IN THE GEORGIA STATE-WIDE BUSINESS COURT

OVERLOOK GARDENS PROPERTIES, LLC, CREEKWOOD APARTMENTS, LLC, INVERNESS II, LLC, and GREYSTONE FARMS APARTMENT COMMUNITY, LLC, Plaintiffs, v. ORIX USA, L.P., RED MORTGAGE CAPITAL, LLC, and RED CAPITAL MARKETS, LLC Defendants.	Case No. 20-GSBC-0002

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

The above-styled action is before the Court on Defendants' (1) Motion for Summary Judgment ("Motion for Summary Judgment") and (2) Motion to Strike, or Alternatively, to Dismiss Paragraphs 172 and 176 of Plaintiffs' Second Amended Complaint ("Motion to Strike") (collectively, "Motions"). Having considered Defendants' Motions, and for the reasons set forth more fully herein, the Court **GRANTS IN PART** the Motion for Summary Judgment and **GRANTS** the Motion to Strike.

I. INTRODUCTION

A. Factual Background

As noted in prior orders issued by this Court, this case arises from a dispute over commercial loan transactions used to finance (or refinance) four multifamily developments in Georgia and the disclosures required pursuant to the contracts and regulations that govern those transactions.

1. *The Parties*

i. Plaintiffs Overlook and Creekwood

Plaintiffs Overlook Gardens Properties, LLC ("Overlook") and Creekwood Apartments, LLC ("Creekwood") are single-asset, Georgia limited liability companies. Defs.' Statement of Each Theory of Recovery & Each Material Fact As to Which There Is No Genuine Issue to Be Tried ("Defs.' SMF") ¶ 1; Pls.' Resp. in Opp'n to Defs.' SMF ("Pls.' Opp'n") ¶ 1. Their sole member is Sun Valley Properties, LLP ("Sun Valley"), a Georgia limited liability partnership. Defs.' SMF ¶ 1; Pls.' Opp'n ¶ 1. Sun Valley has two individual partners, each owning a 50% interest: Kelsey L. Kennon ("Kennon") and Charles A. Gower ("Gower"). Defs.' SMF ¶ 1; Pls.' Opp'n ¶ 1. Overlook owns and operates a 184-unit apartment complex in Macon, Georgia (Overlook Gardens Apartments), while Creekwood owns and operates a 208-unit apartment complex located in Leesburg, Georgia (Creekwood Apartments). Defs.' SMF ¶ 2; Pls.' Opp'n ¶ 2. Paul Hinman

("Hinman") served as Overlook and Creekwood's asset manager and designated corporate representative at all times relevant to this case. Defs.' SMF ¶ 3; Pls.' Opp'n ¶ 3.

ii. Plaintiffs Greystone and Inverness II

Plaintiffs Greystone Farms Apartment Community, LLC ("Greystone") and Inverness II, LLC ("Inverness II") (Overlook, Creekwood, Greystone, and Inverness II are collectively the "Plaintiffs") are also single-asset, Georgia limited liability companies. Defs.' SMF ¶ 6–7; Pls.' Opp'n ¶ 6–7. Greystone's sole member is Woodmont Properties, LLC, a Georgia limited liability company whose members are Ralph G. Leary ("Leary"), Kenneth M. Brown ("Brown"), and Sedgefield Properties, LLC ("Sedgefield"), another Georgia limited liability company. Defs.' SMF ¶ 6; Pls.' Opp'n ¶ 6. Sedgefield's two individual members are William White ("White") and Elizabeth Heard Flourney ("Heard"). Defs.' SMF ¶ 6; Pls.' Opp'n ¶ 6. Through the foregoing corporate structure, Leary, Brown, White, and Heard each personally own approximately 25% of Greystone. Defs.' SMF ¶ 6; Pls.' Opp'n ¶ 6. They are also the individual members of Inverness II. Defs.' SMF ¶ 7; Pls.' Opp'n ¶ 7.

Greystone owns and operates a 305-unit apartment complex in Columbus, Georgia (Greystone Farms Apartments). Defs.' SMF ¶ 6; Pls.' Opp'n ¶ 6. Inverness II, in turn, owns and operates a 164-unit apartment complex that is also located in

Columbus, Georgia (Greystone at Inverness II Apartments). Defs.' SMF ¶ 7; Pls.' Opp'n ¶ 7. Mr. White is Greystone and Inverness II's authorized manager and their sole designated corporate representative for purposes of this litigation. Defs.' SMF ¶ 8; Pls.' Opp'n ¶ 8.

iii. Defendants[1]

Defendant Red Mortgage Capital, LLC ("Red Mortgage") is a Delaware limited liability company with its principal place of business located in Columbus, Ohio. Defs.' SMF ¶ 9; Pls.' Opp'n ¶ 9. Red Mortgage provides financial services in the multifamily, affordable and senior housing, and healthcare markets nationwide. Defs.' SMF ¶ 9; Pls.' Opp'n ¶ 9. Relevant to this dispute, Red Mortgage is a Federal Housing Administration ("FHA") approved lender for providing mortgages secured by multifamily facilities (*i.e.*, apartments with four or more units). Defs.' SMF ¶ 9; Pls.' Opp'n ¶ 9.

Defendant Red Capital Markets, LLC ("Red Markets") is also a Delaware limited liability company. Defs.' SMF ¶ 12; Pls.' Opp'n ¶ 12. Red Markets trades in mortgage backed securities sponsored by the Federal National Mortgage Association and the Government National Mortgage Association ("GNMA"),[2]

[1] The Court previously dismissed without prejudice all claims asserted against Red Capital Partners, LLC and Red Capital Group, LLC for lack of personal jurisdiction. *See* Order Granting Mot. to Dismiss for Lack of Personal Jurisdiction As to Red Capital Partners, LLC; Order Granting Mot. to Dismiss for Lack of Personal Jurisdiction As to Red Capital Grp., LLC.

[2] GNMA is also sometimes referred to as "Ginnie Mae." Defs.' SMF ¶ 18.

respectively. Defs.' SMF ¶ 12; Pls.' Opp'n ¶ 12. James Croft ("Croft") is the Chief Executive Officer of Red Markets and Senior Managing Director of Red Mortgage, and he was involved in the subject loan transactions, described *infra* Part I.A.3. Croft Dep. 12:10.

Defendant Orix USA, L.P. ("Orix") (Red Mortgage, Red Markets, and Orix are collectively the "Defendants")[3] is a Delaware limited partnership. Defs.' SMF ¶ 11; Pls.' Opp'n ¶ 11. Orix is the parent company of Red Capital Group, LLC ("Red Group"), a Delaware limited liability company that is no longer a Defendant in this case.[4] Defs.' SMF ¶ 10; *see also* Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J. & Incorporated Mem. in Supp. Thereof ("Pls.' Resp.") 2. Red Mortgage and Red Markets are subsidiaries of Red Group. Pls.' Resp. 2; Defs.' Ex. 22 at ¶ 4. Those who work for Red Mortgage and Red Markets are all employees of, and are compensated by, Orix. Pls.' Opp'n ¶ 11; Croft Dep. 182:20–183:11.

2. *The FHA Loan and GNMA Securitization Process*

The FHA insures mortgage loans like those at issue in this case. Defs.' SMF ¶ 13; Pls.' Opp'n ¶ 13. FHA-insured loans are underwritten and processed under its Multifamily Accelerated Processing ("MAP") Program. Defs.' SMF ¶ 13; Pls.' Opp'n ¶ 13. At the time each of the four FHA-insured loans at issue (collectively,

[3] *See infra* note 40.

[4] *See supra* note 1.

"Loans" or "Loan transactions") were executed, they were subject to the MAP Guide that was revised on August 18, 2011 ("2011 MAP Guide")[5] and was promulgated and published by the U.S. Department of Housing and Urban Development ("HUD"), as well as all statutes and regulations issued by HUD applicable to Plaintiffs' Loans.[6] Defs.' SMF ¶ 13; Pls.' Opp'n ¶ 13; *see also* Christopher E. Tawa ("Tawa") Aff. ¶ 5.

To qualify for an FHA-insured mortgage, an apartment complex owner must be a single-asset limited liability company that holds free and clear title to the underlying real estate. Defs.' SMF ¶ 14; Pls.' Opp'n ¶ 14. To begin the process, the apartment complex owner, or borrower, typically signs an application letter ("Application Letter")[7] with an authorized FHA lender. Defs.' SMF ¶ 14; Pls.' Opp'n ¶ 14. The Application Letter empowers the lender to process the loan at a specified interest rate and on specified terms, and to apply for HUD insurance on the proposed mortgage. Defs.' SMF ¶ 14; Pls.' Opp'n ¶ 14. The HUD approval process may take several months to complete, and the lender normally charges the borrower an "origination fee" as compensation for processing the application and obtaining a

[5] *See infra* Part II.B.1.iv.

[6] *See infra* Part I.A.4.

[7] The Application Letters relevant to Plaintiffs' Loans are included with the parties' summary judgment papers. Defs.' SMF Exs. 7, 9, 14, 48; Pls.' Statement of Material Facts As to Which There Exists Genuine Issues to Be Tried ("Pls.' SMF") Exs. 1, 22, 39, 48; *see also infra* note 13.

commitment from HUD to insure the proposed loan. Defs.' SMF ¶ 15; Pls.' Opp'n ¶ 15.

If HUD approves the application, the FHA lender usually issues a lender's commitment letter ("Lender's Commitment Letter")[8] to the borrower. Defs.' SMF ¶ 16; Pls.' Opp'n ¶ 16. Therein, the lender offers to provide an FHA loan on particular terms that the borrower can either accept or reject. Defs.' SMF ¶ 16; Pls.' Opp'n ¶ 16. If the borrower accepts and signs the Lender's Commitment Letter, the borrower then has the right to request a final "rate lock" from the FHA lender. Defs.' SMF ¶ 17; Pls.' Opp'n ¶ 17. Through the form of a rate lock letter ("Rate Lock Letter"),[9] the FHA lender offers a proposed rate at the then-prevailing rate. Defs.' SMF ¶ 17; Pls.' Opp'n ¶ 17. This offer is kept open for a specific period of time, and the borrower can choose to accept or reject the offered rate. Defs.' SMF ¶ 17; Pls.' Opp'n ¶ 17. If the borrower accepts the proposed final "rate lock," the borrower then becomes irrevocably obligated to close on the loan if the FHA lender is able to obtain an interest rate at or below that proposed final rate.[10] Defs.' SMF ¶ 17; Pls.'

[8] The Lender's Commitment Letters relevant to Plaintiffs' Loans are included with the parties' summary judgment papers. Defs.' SMF Exs. 8, 10, 15, 22; Pls.' SMF Exs. 4, 89, 90, 91; *see also infra* note 13.

[9] The Rate Lock Letters relevant to Plaintiffs' Loans are included with the parties' summary judgment papers. Defs.' SMF Exs. 34, 35, 36, 37, 41; Pls.' SMF Exs. 5, 27, 41, 50; *see also infra* note 13.

[10] This was the case with each of the Loan transactions at issue here: each of the final interest rates accepted were lower than the initial interest rates indicated in the Rate Lock Letters. *See* Defs.' SMF ¶¶ 59, 60, 72, 73, 84, 85, 96, 100; Pls.' Opp'n ¶¶ 59, 60, 72, 73, 84, 85, 96, 100.

Opp'n ¶ 17. If the parties proceed with the transaction, the lender and borrower thereafter execute a note ("Note") evidencing the loan, among other documents, and ultimately close the transaction.

The lender may, but is not obligated to, pursue liquidation of an FHA-insured mortgage by securitizing and selling it to investors with the backing of GNMA.[11] Defs.' SMF ¶ 18; Pls.' Opp'n ¶ 18. In this process, the lender typically solicits bids from investors to purchase a GNMA security that will ultimately be secured by the FHA-insured mortgage. Defs.' SMF ¶ 19; Pls.' Opp'n ¶ 19. The winning bid (*i.e.*, the investor who bids the highest price) is chosen, and the lender enters into a trade confirmation to sell the mortgage backed GNMA security to that investor in the secondary market. Defs.' SMF ¶ 19; Pls.' Opp'n ¶ 19. The lender is usually able to sell the security at a price that includes a premium above par, referred to as a trade profit or trade premium.[12] Defs.' SMF ¶ 19; Pls.' Opp'n ¶ 19.

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[11] GNMA issues mortgage backed securities that are guaranteed by the full faith and credit of the United States, meaning that, if the mortgage backing the security defaults, payments of the principal and interest will still be made on the appropriate dates to the investor. *See* Defs.' SMF ¶ 18; Pls.' Opp'n ¶ 18.

[12] In this litigation, the parties dispute the meaning of trade profit and yield spread premium. *See* Defs.' SMF ¶¶ 22–23; Pls.' Opp'n ¶¶ 22–23. Plaintiffs view these terms to be synonymous, while Defendants argue they have wholly separate meanings. Defs.' SMF ¶¶ 22–23; Pls.' Opp'n ¶¶ 22–23; *see also* First Am. Compl. ¶ 28; Defs.' Mot. for Summ. J. & Incorporated Mem. of Law in Supp. Thereof ("Defs.' Mot. for Summ. J.") 38 n.20; Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J. & Incorporated Mem. in Supp. Thereof ("Pls.' Resp.") 4. According to Christopher Tawa, former Senior Advisor to the HUD Deputy Assistant Secretary for Multifamily Housing Programs, trade profit (also referred to as "trade premium" or "marketing gain") is compensation paid to a lender and securities trader for trading the GNMA security at an amount above its face, or "par," value. Defs.' SMF Ex. 24, at ¶ 18. Yield spread premium, however, "is a term used primarily with respect to single-family residential loans that describes the excess loan proceeds generated for the

At the closing of the FHA-insured mortgage, the lender funds the mortgage and retains the legal and beneficial interest in the loan until the issuer delivers the GNMA security to the investor. Defs.' SMF ¶ 20; Pls.' Opp'n ¶ 20. Once the security is delivered, the lender usually applies some or all of the sales proceeds to reimburse itself for the loan amount it advanced to the borrower and retains any profit it obtained from selling the security above par. Defs.' SMF ¶¶ 20, 22; Pls.' Opp'n ¶¶ 20, 22. Thereafter, the lender continues to retain legal title to the loan, which is pledged to secure the GNMA's guaranty of the security. Defs.' SMF ¶ 21; Pls.' Opp'n ¶ 21. Thus, after the security is sold, the lender still (i) collects mortgage payments from the borrower, (ii) retains a servicing fee, (iii) pays GNMA a "guaranty fee" (typically 0.13% per year on the outstanding principal balance), and (iv) passes on the balance each month to the security holder, or, if the borrower defaults, it must continue to fund regular monthly payments to the GNMA investor. Defs.' SMF ¶ 21; Pls.' Opp'n ¶ 21.

borrower's use from consensually setting the mortgage loan rate higher than prevailing market rates," proceeds which are then typically used to pay closing costs associated with obtaining the mortgage. *Id.* at ¶ 19; *see also* First Am. Compl. Ex. 29 (February 24, 2009 position statement of the National Association of Mortgage Brokers describing yield spread premium as a "financial planning tool for consumers" that "gives consumers the choice of paying for their mortgage origination fees and costs in cash, up front, or paying a portion or all of those fees and costs each month over the life of the loan through the interest rate"). For the reasons articulated *infra* Part II.B, however, the Court does not find this dispute to be dispositive of any claim.

3. *The Loans at Issue*

Each Plaintiff entered into an FHA-insured loan with Red Mortgage. Defs.' SMF ¶¶ 45, 67, 81, 92; Pls.' Opp'n ¶¶ 45, 67, 81, 92. The four Loans at issue in this litigation were executed between 2012 and 2015, and those transactions are discussed chronologically below.[13] Defs.' SMF ¶¶ 45, 67, 81, 92; Pls.' Opp'n ¶¶ 45, 67, 81, 92.

i. Greystone Loan

On April 13, 2012, Mr. White executed an Application Letter on behalf of Greystone, by which Greystone agreed to apply to Red Mortgage for an FHA loan. Defs.' SMF ¶ 45; *id*. at Ex. 14; Pls.' Opp'n ¶ 45; Pls.' SMF Ex. 39. Assisting in this process was Scott Taccati ("Taccati"), principal and owner of Trillium Capital Resources ("Trillium"), which is an independent commercial real estate loan consulting firm based in Columbus, Georgia. Defs.' SMF ¶¶ 29, 67; Pls.' Opp'n ¶¶ 29, 67; *see also* Taccati Dep. 128:1–134:8. Mr. Taccati specializes in capital markets financing, and he regularly communicated on behalf of Red Mortgage with

[13] The Application Letter, Lender's Commitment Letter, and Rate Lock Letter (collectively, "Loan Documents"), each as defined *supra* Part I.A.2 and discussed in further detail *infra* Part I.A.3 with respect to the subject Loan transactions, are largely form contracts (with the exception of Loan-specific terms) that include many of the same provisions. Except as described herein, the provisions from the Loan Documents cited below are identical or substantially similar in all material respects in each of Plaintiff's Loan Documents. For ease of reference, when referring and citing to such materially identical provisions, the Court refers generally to the Application Letters, Lender's Commitment Letters, and Rate Lock Letters, respectively. Unless otherwise indicated, capitalized terms appearing in materials quoted herein are as defined in the particular instrument or agreement from which the quote is taken.

Plaintiffs throughout the course of their Loan transactions.[14] Defs.' SMF ¶¶ 29, 67; Pls.' Opp'n ¶¶ 29, 67; *see also* Taccati Dep. 11:19–12:16, 39:3–40:24, 57:3–15, 128:1–134:8.

The estimated interest rate on Greystone's FHA loan was 3.1%. Defs.' SMF ¶ 45; Pls.' Opp'n ¶ 45. Red Mortgage timely processed Greystone's application and obtained a commitment from the FHA to insure the proposed mortgage. Defs.' SMF ¶ 48; Pls.' Opp'n ¶ 48. The Application Letter contains, among other provisions, the following fiduciary relationship disclaimer:

> Nothing in this Application Letter creates or is intended to create a joint venture or any agency or fiduciary relationship, duty or obligation between the parties. Borrower hereby agrees and acknowledges that the commitments and services of [Red Mortgage] are being provided as an independent contractor at arm's length.

Defs.' SMF Ex. 14, at 2; Pls.' SMF Ex. 39, at 2.

Thereafter, on July 13, 2012, Red Mortgage issued a Lender's Commitment Letter whereby it proposed to provide Greystone a loan, which the FHA committed to insure, "on the terms and conditions set forth" in the Lender's Commitment Letter and the exhibits attached thereto. Defs.' SMF ¶ 50; *id.* at Ex. 15; Pls.' Opp'n ¶ 50; Pls.' SMF Ex. 89. The Estimated Loan Amount was $20,764,400, and the proposed

[14] The parties here dispute the nature of Mr. Taccati's relationship with Red Mortgage, whether Mr. Taccati acted as a broker or consultant with respect to Plaintiffs' Loan transactions, and whether Defendants were required to disclose fees Mr. Taccati received in connection with Plaintiffs' Loans. *See, e.g.,* Defs.' SMF ¶¶ 29–33, 67; Pls.' Opp'n ¶¶ 29–33, 67; Taccati Dep. 134:21–135:23; *see also infra* Parts I.A.5, II.B.1.iv, II.B.2.iii.

Processed Interest Rate was 3.5%.[15] Defs.' SMF ¶ 50; *id.* at Ex. 15; Pls.' Opp'n ¶ 50; Pls.' SMF Ex. 89.

