No. 18-_____

In the Supreme Court of the United States

METEKU NEGATU,

Petitioner,

–v–

WELLS FARGO BANK, N.A.,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Mortgage Industry in the United States is a ten trillion dollar enterprise. Sixty-five percent of homes in America are owned and carry mortgages. Since 2006, mortgage foreclosures have been on the rise.

The District of Columbia is no different, posting more than 3,000 judicial foreclosure actions in 2016 and 2017 each year. Judicial foreclosures have dominated since April 2014 when the D.C. Superior Court created a special process for litigating foreclosure matters. Designed to emphasize mediation, the result has been a failure of Due Process and Equal Protection. Nearly all of the defendants are African American. At this writing, the undersigned is aware of just one mortgage foreclosure case that has gone to trial since the implementation of that special process. Many of these cases are dated and have not followed clear federal and local statutory requirements. Mortgagors, alleged to be in default, however, have been forced to accept the settlement terms of the Mortgagees or risk summary judgments.

These summary judgments have been entered notwithstanding the fact that there are genuine issues of fact involved in these cases; notwithstanding the fact that courts in the two surrounding jurisdictions, Virginia and Maryland, have issued distinctly different rulings; and courts in other parts of Eastern United States, New York and New Jersey, have also issued distinctly different rulings. Courts throughout the Eastern Region have been thrown into conflict and confusion by the nonconformist stance of the D.C. Courts.

The Question Presented is whether the decision of the D.C. Court of Appeals should be reversed and the case remanded because the due process and equal protection rights of Petitioner were violated.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

At all times relevant to this action, Petitioner, Meteku Negatu, was the Appellant before the District of Columbia Court of Appeals and the Defendant in the trial court, the District of Columbia Superior Court. Petitioner is a resident of the District of Columbia; and the record owner of the subject property located at 2829-11th Street, NorthWest, in the District of Columbia, 20001.

At all times relevant to this action, Respondent Wells Fargo Bank, N.A., according to the Complaint, was the Plaintiff in the subject foreclosure action against the subject property and is alleged to be the successor in interest to the original lender and allegedly the current holder of the Note and beneficiary of the Deed of Trust.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Meteku Negatu respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The Decision of the District of Columbia Court of Appeals, the court of last resort for the District of Columbia, is reproduced below at App.1a. The Summary Judgment of the District of Columbia Superior Court is reproduced below at App.7a. Not all decisions are printed, except those deemed by the Chief Judge of the D.C. Superior Court to be worthy of general publication. These decisions are currently unreported.

JURISDICTION

The D.C. Superior Court granted Summary Judgment in a one paragraph footnote on 30 June 2017 as part of its Five Page Order, and stated only the following:

> Plaintiff alleged and Defendant has not demonstrated a genuine factual dispute that: (1) Defendant is the record owner of the property; (2) Plaintiff is a beneficiary of the Deed of Trust secured by the property; (3) Plaintiff is the current holder of the note; (4) Defendant

> defaulted under terms of Note and Deed of Trust in October of 2009; (5) Plaintiff mailed a demand letter to Defendant's last known address stating the amount needed to cure the default; and (6) Defendant failed to cure the default. Finally, Plaintiff has attached an affidavit which complies with the Service-members Civil Relief Act.

The D.C. Court of Appeals entered its Decision on 31 July 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. XIV, § 1**

  > All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- **D.C. Code § 2-1402.11(a)**

  > It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual

or perceived: race, color, religion, national origin. sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual

- **D.C. Code § 2-1402.68**

  [a]ny practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice.

STATEMENT OF THE CASE

A. Constitutional Implications

There was no showing by the movant of exigent circumstances, no emergency which mandated summary judgment, *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) ("Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone.") Moreover, the instant case is not simple and straightforward. Respondent does not have an automatic right as a matter of law to foreclose. Petitioner raised several complicated matters, matters that should have been resolved by an impartial finder of fact and not the expedited instrument of Summary Judgment. In *Jean Antoine et al. v. U.S. Bank National Association et al.*, (Civil Action No. 07-1518 (RMU), the United States District Court for the District of Columbia, stated in

a Memorandum Opinion (dated October 24, 2010) that 'A "genuine dispute" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action," citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

1. Summary Judgment in These Mortgage Foreclosure Cases Violate Established Principles of Due Process and Equal Protection

Every litigant is entitled to fair and equal treatment and no citizen should be deprived of life, liberty or property without due process of law. The Mortgage Foreclosure System in the District of Columbia, since April of 2014 has not conducted its judicial process in accordance with well established procedures, and defendants in such cases, almost exclusively African American, are treated differently than other litigants in non-foreclosure judicial cases. Moreover, these defendants, because of the nature of the Court's proceedings in foreclosure cases, are not afforded a right to trial.

