No. 19-

IN THE

Supreme Court of the United States

TIMOTHY C. HARRY; KAREN C. HARRY,

Petitioners,

v.

AMERICAN BROKERS CONDUIT; APEX MORTGAGE SERVICES; FIDELITY NATIONAL TITLE GROUP, INC.; AMERICAN HOME MORTGAGE SERVICING, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2007-2 MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-2; HOMEWARD RESIDENTIAL, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; OCWEN LOAN SERVICING, LLC; FIDELITY NATIONAL FINANCIAL, INC.; FIDELITY NATIONAL TITLE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit Court of Appeals was correct in denying Petitioners' Fifth and Fourteenth Amendments rights to Substantive and Procedural Due Process before the taking of real property by upholding the District Court's opinion ruling a fictitious, nonregistered, unlicensed name can enter into a lending transaction, ignore the Defendants' admitted business practices of fabricating new lending documents and forging Petitioners' signatures in order to collect on the newly fabricated note and mortgage and then foreclose on the property by not rendering an opinion and affirming the erroneous decision?

PARTIES TO THE PROCEEDING

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Case: 18-1829 Document: 00117391505 Date Filed: 01/22/2019 Entry ID: 6227047 Defendant-Appellee, Deutsche Bank National Trust Company as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass-Certificates, Series 2007-2 is a New York State-chartered banking corporation, and is a wholly-owned subsidiary of Deutsche Bank Trust Corporation, which is a wholly-owned subsidiary of Deutsche Bank AG, a banking corporation organized under the laws of the Federal Republic of Germany. No publicly held company owns 10% or more of Deutsche Bank AG's stock.

Defendant-Appellee, Mortgage Electronic Registration Systems, Inc. is a wholly-owned subsidiary of MERSCORP Holdings, Inc. MERSCORP Holdings, Inc. is owned by Maroon Holding, LLC. Intercontinental Exchange, Inc. is the only publicly-held corporation that individually owns 10% or more of Maroon Holding, LLC.

Defendant-Appellee, American Home Mortgage Servicing, Inc. is a majority-owned subsidiary of entities affiliated with WL Ross & Co. LLC, which in turn is a wholly-owned subsidiary of Invesco Private Capital, Inc., a wholly owned subsidiary of Invesco PLC, which is a publicly-owned corporation whose stock trades under the symbol IVZ on the New York stock exchange.

Defendant-Appellee, Homeward Residential, Inc. is a non-government corporation formed under the laws of the State of Delaware, which is a wholly owned subsidiary of Homeward Residential Holdings, Inc., which is a wholly owned subsidiary of Ocwen Financial Corporation, a publicly traded corporation.

Defendant-Appellee, Ocwen Loan Servicing, LLC is a non-governmental limited liability company, whose sole member is Ocwen Financial Corporation, a publicly traded corporation.

Case: 18-1829 Document: 00117391556 Date Filed: 01/22/2019 Entry ID: 6227071 Pursuant to Fed. R. App. P. 26.1, Defendants - Appellees Fidelity Title Group, Inc., Fidelity National Financial, Inc., Fidelity National Title Insurance Company (incorrectly named as Fidelity National Title Company), disclose the following:

Fidelity National Title Insurance Company is a subsidiary of Fidelity National Title Group, Inc., which is a subsidiary of FNTG Holdings, LLC. Fidelity National Financial, Inc. is the sole member of FNTG Holdings, LLC. Fidelity National Financial, Inc. is a public company traded on the New York Stock Exchange under the trading symbol FNF. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED CASES

The electronic order issued by the United States Court of Appeals for the First Circuit in *Harry v. American Brokers Conduit, et. al.*, C. A. No. 18-1829 did not issue an opinion when it issued an electronic order affirming the Federal District Court, Boston Division, Opinion dated March 8, 2019.

The Memorandum and Order of the Federal District Court of Massachusetts, Boston Division, in *Harry v. American Brokers Conduit, et. al.* Docket No. 1:16-cv-10895 granting Summary Judgment to Defendant Ocwen Loan Servicing dated August 16, 2018.

The Memorandum and Order of the Federal District Court of Massachusetts, Boston Division, in *Harry v. American Brokers Conduit, et. al.* Docket No. 1:16-cv-10895 dismissing Plaintiffs case against all Defendants except Ocwen Loan Servicing, LLC dated January 12, 2017.

The Memorandum and Order of the Federal District Court of Massachusetts, Boston Division in *Harry v. American Brokers Conduit, et. al.* Docket No. 1:16-cv-10895 dismissing Plaintiffs' claim of default against American Brokers Conduit and Apex Mortgage Services dated August 24, 2018.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

STATEMENT OF RELATED CASES v

TABLE OF CONTENTS vi

TABLE OF APPENDICES ix

TABLE OF CITATIONS x

CITATIONS OF OPINIONS AND ORDERS 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 4

STATEMENT OF THE CASE 7

A. Factual Background 7

B. Procedural History 11

REASONS FOR GRANTING THE PETITION 15

Table of Contents

Page

I. REVIEW IS WARRANTED WHERE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROTECTS AN INDIVIDUAL'S RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND TO BE HEARD ON THE MERITS OF THEIR OWN CASE 16

A. Procedural Due Process. 16

B. Substantive Due Process 18

1. State Law 18

2. Void Contract 19

3. MGL 255E and 255F (App. ____) 22

II. REVIEW IS WARRANTED WHERE A MOTION TO DISMISS MAY ONLY BE ENTERED IF THERE ARE NO ISSUES OF MATERIAL FACT 23

III. REVIEW IS WARRANTED WHERE FABRICATION OF DOCUMENTS IS A VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT ("FDCPA"); THE ISSUANCE OF SUMMARY JUDGMENT ON THIS COUNT WAS IN ERROR 26

Table of Contents

Page

A. Summary Judgment Granted to Defendant Ocwen in Error. 26

B. Defendants violated the FDCPA, M.G.L. 93A. 27

CONCLUSION 29

TABLE OF APPENDICES

Page

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED MARCH 8, 2019 .....1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED AUGUST 24, 2018.....3a

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED AUGUST 16, 2018 .....6a

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED JANUARY 12, 2017 .....20a

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED APRIL 25, 2019 .....56a

APPENDIX F — RELEVANT STATUTORY PROVISIONS 58a

TABLE OF CITED AUTHORITIES

Page

Massachusetts Cases

Blank v. Chelmsford Ob/Gyn, P.C.,
420 Mass. 404 (1995) 23

Iannacchino v. Ford Motor Co.,
451 Mass. 623 (2008) 23

Federal Cases

Ashcrof v. Iqbal,
556 U.S. 662 (2009). 23

Alexander v. United States,
509 U.S. 544 (1993). 5

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986). 26

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 23

Boyko v. Am. Intern Group, Inc.,
2009 WL 5194431 (D.N.J.) (Dec. 23, 2009) 26

California Bank v. Kennedy,
167 US 362 (1897). 21

Carey v. Piphus,
435 U.S. 247 (1978). 17

Page

Chattanooga National Building & Loan Association v. Denson,
189 U.S. 408 (1902) 20

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 26, 27

Central Transp. Co. v. Pullman's Palace Car Co.,
139 U.S. 24 (1891) 20

Connolly v. Union Sewer Pipe Co.,
184 U.S. 540 (1902) 26

Continental Wall Paper Co. v. Louis Voight & Sons Co.,
212 U.S. 227 (1909) 26

Curran v. Cousins,
509 F.3d 36 (1st Cir. 2007) 24

Daily v. Garrett (In re Garrett),
2014 Bankr. LEXIS 3087, 2014 WL 3724984 19

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 19

Esso Standard Oil Co. (P.R.) v. Lopez Freytes,
457 F. Supp. 2d 156 (2006) 17

Fritts v. Palmer,
132 U.S. 282 (1898) 20

Page

Harry v. Countrywide Home Loans, Inc.,
902 F.3d 16 (1st Cir. 2018) 1, 6, 18

Hulin v. Fibreboard Corp.,
178 F.3d 316 (1999) 19

In re Carney,
258 F.3d 415 (5th Cir. 2001). 27

Interstate Amusement Co. v. Albert,
239 U.S. 560 (1916) 20

Jacksonville M., P.R. & N. Co. v. Hooper,
160 U.S. 514 (1896) 21

Langford v. U.S. Dep't of Treasury,
645 F. Supp. 2d 381 (2009). 17

Leone v. Ashwood Fin., Inc.,
257 F.R.D. 343 (E.D.N.Y. 2009) 26

Link v. Wabash R. Co.,
370 U.S. 626 (1962) 17

Louisville, N. A. & C. R. Co. v.
Louisville Trust Co.,
174 U.S. 552 (1899) 21

Marshall v. Jerrico,
446 U.S. 238 (1980). 17

Page

Midland Funding, LLC v. Johnson,
137 S. Ct. 1407 (2017) 27

Munday v. Wisconsin Trust Co.,
252 U.S. 499 (1920) 20

Ruth v. Triumph P'ships,
577 F.3d 790 (7th Cir. 2009) 26

Topalian v. Ehrman,
954 F.2d 1125 (5th Cir. 1992). 27

Traut v. Quantum Servicing Corp.,
2016 U.S. Dist. LEXIS 104180 24

United States v. Crosby,
7 Cranch 115 (1812) 20

Waters v. J.C. Christensen & Assocs.,
2011 U.S. Dist. LEXIS 41075 27

Federal Statutes

Fifth Amendment to the United States
Constitution. 2, 16, 18, 22

Fourteenth Amendment to the United States
Constitution. 2, 16, 18, 22

12 U.S.C. § 2601 12

Page

12 U.S.C. § 2605(e). 10

15 U.S.C. § 1692 . . . . . .2, 27

15 U.S.C. § 1692e 27

15 U.S.C. § 1692e(10) 28

15 U.S.C. § 1692f 27

18 U.S.C. § 96 12

18 U.S.C. § 1014 12

28 U.S.C. § 1254(1). 2

18 U.S.C. § 1963 5

18 U.S.C. §§ 1961-1965 12

28 U.S.C. § 2101(c) 2

State Statues

M.G.L. Chapter 110 § 5 . . . . . .3, 4, 21

M.G.L. Chapter 93A 3, 27, 28

M.G.L. Chapter 93A, § 2(a) 28

Page

M.G.L. Chapter 255E 3, 4, 22, 24

M.G.L. Chapter 255F 3, 4, 22, 24

M.G.L. Chapter 266, § 35A. 12

M.G.L. Chapter 266, § 93A. 12

Federal Rules of Civil Procedure

Fed. R. Civ. P. 12(A)(1)(a)(i) 11

Fed. R. Civ. P. 56 27

Fed. R. Civ. P. 56(a) 26

CITATIONS OF OPINIONS AND ORDERS

The electronic order issued by the United States Court of Appeals for the First Circuit in *Harry v. American Brokers Conduit, et. al.,* C. A. No. 18-1829 did not issue an opinion when it issued an electronic order affirming the Federal District Court, Boston Division, Opinion. The United States Court of Appeals for the First Circuit based its ruling on another case *Harry v. Countrywide Home Loans Inc.*, 902 F.3d 16(1st Cir. 2018) which has no bearing on this case. The Electronic Order is set forth in the Appendix hereto. (App. 1a).

The Memorandum and Order of the Federal District Court of Massachusetts, Boston Division, in *Harry v. American Brokers Conduit, et. al.* Docket No. 1:16-cv-10895 granting Summary Judgment to Defendant Ocwen Loan Servicing is set forth in the Appendix hereto. (App. 6a).

The Memorandum and Order of the Federal District Court of Massachusetts, Boston Division, in *Harry v. American Brokers Conduit, et. al.* Docket No. 1:16-cv-10895 dismissing Plaintiffs case against all Defendants except Ocwen Loan Servicing, LLC is set forth in the Appendix hereto. (App. 20a).

The Memorandum and Order of the Federal District Court of Massachusetts, Boston Division in *Harry v. American Brokers Conduit, et. al.* Docket No. 1:16-cv-10895 dismissing Plaintiffs' claim of default against American Brokers Conduit and Apex Mortgage Services is set forth in the Appendix hereto. (App 3a).

STATEMENT OF JURISDICTION

The First Circuit's electronic order was rendered on March 8, 2019 a mere three days after Plaintiffs' submitted their reply brief. Plaintiffs filed a Petition for Rehearing En Banc on March 22, 2019. The First Circuit denied the Petition on April 25, 2019.

This Petition for Writ of Certiorari is filed within ninety (90) days after April 25, 2019 in accordance with 28 U.S.C. Section 2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

No person …shall be deprived of life, liberty, or property, without due process of law….

Fourteenth Amendment to the United States Constitution

Section 1: [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

15 U.S.C. 1692 Fair Debt Collection Practices Act

Please see Appendix page 58

MASSACHUSETTS GENERAL LAWS Chapter 255E

Please see Appendix page 60a

MASSACHUSETTS GENERAL LAWS Chapter 255F

Please see Appendix page 61a

MASSACHUSETTS GENERAL LAWS Chapter 110 Section 5

Section 5. Any person conducting business in the commonwealth under any title other than the real name of the person conducting the business, whether individually or as a partnership, shall file in the office of the clerk of every city or town where an office of any such person or partnership may be situated a certificate stating the full name and residence of each person conducting such business, the place, including street and number, where, and the title under which, it is conducted, and pay the fee as provided by clause (20) of section thirty-four of chapter two hundred and sixty-two. Such certificate shall be executed under oath by each person whose name appears therein as conducting such business and shall be signed by each such person in the presence of the city or town clerk or a person designated by him or in the presence of a person authorized to take oaths.

MASSACHUSETTS GENERAL LAWS Chapter 93A

Section 2. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

INTRODUCTION

The Petitioners, Timothy C. Harry and Karen C. Harry are victims of the subprime mortgage lending financial crisis that gripped the nation in the aughts. The Harry's were solicited to refinance their property in 2006 by Apex Mortgage Servicers. The lender on the note, American Brokers Conduit, ("ABC") is a fictitious trade name that was not registered anywhere in Massachusetts pursuant to M.G.L. 110 Section 5, did not apply for nor obtain a license to lend money from the Massachusetts Banking Commission pursuant to M.G.L. 255E and M.G.L. 255F. Fidelity Title Group filed the alleged mortgage with the Barnstable Registry of Deeds listing Mortgage Electronic Registration System (MERS) as nominee for the lender. MERS used the member number of American Home Mortgage Holding, Inc. who was not the lender on the note or mortgage.

Defendant Fidelity National Financial, Inc. had a subsidiary, DOCX that was in the business of fabricating lending documents for American Home Mortgage Servicing, Inc. ("AHMSI"). The Fidelity companies were involved with creating the original void note and mortgage and Petitioners believe DOCX was involved with the fabrication and forgery of signatures on the substituted void lending documents.

Over the period of the loan, the Petitioners believed the alleged loan they received was a predatory negative amortization loan and stopped paying on the mortgage. Beginning in 2009 and continuing through January 2016, Deutsche Bank Trust Company ("Deutsche Bank") and Ocwen Loan Servicing, LLC ("Ocwen") began five attempts to foreclose on the property.

