Homeownership Issues for Low Income Seniors

I. Introduction

A. Homeownership challenges and opportunities specific to seniors

1. Dangers/Challenges disproportionately affecting seniors

a. Home solicitation as a threat to homeownership - Seniors are home during the day and often have home equity or own homes outright. Through home solicitation, they are targeted for

(1) Door to Door sales and financing (water conditioners, solar panels, roof repairs)
(2) PACE loans (creating dangerous super liens)
(3) Other home improvement sales and financing – danger from fraudulently induced mortgages and construction liens

b. Reverse mortgage challenges (origination, servicing)
c. Cognitive / health decline - Danger of default and limits ability to pursue legal rights
d. Death of a spouse – Decrease in income, wrongful servicer refusal to communicate with heirs, limitations on loss mitigation, and default traps for reverse mortgage borrowers

B. Opportunities for preserving homeownership

1. Chapter 13 Bankruptcy - Retirement income provides a reliable source for funding a Chapter 13 Plan (non-senior low income homeowners often do not have a reliable source of sufficient income to fund a plan)
2. Home repair programs available to assist low income seniors (SELF/HALO)
3. Reverse mortgage as means of paying off mortgage/liens and reducing costs (changes in eligibility make this a much less likely option)
4. Elderly Mortgage Assistance Program ("ELMORE") as means of curing property charge defaults of reverse mortgages (June 28, 2019 is last day for new applicants and August 30, 2019 is last day for submitting documents)

II. Reverse Mortgages

A. Two types (1) HECM and (2) Proprietary (not being discussed)

B. HECM Reverse Mortgage Basics:

1. Insured by FHA and governed by Federal Statutes/Federal Regulations, Mortgagee Letters and HUD HECM Handbook Borrower must be 62 years old
2. Property must be Borrower's primary residence

3. Borrower must not be delinquent on a federal debt
4. Borrower must be on title to residential property (but after 8/4/2014, Borrower does not have to be sole owner)
5. After 8/4/2014, Non-Borrowing Spouses and Non-Borrowing Owners must sign as Mortgagors and agree to HECM
6. Residence must pass inspection
7. Based on repairs required for Mortgage, repairs will need to be done before closing or with funds set aside at closing for repairs
8. Amount of Initial Principal Balance of Mortgage is based on:

    a. Appraised value of home
    b. Prevailing interest rates
    c. Age of youngest Borrower (loan pre-8/4/2014) or youngest spouse (loan after 8/4/2014)

9. Reverse Mortgages are only approved if after payment of high closing costs and any mandatory set aside for property charges, there will be enough equity that during the life expectancy of the youngest borrower or spouse, the loan balance will not increase to more than the value of the property.
10. Loan balance increases over time based on interest, monthly service fee, and mortgage insurance – Per FHA insurance, when loan balance reaches 98% of value of property, loan is assigned to HUD
11. Only payments required by Mortgage are property charges, such as property tax, homeowners' insurance, association fees
12. After 8/4/2014, Mortgage loan may require Mandatory Set Aside (fully or partially funded) for property charges based on review of Borrower's credit and ability to pay those charges as they come due
13. Loan is nonrecourse (no personal liability for debt)
14. Comes due on Triggering Event, but latest Triggering Event is later of death of Borrower or death of spouse, if spouse was married to Borrower at time of loan (HECM Final Rule: 82 Fed. Reg. 7094 (effective September 19, 2017)
15. After death of Borrower, mortgage may be satisfied by heirs for 95% of fair market value

C. Most common HECM servicing challenges

1. Three primary ways to default- failure to occupy property, failure to maintain property charges, death BUT the rules change at the whim of the servicer
2. Property charge delinquency (need Secretary approval – rubber stamped through efforts of HUD agent)

    a. Seniors often are accustomed to their now-non-existent escrow account taking care of charges (made more confusing if first year charges are paid through origination)
    b. Seniors often experience diminishing mental capacity to take care of charges

c. Homes age also, insurance can be difficult to obtain when homes need even minor but unaffordable improvements
d. Insurance premiums and tax payments may be prematurely and improperly made by servicer
e. False charges are assessed (.27 cent foreclosure)
f. ELMORE provides repayment opportunities but program is ending shortly
g. Repayment plans are confusing and often not properly handled by servicer
h. At Risk Exemption available for borrowers' over 80 years of age with a critical circumstances

3. Property no longer principal residence of Borrower(s) (need Secretary approval – rubber stamped through agent of HUD)

a. Ceases to be principal residence of all borrowers
b. For a period of more than 12 consecutive months the property is not the principal residence of at least one borrower as a result of physical or mental illness
c. Non occupancy certificate defaults – defaults caused by failing to return a card to an entity with which the borrower is not familiar, an action not required by the note or mortgage

4. Death of Borrower

a. Pre Bennett/Plunkett confusion between the Regs and Statutes (surviving borrower – surviving spouse)
b. Pre 2014 - Statute – 12 U.S.C. §1715z-20(j) loan obligation deferred until "homeowners' death"
c. Pre 2014 Reg - due and payable when "mortgagor" dies 24 C.F.R. §206.27(c)(1)
d. Mortgagee Optional Election (new language in mortgage/note – originated after August 4, 2014) (ML 2014-07 – Final Rule – 24 C.F.R. §206.27(c)(3) death of last eligible non-borrowing spouse – ML 2015-15)
e. How works in practice
f. *Edwards v. Reverse Mortgage Solutions, Inc.* 187 So. 3d 895 (Fla. 3rd DCA 2016) and *Smith v. Reverse Mortgage Solutions, Inc.* 200 So.3d 221, (Fla. 3rd DCA 2016); *Onewest Bank, FSB v. Palermo,* 2018 WL 1832326 ---So. 3d --- April 18, 2018); *Estate of Jones v. Live Well Financial, Inc.* 902 F. 3d 1337 (11th Cir. 2018)

5. Curing defaults should be easy but is made more difficult than necessary or required

D. Foreclosure defense strategies – a peek behind the curtain is always good (deposition strategies)

1. Property Charge defaults

a. Proper notices and loss mitigation referrals provided
ML 2015-11 – loss mitigation discretionary/but if offered strict parameters apply [and see 12 U.S.C. §1715u(a)]
b. Double insurance purchased
c. Did servicer obtain HUD approval (based upon accurate information)
d. Premature payment of taxes/FP insurance premiums (Reg X notice provided)?
e. Premature foreclosure after "due and payable" notice
f. ELMORE
g. At risk exemption (See ML 2015-11)

2. Non-occupancy defaults

a. Usually comes down to a battle of the propriety of the non-occupancy certificates and other illegal "requirements"
b. Absence temporary? Less than 12 consecutive months
c. Track who knew what/when
d. Default cured by service?

3. Death

a. Different strategies depending on who is being sued
b. Surviving spouses have rights, were they informed
c. Heirs have rights, were they informed
d. New language in 2014 mortgages/notes
e. MOE

E. Chapter 13 Bankruptcy

1. Repay property charges. Based on language of mortgage, attorneys' fees and costs need not be repaid so long as no reinstatement in past 2 years.
2. Heir of borrower pays 95% of fair market value over term of plan in order to satisfy reverse mortgage. (*In re: Harmon* 2015 WL 8249995 (M.D. Fla. December 2, 2015)

III. Home Improvement Exploitation

1. Common elements of abusive transaction

1. Home solicitation
2. Misrepresentation & failure to provide copy of documents
3. Secured by home/mortgage
4. Insufficient licensing
5. Failure to get permits
6. Fraudulent notarization

7. Immediate commencement of work
8. Overcharging for materials and work
9. High finance charges, including high interest rate

2. Litigation / Defense Strategies

1. Truth in Lending / Home Ownership Equity Protection Act
2. Violation of state consumer protection statutes governing home solicitation sales, retail installment contracts, home improvement contracts, UDAP
3. Breach of Contract
4. Equitable remedies, including rescission, fraudulent inducement, lack of consideration

3. Bankruptcy remedies

1. Objection to claim in Chapter 13 / File in bankruptcy case and bring adversary pursuing defenses to contract, including defenses to the validity, extent or priority of the lien.
2. If junior mortgage or construction lien that is unsecured, bring action to strip in bankruptcy and discharge debt
3. If determination that some amount owed, can pay through Chapter 13 Plan

IV. PACE loans

A. Florida Statutes §163.08 authorizes counties, municipalities, and special districts to adopt PACE loan procedures

1. Shady sales tactics coupled with a lack of consumer protections lead to very dangerous "super liens"
2. Shoddy workmanship
3. Spiked loans (three day right of rescission not provided)
4. Forged signatures on loans, notices of commencement and notices of completion
5. Holder in Due course problems (FTC protections not provided)
6. Lenders complicit in fraud and misrepresentation regarding loan amounts, lien priority

V. Chapter 13 Bankruptcy

A. Opportunity to cure default on secured debt over thirty-six to sixty months

B. Opportunity to strip unsecured junior liens

C. Opportunity for heir of reverse mortgage borrower to pay 95% of value of home over plan period

D. Regarding owned mobile homes on rented lots:

1. If loan older than 910 days, can pay value of mobile home over up to 60 months at reduced interest rate;
2. If loan newer than 910 days, can pay reduced interest rate;
3. Can make prompt cure of lot rent default, with extended prompt cure possible depending on facts.

E. Opportunity to object to claims and file adversary proceedings provides means of asserting defenses to liens and mortgages

F. Removal of state court foreclosure action to bankruptcy court

G. Bankruptcy rules and Middle District of Florida bankruptcy local rule provide affordable means for incompetent debtor-homeowner to file

H. Programs to assist low income and pro se debtors in the Middle District of Florida

1. Mortgage mediation program in Bankruptcy Court for the Middle District of Florida provides opportunity for modification while making affordable plan payment
2. Clinics / Prescription pad
3. Florida Bar Rules facilitating representation of indigent persons

    a. Chapter 11 - Rules Governing the Law School Practice Program
    b. Chapter 12 - Emeritus Lawyers Pro Bono Participation Program
    c. Chapter 13 - Authorized Legal Aid Practitioners Rule

4. Bankruptcy Court for the Middle District of Florida Rule 2092 - Appearance by Law Students
5. 11th Circuit law regarding leniency toward pro se litigants
6. Other resources:
    a. Chapter 7 flow chart (copy attached)
    b. United States District Court for the Middle District of Florida (FLMD) lawsuit flow chart: https://www.flmd.uscourts.gov/civil-case-flowchart
    c. FLMD pro bono manual: https://www.flmd.uscourts.gov/sites/flmd/files/documents/mdfl-guide-for-proceeding-without-a-lawyer.pdf

Reverse Mortgage Litigation and Pre-Litigation Documents

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2018-CA-3734

NATIONSTAR MORTGAGE, LLC DBA CHAMPION MORTGAGE COMPANY,
Plaintiff,
vs.

JOAN T. HERNDON, ET AL.,

Defendants.
_____/

AMENDED ANSWER AND AFFIRMATIVE DEFENSES

The Defendant, JOAN T. HERNDON ("Ms. Herndon") through her undersigned attorneys, and for her Amended Answer and Affirmative Defenses to Plaintiff's Verified Complaint, hereby states:

1. Admitted for jurisdictional purposes only. Denied that Plaintiff is entitled to the relief requested.

2. Admitted for jurisdictional purposes only.

3. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

4. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

5. Admitted.

6. Denied.

7. Denied. Ms. Herndon is identified as a borrower on the mortgage and therefore no default has occurred.

8. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

9. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

10. Denied.

11. Denied. Ms. Herndon's interest is superior to Plaintiffs.

12. Denied.

13. Denied.

14. Denied.

15. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

16. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

17. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

18. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

19. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

20. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

21. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

22. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

23. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

24. The Defendant is without knowledge sufficient to admit or deny this allegation and therefore denies the same.

AFFIRMATIVE DEFENSES

First Affirmative Defense – No Default

1. The Plaintiff has filed the instant action seeking to foreclose on a certain mortgage on the grounds that Dennis Herndon, Ms. Herndon's husband, passed away.

2. However, Ms. Herndon is also identified as a Borrower in the mortgage. Therefore, until she passes away as well, there is no default under the terms of the mortgage.

3. Therefore, there are no grounds to accelerate the loan and foreclose.

Second Affirmative Defense – Failure to Provide Required HECM counseling

4. The loan that is the subject of the above-styled lawsuit is a Home Equity Conversion loan secured by a Home Equity Conversion Mortgage ("HECM"), insured by the Federal Housing Administration and regulated by the Department of Housing and Urban Development.

5. The stated congressional intent for the HECM program is "to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income, through the

insurance of home equity conversion mortgages to permit the conversion of a portion of accumulated home equity into liquid assets." 12 U.S.C. § 1715z-20(a)(1).

6. As such, HECM mortgages are subject to heightened servicing requirements, regulations, and agency oversight. HECM servicing is regulated by 24 C.F.R. § 206, *et. seq.*; HUD Handbook 4235.1 REV – 1; HUD Handbook 4330.1 REV – 5; and Mortgagee Letters periodically issued by HUD pursuant to its administrative authority.

7. Plaintiff was required to provide Ms. Herndon with pre-loan execution counseling. United States Department of Housing and Urban Development, *FHA Reverse Mortgages (HECMs) for Seniors*, www.hud.gov/program_offices/housing/sfh/hecm/hecmabou. *See, e.g.*, 24 C.F.R. §206.41. See also Mortgagee Letter 2004-25.

8. Neither Ms. Herndon nor her now deceased husband Dennis Herndon were ever provided pre-loan execution counseling. Rather, just 8 months shy of her 62nd birthday, which would allow her to qualify for a reverse mortgage loan, Ms. Herndon was induced into signing a deed to her husband relating to her homestead.

9. Had this counseling been offered or provided, Ms. Herndon would have not executed the deed or subsequent loan documents.

10. As a result of the foregoing, Plaintiff is not entitled to the equitable remedy of foreclosure.

Third Affirmative Defense – Failure to Provide Proper Loss Mitigation or Loan Servicing

11. HECM regulations provide that HECM borrower and their heirs have the right to pay off the HECM at 95% of the appraised value of the property. 24 C.F.R. §206.125(c). The regulations also provide that any sale by a mortgagor is intended to include "the mortgage's estate or personal representative. 24 C.F.R. §123(b). HUD interpretations clarify that a sale includes "any

post-death conveyance of the mortgage property (even by operation of law) to the borrower's estate or heirs (including a surviving heir who is not obligated on the HECM note." See also Mortgage Paragraph 9(d)(ii), Mortgagee Letter 2015-10, HUD Administration of Insured Home Mortgage Handbook 4330.1.

12. Ms. Herndon was not advised of her right to pay off the loan at 95% of the appraised value of the property.

13. As a result of the foregoing, Plaintiff is not entitled to the equitable remedy of foreclosure.

Fourth Affirmative Defense – Failure to Provide Proper Loss Mitigation or Loan Servicing

14. Alternatively, HECM loan servicing guidelines also provide that a HECM surviving, "non-borrowing" spouse has the right to seek an option called the "Mortgagee Optional Election." This policy allows surviving spouses to remain in the home after the death of the last "borrower." *See* Mortgagee Letter 2015-15.

15. Plaintiff failed to inform Ms. Herndon that she may qualify for this opportunity and maintains it had no responsibility to do so. Plaintiff did not even consider Ms. Herndon for this option or provide Ms. Herndon with the information necessary to pursue this opportunity to stay in her home after the death of her long-time spouse.

16. As a result of the foregoing, Plaintiff is not entitled to the equitable remedy of foreclosure.

ATTORNEYS FEES

Defendant is entitled to court costs and attorney's fees pursuant to §57.105(7), *Fla. Stat.*

WHEREFORE, the Defendant, Joan Herndon, respectfully requests that this court enter a judgment in Defendant's favor, award Defendant's counsel attorney's fees and costs, and grant such other and further relief as this Court deems proper.

Respectfully submitted,

/s/Michael J. Pelkowski
Michael J. Pelkowski (Fla. Bar 62232)
Michael.Pelkowski@jaxlegalaid.org
Lynn Drysdale, Esquire (Fla. Bar 508489)
Lynn.drysdale@jaxlegalaid.org
Jacksonville Area Legal Aid, Inc.
126 West Adams Street
Jacksonville, Florida 32202
(904) 356-8371, Ext. 306
Fax (904) 515-2662
Jalaconsumer@jaxlegalaid.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has served this 10th day of December, 2018 via email to Karissa.chin-duncan@gmlaw.com and gmforeclosure@gmlaw.com and all other parties via eportal.

Respectfully submitted,

/s/Michael J. Pelkowski
Attorney

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2012-CA-007862

ONEWEST BANK, F.S.B.,
Plaintiff,
vs.

JOSIE MARIE (DECEASED) POLLACK, *et al.*
Defendants.

SECOND AMENDED ANSWER AND AFFIRMATIVE DEFENSES

The Defendant, Linda McClamma ("Ms. McClamma") through her undersigned attorneys, and for her Second Amended Answer and Affirmative Defenses to Plaintiff's Amended Mortgage Foreclosure Complaint ("Complaint") filed herein for the purposes of amending her Answer and Affirmative Defenses to address the substitution of the party Plaintiff. In response to the Plaintiff, Bank of New York Mellon Trust Company, N.A. as Trustee for Mortgage Assets Management Series 1 Trust's ("U.S. Bank" or "Plaintiff") Amended Mortgage Foreclosure Complaint, Ms. McClamma says:

1. Ms. McClamma admits the allegations contained in Paragraph 1 of Plaintiff's complaint for jurisdictional purposes only and denies that Plaintiff is entitled to the relief sought therein.

2. Ms. McClamma denies the allegations contained in Paragraph 2 of Plaintiff's complaint. Plaintiff claims it is the "holder" of the note secured by the subject mortgage. Ms. McClamma denies the note is a negotiable instrument which can be enforced by a mere "holder." Ms. McClamma further denies Plaintiff has any interest in any note and/or mortgage relevant to the above-styled case and pursuant to §§673.3011, 673.3081 and 673.2031, *Fla. Stat.* and demands strict proof of Plaintiff's claimed "holdership."

3. Ms. McClamma is without specific knowledge as to the allegations contained in Paragraphs 3, 4, 9, 10, 11, 16 and 18 of Plaintiff's complaint and denies the same.

4. As to Paragraph 5 of Plaintiff's complaint, Ms. McClamma admits Ms. Pollock died, however, denies the remainder of the allegations of this paragraph.

5. As to Paragraphs 6, 12 and 15 of Plaintiff's complaint, Ms. McClamma admits that she is the owner of the property but denies the remainder of the allegations of these paragraphs.

6. Ms. McClamma denies the allegations contained in Paragraphs 7, 8, 13 and 14 of Plaintiff's complaint.

AMENDED AFFIRMATIVE DEFENSES

Facts Relating to Affirmative Defenses

6. The day the subject loan documents were signed my mother, Josie Marie Pollack (hereinafter "Ms. Pollack") was 78 years old and suffering from many physical impairments which were also taking their toll on her mental state.

7. Her physical impairments included but were not limited to an enlarged liver, COPD, diabetes and heart disease.

8. Ms. Pollack did not understand the loan documents she was signing at the time of the closing which took place in her home. She did not receive the required pre-execution reverse mortgage counseling. During the process of signing the loan documents, Ms. Pollack put down her pen three times, at minimum during the closing. She was upset and crying and told the representative and authorized agent of Plaintiff or its predecessors in interest who showed up with the loan documents, Shawn Petiprin, at least three times, that she did not want to sign the papers unless she was assured that her daughter who held title to the home with her, would not

be kicked out of the home when she (Ms. Pollack) died. Shawn, as authorized agent of Plaintiff or its predecessors in interest promised that Ms. McClamma could stay in the home as long as she (Ms. McClamma) lived and would not be in danger of losing the home as a result of the loan.

9. Only Ms. Pollack, Ms. McClamma. JaNene Cortez, John Williams, Brandy Mershell (now deceased) and Mark Covel were present in Ms. Pollack and Ms. McClamma's home the day of the execution of the loan documents. Shawn did not bring any witnesses or a notary to Ms. Pollack and Ms. McClamma's house to notarize or witness the loan documents. Shawn also did not leave a copy of the loan documents with Ms. Pollack, indicating he would have them completed at the office (presumably to have the documents witnessed and notarized).

10. Shawn also brought a deed for Ms. McClamma to sign. Ms. McClamma did not understand the ramifications of signing the deed and only signed it based upon Shawn's promises that she (Ms. McClamma) would not lose the home if Ms. Pollack died.

11. Ms. Pollack and Ms. McClamma did not have any mortgages on their home when the loan documents that are the subject of the Plaintiff's complaint were signed. Ms. Pollack and Ms. McClamma were and have always been current with taxes and insurance for the property.

First Affirmative Defense – Failure to Provide Required HECM counseling

12. The loan that is the subject of the above-styled lawsuit is a Home Equity Conversion loan secured by a Home Equity Conversion Mortgage ("HECM"), insured by the Federal Housing Administration and regulated by the Department of Housing and Urban Development.

13. The stated congressional intent for the HECM program is "to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income,

through the insurance of home equity conversion mortgages to permit the conversion of a portion of accumulated home equity into liquid assets." 12 U.S.C. § 1715z-20(a)(1).

14. As such, HECM mortgages are subject to heightened servicing requirements, regulations, and agency oversight. HECM servicing is regulated by 24 C.F.R. § 206, *et. seq.*; HUD Handbook 4235.1 REV – 1; HUD Handbook 4330.1 REV – 5; and Mortgagee Letters periodically issued by HUD pursuant to its administrative authority.

15. Plaintiff, or its agents or predecessors in interest, were required to provide Ms. Pollack and Ms. McClamma, both owners of the property with pre-loan execution counseling. United States Department of Housing and Urban Development, *FHA Reverse Mortgages (HECMs) for Seniors*, www.hud.gov/program_offices/housing/sfh/hecm/hecmabou. *See, e.g.*, 24 C.F.R. §206.41. See also Mortgagee Letter 2004-25.

16. Shawn, as authorized agent of the Plaintiff or its predecessors in interest, told both Ms. Pollack and Ms. McClamma that they would receive the required counseling and the signed loan documents after the loan closing. Neither Ms. Pollack nor Ms. McClamma received any counseling prior to the execution of the mortgage or note. Neither Ms. Pollack nor Ms. McClamma ever received any reverse mortgage counseling.

17. Had this counseling been offered or provided, Ms. Pollack would have not executed the loan documents. Merely answering her questions at closing accurately would have lead her not to execute the subject loan.

18. As a result of the foregoing found in Paragraphs 6 through 16, Plaintiff is not entitled to the equitable remedy of foreclosure.

Second Affirmative Defense – Failure to Provide Proper Loss Mitigation or Loan Servicing

19. HECM regulations provide that HECM borrower and their heirs have the right to pay off the HECM at 95% of the appraised value of the property. 24 C.F.R. §206.125(c). The regulations also provide that any sale by a mortgagor is intended to include "the mortgage's estate or personal representative. 24 C.F.R. §123(b). HUD interpretations clarify that a sale includes "any post-death conveyance of the mortgage property (even by operation of law) to the borrower's estate or heirs (including a surviving heir who is not obligated on the HECM note." See also Mortgage Paragraph 9(d)(ii), Mortgagee Letter 2015-10, HUD Administration of Insured Home Mortgage Handbook 4330.1.

20. Instead of contacting Ms. McClamma as a surviving heir and owner of the property which is the subject of the above-styled case, Plaintiff through its authorized representatives and/or predecessors in interest, refused to talk to Ms. McClamma. Therefore, she was not advised of her right to pay off the loan at 95% of the appraised value of the property. If this opportunity had been provided to Ms. McClamma in 2012, the loan delinquency could have been resolved at that time.

21. As a result of the foregoing referenced in Paragraphs 19 and 20 above, Plaintiff is not entitled to the equitable remedy of foreclosure.

Third Affirmative Defense Unclean Hands/Failures of Conditions Precedent

22. Ms. McClamma realleges the allegations contained in Paragraphs 6 through 18, 19 and 20 as if fully set out herein.

23. Foreclosure is an equitable remedy and HECM federal statutes and regulations, the HUD HECM servicing manual and the subject note and mortgage require heightened servicing efforts to avoid the loss of homes by elderly homeowners. Plaintiff, through its agents

and/or predecessors in interest, has failed to meet all conditions precedent, or alternatively, has failed to comply with the subject mortgage and/or has failed to comply with the regulations and servicing handbook citations referenced herein. See C.F.R. 203.500, *et. seq.*; 24 C.F.R. 203.600, *et. seq.*; 24 C.F.R. § 206, *et. seq.*; HUD Handbook 4235.1 REV – 1; HUD Handbook 4330.1 REV – 5 and the relevant Mortgagee Letters.

24. Specifically but without limitation, Plaintiff, through its agents and/or predecessors in interest, have failed to properly communicate with Ms. Pollack and Ms. McClamma, the property owners, regarding the ramifications of signing a reverse mortgage and regarding Ms. McClamma's options at the time of her death.

25. As a result, Plaintiff, through its agents and/or predecessors in interest, have failed to establish statutory and contractual conditions precedent to this foreclosure and by reason thereof comes to the Court with unclean hands and is not entitled to the equitable remedy of foreclosure. *Laws v. Wells Fargo Bank, N.A.,* 159 So.3d 918 (Fla. 1st DCA 2015); *Chrzuszcz v. Wells Fargo Bank, N.A.* 2018 WL 3151206, -----So. 3d ----) (Fla. 1st DCA June 28, 2018); *Network, Inc. v. Knight*, 149 So. 3d 121, 122 (Fla. 4th DCA 2014).

26. As a matter of equity, this Court should refuse to foreclose this mortgage because the execution of the mortgage was made without the required counseling and was a result of misrepresentations and failure to provide Ms. McClamma with proper loss mitigation was also inequitable rendering foreclosure unconscionable.

ATTORNEYS FEES

Defendant is entitled to court costs and attorney's fees pursuant to §57.105(7), *Fla. Stat.*

WHEREFORE, the Defendant, Linda McClamma, respectfully requests that this court enter a judgment in Defendant's favor, award Defendant's counsel attorney's fees and costs, and grant such other and further relief as this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lindsay Cohen, Esquire, Albertelli Law, at lcohen@albertellilaw.net and servealaw@albertellilaw.com on this 19th day of February, 2019.

Respectfully submitted,

/s/Lynn Drysdale
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Counsel for Ms. McClamma

Filing # 63232678 E-Filed 10/24/2017 11:27:25 AM

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
CLAY COUNTY, FLORIDA

CASE NO.: 2015-CA-669

ONEWEST BANK, N.A.,

Plaintiff,

v.

JOHN J.H. YANG, *et al.*,

Defendants.

JOHN J.H. YANG'S RESPONSE TO
PLAINTIFF'S MOTION FOR RECONSIDERATION

COMES NOW Defendant JOHN J.H. YANG ("Mr. Yang"), in compliance with this Court's Order Directing the Defendant to File a Response, entered October 12, 2017, and files his Response to Plaintiff's Motion for Reconsideration and states:

Introduction

1. The case originated on July 7, 2015 as a reverse mortgage foreclosure. Plaintiff, Onewest Bank, N.A. ("Onewest" or "Plaintiff") claimed Mr. Yang defaulted on the terms of his mortgage and mortgage note by failing to occupy the subject property for twelve (12) consecutive months. (Paragraph 5, Plaintiff's Complaint) Discovery confirmed Onewest had made this statement knowing it was false, as Onewest was in regular communication with Mr. Yang - at his home - prior to serving the complaint.

2. Onewest also learned its allegation was false when Mr. Yang was served with initial process on July 20, 2015 at his home, and again on August 31, 2015, when Mr. Yang filed an answer and affirmative defenses denying his home was no longer his principal residence, and

again on August 31, 2015 when Mr. Yang served Request for Admissions with a copy of the Return of Service indicating he had been served at the subject property.

