage of the property.
16 Maybe the only other thing I'd say is this: Any
17 time you hear somebody say "clearly" that much is
18 a red flag on it.

19 THE COURT: Ms. Woody, ma'am, is there
20 anything that you -- I know you're not directly
21 involved in these motions, but I'm glad to hear
22 from you if there's anything you wanted to add.

23 MS. WOODY: Thank you, Your Honor. I,
24 based on what we're here today about, I don't
25 really have a lot to add to it. I have talked to

1 the Crawfords on many occasions and as early as
2 yesterday so I think more of what I would have to
3 offer would be more factual and then things that
4 are not actually laid out here so I'm going to say
5 thank you, but I don't have anything else to add
6 unless there's something you want to ask me that
7 I'm happy to answer.

8 THE COURT: No, ma'am, sounds good.
9 Thank you.

10 Mr. Milam, I'll -- since you started,
11 I'll give you a chance to reply, sir.

12 MR. MILAM: Thank you, Your Honor. I
13 mean, very briefly, the Geddings do not allege
14 that they acquired anything other than an interest
15 in the property. They do not say in the
16 counterclaim that they assumed the mortgage
17 obligation. If they did, that would make them
18 liable for the debt which they have not said that
19 they are personally liable for the debt, nor would
20 they have any basis to.

21 As far as the question of whether they
22 paid anything for the property, there's no
23 allegation in the counterclaim that they paid
24 anything at all for the property. I believe the
25 Court could take judicial notice of the recorded

1 quitclaim deed which contains an affidavit
2 regarding the recording fee which says that no
3 consideration was paid; but at a minimum, there is
4 no allegation in the counterclaim they paid
5 anything for the, in exchange for the receipt of
6 the quitclaim deed. I believe that's all I have
7 unless the Court has any questions about New
8 Residential.

9 THE COURT: No, thank you. Okay. We
10 also have New Residential's motion to strike the
11 jury demand and order of reference.

12 MR. MILAM: Yes, Your Honor. The
13 Geddings would only be entitled to a jury on their
14 counterclaim to the extent they allege claims that
15 are both at-law and compulsory, and I don't think
16 there's any dispute that the unjust enrichment
17 claim is equitable. We don't dispute that the --
18 that a negligence claim and an unfair trade
19 practices claim are claims of law. They're
20 seeking monetary damages from New Residential.

21 What we have said in our motion is
22 that the -- both the negligence claim and the
23 unfair trade practices claim are permissive
24 because they do not allege anything that would
25 provide, that would be a defense to enforcement of

1 the -- of the debt. And the three cases that
2 we've cited that Mr. Radeker has cited, the DAV
3 case, the Carolina First case, the Salon Pros (ph)
4 case, all of them say that the dividing line in
5 the context of a mortgage portfolio, the dividing
6 line between compulsory and permissive is if the
7 allegations in the counterclaim were proven, could
8 that prevent the enforcement of the underlying
9 obligation other than this case, the promissory.

10 The Salon Pros case is probably the
11 perfect -- really, I think all those cases are
12 perfect examples. But in the Salon Pros case, the
13 allegation was that the lender had reneged on a
14 promise to modify the loan and the court found,
15 well, if that allegation was proven and that they
16 were obligated to modify the loan, that that could
17 affect the enforcement of the debt. And I know
18 Mr. Radeker is familiar with that case because he
19 won it before the Court of Appeals. What the
20 Geddings have said that in addition to that, that
21 you can have a compulsory claim if it rises out of
22 the circumstances of the foreclosure. And I have
23 re-read each of those decisions: DAV, Carolina
24 First, and Salon Pros, and I don't believe that
25 there is any holding in those cases for that

1 principle. Each of them divides it on the basis
2 of does it prevent the enforcement if it were
3 proven, would it prevent the enforcement of the
4 debt. Neither the negligence counterclaim nor the
5 unfair trade practices claim they do that. The
6 negligence claim is based on an allegation of that
7 the property was allowed to deteriorate. That, if
8 proven, would not prevent the enforcement of the
9 debt. The allegation in the unfair trade
10 practices claim, there is overlap between that and
11 the defenses they raised; but again, the
12 allegations about origination are all against
13 other parties. There are no unfair trade
14 practices allegations against New Residential that
15 would prevent the enforcement of the debt.

16 Even as to the allegations arising out
17 of origination, if the Geddings were to prove as
18 they claim that no attorney closed the loan, this
19 case was with this loan was entered prior to the
20 2011 decision in matrix, the Supreme Court has
21 said that decision was not retroactive. Even if
22 that were proven it would not bar enforcement of
23 the mortgage; but the more salient point is that
24 that allegation is not against New Residential and
25 so the unfair trade practices claim against New

1 Residential would not bar the enforcement of the
2 debt; therefore, it's not compulsory. We ask the
3 Court to strike the, strike the jury. Thank you,
4 Your Honor.

5 THE COURT: Okay. Mr. Radeker, do you
6 want to respond, sir?

7 MR. RADEKER: Yes, I do. I don't
8 think that Your Honor should grant this motion to
9 strike the jury demand and refer to the master in
10 equity. I think that the plaintiff is arguing a
11 narrower definition of what constitutes a
12 compulsory counterclaim and what's in our
13 memorandum lays it out at length so I'll try to
14 sum it up. And that they're arguing a narrower
15 definition that what our appellate courts have
16 held that it is. If you look at the Carolina
17 First Bank case, which is fairly recent, and the
18 DAV court case which is a good bit older but kind
19 of started out a trend of what constitutes a
20 modern analysis of what a compulsory counterclaim
21 is, and under those cases it's plain that a claim
22 that arises out of the same relationship that is
23 what the plaintiff's claim arises out of is
24 compulsory. Carolina First Bank was about whether
25 it — whether the claim arose out of the

1 origination of the note and mortgage. DAV court
2 was about events that occurred during the
3 relationship of the administration of the
4 mortgage, and in both cases they were held to be
5 compulsory. And the other way that a claim can be
6 compulsory is that if it affects the
7 enforceability of the plaintiff's claim. Here it
8 does.

9 One of the things that the Geddings
10 have pled is they pled an unclean hands defense.
11 The facts that underlie that are the facts that
12 are pled in their counterclaim, not just with
13 regard to the origination facts, but also with
14 regard to the failure to maintain the property
15 once possession was taken of it, facts. And if
16 those facts are proven, they could constitute a
17 complete defense to the plaintiff's claim; and so
18 they're all bound up with one another. The whole
19 purpose of rule 13(a)'s compulsory counterclaim
20 rule is to have all of the claims that relate to a
21 single set of facts tried in the same case. These
22 are compulsory counterclaim. Think about what the
23 alternative would be. It would be that some of
24 these claims could be litigated over here in
25 another case and, you know, that it can all be

1 litigated piecemeal. No, the rule is it's all got
2 to be brought in one case together. If you got a
3 claim that relates to this relationship, you need
4 to raise it, and that's what the Geddings have
5 done. So I note that plaintiff is interpreting it
6 a little bit too narrowly and would point Your
7 Honor to the facts in cases that we note in our
8 memoranda.

9 Also, if the Court has any doubt about
10 whether the Geddings are entitled to a jury trial
11 on these counterclaims, that doubt needs to be
12 resolved in their favor and that's according to
13 numerous cases such as Keels versus Pearce that
14 we've cited in our memorandum. After all, when
15 one has the right to a jury trial, one has the
16 constitutional right to a jury trial; but there's
17 no constitutional right to not have a jury
18 involved in a trial. And so, any purported waiver
19 of the right to a jury trial as would be done by
20 pleading a permissive counterclaim is to be very
21 strictly construed. The Court is to construe it
22 in favor of the right to a jury trial.

23 THE COURT: Thank you.

24 Mr. Bingham, Ms. Woody, I don't know
25 if you all -- I mean, I'm glad to hear from you.

1 I don't know if you're directly involved in this.

2 MR. BINGHAM: Your Honor, I don't
3 really have anything to add other than we do not
4 oppose the plaintiff's motion.

5 MS. WOODY: I have nothing to add,
6 Your Honor. Thank you.

7 THE COURT: Mr. Milam, since it's your
8 motion, sir, I'll give you a chance to reply.

9 MR. MILAM: Yes, Your Honor. So I
10 disagree with Mr. Radeker's reading of DAV court.
11 I do not believe that the court found that the
12 counterclaims were compulsory because they arose
13 out of origination of the loan. The court found
14 that they were compulsory because they would
15 affect the enforceability of the loan, and Mr.
16 Radeker and I just disagree on our reading of that
17 case.

18 THE COURT: Thank you. And I know
19 I've heard from you, Mr. Bingham, somewhat
20 already, but the last motion that I'm showing is
21 USAA's motion for judgment on the pleadings which
22 I know you largely already addressed while we were
23 hearing Mr. Milam's motion, but I'm glad to hear
24 from you on your motion.

25 MR. BINGHAM: Your Honor, I think I

1 was addressing that back when I was addressing his
2 motion so I think, I think I've covered it, but I
3 appreciate the opportunity.

4 THE COURT: Okay. I think that's all
5 the motions, but I'm glad if there's anything
6 anybody else wants to tell me, I've overlooked
7 you, or anything else you need to tell me before
8 we adjourn I'm glad to hear it.

9 MR. RADEKER: Nothing from us, Your
10 Honor. I can't think of anything.

11 MR. MILAM: No, Your Honor.

12 THE COURT: Okay. I am gonna look
13 carefully at this. I do want to take a look at
14 the cases before I give y'all my decision.

15
16 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA))
COUNTY OF FLORENCE)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report from Webex videoconferencing and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings to the best of my ability.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South
Carolina, this 19th day of November, 2020.

Frances B. Ray

FRANCES B. RAY, RPR

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

v.

Todd S. Crawford; Tricia L. Crawford;
William T. Geddings, Jr.; Jane U. Geddings;
and USAA Federal Savings Bank;

Defendant.

**NEW RESIDENTIAL MORTGAGE,
LLC'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS
AND MOTION TO STRIKE JURY
DEMAND**

Plaintiff, New Residential Mortgage, LLC ("New Residential") submits this Memorandum of Law in support of its motion for judgment on the pleadings as to Defendants, William T. Geddings, Jr. and Jane U. Geddings, Jr.'s (the "Geddings") Counterclaims and in support of its motion to strike the Geddings' jury demand.

