No. 102A20-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLEY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	From Mecklenburg County

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DEFENDANT-APPELLANT'S NEW BRIEF

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DEFENDANT-APPELLANT'S NEW BRIEF

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ISSUES PRESENTED

1. Whether a new panel majority erred by vacating the initial Court of Appeals panel's affirmance of the dismissal of Plaintiffs' claims on statute-of-limitations and *res judicata* grounds.

2. Whether the new panel majority erred by remanding and ordering the Superior Court to make "findings of fact and conclusions of law" in connection with a Rule 12(b)(6) dismissal, when no such findings or conclusions had been requested by any party under Rule 52(a)(2), nor were any necessary to conduct a *de novo* review of a dismissal on grounds evident from the face of the complaint.

INTRODUCTION

Plaintiffs are home-mortgagors from five different states who defaulted on their loans and brought this suit claiming that Bank of America defrauded them when they applied for relief under the federal Home Affordable Modification Program (HAMP) back in 2009 and 2010. Their lawsuit is part of a larger universe of dozens of cases filed by the same attorneys, recycling the same boilerplate pleading essentially unaltered except for names and dates. Courts across the country have dismissed these cases as time-barred and on a variety of other grounds. After considering about 175 pages of briefing and holding a three-hour hearing on Bank of America's Rule 12(b)(6) motion to dismiss, the Superior Court in this case (Hon. Lisa C. Bell, presiding) reached the same conclusion.

In an order following the customary and typical form for a Rule 12(b)(6) motion, the Superior Court dismissed Plaintiffs' complaint on limitations and *res judicata* grounds. *See* R pp 664–786, R pp 655–56.

Plaintiffs appealed. The Court of Appeals then affirmed the dismissal on both grounds, holding on *de novo* review that "plaintiffs' complaint fails on its face" because their own allegations established that they were on inquiry notice of their claims years before they filed suit, and that their lawsuit was an improper attempt to re-litigate matters resolved against them in their foreclosure cases. *Taylor v. Bank of Am., N.A.*, No. COA20-160, slip op. at 4–11 (N.C. App. Dec 31, 2020).

But after the opinion was issued, two members of the panel were replaced by newly seated judges, and Plaintiffs moved for reconsideration. The newly constituted panel granted the motion, but declined either to affirm or reverse the Superior Court's judgment on rehearing. Instead, over a dissent from the remaining member of the original panel, the new panel ruled that without "findings that sustain [the Superior Court's] determinations," it could not "determine the reason behind the grant" or "properly review" the dismissal. *Taylor v. Bank of Am., N.A.*, No. COA20-160-2, slip op. at 6 (N.C. App. Oct. 5,

2021). The majority thus ordered the case "remanded for further factual findings and conclusions of law." *Id*. at 7.

Judge Chris Dillon, in dissent, "continue[d] to believe that Judge Bell got it right." *Id*. at 8. He stated:

> In their complaint, Plaintiffs essentially allege that they suffered harm when Defendant fraudulently refused to modify their respective mortgages . . . though they each qualified for a loan modification under HAMP. However, they did not file the complaint until 2018, more than three years after they were denied their modifications [and] more than three years after their respective homes were foreclosed upon. . . .
>
> I conclude that the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place. By that time, Plaintiffs became aware that Defendant would not be modifying their respective loans. Indeed, our Supreme Court has held in a case involving fraud and breach of contract claims that the statute of limitations begins to run at least by the time the plaintiff becomes aware of the injury.
>
> It is evident from the face of the complaint that Plaintiffs did not bring suit until more than three years after they became aware of their injury. . . .

Id. at 8–9 (citing, *e.g.*, *Christenbury Eye Ctr. v. Medflow*, 370 N.C. 1, 9 (2017); citation omitted).

The dissent's analysis was correct, and should have carried the day, as it did in the original panel ruling—and in numerous prior cases where other courts have thrown out near-identical versions of the same stale complaint. The Amended Complaint shows on its face that Plaintiffs

concededly knew of their alleged injuries *years* before bringing suit. Their argument that the statute of limitations was tolled until their current attorneys found them and advised them to sue has no legal merit. As a matter of well-established law in North Carolina and the other jurisdictions implicated by the out-of-state Plaintiffs' claims, it is the day the alleged harm is known, not the day a plaintiff decides to hire a lawyer, that pinpoints when a statute of limitations begins to run. The new panel's majority erred by professing that it could not resolve this issue of law on the record before it, or that it needed "findings of fact" from the Superior Court which no party had asked for to conduct its *de novo* review of a Rule 12(b)(6) ruling. This Court should reverse the new panel decision and reaffirm the Superior Court's well-considered judgment.

STATEMENT OF THE CASE

Plaintiff filed this action on 1 May 2018 in Mecklenburg County Superior Court. R p 11. Plaintiffs are residents of Arizona, California, Michigan, Nevada, North Carolina, and Wisconsin. R pp 197, 207. Defendant Bank of America, N.A., is a national bank headquartered in Charlotte, Mecklenburg County. R p 197. On a consent Motion to Designate Case as Exceptional Case and to Appoint Judge, the Hon. Lisa

C. Bell was appointed to preside under Rule 2.1 of the General Rules of Practice. R p 191.

Pursuant to a case management order and briefing schedule (R pp 631–32), Plaintiffs filed an Amended Complaint on 13 March 2019 (R p 197) and Defendant filed a Motion to Dismiss Amended Complaint on 11 April 2019 (R p 633). Plaintiffs then filed a Motion for Partial Summary Judgment on 12 April 2019. R p 637. The Superior Court held a hearing on both motions on 29 May 2019, and on 2 October 2019 entered an Order concluding that all Plaintiffs' claim were barred by the applicable statutes of limitation and the doctrines of *res judicata* and collateral estoppel, dismissing the action with prejudice under Rule 12(b)(6). R pp 655–56. Plaintiffs noticed their appeal 24 October 2019. The Court of Appeals (Berger, Dillon, Young, JJ.) issued an opinion on 31 December 2020 affirming the Superior Court's order. On 2 February 2021, Plaintiffs filed a Petition for Rehearing. The petition was granted by the Court of Appeals (Carpenter, Dillon, Jackson, JJ.) on 10 March 2021. The new panel issued its opinion on 5 October 2021, reversing and remanding the case for further findings of fact and conclusions of law, with Judge Dillon dissenting. Defendant filed its Notice on 8 November 2021.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Review in this Court is proper pursuant to N.C.G.S. § 7A-30(2) based on the dissent in the Court of Appeals.

STATEMENT OF FACTS

Plaintiffs' Amended Complaint alleges various claims, all arising from an alleged "scheme" by Bank of America to deny them loan modifications under the federal government's 2009 Home Affordable Modification Program. The Amended Complaint follows a long history of litigation concerning HAMP.

A. The Home Affordable Modification Program. The U.S. Treasury Department launched HAMP in 2009 in an effort to mitigate foreclosures in the wake of the last financial crisis.[1] Borrowers could qualify for reduced loan payments under HAMP if they were experiencing genuine economic hardships preventing them staying current on their loans, but not so severe that they would be likely to slide

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[1] CONGRESSIONAL OVERSIGHT PANEL, APRIL OVERSIGHT REPORT: EVALUATING PROGRESS ON TARP FORECLOSURE MITIGATION PROGRAMS 9 (Apr. 14, 2010), available at *http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT55737/pdf/CPRT-11JPRT55737.pdf* (hereinafter, "OVERSIGHT REPORT").

back into default even with HAMP relief.[2] Servicers were instructed to place potentially qualifying borrowers into trial-period plans, during which borrowers were expected to show their ability to sustain modified payments and to submit financial documents to establish HAMP eligibility.[3] During this trial period, foreclosure proceedings were suspended, and borrowers who successfully completed the trial plans could be offered permanent loan modifications.

B. The HAMP MDL. From HAMP's inception, court dockets across the country absorbed complaints from borrowers who had failed to obtain permanent modifications—not just against Bank of America, but against every participating servicer, including numerous putative class actions centralized into federal Multi-District Litigations.[4] Among these was a putative class MDL against Bank of America referenced by

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[2] *See* U.S. Dep't of Treasury, Home Affordable Modification Program Guidelines (Mar. 4, 2009), available at *http://www.treasury.gov/press-center/press-releases/Documents/modification_program_guidelines.pdf*.

[3] *See id.*

[4] *E.g.*, *In re JPMorgan Chase Mortg. Mod. Litig.*, No. 10-2290 (D. Mass.); *In re CitiMortgage, Inc. HAMP Litig.*, No. 11-2274 (C.D. Cal.).

Plaintiffs in their complaint, alleging "mismanagement of the HAMP modification process." R p 207.

When the MDL plaintiffs (unsuccessfully) moved for class certification in June 2013, they located a handful of former bank employees and outside contractors whose employment had been terminated by Bank of America, who signed declarations accusing the bank of devising a malicious conspiracy to defraud vulnerable homeowners. One asserted, for example, that the bank paid employees cash bonuses for sending borrowers who were entitled to HAMP modifications into wrongful foreclosures. R p 202. The MDL court did not credit these declarations when it denied class certification, but their public filing and the ensuing media coverage resulted in these declarations still being cited years later to support allegations of malicious acts in numerous other lawsuits, including this one. R pp 201–204.

C. Origin of Plaintiffs' Complaint. The complaint in this case is based on a template Plaintiffs' counsel and other firms with whom they appear as co-counsel have filed around the country. Relying on the declarations filed in the HAMP MDL, the complaint accuses Bank of

America of devising a fraudulent scheme to deny loan modifications to qualified borrowers, and then asserts that each plaintiff was unfairly denied a loan modification and so must have been a victim of this "scheme." *See id.*

The first court to face a version of this complaint dismissed it as time-barred and rejected the argument, also made by Plaintiffs here, that the statute of limitations was tolled until the plaintiff's attorney advised her to sue, ruling that the plaintiff "was merely ignorant of her rights until she consulted with an attorney, and ignorance of the law does not justify a finding of fraudulent concealment." *Cantrell v. Bank of Am., N.A.*, No. 16-3122, 2017 U.S. Dist. LEXIS 50255, at *9 (W.D. Ark. Apr. 3, 2017). The court further held that "she possessed all the facts she needed to enable her to file a lawsuit against BOA alleging many of the same, if not all of the same, causes of action" back in 2011, when she received written notice from the bank on her HAMP application and lost her property to foreclosure. *Id.*

Similar results came from other federal courts. *E.g.*, *Mandosia v. Bank of Am., N.A.*, No. 17-8153, 2018 U.S. Dist. LEXIS 45237 (C.D. Cal. Mar. 15, 2018), *aff'd*, 794 F. App'x 623 (9th Cir. 2020) (limitations period

started running when plaintiff was denied loan modification); *Jones v. Bank of Am., N.A.*, No. 18-0012, 2018 U.S. Dist. LEXIS 145856, at *25 n.5 (N.D. Ala. Aug. 28, 2018) (refusing to toll limitations period because plaintiff "was in a position" to "investigat[e] the matter" while applying for HAMP).

In Florida, several dozen plaintiffs filed a version of the complaint as a mass-joinder lawsuit. *See Torres v. Bank of Am., N.A.*, No. 17-1534, ECF No. 1 (M.D. Fla. filed June 27, 2017). Judge Richard A. Lazzara found the numerous plaintiffs' claims improperly joined, dismissed the claims of all except the first-named plaintiffs without prejudice to their being re-filed as separate cases, then dismissed the first-named plaintiffs' claims as "barred by the statute of limitations." *Torres*, No. 17-1534, ECF No. 19 (M.D. Fla. Oct. 6, 2017); 2018 U.S. Dist. LEXIS 12640, at *4 (M.D. Fla. Jan. 26, 2018). In that last ruling, the court again rejected the plaintiffs' claims that the statute of limitations was tolled by virtue of their various allegations of fraud, finding those allegations identical to those made in the HAMP MDL and ruling that "Plaintiffs will not be permitted to keep the statute of limitations suspended by finding new

people to repeat the same information that has been available for more than four years." *Torres*, 2018 U.S. Dist. LEXIS 12640, at *13.

The plaintiffs severed from *Torres* re-filed their claims as 85 separate cases in Florida federal courts. All 85 have since been dismissed or disposed of on summary judgment on a variety of different grounds.

Judge Lazzara dismissed "fifteen [] nearly identical cases" as time-barred on the same ground as *Torres*. *E.g.*, *Clavelo v. Bank of Am., N.A.*, No. 17-2644, 2018 U.S. Dist. LEXIS 178789, at *2 (M.D. Fla. Sept. 13, 2018). Judge Sheri Polster Chappell did the same, finding that "it is 'apparent from the face of the complaint' that the claim is time-barred." *E.g.*, *Paredes v. Bank of Am., N.A.*, No. 17-0593, 2018 U.S. Dist. LEXIS 31342, at *11 (M.D. Fla. Feb. 27, 2018).

Then, Judge Steven Merryday dismissed nineteen cases for lack of jurisdiction upon finding them to be "circuitous but unmistakable attempt[s] to impugn the validity of the foreclosure judgment[s]" entered against the plaintiffs. *E.g.*, *Ramirez v. Bank of Am., N.A.*, No. 17-2580, 2018 U.S. Dist. LEXIS 123088, at *9–10 (M.D. Fla. July 24, 2018). Because the plaintiffs "failed to counterclaim" in their foreclosure proceedings, the court stated, "*res judicata* prevents the plaintiffs'

litigating the claim now." *Id.* at *10 n.9. This led to further dismissals by nine more judges of almost all the remaining *Torres* spinoffs on the same ground.[5] Judge William F. Jung disposed of the final three cases on unrelated grounds in a summary-judgment order entered 15 November 2021. *See Zenteno v. Bank of Am., N.A.*, No. 17-02591, ECF No. 255 (M.D. Fla. Nov. 15, 2021).

Attempts to relitigate these cases in state court have thus far met with similar results. *See Salazar v. Bank of Am., N.A.*, No. 18-CA-010252, 2020 Fla. Cir. LEXIS 2275 (Fla. Cir. Ct. Oct. 21, 2020) ("The statute [of limitations] begins to run when knowledge of the cause of action becomes available.").

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[5] *E.g.*, *Rosselini v. Bank of Am., N.A.*, No. 17-2584, 2018 U.S. Dist. LEXIS 178792 (M.D. Fla. Oct. 4, 2018); *Colon v. Bank of Am., N.A.*, No. 17-2549, 2018 U.S. Dist. LEXIS 178131 (M.D. Fla. Oct. 17, 2018); *Captain v. Bank of Am., N.A.*, No. 18-60130, 2018 U.S. Dist. LEXIS 183192 (S.D. Fla. Oct. 25, 2018); *Navarro v. Bank of Am., N.A.*, No. 17-2643, ECF No. 25 (M.D. Fla. Oct. 26, 2018); *Dykes v. Bank of Am., N.A.*, No. 17-62412, 2018 U.S. Dist. LEXIS 224281 (S.D. Fla. Oct. 26, 2018); *Isola v. Bank of Am., N.A.*, No. 17-2640, ECF No. 31 (M.D. Fla. Oct. 30, 2018); *Torres v. Bank of Am., N.A.*, No. 17-2633, ECF No. 43 (M.D. Fla. Dec. 13, 2018); *Brexendorf v. Bank of Am., N.A.*, No. 17-2065, ECF No. 88 (M.D. Fla. Jan. 9, 2019); *Coles v. Bank of Am., N.A.*, No. 17-24153, ECF No. 91 (S.D. Fla. May 20, 2019).

D. The Complaint. Plaintiffs Chester Taylor III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, and Zelmon McBride brought the instant lawsuit in Mecklenburg County Superior Court on May 1, 2018. R pp 8–188. Taylor lives in Wrightsville Beach; the remaining Plaintiffs reside in California, Wisconsin, Arizona, Michigan, and Nevada.[6] R pp 207, 216, 224, 231, 239, 247, 254, 262, 271. (Price was apparently named in error: no allegations about her appeared in the complaint, and she disappeared from the caption in the currently operative amended complaint.) They assert claims for common-law fraud, fraudulent concealment, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, and negligence under the laws of unspecified jurisdictions, plus a claim under the North Carolina Unfair & Deceptive Trade Practices Act, N.C.G.S. § 75-1 *et seq*. R pp 281–301.

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[6] However, the Wisconsin resident is suing over a property located in Minnesota, and the Nevada resident over a property located in Arizona. R pp 162, 271. That matters for purposes of the applicable law. *See* Part I.A.

As in the cases described in Part C above, the Amended Complaint is premised on Plaintiffs' failures to obtain HAMP modifications as far back as 2009 and their theory that these failures reflected a scheme "specifically designed by BOA to set [Plaintiffs] up for foreclosure." R pp 209, 217, 232, 240–41, 249, 256, 263–64, 272. Which of them actually went through foreclosure is left ambiguous, or alleged in conflicting terms—all Plaintiffs allege foreclosures of their properties, *e.g.*, R pp 212, 220–21, 227, 235, 244, 252, 259, 264, 275, but some simultaneously allege different outcomes. R pp 228, 268. In all cases, they blame these outcomes on the "scheme" alleged in the HAMP MDL declarations, and argue they are not barred by the statute of limitations because they "did not know and could not have reasonably discovered these facts until they retained their attorneys." R p 200.

Taylor's allegations exemplify those made by the other Plaintiffs. He alleges seeking a HAMP modification in February 2010 and promptly receiving a three-month trial plan. R pp 208, 212. Plaintiffs allege that these plans promise that "[i]f timely payments are made during those three months … , the homeowner must be offered a permanent modification," but Taylor alleges making "fourteen" payments "in 2010

and 2011 without receiving one." R pp 199, 213. He claims he was in "repeated[]" contact with the bank "throughout" the "2010 through 2012" period "to ensure proper compliance with HAMP's requirements." R pp 209–12. Yet he claims he was "frustrate[d]" by "more than thirty" "unnecessar[y]" requests to "resubmit[] his application and supporting information." R pp 211–12. He claims he ultimately "qualified for HAMP but was wrongfully denied a HAMP modification because of the false and fraudulent statements made by BOA." R p 212. On 25 September 2012, a foreclosure judgment was entered against him. R p 213.

The other Plaintiffs repeat those allegations with different Bank representatives' names and dates. Their alleged conversations with these representatives who they say steered them into harm *all* date back to 2009 and 2010. R pp 216, 225, 231, 233, 240, 242, 248, 250, 255, 257, 263, 265, 271, 273. And the foreclosures or related outcomes that allegedly triggered their injuries *all* occurred in 2011 or 2012, except one in January 2014. R pp 213, 222, 228, 237, 245, 253, 260, 268, 276.

Plaintiffs' counsel followed *Taylor* with similar complaints on behalf of dozens more plaintiffs, resulting in the Chief Justice's designation of the cases as exceptional civil cases under Rule 2.1 of the

General Rules of Practice for the Superior and District Courts and their assignment to Judge Lisa C. Bell. R p 191. On 21 March 2019, Judge Bell entered a case-management order staying all the cases filed after *Taylor* and designating *Taylor* "as the first case for briefing of Defendants' Motion to Dismiss and related motions," with the expectation that the *Taylor* ruling would likely provide guidance for the rest. R pp 631–32.

E. The Motion Ruling. On 11 April 2019, Bank of America moved to dismiss *Taylor* as barred by the statute of limitations and *res judicata*, and for failure to state a claim. R p 633. As to the time bar, Bank of America relied on Plaintiffs' allegations that they were frustrated by the bank's mishandling and denial of their HAMP applications as far back as 2009, and had foreclosure judgments entered against them between April 2011 and January 2014. R. pp. 210, 212, 213, 219, 221, 225, 227, 228, 233–34, 236, 237, 244, 245, 250, 252, 253, 257, 259, 260, 265, 273–74, 274–75, 276. Based on case law establishing that the limitations period starts running "as soon as the injury became apparent to the claimant or should reasonably have become apparent," *Christenbury*, 370 N.C. at 6, Bank of America argued that Plaintiffs could not, as a matter of law, toll the statute of limitations with the argument

that they were not on notice of all elements of their current claims until retaining counsel.

As to *res judicata*, Bank of America relied on the principle that no foreclosure can occur without an adjudication that there is "a valid debt" and a "right to foreclose." *In re Raynor*, 229 N.C. App. 12, 16 (2013). Thus, Bank of America argued, Plaintiffs' claims that their debts were "fraudulent" because they were "wrongfully denied [] HAMP modification[s]" to "set [them] up for foreclosure" could have been asserted in their foreclosure cases and cannot be re-litigated now. E.g., R pp 209, 213, 285.

Plaintiffs also cross-moved for summary judgment in their favor and noticed that motion for hearing alongside Bank of America's motion to dismiss. R p 637. The motion was premised on the contention that a 2012 industry-wide settlement between the Department of Justice and the nation's five largest mortgage servicers (including Bank of America) "involve[d] identical issues in fact and law" as their lawsuit, and thus warranted entry of judgment in Plaintiffs' favor on *res judicata* grounds. R pp 206, 642, 647. Bank of America countered that if "identical" claims were indeed asserted nationwide and settled in 2012, the *res judicata* bar

would work in the other direction and bar Plaintiffs' attempt to re-litigate them, as well as undermining their arguments on the limitations front that they were incapable of discovering their claims until 2018.

Judge Bell heard three hours' worth of oral arguments on both motions on 27 May 2019. Hrg. Tr., R pp 664–786. After taking the argument and extensive briefing under consideration, the Court entered an Order on 3 October 2019 granting Bank of America's motion to dismiss and denying Plaintiffs' motion for summary judgment. R p 655. The Order stated "that all Plaintiffs' claims are barred by the applicable statutes of limitation, and further that the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel."

F. The Appeal. Plaintiffs noticed an appeal to the Court of Appeals on 24 October 2019. On 31 December 2020, a Court of Appeals panel of Judges, Berger, Dillon, and Young unanimously affirmed the Superior Court's dismissal on both grounds. As a threshold matter, the court noted that Plaintiffs had argued only North Carolina law, but "multiple plaintiffs are residents of states other than North Carolina" and therefore subject to the statutes of limitations of their home states,

"not that of North Carolina." Slip op. at 5 (citing *United Va. Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 321 (1986)). But "[e]ven assuming *arguendo* that North Carolina's statute of limitations applies," the court continued, "plaintiffs' complaint fails on its face." *Id.* at 6. The statute gave Plaintiffs three years to sue and started running either from "actual discovery" of their claims or when they "should have been discovered in the exercise of reasonable diligence." *Id.* (quoting *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547 (2003)). Plaintiffs had tried to argue that these are *always* questions of fact for a jury. But the court ruled—correctly—that when the dispositive facts are alleged in the complaint and "not in dispute," application of the statute of limitations is "a matter of law." *Id.* (citing *State Farm*, 161 N.C. App. at 548).

Then Judges Berger and Young left the court. On 4 February 2021, Plaintiffs petitioned for rehearing. A reconstituted panel with newly seated Judges Carpenter and Jackson taking Judge Young's and Judge Berger's place granted the petition in an order dated 10 March 2021.

On 5 October 2021, the new panel reached a decision—but not on the merits. Instead, it stated that the Court "cannot conduct a meaningful review of the trial court's conclusions of law" because it could

not "determine the reason" behind the Superior Court's rulings. Slip op. ¶¶ 8, 10. It remanded the case and directed the Superior Court to "enter a new order" with "further factual findings and conclusions of law" that "sustain its determination regarding the validity and applicability of the statute of limitations or *res judicata* determinations." *Id*. at ¶¶ 10–11.

