

In The

# Supreme Court of the United States

NICOLE RENA McCREA,

*Petitioner,*

v.

MARK S. DEVAN, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI FROM THE  
MARYLAND COURT OF APPEALS

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## BRIEF IN OPPOSITION

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## **QUESTION PRESENTED**

Whether the underlying ratified and affirmed state foreclosure action meets the standard for certiorari review under Supreme Court Rule 10?

## **LIST OF PARTIES**

The Petitioner is Nicole R. McCrea. The Respondents are Mark S. Devan, Thomas P. Dore, Brian S. McNair, and Angela Nasuta, who acted as Substitute Trustees for the Note Holder and Mortgage Loan Servicer in docketing and prosecuting a foreclosure action against the Petitioner's real property in Maryland.

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## STATEMENT OF THE CASE

The Petitioner seeks certiorari review by this Honorable Court of an order of the Maryland Court of Appeals declining to exercise its discretionary review over a ratified and affirmed state foreclosure. This Petition is one of many attempts by the Petitioner to remain in her home and delay the completion of that foreclosure. Respondents offer the following brief history of the underlying foreclosure action.

On June 27, 2003, Ms. McCrea purchased the property located at 12472 Turtle Dove Place, Waldorf, Maryland (the “Property”). On or about March 7, 2007, Ms. McCrea refinanced her mortgage loan with World Savings Bank, F.S.B. In connection with that refinance transaction, Ms. McCrea executed a promissory note in the amount of \$219,000 (the “Note”) and a deed of trust pledging the Property as collateral (the “DOT”). Ms. McCrea began to experience financial difficulty and on November 22, 2010 entered into a loan modification under the Home Affordable Modification Program (“HAMP”).

In June 2014, Ms. McCrea again experienced financial difficulty and defaulted in making payments under her HAMP-modified loan. On October 19, 2016, the Substitute Trustees, who are the Respondents herein, initiated a foreclosure action in the Circuit Court for Charles County, Maryland styled *Devan, et al. v. McCrea*, case number 08-C-16-002735 (the “Foreclosure Action”). While the Foreclosure Action was pending, Ms. McCrea again sought to modify her loan under HAMP. On December 27, 2016, Ms. McCrea was advised of her ineligibility for a second HAMP modification; but was notified that she was eligible for an alternative loan modification program offered by Wells Fargo.

On January 18, 2017, the parties engaged in foreclosure mediation pursuant to the Maryland foreclosure statute which resulted in the offer of a Trial Payment Plan to Ms. McCrea. Ms. McCrea successfully completed the Trial Payment Plan and on April 17, 2017, she was offered a second modification to her mortgage loan under the alternative loan modification program offered by Wells Fargo. Instead of accepting the alternative loan modification offered to her, on May 3, 2017, Ms. McCrea complained to the Consumer Financial Protection Bureau (“CFPB”) about the denial of her application for a second HAMP loan modification, for which she was ineligible.

A foreclosure sale of the Property was scheduled to occur on August 11, 2017. The day before the sale, Ms. McCrea filed an Emergency Motion to Stay or Dismiss the foreclosure action (“14-211 Motion”). The Court denied that 14-211 Motion. A foreclosure sale of the Property occurred on August 11, 2017.

Ms. McCrea noted an appeal to the Maryland Court of Special Appeals on September 8, 2017. She also filed a Motion to Vacate the order denying her 14-211 Motion and a Motion to Stay enforcement of that order (the “September 8, 2019 Motions”), which were denied on September 21, 2017. Ms. McCrea then filed a Motion to Alter and Amend the order denying her September 8, 2019 Motions, which was also denied. On October 10, 2017, the final Order of Ratification was docketed. Ms. McCrea then filed a Motion to Revise the October 10, 2017 Order of Ratification, which was denied by the Circuit Court on November 27, 2017. Ms. McCrea then noted a second appeal to the Maryland Court of Special Appeals on January 3, 2018.

Ms. McCrea's January 3, 2018 appeal was dismissed by the Maryland Court of Special Appeals on September 14, 2018 for failure to timely file a brief therein. Following the dismissal of that appeal, Ms. McCrea filed a Motion for Reconsideration in the Maryland Court of Special Appeals. That motion was denied on October 26, 2018.

