RECORD NO. 171068

In the Supreme Court of Virginia at Richmond

DENNIS W. KERNS,

***Plaintiff-Appellant*,**

v.

WELLS FARGO BANK, N.A.,

***Defendant-Appellee*.**

ON APPEAL FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND

Brief of Appellee

Terry C. Frank (VSB No. 74890)
Benjamin A. Wills (VSB No. 88109)
KAUFMAN & CANOLES, P.C.
Two James Center
1021 East Cary Street, Suite 1400
Richmond, VA 23219-4058
Phone: (804) 771-5700
Facsimile: (888) 360-9092

Counsel for Defendant-Appellee Wells Fargo Bank, N.A.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

This action represents Kerns' attempt to receive damages from his former mortgage lender, despite the accrual of his claims more than five years before he filed suit. Kerns presents the Court one assignment of error: whether the trial court erred in finding that his 30-day pre-acceleration notice claim under his deed of trust was barred by the statute of limitations. Kerns argues that his 30-day notice was actually only a 29-day notice. The central issue in this appeal is whether a 30-day pre-acceleration notice claim accrues when a lender accelerates a loan, or at the later date of the resulting foreclosure.

Kerns' loan documents, which require pre-acceleration notice, make clear that acceleration is the touchstone for when such a right of action accrues. The pre-acceleration notice requirement turns on whether a lender has given a borrower notice at least 30 days prior to acceleration. Once Wells Fargo accelerated Kerns' loan, the entire outstanding balance became due, thereby triggering the accrual point for his claim. Kerns cites only to his later purported "damages" (*i.e.*, the resulting foreclosure) for why the statutory period should accrue after acceleration, despite the only alleged breach act being the notice itself. Simply stated, the Virginia Code clearly provides that a

right of action for breach of contract accrues when the breach occurs, not when the resulting damages occur. Kerns fails to rebut the overwhelming authority to the contrary of his position, nor does he provide any compelling rationale as to why this Court should do so now.

Moreover, Kerns' appeal fails even if his claim was not time barred, as Kerns does not provide any proximate causation between the purported breach (allegedly failing to provide one extra day's notice) and his claimed damages (the foreclosure), which is a requirement for any breach of contract action. The authority Kerns cites in opposition to this deficiency fails to address the issue of causation, and further actually involved allegations that the claimed breach of contract caused the resultant foreclosure (albeit in a conclusory fashion). In this action Kerns makes no such allegations at all.

Finally, Kerns' "back-dating" claims fail because the 30-day notice at issue here was not in fact back-dated. A letter is deemed "mailed" upon deposit in the sender's mail receptacle, not upon the date listed in a confirmation email, which is Kerns' sole basis for his back-dating claim.

Accordingly, the Court should affirm the lower court's ruling.

STATEMENT OF FACTS/PROCEDURAL HISTORY

On October 15, 2009, Kerns entered into a mortgage loan with Wells Fargo's predecessor-in-interest, evidenced by a promissory note (the "Note") in the amount of $204,200, and secured by a deed of trust (the "Deed of Trust") on property located at 608 Fairystone Court, Highland Springs, Virginia 23075-2605 (the "Property"). (J.A. 12, 18, 89 ¶ 4.) The Note and Deed of Trust are collectively referred to as the "Loan Documents," which set forth the terms of Kerns' "Loan."

Kerns defaulted on his Loan, and Wells Fargo sent him an acceleration notice dated June 20, 2010, noting that his total delinquency on the Loan was $4,585.48. (Id. 91 ¶¶ 12-13.) Kerns claims that this notice did not comply with the requirements of the Loan Documents because it only gave 29 days' notice instead of 30 days' notice. (Id. 91 ¶ 14.)

Wells Fargo instructed the trustee, Samuel I. White, P.C. ("SIWPC"), to foreclose on the Property due to Kerns' failure to cure his delinquency. (Id. 92, ¶ 15.) SIWPC conducted a foreclosure sale on the Property on August 23, 2011, at which Wells Fargo made a successful credit bid. (Id. ¶ 19.) On November 4, 2011, Wells Fargo initiated an unlawful detainer proceeding in the General District Court of Henrico County, Case No.

GV11028020-00. (Id. 6 ¶ 27.) The General District Court awarded judgment of possession to Wells Fargo on January 30, 2012, which Kerns appealed to the Henrico Circuit Court as Case No. CL12000369-00 on February 8, 2012. (Id. 6-7 ¶¶ 28-29.)

Kerns thereafter commenced an action against Wells Fargo and SIWPC ("2012 Defendants") on July 5, 2012, by filing a complaint in the United States District Court for the Eastern District of Virginia ("District Court"), Case No. 3:12-cv-490, seeking to set aside the foreclosure sale. (Id. 7 ¶ 30.) The 2012 Defendants filed a motion to dismiss the initial complaint on August 17, 2012. On November 20, 2012, the District Court entered an order granting the 2012 Defendants' motion to dismiss, dismissing Kerns' claims. (Id.) Thereafter, Wells Fargo obtained a writ of possession for the Property from the Henrico County Circuit Court through the appeal, and Kerns vacated the Property. (Id. 8 ¶ 33.)

Kerns then filed the present action in the Circuit Court for the City of Richmond (the "Circuit Court"), instead of Henrico, on August 23, 2016, five years to the day from the foreclosure sale. (Id. 1.) He claims that he did not receive a proper 30-day pre-acceleration notice under the terms of the Deed of Trust and that Wells Fargo nonetheless pursued eviction. Kerns also claimed that Wells Fargo obtained disbursement of bond funds in the

appealed action (CL12000369-00), resulting in his loss of the Property. (Id. 8 ¶ 35.) The Complaint set forth two causes of action for breach of the Deed of Trust and Note (Count One) and breach of the duty of good faith and fair dealing (Count Two), and Kerns sought compensatory damages in the amount of $74,500. (Id. 10.) Wells Fargo filed a Demurrer to the Complaint, which the Circuit Court granted via an Order entered on January 23, 2017. (Id. 88.)

Kerns then filed his Amended Complaint on February 7, 2017, asserting the same 30-day notice claim (Count One), and presenting an entirely new breach of contract theory based on a purported breach of the Deed of Trust's alleged incorporation of a VA guarantee rider (Count Two), also predicated solely on the 29-day notice allegations.[1] (Id. 89-104.) Wells Fargo demurred to the Amended Complaint on February 28, 2017. (Id. 116.) On April 3, 2017, it then filed its Notice of Hearing (for April 17,

[1] Kerns did not appeal the Circuit Court's dismissal of this cause of action to this Court. The Circuit Court found that "there would be no relation back of the new claim pursuant to Va. Code § 8.01-6.1 because of a lack of diligence in filing said claim."

2017), and Memorandum in Support of its Demurrer.[2] (Id. 119.)

At the April 17, 2017, hearing, the Court took Wells Fargo's Demurrer/Plea in Bar under advisement, and requested that the parties submit additional briefing, *inter alia*, on Wells Fargo's statute of limitations defense. See (id. 234 at 50:9-13.) On May 5, 2017, the Circuit Court entered a final order dismissing the Amended Complaint with prejudice. In relevant part, the Circuit Court's Judge Marchant found as follows:

> [T]he Court finds that the Plaintiff's breach of contract claims, including the alleged failure to provide 30 days' notice to the Plaintiff, the alleged breach of implied covenants of good faith and fair dealing, and the alleged breach of the "VA Guaranteed Loan and Assumption Rider" are barred by the applicable five year statute of limitations. Va. Code § 8.01-246(2); see Herbaugh v. Bank of America, N.A. *et al.*, 2016 U.S. Dist. LEXIS 91940 (W.D. Va. July 15, 2016) at *17 (cause of action accrued when acceleration occurred and had to occur prior to the date of the foreclosure sale). The advertisement for the foreclosure sale occurred on August 23, 2011 and this suit was filed August 23, 2016, clearly more than five years after acceleration of the note by the bank. "[A]cceleration is the act which invokes the Note holder's right to foreclose." Id. That acceleration

[2] Kerns filed an opposition brief to the Demurrer on April 10, 2017, noting that Wells Fargo's statute of limitations defense could not be raised via a Demurrer. (J.A. 139.) Well taken, Wells Fargo then filed a Motion for Leave to Supplement Prior Responsive Pleading to include the statute of limitations argument under the nomenclature of Plea in Bar. The Circuit Court granted this motion at the April 17, 2017 hearing, and the case was decided on the Plea in Bar. See (id. 208 at 24:11-12.)

