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# [***Levine v. EverBank***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RKJ-52N1-DYMS-6506-00000-00&context=)

United States District Court for the Northern District of Georgia, Atlanta Division

November 2, 2017, Decided; November 2, 2017, Filed

CIVIL ACTION FILE NO. 1:17-CV-00826-SCJ-CMS

**Reporter**

2017 U.S. Dist. LEXIS 216996 \*

SAM L. LEVINE, Plaintiff, v. EVERBANK, FSB; HSBC BANK, N.A.; HSBC BANK USA, N.A. as Trustee for Opteum Mortgage Acceptance Corporation, Asset-Backed Pass-through Certificates, Series 2005-4; and SHAPIRO PENDERGAST & HASTY, LLP, Defendants.

**Prior History:** [*Levine v. Everbank FSB, 2017 U.S. Dist. LEXIS 214540 (N.D. Ga., May 5, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCC-W731-F04D-255D-00000-00&context=)

**Core Terms**

Lawsuit, allegations, motion to dismiss, notice, res judicata, default, amend, RECOMMEND, Deed, servicer, mortgage, parties, merits, fail to state, acceleration, requirements, days, foreclosure, asserts, written request, Lender, collateral estoppel, breach-of-contract, grounds, wrongful foreclosure, plaintiff's claim, claim for relief, foreclosure sale, cause of action, consent order

**Counsel:** **[\*1]**For Sam L. Levine, Plaintiff: Sam Louis Levine, LEAD ATTORNEY, Law Office of Sam Levine, LLC, Atlanta, GA.

For EverBank, FSB, HSBC Bank USA, N.A., as trustee for, Opteum Mortgage Acceptance Corporation Asset-Backed Pass-Through Certificates, Series 2005-4, Defendants: Gregory M. Taube, LEAD ATTORNEY, Nelson Mullins Riley & Scarborough, LLP-ATL, Atlanta, GA.

For HSBC Bank, N.A, Defendant: Gregory M. Taube, Nelson Mullins Riley & Scarborough, LLP-ATL, Atlanta, GA.

For Shapiro Pendergast & Hasty, LLP., Defendant: Denise Rainwater Griffin, Shapiro Pendergast & Hasty, LLP, Lawrenceville, GA.

**Judges:** CATHERINE M. SALINAS, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** CATHERINE M. SALINAS

**Opinion**

**FINAL REPORT AND RECOMMENDATION**

The plaintiff, Sam L. Levine ("Plaintiff"), is a licensed attorney in Georgia and is representing himself in this matter. This foreclosure-related matter is the second of three lawsuits filed by Plaintiff against the same or substantially the same defendants, challenging a foreclosure sale that took place on March 7, 2017.[[1]](#footnote-0)1 (See Case No. 1:16-cv-04543-SCJ-CMS, U.S. District Court, Northern District of Georgia, Atlanta Division, originally filed on November 1, 2016 in the Superior Court of DeKalb County,**[\*2]** and removed to this Court on November 9, 2016 ("First Lawsuit"); this current case, Case No. 1:17-cv-00826-SCJ-CMS, originally filed on March 6, 2017 in the Superior Court of DeKalb County, and removed to this Court on March 7, 2017 ("Second Lawsuit"); and Case No. 1:17-cv-02130-SCJ-CMS, against the same defendants, plus The Wilcher Properties Group, LLC, originally filed on April 6, 2017 in the Superior Court of DeKalb County, and removed to this Court on June 9, 2017 ("Third Lawsuit")).

Plaintiff's First Lawsuit was dismissed with prejudice against EverBank and the HSBC Defendants on March 9, 2017, and dismissed without prejudice against the law firm defendant, Shapiro Pendergast & Hasty LLP ("SPH"). The Second Lawsuit is currently before this Court for consideration. Plaintiff voluntarily dismissed the Third Lawsuit without prejudice on July 5, 2017 after Defendant SPH filed a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss.

This action, Plaintiff's Second Lawsuit, is presently before the Court on the [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss Plaintiff's complaint filed by three of the four defendants: EverBank, FSB ("EverBank"), HSBC Bank, N.A., and HSBC Bank USA, N.A ., *as trustee for* Opteum Mortgage Acceptance**[\*3]** Corporation Asset-Backed Pass-Through Certificates, Series 2005-4. Hereinafter, the two HSBC entities are referred to collectively as the "HSBC Defendants." EverBank and the HSBC Defendants are referred to collectively as the "EverBank Defendants." (Doc. 14). The docket does not indicate that the fourth defendant, SPH, was ever properly served.

As with Plaintiff's First Lawsuit, in addition to his complaint, Plaintiff also filed a petition for an emergency temporary restraining order ("TRO") or interlocutory injunction seeking to bar the EverBank Defendants from foreclosing on his home, this time on March 7, 2017. (Doc. 2). Because the foreclosure sale actually occurred as scheduled on March 7, 2017, the day the EverBank Defendants removed Plaintiff's Second Lawsuit to this Court, Plaintiff's petition for injunctive relief was denied as moot. (Doc. 7).

Plaintiff has filed a response in opposition to the EverBank Defendants' motion to dismiss (Doc. 15), and the EverBank Defendants have filed a reply (Doc. 17) in support of their motion. The EverBank Defendants' motion to dismiss has been fully briefed, and is before this Court for consideration.

For the reasons discussed below, I **RECOMMEND [\*4]** that the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss (Doc. 14) be **GRANTED** in its entirety. For the reasons set forth in Section V of this Final Report and Recommendation, I further **RECOMMEND** that Defendant SPH be **DISMISSED WITHOUT PREJUDICE** from this lawsuit based on Plaintiff's failure to perfect service.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The basic facts have not changed since Plaintiff's First Lawsuit. They are restated here for ease of reference.

All of Plaintiff's claims in this action arise out of a residential mortgage loan (the "Loan") that Plaintiff obtained on or about May 17, 2005 from Opteum Financial Services, LLC ("Lender") to purchase or refinance the subject Property. As part of the Loan transaction, Plaintiff executed a promissory note (the "Note") in favor of the Lender in the amount of $251,000.00. (Doc. 14-2 at 2).[[2]](#footnote-1)2 Plaintiff executed a security deed ("Security Deed") securing the Loan to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for the Lender. (Id. at 1-21). The Security Deed conveyed to MERS, the grantee, "as nominee for Lender and Lender's successors and assigns ... and to the successors and assigns of MERS," the power of sale to secure repayment of**[\*5]** the Note in the event that Plaintiff defaulted on his Loan obligations. (Id. at 3). The Security Deed was duly recorded in the property records of the Superior Court of DeKalb County, Georgia on May 25, 2005 in Deed Book 17469, Page 634. (Id. at 1).

