U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **10-06544-jw**
Adversary Proceeding Number: **16-80041-jw**

Order Granting in Part and Denying in Part Cross Motions for Summary Judgment

The relief set forth on the following pages, for a total of 25 pages including this page, is hereby ORDERED.

FILED BY THE COURT
12/16/2016

US Bankruptcy Judge
District of South Carolina

Entered: 12/16/2016

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, Craig Lucius Peterkin and Elett Peterkin, Debtors.	C/A No. 10-06544-JW Adv. Pro. No. 16-80041-JW Chapter 13
Craig Lucius Peterkin and Elett Peterkin, Plaintiffs, v. JPMorgan Chase Bank N.A., Defendant.	**ORDER GRANTING IN PART AND DENYING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT**

This matter comes before the Court on the parties' cross-motions for summary judgment. After considering the arguments made at the hearing and reviewing record, the Court makes the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

A. Procedural History

1. Plaintiffs Craig Lucius Peterkin and Elett Peterkin (collectively "Plaintiffs"), filed a petition for relief under Chapter 13 of the Bankruptcy Code on September 9, 2010 ("Chapter 13 Case").

2. As evidenced by the proofs of claim filed in the Chapter 13 Case, defendant JPMorgan Chase Bank, N.A. ("Chase"), was a creditor of Plaintiffs by virtue of the following:

> a) Note dated September 12, 2002, in the original principal amount of $124,000 executed and delivered by Plaintiffs to First Choice Mortgage. This note is secured by a first mortgage lien on a parcel of real property located in

[1] To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any of the following conclusions of law constitute findings of fact, they are so adopted.

Charleston County, South Carolina, with a street address of 1478 Arrow Wind Terrace, Charleston, SC ("Property"). The Property is Plaintiffs' principal residence. ("Loan 3489").[2]

b) Note dated March 22, 2004, in the original principal amount of $44,400 executed and delivered by Plaintiffs to Chase Manhattan Bank USA, N.A. ("Loan 1668").[3] This note is secured by a second mortgage lien on the Property.

3. On September 20, 2010, Plaintiffs filed their proposed Chapter 13 plan, which provided that:

a) with respect to Loan 3489, Plaintiffs would pay Chase $159 per month to cure the prepetition arrearage, and would make regular monthly mortgage payments directly to Chase commencing in October 2010.

b) with respect to Loan 1668, Plaintiffs would pay Chase $67 per month to cure the prepetition arrearage, and would make regular monthly mortgage payments directly to Chase commencing in October 2010.

4. The Chapter 13 plan was served on Chase. Chase did not file an objection to its proposed treatment in the plan. The plan was amended on October 14, 2010, but the amendment did not affect Plaintiffs' treatment of Chase's claims.[4]

5. The Plan was confirmed on October 21, 2010.

6. The following proofs of claim were filed for Loans 3489 and 1668:

a) Chase Home Finance filed Claim 6-1 on October 4, 2010 for Loan 3489. This claim indicated that as of the petition date, the balance due on Loan 3489 was $110,840.65, and the loan had a prepetition arrearage of approximately $10,115.

b) Defendant Chase filed Claim 14-1 on November 22, 2010 for Loan 1668. This claim indicated that, as of the petition date, the balance due on Loan 1668 was $35,853.58. The face of the claim states that the entire balance of Loan 1668 was due as of the petition date; however, Exhibit A to the claim indicates that the "total arrears at petition," was $146.16, identified as a late charge.

No objections were filed to Claim 6-1 or 14-1.

[2] Loan 3489 was sold and assigned to Chase Home Finance, LLC, on August 5, 2010.

[3] It appears from the record that Loan 1668 is sometimes erroneously referred to as "Loan 6681."

[4] The original and amended plan will hereinafter be referred to collectively as the "Plan."

7. On May 1, 2011, Chase Home Finance transferred Claim 6-1 to the defendant Chase. Defendant Chase filed a transfer of claim on May 29, 2011.

8. On or about July 5, 2012, Chase transferred Claim 14-1 to Real Time Resolutions, Inc. ("Real Time"). Real Time filed a transfer of claim on July 9, 2012.

9. Pursuant to the requirements of Federal Rule of Bankruptcy Procedure[5] 3002.1, on November 3, 2015, the Chapter 13 Trustee ("Trustee") filed and served Notices of Final Cure Payment. The notice for Loan 3489 indicated that he had paid $10,115.53 on account of Claim 6-1. The notice for Loan 1668 indicated that he had paid $146.16 on account of Claim 14-1.

10. On November 24, 2015, Chase filed and served a Response to the Notice of Final Cure Payment for Loan 3489. In this response, Chase indicated that it agreed that Plaintiffs had paid the full amount required to cure the prepetition default identified in Claim 6-1, and that Plaintiffs were current with all postpetition payments on Loan 3489.

11. No response was filed to the Notice of Final Cure Payment for Loan 1668.

12. Plaintiffs received their Chapter 13 discharge on November 23, 2015.

13. On December 2, 2015, the Trustee filed his Final Report and Account, and the Chapter 13 Case was closed.

14. On February 19, 2016, Plaintiffs filed *pro se* correspondence with attachments (collectively "Correspondence") with the Court. In the Correspondence, Plaintiffs stated that they were experiencing problems with Chase, and were "seeking a determination as to whether Chase acted in good faith and violated the Fair Credit Reporting Act."

