No. 21-1023

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RONNA M. LAWLER,

Petitioner,

v.

NAVY FEDERAL CREDIT UNION

Respondent.

From the Circuit Court of Berkeley County, West Virginia
The Honorable Steven Redding
Civil Action No. 20-C-224

BRIEF OF RESPONDENT NAVY FEDERAL CREDIT UNION

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BRIEF OF RESPONDENT NAVY FEDERAL CREDIT UNION

INTRODUCTION

This Court should affirm the Circuit Court of Berkeley County's dismissal of Plaintiff-Petitioner Ronna Marie Lawler's Complaint against Defendant-Respondent Navy Federal Credit Union ("Navy Federal") with prejudice.

Ms. Lawler alleges that her mortgage lender, Navy Federal, is liable under a variety of West Virginia common law and statutory theories for damages that she incurred when property that she owned in Martinsburg flooded on several occasions. In connection with Ms. Lawler's mortgage loan application, Navy Federal had obtained a determination, required by federal law, from third-party defendant CoreLogic Flood Services LLC ("CoreLogic"), regarding whether Ms. Lawler's property was in a "special flood hazard zone." If the property *was* in a special flood hazard zone, that same law prohibited Navy Federal from lending unless Ms. Lawler obtained flood insurance. CoreLogic determined that the property was not in a special flood hazard zone, which allowed Navy Federal to proceed with the mortgage application process. When Ms. Lawler inquired if flood insurance was required, Navy Federal told Ms. Lawler that it was not – based on CoreLogic's determination. Ms. Lawler alleges that CoreLogic's determination was wrong; that the property is actually located in a special flood hazard zone; and that Navy Federal must have known that the property was in a special flood hazard zone and, therefore, prone to flooding because Navy Federal had made and serviced mortgage loans for a previous owner of the property. These allegations stem from the premise that Navy Federal would have similarly obtained a federally-required flood determination in connection with those prior loans.

Because Ms. Lawler's claims arise directly from Navy Federal's procurement of and reliance on federally-required flood zone determinations provided by a third party, the Circuit

Court correctly held that 42 U.S.C. sections 4104b(d) and (e) (enacted as part of the National Flood Insurance Reform Act of 1994) required that Ms. Lawler's claims against Navy Federal be dismissed in their entirety. The plain language of sections 4104b(d) and (e) provides that lenders like Navy Federal: (1) may rely on third parties like CoreLogic, who guarantee the accuracy of their work, to provide required flood zone determinations; and (2) "shall not be liable for any error" in such determinations. Although a matter of first impression in this Court, every other court across the country that has considered these statutory provisions vis-à-vis claims by borrowers against regulated lenders has concluded that they shield lenders against claims like Ms. Lawler's.

Ms. Lawler's entire argument on appeal is that the National Flood Insurance Act (the "Act") does not *preempt* her claims. But a constitutional preemption analysis is not relevant here. The Circuit Court did not hold that the Act preempts Ms. Lawler's claims, nor did Navy Federal argue that it does. Rather, the Circuit Court relied on the plain-language liability shield specifically provided in 42 U.S.C. § 4104b(d) and (e). None of the cases Ms. Lawler relies on address those statutory provisions. Indeed, she has not cited a single case suggesting that Sections 4104b(d) and (e) – which provide that a lender "shall not be liable" – do not shield a regulated lender like Navy Federal from claims such as those brought by Ms. Lawler. This Court should affirm.

Though Ms. Lawler declined to address the arguments on appeal, Navy Federal also argued that independent state law grounds warrant dismissal of all of Ms. Lawler's claims, and this Court can affirm dismissal on those grounds too. It is clear from the Complaint and the documents incorporated into it that Ms. Lawler had independent knowledge that the Martinsburg property was either in or adjacent to a special flood hazard zone. Navy Federal also informed Ms. Lawler about the availability of private flood insurance, and Ms. Lawler acknowledged in her loan application that Navy Federal made no representations to her regarding the condition of the property. Yet,

Ms. Lawler chose to ignore what she had learned and purchased the property regardless, forgoing flood insurance. In addition, some of her claims are time-barred. There is no basis for any of Ms. Lawler's claims against Navy Federal, whether for negligence, fraud, breach of contracts, or under the West Virginia Consumer Credit Protection Act ("WVCCPA").

COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR[1]

Did the Circuit Court correctly dismiss Plaintiff-Petitioner's Complaint where:

1. The plain language of 42 U.S.C. §§ 4104b(d) and (e) provides that lenders "shall not be liable" for errors in flood determinations by third parties who guarantee their accuracy;
2. The Complaint does not plausibly allege any other claims regardless:
    a. Defendant-Respondent cannot have fraudulently induced Plaintiff-Petitioner to purchase the property or take out a mortgage loan, since Plaintiff-Petitioner (i) signed the sales contract before approaching Defendant-Respondent about flood insurance; and (ii) had independent knowledge about the property's flood risk;
    b. Defendant-Respondent did not have a duty to Plaintiff-Petitioner in negligence;
    c. Defendant-Respondent had no contractual duty to Plaintiff-Petitioner concerning the property's flood risk; and
    d. The statute of limitations blocks Ms. Lawler's claims under the West Virginia Consumer Credit Protection Act, and regardless, none of the allegations rise to the level of unconscionable conduct under the WVCCPA.

[1] Plaintiff-Petitioner does not challenge the Circuit Court's denial of her Motion for Leave to Supplement/Amend Plaintiff's Response to Navy Federal's Motion to Dismiss. Nor does she assert assignments of error in connection with Navy Federal's state law arguments.

STATEMENT OF THE CASE

I. Ms. Lawler Enters Into a Contract to Purchase the Property, Tells Navy Federal That She Knows That at Least Part of the Property Is in a Special Flood Hazard Zone, and Asks if Flood Insurance Is Required.

On June 23, 2016, Ms. Lawler (then known as Ronna Marie Shupe) entered into a Regional Sales Contract (the "Sale Contract") to purchase residential real estate located at 635 Dry Run Road, Martinsburg, WV 25403 (the "Property") from defendant Kathleen Miller (the "Seller"), contingent on financing and the results of an inspection. APP 013, 041, 052-74. Prior to entering the Sale Contract, Ms. Lawler had obtained a pre-approval for a mortgage loan from Navy Federal, with whom she banked. APP 011. The pre-approval was contingent on underwriting approval for the loan, a ratified sales contract, and other standard settlement conditions. APP 012.

After she had signed the Sale Contract, Ms. Lawler expressed several concerns about the Property to the Seller through the Seller's real estate agent, including a question about water in the Property's basement. APP 012. On June 27, 2016, the Seller emailed her real estate agent asking the agent to inform Ms. Lawler that the Property was located in a flood plain. APP 771, 780. The Seller's real estate agent informed Ms. Lawler's real estate agent. *See* APP 771.

The next day, on June 28, 2016, Ms. Lawler wrote to Navy Federal that she was concerned about the Property's flood zone status:

> Currently I have a contract on 635 Dry Run Road in Martinsburg, WV and received an email today that part of the property I'm purchasing might be in a AE flood zone(100 Year forecasted Zone?) The house sits on 1.99 acres and part of the land falls in that zone, but not the house. I was advised that the mortgage company determines if flood insurance is needed. How can I get an answer on flood insurance ? Because if the answer is yes, then I will be wanting out of my sales contract and look for another house.

APP 049; *see also* APP 012-13, 040-41, 047-50.

II. Navy Federal Receives a Flood Zone Determination from Its Third-Party Vendor, and Informs Ms. Lawler, in Response to Her Inquiry, That Navy Federal Would Not Require Her to Obtain Flood Insurance as a Condition of Financing.

In response to Ms. Lawler's inquiry, Navy Federal told Ms. Lawler that a signed copy of the Sale Contract was needed before Navy Federal would order a flood determination. APP 012-13, 040-41, 047-50. As described more fully below, regulated lenders like Navy Federal have certain obligations under the Act[2] (and pursuant to the National Flood Insurance Program (NFIP) established by the Act) related to flood insurance. Specifically, lenders are prohibited from making mortgage loans without first determining if the collateral property is located in a "special flood hazard" area and, if it is, requiring the borrower to purchase flood insurance. 42 U.S.C. § 4012a(b).

The "AE" zone Ms. Lawler referred to, APP 012, 047-50, is known as an "area of special flood hazard" or "special flood hazard area," 44 C.F.R. § 59.1, § 64.3, for which a lender must require flood insurance. While Ms. Lawler alleges "upon information and belief" that Navy Federal was "notified" that the Property's flood designation had "changed" to AE in 2009 when Navy Federal was servicing another mortgage on the Property for a prior owner, she alleges no factual basis for that belief. Regardless, Navy Federal would not have been permitted to rely on a previous flood designation when making a new loan. 42 U.S.C. § 4104b(d) and (e).

On June 30, 2016, Ms. Lawler sent Navy Federal a copy of the Sale Contract, which she had executed on June 23, 2016. APP 013, 041, 052-74. She also told Navy Federal that the Seller had not purchased flood insurance for the Property, but that the Seller had "received some type of letter" regarding flood insurance. APP 013, 040-41, 047.

On July 1, 2016, the day after receiving the Sale Contract, Navy Federal obtained a flood zone determination for the Property from its vendor, CoreLogic. APP 041-43, 087, 090, 481.

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[2] The National Flood Insurance Act of 1968, along with its several subsequent amendments, including the National Flood Insurance Reform Act of 1994, are collectively referred to as the "Act" in this brief.