On September 17, 2012, MERS assigned the Security Deed and all rights thereunder to Defendant HSBC Bank USA, National Association as Trustee for Opteum Mortgage Acceptance Corporation, Asset-Backed Pass-Through Certificates, Series 2005-4. (Doc. 14-3 at 1, "Assignment"). The Assignment was duly recorded in the property records of the Superior Court of DeKalb County, Georgia on September 26, 2012, in Deed Book 23282, Page 333. (Id.).

On or about September 26, 2016, after Plaintiff had defaulted on his loan obligations, the law firm SPH, on behalf of EverBank as loan servicer for Plaintiff's mortgage loan held by Defendant HSBC Bank USA, National Association as Trustee, sent Plaintiff written notification that SPH had been retained to conduct a nonjudicial foreclosure of the Property, and the sale was scheduled to take place on November 1, 2016. Plaintiff attached a copy of the notice letter to the complaint in his First Lawsuit. (Case No. 1:16-cv-04543-SCJ-CMS,**[\*6]** Doc. 1-1 at 26, "Notice of Foreclosure Sale").

On November 1, 2016, Plaintiff filed his First Lawsuit in the Superior Court of DeKalb County, asking the court, among other things, to issue a TRO and preliminary or permanent injunction enjoining the nonjudicial foreclosure sale scheduled for November 1, 2016. (Id., Doc. 1-1, Compl., ¶ 42). As noted earlier, Defendant EverBank removed the case to this Court and, in conjunction with the HSBC Defendants, filed a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss. Plaintiff's complaint in his First Lawsuit asserted claims for violations of the Real Estate Settlement Procedure Act ("RESPA"), the Truth in Lending Act ("TILA"), the Fair Debt Collection Practices Act ("FDCPA"), wrongful foreclosure or attempted wrongful foreclosure based on an alleged defective notice of foreclosure, violations of national mortgage fraud consent orders entered into with the U.S. Comptroller of the Currency, injunctive relief, and declaratory judgment. (Case No. 1:16-cv-04543-SCJ-CMS, Doc. 1-1 at 5, Compl.). Plaintiff's motion to enjoin the foreclosure sale was denied, and his First Lawsuit was subsequently dismissed pursuant to the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss. (See id., Doc. 17).**[\*7]** Plaintiff prematurely appealed the undersigned U.S. magistrate judge's Report and Recommendation to the Eleventh Circuit Court of Appeals and then also appealed the district judge's dismissal order. Both appeals were subsequently dismissed for failure to prosecute. (See id., Docs. 24-25).

On March 6, 2017, Plaintiff filed this Second Lawsuit against Defendants in the Superior Court of DeKalb County, Civil Action No. 17-cv-2974, again asking the court to issue a TRO and interlocutory injunction enjoining Defendants from proceeding with the nonjudicial foreclosure sale that had been re-scheduled to take place on March 7, 2017. EverBank removed the case to this Court on March 7, 2017 based on Plaintiff's claims for alleged violations of RESPA, TILA, and the FDCPA. (Case No. 1:17-cv-00826-SCJ-CMS, Doc. 1, Notice of Removal; Doc. 2, Verified Petition for Emergency TRO). All defendants consented to the removal. (Doc. 1 ¶ 9).

On March 9, 2017, the federal district judge assigned to this case issued an order directing Defendants to file a response to Plaintiff's Petition for a TRO. (Doc. 4). Defendants filed responses in opposition to Plaintiff's Petition. (Docs. 5-6). On March 16, 2017, the**[\*8]** district judge denied as moot Plaintiff's request for a TRO and injunctive relief on the basis that the foreclosure sale had already taken place on March 7, 2017. (Doc. 7). Because Plaintiff's case involved an alleged wrongful foreclosure, the Court referred the case to the undersigned U.S. magistrate judge for all further pretrial matters. (Id.).

On May 17, 2017, the EverBank Defendants filed the instant [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss Plaintiff's complaint. (Doc. 14). The motion has been briefed and is before this Court for consideration.

**II. LEGAL STANDARDS**

**A.** [***Rule 12(b)(6)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) **Motion to Dismiss**

In order to survive a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss, a complaint need not contain "detailed factual allegations," but must "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) (citation omitted).

In [*Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=), the Supreme Court clarified the pleading standard for civil actions, stating:

[T]he pleading standard [*Rule 8*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice**[\*9]** if it tenders naked assertions devoid of further factual enhancement.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

[*Id. at 678, 129 S. Ct. at 1949*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (internal quotes and citations omitted).

The Iqbal Court went on to instruct that, while a court must accept all factual allegations in a complaint as true, it need not accept as true legal conclusions recited in a complaint. Repeating that "only a complaint that states a plausible claim for relief survives a motion to dismiss," the Supreme Court then advised that "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific**[\*10]** task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" [*Id. at 679, 129 S. Ct. at 1950*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=)) (other citations omitted). All reasonable inferences are to be made in favor of the plaintiff. [*Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BSC0-003B-P31J-00000-00&context=).

**B. Res Judicata**

The doctrine of res judicata, or claim preclusion, bars the filing of claims that were raised or could have been raised in an earlier proceeding. [*Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XVV-0F90-0038-X1BX-00000-00&context=). Two cases involve the same causes of action if they arise out of the same nucleus of operative fact. [*Id. at 1239*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XVV-0F90-0038-X1BX-00000-00&context=). A claim will be barred by res judicata if: (1) there was a final judgment on the merits in the earlier case; (2) the first decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same causes of action are involved in both cases. [*Id. at 1238*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XVV-0F90-0038-X1BX-00000-00&context=). If those elements are present, "[t]he court next determines whether the claim in the new suit was or could have been raised in the prior action; if the answer is yes, res judicata applies." [*In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42NH-1340-0038-X1GV-00000-00&context=). The black-letter**[\*11]** rule is a simple one: "[A] final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action." Id.

As a general proposition, dismissal of a complaint for failure to state a claim operates as an adjudication on the merits for res judicata purposes, even where the dismissal order does not specify whether such dismissal was with prejudice or without prejudice. See [*NAACP v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7BC0-003B-53S8-00000-00&context=) ("unless the court specifies otherwise, dismissal on the grounds that the facts and law show no right to relief operates as an adjudication on the merits"); [*Bierman v. Tampa Elec. Co., 604 F.2d 929, 930-31 (5th Cir. 1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TRY0-0039-M2P3-00000-00&context=) (where district court dismissed action *sua sponte* for failure to prosecute, and did not specify whether dismissal was with or without prejudice, dismissal acted as adjudication on merits, such that res judicata barred subsequent action presenting same claim); [*Hall v. Tower Land and Inv. Co., 512 F.2d 481, 483 (5th Cir. 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3FT0-0039-M1PW-00000-00&context=) (where district judge dismissed first action for failure to state a claim on which relief can be granted, but did not indicate whether dismissal order was "with prejudice" or "without prejudice," that order "operates as an adjudication on the merits" for res judicata purposes); 9 Charles Alan Wright, et al., *Federal Practice & Procedure****[\*12]*** § 2373 (3d ed.) ("Dismissals under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) for failure to state a claim on which relief can be granted ordinarily are deemed to be an adjudication on the merits.").