2. Equal Protection and Due Process Violations

Petitioner and nearly all of the litigants in the Foreclosure Court in the District of Columbia are African Americans, even though African Americans make up only half of the population in the District of Columbia. A *prima facie* case of discrimination is shown by establishing that 1) A Party is a member of a protected class; 2) she suffered an adverse action; and 3) similarly situated litigants, outside of the protected class, received more favorable treatment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802

(1973). "[T]he burden of establishing a *prima facie* case of disparate treatment is not onerous," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A plaintiff can establish a *prima facie* case by "offering evidence adequate to create an inference that an employment decision was based on a discriminatory criteria illegal under [law]," *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 846 (9th Cir. 1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)); and *see Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985) (complainant can establish a *prima facie* case of disparate treatment without satisfying the *McDonnell Douglas* test if he or she provides evidence suggesting rejection was based on discriminatory criteria), amended, 784 F.2d 1407 (1986). A plaintiff who provides such evidence for his or her *prima facie* case may be able to survive summary judgment on this evidence alone, *Lowe*, 775 F.2d at 1008. "The purpose of America's laws is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of gender or other impermissible classification," 411 U.S. 792, 800-801 (1973). In sum, *McDonnell Douglas* enunciates that the primary purpose is to assure neutrality in decisions.

Unlike equal protection, under the D.C. Human Rights Act, Petitioner does not need to prove intent. Once a complainant proves disparate impact, the Respondent has the burden of proving that their purported justification is a genuine legal justification that they relied on and that motivated them. The DC Human Rights Act holds at D.C. Code § 2-1402.11(a) that "It shall be an unlawful discriminatory practice

to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin. sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual: The District of Columbia Court of Appeals has read D.C. Code § 2-1402.68, the Effects Clause of the DCHRA to mean that "despite the absence of any intention to discriminate, practices are unlawful if they bear disproportionately on a protected class and are not independently justified for some nondiscriminatory reason," *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987); *see also Ramirez v. District of Columbia*, No. 99-803(TFH), 2000 WL 517758 (D.D.C. 2000) (holding that "the effects clause of the DCHRA prohibits unintentional discrimination as well as intentional"), *Mitchell v. DCX, Inc.*, 274 F.Supp.2d 33, 47 (D.D.C. 2003). The Court has held that statistical data can be used to show disparate impact and make a prima facie showing of discrimination, " . . . [t]he tenants charge the District with discrimination in violation of the D.C. Human Rights Act . . . A separate provision states that "[a]ny practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice." § 2-1402.68. The D.C. Court of Appeals has held that this "effects clause" imports into the Act "the concept of disparate impact discrimination developed by the Supreme Court in *Griggs v. Duke Power Co*," *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987). " . . . [t]he Second Circuit developed a burden-shifting framework:

once the plaintiff demonstrates that the challenged practice has a disproportionate impact, the burden shifts to the defendant to "prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect," *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935-36 (2d Cir. 1988), aff'd on other grounds, 488 U.S. 15, 18, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988). Several circuits have adopted this burden-shifting framework. *See, e.g.*, *Darst Webbe Tenant Association Board. v. St. Louis Housing Authority*, 417 F.3d 898, 901-02 (8th Cir. 2005); *Langlois v. Abington Housing Authority*, 207 F.3d 43, 51 (1st Cir. 2000).

The United States Supreme Court has stated that a plaintiff must allege a "plausible entitlement to relief" by setting forth "a set of facts consistent with the allegations," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1956 (2007). Further, the Rules manifest a preference for resolution of disputes on the merits, not on technicalities of pleading, and pleadings are construed as to do substantial justice, *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008), quoting *Carter-Obayuwana v. Howard University*, 764 A.2d 779, 787 (D.C. 2001). The D.C. Court of Appeals was required to take all factual allegations in the Complaint as true, *Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009), citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986). *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) is instructive. That case sets out a two-pronged test to measure the weight of summary dismissal, and such a test necessarily resolves in favor of Petitioner. Under *Iqbal*, a court must first determine

what a legal conclusion and what a factual assertion are. When there are well pleaded factual allegations a court must accept those factual allegations as true. Second, the court must determine whether the factual allegations state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads enough facts to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. When analyzing a summary dismissal motion, the Court must construe the complaint in a light most favorable to the plaintiff, while assuming the facts alleged in a complaint as true. Dismissal is only proper where the plaintiff can prove no plausible facts which would support the claim, *Cauman v. Geroge Wash. Univ.*, 630 A.2d 1104, 1105 (D.C. 1993) and *Aronoff v. Lenkin Co.*, 618 A.2d 669, 684 (D.C. 1992). The claims of Petitioner are not only plausible and possible but likely as well.