3. Eventually, on June 22, 2016, Plaintiff dismissed the foreclosure lawsuit, unilaterally claiming the case had been "settled." This also turned out not to be true, with Onewest's corporate representative disavowing this position during her deposition. (*See* Deposition of Karen Dickinson, December 8, 2016, Pages 40 – 44.)

4. Because this unilateral statement of settlement was not true, Mr. Yang filed a timely motion for Attorneys' Fees and Costs. *Tunison v. Bank of America, N.A.*, 144 So. 3d 588 (Fla. 2nd DCA 2014). (Plaintiff's self-serving statement that the voluntary dismissal was based upon a settlement was not binding on the Defendant who was not a party to the unilaterally-filed document) After Mr. Yang's Motion was initially denied, an evidentiary hearing occurred based on Mr. Yang's Request for Rehearing. In the Request for Rehearing, Mr. Yang advised that the Court had overlooked an important evidentiary fact - that there was no settlement - and provided factual support for this position (in addition to the fact that Onewest abandoned the position during Ms. Dickinson's deposition.) Based on this, the Court ultimately reversed its position, entering an Order on January 3, 2017, finding Mr. Yang was entitled to attorney's fees and costs.

5. Now, almost eight months later, Onewest asks the Court to reverse itself again. Rather than pointing to something the Court might have overlooked, however, Onewest's sole argument is based on a non-reverse mortgage case from 1992, with Onewest now arguing that, because the underlying reverse mortgage loan states the loan obligations "are without personal liability," fees could not be awarded to Mr. Yang even if he prevails in the action.

6. First, it is clear Onewest is *not* seeking *re*consideration - it is raising an entirely new argument it could have raised at any time in the past, and certainly prior to the Court's

Order of January 3, 2017. In sum, and as developed below: (a) Onewest is seeking to have the Court reverse itself based on an argument Onewest's attorneys could have brought before the Court not once, but twice - an argument it waited almost eight (8) months after the subject Order was entered to raise; (b) Onewest is relying on a case that was decided in 1992, before the contract between Onewest's predecessor and Mr. Yang was signed; (c) the case upon which Onewest's argument depends, is itself reliant on a case in which the prevailing party was awarded fees and costs; (d) this motion has now caused even more delay in resolution and is causing the presently-assigned judge to take this matter off of the trial/hearing docket.

7. Onewest is wrong on the law and is abusing the procedure. These issues will be discussed in turn.

Mr. Yang is the Prevailing Party in the 2016 Foreclosure Lawsuit

8. The dismissal of the foreclosure lawsuit rendered Mr. Yang the "prevailing party." *Thornber v. City of Ft. Walton Beach*, 568 So.2d 914, 919 (Fla.1990) (the defendant is the prevailing party when the plaintiff voluntarily dismisses an action, a determination on the merits is not a prerequisite to an award of attorney's fees); *See also The Bank of New York v. Williams*, 979 So.2d 347, 348 (Fla. 1st DCA 2008) (defendant prevailing party upon voluntary dismissal despite re-filing of foreclosure case); *J.P. Morgan Mortgage Acquisition Corp. v. Golden,* 98 So.3d 220, 221 - 223 (Fla. 2d DCA 2012) (complaint dismissed for failure to show proper notice of intent to foreclose, defendant prevailing party even though plaintiff could re-file).

Section 57.105(7), Fla. Stat. Supports Mr. Yang's Counsel's Claim for Fees and Costs

9. Mr. Yang relied upon §57.105(7), *Fla. Stat.* to support entitlement to fees. This provision provides:

> (7) If a contract contains a provision **allowing attorney's fees to a party when he or she is required to take any action to enforce the contract**, the **court may also allow reasonable attorney's fees to the other party when that party prevails in any action**, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988. *Emphasis added*

10. Onewest argues Mr. Yang is not entitled to fees pursuant to §57.105(7), *Fla. Stat.* because the underlying reverse mortgage loan states the loan obligations "are without personal liability," therefore, fees cannot be awarded to Mr. Yang even if he wins.

11. The focus of §57.105(7), *Fla. Stat* rests solely on Onewest's right to seek fees if it is "required to take any action to enforce the contract." Onewest made this point itself in this action, when it took the opposite position to the one it currently maintains, based on its own reading of the contract it sought to enforce: *Onewest* sought attorneys' fees and costs in its Complaint. (Paragraphs 9 and b). In its Complaint, Onewest alleged it hired a law firm to "represent them in this action and has agreed to pay them a reasonable fee and costs for their services." (Paragraph 9, Complaint) Onewest based this request for fees and costs on the language of Paragraph 7(C) of the subject note:

> "[C]osts and expenses, including reasonable and customary attorney's fee, associated with the enforcement of this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of the note." Paragraph 7(C) of the note.

The mortgage also provides:

> "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 20, including, but not limited to, reasonable attorney's fees and costs of title evidence." Paragraph 20 of the mortgage.

12. Nowhere in §57.105(7), *Fla. Stat.* is there a requirement that the fees sought must come out of the pocket of the borrower. (Usually, in a foreclosure, the opposite is true - the fees are incorporated into the judgment and satisfied through the sale of the property.)

13. Not only has Onewest taken the opposite position during the pendency of this suit - it has taken the opposite position in other reverse mortgage cases it has filed, both at the trial court level and on appeal. In *Henderson v. Onewest Bank FSB,* 217 So.3d 209 (Fla. 1st DCA 2017), a pro se defendant raised several issues in an attempt to reverse the foreclosure of the reverse mortgage secured by his mother's home. The only issue addressed by the Court was the failure of the Plaintiff to provide admissible, competent evidence of the amount of the fees awarded. The Court remanded the case to the trial court to take evidence on the amount of fees to be awarded - *to Onewest.* Onewest takes whatever position benefits Onewest.

Suchman Does Not Defeat Mr. Yang's Claim for Fees and Costs

14. Onewest relies upon the Third District Court of Appeal's decision in *Suchman Corporate Park, Inc. v. Greenstein,* 600 So. 2d 532 (Fla. 3d DCA 1992) to support its position that Mr. Yang's counsel is not entitled to fees. The *Suchman* Court does not provide any analysis to explain its departure from the plain reading of the statute. The *Suchman* Court refers to the lack of personal liability under the terms of the note and mortgage to explain its refusal to award fees. By contrast, in the instant case, Mr. Yang is personally liable on the note and mortgage allowing for fees and was in danger of losing his home to foreclosure based upon other terms of the note and mortgage. It is difficult to think of liability more real or personal than the loss of one's home for allegedly failing to comply with the terms of a note and/or mortgage. If Onewest was the prevailing party, even though it could not obtain a deficiency judgment against Mr. Yang, he would still have been required to pay the fees and costs awarded in addition to the

principal, interest, and other sums incorporated into the judgment in order to exercise his statutory and contractual right to redeem his interest in his home.

15. The *Suchman* Court cites to the Fourth District Court of Appeal's decision in *Heim v. Kirkland*, 356 So. 2d 850 (Fla. 4th DCA 1978) to support its denial of attorney's fees and costs. The *Heim* Court did not address entitlement to attorneys' fees. Instead, the Plaintiff sought a deficiency when it was not entitled to do so by the terms of the non-recourse mortgage. The *Heim* Court did find the prevailing party was entitled to attorneys' fees and costs. *Id.* at 851. Therefore, the decision in *Heim* support's Mr. Yang's claim for attorneys' fees.

Taking Away One Payment Remedy does not Defeat Entitlement

16. The Second District Court of Appeal has ruled more consistently with the language of §57.105(7), *Fla. Stat.* in *Vaughan v. First Union National Bank of Florida*, 740 So. 2d 1216 (Fla. 2nd DCA 1999). The *Vaughan* Court provides much more in the way of facts to support its decision. The borrowers in *Vaughan* signed the note and mortgage but were not personally liable as a result of a bankruptcy discharge. Even though the borrowers had no personal liability for the fees, the assessment of fees did affect their right to redemption. Because the award of fees affected the borrowers' of redemption, they had the right to contest the fees. *Id.* at 1217. Similarly, Mr. Yang' right and ability to reinstate or redeem the note and mortgage would be significantly affected by the amount of fees if awarded to Plaintiff - he would have been personally liable if he intended to reinstate or redeem.

The Court Cannot "Reconsider" Arguments Which Could Have Been Made Before but Were Not Raised or Considered

17. Finally, Onewest is abusing the procedure. A motion for reconsideration of a non-final order is not provided for by the Florida Rules for Civil Procedure. A final order may be addressed by Rule 1.530, *Fla.R.Civ.P.* There is no corresponding Rule for non-final orders,

only the Court's inherent power to reconsider its own orders. The First District Court of Appeal has focused on the role of motion for reconsideration, in *State ex rel. Jaytex Realty Co. v. Green,* 105 So.2d 817 (1958), indicating:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court.

18. Here, Onewest's Motion for Reconsideration raises a completely new legal argument based upon a case decided in 1992, and, as pointed out above, this new position is different than the one maintained by Onewest at the outset of this case and on appeal in *Henderson*. The fact that Onewest did not or chose not to raise *Suchman* earlier is on Onewest, not the Court, and the attempt to raise this new issue at this late date is a misuse of the procedure.

19. It is interesting to note that in the January 3, 2017 Order Granting Motion for Fees and Cost, this Court held:

> That this litigation became protracted and endured for many months beyond the pleading stage is disconcerting to the Court. It would seem that a confirmation of occupancy coupled with an early reference to Fla. Stat. sec. 57,105(l) and (4) would have been dispositive at the outset and in keeping with the statutory objective of curtailing needless litigation.

20. Now this Court is being asked to consider for the first time arguments which could have been raised at the September 7, 2016 and December 20, 2016 hearings on Mr. Yang's motion for attorneys' fees and costs. Counsel for Mr. Yang has served and now filed a Motion for Sanctions pursuant to Fla. Stat. §57.105(1) and (4).

WHEREFORE, Mr. Yang requests this Court deny Onewest's Motion, for the reasons set forth above.

DATED, this 24th day of October, at Jacksonville, Duval County Florida.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been furnished by electronic transmission to Jonathan Ian Meisels, Esquire and William Bennett, Esquire, Robertson, Anschutz & Scheid, P.L. via electronic transmission at mail@rasflaw.com; j.meisels@raslawfl.com and wbennett@rasflaw.com and John F. Rudy, III, Assistant U.S. Attorney, via electronic transmission usaflm.hud.disclaimers@usdoj.gov on this 24th day of October, 2017.

/s/James A. Kowalski
ATTORNEY

Filing # 48318097 E-Filed 10/31/2016 05:22:20 PM

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

CIT BANK, N.A.,
Plaintiff,

Case No.: 2016CC-001327-0000-00

vs.

OSSIE LOFTON,
Defendant.
_____/

AMENDED ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

COMES NOW the Defendant, OSSIE LOFTON, by and through the undersigned attorneys, and for her Amended Answer and Affirmative Defenses to Plaintiff's Complaint states:

1. Admit for jurisdictional purposes only. Deny that Plaintiff is entitled to the relief sought herein.

2. Without Knowledge.

3. Admit.

4. Admit that Plaintiff declares the amounts due, Deny that Plaintiff is entitled to make that declaration or is entitled to the relief sought therein.

5. Admit that Mr. Lofton died. Deny that Ms. Lofton has failed to perform her obligations under the Mortgage. Deny that the Secretary of Housing and Urban Development approved the alleged occurrence as grounds for acceleration.

6. Admit.

7. Deny.

8. Deny that the conditions precedent to the filing of this action have been met. Specifically and without limitation Plaintiff and its predecessors in interest failed:

a. To refer the mortgage to a local housing counseling agency pursuant to HUD handbook 4330.1 REV-5 §§ 13-23, 13-31C and Mortgagee Letters 2011-01, 2015-11.

b. To issue a repayment notice stating that the mortgage is due and payable that provides the amount of the outstanding balance and instructions, as required by HUD handbook 4330.1 REV-5 §13-33 and Mortgagee Letters 2011-01, 2015-11.

In addition to Plaintiff's failure to service the property, the Department of Housing and Urban Development, via its servicer, NOVAD, failed to abide by its regulatory and servicing obligations by:

a. Failing to demand and review evidence of due and payable status as required by HUD handbook 4331.1 REV-5 §13-31 B and Mortgagee Letter 2011-01.

9. Admit that a law firm was retained.

10. Deny.

11. Admit that Ms. Lofton has a claim and interest as owner of the property.

12. Admit.

13. Deny that any unknown parties may have a claim or interest to the property.

14. Admit that heirs have a claim to the property, Deny that their interests are inferior to those of the Plaintiff.

FACTS RELATING TO MS. LOFTON'S AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

15. Defendant, Ossie Lofton ("Ms. Lofton") is a 90 year old widow that has resided in the subject property without interruption since on or about August, 1974.

16. On April 28, 2003, Ms. Lofton and her now deceased husband, Willie Lofton, executed a Home Equity Conversion Mortgage and Home Equity Conversion Adjustable Rate Note.

17. On or about October 18, 2011, an alleged gap in property hazard insurance occurred. Plaintiff force placed insurance upon the property in the sum of $1,883.30. At the time, rather than a property charge, Plaintiff considered the payment a "line of credit loan advance," and labeled it as such in its monthly mortgage statement.

18. On November 9, 2011 Plaintiff was reimbursed, allegedly by its insurance company, in the amount of $1,460. Plaintiff considered the $1,460 a "loan prepayment."

19. An outstanding balance of $423.30 remained. For approximately three years, Ms. Lofton remained unaware of any outstanding balance because Plaintiff considered the charges a loan advance and failed to notify Ms. Lofton of its unilateral change of the designation of the payment.

20. On or about November 25, 2014, Plaintiff brought an action to foreclose upon Ms. Lofton's property for non-occupancy of the dwelling. At the time, Ms. Lofton had resided in the property without interruption for approximately 40 years.

21. Plaintiff began to conduct property inspections under the pretext that Ms. Lofton had vacated the property. Ms. Lofton was charged for property inspections at least ten times for a total of $200.

22. Plaintiff eventually contacted Ms. Lofton and learned of its error. Plaintiff voluntarily dismissed the 2014 action on December 23, 2014 each party to bear its own fees and costs.

23. Despite the language of the voluntary dismissal, Plaintiff charged Defendant for attorney's fees and costs related to the action in the amount of at least $2,260.

24. Sometime in March, 2015, Ms. Lofton received a letter from Financial Freedom, the loan servicer, advising her that the loan was "suspended and in default" because of the outstanding $423.30. The alleged default had been considered a line of credit loan advance according to the October 31, 2011 statement, and Ms. Lofton had never been adequately informed of Financial Freedom or the Plaintiff's unilateral change of the status of the payment. . Due to her age and declining eyesight, Ms. Lofton did not see or notice the thirty cents in the decimal portion of the sums demanded. As a result, on March 11, 2015 Ms. Lofton wrote a check in the sum of $423 to Financial Freedom.

25. Ms. Lofton was not put on notice that she allegedly owed the servicer $.3 (thirty cents) until August, 2015 when she received a letter stating that she would be subjected to foreclosure if she did not make the $.3 payment by September 8, 2015.

26. Because the notice merely demanded "$.3" and did not state "thirty cents" or "$.30" anywhere, Ms. Lofton, who was approaching her 90th birthday, believed she must pay the servicer $.03 (three cents).

27. On August 17, 2015 Ms. Lofton sent Financial Freedom a check to cover the amounts demanded. In the numerical portion of the check, Ms. Lofton wrote "$0.3," however, in the written portion of the check, Ms. Lofton wrote out "three cents," thereby putting the servicer on notice that she did not understand the demand letter.

28. Plaintiff now brings this action seeking foreclosure of Ms. Lofton's home of 42 years because of an alleged outstanding property charge of $.27 (twenty-seven cents).

AFFIRMATIVE DEFENSES

First Affirmative Defense - Estoppel

29. The loan that is the subject of this action is a Home Equity Conversion loan secured by a Home Equity Conversion Mortgage ("HECM"), insured by the Federal Housing Administration and regulated by the Department of Housing and Urban Development.

30. The stated congressional intent for the HECM program is "to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income, through the insurance of home equity conversion mortgages to permit the conversion of a portion of accumulated home equity into liquid assets." 12 U.S.C. § 1715z-20(a)(1).

31. As such, HECM mortgages are subject to heightened servicing requirements, regulations, and agency oversight. HECM servicing is regulated by 24 C.F.R. § 206, *et. seq.*; HUD Handbook 4235.1 REV – 1; HUD Handbook 4330.1 REV – 5; and Mortgagee Letters periodically issued by HUD pursuant to its administrative authority.

32. On or about October 18, 2011 an alleged lapse in hazard insurance occurred. Plaintiff allegedly advanced to Defendant $1,883.30.

33. When a servicer purchases hazard insurance to cover the property of a borrower that has elected to obtain his or her own insurance coverage, the servicer may either: **(a)** advance the funds for coverage from the borrower's line of credit and reduce the amounts advanced from the borrower's principal limit; or **(b)** if the borrower's principal limit is insufficient to cover the advance, the servicer may charge the borrower for servicing advances and then attempt to collect the debt. If the servicer is advancing a property charge, such as taxes or insurance, it must label and itemize the charges as such in its monthly or annual statements. 24 C.F.R. §§ 206.203, 206.26; HUD Handbook 4330.1 REV – 5 §13-18 (stating that the Mortgagee Must Comply with

Truth-in-Lending Act requirements for periodic disclosures for Open-End Credit, such as 12 C.F.R. 226).

34. Plaintiff originally considered the advance a "line of credit loan advance" and reduced the amount from Defendant's principal limit. A copy of the October 31, 2011 statement is attached hereto and incorporated herein as Exhibit "A."

35. On November 9, 2011, Plaintiff was immediately reimbursed in the amount of $1,460, leaving a balance of $423.30. Because that amount was considered a line of credit advance, Defendant was not put on notice that the Plaintiff unilaterally reclassified the outstanding advance to "property charges" for approximately 4 years.

36. Despite demand letters sent to Defendant in 2015, first for $423.30, and later for $.3, Plaintiff has never converted the line of credit advance to a servicing advance, has never corrected its statements, and has never notified defendant of the error. Plaintiff remained silent about its mistake leaving the defendant to suffer the consequences.

37. In the time since Plaintiff's original mistake or misrepresentation, Plaintiff has accrued interest from the original charge that far exceeds the $.27 due.

38. Ms. Lofton did not take any action to rectify the mistake when it occurred because she was not put on notice of the unilateral change in designation of the charges, and was told by Plaintiff via its monthly statement that she had received a line of credit advance, which is a charge that is reduced from a borrower's principal limit or line of credit and cannot be called due and payable.

39. Ms. Lofton's position has changed for the worse because over the past four years interest has accrued from the original charges, Plaintiff has called the loan due and payable, and the burden of correcting these errors is significantly greater on Defendant because of her

advanced age. Ms. Lofton has also incurred wrongful attorney's fees and costs arising out of Plaintiff's foreclosure action for an alleged non-occupancy that never in fact occurred.

40. Plaintiff should be equitably estopped from proceeding with this action.

Second Affirmative Defense - Failure of a Condition Precedent
Failure to Properly Service Loan

41. C.F.R. §206.203 and HUD Handbook 4330.1 REV – 5 § 13-18 imposes a requirement upon the servicer to disclose an itemized list of all payments made of behalf of the borrower, including insurance payments.

42. On October 19, 2011, Plaintiff advanced Defendant $1,883.30. Plaintiff considered the advance a "line of credit loan advance." A loan servicer may not call an HECM loan due and payable because it has made a line of credit or principal balance loan advance.

43. For approximately 4 years, Plaintiff failed to notify Defendant that the "line of credit loan advance" was in fact an insurance advance. Plaintiff never corrected its mistake, and the alleged insurance advance remains a "line of credit loan advance" according to the itemized statements furnished to Defendant.

44. Plaintiff has failed to adequately service Defendant because it has never disclosed in its statements that an insurance advance was made to Defendant. Plaintiff then waited 4 years to demand payment from Defendant, without offering explanation of the origin of the charges. The error has never been corrected by Plaintiff.

45. Pursuant to Mortgagee letter 2011-01, Plaintiff was required to refer Ms. Lofton to a local Housing Counseling Agency and to provide:

> (1) the contact information for person(s) at the mortgagee's office who the counselor may contact directly to make inquiries or discuss the mortgagor's loan and financial circumstances; and

> (2) the length of time the counselor has to identify a viable solution that may assist the borrower with curing the delinquency, or any alternative steps to address the unpaid property charges.

46. The same mortgagee letter also explicitly states the purpose of the HECM program that foreclosures must be pursued only as a method of last resort for the resolution of unpaid property charges, and "Mortgagees should be proactive and pursue early intervention to avoid future delinquencies."

47. Handbook 4330.1 REV – 5 § 13-31 imposes a duty upon plaintiff to "take whatever steps are necessary to rectify a violation of the mortgage covenants before submitting a request to HUD to declare the mortgage due and payable, including referral of the mortgagor to a housing counseling agency." *See also* 4330.1 REV – 5 § 13-23, which states that mortgagees should refer situations where the mortgage conditions are not being met to a HUD-approved housing counseling agency.

48. Plaintiff sent out demands for payment of the alleged insurance charges on March 3, 2015 for $423.30, and for "$.3" on August 13, 2015, nearly 4 years after it advanced the funds, labeling them as a line of credit advance.

49. Plaintiff immediately received two check payments upon demand. The first for $423, and the latter filled out with mismatching amounts – the written portion of the check stated "three cents," the numerical portion of the check contained the sum of $.3.

50. Because Plaintiff's August 13, 2015 notice merely demanded "$.3" and did not state "thirty cents" or "$.30" anywhere, Ms. Lofton, who was approaching her 90th birthday, believed she must pay the servicer $.03 (three cents).

51. Plaintiff was therefore on notice that **(a)** it had mislabeled its statements in violation of HUD servicing regulations; and **(b)** that Ms. Lofton misunderstood the demand for payment of $.3 (thirty cents) as a demand for payment of $.03 (three cents).

52. Plaintiff could have easily rectified these errors by referring Ms. Lofton to a local HUD counseling agency in accordance with Mortgagee Letter 2011-01; explaining the error to Ms. Lofton over the phone; obtaining a face to face meeting with Ms. Lofton, as required under 24 C.F.R. 203.604 ; correcting and properly itemizing the insurance charge in Ms. Lofton's monthly statements; sending Ms. Lofton a more clear demand letter with an explanation of the charges and Plaintiff's errors; or by taking any other steps reasonably calculated to adequately service the loan of a 90-year old person.

53. Plaintiff caused the errors and mistakes that led to the $.27 property charge, but failed to utilize prudent servicing practices, and failed to rectify these errors via any means necessary as required by servicing regulations and guidelines. Plaintiff therefore failed its conditions precedent for calling a loan due and payable and for bringing this action.

Third Affirmative Defense - Substantial Performance

54. Substantial performance, sometimes referred to as "substantial compliance," is "performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the other party the benefit of the bargain." The doctrine of substantial performance must be applied to mortgage contracts. *Lopez v. JPMorgan Chase Bank*, 187 So. 3d 343 (Fla. 4th DCA 2016); *Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 14 (Fla. 2d DCA 2015), *reh'g denied* (Oct. 13, 2015).

55. Ms. Lofton is a 90 year old woman suffering from poor vision and hearing. Despite these obstacles she has continued to perform her duties under the mortgage contract and continues to maintain hazard insurance on the property.

56. Upon notification that a property charge balance existed, Ms. Lofton promptly wrote Plaintiff a check in the sum of $423. On August 17, 2016 Ms. Lofton received notice of an outstanding property charge balance of "$.3." Due to her advanced age and poor vision, she believed the amounts due were in fact three cents. On the same day she received notice Ms. Lofton wrote a check to Plaintiff in the amount of "three cents," (which she represented as ".3" on the numerical portion of the check) that she believed to be the full amounts due, thereby inadvertently paying Plaintiff $423.03 instead of the $423.3 Plaintiff was now claiming due.

57. A $.27 balance remains due in property charges – approximately half the cost of a postage stamp. It would be unreasonable to deny Ms. Lofton the benefit of her line of credit by foreclosing upon the property, to foreclose upon Ms. Lofton for a mere $.27 cents; to add thousands of dollars in attorney's fees to the balance of the loan without a basis for doing so, and to displace her from her home of 42 years despite her substantial performance under the contract.

58. Substantial performance excuses a technical breach because "actual performance is so similar to the required performance that any breach that may have been committed is immaterial." *Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 14 (Fla. 2d DCA 2015), *reh'g denied* (Oct. 13, 2015) (quoting *Phoenix Mut. Life Ins. Co. v. Adams,* 828 F.Supp. 379, 388 (D.S.C.1993); 15 Richard A. Lord, *Williston on Contracts,* § 44.52, 221–22 n. 17 (4th ed. 2000)). *See also* 187 So. 3d 343 (Fla. 4th DCA 2016); *Ortiz v. PNC Bank, Nat. Ass'n,* 188 So. 3d 923, 925 (Fla. 4th DCA 2016) (finding that mortgages are subject to the substantial compliance doctrine).

59. Ms. Lofton's inadvertent failure to pay $.27 in allegedly outstanding property charges is immaterial and unimportant, therefore she should not be denied the benefit of the contract. The doctrine of substantial compliance or performance is "applicable where a variance from the specifications of the contract is inadvertent or unintentional and unimportant so that the work actually performed is substantially what was called for in the contract."

Lockhart v. Worsham, 508 So. 2d 411, 412 (Fla. 1st DCA 1987).

Fourth Affirmative Defense - Offset

60. On or about October 18, 2011, an alleged gap in property hazard insurance occurred. Plaintiff force placed insurance upon the property in the sum of $1,883.30. At the time, rather than a property charge, Plaintiff considered the payment a "line of credit loan advance," and labeled it as such in its monthly mortgage statement.

61. Plaintiff collected interest derived from the $1,883.30 for the month of October. On November 9, 2011, Plaintiff was reimbursed in the amount of $1,460, leaving a balance of $423.30.

62. Defendant was not notified of Plaintiff's unilateral change in designation of the property charge for approximately 4 years, during which time interest continued to accrue.

63. Plaintiff has added interest to the outstanding principal balance far in excess of the $.27 allegedly owed in insurance advances, which it will collect when the loan comes due. These amounts should be offset from the $.27 in outstanding property charges.

Fifth Affirmative Defense Unclean Hands

64. Plaintiff does not have a valid cause of action for foreclosure due to Plaintiff's failure to service the loan as required by 24 C.F.R. 203.500, *et. seq.*; 24 C.F.R. 203.600, *et. seq.*;

24 C.F.R. § 206, *et. seq.*; HUD Handbook 4235.1 REV – 1; HUD Handbook 4330.1 REV – 5 and the relevant Mortgagee Letters.

65. Plaintiff failed to comply in good faith with the standards of loan servicing applicable to the subject mortgage.

66. Specifically but without limitation, Plaintiff has failed to properly communicate with Ms. Lofton, has failed to rectify mistakes that it caused by making incorrect charges and loan advances, has charged accrued interest that it is not entitled to receive, has charged Defendant for legal costs for which it is not entitled, has failed to take proper measures to collect $.27 despite being on notice that Ms. Lofton did not understand its confusing notices and demands, and has called the loan due and payable two times in two years despite having no grounds to do so.

67. As a result, Plaintiff has failed to establish statutory and contractual conditions precedent to this foreclosure and by reason thereof comes to the Court with unclean hands and is not entitled to the equitable remedy of foreclosure. *Real Estate Mortg. Network, Inc. v. Knight*, 149 So. 3d 121, 122 (Fla. 4th DCA 2014); *Norwest Mortgage v. Rhodes*, 5 Fla. Law Weekly 361 (Fla 12th Judicial Circuit Court 1998); *See also Simpson v. Cleland,* 640 F.2d 1354 (D.C. Cir. 1981); *Cross v. FNMA,* 359 So. 2d 464, 465 (Fla. 4th DCA 1978) (finding that a mortgage foreclosure is an equitable action and equitable defenses are appropriate); *Brown v. Lynn* 392 F. Supp. 559 (N.D. III. 1975) (finding that foreclosure courts can direct the parties to pursue and exhaust the alternatives to foreclosure enumerated in the handbook); *FNMA v. Ricks*, 372 N.Y.S. 2d 485 (1975).