INTRODUCTION

This matter concerns the foreclosure of a June 21, 2007 mortgage ("Mortgage") secured by real property located at 1051 Doral Drive, Manning South Carolina ("Property"). The Property was previously owned by Todd S. Crawford and Tricia L. Crawford (the "Crawfords"), but was conveyed to the Geddings on August 25, 2018 by quitclaim deed. On December 19, 2019, Ditech Financial LLC ("Ditech") assigned the Mortgage to New Residential.

New Residential is entitled to dismissal of the Geddings' counterclaims for negligence, unfair trade practices, and unjust enrichment because the Geddings have not pleaded facts and circumstances that would entitle them to the relief they seek from this Court. Specifically:

- **Negligence.** The negligence counterclaim, which asserts that the prior mortgagee allowed the Property to fall into disrepair, fails because the Geddings do not plead circumstances creating a duty by New Residential to safeguard the Property from deterioration. The Geddings are not parties to the mortgage contract and have no relationship with New Residential, contractual or otherwise, and the Mortgage itself disclaims any duty by the mortgagee to maintain the Property. In any event, New Residential was not assigned the mortgage loan until December 2019, subsequent to the alleged deterioration of the Property, and the Geddings cannot bring a negligence claim against New Residential based on alleged omissions of the prior mortgagee.
- **Unfair trade practices.** The unfair trade practices counterclaim fails because the Geddings have not alleged any unfair or deceptive act by New Residential in the conduct of trade or commerce, and they cannot bring a claim against New Residential based on the alleged acts of other entities prior to the 2019 assignment of the Mortgage.
- **Standing for negligence and unfair trade practices claims.** As a general matter, the Geddings lack standing to assert claims arising out of a mortgage loan to which they are not a party or arising out of alleged property deterioration that occurred before they owned the Property.
- **Unjust enrichment.** The counterclaim for unjust enrichment fails because the Geddings cannot show that the alleged benefit to New Residential was “non-gratuitously conferred.” The Geddings allege that they spent \$60,000.00 to improve the Property after they acquired it by quitclaim deed, but they do not allege that New Residential asked them to make these improvements, or that they had any reason to

expect compensation from New Residential. Because any benefit allegedly conferred was gratuitous, the Geddings cannot seek restitution.

Should any of the Geddings' counterclaims survive dismissal, the Court should strike the jury demand because none of the counterclaims is both legal and compulsory in nature. Having asserted counterclaims in a foreclosure action that are either equitable or permissive, the Geddings have waived any right to a jury on these claims.

STANDARD OF REVIEW

The Court may grant a motion for judgment on the pleadings if the plaintiff "fail[s] to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006) (internal quotations omitted). On the other hand, the motion cannot be sustained if the facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case. *Id.* A motion under Rule 12(c) admits the well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. *Firemen's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co.*, 302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990).

ARGUMENT

I. The Geddings fail to state a claim for negligence.

A. The Geddings have failed to identify a relevant duty owed to them by New Residential

The Geddings' negligence claim is predicated on the allegation that prior mortgagee Ditech Financial LLC ("Ditech") took steps to secure the Property in 2013-14, but allowed it to deteriorate during the years before the Geddings acquired the Property in 2018. As one of the elements of their claim, the Geddings must show that New Residential owed them a duty to safeguard the

Property. “An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.” *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). The common law ordinarily imposes no duty on a person to act. *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). “An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.” *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003). Furthermore, a tort action cannot be founded solely on an alleged breach of contract. *Toney v. LaSalle Bank Nat. Ass’n*, 896 F. Supp. 2d 455, 480 (D.S.C. 2012).

In this case, the Geddings and New Residential do not have even a contractual relationship. The Geddings are strangers to New Residential’s Mortgage, having acquired the property on August 25, 2018 by quitclaim deed from the borrowers, Todd and Tricia Crawford. Nor does the Complaint identify any other relationship between the Geddings and New Residential that would support the creation of duties giving rise to a negligence claim.

Even if the Geddings could assert rights under the mortgage contract, the Mortgage¹ places the duty to maintain the Property on the borrowers, not the lender. Section 7 of the Mortgage states that “[w]hether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition.” See **Exhibit A**, Mortgage § 7. If the borrowers breach their duty to maintain the Property, “the Lender may do and pay for whatever is reasonable or appropriate to protect Lender’s

¹ A copy of the recorded Mortgage is attached as **Exhibit A**. The Court may take judicial notice of the Mortgage on a Rule 12(c) motion because it is a matter of public record whose authenticity has been admitted in the Geddings’ Answer. (See Complaint ¶¶ 7-8, Amended Answer and Counterclaim ¶ 5.); SCRE 201. Additionally, the Geddings cite the execution and recording of the Mortgage as a basis for their claims. (Amended Answer and Counterclaim ¶¶ 15, 46). 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.”)

interest in the Property . . . including securing and/or repairing the Property.” See **Exhibit A**, Mortgage § 9. However, “Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.” Because the Mortgage disclaims any duty by the lender to maintain the Property, and because the Geddings have not identified any independent duty owed by New Residential, this claim must be dismissed.

B. The Geddings cannot assert a negligence claim against New Residential based on allegations against other parties

As noted above, the Geddings’ negligence claim is predicated on the allegation that the prior mortgagee, Ditech, allowed the Property to deteriorate during the years before the Geddings acquired it in 2018. The Geddings make no allegations against New Residential, which as the Geddings’ Answer and Counterclaim acknowledges, was not assigned the Mortgage until 2019. (Amended Answer and Counterclaim ¶ 38.)

As a fundamental element of their negligence claim, the Geddings must show that “the *defendant* was negligent or careless and/or reckless, willful or wanton.” Anderson’s South Carolina Requests to Charge – Civil, § 20-1 Negligence. The Geddings do not claim that New Residential is Ditech’s employer, or is otherwise vicariously liable for the alleged omissions of the prior mortgagee. Nor does New Residential assume liability for claims against a prior mortgagee by virtue of the mortgage assignment. See *Rosemond v. Campbell*, 288 S.C. 516, 343 S.E.2d (S.C. Ct. App. 1986) (holding that as against an assignee, “the obligor can only assert a claim defensively when the assignee seeks to enforce the obligation; he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation.”). Thus, even assuming that the Geddings could show that New Residential owed them a duty, they cannot state a cause of action where they have not alleged any negligent conduct by New Residential.

II. The Geddings fail to state a claim under the South Carolina Unfair Trade Practices Act because they have not alleged any unfair or deceptive act by New Residential

To recover in an action under the South Carolina Unfair Trade Practices Act, a plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code §§ 39-5-10 et seq.; *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). “An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive.” *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 56, 777 S.E.2d 176, 188 (2015). “A deceptive practice is one which has a tendency to deceive.” *Id.*

The Geddings' unfair trade practices claim is based on various purported events in the origination and servicing of the mortgage loan, as well as the alleged failure of the prior mortgagee to safeguard the Property from deterioration. As with the Geddings' negligence claim, these allegations chiefly relate to events prior to the assignment of the Mortgage to New Residential in 2019. However, the Geddings must show that “the *defendant* engaged in an unfair or deceptive act in the conduct of trade or commerce.” *Wright*, 372 S.C. at 23, 640 S.E.2d at 498 (emphasis added).

The sole act alleged specifically against New Residential—that it is attempting to foreclose what the Geddings claim is an invalid lien (Compl. ¶ 47(f))—does not fall within the Act because filing a foreclosure action is not “in the conduct of trade or commerce.” *See Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 24, 431 S.E.2d 587, 591 (1993) (“Trade or commerce is defined as ‘the advertising, offering for sale, sale or distribution of any services and any property . . . and any other . . . thing of value’”(quoting S.C. Code 39-5-10(b))); *see also Concordia Pharm. Inc.*,

S.A.R.L. v. Lazarus Pharm., Inc., No. CV 6:18-1658-HMH, 2019 WL 2502189, at *4 (D.S.C. June 17, 2019) (“Filing a lawsuit is not ‘in the conduct of any trade or commerce.’”). Because the Geddings have not identified any unfair or deceptive acts by New Residential, their unfair trade practices claim must be dismissed.

To the extent that the Geddings’ unfair trade practices claim concerns events in the 2007 origination of the mortgage loan, it is also barred by the three-year statute of limitations for this action. S.C. Code Ann. § 39-5-150.

III. The Geddings lack standing to bring their claims for negligence and unfair trade practices because they are not parties to the mortgage loan, and because they did not own the Property at the time of its alleged deterioration

Rule 17 of the South Carolina Rules of Civil Procedure requires that “[e]very action shall be prosecuted in the name of the real party in interest.” The real party in interest is “the party who, by the substantive law, has the right sought to be enforced.” *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 238, 811 S.E.2d 739, 741 (2018).

The Geddings’ claims for unfair trade practices and negligence are based on purported events in the origination and servicing of a mortgage loan to which they are not parties, as well as alleged deterioration that occurred before they obtained the Property by quitclaim deed in 2018. Because the Geddings lack standing to assert claims on behalf of the borrowers, these claims should be dismissed.

IV. The Geddings claim for unjust enrichment fails because the alleged benefit to New Residential is gratuitous.

To obtain restitution for unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Inglese v. Beal*, 403 S.C. 290, 297, 742 S.E.2d 687, 691 (Ct. App. 2013).

For a benefit to be “non-gratuitous,” the plaintiff “must confer the benefit either (1) at the defendant’s request or (2) in circumstances where the plaintiff reasonably relies on the defendant to pay for the benefit and the defendant understands or ought to understand that the plaintiff expects compensation and looks to him for payment.” *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012). “It is not enough that the defendant has knowledge of the plaintiff’s conduct; he must have induced the plaintiff to confer the benefit.” *Niggel Assocs., Inc. v. Polo’s of N. Myrtle Beach, Inc.*, 296 S.C. 530, 532–33, 374 S.E.2d 507, 509 (Ct. App. 1988).