The Supreme Court has declared that the existence of a racially disparate "impact of the official action"—that is, "whether it 'bears more heavily on one race than another,'"—"may provide an important starting point" for the analysis of constitutional purpose. It is, in fact, a profoundly important starting point because proof of a clear racially disparate impact can often illuminate—in a way that bare professions of official neutrality and even-handedness cannot—the underlying purposes and social meaning of a public policy: "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (citing)

Yick Wo v. Hopkins, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). The Court in *Arlington Heights* went further to state that, when such a "clear pattern" of racial disparity, "unexplainable on grounds other than race," emerges, the appearance of such a pattern makes concluding the "evidentiary inquiry" of discriminatory purpose "relatively easy." As the Supreme Court clearly indicated, a pattern of racially disparate impact alone can be determinative of the purpose inquiry where there is "a pattern as stark as that in *Gomillion* or *Yick Wo*," *Id.* It is hard to imagine a more discriminatory policy with the kind of consequences the Foreclosure Court in the District of Columbia has had on African Americans. This racialized effect is comparable to the policy invalidated in *Gomillion v. Lightfoot*, where the Alabama legislature had changed the political boundaries of the City of Tuskegee in such a way as to remove from the city several hundred African-American voters "while not removing a single white voter or resident," 364 U.S. 339, 341 (1960). Although the displaced African-Americans still had the statewide voting rights they began with, they alone suffered the dislocating local political effects of the boundary revisions. Whatever differences may exist in the racial dynamics of gerrymandering in the electoral context and the racial dynamics of gerrymandering in the context of teacher retention, we can *see* that, in both cases, a completely lopsided and unfair burden is placed on the backs of non-white citizens.

Similarly, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court found a violation where a facially

neutral ordinance, which forbade operation of a laundry in a wooden structure without the special permission of the city's Board of Supervisors, was applied in an unequal way disfavoring Chinese laundry owners. No Chinese owners were granted the special permit while all white applicants except for one received it. Further, according to the evidence, "more than 150" Chinese laundry operators were arrested for violating the ordinance while more than 80 non-Chinese owned laundries operating in wooden facilities without a permit were "left unmolested." In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court invoked *Arlington Heights* and *Gomillion* to find that, even without any evidence of an independent discriminatory public purpose, "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregate . . . voters' on the basis of race," *Id.* at 646-47. In *Shaw*, the challenged North Carolina congressional redistricting plan revealed nothing more shocking than irregularly drawn district lines and the existence of two majority-African-American districts. Yet, these innocuous facts, combined with the Court's recognition that "the legislature always is aware of race when it draws district lines," *Id.* at 660, were sufficient to justify the majority's holding that a valid claim existed. The critical insight of the *Shaw* Court appeared in its statement that reapportionment "is one area in which appearances do matter," *Id.* at 647. When government classes people together "who belong to the same race . . . and who may have little in common with one another but the color of their skin," and then treats them differently from others, the public regime comes to bear "an

uncomfortable resemblance to political apartheid," *Id.*

3. Summary Judgment Was Not Appropriate

This Case was not appropriate for Summary Judgment because the basic facts are complicated and in dispute, *Carl v. Tirado*, 945 A.2d 1208 (D.C. 2008). Moreover, the Trial Court's granting of Summary Judgment did not rest "on a narrow and clear-cut issue of law," *Id.* at 1209. *See also Oliver T. Carr Management., Inc. v. National Delicatessen, Inc.*, 397 A.2d 914 (D.C. 1979). The *Carr* and *Tirado* tests were recently affirmed in *Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013). The Trial Judge's 8 May 2017 Order granting Summary Judgment, demonstrates that this matter does not rest "on a narrow and clear-cut issue of law." Indeed that Order does not even address the manifold issues raised by Appellant in her Opposition to the Motion for Summary Judgment, in other pleadings filed by Appellant at the Trial level, in matters raised before the D.C. Court of Appeals and in the instant Petition. If there is any doubt that the legal issues are not narrow, the Trial Judge's shallow Order erases that doubt.

Summary disposition is only proper "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists," *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). *See also Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969).

