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Bankruptcy Institute

Presented by the CBA Bankruptcy Practice Group

Thursday, December 13, 2018

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8:55 a.m.	**Welcome & Opening Remarks** Brian D. Flick, Esq., *Chair, CBA Bankruptcy Practice Group*	
9 a.m.	**Case Law Update** J. Michael Debbeler, Esq., *Graydon Head & Ritchey LLP*	**TAB A**
10:15 a.m.	**Break**	
10:30 a.m.	**A Conversation with Our Judges** Honorable Beth A. Buchanan and Honorable Jeffery P. Hopkins, *U.S. Bankruptcy Court, S.D. of Ohio*	**TAB B**
11:15 a.m.	**Chapter 13 Update** Carolyn Buffington, Esq., *Chief Deputy, U.S. Bankruptcy Court, S.D. of Ohio* Margaret A. Burks, Esq., *Chapter 13 Trustee, Cincinnati, OH* Francis J. DiCesare, Esq., *Office of the Chapter 13 Trustee, Cincinnati, OH* Tammy Stickley, Esq., *Office of the Chapter 13 Trustee, Cincinnati, OH*	**TAB C**
12 p.m.	**Group Luncheon** (included in your registration fee)	
1 p.m.	**Current Chapter 7 Administration from the Perspective of the Trustees and Debtors' Counsel** Eric Goering, Esq., *Goering & Goering LLC* Eileen Field, Esq.	**TAB D**
2:15 p.m.	**Bankruptcy Rule 3002.1, RESPA and You: A Beginner's Guide to RESPA Litigation** Brian D. Flick, Esq., *DannLaw*	**TAB E**
3 p.m.	**Break**	
3:15 p.m.	**Tax Issues in Chapter 13** Bethany Hamilton, Esq. *Office of the United States Attorney, Columbus, Ohio*	**TAB F**
4:30 p.m.	**Adjourn to Holiday Party**	

TAB
A

J. Michael Debbeler is a partner with the Cincinnati law firm of Graydon Head & Ritchey LLP where he serves on the firm's Executive Committee. Mr. Debbeler received his B.A. degree, cum laude, from the University of Kentucky and his J.D. degree from the University of Cincinnati College of Law, where he was a member of Order of the Barrister. Mr. Debbeler served as a Visiting Instructor in Law at the College of Law for the year following his graduation. Mr. Debbeler is admitted to practice in Ohio and Kentucky, all U.S. District Courts in Ohio, Kentucky, Indiana and Michigan, and in the Sixth, Seventh and Federal Circuit Courts of Appeal Mr. Debbeler represents lenders in all facets of real estate and asset-based liquidations and workouts. He also represents a wide array of clients with other real estate, banking, bankruptcy, debtor/creditor and commercial litigation issues. He has lectured to various groups on a variety of bankruptcy, real estate, and creditors' rights issues. He is a member of the Cincinnati, Ohio State, Kentucky and Northern Kentucky bar associations. He is past Chair of the Bankruptcy Committee of the Cincinnati Bar Association where he remains a member. He also serves as a member in the American Bankruptcy Law Forum, is currently serving on the Board of Advisors of the Midwest Regional Bankruptcy Seminar, is a member of the American Bankruptcy Institute, is a member of the Tri-State Association for Corporate Renewal, is a member of the Indiana Association for Corporate Renewal, is a Fellow of the Ohio State Bar Foundation, and is Vice-President and Board Chair of Parkinson's Support and Wellness, Inc.

CINCINNATI BAR ASSOCIATION BANKRUPTCY INSTITUTE

Bankruptcy Case Law Update

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GRAYDON HEAD & RITCHEY LLP

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1

Mission Product Holdings, Inc. v. Tempnology, No. 17-1657 (Sp. Ct.)

- Does the rejection of a trademark license prevent the licensee from using the mark?

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2

Merit Management Group vs. FTI Consulting, Inc., 138 S. Ct. 883 (Decided Febr. 27, 2018)

- Issue: When determining whether the safe harbor provision of § 546(e) prohibits avoidance of a fraudulent transfer under § 548(a), whether the Court considers only the overarching transfer or should the Court also consider any intermediary transfers between financial institutions?
- Summary: The Trustee of the litigation trust, FTI Consulting, sought to avoid Debtor's transfer of $16.5 million to Merit as part of Debtor's purchase of Merit's stock. To complete the overall stock purchase, Debtor caused the funds held at its bank to be wired to another bank for the benefit of Merit. Merit claimed the safe harbor provision was invoked because of the intermediary transfer made between the financial institutions.
- Holding: The Supreme Court affirmed the 7th Circuit's decision concluding that the only relevant transfer for purposes of the safe harbor provision is the overarching, or end-to-end, transfer that the trustee seeks to avoid. The safe harbor provision is not invoked when financial institutions are used as mere conduits to complete the end-to-end transfer.

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3

U.S. Bank N.A. v. Vill. at Lakeridge, LLC, 138 S. Ct. 960 (Decided March 5, 2018).

- Issue: Whether the correct standard of review for the determination of non-statutory insider status, which involves mixed questions of law and fact, is *de novo* or the clear error standard?
- Summary: Debtor, a corporate entity, filed Chapter 11 having two debts: one owed to U.S. Bank for over $10 million, and one owed to its sole owner, MBP, for over $2 million. Debtor sought to cramdown the creditors' claims, but U.S. Bank objected. As Debtor's sole owner, MBP is considered an insider. Debtor needed the consent of a creditor who was also not an insider to approve the cramdown plan over U.S. Bank's objection. An officer of Debtor, and also a MBP board member, offered to transfer MBP's claim to her romantic partner, Rabkin for $5,000. Rabkin accepted the offer and consented to the cramdown plan. U.S. Bank argued that Rabkin was a non-statutory insider and the transaction was not arm's length. The Bankruptcy Court found that transaction was arm's length, and the 9th Circuit affirmed under the clear error standard of review.
- Holding: The Supreme Court held that the Bankruptcy Court's decision regarding non-statutory insider status primarily concerns a question of fact as opposed to a legal question. Therefore, the applicable standard of review is deferential to the trier of fact and the clear error standard controls for review.

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4

Lamar, Archer & Cofrin v. Appling, 138 S. Ct. 1752, 2018 U.S. LEXIS 3384, 2018 WL 2465174 (June 4, 2018).

- Issue: Whether materially false statements "respecting the debtors' financial condition" under § 523(a)(2)(A) includes statements regarding a single asset?
- Holding: Statements respecting the debtor's financial condition may include a single asset. Debtor misrepresented the amount of his tax return and stated that he would use the return to pay his outstanding legal fees. Debtor's statement induced the law firm to continue representing him. In fact, the return was significantly lower than what debtor represented and he used the return to pay other debts. The Court determined that the ordinary meaning of the statutory word "respecting" was broad enough to include a false statement concerning debtor's tax return.

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5

***Couch v. Panther Petro., LLC (In re Couch)*, 2017 U.S. App. LEXIS 22251 (6th Cir. 2017)**

- Holding: The Bankruptcy Court did not err in determining that a default judgment entered against Debtor in state court for fraud was entitled to preclusive effect in an adversary proceeding because Debtor had actually litigated the case under Tennessee law by filing an answer and counterclaim in the state court action even though his counsel ultimately withdrew and default judgment was entered against Debtor.

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6

Cox v. Specialty Vehicle Sols., LLC, 2017 U.S. App. LEXIS 22969 (6th Cir. 2017)

- Holding: The District Court erred in dismissing the initial lawsuit without addressing whether the stay relief granted at the request of the parties was intended to be retroactive, or merely prospective. The District Court properly dismissed the second lawsuit because the applicable statute of limitations had run and it was not filed within the thirty (30) day grace period provided by 11 U.S.C. § 108(c)(2).

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7

Nestle Waters N. Am., Inc. v. Mt. Glacier LLC (In re Mt. Glacier LLC), 2017 U.S. App. LEXIS 24907 (6th Cir. 2017)

- Holding: Consistent with the Sixth Circuit's holding in *Browning v. Levy*, 11 U.S.C. § 1123(b)(3) permits a debtor to retain its claim as long as its plan of reorganization enables creditors to identify the claim and determine whether the claim might provide additional assets for distribution.

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8

Blasingame v. Grusin (In re Blasingame), 2018 U.S. App. LEXIS 216 (6th Cir. 2018)

- Holding: The Bankruptcy Court improperly found counsel liable for sanctions under Fed. R. Bankr. P. 9011 and 28 U.S.C. § 1927 because counsel did not file Debtor's bankruptcy petition, his conduct was not frivolous and his filings did not unreasonably or vexatiously multiply the proceedings.

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9

Jodway v. Fifth Third Bank (In re Jodway), 2018 U.S. App. LEXIS 269 (6th Cir. 2018)

- Holding: The Bankruptcy Court's orders dismissing Debtor's bankruptcy case and denying the motion for revocation of the order confirming Debtor's Chapter 13 Plan were proper.

GRAYDON

10

***Lewis v. Pa. Higher Educ. Assistance Agency*, 2018 U.S. App. LEXIS 1873 (6th Cir. 2018)**

- Holding: The District Court properly held that Debtor's complaint for unlawful collection of a student loan debt was subject to dismissal because his student loan debt was not discharged in either his prior Chapter 7 or Chapter 13 bankruptcy proceedings.

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11

***Town Ctr. Flats, LLC v. ECP Commer. II LLC (In re Town Ctr. Flats, LLC)*, 2018 U.S. App. LEXIS 4707 (6th Cir. 2018)**

- Holding: Under Michigan law, the redemption period following a foreclosure sale can be extended by agreement of the parties, and the Bankruptcy Court did not err when it determined the subject property was redeemed within the agreed upon redemption period.

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12

New Prods. Corp. v. Tibble (In re Modern Plastics Corp.), 2018 U.S. App. LEXIS 10297 (6th Cir. 2018)

- Holding: The Chapter 7 Trustee did not breach his fiduciary duties to the secured creditors because there was no equity in the subject property, the location of the property accounted for a majority of its value, and the Trustee acted reasonably under the circumstances.

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13

New Prods. Corp. v. Dickenson Wright PLLC (In re Modern Plastics Corp.), 2018 U.S. App. LEXIS 11472 (6th Cir. 2018)

- Holding: The Sixth Circuit affirmed the Bankruptcy Court's award of attorney's fees and costs for non-party respondents to subpoenas duces tecum pursuant to Fed. R. Civ. P. 45, due to the broad scope of the document requests and the undue burden and expense placed upon the respondents.

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14

Andrews v. Mich. Unemployment Ins. Agency, 891 F.3d 245 (6th Cir. 2018)

- Holding: A debt comprised of restitution and penalties ordered by the state unemployment agency due to Debtor's fraud in obtaining unemployment benefits is covered by both 11 U.S.C. 523(a)(2) and 11 U.S.C. 523(a)(7), and is non-dischargeable under the former.

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15

Trost v. Trost (In re Trost), 2018 U.S. App. LEXIS 14225 (6th Cir. 2018)

- Holding: The Bankruptcy Court's granting of summary judgment in a non-dischargeability proceeding was proper where the factual record supported the Court's determination that Debtor's conversion was willful and malicious and collateral estoppel barred Debtor from re-litigating the issues determined in the underlying conversion suit.

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16

Isaacs v. DBI-ASG Coinvestor Fund, III, 2018 U.S. App. LEXIS 19803 (6th Cir. 2018)

- Holding: The Rooker-Feldman doctrine applies on a claim-by-claim basis, and, if the source of the injury is the state court decision, then the Court is barred from asserting jurisdiction.

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17

Davis v. Fiat Chrysler Autos. U.S., LLC, 2018 U.S. App. LEXIS 23560 (6th Cir. 2018)

- Holding: The doctrine of judicial estoppel bars a debtor's hostile work environment claim where the debtor had sufficient information to know of a potential claim prior to discharge of debtor's Chapter 13 bankruptcy.

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18

Ritzen Grp. Inc. v. Jackson Masonry, LLC (In re Jackson Masonry, LLC), 2018 U.S. App. LEXIS 29009 (6th Cir. 2018)

- Holding: An order denying relief from the automatic stay under 11 U.S.C. § 362(d) is a final, appealable order.

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19

Newman v. Univ. of Dayton, 2018 U.S. App. LEXIS 29937 (6th Cir. 2018)

- Holding: The doctrine of judicial estoppel bars a debtor's employment discrimination claims when the debtor fails to disclose the claims and related employment income as assets in his bankruptcy proceedings.

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20

Glen S. Morris Trust v. Charron (In re Charron), 2018 U.S. App. LEXIS 30485 (6th Cir. 2018)

- Holding: The Bankruptcy Court properly applied collateral estoppel in declaring a state court contempt judgment non-dischargeable when the state court actually litigated and necessarily determined that the debtor's violation of a court order was willful and malicious.

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21

Thermo Credit, LLC v. DCA Services, Inc., 2018 U.S. App. LEXIS 30474 (6th Cir. 2018)

- Holding: The Sixth Circuit held: (i) payments subject to a valid lien cannot be subject to recovery from a transferee under the Ohio Uniform Fraudulent Transfer Act; and (ii) a Lender that is aware of the financial condition of its Borrower and of payments by its Borrower to a third party, waives its rights to later seek to recover them under the Ohio Uniform Fraudulent Transfer Act.

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22

In re Hake, Case No. 17-8035, 2017 Bankr. LEXIS 4382 (Dec. 21, 2017)

- Motion for a stay pending appeal pursuant to Rule 8007 was denied where it (1) failed to state whether the prior motion to stay filed in the bankruptcy court was denied, (2) was filed two months after the appeal was filed and on the eve of a foreclosure sale, and (3) was not supported by any affidavits or evidence demonstrating a likelihood of success on the merits.

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23

In re Smallwood, Case No. 17-8038, 2018 Bankr. LEXIS 101 (Jan. 16, 2018)

- An order vacating the dismissal of a bankruptcy case is a final order that is immediately appealable without the necessity of obtaining leave from the court.

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24

In re Odell, Case No. 17-8012, 2018 Bankr. LEXIS 262 (Jan. 30, 2018)

- In the absence of an objection, when a debtor claims an exemption in property that exceeds the value of the property, the property ceases to be property of the estate 30 days after the meeting of creditors.
- An appeal of an order granting relief from stay becomes moot when the subject property is no longer property of the estate and/or a discharge is awarded.

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25

Oakes v. PNC Mortgage Company (In re Oakes), Case No. 17-8005, 2018 Bankr. LEXIS 327 (Feb. 6, 2018)

- In cases applying Ohio law, chapter 7 trustees can use their status as a hypothetical lien creditor under §544(a)(1) to avoid defectively acknowledged mortgages, notwithstanding Ohio's constructive notice statute (Ohio Rev. Code §1301.401).
- Note: This court did not apply Ohio's newly enacted safe-harbor statute (Ohio Rev. Code §5301.07) as that statute did not take effect until after the petition was filed. The court noted that its conclusion would likely be different if that statute had applied.

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In re Norman, Case No. 18-8002, 2018 U.S. App. LEXIS 5625 (March 5, 2018)

- A debtor's motion for leave to appeal an interlocutory order pursuant to Rule 8004 was denied where the debtor failed to establish a substantial ground for any difference of opinion regarding the correctness of the bankruptcy court's ruling.

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Lowe v. Ransier (In re Nicole Gas Prod.), Case Nos. 15-8053/8055, 2018 Bankr. LEXIS 705 (March 13, 2018)

- The principal of a corporate debtor violated the stay by filing a state court action in his own name alleging violations of the OH Corrupt Practices Act because the claims belonged to the debtor, and the principal did not allege any unique damages apart from those suffered by the company.
- As a result of the stay violation, the bankruptcy court properly held the debtor's principal in contempt and awarded sanctions to affected creditors named in the lawsuit.

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In re Perkins, Case Nos. 17-8001/8008, 2018 Bankr. LEXIS 706 (March 13, 2018)

- Debtor was a "family farmer" where (i) her schedules were made in good faith and reflected aggregate debt below the limit in §109, even though the aggregate of all proofs of claim filed resulted in her exceeding the debt limit; and (ii) more than 50% of her income was from farming operations, even though some of that income was from the debtor's partnerships in farming operations other than her own.
- To be confirmed, a plan need not guarantee success, but only needs to provide a "reasonable assurance of success."

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***Giese v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 585 BR 837 (B.A.P. 6th Cir. 2018)**

- There is no mandatory abstention if the proceeding is core.

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***In re Maximus III Props., LLC*, 2018 Bankr. LEXIS 2206 (B.A.P. 6th Cir. 2018)**

- Appeal is not statutorily moot if effective relief can be granted without affecting the validity of the sale.

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***Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 585 B.R. 850 (B.A.P. 6th Ci. 2018)**

- Abuse of discretion standard governs a courts review of its own sale order.

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***Fuller v. Bank of N.Y. Mellon (In re Fuller)*, 2018 Bankr. LEXIS 2039 (B.A.P. 6th Cir. 2018)**

- Failure to file a notice of appeal in 14 days is fatal.

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***In re Jackson*, 585 B.R. 410, (B.A.P. 6th Cir. 2018)**

- Failure to file timely notice of appeal is fatal.

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In re Blasingame, 2018 Bankr. LEXIS 1326 (B.A.P. 6th Cir. 2018)

- Court properly interpreted four corners of trust document to determine the establishment of an equitable life estate.

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In re U.S. Tommy, Inc., 2018 Bankr. LEXIS 2644 (B.A.P. 6th Cir. 2018)

- Motion for stay pending appeal was denied because the appellant failed to establish a likelihood of success on the merits. Appellant could not show that the bankruptcy court's committed an abuse of discretion where the court's decision was based on several factors in the record which could constitute proper cause for dismissal

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36

In re Perez, 2018 Bankr. LEXIS 2921 (B.A.P. 6th Cir. 2018)

- An appeal of an order of nondischargeability of a specific debt under Section 523 is rendered moot by a subsequent denial of the debtor's general discharge under Section 727.

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In re Prather, 2018 Bankr. LEXIS 2828 (B.A.P. 6th Cir. 2018)

- *Pro se* debtor's requests for *in forma pauperis* status and a stay pending appeal contained within a notice of appeal were denied because a notice of appeal is not a proper procedural mechanism by which affirmative relief may be sought.

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In re Dina Towers Condo. Owners Ass'n, 2018 Bankr. LEXIS 2846 (B.A.P. 6th Cir. 2018)

- In bankruptcy courts, corporations must be represented by a licensed attorney authorized to practice in the relevant court.

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In re Bonfiglio, 2018 Bankr. LEXIS 3281 (B.A.P. 6th Cir. 2018)

- A litigation mistake or error in judgment by a party's attorney does not constitute a "mistake" or "excusable neglect" for purposes of a motion for relief from judgment under Fed. R. Civ. P. 60(b)(1). If mistake or excusable neglect cannot be established, the other factors in the Rule 60(b)(1) analysis are irrelevant.

