NO. 22-0035

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GARY DETEMPLE,

Petitioner,

v.

AMERICAN ADVISORS GROUP,
a California corporation,

Respondent.

(ON APPEAL FROM THE
CIRCUIT COURT OF OHIO
COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 17-C-249)

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

This appeal arises from Petitioner Gary DeTemple's abusive and opportunistic use of West Virginia's consumer protection statutes for commercial gain. The underlying loan transaction involves a home equity conversion mortgage ("HECM") that Mr. DeTemple obtained from Respondent American Advisors Group ("AAG").[1] The HECM is a unique loan product. It is a non-recourse loan only available to individuals at least 62 years old and who own and reside in their primary residence. "The product enables seniors to convert untapped home equity into cash through a lump sum distribution or through a series of payments from the lender to the borrower, without any [immediate] repayment of principal or interest . . . ."[2] An obligation to repay only arises in an event of maturity, namely either the recipient's death or sale of the encumbered property.

Mr. DeTemple applied for a HECM loan. He used the proceeds to fund the construction of two townhouses in Bethlehem, West Virginia, which he intended to sell for profit, through his construction business, Shadyside Construction ("Shadyside"), and his company Hubbard Townhouse, LLC ("Hubbard Townhouse"). Mr. DeTemple's commercial use of the HECM proceeds ultimately precluded him from pursuing consumer claims under the West Virginia Residential Mortgage, Lender, Broker and Servicer Act and the West Virginia Consumer Credit and Protection Act.

Background

On October 14, 2010, Mr. DeTemple purchased an undeveloped lot from William Chuchta III and Rebecca Ann Chuchta located on Hubbard Road, Bethlehem, West Virginia ("Hubbard

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[1] HECMs are a type of reverse mortgage.

[2] https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin08/reverse_mortgages.html (last visited May 3, 2022).

Property"). [J.A. at 104-06.] Mr. DeTemple constructed two townhouses on the Hubbard Property using his sole proprietorship, Shadyside. [J.A. at 80-81, 109-10.] The Hubbard Property offered Mr. DeTemple an entrepreneurial opportunity to develop and construct townhouses, which he intended to sell for profit.

Mr. DeTemple was not inexperienced in matters of business in general or in the real estate business in particular. Mr. DeTemple had decades of experience owning and operating a variety of different businesses. [J.A. at 81-85.] Mr. DeTemple testified that he owned "[p]robably 70" parcels of real property and that he routinely participated in real estate closings. [J.A. at 88-89.] For years, he operated businesses that sold boats, swimming pools, owned and leased real estate, and constructed buildings. [J.A. at 81-85.] Mr. DeTemple's earlier commercial endeavors ultimately ended as a result of his criminal conduct. [J.A. at 668-71.]

On October 6, 1995, after a four-week trial, a jury found Mr. DeTemple guilty of **all** twenty felony counts, including three counts of arson, three counts of bankruptcy fraud and 14 counts of mail fraud related to Mr. DeTemple's setting multiple fires on his business and personal premises, his unlawful efforts to collect insurance payments for his arson, and his attempts to avoid creditors through a fraudulent bankruptcy proceeding.[3] *See, e.g.*, *United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998). The United States District Court for the Northern District of West Virginia sentenced Mr. DeTemple to 95 months in prison and three years of supervisory probation for this criminal conduct. [J.A. at 671.] Despite this set back, after his release, Mr. DeTemple continued

[3] Indeed, earlier in the litigation, the Honorable David J. Sims recused himself because he served as Mr. DeTemple's counsel as Mr. DeTemple pursued his insurer Allstate Insurance Company for policy limits and bad faith damages. *See DeTemple v. Allstate Ins. Co.*, No. 5:93-cv-131, 1999 WL 1276564 (N.D. W. Va. Oct. 19, 1999). Allstate refused to pay Mr. DeTemple any insurance proceeds based on its finding that Mr. DeTemple intentionally set the fire. Unsurprisingly given his arson and bankruptcy fraud convictions, the district court imposed sanctions against Mr. DeTemple for pursuing this litigation against Allstate "in bad faith, vexatiously, wantonly, and for oppressive reasons." *Id.* at *3.

to pursue his commercial interests in construction, remodels, and property rentals. These projects required capital and understandably lenders hesitated to lend to Mr. DeTemple.

Before obtaining the HECM loan, Mr. DeTemple prepared the Hubbard Property, including setting the foundation, but the project moved slowly. [J.A. at 95-96.] Mr. DeTemple needed money to finish the construction. [J.A. at 95-96.] The HECM loan with AAG made this possible.

> Timony: Could you have constructed the Hubbard Townhouse without the financing you got from this reverse mortgage?
>
> DeTemple: Well, I would have probably had to do something. And I suppose I'd have to think way back and review some of those documents and stuff. I mean, when you've got the foundation in and you're ready to build the rest of it, you sure don't want to leave the foundation sit there and not done. So I would have had to find a way.
>
> *Which, I mean, there was equity in my house, so why not go with -- I mean, I got my education on the program, why not go with that? I didn't have to make a payment on it, you know.*

[J.A. at 102 (emphasis added).]

Application and Closing

Mr. DeTemple contacted AAG in late December 2014 to learn more about HECMs. [J.A. at 91, 112.] As required by federal regulations, before allowing Mr. DeTemple to even apply, AAG required Mr. DeTemple to complete third-party financial counseling. [J.A. at 91-92, 113.] The counseling program educates prospective HECM applicants on the risks and costs associated with this loan product. As Mr. DeTemple explained:

> I remember they [HECM counselor] explained how it worked, how it started. When I say, "It," the reverse mortgage. And how it ended

> at death, sale or whatever. And they went through that and then they asked you the questions.
>
> And, yeah, I mean, it wasn't hard to understand. I mean, it was pretty straightforward.

[J.A. at 92.] After successfully completing his counseling, on March 13, 2015, Mr. DeTemple applied for his HECM loan with AAG. [J.A. at 293-99.]

AAG rejected Mr. DeTemple's first application because it incorrectly identified the address of his residence.[4] [J.A. at 293-95.] This error led AAG to instruct Mr. DeTemple to submit a new application that properly identified his primary residence at 2 Walnut Street, Bethlehem, West Virginia. [J.A. at 116-22.] AAG then worked with Mr. DeTemple to schedule a closing. At Mr. DeTemple's request, the closing was scheduled for September 2, 2015 at his residence. [J.A. at 537-38.]