With respect to interest rates, the Lender's Commitment Letter "describes the procedures pursuant to which the final [L]oan amount and final interest rate will be determined" and states in part:

> The Borrower understands that changing conditions in the financial market will impact upon the Final Interest Rate and the "Pricing Terms" of the Loan. Upon direction from the Borrower and the prior receipt by the Lender of the "Good Faith Deposit" described below, the Lender shall offer Pricing Terms to the Borrower in the form of a "Rate Lock Letter." These Pricing Terms shall include but not be limited to an interest rate, discount points, prepayment penalties and restrictions and extension fees. Upon receipt of the Rate Lock Letter, the borrower may accept or reject the Pricing Terms described in the Rate Lock Letter. If the Borrower elects to accept those Pricing Terms, the Borrower shall evidence that acceptance by executing and returning a duplicate copy of the Rate Lock Letter to the Lender, which acceptance shall be binding and irrevocable and constitute the Borrower's agreement to a mandatory closing obligation, in the event that the Lender is able to confirm the Pricing Terms. Upon the receipt by the Lender of this fully executed and accepted Rate Lock Letter, the Lender shall use its best efforts to confirm those Pricing Terms, *i.e.*, notwithstanding its acceptance of the Rate Lock Letter, the Borrower understands and agrees that the Pricing Terms are not final, nor binding on the Lender, until such time as the Lender issues to the Borrower its "Confirmation Letter", which Confirmation Letter, and only the Confirmation Letter, shall constitute the final and binding agreement between the Borrower and the Lender as to the Pricing Terms that will apply to the Loan.

[15] As indicated in the Lender's Commitment Letter: "The Processed Interest Rate is an assumed rate that may or may not be the final interest rate . . . upon which the Loan will be made by [Red Mortgage] and insured by FHA." Defs.' SMF Ex. 15, at ¶ B(1); Pls.' SMF Ex. 89, at ¶ B(1).

Defs.' SMF Ex. 15, at ¶ B(2); Pls.' SMF Ex. 89, at ¶ B(2). Like the Application Letter, the Lender's Commitment Letter includes a fiduciary disclaimer:

> The Borrower acknowledges that this Commitment Letter is a commitment from a Lender to make a loan to a Borrower and describes the terms under which a debtor-creditor relationship will be established in this transaction. Nothing in this Commitment Letter, creates or is intended to create a joint venture or any agency or fiduciary relationship, duty or obligation between the parties. Borrower hereby agrees and acknowledges that the commitments and services of [Red Mortgage] are being provided as an independent contractor at arm's length.

Defs.' SMF Ex. 15, at 4; Pls.' SMF Ex. 89, at 4.

The Lender's Commitment Letter also includes "General Conditions to Lender's Commitment for FHA Insured Financing," terms that "constitute conditions precedent to [Red Mortgage's] obligations to make the Loan described in the Lender's Commitment." Defs.' SMF Ex. 15, at Ex. 2, at 1; Pls.' SMF Ex. 89, at Ex. 2, at 1. Numerous general conditions are relevant to the parties' claims and defenses in this litigation, the most salient portions of which are quoted below and discussed *infra* Part II.B:

> **12. <u>GNMA Funding</u>.** The Lender reserves the right, at its election, to securitize and fund the Loan by issuance of GNMA mortgage backed securities.[16]
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[16] It appears undisputed that, at all relevant times, the parties understood Plaintiffs' Loans would be funded through the GNMA securitization process. *See* Ex. Defs.' SMF ¶ 50; Pls.' Opp'n ¶ 50.

21. Brokerage Indemnification. Unless otherwise stated in the Commitment Letter to which these General Conditions are attached, the Borrower and Lender represent to each other that neither have engaged nor have any financial liability for the services of a broker or third party who was instrumental in the issuance of the Lender's Commitment or the FHA Commitment and each holds the other harmless from and against any claims, demands and liabilities for any brokerage or similar fees which arise under an asserted contractual arrangement with the party against whom this indemnification is sought.

22. Use of Funds. Borrower agrees that, subject to the Lender's obligation to hold and apply funds in accordance with FHA requirements and the Loan Documents, once it makes payment to the Lender or its agent (or the Lender receives payment on behalf of the Borrower) for interest, principal, escrows, deposits, late fees, prepayment penalties or otherwise in connection with the Loan, the Borrower thereafter has no right, title or interest whatsoever (either directly or indirectly) to receive any benefits which may accrue to the Lender or any other party as a result of its having received, exchanged, or otherwise sold such funds, securities or other valuables in connection with the Insured Loan.

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24. Assignment and Waiver. This Lender's Commitment when executed by the parties hereto, and the Confirmation Letter,[17] when issued by the Lender, contains the complete and entire terms, conditions and understandings of the parties hereto of the Lender's agreement to provide the Loan as indicated, and no changes will be recognized as valid unless they are reduced to writing and similarly executed. No specific waiver of any of the terms hereof shall be considered as a general waiver. This Commitment may not [be] assigned by the Borrower without the written consent of the Lender. The Lender may assign this Commitment to an assignee that is financially capable of performing the Lender's obligations hereunder in accordance with the express terms hereof.

[17] The Confirmation Letters Red Mortgage issued with respect to the Loans at issue were submitted with the parties' summary judgment papers. *See* Pls.' SMF Exs. 8, 28, 43, 53.

> **25. <u>Interpretation</u>.**
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> B. Nothing in this Commitment expressed or implied is intended or shall be construed to confer upon, or give to, any person, other than the Lender and the Borrower any right, remedy or claim under or by any reason of this Commitment or any covenants. Promises and agreements herein contained by and on behalf of the Lender shall be for the sole and exclusive benefit of the Borrower.
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> **27. <u>Prior Agreement</u>.** This Lender's Commitment supersedes any previous or contemporaneous, written or oral, agreement or understanding between the Borrower and the Lender relative to the transactions that are the subject of the Lender's Commitment and the FHA Commitment.

Defs.' SMF Ex. 15, at Ex. 2, at ¶¶ 12, 21, 22, 24, 25.B, 27; Pls.' SMF Ex. 89, at Ex. 2, at ¶¶ 12, 21, 22, 24, 25.B, 27.

After executing the Lender's Commitment Letter, on July 16, 2012, Mr. White signed a Rate Lock Letter on behalf of Greystone that authorized Red Mortgage to lock in a mortgage on specified pricing terms. Defs.' SMF ¶ 59; *id.* at Ex. 34; Pls.' Opp'n ¶ 59; Pls.' SMF Ex. 41. These pricing terms include the aforementioned Loan amount of $20,764,400 at an interest rate of 2.6% or less (not including Mortgage Insurance Premium or "MIP"). Defs.' SMF ¶ 59; *id.* at Ex. 34; Pls.' Opp'n ¶ 59; Pls.' SMF Ex. 41. Upon executing the Rate Lock Letter, Greystone agreed that if Red Mortgage obtained the pricing terms contained therein and Red

Mortgage issued a Confirmation Letter, Greystone was thereafter obligated to close the Loan on those pricing terms:

> If [Red Mortgage] is able to provide the Pricing Terms set forth in Attachment A to this letter, which attachment is incorporated herein by reference, [Red Mortgage] will issue to you the Confirmation Letter. Provided that [Red Mortgage] issues the Confirmation Letter, you will be unconditionally obligated to close the Loan on the Pricing Terms within the time constraints set out in the Confirmation Letter and the Lender's Commitment. In the event you fail or refuse to do so, you shall be subject to the liabilities and forfeitures described in the Lender's Commitment, including but not limited to the forfeiture of the Good Faith Deposit and all sums previously paid to us, which forfeitures shall not constitute liquidated damages.

Defs.' SMF Ex. 34, at 1; Pls.' SMF Ex. 41, at 1.

Further, as with other Loan Documents, the Rate Lock Letter disclaims any agency or fiduciary relationship between the parties:

> Nothing in the Engagement Letter, the Application Letter, the Lender's Commitment or this letter creates or is intended to create a joint venture or any agency or fiduciary relationship, duty or obligation between the parties. Borrower hereby agrees and acknowledges that the commitments and services of [Red Mortgage] are being provided as an independent contractor at arm's length.

Id.

On August 1, 2012, Red Mortgage confirmed a final interest rate of 2.48%. Defs.' SMF ¶ 60; Pls.' Opp'n ¶ 60; Pls.' SMF Ex. 43. The parties executed a Note evidencing the Loan, and, on August 22, 2012, the Greystone Loan transaction closed. Defs.' SMF ¶ 62; *id.* at Exs. 38, 62; Pls.' Opp'n ¶ 62; Pls.' SMF Ex. 106. At the closing and as a condition thereto, Charles H. Ford ("Ford"), the closing

attorney for Greystone, provided Red Mortgage with an Opinion of Borrower's Counsel in which he certified "[b]ased upon the Certification of Borrower and to the best of our knowledge, there are no side-deals (transactions outside the parameters of the Documents that amend, or are inconsistent with, the terms of said Documents) between Borrower and any party to the transaction other than as disclosed in the Documents." Defs.' SMF ¶ 64 (citing Defs.' SMF Ex. 39, at 9, at ¶ (f)); Pls.' Opp'n ¶ 64; *see also* Ford Dep. 71:15–73:16. As a result of this transaction, Greystone substantially reduced its monthly mortgage payments. Defs.' SMF ¶ 65; Pls.' Opp'n ¶ 65.

In a separate but related transaction, Red Mortgage securitized the Greystone Loan and traded it on the secondary market. Specifically, after obtaining bids from potential investors, on July 17, 2012, Red Mortgage executed a trade confirmation with a GNMA investor, wherein the investor agreed to purchase a GNMA Multifamily Project Loan Security that was "backed" by the Greystone Loan. Pls.' SMF ¶¶ 90–91*; id*. at Exs. 42, 45. The GNMA security was thereafter issued and ultimately delivered to the investor, and Red Mortgage received a trade profit as a result of the transaction. Pls.' SMF ¶¶ 90–91; *id.* at Exs. 42, 44–45.

ii. Overlook Loan

On March 28, 2013, Mr. Gower and Mr. Kennon signed an Application Letter with Red Mortgage to apply for an FHA loan. Defs.' SMF ¶ 67; *id.* at Ex. 14; Pls.'

Opp'n ¶ 67; Pls.' SMF Ex. 1. Sun Valley sought to refinance their existing mortgage, which had a balance of nearly $3.7 million at an interest rate of 6.75%. Defs.' SMF ¶ 67; Pls.' Opp'n ¶ 67. In particular, Sun Valley wanted to reduce that interest rate, increase the loan balance, and withdraw cash to distribute to Mr. Gower and Mr. Kennon. Defs.' SMF ¶ 67; Pls.' Opp'n ¶ 67.

On October 22, 2013, HUD issued a commitment to insure an FHA loan for Overlook in the amount of $5,520,000. Defs.' SMF ¶ 69; Pls.' Opp'n ¶ 69. Shortly thereafter, the parties executed a Lender's Commitment Letter, and, on October 31, 2013, Red Mortgage forwarded Mr. Hinman a Rate Lock Letter proposing to lock the loan rate at 4.30% or less. Defs.' SMF ¶ 69; *id.* at Exs. 8, 35; Pls.' Opp'n ¶ 69; Pls.' SMF Ex. 4. Mr. Hinman did not accept this first Rate Lock Letter, however, and instead, on November 1, 2013, requested that Red Mortgage issue a second Rate Lock Letter with a new proposed rate. Defs.' SMF ¶¶ 71–72; Pls.' Opp'n ¶¶ 71–72. That same day, Red Mortgage issued a second Rate Lock Letter with an interest rate of 4.35% or less (not including MIP), which Mr. Gower and Mr. Kennon signed. Defs.' SMF ¶ 72; *id.* at Ex. 41; Pls.' Opp'n ¶ 72; Pls.' SMF Ex. 5.

On November 4, 2013, Red Mortgage confirmed that it could provide an FHA loan to Overlook in the amount of $5,520,000 with a final fixed rate of 4.28%, and the parties thereafter executed a Note. Defs.' SMF ¶ 73; *id.* at Ex. 44; Pls.' Opp'n ¶ 73; Pls.' SMF Exs. 8, 104. The Loan closed on December 19, 2013, and, as a

result, Mr. Kennon and Mr. Gower distributed between themselves cash proceeds of $1,007,355.68. Defs.' SMF ¶ 76; *id.* at Ex. 45; Pls.' Opp'n ¶ 76. At the closing and as a condition of closing, George Mize, Overlook's closing attorney, provided Red Mortgage with an Opinion of Borrower's Counsel making the same certifications as Mr. Ford, including that there were no side-deals between the borrower and Red Mortgage other than what was disclosed in the relevant Loan transaction documents. Defs.' SMF ¶ 77; *id.* at Ex. 46, at 9, at ¶ (f); Pls.' Opp'n ¶ 77.

As with the Greystone Loan, Red Mortgage securitized the Overlook Loan. On November 4, 2013, Red Mortgage solicited bids and executed a trade confirmation with a GNMA investor, wherein the investor agreed to purchase a GNMA Multifamily Project Loan Security that was "backed" by the Overlook loan. Pls.' SMF ¶¶ 106–08; *id.* at Exs. 7, 11–13. That GNMA security was thereafter issued and ultimately delivered to the investor, and Red Mortgage received a trade profit as a result of this secondary transaction. *Id.* at ¶¶ 107–08.

iii. Inverness II Loan

On August 2, 2014, Mr. White signed an Application Letter for Red Mortgage to provide an FHA-insured loan to Inverness II. Defs.' SMF ¶ 81; *id.* at Ex. 48; Pls.' Opp'n ¶ 81; Pls.' SMF Ex. 22. On May 26, 2015, after Inverness II made some required repairs to its apartment complex, HUD issued a firm commitment to insure

a mortgage of up to $12,640,000 contingent on Inverness II completing remaining repairs. Defs.' SMF ¶ 82; *id.* at Ex. 49; Pls.' Opp'n ¶ 82.

On June 5, 2015, Red Mortgage issued a Lender's Commitment Letter to provide Inverness II an FHA loan with a Processed Interest Rate of 3.50%. Defs.' SMF ¶ 82; *id.* at Ex. 22, at Ex. C; Pls.' Opp'n ¶ 82; Pls.' SMF Ex. 90. It appears that Red Mortgage also issued a proposed Rate Lock Letter, but following subsequent discussions between Mr. White and Red Mortgage, on July 29, 2015, Red Mortgage issued a revised Rate Lock Letter offering a rate of 3.55% or lower (not including MIP). Defs.' SMF ¶ 84; *id.* at Exs. 36, 51, 52; Pls.' Opp'n ¶ 84; Pls.' SMF Ex. 26. Mr. White executed the revised Rate Lock Letter. Defs.' SMF ¶ 85; Pls.' Opp'n ¶ 85.

Red Mortgage ultimately confirmed a final mortgage rate of 3.52%. Defs.' SMF ¶ 85; Pls.' Opp'n ¶ 85; Pls.' SMF Ex. 28. The parties executed a Note, and, on September 30, 2015, Inverness II closed on the FHA loan. Defs.' SMF ¶ 87; *id.* at Ex. 54; Pls.' Opp'n ¶ 87; Pls.' SMF Ex. 107. As a result, Inverness II lowered its monthly mortgage and distributed an aggregate cash sum of $2,140,649.64 to its owners. Defs.' SMF ¶ 88; Pls.' Opp'n ¶ 88. Similar to the Greystone Loan transaction, Mr. Ford provided Red Mortgage with an Opinion of Borrower's Counsel at and as a condition of closing. Defs.' SMF ¶ 89; *id.* at Ex. 55; Pls.' Opp'n ¶ 89. Mr. Ford made the same certification as he did in the Greystone Loan

transaction (*e.g.*, that there were no side-deals between the parties). Defs.' SMF ¶ 89; *id.* at Ex. 55, at 9, at ¶ (f); Pls.' Opp'n ¶ 89.

Again, Red Mortgage securitized the Inverness II Loan through GNMA. On July 29, 2015 (the same day the Rate Lock Letter was issued and executed), Red Mortgage solicited bids and ultimately executed a trade confirmation with a GNMA investor, wherein the investor agreed to purchase a GNMA Multifamily Project Loan Security secured by the Inverness II Loan. Pls.' SMF ¶¶ 133–34. That GNMA security was thereafter issued and ultimately delivered to the investor, and Red Mortgage received a trade profit as a result of this secondary transaction. *Id.*; *see also id.* at Exs. 29, 34–35.

iv. Creekwood Loan

After the Overlook Loan transaction closed, Mr. Hinman requested that Mr. Taccati arrange for Red Mortgage to also refinance Creekwood's then-existing loan. Defs.' SMF ¶¶ 79, 91; Pls.' Opp'n ¶¶ 79, 91. On or around August 25, 2014, Mr. Gower signed an Application Letter on behalf of Creekwood requesting an FHA loan from Red Mortgage at a proposed locked rate of 3.75%. Defs.' SMF ¶ 92; *id.* at Ex. 9; Pls.' Opp'n ¶ 92; Pls.' SMF Ex. 48.

On August 31, 2015, HUD issued a firm commitment to insure a loan for Creekwood in the amount of $12,432,000 at an interest rate of 3.75%. Defs.' SMF ¶ 93; *id.* at Ex. 56; Pls.' Opp'n ¶ 93. Red Mortgage then issued a Lender's

Commitment Letter to Creekwood, which Mr. Gower and Mr. Kennon executed on September 10, 2015. Defs.' SMF ¶ 93; *id.* at Ex. 10; Pls.' Opp'n ¶ 93; Pls.' SMF Ex. 91. Red Mortgage subsequently issued a Rate Lock Letter with a proposed locked rate of 3.57% or lower (not including MIP), which Mr. Kennon executed on behalf of Creekwood and Sun Valley on September 30, 2015. Defs.' SMF ¶ 96; *id.* at Ex. 37; Pls.' Opp'n ¶ 96; Pls.' SMF Ex. 50.

Although there is evidence in the record indicating that, prior to closing the Creekwood Loan, Creekwood had concerns regarding the GNMA securitization and loan process and "premiums" paid to lenders, Mr. Gower and Mr. Kennon closed on the Creekwood Loan on December 22, 2015, at a final interest rate of 3.56% with a loan amount of $12,432,000. Defs.' SMF ¶¶ 94, 97–100, 102; *id.* at Ex. 59; Pls.' Opp'n ¶¶ 94, 97–100, 102; Pls.' SMF Exs. 53, 105. Mr. Mize again provided Red Mortgage with an Opinion of Borrower's Counsel certifying, *inter alia*, that there were no side-deals between the parties. Defs.' SMF ¶ 101; *id.* at Ex. 60, at 9, at ¶ (f); Pls.' Opp'n ¶ 101.[18]

As with the other Loans, Red Mortgage securitized the Creekwood Loan through GNMA. On September 30, 2015 (the same day Mr. Kennon executed the

[18] The parties acknowledged at a hearing on the instant Motions that, since the filing of this action, the Overlook and Inverness II Loans have been refinanced with other lenders. *See, e.g.*, Hinman Dep. II, at 22:16–24:9. There is no evidence suggesting that Plaintiffs have sought to rescind their respective Loans or return the proceeds derived therefrom at any time.

Creekwood Rate Lock Letter), Red Mortgage solicited bids and ultimately executed a trade confirmation with a GNMA investor, wherein the investor agreed to purchase a GNMA Multifamily Project Loan Security that was secured by the Creekwood Loan. Pls.' SMF ¶ 119. That GNMA security was thereafter issued and ultimately delivered to the investor, and Red Mortgage received a trade profit as a result of this secondary transaction. *Id.* at ¶ 120; *see also id.* at Exs. 51–52, 55.

