UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

In re:
LARRY NOLAND NAPPER
and
BONITA ANN WOODS NAPPER, Case No. 18-50029

Debtors.

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BONITA ANN WOODS NAPPER,

Plaintiff, Adversary Proceeding No. 24-06016

v.

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

PLAINTIFF BONITA NAPPER'S RESPONSE IN OPPOSITION TO DEFENDANT SELECT PORTFOLIO SERVICING, INC.'S DEFENSE OF FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

I. INTRODUCTION

Defendant Select Portfolio Servicing, Inc. ("SPS") misapplied every single payment disbursed by Chapter 13 Trustee Kathryn Bringle, then filed false and incomplete information in its Response to Notice of Final Cure Payment, then provided false information to Ms. Napper when she attempted to make her first post-plan payment and sought to collect a monthly payment that SPS knew Trustee Bringle had already paid, then provided false information to Trustee Bringle's Staff Attorney (with the intention that it be passed along to the Court), then watched the Court enter an Order based on that false information, and then asked Ms. Napper to reaffirm her mortgage loan. Now, SPS claims that it should not be held liable for any of it.
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Nowhere in Defendant's Brief in Support of its Defense for Failure to State a Claim ("Defendant's Brief") does Defendant even hint that any of the following is untrue:

1. That SPS's Response to Notice of Final Cure Payment both 1) contained false information about the status of Ms. Napper's mortgage account and which monthly payment was due; and 2) did not itemize the required postpetition amounts that SPS claimed remained unpaid (it can't deny this, as 1) its internal records show that the information was inaccurate; 2) Trustee Bringle had just provided the accurate information to SPS in a public filing served on its attorney; and 3) the Response contains no itemization);

2. That SPS misinformed Ms. Napper, via telephone on July 17, 2023, that her next payment was due for June 2023 – attempting to collect a payment that SPS knew Trustee Bringle had already paid (it can't deny this, as the Trustee informed SPS of the payment in a publicly filed document served on its attorney, and SPS's internal records show that this telephone conversation with Ms. Napper occurred);

3. That SPS's attorney's representation to the Court through the Trustee's Staff Attorney that the last payment from Trustee Bringle was applied to June 2023 was false (it can't deny this, as its internal records show that SPS misapplied it to May 2023, and this Court expressly relied upon that false representation in its Order entered August 11, 2023);

4. That SPS's attorney's representation to the Court through the Trustee's Staff Attorney that Ms. Napper's initial post-plan payment was applied to July 2023 was false (it can't deny this, as its internal records show that SPS misapplied it to June 2023, and this Court expressly relied on that false representation);

5. That, two days after misapplying Ms. Napper's initial post-plan payment to June 2023, SPS withdrew money from Ms. Napper's escrow account to bring her "current" through July 2023, then falsely represented to the Court through the Trustee's Staff Attorney that it was Ms. Napper's payment that brought her current, and then filed and sent Ms. Napper an Escrow Disclosure Statement showing that the withdrawal of funds from her escrow account contributed to a 53% increase of her escrow payment (it can't deny this, as its own records show that it did these things); and

6. That, in September 2023 – after Ms. Napper completed her plan payments, after the Order deeming the mortgage current, and just a month prior to discharge – SPS told Ms. Napper she had to provide a reaffirmation agreement (it can't deny this, as its internal records show that it did so).

Instead of foreshadowing any possibility that it can succeed on the merits, SPS argues 1) that Ms. Napper cannot enforce Rule 3002.1, which is contrary to the Rule's plain language; 2) that Rule 3002.1(i) remedies are not available because Rule 3002.1(g) requires creditors to supply information, but not accurate information; 3) that its claim[1] of "dual payment records" means it can, without penalty, misapply *every payment* from the Trustee and then, use its inaccurate records (instead of the unseen "accurate" records) to file an inaccurate Response to Notice of Final Cure Payment, misinform the Court about the loan status, and then misapply Ms. Napper's first post-plan payment; and 3) that Ms. Napper has alleged no "debt collection" in support of her state law claim, despite SPS telling Ms. Napper that she was due for a month that it knew had already been paid and despite SPS's later request that Ms. Napper reaffirm her mortgage loan.

Ms. Napper's allegations state claims against SPS, and SPS's Defense should be denied.

II. STANDARD

"A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is plausible when the complaint alleges sufficient facts to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The court views the complaint in a light most favorable to the plaintiff." *Martin v. Nautilus Ins. Co.*, 629 F. Supp. 3d 333, 337 (M.D.N.C. 2022) (internal quotation marks and citations omitted).

