IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-107

No. COA20-792

Filed 15 February 2022

Davidson County, No. 19 CVS 1295

DONALD G. JONES and JANET K. JONES, Plaintiffs,

v.

BROCK & SCOTT, PLLC and TRUSTEE SERVICES OF CAROLINA, LLC, Defendants.

Appeal by Plaintiffs from Orders entered 3 March 2020 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 21 September 2021.

Law Office of Jonathan R. Miller, LLC, by Jonathan R. Miller, for plaintiffs-appellants.

Brock & Scott, PLLC, by Alan M. Presel for defendant-appellee Brock & Scott, PLLC.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Archie L. Sumpter for defendant-appellee Trustee Services of Carolina, LLC.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Donald G. Jones and Janet K. Jones (Plaintiffs) appeal the trial court's Orders granting Defendants' Brock & Scott, PLLC (Brock & Scott) and Trustee Services of Carolina, LLC (TSC) (collectively Defendants) Motions to Dismiss with prejudice Plaintiffs' Complaint for failure to state a claim pursuant to N.C. R. Civ. P. 12(b)(6). The Record tends to reflect the following:

¶ 2 Plaintiffs filed the Complaint in this case on 4 June 2019 in Davidson County Superior Court. The Complaint originally named Brock & Scott, TSC, and Madison Revolving Trust 2017 (Madison) as Defendants. Plaintiffs sought to "enjoin Defendants' attempts to foreclose on Plaintiffs' mortgage on their home."[1] Plaintiffs also sought damages and penalties under the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and the North Carolina Debt Collection Act (NCDCA), N.C. Gen. Stat. § 75-50 *et seq.*

¶ 3 The Complaint alleged that in October 2008, Plaintiffs obtained a home equity line of credit (HELOC) from American General Financial Services, Inc. (American General). This HELOC was secured by a deed of trust on Plaintiffs' home in

[1] Madison was alleged to be the "purported holder of the note on Plaintiffs' home mortgage. During the hearing on Defendants' Motions to Dismiss, Plaintiffs informed the trial court they were "not interested in pursuing an injunction anymore" because Madison had since transferred its interest in the mortgage and was no longer pursuing foreclosure on the mortgage. Plaintiffs also filed a voluntary dismissal of Madison. On appeal, Plaintiffs make no argument on their claims for injunctive relief. As such, we affirm the trial court's Orders to the extent they related to Plaintiffs' claim for injunctive relief as Plaintiffs have abandoned that claim on appeal. N.C.R. App. P. 28(b)(6).

Thomasville, North Carolina. The Complaint further alleged that American General changed its name to Springleaf Financial Services of North Carolina, Inc. (Springleaf), and in 2015, Springleaf assigned the deed of trust to Springleaf Mortgage Loan Trust 2013 (Springleaf Trust). According to the Complaint, on 16 May 2018, Springleaf Trust "purported to transfer the deed of trust on [Plaintiffs' home]" by filing an assignment with the Davidson County Register of Deeds listing Madison as the assignee. The assignment was not "signed by an officer of the Springleaf Trust . . . but by someone named Terefe Tekle, who claims to be an officer of 'Nationstar Mortgage, LLC' " as Springleaf Trust's attorney-in-fact. Plaintiffs asserted the 16 May 2018 assignment to Madison did "not include a corporate resolution from Springleaf Trust authorizing either Nationstar or Terefe Tekle to sign deeds, conveyances, or other documents on behalf of Springleaf Trust, as required by N.C. Gen. Stat. § 47-18.3(e)." Thus, Plaintiffs alleged: "As shown more fully above, Madison had no right [to] invoke foreclosure under the deed of trust, because the assignment of the deed of trust does not conform to N.C. Gen. Stat. § 47-18.3." Plaintiffs attached numerous exhibits to the Complaint, including: screenshots of Brock & Scott's website; articles of organization and amendments for Brock & Scott and TSC; annual reports for TSC; and deeds of trust related to the HELOC in question.

¶ 4 The Complaint also contained a section outlining the "Proceedings to Foreclose on the [Plaintiffs'] Home." This section explained Plaintiffs received a Notice of Hearing on non-judicial foreclosure, pursuant to N.C. Gen. Stat. § 45-21.16, on 4 June 2018 "signed by an attorney employee of Brock & Scott, as 'Attorneys for Trustee Services of Carolina, LLC.' " The Davidson County Clerk of Superior Court held a hearing on the matter on 9 July 2018. On 10 September 2018, the Clerk entered an Order "authorizing Trustee Services to conduct a foreclosure sale under the Deed of Trust."[2] Plaintiffs appealed the Clerk's Order to "a judge of the Superior Court under N.C. Gen. Stat. § 45-21.16(d1)." On 16 April 2019, the Superior Court entered an Order affirming the Clerk's Order allowing Defendants to conduct non-judicial foreclosure on Plaintiffs' home. Plaintiffs attached a copy of the Superior Court's Order to the Complaint in this case.

¶ 5 Plaintiffs' FDCPA claim for damages alleged Brock & Scott violated 15 U.S.C. §§ 1692e(5), 1692e(10), and 1692f(6) by serving the Notice of Hearing on non-judicial foreclosure because: "(a) the alleged creditor, Madison, had no right to foreclose on [Plaintiffs'] home, (b) Trustee Services had no right to serve as substitute trustee and, thus, to conduct the foreclosure sale, and (c) Madison had no right to do business as a 'debt buyer' or 'collection agency' " in North Carolina. Plaintiffs also alleged TSC

[2] Plaintiffs did not attach the Clerk's Order to the Complaint as an exhibit.

violated Sections 1692e(5) and 1692e(10) by asserting TSC was a neutral party when it could not have been because, as Plaintiffs alleged, TSC was Brock & Scott's alter ego. Plaintiffs also claimed TSC was "vicariously liable for Brock & Scott's misrepresentations and false threats."

¶ 6 Plaintiffs supported these claims by asserting Brock & Scott was a "debt collector" as defined by 15 U.S.C. § 1692(a)(6) because: Brock & Scott's "website lists one of its practice areas as 'Creditors' Rights & Collections' "; Brock & Scott engage in collections on "Consumer & Retail Cards, Commercial Loans,[etc.]."; "[t]he Collection Division attempts to collect debt from consumers that have defaulted on their legal obligations"; and Brock & Scott engages in "Real Estate Default." Thus, Plaintiffs alleged "Brock & Scott's own website makes clear that it goes well beyond the steps laid out in Chapter 45 of the North Carolina General Statutes to foreclose under a deed of trust[.]"

¶ 7 Plaintiffs also alleged TSC was a "debt collector" as defined by the FDCPA because TSC was "an alter ego and mere department of" Brock & Scott and because Brock & Scott "markets [TSC] services to mortgage servicers and lenders as part of a complete, beginning-to-end debt collection package." Alternatively, Plaintiffs alleged 15 U.S.C. § 1692f(6) applied to TSC because "it uses instrumentalities of interstate

commerce and the mails in its business, the principal purpose of which is the enforcement of security interests."

¶ 8 Plaintiffs also asserted a claim for money damages against TSC pursuant to the NCDCA. Again, Plaintiffs alleged that TSC violated numerous sections of the NCDCA when it served the Notice of Hearing even though: "(a) the alleged creditor, Madison, had no right to foreclose on [Plaintiffs' home], and (b) Trustee Services has no right to serve as substitute trustee and, thus, to conduct the foreclosure sale, and (c) Madison has no right to do business as a 'debt buyer' or 'collection agency' " in North Carolina. As such, Plaintiffs asserted TSC violated N.C. Gen. Stat. §§ "75-51(1), -51(6), -51(8), and -51(4), because Trustee Services could not legally take the actions it was threatening to take." Moreover, Plaintiffs alleged TSC's assertion it would act as a "neutral party" when it was Brock & Scott's "alter ego" was a "false and misleading representation that violated N.C. Gen. Stat. § 75-54 and -54(7)." Plaintiffs supported this claim by incorporating the factual allegations as explained above.

¶ 9 On 4 October 2019, Brock & Scott filed a Motion to Dismiss "pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure" requesting the trial court "dismiss with prejudice the Complaint . . . pursuant to Rule 12(b)(6) . . . ." On 11 October 2019, TSC filed a Motion to Dismiss "pursuant to Rule 12(b)(6) of the North

Carolina Rules of Civil Procedure" requesting the trial court "dismiss with prejudice the Complaint . . . ." Defendants' Motions came on for hearing in Davidson County Superior Court on 24 February 2020. During the hearing, Defendants' counsel presented a number of arguments as to why the Complaint had not stated a claim on which the trial court could grant relief. At the close of Defendants' arguments, Plaintiffs' counsel asked the trial court: "may we be allowed to submit a supplemental brief?" The trial court denied Plaintiffs' request stating: "I'll tell you what. I think I've got everything I need."