**C. Collateral Estoppel**

The elements for collateral estoppel are similar to those for res judicata. See [*Karan, Inc. v. Auto-Owners Ins. Co., 280 Ga. 545, 629 S.E.2d 260, 262-63 (2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JT9-KG00-0039-424G-00000-00&context=) ("[C]ollateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies ... [where] those issues ... actually were litigated and decided in the previous action, or ... necessarily had to be decided in order for the previous judgment to have been rendered."). Like res judicata, collateral estoppel requires the identity of the parties or their privies in both actions. Unlike res judicata, however, collateral estoppel does not require identity of the claim. So long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim. [*Id. at 262*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JT9-KG00-0039-424G-00000-00&context=).

**III. DISCUSSION**

Applying these standards, I conclude that the EverBank Defendants' motion to dismiss should be granted. Most, if not all, of Plaintiff's claims are subject to dismissal on the basis of**[\*13]** res judicata and/or collateral estoppel. Plaintiff's claims are also subject to dismissal for failure to state a plausible claim against any of the defendants with regard to the loan transaction and property at issue in this case.

Plaintiff's complaint in this Second Lawsuit asserts the following claims: Count One, Breach of Contract against the EverBank Defendants and "WFB," an unknown, unnamed entity (Doc. 1-1, Compl., at 22); Count Two, Attempted Wrongful Foreclosure against EverBank and SPH (id. at 27); Count Three, Conversion against EverBank (id. at 29); Count Four, Negligence/Gross Negligence against all Defendants (id.); Count Five, Violations of TILA, [*15 U.S.C. §§ 1639g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=) and [*1641(f)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKC1-NRF4-44MT-00000-00&context=), against all Defendants (id. at 31); Count Six, Violations of RESPA, [*12 U.S.C. §§ 2605(k)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVW1-NRF4-4041-00000-00&context=), [*2605(e)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVW1-NRF4-4041-00000-00&context=), and [*12 C.F.R. § 1024.41*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5T05-90K0-008G-Y3NK-00000-00&context=), against all Defendants (id. at 32); and Count Seven, Violations of the FDCPA against Everbank and SPH (id. at 36).

**A. Plaintiff's Claims for Attempted Wrongful Foreclosure and Conversion**

In Plaintiff's response brief in opposition to the EverBank Defendants' motion to dismiss (Doc. 15), Plaintiff acknowledges that his claim for attempted wrongful foreclosure in Count Two "became moot with the sale of the property." Plaintiff also states that he plans to withdraw his claim for conversion set**[\*14]** forth in Count Three. (Id. at 9, 15 ["There are two (2) [claims] which Plaintiff concedes should be removed from his Complaint"]). Plaintiff has not supported those claims with any argument in his response in opposition to the EverBank Defendants' motion to dismiss. In this district, failure to respond to arguments relating to a claim in the plaintiff's initial response to the motion constitutes abandonment of the claim. See [*Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1322 (11th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:448B-JMN0-0038-X4DP-00000-00&context=) (deeming claim abandoned where argument was not presented in initial response to motion for summary judgment); see also [*White v. Ga. Dep't of Motor Vehicle Safety, No. 1:06-CV-0124-TWT, 2006 U.S. Dist. LEXIS 36497, 2006 WL 1466254, at \*1 (N.D. Ga. May 19, 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4K48-5MT0-TVTK-02M7-00000-00&context=) ("[I]t is well-accepted in this district that the failure to respond to arguments relating to a claim constitutes abandonment of the claim."). Even if Plaintiff had attempted to support those claims, after the Court's review, both of those claims would be subject to dismissal for failure to state a plausible claim. For these reasons, I RECOMMEND that the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss Counts Two and Three of Plaintiff's complaint be GRANTED.

The remainder of this Report and Recommendation will focus on Plaintiff's other claims.

**B. All of Plaintiff's Remaining Claims are Barred by Res Judicata [\*15]  and/or They are Due to be Dismissed for Failure to State a Plausible Claim**

Plaintiff's remaining claims in Counts One, Four, Five, Six, and Seven are barred by res judicata and/or they fail to state a plausible claim for relief. I will address Plaintiff's federal statutory claims first.

**1. RESPA**

Plaintiff alleged in his First Lawsuit that on June 16, 2016, Plaintiff sent to Defendants a Qualified Written Request ("QWR") pursuant to RESPA, and that Defendants violated RESPA by failing to respond to Plaintiff's QWR within five days as required by [*12 U.S.C. § 2605(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVW1-NRF4-4041-00000-00&context=). (Case No. 1:16-cv-04543, Doc. 1, Compl. ¶¶ 12, 15). Plaintiff further alleged that he requested, but did not receive, a full accounting of his payments showing how the payments were applied, an itemized statement of all advances and charges against the account, as well as copies of the original note and security deed and all assignments of the security instrument so that he could identify the secured creditor/lender. (Id. ¶¶ 14, 17). Those claims were dismissed for failure to state a plausible claim. (Case No. 1:16-cv-04543, Doc. 10 at 9-13; Doc. 17).

Plaintiff raises the same (or substantially similar) claims against the EverBank Defendants in**[\*16]** Count Six of the complaint in this case. Plaintiff alleges that he sent EverBank a QWR pursuant to RESPA, on June 16, 2016. Plaintiff further alleges that he requested, but did not receive, the identity of the secured creditor/lender, and a full accounting of his payments showing how the payments were applied. Plaintiff asserts that the EverBank Defendants violated RESPA by failing to respond to Plaintiff's QWR and other requests for information within the required timeframes. (Compl. ¶¶ 39, 109, 114-15, 118-21).

The identity of the parties in both of Plaintiff's lawsuits are identical. The two complaints concern the same nucleus of operative facts — *i.e.*, Plaintiff's defaulted loan and the EverBank Defendants' standing (or alleged lack thereof) to foreclose on the encumbered Property. Both actions also challenge the securitization of the Loan, and EverBank's alleged errors or mismanagement in the servicing of Plaintiff's Loan.

The dismissal of Plaintiff's RESPA claim for failure to state a claim in his First Lawsuit was a final adjudication on the merits. See [*NAACP v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7BC0-003B-53S8-00000-00&context=) ("unless the court specifies otherwise, dismissal on the grounds that the facts and law show no right to relief operates as**[\*17]** an adjudication on the merits"); [*Fed. R. Civ. P. 41(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F026-00000-00&context=) (providing that unless otherwise stated in the order, involuntary dismissal acts as "adjudication on the merits."). This Court rendered the judgment, it is a court of competent jurisdiction, and it had subject matter jurisdiction to enter the judgment in Plaintiff's First Lawsuit.