CoreLogic informed Navy Federal that the Property was not located in a zone that required flood insurance and, since Ms. Lawler had inquired, Navy Federal passed this information along to Ms. Lawler. APP 013, 481.[3]

III. Ms. Lawler Proceeds to Closing, Choosing Not to Obtain Flood Insurance Despite Knowing That the Property Was At the Very Least Directly Adjacent to a Flood Zone.

Ms. Lawler continued on with her mortgage loan application and Property purchase process. APP 013-14. On July 6, 2016, as part of its disclosure obligations under federal law regulating the mortgage lending process (*see*, e.g., 12 C.F.R. § 1024.6), Navy Federal sent Ms. Lawler a packet of information about the mortgage application and financing process and home ownership published by the Consumer Financial Protection Bureau ("CFPB"), entitled "Your home loan toolkit." APP 043-44, 158-84. The CFPB information packet cautioned Ms. Lawler that, "[a]lthough you may not be required to maintain flood insurance on all structures, you may still wish to do so. . . . If you choose to not maintain flood insurance on a structure, and it floods, you are responsible for all flood losses relating to that structure." APP 183.

Ms. Lawler also obtained a Property inspection before closing. APP 044, 206-29. After that inspection, she and the Seller signed an Addendum to Sale Contract ("Addendum") in which Ms. Lawler required the Seller to make certain repairs identified in the inspection report. APP 206. A number of those required repairs related to the inspector's comment that

> [v]isible signs of water intrusion in the basement are present from silt stains observed on along the block wall and from standing water on floor. Water intrusion can lead to more costly repairs and increase damage if not corrected. I am unable to determine the extent of intrusion or how often it occurs. I recommend further investigation or correction by a qualified licensed contractor or water infiltration specialist.

[3] Navy Federal was only required to notify Ms. Lawler of the Property's flood zone designation if Navy Federal had received a determination that it was in a special flood hazard area. *See* 12 C.F.R. § 760.9.

APP 218. The Addendum includes photographs showing where water had entered the Property. APP 215, 218.

On August 19, 2016, Ms. Lawler closed on the Property and mortgage loan (the "Mortgage Loan"), signing a Note and Deed of Trust with Navy Federal. APP 014, 041-43, 077-79, 122-43. She elected not to purchase flood insurance despite her knowledge that the Property was at least adjacent to a flood zone, her own property inspection report describing water intrusion in the Property, and Navy Federal's warnings regarding flood insurance. *See* APP 018, 183, 218. As part of the closing, Ms. Lawler completed and executed a final version of her Uniform Residential Loan Application (the "URLA"). APP 041-43, 102-05. In signing the URLA, Ms. Lawler represented and acknowledged that Navy Federal had not "made any representation or warranty, express or implied, to me regarding the property or the condition or value of the property." APP 104.

IV. The Property Floods

Ms. Lawler alleges that the Property flooded on May 31, 2018, August 21, 2018, September 9, 2018, and September 28, 2018. APP 015-16. She claims that mold accumulated at the Property as a result of moisture from the flooding. APP 017-18.

V. The Proceedings Below.

Ms. Lawler filed her Complaint on September 11, 2020, over four years after she first learned about the Property's flood risk. APP 002. Along with Navy Federal, she sued the Seller and the Seller's real estate agents and brokerage. APP 005-06. Ms. Lawler claims that she would never have purchased the Property had she known the Property was in a flood hazard area. APP 012. Her Complaint seeks compensatory and punitive damages. APP 019-27. Seller's real estate agents filed a Motion to Dismiss on December 21, 2020. APP 725. Seller's real estate agents filed

a motion to join Ms. Lawler's real estate agents as indispensable parties on June 28, 2021. APP 730. Ms. Lawler sold the Property on April 15, 2021. APP 511.[4]

On March 26, 2021, Navy Federal filed a Motion to Dismiss under Rule 12(b)(6), arguing that (1) Sections 4104b(d) and (e) barred Ms. Lawler's claims against Navy Federal, and (2) independent state law grounds warranted dismissal of each of Ms. Lawler's claims. APP 412-50. Navy Federal also filed a third-party Complaint against CoreLogic concurrent with its Motion to Dismiss. APP 454-72. Almost two months after Navy Federal's Motion to Dismiss was fully briefed, Ms. Lawler requested leave to amend/supplement her Response to Navy Federal's Motion to Dismiss, offering an affidavit from her home inspector that said nothing more than that his comments about water intrusion into the Property's basement did not necessarily relate to flooding. APP 697-98. Navy Federal opposed, pointing out that the request was procedurally deficient and did not affect Navy Federal's arguments regardless. APP 703-10.

On November 11, 2021, the Circuit Court granted Navy Federal's motion, dismissing Ms. Lawler's Complaint with prejudice under Rule 12(b)(6), and denying Ms. Lawler's Motion to Supplement/Amend her Repose as moot. APP 719-24. The Circuit Court held that Sections 4104(d) and (e) provide a liability shield for regulated lenders like Navy Federal that rely on flood zone determinations provided from third parties where those third parties guarantee the accuracy of the flood zone determination against claims by borrowers like Ms. Lawler. APP 722-24. The Circuit Court's order did not address the Constitutional question of preemption or the independent state law arguments raised by Navy Federal. APP 724.

On the same day, the Circuit Court denied Seller's real estate agents' motion to dismiss, and ordered that Ms. Lawler's real estate agents be joined as indispensable parties. APP 731.

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[4] *See also, e.g.*, https://www.redfin.com/WV/Martinsburg/635-Dry-Run-Rd-25403/home/15844095 (sale information drawn from publicly recorded documents) (last accessed May 27, 2022).

VI. This Appeal.

Ms. Lawler filed her notice of appeal on December 20, 2021, APP 731, and perfected the appeal on April 21, 2022.

SUMMARY OF ARGUMENT

The Circuit Court correctly applied the liability shield found in the plain text of Sections 4104b(d) and (e) when it dismissed Ms. Lawler's Complaint against Navy Federal. Those sections make it clear that regulated lenders like Navy Federal that rely on third-party vendors to obtain flood zone determinations "shall not be liable" for errors. Protection of regulated lenders like Navy Federal from liability for claims arising from flood zone determinations provided by third parties furthers the Act's purpose to not only ensure that homeowners can obtain reasonably priced flood insurance, but to reduce the burden of ballooning federal government spending on flood disaster assistance. Every other court across the country that has considered the statutory provisions at issue in connection with claims against lenders has come to the same conclusion as the Circuit Court: Sections 4104b(d) and (e) shield regulated lenders such as Navy Federal from claims like those filed by Ms. Lawler.

Ms. Lawler's preemption analysis is irrelevant. The Circuit Court did not hold that Ms. Lawler's claims were preempted by the Act, or otherwise apply principals of federalism. None of the cases she cites analyze Sections 4104b(d) or (e), and all but one involve claims against insurers and/or third-party flood determination providers, rather than lenders like Navy Federal – to whom the liability shield explicitly applies.

Regardless, there are independent state law grounds, which Navy Federal argued below, that also support dismissal of Ms. Lawler's claims. This Court can alternately affirm dismissal on those grounds. It is clear from the Complaint and documents the Complaint incorporates by reference that Ms. Lawler had superior knowledge to Navy Federal's regarding the flood risk to

the Property. Her fraudulent inducement claim fails because Ms. Lawler had already entered into the Sale Contract when she contacted Navy Federal about flood insurance, and because Ms. Lawler had independent knowledge of the Property's flood risk and was warned about flood risks before signing the Mortgage Loan documents. Her negligence claim fails because there was no special relationship between Ms. Lawler and Navy Federal giving rise to a duty on Navy Federal's part and because Ms. Lawler failed to plead that any Navy Federal employee committed an individual act of negligence. Her breach of contract claim fails because there are no terms in the Deed of Trust or Note that involve representations about flood zones. Finally, her claims under the WVCCPA are time-barred. They also fail because mortgage lending is not within the scope of Article 6 and because she pleaded no facts suggesting unconscionable conduct.

This Court should affirm the Circuit Court's dismissal of the Complaint with prejudice.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requested that the Court set this matter for W. Va. App. Procedure Rule 20. (Pet.'s Br. at 6, citing R.A.P. 20(a)(1).) Respondent agrees that this case presents an issue that may be appropriate for consideration under Rule 20, and that oral argument would aid the Court's determination of the dispositive issues.

ARGUMENT

I. Standard of Review.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 775, 461 S.E.2d 516 (1995).

While West Virginia has a liberal pleading standard, a plaintiff must still put forward a valid claim. "Dismissal for failure to state a claim is proper where it is clear that no relief could

be granted under any set of facts that could be proved consistent with the allegations." *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167 (1996) (internal quotation marks omitted).

II. Sections 4104b(d) and (e) Include a Liability Shield for Regulated Lenders Like Navy Federal That Rely on Third-Party Flood Determinations.

The Circuit Court correctly interpreted and applied 42 U.S.C. § 4104b(d) and (e) when it dismissed Ms. Lawler's claims against Navy Federal.

A. Purpose of the National Flood Insurance Act and Program.

The Act's purpose is, as a "matter of national policy," to create a program that reasonably allocates the risk of flood losses as between government and private insurers, and secondarily, through properly allocating the risk, to make flood insurance more affordable and widely available for homeowners whose homes are located in flood hazard zones. *See, e.g.*, 42 U.S.C. §§ 4001, 4002. The primary recipients of the protections provided by the Act and the NFIP are intended to be lenders and the federal government – not mortgage borrowers. As the Fifth Circuit observed in *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152 (5th Cir. 1981),

> Lenders are only directed to require flood insurance for the amount and term of the outstanding loan balance. There is no requirement that the flood insurance cover the equity of the borrower. Plainly, Congress was interested in protecting the lending institutions whose deposits the federal regulatory agencies insured. As for the notice [to the borrower] requirement [if a property is determined to be in a flood zone], the legislative history indicates that it too was enacted in part to help stem the development of flood hazard areas and further diminish the burden of federal disaster assistance.