68. As a matter of equity, this Court should refuse to foreclose this mortgage because calling the loan due and payable was inequitable, unjust, and the circumstances of this case render foreclosure unconscionable.

ATTORNEYS FEES

69. Defendant is entitled to court costs and attorney's fees pursuant to §57.105(7), *Fla. Stat.*

WHEREFORE, the Defendant respectfully requests that this court enter a judgment in Defendant's favor, award Defendant's counsel attorney's fees and costs, and grant such other and further relief as this Court deems proper.

AMENDED COUNTERCLAIMS

COMES NOW, Counter Plaintiff/Defendant, Ossie Lofton, ("Ms. Lofton") by and through her undersigned counsel files her Amended Counterclaim as a matter of right pursuant to Rule 1.190(a), *Fla.R.Civ.P.* and sues CIT Bank, N.A. ("CIT") or ("Counterclaim Defendant") and for her Amended Counterclaims states as follows:

COUNT I

First Violation of the Florida Consumer Collections Practices Act

70. Ms. Lofton realleges the factual allegations set out in paragraphs 15 through 28 above and incorporates the same by reference herein.

71. This is an action brought against Counter Defendant/Plaintiff CIT Bank, N.A. for its violations of the Florida Consumer Collection Practices Act ("FCCPA") pursuant to §559.77, Fla. Stat.

72. Section 559.72(9), *Fla. Stat* provides - Prohibited Practices generally: In collecting consumer debts, no person shall (9) claim, attempt, or threaten to enforce a debt when

such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist.

73. On or about November 25, 2014, Counter Defendant brought an action to foreclose upon Ms. Lofton's property for non-occupancy of the dwelling. At the time, Ms. Lofton had resided in the property without interruption for approximately 40 years.

74. Counter Defendant became aware of its error and dismissed the case without prejudice on December 23, 2014 each party to bear its own fees and costs.

75. Despite the language of the dismissal, Counter Defendant charged Ms. Lofton for legal costs related to the 2014 action in the following dates and in the following amounts: October 24, 2014 for $200; November 24, 2014 for $55; January 7, 2015 for $245; January 8, 2015 for $955; February 5, 2015 $1,155.

76. Counter Defendant continues to demand the $2,610 in legal fees from Defendant in each subsequent statement, despite the language of the voluntary dismissal.

77. As a result of these improper charges, Counter Defendant is liable to Ms. Lofton for actual damages or $1,000 in statutory damages, whichever is greater, declaratory and injunctive relief, punitive damages and court costs and attorney's fees, as provided by §599.77, *Fla. Stat.*

78. Ms. Lofton reserves the right to bring a claim for punitive damages as provided by §§559.77 and §768.72, *Fla. Stat.* upon sufficient showing on the record of a basis for bringing such a claim.

79. It has been necessary for Ms. Lofton to retain Florida Rural Legal Services, Inc. and Jacksonville Area Legal Aid, Inc. to prosecute civil litigation based upon the Act. Her counsel has incurred and will incur costs and other related expenses in prosecuting this action

and her counsel are entitled to reimbursement of their costs and attorneys' fees pursuant to §559.77, *Fla. Stat.*.

WHEREFORE, Ms. Lofton requests that this Court enter a judgment against CIT Bank, N.A., (A) awarding her actual, statutory damages, injunctive and declaratory relief and punitive damages as provided by §559.77, *Fla. Stat.*; (B) awarding attorney's fees and costs; AND (C) Granting such other and further relief as may be deemed just and proper.

COUNT II

Second Violation of the Florida Consumer Collections Practices Act

80. Ms. Lofton realleges the factual allegations set out in paragraphs 15 through 28 above and incorporates the same by reference herein.

81. This is an action brought against Counter Defendant/Plaintiff CIT Bank, N.A. for its violations of the Florida Consumer Collection Practices Act ("FCCPA") pursuant to §559.77, *Fla. Stat.*

82. Section 559.72(9), *Fla. Stat* provides - Prohibited Practices generally: In collecting consumer debts, no person shall (9) claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist

83. On or about October 18, 2011, CIT advanced to Ms. Lofton $1,883.30. At the time, CIT considered the advance a "line of credit loan advance." On November 9, 2011 CIT was allegedly reimbursed by its insurance company, in the amount of $1,460, leaving a balance of $430.30 remaining in the line of credit loan advance.

84. In an HECM loan, though a borrower is entitled to make pre-payments towards the loan without penalty, a lender may not attempt to collect funds or call a loan due and payable to recover funds advanced from the principal limit or via a line of credit. 24 C.F.R. § 206, *et. seq.*; HUD Handbook 4235.1 REV – 1; HUD Handbook 4330.1 REV – 5.

85. Counter Defendant did not make any collection attempts for approximately 4 years. On or about March 3, 2015 Counter Defendant issued a notice demanding payment of the $423.30. On or about August 13, 2015 Counter Defendant issued a notice demanding payment of $.3. In each of those notices, Counter Defendant labeled the debt a "property charge."

86. Counter Defendant knew or should have known that it did not have the right to collect any funds from Ms. Lofton that it had previously advanced as a line of credit advance.

87. As a result of these violations, Counter Defendant is liable to Ms. Lofton for actual damages or $1,000, whichever is greater, declaratory and injunctive relief, punitive damages and court costs and attorney's fees, as provided by §599.77, *Fla. Stat.*

88. Ms. Lofton reserves the right to bring a claim for punitive damages as provided by §§559.77 and §768.72, *Fla. Stat.* upon sufficient showing on the record of a basis for bringing such a claim.

89. It has been necessary for Ms. Lofton to retain Florida Rural Legal Services, Inc. and Jacksonville Area Legal Aid, Inc. to prosecute civil litigation based upon the Act. Her counsel has incurred and will incur costs and other related expenses in prosecuting this action and her counsel are entitled to reimbursement of their costs and attorneys' fees pursuant to §559.77, *Fla. Stat.*.

90. WHEREFORE, Ms. Lofton requests that this Court enter a judgment against CIT Bank, N.A., (A) awarding her statutory damages, injunctive and declaratory relief as provided by

§559.77, *Fla. Stat.*; (B) awarding attorney's fees and costs; AND (C) Granting such other and further relief as may be deemed just and proper.

COUNT III

Age Discrimination in Violation of the Equal Credit Opportunity Act

91. Ms. Lofton realleges the factual allegations set out in paragraphs 15 through 28 above and incorporates the same by reference herein.

92. Under the Equal Credit Opportunity Act ("ECOA"), it is unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . . on the basis of . . . age . . . ." *See* 15 U.S.C. § 1691(a), 12 C.F.R. §202.4.

93. At all times material hereto, Ms. Lofton was an "applicant" as this term is defined by 15 U.S.C. §1691a(b) who was entitled to the benefit of the prohibitions found in 15 U.S.C. §1691, the Equal Credit Opportunity Act ("ECOA"). *See also* 12 C.F.R. §202.2(e) (the term applicant . . . . "includes any person who is or may become contractually liable regarding an extension of credit.)

94. At all relevant times, CIT Bank was and continues to be a creditor as defined by the ECOA, 15 U.S.C. §1691a(e).

95. Ms. Lofton and CIT Bank were involved in a "credit transaction" as that term is defined in 12 C.F.R. §202.2(m). A "credit transaction" means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to revocation, alteration, or termination of credit and collection procedures).

96. A creditor violates the ECOA when its policies and practices "with respect to any aspect of a credit transaction" have an adverse impact on a group based on the age of the group. 15 U.S.C. §1691(a)(1).

97. Numerous studies have documented that older adults compared to younger adults have a diminished capacity to simply hold information in mind (short-term memory), and even greater difficulties maintaining and manipulating information (working memory). Not only do older adults have more difficulty concentrating on the task at hand and ignoring irrelevant information, they also have more difficulty holding multiple pieces of information in mind at the same time, a skill that is necessary to integrate all of the information about the reverse mortgage they are considering and come to a final decision. *Paul Verhaeghen et al.*, "Facts and Fiction about Memory Aging: A Quantitative Integration of Research Findings," 48 J. Gerentology 157, 157 (1993).

98. CIT Bank's policies and practices of improperly force placing insurance, mislabeling statements, waiting many years to attempt to collect property charges, sending confusing demand letters, failing to properly communicate with Ms. Lofton, charging for attorney's fees that it is not owed, alleging that Ms. Lofton stopped residing in the property, while Ms. Lofton never failed to keep up with her responsibilities and made every effort to avoid a default constitutes unlawful discrimination against Ms. Lofton based on her age and the resulting diminished capacity. These practices also have a disparate, adverse and discriminatory impact on elderly persons, including Ms. Lofton.

99. In fact, HUD itself recognizes the vulnerable position of elderly reverse mortgage borrowers and distinguishes elderly persons above the age of 80 as "at risk mortgagors." *See*

Mortgagee Letter 2015-11 "Option 2: At Risk Mortgagors and Allowable Foreclosure Extensions."

100. CIT Bank's policies and practices of sending mixed messages to elderly borrowers, such as Ms. Lofton, failure to rectify its servicing errors, and foreclosing upon her home for an alleged $.27 outstanding property charge constitutes unlawful discrimination and has a disparate impact upon Ms. Lofton as a result of her age.

101. CIT Bank's policies and practices constitute discrimination against Ms. lofton because of her age in violation of 15 USC § 1691. CIT Bank knew that Ms. Lofton was elderly because she had to be over the age of 62 in order to obtain a reverse mortgage and knew that her failure to pay the $.27 was a result of her age because of its interactions with Ms. Lofton and because of her obvious attempts to correct the alleged default.

102. Ms. Lofton has been damaged as a result of CIT Bank's violations of ECOA because she is in danger of losing her home of 42 years as a result of their policies and practices described above. The amount of the mortgage secured by her home has increased by unnecessary and unwarranted delinquency and foreclosure fees and costs, she has suffered the negative credit impacts and stress related to the foreclosure of her home and has lost equity she established in her home.

103. Ms. Lofton reserves the right to bring a claim for punitive damages as provided by §§559.77 and §768.72, *Fla. Stat.* upon sufficient showing on the record of a basis for bringing such a claim.

104. Ms. Lofton has been required to retain the services of the undersigned counsel to pursue her claims against CIT Bank for violations of the ECOA. Counsel will incur costs and attorney's fees as a result of their representation of Ms. Lofton and seeks payment for the same pursuant to 15 U.S.C. §1691e(d).

105. WHEREFORE, Ms. Lofton requests this Court to enter a judgment against CIT Bank pursuant to 15 U.S.C. §1691 (A) warding her actual damages as provided by 15 U.S.C. §1691e(a); (B) Awarding injunctive and declaratory relief as provided by 15 U.S.C. §1691e(c); (C) Awarding her punitive damages of $10,000 as provided by 15 U.S.C. §1691e(b); Awarding attorney's fees to undersigned counsel pursuant to 15 U.S.C. §1691e(d); AND (E) Granting such other and further relief as may deemed just and proper.

COUNT IV

Failure to Provide Adverse Action Notice in Violation of the Equal Credit Opportunity Act

106. Ms. Lofton realleges the factual allegations set out in paragraphs 15 through 28 above and incorporates the same by reference herein

107. Under the Equal Credit Opportunity Act ("ECOA"), an applicant is entitled to a statement of reasons for any adverse action from a creditor. 15 U.S.C. §1691.

108. At all times material hereto, Ms. Lofton was an "applicant" as this term is defined by 15 U.S.C. §1691a(b) who was entitled to the benefit of the requirements of 15 U.S.C. §1691, the Equal Credit Opportunity Act ("ECOA"). See also 12 C.F.R. §202.2(e) (the term applicant . . . . "includes any person who is or may become contractually liable regarding an extension of credit).

109. At all relevant times, CIT Bank was and continues to be a creditor as defined by the ECOA, 15 U.S.C. §1691a(e).

110. Ms. Lofton and CIT Bank were involved in a "credit transaction" as that term is defined in 12 C.F.R. §202.2(m). A "credit transaction" means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit

(including, but not limited to revocation, alteration, or termination of credit and collection procedures).

111. A creditor violates the ECOA when it fails to provide an adverse action notice to a borrower such as Ms. Lofton. CIT Bank's decision to either rescind its October 18, 2011 line of credit advance or to convert it into an insurance advance was not preceded by an adverse action notice. In fact, no adverse action notice was provided at all in violation of the ECOA.

112. Ms. Lofton has been damaged as a result of CIT Bank's violations of ECOA because she is in danger of losing her home of 42 years as a result of their policies and practices described above. The amount of the mortgage secured by her home has increased by unnecessary and unwarranted delinquency and foreclosure fees and costs, she has suffered the negative credit impacts and stress related to the foreclosure of her home and has lost equity she established in her home.

113. Ms. Lofton reserves the right to bring a claim for punitive damages as provided by §§559.77 and §768.72, *Fla. Stat.* upon sufficient showing on the record of a basis for bringing such a claim.

114. Ms. Lofton has been required to retain the services of the undersigned counsel to pursue her claims against CIT Bank for violations of the ECOA. Counsel will incur costs and attorney's fees as a result of their representation of Ms. Lofton and seeks payment for the same pursuant to 15 U.S.C. §1691e(d).

WHEREFORE, Ms. Lofton requests this Court to enter a judgment against CIT Bank pursuant to 15 U.S.C. §1691 (A) warding her actual damages as provided by 15 U.S.C. §1691e(a); (B) Awarding injunctive and declaratory relief as provided by 15 U.S.C. §1691e(c); (C) Awarding her punitive damages of $10,000 as provided by 15 U.S.C. §1691e(b); Awarding

attorney's fees to undersigned counsel pursuant to 15 U.S.C. §1691e(d); AND (E) Granting such other and further relief as may deemed just and proper

COUNT V

Malicious Prosecution

115. On or about November 25, 2014, CIT Bank filed its first mortgage foreclosure lawsuit seeking to foreclose upon Ms. Lofton's home the mailing address for which is 5604 Old Highway 37, Lakeland, Florida 33811.

116. In its Verified Complaint, CIT Bank alleged the property was not occupied by Ms. Lofton since an unspecified date in 2012.

117. This allegation was purportedly verified by Stephanie Toal, Assistant Secretary of One West Bank on November 21, 2014.

118. The certified process server with ProVest, LLC received the Summons and Verified Complaint on December 8, 2014 at 10:20 A.M. and served Ms. Lofton via substitute service on her son, Willie Lofton, at her home at 5604 Old Highway 37, Lakeland, Florida 33811 at 4:45 in the afternoon on the same date. The process server listed the home as Ms. Lofton's usual place of abode, therefore, providing One West with actual notice of Ms. Lofton's continuous, without interruption, occupancy of the home.

119. Ms. Lofton is 90 years old and has difficulty seeing and other physical impairments relating to her age. She did not have any reason to believe she had violated the terms of her mortgage. In fact, she had been in constant contact with CIT Bank regarding sums wrongfully demanded, allegedly due for insurance premiums.

120. Ms. Lofton has been continuously and without interruption living in her property from August, 1974 to present. She has had continuous electric and water service, has paid her

property taxes, has kept the home insured and has always been a good neighbor in a quiet neighborhood.

121. CIT Bank dismissed its lawsuit on or about December 23, 2014. In its dismissal notice it indicated each party should bear their on costs and attorneys' fees. CIT Bank then assessed it fees against Ms. Lofton's account. Specifically, CIT Bank charged Ms. Lofton for legal costs related to the 2014 action in the following dates and in the following amounts: October 24, 2014 for $200; November 24, 2014 for $55; January 7, 2015 for $245; January 8, 2015 for $955; February 5, 2015 $1,155. CIT Bank continues to demand the $2,610 in legal fees from Ms. Lofton each subsequent statement, despite the language of the voluntary dismissal.

122. CIT Bank did not have the right to bring the lawsuit referenced in Paragraph 115 above because Ms. Lofton still lived in her home and was not in default under the terms of her mortgage and mortgage note. CIT Bank did not have probable cause to file the foreclosure lawsuit against Ms. Lofton.

123. CIT Bank exercised malice in filing the November 25, 2014 lawsuit because Ms. Lofton had openly, continuously and without interruption occupied the property secured by the CIT Bank and had been in constant contact with CIT Bank prior to the filing of the foreclosure lawsuit contrary to CIT Bank's unsupported allegations contained in its November 25, 2014 lawsuit.

124. On December 23, 2014, CIT Bank voluntarily dismissed the November 25, 2014 lawsuit. This constitutes a bona fide termination of the November 25, 2014 lawsuit in favor of Ms. Lofton.

125. CIT Bank filed its second, wrongful mortgage foreclosure lawsuit on April 20, 2016 as a result of Ms. Lofton's alleged failure to reimburse it for wrongfully force-placed insurance.

126. CIT Bank claimed in the April 20, 2016 lawsuit that on or about October 18, 2011, an alleged gap in property hazard insurance occurred. CIT wrongfully force placed insurance upon Ms. Lofton's property in the sum of $1,883.30. At the time, rather than a property charge, CIT Bank considered the payment a "line of credit loan advance," and labeled it as such in its monthly mortgage statement.

127. On November 9, 2011 CIT Bank was reimbursed, allegedly by its insurance company, in the amount of $1,460. CIT Bank considered the $1,460 a "loan prepayment."

128. A purported outstanding balance of $423.30 remained. For approximately three years, Ms. Lofton remained unaware of any purported outstanding balance because CIT Bank considered the charges a loan advance and failed to notify Ms. Lofton of its wrongful and unilateral change of the designation of the payment.

129. Sometime in March, 2015, Ms. Lofton received a letter from Financial Freedom, the loan servicer and authorized agent of CIT Bank, advising her that the loan was "suspended and in default" because of the outstanding $423.30. The alleged default had been considered a line of credit loan advance according to the October 31, 2011 statement, and Ms. Lofton had never been adequately informed of Financial Freedom or CIT Bank's wrongful and unilateral change of the status of the payment. . Due to her age and declining eyesight, Ms. Lofton did not see or notice the thirty cents in the decimal portion of the sums demanded. As a result, on March 11, 2015 Ms. Lofton wrote a check in the sum of $423 to Financial Freedom.

130. Ms. Lofton was not put on notice that she allegedly owed the servicer $.3 (thirty cents) until August, 2015 when she received a letter stating that she would be subjected to foreclosure if she did not make the $.3 payment by September 8, 2015.

131. Because the notice merely demanded "$.3" and did not state "thirty cents" or "$.30" anywhere, Ms. Lofton, who was approaching her 90th birthday, believed she must pay the servicer $.03 (three cents).

132. On August 17, 2015 Ms. Lofton sent Financial Freedom a check to cover the amounts demanded. In the numerical portion of the check, Ms. Lofton wrote "$0.3," however, in the written portion of the check, Ms. Lofton wrote out "three cents," thereby putting the servicer on notice that she did not understand the demand letter.

133. CIT Bank then filed a wrongful foreclosure lawsuit seeking to take Ms. Lofton's home of 42 years because of an alleged outstanding property charge of $.27 (twenty-seven cents).

134. Ms. Lofton files this action for malicious prosecution based upon CIT Bank's wrongful filing of two mortgage foreclosure lawsuits, the November 24, 2014 foreclosure and the April 20, 2016 foreclosure. The November 24, 2014 foreclosure was dismissed by CIT Bank on December 23, 2014 and the April 20, 2016 foreclosure lawsuit was dismissed on October 7, 2016.

135. In both lawsuits, CIT Bank falsely "verified" the allegations in its complaint regarding default.

136. CIT Bank did not have the right to bring the lawsuits referenced in Paragraph 134 above because Ms. Lofton was not in default of her mortgage and note.

137. CIT Bank exercised malice in filing the November 25, 2014 and April 20, 2016

foreclosure lawsuits because Ms. Lofton openly, continuously and without interruption occupied the property secured by the CIT Bank mortgage contrary to CIT Bank's unsupported allegations contained in its November 25, 2014 and knew it had no basis for filing a foreclosure lawsuit based upon a purported insurance delinquency.

138. The voluntary dismissal of both wrongful mortgage foreclosure cases constitutes a bona fide termination of each of these lawsuits in favor of Ms. Lofton.

139. Ms. Lofton has suffered damages as a result of the two wrongful mortgage foreclosure lawsuits filed against her. She has suffered illegal and wrongful fees and costs relating to the litigation and has also suffered damage to her health and well-being.

140. Ms. Lofton reserves the right to bring a claim for punitive damages upon sufficient showing on the record of a basis for bringing such a claim.

141. On behalf of her counsel, Ms. Lofton seeks reimbursement of their costs and attorneys' fees.

WHEREFORE, Ms. Lofton requests this Court to enter a judgment against CIT Bank and award her actual damages, attorneys' fees and costs and for other and further relief as this Court may deem just and proper.

COUNT VI

Slander of Title

142. This is an action to recover damages for slander of title as a result of the two wrongful foreclosure cases filed against Ms. Lofton and the accompanying *lis pendens* filed in the public records, respectively located at Book 9395, Page 541 and Book 9801, page 432 of the Public Records for Polk County, Florida.

143. Ms. Lofton is the owner in fee simple of her home located at 5604 Old Highway 37, Lakeland, Florida 33811. This property is further described as

> Lot 1, Less the North 50 Feet of the West 145 Feet Thereof and Lot 2, Less the South 125 Feet Thereof, Block 3, Town of Medulla, Corrected Map, for the Estate of Henry Hays according to the Plat Thereof Recorded in the Plat Book 2, public records of Polk County, Florida being a Part of the W ½ of the NW ¼ of Section 13, Township 29 South, Range 23 East

144. Ms. Lofton acquired legal title and the right to the possession and use of this property on August 28, 1974.

145. At all times material to this claim, Ms. Lofton resided at5604 Old Highway 37, Lakeland, Florida 33811.

146. On November 25, 2014 and April 20, 2016, CIT Bank and its predecessors in interest filed wrongful foreclosure lawsuits and *lis pendens*. These lawsuits and *lis pendens* are such that they naturally would commonly be understood as denying, disparaging, and casting doubt upon Ms. Lofton's title to the above-described property. These lawsuits were so perceived.

147. At the time CIT Bank and its predecessors in interest made and published the foreclosure lawsuits and *lis pendens* when it had no reasonable cause to believe the lawsuits had any basis in law or fact.

148. Alternatively at the time CIT Bank and its predecessors in interest made and published the lawsuits and *lis pendens* Statement, it knew the lawsuits and *lis pendens* were false or demonstrated a reckless disregard for its truth.

149. CIT Bank and its predecessors in interest intentionally published the lawsuits and *lis pendens*, even though it knew, or should have known, that it would result in harm to Ms. Lofton's interest in her home.

150. CIT Bank published the lawsuits and *lis pendens* maliciously without reasonable cause.

151. As a proximate result of CIT Bank's lawsuits and *lis pendens*, Ms. Lofton's title to the Property has been disparaged and slandered, causing damage to Ms. Lofton.

WHEREFORE, Ms. Lofton requests judgment against CIT Bank for damages in a sum within the jurisdictional limits of this court, together with costs of suit, and such further relief as the court deems proper.

DEMAND FOR JURY TRIAL

Ms. Lofton requests a jury trial on all issues so triable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Andrea Alles via eservice at servealaw@albertellilaw.com on this 31 day of October, 2016.

Respectfully submitted,

FLORIDA RURAL LEGAL SERVICES, INC.
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BY: /s/ Pedro Zasciurinskis Lopes
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Counsel for Ms. Lofton
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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2015-CA-6042-XXXX-MA
DIVISION: FC-F

JAMES B. NUTTER & COMPANY,
Plaintiff,
v.

SAMMIE LEE SINGLETON, *et. al.*,
Defendant(s).

DEFENDANT, SAMMIE LEE SINGLETON'S ANSWER, AFFIRMATIVE DEFENSES AND SECOND AMENDED COUNTERCLAIMS

The Defendant, Sammie Lee Singleton, ("Mr. Singleton" or "Defendant") by and through his undersigned attorney, files this his Answer and Affirmative Defenses and, pursuant to Rule 1.190(a), *Fla.R.Civ.P.* his amended counterclaims and states:

ANSWER

1. As to Paragraphs 1 and 2 of Plaintiff's Complaint ("Complaint"), Mr. Singleton admits the allegations contained in these Paragraphs for jurisdictional purposes only, however, does not admit Plaintiff is entitled to the relief sought therein.

2. Mr. Singleton denies the allegations contained in Paragraphs 3 and 4 of Plaintiff's Complaint and requires strict proof thereof and is without knowledge as to the recording allegations contained in Paragraph 4.

3. Mr. Singleton denies the allegations contained in Paragraphs 5 and requires strict proof thereof.

4. As to Paragraph 6 of Plaintiff's Complaint, Mr. Singleton denies Plaintiff is the

FILED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 03/20/2017 04:20:53 PM

holder of the note secured by the subject mortgage and denies the note and/or mortgage were properly transferred, negotiated or assigned to Plaintiff. Mr. Singleton further denies Plaintiff has any interest in any note and/or mortgage relevant to the above-styled case and pursuant to §§673.3011, 673.3081 and 673.2031, *Fla. Stat.* and demands strict proof of Plaintiff's claimed "holdership." Further, claims of "holdership" are not sufficient to confer upon Plaintiff the right to bring the subject lawsuit as the subject note is not a negotiable instrument.

5. As to Paragraphs 7 and 8 of Plaintiff's Complaint, Mr. Singleton denies that Plaintiff has the right to declare the full amount payable under the Note and Mortgage and denies he failed to perform any obligation under the terms of the loan. Mr. Singleton also denies the Secretary of Housing and Urban Development approved the commencement of the subject mortgage foreclosure lawsuit or that the Plaintiff or Secretary had the right to approve any foreclosure. Mr. Singleton demands strict proof of each of these allegations.

6. As to Paragraph 9 of Plaintiff's Complaint, Mr. Singleton denies he owes Plaintiff any sums because he is not in default and because Plaintiff does not have the right to pursue the subject lawsuit and demands strict proof thereof.

7. As to Paragraphs 10 and 13 of the Complaint, Mr. Singleton denies Plaintiff had the right to advance sums or incur attorneys' fees and denies he owes any sums to Plaintiff for any advancements and demands strict proof thereof.

8. As to Paragraph 11 of Plaintiff's Complaint, he admits he owns the subject property.

9. As to Paragraph 12 of Plaintiff's Complaint, Mr. Singleton denies all conditions precedent to acceleration and foreclosure have been fulfilled and have occurred and he demands strict proof thereof.

10. Mr. Singleton denies the allegations contained in Paragraph 14 of Plaintiff's Complaint.

11. As to Paragraphs 15, 16 and 17 of Plaintiff's Complaint, Mr. Singleton is without knowledge regarding the specific allegations and therefore denies the same.

AFFIRMATIVE DEFENSES

First Affirmative Defense – Failure to State a Cause of Action

12. Plaintiff, James B. Nutter & Company (hereinafter "Nutter" or "Plaintiff"), alleges Paragraph 6 of its Complaint that it holds the subject note and mortgage

13. Rule 1.210(a) of the Florida Rules of Civil Procedure provides, in pertinent part:

> Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought...

14. In Florida, the prosecution of a residential mortgage foreclosure action must be by the party that holds the note and mortgage in question. The plaintiff must have the requisite standing when the foreclosure complaint is filed. *Lindsey v. Wells Fargo Bank, N.A.*, 139 So.3d 903 (Fla. 1st DCA 2013).

15. Rule 1.130(a), *Fla.R.Civ.P.* requires the Plaintiff to attach the following to its initial pleading:

> (a) Instruments Attached. --All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading.

16. The only "loan-related" documents attached to the Complaint are a mortgage and

note payable to Mortgage Resources, Inc.