On March 18, 2016, Plaintiffs brought suit in Barnstable County Superior Court seeking to have the alleged loan declared void because the lender was an unregistered, unlicensed, entity lacking the legal capacity to enter into a lending contract, to have the mortgage discharged, to receive quiet title to their property and to seek damages.[1]

The district court dismissed Petitioner's complaint as against all defendants except Ocwen pursuant to Count IV under the Fair Debt Collection Practices Act (FDCPA) stating that Petitioner's complaint was time barred under the statute of limitations and did not state a claim upon which relief could be granted.

During discovery, Petitioners found that the Ocwen business work product, known as the "Harry Comment Log", states "the signature on the loan, in their collateral file, which is held by defendant Deutsche Bank, does not match the signature on the letter" that the Petitioner's sent to Ocwen asking Ocwen to deal solely with their Attorney. During Ocwen's deposition, they admitted that there were two executed mortgages each with a different recording entity listed; the fabricated one Ocwen received from Deutsche Bank that was stamped a "True and

1. Because the First Circuit failed to render an opinion and fully substantiated the District Court's opinion, Petitioners refer to the District Court's ruling. In that ruling, the District Court makes a comment about the damages requested. The damages are math under RICO regarding the fraudulent use of the mail/wire/bank/fictitious name fraud as set out by statutes. 18 USC 1963, *Alexander v. United States*, 509 U.S. 544 (1993). Plaintiffs sued for the maximum amount that has been allowed for each offense Plaintiffs' incurred from Defendants, which Plaintiffs lay out in excruciating detail in their Amended Complaint. [A51 et. seq.].

Certified Copy" of the original, which Ocwen and Deutsche Bank relied on to service the alleged loan and the copy of the one filed with the Barnstable Registry of Deeds. All of Petitioner's evidence and the Defendant's admissions were not even considered by the district court nor reviewed by the First Circuit.

The First Circuit affirmed the district court's granting of Summary Judgment to Ocwen and Dismissal of the case without *issuing an opinion* on the merits of this case. Instead the First Circuit relied upon another opinion in *Harry v. Countrywide Home Loans, Inc.* 902 F.3d 16 (1st Cir. 2018) which is a different case with different plaintiffs, different defendants and a different fact pattern. Further, in *Harry v. Countrywide Home Loans, Inc.*, Countrywide *admitted twice in its response brief that it did not have a license to lend money* in Massachusetts and the First Circuit ignored that judicial admission in its ruling.

The First Circuit ignored all evidence and admissions and found defendant Ocwen did not violate the FDCPA when their practice was to recreate lending documents and forge signatures for business purposes.

This Court's intervention is urgently needed. As it currently stands, the First Circuit is and does ignore this Court' decisions, that an unregistered, unlicensed entity can enter into a contract. The First Circuit's ruling also permits corporations to fabricate and forge individuals' signature on whatever documents are needed to meet the corporation's business purpose. Under any other fact pattern, fabrication of documents and forgery of signatures is considered a felony.

The First Circuit ruling is so unconscionable and completely disrespects the Constitution of the United States and all statutes promulgated thereunder, the Statutes of Massachusetts that this Court has stated must be upheld in Federal Court as well as all Supreme Court rulings. Petitioners are not the only homeowners being swept under the rug by the crimes being committed by defendants. ABC wrote loans across the country. The Supreme Court must intervene to not only protect the Petitioners' rights as homeowners, but direct the federal district and circuit courts to uphold the state and federal laws when it comes to foreclosure of United States citizens' homes.

STATEMENT OF THE CASE

A. Factual Background

In late November 2006 Plaintiffs were contacted by APEX Mortgage Servicers, Inc. ("APEX") regarding refinancing their property. [A51, Para 15-17].[2]

On December 13, 2006, Plaintiffs formally applied with APEX for a Uniform Residential Loan to refinance their current mortgage. Apex, not the Plaintiffs, filled out application and input false financial information. [*Id.* at Para 16-24]

On December 13, 2006, APEX faxed a Good Faith Estimate ("GFE") and a Truth-In-Lending Disclosure

2. The facts are drawn from Petitioner's Amended Complaint and the opinions below. Page numbers are to the appendix submitted to the First Circuit Court of Appeals.

("TIL") prepared on **November 29, 2006**. The information on the GFE, TIL and loan application are all different. [*Id.* At paragraphs 25-35].

On December 21, 2006, Plaintiffs received a one page HUD-1A Settlement Statement prepared by a non-legal entity Fidelity Title Company stating that another non-legal entity American Brokers Conduit ("Hereinafter ABC") was the lender. The HUD-1A was fraught with inaccuracies. [*Id.* at para 36].

Chicago Title Insurance Company, a subsidiary of Fidelity National Title Group wrote a commitment on November 20, 2006 *twelve days prior to the alleged loan application* and a month prior to the alleged closing date stating a Loan Policy in the amount of $450,000 when the alleged loan application and GFE stated a loan amount of $445,500. [*Id*. at para 42-47].

Fidelity Title Group filed the alleged mortgage with the Barnstable Registry of Deeds listing MERS as nominee for ABC using a MERS MIN (Member Identification Number) for American Home Mortgage Holding, Inc. [*Id*. at para 59-65].

On May 1, 2009, MERS as nominee for ABC assigned the alleged mortgage to Deutsche Bank National Trust Company, as Trustee for American Home Mortgage Assets Trust 2007-02, Mortgage-Backed Pass-Through Certificates, Series 2007-02 ("Deutsche Bank"). This assignment of the alleged mortgage ("AOM") is void because the lender did not exist, therefore could not nominate MERS as mortgagee, MERS had nothing to assign, the MERS MIN on the alleged mortgage is for

another entity, Trust 2007-02 was closed according to the Trusts Pooling and Servicing Agreement, the Trust is governed by New York law, the assignment was signed by six illegal known robo-signers, Ron Meharg who prepared the assignment, Tywanna Thomas As Asst. Secretary for MERS, Dawn Williams as Witness for MERS, Korell Harp as VP for MERS (who was in an Oklahoma prison at the time of the execution of the assignment), Christina Huang as Witness for MERS and Britany Snow as the Notary Public. [*Id*. at Para 71-81].

On July 7, 2011 MERS executed a second AOM to Deutsche Bank as Trustee of the same Trust which stated ABC "is organized and existing under the laws of the United States of America", stated that the assignment is a "Confirmatory Assignment" in care of American Home Mortgage Servicing, but using an address for Ocwen Loan Servicing, and this assignment was also executed by known illegal robo-signer April King and notarized by Tammy M. Hansen who does not have a notary commission number in Florida where the document was allegedly executed. [*Id*. at Para. 82-87].

American Home Mortgage Servicing, Inc. ("AHMSI") serviced this alleged note from November 1, 2008 through June 5, 2012 when they changed their name to Homeward Residential Inc.; Homeward was purchased by Ocwen Financial Corporation on October 3, 2012. All three Defendants continued to seek payment on a void note and void mortgage. [*Id*. at Para 88-93].[3]

3. Ocwen Loan Servicing recently sold the mortgage servicing rights to PHH Mortgage Services out of Mt. Laurel, NJ and has sent their first notice of foreclosure to the Petitioners.

On September 28, 2009, Defendant Deutsche Bank began the first of ***five*** attempts to foreclose on the Plaintiffs' property. Notice of Mortgagee's sale was published in *The Enterprise* on November 6, 2009. The second notice was sent November 11, 2010, the third on July 14, 2011, the fourth on February 13, 2015 and the Fifth on January 28, 2016 [*Id.* at para 94-128].

Plaintiffs received correspondence from Ocwen on July 20, 2015 that stated "they [Ocwen] would not communicate with Plaintiffs' counsel because Plaintiffs' signature on the letter they sent to Ocwen requesting that Ocwen deal with Plaintiffs' counsel did not match Plaintiffs' signature on the fraudulent loan documents in Ocwen's possession. This is when Plaintiffs' realized that the alleged loan documents were fraudulent and forged. [*Id.* at Para 115-120].

On July 30, 2015, Plaintiffs, in accordance with RESPA, sent a Qualified Written Request and Validation of Debt letter to Defendant Ocwen who sent one package of documents on September 11, 2015 and a second set of documents on September 30, 2015. The documents sent do not follow the evolution of the debt and the response is in violation of RESPA 12 U.S.C. Section 2605(e). [*Id.* para 132-134].

On September 3, 2015, Defendants MERS, Deutsche Bank, and Ocwen created and caused to be filed a **third** void AOM in the Barnstable Registry of Deeds, [A304, pg. 8].

B. Procedural History

On March 18, 2016, Plaintiffs filed their Verified Complaint with the Barnstable County Superior Court.

Summons were issued and served together with the Verified Complaint on Defendants American Brokers Conduit ("ABC"), Apex Mortgage Services ("Apex"), Fidelity National Inc., Fidelity National Title Group, Inc., Fidelity National Title Company ("Fidelity Companies"), American Home Mortgage Servicing, Inc. ("AHMSI"), Deutsche Bank National Trust Company, as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass- Through Certificates, Series 2007-2 ("Deutsche Bank"), Homeward Residential, Inc. ("Homeward"), Mortgage Electronic Registration Systems, Inc. ("MERS"), Ocwen Loan Servicing, LLC ("Ocwen"), Korde & Associates, P.C. and Ablitt & Carlton Law Firm on April 27, 2016, by Constable Merrill Smallwood to each last known Registered Agent for Service of Process, who denied service which was then filed with the Massachusetts Secretary of State's Office for Service Processing.

On May 17, 2016, Defendants Deutsche Bank, Homeward, MERS and Ocwen removed this matter to federal district court citing Federal Question as appropriate jurisdiction.

On June 13, 2016, Plaintiffs filed a Motion for Default as to ABC and Apex for failing to enter an appearance in accordance with Fed. R. Civ. P. Rule 12(A)(1)(a)(i). Also on June 13, 2016, Plaintiffs voluntary dismissed Defendant Korde & Associates.

On June 28, 2016, the court granted Plaintiffs Motion for Entry of Default against ABC and Apex and issued a Standing Order on Motions for default Judgment. [A37].

On July 8, 2016, Plaintiffs filed Motion for Entry of Default Judgment against ABC and Apex. [A39, A45]. The court denied the Motion on July 29, 2016 then vacated its decision and did not enter another ruling until August 24, 2018.

On July 19, 2016, Plaintiffs filed their Amended Complaint [A51] setting forth violations of racketeering activities under 18 U.S.C. 96 Sections 1961-1965 (count one); expiration of statutes of limitations (count two); violations of M.G.L. Chapter 266, Section 35A, Section 93A (count three); violations of the FDCPA (count four) violations of RESPA 12 U.S.C. Section 2601 (count five); violations of 18 U.S.C. Section 1014 (count six); violations of the Truth in Lending Act (count seven); slander of title (count eight); fraud in the concealment (count nine); rescission enforcement and quiet title (count ten) and Lack of Standing (count eleven). Defendants AHMSI, Deutsche Bank, Homeward, MERS and Ocwen filed their Motion to Dismiss and Memorandum of Law on even date. [A191, A196, A239].

On July 27, 2016, the Fidelity Companies filed their Motion to Dismiss, Memorandum of Law and Declaration [A246, A249, A279, A282-A298].

Plaintiffs filed their Motion in Opposition to Defendants Fidelity Companies' Motion to Dismiss and Memorandum of Law on August 12, 2016. [A302, A441-A639]. Plaintiffs filed their Motion in Opposition to AHMSI, Deutsche

Bank, MERS, Homeward and Ocwen's Motion to Dismiss and Memorandum of Law on August 22, 2016. [A300, A304, A306, A335-A439]. Defendants Fidelity Companies filed a Reply Motion and Memorandum of Law to Plaintiffs' Opposition Motion and Memorandum of Law to Fidelity Companies Motion to Dismiss and Memorandum of Law on September 9, 2016. [A659]. Plaintiffs filed a Memorandum of Law Opposing Defendants AHMSI, Deutsche Bank, MERS, Homeward Motion to Dismiss on September 13, 2016. [A665, A667]. Ocwen filed a reply Motion and Memorandum of Law to Plaintiffs' Opposition to Defendants Motion to Dismiss on October 3, 2016 together with a Motion to Strike with a Memorandum of Law to exclude certain exhibits submitted by Plaintiffs. [A730-A747].

The court held a Motion Hearing on October 5, 2016.

Plaintiffs filed their Opposition Motion and Memorandum of Law to Defendants AHMSI, Deutsche Bank, Homeward, MERS and Ocwen's Motion to Strike certain exhibits submitted by Plaintiffs on October 17, 2016. [A794, A796].

The court issued an Order to Show Cause that Plaintiffs had properly served ABC and Apex. [A805]. Plaintiffs filed their response to the Order to Show Cause on January 12, 2017 together with Exhibits and Affidavit of the serving Constable. [A807-A832].

The court granted all Defendants Motion to Dismiss for failure to state a claim except for Count IV as to Ocwen for violations under the Fair Debt Collection Practices Act with the ruling relying heavily that the

statute of limitations had run on all of the claims. [A834]. Plaintiffs filed a Motion for Reconsideration together with a Memorandum of Law on February 9, 2017. [A861]. The Defendant Fidelity Companies filed an Objection to Plaintiffs Motion for Reconsideration [A863] as well as Defendants AHMSI, Deutsche Bank, Homeward, MERS and Ocwen [A907, A913]. Plaintiffs filed a Reply [A923, A928], but ultimately, the Motion for Reconsideration was denied on April 12, 2017 without an opinion.

Plaintiffs filed an Appeal of the Motion to Dismiss ruling [A834] on April 12, 2017, which was deemed to be untimely by the United States Court of Appeals on June 5, 2017 [A937]. The court terminated Defendants Apex and ABC on May 4, 2017 and vacated that ruling on May 5, 2017.

After protracted maneuvering by defendants, discovery was completed and Plaintiffs filed their Motion for Summary Judgment, Memorandum of Law with attachments and Statement of Facts on June 29, 2018. [Doc. A1060, A1242-A2011, A2015]. Defendants also filed their Motion for Summary Judgment on June 29 2018. [A1062, A1064, A1081-A1235]. Reponses were filed on July 20, 2018 by Defendant Ocwen [A2093, A2042-A2107] and Plaintiffs [A21-7, A2109-A2145]. Plaintiffs also filed a Motion to Strike certain exhibits and Affidavit filed by Defendant together with a Memorandum of Law. [A2161, A2164]. Reply to Defendant Ocwen's Response was filed by Plaintiffs on July 27, 2018 [A2197, A2] and by Defendant to Plaintiffs' response. [A2179, A2157].

The court held a motion hearing on July 30, 2018.

On August 17, 2018, the court denied Plaintiffs' Motion to strike Defendant Ocwen's exhibits, Denied Plaintiffs' Motion for Summary Judgment and Granted Defendant's Motion for Summary Judgment and Dismissed the Petitioner's case against Ocwen. [A2258]. None of the opinions ever address the fact that ABC was nothing more than a fictitious name nor did the opinions address the fabrication of new lending documents.

