

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS EASTERN DIVISION

Alena W. Hammer)	
)	
Plaintiff,	)	No. 13 C 6397
)	
v.	)	Judge Thomas M. Durkin
)	
Residential Credit Solutions, Inc.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Alena Hammer (“Hammer”) brought this lawsuit against Residential Credit Solutions (“RCS”) on September 6, 2013, alleging that RCS caused her damages resulting from breach of contract and violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692; the Illinois Consumer Fraud Act (“ICFA”), 815 ILCS § 505/1; and the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. §§ 2605 & 2609. RCS moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). R. 30. For the reasons explained below, RCS’s motion to dismiss is granted in part and denied in part.

BACKGROUND¹

Hammer obtained a 30-year home mortgage loan for \$220,000 in 2003. R. 1 ¶ 19. The loan required Hammer to pay her taxes and maintain hazard insurance separately from the mortgage loan. *Id.* ¶ 21. Hammer opted out of any escrow

¹ The Court construes the complaint in the light most favorable to Hammer, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).



requirement for the loan, which was effective as long as she remained current on her taxes and insurance. *Id.* ¶ 22. As of August 2009, that loan was being serviced by AmTrust Bank (“FDIC/AmTrust”). *Id.* ¶¶ 23, 27. In February 2009, Plaintiff was laid off from her job and fell behind on her principal and interest payments on the loan. *Id.* ¶ 26. In August 2009, FDIC/AmTrust declared Hammer’s loan in default. *Id.* ¶ 27. On September 9, 2009, FDIC/AmTrust filed a foreclosure against the subject property and against Hammer in DuPage County, Illinois in the case known as *AmTrust Bank v. Hammer*, 2009 CH 3951 (“Foreclosure Case # 1”). *Id.* ¶ 28.

In December 2009, the Federal Deposit Insurance Corporation (“FDIC”) was appointed as receiver for FDIC/AmTrust. *Id.* ¶ 29. In January 2010, Hammer received a call from Theresa Holk of the FDIC/AmTrust about a potential loan modification. R. 1 ¶ 31. Holk explained that Hammer’s modified loan amount would be the principal balance on the loan before the FDIC takeover of FDIC/AmTrust, and that all past-due amounts would be waived. *Id.* ¶ 32. Holk told Hammer she would receive correspondence in the mail with instructions on how to complete the modification. *Id.* ¶ 33. Hammer received a letter from FDIC/AmTrust providing her with a loan modification application and checklist of documents to be submitted no later than February 26, 2010. *Id.* ¶ 34. On February 2, 2010, Hammer submitted the application and documentation. *Id.* On June 21, 2010, Holk notified Hammer that her modification was officially approved with a total principal balance of \$207,176.99. *Id.* ¶ 35. Holk told Hammer that all future dealings should be through

Hammer's new contact person, Chris Pelaci, and that all loan modification payments should be sent to Sandy Beauregard at FDIC/AmTrust. *Id.*

Hammer received the loan modification agreement—which was dated June 8, 2010—on June 28, 2010. *Id.* ¶ 36. The modification agreement noted that it should be returned no later than June 25, 2010, and instructed Hammer to send her new monthly payment of \$749.88 to FDIC/AmTrust by July 1, 2010. *Id.* ¶ 37. It also included a miscellaneous fee of \$2,303.30, increasing the modified balance from \$207,176.99 to \$209,471.59. *Id.* ¶ 38.

When Hammer received the agreement on June 28, she called Pelaci to request additional time to review and sign the modification agreement since she received it three days after the due date in the cover letter. *Id.* ¶ 39. Hammer also disputed the additional fees added to the modified balance. *Id.* Pelaci said she would look into the added fees and told Hammer that she still needed to send in the first \$749.88 payment by July 1, 2010, but did not need to sign the document until Pelaci called her back regarding the unknown fees. *Id.* ¶ 40. Hammer sent her first payment in the amount of \$749.88 to FDIC/AmTrust on June 28, 2010, which FDIC/AmTrust cashed on July 1, 2010. *Id.* ¶ 41, R. 1-2 at 2. When Hammer did not receive a response from Pelaci regarding the fees, she both called and wrote FDIC/AmTrust to dispute the fee and obtain an explanation and further instruction. R. 1 ¶ 42.

On July 23, 2010, Hammer received a RESPA Notice of Assignment stating that effective on August 1, 2010, FDIC/AmTrust would no longer accept payments

for her loan and that she should make her payments to RCS beginning on that date. The letter advised Hammer of her right to send a RESPA Qualified Written Request² (“QWR”) dispute within 60 days. *Id.* ¶ 43. On July 28, 2010, Hammer made her second payment (due August 1, 2010) on the loan modification in the amount of \$749.88³ to FDIC/AmTrust which FDIC/AmTrust cashed on July 30, 2010. *Id.* ¶ 44, R. 1-3 at 2.

On August 2, 2010, RCS applied \$1,499.76—the two payments of \$749.88—to Hammer’s account. *Id.* ¶ 45. On or about August 14, 2010, Pelaci spoke with Hammer over the phone and told Hammer that the fees in her modification were assessed in error. *Id.* ¶ 46. Pelaci instructed Hammer to cross out the \$2,303.30 fee, write in the correct principal balance of \$207,176.99, initial and sign the contract in front of a notary, and return the executed copy to RCS, attention “Jim Bass.” *Id.*

² The RESPA statute defines a Qualified Written Request as “a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer” that “(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower . . . that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.” 12 U.S.C. § 2605(e)(1)(B).

³ In her complaint, Hammer refers to the June and July payment amounts as \$748.88, \$748.99 and \$749.88. R. 1 ¶¶ 40, 41, 44, 45. However, the Court relies on the amount of \$749.88 as reflected in the copies of the June and July 2010 checks and denoted in the loan modification agreement attached as exhibits to Hammer’s complaint. R. 1-1 at 2, R. 1-2 at 2, R. 1-3 at 2. *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 823-24 (N.D. Ill. 2013) (to the extent that an exhibit attached to the complaint contradicts the complaint’s allegations, the exhibit takes precedence) (citing *Forrest v. Universal Sav. Bank, F.A.*, 507 F.3d 540, 542 (7th Cir. 2007)).

Hammer wrote the amounts and then signed, notarized, and mailed the document to Bass as instructed. *Id.*

Upon receiving the document, Bass called Hammer and told her that the modification “did not exist at the time the loan was transferred to [RCS]” and therefore was not valid. Hammer alleges that Bass threatened to take her home and swore at her to the point where she became very distraught. *Id.* ¶ 47. On August 19, 2010, RCS sent Hammer a notice erroneously stating that her real estate taxes were delinquent and that RCS would set up an escrow account to pay the delinquent taxes. *Id.* ¶¶ 49-50.

On August 31, 2010, Hammer disputed the debt in writing, sending a QWR and a Fair Debt Dispute Letter addressed to Beauregard at FDIC/AmTrust. *Id.* ¶ 51. The letters stated that Hammer was sending the money to FDIC/AmTrust because RCS claimed it had no knowledge of the modification. *Id.* On September 1, 2010, Hammer sent her third loan modification payment to FDIC/AmTrust in the amount of \$749.88, which FDIC/AmTrust forwarded to RCS. *Id.* ¶ 52.

On September 19, 2010, Hammer’s hazard insurance policy automatically renewed for a twelve-month period. *Id.* ¶ 54. Hammer alleges that at all times since obtaining the underlying loan in 2003, she has paid her taxes in full and has maintained proper and adequate hazard insurance. *Id.* ¶ 14. Also on September 19, 2010, RCS force-placed insurance⁴ on Hammer’s property. *Id.* ¶ 54. Beginning in

⁴ Hammer does not define “force-placed” insurance. The Court finds useful the definition provided by another district court: “Under standard residential mortgage agreements, if a borrower’s hazard insurance lapses, the lender may ‘force-place’

September 2010, RCS billed Hammer's account certain unexplained fees on multiple occasions including in October 2010, and February, April, and May through August of 2011. *Id.* ¶¶ 53, 57, 69, 74, 76, 79, 81-83, 88, 91.

On September 30, 2010, Hammer sent FDIC/AmTrust another Fair Debt Dispute Letter along with her fourth modification payment in the amount of \$749.88. *Id.* ¶ 55. The letter stated that Hammer had a loan modification contract with FDIC/AmTrust. *Id.* On October 15, 2010, Hammer received a letter from FDIC/AmTrust telling her that her loan had been transferred to RCS more than 60 days earlier and returning her most recent payment "which needs to be paid directly to [RCS]." *Id.* ¶ 56. The letter included Hammer's October 2010 payment check but not her September 2010 payment check. *Id.* On October 29, 2010, Hammer sent a check to RCS in the amount of \$749.88 for her November 2010 payment, also including a third Fair Debt Dispute Letter with her check which stated, "Also, the November payment enclosed as per contract w/FDIC/AmTrust bank prior to transfer to RCS." *Id.* ¶ 58. RCS received the payment on November 1, 2010 and returned the payment on November 5, 2010, without cashing it. *Id.* ¶ 59.

On November 5, 2010, RCS force-placed insurance on Hammer's account for a second time in the amount of \$2,615 which RCS "deducted" from Hammer's escrow account, creating a negative escrow balance. *Id.* ¶ 60. On December 1, 2010, Hammer sent a check to RCS in the amount of \$749.88 which RCS did not cash but

insurance on the home by arranging for its own policy at the borrower's expense." *Decambaliza v. QBE Holdings, Inc.*, No. 13-CV-286-BBC, 2013 WL 5777294, at *1 (W.D. Wis. Oct. 25, 2013).

instead returned to Hammer. *Id.* ¶ 62. After December 1, 2010, Hammer continued to send her monthly payments to RCS via certified mail each month through the filing of her complaint. *Id.* RCS cashed two of Hammer’s payments—for August 2011 and September 2012. *Id.* However, RCS returned all the other checks after holding them for time periods of several weeks to several months. *Id.*

On or about December 3, 2010, Hammer received a letter from RCS that it had not received proof of her insurance policy on the subject property. *Id.* ¶ 63. As a result, they secured force-placed insurance for the third time on her behalf through American Modern Home. *Id.* ¶ 63. The letter also stated that the cost of the policy would be paid out of her loan escrow account, which would be set up if it did not already exist and would result in an increase in her mortgage payment and “future insurance policies.” *Id.* In response, Hammer sent RCS proof of her insurance again.⁵ *Id.* ¶ 64. RCS assessed a third “escrow disbursement” of \$2,516 for force-placed insurance from Hammer’s account on January 4, 2011. *Id.* ¶ 65.

On January 5, 2011, Hammer filed a motion to dismiss Foreclosure Case # 1, alleging that there was a valid and enforceable loan modification agreement with an effective date of July 1, 2010, and that all payments had been timely tendered. *Id.* ¶ 66. On January 11, 2011, Hammer sent RCS her fourth Fair Debt Dispute Letter requesting information as to why RCS was not cashing her checks and disputing the

⁵ Hammer does not allege when she first sent RCS proof of insurance, though she asserts that she sent it to RCS “again” on December 3, 2010. R. 1 ¶ 64.

credit reporting on her account⁶ *Id.* ¶ 67. Hammer enclosed copies of her credit report for reference and proof of hazard insurance. *Id.* RCS never responded to her dispute letter or corrected the credit reporting. *Id.*

On March 18, 2011, DuPage County, Illinois, Circuit Judge Gibson heard arguments on Hammer's motion to dismiss Foreclosure Case # 1 and granted the motion to dismiss the lawsuit. *Id.* ¶ 70. Following the dismissal of Foreclosure Case # 1, Hammer requested reinstatement figures from RCS pursuant to her modification and continued to make monthly payments to RCS each month in the amount of \$749.88. *Id.* ¶ 73. RCS continued to return her payments and bill her for unexplained fees. *Id.* On May 12, 2011, in response to Hammer's request for reinstatement figures, RCS sent Hammer figures reflecting principal and interest payments, late charges, escrow payments, attorney fees, and miscellaneous fees. *Id.* ¶ 76. Subsequently, Hammer called RCS and Codilis, RCS's collection attorneys, to obtain accurate reinstatement figures. *Id.* ¶ 80. Hammer left numerous messages but did not receive any return calls. *Id.*

On July 25, 2011, Hammer spoke with Codilis' attorney, Courtney Nogar, who had represented RCS in Foreclosure Case # 1. *Id.* ¶ 84. Nogar asked Hammer "if she ever intended to pay back the loan." *Id.* Hammer replied that she had been paying every month, that no one would call her back, and that each of her payments

⁶ Hammer notes later in her complaint that RCS "report[ed] false information regarding the subject loan to Equifax, TransUnion, and Experian, including that the loan was in default and . . . fail[ed] to report the debt as disputed to the credit bureaus." *Id.* ¶ 135. She also alleges that RCS caused "damage to her credit report" and she was "denied credit" *Id.* ¶ 121.

was being returned to her. *Id.* Hammer asked Nogar for the amount necessary to bring the loan current, but Nogar did not provide that amount. *Id.* ¶ 85. On July 26, 2011, Hammer sent her August 2011 loan modification payment to RCS in the amount of \$749.88. *Id.* ¶ 86. RCS cashed that payment on July 28, 2011. *Id.* On July 29, 2011, Hammer received an escrow analysis from RCS showing an escrow shortage of \$3,319.80 even though she did not have an escrow account opened pursuant to her mortgage contract or loan modification. *Id.* ¶ 87. The analysis reflected two prior assessments for hazard insurance and indicated that \$2,516 would be added to the loan amount in September 2011. *Id.*

On August 1, 2011, approximately four months after the dismissal of Foreclosure Case # 1, Hammer received an acceleration notice from Codilis on behalf of RCS that stated: “As of 7/29/2011 the amount of the debt we are seeking to collect is \$32,050.60, which includes the sum of payments that have come due on and after the date of default 10/01/2010.” *Id.* ¶ 89. On August 8, 2011, RCS sent Hammer a notice that it was renewing her force-placed insurance and deducting the amount from her escrow account. *Id.* ¶ 91. Hammer again sent RCS proof of her insurance. *Id.*

On August 15, 2011, Hammer received a second “acceleration notice” from RCS stating, “As of 8/11/2011 the amount of the debt we are seeking to collect is \$10,507.95, which includes the sum of payments that have come due on and after the date of default 10/01/2010.” *Id.* ¶ 93. That amount was \$21,542.65 less than the amount listed in the first acceleration notice. *Id.* On August 17, 2011, in an attempt

to resolve the discrepancy, Hammer called the number listed on the acceleration notice and spoke with someone named “Randy” from RCS’s loss mitigation department. *Id.* ¶ 94. That person never called her back. *Id.* On or about September 16, 2011, Hammer received a letter from RCS stating that her account had been referred to foreclosure for a second time for a failure to cure the default. *Id.* ¶ 95. On September 20, 2011, RCS deducted \$2,516 from Hammer’s escrow account to pay for force-placed insurance. *Id.* ¶ 96.