B. Relevant Factual Background

In support of its Motion for Summary Judgment, Respondent relied almost exclusively on unproven factual claims in its Complaint and certain discovery instruments directed at Petitioner. The important and undisputed facts however, largely ignored by the Trial Court, are these: On 29 June 2015, Respondent filed the instant lawsuit for judicial foreclosure of the property located at 2829 11th Street N.W., Washington, DC 20001 (the "Property"). Respondent seeks to foreclose on the mortgage evidenced by a Note in the original principal amount of Six Hundred Fifty Eight Thousand and Five Hundred Dollars ($658,500.00), executed by Petitioner on 13 April 2007, and secured by a Deed of Trust, recorded in the land records for the District of Columbia on 13 April 2007, as Instrument Number 2007103852.

On or about 1 September 2008, Petitioner lost his job as an Information Technology Technician. He acquired employment as a taxi cab driver; however, his income was reduced by Eighty Percent (80%). Petitioner contacted Respondent and informed Respondent of his financial situation. Respondent granted Petitioner a forbearance, however Petitioner nonetheless continued to make mortgage payments during the forbearance period. As his financial situation did not improve, Petitioner filed for bankruptcy on or about 7 April 2009; and the bankruptcy was discharged on or about 1 September 2009. On or about 1 October 2009, Petitioner failed to make his mortgage payment. Petitioner again contacted Respondent and applied for a loan modification. Petitioner applied for loan modifications in years 2010; 2011; and twice in 2016

(21 January 2016 and 15 December 2016). Since 2011, Petitioner's financial situation improved, and he has been able to demonstrate a material change in circumstances and sufficient income to satisfy his mortgage obligations. Respondent however has denied all of Petitioner's requests for a loan modification citing a negative Net Present Value. Petitioner remained in constant communication with Respondent throughout the years and inquired extensively into the status of his multiple modification requests. On numerous occasions, Respondent advised him, as it has advised countless other homeowners similarly situated, that it was in his best interest to refrain from making any payments on his mortgage until loss mitigation options had been fully exhausted, despite the fact that Petitioner frequently informed Respondent that he was capable of making the mortgage payments. Petitioner also maintains that Respondent misguided him by stating that certain programs were limited to individuals who had fallen behind for a certain period of time, and that in order to take advantage of those programs Petitioner would have to continue to refrain from making his payments.

Respondent's statements, advising Petitioner to refrain from making payments while his loan modification requests were pending, were either an intentional misrepresentation or negligent advice from agents, employees or representatives of Respondent. Further, those same agents, employees or representatives of Respondent did not inform or warn Petitioner about the impact that refraining from making payments would have on his chances to obtain a loan modification. Respondent failed to clarify that caution although there were programs designated for

borrowers in far riskier financial positions than Petitioner was at the time. An impartial finder of facts should have been able to weigh these undisputed facts against the backdrop of Respondent's claims. At the center of this matter however is the inordinate delay by Respondent in prosecuting its claim. Because of the inordinate delay, 1) the Statute of Limitations applies; 2) Laches applies; 3) the question of whether Respondent is the "Holder" of the Note and Beneficiary of the Deed of Trust should have been settled and resolved; 4) the question of whether Respondent had standing to bring this lawsuit should have been resolved; and 5) the question of whether Respondent made any effort to mitigate its damages should have been resolved. The undisputed evidence demonstrates, had the Trial Court considered these matters, that all of these questions must be resolved in favor of Petitioner.

REASONS FOR GRANTING THE PETITION

I. SUMMARY JUDGMENT IS NOT SUPPORTED

The Appeals Court failed to review *de novo* the Summary Judgment of the Trial Court. The D.C. Court of Appeals has established that it "reviews grants or denials for summary judgment *de novo* and applies the same standard as the trial court in reviewing and assessing the record in the light most favorable to the non-moving party." *Borger Mgmt., Inc. v. Sindram*, 886 A.2d 52, 58 (D.C. 2005). *See Tobin v. John Grotta Co.*, 886 A.2d 87 (D.C. 2005) ("We review orders granting

summary judgment *de novo*."); *Parcel One Phase One Assocs., L.L.P. v. Museum Square Tenants Ass'n, Inc.*, 146 A.3d 394 (D.C. 2016) ("Whether summary judgment was properly granted is a question of law that we review *de novo*."); *William J. Davis, Inc. v. Tuxedo LLC*, 124 A.3d 612 (D.C. 2015) ("The question whether summary judgment was properly granted is one of law and we review *de novo*."); *Joeckel v. Disabled Am. Veterans*, 793 A.2d 1279 (D.C. 2002) ("In reviewing a trial court order granting summary judgment, we conduct an independent review of the record, and our standard of review is the same as the trial court's standard in considering the motion for summary judgment.").