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In re Lane, 2018 Bankr. LEXIS 3337 (B.A.P. 6th Cir. 2018)

- Denial of a creditor's post-confirmation motion to dismiss a case for lack of good faith and improper treatment of its claim in the plan was not a final, appealable order because it did not alter the parties' rights or the status quo. The order that fixed the rights of the parties was the order confirming the plan, and that was the final order from which the creditor should have appealed.

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In re Hudson, Case No. 17-11835 (Hopkins, Nov. 9, 2017)

- Issue: Whether the Debtors could avoid creditor's mortgage lien as a judicial lien under § 522(f)(1) resulting from the judgment entered in the state court foreclosure proceeding.
- Summary: Creditor filed a foreclosure action, sold the property, and an order confirming the sale was entered. The state court entered an order vacating the sale and dismissing the foreclosure case because the Debtors entered into the first of three loan modifications prior to the sale. This order did not vacate the portion of the confirmation entry which released the mortgages. In a subsequent foreclosure action the court entered a *nun pro tunc* order to correct the omission from the court's prior order regarding the release of the mortgages which effectively restored the mortgages as consensual liens.
- Holding: The Debtors' Motion was denied. Judge Hopkins noted that a mortgage is not converted into a judicial lien by virtue of foreclosure action. Only "judicial liens" that are "obtained by judgment, levy, sequestration or other legal or equitable process or proceeding" can be avoided under § 522(f)(1). The *nun pro tunc* order merely corrected a previous erroneous omission that effectively release the mortgages, and the order did not convert the consensual mortgage lien into a judicial lien.

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***In re Sparks*, Case No. 17-12540, 2018 Bankr. LEXIS 2676 (Aug. 17, 2018) (Hopkins)**

- Debtors cannot count a first mortgage they paid off as a basis to argue that the junior lienholder's lien failed to attach to any equity in the property, while also using the income freed up from paying off the lien to fund the plan.

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***In re Norman*, Case No. 15-13069, 2018 Bankr. LEXIS 2677 (Aug. 3, 2018) (Hopkins)**

- In payment dispute with mortgage lender, confirmation order in prior bankruptcy that determined the principal balance of loan was the "law of the case." Debtors could not argue in subsequent bankruptcy that creditor improperly calculated the claim's principal balance.

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***Davis v. United States (In re Davis)*, Case No. 15-34179, Adv. No. 16-3100, 2018 Bankr. LEXIS 704 (Bankr.S.D. Ohio Jan. 19, 2018) (Judge Buchanan)**

- Tax debt is entitled to priority if assessed within 240 days before petition date or due within the three-years prepetition. A pending bankruptcy tolls these timeframes. When the debtor's Ch. 13 was dismissed and he re-filed a Ch. 7, the IRS was able to look-back to before the Ch. 13 petition to have its claim treated as a priority unsecured claim.

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In re Farrier, Case No. 17-12858 (Bankr. S.D. Ohio 2017)
Leicht vs. Brooks, Adv. 18-01011 (6/21/2018) (Not for publication or citation)

- Trustee's lis pendens notice prevented purchase from debtor from being a BFP. Avoiding a transfer does not spring forth a dower interest.

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***Stone v. Kettering Adventist Healthcare (In re Stone)*, Case No. 15-31896, Adv. No. 17-3012, 587 B.R. 678 (May 31, 2018) (Buchanan)**

- Where the creditor inadvertently discloses personally identifiable information in proof of claim, the general procedure is for the creditor to file redacted copies of the proofs of claim in each case. The creditor cannot not restrict access altogether and only grant access to redacted proof of claim upon request.

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***Guardian Fin. Co. v. Metzger (In re Metzger)*, Case No. 17-11585, Adv. No. 17-1037, 2018 Bankr. LEXIS 3335 (Sept. 4, 2018) (Buchanan)**

- A company's allegedly fraudulent acts cannot be imputed on the debtor merely because he had an ownership interest in the company. And a debt incurred for failure to pay is nondischargeable as fraud under §523(a)(2) only if debtor never intended to pay from the outset.

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Sadlon v. Sadlon, Case No. 17-13107, Adv. No. 17-1064, 2018 Bankr. LEXIS 3334 (Sept. 4, 2018) (Buchanan)

- Under Rule 4007(c), the court had the authority to extend the deadline for causes of action under §523(c), which covers actions under §523(a)(2), (4), and (6), so long as the creditor files a motion requesting an extension before the deadline. The court used the *equitable tolling* doctrine to extend the deadline because the creditor acted diligently to request the extension before the deadline, and the extension did not prejudice the debtor.

GRAYDON

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In re Lister, Case No. 17-12377, 2018 Bankr. LEXIS 3206 (Sept. 25, 2018) (Buchanan)

- So long as "mixed-use" real property securing the creditor's claim includes the debtor's personal residence on the petition date, the claim is subject to the anti-modification provision of §1322(b)(2), and cannot be modified in a Chapter 13 plan.

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***Trask vs. Greenville Fed. (In re Trask)*, 2018 Bankr. LEXIS 2351 (Bankr. S.D. Ohio 2018)**

- Mandatory abstention not available in core proceedings. Payment application and release of a mortgage are within state court wheelhouse and subject to discretionary abstention.

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***Smith v. Rieser (In re Smith)*, 2018 Bankr. LEXIS 2071 (Bankr. S.D. Ohio 2018)**

- Post-petition, pre-conversion rents are property of the bankruptcy estate.

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HOEYHJ v. Browning (In re Browning), 2018 Bankr. LEXIS 2069 (Bankr. S.D. Ohio 2018)

- Under Ohio law, one spouse may act as the apparent agent of another.

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In Re Stringer, 2018 Bankr. LEXIS 1749 (Bankr. S.D. Ohio 2018)

- Court finds attorneys' fees and punitive damages equal to three times the attorneys' fees for egregious violation of the automatic stay.

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54

In re Johnson, 580 B.R. 766 (Bankr. S.D. Ohio 2018)

- $100,000 in punitive damages and attorneys' fees of $422,373.16 for willful violation of stay by state court action.

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Feldman v. Pearl (In re Pearl), Case No. 16-20305, Chapter 13, Adv. No. 16-2006, 2017 Bankr. LEXIS 616*; 63 Bankr. Ct. Dec 225 (U.S. Bankr. E.D. Ky. March 8, 2018)

- **Issues:** Whether the debtor's counterclaims in an adversary proceeding for violations of Kentucky corporate law, oppression of a minority shareholder, and breach of contract would withstand the creditor's motion to dismiss.
- **Holdings:** The Court dismissed the debtor's claims as failing to state a claim upon which relief could be granted. As to the conversion claim, consent was an absolute defense and the debtor's consent was pled and evidenced by a voting agreement. The claim alleging a violation of KRS § 271B.8-310 was subject to dismissal because the statute did not provide an individual cause of action for the debtor as a shareholder or director and thus the debtor lacked standing to assert a direct claim against the plaintiff creditor under the statute. And, the minority shareholder oppression claim was subject to dismissal because corporate shareholders do not owe duties to other shareholders under Kentucky common law.

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Calloway Cleaning & Restoration, Inc. v. McFarland (In reMcFarland), Case No. 16-21587, Adv. No.17-2004, 2018 Bankr. LEXIS 451 (U.S. Bankr. E.D. Ky. February 20, 2018)

- **Issues:** Whether the creditor restoration company was entitled to a finding of nondischargeability where the debtors used insurance proceeds to pay other creditors, allegedly in violation of the parties' contract.
- **Holdings:** The Court granted the debtors summary judgment, because the creditor did not supply sufficient evidence to allow the Court to draw a reasonable inference that, at the time the debtors signed the contract with the creditor, they never intended to pay the creditor for the work, and instead planned to use anticipated insurance proceeds to pay other bills. The fact that the debtors were living paycheck to paycheck and had unpaid bills when they signed the contract did not signify an intention not to repay. And, the Court found no expressed intent to create a trust within the contract or any other evidence in the record to support an express agreement for the debtors to hold the insurance proceeds in trust for the creditor.

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In re Pfetzer, Case No. 17-20802, 2018 Bankr. LEXIS 833; 2018 WL 1448742 (U.S. Bankr. E.D. Ky. March 22, 2018)

- **Issues:** Whether a motion to dismiss for lack of good faith under 11 U.S.C. § 1307(c) can save an otherwise untimely § 1325(a)(7) objection to confirmation of a Chapter 13 plan.
- **Holdings:** Because § 1325(a)(7) requires the determination of the debtor's good faith in filing the petition as part of the plan confirmation process, a motion to dismiss under § 1325(a)(7) cannot rely on an allegation of lack of good faith if the motion is filed after the deadline to object to confirmation.

GRAYDON

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In re Dickson, Case No. 17-51159, 2017 Bankr. LEXIS 4030; (U.S. Bankr. E.D. Ky. November 22, 2017)

- **Issues:** Whether the creditor, having achieved a dismissal of the debtor's chapter 11 proceeding pursuant to § 1112(b)(1), was entitled to reimbursement of her Chapter 11 legal fees pursuant to Bankruptcy Rule 9011(b)(1) or the Court's inherent authority, as a sanction for the debtor's bad faith bankruptcy filing.

- **Holdings:** The Court declined to exercise its inherent authority as a means to impose sanctions, since Fed. R. Bankr. P. 9011 provided sufficient authority for it to consider levying sanctions based upon the filing of the debtor's petition. Sanctions were appropriate because the debtor filed the petition without a legitimate bankruptcy purpose. She sought the protection of the automatic stay but did not intend to reorganize or seek an orderly liquidation; rather, the debtor sought to obtain a civil remedy—the stay of execution of the judgment against the debtor while her appeal was pending.

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In re Thomas, No. 17-20527, 2018 Bankr. LEXIS 565 (Bankr. E.D. Ky. Mar. 1, 2018)

- **Issues:** Whether parties to the settlement of an adversary case demonstrated that they were entitled to have the settlement documents sealed.
- **Holdings:** The Court denied the debtor's motion to seal the settlement agreement, since the debtor failed to provide any evidence to establish that the circumstances warranted the relief requested. Public access to court records should only be restricted in appropriate circumstances.

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In re HNRC Dissolution Co., Case No. 02-14261; 2018 Bankr. LEXIS 1739* (U.S. Bankr. E.D. Ky. June 11 , 2018)

- **Issues:** Whether the Bankruptcy Court had subject matter and personal jurisdiction to decide whether a party asserting an interest in a coal reserve sold by the debtor under Code § 363 had received notice of sale and confirmation orders sufficient to satisfy constitutional due process.
- **Holdings:** (1) The Bankruptcy Court had subject matter and personal jurisdiction to decide whether the interested party Methane had received notice of sale and confirmation orders sufficient to satisfy constitutional due process because the Court had "arising in" subject matter jurisdiction to interpret its own orders under 28 U.S.C.S. § 157 and Methane had sufficient contacts with the United States as a company that operates within its territorial boundary. (2) The purchaser and thus its transferee Alliance was not entitled to enforcement of the order confirming sale free and clear of all interests under Code § 363(f) because the purchaser did not meet its burden to show that Methane, the party asserting an interest, was an unknown party such that notice by publication was sufficient to satisfy constitutional due process.

GRAYDON

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In re Doud, Case No. 14-21834; 2018 Bankr. LEXIS 1883* (U.S. Bankr. E.D. Ky. June 21, 2018)

- **Issues:** Whether the creditor or the debtor should receive funds paid by a Guaranteed Auto Protection provider after debtor totaled his car.
- **Holdings:** (1) The GAP addendum provided that, under the circumstances, the creditor was entitled to receive the GAP benefit as the "named payee." As a result, the debtor had no entitlement to the GAP benefits, and the GAP payment was never part of the debtor's bankruptcy estate under Code § 541(a). (2) As with the creditor's rights under the GAP addendum, the creditor's rights under the retail installment contract were not transferred to the trustee upon the trustee's avoidance of the creditor's security interest in the vehicle.

GRAYDON

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In re Caudill, Case No. 18-70102; 2018 Bankr. LEXIS 2213* (U.S. Bankr. E.D. Ky. July 25, 2018)

- **Issue:** Determination of the value of a manufactured home, for the purpose of determining the amount the debtors had to pay the mortgage company that held a security interest in the home, pursuant to Code § 1325(a)(5)(B).
- **Holdings:** (1) The evidence supported a determination that the Chapter 13 debtors' manufactured home was worth $49,600 for purposes of determining the amount the debtors had to pay a mortgage company that held a security interest in the home under their bankruptcy plan, pursuant to Code § 1325(a)(5)(B). (2) Although the debtors' expert and the mortgage company's expert properly used the NADA cost approach because the home was personal property, the debtors' expert's valuation was suspect because he concluded that the home was manufactured in 2013 when the majority of documents, including the certificate of title, showed that it was manufactured in 2014. (3) The court was not bound by either expert's opinion and had to determine the value of the home based on all evidence it heard.

GRAYDON

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Stone v. Minix (In re Minix), Case No. 17-51915; 2018 Bankr. LEXIS 2286* (U.S. Bankr. E.D. Ky. August 1, 2018)

- **Issues:** Whether the debtor was entitled to an order vacating a default judgment on an adversary complaint to find a debt was non-dischargeable in accordance with Code § 523(a)(6).
- **Holdings:** (1) The Court construed the pro se debtor's late-filed answer as a motion to vacate default. Although the debtor did not offer a persuasive explanation as to why he failed to file a timely answer, the Court found good cause to vacate the entry of default where the only prejudice to the creditor would be that she now had to litigate her case on the merits. (2) The creditor did not serve the debtor's counsel in accordance with Bankruptcy Rule 7004(g), such that the debtor raised a meritorious defense to the entry of a default judgment. (3) The debtor's motion to dismiss was denied, as dismissal was not an appropriate remedy for improper service. (4) Although the debtor's former counsel was not served in accordance with Bankruptcy Rule 7004(g), the debtor suffered no prejudice, particularly given that the court vacated the entry of default.

GRAYDON

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In re Martin, Case No. 18-60270; 2018 Bankr. LEXIS 3656* (U.S. Bankr. E.D. Ky. November 21, 2018)

- **Issues:** Whether the debtors' Chapter 7 Bankruptcy case would be dismissed pursuant to Code § 707(a) "for cause," including that the debtors lacked good faith in filing the case.
- **Holdings:** (1) The debtors' case was not dismissed for lack of good faith under Code § 707(a) because, for purposes of the *Zick* analysis, the evidence did not support that the debtors were attempting to hide income or assets. Instead, they testified openly about gifts from their parents at the evidentiary hearing and did not list their gifts as income on the advice of their counsel. (2) While testimony from one of the debtors was confusing, it did not establish that the debtor was deliberately trying to conceal or misrepresent assets or income sources and, when given the chance to slow down and explain his odd statements, his explanations were adequate. (3) The remaining *Zick* factors, excessive and continued expenditures and a lavish lifestyle, were not present and the creditor failed to meet her burden to otherwise establish "cause" for dismissal under Code § 707(a).

GRAYDON

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In re Lexington Hosp. Grp., LLC, Case No. 17-51568, 2017 Bankr. LEXIS 3782*; 94 U.C.C. Rep. Serv. 2d (Callaghan) 42 (U.S. Bankr. E.D. Ky. November 1, 2017)

- **Issues:** Whether the creditor had a perfected security interest in the Chapter 11 debtor's cash collateral.
- **Holdings:** The debtor's hotel room revenue was an interest in personal property in Kentucky covered by UCC Article 9, and not subject to the creditor's mortgage because, although granting a hotel guest authority to enter and use real property, it did not confer an interest in that property. The creditor did not have a perfected security interest in the cash receipts or deposit accounts generated by the room revenue on the petition date because a cash transaction did not create an account or payment intangible from which proceeds were generated as there was no monetary obligation. The room revenue generated by a cash payment was not cash collateral pursuant to 11 U.S.C.S. § 363(a) that required adequate protection for, or approval of, the creditor under § 363(c)(2).

GRAYDON

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In re Joseph, Case No. 09-30812, 2018 Bankr. LEXIS 329*; (U.S. Bankr. E.D. Ky. February 7, 2018)

- **Issues:** Whether the holder of a tax lien certificate of delinquency violated the discharge injunction by attempting to collect the discharged personal obligation of the debtor.
- **Holdings:** The debtor's in personam tax obligations evidenced by the certificates of delinquency were discharged. The creditor violated the discharge injunction by attempting to collect the discharged personal obligation of the debtor. The original tax liens never attached to the debtor's Johnson County property and could not support the attempt to collect on the certificates of delinquency in the Johnson County foreclosure. Further, KRS § 134.546(4) did not create a lien, nor could it be used to secure a deficiency judgment post-discharge. The creditor and its counsel were in contempt of the discharge injunction, and the debtor was entitled to attorney's fees and costs.

GRAYDON

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In re Denny, No. 15-51918, 2018 Bankr. LEXIS 1118 (Bankr. E.D. Ky. Apr. 12, 2018)

- **Issues:** Whether an attorney had violated the Kentucky Rules of Professional Conduct in his handling of funds received from his client.
- **Holdings:** The attorney violated the Kentucky Rules of Professional Conduct when he took funds the Chapter 13 debtor and her husband gave him to pay off debts they owed under their bankruptcy plan, placed those funds in his business account, withdrew the funds shortly thereafter, and used them to pay business and personal expenses. Severe sanctions, including suspension from practicing law before the court were warranted because this was not the first time the court sanctioned the attorney for professional misconduct and he breached his fiduciary duties to his client, caused her to incur legal fees of $550 to hire a new attorney, and failed to timely comply with the court's order to turn over the money he received from the debtor and her husband to the bankruptcy trustee.

GRAYDON

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In re Mercury Data Sys., Case No. 18-50183; 586 B.R. 260; 2018 Bankr. LEXIS 1714** (U.S. Bankr. E.D. Ky. June 8, 2018)

- **Issues:** Whether the involuntary Chapter 7 debtor was entitled to relief from the order of relief, dismissal, or conversion.
- **Holdings:** (1) The involuntary Chapter 7 petition satisfied Code § 303 and the involuntary debtor received proper notice of the petition; thus, the order for relief could not be set aside on this basis. (2) The involuntary debtor could not use Code § 707 to present evidence it should have presented in a contesting hearing under Code § 303 and cause did not exist to dismiss the case under Code § 707(a). (3) Civil Rule 60(b)(2) did not apply because prior knowledge prevented any conclusion that the debtor was faultless in failing to raise a bad faith argument or claim dispute before entry of order for relief. (4) The debtor was not entitled to conversion under Code § 706 as evidence demonstrated that a successful reorganization was not feasible.