On January 31, 2019, the Court of Special Appeals issued an Unreported Opinion in Ms. McCrea's first appeal affirming the State Circuit Court's August 11, 2017 Order denying her 14-211 Motion. Ms. McCrea also moved for reconsideration of that opinion. By Order dated March 13, 2019, Ms. McCrea's motion for reconsideration was denied and the Court of Special Appeals withdrew and reissued its January 31, 2019 opinion to clarify the procedural history of a case relied upon by Ms. McCrea (the "March 13, 2019 COSA Opinion") which is attached as Exhibit A to Ms. McCrea's Petition.

Ms. McCrea then sought discretionary certiorari review of the March 13, 2019 COSA Opinion by Maryland's Court of Appeals. On April 15, 2019, Ms. McCrea sought to extend the time for filing a Petition for a Writ of Certiorari to the Maryland Court of Appeals along with her Petition for Review. On June 21, 2019, Maryland's Court of Appeals denied Ms. McCrea's Petition for Certiorari review.

Having failed to elicit further review of her foreclosure appeal by the Maryland Court of Appeals, the Petitioner now seeks this Court's extraordinary review. The Petitioner, however, has not identified any basis for this Court's review, nor has she articulated any public interest or important federal question that requires this

Court’s consideration. The principal purpose for certiorari review “is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.” *Braxton v. United States*, 500 U.S. 344, 347 (1991) (citing Supreme Court 10.1, now Supreme Court Rule 10(a)). As this matter involves no such issues, the Petition for Writ of Certiorari should be denied.

## **ARGUMENT**

The Petitioner contends that her garden variety foreclosure is of national importance and asks this Court to consider whether “the Maryland Court of Special Appeals’ March 13, 2019 unpublished Opinion and Memorandum affirming the judgment of the Circuit Court for Charles County is in material conflict with the Supreme Court of the United States’ recent decision considering what is facially sufficient ([*Dahda v. U.S.*, 138 S. Ct. 1491 (2018)]) with regards to the statutory provisions of Maryland Rule 14-211.” As reflected above, Ms. McCrea’s state court appeals were resolved against her due to her failure to file a timely brief in one and her failure to meet the prerequisites to stay a foreclosure sale in the other. The State Circuit Court did not err in denying her Rule 14-211 Motion; nor did the Maryland Court of Special Appeals err in affirming that decision or Maryland’s Court of Appeals err in denying her petition for certiorari review. The Petitioner offers no plausible basis for invoking this Court’s extraordinary review of these state court rulings.

### **I. Reasons for Denying the Petition**

Nothing in Ms. McCrea’s Petition meets the criteria set forth in Supreme Court Rule 10. Neither the Maryland Court of Appeals, nor Maryland’s Court of Special

Appeals “entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ... decided an important federal question in a way that conflicts with a decision by a state court of last resort; or ... so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.” Supreme Court Rule 10(a). Nor did they decide “an important question of federal law that has not been, but should be settled by this Court, or ... an important federal question in a way that conflicts with relevant decisions of this Court.” Supreme Court Rule 10(c).

Instead, the Maryland Court of Appeals declined to exercise *its* discretionary review of the Court of Special Appeals’ affirmance of the denial of Ms. McCrea’s 14-211 Motion to Stay or Dismiss a state foreclosure action. The law applicable to Ms. McCrea’s 14-211 Motion is well-settled and is a matter of state law. As such, nothing herein merits this Court’s extraordinary review of a denial of a motion to stay or dismiss a routine foreclosure action.

## **II. The Maryland Court of Special Appeals Affirmed the Circuit Court’s Denial of Ms. McCrea’s Motion to Stay or Dismiss on the Basis of State Law, Not Any Federal Question**

“[A] defaulting borrower may file a motion to stay the sale of the property and dismiss the foreclosure action” before a scheduled foreclosure sale takes place. *Bates v. Cohn*, 9 A.3d 846, 852 (Md. 2010). The time for filing such a motion is prescribed by Maryland Rule 14-211(a)(2)(A), which provides, in pertinent part, that “a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15

days after the last to occur of: (i) the date the final lost mitigation affidavit is filed; (ii) the date a motion to strike postfile mediation is granted; or (iii) . . . the date the postfile mediation was held.” The last of these events to occur in this case was the postfile mediation, which was held on January 18, 2017. Accordingly, the last possible date on which the Petitioner could have filed her 14-211 Motion was February 2, 2017. Because she did not file her Motion until August 10, 2017, over six months late, it was facially untimely.

