No. 18-1183

IN THE SUPREME COURT OF THE UNITED STATES

Dorothy A Smulley
Petitioner

v.

Federal Housing Finance Agency,
Federal National Mortgage Association,
Mortgage Electronic Registration Systems Inc.
Webster Financial Corporation,
doing business as Webster Bank,
JPMorgan Chase Bank, National Association
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDIX FILED SEPARATELY

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Questions Presented for Review

1. Is the Federal National Mortgage Association (Fannie Mae) a federal instrumentality under the regulatory oversight and conservatorship of the Federal Home Finance Agency (FHFA)?

2. As a federal instrumentality, is Fannie Mae Form 3140, Paragraph F, subject to due process requirements?

3. Is FHFA as conservator of Fannie Mae, and Fannie Mae as principal in a common-law agency relationship with mortgage servicing financial institutions, subject to vicarious liability as a consequence of misdeeds performed by the mortgage servicers?

4. Should Internal Operating Procedures (IOP) within a Circuit provide for sufficient verification which would assure all necessary indexed electronic documents filed with the court below will be identified and brought to the attention of the Circuit Justices designated for the panel hearing?

Parties to the Proceeding

Petitioner is,

Dorothy A Smulley, a *pro se* party.

Respondents are,

Federal Housing Finance Agency,
Federal National Mortgage Association,
Mortgage Electronic Registration Systems Inc.
Webster Financial Corporation, doing business as
Webster Bank, and
JPMorgan Chase Bank, National Association.

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Petitioner Dorothy A Smulley (petitioner) respectfully requests this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the dismissal of petitioner's 18 USC §§ 1961-1968 civil Racketeer Influenced and Corrupt Organizations complaint (RICO).

OPINIONS BELOW

The opinion of the Second Circuit, Smulley v. FHFA, 2018 WL 4849667 (2d Cir. Oct. 5, 2018), is included in petitioner's appendix (filed separately) (A1-9). The order of denial for panel rehearing and rehearing en banc is included (A10). The order of dismissal by the district court is also included (A11-22).

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 2018. A petition for panel rehearing and rehearing en banc was denied November 30, 2018. The petition for writ of certiorari was filed February 27, 2019. Jurisdiction of this Court is invoked under 28 USC § 1254.

INTRODUCTION

Petitioner alleges defendants misuse and abuse of Fannie Mae mortgage form, Multistate Condominium Rider – Single Family – Fannie Mae Freddie Mac Uniform Instrument Form 3140, (A23-25) specifically Paragraph F (A24). Paragraph F provides,

> "Remedies. If Borrower does not pay condominium dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of

> Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment."

This specific language continues to enable parties, such as the defendants, to create fraudulent debt against condominium real property owners where the mortgage note is securitized or owned by Fannie Mae or Freddie Mac. The misuse and abuse as practiced by the defendants is called equity skimming. Equity skimming is complicated and involves the participation of a number of parties each with distinct and necessary roles. If done properly, equity skimming has netted RICO association-in-fact participants an average of $20,000 per property owner. Equity skimming was first publicized in the media around 2011 and despite numerous and varied attempts to curtail equity skimming through state legislation, those efforts have failed. The practice continues unabated in Connecticut at the present time. Petitioner was a victim and has incurred thousands of dollars in costs and fees which would not have been incurred but for the defendants' equity skimming scheme.

Petitioner sets forth four questions. Petitioner respectfully requests the Court to consider her arguments, the documents included in the appendix and the Circuit's significant omissions of material facts which, if the Circuit did consider, would not have concluded as the Circuit did.

ARGUMENTS

1. Is the Federal National Mortgage Association (Fannie Mae) a federal instrumentality under the regulatory oversight and conservatorship of the Federal Home Finance Agency (FHFA)?

The Second Circuit failed to address this pivotal question and left unresolved, contradictory findings both within the Circuit and among the Circuits. Petitioner argues in the affirmative.

