

No. _____

In The
Supreme Court of the United States

PHILLIP FRANCIS LUKE HUGHES,
on behalf of the Estate of Jane K. Hughes,
JOANNE HAFTER,
and all others similarly situated,
Petitioners,

v.

BANK OF AMERICA NATIONAL ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX

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UNPUBLISHED

**UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

No. 17-1202

PHILLIP FRANCIS LUKE HUGHES, on behalf of
the Estate of Jane K. Hughes, and all others
similarly situated; JOANNE HAFTER, and all
others similarly situated,
Plaintiffs - Appellants,

v.

BANK OF AMERICA NATIONAL ASSOCIATION,
Defendant - Appellee.

Appeal from the United States District Court for the
District of South Carolina, at Spartanburg. Mary G.
Lewis, District Judge. (7:15-cv-05083-MGL)

Submitted: August 31, 2017

Decided: September 11, 2017

Before FLOYD, THACKER, and HARRIS, Circuit
Judges.

Affirmed by unpublished per curiam opinion.

Jamie N. Smith, Bradley D. Hewett, D. Michael
Kelly, MIKE KELLY LAW GROUP, LLC, Columbia,
South Carolina, for Appellants. Matthew Allen
Fitzgerald, Bryan Alan Fratkin, Garrett H. Hooe,

MCGUIRE WOODS LLP, Richmond, Virginia,
Robert A. Muckenfuss, MCGUIRE WOODS LLP,
Charlotte, North Carolina, Elizabeth M.Z.
Timmermans, MCGUIRE WOODS LLP, Raleigh,
North Carolina, for Appellee.

Unpublished opinions are not binding precedent in
this circuit.

PER CURIAM:

Phillip Francis Luke Hughes and Joanne
Haftel appeal the district court's order granting
Bank of America National Association's motion to
dismiss for failure to state a claim upon which relief
can be granted. The district court concluded that
Appellants' claims were barred by the applicable
statutes of limitations and that Appellants failed to
establish grounds for equitable tolling. We affirm.

We review de novo a district court's dismissal
of an action under Fed. R. Civ. P. 12(b)(6). *Trejo v.*
Ryman Hosp. Props., Inc., 795 F.3d 442, 445-46 (4th
Cir. 2015). "To survive a motion to dismiss, a
complaint must contain sufficient factual matter,
accepted as true, to state a claim to relief that is
plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.
662, 678 (2009) (internal quotation marks omitted).
"A claim has facial plausibility when the plaintiff
pleads factual content that allows the court to draw
the reasonable inference that the defendant is liable
for the misconduct alleged." *Id.*

In conducting this analysis, we "accept[] as
true the complaint's factual allegations and draw[]
all reasonable inferences in favor of the plaintiff."
Elyazidi v. SunTrust Bank, 780 F.3d 227, 233 (4th

Cir. 2015) (internal quotation marks omitted). However, we need not accept as true “legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments.” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (internal quotation marks omitted). The complaint must offer “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but ultimately “need only give the defendant fair notice of what the claim is and the grounds upon which it rests,” *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (internal quotation marks omitted). And, “[a]lthough a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense.” *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011) (internal quotation marks omitted).

Generally, parties “are entitled to equitable tolling only if they show that they have pursued their rights diligently and extraordinary circumstances prevented them from filing on time.” *Raplee v. United States*, 842 F.3d 328, 333 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2274 (2017). “[E]quitable tolling is reserved for those rare instances where— due to circumstances external to the party’s own conduct—it would be unconscionable to enforce the limitation period against the party

and gross injustice would result.” *Id.* at 333 (internal quotation marks omitted). “[T]he use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.” *Lawrence v. Lynch*, 826 F.3d 198, 204 (4th Cir. 2016) (internal quotation marks omitted). Where a plaintiff has alleged fraudulent concealment of his cause of action, equitable tolling requires a plaintiff to demonstrate that “(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff’s claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence.” *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995).

With these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss Appellants’ claims. Accordingly, we affirm for the reasons stated by the district court. *Hughes v. Bank of Am. Nat’l Ass’n*, No. 7:15-cv-05083-MGL (D.S.C. Feb. 13, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION**

CIVIL ACTION NO. 7:15-5083-MGL

PHILLIP FRANCIS LUKE HUGHES, on behalf of
the ESTATE OF JANE K. HUGHES, JOANNE
HAFTER, and all others similarly situated,
Plaintiffs,

vs.