> therefore occurred on or after June 20, 2011, the alleged date of mailing the notice, but clearly before August 23, 2011, the date of advertising the foreclosure sale (see Complaint ¶¶ 11-16).[3]

(J.A. 178-80.) Kerns filed his Notice of Appeal on June 5, 2017. (Id. 181.)

STANDARD OF REVIEW

Kerns does not assign error to any factual findings, from the exhibits or otherwise, made by the trial court. "Where the facts are undisputed, as in the present case, 'the applicability of the statute of limitations is a purely legal question of statutory construction which [the Court] review[s] de novo.'" Lucas v. Woody, 287 Va. 354, 360, 756 S.E.2d 447, 449 (2014) (quoting Conger v. Barrett, 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010)); see also N. Va. Real Estate, Inc. v. Martins, 283 Va. 86, 102, 720 S.E.2d 121, 129 (2012) ("'[A]n issue of statutory interpretation is a pure question of law which we review de novo. When the language of a statute is unambiguous, we are bound by the plain meaning of that language.'" (quoting Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)); Johnson v. Hart, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010) (quoting Davenport v. Little-Bowser, 269 Va. 546, 552, 611 S.E.2d 366, 369 (2005)).

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[3] The Circuit Court appears to mistakenly label the date of foreclosure, August 23, 2011, as the advertising date of the foreclosure, which necessarily occurred beforehand. The analysis here is unaffected.

ARGUMENT

Wells Fargo respectfully requests that the Court affirm the Circuit Court's ruling for the following reasons: (I) Kerns' claim for breach of Deed of Trust accrued more than five years before he filed his Complaint and therefore is barred under the statute of limitations; (II) Kerns failed to allege that one extra day of notice would have made a difference with respect to his ability to cure the default; and (III) the 30-day pre-acceleration notice is deemed mailed upon deposit, not the date in a confirmation email.

I. Kerns' claim for breach of Deed of Trust accrued more than five years before he filed his Complaint, and therefore is barred under the statute of limitations.

Kerns appeal fails simply because the Circuit Court correctly found that his cause of action accrued when Wells Fargo accelerated the Loan, not when the foreclosure occurred. The Complaint in this action was filed exactly five years from the date of foreclosure. Acceleration necessarily occurred before this date, and, therefore, the Circuit Court correctly found that the five-year statute of limitations for breach of contract actions barred Kerns' claims. Kerns' brief provides no compelling rationale to the contrary and the Court should affirm the Circuit Court because (a) a claim for breach of the pre-acceleration notice requirement accrues upon acceleration; (b) Kerns' claim for breach of the pre-acceleration notice is barred by the statute of limitations;

(c) Kerns cites no authority in support of his position that a pre-acceleration notice claim accrues at foreclosure; and (d) Kerns' policy argument regarding lenders delaying foreclosure until the limitations period expires makes little sense.

A. A claim for breach of the pre-acceleration notice requirement accrues upon acceleration.

Kerns' claim for breach of the pre-acceleration notice requirement is one for breach of contract.[4] See (Appellant's Br. Passim.) In the Commonwealth, an action for breach of a written contract has a limitations period of five years from accrual. See, e.g., Bear Ridge Developers, L.L.C. v. Cooper, 78 Va. Cir. 50, 55 (Fairfax Cnty. 2008) (citing Va. Code Ann §

[4] In Footnote No. 2, Kerns provides that his counsel believes that the applicable statute of limitations to sue on a deed of trust in relation to a foreclosure is 10 years under Virginia Code § 8.01-241. (Appellant's Br. 3 n.2.) Kerns admits that this argument is not before the Court in this appeal, but his counsel raised such argument in the matter of Doss v. Bank of America, N.A., Record No. 171759. Regardless, the argument for an extended limitations period under § 8.01-241 is nonsensical. The section itself is plainly titled "Limitation of enforcement of deeds of trust, mortgages and liens for unpaid purchase money." A suit for a breach of contract related to a foreclosure simply does not fit the bill for the enforcement of a deed of trust given to secure a payment of money. The section provides the 10 year-period accrues "from the time when the original obligation last maturing thereby secured shall have become due and payable." Va. Code Ann. § 8.01-241(A). The time period for a creditor to enforce its rights has nothing at all to do with the entirely distinct rights of action asserted by borrowers under contractual and tort-based theories. The Court should disregard Kerns' misplaced ten-year theory for not being raised and for failing substantively.

8.01-246(2)). "In considering the bar of the statute of limitations, the court must determine when the cause of action accrued." Herbaugh v. Bank of Am., N.A., No. 5:15cv71, 2016 U.S. Dist. LEXIS 91940, at *15 (W.D. Va. July 15, 2016).

Virginia Code § 8.01-230 provides that "the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date . . . when the breach of contract occurs in actions *ex contractu* and not when the resulting damage is discovered." As this Court has noted, the "terms 'right of action' and 'cause of action,' although sometimes used interchangeably, are not synonymous." Van Dam v. Gay, 280 Va. 457, 460, 699 S.E.2d 480, 481 (2010) (citing Stone v. Ethan Allen, Inc., 232 Va. 365, 368, 350 S.E.2d 629, 631 (1986)). "A right of action cannot arise until a cause of action exists because a right of action is a remedial right to presently enforce an existing cause of action." Id. (emphasis in original) (citing Shipman v. Kruck, 267 Va. 495, 502, 593 S.E.2d 319, 322 (2004)).

"Some injury or damage, however slight, is essential to a cause of action, but it is immaterial that all the damages resulting from the injury do not occur at the time of the injury." Van Dam, 280 Va. at 463, 699 S.E.2d at 482-83. "The running of the limitation period will not be tolled by the fact

that actual or substantial damages did not occur until a later date." Id. "This time-honored rule may produce inequities by triggering a statute of limitations when the injury or damage is unknown or difficult or even incapable of discovery, but we have long concluded that it is the role of the General Assembly, not the courts, to change a rule of law . . . ." Id., 699 S.E.2d at 483.

In Van Dam, for example, this Court affirmed that the statute of limitations barred a legal malpractice claim where the appellant sued her former attorney for failing to include the correct language to qualify her for her ex-husband's retirement plans in a property settlement attendant to her divorce. 280 Va. at 459, 699 S.E.2d at 480. The circuit court determined that the lawsuit, brought in 2009, was barred under the statute of limitations, despite the appellant's ex-husband's passing only three years prior, because the right of action accrued back in 1986 when a court entered the final divorce decree, thereby ratifying the property settlement. Id., 699 S.E.2d at 481. This Court affirmed, finding that a claim for breach of contract existed and the claim accrued based on the legal injury suffered when the court ratified the defective property settlement agreement in 1986. Id. at 462, 699 S.E.2d at 482.

In a case directly on point, involving Kerns' current counsel and nearly identical allegations to those at bar, the Western District of Virginia determined that borrowers' claims regarding the backdating of a 30-day notice were time barred because their "claim accrued when acceleration occurred." Herbaugh, 2016 U.S. Dist. LEXIS 91940, at *16. Just as in the Amended Complaint in this action, the Herbaugh plaintiffs claimed that an allegedly backdated 30-day notice repeatedly breached the acceleration clause when the lender instructed a trustee to foreclose; the trustee advertised the foreclosure; the trustee executed a trustee's deed and recorded it; the lender reported the foreclosure to the credit reporting agencies; and the lender pursued eviction. Compare id., 2016 U.S. Dist. LEXIS 91940, at *15-16, with (J.A. 92-94 ¶¶ 18-27.)