[1] Shortly after discharge, Ms. Napper sent a Request for Information to SPS, pursuant to 12 C.F.R. § 1024.36, seeking information about her loan. SPS chose to produce one transaction history showing its misapplication of every payment received from the Trustee. Now, SPS claims a second transaction history exists that did not misapply payment – the "dual payment records." *See* Defendant's Brief, pp. 4-5. It could have produced it but chose not to. Consistent with this Court's equitable powers and in the spirit of Rule 3002.1(i)'s equitable remedies, SPS should be estopped from presenting or relying on the information contained in any transaction history that it failed to provide Ms. Napper in response to her Request for Information.

The Court "accept[s] all factual allegations as true and draw[s] reasonable inferences in the plaintiff's favor." *Guerrero v. Ollie's Bargain Outlet, Inc.*, 115 F.4th 349, 354 (4th Cir. 2024). "The Court also takes judicial notice of pertinent docket entries and papers within this adversary proceeding and the underlying bankruptcy case." *Asilonu v. Okeiyi (In re Okeiyi)*, 664 B.R. 226, 230 (Bankr. M.D.N.C. 2024).

III. ARGUMENT

A. Plaintiff's Allegations Support Her Incorporated Motions and the Requested Relief Provided Rule 3002.1(i)

Plaintiff has alleged that SPS violated Rule 3002.1(g) by providing knowingly inaccurate and incomplete information in its Response to Notice of Final Cure Payment ("Response to NOFC"). Docket # 70. *See* Plaintiff's Complaint, ¶¶ 13-16, 78-86, 94, 110-111, 132, 169-176.

In his Treatise, Judge Lundin stresses the importance of a creditor being forthright, honest, and accurate by providing a complete picture of the mortgage account at this crucial stage of the bankruptcy case:

> The obvious intent here is that the statement in response to a final cure notice **must contain a complete picture of the status of the mortgage** without regard to whether the Notice of Final Cure Payment is based on incomplete information. As explained above, trustees often won't know the status of a mortgage in a Chapter 13 case notwithstanding completion of payments under the plan. **The statement that a mortgage holder must file in response to a Notice of Final Cure Payment is required by Bankruptcy Rule 3002.1(g) to robustly state** whether all amounts required to cure default have been paid and whether all payments are otherwise current under the mortgage. If the holder does not agree that all defaults have been cured and that all payments are current, **the holder must itemize any unpaid amount** required to cure—including postpetition amounts. These required itemizations are detailed on Director's Form 4100R.

Keith M. Lundin, LUNDIN ON CHAPTER 13 § 131.3, at ¶ 136, LundinOnChapter13.com (emphasis added). SPS did not do this. Instead, it obscured the amounts it would later claim were unpaid, resulting in the misleading suggestion that Plaintiff was contractually current when SPS believed she was not. "Indeed, an incorrect statement could be viewed as worse than no statement." *In re Ferrell*, 580 B.R. 181, 187 (Bankr. D.S.C. 2017). The consequences are the same: the Court and debtor are deprived of the full and accurate disclosure required by the Rule.

1. Plaintiff has not Pursued a Private Right of Action Under Rule 3002.1

Plaintiff does not disagree that Rule 3002.1 does not provide a private right of action and Plaintiff has not pursued a private right of action for Defendant's violations of Rule 3002.1. Instead, Plaintiff has incorporated motions seeking a finding that Defendant violated 3002.1(g) and for contempt and sanctions.

A similar situation arose in *Williams v. Citifinancial Servicing LLC*, and this Court stated:

> [T]here are "many decisions within this Circuit which have entered contempt judgments in the context of adversary proceedings." *Dotson v. United Recovery Group (In re Dotson)*, No. 09-72188, 2013 WL 5652732, at *4 n. 4 (Bankr. W.D. Va. Oct. 16, 2013) (declining to apply *Barrientos* rationale to dismiss debtor's claim for violation of the discharge injunction); *see also Harlan v. Rosenberg & Assocs., LLC (In re Harlan)*, 402 B.R. 703 (Bankr. W.D. Va. 2009); *Gates v. Didonato (In re Gates)*, No. 04-12076, 2004 WL 3237345 (Bankr. E.D. Va. Oct. 20, 2004).

Williams v. CitiFinancial Servicing LLC (In re Williams), 612 B.R. 682, 689 n3 (Bankr. M.D.N.C. 2020). Multiple tracts, multiple sets of discovery, and multiple timelines are necessary if SPS's violations of Rule 3002.1 must be addressed by separate motion. This approach should not be required.

