U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **11-03801-hb**
Adversary Proceeding Number: **11-80078-hb**

ORDER GRANTING MOTION TO DISMISS FILED BY PFEIFFER GLEATON WYATT HEWITT, PA f/k/a/ PFEIFFER GANTT & GLEATON, PA

The relief set forth on the following pages, for a total of 18 pages including this page, is hereby ORDERED.

FILED BY THE COURT
10/21/2011

Entered: 10/24/2011

US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, William Leonard Flucker and Bobbie Jo Janine Flucker, Debtor(s).	C/A No. 11-03801-HB Adv. Pro. No. 11-80078-HB Chapter 13
Bobbie Jo Janine Flucker William Leonard Flucker, Plaintiff(s), v. David Gantt Pfeiffer Gantt & Gleaton PA Terence M Morgan aka Terrence Morgan Federal National Mortgage Association National Real Estate Services.com Inc. Michael K Cockrell Jenny Cockrell The Rental Home Store, Defendant(s).	**ORDER GRANTING MOTION TO DISMISS FILED BY PFEIFFER GLEATON WYATT HEWITT, PA f/k/a/ PFEIFFER GANTT & GLEATON, PA**

THIS MATTER comes before the Court upon the Motion to Dismiss[1] filed by Defendant Pfeiffer Gleaton Wyatt Hewitt, PA f/k/a Pfeiffer Gantt & Gleaton, PA ("Firm"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure[2], made applicable to this adversary proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. Plaintiffs filed this action against various Defendants listing causes of action, including a request for the Court to determine the extent of a lien, for damages for fraud and/or constructive fraud, negligence and/or negligent misrepresentation, conspiracy, conversion,

[1] Doc. No. 8, filed on July 20, 2011. Plaintiffs filed a Response to the Motion on July 28, 2011. (Doc. No. 11).
[2] Firm also moved for dismissal pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure for insufficient service of process. However, Firm withdrew this portion of the motion after service was cured by Plaintiffs.

breach of contract with fraudulent conduct, and unfair trade practices.[3] After a review of the pleadings and considering the arguments presented by the parties, the Court finds that the Motion to Dismiss should be granted and the Firm should be dismissed from this lawsuit.

THE ALLEGATIONS OF THE COMPLAINT

The Complaint and record include the following relevant allegations and information[4]:

1. On February 2, 2007, Defendant Terence Morgan purchased a tract of real property located at 515 Tomotley Court, Greer, South Carolina in Spartanburg County ("Subject Property").[5] To secure the loan to purchase the Subject Property, Morgan executed a mortgage agreement with Bankline Mortgage Corp. that was subsequently assigned to Federal National Mortgage Association ("Fannie Mae").[6]

2. Defendant National Real Estate Services.com, Inc. ("NRES") placed an advertisement on the website "Craig's List"[7] which advertised the purchase of homes through a "Beat the Bank" program. Plaintiffs saw this ad on the internet in June 2009.

3. Knowing they had a marginal creditor score, Plaintiffs inquired into the "Beat the Bank" program and were provided a brochure and explanation of the program by

[3] Not all causes of action are asserted against the Firm. Relevant actions are discussed below.
[4] For the purposes of this motion only, the factual allegations are treated as true and viewed in the light most favorable to the non-moving party.
[5] Subject Property purchased from Gray & Willis, Inc. by deed recorded at Book 87-U, Page 207. (Doc. No. 1 at 3, ¶ 21).
[6] *Id.* at 3-4, ¶ 21.
[7] It is presumed by the Court that Defendant NRES placed the ad on Craig's List; however, Plaintiff's Complaint refers to Defendants NRES, Michael K. Cockrell, Jenny Cockrell, and The Rental Store collectively as "Management Agent." *Id.* at 1, ¶ 2. Therefore, it is difficult to discern which Defendant among this group allegedly posted the advertisement because Plaintiff merely states "Management Agent" placed the ad. However, such a determination is immaterial to the instant Motion.