15. Chase, through counsel, filed a protective objection to the Correspondence.

[5] Hereinafter, "Bankruptcy Rule."

16. The Court held a status hearing on March 29, 2016. On April 5, 2016, Plaintiffs, through counsel, filed a motion to reopen the Chapter 13 Case. The Chapter 13 Case was reopened by Order dated April 11, 2016.

17. On April 18, 2016, the above-captioned adversary proceeding was commenced with Plaintiffs filing a *pro se* Complaint. The Complaint was amended on April 25, 2016.[6]

18. Chase answered the Complaint, generally denying the allegations contained therein, raising several procedural defects, and asserting the defense of bona fide error.

19. At the completion of discovery, on October 14, 2016, Plaintiffs moved for summary judgment ("Plaintiffs' Motion"). Chase filed a cross motion for summary judgment and memorandum of law in support on October 19, 2016 (collectively "Chase's Motion"), and an objection to Plaintiffs' Motion on October 31, 2016 ("Chase Objection," together with the Chase Motion, "Chase's Pleadings"). The Court heard oral arguments on November 9, 2016.

B. Cross Motions for Summary Judgment

1. Plaintiffs' Allegations against Chase

The Court has reviewed the Correspondence, the Complaint, Plaintiffs' Responses to Chase's discovery,[7] and Plaintiffs' Motion (collectively "Pleadings"), and determined that Plaintiffs assert the following claims against Chase:

a. Chase's response to the Trustee's Notices of Final Cure was not timely.[8]

b. For the period of January 2016 until February 26, 2016, Chase made collection calls to Plaintiffs claiming that Plaintiffs had not made payments on Loan 3489. During this same period,

[6] A comparison of the original and "amended" complaint reveals that the two documents appear identical. The original and amended complaint will be collectively referred to herein as the "Complaint."

[7] Copies of Plaintiffs' discovery responses are attached to Chase's Motion.

[8] It appears from the Pleadings that Plaintiffs believe that Chase's response was for both loans. However, as discussed in the Findings of Fact, Loan 1668 was transferred to Real Time on July 5, 2012, and Real Time did not file a response for this loan to the Trustee's Notices of Final Cure.

Chase sent Plaintiffs dunning letters stating that payments were past due on Loan 3489. Chase also sent "unsolicited modification packages," for Loan 3489. Plaintiffs assert these acts violated Bankruptcy Rule 3002.1, the Debt Collection Improvement Act, and 11 U.S.C. § 524.[9]

c. For Loan 3489, Chase improperly issued Plaintiffs a Form 1099 for tax year 2015 in the amount of $2,195.88 for Chase's bankruptcy attorney's fees.

d. Chase did not properly credit payments to Plaintiffs' account.[10]

e. Chase failed to provide Plaintiffs with an annual escrow analysis in 2012 and 2014 for Loan 3489, in violation of the Real Estate Settlement Procedures Act.

f. Chase failed to refund Plaintiffs an escrow surplus on Loan 3489 in the amount of $666.53.

g. Chase failed to correctly report mortgage interest payments Plaintiffs made on Loan 1668 in tax years 2010 and 2011, in contravention of various provisions of the Internal Revenue Code.[11]

h. Chase "illegally" sold and transferred Claim 14-1 to Real Time.

i. Commencing in November 2012 and continuing through at least November 2015, Chase reported Plaintiffs' accounts to credit bureaus as being 180 days delinquent, in contravention of the Fair Credit Reporting Act.

j. Chase has failed to "fully" comply with the terms of certain national settlement agreements[12] by failing to waive attorney's fees, late fees, and other legal fees.

k. In 2011 and 2015, Chase sent Plaintiffs incorrect payoff quotes for Loan 3489.

l. Claim 14-1 does not contain the correct amount of the pre-petition arrearage due on Loan 1668.

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[9] Hereinafter, all references to provisions under the United States Bankruptcy Code, 11 U.S.C. §§101, *et seq.*, shall be by section number only.

[10] It appears Plaintiffs believe that Chase incorrectly applied payments Plaintiffs made directly to Chase, as well as payments made by the Chapter 13 Trustee.

[11] The Pleadings reference "IRS Code Regulation Section § 1.1471-4(d), 5(1)(a) (b) Public Law 114-27 section 806," and IRS Code § 6721(a)(1).

[12] It is not clear from the Pleadings whether Plaintiffs' claim is for an alleged violation of the National Mortgage Settlement (http://www.nationalmortgagesettlement.com/about), or the Independent Foreclosure Review Settlement (https://independentforeclosurereview.com/), or both.

In some instances, the Pleadings cite to the specific legal authorities upon which Plaintiffs rely. In other instances, Plaintiffs' Pleadings merely contain factual allegations and generic requests for relief.

As damages, Plaintiffs seek a release of Chase's liens on the Property, as well as monetary compensation from Chase.[13]

2. Chase's Response to Plaintiffs' Allegations

Chase argues that the Complaint is defective because it fails to assert any specific causes of action against Chase. For purposes of its motion, Chase interpreted the Complaint as asserting seven (7) causes of action against Chase, based on Plaintiffs' response to Chase's interrogatories:

a. Violation of Bankruptcy Rule 3002.1;

b. Violation of the Fair Credit Reporting Act;

c. Violation of the National Mortgage Servicers Settlement Agreement;

d. Violation of the Debt Collection Improvement Act;

e. Violation of the Real Estate Settlement Procedures Act; and

f. Violation of the § 524 discharge injunction.