Ms. Napper appreciates the cases cited by Defendant, which confirm that punitive damages and attorney fees are authorized here. In *Harlow v. Wells Fargo & Co.*, the Court stated:

> The Court believes that Rule 3002.1 must have teeth to achieve its purposes, and that, different from a private right of action for compensatory damages, punitive, non-compensatory sanctions can be warranted to achieve its purposes. Otherwise, Rule 3002.1(i), the sanctions provision of the Rule (which is exactly what it is), would have little deterrent ability as to future violations. In that respect, a claim for punitive, non-compensatory sanctions for violation of Rule 3002.1 can and should be able to be maintained.

2022 WL 17586716, *5 (Bankr. W.D.Va., Dec. 12, 2022). "[C]ompliance with Rule 3002.1 is fundamental to the integrity of Chapter 13. Accordingly, the ability of courts to award appropriate punitive damages is a critical deterrent to induce mortgage holders and servicers to make systemic changes that ensure future compliance." *In re Dewitt*, 651 B.R. 215, 234 (Bankr. S.D.Ohio 2023). *See also In re Tollstrup*, 2018 WL 1384378, *4 (Bankr. D.Or., Mar. 16, 2018) ("When there has been a violation of Rule 3002.1, I have discretion to award attorney fees."). *See* Defendant's Brief, p. 3.

Ms. Napper has followed a procedural path that this Court and others have repeatedly endorsed: pursuing appropriate Rule-based and Code-based remedies through a single adversary proceeding rather than splintering them into multiple tracks. Had Ms. Napper chosen the course implicitly suggested by Defendant by both filing motions and filing an adversary complaint, Ms. Napper would have increased the parties' costs and attorney fees and otherwise multiplied the proceedings toward some end that only Defendant knows.

2. SPS is Subject to the Remedies of Rule 3002.1(i)

As Ms. Napper alleged, 1) SPS failed to provide some of the information required by 3002.1(g); and 2) SPS provided inaccurate information. *See* Plaintiff's Complaint, ¶¶ 13-16, 78-86, 94, 110-111, 132, 169-176. SPS submits that because it filed *anything*, *however inaccurate it was*, the

remedies of (i) are unavailable. Defendant is wrong. It relies on a single case, *Trevino*, which has been roundly rejected. *Trevino* states the following on this issue:

> Because Rule 3002.1(i) provides relief in situations involving a *lack* of notice, rather than incorrect notice, this claim must be dismissed. *See, e.g., In re Guitierrez, 2012 Bankr. LEXIS 5110, 2012 WL 5355964 at *4 (Bankr. D.N.M. Oct. 30, 2012)* (holding that Rule 3002.1(i) provides sanctions for a creditor's failure to provide information).

In re Trevino, 535 B.R. 110, 131 (Bankr. S.D.Tex. 2015); Defendant's Brief, p. 3. "Trevino provides little analysis." *In re Heard*, 2021 WL 3540412, *2 (Bankr. D.Or., Aug. 11, 2021).

Trevino relied solely on *Gutierrez*, which did not analyze Rule 3002.1(i)'s application to the provision of *inaccurate* and *incomplete* information. Instead, *Gutierrez* analyzed whether Rule 3002.1(i) applied to the provision of *accurate* and *complete* information after an extension of time was granted. *In re Gutierrez*, 2012 WL 5355964, *4 (Bankr. D.N.M., Oct. 30, 2012). *Gutierrez* does not relate to what SPS did here.

Other Courts disapprove of inaccurate information provided under Rule 3002.1(g). "An inaccurate response under Rule 3002.1(g) complies neither with the letter nor the spirit of Rule 3002.1 and defeats the very purpose for which Rule 3002.1 was enacted." *In re Howard*, 563 B.R. 308, 315 (Bankr. N.D.Cal. 2016). "[T]he provision of inaccurate information is equivalent to a failure to provide information. The purpose of Rule 3002.1, as discussed below, is served only if the creditor provides correct information." *In re Tollstrup*, 2018 WL 1384378, *3. "Recognizing that Rule 3002.1(i) is titled 'Failure to Notify' and references the failure to provide information in accordance with Rule 3002.1, courts have explained how a Rule 3002.1(g) response which contains inaccurate information is as troubling as the failure to file a response or the filing of a

response with no information." *In re Dewitt*, 651 B.R. at n7. "The filing of an incorrect and inaccurate Rule 3002.1(g) statement is the equivalent of filing no statement at all. Indeed, an incorrect statement could be viewed as worse than no statement." *In re Ferrell*, 580 B.R. at 187. "The existing case law supports applying Rule 3002.1 to inaccurate statements in 3002.1 notices." *Harlow*, 2022 WL 17586716, *4.[2]

Defendant violated Rule 3002.1(g) and is subject to Rule 3002.1(i)'s remedies.