The Geddings claim that they are entitled to restitution for the \$60,000.00 they allege they have spent “improving the property and returning it to good and habitable condition” since acquiring ownership in 2018.” If these allegations are accurate, the Geddings presumably spent the funds in the hope of recouping sufficient value from their investment in the Property. The Geddings do not (and cannot) allege that New Residential asked or otherwise induced them to make the alleged improvements. Any benefit to New Residential from the improvements is, under *Campbell*, necessarily gratuitous and the Geddings are not entitled to restitution.

V. Plaintiffs are not entitled to a jury trial on their claims, none of which are both legal and compulsory

“Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial.” *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 96, 800 S.E.2d 488, 491–92 (Ct. App. 2017). The defendant in a foreclosure action is entitled to a jury trial on her counterclaims “only if the counterclaims are legal *and* compulsory.” *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015) (emphasis added). Thus, where the defendant brings permissive counterclaims in the foreclosure action, the defendant waives her right to jury trial on those claims. *Id.* at 296, 109-10; *N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989).

A compulsory counterclaim “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim,” whereas, a permissive counterclaim does not. *See* Rule 13(a)-(b), SCRCF. In a foreclosure action, a counterclaim may only be considered compulsory where the subject of the counterclaim bears a logical relationship to the enforceability of the promissory note. *See DAV Corp.*, 298 S.C. at 518-19, 381 S.E.2d at 905-06; *see also Carolina First Bank*, 414 S.C. at 296, 778 S.E.2d at 109-10. In *Salon Pros*, the Court of Appeals found that an unfair trade practices counterclaim was compulsory where the allegations, if true, could affect the enforceability of the loan. 420 S.C. at 97, 800 S.E.2d at 492.

The Geddings assert two claims at law: negligence and unfair trade practices. Although the Geddings contend that the mortgage loan is invalid, they have failed to make any factual allegations in their counterclaims against New Residential that, if proven, would affect the loan’s enforceability. Because New Residential did not originate the Mortgage loan, any allegations pertaining to origination are not part of the counterclaims against it.² Nor have the Geddings alleged that New Residential has taken any action since obtaining the loan that would affect its enforceability. *Compare Salon Proz*, 420 S.C. at 97, 800 S.E.2d at 492 (finding that an unfair trade practices claim was compulsory where it alleged that the lender had reneged on a promise to modify the loan). Because the counterclaims for negligence and unfair trade practices do not bear

² In any event, the Geddings allegations concerning the 2007 origination, if proven, would not prevent the loan’s enforceability. The Geddings allege that no attorney closed the loan, notwithstanding the fact that the mortgage instrument shows that it was notarized by Anne Noonan, a practicing South Carolina attorney. Even if the allegation were accurate, it would not render the loan unenforceable because the mortgage was closed prior to the date of the opinion in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011). *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012) (finding that *Matrix*’s bar on foreclosure of loans closed without an attorney is not retroactive).

a logical relationship to the enforceability of the loan, and are therefore permissive, and because the unjust enrichment claim is equitable, the Geddings are not entitled to a jury as a matter of right.

CONCLUSION

Because the Geddings have not pleaded any facts or circumstances that would entitle them to relief against New Residential, the counterclaims must be dismissed. In the alternative, because the claims are either equitable or permissive, the Court should strike the jury demand and refer this matter to the Master in Equity or a Special Referee.

Respectfully submitted August 17, 2020.

s/ G. Benjamin Milam

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STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS

CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

vs.

Todd S. Crawford; Tricia L. Crawford;
William T. Geddings, Jr.; Jane U.
Geddings; and USAA Federal Savings
Bank,

Defendants.

**GEDDINGS' MEMORANDUM IN
OPPOSITION TO MOTION TO STRIKE
JURY DEMAND AND FOR ORDER OF
REFERENCE**

Defendants William T. Geddings and Jane U. Geddings (hereinafter "the Geddings") hereby submit this memorandum in opposition to the Plaintiff's motion to strike the Geddings' jury demand and refer the above-captioned action to the master-in-equity.

WHAT MAKES A COUNTERCLAIM COMPULSORY?

"A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP (emphasis added). Such claims are usually referred to as compulsory counterclaims. "A pleading *may* state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRCP (emphasis added). Such claims are usually referred to as permissive counterclaims.

Compulsory, at-law counterclaims made by a defendant in a case in which the plaintiff has asserted only causes of action that sound in equity must be tried by a jury if a jury demand has

been made on the claim. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). Conversely, a defendant waives his right to a jury trial if he asserts a legal but permissive counterclaim where the plaintiff's complaint pleads only equitable causes of action. Blackburn, 407 S.C. at 330; Johnson, 292 S.C. at 54-56.

What is more difficult in many cases than it seems in the abstract is determining whether a counterclaim is compulsory or permissive. Our Supreme Court has developed a test to determine what “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim” and is, thus, a compulsory counterclaim. Rule 13(a), SCRCP. In N.C. Fed. Sav. & Loan Ass’n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), a foreclosure action with counterclaims, the Supreme Court adopted the “logical relationship” test for determining whether a counterclaim is compulsory. The Court held that most of DAV’s counterclaims were compulsory because “there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note[.]” Id. The Court made clear the reason for doing so: of the four tests considered by the Court for whether a counterclaim is compulsory, the Court settled on the “logical relationship test,” which is “by far the most widely accepted because of its flexibility.” Id.

In the DAV case, the plaintiff’s claim was for foreclosure of a mortgage, and the Court’s described of DAV’s counterclaims as follows:

- 1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs;
- 2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action;

- 3) breach of fiduciary duty to co-joint venturers;
- 4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;
- 5) violation of the Unfair Trade Practices Act by breaching the oral agreement;
- 6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

Id. at 517.

The Court held that all but the sixth counterclaim on this list was compulsory. Id. at 518. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. Id.

In Carolina First Bank v. BADD, L.L.C., our Supreme Court, citing the rule that a counterclaim is compulsory if it has a "logical relationship" to the transaction or occurrence subject of the opposing party's claim, held that a counterclaim is compulsory in a foreclosure action if it arises out of the execution of the documents that form the basis of the plaintiff's claim or affects the enforceability of the plaintiff's claim. 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015). The Court there found that the counterclaims were not compulsory where they both assumed the enforceability of the guaranty agreements subject of the plaintiff's claim and did not arise from the events of the execution of the guaranty documents. Id. at 296. The Court stated that the claims did "not arise out of the underlying transaction or occurrence because [they do] not affect the execution or enforceability of the guaranty agreements." Id.

Only one reported case since BADD has discussed that decision in the context of whether a counterclaim is compulsory. In S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017), the Court of Appeals determined a claim for violation of the

South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, was compulsory, citing BADD as authority.

For example, the UTPA claim is an action at law seeking treble damages. The substance of Salon's UTPA claim alleges Bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case." Were this allegation true, it could affect the loan's enforceability. Cf. BADD, 414 S.C. at 296, 778 S.E.2d at 109 (holding a counterclaim was permissive when its allegations, if true, would not have rendered the guaranty agreements unenforceable). Therefore, we find the UTPA claim was both legal and compulsory. See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518-19, 381 S.E.2d 903, 904-05 (1989) (holding a counterclaim alleging violation of the UTPA by breach of an oral agreement was both legal and compulsory).

Salon Proz, 420 S.C. at 97.

DAV Corp., BADD, and Salon Proz may be boiled down to this: there are at least two recognized ways a counterclaim may be compulsory. If a counterclaim arises out of the same set of facts as the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97.

THE COUNTERCLAIMS HERE ARE COMPUSLORY

The counterclaims here – which either arise out of the origination of the mortgage or have to do with the mortgagor-mortgagee relationship – are compulsory. Instructive in this regard is the Court of Appeals' summary of what must be shown in mortgage foreclosure actions:

Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction.

U.S. Bank. Natl. Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (Ct. App. 2009) (footnote omitted).

Not only do the Geddings plead claims that arise out of the same set of facts as the Plaintiff's claim, the facts of the counterclaims also go to whether the Geddings have a defense to the Plaintiff's claim.

Bell never purported to give an exhaustive, exclusive list of affirmative defenses to mortgage foreclosure. See id. Like the defenses listed in Bell, the Geddings' affirmative defenses, which include unclean hands, have the potential to defeat the Plaintiff's mortgage foreclosure claim. If the Geddings prove their unclean hands defense arising out of those same facts, they will have proven a defense that has the potential to defeat Carrington's equitable claims in this case, as "the Court of Equity will refuse to lend its aid to one who has been guilty of inequitable conduct in the subject matter." Id.; accord Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735, 738 (1943).

The same facts that underlie the unclean hands defense form the basis of the counterclaims. If the counterclaims are tried to a jury, as they should be, "[t]he court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court." Blackburn, 407 S.C. at 330. Accordingly, victory for the Geddings on any of their counterclaims would necessarily determine that the facts exist that form the basis of their affirmative defenses to the foreclosure claim – and that would affect the enforceability of the mortgage by the Plaintiff. That is the essence of a compulsory counterclaim.

Further, to be compulsory, there is no requirement of the Geddings counterclaims that they *of necessity* would bar the Plaintiff's claim if they succeed. The Plaintiff appears to adopt such an unduly narrow interpretation of the law in this area. In Salon Proz, the Court of Appeals held a

counterclaim was compulsory where “it *could* affect the loan’s enforceability.” 420 S.C. at 97 (emphasis added). Neither that decision nor any reported decision of any South Carolina appellate court has held that, to be compulsory, a counterclaim must necessarily and always bar the plaintiff’s claim if successful.

There are also cases beyond the DAV Corp.-BADD-Salon Proz trinity that reveal the compulsory counterclaim rule is not as narrow as the Plaintiff perceives it to be. In Jaynes v. County of Fairfield, the Jaynes were defendants in an earlier road-closing action brought by Fairfield County that concerned, *inter alia*, whether a road was public property – a case that Fairfield County lost. 303 S.C. at 435-36, 438 & n. 1. The Court of Appeals held that the Jaynes’ later inverse condemnation action against the county about that road was barred by res judicata, since the claims were about the same road and bore a logical relationship to one another. Id. The claims arose out of a common matter: the road and who owned it. Id.