4. *HUD's Program Obligations*

With respect to each of the foregoing Loans, Red Mortgage and each Plaintiff executed a Request for Endorsement of Credit Instrument & Certificate of Lender, Borrower (HUD-92455M) ("Request for Endorsement"),[19] wherein the parties agreed to be bound by HUD's "Program Obligations," including all applicable HUD regulations, handbooks, guides, and mortgagee letters:

> The parties hereto understand that the Security Instrument, the Note, this Request, and any documents submitted with this Request are considered to be consistent with and shall be interpreted consistently with HUD's regulations as they pertain to the Contract of Insurance. The parties hereto agree to be bound by Program Obligations. . . . [T]he term "Program Obligations" means (1) all applicable statutes and any regulations issued by the Secretary pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and

[19] Endorsement by HUD of the Note on each Loan was a condition precedent to Red Mortgage's obligation to make the Loans. *See* Lender's Commitment Ltrs. Ex. 2, at ¶ 2 ("HUD Mortgage Insurance. The Loan described in the Lender's Commitment shall be evidenced by a Mortgage or Deed of Trust Note (the 'Note') on a form prescribed by the Secretary of Housing and Urban Development ('FHA' or 'HUD'). It is a condition precedent to the Lender's obligation to make the Loan evidenced by the Note that the Note first be endorsed for mortgage insurance by HUD (the 'Endorsement').").

> comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, mortgagee letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in this Request rather than add or delete provisions from such document.

Pls.' SMF Ex. 38, at 1–2; *see also id.* at Ex. 93, at 1 (same); *id.* at Ex. 94, at 1–2 (same); First Am. Compl. Ex. 38, at 1–2 (same).[20] The Note executed with respect to each Loan likewise requires the parties to comply with HUD's Program Obligations as defined above. *See* Pls. SMF Ex. 104, at 1 & ¶ 20; *id.* at Ex. 105, at 1 & ¶ 20; *id.* at Ex. 106, at 1 & ¶ 20; *id.* at Ex. 107, at 1 & ¶ 20.[21]

5. *Plaintiffs' Claims*

In exchange for the services associated with processing and securing the Loans, Plaintiffs agreed to pay Red Mortgage a set fee, referred to as an "origination

[20] As discussed *infra* Part III, after Defendants filed the instant Motion for Summary Judgment, Plaintiffs filed a Second Amended Complaint "for the purpose of adding additional predicate acts" to Plaintiffs' Georgia RICO claims that "occurred subsequent to the filing of" the First Amended Complaint, and also "to specif[y] a request for general damages and interest." Pls.' Second Am. Compl. 1. Because the Second Amended Complaint adds allegations and predicate acts but does not expressly include the allegations of the First Amended Complaint, the Court herein will largely cite to the First Amended Complaint when referencing Plaintiffs' pleadings.

[21] The Lender's Commitment Letters impose similar obligations upon each Plaintiff and the property or "Project" securing its Loan to "remain in full compliance with all HUD requirements both at the time of Endorsement and for the full term of the Loan." *See* Lender's Commitment Ltrs. Ex. 2 at ¶ 3.

fee" or "initial service fee,"[22] plus all necessary costs and expenses. First Am. Compl. ¶¶ 18, 107. Plaintiffs, however, allege Red Mortgage did not disclose that their Loans would be securitized and sold to investors at a premium on the secondary market (rather than at par), allowing Red Mortgage to "pocket" additional, indirect compensation from the premiums investors paid to purchase the GNMA securities above par. *Id.* ¶¶ 26–28; *see also* Pls.' SMF ¶ 74; *supra* Part I.A.2; *infra* Part II.B.1.iii.

Plaintiffs allege Red Mortgage breached its contractual duties and HUD's Program Obligations by, *inter alia*, failing to disclose the trade premiums it received through the securitization of their Loans[23] and not accurately and fully disclosing the fees paid to Mr. Taccati in connection with their Loans (fees that allegedly were funded, in part, through the foregoing premiums). First Am. Compl. ¶¶ 83, 85, 86; *see also* Pls.' SMF ¶ 75. Further, because selling the GMNA securities at a premium caused the interest rate on each of their Loans to be higher than it otherwise would have been, Plaintiffs allege Defendants breached the Loan Documents and other oral

[22] The Application Letters expressly state that the origination fee "shall be fully earned upon the issuance of an FHA Commitment on terms substantially equivalent to those [each Plaintiff] requested in the FHA Application or on terms otherwise accepted by [each Plaintiff]." Application Ltrs. 1.

[23] The parties dispute whether HUD's policies and regulations require the disclosure of trade profits. Defs.' SMF ¶¶ 24, 25; Pls.' Opp'n ¶¶ 24, 25. They nevertheless agree that it is standard industry practice for FHA lenders not to disclose to borrowers the amount of trade profit or premium the lender may realize by selling the GNMA security to an investor. Defs.' SMF ¶ 26; Pls.' Opp'n ¶ 26.

agreements by not using their "best efforts" to confirm pricing terms and not providing the "best available" rates on their Loans. First Am. Compl. ¶ 117; Pls.' SMF ¶ 45; Pls.' Resp. 25–27; Lender's Commitment Ltrs. ¶ B(2).

Relatedly, Plaintiffs contend that, during the loan process, Red Mortgage led Plaintiffs to believe that it would work exclusively to secure the best possible interest rate available for Plaintiffs, but instead fraudulently "induce[d] [Plaintiffs] to unknowingly accept an interest rate higher than the prevailing market interest rate" to ensure it profited from the secondary sale to investors. First Am. Compl. ¶¶ 22, 117–19, 145–48, 171(a), 179. Plaintiffs further allege Red Mortgage's "fraudulent scheme of using yield spread premium to secretly increase [their] overall compensation results in [Plaintiffs] paying an excessive interest rate and [Red Mortgage] reaping compensation in excess of what is reasonably related to the total value of its services and in excess of the compensation [Plaintiffs] agreed to pay." *Id.* ¶ 59.

Based on the foregoing, Plaintiffs assert claims against Defendants for breach of contract (only against Red Mortgage) (Count III), fraud (Count II), and violation of Georgia's Racketeer Influenced and Corrupt Organizations ("RICO") Act (Count I). Plaintiffs seek treble damages, punitive damages, and attorney fees and expenses (Counts IV–VI).

B. **Procedural History**

Plaintiffs initiated this action in the State Court of Muscogee County ("Muscogee State Court") on April 10, 2017. *See* Compl. Defendants thereafter removed the case to the U.S. District Court for the Middle District of Georgia and subsequently moved to transfer the action to the U.S. District Court for the Northern District of Texas, arguing a forum selection clause in the Lender's Commitment Letters required Plaintiffs to litigate their claims in the federal or state courts of Dallas County, Texas. *See Overlook Gardens Props., LLC v. ORIX USA, L.P.*, No. 4:17-CV-101 (CDL), 2017 WL 4953905, at *1 (M.D. Ga. Nov. 1, 2017). The Middle District of Georgia, however, held that Plaintiffs' claims were not controlled by the forum selection clause in the Lender's Commitment Letters, and instead were governed by forum selection clauses contained in each Plaintiff's Note and Security Deed, which identify Georgia "state courts" as the appropriate forum. *Id.* at *4–5. The district court thus denied Defendants' motion to transfer and remanded the case to the Muscogee State Court in November 2017.[24] *Id.* at *6.

Upon remand and after discovery and further proceedings in Muscogee State Court, Defendants filed a petition to transfer the action to this Court on August 5,

[24] Although Defendants appealed the district court's decision, the U.S. Court of Appeals for the Eleventh Circuit dismissed the appeal, finding it lacked jurisdiction to review the district court's remand order. *Overlook Gardens Props., LLC v. ORIX USA, L.P.*, 927 F.3d 1194, 1202–03 (11th Cir. 2019).

2020. *See* Defs.' Pet. to Transfer to Ga. State-wide Bus. Ct. Although the Court initially denied the petition based on Plaintiffs' objection under O.C.G.A. § 15-5A-4(a)(3)(B), the parties later jointly moved for reconsideration in light of Plaintiffs' withdrawal of their objection and the consent of all parties to the transfer. *See* Joint Mot. to Reopen Case & Reconsider Order to Transfer Case to Ga. State-wide Bus. Ct. On March 25, 2021, the Court granted the parties' joint motion and granted the petition to transfer. *See* Order Granting Mot. to Reconsider & Granting Pet. to Transfer. Upon such transfer and following a status conference and additional conferences among counsel, the parties identified the instant Motions, among others, as currently pending.[25] *See* Joint Stipulation Regarding the Authenticity of R. Docs. Relevant to the Pending Mots. Ex. A.

Now, after holding a hearing on the Motion for Summary Judgment and Motion to Strike on November 8, 2021 ("Hearing"), the Court **GRANTS IN PART** the Motion for Summary Judgment and **GRANTS** the Motion to Strike for the reasons explained below.

[25] Although the Muscogee State Court initially granted the Motion to Strike and granted the Motion for Summary Judgment in part with respect to Greystone Farms, the Muscogee State Court later vacated those rulings given the then-pending petition to transfer the action to this Court. *See* Order Denying Defs.' Mot. for Summ. J. in Regards to Overlook Gardens Props., LLC, Creekwood Apartments, LLC, & Inverness II, LLC & Granting Defs.' Mot. to Strike Paragraphs 172 & 176 of Pls.' Compl.; Order Granting Defs.' Mot. for Summ. J. in Regards to Greystone Farms Apartment Cmty., LLC; Order [Vacating Aug. 31, 2020 Orders].

II. MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

Summary judgment is appropriate when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ansley v. Raczka-Long*, 293 Ga. 138, 140 (2013); *see also Cowart v. Widener*, 287 Ga. 622, 623 (2010) ("Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]'" (quoting O.C.G.A. § 9-11-56(c))); *Maxey-Bosshardt Lumber Co. v. Maxwell*, 127 Ga. App. 429, 433 (1972) (noting that the summary judgment process "is designed to provide a prompt and inexpensive method of disposing of any cause where the pleadings, depositions, and affidavits clearly show there is no issue of material fact").

The "burden of establishing the non-existence of any genuine issue of fact is upon the moving party and all doubts are to be resolved against the movant. The movant has that burden even as to issues upon which the opposing party would have the trial burden." *Dixon v. Krause*, 333 Ga. App. 416, 419 (2015). The Court is to view all of the evidence and inferences and conclusions therefrom in the light most favorable to the non-moving party. *See Hannah v. Hampton Auto Parts Inc.*, 234 Ga. App. 910, 911 (1998); *Onbrand Media v. Codex Consulting, Inc.*, 301 Ga. App.

141, 143 (2009); *Warren Averett, LLC v. Landcastle Acquisition Corp.*, 349 Ga. App. 479, 482 (2019) ("In order to prevail on a motion for summary judgment under O.C.G.A. § 9-11-56, the moving party must show that there exists no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, demand judgment as a matter of law.").

B. **Analysis**

1. *Breach of Contract (Count III)*

Under Georgia law, "[a] contract is breached by a party to it who is bound by its provisions to perform some act toward its consummation and who, without legal excuse on his part and through no fault of the opposite party, declines to do so." *Douglas v. McNabb Realty Co.*, 78 Ga. App. 845, 846 (1949); *see also Norton v. Budget Rent A Car Sys., Inc.*, 307 Ga. App. 501, 502 (2010). To prevail on a breach of contract claim, a plaintiff must demonstrate three elements: (1) breach, (2) resultant damages, and (3) that they have the right to complain about the contract being broken. *SAWS at Seven Hills, LLC v. Forester Realty, Inc.*, 342 Ga. App. 780, 784 (2017) (citation omitted). "A breach occurs if a contracting party repudiates or renounces liability under the contract; fails to perform the engagement as specified in the contract; or does some act that renders performance impossible." *UWork.com, Inc. v. Paragon Techs., Inc.*, 321 Ga. App. 584, 590 (2013) (citation omitted); *see also Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga. App. 421, 423 (2003)

("[Georgia courts] have long held that contract disputes are well suited for adjudication by summary judgment because [the] construction of contracts is ordinarily a matter of law for the court." (citation omitted)).

Plaintiffs allege that Red Mortgage breached its contractual obligations by (1) not obtaining the best available interest rate for Plaintiffs, (2) not acting for the sole and exclusive benefit of Plaintiffs, (3) not disclosing the trade profit Red Mortgage made from selling Plaintiffs' loans on the secondary market, and (4) not fully disclosing fees paid to Mr. Taccati. *See* Pls.' Resp. 25; *see also* First Am. Compl. ¶ 184 ("Defendant Red Mortgage [] has breached the terms of its contracts with Plaintiffs and HUD—including, but not limited to, the terms of the initial engagement agreements with Plaintiffs (including the Application Letters and the Lender['s] Commitment Letters), the terms of the Requests for Endorsement[,] . . . and the Program Obligations which include various HUD regulations and which bind all [p]arties to the multifamily lending transaction."). Defendants, however, argue Plaintiffs' contract claims fail because Red Mortgage performed its contractual obligations and there is no evidence that Defendants breached any agreement between the parties. *See* Defs.' Mot. for Summ. J. & Incorporated Mem. of Law in Supp. Thereof ("Defs.' Mot.") 29–39.

As discussed below, the Court finds Red Mortgage is entitled to judgment as a matter of law on most, although not all, of Plaintiffs' contract claims.

i. "Best Available Rates"

Plaintiffs first allege that Red Mortgage breached its purported contractual obligation to provide Plaintiffs with HUD-insured loans at the "best available rates." First Am. Compl. ¶ 148; *see also* Defs.' Mot. 33; Pls.' Resp. 25. Plaintiffs contend this obligation arises from the written Loan Documents and/or a separate oral agreement between the parties. Because neither imposed a duty on Red Mortgage to provide Plaintiffs with the best available interest rate on their Loans, this claim fails as a matter of law.

a. No Written Agreement to Provide the Best Available Rate

First, Plaintiffs contend the Loan Documents impose a contractual duty on Red Mortgage to provide Plaintiffs with the best interest rates available. *See* First Am. Compl. ¶ 184; Pls.' Resp. 25–27; Defs.' Mot. 33–36. However, Plaintiffs do not point to, and the Court finds no provisions in, the Loan Documents that impose such an obligation. Defs.' Mot. 33–36. The Loan Documents on their face are unambiguous, and no provision therein can reasonably be read to require Defendants to obtain the best available interest rate on Plaintiffs' Loans. Further, Plaintiffs' representatives conceded in their depositions that the Loan Documents do not require Red Mortgage to obtain the best available rates. *See* Hinman Dep. I, at 134:12–15 (Question: "Can you pull out of these [Loan Documents] or any – anywhere the piece of paper that says that Red promised to get you the, quote, best

rate available?" Answer: "I do not find that in any of the documents."); Gower Dep. I, at 26:20–27:3 (Question: "Now, is there anything in this application letter or the attached commitment letter or the rate lock letter that says you're going to get the best available rate?" Answer: "No, not the best available rate. I just said that they would be fair and honest and do the best they could."); Ford Dep. 105:18–106:16 (Question: "You're not aware of any . . . actions, anything that [Red] Mortgage did that would be in breach of the transactions that you closed?" Answer: "No. That's right." Question: "You're not aware of any false statements or misrepresentations or broken promises by [Red] Mortgage; is that correct?" Answer: "Correct."); Mize Dep. 79:7–9 (Question: "You're not aware of any breach of the contract by [Red] Mortgage?" Answer: "I'm not aware of any, no."). Because the Loan Documents did not contractually require Red Mortgage to provide Plaintiffs with the best available interest rates on their Loans, Plaintiffs' claim that Red Mortgage breached the written Loan Documents by not providing the "best available rates" fails as a matter of law.[26]

[26] In their papers, Plaintiffs point to correspondence between the parties wherein Mr. Croft and Mr. Taccati reference getting the best rate, providing the best service, or similar language. *See*, *e.g.*, Pls.' SMF Ex. 25 (July 29, 2015 email from Mr. Croft to Mr. White and Mr. Taccati regarding a revised Rate Lock Letter for the Inverness II Project stating, "[t]his is still a great market to [sic] rate, and we will, of course, get you the best rate available – I'm absolutely certain of that."); Pls.' SMF Ex. 19 (June 25, 2014 email from Mr. Taccati to Mr. White regarding the Inverness II Project, stating he "[is] confident [they] can out service the competition with the absolute most competitive pricing"); Pls.' SMF Ex. 31 (July 31, 2015 email from Mr. Taccati to Mr. White, stating "it is not uncommon for competition to mislead clients trying to win the next deal, though it is absolutely unethical to blatantly mislead the client" and that "[t]here is not [sic] better resource in the business

b. No Enforceable Oral Agreement to Solicit Bids to Confirm and Provide the Best Available Rate

Any claim that Red Mortgage breached oral agreements to provide Plaintiffs with the best available rate also fails. Pls.' Resp. 25. Specifically, Plaintiffs allege that Red Mortgage "orally agreed that it would take Plaintiffs' proposed [L]oans to the marketplace and solicit bids on the [L]oans from interested investors in order to confirm the best available interest rate for Plaintiffs." *Id.*

Notably, Plaintiffs' contract claims premised on the breach of alleged oral agreements were asserted for the first time in Plaintiffs' Response to this Motion. *Id.*; *see also* Defs.' Reply in Supp. of Their Mot. for Summ. J. ("Defs.' Reply") 9. It is well established, however, that a party cannot raise a claim for the first time in response to a summary judgment motion. *See Ga. Dep't of Transp. v. Balamo*, 343 Ga. App. 169, 174 n.4 (2017) (rejecting a new claim because plaintiff raised it for the first time in response to a motion for summary judgment, holding "[t]his is not the claim [plaintiff] raised in his complaint, and he cannot amend his pleadings through a response to summary judgment"); *Jahannes v. Mitchell*, 220 Ga. App. 102,

than Jim Croft to execute trades"). These comments, however, constitute mere puffery, which is not enforceable and cannot form the basis of a breach of contract claim. *See Rust v. Boswell*, No. 1:11-CV-03404-JEC-JFK, 2013 WL 12099655, at *17 (N.D. Ga. Oct. 4, 2013) ("[A] party is not justified in relying on and assuming to be true representations consisting of mere expressions of opinion, hope, expectation, puffing and the like[.]"); *see also Sutton Assocs. v. Lexis-Nexis*, 761 N.Y.2d 800, 802–03 (N.Y. App. Div. 2003) (where the plaintiffs alleged that the defendant fraudulently represented that its rates were the "best rates Lexis could offer," holding that "at best, [such statements] constitute non-actionable 'puffery' and/or commendatory sales representations on which a sophisticated commercial entity could not reasonably rely").

103–04 (1996) ("In response to the motion for summary judgment, [plaintiff] alleged a breach of contract claim entirely different from the averments in his complaint . . . . This completely new claim made for the first time in response to the motion for summary judgment does not satisfy even the liberal requirements of the Georgia Civil Practice Act . . . for notice pleading."). These newly asserted claims thus fail on procedural grounds.