17. The subject note is not a negotiable instrument, therefore, cannot be enforced by a mere holder pursuant to an endorsement in blank. An instrument is negotiable if it is an unconditional promise to pay a fixed amount of money and is payable on demand at a definite time. §§673.1041(1), *Fla. Stat.* A negotiable instrument does not state any other undertaking in addition to the payment of money but may contain an undertaking to secure payment with collateral, an authorization to dispose of collateral or confess judgment and a waiver of rights of the obligor. §§673.1041(1)(c), *Fla. Stat.*

18. The subject Adjustable Rate Note attached to the Complaint it is not an "unconditional promise" to pay a "fixed amount" which is payable on demand "at a definite time." As a result, Plaintiff is not a holder entitled to enforce the subject note because the note is not negotiable and there is no assignment attached to the Complaint sufficient to confer any interest to Plaintiff. §671.201(21)(a), *Fla. Stat.* (holder must have "possession of a negotiable instrument").

19. As a result, although Plaintiff names Nutter as the holder of the note, the documents attached to the complaint conflict with this allegation, or alternatively, Nutter's claim it is a "holder" is insufficient to confer upon Nutter the right to bring the subject lawsuit. Therefore, the contents of complaint, note and mortgage cancel out the inconsistent and conflicting allegations as to the Plaintiff's right to bring the subject lawsuit.

Second Affirmative Defense
Failure to Provide the Required Notice of Acceleration

20. Paragraphs 9(d) and 16 of the mortgage attached to Plaintiff's Complaint provide a specified means of providing notice of acceleration to the mortgagor. Plaintiff has

failed to provide the required notice prior to the filing of the subject lawsuit and is, therefore, not entitled to the equitable remedy of foreclosure.

Third Affirmative Defense
Failure to Provide the Required Pre-Foreclosure Loss Mitigation

21. The U.S. Department of Housing and Urban Development's Mortgagee Letter 2011-01 requires Plaintiff to engage in certain activities prior to filing a foreclosure action based upon a purported failure to pay taxes and/or insurance.

22. Specifically,

> ".....within thirty (30) days of the first missed property charge payment, the mortgagee must inform the mortgagor that an obligation of the mortgage has not been performed, and the mortgage is not in compliance with the FHA requirements. The mortgagee must also offer loss mitigation options to allow the mortgagor the opportunity to bring the mortgage into compliance.
>
> Loss mitigation options available to mortgagors who have a delinquent mortgage due to unpaid property charges must include, but are not limited to:
>
> (1) Establishing a realistic repayment plan for the delinquent property charge(s);
>
> (2) Contacting a HUD-approved Housing Counseling Agency (HCA) to receive free assistance in finding some viable resolution to their delinquency, or identifying local resources available to provide funds or homestead exemptions;
>
> and
>
> (3) Refinancing the delinquent HECM to a new HECM if there is sufficient equity to satisfy the existing mortgage and outstanding property charges.

23. The Plaintiff was also required to provide Mr. Singleton with a "Property Charge Delinquency Letter" which must

> (1) provide a thirty (30) day period in which the mortgagor must respond and arrange to cure the delinquency;
> (2) encourage mortgagors to seek the assistance of an HCA; and
> (3) provide a list of all loss mitigation options available to mortgagors to cure the delinquency.

Plaintiff must also refer Mr. Singleton to an HCA and provide:

> (1) the contact information for person(s) at the mortgagee's office who the counselor may contact directly to make inquiries or discuss the mortgagor's loan and financial circumstances; and
>
> (2) the length of time the counselor has to identify a viable solution that may assist the borrower with curing the delinquency, or any alternative steps to address the unpaid property charges.

24. Plaintiff has failed to provide the required letter and pre-foreclosure loss mitigation opportunities required by the U.S. Department of Housing and Urban Development and is, therefore, not entitled to the equitable remedy of foreclosure.

Fourth Affirmative Defense
Unclean Hands

25. Nutter is prohibited from engaging in unfair or deceptive actions in the collection of the subject mortgage loan.

26. Nutter acted in a way that was both inequitable, unfair and deceptive as is more particularly described in Paragraphs 28 through 35 below.

27. Based upon its inequitable, unfair and deceptive actions, Nutter filed the above-styled case with unclean hands. Therefore, Nutter is not entitled to the equitable remedy of foreclosure.

WHEREFORE, Mr. Singleton respectfully requests that this Court enter judgment in his favor, and denying Plaintiff's requested relief. Mr. Singleton also requests this Court enter an order awarding him attorneys' fees and costs and such other and further relief as this court deems just.

AMENDED COUNTERCLAIMS

Facts Relating to Counterclaims

28. Mr. Singleton obtained the subject loan when he was a 73 year old man who was starting to have difficulties understanding his financial affairs based upon health problems related to his age. He did not even realize he was getting a reverse mortgage.

29. Mr. Singleton is presently 80 years old and has to rely upon the assistance of his son to manage his financial affairs. Mr. Singleton, with the assistance of his son, has made every effort to comply with the terms of the mortgage, including maintaining all of his taxes and insurance payments.

30. Representatives of Nutter, represented to Mr. Singleton that there was an approximately six month period during which Mr. Singleton did not pay his insurance premium payments. Nutter claimed Mr. Singleton did not pay his insurance premium for several months in 2012 and 2013.

31. Based upon representations made by Nutter, Mr. Singleton, with the assistance of his son made monthly payments of $88.16 or $88.17 for six months. They then almost doubled the payments they were making to $147.54 or $147.58 for six months, with the approximate last payment on or around November 12, 2013. At that time they reasonably believed all purportedly required repayments were made.

32. During the period of time when Mr. Singleton was making payments, he received repeated letters from Nutter telling him he had to pay $80,559.47 or he would lose his home.

33. Mr. Singleton kept his insurance and taxes current for the remainder of 2013, 2014 and 2015 and thought any purported delinquency had been resolved.

34. Mr. Singleton was then notified a mortgage foreclosure lawsuit would be filed if he did not pay approximately $885.66. This letter was in addition to a contemporaneous letter he received informing him he must pay $80,000.00 to avoid losing his home.

35. Nutter filed the subject mortgage foreclosure lawsuit when Mr. Singleton was only purportedly, approximately $885.66 behind in his repayment of taxes and insurance and at a time when he was and had been making his taxes and insurance premium payments.

Count One
Florida Deceptive and Unfair Trade Practices Act

36. This is an action for injunctive and declaratory relief and for damages against Nutter pursuant to the Florida Deceptive and Unfair Trade Practices Act, Florida Statutes §§501.201, *et seq.* ("FDUTPA" or "the Act"). Mr. Singleton realleges the allegations contained in Paragraphs 28 through 35, inclusive above, and incorporates these allegations by reference herein.

37. At all times relevant hereto, Mr. Singleton was a "consumer" as defined by §501.203 (7), *Fla. Stat.*.

38. At all times relevant hereto, Nutter was engaged in "trade or commerce" as defined by §501.203(8), *Fla. Stat.*.

39. At all times material hereto, Mr. Singleton is and was a senior citizen as that phrase is defined in §501.2077(1)(e), *Fla. Stat.*

40. The actions of Nutter in improperly force-placing Mr. Singleton's insurance premium and/or improperly attempting to collect sums purportedly paid on Mr. Singleton's behalf in an unfair and deceptive manner as is more particularly described in Paragraphs 28 through 35, inclusive, above are actions which constitute willful methods, acts, or practices

which have had the effect of victimizing or attempting to victimize Mr. Singleton, a senior citizen. The allegations contained in Paragraphs 28 through 35 are hereby incorporated by reference herein.

41. Nutter knew or should have known its actions set out in Paragraphs 28 through 35 above led to the victimization of Mr. Singleton.

42. A violation of the Act may be based on "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." *See* §501.203 (3)(c), *Fla. Stat.*.

43. Nutter also engaged in misleading, unfair and deceptive trade practices as more particularly described in Paragraphs 28 through 35, inclusive, above.

44. The Act makes unlawful "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." 501.204 *(1), Fla. Stat.*

45. As a direct result of Nutter's actions, Mr. Singleton has been damaged as he has been required to pay unearned and improper sums to Nutter for improperly force placed insurance premiums and is still in danger of losing his home and the equity he established in his home despite these payments. The amount of the mortgage secured by his home has increased by unnecessary and unwarranted delinquency and foreclosure fees and costs, he has suffered the negative credit impacts and stress related to the foreclosure of his home. He has also been misled as to amounts due to Nutter because of its confusing and deceptive notices.

46. Mr. Singleton has been required to retain the services of the undersigned counsel to pursue his claims against Nutter for violations of the FDUPTA. Counsel will incur costs and

attorney's fees as a result of their representation of Mr. Singleton and seeks payment for the same pursuant to §§501.2105 & 501.211, *Fla. Stat.*

WHEREFORE, Mr. Singleton requests this Court enter a judgment against Nutter pursuant to the FDUPTA as follows:

A. Declare Nutter's practices to be in violation of the FDUTPA as provided by §501.211(1), *Fla. Stat.;*

B. Enjoin Nutter from engaging in deceptive and unfair trade practices as provided by §501.211(1), *Fla. Stat.*; including but not limited to entering a judgment dismissing the above-styled case;

C. Award Mr. Singleton actual damages and civil penalties arising from Nutter's actions, misrepresentations and actions;

D. Award attorney's fees and costs to Mr. Singleton's counsel pursuant to the FDUPTA Act; and to

E. Grant such other and further relief as this Court deems just and equitable.

Count Two
Age Discrimination in Violation of the Equal Credit Opportunity Act

47. Mr. Singleton incorporates Paragraphs 28 through 35, inclusive above and incorporates them by reference herein.

48. Under the Equal Credit Opportunity Act ("ECOA"), it is unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . . on the basis of . . . age . . . ." *See* 15 U.S.C. § 1691(a), 12 C.F.R. §202.4.

49. At all times material hereto, Mr. Singleton was an "applicant" as this term is defined by 15 U.S.C. §1691a(b) who was entitled to the benefit of the prohibitions found in 15

U.S.C. §1691, the Equal Credit Opportunity Act ("ECOA"). *See also* 12 C.F.R. §202.2(e) (the term applicant . . . . "includes any person who is or may become contractually liable regarding an extension of credit.')

50. A creditor under the ECOA includes an "assignee of an original creditor who participates in the decision to extend, renew, or continue credit." 15 U.S.C. § 1691a(e); 12 CFR § 202.2.

51. At all relevant times, Nutter was and continues to be a creditor as defined by the ECOA, 15 U.S.C. §1691a(e).

52. A creditor violates the ECOA when its policies and practices "with respect to any aspect of a credit transaction" have an adverse impact on a group based on the age of the group." 15 U.S.C. §1691(a)(1)

53. Mr. Singleton and Nutter were involved in a "credit transaction" as that term is defined in 12 C.F.R. §202.2(m). A "credit transaction" means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to revocation, alteration, or termination of credit and collection procedures).

54. Mr. Singleton obtained the subject loan when he was a 73 year old man who was having difficulties understanding his financial affairs based upon health problems related to his age. He did not even realize he was getting a reverse mortgage.

55. Mr. Singleton is presently in his eighties and has to rely upon the assistance of his son to manage his financial affairs. Mr. Singleton, with the assistance of his son, has made every effort to comply with the terms of the mortgage, including maintaining all of his taxes and insurance payments. Mr. Singleton has been unable to meet Nutter's demands because Nutter

sends deceptive and misleading statements to Mr. Singleton regarding his obligations pursuant to the terms of his reverse mortgage.

56. Representatives of Nutter, represented to Mr. Singleton that there was an approximately six month period during which Mr. Singleton did not pay his insurance premium payments. Nutter claimed Mr. Singleton did not pay his insurance premium for several months in 2012 and 2013.

57. Based upon representations made by Nutter, Mr. Singleton, with the assistance of his son made monthly payments of $88.16 or $88.17 for six months. They then almost doubled the payments they were making to $147.54 or $147.58 for six months, with the approximate last payment on or around November 12, 2013. At that time they reasonably believed all purportedly required repayments were made.

58. Mr. Singleton was then notified a mortgage foreclosure lawsuit would be filed if he did not pay approximately $885.66. This letter was in addition to a contemporaneous letter he received informing him he must pay $80,000.00 to avoid losing his home

59. During the period of time when Mr. Singleton was making payments, he received repeated letters from Nutter telling him he had to pay $80,559.47 or he would lose his home. This letter was misleading as Mr. Singleton either owed "0" or an amount significantly less than $80,559.47.

60. Mr. Singleton kept his insurance and taxes current for the remainder of 2013, 2014 and 2015 and thought any purported delinquency had been resolved.

61. Nutter filed the subject mortgage foreclosure lawsuit when Mr. Singleton was only purportedly, approximately $885.66 behind in his repayment of taxes and insurance and at a time when he was and had been making his taxes and insurance premium payments.

62. Nutter's deceptive and misleading notices and violations of HUD's policies have created roadblocks in Mr. Singleton's ability to understand and comply with the deceptive and misleading notices forwarded to him. Specifically, Nutter wrongfully force placed insurance on Mr. Singleton's home; provided Mr. Singleton with deceptive and misleading statements of how much was owed to avoid foreclosure and failed to provide him with the opportunity to exercise the "At Risk Extension" as is authorized by the Federal Housing Authority's Mortgagee Letter 2015-11 and/or to allow him a meaningful opportunity to repay any claimed delinquency prior to filing the subject lawsuit as required by 2011-01. Nutter also failed to follow HUD Servicing Handbook Section4330.1, Revision #5 which requires servicers to allow Mr. Singleton to resolve the default through the appropriate means, such as proof of adequate insurance, or payment of taxes or special assessments, etc. Lastly, Nutter failed to follow the reinstatement provisions of the subject note and mortgage.

63. Nutter's policies and practices of: (a) improperly force placing insurance and sending deceptive and misleading messages regarding the amounts owed to reinstate the purportedly delinquent mortgage and note; (b) filing a foreclosure lawsuit based upon a false insurance default when Mr. Singleton was making this tax and insurance payments; and/or (c) filing a mortgage foreclosure lawsuit against an 80 year old Mr. Singleton when he was purportedly approximately $885.66 delinquent and (d) without meaningfully offering the numerous foreclosure avoidance opportunities including but not limited to the pre-foreclosure

options provided by Mortgagee Letter 2011-01 and the "At Risk Extension" all having a disparate impact on elderly persons such as Mr. Singleton with cognitive and memory problems.

64. The disparate impact referenced above in Paragraph 63 above caused by Nutter's deceptive and unfair servicing policies and practices and failure to follow federal law, federal regulations, Mortgagee Letters and Servicing Handbook constitutes discrimination against Mr. Singleton because of his age in violation of 15 USC § 1691. Nutter knew that Mr. Singleton was elderly and had cognitive and memory problems because he had to be over the age of 62 in order to obtain a reverse mortgage and it had received notice of his wish to have his son handle his affairs by way of an authorization signed by Mr. Singleton at the time of the loan closing.

65. Nutter has engaged in the same deceptive and misleading practices with other elderly borrowers as is evident in a similar case filed by Nutter in James B. Nutter & Co. v. Rosa M. Fleming in the Superior Court of New Jersey, Middlesex County, Chancery Division, Docket No.: F 040455-15. Nutter lost is motion for summary judgment in this case in which deceptive and misleading notices of default and pre-foreclosure acceleration notices were sent to 87 year old Ms. Fleming. She alleged owed $6,696.49 in back taxes and insurance reimbursements and Nutter sent notices requiring the payment of $238,990.62 to avoid the loss of her home. *See* Response to Nutter's Motion for Summary Judgment and Order attached hereto as Composite Exhibit "A."

66. Additionally, Nutter engaged in the same deceptive and misleading practices with another elderly borrower as is evident in another similar Nutter foreclosure case. In James B. Nutter & Co. v. Aron Ezilla Ridge, Nutter sought to foreclose upon Ms. Ridge, a 75 widow for failing to pay approximately $49.00 dollars in taxes it advanced before the taxes were due. Nutter required her to pay $66,700.29 plus attorneys' fees to avoid foreclosure. *See* Aron Ezilla Ridge response to

James B. Nutter's Application for Home Equity Foreclosure Order and Affidavit filed in response to Case Number: D.-1-GN-13-000350, in the District Court of Travis County, Texas, Twelfth Judicial District attached hereto as Composite Exhibit "B."

67. Mr. Singleton has been damaged as a result of Nutter's violations of ECOA because he has been required to pay improper and/or unnecessary sums to Nutter for improperly force placed insurance, is in danger of losing his home as a result of their policies and practices described above. The amount of the mortgage secured by his home has increased by unnecessary and unwarranted delinquency and foreclosure fees and costs, he has suffered the negative credit impacts and stress related to the foreclosure of his home.

68. Mr. Singleton has been required to retain the services of the undersigned counsel to pursue his claims against Nutter for violations of the ECOA. Counsel will incur costs and attorney's fees as a result of their representation of Mr. Singleton and seeks payment for the same pursuant to 15 U.S.C. §1691e(d).

WHEREFORE, Mr. Singleton requests this Court to enter a judgment against Nutter pursuant to 15 U.S.C. §1691 as follows:

A. Awarding him actual damages as provided by 15 U.S.C. §1691e(a);

B. Awarding injunctive and declaratory relief as provided by 15 U.S.C. §1691e(c);

C. Awarding him punitive damages of $10,000 as provided by 15 U.S.C. §1691e(b);

D. Awarding attorney's fees to Jacksonville Area Legal Aid, Inc. and costs pursuant to 15 U.S.C. §1691e(d); and

E. Granting such other and further relief as may be deemed just and proper.

Count Three
Failure to Provide Adverse Action Notice in
Violation of the Equal Credit Opportunity Act

69. Mr. Singleton incorporates Paragraphs 28 through 35, inclusive above and incorporates them by reference herein.

70. Under the Equal Credit Opportunity Act ("ECOA"), an applicant is entitled to a statement of reasons for any adverse action from a creditor. 15 U.S.C. §1691.

71. At all times material hereto, Mr. Singleton was an "applicant" as this term is defined by 15 U.S.C. §1691a(b) who was entitled to the benefit of the requirements of 15 U.S.C. §1691, the Equal Credit Opportunity Act ("ECOA"). See also 12 C.F.R. §202.2(e) (the term applicant . . . . "includes any person who is or may become contractually liable regarding an extension of credit.)

72. At all relevant times, Nutter was and continues to be a creditor as defined by the ECOA, 15 U.S.C. §1691a(e).

73. Mr. Singleton and Nutter were involved in a "credit transaction" as that term is defined in 12 C.F.R. §202.2(m). A "credit transaction" means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to revocation, alteration, or termination of credit and collection procedures).

74. A creditor violates the ECOA when it fails to provide an adverse action notice to a borrower such as Mr. Singleton. Nutter's decision to apparently either ignore payments made toward the repayment agreement and/or unilaterally rescind the repayment agreement and initiate foreclosure was not preceded by an adverse action notice. In fact, no adverse action notice was provided at all in violation of the ECOA.

75. Mr. Singleton has been damaged as a result of Nutter's violations of ECOA because he has paid unnecessary and/or improper sums to Nutter for unnecessary force-placed insurance and is in danger of losing his home as a result of their policies and practices described above. The amount of the mortgage secured by his home has increased by unnecessary and unwarranted delinquency and foreclosure fees and costs, he has suffered the negative credit impacts and stress related to the foreclosure of his home.

76. Had Mr. Singleton received the required adverse action notice and/or a notice that was not contradicted by a letter demanding $80,000.00 payment, he could have resolved any purported delinquency.

77. Mr. Singleton has been required to retain the services of the undersigned counsel to pursue his claims against Nutter for violations of the ECOA. Counsel will incur costs and attorney's fees as a result of their representation of Mr. Singleton and seeks payment for the same pursuant to 15 U.S.C. §1691e(d).

WHEREFORE, Mr. Singleton requests this Court to enter a judgment against Nutter pursuant to 15 U.S.C. §1691 as follows:

F. Awarding him actual damages as provided by 15 U.S.C. §1691e(a);

G. Awarding injunctive and declaratory relief as provided by 15 U.S.C. §1691e(c);

H. Awarding him punitive damages of $10,000 as provided by 15 U.S.C. §1691e(b);

I. Awarding attorney's fees to Jacksonville Area Legal Aid, Inc. and costs pursuant to 15 U.S.C. §1691e(d); and

J. Granting such other and further relief as may be deemed just and proper.

DEMAND FOR JURY TRIAL

Mr. Singleton requests a jury trial on all issues so triable.

RESPECTFULLY SUBMITTED,

____/s/Lynn Drysdale_____
Lynn Drysdale, Esquire (508489)
Jacksonville Area Legal Aid, Inc.
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Lynn.drysdale@jaxlegalaid.org
Counsel for Mr. Singleton

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been furnished by electronic transmission to Jessica Quiggle, Esquire; Robertson, Anschutz & Schneid, P.L., via mail@rasflaw.com and jquiggle@rasflaw.com on this 20th day of March, 2017.

/s/Lynn Drysdale
ATTORNEY

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JAMES B. NUTTER & CO.	SUPERIOR COURT OF NEW JERSEY
	MIDDLESEX COUNTY
Plaintiff,	CHANCERY DIVISION
	DOCKET NO. F 040455-15
-vs.-	
	Civil Action
ROSA M. FLEMING, et als.	
Defendant.	

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORT OF DEFENDANT'S CROSS MOTION

Returnable October 14, 2016

ORAL ARGUMENT REQUESTED

Composite Exhibit "A"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. PROCEDURAL HISTORY

Plaintiff James B. Nutter & Co. filed a complaint against Defendant Rosa Fleming for foreclosure of a reverse mortgage. Ms. Fleming filed an Answer in which she raised the issue of Plaintiff's compliance with NJSA 2A:50-56, the Notice of Intent to Foreclose required by the Fair Foreclosure Act (Answer, Sixth Separate Defense.)

Plaintiff has now filed a Motion for Summary Judgment and/or to Strike Answer and Refer Matter to Office of Foreclosure. Defendant opposes both motions and cross-moves for summary judgment dismissing the Complaint. The matter is scheduled for trial on November 16, 2016.

II. STATEMENT OF FACTS

In this case, Plaintiff seeks to foreclose a reverse mortgage against an 87-year old New Brunswick resident[1] because it advanced $6393.03 in property insurance premiums for 2014 - 2016 and $2411.47 in property taxes in 2014. It also claims a $23 payment to the Middlesex County Clerk. [*Defendant's Ex. A, answer to interrogatory #9]*.

Defendant Rosa Fleming took out a reverse mortgage from Amtrust Mortgage Corp. on her house at 146 Townsend St., New Brunswick, on Dec. 1, 2006. *[Plaintiff's Ex. A.]* It was assigned to Plaintiff. *[Plaintiff's Ex. D]* The mortgage does not require Ms. Fleming to make any monthly payments but it does require her to pay for property insurance and real estate taxes. In its foreclosure complaint, all that Plaintiff says about her default is, "On or about July 24, 2015 the Department of Housing and Urban Development called the subject loan due for the defendant's failure to pay the taxes and insurance on the subject property." ¶5-a. In ¶13 of its complaint, Plaintiff alleges that "Plaintiff has complied with the provisions of R.S. §2A:50-53 et seq."

The Notice of Intent to Foreclose upon which Plaintiff relies, dated 09/02/2015, is attached as Plaintiff's Ex. H and Defendant's Ex. C[2]. It contains no more information about Ms. Fleming's

[1] See Ms. Fleming's birthdate, 8/17/1928, Plaintiff's Ex. E, p. 28, top right.

[2] Another letter, entitled "Notice of Intent to Foreclose" was sent on July 24, 2015, Defendant's Ex. B, but it bears no resemblance to the Notice required by the Fair Foreclosure Act, does not disclose the amount of the default, and will not be discussed further.

default than the Complaint does. What it says about the default is, "The Mortgage Note and Mortgage are in default. The default consists of the failure to pay your Real Estate Taxes and/or homeowners Hazard Insurance in a timely manner and providing us with a copy of the paid receipts, as required by the Mortgage securing the Promissory Note underlying this home loan." [*Defendant's Ex. C,* ¶2.]

Paragraph 3 of the Notice of Intent states that at any time up to the entry of final judgment [the debtor] has the right to cure the default "by the performance of the obligations which you were bound to perform in the absence of a default, together with court costs, if any, attorneys' fees, and all contractual late charges due. " At no point does the Notice state what the "performance of the obligations" might mean in dollar terms.

Paragraph 4 then states, in full: "You must tender payment of **$238,990.62.**"

Paragraph 5 states that the lender must receive the sum stated in ¶4, i.e. $238,990.62, no later than October 02, 2015. Paragraph 6 mentions options such as paying the full amount of the default and agreeing to a repayment plan, but it does not clarify what the full amount of the default might be or what a repayment plan would have to repay.

Discovery has disclosed that the amount Ms. Fleming owed in back taxes and force-placed insurance premiums on the date of the Notice of Intent was $6696.49 including the $23 payment to the clerk.*[Defendant's Ex. A, answer to #9.]* It further discloses that Ms. Fleming had the right under the terms of her mortgage to reinstate her mortgage upon payment of this default amount *[Id., answer to #5]*. Those facts do not appear anywhere in the Notice of Intent.

The other issues raised in Ms. Fleming's Answer have been resolved through discovery.

III. ARGUMENT: DEFENDANT HAS RAISED A BONA FIDE DEFENSE IN HER ANSWER AND IS ENTITLED TO SUMMARY JUDGMENT IN HER FAVOR

A. THE LAW REQUIRES SERVICE BY LENDERS OF A COMPLETE AND ACCURATE NOTICE OF INTENT TO FORECLOSE PRIOR TO INSTITUTING A FORECLOSURE ACTION

The Fair Foreclosure Act, N.J.S.A. 2A:50-53 *et seq.*, was enacted in 1995, with the Legislative Finding and Declaration that it is "...the public policy of this State that homeowners should be given every opportunity to pay their home mortgages, and thus keep their homes . . .." *N.J.S.A. 2A:50-54.* To this end, homeowners were given new rights to cure defaults in their mortgages. Exercise of these rights prior to acceleration enables homeowners to avoid the imposition of court costs and legal fees, *N.J.S.A. 2A:50-56, -57*; there is also a right to cure later in the proceedings but prior to the entry of a judgment of foreclosure, N.J.S.A. 2A:50-57. These rights are implemented by notices which the lender must send to the debtor at various steps in the foreclosure process. Without an accurate notice, the debtor cannot exercise the right to cure.

The notice at issue here is required by N.J.S.A. 2A:50-56, and must be sent to the borrower at least 30 days prior to the commencement of any foreclosure action by registered or certified mail. It must "clearly and conspicuously state in a manner calculated to make the debtor aware of the situation" eleven specific things, N.J.S.A. 2A:50-56(c), including the nature of the default, Subsection 2, and the performance, *including the sum of money if any*, required to cure the default, Subsection 4, emphasis added.

B. THE NOTICE OF INTENT SERVED BY PLAINTIFF WAS INCOMPLETE AND MISLEADING

In this case, Nutter's notice did not inform Ms. Fleming that she could, by repaying the $6696.49 in taxes and insurance premiums it had advanced at that point, reinstate her mortgage. The law specifically requires the Notice of Intent to state the sum of money required to cure the default. This notice does not comply. On the contrary, it states the sum needed to pay off the

mortgage, $238,990.62, which it says must be received in 30 days (¶¶4,5). This would cause the average reader to despair--how is she going to come up with such a sum in 30 days?--when in fact she had to come up with the lesser sum and apparently could still have qualified for a 24-month payment plan. The Notice of Intent must be sent *before* the lender can accelerate the mortgage, NJSA 2A:50-56(a), so the payoff amount was not really due. Plaintiff knew it was dealing with a person of advanced age--Ms. Flemings' birthdate is disclosed in the mortgage documents. The purpose of the Notice is to avoid foreclosures; this one does not give a clear and conspicuous disclosure of the information needed to do that, and is not calculated to make the debtor aware of the situation..