Fannie Mae is a federally chartered Government Sponsored Enterprise (GSE) chartered by Congress "and play[s] an important role in the national housing market by making it easier for home buyers to obtain loans." Judicial Watch, Inc. v Fed. Hous. Fin. Agency, 646 F.3d 924, at 926 (D.C.Cir. 2011). Fannie Mae, under the Merrill doctrine, is a federal instrumentality in the furtherance of federal governmental goals. See Faiella v Federal National Mortgage Association, 2017 DNH 250 (Dist Ct.D New Hampshire Dec 13, 2017) *(Fannie Mae designed for important governmental objective and still pursuing objective, it is a federal instrumentality for purposes of Merrill doctrine)*; see also Gray v Seterus Inc, No. 6:13-cv-1805-MC, 2017 WL 525110 at *2-3 (D.Or.Feb.8, 2017) *(Fannie Mae federal instrumentality for purpose of Merrill doctrine)*; see also Hilton v Fed. Nat. Mortg. Assn., 945 F.Supp 1052, at 1055 (S.D. Tex 1996) affirmed 137 F.3d 1350 (5th Cir.1998) *(applying Merrill to claims asserted against Fannie Mae)*. "Classification as a government entity in the Merrill context turns on whether estoppel would thwart congressional intent." (Id.)

The doctrine arises from Federal Crop. Ins. Corp (FCIC) v Merrill, 332 U.S. 380 (1947). In Merrill, an agent for FCIC erroneously informed the plaintiffs their crops were insurable under the Federal Crop Insurance Act. Id. at 382-83. Plaintiffs sought to recover but FCIC refused to pay based on operative regulations. Id. at 383. Plaintiffs sued and state court found FCIC liable on theory of state law which binds the principal to an agent's actions. The Supreme Court found otherwise. To assert estoppel to the Merrill doctrine, the party moving for estoppel "must show that the government engaged in affirmative misconduct." Shafmaster v United States, 707 F.3d 130, at 136 (1st Cir.2013). "[The court] applies estoppel to the Government only in those limited cases where the party can establish both that the Government made a misrepresentation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct. City of New York v. Shalala, 34 F. 3d 1161, at 1168 (2nd Cir. 1994); see also Azizi v. Thornburgh, 908 F.2d 1130, at 1136 (2d Cir.1990); United States v. Boccanfuso, 882 F.2d 666, 670-71 (2d Cir.1989); Scime v. Bowen, 822 F.2d 7, at 9 n.2 (2d Cir.1987); Schweiker v. Hansen, 450 U.S. 785, at 788-90, 101 S.Ct. 1468, 1470-72, 67 L.Ed.2d 685 (1981) (per curiam) *(suggesting that party invoking estoppel against Government would have to show, at a minimum, affirmative misconduct).* Affirmative misconduct, according to one circuit court, requires something more than simple negligence. See Dantran, Inc v US Dept of Labor, 171 F3 58, at 67 (1st Cir.1999).

In addressing FHFA, the law is clear. FHFA is an

independent federal agency of the federal government. 12 USC § 4511(a). See Federal Housing Finance Agency v UBS Americas Inc, 712 F.3d 136, at 138 (2d Cir.2013). FHFA has duties both as a regulator and since 2008, as conservator of Fannie Mae and Freddie Mac. See Leon Cnty., Florida v. Fed. Hous. Fin. Agency, Case No. 4:10CV436-RH/WCS, 2011 WL 4620866, at *1 (N.D. Fla. Sept. 30, 2011). "HERA established... Federal Housing Finance Agency... an independent federal agency charged with supervising and regulating Fannie Mae." Perry Capital LLC v. Mnuchin, 848 F.3d 1072, at 1080-81 (D.C. Cir. 2017). FHFA is empowered as a regulator and conservator of Fannie Mae to "take such action as may be... (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 USC § 4617(b)(2)(D).

However, Congressional intent failed to articulate whether, in the context of conservatorship, Fannie Mae becomes a federal instrumentality as a result of FHFA's oversight.

