NO. _____

IN THE UNITED STATES SUPREME COURT

TIMOTHY B. BROWN,

Petitioner

v.

U.S. BANK NATIONAL ASSOC., AS TRUSTEE, MASTR ASSET BACKED SECURITIES TRUST 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AB1, AND WELLS FARGO BANK, N.A.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITIONER'S APPENDIX

Timothy B. Brown
165 Monticello Way
Fayetteville, GA 30214
770-827-6458
brownte nmobgyn.~~onmicrosoft~~.com
Petitioner Sui Juris

Timothy B. Brown
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770-827-6458
PLAINTIFF Pro Per/Sui Juris

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

TIMOTHY B. BROWN,

Plaintiff

vs.

U.S. BANK NATIONAL ASSOC., AS TRUSTEE, MASTR ASSET BACKED SECURITIES TRUST 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AB1, AND WELLS FARGO BANK, N.A.,

Defendants

CASE NUMBER: 3:19-CV-0001

COMPLAINT FOR WRONGFUL FORECLOSURE, NEGLIGENCE, CONVERSION, FRAUD, AND REQUEST FOR INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Timothy B. Brown, hereinafter referred to as "Plaintiff," and moves the court for relief as herein requested:

I. INTRODUCTION

1. This lawsuit involves claims of violations of Federal and the State of Georgia laws governing mortgages, financing, and debt collection; wrongful foreclosure; negligence,

Conversion, fraud, and an application for injunctive relief. The claims arise out of a mortgage contract entered into between Plaintiff and Defendant U.S. Bank, N.A. for the financing of the purchase of real property located in Fayetteville, Fayette County, Georgia, which property was foreclosed against by Defendant U.S. Bank, who allegedly was appointed by Defendant Wells Fargo to service the loan of Plaintiff.

2. Losing one's home through a foreclosure is one of the most disruptive events that one could experience.
3. Recognizing this; Congress set aside $50 billion in stimulus funding for the Home Affordable Modification

Program ("HAMP"). Created in the wake of the mortgage crisis, HAMP was designed to keep people in their homes, providing a measure of stability to homeowners facing unemployment in harsh economic conditions.

4. Wells Fargo accepted up to $6.4 billion in HAMP funding, but failed to fulfill its obligations and duties to

its customers, such as Plaintiff, under HAMP's loan modification program.

5. Rather than use software developed by Fannie Mae to calculate a borrower's eligibility for HAMP, Wells

Fargo developed its own Proprietary tool. Wells Fargo now admits that this tool caused systematic miscalculations that led to Wells Fargo wrongfully denying loan modifications to over 870 borrowers who qualified for a loan modification under HAMP. Of those, Wells Fargo admits it foreclosed on 545 borrowers when it should have instead offered them a loan modification. Of course, the numbers are much higher than Wells Fargo admits.

6. Loan modifications often substantially reduce borrowers' monthly payments.

7. Plaintiff Timothy B. Brown is the exact type of person whom HAMP was supposed to help. Prior to 2005,

he was working full time and bought a house in Fayetteville, Fayette County, Georgia.

8. When the recession hit, however, he suffered a salary reduction and needed the help that HAMP was

supposed to provide.

9. Rather than extend a HAMP modification, Wells Fargo miscalculated and initiated foreclosure

proceedings. As a result of this wrongful conduct, Plaintiff Timothy B. Brown lost his house despite the over $6 Billion Dollars Wells Fargo was paid to save the homes of homeowners such as Plaintiff Timothy B. Brown.

10. Defendant Wells Fargo has a reputation for fraudulent and deceptive conduct including the forging of documents as well as committing other acts of fraud in the filing of documents in the property records of various states. See "Forensic Examination of the Real Property Records and the Circuit Court Records Osceola County, Florida," a study conducted July 14, 2014 to December 20, 2014 by DK Consultants, LLC (https://www.osceolaclerk.com/Content/UploadedContent/Examination/OC_Forensic_Examination.pdf)

I ask the Court to take judicial notice of this document prepared at the request of Armando Ramirez, Clerk of the Circuit Court of Osceola County, Florida. See especially pages 312-326 which highlight the fraudulent activity of Defendant Wells Fargo in the recording of documents in the property records. Among those abuses are:

A. The drafting of a 150-page "Foreclosure Attorney Manual" which includes detailed instructions on "HOW TO manufacture assignments … for the purpose of foreclosing on real property" at 312;

B. Defendant Wells Fargo has used robo-signing and quotas assigned to employees which have given rise to a systemic culture of fraud, oppression and abuse in the bank's mortgage foreclosure procedures at 318;

C. The report cites an article entitled "Wells Fargo Insiders Detail Foreclosure Fraud Practices" (https://thinkprogress.org/wells-fargo-insiders-detail-foreclosure-fraud-practices-its-exactly-like-an-assembly-line-88a5d9916911) which includes information that Defendant Wells Fargo has paid out over $25 billion dollars in settlements to various governments for "improper foreclosures";

D. Defendant Wells Fargo's use of e-signatures on assignments and other documents raises issues of fraud and improper practices in that the notary section does not specify whether the person "appeared" in person or via electronic signature and there is no way of insuring that the electronic signature is being provided by the person of that name who has authority to sign the document, at 319;

E. The report cited numerous instances of notaries of one state attesting to the signature of a Wells Fargo employee in another state, at 317-321.

11. The above are just a few of the fraudulent acts committed by Defendant Wells Fargo in the recording of documents in the property records of various states and in its foreclosure procedures. No doubt, a forensic examination of the exhibits provided by Defendant Wells Fargo in the instant case will reveal a consistent and pervasive system of fraud and abuses in the foreclosure procedures of Defendant Wells Fargo which raises a material issue of facts regarding the authenticity and veracity of the documents Wells Fargo will file with the Court.

12. Further, the Court ought not to surmise that Defendant Wells Fargo has mended its fraudulent ways since 2014. The bank recently paid out over $185 million dollars to settle government complaints that the bank had engaged in systemic fraud and abuse by creating millions of fake accounts in its checking, savings, and credit card divisions (http://www.latimes.com/business/la-fi-wells-lawsuits-20160909-snap-story.html).

13. Wells Fargo has historically been the nation's largest mortgage lender. That lasted until a string of scandals stemming from Wells Fargo's misdeeds started coming to light in 2017.[1] According to Wells Fargo's latest quarterly filing with the Securities & Exchange

[1] 1 Samantha Sharf, Quicken Loans Overtakes Wells Fargo As America's Largest Mortgage Lender, FORBES (Feb. 5, 2018). (https//tinyurl.com/largest-lender)

Commission (SEC), the bank holds $284 billion in mortgage debt, and another $36 billion on second-mortgages.[2]

14. At the end of 2016, federal regulators revealed that Wells Fargo's employees had "secretly created millions of unauthorized bank and credit card accounts without their customers knowing it."[3]

15. In July 2017, the New York Times revealed that Wells Fargo had charged more than 800,000 borrowers for "force-placed" car insurance that they did not want or need.[4] The bank was only allowed to charge for "force-placed" insurance if the car-loan customer did not have their own auto insurance, but these customers did have their own insurance.[5] The New York Times reported that 25,000 Wells Fargo borrowers had their vehicles wrongfully repossessed as a result of Wells Fargo adding these additional premium amounts for the force-placed insurance to costumers' monthly loan statements.[6]

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[2] **Wells Fargo & Company,** form 10-Q for quarter Ending Sept. 30, 2018, **SECURITIES & EXCHANGE COMMISSION (Oct. 24, 2018), https://tinyurl.com/ybazt2wl.**

[3] **Jackie Wattles et al.,** Wells Fargo's 20-month nightmare, **CNN (April 24, 2018), https://tinyurl.com/cnn-20-mo-nightmare.**

[4] **Gretchen Morgenson, Wells Fargo forced Unwanted Auto Insurance on Borrowers, NEW YORK TIMES (July 27, 2017), https://tinyurl.com/y8p5c4sd.**

[5] Id.

[6] Id.

16. In April 2018, federal regulators settled an enforcement action with Wells Fargo for $1 billion related to its force-placement of unneeded auto insurance, on top of the $1.5 billion that Wells Fargo already faced in penalties from the Department of Justice and states regulators for the opening of fraudulent accounts.[7]

17. And now, Wells Fargo has caused certain customers to lose their homes and suffer financial, physical, and emotional hardships. In August 2018, Wells Fargo admitted that a "software error" had caused it to deny mortgage modifications to at least 625 borrowers (though the actual number is quite higher) who actually qualified for and were entitled to a mortgage modification under federal law.[8] This admission was based on information it knew in 2015 and 2016 but chose not to disclose for nearly three years.

18. In November 2018, Wells Fargo announced that it had understated the number of affected borrowers and that it was actually 40% more; now Wells Fargo claims a total of 874 were wrongfully denied loan modifications

[7] **Matthew Goldstein,** Wells Fargo Pays $1 billion to federal Regulators, **NEW YORK TIMES (Apr. 20, 2018), https://tinyurl.com/wf-reg-fines.**

[8] **Ben Lane,** Wells Fargo reveals software error wrongly denied much-needed mortgage modifications, **HOUSING WIRE (Aug. 3, 2018), https://tinyurl.com/y8j9ljvg.**

by the software error.[9] These borrowers should have received a loan modification under the federal Home Affordable Modification Program (HAMP), but were incorrectly denied.[10]

19. In the end, at least 545 mortgage borrowers lost their homes through foreclosures because of Wells Fargo's software error.[11]

II. Parties

20. Timothy B. Brown (hereinafter "Plaintiff") is an individual residing in the State of Georgia, City of Fayetteville, and County of Fayette.

21. U.S. Bank National Association (hereinafter "Defendant U.S. Bank"), as Trustee, MASTR Asset Backed Securities Trust 2006 AB1, Mortgage Pass-Through Certificates Series 2006-AB1 is a national banking association organized and existing under the laws of the United States and without a registered agent in the State of Georgia. Defendant U.S. Bank is a wholly owned subsidiary of U.S. Bancorp, a bank holding company. Defendant U.S. Bank may be served with process by serving its Registered Agent: CT Corporation System, 350 North St. Paul St., Dallas, Texas 75201.

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[9] **Ben Lane,** Wells Fargo reveals software error led to hundreds of faulty foreclosures, **HOUSING WIRE (Nov. 6, 2018), https://tinyurl.com/y94ezdje.**

[10] Id.

[11] Id.

22. Wells Fargo Bank, N.A. (hereinafter referred to as "Defendant Wells Fargo") is a national banking corporation with its principal place of business in Sioux Falls, SD and can be served with process by serving its registered agent: Corporation Service Company at its registered office 40 Technology Parkway South, Suite 300, Ben Hill, Northcross, GA 30092.

III. JURISDICTION AND VENUE

23. This Court has jurisdiction over this controversy pursuant to 12 USC §2605(f) and 12 C.F.R. §1024.41(a). The Court also has jurisdiction pursuant to 28 U.S.C. §1332, since the parties are citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs.

24. This Court has personal jurisdiction over all of the defendants, who have repeated contacts and transact substantial business in this District, including the actions which form the basis for this Complaint.

25. This court also has supplemental jurisdiction over all other claims that are so related to claims in this action, including State law claims, that they form part of the same case or controversy under Article III of the United States Constitution, pursuant to 28 U.S.C. § 1367.

26. Venue is appropriate in this District pursuant to 28 U.S.C. §1391(a) and (c) and in this Division pursuant to Federal Rules of Civil Procedure, Local Rules for the Northern District of Georgia LR 3.1.

IV. FACTUAL BACKGROUND

27. Plaintiff incorporates by reference the facts set forth in "I. Introduction" above the same as if fully copied and set forth again here.

28. "In response to rapidly deteriorating financial market conditions in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act. The centerpiece of the Act was the Troubled Asset Relief Program (TARP), which required the Secretary of the Treasury to "implement a plan" to "minimize foreclosures" and keep troubled mortgage -borrowers in their homes.[12]

29. The Treasury Secretary created the HAMP program to carry out Congress's mandate. HAMP received $50 billion in TARP funds.[13] Mortgage lenders that chose to participate in the HAMP program were eligible to receive allocations of the stimulus funds.

30. Defendant Wells Fargo chose to participate in HAMP.

[12] Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556 (7th Cir. 2012).
[13] Id.

31. To participate, Defendant Wells Fargo was required to comply with all HAMP program requirements. In exchange for up to $6.4 billion in HAMP funds, Wells Fargo agreed to abide by all "guidelines and procedures issued by the Treasury with respect to [HAMP]" and "any supplemental documentation ...issued by the Treasury," including "Supplemental Directives." See Wells Fargo, Amended and Restated Servicer Participation Agreement, Sec. 1(B).[14]

32. In a Supplemental Directive, the Treasury Secretary required loan-servicers participating in HAMP to issue a mortgage modification to any borrower who met all the criteria to qualify. See Supplemental Directive 09-01 (If a borrower meets all qualifying criteria, "the servicer MUST offer the modification") (emphasis in original).

33. Defendant U.S. Bank accepted more than $20 Billion Dollars in HAMP funds, However, a Federal Judge in Georgia lambasted Defendant U.S. Bank for denying otherwise eligible mortgagors loan modifications.[15] Defendant U.S. Bank agreed to the same terms and conditions for receiving HAMP funds as did Defendant Wells Fargo.

[14] Available at **https://tinyurl.com/wells-fargo-hamp-agreement**.

[15] "Judge Rips Into U.S. Bank For Taking Bailout Money But Denying Mortgage Modifications," (https://consumerist.com/2011/11/16/judge-rips-into-us-bank-for-taking-bailout-money-but-denying-mortgage-modifications/).

34. On or about September 16, 2005, Plaintiff purchased the real property located at 165 Monticello Way, Fayetteville, Fayette County,Georgia, (hereinafter "Subject Property") described legally as:

All that tract or parcel of land lying and being in Land Lot 197 of the 13th District of Fayette County, Georgia, and being Lot 14, Block C, Unit 1 of the Dix-Lee'On Corporation Subdivision, as per plat recorded in Plat Book 6, Page 115, Fayette County, Records, and being more particularly described as follows:

Beginning at a point located on the southwesterly side of Monticello Way, 900 feet Southeasterly as measured along the Southwesterly side of Monticello Way, from the intersection of the Southwesterly side of Monticello Way and the Southerly side of the Dix-Lee'On Drive, said point of beginning also being located at the Southeast corner of Lot 13 of said Block, Unit and Subdivision; thence running Southeasterly along the Southwesterly side of Monticello Way, 100 feet to a point at the Northeast corner of Lot 15 of said Block, Unit, Subdivision; thence running Southwesterly along the Northwesterly side of said Lot 15, 249 .4 feet to a point; thence running Northwesterly 180 feet to a point at the Southwest corner of Lot 13 of said Block, Unit and Subdivision; thence

running Northeasterly along the Southeasterly side of said Lot 13, 249.8 feet to the Point of Beginning.

A copy of the Plat of the Subject Property is attached to this pleading as **Exhibit A** and is incorporated into this pleading by reference for all purposes.

35. On that same date, Plaintiff borrowed $389,500.00 from Defendant Wells Fargo to finance said purchase and in conjunction with such loan, he executed a Security Deed and Note with Defendant Wells Fargo in the principle amount of $389,500.00 by which Defendant Wells Fargo became Plaintiff's mortgagee. A true and correct copy of Plaintiff's Security Deed is attached to this pleading as **Exhibit B** and this document is incorporated into this pleading by reference. On April 21, 2015, Defendant Wells Fargo assigned the Security Deed, but not the Note, to Defendant U.S. Bank. Defendant U.S. Bank became the servicer of the Security Deed and thus remained liable for the terms and conditions and duties of the Security Deed.

36. The original lender, Defendant Wells Fargo, without notice to Plaintiff and without his consent, monetized Plaintiff's Note. This promissory note became the same as a cashier's check or cash and it was entered in the accounting records of Defendant Wells Fargo as an asset. The Note was neither endorsed nor assigned.

37. The effect of the monetizing of Plaintiff's Promissory Note was that it paid for the purchase of the Subject Property.

38. That Plaintiff's Note was paid in full can be seen also in the Security Deed which he signed on September 16, 2005.

Under the Section styled "Transfer of Rights in the Property," appears the following: "Borrower irrevocably grants and conveys to Trustee, in trust, ..." and then the document gives the legal description of the Subject Property. The Security Deed goes on to provide that "BORROWER COVENANTS that borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered ..." How could Plaintiff convey the property to the Trustee except he owned the Subject Property free and clear of any debt? Clearly, the Security Deed shows that Plaintiff's Promissory Note paid off the mortgage debt on the Subject Property.