¶ 10 On 3 March 2020, the trial court entered Orders granting Defendants' Motions to Dismiss. Using identical language in each Order, the trial court explained: "having heard arguments of counsel . . . reviewed the pleadings and other matters of record and/or submitted for consideration, and taken judicial notice of pleadings and other filings in the underlying foreclosure proceeding[,]" "[the trial court] finds as a matter of fact and concludes as a matter of law that Plaintiffs have failed to state any claim upon which relief can be granted" against Defendants. Consequently, the trial court "dismissed with prejudice" Plaintiffs' claims against Defendants. Plaintiffs filed written Notice of Appeal of the trial court's 3 March 2020 Orders on 29 May 2020.[3]

[3] Although Rule 3 of the North Carolina Rules of Appellate Procedure requires parties to file notice of appeal within thirty days of the entry of judgment, on 27 March 2020, the Chief

Issue

¶ 11 The issue on appeal is whether the trial court erred in granting Defendants' Motions to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief could be granted pursuant to N.C. R. Civ. P. 12(b)(6) under either the FDCPA or the NCDCA.

Analysis

¶ 12 Plaintiffs argue the trial court erred in granting Defendants' Motions to Dismiss Plaintiffs' Complaint for failure to state a claim because: (A) Defendants' Motions "failed to state with particularity the grounds upon which [the Motions] were based" pursuant to N.C. R. Civ. P. 7(b)(1); (B) the trial court abused its discretion by denying Plaintiffs' request to submit supplemental briefs during the motion hearing; and (C) that Plaintiffs' Complaint did, in fact, state claims upon which relief could have been granted under the FDCPA and NCDCA.

¶ 13 On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567,

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Justice issued an Order extending deadlines "imposed by the Rules of Appellate Procedure that fall between 27 March 2020 and 30 April 2020, inclusive of those endpoints," by sixty days. Consequently, Plaintiffs timely filed their Notice of Appeal.

597 S.E.2d 673 (2003); *see also Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) ("Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (citation and quotation marks omitted)). This Court views the allegations in the complaint in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994) (citation omitted). Further, this Court considers "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted).

¶ 14 "In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises and must state sufficient allegations to satisfy the substantive elements of at least some recognized claim." *Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 319, 677 S.E.2d 182, 186 (2009) (citation omitted). "[D]espite the liberal nature of the concept of notice pleading, [however,] a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (citation omitted); *see also Leasing Corp. v. Miller*, 45 N.C. App. 400,

405, 263 S.E.2d 313, 317 (1980) ("A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim." (citation omitted)).

A. Adequacy of Motions to Dismiss under N.C. R. Civ. P. 7(b)(1)

¶ 15 Plaintiffs first argue Defendants' Motions to Dismiss did not adequately meet the requirement of N.C. R. Civ. P. 7(b)(1) to state the grounds for a motion with particularity because the Motions alleged only that Plaintiffs' Complaint should be dismissed "pursuant to Rule 12(b)(6)." Although Plaintiffs do not articulate what level of particularity the Motions were required to meet, Plaintiffs' implication appears to be that such Motions to Dismiss under Rule 12(b)(6)—at least in Plaintiffs' case—should identify each and every element the Complaint fails to allege or every fact pleaded which bars relief. Specifically, as it relates to Plaintiffs' claims under the FDCPA, Plaintiffs appear to advocate for Motions to Dismiss which identify with granular detail application of specific statutory sub-sections under 15 U.S.C. § 1692. Plaintiffs submit this is so because "there are dozens, if not hundreds, of ways to lose an FDCPA case at the motion-to-dismiss stage."

¶ 16 Rule 7(b)(1) provides:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a

> cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

N.C. Gen. Stat. § 1A-1 Rule 7(b)(1) (2019). Indeed, we have previously reasoned:

> A bare-bones motion . . . which neither states the grounds nor specifies the relief sought, fails to inform either the court or the adverse party of what the movant wants. Such complete failure to give notice cannot fairly be passed off as a technical defect, as defendant would persuade us. For where court and adverse party cannot comprehend the basis of a motion, they are rendered powerless to respond to it.

Dusenberry v. Dusenberry, 87 N.C. App. 490, 492, 361 S.E.2d 605, 606 (1987) (holding a motion to alter or amend the judgment failed to satisfy Rule 7(b)(1) where it merely stated the defendant "moves this Honorable Court pursuant to Rule 59(e) to alter or amend the judgment"). Rule 59(a) provides nine specific grounds for amending judgments. N.C. Gen. Stat. § 1A-1 Rule 59(a) (2019). Thus, without at least naming one of those grounds, neither the parties nor the trial court can decipher the grounds for a request to alter or amend a judgment. *See Dusenberry*, 87 N.C. App. at 492, 361 S.E.2d at 606 ("[D]efendant's first Rule 59(e) motion failed either to state the grounds or set forth the relief sought.").

¶ 17 However, unlike in *Dusenberry* where the movant only listed the statute and not one of the enumerated grounds for relief under the statute, Defendants here moved to dismiss pursuant to Rule 12(b)(6). Rule 12(b)(6) states a single ground for

dismissal pursuant to the rule—"[f]ailure to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). Therefore, Plaintiffs and the trial court could decipher Defendants' ground for dismissal as it was the only ground available under Rule 12(b)(6). Indeed, to defeat Defendants' Motions to Dismiss, Plaintiffs needed only to argue how their Complaint alleged facts to support any legal claim against Defendants. Consequently, in this case, Defendants' Motions satisfied Rule 7(b)(1)'s particularity requirements. *Cf. Dusenberry*, 87 N.C. App. at 492, 361 S.E.2d at 606.

B. Supplemental Briefing

¶ 18 In an off-shoot to this first argument, Plaintiffs further argue the trial court abused its discretion by denying their request to submit supplemental briefing on Defendants' Motions after Defendants presented their arguments at the motion hearing. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Here, the trial court—even at this preliminary 12(b)(6) stage—had an extensive record before it and received the arguments of counsel at the hearing. Moreover, the trial court did not simply deny Plaintiffs' request to submit supplemental briefing with no explanation. In fact, after hearing all of the parties' arguments on the

Motions to Dismiss, the trial court responded to Plaintiffs' request for supplemental briefing by stating: "I'll tell you what. I think I've got everything I need." Indeed, Plaintiffs fail to articulate any specific issue that required supplemental briefing. On this Record, we cannot conclude the trial court abused its discretion in denying supplemental briefing on Plaintiffs' Rule 12(b)(6) Motion.

C. Failure to State a Claim

¶ 19 Last, Plaintiffs argue the trial court erred in granting Defendants' Motions to Dismiss because their Complaint did, in fact, allege facts to support their legal claims for relief under the FDCPA and NCDCA. Again, this Court reviews Rule 12(b)(6) dismissals de novo, "viewing the allegations as true and . . . in the light most favorable to the non-moving party. . . . When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper." *Sykes v. Health Network Sols. Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019) (citations and quotation marks omitted). Plaintiffs' Complaint lists three alleged violations of the FDCPA: 15 U.S.C. § 1692e(5); 15 U.S.C. § 1692e(10); and 15 U.S.C. § 1692f(6). Plaintiffs also alleged TSC violated various provisions of the NCDCA.

1. FDCPA Claims

¶ 20 The FDCPA regulates:

> " 'debt collector[s].' " 15 U.S.C. § 1692a(6); *see* 91 Stat. 874, 15 U.S.C. § 1692 et seq. A " 'debt collector,' " the Act says, is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." § 1692a(6). This definition, however, goes on to say that "[f]or the purpose of section 1692f(6)" (a separate provision of the Act), "[the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." *Ibid.*

Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 1031, 203 L. Ed. 2d 390, 394 (2019). In *Obduskey*, the creditor bank hired a law firm to pursue non-judicial foreclosure proceedings on the debtor. *Id.* at 1035, 203 L. Ed. 2d at 396. The creditor filed a federal suit against the law firm for alleged violations of 15 U.S.C. § 1692g(b)'s debt verification provisions. *Id.* The United States Supreme Court held that entities involved in merely pursuing non-judicial foreclosures are not subject to the FDCPA's provisions, save for § 1692f(6), because to include such entities would make the "limited-purpose definition" defining those who enforce security instruments as debt collectors "superfluous." *Id.* at 1036-37, 203 L. Ed. 2d at 398-99.