BANK OF AMERICA, N.A.,
Defendant.

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANT'S MOTION TO
DISMISS**

I. INTRODUCTION

In Plaintiffs Francis Luke Hughes and Joanne Hafter (collectively, Plaintiffs)'s Third Amended Complaint, they allege the following causes of action against Defendant: violations of the Truth in Lending Act, 15 U.S.C. § 1601 (TILA), fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent act, and breach of duty of good faith and fair dealing. The Court has federal question jurisdiction over Plaintiffs' TILA claims, 28 U.S.C. § 1331, and supplemental

jurisdiction over Plaintiffs' state claims, 28 U.S.C. § 1367.

Pending before the Court is Defendant's motion to dismiss for Plaintiffs' failure to state a claim, Fed. R. Civ. P. 12(b)(6). Having considered the motion, the response, the reply, the record, and the applicable law, the Court will grant the motion.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Hughes is the personal representative of Jane Hughes. Jane Hughes and her husband, John Hughes (collectively, the Hughes), opened a line of credit with Defendant on June 13, 2006. The Hughes agreed at the time to allow Defendant to draft their payments automatically from their bank account. This account was with Defendant. Viewing the facts in the light most favorable to Plaintiff Hughes, the Hughes declined to purchase the mortgage insurance Defendant offered them when they opened their line of credit. Nevertheless, from 2006 to 2015, Defendant charged them for the product. On or about March 17, 2015, Defendant sent a notice to the Hughes stating their mortgage insurance would be cancelled on September 30, 2015.

Plaintiff Hafter obtained a home equity line from Defendant in October 2008. Viewing the facts in the light most favorable to Plaintiff Hafter, she never authorized Defendant to withdraw any funds from her banking account to pay for mortgage insurance. Even so, Defendant charged her for the product from 2008 until 2015 when Defendant informed Plaintiff Hafter it would no longer do so.

Plaintiffs filed their Third Amended Complaint with this Court after which Defendant filed the instant motion to dismiss. Having been fully briefed on the relevant issues, the Court is prepared to discuss the merits of the motion.

III. STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), Aa complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court is “not required to accept as true the legal conclusions set forth in a plaintiff’s complaint.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999). Indeed, “[t]he presence of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support” the legal conclusion. *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001). In addition, when analyzing a Rule 12(b)(6) motion to dismiss, the Court may consider “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs. Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

IV. CONTENTIONS OF THE PARTIES

Defendant argues all of Plaintiffs’ claims are time barred and equitable tolling is inapplicable. It also contends Plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs maintain their claims have been equitably tolled. Although Plaintiffs agree certain of their claims should be dismissed, they assert the remaining causes of action ought to go forward. The Court details below which claims Plaintiffs aver should survive this motion.

V. DISCUSSION AND ANALYSIS

As noted above, Plaintiffs brought claims against Defendant for violations of the TILA, fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent act, and breach of duty of good faith and fair dealing. Plaintiffs, however, subsequently agreed their claims for breach of duty of good faith and fair dealing should be dismissed, ECF No. 28 at 29. They also consent to the dismissal without prejudice of Plaintiff Hughes' causes of action for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act. ECF No. 31.

Defendant contends all of Plaintiffs' remaining claims are time barred. The Court agrees. Plaintiffs fail to dispute they neglected to file their lawsuit before the pertinent statutes of limitations expired. Instead, they rely on the doctrine of equitable tolling to argue their claims are timely.

Plaintiffs must establish the following elements before equitable tolling applies: "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence."

Supermarket of Marlinton v. Meadow Gold Dairies, 71 F.3d 119, 122 (4th Cir. 1995); *Am. Legion Post 15 v. Horry Cty.*, 674 S.E.2d 181, 184 (S.C. Ct. App. 2009) (emphasizing the need for due diligence before allowing for equitable tolling). Assuming without deciding Plaintiffs are able to satisfy the first requirement, their arguments they can meet the other two elements are unavailing.

The charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus, any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit. Assertions Joanne Hughes "underwent major heart surgery, suffered from dementia, experienced vision impairments, including cataracts and eye surgery, and suffered a broken hip that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina," ECF No. 28 at 3, although unfortunate, are simply insufficient to satisfy the due diligence requirement.

As to Plaintiff Hafter's claims, she admits in her complaint the charge for the insurance appeared on her home equity statement each month, from 2008 until 2015. Accordingly, any argument she failed to discover Defendant's alleged nefarious acts during this time, although she exercised due diligence, strains the bounds of credulity.

The fact equitable tolling is to be employed sparingly is so established as to make citation to authority unnecessary. For the Court to adopt Plaintiffs' position their claims are entitled to

equitable tolling would mean statutes of limitations are inconsequential. And, of course, that is not so.

VI. CONCLUSION

Therefore, based on the foregoing discussion and analysis, Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Signed this 13th day of February, 2017, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Spartanburg Division)**

Civil Action No. 7:15-cv- 05083-MGL

PHILLIP FRANCIS LUKE HUGHES, on
behalf of the Estate of Jane K. Hughes, JOANNE
HAFTER, and all others similarly situated,
Plaintiffs,

vs.

BANK OF AMERICA NATIONAL
ASSOCIATION,
Defendant.

THIRD AMENDED COMPLAINT
(Jury Trial Demanded)
(Class Action)

Plaintiffs, on behalf of the Estate of Jane K. Hughes, Joanne Hafter, and all others similarly situated (the “Class”), would respectfully show unto the court as follows:

1. Plaintiff Phillip Hughes is the son of John P. Hughes, Sr. (Mr. Hughes) and Jane K. Hughes (Mrs. Hughes) and has standing to bring this claim after being appointed as Personal Representative of the Estate of Jane K. Hughes by the Spartanburg County Probate Court. Prior to her death, Mrs. Hughes was a citizen and resident of Spartanburg County, South Carolina.

2. Plaintiff Joanne Hafter is a citizen and resident of Lexington County, South Carolina.

3. Bank of America National Association (“BANA”) is one of the world’s largest financial institutions. Upon information and belief, BANA was at all times relevant to this Complaint a nationally-chartered bank, regulated by the Office of the Comptroller of the Currency, with its principal place of business in North Carolina.

4. This Court has jurisdiction over this matter because there is a complete diversity of citizenship between Plaintiffs and Defendant, the amount in controversy claimed by Plaintiffs exceeds \$75,000.00, and this is an action based on Defendant’s violation of federal law. 28 U.S.C. §§ 1331, 1332(a).

5. Venue is proper because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in Spartanburg County and Lexington County, South Carolina. 28 U.S.C. § 1391(b)(2).

FACTUAL ALLEGATIONS

6. At all relevant times, BANA and its agents marketed a purportedly optional financial product promising “mortgage protection” to its clients. Such plans, including BANA’s “Line Protection Plan,” are essentially a specialized life insurance limited to paying specific portions of a mortgage payment under specific conditions. These plans are marketed, usually at the time of closing, as an *option* to assist survivors in making mortgage payments following the disability or death of a mortgagor. A “mortgage protection” plan is *not* “Private Mortgage Insurance” (widely referred to as “PMI”), which is *required* by lenders to protect a mortgagee in case of default by a mortgagor.

7. BANA, and other companies, market mortgage protection plans because they are extremely profitable. This profitability resulted in such abuses of unsophisticated customers that Congress established explicit disclosure and authorization requirements to protect citizens from being duped into unknowingly paying for unwanted mortgage protection plans. *See, e.g.*, 15 U.S.C. §§ 1604, 1637(c)(5), 1639(l); 12 C.F.R. § 226.4.

8. On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of \$120,000, secured by a mortgage (“Hughes Mortgage”) on their Spartanburg County homestead. The line of credit is governed by a document entitled “Bank of America Maximizer Agreement and Disclosure Statement” (“Agreement”) signed by both borrowers on June 13, 2006.

9. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization (“Authorization”) which allowed BANA to automatically draft “loan payments” from the Hughes’s BANA bank account.