Chase argues that the legal authorities relied on by Plaintiffs to support the relief requested do not provide for private causes of action, or if a private cause of action exists, Plaintiffs have failed to

[13] In addition to a release of the mortgages encumbering the Property, Plaintiffs' seek a "complete account reconciliation," as well as "compensation" in the amount of $5,010,650.95, comprised of:

a) "$4,434.96 – improper transfer amount,"

b) "$1,757.19 falsely stated accrued interest,"

c) "$15,000 bankruptcy fee,"

d) "$1,676.24- Trustee payments,"

e) "$2,100.00- attorney fee,"

f) "$666.56 – non-refunded escrow balance" and

g) "$5,000,000 – punitive and compensatory damages."

In addition, Plaintiffs seek interest on the sums awarded and, even though they are *pro se*, they seek "attorney's fees" in the amount of $360,000 ($60,000 per year for 5 years).

meet their burden of proof, and failed to submit evidence to support their claims. With the exception of Plaintiffs' claims for the alleged violation of the discharge injunction, which Chase concedes may survive summary judgment due to questions of fact, Chase asserts that it is entitled to summary judgment as a matter of law on all of Plaintiffs' claims.

CONCLUSIONS OF LAW

I. Jurisdiction

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). The parties have consented to this Court's entry of final orders and judgments.[14]

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56, made applicable in this adversary proceeding by Bankruptcy Rule 7056, provides that, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and . . . [the rule] should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

Once the moving party has met its burden, the burden of proof shifts to the opposing party to come forward with "any of the kinds of evidentiary materials listed in Rule 56(c)," and to

[14] The Court entered a scheduling order on July 8, 2016 setting deadlines for completing discovery and filing motions. The scheduling order set July 18, 2016 as the deadline for any party who challenged whether the present adversary proceeding is a core proceeding, or otherwise subject to the entry of final orders or judgments by this Court, to file a motion requesting the Court determine those issues. The scheduling order also provided that if the parties did not file a motion before the July 18, 2016 deadline, this would constitute consent to this Court entering all final orders and judgments in this proceeding. Neither Chase nor Plaintiffs filed a motion to challenge the Court's authority to enter final orders and judgments in this proceeding. Therefore, it appears the parties knowingly and voluntarily consented by implication to this Court's entry of final orders and judgments in this matter. *See Wellness Int'l Network, LTD v. Sharif*, 135 S.Ct. 1932, 1948 (2015).

designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324; *Mantushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmovant cannot merely rest on his pleadings, but must identify specific evidence in the record and articulate the precise manner in which the evidence supports his claim. *Celotex*, 477 U.S. at 324; *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). In response to a motion for summary judgment on an issue in which he bears the ultimate burden of proof, the nonmovant must point to specific evidence in the record showing the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-23.

Summary judgment is inappropriate if the parties disagree on the inferences that may reasonably be drawn from the undisputed facts, and is proper if only one conclusion may reasonably be drawn. *Pulliam Inv. Co., Inc. v. Cameo Properties,* 810 F.2d 1282 (4th Cir. 1987); *Croft v. Bayview Loan Servicing,* LLC, 166 F. Supp. 3d 638 (D.S.C. 2016) (same).
When reviewing the facts and evidence produced by the parties, the Court must draw all reasonable inferences in favor of the nonmoving party, and "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Finally, it is important to note in this case Plaintiffs are *pro se.* Pleadings prepared by *pro se* litigants are held to lesser pleading standards than formal pleadings drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 596 (1972). The Supreme Court has instructed this Court and all federal courts to construe *pro se* pleadings liberally, even if they are "inartfully pled." *Boag v. MacDougall*, 454 U.S. 364, 365 (1982); *accord Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008); *Estelle v. Gamble*, 429 U.S. 97, 106) (1976). Using this standard, the Court considers the matters before it.

III. Analysis

A. Claims involving Loan 1668

Plaintiffs have asserted claims related to Loan 1668 for acts that occurred both before and after July 5, 2012. However, it appears from the record that Chase transferred its interest in Loan 1668 to Real Time on or about July 5, 2012. Real Time is not presently a party to this action.

Under the current procedural posture, the Court cannot accord complete relief among the parties on several of Plaintiffs' claims unless and until Real Time is added as a party defendant. *See* Fed. R. Civ. P. 19; Fed. R. Bankr. P. 7019; *see also* Fed. R. Civ. P. 15 (the court should freely give parties leave to amend when justice so requires); Fed. R. Bankr. P. 7015. Therefore, the Court will deny the parties' summary judgment motions, without prejudice to either party, on the following claims asserted involving Loan 1668:

a. Violations of Bankruptcy Rule 3002.1 in connection with Loan 1668;
b. Violation of the discharge injunction of § 524 in connection with Loan 1668, including the alleged failure to properly apply payments made pursuant to the Plan;[15]
c. Errors in Proof of Claim 14.1 related to the pre-petition arrearage.