Plaintiffs then filed another Motion for Default against ABC and Apex on August 17, 2018 [A2269, A2275], which was denied by the court on August 24, 2018 [A2281]. Upon which the court ordered ABC and Apex dismissed [A2284] and ordered Judgment for the Defendant Ocwen on even date. [A2285].

Plaintiffs filed an appeal with the First Circuit Court of Appeals on August 29, 2018 [A2286], which was granted on August 29, 2018. On March 5, 2019, Plaintiffs filed their reply brief. On March 8, 2019, a ***mere three days later***, the First Circuit affirmed the ruling of the district court without an opinion. Plaintiffs had submitted over 2200 pages of testimony and evidence in support of their appeal. Plaintiffs aver that none of it was reviewed or discussed. Plaintiffs filed a Petition for Rehearing En Banc on March 22, 2019, which First Circuit denied on April 25, 2019 again without an opinion.

This Petition followed.

REASONS FOR GRANTING THE PETITION

The ruling by the district court, upheld by the First Circuit, does not follow any of the rulings of this Court

going back almost two hundred years. The ruling flies in the face of black letter law, the Constitution of the United States and the Statutes promulgated thereunder as well as the Statutes of the Commonwealth of Massachusetts.

Petitioners deserve to have their case heard on its own merits, deserve to have a contract written by an entity lacking the legal capacity to do so deemed void and the fabricated duplicate note and mortgage with forged signatures declared illegal and unenforceable.

I. REVIEW IS WARRANTED WHERE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROTECTS AN INDIVIDUAL'S RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND TO BE HEARD ON THE MERITS OF THEIR OWN CASE.

The Fifth Amendment and Fourteenth Amendments

The Fifth Amendment states that "No person shall ….. be deprived of life, liberty or property without due process of law." The Fourteenth Amendment states "nor shall any State deprive any person of life, liberty or property without due process of law.

A. Procedural Due Process

The United States Supreme Court has ruled a party to a lawsuit has the fundamental right under the Fifth and Fourteenth Amendments, of the United States Constitution, to have their case be heard on its own merits.

"The Due Process Clause entitled a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. The neutrality requirement helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and realty of fairness, generating the feeling, so important to a popular government, that justice has been done by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico* 446 U.S. 238 (1980). See also *Esso Standard Oil Co. (P.R.) v. Lopez Freytes,* 457 F. Supp. 2d 156 (2006) (Company was entitled to permanent injunction where it achieved success on the merits by showing that there was a clear violation of its due process rights to a fair and impartial trial where the appearance of bias was so strong that a Constitutional tort would have been committed if the board were to continue with the proceedings against it.) *Langford v. U.S. Dep't of Treasury* 645 F. Supp. 2d 381 (2009) citing *Carey v. Piphus* 435 U.S. 247, 259 (1978).

"…the very purposes for which courts were created -- that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties." *Link v. Wabash R. Co.,* 370 U.S. 626, 648 (1962), Justices Black, Douglas and Chief Justice Renquist dissenting. "Further, this Court has repeatedly held that the case must be decided on its own merits and nothing else."

The First Circuit decided not to render a decision in the case at bar, but to rely on another case *Harry v. Countrywide, et al.* in affirming the district court's decision. The actions of the First Circuit violate Petitioner's Fifth and Fourteenth Amendment right to due process of law before the taking of property. The property at issue is the Petitioners' home.

The First Circuit states "After careful consideration of the record and the parties' arguments, we affirm the district court's decisions…." (2a) Plaintiffs filed their reply brief at 11:00 am on March 5, 2019 and by 1pm, the panel of judges was announced, which included Justice David Souter. On March 8, 2019, *a mere three days later,* the First Circuit issued its ruling affirming the district court's decision.

The First Circuit failed to follow this Court's rulings, the Constitution of the United States and the statutes of Massachusetts. Both the district court and the First Circuit relied upon and cited a faulty case *Harry v. Countrywide Homes Loan Inc.* to rule against Petitioners depriving Petitioners of their federal due process right to have their case heard on its own merits.

B. Substantive Due Process

1. State Law

"Except in matters governed by the U.S. Constitution or by acts of Congress, the law to be applied in any case is the law of the state. Whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There

is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or general, be they commercial law or a part of the law of torts. *Erie R.R. v. Tompkins*, 304 U.S. 64, 69, 1938. "And no clause in the United States Constitution purports to confer such a power upon the federal courts." *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 317 (1999). A federal court sitting in diversity or exercising supplemental jurisdiction over state law claims must apply state substantive law, but a federal court applies federal rules of procedure to its proceedings. *Daily v. Garrett (In re Garrett)*, 2014 Bankr. LEXIS 3087, *1, 2014 WL 3724984.

"The U.S. Constitution recognizes and preserves the autonomy and independence of the states in their legislative and judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States." *Erie,* 69.

Review of this case is imperative as the First Circuit has completely ignored Massachusetts Statutes and authority of the Massachusetts Banking Commission, an administrative agency created under the Massachusetts legislature. This usurpation of power is beyond the scope of their judicial authority.

2. Void Contract

The alleged lending documents are void, under the law. "The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land

is situated". *United States v. Crosby*, 7 Cranch, 115, 116. "Anywhere interstate commerce is not direct affected, a state may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute." *Munday v. Wisconsin Trust Co.*, 252 U.S. 499, 1920, citing *Fritts v. Palmer*, 132 U.S. 282, 288, (1898), *Chattanooga National Building & Loan Association v. Denson*, 189 U.S. 408,(1902); *Interstate Amusement Co. V. Albert*, 239 U.S. 560, 568, (1916).

A contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 38, 1891.

"A contract of a corporation, which is ultra vires in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect; the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it; the contract cannot be ratified by either party, because it could not have been authorized by either; no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have

been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to its or by acting upon it, to show that it was prohibited by those laws." *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U.S. 552, 561, 19 S. Ct. 817, 820, 43 L. Ed. 1081, 1086, 1899 U.S. LEXIS 1518, *16 See also *California Bank v. Kennedy*, 167 US 362 (1897); *Jacksonville M., P.R. & N. Co. v. Hooper*, 160 U.S. 514 (1896).

Massachusetts General Statutes chapter 110 section 5 stipulates the procedures necessary for a "trade name" such as ABC, to be able to legally enter into a contract is to register the name in the town where it does business.

ABC was not registered in Mashpee, Massachusetts where the Plaintiffs live, nor with the Massachusetts Secretary of State. Unless an individual was aware of the Massachusetts Banking Commission's Cease and Desist Order to American Home Mortgage Corp., no one would know what ABC was pretending to be. The First Circuit affirmed the district court statement "American Brokers Conduit was a trade name under which American Home Mortgage Corporation did business. American Home Mortgage Corporation was properly licensed as a mortgage broker in Massachusetts on March 21, 2000." (App. 16a). The district court goes on to say "Even if American Home Mortgage Corporation improperly failed to register that trade name with regulatory authorities, it does not follow that the Harrys were somehow deceived or defrauded by the use of that name. (App.17a).

The district court admitted ABC was a fictitious name and was not registered and gave it legitimacy outside of the Massachusetts statute.

3. MGL 255E and 255F (App. ____)

The district court and First Circuit ignored Massachusetts statutes 255E and 255F. These statutes legislative history began in 1783 when Chapter 25 was enacted creating the Massachusetts Banking Commission and prescribing the requirements as to how and who an entity meeting the definition of a "person" may become licensed to lend money in Massachusetts. (App.___)

This assertion by the district court above dismissing the fact that the name on the lending documents is nothing more than an unregistered trade name completely dishonors the Massachusetts Banking Commissions' power as given to it by the Massachusetts legislature. The Banking Commission ruled in Docket Number 99-026 [A1311]

> "No authority exists under said chapter 255E for a mortgage lender to conduct business under an existing license while also using a trade name for all or any part of its business. The intent of the licensing framework set forth in said chapter 255E is to ensure that a consumer knows the identity of the entity with which he or she is doing business. To allow a lender to use a name other than the name which appears on its license would be contrary to this intent and foster potential consumer confusion regarding the identity of the licensee. Accordingly, it is not permissible for a licensed lender to conduct business under more than one name."

It is imperative for the Supreme Court to grant a Writ Certiorari. Petitioners Fifth and Fourteenth Amendment

rights to procedural and substantive due process have been completely ignored and that violation will result in the unlawful taking of Petitioners property. Petitioners have a right to have the First Circuit rule on the merits of the case at bar. The Petitioners have a right that for a judicial ruling to uphold Massachusetts statutes and this Court's rulings.

II. REVIEW IS WARRANTED WHERE A MOTION TO DISMISS MAY ONLY BE ENTERED IF THERE ARE NO ISSUES OF MATERIAL FACT.

The Court is required to "take as true 'the allegations of the compliant, as well as such inferences as may be drawn therefrom in the plaintiffs' favor…'" *Blank v. Chelmsford Ob/Gyn, P.C.* 420 Mass. 404, 407 (1995). "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . ." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level….. based on the assumption that all the allegations in the complaint are true (even if doubtful in fact) …" *Iannacchino v. Ford Motor Co.*, supra at 636, quoting *Bell Atl. Corp. v. Twombly*, supra at 555. "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." *Ashcrof v. Iqbal* 556 U.S. 662, 2009.

In considering the merits of these motions, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences [*6] in plaintiffs' favor. See *Lu,* 98 F. Supp. 3d at 93. Moreover, the Court should "treat any allegations in the answer that contradict the complaint as false." *Id.* at 94. The Court may also consider certain documents when 1) the documents' authenticity is not disputed by the parties, 2) the documents are "central to the plaintiffs' claim" or 3) the documents are "sufficiently referred to in the complaint." *Curran v. Cousins*, 509 F.3d 36, 44 (1st Cir. 2007). *Traut v. Quantum Servicing Corp.*, 2016 U.S. Dist. LEXIS 104180, *5-6

As Petitioners stated and offered evidence as proof to the district court, ABC was an unregistered fictitious name, an alleged dba of American Home Mortgage Corp., was not a "person" as that term is defined under M.G.L. 255F[4]. As a fictitious unregistered DBA, ABC could not become a licensed lender under the Massachusetts statute. ABC lacked the legal authority to enter into a lending contract. None of the defendants nor the district court deny that ABC did not have a license to lend money or that it was not properly registered.

Defendant Ocwen testified that it deems ABC to be a licensed lender based on "Attorney/client" work product. [A1260, pgs. 47, 55] That is not an exception under MGL 255E and 255F. Whether or not ABC had the legal capacity to enter into a lending arrangement is a material fact.

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4. "Person", a natural person, corporation, company, limited liability company, partnership, or association. American Brokers Conduit, a tradename, a "doing business as" does not meet this definition.

Ocwen admitted that the alleged note they were relying on for servicing the alleged loan was forged stating that the "signature on the note does not match the signature of the Plaintiffs". [A1610, pg. OLS000244]. This is material fact, who forged the new note. It was kept in Deutsche Bank's collateral file and relied upon by Deutsche Bank and Ocwen. Fidelity had a subsidiary, DOCX that did nothing but fabricate new lending documents. The original note has not been produced and does not exist since it was a fabricated note that was produced at deposition as the *original*. Servicing a fabricated note with forged signatures is a felony.

Ocwen presented a second forged alleged Mortgage testifying that it was a "True and Certified Copy" of the original. [A1260, pgs. 49, 53, 57, 58, 59]. Ocwen admitted that these fabricated forged documents came from Deutsche Bank's collateral file. No legal lending transaction executes two mortgages one requesting to be returned to Fidelity National Title Company and one requesting to be returned to American Brokers Conduit. Who fabricated the second mortgage?

There are many material issues in dispute in this case.

Statute of Limitations

The First Circuit was wrong to dismiss the case based on the statute of limitations. In order for the Statute of Limitations to begin to apply, there has to be a legal transaction. The First Circuit was wrong to deem there to be a legitimate lending transaction in contravention of Massachusetts General Statutes and deem every count in the Plaintiffs Amended Complaint as being time barred. "An act done in disobedience to the law creates no right of

action which a court of justice will enforce. The authorities from the earliest time to the present unanimously held that no court will lend its assistance in any way toward carrying out the terms of an illegal contract." *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 541, (1902). See *Continental Wall Paper Co. v. Louis Voight & Sons Co.* 212 U.S. 227 (1909).

III. REVIEW IS WARRANTED WHERE FABRICATION OF DOCUMENTS IS A VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT ("FDCPA"); THE ISSUANCE OF SUMMARY JUDGMENT ON THIS COUNT WAS IN ERROR.

A. Summary Judgment Granted to Defendant Ocwen in Error.

A moving party is to be spared a trial when there is no genuine issue of material fact on the record and that party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). The plaintiff need only establish one FDCPA violation to prevail. *Leone v. Ashwood Fin., Inc.,* 257 F.R.D. 343 (E.D.N.Y. 2009). *Ruth v. Triumph P'ships*, 577 F. 3d 790 (7th Cir. 2009). The FDCPA is a strict liability statute, and debt collectors whose conduct falls short of its requirements are liable here respective of their intentions. *Boyko v. Am. Intern Group, Inc.*, 2009 WL 5194431 (D.N.J.) (Dec. 23, 2009).

The movant must inform the court of the basis for the summary judgment motion and must point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate

the absence of genuine factual issues. *Celotex Corp.,* 477 U.S. at 323; *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Admissions on file provide proper grounds for summary judgment. Fed. R. Civ. P. 56; 8 *In re Carney*, 258 F.3d 415, 420 (5th Cir. 2001).

Summary Judgment granted to Ocwen was in error.

B. Defendants violated the FDCPA, M.G.L. 93A

The FDCPA was enacted in 1978 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumer's debt collection abuses. 15 U.S.C. Section 1692 (e). The FDCPA (15 U.S.C.S. § 1692 et seq.) prohibits a debt collector from asserting any false, deceptive, or misleading representation, or using any unfair or unconscionable means, to collect, or attempt to collect, a debt. 15 U.S.C.S. §§1692e, 1692f. *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1408, 97 (2017). The FDCPA, 15 U.S.C.S. § 1692 et seq., imposes strict liability on debt collectors for their violations. A plaintiff need not show intentional conduct by the collector or actual damages. A plaintiff need only show a violation of one of the FDCPA's provisions in order to make out a prima facie case. In order to prevail on a FDCPA claim, a plaintiff must prove that (1) he was the object of collection activity arising from consumer debt, (2) the defendant is a debt collector within the meaning of the statute, and (3) the defendant engaged in a prohibited act or omission under the FDCPA. *Waters v. J.C. Christensen & Assocs.*, 2011 U.S. Dist. LEXIS 41075, *1, 2011 WL 1344452. The FDCPA prohibits the use of any false representation or deceptive means to collect

or attempt to collect any debt or to obtain information concerning a consumer. 15 U.S.C.S. §1692e(10). *Id*.

The Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A (Chapter 93A), prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mass. Gen. Laws ch. 93A, § 2(a). Pursuant to Chapter 93A, a business practice is unfair and deceptive if it can be found to be immoral, unethical, oppressive, or unscrupulous; or within the bounds of some statutory, common-law or other established concept of unfairness. *Id*. To allege that a business practice is deceptive or unfair under the first element, plaintiffs must show that the trade practice or conduct [1] falls within at least the penumbra of some common-law, statutory, or other established concept of unfairness; [2] is immoral, unethical, oppressive, or unscrupulous; and [3] causes substantial injury to consumers. See *Young*, 828 F.3d 26, 2016.

The First Circuit's erred when it ruled that Ocwen did not violate the FDCPA. That act was created to make sure corporations did not engage in dishonorable business practices to collect on a debt. Fabricating new lending documents to replace lost originals and forging signatures is a dishonorable business practice and a felony. The Defendants not only violated the FDCPA but also M.G.L. 93A.

CONCLUSION

The Supreme Court must hear this case. The First Circuit ruling dishonors the United States Constitution, federal law, Massachusetts General Statutes and rulings of the United States Supreme Court. When a federal judge takes the oath of office to uphold the United States Constitution and all federal and state laws for the duration of his/her life that standard of upholding the law applies irrespective of the case presented.

The Supreme Court must hear this case to stop corporations from fabricating lending documents to replace originals that have been lost and ensure due process is awarded every citizen before the taking of property.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED MARCH 8, 2019

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1829

TIMOTHY C. HARRY; KAREN C. HARRY,

Plaintiffs-Appellants,

v.

AMERICAN BROKERS CONDUIT; APEX MORTGAGE SERVICES; FIDELITY NATIONAL TITLE GROUP, INC.; AMERICAN HOME MORTGAGE SERVICING, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2007-2 MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-2; HOMEWARD RESIDENTIAL, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; OCWEN LOAN SERVICING, LLC; FIDELITY NATIONAL FINANCIAL, INC.; FIDELITY NATIONAL TITLE COMPANY,

Defendants-Appellees,

KORDE & ASSOCIATES, P.C.;
ABLITT & CHARLTON, P.C.,

Defendants.

Appendix A

Before Lynch, *Circuit Judge*, Souter,* *Associate Justice*, and Kayatta, *Circuit Judge*.

Entered: March 8, 2019

JUDGMENT

After careful consideration of the record and the parties' arguments, we affirm the district court's decisions granting the defendants' motions to dismiss and motions for summary judgment, and denying the plaintiffs' motion for default judgment, for essentially the same reasons given by the district court. Almost all of the plaintiffs' claims, brought in an attempt to void a loan refinancing agreement nearly a decade after the transaction, are time-barred or fail to state a valid cause of action. *See Harry v. Countrywide Home Loans, Inc.*, 902 F.3d 16, 18 (1st Cir. 2018) (rejecting the plaintiffs' argument that "the statute of limitations never runs on void documents"). The plaintiffs' remaining claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, fails because there is no evidence that Ocwen Loan Servicing, LLC attempted to collect an invalid debt or otherwise engaged in an act or omission prohibited by that statute. *Affirmed. See* 1st Cir. Rule 27.0(c).

By the Court:

Maria Hamilton, Clerk

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* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED AUGUST 24, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 16-10895-FDS

TIMOTHY C. HARRY AND KAREN C. HARRY,

Plaintiffs,

v.

AMERICAN BROKERS CONDUIT, *et al.*,

Defendants.

ORDER DENYING MOTIONS FOR DEFAULT JUDGMENT

SAYLOR, J.

On June 28, 2016, a default was entered against defendants American Brokers Conduit and Apex Mortgage Services under Fed. R. Civ. P. 55(a). On July 8, 2016, plaintiffs Timothy and Karen Harry moved for entries of default judgment against those same defendants. Because it was unclear whether plaintiffs had properly completed service of process on those defendants, this Court issued an order to show cause on December 22, 2016. The Harrys responded on January 12, 2017, demonstrating that service had been properly completed.

That same day, the Court entered a memorandum and order dismissing all counts of the amended complaint as to all other defendants, except a claim for violation of the Fair Debt Collection Practices Act as to Ocwen Loan Servicing, LLC. Among other things, the Court found that the limitations period had expired as to the Harrys' claims, and that equitable estoppel and equitable tolling did not apply.

On October 23, 2017, the Court denied the Harrys' motion for default judgment without prejudice, noting that Fed. R. Civ. P. 54(b) required that judgment could not enter until all claims were resolved as to all parties.

On August 16, 2018, the Court granted Ocwen's motion for summary judgment. Accordingly, all other claims have now been resolved.

Since then, the Harrys have filed renewed motions for default judgment as to American Brokers Conduit and Apex Mortgage Services, seeking approximately $24 million in damages. However, for the reasons set forth in the Court's January 12, 2017 memorandum and order, it is clear that their claims against those defendants are without merit, either because they are time-barred or because they fail to state a valid cause of action. In addition, the amounts claimed are obviously grossly excessive, and the Harrys have failed to show any prejudice. Under the circumstances, the entry of default judgment is inappropriate. *See Lau v. Cooke*, 2000 WL 287690, at *2 (2d Cir. Mar. 16, 2000) (affirming denial of motion for default judgment as within the district court's

discretion where plaintiff's claims were without merit, no prejudice was shown, and the amount sought by plaintiff was substantial); *see also Limehouse v. Delaware*, 2005 WL 1625233, at *2 (3d Cir. July 12, 2005); *Marshall v. Bowles*, 2004 WL 515915, at *2 (6th Cir. Mar. 15, 2004).

For the foregoing reasons, the Harrys' motions for default judgment as to defendants American Brokers Conduit and Apex Mortgage Services are DENIED. Because there is no apparent reason why the claims against American Brokers Conduit and Apex Mortgage Services should remain pending, and because there is no reason for additional delay, the clerk is directed to dismiss the claims against those two parties without prejudice and to enter final judgment.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: August 24, 2018

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED AUGUST 16, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 16-10895-FDS

TIMOTHY C. HARRY AND KAREN C. HARRY,

Plaintiffs,

v.

OCWEN LOAN SERVICING, LLC,

Defendant.

August 16, 2018, Decided
August 16, 2018, Filed

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION TO STRIKE

SAYLOR, J.

This is a dispute arising out of a mortgage issued to plaintiffs Timothy and Karen Harry in 2006. On December 21, 2006, the Harrys took out a $450,000 loan to refinance their existing mortgage and executed a new mortgage on their property to secure payment of that loan.

They stopped making payments on the new mortgage in November 2008. Although several foreclosure attempts followed, they remain in the house, despite not having made mortgage payments for nearly a decade.

In 2016, the Harrys filed this lawsuit, alleging in substance that the 2006 note and mortgage were void because the lender, American Brokers Conduit, was not an incorporated entity and was not licensed to do business in any state at the time of the loan. They contend that all subsequent assignments of the mortgage were void and all attempts to collect on the note or to foreclose on the property were unauthorized. The 141-page amended complaint sought approximately $200 million in compensatory and punitive damages.

The Court has previously dismissed all claims in this matter but one. The only remaining claim is a claim against defendant Ocwen Loan Servicing for violation of the Fair Debt Collection Practices Act ("FDCPA"). The parties have now cross-moved for summary judgment, and the Harrys have also moved to strike certain exhibits offered by Ocwen in support of its motion.

For the reasons set forth below, the Harrys' motion to strike and motion for summary judgment will be denied, and Ocwen's motion for summary judgment will be granted.

Appendix C

I. Background

A. Factual Background

The following facts are undisputed, except where otherwise noted.

On December 21, 2006, Timothy and Karen Harry executed an adjustable rate note in the principal amount of $450,000. (Def. Ex. A).[1] The named lender was American Brokers Conduit. (*Id.*). The note was secured by a mortgage on the Harrys' home, located at 31 Marway, Mashpee, Massachusetts. (Def. Ex. E; K. Harry Dep. at 46; T. Harry Dep. at 65-66). The named mortgagee was Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for American Brokers Conduit. (Def. Ex. E).[2]

American Home Mortgage Corporation, doing business as American Brokers Conduit, is a subsidiary of American Home Mortgage Holdings, Inc. (Def. Ex. M).[3] American Home Mortgage Corporation and

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1. Only Timothy Harry's signature is on the note.

2. The mortgage describes American Brokers Conduit as a "corporation," which is apparently incorrect. (Def. Ex. E).

3. The Harrys contend that American Brokers Conduit was not licensed to do business in Massachusetts. In support, they provided a screenshot from the Massachusetts Secretary of State's website showing that there is no corporation named "American Brokers Conduit." (Pl. Ex. B). However, a cease-and-desist order from the Massachusetts Secretary of State issued on August 2, 2007, shows that American Home Mortgage Corporation, which

American Home Mortgage Holdings, Inc., are New York corporations with principal offices in Melville, New York. (*Id.*). American Home Mortgage Corporation was licensed to do business as a mortgage lender and mortgage broker in Massachusetts on March 21, 2000. (*Id.*). Therefore, at the time the Harrys executed the loan documents, American Home Mortgage Corporation was permitted to conduct business as a mortgage lender and mortgage broker in Massachusetts. It apparently did business under the trade name American Brokers Conduit.

The Harrys used the loan to refinance an existing mortgage loan on their property, securing a lower interest rate and lower monthly payment. (T. Harry Dep. at 49-50). The bulk of the loan proceeds, $438,000, was used to pay off the Harrys' existing loan with Countrywide Mortgage. (K. Harry Dep. at 41-42). The Countrywide Mortgage discharge was then recorded at the Barnstable County Registry of Deeds on December 28, 2006. (Def. Ex. D). The remaining $12,000 was used by the Harrys for various home improvements. (K. Harry Dep. at 42; T. Harry Dep. at 63-64).

The Harrys made approximately 20 monthly payments on the note before defaulting in November 2008. (K. Harry Dep. at 65, 73; T. Harry Dep. at 51). They stopped paying because they believed they were victims of predatory lending, despite the fact they were financially capable of making payments. (K. Harry Dep. at 68; T. Harry Dep. at 98-99).

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was licensed to do business in the Commonwealth, was doing business under the name American Brokers Conduit. (Def. Ex. M).

Appendix C

On May 1, 2009, Mortgage Electronic Registration Systems ("MERS"), as nominee for American Brokers Conduit, assigned the mortgage to Deutsche Bank National Trust Company. (Def. Ex. G). MERS executed a confirmatory assignment of the mortgage to Deutsche Bank National Trust Company on July 7, 2011. (Def. Ex. H).

Over the next few years, the Harrys submitted multiple applications for loan modifications in an attempt to "free [themselves]" from what they considered "the original fraudulent loan." (T. Harry Dep. at 111). The Harrys received a loan modification offer from American Home Mortgage Servicing, Inc., on May 15, 2012. (K. Harry at 80-81). The Harrys also received loan modification offers and loss mitigation options from other servicers. (T. Harry Dep. at 114). However, they did not accept any of these offers.

In the interim, the Harrys had received multiple foreclosure notices. Those notices were sent on September 28, 2009; November 11, 2010; and July 14, 2011. (Am. Compl. ¶¶ 94, 102, 104).

In March 2013, Ocwen Loan Servicing became the loan servicer. (Def. Ex. I). By February 2015, the Harrys had been in default for more than six years. On February 13, 2015, Ocwen mailed them a document titled "150 Day Right to Cure Your Mortgage Default." (Def. Ex. J). The document warned that if they did not pay the total due past amount, and any additional payments due in the interim, the property could be foreclosed. (*Id.*).

Appendix C

On March 20, 2015, the Harrys mailed a letter to Deutsche Bank National Trust Company entitled "[Truth in Lending Act] Notice of Rescission." (Def. Ex. K). The Harrys purported to rescind the loan, despite having already received (and spent) the $450,000 loan proceeds. (*Id.*). Ocwen, as Deutsche Bank's loan servicer, replied on April 1, 2015, acknowledging receipt of the letter. (Def. Ex. L).

On June 10, 2015, Ocwen issued a Notice of Default to the Harrys. The notice stated that the amount past due was $223,611.23, and that foreclosure would occur unless they became current on their payments. (Def. Ex. F). On July 1, 2015, Ocwen issued another notice to the same effect. (Def. Ex. O).[4] It is undisputed that no payments were made, as the Harrys continued to assert that the note was void and unenforceable. (K. Harry Dep. at 95; T. Harry Dep. at 155-56).

On January 28, 2016, attorney Paul Manning, mailed a letter to the Harrys stating that he represented Ocwen and that Ocwen intended to foreclose on the property. (Def. Ex. P). Invoking the note's acceleration clause, the letter stated that to cure the default, the Harrys needed to pay $760,734.62 (*Id.*). Again, the Harrys refused to repay the loan, contending it was void. (K. Harry Dep. at 100; T. Harry Dep. at 172-73).

4. This time, the stated amount past due was $223,614.37.

B. Procedural History

The Harrys filed the original complaint in this action on March 18, 2016, in Barnstable Superior Court, against a variety of defendants, including Ocwen, Apex Mortgage Services, and American Brokers Conduit. The case was removed to federal court on May 17, 2016. An amended complaint was then filed on June 22, 2016.

On July 8, 2016, the Harrys moved for entry of default judgment against Apex Mortgage Services and American Brokers Conduit for failure to answer the complaint. The motion was denied without prejudice on October 23, 2017. (Docket No. 167).

The 141-page, 11-count complaint alleged a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, (Count One); a claim that the statute of limitations to collect on the note expired, (Count Two); a violation of Mass. Gen. Laws ch. 93A, (Count Three); violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, (Count Four); violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, (Count Five); a violation of 18 U.S.C. § 1014 (Count Six); violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, (Count Seven); slander of title, (Count Eight); and fraud, (Count Nine). In addition, the complaint sought a rescission of the note and mortgage as well as quiet title to the property (Count Ten), and asserted that no defendant had standing to foreclose on the property (Count Eleven).

Appendix C

On January 12, 2017, the Court granted in part and denied in part defendants' motion to dismiss. Specifically, the Court dismissed all counts except for Count Four, the claim under the FDCPA, as to Ocwen. Ocwen and the Harrys have now moved for summary judgment on that remaining claim, and the Harrys have also moved to strike certain exhibits attached to Ocwen's supporting memorandum.

II. Motion to Strike

The Harrys have moved to strike seven exhibits that Ocwen offered in support of its motion for summary judgment: the note (Def. Ex. A); the mortgage (Def. Ex. E); MERS' assignment of the mortgage to Deutsche Bank National Trust Company (Def. Ex. G); the confirmatory assignment of the mortgage to Deutsche Bank National Trust Company (Def. Ex. H); the notice that Ocwen had become the loan servicer (Def. Ex. I); an affidavit from Katherine Ortwerth certifying Ocwen's exhibits (Def. Ex. N); Ocwen's second statement of intent to foreclose (Def. Ex. O); and the letter attorney Manning wrote to the Harrys stating that Ocwen would foreclose on the property (Def. Ex. P). Because the disposition of the motion to strike will affect the evidentiary record, the Court will resolve it first.