¶ 21 Similarly, here, although Plaintiffs alleged facts that could support the conclusion Defendant Brock & Scott was a debt collector, based on the nature of its business generally, the allegations giving rise to Plaintiffs' Complaint stemmed from Defendants' actions in enforcing security interests—the note and deed of trust through non-judicial foreclosure. Consequently, the only claim for which Plaintiffs

could seek relief specifically in this case would be Defendants' alleged violations of § 1692f(6) as an entity enforcing a security interest. *See id.*

¶ 22 15 U.S.C. § 1692f(6) prohibits debt collectors, defined in § 1692a(6) as those enforcing security interests, from:

> Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
> (B) there is no present intention to take possession of the property; or
> (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. § 1692f(6) (2018). Plaintiffs alleged "Madison had no right to invoke foreclosure under the deed of trust, because the assignment of the deed of trust [did] not conform to N.C. Gen. Stat. § 47-18.3." More specifically, Plaintiffs alleged this was so because the assignment to Madison from Springleaf Trust "does not include a corporate resolution from Springleaf Trust authorizing either Nationstar or Terefe Tekle to sign deeds, conveyances, or other documents on behalf of Springleaf Trust, as required by N.C. Gen. Stat. § 47-18.3(e)."

¶ 23 N.C. Gen. Stat. § 47-18.3 addresses the proof of corporate authority to execute instruments to be filed with a register of deeds. Section 47-18.3(e) itself provides for proof of authorization of corporate conveyances of interests in real property:

> Any corporation or limited liability company may convey an interest in real property which is transferable by instrument which is duly executed by either an officer, manager, member, or agent of said corporation or limited liability company and has attached thereto a signed and attested resolution of the board of directors of said corporation or the managers or members of the limited liability company authorizing the said officer, manager, member, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. Notwithstanding the foregoing, this section shall not require a signed and attested resolution of the board of directors of the corporation or the managers or members of the limited liability company to be attached to an instrument or separately recorded in the case of an instrument duly executed by the corporation's or limited liability company's chairman, president, chief executive officer, a vice-president, assistant vice-president, treasurer, chief financial officer, chief operations officer, general counsel, deputy or assistant general counsel, manager, member, director, or other fiduciary duly authorized by the applicable business entity's statutes or governing documents. All deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein.

N.C. Gen. Stat. § 47-18.3 (2019). Thus, in sum, the statute first provides a corporate entity may convey an interest in real property in an instrument executed by "an officer, manager, member, or agent of said corporation" which is accompanied by or contains a corporate resolution authorizing such execution. *Id*. Second, however, the statute also provides a separate global resolution recorded beforehand may also

provide proof of authorization. *Id*. Third, however, the statute provides a recorded corporate resolution is not necessary when the conveyance is executed by a corporation's "chairman, president, chief executive officer, a vice-president, assistant vice-president, treasurer, chief financial officer, chief operations officer, general counsel, deputy or assistant general counsel, manager, member, director, or other fiduciary duly authorized by the applicable business entity's statutes or governing documents." *Id.*

¶ 24 Here, Plaintiffs alleged the transfer of the deed of trust in this case was invalid because it did not include a recorded corporate resolution. But, Plaintiffs do not allege that the person who signed the document was not, in fact, Springleaf Trust's "duly authorized" fiduciary or that there was, in fact, no corporate authorization for the assignment to Madison. Even assuming Plaintiffs alleged facts that could support this argument, Plaintiffs still failed to allege a claim under § 1692f(6) because proper recordation of authorization under N.C. Gen. Stat. § 47-18.3(e) is not required to validly assign a note and the right to enforce the associated deed of trust under N.C. Gen. Stat. § 47-17.2.

¶ 25 N.C. Gen. Stat. § 47-17.2 provides:

> It shall *not be necessary* in order to effect a valid assignment of a note and deed of trust, mortgage, or other agreement pledging real property or an interest in real property as security for an obligation, *to record a written assignment* in the office of the

> register of deeds in the county in which the real property is located. A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. *The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust*, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction. . . .

N.C. Gen. Stat. § 47-17.2 (2019) (emphases added). As such, "the holder of a note can enforce both the note and the Deed of Trust." *Greene v. Tr. Servs. of Carolina, LLC*, 244 N.C. App. 583, 593, 781 S.E.2d 664, 671-72, *writ denied, rev. denied*, 786 S.E.2d 268 (2016). Again, here, there is no allegation Madison was not, in fact, the holder of the note. Indeed, Plaintiffs' Complaint alleges Madison "purports to be the holder of the note on Plaintiff's defaulted home mortgage."

¶ 26 Moreover, documents attached to Plaintiffs' Complaint further reflect Madison was, in fact, the holder of the note. "When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment." *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009) (citation omitted). Under such circumstances, a "trial court

may reject allegations that are contradicted by documents attached to the complaint." *Id.* at 265, 672 S.E.2d at 553 (citation omitted).

¶ 27 In addition to a copy of the assignment from Springleaf Trust to "US Bank as indenture trustee for Madison[,]" Plaintiffs also attached the Appointment of Substitute Trustee appointing TSC as the successor trustee which identifies Madison as the noteholder. Moreover, Plaintiffs attached a copy of the Superior Court Order affirming the Clerk's Order allowing the non-judicial foreclosure proceedings to commence. The Superior Court's Order Affirming Foreclosure Order includes a finding: "Madison Revolving Trust 2017, is the holder of the note sought to be foreclosed and it evidences a valid debt owed by [Plaintiffs]." Thus, as the note holder, Madison could enforce the deed of trust through foreclosure proceedings and had a right to possession.

¶ 28 In this case, Plaintiffs did not allege that Madison was not a valid note holder or that there was, in fact, no authority to assign the note or deed of trust to Madison or that the assignment from Springleaf Trust was, in fact, legally ineffective. Thus, Plaintiffs failed to allege Madison did not, in fact, have no right to foreclose on the property. Therefore, in turn, Plaintiffs did not allege facts Madison did not have a right of possession in the property to sustain a claim under 15 U.S.C. § 1692f(6).

Consequently, the trial court properly granted Defendants' Rule 12(b)(6) Motions to Dismiss Plaintiffs' federal claims.

2. NCDCA Claims

¶ 29 Plaintiffs also alleged Defendant TSC violated the NCDCA when it served the Notice of Hearing alleging Madison had the right to foreclose, TSC had the right to serve as substitute trustee, and that TSC was a neutral party that could protect the noteholder and Plaintiffs. The NCDCA, as codified in N.C. Gen. Stat. § 75-50, *et seq.*, proscribes a number of activities for "debt collectors" collecting debts from "consumer[s]." N.C. Gen. Stat. § 75-50 (2019). In this context, a debt collector is defined as: "any person engaging directly or indirectly, in debt collection from a consumer . . . ."[4] N.C. Gen. Stat. § 75-50(3) (2019). "To establish a NCDCA claim, a plaintiff must show, among other elements, that: (1) the obligation owed is a 'debt'; (2) the one owing the obligation is a 'consumer'; and (3) the one trying to collect the obligation is a 'debt collector.' " *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 197, 767 S.E.2d 374, 378 (2014) (quoting *Green Tree Servicing LLC v. Locklear*, 236 N.C. App. 514, 520, 763 S.E.2d 523, 527 (2014)). Here, TSC specifically argues Plaintiffs have not sufficiently pled they are "consumers" as required to bring a suit pursuant to N.C. Gen. Stat. § 75-50. Under the NCDCA " 'Consumer' means any

[4] Except for collection agencies receiving permits from the Commissioner of Insurance under Article 70 of Chapter 58 of our General Statutes.

natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes." N.C. Gen. Stat. § 75-50(1) (2019).

¶ 30 We have held in order to state a claim under the NCDCA, parties must then "allege that they incurred the debt for 'personal, family, household or agricultural purposes.' " *Wells Fargo Bank, N.A.*, 238 N.C. App. at 197, 767 S.E.2d at 378. Here, Plaintiffs alleged that they were natural persons residing at the subject property in North Carolina and that they incurred a debt through the HELOC on their home. We are mindful that in reviewing a Motion to Dismiss under Rule 12(b)(6) we are to treat the well-pleaded allegations as true and in the light most favorable to the pleader. *Donovan*, 114 N.C. App. at 526, 442 S.E.2d 574. Indeed, a complaint "must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. Cnty. of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). Here, applying these principles we conclude Plaintiff's allegations that, in sum, they obtained the HELOC on their residence are adequate to allege they are "consumers" in that they incurred the debt for household or personal purposes to withstand a Rule 12(b)(6) motion to dismiss on their NCDCA claims. Therefore, under a liberal construction, the Complaint alleged enough facts "to give the substantive elements of at least some legally recognized claim . . . ."

Stanback, 297 N.C. at 204, 254 S.E.2d at 626. Thus, the trial court erred in granting TSC's Motion to Dismiss Plaintiffs' NCDCA claim against TSC. Consequently, we reverse the trial court's dismissal of Plaintiffs' NCDCA claim against TSC. We express no opinion, however, on the ultimate merits of this claim.