Even if Plaintiffs properly asserted claims for breach of oral agreements, they would nevertheless be precluded under the Statute of Frauds. Georgia's Statute of Frauds requires all contracts "for [the] sale of lands, or any interest in, or concerning lands" as well as "commitment[s] to lend money" to be "in writing and signed by the party to be charged therewith." O.C.G.A. §§ 13-5-30(a), (a)(4), (a)(7). Alleged oral agreements to provide Plaintiffs the best available interest rates on their Loans involve both mortgages on land and commitments to lend money. Defs.' Resp. 11. Thus, as a matter of law, such agreements must be in writing to be enforceable against Red Mortgage. *See, e.g., Kamat v. Allatoona Fed. Sav. Bank*, 231 Ga. App. 259, 262–63 (1988) (noting that an "alleged oral promise to provide a mortgage to plaintiffs was unenforceable at the time it was purportedly made because it was not in writing as required by" the statute of frauds); *McFarland v. JPMorgan Chase Bank, N.A.*, No. 2:12-CV-48-WCO, 2012 WL 12865277, at *4 (N.D. Ga. Nov. 28, 2012) ("Courts have consistently held that mortgage agreements are subject to the

requirements of the [S]tatute of [F]rauds."); *see also RHL Props., LLC v. Neese*, 293 Ga. App. 838, 840–41 (2008) (noting that if a "contract is required by the Statute of Frauds to be in writing, any modification of the contract must also be in writing" (quoting *Walden v. Smith*, 249 Ga. App. 32, 34 (2001))).

c. Merger Clauses

Additionally, Plaintiffs' contract claims related to obtaining the best available rate—whether premised on separate written or oral agreements—fail because all such representations merged into and were thus superseded by the Lender's Commitment Letters. Specifically, each Lender's Commitment Letter includes a "Prior Agreement" or merger provision that explicitly states that the "Lender's Commitment Letter supersedes any previous or contemporaneous, written or oral, agreement or understanding between [each Plaintiff] and [Red Mortgage] relative to the transactions that are the subject of the Lender's Commitment and the FHA Commitment." Lender's Commitment Ltrs. Ex. 2, at ¶ 27. Further, the executed Lender's Commitment Letters and Red Mortgage's subsequent Confirmation Letters[27] confirming the terms of the Loans, together, comprise Red Mortgage's complete agreement to provide each of the Loans at issue—agreements that could only be amended in a writing executed by the parties:

> **24. <u>Assignment and Waiver</u>.** This Lender's Commitment when executed by the parties hereto, and the Confirmation Letter, when

[27] *See supra* note 17.

> issued by the Lender, ***contains the complete and entire terms, conditions and understandings of the parties hereto of the Lender's agreement to provide the Loan as indicated***, and ***no changes will be recognized as valid unless they are reduced to writing and similarly executed***. No specific waiver of any of the terms hereof shall be considered as a general waiver.

Id. at ¶ 24 (emphasis added). The terms of the Lender's Commitment Letters remain in effect until the Loans are paid in full. *See id.* ¶ 32 ("All of the terms and provisions set forth in this Commitment shall survive Final Endorsement and shall continue in full force and effect until the Lender shall have received payment in full of the Loans, and all interest thereon, all fees due and payable from the Borrower as set forth in this Commitment, and all other sums provided for in the Loan Documents."). In other words, the Lender's Commitment Letters (along with Red Mortgage's Confirmation Letters) constitute the complete and final agreement between the parties with respect to Red Mortgage's obligation to provide Plaintiffs' Loans, and any prior agreements, representations, or understandings between the parties, whether written or oral, merged into the Lender's Commitment Letters.

A merger clause operates as a disclaimer, establishing that the written agreement comprehensively represents the parties' agreement in its entirety. *See Authentic Architectural Millworks, Inc. v. SCM Grp. USA*, 262 Ga. App. 826, 827–28 (2003) (explaining that "if the contract contains a merger clause, a party cannot argue they relied upon representations other than those contained in the contract" (quotation and citation omitted)). In Georgia, written contracts containing

a merger clause cannot be varied by a party asserting prior or contemporaneous representations that contradict the valid written agreement. *Werner Enters. v. Markel Am. Ins. Co.*, 448 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) ("The Georgia Supreme Court has explained that, in 'written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties . . . .'" (alteration in original) (quoting *First Data POS, Inc. v. Willis*, 273 Ga. 792, 795 (2001))). This is to preclude "any unilateral modification of a written contract through evidence of pre-existing terms which were not incorporated therein." *Id.* at 1379 (quoting *Thomas v. Garrett*, 265 Ga. 395, 396 (1995)). Merger clauses, thus, "control between conflicts of oral and written representations, and no 'violation of any such alleged oral agreement [is actionable].'" *Whitehead Elec. Co. v. Wrigley Mfg. Co., LLC*, No. 1:07-CV-2601-TWT, 2009 WL 10669645, at *3 (N.D. Ga. June 17, 2009) (alteration in original) (quoting *First Data POS*, 273 Ga. at 795).

In light of the merger clauses here, alleged representations or agreements that Red Mortgage would confirm and provide Plaintiffs the "best available" interest rates on their Loans are merged into and superseded by the executed Lender's Commitment Letters and Confirmation Letters. It necessarily follows that Plaintiffs'

breach of contract claims premised on such representations or agreements are precluded by the merger clauses and, thus, fail as a matter of law.[28]

d. Plaintiffs' Certification of No Other Agreements

At each closing, Plaintiffs also affirmatively denied in writing the existence of any "side deals" when they accepted their respective Loans. *See* Defs.' SMF Ex. 39, at Ex. A, at ¶¶ 2, 7 ("The terms and conditions of the Loan as reflected in the Loan Documents as defined in the Opinion Letter to which this is attached have not been amended, modified or supplemented, directly or indirectly, by any other agreement or understanding of the parties or waiver of any of the material provisions of the Loan Documents. . . . There are no side-deals (transactions outside the

[28] Plaintiffs cite to *Diamondhead Corp. v. Robinson* for the proposition that an oral argument that is "an independent and complete contract within itself" and "forms no part of the written contract," may be established by parol evidence. 144 Ga. App. 60, 61 (1977) ("The test to determine whether the oral agreement is one which the law will permit to be plead and proved is whether the oral agreement constitutes a part of the written contract or whether, instead, it is a separate and distinct, oral contract which is not inconsistent with the written contract. If the latter, it admits of pleading and proof." (quoting *S. & S. Builders, Inc. v. Equitable Inv. Corp.*, 219 Ga. 557, 561 (1964)). Here, Plaintiffs seek to introduce parol evidence for what they consider to be a separate and distinct "oral agreement that Red [Mortgage] would market and shop Plaintiffs' loans among interested investors in order to confirm the best available interest rate for Plaintiffs." Pls.' Br. 27. But as Defendants note in their Reply, "Courts have applied this 'separate agreement' exception to the parol evidence rule in situations where 'from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole [of the] transactions between them.'" Defs.' Reply 16 (quoting *Henry v. Blankenship*, 275 Ga. App. 658, 659 (2005). As noted above, here the parties not only agreed that all prior representations and understandings merged into the Lender's Commitment Letters, they also explicitly and unambiguously agreed that the Lender's Commitment Letters and Confirmation Letters would constitute "the complete and entire terms, conditions and understandings of the parties" regarding Red Mortgage's agreement to provide each Plaintiff's Loan. Because those documents represent the complete and final agreements between the parties, the "separate agreement" exception from *Diamondhead Corp.* cannot and does not apply.

parameters of the Documents that amend, or are inconsistent with, the terms of said Documents) between Borrower and any party to the transaction other than as disclosed in the Documents."); *see also id.* at Ex. 46, at Ex. A, at ¶¶ 2, 7 (same); *id.* at Ex. 55, at Ex. A, at ¶¶ 2, 7 (same); *id.* at Ex. 60, at Ex. A, at ¶¶ 2, 7 (same). Based on the foregoing certifications, the closing attorneys representing each Plaintiff provided an Opinion of Borrower's Counsel wherein the closing attorneys also represent that "to the best of [their] knowledge, there [were] no side deals (transactions outside the parameters of the [Loan related] Documents that amend, or are inconsistent with, the terms of said Documents) between the Borrower and any party to the transaction other than as disclosed in the Documents . . . ." Defs.' SMF Ex. 39, at 9, at ¶ (f); *see also id.* at Ex. 46, at 9, at ¶ (f); *id.* at Ex. 55, at 9, at ¶ (f); *id.* at Ex. 60, at 9, at ¶ (f). Likewise, at their depositions, Plaintiffs' closing attorneys confirmed that they did not know of any deals between the parties other than the agreements contained within the Loan Documents. *See* Ford Dep. 70:18–22 (Question: "But there was no—nothing represented to you about any special arrangements or discussions or side deals that Will White had with Red Mortgage?" Answer: "Uh-uh, none."); Mize Dep. 77:4–11 (Question: "Okay. Based upon that, when it says here 'side deals,' that's any understanding outside the documents that could change or amend the meaning or the [e]ffect of the transaction? You were assured by the borrowers, by Mr. Gower, that there was no such understanding or

side deal?" Answer: "Correct.").[29] Plaintiffs, therefore, have certified that there were no other agreements between the parties other than those expressed in the Loan Documents, and the Court finds these certifications to also be dispositive of this issue.

[29] On November 2, 2021, just days before the Hearing on these Motions, Plaintiffs submitted supplemental affidavits of Mr. Ford and Mr. Mize, Plaintiffs' aforementioned closing attorneys, who provided Opinions of Borrower's Counsel with respect to Plaintiffs' Loans. In the affidavits, Mr. Ford and Mr. Mize essentially withdraw representations made in their Opinions of Borrower's Counsel. They aver, *inter alia*, that they "did not know that all material terms of the transaction were not disclosed," including the "undisclosed substantial premium to be paid by [Plaintiffs]" through the "marked up" interest rates and the undisclosed fees paid to Mr. Taccati. Pls.' Notice of Suppl. Evid. in Further Supp. of Their Opp'n to Defs.' Mot. for Summ. J. ("Pls.' Supp. Affs.") Ex. A ¶¶ 5–6; *id.* at Ex. B ¶¶ 5–6. They further state that they would not have signed the Opinion of Borrower's Counsel had they known about "these undisclosed material terms." Pls.' Supp. Affs. Ex. A ¶ 7; *id.* at Ex. B ¶ 7. At the Hearing, Defendants asked the Court to strike the affidavits and decline to consider them, arguing they are untimely, conflict with Mr. Ford and Mr. Mize's Opinions of Borrower's Counsel, and do not create any issue of fact.

Pursuant to Code section 9-11-56(c), "the adverse party [to a summary judgment motion] prior to the day of hearing may serve opposing affidavits." O.C.G.A. § 9-11-6(c); *see also id.* § 9-11-6(d) ("Opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time."). Because the parties already participated in a summary judgment hearing in the Muscogee State Court in 2020, the summary judgment record is closed, and Plaintiffs have not sought leave to supplement the record. Thus, the Court finds the supplemental affidavits to be untimely. Although the Hearing was convened upon the transfer of the case in order to apprise this Court of the parties' summary judgment arguments, Plaintiffs have not identified any authority for the proposition that such a situation afforded them a second or renewed opportunity to submit opposing affidavits under Code section 9-11-56. Therefore, the Court will not consider the affidavits for purposes of the instant Motion for Summary Judgment. Moreover, as Defendants noted at the hearing, the Opinion of Borrower's Counsel, which includes the Borrower's Certificate, is a form document required and relied upon by HUD (HUD-91725M) for purposes of insuring Plaintiffs' Loans. Thus, if Plaintiffs' allegations are true (*e.g.*, there were separate oral agreements or understandings with Red Mortgage related to their Loans), such allegations seriously call into question the representations Plaintiffs made, independently and through their closing attorneys, to HUD.

e. No Evidence of Better Rates

Plaintiffs' "best available rate" contract claims also fall short because there is no evidence that the rates Plaintiffs obtained from Red Mortgage were not, in fact, the best rates available to them at that time and on the terms sought. *See* White Dep. I, at 100:2–6, 102:1–7 (Question: "Do you know if you – when you were entering into this first transaction with Red Mortgage, did you look at what was available on the Internet to compare rates?" Answer: "No." . . . Question: "Okay. Do you know if any other FHA-approved lender, as of the latter part of 2012, was able to deliver a rate lower than the rate that you obtained?" Answer: "I have no idea." Question: "Have you made any effort to try to determine that?" Answer: "I have not."); Hinman Dep. I, at 54:2–4 (Question: "Did you talk to other lenders or providers of loans?" Answer: "We did not."); Hinman Dep. II, at 21:3–7, 82:2–6 (Question: "Have you made any effort to determine if the rates that were delivered to you by [Red] Mortgage were, in fact, competitive FHA rates at the time they were provided?" Answer: "I have not, no." . . . Question: "So you're not aware of any facts to suggest that the rate that you got from [Red], at that time, was not the best available rate?" Answer: "I've not researched it, and no one has told me that it is not.").

The fact that GNMA investors were willing to purchase securities backed by Plaintiffs' Loans at certain rates does not establish that any FHA lender was willing

to provide a HUD-insured loan at a better interest rate on the same terms and at the time of each Loan transaction, respectively. While Plaintiffs repeatedly attempt to conflate them, originating and providing a HUD-insured loan is a distinct and separate transaction from securitizing and trading mortgage backed securities on the secondary market; they are plainly different commercial transactions involving other lenders with different obligations and risks.[30] Absent evidence from which a reasonable jury could find that Plaintiffs could have received FHA-loans on the same terms but with a better interest rate, Plaintiffs' "best available rate" claims fail.

ii. "Sole and Exclusive Benefit of the Borrower"

Plaintiffs next allege that Red Mortgage breached their contractual obligations by not acting for Plaintiffs' sole and exclusive benefit. To support these claims, Plaintiffs point to language in the Lender's Commitment Letters that expresses that the promises contained therein "shall be for the sole and exclusive benefit of the Borrower." First Am. Compl. ¶¶ 117–19; *see* Lender's Commitment Ltrs. Ex. 2, at ¶ 25(B). Plaintiffs' reliance on this language is misplaced, however, because it does not consider the relevant paragraph in its entirety. Paragraph 25(B) of the General Conditions of the Lender's Commitment Letters states:

[30] *See supra* Part I.A.2.

> **25. <u>Interpretation</u>.**
>
> ***
>
> B. Nothing in this Commitment expressed or implied is intended or shall be construed to confer upon, or give to, any person, other than the Lender and the Borrower any right, remedy or claim under or by any reason of this Commitment or any covenants. Promises and agreements herein contained by and on behalf of the Lender shall be for the sole and exclusive benefit of the Borrower.

Lender's Commitment Ltrs. Ex. 2, at ¶ 25(B) ("Paragraph 25"). The first sentence in Paragraph 25, thus, establishes that only Red Mortgage and Plaintiffs, respectively, have any rights or remedies under each Lender's Commitment Letter, while the second sentence makes clear that Red Mortgage's promises therein are for the benefit of each Plaintiff. Read in its entirety and in context, it is apparent that Paragraph 25 precludes third party beneficiary claims; when "interpret[ing]" each Lender's Commitment Letter, the "[p]romises and agreements" made by Red Mortgage are "for the sole and exclusive benefit" of each Plaintiff, as opposed to any third party. From such agreement, it does not follow that Red Mortgage took on a fiduciary obligation or otherwise agreed to act solely and exclusively for each Plaintiff's benefit.[31] To the contrary, in the Loan Documents, the parties expressly and repeatedly agreed that they were establishing an arm's length debtor-creditor

[31] *See infra* Part II.B.2.ii.

relationship and that Red Mortgage was not a fiduciary or partner of any Plaintiff. Application Ltrs. 2–3; Lender's Commitment Ltrs. 4; Rate Lock Ltrs. 1.

Plaintiffs Greystone and Inverness II's own closing attorney, Mr. Ford, testified that the purpose of the foregoing provision was to prevent third parties from claiming rights under the Lender's Commitment Letter. Ford Dep. 90:1–91:22. Mr. Ford also opined that interpreting Paragraph 25 as creating a fiduciary relationship or contractual duty that required Red Mortgage to act for the sole and exclusive benefit of Plaintiffs would be unreasonable. *Id.* (Question: "Is the purpose of that to prevent third parties from claiming rights under this agreement?" Answer: "It—I think that's right . . . ." Question: "Would you possibly or reasonably interpret that to create a fiduciary relationship on behalf of the borrower and the lender? . . . ." Answer: "No, it would not be reasonable."). Because Paragraph 25 cannot reasonably be read to impose a duty upon or otherwise obligate Red Mortgage to act for Plaintiffs' "sole and exclusive benefit" to the exclusion of Red Mortgage's own self-interest, Plaintiffs' contract claims premised on this language extracted from Paragraph 25 fail.

iii. Disclosure of Trade Profits

Plaintiffs also contend that Red Mortgage breached its contractual obligations under the Loan Documents as well as certain HUD Program Obligations by failing to disclose the trade profit it made from securitizing Plaintiffs' Loans and trading

the GNMA mortgage backed securities on the secondary market. *See* First Am. Compl. ¶¶ 22–29; Pls.' Resp. 42–45. The Loan Documents, however, impose no such obligation on Red Mortgage. In fact, each Lender's Commitment Letter unambiguously states that Red Mortgage "reserve[d] the right, at its election, to securitize and fund the Loan by issuance of GNMA mortgage backed securities." Lender's Commitment Ltrs. Ex. 2, at ¶ 12. In that same agreement, Red Mortgage also gave notice that it might benefit "as a result of its having . . . sold such funds, securities or other valuables in connection with the Insured Loan" and plainly advises that once the Borrower "makes payment to the Lender or its agent . . . in connection with the Loan, the Borrower thereafter has no right, title, or interest whatsoever (either directly or indirectly) to receive any [such] benefits which may accrue to [Red Mortgage] or any other party." *Id.* Ex. 2, at ¶ 22.

Although Plaintiffs generally contend the HUD Program Obligations governing the parties' various agreements require (or should require) the disclosure of trade profits received by lenders, again, they fail to identify any HUD regulation or policy requiring such disclosure. In fact, Plaintiffs acknowledge that, in 2010, HUD considered requiring the disclosure of trade profit on either form HUD-92434M or HUD-92455M as part of its revisions to certain loan closing documents. First Am. Compl. ¶¶ 92–96. Upon considering public comments to the proposed regulatory changes, however, HUD noted that such a requirement would

constitute a "substantial, significant, and notable new policy," and it ultimately withdrew the proposal:

> Disclosure of Gains From Trading Ginnie Mae Securities. Commenters noted that the proposed requirement in the loan documents that Lenders disclose gains from trading the Ginnie Mae security would create a substantial, significant and notable new policy. Commenters submitted that such disclosure does not belong in the closing documents nor should it be part of the process for changing loan documents. HUD agrees with this concern and has removed this requirement.

HUD Multifamily Rental Project Closing Documents, 75 FR 80517-01, 80519 (Dec. 22, 2010).[32]

[32] In withdrawing its proposal regarding the disclosure of trade profits, HUD noted that it was "[e]liminating the declaration to the Borrower of the trading premium earned by Mortgagee upon Sale of Ginnie Mae Securities to allow Lenders and Borrowers to negotiate appropriate compensation." HUD Multifamily Rental Project Closing Documents, 75 FR 80517-01, 80523 (Dec. 22, 2010). From this, Plaintiffs suggest that Red Mortgage was still required to disclose the profit it made from the sale of GNMA securities secured by Plaintiffs' Loans during the parties' negotiations. First Am. Compl. ¶¶ 96–97; *see also* Pls.' SMF ¶ 56 (noting that, under section 3.2 of the 2011 MAP Guide, "[t]he interest rate on a HUD insured loan is negotiated between the borrower, the mortgagee and the GNMA investor"). It is simply illogical, however, to conclude that the express "eliminat[ion]" of a proposed disclosure requirement nevertheless constitutes an affirmative disclosure obligation. Rather, HUD left to the parties the right to freely negotiate their loan transaction. As noted above, from the terms of the Loan Documents, Plaintiffs were clearly and unambiguously on notice that Red Mortgage had the right to securitize their Loans through GNMA and to obtain a profit or premium from the sale of the GNMA securities on the secondary market. No evidence has been adduced from which to conclude that Plaintiffs were in any way prevented from negotiating the securitization of their Loans or profits earned therefrom prior to executing the Loan Documents and other agreements effectuating their Loans. Indeed, the record reflects that, in the months leading up to this lawsuit, Plaintiffs engaged in due diligence regarding GNMA securities and freely negotiated (with Red and other lenders) various disclosures related to trade profits on certain proposed loan transactions. *See*, *e.g.*, White Dep. I, at 232:3–238:17, 240:1–248:5, 257:12–260:5, 263:1–11; Pls.' SMF Exs. 78, 79, 82, 85, 90, 92, 93, 103, 105. These actions plainly belie any contention by Plaintiffs that they were in any way prevented from engaging in similar inquiries and negotiations with respect to the Loans at issue in this litigation.