Through an oversight, AAG retained West Virginia attorney Robert Milner ("Attorney Milner") for Mr. DeTemple. [J.A. at 137.] Attorney Milner informed Mr. DeTemple that he had:

> been contracted to perform a witness closing for your loan transaction. I have arranged for [Frank Pearson] who is a notary under my direct supervision to meet with you and witness the closing. Although I am not physically present, I am available by phone at [] to answer any questions that you may have, and, if you wish, to go through the closing paperwork over the phone with you. [Frank Pearson,] [m]y agent[,] is not permitted by the rules of the West Virginia State Bar to answer any questions regarding the closing. My primary mission is to answer any legal questions regarding the loan paperwork. Questions regarding the terms of the loan or charges on the settlement should be answered by your lender or the title company. I will assist you in that process if you wish.
>
> YOU HAVE THE RIGHT TO RETAIN PERSONAL COUNSEL TO ADVISE YOU AND CONDUCT THE CLOSING. PLEASE

[4] Mr. DeTemple incorrectly states that 4 Cross Street and 2 Walnut Street refer to the same property. In fact, they are different parcels immediately adjacent to each other. [J.A. at 294-95.] To complicate matters further, Mr. DeTemple also owned 2 Cross Street, which was one of his rental properties.

> ADJOURN THE CLOSING AND CONTACT THE TITLE COMPANY TO MAKE ARRANGEMENTS.
>
> By signing the below[,] you acknowledge receipt and review of this letter. You also acknowledge that neither I nor my closing agent has exerted any pressure, undue influence or coercion to induce you to sign the loan documents. You are signing the documents of your own free will.

[J.A. at 137 (emphasis in original).] Mr. DeTemple reviewed the disclosure, consented to it, and signed it. [J.A. at 137.] Even though Mr. DeTemple initially indicated he wanted Attorney Lantz to represent him in the closing, he chose to continue with the closing rather than rescheduling it. [J.A. at 137, 148-49, 153-82.] After receiving Mr. DeTemple's consent, the closing occurred.

The closing was uneventful. The notary, Frank Pearson, personally delivered the documents to Mr. DeTemple and notarized his signature. [J.A. at 148-49.] Mr. DeTemple reviewed and signed the closing papers, including the HECM Note, the Federal Truth-In-Lending, and Settlement Statement. [J.A. at 153-82.] The closing papers set forth the terms governing principal advancements, interest, repayment obligations at loan maturity, and identified closing costs and principal limits for distribution. [J.A. at 153-66.] The Truth-in-Lending Statement identified all the finance charges and settlements expenses associated with the HECM loan. [J.A. at 172-73.] Finally, the Settlement Statement, for the third time, identified all the costs related to this transaction. [J.A. at 179-84.] Despite receipt and review of these documents, Mr. DeTemple never called Attorney Milner nor asked any questions about the closing. [J.A. at 141, 148.] Ultimately, the loan closed successfully. On September 10, 2015, after deductions for finance charges and settlement expenses, Mr. DeTemple received the initial maximum distribution of $40,471.00.[5] [J.A. at 231.]

[5] The AAG loan provided DeTemple with a maximum credit limit of up to $79,660.00. [J.A. at 164.] DeTemple, however, was only able to obtain a maximum of $47,796.00 at closing. Following the deduction of loan charges and fees, DeTemple received $40,471.00 at the closing.

Construction of the Hubbard Townhouses

Mr. DeTemple immediately began construction on the Hubbard Property.[6] [J.A. at 95-96, 102.] Over the next two years, Mr. DeTemple used his construction firm, Shadyside, to finish construction. Shadyside framed the townhouses, installed a roof, and did the electrical, plumbing, HVAC work.[7] [J.A. at 95-96, 102, 220-235.] In all, Mr. DeTemple spent $56,000.00 finishing the construction of the first townhouse:

Payment Date	**Payee**	**Payment Amount**
10/02/15	Shadyside Construction	$2,000.00
10/07/15	Shadyside Construction	$6,000.00
02/23/16	Shadyside Construction	$3,000.00
03/17/16	Shadyside Construction	$1,800.00
03/17/16	Shadyside Construction	$2,000.00
02/27/17	Shadyside Construction	$2,600.00
03/13/17	Shadyside Construction	$2,100.00
03/23/17	Shadyside Construction	$2,000.00
06/13/17	Shadyside Construction	$9,500.00
06/13/17	Shadyside Construction	$3,000.00
06/20/17	Shadyside Construction	$10,000.00
06/29/17	Shadyside Construction	$12,000.00
Total		**$56,000.00**

The project succeeded, and, on June 27, 2017, Hubbard Townhouse sold one of the two units for $120,000.00. [J.A. at 214-16.]

[6] For reasons unknown, Mr. DeTemple only included black and white photographs of the renovations with the Joint Appendix. [J.A. at 183-213.]

[7] Through the HECM loan, in two years, Mr. DeTemple completed more of the construction of the Hubbard Property than in the five years prior to the loan.

Procedural History

Despite the commercial success of the Hubbard Property venture and even though he had used all of the HECM loan proceeds, on September 1, 2017, Mr. DeTemple filed a lawsuit against AAG seeking cancellation of his HECM loan. [J.A. at 981.] On December 28, 2017, Mr. DeTemple filed an Amended Complaint against AAG and Mr. Pearson. [J.A. at 10-17.] The Amended Complaint alleged six claims against AAG: (1) unauthorized practice of law (contempt); (2) unauthorized practice of law (negligence *per se*); (3) unjust enrichment; (4) violations of the West Virginia Residential Mortgage Lender, Broker and Services Act ("RMLA"); (5) unauthorized charges under the West Virginia Consumer Credit and Protection Act ("CCPA"); and (6) unconscionability or unconscionable inducement under the CCPA. [J.A. at 10-17.] Mr. DeTemple prayed that the circuit court would cancel the HECM loan, award him compensatory damages, award him civil penalties under the CCPA, award him his reasonable attorneys' fees under both the RMLA and CCPA, and award pre- and post-judgment interest. [J.A. at 16.] AAG denied Mr. DeTemple's allegations, the parties engaged in discovery, and the parties filed competing motions for summary judgment.