39. Defendant Wells Fargo committed fraud when it had Plaintiff to sign the Security Deed knowing that his debt had

been paid in full on the Subject Property. Additionally, Defendant U.S. Bank committed fraud when it represented that it had standing to foreclose against the Subject Property and it committed further fraud when it engaged in a wrongful and void foreclosure sale.

40. Plaintiff did not discover the fraud committed by Defendant Wells Fargo until recently when he was researching

Matters regarding his Complaint and ran across a video on the Internet by a member of the Federal Reserve System who explained the concept of the Promissory Note and how it pays the mortgage debt in full. Needless to write, Plaintiff was shocked and amazed when he read his Security Deed and discovered that he was a victim of fraudulent misconduct by Defendant Wells Fargo.

41. Plaintiff has made numerous demands upon Defendant Wells Fargo and Defendant U.S. Bank to verify any debt

they claim he owes on the Subject Property and despite these numerous requests to Defendant Wells Fargo and Defendant U.S. Bank and their attorneys and agents, Defendants and their attorneys and agents have failed and refused to provide Plaintiff with the information he requested and needed to determine the status of his mortgage and to whom he needed to make payments and when and where. These demands were made both before he discovered that his mortgage debt was paid in full and after such discovery.

42. In early 2016, as the result of a worsening economy, Plaintiff notified Defendant U.S. Bank and Defendant Wells

Fargo that he had suffered a reduction in salary and he wished to apply for a loan modification under HAMP so that he could keep making his mortgage payments.

At the time he made these requests, Plaintiff was not behind in his mortgage and was not aware that his mortgage loan had been paid in full.

43. The Defendants responded by telling Plaintiff he was ineligible to apply for a loan modification until his mortgage debt was at least 30 days past due. Plaintiff relied in good faith on the representations of Defendants and allowed his mortgage to fall into arrears.

44. Once his mortgage debt was at least 30 days past due, Plaintiff reapplied for a loan modification. This time, Plaintiff's application was accepted and Plaintiff submitted all of the required documents including proof of his salary reduction and the fact that he now had two children going off to college.

45. After he submitted his loan modification request, Plaintiff received from Defendant Wells Fargo a Notice of Foreclosure Sale scheduled for 90 days after the submission of his loan modification request. Thereafter, Plaintiff had a face-to-face meeting with Defendant Wells Fargo at which he was led to believe that his loan modification would be approved. As a result of this assurance, Plaintiff took no further efforts to avail himself of any of his other alternatives to foreclosure.

46. At the time he applied for a loan modification pursuant to HAMP, Plaintiff was eligible for a loan modification

given that he had suffered two financial setbacks and he had sufficient income to pay 31% of his income in mortgage payments. Thus, it was with great distress and agony that Plaintiff received notice on the 85th day after his application that his request for a loan modification had been denied.

47. Sometime in September 2016, on the 91st day after his application for HAMP relief, Plaintiff received a Notice of Foreclosure Sale dated August 30, 2016 from the law firm of McCalla Raymer Pierce, LLC. The letter was not signed and it was not clear which, if any, of the defendants the law firm was representing. The letter stated that the Subject Property would be foreclosed against on the first Tuesday in October 2016.

48. On December 2, 2016, Plaintiff filed a Chapter 13 Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division which was assigned Case Number 16-12409-WHD. A true and correct copy of the Bankruptcy Docket Sheet is attached hereto as **Exhibit C** and this Exhibit is incorporated into this Complaint by reference for all purposes.

49. Defendant Wells Fargo and Defendant U.S. Bank were given due notice of Plaintiff's bankruptcy filing.

50. In early January 2017, Plaintiff received a letter from Premiere Asset Services which advised me that the Subject

Property had undergone a change of ownership. The letter did not say who the new owner is but stated that Defendant Wells Fargo was now the "Servicer" of the alleged mortgage debt.

51. Upon further research, Plaintiff discovered that a foreclosure sale of the Subject Property is alleged to have taken place on December 6, 2016 at which Defendant U.S. Bank purchased the Subject Property for $247,050.00

52. If a foreclosure sale took place on the Subject Property on December 6, 2016, said sale is in violation of the Automatic Stay which was then in effect.

53. If a foreclosure sale took place in December 6, 2016, then said sale took place without providing me the notices and remedies to which I am entitled under the Note, the Security Deed, and Georgia law.

54. If a foreclosure sale took place on December 6, 2016, then said sale is wrongful because there is no mortgage debt outstanding against the Subject Property, the sale is in violation of the Automatic Stay afforded to those who file bankruptcy, and the sale violated the Note, the Security Deed and Georgia law.

55. As a result of Defendants' misconduct, Plaintiff has suffered severe emotional and mental anguish and distress which exceeds the minimal jurisdictional limits of the Court and for which Plaintiff hereby sues.

56. The conduct of Defendant U.S. Bank in pursuing a wrongful foreclosure is wanton, with malice, reckless, and in total disregard to Plaintiff's rights to such a degree that the Court should assess punitive damages against Defendants, jointly and severally, in a sum which exceeds the minimal jurisdictional limits of the Court.

57. The foreclosure sale, if in fact it occurred, has resulted in the taking of Plaintiff's home, the Subject Property, which results in damages to Plaintiff in a manner that cannot be compensated adequately by money damages even though the loss of the house constitutes damages in excess of $253,000.00; all of such damages for which Plaintiff hereby sues for money damages and injunctive relief.

V. CAUSES OF ACTION

58. **NEGLIGENCE**

A. Plaintiff incorporates by reference the Facts set forth in 1-19 and 27-57 above the same as if fully copied and set forth herein.

B. Defendant Wells Fargo had a duty to implement HAMP and to approve Plaintiff's application for a loan modification

because Plaintiff met the eligibility requirements for a loan modification under HAMP.

C. To be eligible for HAMP, borrowers needed to (among other things); Show that they had suffered a financial hardship;

and be able to pay 31/% of their monthly income towards the mortgage.

D. If the borrower met these eligibility criteria, the loan servicer participating in HAMP was required to issue a mortgage

modification if the ""Net Present Value" of the modified mortgage was positive, meaning it was "'more profitable to modify the loan than to allow the loan to go into foreclosure."

E. In essence, a positive Net Present Value meant that the lender was expected to lose money by foreclosing on rather than

modifying the mortgage.

F. If the Net Present Value calculation was positive, the Treasury Secretary required the loan servicer to issue a modification.

If it was negative, the servicer could choose to offer a modification, but did not have to. See Supplemental Directive 09-01. Loan servicers received HAMP money for every loan modification they issued, as an incentive to offer modifications.

G. When modifying a mortgage, HAMP-participating lenders were required to reduce the borrower's monthly mortgage payment to get it "as close as possible to 31 percent" of the borrower's monthly income. To achieve this, loan servicers were required to reduce the interest rate on the loan. If this reduction was insufficient to get the payment down to 31 percent of borrower income, the loan servicer was required to convert the mortgage to a 40-year term. If that wasn't enough, the servicer had to place the loan in forbearance and waive interest on the loan while in forbearance.

H. Borrowers who qualified for HAMP were generally given a trial modification for three months or more. If they were able to pay the modified amount and remained HAMP eligible, they could receive a permanent modification.

I. This elaborate scheme reflects the public policy of the U.S. Congress and the President to save the homes of Americans from foreclosure.

J. Both Defendants accepted billions of dollars from U.S. Taxpayers to carry out this public policy yet they failed to do so and the mission of the U.S. Congress and President was thwarted as is the case with Plaintiff.

K. Wells Fargo had a duty to exercise reasonable care in the creation, implementation, and use of its internal software to determine whether a mortgage modification was required under HAMP regulations.

L. Wells Fargo had a duty to ensure that borrowers who met all objective requirements were given a HAMP mortgage modification.

M. Wells Fargo failed to exercise reasonable care in the creation, implementation, and use of its internal software to determine whether a mortgage modification was required under HAMP regulations.

N. Wells Fargo failed to ensure that borrowers who met all objective requirements were given or offered a HAMP mortgage modification.

O. Wells Fargo denied or failed to offer mortgage modification to Plaintiff who met all objective requirements to receive a permanent HAMP mortgage modification.

P. Wells Fargo breached its duties to Plaintiff by:

1. Failing to perform mortgage servicing functions consistent with its responsibilities to Plaintiff;

2. Creating, implementing, and using an internal software program and protocols that were flawed and defective and incorrectly calculated whether Plaintiff was entitled to a HAMP mortgage modification;

3. Failing to properly supervise its agents and employees. including its loss mitigation and collection personnel; foreclosure attorneys; and technical, computer and engineering employees who developed, implemented. and used the internal software to determine whether Plaintiff qualified for a HAMP mortgage modification;

4. Making inaccurate calculations and determinations of Plaintiff's eligibility for a HAMP mortgage modification;

5. Not conducting sufficient testing to determine whether its internal software program was correctly calculating

whether a borrower, such as Plaintiff, was entitled to a HAMP mortgage modification;

6. Failing to give HAMP mortgage modifications and other foreclosure alternatives to qualified borrowers such as Plaintiff; and

7. Concealing the error in its internal software program from approximately 2015 through October 2018.

Q. Defendant Wells Fargo knew or should have known that borrowers such as Plaintiff would suffer injury as a result of Wells Fargo's failure

to exercise reasonable care.

R. Defendant Wells Fargo's violations of law and/or negligence were the direct and proximate cause of Plaintiff's injuries, harm and economic loss,

which Plaintiff suffered and will continue to suffer, including the loss of the Subject Property in a sum which exceeds $253,000.00.

S. As a consequence of Defendant Wells Fargo's negligence, Plaintiff was injured in at least the following ways:

1. wrongful foreclosure;

2. otherwise avoidable losses, of Plaintiff's home to foreclosure;

3. less favorable mortgage modification;

4. increased fees and other costs related to a wrongful foreclosure;

5. lost equity in Plaintiff's home that was foreclosed on;

6. loss of savings in fruitless attempts to secure mortgage modifications;

7. loss of opportunities to pursue other refinancing or loss mitigation strategies;

8. increased costs associated with lowered credit scores; and

9. significant stress causing physical injuries and emotional distress.

59. **Wrongful Foreclosure**

A. Plaintiff incorporates by reference the allegations set forth in the Factual Background and Introduction above and replead the same by reference

the same as if fully set forth again herein.

B. Plaintiff contends that the foreclosure sale of December 6, 2016, if in fact such a sale took place, was wrongful and should be rescinded and set aside for the following reasons:

1. Any debt owed by Plaintiff to Defendant Wells Fargo or Defendant U.S. Bank has been satisfied and fully discharged prior to the foreclosure

sale as verified by the attached **Exhibit B** which is incorporated herein by reference for all purposes as if fully set forth herein.

2. Defendant Wells Fargo breached its fiduciary duty to me in wrongfully denying my application for a loan modification under HAMP which

misconduct was the direct and proximate cause of the wrongful foreclosure sale;

3. Defendant Wells Fargo breached its contract with the Secretary of the Treasury, to which Plaintiff is a third-party beneficiary, by not approving

Plaintiff for a loan modification for which he was eligible and qualified and for which Defendant had been paid over $6 Billion Dollars to assist borrowers such as Plaintiff;

4. The wrongful denial of Plaintiff's loan modification under HAMP was

a direct and proximate cause of the wrongful foreclosure sale as such sale would not have happened but for the misrepresentations of Defendant Wells Fargo and its negligence in devising a flawed system of analyzing borrowers for eligibility for HAMP and its wrongful denial of Plaintiff's application for a loan modification.

5. Defendant U.S. Bank breached its fiduciary and contractual duty to Plaintiff in conducting the Foreclosure sale in the face of its failure to hold

a face-to-face meeting with Plaintiff when his mortgage became three months in arrears and to hold another face-to-face meeting with Plaintiff at least 30 days before the foreclosure sale as required by 24 C.F.R. Section 203.604(b) and Section 203.606(a) and also required by Plaintiff's Security Deed. If it is found after discovery that Defendant U.S. Bank did not conduct the actual foreclosure sale, Defendant U.S. Bank would still be liable because as the Servicer, it is charged with the duty of making sure that all conditions precedent to a foreclosure sale are fulfilled and that the foreclosure sale is conducted in good faith.

6. The foreclosure sale is wrongful in that it was conducted at a time when the courthouse and many other government offices and businesses

were closed due to inclement weather and this factor reduced the number of people who ordinarily would have been present to bid on the property and gave Defendant U.S. Bank an unfair advantage and caused the foreclosure sale to yield a greatly reduced sales price than what it would have generated had the foreclosure sale been conducted in a fair and impartial and reasonable manner. Thus, Defendant U.S. Bank breached its duty to conduct the foreclosure sale in good faith.

7. The foreclosure was wrongful in that Plaintiff would not have been behind in his mortgage payments but for the misrepresentation by Defendant Wells Fargo that Plaintiff had to be delinquent in his mortgage payments to apply for HAMP assistance and there would not have been a need for a foreclosure sale had Defendant Wells Fargo approved Plaintiff for a loan modification under HAMP as Defendant Wells Fargo had a duty to do and for which it had been paid over $6 Billion Dollars to accomplish.

8. The foreclosure sale is wrongful because Plaintiff's mortgage debt was paid in full and discharged when Plaintiff gave Defendant Wells Fargo

his Promissory Note which Defendant Wells Fargo monetized.

9. The foreclosure sale was wrongful in that Defendant U.S. Bank lacked standing to conduct a foreclosure sale and such sale on

December 6, 2016 violated the applicable section of Federal Law which provides:

> 12 CFR § 226.39(a)(1), stating in part that: "... a servicer of a mortgage loan shall not be treated as the owner of the obligation if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the obligation." See also 15 U.S.C. § 1641(f)(1): "A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is or was the owner of the obligation.".

10. It is undisputed that Defendant U.S. Bank lacked any interest in Plaintiff's property and Defendant U.S. Bank's sole function was that of loan

servicer.

11. Thus, the December 6, 2016 foreclosure sale, if in fact such sale took place, was wrongful, and Plaintiff asks this Honorable Court to declare the sale/purported sale wrongful and void, to rescind the sale, and to declare Plaintiff the rightful owner of his home – the Subject Property described in 34 above, and to assess actual damages against Defendant Wells Fargo and Defendant U.S. Bank, jointly and severally, in an amount which exceeds the minimum jurisdictional limits of the court including damages for emotional distress and mental anguish and distress and assess punitive damages against Defendant to deter such conduct in the future by Defendant and others and that such damages be in a sum of at least $1,000,000.00, together with pre and post-judgment interest and such other and further relief in law and in equity to which Plaintiff may show himself justly entitled.

60. CONVERSION

A. Plaintiff incorporates by reference the foregoing allegations the same as if fully copied and set forth again here.

B. Plaintiff was the owner and possessor of the Subject Property. As a result of the conduct alleged above, Defendant Wells Fargo and Defendant U.S. Bank interfered with Plaintiff's right to possess and to control the Subject Property by denying Plaintiff a HAMP loan modification to which Plaintiff was eligible and by engaging in a wrongful foreclosure sale that

result in the wrongful taking of the Subject Property. At the time of the conversion, Plaintiff had a superior right of possession and control of the Subject Property.

C.As a direct and proximate result of Defendant Wells Fargo and Defendant U.S. Bank misconduct, Plaintiff

suffered injury, damages, loss of the Subject Property in an amount of over $253,000.00, for which Plaintiff sues for compensatory damages.

61. GEORGIA CONSUMER FRAUD ACT

A. Plaintiff incorporates by reference the foregoing allegations the same as if fully copied and set forth again here.

B. The Georgia O.C.G.A. 51-6-1 (2010), provides "Fraud, accompanied by damage to the party defrauded,

always gives a right of action to the injured party.