The Harrys argue that the Ortwerth affidavit should be struck because her statements constitute hearsay. (Pls. Mem. in Supp. of Mot. to Strike at 2). They contend that because Ortwerth is an employee of Ocwen Financial Corporation rather than Ocwen Loan Servicing, she is

unqualified to provide an affidavit. In turn, because the Ortwerth affidavit was used to authenticate the other six exhibits, the Harrys contend that those exhibits should also be struck.

That argument is plainly without merit. As Ortwerth's affidavit makes clear, Ocwen Loan Servicing is an indirect subsidiary of Ocwen Financial Corporation. (Def. Ex. N ¶ 2). In addition, although Ortwerth was not personally involved in creating the documents in question, such documents may be authenticated, and qualify under the hearsay exception for business records, provided they are certified by a "custodian or another qualified witness." Fed. R. Evid. 803(6)(D), 902(11). Ortwerth is such a witness. In preparing her affidavit, she reviewed Ocwen's business records and correspondence, and personally verified the loan accounting information. (Def. Ex. N ¶ 5). There is no requirement that the "qualified witness" be the person who actually prepared the record. *See HMC Assets, LLC v. Conley*, 2016 U.S. Dist. LEXIS 111594, 2016 WL 4443152, at *3 (D. Mass. Aug. 22, 2016).

Therefore, the motion to strike will be denied.[5]

III. Legal Standard for Summary Judgment

The role of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. General Elec.*

5. The Harrys also appear to object to Ortwerth's answers in her deposition testimony as incomplete or evasive. (Pls. Mem. in Supp. of Mot. to Strike at 13). To that extent, they should have filed a motion to compel, not a motion to strike.

Co., 950 F.2d 816, 822 (1st Cir. 1991) (quoting *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990)). Summary judgment is appropriate when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue is "one that must be decided at trial because the evidence, viewed in the light most flattering to the nonmovant, would permit a rational fact finder to resolve the issue in favor of either party." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (citation omitted). In evaluating a summary judgment motion, the court indulges all reasonable inferences in favor of the nonmoving party. *See O'Connor v. Steeves*, 994 F.2d 905, 907 (1st Cir. 1993). When "a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (quotations omitted). The nonmoving party may not simply "rest upon mere allegation or denials of his pleading," but instead must "present affirmative evidence." *Id.* at 256-57.

IV. Summary Judgment Analysis

The FDCPA was enacted in 1978 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The elements of a FDCPA claim are as follows: (1) the plaintiff was the object of collection activity

arising from consumer debt; (2) the defendant is a debt collector as defined by the FDCPA; and (3) the defendant engaged in an act or omission prohibited by the FDCPA. *See Rhodes v. Ocwen Loan Servicing, LLC*, 44 F. Supp. 3d 137, 141 (D. Mass. 2014). It is undisputed that the Harrys were the "object of collection activities arising from consumer debt" and that Ocwen is a "debt collector." The parties only dispute whether Ocwen's conduct was prohibited by the FDCPA.

The Harrys contend that Ocwen violated the FDCPA three times by trying to collect an invalid debt. First, on June 10, 2015, Ocwen issued a Notice of Default. (Def. Ex. F). Second, on July 1, 2015, Ocwen issued another such notice, warning that the loan was past due and that foreclosure would occur. (Def. Ex. O). Third, on January 28, 2016, attorney Manning mailed a letter on behalf of Ocwen warning that Ocwen would initiate the foreclosure process. (Def. Ex. P).

The Harrys do not dispute the substantive content of these documents. Rather, their only argument is that the underlying debt is void, and that any attempts to collect on that obligation constitute abusive debt collection practices. (Pls. Mem. in Supp. of SJ at 12). In support, they claim that American Brokers Conduit was not licensed to do business in Massachusetts, and that therefore the entire transaction was void from the beginning.

As explained above, American Brokers Conduit was a trade name under which American Home Mortgage Corporation did business. (Def. Ex. M). American Home Mortgage Corporation was properly licensed as a

mortgage lender and mortgage broker in Massachusetts on March 21, 2000. (*Id.*). Even if American Home Mortgage Corporation improperly failed to register that trade name with regulatory authorities, it does not follow that the Harrys were somehow deceived or defrauded by the use of that name. Among other things, they received $450,000 in loan proceeds, which were hardly fictitious. And it certainly does not follow that the entire transaction was void from the beginning. The Harrys have cited no legal authority for that proposition, and it is unsupported by logic or equity.[6] Accordingly, there is no reason to conclude that the note was void or unenforceable.

The Harrys offer several additional arguments: (1) Ocwen fabricated the loan and mortgage, (2) that Ocwen "was charging [the Harrys] litigation fees three years before a complaint was filed," (3) that Ocwen improperly charged for "hazard insurance" on the property, and that (4) that Ocwen should have known the loan was void. (Pls. Mem. in Supp. of SJ at 12-13).

None of those contentions have merit. First, as the Harrys conceded in their depositions, they personally executed the note and mortgage on the property, and they received (and used) the proceeds. The loan and mortgage are therefore not "fabricated." (Def. Exs. A, E; K. Harry

6. Despite their claims of rescission and that the loan was void from the outset, the Harrys do not seek to unwind the transaction in its entirety. Rather, they seek both to keep the house and to cancel the debt—in other words, they want the house for free. Such a resolution would not, to put it mildly, be fair and equitable.

Dep. at 46-47; T. Harry Dep. at 65-66).[7] Second, the Harrys point to a line item in Ocwen's files stating that they were charged $3,917.80 in litigation fees on May 21, 2013, three years before this suit was filed. (Pl. Ex. I-1 at 1). However, those fees were for foreclosure proceedings that Ocwen initiated because of the Harrys' default. (Ortwerth Dep. at 142-44). The mortgage authorized the lender to charge such fees to the borrower. (Def. Ex. E at 10). Third, the Harrys point to another line item dated March 11, 2013, stating "Hazard Insurance Policy Setup Required." (Pl. Ex. I at 5). It appears the Harrys were charged certain premiums for hazard insurance. However, the text of the mortgage clearly gave the lender the right to purchase property insurance in the event the borrower failed to maintain certain forms of coverage. (Def. Ex. E at 7). Here, Ocwen simply continued paying the Harrys' existing hazard insurance. (Def.'s Opp. Ex. D). Finally, the loan was clearly not void, as discussed above. And even if the loan was invalid for some reason, a debt collector is not obligated to verify the validity of the debt. *See Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1174 (9th Cir. 2006) ("Within reasonable limits, [a debt collector is] entitled to rely on [its] client's statements to verify the debt."); *Shapiro v. Haenn*, 222 F. Supp. 2d 29, 44 (D. Me. 2002) ("[D]ebt collectors may rely on the information their

7. The Harrys claim that they did not sign the note produced by Ocwen. In support, they point to an entry in Ocwen's files dated July 15, 2015, which states "Signature not matching." (Pl. Ex. I-7 at 10). Putting aside the fact that the entry does not provide any greater specificity, the Harrys do not dispute either the content of the note or the fact that they executed a note with identical terms on December 21, 2006. Rather, they only offer the farfetched claim that Ocwen fabricated the note and mortgage in question.

clients provide, and the FDCPA does not require them to conduct their own investigation into the amount or validity of the underlying loan.").[8]

Accordingly, there is no evidence that Ocwen violated the FDCPA, and summary judgment in its favor is appropriate.

V. Conclusion

For the foregoing reasons, plaintiffs' motion to strike is DENIED; plaintiffs' motion for summary judgment is DENIED; and defendant's motion for summary judgment is GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: August 16, 2018

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8. The Harrys also claim that Ocwen's comment log for their loan contains judicial admissions. (Pls. Mem. in Supp. of SJ at 16-17). This is plainly incorrect. A judicial admission is "[a] formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it." *Admission (Judicial)*, Black's Law Dictionary (10th ed. 2014). Because a pleading in prior litigation does not constitute a judicial admission in a subsequent case, it follows that a comment in business records made pre-suit similarly cannot constitute a judicial admission. *See United States v. Raphelson*, 802 F.2d 588, 592 (1st Cir. 1986).

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED JANUARY 12, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 16-10895-FDS

TIMOTHY C. HARRY AND KAREN C. HARRY,

Plaintiffs,

v.

AMERICAN BROKERS CONDUIT; APEX MORTGAGE SERVICES; FIDELITY NATIONAL FINANCIAL, INC.; FIDELITY NATIONAL TITLE COMPANY; FIDELITY NATIONAL TITLE GROUP, INC.; AMERICAN HOME MORTGAGE SERVICING, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2007-2 MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-2; HOMEWARD RESIDENTIAL, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; AND OCWEN LOAN SERVICING, LLC,

Defendants.

January 12, 2017, Decided
January 12, 2017, Filed

Appendix D

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND MOTION TO STRIKE

SAYLOR, J.

This is a dispute arising out of a mortgage issued to plaintiffs in 2006. On December 21, 2006, plaintiffs took out a $450,000 loan to refinance their existing mortgage and executed a new mortgage on their property to secure payment of that loan. Plaintiffs stopped making payments on the new mortgage in 2008. Several foreclosure attempts followed. Plaintiffs have now filed suit, alleging in substance that the note and mortgage are void because the lender, American Brokers Conduit, was not an incorporated entity and was not licensed to do business in any state at the time of the loan. The complaint further alleges that all subsequent assignments of the mortgage were void and all attempts to collect on the note or to foreclose on the property were unauthorized.

Plaintiffs do not dispute that they received the $450,000 loan to refinance their mortgage. They likewise do not dispute that they continue to possess the property and have made no mortgage payments for more than eight years.

This is not a typical situation in which homeowner plaintiffs are seeking to forestall a mortgage foreclosure, contending that there is some defect in the assignment of the mortgage or the note. Instead, plaintiffs claim that the entire 2006 lending transaction should be declared void. They seek "to have the original note marked cancelled and

returned to [them]," "to have [the] mortgage . . . released in the land records," and to recover compensatory and punitive damages of more than $197 million. In other words, plaintiffs want to undo the loan transaction—but they also want to keep both the $450,000 loan proceeds (which, presumably, they used to discharge their prior mortgage) and the property. Put simply, plaintiffs want to erase their debt, keep the house (for free), and to be compensated handsomely for their trouble.

Defendants have moved to dismiss the complaint for the failure to state a claim upon which relief can be granted. There are multiple problems with plaintiffs' claims, beginning with the fact that the loan transaction occurred in 2006, and the limitations period for almost all of their claims expired some time ago. As to most of their claims, the only real question is whether the limitations period should be tolled for any reason. Because the complaint fails to allege any plausible reason why those limitations periods should be equitably tolled, the motions to dismiss, with one exception, will be granted.

I. Background

A. Factual Background

The facts are set forth as described in the complaint.

1. The Loan Application and Closing

Sometime prior to November 2006, plaintiffs Timothy and Karen Harry were contacted by defendant APEX

Mortgage Services, LLC, a mortgage servicing company, about refinancing the mortgage on their home in Mashpee, Massachusetts. (Am. Compl. ¶¶ 1, 5, 15). In late November 2006, plaintiffs began the process of applying for a new loan. (*Id.* ¶ 15). APEX faxed to the plaintiffs a "Borrower's Certification and Authorization Certification" form dated December 2, 2006. (*Id.*). That form required plaintiffs' signatures, certifying that the information they provided in their loan application was true and complete. (*Id.*). The form also stated that APEX had the right to initiate a full documentation review to verify the information plaintiffs provided, and that it, and the mortgage guaranty insurer (if any), might verify the information in the loan application and in any other documentation provided in connection with the loan. (*Id.*). The form also required plaintiffs to authorize APEX to provide any requested documents to any investor to whom APEX might sell the mortgage. (*Id.*).

On December 13, 2006, plaintiffs formally applied with APEX for a refinancing loan. (*Id.* ¶ 17). The loan application was prepared by APEX, not by plaintiffs themselves, and was faxed to plaintiffs on December 13. (*Id.* ¶ 18). According to the complaint, the application indicated that it was for a loan amount of $445,500 with an interest rate of 1.750% for 480 months (40 years). (*Id.*). The complaint alleges that APEX falsified information on the application by, for example, significantly overstating plaintiffs' monthly income and referring to unspecified credit union accounts and life insurance policies. (*Id.*). It also alleges that the application was backdated to November 29, 2006, and that the application was prepared by Pierre Haber, "a known illegal robo-signer." (*Id.* ¶ 22).

Appendix D

Along with the loan application, APEX also sent plaintiffs a Good Faith Estimate ("GFE") form and Truth in Lending ("TIL") disclosure statement, both dated November 20, 2006. (*Id.* ¶¶ 25, 30). The GFE stated a loan number of 0611EM005801, a base loan amount of $445,500, an interest rate of 1.750%, a term of 480 months (40 years), as well as a number of fees associated with the loan. (*Id.* ¶ 25). According to the complaint, the information provided in the TIL disclosure differed from that in the GFE. (*Id.* ¶ 31). The TIL disclosure stated a loan amount of $458,089.49, an APR of 6.246%, and a term of 30 years. (*Id.* ¶¶ 30, 52).

On December 21, 2006, defendant Fidelity Title Company prepared a HUD-1A settlement statement for plaintiffs' loan. (*Id.* ¶ 36). The complaint alleges that Fidelity Title Company does not exist. (*Id.* ¶¶ 8, 38). According to the complaint, the HUD-1A included a number of differences from the GFE and TIL disclosure statement. The HUD-1A allegedly stated that American Brokers Conduit was the lender, provided a different loan number of 0001552524, and stated a loan amount of $450,000. (*Id.* ¶ 38). The complaint alleges that American Brokers Conduit did not legally exist as an entity in 2006 and has never been legally incorporated in any state. (*Id.* ¶¶ 4, 37). Accompanying the HUD-1A was a form prepared by Chicago Title Insurance Company, apparently explaining the title insurance policy that it was issuing to American Brokers Conduit for the plaintiffs' mortgage. (*Id.* ¶ 42). The insurance form stated a commitment date of November 20, 2006, and a loan amount of $450,000. (*Id.*).

The loan closing took place on December 21, 2006. On that day, the note was issued and a mortgage on plaintiffs' property executed in order to secure payment of the note. (*Id.* ¶¶ 49, 58, 61). The note issued to plaintiffs stated an interest rate of 1.725%, but on January 1, 2007, the interest rate allegedly jumped to 10.083%. (*Id.* ¶ 50). It appears that an adjustable rate rider and a prepayment rider accompanied the note. (*Id.* ¶ 65). The note also stated the loan was a 40-year loan in the amount of $450,000. (*Id.* ¶¶ 51-52).