Defendant Michael Cockrell.[8] Through this program, Plaintiffs would make all payments on their home directly to NRES.[9]

4. Plaintiffs informed NRES of their interest in the Subject Property (owned by Defendant Terence Morgan and allegedly encumbered by a mortgage), which at the time was advertised as being for sale by a third party real estate agent. NRES contacted the seller, Morgan.[10] Thereafter, Defendant Michael Cockrell presented a Contract Report to the Plaintiffs. The Report indicated that the "net worth" of the Subject Property after ten years would be $263,313, based on the home value increasing at 4% each year. However, there was no indication of the source of the 4% appreciation figure.[11]

5. On July 10, 2009, Plaintiffs signed a "Contract for Sale" prepared by NRES for the purchase of the Subject Property.[12] Shortly thereafter, Morgan agreed to and executed the Contract for Sale.

6. The Contract for Sale provided that Morgan was to convey marketable title and deliver a general warranty deed to Plaintiffs. Despite this provision, a "Bond for Title" was drafted by NRES instead.[13]

7. On or about the same date, Plaintiffs entered into an Escrow/Payment Management Agreement ("Debtor Payment Agreement") with NRES. Pursuant to this

---

[8] The Complaint alleges that brochures for the "Beat the Bank" program describe it as "a process for a private home sale to be achieved through professional sources for the protection and well being of all parties." *Id.* at 4, ¶ 28. The program provides for NRES to assist potential buyers with purchasing homes by helping them complete paperwork, including forms for the IRS to receive the $8,000 first time homebuyer tax credit, and for all payments due on the home to be made to and by NRES to the appropriate parties (i.e., mortgage, insurance, taxes, etc.). *Id.*

[9] The Court interprets this to mean Plaintiffs wanted to buy a home but were hampered by their credit score, so they considered the "Beat the Bank" program as an alternative to conventional financing to meet their goal of home ownership and consulted with Michael Cockrell as a result. If they participated in this program they would make all payments on any home they obtained thereby directly to NRES.

[10] *Id.* at 5, ¶¶ 30-31.

[11] *Id.* at ¶¶ 32-33.

[12] *Id.* at 6, ¶ 38.

[13] *Id.* at ¶¶ 40-41.

agreement, Plaintiffs were to make all payments associated with the Subject Property (i.e, mortgage payments, property tax, etc.) directly to NRES.[14]

8. Shortly thereafter, Morgan entered into a Payment/Escrow Management Agreement ("Seller Payment Agreement") with NRES, where Morgan represented that all mortgage payments on the property were current and that the property was free of any liens or encumbrances.[15]

9. The closing on the Subject Property occurred on July 22, 2009, at Firm's office and was conducted by Defendant David Gantt, who was an attorney practicing at the Firm at that time.[16]

10. At the closing, the Plaintiffs were presented with a Bond for Title instead of a general warranty deed. Plaintiffs allege that they were assured that this arrangement was in their best interests, and it appears from the allegations of the Complaint that Mr. Gantt allegedly communicated this assurance. Plaintiffs were not provided any disclosure regarding who Mr. Gantt represented and did not pay Mr. Gantt for his services.[17] Throughout the Complaint, Plaintiffs refer to Defendants David Gantt and the Firm collectively as "Gantt," moving back and forth between the plural and singular. The Complaint states "*David Gantt and Pfeifer Gantt Gleaton PA (collectively Gantt) is an attorney and his firm is located in Greenville SC who provided closing services on the*

[14] *Id.* at ¶ 44.
[15] *Id.* at ¶¶ 45-46. It is assumed by the Court that this means all liens and encumbrances other than the mortgage to Fannie Mae.
[16] It is unclear from Firm's Motion when Mr. Gantt left the Firm because the Motion states that Mr. Gantt has not been a shareholder, officer, director, or employee of the Firm since both August 1, 2011, and August 1, 2009. (Doc. No. 8 at 1, 10). However, it is clear from the Motion that Mr. Gantt was a practicing attorney at the Firm at the time of the closing at issue in the instant case.
[17] Plaintiffs mentioned in their pleadings that Mr. Gantt appeared in a video for NRES and explained at the hearing that the video was filmed with pictures of the Firm in the background. However, it is not alleged that Plaintiffs saw this advertisement prior to the closing or entering of the Contract of Sale with NRES, or that the Firm was aware of the video.

subject Bond for Title, and it is alleged they co-conspired or were joint venturers/partners or agent of Management Agent."[18] Without a distinction between the parties and with these vague inconsistencies, it is difficult for the Court to discern whether the individual or the Firm participated in certain acts mentioned therein. However, in context the Court does not understand that Plaintiff intended to allege that the entire firm made any direct representation to Plaintiffs, but rather that Gantt did so.