On June 3, 2021, both Mr. DeTemple and AAG filed motions for summary judgment. In its motion, AAG argued that no unauthorized practice of law occurred because Attorney Milner conducted the closing. [J.A. at 56-58.] Further, AAG asserted that Mr. DeTemple's remaining causes of action failed because the HECM loan was neither a "primary loan" nor a "consumer loan" under the RMLA and CCPA, because Mr. DeTemple lacked evidence that he primarily used the HECM loan proceeds for a personal or household purpose. [J.A. at 61-63.] AAG further argued that Mr. DeTemple had no claim for unconscionable inducement or unconscionability because there was no evidence supporting such a claim. [J.A. at 65-67.] Finally, AAG argued that

even if the consumer protection statutes were applicable, Mr. DeTemple's statutory claims nevertheless failed because: (1) there was no evidence that any of the fees were illegal or duplicative and (2) Mr. DeTemple failed to explain how AAG could be held liable for fees assessed by independent third-party service providers. [J.A. at 63-65.] After the completion of briefing, on September 24, 2021, the Circuit Court of Ohio County heard oral argument on the motions. [J.A. at 809-75.]

After oral argument, on September 30, 2021, the Circuit Court awarded summary judgment to AAG on all of Mr. DeTemple's claims. [J.A. at 2-5.] Thereafter, on October 12, 2021, Mr. DeTemple moved to amend or alter this judgment. [J.A. at 888-905.] After the completion of briefing, on December 16, 2021, the Circuit Court granted, in part, Mr. DeTemple's motion and withdrew one of several alternative grounds supporting its award of summary judgment to AAG. [J.A. at 7-9.] Mr. DeTemple appeals the Circuit Court's September 30 and December 16, 2021 Orders.

II. SUMMARY OF THE ARGUMENT

In its December 16, 2021 Order, the Circuit Court astutely observed that Mr. DeTemple was attempting to "have his cake and eat it too." This statement could not be more true. Before applying for this loan, Mr. DeTemple purchased an undeveloped lot on Hubbard Road, Bethlehem, West Virginia for $3,000.00. To fully develop the property, Mr. DeTemple needed more money. He applied for and received a HECM loan from AAG. The loan enabled Mr. DeTemple to access over $79,000.00 of equity in his residence to use to finish the construction of two townhouses. Mr. DeTemple took the maximum withdrawals from his HECM loan and paid his own construction firm, Shadyside, to finish construction. Prior to the Circuit Court's dispositive ruling, Mr. DeTemple sold one of the townhouses for $120,000.00. In other words, through receipt of this loan from AAG, Mr. DeTemple more than doubled his investment. Yet, despite this resounding

commercial success, on September 1, 2017, Mr. DeTemple filed his Complaint requesting the Circuit Court to cancel the very loan he just utilized and to impose civil penalties and attorneys' fees against AAG. The Circuit Court saw through Mr. DeTemple's charade.

With respect to the claims at issue in this appeal, Mr. DeTemple could not prove either unconscionable inducement or unconscionability under the CCPA.[8] Unconscionability requires a combination of substantive and procedural unconscionability. It requires evidence of terms so one-sided or a loan so unfair that the contract lacks fundamental fairness. None of these circumstances exist here. This HECM loan worked great for Mr. DeTemple. It infused cash into a project and allowed him to more than double his investment. There is nothing inherently unfair in this transaction. Likewise, no evidence supports unconscionable inducement. Mr. DeTemple fully understood the terms of the HECM loan and even participated in HECM counseling before applying. The HECM counseling explained how the HECM loan product worked, its costs, and its terms. Indeed, the HECM counseling is dispositive of the inducement claim. Mr. DeTemple also read and signed all of the loan closing documents, which meticulously disclosed each of the finance charges and settlement expenses he was assessed. There is no unconscionable inducement, here. Instead, Mr. DeTemple knowingly and willingly entered into the loan to his benefit.

Mr. DeTemple's remaining claims under the RMLA and CCPA similarly fail. Mr. DeTemple fails to meet the criteria under either act to pursue claims because he obtained the HECM for a commercial purpose and not primarily for "a personal, family, or household" purpose. The evidence is clear that Mr. DeTemple used the money from the loan to build the Hubbard Property townhouses, which he intended to sell for a profit through his limited liability company

[8] Mr. DeTemple elected not to appeal the Circuit Court's award of summary judgment on Counts I-III related to the alleged unauthorized practice of law.

Hubbard Townhouse, LLC. Under oath, Mr. DeTemple testified to this fact multiple times during his deposition. The checks to Shadyside for construction of the townhouse follow the distributions under the loan. Even without this evidence, Mr. DeTemple admits that he cannot meet his burden to show the HECM loan was a "primary loan" or a "consumer loan,"[9] which is necessary to bring the loan within the scope of either the RMLA or the CCPA. There is no evidence of any duplicative fees or joint venture to impose liability against AAG. As a result, there was no issue of fact and the Circuit Court correctly awarded summary judgment to AAG.

In the end, the Circuit Court correctly resolved this case. Mr. DeTemple lacked evidence to survive summary judgment on his claims under the RMLA and CCPA. This Court should affirm the Circuit Court's Orders in their entirety.

III. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is this case is completely unnecessary. This is a frivolous appeal under Rule 18(a)(2) of the West Virginia Rules of Appellate Procedure and allowing oral argument for this matter under these facts would not be prudent or a wise use of judicial time and resources.

IV. ARGUMENT

This Court reviews circuit court summary judgment decisions using a *de novo* standard of review. *See* Syl. Pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994). This Court "determine[s] whether the stated reasons for the granting of summary judgment by the lower court are supported by the record." *See Westfall v. Dunbar*, 517 S.E.2d 479, 484 (W. Va. 1999). Review requires "examin[ation] [of] whether there remains any genuine issues of fact to be tried and whether

[9] Certainly, Mr. DeTemple attempted to create issues of fact, but these efforts fail. Mr. DeTemple submitted answers to interrogatories months after the due date and close of discovery and tried to contradict his sworn discovery answers. This sham tactic does not create a factual dispute. Even if this Court indulged Mr. DeTemple and considered his belated and fabricated responses, at their core, Mr. DeTemple claims he lacks the ability to determine how he used the loan proceeds and he carries the burden of proof to submit evidence as to the "personal, family or household" purpose for the loan.

further inquiry regarding the facts is desirable to clarify application of the law." *See Blessing v. Nat'l Eng. & Contracting Co.*, 664 S.E.2d 152, 154 (W. Va. 2008).