Plaintiffs are directed to amend their Complaint within ten (10) days of their receipt of this Order to add Real Time, so all the parties necessary for a complete adjudication will be before the Court.

B. Evidentiary and Procedural Issues

Both parties filed lengthy memoranda with attachments in support of their cross motions for summary judgment. In addition, the record contains a number of documents submitted by Plaintiffs in connection with this matter. In some instances, only portions of documents were

[15] Plaintiffs maintain that Chase did not properly "reconcile" their accounts after receiving $4,434.96 from the Trustee. This claim could either be construed as asserting a claim under § 524, or as a request for an accounting.

filed.[16] In some instances, the documents were redacted so extensively that it is impossible for the Court to determine to which loan the document relates.[17] Furthermore, despite the voluminous documentation, it appears that certain potentially relevant documents are not part of the record, and the record is incomplete.

An additional challenge faced by the Court when attempting to rule on the parties' motions is the fact that neither party filed an affidavit either in support of their motion, or in opposition to their opponent's motion. None of the documents offered by either party is authenticated. While, in its Objection, Chase expressed dissatisfaction with Plaintiffs' failure to file affidavits, no party raised a formal objection either to their opponent's failure to authenticate their exhibits, or their failure to submit affidavits. *See* Fed. R. Banker. P. 7056(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible as evidence.").

Inasmuch as neither party interposed a formal objection to the Court considering their opponent's offerings, and in light of the leeway given to *pro se* parties, for purposes of ruling on these motions, the Court will consider all of the documents in the record. *See, e.g., Weaver v. AEGON USA, LLC*, 2015 WL 5691836 at *3 (D.S.C. 2015), *modified*, 2016 WL 1570158 (D.S.C. 2016) (when ruling on a facial attack on a pleading, the Court may consider undisputed matters of public record and undisputedly authentic documents) (internal citations omitted).

C. Alleged violations of Bankruptcy Rule 3002.1 in connection with Loan 3489

Bankruptcy Rule 3002.1 establishes a procedure both to ensure that a debtor's mortgage is completely current at the time the debtor makes his final plan payment, and to enable the Court

[16] *See, e.g.*, Exhibits to Plaintiffs' Motion.

[17] *See, e.g.*, Chase's Motion at Exhibit G.

to address any issues regarding the status of the mortgage while the case is pending. Fed. R. Bankr. P. 3002.1; *see generally* Eugene R. Wedoff, *Proposed New Bankruptcy Rules on Creditor Disclosure and Court Enforcement of the Disclosures – Open For Comment*, 83 Am. Bankr. L.J. 579, 583-84 (2009). Bankruptcy Rule 3002.1 provides that when a debtor has completed his plan payments, the Chapter 13 trustee must send the debtor and his mortgage holder a notice that states the debtor has fully paid the amount required to cure any default on the mortgage creditor's claim. Fed. R. Bankr. P. 3002.1(f). Within 21 days after service of the notice, the mortgage creditor must file and serve a response:

> indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with §1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

Fed. R. Bankr. P. 3002.1(g). The rule further provides for penalties if a mortgage creditor fails to comply with the rule. Specifically:

> If the holder of a claim fails to provide any information as required by subdivision . . . (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
>
> (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
>
> (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Id. at (i). This process enables the Court, as well as the debtor and his counsel, to ensure that a mortgage is completely current when the debtor makes his final payment curing a prepetition default. Wedoff, *Proposed New Bankruptcy Rules*, *supra* at 583-84.

Plaintiffs allege that Chase did not file a timely response to the Trustee's Notice of Final Cure. The Trustee filed and served the Notices of Final Cure for both loans on November 3,

2015. Chase filed its response for Loan 3489 on November 24, 2015. On the narrow issue of the timeliness of Chase's response to the Trustee's Notice of Final Cure for Loan 3489/Claim 6-1, Plaintiffs concerns are not founded.

D. Alleged violations of 11 U.S.C. § 524

1. Loan 3489

Plaintiffs allege that from January 2016 until February 26, 2016, Chase made collection calls and sent dunning letters to Plaintiffs claiming that Loan 3489 was not current. Plaintiffs state a Chase representative advised them in January 2016 that Chase had applied the payment they made in December 2015 to the payment due in August 2015. Plaintiffs' documentation supports their claim that after their Chapter 13 Case was closed, they received both dunning letters and phone calls from Chase related to alleged past due amounts owing on Loan 3489.[18] The record also contains copies of loan modification packages for Loan 3489.

Chase disputes Plaintiffs' assertions related to Loan 3489. Pointing to the exhibits attached to its motion, Chase claims that Loan 3489 did not have a past due balance until February 2016 and that its records show that the past due balance was for payments due post-petition. Chase also directs the Court's attention to its Response to the Notice of Final Cure, wherein Chase represented that, "[a]s of November 19, 2015 . . . Debtor(s) . . . have paid the full amount required to cure the default on [Claim 6-1] as filed . . . [and] Chase has reviewed its records and [Debtors are] current on the post-petition payments due to Chase." Chase further argues that Plaintiffs failed to prove that its collection efforts were related to amounts that were to have been paid through the Plan.

[18] The documentation consists, in part, of copies of correspondence from Chase dated January 26, 2016, and February 3, 2016, informing Plaintiffs that Loan 3489 was past due and demanding payment. Plaintiffs also provided a list of the dates they received collection calls, and a chart of the payments they claim to have made to Chase.