11. The Seller Payment Agreement was disclosed to Plaintiffs after the closing. Plaintiffs allege that Mr. Gantt was aware of the Seller Payment Agreement between Morgan and NRES, as Gantt and the Firm drafted the Agreement.[19]

12. Plaintiffs were not provided a disclosure as to where their funds were disbursed.[20] However, after the closing, they continually made the mortgage payment on the Subject Property from September 2009 through April 2011. At first, Plaintiffs sent their payments directly to a bank account provided by NRES; however, in 2011 Plaintiffs began making payments directly to NRES at its new business, The Rental Store.[21]

13. Despite the fact that Plaintiffs diligently made their payments each month pursuant to the various agreements, the mortgagee, Fannie Mae, filed an action to foreclosure on its interest in the Subject Property.[22] Their last payment for the mortgage on the Subject Property was credited to the payment due for December 2010.[23]

14. Plaintiffs allege that not all of the payments paid by them to NRES were sent to the mortgagee. The mortgage was in default as of January 2011 and the amount of the

[18] Doc. No. 1 at 3, ¶ 16.
[19] Although not alleged directly in the Complaint, Plaintiffs' counsel explained that it is presumed by the Plaintiffs that the Firm participated in the drafting of such documents because they were presented on the firm's letterhead.
[20] Doc. No. 1 at 7, ¶ 54.
[21] *Id.* at 8, ¶ 57.
[22] *See Federal Nat'l Mortg. Assoc. v. Terence M. Morgan, et al.*, C/A No. 2011-CP-42-02209 (May 18, 2011).
[23] Doc. No. 1 at 8, ¶ 59.

arrearage was approximately $10,000.[24] Regular monthly payments were scheduled at approximately $1,500.00.[25]

15. Plaintiffs assert that NRES and The Rental Store did not apply their payments to the mortgage and, instead, used the funds for their own pecuniary interest.[26]

16. In an attempt to stay the foreclosure proceedings and the loss of any interest Plaintiffs may have in the Subject Property, Plaintiffs filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on June 14, 2011.[27] Through their Chapter 13 plan[28], Plaintiffs seek to cure the arrearage on the mortgage being foreclosed on by Fannie Mae. Plaintiffs' plan has not yet been confirmed.[29]

17. According to Plaintiffs' bankruptcy schedules, two Homeowner's Associations have liens on the Subject Property in addition to the mortgage.

18. Plaintiffs allege that they have been damaged because their payments were not applied appropriately, causing a foreclosure action to be initiated on the Subject Property. In addition, Plaintiffs allege that damages arise from NRES's failure to add Plaintiffs to Morgan's property insurance policy as loss payees because there was subsequent roof damage that left Plaintiffs without recourse for insurance coverage.[30]

19. Plaintiffs' first, fifth and sixth claims for relief do not involve the Firm.

---

[24] *Id.* at ¶ 62.
[25] *Id.* at ¶ 57.
[26] *Id.*
[27] *In re Flucker*, C/A No. 11-03801-HB (Bankr. D.S.C. June 14, 2011).
[28] Doc. No. 2, C/A No. 11-03801-HB.
[29] Fannie Mae filed an Objection to Confirmation on July 18, 2011, asserting that Debtors do not own the Subject Property and that it is not property of the estate. (Doc. No. 14, C/A No. 11-03801-HB). A hearing on the Objection to Confirmation was held on the same day as the hearing on this Motion. With regard to the confirmation matter, the Court requested that the parties submit competing proposed orders for the Court to take under advisement. (Doc. No. 30, C/A No. 11-03801-HB). To date, the Court has not entered a decision on the Objection to Confirmation.
[30] Doc. No. 1 at 6, ¶ 44.