Although Plaintiff's current lawsuit has added a few new allegations in his RESPA claim, including that Defendants allegedly failed to provide relevant contact information for the "owner" of Plaintiff's Note within ten days after receiving a request (Compl. ¶ 120), Plaintiff's new allegations are all premised on Plaintiff's previously-adjudicated assertions. Res judicata bars claims that were or could have been adjudicated in the prior action. [*In re Piper Aircraft Corp., 244 F.3d at 1296*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42NH-1340-0038-X1GV-00000-00&context=) ("[A] final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action."); [*CenTrust Mortg. Corp. v. Smith & Jenkins, P.C., 220 Ga. App. 394, 397, 469 S.E.2d 466 (1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX8-B230-003G-P2RV-00000-00&context=) ("[O]ne must assert all claims for relief concerning the same subject matter in one lawsuit and any claims for relief concerning that same subject matter which are not raised will be res judicata.") (quotation marks, citations, and emphasis omitted). For the reasons stated,**[\*18]** Plaintiff's RESPA claims are barred by res judicata.

**2. FDCPA**

The same reasoning applies to Count Seven of the Complaint in which Plaintiff raises FDCPA claims against the EverBank Defendants. In Plaintiff's First Lawsuit, Plaintiff alleged that the EverBank Defendants, in attempting to collect the debt at issue in that lawsuit, violated [*Sections 1692(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GHC1-NRF4-407T-00000-00&context=), [*(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GHC1-NRF4-407T-00000-00&context=), and [*(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GHC1-NRF4-407T-00000-00&context=) of the FDCPA because they allegedly had no enforceable right or interest in the Property and were attempting to collect a debt they did not own. (Case No. 1:16-cv-04543, Doc. 1-1, ¶¶ 25-28, 44-49). Plaintiff further alleged that EverBank violated the FDCPA by making false representations to Plaintiff concerning the legal status of the debt. (Id. ¶ 47). This Court determined that Plaintiff had failed to plausibly allege that any of the EverBank Defendants was a "debt collector" as defined in the FDCPA. The Court noted that the FDCPA only applies to "debt collectors" and not to creditors or mortgage servicers, like the HSBC Defendants and their mortgage servicer, EverBank. The Court concluded that Plaintiff had failed to plead sufficient factual content from which the Court could infer that the principal purpose of the HSBC Defendants' or EverBank's**[\*19]** business was debt collection, or that they regularly collect or attempt to collect debts owed or due to others, and dismissed the FDCPA claim. (Case No. 1:16-cv-04543, Doc. 10 at 23-27; Doc. 17).

In Plaintiff's Second Lawsuit, Plaintiff again alleges that the EverBank Defendants violated the same provisions of the FDCPA, by (1) allegedly misrepresenting the legal status of the debt "when they knew or should have known that they were not entitled to collect on same," (2) by threatening to foreclose on Plaintiff's home when they had no present right to possession of the Property, and (3) by threatening to take other (unspecified) actions prohibited by law. (Compl. ¶¶ 128-29, 131-32, 134). In addition, this time around, Plaintiff alleges that the EverBank Defendants also violated [*Section 1692g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMR1-NRF4-4215-00000-00&context=) by failing to comply with the FDCPA's requirements concerning the validation of a disputed debt and "the 'five-day notice'" provision of the FDCPA.

Plaintiff's FDCPA claims are barred by res judicata because they either were or could have been adjudicated in Plaintiff's First Lawsuit. Plaintiff's [*Section 1692g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMR1-NRF4-4215-00000-00&context=) claim is also subject to dismissal for failure to state a plausible claim. His allegations fail to indicate in what**[\*20]** way the EverBank Defendants allegedly failed to comply with the requirements of that section. Accordingly, Plaintiff's Count Seven claims under the FDCPA are due to be dismissed.

**3. TILA**

TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." [*15 U.S.C. § 1601(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GK61-NRF4-42S2-00000-00&context=). To effectuate this remedial purpose, courts "construe the Act's provisions liberally in favor of the consumer." [*Hauk v. JPMorgan Chase Bank USA, 552 F.3d 1114, 1118 (9th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VG7-2XS0-TXFX-D2KP-00000-00&context=) (internal quotation marks and citations omitted).

In Count Five, Plaintiff alleges that the EverBank Defendants violated TILA in two ways. First, Plaintiff alleges that the EverBank Defendants violated [*15 U.S.C. § 1639g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=) by failing and refusing to provide an accurate payoff statement. (Compl. ¶ 104). He also contends that the EverBank Defendants violated [*15 U.S.C. § 1641(f)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKC1-NRF4-44MT-00000-00&context=) by failing and refusing to confirm the identity of, and to provide the address and telephone number for the owner of the subject obligation. (Id. ¶ 103). After due consideration, I conclude that Plaintiff has failed to state a plausible claim under TILA.**[\*21]**[[3]](#footnote-2)3

[***Section 1639g***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=)

A recent amendment to TILA as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ([*Pub. L. 111-203*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=)) provides that "[a] creditor or servicer of a home loan shall send an accurate payoff balance within a reasonable time, but in no case more than 7 business days, after the receipt of a written request for such balance from or on behalf of the borrower." [*15 U.S.C. § 1639g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=).[[4]](#footnote-3)4 To state a valid claim pursuant to [*Section 1639g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=), a plaintiff must allege that he made a written payoff demand to a creditor or servicer of his home loan, and the creditor failed to provide a response. See [*Berry v. U.S. Bank Nat'l Ass'n, No. 14-24877-CIV-KING, 2015 U.S. Dist. LEXIS 192179, 2015 WL 11233192, at \*3 (S.D. Fla. Apr. 29, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RXP-62F1-JSJC-X18T-00000-00&context=).

In this case, the allegations in Plaintiff's complaint are insufficient to state a valid claim under [*§ 1639g of TILA*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=). Plaintiff merely alleges that on more than one occasion, he attempted to get a total payoff amount on his loan. (Compl. ¶ 41). However, Plaintiff's complaint fails to allege that he ever sent a written request for an accurate payoff statement from any of the EverBank Defendants, to which EverBank Defendant he allegedly sent his written request, or when he may have sent such a written request. (Compl. ¶¶ 104-107). Such factual allegations are necessary to survive a motion**[\*22]** to dismiss. See [*Berry, 2015 U.S. Dist. LEXIS 192179, 2015 WL 11233192, at \*4*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RXG-X0Y1-JCRC-B4RJ-00000-00&context=) (holding that the plaintiff's bare assertion that he had "not received an accurate payoff within the required timeframe" was nothing but an unsupported legal conclusion that could not survive the defendant's motion to dismiss). Plaintiff has not pled sufficient facts to support a [*§ 1639g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=) claim under TILA.