C.Defendant Wells Fargo's unconscionable and deceptive practices include:

1. Failing to perform mortgage servicing functions consistent with its responsibilities to

Plaintiff and HAMP regulations;

2. Creating, implementing, and using an internal software program and protocols that were

flawed and defective and incorrectly calculated whether a borrower such as Plaintiff was entitled to a HAMP mortgage modification;

3. Failing to properly supervise its agents and employees, including its loss mitigation and collection personnel; foreclosure attorneys; and technical. computer, and engineering employees who developed, implemented, and used the internal software to determine whether a borrower such as Plaintiff qualified for a HAMP mortgage modification;

4. Making inaccurate calculations and determinations of Plaintiff's eligibility for a HAMP mortgage modification;

5. Not conducting sufficient testing to determine whether its internal software program was correctly calculating whether a borrower such as Plaintiff was entitled to a HAMP mortgage modification;

6. Failing to give HAMP mortgage modifications and other foreclosure alternatives to qualified borrowers such as Plaintiff; and

7. Concealing the error in its internal software program from approximately 2015 through October 20 1 8.

D. Wells Fargo's representations and omissions were material because they were likely to deceive Plaintiff, and in fact did deceive Plaintiff, about his entitlement to a mortgage modification under HAMP and the adequacy of Defendant Wells Fargo's methods

for evaluating someone's entitlement to a HAMP modification such as Plaintiff.

E. Defendant Wells Fargo intended to mislead Plaintiff and in fact did mislead Plaintiff and induced him to rely on Defendant Wells Fargo's misrepresentations and omissions to

the detriment of Plaintiff who would not have allowed his mortgage to go into arrears had he known that Defendant Wells Fargo would not act in good faith in evaluating and approving Plaintiff for a HAMP modification.

F. Defendant Wells Fargo intended to mislead Plaintiff and in fact did mislead Plaintiff by representing to Plaintiff at his face-to-face meeting that Plaintiff's HAMP modification would be approved, and such misrepresentations lulled Plaintiff into inaction so he did not avail himself of other remedies available to him to avoid foreclosure.

G. Wells Fargo acted intentionally or knowingly to violate Georgia's Fraud Statute and to lull Plaintiff into inaction such that Plaintiff had insufficient time to seek alternatives

to foreclosure when Defendant Wells Fargo notified Plaintiff just six days before foreclosure that Plaintiff's HAMP modification was denied.

H. As a direct and proximate result of Wells Fargo's unconscionable and deceptive practices, Plaintiff suffered injury in fact and lost money and property through;

1. wrongful foreclosure;

2. otherwise avoidable loss of his home to foreclosure;

3. less favorable mortgage modifications;

4. increased fees and other costs to avoid or attempt to avoid foreclosure;

5. lost equity in Plaintiff's home that was foreclosed on;

6. loss of savings in fruitless attempts to secure mortgage modifications;

7. loss of opportunities to pursue other refinancing or loss mitigation strategies; and

8. increased costs associated with lowered credit scores.

I. Because of Wells Fargo's unconscionable and deceptive business practices, Plaintiff is entitled to relief, including injunctive relief, other equitable relief, actual damages,

treble damages, restitution, and attorneys' fees and costs.

62. Request for Injunctive Relief Including Temporary Restraining Order

A. An immediate Temporary Restraining Order against Defendants is required to protect Plaintiff's homestead and his goodwill and reputation. Without a Temporary Restraining

Order and Temporary Injunction, Plaintiff will be irreparably harmed by these Defendants in evicting Plaintiff from his residential homestead as the result of a wrongful foreclosure. The loss of Plaintiff's homestead, goodwill, and reputation cannot be adequately compensated through money damages and the harm will be irreparable and permanent.

B. To preserve the status quo, Plaintiff requests a Temporary Restraining Order prohibiting these Defendants from continuing with the eviction process against Plaintiff from his residential homestead presently scheduled for "immediately" according to an eviction notice received from an attorney. Further, a Temporary Restraining Order will allow Plaintiff the time he needs to litigate the instant lawsuit.

C. Plaintiff further requests a Temporary Injunction prohibiting these Defendants from evicting Plaintiff from his residential homestead until this Honorable Court can resolve the issues raised herein. Upon final hearing, Plaintiff requests that the Temporary Injunction become permanent.

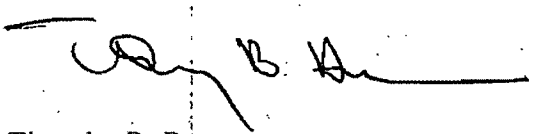
D. Plaintiff prays for such damages as he may be entitled to in law and in equity, including reasonable and necessary attorney fees.

A. JURY TRIAL

B. A jury trial is demanded.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that this Court grant the requested relief and upon final trial that Plaintiff be awarded the damages requested above, pre- and post-judgment interest, court costs, and such other and further relief to which he may be justly entitled in law and in equity.

Thank You,



Timothy B. Brown

165 Monticello Way
Fayetteville, GA 30214
770-827-6458
PLAINTIFF PRO PER/SUI JURIS

VERIFICATION

STATE OF GEORGIA []
[]
COUNTY OF FAYETTE []

BEFORE ME, the undersigned authority, on this day personally appeared Timothy B. Brown, Plaintiff in the above-entitled and numbered cause, who, being by me first duly sworn, deposed and said that he has read the allegations contained in the foregoing application for

temporary restraining order, temporary and permanent injunction, and each and every fact and matter therein stated is within his personal knowledge and is true and correct.

Timothy B. Brown

SUBSCRIBED AND SWORN to before me, this 3 day of ~~December 2018.~~ January 2019

Notary Public in and for the State of Georgia

ANTOINETTE BLOUNT BYSE
Notary Public - State of Georgia
Fulton County
My Commission Expires Nov 12, 2021

CERTIFICATION AS TO FONT

Pursuant to N.D. Ga. Local Rule 7.1 D, I hereby certify that this document is submitted in Times New Roman 14-point type as required by N.D. Ga. Local Rule 5.1(b).

Timothy B. Brown

EXHIBIT A
LEGAL DESCRIPTION

Attached to file: 96-00680541

All that tract or parcel of land lying and being in Land Lot 197 of the 13th District of Fayette County, Georgia, and being Lot 14, Block C, Unit 1 of the Dix-Lee 'On Corporation Subdivision, as per plat recorded in Plat Book 6, Page 115, Fayette County, Records, and being more particularly described as follows:

Beginning at a point located on the southwesterly side of Monticello Way, 900 feet Southeasterly as measured along the Southwesterly side of Monticello Way, from the intersection of the Southwesterly side of Monticello Way and the Southerly side of the Dix-Lee 'On Drive, said point of beginning also being located at the Southeast corner of Lot 13 of said Block, Unit and Subdivision; thence running Southeasterly along the Southwesterly side of Monticello way, 100 feet to a point at the Northeast corner of Lot 15 of said Block, Unit, Subdivision; thence running Southwesterly along the Northwesterly side of said Lot 15, 249.4 feet to a point; thence running Northwesterly 180 feet to a point at the Southwest corner of Lot 13 of said Block, Unit and Subdivision; thence running Northeasterly along the Southeasterly side of said Lot 13, 249.8 feet to the Point of Beginning.

EXHIBIT B

Doc ID: 006860030020 Type: GLR
Filed: 09/22/2005 at 09:04:00 AM
Fee Amt: $1,216.50 Page 1 of 20
Intangible Tax: $1,168.50
Fayette, Ga. Clerk Superior Court
Sheila Studdard Clerk of Court
BK 2863 PG 431-450

~~Return To:~~
~~WELLS FARGO BANK, N.A.~~
~~INVESTOR DOCUMENT MANAGER~~
~~1000 BLUE GENTIAN ROAD~~
~~EAGAN, MN 55121-1663~~

Prepared By:
ARETHA D. WILLIAMS
WELLS FARGO BANK, N.A.
1 HOME CAMPUS
DES MOINES, IA 50328-

Return to:
Rand and Associates
3237 Satellite Blvd., Bldg. 300,
Suite 450 Duluth, GA 30096

[Space Above This Line For Recording Data]

SECURITY DEED

0147194864

DEFINITIONS

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

(A) "Security Instrument" means this document, which is dated **SEPTEMBER 16, 2005** together with all Riders to this document.
(B) "Borrower" is
TIMOTHY B. BROWN, SOLELY

Borrower is the grantor under this Security Instrument.
(C) "Lender" is **WELLS FARGO BANK, N.A.**

Lender is a **National Association**
organized and existing under the laws of **THE UNITED STATES OF AMERICA**

Lender's address is
P. O. BOX 5137, DES MOINES, IA 50306-5137
Lender is the grantee under this Security Instrument.
(D) "Note" means the promissory note signed by Borrower and dated **SEPTEMBER 16, 2005**. The Note states that Borrower owes Lender **THREE HUNDRED EIGHTY-NINE THOUSAND FIVE HUNDRED AND NO/100** Dollars (U.S. $ 389,500.00.....) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **OCTOBER 1, 2035**.
(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

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

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(K) "Escrow Items" means those items that are described in Section 3.
(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that

governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

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

County	of	**FULTON**
[Type of Recording Jurisdiction]		[Name of Recording Jurisdiction]

LEGAL DESCRIPTION IS ATTACHED HERETO AS SCHEDULE "A" AND MADE A PART HEREOF.

Parcel ID Number:
165 MONTICELLO WAY
FAIRBURN [City] , Georgia **30213** [Zip Code]
("Property Address"):

which currently has the address of [Street]

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all improvements now or hereafter erected on the property, and all the easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

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

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

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

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

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

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

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

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

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

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

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be

required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

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

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

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

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

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

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

or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

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

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

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In

either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

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

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

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

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

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or

(c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property (as set forth below). Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, making repairs, replacing doors and windows, draining water from pipes, eliminating building or other code violations or dangerous conditions. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by

this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

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

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

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

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

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly

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

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

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

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

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

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

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

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

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer or servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

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

The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

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

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

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

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

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or

any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale granted by Borrower and any other remedies permitted by Applicable Law. Borrower appoints Lender the agent and attorney-in-fact for Borrower to exercise the power of sale. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall give a copy of a notice of sale by public advertisement for the time and in the manner prescribed by Applicable Law. Lender, without further demand on borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Lender determines. Lender or its designee may purchase the Property at any sale.

Lender shall convey to the purchaser indefeasible title to the Property, and Borrower hereby appoints Lender Borrower's agent and attorney-in-fact to make such conveyance. The recitals in the Lender's deed shall be prima facie evidence of the truth of the statements made therein. Borrower covenants and agrees that Lender shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it. The power and agency granted are coupled with an interest, are irrevocable by death or otherwise and are cumulative to the remedies for collection of debt as provided by Applicable Law.

If the Property is sold pursuant to this Section 22, Borrower, or any person holding possession of the Property through Borrower, shall immediately surrender possession of the Property to the purchaser at the sale. If possession is not surrendered, Borrower or such person shall be a tenant holding over and may be dispossessed in accordance with Applicable Law.

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

24. Waiver of Homesteads. Borrower waives all rights of homestead exemption in the Property.

25. Assumption Not a Novation. Lender's acceptance of an assumption of the obligations of this Security Instrument and the Note, and any release of Borrower in connection therewith, shall not constitute a novation.

26. Security Deed. This conveyance is to be contrued under the existing laws of of the State of Georgia as a deed passing title, and not as a mortgage, and is intended to secure the payment of all sums secured hereby.

BORROWER ACCEPTS AND AGREES to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

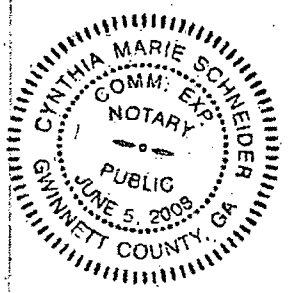
IN WITNESS WHEREOF, Borrower has signed and sealed this Security Instrument.

TIMOTHY B. BROWN (Seal) Borrower

STATE OF GEORGIA, Fayette County ss:

Signed, sealed and delivered in the presence of:

Unofficial Witness William J. Schneider



Notary Public, State of Georgia

County

Doc ID: 009638740001 Type: ASGN
Recorded: 04/29/2015 at 09:15:00 AM
Fee Amt: $7.00 Page 1 of 1
Fayette, Ga. Clerk Superior Court
Sheila Studdard Clerk of Court
BK 4308 PG 644

Recording Requested By: WELLS FARGO BANK, N.A.
When Recorded Return To: ASSIGNMENT TEAM, WELLS FARGO BANK, N.A. MAC: N9289-016 PO BOX 1629, EAGAN, MN 55121-4400

CORPORATE ASSIGNMENT OF SECURITY DEED

Fayette, Georgia
"BROWN"

PREPARED BY: WELLS FARGO BANK, N.A.,

Date of Assignment: April 21st, 2015
Assignor: WELLS FARGO BANK, N.A. at 1 HOME CAMPUS, DES MOINES, IA 50328
Assignee: U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MASTR ASSET BACKED SECURITIES TRUST 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AB1 at 60 LIVINGSTON AVENUE, ST PAUL, MN 55107

Executed By: TIMOTHY B. BROWN, SOLELY To: WELLS FARGO BANK, N.A.
Date of Security Deed: 09/16/2005 Recorded: 09/22/2005 in Book/Reel/Liber: 2863 Page/Folio: 431 In the County of Fayette, State of Georgia.

Property Address: 165 MONTICELLO WAY, FAIRBURN, GA 30213

KNOW ALL MEN BY THESE PRESENTS, that for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the said Assignor hereby assigns unto the above-named Assignee, the said Mortgage having an original principal sum of $389,500.00 with interest, secured thereby, and the full benefit of all the powers and of all the covenants and provisos therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's interest under the Mortgage.

TO HAVE AND TO HOLD the said Mortgage, and the said property unto the said Assignee forever, subject to the terms contained in said Mortgage.

WELLS FARGO BANK, N.A.
On 4-22-15

By: Scott Gerald Heurkins
Vice President Loan Documentation

WITNESS
Janet L. Jones

WITNESS
Kelley Buffington

STATE OF Minnesota
COUNTY OF Dakota

On 4/22/15 before me, Jessica M Gartner, a Notary Public in the State of Minnesota, personally appeared Scott Gerald Heurkins, Vice President Loan Documentation, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal,

Jessica M Gartner
Notary Expires: 1/31/2017

JESSICA M. GARTNER
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2017

(This area for notarial seal)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

TIMOTHY B. BROWN,

Plaintiff,

v.

U.S. BANK NATIONAL ASSOCIATION, et al.

Defendant.

CIVIL ACTION FILE

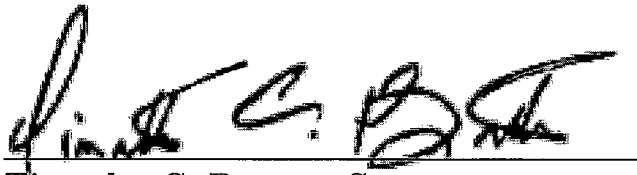
NO. 3:19-cv-1-TCB

ORDER

This case comes before the Court on Plaintiff Timothy B. Brown's pro se complaint [1]. This case involves claims similar to those in the case Brown previously filed against Defendants U.S. Bank National Association and Wells Fargo Bank, N.A., Civil Action File Number 3:17-cv-44-TCB. The Court directs this case be referred to Magistrate Judge Russell G. Vineyard pursuant to this Court's Standing Order 18-01 because Brown alleges Defendants violated the Real Estate Settlement

Procedures Act, 12 U.S.C. § 2601, *et seq.* Judge Vineyard should also determine whether this action is barred by res judicata.

IT IS SO ORDERED this 3rd day of January, 2019.