On September 21, 2011, RCS filed a second foreclosure against the subject property and against Hammer in DuPage County, Illinois, in the case known as *RCS v. Hammer*, 2011 CH 004503 (“Foreclosure Case # 2”). *Id.* ¶ 97. The foreclosure complaint alleged a default under the original note and mortgage. *Id.* The complaint did not reference or attach the loan modification. *Id.* On September 30, 2011, Hammer received a “Notice Pursuant to the Fair Debt Collection Practices Act” from Codilis on behalf of RCS notifying her of her right to dispute the debt within 30 days. *Id.* ¶ 98. Hammer also received another notice of force-placed insurance and a deduction of \$2,516 from her escrow account. *Id.* ¶ 99.

On October 28, 2011, Hammer sent another Fair Debt Dispute Letter requesting verification of the debt in writing and RCS to cease all phone calls to her. *Id.* ¶ 100. Hammer also sent RCS a QWR asking for a payment history, the amount alleged to be owed, an accounting, a record and proof of each payment that Hammer made, an “[e]xplanation on the alleged lapse in Hazard Insurance that was force placed on the account when proof of insurance had been previously provided,” and

“the identity of the holder of [the] mortgage pursuant to U.S.C. § 1641(f)(2),” as well as a complete breakdown of the fees, payments, and amounts alleged as owing on the loan and how each was calculated. *Id.* ¶ 101. On October 31, 2011, RCS acknowledged receipt of Hammer’s QWR and FDCPA dispute letter. *Id.* ¶ 102.

On November 4, 2011, Hammer filed a motion to dismiss Foreclosure Case # 2. *Id.* ¶ 103. On February 29, 2012, Judge Gibson granted the motion to dismiss the first amended complaint without prejudice. ⁷ *Id.* On November 7, 2011, RCS partly responded to both Hammer’s QWR and her FDCPA dispute letter in a single response. *Id.* ¶ 104. The response letter provided a breakdown of fees and amounts to reinstate the loan. *Id.* It did not provide an explanation of fees or the force-placed insurance, nor did it provide verification of the debt. *Id.* The response letter stated that Hammer’s loan modification “had been finalized” on August 9, 2011, the date that RCS cashed Hammer’s August 2011 payment. *Id.* ¶ 105.

By January 2012, after Hammer tendered 19 consecutive payments pursuant to the loan modification, RCS developed a pattern and practice of accepting Hammer’s checks, keeping them for several weeks to several months, then returning them to Hammer. *Id.* ¶ 106. Over this period of time, Hammer’s health and well-being “drastically deteriorated.” *Id.* ¶ 107. She developed severe nerve and internal organ problems that her physician could not attach to anything other than stress. *Id.* Hammer’s medical records show a steady decline in her health from the

⁷ Neither party specifies whether Judge Gibson’s February 29, 2012 dismissal was of RCS’s original complaint or first amended complaint. However, since RCS filed its second amended complaint on March 28, 2012, R. 32-4, the Court presumes the complaint Judge Gibson dismissed was indeed RCS’s first amended complaint.

time that RCS took over the loan through the filing of Hammer's September 6, 2013, complaint. *Id.*

On February 3, 2012, Codilis sent Hammer another reinstatement letter with figures that did not recognize her loan modification. *Id.* ¶ 108. On March 28, 2012, RCS filed a second amended complaint in Foreclosure Case # 2, R. 32-4, alleging that the terms of the loan modification as presented by Hammer were unenforceable because there was no "meeting of the minds." R. 1 ¶ 109. Hammer continued to send in her loan modification payments every month, but RCS rejected all of Hammer's subsequent payments until September 2012, when RCS cashed her payment. *Id.* ¶¶ 110-11. On September 19 and October 5, 2012, RCS sent Hammer letters stating that it had reviewed her insurance policy and that she was required to increase the amount of her policy coverage because it was inadequate compared to her outstanding loan balance and did not cover the loss of the property. *Id.* ¶ 112.

On September 6, 2013, as a result of RCS's actions, Hammer filed a four-count complaint in this Court. On January 27, 2014, RCS filed a motion to dismiss all four counts of the complaint, R. 29. Briefing on the motion was completed on March 10, 2014. At a hearing before the Court on March 27, 2014, the parties represented that Foreclosure Case # 2 is currently stayed in state court.

LEGAL STANDARD

A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *See, e.g., Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). A complaint must provide "a short and plain statement of the claim

showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), sufficient to provide defendant with “fair notice” of the claim and the basis for it. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This “standard demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

While “detailed factual allegations” are not required, “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. The complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Mann v. Vogel*, 707 F.3d 872, 877 (7th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678).

Rule 9(b) requires a pleading to “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). While the precise level of particularity required under Rule 9(b) depends upon the facts of the case, the pleading “ordinarily requires describing the who, what, when, where, and how of the fraud.” *Anchorbank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011) (internal quotations omitted). One of the purposes of the particularity and specificity required under Rule 9(b) is “to force the plaintiff to do more than the usual investigation before filing his complaint.” *Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467,

469 (7th Cir.1999). *Camasta v. Jos. A. Bank Clothiers, Inc.*, No. 13 C 2831, 2014 WL 3765935, at *3 (7th Cir. Aug. 1, 2014).

ANALYSIS

I. Count I—Breach of Contract Claim

Hammer alleges that she had a valid and enforceable mortgage contract with RCS in the form of the loan modification and RCS breached that contract. RCS contends that Hammer’s claim for breach of contract fails because RCS did not assent to the loan modification that FDIC/AmTrust offered to Hammer or to Hammer’s unilateral amendment of that loan modification thirteen days after RCS took control of the mortgage. R. 30 at 4-5.

A. Signature of Loan Modification

Under Illinois law,⁸ the elements of a breach of contract cause of action are “(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages.” *Ass’n Ben. Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 849 (7th Cir. 2007) (citing *MC Baldwin Fin. Co. v. DiMaggio, Rosario & Veraja, LLC*, 845 N.E.2d 22, 30 (Ill. App. Ct. 1st Dist. 2006), leave to appeal denied, 850 N.E.2d 808 (2006)). “The test for an offer is whether it induces a reasonable belief in the [offeree] that [s]he can, by accepting, bind the [offeror].” *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 562 (7th Cir. 2012); *Boomer v. AT & T Corp.*, 309 F.3d 404, 415 (7th Cir. 2002)

⁸ The parties do not dispute the application of Illinois law. While RCS later cites to a Sixth Circuit case in arguing why the contract claim should be dismissed, R. 31 at 5, RCS initially recites the elements for a breach of contract claim under Illinois law. R. 31 at 3-4.

(quoting *McCarty v. Verson Allsteel Press Co.*, 411 N.E.2d 936, 943 (Ill. App. Ct. 1st Dist. 1980)); *see also* Restatement (Second) of Contracts § 24 (1981) (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”).

Hammer’s allegations support a plausible inference that a reasonable person in her position would interpret the modification agreement and the surrounding circumstances to constitute a definite offer to provide for permanent modification. This offer was available so long as Hammer satisfied the conditions in the document itself and followed the instructions of the FDIC/AmTrust representative regarding the modification, which, according to Hammer’s allegations, she did.

As Hammer notes, the language in her loan modification documents did not explicitly state that the lender’s signature was required in order for the modification to take effect. The surrounding circumstances—including the date on which Hammer received the modification, her conversations with Pelaci, and RCS’s credit of her June and July payments to her account—also support a plausible claim that no additional signature from her servicer was required to finalize the loan modification. Although Hammer amended the modification by inserting the total amount without fees and crossing out the miscellaneous fee, she alleges that she did so “at the express direction of FDIC/AmTrust and with AmTrust’s agreement.” R. 31 at 8. FDIC/AmTrust cashed her June and July 2010 payments and RCS applied those payments to her account, as described. While RCS called Hammer after it

received the modification to say there was no modification in place when her loan was serviced, the terms of the modification are “clear and definite enough” to support Hammer’s breach of contract theory that the servicer’s signature was not required for acceptance. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 565 (7th Cir. 2012). Hammer’s contract claim thus survives the motion dismiss to the extent it is attacked for a lack of signature by FDIC/AmTrust.

B. RCS’s Assent to the Loan Modification

RCS also moves to dismiss Hammer’s contract claim because it claims it did not assent to Hammer’s unilateral changes. Hammer argues that RCS is bound by the conduct of its assignor, FDIC/AmTrust for the following reasons: (1) RCS conceded the existence of a valid loan modification in multiple writings including the August 15, 2011 reinstatement letter incorporating terms and monthly payments from the modification letter, the September 21, 2011 foreclosure complaint alleging a default date of October 2010 (three months after the effective date of the modification) and the November 7, 2011 response to Hammer’s QWR stating that the modification had been finalized, R. 31 at 6; (2) Judge Gibson already adjudicated the issue of contract formation, ⁹ *Id.* at 6-7; (3) RCS is bound by

⁹ Hammer cites *Crigler v. Axia Inc.*, 735 F. Supp. 868, 871 (N.D. Ill. 1990) for the application of the law of the case doctrine. Hammer claims it dictates that Judge’s Gibson’s oral rulings on the validity of the loan modification prevent RCS from arguing that there was no enforceable contract in this case. R. 31 at 7. While the Court finds that Hammer’s breach of contract claim survives for alternative reasons and thus need not address this argument, it is worth noting that in *Crigler*, the court found that “the complaint filed in [federal] court [was] identical in all substantive respects to the amended complaint dismissed in the state court action,”

the conduct of FDIC/AmTrust as a transferee under RESPA § 2605 (d) which, along with RCS's application of Hammer's payments during the transfer period, validated the contract; or (4) in the event that the Court finds RCS's signature was necessary, the signature requirement was satisfied by RCS's application of payments to Hammer's account (checks endorsed by FDIC/AmTrust), RCS's written response to Hammer's QWR, and RCS's reinstatement letter acknowledging the modification on its letterhead.¹⁰ R. 31 at 5-10.

In addition to its other arguments, RCS responds that the law of the case doctrine does not apply because the foreclosure cases are not the same as this case and Judge Gibson did not in fact decide whether Hammer's revisions were binding on RCS in Foreclosure Case # 2. Even accepting the validity RCS's other arguments, the June and July payments that RCS credited to Hammer's account—which Hammer paid at the direction of Pelaci—were for \$749.88, the same amount as the payments listed in the modification that Hammer signed. R. 1-1 at 1, Ex. A; R 1-2, Ex. B; R. 1-3, Ex. C. This at least makes plausible Hammer's claim that the modification was effective because it shows that RCS was operating in accordance with the modification agreement. Additionally, RCS offers no response to Hammer's argument that it conceded the existence of a valid loan modification: (1) on August

which Hammer does not assert here. *Crigler*, 735 F. Supp. at 871-72 (citations omitted).

¹⁰ Hammer notes that she also alleged RCS breached the duty of good faith and fair dealing, but RCS did not raise this argument in its motion to dismiss. In reply, RCS argues that it had no choice but to return Hammer's payments which did not constitute a breach of good faith and fair dealing, R. 32 at 6, but that dispute is not appropriate for resolution on a motion to dismiss.

15, 2011, in its reinstatement letter incorporating terms and monthly payments from the modification letter; (2) on September 21, 2011, in its foreclosure complaint alleging a default date of October 2010, three months after the effective date of the modification; and (3) on November 7, 2011, in its response to Hammer's QWR that the modification had been finalized. R. 31 at 6.¹¹

Given that this case is only at the pleading stage, the Court finds Hammer's allegations sufficient to survive dismissal. Her allegations of AmTrust and RCS's offer and acceptance of the loan modification agreement state a plausible claim for a breach of contract. Of course, as the case proceeds, it will be Hammer's burden to prove (not plead) that a contract existed between her and RCS. *See, e.g., Lagen v. United Continental Holdings, Inc.*, 920 F. Supp. 2d 912, 917 (N. D. Ill. 2013).¹²

c. Damages

RCS argues that Hammer fails to plead sufficient damages with respect to her contract claim because emotional distress is not available for breach of contract and Hammer did not allege any proof of other actual damages "because there were

¹¹ RCS claims that Hammer conceded in its answer to Foreclosure Case # 2 that there was an actual dispute between the parties whether the unpaid principal balance reflected the parties' mutual agreement and intent. R. 32 at 5. RCS raises this argument for the first time on reply, so the Court will not consider it. *Amerson v. Farrey*, 492 F.3d 848, 852 (7th Cir. 2007) ("Arguments raised for the first time in a reply brief are waived.").