Judge Dillon dissented, writing: "I was on the panel which issued the original opinion in this appeal. I continue to believe that Judge Bell got it right." *Id*. at ¶ 12 (citation omitted). As a matter of law, the dissent stated, "the statute of limitations begins to run at least by the time the plaintiff becomes aware of the injury." *Id*. at ¶ 17. The alleged injury here was that Bank of America allegedly "refused to modify [Plaintiffs'] respective mortgages" and that their properties were later "foreclosed upon." *Id*. at ¶¶ 15–16. Thus, "the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place." *Id*. at ¶ 17. And "Plaintiffs did not bring suit until more than three years after" that." *Id*. at ¶ 18. Plaintiffs' assertions that "[t]hey learned they might have a legal claim for fraud only after they had consulted attorneys years later" were not relevant, the dissent reasoned, because "[t]hey should have sought legal advice once they suffered their injury." *Id*.

"Accordingly," the dissent concluded, "Judge Bell ruled correctly," noting "that her dismissal orders are consistent with a number of dismissal orders from across the country involving similar claims." *Id.*

STANDARD OF REVIEW

This Court "review[s] a dismissal under Rule 12(b)(6) *de novo*." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). "When the complaint on its face reveals that no law supports the claim …. or discloses facts that necessarily defeat the claim, dismissal is proper." *Id.* (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448 (2015)).

ARGUMENT

The Superior Court's dismissal of Plaintiffs' complaint, and the original Court of Appeals panel's affirmance of that ruling, were each based on a routine application of well-established law to the facts affirmatively pled in the complaint. This Court should reinstate them.

I.

This Court Should Reaffirm the Superior Court's Routine Application of the Statute of Limitations.

The limitations analysis is straightforward. Plaintiffs conceded their claims were time-barred unless the statutes of limitations are tolled. And

there is no merit to the legal argument Plaintiffs made that they were entitled to have the statutes of limitations tolled until the moment they decided to hire their current attorneys—not under North Carolina law, and not under the laws applicable to the out-of-state Plaintiffs, either.

A. Plaintiffs cannot use North Carolina courts to resurrect claims that are time-barred where they arose.

In the Superior Court and again in the Court of Appeals, Plaintiffs presented arguments exclusively under North Carolina law. They never accounted for North Carolina's door-closing statute, which provides that "where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State." N.C.G.S. § 1-21. Here, Plaintiffs' claims arose in the states where "the real estate at issue is located" and where their alleged "economic loss was felt." *Synovus Bank v. Coleman*, 887 F. Supp. 2d 659, 669 (W.D.N.C. 2012) (citing, *e.g.*, *United Va. Bank v. Air-Lift Assocs.*, 979 N.C. App. 315, 321 (1986), for the proposition that "Virginia law applied where bank's wrongful sale of collateral occurred in Virginia").

Thus, Plaintiffs cannot invoke North Carolina's statute of limitations or tolling rules when their claims are time-barred in their

home states. The door-closing rule is unequivocal: "No action barred in the state of origin may be litigated here." *Little v. Stevens*, 267 N.C. 328, 334 (1966). "The purpose of this provision is to prevent a non-resident claimant from coming into this State and prosecuting a claim, whether against a resident or a non-resident, under the [North Carolina] statute of limitations, where the claim would be outlawed under the statute prevailing in the state where the cause of action arose." *Id*. at 332. Thus, the limitations analysis requires the Court to assess whether Plaintiffs' claims would be barred "where [they] arose," not only in North Carolina.

This is not a mere formality. Plaintiffs argued they were entitled to toll the statutes of limitations under the discovery rule. Not so under Michigan law, where one Plaintiff's claims arose. R p 254; *Boyle v. GMC*, 661 N.W.2d 557, 558, 560 (Mich. 2003) ("rejecting a discovery rule in fraud cases"). And since Plaintiffs never argued, in either of the courts below, that they are entitled to tolling under any state's laws other than North Carolina's, they waived any right to have their claims reinstated on that premise. *See, e.g.*, *Westminster Homes, In. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309 (2001) ("issues and theories of a case not raised below will not be considered on appeal").

B. Plaintiffs' claims are time-barred under all applicable statutes of limitations.

Although North Carolina law only applies to a single Plaintiff's claims, it is a useful place to begin. North Carolina's three-year statute of limitations for fraud claims starts running "from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence." *Peacock v. Barnes*, 142 N.C. 215, 218 (1906). Throughout this litigation, Plaintiffs have tried to argue that the question of when they "should have [] discovered" their claims is *always* a jury question. That is wrong. "A Rule 12(b)(6) motion to dismiss is the proper vehicle for asserting a statute of limitations defense if it appears on the face of the complaint that such a statute bars the claim." *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 652 (2017).[7] That is the situation here, so the Rule 12(b)(6) dismissal was proper.

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[7] Rule 12(b)(6) dismissals based on the legal determination that plaintiffs "should have discovered" their claims sooner are routine in North Carolina and elsewhere, despite Plaintiffs' efforts to argue that such dismissals are somehow unprecedented. *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 338–41 (2011); *accord*, *e.g.*, *Button v. McKnight*, No. COA10-858, 2011 N.C. App. LEXIS 748, at *10 (N.C. App. Apr. 19, 2011) (same); *Wilson*, 253 N.C. App. at 654 (affirming dismissal because plaintiff "fails to allege" inability to discover claims); *DePalma v. Roman Cath. Diocese of Raleigh*, No. COA04-206, 2004 N.C. App. LEXIS 2148, at *11 (N.C. App. Dec. 7, 2004) (affirming dismissal based on when

1. Plaintiffs affirmatively alleged facts triggering the time bar.

The dissent correctly observed that "[i]t is evident from the face of the face of the complaint" that Plaintiffs "should have [] discovered" their claims "more than three years" before they brought suit, because they were concededly "aware of their injury"—i.e., the foreclosures on "their respective properties." Slip op. ¶ 18; *see* R pp 213, 222, 228, 237, 245, 253, 260, 268, 276 (alleging dates of foreclosures and related harms). Thus, "the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place." *Id*.

This analysis followed North Carolina law long-established by this Court. *E.g.*, *Christenbury*, 370 N.C. at 2 ("North Carolina law has long recognized the principle that a party must timely bring an action upon discovery of an injury to avoid dismissal of the claim."); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 492 (1985) ("a cause of action accrues at the time the injury occurs"). It was also consistent with the on-all-fours "dismissal orders from courts across the country" that

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plaintiff's "injury" was "apparent"); *In re Will of Evans*, 46 N.C. App. 72, 75–77 (1980) ("where the facts are admitted or established the question of the bar of the applicable statute [of limitations] becomes a question of law").

have rejected near-identical versions of the same complaint. Slip op. ¶ 18; *see*, *e.g.*, *Cantrell*, 2017 U.S. Dist. LEXIS 50255, at *8–9 (notices of HAMP denial and foreclosure triggered limitations period); *Mandosia*, 794 F. App'x at 623 (HAMP denial triggered limitations period). The alleged harm (foreclosure on a property) gives notice of a possible claim and imposes the duty to investigate it and assert it before the statute of limitations runs out.

Knowledge of a harm isn't the *only* thing that puts a plaintiff on notice of a claim—it is simply one application of the general rule that the duty to "exercise [] reasonable diligence" arises "when the plaintiff first becomes aware of facts and circumstances" that would have aroused "suspicion" of wrongdoing. *Doe v. Roman Cath. Diocese of Charlotte*, 242 N.C. App. 538, 543–44 (2015). Other circumstances that arouse "suspicion" as a matter of law include when a plaintiff "knew that he was receiving none of the pecuniary benefits" to which he claimed to be entitled. *Hiatt v. Burlington Indus., Inc.*, 55 N.C. App. 523, 529 (1982). Those circumstances, too, are fatal to Plaintiffs' claims. In addition to admitting they knew about their injuries years before they filed suit, Plaintiffs also admitted knowledge, even earlier, of harm due to the

denial of the benefits to which they claimed to have been entitled. *E.g.*, R p 211–12 (alleging HAMP applications were "wrongfully denied" before foreclosures). And even before their denials, they allege being "repeatedly" "frustrate[d]" by grievances about the HAMP application process, to the point of making "frequent phone calls to ensure proper compliance with HAMP." R p 211.

Borrowers alleging "frequent phone calls to ensure proper compliance" due to prolonged and repeated frustrations cannot claim they had no grounds to suspect non-compliance. Once plaintiffs are under a duty to inquire, "plaintiffs are charged with the knowledge" of all facts "that a reasonable inquiry would have disclosed." *Thorpe v. DeMent*, 69 N.C. App. 355, 362–63 (1984). And it is not necessary for a plaintiff to have "complete information of all details" of their claims to trigger the running of the statute of limitations. *Cascadden v. Household Realty Corp.*, 196 N.C. App. 517, 2009 N.C. App. LEXIS 538, at *5 (2009).

The second Court of Appeals panel majority worried needlessly whether the Superior Court somehow went "outside the four corners of the [] complaint" in ruling on the motion to dismiss. Slip op. ¶ 10. But But there was no need in this case to go outside the four corners of the

complaint to discern what a reasonable inquiry would have disclosed. That's because the complaint goes into extensive detail about what Plaintiffs concluded once they finally *did* retain their present counsel and make allegations based on their counsel's investigation. It is all grounded on material long part of the public record which Plaintiffs could have discovered years earlier, had they inquired years earlier, when they were obliged to do so.

In particular, Plaintiffs allege they concluded they were victims of fraud when their current lawyers told them of:

> (i) the HAMP MDL "filed in 2011" alleging "mismanagement of the HAMP modification process" and "arbitrarily denied permanent modifications," and the district court's 2013 denial of class certification. R p 207.
>
> (ii) the ex-employee and ex-contractor declarations filed in the HAMP MDL accusing Bank of America of a "strategy" of "denying" and "delaying" HAMP applications, filed on the public docket in that case in 2013. R pp 201–02. In an effort to extend the shelf life of these allegations, Plaintiffs also cited a newer declaration dated 2017. R p 201. But it was a word-for-word copy of one of the 2013 declarations. *See Torres*, 2018 U.S. Dist. LEXIS, at *13 (refusing to toll statute of limitations based on the 2017 declaration because "Plaintiffs will not be permitted to keep the statute of limitations suspended by finding new people to repeat the same information that has been available for more than four years").
>
> (iii) the suits filed by the federal government and 49 State attorneys general against five major mortgage servicers, including Bank of America, in 2011, which resulted in the $25 billion National

> Mortgage Settlement announced to the public in 2012. R p 206. Plaintiffs affirmatively allege that "[t]he conduct complained of" in their own complaint "involves identical issues in fact and law raised in the federal lawsuit" brought in 2011. R p 207.

Plaintiffs say they did not "learn of the[se] facts" until "after [they] retained their attorneys in this matter." R p 200. But when they learned of these "facts" is irrelevant as a matter of law. Inquiry notice, not actual notice, is the relevant legal standard. *Peacock*, 142 N.C. at 218. And Plaintiffs were on inquiry notice, at the *latest*, "when their respective properties were foreclosed upon" (slip op. ¶ 18 (Dillon, J., dissenting)), if they were not already on notice when their modification applications were denied or when they claim to have been "frustrated" trying to obtain them. R pp. 211–12. Plaintiffs did not need knowledge of the HAMP MDL declarations to assert claims they were wrongfully denied loan modifications after complying with their trial plans, and any purported "facts" those declarations supplied were merely additional "details" of which "complete information" was unnecessary to trigger the statute of limitations. *Cascadden*, 2009 N.C. App. LEXIS 538, * 5.

The law in the other jurisdictions governing the out-of-state Plaintiffs' claims, where they recognize a discovery rule at all, is consistent. In Arizona, as here, it is "not necessary … for [plaintiffs] to

know all the facts for the statute of limitations to begin to run. All that is required is that they should have known such facts that would have prompted a reasonable person to investigate." *Richards v. Powercraft Homes, Inc.*, 678 P.2d 449, 451 (Ariz. Ct. App. 1983). Likewise, in California, which governs a plurality of the Plaintiffs' claims, "a plaintiff need not be aware of the specific 'facts necessary to establish the claim; that is a process contemplated by pretrial discovery. … So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 928 (Cal. 1988).[8]

However, "waiting for the facts to find [them]" is exactly what Plaintiffs describe doing in their Amended Complaint. That is insufficient to avoid the applicable statutes of limitation.

2. The dates Plaintiffs responded to lawyer solicitations are not relevant.

Plaintiffs' primary argument in favor of tolling the limitations period is that they "did not know, and could not have reasonably

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[8] *Accord*, *e.g.*, *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 237 (8th Cir. 1996) (collecting Minnesota precedents "impos[ing] an affirmative duty to investigate upon a party who is aware of facts that might constitute a possible cause of action for fraud").

discovered," any grounds for their claims "until [they] retained [their] attorneys in this matter." R p 211. Plaintiffs tried to argue below that this boilerplate allegation should have been "the end of the analysis," and all they had to do to survive dismissal was to recite, "I did not know and I could not know." R p 706. But if reciting those words were all that was needed to evade a statute of limitations, no complaint would *ever* be dismissed. Ample precedents of this Court and others dismissing complaints with boilerplate allegations that the plaintiffs "could not have [] discovered" their claims establish that such a rote recitation is *not* "the end of the analysis." *Christenbury*, 370 N.C. at 6; R p 706. It is only the beginning.

Plaintiffs' contention that they "could not have reasonably discovered" their claims until retaining their current counsel is unsustainable as a matter of law and affirmatively pleaded fact. Their current attorneys were retained in 2016 and 2017. R pp 208, 217, 232, 240, 248, 255, 263, 272. But their attorneys did not base their claims on anything *newly discovered* in 2016 or 2017. They just asserted Plaintiffs were fraud victims based on claims made in the 2011 MDL and the 2012 government lawsuit (*see* Part I.B.1), then made rote allegations that

Plaintiffs had no way of knowing this until retaining their present counsel. R pp 200–07. But the law does not permit plaintiffs with full notice of their alleged harms to keep a statute of limitations tolled indefinitely until a lawyer finds them, as many other courts recognized in holding identical claims time-barred.

Most recently, a Florida court dismissed another clone of Plaintiffs' complaint with the reasoning:

> [T]he court rejects the notion that a statute of limitations can stay in suspension until one talks to an attorney. The plaintiff chooses how long he waits before consulting an attorney, so making the date of legal consultation determinative would abrogate all statutes of limitation.

Salazar, 2020 Fla. Cir. LEXIS 2275, at *3. The court added that the plaintiffs "could have learned" of the grounds for their claims sooner if they had "hir[ed] a lawyer" sooner. *Id*. The same is manifestly true here given that Plaintiffs relied on no information more recent than 2013. Numerous other courts dismissing complaints based on the same template as Plaintiffs' have held the same. *E.g.*, *Cantrell*, 2017 U.S. Dist. LEXIS 50255, at *8–9 (rejecting claim that plaintiffs could not be aware of the "scheme" alleged in the HAMP MDL declarations "until [they]

consulted with [their] attorney"); *Jones*, 2018 U.S. Dist. LEXIS, at *25 n.5; *Mandosia*, 2018 U.S. Dist. LEXIS 45237, at *7.

The U.S. Supreme Court has reinforced this view, as the dissent noted. Slip op. ¶ 17 (citing *United States v. Kubrick*, 444 U.S. 111, 123 (1979)). In *Kubrick*, the Court differentiated "ignorance of the fact of [the plaintiff's] injury" from "ignorance of his legal rights," because once a plaintiff knows "he has been hurt," "[t]here are others who can tell him if he has been wronged, and he need only ask"—in particular, "by seeking advice in the [] legal community." *Id.* at 122–23. The "reasonable diligence" required of plaintiffs *includes* the duty to seek "advice … as to whether he had been legally wronged." *Id.* at 123 n.10.

And in *Wood v. Carpenter*, 101 U.S. 135, 140–41 (1879), the Court held: "A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner." Plaintiffs do not do this. They claim "ignorance" of their claims while going through their foreclosures before 2014 and "knowledge" after retaining their current attorneys in 2016–17. But they do not—and cannot—explain how they were prevented from

acquiring that knowledge sooner. R pp 214, 222, 229, 237, 246, 254, 262, 269. Instead, the facts they allege preclude that inference. Everything their attorneys base their claims on was public by 2013. R pp 201–04.

The "fatal flaw" in suspending statutes of limitations under those circumstances "readily reveals itself when one considers that if Plaintiff had not contacted an attorney, under his interpretation, the statute of limitations would still not have expired, nor would it ever." *Migliarese v. United States*, 542 F. Supp. 2d 434, 441 & n.5 (M.D.N.C. 2008). "[A]ny plaintiff who requires the assistance of counsel to discover the existence of a claim, including plaintiffs who conduct virtually no diligence, would be automatically entitled to equitable tolling of the statute of limitations for an indefinite period of time until that plaintiff retains counsel." *McCarn v. HSBC USA, Inc.*, No. 12-0375, 2012 U.S. Dist. LEXIS 162257, *21–22 (E.D. Cal. Nov. 13, 2012).

That is why the law imposes a duty on plaintiffs to "go find the facts" instead of "wait[ing] for the facts to find [them]." *Jolly*, *supra*. And the complaint concedes on its face that when Plaintiffs finally went to "find the facts," everything they found dated from 2013 and earlier. *See* Part I.B.1 above. They are "charged with th[is] knowledge" as of the

earliest date they were obliged to investigate. *Thorpe*, 69 N.C. App. at 362–63. The date on which they hired counsel is not relevant.

And while the Court need go no further than the complaint's own allegations to affirm dismissal on this basis, Plaintiffs' insistence that the Court's analysis is restricted to the "four corners of the complaint," slip op. ¶ 10, misstates the legal standard. It has never been doubted that other courts' decisions, and public documents, are subject to judicial notice on a motion to dismiss.[9] Here, there is ample case law addressing hundreds of other lawsuits alleging the very same grievances as Plaintiffs' back to HAMP's earliest days, which many such plaintiffs managed to assert *pro se*, without counsel. *Compare*, *e.g.*, R p 211–12 (complaining Appellants were "wrongfully denied [] HAMP modification[s]" after requests to "resubmit" documents), *with Ramos v. Bank of Am., N.A.*, No. 11-3022, 2012 U.S. Dist. LEXIS 166960, at *2–5

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[9] *See*, *e.g.*, *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 420 (2015) ("trial court properly" took judicial notice of court records and mortgage documents on motion to dismiss); *Bryson v. Cooper*, No. COA03-1484, 2004 N.C. App. LEXIS 1930, *5 (Oct. 19, 2004) (taking judicial notice of prior complaint for purposes of assessing similarity of allegations); *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP*, 2018 NCBC LEXIS 16, at *14 (N.C. Super. Ct. Feb. 16, 2018) ("Courts may in their discretion take judicial notice of court filings made in other jurisdictions.").

(D. Md. Nov. 26, 2012) (*pro se* plaintiff complaining she "never received a permanent modification" after requests to "re-produce documents [defendant] already possessed" and other "deceptive" acts in violation of "HAMP guidelines"); R p 215 (alleging Bank of America "had no intention of approving" Plaintiffs' HAMP applications), *with Ferrerr v. U.S. Bank, N.A.*, No. 14-20741, 2014 U.S. Dist. LEXIS 129325, at *18 (S.D. Fla. Sept. 16, 2014) (*pro se* plaintiff accusing bank of "having no intention of honoring [] agreement" to provide HAMP modifications). If these *pro se* plaintiffs could discern and assert these claims without hiring Plaintiffs' counsel, then Plaintiffs could have, too.

At the end of the day, this is not a case about Plaintiffs' belated discovery of their claims. It is a case about their attorneys' belated discovery of their clients.

C. No further trial court proceedings are needed to affirm the *res judicata* ruling.

The Superior Court also ruled "the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel." R p 655. Again, this Court need go no further than the face of the complaint to affirm this ruling.

Res judicata "bars every ground of recovery or defense which … could have been presented in [a] previous action." *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93 (1988). Plaintiffs allege in this case that the bank engineered a scheme "specifically designed … to set Plaintiff[s] up for foreclosure," tricked them into defaulting on their loans, sabotaged their efforts to cure their defaults, "committed fraud in the discharge of its foreclosure procedures," and damaged them by foreclosing on their loans. *E.g.*, R pp 208, 209, 211, 283. As numerous other courts construing identical complaints have held, these are undoubtedly claims that "could have been raised in the state court foreclosure [proceedings] before final judgment was entered." *E.g.*, *Clavelo*, 2018 U.S. Dist. LEXIS 178789, at *2–3; *Zuluaga v. Bank of Am., N.A.*, No. 17-2543, 2018 U.S. Dist. LEXIS 177524, at *10–11 (M.D. Fla. May 15, 2018), *Colon*, 2018 U.S. Dist. LEXIS 5024083, at *10; *Rosselini*, 2018 U.S. Dist. LEXIS 178792, at *5; *Ramirez*, 2018 U.S. Dist. LEXIS 123088, at *9–10 (calling these lawsuits "circuitous but unmistakable attempt[s] to impugn the validity of the foreclosure judgment[s]"). North Carolina law is consistent. *See Espey v. Select Portfolio Servs., Inc.*, 240 N.C. App. 293 (2015) (*res judicata* bars

any "collateral attack on an order … which authorized defendants to proceed with a foreclosure").

Moreover, Plaintiffs' argument seeks to undermine the validity of foreclosures rendered in four other states. But the "public Acts, Records, and judicial Proceedings" of other states are constitutionally owed the same "Full Faith and Credit" here that North Carolina's proceedings would warrant anywhere else. U.S. CONST. Art. IV, § 1. Once again, "Judge Bell got it right." Slip op. ¶ 12 (Dillon, J., dissenting). This Court should not allow these disparate Plaintiffs to employ North Carolina's courts to impugn the judgments and proceedings of their own states.

II.

Ordering "Findings of Fact" on a Rule 12(b)(6) Dismissal Order Was Both Improper and Unnecessary to Conduct a *de Novo* Appellate Review.

Neither the original Court of Appeals panel nor the dissent had trouble assessing whether the Superior Court was correct to dismiss the complaint as time-barred on the record before them. *See* slip op. ¶¶ 12–14 (Dillon, J., dissenting). But the new panel majority improperly found itself unable to "conduct a meaningful review of the trial court's

conclusions of law" without having "further findings" of fact. *Id*. at ¶ 10. This was error on two levels.

First, there is no *need* for a reviewing court to have a detailed explication of the trial court's reasoning or an accounting of what it "considered" (*id*. at ¶ 9) to conduct a *de novo* review of a Rule 12(b)(6) ruling. "Under a *de novo review*, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33 (2008). The very essence of considering a matter "anew" is that it is analyzed "as if not considered or decided" by the lower tribunal. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62 (1996). The new panel majority deemed itself incapable of "conduct[ing] a meaningful review" without knowing what the Superior Court "considered" (slip op. at ¶ 9–10), but a reviewing court assessing the matter anew, "as if not considered" by the lower court at all, as in *Dorsey*, does not need to know what the lower court "considered" to reach its own ruling.

Second, the "factual findings and conclusions of law" the new panel ordered the Superior Court to enter (*id*. at ¶¶ 1, 11) are improper under North Carolina's Rules of Civil Procedure and longstanding practice.