Timothy C. Batten, Sr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

TIMOTHY B. BROWN, Plaintiff, v. U.S. BANK NATIONAL ASSOC. *as Trustee, Mastr Asset Backed Securities Trust 2006-AB1, Mortgage Pass-Through Certificates Series 2006-AB1*, and WELLS FARGO BANK, N.A., Defendants.	CIVIL ACTION NO. 3:19-cv-00001-TCB-RGV

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

Plaintiff Timothy B. Brown ("Brown"), proceeding *pro se*, brings this action against defendants U.S. Bank National Association, as Trustee for MASTR Asset Backed Securities Trust 2006-AB1, Mortgage Pass-Through Certificates Series 2006-AB1 ("U.S. Bank") and Wells Fargo Bank, N.A. ("Wells Fargo"), jointly referred to as "defendants," alleging claims of negligence, wrongful foreclosure, conversion, and fraud. See [Doc. 1].[1] Defendants have moved to dismiss Brown's complaint, [Doc. 6], which Brown opposes, see [Doc. 7], and defendants have filed a reply in support of their motion, [Doc. 8]. The Honorable Timothy C. Batten, Sr., United States District Judge, has referred this case to the undersigned to "determine

[1] The listed document and page numbers in citations to the record refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ECF.

whether this action is barred by res judicata" since this case "involves claims similar to those in the case Brown previously filed against [d]efendants [ ], Civil Action File Number 3:17-cv-44-TCB." [Doc. 2 at 1-2]. For the reasons that follow, it is **RECOMMENDED** that Brown's complaint be **DISMISSED** as barred by res judicata and, alternatively, that defendants' motion to dismiss, [Doc. 6], be **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action concerns the real property located at 165 Monticello Way, Fayetteville, Georgia ("the property"). See [Doc. 1 at 13 ¶ 34, 39-56].[2] On September 16, 2005, Brown obtained a mortgage loan in the original principal amount of $389,500.00 from Wells Fargo and used the proceeds of the loan to purchase the property. [Id. at 13 ¶ 34, 14 ¶ 35, 39-56]. The transaction was secured by the property pursuant to a security deed executed by Brown in favor of Wells Fargo, and the deed was recorded at Deed Book 2863, Pages 431-450, in the real property

[2] The factual background is taken from the pleadings and exhibits and does not constitute findings of fact by the Court. Additionally, Brown attached several documents to his complaint, see [Doc. 1], and the Court will consider these documents since they are "central to the plaintiff's claim and the authenticity of the document[s] is not challenged," Adamson v. Poorter, No. 06-15941, 2007 WL 2900576, at *2 (11th Cir. Oct. 4, 2007) (per curiam) (unpublished) (citations omitted); see also Clark v. Bibb Cty. Bd. of Educ., 174 F. Supp. 2d 1369, 1370 (M.D. Ga. 2001) (citation omitted) ("A court evaluating a motion to dismiss for failure to state a claim upon which relief can be granted must focus its analysis on the face of the complaint, but it may also consider any attachments to the complaint[.]").

records of Fayette County, Georgia. [Id. at 14 ¶ 35, 39]. On April 21, 2015, Wells Fargo assigned the security deed to U.S. Bank, as evidenced by the assignment recorded on April 29, 2015, at Deed Book 4308, Page 644, of the Fayette County, Georgia, real estate records. See [id. at 57].

At some point, Brown defaulted on his obligations under the mortgage loan, and U.S. Bank commenced non-judicial foreclosure proceedings against the property. See [id. at 17 ¶¶ 44-45, 18 ¶ 47]. On June 29, 2016, Brown filed his first Chapter 13 bankruptcy action. See In re Brown, Bankruptcy Petition No. 16-11288-WHD (Bankr. N.D. Ga. 2016). On August 2, 2016, Brown's bankruptcy petition was dismissed based on his failure to correct a filing deficiency, see id. at [Doc. 12], and on September 26, 2016, he again filed for Chapter 13 bankruptcy relief, see In re Brown, Bankruptcy Petition No. 16-11915-WHD (Bankr. N.D. Ga. 2016). However, on October 12, 2016, Brown's second bankruptcy action was dismissed for his failure to pay the filing fee. See id. at [Doc. 12]. On December 2, 2016, Brown filed a third petition for Chapter 13 bankruptcy relief, see In re Brown, Bankruptcy Petition No. 16-12409-WHD (Bankr. N.D. Ga. 2016); see also [Doc. 1 at 18 ¶ 48], and on December 6, 2016, U.S. Bank purchased the property at a foreclosure sale, see [Doc. 1 at 19 ¶ 51]. On February 13, 2017, Brown's third bankruptcy action was dismissed pursuant to 11 U.S.C. §§ 105(a) and 109(g), since he had "filed two [] other recent bankruptcy

cases" that had been dismissed. See In re Brown, Bankruptcy Petition No. 16-12409-WHD, at [Doc. 10].[3]

The parties have a history of litigation related to the property. On March 30, 2017, Brown filed an action against defendants centered around his allegations concerning the validity of the assignment at issue, whether defendants had the right to foreclose on the property, and whether the December 2016 foreclosure sale violated any automatic stay that should have been in place due to his bankruptcy filing. See Brown v. U.S. Bank Nat'l Ass'n, Civil Action File No. 3:17-cv-00044-TCB, at [Doc. 1] (N.D. Ga. Mar. 30, 2017). Based on these allegations, Brown asserted claims for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq., and the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., as well as state law claims for breach of contract, quiet title, and wrongful foreclosure, and he sought an emergency temporary restraining order ("TRO"). Id. After defendants moved to dismiss Brown's complaint in its entirety, see id. at [Doc. 5], the undersigned issued a Report and Recommendation, recommending that Brown's claims against Wells Fargo be dismissed for failure to

[3] Specifically, 11 U.S.C. § 109(g) provides that "no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case[.]" 11 U.S.C. § 109(g)(1).

state any plausible claim and that U.S. Bank be dismissed without prejudice for Brown's failure to properly serve it within the time allowed by Rule 4 of the Federal Rules of Civil Procedure. See id. at [Doc. 7]. Thereafter, Brown filed objections to the Report and Recommendation, in which he also requested, among other things, an opportunity to amend his complaint. Id. at [Doc. 9]. On February 13, 2018, Judge Batten issued an Order adopting the Report and Recommendation, and he dismissed U.S. Bank for lack of service, dismissed Brown's claims against Wells Fargo under the FDCPA, RESPA, and O.C.G.A. § 44-14-162, and denied his request for injunctive relief, but granted Brown's request for leave to amend his complaint and ordered him to file a motion and brief in support, along with a copy of the proposed amended complaint, within seven days of that Order. Id. at [Doc. 11]. Brown filed the motion for leave to amend his complaint, id. at [Doc. 12], which was granted, see id. at [Docs. 13 & 14].

In his amended complaint, Brown alleged that Wells Fargo, as the original lender at the time of the loan transaction in September 2005, "monetized [his] Note," the "effect" of which "was that it paid for the purchase of the [] [p]roperty." Id. at [Doc. 14 ¶¶ 11-13]. Based on this "monetizing of [his] Promissory Note," Brown asserted:

> That my Note was paid in full can be seen also in the Security Deed which I signed on September 26, 2005. Under the Section styled

> "Transfer of Rights in the Property," appears the following: "Borrower irrevocably grants and conveys to Trustee, in trust, . . ." and then the document gives the legal description of the [] [p]roperty. The Security Deed goes on to provide that "BORROWER COVENANTS that borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the [p]roperty and that the [p]roperty is unencumbered . . ." How could I convey the property to the Trustee except I owned the [] [p]roperty free and clear of any debt? Clearly, the Security Deed shows that my Promissory Note paid off my mortgage debt on the [] [p]roperty."

Id. at [Doc. 14 ¶¶ 12-13 (first and sixth alterations in original)]. Relying on this premise, Brown asserted that Wells Fargo "committed fraud when it had [him] to sign the Security Deed knowing that [his] debt had been paid in full on the [] [p]roperty" and that it "committed fraud when it represented that it had standing to foreclose against the [] [p]roperty and it committed further fraud when it engaged in a wrongful and void foreclosure sale." Id. at [Doc. 14 ¶ 14].

Brown also alleged that his "mortgage debt was fully paid and discharged a second time as evidenced by the Notice of Default Judgment dated March 27, 2017," which "was duly served upon Defendant after it failed and refused to offer a controverting affidavit to [his] Affidavit of Fact/Truth of Default Judgment dated July 10, 2017," and "served upon [] Wells Fargo after it failed and refused to respond to [his] Notice of Debt Validation and Demand for Production of Documents dated February 22, 2017." Id. at [Doc. 14 ¶¶ 17-18, 46-80]. Brown asserted that because Wells Fargo failed to "rebut[] these documents or provide[] controverting

affidavits," its "failure amount[ed] to [its] tacit agreement that [his] mortgage debt [was] paid in full as a person of ordinary prudence under the same or similar circumstances when presented the documents . . . would have taken action and made their opposition known if they did in fact dispute the contents of those documents and the facts stated in such documents"and that "[a] reasonable and prudent business/legal person in the same or similar circumstances would have not remained silent in the face of allegations that a debt of several hundred thousand dollars had been paid in full." Id. at [Doc. 14 ¶ 19].

Brown further alleged that he received a notice of foreclosure sale sometime in September of 2016, and that he filed a Chapter 13 bankruptcy petition in December of 2016, but that in "early January 2017," he was informed that the property had been sold and that Wells Fargo was now the servicer of the mortgage debt and he then discovered that U.S. Bank purchased the property. Id. at [Doc. 14 ¶¶ 20-24]. Brown asserted that "[i]f a foreclosure sale took place on the [] [p]roperty on December 6, 2016, said sale [was] in violation of the Automatic Stay which was then in effect"; "took place without providing [him] the notices and remedies to which [he was] entitled under the Note, the Security Deed, and Georgia law"; and was "[w]rongful because there [was] no mortgage debt outstanding against the [] [p]roperty[.]" Id. at [Doc. 14 ¶¶ 25-27].

Based on these allegations, Brown asserted a claim for breach of contract, claiming that Wells Fargo breached paragraph 11 of the promissory note and paragraph 22 of the security deed by "failing to give [him] notice of the acceleration of [his] mortgage debt," "failing to give [him] 30 days in which to pay whatever balance remained on [his] mortgage debt," and failing to provide him with a notice of default, a notice of acceleration, a notice of his right to reinstate the loan after acceleration, and notice of any foreclosure sale on his property. Id. at [Doc. 14 ¶ 31A-B]. Brown further asserted that the security deed incorporated certain regulations of the United States Department of Housing and Urban Development ("HUD") and that Wells Fargo breached those contractual provisions by failing "to arrange a face-to-face meeting with [him] as a condition precedent to foreclosure." Id. at [Doc. 14 ¶ 31C].[4] As a consequence of these failures, Brown maintained that he "was deprived of [his] right of reinstatement of [his] mortgage debt and as a

[4] Brown maintained that had Wells Fargo held "the required face-to-[f]ace meeting, [he] would have been able to present [his] documents . . . and show . . . that its failure to respond to those documents amount[ed] to an agreement that any mortgage debt on [his] property [was] paid in full or [] Wells Fargo could have shown [him] that [he] was wrong in which case [he] would have taken advantage of [his] right to reinstate [his] mortgage loan by paying the arrearages or getting [his] loan refinanced or taking advantage of government programs such as [the Home Affordable Refinance Program] and [Home Affordable Modification Program ('HAMP')] for which [he was] qualified to apply and receive." Brown, Civil Action File No. 3:17-cv-00044-TCB, at [Doc. 14 ¶ 31C(5)].

further consequence . . . suffered the loss of [his] homestead[.]" Id. at [Doc. 14 ¶ 31B].

Brown also asserted a claim for wrongful foreclosure, alleging that the "foreclosure sale of December 6, 2016, if in fact such a Sale took place, was wrongful and should be rescinded and set aside[.]" Id. at [Doc. 14 ¶ 32B]. Specifically, Brown alleged that the "debt owed by [him] to [] Wells Fargo or . . . U.S. Bank ha[d] been satisfied and fully discharged prior to the foreclosure sale as verified by the [Notice of Default Judgment]," that Wells Fargo "breached its fiduciary duty to [him] in conducting the Foreclosure sale in that it sold the property to an insider for an inadequate price," that it "breached its fiduciary duty in conducting the Foreclosure sale in the face of its failure to hold a face-to-face meeting with [him] when [his] mortgage became three months in arrears and to hold another face-to-face meeting with [him] at least 30 days before the foreclosure sale," that the "foreclosure sale [was] wrongful in that it was conducted at a time when the courthouse and many other government offices and businesses were closed due to inclement weather," thereby providing U.S. Bank "an advantage and caus[ing] the foreclosure sale to yield a greatly reduced sales price than what it would have generated had the foreclosure sale been conducted in a fair and impartial reasonable manner," and that the sale was "wrongful because [his] mortgage debt was paid in full and discharged

when [he] gave [] Wells Fargo [his] Promissory Note which it monetized." Id. at [Doc. 14 ¶ 32B(1)-(5)]. After Wells Fargo filed a motion to dismiss Brown's amended complaint, id. at [Doc. 16], the undersigned issued a Report and Recommendation, recommending that Wells Fargo's motion to dismiss be granted and Brown's amended complaint be dismissed, id. at [Doc. 18], which was adopted on December 3, 2018, id. at [Doc. 21].[5]

On January 3, 2019, Brown filed the instant action against defendants. [Doc. 1]. In this complaint, Brown again complains that Wells Fargo "monetized [his] Note," the "effect" of which "was that it paid for the purchase of the [] [p]roperty." [Id. at 14-15 ¶¶ 36-37]. Relying on this premise, Brown asserts that Wells Fargo "committed fraud when it had [him] to sign the Security Deed knowing that his debt had been paid in full on the [] [p]roperty" and that U.S. Bank "committed fraud when it represented that it had standing to foreclose against the [] [p]roperty and it committed further fraud when it engaged in a wrongful and void foreclosure sale." [Id. at 15 ¶ 39].

Brown alleges that in early 2016 he notified defendants that he wanted to apply "for a loan modification under HAMP," but "[d]efendants responded by

[5] Brown appealed the decision to the Eleventh Circuit Court of Appeals, but the Eleventh Circuit dismissed the appeal on February 8, 2019. See Brown, Civil Action File No. 3:17-cv-00044-TCB, at [Doc. 26].

telling [him] he was ineligible to apply for a loan modification until his mortgage debt was at least 30 days past due," so once "his mortgage debt was at least 30 days past due, [he] reapplied for a loan modification." [Id. at 16-17 ¶¶ 42-44]. After he submitted his request, Brown maintains that he received from Wells Fargo a "Notice of Foreclosure Sale scheduled for 90 days after the submission of his loan modification request," and that he thereafter "had a face-to-face meeting with [] Wells Fargo at which he was led to believe [] his loan modification would be approved," so he "took no further efforts to avail himself of any of his other alternatives to foreclosure." [Id. at 17 ¶ 45]. He contends that he subsequently received notice that his "request for a loan modification had been denied." [Id. at 18 ¶ 46].

Brown also alleges that he received a notice of foreclosure sale sometime in September of 2016, and that he filed a Chapter 13 bankruptcy petition in December of 2016, but that in "early January 2017," he was informed that the property had been sold and that Wells Fargo was now the servicer of the mortgage debt and he then discovered that U.S. Bank purchased the property at a foreclosure sale on December 6, 2016. [Id. at 18-19 ¶¶ 47-51]. Brown asserts that if a foreclosure sale took place on December 6, 2016, then the "sale [was] in violation of the Automatic Stay which was then in effect"; "took place without providing [him] the notices and

remedies to which [he was] entitled under the Note, the Security Deed, and Georgia law"; and was "wrongful because there [was] no mortgage debt outstanding against the [] [p]roperty[.]" [Id. at 19 ¶¶ 52-54]. Brown then asserts claims for negligence, wrongful foreclosure, conversion, and fraud, and he requests injunctive relief, including a TRO. See generally [Doc. 1]. Defendants have filed a motion to dismiss Brown's complaint in its entirety, [Doc. 6], which Brown opposes, [Doc. 7], and defendants have filed a reply in support of their motion, [Doc. 8].

II. DISCUSSION

A. Res Judicata

Although defendants have not raised the defense of res judicata in their motion to dismiss, see [Doc. 6], Judge Batten referred the case to the undersigned to determine whether this action is barred by res judicata since it involves claims similar to those Brown previously brought in this Court,[6] [Doc. 2 at 2]; see also

[6] The Court uses the term res judicata in its traditional sense as a synonym for claim preclusion, which "bars the re-litigation of claims that were raised or could have been raised in a prior proceeding," McCulley v. Bank of Am., N.A., 605 F. App'x 875, 877 (11th Cir. 2015) (per curiam) (unpublished) (citing Lobo v. Celebrity Cruises, Inc., 704 F.3d 882, 892 (11th Cir. 2013)), as distinguished from collateral estoppel (or issue preclusion), which applies only to specific issues that were actually litigated and necessarily decided in the prior action, see In re Morrow, 508 B.R. 514, 522 (Bankr. N.D. Ga. 2014) (quoting Waldroup v. Greene Cty. Hosp. Auth., 463 S.E.2d 5, 7 (Ga. 1995)) (noting that "collateral estoppel under Georgia law limits the doctrine's applicability to 'those issues that necessarily had to be decided in order for the previous judgment to have been rendered'").