C. THIS COURT HAS DISCRETION TO FASHION AN APPROPRIATE REMEDY FOR THE DEFECTIVE NOTICE

The leading case on defective Notices of Intent is *US Bank NA v. Guillaume, 209 NJ 449 (2012)*. The bank's servicer had served a Notice of Intent which failed to identify the lender by name and address as required by the Fair Foreclosure Act, 2A:50-56(c)(11). The Guillaumes had failed to answer the complaint and were on the brink of a sheriff's sale by the time they filed an order to show cause with the trial court to address the issue. The trial court denied the Guillaumes' motion to dismiss the complaint or vacate the default judgment, finding no excusable neglect or meritorious defense under R. 4:50-1(a), but it did order the bank to serve a compliant Notice of Intent. After two more unsuccessful attempts by the bank to get it right, the court just permitted it to proceed with its default judgment. When the case reached the Supreme Court, the Court denied relief to the Guillaumes under R. 4:50 but discussed the contents and purpose of the Notice of Intent and what trial courts should do in the future about defective Notices. It rejected any across-the- board requirement that the foreclosure complaint be dismissed as held in *Bank of New York v. Laks, 422 N.J. Super. 201 (App.Div. 2011)*, but said, " A trial court adjudicating a foreclosure action in which the notice of intention does not comply with N.J.S.A. 2A:50–56(c)(11) may dismiss the

action without prejudice, order the service of a corrected notice, or impose another remedy appropriate to the circumstances of the case." *209 NJ. at 476.* Courts retain discretion to fashion equitable remedies in their "unlimited variety," tailored to the individual case, *Id.*

By way of further guidance, the Court says:

> In determining an appropriate remedy for a violation of NJSA 2A:50-56(c)(11), trial courts should consider the express purpose of the provision: to provide notice that makes "the debtor aware of the situation," and to enable the homeowner to attempt to cure the default. *[citations omitted]* Accordingly, a trial court fashioning an equitable remedy for a violation of NJSA 2A:50-56(c)(11) should consider the impact of the defect in the notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default.

209 NJ at 479.

While the Guillaume Court was discussing Subsection 11, disclosure of the name and address of the lender, it is difficult to imagine a more essential part of the Notice of Intent than Subsection 4, the dollar amount required to cure the default. Everything the Court said about Subsection 11 goes double for that disclosure. Not only is this figure omitted from Ms. Fleming's notice but the total accelerated mortgage balance is presented in the form of a demand, "You must tender payment in the amount of **$238,990.62.**" Defendant's Ex. C, ¶4. This is followed immediately by the statement that the "Lender must receive" that sum no later than October 2, 2015. ¶5. Reading this, the borrower would conclude that she had to come up with that large sum in order to avoid foreclosure. That is the opposite of what a Notice of Intent is supposed to communicate. The "impact of the defect," as the *Guillaume* Court put it, "on his or her opportunity to cure the default" could hardly be greater.

Under these circumstances, Defendant urges the court to dismiss the complaint without prejudice and permit her a chance to cure the default without the added burden of foreclosure fees and costs. This would solve any reluctance by Plaintiff to allow a cure by installments while a suit is pending. Alternatively, the Guillaume court endorsed the possibility of extending a penalty-free

right to cure in conjunction with an order to serve a compliant notice. It cited *G.E. Capital Mortgage Services Inc. v. Weisman, 339 NJ Super. 590 at 595, (Ch. Div. 2000)*, where the court ordered a corrected notice of intent which "shall not contain any fees or costs associated with the foreclosure action, but only those fees and costs which would have been due had no foreclosure been commenced," and extended to the buyers a right to cure *nunc pro tunc. Id., 209 NJ at 478.*

IV. CONCLUSION

Defendant in this case presents a bona fide defense, namely a fatal defect in the Notice of Intent Plaintiff served under the Fair Foreclosure Act. There is no factual dispute about this notice; it is attached to Plaintiff's moving papers. What remains is for the Court to decide the appropriate remedy. Plaintiff's motions for summary judgment and to strike the Answer should be denied.

Respectfully submitted,

CENTRAL JERSEY LEGAL SERVICES INC.
Attorneys for Defendant

BY: S/
GAIL CHESTER, ESQ.

Dated: October 5, 2016

FILED

OCT 14 2016

JUDGE ANN McCORMICK

#2015-3263
POWERS KIRN, LLC
728 Marne Highway, Suite 200
Moorestown, NJ 08057
(856) 802-1000
Attorneys for Plaintiff
Michael B. McNeil, Esquire - 018262012

James B. Nutter and Company Plaintiff v. Rosa M. Fleming, et al. Defendant(s)	: SUPERIOR COURT OF NEW JERSEY : CHANCERY DIVISION : MIDDLESEX COUNTY : : Docket No. F 040455 15 : : CIVIL ACTION : : ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND/OR STRIKING ANSWER AND REFERRAL TO OFFICE OF FORECLOSURE

THIS MATTER being opened to the Court on plaintiff's motion for summary judgment and/or striking the answer of the defendant Rosa M. Fleming, and the Court having considered the pleadings, affidavits/certifications, admissions and other moving papers, the briefs and arguments and for good cause shown;

FOR THE REASONS SET FORTH ON THE RECORD ON 10/14/16

IT IS on the 14 day of Oct, 20 16, ORDERED:

1. That the motion of the plaintiff be granted for summary judgment and that the answer of the defendant Rosa M. Fleming be stricken and that the Clerk of the Court shall enter the default of the defendant as though no answering pleading had been filed.

DENIED

2. That this matter be referred to the Office of Foreclosure in the Office of the Clerk of Superior Court in Trenton, New Jersey, for further proceedings and entry of final judgment as an uncontested matter with the appropriate notices sent to all parties entitled to the same in accordance with the Rules of this Court.

3. That a copy of this order shall be served on other parties by regular mail, postage prepaid, within 7 days hereof.

Ann G. McCormick, J.S.C.

Motion was _____ unopposed.
_____ opposed.

- Pl shall serve on def and her counsel on or before 10/28/16, a corrected NOI which shall include a repayment plan.

- The 11/16/16 trial is hereby adjourned

- a CMC conference is scheduled for 12/16/16 2pm.

FILED

JAN 12 2017

JOSEPH M. McCORMICK

#2015-3263

POWERS KIRN, LLC
728 Marne Highway, Suite 200
Moorestown, NJ 08057
(856) 802-1000
Attorneys for Plaintiff
Michael B. McNeil, Esquire - 018262012

James B. Nutter and Company	: SUPERIOR COURT OF NEW JERSEY
	: CHANCERY DIVISION
Plaintiff	: MIDDLESEX COUNTY
	:
v.	: Docket No. F-040455-15
	:
Rosa M. Fleming, et al.	: CIVIL ACTION
	:
Defendant(s).	: ORDER

THIS MATTER coming before the Court on a case management conference conducted on December 16, 2016; and

WHEREAS Plaintiff holds a Home Equity Conversion Mortgage against Defendant Rosa M. Fleming's property located at 146 Townsend St., New Brunswick, NJ 08901; and

WHEREAS Defendant defaulted under the terms of Plaintiff's Mortgage by failing to pay the real estate taxes and to maintain homeowners hazard insurance for the mortgaged property; and

WHEREAS as a result of Defendant's default, Plaintiff advanced payment for the real estate taxes and homeowners hazard insurance premiums on Defendant's behalf; and

WHEREAS Plaintiff commenced this action on December 17, 2015 to enforce its Home Equity Conversion Mortgage and foreclose the defendants' equity of redemption in and to the mortgaged property; and

WHEREAS on March 28, 2016, Defendant filed a contesting answer in this action; and

WHEREAS Plaintiff and Defendant have entered into a Repayment Plan Agreement whereby Defendant has agreed to repay the amounts advanced by Plaintiff as a result of Defendant's default over a twenty-four (24) month period

IT IS on the 12 day of Jan, 2017, ORDERED:

1. That Defendant's contesting answer is hereby withdrawn;

2. That this matter is hereby dismissed, without prejudice;

3. That this matter is subject to immediate revival and restoration to the Court's active docket upon fifteen (15) day's written notice to the Court and Defendant, through counsel Gail Chester, Esq., that Defendant has defaulted under the terms of the Repayment Plan Agreement, provided Defendant does not cure such default within the fifteen (15) notice period;

4. That upon revival and restoration of this matter to the Court's active docket, this matter will be returned to the Office of Foreclosure in the Office of the Clerk of the Superior Court in Trenton, New Jersey for further proceedings and entry of final judgment as an uncontested matter with the appropriate notices sent to all parties entitled to same in accordance with the Rules of this Court; and

5. That a copy of this order shall be served on other parties by regular mail, postage prepaid, within 7 days hereof.

Ann G. McCormick, J.S.C.

The undersigned hereby consent to the form and entry of this order.

POWERS KIRN, LLC
Attorneys for Plaintiff

By: _____
Michael B. McNeil
Dated: 1/10/17

CENTRAL JERSEY LEGAL SERVICES, INC.
Attorneys for Defendant Rosa M. Fleming

By: _____
Gail Chester
Dated: 1/10/17

CAUSE NO. _____

ARON EZILLA RIDGE Plaintiff	§	IN THE DISTRICT COURT OF
v.	§	OF TRAVIS COUNTY, TEXAS
JAMES B. NUTTER & COMPANY Defendant	§	_____JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DECLARATORY RELIEF

Plaintiff Aron Ezilla Ridge files this Original Petition against Defendant James B. Nutter & Company and would show the Court as follows:

I. Discovery Level

1. This case is intended to be conducted under Level 1, Tex. R. Civ. P. 190.2.

II. Parties

2. Plaintiff, Aron Ezilla Ridge, an individual, is a resident of Travis County, Texas.

3. Defendant James B. Nutter & Company ("Nutter" or "Defendant") is a mortgage lender corporation whose place of business is 4153 Broadway, Kansas City, MO 64111. Defendant may be served by service on its registered agent for service of process in Texas: C T Corporation System, 350 N. St. Paul St., Ste. 2900, Dallas, TX 75201-4234.

III. Jurisdiction and Venue

4. The Court has jurisdiction over this lawsuit because the amount in controversy exceeds this Court's minimum jurisdictional requirements.

5. Venue is mandatory under Tex. Prac. & Rem. Code §15.011 in Travis County because this suit concerns an interest in real property that is located entirely in Travis County.

Composite Exhibit "B"

IV. Procedural Background

6. On January 30, 2013, Defendant filed an application under Tex. R. Civ. P. 736 for foreclosure of its reverse mortgage on the home of Mrs. Aron Ezilla Ridge in Cause No. D-1-GN-13-000350, *In Re: Order for Foreclosure Concerning Aron Ezilla Ridge and 3012 Webberville Road, Austin, Texas* in the 126th District Court of Travis County, Texas. Pursuant to Tex. R. Civ. P. 736.11, Ms. Ridge files this action relating to the threatened foreclosure of the reverse mortgage that Defendant seeks to accomplish.

V. Factual Background

7. Ms. Aron Ezilla Ridge is 75 years old. She is partially blind, has diabetes, and congestive heart failure. She was diagnosed with, and had surgery for, colon cancer a few years ago. She needs a wheelchair to leave her home and is largely house-bound at this point in her life. Although she still lives alone, she has family members close by who check on her daily. She can read but her reading level is approximately at the 6th grade level and her ability to read is, of course, further limited by her failing eyesight.

8. Ms. Ridge bought her home at 3012 Webberville Road in 1966. It is a one-bedroom, one-bath home with a small living room and a smaller kitchen—approximately 900 square feet of living space. Ms. Ridge has lived in this home for 47 years. She finished paying for the home in 1992 or 1993. By 2007, the home was in serious need of repair. There were numerous leaks in the roof and the entire roof needed to be replaced. She also needed to make major repairs to the kitchen and bathroom to make the home safe for her to live in. Ms. Ridge was 69 in 2007 and no longer able to work. She did not have money to make these repairs.

9. In 2007, Ms. Ridge saw advertisements on television describing reverse mortgages as providing homeowners with money to supplement their income or provide funds to

remodel or improve their homes. The advertisements said that the homeowner would not have to repay the money as long as the homeowner remained in the home and that the homeowner would not be individually liable for the loan, even if the homeowner were forced to move out of the home for health or other reasons. Ms. Ridge thought that a reverse mortgage would allow her to repair her home. When she received an advertisement in the mail for a reverse mortgage, she called the number on the advertisement. People came to her home and took information from her about her income, expenses, and debt. On February 22, 2007, a lady came to her house to tell her that she had qualified for a reverse mortgage and bringing papers for her to sign. The lady read the legal documents to her and she signed them.

10. In return, she received $39,143.10 as a lump sum payment on a home that the lender appraised as worth $84,000 as of February 2007 but that had been appraised at $37,716 by the Travis County Appraisal District for the same year. Legible copies of the executed Adjustable Deed of Trust and an unsigned copy of the Adjustable Rate Note that Ms. Ridge signed are attached as Exhibits A and B to this Petition. Ms. Ridge does not have an executed copy of the Note.

11. Ms. Ridge used the money to repair her home. She continues to live there. She had been told in 2000 by the Travis County Tax Assessor's office that she did not need to pay property taxes because the value of her home was below the homestead and senior exemption cap, but in 2011, she received a property tax bill of $20.31. She was able to drive to the Tax Assessor's office and paid those taxes in full before they were due.

12. On April 20, 2012, Ms. Ridge received an appraisal from the Travis County Appraisal Office saying that her property was appraised for a value of $60,743.00 and that her property taxes were estimated as being $46.87. *See* Exhibit C. Ms. Ridge assumed that, if she

owed property taxes, the bill would come later. Ms. Ridge did not receive a tax bill. She did, however, receive a receipt saying that her taxes, in the amount of $49.00, were paid late in 2012. *See* Exhibit D. She assumed that the receipt meant that she was again exempt from property taxes. She did not call the Tax Office to see why she had received a receipt without having received a bill.

13. A letter dated January 21, 2013 was sent by attorneys for Defendant saying that her reverse mortgage had been accelerated and that Ms. Ridge was responsible for paying the entire amount of money now due under the loan or the lender, would exercise its right to enforce the lien on her home. *See* Exhibit E. Ms. Ridge does not remember receiving this letter.

14. On February 6, 2013, Ms. Ridge was served with citation and a copy of Cause No. D-1-GN-13-000350, *In re Order for Foreclosure Concerning Aron Ezilla Ridge and 3012 Webberville Road, Austin, TX 78702,* in the 126th Judicial District Court of Travis County, Texas (the "Application"). *See* Exhibit F. The Application had been filed on January 30, 2013. That Application stated that Ms. Ridge was in default "for failure to pay property taxes." *See* ¶7, Exhibit F. The only property taxes to which the Application could possibly refer were the taxes for 2012—which were not due until January 31, 2013. Yet Defendant intended to enforce its right to foreclose on Ms. Ridge's home because she had not paid $49.00, which at the time the Application was filed, was not yet due.

15. Nutter's Application claimed that Ms. Ridge's failure to pay property taxes for 2012 gave Nutter the right to accelerate the lien on her homestead. In order to redeem her home of almost 50 years, Ms. Ridge would have to pay $66,700.29 plus attorneys' fees—almost twice the amount she had received in 2007 and more than the appraised value of her home in 2012. *See* Ex. C.

16. Ms. Ridge, when she was served with the Application, attempted to pay the property taxes on her home and was told that the Travis County Tax Office could not accept payment because those taxes were already paid, before they were due, by Defendant.

17. Ms. Ridge, who lives on disability payments of $641 per month and has no other income or source of funds, cannot pay the amount demanded by Defendant—nor should she have to. Defendant's payment of Ms. Ridge's property tax for 2012 before those taxes were due and then filing an Application to foreclose on her home, also before the tax due date, is a violation of the Texas Debt Collection Act and Deceptive Trade Practices Act, a breach of the agreement into which Ms. Ridge and Defendant entered for her reverse mortgage, an attempted conversion of her property, unjust enrichment, and wrongful foreclosure.

18. All conditions precedent to bring this action have been performed or have occurred.

VI. Causes of Action

A. Violation of Unfair Debt Collection Act Un der Tex. Fin. Code §392.404(a) and Injunctive Relief.

19. Plaintiff is a consumer under Tex. Fin. §392.001(1) because she incurred a consumer debt by executing the reverse mortgage documents in order to obtain money to repair her home. The money she received was a consumer debt as defined by §392.001(2) because it was an obligation entered into primarily for her personal household purposes.

20. Defendant is a debt collector under Tex. Fin. Code §392.001(6) because Defendant engaged in debt collection by filing the Application for the purpose of foreclosing on Plaintiff's homestead by claiming that she had failed to pay property taxes on her property before those taxes were due.

21. Defendant engaged in fraudulent, deceptive, or misleading representations by

filing an Application claiming that Plaintiff was "in default due to [her] failure to pay property taxes." *See* Ex. E, ¶7. At the time the Application was filed on January 30, 2013, Plaintiff was not in default for failure to pay property taxes. Plaintiff had paid her 2011 property taxes in full and her 2012 property taxes of $49.00 were not yet due. This constitutes a violation of Tex. Fin. Code §392.304(a)(8) by misrepresenting the consumer debt's status in a judicial or governmental proceeding. Defendant's actions constitute a producing and proximate cause of damages to Plaintiff.

22. Defendant's attempted foreclosure was knowing and intentional because Defendant had access to all the applicable documents involved in this reverse mortgage and was much more sophisticated and knowledgeable about this type of debt instrument.

23. Defendant's false statement that Plaintiff had failed to meet her obligations under the Deed of Trust and Note to pay her property taxes was more than a shock to her. The anxiety it caused her affected her ability to control her diabetes and blood pressure.

24. Defendant's action in misrepresenting Plaintiff's debt status was an act of gross negligence under Tex. Civ. Prac. & Rem. Code §41.003(a)(3) for which exemplary damages are recoverable.

25. Plaintiff also asks for injunctive relief to prevent foreclosure on her home under Tex. Fin. Code §293.403(a)(1) and for actual damages sustained as a result of violation of this chapter. Tex. Fin. Code §392.403(a)(2).

26. Plaintiff also asks for attorneys' fees reasonably related to the amount of work performed and costs. Tex. Fin. Code §392.403(b).

B. Violation of Deceptive Trade Practices Act.

27. Plaintiff is a consumer under the DTPA because she sought money through a

reverse mortgage in order to repair home so as to make it more safe and livable for her at her advanced age and compromised health and she used the money obtained through the reverse mortgage from Defendant to obtain the goods and services necessary to repair her home.

28. As a result of Defendant's Violation of Tex. Fin. Code §392.304(a)(8), Plaintiff also alleges a violation of the Deceptive Trade Practices Act as permitted under Tex. Fin. Code §392.404. Defendant's deceptive acts were therefore committed in connection with Plaintiff's transaction in obtaining goods and services by means of the reverse mortgage entered into by Plaintiff with Defendant.

29. Plaintiff relied upon the representations made to her by Defendant that the reverse mortgage would enable her to remain in her home as long as possible and she did not default on her obligations to Defendant in making sure that her property taxes were properly paid. Plaintiff's reliance was reasonable and resulted in damages to her.

30. Plaintiff is an elderly woman in poor health and limited education. She believed that she had received a reverse mortgage that would enable her to get her home repaired so that it would be possible for her to stay there until her death or until her health made it impossible for her to live in her home any longer. Defendant's act of filing an Application and misrepresenting to a Texas court that Plaintiff's reverse mortgage was in default for failure to pay property taxes when her property taxes were not yet due was unconscionable under Tex. Bus. & Com Code §17.50(a)(3) because it took advantage of Plaintiff's lack of knowledge, ability experience or capacity to a grossly unfair degree. Tex. Bus. & Com. Code §17.45(5). The actions of Defendant in seeking to foreclose on Plaintiff when Plaintiff was not in default on her reverse mortgage was an act whose unfairness was "glaringly noticeable, flagrant, complete and unmitigated," especially given the economic power and sophistication of Defendant and the lack

of sophistication of the Plaintiff in this situation. *Bradford v. Vento,* 48 S.W.3d 749, 760 (Tex. 2001).

31. Defendant's actions were also intentional and knowing. Defendant is a business that regularly makes reverse mortgages to people in Texas. Defendant drafted the documents that its sales people read to Plaintiff and that she signed. Defendant also knows the dates when Texas property taxes are due and knew how to check to see if Plaintiff was current on her tax payments.

32. Defendant's actions were a producing cause of Plaintiff's damages, which included actual and mental-anguish damages.

33. Because of Defendant's DTPA violations, Plaintiff asks for treble damages because Defendant knowingly and intentionally violated the DTPA. Tex. Bus. Com. Code §17.50(b)(1).

34. Plaintiff also asks for reasonable attorneys' fees and court costs. Tex.. Bus. Com. Code §17.50(d).

C. Statutory Fraud In A Real Estate Transaction.

35. As shown above, Defendant made a false representation to Plaintiff of a material fact—that she could remain in her home until her death or until her health made it impossible for her to remain there as long as she remained current on paying her property taxes—in order to induce her to enter into Defendant's reverse mortgage agreement, and Plaintiff relied upon that misrepresentation in agreeing to the reverse mortgage. Defendant is, therefore, liable, under Tex. Bus. & Com. Code, §27.01(a)(1), for statutory fraud. Defendant's representation was false because Defendant paid Plaintiff's property tax for 2012 and then tried to foreclose on Plaintiff's home before the 2012 property tax was due.

36. Defendant's action in filing an Application for Foreclosure before Plaintiff's property taxes were due was intentional and knowing. Defendant took advantage of Plaintiff's lack of sophistication, poor health and inability to move about freely by paying her property taxes before she received a property tax bill for 2012. Defendant's actions were intended to create a situation in which Defendant could claim Ms. Ridge was in default (when she was not) so that Defendant could seize her home for $49.

37. Plaintiff was damaged by Defendant's false representations and intentional and knowing acts.

D. Attempted Unjust Enrichment and Attempted Conversion

38. Based upon the facts alleged above, Plaintiff also alleges that Defendant is attempting unjust enrichment and conversion of Plaintiff's homestead by attempting to foreclose on Plaintiff's home when Plaintiff is not in default on her reverse mortgage.

E. Wrongful Acceleration

39. The Texas Constitutions provides special and unique protection for the homestead, separate and distinct from the protections given other types of property. Tex. Const. art. XVI, §50. Constitutional homestead rights protect citizens from losing their homes; accordingly statutes related to homestead rights are to be liberally construed to protect the homestead. *Kendall Builders, Inc. v. Chesson,* 149 S.W.3d 796, 807 (Tx. App—Austin 2004, pet. denied. Homestead rights have historically enjoyed great protection. *Id.* In order for a creditor to foreclose on a homestead, even for one of the types of liens allowed by the Constitution—such as a reverse mortgage—the creditor may not foreclose unless the borrower is actually in default. A creditor holding a reverse mortgage on a homestead has a lien that may not require payment of principal or interest until the borrower actually defaults on an obligation such

as paying taxes. Tex. Const. art. XVI, §50k(6)(D)(i).

40. The facts as stated in this Petition show that Plaintiff was not in default when Defendant's Application claims that Defendant sent out a Notice of Default (which Plaintiff denies receiving) on July 3, 2012. That Notice claimed that Plaintiff was in default as of July 3, 2012 for failure to "pay the full amount owed for Real Estate Taxes and/or homeowners hazard insurance" but did not tell Plaintiff which was the source of the default. At that point, Plaintiff had paid her 2011 property taxes timely and had not received a bill for her 2012 property taxes which would, in any event, not be due and owing until January 31, 2013. On January 21, 2013, when Defendant's counsel sent out a Notice of Acceleration, Plaintiff's property taxes for 2011 were still paid in full and her 2012 property taxes were still not due. Even when the Application was filed on January 30, 2013 claiming that Plaintiff had failed to pay her property taxes, Plaintiff's property taxes were still not due. *See* Ex. E, ¶7.

41. Defendant wrongfully accelerated Plaintiff's reverse mortgage and claimed a right to take Plaintiff's homestead from her when she was not in default under the terms her Deed of Trust and Note.

42. Defendant's wrongful acceleration is the producing cause of Plaintiff's damages.

F. Breach of Contract

43. The Adjustable Rate Deed of Trust that Ms. Ridge executed on February 22, 2007 was a valid and enforceable written contract. That contract allowed Defendant to accelerate repayment of the lien on her homestead only under certain circumstances. One of those circumstances—and the only one cited in Defendants' Application—was failure to pay property taxes. *See* Exhibit A, ¶9(b)(ii); Exhibit F, ¶7.

44. Ms. Ridge never defaulted by failing to pay her property taxes. Her taxes were

not overdue on January 30, 2013 when Defendant filed its Application. Defendant, by stepping in to pay those taxes before they were due (and before Ms. Ridge received a bill notifying her of her duty to pay any taxes at all), and then initiating a proceeding to take her home for a default that had not occurred breached its contract with Plaintiff.

45. Defendant's breach of contract was a producing cause of damages suffered by Plaintiff.

G. Declaratory Judgment

46. Pursuant to Tex. Civ. Prac. & Rem. Code §§37,001 *et seq.*, Plaintiff asks the Court for a declaration her rights under the Deed of Trust and Note that:

a. Defendant had no right to accelerate the maturity of the Note and that Defendant's acceleration is void;

b. Defendant has no right to foreclose on Plaintiff's home based on any monetary or other default under the Deed of Trust and Note; and

c. Defendant, by filing its Application before Plaintiff was in default for non-payment of property taxes, has waived any claim to collect late fees, charges, attorney's fees, interest, or penalties it alleged that Plaintiff owed as a result of that alleged default.

VII. Damages

47. Plaintiff has sustained actual and consequential damages in amounts that exceed the Court's minimum jurisdictional limits.

48. Defendant should be held liable for exemplary damages because the harm that Plaintiff sustained resulted from gross negligence. Tex. Civ. Prac. & Rem. Code §41.003(a)(3).

VIII. Attorneys' Fees

49. Plaintiff has been forced to employ attorneys to protect her rights and are entitled to an award of attorneys' fees in this action pursuant to the claims for breach of contract, action for declaratory judgment, unlawful debt collection, and DTPA claims, Tex. Civ. Prac & Rem.

Code §§ 38.001(8), 37.009, Tex. Fin. Code §392.403(b), and Tex. Bus. & Com. Code §17.50(d).

PRAYER

WHEREFORE, Plaintiff asks the Court to award her a declaratory judgment protecting her right to her homestead, all actual and consequential damages, exemplary damages, treble damages under the DTPA, attorneys' fees, costs, pre-judgment and post-judgment interest, and all other relief, at law or in equity, to which she may show herself justly entitled

Respectfully submitted,

GEORGE, BROTHERS, KINCAID & HORTON, L.L.P.

By: Nanneska N. Hazel

Nanneska N. Hazel
Texas State Bar No. 12813500
114 W. 7th Street, Suite 1100
Austin, Texas 78701
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Facsimile: (512) 499-0094
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ATTORNEY FOR ARON EZILLA RIDGE

Filing # 52076108 E-Filed 02/06/2017 08:18:16 AM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2015-CA-6042-XXXX-MA
DIVISION: FC-F

JAMES B. NUTTER & COMPANY,
Plaintiff,
v.

SAMMIE LEE SINGLETON, *et. al.*,
Defendant(s).