Rule 52 states that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order … only when requested by a party and as provided in Rule 41(b)." N.C.G.S. § 1A-1, N.C. R. Civ. P. 52(a)(2). No such request was made by Plaintiffs. The Superior Court Judges' Benchbook further explains that, "even if requested," such findings are not required in ruling on a Rule 12(b)(6) motion. N.C. Super. Ct. Judges' Benchbook, "Findings of Fact and Conclusions of Law," III.C.1, UNC Sch. of Gov't (J. Smith, ed.).[10] At the 2021 Orientation for new Superior Court Judges, the Hon. Paul Ridgeway set forth the "general principle[]" that on a decision "requir[ing] you to accept one party's version of the facts as true (e.g. granting or denying a N.C. R. Civ. P. 12(b)(6) motion)," "FOF/CL normally are not appropriate." Hon. Paul C. Ridgeway, Findings of Fact & Conclusions of Law, Presented at Orientation for New Super. Ct. Judges 1 (Jan. 28, 2021); *see also G&S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 490; 380 S.E.2d 792, 796 (1989).[11]

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[10] *See https://benchbook.sog.unc.edu/judicial-administration-and-general-matters/findings-fact-and-conclusions-law.*

[11] *See https://www.sog.unc.edu/resource-series/orientation-new-superior-court-judges-january-23-27-2017.*

Thus, it was error for the Court of Appeals to reverse and remand, directing Judge Bell to make "findings of fact" and to hold they were necessary to "properly review whether the trial court correctly granted Defendant's motion." If allowed to stand, this ruling will contravene longstanding precedents of this Court and time-honored Superior Court practice, sow confusion where there had previously been a clear understanding of what was expected from the trial courts, and significantly increase the burdens on trial judges lacking the resources to generate fully explicated opinions with every order.

Importantly, this is not a case where the Superior Court ruled hastily or where there is anything to suggest that it failed to take any party's arguments under consideration. The record indicates that the court benefited from 175 pages of briefing and considered the parties' positions in depth through incisive questioning over the course of a three-hour oral argument. Hrg. Tr., R pp 664–786. The seasoned Superior Court Judge not only discharged her duty to make a ruling based on the allegations and arguments before her, but did so correctly.

CONCLUSION

Thus, for the reasons set forth above and on the appellate record, Bank of America respectfully urges this Court to reaffirm the judgment of the Superior Court and reverse the erroneous panel decision of the Court of Appeals on the basis of the dissent.

This 10th day of January, 2022.

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N.C. R. APP. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that on 10 January 2022 the foregoing **Defendant-Appellant's New Brief** was electronically filed and served upon each of the parties in this action by email and by mailing a copy by First Class mail, addressed as follows:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARMEN BREXENDORF,

Plaintiff,

v. Case No. 6:17-cv-2065-Orl-37GJK

BANK OF AMERICA, N.A.,

Defendant.

ORDER

On January 9, 2019, the Court held a hearing on Defendant's motion to dismiss Plaintiff's fourth amended complaint (Doc. 75). (Doc. 87 ("**Hearing**").) Having considered the parties' filings and oral arguments, the Court pronounced its ruling at the Hearing, finding that the *Rooker-Feldman* doctrine bars Plaintiff's claims for damages arising from the loss of her home and equity in her home. This Order memorializes the Court's oral pronouncement.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Bank of America, N.A.'s Motion to Dismiss Fourth Amended Complaint and Incorporated Memorandum of Law (Doc. 75) is **GRANTED IN PART AND DENIED IN PART:**

    a. Defendant's Motion is **GRANTED** to the extent Plaintiff's claims for damages arising from the loss of her home and equity in her home are barred by the *Rooker-Feldman* doctrine.

b. In all other respects, the Motion is **DENIED WITHOUT PREJUDICE.**

2. Plaintiff's Fourth Amended Complaint (Doc. 75) is **DISMISSED** for lack of subject matter jurisdiction.

3. On or before Wednesday, **January 23, 2019**, Plaintiff may file an amended complaint consistent with the Court's directives at the Hearing. Absent a timely amended complaint the Clerk will be directed to close the file.

DONE AND ORDERED in Chambers in Orlando, Florida, on January 9, 2019.

ROY B. DALTON JR.
United States District Judge

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-24153-CIV-GAYLES

MARIE COLES,
Plaintiff,

v.

BANK OF AMERICA, N.A.,
Defendant.
_____/

ORDER

THIS CAUSE comes before the Court on Defendant Bank of America, N.A.'s Motion and Memorandum in Support by Defendant Bank of America, N.A., to Dismiss Plaintiff's Third Amended Complaint ("Motion") [ECF No. 61]. Defendant argues, *inter alia*, that the Third Amended Complaint [ECF No. 57] should be dismissed because this Court has no subject matter jurisdiction over Plaintiff Marie Coles's claims under the *Rooker-Feldman* doctrine. The Court has reviewed the Motion, the parties' submissions, the record, and the applicable law. For the reasons that follow, Defendant's Motion is granted.

I. BACKGROUND[1]

A. The Home Affordable Modification Program

This case revolves around Defendant's alleged scheme to defraud millions of homeowners in the wake of the 2008 financial crisis. Following the stock market crash, Congress allocated billions of taxpayer dollars to newly-created programs in exchange for the recipients' agreement

[1] For purposes of Defendant's Motion, the Court accepts as true all facts in the Third Amended Complaint, save for the jurisdictional facts, which Plaintiff is required to prove as the Supreme Court explained in *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). *See infra* pp. 4–5.

to implement certain congressionally-specified mechanisms designed to lessen the impact of the financial crisis on every-day Americans.

The Home Affordable Modification Program ("HAMP") was intended to help borrowers keep their homes. To receive federal funds from HAMP, Defendant agreed to use "reasonable efforts" to help homeowners refinance their mortgages. The program worked as follows: a borrower would contact Defendant and request to refinance her loan. Defendant would screen her file and determine if she qualified. After receiving pre-approval (known as a HAMP Loan Workout Plan), the borrower entered a three-month trial phase during which she would make lower monthly mortgage payments and simultaneously submit financial paperwork to obtain a permanent modification. If payments were timely made and the paperwork was approved, the borrower's mortgage would be permanently modified. After a few years of compliance with the modified mortgage rate, Defendant could slowly increase the interest rate in anticipation of the economy's revival. Defendant received "incentive payments" from the federal government for every homeowner who received a HAMP modification.

Over the past few years, several lawsuits have been filed claiming that Defendant fraudulently operated its HAMP program in order to retain the incentive payments and profit off the borrower's losses. These lawsuits are bolstered by numerous whistleblower affidavits. In one such case, Defendant paid back one billion dollars of taxpayer money. *See United States v. Bank of America, N.A., et al.*, No. 1:11-cv-03270 (E.D.N.Y. 2014).

B. Factual History

In 2002, Plaintiff executed a mortgage and note for her home in Miami in the amount of approximately $80,000.00. Plaintiff's loan was refinanced in 2004 and then again in 2006. By that point, Defendant serviced her mortgage. In March 2009, Plaintiff reached out to Defendant and

requested a HAMP modification. In June or July of the same year, Defendant's loan representative advised her to stop making her regular mortgage payments because HAMP eligibility required that a borrower be in default. Plaintiff accordingly stopped making her payments and defaulted. Plaintiff received a letter from Defendant stating that she was "approved" for the modification in August 2009 and began making trial payments that month.

Plaintiff then submitted financial documents in pursuit of a permanent modification. She received a letter from Defendant confirming their receipt on November 30, 2009. Shortly thereafter, Defendant told Plaintiff that some of the documents were "missing or incorrect." Plaintiff resubmitted them less than a month later. Defendant found another issue with them. Plaintiff ultimately resubmitted her documents at least six different times in response to Defendant's enquiries about lost, missing, or incorrect documents. During this time, Defendant's representatives continued to advise her to stay in default.

Because of how long it took to process her paperwork, Plaintiff's application was never approved for a permanent modification. Despite this, she made six trial payments of $967.50 on Defendant's instruction. Plaintiff also alleges that during this time Defendant conducted illegal "property inspections" on her house and charged her fees for each one. Plaintiff alleges that Defendant knowingly deposited her trial payments into a separate account, one not tied to her mortgage, so that Defendant could keep those funds for its own profit. And because Defendant did not apply those payments to her account, Plaintiff remained in default.

Defendant ultimately foreclosed on Plaintiff's home on February 10, 2014. As part of the foreclosure, a judgment in the amount of $329,000.05 was entered against Plaintiff in state court. Plaintiff now contends that Defendant's loan officer lied to her in the initial conversations about her HAMP eligibility, application process, and foreclosure period, and that Defendant intentionally

lost her documents and delayed her application so that she would lose her home. Plaintiff claims that Defendant profited from her losses by keeping the trial payments and inspection fees and foreclosing on her home. Finally, Plaintiff asserts that she had no way of knowing about Defendant's scheme before her lawyers described the lawsuits against Defendant.

C. Procedural History

Plaintiff's Third Amended Complaint, filed on August 22, 2018, asserts claims of (1) common law fraud – Count I and (2) violations of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.01, *et seq.* – Count II. [ECF No. 57]. Plaintiff seeks damages for (1) loss of funds paid to Defendant in the form of unapplied trial payments, (2) fraudulent inspections, (3) costs incurred for repeated attempts to send in her HAMP application, and (4) loss of equity and future equity in the home. [*Id.* ¶ 105]. Defendant filed its Motion to Dismiss on September 5, 2018. [ECF No. 61]. The Motion is now ripe for review.

II. LEGAL STANDARD

A motion to dismiss for lack of subject matter jurisdiction brought pursuant to Federal Rule of Civil Procedure 12(b)(1) may present either a facial or a factual challenge to the complaint. [2] *See McElmurray v. Consol. Gov't*, 501 F.3d 1244, 1251 (11th Cir. 2007). In a facial challenge, a court is required only to determine if the plaintiff has "sufficiently alleged a basis for subject matter jurisdiction." *Id.* at 1251. Furthermore, "the court must consider the allegations in the plaintiff's complaint as true." *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981).[3] By contrast, a factual attack "challenge[s] 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings,

[2] Defendant raises several arguments in its Motion. Because the Court agrees that it lacks subject matter jurisdiction over this case pursuant to the *Rooker-Feldman* doctrine, it will not address the remaining arguments.

[3] The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

and matters outside the pleadings . . . are considered.'" *McElmurray*, 501 F.3d at 1251 (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). In a factual attack, "no presumptive truthfulness attaches to [a] plaintiff's allegations," *Lawrence*, 919 F.2d at 1529 (citation and internal quotation marks omitted), and the plaintiff bears the burden to prove the facts sufficient to establish subject matter jurisdiction. *See OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002).

Here, Defendant has advanced a factual attack on Plaintiff's Third Amended Complaint because it contends that this Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine. *See, e.g.*, *Christophe v. Morris*, 198 F. App'x 818 (11th Cir. 2006) (per curiam) (affirming a district court's decision to dismiss the plaintiff's complaint where the district court had considered *Rooker-Feldman* as a factual attack on its subject matter jurisdiction). Accordingly, this Court may properly consider evidence outside the pleadings in determining whether the Third Amended Complaint should be dismissed.

III. DISCUSSION

"The *Rooker-Feldman* doctrine makes clear that federal district courts cannot review state court final judgments because that task is reserved for state appellate courts or, as a last resort, the United States Supreme Court." *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (per curiam).[4] The doctrine, named for *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic*

[4] There is no procedural bar to the application of the *Rooker-Feldman* doctrine here. The state foreclosure judgment was entered on February 10, 2014; Plaintiff did not appeal; and the present federal action was not filed until November 13, 2017. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 208, 284 (2005); *Nicholson v. Shafe*, 558 F.3d 1266, 1276 (11th Cir. 2009).

Indus. Corp., 544 U.S. 280, 284 (2005). "*Rooker* and *Feldman* exhibit the limited circumstances in which [the Supreme Court's] appellate jurisdiction over state-court judgments precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority." *Id.* at 291 (internal citation omitted). The doctrine bars federal claims raised in the state court and claims "inextricably intertwined" with the state court's judgment. *See Feldman*, 460 U.S. at 482 n.16. "A claim is 'inextricably intertwined' if it would 'effectively nullify' the state court judgment, or [if] it 'succeeds only to the extent that the state court wrongly decided the issues.'" *Casale*, 558 F.3d at 1260 (quoting *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001)) (internal quotation marks omitted); *see also Springer v. Perryman*, 401 F. App'x 457, 458 (11th Cir. 2010) (per curiam).

A. Count I – Common Law Fraud

The Court finds instructive the reasoned analysis of Judge Altonaga in a virtually identical case. In *Captain v. Bank of America, N.A.*, plaintiffs executed a HAMP Loan Workout Plan after falling behind in their mortgage payments. No. 18-60130-CIV, 2018 WL 5298538, at *1 (S.D. Fla. Oct. 25, 2018). They were then "approved" and began making trial payments. *Id.* Plaintiffs were repeatedly told, though, that their HAMP application documents and payments were "not received." *Id.* Ultimately, their home was foreclosed upon. *Id.*

Judge Altonaga held that the court lacked jurisdiction under *Rooker-Feldman* for two reasons.[5] First, she found that plaintiffs had constructive notice of fraud before the foreclosure judgment was entered. *Id.* at *5. Underlying her decision was that plaintiffs were aware of the

[5] The case before Judge Altonaga was decided at summary judgment. Although the instant case proceeds on a Motion to Dismiss, the legal issue and analysis presented is the same because *Rooker-Feldman* is a jurisdictional bar. *See Rance v. D.R. Horton, Inc.*, No. 07-80402-CIV, 2009 WL 10668926, at *3 (S.D. Fla. Aug. 11, 2009), *aff'd*, 392 F. App'x 749 (11th Cir. 2010).

"irregularities" in the process: they were "approved" for a HAMP modification and had repeatedly submitted HAMP documents—and payments—but were told that nothing was received. *Id.* As such, "[p]laintiffs had a reasonable opportunity to raise their fraud claim" in the state court proceedings and were barred from doing so in federal court. *Id.* at *6. Second, Judge Altonaga held that plaintiffs' fraud claim was inextricably intertwined with the foreclosure action. *Id.* at *7. Judge Altonaga found that fraud was an equitable defense to foreclosure, which if raised before the state court would have likely changed its result. *Id.* Judge Altonaga also found that the damages, which sought compensation for the lost house and the costs spent pursuing HAMP modifications, were intertwined with the state court judgment because they "would effectively nullify the state court judgment and necessarily hold that the state court wrongly decided the issues." *Id.* at *7 (citing *Casale*, 558 F.3d at 1260) (internal quotations omitted).

The parties here have raised identical arguments. Defendant cites a litany of federal cases—each of which "dismiss[es] actions where plaintiffs were, in reality, challenging state-foreclosure judgments"—and argues that Plaintiff's claims are similarly inextricably intertwined with the state court judgment. *Figueroa v. Merscorp, Inc.*, 766 F. Supp. 2d 1305, 1320 (S.D. Fla. 2011). Plaintiff counters that *Rooker-Feldman* does not apply because (1) she was unaware of the fraud at the time of the state court proceedings and judgment and (2) her requested damages would not disturb the state court judgment.

First, the Court finds that Plaintiff had constructive notice of her fraud claim because she was aware of the irregular events prior to the state court judgment. Specifically, Plaintiff was aware of her own six modification payments and her repeated attempts to send Defendant her financial paperwork in response to its enquiries about lost, missing, and/or incorrect documents. *Casale*, 558 F.3d at 1260; *Figueroa*, 766 F. Supp. 2d at 1325–26. Thus, like the plaintiffs in *Captain*, she

"should have known of the basis of [her] fraud claim" at the time of the state court judgment. 2018 WL 5298538, at *5.

Second, the Court finds that Plaintiff's suit is inextricably intertwined with the state court judgment. Plaintiff's fraud claim would have constituted an equitable defense to foreclosure before the state court. *See id.* at *6 (citing *Najera v. NationsBank Tr. Co., N.A.*, 707 So. 2d 1153, 1155 (Fla. 5th DCA 1998)). Had she raised it at that time, she may not have lost her home. *Id.* This Court cannot retroactively provide relief for her failure to do so.

Plaintiff also seeks damages that would "effectively nullify the state court judgment and necessarily hold that the state court wrongly decided the issues." *Id.* at *7 (citing *Casale*, 558 F.3d at 1260); *see also Nivia v. Nation Star Mortg., LLC*, 620 F. App'x 822, 825 (11th Cir. 2015) (per curiam) ("The inquiry is whether either the damages award would annul the effect of the state court judgment or the state court's adoption of the legal theory supporting the award would have produced a different result."), *cert. denied Nivia v. Aurora Loan Servs., LLC*, 136 S. Ct. 909 (2016). Plaintiff seeks compensation for lost equity and future equity in the house, HAMP payments, and inspection fees. These are identical to the damages sought and rejected in *Captain*. 2018 WL 5298538, at *7. Here, as there, success on the merits would financially restore her loss—which, for practical purposes, would void the result that the state court reached.

Plaintiff tries to dodge this bullet by arguing that *Rooker-Feldman* does not bar a federal claim simply because it may yield findings inconsistent with a state court judgment. *See Exxon*, 544 U.S. at 293 (noting that jurisdiction exists "[i]f a federal plaintiff present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which [s]he was a party" (internal quotations omitted)). Plaintiff's claims do not fit into this exception because such cases are factually distinguishable. In *Arthur v. JP Morgan Chase Bank*, for example,

plaintiff sought money damages "for alleged criminal and fraudulent conduct in the *generation* of foreclosure-related documents"—the physical creation of fraudulent documents used to foreclose on the home. 569 F. App'x 669, 675 (11th Cir. 2014) (emphasis in original). No such allegation exists here. Plaintiff also does not seek damages based on Defendant's wrongful conduct during the state court proceedings, *see Kohler v. Garlets*, 578 F. App'x 862, 864 (11th Cir. 2014), or claim a broader injury emanating from the state court judgment, *see Nero v. Mayan Mainstreet INV 1 LLC, et al.*, No. 6:14-cv-1363-Orl-40TBS, 2014 WL 12610668 at *11–12 (M.D. Fla. Nov. 13, 2014) (asserting RICO claims based on fraudulent mortgage assignments).

As Plaintiff seeks solely to restore her financial losses, the Court concludes that a judgment in her favor would necessarily annul the state court judgment. The suits are therefore inextricably intertwined.

B. Count II – Florida Deceptive and Unfair Trade Practices Act

The Court further finds that *Rooker-Feldman* bars Count II, Plaintiff's claim for violation of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.01, *et seq.* ("FDUTPA"). The Eleventh Circuit squarely addressed this issue in *Nivia v. Nation Star Mortgage, LLC*, holding that a FDUTPA challenge to deceptive trade practices of failing to modify a loan and denying fair opportunities to cure a default "effectively amounted to an equitable defense to the foreclosure[] and the adoption of that theory would have produced a different result in state court." *Captain*, 2018 WL 5298538, at *6 (citing *Nivia*, 620 F. App'x at 825). Had Plaintiff raised her allegations of fraudulent lending practices—of which she had constructive notice at the time of the state court judgment—she may not have lost her home. But "[b]y failing to raise [her] claim in state court[,] [she] forfeit[ed] [her] right to obtain review of the state court decision in any federal court." *Nivia*, 620 F. App'x at 825 (citing *Feldman*, 460 U.S. at 482 n.16). And now, any review of her argument

on the merits could end with a result that the state court entered a legally invalid judgment, which the Court cannot allow. *Id.*

* * *

Accordingly, the Court finds that Plaintiff's claims are barred by the *Rooker-Feldman* doctrine and must be dismissed for lack of subject matter jurisdiction. *See generally Flournoy v. Gov't Nat'l Mortg. Ass'n*, 156 F. Supp. 3d 1375, 1380 (S.D. Fla. 2016).

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the Motion and Memorandum in Support by Defendant Bank of America, N.A., to Dismiss Plaintiff's Third Amended Complaint [ECF No. 61] is **GRANTED**. Plaintiff's Third Amended Complaint [ECF No. 57] is **DISMISSED WITH PREJUDICE** for lack of subject matter jurisdiction.

All pending motions are **DENIED AS MOOT**.

The Clerk is directed to mark this case **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of May, 2019.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALBERTO ISOLA,

Plaintiff,

v. **Case No: 8:17-cv-2640-T-35AEP**

BANK OF AMERICA, N.A.,

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff's Response to Court's Order to Show Cause Entered on October 24, 2018. (Dkt. 29) Having reviewed Plaintiff's Response to the Court's Order to Show Cause, the allegations of the Amended Complaint, all relevant filings, case law, and being otherwise fully advised, the Court finds that this action is due to be dismissed without prejudice for lack of subject matter jurisdiction.[1]

I. BACKGROUND

On June 27, 2017, Plaintiff and 117 others sued Bank of America in the Middle District of Florida in a single action, Torres et al v. Bank of America, N.A., 8:17-cv-1534-RAL-TBM. The 292-page complaint in that action alleged fraud and the violation of

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1 Defendant Bank of America does not raise the issue of subject matter jurisdiction in its pending Motion to Dismiss. However, the Court is required to consider its subject matter jurisdiction at any point during the proceedings *sua sponte* when it becomes concerned that jurisdiction is lacking. Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 197 (11th Cir. 2008). Further, the Court need not address Bank of America's alternate grounds for dismissal raised in the pending motion to dismiss if the Court concludes that it lacks jurisdiction. See Boda v. United States, 698 F. 2d 1174, 1177 n.4 (11th Cir. 1983) (noting that "[w]here dismissal can be based on lack of subject matter jurisdiction and failure to state a claim, the court should dismiss on only the jurisdictional grounds. This dismissal is without prejudice."); accord Dimaio v. Democratic Nat'l Comm., 520 F. 3d 1299, 1303 (11th Cir. 2008) (citing and quoting Boda).

Florida's Deceptive and Unfair Trade Practices Act. Bank of America moved to dismiss, arguing misjoinder of the plaintiffs' claims, failure to plead fraud with particularity, failure to state a claim, expiration of the four-year limitation, and the absence of a private right to sue a bank for violating the requirements of the Home Affordable Modification Program ("HAMP"). Before resolving the motion to dismiss, the presiding judge observed that the complaint failed to invoke diversity jurisdiction and ordered the plaintiffs to amend. The plaintiffs then filed a 403-page amended complaint. Bank of America again moved to dismiss, repeating the arguments from its earlier motion. The presiding judge found misjoinder, severed the plaintiffs' claims, and ordered the plaintiffs to sue separately.

Then, between October 30, 2017 and November 3, 2017, more than 100 plaintiffs sued Bank of America in the Middle District of Florida in 80 nearly identical actions, all alleging one-count of fraud under Florida common law. The actions are distributed among eight district judges in the Middle District. The instant case is one of these actions.