3. Ms. Napper May Seek the Remedies Provided by Rule 3002.1(i).

Defendant next claims that Ms. Napper cannot seek the remedies of Rule 3002.1(i) because she did not file the motion under Rule 3002.1(h). Defendant is wrong. Its argument 1) ignores the plain language of (h) and (i); 2) dismisses the local practice in this District; and 3) if adopted, would waste significant resources due to unnecessary filings. Defendant does not cite a single case or other authority to support this argument.

a. The Plain Language of Rule 3002.1(i)

"[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587 (2004). "It is an axiom of statutory interpretation that the plain meaning of an unambiguous statute governs, barring exceptional circumstances." *Wachovia Bank v. Schmidt*, 388 F.3d 414, 416 (4th Cir. 2004); *In*

[2] One attorney-author observed that "numerous courts facing the issue have held that Rule 3002.1(i)'s remedy provisions are triggered if the required filing is made but contains inaccurate information" and suggested that "mortgage creditors should renew their focus on their Rule 3002.1 practices to ensure that the filings they make contain accurate information." Glenn E. Glover, "*Does Bankruptcy Rule 3002.1's Remedy Provision Apply for Filings with Inaccurate Information?*" FINANCIAL SERVICES PERSPECTIVE (a blog by Bradley Arant Boult Cummings LLP). https://www.financialservicesperspectives.com/2021/12/does-bankruptcy-rule-3002-1s-remedy-provision-apply-for-filings-with-inaccurate-information/ (2021).

re Jones, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006). "In matters of statutory interpretation, text is always the alpha." *Whitlock v. Lowe (In re Deberry)*, 945 F.3d 943, 947 (5th Cir. 2019).

Rule 3002.1(i)'s plain language supports a debtor seeking remedies under subsection (i) for violation of (g). The Rule states, "If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions…."

Defendant tries to force a link between (i)'s remedies and the motion under subsection (h) – ignoring that (i) contains no reference to (h), while explicitly referencing (b), (c), and (g). Nothing indicates that the 3002.1(h) motion determines anything about 3002.1(i). [3]

Had the Rule's drafters intended the remedies under (i) to be available only to the movant under (h), they would have specified that. The fact that they did not indicates that no such limitation was intended.

b. Ms. Napper Proceeds in Accordance with Local Practice

In this District, it is routine for the Chapter 13 Trustee to file the Rule 3002.1(h) motion, particularly when the Trustee has made ongoing disbursements. The practice makes sense: the Trustee has the relevant payment history and the obligation to confirm final cure. A debtor joining the motion is not required other than to contest the Trustee's position or offer additional facts.

[3] It may or may not be worth noting here that Rule 3002.1(h) expressly allows the "debtor or trustee" to file the motion. Defendant cites no authority for its conclusion that the disjunct in Rule 3002.1(h) should not be afforded its plain meaning. Rule 3002.1(h) states, "On motion of the debtor or trustee...." and (i) does not reference (h). Plaintiff believes that that actually means what it says: the "the debtor" or the "trustee" can file the motion, and the movant's identity does not affect who may seek 3002.1(i)'s remedies.

c. Defendant's Proposed Procedure Wastes Resources

Trustee Bringle was the party with the payment records and appropriately filed the Rule 3002.1(h) motion. Defendant states: "Plaintiff had an opportunity to join the motion but did not do so." *See* Defendant's Brief, p. 3. Defendant implies that Ms. Napper should have filed a notice of joinder of the Trustee's motion to preserve her access to the remedies provided by (i). Defendant's suggestion is problematic.

First, the Trustee has the payment records; it would be odd for a debtor to file the motion or join the motion if the debtor has no knowledge of, or reason to dispute, the Trustee's record of payment. Second, if debtors District-wide were to file notices of joinder regularly, solely to preserve access to Rule 3002.1(i)'s remedies, it would cause hundreds of additional filings, and the vast majority would end up serving no purpose.