The mortgage stated a loan amount of $450,000, payable to Mortgage Electronic Registration System, Inc. ("MERS"), as nominee for American Bankers Conduit. (*Id.* ¶ 61). According to the complaint, the MERS identification number listed on the mortgage is associated with American Home Mortgage Holding, Inc., and not with American Brokers Conduit. (*Id.* ¶ 63). The mortgage was recorded on February 7, 2007, in the Barnstable Registry of Deeds by Fidelity Title Group. (*Id.* ¶ 61). According to the complaint, plaintiffs' signatures on the mortgage do not match their signatures on the adjustable rate and prepayment riders, and therefore their signatures were forged. (*Id.* ¶ 65).

Plaintiffs began making payments on February 1, 2007. (*Id.* ¶ 56). The last payment they made was on October 1, 2008. (*Id.*).

2. The Assignments and Modification

On May 1, 2009, MERS, as nominee for American Brokers Conduit, assigned the mortgage, but not the

underlying note, to Deutsche Bank National Trust Company as Trustee for American Home Mortgage Assets Trust 2007-02. (*Id.* ¶ 71). The assignment was allegedly backdated, stating that it was effective as of April 27, 2009. (*Id.* ¶ 73). According to the complaint, that assignment was void because American Brokers Conduit did not exist, and therefore could not appoint MERS as its nominee, and therefore MERS had nothing to assign. (*Id.* ¶ 75). The complaint further alleges that the trust to which the mortgage was transferred had "closed" in February 2007, and therefore could not have accepted the assignment in 2009. (*Id.*). The assignment was prepared and recorded by DOCX, a subsidiary of Fidelity Financial. (*Id.* ¶ 76). The complaint alleges that six "illegal robo-signers," all MERS employees, executed the assignment. (*Id.* ¶ 78).

On July 7, 2010, MERS again assigned the mortgage to Deutsche Bank as Trustee for the same trust. (*Id.* ¶ 82). According to the complaint, the second assignment provided a new trust address, which was that of American Home Mortgage Servicing, Inc. ("AHMSI"). Also according to the complaint, the second assignment was intended to correct defects in the first assignment. (*Id.* ¶ 85). However, the complaint alleges that the second assignment was also signed by "another known illegal robo-signer." (*Id.* ¶ 85). The complaint alleges that all defendants knew or should have known that the assignments were fraudulent and void. (*Id.* ¶ 87).

On May 15, 2012, plaintiffs received a letter from AHMSI informing them of the availability of several payment options. (*Id.* ¶ 129). That communication listed

plaintiffs' gross monthly income as $5,063.78, as compared to the gross monthly income of $14,950.00 that was stated on the loan application allegedly prepared by APEX. (*Id.*). The complaint alleges that the inconsistency confirms that APEX falsified information on the loan application. (*Id.* ¶ 131). According to the complaint, plaintiffs never agreed to a modification of their payment obligations. (*Id.* ¶ 130).

3. The Foreclosure Attempts

Plaintiffs stopped making payments on their mortgage after October 1, 2008. (*Id.* ¶ 88). They received multiple notices regarding their mortgage from AHMSI from November 1, 2008, through June 5, 2012, when AHMSI changed its name to Homeward Residential. (*Id.*).[1] The complaint alleges that AHMSI/Homeward Residential knew that the issuer of the note—that is, American Brokers Conduit—was a non-existent entity and that therefore the note was void, yet continued to press for payment. (*Id.* ¶ 89-90). Ocwen Financial Corporation purchased Homeward Residential on October 3, 2012. (*Id.* ¶ 92). According to the complaint, without inquiring into the facts surrounding the plaintiffs' mortgage, Ocwen continued to harass them for payment on the loan. (*Id.*).

On September 28, 2009, Deutsche Bank filed a complaint in the Superior Court of Massachusetts, Barnstable County, seeking foreclosure on the property.

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1. The complaint does not specify whether Homeward Residential continued to send notices regarding payment after June 5, 2012.

(*Id.* ¶ 94).[2] A notice of mortgagee's sale of the property was published on November 6, 2009. (*Id.* ¶ 95). However, according to the complaint, nothing happened for more than a year, until November 11, 2010, when Deutsche Bank sent plaintiffs a notice of intention to foreclose and second notice of mortgagee's sale of the property. (*Id.* ¶¶ 101-02). A sale by public auction was scheduled for December 17, 2010, but was later cancelled. (*Id.* ¶¶ 102-03).

Deutsche Bank allegedly issued a third notice of foreclosure on July 14, 2011. (*Id.* ¶ 104). On September 1, 2011, plaintiffs then received another notice of foreclosure sale and notice of mortgagee's sale of the property, stating that the property would be sold by public auction on October 7, 2011. (*Id.* ¶ 105). Again, no sale ever took place. (*Id.* ¶ 106).

On February 13, 2015, plaintiffs received a notice from Ocwen of its intent to foreclose on the property on behalf of Deutsche Bank. (*Id.* ¶ 115). On May 27, 2015, plaintiffs' attorney sent Ocwen a dispute of the alleged debt and requested that, from that point forward, Ocwen communicate only with plaintiffs' attorney. (*Id.* ¶ 116). On June 10, 2015, Ocwen sent, directly to plaintiffs, a notice of default stating an amount past due of $223,611.23 on loan number 7140304192. (*Id.* ¶ 117). That notice also stated that Ocwen intended to foreclose on the mortgage unless plaintiffs became current on their payments. (*Id.*). Ocwen

2. Deutsche Bank filed that complaint through its attorneys, Ablitt & Scofield P.C. Plaintiffs originally named that firm as a defendant in this action, but voluntarily moved to dismiss it on October 11, 2016. That motion was granted on December 22, 2016.

sent another notice to the same effect, also directly to plaintiffs, on July 1, 2015. (*Id.* ¶ 118).

According to the complaint, Ocwen mailed plaintiffs two letters on July 20, 2015. (*Id.* ¶¶ 119-20). The first stated that Ocwen had received plaintiffs' correspondence but needed more time to respond. (*Id.* ¶ 119). The second stated that it had received plaintiffs' request to communicate only through their attorney, but could not authorize their attorney to receive information regarding the loan because their signatures on the request did not match their signatures on their loan documents. (*Id.* ¶ 120). Ocwen mailed another letter to plaintiffs on September 4, 2015, stating that it had received plaintiffs' request but was unable to provide a response. (*Id.* ¶ 121). It is unclear from the complaint whether that third letter was referring to plaintiffs' letter disputing the debt or the letter requesting to authorize their attorney to receive communications.

On January 28, 2016, plaintiffs received another letter from Ocwen threatening litigation and foreclosure. (*Id.* ¶ 122). Plaintiffs responded by disputing the debt. (*Id.* ¶ 123).

It does not appear that a foreclosure of plaintiffs' property has occurred, or that foreclosure proceedings are imminent.

4. Plaintiffs' Attempted Rescission and "Qualified Written Request"

On March 20, 2015, plaintiffs sent to all defendants a rescission notice pursuant to the Truth in Lending

Act ("TILA").[3] The complaint alleges that, due to that rescission notice, defendants were required to return to plaintiffs any money they had paid towards the note. (*Id.* ¶ 142).

On July 30, 2015, plaintiffs sent a "Qualified Written Request and Validation of Debt" letter to Ocwen. (*Id.* ¶ 132).[4] In response, Ocwen sent plaintiffs two packages of documents, one on September 11, 2015, and another on September 30, 2015. (*Id.* ¶ 133). According to the complaint, the documents sent were inadequate because they failed to adequately document "the historical evolution of the alleged debt." (*Id.* ¶ 134).

B. Procedural History

Plaintiffs filed the original complaint in this action on March 18, 2016, in Massachusetts state court.

3. TILA provides borrowers with the right to rescind mortgage transactions, by notifying their creditors of their intent to do so, until midnight of the third business day following closing or the delivery of the information and rescission forms required by the statute, whichever is later. 15 U.S.C. § 1635(a). The rescission period may be extended if the borrower did not receive adequate notice of the right to rescind, but, even if extended, that right "completely extinguishes" after three years from the closing of the transaction. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998); 15 U.S.C. § 1635(f).

4. Under the Real Estate Settlement Procedures Act ("RESPA"), loan servicers are required to respond to "qualified written requests," which are written requests from borrowers seeking information about their account or explaining their belief that there is an error in their account. 12 U.S.C. § 2605(e).

Defendants removed the action to this Court on May 17, 2016. Plaintiffs filed an amended complaint on June 22, 2016. The amended complaint alleges (1) a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, as to all defendants (Count One); a claim that the statute of limitations to collect on the note has expired (Count Two); a violation of Mass. Gen. Laws ch. 93A as to all defendants (Count Three); violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, as to defendants AHMSI, Deutsche Bank, Ocwen, and Homeward (Count Four); violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, as to defendants APEX, American Brokers Conduit, AHMSI, Fidelity Financial, Fidelity Title Company, and Fidelity Title Group (Count Five); a violation of 18 U.S.C. § 1014, as to all defendants (Count Six); violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, as to defendants APEX, American Brokers Conduit, AHMSI, Fidelity Financial, Fidelity Title Company, and Fidelity Title Group, (Count Seven); slander of title, as to all defendants (Count Eight); fraud, as to all defendants (Count Nine); seeks a rescission of the note and mortgage as well as to quiet title to the Mashpee property (Count Ten); and asserts that no defendant has standing to foreclose on the Mashpee property (Count Eleven).[5]

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5. Count Four was originally also brought against the law firm Ablitt & Scofield P.C. The complaint also asserted a claim for the violation of the Professional Rules of Conduct against Ablitt & Scofield. (Count Twelve). However, that firm was dismissed from this action on December 22, 2016.

Appendix D

On July 19, 2016, defendants American Home Mortgage Servicing, Deutsche Bank, Homeward Residential, MERS, and Ocwen moved to dismiss for failure to state a claim upon which relief can be granted. On July 27, 2016, defendants Fidelity National Financial, Fidelity National Title Insurance, and Fidelity National Title Group likewise moved to dismiss for failure to state a claim. On October 3, 2016, defendants American Home Mortgage Servicing, Deutsche Bank, Homeward Residential, MERS, and Ocwen moved to strike certain documents attached to plaintiffs' opposition memorandum.

II. Legal Standard

On a motion to dismiss, the Court "must assume the truth of all well-plead[ed] facts and give plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if the facts as alleged do not

"possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (quotations and original alterations omitted).

III. Analysis

A. Defendants' Motion to Strike

Defendants American Home Mortgage Servicing, Inc.; Deutsche Bank National Trust Company; Homeward Residential; Mortgage Electronic Registration Systems, Inc.; and Ocwen Loan Servicing, LLC have moved to strike a number of documents attached as exhibits to the plaintiffs' opposition to their motion to dismiss. Because the Court did not rely on the disputed documents in deciding defendants' motion to dismiss, the motion to strike will be denied as moot.

B. RICO Violations (Count One)

Count One alleges that all defendants violated the RICO statute, 18 U.S.C. § 1962, by engaging in a series of misrepresentations and omissions as part of a common plan to defraud plaintiffs out of their money and property. The limitations period for civil RICO claims is four years. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987). A civil RICO claim accrues at the time a plaintiff knew or should have known of his injury. *Lares Group, II v. Tobin*, 221 F.3d 41, 44 (1st Cir. 2000).

Appendix D

Plaintiffs allege a variety of issues arising out of their 2006 loan transaction. Among other things, they contend that the loan application contained false information (it both overstated their income and included fictitious assets); that their signatures were forged on the mortgage, the adjustable rate rider, and the prepayment rider; that the various loan documents (the GFE, the TILA disclosure statement, and the HUD-1A) were fraudulent and set forth differing amounts as to the amount of the loan and the interest rate; and that they were charged a usurious interest rate. They contend that the lender (American Bankers Conduit) did not exist at the time (although plaintiffs did in fact receive $450,000 from the lender, which appears to have been used to discharge their existing mortgage). They contend that they did not actually give a valid mortgage to MERS, because MERS was purportedly the nominee for American Brokers Conduit, and American Brokers Conduit did not exist. All of those actions occurred on or about the date of the loan closing, which was December 21, 2006.[6]

Furthermore, according to the complaint, the harm suffered by plaintiffs as a result of the alleged racketeering activity was the loss of "the valuable ability

6. Plaintiffs also allege that various entities who held an interest in the loan at different times after the closing were fictitious, not incorporated, or not licensed to do business in Massachusetts, and that various assignments of interest were "robo-signed." Even assuming the truth of those allegations, it is entirely unclear how any of that caused an injury in December 2006. Plaintiffs allege that they received $450,000 (not a fictitious amount) and that they gave a mortgage to MERS (not a fictitious entity).

and opportunity to refinance their property with real existing entities, a true identified creditor, on accurate terms disclosed." (Am. Compl. ¶ 162). That injury occurred "immediately" upon the loan closing, again on December 21, 2006. (*Id.*) Thus, because plaintiffs knew or reasonably should have known of their injury no later than December 21, 2006, the limitations period for their RICO claims expired on December 21, 2010.

Furthermore, plaintiffs have not met their burden of showing that the RICO limitations period should be tolled or that defendants should be estopped from asserting a limitations defense. Equitable estoppel and equitable tolling are exceptions to the general rule that plaintiffs must bring claims within the applicable limitations periods. The two doctrines are related, but apply in different contexts. "[E]quitable estoppel applies when a plaintiff who knows of his cause of action reasonably relies on the defendant's conduct or statements in failing to bring suit." *Ramirez-Carlo v. United States*, 496 F.3d 41, 48 (1st Cir. 2007). "Equitable tolling applies when the plaintiff is unaware of the facts underlying his cause of action." *Id.* Neither is applicable here.

Equitable estoppel may bar a defendant from asserting the statute of limitations as an affirmative defense if the plaintiff can show:

> that the statements of the defendant lulled the plaintiff into the false belief that it was not necessary . . . to commence action within the statutory period of limitations . . ., that

> the plaintiff was induced by these statements to refrain from bringing suit, as otherwise [the plaintiff] would have done, and was thereby harmed, and that the defendant knew or had reasonable cause to know that such consequences might follow.

Pagliarini v. Iannaco, 440 Mass. 1032, 1032, 800 N.E.2d 696 (2003) (alterations original) (internal quotation marks omitted).

Plaintiffs contend that equitable estoppel is appropriate here because of the defendants' alleged fraudulent concealment of the fact that the note and mortgage were void. (Am. Compl. ¶¶ 166(b)). However, that collapses the inquiry of equitable estoppel into plaintiffs' substantive fraud claim. The doctrine of equitable estoppel in this context focuses not on whether defendants participated in a fraud generally, but rather whether they made misleading statements specifically regarding the necessity of bringing a lawsuit within the statutory period. *See Kozikowski v. Toll Bros., Inc.*, 354 F.3d 16, 24 (1st Cir. 2003) (defining first prong of equitable estoppel test as whether defendant "made representations that it knew of should have known would induce the [plaintiffs] to postpone bringing a suit"). The complaint fails to allege any facts suggesting that the defendants lulled the plaintiffs into thinking that they did not need to file a lawsuit within the applicable statutory periods. For example, the complaint does not allege that defendants assured plaintiffs they would resolve any conflict, eliminating the need for litigation, *see id.*, nor does it allege that defendants misrepresented the length

of the applicable limitations period, *see Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959). Plaintiffs have therefore not met their burden of showing that the doctrine of equitable estoppel applies.