Arizona v. California, 530 U.S. 392, 412 (2000) (citation omitted) ("'[I]f a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised" since res judicata "'is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste'"); Cmty. State Bank v. Strong, 651 F.3d 1241, 1261 n.17 (11th Cir. 2011) (citations omitted) ("[T]his Court may consider the preclusive effect of a prior judgment *sua sponte*."); Shurick v. Boeing Co., 623 F.3d 1114, 1116 n.2 (11th Cir. 2010) (per curiam) (alterations in original) (citations omitted) ("Although Federal Rule of Civil Procedure 8(c) classifies claim preclusion as an affirmative defense, '[d]ismissal by the court sua sponte on res judicata grounds . . . is permissible in the interest of judicial economy where both actions were brought before the same court.'"); Restivo v. Bank of Am. NA, No. 3:18-CV-68 (CAR), 2019 WL 1117910, at *3 n.17 (M.D. Ga. Mar. 10, 2019) (alterations in original) (citation omitted) ("Although BANA does not raise the issue of res judicata as an affirmative defense, '[d]ismissal by the court sua sponte on res judicata grounds. . . is permissible in the interest of judicial economy where both actions were brought before the same court.'"); Rumbough v. Comenity Capital Bank, Case No: 6:17-cv-956-Orl-18GJK, 2017 WL 10058564, at *4 (M.D. Fla. Nov. 6, 2017) (citation omitted) ("'[W]hen necessary, the court may raise the

question of claim or issue preclusion sua sponte.'"); Taylor v. Cochran, CIVIL ACTION 16-0251-KD-M, 2016 WL 7472144, at *5 (S.D. Ala. Dec. 12, 2016), adopted by 2016 WL 7469725, at *1 (S.D. Ala. Dec. 28, 2016) (citation omitted) (finding plaintiff's claims were barred by res judicata despite the defendant's failure to raise the issue since "'[d]ismissal by the court sua sponte on res judicata grounds . . . is permissible in the interest of judicial economy where both actions were brought before the same court'"). Thus, the Court will first address whether Brown's complaint is barred by res judicata.

Under the principle of res judicata, a final judgment on the merits in a civil action operates to preclude parties or their privies from re-litigating in a subsequent proceeding issues that were or could have been raised in the original action. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (citations omitted). "Whether in federal or state courts, 'res judicata . . . relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.'" Davis v. U.S. Steel Supply, 688 F.2d 166, 174 (3d Cir. 1982) (en banc) (citations omitted) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). "The doctrine of res judicata is one of finality, providing that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights and responsibilities of the parties and their

privies." Baptiste v. Comm'r of Internal Revenue, 29 F.3d 1533, 1539 (11th Cir. 1994). "As to the parties to the prior proceeding and their privies, res judicata constitutes an absolute bar to a subsequent judicial proceeding involving the same cause of action." Id. (citations omitted).

For res judicata to apply, four elements must exist: (1) a final judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) identical parties (or their privies) in both actions, and (4) the same cause of action at issue in both cases. In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001) (citations omitted); see also Echeverria v. Bank of Am., N.A., 632 F. App'x 1006, 1008 (11th Cir. 2015) (per curiam) (citation omitted); Clark v. Comm'r of Internal Revenue, No. CV409-058, 2009 WL 1363411, at *2 (S.D. Ga. Mar. 30, 2009), adopted by 2009 WL 1034785, at *1 (S.D. Ga. Apr. 16, 2009) (citations omitted). "Generally both the party invoking res judicata and the party against whom it is invoked must have been represented in the prior action for res judicata to apply." Vereen v. Everett, Civil Action No. 1:08-CV-1969-RWS, 2009 WL 901007, at *3 (N.D. Ga. Mar. 31, 2009) (internal marks omitted) (quoting Akin v. PAFEC Ltd., 991 F.2d 1550, 1559 (11th Cir. 1993)).

All of the elements of res judicata are satisfied in this case, as Brown previously brought an action premised on the same allegations against the same two defendants, and that cause of action was definitively adjudicated on the merits by

a court of competent jurisdiction. See Brown, Civil Action File No. 3:17-cv-00044-TCB. First, the order dismissing Brown's prior action against Wells Fargo for failure to state a claim was indisputably a final adjudication on the merits by a court of competent jurisdiction. See Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 534 (5th Cir. 1978)[7] (citations omitted) ("It is clear that a stipulation of dismissal with prejudice, or, for that matter, a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action."); Reynolds v. JPMorgan Chase Bank, N.A., Civil Action No. 5:13–CV–440 (MTT), 2014 WL 132248, at *3 (M.D. Ga. Jan. 14, 2014) (first and third alterations in original) (citations and internal marks omitted) (explaining that "[t]he phrases 'with prejudice' and 'on the merits' are synonymous terms," and that "[i]t is clear that [a] dismissal with prejudice operates as a judgment on the merits unless the court specifies otherwise"); Johnson v. Bank of Am., N.A., Civil Action No. 5:12–CV–85(MTT), 2012 WL 1903907, at *2 (M.D. Ga. May 25, 2012) (citation omitted) (finding "that the U.S. District Court for the Northern District of Georgia was a court of competent jurisdiction"); Thomas v. BAC Home Loans Servicing, LP, CIVIL ACTION FILE NO. 1:11-CV-03719-AT-GGB, 2012 WL 13012806,

[7] Decisions of the Fifth Circuit rendered before October 1, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

at *5 (N.D. Ga. May 23, 2012), adopted by 2012 WL 13013624, at *1 (N.D. Ga. July 9, 2012) (citations omitted) ("As a general proposition, dismissal of a complaint for failure to state a claim operates as an adjudication on the merits for res judicata purposes, even where the dismissal order does not specify whether such dismissal was with prejudice or without prejudice.").

Moreover, defendants, or their privies, were parties in the prior action. Wells Fargo was a party to the prior action, and although U.S. Bank was not served with process in the prior action, see Brown, Civil Action File No. 3:17-cv-00044-TCB, at [Doc. 11], and "thus w[as] not [a] 'part[y]' for *res judicata* purposes," Williams v. Owens, No. 2:13-CV-432-MEF-TFM, 2014 WL 5112053, at *3 n.6 (M.D. Ala. Aug. 19, 2014), adopted by 2014 WL 5112051, at *1 (M.D. Ala. Sept. 24, 2014) (citation omitted), "the doctrine of *res judicata* may [] operate against an unserved defendant to the first action" if "the unserved defendant was in privity with a party to the first action," Davis v. Davis, 551 F. App'x 991, 996 (11th Cir. 2014) (per curiam) (unpublished) (citations omitted). "'Privity' describes a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty." Hart v. Yamaha-Parts Distribs., Inc., 787 F.2d 1468, 1472 (11th Cir. 1986) (citations omitted); see also Cordner v. Specialized Loan Servicing, LLC, CIVIL ACTION FILE NO.

1:15-CV-2090-TWT-JFK, 2016 WL 3675557, at *13 (N.D. Ga. June 7, 2016), adopted by 2016 WL 3634722, at *1 (N.D. Ga. July 7, 2016) (citations and internal marks omitted) ("A privy is one who is represented at trial and who is in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right."). "Privity is a flexible legal term, comprising several different types of relationships and generally applying when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." Cordner, 2016 WL 3675557, at *13 (citation and internal marks omitted).

"Courts acknowledge that privity exists between preceding and succeeding owners of property," and "[s]imilarly, assignees and servicing agents of a loan are in privity with an original mortgage company." Ernest v. CitiMortgage, Inc., No. SA:13-CV-802-DAE, 2014 WL 294544, at *4 (W.D. Tex. Jan. 22, 2014) (citations omitted); see also Axiom Worldwide, Inc. v. Excite Med. Corp., 591 F. App'x 767, 772 (11th Cir. 2014) (unpublished) (emphasis, citations, and internal marks omitted) ("[N]onparty preclusion may be justified based on a variety of pre-existing substantive legal relationships between the person to be bound and a party to the judgment," which "include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor[.]"); Bailey v. Deutsche

Bank Tr. Co. Ams., No. 3:13-CV-00001 (CAR), 2013 WL 820411, at *2-3 (M.D. Ga. Mar. 5, 2013); Crooked Creek Props., Inc. v. Ensley, No. 2:08-CV-1002-WKW[WO], 2009 WL 3644835, at *16 (M.D. Ala. Oct. 28, 2009), aff'd, 380 F. App'x 914 (11th Cir. 2010) (per curiam) (unpublished). Here, Wells Fargo assigned the security deed to U.S. Bank, see [Doc. 1 at 57], and thus, the Court finds that privity exists between Wells Fargo and U.S. Bank "such that the requisite identity of the parties element is satisfied," Cordner, 2016 WL 3675557, at *13; see also Bouldin v. Mortg. Elec. Registration Sys., Inc., CIVIL ACTION FILE NO. 1:14-cv-03214-TCB-RGV, 2015 WL 11517084, at *7 (N.D. Ga. Feb. 5, 2015), adopted by 2015 WL 11622462, at *1 (N.D. Ga. Feb. 23, 2015) (first and third alterations in original) (citation and internal marks omitted) (finding "MERS, as the original beneficiary under the [security deed] and assignor, share[d] sufficient interest with [the assignee] to establish privity").

With regard to the fourth element, identical claims and legal theories are not required for res judicata to apply. Rather, "'[i]f a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, . . . the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata.'" Milburn v. Aegis Wholesale Corp., Civil Action No. 1:12-CV-1886-RWS, 2013 WL 1747915, at *4 (N.D. Ga. Apr. 22, 2013) (second alteration in original) (quoting Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1503 (11th Cir.

1990)); see also Home Depot U.S.A., Inc. v. U.S. Fire Ins. Co., 299 F. App'x 892, 896 (11th Cir. 2008) (per curiam) (unpublished). The instant action clearly constitutes the same cause of action as Brown's previous action since the earlier action was based on the same core nucleus of operative fact and raised some of the same claims and allegations as those presented in this action.[8] Consequently, the fourth and final

[8] Moreover, the addition of new claims in the current complaint that were not asserted in the prior action is of no moment because "[r]es judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact," Draper v. Atlanta Indep. Sch. Sys., 377 F. App'x 937, 939 (11th Cir. 2010) (unpublished) (citations and internal marks omitted), and it therefore "bars the filing of claims which were raised *or could have been raised* in an earlier proceeding," Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999) (emphasis added) (citation omitted); see also Aning v. Fed. Nat'l Mortg. Ass'n, 754 F. App'x 816, 820 (11th Cir. 2018) (per curiam) (unpublished) (citations omitted) (finding that plaintiffs could not "create a new cause of action by asserting a new theory of recovery" and that the distinction between "fil[ing] a motion for an injunction and not a complaint" was not relevant "for res judicata purposes," since the two "arise from the same core facts," and "two claims are identical when they are based on the same allegations of misconduct, and the underlying allegation of misconduct in both cases is the defendants' improper foreclosure of the . . . property"); Manning v. City of Auburn, 953 F.2d 1355, 1358 (11th Cir. 1992) (citation omitted) (explaining that res judicata "bars relitigation of matters that were litigated or could have been litigated in [the] earlier suit."); Gjellum v. City of Birmingham, 829 F.2d 1056, 1059–60 (11th Cir. 1987) (citation and internal marks omitted) ("[W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties . . . are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim . . . but as to any other admissible matter which might have been offered for that purpose."); Neely v. City of Riverdale, 681 S.E.2d 677, 679 (Ga. Ct. App. 2009) ("The doctrine [of res judicata] applies even if some new factual allegations have been made[or] some new relief has been requested . . . . It is only where the merits were not *and* could not have been determined under a proper presentation and management of the case that res judicata is not a viable defense.");

element of res judicata is satisfied, and Brown's complaint is due to be dismissed as barred by res judicata. See Vereen, 2009 WL 901007, at *3 (finding claims barred by res judicata where "a comparison of the allegations in the [earlier and later complaints] . . . show[s] that all of the previous litigation arises from the same nucleus of operative facts."); see also Milburn, 2013 WL 1747915, at *4 (applying res judicata where "[i]n both cases, Plaintiff challenged [the] authority to foreclose on the property," and where "[t]he same Property, Note, Security Deed, and Assignment [were] at issue in both suits"). Accordingly, it is **RECOMMENDED** that Brown's complaint be **DISMISSED WITH PREJUDICE** as barred by res judicata.[9]

Franklin v. Gwinnett Cty. Pub. Sch., 407 S.E.2d 78, 83 (Ga. Ct. App. 1991), superseded by statute on other grounds as stated in, One Bluff Drive, LLC v. K.A.P., Inc., 766 S.E.2d 508, 513 (Ga. Ct. App. 2014) (citation omitted) (citing Spence v. Erwin, 38 S.E.2d 394, 396-97 (Ga. 1946)) (defining a cause of action "as 'all the facts which together constitute the plaintiff's right to maintain the action,'" and explaining that, "when a subsequent action arises from the same wrong as a prior action and is based on essentially the same facts, the subsequent action should be barred by res judicata").

[9] Alternatively, and to the extent Brown's complaint includes any claims that are not barred by res judicata, the Court will address defendants' arguments for dismissal of all of Brown's claims.

B. Defendants' Motion to Dismiss, [Doc. 6]

1. *Legal Standard*

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of an action when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the court must accept Brown's allegations as true and construe the complaint in his favor. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993) (citation omitted).[10] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [Brown's] obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (last alteration in original) (citations and internal marks omitted).

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[10] "However, the court need not 'accept as true a legal conclusion couched as a factual allegation.'" Smith v. Delta Air Lines, Inc., 422 F. Supp. 2d 1310, 1324 (N.D. Ga. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). "Additionally, '[c]onclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint. If the appended document . . . reveals facts which foreclose recovery as a matter of law, dismissal is appropriate.'" Id. (alterations in original) (footnote omitted) (quoting Associated Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974)) .

Furthermore, "Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Broner v. Wash. Mut. Bank, FA, 258 F. App'x 254, 256 (11th Cir. 2007) (per curiam) (unpublished) (quoting Fed. R. Civ. P. 8(a)(2)). "Factual allegations must be enough to raise a right to relief above the speculative level," Twombly, 550 U.S. at 555 (footnote and citation omitted), as the complaint must contain "enough facts to state a claim to relief that is plausible on its face," id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556).

The Supreme Court in Iqbal held:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not "show[n]"–"that the pleader is entitled to relief."

Id. at 678-79 (last alteration in original) (citations omitted). Thus, "[t]o state a plausible claim for relief, [Brown] must go beyond merely pleading the 'sheer possibility' of unlawful activity by [defendants] and so must offer 'factual content that allows the court to draw the reasonable inference that [defendants] [are] liable for the misconduct alleged.'" Stabb v. GMAC Mortg., LLC, 579 F. App'x 706, 708 (11th Cir. 2014) (per curiam) (unpublished) (citation omitted). "Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law." Moore v. McCalla Raymer, LLC, 916 F. Supp. 2d 1332, 1342 (N.D. Ga. 2013), adopted at 1336 (citations and internal marks omitted).

Finally, although *pro se* pleadings are governed by less stringent standards than pleadings prepared by attorneys, see Haines v. Kerner, 404 U.S. 519, 520 (1972); Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam) (citation omitted), *pro se* parties are still required to comply with minimum pleading standards set forth in the Federal Rules of Civil Procedure and this District's Local Rules, Grew v. Hopper, No. 2:07-cv-550-FtM-34SPC, 2008 WL 114915, at *2 (M.D. Fla. Jan. 9, 2008) (citations omitted); see also Beckwith v. Bellsouth Telecomms., Inc., 146 F. App'x 368, 371 (11th Cir. 2005) (per curiam) (unpublished) (citation omitted) (noting that although they are construed liberally, "*pro se* complaints also must comply with the procedural rules that govern pleadings"); Lindsay v. Bank of Am.

Home Loans, CIVIL ACTION NO. 1:15-CV-2074-ELR-LTW, 2016 WL 4546654, at *4 (N.D. Ga. Feb. 1, 2016) (citation omitted).