[***Section 1641(f)(2)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKC1-NRF4-44MT-00000-00&context=)

For the same or similar reason, Plaintiff has also failed to state a valid claim under [*§ 1641(f)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKC1-NRF4-44MT-00000-00&context=). That provision provides, "Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation." [*15 U.S.C. § 1641(f)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKC1-NRF4-44MT-00000-00&context=). Plaintiff's complaint again fails to allege or show that he ever made a written request to any of the EverBank Defendants to provide the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation. Plaintiff has also failed to allege what he purportedly said in any such written request, or when he may have sent such a written request. Plaintiff's "naked assertions devoid of further factual enhancement" are insufficient to state a plausible claim for relief, under [*Iqbal*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=)/[*Twombly*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=).

For**[\*23]** all the reasons stated, I recommend that the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss Plaintiff's Count Five claims under TILA be granted because the claims are barred by res judicata and/or they fail to state a plausible claim for relief.

**4. Breach of Contract**

Res judicata also bars Plaintiff's Count One breach-of-contract claim that alleges that the EverBank Defendants "negligently breached the terms of the loan agreement at issue, for example by failing to fulfill and comply with the Security Deed." (Compl. ¶ 65). Plaintiff first alleges that the EverBank Defendants breached the Security Deed by failing to comply with the requirements of Georgia's foreclosure statute, [*O.C.G.A. § 44-14-162.2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5STN-9X90-004D-83GM-00000-00&context=), by not providing in its notice of foreclosure letter "the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor." (Id. ¶¶ 72-74).

Plaintiff further alleges that "defendants" "negligently breached the terms of the loan agreements [sic] at issue, by failing to comply with the Security Deed concerning Acceleration of the debt." (Id. ¶¶ 77, 81). Specifically, Plaintiff alleges that the notice of default that**[\*24]** he was sent failed to specify: "(a) the default; (b) the action required to cure the default; (c) a date not less than 30 days from the date the notice is given ... by which default must be cured; and (d) that failure to cure the default on or before the date specified...may result in acceleration...and sale of the Property." (Id. ¶¶ 78).

With regard to the notice of default, Plaintiff's complaint appears to concede that he did receive notice, but he complains that the notice he received was "not prior to acceleration and violated the requirement that the notice specify a date not less than 30 days by which to cure the existing default." (Compl. ¶ 26). He also alleges "that the acceleration of the loan amount was premature," that he was not informed of the right to reinstate after acceleration or the right to bring a court action, and that EverBank did not give proper notice of default prior to acceleration. (Compl. ¶¶ 27, 81).

As an exhibit to their motion to dismiss, the EverBank Defendants have attached a copy of the notice of default dated August 17, 2015 that EverBank asserts it sent to Plaintiff on that day, which was well before Plaintiff filed his First Lawsuit. (Doc. 14-4 at**[\*25]** 1-3). The exhibit reflects that EverBank gave notice of default on August 17, 2015, prior to acceleration, in accordance with the terms of the Security Deed. The August 17, 2015 notice informed Plaintiff that he was in default; it provided the amount that Plaintiff needed to pay in order to cure the default and the date by which the default needed to be cured (September 21, 2015); and informed Plaintiff that failure to cure the default on or before that date "may result in acceleration of the sums secured by your security instrument without further demand, which could result in the sale of the secured property and any other remedies permitted by applicable law." (Id. at 1). Plaintiff was also informed of his right to reinstate after acceleration and the right to raise defenses in the foreclosure action to assert the non-existence of a default or any other defense to acceleration and sale. (Id.).

In Plaintiff's Response, Plaintiff has not addressed the August 17, 2015 notice of default that the EverBank Defendants attached to their motion, or attempted in any way to challenge its authenticity or deny that he received such a notice. In the Eleventh Circuit, "when the exhibits contradict the general**[\*26]** and conclusory allegations of the pleading, the exhibits govern." *Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1206 (11th Cir. 2007)*; see also [*Friedman v. Market Street Mortgage Co., 520 F.3d 1289, 1295 n.6 (11th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S3M-SDD0-TXFX-G22F-00000-00&context=) (stating that where there is a conflict between allegations in a pleading and the mortgage loan documents attached to the complaint, "it is well settled that the exhibits control") (citation omitted); [*Simmons v. Peavy-Welsh Lumber Co., 113 F.2d 812, 813 (5th Cir. 1940)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-W6G0-003B-T3HX-00000-00&context=) ("Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control."). Here, the August 17, 2015 notice of default has not been challenged; it directly contradicts Plaintiff's conclusory allegations and shows that his breach-of-contract allegations are without legal or factual merit.

In addition, Plaintiff's breach-of-contract allegations all pertain to conduct that allegedly occurred prior to the date that Plaintiff filed his First Lawsuit, and thus the claims either were or could have been adjudicated in that lawsuit. Plaintiff's First Lawsuit expressly alleged that the EverBank Defendants failed to comply with Georgia's foreclosure statute by failing to include the name, address, and telephone number of the individual or entity "who shall have full authority to negotiate, amend and modify all terms of the mortgage with the debtor." (Case No. 1:16-cv-04543,**[\*27]** Compl. ¶ 21). The Court found that the notice satisfied the statutory requirements and that Plaintiff's assertions were insufficient to survive a motion to dismiss. The Court found that Plaintiff had also failed to allege or show that any purported improper or deficient notice caused his alleged damages. Plaintiff is attempting to assert the same claim in his Second Lawsuit. It is equally without merit, and is also barred by res judicata.

Even if res judicata does not apply, Plaintiff's breach-of-contract claims are still subject to dismissal for failure to state a plausible claim. Under Georgia law, a plaintiff "has the burden of pleading and proving the existence of a valid contract by showing that there are 'parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.'" [*Eastview Healthcare, LLC v. Synertx, Inc., 296 Ga. App. 393, 398-99, 674 S.E.2d 641, 646 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VRS-2P10-TXFS-C345-00000-00&context=). Once the existence of a contract is established, a plaintiff may only recover damages for breach of contract by demonstrating: (1) plaintiff's performance of the contract, (2) defendant's breach of the contract, and (3) the breach caused the plaintiff harm. [*Jones v. Central Builders Supply Co., 217 Ga. 190, 195-96, 121 S.E.2d 633, 638 (1961)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-5G40-003F-J0VG-00000-00&context=) (citations omitted).