Plaintiffs also seek equitable tolling of the limitations period. "[T]he doctrine of equitable tolling is applicable only where the prospective plaintiff did not have, and could not have had with due diligence, the information essential to bringing suit." *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 631, 682 N.E.2d 624 (1997). The complaint alleges two basic grounds for equitable tolling.

First, the complaint alleges that plaintiffs were "unable to obtain vital information bearing on their claims" because they were "not on inquiry notice of Defendants['] wrongdoing and had no duty to initiate an investigation of any nature because the documents presented to them by the Defendants appeared to be legitimate." (Am. Compl. ¶ 166(c)(i)). However, that claim is implausible, and indeed entirely inconsistent with the facts as alleged in the complaint. According to the complaint, the documents plaintiffs received at closing contained inconsistent information concerning (among other things) the identity of the lender, the amount of the loan, and the interest rate charged. (*Id.* ¶ 38). The complaint further alleges that the interest rate on the loan jumped from 1.725% (the amount on the note, dated December 21, 2006) to 10.083% (as of January 1, 2007, eleven days later). Plaintiffs were therefore on inquiry notice at that time of defendants' alleged wrongdoing with regard to the circumstances of the loan and mortgage.

Second, plaintiffs contend that even if they had attempted to investigate, any "such investigation would have been futile because it would not have uncovered the true, unlawful nature of Defendants[']scheme to defraud Plaintiffs." (*Id.* ¶ 166(c)(i)). But that allegation is entirely conclusory. Plaintiffs do not allege that they attempted to investigate and were thwarted, or even that they attempted to investigate at all. Instead, it appears that they simply waited nine years to file a complaint. Likewise, plaintiffs contend that their claims were "tolled until they discovered the truth underlying their claims shortly before filing their original Complaint." (*Id.*). However, the complaint does not assert any facts suggesting that the information necessary for plaintiffs' suit was unavailable prior to 2016, nor does it explain why the information suddenly became available at that time.

The complaint therefore fails to make plausible allegations as to why equitable tolling should apply. *See Abdallah v. Bain Capital LLC*, 880 F. Supp. 2d 190, 198 (D. Mass. 2012) (holding that equitable tolling is not justified where plaintiff fails to provide facts demonstrating that diligent inquiry would not have produced the necessary information earlier). Thus, the RICO claims are time-barred.

C. Expiration of Statute of Limitations to Collect on Note (Count Two)

Count Two alleges that the limitations period to collect on a "non-existent void fraudulent debt and void fraudulent mortgage" has expired. (Am. Compl. ¶ 176). That count

fails to assert a valid cause of action and will therefore be dismissed.

D. Chapter 93A Violations (Count Three)

The complaint alleges that all defendants violated Mass. Gen. Laws ch. 93A by virtue of their participation in an allegedly fraudulent issuance and assignment of the note. However, plaintiff does not appear to have delivered to any of the defendants the demand letter required by Chapter 93A. At least 30 days prior to filing a claim under Chapter 93A, a plaintiff is required to deliver "to any prospective respondent" a demand letter "identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered." Mass. Gen. Laws ch. 93A § 9(3). The complaint does not state that plaintiffs sent demand letters to the defendants, and therefore they may not now assert claims under Chapter 93A. *See City of Boston v. Aetna Life Ins. Co.*, 399 Mass. 569, 574, 506 N.E.2d 106 (1987) ("The failure of the City to allege the sending of a demand letter is fatal to its [Chapter 93A] § 9 claim.").

Even if plaintiffs had submitted the required demand letters, however, their Chapter 93A claims would still be barred under the applicable statute of limitations. Chapter 93A has a four-year limitations period. Mass. Gen. Laws ch. 260, § 5A; *see McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109, 124 n.16 (1st Cir. 2014). As with RICO claims, Chapter 93A claims accrue "when the plaintiff knew or should have known of appreciable harm" resulting from the defendant's alleged unfair or deceptive

practice. *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 29 Mass. App. Ct. 215, 221, 560 N.E.2d 122 (1990). Plaintiffs' Chapter 93A claims, as with their RICO claims, are premised upon the allegedly fraudulent nature of the transaction that occurred on December 21, 2006. Thus, for the same reasons set forth above, their Chapter 93A claims are barred by the applicable statute of limitations.

Furthermore, plaintiffs have again failed establish that the Chapter 93A limitations period should be tolled or that defendants should be estopped from asserting a limitations defense. As to equitable estoppel, plaintiffs again contend that defendants should be estopped from asserting a limitations defense on the grounds that they concealed from plaintiffs the alleged defects in their note and mortgage. (Am. Compl. ¶ 180(b)). For the reasons stated above—that is, because the complaint does not allege that defendants lulled them into thinking that timely legal action was not necessary, or anything similar—equitable estoppel is not appropriate here.

As to equitable tolling, plaintiffs repeat their contentions that they were not on notice of defendants' wrongdoing and that any timely investigation would have been futile. (Am. Compl. ¶ 180(c)). Because those claims are implausible and conclusory, the Chapter 93A claims are time-barred.

E. FDCPA Violations (Count Four)

The complaint alleges that defendants AHMSI, Deutsche Bank, Ocwen, and Homeward Residential

violated the FDCPA by virtue of their attempts to collect on an allegedly fraudulent and void note. The FDCPA has a one-year limitations period. 15 U.S.C. § 1692k(d) ("An action to enforce any liability created by this subchapter may be brought . . . within one year from the date on which the violation occurs.").

According to the complaint, AHMSI began attempting to collect on the note in October 2008. (Am. Compl. ¶ 88). Deutsche Bank began foreclosure proceedings against the property in September 2009. (*Id.* ¶ 94). AHMSI changed its name to Homeward Residential in June 2012, and continued attempting to collect on the note. (*Id.*). Ocwen then purchased Homeward Residential in October 2012, and continued attempting to collect on the note. (*Id.* ¶ 92). According to the complaint, Ocwen informed plaintiffs' of its intent to foreclose on their property, or otherwise attempted to collect on the note, on February 13, 2015; June 10, 2015; July 1, 2015; and January 28, 2016. (*Id.* ¶¶ 115, 117, 118, 122).

Plaintiffs filed this action on March 18, 2016. As to defendants AHMSI, Deutsche Bank, and Homeward Residential—who attempted to collect on the note in 2008, 2009, and 2012, respectively—the FDCPA's one-year limitations period has expired. Once again, plaintiffs have failed to establish that equitable estoppel or equitable tolling should apply. Plaintiffs again set forth the same contentions that equitable estoppel is appropriate due to defendants' alleged concealment of defects in the mortgage and note, and that equitable tolling is appropriate due to the absence of inquiry notice and alleged futility of timely

investigation. (Am. Compl. ¶ 189(b)-(c)). For the reasons stated above, the complaint fails to allege a plausible basis for equitable estoppel and equitable tolling.

Plaintiffs' FDCPA claim appears, however, to be timely as to Ocwen's alleged conduct on June 10, 2015; July 1, 2015; and January 28, 2016.[7] To state a claim under the FDCPA, plaintiffs must establish "(1) that [they were] the object[s] of collection activity arising from consumer debt, (2) defendants are debt collectors as defined by the FDCPA, and (3) defendants engaged in an act or omission prohibited by the FDCPA." *Rhodes v. Ocwen Loan Servicing, LLC*, 44 F. Supp. 3d 137, 141 (D. Mass. 2014) (internal quotation marks omitted). It does not appear to be disputed that prongs one and two are satisfied. As to prong three, under § 1692e of the FDCPA, "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "[t]he false representation of the character, amount, or legal status of any debt," and "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(2)(A), (5).

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7. Defendants appear to contend that the limitations period on any possible FDCPA claim against a particular defendant begins to run the first time that defendant is alleged to have violated the FDCPA. However, discrete FDCPA violations may be actionable even where prior violations are time-barred. *See, e.g., Solomon v. HSBC Mortg. Corp.*, 395 Fed. Appx. 494, 497 (10th Cir. 2010) ("For statute-of-limitations purposes, discrete violations of the FDCPA should be analyzed on an individual basis.") (unpublished opinion); *Purnell v. Arrow Fin. Servs., LLC*, 303 Fed. Appx. 297, 301-02, 304 (6th Cir. 2008) (unpublished opinion).

The complaint alleges that Ocwen sent plaintiffs (1) a notice of default stating an amount past due of $223,611.23 and directing plaintiffs to remit payment within approximately five weeks (the June 10 letter); (2) a letter notifying plaintiffs of its intent to foreclose on their property, stating that it had the right to foreclose as it had possession of the promissory note and that the chain of endorsement is complete, and including a list of allegedly "confusing" amounts owed (the July 1 letter); and (3) a letter, sent through their counsel, allegedly "threatening litigation and foreclosure" and giving plaintiffs 30 days to respond (the January 28 letter). (Am. Compl. ¶¶ 117, 118, 122). Those allegations, taken in conjunction with the rest of the complaint, are sufficient to survive a motion to dismiss. *Cf. Chiras v. Associated Credit Servs.*, 2012 U.S. Dist. LEXIS 101614, 2012 WL 3025093 at *1 (holding that complaint failed to state a claim for violation of FDCPA where it was devoid of facts such as the dates and content of allegedly unlawful communications).

F. RESPA Violations (Count Five)

Count Five alleges RESPA violations against defendants APEX, American Brokers Conduit, AHMSI, Fidelity Financial, Fidelity Title Group, and Fidelity Title Company on the ground that the disclosure statements they provided were inadequate under the statute. (Am. Compl. ¶ 193). The allegedly inadequate disclosures specifically referred to in the complaint include the GFE, the TIL disclosure, and the HUD-1A, all of which were disclosed no later than December 21, 2006. Although it is not clear from the complaint, it appears that the RESPA

claim is brought under 12 U.S.C. § 2604(c), which requires lenders to provide borrowers a "good faith estimate of the amount or range or charges for specific settlement services the borrower is likely to incur in connection with the settlement" not later than three days after it receives the borrower's loan application. 12 U.S.C. § 2604(c) & (d).[8] However, that provision does not create a private right of action for borrowers. *See In re Noyes*, 382 B. R. 561, 580 (Bankr. D. Mass. 2008).

To the extent that the complaint may be read to assert a claim under § 2605, that claim is barred on its face by the applicable statute of limitations. Among other things, § 2605 requires that mortgagees disclose, at the time of a loan application, whether the servicing of the loan may be assigned, sold, or transferred. 12 U.S.C. § 2605(a). It also requires loan servicers to notify borrowers in writing of any assignment, sale, or transfer. 12 U.S.C. § 2605(b)-(c).[9] Claims brought under § 2605 are subject

8. The complaint alleges, for example, that the statements plaintiffs received, including the GFE, the TIL disclosure, and the HUD-1A, violated RESPA. (Am. Compl. ¶¶ 191, 193).

9. Section 2605 also requires loan servicers to respond to "qualified written requests," which are written requests from borrowers seeking information about their account or explaining their belief that there is an error in their account. 12 U.S.C. § 2605(e). According to the complaint, plaintiffs did send a qualified written request to Ocwen in July 2015. (Am. Compl. ¶ 132). The complaint further alleges that Ocwen's response was inadequate under RESPA. (Am. Compl. ¶ 134). However, plaintiffs' RESPA claim (Count Five) is brought only against defendants APEX, American Brokers Conduit, AHMSI, Fidelity Financial, Fidelity Title Company, and Fidelity Title Group. There is no RESPA claim asserted against Ocwen.

to a three-year limitations period. 12 U.S.C. § 2614.[10] To the extent the RESPA claim is premised on a failure to provide the requisite disclosures regarding assignments, that claim accrued on December 21, 2006. The complaint focuses only on the disclosures that were or were not made at the time of closing; it says nothing of disclosures or notifications that were or were not made at the time that any assignments were made. (Am. Compl. ¶¶ 191-197). Thus, the limitations period under RESPA expired no later than December 21, 2009, unless tolled.

Once again, plaintiffs have failed to establish that equitable estoppel or equitable tolling should apply. Plaintiffs again contend that equitable estoppel is appropriate due to defendants' alleged concealment of defects in the mortgage and note, and that equitable tolling is appropriate due to the absence of inquiry notice and the alleged futility of a timely investigation. (Am. Compl. ¶ 198 (b)-(c)). For the reasons stated above, those claims are implausible and conclusory. Plaintiffs' RESPA claims are therefore time-barred.

G. Violations of 18 U.S.C. § 1014 (Count Six)

Count Six alleges that defendants APEX, American Brokers Conduit, Fidelity Financial, Fidelity Title

10. RESPA provides for a shorter, one-year limitations period for claims brought under sections 2607 and 2608, but those sections do not appear to be implicated here. Section 2607 prohibits kickbacks and unearned fees for real estate settlement services; section 2608 prohibits sellers of property from requiring that buyers purchase title insurance from any particular title company. 12 U.S.C. §§ 2607, 2608.

Company, and Fidelity Title Group violated 18 U.S.C. § 1014 by making false statements on plaintiffs' loan application and preparing a fraudulent HUD-1A statement. (Am. Compl. ¶¶ 199-209). Section 1014 is a criminal statute, and provides no private right of action. *See Federal Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 137 (4th Cir. 1987). Count Six will therefore be dismissed.

H. TILA Violations (Count Seven)

Count Seven alleges that defendants APEX, American Brokers Conduit, AHMSI, Fidelity Financial, Fidelity Title Company, and Fidelity Title Group violated TILA, 15 U.S.C. § 1601 *et seq.*, by (1) having American Brokers Conduit—an allegedly non-existent "pretender lender"—"table fund" the loan for an unidentified third party, (2) making fraudulent representations about the plaintiffs' income and assets on their loan application, and (3) fraudulently procuring plaintiffs' signatures on multiple occasions. (Am. Compl. ¶¶ 213-217).[11] Actions for damages under TILA must be brought within one year from the date of the alleged violation. *See Rodrigues v. Members Mortg. Co.*, 323 F. Supp. 2d 202, 210 (D. Mass. 2004) (citing 15 U.S.C. § 1640(e)). It appears that plaintiffs' TILA claims are premised on conduct that occurred at the time of closing in December 2006. The limitations period for those claims therefore expired no later than December 2007, unless tolled.

11. Although the complaint is not clear, it appears that the alleged forgery concerned plaintiffs' signatures on the adjustable rate rider and prepayment rider that accompanied the mortgage. (Am. Compl. ¶ 65).

Once again, plaintiffs have failed to establish that equitable estoppel or equitable tolling should apply, and make only implausible and conclusory allegations in support of those claims. (*See* Am. Compl. ¶ 222 (b)-(c)). Plaintiffs' TILA claims are therefore time-barred.

