APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

William Pryor Chief Judge, Grant and Tjoflat, Circuit Judges.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-15182

D.C. Docket No. 1:19-cv-00258-TFM-MU

APPENDIX A

LEWIS ARCHER,
SHEARIE ARCHER,

Plaintiffs-Appellants,

versus

AMERICA'S FIRST FEDERAL CREDIT UNION,

Defendant-Appellee.

Appeal from the United States District Court for the

Southern District of Alabama

(February 1, 2021)

Before WILLIAM PRYOR, Chief Judge, GRANT and

TJOFLAT, Circuit Judges. GRANT, Circuit Judge:

After a state court granted America's First possession of the Archers' home, Lewis and

Shearie Archer sued in federal court asserting violations of the Real Estate Settlement Procedures Act but because their claims were fully litigated in the earlier state court action—or, at least, should have been—the doctrine of res judicata prevents us from giving those issues a second look.

I.

We accept as true all of the Archers' factual allegations in this appeal of a ruling on a motion to dismiss. *Luke v. Gulley, 975 F.3d 1140, 1143* (11th Cir. 2020). When Lewis and Shearie Archer stopped paying the mortgage on their home, America's First declared the mortgage in default. It attempted to foreclose seven times over nineteen months—a "stressful" and "cruel" exercise that culminated in a foreclosure sale on January 29, 2016. Though their house sold, the Archers refused to leave. The stress

had caused Shearie to go into a diabetic coma, which she remained in for seven days.

Because the Archers did not vacate the premises, America's First initiated an ejectment action in the Circuit Court of Mobile County, Alabama. The Archers hired an attorney; they say they told him to bring claims under the Real Estate Settlement Procedures Act in federal court. He never did. But the Archers did raise various Real Estate Settlement Procedures Act allegations as defenses in the state court action. In their initial pleading, they asserted that the foreclosure sale was conducted "contrary to federal law including, but not limited to" the Real Estate Settlement Procedures Act. And in response to America's First's motion for summary judgment, they claimed that America's First engaged in "Dual Tracking" by proceeding with foreclosure during the mortgage modification process. They also argued that

America's First failed to notify them of their appeal rights under 12 C.F.R. § 1024.41(f)(1) during the modification process.

The state court nonetheless granted summary judgment for America's First and awarded it possession of the property. The Archers, now proceeding pro se, appealed the order to the Alabama Court of Civil Appeals. That court affirmed the trial court's judgment.

Two weeks later, the Archers commenced this action in federal court. Their claim was "filed pursuant to section 6(f) of" the Real Estate Settlement Procedures Act. They alleged that America's First engaged in "Dual-Tracking," in violation of 12 C.F.R. §§ 1024.41(f)(1)(i) and 1024.41(i). America's First moved to dismiss, arguing that the claims were barred by the Act's three-year statute of limitations and by res judicata. It also

argued that any new claims brought under the Act were barred because the Archers failed to raise them as compulsory counterclaims in the earlier action. The district court agreed that the Archers had missed the Act's filing deadline, and dismissed their claims on that basis.

This appeal followed. The Archers contend that the "extraordinary circumstances" of their case warrant equitable tolling of the Act's statute of limitations. America's First disagrees, and also says that the Archers' claims are barred by the doctrine of res judicata either way.

II.

We review de novo the district court's grant of a motion to dismiss. *Hill v. White,* 321 F.3d 1334, 1335 (11th Cir. 2003). We may affirm the district court's judgment for any reason supported by the record,

even if not relied upon by the district court. *United States v. Al-Arian,* 514 F.3d 1184, 1189 (11th Cir. 2008).

III.

When asked to give res judicata effect to a state court judgment, we must apply the res judicata principles of "the state whose decision is set up as a bar to further litigation." *Kizzire v. Baptist Health Sys., Inc.,* 441 F.3d 1306, 1308 (11th Cir. 2006) (quoting *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486, 1509 (11th Cir. 1985)). Because America's First contends that the Alabama state court judgment bars this federal action, the res judicata principles of Alabama apply.

Under Alabama law, the essential elements of res judicata are: "(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3)

with substantial identity of the parties, and (4) with the same cause of action presented in both actions." Id. at 1308–09 (quoting *Equity Res. Mgmt., Inc. v. Vinson,* 723 So. 2d 634, 636 (Ala. 1998)). If those four elements are met, then any claim that was—or could have been—adjudicated in the earlier action is "barred from future litigation." *Id.* at 1309.

The first three elements are easily satisfied here. The trial court's grant of summary judgment, which was affirmed by the Alabama Court of Civil Appeals, clearly constitutes a prior judgment on the merits. *Ex parte Jefferson County*, 656 So. 2d 382, 385 (Ala. 1995). There is no doubt that both the Circuit Court of Mobile County and the Alabama Court of Civil Appeals are courts of competent jurisdiction; federal and state courts have concurrent jurisdiction over Real Estate Settlement Procedure Act claims. *See* 12 U.S.C. § 2614. And, of course, the parties in this

action and in the ejectment action are the same—they have simply switched places.

That leaves us with the question of whether it was the "same cause of action" in both actions. Alabama uses the "substantial evidence" test to answer this question. *Kizzire,* 441 F.3d at 1309. If the same evidence substantially supports both actions, this element is met. *Id.* Res judicata applies not just to the precise legal theories advanced in the earlier case, but to *"all legal theories and claims* arising out of the same nucleus of operative facts." *Id.* (quoting *Old Republic Ins. Co. v. Lanier,* 790 So. 2d 922, 928 (Ala. 2000)).

Both the state and federal court actions concerned the same nucleus of operative facts. In state court, America's First sought possession of the Archers' home based on the foreclosure sale; the Archers defended by saying that the foreclosure sale

was void under the Real Estate Settlement Procedures Act. The Archers also argued that America's First failed to provide the proper notifications and that America's First engaged in "Dual Tracking." Then, in federal court, the Archers' newly filed claims again centered on the foreclosure of their home. The couple alleged that America's First failed to provide the proper notifications and violated "Dual-Tracking protection laws" when it foreclosed on their home. Indeed, most of the facts and allegations from their present complaint came from their various state court filings. Each of their arguments in federal court arise from the exact same transaction and occurrence as that of the earlier litigation.

There is no question that the Archers' federal complaint attempts to raise claims arising out of the same operative facts as the state court action.