Conclusion

¶ 31 Accordingly, for the foregoing reasons, we affirm the trial court's Orders granting Defendants' Motions to Dismiss Plaintiffs' FDCPA claims. However, we reverse the trial court's Order granting TSC's Motion to Dismiss only insofar as the Order dismissed Plaintiffs' NCDCA claim against TSC, and we remand to the trial court for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judge INMAN concurs.

Judge MURPHY concurs in part and dissents in part.

Report per Rule 30(e).

MURPHY, Judge, concurring in part and dissenting in part.

¶ 32 I agree with the Majority's holding that Plaintiffs' Complaint sufficiently alleges violations of the North Carolina Debt Collection Act ("NCDCA") by Defendant TSC. However, I disagree with the Majority's holding that Plaintiffs' Complaint does not sufficiently allege violations of the federal Fair Debt Collection Practices Act ("FDCPA") to overcome a Rule 12(b)(6) motion to dismiss, and therefore I respectfully dissent.

¶ 33 The Majority reads and applies the U.S. Supreme Court's holding in *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019), to conclude that "the only claim for which Plaintiffs could seek relief specifically in this case would be Defendants' alleged violations of [15 U.S.C.] § 1692f(6) as an entity enforcing a security interest" because "the allegations giving rise to Plaintiffs' Complaint stemmed from Defendants' actions in enforcing security interests[.]" *Supra* at ¶ 21. However, I read *Obduskey* to leave open the possibility that a party enforcing a security interest could be considered a general debt collector under the FDCPA where a complaint alleges facts that support the party being a debt collector based on the nature of its business generally. Consequently, I would hold Plaintiffs' Complaint sufficiently alleges that Defendants are debt collectors based on the nature of their businesses generally and, thus, are subject to the full coverage of the FDCPA. I would also hold Plaintiffs' Complaint sufficiently alleges that Defendants violated several prohibitions of the FDCPA upon which relief can be granted. As a result, in addition

to the Majority's reversal of the dismissal of Plaintiffs' NCDCA claims against TSC, I would reverse the trial court's dismissal of Plaintiffs' FDCPA claims.

ANALYSIS

¶ 34 On appeal of a Rule 12(b)(6) motion, we conduct "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. Of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (marks omitted).

¶ 35 "The essential question on a motion under Rule 12(b)(6) 'is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory.'" *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001) (quoting *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985)). The trial court must treat the allegations in the complaint as true, *see Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 575, 473 S.E.2d 680, 682, *disc. rev. denied*, 344 N.C. 734, 478 S.E.2d 5 (1996), but it is not required to accept as true any conclusions of law or unwarranted deductions of fact. *See Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). The trial court "should not dismiss the complaint unless it appears

beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 292, 603 S.E.2d 147, 154 (2004), *disc. rev. denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). Thus, we should reverse the grant of a Rule 12(b)(6) motion "unless it appears to a certainty that [the] plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (marks omitted).

A. "Debt Collector" Under the FDCPA

¶ 36 I do not read the holding of *Obduskey*, 139 S. Ct. 1029, 203 L. Ed. 2d 390, to require that "the only claim for which Plaintiffs could seek relief specifically in this case would be Defendants' alleged violations of [15 U.S.C.] § 1692f(6) as an entity enforcing a security interest" because "the allegations giving rise to Plaintiffs' Complaint stemmed from Defendants' actions in enforcing security interests[.]" *Supra* at ¶ 21. The Majority does acknowledge that, if not for this conclusion, "Plaintiffs alleged facts that could support the conclusion Defendant Brock & Scott was a debt collector based on the nature of its business generally[.]" *Supra* at ¶ 21. I agree with this limited portion of the Majority's reasoning and, as discussed below, would hold that Plaintiffs alleged enough to survive Defendants' motions to dismiss.

¶ 37 The FDCPA provides two definitions for "debt collector." *See* 15 U.S.C. § 1692a(6) (2019). A debt collector is "any person who uses any instrumentality of

interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* Additionally, "[f]or the purpose of [15 U.S.C. §] 1692f(6) . . . , such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Id.* The distinction between the two is significant: general debt collectors must comply with the entire Act; security-interest enforcers need only comply with 15 U.S.C. § 1692f(6). *See Obduskey*, 139 S. Ct. at 1036, 203 L. Ed. 2d at 397 ("No one here disputes that McCarthy is, by virtue of its role enforcing security interests, at least subject to the specific prohibitions contained in [15 U.S.C.] § 1692f(6). The question is whether *other* provisions . . . apply[,] [a]nd they do if . . . McCarthy falls within the scope of the Act's primary definition of 'debt collector.'").

¶ 38 Based on this distinction, the U.S. Supreme Court held in *Obduskey* that "but for [15 U.S.C.] § 1692f(6), those who engage in *only* nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act." *Id.* at 1038, 203 L. Ed. 2d at 399. There, "the only basis alleged for concluding that [the defendant was] a debt collector under the Act [was] its role in nonjudicial foreclosure proceedings." *Id.* at 1039, 203 L. Ed. 2d at 401. The Supreme Court explained that 15 U.S.C. § 1692a(6) "does (with its [15 U.S.C.] § 1692f(6) exception) place those

whose 'principal purpose is the enforcement of security interests' outside the scope of the primary 'debt collector' definition where the business is engaged in no more than the kind of security-interest enforcement at issue here—nonjudicial foreclosure proceedings." *Id.* at 1033, 203 L. Ed. 2d at 394 (citation omitted). The Majority likens the allegations in Plaintiffs' Complaint to the facts of *Obduskey* to conclude Defendants are only security-interest enforcers because the allegations giving rise to Plaintiffs' claims stem from Defendants' enforcement of security interests in the note and deed of trust through nonjudicial foreclosure. *Supra* at ¶¶ 20-21.

¶ 39 But the *Obduskey* holding related to the situation where the "only basis" alleged for a defendant being a debt collector is "its role in nonjudicial foreclosure proceedings." *Obduskey*, 139 S. Ct. at 1039, 203 L. Ed. 2d at 401. It did "not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transfer a security-interest enforcer into a debt collector subject to the main coverage of the Act." *Id.* at 1040, 203 L. Ed. 2d at 401. Here, as discussed below, the Complaint is much more detailed and thorough in its allegations than solely relying on Defendants' enforcement of security interests. Thus, the Supreme Court left unanswered the question with which we are presented here: may a party enforcing a security interest be considered a general debt collector under the FDCPA where the Complaint alleges facts that support the party being a debt collector based on the nature of its business generally?

¶ 40 In my review of the trial court's grant of Defendants' Rule 12(b)(6) motions, the answer to that question—when considering the facts alleged here as true and viewing them in the light most favorable to Plaintiffs—is yes. If not for the Majority's reliance on *Obduskey*, which it extends beyond the issue decided there, the Majority would also answer this question in the affirmative, at least for Defendant Brock & Scott being classified as a debt collector. *Supra* at ¶ 21 ("Plaintiffs alleged facts that could support the conclusion Defendant Brock & Scott was a debt collector based on the nature of its business generally . . . ."). Here, the Complaint sufficiently alleges facts that support that Defendants Brock & Scott and TSC are debt collectors based on the nature of their businesses generally. *See* 15 U.S.C. § 1692a(6) (2019) (defining "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect" debts owed to another).

¶ 41 First, the Complaint provides five paragraphs of factual allegations that support the conclusion that Defendant Brock & Scott is a debt collector:

> 5. Brock & Scott's website lists one of its practice areas as "Creditors' Rights & Collections." Its website further states that its clients include "top national banks, credit card companies, retailers, commercial asset holders and others across the county. We provide nationwide coverage on both commercial and consumer account collection matters."
>
> 6. Brock & Scott's website goes on to state, "Our Collections

> and National Account Services divisions cover collections litigation, post-judgment execution, settlement negotiations and skip tracing on the following types of claims: Consumer & Retail Cards, Commercial Loans, Business Cards, Banking, Auto Loans, Personal Lines & Loans, Student Loans, Home Equity Lines & Loans, Mortgage Deficiency Balances, [and] Small Business. . . . The Collection Division attempts to collect debt from consumers that have defaulted on their legal obligations."
>
> 7. Brock & Scott's website also lists one of the firm's practice areas as "Real Estate Default." The website goes on to state that the "Real Estate Default Services" it offers include "Pre-Foreclosure, Loss Mitigation, Title Curative Remedies & Litigation, Residential & Commercial Foreclosure Services, Mobile Home Foreclosures & Title Curative, Bankruptcy, Litigation & Defense, Evictions, REO Services, [and] Deficiency Suits."
>
> 8. In other words, Brock & Scott's own website makes clear that it goes well beyond taking the steps laid out in Chapter 45 of the North Carolina General Statutes to foreclose under a deed of trust; to the contrary, Brock & Scott engages in a host of types of activities in order to collect on defaulted home mortgages, which go beyond simply "enforcing security interests."
>
> 9. Brock & Scott has filed several lawsuits against North Carolina consumers to collect consumer debts. Brock & Scott also regularly sends debt-collection letters to North Carolina consumers on behalf of its clients.
>
> 10. For the foregoing reasons, Brock & Scott is a "debt collector" as that term is defined by 15 U.S.C. § [1692a(6)].