2. *Analysis*

Brown asserts claims of negligence, wrongful foreclosure, conversion, and fraud, and he requests injunctive relief. See [Doc. 1]. Defendants move to dismiss Brown's complaint in its entirety for failure to state a claim upon which relief can be granted. See [Doc. 6]. The Court will address the merits of each of the claims asserted in Brown's complaint.

a. Negligence

Brown asserts a claim for negligence against Wells Fargo, arguing that it "had a duty to implement HAMP and to approve [his] application for a loan modification because [he] met the eligibility requirements for a loan modification under HAMP." [Doc. 1 at 21 ¶ 58B].[11] Although Brown's negligence "claim[is] couched in terms of state law, [it] depend[s] entirely on [Well Fargo's] alleged violations of federal law," as "the basis of [Brown's] . . . negligence claim[] is that [Wells Fargo] violated several provisions of HAMP and failed to properly apply the HAMP guidelines." Williams

[11] Brown claims that defendants have not moved to dismiss his cause of action for negligence against U.S. Bank, see [Doc. 7 at 6], but as defendants point out, "[n]one of the allegations in the 'negligence' section of the [c]omplaint are directed at U.S. Bank," and thus, Brown "did not assert a negligence claim against U.S. Bank." [Doc. 8 at 2 n.1]. The Court agrees and will only address the negligence claim alleged in the complaint, which is asserted only against Wells Fargo.

v. Wells Fargo Bank, N.A., CIVIL ACTION NO. 1:12-cv-0390-JEC, 2012 WL 13014956, at *2 (N.D. Ga. Sept. 18, 2012) (citations omitted). Defendants argue that Brown fails to state a negligence claim against Wells Fargo based on alleged HAMP violations because Brown "does not have [a] private right of action against Wells Fargo premised on alleged HAMP violations, irrespective of how he captions or couches the claim." [Doc. 6 at 6-7 (citations omitted)].[12] The Court agrees.

"[T]he HAMP statute cannot serve as the basis for a negligence claim." Moragon v. Ocwen Loan Servicing, LLC, Case No: 6:17-cv-2028-Orl-40KRS, 2018 WL 3761036, at *7 (M.D. Fla. June 22, 2018), adopted by 2018 WL 3758310, at *1 (M.D. Fla. July 12, 2018). "HAMP was established in conjunction with [the Emergency Economic Stabilization Act of 2008 ('EESA')], as part of an effort to preserve home ownership and promote jobs and growth during the economic crisis of 2008." Williams, 2012 WL 13014956, at *2 (citing 12 U.S.C. § 5201(2)(B)). "To that end, HAMP was designed to prevent avoidable foreclosures by 'incentivizing loan

[12] Brown argues that defendants have mischaracterized his negligence claim because his "claim in negligence is premised on the common law of the State of Georgia and NOT HAMP." [Doc. 7 at 6]. However, as defendants point out in their reply, Brown's negligence claim "plainly identifies three [] duties allegedly owed by Wells Fargo all of which purportedly arise from HAMP[.]" [Doc. 8 at 2 (footnote omitted)]. The Court agrees with defendants that there "is no way to read [Brown's c]omplaint other than that he is trying to assert a negligence claim against Wells Fargo premised on duties purportedly owed to him under HAMP" and, as discussed hereinafter, those "alleged duties simply cannot serve as the basis for a negligence claim[.]" [Id. at 3].

servicers to reduce the required monthly mortgage payments for certain struggling homeowners.'" Id. (quoting Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 (11th Cir. 2012) (per curiam)). "Neither HAMP nor EESA expressly creates a private right of action for homeowners against loan servicers." Id. (citation omitted). "In *Miller*, the Eleventh Circuit likewise concluded that it was 'clear that no implied right of action exists' under either provision," explaining that "1) EESA and HAMP were not passed for the 'especial benefit' of struggling homeowners, but rather to restore liquidity and stability to the American financial system, (2) there is no discernible legislative intent to create a private right of action in either EESA or HAMP and providing such a right would likely chill participation in the program, and (3) contract and property law are traditionally the domain of state as opposed to federal law." Id. (citation omitted). "Applying *Miller*, [Brown] cannot state a plausible claim for relief based on [Wells Fargo's] alleged HAMP violations, regardless of whether the claim is couched in terms of negligence[.]" Id. (citation omitted); see also Moragon, 2018 WL 3761036, at *7 ("Although the *Miller* case did not involve negligence claims, its rationale clearly mandates that [plaintiff]'s negligence and negligent processing claims are barred insofar as they are premised on [defendant]'s alleged violation of the HAMP guidelines.").[13] Accordingly, it is

[13] Brown argues that "reliance on *Miller* is misplaced" because "*Miller* was briefed and decided before the 2012 changes to HAMP took effect on June 1, 2012,"

RECOMMENDED that defendants' motion to dismiss Brown's negligence claim asserted against Wells Fargo be **GRANTED**.

b. Wrongful Foreclosure

Brown next asserts a claim for wrongful foreclosure. See [Doc. 1]. Specifically, he claims that the foreclosure was wrongful for the following reasons: (1) the debt owed to defendants had been satisfied prior to the foreclosure since Wells Fargo "monetized" the promissory note; (2) Wells Fargo breached its duty to him by wrongfully denying his application for a loan modification under HAMP; (3) U.S. Bank breached its duty to him in conducting the foreclosure sale without

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and "the *Miller* Court did not involve a cause of action for negligence[.]" [Doc. 7 at 9-11]. However, as defendants point out, Brown "cites no authority that any changes to HAMP in 2012 provide him with a private right of action," and "the *Williams* and *Moragon* cases decided in September 2012 and June 2018, respectively, . . . state[] that negligence claims premised on HAMP are barred by the rule discussed in the *Miller* case." [Doc. 8 at 4 (footnote omitted)]. Brown attempts to distinguish Williams and Moragon and argues that they are not "reported" decisions. See [Doc. 7 at 12-13]. While these cases are unreported district court opinions, the Court finds them persuasive and rejects Brown's arguments. See S. Farms Ltd. v. Am. Farmland Inv'rs Corp., No. 6:06-cv-309-Orl-22DAB, 2006 WL 2038532, at *2 & n.3 (M.D. Fla. July 19, 2006) (finding unreported district court cases were "persuasive"). Brown also argues that there is an exception to the Miller case "where the plaintiff pleads promissory estoppel." [Doc. 7 at 13-14 (citations omitted)]. "[Brown], however, raises this promissory estoppel claim for the first time in his [r]esponse; nowhere does [he] assert in his [c]omplaint that he [is] entitled to relief under HAMP on the basis of promissory estoppel." Rule v. Chase Home Fin. LLC, No. 3:11-CV-146 CAR, 2012 WL 1833394, at *4 (M.D. Ga. May 18, 2012). Brown "may not supplant allegations made in his [c]omplaint with new allegations raised in a response to a motion to dismiss." Id. (citations omitted).

having a face-to-face meeting as required by 24 C.F.R. §§ 203.604(b) and 203.606(a) and the security deed; (4) U.S. Bank breached its duty to conduct the foreclosure sale in good faith since the foreclosure sale was conducted at a time when the courthouse and other government offices were closed due to inclement weather, which caused the "sale to yield a greatly reduced sales price"; and (5) U.S. Bank lacked standing to conduct a foreclosure sale because it had no interest in the property. [Id. at 26-30 ¶ 59B1-11].

To establish a claim for wrongful foreclosure, Brown must show "(1) a legal duty owed to [him] by the foreclosing party, (2) breach of that duty, (3) causal connection between the breach of that duty and the injury sustained, and (4) damages." McGinnis v. Am. Home Mortg. Servicing, Inc., No. 5:11-CV-284 (CAR), 2012 WL 426022, at *3 (M.D. Ga. Feb. 9, 2012) (citation omitted). First, Brown has "failed to allege a causal connection between any breach and the damages he allegedly sustained." Fitzpatrick v. Bank of N.Y. Mellon, CIVIL ACTION NO. 1:13-CV-1496-RWS-ECS, 2013 WL 12097456, at *4 (N.D. Ga. Nov. 12, 2013), adopted by 2013 WL 12108621, at *1 (N.D. Ga. Dec. 3, 2013), aff'd, 580 F. App'x 690 (11th Cir. 2014) (per curiam) (unpublished) (citations omitted). Indeed, "[i]n order to show the injury was caused by the breach of duty and not [his] own acts or omission, [Brown] must not be in default on [his] mortgage." Harden v. JP Morgan Chase Bank, N.A.,

Civil Action No. 1:13-CV-03535-RWS, 2014 WL 836013, at *3 (N.D. Ga. Mar. 4, 2014) (citation omitted). The complaint does "not allege[] that [Brown] has made [all of his] mortgage payments" or that he "tendered any amount owed under the loan." Silvestar v. Nationstar Mortg. LLC, CIVIL ACTION FILE NO. 1:15-cv-4246-RWS-JKL, 2016 WL 5339736, at *4 (N.D. Ga. July 12, 2016), adopted by 2016 WL 5660348, at *1 (N.D. Ga. Aug. 25, 2016); see also Chester v. Bank of Am., CIVIL ACTION FILE NO. 1:14-CV-00027-JEC-GGB, Civil Action File No. 13CV02791, 2014 WL 12117966, at *6-7 (N.D. Ga. May 7, 2014), adopted by 2014 WL 12284023, at *1 (N.D. Ga. Aug. 28, 2014) (citations omitted).

In addition, as to Brown's allegation that his debt had been satisfied, defendants argue that his claim is nonsensical and meritless. [Doc. 6 at 7-8]. In his response brief, Brown "hereby dismiss[es] voluntarily any claim based on the monetization of [his] Note and/or the claim that his mortgage is paid in full[.]" [Doc. 7 at 15]. Thus, defendants' motion to dismiss Brown's wrongful foreclosure claim on this basis is due to be granted as unopposed. With regard to his claim that the foreclosure was wrongful because Wells Fargo denied his application for a loan modification under HAMP, despite Brown's claim to the contrary, [Doc. 7 at 16], his "wrongful foreclosure claim is nothing more than a disguised HAMP claim, and fails to state a cause of action independent of HAMP," Shofner v. CitiMortgage, Inc.,

CIVIL ACTION FILE NO. 4:11-CV-0254-HLM, 2011 WL 13229645, at *8 (N.D. Ga. Dec. 12, 2011). His "wrongful foreclosure claim [based on HAMP] therefore is due to be dismissed." Id.[14]

As for Brown's remaining contentions regarding his wrongful foreclosure claim, defendants argue that U.S. Bank did not breach any duties as the cited federal regulations relate to mortgages insured by HUD, that U.S. Bank had standing to foreclose, and that U.S. Bank did not breach any duty by conducting the foreclosure sale on December 6, 2016. [Doc. 6 at 9-11]. As defendants point out in their reply, Brown "does not address the[se] other grounds for dismissal of the wrongful

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[14] Brown claims that courts "have allowed wrongful foreclosure actions to proceed when HAMP is involved" and cites Rule, 2012 WL 1833394, "where the [c]ourt found that Rule's claims of promissory estoppel and lack of pre-foreclosure notice could proceed." [Doc. 7 at 16-17 (internal marks omitted)]. However, similar to the plaintiff in Rule, Brown raises his claim of promissory estoppel for the first time in response to defendants' argument that his claim for wrongful foreclosure based on any purported HAMP violation fails, and as previously discussed, this claim is not properly before the Court and will not be considered. See Rule, 2012 WL 1833394, at *4. And, while the court in Rule did recognize that a "bank's failure to provide proper notice is a breach of the duty to fairly exercise the power of sale and may support a claim for wrongful foreclosure," id. (citation omitted), this does not support his claim that he can proceed on his wrongful foreclosure claim based on alleged HAMP violations, and he does not base his wrongful foreclosure claim on lack of proper notice, see [Doc. 1 at 26-30 ¶ 59B1-11]. Brown also cites Williams v. Wells Fargo Bank, N.A., Civil Action No. 1:12-cv-0752-JEC, 2013 WL 1189500 (N.D. Ga. Mar. 21, 2013), asserting that it "cannot be contested that [he has] set forth a sufficient cause of action for wrongful foreclosure," [Doc. 7 at 16], but the court in Williams found that plaintiff failed to state a claim for wrongful foreclosure, 2013 WL 1189500, at *3. Thus, Brown's reliance on Rule and Williams is misplaced.

foreclosure claim raised in the [m]otion[to dismiss]." [Doc. 8 at 8]. "[I]n this district, failure to respond to arguments relating to a claim in the plaintiff's initial response to the motion constitutes abandonment of the claim." Moreno v. Turner, CIVIL ACTION NO. 1:13-CV-01518-RLV-JCF, 2013 WL 12095213, at *3 (N.D. Ga. Dec. 19, 2013), adopted by 2014 WL 12527483, at *1 (N.D. Ga. Jan. 31, 2014), aff'd on other grounds, 572 F. App'x 852 (11th Cir. 2014) (per curiam) (unpublished) (citation and internal marks omitted). "This principle applies . . . to justify dismissal of [Brown's] claim[] on the ground[] that [it has] been abandoned." White v. GA Dep't of Motor Vehicle Safety, Civil Action No. 1:06-CV-0124-TWT, 2006 WL 1466254, at *1 (N.D. Ga. May 19, 2006), adopted at *1.[15] Accordingly, it is **RECOMMENDED**

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[15] Even if Brown had not abandoned these arguments as to his wrongful foreclosure claim, this claim would still be subject to dismissal. First, "Brown's wrongful foreclosure claim cannot be premised on [U.S. Bank's] purported failure to comply with HUD regulations since those regulations were not incorporated, either explicitly or implicitly, in the security deed." Brown v. Wells Fargo Bank, N.A., CIVIL ACTION NO. 3:17-cv-00044-TCB-RGV, 2018 WL 6694897, at *10 (N.D. Ga. Oct. 11, 2018), adopted by 2018 WL 6694921, at *5 (N.D. Ga. Dec. 3, 2018). In addition, his argument that U.S. Bank lacked standing to foreclose is meritless. In Georgia, "the holder of a deed to secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed." DeWeese v. JPMorgan Chase Bank, N.A., Civil Action No. 2:13-CV-00059-RWS, 2013 WL 6178546, at *5 (N.D. Ga. Nov. 25, 2013) (citing You v. JP Morgan Chase Bank, N.A., 743 S.E.2d 428, 433 (Ga. 2013)). Here, it is undisputed that Brown executed a valid security deed that conveyed the property to Wells Fargo, with power of sale. See [Doc. 1 at 39-56]. Since Wells Fargo subsequently assigned its rights under the security deed to U.S. Bank, which was properly filed in the Office of the Clerk of the Superior Court of Fayette County, see

that defendants' motion to dismiss Brown's claim for wrongful foreclosure be **GRANTED** for all the reasons discussed.

[id. at 57], it follows that U.S. Bank is entitled to exercise the power of sale under the terms of the security deed. In other words, because U.S. Bank holds the security deed to the property, it "possesses full authority to exercise the power of sale upon . . .default, regardless of [whether it is the "secured creditor" or "real party in interest"] with respect to the note," You, 743 S.E.2d at 433; see also Smith v. Saxon Mortg., 446 F. App'x 239, 240 (11th Cir. 2011) (per curiam) (unpublished), summarily aff'g, Civil Action No. 1:09-cv-3375-WCO, at [Doc. 31 at 3-6] (N.D. Ga. Mar. 16, 2011). Furthermore, "Brown appears to allege a claim for wrongful foreclosure based on 'chilling the bid' given his allegations regarding an inadequate price and conducting the sale at a time when offices and businesses were closed due to inclement weather, thereby reducing the number of people present to bid." Brown, 2018 WL 6694897, at *10; see also [Doc. 1 at 27-28 ¶ 59B6]. "A claim of 'chilling the bidding' arises from evidence that the foreclosing party's conduct (perhaps in combination with the conduct of others) suppressed the bidding at a foreclosure sale." LSREF2 Baron, LLC v. Alexander SRP Apartments, LLC, 17 F. Supp. 3d 1289, 1311 (N.D. Ga. 2014) (citation omitted). "To prevail on a wrongful foreclosure claim premised on alleged bid-chilling, the debtor must prove (1) a grossly inadequate price and (2) conduct that amounts to fraud, mistake, misapprehension, surprise or similar behavior." Id. (citations omitted). Brown "has not alleged any facts indicating that the property was sold at foreclosure for an inadequate price, much less a price that was grossly inadequate," and he therefore "has not averred facts that would entitle [him] to recover damages under the theory that [U.S. Bank] failed to exercise the power of sale fairly and in good faith, because []he has not pleaded that the property was sold at foreclosure for a grossly inadequate price." Casamayor v. BAC Home Loans Servicing, LP, CIVIL ACTION NO. 1:12-cv-1522-SCJ-ECS, 2013 WL 12247700, at *10-11 (N.D. Ga. Feb. 4, 2013), adopted by 2013 WL 12247837, at *4 (N.D. Ga. Feb. 25, 2013) (citations omitted). Moreover, "[i]nadequacy of price alone is insufficient to sustain a claim for wrongful foreclosure," LSREF2 Baron, 17 F. Supp. 3d at 1311(citations omitted), and Brown has not alleged facts that otherwise plausibly support the elements of a wrongful foreclosure bid-chilling claim.

c. Conversion

Brown also asserts a claim for conversion against defendants, again relying on HAMP violations, which he contends "interfered with [his] right to possess and control the [] [p]roperty." [Doc. 1 at 30 ¶ 60B]. Defendants argue that this claim should be dismissed because Brown fails to allege the essential elements of conversion. [Doc. 6 at 12]. Brown "did not address his conversion claim in his [r]esponse," [Doc. 8 at 9], and thus, defendants' motion to dismiss this claim could be granted on this basis alone, see White, 2006 WL 1466254, at *1. Nevertheless, the Court will briefly address Brown's conversion claim.