The Court has reviewed the documents offered by the parties on this issue, and finds that there are questions of material fact that preclude the Court awarding either party summary judgment. It is clear from the record that Chase engaged in post-discharge collection efforts on Loan 3489. However, it is not clear from the record that Chase's efforts were, in fact, limited to collecting sums that allegedly became due post-discharge. On the one hand, in both its response to the Notice of Final Cure and its pleadings, Chase states that as of November 19, 2015, Loan 3489 was current. However, the exhibits to Chase's motion indicate that as of December 2015 Plaintiffs' account was due for the November 1, 2015 payment. Inconsistencies such as these cause the Court to share Plaintiffs' concern over Chase's accounting practices related to Loan 3489.[19]

Because there is conflicting evidence in the record regarding the reasons for the January – February 2016 collection efforts, summary judgment is not proper. The parties' cross motions on this issue are denied.

2. Failure to properly apply $4,434.96.

Plaintiffs allege that Real Time "refunded payments received from the Trustee between Aug 2012 and June 2013 totaling $4,434.96 in April 2014." The Court is unable to determine from the record if Plaintiffs believe these funds should have been applied to Loan 3489 or Loan 1668. Chase's Pleadings do not respond to this allegation.

The Court has already ruled that, to the extent that Plaintiffs attempt to state a claim for violations of § 524 related to Loan 1668, the Court cannot consider this claim until Real Time is

[19] Chase's exhibits reveal several inconsistencies regarding the status of Loan 3489. For example, the November 2015 statement for Loan 3489 states that as of November 2, 2015, Plaintiffs' contractual due date was August 1, 2015, and their post-petition due date was February 1, 2016. The December 2015 statement, however, indicates that both the contractual due date and post-petition due date were November 1, 2015. The February 2016 statement appears to show both that Plaintiffs made a payment on January 1 and February 3, 2016, but also that their account is past due in the amount of $1,109.76.

made a party to this action. To the extent that Plaintiffs attempt to state a claim for violations of § 524 involving Loan 3489 and the $4,434.96, the Court cannot grant judgment at this time because there is insufficient evidence in the record. This matter will be set for trial.

E. "Tax Code" claims

i) Issuance of Form 1099

Plaintiffs allege that Chase issued them a Form 1099 for attorney's fees it incurred in the Chapter 13 Case.[20] The Form 1099 indicates that it was issued in connection with Loan 3489 for tax year 2015, for $2,195.88 in "Other Income." In their responses to Chase's interrogatories, Plaintiffs identified two Chase employees, Hanie Barba and Brandon Norman, whom Plaintiffs say told them in February 2016 that the Form 1099 was issued for Chase's bankruptcy attorney's fees.

Chase asserts that the Form 1099 was for an escrow credit made to Plaintiffs' after Chase ran an escrow analysis on their account for tax year 2015. In support of this position, Chase points to a letter from Chase to Plaintiffs dated January 19, 2016, attached as Exhibit G to Chase's Motion, that advises Plaintiffs that Chase "may have provided you with a refund or credit for your escrow account." The loan number on Exhibit G is redacted.

Questions of material fact regarding the Form 1099 preclude the Court from granting summary judgment on this issue. Although it is clear that Chase issued the Form 1099 for Loan 3489, there is conflicting evidence in the record about the reason its issuance. Because the conflicting evidence on this issue, summary judgment is denied.

[20] Plaintiffs filed a copy of the Form 1099 with their Correspondence.

ii) Failure to correctly report mortgage interest for years 2010 and 2011 on Loan 1668[21]

Plaintiffs assert that Chase did not correctly report mortgage interest they paid in tax years 2010 and 2011 on Loan 1668 and that as a result, Plaintiffs were unable to deduct all of the interest payments they made on this loan on their tax returns. Plaintiffs' responses to Chase's interrogatories indicate that they believe they have suffered damages of "$2200.00 est."[22] Plaintiffs have asked for damages against Chase pursuant to 26 U.S.C. §§ 6721 and 6722.

Chase asserts that Plaintiffs' claims are barred by the three (3) year statute of limitations under South Carolina law. Chase also argues that 26 U.S.C. §§ 6721 and 6722, do not create private rights of action.

Chase's assertion that Plaintiffs' claims are barred by the statute of limitations must fail because Chase failed to raise this defense in its answer to the Complaint. Rule 8 of the Federal Rules of Civil Procedure, made applicable in this adversary proceeding by Bankruptcy Rule 7008, provides a list of affirmative defenses that must be raised by a party in their responsive pleading. *See* Fed. R. Bankr. P. 7008(c)(1). If an affirmative defense is not timely raised, it is deemed waived. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 703 S.E.2d 221, 224-25 (S.C. 2010) (party's failure to plead an affirmative defense is deemed a waiver of party's right to assert defense) (internal citations omitted). Chase failed to raise the statute of limitations as an affirmative defense in its answer; therefore, Chase is deemed to have waived the defense.

Notwithstanding its waiver of the statute of limitations defense, Chase is entitled to summary judgment on this claim because neither 26 U.S.C. §§ 6721 or 6722 create a private

[21] Chase did not transfer Claim 14-1 until 2012. Therefore, Chase would have been responsible for making any tax reporting for Loan 1668 for tax years 2010 and 2011.