A. The Circuit Court correctly granted summary judgment because Mr. DeTemple did not incur the HECM loan for primarily personal, family or household purposes.

In his Amended Complaint, Mr. DeTemple attempted to pursue claims against AAG under both the RMLA and the CCPA. [J.A. at 14-16.] For these statutes to apply, the HECM loan must either be a "primary mortgage loan," under the RMLA, and/or a "consumer loan," under the CCPA. The RMLA defines a "primary mortgage loan" as "any loan primarily for personal, family or household use that is secured by a mortgage, deed of trust or other equivalent consensual security interest." *See* W. VA. CODE § 31-17-1(m). Likewise, the CCPA defines a "consumer loan," in pertinent part, as a "debt [] incurred primarily for a personal, family, household or agricultural purpose." W. VA. CODE § 46A-1-102(15). All the claims at issue in this appeal hinge on Mr. DeTemple establishing his burden that he obtained the HECM loan "primarily for a personal, family, [or] household" purpose. Mr. DeTemple simply failed to produce evidence to create a material issue that he incurred the loan for consumer purposes.

AAG agrees with Mr. DeTemple that the statutory definitions used in West Virginia's consumer protection statutes have their origin in the Federal Truth in Lending Act ("TILA"). Like West Virginia's consumer statutes, TILA makes clear that loans made "primarily for business, commercial, or agricultural purposes" are exempt from its coverage. 15 U.S.C. § 1603. It is well-settled under TILA case law that when loan proceeds are primarily used for commercial purposes, TILA does not apply.[10] *See St. Hill v. Tribeca Lending Corp.*, 403 Fed. App'x 717 (3d Cir. 2010)

[10] Mr. DeTemple cites to a panoply of cases for the proposition that "[a] statement in the loan file that the loan is or is not for a covered purpose is generally dispositive." [Pet. Br. at 13.] The cited cases are inapposite. *See Stillman v. First Nat. Bank*, 791 P.2d 23 (Idaho Ct. App. 1990) (consumer arguing for ex post formulation of the lender's duty on commercial loan which would require monitoring of consumer spending on account); *Winkle v. Grand Nat. Bank*, 601 S.W.2d 559 (Ark. 1980) (same); *Toy Nat'l Bank of*

(despite home serving as collateral, loan is for commercial purposes when the pay-off of business debts was the "but-for" cause for the loan); *Weaver v. Real Estate Funding, LLC*, No. 09-101, 2010 WL 1662991 (D. Md. Apr. 21, 2010) (no TILA coverage for loan where proceeds were used for commercial purposes); *Dunn v. Meridian Mortg.*, No. 3:09-cv-18, 2009 WL 1165396 (W.D. Va. May 1, 2009), *aff'd*, 334 Fed. App'x 566 (4th Cir. 2009) (no TILA liability because the loan was used for business purpose); *Bokros v. Associates Fin., Inc.*, 607 F. Supp. 869 (N.D. Ill. 1984) (loan exempt where $9,000 of $17,000 borrowed had business purpose); *Gombosi v. Carteret Mortg. Corp.*, 894 F. Supp. 176 (E.D. Pa. 1995) (the fact that the creditor has attempted to comply with TILA is not evidence that the loan is covered by TILA); *Jones v. Luthi*, 586 F. Supp. 2d 595 (D.S.C. 2008), *aff'd*, No. 081762, 2009 WL 1144147 (4th Cir. 2009) (no TILA coverage for loans used to build homes for sale); and *Hinchliffe v. Option One Mortg. Corp.*, No. 08-2094, 2009 WL 1708007 (E.D. Pa. June 16, 2009) (coverage of TILA is not dependent on whether property securing loan was borrower's personal residence but instead whether use of proceeds was for personal purposes).

Mr. DeTemple applied for and received the HECM loan to fund the construction of two townhouses on Hubbard Road, which he intended to sell for a profit. Mr. DeTemple admitted this fact during his deposition. Under oath, Mr. DeTemple testified, in multiple instances, that he needed the loan to finish construction. [J.A. at 95-96, 102.] "I have a foundation and I have a building started and my money to put the rest of the building up was coming right out of that loan." [J.A. at 99.] "[A] bunch of that first money went was into that building." [J.A. at 96.] This

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Sioux City v. McGarr, 286 N.W.2d 376, 379 (Iowa 1979) (dealing with refinancing of obligations involving consumer and commercial purposes); *Sherrill v. Verde Capital Corp.*, 719 F.2d 364, 367 (11th Cir. 1983) (the purpose of the transaction is controlling, not the property on which a security interest is retained); *In re Denney*, No. 06-41877, 2007 WL 4302770 *3 (Bankr. W.D. Wash. Dec. 6, 2007) ("If the primary purpose of the loan at its inception was business, the borrowers' subsequent conduct is immaterial").

testimony, in and of itself, is wholly dispositive to the issue of the primary purpose of the loan. Mr. DeTemple's commercial venture was the "but for" cause for obtaining the AAG loan.

Moreover, Mr. DeTemple issued a series of checks totaling $56,000.00 through his construction firm, Shadyside, to complete construction of the first Hubbard Property townhouse. [J.A. at 220-30.] Theses checks follow the approximately $72,000.00 in loan proceeds Mr. DeTemple received from the HECM loan through the date he sold the first townhouse. [J.A. at 231-35.] In other words, Mr. DeTemple used the HECM proceeds to fund Shadyside's construction of the townhouse, which, in turn, he sold for a profit through Hubbard Townhouse, LLC. This is a clear commercial purpose.