In First-Citizens Bank & Trust Co. v. Hucks, a case in which the compulsory or permissive nature of a counterclaim was put in issue by a jury demand on the counterclaim, the Supreme Court’s analysis was as follows:

In the instant case, the trustee’s equity action seeks a declaration of rights arising in the administration of a trust. The legal counterclaim alleges that the trustee has breached its contractual agreement and fiduciary duty. We find that there is a logical relationship between the counterclaim and the claim. Hence the counterclaim is compulsory, and appellants are entitled to a jury trial on their counterclaim.

305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). Again, the claims arose out of a common matter or set of transactions: the trust and its administration. Id.

The purpose of the compulsory counterclaim rule is “to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” Beach

Co., 351 S.C. at 62. If the scope of what is a compulsory counterclaim were instead limited to a counterclaim that would of necessity preclude success on the opposing claim, Jaynes and Hucks could not have been decided in the way that they were. Hucks, 305 S.C. at 298; Jaynes, 303 S.C. at 435-36, 438 & n. 1.

In addition to arising out of a common transaction or occurrence – the mortgage, its origination, and the conduct of the mortgagor-mortgagee relationship – the counterclaims are compulsory because they have the potential to prevent the Plaintiff from prevailing on its claims. Because the counterclaims arise out of the same set of facts as the Plaintiff’s claim, they are compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. Because the counterclaims could affect the enforceability of the Plaintiff’s claim, they are compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. Accordingly, the Geddings retain their right to a jury trial. Blackburn, 407 S.C. at 330; Johnson, 292 S.C. at 54-56.

ANY DOUBT ABOUT JURY TRIAL SHOULD BE RESOLVED IN FAVOR OF IT

“The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication.” Salon Proz, 420 S.C. at 94 (quoting Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993)); accord Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46 (1995) (same); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637 (1992) (same); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863 (Ct. App. 2002) (same).

If there is doubt, the thing to do is to uphold the right to trial by jury. That would be to err, if at all, on the side of caution. And the side of caution is the side on which the Geddings have the right to a jury trial. After all, it is the right to have a trial by jury that is constitutionally enshrined.

S.C. Const. art. I, § 14. Vice-versa is not true; there is no right to exclude a jury from being part of one's trial. See Patterson v. McNeill & Assocs., Inc., 312 S.C. 471, 441 S.E.2d 328, 329 (Ct. App. 1994).

CONCLUSION

The Plaintiff's motion to strike the jury demand and refer this case to the master-in-equity should be denied.

Respectfully submitted,

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Columbia, South Carolina
August 18, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS

CASE NO. 2020-CP-14-00023

New Residential Mortgage, LLC,

Plaintiff,

vs.

**Todd S. Crawford; Tricia L. Crawford;
 William T. Geddings, Jr.; Jane U.
 Geddings; and USAA Federal Savings
 Bank,**

Defendants.

**GEDDINGS' MEMORANDUM IN
 OPPOSITION TO
 PLAINTIFF'S MOTION FOR JUDGMENT
 ON THE PLEADINGS**

Defendants William T. Geddings and Jane U. Geddings (hereinafter "the Geddings") hereby submit this memorandum in opposition to the Plaintiff's motion for judgment on the pleadings against the Geddings in the above-captioned action.

STANDARD

The standard of whether a motion for judgment on the pleadings should be granted is the same as for a motion under Rule 12(b)(6), SCRPC. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). In deciding a motion for judgment on the pleadings, the court may not consider matters outside the content of the non-moving party's pleadings. See Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234. A judgment on the pleadings is proper only where there is no issue of fact raised by the non-moving party's pleadings that would entitle the non-moving party to judgment if those issues were resolved in his favor. Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47, 49 (2009). The court must deny a motion for judgment on the pleadings if, when viewed in the light most favorable to the

non-moving party, and with every doubt resolved in his favor, “the facts alleged [in the non-moving party’s pleadings] and inferences reasonably deducible therefrom would entitle the [non-moving party] to any relief on any theory of the case.” Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995); accord Sapp, 687 S.E.2d at 49; Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

Our Supreme Court recently noted that “[u]nder Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.” Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). This applies to counterclaims. See Charleston County School Dist. v. Laidlaw Transit Inc., 348 S.C. 420, 424, 559 S.E.2d 362 (Ct. App. 2001) (motion to dismiss standard applies equally to counterclaims and complaints). Given that the standards for a motion for judgment on the pleadings and a motion to dismiss under Rule 12(b)(6), SCRCp, are the same, this principle applies to motions for judgment on the pleadings, as well.

THE PLAINTIFF TOOK THE MORTGAGE SUBJECT TO CLAIMS AND DEFENSES

The Plaintiff appears to rely on its status as an assignee in an attempt to escape liability on the Geddings’ counterclaims; however, if the Plaintiff has come to own the note and mortgage, it took that note and mortgage subject to claims and defenses against its predecessors. Accordingly, the Geddings’ counterclaims lie against the Plaintiff even if they are based on conduct of the Plaintiff’s predecessor or predecessors in interest.

Under South Carolina law, an assignee takes a mortgage “subject to all the infirmities in and against his assignor.” Patterson v. Rabb, 38 S.C. 138, 17 S.E. 463, 467 (1893); accord Woodrow v. Frederick, 133 S.C. 431, 439, 131 S.E. 598, 601 (1926) (same principle described as

“settled by an unbroken series of authorities”). The principles of law the Court of Appeals set out in Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), show that the Geddings certainly can assert their claims from a defensive posture (as they have done here) against an assignee of a previous owner of the note and mortgage whose conduct gave rise to the counterclaims. The Geddings draw the court’s attention to the quotation from Rosemond below:

At common law, an assignee’s rights can be no greater than those of his assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, *the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor.* Id. However, absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation. Koppers Company v. Kaiser Aluminum and Chemical Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970). Thus, *as against the assignee, the obligor can only assert a claim defensively when the assignee seeks to enforce the obligation*; he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation. Langel v. Betz, 250 N.Y. 159, 164 N.E. 890 (1928); Pargman v. Maguth, 2 N.J.Super. 33, 64 A.2d 456 (1949).

288 S.C. at 522-23 (emphasis added).

The Geddings may assert their counterclaims against the Plaintiff, even if those counterclaims arise from conduct of one of the Plaintiff’s predecessors.

THE GEDDINGS STAND IN THE SHOES OF THE PREVIOUS LANDOWNERS

Just as the Plaintiff stands in the shoes of its assignor, so do the Geddings stand in the shoes of the mortgagors, from whom they have received their rights related the subject property. Indeed, the Plaintiff’s complaint alleges that “[p]ursuant to a Title to Real Estate executed on or about August 25, 2018, Todd S. Crawford and Tricia L. Crawford conveyed to William T. Geddings Jr. and Jane U. Geddings all of the rights, title and interest in the real property at issue.” This includes rights related to the property’s mortgages and rights arising from damage to the property.

Further, the Plaintiff presents no authority for the proposition that a claim for property damage cannot be asserted by one who comes to own the property after a tortfeasor damages it. The Plaintiff asks the court to accept, as a matter of law, a contention for which it offers no legal support.

The Plaintiff argues something of a double standard: if the Geddings cannot assert these claims against the Plaintiff, it would follow that the Plaintiff has no business suing the Geddings – but the Plaintiff, of course, does not mention that. Because of the various transfers relating to the subject property, these parties can assert their claims against one another.

THE FACTS ALLEGED INDICATE A DUTY WAS UNDERTAKEN

The Plaintiff proclaims that it (or its predecessor) had no duty to the owners of this property to take any care of it. Before it took possession of the property, it did not. Once it undertook to take possession of property owned by another, however, that changed.

One who does not owe a duty may assume it by voluntarily undertaking to do something he is not already required to do.

“While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken.” Vaughan v. Town of Lyman, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006). “The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder.” Id. at 446-47, 635 S.E.2d at 637 (quoting Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)).

Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 291 (2019); accord Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847 (Ct. App. 1997).

Section 9 of the mortgage does not say that the Plaintiff owes no duty to the landowner when it takes possession of the property. It says that the mortgagee does not have any duty to take

possession of the property. Once the mortgagee took possession of the property and undertook to maintain it, though, it also took on a duty to use due care in maintaining the property. Wright, 426 S.C. at 212; Vaughan, 370 S.C. at 446; Miller, 329 S.C. at 314; Hurst, 329 S.C. at 481.

Indeed, the law is that a mortgagee that takes possession of property has duties to the owner to manage and maintain it adequately and not to injure the property. 54A Am.Jur.2d Mortgages § 255; 59 C.J.S. Mortgages § 398.

A mortgagee in possession of the mortgaged premises is liable for waste or gross mismanagement or wrongful or tortious acts which injure the property, including the permanent depreciation of the property caused by the failure to make necessary or proper repairs.

59 C.J.S. Mortgages § 398.

As to a mortgagee in possession, the general rule is that he or she is bound to the exercise of the same care and supervision over the mortgaged property that a prudent man would exercise over his or her own. Generally, a mortgagee in possession has a duty to seek to make the subject property productive, and a failure of that duty gives rise to liability. She is responsible for a permanent depreciation in the property due to her reckless or improvident management or waste.

54A Am.Jur.2d Mortgages § 255

The Geddings have alleged facts that make the Plaintiff answerable for the breach of an undertaken duty to maintain and to refrain from injuring the property.

THE ALL ELEMENTS OF AN UNFAIR TRADE PRACTICES CLAIM ARE PRESENT

To recover under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, a plaintiff must show: (1) the defendant violated S.C. Code Ann. § 39-5-20 by engaging in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). The South Carolina Supreme Court has stated

that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998).

Here, the Geddings allege, in addition to the tortious injuries to and failure to maintain the property, numerous consumer protection statute violations concerning the mortgage(s) at issue. They also allege that "the conduct engaged in by the Plaintiff, or its predecessors, and/or USAA Federal Savings Bank and/or Green Tree Servicing LLC has occurred in the past, may occur in the future and poses a risk to the public." The Geddings point the court to the recent Court of Appeals decision of Beneficial Financial I, Inc. v. Windham, Op. No. 5753 (S.C. Ct. App. filed Aug. 5, 2020) (Shearouse Adv. Sh. No. 30 at 32, 39-41), which tends to indicate that the Geddings' allegations sufficiently plead an Unfair Trade Practices claim.