10. During the meeting to complete the Hughes Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled “Optional Line Protection Plan Addendum (“Addendum”).” As stated on the form, the “Line Protection Plan only provide protection on the variable portion of your credit line” and “This Product Is Optional.” As understood by the Hughes, if they elected it, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. At the time that BANA presented the plan to the Hughes, LPP offered six protection

options, with the monthly fee ranging in cost from 4.5% to 13.5% of the minimum monthly payment on the borrowers' credit line.

11. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan.

12. Mr. and Mrs. Hughes both signed a 2-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA had provided them with the Line Protection Plan information. The Hughes designated their election to decline the purportedly optional Line Protection Plan by clearly and conspicuously checking a box next to "DECLINE to purchase any Protection on this Credit Line" option. *See* attached Exhibit A (OPTIONAL LINE PROTECTION PLAN ADDENDUM dated June 13, 2006).

13. In June 2006, Mr. Hughes was age 86. Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision impairments, including cataracts and eye surgery, from June 2006 until her death. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina.

14. John P. Hughes died on October 22, 2008, at the age of 87. Mr. Hughes left his estate to his wife, Jane K. Hughes.

15. Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to the Mr. and Mrs. Hughes, informing them that the Line Protection Plan would be cancelled on September 30,

2015. The notice also indicated that John P. Hughes was a “protected” borrower.

16. By letter dated March 17, 2015, BANA notified Mr. and Mrs. Hughes that “The optional Line Protection Plan will be cancelled on September 30, 2015,” and that “You’re no longer being charged for the Protection Plan as of April 1, 2015.” *See* attached Exhibit B.

17. Curiously, the BANA notice to the Hughes also stated that “Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determine that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210.” Ex. B. at 1.

18. Although Mr. and Mrs. Hughes never elected to purchase any “Protection Plan,” BANA sent a second letter dated March 25, 2015, stating that Mr. Hughes had selected “6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization” protection at a monthly rate of 9.5% of the Hughes’ Minimum Monthly Payment.

19. In response to an inquiry from Mrs. Hughes, BANA stated in a May 6, 2015, letter that “The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request” and enclosed an 8-page document entitled “OPTIONAL LINE PROTECTION PLAN ADDENDUM (“ADDENDUM”).” *See* attached Exhibit C.

20. The 8-page “ADDENDUM” provided by BANA in May 2015 is not the 2-page “ADDENDUM”

signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide for signatures or a place for election or rejection of the “protection.”

21. In any event, BANA did not provide the 8-page ADDENDUM to Mr. or Mrs. Hughes before May 2015.

22. The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006.

23. Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mr. or Mrs. Hughes revealing that BANA believed that the Hughes had elected any “Protection Plan” or that an amount was to be or was being charged to them for such a plan.

24. To date, Plaintiff has been unable to locate, and BANA has been unable to provide, any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any “Protective Plan” coverage of any sort.

25. Despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of \$28.40 from the Hughes’s BANA joint checking account beginning on or about June 2006. This charge was ambiguously listed as “Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXX4660 Ppd” and appeared amid numerous other monthly charges. *See* attached Exhibit D.

26. All other charges from BANA or its subsidiaries appearing on the Hughes’s bank statements during the relevant period were clearly designated as transactions with “Bank of America” or “BkofAmerica” and other insurance transactions

were clearly identified with the name of the charging company (i.e., “Patrons Mutual,” “Travelers Insur”).

27. In addition, none of the numbers in the Line Protection Plan transaction description were related to the Hughes’s BANA mortgage or line of credit.

28. As neither Mr. or Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that “Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd” was a BANA charge generally or a “Line Protection Plan” charge specifically until receiving the March 2015 BANA notices.

29. Upon receiving notice of Mr. Hughes’s death, on May 6, 2015, BANA declined coverage under the Line Protection Plan on the grounds that “[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury).”

30. Upon request, BANA refunded the payments drawn from the Hughes’s joint account after Mr. Hughes’s death.

31. BANA refused and continues to refuse to refund the payments drawn during Mr. Hughes’s lifetime.

32. On June 3, 2015, Jane K. Hughes passed away, and Plaintiff was named as personal representative of her estate.

33. In October 2008, Joanne Hafter obtained a home equity loan from BANA in the amount of \$30,000.00, secured by a mortgage (“Hafter Mortgage”) on her Lexington County homestead. During the closing of the Hafter Mortgage, Ms.