Taking as true the Complaint's allegations that Brock & Scott's business goes beyond solely foreclosing under deeds of trust by engaging in a variety of activities when collecting and attempting to collect debts owed to others based on its own description

of its business and on its filing of lawsuits and sending of letters to collect debts on behalf of clients, the Complaint sufficiently alleges that Defendant Brock & Scott is a debt collector based on the nature of its business generally.

¶ 42 Second, the Complaint provides three paragraphs of factual allegations that support the conclusion that Defendant TSC is a debt collector:

> 12. [TSC] regularly acts as a substitute trustee under deeds of trust, and in that capacity has initiated thousands of home foreclosures within the State of North Carolina.
>
> 13. On information and belief, and as further explained below, [TSC] is owned and controlled solely by Brock & Scott. Further, on information and belief, Brock & Scott markets [TSC's] services to mortgage servicers and lenders as part of a complete, beginning-to-end debt collection package. Finally, on information and belief, [TSC] is an alter ego or mere department of Brock & Scott, such that [TSC] and Brock & Scott form part of the same single enterprise.
>
> 14. Because [TSC] is an alter ego and mere department of, and part of the same single enterprise as, Brock & Scott, a debt collector subject to the FDCPA, it too is a "debt collector" as that term is defined by 15 U.S.C. § [1692a(6)].

As the Complaint's allegations are sufficient to support that Brock & Scott is a debt collector based on the nature of its business generally, the allegations are sufficient to support that TSC is one as well since we take as true that Defendants are part of a single enterprise. In sum, contrary to the Majority's conclusion, Defendants are subject to *all* the FDCPA's prohibitions—not just the prohibition in 15 U.S.C. §

1692f(6). We must therefore consider whether Plaintiffs' FDCPA claims were sufficiently alleged to withstand Defendants' Rule 12(b)(6) motions.

B. Pleading Sufficiency of Plaintiffs' FDCPA Claims

1. Invocation of Nonjudicial Foreclosure in Violation of 15 U.S.C. § 1692f(6)

¶ 43 We first address Plaintiffs' FDCPA claim that alleges Defendants violated 15 U.S.C. § 1692f(6) by invoking nonjudicial foreclosure with "no present right to possession of the property claimed as collateral through an enforceable security interest." The Complaint alleges three bases for Defendants improperly invoking nonjudicial foreclosure: "(a) the alleged creditor, Madison, had no right to foreclose . . . , (b) [TSC] had no right to serve as substitute trustee and . . . conduct the foreclosure sale, and (c) Madison has no right to do business as a 'debt buyer' or 'collection agency.'" When taking the factual allegations supporting the bases as true, the Complaint sufficiently alleges Defendants violated 15 U.S.C. § 1692f(6).

¶ 44 15 U.S.C. § 1692f(6) prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest[.]" 15 U.S.C. § 1692f(6) (2019). No matter whether they are general debt collectors or security-interest enforcers, Defendants are bound by the prohibition in 15 U.S.C. § 1692f(6). *See* 15 U.S.C. § 1692a(6) (2019).

a. Assignment of the Deed of Trust from Springleaf Trust to Madison

i. Sufficiency of Allegations

¶ 45 The first basis for Plaintiffs' 15 U.S.C. § 1692f(6) claim is that Defendants invoked nonjudicial foreclosure proceedings "despite . . . the alleged creditor, Madison, [having] no right to foreclose on [Plaintiffs'] home." Plaintiffs' Complaint alleges "Madison [had] no right to invoke foreclosure under the deed of trust, because the assignment of the deed of trust [did] not conform to [N.C.G.S.] § 47-18.3." The Complaint further alleges the assignment to Madison from Springleaf Trust "does not include a corporate resolution from Springleaf Trust authorizing either Nationstar or Terefe Tekle to sign deeds, conveyances, or other documents on behalf of Springleaf Trust, as required by [N.C.G.S.] § 47-18.3(e)."

¶ 46 As explained by the Majority, N.C.G.S. § 47-18.3(e) requires proof that the person signing an instrument that conveys an interest in real property on behalf of a corporate entity has been approved to convey the interest by requiring the attachment of an authorizing corporate resolution to the instrument unless the conveyance is executed by specific individuals or there was a separate global authorizing resolution recorded beforehand. *Supra* at ¶ 23 (citing N.C.G.S. § 47-18.3(e) (2019)).

¶ 47 Here, taking the allegations as true and viewing them in the light most favorable to Plaintiffs, the Complaint alleges facts that indicate the assignment did not conform to N.C.G.S. § 47-18.3(e) and, thus, that Defendants violated 15 U.S.C. §

1692f(6) by invoking nonjudicial foreclosure with no present right to possession of the property claimed as collateral through an enforceable security interest. The Complaint provides two paragraphs of allegations in support of Plaintiffs' argument that the purported assignment did not conform with N.C.G.S. § 47-18.3:

> 36. On [16 May 2018], another assignment which purported to transfer the deed of trust on [Plaintiffs'] [h]ome was filed with the Davidson County Register of Deeds. A copy of the purported [16 May 2018] is attached to this Complaint as **Exhibit D**. The document, on its face, claims to have been electronically submitted by Brock & Scott. The document was signed, not by an officer of the Springleaf Trust or of U.S. Bank National Association (indenture trustee of Springleaf Trust) ("U.S. Bank"), but by someone named Terefe Tekle, who claims to be an officer of "Nationstar Mortgage LLC, its attorney-in-fact." Whether Nationstar Mortgage LLC ("Nationstar") is claiming to be Springleaf Trust's attorney-in-fact, or U.S. Bank's attorney-in-fact, is unclear. Madison is named as the assignee. Madison's address is listed on the assignment as P.O. Box 296, Madison, WI 53701.
>
> 37. The purported [16 May 2018] assignment does not include a corporate resolution from Springleaf Trust authorizing either Nationstar or Terefe Tekle to sign deeds, conveyances, or other documents on behalf of Springleaf Trust, as required by [N.C.G.S.] § 47-18.3(e).

As we must take allegations in Plaintiff's Complaint as true, we must accept that Terefe Tekle—who signed and executed the assignment on behalf of Springleaf Trust—was not an officer of Springleaf Trust or U.S. Bank National Association (its indenture trustee) but instead an officer of Nationstar. We must also accept that the

purported assignment does not have an attached corporate resolution from Springleaf Trust authorizing either Nationstar or Tekle to sign deeds, conveyances, or other documents on behalf of Springleaf Trust. The Complaint sufficiently states a 15 U.S.C. § 1692f(6) claim because the purported assignment to Madison was not authorized by law and, thus, Defendants would lack the right to present possession of the property if Tekle was not an officer of Springleaf Trust or its indenture trustee *and* the assignment was not accompanied by a corporate resolution from Springleaf Trust authorizing Tekle or Nationstar to enter into such an assignment on their behalf as required by N.C.G.S. § 47-18.3(e).

ii. Missing Explicit Allegations

¶ 48 This conclusion is not changed by the Complaint not explicitly alleging, as the Majority opines, "that the person who signed the document was not, in fact, Springleaf Trust's 'duly authorized' fiduciary or that there was, in fact, no corporate authorization for the assignment to Madison." *Supra* at ¶ 24. "The complaint must be liberally construed, and [a] court should not dismiss the complaint unless it appears *beyond a doubt* that the plaintiff could not prove *any* set of facts to support his claim which would entitle him to relief." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (emphasis added), *disc. rev. denied*, 358 N.C. 543, 599 S,E,2d 48-49 (2004). When construed liberally and its factual allegations viewed in the light most favorable to Plaintiffs, the Complaint alleges that

neither Tekle nor Nationstar was a duly authorized fiduciary and no global authorizing resolution was recorded beforehand by claiming N.C.G.S. § 47-18.3(e) requires an attached corporate authorization for Nationstar or Tekle to sign documents on behalf of Springleaf Trust and alleges explicitly there was no such attached corporate resolution.

iii. Allegation from ¶ 18 of the Complaint

¶ 49 Nor is this conclusion altered by the Majority's reliance on the allegation in paragraph 18 of the Complaint that "Madison 'purports to be the holder of the note on [Plaintiffs'] defaulted home mortgage.'" *Supra* at ¶ 25. "Purport" is defined as "[t]o profess or claim, esp[ecially] falsely[,]" meaning the Complaint alleges that Madison falsely claims to be the holder of the note—a position consistent with the Complaint's allegation that the assignment of the note from Springleaf Trust to Madison was invalid. *Purport*, BLACK'S LAW DICTIONARY (11th ed. 2019). Consequently, it does not "appear[] to a certainty that [Plaintiffs are] entitled to no relief under any state of facts which could be proved in support of the claim." *Cage*, 337 N.C. at 683, 448 S.E.2d at 116.

iv. Interaction between N.C.G.S. § 47-17.2 and N.C.G.S. § 47-18.3(e)

¶ 50 Further justifying its decision to affirm the dismissal of Plaintiffs' 15 U.S.C. § 1692f(6) claim, the Majority asserts,

> assuming Plaintiffs alleged facts that could support this

> argument, Plaintiffs still failed to allege a claim under [15 U.S.C.] § 1692f(6) because proper recordation of authorization under [N.C.G.S.] § 47-18.3(e) is not required to validly assign a note and the right to enforce the associated deed of trust under [N.C.G.S.] § 47-17.2.