Further, duty to the party asserting the claim is not an element of an Unfair Trade Practices claim. Wright, 372 S.C. at 23. The Geddings could maintain this claim even if the Plaintiff owed them no duty.

ATTORNEY PREFERENCE STATUTE AND REMEDIES FOR VIOLATION

One of the consumer protection statutes that this invoked in the Geddings' Unfair Trade Practices claim is S.C. Code Ann. § 37-10-102, commonly referred to as the attorney preference statute. This is technically its own, different claim. Nevertheless, the Geddings have pled a claim for violation of the attorney preference statute.

Under S.C. Code Ann. § 37-3-105, the attorney preference statute applies to the subject mortgage loan even if the mortgage sought to be foreclosed is a first lien on the subject property (which would, for many purposes, take it outside the scope of the Consumer Protection Code). Subsection (3) of S.C. Code Ann. § 37-3-105 provides that "[l]oans excluded from the definition

of a ‘consumer loan’ pursuant to subsection (1) also are subject to the provisions of Chapter 7, Chapter 10, Chapter 22, and Chapter 23 of this title.” S.C. Code Ann. § 37-3-105(3). Chapter 10 of Title 37 is where the attorney preference statute (S.C. Code Ann. § 37-10-102) and the corresponding remedies statute (S.C. Code Ann. § 37-10-105) are codified.

In pertinent part, 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.

The attorney preference statute is in Chapter 10 of the South Carolina Consumer Protection Code, which is codified in Title 37 of the South Carolina Code of Laws. 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.

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

Per S.C. Code Ann. § 37-10-105(A), it is certainly proper, regardless of the amount of time that has passed, for the Geddings to assert violation of this statute in this action that seeks to collect the mortgage debt. Further, the Geddings also plead facts that support the inducement of the subject loan by unconscionable conduct.

The answer and counterclaim alleges that the loan was closed without the required supervision of a licensed South Carolina attorney. That is, or at least could be interpreted as, inducement of the loan by unconscionable conduct.

The General Assembly has provided that the Consumer Protection Code “shall be liberally construed and applied to promote its underlying purposes and policies.” S.C. Code Ann. § 37-1-102(1); accord King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324-26 (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). Among the specifically enumerated purposes of the Consumer Protection Code are “to further consumer understanding of the terms of credit transactions” and “to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors.” S.C. Code Ann. § 37-1-102(2)(c)&(d).

The court must, accordingly, interpret S.C. Code Ann. § 37-10-105, including the statute's use of the word "unconscionable," consistently with the purposes of the Consumer Protection Code, i.e., liberally in favor of the furtherance of consumer understanding of the terms of credit transactions and the protection of consumers against unfair practices by suppliers of consumer credit. S.C. Code Ann. § 37-1-102(1)&(2)(c)&(d).

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.

In Wachovia Bank, N.A. v. Coffey, the Court of Appeals observed 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[.]" 389 S.C. 68, 698 S.E.2d 244, 248 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013). The Court of Appeals noted that the purpose served by our Supreme Court requiring lawyers to supervise mortgage loan closings is "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." Id. (quoting Buyers Service, 292 S.C. at 431). The Supreme Court favorably cited Coffey's "inherently prejudicial" description in Matrix Financial Services Corp. v. Frazer, which reaffirmed that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." 394 S.C. 134, 714 S.E.2d 532, 534 (2011). That prejudice inheres in the unauthorized practice of law is an accurate statement of the law of this state.

Among the chief reasons our Supreme Court requires an attorney licensed to practice law in this state to supervise a mortgage loan closing is so that the mortgage loan customer is in a position to receive accurate information from the lawyer, who represents the customer, about the terms of credit transactions, and so that the lawyer may protect the customer from unfair practices by suppliers of mortgage credit. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing lawyer represents the mortgage loan customer¹, Doe, 355 S.C. at 315, and must supervise the closing because, among other things, “attorneys . . . have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of” the Supreme Court. Buyers Service, 292 S.C. at 434. Per our Supreme Court, underpinning the attorney supervision requirement is the principle that “protection of the public is of paramount concern.” Id. Chiefly, what the Court has sought to protect the public from are the negative consequences engendered by people entering into mortgage loan transactions without the opportunity to make a meaningful, informed choice about whether to sign on to the terms of that transaction. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing attorney is there to ensure the choice to enter into the mortgage loan is meaningful and the bargaining process is fundamentally fair. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

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). This is no less so in the context of an out-of-court transaction like a mortgage loan closing. See Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The right of a mortgage loan customer to be represented in a mortgage loan closing by a loyal, unconflicted attorney of his own choice, there to ensure the customer has a

¹ Under certain circumstances, the closing attorney may also represent the lender. Doe, 355 S.C. at 315.

meaningful choice about whether to enter into the transaction and that the process is fair, is indeed substantial. Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

Unconscionability simply means “[e]xtreme unfairness.” Black’s Law Dictionary 1663 (9th ed. 2009). 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). Unconscionability is not and should not be a one-size-fits-all inquiry; rather, “unconscionability claims are context-specific[.]” McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273, 283 (4th Cir. 2016) (analyzing West Virginia unconscionability law).

Our General Assembly has provided that analysis of unconscionability or inducement by unconscionable conduct under the Consumer Protection Code is not limited to a pre-written checklist of elements or even factors. S.C. Code Ann. § 37-5-108(4)(a) (“consideration must be given to applicable factors,” listing some factors but noting that list is “without limitation”). An absence of meaningful choice and a lack of fundamental fairness, though, are among the hallmarks of unconscionability. See Simpson, 644 S.E.2d at 669. That is consistent with the legislative mandate concerning interpretation of the Consumer Protection Code. S.C. Code Ann. § 37-1-102(1)&(2)(c)&(d). The essence of unconscionability is fundamental unfairness, and there are as many forms in which that may manifest itself as there are opportunities for it to do so. See McFarland, 810 F.3d at 283; S.C. Code Ann. § 37-5-108(4)(a); Black’s Law Dictionary at 1663.

That said, “the fact that the seller, lessor, or lender knowingly has taken advantage of the inability of the consumer or debtor reasonably to protect his interests” is specifically listed by our legislature as a factor to be used in analyzing whether a transaction was induced by unconscionable conduct. S.C. Code Ann. § 37-5-108(4)(a)(iv). If the lending institution making the mortgage

loan deprives the customers of the opportunity to have an attorney represent them in the closing, it has deprived them of a substantial right that exists to make sure they have a meaningful choice and that the process is a fair one. See Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. That is extremely unfair. 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, can be understood to be inducement of the loan by unconscionable conduct.

The Geddings have pled both an “ordinary” attorney preference statute violation claim and one for violation of the attorney preference statute with inducement by unconscionable conduct.

PLAINTIFF CANNOT WIN ITS MOTION ON THE STATUTE OF LIMITATIONS

The statute of limitations is an affirmative defense in South Carolina. E.g., Glenn v. Sch. Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). “[A]n affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint [or counterclaim] demonstrate the existence of the affirmative defense.” Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869, 878 (2006).

Most at-law claims in this State have a three-year statute of limitations under S.C. Code Ann. § 15-3-530. South Carolina follows the discovery rule. See S.C. Code Ann. § 15-3-535. “Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct.” True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). In some cases (e.g., a typical car wreck case), this date is fairly obvious. In others, this moment is not so easy to pinpoint. See Monroe v. Benson, 390 S.C. 153, 700 S.E.2d 273, 278 (Ct. App. 2010)

(statute of limitations did not begin to run until over four and a half years after deceptive property transfer).

“The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide.” Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009). Only “when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination . . . become[] a matter of law[.]” Id.

Here, when the discovery rule moment happened is not entirely clear, and it is certainly not apparent from the allegations of the Geddings’ pleading. It alleges when the efforts to take possession of the property began, but not when they ended or when the injuries to and failures to maintain the property ended – and much less when a reasonable person should have discovered the injuries to the property and failure to maintain it.

In addition, the statute of limitations under the Unfair Trade Practices Act is “three years after *discovery* of the unlawful conduct[.]” not three years from an objective “discovery rule” point in time. S.C. Code Ann. § 39-5-150 (emphasis added). This moment in time is not alleged.

Whether a statute of limitations defense can be successfully proven is a matter to be explored on the facts, not the pleadings. See Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 145, 697 S.E.2d 644, 654 (Ct. App. 2010).

Because it is not apparent from the Geddings’ allegations that a statute of limitations defense must succeed as a matter of law, the motion for judgment on the pleadings must be denied on this ground. See Spence, 628 S.E.2d at 878. The Plaintiff is free to plead this defense and explore it on the merits, but the court cannot conclude as a matter of law, based on the content of the pleadings, that the counterclaims are barred by the statute of limitations.

ALL ELEMENTS OF AN UNJUST ENRICHMENT CLAIM ARE PLED

Unjust enrichment is an equitable doctrine which permits the recovery from the enriched party of the amount by which he has been unjustly enriched at the expense of the claimant. Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988). The test for unjust enrichment, per our Supreme Court, is as follows:

- (1) benefit conferred by plaintiff upon the defendant;
- (2) realization of that benefit by the defendant; and
- (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.

Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872-73 (2000).

Here, the Geddings allege that they have enriched the Plaintiff – dramatically increasing the value of its collateral – under circumstances that make it unjust for the Plaintiff to retain that benefit without paying its value. Those circumstances include the fact that the mortgagee’s behavior was such that it acted like it had abandoned its mortgage or any right to enforce it. Since these facts could be seen as fitting the elements of unjust enrichment, it is up to a finder of fact to determine whether they do.

CONCLUSION

The Plaintiff is not entitled to judgment on the pleadings. The Plaintiff’s motion for judgment on the pleadings should be denied.

Respectfully submitted,

/s/ Andrew S. Radeker

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ATTORNEY FOR GEDDINGS DEFENDANTS

Columbia, South Carolina

August 18, 2020

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Beneficial Financial I, Inc., successor by merger to
Beneficial Mortgage Co. of South Carolina, Appellant,

v.