In dismissing these claims with prejudice, the court noted that the relevant limitations period began on the date of the alleged breach. Herbaugh, 2016 U.S. Dist. LEXIS 91940, at *16 (citing Va. Code Ann. § 8.01-230). With respect to when acceleration occurred, the court noted that "such a breach had to occur prior to the date of the foreclosure sale." Id., 2016 U.S. Dist. LEXIS 91940, at *17-18 ("As a practical matter, acceleration must occur at the time of or prior to foreclosure, as acceleration is the act which invokes the Noteholder's right to foreclose.

Upon the foreclosure sale, there is no longer a mortgage loan to accelerate."). Further, the court found that such allegations "rely entirely on alleged deficiencies in the pre-acceleration notice [the borrowers] received," and "did not occur at intervals or even continuously." Id., 2016 U.S. Dist. LEXIS 91940, at *16 ("Therefore, the Herbaughs' claim accrued when acceleration occurred.").

B. Kerns' claim for breach of the pre-acceleration notice is barred by the statute of limitations.

"Statutes of limitations are strictly enforced and exceptions thereto are narrowly construed." Arrington v. Peoples Sec. Life Ins. Co., 250 Va. 52, 55, 458 S.E.2d 289, 290 (1995). "Any doubt about the enforcement of the statute "must be resolved in favor of the enforcement of the statute." Id. As Kerns admits, [i]f the statute of limitations began to run upon acceleration of the [N]ote, then Kerns' appeal must fail." (Appellant's Br. 3.)

Substantively, this case is the same as Herbaugh. The Amended Complaint count at issue is based on a single wrongful act—the sending of a pre-acceleration notice that allegedly only provided 29 days to cure rather than 30 days as provided for in the Loan Documents. Kerns cites paragraph 7(C) of the Note and the portion of paragraph 22 of the Deed of Trust dealing solely with acceleration. See (J.A. 90 ¶¶ 6-7.) Under the terms of the Loan Documents, which create the pre-acceleration notice

requirement, a 30-day letter is required prior to accelerate of the Loan. Acceleration is the touchstone for when a cause and right of action accrues for a breach of the 30-day notice requirement. For example, the Note provides as follows:

> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, **the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all interest that I owe on that amount**. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(J.A. 14 ¶ 7(C)) (emphasis added). The Note specifies that "[t]hat date," referring to acceleration, "must be at least 30 days after the date on which the notice is mailed." Similarly, the Deed of Trust provides that "Lender shall give notice to Borrower prior to acceleration following Borrower's breach," noting that the notice should specify "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured." (Id. 30 ¶ 22.) In turn, the 30-day pre-acceleration notice at issue provides that "[u]nless the payments on your loan can be brought current by July 20, 2010, it will become necessary to require immediate payment in full (also called acceleration) of your Mortgage Note and pursue the remedies provided for in your Mortgage or Deed of Trust." (Id. 107)

The lender's obligation, pursuant to the clear terms of the Loan Documents, is to give a 30-day notice "prior to acceleration following Borrower's breach." (Id. 30 ¶ 22.) The notice itself in this case demonstrates that its purpose was to allow Kerns an opportunity to cure prior to acceleration of the Loan. Accordingly, this provision is breached when acceleration occurs and a lender has not sent a proper 30-day notice.

Thus, assuming a notice is improper, the cause and right of action accrue once acceleration has occurred, because this is the moment of breach, when the acceleration damaged Kerns, however slightly. See Van Dam, 280 Va. at 463, 699 S.E.2d at 482-83; Va. Code Ann. § 8.01-230 (providing a right of action accrues "when the breach of contract occurs in actions *ex contractu* and not when the resulting damage is discovered"). Indeed, after acceleration the entire amount of the outstanding balance became due, which is a worse position than when the amount demanded in the pre-acceleration notice was just the late payments. A subsequent foreclosure is just further damages resulting from the prior, singular

breach.[5] See Herbaugh, 2016 U.S. Dist. LEXIS 91940, at *16 (citing cases).

With respect to timing, acceleration necessarily occurs as a prerequisite to the commencement of foreclosure proceedings, much less the date of the foreclosure. The Deed of Trust provides that foreclosure can only occur after the 30-day notice "[i]f the default is not cured on or before the date specified." (J.A. 30 ¶ 22); see also Va. Code Ann. § 55-59.1(A) (providing that a trustee's written notice of a foreclosure sale, which must be sent 14 days prior to foreclosure, "shall be deemed an effective exercise of any right of acceleration contained in such deed of trust or otherwise possessed by the party secured relative to the indebtedness secured"); (J.A. 107) (noting that "[o]nce acceleration has occurred, we may take steps to terminate your ownership in the property by a foreclosure

[5] Moreover, Kerns alleges in his Amended Complaint that Wells Fargo breached the Deed of Trust through the advertisement of the foreclosure, which also constitute damages based on a faulty acceleration. (J.A. 93 ¶ 18.) The foreclosure advertisement necessarily occurred prior to the foreclosure sale itself, and thus, should such advertisement be deemed the accrual point, Kerns' claim would still be barred.

proceeding").[6]

In sum, the 30-day notice requirement stated in the Loan Documents is a precondition before the lender can accelerate the Loan. Thus, the 30-day notice requirement is breached if acceleration occurs without a proper notice. Acceleration is the moment of accrual. Acceleration necessarily occurs well before the actual event of foreclosure. Therefore, Kerns' ability to bring a breach of contract action based on a breach of the 30-day notice requirement accrued before the August 23, 2011 foreclosure. Herbaugh, 2016 U.S. Dist. LEXIS 91940, at *16 ("The Herbaughs' claims rely entirely on alleged deficiencies in the pre-acceleration notice they received. The alleged breaches did not occur at intervals or even continuously, but occurred when Defendants accelerated the mortgage loan and foreclosed on the Property without providing notice required by the Acceleration

[6] With respect to when acceleration occurred, the Western District noted that "such a breach had to occur prior to the date of the foreclosure sale." Herbaugh, 2016 U.S. Dist. LEXIS 91940, at *17-18 (emphasis added). The exact moment of acceleration is immaterial for application of the statutory bar in this case, where the original Complaint was not filed until five years to the day after foreclosure (which in turn necessarily occurred after acceleration). See id. Nonetheless, to the extent necessary, a definitive point of acceleration could be determined if it became an issue in another factual scenario through the trustee's sending of a 14-day foreclosure notice (which must occur at least 14 days prior to foreclosure). See Va. Code. Ann. § 55-59.1(A).

Clauses. Therefore, the Herbaughs' claim accrued when acceleration occurred.").

Kerns filed this action on August 23, 2016, five years from the date of foreclosure. The statute of limitations for a breach of contract claim in the Commonwealth is five years after accrual. Va. Code Ann § 8.01-246(2). Accordingly, Kerns' action must fail as it is based a purported breach of the 30-day notice requirement, which accrued more than five years prior to the initiation of this action.

C. Kerns cites no compelling authority in support of his position that a pre-acceleration notice claim accrues at foreclosure.

The Court should deny Kerns' appeal because he presents no persuasive authority in support of his position. First, Kerns attempts to distinguish Herbaugh by only noting that in that case both acceleration and the foreclosure occurred more than five years before the filing. (Appellant's Br. 9-10.) The fact that the Herbaugh action was also filed more than five years after a foreclosure is irrelevant, however, as that court explicitly held that the moment of accrual was acceleration, not foreclosure. Herbaugh, 2016 U.S. Dist. LEXIS 91940, at *16. In fact, the Herbaugh court expressly distinguished the Hampton Roads Sanitation Dist. v. McDonnell, 234 Va. 235, 360 S.E.2d 841 (1987), opinion cited by Kerns in his former opposition

briefing, providing that the borrowers' "claims rely entirely on alleged deficiencies in the pre-acceleration notice they received. The alleged breaches did not occur at intervals or even continuously . . . ." Herbaugh, 2016 U.S. Dist. LEXIS 91940, at *16.