Hafters rejected any offer of a Line Protection Plan or mortgage protection services and has never since authorized BANA to withdraw any funds for a Line Protection Plan or any other similar “plan.”

34. Despite her rejection of the Line Protection Plan, BANA charged Ms. Hafters a monthly fee for this rejected and unwanted product, beginning in October 2008 and extending through 2015. The charge was listed only as “LPP Fee Assessment” on the monthly transaction summary for her home equity loan. The monthly charges for the Line Protection Plan ranged from approximately three dollars (\$3.00) to forty dollars (\$40.00) per month from 2008 until 2015.

35. In 2015, BANA notified Ms. Hafters that she would no longer be charged for the Line Protection Plan.

36. On March 9, 2016, Defendants counsel sent Mrs. Hafters counsel a partial copy of two documents, each purportedly containing Mrs. Hafters signature. The first document was a copy of a document entitled “Bank of America Equity Maximizer Agreement and Disclosure Statement” (“Agreement”). The second document was “Page 1 of 9” of a document with the Bank of America logo and “IMPORTANT NOTICE” on the top of the page and which states that it is a “Confirmation Letter.”

37. The signature dated “9-26-08” on Agreement page 9 of 10 that purports to be that of “Joanne C Hafters” is not Mrs. Hafters true signature and was not placed on this document by Mrs. Hafters.

38. The Confirmation Letter “Page 1 of 9” indicates that the signatory elected to “ACCEPT Line Protection Plan” coverage with the election box and supporting information typed in the appropriate

locations. The “X” used to designate acceptance of the product and the supporting information on the Confirmation Letter appears to have been prepared and placed on the document by Defendant before the document could have been presented to Mrs. Hafter. As presented, the document offered no option for Mrs. Hafter to decline the offered product.

ALLEGATIONS AS TO THE CLASS

39. Bank of America has been involved in or condoned similar fraudulent “protection” plan schemes in the past. *See* <http://topclassactions.com/lawsuit-settlements/lawsuit-news/2798-bank-of-america-credit-protection-class-action-settlement/>.

40. Upon information and belief, the Line Protection Plan and similar “mortgage protection” plans are a very profitable business line for BANA.

41. The Named Plaintiffs seek damages on behalf of themselves and all others similarly situated, against the Defendant in an amount to be determined at trial.

42. This civil action is brought by the Named Plaintiffs as a class action on behalf of themselves and all others similarly situated under the provisions of Federal Rule of Civil Procedure 23.

43. The Class consists of BANA customers who, without the customer’s express and informed written consent or in direct contradiction of the rejection of an offered plan, were enrolled in and charged for protection plan insurance products referred variously as “Borrower’s Protection Plan,” “Line Protection Plan,” or other similar monikers.

44. Under Federal Rule of Civil Procedure 23, a class action is appropriate in this case because:

- a. Based on Defendant's volume of "protection plan" participants, both knowing and unknowing, the class is so numerous that joinder of all members is impractical;
- b. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. These questions include:
 - i. Whether BANA's unilateral enrollment of the Proposed Class into a "protection plan" program constitutes a violation of the Truth in Lending Act, fraud, breach of contract, or a breach of the duty of good faith and fair dealing;
 - ii. Whether BANA committed fraudulent acts or otherwise was in breach of contract by drafting payments from the financial accounts of the Proposed Class without express authorization and in violation of the customer's clear contrary election;
- c. The claims of the Named Plaintiffs are typical of the class members' claims. All are based on the same facts and legal theories;
- d. The Named Plaintiffs will fairly and adequately represent the class members' interests. All claims are based on the same facts and legal theories and Plaintiffs' interests are consistent with the interests of the class; and
- e. The Named Plaintiffs have retained counsel experienced in bringing class actions.

45. The Named Plaintiffs' claims are typical of the claims of the members of the Proposed Class

because: 1) the Named Plaintiffs satisfy each of the criteria of the Proposed Class; 2) all other members of the Proposed Class have suffered or may suffer the identical harm as the Proposed Class's plaintiff representative as a result of Defendant's violations of law as alleged herein; 3) the remedy sought by the Named Plaintiffs is also sought by each of the other members of the Proposed Class and is directed towards Defendant's conduct perpetrated on the Proposed Class as a whole.