GRAYDON

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In re Mercury Data Sys., Case No. 18-50183; 2018 Bankr. LEXIS 3067** (U.S. Bankr. E.D. Ky. September 25, 2018)

- **Issues:** Whether the former president of the involuntary Chapter 7 debtor was entitled to administrative expense priority for compensation.
- **Holdings:** For an administrative expense to have priority under Code § 503(b)(1)(A), it must have been an actual cost that is necessary to the preservation of the estate. Taylor's claim was denied to the extent that he had no expectation of payment, since the work was done prior to entry of the Order for Relief and therefore there was no estate for which work was done. Taylor's claim for work done to prepare a final invoice was given priority over the trustee's objection, since preparation of a timely invoice the trustee would not have been able to complete was preservation of an asset of the estate.

GRAYDON

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In re Keokuk, Case No. 17-30370; 2018 Bankr. LEXIS 3653* (U.S. Bankr. E.D. Ky. November 20, 2018)

- **Issues:** Whether the Chapter 13 debtor's plan complied with Code § 1325(a)(5) regarding a manufactured home.
- **Holdings:** Code § 1325(a)(5) recognizes that a creditor and debtor may agree on a proposed treatment. If they do not, the debtor has two choices: (1) "cram down" the claim to its secured value under Code § 1325(a)(5)(B), or (2) surrender the collateral under Code § 1325(a)(5)(C). When a debtor chooses the cram down option, the amount of the allowed secured claim is determined according to the requirements of Code § 506(a), and replacement value governs. The debtor's plan was not confirmable because it did not propose to pay the creditor its allowed secured claim, and surrender of the mobile home would not be treated as a distribution under Code § 1325(a)(5)(B)(ii).

GRAYDON

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Farm Credit Mid-Am., PCA v. Tingle (In re Tingle), Case No. 17-30531; 2018 Bankr. LEXIS 3654* (U.S. Bankr. E.D. Ky. November 21, 2018)

- **Issues:** Whether the creditor was entitled to summary judgment that the Chapter 7 debtors' obligations were non-dischargeable pursuant to Code § 523(a)(2)(A), 2(B), 4, and/or 6.
- **Holdings:** (1) The creditor's motion for summary judgment was denied in part because a trial was required to resolve its Code § 523(a)(2)(A) and (2)(B), (4), and (6) claims, in light of the debtors' defenses including lack of actual fraud, preparation of the balance sheets by the creditor rather than the debtors, and payment. (2) The creditor's motion for summary judgment was granted to the extent that the debtors were denied a discharge pursuant to Code § 727(a)(3) and (a)(5), based on the debtors' failure to keep or preserve records and adequately explain the loss of assets.

GRAYDON

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Dean v. Lane (In re Lane), Case No. 17-32237(1)(13), AP No. 17-03062, 2018 Bankr. LEXIS 472 (U.S. Bankr. W.D. Ky. February 21 2018)

- **Issues:** Whether the bankruptcy court had jurisdiction to liquidate or estimate a personal injury claim.
- **Holdings:** The Court granted the debtor's motion to dismiss the nondischargeability action, holding it does not have jurisdiction to liquidate or estimate the claim because personal injury claims had not been referred to the bankruptcy court, pursuant to LR 83.12(a).

GRAYDON

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In re Lane, Case No. 17-32237(1)(13), 2018 Bankr. LEXIS 303* (U.S. Bankr. W.D. Ky. February 5, 2018)

- **Issues:** Whether a creditor's motion to dismiss the debtor's case as being filed in bad faith would be granted, where the debtor's Chapter 13 Plan had been confirmed.
-
- **Holdings:** The creditors' motion to dismiss the debtor's confirmed plan was denied. The order of confirmation was now a final order and the issues of feasibility and good faith were waived because they could have been raised by the creditors and their counsel when they objected to confirmation of the plan, but were not.

GRAYDON

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In re Lane, No. 17-32237(1)(13), 2018 Bankr. LEXIS 1294 (Bankr. W.D. Ky. May 2, 2018)

- **Issues:** Whether the debtor's counsel was entitled to an amendment of the confirmation order to allow counsel to file an application for additional fees.
-
- **Holdings:** Administrative Rule 5.3 regarding flat fees in Chapter 13 cases was implemented to prevent a debtor's counsel from "double dipping" and gaining extra compensation for normal legal services that should be covered by the flat fee. The Rule was not designed to prohibit a debtor's counsel from filing fee applications for extra work performed on matters outside the realm of an ordinary Chapter 13 case. A case in which an unsecured creditor was to be paid 100% plus interest, but had nevertheless filed two adversary proceedings and an appeal, was not an "ordinary" case. To deny a debtor's attorney additional fees in such a matter would discourage all debtors' lawyers from representing debtors in any resulting litigation, causing debtors additional expense and extreme prejudice by loss of the counsel who may be the most knowledgeable about the debtor's case. The fee application was allowed.

GRAYDON

75

In re Lane, No. 17-32237(1)(13), 2018 Bankr. LEXIS 1295 (Bankr. W.D. Ky. May 2, 2018)

- **Issues:** Whether the creditors were entitled to production of the debtor's taxes and other documents.
- **Holdings:** The Court denied the creditors' motion under 11 U.S.C.S. § 521(f) for an order requiring the debtor to produce copies of her tax returns for the four years prior to confirmation of her Chapter 13 plan, which paid the creditors' claim at 100 percent with interest, as there was no request for a modification of the plan under 11 U.S.C.S. § 1329 and it appeared that the request served no purpose other than to harass debtor. Further, if the request was to gather information for a pending adversary proceeding, nothing in either 11 U.S.C.S. §§ 521(f) or 1329 indicated that they were intended to be used as a discovery tool in another proceeding. The creditors made no showing that the requested information could not be obtained from other sources and that they had a demonstrated need for the information or that it would aid in administration of the case as required by 11 U.S.C.S. § 521(g)(2).

GRAYDON

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In re Alliance Mgmt. Servs., LLC, Case No. 16-31239(1)(7), AP No. 17-3034, 2018 Bankr. LEXIS 148 (U.S. Bankr. W.D. Ky. January 23, 2018)

- **Issues:** Whether the Trustee was entitled to summary judgment on a preferential transfer complaint, where the creditor had failed to timely respond to requests for admission.

- **Holdings:** Pursuant to 11 U.S.C.S. § 547(b), the Trustee met his burden of proving each element establishing that he was entitled to void the two preferential transfers made by the debtor for the benefit of defendant. The Trustee also established that the defendant could not prove the affirmative defenses it asserted in its answer. Thus, pursuant to Fed. R. Bankr. P. 7056, the Trustee was entitled to summary judgment in his favor as a matter of law.

GRAYDON

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Smith v. Smith (In re Smith), Case No. 17-10067(1)(12), AP No.17-1010; 2017 Bankr. LEXIS 4152* (U.S. Bankr. W.D. Ky. December 6, 2017)

- **Issues:** Whether structures erected on the Chapter 12 debtor's farm were permanent fixtures, such that the first mortgage lien holder had a claim to insurance proceeds issued when the structures were destroyed in a windstorm.

- **Holdings:** The first mortgage holder on the farm met its burden of proof in meeting the required elements of the three part test of *Heflin* to characterize the tobacco pole barns as permanent fixtures to the realty. As such, the insurance checks issued by the debtor's insurance company following the destruction of the barns by a windstorm constituted a part of the collateral of said mortgage holder under its mortgage with the debtor. Therefore, the two insurance checks from the insurance company in the amount of $129,000 and $130,000 had to be turned over to the first mortgage holder as they did not constitute the collateral of two other creditors. The court was convinced by the testimony regarding the structure of the barns, the way in which they were constructed and their use that they were integral to the debtor's tobacco farming operation and meant to be permanent fixtures to the farm.

GRAYDON

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Edmonton State Bank v. Smith (In re Smith), Case No. 17-10067(1)(12), AP No. 17-1010, 2018 Bankr. LEXIS 853*; 2018 WL 1466080 (U.S. Bankr. W.D. Ky. March 22, 2018)

- **Issues:** Whether the creditor's lien extended to two pole barn structures on the debtor's property.
- **Holding:** The creditor's lien was only on equipment and did not apply to two pole barn structures, which were fixtures and subject to another creditor's mortgage on the debtor's real property.

GRAYDON

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In re Hole, Case No. 17-32875(1)(7), 2018 Bankr. LEXIS 594* (U.S. Bankr. W.D. Ky. March 2, 2018)

- **Issues:** Whether the bankruptcy court's equitable authority allowed it to extend the deadline to file a non-dischargeability complaint pursuant to 11 U.S.C. § 105(a).
- **Holdings:** The Court granted the creditors' motion for an extension of time to file a non-dischargeability complaint where the motion was filed one day after the deadline for filing such complaints, because the creditors had been diligent in pursuing their claims, the debtor was not prejudiced by the delay, and the circumstances warranted extending the deadline pursuant to 11 U.S.C. § 105(a).

GRAYDON

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In re Blankenship, Case No. 17-32785(1), 2018 Bankr. LEXIS 711*; 2018 WL 1357360 (U.S. Bankr. W.D. Ky. March 14, 2018)

- **Issues:** Whether the debtor was entitled to judgment avoiding the liens on the interest of his non-debtor spouse under § 522(f).
- **Holdings:** The Court denied the debtor's motion to avoid the judicial liens under 11 U.S.C.S. § 522(f). The judicial liens did not affix to an interest of the debtor in the property and were not impairing his exemptions because the judgments were not obtained against him, but rather were obtained against his non-debtor spouse. To the extent the debtor sought to avoid the liens on the interest of his non-debtor spouse, this was an impermissible use of § 522(f).

GRAYDON

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Ryan v. Morris (In re Morris), Case No. 15-10860(7)(1), AP No.16-1007, 579 B.R. 422*; 2017 Bankr. LEXIS 4310* (U.S. Bankr. W.D. Ky. December 19, 2017)

- **Issues:** Whether a debt owed to the creditor was nondischargeble, where the debtor used sale proceeds of several properties that had been purchased with the creditors' money by depositing them in a joint bank account with his wife and used the funds for personal expenses and to purchase other properties in the debtors' name.
- **Holdings:** The debt was nondischargeable under 11 U.S.C.S. § 523(a)(6) because the preponderance of the evidence established that the debtor committed conversion by exercising dominion and control over the sale proceeds of several properties that had been purchased with the creditors' money when he deposited those funds in a joint bank account with his wife and used those funds for personal expenses and to purchase other properties in the debtors' name. The creditors also established all of the elements for nondischargeability under § 523(a)(2)(A). The discharge was denied under 11 U.S.C.S. § 727(a)(3) where, inter alia, the debtors failed to produce records of over 87 real estate transactions. The discharge was denied under § 727(a)(4), as he debtor testified falsely in his Rule 2004 examination that he did not possess any documents because they were destroyed when his computer was seized.

GRAYDON

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Ryan v. Morris (In re Morris), Nos. 15-10860(1)(7), 16-1007, 2018 Bankr. LEXIS 1208 (Bankr. W.D. Ky. Apr. 23, 2018)

- **Issues:** Whether the debtors were entitled to an order vacating the judgment determining they were not entitled to a discharge.
- **Holdings:** The fact that debtor one did not sign a note payable to plaintiffs did not mean they were not creditors with standing to object to her discharge, as there was no challenge to their proof of claim, and thus no finding it had been disallowed. The court declined to vacate its judgment denying debtor one a discharge under 11 U.S.C.S. § 727(a)(3) for failing to maintain adequate records, as a reasonably prudent person in the same or similar circumstances would not have relied on her husband to maintain all of the business records. There was no merit to debtor two's challenge to the judgment on the grounds that it did not credit him for all payments he made on the debt, as he did not indicate what payments he made that were not credited. The court declined to vacate its award to plaintiffs of pre-judgment interest at the contract rate, as it made them whole.

GRAYDON

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Wheatley v. Johnson (In re Johnson), Case No. 16-31815 (1)(7), AP No. 16-3081; 579 B.R. 796; 2017 Bankr. LEXIS 438558* (U.S. Bankr. W.D. Ky. December 21, 2017)

- **Issues:** Whether the trustee was entitled to a judgment against the defendant for a preferential transfer under 11 U.S.C. §§ 547, 548, 550, 551 and KRS § 378.010, et seq. in light of alleged constructive fraud.
- **Holdings:** The transfer from the debtor to the defendant transferee met the elements of a preference under 11 U.S.C.S. § 547(b). Therefore, judgment in favor of the Trustee was appropriate. The facts established the existence of several badges of fraud. The Trustee was entitled to judgment in his favor under 11 U.S.C.S. § 548(a)(1)(A) (actual fraud). The Trustee was also entitled to judgment against the defendant for constructive fraud under § 548(a)(1)(B). The evidence precluded the court from making a finding in favor of the defendant on the defense that the funds the debtor transferred constituted rental payments to the defendant in exchange for the debtor being allowed to live with his family. The court rejected the "no harm, no foul" rule (i.e. wildcard exemption is not fully used, but could have been used for the subject funds). The Trustee was entitled to turnover of the value of the avoided transfer under 11 U.S.C.S. §§ 541(a)(4), 550.

GRAYDON

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CNH Indus. Capital Am. LLC v. Williams (In re Williams), Nos. 17-10722(1)(7), 17-1026, 2018 Bankr. LEXIS 1047 (Bankr. W.D. Ky. Apr. 5, 2018)

- **Issues:** Whether a debt was nondischargeable where the debtor sold the collateral without paying the creditor, but intended to pay the creditor at a later time.
- **Holdings:** Because the debtor admitted that he sold some of the equipment securing the creditor's loans and failed to pay the proceeds of those sales to the creditor, the debt was nondischargeable under 11 U.S.C.S. § 523(a)(6), because by converting the equipment and selling it without the creditor's consent, the debtor's actions were "willful" per § 523(a)(6). The same facts established that he acted "maliciously" because his actions were in conscious disregard of the creditor's security interest. To the extent the debtor intended to eventually pay the creditor back, such intent was insufficient to negate the elements of § 523(a)(6).

GRAYDON

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Campbell v. Butz (In re Butz), Case No. 15-103401(1)(7), AP No. 16-1013, 2018 Bankr. LEXIS 27* (U.S. Bankr. W.D. Ky. January 5, 2018)

- **Issues:** Whether a loan made to the debtors for a failed business was a nondischargeable debt in light of the creditor's allegations of fraud
- **Holdings:** Debt resulting from sums loaned to the debtors by the debtor wife's parents was nondischargeable under 11 U.S.C.S. § 523(a)(2)(A) because there was ample evidence that the debtors induced the parents to make the loans for use in their retail business but then transferred the funds into their own personal account and used such funds to pay their own lavish personal and living expenses. The debtors were not entitled to a discharge pursuant to 11 U.S.C.S. § 727(a)(3) because where the debtors were both educated, sophisticated business people, failure to produce basic business documents showed the debtors did not adequately preserve or maintain records in order to ascertain the debtors' financial condition. The debtors also were not entitled to a discharge pursuant to 11 U.S.C.S. § 727(a)(6) because they refused to obey a lawful order of the court seeking documents.

GRAYDON

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Campbell v. Butz (In re Butz), Nos. 15-10340(1)(7), 16-1013, 2018 Bankr. LEXIS 1176 (Bankr. W.D. Ky. Apr. 19, 2018)

- **Issues:** Whether a debt owed to the creditor was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6).
- **Holdings:** The court rejected the debtors' claim that the court failed to adequately set forth facts as to plaintiffs' knowledge regarding the risky nature of the loan. The record did not support the debtors' claim that the court failed to set forth undisputed facts as to plaintiffs' knowledge and consent to using funds from plaintiffs for living expenses. The court would amend the judgment to clarify that any interest awarded was pre-judgment interest on the debt, for a total debt of $328,589. Since the interest rate at issue was pre-judgment interest only, it was governed by state law, specifically Ky. Rev. Stat. Ann. § 360.010.

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In re Abell, No. 17-32555(1)(13), 2018 Bankr. LEXIS 1117 (Bankr. W.D. Ky. Apr. 12, 2018)

- **Issues:** Whether the creditor had a secured claim, where its interest attached to the collateral pre-petition, but its lien was not perfected until post-petition.
- **Holdings:** The undisputed facts of the case established that the creditor did not strictly comply with the requirements of KRS § 186A.190 until August 21, 2017. This was two weeks after the debtors filed their Chapter 13 Petition, and accordingly, the creditor's claim was an unsecured claim. KRS § 355.9-311(1) simply states that the filing of the financing statement is not necessary to perfect a security interest in motor vehicles which were covered by KRS ch. 186A. However, ch. 186A provides the method for perfection, which is by notation of the lien on the Certificate of Title. The creditor never had a secured claim against the debtor. Therefore, the court could not amend the Order of Confirmation to treat the creditor's claim as secured, but the court was unaware of any reason why the claim could not be treated as unsecured.

GRAYDON

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Parrish v. Lincoln Nat'l Bank, Nos. 17-31087(1)(13), 18-3005, 2018 Bankr. LEXIS 1398 (Bankr. W.D. Ky. May 10, 2018)

- **Issues:** Whether the debtor's avoidance action under 11 U.S.C.S. § 544 would be dismissed, where the debtor did not first seek an order from the court for leave to file the avoidance action.
- **Holdings:** Where a debtor brought an avoidance action under 11 U.S.C.S. § 544, without first seeking an order from the court for leave to file the avoidance action, the case had to be dismissed without prejudice for lack of standing. The court would not grant the debtor's Motion for Derivative Standing because the Complaint, based on 11 U.S.C.S. § 547(b)(5), did not state a claim upon which debtor was entitled to relief.

GRAYDON

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Owens v. Coffey (In re Coffey), Case No. 17-31506, Chapter 13, AP No. 17-3040; 2018 Bankr. LEXIS 564* (U.S. Bankr. W.D. Ky. March 1, 2018)

- **Issues:** Whether the debtor's motion for judgment on the pleadings of the creditor's adversary complaint for nondischargeability would be granted, where the confirmed Plan did not expressly provide that the creditor's claims were deemed dischargeable.
- **Holdings:** The Court denied the debtor's motion for judgment on the pleadings in the adversary case, and granted the creditor's motion for stay relief in the main bankruptcy case. The Plan did not expressly provide that the creditor's claims were deemed dischargeable, and thus the creditor did not have notice. And, the debtor's arguments as to the merits of the underlying claim should be asserted in the state court action, and could not defeat the nondischargeability claims at this stage of the litigation.

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CINCINNATI BAR ASSOCIATION BANKRUPTCY INSTITUTE

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BANKRUPTCY CASE LAW UPDATE

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UNITED STATES SUPREME COURT

***Mission Product Holdings, Inc. v. Tempnology*, (No. 17-1657) (Sp. Ct.)**

The Supreme Court granted a *petition for certiorari* and agreed to decide whether rejection of a trademark license bars the licensee from continuing to use the mark. The circuits are split with the 4th Circuit ruling that rejection precludes the licensee from using the mark (Lubrizol) and the 7th Circuit ruled rejection does not bar use of the mark (Sunbeam). The First Circuit in Tempnology sided with the 4th Circuit.

Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883, 2018 U.S. LEXIS 1514, 2018 WL 1054879 (November 6, 2017, Argued; February 27, 2018, Decided).