Here, Plaintiff has**[\*28]** failed to plead any of the elements of a breach-of-contract action. Plaintiff's Complaint fails to provide sufficient (or any) factual support for his claim that the EverBank Defendants in some way breached the Security Deed by failing to properly apply his payments in accordance with the provisions of the contract. Plaintiff alleges that the EverBank Defendants breached Section 2 of the subject Security Deed by failing to adhere to the proper sequence of how payments were to be applied and by failing to properly manage the escrow account. (Compl. ¶¶ 66-68). Plaintiff's complaint, however, does not identify any payments that were not applied properly. Nor does it allege that Plaintiff remitted all payments when due, or that he was current on his loan obligations, or that he has ever paid the loan indebtedness in full. Plaintiff's complaint also fails to identify in what particular way or ways EverBank allegedly failed to manage Plaintiff's escrow account. (Id. ¶ 68).

Plaintiff has also failed to allege or show that he performed his obligations under the Security Deed, or to provide any factual support showing how the EverBank Defendants' alleged breach caused him harm or damages. Thus, Plaintiff's**[\*29]** conclusory breach-of-contract allegations fail as a matter of law. Plaintiff's breach-of-contract claims are also barred by res judicata. Accordingly, I recommend that the EverBank Defendants' motion to dismiss Plaintiff's breach-of-contract claims be granted.

**5. Negligence/Gross Negligence**

To state a valid a cause of action for negligence, a plaintiff must allege and establish the following four elements: (1) a legal duty to conform to a standard of conduct; (2) a breach of this duty; (3) a causal connection between the conduct and the resulting injury; and (4) damage to the plaintiff. See [*Martha H. West Trust v. Market Value of Atlanta, Inc., 262 Ga. App. 90, 91, 584 S.E.2d 688, 690 (2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4902-SJX0-0039-41R8-00000-00&context=).

In Count Four of Plaintiff's Complaint, Plaintiff asserts a variety of negligence claims. The first two are premised on the same unsupported allegation that a contractual relationship can give rise to a duty in negligence — i.e., Plaintiff alleges that each of the EverBank Defendants was negligent "in the maintenance, accounting, and servicing of his mortgage," and that "HSBC" was negligent by having and keeping EverBank as its servicer. (Compl. ¶ 98). While it is true that, under Georgia law, misfeasance in the performance of a contractual duty may give rise to a tort action, such tort action does**[\*30]** not arise unless the injury to the plaintiff has been "an independent injury over and above the mere disappointment of plaintiff's hope to receive his contracted for benefit." [*Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 294, 217 S.E.2d 602, 604 (1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-9BC0-003F-J1K6-00000-00&context=). "[A]n action in tort may not be maintained for what is a mere breach through non-action or through ineffective performance (which is the same thing) of a contract duty—the duty must arise independent of contract to constitute a tort." [*Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363, 366, 203 S.E.2d 587, 591 (1973)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-9J80-003F-J3JC-00000-00&context=) ("[I]n order to maintain an action ex delicto because of a breach of duty growing out of a contractual relation[,] the breach must be shown to have been a breach of a duty imposed by law and not merely the breach of a duty imposed by the contract itself.").

In this case, Plaintiff's first two negligence allegations fail because the duties allegedly breached arose solely from the contractual relationship between the parties rather than independent of the contractual relationship. Plaintiff's allegations are also barred by res judicata, because they pertain to a time period before the Loan was accelerated and before Plaintiff filed his First Lawsuit. These claims could have and should have been adjudicated in Plaintiff's First Lawsuit.

Plaintiff next alleges that when he was applying**[\*31]** for a loan modification, that EverBank knowingly made false statements to Plaintiff that foreclosure proceedings would not continue while his applications were pending. (Compl. ¶ 99). Plaintiff asserts that the consent orders that HSBC entered into in 2011, 2013, and 2016 with the U.S. Comptroller of the Currency (which formed the subject of Count Three of the complaint that Plaintiff filed in his First Lawsuit) forbade EverBank and HSBC from dual tracking (i.e., continuing to pursue foreclosure while a borrower was attempting to obtain a modification of his loan), and that those consent orders created a duty to avoid harming Plaintiff apart from the obligations set forth in the subject Security Deed. (Id. ¶ 101).

Plaintiff's allegations based on the alleged consent orders are barred by res judicata and/or collateral estoppel because Plaintiff asserted them in his First Lawsuit. In Plaintiff's First Lawsuit, the Court found that no private right of action exists under any of those consent orders, and that the consent orders expressly disclaimed the possibility of any such remedy arising from their terms. (Case No. 1:16-cv-4543, Doc. 10 at 21). The Court further found that Plaintiff**[\*32]** lacked standing to enforce the consent orders because Plaintiff was not a party to those agreements, and that the EverBank Defendants' alleged refusal to modify Plaintiff's loan did not support a cause of action. (Id. at 22-23).

In addition, to the extent that Plaintiff now seeks to assert again that the EverBank Defendants owed him an independent duty of some sort, Plaintiff has failed to state a plausible claim for negligence or gross negligence. Plaintiff has failed to allege or show a breach of any statutory or ***regulatory*** duty. He has also failed to allege sufficient facts to support a negligence or gross negligence claim. In sum, Plaintiff's state law claims for negligence and breach of an unidentified duty are without any factual and/or legal support. They are also barred by res judicata and/or collateral estoppel.

To the extent that Plaintiff is attempting to allege and assert that the HSBC Defendants and/or EverBank breached a fiduciary duty to him, Plaintiff has not shown or established the existence of a duty or fiduciary relationship between himself and any of those entities. A loan servicer does not owe any heightened or fiduciary duty to a borrower on a loan, nor does a creditor. See**[\*33]** [*Russell v. Barnett Banks, Inc., 241 Ga. App. 672, 673-74, 527 S.E.2d 25, 27 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YTJ-0660-0039-42P3-00000-00&context=) ("There is ... no confidential relationship between lender and borrower or mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests"). In Georgia, the law is clear that "[c]reditors deal with debtors at arm's length, and do not stand in a fiduciary capacity in relationship to the debtor." [*May v. Citizens & S. Nat'l Bank, 202 Ga. App. 217, 219, 413 S.E.2d 780, 782 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX8-BVT0-003G-P516-00000-00&context=) (citing *Phillips v. Atlantic Bank & Trust Co., 168 Ga. App. 590, 591, 309 S.E.2d 813 (1983))*; see also [*Pardue v. Bankers First Fed. Sav. & Loan Ass'n, 175 Ga. App. 814, 815, 334 S.E.2d 926, 927 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-6KX0-003F-J2DN-00000-00&context=) (stating that "[t]here is ... no confidential relationship between lender and borrower or mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests."). Plaintiff has not alleged or shown the existence of a fiduciary duty or confidential relationship with any of the EverBank Defendants.