Here, Trustee Bringle filed the (h) motion. At that time, Ms. Napper had not yet obtained her account transaction history and had no reason to believe that the information provided by SPS was inaccurate. Only after discharge and after reviewing SPS's accounting were those falsehoods revealed.[4]

[4] The latter half of Defendant's third argument is bizarre. It claims that the Order entered on August 11, 2023, "resolved the issues between Plaintiff and Defendant" and that, because no amounts were awarded under Rule 3002.1(i), Plaintiff should not be permitted to include the motion incorporated in her Complaint for SPS's violations of Rule 3002.1. *See* Defendant's Brief, pp. 3-4. Defendant cites no authority. It knows that the Order did not resolve anything between it and Plaintiff because it provided false information to the Trustee's Staff Attorney and misled the Court into relying on that false information. Only later did Ms. Napper discover that Defendant misrepresented its accounting to the Trustee and the Court. SPS's own records show that it misapplied Ms. Napper's payment and removed money from Ms. Napper's escrow account to bring the account current, leading to an escrow deficiency and 53% increase in Ms. Napper's escrow payment. *See* Notice of Mortgage Payment Change (filed 9/25/2023). *See* Plaintiff's Complaint, ¶¶ 14-15, 97-100.

Adopting SPS's suggestion here would cause an impractical number of unnecessary filings. It would force a waste of judicial resources, clutter the dockets, and dilute each debtor's attorney's base fee – all because one creditor suggested, without authority, that a debtor must join the Rule 3002.1(h) motion to retain access to Rule 3002.1(i)'s remedies.

Defendant's argument should be rejected. Ms. Napper may seek the remedies of subparagraph (i) because SPS violated (g). *See* Plaintiff's Complaint, ¶¶ 13-16, 78-86, 94, 110-111, 132, 169-176.

B. SPS Violated the Automatic Stay

Plaintiff alleged that SPS misapplied every payment from the Trustee and then communicated false information to Ms. Napper based on those misapplications, seeking payment for a month that SPS knew had already been paid by Trustee Bringle. *See* Plaintiff's Complaint, ¶¶ 11, 16-17, 59-76, 82, 85, 86, 107-108, 153. SPS could have easily corrected the information prior to misrepresenting it to Ms. Napper because, over one month earlier, Trustee Bringle informed SPS how that payment should have been applied (by specifying the check number and month to which it should have been applied). Instead, SPS chose to ignore that for over a month and told Ms. Napper that she owed money for the payment Trustee Bringle already said she had paid.

SPS exercised improper control over property of the estate.

1. Defendant Misapplied Payments and Communicated the Resulting False Information to Ms. Napper, Trustee Bringle, Trustee Bringle's Staff Attorney, and this Court.

Defendant knows that it communicated false information to everyone involved in Ms. Napper's bankruptcy case and that the information resulted from its misapplication of Trustee Bringle's payments. Defendant knows exactly when it communicated false information to each

of the parties involved here. Yet, SPS states, "the Complaint contains no allegation that Plaintiff knew of the alleged payment misapplications or that they were communicated to her." *See* Defendant's Brief, p. 4. Defendant is wrong. Ms. Napper alleged each of them. *See* Plaintiff's Complaint, ¶¶ 16, 83-86, 94, 106-109, 153.

Defendant relies on *Mann v. Chase Manhattan* and the "internal bookkeeping" defense. 316 F.3d 1, 3 (1st Cir. 2003); Defendant's Brief, p. 4. About the *Mann* case, this Court stated, "the First Circuit was careful to note that erroneous postpetition bookkeeping entries that 'are in no manner communicated to the debtor, the debtor's other creditors, the bankruptcy court, nor any third party,' do not constitute violations." *Williams*, 612 B.R. at 695 *quoting Mann*, 316 F.3d at 3; *see also Bivens v. Newrez LLC (In re Bivens)*, 625 B.R. 843, 849 (Bankr. M.D.N.C. 2021).

The "internal bookkeeping" defense does not apply when the servicer communicates the erroneous information to the debtor or other parties. That rationale does not apply here because SPS communicated the false information to Ms. Napper, Trustee Bringle, Trustee Bringle's Staff Attorney, and this Court.

2. Defendant's "Dual Payment Records" Argument Does Not Excuse Misapplications or False Representations

Defendant's second argument to avoid liability under Section 362 is the following:

> [T]he Complaint in no way connects the alleged misapplication of payments on a contractual basis to an alleged misapplication of payments on a Chapter 13 postpetition basis. Mortgage creditors are allowed to maintain dual payment records for Chapter 13 cases involving treatment of their mortgage claim as a "cure and maintain" claim under 11 U.S.C. § 1322(b)(5) – a contractual one and a postpetition one. The postpetition payment record is the one that matters as it tracks whether or not the debtor is current on monthly postpetition payments. *So long*

> *as the postpetition payment application and status is correct*, a contractual application cannot be said to be a "misapplication" in the first instance. To the extent a mortgage creditor applies payments on a contractual basis on its system of record which differs from its application of the payments on a postpetition basis, it is akin to a recordation on its internal records, which is not a violation of the automatic stay.