Id. at 159. The same purpose undergirds the Act's requirement that a lender procure a flood zone determination; it is "not to inform the borrower of the home's flood zone status, but rather to protect the lender and the federal government from the financial risk that is posed by uninsured homes located in flood zones." *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 252 (5th Cir. 2008).

Against this backdrop, the Act mandates that regulated mortgage lenders like Navy Federal determine before lending whether they must require borrowers to obtain flood insurance for

properties that will be mortgaged. 42 U.S.C. § 4012a(b)(1)(A). Lenders are prohibited from making mortgage loans secured by any property "having special flood hazards" unless the borrower obtains the required amount of flood insurance coverage. *Id.*; 12 C.F.R. § 760.3. If a property is located within a special flood hazard area, lenders must inform the borrower and require that the borrower obtain a minimum amount of flood insurance. 12 C.F.R. § 760.9. If a property is not within a flood hazard zone, regulated lenders have no statutory or regulatory obligations to notify the borrower. *See id.* If a borrower fails to obtain the necessary flood insurance, the lender must do so on the borrower's behalf, at the borrower's expense. 42 U.S.C. § 4012a(e).

B. A Liability Shield in Connection with a Lender's Prescribed Use of the Standard Flood Hazard Determination Form Prescribed by 4104b Is Consistent With the Act's Purpose.

Consistent with this statutory scheme, the Act prescribes use of a standard flood hazard determination form ("SFHDF") for determining whether the home securing a mortgage loan is located in a special flood hazard area. *See* 42 U.S.C. § 4104b. In using the SFHDF, lenders are permitted to rely on information provided by third parties with relevant expertise to determine whether a given property is located in a special flood hazard area, if those third parties guarantee the accuracy of the information they provide:

> [i]n providing information regarding special flood hazards on the form developed under this section, any lender (or other person required to use the form) who makes, increases, extends, or renews a loan secured by improved real estate or a mobile home may provide for the acquisition or determination of such information to be made by a person other than such lender (or other person), only to the extent such person guarantees the accuracy of the information.

See 42 U.S.C. § 4104b(d). The Act goes on, in subsection (e), to provide that

> [a]ny person increasing, extending, renewing, or purchasing a loan secured by improved real estate or a mobile home may rely on a previous determination of whether the building or mobile home is located in an area having special flood hazards (and shall not be liable for any error in such previous determination), if the previous determination was made not more than 7 years before the date of the

> transaction and the basis for the previous determination has been set forth on a form under this section[.]

42 U.S.C. § 4104b(e). Read together, these two sections provide that: (1) lenders may rely on third party providers, such as CoreLogic, for flood insurance determinations, so long as the provider guarantees the accuracy of its determinations; (2) when lenders do so, they "shall not be liable for any error" that may result; and (3) if a lender engages in activity related to the same loan subsequent to lending – such as "increasing, extending, renewing, or purchasing a loan" – the lender may rely on a prior flood determination form, so long as less than seven years have passed from the date of the transaction in connection with which the form was obtained.[5]

This interpretation of Sections 4104b(d) and (e) makes logical sense and is in line with the NFIP's and Act's purpose. As discussed *supra*, a primary purpose of the Act is to protect regulated lenders like Navy Federal from losses. And the purpose of Section 4104b in general is to "facilitate compliance with the flood insurance purchase requirements of this title." *Id.* § 4104b(b)(1). The legislative history indicates that Congress believed that allowing reliance on a form that is guaranteed by a third party to be accurate would be sufficient to protect the interests of borrowers:

> The Conferees recognize and intend that the guarantees for third party information in this provision are adequate to protect the interests of the borrower and to ensure the quality of the information provided by the third party. Since the lender is relying on the guarantee in order to ensure compliance with the mandatory flood insurance purchase requirements, lenders have ample incentives to ensure that the guarantees are adequate to protect the lender.

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[5] Although Ms. Lawler did not assert any claims pursuant to the Act itself, we note that "[c]ourts consistently have held that the [Act] does not provide a private cause of action against a lender for failure to make a proper flood zone determination." *Blackstone v. Chase Manhattan Mortg. Corp.*, 802 F. Supp. 2d 732, 736 (E.D. La. 2011); *see also Wentwood Westside I LP v. GMAC Commercial Mortg. Corp.*, 419 F.3d 310, 323 (5th Cir. 2005) ("Every single federal court to consider whether a federal private right of action arises under section 4012a has concluded that the federal treasury, not individual mortgagors . . . is the class the statute intends to protect."); *Mid-America Nat'l Bank v. First Sav. & Loan Ass'n*, 161 Ill. App. 3d 531, 536 (Ill. App. 1987) ("[T]he . . . Act does not provide borrowers with either an express or implied Federal statutory cause of action against a lending institution for violations of the Act").

H.R. Conf. Rep. 103-652, § 528.

Here, Navy Federal was required to obtain a flood hazard determination, and under the Act, Navy Federal was entitled to rely on the SFHDF provided by CoreLogic because CoreLogic guaranteed its accuracy. 42 U.S.C. § 4104b(d). Thus, the only reason Navy Federal had information to provide to Ms. Lawler about the Property's flood status was because Navy Federal was fulfilling its obligations under the Act. *Id.* Similarly, the only basis for Ms. Lawler's alleged "information and belief" that Navy Federal possessed historical information about the Property's flood status is her assumption that Navy Federal would have also followed the Act and commissioned a flood determination in connection with previous mortgage loans secured by the Property. APP 007-09. Navy Federal had no other duty or reason to obtain information about the Property's flood status, or to commission the statutorily required flood hazard determination from CoreLogic. It did not request that information for the benefit of Ms. Lawler, nor did it even have a statutory obligation to share it with her – since the form showed that the Property was *not* in a special flood hazard zone. *See* 12 C.F.R. § 760.9.

Thus, when section 4104b uses the language "shall not be liable" in connection with obtaining flood hazard determinations, it makes sense that it means just that: borrower plaintiffs cannot sue their mortgage lenders where the causes of action, as here, arise ***solely*** from the lender's provision of information from an allegedly incorrect flood hazard determination form, which the lender only obtained because it was complying with its obligations under section 4104b.

C. Case Law Supports the Circuit Court's Interpretation of 4104b(d) and (e).

Navy Federal recognizes that few courts have analyzed how Sections 4104b(d) and (e) protect regulated lenders like Navy Federal from claims by borrowers like Ms. Lawler arising from an allegedly incorrect SFHDF obtained from a third party, and that this is an issue of first impression for this Court. More often, the cases are brought against flood insurance carriers or

flood determination companies like CoreLogic. However, the cases that have addressed the issue have tended to reach the same conclusion as the Circuit Court. Navy Federal has found no decision holding that Sections 4104b(d) and (e) do *not* immunize regulated lenders from flood hazard determination form-based claims by borrowers.

For instance, in *Clark v. Amsouth Mortg. Co.*, 474 F. Supp. 2d 1249 (M.D. Ala. 2007), the plaintiffs brought state law claims of breach of contract, unjust enrichment, conversion, negligence, fraud, and breach of duty to a third-party beneficiary against their mortgage lender and servicer because the lender allegedly wrongfully "force[ ] placed" flood insurance on their property. *Id.* at 1250. The lender relied on a third party to prepare a flood hazard determination on the property, which erroneously found that the property was located in a flood zone. *Id.* at 1251. The court noted that Section 4104b(d) allowed "[l]ending institutions . . . [to] delegate the acquisition of information needed to complete a flood-hazard determination to a third-party" if the third party guaranteed its accuracy. *Id.* at 1252. In this instance, the third party hired by the servicer had guaranteed the accuracy of the determinations, which led to the lender force-placing the insurance on the plaintiffs' property. *Id.* at 1252-53. The Court then held that

> the plain language of § 4104b(d) in the NFIA authorizes lending institutions to use third-party determination companies, as AmSouth and Dovenmuehle did, and § 4104d(e) in the statute releases them from liability. Therefore, absent a clearly expressed legislative intention to the contrary, such companies are shielded from liability. The court has found nothing in the [Act] to undermine the express language of § 4104b(d) and § 4104d(e). The Clarks' claims, both federal and state, against AmSouth and Dovenmuehle are therefore barred.

Id. at 1253 (internal citations and quotations omitted).[6]

Other courts have reached the same conclusion in dicta, often when considering claims against parties other than lenders, such as flood hazard determination providers. For example, in

[6] The quoted text from *Clark* appears to have inadvertently transposed the "b" from 4104b(e) with a "d."

Ford v. First Am. Flood Data Servs., 2006 U.S. Dist. LEXIS 74350 (M.D.N.C. Oct. 11, 2006), a borrower brought state law claims against a flood hazard determination company for failing to note at the time of purchase that the property was in a flood zone, alleging she would not have purchased the property had she known its true status. *Id.* at *3-4. The court examined Section 4104b in deciding whether the plaintiff's state law claims could proceed against the flood hazard determination company. *Id.* at *19. The court concluded that

> The subsections of section 4104b that regulate third-party flood zone determinations only address the relationship between the lender and the third party and do not mention the borrower, indicating a lack of intent to protect the borrower. *See* § 4104b(d-e). In addition, subsection (e) allows lenders to rely on third-party determinations, thereby shielding lenders from liability for error. § 4104b(e). Therefore, Congress uses subsection (e) to expressly deny a cause of action by a borrower against a lender, a party with whom the borrower is in contractual privity, for an error made in the flood hazard determination.