Kizzire, 441 F.3d at 1309. And because the same evidence "substantially supports" both suits, all four elements of res judicata are met. *Id.* at 1310. Though the Archers may not have raised the exact same claims in each suit, the legal theories in both arise out of the same nucleus of operative facts. In these circumstances, permitting the Archers to proceed would be giving them a second bite at the apple, which we cannot do.[1]

The Archers devote two sentences of their initial brief to arguing that the district court violated the "Supremacy Clause" when it refused to stay the Alabama court's writ of possession while their case was ongoing. But the Archers provide no additional support for the idea that a district court might have

[1] Because we hold that the Archers' claims were barred by res judicata, we need not consider whether they were also barred by the Real Estate Settlement Procedure Act's statute of limitations.

the power to collaterally review a state court judgment regarding the validity of a foreclosure proceeding. This argument was not fully briefed, so it is abandoned. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).

* * *

Because the Archers' complaint raises claims that arise out of the same nucleus of operative fact as the earlier state court action, the doctrine of res judicata bars their claims. For that reason, we **AFFIRM** the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEWIS ARCHER and
SHEARIE ARCHER
Plaintiffs,

vs. CIV. ACT. NO. 1:19-cv-258-TFM-MU

AMERICA'S FIRST FEDERAL CREDIT UNION

Defendant.

MEMORANDUM OPINION AND ORDER

On September 17, 2019, the Magistrate Judge entered a Report and Recommendation (Doc. 26) which recommends denial of the Plaintiffs' Motion to Recall Writ of Possession (Doc. 20) and the granting of Defendant's Motion to Dismiss (Docs. 15, 19). Plaintiffs timely filed objections (Doc. 27).

APPENDIX B

In their objections, Plaintiffs argue they were diligent throughout the ejectment process and the state court proceedings regarding their home. Doc. 27 at 1. They argue that "there were extraordinary circumstances beyond [their] control that prevented [them] from filing this lawsuit sooner." Id. They further assert they asked their attorney from the state-proceeding to file in federal court and were told that it was. *Id.* At 3. They request that the Court apply the doctrine of equitable tolling and suspend the running of the statute of limitations from February 2, 2016 to May 31, 2019 (the date the instant action was filed). Id.

A claim under the Real Estate Settlement Procedures Act ("RESPA") "may be brought within 3 years from the date of the occurrence of the violation." 12 U.S.C. § 2614. Based on their objections, Plaintiffs essentially concede that the

three-year statute of limitations has expired on their claims. The Court then turns the request for equitable tolling the statute of limitations.

Courts "look to the relevant statute for guidance in determining whether equitable tolling is appropriate in a given situation." *Arce v. Garcia,* 434 F.3d 1254, 1260 (11th Cir. 2006). However, equitable tolling is an extraordinary remedy only applicable in exceptional circumstances and should be extended only sparingly. *Justice v. United States,* 6 F.3d 1474, 1479 (11th Cir. 1993) (citing *Irwin v. Veterans Administration,* 498 U.S. 89, 96, 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990). "The general test for equitable tolling requires the party seeking tolling to prove (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Villareal v. R.J. Reynolds Tobacco Co.,* 839

F.3d 958, 971 (11th Cir. 2016) (quotation omitted). There is some split in authority on whether the RESPA statute of limitations may be equitably tolled. *Compare, e.g. Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1041 (D.C. Cir. 1986 (finding that equitable tolling does not apply to RESPA) with *Lawyers Title Ins. Corp. v. Dearborn Title Corp.,* 118 F.3d 1157, 1166-67 (7th Cir. 1997) (finding RESPA is subject to equitable tolling). However, it would appear that the Eleventh Circuit, though not addressed directly in a published opinion, would determine RESPA is subject to equitable tolling. *See Pedraza v. United Guar. Corp.,* 313 F.3d 1323 (11th Cir. 2002) (acknowledging the potential application of equitable tolling to RESPA actions); *McCarley v. KPMG Int'l,* 293 F. App'x 719, 723 (11th Cir. 2008) (an unpublished Eleventh Circuit case noting the circuit split and the Eleventh Circuit Court of

Appeals' acknowledgement in *Pedraza)*. However, despite this, the Court finds that even if equitable tolling does apply in RESPA cases, the requirements would not be met here.

By their own statements in the objections, Plaintiffs were aware of the claim and requested their attorney to file the case. These are not extraordinary circumstances beyond their control nor is that failure to file a claim a basis for tolling the statute of limitations. Further, though the Court is certainly sympathetic to the medical stress and its resulting distractions, it still does not provide a legal basis for tolling the claims.

Therefore, after due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Report and Recommendation to which objection is made, the Report and Recommendation

of the Magistrate Judge made under 28 U.S. C. § 636(b)(1)(B) is **ADOPTED** as the opinion of this Court. Accordingly, it is **ORDERED** and the Plaintiff's Objections are **OVERRULED,** Defendants Motion to Dismiss (Doc. 15) as supplemented (Doc. 19) is **GRANTED,** and the Motion to Recall Writ of Possession (Doc. 20 is **DENIED.**

DONE and **ORDERED** this the 2nd day of December 2019.

/s/ Terry F. Moorer
TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

APPENDIX C

MAGISTRATE JUDGES REPORT AND

RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LEWIS ARCHER and SHEARIE : ARCHER,

:Plaintiffs, :

vs. CA 19-0258-TFM-MU

AMERICA'S FIRST FEDERAL CREDIT UNION,

Defendant.