The Court of Appeals has held that the party opposing the motion for summary judgment must provide enough evidence to make a prima facie case in support of its position. *Parcel One Phase One Assocs., L.L.P. v. Museum Square Tenants Ass'n, Inc.*, 146 A.3d 394 (D.C. 2016). Furthermore, "mere conclusory allegations by the non-moving party are legally insufficient to avoid the entry of summary judgment." *Little v. D.C. Water & Sewer Auth.*, 91 A.3d 1020, 1025 (D.C. 2014). Rather, the non-moving party must show that there is a genuine issue of material fact and that the moving party is not entitled to judgment as a matter of law. *See Reeves v. Wash. Metro. Area Transit Auth.*, 135 A.3d 807 (D.C. 2016); *Sibley v. St. Albans Sch.*, 134 A.3d 789 (D.C. 2016).

The Court of Appeals found that the non-moving party adequately raised a genuine issue of material fact in *Reeves v. Wash. Metro. Area Transit Auth.*, 135 A.3d 807 (D.C. 2016), and therefore held that the

lower court incorrectly granted summary judgment to the moving party because the evidence presented by the non-movant's expert witness "[revealed] evidence sufficient to present a question of fact, and hence, a jury question." *Id.* at 812 (alterations added). Similarly, in *William J. Davis v. Tuxedo LLC*, 124 A.3d 612 (D.C. 2015), the Court of Appeals overruled the lower court's granting of summary judgment because "there was no meeting of the minds between the parties on a number of the material terms." *Id.* at 621.

The Court in *William J. Davis* also expounds on what a non-movant must adequately demonstrate to challenge a motion for summary judgment. The Court states that a motion for summary judgment "may not be avoided merely by demonstrating a disputed factual issue," rather, the "opposing party must show that the fact is material and that there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 624.

II. STATUTE OF LIMITATIONS APPLIES

The statute of limitations in the District of Columbia for bringing a breach of contract claim is three years, D.C. Code § 12-301(7).[1] Respondent admits

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[1] Respondent has argued that the instant contract is one "Under Seal," thereby extending the Statute of Limitations to twelve years under District of Columbia Law, D.C. Code § 12-301(6). However, in the District of Columbia, "[c]ourts have been reluctant to declare a document to be sealed in the absence of evidence that the parties intended it to be under seal." Even the appearance of the word "seal" and the impression of the corporate seal on a document has been held insufficient to create a sealed document, *President and Directors of Georgetown College v.*

that the relevant instruments were executed on 13 April 2007, when Petitioner obtained a mortgage loan in the amount of $658,500.00 (the "Loan") and executed both a promissory note (the "Note") evidencing the terms of the Loan, and a deed of Trust, (the "Deed of Trust") encumbering the Property, Complaint ¶¶ 7-8. Respondent also claimed that it is the successor in interest to the original lender and alleges that it is the current holder of the Note and beneficiary of the Deed of Trust, Complaint ¶ 9 And, Respondent concedes that on 1 October 2009, Petitioner defaulted on the Note and Deed of Trust by failing to make the required monthly payments, Complaint ¶ 10 and that it did not file its Complaint (the "Complaint") asserting one count for judicial foreclosure against Petitioner until 19 June 2015, Docket Entry dated 19 June 2015. Thus, the preliminary question to be resolved was whether Respondent's claim were time barred, and this turns on the question of when the statute of limitations started to run. Under the District of Columbia's discovery rule, the statute of limitations begins to run when a party becomes aware that he has suffered harm which has been caused by another, *Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996). Other courts in this district, as well as District of Columbia courts, have held that a breach of contract claim accrues when the plaintiff is notified of his or her termination or nonrenewal. *See Allison v. Howard Univ.*, 209 F.Supp.2d 55, 60 (D.D.C. 2002); *Harris v. Ladner*, 828 A.2d 203, 206 (D.C. 2003); *Stephenson v. American Dental Ass'n*, 789 A.2d 1248, 1251-52 (D.C. 2002). If

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Madden, 505 F. Supp. 557, 587 [(D.Md.1980)], aff'd, 660 F.2d 91, 96 (4th Cir. 1981) [(per curiam)].

the clock begins to run when a party has been made aware that the other is refusing to perform, it is clear from the face of the Complaint that Respondent knew that Petitioner would no longer perform the contract on or about 1 October 2009. Thus, the statute of limitations for all of the claims began to run on 1 October 2009. Under the three-year statute of limitations, Respondent had until 1 October 2012 to file its Complaint. Respondent did not file its Complaint by that time. Thus the Complaint is time-barred.