Importantly, the TILA line of cases demonstrate that Mr. DeTemple carries the burden of proving that the loan was entered into primarily for personal purposes, as opposed to providing capital to his businesses. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 751 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974); *Gombosi v. Carteret Mortg. Corp.*, 894 F. Supp. 176, 180 (E.D. Pa. 1995). Mr. DeTemple cannot meet this burden because his deposition testimony makes the commercial purpose clear, and he admitted that he cannot provide exact dollar figures on how he used the HECM loan proceeds. [J.A. at 455-458 (explaining that "[b]ecause money is fungible, it is impossible to say exactly what these funds were used for" and "[i]t is impossible to provide exact dollar figures as detailed records were not maintained to track loan related spending beyond what has been produced").] Mr. DeTemple's effort to argue otherwise is both subterfuge and disingenuous.

In an attempt to evade his own sworn deposition testimony—almost one year after his unequivocal, unrehearsed statements concerning the commercial purpose of the HECM loan—DeTemple provided an interrogatory response purporting to explain that the HECM proceeds were

used for consumer purposes. [J.A. at 455-458.] The interrogatory response directly contradicted Mr. DeTemple's sworn deposition testimony.[11] [*Compare* J.A. at 95-96, 99, 102 *with* J.A. at 455-58.] It is patently absurd to suggest that Mr. DeTemple somehow spent more money remodeling a few rooms in his house than he spent building an entire new home from the foundation up, particularly when it is in clear contradiction to sworn deposition testimony. [*Compare* J.A. at 95-96, 99, 102 *with* J.A. at 456.]

Mr. DeTemple's deceptive obfuscation of his own sworn deposition testimony is unsurprising. Years ago, DeTemple sued Allstate Insurance Company ("Allstate") alleging that it engaged in bad faith in refusing to pay insurance proceeds for a fire DeTemple intentionally set. *See DeTemple v. Allstate Ins. Co.*, 1999 WL 1276564 (N.D. W. Va. 1999); *see also United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998) (affirming DeTemple's convictions for arson, wire fraud, and bankruptcy fraud). Consequently, Judge Stamp ordered Mr. DeTemple to pay Allstate's fees and costs, based on his finding that:

> Plaintiff Gary DeTemple attempted to defraud Allstate. He caused his house to be set on fire and then, notwithstanding his own criminal act, filed this lawsuit against Allstate seeking hundreds of thousands of additional dollars in damages. *It is clear that the lawsuit was filed in bad faith to perpetuate the fraud. Moreover, despite his criminal conviction, DeTemple continued to maintain his suit.*

See DeTemple, 1999 WL 1276564 at *2 (emphasis added).

In addition, Mr. DeTemple's counsel provided an affidavit attempting to analyze the traceability of the HECM loan proceeds.[12] Mr. DeTemple's deposition testimony belies his

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[11] *cf.* [J.A. at 95 ("I don't know that we did the vacation. It's just things that I wanted to do to my home and things that I was going to do on the Hubbard Townhouse. I was getting ready to build that building. Had all the land prepared.")]; *with* [J.A. 101-102 (explaining that HECM proceeds were used on the duplex [townhouse] and to refinish the rec room in his basement with no mention of any other expenditures).]

[12] AAG filed a motion to strike Mr. Causey's Affidavit. [J.A. 614-57.]

contention that, "at most, 4 transactions are traceable to the loan proceeds, which total $12,600." [J.A. 551.] Mr. DeTemple acknowledged that he had started the foundation and that the remaining monies to finance the construction of the townhouse were earmarked to come directly from the HECM proceeds. [J.A. at 99, 102-103.] There can be no better evidence than DeTemple's own unrehearsed admissions. It, again, defies all logic—and DeTemple's sworn testimony—to argue that DeTemple completed the construction of the townhouse (except for the foundation) for merely $12,600.00. [J.A. at 183-213.] This argument is simply not persuasive.

Moreover, the Causey Affidavit and DeTemple's sham discovery responses cannot be used to negate the clear and unequivocal testimony that DeTemple gave at his deposition. After all, this Court has adopted the "sham affidavit" rule, which provides that:

> To defeat summary judgment, *an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained.* To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.

Syl. pt. 3, *Tolley v. Carboline Co.*, 617 S.E.2d 508 (W. Va. 2005) (emphasis added). Here, the Causey Affidavit and DeTemple's subsequent discovery responses squarely contradict his deposition testimony. Moreover, DeTemple made no attempt to explain the inconsistencies between his testimony and the Causey Affidavit and his later discovery responses. In addition, DeTemple's counsel had more than adequate opportunities to examine DeTemple at his deposition. Likewise, to the extent the Causey Affidavit and DeTemple's subsequent discovery responses are based on evidence, that evidence would have been available—and known—to DeTemple before

his deposition. There is just no basis to conclude that DeTemple's deposition testimony was the product of confusion.

Based on the foregoing, DeTemple's deposition testimony is binding and makes clear that he was not acting as a consumer when he applied for his HECM loan, and he did not use the loan proceeds primarily for a consumer purpose. Notwithstanding DeTemple's own admissions, DeTemple also admits that he cannot provide an accounting of how he used the HECM proceeds. [J.A. at 455-458.] This alone is dispositive because DeTemple concedes that he cannot meet his burden in showing that the HECM proceeds were used primarily for a consumer purpose. [J.A. at 455-458.]; *see Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 879 (W. Va. 1996) (explaining that, in granting summary judgment, the movant does not need to negate the elements of claims on which the non-moving party bears the burden at trial; rather, the non-moving party bearing the burden at trial must come forward with competent affirmative evidence to support the non-movant's claims). Thus, neither the RMLA nor the CCPA apply under the circumstances and this Court should affirm the Circuit Court's award of summary judgment to AAG.

B. Even if this Court finds that the RMLA and CCPA apply, the Circuit Court properly awarded summary judgment on Counts IV and V.

Even if the RMLA or the CCPA is found to apply, the Circuit Court's grant of summary judgment should be affirmed because Mr. DeTemple (a) failed to provide any evidence that AAG charged excessive fees or (b) explain how AAG can be held liable for alleged acts and/or omissions committed by independent third-party settlement service providers.

1. AAG cannot be held liable for the alleged acts and/or omissions of independent third-party settlement service providers.