Under Maryland Rule 14-211(a)(2)(C), a late filing can be excused by a Circuit Court upon the demonstration of good cause. The Petitioner claims to have presented good cause for the six-month delay, based upon her rejection of the alternative Wells Fargo loan modification offered to her on April 17, 2017 and in light of her complaint to the CFPB about the denial of her application for a second HAMP loan modification. Taking these two contentions in order, the Petitioner’s rejection of the alternative mortgage modification offered to her by Wells Fargo could not have given the Petitioner reason to believe that the foreclosure proceeding was somehow suspended or cancelled. Very much to the contrary, Wells Fargo specifically warned the Petitioner that “the foreclosure action will move forward” if she did not accept and return the signed agreement for the Wells Fargo alternative loan modification by a date certain. See March 13, 2019 COSA Opinion at pp. 6-7. In the face of this explicit warning from Wells Fargo, it simply was not reasonable for the Petitioner to believe that foreclosure proceeding would be suspended after she rejected the alternative loan modification agreement.

For the same reason, the fact that the Petitioner complained about the denial of a second HAMP modification to the CFPB does not excuse her failure to file a timely Motion to Stay or Dismiss the foreclosure. As set forth above, Wells Fargo made it unmistakably clear to Ms. McCrea that her failure to accept the alternative loan modification program would cause the foreclosure action to “move forward.” Here again, it simply was not reasonable for the Petitioner to conclude that she could disregard the deadlines imposed by Maryland Rule 14-211 when she complained to the CFPB regarding the denial of her second HAMP application. If she truly believed what she now argues to this Court, she could have timely filed her Rule 14-211 Motion and offered her CFPB complaint as a basis therefor. However, she did not do so.

### **III. The Motion to Stay or Dismiss Did Not Present Any Issues for Which Certiorari Review is Warranted under Supreme Court Rule 10**

Even if the Petitioner’s Rule 14-211 Motion had been timely filed, her 14-211 Motion also needed to “state a valid defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action,” which it did not. See Maryland Rule 14-211(b)(1)(C). Under this Rule, “the factual and legal bases of a defense must be stated ‘with particularity’ and . . . any available supporting documents or material must be provided.” *Buckingham v. Fisher*, 115 A.3d 248, 253 (2015). Maryland’s Court of Special Appeals in *Buckingham* considered the pleading standard applicable to Rule 14-211 Motions and state that:

The text of the Rule does not make explicit what level of “particularity” is required for a defense to be deemed valid on its face and trigger an evidentiary hearing on the merits. But the fact that an asserted defense must be “accompanied by any supporting documents or other material in the possession or control of the moving party,” Rule 14-211(a)(3)(C),

leads us to believe that bare assertions of a broad defense to the validity of a lien instrument will not be sufficient. The requirements of stating a defense with particularity and supporting those assertions with any available evidence leads us to conclude that, under Rule 14-211, the pleading standard is more exacting than the pleading standard for an initial complaint. ... *In the context of Rule 14-211, we hold that particularity means that each element of a defense must be accompanied by some level of factual and legal support. General allegations will not be sufficient to raise a valid defense requiring an evidentiary hearing on the merits.*

*Buckingham, supra*, 115 A.3d at 253–54 (emphasis added).

Here, the State Circuit Court and Maryland's Court of Special Appeals correctly found that the Petitioner's Rule 14-211 Motion did not meet this standard. In her 14-211 Motion, the only assertion of 'defenses,' aside from her generic belief that she was entitled to a second HAMP modification, is the following paragraph:

Based on Wells Fargo and the Plaintiff's actions the Defendant has cause of action and/or claims under: Title VI Discrimination; Title VI Retaliation; Fair Housing Act Discrimination; Fraud in the Inducement; Detrimental Reliance; Substantive Unconscionability; Procedural Unconscionability; Misrepresentation under Maryland Consumer Protection Act; Material Omission under Maryland Consumer Protection Act; Common Law Fraudulent Misrepresentation; Reformation of the Mortgage; Material Omission under Maryland Mortgage Fraud Protection Act; Material Misrepresentation under Maryland Mortgage Fraud Protection Act; Violation of Maryland consumer Debt Collection Act; Violation of Maryland Real Property Article; Common Law Breach of Contract; Misrepresentation under the Fair Debt Collections Practices Act; against Wells Fargo; Misrepresentation under Fair Debt Collections Practices Act against the Plaintiffs; Violation of the Equal Credit Opportunity Act; Violation of the Maryland Equal Credit Opportunity Act.