In a letter from Thomas A. Bernaciak ("Bernaciak"), Director of the Technical Support Division in HUD's Office of Multifamily Production, to Mr. Croft, Mr. Bernaciak also confirmed that trade profits are generally not disclosed to the borrower:

> HUD does not require disclosure of trade profit on form HUD-92455M (refinance closings) or on HUD-92434M (new construction/substantial rehabilitation closings), as such amounts are not considered a Financing Charge as defined in the forms. This has been HUD's policy for the current "M" iteration of the closing document forms dating back to 2010, when the Department specifically decided against requiring disclosure of trade profit in the HUD-92434M (75 Fed. Reg. 80517, 80523; December 22, 20l0). . . . HUD does not require lenders' disclosure of trade profit to borrowers and it is not publicly available information.[33]

Defs.' SMF Ex. 29;[34] *see also* Defs.' SMF Ex. 24, at ¶ 22 ("It is standard industry practice for FHA lenders not to disclose to borrowers the existence or the amount of

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[33] Pursuant to HUD Mortgagee Letter 2011-05 dated January 5, 2011, and the applicable MAP Guide, lenders must, within their audited financial statements, disclose to HUD (and only to HUD) the total amount of loan fees earned that exceed 5% on a transaction, which include both financing fees and trade profit. Defs.' SMF ¶ 25; Pls.' Opp'n ¶ 25.

[34] Plaintiffs generally refer to Mr. Bernaciak's letter as "hearsay opinion" and "inadmissible hearsay." Pls.' Opp'n ¶¶ 24, 28. Plaintiffs did not, however raise the issue in their Response nor did they move to strike or otherwise formally object to the consideration of the exhibit. "[E]vidence offered on motion for summary judgment is held to the same standards of admissibility as evidence at trial, and evidence inadmissible at trial is generally inadmissible on motion for summary judgment." *Barich v. Cracker Barrel Old Country Store, Inc.*, 244 Ga. App. 550, 551 (2000). Nevertheless, the Court seriously questions whether Plaintiffs' general hearsay reference buried in their statement of material facts response (to which no corresponding response by Defendants is permitted) is sufficient to raise a hearsay objection, particularly when it was not raised in Plaintiffs' briefing, by separate motion or objection, or during oral argument, neither before this Court nor the Muscogee State Court. The Court does not, however, find Mr. Bernaciak's letter to be dispositive of any issue given the other evidence cited herein, including HUD's own formal statements regarding withdrawing its proposal to require disclosure of trade profits to borrowers in certain loan closing documents.

trade profit that may be realized by selling the GNMA security to an investor, since the borrower is not a party to that transaction.").

Ultimately, Plaintiffs appear to take somewhat contradictory positions. While they acknowledge that it is an industry-wide practice for lenders not to disclose trade profit information to borrowers and recognize that, in 2010, HUD considered but decided against requiring such disclosures in certain HUD forms, Plaintiffs nevertheless maintain that Red Mortgage breached its contractual obligations (and committed fraud)[35] by failing to disclose the trade profits they received upon securitizing Plaintiffs' Loans and trading those securities. *See, e.g.*, Pls.' Opp'n ¶¶ 26, 98; Pls.' SMF ¶¶ 52–56. But absent some affirmative obligation on Red Mortgage to disclose this information, the failure to do so simply does not constitute a breach of HUD's Program Obligations or the parties' various agreements.

Because HUD specifically considered whether it would require the affirmative disclosure of trade profits and decided against it, and Plaintiffs have not identified any HUD Program Obligation requiring such disclosures, any allegation that Red Mortgage breached a contractual obligation arising under HUD's regulatory framework by not disclosing such secondary profits fails.[36]

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[35] *See infra* Part II.B.2.i.

[36] Plaintiffs also argue that trade profit is actually "additional compensation paid by the borrower, and that it should have been disclosed in the written agreement with all the other compensation, costs, fees and expenses detailed as being associated with the fully funded loan." Pls.' Resp. 44–45. This argument, however, ignores that the trade profit Defendants make from selling Plaintiffs'

iv. Disclosures Regarding Brokers and Other Third Parties

Finally, Plaintiffs allege that Red Mortgage breached its contractual obligations by failing to fully disclose information regarding brokers or other third parties that were involved with their Loan transactions and, specifically, failing to fully disclose the fees paid to Mr. Taccati. *See* Pls.' Resp. 45–47; First Am. Compl. ¶¶ 81–83. Plaintiffs specifically cite to a "Brokerage Indemnification" provision in the General Conditions of the Lender's Commitment Letters:

> **21. <u>Brokerage Indemnification</u>.** Unless otherwise stated in the Commitment Letter to which these General Conditions are attached, the Borrower and Lender represent to each other that neither have engaged nor have any financial liability for the services of a broker or third party who was instrumental in the issuance of the Lender's Commitment or the FHA Commitment and each holds the other harmless from and against any claims, demands and liabilities for any brokerage or similar fees which arise under an asserted contractual arrangement with the party against whom this indemnification is sought.

Lender's Commitment Ltrs. Ex. 2, at ¶ 21 (collectively, "Brokerage Indemnification provision").

The parties dispute the meaning and obligations flowing from the Brokerage Indemnification provision. Plaintiffs interpret the provision as "requiring the disclosure of any financial compensation paid to a broker or other third-party in connection with Plaintiffs' [L]oans." Pls.' Resp. 45. Plaintiffs further contend that,

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Loans on the secondary market is a wholly separate transaction that, as discussed *supra*, is not required to be disclosed to Plaintiffs as borrowers. *See supra* Parts I.A.2, II.B.1.iii.

although it is undisputed that Red Mortgage engaged Mr. Taccati's services in relation to their Loans, "none of the Lender Commitment Letters for any of the four Plaintiffs contain any disclosure related to [Red Mortgage's] use of, or financial obligation to, a broker or any other third-party in relation to processing Plaintiffs' [L]oans." Pls.' Resp. 45–46. Defendants counter that the Lender's Commitment Letters only require "that Red Mortgage indemnify the borrowers from any future claim that Borrower should be liable for fees paid by Red Mortgage to its consultant [Taccati]" and, insofar as "Plaintiffs do not allege that they had to come out of pocket for any of Mr. Taccati's consulting fees," the Brokerage Indemnification provision has no bearing. Defs.' Reply 9 n.2.

"The construction of a contract is a question of law for the court." O.C.G.A. § 13-2-1; *see Primary Invs., LLC v. Wee Tender Care III, Inc.*, 323 Ga. App. 196, 197 (2013). The "familiar framework" of contract construction involves three-steps:

> First, the trial court must decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.

Langley v. MP Spring Lake, LLC, 307 Ga. 321, 323–24 (2019) (quoting *City of Baldwin v. Woodard & Curran, Inc.*, 293 Ga. 19, 30 (2013)); *see also Unified Gov't of Athens-Clarke Cnty. v. Stiles Apartments, Inc.*, 295 Ga. 829, 832 (2014) ("The

cardinal rule of contract construction is to ascertain the intention of the parties. . . . When the terms of a contract are clear and unambiguous, the reviewing court looks only to the contract itself to determine the parties' intent." (citations omitted)).

The Brokerage Indemnification provision plainly includes both a representation regarding the disclosure of certain information relevant to indemnification and an indemnification obligation: unless otherwise stated in the Lender's Commitment Letter (i) the parties represent that they have not "engaged nor have any financial liability for the services of a broker or third party who was instrumental in the issuance of the Lender's Commitment or the FHA Commitment" (*i.e.*, if either the borrower or lender has engaged such a broker or third party it must be so "stated" in the Lender's Commitment Letter), *and* (ii) the parties agree to indemnify each other against any claims, demands, or liabilities for "brokerage or other similar fees" arising from any contractual arrangement. Lender's Commitment Ltrs. Ex. 2, at ¶ 21. Defendants' argument that the Lender's Commitment Letters "only required that Red Mortgage indemnify [Plaintiffs] from any future claims that [Plaintiffs] should be liable for fees paid by Red Mortgage to its consultant" focuses on clause (ii) while entirely ignoring the representation (and, thus, the concomitant disclosure obligation) encompassed within clause (i) of the Brokerage Indemnification provision. *See id.* And under the established rules of contract construction, "the favored construction will be that which gives meaning and effect

to all the terms of the contract over that which nullifies and renders meaningless a part of the document." *Primary Invs., LLC*, 323 Ga. App. at 198 (quoting *Schafer Props. v. Tara State Bank*, 220 Ga. App. 378, 381 (1996)). Applying the plain and unambiguous terms of the provision, if either Red Mortgage or Plaintiffs "engaged" or had a "financial liability" to any broker or "instrumental" third party with respect to Plaintiffs' Loans, respectively, they were required to disclose such individual or entity and the fact of such financial liability in the Lender's Commitment Letters, *in addition to* being obligated to indemnify each other for any claims or demands for brokerage or similar fees.

Although the parties strongly dispute whether Mr. Taccati acted as a broker or as a consultant to Red Mortgage with respect to the subject Loan transactions,[37] there is evidence from which a reasonable jury could find that Red Mortgage "engaged" Mr. Taccati and that he was a third party who "was instrumental in the issuance of the Lender's Commitment or the FHA Commitment." *See, e.g.*, Croft Dep. 97:6–99:1, 101:11–102:18, 152:4–156:2. It is undisputed that Red Mortgage and Mr. Taccati (on behalf of Trillium) executed fee-splitting agreements with respect to each Loan at issue wherein Red Mortgage agreed to pay Mr. Taccati a fee in exchange for his assistance "gathering information on [each] Project's real estate market (apartment comps, new housing starts, employment data, population growth

[37] *See supra* note 14.

data, etc.)" as well as "the requisite information on [each] Project and proposed mortgagor/sponsor for the firm commitment application." *See* Pls.' SMF Ex. 2, at 1; *id.* at Ex. 32, at 1; *id.* at Ex. 40, at 1; *id.* at Ex. 49, at 1. Despite this, only the Overlook Lender's Commitment Letter references Mr. Taccati or his firm, Trillium, and none of the Lender's Commitment Letters state that a financial liability is owed to Mr. Taccati or Trillium. *See* Defs.' SMF Ex. 8, at 2 (identifying Trillium as the "FHA Consultant" on the Overlook transaction but not the fact of any financial liability); *id.* at Ex. 10 (making no disclosure with respect to Mr. Taccati or Trillium on the Creekwood transaction); *id.* at Ex. 15 (making no disclosure with respect to Mr. Taccati or Trillium on the Greystone transaction); *id.* at Ex. 22, at Ex. C (making no disclosure with respect to Mr. Taccati or Trillium on the Inverness II transaction). Thus, there is at least some evidence from which a reasonable jury could find that Red Mortgage breached its contractual obligations to Plaintiffs under the Lender's Commitment Letters by failing to disclose that Red Mortgage had engaged Mr. Taccati (or Trillium) and the fact that it owed a financial liability to him.[38]

[38] The Court, however, notes there is ample evidence that Plaintiffs were aware of Mr. Taccati's involvement in their Loan transactions and communicated with him regarding same. *See, e.g.*, Gower Dep. II, 140:12–141:5; Hinman 30(b)(6) Dep. 18:16–25; Hinman Dep. 47:8–50:13, 62:18–63:7; 77:19–83:15, 91:1–19, 100:11–103:1; White Dep. 56:24–59:15, 131:2–133:12, 135:17–139:10. Given this, what, if any, damages may ultimately flow to Plaintiffs from Red Mortgage's failure to disclose its engagement with Mr. Taccati or that it owed him a financial liability remains to be seen. Nevertheless, because Plaintiffs may at least be entitled to nominal damages for a *de minimis* breach of the Lender's Commitment Letters, Plaintiffs' contract claim from such failure survives the instant Motion for Summary Judgment. *See 6428 Church St., LLC v. SM Corrigan, LLC*, 352 Ga. App. 437, 444 (2019) ("[T]he lack of evidence regarding the actual

The Court does not, however, construe the Brokerage Indemnification provision as requiring the disclosure of the actual fees paid or owed to Mr. Taccati or Trillium. Simply put, a representation that a "financial liability" is or is not owed is distinct from an obligation to disclose the amount of any such liability, and here, no reference is made to the amount or nature of any financial liability owed nor any similar language. If the parties had intended to require the disclosure of the amount of brokerage or similar fees owed, they easily could have stated so. They did not, and the Court cannot inject additional terms or language requiring such disclosure under the guise of contract construction. *See Park 'N Go of Ga., Inc. v. U.S. Fid. & Guar. Co.*, 266 Ga. 787, 791 (1996) ("[W]hen the terms of a written contract are clear and unambiguous, the court is to look to the contract alone to find the parties' intent." (citation omitted)). Further, whether a financial liability is or is not owed (rather than the amount of such liability) seems most relevant given the indemnification obligation contained in clause (ii) of the provision.[39]

amount of damages is not dispositive on a motion for summary judgment in a breach of contract case. . . . This is because . . . in every case of breach of contract, the injured party has a right to damages, but, if there has been no actual damage, the injured party may recover nominal damages sufficient to cover the costs of bringing the action." (citations and internal punctuation omitted)).

[39] There is also evidence that this interpretation of the Brokerage Indemnification provision is consistent with industry practice. *See* Defs.' SMF Ex. 24, at ¶ 25 ("It is standard industry practice for FHA lenders not to disclose to borrowers the specific terms of a broker's or consultant's compensation, other than to acknowledge that any fees due them will be paid by the lender and will not be the responsibility of the borrower.").

Plaintiffs also contend HUD's Program Obligations require the full disclosure of all broker fees (including on form HUD-92455M) and that HUD "requires fees paid to brokers or consultants to be paid solely from the Lender's fees." Pls.' Resp. 6–7, 45; Pls.' Opp'n ¶ 32; Pls.' SMF ¶¶ 57–58. According to Plaintiffs, Red Mortgage breached HUD's Program Obligations by "not disclos[ing] any of the broker fees that it paid to [Mr.] Taccati in connection with the [Loans] for Greystone Farms, Inverness [II], or Creekwood," and "only partially disclos[ing] the broker fees it paid to [Mr.] Taccati in connection with the Overlook [L]oan." Pls.' Resp. 7; *see also* First Am. Compl. ¶ 83 ("Red does not fully disclose broker fees as required by the Program Obligations. Red either falsely states the broker fees as being a lower amount than what the brokers actually received, including the undisclosed yield spread premium . . . or, in some instances, Red fails to disclose the broker fees all [sic] together.").

With respect to the disclosure of broker fees, again, Plaintiffs fail to cite to any HUD requirement applicable at the time Plaintiffs' Loans were processed that specifically required the disclosure of such fees. In support of their claim, Plaintiffs reference the 2016 MAP Guide which, indeed, states that "[f]ees to mortgage brokers are allowed so long as they are disclosed in the Underwriting Narrative and form HUD-92424M (or HUD-92455M, as appropriate)" and other conditions are satisfied. First Am. Compl. Ex. 28, at 2016 MAP Guide, at § 11.5(D)(1). The 2016

MAP Guide, however, was issued on January 29, 2016, well after Plaintiffs' Loans closed. *Id.* at 1. Based on the limited excerpts in the record, it appears the applicable guide—the 2011 MAP Guide—only requires that broker fees be disclosed when a lender seeks special approval from HUD to compensate a broker who has already received compensation from another entity for services related to the transaction or property. *See* Pls.' SMF Ex. 85 ("2011 MAP Guide"), at § 11.4(E)(2)–(3) ("(2) Lender may not pay anything of value . . . to any person or entity in connection with an insured transaction if the person or entity has received any other compensation from . . . any other person for services related to the transaction, or related to the purchase or sale of the mortgaged property, except as approved by HUD. (3) The Hub Director may approve compensation for services actually performed, which approval must . . . be based on the following findings . . . . d. The broker's fee is included in form HUD-92434M . . . ."). Although Plaintiffs contend Appendix 2H of the 2011 MAP Guide mandates disclosure of broker fees, that appendix only states that a broker's fee must be included in the "Mortgagee Certificate" when a lender seeks approval to pay a broker who has already received compensation from another entity, consistent with § 11.4(E)(2)–(3). *See* Pls. Resp. 6; Pls.' SMF ¶ 57; 2011 MAP Guide at App. 2H(E).

Plaintiffs also assert that chapter 2, section 2.3 of the 2011 MAP Guide requires full disclosure of all broker fees and that all such fees be paid from the

lender's fee. Pls.' Resp. 6–7; Pls.' SMF ¶¶ 57–58. Section 2.3, titled "Standards Required for Qualification," discusses the requirements to qualify as a MAP Lender. Paragraph (H) thereof addresses a lender's use of consultants, including brokers, and states in relevant part:

> It has long been common practice for Lenders to use consultants, individuals and companies, to increase origination and underwriting capacity. ***The term consultant, as used here, applies to a mortgage broker, loan correspondent and packager***. The roles and relationships a consultant may have under . . . MAP processing are the following: . . .
>
> 2. Under MAP, the consultant's sole purpose is to refer new business to a MAP Lender including information supplied by a proposed borrower/sponsor.
>
> a. ***The consultant's fee is paid from the mortgagee's fees***.
> b. The consultant cannot have any identity of interest with the borrower/sponsor or any affiliated entity.
> c. There is no additional role for the consultant. . . .

2011 MAP Guide at § 2.3(H) (emphasis added).

The Court discerns no statement from the foregoing that mandates disclosure of the amount of broker or consultant fees. Paragraph H does, however, on its face require that fees paid to a "consultant"—a term that, at least in this context, applies to a "mortgage broker"—should be paid from the mortgagee's (*i.e.*, lender's) fees. As noted above, here there is evidence that Red Mortgage and Mr. Taccati executed fee-splitting agreements with respect to Plaintiffs' Loans wherein Red Mortgage agreed to pay a fee in exchange for his services in connection with each Loan. *See* Pls.' SMF Ex. 2; *id.* at Ex. 32; *id.* at Ex. 40; *id.* at Ex. 49. Those fees included a

percentage of Red Mortgage's origination fee (payable upon receipt of such fee) and a percentage of the premium it received upon the sale of the GNMA security related to each Loan, respectively (payable upon delivery of the GNMA permanent loan certificate to the GNMA investor and upon receipt of the premium). Pls.' SMF Ex. 2, at 1; *id.* at Ex. 32, at 1; *id.* at Ex. 40, at 1; *id.* at Ex. 49, at 1. Based on the amount and timing of the fee payments, and viewing the foregoing evidence and all inferences and conclusions therefrom in the light most favorable to Plaintiffs as the non-moving parties, a question of fact exists on the narrow issue of whether the fees paid to Mr. Taccati/Trillium were "paid from the mortgagee's fees."