II. DISCUSSION

In its Show Cause Order, the Court observed that four other judges in the Middle District of Florida have now dismissed their nearly identical cases involving alleged fraud perpetrated by Bank of America in facilitating illegal and fraudulent property foreclosures for lack of subject matter jurisdiction under the Rooker-Feldman[2] doctrine.[3]

2 The doctrine evolved from the two United States Supreme Court cases from which its name is derived, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

3 Gonzalez v. Bank of America, N.A., 5:17-cv-00519-SDM-PRL (Dkt. 44); Varela-Pietri et al v. Bank of America, N.A., 8:17-cv-02534-SDM-TGW (Dkt. 50); Salazar v. Bank of America, N.A., 8:17-cv-02535-SDM-AEP (Dkt. 50); Diaz v. Bank of America, N.A., 8:17-cv-02537-SDM-MAP (Dkt. 51); Rostgaard v. Bank of America, N.A., 8:17-cv-02538-SDM-CPT (Dkt. 57); Collazo v. Bank of America, N.A., 8:17-cv-02539-RAL-AAS (Dkt. 35); Gonzalez v. Bank of America, N.A., 8:17-cv-2546-RAL-CPT (Dkt. 32); Alonso et al v. Bank of America, N.A., 8:17-cv-02547-VMC-SPF (Dkt. 62); Colon v. Bank of America, N.A., 8:17-cv-2548-RAL-AAS (Dkt. 30); Colon et al v. Bank of America, N.A., 8:17-cv-02549-VMC-JSS (Dkt. 60); Guevara v. Bank

Under the Rooker-Feldman doctrine, federal courts, other than the Supreme Court, do not have jurisdiction to review final state court decisions. See Target Media Partners v. Specialty Mktg. Corp., 881 F.3d 1279, 1285–86 (11th Cir. 2018) (explaining the Rooker-Feldman doctrine and recognizing its limited scope "to bar only those claims asserted by the parties who have lost in state court and then ask the district court, ultimately, to review and reject a state court's judgments"). If a claim is one "inextricably intertwined" with a state court judgment and would "effectively nullify the state court judgment," then Rooker-Feldman bars the claim if there was reasonable opportunity to raise the particular claim in the state court proceeding. Id. Claims that have been found to be "inextricably intertwined" with state court judgments are "limited to those raising a question that was or should have been properly before the state court." Id. at 1286.

Plaintiff's Response to the Show Cause Order argues, in sum, that the Rooker-Feldman doctrine does not apply in this instance because his fraud claim is not an indirect attack on the foreclosure judgment, but rather, is a distinct claim that Bank of America's fraudulent actions resulted in a wrongful denial of a HAMP modification. This is the same

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of America, N.A., 8:17-cv-02550-SCB-JSS (Dkt. 36); Mosquea v. Bank of America, N.A., 8:17-cv-02551-SDM-TGW (Dkt. 46); Peralta v. Bank of America, N.A., 8:17-cv-2580-SDM-MAP (Dkt. 56); Gonzalez v. Bank of America, N.A., 8:17-cv-2581-RAL-AAS; (Dkt. 29); Restrepo v. Bank of America, N.A., 8:17-cv-2582-RAL-CPT (Dkt. 30); Rodriguez v. Bank of America, N.A., 8:17-cv-02583-SDM-TGW (Dkt. 51); Santos v. Bank of America, N.A., 8:17-cv-02585-VMC-AEP (Dkt. 63); Ruiz v. Bank of America, N.A., 8:17-cv-02586-SDM-TGW (Dkt. 41); Rosselini v. Bank of America, N.A., 8:17-cv-02584-SCB-CPT (Dkt. 29); Santos v. Bank of America, N.A., 8:17-cv-02587-SCB-SPF (Dkt. 29); Santos v. Bank of America, N.A., 8:17-cv-2588-SDM-MAP (Dkt. 47); Urtiaga et al v. Bank of America, N.A., 8:17-cv-02590-SCB-CPT (Dkt. 30); Acosta v. Bank of America, N.A., 8:17-cv-2592-SDM-AAS (Dkt. 55); Blanco v. Bank of America, N.A., 8:17-cv-02593-SDM-JSS (Dkt. 48); Cedeno v. Bank of America, N.A., 8:17-cv-2594-RAL-AAS (Dkt. 33); Penaranda v. Bank of America, N.A., 8:17-cv-2599-RAL-SPF (Dkt. 31); Garcia v. Bank of America, N.A., 8:17-cv-02602-SDM-AAS (Dkt. 46); Zalazar v. Bank of America, N.A., 8:17-cv-02603-SDM-CPT (Dkt. 48); Perez v. Bank of America, N.A., 8:17- cv-02623-SDM-JSS (Dkt. 50); Moncada et al v. Bank of America, N.A., 8:17-cv-02625-SDM-AEP (Dkt. 45); Espinel v. Bank of America, N.A., 8:17-cv-02628-SDM-JSS (Dkt. 44); Ocampo v. Bank of America, N.A., 8:17-cv-2631-SDM-JSS (Dkt. 42); Carmenates v. Bank of America, N.A., 8:17-cv-2635-SDM-JSS (Dkt. 50); Clavelo v. Bank of America, N.A., 8:17-cv-2644-RAL-TGW (Dkt. 29); Valencia et al v. Bank of America, N.A., 8:17-cv-02645-SCB-JSS (Dkt. 33). The Parties' primary counsel in all of these cases is the same as in the instant case.

argument that was thoroughly considered and rejected by the other four judges of the Middle District in the above-listed cases, whose reasoning the Court adopts here. Thus, Plaintiff's response fails to show satisfactory cause why this case should not be dismissed for lack of subject matter jurisdiction.

In the Amended Complaint, Plaintiff alleges that Bank of America tricked him into defaulting on his loan by telling him that it was a prerequisite for HAMP modification eligibility, instructed him to make "trial payments" to Bank of America that it never applied to his account or refunded, charged fraudulent inspection fees that added to the foreclosure judgment, induced him to incur unnecessary costs for sending multiple applications for a HAMP loan modification and related financial documents to Bank of America, damaged his credit, and caused the loss of his home and equity in that home. The issues of alleged fraud in this case are alleged to have preceded the foreclosure. As such, these issues could have been raised in the state court foreclosure action before final judgment was entered. See Nivia v. Nation Star Mortg., LLC, 620 F. App'x 822, 825 (11th Cir. 2015); Shahar v. Green Tree Servicing LLC, 125 So.3d 251, 252–54 (Fla. 4th DCA 2013) (finding unclean hands to be a sufficiently pled affirmative defense to foreclosure where a lender made material misrepresentations in connection with the mortgage).

Further, granting Plaintiff's damages, which principally stem from the loss of Plaintiff's home and the equity in that home—a loss occasioned by the foreclosure judgment itself, would effectively nullify the entry of that judgment. See Santos v. Bank of America, N.A., Defendant., No. 8:17-CV-2585-T-33AEP, 2018 WL 5024335 (M.D. Fla. Oct. 17, 2018) ("Because the state court found that the foreclosure leading to the loss of

Plaintiff's home was proper, granting damages for the loss of Plaintiff's home suggests entry of the foreclosure judgment was wrongful."). It would not change the result that Plaintiff alleges he was unaware of the facts he now knows until he retained his attorney in this case.[4]

Therefore, for the reasons set forth, and authority cited, by the four other judges of the Middle District in the over thirty aforementioned virtually identical cases, the Court finds the fraud alleged here is inextricably intertwined with the state foreclosure judgment, and Plaintiff's claims are barred by the Rooker-Feldman doctrine.[5]

III. CONCLUSION

Upon consideration of the foregoing, the Court hereby **ORDERS** as follows:

1. Plaintiff's Amended Complaint, (Dkt. 16), is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction under the Rooker-Feldman doctrine.
2. The Clerk is directed to **TERMINATE** all pending motions and **CLOSE** this case.

DONE and **ORDERED** in Tampa, Florida, this 30th day of October, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

4 The Court notes that the conduct that Plaintiff claims was hidden from him could have been discovered by Plaintiff during the state foreclosure action. As Plaintiff recognizes in his Amended Complaint, (Dkt. 16 at 9–10), the issues concerning Bank of America's mismanagement of the HAMP modification process were being litigated by other plaintiffs nationally, such that in 2010, the judicial panel on multidistrict litigation transferred several cases to the United States District Court for the District of Massachusetts for consolidated pretrial proceedings. See In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, M.D.L. No. 1:10-md-02193-RWZ.

5 See, e.g., Ocampo v. Bank of America, N.A., No. 8:17-CV-2631-T-23JSS, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018) (citing Figueroa v. Merscorp, Inc., 766 F. Supp. 2d 1305 (S.D. Fla. 2011), aff'd, 477 F. App'x 558 (11th Cir. 2012) (unpublished) and Nivia v. Nation Star Mortg., LLC, 620 F. App'x 822 (11th Cir. 2015) (unpublished)); Carmenates v. Bank of America, N.A., No. 8:17-CV-2635-T-23JSS, 2018 WL 3548727 (M.D. Fla. July 24, 2018) (same).

Copies furnished to:
Counsel of Record
Any pro se party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

YURISAN NAVARRO,

Plaintiff,

v. **Case No: 8:17-cv-2643-T-27SPF**

BANK OF AMERICA, N.A,

Defendant.
_____/

ORDER

BEFORE THE COURT is Plaintiff's Response to Court's Order to Show Cause (Dkt. 22) and Defendant's Reply (Dkt. 23). On October 2, 2018, Plaintiff was ordered to show cause why this case should not be dismissed for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.[1] Upon consideration, the Complaint is due to be dismissed for lack of subject matter jurisdiction.

Background

Plaintiff and more than seventy others brought nearly identical actions against Bank of America, alleging fraud. Plaintiff alleges that in 2009 he began experiencing financial hardship and contacted Bank of America to request a HAMP [Home Affordable Modification Program] loan modification. (Dkt. 1, Complaint, ¶ 36). On or around January 6, 2010, a Bank of America representative advised him to refrain from making regular mortgage payments in order to get a HAMP loan modification. (Id. at ¶ 37). Based on this conversation, Plaintiff refrained from making

[1] Federal courts are courts of limited jurisdiction. *Russell Corp. v. American Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001). Accordingly, a federal court is "obligated to inquire into subject-matter jurisdiction *sua sponte* whenever it may be lacking." *Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004) (citation omitted).

his regular mortgage payments and defaulted. (Id. at ¶ 39).

During this time frame, Plaintiff submitted a HAMP loan modification application with supporting financial documents. (Id. at ¶¶ 40, 44). He alleges that on or about January 27, 2010, a representative of Defendant verbally informed him that he was finally approved for a trial loan modification. (Id. at ¶ 46). He made three "trial payments." (Id. at ¶ 49). On or about April 16, 2010, and on at least three other occasions, he was told the documents he had submitted to qualify for a HAMP modification were "incomplete." (Id. at ¶¶ 41, 44). On June 19, 2012, his home was foreclosed and a judgment entered against him. (Id. at ¶ 49). Essentially, Plaintiff alleges that Bank of America "misled" him into defaulting on his mortgage at each stage of the HAMP loan modification process, which resulted in the foreclosure of his property. (Id. at ¶¶ 38-39).

Discussion

Under the *Rooker-Feldman* doctrine,[2] federal district courts may not review state court judgments. *See Green v. Jefferson County Com'n*, 563 F.3d 1243, 1249 (11th Cir. 2009). "The *Rooker-Feldman* doctrine is 'confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1331 (11th Cir. 2010) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005)) (emphasis in original). The doctrine bars federal review where the issue before the federal court is "'inextricably intertwined' with the state court judgment so that (1) the success of the federal claim would 'effectively nullify' the state court judgment, or that (2) the federal claim would succeed 'only

[2] This doctrine derives from *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

to the extent that the state court wrongly decided the issues.'" *Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1262-63 (11th Cir. 2012) (quoting *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (per curiam)); *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1286 (11th Cir. 2018) ("The class of federal claims that we have found to be 'inextricably intertwined' with state court judgments is limited to those raising a question that was or should have been properly before the state court.").

Plaintiff contends that *Rooker-Feldman* does not apply because he "does not argue that the foreclosure judgment was improperly granted nor that the foreclosure judgment is void." (Dkt. 22, p. 3). He maintains that "[n]othing in Plaintiff's claims indicates a desire to undo or nullify the foreclosure judgment" and contends that his Complaint alleges that Defendant's fraudulent conduct resulted in a wrongful denial of his HAMP loan modification. (Id.). To support his position that *Rooker-Feldman* does not apply to claims under HAMP, Plaintiff relies on *Nivia v. Nation Star Mortg., LLC*, 620 F. App'x 822 (11th Cir. 2015). However, his reliance on *Nivia* is misplaced.

The plaintiff in *Nivia* sought a HAMP loan modification nine months *after* a foreclosure judgment was entered. *Id.* at 823. After the loan modification was denied, the plaintiff sued the bank in federal court for violations of HAMP and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). *Id.* The court held that *Rooker-Feldman* did not bar review of the HAMP modification claim because it "could not have been at issue in the foreclosure proceeding" that occurred nine-months *before*. *Id.* at 825. Pertinent here, however, the court found that *Rooker-Feldman* barred the FDUTPA claim: "We construe the homeowners' allegation to extend beyond the lenders' denial of the September 2012 loan modification request and to include conduct *before* the foreclosure judgment. In effect, the homeowners' claim amounts to an equitable defense to foreclosure that [the homeowners] failed to raise before the state court." *Id.* The court in *Nivia*, as in *Target Media*,

focused on the temporal sequence of events when analyzing whether *Rooker-Feldman* applied. It did not, as Plaintiff urges, find that the *Rooker-Feldman* doctrine is inapplicable to all HAMP claims. (Dkt. 22, p. 2).

Plaintiff also contends that his claim is not inextricably intertwined with the prior state court judgment because it "do[es] not require a determination that the state court erroneously entered the foreclosure judgment." (Id. at p. 3). However, similar to the FDUPTA claim in *Nivia*, Plaintiff's claim of fraud can only succeed if "the state court wrongly decided the issue", *i.e.* the foreclosure. *See Nivia*, 620 F. App'x at 824.

Following *Target Media*, 881 F.3d at 1289, the inquiry therefore focuses on whether Plaintiff's fraud claim is "inextricably intertwined" with the state court foreclosure judgment. Without question, it is. Plaintiff alleges that Defendant "misled" him into defaulting on his mortgage (Dkt. 1, ¶ 38), instructed him to "make trial payments," which Defendant retained as profit (Id. at ¶¶ 39, 47), induced him to spend time and incur unnecessary costs associated with loan modification applications that it knew would not be reviewed (Id. at ¶¶ 40-44, 69), caused "damage to his credit" (Id. at ¶¶ 50, 69), and as a result, he suffered "*the loss of his home*" and his equity. (Id. at ¶¶ 50, 58, 69) (emphasis added). In other words, the Complaint alleges that Defendant misrepresented the eligibility requirements for a HAMP modification "to set Plaintiff up for foreclosure." (Id. at ¶ 38). These allegations essentially attack the state court foreclosure judgment and could have been raised in that case. *See Varela-Pietri v. Bank of America, N.A.*, No. 17-cv-2534, 2018 WL 4208002, at *3 (M.D. Fla. Sept. 4, 2018) ("the fraud claim in this action appears a circuitous but unmistakable attempt to impugn the validity of the foreclosure judgment").

Conclusion

Federal review of Plaintiff's fraud claim is barred under the *Rooker-Feldman* doctrine as it

is inextricably intertwined with the state court foreclosure judgment.[3] Accordingly, this case is **DISMISSED** for lack of subject matter jurisdiction. Any pending motions are denied as moot. The CLERK is directed to **CLOSE** the file.

DONE AND ORDERED this 26th day of October, 2018.

/s/ James D. Whittemore

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record

[3] At least three other district courts have found nearly identical claims were barred by *Rooker-Feldman*. See *Spitaleri v. Bank of America, N.A.*, No. 17-cv-518, 2018 WL 5024336 (M.D. Fla. Oct. 17, 2018); *Restrepo v. Bank of America, N.A.*, No. 8:17-cv-2582 (Dkt. 30) (M.D. Fla. Sept. 13, 2018); *Ocampo v. Bank of America, N.A.*, No. 17-cv-2631, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018) (holding that the claims were barred by *Rooker-Feldman*, and if not, still barred by *res judicata*).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDDIE and AWILDA TORRES, *et al.*,

Plaintiffs,

v. CASE NO. 8:17-cv-1534-T-26TBM

BANK OF AMERICA, N.A.,

Defendants.

_____/

O R D E R

THIS CAUSE comes before the Court on Defendant Bank of America, N.A.'s Motion to Dismiss the Amended Complaint, or in the Alternative, to Sever Misjoined Claims (Dkt. 17) and Plaintiffs' Response in Opposition (Dkt. 18). Having carefully considered the parties's submissions, together with the well-pleaded allegations of Plaintiffs' complaint, the Court finds that Defendant's motion is due to be granted to the extent that all claims, other than those alleged by the first-named Plaintiffs, Eddie and Awilda Torres ("the Torreses"), will be severed and dismissed without prejudice to being refiled in separate individual actions and that the Torres' claim will be dismissed without prejudice to being refiled in an amended complaint.

Under Rule 20(a)(1) of the Federal Rules of Civil Procedure, claims are properly joined only if they "aris[e] out of the same transaction, occurrence, or series of

transactions or occurrences" and share a common "question of law or fact." As one court has observed, "Rule 20 refers to the *same* transaction or occurrence not to *similar* transactions or occurrences." Hartley v. Clark, 2010 WL 1187880, at *3 (N.D. Fla. Feb. 12, 2010) (emphasis added), Report and Recommendation adopted at 2010 WL 1187879 (N.D. Fla. March 23, 2010). When claims are not permissibly joined, a court may drop misjoined parties or sever any claim against a party pursuant to Rule 21 of the Federal Rules of Civil Procedure. Additionally, a court enjoys considerable discretion to do so in the interests of judicial economy even if the technical requirements of Rule 20 are met. See, e.g., Barber v. America's Wholesale Lender, 289 F.R.D. 364, 368 (M.D. Fla. 2013).

The 116 Plaintiffs here (75 if counting co-borrowers as a single Plaintiff) allege that they defaulted on their mortgage loans and sought help from Defendant Bank of America N.A. in the form of loan modifications under the federal Home Affordable Modification Program ("HAMP"). HAMP operated by giving borrowers a trial period to prove they can make sustainable loan payments while the servicer evaluates whether they qualify for permanent relief. Plaintiffs claim that this was an elaborate fraud, the design of which entailed first tricking Plaintiffs into *not* making loan payments, and then tricking them into making loan payments by pretending they were approved for trial modifications. (Dkt. 16, Amended Complaint ("Amd. Cmp."), ¶¶ 37, 44). Plaintiffs failed to qualify for permanent modifications, failed to cure their defaults, and went through foreclosure, and now claim to be the victims of fraud as a result. The facts of

each Plaintiff's dealings with Defendant are alleged in general, boilerplate terms, virtually identical from one Plaintiff to the next so as to justify joining 116 Plaintiffs in any number of different factual circumstances into one omnibus lawsuit. The Court must agree with Defendant that this is not a permissible joinder under Rule 20.

Plaintiffs claims in this case (except for the Torres' claim) are due to be severed based on the reasoning applied by the court in Green v. Citimortgage, Inc., 2013 WL 6712482, at *5 (E.D.N.Y. Dec. 18, 2013), in which the court severed claims of fraudulent misrepresentation stemming from HAMP applications because the case involved at least twenty-six distinct loans attached to twenty-six separate properties and separate applications for HAMP modifications over a five and a half year period. Green involved claims pursuing exactly the same theories pursued by Plaintiffs here (see Dkt. 16, Amd. Cmp., ¶ 37), that the defendants had "a fraudulent loan modification program, purporting to offer the possibility of a loan modification agreement to the Plaintiffs and other homeowners, while driving [them] into default to enable Defendants to pursue foreclosure against those same homeowners[.]" 2013 WL 6712482, at *3. The court found that these transactions did not "arise out of the same 'transaction' or 'occurrence'" because, among other reasons, each plaintiff "separately applied for loan modifications" and the terms of the trial modifications differed from plaintiff to plaintiff. Green, 2013 WL 6712482, at *5. The court concluded, by adopting the rationale of Kalie v. Bank of America Corp., 2013 WL 4044951, at *6 (S.D. New York 2013) in support of its

determination, that allowing joinder of Plaintiffs' claims did not promote the interest of judicial economy:

> Inasmuch as each plaintiff's claims appear to arise out of a mortgage-related transaction that is distinct from the transactions on which the other plaintiffs' claims are based, and as each plaintiffs claims implicate distinct loans, locations, dates and personnel, there is no meaningful economy of scale gained by trying the [ ] cases together. There will be little, if any, overlapping discovery and each plaintiff's claims will require distinct witnesses and documentary proof. The interest in economy is affirmatively disserved by forcing these many parties to attend a common trial at which these separate, unrelated claims would be resolved. Furthermore, settlement of the claims is likely to be facilitated if the claims relating to discrete loan transactions are litigated separately.

Green, 2013 WL 6712482, at *6 (internal brackets, quotation marks, and citations omitted). This Court must likewise find that Plaintiffs' claims did not arise of the same transaction or occurrence. Rather, the claims arise from different borrowers' loans or loan-modification attempts and necessarily involve different sets of operative facts, even if the claims are pled similarly and present similar legal issues.

As Defendant asserts, under these circumstances, even if Plaintiffs had satisfied the joinder requirements of Rule 20, severance would still be proper. Under Rule 21 of the Federal Rules of Civil Procedure, courts look to four factors to determine if claims should be severed: "(1) the interest of avoiding prejudice and delay; (2) ensuring judicial economy; (3) safeguarding principles of fundamental fairness; and (4) whether different witnesses and documentary proof would be required for plaintiffs' claims." Hofmann v. EMI Resorts, Inc., 2010 WL 9034908, at *1 (S.D. Fla. July 21, 2010) (internal quotation

marks and citation omitted). Some of the Plaintiffs have already implicitly indicated in an earlier related case, now dismissed, that there will be no gains in judicial economy from their joinder. The case management report they filed in that case proposed an "Estimated Length of Trial" of "3 Days Per Plaintiff." This would amount to a total of 225 trial days in the current case with 75 Plaintiffs. See Alonso et al. v. Bank of America, N.A., No. 8:17-cv-238-VMC-MAP, Dkt. 20, pg. 2 (M.D. Fla. 2017).

The fact that Plaintiffs' complaint has grown to 332 pages and 1,521 paragraphs only bolsters the Court's conclusion that mass joinder is inappropriate in this case. A complaint of such length is incapable of satisfying the "short and plain statement" requirement of Rule 8(a) of the Federal Rules of Civil Procedure; however, severed individual claims could easily be pled in compliance with this requirement. Therefore, the Court will grant the Alternative Motion to Sever Misjoined Claims with regard to all of the Plaintiffs, except the first-named Plaintiffs, Eddie and Awilda Torres, who shall remain as Plaintiffs in this case.

With regard to the allegations advanced by the Torreses, the Court is not convinced that they have pled their fraud claim with the "particularity" required by Rule 9(b) of the Federal Rules of Civil Procedure. Generally, but with specific focus on paragraphs 39, 40, 41, 42, 44, 50, and 51 of the allegations of the Amended Complaint, the Court concludes that the Torreses have not specified: "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and

(2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making same, and (3) the content of such statements and the manner in which they misled the plaintiff[.]" Brooks v. Blue Cross and Blue Shield of Fla., 116 F. 3d 1364, 1371 (11th Cir. 1997) (citations omitted); accord Azar v. American Home Mtge. Serv., Inc., 2110 WL 5648880, at *4 (M.D. Fla. July 16, 2010) (citing Brooks). They will, however, be afforded an opportunity to replead their claim of fraud against Defendant.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** as follows:

1) Defendant's Motion to Sever Misjoined Claims (Dkt. 17) is **GRANTED.** All claims, other than the claim of the Torreses, are severed pursuant to Rule 21 and dismissed without prejudice to commencing separate individual actions. The statute of limitations for any claim asserted in this case is deemed tolled during the pendency of this action and for a period of thirty (30) days from the date of this order.

2) Defendant's Alternative Motion to Dismiss the Amended Complaint (Dkt. 17) is **GRANTED** as to the Torres' claim but without prejudice to filing an amended complaint within fourteen (14) days of this order. Defendant shall file a response to the amended complaint within fourteen (14) days of service of the amended complaint.