See Defendant's Brief, pp. 4-5 (internal citations omitted) (emphasis supplied).

"So long as the postpetition payment application and status is correct…"

This defense fails for three reasons:

First, SPS has not demonstrated that a correct postpetition accounting exists. *See* footnote 1, *supra*. It did not rely on such a record when filing its Response to NOFC. It did not provide one to Ms. Napper or the Trustee. And it did not use it when communicating with the Court.

Second, having "dual payment records" does not give a creditor license to misapply plan payments in violation of § 1322(b)(5) or to mislead the debtor or the Court. The concept of dual tracking is meant to ensure accurate parallel records – not to justify incorrect reports or demands.

Third, even assuming a separate and correct "postpetition" record existed, SPS chose to base its Rule 3002.1(g) response and its delinquency assertions on the contractual ledger, despite knowing it was inaccurate. It communicated that false information knowing the Court would rely on it when entering a final cure determination under Rule 3002.1(h).[5] If a correct accounting existed, it was not the basis for SPS's filings or communications in this case. This conduct is not

[5] This Court's order entered August 11, 2023, states, "Creditor's Counsel, Ryan Srnik, contacted Mr. Cahoon after this motion was filed. Upon a review of the account, Mr. Srnik agreed that the Trustee's check numbered 1085595 brought the account current through the June 15, 2023, payment, and that the Debtors' $810.00 check received on July 24, 2023 brought the account current through the July 15, 2023, payment." Docket # 75, p. 1. SPS knew that this representation was false. *See* Plaintiff's Complaint, ¶¶ 14-15, 97-99.

protected by the existence of an alternate, unused accounting record. To the contrary, it underscores that SPS had the means to comply with the Code and chose not to.

"Dual payment records" are not a talisman that cleanses SPS of its wrongdoing. Had it not communicated inaccurate information to Ms. Napper; had it not sought payment for a month it knew Trustee Bringle had already paid; had it not communicated false information to Trustee Bringle's Staff Attorney; had it not provided that information with the intention that the Court rely on it – SPS could have avoided violation of the automatic stay.

But SPS did communicate inaccurate information to Ms. Napper; SPS did seek payment for a month it knew Trustee Bringle had already paid; SPS did communicate false information to Trustee Bringle's Staff Attorney; SPS did provide that information with the intention that the Court rely on it. Why did the "dual payment records" not prevent SPS from doing these things? Because either the "dual payment records" do not exist or they do not serve as the magical defense SPS desires them to be.

3. A Mortgage Servicer Must Comply With the Confirmation Order and Must Not Do Whatever it Wants With the Funds Received from the Trustee.

The Chapter 13 Trustee's payments remain a part of the bankruptcy estate's administration until properly applied by the recipient in accordance with the confirmed plan. A mortgage servicer must apply those payments in accordance with the confirmed plan and must not be permitted to exercise control over those assets inconsistent with the confirmed plan.

"In *Williams v. CitiFinancial Servicing LLC (In re Williams)*, 612 B.R. 682 (Bankr. M.D.N.C. 2020), this Court found, in line with the majority of courts to consider the issue, that a failure to credit payments according to the terms of a confirmed plan may rise to the level of a willful

violation of the stay." *Carnegie v. Nationstar Mortg., LLC (In re Carnegie)*, 621 B.R. 392, 412 (Bankr. M.D.N.C. 2020) *citing Williams*, 612 B.R. at 694 ("[T]he majority of courts to consider the issue have concluded that misapplication of chapter 13 plan payments is a cause of action for violation of the automatic stay. [collecting cases]."). *See also Bivens*, 625 B.R. at 849.

Here, SPS not only communicated false information to all interested parties, but on July 17, 2023, it sought to collect money from Ms. Napper that it knew Trustee Bringle had already paid. SPS did this over three months before the automatic stay terminated. Additionally, days before the stay terminated, SPS requested Ms. Napper reaffirm her mortgage loan. SPS made attempts to collect while the automatic stay was in effect, and Defendant's records confirm this.[6]

Defendant relies on a case that implies that a creditor subject to the terms of a confirmed plan and subject to the authority of the Bankruptcy Court can do what it wants with funds received from a Cha.pter 13 Trustee because, after receipt, the funds are no longer property of the estate. *See* Defendant's Brief, p. 5-6; *In re Rodriguez*, 421 B.R. 356, 367 (Bankr. S.D.Tex. 2009).