I. Slander of Title (Count Eight)

Count Eight alleges a slander of title claim against all defendants. It appears that this claim is premised on three separate instances of alleged slander. First, according to the complaint, plaintiffs' title was slandered when the allegedly void mortgage was recorded on February 7, 2007. (Am. Compl. ¶ 226). Second, according to the complaint, their title was again slandered when the first assignment of the mortgage was recorded on May 7, 2009. (*Id.* ¶ 28). Third, according to the complaint, their title was once again slandered when the second assignment of the mortgage was recorded on July 18, 2011. (*Id.* ¶ 235). Under Massachusetts law, the tort of slander of title is subject to a three-year limitations period. *See RFF Family P'ship, LP v. Ross*, 814 F.3d 520, 531 (1st Cir. 2016) (citing Mass. Gen. Laws ch. 260, § 4). Therefore, even taking the date of the most recent allegedly slanderous recording, the limitations period expired no later than July 2014. Count Eight is therefore time-barred, unless tolled.

Yet again, plaintiffs have failed to establish that equitable estoppel or equitable tolling should apply. Plaintiffs simply repeat their allegations as to those issues, and again those allegations are implausible and conclusory. Accordingly, plaintiffs' claims for slander of title are time-barred.

Appendix D

J. Fraud (Count Nine)

Count Nine alleges that defendants APEX, American Brokers Conduit, Fidelity Title Company, Fidelity Financial, Fidelity Title Group, and MERS fraudulently concealed from plaintiffs the fact that American Brokers Conduit was not an incorporated entity and was not licensed to do business in any state. (Am. Compl. ¶ 254(a)-(f)). The complaint also alleges that defendant Deutsche Bank fraudulently concealed the fact that the trust to which the mortgage was assigned was "closed" and therefore could not accept the assignment. (*Id.* ¶ 254(g)). It further alleges that AHMSI, Homeward, and Ocwen all knew that the note was void yet concealed that fact from plaintiffs and attempted to collect on the allegedly void note. (*Id.* ¶ 254(h)).

It is unclear whether this is an independent fraud claim or an argument in support of tolling the limitations period applicable to plaintiffs' other claims. Presumably, plaintiffs are claiming, at least in part, that they were fraudulently induced to enter into the loan transaction on December 21, 2006. Any subsequent fraudulent concealment would not appear to be independently actionable, but might "toll[] the statute of limitations [period] if 'the wrongdoer . . . concealed the existence of a cause of action through some affirmative act done with intent to deceive.'" *Harry v. Countrywide Home Loans Inc.*, 2016 U.S. Dist. LEXIS 165132, 2016 WL 7013451 at *5 (D. Mass. 2016) (quoting *Abdallah*, 752 F.3d at 119-20)

(last alteration original).[12] As has already been discussed, plaintiffs were on inquiry notice as to the claim of fraud at the time the loan closed, and tolling the applicable limitations period is not appropriate in this case.

To the extent that the complaint asserts an independent claim of fraud, that claim is facially time-barred. Under Massachusetts law, the claims for fraud is subject to a three-year limitations period. *Stolzoff v. Waste Sys. Int'l, Inc.*, 58 Mass. App. Ct. 747, 755, 792 N.E.2d 1031 (2003). Fraud claims accrue "at the time a plaintiff learns or reasonably should have learned of the misrepresentation." *Kent v. Dupree*, 13 Mass. App. Ct. 44, 47, 429 N.E.2d 1041 (1982). As to defendants APEX, American Brokers Conduit, Fidelity Title Company, Fidelity Financial, Fidelity Title Group, and MERS, the fraud claim is based on their failure to disclose that American Brokers Conduit was, allegedly, not an incorporated entity licensed to do business. Plaintiffs were put on notice regarding the identity of the lender at the December 21, 2006 closing. The HUD-1A that plaintiffs received at closing on December 21, 2006, stated that American Brokers Conduit was the lender. (Am. Compl. ¶ 36). However, according to the complaint, the TIL disclosure statement they received stated that APEX was the lender. (*Id.* ¶30). Plaintiffs were therefore put on inquiry notice regarding the identity of

12. The plaintiffs in *Harry v. Countrywide Home Loans Inc.* appear to be different from the plaintiffs in this action. However, the same attorney represented the plaintiffs in that action, and the dispute there involved a very similar mortgage dispute involving a property in Mashpee, Massachusetts. It is unclear whether there is any relationship between the plaintiffs in these two cases.

their lender in December 2006. *See Szymanski v. Boston Mut. Life Ins. Co.*, 56 Mass. App. Ct. 367, 371, 778 N.E.2d 16 (2002) (stating that plaintiff may be put on inquiry notice of claim when he is informed of facts that would suggest to reasonably prudent person in his position that he has been injured). Thus, plaintiffs' fraud claims against APEX, American Brokers Conduit, Fidelity Title Company, Fidelity Financial, Fidelity Title Group, and MERS expired no later than December 2009, unless tolled.

The fraud claim against Deutsche Bank is premised on the May 1, 2009 assignment to Deutsche Bank. According to the complaint, it appears that documentation concerning the trust to which the mortgage was assigned was recorded in the Barnstable County Registry of Deeds on May 7, 2009, and therefore publicly available at that time. (Am. Compl. ¶ 76). In any event, the complaint does not allege that the assignment to Deutsche Bank induced plaintiffs to act, or to refrain from acting, in any material way.

Finally, the fraud claims against AHMSI, Homeward, and Ocwen are premised on their attempts to collect on what they allegedly knew was a void note, while failing to disclose that fact to plaintiffs.[13] According to

13. The complaint does not appear to allege a fraud claim against Deutsche Bank based on its foreclosure attempts. However, to the extent that it does, those claims are time-barred. According to the complaint, Deutsche Bank attempted to foreclose on plaintiffs' property in satisfaction of their debt in 2009, 2010, and 2011. (Am. Compl. ¶¶ 94-104). The three-year limitations period on any fraud claim arising out of that conduct has therefore expired.

the complaint, AHMSI attempted to collect on the note from November 2008 through June 2012; Homeward Residential attempted to collect on the note from June 2012 through October 2012; and Ocwen attempted to collect on the note from February 2015 through January 2016. (Am. Compl. ¶¶ 88-92, 115, 117-18, 122). The three-year limitations period has thus expired, unless tolled, as to all defendants except Ocwen, and as with virtually all claims in the complaint, plaintiffs have failed to allege a plausible bases why equitable estoppel or equitable tolling should apply. (*See* Am. Compl. ¶ 256 (b)-(c)).

The fraud claim against Ocwen, while timely, fails to state a claim upon which relief can be granted. To state a claim for fraud, the complaint must allege: "(1) a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiffs to act on this representation, (4) that the plaintiffs reasonably relied on the representation as true, and (5) that they acted upon it to their damage." *Commonwealth v. Lucas*, 472 Mass. 387, 394, 34 N.E.3d 1242 (2015) (internal quotation marks omitted).[14] Pursuant to Fed.

14. It appears plaintiff's fraud claim is based on a failure to disclose rather than a direct misrepresentation. The complaint alleges that Ocwen "chose to try and elicit money from the Plaintiffs knowing that all of the paperwork for the alleged void note and void alleged mortgage and assignments were fraudulent and didn't exist" and "hid this fact from the Plaintiffs." (Am. Cmpl. ¶ 254(h)). A failure to disclose may constitute a misrepresentation where the defendant has a preexisting duty to disclose certain information, *see Greenery Rehab. Group, Inc. v. Antaramian*, 36 Mass. App. Ct. 73, 77-78, 628 N.E.2d 1291 (1994), or where disclosure is necessary to correct what would otherwise be a materially misleading statement, *see Nei v.*

R. Civ. P. 9(b), allegations of fraud must be pleaded with particularity. *See Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985). Even assuming that the complaint alleged a false representation made with the requisite knowledge and intent with sufficient particularity to satisfy the heightened pleading requirements of Rule 9(b), it does not allege the kind of reliance and damage that can give rise to a fraud claim. *See Sovereign Bank v. Sturgis*, 863 F. Supp. 2d. 75, 85-86 (D. Mass. 2012) (dismissing fraud claim for, among other things, failure to allege detriment). The complaint alleges that plaintiffs suffered injuries in the form of multiple foreclosure attempts, a reduction in their credit rating, and Karen's hospitalization due the stress of the threatened foreclosure. (Am. Compl. ¶ 254). The complaint does not, however, allege that plaintiffs acted in any way in detrimental reliance on Ocwen's alleged misrepresentation. It appears that plaintiffs simply continued to live in their home without making any mortgage payments. Furthermore, plaintiffs' alleged injuries appear to result from their own failure, since 2008, to make payments on their mortgage, not from any actions they took (or failed to take) in reliance on Ocwen's representations about its intent to foreclose.

Boston Survey Consultants, Inc., 388 Mass. 320, 322-23, 446 N.E.2d 681 (1983). For the purposes of deciding this motion to dismiss, the Court will assume that Ocwen's statement of its intent to foreclose could constitute a materially misleading statement—if, as plaintiffs allege, it did in fact know that it did not have the legal authority to foreclose—such that a duty to disclose the alleged defects in the note and mortgage was triggered.

K. Rescission and Quiet Title (Count Ten)

In Count Ten, plaintiffs seek to exercise a right of rescission under TILA. TILA provides borrowers with the right to rescind mortgage transactions until midnight of the third business day following closing or the delivery of the information and rescission forms required by the statute, whichever is later. 15 U.S.C. § 1635(a). The rescission period may be extended if the borrower did not receive adequate notice of the right to rescind; however, even if extended, that right "completely extinguishes" after three years from the closing of the transaction. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998); 15 U.S.C. § 1635(f). In order to exercise their right to rescind, borrowers must notify their creditor of their intent to do so. 15 U.S.C. § 1635(a).

According to the complaint, plaintiffs mailed their TILA rescission notice to all defendants on March 20, 2015. However, because their mortgage transaction closed on December 21, 2006, their right to rescind had "completely extinguishe[d]" no later than December 21, 2009. *Beach*, 523 U.S. at 412. Count Ten is therefore time-barred unless tolled, and again the complaint does not allege a plausible basis for the application of equitable estoppel or equitable tolling. (*See* Am. Compl. ¶ 271 (b)-(c)). Count Ten will therefore be dismissed.

L. Absence of Standing to Foreclose (Count Eleven)

Count Eleven alleges that none of the defendants have standing to collect money from plaintiffs or foreclose on

their property because the documents associated with their mortgage are all invalid. (Am. Compl. ¶ 273). Because that count does not assert any independent cause of action, it will be dismissed.

IV. Conclusion

For the foregoing reasons:

A. Defendants American Home Mortgage Servicing, Inc., Deutsche Bank National Trust Company, Homeward Residential, Mortgage Electronic Registration Systems, Inc., and Ocwen Loan Servicing, LLC's motion to dismiss (Docket No. 53) is GRANTED in part and DENIED in part. All claims against those defendants are dismissed for failure to state a claim upon which relief can be granted except for the claim in Count Four as to defendant Ocwen Loan Servicing, LLC.

B. Defendants Fidelity National Financial, Inc., Fidelity National Title Insurance Company, and Fidelity National Title Group, Inc.'s motion to dismiss (Docket No. 57) is GRANTED.

C. Defendants American Home Mortgage Servicing, Inc., Deutsche Bank National Trust Company, Homeward Residential, Mortgage Electronic Registration Systems,

Inc., and Ocwen Loan Servicing, LLC's motion to strike (Docket No. 89) is DENIED as moot.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
Dated: January 12, 2017 United States District Judge

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED APRIL 25, 2019

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1829

TIMOTHY C. HARRY; KAREN C. HARRY,

Plaintiffs-Appellants,

v.

AMERICAN BROKERS CONDUIT; APEX MORTGAGE SERVICES; FIDELITY NATIONAL TITLE GROUP, INC.; AMERICAN HOME MORTGAGE SERVICING, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2007-2 MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-2; HOMEWARD RESIDENTIAL, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; OCWEN LOAN SERVICING, LLC; FIDELITY NATIONAL FINANCIAL, INC.; FIDELITY NATIONAL TITLE COMPANY,

Defendants-Appellees,

- and -

KORDE & ASSOCIATES, P.C.; ABLITT & CHARLTON, P.C,

Defendants.

Appendix E

Before

Howard, *Chief Judge*,
Souter,* *Associate Justice*,
Torruella, Lynch, Thompson,
Kayatta and Barron, *Circuit Judges*.

ORDER OF COURT

Entered: April 25, 2019

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing *en banc* has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing *en banc* having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard *en banc*, it is ordered that the petition for rehearing and petition for rehearing *en banc* be denied.

By the Court:
Maria R. Hamilton, Clerk

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* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

APPENDIX F — RELEVANT STATUTORY PROVISIONS

15 U.S.C. 1692 FAIR DEBT COLLECTION PRACTICES ACT

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

15 U.S.C. 1692 (a) & (e)

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(e) Purposes. It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to unsure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. 1692(e) (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of --

(A) the character, amount, or legal status of any debt;

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. 1692(f) A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

Appendix F

MASSACHUSETTS GENERAL LAWS CHAPTER 255E

M.G.L. Chapter 255E entitled Licensing of Certain Mortgage Lenders and Brokers, Section 1 defines *Mortgage Broker* to be "any person who for compensation or gain, or in the expectation of compensation or gain, directly or indirectly negotiates, places, assists in placement, finds or offers to negotiate, place, assist in placement or find mortgage loans on residential property for others." M.G.L. Chapter 255E, Section 1 defines a *Mortgage Lender* as "any person engaged in the business of making mortgage loans, or issuing commitments for mortgage loans. M.G.L. Chapter 255E, Section 1 defines Mortgage loan as "a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on residential property. M.G.L. Chapter 255E, Section 1 defines *Multi-state licensing system* as "a system involving 1 or more states, the District of Columbia or the commonwealth of Puerto Rico for the sharing of regulatory information and the licensing and application processes, by electronic or other means, for mortgage lenders and mortgage brokers. M.G.L. Chapter 255E, Section 2 states that "No person shall act as a mortgage broker or mortgage lender with respect to residential property unless first obtaining a license from the commissioner…." Section 2 does provide for some exceptions, none of which apply to this case.

Appendix F

MASSACHUSETTS GENERAL LAWS CHAPTER 255F

M.G.L. Chapter 255F Section 1 defines *Mortgage loan originator* as "a person who for compensation or gain or in the expectation of compensation or gain: (i) takes a residential mortgage loan application; or (ii) offers or negotiates terms of a residential mortgage loan." M.G.L. Chapter 255F Section 1 defines *Loan processor or underwriter* as "an individual who performs clerical or support duties as an employee at the direction of and subject to the supervision and instruction of a person licensed, or exempt from licensing under this chapter…. That said person shall not represent to the public….. that such individual is licensed or otherwise authorized by law to perform any of the activities of a mortgage loan originator." M.G.L. Chapter 255F Section 1 defines nationwide mortgage licensing system and registry, as "a mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of licensed mortgage loan originators." M.G.L. Chapter 255F Section 1 defines *Unique identifier*, as "a number or other identifier assigned by protocols established by the Nationwide Mortgage Licensing System and Registry." (hereinafter "NMLSR") M.G.L.