DONE AND ORDERED at Tampa, Florida, on October 6, 2017.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FRANKLIN TORRES and LUISA TORRES,

Plaintiffs,

v. Case No: 8:17-cv-2633-T-36CPT

BANK OF AMERICA, N.A.,

Defendant.
_____/

ORDER

This cause comes before the Court upon the parties' responses to the Court's inquiry as to subject matter jurisdiction. Docs. 38-42. After a review of its jurisdiction, the Court *sua sponte* directed Plaintiffs to show cause why this case should not be dismissed pursuant to the *Rooker-Feldman* doctrine for lack of subject matter jurisdiction and permitted Defendant the opportunity to reply. Docs. 38, 41. The Court, having considered the matter and being fully advised in the premises, will dismiss this case for lack of subject matter jurisdiction.

I. BACKGROUND

Plaintiffs are the borrowers on a mortgage loan that was foreclosed in state court after they defaulted by failing to make payments on the loan. Doc. 23 ¶¶ 37, 42, 54. Plaintiffs allege that they first began experiencing financial hardship and contacted Defendant, Bank of America, which was the servicer of the loan, in 2010 to request a modification under the Home Affordable Modification Program ("HAMP"). *Id.* ¶¶ 39-40. They submitted a HAMP application in 2010. *Id.* ¶ 43. On July 7, 2010, Bank of America incorrectly advised them that they should refrain from making their regular mortgage payments because default was required for HAMP eligibility. *Id.* ¶ 40. However, a person could be eligible for HAMP if default was reasonably foreseeable and

Plaintiffs allege that Bank of America intentionally provided false information to set Plaintiffs up for foreclosure. *Id.* ¶¶ 40-41. Plaintiffs relied on Bank of America's representation and stopped making their regular mortgage payments. *Id.* ¶ 42.

Bank of America later advised Plaintiffs on October 20, 2010 that they were approved for a HAMP modification and they should make temporary trial payments. *Id.* ¶ 50. Plaintiffs, however, had not been approved and Bank of America did not apply the trial payments to Plaintiffs' mortgage, but kept the funds in an unapplied account while deciding on Plaintiffs' HAMP application. *Id.* ¶¶ 50-52.

On December 3, 2013, Plaintiffs' mortgage was foreclosed and a judgment was entered against them in state court. *Id.* ¶ 54. Plaintiffs filed this action on November 3, 2017, alleging a single count for common law fraud against Bank of America in connection with its representations to them during the HAMP application process. *Id.* ¶¶ 76-92.

II. LEGAL STANDARD

Under the *Rooker-Feldman* doctrine, federal courts do not have jurisdiction to "exercise appellate authority 'to reverse or modify' a state court judgment," meaning that "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced" may not obtain rejection of the state-court judgment through review by the district court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284-85 (2005) (citing *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413, 416 (1923); *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983)). The *Rooker-Feldman* doctrine applies where a claim is "inextricably intertwined" with a state court judgment such that a decision by the district court would "effectively nullify the state court judgment," or the claim could "succeed[] only to the extent that the state court wrongly decided the issues." *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1286 (11th

Cir. 2018) (citation omitted). In determining whether the *Rooker-Feldman* doctrine applies, courts look to "the federal claim's relationship to the issues involved in the state court proceeding, instead of . . . the type of relief sought by the plaintiff." *Velardo v. Fremont Inv. & Loan*, 298 F. App'x 890, 892 (11th Cir. 2008). "The doctrine is rooted in an understanding that Congress has given only the United States Supreme Court the ability to hear an appeal from a state court decision," whereas district courts "have been given original, not appellate, jurisdiction." *Id.* at 1284 (citing 28 U.S.C. §§ 1257(a), 1331, 1332).

III. DISCUSSION

The case at hand is one of several filed in the United States District Court for the Middle District of Florida against Bank of America that involves the same alleged fraud. Several of these cases have been dismissed for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine because the plaintiffs' cases in federal court were inextricably intertwined with a state court foreclosure action. *Machado v. Bank of Am.*, No. 8:17-cv-2531-T-33AAS, 2018 WL 5024177 (M.D. Fla. Oct. 17, 2018); *Ocampo v. Bank of Am.*, No. 8:17-cv-2631-T-23JSS, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018); *Colon v. Bank of Am.*, No. 8:17-cv-2548-T-26AAS (Sept. 13, 2018), ECF No. 30.

In a recent case, like the one at hand, the plaintiff filed a complaint in this Court alleging one count of common law fraud against Bank of America based on allegations that it schemed to, and did, make misrepresentations concerning the HAMP program to send the plaintiff into default and obtain a foreclosure judgment. *Machado*, 2018 WL 5024177, at *4. The complaint alleged that the plaintiffs lost their home and the equity in their home after the state court foreclosure judgment was entered, and these losses were the alleged damages in the federal action. *Id.* However, "[b]ecause the state court found that the foreclosure leading to the loss of Plaintiffs'

home was proper," this Court reasoned that "granting damages for the loss of Plaintiffs' home suggests entry of the foreclosure judgment was wrongful." *Id.* Thus, the Court found that the federal action was an attempt to impugn the validity of the foreclosure judgment and dismissed the action for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine. *Id.*

Likewise, in *Varela-Pietri v. Bank of America, N.A.*, No. 8:17-cv-2534-T-23TGW, 2018 WL 4208002, at *3 (M.D. Fla. Sept. 4, 2018), another fraud case against Bank of America alleging a scheme to obtain foreclosure through misrepresentations regarding the HAMP program, the Court noted that, the plaintiffs "complain[ed] exclusively about misrepresentation that preceded—and ultimately caused—the foreclosure." As in *Machado* and the instant case, the plaintiffs alleged that the misrepresentations resulted in the loss of their home and the equity in their home, and that such loss was "occasioned by the state court action, which foreclosed [the plaintiffs'] right of redemption and resulted in a deficiency judgment . . . ." *Id.* Accordingly, the Court found that the federal action was an "unmistakable attempt to impugn the validity of the foreclosure judgment." *Id.*

Similar to those cases, Plaintiffs' claim in this case is based on purported misrepresentations by Bank of America that led to default on their loan and entry of a state court foreclosure judgment against them. Accordingly, the Court directed Plaintiffs to show cause why this case should not be dismissed for lack of subject matter jurisdiction. Doc. 38. Plaintiffs argue that this case does not seek to undo the foreclosure judgment or render it void, but instead alleges that Bank of America's fraudulent actions resulted in the wrongful denial of their HAMP application. Doc. 39 at 3.

Plaintiffs rely on *Nivia v. Nation Star Mortgage, LLC*, 620 F. App'x 822, 824 (11th Cir. 2015), to argue that claims under HAMP are not barred by the *Rooker-Feldman* doctrine. Doc. 39

at 2. In *Nivia*, the borrowers defaulted on their loan and a foreclosure judgment was entered by the state court. 620 F. App'x at 823. Shortly before the sale of the property, the borrowers filed an action against the lenders arguing that the lenders should have granted a loan modification request made by the borrower after the state court entered the final judgment of foreclosure, and that the failure to do so violated the lenders' duties under the Troubled Asset Relief Program ("TARP") and HAMP. *Id.* The borrowers also alleged that the lenders violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). *Id.* The lenders removed the action to federal court and moved to dismiss based on the *Rooker-Feldman* doctrine. *Id.*

The Eleventh Circuit held that the borrowers' claims under TARP and HAMP were not barred by the *Rooker-Feldman* doctrine because the borrowers did not "seek to undo the effect of the foreclosure judgment" and did not "make arguments that would have undermined its validity." *Id.* In reaching this conclusion, the Eleventh Circuit explained that the borrowers sought damages that would not nullify the foreclosure judgment because the damages would not "challenge the transfer of the real property effectuated by the foreclosure." *Id.* Additionally, the Court stated that "the success of putative claims under TARP or HAMP would not require a determination that the state court erroneously entered the foreclosure judgment." *Id.* Notably, the borrowers alleged "that the lenders failed to respond adequately to their September 2012 request for a loan modification, which could not have been at issue in the foreclosure proceeding that concluded in December 2011." *Id.* at 825. Additionally, the Court concluded that there was "no authority for the proposition that a lender's failure to fulfill any duties under TARP or HAMP invalidates a foreclosure resulting from that failure as a matter of law." *Id.* Accordingly, the Court held that "the putative claims under TARP and HAMP [were] not barred under the *Rooker-Feldman*

doctrine." *Id.* Nonetheless, the Eleventh Circuit affirmed dismissal of these claims because no private right of action existed under TARP or HAMP. *Id.* at 825.

The *Nivia* Court reached a different conclusion under *Rooker-Feldman* with respect to the borrowers' FDUTPA claim. In that claim, the borrowers alleged that the lenders' representations that modifications were generally available were deceptive because the lenders failed to help the borrowers modify their loan, which denied the borrowers the possibility to cure their default. *Id.* The Eleventh Circuit read these allegations as extending to conduct before the foreclosure judgment was entered, so that the claim was essentially "an equitable defense to foreclosure that [the borrowers] failed to raise before the state court." *Id.* Accordingly, success on the merits of the FDUTPA claim would require the federal court to determine that the state court judgment was wrongly entered and legally invalid and, therefore, no subject matter jurisdiction existed over the claim based on the *Rooker-Feldman* doctrine. *Id.*

The facts here are more comparable to the FDUTPA claim in *Nivia* than the TARP and HAMP claims. Whereas the modification communications in *Nivia* occurred after the state court entered judgment, rendering it impossible for such communications to have been at issue in the foreclosure proceedings, the communications in this case occurred before the state court entered judgment. As the Court in *Nivia* explained, where the allegations implicate pre-foreclosure actions that could constitute a defense in that action, the *Rooker-Feldman* doctrine applies and deprives the federal court of subject matter jurisdiction.

Likewise, *Ye Ho v. Wells Fargo Bank, N.A.*, 738 F. App'x 525 (11th Cir. 2018), relied on by Bank of America, also indicates that dismissal based on *Rooker-Feldman* is appropriate in this case. In *Ye Ho*, after a foreclosure case was filed in state court, the borrower received an unsolicited loan modification offer from the servicer of her loan. *Id.* at 526. "The offer required

her to continue residing in the home, make three trial payments, continue to make timely payments thereafter, and sign relevant final modification documents." *Id.* The borrower made the payments and completed and returned the modification agreement. *Id.* The servicer never communicated its receipt of the modification documents to the borrower. *Id.* at 527. After the modification documents were completed by the borrower, the foreclosure action proceeded to a final judgment of foreclosure, and the property was sold at a foreclosure sale. *Id.* Subsequently, the borrower received a response from the servicer explaining that the loan modification agreement was rejected as incomplete because it was not signed by the borrower's husband. *Id.* Throughout this process, the borrower sought relief from the foreclosure judgment and sale based on fraud. *Id.*

After the borrower's state court actions were concluded, the borrower filed an action in federal court alleging numerous causes of actions, including wrongful foreclosure. *Id.* The wrongful foreclosure claim was based on arguments that the servicer lacked standing to enforce the mortgage and fraudulently secured the foreclosure. *Id.* The Eleventh Circuit held that this claim was barred by the *Rooker-Feldman* doctrine because the borrower raised the standing and fraud issues in the state court proceedings. *Id.* at 531. Thus, if the federal action was successful, it would " 'effectively nullify the state court judgment' and necessarily hold 'that the state court wrongly decided the issues.' " *Id.* (quoting *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009)).

Here, Plaintiffs complain about pre-foreclosure conduct that relates to whether foreclosure was proper. Indeed, Plaintiffs' allegations tell the story of a scheme devised by Bank of America to allow it to foreclose and financially benefit in the process. Accordingly, Plaintiffs' claim is inextricably intertwined with the foreclosure action and success by the Plaintiffs in this case would

necessitate a finding by this Court that the foreclosure judgment was not valid. As a result, this Court is without subject matter jurisdiction.

Accordingly, it is **ORDERED AND ADJUDGED**:

1. This action is **DISMISSED** without prejudice for lack of subject matter jurisdiction.

2. The Clerk is directed to terminate any pending motions and close this case.

DONE AND ORDERED in Tampa, Florida on December 13, 2018.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copies to:
Counsel of Record and Unrepresented Parties, if any

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PABLO A. ZENTENO and MARIA J. ZENTENO,

Plaintiffs,

v. Case No. 8:17-cv-2591-WFJ-TGW

BANK OF AMERICA, N.A.,

Defendant.

MANUEL BLANCO and LIXIS QUINTOSA,

Plaintiffs,

v. Case No. 8:17-cv-2626-WFJ-SPF

BANK OF AMERICA, N.A.,

Defendant.

PEDRO PABLO COLLAZO CRUZ and ODALYS RODRIGUEZ,

Plaintiffs,

v. Case No. 8:17-cv-2627-WFJ-SPF

BANK OF AMERICA, N.A.,

Defendant.

_____/

ORDER

Plaintiffs allege Bank of America ("BOA") committed fraud when servicing Plaintiffs' applications for the Home Affordable Modification Program ("HAMP") in the wake of the 2008 financial crisis. Before the Court today are the following cross-motions for summary judgment in three individual cases: *Rodriguez*, Dkts. 225 and 228; *Zenteno*, Dkts. 248 and 251; and *Blanco*, Dkts. 229 and 232. All parties filed several responses and replies: *Rodriguez*, Dkts. 229, 230, 231; *Zenteno*, Dkts. 252, 253, 254; and *Blanco*, Dkts. 233, 234, 235, 239, 240. With the benefit of oral argument and full briefing, the Court grants summary judgment in favor of Defendant BOA on all claims and denies Plaintiffs' motions for summary judgment in their entirety.

BACKGROUND

I. Factual Background

This opinion involves three sets of Plaintiffs from three cases: (1) Pablo and Maria Zenteno; (2) Pedro Pablo Collazo Cruz[1] and Odalys Rodriguez; and (3) Manuel Blanco and Lixis Quintosa. All Plaintiffs had mortgages on their homes that were serviced by BOA. Like many Americans, Plaintiffs experienced economic difficulties in the wake of the 2008 financial crisis. This ultimately led

[1] Mr. Cruz passed away in May 2018. *See Rodriguez*, Dkt. 158 at 2. The Court previously granted summary judgment in favor of Defendant BOA and against Mr. Cruz because of his death. *Id.* at 7–8. Because Ms. Rodriguez is the only remaining plaintiff in the case, the Court will refer to it as the *Rodriguez* case, despite the parties referring to it as the *Cruz* case.

Plaintiffs to seek financial relief through HAMP—a program implemented by the United States government in March 2009 to help homeowners facing foreclosure.

A. Plaintiff Zenteno

Plaintiff Zenteno and his wife, Maria Zenteno, executed a mortgage with Defendant BOA in November 2005 for their home in Tampa, Florida. *Zenteno*, Dkt. 250-3. As a result of the 2008 financial crisis, the Zentenos began falling behind on their mortgage payments in December 2008. *Zenteno*, Dkt. 250-12. Plaintiff Zenteno and his wife submitted a letter to BOA stating: "[t]he reason I had fell behind with the monthly payment is because, last year in Nov. 2007 my job slow down drastically and wasn't enough income come in." *Zenteno*, Dkt. 250-31. Plaintiffs contacted Defendant BOA by phone sometime in 2009 requesting a loan modification through HAMP. *Zenteno*, Dkt. 100 at 10.

According to Plaintiff Zenteno, in November 2009, a BOA representative told him by phone that he should refrain from making his regular mortgage payments. *Id.* at 10. The representative allegedly stated that being "past due" on the mortgage was a prerequisite for HAMP loan modification eligibility. *Id.* at 10–11.

Defendant BOA provided Plaintiff Zenteno an application for a HAMP loan modification in April 2010. *Id.* at 11; *Zenteno*, Dkt. 251, Ex. A. Plaintiff completed the application and signed it on May 12, 2010. *Zenteno*, Dkt. 251, Ex. B. In a letter

dated May 26, 2010, Defendant BOA requested Plaintiff Zenteno send required documents missing from his application. *Zenteno*, Dkt. 251, Ex. C.

In November 2010, a BOA representative allegedly told Plaintiff Zenteno over the phone that his application materials were "not current." *Zenteno*, Dkt. 100 at 11. BOA representatives repeated these concerns about the status of Plaintiff Zenteno's application materials on subsequent phone calls. *Id.* at 11–12. Plaintiff Zenteno says he resubmitted his application and supporting materials more than four times. *Id.* at 12. "Plaintiffs did not receive any written verification that their HAMP modification application was ultimately received." *Id.* at 13.

In December 2010, BOA representatives allegedly told Plaintiff over the phone that he was approved for a loan modification under HAMP. *Id.* During this phone call, the BOA employees verbally told Plaintiff he should begin making "trial payments" of $1,438.81 pursuant to HAMP. *Id.* Plaintiff made three such trial payments. *Id.* at 13–14.

Plaintiff Zenteno alleges BOA charged fees for property inspections seventeen times from 2008 to 2012, despite Plaintiff living in the home then. *Id.* at 13.

On April 12, 2012, Plaintiff's home was foreclosed upon in a state-court proceeding. *Id.*; *Zenteno*, Dkt. 158-27. The state court entered a judgment against Plaintiff Zenteno for a total of $222,887.65, with $265 representing fees he

allegedly owed BOA for the property inspections. *Zenteno*, Dkt. 158-27 at 2. Plaintiff Zenteno moved out of the home in 2016. *Zenteno*, Dkt. 100 at 14.

B. Plaintiff Rodriguez

Plaintiff Rodriguez's story is similar to Plaintiff Zenteno's. In August 2007, Plaintiff Rodriguez and Plaintiff Cruz executed a mortgage for their home in Tampa, Florida. *Rodriguez*, Dkt. 103 at 10. BOA soon began servicing the loan. *Id.* After experiencing financial hardship, Plaintiff Rodriguez contacted Defendant BOA by phone in 2009 to request a loan modification through HAMP. *Id.* Defendant BOA provided a HAMP application to Plaintiff Rodriguez in August 2011.[2] *Id.* at 11. Plaintiff Rodriguez says she properly completed the application and returned it to BOA. *Id.*

Plaintiff Rodriguez alleges many of the same interactions with BOA representatives as Plaintiff Zenteno. In August 2011, a BOA representative allegedly told Plaintiff Rodriguez by phone that she should refrain from making her regular mortgage payments so as to qualify for HAMP. *Id.* at 10. In September 2011, BOA representatives allegedly told Plaintiff Rodriguez by phone that her application for a HAMP loan modification was incomplete and that she needed to

[2] Although Plaintiff alleges in the Amended Complaint that she received the HAMP application from BOA in August 2011, Plaintiff later provided the Court with a letter from Defendant BOA that provided Plaintiff Rodriguez a HAMP application and was dated May 20, 2009. *Rodriguez*, Dkt. 228, Ex. A.

submit new application materials. *Id.* at 11. Then a BOA representative told Plaintiff on the phone that she was "approved" for a HAMP loan modification and should start making "trial payments" of $970.[3] *Id.* at 12. And BOA allegedly conducted twenty-three property inspections on the home from 2009 to 2012, all while Plaintiff lived there. *Id.* at 14.

Despite making six trial payments of $970 from 2010 to 2011, Plaintiff was unable to keep her home. *Id.* at 13. On May 15, 2012, a state court entered a foreclosure judgment against Plaintiff Rodriguez and her husband for a total of $290,899.04, with $361 representing fees they allegedly owed BOA for the property inspections. *Rodriguez*, Dkt. 141-17 at 3. Plaintiff Rodriguez moved out of the home in 2012. *Rodriguez*, Dkt. 103 at 14.

C. Plaintiff Blanco

Plaintiff Blanco alleges similar experiences to those of Plaintiff Zenteno and Plaintiff Rodriguez. In July 2007, Plaintiff Blanco and Plaintiff Lixis Quintosa executed a mortgage with Defendant BOA for their home in Tampa, Florida. *Blanco*, Dkt. 17 at 10. After experiencing financial hardship, Plaintiff Blanco contacted Defendant BOA by phone in 2009 to request a loan modification through HAMP. *Id.* In August 2009, Plaintiff Blanco provided BOA an affidavit describing

[3] In the Amended Complaint, Plaintiff states this verbal approval for a HAMP loan modification occurred in September 2009, but she also alleges she completed her application for a HAMP loan modification almost two years later, in August 2011. *Rodriguez*, Dkt. 103 at 11, 12.

his financial hardship. *Blanco*, Dkt. 232, Ex. A. Defendant BOA provided a HAMP application to Plaintiff Blanco in 2010. *Blanco*, Dkt. 17 at 11. Plaintiff says he properly completed the application and returned it to BOA. *Id.; Blanco*, Dkt. 232 Ex. B.[4]

In December 2011, a BOA representative allegedly told Plaintiff Blanco by phone that he should refrain from making his regular mortgage payments so as to qualify for HAMP. *Blanco*, Dkt. 17 at 10. In March 2012, BOA representatives allegedly told Plaintiff Blanco by phone that his application materials for a HAMP loan modification were "not current." *Id.* at 12. A BOA representative told Plaintiff over the phone in November 2011 that he was "approved" for a HAMP loan modification and should start making "trial payments" of $972.90. *Id.* at 13. And BOA allegedly conducted thirty-four property inspections on the home from 2010 to 2012, all while Plaintiff lived there. *Id.* at 14.

Despite making three trial payments of $972.90 in 2011, Plaintiff was unable to keep his home. *Id.* at 14. On December 28, 2012, a state court entered a foreclosure judgment against Plaintiff Blanco for a total of $261,951.51, with $390 representing fees he allegedly owed BOA for the property inspections. *Blanco*, Dkt. 147-25 at 3. Plaintiff Blanco moved out of the home in 2011. *Blanco*, Dkt. 17 at 14.

[4] The HAMP application Plaintiff provided this Court is not dated. *Blanco*, Dkt. 232 Ex. B.

II. Procedural Background

Each set of plaintiffs allege Defendant BOA committed common law fraud[5] in four ways when servicing their HAMP applications:

(1) By falsely telling Plaintiffs they could not be current on their mortgages to qualify for HAMP loan modifications and failing to tell them they could qualify for HAMP if default was reasonably foreseeable ("HAMP Eligibility Claims");

(2) By falsely telling Plaintiffs the requested supporting financial documents Plaintiffs had submitted to BOA were missing ("Supporting Documents Claims");

(3) By falsely telling Plaintiffs they were approved for HAMP modifications and needed to start making trial payments ("HAMP Approval Claims");

(4) And by fraudulently omitting how inspection fees charged to Plaintiffs' accounts would be applied ("Inspection Fee Claims").

After litigation and delays due to the COVID-19 pandemic, the Court was prepared to begin a joint bench trial for these cases in July 2021. However, the Court canceled the trial and ordered the parties to file competing motions for

[5] The Eleventh Circuit has held that no private cause of action exists under HAMP. *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113, 1116 (11th Cir. 2012).

summary judgment addressing whether Florida's Banking Statute of Frauds precludes Plaintiffs' claims and whether the special damages sought by Plaintiffs are proper fraud remedies. The Court now addresses these motions.

LEGAL STANDARD

Summary judgment should be entered only if there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; it must be a *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.* at 248.

If factual issues are present and they are material, the Court must deny the motion and proceed to trial. *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990).