Issue: When determining whether the safe harbor provision of § 546(e) prohibits avoidance of a fraudulent transfer under § 548(a), whether the Court considers only the overarching transfer or should the Court also considers any intermediary transfers between financial institutions?

Summary: Debtor, Valley View Downs, and Bedford Downs were competing to acquire the last harness-racing license in Pennsylvania. The parties entered an agreement where Bedford Downs withdrew as a competitor for the license, and Debtor then purchased Bedford Downs stock for $55 million after Debtor acquired the license. In transferring the funds for the stock purchase, Debtor wired funds from its bank to Bedford Downs' bank. Merit was a shareholder of Bedford Downs and received $16.5 million for the sale of its stock. Debtor and its parent company filed Chapter 11 after they failed to open their "racino." FTI Consulting was the trustee of the litigation trust and sought to avoid the transfer of funds from Debtor to Merit under § 548(a) because Debtor was insolvent when it purchased Bedford Downs' stock. Merit argued that § 546(e) prohibited the avoidance of the transfer because it included transfers made by and to financial institutions.

Holding: Merit prevailed before the District Court, and the Seventh Circuit reversed. The Supreme Court affirmed the Seventh Circuit's decision concluding that the only relevant transfer for purposes of the safe harbor provision of § 546(e) is the overarching transfer that the trustee seeks to avoid. The Court was not required to consider the intermediary transfers between the financial institutions. The safe harbor provision is not invoked when parties to a transfer merely use financial institutions as a conduit to complete the overarching transfer.

U.S. Bank N.A. v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 2018 U.S. LEXIS 1520 (October 31, 2017, Argued; March 5, 2018, Decided).

Issue: Whether the appropriate appellate standard of review for a decision regarding non-statutory insider status, which involves mixed questions of law and fact, is *de novo* or the clear error standard?

Summary: Debtor, a corporate entity, filed Chapter 11 bankruptcy having two debts. Debtor owed U.S. Bank over $10 million and owed its sole owner, MBP, over $2 million. U.S. Bank opposed Debtor's plan seeking to impair both creditors. Debtor then sought to cramdown the creditor's claims, but it needed the consent of one impaired creditor. However, MBP, as a statutory insider of debtor, could not provide the consent needed for a cramdown plan. An officer of Debtor, and also a board member of MBP, offered to sell MBP's claim to her romantic partner, Rabkin, for $5,000. Rabkin purchased MBP's claim and consented to the cramdown plan. U.S. Bank argued that Rabkin was a non-statutory insider because he was romantically involved with Debtor's officer and that the purchase was not an arm's-length transaction. The Bankruptcy Court rejected U.S. Bank's argument. The Ninth Circuit held that the Bankruptcy Court's finding was reviewed under the clear-error standard and it could not be reversed under that standard.

Holding: The Supreme Court only reviewed the issue of whether the standard of review on non-statutory insider status is *de novo* or clear error. The Court affirmed in finding that the clear error standard applied. The mixed questions of law and fact regarding a non-statutory insider status decision primarily concerned a question of fact as opposed to a legal question. Therefore, the applicable standard of review is deferential to the trier of fact, and the clear error standard controls for review.

Lamar, Archer & Cofrin v. Appling, 138 S. Ct. 1752, 2018 U.S. LEXIS 3384, 2018 WL 2465174 (April 17, 2018, Argued; June 4, 2018, Decided).

Issue: When determining whether § 523(a)(2)(A) prohibits debtors from discharging debts obtained by materially false statements made in writing respecting debtors' financial condition, whether "respecting the debtors' financial condition" includes statements about a single asset?

Summary: Debtor retained Lamar, Archer & Cofrin, a law firm, to represent debtor in business litigation. During the litigation, debtor fell behind on his legal bill of more than $60,000. Debtor told Lamar that he was expecting a significant tax refund that would cover his existing and future legal fees. Lamar continued to represent debtor based on debtor's statement. However, Debtor's tax refund was far less than his statement to Lamar, and debtor used the refund to pay other business expenses. Lamar obtained judgment against debtor for its legal fees. Debtor then filed a Chapter 7 bankruptcy. The bankruptcy court found the debt nondischargeable under § 523(a)(2)(A) because of debtor's false statements. The Eleventh Circuit reversed finding that statements respecting the debtor's financial condition may include a single asset.
Holding: The Supreme Court affirmed the Eleventh Circuit's decision concluding that statements respecting the debtor's financial condition may include a single asset. The Court determined that the ordinary meaning of the statutory word "respecting" was broad enough to include a statement about a single asset compromising of debtor's financial condition.

U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

***Couch v. Panther Petro., LLC (In re Couch)*, 2017 U.S. App. LEXIS 22251 (Nov. 6, 2017)**

Summary: Tennessee employer sued Debtor in state court for fraud, breach of fiduciary duty, conversion, breach of contract and other claims. Debtor filed an answer and counterclaim. Debtor's state court counsel withdrew due to Debtor's failure to keep in touch with counsel. Debtor failed to comply with a discovery order and the state court granted a default judgment against Debtor after an evidentiary hearing. Debtor filed a Chapter 7 bankruptcy case but failed to list his former employer ("Employer"). Employer filed a non-dischargeability case under Section 523 (a)(2)(A), (a)(4) and (a)(6). The Bankruptcy Court granted Employer summary judgement on all claims except (a)(4).

Holding: The Sixth Circuit affirmed the Bankruptcy Appellate Panel's decision upholding the Bankruptcy Court's granting of a motion for summary judgment in a non-dischargeability case finding that a state trial court decision in Tennessee against Debtor for fraud was entitled to preclusive effect in the adversary case. The Sixth Circuit found that Debtor had "actually litigated" the case under Tennessee law by filing an answer and counterclaim even though counsel later withdrew and Debtor did not oppose a motion for default judgment entered against him.

***Cox v. Specialty Vehicle Sols., LLC*, *2017 U.S. App. LEXIS 22969* (November 14, 2017)**

Summary: Cox alleged that he was injured as a result of Debtor's negligent installation of a car battery, and his counsel informed Debtor that Cox intended to file suit due to his injuries. Debtor's employees and Cox's attorney inspected the vehicle. Approximately one month later, Debtor filed a Chapter 11 bankruptcy petition and did not list Cox as a creditor or serve Cox with a copy of the petition. Thereafter, Cox sued Debtor in state court five days before the statute of limitations would have run for personal injury actions in Kentucky. After Debtor filed a notice of the automatic stay in the personal injury litigation ("Lawsuit I"), Cox moved for relief from the automatic stay in the bankruptcy case. The parties entered into an agreed order granting Cox relief from the automatic stay to "resume and prosecute to conclusion" Lawsuit I ("Agreed Order"), which was entered on August 7, 2015. Lawsuit I was then removed to federal district court. Debtor then filed a motion to dismiss Lawsuit I arguing that it was null and void pursuant to *Easley v. Pettibone Mich. Corp*., 990 F.2d 905 (6th Cir. 1993) and Cox responded that the Bankruptcy Court intended to and did annul the automatic stay. Cox filed a new action in federal court on September 11, 2015 ("Lawsuit II") against Debtor asserting the same claims as in Lawsuit I. Debtor filed a motion to dismiss Lawsuit II arguing that the applicable statute of limitations had run. Cox did not respond to the motion.

The District Court dismissed both actions holding that: (i) the equitable exception permitted under *Easley* did not apply and therefore Lawsuit I was void as a matter of law; and (ii) Cox had thirty (30) days from the date of the Agreed Order to file Lawsuit II pursuant to 11 U.S.C. § 108(c)(2). Cox then filed identical motions to amend the judgment pursuant to Civ. R. 59(e) in both actions,

which the District Court denied. Cox appealed. Cox also moved to reopen the bankruptcy proceedings and obtain clarification from the Bankruptcy Court regarding the Agreed Order, which the Court declined to do.

Holding: The Sixth Circuit vacated the dismissal of Lawsuit I and remanded to the District Court for analysis of the parties' intent under the Agreed Order and a determination if the relief from stay was intended to be retroactive or prospective. The Sixth Circuit reasoned that, under *Easley*, a Bankruptcy Court has independent statutory authority to find acts in violation of the stay can be retroactively annulled, for cause.

The Sixth Circuit affirmed the dismissal of Lawsuit II finding that the applicable statute of limitations had run and Cox failed to file Lawsuit II within thirty days after notice of termination of the stay as permitted under 11 U.S.C. § 108(c)(2). The Court also held that the District Court did not abuse its discretion in rejecting Cox's argument that Debtor was judicially estopped from arguing for dismissal of the lawsuits due to the Agreed Order because Cox failed to raise that issue in opposition to Debtor's motions to dismiss.

***Nestle Waters N. Am., Inc. v. Mt. Glacier LLC (In re Mt. Glacier LLC)*, 2017 U.S. App. LEXIS 24907 (December 11, 2017)**

Summary: Debtor filed a Chapter 11 bankruptcy case while Debtor and Nestle Waters North American Inc. ("Nestle") were engaged in arbitration. Debtor filed a disclosure statement in the bankruptcy case, which listed a counterclaim asserted by Debtor against Nestle as one of its assets. After Debtor's plan of reorganization ("Plan") was confirmed, Debtor attempted to resume arbitration, but Nestle objected claiming that Debtor failed to reserve its claim in the Plan. The Bankruptcy Court ruled that Debtor properly reserved its claim against Nestle, and the District Court affirmed.

Holding: The Sixth Circuit confirmed that its holding in *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002) did not require a debtor's reservation of claim under 11 U.S.C. § 1123(b)(3) to name each defendant and state the factual basis for each cause of action, but only required a claim reservation to enable creditors to identify the claims and evaluate whether any of the claims might provide additional assets for distribution. The Sixth Circuit held that Debtor's Plan was sufficient for retention of its claim against Nestle.

***Blasingame v. Grusin (In re Blasingame)*, 2018 U.S. App. LEXIS 216 (January 4, 2018)**

Summary: Debtors discussed certain financial issues with their long-time acquaintance and attorney ("Grusin"), who referred them to a bankruptcy attorney ("Fullen"). Fullen filed a Chapter 7 bankruptcy petition on behalf of the Debtors. Debtors failed to disclose several trusts and other trust assets in their schedules and statement of financial affairs. Creditor Church Joint Venture, L.P. ("Creditor"), along with the Chapter 7 Trustee and another creditor, filed an adversary proceeding objecting to the Debtors' discharge. The Bankruptcy Court granted Creditor's motion for partial summary judgment denying the Debtors' petition for discharge. The Bankruptcy Court

granted the Debtors' motion for relief from judgment because the Debtors relied on information from Fullen and Grusin related to the inclusion of trusts in the bankruptcy estate.

Creditor filed a motion for sanctions against Fullen and Grusin alleging violations of Fed. R. Bankr. P. 9011 and 28 U.S.C. § 1927. The Bankruptcy Court ordered Grusin, *inter alia*, to pay $20,000 to the Trustee pursuant to Rule 9011 and to pay a total of almost $75,000 to Creditor and the Trustee pursuant to Section 1927. Grusin appealed to the Bankruptcy Appellate Panel, which vacated the Bankruptcy Court's orders imposing sanctions against Grusin. Creditor appealed.

Holding: The Sixth Circuit affirmed the BAP's decision and held that sanctions pursuant to Rule 9011 were not warranted because Grusin did not file the Debtors' bankruptcy petition. Noting that negligence or incompetence alone is not enough to warrant sanctions under Section 1927, the Court further determined that the evidence was insufficient to support a finding that Grusin's conduct was frivolous and subject to the imposition of sanctions.

***Jodway v. Fifth Third Bank (In re Jodway)*, 2018 U.S. App. LEXIS 269 (January 5, 2018)**

Summary: As part of Debtor's Chapter 13 Plan ("Plan"), he agreed to surrender certain property ("Property") and make monthly deficiency payments to the secured creditor ("Creditor"). Notwithstanding the Plan, Debtor contested Creditor's foreclosure of the Property in state court and stopped making deficiency payments. The Bankruptcy Court indicated that if Debtor would agree to surrender the Property, it would consider modification of the Plan to decrease the deficiency payments. Debtor's case was ultimately dismissed. Debtor appealed and the District Court affirmed. Debtor and his wife also filed a motion to revoke the order confirming the Plan, which the Bankruptcy Court denied as untimely. The District Court affirmed.

Holding: The Sixth Circuit affirmed the District Court on both issues. In affirming the dismissal of Debtor's bankruptcy case, the Sixth Circuit held that: (i) the Bankruptcy did not abuse its discretion in declining to modify the amount of Debtor's deficiency payments without surrender of the Property; (ii) the Rooker-Feldman doctrine did not apply; (iii) Debtor waived his due process argument because he failed to previously assert it; and (iv) the doctrine of res judicata barred his claim that Creditor's mortgage was invalid. The Sixth Circuit further held that the motion for revocation of the confirmation order pursuant to 11 U.S.C. § 1330 was untimely and was properly denied.

***Lewis v. Pa. Higher Educ. Assistance Agency*, 2018 U.S. App. LEXIS 1873 (January 24, 2018)**

Summary: In 2005, Debtor filed a pro se Chapter 7 bankruptcy petition, which listed his student loan debt. Debtor was awarded discharge in the Chapter 7 bankruptcy case. In 2012, Debtor filed a pro se Chapter 13 bankruptcy petition. A student loan creditor filed a proof of claim for student loan obligations in the amount of $38,510.59. Debtor objected to the claim on the grounds that the debt had been discharged in his prior Chapter 7 bankruptcy case, but the objection was overruled. Debtor's Chapter 13 bankruptcy case was dismissed as a result of Debtor's failure to make the required payments. Debtor then filed a complaint in District Court asserting claims

related to the unlawful collection of the student loan debt. The District Court granted the defendants' motion to dismiss Debtor's complaint. Debtor appealed.

Holding: The Sixth Circuit affirmed the decision of the District Court and held that Debtor's student loan debt was not discharged in either of his bankruptcy cases. Specifically, the Sixth Circuit noted that 11 U.S.C. § 523 (a)(8) renders student loan debtor nondischargeable unless there is a determination of undue hardship, and Debtor did not commence an adversary proceeding in his Chapter 7 bankruptcy case to seek such a determination.

***Town Ctr. Flats, LLC v. ECP Commer. II LLC (In re Town Ctr. Flats, LLC)*, 2018 U.S. App. LEXIS 5707 (March 7, 2018)**

Summary: Town Center Flats, LLC ("Debtor") owned a 53-unit condominium building (the "Property"). Fox Brothers Company ("Fox Brothers") filed a construction lien against TC Flats, Town Center Development Co., Inc. ("TC Development"), and their principal. Fox Brothers asserted the lien against the Property and obtained a judgment of foreclosure. Key Bank held the first mortgage on the Property and did not appear in the foreclosure action. A sheriff's deed on the Property was executed in favor of Fox Brothers, and the Circuit Court confirmed the sale and set a redemption deadline of December 2, 2009. The Bankruptcy Court found that the parties to the foreclosure agreed to extend the redemption period to December 4, 2009. On that date, Fox Brothers received payment in the amount of $32,500 in cash and checks from Debtor's principal and executed a quit-claim deed to TC Development. Although legally distinct entities, the filings in the foreclosure, including the confirmation order, would routinely refer to TC Development or both Town Center entities in the caption.

The Town Center entities each filed Chapter 11 bankruptcy cases. In an attempt to establish that the first mortgage on the Property had been discharged in the foreclosure action, Debtor argued it had failed to redeem the Property in the time permitted under the confirmation order and Fox Brothers had then sold the Property to TC Development. The Bankruptcy Court found that the parties had agreed to extend the redemption period, which was permissible under Michigan law, and the payment to Fox Brothers was intended to redeem the Property. Therefore, the quit-claim deed did not transfer the Property from Fox Brothers to TC Development and the Property remained subject to the first mortgage. The District Court affirmed.

Holding: The Sixth Circuit held that Michigan law provides that parties to a foreclosure sale, even a judicial foreclosure sale, may extend the deadline for redemption of a property by agreement, and that the Bankruptcy Court did not err when it determined the $32,500 payment operated to redeem the Property.

***New Prods. Corp. v. Tibble (In re Modern Plastics Corp.)*, 2018 U.S. App. LEXIS 10297 (April 24, 2018)**

Summary: Debtor owned certain real property, which included a building that was at one time used for manufacturing, office and related purposes (the "Property"). The Property was pledged

to Bank of America ("BOA") as a part of Debtor's mortgage loans with BOA. Debtor filed a Chapter 7 bankruptcy case in January 2009. Debtor negotiated a sale of the Property, but the sale did not close. The Chapter 7 Trustee ("Trustee") initially maintained insurance on the Property, but cancelled the insurance in November 2010 after BOA advised it would not pay the insurance premiums or for any maintenance of the Property. On March 4, 2013, New Products Corporation ("NPC") obtained an assignment of the loan documents between BOA and Debtor. After the assignment, NPC discovered that the interior of the building on the Property had been stripped by scrappers and the roof had failed in two places.

NPC objected to the Trustee's final report and filed an adversary proceeding against the Chapter 7 Trustee and his surety for breach of fiduciary duties to the estate, BOA and NPC claiming that the Trustee failed to protect the Property from being stripped and vandalized. The Trustee's final report was approved and the Property was abandoned. The Trustee resigned and a successor trustee was appointed. The Bankruptcy Court ordered a bifurcated trial because it found that disputed questions of valuation and equity were central to determining whether the Trustee breached his fiduciary duties or whether he acted reasonably under the circumstances. After two days of trial and NPC had rested its case, the Bankruptcy Court granted judgment in favor of the defendants pursuant to Fed. R. Civ. P. 52(c). The District Court affirmed.

Holding: The Sixth Circuit affirmed the District Court's order affirming the Bankruptcy Court's judgment. The Sixth Circuit held that: (i) the Bankruptcy Court did not err when it determined the Trustee did not breach its fiduciary duty to BOA or NPC because there was no equity in the Property and the Trustee and BOA agreed to neglect the building; (ii) NPC's claims that certain findings of fact were not supported by the record, that testimony of NPC's expert witness was improperly excluded, and that it did not have the opportunity to be fully heard were without merit; (iii) NPC forfeited its argument that it should have been allowed to proceed with a claim on behalf of the estate because the adversary was filed prior to the Trustee's resignation; and (iv) the Bankruptcy Court properly concluded that the assignment to NPC of all of BOA's rights, title and interest in the loan documents did not include any contract claims predating the assignment, including any claims for breach of fiduciary duties.