DeTemple's Amended Complaint alleges that the third-party settlement services providers were agents of AAG or were in a joint venture with AAG. [J.A. 11-12.] These allegations,

however, are supported by no evidence—in the record or otherwise. A joint venture "is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge." Syl. Pt. 2, *Price v. Halstead*, 355 S.E.2d 380 (W. Va. 1987). This Court has noted certain distinguishing elements essential to the creation of a joint venture:

> As between the parties, a contract, written or verbal, is essential to create the relation of joint adventurers . . . . To constitute a joint adventure the parties must combine their property, money, efforts, skill, or knowledge, in some common undertaking of a special or particular nature, but the contributions of the respective parties need not be equal or of the same character. There must, however, be some contribution by each party of something promotive of the enterprise . . . . *An agreement, express or implied, for the sharing of profits is generally considered essential to the creation of a joint adventure, and it has been held that, at common law, in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses.* It has also been held, however, that the sharing of losses is not essential, or at least that there need not be a specific agreement to share the losses, and that, if the nature of the undertaking is such that no losses, other than those of time and labor in carrying out the enterprise, are likely to occur, an agreement to divide the profits may suffice to make it a joint adventure, even in the absence of a provision to share the losses.

Armor v. Lantz, 535 S.E.2d 737, 733 (W. Va. 2000) (quoting *Pownall v. Cearfoss*, 40 S.E.2d 886, 893-94 (W. Va. 1946)) (emphasis added) (ellipses in original). In reviewing whether a joint venture has been proven, this Court focuses on the presence or absence of an agreement, express or implied, among the alleged joint venturers to share in the profits and losses of an enterprise. Without such an agreement, these claims ordinarily fail.

In *Kerns v. Slider Augering & Welding, Inc.*, 505 S.E.2d 611 (W. Va. 1997), the plaintiff was injured in a mining accident. He sought recovery from his employer and the firm that hired his employer and for whom the plaintiff and his employer were working at the time the plaintiff was injured. In seeking recovery from his employer and the firm that hired his employer, the

plaintiff alleged that his employer and the firm that hired the employer were engaged in a joint venture. The *Kerns* Court rejected this argument and emphasized the fact that the plaintiff's employer was being paid a per-ton price for the coal extracted, and, therefore, there was no joint venture because there was no evidence that the two firms "agreed to share profits and losses." *Id.* at 619.

Here, as in *Kerns*, the third-party settlement service providers are AAG's independent contractors, rather than AAG's joint venturers. Indeed, AAG's contract with Timios, Inc. ("Timios") expressly states that Timios "is an independent contractor." [J.A. at 539-544.] There was no agreement to share in the profits and losses—AAG simply contracted with third parties to provide settlement services to close DeTemple's loan and pay fees for the services. [J.A. at 141, 497-99.] Without establishing any theory of vicarious liability, Mr. DeTemple's claims based upon third-party fees assessed at the closing must fail because these fees were not collected by or paid to AAG but, instead, were paid to third-party entities that are separate and distinct from AAG. [J.A. at 494-95, 498-99.] DeTemple has failed to cite any evidence of record that suggests AAG shared in profits or losses with the third-party settlement service providers. DeTemple's attempt to hold AAG vicariously liable for alleged acts or omission of third-party settlement services providers has no basis in law or fact. This Court should affirm the circuit court's award of summary judgment.

2. The challenged fees were not illegal, duplicative, or otherwise improper.

Additionally, Mr. DeTemple's claims against AAG also fail because he lacked evidence that the fees in dispute were duplicative, excessive, or unreasonable. Much of Mr. DeTemple's purported evidence that the fees were duplicative is that the descriptions provided for the fees in the HUD-1 are similar, but this is not evidence that Mr. DeTemple was double-charged for any service. Mr. DeTemple claims the following closing charges are excessive and duplicative:

1. $395 for a Settlement Closing Fee to FNC (Line 1102)[13];

2. $375 for an Attorney Closing Fee to Premier Lender Services (Line 1111)[14];

3. $595 for a Title Examination Fee to FNC (Line 1109); and

4. $295 for an Abstract or Title search to WFG National Title Insurance Company (Line 1110).

[J.A. at 242.] However, the allegedly duplicative fees were assessed and collected by ***different*** third-party settlement services providers for ***different*** settlement services.[15] (emphasis added).

DeTemple's argument also appears to rest on the notion that certain charges were not remitted to a West Virginia licensed attorney. AAG, however, is permitted to contract with third-party settlement service providers to perform the services that are identified on the HUD-1 Settlement Statement. In particular, DeTemple alleges RMLA violations based on the assertions that (a) he was charged for a service not actually provided and (b) AAG improperly collected an attorney fee at closing in excess of the fee remitted to Attorney Milner. [J.A. at 247]; *see also* W. VA. CODE § 31-17-8(m)(1). DeTemple notes that the HUD-1 indicated that $375 was being paid for an "Attorney Closing Fee." *Id.* Based on documents DeTemple obtained from Attorney Milner indicating that Attorney Milner received $325, DeTemple argues that AAG misrepresented the cost of Attorney Milner's services or otherwise violated West Virginia law by not remitting the entire $375 to Attorney Milner. This argument fails. Attorney Milner and the other settlement services providers were paid for services they provided to close DeTemple's HECM loan.

In *Sosa v. Chase Manhattan Mortg. Co.*, 348 F.3d 979, 983 (11th Cir. 2003), the plaintiff alleged that "Chase charged borrowers $50 for courier or messenger fees, that Chase paid only a

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[13] Line 1102 references Line 1102 on the HUD-1 Settlement Statement at [J.A. 176.]

[14] The HUD-1 mistakenly identifies Premier Lender Services, instead of Timios.

[15] As noted above, DeTemple was never charged for any services rendered with respect to his HECM loan application for the 4 Cross Street property.

portion of that fee to third-party contractors, and that Chase 'created the misimpression' that the fees were entirely paid to third-parties." 348 F.3d 979, 983 (11th Cir. 2003). In essence, in *Sosa*, as is the case here, the plaintiff alleged that the lender accepted funds for which it provided no services. In examining the adequacy of this allegation, the Eleventh Circuit found that:

> What is missing is an allegation that the portion of the charge that Chase retained was accepted other than for services actually performed, i.e., that Chase performed no services that would justify its retention of a portion of the fee.
>
> Not only does the complaint fail to allege that Chase did not perform any services, we do not believe that the borrowers could credibly make such an allegation. *It is undisputed that the charges were paid to Chase and that Chase arranged to have items delivered to complete the closing. Through its agents, therefore, Chase performed the deliveries that were the subject of the charges.* Moreover, even if Chase could not be credited with the actual delivery, Chase benefitted the borrowers by arranging for third party contractors to perform the deliveries. Under these circumstances, we find it impossible to say that Chase performed no services for which its retention of a portion of the fees at issue was justified.