Supra at ¶ 24. I disagree with the Majority's characterization of Plaintiffs' allegations. Plaintiffs' Complaint, in the light most favorable to Plaintiffs, does not allege that Defendants *failed to record* the corporate authority, but instead alleges that the purported assignment *was made without* corporate authority. Although Plaintiffs rely on the absence of any corporate authorization in Defendants' recorded assignment of the deed of trust, the requirement of N.C.G.S. § 47-18.3(e) that a corporate authorization be "attached" to the instrument would require such an authorization to appear with the assignment in the public registry.[5] In the context of Plaintiffs' allegations regarding the lack of corporate authority for the assignment of the deed of trust, N.C.G.S. § 47-17.2 is inapplicable.

¶ 51 The Majority emphasizes N.C.G.S. § 47-17.2's language that it "not be necessary . . . to record a written assignment" and that the "assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust." *Supra* at ¶ 25

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[5] I note that, if the Majority is correct that there is no requirement to record a corporate authority "attached" to an assignment when the assignment is recorded with the Register of Deeds, it is unclear to me how *any* complaint could survive a motion to dismiss on whether an assignment was made with corporate authority. *Supra* at ¶¶ 22-27.

(emphasis omitted) (quoting N.C.G.S. § 47-17.2 (2019)). This portion of N.C.G.S. § 47-17.2 provides the rights of an assignee, which exist independently of whether the assignment is recorded, but only where there has been a "valid" and "effective" assignment.[6] N.C.G.S. § 47-17.2 (2021). However, the failure to comply with N.C.G.S. § 47-18.3(e) results in an invalid assignment that does not pass title. *See generally* N.C.G.S. § 47-18.3(e) (2021).

¶ 52 As discussed above, N.C.G.S. § 47-18.3(e) states:

> Any corporation or limited liability company may convey an interest in real property which is transferable by instrument which is duly executed by either an officer, manager, member, or agent of said corporation or limited liability company *and has attached thereto a signed and attested resolution* of the board of directors of said corporation or the managers or members of the limited liability company *authorizing the said officer, manager, member, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments*.

N.C.G.S. § 47-18.3(e) (2021) (emphasis added). However, there is an exception to this requirement:

> This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies,

---

[6] N.C.G.S. § 47-17.2 does not discuss what must be done to execute a valid assignment other than to generally provide that recordation is a not a requirement of a valid assignment. *See generally* N.C.G.S. § 47-17.2 (2021). The removal of a requirement of recordation generally for a valid assignment does not change the specific requirement that corporations and limited liability companies authorize their conveyances in order to execute a valid conveyance pursuant to N.C.G.S. § 47-18.3(e).

> which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority.

N.C.G.S. § 47-18.3(e) (2021). There is also an additional exception to the requirement to attaching a signed and attested resolution:

> Notwithstanding the foregoing, this section shall not require a signed and attested resolution of the board of directors of the corporation or the managers or members of the limited liability company to be attached to an instrument or separately recorded in the case of an instrument duly executed by the corporation's or limited liability company's chairman, president, chief executive officer, a vice-president, assistant vice-president, treasurer, chief financial officer, chief operations officer, general counsel, deputy or assistant general counsel, manager, member, director, or other fiduciary duly authorized by the applicable business entity's statutes or governing documents.

N.C.G.S. § 47-18.3(e) (2021). In essence, this section sets out how corporations and limited liability companies may convey an interest in real property that is transferable by an instrument, requiring a signed and attested authorizing resolution to be attached to the instrument that authorizes the conveyance, or an attested authorizing resolution previously recorded in the county where the land lies, or the instrument to be signed by certain individuals within the corporation or limited liability company. According to the terms of N.C.G.S. § 47-18.3(e), a conveyance that has not been executed in accordance with this method is not valid or effective to pass title. *See* N.C.G.S. § 47-18.3(e) (2021) ("All deeds, conveyances, or other instruments

which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein."). Consequently, where a complaint has sufficiently alleged that a conveyance was invalid and ineffective due to the failure to comply with N.C.G.S. § 47-18.3(e), as was alleged by Plaintiffs' Complaint, the language of N.C.G.S. § 47-17.2 does not defeat that allegation at the motion to dismiss stage.

¶ 53 Here, the Complaint alleges that such a valid and effective assignment did not exist because of the failure to comply with N.C.G.S. § 47-18.3(e) and, thus, that Defendants violated 15 U.S.C. § 1692f(6). As a result, N.C.G.S. § 47-17.2 does not defeat Plaintiffs' Complaint's allegation that there was not any corporate authority for the assignment of the deed of trust.

v. Documents Attached to the Complaint

¶ 54 The Majority's final reason for affirming the dismissal of Plaintiffs' 15 U.S.C. § 1692f(6) claim is that "documents attached to Plaintiffs' Complaint further reflect Madison was, in fact, the holder of the note." *Supra* at ¶ 26. Specifically, the Majority relies on the Superior Court's Order Affirming Foreclosure Order attached to the Complaint that "includes a finding[] [that] 'Madison Revolving Trust 2017[] is the holder of the note sought to be foreclosed and it evidences a valid debt owed by Plaintiffs.'" *Supra* at ¶ 27. Although the Majority is correct that documents attached to a complaint may be considered in connection with a Rule 12(b)(6) motion such that

the trial court may reject allegations contradicted by the documents, here it was improper for the trial court to do so.

¶ 55 If Defendants wanted to argue here that the legal conclusions in the Superior Court's Order are binding on this later-filed case, they must have raised the affirmative defense of collateral estoppel in their Rule 12(b)(6) motions. *See N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 374, 649 S.E.2d 14, 26 (2007) (noting collateral estoppel is an affirmative defense); *Gray v. Fed. Nat'l Mortg. Ass'n*, 264 N.C. App. 642, 648-51, 830 S.E.2d 652, 657-59 (2019) (holding the trial court properly barred claims in a second suit challenging the defendant's authority to foreclose under collateral estoppel because the defendant's "right to foreclose *was* authorized by the [county] assistant clerk" and, thus, the claims "merely constitute[d] a collateral attack on [the defendant's] right to foreclose"), *disc. rev. denied*, 374 N.C. 267, 839 S.E.2d 853 (2020). But, as Defendants have not pled this affirmative defense, "[i]t is inappropriate to consider, for purposes of a motion under [Rule] 12(b)(6)," whether collateral estoppel bars Plaintiffs' claims because it "is an affirmative defense that can only be raised by answer or reply."[7] *Brooks Distrib. Co. v. Pugh*, 91 N.C. App. 715, 723-24, 373 S.E.2d 300, 305 (1988) (Cozort, J., dissenting),

[7] Although this issue is not preserved for our review on appeal, Defendants have not waived their ability to assert this affirmative defense below, if appropriate, with their answer to the Complaint.

rev'd per curiam, 324 N.C. 326, 378 S.E.2d 31 (1989) (reversing for reasons stated in Judge Cozort's dissent); *see also* N.C.G.S. § 1A-1, Rule 8(c) (2021). In sum, Plaintiffs' Complaint sufficiently states a 15 U.S.C. § 1692f(6) claim based on Defendants' alleged violation of N.C.G.S. § 47-18.3(e).

b. Remaining Bases for Plaintiffs' 15 U.S.C. § 1692f(6) Claim

¶ 56 Additionally, as to the second and third bases for Plaintiffs' 15 U.S.C. § 1692f(6) claim—that TSC had no right to serve as substitute trustee and invoke foreclosure and that Madison has no right to do business as a "debt buyer" or "collection agency"—the Complaint provides the following allegations that, if taken as true, are sufficient to support a claim upon which relief can be granted:

> 17. Defendant Madison Revolving Trust 2017 ("Madison") is a statutory trust organized and existing under the laws of the State of Delaware. Its principal place of business is c/o Wilmington Savings Fund Society, FSB, 500 Delaware Ave., 11th Fl., Wilmington, DE 19801.
>
> 18. Madison purports to be the holder of the note on Plaintiff's defaulted home mortgage.
>
> 19. According to the Delaware Secretary of State Division of Corporations website, Madison came into existence on [11 August 2017], several months after [] Plaintiffs' home mortgage initially entered default.
>
> 20. On information and belief, Madison is owned and controlled entirely by a company called Chimera Investment Corporation ("Chimera"), which is not a bank nor related to any bank. On information and belief, Wilmington Savings Fund Society, FSB is listed as a

trustee of Madison for the sole reason that, by law, at least one trustee of any Delaware statutory trust must be a resident of Delaware.