***New Prods. Corp. v. Dickenson Wright PLLC (In re Modern Plastics Corp.)*, 2018 U.S. App. LEXIS 11472 (April 26, 2018)**

Summary: New Products Corporation ("NPC") filed an adversary proceeding against the Chapter 7 Trustee and his surety for breach of fiduciary duties with respect to certain real property owned by Debtor. Beginning in August 2014, NPC's counsel served five non-parties (collectively, the "Respondents") with subpoenas duces tecum seeking the production of documents in 36-58 broad categories dating back to January 1, 2005, in connection with the adversary proceeding. The Respondents objected to the subpoenas due the broad scope and undue burden the subpoenas placed on the Respondents, but also indicated they would proceed in good faith under the assumption the parties would agree on a stipulated order, which would address, *inter alia*, reimbursement of costs. The objections contained a demand for the Respondents to be compensated, pursuant to Fed. R. Civ. P. 45, for all costs in connection with production of the documentation, including reasonable attorney's fees. Respondents' counsel submitted a proposed

protective order but NPC's counsel did not respond, comment or suggest any limit to the Respondents' search parameters. On January 5, 2015, Respondents' counsel indicated that the document review was complete, but no documents would be produced without a protective order and, further, that the Respondents expected reimbursement of more than $150,000 in costs.

After a full evidentiary hearing on the issues of costs, the Bankruptcy Court concluded that NPC and its counsel should bear the burden of the reasonable attorney's fees for the Respondents under Rule 45, and awarded a total of $166,187.50 to the Respondents. The Bankruptcy Court denied NPC's motion for reconsideration and a stay. After further proceedings, the Bankruptcy Court ordered an additional $4,725.00 in attorney's fees and costs incurred by Respondents in connection with contempt proceedings as a result of NPC and its counsel's failure to pay the award for attorney's fees. The District Court affirmed the orders of the Bankruptcy Court.

Holding: The Sixth Circuit affirmed and held that attorneys' fees and costs were appropriate as sanctions under Rule 45(d)(1) because: (i) the subpoenas were unduly burdensome upon the Respondents due the broad scope and of the requests; and (ii) NPC's counsel could have mitigated the expense by taking reasonable steps to address the Respondents' concerns regarding the document production. The Court also held that cost-shifting was appropriate under Rule 45(d)(2)(B)(ii) because the Respondents specifically objected to the burden and expense of complying with the subpoenas, sufficiently communicated these concerns to NPC's counsel, invited suggestions to narrow the search parameters, and did not produce the documentation until required to do so.

***Andrews v. Mich. Unemployment Ins. Agency*, 891 F.3d 245, 2018 U.S. App. LEXIS 14082 (May 29, 2018)**

Summary: This appeal involves the same issue in two different cases, in which separate Debtors obtained unemployment benefits from the Michigan Unemployment Insurance Agency ("Agency") at the same time they were receiving wages, which they failed to report. The Agency determined the Debtors committed fraud and ordered restitution and penalties. Each Debtor filed a Chapter 13 bankruptcy, and the Agency filed adversary proceedings alleging the penalties were non-dischargeable. In one case, the Bankruptcy Court ruled in Debtor's favor fining that the penalties fell only under 11 U.S.C. 523(a)(7) and were dischargeable. In the other case, the Bankruptcy Court concluded that the penalties fell under both Sections 523(a)(2) and 523(a)(7). The District Court held in both cases that the entire debt, including the penalties, was non-dischargeable under Section 523(a)(2).

Holding: The Sixth Circuit affirmed the decisions and held that the debt to the Agency, including penalties, was covered under both Section 523(a)(2) and Section 523(a)(7), and is non-dischargeable pursuant to 11 U.S.C. 523(a)(2). The Court noted that it did not matter that the debt is dischargeable under Section 523(a)(7) because the Agency argued the debt was non-dischargeable under Section 523(a)(2).

***Trost v. Trost (In re Trost)*, 2018 U.S. App. LEXIS 14225 (May 30, 2018)**

Summary: Sherry Trost ("Sherry") agreed that Zachary Trost ("Debtor") could pay off debts related to a television show in exchange for certain property related to the show. Debtor did not pay the debts, and Sherry sued Debtor in District Court for breach of contract, fraud and conversion. After a jury trial in which Sherry put forth evidence in support of her claims and Debtor did not put on any evidence, a verdict was entered in favor of Sherry on the breach of contract and conversion claims. The District Court denied Debtor's motion for judgment as a matter of law on the conversion claim, but granted the motion as to the breach of contract claim. The Sixth Circuit affirmed the District Court's denial on the conversion claim, but reversed the District's Court judgment on the breach of contract claim.

Debtor filed a Chapter 7 bankruptcy petition. Sherry filed an adversary proceeding asserting the debt was non-dischargeable under 11 U.S.C. 523(a)(6). The Bankruptcy Court granted summary judgment in favor of Sherry. The Bankruptcy Court determined that Debtor was collaterally estopped from re-litigating certain factual issues determined in the conversion suit, and that the factual determinations showed Debtor caused a "willful and malicious" injury. Debtor appealed. The BAP affirmed.

Holding: The Sixth Circuit affirmed the decision of the Bankruptcy Court and held that the doctrine of collateral estoppel barred Debtor from re-litigating whether his actions constituted conversion. The Sixth Circuit further held that the record established Debtor's conversion was willful and malicious, and, therefore, the subject debt is non-dischargeable under 11 U.S.C. 523(a)(6).

***Isaacs v. DBI-ASG Coinvestor Fund, III*, 2018 U.S. App. LEXIS 19803 (July 18, 2018)**

Summary: Residential mortgage was executed but not recorded. One year later the mortgagor filed a Chapter 7 bankruptcy. The mortgagee recorded the mortgage during the bankruptcy but the Trustee and Debtor were unaware of the recording. The Chapter 7 case closed. Ten years later the holder of the mortgage filed an in rem foreclosure and was granted a default judgement. Prior to the state court sale, the mortgagor filed a Chapter 13 bankruptcy. The Debtor filed an adversary proceeding seeking to avoid the mortgage under Section 544. The Bankruptcy Court ruled in favor of the Debtor on the grounds that the wording of the mortgage meant the lien of the mortgage attached upon recording. The BAP reversed, finding the lien of the mortgage attached on execution and the attack on the mortgage violated Rooker-Feldman as an impermissible appeal of the state court judgment. The Sixth Circuit accepted the BAP's decision on Rooker-Feldman as to the attachment issue but remanded for further consideration of the Section 544 issues.

The Sixth Circuit reasoned that the Kentucky state court judgment necessarily determined that the mortgage attached upon execution and the Bankruptcy Court could not invalidate that determination. However, the state court judgment did not determine perfection of the mortgage as the mortgage was effective as between the parties. An attack in the Bankruptcy Court, under Section 544 seeking to avoid the mortgage as either recorded in violation of the stay or never recorded before the original Chapter 7 case, does not attack the underlying state court judgment. Neither the Bankruptcy Court nor the BAP ruled on the underlying Section 544 claim. The Sixth

Circuit discussed the invalidity of a lien filed in violation of the automatic stay. The Sixth Circuit also denied the mortgagee's attack on the Debtor's derivative standing.

Holding: Sixth Circuit ruled that the Rooker-Feldman doctrine applies on a claim-by-claim basis and, if the source of the injury is the state court decision, then the Court is barred from asserting jurisdiction. If the source of injury is not from the state court decision then there is an independent claim. The Bankruptcy Court cannot vacate a state court judgment. In this case, the Bankruptcy Appellate Panel's decision is affirmed as to one argument of the Debtor on a mortgage avoidance claim and the case is remanded as to the other claim which was not ruled upon below.

***Davis v. Fiat Chrysler Autos. U.S., LLC*, 2018 U.S. App. LEXIS 23560 (August 22, 2018)**

Summary: Debtor was employed by Fiat Chrysler Automotive ("FCA"). In 2008, Debtor filed a Chapter 13 bankruptcy petition. In 2012, Debtor was internally transferred at FCA to a new workspace where incidents occurred that gave rise to Debtor's hostile work place claims. Debtor obtained a discharge after completion of her Chapter 13 Plan on December 10, 2013. In March 2015, she filed a discrimination charge with the EEOC. In October 2015, Debtor file a lawsuit against FCA alleging a hostile work environment. The District Court granted summary judgment in favor of FCA finding that Debtor's claims were barred by judicial estoppel and failed as a matter of law because Debtor had not demonstrated that any racial harassment was sufficiently severe or pervasive.

Holding: In affirming the District Court's decision, the Sixth Circuit held that judicial estoppel barred Debtor's hostile work environment claim because Debtor failed to disclose the claim in her bankruptcy proceeding and her omission was not the result of mistake or inadvertence. Reading the record in the light most favorable to Debtor, the Court found Debtor had knowledge of a potential discrimination claim against FCA prior to December 10, 2013.

***Ritzen Grp. Inc. v. Jackson Masonry, LLC (In re Jackson Masonry, LLC)*, 2018 U.S. App. LEXIS 29009 (October 16, 2018)**

Summary: Creditor sought relief from stay to continue litigating breach of contract claim in state court. The court denied relief from stay. Creditor did not appeal. Instead, he brought a claim in the Bankruptcy Court and lost. He then appealed both the denial of stay relief and the breach of contract determination to the District Court. The District Court found the appeal of the order denying relief from stay was untimely because it was not filed within fourteen days of the court's ruling, and rejected the appeal of the breach of contract decision on the merits.

Holding: An order denying relief from the automatic stay is a final, appealable order. Under 28 U.S.C. §158(a), district courts have jurisdiction to hear appeals from "final judgments, orders, and decrees [and certain interlocutory orders] of bankruptcy judges in cases and *proceedings*…" The court found stay relief to be a *proceeding* because it initiates a series of formal procedural steps where the court determines whether a legal standard is met and grants or denies relief accordingly. Moreover, it is *final* because an order denying stay relief terminates the proceeding, and its

consequences are significant and irreparable. Therefore, a stay relief denial is final and appealable. The failure to appeal within 14 days under Rule 8002(a) warranted dismissal.

***Newman v. Univ. of Dayton*, 2018 U.S. App. LEXIS 29937 (October 24, 2018)**

Summary: Debtor filed a Chapter 13 bankruptcy petition in October 2014, indicating that he was not employed. From January 2015 to December 2016, Debtor was employed at the University of Dayton, but failed to disclose the employment or income despite amendments to his Chapter 13 Plan during that time period. In May 2017, Debtor filed an employment discrimination lawsuit against the University. The University moved to dismiss the complaint on the grounds that Debtor was judicially estopped from asserting the claims because they were not listed as assets in his bankruptcy petition. The District Court granted the motion after converting it to a motion for summary judgment. The District Court found that the requirements for judicial estoppel were met because (i) Debtor assumed a position that was contrary to the one he asserted under oath in the bankruptcy proceedings; (ii) the Bankruptcy Court adopted the contrary position as part of a final disposition; and (iii) Debtor's omission did not result from mistake or inadvertence.

Holding: The Sixth Circuit affirmed the decision of the District Court. The Sixth Circuit held that Debtor's employment discrimination claims were barred by judicial estoppel because he failed to disclose the claims and related employment income in his bankruptcy petition, and only corrected the omissions after they were brought to the attention of the courts by other parties.

***Glen S. Morris Trust v. Charron (In re Charron),* 2018 U.S. App. LEXIS 30485 (October 26, 2018)**

Summary: Debtor file a Chapter 7 bankruptcy petition. A creditor, who had previously obtained a contempt judgment against Debtor in state court, filed an adversary alleging the judgment was non-dischargeable under 11 U.S.C. 523(a)(6). The Bankruptcy Court granted Creditor's motion for summary judgment because Debtor's actions that resulted in the contempt judgment were willful and malicious according to the facts established in the state court proceedings. The District Court affirmed.

Holding: The Sixth Circuit affirmed and held that collateral estoppel precluded Debtor from re-litigating whether his conduct was willful and malicious because the state court actually litigated and necessarily determined that issue.

***Thermo Credit, LLC v. DCA Services, Inc.*, 2018 U.S. App. LEXIS 30474 (October 29, 2018)**

Summary: Lender filed suit in District Court against a third party who had received payments from the Lender's Borrower both before and after the Chapter 11 of the Borrower. The third party had entered into an agreement with the Borrower to manage the Borrower's business. The agreement was amended and revised several times. When the Borrower filed its Chapter 11, the

Lender was granted a first priority lien in the Borrower's assets as a condition of the Borrower's use of cash collateral. The Borrower, as the debtor, made payments to the third party during the Chapter 11 just as it had prior to the bankruptcy filing. After the bankruptcy case was dismissed, the Lender sued the third party under the UFTA to recover the payments made pre-petition and post-petition to the third party. The District Court granted summary judgment to the third party on the Lender's attempt to recover both sets of payments. The Sixth Circuit affirmed the District Court as to both sets of payments.

The evidence showed that the Lender monitored its borrower's affairs closely and was aware of the payments made pre-petition to the third party. The Lender took no action to stop the payments. The Lender was concerned about the size of the payments, but did nothing. The Lender claimed that to interfere with the payments would result in lender liability. The Sixth Circuit discounted this argument. In bankruptcy, the lien granted to the Lender in all assets of the Borrower extended to the cash of the Borrower as debtor. The payments to the third party then were subject to the lien. The Lender claimed the payments were free of the lien, which the Sixth Circuit agreed with, but the Sixth Circuit stated that the proper time frame for review was when the payments were first made.

Holding: Sixth Circuit held that, under the Ohio UFTA, payments subject to a valid lien cannot be subject to being recovered from a transferee. The Court also held that a Lender that is aware of the financial condition of its Borrower and is aware of the payments by its Borrower to a third party waives its rights to later seek to recover them under the Ohio UFTA

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

In re Hake, Case No. 17-8035, 2017 Bankr. LEXIS 4382 (Dec. 21, 2017)

Facts: The bankruptcy case dismissed a chapter 12 case for cause, including bad faith, and imposed a one year bar on filing. The debtor timely appealed the dismissal. Two months later, on the eve of a foreclosure sale, the debtor filed identical motions to stay pending appeal in the bankruptcy court and the BAP. The stay motion filed in the BAP did not state that the debtor moved for a stay in the bankruptcy court, and was not supported by any affidavits or other evidentiary materials from the bankruptcy court's record.

Issue: Did the debtor's motion to stay the bankruptcy court's dismissal pending appeal to the BAP satisfy the requirements for a stay under Fed. R. Bankr. P. 8007?

Holding: No. First, the motion to stay filed in the BAP did not comply with Rule 8007. Under that rule, where a motion to stay has been first filed in the bankruptcy court, a motion to stay filed in the BAP must specifically state whether the bankruptcy court has denied or not yet ruled on the motion. Second, the motion filed in the BAP was not timely because it was not filed until two months after the appeal was filed and only two days before a scheduled foreclosure sale of the debtor's property was to take place. Finally, the motion to stay did not meet the standard for obtaining a stay under Rule 8007 because it failed to include any affidavits or other evidentiary materials from the bankruptcy court's record to demonstrate a likelihood of success on the merits or any irreparable injury that the movant stood to incur.

In re Smallwood, Case No. 17-8038, 2018 Bankr. LEXIS 101 (Jan. 16, 2018)

Facts: The bankruptcy court entered an order vacating its previous order dismissing a debtor's chapter 13 bankruptcy case for failure to make plan payments. A creditor filed a motion under Rule 8004 seeking leave to appeal the bankruptcy court's order vacating the dismissal.

Issue: Must a party obtain leave to appeal an order vacating a dismissal of a bankruptcy case?

Holding: No. An order vacating the dismissal of a bankruptcy case is a final order that is immediately appealable without the necessity of obtaining leave from the court or waiting until completion of the Chapter 13 plan. As a final order, the creditor had a right to appeal the order vacating the dismissal as of right.

In re Odell, Case No. 17-8012, 2018 Bankr. LEXIS 262 (Jan. 30, 2018)

Facts: Chapter 7 debtor filed a petition claiming an interest in certain real property, and claimed a homestead exemption in that property which exceeded the value of the property. No objections to the claimed homestead exemption were filed. Subsequently, a creditor claiming to have a mortgage on the property filed a motion for relief from the automatic stay. The bankruptcy court

granted the motion for relief, and the debtor filed a timely appeal of the stay order. During the appeal, the debtor received her chapter 7 discharge.

Issue: Was debtor's appeal of the order granting relief from the automatic stay rendered moot by (i) the debtor's claiming of a homestead exemption in the property that exceeded the value of the property, and/or (ii) the granting of a discharge?

Holding: Yes, the BAP found the appeal to be moot. The automatic stay of an act against property terminates when such property is no longer property of the estate. When debtor claimed a homestead exemption in the property that exceeded the value of the property, and no objections to such exemption were filed, the property ceased to be property of the bankruptcy estate 30 days after the meeting of creditors. Once the property was no longer property of the estate, the automatic stay of actions against that property terminated. In addition, the automatic stay of all other actions against the debtor terminated when the debtor received her discharge. As the automatic stay was effectively terminated, the appeal of the order granting relief from the automatic stay was moot, and the appeal was dismissed accordingly.

Oakes v. PNC Mortgage Company (In re Oakes), Case No. 17-8005, 2018 Bankr. LEXIS 327 (Feb. 6, 2018)

Facts: Chapter 7 trustee sought to avoid a mortgage with a defective acknowledgement clause pursuant to his status as either a bona fide purchaser under §544(a)(3) or a hypothetical lien creditor under §544(a)(1). The creditor argued that the defective acknowledgement did not prevent the mortgage from giving constructive notice of the mortgage under Ohio Rev. Code §1301.401, and the newly enacted Ohio Revised Code §5301.07.

Issues: (1) Can the trustee avoid the defective mortgage as a hypothetical bona fide purchaser under §544(a)(3) in light of Ohio's constructive notice statute, Ohio Rev. Code §1301.401, and the Ohio Supreme Court's interpretation of that statute in *In re Messer*, 145 Ohio St.3d 441 (Ohio 2016)?

(2) Can the trustee avoid the defective mortgage as a hypothetical lien creditor under §544(a)(1) in light of Ohio's constructive notice statute, Ohio Rev. Code §1301.401, and the Ohio Supreme Court's decision in *In re Messer*?

(3) Does Ohio's enactment of Ohio Rev. Code §5301.07 affect the trustee's avoidance powers where the statute did not become effective until after the petition was filed?

Holdings:
(1) No, the trustee is not able to avoid the defective mortgage as a hypothetical bona fide purchaser under §544(a)(3) in light of Ohio Rev. Code §1301.401 and the Ohio Supreme Court's interpretation of that statute in *In re Messer*. Pursuant to Ohio Rev. Code §1301.401 and *In re Messer*, the act of recording a mortgage is deemed to provide constructive notice to the world of its existence, even if the mortgage is defective. The trustee, having constructive notice of the

Creditor's defective mortgage, cannot acquire the status of a bona fide purchaser, and therefore, cannot avoid the mortgage under §544(a)(3).

(2) Yes, the court held that the constructive notice of defective mortgages provided for in Ohio Rev. Code §1301.401 may prevent the trustee from becoming a bona fide purchaser, but has "no impact on the lien priority dispute." To the contrary, the important factor in the lien priority dispute is determining which lien is the first in time that strictly adhered to recording statutes. Looking to Ohio caselaw, the court concluded that a subsequent properly perfected lien (i.e., the lien a trustee obtains upon the filing of a bankruptcy petition) takes priority over a defectively executed but recorded mortgage despite either actual or constructive notice. Therefore, the trustee had the power to avoid the defective mortgage as a hypothetical lien creditor under §544(a)(1).