¹² RCS also contends that Hammer admits that her loan went into default in February 2009 and therefore her monthly payment starting in June 2010 could not bring her account balance up to date. R. 32 at 6. This is a factual dispute inappropriate for resolution on a motion to dismiss. *Cushing v. City of Chicago*, 3 F.3d 1156, 1163 (7th Cir. 1993) (holding that resolving issues of fact are "inappropriate for resolution in a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6).")

none; she was able to live in a house that [sic] she quit making payments.” R. 30 at 5. RCS’s argument is unavailing. While proof of damages is an essential element of a contract claim, Hammer has sufficiently pled damages as a result of RCS’s breach. First, in asserting that Hammer may not recover damages for emotional distress for a breach a contract, RCS cites a Sixth Circuit decision applying Michigan law—not Illinois law. R. 30 at 5 (citing *Kevelighan v. Orfans Assocs., P.C.*, 498 Fed. Appx. 469, 476 (6th Cir. 2012) (citing Michigan cases for the proposition that emotional damages are not available for breach of contract)). While Illinois does not allow punitive and emotional distress damages for a breach of contract, “compensation for emotional distress is allowed where the breach of contract was wanton or reckless and caused bodily harm or where the defendant had reason to know, when the contract was made, that its breach would cause more than pecuniary loss.” *Woodard v. Chicago Bd. of Educ.*, No. 00 C 5515, 2001 WL 1631892, at *3 (N.D. Ill. Dec. 18, 2001) (citing *Stafford v. Puro*, 63 F.3d 1436, 1443 (7th Cir. 1995); *Morrow v. L.A. Goldschmidt*, 112 Ill.2d 87 (1986); *Maere v. Churchill*, (452 N.E.2d 694) (Ill. App. Ct. 3d Dist. 1983)).

Here, Hammer alleges the following damages beyond emotional damages as a result of RCS’s breach: “illegal fees, charges, interest, damage to her credit report, being denied credit . . . physical illness and injury, and the loss of funds that RCS misapplied to Hammer’s account.” R. 1 ¶ 121. These allegations demonstrate damages recoverable under a breach of contract claim and are thus sufficiently pled to withstand RCS’s motion to dismiss. See *Fletcher v. OneWest Bank, FSB*, 798 F.

Supp. 2d 925, 932 (N.D. Ill. 2011) (concluding that, under Illinois law, the plaintiff had “alleged damages for her breach of contract claim” by asserting “damages in the form of fees, charges, accrued interest, and damage to her credit reports”); *see also Russo v. Bank of Am., N.A.*, No. 14 CV 382, 2014 WL 3811116, at *8 (N.D. Ill. Aug. 1, 2014) (finding lost credit opportunities cognizable injuries to support a breach-of-contract claim under Illinois law).

Accordingly, RCS’s motion to dismiss Hammer’s breach of contract claim is denied.

II. Count II—Fair Debt Collection Practices Act Claims

In Count II of her complaint, Hammer alleges that RCS violates the FDCPA, 15 U.S.C. §§ 1692d-g and 1692k. Hammer’s FDCPA claims are premised on RCS’s “debt collection efforts, by misrepresenting the debt’s status, the amount owed, and by failing to verify the debt in response to Hammer’s dispute letters.” R. 1 ¶ 127.

RCS contends that Count II is time-barred.¹³ 15 U.S.C. § 1692k(d) requires an action seeking to enforce liability under the FDCPA to be brought “within one year from the date on which the violation occurs.”

Hammer argues that she alleges FDCPA violations within the statute of limitations, pointing specifically to the following:

¹³ “[W]here . . . the expiration of the statute of limitations is clear from the face of the complaint, the plaintiff must plead in the complaint any exceptions to the application of the statute of limitations upon which the plaintiff relied in bringing her case. *Thomas v. Ocwen Fed. Bank FSB*, No. 01 C 4249, 2002 WL 99737, at *3 (N.D. Ill. Jan. 25, 2002) (citing *See Theriot, III v. Captain James Sprinkle, Inc.*, 30 F.3d 136 (7th Cir. 1994)).

“(a) mismanagement of the loan account (Compl. ¶ 128); (b) perpetual disregard for the loan modification (*Id.* ¶ 129); (c) misrepresenting the status of the debt (*Id.* ¶¶ 130-34); (d) failing to respond to Hammer’s disputes and reporting to credit bureaus during the dispute period (*Id.* ¶¶ 135-38, 142); (e) continuing to prosecute a wrongful foreclosure action without verifying the debt (*Id.* ¶ 145) . . . and cashed Hammer’s September 2012 payment . . . and later claimed, deceptively, that no loan modification existed. (Compl. ¶ 111.)

R. 31 at 11. The paragraphs Hammer references cite to 15 U.S.C. §§ 1692d-f and 1692g(b).¹⁴ To determine “the date on which the violation occurs,” and thus the starting point for the statute of limitations on these claims, the Court looks to the specific violations Hammer alleges against RCS under the specific sections of the FDCPA. *Typpi v. PNC Bank, Nat’l Ass’n*, No. 13 CV 3930, 2014 WL 296035, at *4 (N.D. Ill. Jan. 27, 2014); *Jones v. U.S. Bank Nat. Ass’n*, No. 10 C 0008, 2011 WL 814901 (N.D. Ill. Feb. 25, 2011).

A. § 1692d

Section 1692d prohibits debt collectors from engaging “in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” 15 U.S.C. § 1692d. Hammer claims that RCS violated this section when it “engaged in abusive and oppressive conduct through unethical mismanagement of the account and treatment of Hammer’s repeated disputes and inquiries over a period spanning a year and a half and two

¹⁴ Hammer does not reference her claims alleging a violation of § 1692g(a) (in paragraphs 140 and 141 of the complaint) or 1692k(c) (in paragraph 146 of the complaint) as being within the statute of limitations. Presumably, she asserts that these claims should be considered under her theory of tolling based on fraudulent concealment.

(2) separate foreclosure cases” and “through its perpetual disregard for the loan modification and Hammer’s timely payments.” R. 1 ¶¶ 128-29.

The only acts with precise dates that Hammer references in Count II of her complaint for a violation of section 1692d are the two foreclosure actions, the first of which FDIC/AmTrust filed on September 9, 2009, and the second of which RCS filed on September 16, 2011. Those alleged violations occurred well before the one-year statute of limitations, requiring an action to accrue after September 6, 2012. The Court cannot precisely identify RCS’s remaining conduct that Hammer alleges to have violated FDCPA under § 1692d due to her generalized allegations in this count. However, to the extent Hammer puts forth facts to support a continuing violation and an ongoing, continuous pattern and course of conduct, that argument fails. *See, e.g., Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 825 (N.D. Ill. 2013) (rejecting outright a plaintiff’s reliance on the continuing violation doctrine in an FDCPA case); *see also Lockhart v. HSBC Finance Corp.*, No. 13 C 9323, 2014 WL 3811002, at *10-11 (N.D. Ill. Aug. 1, 2014) (citing *Hill* and noting that “[t]he purpose of the continuing violation doctrine is not to reset the statute of limitations every time an individual act occurs”). Because the identifiable violations occurred well before the one-year statute of limitations, Hammer cannot maintain her claim against RCS for a violation of 15 U.S.C. § 1692d as pled.

B. § 1692g(b)

Section 1692g(b) states, in relevant part, that when a consumer timely notifies a debt collector in writing that a debt is disputed, “the debt collector shall

cease collection of the debt . . . until the debt collector obtains verification of the debt or a copy of a judgment . . . and a copy of such verification or judgment ... is mailed to the consumer by the debt collector.” 15 U.S.C. § 1692g(b). “Because the FDCPA bars any debt collection activity until verification, a cause of action under Section 1692g(b) accrues when the debt is pursued prior to verification.” *Typpi*, 2014 WL 296035, at *4 (citing *Jones v. U.S. Bank Nat. Ass’n*, No. 10 C 0008, 2011 WL 814901, at *4 (N.D. Ill. Feb. 25, 2011)). “Where an [alleged] FDCPA violation arises out of a collections lawsuit, the Seventh Circuit has not decided when the FDCPA’s statute of limitations begins to run, though the circuit courts that have ruled on the issue agree that the clock starts when the allegedly wrongful litigation begins.” *Judy v. Blatt, Hasenmiller, Leibsker & Moore LLC*, No. 09 C 1226, 2010 WL 431484, at *3 (N.D. Ill. Jan. 29, 2010) (citing *Johnson v. Riddle*, 305 F.3d 1107, 1113 (10th Cir. 2002); *Naas v. Stolman*, 130 F.3d 892, 893 (9th Cir. 1997)).

Hammer asserts that she disputed her debt through an October 28, 2011 Fair Debt Dispute Letter and that RCS has nonetheless continued to prosecute the Foreclosure Case # 2, which it commenced on September 16, 2011, without verifying the underlying debt. Hammer’s cause of action arising under 1692g(b) accrued when RCS commenced the debt collection through the foreclosure case prior to verification, well before the one-year statute of limitations which ran out on September 16, 2012. Therefore, Hammer’s claim under 1692g(b) does not survive the motion to dismiss.

C. §§ 1692e-f

Hammer also asserts that RCS violated 15 U.S.C. §§ 1692e and 1692f. Hammer alleges that RCS violated these sections by “lumping the attorney fees, unauthorized fees and costs, and costs to repay force-placed insurance in with the principal debt obligation,” R. 1 ¶ 138, and “by including escrow overdraft charges and improper corporate advances (from the force-placed insurance) in its dunning letters, acceleration notices, restatement letters, and payoff letters sent to Hammer.” *Id.* ¶ 139. Section 1692e states that a “debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. Section 1692f prohibits using “unfair or unconscionable means to collect or attempt to collect any debt.” § 1692f.

The accrual of these claims, as pled, occurred before the September 6, 2012 limitations date. According to Hammer’s complaint, RCS first assessed unexplained fees on Hammer’s account on September 14, 2010, R. 1 ¶ 53, and assessed attorney’s fees and escrow payment charges as early as May 12, 2011, in response to Hammer’s request for reinstatement figures. R. 1 ¶ 77. As early as December 3, 2010, RCS notified Hammer that it had secured force-placed insurance on her behalf. R. 1 ¶ 63. Thus, the clock began to run on these claims in 2010 and 2011, so they are time-barred.¹⁵

¹⁵ Hammer also argues that RCS violated section 1692e in its attempt to collect the subject debt by way of foreclosure, perpetually declaring the subject loan in default, illegally force-placing insurance, and establishing an escrow account. R. 1 ¶ 134. The accrual of that claim, too, occurred prior to the statute of limitations for the

Hammer also alleges that RCS violated subsections e(2),(5), and (8) of the FDCPA. Section e(5) prohibits “[t]he threat to take any action that cannot legally be taken or that is not intended to be taken.” 15 U.S.C. §1692e(5). Hammer’s claim under section e(5) is based on RCS continuing its pursuit of the foreclosure cases. Assuming the pursuit of the foreclosures is actionable, they were commenced in 2009 and 2011, respectively, barring Hammer’s claim under section e(5) as well.

Hammer’s claims under section 1692e(2) and (8) also cannot withstand RCS’s statute of limitations argument. Section e(2) prohibits false representation of “the character, amount, or legal status of any debt; or . . . any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.” § 1692e(2). Section e(8) prohibits “[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.” § 1692e(8). Hammer alleges that RCS violated section e(2) by misrepresenting the collectable status of the debt, R. 1 ¶ 131, and violated section e(8) by reporting false information regarding the loan to credit bureaus.

It is unclear from the face of Hammer’s complaint when these activities first took place. However, there is no indication in the complaint that these activities first took place on or after September 6, 2012, which would be within the statute of limitations. In terms of activity alleged after September 6, 2012 that might fall under the category of “misrepresenting the collectable status of her debt,” Hammer

reasons stated with regard to when Hammer became aware of the escrow account, foreclosure actions, and force-placed insurance.

asserts that RCS sent her letters on September 19 and October 5, 2012 regarding her insurance policy stating that she was required to increase her policy coverage due to her loan balance. R. 1 ¶¶ 112-13. However, Hammer first received a letter from RCS about her alleged lack of insurance on December 3, 2010, R. 1 ¶ 63, long before the September 6, 2012 date. Additionally, Hammer does not allege that RCS reported information regarding the loan to credit bureaus on or after September 6, 2012. Thus, the clock on these claims—if they materialized at all—began to run prior to September 6, 2012. All of Hammer’s FDCPA claims are barred by the statute of limitations.

D. Statute of Limitations Tolling

Hammer contends the statute of limitations should be tolled for her FDCPA claims prior to September 6, 2012, because RCS engaged in fraudulent concealment which prevented her from timely filing suit. In response, RCS argues that Hammer fails to plead fraudulent concealment with specificity as required under Federal Rule of Civil Procedure 9(b) because she fails to explain how RCS’s alleged fraud prevented her from timely discovering the basis of her claims.¹⁶

“Equitable estoppel, a subset of which is fraudulent concealment, applies when the plaintiff shows that the defendant misled him or took active steps to

¹⁶ RCS raises the issue of equitable tolling, but that is distinct from fraudulent concealment. *Olszewski v. Quicken Loans Inc.*, 12 CV 3131, 2013 WL 317060, at *2 (N.D. Ill. Jan. 28, 2013) (“Equitable tolling is frequently confused with fraudulent concealment, a subset of equitable estoppel . . . [h]owever, the Seventh Circuit has clearly held that equitable tolling and fraudulent concealment are two separate doctrines” (citing *Shropshear v. Corp. Counsel of Chi.*, 275 F.3d 593, 595 (7th Cir. 2001); *Asher v. Chase Bank United States, N.A.*, 310 Fed. Appx. 912, 917 (7th Cir. 2009))).

prevent him from filing suit before the statutory period expired.” *Asher v. Chase Bank USA, N.A.*, 310 Fed. Appx 912, 917 (7th Cir. 2009) (citing *Smith v. Potter*, 445 F.3d 1000, 1010 (7th Cir. 2006); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990)). The “doctrine contemplates that the plaintiff has discovered, or . . . should have discovered, that the defendant injured him, and denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff’s claim is founded—to prevent the plaintiff from suing in time.” *Hentosh v. Herman M. Finch Univ. of Health Sci./The Chi. Med. Sch.*, 167 F.3d 1170, 1174 (7th Cir. 1999) (citations and quotation marks omitted). The alleged acts of fraudulent concealment must constitute more than a failure to disclose the alleged initial fraudulent conduct. *Arriaga v. Wells Fargo Bank, N.A.*, No. 09 C 2115, 2011 WL 4738522, at *3 (N.D. Ill. Sept. 30, 2011) (citing *Sharp v. United Airlines, Inc.*, 236 F.3d 368, 372 (7th Cir. 2001)). Courts should apply equitable estoppel “sparingly.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

In the context of tolling, “[a] plaintiff must plead with Rule 9(b) particularity the specific conduct of the defendant that entitles the plaintiff to toll the limitations period for fraudulent concealment.” *Arriaga*, 2011 WL 4738522, at *4 (citing *Whitley v. Taylor Bean & Whitacker Mortg. Corp.*, 607 F. Supp. 2d 885, 900 (N.D. Ill. 2009)). “A complaint should distinctly state what the discovered fraud actually was and when the plaintiff discovered it, so that the Court may evaluate whether he could have discovered it through the exercise of due diligence.” *Greer v. Bank One*, No. 01 C 7352, 2002 WL 1732366, at *3 (N.D. Ill. July 25, 2002), *aff’d sub nom. Greer v.*

Cnty. of Cook, IL, 54 Fed. Appx. 232 (7th Cir. 2002) (citations omitted). A plaintiff must state “the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.” *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 668 (7th Cir. 2008) (quoting *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078 (7th Cir. 1997)).