REPORT AND RECOMMENDATION

This cause is before the Magistrate Judge for issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and S.D. Ala. GenLR 72(a)(2)(S), on Plaintiffs' second-amended complaint (see Doc. 7), Defendant America's First Federal

Credit Union's ("AFFCU's") motion to dismiss second-amended complaint (Doc. 15; see also Doc. 16 (AFFCU's evidentiary submission)), as supplemented (Doc. 19), Plaintiff's response in opposition, with attachments (Doc. 23), and AFFCU's reply (Doc. 24). Upon consideration of these pleadings, as well as other pleadings in the file (Doc. 20 (Plaintiffs' motion to recall writ of possession and brief); Doc. 22 (Defendant's response in opposition); Doc.25 (Plaintiffs' response to Defendant's response)), the Magistrate Judge **RECOMMENDS** that the Court **GRANT** AFFCU's motion to dismiss second-amended complaint (Doc. 15), as supplemented (Doc. 19), and **DENY** Plaintiffs' motion to recall writ of possession (Doc. 20).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Lewis Archer initially filed a complaint against AFFCU in this Court on May 31, 2019. (Doc. 1). Following entry of an order instructing Plaintiff to file an amended complaint and an amended motion to proceed without prepayment of fees (or, alternatively, pay the $400.00 filing fee) (see Doc. 4), the Plaintiffs ultimately paid the filing fee (Doc. 6) and filed a second-amended complaint (Doc. 7) on July 2, 2019.[1] In the second-

[1] Plaintiff Lewis Archer filed an amended complaint on June 10, 2019 (Doc. 5) before he received the undersigned's Order dated June 7, 2019 (Doc. 4). Thus, the complaint filed by Lewis and Shearie Archer on July 2, 2019 (Doc. 7) constitutes the operative pleading in this case. See, e.g., Rosa v. Florida Dep't of Corrections, 522 Fed.Appx. 710, 714 (11th Cir. June 26, 2013) ("Under the Federal Rules of Civil Procedure, 'an amended complaint supersedes the initial complaint and

amended complaint, Plaintiffs specifically aver that this Court may exercise federal question jurisdiction, 28 U.S.C. § 1331, and that their claims are being brought pursuant to § 6(f) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605(f)(1)-(3), and 12 C.F.R. § 1024.41(a)[2]. (See Doc. 7, at 1-2). Plaintiffs set forth two counts in their complaint: Count 1 asserts AFFCU's violation of the dual-tracking provisions of 12 C.F.R. § 1024.41(f)(1)(i) by virtue of Defendant making a preforeclosure first notice of filing on July 11, 2014 without Plaintiffs' mortgage being 120 days late (Doc. 7, at 2) and Count 2 asserts AFFCU's violation of the dual-tracking provisions of 12 C.F.R. §

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becomes the operative pleading in the case.'" (quoting Krinsk v. SunTrust Banks. Inc., 654 F.3d 1194, 1202 (11th Cir. 2011)).

[2] "A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f))." 12 C.F.R. § 1024.41(a).

1024.41(i) "by requesting a duplicate second application in the beginning of October of 2014 after the Archer[]s had already gone through a thorough [a]pplication process with submitted tax returns at the beginning of June 2014." (Doc. 7, at 4). The factual underpinnings of Plaintiffs' claim are set forth in the second-amended complaint and read, in relevant measure, as follows:

> Lewis and Shearie Archer, husband and wife[,] executed a note and mortgage, dated May 9, 2008, payable to AFFCU in the principal amount of $165,000.00 secured by the following property:
>
> Lot 1, Tara Estates as recorded in Map Book 20, Page 89, In the Probate Office of Mobile County, Alabama.
>
> The street address of the property is: 9070 O'Hara Drive Mobile, Alabama 36695. The mortgage

was recorded in the office of the Judge of Probate of Mobile County, Alabama, in Instrument Number 2008040886, Book 6333, Page 996, C. 38.

In early June of 2014, **AFFCU sent the Archers** [] to Hardest Hit Alabama to qualify for mortgage assistance help [] since [the] $1,728 monthly payments were excessive due to Lewis Archer's decrease in income and Shearie Archer's health challenges.

Hardest hit Alabama[,] in conjunction with AFFCU[,] put the Archers through a **thorough qualifying process** that involved [the] submi[ssion] of tax returns. The Archers successfully qualified for $30,000 maximum of approved help towards permanent modification. Since the Archers were qualified and approved, AFFCU was to fax a simple modification plan to 1(888)207-1439 for the $30,000 to be sent and applied. []

On July 9th, 2014, AFFCU Branch Manager Jason Fuller met with Mr. Archer in his office with Assistant Vice President Mark Shadddix on the telephone. The Assistant Vice President confirmed to the Branch Manager and Mr. Archer that AFFCU did in fact accept the $30,000 help. □

Since all were in agreement, the contents of the meeting were memorialized by Mr. Archer on the same day and emailed to the Assistant Vice President so it would be stamped dated. □ On July 11th, 2014, Collection Manager Sharon Richardson sent the Archers a Right to Cure letter towards foreclosure. □ Yet, the memorialized contents of the meeting were emailed again on July 14th[,] 2014[,] this time by the Branch Manager himself to the Assistant Vice President with no complaints, confusion or misunderstanding of plan participation. □

AFFCU simply reneged on the promise and did not fax to Hardest Hit Alabama the already written simple permanent modification plan to be funded by the available $30,000. []

It became clear that AFFCU[,] instead, stopped accepting payments on June 30th, 2014; [f]alsely sent notice on July 11th, 2014 that the Archer[]s were delinquent on the loan[;][3] and started a series of **seven foreclosure attempts while taking the Archers through various modification exercises.** [] Those two tracks ended 19 months later on January 29th[,] 2016 with an official **foreclosure and a letter ending modification efforts both on the same day.** []

[3] In the letter penned to the Archers on July 11, 2014, AFFCU declared the mortgage in default. (See Doc. 7, at 6 & Exhibit AA).

The dates of the seven foreclosure attempt letters while going through the modification processes are: 1. (September 5th, 2014)[,] 2. (January 30th, 2015)[,] 3. (May 28th, 2015)[,] 4. (August 19th, 2015)[,] 5. (November 20th, 2015)[,] 6. (January 4th, 2016)[, and actual foreclosure (January 29th, 2016). [] AFFCU published the Archers' home for foreclosure purposes at least thirteen times[] (Sept 10th, 2014[,] Sept 17th, 2014[,] Sept 24th, 2014,[,] June 3rd, 2015[,] June 10th, 2015[,] June 17th, 2015[,] August 26th, 2015[,] Sept 2nd, 2015[,] Sept 9th, 2015[,] Dec 2nd, 2015[,] Dec 9th, 2015[,] Dec 16th, 2015[,] Jan 10th, 2016.) []

(Id. at 5-7 (internal citations omitted; footnote added; emphasis in original)). [4]

[4] The facts submitted by the Archers in support of their federal-court complaint are virtually identical to the statement of facts contained in Lewis Archer's February 20, 2019 response to brief of appellee AFFCU filed in the Alabama Court of Civil

Although the operative pleading in this case (Doc. 7) concludes with the salient fact that the actual foreclosure took place on January 29, 2016 (see id. at 7),[5] much more occurred after that date and up to May 31, 2019, the date Lewis Archer initially instituted this action in this Court (see Doc. 1).