(3) No. The court acknowledged that its conclusion that the trustee had the power to avoid the defectively acknowledged mortgage using its powers as a hypothetical lien creditor under §544(a)(1) would likely be different if the newly enacted Ohio Rev. Code §5301.07 applied. This statute creates a rebuttable presumption that a real property instrument which is signed and acknowledged by a person with an interest in the real property is valid, enforceable and effective in all respects as if legally made, notwithstanding any procedural defects. However, this statute did not go into effect until after the petition was filed, and provides that it shall not be applied retroactively to impair any vested rights. The court held that such retroactive application in this case would impair the trustee's vested rights. Therefore, this statute did not apply in this case.

In re Norman, Case No. 18-8002, 2018 U.S. App. LEXIS 5625 (March 5, 2018)

Facts: Chapter 13 debtors filed a motion with the bankruptcy court seeking to alter, amend or vacate the bankruptcy court's order overruling their objection to a claim. The bankruptcy court entered an order granting the debtor's motion in part and denying in part. Because the Order did not fully and finally dispose of the debtor's objection to the claim, the order was indisputably interlocutory in nature. As a result, the debtor's filed a motion to the BAP seeking leave to appeal the interlocutory order pursuant to Rule 8004.

Issue: Are the debtors entitled to appeal the interlocutory order under Rule 8004?

Holding: No. An appellant seeking review of an interlocutory order must show: (1) the question involved is one of law, (2) the question is controlling, (3) there is substantial ground for difference of opinion respect the correctness of the bankruptcy court's decision, and (4) an immediate appeal would materially advance the ultimate termination of the litigation. Here, the issue at hand—the bankruptcy court's ruling on the application of *res judicata*—was a question of law; however, the BAP found that the debtors failed to establish a substantial ground for any difference of opinion regarding the correctness of the bankruptcy court's ruling. Namely, there was substantial authority supporting the bankruptcy court's decision. Therefore, debtors' request for an interlocutory appeal was denied.

Lowe v. Ransier (In re Nicole Gas Prod.), Case Nos. 15-8053/8055, 2018 Bankr. LEXIS 705 (March 13, 2018)

Facts: After a corporate debtor filed a bankruptcy petition, the debtor's principal filed actions in state court against certain creditors for violations of the Ohio Corrupt Practices Act, Ohio Rev. Code §2923.34 (OCPA). The principal filed the actions in his own name, claiming that he was damaged in the form of loss of value to his interest in the debtor company. The bankruptcy court found that the OCPA claims belonged to the debtor, not its individual shareholders, and that the principal's filing of those actions outside of the bankruptcy case constituted a violation of the automatic stay. Due to the violation, the bankruptcy court held the debtor's principal in contempt, and awarded sanctions in favor of the creditors who were the subject of the state court litigation for the attorney fees and costs incurred in connection therewith.

Issues: (1) Did the OCPA give the debtor's principal an individual claim that was separate and distinct from the debtor's claims, such that those claims were the exclusive property of the bankruptcy estate?

(2) Did the bankruptcy court properly find the debtor's principal in contempt and award sanctions in the form of attorney fees and costs in favor of the affected creditors?

Holdings:
(1) Yes. The damages the debtor's principal alleged in his OCPA lawsuits were identical to the damages incurred by the debtor company as a result of such violations and, as such, were merely derivative in nature. Moreover, the OCPA does not provide an individual claim to shareholders who did not suffer any unique damages separate and apart from the damages suffered by their company. Therefore, the OCPA claims belonged to the debtor and, upon the filing of the bankruptcy petition, became the exclusive property of debtor's bankruptcy estate. As the exclusive property of the debtor's estate, the debtor's principal's efforts to recover for the damages suffered by the debtor constituted an act to exercise control over estate property in violation of §362(a)(3).

(2) Yes. Because the debtor's principal violated the automatic stay, the bankruptcy court properly exercised its inherent authority to impose sanctions for contempt, including the authority to order the principal to pay the fees and costs of the affected creditors for their efforts in defending against the improper lawsuits.

In re Perkins, Case Nos. 17-8001/8008, 2018 Bankr. LEXIS 706 (March 13, 2018)

Facts: Creditor appealed bankruptcy court's confirmation of a chapter 12 plan arguing that the bankruptcy court improperly found the debtor to be a "family farmer" on the grounds that the debtor both exceeded the "aggregate debt" limit and did not receive more than half of her income from her farming operation. Alternatively, the creditor argued that, even if the debtor qualified, the plan should not have been confirmed as it was not feasible, provided improper treatment to another creditor's secured claim, and failed to meet the best interests of creditors test.

Issues: (1) Did the bankruptcy court correctly conclude that the debtor did not exceed the aggregate debt limit for family farmers?

(2) Did the bankruptcy court correctly conclude that the debtor satisfied the farm income requirement?

(3) Was the debtor's chapter 12 plan sufficiently feasible to satisfy the requirements for confirmation?

(4) Did the objecting creditor receive appropriate treatment of its secured claim in the plan?

(5) Did the chapter 12 plan meet the best interests of creditors test pursuant to §1225(a)(4)?

Holdings:

(1) Yes. The objecting creditor argued that the aggregate debt should be calculated by adding the amount of all scheduled claims and all additional proofs of claims filed against the debtor during the case. The court rejected this approach and found that, so long as the debtor's schedules were made in good faith and reflected aggregate debt below the limit in §109(e), the debtor is eligible to be a chapter 12 debtor. The fact that additional proofs of claim were filed after the debtor's schedules that would result in the debtor exceeding the aggregate debt limit does not affect the debtor's eligibility, at least where the omission of those later filed claims in the debtor's schedules was not the result of bad faith.

(2) Yes. In order to be eligible as a family farmer under §101(18), more than 50% of the debtor's total income must be from "such farming operation." In addition to the debtor's own farming operation, the debtor earned $764,472 from her partnership in other farming operations. The objecting creditor argued that income from the debtor's partnerships in other farming operations should not be counted as it was not derived from her principal farming operation. The court rejected this argument, finding that §101(18) includes income earned from any actual farming operation, not just the particular farming operation that is the subject of the bankruptcy.

(3) Yes. The objecting creditor argued that the income projections underlying the plan were overly optimistic based upon the actual income and production of the farm in prior years. The court noted that the plan does not need to guarantee success, but only needs to provide a "reasonable assurance of success." Based upon the evidence presented by the debtor, the court found that the plan was feasible as it was based on sufficient evidence.

(4) Yes. The bankruptcy court correctly determined that the treatment of the objecting creditor's secured claim satisfied §1225(a)(5)(B) as its distribution under the plan was not less than the allowed amount of the creditor's secured claim. The interest rate to be applied to the secured claim was also reasonable as the 1% risk adjustment added to the prime rate was reasonable in light of the court's findings that the farm had a long history of successful farming, the richness of the land itself, and the fact that the creditor was over-secured on an appreciating asset.

(5) Yes. According to the debtor's liquidation analysis, a liquidation of her property would not result in any payments to non-priority unsecured creditors. Because the proposed plan would result in some payments to unsecured creditors, it satisfied the best interests of creditors test.

Giese v. Lexington Coal Co. (In re HNRC Dissolution Co.), 585 B.R. 837 (B.A.P. 6th Cir. 2018)

Individual claims debtor HNRC paid royalties into an account due to mining operations on certain property. Individual bought property and filed a state court suit asserting a right to the royalties. Purchaser of assets from debtor claimed ownership of the royalties. State court action was removed. Individual maintained Bankruptcy Court should abstain – Bankruptcy Court denied that request and dismissed the complaint. BAP affirmed the decision of Bankruptcy Court in all respects fining 5 of 7 claims were "core" and there was no mandatory abstention required. Further, *res judicata* barred the suit.

In re Maximus III Props., LLC, 2018 Bankr. LEXIS 2206 (B.A.P. 6th Cir. 2018)

Bankruptcy Court accepted fiduciary judgment of trustee and concluded a purchase proceeded in good faith. Without specific evidence of collusion or bad acts, BAP would not second guess Bankruptcy Court. Although sale could not be undone, if effective relief can be granted without affecting validity of sale then appeal is not statutorily moot. Since debtor's arguments were based on attacking the sale, the appeal was statutorily moot.

Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 585 B.R. 850 (B.A.P. 6th Ci. 2018)

Creditor filed action asserting derivative standing to pursue claim on behalf of Chapter 7 Trustee against debtors and their investment trust. Bankruptcy Court granted defendants' motion to dismiss. BAP affirmed finding no abuse of discretion for the interpretation of the sale order which determined the scope of assets conveyed and, on de novo review, there was a lack of standing.

Fuller v. Bank of N.Y. Mellon (In re Fuller), 2018 Bankr. LEXIS 2039 (B.A.P. 6th Cir. 2018)

Appeal dismissed due to Appellant's failure to file a notice of appeal within 14 days as required by 28 U.S.C. §158(c)(2).

***In re Jackson*, 585 B.R. 410, (B.A.P. 6th Cir. 2018)**

BAP, *sua sponte*, determined that notice of appeal was filed late for purpose of 28 U.S.C. §158(c)(2). *Pro se* debtor tried to appeal various rulings but filed her Notice of Appeal 28 days after Memorandum of Decision and Order.

In re Blasingame, 2018 Bankr. LEXIS 1326 (B.A.P. 6th Cir. 2018)

Bankruptcy Court determined from the four corners of a trust document that the trust established an equitable life estate in the property. BAP accepted the rationale and affirming finding no basis for the contention that the life estate was legal and transferable to the bankruptcy estate.

In re U.S. Tommy, Inc., 2018 Bankr. LEXIS 2644 (B.A.P. 6th Cir. 2018)

Facts: After filing a notice of appeal of the bankruptcy court's dismissal of the debtor's chapter 11 case, the debtor filed a motion with the BAP seeking an order suspending the bankruptcy court's dismissal order, ordering the estate to remain open, and re-imposing the automatic stay.

Issue: Is the debtor entitled to a stay pending appeal of the bankruptcy court's order dismissing the case?

Holding: No. The stay motion is governed by Bankr. R. 8007, which requires the balancing of four factors when deciding whether a stay should issue: (1) whether a likelihood of success has been demonstrated, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other interested parties, and (4) where the public interest lies. Here, the debtor failed to establish a likelihood of success on the merits because it failed to show that the bankruptcy court committed an abuse of discretion. The bankruptcy court's decision was based on several factors in the record which could constitute cause for dismissal. The debtor also failed to show irreparable harm because the harm it alleged—i.e., that the sale of the debtor's hotel would permanently put the owner out of work—was harm to the debtor's principal, not the debtor itself.

In re Perez, 2018 Bankr. LEXIS 2921 (B.A.P. 6th Cir. 2018)

Facts: Debtor appealed the bankruptcy court's order of nondischargeability of an individual debt owed to a creditor. While the appeal was pending, the bankruptcy court entered an order denying the debtor's general discharge pursuant to Sections 727(a)(2) and (4).

Issue: Is an appeal of an order of nondischargeability of a specific debt under Section 523 rendered moot by a subsequent denial of the debtor's general discharge under Section 727?

Holding: Yes. An order denying a debtor's general discharge renders a Section 523 nondischargeability claim moot because the debt has already been determined to be non-dischargeable. The court found that the creditor already had the result it sought, and that it could no longer grant meaningful relief on the Section 523 claim.

In re Prather, 2018 Bankr. LEXIS 2828 (B.A.P. 6th Cir. 2018)

Pro se debtor filed a notice of appeal of an order dismissing her chapter 7 case which included several handwritten requests, including a request for *in forma pauperis* status on appeal and a stay pending appeal. BAP, *sua sponte*, determined that a notice of appeal is not a proper mechanism by which relief may be sought, and denied all requests for relief in the notice.

In re Dina Towers Condo. Owners Ass'n, 2018 Bankr. LEXIS 2846 (B.A.P. 6th Cir. 2018)

Facts: The bankruptcy court dismissed a debtor's bankruptcy case pursuant to LBR 1074-1(a) on the grounds that the debtor was an entity, and the petition was filed *pro se*. The debtor's principal filed a notice of appeal "in pro se" of the dismissal, but placed the letters "JD" following his name. The principal, however, was not admitted to practice law in Ohio or the Sixth Circuit.

Issue: Can the corporate debtor proceed with the appeal *pro se*?

Holding: No. Corporations and partnerships must be represented in federal court by a licensed attorney. The BAP, *sua sponte*, ordered the debtor to show cause in writing within 21 days why the appeal should not be dismissed for being filed and prosecuted without counsel, and required the debtor's response to be filed by an attorney licensed to practice before the BAP.

In re Bonfiglio, 2018 Bankr. LEXIS 3281 (B.A.P. 6th Cir. 2018)

Facts: The bankruptcy court granted a debtor's motion to avoid a creditor's lien after the creditor failed to timely respond to the motion. The creditor filed a motion for relief from the avoidance order arguing (1) that its failure to respond to the motion was the result of excusable neglect arising from the belief of movant's counsel that a settlement would be reached or a hearing set prior to the court's ruling, (2) that the debtor would not be prejudiced by granting relief, and (3) that the creditor had a meritorious defense against the debtor's motion. The bankruptcy court denied the motion for relief on the grounds that the creditor failed to establish a mistake or excusable neglect, and the creditor appealed.

Issues: (1) Did the creditor satisfy the Rule 60(b)(1) standard for "excusable neglect" where its failure to respond to the motion was due to the existence of ongoing settlement negotiations with opposing counsel, and the belief that a settlement would be reached?

(2) Where a movant has failed to satisfy the excusable neglect standard, does a bankruptcy court abuse its discretion by denying a motion for relief from judgment without considering additional factors relevant to the Rule 60(b)(1) analysis?

Holding:
(1) No. The BAP noted that Rule 60(b)(1) is not intended to resolve litigation mistakes of a party's counsel, and that a party is responsible for any mistake or error in judgment by its counsel. Where no actual agreement had been reached and no request for extension of time was sought, the belief

of movant's counsel that the matter would either be resolved prior to a decision or that the matter would be set for a hearing did not relieve the creditor from the obligation to respond to the debtor's motion, and did not establish excusable neglect to justify relief from judgment under Rule 60(b)(1).

(2) No. A showing of mistake or excusable neglect is mandatory in order to obtain relief under Rule 60(b)(1). The other Rule 60(b)(1) factors such as the existence of a meritorious claim or defense and prejudice to other parties only come into play after the movant has satisfied the threshold requirement of establishing mistake or excusable neglect.

In re Lane, 2018 Bankr. LEXIS 3337 (B.A.P. 6th Cir. 2018)

Facts: Creditors objected to the confirmation of a chapter 13 plan based upon the proposed treatment of their secured claim. The objection was subsequently resolved by agreement of the parties, and the bankruptcy court entered an order confirming the plan. After the appeal period for the confirmation order expired, creditors filed a motion to dismiss the case. The motion to dismiss was not based on any post-confirmation conduct, but, rather, pertained to the treatment of their secured claim in the plan. The bankruptcy court denied the motion holding that the issues pertaining to the confirmation of the plan were finally determined by the court's confirmation order, which was not appealed. The creditors appealed the denial of the motion.

Issues: (1) Was the bankruptcy court's denial of the motion to dismiss a final, appealable order?

(2) If not a final order, should the creditors be entitled to leave to appeal the interlocutory order under 28 U.S.C. § 158?

Holding:
(1) No, the denial of the motion to dismiss was not final. The finality of an order requires it to be both procedurally complete and determinative of substantive rights. The relevant consideration is whether the decision alters the parties' legal rights and the status quo. The BAP found this standard was not met here because the denial of the motion to dismiss did not alter the parties' rights or the status quo. The BAP noted that the parties' rights in the case were fixed when the bankruptcy court confirmed the plan, and, therefore, the confirmation order was the final order from which the creditors should have appealed.

(2) No. To be entitled to leave to appeal an interlocutory order, the appellant must show, among other things, "a substantial ground for difference of opinion respecting the correctness of the court's decision." Here, the bankruptcy court determined that the confirmation of the plan precluded the creditors from raising their attack on the debtor's good faith and treatment of their claim in the plan. The BAP found that there was nothing novel or controversial about the bankruptcy court's denial of the post-confirmation motion based on the preclusive effect of the unchallenged confirmation order. Absent any substantial ground for difference of opinion regarding the binding effect of the plan, the BAP fond that no basis existed to permit an interlocutory appeal.

SOUTHERN DISTRICT OF OHIO

JUDGE JEFFREY P. HOPKINS

In re Hudson, Case No. 17-11835 (Hopkins, Nov. 9, 2017).

Issue: Whether the Debtors could avoid the mortgage lien as a judicial lien under § 522(f)(1) resulting from the judgment entered in the state court foreclosure proceeding.

Summary: The creditor held a consensual mortgage lien on the Debtors' residence. The creditor filed a foreclosure action, sold the property, and an order confirming the sale was entered. Within three months the state court then entered an order vacating the sale and dismissing the foreclosure case because the Debtors entered into a loan modification prior to the sale. This order did not vacate the portion of the confirmation entry which released the mortgages. The Debtors entered into two subsequent loan modifications with the creditor which provided that the lien is renewed and extended until the debt is paid. The Debtors continued making payments on the loan, and both parties took actions confirming that the mortgage was valid and enforceable. The creditor filed a second foreclosure action and the court entered a *nun pro tunc* order to correct the omission from the court's prior order regarding the release of the mortgages. The *nun pro tunc* order effectively restored the mortgages as consensual liens relating back to when they were recorded.

Holding: The Debtors' Motion was denied. Judge Hopkins noted that a mortgage is not converted into a judicial lien by virtue of foreclosure action. Only "judicial liens" that are "obtained by judgment, levy, sequestration or other legal or equitable process or proceeding" can be avoided under § 522(f)(1). The *nun pro tunc* order merely corrected a previous erroneous omission that effectively release the mortgages, and the order did not convert the consensual mortgage lien into a judicial lien.

***In re Sparks*,** Case No. 17-12540, 2018 Bankr. LEXIS 2676 (Aug. 17, 2018) (Hopkins)

Facts: Chapter 13 Debtor proposed amended plan that bifurcated secured claim against debtor's home under §1325(a)(5). Fifth Third had a first and second lien, WesBanco had a third. The parties disagreed on valuation, and WesBanco and the Debtor submitted competing appraisals. Moreover, the debtors proposed to use the funds freed up by a charged-off and released first mortgage to fund the plan.

Issue: can a debtor use the income freed up by a charged-off and released first mortgage to fund the plan?

Analysis: The court first found WesBanco's appraisal more credible, and adopted its valuation. As a result, its claim was fully secured by the home's equity. The court then found that it had no basis in the code to allow the debtors to use a mortgage they paid off as a basis to argue the junior lienholder's lien failed to attach to any equity in the property, while also using that income freed up to fund the plan. And so the court declined to use its equitable power to allow the plan to act as "sword to artificially slash WesBanco's security interest in the Property." Confirmation denied.