DISCUSSION AND CONCLUSIONS OF LAW

Plaintiffs allege that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Local Civil Rule 83.XI.01, DSC and that venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

Fed. R. Civ. P. 12(b)(6) provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. In reviewing claims for failure to state a claim, a court must construe the allegations in the light most favorable to the plaintiff. In order to survive a motion to dismiss, the pleader must provide more than mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007) (citations omitted). Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a pleading does not require detailed factual allegations; however, it demands more than an unadorned assertion that the plaintiff is entitled to relief. *Id.* Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements are insufficient. *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009).

Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1950. A motion pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint and should be considered with the assumption that the facts alleged in the complaint are true. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (citations omitted). "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506,

514, 122 S.Ct. 992 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984)).

SECOND CAUSE OF ACTION—FRAUD AND/OR CONSTRUCTIVE FRAUD

Firm asks the Court to dismiss the second cause of action, which is directed in part at this Defendant. For Plaintiffs to ultimately prevail, the Court must find that Plaintiffs have been damaged by the Firm's fraudulent actions. "Fraud is an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (App. 2003) (citing Black's Law Dictionary 660 (6th ed. 1990)). Under South Carolina law, to prevail on a claim for actual fraud, the plaintiff must show the following elements:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent proximate injury.

Id. (citations omitted). "To establish constructive fraud, all elements of actual fraud except the element of intent must be established." *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (App. 2005) (quotation marks and citations omitted).

"Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake." *Swierkiewicz*, 534 U.S. at 513, 122 S.Ct. 992 (footnote omitted). Therefore, Rule 8(a)'s simplified notice pleading standard is inapplicable to claims for fraud or mistake and Rule 9(b) must be complied with.[31]

[31] Rule 9(b) applies to statutory claims of fraud or misrepresentation as well as traditional common law claims involving allegations of fraud. *See e.g.*, *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1477 (2d Cir. 1995)

Pursuant to Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "To meet this standard, [a] plaintiff must, at minimum, describe 'the time, place, and contents of the false representations as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

> Rule 9(b) serves three purposes: (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints "as a pretext for the discovery of unknown wrongs"; (2) to protect those whose reputation would be harmed as a result of being subject to fraud charges; and (3) to "prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) (quoting *In re Stac Elecs. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)).

While the Complaint provides some detail regarding the sequence of events (i.e., what occurred, when the events occurred, and to some extent, which parties were involved in each stage), the cause of action for fraud and/or constructive fraud lacks any specific facts as to what actions of the Firm were fraudulent. Specifically, due to Plaintiffs' referral of the Firm and Mr. Gantt collectively as "Gantt" throughout the Complaint, it is difficult to determine what exactly the Firm—separate from any action taken by Gantt individually—

(stating that a party's argument that Rule 9(b) applies only to common law fraud claims is meritless because "Rule 9(b) has commonly been applied to other statutory fraud claims . . ."); *Williams v. McKinney*, C/A No. 6:06-3465-HFF-WMC, 2008 WL 731124, at *4 (D.S.C. Mar. 18, 2008) (finding that a claim for common law fraud failed to satisfy Rule 9(b)); *In re McConnell*, 390 B.R. 170, 181 (Bankr. W.D. Pa. 2008) ("[T]he heightened pleading requirement of Fed. R. Civ. P. 9(b) applies equally to fraud counts premised on common law fraud." (citations omitted)).

falsely represented to Plaintiffs and whether the Firm had any knowledge of falsity of any statement/representation made by Gantt. Therefore, if allowed to proceed further, the fraud claim would have to rest primarily on facts that may be obtained through the process of discovery to determine the Firm's involvement, if any, in the transaction at issue. This approach is exactly what Rule 9(b) seeks to prevent. *See Harrison*, 176 F.3d at 789 ("The clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed.").