Appendix E to Ms. McCrea's Petition, p. 5, ¶ 21. As stated by Maryland's Court of Special Appeals this statement offered by the Petitioner in support of her 14-211 Motion "merely sets forth a laundry list of twenty state and federal causes of action

without alleging particular factual grounds” to stay or dismiss the foreclosure. See March 13, 2019 COSA Opinion at p. 17.

In her Petition to this Court, Ms. McCrea relies upon *Dahda v. U.S.*, 138 S.Ct. 1491 (2018) in support of her assertion that Maryland’s Court of Special Appeals erred in finding that the Rule 14-211 Motion did not state a valid defense “on its face.” *Dahda* is inapposite here. In *Dahda*, this Court reviewed the sufficiency of a wiretap order issued under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, and was asked to determine whether suppression of a wire or oral communication was warranted where the order of approval of the wiretap was “insufficient on its face.” This Court held therein that while the wiretap orders did contain a statement of expanded territorial jurisdiction, because:

none of the communications unlawfully intercepted outside of the judge’s territorial jurisdiction were introduced at trial, ... the inclusion of the extra sentence had no significant adverse effect upon the Dahdas. Because the remainder of each order was itself legally sufficient, we conclude that the Orders were not insufficient on their face.

*Dahda*, 138 S.Ct. at 1494 (internal quotation marks omitted). *Dahda* has no bearing on the Petitioner’s 14-211 Motion filed in the foreclosure action.

Here, unlike *Dahda*, Maryland Rule 14-211 places the burden of pleading with particularity upon the movant - i.e. Ms. McCrea. As noted above, the State Circuit Court and Maryland’s Court of Special Appeals agreed that while Ms. McCrea’s 14-211 Motion contains a recitation of her financial history and her efforts to twice modify her loan under HAMP, she failed to set forth with particularity the elements of each alleged defense together with “some level of factual and legal support.”

Similarly, Ms. McCrea relies on *Wells Fargo Home Mortgage, Inc. v. Neal*, 922 A.2d 538 (Md. 2007), wherein the Court of Appeals of Maryland found that a lender's failure to complete the mandatory HUD loss mitigation review, which were identified in the Deed of Trust in *that* case as a condition precedent to foreclosure, was a valid defense to foreclosure. Ms. McCrea now contends that the pre-foreclosure mandatory HUD loss mitigation review in *Neal* is analogous to her complaint to the CFPB about the denial of her second HAMP loan modification. It is not. The CFPB complaint did not interfere with (nor did Ms. McCrea allege it did in her 14-211 Motion) the pace of foreclosure action.

It is clear that Ms. McCrea's entire case is predicated on her belief that she was entitled to a second loan modification under HAMP. Her loan was reviewed for both a second HAMP modification (for which she was determined to be ineligible) and an alternative loan modification program which she was offered and declined. After completing the trial payments under that alternative modification program, Ms. McCrea elected not to proceed with the final alternative modification program and instead chose to pursue a complaint with the CFPB. Had Ms. McCrea accepted the alternative modification program, *that* would have suspended or resulted in the dismissal of her foreclosure. She chose not to and as such, she failed to meet her burden to file a timely and compliant Rule 14-211 motion.

Accordingly, even if the Petitioner's Motion to Stay or Dismiss the foreclosure had been timely filed, or accepted late for good cause shown, it nonetheless was deficient for the failure to plead a valid defense to the mortgage lien and raised no issues for consideration by this Court under *Dahda* or Supreme Court Rule 10.

## CONCLUSION

As reflected above, nothing in the Petition implicates any of the considerations which support a writ of certiorari under Supreme Court Rule 10. This case simply does not present a conflict between courts or a pressing federal issue worthy of this Court's review. Accordingly, the Petition for a Writ of Certiorari should be denied.

*/s/ Virginia W. Barnhart* \_\_\_\_\_

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