[6] Plaintiff regrets that, although she alleged that Defendant engaged in this conduct, the date of the communication was not specifically alleged. *See* Plaintiff's Complaint, ¶¶ 16-17, 86, 107-108, 153. The date of the telephone call, during which Ms. Napper attempted to make her first, post-plan, direct payment to SPS, was July 17, 2023. SPS's own records contain this date, as well as the content of the call, including SPS's false claim that Ms. Napper was due for a month that Trustee Bringle had already paid. The automatic stay terminated on October 23, 2023 – over three months later. To the extent that the viability of this claim turns on whether or not Ms. Napper pled the precise date of the telephone call, Ms. Napper requests leave to file a technical amendment that changes nothing other than adding the date of that telephone call. Leave to amend a complaint should be "freely given ... when justice so requires." *Wynn v. Perry*, 2018 U.S. Dist. LEXIS 167891 *10 (W.D.N.C., Sep. 28, 2018) *quoting* Fed.R.Civ.P. 15(a)(2). "[T]his mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227 (1962). *See also Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 769 (4th Cir. 2011).

Other courts have rejected *Rodriguez's* infeasible view of what it means to exercise control over property of the estate when estate property (in the form of payments) is received pursuant to a confirmed plan.

"This Court finds that the misapplication of payments can be a violation of the automatic stay and rejects the holding of *Rodriguez* that the lender's possession of the funds negates an improper exercise over property of the estate." *Culberson v. Nationstar Mortg., LLC (In re Culberson)*, 2022 Bankr. LEXIS 1629 (Bankr. E.D.Tenn., June 10, 2022). After citing and acknowledging *Rodriguez*, one Court found a violation of the automatic stay even when the payments came directly from the debtor: "For the reasons set forth below, this Court finds that allegations of misapplication of plan payments from the trustee or payments made outside the plan by the debtor are sufficient to state a cause of action for violation of the automatic stay in § 362(a)." *Villwock v. Citi Residential Lending (In re Villwock)*, 2010 Bankr. LEXIS 6556 (Bankr. N.D.Ohio, Aug. 10, 2010).

Years later, after citing both *Rodriguez* and *Villwock*, the Northern District of Ohio stated: "Accordingly, the Debtors' claims for violation of the automatic stay do not fail as a matter of law to the extent they are based on Nationstar's misapplication of mortgage payments." *In re Mocella*, 2016 Bankr. LEXIS 2477, *46-47 (Bankr. N.D.Ohio, June 17, 2016). *See also Szoke v. Chase Home Fin., Inc. (In re Szoke)*, 2012 Bankr. LEXIS 6299, *17-18 (Bankr. N.D.Ohio, Aug. 28, 2012) ("[T]his Court concludes that a creditor's misapplication of payments made by a chapter 13 debtor pursuant to a confirmed plan may *constitute an improper exercise of control over estate property in violation of § 362(a)(3).*") (emphasis added).

Defendant misreads this Court's *Williams* opinion and declares the only way to get around *Rodriguez* is alleging collection of a preprepetition debt. *See* Defendant's Brief, p. 5. *Williams* did not say that. This Court followed the majority rule, implicitly rejecting *Rodriguez's* conclusion that the stay has no application to funds after receipt: "The Confirmed Plan, binding upon CitiFinancial and Carrington pursuant to § 1327, specified the extent to which CitiFinancial and Carrington could properly *exercise control over payments made by the chapter 13 trustee*, and acts in contravention of the Confirmed Plan may rise to a level of a willful violation of the stay." *Williams*, 612 B.R. at 695 (emphasis added).[7] This Court cited *Mattox v. Wells Fargo, NA (In re Mattox)*, 2011 WL 3626762, *6 (Bankr. E.D. Ky., Aug. 17, 2011) ("Other courts have likewise held that a creditor may violate the automatic stay by misapplying payments, and in particular misapplying payments received from the Chapter 13 Trustee under the Plaintiff's plan, pursuant to §362(a)(3)….").

Defendant wants this Court to adopt a myopic view of "property of the estate" – a view that would allow a mortgage creditor to accept a payment and apply it inconsistent with the confirmed plan. And Section 362's prohibition on exercising control over property of the estate would be inapplicable.

Defendant misapplied every payment, communicated false information about it to the parties and the Court, and attempted to collect money that was not owed. Defendant improperly exercised control over property of the estate, in violation of 11 U.S.C. § 362(a)(3).

[7] Moreover, SPS's misapplication of every payment from the Trustee to a month other than which the payment was designated is a violation of the Order Confirming Plan, Docket # 17, § 8.2(b). *See* Plaintiff's Complaint, ¶¶ 11, 59-76, 82, 85.