Id. at *19-20. It went on to hold that North Carolina "does not recognize private state law claims by a borrower based on a violation of the flood zone determination and notification provisions of the Act." *Id.* at *27; *see also id.* at *28 ("Therefore, this court finds that . . . North Carolina law would not recognize a private state law claim by a purchaser against a lender or a third-party determination company based on a violation of the Act.")

In *Klecan v. Countrywide Home Loans, Inc.*, 951 N.E.2d 1212 (Ill App. 2011), the borrower plaintiffs brought state law claims against their lender and the flood hazard determination company for losses following a flood after the flood hazard determination company mistakenly stated that the property was not in a flood zone. *Id.* at 1213-14. Notably, the plaintiffs conceded at the motion to dismiss stage that their state law claims against the lender were barred by the Act. *Id.* at 1214. The Illinois appellate court analyzed the language in Section 4104b to determine whether the plaintiff's claims against the flood determination provider could survive a motion to

dismiss. *Id.* at 1215. The court noted that the Act bars, at a minimum, negligence claims by borrowers against lenders for errors in flood hazard determinations made by third parties:

> The plain language of the Flood Act authorizes lenders to rely on a third-party flood determiner's findings without incurring liability for the determiner's mistakes. See 42 U.S.C. §§ 4104b(d), (e) (2006). However, the Flood Act does not extend similar immunity to suits by borrowers against flood determiners. Thus, we find that the plain language of the Flood Act does not bar a common law negligence claim brought by a borrower against a flood determiner.

Id.

In *Wells Fargo Bank, N.A. v. Fonder*, 868 N.W.2d 409 (S.D. 2015), the plaintiffs purchased a home from Wells Fargo, and a third party conducted a flood hazard determination. *Id.* at 411. The third party determined that the home was not in a flood hazard zone, and the plaintiffs did not purchase flood insurance. *Id.* After the plaintiffs' home flooded, Wells Fargo filed an action to foreclose, and during the pendency of that action the plaintiffs brought state law claims against the flood determination provider. *Id.* In the context of deciding whether the Act allowed borrowers to bring state law claims against flood-determination companies, the Supreme Court of South Dakota cited Sections 4104b(d) and (e) while noting that while the Act "does prohibit liability for lenders as against borrowers . . . nothing in the [Act] directly speaks to a flood determiner's liability to a borrower." *Id.* at 414.

The Southern District of Mississippi also addressed Sections 4104b(d) and (e) in *Duhon v. Trustmark Bank*, 2007 U.S. Dist. LEXIS 18078 (S.D. Miss. Feb. 25, 2007). The lender hired a third-party flood determination company as part of its initial financing of the plaintiff's purchase of her home. *Id.* at *2. The company determined that the property was not in a flood hazard zone. *Id.* at *3. Flooding from Hurricane Katrina subsequently damaged the property. *Id.* The plaintiff brought state law claims against the lender and flood hazard determiner. While the court's primary analysis involved subject matter jurisdiction, the court noted that the Act permitted regulated

lenders to delegate the work of determining if a property is located in a flood hazard area and that the Act "include[d] a grant of immunity to Regulated Lenders that rely on third parties to make SFHA determinations." *Id.* at *4-5.

In *Cruey v. First Am. Flood Data Servs.*, 174 F. Supp. 2d 525 (E.D. Ky. 2001), the Eastern District of Kentucky addressed whether there was an implied right of action against flood hazard determination companies under Section 4104b. *Id.* at 527. Before directly addressing the question, the court noted that regulated lenders are explicitly protected from liability under Sections 4104b: "Subsection (d) grants lending institutions the authority to delegate the acquisition or determination of information needed to complete the SFHDF. . . . Subsection (e) . . . amounts to a broad grant of immunity to lending institutions covered by the Act." *Id.* at 527-28.

The Fifth Circuit in *Paul v. Landsafe Flood Determination, Inc.*, 550 F.3d 511 (5th Cir. 2008) is the only federal Circuit Court of Appeals to discuss Sections 4104b(d) and (e). In *Paul*, the regulated lender also retained a third-party flood determination provider, which determined that the property was not in a hazard flood zone. *Id.* at 512. After the home was damaged by Hurricane Katrina, the plaintiff learned that it was in fact located in a flood hazard area. *Id.* While the court ultimately remanded the case to the district court to determine whether state law claims against the third-party flood determination company could proceed, *id.* at 518-19, the Fifth Circuit stated that "[t]here is no liability for a lender who relies on a previous flood-zone determination at the time of "increasing, extending, renewing, or purchasing a loan." *Id.* at 513 (citing 42 U.S.C. § 4104b(e)).

While Ms. Lawler complains that cases like these are "out-of-jurisdiction" or "unpublished" (Pet.'s Br. at 17), she does not cite a single case where a court found that a regulated lender could be held liable under state common law or statutory claims arising from an inaccurate

flood hazard determination provided by a third party. The available authority squarely favors affirming the Circuit Court.[7]

D. Sections 4104b(d) and (e) Should be Read Together.

Ms. Lawler attempts to disassociate Sections 4104b(d) and (e) – pointing out that the "shall not be liable" language only appears in 4104b(e), which allows reliance on a prior flood determination when "increasing, extending, renewing, or purchasing a loan," so long as the determination was made less than seven years ago. But Ms. Lawler does not explain why it would make sense that the "shall not be liable" language would not also cover the scenario described in 4104b(d) – allowing a lender who "makes, increases, extends, or renews a loan" to rely on a third party that guarantees the accuracy of the information. Presumably it works both ways – surely a lender relying on a "previous determination" under 4104b(e) may only rely on that prior determination, if provided by a third party, to the extent the third party "guarantee[d] the accuracy of the information," even though the guarantee language is only found in 4104b(d) and not 4104b(e). A reading of the two sections together, as set out above, is the only reading that makes sense. Indeed, it would make no sense to allow for liability against lenders who obtain guaranteed flood hazard certifications from third parties in connection with making a loan, while exempting lenders who rely on a previously-obtained *unguaranteed* flood determination when they "increase[], extend[], renew[], or purchas[] a loan." 42 U.S.C. § 4104b(e).

Looking to other provisions within the Act provides additional clarity. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes[.]") For instance, 42 U.S.C. § 4012a, covering the basic requirement that

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[7] Ms. Lawler's argument that *Cruey* and *Duhon* have been effectively overruled is similarly unavailing for reasons discussed *infra* in Section III.

flood insurance must be purchased before a mortgage lender may lend, makes clear that insurance is required whenever a regulated lending institution "make[s], increase[s], extend[s], or renew[s] any loan secured by improved real estate." 42 U.S.C. § 4012a(b)(1)(A). "Making" a loan is clearly grouped together with "increasing," "extending," and "renewing" a loan as a triggering event for the Act's requirements.

Certainly Ms. Lawler does not cite any cases to support her view. Rather, courts have almost uniformly read these sections together when discussing how the Act shields regulated lenders like Navy Federal from liability for errors by third parties making flood zone determinations. *See, e.g.*, *Clark* , 474 F. Supp. 2d at 1253 ("This court has found nothing in the NFIA to undermine the express language of § 4104b(d) and § 4104d(e)."); *Duhon*, 2007 U.S. Dist. LEXIS 18078, at *4-5 ("Under [Section 4104b(d) of] the Act, Regulated Lenders are permitted to delegate the task of determining whether a particular piece of property falls within a SFHA to third parties. The 1994 amendments to the NFIA [under Section 4104b(e)] include a grant of immunity to Regulated Lenders that rely on third parties to make SFHA determinations."); *Ford*, 2006 U.S. Dist. LEXIS 74350, at *19 ("The subsections of section 4104b that regulate third-party flood zone determinations only address the relationship between the lender and the third party and do not mention the borrower, indicating a lack of intent to protect the borrower. *See* § 4104b(d-e)."); *Cruey*, 174 F. Supp. 2d at 529 ("the only subsections that could conceivably give rise to an implied right of action are subsections (d) or (e). . . . Specifically, subsection (d) applies to 'any lender (or other person required to use the [Standard Flood Hazard Determination Form]) who makes, increases, extends, or renews a loan', subsection (e) to 'any person increasing, renewing, or purchasing a loan'"); *Klecan*, 951 N.E.2d at 1215 ("The plain language of the Flood Act authorizes

lenders to rely on a third-party flood determiner's findings without incurring liability for the determiner's mistakes. *See* 42 U.S.C. §§ 4104b(d), (e) (2006).").

Only one court has explicitly mentioned the difference in language in Sections 4104b(d) and (e). In *Paul*, the Fifth Circuit noted (in dicta), without stating more, that "[i]t is unclear ***how*** that particular immunity [from Section 4104b(e)] applies to the making of the initial loan," 550 F.3d at 513 (emphasis added), but didn't discount the possibility that it in fact *did* apply to the making of the initial loan.

* * *

The Act provides that regulated lenders like Navy Federal "shall not be liable" for errors resulting from flood hazard determinations performed by third parties like CoreLogic. The Circuit Court correctly applied that liability shield here, and this Court should affirm.