348 F.3d at 983-84 (emphasis added). The same analysis applies here.

Here, AAG retained Timios to coordinate the closing for DeTemple's loan. [J.A. at 545-547.][16] In turn, Timios retained Attorney Milner, a West Virginia licensed attorney, to perform the loan closing. The HUD-1 indicates that an attorney closing fee was charged in the amount of $375, of which Timios paid Attorney Milner a total of $325. [J.A. at 176.] All amounts not paid to Attorney Milner were retained by Timios as payment for services provided by Timios, including, but not limited to, retaining Attorney Milner to perform DeTemple's loan closing, coordinating DeTemple's loan closing with Attorney Milner, and obtaining delivery of DeTemple's executed closing documents from Attorney Milner. [J.A. at 545-547.] Like *Sosa*,

[16] The HUD-1 erroneously identified Premier Lender Services, instead of Timios.

DeTemple cannot credibly assert that any portion of the attorney closing fee was accepted for services not actually performed. Through its independent contractors, AAG benefited Mr. DeTemple by arranging for third-party settlement services providers to perform necessary services to close the loan, which in turn earned DeTemple a handsome profit by allowing him to complete the development of the Hubbard Property. [J.A. at 539-547.]

Moreover, AAG's corporate designee, Victor Sanchez, explained the services provided for each disputed fee.[17] As it relates to the $395 Settlement Closing Fee paid to FNC, the settlement agent, the fee was paid to FNC for administering the loan closing, including gathering necessary loan documentation, obtaining and disbursing loan funds, and resolving any closing issues. [Resp. Ex. 13, Sanchez Dep. Tr. 50:8-25.] The $375 Attorney Closing Fee to Timios was for contracting with Attorney Milner, coordinating the closing, and obtaining closing documents. [J.A. at 139.] The Settlement Closing Fee (Line 1102) and the Attorney Closing Fee (Line 1111) were assessed for distinct closing services provided to DeTemple, were paid to separate and distinct settlement services providers, and were not paid to AAG.

Likewise, the $595 Title Examination Fee (Line 1109) paid to FNC and the $295 Abstract or Title search fee (Line 1110) paid to WFG were proper. For the Title Examination Fee (Line 1109), Mr. Sanchez clearly explained that "the title searches are conducted under the supervision of a West Virginia licensed attorney, they have to contract with a service provider for that, which in this case was WFG. And they contracted with a West Virginia licensed attorney to provide a title opinion [Attorney Brian Carr]. And with that information, they use that information in their

[17] The "Attorney Closing Fee" and all of the other challenged fees were adequately disclosed on the HUD-1 as required by applicable federal regulations. Indeed, HUD's regulation proscribe that "[c]harges for loan origination and title services should not be itemized, except as provided in these instructions." App. B to Part 3500, 24 C.F.R. Part 3500. HUD's regulations further require that "[t]he names of the recipients of the settlement charges . . . be included on the blank lines." The HUD-1 provided to DeTemple conformed with HUD's regulations in every respect.

title examination process, and that is reflected on 1109 . . . [of the HUD-1]." [J.A. at 494-95.] As explained, WFG contracted with attorney Brian Carr to perform the title search. [J.A. at 496, 537.] In turn, FNC obtains the information from the title opinion and creates transaction specific documents. [J.A. at 497.] AAG's use of third-party settlement services providers to close DeTemple's loan is standard operating procedure, and the fees charged are not illegal, duplicative, or otherwise improper.

AAG never charged DeTemple any fees related to the title work performed with respect to the ineligible 4 Cross Street property – duplicative or otherwise. Again, DeTemple initially applied for a HECM loan through AAG using an ineligible property. [J.A. at 500.] Lantz Law Offices performed the title services with respect to the ineligible 4 Cross Street property, not the 2 Walnut Street residence. [J.A. at 530-33.] Attorney Carr performed title services on 2 Walnut Street, not 4 Cross Street. [J.A. at 536-38.] These title services occurred on two different properties because DeTemple initially applied for a HECM loan using an ineligible property. Consequently, because DeTemple never paid any fees for title services in relation to the ineligible property, no duplicative work was performed in relation to DeTemple's HECM loan.[18]

Lastly, DeTemple argued that AAG overcharged him for the origination fee and the $595 Title Examination Fee because FNC "is not an unrelated third party." [J.A. at 255.] DeTemple relied on the RMLA, which provides that "[e]xcept for fees for services provided by unrelated third parties for appraisals, inspections, title searches and credit reports, no application fee is allowed whether or not the mortgage loan is consummated" and limits closing costs payable to

[18] DeTemple was not assessed any fees related to the services rendered concerning the 4 Cross Street property.

related entities. W. VA. CODE § 31-17-8(g), § 31-17-8(m)(4). DeTemple's position is in direct conflict with the definition of "Affiliated" set forth in the RMLA.

The RMLA defines "Affiliated" as "persons under the same ownership or management control. As to corporations, limited liability companies, or partnerships, where common owners manage or control a ***majority*** of the stock, membership interests, or general partnership interests of one or more such corporations . . . those persons are considered affiliated." W. VA. CODE § 31-17-1(b) (emphasis added). Interestingly, the term "Affiliated" appears nowhere outside of the definition section of the RMLA. Given this, the only reasonable interpretation of "unrelated third parties" necessarily entails the application of the defined term "Affiliated." *See Republic of Sudan*, 139 S. Ct. at 1058 ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of the same law."). Here, in AAG's case, FNC is not an affiliated company under the RMLA because AAG's President and 15.34% owner owns **49%** of FNC—less than majority. [J.A. at 492-493.] For purposes of the RMLA, AAG and FNC are unrelated third parties and the provisions capping certain fees for related entities are inapplicable. Thus, DeTemple's arguments concerning an illegal origination fee and $595 Title Examination Fee paid to FNC fail as a matter of law.