For all the reasons stated, Plaintiff's Count Four negligence/gross negligence claims are barred by res judicata and/or collateral estoppel. The claims are also subject to dismissal for failure to state a plausible claim, pursuant to [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) and [*Iqbal*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=)/[*Twombly*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). Accordingly, I recommend that the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss Plaintiff's negligence claims be granted.

**C. Other Allegations**

To the extent that Plaintiff's complaint contains other unsupported allegations not addressed above, such allegations fail to raise a right to relief**[\*34]** above the speculative level and are also due to be dismissed. See [*Twombly, 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=).

**D. Futility of Amendment**

Throughout Plaintiff's response brief in opposition to the EverBank Defendants' motion to dismiss, Plaintiff mentions that should the Court conclude that any of his claims are insufficiently pled, he "stands ready, willing, and able to Amend, with the Court's permission." (Doc. 15 at 3, 9-11, 13, 16). Plaintiff, however, has submitted no proposed amended complaint despite having had more than five months to do so.

[*Rule 15 of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) governs amendments to the pleadings. The rule states, in pertinent part:

A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under [*Rule 12(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), [*(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), or [*(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), whichever is earlier.

[*Fed. R. Civ. P. 15(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) & [*(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." [*Fed. R. Civ. P. 15(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=). In this case, Plaintiff has not obtained the opposing party's written consent to file an amended complaint. Therefore, the Court's leave to amend is required. "Although [l]eave to amend shall be freely given when justice**[\*35]** so requires, a motion to amend may be denied on numerous grounds such as undue delay, undue prejudice to the defendants, and futility of the amendment." [*Maynard v. Bd. of Regents, 342 F.3d 1281, 1287 (11th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49C5-7JD0-0038-X095-00000-00&context=) (citations and internal quotation marks omitted). The decision to grant or deny leave to amend rests in the sound discretion of the court. See id.

Pursuant to the federal and local rules, the proper method for requesting leave to amend is by separate motion, stating "with particularity the grounds for seeking the order" and "the relief sought."[[5]](#footnote-4)5 See [*Fed. R. Civ. P. 7(b)(1)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YF-00000-00&context=) & [*(C)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YF-00000-00&context=); [*LR 7.1, NDGa*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SVY-T880-004D-829G-00000-00&context=). In the Eleventh Circuit, a motion for leave to amend must also either set forth the substance of the proposed amendment or attach a copy of the proposed amendment. See [*Long v. Satz, 181 F.3d 1275, 1279 (11th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X41-5HB0-0038-X3CS-00000-00&context=) (affirming district court's denial of leave to amend where request for leave to amend was included in the memorandum that the plaintiff filed in opposition to a motion to dismiss, and the plaintiff had failed to attach the amendment or set forth the substance of the proposed amendment) (citing with approval [*Wisdom v. First Midwest Bank, 167 F.3d 402, 409 (8th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VJ3-7D30-0038-X1GY-00000-00&context=) ("[P]arties should not be allowed to amend their complaint without showing how the complaint could be amended to save the meritless claim.")). See also [*In re AndroGel* ***Antitrust*** *Litig., 687 F. Supp. 2d 1371, 1382 (N.D. Ga. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XW6-R5S0-YB0M-X003-00000-00&context=) (stating that a request for leave to amend a complaint**[\*36]** must be made by motion and must either attach a copy of the proposed amendment or include the substance of the proposed amendment).

Here, Plaintiff has not filed a separate motion for leave to amend, which is the proper procedural vehicle for such a request. [*Posner v. Essex Ins. Co., Ltd., 178 F.3d 1209, 1222 (11th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WX1-4YX0-0038-X4JW-00000-00&context=). The Eleventh Circuit has held that where, like here, a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly. Id. (citing [*Kelly v. Kelly, 901 F. Supp. 1567, 1570 (M.D. Fla. 1995))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9PV0-001T-515M-00000-00&context=). Plaintiff has also failed to set forth any grounds on which he seeks to amend his pleading in his requests to amend. Plaintiff's requests to amend do not conform to the requirements of the federal or local rules. See [*Fed. R. Civ. P. 7(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YF-00000-00&context=); [*LR 7.1(A)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SVY-T880-004D-829G-00000-00&context=). Notwithstanding the liberal pleading standard for civil complaints under [*Rule 8(a)(2) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=), a brief opposing a motion to dismiss is not a proper mechanism for amending a complaint. See [*Gilmour v. Gates, McDonald and Co., 382 F.3d 1312, 1315 (11th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D7M-4RM0-0038-X0JP-00000-00&context=) (stating that a plaintiff may not amend his complaint through argument in a brief opposing summary judgment).

I further conclude that allowing Plaintiff to file an amended complaint at this juncture would be futile. As noted earlier, this is one of multiple actions that Plaintiff has filed in an effort to forestall foreclosure proceedings. Although**[\*37]** he is proceeding *pro se*, he is an attorney, and he should, by now, be well aware of the pleading requirements in federal court. Plaintiff has had multiple opportunities to state a valid claim, if he had one.

In sum, Plaintiff has not filed a proper motion for leave to amend his complaint, and he has failed to set forth any valid grounds on which he seeks to amend his pleading. Plaintiff has also failed to identify any facts he could plead in an amended complaint that would overcome the fatal defects noted in his current complaint. Instead, he asserts that he believes he has sufficiently pled his claims. (Doc. 15 at 10).

For the most part, the allegations in his current complaint (and the complaints in his other lawsuits as well) are nothing more than formulaic recitations of some, but not all, of the elements of the claims he is attempting to assert. They are insufficient to raise a right to relief above the speculative level. For this reason and the reasons discussed above, I believe amendment would be futile and therefore recommend that Plaintiff's requests for yet another opportunity to plead his claims be denied. See [*Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:435S-XVF0-0038-X0V6-00000-00&context=) (per curiam) (stating that a district court need not allow an**[\*38]** amendment where amendment would be futile); [*Watkins v. Beneficial, HSBC Mortg., No. 1:10-CV-1999-TWT-RGV, 2010 U.S. Dist. LEXIS 112857, 2010 WL 4318898, at \*5 (N.D. Ga. Sept. 2, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:519V-TNT1-652H-G003-00000-00&context=), *adopted by* [*2010 U.S. Dist. LEXIS 112848, 2010 WL 4312878 (N.D. Ga. Oct. 21, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:519V-TNT1-652H-G004-00000-00&context=) (dismissing *pro se* complaint with prejudice where amendment would be futile); [*Kariguddaiah v. Wells Fargo Bank, N.A., No. C-09-5716-MHP, 2010 U.S. Dist. LEXIS 65561, 2010 WL 2650492, at \*3 (N.D. Cal. July 1, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YVC-4VR0-YB0M-N01X-00000-00&context=) (finding leave to amend wrongful foreclosure claim, among other things, would be futile where "plaintiff has not identified any facts he could plead in a further amended complaint to overcome the noted fatal defects")).