DEFENDANT/COUNTERCLAIM PLAINTIFF'S RESPONSE IN OPPOSITION TO PLAINTIFF/COUNTERCLAIM DEFENDANT'S MOTION TO STRIKE HIS AFFIRMATIVE DEFENSES AND MOTION TO DISMISS HIS AMENDED COUNTERCLAIMS

The Defendants/Counterclaim Plaintiff, Sammie Lee Singleton, (hereinafter "Mr. Singleton," "Defendant" or "Counterclaim Plaintiff") files his response in opposition to James B. Nutter & Company's (hereinafter "Nutter," "Plaintiff, or "Counterclaim Defendant") Motion to Strike his First, Third and Fourth Affirmative Defenses and Motion to Dismiss his three Amended Counterclaims and says:

I. INTRODUCTION

On September 22, 2015, Nutter filed the above-styled lawsuit against Mr. Singleton to foreclose upon his reverse mortgage for a purported failure to pay either homeowner's insurance and/or taxes. The Complaint does not specify the nature of the non-payment of sums sought which caused the purported default. In its complaint, Nutter claims Mr. Singleton owes $87,719.92 for failure to pay insurance and/or taxes. (Paragraph 9 of Plaintiff's Complaint). In its "Wherefore" clause, Plaintiff requests the Court determine the amount due for "costs, attorneys' fees, principal and interest on the note and mortgage, late charges, abstracting, taxes expenses and costs" and if

FILED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 02/06/2017 09:36:14 AM

these sums are not paid, Plaintiff requests foreclosure of the subject property.

Mr. Singleton filed an answer, affirmative defenses and amended counterclaims on August 2, 2016. In his answer, Mr. Singleton denied Plaintiff was entitled to the relief it sought. Mr. Singleton also raised four Affirmative Defenses: 1) Failure to State a Cause of Action (standing); 2) Failure to Provide the Required Notice of Acceleration; 3) Failure to Provide the Required Pre-Foreclosure Loss Mitigation and 4) Unclean Hands.

Mr. Singleton also filed counterclaims against the Plaintiff for its actions related to its effort to obtain sums from him pursuant to a repayment agreement to reimbursement Plaintiff for insurance premiums it, either rightly or wrongfully, advanced and for claiming he was in default when he was making payments on sum purportedly due and without giving him the proper notice it was declaring the repayment agreement in default or rescinded. Mr. Singleton's there counterclaims include Plaintiff 's alleged violations of 1) the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part Two, *Fla.Stat.* ("FDUTPA"); 2) the Equal Credit Opportunity Act, 15 U.S.C. §1691, *et seq.* ("ECOA") (age discrimination) and 3) ECOA (failure to provide an "adverse action" notice).

In support of his counterclaims, Mr. Singleton set out very detailed allegations of Plaintiff's actions in improperly and/or inequitably servicing/collecting his reverse mortgage loan, specifically its treatment of its agreement with Mr. Singleton to repay insurance premiums purchased by Plaintiff to cover a purported six (6) months lapse in insurance premiums by Mr. Singleton. The total sought was either $885.66 or over $80,000.00, depending on the notice reviewed. Mr. Singleton asked for and received a repayment plan which he complied with. The allegations contained in his answer, affirmative defenses and amended counterclaims arise out of

Plaintiff's pre-foreclosure collection actions and its actions relating to its attempts to take his home for less than $800.00.

II. MOTION TO DISMISS STANDARD

"In considering a motion to dismiss, a trial court is confined to the allegations contained within the four corners of the complaint." *Crews v. Ellis*, 531 So.2d 1372 (Fla. 1st DCA 1988). In addition, "the function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action, and a court is not permitted to speculate as to whether a plaintiff has any prospect of proving the allegations." *Id.*

The First District Court of Appeal also held

> The party moving for dismissal necessarily admits the truth of all facts in evidence, and every reasonable conclusion or inference based thereon favorable to the nonmoving party. *Weaver v. The Leon County Classroom Teacher's Association*, 680 So.2d 478 (Fla. 1st DCA 1996).

See also Fish v. Post of Amvet #85, 560 So.2d 337, 339 (Fla. 1st DCA 1990) (In analyzing the complaint the trial court is confined to the allegations contained within the four corners of the complaint and may not consider defenses).

As will be more particularly described at the conclusion of this memorandum of law, most of the arguments made by movants require this Court to look outside the four corners of the complaint and require the Court to review the "facts" as set out by the movants as true or at least to draw all reasonable inferences in favor of the movants and not Mr. Singleton. This is not the role of a motion to dismiss.

Filing # 52076108 E-Filed 02/06/2017 08:18:16 AM

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2015-CA-6042-XXXX-MA
DIVISION: FC-F

JAMES B. NUTTER & COMPANY,
Plaintiff,
v.

SAMMIE LEE SINGLETON, *et. al.*,
Defendant(s).

DEFENDANT/COUNTERCLAIM PLAINTIFF'S RESPONSE IN OPPOSITION TO PLAINTIFF/COUNTERCLAIM DEFENDANT'S MOTION TO STRIKE HIS AFFIRMATIVE DEFENSES AND MOTION TO DISMISS HIS AMENDED COUNTERCLAIMS

The Defendants/Counterclaim Plaintiff, Sammie Lee Singleton, (hereinafter "Mr. Singleton," "Defendant" or "Counterclaim Plaintiff") files his response in opposition to James B. Nutter & Company's (hereinafter "Nutter," "Plaintiff, or "Counterclaim Defendant") Motion to Strike his First, Third and Fourth Affirmative Defenses and Motion to Dismiss his three Amended Counterclaims and says:

I. INTRODUCTION

On September 22, 2015, Nutter filed the above-styled lawsuit against Mr. Singleton to foreclose upon his reverse mortgage for a purported failure to pay either homeowner's insurance and/or taxes. The Complaint does not specify the nature of the non-payment of sums sought which caused the purported default. In its complaint, Nutter claims Mr. Singleton owes $87,719.92 for failure to pay insurance and/or taxes. (Paragraph 9 of Plaintiff's Complaint). In its "Wherefore" clause, Plaintiff requests the Court determine the amount due for "costs, attorneys' fees, principal and interest on the note and mortgage, late charges, abstracting, taxes expenses and costs" and if

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Mr. Singleton filed an answer, affirmative defenses and amended counterclaims on August 2, 2016. In his answer, Mr. Singleton denied Plaintiff was entitled to the relief it sought. Mr. Singleton also raised four Affirmative Defenses: 1) Failure to State a Cause of Action (standing); 2) Failure to Provide the Required Notice of Acceleration; 3) Failure to Provide the Required Pre-Foreclosure Loss Mitigation and 4) Unclean Hands.

Mr. Singleton also filed counterclaims against the Plaintiff for its actions related to its effort to obtain sums from him pursuant to a repayment agreement to reimbursement Plaintiff for insurance premiums it, either rightly or wrongfully, advanced and for claiming he was in default when he was making payments on sum purportedly due and without giving him the proper notice it was declaring the repayment agreement in default or rescinded. Mr. Singleton's there counterclaims include Plaintiff 's alleged violations of 1) the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part Two, *Fla.Stat.* ("FDUTPA"); 2) the Equal Credit Opportunity Act, 15 U.S.C. §1691, *et seq.* ("ECOA") (age discrimination) and 3) ECOA (failure to provide an "adverse action" notice).

In support of his counterclaims, Mr. Singleton set out very detailed allegations of Plaintiff's actions in improperly and/or inequitably servicing/collecting his reverse mortgage loan, specifically its treatment of its agreement with Mr. Singleton to repay insurance premiums purchased by Plaintiff to cover a purported six (6) months lapse in insurance premiums by Mr. Singleton. The total sought was either $885.66 or over $80,000.00, depending on the notice reviewed. Mr. Singleton asked for and received a repayment plan which he complied with. The allegations contained in his answer, affirmative defenses and amended counterclaims arise out of

Plaintiff's pre-foreclosure collection actions and its actions relating to its attempts to take his home for less than $800.00.

II. MOTION TO DISMISS STANDARD

"In considering a motion to dismiss, a trial court is confined to the allegations contained within the four corners of the complaint." *Crews v. Ellis*, 531 So.2d 1372 (Fla. 1st DCA 1988). In addition, "the function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action, and a court is not permitted to speculate as to whether a plaintiff has any prospect of proving the allegations." *Id.*

The First District Court of Appeal also held

> The party moving for dismissal necessarily admits the truth of all facts in evidence, and every reasonable conclusion or inference based thereon favorable to the nonmoving party. *Weaver v. The Leon County Classroom Teacher's Association*, 680 So.2d 478 (Fla. 1st DCA 1996).

See also Fish v. Post of Amvet #85, 560 So.2d 337, 339 (Fla. 1st DCA 1990) (In analyzing the complaint the trial court is confined to the allegations contained within the four corners of the complaint and may not consider defenses).

As will be more particularly described at the conclusion of this memorandum of law, most of the arguments made by movants require this Court to look outside the four corners of the complaint and require the Court to review the "facts" as set out by the movants as true or at least to draw all reasonable inferences in favor of the movants and not Mr. Singleton. This is not the role of a motion to dismiss.

III. MOTION TO STRIKE STANDARD

The striking of pleadings is not favored. *Sanchez v. LaSalle Bank National Association* 44 So. 3d 227, 228 (Fla. 3rd DCA 2010). The *Sanchez* Court repeated the standard for striking pleadings which are "redundant, immaterial, impertinent or scandalous" or a "sham." *Fla. R. Civ. P.* Rules 1.140(f), 1.150. A motion to strike should be used sparingly and, as with a motion to dismiss, any doubts should be resolved in favor of the pleadings. When a defense is legally sufficient on its face and presents a bona fide issue of fact, it is improper to grant a motion to strike. *Hulley v. Cape Kennedy Leasing Corp.*, 376 So. 2d. 884, 885 (Fla. 5th DCA 1979).

IV. FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT COUNTERCLAIM IS SUFFICIENTLY PLED

Nutter moves to dismiss Mr. Singleton's claims it violated the Florida Deceptive and Unfair Trade Practices Act, §§501.201, *et seq.*("FDUTPA") because Mr. Singleton failed to allege facts that would "support an inference that Plaintiff's actions were misleading, that they offend public policy or that they were immoral, unethical, oppressive, unscrupulous or injurious" to Mr. Singleton. Nutter cast a pretty large net of options for Mr. Singleton to choose from to properly allege a violation of the FDUTPA. Plaintiff also claims that Mr. Singleton, as a question of law, has not properly alleged causation and damages. (Pages 3 – 7 of Nutter's Motion to Dismiss Counterclaims, specifically Paragraphs 10, 11, 14 – 18)

What Constitutes a Deceptive and/or Unfair Practice

The FDUTPA must be construed liberally to protect the consuming public from those "who engage in... deceptive, or unfair acts or practices in the conduct of any trade or commerce." §501.202(2), *Fla.Stat. See also Schauer v. General Motors Acceptance Corp.*, 819 So.2d 809, 812 (Fla. 4th DCA 2002) In *Schauer,* the Fourth District Court of Appeal reversed the dismissal of

FDUTPA claims and found that Schauer's allegations that GMAC violated FDUTPA by harassing him and his family in connection with the collection of a debt was unfair and/or deceptive and fell within the broad definition of "trade and commerce." As in the instant case, GMAC argued Schauer should have read the loan agreement he signed and should be bound by its terms. The Court found at "a minimum" the plaintiff's allegations still suggest the defendant's actions were unfair and deceptive. 819 So.2d at 813.

It is unnecessary to find a violation of a specific rule or regulation to find a violation of the FDUTPA. *Department of Legal Affairs v. Father and Son Moving & Storage, Inc.*, 643 So. 2d 22 (Fla. 4th DCA 1994). An unfair practice is "one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Deception is a proper characterization of a "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. "To require a specific prohibitory rule for every act which may be considered unfair or deceptive would again put unscrupulous businesses one step ahead of Florida's ability to combat such practices, for which our law extends no tolerance. *Father & Sons,* 643 So.2d at 27.

Mr. Singleton is seeking actual damages as well as injunctive or declaratory relief. These remedies are specifically provided by FDUPTA and can be sought in connection with a mortgage foreclosure case. The Florida Southern District Court in *Galstaldi v.Sunvest Communities USA, LLC,* 637 F.Supp.2d 1045 (S.D. Fla. 2009) found that the FDUTPA was not only for the protection of individual consumers, but instead is broadly worded to authorize declaratory and injunctive relief even if those remedies might not benefit the individual consumers who filed the suit. 637 F. Supp. 2d at 1057. The Southern District Court in *Martorella v. Deutsche Bank National Trust Company*, 931

F.Supp.2d 1218, 1225 (S.D. Fla. 2013) denied Deutsche Bank and the servicers' motions to dismiss the Plaintiffs' FDUPTA claims that Defendants participated in an unfair and/or deceptive scheme to charge borrowers for force-placed property insurance at grossly excessive rates. The Defendants in *Martorella* argued that their purported kickback scheme and their purported improper purchase of force placed insurance did not fall in the FDUPTA definition of "trade or commerce" just as argued in the instant case involving very similar claims of wrongdoing in the context of force placed insurance and collection. The *Martorella* Court also found that "mortgage loan servicing" fell under the definition of "trade and commerce." 931 F. Supp. 2d at 1224.

> The conduct challenged in the Complaint is Defendants' provision of insurance (a product) to Martorella for which Martorella paid excessive premiums and Defendants received kickbacks in the form of commissions. Such conduct falls squarely within "the statute's broad definition of 'trade or commerce.' 931 F. Supp.2d at 1224.

The *Martorella* Court also found causation and damages were properly stated because "a reasonably prudent person could foresee that a harm like the one that the plaintiff suffered might result from his or her actions, then there is proximate causation." 931 F. Supp. 2d at 1224, 1225.

Lastly, the Southern District of Florida in *U.S. Bank, N.A. v. Capparelli,* 2014 WL 2807648 (S.D. Fla. June 20, 2014) found actions taken in the context of collection of a mortgage and note and pre-foreclosure negotiations could be the basis for an FDUTPA claim. 2014 WL 2807648 *5. The *Caparelli* Court found "Because the FDUPTA is a consumer and business protection statute that is remedial in nature, this Court is inclined to align with the courts that construe the FDUPTA liberally in favor of consumers." *Id.* The Court found the purpose of the FDUTPA was to provide remedies for conduct outside the reach of traditional common law torts such as fraud, and therefore, "the plaintiff need not prove the elements of fraud to sustain an action under the statute." *Id.* at *5.

Mr. Singleton has alleged he has been damaged by being required to pay unearned and improper sums to Nutter for improperly force placed insurance premiums. Mr. Singleton has also alleged Nutter unilaterally changed the terms of this repayment agreement. He also alleged he has paid improper sums and is still in danger of losing his home as result of these actions. (Counterclaims Paragraph 29 – 34, 40, 45). These allegations fall within the parameter of a properly pled FDUPTA claim based upon the cases cited above.

Nutter relies upon *Coursen v. Shapiro & Fishman, GP*, 588 Fed. Appx. 882, 885 (11th Cir. 2014) as analogous to the instant case. The Eleventh Circuit in *Coursen* found there were insufficient allegations of damages for an FDUPTA claim based upon loan servicing failures. The primary problem with Ms. Coursen's claims is that they were brought after a foreclosure judgment had been entered against her and her claims were based primarily on actions taken place within the foreclosure. These claims were barred by the litigation privilege, were untimely, were partially brought against a defendant that was not involved in the actions which were the subject of the lawsuit and collateral estoppel. The Eleventh Circuit also found *Coursen* had not suffered damages because she did not pay her mortgage payments leading to the loss of her home. Mr. Singleton's failure or non-failure to pay his insurance premiums or his failure or non-failure to comply with the repayment plan, if warranted, are factual issues which have yet to be determined by the Court. Therefore, assuming *Coursen* was controlling, there are factual issues which must be resolved therefore, rendering dismissal at this stage inappropriate .

As an aside, in Paragraph 14 its motion, Nutter claims this repayment plan was provided to Mr. Singleton in Nutter's attempt to go "above and beyond." As will be more specifically set out below, this payment plan was not charity provided by Nutter, instead it was required by Mortgagee Letter 2011-01 governing the pre-foreclosure actions required in connection with reverse mortgages.

VII. EQUAL CREDIT OPPORTUNITY ACT CLAIMS ARE SUFFICIENTLY PLED

The Equal Credit Opportunity Act ("ECOA") makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction - (1) on the basis of race, color, religion, national origin, sex or marital status, or age . . . [.]" 15 U.S.C. § 1691(a)(1). *Chen v. Whitney Nat. Bank*, 65 So.3d 1170 (Fla. 1st DCA 2011). ECOA prohibits discrimination and requires the creditor to provide an adverse action notice providing the specific reasons for any adverse action taken. 15 U.S.C. § 1691(d). An "adverse action" requirement assists borrowers in identifying if the "adverse action" was taken based upon a discriminatory purpose.

VIII. EQUAL CREDIT OPPORTUNITY ACT CLAIMS – AGE DISCRIMINATION – ARE PROPERLY PLED

Nutter's bases for its Motion to Dismiss Mr. Singleton's ECOA counterclaims include: 1) there is no age discrimination because everyone who takes out a reverse mortgage has to be at least 62 years old; 2) the servicing of the loan is not covered by ECOA, only origination; 3) the statute of limitations bars the claim when based upon the date the loan was signed, and 4) Mr. Singleton's failure to properly allege a statistical pattern and practice. (Motion to Dismiss Paragraph 25 through 35)

Reverse Mortgage Age Requirements Do not Render ECOA Irrelevant and, Instead Further Mr. Singleton's Claim

Nutter's first argues because a borrower has to be 62 years old to obtain a reverse mortgage, ECOA's age discrimination bar does not apply to Mr. Singleton. To the contrary, Nutter's reasoning bolsters Mr. Singleton claims that Nutter knew that its borrower population is, by definition, older borrowers like Mr. Singleton who was having "difficulties understanding his financial affairs based upon health problems related to his age." (Paragraph 26 of Mr. Singleton's Counterclaims) Mr. Singleton alleged Nutter's actions in "improperly force placing insurance or,

alternatively, sending mixed messages regarding the amounts owed to reinstate the purportedly delinquent mortgage and note; filing a foreclosure lawsuit based upon a false insurance default when Mr. Singleton was making his tax and insurance payments; and/or filing a foreclosure lawsuit against an 80 year old Mr. Singleton when he was purportedly approximately $885.66 delinquent all constitute unlawful discrimination against Mr. Singleton based upon his age and diminished capacity. (Counterclaims Paragraph 54) all violated ECOA. Mr. Singleton also alleges Nutter knew he was elderly because of the reverse mortgage age requirement as studies show older adults, compared to younger adults have diminished capacities. (Counterclaim Paragraphs 53 and 55)

In support of its arguments Nutter relies upon *Earley v. Champion Intern. Corp.*, 907 F. 2d 1077, 1081 (11th Cir. 1990). The Eleventh Circuit in *Earley* was addressing an Age Discrimination in Employment Act 29 U.S.C. §§ 621, *et seq.*, claim for an alleged discriminatory discharge. 907 F. 2d at 1080. Although the court was not addressing an ECOA claim, it is important to note that the case upon which the *Earley* Court based its disparate impact burden shifting analysis was *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, (1973). The *McDonnell Douglas Corp.* standard to establish a prima facie case for discrimination was been superseded by *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100 (2003) (instead of requiring the defendant to produce a legitimate, nondiscriminatory reason and then shifting the burden of proof to plaintiff to prove, by direct or indirect evidence, that this proffered nondiscriminatory reason was false and a pretext for a discriminatory motive, the defendant bears the burden of proof on the "same decision test") *Earley* was also decided at the summary judgment stage after the parties engaged in discovery, not in the context of a motion to dismiss as in the instant case. 907 F. 2d at 1080 -1081

Nutter also relies upon *Massey v. First Greensboro Home Equity, Inc.* 1998 WL 231141, at *9 to support its argument that Mr. Singleton cannot practically and logically set forth facts

demonstrating disparate treatment and/or disparate impact when the borrowers must be 62 to apply for a reverse mortgage. The *Massey* Court denied First Greensboro's motion for summary judgment because the Court found the facts could be interpreted to find that older borrowers were more negatively impacted by First Greensboro's loan approval practices. 1998 WL 231141*10, 11. Therefore, this decision is helpful to Mr. Singleton. Mr. Singleton is a member of a captive group of borrowers whose age could be found to lead to a lesser ability to navigate Nutter's collection procedures. (Counterclaims Paragraph 53, 54, 55).

Mr. Singleton Falls within the Definition of Persons Entitled to ECOA Protections and His Claims are not Time Barred

In its motion to dismiss Mr. Singleton's ECOA counterclaims, Nutter continues its focus on the origination of the loan and also argues that Mr. Singleton is not an "applicant" as that term is defined by Regulation B. Additionally, Nutter claims the time within which Mr. Singleton was an "applicant" was in 2008 when he signed the reverse mortgage so his claims are time barred by the five (5) year statute of limitations to bring an ECOA claim. 15 U.S.C. §1691e(f).

Mr. Singleton is An Applicant

To state an ECOA claim, the defendant must allege (1) defendant is an "applicant" and (2) defendant has discriminated against plaintiff with respect to "any aspect" of a "credit transaction." 15 U.S.C. §1691(a)(1) Regulation B (12 C.F.R. Part 1002) was issued by the Consumer Financial Protection Bureau to elaborate on the requirements and protections provided by ECOA. 12 C.F.R. §1002.1(a).

The term "applicant" is broadly interpreted for ECOA purposes. An "applicant" is defined as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a

previously established credit limit." 15 U.S.C. $1691a. Regulation B expands the definition of applicant even further:

> Applicant means any person who requests **or who has received an extension of credit from a creditor,** and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 1002.7(d), the term includes guarantors, sureties, endorsers, and similar parties. 12 C.F.R. 1002.2(e), emphasis provided by author.

Further, the second requirement of coverage is that the transaction in question is a "credit transaction." This term is also broadly interpreted by Regulation B.

> Credit transaction means **every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit** (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, **alteration, or termination of credit; and collection procedures**). 12 C.F.R. 1002.2(m), Emphasis provided by author.

Nutter cites to *Gorham–DiMaggio v. Countrywide Home Loans, Inc.*, 592 F.Supp.2d 283, 295 (N.D.N.Y.2008) to support its position that Mr. Singleton's allegation are insufficient because only initial applications for credit are covered by ECOA. There are no Florida courts which follow the *Gorham* Court's analysis and the *Gorham* Court does not address why its analysis ignores the plain language of the statue and regulation. The distinction may lie in the fact that Ms. Gorham was seeking claims based upon the defendant's treatment of her escrow account. The *Gorham* Court found the plaintiff did, not ask for a new extension of credit, instead she was questioning how her escrow was handled. 592 F. Supp. 2d 283, 290 – 292. Mr. Singleton's claims are based upon a "credit extension" to cover allegedly unpaid insurance outlays by Nutter and Nutter's collection procedures in general.

Statute of Limitations

The trigger date for the violations which are the subject of Mr. Singleton's complaint is not

the date of origination, therefore, the five (5) years statute of limitations does not begin to run until the improper collection procedures or adverse action occurred. 15 U.S.C. §1691e(f). Although it is not clear exactly with the violation occurred, based upon the allegations of the Foreclosure Complaint, they occurred sometime around June, 2015. Mr. Singleton's initial counterclaims were filed in December, 2015 within the statute of limitations requirements.

Mr. Singleton's Allegations of Discrimination Based upon a Disparate Impact are Sufficient to Survive a Motion to Dismiss

Based upon the clear language of ECOA and the accompanying Regulations, Mr. Singleton's allegations are sufficient to survive a motion to dismiss based upon the allegations referenced above and contained in Paragraphs 51 - 55 relating to the extension of credit in connection with Mr. Singleton's reverse mortgage loan to repay sums purportedly due for insurance premium outlays, actions which are also clearly collection procedures.

Nutter also relies upon *Coser v. Moore,* 739 F. 2d 746 (2d Cir. 1984) and *16630 Southfield Ltd. Partnership v. Flagstar Bank, F.S.B.,* 727 F. 3.d 502 (6th Cir. 2013) to support its argument that Mr. Singleton's allegations are insufficient. The Court in *Coser* was not addressing ECOA claims, instead it was addressing employment sex discrimination claims pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.* In *Southfield* the Sixth Circuit was using the federal pleading standard established by the United States Supreme Court *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) to dismiss claims of national origin discrimination claimed by Iraqi citizen seeking to modify an already restructured loan. The *Southfield* Court found fiscally sound reasons for the denial of the modification request and found the decision was not based upon discrimination given the troubled history of the loan. Importantly, the *Southfield* Court

found

> To be sure, the mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal. *See Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.,* 648 F.3d 452, 458 (6th Cir.2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.") 727 F. 3.d 502, 505.

Further, the *Southfield* Court found

> Thus, if a plaintiff's claim is plausible, the availability of other explanations—even more likely explanations—does not bar the door to discovery. But you can't assess the plausibility of an inference in a vacuum. The reasonableness of one explanation for an incident depends, in part, on the strength of competing explanations. (How reasonable is it to infer that it rained last night from the fact that my lawn is wet? It depends, among other things, on whether I own a sprinkler.) Where, as here, the complaint alleges facts that are merely consistent with liability (i.e., being Iraqi and being denied a loan extension) as opposed to facts that demonstrate discriminatory intent (i.e., disparate impact or direct evidence), the existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made. 727 F. 3.d 502, 505

Mr. Singleton does not just allege because he is old he has been denied credit. He alleges that problematic extension of credit to repay insurance outlays by Nutter and the problematic collection of that additional extension of credit have a more negative impact on senior citizens, the only population which can obtain a reverse mortgage, than on younger borrowers. (Paragraphs 53, 54, 55, and 56) Discrimination is not usually blatant and obvious. If this Court is considering analogous anti-discrimination precedent, the United States Supreme Court recently addressed claims brought pursuant to the Federal Fair Housing Act, 42 U.S.C. §3601, *et. seq.* in *Texas Dep't of Housing & Community Affairs v. Inclusive Community Project, Inc.*, 135 S. Ct. 2507, 2523-24, (2015). The Court found prima facie evidence of a disparate impact (also relevant to an ECOA claim) exists where

> (1) the lender or servicer has an outwardly or facially neutral policy or practice and (2) a significantly adverse or disproportionate impact upon members of a protected class is produced by the application of the facially neutral policy or practice. 135 S. Ct. 2507,

2523-24, (2015), *see also Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) and *Gallagher v. Magner*, 619 F. 3d 823, 834 (8th Cir. 2010).

The Court in *M&T Mortgage v. White*,736 F. Supp. 2d 538, 574 (E.D.N.Y. 2010) denied a defensive summary judgment based upon claims that a creditor violated the ECOA when its policies and practices "with respect to any aspect of a credit transaction" had a discriminatory impact. White alleged a vendor intentionally targeted purchasers for unfavorable terms in various aspects of home sales. The Court found a defense summary judgment was inappropriate because the evidence one way or the other was not strong enough to entitle either party to judgment as a matter of law on the discrimination claims. 736 F. Supp. 2d 538, 574 – 575. The Court found

> The nature of this type of discrimination, inasmuch as the plaintiffs were not *denied* a loan or a housing opportunity on account race, but were allegedly *targeted* for unfavorable terms in connection with housing and a loan on account of race, should therefore trigger alternative legal considerations reflective of this different species of discrimination, allowing similarly-situated plaintiffs to establish a *prima facie* case of housing discrimination under the FHA and the ECOA. *Id.* at 575.

Nutter's motion to dismiss should be denied because Mr. Singleton has sufficiently stated a cause of action for violation of ECOA's discrimination prohibitions. Mr. Singleton has alleged Nutter's policies and practices of improperly force placing insurance and/or sending mixed messages regarding the amounts owed to reinstate the purportedly delinquent mortgage and note, foreclosing when Mr. Singleton was properly making payments and filing a foreclosure lawsuit to take Mr. Singleton's home when he was purportedly approximately $885.66 delinquent in the repayment agreement, constitutes unlawful discrimination against Mr. Singleton based on his age. These practices also have a disparate, adverse and discriminatory impact on elderly persons, including Mr. Singleton.

IX. EQUAL CREDIT OPPORTUNITY ACT CLAIMS – ADVERSE ACTION – ARE PROPERLY PLED

According to ECOA and Regulation B, an adverse action includes:

15 U.S.C. §1691(d)(6) ". . . a denial or revocation of credit, a change in terms of an existing credit arrangement, or a refusal to grant credit in substantially the among or on substantially the terms requested....."

and 12 C.F.R. §1002.2(c)(1)(ii)

(c) Adverse action.