Based on the Archers' refusal to vacate the premises of 9070 O'Hara Drive, Mobile, Alabama 36695 following the foreclosure sale, a refusal which exists to this day (see, e.g., Doc. 25, at 3 (immediately inserted following the signature line on Plaintiffs' August 26, 2019 response to Defendant's response to Plaintiffs' motion to recall writ of possession is the

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Appeals, by and through his attorney, Marcus McCrory. (Compare id. with Doc. 16, Exhibit 11, at 8-12).

[5] AFFCU purchased the real property at 9070 O'Hara Drive, Mobile, Alabama 36695 at the mortgage foreclosure sale held on January 29, 2016. (Doc. 16, Exhibit 1, April 11, 2016 COMPLAINT, at 1). (Continued)

address of 9070 O'Hara Drive, Mobile, AL 36695)), AFFCU instituted an ejectment action against the Archers, in accordance with § 6-6-280 of the Alabama Code,[6] in the Circuit Court of Mobile County, Alabama on April 11, 2016. (Doc. 16, Exhibit 1, COMPLAINT; see also id., Exhibit 9, at 1-2 ("[AFFCU] filed in the Mobile Circuit Court [] a complaint seeking to eject Lewis Archer and Shearie Archer from real property AFFCU had purchased at a January 29, 2016, foreclosure sale[.]")). In an amended answer and counterclaim, filed January 10, 2017 in the state court action, the Archers asserted as a defense that the "foreclosure sale was conducted contrary to federal law including, but not limited to[,] RESPA, 12 USC §2600, et[] al.[,] and is, therefore,

[6] "A plaintiff commencing an action for the recovery of lands or the possession thereof has an election to proceed by an action of ejectment or by an action in the nature of an action of ejectment as is provided in subsection (b) of this section." Ala.Code § 6-6-280(a).

void and of no legal effect[,]" (Doc. 16, Exhibit 2, at 2) and counterclaimed for breach of mortgage contract and declaratory judgment (id. at 2-3). Additionally, in a January 24, 2018 response to AFFCU's renewed motion for summary judgment, the Archers argued that AFFCU had no ownership interest in the subject property or any right to pursue ejectment based upon the following:

1. [AFFCU] is prohibited by Federal Law from proceeding with foreclosure if an application to modify has been submitted.

2. Archer submitted the complete application in October 2014 [].

3. During the modification process [AFFCU] never notified him that his application was denied and never notified him of his appeal rights under 12 CFR 1024.41 (f)(1) . . . .

4. By proceeding with the foreclosure during the modification process, [AFFCU] engaged in "Dual Tracking["] which is prohibited. Since they were prohibited by the "Dual Tracking" Law from foreclosing, any purported foreclosure sale is void or voidable under federal law. (Doc. 16, Exhibit 3).

On June 25, 2018, the Circuit Court of Mobile County, Alabama entered a judgment in favor of AFFCU and against the Archers (based on AFFCU's motion for summary judgment), finding AFFCU entitled to possession of the subject property and authorizing issuance of a Writ of Possession by the Clerk of Court to the Sheriff of Mobile County, Alabama "for the execution of such writ." (Doc. 16, Exhibit 4). On July 23, 2018, Lewis Archer filed a motion to alter, amend or vacate the summary judgment entered in favor of AFFCU, arguing that there were a number of disputed facts prohibiting the

granting of AFFCU's motion (including, whether AFFCU wrongfully engaged in dual tracking by proceeding with foreclosure while the loan modification process was still pending and whether AFFCU provided reasonable notice of the right to reinstate pursuant to federal regulations) and additionally arguing that "Mr. Archer" had "the right to bring an affirmative action to attack the foreclosure because the required Federal Regulations were not followed relating to [c]ounseling and the right to reinstate the mortgage, his counterclaim does this." (Doc. 16, Exhibit 5, at 1 & 2). Following the August 14, 2018 denial of the motion to alter, amend or vacate (Doc. 16, Exhibit 6), Lewis Archer filed notice of appeal to the Alabama Supreme Court, which was deflected to the Alabama Court of Civil Appeals (see Doc. 16, Exhibit 7). In the docket statement to the Alabama Supreme Court completed

by counsel for Lewis Archer, Marcus McCrory, on August 24, 2018, the following issues were identified: "Whether the foreclosure was rendered void or voidable because the Credit Union failed to provide modification, failed to provide notice of acceleration, the right to reinstate and notice of foreclosure pursuant to the mortgage and Federal Law. Also whether the Credit Union engaged in 'Dual Tracking'[.]" (Doc. 16, Exhibit 8, at 2). After the parties briefed the issues, the Alabama Court of Civil Appeals issued an opinion on May 17, 2019 affirming the judgment of the Mobile County Circuit Court. (Doc. 16, Exhibit 9.) With this decision, Alabama's civil appellate court thus affirmed that AFFCU was properly awarded possession of the subject property. (Compare id. with id., Exhibit 4). The Alabama Court of Civil Appeals issued a certificate of final judgment

of affirmance on June 5, 2019 (Doc. 15, Exhibit 10), ending the state court litigation.

Before the state court litigation was fully concluded, Lewis Archer filed a complaint in this Court on May 31, 2019 (Doc. 1) and, ultimately, the Archers (both of them) filed a second-amended complaint on July 2, 2019 (Doc. 7), the contents of which the undersigned will not again address. AFFCU filed its motion to dismiss second amended complaint on July 26, 2019 (Doc. 15). AFFCU contends that Plaintiffs' claims are barred by the applicable RESPA statute of limitations (id. at 6-7) and by res judicata (id. at 7-11). AFFCU concludes its brief with the argument that the Archers waived their right to assert any claim under RESPA by failing to raise each such claim as a compulsory counterclaim in the state court action. (Id. at 11-12).

On August 1, 2019, AFFCU filed a supplement to its motion to dismiss second amended complaint. (Doc. 19.) AFFCU attached to its brief pleading a document Lewis Archer filed in the Circuit Court of Mobile County, Alabama that same day, August 1, 2019, entitled "NOTICE OF REMOVAL" but containing the style of this action and averring, as follows: "The following matter was MOVED on 5/31/2019 to Federal District Court. **AMERICA'S FIRST FCU V. LEWIS ARCHER ET AL 02-CV-2016-900716.00[.]** Please recall the Writ of Possession." (Doc. 19, Exhibit 12.) AFFCU argues in its supplement that the foregoing pleading filed in the state court action is but "further evidence that the state court action and this federal action are 'the same cause of action' and that they arise out of the same transaction or occurrence[,]" such that this federal action should be dismissed. (Doc. 19, at 2).