Jon Windham, a/k/a Jon D. Windham; Frances
Windham, a/k/a Frances C. Windham; and Jerry Coker,
a/k/a Jerry L. Coker; Carolina Bank a/k/a Carolina Bank
& Trust Co., The United States of America, by and
through its agency, the Internal Revenue Service; and
The Citizens Bank, Defendants,

Of whom Jon Windham a/k/a Jon D. Windham is the
Respondent.

Appellate Case No. 2017-001954

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5753
Heard December 10, 2019 - Filed August 5, 2020

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Rebecca Kinlein Lindahl and Richard L. Farley, both of
Katten Muchin Rosenman, LLP, of Charlotte, North
Carolina, for Appellant.

Penny Hays Cauley, Esquire of Hays Cauley, PC of
Florence, for Respondent.

KONDUROS, J.: In this foreclosure action, Beneficial Financial I, Inc. (Beneficial), lender, challenges the grant of summary judgment to Jon Windham, borrower, on his counterclaims for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), fraud, negligent misrepresentation, intentional infliction of emotional distress, and negligent and reckless training and supervision. Beneficial argues Windham was not entitled to the award because Windham did not meet his burden of proof for any of his counterclaims, even though Beneficial did not submit evidence in opposition at the hearing. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Windham entered into a Loan Repayment and Security Agreement (Agreement) and a mortgage (Mortgage) with Beneficial Mortgage Company of South Carolina dated June 25, 2002, in the amount of \$191,912.61, to secure a loan for real property in Florence County, South Carolina. The Agreement required Windham to obtain title insurance and hazard insurance on the property, name Beneficial as loss payee, and provide Beneficial with an endorsement. The Agreement also stated Beneficial could place hazard insurance on the property if Windham failed to maintain the insurance or failed to provide proof of the insurance. The Agreement mandated Windham pay Beneficial the "[p]rincipal and [i]nterest computed at the [c]ontract [r]ate ... and any monthly insurance premium, if elected."

On April 11, 2014, Beneficial filed a complaint against Windham to foreclose on the Mortgage, claiming Windham failed to pay "installments of principal and interest which became due on July 29, 2012," and seeking "the entire balance of said principal and interest due and payable at once" and attorney's fees and costs. Beneficial claimed in its "Notice Required by the Fair Debt Collection Practices

Act," the total debt Windham owed as of April 9, 2014, was \$230,522.96. Beneficial also sought reformation of the deed and Mortgage.¹

Windham answered, asserting Beneficial "wrongfully force-placed insurance" on the property "even though [Beneficial] had knowledge that said property was already insured." Windham argued this added insurance cost "caused [his] payment to increase and also resulted in [his] payments to only be credited to the additional insurance cost rather than to the principal and interest due on the mortgage" and "began the process of [his] initial delinquency." Furthermore, Windham alleged Beneficial represented to him "that if he were to make bi-monthly payments of \$1,000.00 on the loan for six months, he would be offered a loan modification"; however, Windham alleged Beneficial stopped accepting his payments and did not contact him to modify the loan as promised. Windham counterclaimed against Beneficial alleging violation of the SCUTPA, intentional infliction of emotional distress, negligent training and supervision, reckless and wanton training and supervision,² breach of implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation.

Beneficial responded to Windham's counterclaims, admitting it "force[-]placed insurance on its collateral and charged Windham with the cost of force-placed insurance" but it did so "as permitted by the loan documents." Moreover, Beneficial admitted Windham made some payments of \$1,000 and those payments were applied in accordance with the Mortgage.

During the discovery process, Beneficial repeatedly delayed Windham's deposition of a Beneficial corporate witness. Ultimately, the parties entered into a consent order (Consent Order) dated June 9, 2017, in which Beneficial agreed to produce the corporate witness pursuant to Rule 30(b)(6), SCRCF, on July 10, 2017. The parties also agreed that failure on the part of Beneficial to produce the witness

¹ Beneficial named Frances Windham, Jerry Coker, Carolina Bank, the United States of America by and through the Internal Revenue Service, and the Citizens Bank, in addition to Windham, in its complaint. Jon Windham, however, is the sole respondent in this appeal.

² The circuit court awarded Windham summary judgment "on his claims of negligent and reckless training and supervision," without expressly stating the term "wanton." The parties also refer to negligent and reckless training and supervision on appeal.

would "result in [Beneficial] being prohibited from offering any testimony in support of [Beneficial's] foreclosure action and also prohibit [Beneficial] from offering any testimony in defense of ... Windham's counterclaims."

Beneficial's corporate representative did not appear for the deposition on July 10, 2017, and Windham filed a motion for summary judgment, a memorandum in support, and his own affidavit. The circuit court held a hearing on August 31, 2017, and found Beneficial "failed to overcome the facts and law set forth by [Windham]" and "there is no genuine issue of material fact in this matter and that summary judgment is due to be granted in [Windham's] favor." This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202,211, 826 S.E.2d 285,290 (2019) (quoting *George v. Fabri*, 345 S.C. 440,452,548 S.E.2d 868, 874 (2001)). "When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC." *Id.* (quoting *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)).

Rule 56(c), SCRPC, provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." "On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party."

Id. at 211-12, 826 S.E.2d at 290 (alteration in original) (quoting *George*, 345 S.C. at 452, 548 S.E.2d at 874).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196,202 (Ct. App. 2008). "When reasonable minds

cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted." *Id.*

When a motion for summary judgment is made *and supported* as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRCP (emphasis added).

Our supreme court has addressed the initial burden the moving party carries to succeed on a summary judgment motion:

The grant of summary judgment is appropriate only if it is clear that no genuine issue of material fact exists, that inquiry into the facts is not desirable to clarify the application of the law, and that the movant is entitled to judgment as a matter of law.

A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.

Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418,422, 392 S.E.2d 460, 462 (1990) (citations omitted).

LAW/ANALYSIS

I. Preservation

Initially, Windham argues Beneficial did not preserve any issue on appeal. Windham alleges because Beneficial "did not object to [his] affidavit and failed to file any memorandum of law in opposition" to his motion, Beneficial failed to preserve any issue regarding the summary judgment award on appeal. We disagree.

[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."

Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

However, our supreme court has found an issue is preserved for appeal when

[t]he trial judge's order granted respondents' motion for summary judgment on *precisely* the grounds argued by respondents at the summary judgment hearing. While that order did not restate the ground on which petitioner opposed the motion—a duty based on the existence of a prior attorney-client relationship—the order explicitly addresses that argument by ruling respondents "owed no duty or obligation" to petitioner. This ruling is sufficient to preserve petitioner's argument that respondents owed a duty to petitioner, and petitioner was not required to file a Rule 59(e)[, SCRCP,] motion to alter or amend in order to preserve the issue for appeal.

Spence v. Wingate, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009).

The Consent Order precluded Beneficial from "offering any testimony in defense of ... Windham's counterclaims," and it did not file a memorandum or affidavit related to the summary judgment. However, the circuit court considered the pleadings in its review of the evidence, including Beneficial's pleadings, which attached the Agreement and Mortgage. Furthermore, the circuit court granted Windham summary judgment on the grounds Windham argued at the hearing. Therefore, the issue of whether summary judgment was proper based solely on the evidence put forth by Windham was raised to and ruled upon by the circuit court. Accordingly, we hold Beneficial's issue alleging error in the award is preserved for review on appeal.

II. Judgment by Default

Beneficial contends the circuit court erred in granting Windham summary judgment on his claims on the basis Beneficial did not submit evidence in opposition to Windham's motion for summary judgment. Beneficial asserts the circuit court granted summary judgment to Windham "by default." We disagree.

On a motion for summary judgment, the moving party carries the burden of proof even when the nonmoving party does not submit any evidence in opposition.

A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment *even though his adversary does not come forward with opposing materials.*

Standard Fire Ins. Co., 301 S.C. at 422, 392 S.E.2d at 462 (emphasis added) (citations omitted).

Windham submitted a memorandum and an affidavit in support of his motion for summary judgment, and the circuit court heard the motion on August 31, 2017. The circuit court's order provided it had reviewed "the pleadings, affidavits on file, [Windham's] brief, and arguments of counsel." Additionally, Beneficial expressly

agreed in the Consent Order if it did not provide a Rule 30(b)(6), SCRCF, witness it would be prohibited "from offering any testimony in defense of ... Windham's counterclaims." We, therefore, find Beneficial's argument the circuit court granted summary judgment by default to be without merit.

III. Burden of Proof

Beneficial contends the circuit court erred in granting summary judgment to Windham because he did not meet his burden of proof required by Rule 56(c), SCRCF. We agree in part, disagree in part, and address each cause of action in turn.³

A. SCUTPA

Beneficial maintains the circuit court erred in granting summary judgment to Windham on his counterclaim for a violation of the SCUTPA. We disagree.

The SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006) (quoting *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005)). "In order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public interest. 'An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace.'" *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 453, 814 S.E.2d 643, 655 (Ct. App. 2018) (quoting *Noack Enters., Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 349-50 (Ct. App. 1986)), *cert. denied*, S.C. Sup. Ct. Order dated Nov. 9, 2018.

³ On appeal, Beneficial argues Windham is not entitled to summary judgment on his claim of breach of the implied covenant of good faith and fair dealing, in addition to Windham's counterclaims addressed herein. However, Windham did not seek summary judgment on this claim, and the circuit court did not award summary judgment on this claim.

"After alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the plaintiff has proven an adverse effect on the public interest ... the plaintiff need not allege or prove anything further in relation to the public interest requirement." *Crary v. Djebelli*, 329 S.C. 385,388,496 S.E.2d 21, 23 (1998).

An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Id. at 453-54, 814 S.E.2d at 655 (quoting *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004)). However, these are not the only two ways impact on the public interest may be shown, rather "each case must be evaluated on its own merits." *Crary*, 329 S.C. at 388, 496 S.E.2d at 23.

In the present case, we evaluate whether Windham proved there was no genuine issue of material fact regarding his SCUTPA counterclaim. Windham asserted Beneficial's conduct violated the SCUTPA by (1) "foreclosing on a tract of land which [Beneficial] knows, or should know, was not to be secured by any mortgage between [Beneficial] and [Windham]"⁴; (2) "force-placing insurance on [Windham's] property when [Windham] already had insurance, causing [Windham's] monthly payment to increase"; (3) "taking monthly payments from [Windham] and applying them all to alleged interest and fees"; (4) "unilaterally ceasing acceptance of payments from [Windham] on his loan"; and (5) "refusing to offer [Windham] a loan modification, even after stating it would do so."