III. Ms. Lawler's Preemption Argument Is Irrelevant.

Ms. Lawler focuses her appellate argument on preemption. This approach is curious because the Circuit Court did not apply the Constitutional doctrine of preemption. Nor did Navy Federal make a preemption argument in the Circuit Court. The argument is a legal strawman. None of the cases Ms. Lawler relies on discuss Sections 4104b(d) or (e) at all, and her emphasis on the "claims handling" versus "procurement" dichotomy developed in connection with claims against insurers ultimately has no bearing on the Circuit Court's application of Sections 4104b(d) and (e): those cases either only address preemption, and/or do not involve claims against regulated lenders – the entities the liability shield is meant to protect.

Hofbauer v. Nw. Nat'l Bank, 700 F.2d 1197 (8th Cir. 1983) does not help Ms. Lawler's preemption argument – since the case is not actually about preemption, even though Ms. Lawler claims that it is. (Pet.'s Br. at 9 ("In *Hofbauer v. Nw. Nat'l Bank*, the Eight Circuit rejected a finding of preemption")). Rather, in *Hofbauer,* the Eighth Circuit recognized that no implied

federal right of action exists for violations of the Act and remanded to state court the question of whether a violation of the Act could support a state law claim for negligence. 700 F.2d at 1201. Moreover, *Hofbauer* can have no bearing on whether Sections 4104b(d) and (e) contain a liability shield for lenders since those provisions did not become part of the Act until 1994, eleven years after *Hofbauer* was decided. *See* Pub. Law 103-325, § 528.

Spong v. Fid. Nat'l Prop. and Cas. Ins. Co., 787 F.3d 296 (5th Cir. 2015) and *Campo v. Allstate Ins. Co.*, 562 F.3d 751 (5th Cir. 2009) – both preemption cases – involved claims against Write-Your-Own ("WYO") insurance carriers participating in the NFIP, not regulated lenders. *Spong*, 787 F.3d at 299; *Campo*, 562 F.3d at 752. Sections 4104b(d) and (e), and the requirement to obtain a flood hazard determination form, are directed at regulated lenders, not WYO carriers. Whether claims against WYO carriers are preempted by the Act has no bearing on whether Sections 4104b(d) and (e), by their plain language, shield regulated lenders from liability for borrower claims arising from erroneous flood hazard determinations. The "policy procurement" versus "claims handling" dichotomy these cases present is also irrelevant because neither *Spong* nor *Campo* apply it to regulated lenders like Navy Federal, who neither assist with "procuring" insurance nor "handling" claims on insurance policies.

Harris v. Nationwide Mut. Fire Ins. Co., 832 F.3d 593 (6th Cir. 2016) ("*Harris I*") does not cast doubt on the Circuit Court's decision either. Unlike *Spong* and *Campo*, *Harris* at least involved state law claims against a regulated lender. *Id.* at 594. However, the Sixth Circuit did not discuss the application of Sections 4104b(d) or (e); it merely adopted the policy procurement/claims handling reasoning from *Spong* and *Campo* and applied it to the claims against the lender – holding that a "procurement" claim is not preempted under the *Spong* and *Campo* analysis, without recognizing that a claim against a lender could not fall into the "claims handling"

bucket anyway, since lenders do not handle insurance claims. *Id.* at 596-97. The Sixth Circuit remanded to the district court to determine whether the plaintiffs' state law claims were viable under Tennessee law.[8] *Id.* at 597. Since *Harris I* does not engage with or analyze the sections of the Act relied on by the Circuit Court (Section 4104b), it has no persuasive authority in this case, in which the trial court applied Section 4104b's plain-language liability shield.[9]

Williams v. Standard Fire Ins. Co., 892 F. Supp. 2d 615 (M.D. Pa. 2012) is also a preemption case; the court was not interpreting Sections 4104b(d) and (e). Again, the claims were not brought against a lender; they were brought against an insurance company and CoreLogic. *Id.* at 617-18. There is nothing in *Williams* that suggests that its analysis allowing state law claims to proceed against an insurer and third-party flood determination provider extends to claims against regulated lenders that fit squarely within the shield provided by Sections 4104b(d) and (e).

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[8] Back in the district court, in *Harris v. Nationwide Mut. Fire Ins. Co.*, 367 F. Supp. 3d 768, 775-76 (M.D. Tenn. 2019) ("*Harris II*"), the regulated lenders again filed a motion to dismiss the remaining two claims: negligence and negligent misrepresentation. 367 F. Supp. 3d at 773. The court noted that each of these claims emanated from the regulated lenders' obligation under the Act. *Id.* *See also* fn. 4, above. As for the negligence claim, the court explained that every court that had considered the question found that no duty in negligence could be derived from the Act, and plaintiffs cited no case law to support their position that such a duty existed. *Id.* at 774-77. The court concluded that "[a]bsent any authority to the contrary, the court must assume that the Tennessee Supreme Court would follow the rest of the country and hold that a plaintiff cannot sustain a claim for negligence based on a duty allegedly imposed by the [Act]." The court also dismissed the negligent misrepresentation claim, noting that the regulated lender's reliance on CoreLogic's flood determination was not a representation at all. *Id.* at 778.

[9] Indeed, state courts and federal courts deciding whether purported violations of the Act could support state law claims by borrowers against lenders, in cases like *Harris* and *Harris II* where the 4104b liability shield was not analyzed, have uniformly and consistently answered that question in the negative – for reasons similar to those advanced by Navy Federal in Section IV, below. *See, e.g., Jackson v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 158639, at *58-61 (W.D. Pa. Nov. 6, 2013) (collecting cases); *Kelly v. Wash. Mut.*, 2009 U.S. Dist. LEXIS 63683, at *7 (S.D. Miss. Apr. 28, 2009) ("In the present case, a third party, not WaMu, performed the flood zone determination for the Kelly property. . . . Based upon the facts of this case, the Court is of the opinion that Plaintiff has not carried the burden of demonstrating the existence of any legal duty owed her by WaMu under state law. The Court must therefore conclude that Plaintiff is unable to state a claim against WaMu under Mississippi law."); *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 25-26 (Iowa 2012) ("Can a borrower sue a lender under state law in negligence for failing to discharge a duty created by the [Act]? For the reasons that follow, we believe the answer to this question is no."); *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, ¶¶ 12-14 (2012) (no state law duty for regulated lender for obligations created by the Act).

Finally, *Cruey* and *Duhon* (discussed above at 17-18) cannot have been overruled by *Harris* and *Spong* (Pet.'s Br. at 17-18), respectively, since neither *Cruey* nor *Duhon* were preemption cases. *Cruey* held that Section 4104b does not create a private right of action, 174 F. Supp. 2d at 532, and *Duhon*'s holding was limited to subject matter jurisdiction. 2007 U.S. Dist. LEXIS 18078, at *13-14.

The cases Ms. Lawler cites do nothing more than support an argument – not relevant to the facts of this case – that state law claims against third-party flood hazard determination companies, and against insurance companies in the policy procurement setting, may not be preempted by the Act. They contain no analysis that would support a conclusion that Sections 4104b(d) and (e), by their plain language, do not shield a regulated lender like Navy Federal from Ms. Lawler's claims, which arise entirely from an allegedly incorrect SFHDF provided to navy Federal by a third-party (CoreLogic) that guaranteed its accuracy.

IV. Liability Shield Aside, This Court Can Affirm Dismissal of All of Ms. Lawler's Claims on Independent Grounds.

Although the Circuit Court correctly granted Navy Federal's Motion to Dismiss because the Act bars all of Ms. Lawler's claims against Navy Federal, this Court could also affirm on any of the other grounds Navy Federal advanced in the Circuit Court. *Greaser v. Hinkle*, 245 W. Va. 122, 128, 857 S.E.2d 614 (2021). Ms. Lawler chose not to address these arguments in her brief, and she has waived her opportunity to do so on appeal. *See Birchfield v. Zen's Dev., LLC*, 245 W. Va. 82, 94, 857 S.E.2d 422 (2021).[10]

[10] And therefore, the Court must disregard any arguments Ms. Lawler may assert on reply on these points. *See Birchfield*, 245 W.Va. at 94.

A. Ms. Lawler Has No Fraud in the Inducement to Contract Claim.[11]

1. Navy Federal Could Not Have Induced Ms. Lawler to Enter into the Sale Contract Because Ms. Lawler Had Already Executed that Contract Before Asking Navy Federal About Flood Insurance.

Count III fails to state a claim arising from the Sale Contract because Ms. Lawler ***had already agreed to the Sale Contract when she contacted Navy Federal about flood insurance.*** The Complaint conveniently omits this detail. Ms. Lawler mischaracterizes Navy Federal's communications on or about June 28, 2016 as forcing her to sign the Sale Contract in order to learn whether Navy Federal required flood insurance. APP 012. But, as other documents incorporated by reference into the Complaint demonstrate, Navy Federal simply told Ms. Lawler it needed to see the executed Sale Contract before incurring the expense of having its vendor make the flood determination—something Ms. Lawler clearly understood. APP 012-13, 048 ("ok so I need to send you the contract to get a flood very?") And even before that exchange, Ms. Lawler told Navy Federal she had already agreed to the Sale Contract:

> ***Currently I have a contract on 635 Dry Run Road in Martinsburg, WV*** and received an email today that part of the property I'm purchasing might be in a AE flood zone(100 Year forecasted Zone?) The house sits on 1.99 acres and part of the land falls in that zone, but not the house. I was advised that the mortgage company determines if flood insurance is needed. How can I get an answer on flood insurance ?