Kerns then relies on the opinion in Jackson v. Ocwen Loan Servicing, No. 3:15cv238, 2016 U.S. Dist. LEXIS 44367 (E.D. Va. Mar. 31, 2016), as persuasive authority. The opinion is unavailing, as the Jackson court found that a borrowers' breach of contract claim failed because "[n]o foreclosure took place," an thus the borrowers "claim no damages from the lack of notice." 2016 U.S. Dist. LEXIS 44367, at *25 (emphasis added). First, the three sentences from Jackson referenced by Kerns did not address the accrual point of a right of action for statute of limitations purposes, and nowhere in that opinion is a discussion of whether the borrowers cite damages at all. In other words, the fact that the Jackson court provided that the borrowers pleaded no damages absent a foreclosure does not provide a basis for Kerns' theory that the only damage a borrower can

suffer from the breach is foreclosure. Moreover, Jackson actually contradicts Kerns' argument by equating a foreclosure to damages.[7]

Kerns cannot artificially extend the accrual of a cause of action by only citing purported damages within the statutory period, and ignoring the initial and defining damage of acceleration (as noted, subsequent damages do not re-trigger the limitations period). The entire Amended Complaint is based on a singular allegation of wrongdoing (the allegedly backdated acceleration notice). The contractual provisions at issue provide that the lender's obligation is to give a 30-day notice "prior to acceleration following Borrower's breach." In other words, a 29-day notice becomes wrongful once acceleration occurs; no foreclosure is required. The actual pre-acceleration notice requirement, which is the only breach at issue in this case, is relative only to acceleration and not foreclosure. Kerns' purported damages are the natural consequences of any foreclosure sale. Kerns would have experienced the foregoing whether the acceleration notice was

[7] To the extent the Jackson court did intend to imply that the only damages that can be suffered based on an improper 30-day notice occur at or after foreclosure, it is mistaken. Acceleration itself constitutes damages, as discussed above, because thereafter a borrower is required to satisfy the entire outstanding amount due (as noted in the Loan Documents and the acceleration notice itself), versus catching up on a few payments. As this Court has noted, the "running of the limitation period will not be tolled by the fact that actual or substantial damages did not occur until a later date." Van Dam, 280 Va. at 463, 699 S.E.2d at 482-83.

for 29 days or 30 days or 100 days (and as noted below, he pleaded no facts in the Amended Complaint to the contrary).[8]

D. Kerns' policy argument that lenders intentionally delay foreclosure until the limitations period expires is illogical.

Kern's final argument is that the Court should ignore the actual accrual of the statute of limitations at acceleration because he claims lenders would "accelerate early without sending a proper 30-day cure notice . . ., followed by a five[-]year wait," presumably allowing the lender to foreclose without complying with the requirement. (Appellant's Br. 11-12.) According to Kerns, lenders will purposefully send out improper pre-acceleration notices; wait for five years until Virginia's statute of limitations expires, all while the borrower resides in the property without paying; and then foreclose. Simply stated, such arguments are without foundation or merit.

Any loan servicer that purposefully sought to permit borrowers to reside in properties for free for five years merely to avoid sending out a single document surely will not remain a servicer for long. The idea that servicers would purposefully seek foreclosure to avoid sending out a loss mitigation

[8] Otherwise, Kerns' argument becomes a slippery slope, where every subsequent action taken enforcing the Loan Documents would constitute a new breach and a new statutory period, based solely on one improper action. This theory would extend Kerns' ability to bring an action based solely on conduct occurring in June 2011 indefinitely as long as new actions were taken under the Loan Documents.

letter is fundamentally unsound to begin with. Lenders do not want to foreclose on their borrowers. Keeping borrowers in their properties such that they can fully pay off their loan is far more desirable that being forced to seek a foreclosure, which, as Kerns notes, often results in a credit bid purchase for less than a potential realtor sale, and thus in turn often results in proceeds less than the outstanding balance of the loan. Moreover, with an acceleration accrual point, under Kerns' scenario borrowers would have the ability to immediately bring action for a pre-acceleration breach when acceleration occurred, and would not have to wait for a foreclosure, which is not relevant to such a breach as noted above. The only way Kerns' scenario would occur is if a borrower failed to assert his or her rights after accrual.

Simply put, this action was filed more than five years after the alleged breach, and Kern's policy argument cannot obviate the statutory barring of his claim. See Van Dam, 280 Va. at 463, 699 S.E.2d at 4883 ("This time-honored rule may produce inequities by triggering a statute of limitations when the injury or damage is unknown or difficult or even incapable of discovery, but we have long concluded that it is the role of the General Assembly, not the courts, to change a rule of law . . . .").

II. Kerns failed to allege that the one extra day would have made a difference with respect to his ability to cure the default.

Assuming Kerns' right of action was not barred by the statute of limitations discussed above, he still fails to state a claim because his Amended Complaint lacks a critical element required in all breach of contract actions in the Commonwealth—causation. Kerns must provide some proximate causation between the purported breach and his alleged damages.[9]

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[9] As an aside, Wells Fargo is compelled to note that Kerns' theory of "strict liability" set forth in his Complaints is unfounded in the contractual arena in general and with respect to compliance with a deed of trust. "In the Commonwealth of Virginia, adherence to a Deed of Trust is measured by the standard of substantial compliance." Mayo v. Wells Fargo Bank, N.A., No. 4:13cv163, 2015 U.S. Dist. LEXIS 26383, at *15 (E.D. Va. Mar. 4, 2015) (citing Va. Hous. Dev. Auth. V. Fox Run Ltd. P'ship, 255 Va. 356, 497 S.E.2d 747 (Va. 1998)); see also Bailey v. Pioneer Fed. Savings & Loan Assoc., 210 Va. 558, 172 S.E.2d 730 (1970). This has been the case for over a century. See, e.g., Preston v. Johnson, 105 Va. 238, 239-40, 53 S.E. 1, 1 (1906) (citing numerous 19th century cases holding the same). Indeed, the concept of "strict liability," which is a tort doctrine, makes little sense with respect to contractual disputes, as such liability is meant to contrast with the causation usually required to recover for tortious conduct in abnormally dangerous situations. See Hemeon v. Petro-Tech, 31 Va. Cir. 421, 424 (Loudon 1993); Childs v. Westinghouse Elec. Corp., 12 Va. Cir. 238, 239 (Fairfax Cnty. 1988) (noting the idea that "strict liability has its foundation in tort, rather than contract"). The Western District of Virginia recently analyzed this identical argument from Kerns' counsel and rejected it outright. See Stansbury v. Fed. Home Loan Mortg. Corp., No. 7:16-cv-00516, 2017 U.S. Dist. LEXIS 140399, at *10 (W.D. Va. Aug. 31, 2017).

As acknowledged by Wells Fargo to the Circuit Court, some courts have found that an allegation of a 29-day notice alone may constitute a breach sufficient to survive an initial dispositive motion. See Tedders v. Bank of Am., N.A., 92 Va. Cir. 33, 36 (Colonial Heights 2015) ("The absence of an allegation by mortgagee that he could have cured the default was not fatal to the breach of deed of trust claim."); Thomas v. Bank of Am., N.A., No. 4:12cv143, 2013 U.S. Dist. LEXIS 189799, at *11 (E.D. Va. Mar. 19, 2013) (finding an alleged backdated notice was immaterial and yet "can be grounds for compensatory damages, and that is one of the forms of relief Plaintiffs have requested, they have stated a claim for which relief may be granted"); Belote v. Bank of Am., N.A., No. 3:12CV526-JRS, 2012 U.S. Dist. LEXIS 178971, at *14 (E.D. Va. Dec. 18, 2012) (same); Harrison v. US Bank Nat'l Ass'n, No. 3:12-cv-00224, 2012 U.S. Dist. LEXIS 85735, at *4-5 (E.D. Va. June 20, 2012) (same).

Conversely, other courts have found that improper pre-acceleration notice claims fail without the borrower's ability to bring the loan current and show some causal connection between the purported breach and alleged damages (in other words, whether the foreclosure damages would have still occurred had the notice been proper). See, e.g., Blick v. Shapiro & Brown, LLP, No. 3:16-CV-00070, 2017 U.S. Dist. LEXIS 1826, at *12 (W.D.