First, to the extent Brown's claim is based entirely on defendants' alleged failure to comply with HAMP, it is due to be dismissed. See Shofner, 2011 WL 13229645, at *8 (citations omitted) ("The majority of courts that have addressed this issue have concluded that a plaintiff may not pursue a state law cause of action that seeks to do nothing more than enforce HAMP, or that is not sufficiently independent of HAMP."). Moreover, Brown does not allege a plausible claim for conversion as he has not pled that either defendant is in actual possession of the property, see Porter v. Ocwen Loan Servicing, Civil Action No. 1:16-CV-04759-RWS-JCF, 2017 WL 8186845, at *3 (N.D. Ga. Apr. 24, 2017), adopted by 2017 WL 8186800, at *1 (N.D. Ga. July 7, 2017) (citation omitted) ("To allege a plausible claim for conversion, a plaintiff

must show '(1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property.'"); see also Kin Chun Chung v. JPMorgan Chase Bank, N.A., 975 F. Supp. 2d 1333, 1347 (N.D. Ga. 2013) (citation omitted) ("Further precluding recovery [on plaintiff's conversion claim], the [p]laintiff does not even allege that Chase still possesses any of these items."), and it appears from the complaint and his response that he is in possession of the property, see [Doc. 1 at 34-35 ¶ 62 (requesting TRO to prevent eviction); Doc. 7 at 18 (noting that the state court has stayed the dispossessory proceedings pending the outcome of this case)]. Lastly, Brown "cannot state a claim for conversion because the property [d]efendant[s] allegedly converted is [his] home, and under Georgia law, conversion does not apply to real property." Porter, 2017 WL 8186845, at * 3 (alterations, citation, and internal marks omitted); see also Kin Chun Chung, 975 F. Supp. 2d at 1347 (citation omitted) ("Conversion does not apply to real property."). Accordingly, it is **RECOMMENDED** that defendants' motion to dismiss Brown's conversion claim be **GRANTED**.

d. Fraud

Brown's complaint contains a count entitled "Georgia Consume Fraud Act" and cites O.C.G.A. § 51-6-1 thererin. [Doc. 1 at 31-34 ¶ 61]. Defendants interpret this

cause of action as an attempt to assert a claim for fraud and argue that Brown fails to allege his claim with particularity as required by Federal Rule of Civil Procedure 9(b) when asserting a claim for fraud. [Doc. 6 at 12-14]. Brown appears to concede defendants' argument, [Doc. 7 at 17], and defendants' motion to dismiss Brown's fraud claim is due to be granted as unopposed.

Brown asks "the Court for leave to amend [his c]omplaint to plead [his] claim for fraud with more particularity." [Id.]. Brown's request is due to be denied because "[f]iling a motion is the proper method to request leave to amend a complaint." Long v. Satz, 181 F.3d 1275, 1279 (11th Cir. 1999) (per curiam). Rule 7(b) of the Federal Rules of Civil Procedure provides that a "request for a court order must be made by motion," which must "(A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought." Fed. R. Civ. P. 7(b)(1). Since Brown's request for leave to file an amended complaint was included in his memorandum in opposition to defendants' motion to dismiss, not in a separate motion, and he has failed to include a proposed amended complaint or a description of the substance of any proposed amendments that would support a plausible claim, his request is due to be denied. Dunkerley v. Estes, Civil Action No. 13-00331-CB-M, 2014 WL 3063563, at *2 (S.D. Ala. July 7, 2014); see also Long, 181 F.3d at 1279; Meeks v. Equifax Info. Servs., LLC,

CIVIL ACTION FILE NO. 1:18-CV-03666-TWT-WEJ, 2019 WL 1856411, at *7 (N.D. Ga. Mar. 4, 2019), adopted by 2019 WL 1856412, at *1 (N.D. Ga. Apr. 23, 2019) (citations omitted) (noting that "plaintiff never filed a motion for leave to amend setting forth the substance of the proposed amendment or attaching a copy of a proposed second amended complaint" and thus finding that the request to amend was "legally insufficient and should be denied").

"Additionally, courts need not grant an opportunity to amend when amendment would be futile, and it is well settled that amendment is futile where an action is barred by res judicata." Givenchy v. Countrywide Home Loans, Inc., CIVIL ACTION NO. 1:18-cv-02180-SCJ-RGV, 2018 WL 6829074, at *7 (N.D. Ga. Nov. 21, 2018), adopted by 2018 WL 6829057, at *1 (N.D. Ga. Dec. 13, 2018) (citations omitted). "Thus, even if [Brown] had followed the proper procedures in requesting leave to amend, his requested amendment would have been futile because, as the foregoing discussion demonstrates, his claims are barred by res judicata." Id. Accordingly, Brown's request to amend his complaint is **DENIED**.

e. Injunctive Relief

Finally, Brown requested in his complaint injunctive relief, including a TRO, to prohibit defendants continuing with eviction proceedings. [Doc. 1 at 34-35 ¶ 62]. Defendants moved to dismiss this claim, [Doc. 6 at 14-15], and in his response brief,

Brown voluntarily dismisses his request for injunctive relief as the state court has stayed the dispossessory proceedings pending the outcome of this case, [Doc. 7 at 18]. Accordingly, it is **RECOMMENDED** that defendants' motion to dismiss Brown's claim for injunctive relief be **GRANTED** as unopposed.[16]

III. CONCLUSION

For the foregoing reasons, it is **RECOMMENDED** that this case be **DISMISSED WITH PREJUDICE** as barred by res judicata and, alternatively, that defendants' motion to dismiss, [Doc. 6], be **GRANTED**.

The Clerk is **DIRECTED** to terminate this referral.

IT IS SO RECOMMENDED this 22nd day of July, 2019.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

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[16] Brown references 12 U.S.C. § 2605(f) and 12 C.F.R. § 1024.41(a) in the section of his complaint pertaining to jurisdiction. See [Doc. 1 at 10 ¶ 23]. However, he has not asserted any claims under RESPA or alleged that either defendant violated RESPA, nor has he included any factual allegations that would support such a claim. Thus, to the extent Brown intended to assert a claim pursuant to RESPA, this claim also is due to be dismissed. See Watkins v. Beneficial, HSBC Mortg., Civil Action No. 1:10-CV-1999-TWT-RGV, 2010 WL 4318898, at *3 (N.D. Ga. Sept. 2, 2010), adopted by 2010 WL 4312878, at *1 (N.D. Ga. Oct. 21, 2010) (citations omitted) (finding plaintiff's "vague references to alleged RESPA violations" without "sufficient facts to support his RESPA claims" failed to state a claim against defendant under RESPA).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

TIMOTHY B. BROWN, Plaintiff, v. U.S. BANK NATIONAL ASSOC. and WELLS FARGO BANK, N.A., Defendants.	CIVIL ACTION FILE NO. 3:19-cv-1-TCB

O R D E R

This case comes before the Court on Magistrate Judge Russell G. Vineyard's report and recommendation (the "R&R") [10], which recommends dismissing this case with prejudice as barred by res judicata and, alternatively, granting Defendants' motion [6] to dismiss. Plaintiff Timothy Brown has filed objections [13].

A district judge has a duty to conduct a "careful and complete" review of a magistrate judge's R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam) (quoting *Nettles v. Wainwright*,

677 F.2d 404, 408 (5th Cir. Unit B 1982)). This review may take different forms, however, depending on whether there are objections to the R&R. The district judge must "make a de novo determination of those portions of the [R&R] to which objection is made." 28 U.S.C. § 636(b)(1)(C). In contrast, those portions of the R&R to which no objection is made need only be reviewed for "clear error." *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006) (per curiam) (quoting *Diamond v. Colonial Life & Accident Ins.*, 416 F.3d 310, 315 (4th Cir. 2005)).[1]

"Parties filing objections must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." *Nettles*, 677 F.2d at 410 n.8. "This rule

[1] *Macort* dealt only with the standard of review to be applied to a magistrate's factual findings, but the Supreme Court has indicated that there is no reason for the district court to apply a different standard to a magistrate's legal conclusions. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Thus, district courts in this circuit have routinely reviewed both legal and factual conclusions for clear error. *See Tauber v. Barnhart*, 438 F. Supp. 2d 1366, 1373–74 (N.D. Ga. 2006) (collecting cases). This is to be contrasted with the standard of review on appeal, which distinguishes between the two. *See Monroe v. Thigpen*, 932 F.2d 1437, 1440 (11th Cir. 1991) (holding that when a magistrate's findings of fact are adopted by the district court without objection, they are reviewed on appeal under a "plain error standard" while questions of law always remain subject to de novo review).

facilitates the opportunity for district judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act." *Id.* at 410.

After conducting a complete and careful review of the R&R, the district judge "may accept, reject, or modify" the magistrate judge's findings and recommendations. 28 U.S.C. § 636(b)(1)(C); *Williams*, 681 F.2d at 732. The district judge "may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C).

Brown objects to the R&R's findings that (1) the action is barred by res judicata, (2) any negligence claim premised on the Home Affordable Modification Program ("HAMP") is barred, and (3) he should not be allowed to re-plead his fraud claim. The Court addresses each of these objections in turn.

Brown first objects to the R&R's finding that his complaint is barred by res judicata. Brown asserts that at the time he filed his previous lawsuit, he was unaware of the causes of action that form the basis of his current lawsuit.

On March 30, 2017, Brown filed his first lawsuit alleging claims for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. and the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2602 et seq., along with myriad state-law claims. In that case, the Court dismissed claims against Defendant Wells Fargo for failure to state a claim and against Defendant U.S. Bank for failure to effect service of process.

Brown then filed an amended complaint alleging claims for fraud, breach of contract, and wrongful foreclosure. Again, this Court dismissed the claims against Wells Fargo.

On January 3, 2019, Brown filed the present action. He brings claims against U.S. Bank and Wells Fargo for negligence, wrongful foreclosure, conversion, and violation of the Georgia Consumer Fraud Act.

Though Brown argues that he had a new factual basis for the claims in this action, the Court disagrees. The doctrine of res judicata bars the filing of claims that were raised or could have been raised in an earlier proceeding. *Ragsdale v. Rubbermaid*, 193 F.3d 1235, 1238 (11th

Cir. 1999). All elements of res judicata are satisfied; though Brown may assert new factual allegations, his previous and present lawsuit arise from the same operative nucleus of facts. Brown's objection is overruled.

Next, Brown objects to the R&R's finding that his negligence claim is preempted by HAMP. He argues that HAMP imposed a duty upon Defendants to treat him a certain way and that they breached that duty. Thus, Brown asserts, he seeks redress under a negligence theory because duty is an element of a negligence claim.

The law is clear that HAMP cannot serve as the basis for a negligence claim, *Moragon v. Ocwen Loan Servicing, LLC*, No. 6:17-cv-2028-Orl-40KRS, 2018 WL 3761036, at *7 (M.D. Fla. June 22, 2018), and Brown's objection is overruled.

Finally, Brown objects to the R&R's finding that he should not be allowed to amend his fraud claim because the claim is not barred by res judicata.

As a preliminary matter, Brown filed his request to file an amended complaint as part of his response to Defendants' motion to dismiss and not as a separate motion. Accordingly, because Brown did

not file a motion for leave to file an amended complaint, his request to file an amended complaint should be denied. More important, Brown's amendment would be futile. Brown attempted to plead fraud in his amended complaint in the prior action and the claim was dismissed; therefore, the claim is barred by res judicata.

Having conducted a complete and careful review of the R&R, including a de novo review of those portions of the R&R to which Brown objects to, the Court overrules Brown's objections [12] and adopts as its order the R&R [10]. Brown's case is dismissed. The Clerk is directed to close this case.

IT IS SO ORDERED this 19th day of August, 2019.

Timothy C. Batten, Sr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

TIMOTHY B. BROWN,

Plaintiff,

vs.

U.S. BANK NATIONAL ASSOC. and WELLS FARGO BANK, N.A.,

Defendant.

CIVIL ACTION FILE

NO. 3:19-cv-00001-TCB

JUDGMENT

This action having come before the court, Honorable Timothy C. Batten, Sr., United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted said motion, it is

Ordered and Adjudged that the action be, and the same hereby is, dismissed.

Dated at Newnan, Georgia, this 19th day of August, 2019.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Uzma S. Wiggins
Uzma S. Wiggins, Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
August 19, 2019
James N. Hatten
Clerk of Court

By: s/Uzma S. Wiggins
Deputy Clerk

Timothy B. Brown
C/O 165 Monticello Way
Fayetteville, GA
Zip code exempt [30214]
Without the United States Corporation
770-827-6458
PLAINTIFF Pro Per/Sui Juris

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

TIMOTHY B. BROWN, Plaintiff vs. U.S. BANK NATIONAL ASSOC., AS TRUSTEE, MASTR ASSET BACKED SECURITIES TRUST 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AB1, AND WELLS FARGO BANK, N.A., Defendants	CASE NUMBER: 3:19-cv-00001-TCB-RGV **PLAINTIFF'S MOTION FOR NEW TRIAL AND MEMORANDUM OF LAW IN SUPPORT** ORAL ARGUMENT NOT REQUESTED

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Timothy B. Brown, hereinafter referred to as "Plaintiff," proceeding hereafter as Sui Juris, and files this my Motion for New Trial and

Memorandum of Law in Support requesting the Court to reconsider and to set aside its Opinion and Judgment dismissing my case entered on August 19, 2019.

I. RULE 59 STANDARD

A motion for new trial may be granted "after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court or District of Columbia courts," Fed. R. Civ. P. 59(a)(1)(B). Further, it is within "the sound discretion of the trial court", to grant a motion for new trial for any reason which will "prevent a miscarriage of justice." *Roy v. Volkswagen of America,* 896 F.2d 1174, 1176 (9th Cir. 1990) (*citing Hanson v. Shell Oil Co,* 541 F.2d 1352, 1359 (9th Cir. 1976)). Appellate courts "review the district court's denial of a motion for new trial for abuse of discretion." *Steger v. General Elec. Co.,* 318 F.3d 1066, 1081 (11th Cir. 2003).

II. IT IS A MISCARRIAGE OF JUSTICE FOR THE COURT TO GRANT DEFENDANTS' MOTION TO DISMISS MY CAUSE OF ACTION FOR NEGLIGENCE

The Court accepted the Magistrate Judge's recommendation that my negligence cause of action be dismissed for failure to state a claim because such an action is preempted by HAMP. The Court cited a single case, *Moragon v. Ocwen Loan Servicing, LLC,* No. 6:17-cv-2028-Orl-40KRS, 2018 WL 3761036, at *7 (M.D. Fla. June 22, 2018), to support its ruling. I do not have access to WestLaw and could not locate this case anywhere else. In addition, I cannot find a single

case in the 11th Cir. Which cites *Moragon.* However, I did find some cases which reach a different conclusion that does *Moragon.*

In the leading federal appellate decision on this issue, the United States Court of Appeals for the Seventh Circuit rejected Wells Fargo's contention that the absence of a private federal remedy under HAMP displaced the plaintiffs' state-law claims. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 581 (7th Cir. 2012). There, the plaintiff alleged that Wells Fargo had issued her a "trial" loan modification under which it agreed to permanently modify the loan if she qualified under HAMP guidelines. The plaintiff alleged that although she did qualify, Wells Fargo refused to grant her a permanent modification after it miscalculated her property taxes. The district court dismissed the complaint in its entirety, reasoning that the plaintiff's state-law claims were premised on Wells Fargo's obligations under HAMP, which did not confer a private right of action. Id. at 555–59. In reversing the dismissal, *Wigod* concluded that "[t]he absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law." Id. at 581.