⁴ Windham asserted in his answer and counterclaim the Mortgage wrongly covered one and one-half acres, even though Windham "alerted the loan officer that the Note was only to be secured by a mortgage on one acre of [his] property, not the entire 1.5 acre lot." The Mortgage Windham signed, however, indicated the property subject to the Mortgage is "approximately 1 ½ acres."

Windham asserted in his affidavit he maintained the required insurance on his property and it was in effect when Beneficial force-placed insurance on the property. He also attested he repeatedly provided proof the insurance was in effect to Beneficial. Windham's counterclaim alleged the actions of Beneficial "have a real and substantial potential for repetition and are a threat to the public interest," arguing Beneficial's actions "were in line with its policies and procedures," Beneficial "services numerous loans in South Carolina, as well as across the country," and Beneficial's actions were "done under the authority of the same policies, procedures, and leadership that are in effect relating to every other loan managed, serviced and/or written by [Beneficial]." Significantly, in its motions to dismiss and reply, Beneficial "admit[ted] that it force placed insurance on its collateral and charged Windham with the cost of force-placed insurance, as permitted by the loan documents."

We recognize the information provided to the circuit court consisted of the pleadings, Windham's affidavit and memorandum, and a brief hearing and did not include exhibits or testimonial evidence; however, accepting this uncontroverted proof as presented, and giving the benefit of all reasonable inferences to Beneficial as we must when reviewing a grant of summary judgment, we find there is no dispute-Windham met his burden of proof on his counterclaim for a violation of the SCUTPA by Beneficial. In its answer, Beneficial admitted it was in the business of providing mortgages to homeowners. According to the pleadings and Windham's affidavit, Beneficial force-placed hazard insurance on Windham's home in breach of its contract with Windham, prejudicing Windham by raising his mortgage payments so substantially Windham was no longer able to pay down his principal. Instead, Windham found himself with a pending foreclosure. Beneficial's unfair practice of force-placing hazard insurance in violation of a mortgage contract has the potential for repetition. See *Crary*, 329 S.C. at 388, 496 S.E.2d at 23 (1998) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). Therefore, we affirm the circuit court's grant of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA.

B. Fraud

Beneficial contends the circuit court erred in granting summary judgment to Windham on his counterclaim for fraud. We agree.

Windham asserted Beneficial committed fraud by orally representing to him if he made \$1,000 payments twice each month for six months, Beneficial would modify his loan; however, Beneficial did not modify the loan.

To establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence: (1) a representation of fact; (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. The failure to prove any element of fraud or misrepresentation is fatal to the claim.

Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007) (citations omitted). "Failure to prove any element of fraud is fatal to the action. Furthermore, '[f]raud cannot be presumed; it must be proved by clear, cogent, and convincing evidence.'" *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002) (citation omitted) (quoting *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 374, 404 S.E.2d 912, 917 (Ct. App. 1991)).

Our supreme court's decision in *Turner v. Milliman*, 392 S.C. 116, 708 S.E.2d 766 (2011), provides targeted guidance. In *Turner*, the supreme court elaborated upon the precept that neither a broken promise nor making a statement to do something in the future, that is not done, can qualify as a fraudulent or negligent representation: "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." *Id.* at 123, 708 S.E.2d at 769-70 (quoting *Sauner v. Pub. Serv. Auth. of SC*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003)).

In addressing the difference between that which is actionable or that which does not qualify as fraudulent, the *Turner* court noted "to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events." *Id.* at 123, 708 S.E.2d at 770. On the other hand, "where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is fraudulent misrepresentation of a fact, and actionable as such." *Id.* (quoting *Davis v. Upton*, 250 S.C. 288,291, 157 S.E.2d 567, 568 (1967)).

The *Turner* court also noted breaking a contract does not constitute fraud, it is rather the component of making a representation without any intention of going through with the agreement that is actionable. *Id.* at 123-24, 708 S.E.2d at 770. The party alleging such fraud must therefore provide additional evidence than simply stating his opponent did not do that which he promised to do: "Evidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform.' An inference of a lack of intent to perform a promise can only be made when nonobservance of a promise is coupled with other evidence." *Id.* (quoting *Woods v. State*, 314 S.C. 501,506,431 S.E.2d 260,263 (Ct. App. 1993)). See also *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 526-27, 455 S.E.2d 183, 187 (Ct. App. 1995) ("Not every statement made in the course of a commercial dealing is actionable at law. It is well settled that to establish actionable fraud there must first be a false representation. The false representation must be predicated upon misstatements of fact rather than upon an expression of opinion, an expression of intention or an expression of confidence that a bargain will be satisfactory." (citations omitted)).

Conversely, this court has reversed the award of summary judgment for fraud when the record contained testimony from an employee admitting intentional wrongdoing. *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 480-81, 458 S.E.2d 431,437 (Ct. App. 1995). With such testimony, this court found "there was sufficient evidence to create a question of fact as to whether or not [the respondent] had made promises to the [appellants] with the present intention not to fulfill them." *Id.* at 481,458 S.E.2d at 437; see also *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435,440,339 S.E.2d 142, 146 (Ct. App. 1985) ("The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date. Inferences of fact, like fullbacks on football teams, do not ordinarily run backward." (citations omitted)).

Windham has not put forward evidence that Beneficial acted with knowledge that it had no intention of keeping its promise to modify Windham's loan at the time the representation was made. Therefore, we reverse the circuit court's award of summary judgment on Windham's counterclaim for fraud in order for further discovery and litigation to resume.

C. Negligent Misrepresentation

Beneficial argues the circuit court erred in granting summary judgment to Windham on his counterclaim for negligent misrepresentation. We agree.

Windham summarily stated in his answer and counterclaim for negligent misrepresentation Beneficial made a false representation in the course of its business and Beneficial had a pecuniary interest in making those statements and owed a duty to Windham to communicate truthful information, which Beneficial breached. Further, Windham contended he relied upon Beneficial's representations that if he made the \$1,000 payments, Beneficial would offer a loan modification. Windham asserted the result of Beneficial's actions caused him "pecuniary losses including mental anguish, physical sickness and suffering, embarrassment and humiliation."

In a claim for negligent misrepresentation, a plaintiff must prove that:

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

Robertson, 350 S.C. at 349, 565 S.E.2d at 314 (quoting *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 266-67, 536 S.E.2d 399, 405 (Ct. App. 2000)).

"Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation any more than it is sufficient to prove fraudulent misrepresentation." *Winburn*, 287 S.C. at 442, 339 S.E.2d at 147.

In *Sauner*, 354 S.C. at 408, 581 S.E.2d at 167, the supreme court determined a company's statement about what it would do in the future did not constitute a misrepresentation.

[The company's] statement that it would establish fair market value for the lots is a statement about the future. The appraisals had not been conducted at the time it made the statement. As such, it is not actionable as a misrepresentation. To be actionable, "the representation must relate to a present or pre-existing fact and be false when made."

Id. (quoting *Koontz v. Thomas*, 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct. App. 1999)). The court held, "Representations based on statements as to future events or unfulfilled promises are not usually actionable." *Id.*

As with the claim for fraud, Windham did not prove Beneficial made a false representation. Windham asserted Beneficial offered him a loan modification if he made the payments. We find this statement was a representation as to a future event, and Windham did not prove the representation was false when made. Therefore, we reverse the finding of the circuit court granting summary judgment to Windham on his claim for negligent misrepresentation.

D. Intentional Infliction of Emotional Distress

Beneficial contends the circuit court erred in granting summary judgment to Windham on his counterclaim for intentional infliction of emotional distress. We agree.

Our supreme court set forth the elements of the cause of action for the intentional infliction of emotional distress in *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007) (quoting *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981)):

- (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
- (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
- (3) the actions of the defendant caused plaintiffs emotional distress; and
- (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

"[W]hen ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim for intentional infliction of emotional distress." *Id.* at 358, 650 S.E.2d at 71.

Our supreme court also established the claim of intentional infliction of emotional distress carries with it a higher level of proof:

To permit a plaintiff to legitimately state a cause of action by simply alleging, "I suffered emotional distress" would be irreconcilable with this [c]ourt's development of the law in this area. In the words of Justice Littlejohn, the court must look for something "more"-in the form of third party witness testimony and other corroborating evidence-in order to make a prima facie showing of "severe" emotional distress.

Id. at 358-59, 650 S.E.2d at 72.

The *Hansson* court found the court of appeals erred in reversing the award of summary judgment to Hansson's employer on Hansson's intentional infliction of emotional distress cause of action when Hansson alleged losing sleep, a diagnosis of grinding his teeth while sleeping, and expenses for dental work. *Id.* at 359-60, 650 S.E.2d at 72. The supreme court ruled Hansson "failed to provide any legally sufficient evidence in this case to show that his resulting emotional distress was

'severe' within the contemplation of this [c]ourt's mental anguish jurisprudence." *Id.*

Here, Windham claimed intentional infliction of emotional distress in his answer and counterclaims, asserting Beneficial either "intentionally or recklessly inflicted severe emotional distress," or knew such would result from its conduct. Windham asserted Beneficial's conduct was "part of a conscious scheme ... to take [Windham's] home away from him after [Beneficial] was the cause of the initial delinquency by wrongfully force-placing insurance on [Windham's] home." Windham alleges the resulting emotional distress was "so severe that no reasonable person could be expected to endure it" and included "mental anguish, anxiety, and humiliation" and seeks actual and punitive damages. In his affidavit, Windham asserted:

I have spent the last three years suffering with the constant fear that my home was going to be taken away from me I have spent the last several years in emotional distress, dealing with anxiety, embarrassment, humiliation, and fear. I have also suffered physical distress, including loss of sleep, headaches, pain and suffering.