**IV. SUMMARY**

For the reasons stated above, I **RECOMMEND** that the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss (Doc. 14) be **GRANTED** in its entirety.

**V. DEFENDANT SHAPIRO, PENDERGAST & HASTY, LLP**

Defendant EverBank's Notice of Removal in this case states that as of the date this case was removed to federal court (March 7, 2017), Defendant SPH had not been served. (Doc. 1 at 2, ¶ 4). On March 8, 2017, Defendant SPH entered a notice of appearance, "without waiver of any defenses, including without limitation, lack of personal jurisdiction." (Doc. 3). On April 6, 2017, in response to Plaintiff's motion to remand, SPH reiterated that as of the date of removal, it had not been served with process. (Doc. 12).

The recently revised [*Federal Rule of Civil Procedure 4(m)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=) requires service**[\*39]** of the summons and complaint upon each defendant to be made within 90 days after the filing of the complaint. [*Fed. R. Civ. P. 4(m)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=). [*Rule 4(l)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=) requires that unless service is waived, proof of service must be made to the court. [*Fed. R. Civ. P. 4(l)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=). If a defendant is not served within 90 days after the complaint is filed, the court on its own — after notice to the plaintiff — must dismiss the action without prejudice against that defendant.

Despite being repeatedly put on notice that service has not been perfected on SPH, the docket shows that Plaintiff has never filed a proof of service indicating valid service on that defendant. On May 31, 2017, Plaintiff filed a "Notice of Filing Affidavit of Service" purportedly indicating that on May 12, 2017, Philip Hasty, as registered agent for SPH, was served with a copy of the summons and Plaintiff's complaint. (Doc. 16). However, a careful review of that filing shows that it is a proof of service on SPH with regard to Plaintiff's Third Lawsuit — not this case. (See Doc. 16-1, referencing Case No. 17CV4113, in DeKalb County Superior Court, which, upon removal to this Court, was assigned Case No. 1:17-cv-02130-SCJ-CMS). As noted earlier, Plaintiff voluntarily dismissed that lawsuit without**[\*40]** prejudice on July 5, 2017.

Well over 90 days have passed since this case was removed to this Court, and no valid proof of service has been filed with the Court for Defendant SPH. For the reasons stated, I **RECOMMEND** that Defendant Shapiro Pendergast & Hasty be **DISMISSED WITHOUT PREJUDICE** from this lawsuit for failure to perfect service of process.

**VI. CONCLUSION**

For the reasons stated above, I **RECOMMEND** the following:

(1) that the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss (Doc. 14) be **GRANTED** in its entirety; and

(2) that Defendant Shapiro Pendergast & Hasty be **DISMISSED WITHOUT PREJUDICE** from this lawsuit.

This is a Final Report and Recommendation, and there is nothing further in this action pending before the undersigned Magistrate Judge. Accordingly, the Clerk is **DIRECTED** to terminate this reference.

**IT IS SO RECOMMENDED and DIRECTED**, this 2nd day of November, 2017.

/s/ Catherine M. Salinas

CATHERINE M. SALINAS

UNITED STATES MAGISTRATE JUDGE

**End of Document**

1. 1All of Plaintiff's lawsuits pertain to the real property located at 1014 Havenridge Lane, N.E., Atlanta, Georgia, 30319 (the "Property"). Plaintiff also apparently filed three bankruptcy cases in less than a year seeking to halt foreclosure proceedings on the same Property. See In Re Sam Levine, U.S. Bankruptcy Court, Northern District of Georgia, Atlanta Division, Case Nos. 16-51824, 16-61477, and 16-69178. [↑](#footnote-ref-0)
2. 2The Court has taken the parties' exhibits into consideration in reviewing the merits of the EverBank Defendants' motion to dismiss (without converting the motion to a motion for summary judgment) because in Plaintiff's complaint, Plaintiff refers to the transactions or information memorialized in the exhibits, the documents are central to Plaintiff's claims, and the authenticity of the documents has not been challenged. See [*Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46R6-5FR0-0038-X3K5-00000-00&context=); [*Brooks v. Blue Cross & Blue Shield, 116 F.3d 1364, 1369 (11th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J3P0-00B1-D0F2-00000-00&context=) ("where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) dismissal"). A district court may also take judicial notice of matters of public record without converting a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion into a [*Rule 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=) motion. [*Serpentfoot v. Rome City Comm'n, 322 F. App'x 801, 807 (11th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W17-3CT0-TXFX-G2Y6-00000-00&context=) (citing [*Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1278 (11th Cir. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XDY-Y560-0038-X35X-00000-00&context=). [↑](#footnote-ref-1)
3. 3With regard to Plaintiff's TILA claims raised in Count Five of his current complaint, Plaintiff's complaint in his First Lawsuit made one passing reference to TILA in a heading on page 14 of the complaint, but the complaint contained no actual allegations or facts describing what action or actions by any of the defendants in that case violated any particular TILA requirement. The Court held that Plaintiff had failed to meet even the minimal pleading standards required of a *pro se* plaintiff to state a plausible claim under TILA. The Court granted the EverBank Defendants' [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss Plaintiff's TILA claim. Because Plaintiff could have raised an actual claim under TILA in his First Lawsuit, but failed to do so, Plaintiff's current TILA claims may also be barred by res judicata. [*In re Piper Aircraft Corp., 244 F.3d at 1296*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42NH-1340-0038-X1GV-00000-00&context=); [*CenTrust Mortg. Corp., 220 Ga. App. at 397, 469 S.E.2d 466*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX8-B230-003G-P2RV-00000-00&context=). [↑](#footnote-ref-2)
4. 4[*Section 1639g*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-5P31-NRF4-4004-00000-00&context=) became effective on January 10, 2014. [*Palmisano v. JPMorgan Chase Bank, N.A., No. CV-16-03026-PHX-JAT, 2017 U.S. Dist. LEXIS 107769, 2017 WL 2964123, at \*4 (D. Ariz. July 12, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0T-80C1-F04C-S2N0-00000-00&context=). [↑](#footnote-ref-3)
5. 5[*Federal Rule of Civil Procedure 7(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YF-00000-00&context=) provides that "[a] request for a court order must be made by motion. The motion must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought." [*Fed. R. Civ. P. 7(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YF-00000-00&context=). [*Local Rule 7.1(A)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SVY-T880-004D-829G-00000-00&context=) provides that every motion presented to the clerk for filing shall be accompanied by a memorandum of law that cites supporting authority. [*LR 7.1(A)(1), NDGa*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SVY-T880-004D-829G-00000-00&context=). [↑](#footnote-ref-4)