Hammer’s allegations in the complaint fall short of the standard to state a plausible claim for tolling based on fraudulent concealment. Hammer contends:

RCS employed a perpetual tactic of supplying conflicting information that left an elderly widow in a state of confusion. RCS provided Hammer three conflicting reinstatement letters in a 90[-]day period, provided conflicting information in response to all of her disputes leading up the instant lawsuit, and misrepresented the status of her own loan, or its willingness to honor the contractual terms or Judge Gibson’s orders.

R. 31 at 12. Hammer fails to allege with the required specificity how RCS’s conduct and the content of its misrepresentations prevented her from discovering her cause of action. She also fails to allege how RCS’s fraudulent concealment goes “above and beyond” the wrongdoing upon which her claim is founded and further fails to allege when she actually discovered the fraud so the Court may evaluate whether she could have discovered it through the exercise of due diligence. Therefore, the FDCPA claims are not tolled and Hammer’s FDCPA claims are dismissed with prejudice.

III. Count III—Illinois Consumer Fraud Act

Hammer alleges that RCS violated the ICFA by engaging in unfair and deceptive acts. RCS argues that Hammer's ICFA claim should be dismissed for the following reasons: (1) Hammer fails to plead proximate cause and actual damages with specificity; (2) the foreclosure actions are not governed by the ICFA; and (3) some of Hammer's allegations are time-barred. R. 30 at 7. In response, Hammer argues that her allegations meet the corresponding standards for both her fraud and unfair practice claims.

“To state a cause of action under the ICFA, five elements must be proven: (1) a deceptive act or unfair practice occurred, (2) the defendant intended for plaintiff to rely on the deception, (3) the deception occurred in the course of conduct involving trade or commerce, (4) the plaintiff sustained actual damages, and (5) such damages were proximately caused by the defendant's deception.” *Wiegel v. Stork Craft Mfg., Inc.*, 780 F. Supp. 2d 691, 693 (N.D. Ill. 2011) (citing *Dubey v. Public Storage, Inc.*, 918 N.E.2d 265, 277 (Ill. App. Ct. 5th Dist. 2009)). For claims of fraud under the ICFA, the sufficiency of a complaint is analyzed under the heightened pleading standard set forth in Federal Rule of Civil Procedure 9(b). *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 446–47 (7th Cir. 2011).

Hammer does not respond directly to each of RCS's arguments, though she does argue that the heightened standard does not apply to her unfair practice claims under the ICFA. R. 31 at 12. Hammer contends that her allegations of force-

placed insurance and illegal fees are sufficient to state an ICFA claim for unfair practices under *Typpi*. She argues that “when taken as a whole over several years, RCS’s conduct was so unethical and unending, that Hammer had no choice but to submit.” R. 31 at 13. RCS responds that Hammer’s complaint in fact alleges fraud and misrepresentations, not an unfair practice.

Courts interpreting the meaning of “unfair practice” have held that a plaintiff states a claim under the ICFA where the defendant’s conduct “gave plaintiff no reasonable alternative to avoid a charge or penalty.” *Typpi*, 2014 WL 296035, at *8 (citing *Hill v. PS Ill. Trust*, 856 N.E.2d 560, 569) (Ill. App. Ct. 1st Dist. 2006) (additional citations omitted)). To evaluate whether a business practice is unfair, a court must look to: “(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers.” *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill. 2002). “Because neither fraud nor mistake is an element of unfair conduct under Illinois’ Consumer Fraud Act, a cause of action for unfair practices under the Consumer Fraud Act need only meet the notice pleading standard of “Rule” 8(a), not the particularity requirement in Rule 9(b).” *Windy City Metal*, 536 F.3d at 670.

In response to RCS’s motion to dismiss, Hammer identifies as unfair practices RCS’s force-placed insurance and illegal fees. R. 31 at 13. However, in her complaint, Hammer asserts that “RCS committed a deceptive act or practice by force-placing insurance multiple times and by assessing fees and costs that

Hammer did not owe,” R. 1 ¶ 153, making no reference to the force-placed insurance and related fees being a basis for unfair as opposed to deceptive conduct. This indicates that Hammer’s deceptive practices claim—not her unfair practices claim—relies on the force-placed insurance and related fees.

To the extent Hammer relies on additional allegations to support her unfair and deceptive practice claims under the ICFA, it is difficult to sort out what Hammer is pleading as violations of the ICFA. Hammer’s complaint is unclear about which facts go to unfair practices, requiring conformance to Rule 8, and which facts go to fraud and deceptive practices, requiring conformance to Rule 9(b). For example, Hammer’s complaint alleges that RCS “engag[ed] in unfair and deceptive acts or practices by using fraud, deception, and misrepresentation in its attempt to collect a superseded debt, . . . RCS’s communications to Hammer were confusing, deceptive, and unfair as Hammer was attempting to resolve any discrepancies in good faith [and] . . . [t]he misrepresentations, deception, and unfair practices complained of occurred in the course of conduct involving trade or commerce” *Id.* ¶¶ 149, 155, 157. Hammer’s broad allegations of deception raise “the very concerns that Rule 9(b) seeks to protect in requiring particularity.” *Pirelli Armstrong Tire Corp., Retiree Med. Benefits Trust v. Walgreen Co.*, No. 09 C 2046, 2010 WL 624709, at *7 (N.D. Ill. Feb. 18, 2010) *aff’d*, 631 F.3d 436 (7th Cir. 2011) (noting that “a principle purpose of requiring fraud be pleaded with particularity is . . . to protect individuals and businesses from privileged libel” and “if adding an allegation of ‘unfairness’ to every allegation of fraud required a fall-back to a more relaxed

pleading standard under Rule 8(a), then all consumer fraud cases would be pleaded with these words and be subject to the less stringent standard”) (citing *Kennedy v. Venrock Assoc.*, 348 F.3d 584, 594 (7th Cir. 2003)). For that reason, both Hammer’s unfair practice and fraud claims under the ICFA are dismissed without prejudice. Hammer may, however, replead her ICFA claims. See *Vangsness v. Deutsche Bank Nat’l. Trust Co.*, No. 12 C 50003, 2012 WL 5989354, at *5 (N.D. Ill. Nov. 29, 2012) (instructing plaintiff to replead ICFA claims for fraud and deception in separate counts from unfair conduct) (citing *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638, 641 (7th Cir. 2007)).

If Hammer chooses to replead, she must specifically set out her unfair practices claims under the ICFA in a separate count from her deceptive practice claims (meeting the requirements of Rule 9(b)) under the ICFA. In each count, Hammer should set out the facts alleged to be in support of the claims in that particular count rather than incorporating facts by reference.

IV. COUNT IV—RESPA Claim

RCS argues that Hammer’s RESPA claim should be dismissed because Hammer’s loan fell into default in August 2009, which meant that after that point (and before transfer to RCS) the loan was no longer being serviced and no servicing rights existed to be assigned, sold, or transferred under 12 U.S.C. 2605(i)(3). R. 30 at 10. Hammer responds that her entire complaint is based on the premise that the

loan has not been in default since Hammer accepted a loan modification in July 2010.¹⁷

“RESPA is a consumer protection statute that regulates the real estate settlement process, including servicing of loans and assignment of those loans.” *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 680 (7th Cir. 2011). RESPA places a duty on loan servicers to respond to borrower inquiries. 12 U.S.C. § 2605(e). “RESPA defines ‘servicer’ to mean ‘the person responsible for [the] servicing of a loan’, and ‘servicing’ to mean ‘receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan [.]’” *Jones v. Wells Fargo Home Mortgage, Inc.*, No. 10 C 0008, 2014 WL 3974261 (N.D. Ill. Aug. 12, 2014) (citing 12 U.S.C. § 2605(i)(2), (i)(3)). As discussed, Hammer’s breach of contract claim survives dismissal. Hammer states a plausible claim that beginning in August 2010, RCS became the servicer of her loan and was receiving payments—some of which it cashed or credited to her account—specifically those in August 2010, August 2011, and September 2012. As such, RCS plausibly received, at least on those dates, scheduled periodic payments from Hammer pursuant to the loan terms, and was responsible for servicing the loan. Thus, Hammer has pled sufficient facts to state a plausible claim that RCS was servicing her loan.

RCS directs the Court to *Daw v. Peoples Bank & Trust Co.*, 5 Fed. Appx. 504, 505 (7th Cir. 2001) and *Sanchez v. Onewest Bank, FSB*, 2013 WL 139870, at *3

¹⁷ On reply, RCS first argues that any alleged conduct prior to September 6, 2012 is also time barred by RESPA’s one-year statute of limitations. However, RCS failed to raise this argument in its opening brief. As a result, it is waived. *Amerson v. Farrey*, 492 F.3d 848, 852 (7th Cir. 2007).

(N.D. Ill. Jan. 10, 2013) to argue that RCS was not servicing the loan and was not a servicer because Hammer's loans had already gone into default and a foreclosure complaint had been filed against her when RCS took over her loan. This contention is not persuasive. The facts in *Daw* and *Sanchez* are distinguishable from those here. In *Daw*, which was before the court on summary judgment, plaintiff's loan servicer assigned the mortgage to the guarantors of the debt—plaintiff's parents—after they paid off the defaulted loan. 5 Fed. Appx. at 504. The plaintiff alleged under RESPA Section 2605(b) that she had not been notified of the assignment, sale, or transfer of the servicing of the loan to her parents after she defaulted. *Id.* at 506. The court found that there were no servicing rights to assign, sell, or transfer once *Daw* defaulted as there were no longer any scheduled periodic payments to make or collect. *Id.* However, unlike in this case, there was no allegation in *Daw* that the lender continued to act as a servicer of the loan, through its acceptance of payments or otherwise. Thus, although Hammer defaulted on her loan, she alleges that a loan modification agreement was subsequently put in place and that she continued to make payments according to that agreement, some of which RCS accepted. The allegations that RCS serviced her loan therefore distinguish her case from *Daw*.

Similarly, *Sanchez* did not address the status of a servicer under RESPA where a plaintiff, like Hammer, claimed that the servicer continued to collect payments after the default. In *Sanchez*, plaintiff defaulted, the servicer initiated foreclosure proceedings, and the Cook County Circuit Court entered a foreclosure

judgment against the plaintiff in the underlying case. *Sanchez*, 2013 WL 139870, at *2. After the foreclosure judgment was entered, the plaintiff sent the servicer a letter it labeled a QWR under RESPA, requesting information relating to the loan history. *Id.* The servicer responded, noting that it was no longer servicing the account as an active mortgage loan and could not provide the information requested. *Id.* The property at issue in *Sanchez* was already in foreclosure and had been sold pursuant to a judicial sale three weeks prior to the plaintiffs' letter on which it based its RESPA claims. *Id.* at *3. The court did not address, however, whether the outcome would have been the same if the plaintiffs had continued to make payments after defaulting or the loan servicers had continued to accept those payments. In this case, Hammer's allegations are enough to state a plausible claim that RCS was servicing the loan, so the Court rejects RCS's argument that her RESPA claim should be dismissed on that ground.

Moreover, while RCS argues that no rights existed to be serviced after plaintiff's default in August 2009, documents Hammer received belie that argument. Hammer alleged that the RESPA notice she received from RCS on July 23, 2010, was entitled "Notice of Assignment, Sale, or Transfer of *Servicing* Rights" R. 1 ¶ 43 (emphasis added). The notice stated, "[E]ffective 8/1/2010, your previous loan servicer, AmTrust Bank, will no longer accept payments for your loan. Beginning 8/1/2010 please make your payments to RCS . . ." R. 1 ¶ 43. The letter also advised Hammer of her right to send a RESPA QWR dispute within 60 days. *Id.* The letter accompanying the modification agreement stated that it would "bring

[her] loan current by capitalizing the amount that [she was] currently behind over the life of the loan” and that the representative was “pleased” to be able “to work with [Hammer] in bringing [her] loan current to avoid [her] home going into foreclosure.” R. 1-1 at 2. This language supports a plausible claim that Hammer’s loan was no longer in default as it was being brought current, her loan was being serviced, and RCS would be the servicer of the loan effective August 1, 2010. Thus, Hammer has alleged facts to plausibly suggest that RCS was servicing the loan after her August 2009 default and the initiation of Foreclosure Case # 1 on September 9, 2009. As a result, RCS’s motion to dismiss Hammer’s RESPA claim is denied.

CONCLUSION

Hammer has pled sufficient factual allegations to survive RCS’s motion to dismiss her claims for breach of contract and violation of RESPA. The Court grants RCS’s motion to dismiss Hammer’s FDCPA claims with prejudice and grants the motion to dismiss Hammer’s ICFA claim without prejudice and with leave to replead.