Further, Plaintiffs have not sufficiently described the time, place, and contents of the false representation made by the Firm and what the Firm obtained thereby. *See Kellogg Brown & Root*, 525 F.3d at 379. Therefore, the Court finds that the Complaint does not sufficiently plead the fraud or constructive fraud cause of action to meet the particularity requirement under Rule 9(b). Accordingly, Firm's Motion is granted and the fraud and/or constructive fraud claim against the Firm is dismissed.

THIRD CAUSE OF ACTION—NEGLIGENCE AND/OR NEGLIGENT MISREPRESENTATION

The Firm asserts that the third cause of action should also be dismissed because the negligence claim is a disguised claim for legal malpractice and, therefore, cannot be a claim under S.C. Code Ann. § 15-36-100.[32] In addition, the Firm argues that, like the claims for fraud and constructive fraud, Plaintiffs did not plead the negligent misrepresentation claim with particularity, as required by Rule 9(b).

[32] The statute provides, in relevant part that:

> in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) [which includes attorneys at law] . . . the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

S.C. Code Ann. § 15-36-100(B).

Generally, a claim for negligence requires the showing of: (1) duty; (2) breach; (3) proximate cause; and (4) damages. *See Cody P. v. Bank of Am., N.A.*, __ S.E.2d __, 2011 WL 3803793, at *2 (App. Aug. 23, 2011) (citations omitted).

> To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011) (citations omitted).

The Court finds that Plaintiffs have failed to sufficiently plead the cause of action and the Motion should be granted. It is unclear from the Complaint what duty the Firm owed to Plaintiffs. The cause of action merely asserts that "Gantt" (either the Firm, Mr. Gantt, or both) "breach[ed] their duty to Plaintiff to fully disclosing the status of the mortgage." The Court is unclear as to which Defendant this refers to and the stated duty of "disclosing the status of the mortgage" is vague at best. Therefore, the Court finds that Plaintiffs failed to plead any duty owed to them by the Firm. Consequently, Plaintiffs also failed to state a claim for negligent misrepresentation, which requires that "a plaintiff must allege that the defendant owed a duty of care to communicate truthful information to that plaintiff." *Pitten v. Jacobs*, 903 F.Supp. 937, 951 (D.S.C. 1995).

In South Carolina, "[t]he key difference between fraud and negligent misrepresentation is that 'fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement.'" *Armstrong*, 366 S.C. at 220, 621 S.E.2d at 375-76 (quoting *Brown v. Stewart*, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (App. 2001)). Because no false statement specifically

attributable to the Firm has been alleged, the Court finds that Plaintiffs have failed to state a cause of action against the Firm for negligent misrepresentation. Therefore, Firm's Motion is granted for the negligence and/or negligent misrepresentation claim.

FOURTH CAUSE OF ACTION—CONSPIRACY

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp. Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "It is well-settled in South Carolina that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes him special damage." *Pridgen v. Ward*, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (App. 2010) (quotation marks and citations omitted). "In order to establish a cause of action for civil conspiracy, a plaintiff must show that there were special damages which *arose specifically because of the conspiracy itself*, and that were not caused by any related causes of action." *Alonso v. McAllister Towing of Charleston, Inc.*, 595 F.Supp.2d 645, 652 (D.S.C. 2009) (emphasis added) (citing *Pye v. Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006)). Special damages "are not implied at law because they do not necessarily result from the wrong. *Special damages must, therefore, be specifically alleged in the complaint* to avoid surprise to the other party." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (App. 2009) (emphasis added) (citing *Sheek v. Lee*, 289 S.C. 327, 327, 345 S.E.2d 496, 497 (1986))).

In the instant case, the Plaintiffs' Complaint fails to allege any special damages that were incurred as a result of any conspiracy involving the Firm. The Complaint merely recites the elements for a claim of civil conspiracy and states that the Plaintiffs seek "actual

and punitive damages"[33] which were also set forth in the fraud and/or constructive fraud and negligence and/or negligent misrepresentation causes of action.[34] Alleging the same damages as those stated in other causes of action is insufficient to establish special damages. *See id.* ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." (citations omitted)). Further, there are no allegations that the Firm, separate and apart from the actions of Gantt individually, conspired in any way. Therefore, the relief requested in the Motion should be granted.