Va. Jan. 5, 2017) ("While the Court must make reasonable inferences in interpreting the complaint, Iqbal, 556 U.S. at 678, it is too large a leap to infer that the failure to give timely notice of default here caused the loss of the house, particularly when actual notice was obtained eleven days later and several months elapsed before the Property was sold at auction. Absent the allegation of some facts plausibly connecting the breach and loss of the Property at auction, Plaintiff has failed to state a claim for breach of contract."); James v. Onewest Bank, N.A., No. 1:15-cv-1424, 2016 U.S. Dist. LEXIS 39157, at *14 (E.D. Va. Mar. 22, 2016) ("Where a plaintiff claims a foreclosure caused him injury, the plaintiff must sufficiently trace the defendant's breach of the deed of trust to the foreclosure. Thus, if a plaintiff cannot sufficiently allege that he would have cured the default had the defendant sent a proper cure notice, his claim must be dismissed."); Pena v. HSBC Bank USA, No. 1:14CV1018, 2014 U.S. Dist. LEXIS 155888, at *18-19 (E.D. Va. Nov. 4, 2014) ("Moreover, even giving Plaintiffs the benefit of doubt, they have failed to sufficiently allege that they were harmed by the purported breach. Plaintiffs do not claim that they would have been able to pay the amount owed or taken action to halt the foreclosure. Therefore, even if the notice was defective, Plaintiffs have not alleged that they suffered any harm as a result."); Jones v. Fulton Bank,

N.A., 2013 U.S. Dist. LEXIS 100779, at *15-16 (E.D. Va. July 18, 2013) ("Plaintiffs do not claim that they would have been able to pay the amount they believe they owe, that they overpaid based on the alleged misstatement, or that they paid any amount whatsoever in an attempt to cure the default. Therefore, even if the Notice Letter materially overstated the amount due, Plaintiffs have not alleged that they suffered any harm as a result."), aff'd 565 F. App'x 251 (4th Cir. Apr. 9, 2014) ("While a deficient pre-acceleration notice constitutes a breach of contract, see Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 654 S.E.2d 898, 901 (Va. 2008), a plaintiff must still plead damages due to that breach.")

This Court, however, has not conclusively addressed the issue. Virginia courts findings that allegations of a 29-day notice alone constitute a breach, at least for the purposes of an initial dispositive motion, often point to this Court's decisions in Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 118, 654 S.E.2d 898, 899 (2008), and Squire v. Va. Housing Development Authority, 287 Va. 507, 758 S.E.2d 55 (2014), as dispositive. These decisions, however, are distinguishable, as neither directly addressed the issue of causation.

In the Bayview complaint, the plaintiff explicitly pleaded that she was "ready, willing and able to pay the balance owed on the [deeds of trust],

including principal, interest and any fees that may be due for the late payments."[10] The issue of causation between the breach and damages simply was not raised on appeal. Bayview, 275 Va. at 118, 654 S.E.2d at 899.

In Squire, this Court analyzed the incorporation of certain FHA regulations that explicitly provided that no foreclosure could occur without compliance with a "face-to-face" meeting requirement, whereby all manner of loss mitigation options could be considered. The opinion again did not address the issue of causation, though Justice Mims provided in a concurrence that "[i]t is reasonable to infer from these facts that if VHDA had complied with the Regulation and met her face-to-face, she might have been able to pay the amount required, or at least to learn how much it was," and therefore one could infer "that VHDA's violation of the Regulation and breach of the deed of trust prevented her from reinstating her loan." Id. at 529-30, 758 S.E.2d at 68. Further, as Chief Justice Kinser noted in a partial dissent, the Squire plaintiff at least pleaded a conclusory statement that the alleged lack of compliance with FHA regulations caused the foreclosure itself. Squire, 287 Va. at 526, 758 S.E.2d at 66 (Kinser, J.

[10] A copy of the Bayview complaint is enclosed as **Exhibit A** (see paragraph 32).

dissenting) (providing also that in Justice Kinser's view even a conclusory allegation that foreclosure was caused by the alleged breach itself is insufficient without some actual factual allegations in support).

Finally, this Court also addressed the 30-day notice requirement in a recent unreported opinion cited by Kerns at the Demurrer/Plea in Bar hearing. Newport News Shipbuilding Emples. Credit Union v. Busch, No. 150678, 2016 Va. Unpub. LEXIS 18 (Va. June 16, 2016). Once again, however, there was no direct discussion as to whether the borrower there could have cured. Id., 2016 Va. Unpub. LEXIS 18, at *5-7. Further, the defendant "did not assign error to the circuit court's ruling that it had not substantially complied with the pre-acceleration notice requirement." Id., 2016 Va. Unpub. LEXIS 18, at *6 n.1.

Kerns fails to allege that had he received a proper 30-day pre-acceleration notice, providing him one extra day to cure, that he would have been able to bring the loan current. Wells Fargo posits that the above line of cases requiring some causation between the alleged breach and damages are consistent with the long standing standard of compliance with deeds of trust in the Commonwealth, along with this Court's requirements for a valid breach of contract claim. "[R]ecovery of damages for a breach of contract requires causation." Rastek Constr. & Dev. Corp. v. Gen. Land

Commer. Co., LLC, 294 Va. 416, 430, 806 S.E.2d 740, 748 (2017); Ramos v. Wells Fargo Bank, NA, 289 Va. 321, 323, 770 S.E.2d 491, 493 (2015) ("As indicated above, an essential element in a breach of contract action is that the defendant's breach of a contractual obligation caused injury or damage to the plaintiff."); see also Squire, 287 Va. at 528, 758 S.E.2d at 67 (Kinser, J. dissenting) ("King did not allege any fact to show that the foreclosure was 'caused by the breach of obligation.'").

No allegations exist in the record where Kerns claims that the extra day's notice (assuming such claim sufficiently pleaded, which, as discussed below, is not clear at all) would have prevented the acceleration of his Loan or the subsequent damages he allegedly suffered thereby. "From the facts alleged, the loss of the [Property] appears caused by [Kern's] default on the Note, and not by a failure of notice." Blick, 2017 U.S. Dist. LEXIS 1826, at *11-12. Without even a conclusory assertion of causation, Kerns' claim cannot succeed.

III. The 30-day notice is deemed mailed upon deposit, not the date in a confirmation email.

Finally, Kern's back-dating claims fail because the 30-day notice at issue here was not in fact backdated. A letter is deemed "mailed" upon deposit in the sender's mail receptacle, not upon the date listed in a USPS confirmation email. Kerns claims that the acceleration notice was mailed

on June 21, 2010, based solely on a USPS "Track & Confirm email," which he has attached to the Amended Complaint as Exhibit B. (J.A. 91 ¶ 12.) He claims that the notice thus is only a "29-day notice rather than a 30-day notice." (Id. ¶ 13.) However, the "Track & Confirm email" only provides the date when "Electronic Shipping Info [Was] Received," which was June 21, 2010. (Id. 110.) The email provides no information regarding when the notice was actually placed in a mailing receptacle.

Black's Law Dictionary defines "mail" as "[t]o deposit (a letter, package, etc.) with the U.S. Postal Service; to ensure that a letter, package, etc. is properly addressed, stamped, and placed into a receptacle for mail pickup." Black's Law Dictionary 972 (8th ed. 2007) (emphasis added). Therefore, the notice was mailed the minute it was placed in any mail receptacle. The USPS Domestic Mail Manual states that "[s]ingle piece First-Class Mail letters may be deposited into any collection box, mail receptacle, or at any place where mail is accepted if the full required postage is paid with adhesive stamps." USPS, Domestic Mail Manual: 136 Deposit, USPS.com (last visited Apr. 29, 2018), available at http://pe.usps.gov/text/dmm300/136.htm. This can occur well after pickup on any given day.