APP 049 (emphasis added). Nor was the Sale Contract contingent on a determination that the Property was not in a flood zone. APP 052-74. In *Geary v. WesBanco Bank, Inc.*, 2020 W. Va. LEXIS 2 (W. Va. Jan. 13, 2020), this Court found no liability against a lender for claims based on erroneous flood zone determination where, among other things, the sale contract had "no contingency related to a determination as to whether the subject property was located in a flood

[11] Ms. Lawler conceded that her Complaint did not adequately plead a fraud in the execution of contract claim and voluntarily withdrew it. APP 502.

zone." *Id.* at *2. Because Ms. Lawler had already agreed to the Sale Contract, she could not have relied on or been induced by any representation from Navy Federal to enter into the Sale Contract.

2. Navy Federal Did Not Fraudulently Induce Ms. Lawler to Agree to the Note or the Deed of Trust.

To the extent Ms. Lawler's claim for Fraud in Inducement to Contract could arise from the Note and/or Deed of Trust,[12] it fails regardless. The elements of a fraud in inducement to contract claim include: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." *Lengyel v. Lint,* 167 W. Va. 272, 276-77, 280 S.E.2d 66 (1981). The Complaint's allegations do not satisfy the required elements.

The Complaint and documents incorporated by reference within it demonstrate that Ms. Lawler could not possibly have reasonably relied on Navy Federal's statement that the Property was not in a flood zone as any kind of guarantee against flooding, or that flood insurance would not have been advisable or prudent. First, Ms. Lawler affirmatively represented and acknowledged on her signed loan application (URLA) that Navy Federal had not made any representations or warranties to her regarding the Property or about the Property's condition or value. Second, Ms. Lawler had independent knowledge about the Property's flood risk. Third, Navy Federal informed Ms. Lawler generally about the risk of flooding and the dangers of failing to carry flood insurance even if Navy Federal did not require it as a condition of offering financing.

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[12] Count III of Ms. Lawler's Complaint only referred to the Sale Contract between Ms. Lawler and the Seller; it does not discuss either the Note or Deed of Trust – the only contracts between Navy Federal and Ms. Lawler. APP 023. Paragraph 141 of Ms. Lawler's Complaint specifically refers to the "contract to purchase the property." *Id.* Paragraph 146 simply refers to "the contract." APP 024. The other two paragraphs in Count III that refer to any "contract" omit Navy Federal. APP 023.

Ms. Lawler, as part of her application for financing from Navy Federal, executed the URLA, wherein she expressly represented and acknowledged, through her signature, that Navy Federal had not made any representations to her about the Property or the Property's condition or value. *See* APP 104 (URLA at Section IX). Specifically, Section IX of the URLA, titled "Acknowledgment and Agreement," stated:

> Each of the undersigned specifically represents to Lender and to Lender's actual and potential agents, brokers, processors, attorneys, insurers, servicers, successors and assigns and agrees and acknowledges that: . . . (10) neither Lender nor its agents, brokers, insurers, servicers, successors or assigns has made any representation or warranty, express or implied, to me regarding the property or the condition or value of the property.

Id.

Ms. Lawler cannot plausibly claim that Navy Federal misled her into agreeing to the Note or Deed of Trust when she expressly stated as part of her application that Navy Federal ***had done no such thing.*** *See Sedlock v. Moyle,* 222 W. Va. 547, 551, 668 S.E.2d 176 (2008); *see also Stanley v. Huntington Nat'l Bank*, 492 F. App'x 456, 460 (4th Cir. 2012) (applying West Virginia law and noting that a party cannot avoid the unambiguous terms of a contract rider); *Lavis v. Reverse Mortg. Sols., LLC,* 2018 U.S. Dist. LEXIS 78190, at *15-18 (S.D. W. Va. May 9, 2018) (plaintiff's claim of unconscionable inducement dismissed because plaintiff signed loan documents that contained accurate terms of her loan).

Furthermore, Ms. Lawler cannot plausibly claim that she relied on Navy Federal's alleged omission about the Property's flood history or likelihood of flooding because, by her own admission, she had independent and superior knowledge that the Property was a flood risk. The reason Ms. Lawler approached Navy Federal to ask about flood zones and flood insurance in the first place was because she received an email stating that the Property was at least partially located in a special flood hazard zone. APP 049. The Seller directed her real estate agent to inform Ms.

Lawler that the Property was in a flood zone on June 27, 2016, and a day later, Ms. Lawler contacted Navy Federal, stating that the Seller has mentioned receiving "some type of letter" regarding flood insurance. APP 047, 771, 780.

Finally, Navy Federal notified Ms. Lawler about flooding risks generally as part of the loan disclosures required by the CFPB. APP 158-84. The CFPB Home Loan Toolkit Navy Federal sent Ms. Lawler on July 5, 2016 contained a section titled "Determine if you need flood insurance":

> Flooding causes more than $8 billion in damages in the United States in an average year. You can protect your home and its contents from flood damage. Depending on your property location, your home is considered either at high-risk or at moderate-to-low risk for a flood. Your insurance premium varies accordingly. ***You can find out more about flood insurance at FloodSmart.gov. Private flood insurance could also be available. Although you may not be required to maintain flood insurance on all structures, you may still wish to do so,*** and your mortgage lender may still require you to do so to protect the collateral securing the mortgage. ***If you choose to not maintain flood insurance on a structure, and it floods, you are responsible for all flood losses relating to that structure.***

APP 183 (emphasis added). Navy Federal, via the CFPB Home Loan Toolkit, explicitly informed Ms. Lawler of the risks associated with a failure to obtain flood insurance, that she could purchase private flood insurance if she so desired and, importantly, that she would be responsible for any losses caused by flooding in the absence of flood insurance.

Given all of the above, it was unreasonable for Ms. Lawler to solely rely on Navy Federal's statement, based on the flood hazard determination form from CoreLogic, that the Property was not in a special flood hazard zone as an assurance that there was no risk that the Property might flood, or that it would not be prudent for Ms. Lawler to purchase flood insurance to mitigate any risk presented by potential flooding, given the Property's location. Ms. Lawler knew at a minimum that the Property was likely in or near a flood zone, that water had previously intruded into the Property, and Navy Federal explained to her the risks of failing to purchase flood insurance.

Nor does Ms. Lawler's Complaint plausibly allege that Navy Federal knew that its representation about the Property's flood zone status was wrong. Her Complaint alleges that Navy Federal must have known that the Property was in an AE flood zone because it had held a prior mortgage on the Property for a different borrower. APP 008-09. But if Navy Federal's vendor CoreLogic had not informed Navy Federal that the Property was in a flood zone when Navy Federal was considering Ms. Lawler's loan application, on what basis can Ms. Lawler plausibly assume that Navy Federal would have received different flood zone information in connection with a different loan application? And as stated in Sections II.A-B above, under the Act, not only was Navy Federal entitled to rely on CoreLogic's determination in connection with Ms. Lawler's loan, but Navy Federal was prohibited from relying on a prior determination older than seven years when making a new loan. 42 U.S.C. § 4104b(d), (e).

Ms. Lawler cannot state a claim for fraudulent inducement. This Court should affirm the Circuit Court's dismissal of Count III.

B. Ms. Lawler's Claims of Common Law Negligence Were Properly Dismissed.

The Court should also affirm dismissal of Ms. Lawler's Common Law Negligence claim (Count V) because the claim is fashioned as a negligent training and supervision claim, APP 027, yet contains no other allegations regarding negligent acts by any of Navy Federal's employees.[13] Further, Ms. Lawler fails to allege that a special relationship existed that could be the source of an independent tort duty beyond the Note and Deed of Trust.

[13] The Complaint specifically alleges that Navy Federal failed "to train, supervise, monitor or otherwise control its employees to ensure that its employees properly used proper and lawful legal documents when negotiating, creating and issuing secured loans related to real property in West Virginia." APP 027.

1. The Complaint Does Not Allege Acts of Negligence by Employees.

A negligent training and supervision claim must first make an underlying showing of negligence by an employee and then demonstrate that the employer negligently trained or supervised the employee. *Carroll v. USAA Sav. Bank,* 2017 U.S. Dist. LEXIS 28548, at *7 (S.D. W. Va. Mar. 1, 2017). As a predicate, the Complaint needs to allege that Navy Federal's employee committed a negligent act to survive a motion to dismiss a negligent supervision claim. *See Taylor v. Cabell Huntington Hosp., Inc.,* 208 W. Va. 128, 134, 538 S.E.2d 719 (2000); *see also Heslep v. Americans for African Adoption, Inc.,* 890 F. Supp. 2d 671, 687 (N.D. W. Va. 2012).

Ms. Lawler's Complaint alleges nothing more than unsupported boilerplate claims – that Navy Federal "negligently failed to train, supervise, monitor or otherwise control its employees to ensure that its employees properly used proper and lawful legal documents when negotiating, creating and issuing secured loans related to real property located in West Virginia." This is fatal to her claim even under the notice pleading standard. *Malone v. Potomac Highlands Airport Auth.,* 237 W. Va. 235, 240, 786 S.E.2d 594 (2015).