The Defendant's August 1, 2019 supplement to its motion to dismiss prompted the Archers to file a motion to recall writ of possession on August 2, 2019. (See Doc. 20, at ¶ 3 ("Since the defendant filed a motion on 8/1/2019 to make this more than it is, we therefore motion the court to issue an order for the defendant itself to immediately recall the writ of possession and cease and desist all such actions while this case is ongoing.")). Attached to the Plaintiffs' motion is a notice placed on the door of the residence at 9070 O'Hara Drive, Mobile, Alabama 36695, advising that eviction is "to take place 8/15/19 9:00 AM." (Doc. 20, Exhibit Q). [7]

[7] On August 19, 2019, AFFCU filed its response in opposition to Plaintiffs' motion to recall writ of possession. (Doc. 22.) Initially, Defendant argues the motion is due to be denied because a court of competent jurisdiction issued the writ of possession/execution and Plaintiffs cite no legal or factual

support for the relief they seek. (Id. at 1.) AFFCU also contends that the proper course for challenging the Mobile County Circuit Court's order authorizing issuance of a writ of possession by the Clerk of Court to the Sheriff of Mobile County, Alabama for the execution of such writ was an appeal to Alabama's appellate courts, which is exactly the route Lewis Archer took. (See id. at 2). And since the Alabama Court of Civil Appeals affirmed the judgment of the Mobile County Circuit Court, with that court issuing a final certificate of judgment on June 5, 2019, "AFFCU is within its rights to act on the order issued by the Circuit Court of Mobile County, and Plaintiffs' improper attempt to collaterally attack a valid order from an Alabama state court of competent jurisdiction should be rejected." (Id.) In responding to AFFCU's response (see Doc. 25), the Archers simply aver that the Defendant did not let the state appellate process run its course without sending the Sheriff out to try to evict them; instead, according to the Archers, AFFCU sent the Sheriff out to their home twice during the state appellate process to place eviction notices on their door. (See id. at 2-3 & Exhibit X.) The Archers conclude their response as follows: (Continued)

The Archers filed their response to AFFCU's motion to dismiss on August 19, 2019. (Doc. 23). Initially, the Archers assert that the state courts of Alabama never ruled on the federal issue that is presented in the instant lawsuit[8] and could have not

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"This recent eviction attempt [advising of eviction to take place on 8/15/19] in the middle of this federal litigation is a shameful repeated action tactic on the part of the defendant to put pressure on the plaintiffs to affect the outcome of this federal lawsuit." (Id. at 3.) Nowhere in their response, however, do the Archers establish how this Court has the power or jurisdiction to recall a writ issued by a court of competent jurisdiction (that is, the Mobile County Circuit Court). (See generally Doc. 25; compare id. with Doc. 20 (in their initial motion, Plaintiffs also fail to point to any caselaw which establishes this Court's power or jurisdiction to recall a writ of possession issued by a state court of competent jurisdiction)).

[8] The Archers identified the federal issue as follows: "Should defendant 'AFFCU' have started foreclosing on the

ruled on this issue both because "[a] non-judicial foreclosure like the Archer[]s[']s is not considered to be a foreclosure in an Alabama State Court ejectment action[]" and because "[t]he defendant's failure to comply with Federal loss-mitigation regulations concerning the $30,000 that it sent to the Archers to get cannot be asserted as a defense in an Alabama state court ejectment action." *(Id.* at 3-4). Plaintiffs then go on to argue that they did attempt to assert, "as best as possible [] without the benefit of counsel[,]" the two federal issues in this lawsuit as compulsory counterclaims in their reply brief filed in the Alabama Court of Civil Appeals *(see id.* at 5); however, according to the Archers, Alabama's civil appellate court addressed neither issue (id.). Finally,

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Archers[']s home of 27 years in the first place, while having access to $30,000 of federal loss-mitigation funds it sent the Archers to get, making it impossible for the mortgage to have been 120 days in arrears?" (Doc. 23, at 3). (Continued)

Plaintiffs contend that two res judicata elements are not met (that is, there was no final judgment on the merits and there was no decision rendered by a court of competent jurisdiction) *(id.* at 6) and that this case is not barred by the statute of limitations *(id.* at 7 ("The defendant's illegal predatory conduct was brought to the attention of Federal Authority with judicial powers [] National Credit Union Administration [NCUA] since January 2015. The defendant was found to have broken federal law, overcharging through temporary modifications that it strongly encouraged. (Exhibit O and Exhibit N). [9]

[9] By letter dated October 21, 2015, the Office of Consumer Protection of the National Credit Union Administration ("NCUA") did not make a specific finding that AFFCU broke federal law; instead, the consumer protection arm of NCUA determined that based on AFFCU's actions in "subsequently" providing the Archers with a copy of the appraisal and

As the defendant points out this has been ongoing since then and the defendant is finally in federal court." (footnote added))).

In its reply, AFFCU simply reiterates why Plaintiffs' claims are barred by the applicable statute of limitations and res judicata and, as well, why and how Plaintiffs waived their right to assert a claim

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refunding them the cost of the appraisal, it was closing its file based on a final resolution of the matter. (Doc. 7, Exhibit O). This arm of the NCUA went on to inform Lewis Archer that since it could not provide legal advice, he might want to consult with private counsel to inform his "ability to pursue a private right of action if one exists." (Id.).

As for Exhibit N, that exhibit provided by Plaintiffs makes reference to $923.24 in finance charges assessed against the Archers by AFFCU sometime before September of 2015 that were subsequently credited to the Archers['] mortgage account as reflected in the September 2015 statement. (See Doc. 7, Exhibit N).

under RESPA by failing to raise it as a compulsory counterclaim in the Mobile County Circuit Court. (See Doc. 24). In addressing the statute of limitations argument, AFFCU explains why Plaintiffs' response provides further support for why their claims are time-barred. (Id. at 1-2).