(1) The term means:
(ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts;

Mr. Singleton has alleged Nutter violated ECOA's adverse action requirements when it made a unilateral and without notice decision to "either ignore payments made toward the repayment agreement and/or unilaterally rescind the repayment agreement." This failure to comply with the repayment agreement and ECOA's adverse action requirements harmed Mr. Singleton because with proper notice he could have made arrangements to repay such a small sum, particularly when he was receiving contradicting messages regarding the amount owed with the $80,000.00 payment it demanded. (Paragraphs 63 and 65)

In a case more factually similar to the instant case, the Ninth Circuit Court of Appeal reversed the trial court's decision to dismiss an ECOA claim in *Schlegel v. Wells Fargo Bank, NA,* 720 F.3d 1204 (9th Cir. 2013). The Schlegels were behind in their mortgage payments and sought a loan modification. The Schlegels allege Wells Fargo ignored their loan modification application and filed a foreclosure lawsuit. 720 F. 3d 1204, 1210. The Schlegels alleged, similarly to Mr. Singleton, that Wells Fargo acceleration of their debt instead of reviewing their loan modification application was a "revocation of credit" pursuant to ECOA. The *Schlegel* Court found

> ECOA does not define "revocation," and so we read it as having its plain meaning: "The action of revoking, rescinding, or annulling; withdrawal." Oxford English Dictionary 838 (2d ed.1989); *see also id.* (defining "revoke" as "[t]o annul, repeal, rescind, cancel"); Merriam–Webster's Collegiate Dictionary 1068 (11th ed.2005) (defining revoke" to mean: "to annul by recalling or taking back"). Thus, a lender revokes credit when it annuls, repeals, rescinds or cancels a right to defer payment of a debt. 720 F. 3d 1204, 1210 – 1211.

Further, a substantive discrimination claims is not even needed to raise an adverse action claim. *See, e.g., Costa v. Mauro Chevrolet, Inc.,* 390 F. Supp. 2d 720, 728 (N.D. Ill. 2005) ("Without regard to allegations of discrimination, a creditor's failure to provide a written rejection notice is actionable under the ECOA."); *see id.* at 728-29

X. MR. SINGLETON'S FIRST AFFIRMATIVE DEFENSE QUESTIONING PLAINTIFF'S RIGHT TO BRING THE SUBJECT LAWSUIT IS LEGALLY SUFFICIENT

Nutter's claim of lack of standing, or right to enforce the subject note and bring the subject lawsuit, is based upon the premise that the subject note is not a negotiable instrument and Plaintiff's use of its status as a "holder" of the note to support its "standing" claim. Mr. Singleton alleges that the subject note is not an "unconditional promise to pay" to pay a "fixed amount" which is payable on demand "at a definite time." (Paragraph 18, Affirmative Defenses)

A note is negotiable if it is an unconditional promise to pay a fixed amount of money and is payable on demand at a definite time. §§673.1041(1), *Fla. Stat.* A negotiable instrument does not state any other undertaking in addition to the payment of money but may contain an undertaking to secure payment with collateral, an authorization to dispose of collateral or confess judgment and a waiver of rights of the obligor. §§673.1041(1)(c), *Fla. Stat.*

Paragraph 7 of the subject note requires the owner of the note to seek the approval of the Secretary of the Department of Housing and Urban Development to obtain the right to call the note "due and payable" and to file a foreclosure lawsuit if the nature of the default is: "An obligation of

the Borrower under the Security Instrument is not performed" as is alleged in the subject foreclosure complaint.

Paragraph 7 of the note creates several conditions other than payment, specifically that the borrower(s) generally maintain the property as their principal residence, stay alive and pay taxes and insurance. The owner has to seek approval of the Secretary before it can foreclose if the default is claimed to be a failure to pay insurance or taxes. These additional requirements of the note and on enforcement render the note non-negotiable. *See General Motors Acceptance Corp. v. Honest Air Conditioning & Heating, Inc.*, 933 So. 2d 34 (Fla. 2d DCA 2006). *See also, Holly Hill Acres, Ltd. V. Charter Bank of Gainesville*, 314 So. 2d 209 (Fla. 2d DCA 1975) (note that incorporate terms of the mortgage non-negotiable).

Neither the UCC nor case law presumes that any document is a "negotiable instrument." Not all notes, including mortgage notes, are "negotiable instruments." See also *Nagel v. Cronebaugh,* 782 So.2d 436, 439 (Fla. 5th DCA 2001). (confusing and ambiguous language regarding when the note could be called due rendered the note non-negotiable). No case has held that a reverse-mortgage note is a "negotiable instrument." The Florida Legislature ("Legislature") and the authors of the UCC "were careful to limit the type of instrument which would carry the powerful magic of negotiability...." In §673.1041(1) *Fla. Stat.*, the Legislature directly stated that Nutter is limited to facts "described in the promise" itself for proof of the first three (3) statutory requirements unconditional promise, promise to pay money, and promise to pay a fixed amount. The Legislature expanded the scope of this four-corners rule in Official Comment 5 to former Section 673.119, by insisting that "negotiability of an instrument is always to be determined by what appears on the face of the instrument alone...."

XI. MR. SINGLETON'S THIRD AND FOURTH AFFIRMATIVE DEFENSES RELATING TO PRE-FORECLOSURE ADVOIDANCE REQUIREMENTS AND ITS ACTIONS IN SERVICING MR. SINGLETON'S LOAN ARE LEGALLY SUFFICIENT

Mr. Singleton also opposes the striking of his third and fourth affirmative defense relating to Plaintiff's failure to provide pre-foreclosure repayment opportunities and comply with the repayment plan offered. This Court may consider matters which touch upon the equities of the foreclosure even if this equitable "defense" would not rise to the level of a legally-cognizable claim. This standard is often repeated by the District Courts of Appeal relying upon the decision in *Cross v. Federal National Mortgage Ass'n,* 359 So. 2d 464, 465 (Fla. 4th DCA 1978).

In *Cross* the Court reversed a foreclosure summary judgment. In doing so, it recognized that foreclosure is an equitable action rendering equitable defenses appropriate. 359 So. 2d at 465. The *Cross* Court found that the pre-foreclosure guidelines set out in the Housing and Urban Development mortgagee handbook were not mandatory procedures constituting conditions precedent to foreclosure. *Id.* However the Court did find that "given the purpose of this federal Act and the recommended efforts to obviate the necessity of foreclosure, any substantial deviation from the recommended norm might be considered by the trial court under the heading of an equitable defense." 359 So. 2d at 465. The *Cross* Court relied upon Handbook guidelines that had not yet been codified by federal regulations. *Id.*

The *Cross* defense of failure to follow the HUD guidelines was based upon a HUD handbook just as the affirmative defense in Mr. Singleton's case was based upon the Mortgagee Letters which supplement and update the HUD Home Equity Conversion Mortgages Handbook Volume 4235.1. This is the Handbook that provides instructions to "approved mortgagees and to HUD Field Office personnel regarding the processing and servicing of a Home Equity Conversion

Mortgage (HECM)." [1] In fact, the HECM Handbook supplemented by the Mortgagee Letter referenced in Mr. Singleton's case refers to the Handbook referenced in *Cross* as a servicing guide. *See* HECM Volume 4235.1(9-10) and the Administration of Insured Home Mortgages 4330.1, referenced at *Cross,* 359 So. 2d at 465.

Cross followed by the First District Court of Appeal

The First District Court of Appeal in *Laws v. Wells Fargo Bank, N.A.*, 159 So. 3d 918, 919 (Fla. 1st DCA 2015) held borrowers being sued for foreclosure of their FHA mortgage were "entitled to raise [the lender's] failure to comply with [HUD Regulations] as a defense." 159 So. 3d at 919. This was true even though the regulations did not create a private right of action. "Because the note contains language specifically and expressly incorporating HUD regulations that require a written notice of acceleration, Laws was entitled to raise failure to comply with these requirements with these regulations as a valid defense to foreclosure." 159 So. 3d at 919. In *Laws,* the Defendants raised the failure to provide proper notice referenced by HUD regulations as an affirmative defense. The *Laws* HUD/FHA mortgage contained specific requirements allowing acceleration only when permitted by HUD regulations. Similarly, the subject mortgage requires the approval of the Secretary of HUD prior to foreclosure. (Note Paragraph 7(B)(iii) and Mortgage Paragraph 9(b)(iii)). The Singleton mortgage owner/holder and servicers are governed by the HUD Home Equity Conversion Mortgages Handbook Volume 4235.1. The Department of Housing and Urban Development also holds a second mortgage to secure its interest in the property as guarantor of the subject mortgage.

In reaching its decision that the FHA/HUD related affirmative defense in *Laws* should survive a summary judgment motion, the First District Court of Appeal also relied upon the

1 http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4235.1.

decision in *Real Estate Mortgage Network, Inc. v. Knight,* 149 So. 3d 121 (Fla. 4th DCA 2014). In *Knight,* the borrowers also had an FHA mortgage and claimed the mortgagee did not follow the HUD regulations, specifically 12 C.F.R. §203.605 which require lenders to make certain loss mitigation efforts prior to initiating foreclosure. 149 So. 3d at 122. These regulations are similar to the repayment options required by Mortgage Letter 2011-01 which requires the Plaintiff to engage in certain activities prior to filing a foreclosure action based upon a purported failure to pay taxes and/or insurance. The *Knight* regulations also do not provide a private right of action.

In both *Laws* and *Knight,* the foreclosure plaintiffs did not dispute that "HUD and FHA statutes, guidelines, rules and regulations apply" but each countered with an argument "that HUD regulations are not generally considered to be conditions precedent to foreclosure." Both courts borrowed the language from *Cross* to hold that even though the handbook or regulations are not conditions precedent, they can provide the basis for an equitable defense. *See Knight* at 149 So. 3d 121, 122; *Laws* at 159 So. 3d 918, 919. *See also Acosta v. Deutsche Bank Nat. Trust Co.,* 88 So. 3d 415 (Fla. 4th DCA 2012) (bank's failure to comply with the forbearance, mortgage modification and foreclosure prevention loan servicing requirements imposed by the National Housing Act, 12 U.S.C. §1701x(c)(5) constitutes a meritorious defense).

WHEREFORE, the Counterclaim Defendant, Sammie Singleton requests this court to deny Nutter's Motions to Strike his Affirmative Defenses and to Dismiss his Amended Counterclaims. Alternatively, to the extent any of the allegations are deemed insufficient, Mr. Singleton requests leave to amend those allegations.

RESPECTFULLY SUBMITTED,
JACKSONVILLE AREA LEGAL AID, INC.

_____/s/Lynn Drysdale_____
Lynn Drysdale, Esquire (508489)

126 West Adams Street
Jacksonville, Florida 32202
Ph: 904 356 8371, Ext. 306 (LD)
Facsimile: 904 224 1587
Lynn.drysdale@Jaxlegalaid.org
Attorney for Mr. Singleton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above document has been furnished by email transmission to Jessica Pierce Quiggle, Esquire, Robertson, Anschutz & Schneid, P.L. at mail@rasflaw.com and jquiggle@rasflaw.com on this 6th day of February, 2017.

/s/ Lynn Drysdale
ATTORNEY

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2012-CA-10840
DIVISION: FC-A

REVERSE MORTGAGE SOLUTIONS, INC.,
Plaintiff,
v.

GLORIA B. DUNBAR, *et al.*,
Defendants.
_____/

ORDER GRANTING GLORIA B. DUNBAR'S MOTION FOR SANCTIONS AND ORDER DISMISSING THIS CASE WITH PREJUDICE

This matter came before the Court on Gloria B. Dunbar's "Defendant's Motion for Sanctions Pursuant to Rule 1.380(b)(2), *Fla.R.Civ. P.* including Dismissal of Plaintiff's Complaint for Failure to Comply with Discovery and Court Orders." Gloria B. Dunbar's ("Ms. Dunbar") motion for sanctions addresses Plaintiff 's failure to provide a corporate representative prepared to address the issues set out in her Answer and Affirmative Defenses and her three notices of taking deposition. Ms. Dunbar's motion for sanctions also addressed this Court's orders relating to the deposition of the Plaintiff's corporate representative and requiring Plaintiff's compliance with the notices and various discovery orders. The Court having reviewed Ms. Dunbar's motion, reviewed the file in this case, heard argument of the parties and attended the third of the three depositions this Court finds as follows:

Procedural History

Issues raised in Pleading, Affidavits and During Discovery

1. Plaintiff, Reverse Mortgage Solutions, Inc. filed this foreclosure lawsuit on October 2, 2012.

2. Ms. Dunbar filed an Answer and Affirmative Defenses and an Affidavit in Opposition to Plaintiff's Motion for Summary Judgment raising issues relating to Plaintiff's alleged failure to provide the proper notices required before the foreclosure of a reverse mortgage, Plaintiff's claim that it was required to paid taxes, Plaintiff's alleged failure to pay liens out of the proceeds of the reverse mortgage, Plaintiff's alleged failure to provide Ms. Dunbar with the information required for her to pay her taxes, and Plaintiff's right to bring the subject lawsuit. *See* Ms. Dunbar's Answer and Affirmative Defenses served on June 3, 2013 and her Affidavit in Opposition to Plaintiff's Motion for Summary Final Judgment served on June 16, 2104.

3. In addition to the issues raised in Ms. Dunbar's pleadings and affidavit, issues also arose during the limited deposition testimony. Specifically, whether Plaintiff failed to utilize the remaining balance of Ms. Dunbar's reverse mortgage reserves and whether Plaintiff wrongfully deemed the mortgage in default and obtained forced-placed insurance when it had evidence that Ms. Dunbar had her own insurance.

Ms. Dunbar's Efforts to Obtain Information
Through a Deposition of Plaintiff's Corporate Representative,
Proceedings Before this Court and the Resulting Court Orders

4. On January 16, 2014, Ms. Dunbar served her first Notice of Taking Deposition Duces Tecum of Plaintiff's corporate representative with the most knowledge relating to the matters raised in her Answer, Affirmative Defenses, and Affidavit. Ms. Dunbar unilaterally set the date of the deposition for February 26, 2014 after Plaintiff failed to respond to Defendant's July 13, 2013; October 14, 2013: and October 21, 2013 letters sent to Plaintiff's counsel by Defendant in an effort to determine a mutually agreeable date and time for the deposition. The deposition was re-set for April 10, 2014 to accommodate Plaintiff's schedule.

5. After the new Notice was served, Plaintiff filed a Motion for Protective Order which was denied in an Order dated February 20, 2014. In this Order the Court allowed a telephonic deposition to take place and required the Defendant to produce documents ten (10) days prior to the deposition.

6. On May 5, 2014, this Court entered an Order clarifying the February 20, 2014 Order allowing the deposition to take place telephonically but requiring the Plaintiff rather than the Defendant to provide documents which were going to be relied upon at the deposition to be produced to Defendant ten (10) days prior to the deposition.

7. On June 20, 2014, this Court entered an Order resulting from a Case Management Conference and Ms. Dunbar's Motion for Continuance which addressed Plaintiff's continued failure to provide deposition dates and times. Excerpts from this order follow:

> 2. Reverse Mortgage Solutions, Inc. shall produce a corporate representative(s) prepared to respond to the matters included in the notice of deposition that was the subject of this Court's February 20, 2014 and May 5, 2014 Orders.
> 3. The deposition shall be conducted telephonically and shall take place the week of June 30, 2014 or the week of July 7, 2014. The parties shall consult with one another to determine a mutually agreeable time and date during these two weeks for the deposition to occur.
> 4. If a representative does not appear the deposition will take place before the Honorable Michael R. Weatherby.

8. The parties attended a deposition on July 8, 2014 pursuant to the above-referenced Order and the June 25, 2014 Amended Notice of Taking Deposition.

9. The corporate representative who attended the deposition had only been working at Reverse Mortgage Solutions for approximately four (4) months and did not have the requisite knowledge or information regarding the subjects listed in the Notice of Taking Deposition. This representative also did not make any inquires with others within the corporation to determine if other employees had knowledge or information regarding the topics listed in the Notice of

Taking Deposition.

10. At the July 8, 2014 deposition, the representative agreed to provide some of the information she was not prepared to discuss at the deposition and several specified documents, which were confirmed at the deposition. The July 8, 2014 deposition was adjourned by counsel for Ms. Dunbar to allow the witness to obtain the requested documents and to familiarize herself with the areas of inquiry she was not prepared to discuss.

11. On July 21, 2014, counsel for Ms. Dunbar sent counsel for Plaintiff a letter requesting times and dates for the continuation of the deposition on the following specific topics:

a. The original note and mortgage and the transfer of the loan to Reverse Mortgage Solutions. Topics/Document Requests Number 1, 2, 3, 4 and 10 of the Amended Notice of Taking Deposition Duces Tecum.

b. Payments made, the loan history, the underlying basis for the expenditures for ad valorem taxes or the non-payment of ISPC lien. Topics/Document Requests Number 5, 6 and 9 of the Amended Notice of Taking Deposition Duces Tecum.

c. The acceleration letter or compliance with any other conditions precedent or any of the correspondence provided prior to the deposition. Topics/Document/Request Number 7 and 8 of the Amended Notice of Taking Deposition Duces Tecum.

d. The affidavit filed in this action. Topics/Documents Requested Number 11 of the Amended Notice of Taking Deposition Duces Tecum.

12. Counsel for Ms. Dunbar requested the documents and a response to her request for potential times and dates for the continuation of the July 8, 2014 deposition on or before July 25, 2014. Counsel for Ms. Dunbar received no response to this request for dates and time and sent a follow up letter requesting the same on September 24, 2014. Both letters were efforts to comply with Florida Rule of Civil Procedure 1.380(a)(2) in making informal, good faith efforts to resolve Plaintiff's failure to comply with this Court's June 20, 2014 Order referenced in Paragraph 6 above.

13. Counsel for Ms. Dunbar scheduled a Motion to Compel the Deposition of the Corporate Representative for Plaintiff for October 1, 2014.

14. At this hearing date and time, this Court granted Ms. Dunbar's Motion to Compel and for Sanctions in an Order dated October 13, 2014. In this Order the Court held:

> 2. The parties shall immediately reschedule the deposition of the Plaintiff's Corporate Representative(s). At that time and date, Reverse Mortgage shall designate and produce one or more officers, directors, or managing agents or other person or persons as the Corporate Representative who shall testify about matters known or reasonably available to the organization relating to the documents, items and/or issues listed below:
>
> > e. The original note and mortgage and the transfer of the subject loan to Reverse Mortgage Solutions and the topics/documents contained in Requests Number 1, 2, 3, 4 and 10 of Ms. Dunbar's June 25, 2014 Amended Notice of Taking Deposition Duces Tecum.
> >
> > f. The loan history including but limited to the payments made for ad valorem taxes or the non-payment of ISPC lien and the topics/documents contained in Requests Number 5, 6 and 9 of Ms. Dunbar's June 25, 2014 Amended Notice of Taking Deposition Duces Tecum.
> >
> > g. The acceleration letter or compliance with any other conditions precedent or any of the other correspondence provided prior to the July 8, 2014 deposition and the topics/documents contained in Requests Number 7 and 8 of Ms. Dunbar's June 25, 2014 Amended Notice of Taking Deposition Duces Tecum.
> >
> > h. The February 11, 2014 affidavit of indebtedness filed in this action and the topics/documents contained in Request Number 11 of Ms. Dunbar's June 25, 2014 Amended Notice of Taking Deposition Duces Tecum.
>
> 3. Counsel for Ms. Dunbar is awarded fees and costs associated with the above-referenced motion to compel and for sanctions and the hearing held on Wednesday, October 1, 2014. The parties shall set a hearing for a mutually agreeable time and date for this Court to determine a reasonable rate and reasonable number of hours and the appropriate costs to be incorporated into the fee award.
>
> 4. This case shall be before this Court for a Case Management Conference on Friday, November 14, 2014 at 10:00 a.m. in Room 604 of the

Duval County Courthouse, 501 West Adams Street, Jacksonville, Florida 32202.

15. This Court entered an Order awarding counsel for Ms. Dunbar $935.00 in attorneys' fees as sanctions referenced in the October 13, 2014 Order.

16. Plaintiff filed a second Motion for Protective Order on November 6, 2014. This Motion was denied by this Court in an order dated November 17, 2014. Also, in an Order entered at the Case Management Conference held on November 14, 2014, this Court required the continuation deposition to take place before January 6, 2015.

17. The deposition of the Plaintiff's corporate representative was rescheduled by mutual agreement for Monday, December 15, 2015 at 3:30 p.m. A new corporate representative and counsel for Plaintiff both appeared by telephone. The corporate representative could not be sworn in because he was calling from his home office and could not locate a notary to swear him in when given an opportunity to find an available notary. Therefore, the witness was not prepared to testify under oath as to any of the matters provided in the Notice or the October 13, 2014 Order.

18. Ms. Dunbar filed another Motion to Dismiss on December 31, 2014 based upon Plaintiff's failure to comply with June 20, 2014, October 13, 2014 November 14, 2014 Orders which were entered as a result of Ms. Dunbar's difficulties in setting the deposition of a corporate representative with the requisite knowledge (or who made any effort to learn the knowledge of the employees of the corporation).

19. There were also Orders dated February 20, 2014; May 5, 2014; November 14, 2014; and November 17, 2014 addressing Ms. Dunbar's request to take a corporate representative deposition of a person equipped with the knowledge of the corporation.

20. On January 6, 2015, this Court held a hearing on Ms. Dunbar's December 31,

2014 Motion to Dismiss. At this hearing, the Court required the third attempt at a deposition to take place at the Courthouse in the presence of the Honorable Michael R. Weatherby on February 19. 2015.

21. On February 19, 2015, the parties attended a third deposition of Plaintiff's corporate representative which was held in Chambers before the Honorable Michael R. Weatherby. At this deposition, the same corporate representative who was present telephonically without a notary on December 8, 2014 attended in person along with counsel for the Plaintiff.

22. The corporate representative produced at the second and third depositions had only been working at Reverse Mortgage Solutions for approximately two and a half (2.5) months in February, 2015 and had just been hired before attempting to appear telephonically at the second deposition. This representative admitted he only had the same knowledge as the corporate representative from the first deposition who was not prepared.

23. Similar to the first corporate representative, the second corporate representative did not have the requisite information to determine the information available to the corporation through other knowledgeable employees of Reverse Mortgage Solutions. For example, the witness did not have the following information:

a. The original note and mortgage and transfer of the loan to Reverse Mortgage Solutions, and whether there was a trust involved with to the original note. Gresham Deposition Page 15: lines 9 – Page 16: Page 16: lines 4 – 18.

b. The "boarding date" of when the loan would have entered RMS' database, and who inputted the information to board the loan. Gresham Deposition Page 16: lines 19 through Page 17: lines 1 – 7; Page 18, lines 4 – 16.

c. Specifics regarding the information contained in their system, such as where the loan information came from, what department at RMS it was received by, and who input the information into the

RMS system. Gresham Deposition Page 18: lines 18 through Page 19: line 22.

d. The Navigator system, when it was first used, and whether it was being used at the time RMS filed the subject lawsuit. Gresham Deposition Page 19: lines 24 through Page 21: line 21.

e. Specifics about the RMS letters relating to Ms. Dunbar's default, taxes, and insurance, such as who sent out the letter. Gresham Deposition Page 25: lines 1 –24.

f. The value of the property at the time RMS paid for property insurance and why there were two policies obtained for the same period of time. Gresham Deposition Page 44, lines 15 through Page 45: line 8, Page 46: lines 17 through Page 47: line 24.

g. The relationship between RMS and DEVAL, such as whether DEVAL did independent research to determine whether property taxes had been paid, whether RMS sends any supporting documentation for foreclosure approval to DEVAL, and whether DEVAL charges RMS for the foreclosure approval service. Page 49: lines 25 through Page 50: Line 7.

24. A party to an action "may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." Rule 1.280(b)(1), *Fla. R. Civ. P.*

25. Plaintiff has produced two deponents in three depositions who were not prepared to address the matters listed in the deposition notices and court orders. One witness was produced twice, once without notary present to swear him in and when he had just been hired by the Plaintiff. Two months later when he appeared at a deposition in person he still did not have the requested and required information.

Application of the Law to the Facts in this Case

26. Florida Rule of Civil Procedure 1.380(a)(3) provides that "an evasive or incomplete answer shall be treated as a failure to answer." Plaintiff has been evasive and

incomplete in response to Ms. Dunbar's discovery efforts and has failed to comply with three Court Orders relating to motions to compel and several other Court orders. Florida Rule of Civil Procedure 1.380 governs sanctions for failure to comply with discovery orders and provides, in pertinent part, that a trial court may enter "a judgment by default against the disobedient party." Fla. R. Civ. P. 1.380(b)(2)(C).

27. The Florida Supreme Court in *Mercer v. Raine*, 443 So.2d 944 (Fla. 1983) affirmed trial court's order striking defendant's pleadings, entering a default judgment against defendant and ordering defendant to pay cost and fees for failure to comply with discovery. In *Mercer* the Florida Supreme Court found the defendant "'knew what was going on' and had 'total disregard for the consequences' of the pending action." *Mercer* at 946. The Fourth Judicial District Court of Appeal in *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So.2d 1287 (Fla. 4th DCA 2002) also upheld the striking of Defendant's pleadings after the Plaintiff had to move for sanctions twice and Defendant still failed to comply with the trial court's orders. In *Radcliffe*, the Court found that "the court did not err in its interpretation of the facts or the use of its judgment" and noted that "discovery had already been delayed by [defendants] 'foot dragging.'" Id. at 1290-1291. Florida Rule of Civil Procedure 1.380(d) provides "[i]nstead of any order or in addition to it, the court shall require the party failing to act to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.

Motion to Dismiss

28. Florida Rule of Civil Procedure Rule 1.420 states:

> DISMISSAL OF ACTIONS: ...
> **(b) Involuntary Dismissal.** Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court. Fla. R. Civ. P. R. 1.420(b) (2013).

29. In *Kozel*, Florida's Supreme Court articulated the requirement that a trial court consider six factors to determine whether a dismissal with prejudice is warranted. *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993).

30. The factors to be considered are:

a) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;

b) whether the attorney has been previously sanctioned;

c) whether the client was personally involved in the act of disobedience;

d) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;

e) whether the attorney offered reasonable justification for noncompliance; and

f) whether the delay created significant problems of judicial administration.

31. This Court finds these factors, as applied to this case are all met, specifically:

a) Whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience – This Court finds the Plaintiff in this case has engaged in worst instance this Court has ever seen of obfuscation, delay, manipulation and dropping the ball. This case is at the point at which Plaintiff's actions have all of the indicia of being intentional. During the course of this case, this Court found it was necessary to threaten to have the deposition in the courtroom which turned out to be necessary on February 19, 2015.

b) Whether the attorney has been previously sanctioned – This Court has entered at minimum three orders requiring Plaintiff to produce a corporate representative with the requisite knowledge, including the June 20 2014 Order requiring the deposition to take place before a certain date or the deposition would take place before the Court, the October 13, 2014 compelling the attendance of a knowledgeable witness and entering monetary sanctions and the November 14, 2014 Order requiring the deposition to take place on or before January 6, 2015. This Court also ruled at the January 6, 2015 hearing on Ms. Dunbar's Motion to Dismiss that the deposition of a knowledgeable Plaintiff's corporate representative must take place before the undersigned Judge on a date certain at the Duval County Courthouse.

c) Whether the client was personally involved in the act of disobedience – The client chose to send an unprepared witness to three depositions and had many opportunities to correct this failure to comply with notices and court order. Therefore, the client was personally involved in the act of disobedience.

d) Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion – Counsel for Ms. Dunbar expended many hours with efforts to obtain information relevant to Ms. Dunbar's defenses including a number of efforts to coordinate a deposition without court intervention, preparation of motions to compel compliance, motions for sanctions and motions to otherwise enforce court orders. Counsel for Ms. Dunbar also attended numerous hearings relating to these efforts. Further, as pointed out at the hearing on Ms. Dunbar's last motion to compel, she has the burden of proving her affirmative defenses and she has been thwarted with her efforts to obtain information known only to the Plaintiff by Plaintiff repeated failure to cooperate and failure to obey court orders.

e) Whether the attorney offered reasonable justification for noncompliance – The Court finds there is no reasonable justification for the numerous instances of noncompliance as evidenced by the repeated obfuscation, delay, manipulation and dropping the ball.

f) Whether the delay created significant problems of judicial administration – This Plaintiff has repeatedly interfered with the process and required the attention of this Court.