[22] It is unclear whether this figure represents the amount of unreported interest, or the overpayment of taxes as a result of the underreported interest.

right of action. *See* 26 U.S.C. § 6624(b) (2016) ("Any penalty imposed by this part shall be paid upon notice and demand by the Secretary and in the same manner as tax."); *Katzman v. Essex Waterfront Owners, LLC*, 660 F.3d 565, 569 (2d Cir. 2011) (recognizing that neither §§ 6721 or 6722 create a private right of action); *see also Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress" and unless the statute in question evidences congressional intent to create "not just a private right but also a private remedy," no such right exists "and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.").

Thus, while Chase may have failed to correctly report the interest Plaintiffs paid on Loan 1668, the Internal Revenue Code does not provide Plaintiffs with a private right of action. Chase is entitled to summary judgment as a matter of law on this claim.

F. Failure to provide an annual escrow analysis

Plaintiffs claim that Chase failed to provide them with an annual escrow analysis in 2012 and 2014,[23] as required by the Real Estate Settlement Procedures Act ("RESPA"). The record on this issue is far from complete, and Chase did not address this allegation in its pleadings. Therefore, the Court will not grant summary judgment on this issue, and will consider the claim at trial.

G. Failure to refund an escrow surplus

Plaintiffs assert that Chase advised them in June 2015 that their escrow account for Loan 3489 had an escrow surplus of $666.53, but Chase refused to refund the surplus because Plaintiffs' account was past due. In support of this allegation, Plaintiffs submitted a copy of the

[23] It is not clear from Plaintiffs' pleadings if their complaint is related to Loan 3489 or Loan 1668; however, the documentation submitted by Plaintiffs on this issue only references Loan 3489.

correspondence from Chase dated June 2015 advising them of the escrow surplus and declining to refund the same.

Chase responds to Plaintiffs' arguments by claiming that Plaintiffs failed to show that Chase's refusal to refund the escrow surplus damaged Plaintiffs. Chase further alleges that its refusal to refund the surplus was acceptable because Chase was entitled to exercise its right to setoff of the escrow refund "against future amounts that Plaintiffs would owe Chase regardless."

RESPA provides that if a borrower's account is current at the time of the escrow analysis, and there is an escrow surplus greater than or equal to $50, the borrower is entitled to a refund of the surplus within 30 days from the date of the escrow analysis. 12 C.F.R. § 1024.17(f)(2)(i) (2016). If, however, at the time of the escrow analysis, the borrower's account is 30 or more days past due, the servicer is not required to refund the surplus, and may retain the surplus in accordance with the parties' loan documents. 12 C.F.R. § 1024.17(f)(2)(ii) (2016).

Plaintiffs filed bankruptcy in September 2010. In June 2015 the parties were operating under the confirmed Plan, which provided for a cure of Plaintiffs' prepetition defaults under Loan 3489 and the maintenance of regular monthly payments. Plaintiffs had not yet completed all payments under the Chapter 13 plan in June 2015, so Loan 3489 was not "current at the time of the escrow analysis." Therefore, under the clear terms of 12 C.F.R. § 1024.17(f)(2)(ii), Chase was not required to refund the escrow surplus of $666.53, and was permitted to retain the surplus pursuant to the terms of the parties' loan documents.

However, the Court cannot grant summary judgment on this issue because the ultimate disposition of the June 2015 $666.53 escrow surplus is not clear. At best, the documentation offered by the parties on the escrow for Loan 3489 is ambiguous. Because questions of fact exist regarding the status of Plaintiffs' escrow account for Loan 3489, and the disposition of any

surplus contained therein, the Court declines to grant the parties' cross motions for summary judgment on this issue.

H. "Illegal" sale and transfer of Claim 14-1

Plaintiffs assert that they have a claim against Chase for its "illegal" sale of Loan 1668 and transfer of Claim 14-1 to Real Time. Plaintiffs cited no authority for this position, and Chase did not respond to this claim.

Because the record is incomplete on this issue, the Court will continue it over for trial.

I. Alleged violations of Fair Credit Reporting Act

Plaintiffs argue that commencing in November 2012, while the Chapter 13 Case was pending, Chase began reporting to credit bureaus that Plaintiffs' account was 180 days delinquent.[24] Plaintiffs assert that these actions give rise to a claim under § 1681s-2 of the Fair Credit Reporting Act ("FCRA").

Chase argues that even if it engaged in the acts complained of, the FCRA does not provide Plaintiffs with a private right of action for violations of 15 U.S.C. § 1681s-2(a). If Plaintiffs intended instead to bring a claim for a violation of 15 U.S.C. § 1681s-2(b), Chase argues this claim also fails as a matter of law because the FCRA did not require Chase to take any action until Plaintiffs first submit a dispute to the credit reporting agency.[25]

The FCRA imposes upon "furnishers of information" an affirmative duty to provide credit reporting agencies with accurate information regarding consumer accounts. *See* 15 U.S.C.

[24] It is not clear from the Complaint which account Plaintiffs allege was improperly reported. It appears from the Correspondence that both Loan 3489 and Loan 1668 appear on Plaintiffs' credit report. Loan 3489 was last reported in November 2012, and Loan 1668 was last reported in July 2013.