Additionally, the closing documents incorporated by reference into the Complaint plainly state that third-party vendor CoreLogic performed the flood determination for the Property, not Navy Federal. APP 087, 090. The record is devoid of any facts suggesting that Navy Federal, or any of its employees, were negligent in relying on CoreLogic's flood determination. This is also like *Geary*, discussed above at 25-26. In *Geary,* the plaintiff brought negligence and breach of contract claims against her lender after she learned that a parcel of real property she purchased was located in a flood zone. 2020 W. Va. LEXIS 2, at *2-6. Before closing, the lender provided the plaintiff with a notice from its vendor, who had erroneously declared that the parcel was not located in a Special Flood Hazard Area. *Id.* at *5-6. Plaintiff alleged that the lender had negligently determined the property was not in a flood zone. *Id.* at *6-7. This Court, in affirming the circuit

court's grant of summary judgment in favor of the lender, held that the lender had not breached any duty to plaintiff because the lender had not performed the flood determination, and there was no evidence to establish that the lender was negligent in relying on its contractor's determination. *Id.* at *8. Again, even under liberal pleading standards, Ms. Lawler must plead some fact demonstrating Navy Federal's negligence.

2. There Is No Special Relationship Between Ms. Lawler and Navy Federal Giving Rise to a Duty in Negligence.

Ms. Lawler also fails to allege facts suggesting that there could be any tort liability based on her relationship with Navy Federal. Navy Federal owed her no duty of care in negligence. As a general rule, "[t]ort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation." *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 614, 567 S.E.2d 619 (2002). This Court has referred to the sort of relationship where tort liability may arise as a "special relationship." *See, e.g., Aikens v. Debow,* 208 W. Va. 486, 499, 541 S.E.2d 576 (2000). "The existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected ***differently from society in general.***" *Id.* (emphasis added). "In the lender-borrower context, a special relationship may exist where a lender performs services not normally provided by a lender to a borrower." *Tinsley v. OneWest Bank, FSB,* 4 F. Supp. 3d 805, 839 (S.D. W. Va. 2014) (citation omitted).

The Complaint does not allege that Navy Federal provided special services to Ms. Lawler different from those it provides to other borrowers. It simply states that Ms. Lawler had a longstanding banking relationship with Navy Federal and that she asked Navy Federal questions about the home buying process. APP 011-12. This is not enough to create a "special relationship." *Branch Banking & Trust Co. v. Meridian Holding Co., LLC*, 2020 U.S. Dist. LEXIS 67951, at

*26-28 (S.D. W. Va. Apr. 17, 2020) (noting that there was no special relationship between lender and borrower where the bank transferred account to a specialized unit that was personally managed by a high-ranking employee); *cf. Glascock v. City Nat'l Bank of W. Va.*, 213 W. Va. 61, 67, 576 S.E.2d 540 (2002) (holding "where a lender making a construction loan to a borrower creates a special relationship with the borrower by maintaining oversight of, or intervening in, the construction process, that relationship brings with it a duty to disclose any information that would be critical to the integrity of the construction project.")

Ms. Lawler alleges that Navy Federal failed to properly train or supervise its employees to ensure that they "used proper and lawful legal documents when negotiating, creating and issuing secured loans related to real property located in West Virginia." APP 027. But this alleged duty arose out of the standard relationship between a lender and a borrower; nothing in Ms. Lawler's Complaint suggests that this obligation was unique to either her or Navy Federal, or otherwise not applicable to all lender-borrower relationships. *See Hanshaw v. Wells Fargo Bank, N.A.,* 2015 U.S. Dist. LEXIS 121086, at *57 (S.D. W. Va. Sept. 11, 2015). There can be no negligence claim where there is no duty of care to begin with. Furthermore, as noted above in footnote 7, every court that has examined whether a purported violation of the Act gives rise to a state law negligence claim has answered that question in the negative.

C. This Court Should Affirm Dismissal of Ms. Lawler's Breach of Contract Claim.

The Court should also affirm dismissal of Ms. Lawler's Breach of Contract Claim (Count II). Ms. Lawler lumped all of the named defendants together, including Navy Federal, the Seller, and the real estate agents involved in the transaction, alleging simply that these parties collectively "breached their contractual agreements[.]" APP 022. Ms. Lawler does not distinguish between the Sale Contract – to which Navy Federal was not a party – and the Deed of Trust and Note.

Despite this ambiguity in her pleading, and this Court's recent decision in *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 854 S.E.2d 870 (2020), Ms. Lawler's Complaint nonetheless fails to state a claim upon which relief can be granted. First, Navy Federal was not a party to the Sale Contract. Therefore, any allegation that Navy Federal breached the Sale Contract must be dismissed. *See Weber v. Wells Fargo Bank, N.A.*, 2021 U.S. Dist. LEXIS 40198, at *16 (N.D. W. Va. Mar. 4, 2021).

The Complaint also fails to allege that Navy Federal violated the terms of the Note or Deed of Trust – the only relevant contracts between Navy Federal and Ms. Lawler. Neither document contains an obligation for Navy Federal to have disclosed to Ms. Lawler "the known defects that affected this property" or "the full extent of the problems and prior damage to the property." APP 022. Quite the opposite, given Ms. Lawler's acknowledgment on the URLA that Navy Federal made no such representations. APP 104. Neither the Note nor Deed of Trust contains a term that imposes the obligation or contractual duty that Ms. Lawler alleges Navy Federal breached.

D. This Court Should Affirm Dismissal of Ms. Lawler's Claims Under the West Virginia Consumer Credit and Protection Act.

Finally, the Court should affirm dismissal of both of Ms. Lawler's WVCCPA claims (Count I, APP 019-21) for failure to state a claim via either W. Va. Code § 46A-2-121 or § 46A-6-104.

1. The Statute of Limitations Bars the WVCCPA Claims.

This Court should affirm dismissal of Ms. Lawler's WVCCPA claims because they are time-barred. Claims under the WVCCPA must be brought within four years of a violation. W. Va. Code § 46A-5-101(1); *Harper v. Jackson Hewitt, Inc.*, 227 W. Va. 142, 152-53, 706 S.E.2d 63 (2010). The latest that any violation of the WVCCPA by Navy Federal could have occurred would have been the date of Ms. Lawler's closing on the Property, which occurred on August 19,

2016. APP 009, 014, 019-21. Ms. Lawler did not file her Complaint until September 11, 2020, twenty-three days after the latest day on which the limitations period could have run.

Any argument that these claims are saved by the discovery rule is unavailing under the five-step analysis supplied by *Dunn v. Rockwell*, 225 W. Va. 43, 52, 689 S.E.2d 255 (2009):[14]

Step 1: The statute of limitations for claims under the WVCCPA is four years. W. Va. Code § 46A-5-101(1).

Step 2: According to the Complaint, the elements of Ms. Lawler's WVCCPA claims all occurred prior to her closing on the Property and Mortgage Loan on August 19, 2016. APP 009, 014, 019-21. The theory underpinning Ms. Lawler's WVCCPA claim as pleaded is that Navy Federal unconscionably induced her to purchase property that flooded by telling her, by an email dated July 1, 2016, APP 013, that flood insurance was not required for the Property (based on information provided to Navy Federal by CoreLogic), when in fact it was. APP 019-21.

Step 3: The discovery rule does not save Ms. Lawler's claims. The date on which Navy Federal sent that email (July 1, 2016) is the date on which Ms. Lawler "kn[ew], or by the exercise of reasonable diligence should have known," *Dunn*, 225 W. Va. at 53, that Navy Federal may not have provided correct information to her. This is because Ms. Lawler had independent knowledge that the Property, or at least a portion of it, may have been in a special flood hazard zone, before she ever contacted Navy Federal. APP 047-50, 780-81. She thus had knowledge of the basis for any cause of action under the WVCCPA as soon as Navy Federal provided information to her in a July 1, 2016 email that contradicted what she independently already knew about the Property's flood risk, and certainly before closing on August 19, 2016.

[14] Navy Federal notes that cases such as *State ex rel. 3M Co. v. Hoke*, 244 W.Va. 299, 852 S.E.2d 799 (2020), have held that the discovery rule applies to WVCCPA claims brought by the Attorney General, and thus Navy Federal assumes but does not concede for the purposes of this argument that the rule applies.

Step 4: No tolling applies. Ms. Lawler has not alleged that Navy Federal fraudulently concealed any facts that prevented her from discovering her potential cause of action. Again, she cannot – because it was Ms. Lawler, not Navy Federal, who had prior knowledge that the Property may have actually been in a special flood hazard zone. APP 047-50, 780-81.

Step 5: No other tolling doctrine has been alleged that could stay the limitations period.

The limitations period expired at the latest on August 19, 2020, four years after the closing date for the Property and Mortgage Loan, twenty-three days before Ms. Lawler filed suit. Ms. Lawler's WVCCPA claims are untimely and should be dismissed

2. Ms. Lawler's Claim for Violation of W. Va. Code § 46A-6-104 Fails Because Navy Federal Did Not Offer Ms. Lawler Goods or Services for Sale or Lease.

Count I was also properly dismissed to the extent it alleges a violation of W. Va. Code § 46A-6-104 because the Mortgage Loan falls outside the definition of instruments or transactions to which Article 6 of the WVCCPA applies. While the statute does apply to some kinds of loans – for example, "revolving loan accounts" – it does not apply to residential mortgage loans.

Article 6 of the WVCCPA concerns general consumer protection: "[t]he Legislature Legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition." W. Va. Code § 46A-6-101(1). The WVCCPA states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." W. Va. Code § 46A-6-104. The term "trade or commerce," as defined in this section of the WVCCPA, means "the advertising, offering for sale, sale or distribution of any goods or services and shall include any trade or commerce, directly or indirectly, affecting the people of this state." W. Va. Code § 46A-6-102(6).

The term "sale" is defined as "any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit." W. Va. Code § 46A-6-102(5).