ENTERED:



Honorable Thomas M. Durkin
United States District Judge

Dated: September 11, 2014

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ALENA W. HAMMER,)	
	Plaintiff,	)	CIVIL ACTION
)	
		)	File No. 1:13-cv-6397
RESIDENTIAL CREDIT SOLUTIONS, INC.,	v.)	
		)	JURY TRIAL DEMANDED
)	
	Defendant.	)	Honorable Judge Durkin
)	

FIRST AMENDED COMPLAINT

NOW COMES the Plaintiff, ALENA W. HAMMER, by and through her attorneys, SULAIMAN LAW GROUP, LTD., filing this first amended complaint against Defendant RESIDENTIAL CREDIT SOLUTIONS, INC. as follows:

NATURE OF THE ACTION

1. Plaintiff ALENA W. HAMMER brings this action against RESIDENTIAL CREDIT SOLUTIONS, INC. for damages resulting from breach of contract and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”) and the Real Estate Settlement Procedures Act (“RESPA”).
2. All of the claims stated herein stem from the wrongful servicing, debt collection, and loss mitigation activities related to Hammer’s mortgage loan, and the ensuing wrongful foreclosure actions filed against Hammer in both 2009 and 2011.

JURISDICTION AND VENUE

3. Subject matter jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 and 1337 as the action arises under the laws of the United States.
4. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391 as Hammer resides in this District, the property that is the subject of this action is situated in this District, and a substantial part of the events or omissions complained of occurred in this District.

PARTIES

6. Plaintiff ALENA W. HAMMER (“Hammer”) is a senior citizen who resides at 355 N. Addison, Villa Park, Illinois 60181 (“subject property”). The subject property is a single family home and Hammer’s primary residence.

7. Defendant RESIDENTIAL CREDIT SOLUTIONS, INC. (“RCS”) is a wholly owned subsidiary of RESIDENTIAL CREDIT HOLDINGS, LLC. RCS is a Delaware corporation with its principal place of business in Fort Worth, Texas. RCS is in the business of servicing loans across the country, including in the State of Illinois.

INTRODUCTION

8. Hammer, a grandmother and senior citizen of declining health, obtained a loan modification from RCS’s predecessor in July 2010. Since that date, Hammer has tendered her required monthly payment for 51 consecutive months without fail.

9. When RCS obtained the servicing rights on Hammer’s mortgage loan in August 2010, RCS refused to honor Hammer’s loan modification.

10. After repeated objections regarding RCS’s servicing fell on deaf ears, RCS declared Hammer in default, and then proceeded to prosecute two separate foreclosure actions against Hammer spanning four years. After being defeated in the first case due to its failure to honor the loan modification, RCS, in spite of the ruling, filed another wrongful foreclosure action in 2011; the 2011 foreclosure action was based on the same inaccurate allegations as the first action.

11. Over the last several years, Hammer has made countless “Fair Debt” disputes and QWRs to RCS. As RCS systematically ignored the disputes, it continued to prosecute its second foreclosure case.

12. Along the way, RCS wrongfully force-placed insurance on Hammer’s property countless times, even though Hammer had sent proof of her hazard insurance directly to RCS on numerous occasions.

13. On top of that, RCS illegally set up an “escrow account” and charged Hammer for her “force placed insurance” and also her “failure to pay real estate taxes.”

14. At all times since obtaining the underlying loan in 2003, Hammer has paid her taxes in full and has maintained proper and adequate hazard insurance.

15. RCS assessed at least 21 separate unexplained fees on Hammer’s account since August 2010; RCS has yet to provide clarification on any of these charges.

16. In an attempt to resolve any discrepancy, Hammer requested reinstatement figures from RCS. RCS provided Hammer with three conflicting payoff letters, one with a reinstatement figure as high as \$34,000.00, and one with a figure as low as \$10,000.00.

17. This harassment has continued through the date of this complaint. RCS still refuses to honor Hammer’s loan modification, or disclaim any wrongful fees.

18. As a result of RCS’s perpetual harassment and litigation, the stress imposed upon Hammer over the last several years has led to severe medical problems, medical bills, and the abrogation of her right to the quiet enjoyment of her home.

FACTS SUPPORTING CAUSE OF ACTION

19. On December 9, 2003, Hammer executed a 30-year mortgage loan (“subject loan”) in the amount of \$220,000.00 in favor of First Centennial Mortgage, Inc. for the purchase of the subject property as her primary residence.

20. The subject mortgage required that Hammer make monthly payments of principal and interest, to be applied first to interest, then to principal, then to any outstanding costs and fees.

21. The subject mortgage required that Hammer pay her taxes and maintain hazard insurance separately from the mortgage loan.

22. Hammer opted out of any escrow requirement for the subject loan. The escrow waiver was effective so long as Hammer remained current on her taxes and insurance.

23. Thereafter, AmTrust Bank (“AmTrust”) obtained servicing rights for the subject loan.¹

24. At all times from 2003 through the filing of this amended complaint, Hammer maintained hazard insurance on her home as required by the mortgage.

25. At all times from 2003 through the filing of this complaint, Hammer paid the real estate taxes in-full and on time.

a. The First Foreclosure Case & Loan Modification

26. On February 27, 2009, Hammer was laid-off from her job of seventeen (17) years. As a result, Hammer fell behind on her principal and interest payments.

27. In August 2009, AmTrust declared the subject mortgage loan in default.

28. On September 9, 2009, AmTrust Bank filed a foreclosure against the subject property and against Hammer in DuPage County, Illinois in the case known as *AmTrust Bank v Hammer*, 2009 CH 3951 (“Foreclosure Case #1”).

¹ AmTrust may have become the owner and holder of the indebtedness as well.

29. In December 2009, AmTrust was closed by the Office of Thrift Supervision. The Federal Deposit Insurance Corporation (“FDIC”) was appointed as receiver for AmTrust.

30. On December 7, 2009, the FDIC instructed Hammer to make her mortgage payment checks out to “FDIC as Receiver for AmTrust Bank, Cleveland, OH,” and to send all payments to “the same address you are currently forwarding those items to.”

31. In January 2010, Hammer received a call from “Theresa Holk” at the FDIC/AmTrust about a potential loan modification.

32. Holk explained that Hammer’s modified loan amount would be the principal balance on the loan before the FDIC takeover of AmTrust, and that all past-due amounts would be waived.

33. Holk quoted Hammer the modified balance of \$207,176.99, with a waiver of all fees, penalties, and past-due interest. Holk told Hammer that she would receive correspondence in the mail with instructions on how to complete the modification.

34. Hammer received a letter from the FDIC/AmTrust providing Hammer with a loan modification application and checklist of documents to be submitted no later than February 26, 2010. On February 2, 2010, Hammer submitted the application and documentation.

35. On June 21, 2010, Holk notified Hammer that her modification was officially approved with a total principal balance of \$207,176.99 and that all future dealings should be through Hammer’s new contact person, “Chris Pelaci,” and that all loan modification payments should be sent to “Sandy Beauregard” at FDIC/AmTrust.

36. On June 28, 2010, Hammer received the written loan modification in the mail. *See* Exhibit A attached hereto is a true and correct copy of the loan modification.

37. The loan modification package and cover letter were dated June 8, 2010. The cover letter notified Hammer that she must sign, notarize, and return the modification to AmTrust no later

than June 25, 2010, and send her new monthly payment of \$749.88 to AmTrust by July 1, 2010.

Id.

38. The loan modification also included a miscellaneous fee of \$2,303.30, increasing the modified balance from \$207,176.99 to \$209,471.59. *Id.*

39. Hammer called Pelaci to request additional time to review and sign the document since she received the modification three (3) days *after* the due date set forth in the cover letter.

Hammer also disputed the \$2,303.30 in fees added to the modified balance.

40. Pelaci said she would look into the added fees. Pelaci told Hammer that she still needed to send in her first payment of \$749.88 by July 1, 2010, but did not need to sign the document until Pelaci called her back regarding the unknown fees.

41. Hammer sent her first payment to AmTrust on June 28, 2010 in the amount of \$749.88. AmTrust cashed Hammer's first loan modification payment on July 1, 2010. *See* Exhibit B attached hereto is a true and correct copy of the June 28, 2010 payment.

42. Hammer did not receive any response from Pelaci regarding the \$2,303.30 in unspecified fees. She called and wrote AmTrust/FDIC to dispute the fee and obtain an explanation and further instruction.

43. On July 23, 2010, Hammer received a RESPA "Notice of Assignment, Sale, or Transfer of Servicing Rights" from RCS. The notice stated, "[e]ffective 8/1/2010, your previous loan servicer, AmTrust Bank, will no longer accept payments for your loan. Beginning 8/1/2010, please make your payments to RCS...." The letter advised Hammer of her right to send a RESPA "Qualified Written Request" dispute within 60 days.

44. On July 28, 2010, Hammer made her second payment (the August 1, 2010 payment) on the loan modification in the amount of \$749.88 to AmTrust. AmTrust cashed the check on July 30, 2010. *See* Exhibit C attached hereto is a true and correct copy of the July 28, 2010 payment.

45. On August 2, 2010, RCS applied \$1,499.76 in payments to Hammer's account (\$749.88 x 2 payments).

46. On or about August 14, 2010, Pelaci spoke with Hammer over the phone regarding the \$2,303.30 in unspecified fees. Pelaci told Hammer that the fees were assessed in error and that Hammer needed to cross out the \$2,303.30 fee, write in the correct principal balance of \$207,176.99, initial and sign the contract in front of a notary, then return the executed copy to RCS, attention "Jim Bass." Hammer wrote the amounts as instructed. Hammer then signed, notarized, and mailed the document to Bass as instructed. *See* Exhibit A.

47. Upon receipt of the document, Bass called Hammer. Bass stated that the loan modification "did not exist at the time the loan was transferred to [RCS]" and therefore was not valid, and that RCS would take Hammer's home. Bass yelled and swore at Hammer to the point where she became very distraught. Bass hung up the phone on Hammer.

48. Hammer called RCS several times in an attempt to speak to Bass to resolve the issue. Bass would not take her calls. Instead, Hammer spoke with his associates, who called Hammer a "deadbeat," and told her that she "wouldn't have this problem if [she] had paid her mortgage."

49. On August 19, 2010, RCS sent Hammer a notice that her real estate taxes were delinquent.

50. Hammer's real estate taxes were always current from 2003 through today.

51. On August 31, 2010, Hammer disputed the debt in writing, sent a Qualified Written Request, and sent Fair Debt Dispute Letter addressed to Sandy Beauregard at FDIC/AmTrust

stating, “[RCS] claims FDIC sent no files to them. No knowledge of modification! I’m sending the payment to you for that reason....I need to know where the money I’m sending is going.”

52. On September 1, 2010, Hammer sent her third loan modification payment to AmTrust in the amount of \$749.88, which AmTrust forwarded to RCS.

53. On September 14, 2010, RCS billed \$100.00 to Hammer’s account in unexplained fees.

54. On September 19, 2010, Hammer’s hazard insurance policy automatically renewed for a twelve (12) month period. Also on September 19, 2010, unbeknownst to Hammer at the time, RCS unilaterally set up an escrow account, force-placed insurance on Hammer’s property, and charged Hammer’s account.

55. On September 30, 2010, Hammer sent another Fair Debt Dispute Letter to AmTrust/FDIC along with her fourth modification payment in the amount of \$749.88. The letter stated that Hammer had a loan modification contract with AmTrust/FDIC.

56. On or about October 15, 2010, Hammer received a letter from FDIC/AmTrust, stating “Please be advised that your mortgage loan was transferred to [RCS] more than 60 days ago. Immediately after the transfer payments were forwarded, however we are enclosing the most recent payment received on your behalf, which needs to be paid directly to [RCS].” The letter included Hammer’s October 2010 payment, but not her September 2010 payment.

57. On October 15, 2010, RCS billed \$15.00 to Hammer’s account in unexplained fees.

58. On October 29, 2010, Hammer sent a check to RCS in the amount of \$749.88 for her November 2010 payment (fifth modification payment). Hammer included a third Fair Debt Dispute Letter with her check stating, “Also, the November payment enclosed as per contract w/FDIC/AmTrust bank prior to transfer to RCS.”

59. RCS received the payment on November 1, 2010 and returned the payment without cashing it on November 5, 2010.

60. On November 5, 2010, and unbeknownst to Hammer, RCS “force-placed” insurance on Hammer’s account for a second time in the amount of \$2,615.00, which RCS “deducted” from Hammer’s escrow account, creating a negative escrow balance.

61. Hammer did not have an escrow account per the terms of her mortgage contract and modification. RCS had set one up for her without her authorization and was “deducting” the amounts for force-placed insurance and real estate taxes from that account, even though taxes and insurance were current.

62. On December 1, 2010, Hammer sent a check to RCS in the amount of \$749.88. RCS returned the payment to Hammer without cashing it. Hammer continued to send her monthly payments to RCS via certified mail each month from July 2010 through today. Unless specifically addressed herein, RCS returned Hammer’s payments every month, after holding her checks for several weeks to several months.²

63. On or about December 3, 2010, Hammer received a letter from RCS stating that it had not received proof of her insurance policy on the subject property. As a result, they secured “force-placed” insurance on her behalf through “American Modern Home.” The letter also stated:

“The cost of this policy will be paid out of your loan escrow account. If you do not have an escrow account for insurance, one will be set up to begin collecting funds to pay for this policy and all future insurance policies. This will result in your mortgage payment increasing to pay for this policy and future insurance policies. Any insurance policy we purchase on your behalf may be cancelled at any time by providing us with evidence of other acceptable insurance. If you provide coverage effective the date of the policy we purchased, the escrow

² Hammer has proof of all of her payments, including the U.S. certified mail “green card” to establish delivery to RCS.

account we established to pay for this insurance will be deleted and you will continue to be responsible for obtaining and paying for insurance coverage.”