Plaintiffs have failed to identify any contractual provision or applicable regulatory obligation that requires the disclosure of fees paid to Mr. Taccati. Absent such, Plaintiffs' breach of contract claims premised on the failure to disclose such fees fails as a matter of law. However, as detailed above, claims arising from Red Mortgage's alleged failure to (i) identify Mr. Taccati (or Trillium) or the fact of the financial liability owed to him per paragraph 21 of the Lender's Commitment Letters, and (ii) pay consultant fees strictly from its mortgagee fees pursuant to the 2011 MAP Guide survive the instant motion.

2. *Fraud (Count II)*

In Georgia, to maintain a claim for fraud the plaintiff must show: "(1) [a] false representation made by the defendant; (2) scienter; (3) an intention to induce the

plaintiff to act or refrain from acting in reliance by the plaintiff; (4) justifiable reliance by the plaintiff; [and] (5) damage to the plaintiff." *Romedy v. Willett Lincoln-Mercury, Inc.*, 136 Ga. App. 67, 67 (1975) (quotation and citation omitted). A plaintiff can demonstrate the first element, misrepresentation of a material fact, "by either showing that a material fact was, in fact, misrepresented, or that a material fact was concealed by the defendant." *Huddleston v. R.J. Reynolds Tobacco Co.*, 66 F. Supp. 2d 1370, 1376 (N.D. Ga. 1999). However, in the latter situation, "the plaintiff must further allege that a fiduciary or confidential relationship existed such that the defendants had a duty to disclose the material fact in question." *Id.* (citing *Hubbard v. Stewart*, 651 F. Supp. 294, 298 (M.D. Ga. 1987)); *see also* O.C.G.A. § 51-6-2(a) ("Willful misrepresentation of a material fact, made to induce another to act, upon which such person acts to his injury, will give him a right of action. Mere concealment of a material fact, unless done in such a manner as to deceive and mislead, will not support an action.").

Additionally, under Georgia law, a plaintiff alleging that it was induced by fraud to enter a contract must make a critical election when initiating suit:

> Where fraud in the inducement is alleged, the pleader has a choice between rescinding the contract or affirming it. If he rescinds he is not bound by any of its provisions, but in order to rescind successfully he must return or offer to return the subject matter of the sale in order to place the seller in the same situation in which he was prior to the transaction. If he affirms and suffers damages he is entitled to recover those damages which he can prove, but he is bound by the contract, having elected to stand upon it.

Guernsey Petroleum Corp. v. Data Gen. Corp., 183 Ga. App. 790, 791 (1987) (quoting *Garrett v. Diamond*, 144 Ga. App. 428, 430 (1977)).

"For an action for fraud to survive a motion for summary judgment, there must be some evidence from which a jury could find each element of the tort." *Cobb Cnty. Sch. Dist. v. MAT Factory, Inc.*, 215 Ga. App. 697, 701 (1994) (quoting *Crawford v. Williams*, 258 Ga. 806, 806 (1989)). Summary judgment, thus, is proper if at least one element of the fraud claim fails. *See Arp v. United Cmty. Bank*, 272 Ga. App. 331, 334 (2005) (affirming summary judgment based on lack of justifiable reliance, noting that "[s]o long as one essential element under any theory of recovery is lacking the defendant is entitled to summary judgment as a matter of law irrespective of any issues of fact with regard to other essential elements" (citation omitted)).

Here, Plaintiffs allege Defendants defrauded them "by routinely falsely promis[ing] Plaintiffs that in exchange for a certain disclosed and agreed upon fee . . . Defendants and their agents and/or employees would work for the sole and exclusive benefit of Plaintiffs to secure a HUD-guaranteed loan at the best available interest rate for Plaintiffs." First Am. Compl. ¶ 179. Plaintiffs contend they reasonably relied on such misrepresentations by signing the Application Letters and Lender's Commitment Letters, and, as a proximate result, "Plaintiffs are bound to pay interest rates in excess of what they otherwise would have agreed to pay,"

resulting in "hundreds of thousands of dollars in excess interest paid over the life of the loans." *Id.* ¶ 82. In their Response, Plaintiffs further allege Red Mortgage[40] "committed fraud by making [various] material misrepresentations and omissions in connection with each of Plaintiffs' [L]oans with a present intent not to perform as promised and to induce Plaintiffs to engage Red [Mortgage]'s services," including: (i) misrepresenting that Red Mortgage would obtain the "best available rate" for Plaintiffs; (ii) failing to inform Plaintiffs that the estimated interest rate Red Mortgage offered included "a substantial secret trade premium"; (iii) failing to inform Plaintiffs that the most important factor influencing the final interest rate was the amount of trade premium; (iv) purporting to disclose all costs, fees, and expenses related to the Loans, including Red Mortgage's "full compensation for its services up through and including the funding of Plaintiffs' [L]oans" but failing to disclose "the substantial trade premium"; (v) misrepresenting the process by which Red Mortgage would "'confirm' the best available interest rate for Plaintiffs"; and (vi) failing to disclose the broker fees paid to Mr. Taccati in connection with

[40] The Court notes that, in their pleadings, Plaintiffs refer to Defendants' collectively as "Red"; however, in Plaintiffs' Response, Plaintiffs specifically define Red Mortgage as "Red" and thereafter direct nearly all of their arguments and allegations to the actions and alleged misconduct of Red Mortgage. *Compare* First Am. Compl. ¶ 3 (defining Defendants collectively as "Red" and referring to Defendants throughout the pleadings as "Red" and "Red enterprise"), *with* Pls.' Resp. 2 (defining Red Mortgage, Red Markets, Red Group, and Red Capital Partners, LLC collectively as "Red Group entities," those entities and Orix collectively as the "Red enterprise," and Red Mortgage simply as "Red"), *and* Pls. Resp. 2–70 (directing Plaintiffs' arguments almost exclusively to the actions of "Red").

Plaintiffs' Loans. *See* Pls.' Resp. 51. Plaintiffs' fraud claims are, thus, generally premised on alleged (1) misrepresentations regarding providing the "best available" rate on Plaintiffs' Loans, and (2) failures to fully disclose (or concealing) the fees and costs related to the Loans, including trade premiums Red Mortgage received and fees paid to Mr. Taccati.

As discussed below, however, Plaintiffs have largely failed to demonstrate how their fraud claims satisfy the requisite elements of fraud and are anything other than repetitions of their breach of contract claims. To the extent the fraud claims are premised on the failure to disclose information, they fail because there is no fiduciary relationship between the parties. To the extent the claims are based on alleged misrepresentations, they are mostly (though not entirely) precluded under the merger clauses discussed *supra* Part II.B.1.c. Further, Greystone's fraud claims are time barred.

i. Fraud Claims Mirror the Contract Claims

Plaintiffs' contract and fraud claims both undisputedly arise out of the same Loan transactions and the parties' contractual relationship. Problematically for Plaintiffs, they rely on most of the same breach of contract allegations to support their fraud-based claims. *Compare* First Am. Compl. ¶¶ 117–119 (alleging Red Mortgage agreed *in the Lender's Commitment Letters* that all promises therein would be "for the sole and exclusive benefit of [Plaintiffs]," but instead Defendants

worked against Plaintiffs' interests to secure a higher rate that would provide the most financial benefit to Defendants), *and* Pls.' Resp. 25 (alleging Red Mortgage breached its *contractual obligations* by not acting for Plaintiffs' "sole and exclusive benefit as promised"), *with* First Am. Compl. ¶ 179 (alleging, in support of Plaintiffs' *fraud claims*, that Defendants agreed they "would work for the sole and exclusive benefit of Plaintiffs to secure a HUD-guaranteed loan at the best available interest rate for Plaintiffs"); *compare also* Pls.' Resp. 24–25 (alleging Red Mortgage breached its *contractual obligations* by "not procuring Plaintiffs the best—*i.e.*, the lowest—available interest rate by marketing Plaintiffs' loans to investors and not soliciting investor bids on Plaintiffs' behalf based on the lowest interest rate"), *with id.* at 51 (alleging Red Mortgage *defrauded* them by misrepresenting to Plaintiffs that it "would obtain for them the best available interest rate" and "the process by which [Red Mortgage] would 'confirm' the best available interest rate for Plaintiffs"); *compare also id.* at 25 (alleging Red Mortgage breached its *contractual obligations* by "not fully disclosing the material terms of the [L]oans, including the fees and compensation that Plaintiffs would pay, and that Red [Mortgage] would collect"), *with id.* at 51 (alleging Red Mortgage committed *fraud* by purporting to disclose all costs and fees associated with funding Plaintiffs' Loans but failing to disclose "the substantial trade premium"); *compare also id.* at 25 (alleging Red Mortgage breached its *contractual obligations* by failing to disclose the "substantial

monies paid to broker Scott Taccati/Trillium Capital in connection with each of Plaintiffs' [L]oans"), *with id.* at 51 (alleging Red Mortgage committed *fraud* by failing to disclose the "substantial broker fees paid to Scott Taccati/Trillium Capital in connection with each of Plaintiffs' [L]oans").

It is well settled, however, "that mere failure to perform a contract does not constitute a tort[.]" *ServiceMaster Co., L.P. v. Martin*, 252 Ga. App. 751, 754 (2001); *see also* O.C.G.A. § 51-1-1 ("A tort is the unlawful violation of a private legal right other than a mere breach of contract, express or implied."). "A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law." *ServiceMaster Co., L.P.*, 252 Ga. App. at 754 (affirming dismissal of tort claims brought by former employee against former employer where the duties that the employer allegedly breached arose directly from, not independent of, a written employment agreement and, thus, could not form the basis of independent torts). Moreover, promises as to future events generally cannot form the basis of a fraud claim unless the promise was made with "a present intent not to perform":

> The general rule is that actionable fraud cannot be predicated upon promises to perform some act in the future. . . . Nor does actionable fraud result from a mere failure to perform promises made. . . . Otherwise any breach of a contract would amount to fraud. . . . An exception to the general rule exists where a promise as to future events is made with a present intent not to perform or where the promisor knows that the future event will not take place.

Hamilton v. Advance Leasing & Rent-A-Car, Inc., 208 Ga. App. 848, 849 (1993) (citation and internal punctuation omitted).

As summarized above, the duties, representations, and promises upon which Plaintiffs predicate their fraud claim arise out of the Loan transactions and the parties' contractual relationship. For the same reasons discussed *supra* Part II.B.1, the Loan Documents do not support Plaintiffs' fraud-related allegations, and invalid oral agreements cannot form the basis of a fraud claim. *See Bayles v. IndyMac Mortg. Servs.*, No. 2:11-CV-00225-RWS, 2012 WL 12888858, at *5 (N.D. Ga. Dec. 21, 2012) (finding "a fraud claim cannot, as a matter of law, be founded on a promise that fails to satisfy the [S]tatute of [F]rauds" and, thus, granting summary judgment on a fraud claim "predicated on an agreement [to modify a mortgage agreement] that [was] unenforceable under the Georgia statute of frauds." (citations and quotations omitted)); *see also Royal v. Bland Props., Inc.*, 175 Ga. App. 250, 251 (1985) ("If a promise is unenforceable it cannot form a basis of a fraud claim.").

ii. No Fiduciary or Confidential Relationship

To the extent Plaintiffs' fraud claims are premised on alleged duties arising outside of the Loan Documents and related agreements, summary judgment is nevertheless also appropriate because there is no fiduciary or confidential relationship between the parties. As noted above, "[a] plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the

defendant also breaches an independent duty imposed by law." *ServiceMaster Co., L.P.*, 252 Ga. App. at 754. Indeed, a breach of contract "cannot constitute a tort unless there exists between the parties a special or confidential relationship. . . . Only when such a relationship is present can a party to a contract bring an action *ex delicto* against the party who owes a duty imposed by law as a result of the special relationship." *Miles v. Great S. Life Ins. Co.*, 197 Ga. App. 540, 541 (1990); *see also Baxter v. Fairfield Fin. Servs., Inc.*, 307 Ga. App. 286, 293 (2010) ("A party can be held liable for fraudulently concealing a material fact only if the party has a duty to disclose or communicate the fact." (citation omitted)). "The party asserting the existence of a confidential relationship has the burden of establishing its existence." *Canales v. Wilson Southland Ins. Agency*, 261 Ga. App. 529, 531 (2003) (footnote omitted).

Plaintiffs contend their Loan transactions were not conducted at arm's length and that Red Mortgage breached fiduciary and other legal duties owed to Plaintiffs by not acting for their sole and exclusive benefit to obtain the best available interest rates on the Loans and by not disclosing information regarding trade premiums and broker fees. *See* Pls.' Resp. 29, 53–55. As noted above, however, Red Mortgage did not have any contractual obligations (written or oral) of this sort, and in the Loan Documents Plaintiffs expressly disclaim the existence of any fiduciary relationship. *See supra* Parts I.A.3, II.B.1.ii. Every Loan Document associated with these

transactions includes an express acknowledgment that there was no agency or fiduciary relationship between the parties and that the commitments and services provided in the transactions were performed at arm's length. *See, e.g.*, Rate Lock Ltrs. 1 ("Nothing in the Engagement Letter, the Application Letter, the Lender's Commitment or this letter creates or is intended to create a joint venture or any agency or fiduciary relationship, duty or obligation between the parties. Borrower hereby agrees and acknowledges that the commitments and services of [Red Mortgage] are being provided as an independent contractor at arm's length."). Having chosen to affirm the Loan Documents (and other agreements governing their Loans) and sue for fraud, Plaintiffs are bound by those contracts, including the foregoing fiduciary disclaimers. *See Guernsey Petroleum Corp.*, 183 Ga. App. at 791; *Garrett*, 144 Ga. App. at 430. And provisions disclaiming a fiduciary relationship and acknowledging that a transaction is arm's-length are routinely enforced in Georgia. *See, e.g.*, *Newitt v. First Union Nat'l Bank*, 270 Ga. App. 538, 545–46 (2004) (holding no fiduciary duty may be imposed when the contracts themselves "expressly state[] that there was no fiduciary relationship . . . [and] expressly acknowledged that the transaction was one at 'arm's length'"); *Prince Heaton Enters., Inc. v. Buffalos' Franchise Concepts, Inc.*, 117 F. Supp. 2d 1357, 1365 (N.D. Ga. 2000) (finding the plaintiff's breach of fiduciary duty allegations "fail[ed] by virtue of their contractual agreement" with the defendants, which stated

simply "this Agreement does not establish a fiduciary relationship between [the parties]").

Additionally, the commercial nature of the parties' association belies Plaintiffs' allegation that a fiduciary or confidential relationship existed between the parties. "In the majority of business dealings, opposite parties have trust and confidence in each other's integrity, but there is no confidential relationship by this alone." *Kienel v. Lanier*, 190 Ga. App. 201, 203 (1989) (citations and punctuation omitted); *see Parello v. Maio*, 268 Ga. 852, 853 (1998) ("[T]he mere circumstance that two people have come to repose a certain amount of trust and confidence in each other as the result of business dealings is not, in and of itself, sufficient to find the existence of a confidential relationship." (citation omitted)). For this reason, "[b]usiness relationships are not ordinarily confidential relationships." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (citing *Williams v. Dresser Indus., Inc.*, 120 F.3d 1163, 1168 (11th Cir. 1997)); *see Baxter*, 307 Ga. App. at 293 ("[O]ur law does not create a confidential or fiduciary relationship between a financial institution and those with whom it deals." (citation omitted)). Where parties are involved in a transaction to further their own separate business objectives, as is the case here, there is no duty to represent or advance the other's interests. *See Kienel*, 190 Ga. App. at 204. A fiduciary or confidential relationship arises "where one party is so situated as to exercise a controlling influence over the will, conduct,

and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." O.C.G.A. § 23-2-58. No evidence of such a confidential or fiduciary relationship exists here.

In fact, it is well settled that "[t]here is . . . *particularly* no confidential relationship between lender and borrower or mortgagee and mortgagor, for they are creditor and debtor with clearly opposite interests." *Pardue v. Bankers First Fed. Sav. & Loan Ass'n*, 175 Ga. App. 814, 815 (1985). A mortgage lender also has no legal or moral duty to "disclose that it was not acting in the plaintiff's best interest" or that it "was, instead, primarily concerned with its own financial interests." *Bonds v. Fed. Nat'l Mortg. Ass'n*, No. 1:11-CV-3259-CAP, 2011 WL 13221070, at *2 (N.D. Ga. Oct. 21, 2011) (applying Georgia law and finding there was no fiduciary duty or relationship even when the lender "steered the plaintiff into the subject loan because of its own financial considerations"); *see also CWCapital, LLC v. Saugus Colony Ltd., L.P.*, No. 11-1370, 2012 WL 11947571, at *3 (Mass. Super. Ct. Nov. 30, 2012) (finding, in a similar factual scenario, that any fiduciary relationship alleged by the borrower was "for the limited purpose of allowing [the lender] to apply to HUD for a mortgage insurance commitment[,]" on the borrower's behalf but that, "[w]ith regard to the overall loan," the parties' borrower-lender relationship was clear, and the Loan transaction was conducted at arm's length despite

borrower's assertion that it "repose[d] trust and confidence" in the lender). The relationship between Plaintiffs and Red Mortgage is plainly that of lender and borrower, and there is no evidence in the record here that rebuts the general presumption that such does not constitute a fiduciary or otherwise confidential relationship.

Plaintiffs correctly note that duties may arise outside of the context of a fiduciary or confidential relationship. *See* Pls.' Resp. 53–54. Duties to disclose may be created "by law, contract, or the facts of a particular case." *Wright v. Apartment Inv. & Mgmt. Co.*, 315 Ga. App. 587, 593 (2012); *see also Pinon v. Daimler AG*, No. 1:18-CV-3984, 2019 WL 11648560, at *16 (N.D. Ga. Nov. 4, 2019) (recognizing that a duty to disclose may arise outside of a confidential relationship, based on the particular circumstances of the case, a request for information, "or where there is inequality of condition and knowledge, or where there are other attendant circumstances" (citations and quotations omitted)). Plaintiffs' argument, although legally correct, is inapplicable here, however, because, as detailed above, there is no legal or contractual basis for disclosures of the sort upon which Plaintiffs now premise their fraud claims.

Further, Plaintiffs are experienced, sophisticated business entities that at all relevant times were represented by competent legal counsel and were fully capable

of investigating and negotiating the circumstances of which they now complain.[41] As noted *supra* Part II.B.1, Plaintiffs' allegation that Red Mortgage failed to disclose that it would receive a premium from the securitization and sale of the Loans is contradicted by the very Loan Documents that each Plaintiff signed, including the Lender's Commitment Letters, which unambiguously disclose that Red Mortgage could securitize and sell Plaintiffs' Loans to receive a benefit (*i.e.*, profit). *See* Lender's Commitment Ltrs. Ex. 2, at ¶¶ 12, 22. Plaintiffs had an obligation to read and understand the Loan Documents and, to the extent Plaintiffs deemed it necessary, to investigate and inquire further into the terms contained therein. Plaintiffs' failure to do so precludes a finding of fraud. *See Legacy Acad., Inc. v. Mamilove, LLC*, 297 Ga. 15, 17 (2015) ("It is well-settled law . . . that 'a party who has the capacity and opportunity to read a written contract cannot afterwards set up fraud in the procurement of his signature to the instrument based on [extra-contractual] representations that differ from the terms of the contract . . . . [T]he only type of fraud that can relieve a party of his obligation to read a written contract and be bound by its terms is a fraud that prevents the party from reading the contract.'" (quoting *Novare Grp., Inc. v. Sarif*, 290 Ga. 186, 188–89 (2011))); *Canales*, 261 Ga. App. at 533 ("[A] party to a contract . . . must read the contract, and . . . fraud excuses the duty to read only if it is such fraud as prevents the party

[41] *See supra* note 32.

from reading. This rule is based on the commonsense principle that one cannot claim to be defrauded about a matter equally open to the observation of all parties where no special relationship of trust or confidence exists." (citations and international punctuation omitted)); *see also Credithrift of Am., Inc. v. Whitley*, 190 Ga. App. 833, 834 (1989) ("[I]n the absence of special circumstances one must exercise ordinary diligence in making an independent verification of contractual terms and representations, failure to do which will bar an action based on fraud." (citation omitted)).

iii. Merger Clauses

The merger clauses in the Lender's Commitment Letters also preclude most of Plaintiffs' fraud claims. As noted above, where a plaintiff alleges that he was induced by fraud to enter a contract and yet elects to affirm the contract and sue for damages, "he is bound by the contract, having elected to stand upon it." *Guernsey Petroleum Corp.*, 183 Ga. App. at 791; *Garrett*, 144 Ga. App. at 430. Plaintiffs here do not seek to rescind the Loan transactions, but have instead elected to affirm the agreements they executed in connection with their Loans.[42] They are, thus, "bound by the contract[s'] terms and [are] subject to any defenses which may be based on the contract[s]." *Authentic Architectural Millworks, Inc.*, 262 Ga. App. at 827 (quoting *Hightower v. Century 21 Farish Realty*, 214 Ga. App. 522, 523–24 (1994)).