2. As a federal instrumentality, is Fannie Mae Form 3140, Paragraph F subject to due process requirements?

Federal instrumentality determines what rights, if any, real property owners of condominiums possess in the placement of Fannie Mae securitized mortgages. Fannie Mae Form 3140 Paragraph F governs the relationship

between the borrower and the condominium association by interposing the lender in the borrower's contractual relationship with the condominium association. Paragraph F imposes penalties against the borrower for the benefit of the condominium association and others, nonparties to Form 3140 and nonparties to the borrower's promissory note. The penalties imposed occur without notice to the borrower and without an opportunity for the borrower to be heard thus, Paragraph F denies the borrower the right of due process. Form 3140 Paragraph F permits the deprivation of property without due process of law and without just compensation.

The language of Paragraph F fails to provide for notice to the borrower and fails to provide a procedure where the borrower's right to be heard can be heard prior to any action taken against the borrower. If Fannie Mae is a federal instrumentality under FHFA oversight, Paragraph F creates violations of due process because Paragraph F not only permits delinquencies to be charged back to the borrower for assessments and interest, other nondescript costs and fees are also charged back without any dollar limits leaving the borrower without the ability to dispute the additional debt because such additional debt is never declared by the mortgagee and/or servicer during any foreclosure court proceeding.

Paragraph F as worded is unreasonable and arbitrary and harms borrowers. The harm is selective. The harm is applicable only to condominium owners with mortgages which involve Fannie Mae or Freddie Mac. The language of Form 3140 Paragraph F places the lender and

condominium association beyond statutory and constitutional bounds in a manner which adversely impact the rights of the borrower. But for the language in Paragraph F, none of the alleged patterns of racketeering activity could neither exist nor create unlawful revenue in excess of $3 million a year for association-in-fact participants. The language may appear lawful when in fact, the practices employed involve schemes of self-enrichment through predicate acts of conspiracy, extortion and fraud. Fannie Mae's Form 3140 Paragraph F clearly demonstrates affirmative misconduct.

The fraud of equity skimming could not come into play but for the permissive language of Paragraph F which denies borrowers any notice at any time prior to the imposition of penalties contained therein. Only after penalties are imposed and funds disbursed is the borrower notified. Thus, FHFA and Fannie Mae, exercise and continue to exercise, affirmative misconduct through the permissive language of Paragraph F which permits and encourages erroneous deprivation of a property right without due process.

The Second Circuit left standing defendants' claims asserting FHFA is not a government actor. This contradicts the intent of Congress and FHFA's role as regulator and conservator. See 12 USC § 4511(a). The Circuit also left standing the district court's oral assertion which identified Fannie Mae as a federal instrumentality and Form 3140, a federal document; later reversed in the written order of dismissal (A11-22). Thus, the Circuit failed to address all of petitioner's issues presented for appeal.

These failures resulted in an unfair prejudice to the petitioner.

3. Is FHFA, as conservator of Fannie Mae, and, Fannie Mae as principal in a common-law agency relationship with mortgage-servicing financial institutions, subject to vicarious liability as a consequence of misdeeds performed by the mortgage servicers?

Petitioner argues affirmative misconduct resting on Fannie Mae's Form 3140 Paragraph F exposes FHFA and Fannie Mae to due process violations. In a mortgagee – mortgage servicer agency relationship, FHFA and Fannie Mae are vicariously liable for the actions of servicers under contract with Fannie Mae. Plaintiff further argues contract law governs because Paragraph F is unclear and ambiguous and subject to immediate dispute.

Under principles of common-law agency, an agent has the power "to do an act or to conduct a transaction on account of the principal which, with respect to the principal, he is privileged to do because of the principal's manifestations to him." Minskoff v. Am. Express Travel Related Servs. Co., 98 F.3d 703, 708 (2d Cir.1996) quoting Restatement (Second) of Agency § 7 cmt. a (1958).