In re Norman, Case No. 15-13069, 2018 Bankr. LEXIS 2677 (Aug. 3, 2018) (Hopkins)

Facts: Debtors objected to creditor's proof of claim on mortgage loan, arguing that creditor did not properly calculate the principal balance and interest rate. Creditor argued that its Proof of Claim was prima facie evidence of the debt that was not sufficiently rebutted, and that the debtors' 2004 bankruptcy confirmation order was the law of the case establishing the amount of the debt.

Issue: did the debtors overcome the prima facie validity of the debt?

Analysis: No. The 2004 Confirmation Order was the law of the case, and under that doctrine, a decision on an issue made at one stage of a case should be given effect in successive stages of the litigation. *U.S. v. Todd*, 920 F.3d 399, 403 (6th Cir. 1990). Debtors did not argue that payments were misapplied in the meantime. As a result, the Proof of Claim in this case that was based on the 2004 Confirmation Order established the amount of the debt. Debtors' objection to Proof of Claim was overruled.

JUDGE BETH A. BUCHANAN

***Davis v. United States (In re Davis)*,** Case No. 15-34179, Adv. No. 16-3100, 2018 Bankr. LEXIS 704 (Bankr.S.D. Ohio Jan. 19, 2018) (Judge Buchanan)

Facts: The IRS sought to have a Chapter 7 debtor's 2004-06, and 2008-2010 tax obligations deemed nondischargeable. Debtor opposed, arguing that tax obligations were paid through his prior Ch. 13 case. The IRS sought to use equitable tolling to extend the lookback period to the period before the 2011 Bankruptcy.

9/6/11	Debtor files Ch. 13 bankruptcy
10/17/11	2004 Tax assessment
10/24/11	2005 Tax assessment
11/5/15	Ch. 13 bankruptcy dismissed
12/28/15	Ch. 7 bankruptcy filed

Issues:
1) Are the 2008-10 tax returns filed during the "three-year lookback period" before the 2011 Bankruptcy nondischargeable in the 2015 Bankruptcy?

2) Are taxes assessed during the 2011 Bankruptcy non-dischargeable considered to be assessed in the 240 days prior to the 2015 Bankruptcy?

3) Does the tax return filed after the tax assessment render the debt dischargeable?

4) Was the IRS bound to apply payments according to the debtors' plan when the case was dismissed?

Analysis:
1) Yes. Under §523(a)(1)(A), priority tax debts under §507(a)(8) are non-dischargeable. A debt is entitled to priority under §507(a)(8) if the return was due within the three years prior to the petition filing – the so-called "three-year lookback period." Moreover, any claim is equitably tolled during the pendency of the bankruptcy, plus 90 days after the case is dismissed. Here, the 2015 Bankruptcy was filed just 53 days after the 2011 Bankruptcy was dismissed. Therefore, the claim remained tolled, and the "three-year lookback period" included the time before the 2011 Bankruptcy. The 2008, 2009, and 2010 tax debts were nondischargeable.

2) Yes. Under §507(a)(8)(A)(ii), taxes are entitled to priority treatment if "assessed within the 240 days before the date of filing the petition." By excluding the time during which the prior 2011 Bankruptcy case was pending, the tax assessments were within the 240 days prior to the 2015 Bankruptcy. The 2004 and 2005 tax debts were nondischargeable in the 2015 Bankruptcy.

3) No, the debt remains nondischargeable. Under §523(a)(1)(B)(i) tax liabilities for which the debtor never filed a return are nondischargeable. Under §523(a)(1)(B)(ii), a return filed after its due date but within two years of the bankruptcy filing is nondischargeable. However, in this case,

the 2006 tax return was due April 15, 2007. The IRS filed a substitute for return ("SFR") on September 1, 2008, and made a deficiency assessment on March 23, 2009. The Debtor filed his return for 2006 taxes on September 7, 2011. The Courts are in general agreement that a tax return filed very late and only after an assessment does not qualify as a return. Therefore, the tax debt was nondischargeable.

4) No. The Debtor argued that the IRS misapplied his plan payments by allocating it to obligations other than the obligations the trustee earmarked for payment. However, given the dismissal, the IRS was no longer bound apply the payments in that manner. Where a case is dismissed, the debtor is no longer entitled to the terms of the confirmed plan advantageous to the debtor.

In re Farrier, Case No. 17-12858 (Bankr. S.D. Ohio 2017)
Leicht vs. Brooks, Adv. 18-01011 (6/21/2018) (Not for publication or citation)

Mary Farrier filed a Chapter 7 on 8/3/17 and George Leicht was appointed her trustee. Four months prior to filing her petition Farrier transferred real property on North Bend Road ("Property") to her daughter Brandi Jordan for no consideration. On 10/5/17 Leicht filed an adversary proceeding to avoid the transfer of the Property under Section 548 and Jordan re-conveyed it to the Debtor.

On 1/31/18 Leicht moved to sell the Property and recorded a lis pendens notice with the Recorder. On 2/5/18 the Debtor transferred the Property to her husband, Frank Brooks, for $1,000.00 – which was far below the listing price of $55,000.00. Leicht then filed an adversary proceeding to avoid the transfer to Brooks under Section 549 as an unauthorized post-petition transfer.

Judge Buchanan issued a Memorandum Decision on Leicht's MSJ and Brooks's opposition.

Judge Buchanan granted Leicht's MSJ and stated:

1. The Court had jurisdiction over Brooks and there is nationwide service of process.

2. The transfer was not authorized by the Court. The lis pendens prevented Brooks from being a good faith purchaser.

3. Brooks has no interest in the property after the transfer is avoided as his dower interest merged into his fee interest. The "undoing" of the transfer does not re-establish his dower interest. The trustee has BFP status under Section 544(a)(3) which would preempt Brooks dower claim in any event.

Stone v. Ketterning Adventist Healthcare (In re Stone), Case No. 15-31896, Adv. No. 17-3012, 587 B.R. 678 (May 31, 2018) (Buchanan)

Facts: Kettering Hosptial filed 11,268 proofs of claim that disclosed personal information. Kettering was sued in a class-action, and agreed to a settlement that would require it to file a miscellaneous proceeding where it would request to restrict access to the proofs of claim with personal or billing information. Kettering did so.

Issue: was Kettering permitted to restrict access to the offending proofs of claim?

Analysis: No. The general procedure is for the creditor to file redacted copies of the proofs of claim, not to restrict access altogether. Kettering's proposal required an interested party to request access to the proof of claim, and then Kettering would provide a redacted copy. The court reasoned that the wholesale sealing of the record ran afoul of the general policy in favor of public access to court records. Kettering was required to file a motion to redact in each case, with a copy of the redacted proof of claim attached.

Guardian Fin. Co. v. Metzger (In re Metzger), Case No. 17-11585, Adv. No. 17-1037, 2018 Bankr. LEXIS 3335 (Sept. 4, 2018) (Buchanan)

Facts: Debtor was president of auto finance company, CarZoom, that agreed to assign its retail installment contracts to Guardian. Debtor personally guaranteed CarZoom's obligations. Despite its obligation, CarZoom did not send payments collected to Guardian. Debtor filed Chapter 7, and Guardian brought a non-dischargeability action under §523(a)(2), (4), (6) for failing to remit payments to Guardian. Debtor moved to dismiss for failure to state a claim.

Issue: Did Guardian state a claim for relief under §523?

Analysis:. The complaint did not state a claim under §523(a)(2) because a promise to pay a debt in the future and failure to do so is not tantamount to a false pretense or false representation. The creditor must establish that the Debtor never intended to do so. The debtor's failure to remit payment was not part of a scheme to defraud. And a company's fraudulent acts cannot be imputed on the debtor merely because he had an ownership interest in the company.

The complaint also failed to state a claim under §523(a)(4) for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." This section only applies to express or technical trusts, which were not at issue. Moreover, the debtor came into lawful possession of the funds, so Guardian failed to state a claim for larceny.

Finally, the complaint did state a claim for "willful and malicious injury" under §523(a)(6). The term "malicious" means "taken in conscious disregard of one's duties without just cause or excuse" and does not require ill-will or specific intent. And "willful" means the action was taken with intent or desire to cause injury. While a close call, the complaint stated a claim, as Guardian could prove a conversion claim.

Sadlon v. Sadlon, Case No. 17-13107, Adv. No. 17-1064, 2018 Bankr. LEXIS 3334 (Sept. 4, 2018) (Buchanan)

Facts: Debtor's ex-wife filed a complaint object to the discharge of domestic support obligations and marital debts. The deadline to file a §523(c) cause of action was Dec. 4. The creditor filed an *Objection to Discharge* on Dec. 4. The creditor filed a Motion to Extend and an adversary proceeding the next day. The Debtor moved to dismiss the adversary complaint as untimely and for failure to state a claim.

Issue: can the court extend the deadline to file a dischargeability complaint?

: Yes. Under Rule 4007(c), the court had the authority to extend the deadline for causes of action under §523(c), which covers actions under §523(a)(2), (4), and (6), so long as the creditor files a motion requesting an extension before the deadline. The court used the *equitable tolling* doctrine to extend the deadline because the creditor acted diligently to request the extension before the deadline, and the extension did not prejudice the debtor. The court also found lack of specific allegations, including the provision of §523 under which the creditor sought relief fell short of the specificity required by Civil Rule 8, but gave the creditor leave to amend the complaint.

In re Lister, Case No. 17-12377, 2018 Bankr. LEXIS 3206 (Sept. 25, 2018) (Buchanan)

Facts: Chapter 13 Debtors owned two adjacent parcels of "mixed-use" property consisting of a home in which they operated a day care for the past 21 years and a separate rental structure generating $600 per month. The entire property was secured by one mortgage. The Debtors' plan proposed to cramdown the mortgage loan. The secured creditor objected.

Issues: 1) does the anti-modification provision of §1322(b)(2) apply to a security interest in "mixed-use" real property that includes the debtor's principal residence? 2) what point in time does the court use to determine the "principal residence" status?

Analysis: Under §1322(b)(2), known as the "anti-modification provision" or "anti-modification exception," a plan "may modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence."*

There are 3 prevailing approaches to determining whether the anti-modification provision applies:

1) The "Bright-Line Only" Approach: the anti-modification provision does not apply unless the property is only the debtor's personal residence. Courts adopting this approach argue the plain meaning of §1322(b)(2) compels this approach. Critics argue it is far to easy for the debtor to manipulate on the eve of a bankruptcy filing. The court did not adopt this approach.

2) The "Bright-Line Includes" Approach: the anti-modification provision applies if the debtor principally resides in some portion of the real property. Courts in support also argue the plain meaning, but that "only" modifies "secured," so it applies to secured claims *only* secured by a security interest, and not a security interest that is *only* the debtor's personal residence. Critics argue that it leads to absurd results (e.g., the debtor who lives in a small apartment in his factory).

3) The Case-by-case Approach: As the name suggests, courts look at the circumstances and make a case-by-case determination. Critics argue it introduces uncertainty and unpredictability.
In determining the point in time for determining "principal residence," there are three self-explanatory approaches: (1) The Petition Date Approach; (2) the Loan Date Approach; and the (3) Hybrid Approach.

The court adopted the "Bright-Line Includes Approach" and the "Petition Date Approach." As a result, so long as the real property securing the creditor's claim includes the debtor's personal residence on the petition date, the claim is subject to the anti-modification provision. The court conceded that no approach is without pitfalls, but this approach has greater certainty and is less susceptible to the debtor's manipulation.

In this case, the debtors property included their personal residence on the petition date, so the debtors could not modify the secured claim.

JUDGE GUY R. HUMPHREY

Trask vs. Greenville Fed. (In re Trask), 2018 Bankr. LEXIS 2351 (Bankr. S.D. Ohio 2018)

Adversary proceeding by debtors against financial institution (FI) seeking monetary damages for violation of automatic sty and discharge injunction. FI seeks mandatory or discretionary abstention under 28 U.S.C. §1334(c) until a foreclosure action was completed. Mandatory abstention was not available as claims in the AP were core proceedings. Court determines that issues regarding payment application and/or release of a second mortgage are within state court's "wheelhouse", and subject to discretionary abstention.

Smith v. Rieser (In re Smith), 2018 Bankr. LEXIS 2071 (Bankr. S.D. Ohio 2018)

Chapter 11 bankruptcy filed by debtors owning 15 parcels of rental property, most with paying tenants. UST moved to convert or appoint a trustee and case was converted to a Chapter 7. Trustee moved to compel debtors to turn over payments collected post-petition, and then filed an AP. Trustee moved for summary judgment that the post-petition, pre-conversion rents were property of the Chapter estate. Court found the rents were property of the estate under Section 541(a)(6).

HOEYHJ v. Browning (In re Browning), 2018 Bankr. LEXIS 2069 (Bankr. S.D. Ohio 2018)

Remediation contractor filed non-dischargeability complaint against debtor under Sections 523(a)(4), (a)(6), and (a)(15). Contractor dismissed all but (a)(4) claim. Debtor sought summary judgment. Debtor's soon to be ex-husband dealt with Contractor. Insurance company issued check to debtor and ex-husband and debtor received funds equaling amount of damage repaired by Contractor. Under Ohio law, one spouse may act as apparent agent for the other. Summary judgment denied to debtor except as to a larceny account as funds were property received.

JUDGE C. KATHRYN PRESTON

In Re Stringer, 2018 Bankr. LEXIS 1749 (Bankr. S.D. Ohio 2018)

Creditor received judgment against debtor/author and her company pre-petition. After a royalty stream of payments was abandoned by the Chapter 7 Trustee, the creditor filed a garnishment against the royalty stream of payments which were due to debtor and/or her company. On a motion to show cause, the Court found the creditor and its attorney were jointly and severally liable for attorneys' fees and punitive damages in an amount of three times the attorneys' fees. These damages were intended to punish a willful violation of the automatic stay.

JUDGE JOHN A. HOFFMAN, JR.

***In re Johnson*, 580 B.R. 766** (Bankr. S.D. Ohio 2018)

In Chapter 11 case of NHL player, Court determined creditor willfully violated the automatic stay by procuring an arbitration award containing findings it had security interest in the debtor player's contract. Creditor then sought state court enforcement. Court previously found attorneys' fees of $422,373.16 to be reasonable for pursuing contempt. In this opinion, Court finds creditor liable for their attorneys' fees and $100,000.00 in punitive damages.

EASTERN DISTRICT OF KENTUCKY

JUDGE TRACEY N. WISE

***Feldman v. Pearl (In re Pearl)*, Case No. 16-20305, Chapter 13, Adv. No. 16-2006, 2017 Bankr. LEXIS 616*; 63 Bankr. Ct. Dec 225 (U.S. Bankr. E.D. Ky. March 8, 2018)**

Issues: Whether the debtor's counterclaims in an adversary proceeding for violations of Kentucky corporate law, oppression of a minority shareholder, and breach of contract would withstand the creditor's motion to dismiss.

Facts: The creditor Feldman held an RDC shareholder meeting during which he acquired certain claims of the company. He held the meeting at a time when he knew that the debtor was extremely ill and could not attend. Feldman caused RDC to terminate the debtor's employment. Feldman also terminated the debtor's membership on the RDC board. Feldman established a separate corporation to which the assets of RDC were transferred.

The debtor filed a chapter 13 bankruptcy case, and Feldman, who alleged the debtor wrongfully received distributions from RDC, commenced an adversary proceeding seeking a judgment that his claim against the debtor was nondischargeable. The debtor responded with a counterclaim seeking redress for alleged conversion, violations of Kentucky corporate law, oppression of a minority shareholder, and breach of contract.

Holdings: The Court dismissed the debtor's claims as failing to state a claim upon which relief could be granted. As to the conversion claim, consent was an absolute defense and the debtor's consent was pled and evidenced by a voting agreement. The claim alleging a violation of KRS § 271B.8-310 was subject to dismissal because the statute did not provide an individual cause of action for the debtor as a shareholder or director and thus the debtor lacked standing to assert a direct claim against the plaintiff creditor under the statute. And, the minority shareholder oppression claim was subject to dismissal because corporate shareholders do not owe duties to other shareholders under Kentucky common law.

***Calloway Cleaning & Restoration, Inc. v. McFarland (In reMcFarland)*, Case No. 16-21587, Adv. No.17-2004, 2018 Bankr. LEXIS 451 (U.S. Bankr. E.D. Ky. February 20, 2018)**

Issues: Whether the creditor restoration company was entitled to a finding of nondischargeability where the debtors used insurance proceeds to pay other creditors, allegedly in violation of the parties' contract.

Facts: Following a fire at the debtors' home, they entered into a contract with the creditor for restoration work. The contract provided that the creditor would take insurance proceeds as compensation for the work. The debtors complained about perceived deficiencies with the creditor's work, and the creditor did not complete the work. In the meantime, the debtors deposited the insurance proceeds in their personal account and used them to pay other bills. As a result,

when the debtors filed for bankruptcy relief, the creditor filed an action arguing that the debt to it was non-dischargeable under 11 U.S.C. § 523(a)(2) and (4).

Holdings: The Court granted the debtors summary judgment, because the creditor did not supply sufficient evidence to allow the Court to draw a reasonable inference that, at the time the debtors signed the contract with the creditor, they never intended to pay the creditor for the work, and instead planned to use anticipated insurance proceeds to pay other bills. The fact that the debtors were living paycheck to paycheck and had unpaid bills when they signed the contract did not signify an intention not to repay. And, the Court found no expressed intent to create a trust within the contract or any other evidence in the record to support an express agreement for the debtors to hold the insurance proceeds in trust for the creditor.

***In re Pfetzer*, Case No. 17-20802, 2018 Bankr. LEXIS 833; 2018 WL 1448742 (U.S. Bankr. E.D. Ky. March 22, 2018)**

Issues: Whether a motion to dismiss for lack of good faith under 11 U.S.C. § 1307(c) can save an otherwise untimely § 1325(a)(7) objection to confirmation of a Chapter 13 plan.

Facts: The debtor filed a chapter 13 petition, which stated that, as of the filing, the debtor and the creditor were parties to state court litigation. The debtor filed a chapter 13 plan, and then an amended chapter 13 plan, regarding which the creditor never filed an objection to confirmation.

The creditor filed a motion requesting a dismissal for cause under § 1307(c), asserting the debtor's alleged bad faith in filing his petition. Specifically, the creditor argued that the debtor purposefully and fraudulently transferred and concealed his assets in a scheme to protect his assets from creditors, and that his bankruptcy filing was in bad faith as a continuation of the scheme. The debtor objected, on the grounds that the creditor did not file a timely objection to confirmation under § 1325(a)(7) based on the debtor's alleged lack of good faith in filing his petition. Thus, the debtor argued, the creditor was barred from raising the same objection under the guise of a motion to dismiss under § 1307(c).