First, Plaintiff argues that AFFCU's "illegal predatory conduct was brought to the attention of Federal Authority with judicial powers (NCUA) National Credit Union Administration since January 2015." Id. (emphasis added). January 2015 is more than three years before this lawsuit was filed. Given that the purported "illegal predatory conduct" was brought to the attention of the NCUA more than three years before this suit was filed is further evidence that Plaintiffs' claims are time barred.

Second, Plaintiffs cite to Exhibits O and N to support their argument that AFFCU "was found to

have broken federal law, overcharging through temporary modifications that it strongly encouraged." Id. Exhibit O is dated October 15, 2015. Doc. 7, Page ID #118-119. Exhibit N pertains to a purported overcharge of $923.24 in finance charges that were credited back to Plaintiffs in September 2015. Doc. 7, Page ID #116-117. Again, these allegations of wrongdoing occurred more than three years before this lawsuit was filed. *(Id.).*

CONCLUSIONS OF LAW

A. **Motion to Dismiss Standard and Judicial Notice.** As reflected above, AFFCU's principle arguments in support of dismissal of the second-amended complaint are that the Archers' claims are barred by the applicable statute of limitations and by the doctrine of res judicata. The Eleventh Circuit has made clear that "a motion to dismiss for failure to state a claim is an appropriate method for raising a

statute of limitations defense[,]" Edwards v. Apple Computer, Inc., 645 Fed.Appx. 849, 851 (11th Cir. Mar. 9, 2016), citing Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 (5th Cir. 1977), and, as well, is an appropriate vehicle by which to raise the Rule 8(c) affirmative defense of res judicata "where the existence of the defense can be determined from the face of the complaint[,]" Solis v. Global Acceptance Credit Co., L.P., 601 Fed.Appx. 767, 771 (11th Cir. Jan. 28, 2015), citing Concordia v. Bendekovic, 693 F.2d 1073, 1075 (11th Cir. 1982).

When deciding a 12(b)(6) motion to dismiss, a court will "'primarily consider the allegations in the complaint,' but '. . . is not [always] limited to the four corners of the complaint.'" Halmos v. Bomardier Aerospace Corp., 404 Fed.Appx. 376, 377 (11th Cir. Dec. 7, 2010), quoting Long v. Slaton, 508 F.3d 576, 578 n.3 (11th Cir. 2007) (other citation omitted).

Indeed, the Eleventh Circuit has made clear that "a district court may take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion." Id. (citations omitted); see also id. ("The district court's determination did not exceed the permissible scope of a 12(b)(6) motion to dismiss—the complaint, attachments to the complaint, and matters of public record."). Of particular import in this case, the Eleventh Circuit has held that "[c]ourts may take judicial notice of publicly filed documents, such as those in state court litigation, at the Rule 12(b)(6) stage." United States ex rel. Osheroff v. Humana, Inc., 776 F.3d 805, 811 n.4 (11th Cir. 2015) (citations omitted); see also Solis, supra, 601 Fed.Appx. at 771 (in affirming the grant of a motion to dismiss on res judicata grounds, the Eleventh Circuit concluded that "the district court properly considered its own

records in resolving the defendants' motion to dismiss."). Accordingly, this Court can properly consider not only those documents attached to Plaintiffs' second-amended complaint but, as well, those publicly filed documents in the state court litigation between AFFCU and the Archers.

B. Statute of Limitations on 12 U.S.C. § 2605(f) RESPA Claims. The Archers' second-amended complaint makes clear that their action is filed pursuant to § 6(f) of RESPA, 12 U.S.C. § "2605(f)(1)(3)." Plaintiffs specifically assert two counts seeking to enforce the provisions of 12 C.F.R. § 1024.41 (see Doc. 7, at 2-4). See 12 C.F.R. § 1024.41(a) ("A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f))."); 12 U.S.C. § 2605(f) (creating a private right of action for a borrower to sue

"[w]hoever fails to comply with any provision of this section").

"Section 2605 of RESPA governs the 'servicing of mortgage loans and administration of escrow accounts' and 'has a three year statute of limitations[,]'" Hennington v. JPMorgan Chase Bank, N.A., 2018 WL 4474642, *10 (N.D. Ga. Apr. 10, 2018) (quoting Hudgins v. Seterus, Inc., 192 F.Supp.3d 1343, 1347 (S.D. Fla. 2016)), report and recommendation adopted, 2018 WL 4473143 (N.D. Ga. Sept. 6, 2018), which begins to run when the violation occurs, 12 U.S.C. § 2614 ("Any action pursuant to the provisions of section 2605 . . . of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of

section 2605 of this title . . . **from the date of the occurrence of the violation[**.]" (emphasis supplied)).

Count 1 of the Plaintiffs' amended complaint alleges a July 11, 2014 violation of the dual tracking provisions of 12 C.F.R. § 1024.41(f)(1) (Doc. 7, at 2) and Count 2 of the amended complaint alleges an October 2014 violation of § 1024.41(i) (id. at 4). Because Plaintiffs did not file their RESPA claims until May 31, 2019 (see Doc. 1 (original complaint of Plaintiff Lewis Archer was filed on May 31, 2019)), more than three years after Plaintiffs' amended complaint alleges that the violations of § 1024.41 occurred, those claims are barred by RESPA's three-year limitations period.[10]

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[10] Even if the Court was to consider that Count 1 of the complaint alleges a "continuing" violation of § 1024.41(f) until January 29, 2019, the final disclosure date and the date AFFCU

At no point since the institution of this lawsuit have the Archers made any argument that RESPA's three-year limitations period should be equitably tolled; however, even had they made such an argument, they do not allege any facts that would

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"sent a letter terminating all modification efforts" (Doc. 7, at 3), Plaintiffs' claims still remain barred by the three-year statute of limitations. The same is true even if the Court considers the date set forth in Plaintiffs' response in opposition and associated date referenced in the opposition. (See Doc. 23, at 7 (citation to January 2015 as being the date the Plaintiffs' brought to the attention of the NCUA Defendant's purported "illegal predatory conduct"); cf. Doc. 7, Exhibit O (October 21, 2015 letter from the consumer protection arm of the NCUA, advising Lewis Archer that based upon AFFCU's actions in subsequently supplying him with a copy of the appraisal and refunding him the cost of the appraisal, his file was being close—based on resolution of the matter—and advising that his ability to pursue a private right of action was not being limited if he had a private right of action)).

support application of equitable tolling. The Eleventh Circuit has made clear that "'[i]n order to be entitled to the benefit of equitable tolling, a petitioner must act with diligence, and the untimeliness of the filing must be the result of circumstances beyond his control.'" *McCarley v. KPMG Int'l,* 293 Fed.Appx. 719, 722-23 (11th Cir. Sept. 15, 2008), quoting *Drew v. Department of Corrections,* 297 F.3d 1278, 1286-87 (11th Cir. 2002). "The burden of establishing entitlement to this extraordinary remedy rests with the petitioner." Id. at 723, citing *Justice v. United States,* 6 F.3d 1474, 1479 (11th Cir. 1993). And while there "appears to be a circuit split regarding whether equitable tolling applies to RESPA claims[,]" and the Eleventh Circuit "has not addressed the issue directly," the appellate court has "acknowledged the potential application of equitable tolling to RESPA actions." Id. at 723 n.6 (citations omitted).