SEVENTH CAUSE OF ACTION—SOUTH CAROLINA UNFAIR TRADE PRACTICES

Debtors allege that the Firm, along with other Defendants violated the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* ("SCUTPA"), by participating in the "Beat the Bank" program with other Defendants by conducting the closing. The Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . ." S.C. Code Ann. § 39-5-20(a). South Carolina defines "trade" and "commerce" as "advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code. Ann. § 39–5–10(b). "Under South Carolina law, a trade practice is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Beattie v. Nations Credit Fin. Servs. Corp.*, 69 F.App'x 585, 588 (4th Cir. 2003) (citations omitted). "[A] practice is 'deceptive' when it has a tendency to deceive." *Johnson*, 349 S.C. at 637, 564 S.E. 2d at

[33] Doc. No. 1 at 12, ¶ 93.
[34] *Id.* at 10, 11, ¶¶ 81, 87.

666. In addition, "[t]he SCUTPA was enacted to protect the public: 'The [A]ct is not available to redress a private wrong where the public interest is unaffected.'" *Bessinger v. Food Lion, Inc.*, 305 F.Supp.2d 574, 582 (D.S.C. 2003) (quoting *Columbia E. Assoc. v. Bi-Lo, Inc.* 299 S.C. 515, 522, 386 S.E.2d 259, 263 (App. 1989)).

Section 39-5-140 of the SCUTPA provides a private right of action for actual damages arising from violations of § 39-5-20:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. . . .

S.C. Code Ann. § 39-5-140(a).

The Firm claims that it is exempt from a private cause of action arising from a violation of SCUTPA pursuant to S.C. Code Ann. § 39-5-40. The statute provides that SCUTPA does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." S.C. Code Ann. § 39-5-40(a).

South Carolina courts have previously held that "the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes . . . [Therefore,] the intent of our Legislature was to exclude activities which would otherwise be allowed or authorized." *Johnson v. Collins Entm't Co.*, 349 S.C. 613, 637, 564 S.E.2d 653, 666 (2002) (quoting *Ward v. Dick Dyer & Assoc., Inc.*, 304 S.C. 152, 155-56, 403 S.E.2d 310, 312 (1991)); *see also City of Charleston, S.C. v. Hotels.com, LP*, 487 F.Supp.2d 676, 681 (D.S.C. 2007) ("The regulatory exception applies when the

complained of acts fall within the framework of a regulatory body . . ."). South Carolina courts have "indicated that the exemption is not meant to exclude *every* activity regulated by another agency or statute, rather it is meant to ensure that companies are not subjected to lawsuits for following an agency regulation or statute." *Beattie* 69 F.App'x at 588 (citations omitted). The Court disagrees with the Firm's contention that it is exempt from SCUTPA and concludes that case law supports this finding.[35]

Despite this finding, the Court concludes that the SCUTPA claim should be dismissed because Plaintiffs have failed to specifically allege what conduct the Firm engaged in that constituted a violation of SCUTPA. To maintain a cause of action under SCUTPA, the Debtors must show the following elements:

> (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.

Havird Oil Co., Inc. v. Marathon Oil Co., Inc., 149 F.3d 283, 291 (4th Cir. 1998).

Plaintiffs allege that "[t]he 'Beat the Bank' program, in conjunction with the home appreciation representation, the use of Bond for Title when the Contract for Purchase is to convey a deed, mislead consumers such as Plaintiffs."[36] Like those in *Beattie*, the Plaintiffs in the instant case do not direct the Court's attention to any specific common law, statutory or constitutional violation that might amount to an "unlawful trade practice" with regard to