C. No evidence supports either unconscionability or unconscionable inducement.

Count VI of Mr. DeTemple's Amended Complaint seeks to cancel the HECM loan based on either unconscionable inducement or unconscionability under West Virginia Code § 46A-2-121. For unconscionability to exist, there must be "an overall and gross imbalance, one-sidedness or lopsidedness in a contract." *See* Syl. Pt. 7, in part, *Triple 7 Commodities, Inc. v. High Cntry. Mining, Inc.*, 857 S.E.2d 403 (W. Va. 2021). This balancing analysis focuses on both procedural and substantive unconscionability. *See* Syl. Pt. 6, *Horizon Ventures of W. Va. Inc. v. Am. Bituminous Power Partners, L.P.*, 857 S.E.2d 33 (W. Va. 2021). Procedural unconscionability

focuses on the "inequities, improprieties, or unfairness in the bargaining process and formation of the contract . . . . These inadequacies, include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed . . . ." Syl. Pt. 7, *Rent-A-Center, Inc. v. Ellis*, 827 S.E.2d 605 (W. Va. 2019). Conversely, substantive unconscionability focuses on the "unfairness in the contract itself[,]" and the Court focuses its analysis on "the commercial reasonableness of the contract terms, the purposes and effects of the terms, the allocation of the risks between the parties, and public policy concerns." Syl. Pt. 6, *Hampden Coal, LLC v. Varney*, 810 S.E.2d 286 (W. Va. 2018).

"The standard for unconscionable inducement is different and higher than that for procedural unconscionability." *See McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 286 (4th Cir. 2016). An inducement claim requires that the false promise caused an individual to surrender property to their detriment. *See, e.g., Bluestone Coal Corp. v. CNX Land Recs., Inc.*, No. 1:07-00549, 2007 WL 6641647, *5-6 (S.D. W. Va. Nov. 16, 2007). Reviewing the facts through this lens, Mr. DeTemple lacked evidence to survive summary judgment on this claim.

In *Lavis v. Reverse Mortgage Solutions,* 2018 WL 2171444 (S.D. W. Va. May 9, 2018), the District Court for the Southern District of West Virginia disposed of the same claim with similar facts. Specifically, Judge Berger examined an unconscionable inducement claim under the WVCCPA arising from an individual's dissatisfaction regarding a reverse mortgage loan. *See* 2018 WL 2171444 (S.D. W. Va. May 9, 2018). The *Lavis* court held that the borrower's participation in HECM counseling, along with the borrower's signature on the loan application and closing documents, defeated the borrower's unconscionable inducement claim under W. Va. Code § 46A-2-121(a). *Id.* at *6.

Like *Lavis*, the written documents of record, including the loan application, closing documents, and Certificate of HECM Counseling, were signed by DeTemple. Because West Virginia imposes a duty on "[a] party to a contract . . . to read the instrument", DeTemple's unconscionable inducement or unconscionability claim must fail. *See* Syl. Pt. 4, *Am. States Ins. Co. v. Surbaugh*, 745 S.E.2d 179 (W. Va. 2013). A "person who fails to read a document to which he places his signature does so at his peril." *See Kruse v. Farid*, 835 S.E.2d 163, 167 (W. Va. 2019) (quoting *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 910 (W. Va. 1982)). The written documents signed by DeTemple are fatal to his unconscionable inducement and/or unconscionability claim. DeTemple even acknowledges the HECM counseling he received: "there was equity in my house, so why not go with it – I mean, I got my education on the [reverse mortgage loan] program, why not go with that? I didn't have to make a payment on it, you know." [J.A. at 102-03.]

Nothing about this transaction is unconscionable. The AAG loan is an objectively fair transaction. As a result of the loan, DeTemple received a $79,660 line of credit, secured by his principal residence. Under the loan's terms, Mr. DeTemple is allowed to reside in his home, without any obligation to repay anything for as long as he lives in the home. As Mr. DeTemple admitted in his deposition, the loan benefited him because it allowed him to use the equity in his home to develop the Hubbard Property, which earned him a substantial profit. [J.A. at 102.] Consequently, nothing about this transaction is substantively unconscionable.

Nor is the AAG loan procedurally unconscionable. Mr. DeTemple is a sophisticated businessman who, for more than four decades, owned and operated a variety of residential and construction businesses. [J.A. at 80-82.] Until his convictions for arson, bankruptcy fraud, and wire fraud, Mr. DeTemple owned and operated a large commercial marina and pool business,

along with a significant number of rental properties.[19] [J.A. at 88.] Even today, Mr. DeTemple testified that he owns "probably 70" separate parcels of real property through Small Land Holdings of West Virginia, LLC. [J.A. at 87.] Relatedly, DeTemple has probably participated in more real estate closings than many real estate lawyers.[20] Most importantly, prior to entering into the loan, Mr. DeTemple received specific counseling regarding the nature of the HECM product and he took and passed a test that demonstrated his knowledge of the product. [J.A. at 91-92, 113-14.] This transaction is neither procedurally nor substantively unconscionable and this Court should affirm the circuit court's award of summary judgment on Count VI of the Amend Complaint.

V. CONCLUSION

Mr. DeTemple's statutory consumer protection claims fail because he cannot meet his burden of establishing that the primary purpose of his loan was consumer, rather than commercial. In fact, the evidence of record indicates that Mr. DeTemple's primary reason for obtaining the loan, and subsequent spending was commercial in nature. Even if found otherwise, Mr. DeTemple's claims nevertheless fail on the merits. The charges and fees assessed in connection with the loan were reasonable and authorized by federal and state law. Nor was the closing of the loan or the loan itself unconscionable. DeTemple received counseling on the loan product and received the benefit of the bargain he struck—earning a substantial profit from the development of the Hubbard Property. For these reasons, Respondent AAG respectfully requests this Court affirm the Circuit Court's Orders.

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[19] *See generally United States v. DeTemple*, 162 F.3d 279, 282 (4th Cir. 1998).

[20] When asked how many closings he has attended during his lifetime, DeTemple's reply was "[l]ess than 100." [J.A. at 89.] He later stated that the total number was "[m]aybe more" than 40. *Id.*

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CERTIFICATE OF SERVICE

I, Patrick C. Timony, counsel for Respondent American Advisors Group, do hereby certify that on **June 2, 2021**, I served the foregoing **Respondent's Brief** upon the following party:

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