21. On information and belief, Madison was formed for the sole purpose of accepting assignment of home mortgages already in default, then collecting upon those accounts.

22. On information and belief, the principal purpose of Madison business — i.e., the way that Madison makes money — is by collecting the delinquent or charged-off debts it purchases. In the course of this business, it uses instrumentalities of interstate commerce or the mails.

23. Moreover, Madison regularly collects or attempts to collect debts owed or due or asserted to be owed or due another. Put another way, while Madison is in the business of collecting debts from consumers, it never loans money to consumers; rather, all of the debts which Madison collects or attempts to collect are asserted to be owed or due to the national bank, lender, or other entity from whom Madison purchased the debt. Madison usually undertakes its collection efforts indirectly, through servicers and law firms that it hires.

24. For the foregoing reasons, Madison is a "debt collector" as that term is defined by 15 U.S.C. § [1692a(6)].

25. Moreover, because Madison is engaged in the business of purchasing delinquent or charged-off consumer credit accounts, Madison is both a "debt buyer" and a "collection agency" as those terms are defined by [N.C.G.S.] § 58-70-15(b).

26. Nevertheless, Madison has not taken the steps (including obtaining a permit) to do business as a collection agency, as required by [N.C.G.S.] § 58-70-1.

. . . .

42. In 2017, the North Carolina General Assembly enacted N.C. Session Law 2017-206, which, among other things, added the following language to the North Carolina statute governing foreclosures under deeds of trust: "An attorney who serves as the trustee or substitute trustee shall not represent either the noteholders or the interests of the borrower while initiating a foreclosure proceeding." [N.C.G.S.] § 45-10.

43. The prohibition added by the legislature in 2017 built upon previously existing law. For instance, the statutory Notice of Hearing used to initiate foreclosure proceedings in North Carolina is required to include the following notice: "[T]he trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." [N.C.G.S.] § 45-21.16(c)(7)(b).

44. Moreover, in 2014, the North Carolina State Bar issued a formal ethics opinion that stated the following: "Because of the conflict between the neutral, fiduciary role of trustee and the role of an advocate for one of the parties to a contested foreclosure, a number of ethics opinions hold that a lawyer serving as trustee in a contested foreclosure proceeding may not represent the secured creditor or the debtor in the proceeding. . . . By extension, a lawyer representing the trustee in a contested foreclosure proceeding is also prohibited from representing the secured creditor or the debtor in the proceeding." N.C. State Bar Formal Ethics Opinion 2014-2.

45. On information and belief, and for the reasons explained below, Brock & Scott and Trustee Services are inextricably intertwined, such that they form a single common enterprise. Put another way, Trustee Services is an alter ego or mere department of Brock & Scott. This is a problem because Brock & Scott is retained and paid by either the creditor (here, Madison) or the creditor's agent

(here, Nationstar), whose job it is to pursue the creditor's interests. Furthermore, on information and belief, the amount that Brock & Scott is paid is tied directly to whether and to what extent it successfully realizes the creditor's interest – creating a conflict of interest (since the same single enterprise is both acting as trustee and advocating for the creditor) that is unacceptably dangerous to borrowers.

46. Brock & Scott was formed in 1998. A copy of the Brock & Scott's Articles of Organization is attached to this Complaint as **Exhibit F**. The Articles of Organization lists Thomas E. Brock as the "Organizing Member."

47. Brock & Scott changed its name to Brock, Scott & Ingersoll, PLLC in 2001. A copy of the Amendment of Articles of Organization that effected that change is attached to this Complaint as **Exhibit G**.

48. Trustee Services was formed in 2003. A copy of its Articles of Organization is attached to this Complaint as **Exhibit H**. The Article of Organization lists Marc W. Ingersoll as both the organizer and initial registered agent of Trustee Services, and Mr. Ingersoll's address is listed as "Brock Scott & Ingersoll, PLLC, 154 Charlois Boulevard, Winston-Salem, NC 27103."

49. In early 2004, Brock, Scott & Ingersoll, PLLC changed its name back to Brock & Scott. The Amendment of Articles of Organization that effected that change is attached to this Complaint as **Exhibit I**.

50. About a month later, Mr. Ingersoll resigned as registered agent for Trustee Services. Mr. Ingersoll's Statement of Resignation is attached to this Complaint as **Exhibit J**.

51. A short time later, Trustee Services designated a new registered agent by filing the form attached to this Complaint as **Exhibit K**. The form was executed by

"James P. Bonner, member/mgr" and it designated Brian Campbell as the new registered agent for Trustee Services.

52. Mr. Bonner is a managing partner of Brock & Scott, whose primary responsibility is directing its Foreclosure Division, as evidenced by Mr. Bonner's profile on www.brockandscott.com, a copy of which is attached to this Complaint as **Exhibit L**.

53. Mr. Campbell is a managing partner of Brock & Scott, whose primary responsibility is managing the Foreclosure Division in North Carolina & South Carolina, as evidenced by Mr. Campbell's profile on www.brockandscott.com, a copy of which is attached to this Complaint as **Exhibit M**.

54. Later that year, Trustee Services filed another Change of Registered Agent form – a copy of which is attached to this Complaint as **Exhibit N** – this time designating Erik T. Bennington as its registered agent.

55. According to the profile page he maintains at the social networking website LinkedIn, Mr. Bennington worked at Brock & Scott from September 2003 to March 2005, where he "[o]versaw daily operations of [the] foreclosure section of [a] statewide creditors' rights law firm handling over 500 new cases each month." A copy of Mr. Bennington's LinkedIn profile page is attached to this Complaint as **Exhibit O**.

56. Annual reports that Trustee Services filed in 2004 – a copy of which is attached to this Complaint as **Exhibit P** – was signed by "Brian L. Campbell, Member/Manager."

57. An annual report that Trustee Services filed in 2010 – a copy of which is attached to this Complaint as **Exhibit Q** – was signed by "Thomas E. Brock, Manager."

58. In short, numerous publicly filed documents demonstrate that Trustee Services was formed and managed by people directly connected to Brock & Scott's

> mortgage collections practice, including named partners of the law firm.
>
> 59. On information and belief, Brock & Scott continues to exercise direct and exclusive control over Trustee Services, such that Trustee Services is a mere department or alter-ego of Brock & Scott, and the two companies form part of a single economic enterprise.
>
> 60. On information and belief, Brock & Scott markets the services of Trustee Services to mortgage lenders and servicers as part of a total package of mortgage debt-collection services.

Defendant Brock & Scott contends Plaintiffs failed to raise the substitute trustee issue within the one-year period prescribed by the statute of limitations, and it claims the assertion that Madison has no right to do business as a "debt buyer" or "collection agency" was not raised in the foreclosure proceeding and, thus, the Superior Court's Order is binding on Madison's right to do business as such an entity.

¶ 57 However, as neither defense was raised with Defendants' Rule 12(b)(6) motions, we may not address them on appeal. *See Unifund CCR, LLC v. Francois*, 260 N.C. App. 443, 445, 817 S.E.2d 915, 917 (2018) (noting a statute of limitations defense is an affirmative defense); *N.C. Indus. Capital*, 185 N.C. App. at 374, 649 S.E.2d at 26 (noting collateral estoppel is an affirmative defense); *Brooks Distrib. Co.*, 91 N.C. App. at 723-24, 373 S.E.2d at 305 (Cozort, J., dissenting) (declining to address an affirmative defense not raised in a Rule 12(b)(6) motion), *rev'd per curiam*, 324 N.C. 326, 378 S.E.2d 31 (reversing for reasons stated in Judge Cozort's dissent).

Plaintiffs made sufficient factual allegations supporting these bases for Plaintiffs' 15 U.S.C. § 1692f(6) claim on which relief can be granted, and we should reverse the dismissal of these portions of their claim.