---

[35] In *Beattie v. Nations Credit Fin. Serv. Corp.*, 69 F.App'x 585 (4th Cir. 2003), the Fourth Circuit held that a mortgagee was not exempt from liability under SCUTPA based on its pursuit of collection and foreclosure activities because SCUTPA did not protect mortgagees from lawsuits for "general activity." *Id.* at 588. In addition, there was "no indication that a statute or agency regulation requires or permits [mortgagee] to pursue collection and foreclosure activities on accounts purportedly satisfied by a [Lost Mortgage Satisfaction] affidavit." *Id.* Like collection and foreclosure activities, the Court believes that involvement in the closing of a parcel of real property is not exempt from SCUTPA. Firm's involvement as the closing attorney does not constitute a transaction "allowed or authorized by regulatory agencies or other statutes." *Johnson v. Collins Entm't Co.*, 349 S.C. 613, 637, 564 S.E.2d 653, 666 (2002); therefore, Firm is not exempt from Debtors' SCUTPA claim.

[36] Doc. No. 1 at 13, ¶ 104.

the Firm's involvement (i.e., the closing). *See Beattie*, 69 F.App'x at 588-89. Also, the Complaint does not distinguish how the Firm, apart from other Defendants, was involved with the "appreciation representation," the decision to present a Bond for Title in lieu of conveying a deed, or any other part of the actions described in the Complaint. Even after "consider[ing] the facts 'surrounding the transaction and its impact on the market place' in determining whether or not a particular occurrence is unfair under the SCUTPA" *id.* at 589 (quoting *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326 396 S.E.2d 105, 108 (App. 1989), *rev'd in part on other grounds by* 309 S.C. 263, 422 S.E.2d 103 (1992)), the Court cannot find from the face of the pleadings how the Firm's minimal participation in the closing resulted in an unlawful trade practice. Furthermore, the Court calls into question whether the mere presence of the parties in the Firm's office for a closing constitutes "trade" or "commerce" as defined by the Act.

In addition, Plaintiffs merely allege that "[t]he failure to conform to the duties set forth in S.C. Code § 40-57-137 and 139 and the use of Seller [Payment] Agreement is deceptive."[37] However, neither the Firm nor Mr. Gantt was a party to the Seller Payment Agreement, which was between Morgan and NRES.[38] Further, S.C. Code Ann. §§ 40-57-137 and 139 do not apply to the Firm or Mr. Gantt. Chapter 57 of Title 40 applies to real estate brokers, salesmen, and property managers[39]; attorneys-at-law are governed by Chapter

[37] Doc. No. 1 at 13, ¶ 105.
[38] *See id.* at 6, ¶¶ 45-46.
[39] "Unless otherwise provided for in this chapter, Article 1, Chapter 1, Title 40 applies to real estate brokers, salesmen, and property managers; however, if there is a conflict between this chapter and Article 1, Chapter 1, Title 40, the provisions of this chapter control." S.C. Code Ann. § 40-57-5 (titled "Applicability of chapter; conflicts of laws"). Section 137 is titled "Real estate brokerage company duties to client; agency relationship; applicability of common law." S.C. Code Ann. § 40-57-137. Section 139 is titled "Duty of licensee to provide agency disclosure form." S.C. Code Ann. § 40-57-139.

5 of Title 40.[40] Therefore, the Court finds that Plaintiffs have failed to sufficiently allege a claim for violation of the SCUTPA and such cause of action is dismissed.

IT IS THEREFORE ORDERED:

That Defendant's Motion to Dismiss is hereby **granted** and the Court finds as follows in favor of Defendant Pfeiffer Gleaton Wyatt Hewitt, PA f/k/a Pfeiffer Gantt & Gleaton, PA:

1) The first cause of action is not directed at this Defendant;
2) The second cause of action for fraud and/or constructive fraud is hereby dismissed as to this Defendant;
3) The third cause of action for negligence and/or negligent misrepresentation is dismissed as to this Defendant;
4) The fourth cause of action for conspiracy is hereby Dismissed as to this Defendant;
5) The fifth cause of action is not directed to this Defendant;
6) The sixth cause of action is not directed to this Defendant;
7) The seventh cause of action for violation of SCUTPA is hereby dismissed as to this Defendant.

[40] S.C. Code Ann. § 40-5-10 *et seq.*