ANALYSIS

I. The Banking Statute of Frauds Bars the HAMP Approval Claims.

Florida's Banking Statute of Frauds prohibits a debtor from suing a creditor over a credit agreement unless the agreement: (1) is in writing, (2) expresses consideration, (3) sets forth the relevant terms and conditions, and (4) is signed by the creditor and the debtor. Fla. Stat. § 687.0304; *see also Bloch v. Wells Fargo Home Mortg.*, 755 F.3d 886, 889–90 (11th Cir. 2014). A credit agreement is defined as "an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation." Fla. Stat. § 687.0304(a). To the extent verbal conversations add to a credit agreement, such additions are barred by the statute. *Bloch*, 755 F.3d at 889. The Banking Statute of Frauds applies to a wide variety of claim types, including fraud claims. *See Uribe v. Bank of Am., N.A.*, No. 8:17–cv–2589–T–33AEP, 2018 WL 2215498, at *3 (M.D. Fla. May 15, 2018) ("The banking statute of frauds is applicable to fraud claims where the borrower has alleged that the lender orally agreed to make financial accommodations to the borrower."); *see also Dixon v. Countrywide Fin. Corp.*, 664 F. Supp. 2d 1304, 1309–10 (S.D. Fla. 2009).

Here, pursuant to the Hamp Approval Claims, Plaintiffs allege that representatives of Defendant BOA "verbally informed Plaintiffs over the phone that they were 'approved' [for HAMP loan modifications] and requested they make

'trial payments'. . . pursuant to [HAMP]." *Zenteno*, Dkt. 100 at 13; *Blanco*, Dkt. 17 at 13; *Rodriguez*, Dkt. 103 at 12. Plaintiffs claim "[t]his statement was false, as the application wasn't approved. Instead, BOA had no intention of approving the application and this fact was fraudulently omitted from the Plaintiffs." *Zenteno*, Dkt. 100 at 13; *Blanco*, Dkt. 17 at 13; *Rodriguez*, Dkt. 103 at 12.

The Court holds that the HAMP Approval Claims fall within Florida's Banking Statute of Frauds. The claims are based on Defendant BOA's alleged verbal representations that it would financially accommodate Plaintiffs by modifying their mortgages through HAMP. As Plaintiffs admit, loan modifications constitute credit agreements under the statute. *Rodriguez*, Dkt. 228 at 4; *Zenteno*, Dkt. 251 at 4; *Blanco*, Dkt. 232 at 5. Therefore, to be enforceable under the Banking Statute of Frauds, the loan modifications must be in writings that express consideration, set forth the relevant terms and conditions, and are signed by the creditor and the debtors.

In all three cases, Plaintiffs argue that these requirements under the Banking Statute of Frauds are satisfied by the aggregation of certain documents pertaining to HAMP. *Rodriguez*, Dkt. 228 at 4–7; *Zenteno*, Dkt. 251 at 4–8; *Blanco*, Dkt. 232 at 4–8. Plaintiffs are correct that several writings can be combined to satisfy the Banking Statute of Frauds, even when the writings on their own would not. *See Traver v. Wells Fargo Bank, N.A.*, No. 3:14-cv-895-J-32MCR, 2015 WL 9474612,

at *5 (M.D. Fla. Dec. 29, 2015) ("Florida state courts and other federal courts applying Florida law have also extended this rule by aggregating documents to determine whether there is a writing sufficient to satisfy Florida's Banking Statute of Frauds."). But, as explained below, each Plaintiff falls short of satisfying the aggregation doctrine.

A. Plaintiff Rodriguez's HAMP Approval Claim

Plaintiff Rodriguez argues there are two writings that can be combined to satisfy the Banking Statute of Frauds in her case: (1) a letter from Bank of America—signed by the Senior Vice President of the Home Retention Division for Bank of America—that outlined the HAMP process and attached a HAMP application; and (2) Plaintiff's completed HAMP application affixed with her husband's signature.[6] *Rodriguez*, Dkt. 228 at 4–7. For the reasons explained below, these writings—even when aggregated together—do not satisfy the Banking Statute of Frauds.

First, these writings do not show that Defendant BOA ever approved Plaintiff Rodriguez or her husband for a HAMP loan modification. The language in the letter sent by BOA is overwhelmingly conditional. *Rodriguez*, Dkt. 228, Ex. A.

[6] Confusingly, the completed HAMP application that Plaintiff Rodriguez provides in support of her aggregation argument is dated September 10, 2012—over four months *after* the state court issued a final judgment foreclosing the home on May 15, 2012. *Compare Rodriguez,* Dkt. 228, Ex. B *with Rodriguez*, Dkt. 141-17 at 2.

For example, the letter states Plaintiff "may be eligible" for HAMP modifications and that Plaintiff must provide documentation "to confirm [her] eligibility and continue the modification process." *Id.* at 2 (emphasis added). The letter even states: "Please note that your modification will not be effective unless you meet all of the applicable conditions and you are notified in writing that your modification has been approved." *Id.* at 8. Plaintiff Rodriguez has pointed to no document that contains any express commitment by BOA to modify her mortgage through HAMP. Such conditional language cannot satisfy the Banking Statute of Frauds. *See Mark Andrew of the Palm Beaches, Ltd. v. GMAC Comm. Mortg. Corp.*, 265 F. Supp. 2d 366, 380–81 (S.D.N.Y. 2003) (applying Florida law and holding the Banking Statute of Frauds was not satisfied by an aggregation of documents that failed to show the creditor made an express commitment to the debtor), *aff'd* 96 F. App'x 750 (2d Cir. 2004).

Second, the aggregation doctrine contemplates that the documents at issue be executed "at or near the same time." *Collins v. Citrus Nat'l Bank*, 641 So. 2d 458, 459 (Fla. 5th DCA 1994) ("Where two or more documents are executed by the same parties, *at or near the same time*, in the course of the same transaction, and concern the same subject matter, they will be read and construed together.") (emphasis added). Here, Defendant BOA sent its letter to Plaintiff Rodriguez and her husband in May 2009. *Rodriguez*, Dkt. 228, Ex. A at 1. But Rodriguez's

husband sent BOA the completed HAMP application more than three years later, in September 2012, months after final foreclosure. *Rodriguez*, Dkt. 228, Ex. B at 1, 7. The Court declines to aggregate documents completed three years apart.

Finally, in *Bloch*, 755 F.3d at 889–90, the Eleventh Circuit held that the Banking Statute of Frauds barred claims related to HAMP even though the plaintiffs offered the following writings: (1) a letter from the bank-defendant inviting plaintiffs to apply for HAMP; and (2) the plaintiffs' completed HAMP application affixed with their signatures. These are the same writings offered by Plaintiff Rodriguez. The Eleventh Circuit stated: "It is undisputed there is no signed written agreement expressing consideration and setting forth the relevant terms and conditions of the purported HAMP modification." *Id.* at 890. So, too, here. Summary judgment is granted in favor of Defendant BOA on Plaintiff Rodriguez's HAMP Approval Claim.

B. Plaintiff Zenteno's HAMP Approval Claim

Plaintiff Zenteno offers three writings to support his aggregation argument: (1) a letter from BOA on April 21, 2010, inviting Zenteno to apply for HAMP and attaching a HAMP application; (2) Zenteno's HAMP application affixed with his signature; and (3) another letter from BOA dated May 26, 2010, stating that Plaintiff must submit documents so that BOA can complete its HAMP eligibility review. *Zenteno*, Dkt. 251 at 2.

Plaintiff Zenteno faces the same fate as Plaintiff Rodriguez. The writings offered by Zenteno do not evince BOA ever expressing a commitment to modify Zenteno's mortgage through HAMP. Zenteno offers the same two writings offered by Rodriguez, which contain the same conditional language explained above. *Zenteno*, Dkt. 251, Exs. A, B. The addition of the May 26th letter does not change the outcome. Indeed, this letter states BOA still needed to "verify [Zenteno's] eligibility to *begin* the process toward a [HAMP] loan modification." *Zenteno*, Dkt. 251, Ex. C at 1 (emphasis added). The Court grants summary judgment in favor of Defendant BOA on Zenteno's HAMP Approval Claim.

C. Plaintiff Blanco's HAMP Approval Claim

Plaintiff Blanco offers several more documents than his peers to support his aggregation argument. These documents include:

- A handwritten hardship affidavit signed by Plaintiff Blanco in August 2009 to support his application for a HAMP loan modification (Exhibit A);
- An electronic application for a HAMP loan modification filled out and electronically signed by Plaintiff Blanco and his wife (Exhibit B);
- A cover letter from Defendant BOA enclosing a proposed agreement to modify Plaintiff Blanco's loan (Exhibit C);

- The same document as Exhibit C but signed by Plaintiff Blanco and his wife on October 31, 2010 (Exhibit D);
- A letter written and signed by Defendant BOA's Senior Vice President of the Home Retention Division stating that Plaintiff Blanco is eligible for a trial modification of his loan (Exhibit F)[7];
- A Trial Period Plan and Frequently Asked Questions about the proposed trial modification (Exhibit E).

Blanco, Dkt. 232 at 15–38.

The Court asked the parties for further briefing on these documents, particularly Exhibits C, D, E, and F, which do not contain any reference to HAMP. *Blanco*, Dkt. 236. Plaintiff Blanco responded:

> As for whether the documents are related to the HAMP Loan Modification Program, the Plaintiffs [sic] discovery requests and claims are only related to HAMP loan modifications. No other type of loan modification or refinance were ever requested. It was Plaintiffs' understanding and intention that all loan modification applications they made were related to the HAMP Loan Modification Program.

Blanco, Dkt. 239 at 1–2.

But Defendant BOA says these exhibits are not related to HAMP at all. *Blanco*, Dkt. 240 at 2–5. These documents are instead related to Plaintiff Blanco's application for a loan modification *outside* of HAMP. *Id.* at 4. BOA stated:

[7] The Court is listing Exhibits E and F out of alphabetical order to clarify that the cover letter (Exhibit F) included the Trial Period Plan (Exhibit E) as an enclosure in the correspondence.

> After being denied for loan modification assistance under HAMP, Bank of America reviewed the Plaintiffs' loan for an in-house loan modification. It was Bank of America's practice to continue reviewing Plaintiffs for other loan modification options after being declined under the HAMP program.

Id. at 3–4. According to BOA, Exhibit F is the letter offering Plaintiffs a trial plan for an in-house loan modification unrelated to HAMP. *Id*. at 4. Exhibit E included the requirements that Plaintiff Blanco must satisfy to complete the trial plan. *Id.* BOA stated that Plaintiff Blanco completed the trial plan successfully and was approved to apply for a permanent in-house loan modification. *Id.* Exhibits C and D are the cover letters enclosing the proposed agreement for a permanent in-house loan modification (with Exhibit D being the version signed by Plaintiff Blanco and his wife). This agreement required Plaintiff Blanco to complete the paperwork by October 8, 2010, to receive the permanent loan modification. *Blanco*, Dkt. 232, Ex. D at 1. But Plaintiff did not do so until October 31, 2010. *Blanco*, Dkt. 232, Ex. E at 5. Because Plaintiff missed this deadline, BOA denied his application for the permanent in-house loan modification. *Blanco*, Dkt. 240 at 5.

The Court finds Defendant BOA's explanation of these documents to be not in real contest. Plaintiff Blanco offers only the declarations of himself and his wife's "understanding and intention" to support his conclusion that Exhibits C, D, E, and F are related to HAMP. *Blanco*, Dkt. 239 at 1–2. But the records themselves do not support this. Whereas Exhibits A and B reference HAMP multiple times,

Exhibits C, D, E, and F do not mention HAMP once.[8] Defendant BOA has authenticated these latter exhibits as being non-related to HAMP. Because Exhibits C, D, E, and F are not related to HAMP or the alleged credit agreement at issue in this case, the Court will not consider them for Plaintiff's aggregation argument.

This leaves Exhibits A and B. And, like his peers, Plaintiff Blanco fails to provide any documents showing BOA ever expressly committed to modifying his mortgage through HAMP. Exhibit A is an affidavit completed by Plaintiff Blanco outlining financial hardships that could qualify him for HAMP. *Blanco*, Dkt. 232, Ex. A. Exhibit B is Plaintiff Blanco's application to be considered for a loan modification under HAMP. *Blanco*, Dkt. 232, Ex. B. Neither document contains a signature from Defendant BOA. And both documents use the same type of conditional language as the other Plaintiffs' HAMP application materials analyzed above. *See, e.g.*, *id*. at 3 ("I understand that the Servicer will use the information in this document to *evaluate my eligibility* for a loan modification[.]") (emphasis added). These documents, even when aggregated, are not enough to remove Plaintiff Blanco's claims from the Banking Statute of Frauds.

In sum, the HAMP Approval Claims brought by each Plaintiff are based on credit agreements as defined by the Banking Statute of Frauds. Because these

[8] It is worth noting that the materials submitted by the other Plaintiffs all referenced HAMP, as well.

credit agreements are not in writing or signed by the Defendant, they do not have any legal effect. Summary judgment is granted in favor of Defendant BOA.

II. The Banking Statute of Frauds Also Bars the HAMP Eligibility Claims and the Supporting Documents Claims.

Plaintiffs say the above finding should be limited to only the HAMP Approval Claims. Plaintiffs argue that, even if the Banking Statute of Frauds bars the HAMP Approval Claims, the three other claims should nevertheless survive because those claims do not explicitly involve credit agreements as defined by the statute. *Rodriguez*, Dkt. 228 at 8–9; *Zenteno*, Dkt. 251 at 8–10; *Blanco*, Dkt. 232 at 8–9.

Two cases lend Plaintiffs some support. Both cases arise from motions to dismiss, a different consideration than here. In *Uribe*, 2018 WL 2215498, at *1, the plaintiff brought the same four claims asserted by Plaintiffs here: the HAMP Approval Claim, the HAMP Eligibility Claim, the Supporting Documents Claim, and the Inspection Fee Claim. The court ruled that Florida's Banking Statute of Frauds barred the HAMP Approval Claim because it was based on the bank's oral agreement to approve the plaintiff's HAMP application, which constituted a financial accommodation to the borrower as defined by the statute. *Id.* at *3. But in addressing dismissal standards under Fed. R. Civ. P. 12(b)(6), the court ruled that the other claims were not barred by the Banking Statute of Frauds because they

"[did] not involve a credit agreement as defined by the statute." *Id.* The court offered no analysis supporting this assertion.[9]

Similarly, in *Carmenates v. Bank of Am., N.A.*, No. 8:17-cv-2635-T-23JSS, 2018 WL 659594, at *1 (M.D. Fla. Feb. 1, 2018), the plaintiff brought the same four claims advanced by Plaintiffs here. While ruling on a motion to dismiss, the court stated:

> In this instance, only the [HAMP Approval Claim] appears an attempt to enforce an oral credit agreement. The remaining claims appear based on a duty other than under an oral credit agreement. For example, the plaintiffs infer fraud from Bank of America's charging an inspection fee purportedly prohibited by a Department of Housing and Urban Development guideline.

Id. at *3. The court offered no other analysis on this point, and it did not explain how the HAMP Eligibility Claim or the Supporting Documents Claim did not trigger the Banking Statute of Frauds.[10]

This Court is in a different procedural posture. After careful review of the statute's origins and corresponding cases, this Court believes the Banking Statute of Frauds—after full case discovery and considered in this summary judgment posture—encapsulates the HAMP Eligibility Claims and the Supporting Documents Claims.

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[9] The *Uribe* court later granted summary judgment against the plaintiff under the *Rooker-Feldman* doctrine. *See* Case No. 8:17-cv-2589-VMC (M.D. Fla. Oct. 17, 2018) at Dkt. 59.
[10] The *Carmenates* court later dismissed the complaint with prejudice on *Rooker-Feldman* grounds. *See* Case No. 8:17-cv-2635-T-23JSS (M.D. Fla. July 24, 2018) at Dkt. 50.

Florida based its Banking Statute of Frauds on a similar statute in Minnesota: the Minnesota Credit Agreement Statute, Minn. Stat. § 513.33. *See Puff 'N Stuff of Winter Park, Inc. v. Bell*, 683 So. 2d 1176, 1183 n.2 (Fla. 5th DCA 1996) (Griffin, J., dissenting) (stating that Florida based its statute on Minnesota's statute). Florida's statute uses language that is virtually identical to Minnesota's statute. Because of this, many courts in Florida have recognized that the Minnesota statute and corresponding Minnesota cases provide important context for interpreting the Florida statute. *See, e.g.*, *Brake v. Wells Fargo Fin. Sys. Fla., Inc.*, No. 8:10-cv-338-T-33TGW, 2011 WL 6719215, at *8 n.6 (M.D. Fla. Dec. 5, 2011) ("Minnesota cases are persuasive authority because Florida's banking statute of frauds is patterned upon, and virtually identical to, Minnesota's banking statute of frauds.").

Particularly relevant here is Subsection 3 of the Florida Banking Statute of Frauds, which is identical to Subsection 3 of the Minnesota Credit Agreement Statute. It states:

> The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subsection (2):
>
> 1. The rendering of financial advice by a creditor to a debtor;
>
> 2. The consultation by a creditor with a debtor; or
>
> 3. The agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising

> remedies under prior credit agreements, or extending installments due under prior credit agreements.

Fla. Stat. § 687.0304(3).

The Eighth Circuit interpreted this subsection in *Brisbin v. Aurora Loan Servs., LLC*, 679 F.3d 748, 753 (8th Cir. 2012). There, the plaintiff argued Subsection 3 carved out exceptions to the definition of "credit agreement" given in Subsection 1. *Id.* The Court rejected this construction. *Id.* Instead of listing exceptions to the definition of "credit agreement," Subsection 3 actually provides examples of credit agreements specifically *covered* by the statute. *Id.* This means that the statute applies to financial advice given by the creditor to the debtor, as well as consultations between the creditor and debtor, in the context of credit agreements. If the creditor gave such financial advice orally, then the statute may bar the introduction of such representations. *See Becker v. First Am. State Bank of Redwood Falls*, 420 N.W. 2d 239, 240–41 (Minn. App. 1988) (finding that the Minnesota Credit Agreement Statute barred creditor's financial advice for debtor to reduce indebtedness).

This Court believes the Eighth Circuit's interpretation of Subsection 3 is consistent with the Florida Banking Statute of Fraud's overall purpose, which is "to protect lenders from liability for actions or statements a lender might make in the context of counseling or negotiating with the borrower which the borrower construes as an agreement[.]" *Dixon*, 664 F. Supp. 2d at 1309. The object of

statutory interpretation is to ascertain and effectuate the intention of the legislature. *Whynes v. Am. Sec. Ins. Co.*, 240 So. 3d 867, 869 (Fla. 4th DCA 2018) (citing *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006)). The Court believes the Eighth Circuit's statutory interpretation in *Brisbin* does just that.

Keeping these lessons in mind, the Court will now address the remaining claims in turn. Two of Plaintiffs' remaining claims—the HAMP Eligibility Claims and the Supporting Documents Claims—involve credit agreements as defined by the Banking Statute of Frauds. Because these agreements are not in writing nor signed by the parties, Plaintiffs cannot sue upon them.

A. The HAMP Eligibility Claims

Pursuant to the HAMP Eligibility Claims, Plaintiffs allege that representatives of Defendant BOA orally told Plaintiffs on the phone that being "past due" on their mortgage loans was a prerequisite for HAMP eligibility. *Zenteno*, Dkt. 100 at 10–11; *Blanco*, Dkt. 17 at 11; *Rodriguez*, Dkt. 103 at 10. Plaintiffs argue "[t]his statement was false as default was not required for HAMP eligibility. [The] BOA loan representative . . . omitted the fact that eligibility was available for HAMP to borrowers if default was reasonably foreseeable." *Zenteno*, Dkt. 100 at 11; *Blanco*, Dkt. 17 at 11; *Rodriguez*, Dkt. 103 at 10. Plaintiffs argue these statements constitute common law fraud.

The Court holds that the HAMP Eligibility Claims fall within the purview of the Banking Statute of Frauds. There can be no serious dispute that a loan modification under HAMP constitutes a credit agreement as defined by the statute.[11] The oral representations complained of in the HAMP Eligibility Claims were made in the context of Plaintiffs applying for HAMP loan modifications. As discussed above, Subsection 3 of the statute covers financial advice given by the creditor to the debtor, as well as consultations between the creditor and debtor, in the context of negotiating credit agreements. That is what happened here: Plaintiffs assert Defendant BOA gave financial advice (albeit allegedly incorrect financial advice) to Plaintiffs in their quests to modify their mortgages through HAMP.

The HAMP Eligibility Claims are also tied to another credit agreement: Plaintiffs' existing mortgages. By allegedly telling Plaintiffs to not make their regular monthly mortgage payments, Defendant BOA arguably agreed to forbear exercising its remedies under these prior credit agreements. This, too, is covered by Subsection 3 of the statute. *See* Fla. Stat. § 687.0304 ("The agreement by a creditor to take certain actions, such as . . . forbearing from exercising remedies under prior credit agreements); *see also Figgins v. Wilcox*, 879 N.W.2d 653, 657–58 (Minn. 2016) (holding that bank's statement that debtor did not need to make payments

[11] Plaintiffs largely admit this. *See Zenteno*, Dkt. 251 at 4; *Blanco*, Dkt. 232 at 5; *Rodriguez*, Dkt. 228 at 4 ("Plaintiffs agree that permanent loan modification agreements are credit agreements within the meaning of the Banking Statute of Frauds.").

while the parties negotiated refinancing constituted an agreement to "forbear the repayment of money," as well as a "financial accommodation," under the statute).

The Court therefore holds that the HAMP Eligibility Claims are based on representations that fall within the Banking Statute of Frauds. *See Freeman v. Ally Fin. Inc.*, 528 F. Supp. 3d 1038, 1045 (D. Minn. 2021) (stating that plaintiffs cannot maintain actions in which they assert the existence of unwritten credit agreements and their claims are "contingent on proof" of such agreements). For Plaintiffs to bring these claims, then, the credit agreements must be in writing and signed by the parties. There is no such document in any of the three cases. Summary judgment is therefore granted in favor of Defendant BOA for the HAMP Eligibility Claims.

B. The Supporting Documents Claims

Pursuant to the Supporting Documents Claims, Plaintiffs argue BOA employees falsely informed Plaintiffs by phone that their applications were missing signatures and were "not current." *Zenteno*, Dkt. 100 at 11–12; *Blanco*, Dkt. 17 at 11–12; *Rodriguez*, Dkt. 103 at 11. According to Plaintiffs, the BOA employees repeatedly told them on phone calls that they must submit new application materials to complete their applications for HAMP loan modifications. *Zenteno*, Dkt. 100 at 11–12; *Blanco*, Dkt. 17 at 11–12; *Rodriguez*, Dkt. 103 at 11.

Although a closer call than the HAMP Eligibility Claims, the Court holds that the Banking Statute of Frauds applies to the Supporting Documents Claims, as well. The oral statements underlying these claims were made in the context of BOA employees counseling Plaintiffs on their applications for HAMP loan modifications. Plaintiffs seek to make actionable statements of BOA that were part of failed negotiations for modified credit agreements under HAMP. *Brisbin* shows that the Banking Statute of Frauds covers creditors' consultations with debtors regarding credit agreements. 679 F.3d at 753.