Even assuming that equitable tolling applies to RESPA claims, the undersigned finds nothing in the Archers' amended complaint (see Doc. 7) in the way of facts that would excuse the delay in filing their federal complaint. The amended complaint simply alleges various violations of RESPA provisions in 2014 (and a final foreclosure date of January 29, 2016, the same date that Plaintiffs were advised that AFFCU was terminating all modification efforts) but does not allege any facts to explain why they did not then file their RESPA claims until May 31, 2019, see McCarley, supra, 293 Fed.Appx. at 723 (affirming the district court's grant of summary judgment in favor of Defendant HSBC Mortgage Corporation on Plaintiff's RESPA claims on the alternate ground that those claims were barred by the three-year statute of limitations because the alleged violations occurred more than three years before McCarley filed

his complaint and even assuming equitable tolling is applicable to RESPA claims, Plaintiff did not proffer "any evidence to show the doctrine should apply."), either in this Court or in Mobile County Circuit Court, see 12 U.S.C. § 2614, *supra*. Instead, it is apparent from Plaintiffs' amended complaint (Doc. 7) and the remaining evidence of record attached to the amended complaint and documents which this Court can take judicial notice of that the Archers simply waited until the ejectment proceedings were all but completed in state court before filing the instant lawsuit in an attempt to get a second bite at the proverbial apple. Under these circumstances, it is clear to the undersigned that the Court must dismiss

Plaintiffs' RESPA claims (that is, the amended complaint) as timebarred.[11]

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[11] In light of the clear untimeliness of Plaintiff's RESPA claims, the undersigned pretermits any lengthy discussion of AFFCU's alternative argument that the Archers' RESPA claims are barred under the doctrine of res judicata. (See Doc. 15, at 7-12). The undersigned does note parenthetically that though AFFCU improperly identifies the controlling law as federal claim preclusion law (see id. at 9-10), compare Kizzire v. Baptist Health Sys., Inc., 441 F.3d 1306, 1308 (11th Cir. 2006) (recognizing that where, as here, a federal district court is "'asked to give res judicata effect to a state court judgment, [the court] must apply the res judicata principles of the law of the state whose decision is set up as a bar to further litigation.'") with Brosnick v. Wells Fargo Bank, N.A., 2018 WL 6807340, *4 (S.D. Fla. Sept. 25, 2018) ("'When a suit is brought under federal question jurisdiction, and the federal court "is asked to give res judicata effect to a state court judgment, it must apply the res judicata principles of the law of the state whose decision is set up as a bar to further litigation."'"), this error would not

prevent the Court from reaching the merits of AFFCU's argument in this regard since "Alabama law on the doctrine[] of res judicata . . . is substantively the same as federal law." McCulley v. Bank of America, N.A., 605 Fed.Appx. 875, 878 (11th Cir. Apr. 2, 2015); cf. Kizzire, supra, 441 F.3d at 1308-09 ("Under Alabama law, 'the essential elements of res judicata are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions.'") with Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999) ("Under Eleventh Circuit precedent, a claim will be barred by prior litigation if all four of the following elements are present: (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."), cert. denied, 530 U.S. 1223, 120 S.Ct. 2237, 147 L.Ed.2d 265 (2000).

In arguing that the first two res judicata elements are not met (Doc. 23, at 6; see also id. at 3-5), the Archers confuse those two elements with the fourth element, see Duke v. Nationstar

Mortgage, L.L.C., 893 F.Supp.2d 1238, 1246 (N.D. Ala. 2012), as the Mobile County Circuit (Continued) Court's granting of summary judgment in favor of AFFCU in the ejectment action (that is, granting possession of the house/property to AFFCU), which was affirmed by the Alabama Court of Civil Appeals, constitutes a prior judgment (or prior judgments) on the merits, compare Mars Hill Baptist Church of Anniston, Ala., Inc. v. Mars Hill Missionary Baptist Church, 761 So.2d 975, 978 (Ala. 1999) ("'A judgment is on the merits when it amounts to a decision as to the respective rights and liabilities of the parties, based on the ultimate fact or state of the parties disclosed by the pleadings or evidence, or both, and on which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions.'") with Ex parte Jefferson County, 656 So.2d 382, 385 (Ala. 1995) ("A summary judgment acts as a judgment on the merits.") and there is no doubt that both of these courts are indisputably courts of competent jurisdiction, see, e.g., Duke, supra, 893 F.Supp.2d at 1246 ("The Circuit Court of Shelby County was indisputably a court of competent jurisdiction over the case before it."). And, of course, the third res judicata element is satisfied because the parties in this

action and the ejectment action are identical (they have simply "switched" places). See Greene v. Jefferson County Comm'n, 13 So.3d 901, 912 (Ala. 2008) (recognizing that parties are substantially identical for purposes of res judicata when they are the same (that is, exactly identical) or in privity with one another).