64. Hammer again sent RCS proof of her insurance on December 10, 2010.

65. On January 4, 2011, RCS assessed an “escrow disbursement” of \$2,516.00 for force-placed-insurance from Hammer’s account.

66. On January 5, 2011, Hammer filed a motion to dismiss Foreclosure Case #1, alleging that there was a valid and enforceable loan modification agreement with an effective date of July 1, 2010, and that all payments had been timely tendered.

67. On January 11, 2011, Hammer sent RCS her fourth Fair Debt Dispute Letter requesting information as to why RCS was not cashing her checks, and disputing the credit reporting on her account. Hammer enclosed copies of her credit report for reference and proof of hazard insurance. RCS never responded to her dispute letter or corrected the credit reporting.

68. RCS did not report that Hammer disputed the debt to credit bureaus, nor reverse the charges for forced placed insurance.

69. On February 3, 2011, RCS billed four (4) separate fees totaling \$511.50 to Hammer’s account without explanation.

70. On March 18, 2011, the Honorable Judge Gibson heard arguments on Hammer’s motion to dismiss Foreclosure Case #1. Judge Gibson granted the motion to dismiss the entire lawsuit.

71. Gibson ruled that Hammer’s monthly checks that were cashed for July and August 2010 ratified the modification contract. Gibson specifically ruled as a matter of law that the June 28, 2010 and July 28, 2010 checks cashed by FDIC/AmTrust were “deemed acceptance of the terms of the revised modification agreement as revised by Ms. Hammer...the agreement was ratified.”³

³ Hammer can provide a copy of the relevant transcript.

72. In conjunction with the court order, Hammer requested reinstatement figures pursuant to her loan modification so she could tender a one-time payment to address all of the wrongfully rejected payments to date. Judge Gibson instructed the parties to arrange for Hammer to reinstate pursuant to the terms of the loan modification.

73. In the intervening period following the dismissal of Foreclosure Case #1, Hammer continued to make monthly payments to RCS each month in the amount of \$749.88. RCS continued to return her payments and bill her for unexplained fees.

74. On April, 8, 2011, RCS billed \$100.00 to Hammer's account in unexplained fees.

75. RCS ignored Judge Gibson's ruling, ignored the loan modification, and continued to harass Hammer by collecting upon the unmodified mortgage loan.

76. On May 12, 2011, in response to Hammer's request for reinstatement figures, RCS sent Hammer the following reinstatement figures:

\$16,714.39	(May 1, 2009 - March 1, 2010 P&I Payments at \$1,519.49 each)
\$9,598.92	(April, 2010 - May 1, 2011 P&I Payments at \$685.63 each)
\$960.93	(March 1, 2011 - May 1, 2011 Escrow Payments at \$320.31 each)
\$1,178.47	(Late Charges)
\$2,526.06	(Attorney Fees)
+ <u>\$2,526.03</u>	(Misc. Fees)
\$33,486.64	Total Amount Due Good Through May 31, 2011

77. These reinstatement figures:

- a) disregarded the loan modification and Judge Gibson's ruling;
- b) did not waive past due fees and costs effective July 2010;
- c) did not use the modified monthly payment of \$749.88 effective July 2010;
- d) assessed late fees on Hammer's timely payments;
- e) included escrow payments when there was no escrow account; and
- f) included attorney's fees and late charges for Foreclosure Case #1 (a case that Hammer prevailed).

78. Even if Hammer didn't make any payments from July 2010 to the date of the acceleration, the amount necessary to reinstate the loan would have been \$8,248.68 (\$749.88 x 11 payments). RCS was demanding a figure approximately \$25,000.00 more to "reinstate the loan."

79. On May 27, 2011, RCS billed \$375.00 to Hammer's account in unexplained fees.

80. Hammer called RCS and Codilis (RCS's collection attorneys) directly to obtain accurate reinstatement figures. Hammer left numerous messages but did not receive any return calls.

81. On June 14, 2011, RCS billed \$13.50 to Hammer's account in unexplained fees.

82. On July 7, 2011, RCS billed \$55.00 to Hammer's account in unexplained fees.

83. On July 19, 2011, RCS billed \$13.50 to Hammer's account in unexplained fees.

84. On July 25, 2011, Hammer spoke with the Codilis attorney Courtney Nogar who had represented RCS in Foreclosure Case #1. Nogar asked Hammer "if she ever intended to pay back the loan." Hammer replied that she had been paying every month, that no one would call her back, and that each of her payments were being returned to her.

85. Hammer asked Nogar for the amount necessary to bring the loan current. In response, Nogar simply asked for the balance in Hammer's savings account. Nogar would not provide Hammer a reinstate figure, but promised to call her back. Nogar never called Hammer back.

86. On July 26, 2011, Hammer sent her August 2011 loan modification payment to RCS in the amount of \$749.88. RCS *cash*ed that payment on July 28, 2011.

87. On or about July 29, 2011, Hammer received an Escrow Analysis from RCS, showing an "escrow shortage" of \$3,319.80, even though she did not have an escrow account per her mortgage contract or modification. The Escrow Analysis also showed that hazard insurance had

been charged to her account at least two (2) times prior and that \$2,516.00 was scheduled to be assessed to the subject loan account in September 2011.

88. On August 1, 2011, RCS billed \$11.00 to Hammer's account in unexplained fees.

89. On August 1, 2011, approximately four (4) months after the dismissal of the Foreclosure Case #1, Hammer received an "acceleration notice" from Codilis on behalf of RCS. The acceleration notice stated, "As of 7/29/2011 the amount of the debt we are seeking to collect is \$32,050.60, which includes the sum of payments that have come due on and after the date of default 10/01/2010."⁴

90. On August 2, 2011, RCS billed \$910.00, \$290.00, \$40.00, \$418.00, and \$475.00 to Hammer's account, totaling \$2,133.00 in unexplained fees.

91. On August 8, 2011, RCS sent Hammer a notice that it was renewing her force-placed insurance and deducting the amount from her escrow account. Hammer still had proper insurance and sent RCS proof of the same.

92. On August 8, 2011, Hammer received a notice from RCS that her "force-placed insurance" was scheduled to expire and that RCS would purchase the "forced-placed insurance" from her "escrow account." Again, Hammer sent RCS proof of her insurance.

93. On August 15, 2011, Hammer received a second "acceleration notice" from RCS stating, "As of 8/11/2011 the amount of the debt we are seeking to collect is \$10,507.95, which includes the sum of payments that have come due on and after the date of default 10/01/2010." This amount was \$21,542.65.00 less than the amount listed in the first acceleration notice.

94. On August 17, 2011, Hammer called the number listed on the acceleration notice and spoke with "Randy" from the loss mitigation department in an attempt to resolve the

⁴ The acceleration notice stated that the creditor was "Amtrust_NP SFR Venture, LLC" and that RCS was only the servicer.

discrepancy. Randy took down Hammer's information and said that he would look into the matter and call Hammer back. He never did.

95. On or about September 16, 2011, Hammer received a letter from RCS stating that her account had been referred to foreclosure for a second time for a failure to cure the default.

96. On September 20, 2011, RCS deducted \$2,516.00 from her escrow account to pay for force-placed insurance.

b. The Second Foreclosure Case

97. On September 21, 2011, RCS filed a second foreclosure against the subject property and against Hammer in DuPage County, Illinois in the case known as *RCS v Hammer*, 2011 CH 004503 ("Foreclosure Case #2"). The foreclosure complaint alleged a default under the original note and mortgage. The complaint did not reference or attach the loan modification.⁵

98. On September 30, 2011, Hammer received a "Notice Pursuant to the Fair Debt Collection Practices Act" from Codilis on behalf of RCS notifying her of her right to dispute the debt within 30 days.

99. On September 30, 2011, RCS force-placed insurance and deducted \$2,516.00 from Hammer's escrow account.

100. Also on October 28, 2011, Hammer, through her attorney Jack Kozar, sent another Fair Debt Dispute Letter requesting verification of the debt in writing, and requesting that RCS cease all phone calls to Hammer. The letter requested that all future communication from RCS be in writing.

101. On October 28, 2011, Hammer, through her attorney Kozar, sent a Qualified Written Request ("QWR") asking for a payment history, amount alleged as owing, an accounting, a

⁵ The "default" date alleged in the complaint was October 2010, two months after Hammer's July and August 2010 payment under the loan modification.

record and proof of each payment that Hammer made, an “[e]xplanation on the alleged lapse in Hazard Insurance that was force placed on the account when proof of insurance had been previously provided,” and “the identity of the holder of [the] mortgage pursuant to U.S.C. § 1641(f)(2),” as well as a complete breakdown of the fees, payments, and amounts alleged as owing on the loan and how each was calculated.

102. On October 31, 2011, RCS acknowledged receipt of Hammer’s QWR and FDCPA dispute letter.

103. On November 4, 2011, Hammer filed a five (5) part motion to dismiss the second foreclosure. Judge Gibson granted the motion without prejudice on February 29, 2012.

104. On November 7, 2011, RCS partly responded to both Hammer’s QWR and her FDCPA dispute letter in a single response. The response letter only provided a breakdown of fees and amounts to reinstate the loan, but did not provide an explanation of fees or the force-placed insurance, nor did it provide verification of the debt.

105. Interestingly enough, the response letter stated that Hammer’s loan modification “had been finalized” on “August 9, 2011” (when RCS cashed Hammer’s August 2011 payment).

106. By January 2012, and after 19 consecutive tendered payments by Hammer pursuant to the loan modification, RCS had developed a pattern and practice of accepting Hammer’s checks, keeping them for several weeks to several months, then returning them to Hammer.

107. Over this period of time, Hammer’s health and well-being drastically deteriorated. She developed severe nerve and internal organ problems that her physician could not attach to anything other than undue stress. Hammer’s medical records show a steady decline in her health from the time that RCS took over the loan through the present date.

108. On February 3, 2012, Codilis sent Hammer another reinstatement letter with figures that did *not* recognize her loan modification.

109. On March 28, 2012, RCS filed a second amended complaint in Foreclosure Case #2, alleging that the terms of the loan modification as presented by Hammer were unenforceable because there was no “meeting of the minds.”

110. Months passed without resolve, but Hammer continued to send in her loan modification payments every month.

111. RCS rejected all of Hammer’s subsequent payments, until September 2012, when RCS *cash*ed Hammer’s payment.

112. On September 19, 2012, RCS sent Hammer a letter stating, inaccurately, that it had reviewed her insurance policy and that she was required to increase the amount of her policy coverage because it was inadequate compared to her outstanding loan balance and to cover the loss of the property.

113. On October 5, 2012, RCS again sent Hammer a letter stating that it had reviewed her insurance policy and that she was required to increase the amount of her policy coverage because it was inadequate compared to her outstanding loan balance and to cover the loss of the property.

114. Through the filing of this complaint, RCS never verified the debt or ceased collection activities in response to the fair debt dispute letter.

COUNT I – BREACH OF CONTRACT

115. Hammer restates paragraphs 1 through 114 as though fully set forth herein.

116. Under Illinois law, every contract implies a covenant of good faith and fair dealing.

117. Hammer has a valid and enforceable mortgage contract with RCS in the form of the loan modification.

118. Hammer substantially performed her duties under the contract by tendering all monthly payments to RCS, and its assignor, and by complying with all of the other terms of the contract.

119. RCS is in material breach of the subject note, mortgage, and loan modification for its:

- a. failure to accept Hammer's timely payments;
- b. failure to properly account for Hammer's payments;
- c. misapplying Hammer's payments;
- d. failure to comply with a court order affirming the loan modification;
- e. filing of a wrongful foreclosure;
- f. charging of unauthorized fees and costs;
- g. failure to provide accurate repayment and reinstatement figures;
- h. failure to accurately respond to Hammer's written correspondence and disputes;
- i. failure to provide an accurate accounting; and
- j. failure to conduct its affairs in good faith.

120. RCS further breached the express terms of the subject note, mortgage, and loan modification and its implied duty of good faith and fair dealing by:

- a. imposing an escrow account and increasing monthly mortgage amounts without notification to or authorization from Hammer;
- b. perpetually ignoring Hammer's written and oral requests for an explanation on why her payments were being rejected;
- c. placing the subject loan in default;
- d. negatively reporting Hammer to credit bureaus;
- e. refusing to respond to Hammer's repeated calls, letters, and objections;

- f. forcing Hammer to pay for force-placed hazard insurance in excess of the amount required by the mortgage contract;
- g. profiting from and failing to disclose commissions and/or kickbacks related to the insurance that it forced on Hammer's property;
- h. converting escrow funds to pay the premiums on the force-placed insurance and unauthorized fees;
- i. charging and collecting unauthorized costs and fees from Hammer not permitted in ¶¶ 1 through 3 of the mortgage, the loan modification, or state or federal law;
- j. charging and collecting fees from Hammer that were not authorized by the mortgage contract;
- k. debiting amounts from Hammer's real estate "escrow account" and applying Hammer's payments first to escrow before principal and interest in violation of the mortgage contract;
- l. failing to provide timely and accurate information regarding Hammer's payments and amounts due under the note and loan modification.

121. RCS's breach of the subject contract has caused Hammer damages that consist of illegal fees, charges, interest, damage to her credit report, being denied credit, loss of equity in her home, emotional distress, physical illness and injury, medical bills, pain and suffering, and the loss of funds that RCS misapplied to Hammer's account.

122. Hammer repeatedly communicated to RCS and Codilis that she was a senior-citizen, with heart problems and health conditions that had developed because of RCS's conduct, and that her conditions were exacerbated by RCS's harassment and refusal honor the loan modification.

123. Each time that Hammer appeared in court for the Foreclosure Case #1 and Foreclosure Case #2, it was openly apparent that it was physically difficult for Hammer to walk, appear in court, and stand at the bench.

124. After her health worsened from the increase in stress described above, Hammer appeared in court for Foreclosure Case #1 and Foreclosure Case #2, in the presence of RCS and Codilis, wearing an oxygen mask and walking with the assistance of a cane.