Additionally, Plaintiffs allege BOA repeatedly requested these documents "for the specific purpose of frustrating the HAMP application process to ensure a modification was ultimately declined, resulting in foreclosure." *Zenteno*, Dkt. 100 at 11–12; *Blanco*, Dkt. 17 at 11–12; *Rodriguez*, Dkt. 103 at 11. In other words, Plaintiffs allege they were damaged by these document requests in the form of being wrongfully denied HAMP loan modifications. Indeed, Plaintiffs' expert stated that the "appropriate damages award is an amount that restores the household financially to where it would had been had it received the HAMP modification with its associated financial benefits." *Rodriguez*, Dkt. 170 at 183. This theory of damages is telling. By alleging that these document requests caused them to wrongfully lose the ability to get HAMP loan modifications, Plaintiffs

have pled the Supporting Documents Claims in such a way that ties the claims to credit agreements under the Banking Statute of Frauds.

In sum, both the HAMP Eligibility Claims and the Supporting Documents Claims are contingent on the existence of unwritten credit agreements. These claims are closely tied to HAMP—whether Plaintiffs' applications for HAMP loan modifications, BOA's handling of those HAMP applications, or BOA's ultimate denial of those HAMP applications. Indeed, Plaintiffs themselves state "the very crux of this case is that Plaintiffs were not given a HAMP modification when they were entitled to receive one, and that Bank of America's lies led to foreclosure." *Zenteno*, Dkt. 251 at 9; *Blanco*, Dkt. 232 at 9; *Rodriguez*, Dkt. 228 at 9. The HAMP Eligibility Claims and the Supporting Documents Claims are therefore actions on credit agreements, and the debtors thus "may not maintain" them because the agreements purportedly arising from the alleged misrepresentations are not in writing nor signed by BOA. *Bracewell v. U.S. Bank Nat. Ass'n*, 748 F.3d 793, 796 (8th Cir. 2014). Summary judgment is granted in favor of Defendant BOA on these claims.

III. The Inspection Fee Claims Are Barred by *Rooker-Feldman*.

Federal district courts may not review or reject state-court judgments rendered before the district court litigation began. *See Rooker v. Fid. Tr. Co*., 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). This

rule—known as the *Rooker-Feldman* doctrine— "follows naturally from the jurisdictional boundaries that Congress has set for the federal courts," which are that (1) federal district courts are courts of original jurisdiction, which generally cannot hear appeals, and that (2) only the Supreme Court can reverse or modify state court judgments. *Behr v. Campbell*, 8 F.4th 1206, 1210 (11th Cir. 2021) (cleaned up). "Allowing federal district courts to alter or directly review the judgments of state courts would violate both of those jurisdictional grants." *Id.*

The Eleventh Circuit recently reiterated the limitations of this doctrine in *Behr*, 8 F.4th at 1211. There, the court stated that *Rooker-Feldman* is not "a one-size-fits-all preclusion doctrine for a vast array of claims relating to state court litigation." *Id.* at 1208. The doctrine is instead "confined" to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of these judgments." *Id.* at 1209−10; *see also Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 284 (2005). *Rooker-Feldman* "applies only when litigants try to appeal state court losses in the lower federal courts." *Behr*, 8 F.4th at 1214.

Here, pursuant to the Inspection Fee Claims, Plaintiffs allege "BOA committed common law fraud upon the Plaintiffs when throughout the HAMP application BOA employees omitted the fact that the bank was conducting

unnecessary and improper inspections on their home[s] and charging their account[s] inspection fees." *Zenteno*, Dkt. 100 at 15; *Blanco*, Dkt. 17 at 15; *Rodriguez*, Dkt. 103 at 14. Plaintiffs say BOA improperly charged them for numerous inspection fees over the course of several years. *Zenteno*, Dkt. 100 at 15; *Blanco*, Dkt. 17 at 15; *Rodriguez*, Dkt. 103 at 14. According to Plaintiffs, "[t]hese inspection fees are impermissible under the HUD Servicing Guidelines and are but one example of the fraudulent charges for which BOA applied to Plaintiffs' account *and added to the foreclosure judgment amount*." *Zenteno*, Dkt. 100 at 14; *Blanco*, Dkt. 17 at 14–15; *Rodriquez*, Dkt. 103 at 14 (emphasis added).

This last statement is telling. Each of the Plaintiffs had their homes foreclosed upon in state-court judgments. *Zenteno*, Dkt. 158-27 at 2; *Blanco*, Dkt. 147-25 at 2; *Rodriguez*, Dkt. 141-17 at 2. And in each judgment, the state court included the inspection fees in an itemized list of what each Plaintiff owed to Defendant BOA. *Zenteno*, Dkt. 158-27 at 2; *Blanco*, Dkt. 147-25 at 2; *Rodriguez*, Dkt. 141-17 at 2. The damages Plaintiffs now seek in these federal cases are the same damages ordered in the state-court judgments.

According to the Eleventh Circuit, the claim for relief matters when determining whether *Rooker-Feldman* applies. *See Behr*, 8 F.4th at 1214. While plaintiffs may seek "relief for violations that happened during the state court processes," such as a third party violating a plaintiff's constitutional rights while

the state-court proceedings were pending, plaintiffs may not seek "rejection of the state court judgment[s]" themselves. *Id.* at 1213. In effect, *Rooker-Feldman* applies when the federal-court plaintiff is seeking to appeal an adverse state-court judgment. *Id.* at 1214 ("[*Rooker-Feldman*] applies only when litigants try to appeal state court losses in the lower federal courts.")

By requesting damages for these inspection fees, Plaintiffs essentially ask this Court to void and vacate the inspection fees ordered in the state-court foreclosure judgments. This the Court cannot do. The remedies Plaintiffs seek (i.e., repayment of the inspection fees) are direct attacks on the state-court judgments in the foreclosure actions. *See Behr*, 8 F.4th at 1212 ("[T]o be barred by *Rooker-Feldman* requires that it amount to a direct attack on the underlying state court decision." (quoting *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1288 (11th Cir. 2018))). Plaintiffs are state-court losers complaining of injuries caused by prior state-court judgments. The Inspection Fee Claims are therefore barred by *Rooker-Feldman*.

This outcome is not changed by the fact that Plaintiffs now claim the inspection fees were fraudulent. *Rooker-Feldman* "does not prioritize form over substance. It bars all appeals of state court judgments—whether the plaintiff admits to filing a direct appeal of the judgment or tries to call the appeal something else." *Behr*, 8 F.4th at 1211; *see also May v. Morgan Cnty.*, 878 F.3d 1001, 1005 (11th

Cir. 2017) (stating that a "state court loser cannot avoid *Rooker-Feldman*'s bar by cleverly cloaking her pleadings in the cloth of a different claim"). Plaintiffs are directly challenging portions of the state-court foreclosure judgments. If Plaintiffs believe these portions of the judgments are fraudulent, Plaintiffs must go back to state court to argue this.

In sum, even under the Eleventh Circuit's more restrictive view of *Rooker-Feldman*, the Court holds that Plaintiff's Inspection Fee Claims are barred. Summary judgment is granted in favor of Defendant BOA.

CONCLUSION

The Court **GRANTS** the following Motions for Summary Judgment filed by Defendant Bank of America:

- In *Zenteno*, 8:17-cv-2591, the Court grants Defendant BOA's Motion for Summary Judgment on all claims, Dkt. 248.
- In *Rodriguez*, 8:17-cv-2627, the Court grants Defendant BOA's Motion for Summary Judgment on all claims, Dkt. 225.
- And in *Blanco*, 8:17-cv-2626, the Court grants Defendant BOA's Motion for Summary Judgment on all claims, Dkt. 229.

The Court **DENIES** the following Motions for Summary Judgment filed by the individual Plaintiffs:

- In *Zenteno*, 8:17-cv-2591, the Court denies in its entirety the Plaintiffs' Motion for Summary Judgment, Dkt. 251.
- In *Rodriguez*, 8:17-cv-2627, the Court denies in its entirety the Plaintiffs' Motion for Summary Judgment, Dkt. 228.
- And in *Blanco*, 8:17-cv-2626, the Court denies in its entirety the Plaintiffs' Motion for Summary Judgment, Dkt. 232.

The clerk is directed to close the cases.

DONE AND ORDERED at Tampa, Florida, on November 15, 2021.

/s/ William F. Jung
WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

Contents of Appendix

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Paul C. Ridgeway
Senior Resident Superior Court Judge (10th Judicial District – Wake County)
Presented at Orientation for New Superior Court Judges
28 January 2021

I. INTRODUCTION

PURPOSE OF FINDINGS OF FACT ("FOF") AND CONCLUSIONS OF LAW ("COL")

A. Not designed to encourage "ritualistic recitations" (i.e. harass the trial judge) but instead to:

1. Dispose of issues raised by the pleadings;

2. Make definite what was decided for purposes of res judicata and estoppel;

3. Evoke care on the part of the trial judge in ascertaining the facts; and

4. Allow for meaningful appellate review.

State v. Baker, COA 10-98 (7 Dec. 2010); *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001); *Hill v. Lassiter*, 135 N.C. App. 515, 518, 520 S.E.2d 797, 800 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 562, 402 S.E.2d 860, 862 (1991).

See further: Anderson, *Civil Orders: Findings of Fact and Conclusions of Law*, NC SUPERIOR COURT JUDGES' BENCHBOOK (School of Government, UNC 2017)

GENERAL PRINCIPLES

A. If you are evaluating evidence, or the matter involves an appeal that by statute invokes the trial judge's original jurisdiction (i.e. *de novo* review of some clerk of court matters or some administrative agency appeals), be alert to the need for FOF/COL. In some instances, they will be required (as discussed below), in others they will not, except on request of a party.

B. If the matter requires you to accept one party's version of the facts as true (e.g. granting or denying a N.C. R. Civ. P. 12(b)(6) motion), or requires that you accept a lower tribunals findings as conclusive (e.g. reviewing some clerk of court matters and many administrative agency appeals), then FOF/COL normally are not appropriate.

WHAT IS REQUIRED?

Judge must:

A. **Find facts on all issues joined in the pleadings**.

Note that findings of fact are conclusive upon appellate review if supported by competent evidence, even though there may be evidence to the contrary. *Heating & Air Cond. Assoc. v. Myerly,* 29 N.C. App. 85 (1976).

Trial judge is required to find and state ultimate facts only, not evidentiary facts. *State v. Escobar,* 187 N.C. App. 267, 271, 652 S.E.2d 694, 698 (2007). Ultimate fact is the "final resulting effect reached by process of logical reasoning from evidentiary facts." *Farmers Bank v. Michael T. Brown Distr., Inc.,* 307 NC 342 (1983). Evidentiary facts are those "subsidiary facts required to prove the ultimate facts." "Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn." *Id.* Furthermore, the Court is only required to make findings of fact to resolve "all *material* factual conflicts" in the evidence. *State v. Vaughn,* 2013 N.C. App. LEXIS 1089, at 10 (2013) (unpublished) citing *State v. Phillips*, 365 N.C. 103, 116, 711 S.E.2d 122, 134 (2011) (noting that "a more detailed order would be the better practice," *Vaughn* at 11).

For further guidance on requirements for adequate findings of fact, compare and contrast these cases: *Farmers Bank v. Michael T. Brown Distr., Inc.,* 307 NC 342 (1983); *Tolbert v. Hiatt*, 95 N.C. App. 380 (1989); and *State v. Baker*, COA 10-98 (7 Dec. 2010); *In the Matter of S.C.R.*, 718 S.E.2d 709 (2011); *State v. Vaughn,* 2013 N.C. App..LEXIS 1089 (2013)(unpublished).

B. **Declare conclusions of law arising from those facts.**

Conclusions of Law are "the court's statement of law which is determinative of the matter at issue between the parties." *Montgomery v. Montgomery*, 32 N.C. App. 154. It is the "application of fixed rules of law." *State v. Freeman,* 307 N.C. App. 357 (1983). The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law and from which the judgment is to result. *Montgomery, supra.,, citing* 89 C.J.S., Trial, § 615b (1955).

Conclusions of Law must be stated separately from the findings of fact. *Montgomery, supra.* The purpose of requiring that conclusions of law to be stated separately is to enable appellate courts to determine what law the trial court applied. *Hinson v. Jefferson*, 287 N.C. 422 (1975).

C. **Enter judgment accordingly.**

Hilliard v. Hilliard, 146 N.C. App. 709, 710-11, 554 S.E.2d 374, 376 (2001) (quoting *Whitfield v. Todd*, 116 N.C. App. 335, 338, 447 S.E.2d 796, 798 (1994)); *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985) (citing *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971)).

II. WHEN ARE FOF/COL REQUIRED OR APPROPRIATE?

CRIMINAL CASES

A. **Motions to suppress evidence** (N.C. Gen. Stat. § 15A-977(f)). See thorough discussion of this requirement in *State v. Baker*, COA 10-98 (7 Dec. 2010). General rule: Judge is the finder of fact at the hearing on a motion to suppress evidence and should make written findings of fact and conclusions of law. *State v. Grogan*, 40 N.C. App. 371 (1979). Statute is complied with when the judge announces his/her ruling in open court and later files a written order setting forth the findings of fact and conclusions of law. *State v. Fisher*, 158 N.C. App. 133 (2003).

B. **Proceedings regarding capacity** (N.C. Gen. Stat. § 15A-1002 (Determination of mental capacity) and §15A-1003 (Referral of incapable defendant for civil commitment proceedings).

C. **Mistrials** (N.C. Gen. Stat. § 15A-1064). Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.

D. **Motions for Appropriate Relief** (N.C. Gen. Stat. § 15A-1420(c)). FOF required when the Court holds an evidentiary hearing to resolve disputed issues of fact. COL required when motion is based on an asserted violation of the defendant's rights under the U.S. Constitution or other federal law.

E. **Order allowing remote testimony of child witnesses.** N.C. Gen. Stat. § 15A-1225.1. Order allowing or disallowing shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of remote testimony requires additional findings as enumerated in 15A-1225.1(d)(1)-(5).

F. **Maintenance of Order in the Courtroom – Custody and restraint of defendant and witnesses.** N.C. Gen. Stat. § 15A-1031.

G. **Order Assuring Attendance of Material Witness**. 15A-803(d).

H. **Sex Offenses.** Bail and Pre-trial release – deviation from standard no-contact provisions. N.C. Gen. Stat. § 15A-534. Issuance of permanent no-contact order at sentencing. N.G. Gen. Stat. § 15A-1340.50. Deviation from structured sentencing for adults found guilty of sex offenses or rape of child. N.C. Gen. Stat. § 14-27.2A and .4A. Determination of satellite-based monitoring requirements. N.C. Gen. Stat. § 14-208.40A and B.

I. **Costs in Criminal Matters.** A 2011 amendment to N.C. Gen. Stat. § 7A-304(a) requires that "written finding of just cause" be made whenever a judge waives any court costs required by § 7A-304(a). Court costs otherwise required under § 7A-304(a) include General Court of Justice fees, SBI lab test fees, impaired driving fee, jail fee and several other miscellaneous fees.

J.. ***Batson* Issues.** *State v. Hood*, 848 S.E.2d 515, 522 (N.C. Ct. App. 2020) "The trial court's summary denial of Defendant's *Batson* challenge precludes appellate review. The trial court was tasked with considering the evidence and determining whether the challenged strike of prospective juror Smith 'was motivated in substantial part by discriminatory intent' on the part of the State. Without specific findings of fact, this Court cannot establish on review that the trial court 'appropriately considered all of the evidence necessary to determine whether [Defendant] proved purposeful discrimination with respect to the State's peremptory challenge' . . . Moreover, the trial court's ruling was deficient in that it 'did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges.'" (Remanded to the trial court with instructions "to conduct a *Batson* hearing . . . [and] to make findings of fact and conclusions of law").

K. **Impact of Delayed Ruling**

1. *See State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005) (granting new trial for defendant where trial court heard motion to suppress during spring term, did not get consent of the parties to enter order out of session and out of term, and did not announce ruling in open court until seven months later, during fall term, and did not enter the order until one year later). *See*, Crowell, *Out-of-term, Out-of-Session, Out-of-County*, Adm. of Justice Bulletin No. 2008/05 (Nov. 2008).

2. When a ruling on a motion to suppress is announced in open court, but not yet reduced to writing, and notice of appeal is given prior to the written order being entered, the trial court apparently continues to have jurisdiction to enter the written order consistent with its prior ruling. *See State v. Oates*, 366 N.C. 264 (2012) (discussing legal effect of notice of appeal given three months prior to entry of written order). See further: *State v. Smith*, 320 N.C. 404, 415, 358 S.E.2d 329, 335 (1993) ("[t]he order, however, is simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress . . . . It

was inserted in the transcript in place of the verbal order rendered in open court.")

3. *Cf. Dalenko v. Wake County Dep't of Human Servs.,* 157 N.C. App. 49, 58, 578 S.E.2d 599, 605 (2003) (in civil cases, relevant statutes permit a judge to sign judgment or order out of term and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district and no party objects). *See also* N.C.R. Civ. P. 58. *See,* Crowell, *supra.*

4. Note: Recent amendment to N.C.R. Civ. P. 7 now allows motions filed in Superior Court district consisting of more than one county to be heard in any county in that district. *See* N.C.R. Civ. P. 7(b)(4).

CIVIL CASES

A. **N.C.R. Civ. P. 52** sets out general standard:

1. Under Rule 52(a)(1), FOF/COL are required in all actions tried upon the facts without a jury or with an advisory jury.

2. FOF/COL must be entered in bench trials, even absent a request by the parties. Failure to enter proper order will generally result in remand, unless facts are undisputed and lead to only one inference. *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 822-24 (N.C. Ct. App. 2009); *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 16, 657 S.E.2d 673, 683 (2008); *Cumberland Homes, Inc., v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 520-21, 581 S.E.2d 94, 96 (2003) (declaratory judgment action).

3. Dismissal under N.C.R. Civ. P. 41(b) also requires entry of findings and conclusions where Court hears the case without a jury and dismisses the matter on the merits at the close of the plaintiff's evidence.

   a. Test for dismissal under Rule 41(b) differs from that for directed verdict under Rule 50(a). Trial court does not take evidence in the light most favorable to plaintiff, but simply considers and weighs all competent evidence before it. *See Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999) (stating test and reversing trial court for failing to make findings/conclusions required for appellate review).

   b. Court may dismiss the matter and enter findings even though plaintiff has made out prima facie case that would have precluded a directed verdict for defendant in a jury case. *In re Foreclosure of Deed of Trust*, 63 N.C. App. 744, 746, 306 S.E.2d 475, 476 (1983).

c. But better practice is to decline to enter Rule 41(b) dismissals except in the clearest of cases. *See, e.g., In re J.E.C.M.*, No. COA07-1424, 2008 N.C. App. LEXIS 394, at *11 (N.C. Ct. App. 2008)(unpublished) (quoting *Esteel Co. v. Goodman*, 82 N.C. App. 692, 695, 348 S.E.2d 153, 156 (1986)).

4. In all other cases, FOF/COL are necessary only when requested by a party, pursuant to N.C. R. Civ. P. 52, or where otherwise required by statute or case law.

a. *E.g., Agbemavor v. Keteku*, 177 N.C. App. 546, 629 S.E.2d 337 (2006) (reversing grant of summary judgment where trial court failed to make findings of fact regarding service of process and jurisdiction over defendant after defendant made a motion pursuant to N.C. R. Civ. P. 52(a)(2) requesting that the trial court make such findings).

However, even where requested under Rule 52, the court is not required to make findings of fact on interlocutory orders that are not appealable, such as a denial of a Rule 12(b)(6) motion. *O'Neill v. So. Nat'l Bank*, 40 N.C. App. 227 (1979). *See also* discussion of Summary Judgment orders below.

b. Absent specific request, trial court has discretion whether to make FOF. If court does not do so, appellate courts will presume that the trial court on proper evidence found facts to support its judgment. *Cail v. Cerwin*, 185 N.C. App. 176, 189, 648 S.E.2d 510, 519 (2007); *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987) (discovery sanctions).

B. **Timing of N.C. R. Civ. P. 52 request**

1. *J.M. Dev. Group v. Glover*, 151 N.C. App. 584, 586, 566 S.E.2d 128, 130 (2002) (request deemed timely if made before entry of written order).

C. **Preparation of Order**

1. Court may request proposed FOF/COL from counsel and may adopt those prepared by a party. *Johnson v. Johnson*, 67 N.C. App. 250, 257, 313 S.E. 2d 162, 166 (1984).

2. *But see Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d. Cir. 2004) (reversing trial court for adopting draft opinion submitted by prevailing party, stating, "That practice involves the failure of a trial judge to perform his judicial function" (quoting *Chicopee Mfg. Corp. v. Kendall Co.*, 288

F.2d 719, 725 (4th Cir. 1961))); s*ee also United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004) (vacating intermediate appellate court decision because opinion replicated substantial portions of the government's brief).

D. **Amendment of FOF/COL**

1. Rule 52(b) allows amendment upon motion made not later than 10 days after entry of judgment.
2. So long as motion is otherwise timely, trial court may amend judgment or order even though notice of appeal has been given. *York v. Taylor*, 79 N.C. App. 653, 654-55, 339 S.E.2d 830, 831 (1986).

III. SPECIFIC LEGAL ISSUES

CIVIL MOTIONS & TRIAL MATTERS

A. **TRO/Preliminary Injunction** (N.C.R. Civ. P. 52(a)(2) & N.C.R. Civ. P. 65)

1. Although order must state the reason(s) for granting relief, FOF/COL generally not required unless requested by a party or otherwise required by statute for the remedy being considered. *Pruitt v. Williams*, 25 N.C. App. 376, 378, 213 S.E.2d 369, 371 (1975).

2. Same analysis applies to motions seeking other provisional remedies (i.e., arrest and bail, attachment, claim and delivery, and receivership proceedings).

3. Effect of delay in entering Order on TRO/PI

   a. *See Hassell v. Hassell*, No. COA01-553, 2002 N.C. App. LEXIS 1911, at *5-6 (N.C. Ct. App. 2002)(unpublished) (trial court erred in holding defendant in civil contempt for failing to pay alimony where contempt finding was based on conduct preceding entry of order); *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780, (trial court erred in holding defendant in civil contempt for violating a preliminary injunction order where the contempt finding was based on conduct that occurred prior to filing of the order), *rev. denied*, 349 N.C. 361, 525 S.E.2d 453 (1998).

   b. *But see Hart Cotton Mills, Inc. v. Abrams,* 231 N.C. 431, 438, 57 S.E.2d 803, 807 (1950) (formal service of an preliminary injunction order is not required to hold party accountable for violating the same; all that is necessary is actual notice of the order's existence and contents).

B. **Consent Judgments**

FOF/COL not required even if requested by parties, as these are not judgments in the purest sense, but rather a summary of the parties' agreement. *Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E.2d 869, 875 (1999); *In re Estate of Peebles*, 118 N.C. App. 296, 300, 454 S.E.2d 854, 857 (1995).

C. **Rule 12(b)(6) Motions to Dismiss**

FOF/COL not required (even if requested)--trial court is deemed to have accepted as true the well-pleaded allegations of the non-moving party. *G & S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 490, 380 S.E.2d 792, 796 (1989).

D. **Motions for Judgment on the Pleadings** (N.C.R. Civ. P. 12(c))

Same rule applies. *United Va. Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 323, 339 S.E.2d 90, 95 (1986) (quoting *J.F. Wilkerson Contracting Co. v. Rowland*, 29 N.C. App. 722, 725, 225 S.E.2d 840, 842 (1976)).

E. **Motions for Summary Judgment** (N.C.R. Civ. P. 56(c))

1. Same rule applies, as summary judgment presupposes that there are no triable issues of material fact. *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 680, 401 S.E.2d 92, 95 (1991) (quoting *Garrison v. Blakeney*, 37 N.C. App. 73, 76, 246 S.E.2d 144, 146 (1978)).