The pivotal issue in this case, as in most cases, is whether the fourth res judicata element is satisfied; that is, whether this action and the state court ejectment action are the same for res judicata purposes. And this is where the undersigned does not reach a specific determination (in light of the Archers' untimely assertion of their RESPA claims), even though there is some facial appeal to AFFCU's putative implicit argument that this fourth element is met because the Archers' current claims were compulsory counterclaims in the state court ejectment action and were not properly raised as compulsory counterclaims in the state court action (see Doc. 15, at 11-12). Compare Duke, supra, at 1249-50 with Patrick v. CitiFinancial Corp., LLC, 2015 WL 5236031 (M.D. Ala. Sept. 8, 2015) and Clark v. Wells Fargo Bank, N.A., 24 So.3d 424 (Ala. 2009); see generally Ala.R.Civ.P. 13(a) (defining compulsory counterclaim and

C. Plaintiffs' Motion to Recall Writ of Possession (Doc. 20). On August 2, 2019, the Archers filed a motion to recall writ of possession. Therein, the Plaintiffs initially state they were simply following instructions of the Mobile County Circuit Court in "filling out forms to recall a writ of possession" (id. at 1) but then go on to argue that since AFFCU "filed a motion on 8/1/2019 to make this more than it is," they now request this Court "to issue an order for the defendant itself to immediately recall the writ of possession and cease and desist all such actions while this case is ongoing." *(Id. at 2).* It is obvious that the "motion" filed by AFFCU on August 1, 2019, to which the Archers make reference, is the Defendant's supplement to its motion to dismiss

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recognizing that a party must assert it in a pleading); Ala.R.Civ.P. 7(a) (setting forth the limited universe of pleadings, none of which are an appellate brief).

(Doc. 19), to which was attached the Plaintiffs' purported notice of removal filed in the prior state court ejectment action (see id., Exhibit 12).

The undersigned recommends that this Court **deny** Plaintiffs' motion to recall writ of possession (Doc. 20) given the foregoing analysis that the Archers' RESPA claims are time-barred. Moreover, even in absence of the statute of limitations analysis, the undersigned would recommend the denial of the Plaintiffs' motion because the Archers have not cited this Court any caselaw (or other authority) which establishes that this Court (in what would have to be regarded as a collateral proceeding) possesses the power to recall a writ of possession issued by an Alabama court of competent jurisdiction (that is, the Circuit Court of Mobile County, Alabama) or the power to order AFFCU to recall the writ of possession. When the Circuit Court of Mobile

County, Alabama entered judgment in favor of AFFCU and against the Archers on June 25, 2018, finding AFFCU entitled to possession of the subject property, the court specifically authorized issuance of a writ of possession by the Clerk of Court to the Sheriff of Mobile County, Alabama "for the execution of such writ." (Doc. 15, Exhibit 4). The trial court's judgment was affirmed by the Alabama Court of Civil Appeals on May 17, 2019 (Doc. 15, Exhibit 9) and the state court ejectment action ended with the appellate court's issuance of a certificate of final judgment of affirmance on June 5, 2019 (see Doc. 15, Exhibit 10).

The fact that the Archers initiated the federal court litigation on May 31, 2019 (see Doc. 1), some five days before the state court ejectment action ended, supplies no authority for this Court to countermand process authorized by the Mobile

County Circuit Court (and affirmed by the Alabama Court of Civil Appeals). After all, the Archers initiated suit in this Court (see Doc. 1 (entitled a complaint, not a notice of removal with attached documents from state court)); they did not remove the state court ejectment action from the Mobile County Circuit Court, see 28 U.S.C. § 1446(a) ("A defendant or defendants desiring to remove any civil action from a State court **shall file** in the district court of the United States for the district and division within which such action is pending **a notice of removal** signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing **a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such** defendant or **defendants in such action.**" (emphasis supplied)), nor could they have done so because the state court litigation was, at the

time of initiation of this suit, still before the Alabama Court of Civil Appeals and remained there until its conclusion on June 5, 2019. And, of course, it bears observation that since May 31, 2019, when Lewis Archer first initiated this federal action (see Doc. 1), the Archers have never been in a position to (procedurally speaking) timely remove the state court ejectment action to this Court, see 28 U.S.C. § 1446(b)(1) ("The notice of removal of a civil action or proceeding **shall be filed within 30 days** after receipt by the defendant, through service or otherwise, of a copy of an **initial pleading** setting forth the claim for relief upon which such action or proceeding is based . . . "), nor would they have ever been successful, from a substantive standpoint, in removing the state court ejectment action in a timely manner within 30 days of the filing of that action on April 11, 2016 (that is, by May 11, 2016), since the removal (obviously)

would have been based upon RESPA counterclaims, see, e.g., Vaden v. Discover Bank, 556 U.S. 49, 60, 129 S.Ct. 1262, 1272, 173 L.Ed.2d 206 (2009) ("Nor can federal jurisdiction rest upon an actual or anticipated counterclaim."); Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 830, 122 S.Ct. 1889, 1893, 153 L.Ed.2d 13 (2002) ("[T]he well-pleaded complaint rule, properly understood, [does not] allow[] a counterclaim to serve as the basis for a district court's 'arising under' jurisdiction."); HSBC Bank USA Nat'l Ass'n v. Bobrowski, 2015 WL 4506824, *2 (M.D. Fla. July 23, 2015) ("[T]he assertion of federal counterclaims is insufficient to confer federal question jurisdiction under § 1331.").

To the extent the Archers have any remaining entitlement to recall of the writ of possession (which does not appear to be the case), they must seek such

relief in the state courts of Alabama, as they alluded to in the first sentence of their motion; this Court simply lacks the power to take any action with respect to the writ of possession issued by the Mobile County Circuit Court, whether by recall the writ itself or ordering AFFCU to recall the writ. Thus, it is recommended that the Archers' motion to recall writ of possession (Doc. 20) be **DENIED** on this alternative basis as well because the Archers' RESPA claims are time-barred. **CONCLUSION**

Based upon the foregoing, it is **RECOMMENDED** that the Court **GRANT** Defendant AFFCU's motion to dismiss second-amended complaint (Doc. 15), as supplemented (Doc. 19), and **DENY** Plaintiffs' motion to recall writ of possession (Doc. 20).

DONE this the 17th day of September, 2019

s/P Bradley Murray
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

REHEARING DENIAL

William Pryor Chief Judge, Grant and Tjoflat, Circuit Judges.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-15182

LEWIS ARCHER,

SHEARIE ARCHER,

Plaintiffs-Appellants,

Versus

AMERICA'S FIRST FEDERAL CREDIT UNION

Defendant-Appellee

Appeal from the United States District Court

for the Southern District of Alabama

Before WILLIAM PRYOR, Chief Judge, GRANT and TJOFLAT, Circuit Judges

APPENDIX D

PER CURIAM:

The Petition for Panel Rehearing filed by Lewis and Shearie Archer is DENIED.

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