46. A class action is superior for the fair and efficient adjudication of the class members' claims. The injury suffered by each individual class member in this action is likely to be disproportionate to the burden and expense of individual prosecution of complex and extensive litigation to proscribe Defendant's conduct and practices. Additionally, effective redress for each and every class member against Defendant may be limited or even impossible where serial, duplicitous, or concurrent litigation occurs on these disputes. Individualized litigation may lead to incongruous and conflicting judgments against Defendant. A class action procedure involving all class members, Defendant and the court present fewer management difficulties, and provide the benefit of a single adjudication, economy of scale, and judicial efficiency and fairness.

FOR A FIRST CAUSE OF ACTION
(Violation of the Truth in Lending Act—15
U.S.C. § 1601 *et seq.*)

47. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

48. Residential mortgage loan agreements and line of credit agreements between Defendant BANA and its customers, including the Agreements signed by Mr. and Mrs. Hughes and Ms. Hafter are subject to the disclosure requirements of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*, and related regulations, commentary, and interpretive guidance promulgated by the Federal Reserve Board.

49. BANA is a “creditor” as defined by TILA.

50. BANA is required to clearly, conspicuously, and timely disclose all finance charges, other charges, and third party charges that may be imposed in connection with a mortgage loan or line of credit.

51. Voluntary credit insurance premiums must be included in the finance charges unless:

- a. The coverage of the debtor by the insurance is voluntary and this fact is clearly disclosed in writing; and
- b. In order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so.

52. BANA charged Ms. Hafter and Mr. and Mrs. Hughes for Line Protection Plan premiums not only without specific affirmative written indication of their desire to purchase Line Protection Plan, but contrary to an explicit written declination of the purportedly “optional” plan. In doing so, BANA violated TILA by excluding the plan premium from the finance charge disclosed to Joanne Hafter and Jane and John Hughes.

53. Plaintiffs’ TILA claim is timely because BANA illegally charged Plaintiffs for the declined

Line Protection Plan in 2015, which is within one year of the initially filed Complaint. Further, to the extent that the TILA violations set forth above occurred more than one year prior to the commencement of this action, Plaintiffs did not discover and did not have a reasonable opportunity to discover BANA's illegal conduct because of BANA's fraudulent nondisclosures and misleading charge description, Mrs. Hughes age- and health-related cognitive difficulties, until March 2015 when BANA first advised Plaintiffs of the plan's cancellation.

54. BANA systematically and pervasively engaged in similar violations of TILA to the detriment of other members of the Proposed Class.

55. As a result of BANA's violations, Plaintiffs and the Proposed Class are entitled to recover actual damages and statutory damages as provided by 15 U.S.C. § 1640(a)(1)-(2).

56. Plaintiffs and the Proposed Class are also entitled to recovery or attorneys' fees and costs to be paid by BANA, as provided by 15 U.S.C. § 1640(a)(3).

FOR A SECOND CAUSE OF ACTION
(Fraud)

57. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

58. Defendant BANA made the following false and material representations and engaged in the following fraudulent conduct, among others alleged herein:

- a. BANA, with knowledge of the falsity or reckless disregard for the truth of its representation, represented to Ms. Hafter and

Mr. and Mrs. Hughes that BANA would draft funds from their respective accounts solely for monthly loan payments;

b. Through its agreements with Plaintiffs, BANA represented, with knowledge of the falsity or reckless disregard for the truth of its representation, that a protection plan, including the Line Protection Plan, was optional coverage that would only be added to the Plaintiffs' credit line and home equity loan with their consent;

c. The purported signature of Ms. Hafter appearing on the Agreement is not her true signature and was not placed there by her.

59. BANA made these representations to Plaintiffs with the intent that Plaintiffs be induced to enter into the Agreement with BANA and sign the Authorization to grant BANA access to their account for purposes of drafting funds.

60. Plaintiffs had no knowledge of the falsity of BANA's representations and had the right to rely on those representations. Plaintiffs used reasonable prudence and diligence by documenting in writing their decision to decline LPP coverage.