With this principle in mind, there are two contractual issues here. First, Form 3140 is a contract of adhesion. "A contract of adhesion is a contract formed as a product of a gross inequality of bargaining power between parties. Klos v. Polskie Linie Lotnicze, 133 F.3d 164, at 168 (2d Cir.1997). Adhesion occurs when... the contract is unconscionable" Id. "Whether a provision of a contract is

unconscionable... is a legal issue, not a factual issue. See NML Capital v. Republic of Argentina, 621 F.3d 230, at 236 (2d Cir.2010); see also Cheshire Mortg. Serv., Inc. v. Montes, 223 Conn. 80, at 87, 612 A.2d 1130 (1992) *(question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case).* "This Court may therefore resolve that issue at the summary judgment stage." Daimler Chrysler Ins. Co., LLC v. Pambianchi 762 F. Supp. 2d 410, at 421 (Dist. Ct. Conn 2011). Form 3140 Paragraph F fails to comply with basic tenets of due process. And setting aside arguments for or against due process for the moment, simply put, Paragraph F is unconscionable. This is a question of law which the Circuit failed to address.

Second, the Truth In Lending Act (TILA), imposes liability on creditors and their assignees. See Khan v Bank of New York Mellon, 849 F.Supp.2d 1377, at 1378-79 (S.D.Fla 2012). TILA is a consumer protection statute which is interpreted to favor consumers. *Khan, supra,* at 1380. The difference between a creditor and an assignee is the creditor originates the loan and then owns the obligation where the assignee receives ownership of the loan without having originated the loan. See 15 USC §§ 1602(g), 1641(a). Mortgage creditors and assignees derive the same benefit from mortgage servicers, that is, servicers make sure the loan payments are received as required under the terms of the loan. Liability of a creditor and an assignee, therefore, is the same. TILA makes creditors liable for employing irresponsible servicers. Therefore, an assignee, who is acting just like a creditor, is also liable for

their own irresponsible servicers.

The Circuit failed to address plaintiff's arguments under the plain language of plaintiff's appeal. Simply put, the Circuit reviewed for constitutional due process without first addressing the crucial and core issue of federal instrumentality. A due process violation is inapplicable to private actors. Thus, the opinion of the Circuit exacerbated the already contradictory field regarding FHFA's and Fannie Mae's liability in relation to Fannie Mae mortgages and servicers of those mortgages. Vicarious liability is neither synonymous with nor serves as a substitute for constitutional due process. The Circuit exceeded the Court's authority by affirming the district court's judgment on the basis of an issue none of the parties to this action had neither raised nor presented as an alternative. If the Circuit properly raised the issue *sua sponte*, the Circuit incorrectly determined petitioner's claim failed as a matter of law.

4. Should judicial Internal Operating Procedures (IOP) within a Circuit provide for sufficient verification which would assure all necessary indexed electronic documents filed with the court below will be identified and brought to the attention of the Circuit Justices designated for the panel hearing?

Petitioner's case alleges civil racketeering pursuant to 18 USC §§ 1961-1968. Civil RICO cases resemble antitrust cases in point of complexity. Complex litigation requires the court to ascertain if a complaint contains sufficient factual matter, accepted as true, to state a claim

for relief which is plausible therein. The Second Circuit district court, Connecticut Division, requires additional documentation to satisfy the heightened pleading requirements under FRAP 9(b) and has issued a Standing Order (SO). The SO requires submission of a RICO Case Statement (Case Statement) to be timely filed.

In petitioner's case, a Case Statement was timely filed with the original complaint. Petitioner timely filed an amended Case Statement (A26-64) with petitioner's First Amended Complaint, which FAC was the basis of dismissal for failure to comply with the heightened pleading requirement.

Upon appeal to the Circuit, petitioner made known to the Circuit the failure of the district court to consider petitioner's Case Statement. However, the Circuit also failed to consider the Case Statement. Thus, the Circuit's review was neither correct nor complete. A petition for panel rehearing and rehearing en banc was filed and the material omission once again articulated by petitioner. Panel rehearing and rehearing en banc were denied.

FRAP rules fail to provide for verification of all electronic files necessary for Circuit review. Instead, the Circuit relies upon IOPs which, in petitioner's case, created omission of material facts on the record. If the Case Statement was considered, the Circuit would have been unable to find as the Circuit did.

CONCLUSION

For all the reasons discussed, petitioner respectfully requests the Court to grant certiorari to review the judgment of the Second Circuit.

Respectfully submitted,

/s/ Dorothy A Smulley

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Dated February 27, 2019