A. Laches

While the application of a statute of limitations is less rigid, laches is more free-form. A defendant can prevail if he can show on a particular set of facts that the plaintiff's delay was unreasonable and that the delay worked to the defendant's detriment, *Abraham v. Ordway*, 158 U.S. 416, 420 (1895); *Major v. Shaver*, 187 F.2d 211, 212 (D.C. Cir. 1951).

B. Contracts Under Seal as Relates to Petitioner

Here, the record contains no evidence that the parties intended the Deed of Trust or the Note to be a sealed instrument. *See Huntley v. Bortolussi*, 667 A.2d 1362, 1365 (D.C. 1995), where the Court considered whether a suit brought on an unsealed promissory note acknowledged in and secured by a contemporaneously executed and sealed deed of trust constituted an action on "an instrument under seal" for § 12-301(6) purposes. The Court in *Huntley* held that the twelve year statute of limitations did not apply because the promissory note and a subsequent extension were not under seal, and the sealed deed of trust did not contain "an independent undertaking or covenant to pay

the indebtedness." *Madden*, cited in *Huntley*, did indeed hold that the appearance of the word "seal" and the impression of corporate seals on a document was insufficient to create a sealed instrument, *Madden*, footnote *supra*, 505 F.Supp. at 587. The Court went on to conclude in *Madden* that the combined use of the word "(Seal)" and of impressions should be considered insufficient by themselves to manifest an intent to render the contract under seal, particularly where such use of the word and of such impressions would serve no purpose other than to extend the statute of limitations, *Id.* at 587.

In a 1997 Case before the District of Columbia Court of Appeals, *Richard A. Burgess, Appellant, v. Square 3324 Hampshire Gardens Apartments, Inc., Appellee.*, 691 A.2d 1153 (1997), the Court cited numerous authorities for the proposition that the presence of a corporate seal may not by itself make a document an instrument under seal for § 12-301(6) purposes, *Simonson v. International Bank of Washington*, 114 U.S. App. D.C. 160, 160, 312 F.2d 887, 887 (1963) (per curiam); *Sigler v. Mount Vernon Bottling Co.*, 158 F.Supp. 234, 235-36 (D.D.C.), aff'd, 104 U.S. App. D.C. 260, 261-62, 261 F.2d 378, 379-80 (1958) (per curiam). *See also A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 314 U.S. App. D.C. 122, 135, 62 F.3d 1454, 1467 (1995); *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 147 U.S.App. D.C. 14, 25 n. 68, 452 F.2d 1346, 1357 n. 68 (1971). That is the case because corporate seals are routinely employed "for identification and as a mark of genuineness," a use which does not necessarily evince an intention to create an instrument under seal. *Sigler, supra*, 158 F.Supp. at 236, 104 U.S. App. D.C. at 262, 261 F.2d

at 380. *See also Fox-Greenwald*, *supra*, 147 U.S. App. D.C. at 25 n. 68, 452 F.2d at 1357 n. 68. Thus, in order for a document to be an instrument under seal for statute of limitations purposes, something more than a corporate seal, such as, for example, a recitation that the document is "signed and sealed," is required. *See Sigler*, *supra*, 158 F.Supp. at 235-36, 104 U.S.App. D.C. at 261-62, 261 F.2d at 380. *See also A.I. Trade*, *supra*, 314 U.S. App. D.C. at 135, 62 F.3d at 1467.

III. REGIONAL STATE LAW SUPPORTS THE PETITIONER

In Maryland and Virginia, adding the word "Seal" does not itself extend the statute of limitations, the so-called "enforcement period." If "(Seal)" appears next to the signatures, courts in both states will look to whether the parties knowingly and willingly intended the contract to be subject to the longer limitations period. *See Rouse-Teachers Properties, Inc. v. Maryland Cas. Co.*, 358 Md. 575 (2000); and *School Board of Fairfax County v. M.L. Whitlow, Inc.*, 223 Va. 157 (1982).

In Maryland[2], if a corporate seal is impressed on an agreement it will remain a simple contract unless

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[2] In general, the decisions of nearby jurisdictions are the most persuasive indication of how a particular state will decide a common law issue, and, at least with respect to Maryland law, that rule has been elevated into a formal principle. Because the District of Columbia was created from land ceded by Maryland and Virginia, statutory language incorporates Maryland's common law as it stood on 27 February 1801. *See* D.C. Code § 49-301 (1990). Consequently, the D.C. Court of Appeals has found Maryland law to be "especially persuasive authority." *Napoleon v. Heard*, 455 A.2d 901, 903 (D.C. 1983); *accord Watkins v. Rives*, 125 F.2d 33, 35 (D.C. Cir. 1941) (noting that the D.C. Circuit, when it sat as the court of last resort in the District of