[25] Title 15 U.S.C. § 1681i(a)(2) sets forth the procedure whereby a consumer may dispute the accuracy or completeness of the information appearing in his credit report. The consumer's notification of the dispute to the credit reporting agency triggers the duty of the credit reporting agency and furnisher to conduct a reasonable investigation into the accuracy of the information. *See* 15 U.S.C. §§ 1681i, 1681s-2(b) (2016).

§ 1681s-2(a) (2016).[26] In addition, § 1681s-2(b) requires furnishers who receive notice from a credit reporting agency of a dispute involving the accuracy of the information provided, to:

> (A) conduct an investigation with respect to the disputed information;
>
> (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;
>
> (C) report the results of the investigation to the consumer reporting agency;
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
>
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly--
>
> > (i) modify that item of information;
> >
> > (ii) delete that item of information; or
> >
> > (iii) permanently block the reporting of that item of information.

15 U.S.C. § 1681s-2(b) (2016). If the consumer has followed the dispute procedure provided for in § 1681i(a)(2), and the furnisher fails to take the appropriate action, the consumer may bring a private suit against the furnisher for its violation of 15 U.S.C. § 1681s-2(b). *See Saunders v. Branch Banking and Trust Co.*, 526 F.3d 142, 149 (4th Cir. 2008).

While the FCRA permits consumers to sue furnishers for their failure to comply with 15 U.S.C. § 1681s-2(b), it does not provide consumers with a private right of action for a furnisher's failure to comply with § 1681s-2(a). 15 U.S.C. § 1681s-2(c); *see Saunders v. Branch Banking*

[26] Section 1681s-2(a) provides, in relevant part, that furnishers, "shall not furnish any information relating to a consumer . . . if the [furnisher] knows or has reasonable cause to believe that the information is inaccurate [or if the furnisher] has been notified by the consumer . . . that specific information is inaccurate; and the information is, in fact, inaccurate." 15 U.S.C. § 1681s-2(a) (2016).

and Trust Co., 526 F.3d at 149; *accord Longman v. Wachovia Bank, N.A.*, 702 F.3d 148, 151 (2d Cir. 2012); *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 615-16 (6th Cir. 2012); *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1147 (10th Cir. 2012).

Because there is no private right of action for violations of 15 U.S.C. § 1681s-2(a), Plaintiffs claim against Chase under this code section must fail as a matter of law. In addition, because there is no evidence either that Plaintiffs submitted a notice of dispute with the credit reporting agency, or that Chase received notice of Plaintiffs' disputes from the credit reporting agency and failed to act, Plaintiffs claims under 15 U.S.C. § 1681s-2(b) fail as a matter of law. Chase is entitled to summary judgment on the FCRA claims.

J. Breach of settlement agreements and other alleged violations

Plaintiffs argue that Chase has failed to "fully" comply with the terms of settlement agreements to which Chase was a party.[27] Plaintiffs also attempt to assert claims against Chase for its alleged wrongdoings, as asserted by parties in other cases to which Chase is a party.

In response to Plaintiffs' claims related to Chase's alleged violations of settlement agreements, Chase argues that Plaintiffs failed to meet their burden of identifying the specific contractual provision Chase breached. With respect to Plaintiffs' attempt to impose liability on Chase based on the allegations raised in other lawsuits, Chase argues that Plaintiffs cannot rely on allegations asserted in other suits as a means of establishing Chase's liability to Plaintiffs in this action.

[27] In addition to the two settlements described herein, as part of the Correspondence, Plaintiffs submitted a portion of an Official Notice of Proposed Class Action Settlement and Fairness Hearing postcard ("Postcard") that Plaintiffs say they received after the Chapter 13 Case was closed. The return address on the Postcard indicates that it was sent to Plaintiffs by the Chase FCRA Settlement Claims Administrator. The Postcard states that Plaintiffs "have been identified by Chase as a potential member of a class of persons as to whom Chase obtained information from a credit reporting agency to conduct an 'account review' after the occurrence of one of several events, including account closure, bankruptcy discharge, and foreclosure." Plaintiffs indicated in the Pleadings and in oral arguments that they had opted out of the settlement described in the Postcard.

It is unclear from the Pleadings what settlement agreement Plaintiffs believe Chase violated. The Independent Foreclosure Review Settlement, mentioned in the Pleadings, is a settlement that was reached in January 2013 between certain mortgage servicers and federal banking regulators.[28] The settlement resulted in all eligible borrowers receiving a payment, and Plaintiffs' Motion indicated that they did receive $2,000 from this settlement. *See* Plaintiffs' Motion at 3.

The National Mortgage Servicers Settlement, also mentioned in the Pleadings, was a joint state-federal settlement reached in February 2012 between several mortgage servicers and 49 states attorney generals and the federal government.[29] This settlement resulted in the entry of a Consent Judgment on April 4, 2014, by the United States District Court for the District of Columbia, which retained exclusive jurisdiction over enforcement of the settlement. *See United States v. Bank of America, et al.*, Case No. 1:12-cv-00361-RMC, at *E-14 (D. D.C. April 4, 2012).

To the extent Plaintiffs believe they have a claim against Chase for a violation of the specific provision of the National Mortgage Servicer's Settlement, this Court cannot rule on these claims because the District Court for the District of Columbia has exclusive jurisdiction over alleged breaches of that agreement. Any claims for violations of this settlement must be filed in the District Court for the District of Columbia.