Here, Kerns alleges no facts to support his conclusory contention that Wells Fargo "backdated" the notice. The notice is clearly dated June 20, 2010. See (J.A. 110.) Kerns relies on Exhibit B, which states that "Electronic Shipping Info [was] Received" on June 21, 2010. However, this is not a reflection of the date the notice was actually placed in a USPS mail receptacle, and hence not a reflection of when the notice was actually mailed. See Lesofski v. Lash, No. CV 11-840 TUC DCB, 2013 U.S. Dist. LEXIS 166165, at *5 (D. Ariz. Nov. 18, 2013) (noting an argument that "the tracking number, when researched, reflects 'Electronic Shipping Info Received' which does not . . . reflect an actual mailing date"). The relevant date here is not the date the notice was postmarked or electronic shipping information was received, but when the notice was placed in a USPS mail receptacle. As is shown on the face of the notice, that was done on June 20, 2010. Kerns has no ability to allege any facts to the contrary.

The notice clearly states that the default must be cured by July 20, 2010, 30 days from date of mailing. Therefore, from the face of the notice, it is clear that Wells Fargo complied with the 30-day requirement in paragraphs 22 of the Deed of Trust and 7(c) of the Note. The mail confirmation attached to the Complaint as Exhibit B does not change this analysis. Placing the notice in the mail receptacle on June 20, 2010, was

still a “mailing” as required by the terms of the Note and Deed of Trust. Kerns merely draws the conclusion that Wells Fargo backdated the notice and mailed it on June 21, 2010, with no factual allegations to support these inferences, and accordingly, the Court need not afford any deference.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the Court should affirm the ruling of the Circuit Court. In summation, Kerns’ appeal fails because the Circuit Court correctly found that the five-year statute of limitations for breach of contract actions barred Kerns’ claims, which accrued on the date of acceleration. Kerns’ Opening Brief provides no compelling rationale to the contrary. Further, Kerns failed to allege any proximate causation between the purported breach and his damages, which is a requirement for a breach of contract action to succeed. Finally, Kern’s back-dating claims fail because the 30-day notice at issue here was not in fact backdated as evidenced through the documents attached to the Amended Complaint. Accordingly, Appellee, Wells Fargo Bank, N.A., respectfully requests that the Court affirm the Circuit Court’s dismissal of Kerns’ claims.

Dated: May 7, 2018

Respectfully submitted,

WELLS FARGO BANK, N.A.

By: */s/ Terry C. Frank*
Of Counsel

Terry C. Frank, Esq. (VSB No. 74890)
E-mail: tcfrank@kaufcan.com
Benjamin A. Wills, Esq. (VSB No. 88109)
E-mail: bawills@kaufcan.com
Kaufman & Canoles, P.C.
Two James Center
1021 East Cary Street, Suite 1400
Richmond, VA 23219-4058
Phone: (804) 771-5700
Fax: (888) 360-9092

Counsel for Appellee Wells Fargo Bank, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 7, 2018, the Brief of Appellee was filed electronically via the VACES system with the Supreme Court of Virginia and that three copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellee was sent via email to all counsel of record, at the email addresses below:

Henry W. McLaughlin (VSB No. 07105)
henry@mclaughlinvalaw.com
Law Office of Henry McLaughlin, P.C.
Eighth and Main Building
707 East Main Street, Ste. 1050
Richmond, VA 23219
Phone: (804) 205-9020
Fax: (877)575-0245
Counsel for Appellants

Counsel for the appellee does not waive oral argument.

/s/ Terry C. Frank

VIRGINIA: IN THE CIRCUIT COURT FOR ROCKINGHAM COUNTY

JANET M. SIMMONS, Plaintiff, v. BAYVIEW LOAN SERVICING, LLC, SPECIALIZED, INC. OF VIRGINIA, STEPHEN P. NAPOTNIK, RICHARD WEBSTER, TRUSTEE, Serve at: 440 South Main Street Harrisonburg, VA 22801 and FNB SOUTHEAST Serve: CT Corporation System 4701 Cox Road, Suite 301 Glen Allen, VA 23060-6802 Defendants.	)	Case No. CH05-00444

AMENDED COMPLAINT

Plaintiff, Janet M. Simmons, by counsel, for her Amended Complaint against Defendants Bayview Loan Servicing, LLC ("Bayview"), Specialized, Inc. of Virginia ("Specialized"), Stephen P. Napotnik ("Napotnik"), Richard Webster, Trustee, and FNB Southeast, alleges as follows:

INTRODUCTION

1. Plaintiff files this Amended Complaint seeking equitable relief in the form of an Order of this Court that voids a foreclosure sale and otherwise quiets title to her real property, or, in the alternative, a judgment that awards her monetary damages for breaches by the holder of the note that was secured by the Deed of Trust under which the foreclosure sale occurred.

STATEMENT OF FACTS

2. In 1992, Plaintiff, Janet M. Simmons, and her husband, Donald H. Simmons, were conveyed a parcel of land containing 3.08 acres, more or less, with improvements thereon, situate and lying on the east side of Route 668 in Ashby District, Rockingham County, Virginia by deed dated September 30th, 1992, such deed being of record in the Clerk's Office of the Circuit Court of Rockingham County, Virginia ("Clerk's Office") in Deed Book No. 1162, at Page 276. A copy of the foregoing instrument, marked **Exhibit A**, is attached to this Amended Complaint and incorporated herein by reference as if fully set forth herein.

3. By Deed of Trust dated May 26, 1994, of record in the Clerk's Office in Deed Book No. 1281, at Page 1, Donald H. Simmons and Janet M. Simmons, husband and wife, conveyed the aforesaid real property in trust to Charlene D. Megginson and Harold P. Warner, Trustees, to secure the payment of a Deed of Trust Note in the principal amount of $66,300.00, with interest thereon, payable in monthly installments, for the benefit of the lender and note holder, Central Fidelity Mortgage Corporation. The foregoing instrument, and all other instruments referenced in this Amended Complaint, is incorporated herein by reference as if fully set forth herein. The foregoing Deed of Trust is hereinafter referred to as the "First Deed of Trust," and the note that it secures is hereinafter referred to as the "First Deed of Trust Note." The First Deed of Trust Note was last held by Wachovia Bank, N.A. (GMAC Mortgage servicing such note), and Defendant Specialized was the last substitute trustee on the First Deed of Trust. See Instrument entitled "Substitute of Trustee" that is of record in the Clerk's Office in Deed Bok 2445, at Page 623. Plaintiff does not assert any claims in this Amended Complaint concerning the First Deed of Trust and the First Deed of Trust Note, references thereto only being made for background informational purposes.

4. By Deed of Trust dated May 8, 1998, of record in the Clerk's Office in Deed Book No. 1594, at Page 523, Donald H. Simmons and Janet M. Simmons, husband and wife, conveyed the aforesaid real property in trust to Arthur Friedman, Trustee, to secure the payment of a Deed of Trust Note in the principal sum of $134,532.00 with interest, payable in monthly installments, for the benefit of the lender and note holder, Common Point Mortgage, Inc. A copy of the foregoing instrument, marked **Exhibit B**, is attached to this Amended Complaint and incorporated herein by reference as if fully set forth herein. The foregoing Deed of Trust is

hereinafter referred to as the "Second Deed of Trust," and the note it secures is hereinafter referred to as the "Second Deed of Trust Note."

5. By Deed dated June 7, 2001, and found in the Clerk's Office in Deed Book No. 1930, at Page 404, Donald H. Simmons and Janet M. Simmons conveyed the aforementioned real property to Plaintiff, Janet M. Simmons. A copy of the aforementioned deed, marked **Exhibit C**, is attached hereto and incorporated herein by reference.

6. By an Assignment dated September 18, 2002, the Second Deed of Trust and note secured thereby were assigned to Wachovia Bank, N.A., said Assignment being of record in the Clerk's Office in Deed Book No. 2418, at Page 576.

7. Defendant Bayview, representing itself as the "servicer" for Wachovia Bank, N.A., and the holder of the Second Deed of Trust Note, appointed Defendant Specialized as Substitute Trustee under the Deed of Trust by an instrument dated May 19, 2005 that is recorded in the Clerk's Office in Deed Book No. 2690, at Page 101. A copy of the aforementioned instrument, marked **Exhibit D**, is attached hereto and incorporated herein by reference.

8. During the calendar years 2003, 2004 and 2005, Plaintiff did not timely pay all of the installments due under the First Deed of Trust Note and the Second Deed of Trust Note.