[42] *See supra* note 18.

Again, here the parties unambiguously agreed that each Lender's Commitment Letter "supersedes any previous or contemporaneous, written or oral, agreement or understanding between [each Plaintiff] and [Red Mortgage] relative to the transactions that are the subject of the Lender's Commitment and the FHA Commitment." Lender's Commitment Ltrs. Ex. 2, at ¶ 27. The parties moreover agreed that the executed Lender's Commitment Letter, together with the corresponding Confirmation Letter, contain all of the terms and understandings of the parties regarding Red Mortgage's agreement to provide each Loan. *Id.* Ex. 2, at ¶ 24 ("This Lender's Commitment when executed by the parties hereto, and the Confirmation Letter, when issued by the Lender, ***contains the complete and entire terms, conditions and understandings of the parties hereto of the Lender's agreement to provide the Loan as indicated, and no changes will be recognized as valid unless they are reduced to writing and similarly executed*** . . . ." (emphasis added)).

"In essence, a merger clause operates as a disclaimer of all representations not made on the face of the contract." *Megel v. Donaldson*, 288 Ga. App. 510, 515 (2007) (quoting *Ekeledo v. Amporful*, 281 Ga. 817, 819 (2007)). As explained by the Georgia Court of Appeals in *Estate of Sam Farkas, Inc. v. Clark*:

> In the event [a] contract contains an entire agreement clause, that clause operates as a disclaimer, establishing that the written contract completely and comprehensively represents all the parties' agreement. This clause then bars the [plaintiff] from asserting reliance on the

> alleged misrepresentation not contained within the contract. Therefore, any fraud claim the [plaintiff] might assert would be barred because reliance is an element essential to establishing fraud.

238 Ga. App. 115, 118 (1999) (citation omitted); *see also Herman Homes, Inc. v. Smith*, 249 Ga. App. 131, 132 (2001). Thus, "[w]here [an] allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he relied upon the other party's misrepresentation and his action for fraud must fail." *Weinstock v. Novare Grp., Inc*., 309 Ga. App. 351, 356 (2011); *see also Am. Casual Dining, L.P. v. Moe's Sw. Grill, L.L.C.*, 426 F. Supp. 2d 1356, 1368 (N.D. Ga. 2006) ("When a contract contains a merger clause that establishes that the written contract completely represents all of the parties' agreement, a plaintiff cannot prove that it justifiably relied on alleged misrepresentations not contained within the contract." (citation omitted)); *Newitt*, 270 Ga. App. at 544 (holding that, where plaintiffs never rescinded the agreements at issue, they "remain[ed] bound by the plain, unambiguous language in the . . . agreements, terms that expressly preclude the allegations that form the basis of their fraud claims").

Merger clauses "are routinely upheld by Georgia courts," and the Court finds the ones included in the Lender's Commitment Letters valid and controlling here. *Tri-State Consumer Ins. Co. v. LexisNexis Risk Sols. Inc.*, 823 F. Supp. 2d 1306, 1320 (N.D. Ga. 2011). Plaintiffs' fraud claims premised on alleged

misrepresentations made prior to or contemporaneously with the Lender's Commitment Letters and Confirmation Letters therefore fail as a matter of law.

Nevertheless, a merger clause does not bar a claim for fraud when the claimant relies upon misrepresentations within the contract itself. *See Authentic Architectural Millworks, Inc.*, 262 Ga. App. at 827–28 ("Because the record shows that Authentic relied upon misrepresentations in the contract itself, no alleged merger clause can bar its fraud and misrepresentation claims." (citation omitted)); *Chhina Fam. P'ship, L.P. v. S-K Grp. of Motels, Inc.*, 275 Ga. App. 811, 813 (2005) ("[A] valid merger clause does not prohibit a claim based upon a misrepresentation in the contract itself." (citation omitted)).

Plaintiffs claim that Red Mortgage intentionally made misrepresentations in the Loan Documents to induce reliance and persuade Plaintiffs to deal exclusively with them. *See* First Am. Compl. ¶ 180; Pls.' Resp. 61. In particular, Plaintiffs argue that "Red [Mortgage] represents in the Lender Commitment Letter that it will use its 'best efforts to confirm the pricing terms,' ***a promise which the written agreement says must be interpreted as being for the 'sole and exclusive benefit' of Plaintiffs***." Pls.' Resp. 61 (emphasis in original). According to Plaintiffs, this constitutes a misrepresentation that is squarely within the contract itself. *See id.* at 62. However, for the reasons discussed *supra* Part II.B.1.ii, Plaintiffs misconstrue Paragraph 25. Read fully and in context, that paragraph merely provides that the

promises made in each of the Lender's Commitment Letters are for the sole benefit of each Plaintiff, rather than third parties. *Id.*

Plaintiffs also misstate and misconstrue Red Mortgage's obligation to use its "best efforts to confirm the pricing terms." Plaintiffs extracted the phrase from the Lender's Commitment Letters, which all describe "Pricing Terms" as including, but not limited to, "an interest rate, discount points, prepayment penalties and restrictions and extension fees." Lender's Commitment Ltrs. ¶ B(2). In the foregoing provisions, Plaintiffs acknowledge that "changing conditions in the financial market will impact upon the Final Interest Rate and the 'Pricing Terms' of the[ir] Loan," terms which would be offered in the form of a Rate Lock Letter and which Plaintiffs were free to accept or reject. *Id.* Upon receipt of the executed Rate Lock Letter, Red Mortgage agreed that it would

> use its best efforts to confirm those Pricing Terms, ***i.e. notwithstanding its acceptance of the Rate Lock Letter, the Borrower understands and agrees that the Pricing Terms are not final, nor binding on the Lender, until such time as the Lender issues to the Borrower its "Confirmation Letter"***, which Confirmation Letter, and only the Confirmation Letter, shall constitute the final and binding agreement between the Borrower and the Lender as to the Pricing Terms that will apply to the Loan.

Id. (emphasis added); *see also I.E.*, *Black's Law Dictionary* (11th ed. 2019) (defining "*i.e.*" as "that is"). Thus, contrary to Plaintiffs' suggestion, Red Mortgage's commitment to "use its best efforts to confirm th[e] Pricing Terms" was in effect a warning that the Pricing Terms were not final until Red Mortgage issued its

Confirmation Letter, which would constitute the final agreement of the parties as to the "Pricing Terms." Lender's Commitment Ltrs. ¶ B(2). Further, record evidence establishes that, with respect to each Loan, Red Mortgage, in fact, "confirm[ed] the Pricing Terms" in the Rate Lock Letters since the final interest rate on each Loan was at or below the rate indicated in the corresponding Rate Lock Letter. *Compare* Defs.' SMF Ex. 34 (offering an interest rate of "2.60% or less" in the Greystone Rate Lock Letter), *with* Pls.' SMF Ex. 43 (confirming an interest rate of 2.48% on the Greystone Loan); *compare also* Defs.' SMF Ex. 41 (offering an interest rate of "4.35% or less" in the Overlook Rate Lock Letter), *with* Pls.' SMF Ex. 8 (confirming an interest rate of 4.28% on the Overlook Loan); *compare also* Defs.' SMF Ex. 36 (offering an interest rate of "3.55% or lower" in the Inverness II Rate Lock Letter), *with* Pls.' SMF Ex. 28 (confirming an interest rate of 3.52% on the Inverness II Loan); *compare also* Defs.' SMF Ex. 37 (offering an interest rate of "3.57% or lower in the Creekwood Rate Lock Letter), *with* Pls.' SMF Ex. 53 (confirming an interest rate of 3.56% on the Creekwood Loan).[43]

Plaintiffs also claim the Lender's Commitment Letters falsely represent that Red Mortgage "may or may not be able to get" the estimated interest rate it offered to Plaintiffs and that Red Mortgage would have to "confirm" the availability of said interest rate with a third-party investor. Pls.' Resp. 61. In an attempt to highlight

[43] *See supra* Part I.A.3.

the alleged falsity of this representation, Plaintiffs then point to deposition testimony of Mr. Croft, who testified that, "Red sets the rate." *Id.* Plaintiffs argue "the evidence shows that Red Mortgage's representations related to the unknown availability of a particular interest rate, as well as its representations concerning the process of confirming the availability of said rates with investors, were patently false." *Id.* Plaintiffs' argument, however, misrepresents the language in the Lender's Commitment Letters and does not provide the full context of Mr. Croft's deposition testimony.

First, the Lender's Commitment Letters actually state that "[t]he Processed Interest Rate is an assumed rate that may or may not be the final interest rate . . . upon which the Loan will be made by the Lender and insured by FHA." Lender's Commitment Ltrs. ¶ B(1). This provision does not allude to whether Red Mortgage may or may not be able to obtain the Processed Interest Rate; it simply states that it may not be the final interest rate. Additionally, as noted above, the "confirm" language in the Lender's Commitment Letters refers to Red Mortgage's obligation to use "its best efforts to confirm [the] Pricing Terms" outlined in the Rate Lock Letter, not that Red Mortgage must confirm the availability of the interest rate with a third-party investor. *Id.* ¶ B(2).

Furthermore, while Mr. Croft does admit that Red Mortgage sets the interest rate, he also explains that this is typically how GNMA securities are sold; they are

not sold on the open market where investors attempt to set their own interest rates. Croft Dep. 82:12–84:3 ("We do not allow the investor to set the interest rate, nor do they want to set the interest rate. They want and expect us to present them with a security which they can bid a price on. That is how the market works."). Regardless, Red Mortgage does not have to "confirm" the availability of the interest rate with a third party investor; indeed, no such obligation exists in the Loan Documents. Red Mortgage must simply use its "best efforts to confirm the Pricing Terms" in the Rate Lock Letter, which, again, it did. The foregoing language from the Lender's Commitment Letters does not constitute a misrepresentation within the contract itself.

There is, however, evidence that Red Mortgage made a false statement in the Request for Endorsement submitted to HUD in connection with the Overlook Loan. *See* Pls.' SMF Ex. 93. In Exhibit A thereto, which sets out the Financing Charges that would be collected in connection with the endorsement, Red Mortgage discloses the "Initial service charge" and "Permanent loan fee" charged on the transaction. *Id.* at Ex. A, at ¶ 2. Red Mortgage then represents: "From the foregoing amount(s), [Red Mortgage] will pay the sum of $22,080.00 to Trillium Capital Resources for services provided in connection with the processing and closing of the Loan." *Id.* But as discussed *supra* Part II.B.1.iv, Red Mortgage and Mr. Taccati executed a fee-splitting agreement wherein Red Mortgage agreed to pay Mr. Taccati/Trillium

based on not only a percentage of Red Mortgage's origination fee, but also a percentage of the premium it received upon the sale of the GNMA security related to the Overlook Loan. *Compare id.*, *with* Pls.' SMF Ex. 2. Although Red Mortgage was not obligated to disclose to Overlook the consultant or broker fee it paid to Mr. Taccati/Trillium, having elected to do so, Red Mortgage could not misrepresent the amount of the fee. Construing the evidence and all inferences and conclusions therefrom in the light most favorable to Plaintiffs as the non-moving parties, a question of fact exists on the narrow issue of whether Red Mortgage committed fraud by making false representations in the Request for Endorsement regarding the fees paid to Mr. Taccati/Trillium related to the Overlook Loan. All other fraud claims asserted by Plaintiffs fail as a matter of law for the reasons discussed above.

iv. Greystone's Fraud Claims Are Barred by the Statute of Limitations

In Georgia, actions for fraud are governed by a four-year statute of limitations. *See* O.C.G.A. § 9-3-31 ("Actions for injuries to personalty shall be brought within four years after the right of action accrues."); *Willis v. City of Atlanta*, 265 Ga. App. 640, 643 (2004) ("A four-year statute of limitation governs actions for fraud[.]").

Greystone executed the Loan Documents in 2012, and the Greystone Loan closed on August 22, 2012. *See* Defs.' SMF Ex. 14 (indicating Greystone executed the Application Letter on April 13, 2012); *id.* at Ex. 15 (indicating Greystone executed the Lender's Commitment Letter on July 16, 2012); *id.* at Ex. 34 (indicating

Greystone executed the Rate Lock Letter on July 16, 2012); *id.* at Ex. 62 (settlement statement indicating the Greystone Loan closed on August 22, 2012). Greystone did not bring this lawsuit until April 10, 2017, however, which is well over four years after any alleged misrepresentation or omission that could have formed the basis for Greystone's fraud claims occurred. Greystone nevertheless contends that Mr. White did not become "suspicious of Red [Mortgage's] truthfulness (or lack thereof) in their dealings" until approximately fall of 2015, and it "was not until the spring of 2017 that Greystone [] and the other Plaintiffs . . . believed that they had sufficient knowledge of Red [Mortgage's] fraud" to file this lawsuit. Pls.' Resp. 63–64. Greystone, thus, argues the statute of limitations was tolled during the intervening period such that Greystone's fraud claims are not time barred. *Id.* The Court disagrees.

Under Georgia law, "[i]f the defendant . . . [is] guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." O.C.G.A. § 9-3-96. The foregoing statute "has always been strictly construed to require (1) actual fraud involving moral turpitude, or (2) a fraudulent breach of a duty to disclose that exists because of a relationship of trust and confidence." *Hunter, Maclean, Exley & Dunn, P.C. v. Frame*, 269 Ga. 844, 846 (1998); *see also Macon-Bibb Cnty. Hosp. Auth. v. Ga. Kaolin Co.*, 646 F. Supp. 90, 94 (M.D. Ga.

1986), *aff'd*, 817 F.2d 98 (11th Cir. 1987) ("The fraud necessary to toll the statute must include 'deceit, false representation, or other conduct involving moral turpitude', and must have the effect of deterring the plaintiff from bringing suit." (quoting *Carnes v. Bank of Jonesboro*, 58 Ga. App. 193, 196 (1938), *aff'd*, 187 Ga. 795 (1939))).

Where the basis or "gravamen" of an action is actual fraud, "the mere silence of the party committing it is treated as a continuation of the original fraud and as constituting a fraudulent concealment." *Shipman v. Horizon Corp.*, 245 Ga. 808, 809 (1980) (citation omitted). In such cases, the statute of limitations does not begin to run against the "right of action until such fraud is discovered, or could have been discovered by the exercise of ordinary care and diligence." *Id.* The plaintiff, however, has the burden of establishing fraud involving moral turpitude and that the limitation period should be tolled. *Slade v. Chrysler Corp.*, 36 F. Supp. 2d 1370, 1372 (M.D. Ga. 1998), *aff'd sub nom. Slade v. Chrysler Motors Corp.*, 170 F.3d 189 (11th Cir. 1999) (citation omitted). "In the absence of a fiduciary relation, even fraud will not prevent a suit from being barred, where the plaintiff has failed to exercise reasonable diligence to detect such fraud." *Id.* In this regard, "'reasonable diligence' is not measured by a subjective standard, but, rather, must be measured by the 'prudent man' standard which is an objective one." *Jim Walter Corp. v. Ward*, 245 Ga. 355, 357 (1980).

Here, Greystone was well aware of the information that was not disclosed to it in the Loan Documents (*e.g.*, the amount of trade premium, the amount of broker or consultant fees paid to Mr. Taccati, etc.) at the time they executed the Loan Documents and thereafter closed the Loan. To the extent Greystone contends Defendants had a duty to disclose that information such that the failure to do so amounts to fraud, nothing barred or deterred Greystone from pursuing such claims within the limitation period. With respect to the trade premium Red Mortgage received in connection with the Greystone Loan, as discussed *supra* Part II.B.1.iii, Greystone was on notice that Red Mortgage might securitize the Loan and sell the mortgage backed securities to investors and that Red Mortgage might earn a profit in doing so. Lender's Commitment Ltrs. Ex. 2, at ¶¶ 12, 22. There is no evidence that Greystone, a sophisticated business entity represented by competent counsel, was in any way barred or deterred from, *e.g.*, investigating and gaining more information on the GNMA securitization process and inquiring further about the potential "benefits" Red Mortgage was contractually entitled to retain per the Lender's Commitment Letter.[44] *Id.* Similarly, Greystone was clearly aware of the final interest rate at the time it closed its Loan. To the extent Greystone contends Defendants made misrepresentations regarding obtaining the "best available rate," nothing barred or deterred Greystone from investigating the rates offered by other

[44] *See supra* note 32.

FHA lenders or the rates at which GNMA securities were trading during the relevant period. Greystone simply elected not to do so during the limitation period or thereafter. *See, e.g.*, White Dep. 94:2–6, 100:2–6, 102:1–7, 147:13–149:1, 308:21– 310:1.

The Court finds the limitation period was not tolled, and, thus, Greystone's fraud claims are barred under the applicable four-year statute of limitations as a matter of law. *See Falanga v. Kirschner & Venker, P.C.*, 286 Ga. App. 92, 94–95 (2007) (holding that plaintiff's fraud claims were barred by the statute of limitations because plaintiff knew or could have known through due diligence of the alleged fraud more than four years prior to filing suit).

3. *Georgia RICO Violations (Count I)*

The purpose of the Georgia RICO Act ("RICO Act" or "Act") is to "provide compensation to private persons injured or aggrieved by reason of any RICO violation." *Williams Gen. Corp. v. Stone*, 280 Ga. 631, 632 (2006) (quoting *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 429 (2005)).[45] The RICO Act makes it "unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of

[45] *See* O.C.G.A. §16-14-2 ("It is the intent of the General Assembly, however, that th[e] [RICO Act] apply to an interrelated *pattern of criminal activity* motivated by or the effect of which is pecuniary gain or economic or physical threat or injury. This [Act] shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions.").

any enterprise, real property, or personal property, including money."[46] O.C.G.A. § 16-14-4(a). The Act, however, is intended to deter criminal conduct, not to address and govern general business and contract disputes. *See All Fleet Refinishing, Inc. v. W. Ga. Nat'l Bank*, 280 Ga. App. 676, 679 (2006) (stating that the Georgia General Assembly "enacted the RICO statutory framework to deter *criminal* conduct"); *Belcher*, 2012 WL 12875505, at *5 (holding that, in a business dispute over ownership of a promissory note and the validity of a related foreclosure, plaintiffs raised their Georgia RICO allegations "within the context of the very kind of commercial dispute the RICO Act was not intended to address"); *see also Delta Airlines, Inc. v. Wunder*, No. 1:13-CV-3388-MHC, 2015 WL 11347586, at *7 (N.D. Ga. Dec. 28, 2015) (finding that "Delta's mail and wire fraud allegations [were] simply restatements of its trademark claim" and holding that, "at its core, this is a simple commercial dispute and not a federal RICO case");[47] *Infectious Disease Sols., P.C. v. Synamed*, No. 1:07-CV-0211-WSD, 2007 WL 2454093, at *1 n.1 (N.D. Ga.