Other districts throughout the country have similarly found that the HAMP will not obviate a cause of action purely because the cause of action is in some manner related to the HAMP. See *Vida v. OneWest Bank, F.S.B.*, 2010 WL

5148473 (D. Or. Dec. 13, 2010) (finding that defendants were not necessarily immunized for their conduct even though the alleged transaction was associated with the HAMP); *Darcy v. CitiFinancial, Inc., 2011* WL 3758805, at *4 (W.D. Mich. Aug. 25, 2011) (holding that plaintiff's contract action "[was] not preempted or otherwise precluded by HAMP"); see also *Corvello v. Wells Fargo Bank, NA,* 728 F.3d 878, 884 (9th Cir. 2013).[1] See also Givens v. Saxon Mortg. Servs., Inc., CIVIL ACTION NO. 13-00245-KD-N (S.D. Ala. May. 30, 2014) where the district court allowed a claim for fraudulent inducement into a HAMP modification to go forward.

The 11th Cir., after restating its rule in *Miller*, found that promissory estoppel and negligent misrepresentation related to HAMP were not barred under *Miller*, although the Appeals Court affirmed a grant of summary judgment on lack of evidence grounds, *Bloch v. Wells Fargo Home Mortg.*, 755 F.3d 886 (11th Cir. 2014). My negligence claims are much more detailed and reliable than the scintilla of evidence offered by the Blochs. I ask the Court to look particularly at paragraphs K, L, M, P, and Q of my negligence cause of action. In addition, I should be allowed to amend my complaint and add promissory estoppel instead of fraud for the misrepresentation of Wells Fargo who told me that I needed to let my

[1] Cited in Ferrerr v. U.S. Bank, N.A., Case No. 14-CIV-20741-BLOOM/Valle (S.D. Fla. Sep. 15, 2014).

mortgage get three months behind before I could qualify for a loan modification – a statement Wells Fargo knew was false and which it knew that I would rely upon it to my detriment which is just what happened. This inability thus far to hold Wells Fargo and others liable for their misdeeds is just the kind of miscarriage of justice Rule 59 seeks to rectify. "Otherwise, it would be impossible to give any meaning to the concept of "miscarriage of justice."" *U.S. v. Wall,* 389 F.3d 457, 466 (5th Cir. 2004).

Although *U.S. v. Wall* is a criminal appeal, the miscarriage of justice standard applies to civil cases as well, *Cline v. Wal-Mart Stores, Incorporated,* 144 F.3d 294, 306-7 (4th Cir. 1998).

III. CONCLUSION

The housing crisis continues driven in large part by the misconduct, and in some instances, fraudulent conduct of many of the financial institutions involved in the housing market. Few consumers, myself included, have the resources or power to redress wrongful foreclosures except by resort to courts which are supposed to be the guardians of justice. However, sometimes, courts fail to see clearly because of the smokescreen generated by those who see numbers rather than people. Such is the case here. *Miller* has been given too narrow an interpretation and too much of a far-reaching application. I have shown that the 11th Cir. Which rendered the *Miller* decision, has stated clearly that *Miller* does not

bar all state law claims premised in some respect on HAMP. I have shown also that many district court cases in the 11th Cir. discuss HAMP related cases without any discussion of *Miller*.

I was wronged by the misconduct of the defendants in this case and that misconduct caused me to become delinquent in my mortgage payments even though I was not delinquent in those payments when I contacted defendants for assistance. It is a miscarriage of justice to deny me an opportunity to be heard and to hold the defendants accountable for their misconduct. I ask the Court to reconsider its dismissal of my case and to grant me a new trial.

Respectfully submitted this 30th day of August 2019.

Timothy Brown
C/O 165 Monticello Way
Fayetteville, GA
Zip code exempt [30214]
Without the United States Corporation
770-827-6458
PLAINTIFF Pro Per/Sui Juris

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I mailed postage prepaid, certified mail, return receipt requested, a copy of the above and foregoing **PLAINTIFF'S MOTION FOR NEW TRIAL AND MEMORANDUM OF LAW IN SUPPORT**

to the following attorneys of record for Defendants at the addresses indicated below:

Daniel P. Moore
Baker, Donelson, et al
Monarch Plaza, Suite 1600
3414 Peachtree Rd., N.E.
Atlanta, GA 30326

Arthur A. Ebbs, Esq.
WOMBLE BOND DICKINSON (US), LLP
271 17 St. NW, Suite 2400
Atlanta, GA 30363

Timothy B. Brown

CERTIFICATION AS TO FONT

Pursuant to N.D. Ga. Local Rule 7.1 D, I hereby certify that this document is submitted in Times New Roman 14-point type as required by N.D. Ga. Local Rule 5.1(b).

Timothy B. Brown

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Form 1. Notice of Appeal from a Judgment or Order of a United States District Court

Name of U.S. District Court: Northern District of Georgia

U.S. District Court case number: 3:19-cv-00001-TCB-RGV

Date case was first filed in U.S. District Court: 01/23/2019

Date of judgment or order you are appealing: 08/19/2019

Fee paid for appeal? *(appeal fees are paid at the U.S. District Court)*

◉ Yes ○ No ○ IFP was granted by U.S. District Court

List all Appellants *(List each party filing the appeal. Do not use "et al." or other abbreviations.)*

Timothy B. Brown

Is this a cross-appeal? ○ Yes ◉ No

If Yes, what is the first appeal case number?

Was there a previous appeal in this case? ○ Yes ◉ No

If Yes, what is the prior appeal case number?

Your mailing address:

165 Monticello Way

City: Fayetteville State: GA Zip Code: 30214

Prisoner Inmate or A Number (if applicable):

Signature **Date** Sep 24, 2019

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Form 6. Representation Statement

Instructions for this form: http://www.ca9.uscourts.gov/forms/form06instructions.pdf

Appellant(s) *(List **each** party filing the appeal, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

Timothy B. Brown

Name(s) of counsel (if any):

None.

Address: 165 Monticello Way, Fayetteville, GA 30214

Telephone number(s): 770-827-6458

Email(s): brownt@nmobgyn.com

Is counsel registered for Electronic Filing in the 9th Circuit? ○ Yes ◉ No

---

Appellee(s) *(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)*

Name(s) of party/parties:

Wells Fargo Bank, N.A.
U.S. BANK NATIONAL ASSOC., AS TRUSTEE, MASTR ASSET BACKED SECURITIES TRUST 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICA

Name(s) of counsel (if any):

Dylan W. Howard
Daniel Patrick Moore
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC- Atl

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Telephone number(s): 404-577-6000 678-406-8704 770-643-7242 (fax)

Email(s): dhoward@bakerdonelson.com dmoore@geherenlaw.com

To list additional parties and/or counsel, use next page.

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ○ Yes ◉ No

Appellees

Name(s) of party/parties:

U.S. BANK NATIONAL ASSOC., AS TRUSTEE, MASTR ASSET BACKED SECURITIES TRUST 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICA

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Name(s) of party/parties:

Wells Fargo Bank, N.A.

Name(s) of counsel (if any):

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

TIMOTHY B. BROWN, Plaintiff, v. U.S. BANK NATIONAL ASSOC. and WELLS FARGO BANK. N.A., Defendants.	CIVIL ACTION FILE NO. 3:19-cv-1-TCB

ORDER

This case comes before the Court on Plaintiff Timothy Brown's pro se motion [16] for new trial.

Brown's motion is mistitled because a trial was never held in this case. Rather, the Court construes Brown's motion as a motion for reconsideration.

The Federal Rules of Civil Procedure do not specifically authorize motions for reconsideration. Local Rule 7.2E provides that motions for reconsideration are not to be filed "as a matter of routine practice," but

only when "absolutely necessary." A party may move for reconsideration only when at least one of the following three elements exists: (1) the discovery of new evidence; (2) an intervening development or change in the controlling law; or (3) the need to correct a clear error or manifest injustice. *Pres. Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995).

A motion for reconsideration "is not an opportunity for the moving party . . . to instruct the court on how the court could have done it better the first time." *Id.* (internal punctuation omitted). In other words, a party "may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." *Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000); *see also Godby v. Electrolux Corp.*, Nos. 1:93-cv-0353-ODE, 1:93-cv-126-ODE, 1994 WL 470220, *1 (N.D. Ga. May 25, 1994) ("A motion for reconsideration should not be used to reiterate arguments that have previously been made. . . . [It is an improper use of] the motion to

reconsider to ask the Court to rethink what the Court has already thought through—rightly or wrongly.") (citation omitted); *In re Hollowell*, 242 B.R. 541, 542–43 (Bankr. N.D. Ga. 1999) ("Motions for reconsideration should not be used to relitigate issues already decided or as a substitute for appeal. Such motions also should not be used to raise arguments which were or could have been raised before judgment was issued.") (citation omitted).

On March 30, 2017, Brown filed his first lawsuit alleging claims for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. and the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2602 et seq., myriad state-law claims, fraud, breach of contract, and wrongful disclosure. The Court dismissed the claims against Defendant Wells Fargo for failure to state a claim and against Defendant U.S. Bank for failure to effect service of process.

On January 3, Brown filed the present action against the same defendants, alleging claims for negligence, wrongful foreclosure, conversion, and violation of the Georgia Consumer Fraud Act. Brown's current lawsuit arises out of the same operative nucleus of facts as his

first lawsuit. On August 19, the Court adopted Magistrate Judge Russell G. Vineyard's report and recommendation and dismissed Brown's claims in the present action. On August 30, Brown filed his motion for a new trial.

Brown argues that his negligence claim should not have been dismissed. However, he has failed to demonstrate the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or manifest injustice, as required for a motion for reconsideration to be granted. *See Pres. Endangered Areas of Cobb's History, Inc.*, 917 F. Supp. at 1560. Brown merely cites to cases that allegedly "reach a different conclusion" than the case that the Court previously cited, and fails to address the doctrine of res judicata. [16] at 3.

The doctrine of res judicata bars the filing of claims that were raised or *could have been raised* in an earlier proceeding. *Ragsdale v. Rubbermaid*, 193 F.3d 1235, 1238 (11th Cir. 1999). Thus, "actual knowledge of a potential claim . . . is not a requirement for res judicata to bar a subsequent action." *In re Baldwin*, No. 03-MC-3152-N, 307 B.R.

251, 266 (M.D. Ala. Mar. 10, 2004) (internal citations omitted). Regardless of the claims that Brown asserts in the current lawsuit, the first lawsuit and the current lawsuit arise out of the same operative nucleus of facts. Although Brown previously asserted that he was unaware of the causes of action that form the basis of his current lawsuit when he filed his first lawsuit, his assertion does not overcome the doctrine of res judicata. Thus, the doctrine of res judicata bars the claims in the current lawsuit.

Brown also cites several cases to further his argument that the absence of a private federal remedy under HAMP does not displace state-law claims. However, as stated in the August 19 order, HAMP cannot serve as the basis for a negligence claim. *See Miller v. Chase Home Finance, LLC*, 677 F.3d 1113, 1116–17 (11th Cir. 2012) (holding that the plaintiff lacked standing to bring breach of contract, breach of implied duty of good faith and fair dealing, and promissory estoppel claims "insofar as they [were] premised on an alleged breach of [Defendant]'s HAMP obligations" because no private right of action

exists under HAMP); *see also Williams v. Wells Fargo Bank, N.A.*, No. 1:12-cv-0390-JEC, 2012 WL 13014956, at *2 (N.D. Ga. Sept. 18, 2012).

Brown points the Court to paragraphs K, L, M, P, and Q of the negligence cause of action in his complaint to support his assertion that his negligence claim is not barred. However, those paragraphs discuss Defendant Wells Fargo's alleged HAMP violations. Because Brown's negligence claim is based on alleged HAMP violations, Brown lacks the requisite standing to bring his negligence claim.

Finally, Brown asserts that he should be allowed to file an amended complaint as part of his motion for a new trial and not as a separate motion. Because Brown did not file a motion for leave to file an amended complaint, his request to file an amended complaint will be denied. More importantly, Federal Rule of Civil Procedure 15(a), which governs the amendment of pleadings, only permits amended pleadings "*before* judgment is entered." *Toenniges v. Ga. Dep't of Corr.*, 502 F. App'x. 888, 890 (11th Cir. 2012) (citing *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010)). Rule 15(a) does not apply "once the district court has dismissed the complaint and entered final

judgment for the defendant." *Jacobs*, 626 F.3d at 1344 (citing *Czeremcha v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1556 (11th Cir. 1984)). Brown filed his motion on August 30, after the Court entered judgment and dismissed the case on August 19. Thus, the Court denies Brown leave to amend his complaint post-judgment.

For the foregoing reasons, after careful review, the Court finds that Brown has failed to meet his burden of showing that his motion for reconsideration is proper and should be granted; therefore, it is denied.

IT IS SO ORDERED this 19th day of September, 2019.

Timothy C. Batten, Sr.
United States District Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13825
Non-Argument Calendar

D.C. Docket No. 3:19-cv-00001-TCB

TIMOTHY B. BROWN,

Plaintiff-Appellant,

versus

U.S. BANK NATIONAL ASSOC.,
as trustee for As Trustee, Mastr Asset Backed Securities Trust 2006-AB1,
Mortgage Pass-Through Certificates Series 2006-AB1,
WELLS FARGO BANK N.A.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 15, 2020)

Before WILLIAM PRYOR, JILL PRYOR and NEWSOM, Circuit Judges.

PER CURIAM:

Timothy Brown appeals *pro se* the dismissal of his complaint against U.S. Bank National Association and Wells Fargo Bank, N.A. Brown complained of negligence by Wells Fargo in implementing the Home Affordable Modification Program and refusing to modify Brown's mortgage payments; of a wrongful foreclosure by Wells Fargo and by U.S. Bank; of conversion by both banks; and of violations of the Georgia Consumer Fraud Act by both banks. The district court dismissed Brown's complaint as barred by res judicata and, in the alternative, for failure to state a claim for relief, Fed. R. Civ. P. 12(b)(6). We affirm.

The district court correctly dismissed Brown's complaint as barred by res judicata. "Res judicata, or more properly claim preclusion, is a judicially made doctrine with the purpose of both giving finality to parties who have already litigated a claim and promoting judicial economy; it bars claims that could have been litigated as well." *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006). The doctrine applies if "(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999). Brown does not dispute that his present action and an action he filed in

2017 against Wells Fargo and U.S. Bank involve the same parties. The two actions are based on the same factual predicate: the alleged wrongful foreclosure and sale of his property. Brown complained previously of breach of contract, a wrongful foreclosure on his property, and of violations of the Fair Debt Collection Practices Act and the Real Estate Settlement Procedures Act, and the district court dismissed the complaint for failure to state a claim, which "unambiguously constitutes a ruling on the merits." *Borden v. Allen*, 646 F.3d 785, 812 (11th Cir. 2011) (internal quotation marks omitted). In his new complaint, Brown alleges, for the first time, a claim of negligence for failing to modify his loan payments, but that claim is "based upon the same factual predicate . . . as [his] former action, [so] the two cases are really the same claim or cause of action for purposes of res judicata," *Citibank, N.A. v. Data Leasing Fin. Corp.*, 904 F.2d 1498, 1503 (11th Cir. 1990). Brown's new legal theory is rooted in the actions Wells Fargo took leading up to and during foreclosure. *See Jaffree v. Wallace*, 837 F.2d 1461, 1468 (11th Cir. 1988) ("Res judicata . . . extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact.").

We **AFFIRM** the dismissal of Brown's complaint.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-13825

District Court Docket No.
3:19-cv-00001-TCB

TIMOTHY B. BROWN,

Plaintiff - Appellant,

versus

U.S. BANK NATIONAL ASSOC.,
as trustee for As Trustee, Mastr Asset Backed Securities Trust 2006-AB1,
Mortgage Pass-Through Certificates Series 2006-AB1,
WELLS FARGO BANK N.A.,

Defendants - Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: April 15, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 27, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-13825-HH
Case Style: Timothy Brown v. U.S. Bank National Association, et al
District Court Docket No: 3:19-cv-00001-TCB

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH/lt
Phone #: 404-335-6169

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13825-HH

TIMOTHY B. BROWN,

Plaintiff - Appellant,

versus

U.S. BANK NATIONAL ASSOC.,
as trustee for As Trustee, Mastr Asset Backed Securities Trust 2006-AB1,
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WELLS FARGO BANK N.A.,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: WILLIAM PRYOR, JILL PRYOR and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Timothy Brown is DENIED.

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