9. During the first half of the calendar year 2005, the holder of the First Deed of Trust Note contacted Plaintiff and notified her of its intent to accelerate the note and foreclose on the subject real property if certain action was not taken by Plaintiff.

10. On July 14, 2005, Plaintiff sent a payment to the holder of the First Deed of Trust so as to prevent a foreclosure. A copy of the Foreclosure Forbearance Agreement and Western Union Payment Receipts, collectively marked **Exhibit E**, is attached hereto and incorporated herein.

11. Unbeknownst to Plaintiff, the day prior to her preventing a foreclosure under the First Deed of Trust, a foreclosure had already occurred under the Second Deed of Trust. In fact, following the foreclosure sale, and in addition to making payments on the First Deed of Trust Note, Plaintiff continued to make improvement to her real property until she learned of the sale. Prior to the foreclosure sale, Plaintiff never observed the "notice of Trustee's Sale" that was published in the Daily News Record that is circulated in the City of Harrisonburg, Rockingham County, and surrounding areas. A copy of the notice, marked **Exhibit F**, is attached hereto and incorporated herein by reference.

12. On July 13, 2005, Defendant Specialized, purported to sell the subject real property at public auction to Defendant Napotnik and Timothy J. Peters for a price of $172,000.00. Upon information and belief, the subject real property had an appraised value in an amount in excess of $340,000.00 around the time of the sale or shortly thereafter.

13. Defendant Specialized purported to convey the subject real property to Defendant Napotnik by Substitute Trustee's Deed dated July 13, 2005, that is of record in the Clerk's Office in Deed Book No. 2702, at Page 723. A copy of the foregoing instrument, marked **Exhibit G**, is attached to this Amended Complaint and incorporated herein by reference as if fully set forth herein.

14. Upon information and belief, Timothy J. Peters was inadvertently not included as a named grantee on the Substitute Trustee's Deed. Timothy J. Peters is not otherwise identified as the owner of any legal or equitable interest in the subject real property within the title records maintained in the Clerk's Office. Because Defendant Timothy J. Peters is not an owner of record of the real property in dispute herein, he is not a necessary party to this law suit.

15. By Deed of Trust dated July 27, 2005 that is of record in the Clerk's Office in Deed Book No. 2707, at Page 727, Defendant Napotnik and Timothy J. Peters conveyed their interest in the subject real property, to the extent any such interest may exist, in trust to Richard Webster, Trustee, to secure the payment of a Deed of Trust Note for the benefit of Defendant FNB Southeast. The foregoing deed of trust is hereinafter referred to as the "FNB Southeast Deed of Trust," and the note that it secures is hereinafter referred to as the "FNB Southeast Deed of Trust Note." A copy of the FNB Southeast Deed of Trust, marked **Exhibit H**, is attached hereto and incorporated herein by reference.

16. Plaintiff maintains that she did not receive any notice from Defendant Bayview of its intent to accelerate the Second Deed of Trust Note and to invoke the power of sale if certain conditions were not met.

17. Paragraph 17 of the Second Deed of Trust requires that a pre-acceleration notice be sent. That paragraph states as follows:

> Acceleration; Remedies. Except as provided in paragraph 16 hereof, upon Borrower's breach of any covenant or agreement of Borrower in this Deed of Trust, including the covenants to pay when due any sums secured by this Deed of Trust, Lender prior to acceleration shall give notice to Borrower as provided in paragraph 12 hereof specifying (1) the breach; (2) the action required to cure

such breach; (3) a date, not less than 10 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the nonexistence of a default or any other defense of Borrower to acceleration and sale. If the breach is not cured on or before the date specified in the notice, Lender, at Lender's option, may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all reasonable costs and expenses incurred in pursuing the remedies provided in this paragraph 17, including, but not limited to, reasonable attorneys' fees.

If Lender invokes the power of sale, Lender or Trustee shall give to Borrower (and the owner of the Property, if a different person) notice of sale in the manner prescribed by applicable law. Trustee shall give public notice of sale by advertising, in accordance with applicable law, once a week for two successive weeks in a newspaper having general circulation in the county or city in which the Property or some portion thereof is located, and by such additional or different form of advertisement as the Trustee may deem advisable, if any. Trustee may sell the Property on the eighth day after the first advertisement or any day thereafter, but not later than 30 days following the last advertisement. Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in such order as Trustee may determine. Trustee may postpone sale of all or any parcel of the Property by advertising in accordance with applicable law. Lender or Lender's designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property so sold with special warranty of title. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all reasonable costs and expenses of the sale, including, but not limited to, Trustee's fees of 5.000% of the gross sale price, reasonable attorneys' fees and costs of title evidence; (b) to the discharge of all taxes, levies and assessments on the Property, if any, as provided by applicable law; (c) to all

> sums secured by this Deed of Trust; and (d) the excess, if any, to the person or persons legally entitled thereto. Trustees shall not be required to take possession of the Property prior to the sale thereof or to deliver possession of the Property to the purchaser of such sale.

18. The pre-acceleration notice, as with all notices required to be sent under the Second Deed of Trust, are subject to Paragraph 12 of the Second Deed of Trust, which states as follows:

> Notice. Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Deed of Trust shall be given by delivering it or by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein, and (b) any notice to Lender shall be given by certified mail to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this Deed of Trust shall be deemed to have been given to Borrower or Lender when given in the manner designated herein.

19. Following commencement of these proceedings, Defendant Bayview produced a copy of pre-acceleration notices that it contends were sent to Plaintiff at two separate addresses for the subject real property (the rural route and box number address and a 911 address that was assigned after the Second Deed of Trust Note was executed). A copy of the pre-acceleration notice for each address, marked **Exhibits I and J**, respectively, are attached hereto and incorporated herein (the notices were identical except for the mailing addresses).

20. Plaintiff denies that she ever received the pre-acceleration notices that are marked as **Exhibits I and J**.

21. The pre-acceleration notices marked as **Exhibits I and J** do not indicate thereon that they were sent by certified mail as required in Paragraph 12 of the Second Deed of Trust.

22. The pre-acceleration notices marked as **Exhibits I and J** are not signed by the author, thus calling into question whether they ever were in fact mailed.

23. In addition to failing to provide her with the pre-acceleration notice required pursuant to Paragraph 17 of the Second Deed of Trust, Plaintiff believes that Defendant Bayview improperly credited her account on the Second Deed of Trust Note. The Second Deed of Trust Note has been held by Common Point Mortgage, Residential Funding Corporation, Empire Mortgage X, Inc., Wachovia Bank, N.A., and then Defendant Bayview, as evidenced in the title

history for the subject real property. Plaintiff is in the process of reconciling her payment records with the payment receipt records of the various note holders.

24. Pursuant to the express terms of the Second Deed of Trust, the trustee named therein, or his substitute, does not have authority to invoke the power of sale until all prerequisites of the Deed of Trust have been met by the note holder.

25. Bayview failed to comply with the terms of the Second Deed of Trust that were a prerequisite to accelerating the Second Deed of Trust Note and invoking the power of sale under the Second Deed of Trust. Among other things, Defendant Bayview failed to provide the pre-acceleration notice that is expressly required in the Second Deed of Trust, and Defendant Bayview failed to properly credit payments to Plaintiff's account on the Second Deed of Trust Note.

26. Because Defendant Bayview failed to comply with its obligations under the Second Deed of Trust Note that were a prerequisite to invoking the power of sale, Defendant Specialized, in its role as Substitute Trustee, lacked authority to foreclose and sell the subject real property at public auction.

27. Lacking authority to foreclose and sell the subject real property, any deed executed by Defendant Specialized is void *ab initio*, null, and of no force or effect.

28. At the foreclosure sale of the subject real property, Defendant Napotnik bid at his peril. In recognition of the risk that generally attains to foreclosure sales, Defendant Napotnik bid considerably less than the fair market value of the subject real property.