125. When Hammer spoke to RCS's representatives, it was clear from the sound of her voice that she was an elderly woman. Moreover, Hammer's age was a part of her loan record and part of the hardship letter submitted when she applied for the loan modification.

126. RCS and its agents, Codilis, knew and had reason to know at the time loan modification that a breach of the loan modification would cause more than pecuniary loss to Hammer.

127. RCS and its agents, Codilis, knew and had reason to know with each subsequent breach of the loan modification, that their actions would cause more than pecuniary loss to Hammer.

128. Additionally, the fundamental basis of the instant breach of contract claim is identical in all substantive respects to Judge Gibson's March 18, 2011 ruling and dismissal of Foreclosure Case #1, whereby Judge Gibson affirmed the existence of the loan modification, rejected the claim that the original note and mortgage were the operative agreements, and dismissed the lawsuit in its entirety on that basis.

WHEREFORE, Plaintiff ALENA HAMMER respectfully requests that this Honorable Court:

- a. find that Defendant RCS materially breached the mortgage contract;
- b. award Hammer her actual damages to be proven at trial;
- c. award Hammer her reasonable attorney's fees and costs; and
- d. award Hammer any other relief this Honorable Court deems equitable and just.

COUNT II – VIOLATION OF CONSUMER FRAUD ACT (UNFAIRNESS)

129. Hammer restates paragraphs 1 through 128 above as though fully set forth herein.

130. Hammer meets the ICFA definition of “consumer.” *See* 810 ILCS 505/1.

131. RCS violated 815 ILCS 505/2 by engaging in unfair acts and practices to collect a superseded debt.

132. It was unfair for RCS to ignore both the existence of the loan modification and Judge Gibson’s March 18, 2011 ruling and proceed to collect upon the un-modified mortgage loan for over three years.

133. It was unfair for RCS to charge Hammer the following unexplained fees:

- i. On September 14, 2010, RCS billed \$100.00 to Hammer’s account;
- ii. On October 15, 2010, RCS billed \$15.00 to Hammer’s account;
- iii. On February 3, 2011, RCS billed four (4) separate fees totaling \$511.50 to Hammer’s account;
- iv. On April, 8, 2011, RCS billed \$100.00 to Hammer’s account;
- v. On May 27, 2011, RCS billed \$375.00 to Hammer’s account;
- vi. On June 14, 2011, RCS billed \$13.50 to Hammer’s account;
- vii. On July 7, 2011, RCS billed \$55.00 to Hammer’s account;
- viii. On July 19, 2011, RCS billed \$13.50 to Hammer’s account;
- ix. On August 1, 2011, RCS billed \$11.00 to Hammer’s account; and
- x. On August 2, 2011, RCS billed \$910.00, \$290.00, \$40.00, \$418.00, and \$475.00 to Hammer’s account, totaling \$2,133.00.

134. It was unfair for RCS to charge Hammer the above fees because Hammer was fully current on the required mortgage payments, real estate taxes, and insurance. RCS had no legal basis for charging the fees, and RCS refused to provide an explanation or basis for the fees.

135. It was unfair for RCS to unilaterally impose an escrow account on the subject loan on September 19, 2010. The mortgage contract did not allow for an escrow account and RCS had no legal basis for imposing an escrow account.

136. It was unfair for RCS to impose an escrow account on the subject loan to pay for insurance. Hammer maintained and provided RCS with proof of her insurance at all times, including December 10, 2010, January 11, 2011, and August 8, 2011.

137. It was unfair for RCS to charge Hammer for force-placed insurance and charge those fees to an illegal escrow account. Hammer maintained proper insurance at all times.

138. Specifically, it was unfair for RCS:

- a. to force-place insurance on Hammer's property on September 19, 2010, November 5, 2010, December 3, 2010, January 4, 2011, August 8, 2011, and September 30, 2011;
- b. to charge Hammer's account \$2,615.00 and \$2,516.00 (twice) on November 5, 2010, January 4, 2011, and September 20, 2011, respectively; and
- c. to send Hammer an Escrow Analysis that claimed a \$3,319.80 "escrow shortage" on July 29, 2011.

139. It was unfair for RCS to provide Hammer with conflicting reinstatement figures for the subject loan.

140. In response to Hammer's request for reinstatement figures to bring her loan current, RCS provided Hammer with three separate "reinstatement figures" over a three-month period. The reinstatement figures differed by over \$21,000.00.

141. Over a three-month period, RCS provided Hammer the following reinstatement figures:

- a. On May 12, 2011, RCS claimed that Hammer owed \$33,486.64 to bring the loan current;
- b. On August 1, 2011, RCS claimed that Hammer owed \$32,050.60 to bring the loan current; and
- c. On August 15, 2011, RCS claimed that Hammer owed \$10,507.95 to bring the loan current.

142. The reinstatement figures provided also failed to acknowledge the terms of Hammer's binding loan modification, and included unearned fees and costs including \$1,178.47 in late charges, \$2,526.06 in attorney fees, and \$2,526.03 in miscellaneous fees.

143. It was unfair for RCS to provide Hammer with conflicting information that ignored the existence of the loan modification. It was unfair for RCS to provide Hammer with reinstatement figures that misstated the amount of debt and the status the loan modification. Moreover, it was unfair for RCS to lump attorney's fees, late fees, escrow charges, and escrow fees in its reinstatement figures because Hammer was fully current on her loan.

144. In a correspondence to Hammer dated November 7, 2011, RCS admitted that the loan modification "had been finalized" on "August 9, 2011." It was unfair for RCS to file Foreclosure Case #2 on September 21, 2012 denying the existence of the loan modification after admitting to the existence of a loan modification in November 2011.

145. It was also unfair for RCS to:

- a. threaten to increase Hammer's monthly payments when she was current;
- b. refuse to return Hammer's phone calls (Randy, Codilis, and Courtney Nogar); and
- c. refuse to accept Hammer's monthly payments for the last four years.

146. RCS's communications where purposely misleading and confusing, and Hammer had little choice but to submit; Hammer relied on the misinformation provided to her detriment.

147. RCS intended that Hammer rely on its unfair practices to induce payments above and beyond what was actually owed. Hammer did in fact rely on RCS's unfair practices which resulted in the following specific damages.

148. All of RCS's actions were the proximate cause of damages to Hammer that include illegal fees, charges, interest, damage to her credit report, being denied credit, loss of equity in

her home, emotional distress, physical illness and injury, medical bills, pain and suffering, and the loss of funds that RCS misapplied to Hammer's account.

149. The unfair practices complained of occurred in the course of conduct involving trade or commerce.

150. This conduct is part of a pattern and practice of behavior in which RCS routinely engages as part of its business model. It is RCS's normal business practice to ignore contractual arrangements and state and federal law, and then misstate the nature of outstanding "debts" and amounts "owed" to consumers for its own pecuniary gain.

151. An award of punitive damages is appropriate because RCS's conduct was outrageous, willful, and wanton, and it showed a reckless disregard for the rights of Hammer over a four year period. Additionally, when Hammer objected and demanded proper accounting on her loan, RCS attempted to silence Hammer by intensifying its harassment and illegal efforts.

WHEREFORE, Plaintiff ALENA HAMMER requests that this Honorable Court:

- a. enter judgment in her favor and against RCS;
- b. declare that the practices complained of herein are unlawful and violate the aforementioned statutes and regulations;
- c. award Hammer statutory, actual, and punitive damages, in an amount to be determined at trial, for the underlying ICFA violations;
- d. order the deletion of all adverse credit reporting related to the loan;
- e. award Hammer costs and reasonable attorney fees as provided under 815 ILCS 505/10a(c); and
- f. award any other relief as this Honorable Court deems just and appropriate.

COUNT III – VIOLATION OF CONSUMER FRAUD ACT (DECEPTION)

152. Hammer restates paragraphs 1 through 151 above as though fully set forth herein.
153. Hammer meets the ICFA definition of “consumer.” *See* 810 ILCS 505/1.
154. RCS violated 815 ILCS 505/2 by engaging in deceptive practices to collect the subject debt from Hammer.
155. It was deceptive for RCS to:
- i. falsely claim that Hammer did not have property insurance in correspondence dated September 19, 2010, November 5, 2010, December 3, 2010, January 4, 2011, August 8, 2011, and September 30, 2011;
 - ii. falsely claim that Hammer failed to provide RCS proof of her insurance policies when Hammer provided RCS proof of her insurance in correspondence on at least December 3, 2010, January 11, 2011, and August 8, 2011;
 - iii. falsely claim that Hammer’s real estate taxes were delinquent;
 - iv. falsely claim in correspondences dated September 19, 2012 and October 5, 2012 that Hammer’s insurance policy was inadequate compared to her outstanding loan balance;
 - v. falsely claim an “escrow shortage” in a correspondence dated December 3, 2010 when Hammer was current on her taxes and insurance;
 - vi. falsely claim in correspondence dated December 3, 2010 that RCS had the right to increase Hammer’s monthly payment because Hammer did not have insurance which was in contravention of the factual realities and the operative contract;
 - vii. falsely allege in Foreclosure Case #2 on September 21, 2012 that the loan modification did not exist, after RCS admitted that the modification “had been finalized” on “August 9, 2011” in a correspondence dated November 7, 2011;
 - viii. falsely claim in a May 12, 2011 correspondence that Hammer owed \$33,486.64 to bring the loan current;
 - ix. falsely claim in a August 1, 2011 correspondence that Hammer owed \$32,050.60 to bring the loan current;
 - xi. falsely declare illegal fees on the loan – lumped with the principal debt obligation – that were not authorized by contract or law on September 14, 2010, October 15, 2010, February 3, 2011, April, 8, 2011, May 27, 2011, June 14, 2011, July 7, 2011, July 19, 2011, August 1, 2011, and August 2, 2011.

156. RCS's overall scheme – to confuse and trick Hammer to collect and foreclose upon a superseded debt and misstate the amounts due on the loan – was deceptive.

157. RCS's communications to Hammer were purposely confusing and designed to thwart Hammer's attempts to reinstate her mortgage loan. RCS provided conflicting and materially false and inaccurate correspondence, falsely denied the existence of the loan modification (after admitting to it on November 7, 2011), and falsely assessed fees and costs that were deceiving.

158. Moreover, RCS took advantage of a senior citizen by intensifying their deceptive acts in response to Hammer's objections.

159. RCS attempted to discourage Hammer from any continuing efforts to keep her home, by repeatedly sending her false and confusing correspondences, and repeatedly ignoring her requests for information – only to re-file a foreclosure action knowing that it was difficult for Hammer to physically travel to Court in her ailing physical condition or afford an attorney. Hammer's deteriorating health was directly caused by the never-ending stress related to her loan and wrongful foreclosure of her home.

160. The deceptive practices occurred in the course of conduct involving trade or commerce.

161. RCS intended that Hammer rely on its deceptive practices to induce payments above and beyond what was actually owed. Hammer did in fact rely on RCS's unfair practices which resulted in the following specific damages.

162. All of RCS's actions were the proximate cause of damages to Hammer that include illegal fees, charges, interest, damage to her credit report, being denied credit, loss of equity in her home, emotional distress, physical illness and injury, medical bills, pain and suffering, and the loss of funds that RCS misapplied to Hammer's account.

163. This conduct is part of a pattern and practice of behavior in which RCS routinely engages as part of its business model. It is RCS's normal business practice to falsely characterize contractual arrangements and state and federal law, and then misstate the nature of outstanding "debts" and amounts "owed" to consumers for its own pecuniary gain.

164. An award of punitive damages is appropriate because RCS's conduct was outrageous, willful, and wanton, and it showed a reckless disregard for the rights of Hammer over a three year period. Additionally, when Hammer objected and demanded proper accounting on her loan, RCS attempted to silence Hammer by intensifying its harassment and illegal efforts.

WHEREFORE, Plaintiff ALENA HAMMER requests that this Honorable Court:

- a. enter judgment in her favor and against RCS;
- b. declare that the practices complained of herein are unlawful and violate the aforementioned statutes and regulations;
- c. award Hammer statutory, actual, and punitive damages, in an amount to be determined at trial, for the underlying ICFA violations;
- d. order the deletion of all adverse credit reporting related to the loan;
- e. award Hammer costs and reasonable attorney fees as provided under 815 ILCS 505/10a(c); and
- f. award any other relief as this Honorable Court deems just and appropriate.

COUNT IV – VIOLATION OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT

165. Hammer realleges paragraphs 1 through 164 above as though fully set forth herein.

166. RCS qualifies as a “servicer” under RESPA, § 2605(i)(2).

167. RCS violated 12 U.S.C. § 2605 by failing to honor Hammer’s payments made within 60 days of the transfer from the FDIC to RCS.

168. RCS violated RESPA § 2605 when it failed to honor Hammer’s loan modification within 60 days of obtaining servicing rights, and instead declared Hammer in default.

169. RCS violated RESPA §2605(d) when it failed credit payments made during the 60 day transfer period.

170. RCS failed to send Hammer the required RESPA notices or properly respond to Hammer’s QWRs.

171. RCS failed to conduct a reasonable investigation or make necessary corrections to Hammer’s account after Hammer’s disputes.

a. Force-Placed Insurance

172. RCS purchased force-placed insurance on multiple occasions, wrongfully set up an escrow account, and deducted amounts from Hammer’s account for the force placed insurance.

173. RCS sought an “escrow shortage or deficiency” without producing documentation to substantiate the shortage or deficiency or prior notice to Hammer as required under RESPA.

174. RCS failed to provide any notice of this alleged escrow shortage to Hammer until *after* it had charged the amount to Hammer’s account and deducted it from the escrow.

175. RCS assessed fees against Hammer without conducting an annual escrow analysis or providing prior notice as required by RESPA and its implementing regulations. 12 U.S.C. § 2609(b); 24 C.F.R. § 3500.17(f).