This Article does not apply to Navy Federal's actions, nor the Note or Deed of Trust, as described in Ms. Lawler's Complaint because Navy Federal did not offer Ms. Lawler any goods or services for sale or lease. It assisted Ms. Lawler in financing her purchase of the Property and ultimately entered into the Note and Deed of Trust. APP 014, 020, 076-144. Under West Virginia law, Navy Federal's actions do not fall within Article 6 of the WVCCPA.

Although this Court has not yet reached this conclusion, the United States District Court for the Southern District of West Virginia has consistently held that home-secured loans are not a sale of goods or services under the WVCCPA. First, in *Kennedy v. BAC Home Loans Servicing, LP,* 2013 U.S. Dist. LEXIS 133173 (S.D. W. Va. Sept. 18, 2013), the plaintiffs brought claims under the WVCCPA against their mortgage servicer after their home had been destroyed by a fire; the insurer sent the servicer a check for the payoff, but the servicer nonetheless instituted collections actions against the plaintiffs. *Id.* at *1-4. In determining the correct statute of limitations, the court held that the mortgage did not fall within any of the definitions contained in Article 6 of the WVCCPA. *Id.* at *15-16.

The court reached the same conclusion in *Hanshaw,* where the plaintiffs alleged that they were unconscionably induced to enter into a home loan issued by Wells Fargo based on a false and inaccurate appraisal. 2015 U.S. Dist. LEXIS 121086, at *2-3. The plaintiffs fell behind on their payments, and Wells Fargo refused to modify the loan. *Id.* at *3-5. The plaintiffs then brought a variety of claims against Wells Fargo under both common law and the WVCCPA. *Id.* at *6. In analyzing Wells Fargo's statute of limitations arguments, the district court held that the home loan

was neither a "revolving charge account" nor a "revolving loan account" nor a "sale" as defined in Article 6 of the WVCCPA. *Id.* at *18.

Finally, in *Miller v. JPMorgan Chase Bank, N.A.*, 2018 U.S. Dist. LEXIS 177380 (S.D. W. Va. Oct. 16, 2018), the plaintiff sued his lender under the WVCCPA when it failed to disburse insurance proceeds related to a roof repair. *Id.* at *2-4. The plaintiff argued that, as a "mortgage servicer," his lender was engaged in "trade and commerce," and thus its conduct fell within § 46A-6-104. *Id.* at *7-8. The court examined the statutory language of Article 6, held "that the mortgage loan in question is not a sale of a good or service" and dismissed the Article 6 claim. *Id.* at *9.

This conclusion is also supported by this Court's decision in *State ex rel. Morrisey v. Copper Beech Townhome Cmtys. Twenty-Six, LLC,* 239 W. Va. 741, 806 S.E.2d 72 (2017). *Morrisey* dealt with whether the WVCCPA "applies to and regulates the relationship between a landlord and tenant under a lease for residential real property." *Id.* at 743. The West Virginia Attorney General had brought suit against the defendant, alleging that the terms in the defendant's leases included fees and charges that violated the WVCCPA. *Id.* The Court specifically reviewed §§ 46A-6-101 to -106, and found that the WVCCPA's "deceptive practices provisions" do not regulate residential leases of real property, noting that the legislature narrowly drafted the definitions in Article 6. *See id.* at 751. The Court noted that the legislature was free to amend the section to include broader language, but that in light of its failure to do so, the Court would not "arbitrarily read into the deceptive practices provisions that which it does not say." *Id.* This same logic applies to Ms. Lawler's Complaint. Article 6 of the WVCCPA does not cover mortgage loans. *See* W. Va. Code §§ 46A-6-102 to -106.

3. Navy Federal did not Unconscionably Induce Ms. Lawler to Enter into Any Contract.

The Court should affirm dismissal of the allegations of Count I that rely on alleged violations of W. Va. Code § 46A-2-121 for essentially the same reasons that the Court should affirm dismissal of Ms. Lawler's claim for Fraud in Inducement to Contract (Count III). (*See* Section IV.A.) With respect to unconscionable inducement, West Virginia generally equates such conduct with fraud. *One Valley Bank of Oak Hill, Inc. v. Bolen,* 188 W. Va. 687, 691, 425 S.E.2d 829 (1992) ("However, W. Va. Code, 46A-2-121 [1974], expressly deals with conduct that is 'unconscionable' which we have equated with fraudulent conduct.") There is no set of facts under which the Court could find that Navy Federal acted in an unconscionable manner with respect either the Sale Contract or the Mortgage Loan.

The WVCCPA does not define the term "unconscionable." *Herrod v. First Republic Mortg. Corp.,* 218 W. Va. 611, 617, 625 S.E.2d 373 (2005). However, courts have looked to the definition of the term in the Uniform Consumer Credit Code. "[T]he principle of unconscionability 'is one of the prevention of oppression and unfair surprise and not the disturbance of reasonable allocation of risks or reasonable advantage because of superior bargaining power or position.'" *Id.* (quoting Uniform Consumer Credit Code, § 5.108 cmt. 3, 7A U.L.A. 170 (1974)). *See also Drake v. W. Va. Self-Storage, Inc.,* 203 W. Va. 497, 500, 509 S.E.2d 21 (1998). An "inducement by unconscionable conduct claim is predicated solely on the process leading up to contract formation and entirely independent of any showing of substantive unconscionability." *Alig v. Quicken Loans, Inc.,* 2016 U.S. Dist. LEXIS 194382, at *21 (N.D. W. Va. June 2, 2016).

Ms. Lawler does not allege that the terms of the Sale Contract (to which Navy Federal is not a party) or the Note or Deed of Trust were themselves unconscionable. Instead, Ms. Lawler specifically alleges that Navy Federal's conduct inducing the contracts was unconscionable. As

set forth above in Section IV.A.i, Navy Federal could not have unconscionably induced Ms. Lawler to enter into the Sale Contract because she had already agreed to the contract when she first asked Navy Federal whether the Property needed flood insurance. APP 049. Further, as set forth above in Section IV.A.ii, Navy Federal could not have unconscionably induced Ms. Lawler to enter into the Mortgage Loan because, in applying for financing from Navy Federal, Ms. Lawler explicitly stated that Navy Federal had made no representations about the condition or value of the Property. APP 104. Ms. Lawler also had independent knowledge of the Property's risk of flooding, APP 047-50, 780-81, and Navy Federal informed her of her risk if she elected not to purchase flood insurance. APP 183. The fact that Ms. Lawler was allegedly an unsophisticated, first-time home buyer, APP 011-12, does not mean that her arms-length transaction with her mortgage lender was unconscionable or fraudulent.

4. To the Extent that Unconscionable Conduct Under § 46A-2-121 Extends Beyond Fraud, the Court Should Nonetheless Affirm Dismissal of Ms. Lawler's Claim for Violation of § 46A-2-121.

The Court should affirm dismissal of Count I of Ms. Lawler's Complaint even if the alleged unconscionable conduct implicated by § 46A-2-121 extends beyond fraud. In *Alig,* the United States District Court for the Northern District of West Virginia suggested that unconscionable conduct can also consist of "false statements and withholding facts from plaintiffs." 2016 U.S. Dist. LEXIS 194382, at *24. The court highlighted that this conduct included "deceit," which encompassed the defendant lender's "attempts to prejudice or influence appraisers [to provide inflated values that met or exceeded the lender's targets] but also the [lender's] withholding of such practice from borrowers." *Id.* at *26-27.

The Complaint's allegations of Navy Federal's conduct fall far short of the conduct described as "deceit" in *Alig.* Ms. Lawler averred only that Navy Federal must have known of the Property's flood history through its prior relationship with the Property, and that it failed to provide

her with that information when it told her that the Property did not require flood insurance. APP 008-09. But even if Navy Federal previously received a flood determination placing the Property in a special flood hazard zone (though again, the Complaint does not provide a plausible basis from which to make that assumption), Navy Federal was not only entitled, but was required by law to rely on the new flood zone determination made by CoreLogic. 42 U.S.C. § 4104b(d). The result is that Navy Federal's reliance on CoreLogic's flood zone determination was reasonable, and there is no plausible basis for a claim that Navy Federal deceitfully withheld information from Ms. Lawler. *Id.*; *see also Geary,* 2020 W. Va. LEXIS 2, at *8.

5. Portions of the Relief Requested by Ms. Lawler for Navy Federal's Alleged Violation of the WVCCPA are Unavailable.[15]

Finally, Navy Federal notes that Ms. Lawler's request for statutory penalties under § 46A-5-106 for Navy Federal's alleged violations of the WVCCPA – even if she successfully pled and proved such claims, which she cannot – is unavailable under West Virginia law. That section of the WVCCPA simply provides that the court may increase an award made under § 46A-5-101 for inflation based on the consumer price index. W. Va. Code § 46A-5-106. It does not refer to, mention, or otherwise provide for any statutory penalties.

CONCLUSION

For the foregoing reasons, Navy Federal respectfully requests that this Court affirm the Circuit Court's decision to grant Navy Federal's Motion to Dismiss with prejudice.

[15] Ms. Lawler conceded in the District Court that because she sold the Property April 16, 2021, her request for cancellation of the debt and injunctive relief is now moot. APP 511.

Dated: June 6, 2022

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CERTIFICATE OF SERVICE

I, the undersigned counsel for the Respondent, do hereby certify that service of the foregoing **BRIEF OF RESPONDENT NAVY FEDRAL CREDIT UNION** was had upon the parties, as set forth below, by mailing a true copy thereof, by United States Mail, postage prepaid, this 6th day of June, 2022.

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