2. Threat of Action That Could Not Legally Be Taken in Violation of 15 U.S.C. § 1692e(5)

¶ 58 Plaintiffs' Complaint contained another FDCPA claim alleging Defendants' invocation of nonjudicial foreclosure also violated 15 U.S.C. § 1692e(5) "because it constituted a threat to take action that cannot be legally taken." The Complaint supports this claim with the same reasons used to support the first FDCPA claim discussed above as the "threat to take action that cannot be legally taken" is based on the claims that Defendants could not invoke this process without the present right to possession and that they threatened to take such action by giving notice to Plaintiffs in the Notice of Hearing.

¶ 59 15 U.S.C. § 1692e(5) prohibits a debt collector from threatening "to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5) (2019). An entity must meet the general definition of "debt collector" to be subject to the prohibitions in 15 U.S.C. § 1692e, including the one in 15 U.S.C. § 1692e(5). As explained above, Plaintiffs' Complaint sufficiently alleges Defendants are general debt collectors subject to all restrictions in the FDCPA and Defendants have wrongfully invoked nonjudicial foreclosure without the present right to

possession. Plaintiffs' Complaint therefore sufficiently states a 15 U.S.C. § 1692e(5) claim against Defendants on the basis that the Notice of Hearing constituted a threat of action that could not legally be taken.

3. False and Misleading Representation in Violation of 15 U.S.C. §§ 1692e and 1692e(10)

¶ 60 Plaintiffs' final FDCPA claim alleges Defendants violated 15 U.S.C. §§ 1692e and 1692e(10) by asserting in the Notice of Hearing that TSC was a "neutral party" because the assertion was a false and misleading representation of the fact that TSC "is the alter ego of a law firm that was working for the creditor."

¶ 61 15 U.S.C. § 1692e prohibits a debt collector from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e (2019). Further, 15 U.S.C. § 1692e(10) prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(10) (2019). Like their 15 U.S.C. § 1692e(5) claim, Plaintiffs must sufficiently allege Defendants are debt collectors under the FDCPA's general definition. Here, Plaintiffs satisfy this requirement. Additionally, Plaintiffs have provided sufficient facts to conclude that the representation of TSC as a "neutral party" violated 15 U.S.C. §§ 1692e and 1692e(10) based on their alter ego theory, as set out earlier, and the subsequent actions to attempt to collect a debt:

61. On [4 June 2018], [Plaintiffs] received a Notice of Hearing, which is the first step in North Carolina's non-judicial foreclosure process under [N.C.G.S. §] 45-21.16. A copy of the Notice of Hearing that was served on [Plaintiffs] is attached to this Complaint as **Exhibit R**.

62. The Notice of hearing was signed by an attorney employee of Brock & Scott, as "Attorneys for Trustee Services of Carolina, LLC."

63. The statutorily required hearing before the Clerk of the Superior Court was held at the Davidson County Courthouse on [9 July 2018], then adjourned to [10 September 2018]. On the first date, an attorney employee of Brock & Scott appeared, purportedly on behalf of Trustee Services; on the second date, the same attorney employee appeared, but announced that he was now representing the creditor, Madison. The Brock & Scott attorney made all of the arguments in favor of letting the foreclosure sale proceed. Another attorney, from a different law firm, purported to represent Trustee Services during the second date; he did not make any arguments regarding whether or not the foreclosure should proceed.

64. As explained above, Brock & Scott – which was purporting to represent Trustee Services when it signed the Notice of Hearing – was already performing legal services for Madison and/or Nationstar before it signed the Notice of Hearing. Specifically, Brock & Scott had already taken steps to file the assignment of the Deed of Trust to Madison and the designation of the substitute trustee before filing the Notice of Hearing.

65. Moreover, despite the Brock & Scott attorney's announcement that he was now representing the creditor rather than the substitute trustee on [10 September 2018], it was impossible for Brock & Scott to withdraw from representing Trustee Services because Brock & Scott is Trustee Services.

66. On [10 September 2018], the Clerk of the Superior Court signed an order authorizing Trustee Services to conduct a foreclosure sale under the Deed of Trust.

67. The [Plaintiffs] timely appealed the order of the Clerk to a judge of the Superior Court under [N.C.G.S.] § 45-21.16(d1).

68. On [10 October 2018], an attorney from the firm of McGuireWoods LLP entered a notice of appearance in the foreclosure case. In the notice of appearance, the McGuireWoods attorney purported to be representing Trustee Services. A copy of the Notice of Appearance is attached to this Complaint as **Exhibit S**.

69. Nevertheless, during the hearing before the Superior Court judge on [28 January 2019], the McGuireWoods attorney announced that he represented the creditor, Madison, and made arguments in support of allowing the foreclosure sale to proceed.

70. On information and belief, the McGuireWoods attorney's confusion over which company he was representing was a result of the fact that his firm was retained by Brock & Scott/Trustee Services – in other words, the substitute trustee retained a lawyer on behalf of the creditor.

71. A judge of the Superior Court signed an order affirming the Clerk's decision on [16 April 2019]. A copy of the order is attached to this Complaint as **Exhibit T**.

72. On [24 May 2019], [Plaintiffs] appealed to the North Carolina Court of Appeals. That appeal is currently pending.

73. On [3 June 2019], Brock & Scott again appeared on behalf of the creditor in a hearing on a motion filed by [Plaintiffs] – at nearly the exact same time that its alter-ego, Trustee Services, was scheduled to conduct a

> foreclosure sale of 283 Grove Court.
>
> 74. Brock & Scott and Trustee Services, by forming a single enterprise to both serve as substitute trustee and provide debt collection and legal services to mortgage servicers and/or lenders, routinely violate [N.C.G.S.] § 45-10 and N.C. State Bar Formal Ethics Opinion 2014-2. And, by concealing the fact that they operate as a single entity, they violate state and federal debt collection rules.
>
> 75. The fact that the substitute trustee in thousands of North Carolina foreclosures is paid to represent the interests of the creditors means that the substitute trustee has no incentive to engage in an independent investigation as to whether the creditor is entitled to invoke the Deed of Trust. Such independent investigations would likely spot numerous problems, such as the problem with the chain of title in this case.
>
> . . . .
>
> 88. Moreover, the Notice of Hearing asserted that Trustee Services was a "neutral party." As more fully explained above, Trustee Services never was, and never could be, a "neutral party," because it is the alter ego of a law firm that was working for the creditor. For this reason, the Notice of Hearing's assertion that Trustee Services was a "neutral party" was a false and misleading representation that violated [15 U.S.C.] § 1692e and [15 U.S.C. §] 1692e(10).

¶ 62 The only obstacle to reversing the motions to dismiss on this claim is Defendant TSC's argument that Plaintiffs' claim regarding the relationship between Defendants is foreclosed by the decision in *Laws v. Priority Tr. Servs. of N.C., LLC*, 375 F. App'x 345 (4th Cir. 2010). Defendant TSC contends Plaintiffs' claim "is the same claim that

was disposed of by the [Fourth] Circuit in *Laws*." I do not find *Laws* to be persuasive.[8]

¶ 63 In sum, for this claim and Plaintiffs' other FDCPA claims, the Complaint alleges factual allegations that—if treated as true and considered in the light most favorable to Plaintiffs—support claims upon which relief can be granted.

CONCLUSION

¶ 64 Although I agree with the Majority's holding that Plaintiffs' Complaint sufficiently alleges a violation of the NCDCA by Defendant TSC, I would also hold Plaintiffs' Complaint sufficiently alleges that Defendants are debt collectors subject to the entirety of the FDCPA and that Defendants violated several separate prohibitions of the Act. The Complaint states FDCPA claims against Defendants upon which relief can be granted. I disagree with the decision to affirm the dismissal of Plaintiffs' FDCPA claims and respectfully dissent in part.

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[8] *Laws* is non-binding authority. *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 ("[W]ith the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State."), *disc. rev. denied*, 350 N.C. 836, 538 S.E.2d 570, *cert. denied*, 528 U.S. 1022, 145 L. Ed. 2d 414 (1999). Even if I were to find the Fourth Circuit's reasoning persuasive, *Laws* did not address the same FDCPA claims that Plaintiffs assert in this case. In *Laws*, as Defendant TSC's Brief acknowledges, the claims at issue involved state law claims regarding breach of fiduciary duties of neutrality and a conflict of interest. *Laws*, 375 F. App'x at 346. The Fourth Circuit held that "under North Carolina law, a violation of the Rules of Professional Conduct for attorneys cannot serve as a basis for civil liability." *Id.* at 348. Meanwhile, here, Plaintiffs make both North Carolina and federal law claims based on the NCDCA and the FDCPA, respectively—statutory claims the Complaint sufficiently alleges. *Laws*, thus, does not foreclose Plaintiffs' 15 U.S.C. § 1692e(10) claim.