either the body of the contract itself indicates that the parties intended to establish an agreement under seal, or sufficient extrinsic evidence, in the nature of 'how and when and under what circumstances the corporate seal was affixed,' establishes the parties desire to create a specialty, *Mayor & Council of Federalsburg v. Allied Contractors, Inc.*, 275 Md. 151, 155-56; 338 A.2d 275 (1975) (citing *General Petroleum Corp. v. Seaboard Terminals Corp.*, 23 F.Supp. 137, 139 (D.Md. 1938)). *See* also *Gildenhorn*, 271 Md. at 398, 317 A.2d at 842; *Levin v. Friedman*, 271 Md. 438, 443, 317 A.2d 831, 834 (1974). *See also President and Dirs. of Georgetown Coll. v. Madden*, 505 F.Supp. 557, 585 (D.Md. 1980) aff'd, 660 F.2d 91, 96 (4th Cir. 1981) [(per curiam)], (explaining that "[a] sealed instrument is not created by accident" and "the intent of the parties is what controls.")

The decision in *Rouse* from Maryland's highest Court is mirrored in Virginia, the state that contributed the balance of land in 1800 to create the District of Columbia, *School Board of Fairfax County v. M.L. Whitlow, Inc.*, 223 Va. 157 (1982). In the District of Columbia too, "Courts have been reluctant to declare a document to be sealed in the absence of evidence that the parties intended it to be under seal," *Huntley v. Bortolussi*, 667 A.2d 1362, 1365 (D.C.1995). And, as indicated, very recently courts in New York and New Jersey have adopted the Maryland, Virginia and

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Columbia, "customarily, looked to later decisions of the Court of Appeals of Maryland for assistance"). Indeed, the D.C. Court of Appeals may have a statutory obligation to "look to the laws of Maryland for guidance when a question novel to our law is before us," *White v. Parnell*, 397 F.2d 709, 710 n. 1 (D.C. Cir. 1968).

District of Columbia's rulings and reasoning on purported sealed instruments, *Soroush v. Citimortgage, Inc.*, Index No. 706506/2015 (Queens County Sup. Ct., January 11, 2016), ruling because the Mortgagor failed to bring a foreclosure action within the six year Statute of Limitations, the Court 1) granted the Mortgagee Summary Judgment; 2) declared that the mortgage held by Citimortgage was invalid; 3) directed the Real Estate Clerk of the County to discharge the recorded mortgage; and 4) extinguished the underlying promissory note; and *Washington v. Specialized Loan Servicing, LLC (In re Washington)*, 2014 Bankr. LEXIS 4649 (Nov. 5, 2014).

Finally, Respondent relies heavily on the Case of *Winston Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 323 (D.C. 2008) (a Case actually cited by Appellant), without revealing that the D.C. Court of Appeals in that Case found that the statute of limitations period would not be extended to twelve years and was subject to the three-year limitations period, concluding that D.C. Code § 12-301(8) (2001) provides that a three-year statute of limitations applies when no other period of limitation is specified for an action, *Murray*, *Id.* (citing *Obelisk Corp. v. Riggs Nat'l Bank*, 668 A.2d 847, 852 (1995). And, *see Logan v. LaSalle National Bank*, 80 A.3d 1014 (2013).

IV. RESPONDENT LACKED STANDING TO FORECLOSE

Respondent asserts that it is the "holder of the subject note" and therefore automatically entitled to foreclose. That must be proven factually, and it was not at the Trial level.

The subject Note is a negotiable instrument. The Uniform Commercial Code governs negotiable instruments. All of the states and the District of Columbia have adopted, with some minor differences, the Uniform Commercial Code ("UCC"). The UCC is statutory, is part of the D.C. Code, and its provisions dictate who can enforce negotiable instruments, defenses that can be raised, and other issues such as presentment and dishonor. This action involves the claim of Appellee that it is the "holder of the note." The claim involves review of the UCC's provisions regarding whether one is a "person entitled to enforce" the note (a "PETE"). A PETE may demand payment from the debtor and otherwise enforce the terms of the note. To determine whether one is a PETE, the inquiry begins with D.C. Code § 28:3-301. Person entitled to enforce instrument.