61. Plaintiffs relied on BANA's representations to their detriment, resulting in consequent and proximate injury in that BANA thereafter wrongly used its automatic drafting capability to improperly deduct payments from Plaintiffs' financial accounts to pay for the Line Protection Plan without their knowledge and despite their rejection of that plan.

62. Due to the fraudulent nature of BANA's actions, Plaintiffs are also entitled to punitive damages.

FOR A THIRD CAUSE OF ACTION
(Fraudulent Concealment)

63. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

64. Pleading in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in the Line Protection Plan by not providing any notice to them of the enrollment.

65. Defendant BANA wrongly withdrew monthly payments for the Line Protection Plan from the Hughes's account under the confusing and non-descript transaction of "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXX4660 Ppd" with the intention that the Hughes's not identify the true nature of the transaction.

66. Because the Plaintiffs entrusted BANA with authorization to draft monies from their accounts, and expressly reposed a trust in confidence in BANA with respect to automatic drafting transactions, BANA had a duty to disclose to Plaintiffs that it unilaterally enrolled them in the Line Protection Program and that BANA was withdrawing payments t which were not authorized by the borrowers.

67. Alternatively, BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties.

68. As a result of BANA's concealment, Plaintiffs suffered monetary damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their account.

69. Due to the fraudulent nature of BANA's actions, Plaintiffs are also entitled to punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)

70. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

71. Plaintiffs and BANA entered into a binding agreement supported by good and valuable consideration which is represented by the Hughes Mortgage, the Hafter Mortgage, the Agreement, the Authorization, and the Addendum collectively.

72. Plaintiffs performed all obligations required of them under the Agreement or has had the performance of any obligation excused.

73. Defendant BANA breached the agreements between them and Plaintiffs by enrolling Plaintiffs in the Line Protection Plan without their express agreement, and without having them sign a separate addendum explicitly electing such coverage.

74. BANA further breached the agreement by drafting Line Protection Plan payments from the Plaintiffs' financial accounts, thereby exceeding its authority under the agreements between the parties, which are limited only to drafting loan payments.

75. As a result of these breaches by BANA, Plaintiffs suffered damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their bank accounts.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract Accompanied by
Fraudulent Acts)

76. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

77. BANA, in addition to breaching its contract with Mr. and Mrs. Hughes and Ms. Hafter as set forth above, acted fraudulently by concealing that it enrolled Plaintiffs in its Line Protection Plan without express permission and by drafting unauthorized payments for the product from Plaintiffs' respective bank accounts.

78. BANA had a fiduciary and contractual duty to disclose these facts to Mr. and Mrs. Hughes and Ms. Hafter.

79. As a result of BANA's breach of contract accompanied by fraudulent concealment, Plaintiffs were damaged in that they unknowingly paid for a benefit that was expressly declined.

80. Due to the fraudulent nature of BANA's actions, Plaintiffs are also entitled to punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Breach of Duty of Good Faith and Fair Dealing)

81. Plaintiffs restate and reallege each and every allegation as if repeated herein verbatim.

82. BANA breached the duty of good faith and fair dealing implied in the transaction and owed to Plaintiffs, inasmuch as BANA undertook the fraudulent, unfair, and deceptive conduct described herein. Further, in marketing and selling insurance (i.e., the "Line Protection Plan") under the guise of mortgage "protection," BANA violated S.C. Code Ann. § 38-25-110, et. seq., by engaging in the unauthorized business of insurance because BANA is not licensed to transact insurance business in South Carolina.

83. As a direct and proximate result of this breach of duty, Plaintiffs have suffered damages.

84. BANA is vicariously liable for this cause of action for the actions of its employees, agents, contractors and/or servants under the doctrine of respondeat superior.

JURY TRIAL DEMAND

85. Plaintiffs hereby demand that all issues in this case triable before a jury be so tried.

DAMAGES

WHEREFORE, Plaintiffs pray for the following relief:

- A. For an order certifying the class defined herein, appointing undersigned counsel as class counsel, approving Plaintiffs as class representatives, and requiring that notice be provided to the class;
- B. Actual and punitive damages in excess of \$75,000.00, as determined at trial;
- C. Attorney fees and costs;
- D. Pre-judgment interest and post-judgment interest; and
- E. Such other and further relief as the Court deems just and proper.

Respectfully Submitted,
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