Likewise, to the extent Plaintiffs believe they have a claim against Chase for a violation of the specific provision of the Independent Foreclosure Review Settlement, it appears that exclusive authority over enforcement of this settlement rests with the Department of the

[28] *See* https://independentforeclosurereview.com/.
[29] *See* http://www.nationalmortgagesettlement.com/about.

Treasury's Office of the Comptroller of the Currency. *See In re JP Morgan Chase Bank, N.A.*, #2015-064, #2011-050 and #2013-129, Consent Order Amending the 2011 Consent Order and 2013 Amendment to Consent Order dated June 16, 2015.

With respect to the issue of Chase's liability to Plaintiffs for Chase's alleged wrongdoings in other cases, Plaintiffs' claims must fail. Whether or not the allegations against Chase in other matters are true, this Court cannot award Plaintiffs damages in this action against Chase based on allegations made by third parties in cases pending in other districts, nor can the Court impose liability in this case based on settlements reached in other cases and courts.

K. Incorrect mortgage payoff

Plaintiffs allege that they asked Chase for a mortgage payoff in 2011 and 2015 and, in response, received incorrect payoffs. A copy of a July 15, 2015 payoff letter is in the record. However, it is unclear from the record why Plaintiffs believe the payoffs were incorrect. Chase's Pleadings do not respond to these allegations.

Because the record is incomplete on this issue, the Court will deny summary judgment on this claim, and hold the matter over for trial.

L. Alleged violation of the Debt Collection Improvement Act

Plaintiffs argue that Chase violated the Debt Collection Improvement Act ("DCIA") when Plaintiffs continued to receive collection calls in January 2016 after they asked Chase representative "E.J. Reed" in December 2015 to communicate with them in writing. Chase asserts that the DCIA is not applicable in this case.

The DCIA is a federal statute passed by Congress in 1996 that centralizes the government wide collection of delinquent non-tax debt owed to the United States. 31 U.S.C. § 3701 *et seq.* (2016); *see* The Office of Legislative and Public Affairs Fact Sheets,

https://www.fms.treas.gov/news/factsheets/dcia.html. The DCIA is not a consumer protection statute, nor is its purpose to protect Plaintiffs from the acts complained of. Therefore, Plaintiffs' claims against Chase for alleged violations of the DCIA fail as a matter of law, and Chase is entitled to summary judgment on this issue.

CONCLUSION

It is apparent to the Court from its review of the entire record that serious questions of fact surround Chase's administration of Plaintiffs' loans. In addition, there appear to be issues regarding the interrelationship between Chase and Real Time, and the servicing of Loan 1668, that cannot be resolved based on the record before the Court.

For these reasons, the just, complete, and thorough resolution of all of these matters mandates that this case be set for trial, with representatives of both Chase and Real Time present and prepared to address the questions raised herein, as well any other relevant issues that the Court may identify.

Based on the foregoing, and for the reasons stated herein, it is ORDERED that

1. Chase's Motion for summary judgment is granted on the following claims:
    a. in connection with Loan 1668, Plaintiffs' claim against Chase for its alleged violations of 26 U.S.C. §§ 6721 or 6722;
    b. in connection with both Loan 3489 and 1668, Plaintiffs' claim against Chase for its alleged violations of 15 U.S.C. § 1681s-2(a) and (b); and
    c. Plaintiffs' claim against Chase for its alleged violations of the DCIA.
2. summary judgment is denied on the following claims:
    a. Plaintiffs' claim against Chase for its alleged violations of § 524 in connection with Loan 3489 and 1668;
    b. Plaintiffs' claim against Chase related to issuance of Form 1099 for Loan 3489;
    c. Plaintiffs' claim against Chase for its alleged failure to provide an annual escrow analysis for Loan 3489;

d. Plaintiffs' claims against Chase for its alleged failure to refund the escrow surplus for Loan 3489;

e. Plaintiffs' claims against Chase for the "illegal sale and transfer" of Claim 14-1;

f. Plaintiffs' claims against Chase for its alleged failure to provide a correct mortgage loan payoff.

g. Plaintiffs' claims for alleged violations of Bankruptcy Rule 3002.1 in connection with Loan 1668;

h. Plaintiffs' claims for the illegal sale of Claim 14-1 to Real Time; and

i. Plaintiffs' claims for errors in Proof of Claim 14.1 related to the pre-petition arrearage.

It is further,

ORDERED, pursuant to Bankruptcy Rule 7019, Real Time be added as a party defendant. Within ten (10) days from their receipt of this Order, Plaintiffs are directed to amend their complaint to join Real Time as a party defendant. Plaintiffs are directed to file the amended complaint with the Clerk of Court, who is directed to issue a Summons. Upon receipt of the Summons, Plaintiffs are directed to serve the Summons and Amended Complaint, together with a copy of this Order, on Real Time, pursuant to the Bankruptcy Rules. In the event Plaintiffs fail to amend their complaint within the time prescribed, Plaintiffs will be barred from obtaining relief against Real Time in this proceeding. It is further,

ORDERED that the scheduling of the trial in this matter and the final pretrial conference will be by separate order.

AND IT IS SO ORDERED.