32. The Rules of Civil Procedure grant the trial judge a broad range of sanctions to enforce the parties' compliance with court orders and absent an abuse of discretion, the trial court's exercise of that discretion may not be disturbed. *Mercer, supra*, 443 So.2d at 946.

33. The Court has determined that granting less severe sanctions will result in further noncompliance and, therefore, finds it has the authority to impose the most severe penalty. *Pinakatt v. Mercy Hospital, Inc.*, 394 So.2d 441, 443 (Fla. 3d DCA 1981) (dismissing a complaint as a sanction against a plaintiff for failure to make discovery may be with prejudice where a plaintiff willfully refuses to obey an order of the court).

It is therefore, ORDERED AND ADJUDGED:

A. This mortgage foreclosure case is dismissed with prejudice.

B. The note and the mortgage which are the subject of the above-styled case are hereby cancelled and satisfied by and through the entry of this judgment.

C. Counsel for Ms. Dunbar is awarded fees and costs associated with the above-referenced motion for sanctions and for the dismissal of this case.

D. Counsel for the parties shall set a hearing for a mutually agreeable time and date for this Court to determine a reasonable rate and reasonable number of hours and the appropriate costs to be incorporated into the fee award.

DONE AND ORDERED in Duval County, Florida, this 17 day of June, 2014.

Michael R. Weatherby

MICHAEL R. WEATHERBY
CIRCUIT COURT JUDGE

Copies furnished to:

Curtis Wilson, Esquire, Attorney for Plaintiff
Lynn Drysdale, Esquire, Attorney for Defendant

Filing # 59418104 E-Filed 07/24/2017 02:27:24 PM

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, FLORIDA

CASE NO: 53-2016-CA-01327
DIVISION:

CIT BANK, N.A.,
Plaintiff,
vs.

OSSIE D. LOFTON, *et. al.*,
Defendants.

FIFTH AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM

TO: CIT Bank, N.A.
c/o t Jonathon D. Nicol, Esquire
Bryan Cave, LLP
One Kansas City Place
1200 Main Street
Suite3800
Kansas City, Missouri 64105-2122
Via electronic transmission at: jonathon.nicol@bryancave.com

PLEASE TAKE NOTICE that counsel for the Counterclaim Plaintiff, Ossie D. Lofton, ("Ms. Lofton"), will take the continued deposition pursuant to Rule 1.310(b)(6), *Fla.R.Civ.P.* of the corporate representative of the Counterclaim Defendant, CIT Bank, N.A. ("CIT") commencing on Wednesday, August 30, 2017 at 9:00 a.m. at 126 West Adams Street, Jacksonville, Florida, 32202 in the Seventh Floor Conference Room. The deposition shall be transcribed by Carol Debee Martin or her designee. Carol Debee Martin, Jacksonville Court Reporting, Inc., Post Office Box 5675, Jacksonville, Florida 32247, (904) 743-5791 (work), (904) 465-0787 (cell), (904) 744-1988 (fax), debeemartin@aol.com.

Said continuation of the deposition of CIT's corporate representative(s) is for the purpose of discovery, for use at trial and/or any dispositive motions hearing in the above-styled case.

At that time and date, CIT shall designate and produce one or more officers, directors, or

managing agents or other person or persons as the Corporate Representative(s) who shall testify about matters known or reasonably available to the organization relating to the documents, items and/or issues listed below:

1) CIT's position that Ms. Lofton no longer occupied the property at the time prior to and at the filing of the case styled Onewest Bank N.A., v. Ossie Lofton, 2014CA-004708.

2) CIT's accounting of any sums purportedly disbursed from Ms. Lofton's loan proceeds and otherwise paid to her and paid to third parties and CIT on her behalf from the inception of the subject mortgage loan to present.

3) Notices, letters, forms and other correspondence CIT and its predecessors in interest sent to and received from Deval LLC relating to Ms. Lofton's loan account, including but not limited to any invoices, billing statements and other documents reflecting sums paid by CIT and its predecessors in interest to Deval LLC and by Deval LLC to CIT and its predecessors in interest.

4) Notices, letters, forms or other correspondence CIT sent to and received from Novad Management Consulting relating to Ms. Lofton's loan account, including but not limited to any invoices, billing statements and other documents reflecting sums paid by CIT to Novad Management Consulting and by Novad Management Consulting to CIT.

5) Notices, letters, forms and other correspondence CIT, its agents and predecessors in interest sent to or received from the U.S. Department of Housing and Urban Development relating to the decision to foreclose upon the property, both in 2014 and 2016, with a mailing address of 5604 Old Highway 37, Lakeland, Florida 33811.

6) Correspondence sent by CIT, its agents and predecessors to Ms. Lofton and correspondence received from CIT, its agents and predecessors from Ms. Lofton.

7) Servicing notes reflecting CIT, its agents and predecessors' actions in servicing the loan executed by Ms. Lofton, including but not limited to all property inspection reports relating to the property with a mailing address of 5604 Old Highway 37, Lakeland, Florida 33811.

8) CIT's position that Ms. Lofton was in default of the subject note and/or mortgage at the time it, and its predecessor in interest filed the following cases 1) Onewest Bank, N.A. v. Ossie Lofton, Case Number 2014-CA-4708 filed on November 25, 2014 ("2014 foreclosure") and 2) CIT Bank, N.A. v. Ossie Lofton, Case Number 2016-CA-01327 filed on April 20, 2016 ("2016 foreclosure").

9) CIT's allegations contained in Paragraphs 8 of CIT's predecessor's 2014 foreclosure and the subject 2016 foreclosure lawsuit that all conditions precedent to the filing of the subject mortgage foreclosure lawsuits were met or occurred prior to filing the above-styled case.

10) The basis for CIT's position that HUD required them to file the 2016 foreclosure lawsuit referenced in Paragraph 8 above against Ms. Lofton.

11) All documents CIT intends to use at trial, to the extent known.

This representative will be asked to testify as provided above and should have with them at that time:

1) All documents and records relied upon by the representative to support CIT's claim that Ms. Lofton no longer occupied the property at all times relevant to the 2014 foreclosure lawsuit referenced in Paragraph 8 above.

2) All documents which reflect a complete accounting of any sums purportedly disbursed from Ms. Lofton's loan proceeds and otherwise paid on her behalf from the date of inception of the subject mortgage loan to present.

3) Any documents which support CIT and its predecessor's positions in Paragraph 8 of its 2014 and 2016 foreclosure Complaints that it had performed all conditions precedent to the acceleration of the subject loan and the filing of the foreclosure lawsuits referenced in Paragraph 8 on Page 2 above.

4) Any documents and other information CIT and its predecessors in interest provided in any form to and received from Deval LLC relating to Ms. Lofton's loan account, including but not limited to any invoices, billing statements and other documents reflecting sums paid by CIT and its predecessors in interest to Deval LLC and Deval LLC to CIT or its predecessors in interest.

5) Any documents and other information CIT provided in any form to and received from Novad Management Consulting relating to Ms. Lofton's loan account, including but not limited to any invoices, billing statements and other documents reflecting sums paid by CIT to Novad Management Consulting and Novad Management Consulting to CIT.

6) Any documents and other information provided in any form CIT its agents and predecessors in interest, provided to and received from the U.S. Department of Housing and Urban Development relating to the decision to foreclose upon the property with a mailing address of 5604 Old Highway 37, Lakeland, Florida 33811, include in this response all documents and information provided to HUD through any third party agents.

7) Any correspondence sent by CIT, its agents and predecessors to Ms. Lofton and received from CIT from Ms. Lofton and any agent and person acting on her behalf.

8) Any and all CIT, its agents or predecessors' servicing notes relating to Ms. Lofton's loan which was the subject of the above-styled case, including but not limited to all property inspection reports relating to the property with a mailing address of 5604 Old Highway 37, Lakeland, Florida 33811.

9) All documents supporting CIT's, its agents and predecessors' positions that Ms. Lofton was in default of the subject note and/or mortgage at the time it, and its predecessor in interest filed the following cases 1) Onewest Bank, N.A. v. Ossie Lofton, Case Number 2014-CA-4708 filed on November 25, 2014 ("2014 foreclosure") and 2) CIT Bank, N.A. v. Ossie Lofton, Case Number 2016-CA-01327 filed on April 20, 2016 ("2016 foreclosure")

10) All documents which relate to or support CIT's position that HUD required them to file the 2016 foreclosure lawsuit referenced in Paragraph 8 of Page 2 above against Ms. Lofton.

11) All documents CIT intends to use at trial, to the extent known.

Said deposition is to be taken for discovery purposes, for use as evidence at hearings and at trial.

Dated at Jacksonville, Duval County, Florida, this 24th day of July, 2017.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically furnished to CIT Bank, N.A., c/o t Jonathon D. Nicol, Esquire, Bryan Cave, LLP, One Kansas City Place, 1200 Main Streetcar Suite 3800, Kansas City, Missouri 64105-2122, via electronic transmission at: jonathon.nicol@bryancave.com on this 24th day of July, 2017.

FLORIDA RURAL LEGAL SERVICES, INC.
1321 E. Memorial Blvd., #101
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

NATIONSTAR MORTGAGE d/b/a CHAMPION MORTGAGE COMPANY,
Plaintiff,

Case No. 2015-30706 CICI

vs.

NADINE SPENCER, et al,
Defendant.
_____/

COUNTERCLAIM PLAINTIFF'S MOTION TO AMEND COUNTERCLAIMS TO ASSERT A CLAIM FOR PUNITIVE DAMAGES AND PROFFER IN SUPPORT THEREOF

COMES NOW the Counterclaim Plaintiff, Nadine Spencer ("Ms. Spencer"), by and through her undersigned attorneys, and respectfully request this Honorable Court grant leave to amend her previously filed Amended Counterclaims, and, pursuant to the provisions of Section 768.72, Florida Statutes, amend the prayer for relief to assert a claim for punitive damages, as Nationstar has, on numerous occasions, acted with gross negligence and/ or wanton and willful disregard towards Ms. Spencer. In support of this Motion, Ms. Spencer would proffer and state as follows:

1. On May 8, 2015, Nationstar Mortgage, LLC d/b/a Champion Mortgage Company ("Nationstar") filed a mortgage foreclosure lawsuit against Ms. Spencer seeking to foreclose upon her home located at 752 Madison Ave. Daytona Beach, FL 32114 because, as Nationstar alleged, Ms. Spencer did not live in her home. Thereafter, Nationstar hand-served Ms. Spencer with service of process - at her home. Nationstar then dismissed its foreclosure lawsuit against Ms. Spence on March 11, 2016 - seeking to take her home for almost a year, based on an utterly false pretense - a pretense which Nationstar has now admitted knowing was false.

2. In its Complaint, Nationstar claims "Nadine Spencer ceased occupying the property for reasons other than death and the subject property is not the principal residence of any surviving borrower." Nationstar also made these representations to the Secretary of Housing and Urban Development in order to obtain HUD's approval to file the May 8, 2015 foreclosure lawsuit. (Nationstar Complaint Paragraph 8)

3. Nationstar has now provided sworn testimony, through its corporate representative, on February 1, 2017. Nationstar has confirmed:

a. It was actually aware the utilities were on and active during the time it alleged the home was not occupied:

[page 102, lines 19 through page 103, line 4]

BY MS. DRYSDALE: Q. So I'm showing you Bates stamp 231 to 288. These don't appear to be in consecutive order, but I think the last one is August of 2015, but go ahead and take a look at those documents and let me know if you recognize them. The question is going to be, while you're looking though them, is there any indication in those documents that the property was vacant or the electricity or utilities had been turned off? You may know the answer to that question without looking at them, but that's going to be the next question.

A. Okay. They all appear to be occupied, and the electricity and water are on.

[page 110, lines 8 through page 111, line 5]

b. It was regularly directing mail addressed to Ms. Spencer to the subject residence and was actually aware the mail was not being returned:

Q. And I also understand that Nationstar was required to send monthly statements or periodic statements to Miss Spencer; is that correct?

A. It's not a requirement.

Q. Oh, it's not?

A. No, but it is sent as a notification of monthly statements.

Q. So that was done by Nationstar from July 2012 through to the time that they started sending those documents to her attorney; is that accurate?

A. Yes, yes, that should have been mailed out.

Q. Did any of the insurance letters or the monthly statements ever come back as unable to deliver?

A. I'd have to reference the loan notes on that.

Q. Okay.

A. When was the beginning or what dates did you mention?

Q. Let's start with January 2014 to June of 2015.

A. And through -- can you repeat how far I'm looking through?

(Question read.)

A. There are no notes indicating that mail was returned that I can see.

c. While Nationstar based its entire foreclosure complaint on Ms. Spencer's failure to return an "Occupancy Certificate" postcard (a requirement it admits is not found anywhere in the Note or Mortgage), Nationstar has admitted it received the Occupancy Certificate *before* suing Ms. Spencer for not living in her home - and received the Occupancy Certificate again while it was suing her.

[page 51, lines 1 – 17]

Q. Okay. I think you mentioned earlier you couldn't identify who placed the received stamp on that letter. Do the Loan Notes Detail, do they help provide information as to when Nationstar received the completed occupancy certificate?

A. Yes. They do indicate that an occupancy certificate was received from the borrower.

Q. Can you tell me when it was received?

A. February 9, 2015.

Q. Okay. When I'm referring to it, I'm talking about the completed occupancy certificate. I think that's Bates 12 stamp 415?

A. Correct.

Q. So that was received on February?

A. The date stamp, February 3rd.

Q. 2015?

A. Correct.

[Page 92, lines 18 through 25, Page 93, line 1]

Q. The question is: Is the document that was received along with the letter from an attorney in May of -- 20 I'm sorry -- in June of 2015, is that the same document that is reflected at Bates stamp 415, which I believe was received on February the 9th of 2015?

A. February 3rd.

Q. February 3rd.

MS. HOECK: Object to form.

A. It appears to be the same document, yes.

d. While it was suing Ms. Spencer for not living in her home, Nationstar representatives regularly communicated with Ms. Spencer - in the home:

[page 52, line 4 through page 54, line 14]

Q. Can you tell me what the entry at October 15, 5 2014, what that represents? What happened based on the notes contained from October 15, 2014?

A. Well, the notes indicate that Mrs. Spencer contacted Champion regarding forced placed insurance that was on her property. And she stated she had some.

Q. She stated she had insurance?

A. Yes. She stated she had insurance. We advised her to submit the declaration copy. And we provided a fax number.

Q. Is IB inbound?

A. Correct.

Q. CS, what does that stand for?

A. Customer support. That's the team that took the call.

Q. And that's a department within Nationstar?

A. Correct.

Q. Does customer support handle all types of calls, occupancy calls, taxes and insurance calls, or just a certain type of call?

A. All calls.

Q. I note that this is at, 10/15/2014 is after the loan had been deemed in default for non-occupancy. Was there any discussion with Miss Spencer when she called in October relating to whether or not she still lived in the property?

A. The notes don't show that if there was.

Q. But she did indicate –

A. I can't –

Q. Oh, I'm sorry.

A. I was just going to say I can't tell if there was discussion.

Q. But she did indicate that she had property insurance?

A. Correct.

Q. Would this not trigger within Nationstar a review of its previous determination that the loan was in default for non-occupancy?

A. No.

Q. Why not?

A. Can you restate your question, can trigger a review?

Q. Yes, ma'am. I'm just curious if the loan was deemed in non-occupancy default because Miss Spencer didn't reside there and didn't return an occupancy certificate, then if she calls Nationstar upset about the fact that Champion had forced placed insurance on her property and stating that she had insurance, would that not at least lead to a review by Nationstar to determine whether or not she did live in the property?

A. No. We would request an occupancy cert to certify that.

Q. So had Miss Spencer said in her call -- we don't have that in the notes, but if she had said in her call I still live here, would that have triggered a reversal of the default status of her loan?

A. No.

Q. Why not?

A. Because she would have to complete and send in writing validation, certification that she lived in the property.

[page 61, line 14 through page 62, line 11]

Q. So January 6, 2015, this is on Bates stamp 316 of Exhibit No. 5, I believe that this is an inbound customer service call from Miss Spencer; is that correct?

A. I'm sorry, which date?

Q. January 6th of 2015.

A. Yes, that would be an inbound call.

Q. Okay. And in this call, she said that she received insurance; is that correct?

A. Correct.

Q. And what is ordered occ cert, cell, called due: non-occ RFD?

A. Ordered occ cert, cell phone would be the phone number that inbound call came from. Call due for non-occ.

Q. Okay. Looking down at 12 -- and, again, so that call didn't trigger a reconsideration of the non-occupancy determination?

A. It doesn't state that, no.

Q. Would that be the normal course for Nationstar to reconsider a non-occupancy default determination when they had, I guess, at this point at least two telephone conversations with the borrower?

A. No. We're looking for required the occ cert at that time.

[page 63, line 25 through page 65, line 5]

Q. Okay. The March 11, 2015, I believe again that's an inbound customer service call from Miss Spencer; is that correct?

A. That's correct.

Q. And is that -- since it's now in default status, that would be directly to Nationstar?

A. Yes. It's in due and payable status at this point.

Q. Okay. So Mrs. CI, is that Miss Spencer?

A. Called in.

Q. Called in to see why she didn't have anything available in her, and is that line of credit?

A. Correct.

Q. And she was advised of the status of her loan, and she stated she lived in the property. Is that accurate?

MS. HOECK: Are you asking her if that's what the notes say?

MS. DRYSDALE: Well, I'm somewhat -- the notes are in shorthand, so I'm trying to put it in full word language, proper English, or somewhat -- a sentence that somewhat relates to proper English.

A. Mrs. stated she lived in property. Attempted to tell her what she needed to send in to resolve the account, but she refused to listen, also the default balance, and she hung up.

Q. So, again, we have Miss Spencer speaking to someone directly at Nationstar/Champion telling them that she lives in the property and that didn't trigger a review of her non-occupancy status; is that correct?

A. That's correct. We attempted to tell her what was needed per the loan notes.

[page 74, line 3 through page 76, line 6]

Q. Okay. Can you tell me what happened based on these notes on April the 7th of 2015?

MS. HOECK: You want her just to read out the conversation based on what it says?

MS. DRYSDALE: It's in a bit of a shorthand. If she could do a little more than reading so I could understand what the shorthand means, that would be helpful.

A. Okay. So the borrower called in about why she's continuing to receive notes from Champion about her occupancy. The rep advises her she needs to send in two different utilities bills and brief explanation. The rep tried to advise that this will stop the calls and

letters. She stated she will not send in utility bills. The rep advised will notate her desires and released the call.

Q. So this April 2015 conversation and a call from Miss Spencer didn't trigger a re-review of the due and payable status of the loan; is that correct?

A. Uh-huh.

MS. HOECK: Answer audibly for the court reporter.

A. Correct.

BY MS. DRYSDALE: Q. Where is the requirement that Miss Spencer needed to provide two different utility bills and a brief explanation?

A. Where is -- say that again, please.

Q. Where is the requirement that Miss -- it says that the rep told her that she needed to send in two different utility bills and a brief explanation. Where would I find that requirement?

A. You won't find that requirement in writing.

Q. Okay. So I'm assuming based on your response that Miss Spencer also would not find that requirement in writing?

A. There was a letter sent that had requested it, yes.

Q. Requested it as a requirement?

A. To cure her default, yes.

Q. So if it's not written anywhere, how did the person, Robin S, know to tell Miss Spencer that she had to do that?

A. Because it's a standard servicer practice to rescind the loan from Novad. Novad had been denying just rescinding due and payable loans with signed occupancy certifications. They require supporting documentation if the loan is called due and payable, and utilities bills and/or a letter of explanation were the documents that they would accept to rescind the loan.

Q. So that's, what you just described, that's separate from a directive or suggestion from the National Reverse Mortgage Lender Association?

MS. HOECK: Object to form.

A. This was Novad.

[Page 89, lines 23 through 25; Page 90, lines 1 through 25, Page 91, lines 1 and 2

Q. So I'm handing you back Exhibit No. 8, and as I understand it, that's a letter letting Miss Spencer know that the forced placed insurance that was obtained for 2014 was canceled in 2015; is that correct?

A. Correct.

Q. Do you know what communications between Miss Spencer and Celink occurred leading to that Celink canceling the insurance?

A. There was a fax received providing us her insurance coverage.

Q. Was that a fax from Miss Spencer?

A. I believe it was from her insurance company. Hold on. From her insurance company.

Q. Okay. So this document from Central Insurance with a fax cover page, Bates stamp –

A. 75.

Q. -- 75, is that a document that was contained in Nationstar's records?

A. Yes.

Q. And do I understand that document to be a fax from Mrs. Spencer's insurance agent to let Nationstar know that she had continuously maintained insurance from 2009?

A. Not 2009. This is evidence of insurance from June 21 20, 2014 through June 20, 2016.

Q. Okay. I was just looking at the cover sheet.

A. Oh. It does state that she has never lapsed since 24 2009.

Q. Is there some record that would show that that statement is inaccurate from the insurance agent?

A. No. She provided insurance policies.

4. In addition to being grossly negligent for suing Ms. Spencer for not living in her home - while it was actually aware she lived in her home, Nationstar continued to show its utter ineptitude as a mortgage servicer, compounding its gross negligence. Nationstar sent Ms.

Spencer a "return envelope" along with her "Occupancy Certificate" - addressed to a completely different company. On another occasion, Nationstar's employee violated its own (admitted) internal policy by telling Ms. Spencer she had to provide utility bills and a hardship letter to avoid default status when its internal policy no longer required this..

5. The actions of Nationstar, evidence either gross misconduct or willful and wanton disregard of Ms. Spencer's rights. Nationstar prosecuted this foreclosure action after being actually aware it lacked probable cause to allege Ms. Spencer did not reside in her home. Malicious prosecution occurs when a party either commences or continues litigation after learning the claim is without merit. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994) The presence of legal malice based upon a showing of gross misconduct or willful and wanton disregard of a Plaintiff's rights is sufficient to support a punitive damages award. *Alamo, supra.*

6. The Court is permitted to consider Ms. Spencer's proffer of evidence in support of a Motion for Leave to Amend pursuant to Section 768.72, Florida Statutes. Florida courts do not require a fact intensive investigation into the merits. Instead, the Florida courts entertain the punitive damage issue by way of a motion to dismiss or a motion to strike, not a summary judgment motion. *Will v. Systems Engineering Consultants, Inc.,* 554 So.2d 591, 592 (Fla. 3d DCA 1989); *Solis v. Calvo,* 689 So.2d 366 (Fla. 3d DCA 1997) Pursuant to Florida Statute section 768.72, a punitive damage claim can be supported by a proffer of evidence. A formal evidentiary hearing is not mandated by the statute. *Porter v. Ogden, Newell Welch*, 241 F. 3d 1334, 1340 - 1341 (11th Cir. 2001). Ms. Spencer is not required to conduct an evidentiary hearing where witnesses testify and evidence is offered and scrutinized under evidentiary rules, as in a trial, Further it is not necessary or appropriate for her to ask the court to make evidentiary

rulings, weigh rebuttal evidence, or engage in credibility determinations in considering the sufficiency of the proffer. *Royal Marco Point I Condominium Association, Inc. v. QBE Insurance Corporation,* 2010 WL 2609367 (Fla. M.D. June 30, 2010).

7. Ms. Spencer seeks leave of Court to proffer the above-referenced evidence in order to provide a reasonable basis for recovery of punitive damages and for leave of Court to file the Second Amended Counterclaim. A copy of the Second Amended Counterclaim is attached hereto as Exhibit "A" and incorporated by reference.

WHEREFORE, Ms. Spencer respectfully requests this Court allow an amendment to the First Amended Complaint to assert a claim for punitive damages, for the reasons set forth above, pursuant to Section 768.72, Florida Statutes.

DATED, at Daytona Beach, Volusia County, Florida, this 17th day of April, 2017.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via e-Portal service to Jonathan Meisels, Esq., Robertson, Anschutz and Schneid, P.L. at mail@rasflaw.com; Kathryn B. Hoeck, Esq., Akerman LLP, Kathryn.hoeck@akerman.com, Patricia.blouin@akerman.com and Colleen Murphy Davis, Esq., usaflm.hud.disclaimers@usdoj.gov ; michalene.y.rowells@hud.gov this 17th day of April, 2017.

JACKSONVILLE AREA LEGAL AID, INC.

/s/ Lynn Drysdale

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A Wealth of *Justice* for Those Who Have Neither

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October 12, 2018

Celink
Attn: Mailstop AUS- 01
P.O. Box 85400
Austin, Texas 78708

Certified Mail Return Receipt Requested

RECEIPT NUMBER:_____

RE: Notice of Error -
Property Address:
Jacksonville, Florida 32208-32084
Financial Freedom Loan Number: 38/Celink Loan Number:

To Whom It May Concern:

On behalf of Ms. C we are providing this Qualified Written Request and pursuant to 12 U.S.C. 2605(e) and her Notice of Error pursuant to 12 C.F.R. §1024.35 and 12 U.S.C. § 2605(e) of the Real Estate Settlement Procedures Act. I have enclosed a Release and Authorization signed by Ms..

Celink's predecessor servicing interests, Financial Freedom, obtained Elmore funds to reinstate a previous property charges delinquency. Financial Freedom was also provided with Hardest Hit Funds through the Elmore program to pay the 2017 ad valoreum taxes and the homeowner's insurance premium for Ms. C for the following year, 2018. I am enclosing a November 20, 2107 letter from Financial Freedom to Ms. C informing her that $7,778.77 remained in her Hardest Hit/Elmore fund reserve for payment of her insurance premium. Ms. C's insurance premium was becoming due and Celink (and Financial Freedom) failed to use the remaining sums to pay the insurance premium so Ms. C had to do so. I have also enclosed a Payment Confirmation Receipt from Ms. C's insurer memorializing this payment.

Celink is now required to reimburse Ms. C for these out of pocket expenses she incurred. Celink also needs to correct its records to insure that Ms. C does not have to pay the next installment due for her insurance premium because Celink has been provided money to pay this premium. In your response, please provide a full and complete breakdown, including a full description for an accounting of any sums received on Ms. C's behalf in the last two years and all disbursements made relating to her account. We anticipate receiving this information within the time parameters set out in 12 C.F.R. §1024.35.

Sincerely,

Lynn Drysdale
Division Chief, Consumer Litigation and Legislative Advocacy Unit

Sue-Helen Motley

From: Lynn Drysdale <Lynn.Drysdale@jaxlegalaid.org>
Sent: Tuesday, April 02, 2019 6:22 AM
To: Sue-Helen Motley
Subject: Fwd: Reverse Mortgage Portion - One PACE Answer
Attachments: Senior materials group 1 ans aff defenses depo notice fee memo.pdf; Answer and Amended Affirmative Defenses (1).pdf; McClamma"s Second Amended Answer and Affirmative Defenses.pdf; Senior materials group 2 dismissal order and counterclaims.pdf; Senior materials group 3 memo continued.pdf; Senior materials - group 4 counterclaims - memo of law.pdf

I am attaching materials I would like to use but can pare down. This is probably too much. They are also not redacted because they are all of public record but I can go back and redact. They will come in four messages but I can combine. Lynn

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Home Improvement Defensive Pleadings