2. While FOF in summary judgment orders generally are "disfavored," *see, e.g., Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 722, 338 S.E.2d 601, 604 (1986) (citing *Carroll v. Rountree*, 34 N.C. App. 167, 237 S.E.2d 566 (1977)), where there is no real issue of disputed fact, a factual summary is not error and may be helpful on appeal. *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 189, 594 S.E.2d 809, 813 (2004) (quoting *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 64-65 (2001)); *Capps v. City of Raleigh*, 35 N.C. App. 290, 292-93, 241 S.E.2d 527, 529 (1978).

F. **Motions for Relief from Judgment** (N.C.R. Civ. P. 60(b))

1. FOF/COL not required unless requested by a party, although it is better practice. *Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642 (2000) (quoting *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993)).

2. But if judge does not make formal FOF/COL, appellate court will determine whether evidence supports judge's conclusions. *Monaghan v. Schilling*, 677 S.E.2d 562, 564-65 (N.C. Ct. App. 2009).

G. **Motions to Compel Arbitration**

Trial court must make FOF/COL as to whether parties had valid arbitration agreement and whether dispute falls within agreement's substantive scope. *U.S. Trust Co., N.A. v. Stanford Group Co.*, 681 S.E.2d 512, 514 (N.C. Ct. App. 2009).

H. **Criminal & Civil Contempt** (N.C. Gen. Stat. §§ 5A-11, 14, 23(e))

1. Statute requires separate FOF/COL sufficient to justify order of contempt. *State v. Ford,* 164 N.C. App. 566, 596 S.E.2d 846 (2004); *Glesner v. Dembrosky*, 73 N.C. App. 594, 597, 327 S.E.2d 60, 62 (1985).

2. For criminal contempt, be sure that you find relevant facts supporting your order beyond a reasonable doubt or you will see the case again. *See State v. Brill*, No. COA07-1143, 2008 N.C. App. LEXIS 989, at *17 (N.C. Ct. App. 2008); *Ford,* 164 N.C. App. at 569-70, 596 S.E.2d at 849.

3. Exception: FOF/COL not required where there are no factual determinations for the court to make. *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999) (affirming contempt order where trial court failed to indicate the standard of proof applied in holding the witness in contempt for refusing the trial court's order to answer an attorney's question because "there was simply no factual determination for the trial court to make").

4. For civil contempt, order must be reduced to writing, entered as a judgment and adequate notice given before contempt is proper. *Carter v. Hill,* 186 N.C. App. 464, 466, 650 S.E.2d 843, 845 (2007).

I. **Rule 11 Sanctions**

1. FOF/COL required for appellate review. *Lowry v. Lowry*, 99 N.C. App. 246, 255, 393 S.E.2d 141, 146 (1990).

2. Failure to enter FOF/COL generally results in reversible error unless there is no evidence in the record, considered in the light most favorable to the movant, which could support an award of sanctions. *Lincoln v. Beuche*, 166 N.C. App. 150, 601 S.E.2d 237 (2004).

J. **Award of Attorney Fees**

Order must contain FOF and COL regarding entitlement to attorney fees, *Washington v. Horton*, 132 N.C. App. 347, 351 (1999) and the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381 (1993) (award of fees under Chapter 75); *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E.2d 168, 170 (1975) (award of fees under N.C. Gen. Stat. § 6-21.1 requires court to make some findings of fact supporting award).

K. **Sanctions for Non-attendance at Mediated Settlement Conference**

Order must contain findings explaining the Court's conclusion that the non-attendance was without good cause. *Perry v. GRP Financial Services Corp.,* 196 N.C. App. 41 (2009).

L. **Motion for JNOV on Jury Award of Punitive Damages**

NCGS 1D-15(a) does not require findings of fact, but the trial court "shall state in a 'written opinion' its reasons for upholding or disturbing the finding or award." The trial judge, in doing so, is not determining the truth or falsity of the evidence or weighing the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. *Scarborough v. Dillard's, Inc.*, 363 N.C. 715 (2009); *Hudgins v. Wagoner*, 694 S.E.2d 436 (N.C. App. 2010).

M. **Batson Issues (***see II(J) – Batson Issues, above under Criminal Law issues)*

APPEALS

A. **Appeals from the Clerk**

1. Where judge sits as an appellate court, FOF/COL not appropriate. Example: Petitions to reopen estate under N.C. Gen. Stat. Ch. 28. *See, e.g., In Re Estate of English*, 83 N.C. App. 359, 367, 350 S.E.2d 379, 384 (1986) (on appeal of Clerk's order denying petition to reopen estate, the superior court hearing should have been on the record only and not *de novo*, and the judge was confined to correcting errors of law).

2. But FOF/COL are required where statute requires trial court to hear the matter *de novo* (original jurisdiction). Examples:

   a. Competency determinations (N.C. Gen. Stat. Chapter 35A)

   b. Foreclosure appeals (N.C. Gen. Stat. Chapter 45).

B. **Agency Appeals**

(For further information on the topic of review of agency appeals by the trial court, see *Administrative Appeals* in the Superior Court Judges' Survival Guide.)

1. Rules of Civil Procedure (including Rule 52) generally do not apply to agency appeals under the APA (N.C. Gen. Stat. § 150B-1, *et. seq.*) or other statutory appeal mechanisms.

2. Whether an agency appeal requires FOF/COL depends upon two considerations:

    i. Whether the reviewing court finds that the finding of facts of the agency were not supported by substantial evidence (see 4, *infra*); or

    ii. Whether a specific statute requires a *de novo* hearing (original jurisdiction) of the agency's decision (see 5, *infra*).

3. The requirement of FOF/COL depends upon the statutory bases of the appeal. Many appeals are governed by the Administrative Procedures Act ("APA"). N.C. Gen. Stat. § 150B-51(a1) and (b) of the APA set out the permitted grounds that may be asserted on appeal.

    a. If the grounds for appeal brought under the APA are that the decision was **not supported by substantial evidence** (N.C. Gen. Stat. § 150B-51(b)(5)) or that it was **arbitrary, capricious or an abuse of discretion** (N.C. Gen. Stat. § 150B-51(b)(6)), the standard of review is the "whole record review." The whole record review requires the examination of all competent evidence to determine if the agency's decision is supported by substantial evidence." *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm*., 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Walker v. N.C. Dep't of Human Resources,* 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990). *See also, N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530 (2005). In such instances, except where the Court finds that the agency's findings were not supported by substantial evidence (see 4, *infra.),* **FOF are not appropriate, and the COL should simply be whether the decision was supported by substantial evidence and/or whether the decision was arbitrary, capricious or an abuse of discretion**. *Markham v. Swails*, 29 N.C. App. 205, 223 S.E.2d 920 (1976).

b. If the grounds for appeal under APA are that the decision was in **violation of constitutional provisions** (N.C. Gen. Stat. § 150B-51(b)(1)), in **excess of statutory authority or jurisdiction** (N.C. Gen. Stat. § 150B-51(b)(2)), made upon **unlawful procedure** (N.C. Gen. Stat. § 150B-51(b)(3)) or affected by **other error of law** (N.C. Gen. Stat. § 150B-51(b)(4)), the standard of review is *de novo.* However, even though the standard of review is *de novo*, the reviewing court is exercising only its appellate jurisdiction and not its original jurisdiction and therefore is not conducing a "*de novo* hearing" but is required to adopt the agency's findings of fact that are supported by substantial evidence and not make alternate findings. Thus, unless the Court finds that the agency's findings were not supported by substantial evidence (see 4, *infra.),* **FOF are not appropriate, but COL are.** *N.C. Forestry Ass'n v. N.C. Dep't of Env't and Natural Res.*, 162 N.C. App. 467, 475, 591 S.E.2d 549, 555 (2004); *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

4. If, under either the whole record review or *de novo* review described *supra* in (3)(a) and (b) the reviewing court finds that the **agency's FOF are not supported by substantial evidence**, then the reviewing **court should enter FOF on those findings that are at variance with the agency's**. *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530 (2005) citing *Scroggs v. N.C. Justice Standards Com.*, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991). However, this is not to be used as a "tool for judicial intrusion; the court is not permitted to replace the agency's judgment with its own even though a different conclusion might be rational." *N.C. Dep't of Crime Control, supra,* citing *Floyd v. N.C. Dep't of Commerce*, 99 N.C. App. 125, 129, 392 S.E.2d 660, 662 (1990).

5. In some instances, **statutes other than the APA govern the appeal** of agency decisions. Sometimes, those statutes require the trial court to "hear the matter *de novo,*" which invokes the trial court's original jurisdiction to hear the matter anew, and in such cases**, FOF and COL of the reviewing court are required.** See, e.g. N.C. Gen. Stat. § 20-25 (appeal of DMV suspension of driver's license). *See Joyner v. Garrett*, 279 N.C. 226, 232, 182 S.E.2d 553, 558 (1971).

However, where a statute other than the APA provides for judicial review of an administrative action, but does not specify that the trial court is to "hear the matter *de novo*" or words to that effect, the review is presumed to be limited to the trial court's appellate jurisdiction and FOF would not be appropriate. See e.g.:

a. Employment Security Commission Appeals (governed by N.C. Gen. Stat. § 96-15): FOF by Commission deemed conclusive if there is any competent evidence to support them; court's review is confined to questions of law.

b. Zoning Board Appeals *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 54-55, 344 S.E.2d 272, 274 (1986) (quoting *In re Campsites Unltd.*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975)) (trial court may only determine whether FOF are supported by competent evidence).

West's North Carolina General Statutes Annotated
Chapter 1A. Rules of Civil Procedure (Refs & Annos)
Article 6. Trials

Rules Civ.Proc., G.S. § 1A-1, Rule 52

Rule 52. Findings by the court

Currentness

(a) Findings.--

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(b) Amendment.--Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

(c) Review on appeal.--When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings.

Credits
Added by Laws 1967, c. 954, § 1. Amended by Laws 1969, c. 895, § 12.

Editors' Notes

COMMENT

Comment to this Rule as Originally Enacted.--This rule largely follows prior law, incorporating little of the federal rule. Former § 1-185 called for written findings and conclusions of law "upon trial of an issue of fact by the court." In respect to motions and provisional remedies, the Commission has been guided by the North Carolina case law. See Millhiser v. Balsley, 106 N.C. 433, 11 S.E. 314 (1890); Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896). The reference to Rule 41(b) has to

do with the situation when the trial judge is dismissing an action at the close of the plaintiff's evidence with the determination that the dismissal shall be on the merits. In this situation, both Rules 41 and 52 contemplate that the judge shall make written findings and conclusions.

Comment to the 1969 amendment.--(a) The amendment to Rule 52(a) and the addition of subsections (1) and (2) to section (a) merely assign numbers to the paragraphs. The other change is a matter of grammar.

The amendment added subsection (3) which is new. It provides that when findings are necessary by the court, it is sufficient if the findings of fact and conclusions of law appear in the decision or memorandum. The main purpose here is to make it clear that no particular form is required, and it is sufficient if the findings of fact and conclusions of law are distinguishable.

Notes of Decisions (533)

Rules Civ. Proc., G.S. § 1A-1, Rule 52, NC ST RCP § 1A-1, Rule 52
The statutes and Constitution are current through S.L. 2021-147, of the 2021 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

End of Document

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Edited version of handout prepared by Special Superior Court Judge Albert Diaz for orientation for new superior court judges in Jan. 2009

I. INTRODUCTION

PURPOSE OF FINDINGS OF FACT (FOF) & CONCLUSIONS OF LAW (COL)

A. Not designed to encourage "ritualistic recitations" (i.e., harass the trial judge) but instead to:

1. Dispose of issues raised by the pleadings;

2. Make definite what was decided for purposes of res judicata and estoppel;

3. Evoke care on the part of the trial judge in ascertaining the facts; and

4. Allow for meaningful appellate review.

Greensboro Masonic Temple v. McMillan, 142 N.C. App. 379, 382 (2001); *Hill v. Lassiter*, 135 N.C. App. 515 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560 (1991).

GENERAL PRINCIPLES

A. If you are evaluating evidence, or the matter involves an appeal that grants trial judge *de novo* review power, be alert to the need for FOF/COL. In some instances, they will be required (as discussed below), in others not, except on request of a party.

B. If the matter requires you to accept one party's version of the facts as true, or puts you in the role of a traditional appellate court, then FOF/COL normally are not appropriate.

WHAT IS REQUIRED?

Judge must:

A. Find facts on all issues joined in the pleadings;

B. Declare conclusions of law arising from the facts; and

C. Enter judgment accordingly.

Hilliard v. Hilliard; 146 N.C. App. 709, 710-11 (2001); *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350 (1985).

II. WHEN ARE FOF/COL REQUIRED OR APPROPRIATE?

CRIMINAL CASES

A. Motions to suppress evidence (G.S. 15A-977(f)).

B. Proceedings regarding capacity (G.S. 15A-1001-09).

C. Mistrials (G.S. 15A-1064).

D. Motions for Appropriate Relief (G.S. 15A-1420).

FOF required when the court holds an evidentiary hearing to resolve disputed issues of fact. COL required when motion is based on an asserted violation of the defendant's rights under the US Constitution or other federal law.

CIVIL CASES

A. N.C.R. Civ. P. 52 sets out the general standard:

1. Under Rule 52(a)(1), FOF/COL are required in all actions tried upon the facts without a jury.

2. FOF/COL must be entered in bench trials, even absent a request by the parties. Failure to enter proper order will generally result in remand, unless facts are undisputed and lead to only one inference. *Lineberger v. N.C. Dept. of Corr.*, 189 N.C. App. 1, 16 (2008); *Cumberland Homes, Inc., v. Carolina Lakes Prop. Owner's Ass'n*, *Inc.,* 158 N.C. App. 518, 520-21 (2003) (declaratory judgment action).

3. Dismissal under N.C.R. Civ. P. 41(b) also requires entry of findings and conclusions when the court hears the case without a jury and dismisses the matter on the merits at the close of the plaintiff's evidence.

   a. Test for dismissal under Rule 41(b) differs from that of directed verdict under Rule 50(a). Trial court does not take evidence in light most favorable to plaintiff but simply considers and weighs all competent evidence before it. *See Hill v. Lassiter*, 135 N.C. App. 515 (1999) (stating test and reversing trial court for failing to make findings/conclusions required for appellate review).

   b. Court may dismiss the matter and enter findings even though plaintiff has made out prima facie case that would have precluded directed verdict for defendant in a jury case. *In re Foreclosure of Deed of Trust*, 63 N.C. App. 744 (1983).

   c. But better practice is to decline to enter Rule 41(b) dismissals "except in the clearest of cases." *See, e.g., In re J.E.C.M.*, 189 N.C. App. 209 (2008) (unpublished) (quoting *Esteel Co. v. Goodman*, 82 N.C. App. 692, 695 (1986)).

4. In all other cases, FOF/COL are necessary only when requested by a party, or where otherwise required by statute or case law.

   a. *E.g., Agbemavor v. Keteku*, 177 N.C. App. 546 (2006) (reversing grant of summary judgment where trial court failed to make findings of fact regarding service of process and jurisdiction over defendant after defendant moved pursuant to Rule 52(a)(2) that the trial court make such findings).

   b. Absent specific request, trial court has discretion whether to make FOF/COL. If trial court does not do so, appellate courts will presume that trial judge, on proper evidence, found facts to support the judgment. *Cail v. Cerwin*, 185 N.C. App. 176, 188 (2007); *Watkins v. Hellings*, 321 N.C. 78 (1987) (discovery sanctions).

B. Timing of request

   1. *J.M. Dev. Group v. Glover*, 151 N.C. App. 584 (2002) (request deemed timely if made before entry of written order).

C. Preparation of Order

   1. Court may request proposed FOF/COL from counsel and may adopt those prepared by a party. *Johnson v. Johnson*, 67 N.C. App. 250 (1984).

   2. *But see Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d. Cir. 2004) (reversing trial court for adopting draft opinion submitted by prevailing party, stating that this "practice involves the failure of a trial judge to perform his judicial function"); s*ee also United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004) (vacating 16 intermediate appellate court decisions because opinions replicated substantial portions of the government's brief).

D. Amendment of FOF/COL

   1. Rule 52(b) allows amendment upon motion made not later than 10 days after entry of judgment.

   2. So long as the motion is otherwise timely, the trial court may amend judgment or order even though notice of appeal has been given. *York v. Taylor*, 79 N.C. App. 653 (1986).

III. SPECIFIC LEGAL ISSUES

TRIAL MATTERS

A. TRO/Preliminary Injunction (Rule 52(a)(2) and Rule 65)

1. Although order must state reason for granting relief, FOF/COL are generally not required unless requested by party or otherwise required by statute. *Pruitt v. Williams*, 25 N.C. App. 376 (1975).

2. Same analysis applies to motions seeking other provisional remedies (i.e., arrest and bail, attachment, claim and delivery, and receivership proceedings).

3. Effect of delay in entering order

   a. *See Hassell v. Hassell*, 149 N.C. App. 972 (2002) (unpublished); *Onslow County v. Moore*, 129 N.C. App. 376 (1998) (trial court erred in holding defendant in contempt for violating a preliminary injunction order where the contempt finding was based on conduct that occurred prior to filing of the order).

   b. *But see Hart Cotton Mills, Inc. v. Abrams,* 231 N.C. 431 (1950) (formal service of an preliminary injunction order is not required to hold party accountable for violating the same; all that is necessary is actual notice of the order's existence and contents).

B. Consent Judgments

1. Not required even if requested by parties, as these are not judgments in purest sense, but rather a summary of the parties' agreement. *Buckingham v. Buckingham*, 134 N.C. App. 82, 89 (1999); *In re Estate of Peebles*, 118 N.C. App. 296 (1995).

C. Rule 12(b)(6) Motions to Dismiss

1. Not required (even if requested) — trial court is deemed to have accepted as true the well-pleaded allegations of non-moving party. *G & S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483 (1989).

D. Motions for Judgment on the Pleadings (N.C.R. Civ. P. 12(c))

1. Same rule applies. *United Va. Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 323 (1986) (quoting *J.F. Wilkerson Contracting Co., Inc. v. Rowland*, 29 N.C. App. 722 (1976)).

E. Motions for Summary Judgment (N.C.R. Civ. P. 56(c))

1. Same rule applies, as summary judgment presupposes that there are no triable issues of material fact. *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 680 (1991) (quoting *Garrison v. Blakeney*, 37 N.C. App. 73 (1978)).

2. While FOF/COL in summary judgment orders generally are considered "ill advised", *see, e.g., Amoco Oil Co. v. Griffin*, 78 N.C. App. 716 (1986), where there is no real issue of disputed fact a factual summary is not

error and may be helpful on appeal. *Wiley v. United Parcel Serv. Inc.*, 164 N.C. App. 183 (2004); *Capps v. City of Raleigh*, 35 N.C. App. 290 (1978).

F. Motions for Relief from Judgment (Rule 60(b))

1. Not required, but might be better practice. *Condellone v. Condellone*, 137 N.C. App. 547 (2000).

G. Criminal and Civil Contempt (G.S. 5A-11, -14, -23(e))

1. Statute requires separate findings of fact sufficient to justify order of contempt. *State v. Ford,* 164 N.C. App. 566 (2004); *Glesner v. Dembrosky*, 73 N.C. App. 594 (1985).

2. For criminal contempt, be sure that you find relevant facts supporting your order beyond a reasonable doubt or you will see the case again. *State v. Brill*, 190 N.C. App. 674 (2008) (unpublished); *Ford,* 164 N.C. App. at 568-70.

3. Exception: Court need not apply standard where there are no factual determinations for the court to make. *In re Owens*, 128 N.C. App. 577, 581 (1998) (affirming contempt order where trial court failed to indicate the standard of proof applied in holding the witness in contempt for refusing the trial court's order to answer an attorney's question because "there was simply no factual determination for the trial court to make").

H. Rule 11 Sanctions

1. FOF/COL required for appellate review. *Lowry v. Lowry*, 99 N.C. App. 246 (1990). Failure to enter FOF/COL generally results in reversible error unless there is no evidence in the record, considered in the light most favorable to the movant, which could support an award of sanctions. *Lincoln v. Beuche*, 166 N.C. App. 150 (2004).

I. Award of Attorneys Fees

1. Order must contain findings regarding "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 195 (1993) (award of fees under Chapter 75); *Hill v. Jones*, 26 N.C. App. 168 (1975) (award of fees under G.S. 6-21.1 requires court to make some findings of fact supporting award).

APPEALS

A. Appeals from the Clerk

1. Where judge sits as an appellate court, FOF/COL not appropriate.

Example: Petitions to reopen estate under G.S. Chap. 28. *See, e.g., In Re Estate of English*, 83 N.C. App. 359 (1986) (on appeal of clerk's order

denying petition to reopen estate, the superior court hearing should have been on the record only and not *de novo*, and the judge was confined to correcting errors of law).

2. But FOF/COL required for *de novo* proceedings.

   Example: Competency determinations (G.S. Chapter 35A)

B. Agency Appeals

1. Rules of Civil Procedure (including Rule 52) generally do not apply to agency appeals under the Administrative Procedure Act (G.S. Chapter 150B) or other statutory appeal mechanisms. When the judge sits as a true appellate court and applies the "whole record" review, the judge generally may not find facts (instead, test is whether there is "substantial evidence" to support FOF), and trial court's review of conclusions of law is limited to statutory criteria. *Markham v. Swails*, 29 N.C. App. 205 (1976).
2. But where petitioner alleges that final agency decision is affected by error of law, judge's review is *de novo* as to COL. *N.C. Forestry Ass'n v. N.C. Dep't of Env't and Natural Res.*, 162 N.C. App. 467, 475, *overruled on other grounds by N.C. Dep't of Env't and Natural Res. v. Carroll,* 358 N.C. 649 (2004). However when conducting the *de novo* review, a judge is required to adopt the administrative agency's findings of fact that were supported by substantial evidence, rather than make alternate findings of fact. *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649 (2004).

3. Other examples:

   a. Employment Security Commission appeals (governed by G.S. 96-15): FOF by commission deemed conclusive if there is any competent evidence to support them; court's review is confined to questions of law.

   b. Zoning board appeals (G.S. 153A-345(e)): *Godfrey v. Zoning Bd. Of Adjustment*, 317 N.C. 51 (1986) (trial court may only determine whether FOF are supported by competent evidence).

   c. But where reviewing court determines that FOF in APA appeal are not supported by competent or substantial evidence, court may enter findings at variance with those of agency. *N.C. Dep't of Crime Control and Pub. Safety v. Greene*, 172 N.C. App. 530, 534 (2005); *Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 101 N.C. App. 699, 702 (1991).

4. Where statute grants judge *de novo* review of agency decision, court must enter FOF/COL.

   Examples:

a. G.S. 150B-51(c): When agency does not adopt administrative law judge's recommended decision, the trial judge has *de novo* review and must make FOF/COL. *See, e.g., Donoghue v. N.C. Dep't of Corr.*, 166 N.C. App. 612 (2004).

b. G.S. 20-25 (appeal of DMV suspension of driver's license). *See Joyner v. Garrett*, 279 N.C. 226 (1971).

United States Code Annotated
Constitution of the United States
Annotated
Article IV. States--Reciprocal Relationship Between States and with United States

U.S.C.A. Const. Art. IV § 1

Section 1. Full Faith and Credit

Currentness

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Notes of Decisions (632)

U.S.C.A. Const. Art. IV § 1, USCA CONST Art. IV § 1
Current through P.L. 117-80.

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