Respondent did not prove at the Trial level that it is a PETE. Even if Respondent claims to be in possession of the original, endorsed Note, Respondent is well aware, and the Trial Court should have taken cognizance of the fact that this mere assertion does not make it a non-disputed genuine issue and the question of standing is hotly contested with clear results in many jurisdictions

V. RESPONDENT TOOK NO ACTION TO MITIGATE ITS DAMAGES

Respondent waited six years to bring this lawsuit while mortgage costs, interest and attorneys and other fees piled up; apparently making no effort during that time to limit these rising costs. Now Respondent simply seeks to pass all of those costs on to Petitioner. It cannot. When a party suffers breach of contract, as

is alleged here, that party has a duty to do all that is reasonably within its power to minimize the monetary damages or harm suffered. Respondent apparently did nothing in the instant matter. That is certainly a matter of factual dispute, *Treasurer of the University of the District of Columbia v. Vossoughi*, 963 A.2d 1162, 1178 (D.C. 2009); *Obelisk Corporation v. Riggs National Bank of Washington, D.C.*, 668 A.2d 847, 856 (D.C. 1995), *Edward M. Crough Inc. v. Department of General Services*, 572 A.2d 457, 466 (D.C. 1990).

VI. A ONE PARAGRAPH SUMMARY JUDGMENT PRE-EMPTS DUE PROCESS

The potential loss of one's housing is a sufficiently significant private interest that gives rise to Due Process Protection, *Covey v. Sommers*, 351 U.S. 141 (1956); *Lindsey v. Normet*, 405 U.S. 56 (1972); and *Green v. Lindsey*, 456 U.S. 444 (1982). The District of Columbia Court of Appeals of course has followed this principle, *Frank Emmet Realty v. Monroe*, 562 A.2d 134 (1989).

As former Law Professor points Cunningham points out, "The property interests at stake in evictions actions both for landlords and for tenants are considerable and undisputable." Professor Cunningham further notes that the Decision by the United States Supreme Court in *Doehr* sets up a three part test for due process compliance by court and agency procedures where actions may result in the taking of property. The three part test as stated in *Doehr,* according to the Professor is: . . . first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation; and third . . . principal attention to the interest of

the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections, *Connecticut v. Doehr*, 501 U.S. 1 (1991).

Respondent did not assert and the DCCA did not pronounce any good reason to pre-empt the Due Process Protection of Petitioner.

VII. The Preference to Make Decisions on the Merits

It has long been established in courts that litigation should be decided on the merits of a case. The instant effort by Respondent to summarily prevail in the Case runs counter to that long-standing "judicial preference for the resolution of disputes on the merits rather than by the harsh sanction of dismissal," *Bond v. Wilson*, App. D.C., 398 A2d 21 (1979); *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam); *Hiern v. St.Paul-Mercur' Indem. Co.*, 262 F.2d 526, 530 (5th Cir. 1959); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); and *see* 6 J. Moore, Federal Practice 55.10[1], at 55-235 to 236 (2d ed. 1976). Furthermore, because D.C. Superior Court Rules track the Federal Rules, this Court may look to the decisions of the Federal Court interpreting the Federal Rules as persuasive authority in interpreting the local rule. *See Puckrein v. Jenkins*, 884 A.2d 46, 2005 D.C. App. LEXIS 497 (2005). The finality achieved through entry of dismissal should readily give way to the competing interests in reaching the merits of a lawsuit.

CONCLUSION

A cause of action generally accrues for statute-of-limitations purposes when the plaintiff knows or by the exercise of reasonable diligence should know of its injury, the injury's cause-in-fact, and some evidence of wrongdoing, *Ray v. Queen*, 747 A.2d 1137, 1141 (D.C. 2000). The analysis is "highly fact bound" and requires an evaluation of all of the circumstances. "What constitutes acting reasonably under the circumstances is a 'highly factual analysis,'" *In re Estate of Delaney*, 819 A.2d 968, 982 (D.C. 2003) (citation omitted). Here the facts are clear. This action is time barred. Moreover, Respondent now seeks to collect from the Petitioner thousands of dollars which, by law and justice, are not owing to Respondent. Indeed, Respondent did not demonstrate that it had standing to sue any of the Defendants.

A blind eye was turned by the Trial Judge to fundamental, hard fought Common Law, Statutory and Constitutional rights. No citizen, no matter his or her status or how he or she is regarded, should ever be forced to shred rights at the Courthouse Gates as is demonstrated here.

Respondent's Motion for Summary Judgment was premature and should have been denied. A One Paragraph Summary Judgment rattles the notion of due process in a way unimaginable by any treatment of the subject. As stated by the Court in *Wilburn v. Robinson*, 480 F.3d 1140, 1143 n.2 (D.C. Cir. 2007) (quoting *Gleklen v. Democratic Cong. Campaign*, "a non-movant is not required . . . to produce evidence

in a form that would be admissible at trial," 199 F.3d 1365, 1369 (D.C. Cir. 2000).

Respectfully submitted,

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