176. The subject mortgage and RESPA require notice of any shortfall or deficiency prior to imposing the amount on a borrower's loan. RCS did not did not send notice of the escrow increase or conduct the annual escrow analysis before imposing the fee to Hammer's escrow.

177. RCS did not correct the wrongful escrow increase, charge, and deduction for force-placed insurance.

178. RCS failed to verify Hammer's insurance before force-placing insurance in violation of RESPA, or reverse the force-placed insurance after receiving proof of insurance.

179. RCS failed to correct its mistakes after learning that Hammer had insurance.

180. All of RCS's actions were the proximate cause of damages to Hammer that include those plead in paragraph 162 above.

181. Hammer suffered actual damages from violations of RESPA §§ 2605 and 2609.

WHEREFORE, Plaintiff ALENA HAMMER requests that this Honorable Court:

- a. grant judgment in her favor and against Defendant RCS;
- b. declare RCS's perpetual conduct to be a violation of RESPA;
- c. award Hammer actual and additional damages pursuant to 12 U.S.C. § 2605; and
- d. award Hammer her reasonable attorney's fees and costs pursuant to RESPA § 2605(f); and
- e. and any other relief this Honorable Court deems equitable and just.

Plaintiff demands trial by jury.

Respectfully Submitted,

By: ___s:/Ross Zambon___

Ross Zambon
Attorney for Plaintiff

Sulaiman Law Group, Ltd.
Ross M. Zambon
ARDC # 6294149
Mara A. Baltabols
ARDC # 6299033
900 Jorie Blvd., Suite 150
Oak Brook, IL 60523

EXHIBIT

A

2a



June 8, 2010

Alena Hammer
355 N. Addison Road
Villa Park, IL 60181

RE: Mortgage Loan Number - # 0007064675 Property Address: 355 N. Addison Road, Villa Park, IL 60181

Dear Alena Hammer,

Enclosed is a copy of the **Loan Modification Agreement** for your review and acknowledgment. Please sign and notarize these agreements and mail it back to me using the prepaid envelope enclosed before **June 25, 2010**. Please **sign, have witnessed and notarize** the two (2) loan modifications **NOT STAMPED COPY**, and return to AmTrust Bank a Division of New York Community Bank ("AmTrust"). Retain the 3rd modification **STAMPED COPY** for your records.

The Effective Date of your new monthly payment is **July 1, 2010** for \$749.88 and broken down as follows:

Principal & Interest: \$749.88

The modified principal balance of \$209,471.59 was calculated as follows:

Current Principal Balance	\$207,167.99
Interest Due	Waived
Escrow Required	\$0.00
Fees/Costs	\$2,303.60
Less Contributions	(\$ 0.00) Credit
Modified Principal Balance	\$209,471.59

This loan modification will bring your loan current by capitalizing the amount that you are currently behind over the life of the loan.

Your monthly mortgage payments are subject to change when we perform our Annual Escrow Analysis that is based on any changes to your real estate taxes or homeowners insurance premium. An Escrow Analysis statement will be mailed to you at that time.

All future payments beginning in **July 1, 2010** should be mailed to the address provided on the monthly statement.

I am pleased that I was able to work with you to bring your loan current to avoid your home going into foreclosure.

You can contact me direct at 1-216-588-5898 if you have any questions.

IF THIS DOCUMENT IS NOT SIGNED AND NOTARIZED BY THE DATE INDICATED, WE WILL ASSUME THAT YOU ARE NO LONGER INTERESTED IN ASSISTANCE TO BRING THE LOAN CURRENT AND WE WILL CONTINUE WITH OUR COLLECTION/FORECLOSURE ACTION.

Sincerely,

Loss Mitigation Department

Sent to: Sandy Beauregard 6/28 Sent UPS 2nd Day
216-588-5585 1st pay
Amtrust Bank
0h 98-0506
1111 Chester Avenue / Cleveland, OH 44114

AFTER RECORDING, RETURN TO:

FDIC as receiver for Amtrust Bank
Attn: D. Wilson
OH98-0504
1111 Chester Avenue, Suite 200
Cleveland OH 44114

Loan # 0007064675

[Space Above This Line For Recording Data]

MIN 100162500070646758

LOAN MODIFICATION AGREEMENT
Balloon
(Step Rate)

This Loan is payable in full at maturity, you must repay the entire Principal Balance of the Loan and unpaid interest then due. Lender is under no obligation to refinance the loan at the time. You will, therefore, be required to make payment out of other assets that you may own, or will have to find a lender, which may be the lender you have this loan with, willing to lend you the money. If you refinance this loan at Maturity, you may have to pay some or all of the closing costs normally associated with anew loan even if you obtain refinancing from the same lender.

This Loan Modification Agreement ("Agreement"), made this 1st day of June, 2010, between Alena Hammer, Unmarried Woman ("Borrower"), and FDIC as receiver for Amtrust Bank, ("Lender"), and Mortgage Electronic Registration Systems, Inc., ("Mortgagee") amends and supplements (1) the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), and Timely Payment Rewards Rider, if any, dated December 9, 2003, and granted or assigned to Mortgage Electronic Systems, Inc., as mortgagee of record (solely as nominee for Lender and Lender's successors and assigns), P.O. Box 2026, Flint, Michigan 48501-2026 and recorded on December 19, 2003 under Document # R2003-477313, Book #, Page(s) # of the County of Dupage, Records of Illinois and (2) the Note bearing the same date as, and secured by, the Security Instrument, which covers the real and personal property described in the Security Instrument and defined therein as the "Property", located at

355 N. Addison Road, Villa Park, Illinois 60181

the real property described being set forth as follows:
See Attached Exhibit A

In consideration of the mutual promises and agreements exchanged, the parties hereto agree as follows (notwithstanding anything to the contrary contained in the Note and Security Instrument):

1. As of June 1, 2010, the amount payable under the Note and the Security Instrument (the "Unpaid Principal Balance") is U.S. ~~\$209,471.59~~ consisting of the amount(s) loaned to Borrower by Lender and any interest capitalized to date. $\rightarrow 207,167.99$

MERS Phone: 1-888-679-6377

Loan Modification Agreement—Single Family—Fannie Mae Uniform Instrument
—THE COMPLIANCE SOURCE, INC.—
www.compliancesource.com

Page 1 of 4

MERS Modified Form 3179 1/01 (rev. 8/01)
23702MU 05/04
©2004, The Compliance Source, Inc.

BARCODE

2. The Borrower promises to pay the Unpaid Principal Balance, plus interest, to the order of the Lender. Interest will be charged on the Unpaid Principal Balance for the *first five years* at the yearly rate of 3.000%, from **June 1, 2010**, and Borrower promises to pay in monthly payments of principal and interest, in the amount of **\$749.88** beginning on the **1st day of July, 2010**. Beginning on the first day of the *sixth year*, interest will be charged at the yearly rate of 4.000% from **June 1, 2015** and Borrower shall pay monthly payments of principal and interest in the amount of **\$862.74** beginning on the **1st day of July, 2015**. Beginning on the first day of the *seventh year* interest will be charged at a yearly rate of 5.000% from **June 1, 2016** and Borrower shall pay monthly principal and interest payments of **\$980.82**, beginning on the **1st day of July, 2016**. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Modification Agreement. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on **July 1, 2040** I still owe amounts under this Modification Agreement, I will pay those amounts in full on that date which is called the "Maturity Date".

Borrower will make such payments at 1801 East Ninth Street Cleveland OH 44114 or at such place as Lender may require.

3. If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

4. Borrower also will comply with all other covenants, agreements, and requirements of the Security Instrument, including without limitation, Borrower's covenants and agreements to make all payments of taxes, insurance premiums, assessments, escrow items, impounds, and all other payments that Borrower is obligated to make under the Security Instrument; however, the following terms and provisions are forever canceled, null and void, as of the date specified in paragraph No. 1 above:
 - (a) all terms and provisions of the Note and Security Instrument (if any) providing for, implementing, or relating to, any change or adjustment in the rate of interest payable under the Note, including, where applicable, the Timely Payment Rewards rate reduction, as described in paragraph 1 of the Timely Payment Rewards Addendum to Note and paragraph A.1. of the Timely Payment Rewards Rider. By executing this Agreement, Borrower waives any Timely Payment Rewards rate reduction to which Borrower may have otherwise been entitled; and
 - (b) all terms and provisions of any adjustable rate rider, or Timely Payment Rewards Rider, where applicable, or other instrument or document that is affixed to, wholly or partially incorporated into, or is part of, the Note or Security Instrument and that contains any such terms and provisions as those referred to in (a) above.

5. Nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument. Except as otherwise specifically provided in this Agreement, the Note and Security Instrument will remain unchanged, and Borrower and Lender will be bound by, and comply with, all of the terms and provisions thereof, as amended by this Agreement.

MERS Phone: 1-888-679-6377

Loan Modification Agreement—Single Family—Fannie Mae Uniform Instrument
—THE COMPLIANCE SOURCE, INC.—
www.compliancesource.com

Page 2 of 4

MERS Modified Form 3179 1/01 (rev. 8/01)

23702MU 05/04

©2004, The Compliance Source, Inc.

BARCODE

EXECUTED as of the day and year first above written.

Alena Hammer (Seal)
Alena Hammer -Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

[Sign Original Only]

Witnessed By:

Victoria Weiss
Signature

Ramma Giralano
Signature

VICTORIA WEISS
Print Name

Ramma Giralano
Print Name

ACCEPTED AND AGREED TO BY THE OWNER AND HOLDER OF SAID NOTE:

(Seal)
-Lender

(Seal)
Mortgage Electronic Registration Systems, Inc. -Mortgagee

By: _____

[Acknowledgment on Following Page]

BORROWER ACKNOWLEDGMENT

State of ILLINOIS

§
§
§

County of DU PAGE

This instrument was acknowledged before me on 8/16/2010, by **Alena Hammer**



Joseph A. Giralamo
Notary Public, State of
My Commission Expires:

LENDER ACKNOWLEDGMENT

State of

§
§
§

County of

The foregoing instrument was acknowledged before me on _____ [date],
by _____ [name of officer or agent, title of officer or agent]
of _____ [name of corporation acknowledging], a
[state or place of incorporation] corporation, on behalf of the corporation.

EXHIBIT


B

7064675 2-2566/710 2133

ALENA W. HAMMER
355 N. ADDISON RD.
VILLA PARK, IL 60181

DATE 6/28/10

PAY AmTrust Bank \$ 749.88
TO THE ORDER OF
Seven Hundred Forty Nine & 88/100 DOLLARS

 **HARRIS.** Harris N.A.


MEMO _____ Alena Hammer

⑆071025661⑆ 4300525121⑆ 2133

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
RESERVED FOR FINANCIAL INSTITUTION USE

AmTrust Bank 240670433
0005980000023710 07/01/2010

○ ENDORSE HERE



The security features listed on the front of these notes are not listed, printed indicia only.

Security Features:

- Residue of dough on the front and back.
- 19 S. A. (1999) in the center.
- 25 dollar bill in the front and back.
- Shiny or spiky metal appearance on the front and back.
- At a glance, the bill is different from other bills in the series.

© 2009 American Bank Note Company, Inc. All rights reserved.

FEDERAL RESERVE BOARD OF GOVERNORS REG. CC

Media	M--
Posting Date	20100702
CPCS Seq #	2600315849
Account #	4300525121
Amount	74988
Ck/Serial #	2133
Dep CPCS Seq #	128
Dep Account	0
R/T Routing Transit	07102566
Bank #	29
TranCode	0
Exception	0

July

EXHIBIT

C

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ALENA W. HAMMER,		)	CIVIL ACTION
	Plaintiff,)	
		)	File No. 1:13-cv-6397
)	
RESIDENTIAL CREDIT SOLUTIONS, INC.,	v.	)	JURY TRIAL DEMANDED
)	
	Defendant.	)	Honorable Judge Durkin

NOTICE OF FILING

To: David M. Schultz
John P. Ryan
Hinshaw & Culbertson, LLP
222 North LaSalle Street, Suite 300
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on **September 26, 2014**, Plaintiff caused to be filed with the Clerk of the United States District For the Northern District of Illinois, Eastern Division, **Plaintiff Alena Hammer's First Amended Complaint**, a copy of which is attached hereto.

/s/ Ross M. Zambon

ROSS M. ZAMBON, No. 6294149
SULAIMAN LAW GROUP, LTD.
Attorney for Plaintiff

Sulaiman Law Group, Ltd.
Ross M. Zambon (ARDC# 6294149)
Mara A. Baltabols (ARDC# 6299033)
900 Jorie Boulevard, Suite 150
Oak Brook, Illinois 60523
Telephone: (630) 575-8181
Main Fax: (630) 575-8188
rzambon@sulaimanlaw.com
mbaltabols@sulaimanlaw.com

CERTIFICATE OF SERVICE

I, Ross M. Zambon, an attorney, certify that on September 26, 2014, I caused the foregoing **Notice of Filing** to be served upon counsel of record through operation of the Court's Case Management/Electronic Case File (CM/ECF) system.

/s/ Ross M. Zambon

ROSS M. ZAMBON, No. 6294149
SULAIMAN LAW GROUP, LTD.
Attorney for Plaintiff
900 JORIE BOULEVARD, SUITE 150
OAK BROOK, ILLINOIS 60523
(630) 575-8181

ACE

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

Alena Hammer	)	Case No: 13 C 6397
)	
v.)	
	)	Judge: Thomas M. Durkin
)	
Residential Credit Solutions)	
)	

ORDER

Jury trial held and completed. Defendant's renewed Rule 50 motion and motion for a directed verdict are denied for the reasons stated. Jury returns a verdict in favor of the Plaintiff. Plaintiff is awarded \$500,000 in compensatory damages and \$1,500,000 in punitive damages. Enter Verdict. Post trial motions are to be filed by 5/18/15. Responses are due 6/15/15. Replies are due 6/29/15. A status hearing is set for 7/8/15 at 9:00 a.m. (6:35)

Date: 4/20/15

/s/ Thomas M. Durkin

2015 APR 21 AM 8:11