[46] Under the Act, a "pattern of racketeering activity" is defined as "[e]ngaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents[.]" O.C.G.A. § 16-14-3(4)(A). "Two acts that are in fact ordinary and customary aspects of a single transaction cannot constitute the required two separate acts under Georgia RICO." *Belcher v. OneWst Bank*, No. 1:12-CV-00096-AT, 2012 WL 12875505, at *5 (N.D. Ga. Sept. 10, 2012) (quotation and citation omitted).

[47] The Georgia and federal RICO statutes are similar, so Georgia courts often find analysis of the federal RICO statute persuasive. *See Stone*, 279 Ga. at 430 ("Because the Georgia RICO Act was modeled after the federal statute, this Court has found federal authority persuasive in interpreting the Georgia RICO statute and we do so again.").

Aug. 23, 2007) ("RICO and punitive damages claims are increasingly being asserted in cases that fundamentally concern commercial disputes. This litigation strategy is seldom successful, and often unnecessarily increases the cost of litigation and the burden of the parties and the courts."). Under Georgia law, when the underlying claims upon which a RICO claim is premised fail, the RICO claim likewise fails as a matter of law. *See J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 560 (2007) (affirming summary judgment to the defendant on a RICO claim that was premised on failed fraud and conversion claims); *Tri-State Consumer Ins. Co.*, 823 F. Supp. 2d at 1324 (applying Georgia law and holding that a plaintiff's RICO claim fails as a matter of law when predicated on a deficient fraud claim). Such is the case here.

All of the predicate acts upon which Plaintiffs premise their Georgia RICO claims—theft by deception,[48] wire fraud,[49] and false swearing[50]—are based upon the

[48] A person commits theft by deception when he "obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property." O.C.G.A. § 16-8-3(a); *see also Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602, 604 (1994) (holding the *mens rea*, or general criminal intent, needed to prove a criminal case is greater than the scienter, or knowledge, needed to prove civil fraud: "Scienter for fraud purposes may be shown by a fraudulent or reckless representation even if the party making the representation does not know that such facts are false. . . . Theft by deception requires that the person committing the crime does know or believe that the created impression (which itself must have been intentionally created or confirmed) is false." (citations and punctuation omitted)).

[49] A person commits mail or wire fraud when he "(1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme." *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 906 n.8 (11th Cir. 1996) (citing *Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir. 1991)); *see also* 18 U.S.C. § 1343.

[50] *See* O.C.G.A. § 16-10-71(a) ("A person to whom a lawful oath or affirmation has been

same allegations made in support of Plaintiffs' failed contract and fraud claims. *See* Defs.' Resp. 62– 63; *see also* First Am. Compl. ¶¶ 163–76. Specifically, with respect to their theft by deception allegations, Plaintiffs claim Defendants deceptively (i) led Plaintiffs' to believe that Defendants would act for Plaintiffs' "sole benefit" when Defendants actually worked to benefit themselves, (ii) failed to correct the false impression that Defendants were working for Plaintiffs' "sole benefit"; (iii) prevented Plaintiffs from acquiring information related to the trade profit Red Mortgage received in connection with Plaintiffs' Loans; and (iv) promised Plaintiffs that Defendants would work to find Plaintiffs the best available interest rate for their Loans. *See* First Am. Compl. ¶ 171; s*ee also* Pls.' Resp. 67–70.[51] Plaintiffs' wire fraud and false swearing claims incorporate these same allegations. *Id.* ¶¶ 172–74.

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administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement."); *see also Spillers v. State*, 299 Ga. App. 854, 856 (2009) ("[T]he essential elements of false swearing consist in (1) wilfully, knowingly, absolutely, and falsely swearing under oath or affirmation, (2) upon a matter as to which a party could legally be sworn, and (3) on oath administered by a person legally authorized to administer it. . . . The intent to testify falsely and the falsity of the testimony must both appear." (citation and punctuation omitted)).

[51] After the filing of this Motion and well after the close of discovery, Plaintiffs filed their Second Amended Complaint alleging additional predicate acts—attempted theft by extortion and additional acts of mail and wire fraud. *See generally* Second Am. Compl. As discussed *infra* Part III.B, Plaintiffs' Second Amended Complaint was filed without leave of court, and is therefore stricken in its entirety because it was improperly filed under Code section 9-11-15(d). Moreover, claims premised on those additional predicate acts would similarly fail as a matter of law. *See infra* note 59.

As detailed *supra* Part II.B.2, however, Defendants had no contractual, legal, or fiduciary duty to disclose to Plaintiffs the information upon which they premise their fraud-through-omissions claims. Further, Plaintiffs' allegations that Defendants deceived them and falsely promised to act for their "sole benefit" and to obtain "the best available interest rate" are representations that allegedly were made prior to or contemporaneously with the Lender's Commitment Letters and Confirmation Letters and, thus, are precluded by merger clauses.[52] *See supra* Part II.B.2.iii; *see also, e.g.*, *First Data POS, Inc.*, 273 Ga. at 792 ("[I]n an arm's length business transaction, pre-contractual representations are superseded by a valid

[52] Plaintiffs also cite to letters between Mr. Hinman and Mr. Croft (exchanged after the Creekwood Lender's Commitment Letter and Confirmation Letter but prior to closing the Creekwood Loan) and suggest Mr. Croft's responses to Mr. Hinman's inquiries therein regarding fees associated with the Overlook and Creekwood Loans "created and/or failed to correct" a false impression that Defendants were obligated to correct. *See* Pls.' Resp. 19–20, 67–68; *see also* Pls.' SMF Exs. 58–60. The Court disagrees. As noted above, the executed Lender's Commitment Letter and Confirmation Letter constitute the full agreement of the parties' regarding Red Mortgage's obligation to provide the Loans as indicated—agreements that could only be amended through an executed writing. *See supra* Parts II.B.1.i.c, II.B.2.iii. Further, Mr. Hinman's December 8, 2015 letter focused on "yield spread premium." Pls.' SMF Ex. 58. Mr. Croft's response accurately stated there was no yield spread premium associated with the Overlook Loan nor was any projected on the Creekwood Loan, and Mr. Hinman's December 16, 2015 reply plainly indicates he was satisfied with Mr. Croft's response regarding yield spread premium. Pls.' SMF Exs. 59–60. To the extent Plaintiffs contend Red Mortgage was obligated to correct Mr. Hinman's "false impression" that Red Mortgage obtained "the best available interest rates" on the Loans or that Red Mortgage was obligated to disclose that it "was not working to secure the best deal for Plaintiffs," for all of the reasons discussed herein, no such obligation exists. *See supra* Parts II.B.1, II.B.2. Although Mr. Croft misstated that Red Mortgage sold the GNMA security backed by the Overlook Loan to Red Markets (a misstatement he has acknowledged), Plaintiffs have not articulated how they relied on that statement to their detriment nor how such constitutes racketeering. Pls.' SMF Ex. 59; *see also* Croft Dep. 158:3–159:6. Indeed, the Court discerns nothing from these letters that evidence "the pattern of racketeering activity or proceeds derived therefrom" necessary to sustain a RICO claim.

merger clause, and cannot form the basis of post-contractual . . . [Georgia RICO claims based on] theft by deception . . . ."); *Legacy Acad., Inc.*, 297 Ga. at 20 (finding the plaintiffs' fraud, negligent misrepresentation, and RICO claims, "which depended entirely on allegations of pre-contractual representations," were precluded as a matter of law by the merger clause in the parties' agreement); *Prince Heaton Enters., Inc.*, 117 F. Supp. 2d at 1363 (applying Georgia law and stating that, when "allegations reveal the contractual nature of their dispute[,]" the court must "decline[] Plaintiffs' invitation to turn a contract dispute between sophisticated businessmen into a racketeering claim").

Because the predicate acts upon which Plaintiffs' RICO claims are premised fail, the RICO claims likewise fail as a matter of law.[53] Defendants are therefore entitled to summary judgment on Count I.[54]

[53] Although a narrow and discrete fraud claim remains for adjudication pursuant to the Court's ruling *supra* Part II.B.2.iii, that claim, standing alone, does not establish "a pattern of racketeering activity or proceeds derived therefrom" so as to sustain a RICO Act claim.

[54] Because Plaintiffs' Georgia RICO claims fail as a matter of law, so too do their claims for attorneys' fees (Count IV) and treble damages (Count VI) under Code section 16-14-6(c). Nevertheless, certain breach of contract and fraud claims remain for adjudication and, therefore, Plaintiffs' claims for attorneys' fees under Code section 13-6-11 (Count IV) and Overlook's claim for punitive damages (Count V) related to the remaining claims survive the instant Motion for Summary Judgment. *See Racette v. Bank of Am., N.A.*, 318 Ga. App. 171, 181 (2012) ("An award of attorney fees, costs, and punitive damages is derivative of a plaintiff's substantive claims." (citation omitted)); *Cmty. & S. Bank v. Lovell*, 302 Ga. 375, 380, 807 (2017) (holding that when "substantive claims remain pursuant to which attorney fees and punitive damages may be available," derivative claims for attorney fees and punitive damages also remain).

III. **MOTION TO STRIKE**

In their Motion to Strike, Defendants move to strike Plaintiffs' Second Amended Complaint in its entirety as an unauthorized supplemental pleading filed without leave of Court in violation of Code section 9-11-15(d). Alternatively, Defendants move to dismiss, pursuant to Code sections 9-11-12(b) and 9-11-9(b), Paragraphs 172 and 176 of the Second Amended Complaint for failure to state a claim upon which relief may be granted and for failing to plead such supplemental claims with sufficient particularity.

A. **Legal Standard**

Under Georgia's Civil Practice Act, a party seeking to supplement its pleading to assert events or claims that occurred after the action was initiated is required to seek leave of court and reasonable notice must be given to the parties. *See* O.C.G.A. § 9-11-15(d) ("*Upon motion of a party* the court may, *upon reasonable notice and upon such terms as are just*, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." (emphasis added)); *see also, e.g.*, *Osprey Cove Real Est., LLC v. Towerview Constr., LLC*, 343 Ga. App. 436, 442 (2017) (reversing denial of motion to dismiss wrongful foreclosure claim where a foreclosure sale had not occurred at the time of filing the initial complaint and plaintiff failed to seek supplementation of the complaint with allegations concerning

any foreclosure sale that occurred thereafter).[55] Thus, "[u]nlike an amended pleading that a party may unilaterally file at any time prior to the entry of a pre-trial order, a party does not have the right to unilaterally file supplemental pleadings." *Tyson v. McPhail Props., Inc.*, 223 Ga. App. 683, 685 (1996). *See* O.C.G.A. § 9-11-15(a); *compare* O.C.G.A. § 9-11-15(d).

Georgia courts have broad authority to permit the amendment or supplementation of pleadings under Code section 9-11-15, and a mere procedural defect will not, on its own, authorize dismissing or striking a pleading for failure to comply with subsection 9-11-15(d). *See Ford's & Gantt Co. v. Wallace*, 249 Ga. App. 273, 276 (2001) ("Not only is the right of amendment very broad, but so is the court's discretion in this regard, and its determination will not be disturbed absent abuse." (citations omitted)); *Glynn-Brunswick Mem'l Hosp. Auth. v. Gibbons*, 243 Ga. App. 341, 346 (2000) ("Like the right of amendment, the discretion of the trial court in controlling it is very broad."). Courts must nevertheless consider the particular circumstances of the case and weigh any prejudice to the defendant from the improper pleading. *See, e.g., Gibbons*, 243 Ga. App. at 346; *Pew v. One*

[55] Similarly, a party wishing to assert a counterclaim that matured or was acquired after its initial pleading must also seek leave of Court. *See* O.C.G.A. § 9-11-13(e) ("A claim which either matured or was acquired by the pleader after serving his pleading may, *with the permission of the court*, be presented as a counterclaim by supplemental pleading." (emphasis added)); *see also, e.g., Feifer v. Reliance Kitchens, USA, Inc.*, 189 Ga. App. 653, 655 (1988) (affirming exclusion of evidence in support of an amended counterclaim, finding "defendants failed to obtain leave to file their 'after-acquired' counterclaim," and thus "the claim was not properly before the trial court").

Buckhead Loop Condo. Ass'n, Inc., 305 Ga. App. 456, 459 (2010); *Thimble Square, Inc. v. Frost*, 221 Ga. App. 379, 379 (1996); *Tyson*, 223 Ga. App. at 685.[56]

B. **Analysis**

Here, Plaintiffs unilaterally filed their Second Amended Complaint purporting to assert new and factually distinct RICO allegations related to conduct that occurred after initiating this litigation. *See generally* Second Am. Compl. Plaintiffs expressly acknowledge in the Second Amended Complaint that it was "filed for the purpose of adding additional predicate acts . . . in further violation of [the] Georgia [RICO] Act"—predicate acts that allegedly "occurred subsequent to the filing of Plaintiffs' initial Complaint . . . and also subsequent to the filing of Plaintiffs' First Amended Complaint. . . ." Second Am. Compl. 1. Plaintiffs, however, did not move for leave of court when they filed their supplemental pleading nor did they do so at any time after Defendants raised the issue through the instant motion.

Plaintiffs contend that leave of court was not required because no pretrial order has been issued yet, and, thus, they may amend their pleading "as a matter of course and without leave of court" under Code section 9-11-15(a). Pls.' Resp. in Opp'n to Defs.' Mot. & Supporting Br. to Strike or, Alternatively, to Dismiss "New"

[56] As noted above, Defendants here move to strike the Second Amended Complaint in its entirety for failure to comply with Code section 9-11-15(d). Under Code section 9-11-12(f), a party may move "within 30 days after the service of the pleading upon him" to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." O.C.G.A. § 9-11-12(f).

Paragraphs 172 & 176 of Pls.' Second Am. Compl. ("Pls.' Resp. to Mot. to Strike") 1–3. Nevertheless, as noted *supra* Part III.A, under the Civil Practice Act, the right to amend a pleading is distinct from the right to supplement a pleading with allegations, claims, and events that occurred after the pleading sought to be supplemented. In the latter scenario, Code section 9-11-15(d) controls, and it unequivocally requires leave of court. Plaintiffs also assert that, because their Georgia RICO claim was asserted in their original Complaint and "is not a newly matured or acquired claim," leave was not required. Pls.' Resp. to Mot. to Strike 3. Subsection (d), however, is not limited to the filing of new claims or causes of action; rather, it plainly requires leave of court whenever a party seeks to supplement its pleading with "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." O.C.G.A. § 9-11-15(d).

Having found that leave of court was required to file the Second Amended Complaint, the Court must consider the effect and potential prejudice to Defendants from Plaintiffs' failure to do so. *See Gibbons*, 243 Ga. App. at 346; *Frost*, 221 Ga. App. at 379. Through the Second Amended Complaint, Plaintiffs purport to add predicate acts to their Georgia RICO claims based on letters Defendants sent Plaintiffs related to this litigation. Specifically, in letters dated August 17, 2018 ("Demand Letters"), Defendants advise Plaintiffs that "the filing and prosecution" of this case "violates certain provisions of the Loan Documents," constitutes a

default thereunder, and triggers a contractual obligation to pay Red Mortgage's fees and expenses "incurred . . . to enforce the provisions of the Loan Documents and as a result of [each Plaintiff's] default under the Note and Mortgage." Second Am. Compl. Ex. 42(a), at 1–2; *id.* at Ex. 42(b), at 1–2; *id.* at Ex. 42(c), at 1–2. The Demand Letters state the amount of fees and expenses due as of that time and indicate payment is due within 30 days "[t]o keep in compliance with the Loan Documents." *Id.* at Ex. 42(a), at 2; *id.* at Ex. 42(b), at 2; *id.* at Ex. 42(c), at 2. Red Mortgage also offers to forego its rights to such payments and release Plaintiffs from such liability if Plaintiffs dismiss their claims with prejudice and warns that it may "pursue its contractual remedies pursuant to the Loan Documents" if Plaintiffs "continue prosecuting" the case. *Id.* at Ex. 42(a), at 2–3; *id.* at Ex. 42(b), at 2–3; *id.* at Ex. 42(c), at 2–3. Plaintiffs contend the Demand Letters are unlawful "threats" that constitute attempted theft by extortion, mail fraud, and wire fraud and are actionable under the Georgia RICO Act. Second Am. Compl. ¶¶ 172, 176.

Although Defense counsel sent the Demand Letters on or around August 17, 2018, Plaintiffs did not file their Second Amended Complaint until January 21, 2020, more than 17 months later,[57] well after discovery had closed and Defendants had

[57] Following the Demand Letters, the parties exchanged letters regarding same. *See* Second Am. Compl. Exs. 43, 44, 45. It appears that the last such communication was a letter from Plaintiffs dated September 4, 2018, wherein Plaintiffs ask Defendants to answer certain questions regarding the alleged default and what provisions of the "Loan Documents" Defendants claim to be enforcing, among others. Plaintiffs assert Defendants never responded to the September 4, 2018

moved for summary judgment on all claims.[58] Given this unexplained delay and the factually distinct nature of the supplemental predicate acts alleged in the Second Amended Complaint, the Court finds that allowing Plaintiffs to proceed with the improperly filed Second Amended Complaint would unduly prejudice Defendants, particularly when the foregoing is considered in the context of the complicated procedural history of this case. Defendants' Motion to Strike is therefore **GRANTED**.[59]

IV. CONCLUSION

Given all of the above, the Court hereby **DENIES IN PART** and **GRANTS IN PART** Defendants' Motion for Summary Judgment. More specifically, and as detailed above, the Motion for Summary Judgment is **DENIED** with respect to (1) claims that Red Mortgage breached its contractual obligations to Plaintiffs by not disclosing in the Lender's Commitment Letter (i) that it had engaged the services of Trillium and/or Mr. Taccati in connection with Plaintiffs' Loans, respectively, and (ii) the fact of any financial liability owed to Trillium and/or Mr. Taccati with respect

letter, but do not explain their additional 16-month delay in raising supplemental allegations predicated on the Demand Letters.

[58] Notably, Plaintiffs filed their Second Amended Complaint contemporaneously with Plaintiffs' opposition to Defendants' Motion for Summary Judgment.

[59] Even if the Court were to excuse Plaintiffs' failure to seek leave of court before filing its Second Amended Complaint, the Court nevertheless finds that Plaintiffs' supplemental predicate acts alleged in support of their Georgia RICO claim (*i.e.*, attempted theft by extortion, mail fraud, and wire fraud) fail as a matter of law for the reasons set forth in Defendants' Motion to Strike and discussed *supra* Part II.B.3.

to such engagements; (2) claims that Red Mortgage breached a requirement under the HUD Program Obligations that fees paid to consultants be paid from the mortgagees' fees; and (3) Plaintiff Overlook's fraud claim against Red Mortgage related to alleged misrepresentations of the amount of fees paid to Trillium in the Overlook Request for Endorsement. Defendants' Motion for Summary is otherwise **GRANTED** in all other respects. Additionally, the Court **GRANTS** the Motion to Strike.

IT IS SO ORDERED this 24th day of February, 2022.

Sara L Doyle

HON. SARA L. DOYLE
Judge, Georgia State-wide Business Court
Sitting by Designation

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