29. Defendant Napotnik cannot be a good faith or bona fide purchaser for value without notice because such a legal principle does not apply to a void foreclosure sale. A purchaser at a foreclosure sale obtains only such title as the trustee had authority to convey. In fact, the Substitute Trustee's Deed (**Exhibit G**) conveys the property by "Special Warranty of Title." In Motley v. Hodges, 120 Va. 198, 91 S.E. 757 (1917), the Supreme Court of Virginia stated the well recognized principle that:

> A purchaser of land at a public sale made by a trustee must look to the title of the grantor of the land, and he is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent; he cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle of caveat emptor applies.

Id. (citations omitted).

30. Defendant Napotnik can only convey such title in the subject real property as he may possess. Because Defendant Napotnik acquired absolutely no interest in the subject real property from Defendant Specialized in its capacity as Substitute Trustee, Defendant Richard Webster, Trustee, acquired absolutely no interest in the subject real property.

31. Plaintiff remains in possession of the subject real property.

32. Plaintiff remains ready, willing and able to pay the balance owed on the First Deed of Trust Note and Second Deed of Trust Note, including the principal, interest, and any fees that may be due for late payments.

33. The necessary parties to this law suit are Defendant Bayview, the holder of the Second Deed of Trust Note, Defendant Specialized, the Substitute Trustee on the Second Deed of Trust, Defendant Napotnik, who claims an interest in the subject real property, Defendant Richard Webster, Trustee, who claims an interest in the subject real property pursuant to the FNB Southeast Deed of Trust, and Defendant FNB Southeast, who holds a note that purports to be secured by the real property through the FNB Southeast Deed of Trust. The holder of the First Deed of Trust Note (i.e., Wachovia Bank, N.A.), as well as the current trustee on the First Deed of Trust, are not necessary parties because said note and deed of trust have been satisfied and their rights will not be affected should this court void the deed that purported to convey the subject real property to Defendant Napotnik. Wachovia Bank, N.A. may have an interest in the Second Deed of Trust Note, but Defendant Bayview has represented that it is the current note holder. See **Exhibit D** (signature line).

34. Plaintiff asserts that she has clean hands for seeking equitable relief, notwithstanding that she may have been delinquent in making installment payments under the Second Deed of Trust Note. To hold otherwise would dispense with Defendant Bayview's obligations to comply with the terms of the Second Deed of Trust, most of such terms being required by law.

35. Plaintiff asserts that she diligently pursued equitable relief upon learning that a foreclosure sale had occurred. Efforts were made to contact both Defendants Bayview and Specialized to obtain documents that evidenced their respective compliance with the terms of the Second Deed of Trust and relevant statutory requirements. Plaintiff notes that certain allegations against Defendant Specialized contained in the Bill of Complaint that were made upon information and belief are no longer being made herein because Defendant Specialized produced

certain documents to Plaintiff's counsel subsequent to the filing of the Bill of Complaint, such documents resolving relevant factual issues.

36. Defendant Napotnik is collaterally and equitably estopped from contending that his rights in the subject real property are superior to those of Plaintiff. In the case styled Timothy Peters and Steven Napotnik v. Janet M. Simmons, in the General District Court of Rockingham County, Case No. GV 05 008186, Janet M. Simmons prevailed on an unlawful detainer suit concerning ownership of the real property at issue in these proceedings. That decision was not appealed by Steven Napotnik (aka Stephen P. Napotnik) and it is *res judicata* to the matters asserted herein. Defendant Napotnik otherwise waived his right to contest Janet M. Simmons prayer for equitable relief herein in that he failed to appeal the unfavorable ruling in the court below.

COUNT ONE
PRAYER FOR EQUITABLE RELIEF

37. Plaintiff restates and realleges Paragraphs 1 through 36 as if they were fully stated herein.

38. Plaintiff will incur irreparable harm if the Substitute Trustee's Deed that was given to Defendant Napotnik is not held to be void, as well as all other encumbrances placed on the subject real property following the foreclosure sale.

39. Plaintiff does not have an adequate remedy at law because the subject real property is unique. Among other things, Plaintiff has raised and continues to raise her children on the subject real property. Plaintiff has also made many of the improvements on the subject real property.

40. Defendant Specialized's sale of the subject real property should be set aside as void because Defendant Specialized, acting as Substitute Trustee, did not have proper authority to conduct the foreclosure sale. Defendant Specialized lacked authority to conduct the sale because Defendant Bayview failed to comply with prerequisites that were required to invoke the power of sale. Among other things, Defendant Bayview failed to provide the pre-acceleration notice that is expressly required in the Second Deed of Trust, and Defendant Bayview failed to properly credit payments to Plaintiff's account on the Second Deed of Trust Note.

41. Because Defendant Specialized, acting as Substitute Trustee, did not have proper authority under the Second Deed of Trust to foreclose on the subject real property and sell it at

public auction, this Court may, through its equitable powers, vacate the foreclosure sale and void the Substitute Trustee's Deed that was executed by Defendant Specialized and recorded by Defendant Napotnik.

42. Furthermore, this Court may exercise its equitable powers to void the FNB Southeast Deed of Trust, as well as any other encumbrances placed on the subject property following the foreclosure sale.

WHEREFORE, Plaintiff, Janet M. Simmons, by counsel, respectfully prays that the Court enter an Order that:

a. Invalidates, sets aside, vacates, and voids the foreclosure sale;

b. Invalidates, sets aside, vacates, and voids the Substitute Trustee's Deed;

c. Invalidates, sets aside, vacates, and voids the FNB Southeast Deed of Trust;

d. Divests the title to the subject real property from Defendants;

e. Quiets against Defendant the title to the subject real property that is held by Plaintiff;

f. Releases the liens on the property belonging to the holders of the First Deed of Trust Note and Second Deed of Trust Note, and directs Plaintiff to deposit into the Court the balance due on said notes as determined by the Court;

g. Determines the equitable interests that Defendants may have in the amounts deposited in the Court by Plaintiff and directs payment of said amounts to Defendants as their interests are so determined;

h. Awards Plaintiff her costs incurred herein, including any attorney's fees that may be allowed under law; and

i. Grants such other relief as this Court may deem just and proper.

COUNT TWO
BREACH OF CONTRACT

43. Plaintiff restates and realleges Paragraphs 1 through 36 as if they were fully stated herein.

44. Defendant Bayview breached the Second Deed of Trust Note and the Second Deed of Trust by, among other things, failing to provide the pre-acceleration notice that is expressly

required in the Second Deed of Trust, and failing to properly credit payments to Plaintiff's account on the Second Deed of Trust Note.

45. Unless the equitable relief in Count One, above, is granted, the aforementioned breaches by Defendant Bayview will directly and proximately result in Plaintiff incurring damages. Those damages include, without limitation, lost equity in her real property, lost appreciation of the value of her real property, costs of the foreclosure sale that were credited against her, plus amounts not credited (the value of which has not yet been determined). Based on the present fair market value of her real property, Plaintiff estimates that her losses would be at least $170,000.00, and possibly considerably more.

WHEREFORE, Plaintiff, Janet M. Simmons, while maintaining that money damages are not an adequate remedy, respectfully prays that should this Court determine that equitable relief is not available to her, that in the alternative thereto, it enter judgment in her favor against Defendant Bayview in the amount of $400,000.00, or such other amount proven to be her actual damages, with prejudgment and post-judgment interest thereon, plus her costs and attorney's fees incurred herein to the extent permitted by law.

JANET M. SIMMONS
By Counsel

_____

KEVIN M. ROSE (VSB No. 35930)
BotkinRose PLC
3210 Peoples Drive
Harrisonburg, Virginia 22801
(540) 437-0019 (office)
(540) 437-0022 (fax)
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this _____ day of February, 2006, mailed a true and complete copy of the foregoing Amended Complaint to:

M. Richard Epps, Esquire
605 Lynnhaven Parkway
Virginia Beach, Virginia 23452
Counsel for Specialized Inc. of Virginia, LLC

David A. Rosen, Esquire
Bierman, Geesing & Ward, LLC
7315 Wisconsin Avenue
Suite 315, East Tower
Bethesda, Maryland 20814
Counsel for Bayview Loan Servicing, LLC

Robert S. Hahn, Esquire
510 East Market Street, Suite 101
Harrisonburg, Virginia 22801
Counsel for Steven Napotnik

_____
Counsel for Plaintiff