C. Defendant Violated the North Carolina Debt Collection Act

1. This Court has Subject Matter Jurisdiction Over the NCDCA Claim

Unlike the facts underlying this Court's *Gaitor* decision, where the NCDCA claim was entirely derivative of Section 524 (and, thus, with no independent jurisdictional anchor), Plaintiff's NCDCA claim here is based on concrete, actionable misconduct that occurred during Ms. Napper's bankruptcy, that affected the Trustee's administration of the Chapter 13 case, and that affected the Court's order pursuant to Rule 3002.1(h). The NCDCA violations alleged here involve false statements made to the Court, the Trustee, and Plaintiff about the status of mortgage payments – statements that *affected judicial decision-making* and *threatened the integrity of the final cure determination*. These are not collateral, post-discharge claims – Defendant's misconduct occurred during the confirmed plan's term and affected this Court supervision over the plan.[8]

2. The NCDCA Claim is Not Preempted by the Bankruptcy Code

"[The Bankruptcy Clause] is not about ensuring uniformity in state laws whenever they happen to intersect with bankruptcy. It is about empowering Congress to enact bankruptcy laws and ensuring that federal bankruptcy laws themselves do not vary impermissibly from state to state." *Guthrie v. PHH Mortg. Corp.*, 79 F.4th 328, 341 (4th Cir. 2023) *citing Siegel v. Fitzgerald*, 596 U.S. 464, 142 S. Ct. 1770, 1781 (2022). The Fourth Circuit continued: "The Supreme Court has explained that state laws 'on the subject of bankruptcies are suspended' if they conflict with federal bankruptcy law. *Butner v. United States*, 440 U.S. 48, 54 n.9, 99 S. Ct. 914 (1979). But the

[8] The jurisdictional issues were not raised by Defendant and are briefly included here out of caution. Ms. Napper would be glad to provide additional briefing on these issues.

Court has also emphasized that preemption depends on an actual conflict, and not all state-levels differences frustrate the Constitution's uniformity principle." *Guthrie*, 79 F.4th at 341.

In *Guthrie*, the Fourth Circuit observed that the state law claims did "not create an obstacle to the goals of the Bankruptcy Code. States are separate sovereigns that should have the freedom, at least generally, to create causes of action as they see fit. While preemption limits this freedom, we do not presume preemption. And we likewise should not "seek out conflicts between state and federal regulation where none clearly exists." *Guthrie*, 79 F.4th at 341-42 *quoting English v. Gen. Elec. Co.*, 496 U.S. 72, 90, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990); *see also Barnhill v. FirstPoint, Inc.*, 2017 U.S. Dist. LEXIS 74979, *8-13 (M.D.N.C., May 17, 2017).

Here, the NCDCA claims do not create an obstacle to the goals of the Bankruptcy Code (unlike Defendant's actions, which actually did obstruct those goals).

3. Plaintiff Alleged the Elements of a Claim Under the NCDCA

"All NCDCA claims require: (1) a consumer; (2) that owes a debt; (3) to a debt collector. The plaintiff must then establish the three generalized requirements for a Chapter 75 claim: (1) an unfair act (2) in or affecting commerce (3) proximately causing injury." *Custer v. Dovenmuehle Mortg., Inc.*, 2024 U.S. Dist. LEXIS 189590, *4-5 (M.D.N.C., Oct. 18, 2024) (internal cites & quotes omitted).

Defendant attempted to collect a payment that it knew had already been paid, both directly from Ms. Napper and through the bankruptcy process. Defendant misrepresented the status of the loan to Ms. Napper, Trustee Bringle, and the Court, and attempted to get around it by removing money from Ms. Napper's escrow account – then later telling Ms. Napper the monthly escrow payment had to increase by more than 53%. Finally, Defendant attempted to

coerce Ms. Napper into reaffirming her loan when expressly prohibited by the NCDCA. *See* N.C.Gen.Stat. §§ 75-51, -51(8), -54, -54(4), -55, -55(1), and -55(2).

Plaintiff has alleged the elements of a claim under the NCDCA. *See* Plaintiff's Complaint, ¶¶ 16-17, 30, 34-38, 42-43, 83-86, 107-109, 114-120, 153, 155, 158, 161.

IV. CONCLUSION

Defendant's Defense of failure to state a claim should be denied.

March 31, 2025

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CERTIFICATE OF SERVICE

I certify that on March 31, 2025, the foregoing Plaintiff's Response in Opposition to Defendant's Defense of Failure to State a Claim was filed with the Clerk of Court using the CM/ECF system, which constitutes service upon the following parties:

G. Benjamin Milam
bmilam@bradley.com

ATTORNEY FOR DEFENDANT

/s/ Craig M. Shapiro
Craig M. Shapiro