Windham did not sufficiently meet his burden to prove his distress was so extreme to render summary judgment of his claim appropriate. "Under the heightened standard of proof for emotional distress claims emphasized in *Ford*, [276 S.C. at 161, 276 S.E.2d at 778,] a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions." *Hansson*, 374 S.C. at 358, 650 S.E.2d at 72. Therefore, we reverse the circuit court's award of summary judgment on Windham's claim for intentional infliction of emotional distress.

E. Negligent and Reckless Training and Supervision

Finally, Beneficial asserts the circuit court erred in granting summary judgment to Windham on his counterclaim against Beneficial for the negligent and reckless training and supervision of its employees. We agree.

In his memorandum in support of his motion for summary judgment, Windham asserted Beneficial "should have known that its failure to properly supervise the individuals to which it assigned [Windham's] loan could result in the conduct happened upon [Windham]."

In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages.

Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006).

Our supreme court "has long noted the 'troublesome question of the distinction to be made in the degrees of negligence.'" *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Hicks v. McCandlish*, 221 S.C. 410, 414, 70 S.E.2d 629, 631 (1952)). "[N]egligence is the failure to use due care,' i.e., 'that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances.' It is often referred to as either ordinary negligence or simple negligence." *Id.* (alteration by court) (quoting *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973)).

"Recklessness implies the doing of a negligent act knowingly"; it is a "conscious failure to exercise due care." If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning-the conscious failure to exercise due care. The element distinguishing actionable negligence from willful tort is inadvertence.

Id. (quoting *Yaun v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)).

"[N]egligence may be so gross as to amount to recklessness, and when it does, it ceases to be mere negligence and assumes very much the nature of willfulness."

Id. (quoting *Jeffers v. Hardeman*, 231 S.C. 578, 582-83, 99 S.E.2d 402, 404 (1957)).

A plaintiff in a civil case may have a number of causes of action at his disposal through which he may seek to hold a tortfeasor or other responsible party liable for his injury, and this is no less the case when a plaintiff alleges that he has been injured by an employee acting in the course and scope of his employment.

James v. Kelly Trucking Co., 377 S.C. 628,631,661 S.E.2d 329,330 (2008).

Just as an employee can act to cause another's injury in a tortious manner, so can an employer be independently liable in tort. In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public.

Id.

We note the decision in *Rickborn v. Liberty Life Insurance Co.* also provides guidance. 321 S.C. 291,468 S.E.2d 292 (1996). In *Rickborn*, our supreme court found the negligence of a life insurance company's employee "was imputable to" the company. *Id.* at 305, 468 S.E.2d at 301. The supreme court considered acts of wrongdoing on the part of the employee that were known to the company, such as knowledge an application for insurance was incomplete, failure to determine a corrected application was submitted, and evidence the company knew the employee had "mishandled the preparation of other applications and was considered by [the company] to be a below average sales agent." *Id.* at 303, 468 S.E.2d at 299. The supreme court found these facts proved the company "was alerted to the fact that [the employee's] carelessness could cause harm and, therefore, it breached a duty of care owed to [the applicant] by failing to properly supervise [the employee]." *Id.*

Here, the record does not support Windham's award of summary judgment for negligent or reckless supervision and training. Windham offered only his general and unspecific assertion Beneficial failed to train and supervise its agents, without any evidence of acts of wrongdoing by an employee, and without evidence an employee's actions were imputable to Beneficial. Reviewing the evidence in the light most favorable to Beneficial, Windham failed to show there was no genuine issue of material fact as to whether Beneficial negligently or recklessly trained and supervised its employees. Accordingly, we reverse the circuit court's grant of summary judgment on Windham's negligent and reckless training and supervision counterclaim against Beneficial.

CONCLUSION

We affirm the circuit court's award of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA, finding Windham proved there was no genuine issue of material fact regarding this claim. We reverse the circuit court's award of summary judgment to Windham on his counterclaims for fraud, negligent misrepresentation, intentional infliction of emotional distress, and negligent and reckless training and supervision because Windham failed to prove there were no genuine issues of material fact regarding these counterclaims, and we remand these claims to the circuit court. Therefore, the circuit court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, C.J., and HILL, J., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Judge

Common Pleas Case No. 2020-CP-14-00023

RECEIVED

Nov 06 2020

SC Court of Appeals

New Residential Mortgage, LLC, ...Plaintiff,

v.

Todd S. Crawford; Tricia L. Crawford; William T. Geddings, Jr.; Jane U. Geddings;
and USAA Federal Savings Bank, ...Defendants,

of whom William T. Geddings, Jr., and Jane U. Geddings are the.....Appellants,

and

New Residential Mortgage, LLC and USAA Federal Savings Bank
are the.....Respondents.

NOTICE OF APPEAL

The Appellants, William T. Geddings, Jr., and Jane U. Geddings, appeal from the orders of the Honorable Kristi F. Curtis filed on September 3, 2020, and October 9, 2020, issued in the above-captioned action. Copies of these orders are submitted to the Court of Appeals herewith. Appellants received written notice of the entry of these orders on the date of their filing.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Judge

Common Pleas Case No. 2020-CP-14-00023

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SC Court of Appeals

New Residential Mortgage, LLC, ...Plaintiff,

v.

Todd S. Crawford; Tricia L. Crawford; William T. Geddings, Jr.; Jane U. Geddings;
and USAA Federal Savings Bank, ...Defendants,

of whom William T. Geddings, Jr., and Jane U. Geddings are the.....Appellants,

and

New Residential Mortgage, LLC and USAA Federal Savings Bank
are the.....Respondents.

PROOF OF SERVICE

I certify that I have served the foregoing notice of appeal on the date given
below by emailing it to opposing counsel at the addresses noted below.

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November 6, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 12 2020

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

SC Court of Appeals

Kristi F. Curtis, Circuit Judge

Appellate Case No. 2020-001490
Common Pleas Case No. 2020-CP-14-00023

New Residential Mortgage LLC, ... Plaintiff,

v.

Todd S. Crawford, Tricia L. Crawford, William T. Geddings, Jr., Jane U. Geddings,
and USAA Federal Savings Bank, ... Defendants,

Of Whom William T. Geddings, Jr. and Jane U. Geddings are the Appellants,

and

New Residential Mortgage LLC and USAA Federal Savings Bank are the
..... Respondents.

NOTICE OF CROSS-APPEAL

Respondent-Appellant, New Residential Mortgage LLC, cross-appeals from the order of the Honorable Kristi F. Curtis filed September 3, 2020. Respondent-Appellant received a notice of appeal from Appellants-Respondents on November 6, 2020. This cross-appeal is contingent on the Court's determination that it has appellate jurisdiction over this appeal, and Respondent-Appellant does not waive any right to seek dismissal of the appeal for lack of jurisdiction.

November 11, 2020.


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Judge

Appellate Case No. 2020-001490
Common Pleas Case No. 2020-CP-14-00023

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SC Court of Appeals

New Residential Mortgage LLC, ... Plaintiff,

v.

Todd S. Crawford, Tricia L. Crawford, William T. Geddings, Jr., Jane U. Geddings,
and USAA Federal Savings Bank, ... Defendants,

Of Whom William T. Geddings, Jr. and Jane U. Geddings are the Appellants,

and

New Residential Mortgage LLC and USAA Federal Savings Bank are the
.....Respondents.

PROOF OF SERVICE

I certify that I served the notice of cross-appeal by depositing a copy of it on the date shown below in the United States mail, postage prepaid, and by electronic mail, addressed as follows:

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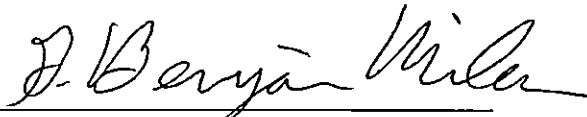
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November 11, 2020.


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November 11, 2020

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SC Court of Appeals

VIA FEDERAL EXPRESS

South Carolina Court of Appeals
Attn: Clerk of Court
1220 Senate Street
Columbia, SC 29201

RE: New Residential Mortgage LLC v. Todd S. Crawford, et al.
Appellate Case No. 2020-001490 – Common Pleas case No. 2020-CP-14-00023

Dear Clerk:

Enclosed please find an original plus two copies of Respondent-Appellant, New Residential Mortgage's Notice of Cross-Appeal for filing in connection with the above-referenced action. I am also enclosing a firm check in the sum of \$250.00 as well as a return metered envelope. Once filed, please return to me the filed copy.

Thanking you in advance. Should you have any questions, please do not hesitate to contact our office.

Sincerely,

Bradley Arant Boult Cummings LLP

Marta E. Dellova

Marta E. Dellova
Legal Assistant to G. Benjamin Milam

/med

Enclosures

cc: All Parties Listed on Certificate of Service (w/Enc./Via US and Electronic Mail)

4831-5884-5137.1

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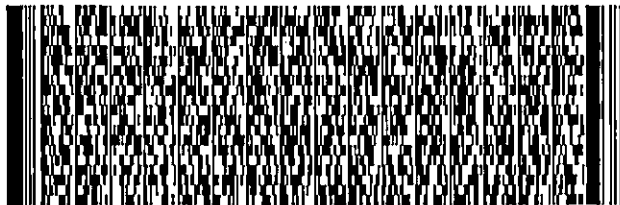
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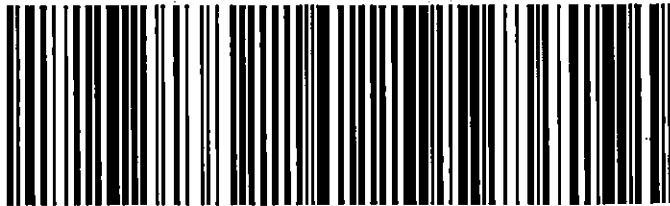
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SC Court of Appeals

Record on Appeal p. 194

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Dec 13 2021

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v.

Todd S. Crawford, Tricia L. Crawford, William T. Geddings, Jr., Jane U. Geddings,
and USAA Federal Savings Bank, ... Defendants,

Of Whom William T. Geddings, Jr. and
Jane U. Geddings are the Appellants-Respondents,

and

New Residential Mortgage LLC is the Respondent-Appellant,

and USAA Federal Savings Bank is the Respondent.

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,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

Harrison, Radeker & Smith, P.A.

Attorney for Appellants-Respondents