Holdings: Because § 1325(a)(7) requires the determination of the debtor's good faith in filing the petition as part of the plan confirmation process, a motion to dismiss under § 1325(a)(7) cannot rely on an allegation of lack of good faith if the motion is filed after the deadline to object to confirmation.

***In re Dickson*, Case No. 17-51159, 2017 Bankr. LEXIS 4030; (U.S. Bankr. E.D. Ky. November 22, 2017)**

Issues: Whether the creditor, having achieved a dismissal of the debtor's chapter 11 proceeding pursuant to § 1112(b)(1), was entitled to reimbursement of her Chapter 11 legal fees pursuant to Bankruptcy Rule 9011(b)(1) or the Court's inherent authority, as a sanction for the debtor's bad faith bankruptcy filing.

Facts: The debtor was the creditor's 81-year-old mother. The creditor had filed a lawsuit against the debtor and the debtor's son, William Dickson, in the state court, and received a jury verdict of over three million dollars for breach of fiduciary duties, wrongful interference with a devise or inheritance, intentional infliction of emotional distress, and punitive damages.

The debtor filed a voluntary chapter 11 petition. Shortly thereafter, she filed an application to retain an attorney as special counsel to pursue her appeal in the state court litigation, and she obtained stay relief to do so.

The creditor filed a motion to dismiss the bankruptcy case for the debtor's lack of good faith. Specifically, she argued that the debtor was solvent, and she filed the bankruptcy case for the sole purpose of avoiding the supersedeas bond required to stay collection during the pendency of an appeal. The Court granted the motion to dismiss after reviewing the *Laguna* factors and noting (1) that the debtor had multiple assets; (2) her prepetition conduct leading to the state court judgment was improper; (3) it was essentially a two-party case with the debtor's only remaining creditors being the litigation parties; (4) the debtor filed the bankruptcy only when the state court judgment became final and collection action could ensue; and (5) the debtor had no business to reorganize and she opposed liquidation, so there was no bankruptcy purpose. The creditor then sought reimbursement of her attorneys' fees.

Holdings: The Court declined to exercise its inherent authority as a means to impose sanctions, since Fed. R. Bankr. P. 9011 provided sufficient authority for it to consider levying sanctions based upon the filing of the debtor's petition. Sanctions were appropriate because the debtor filed the petition without a legitimate bankruptcy purpose. She sought the protection of the automatic stay but did not intend to reorganize or seek an orderly liquidation; rather, the debtor sought to obtain a civil remedy—the stay of execution of the judgment against the debtor while her appeal was pending.

***In re Thomas*, No. 17-20527, 2018 Bankr. LEXIS 565 (Bankr. E.D. Ky. Mar. 1, 2018)**

Issues: Whether parties to the settlement of an adversary case demonstrated that they were entitled to have the settlement documents sealed.

Facts: The co-debtors Brittany Thomas (the "debtor") and Andrew Thomas filed a chapter 13 bankruptcy petition. A few months later, the debtor filed an adversary proceeding asserting proposed class claims against the defendants AT&T Corp. and DirecTV, LLC, for engaging in a repeated course of conduct that violated the automatic stay under § 362.

Upon settling her own – but not the class – claims with the defendants, the debtor filed a motion to seal, and filed the fully-executed Settlement Agreement in the record under a provisional seal for the Court's review. The debtor also filed a motion to compromise under Rule 9019, requiring the Court to "determine if the settlement is fair and equitable based on the facts of the case." The debtor argued that sealing the agreement was necessary because the defendants would not agree to settle unless the settlement was kept confidential.

Holdings: The Court denied the debtor's motion to seal the settlement agreement, since the debtor failed to provide any evidence to establish that the circumstances warranted the relief requested. Public access to court records should only be restricted in appropriate circumstances.

***In re HNRC Dissolution Co.*, Case No. 02-14261; 2018 Bankr. LEXIS 1739* (U.S. Bankr. E.D. Ky. June 11 , 2018)**

Issues: Whether the Bankruptcy Court had subject matter and personal jurisdiction to decide whether a party asserting an interest in a coal reserve sold by the debtor under Code § 363 had received notice of sale and confirmation orders sufficient to satisfy constitutional due process.

Facts: The Chapter 11 debtor sold substantially all of its assets pursuant to a court-approved auction process, including a coal reserve located in Hamilton County, Illinois. Illinois Methane, LLC ("Methane") sued the transferee of the purchaser, Alliance, in an Illinois state court, seeking to collect based on an interest in the coalbed methane gas rights in the reserve. The Bankruptcy was reopened on Alliance's motion for the Court to determine whether Alliance acquired the reserve free and clear. Methane opposed the motion on the grounds that (1) the Court lacked subject matter and personal jurisdiction over a dispute between two non-debtor parties involving state law property rights; (2) the Court must abstain because state law issues predominate; and/or (3) Methane's interest was not extinguished by the sale and confirmation process because the publication notice of the Sale and Confirmation Orders did not satisfy constitutional due process as to Methane.

Holdings: (1) The Bankruptcy Court had subject matter and personal jurisdiction to decide whether the interested party Methane had received notice of sale and confirmation orders sufficient to satisfy constitutional due process because the Court had "arising in" subject matter jurisdiction to interpret its own orders under 28 U.S.C.S. § 157 and Methane had sufficient contacts with the United States as a company that operates within its territorial boundary. (2) The purchaser and thus its transferee Alliance was not entitled to enforcement of the order confirming sale free and clear of all interests under Code § 363(f) because the purchaser did not meet its burden to show that Methane, the party asserting an interest, was an unknown party such that notice by publication was sufficient to satisfy constitutional due process.

***In re Doud*, Case No. 14-21834; 2018 Bankr. LEXIS 1883* (U.S. Bankr. E.D. Ky. June 21, 2018)**

Issues: Whether the creditor or the debtor should receive funds paid by a Guaranteed Auto Protection provider after debtor totaled his car.

Facts: The debtor purchased a vehicle from the creditor by paying a down payment and financing the remainder of the purchase price. Included within the total amount financed was a charge for optional Guaranteed Auto Protection (GAP). The installment contract also included a security interest in the vehicle. The debtor also executed a GAP addendum, which did not specify which person or entity would receive a payment from the GAP protection provider in the event any payment became due.

The debtor later filed a Chapter 13 Bankruptcy, in which the debtor, the creditor, and the trustee agreed that the creditor's lien on the vehicle was not timely perfected and was thus avoided in accordance with Code §§ 544 and 547. The vehicle was preserved for the benefit of the estate pursuant to Code § 551, and the creditor's claim was treated as a general unsecured claim.

Later, the debtor totaled the vehicle. With the trustee's consent, the debtor received insurance proceeds so he could purchase a replacement vehicle. However, because the insurance proceeds were not sufficient to cover the remaining indebtedness to the creditor on its unsecured claim, the GAP protection was triggered. The debtor and the creditor each asserted that they were entitled to the GAP payment. The creditor produced a supplemental document, to which neither the trustee nor the debtor objected, that explained the manner in which GAP benefits would be calculated. This document provided that the GAP benefits would be paid to the debtor if the financing agreement was satisfied, and to the creditor if not.

Holdings: (1) The GAP addendum provided that, under the circumstances, the creditor was entitled to receive the GAP benefit as the "named payee." As a result, the debtor had no entitlement to the GAP benefits, and the GAP payment was never part of the debtor's bankruptcy estate under Code § 541(a). (2) As with the creditor's rights under the GAP addendum, the creditor's rights under the retail installment contract were not transferred to the trustee upon the trustee's avoidance of the creditor's security interest in the vehicle.

***In re Caudill*, Case No. 18-70102; 2018 Bankr. LEXIS 2213* (U.S. Bankr. E.D. Ky. July 25, 2018)**

Issue: Determination of the value of a manufactured home, for the purpose of determining the amount the debtors had to pay the mortgage company that held a security interest in the home, pursuant to Code § 1325(a)(5)(B).

Facts: The court held a valuation hearing on the debtors' motion to set the value of a manufactured home. Prior to the hearing, experts for the debtors and the creditor submitted their direct testimony via affidavits that attached appraisal reports, which were deemed admitted without objection. All witnesses were subject to cross-examination. Although both experts offered opinions of value using the NADA cost approach, they reached different values owing to a few differences of opinion.

Holdings: (1) The evidence supported a determination that the Chapter 13 debtors' manufactured home was worth $49,600 for purposes of determining the amount the debtors had to pay a mortgage company that held a security interest in the home under their bankruptcy plan, pursuant to Code § 1325(a)(5)(B). (2) Although the debtors' expert and the mortgage company's expert properly used the NADA cost approach because the home was personal property, the debtors' expert's valuation was suspect because he concluded that the home was manufactured in 2013 when the majority of documents, including the certificate of title, showed that it was manufactured in 2014. (3) The court was not bound by either expert's opinion and had to determine the value of the home based on all evidence it heard.

***Stone v. Minix (In re Minix)*, Case No. 17-51915; 2018 Bankr. LEXIS 2286* (U.S. Bankr. E.D. Ky. August 1, 2018)**

Issues: Whether the debtor was entitled to an order vacating a default judgment on an adversary complaint to find a debt was non-dischargeable in accordance with Code § 523(a)(6).

Facts: The plaintiff filed a complaint against the debtor seeking a determination that a debt was nondischargeable. The debtor's attorney in the underlying bankruptcy case received electronic notice of the filing. The Court issued a deficiency notice because the complaint did not contain a statement regarding consent in accordance with Bankruptcy Rules 7008 and 9027(a). The plaintiff filed an amended complaint which was served on the debtor via first class mail, but was not served on the debtor's attorney. Less than a month later, the debtor's attorney withdrew as counsel.

The debtor did not file an answer to the complaint within 30 days of the issuance of the summons. Accordingly, the plaintiff sought a default against the debtor under Bankruptcy Rule 7055 and Civil Rule 55. The debtor filed an objection, arguing that he had "removed" the adversary proceeding to the district court such that "the bankruptcy clerk has no jurisdiction to grant Entry of Default Judgment." The Court overruled the objection.

The plaintiff filed a motion for default judgment. The debtor filed an answer and an amended answer to the complaint, an objection to the motion for default judgment, and a motion to dismiss the adversary proceeding. The plaintiff objected and moved to strike the debtor's answer.

Holdings: (1) The Court construed the pro se debtor's late-filed answer as a motion to vacate default. Although the debtor did not offer a persuasive explanation as to why he failed to file a timely answer, the Court found good cause to vacate the entry of default where the only prejudice to the creditor would be that she now had to litigate her case on the merits. (2) The creditor did not serve the debtor's counsel in accordance with Bankruptcy Rule 7004(g), such that the debtor raised a meritorious defense to the entry of a default judgment. (3) The debtor's motion to dismiss was denied, as dismissal was not an appropriate remedy for improper service. (4) Although the debtor's former counsel was not served in accordance with Bankruptcy Rule 7004(g), the debtor suffered no prejudice, particularly given that the court vacated the entry of default.

***In re Martin*, Case No. 18-60270; 2018 Bankr. LEXIS 3656* (U.S. Bankr. E.D. Ky. November 21, 2018)**

Issues: Whether the debtors' Chapter 7 Bankruptcy case would be dismissed pursuant to Code § 707(a) "for cause," including that the debtors lacked good faith in filing the case.

Facts: The debtors were good friends with the creditor and her husband, an attorney. The debtors believed that the attorney had been their personal counsel for several years, since he assisted them with the Chapter 11 bankruptcy of their former company. After the company's filing, the attorney advised the debtors to file a personal bankruptcy. They did so and received a Chapter 7 discharge.

Later, the attorney approached the debtors about purchasing his wife's durable medical equipment

business. Because the debtors believed that the attorney was acting as their counsel and trusted him, they forewent traditional due diligence measures and agreed to buy the business. The transaction was not memorialized in traditional sale documents. The only document between the parties was an Agreed Judgment that the attorney had the debtors sign concurrently with acquiring the business assets, and as collateral for the business purchase price. The attorney explained to the debtors that if they did not sign the Agreed Judgment, his wife would leave him and take his children. He also stated that the Agreed Judgment would "never see the light of day," and the debtors should only pay what they could when they could. With that understanding, and the belief that the attorney was their lawyer, the debtors signed the Agreed Judgment.

In 2010, the creditor obtained entry of the Agreed Judgment in the Laurel County Circuit Court. The judgment provided for suspension of the right of execution so long as the debtors made monthly payments with the balance due in 2015. The Agreed Judgment was signed by the attorney – not for the debtors, but for his creditor wife.

The debtors operated the business for approximately three years, making far less than what they thought they would. They eventually sold a majority of the business equipment for scrap and ultimately closed the business and liquidated its remaining assets.

The debtors made no payments to the creditor pursuant to the Agreed Judgment, and no payment was demanded. Suddenly, in 2017, the creditor caused the sheriff to execute upon the debtors' personal property to collect the Agreed Judgment debt. When asked why she waited eight years to collect, the creditor testified that she did not wait, instead encouraging her counsel and husband, the attorney, to take action. Because he did not, she acted for herself after she graduated from law school.

When the debtors filed a new Chapter 7 Bankruptcy, the creditor sought dismissal for lack of good faith. She argued in part that the debtors had not paid the Agreed Judgment according to its terms, and that they were paying all of their debts other than the Agreed Judgment and a mortgage for which they were in the process of negotiating a resolution. The Court noted that the creditor produced no evidence that the debtors exhibited conduct akin to fraud, misconduct, or gross negligence regarding the Agreed Judgment debt. Based on the debtors' understanding from the attorney that they did not have to pay the debt, and years of no collection efforts, the debtors' understanding about the Agreed Judgment was credible.

Holdings: (1) The debtors' case was not dismissed for lack of good faith under Code § 707(a) because, for purposes of the *Zick* analysis, the evidence did not support that the debtors were attempting to hide income or assets. Instead, they testified openly about gifts from their parents at the evidentiary hearing and did not list their gifts as income on the advice of their counsel. (2) While testimony from one of the debtors was confusing, it did not establish that the debtor was deliberately trying to conceal or misrepresent assets or income sources and, when given the chance to slow down and explain his odd statements, his explanations were adequate. (3) The remaining *Zick* factors, excessive and continued expenditures and a lavish lifestyle, were not present and the creditor failed to meet her burden to otherwise establish "cause" for dismissal under Code § 707(a).

JUDGE GREGORY A. SCHAAF

***In re Lexington Hosp. Grp., LLC*, Case No. 17-51568, 2017 Bankr. LEXIS 3782*; 94 U.C.C. Rep. Serv. 2d (Callaghan) 42 (U.S. Bankr. E.D. Ky. November 1, 2017)**

Issues: Whether the creditor had a perfected security interest in the Chapter 11 debtor's cash collateral.

Facts: The debtor borrowed over six million dollars for a period of 15 months, pursuant to a loan agreement with the creditor, to acquire a hotel and conference center. The note was secured by a mortgage and security agreement that included a provision that assigned the debtor's interests in leases and rents. The note was also secured by an "all-assets security agreement," which included accounts and general intangibles, including payment intangibles. The creditor filed a financing statement with the Kentucky Secretary of State, which did not identify "general intangibles" or "payment intangibles" in its description of the collateral.

The debtor defaulted on the note and entered into a forbearance agreement with the creditor. After the debtor defaulted on the forbearance agreement, the creditor notified the debtor of its default and sought the appointment of a receiver in state court. The debtor then filed a chapter 11 petition, and the creditor filed a claim of more than 8 million dollars, which indicated that it was secured by all of the debtor's assets based on a "Mortgage/UCC Financing Statement."

The debtor sought permission to use cash collateral according to a proposed budget immediately upon filing its chapter 11 petition. The debtor and the creditor entered into an agreed order for the interim use of cash collateral. The debtor later filed an emergency motion to modify the cash collateral budget, and to extend use of its cash collateral. The creditor did not object to the budget, but it did raise concerns about the debtor's failure to share financial information. It also suggested the numerous amendments raised doubts about the accuracy of the debtor's budget. The emergency motion to modify was granted on an interim basis.

The creditor filed an emergency motion to prohibit the debtor's use of cash collateral, complaining that the debtor had submitted multiple budgets to the creditor, and again calling into question the accuracy of the information provided. The creditor also complained about the debtor's use of cash collateral to pay professional fees. The debtor responded that the creditor did not have a perfected security interest in the cash collateral, leaving the debtor with sufficient unencumbered cash to fund necessary expenses, including legal fees.

Holdings: The debtor's hotel room revenue was an interest in personal property in Kentucky covered by UCC Article 9, and not subject to the creditor's mortgage because, although granting a hotel guest authority to enter and use real property, it did not confer an interest in that property. The creditor did not have a perfected security interest in the cash receipts or deposit accounts generated by the room revenue on the petition date because a cash transaction did not create an account or payment intangible from which proceeds were generated as there was no monetary obligation. The room revenue generated by a cash payment was not cash collateral pursuant to 11

U.S.C.S. § 363(a) that required adequate protection for, or approval of, the creditor under § 363(c)(2).

***In re Joseph*, Case No. 09-30812, 2018 Bankr. LEXIS 329*; (U.S. Bankr. E.D. Ky. February 7, 2018)**

Issues: Whether the holder of a tax lien certificate of delinquency violated the discharge injunction by attempting to collect the discharged personal obligation of the debtor.

Facts: When the debtor filed for Chapter 13 relief and then converted to Chapter 7, she owned numerous parcels of real property in Franklin County and Johnson County. She scheduled a significant amount of property tax debt, and there were liens on the properties. Although the creditor KTBS was a third party who purchased a taxing authority certificate of delinquency, the debtor did not list it in her schedules.

After the debtor received a Chapter 7 discharge, the creditor obtained an in rem default and summary judgment in a Franklin County foreclosure that had been filed by another creditor pre-bankruptcy. One property was sold pursuant to the judgment but did not generate sufficient funds to satisfy the debt, and another property did not sell at all. Because the debt was not satisfied, the creditor filed judgment liens in Johnson County to "act as a lien upon all real estate in [the] County in which the above Judgment Debtor has any ownership."

The creditor then filed a foreclosure complaint in Johnson County, in which it stated that it had "obtained an in personam judgment against [the debtor] by virtue of unpaid certificates of delinquency." It sought a supplemental judgment against the debtor, foreclosure on the Johnson County Properties, and payment of the judgment liens from the proceeds of the sale. The debtor filed an answer and a counterclaim, in which she asserted that the relief requested was barred by her chapter 7 discharge and violated the discharge injunction. The debtor then filed a motion for sanctions in the bankruptcy.

Holdings: The debtor's in personam tax obligations evidenced by the certificates of delinquency were discharged. The creditor violated the discharge injunction by attempting to collect the discharged personal obligation of the debtor. The original tax liens never attached to the debtor's Johnson County property and could not support the attempt to collect on the certificates of delinquency in the Johnson County foreclosure. Further, KRS § 134.546(4) did not create a lien, nor could it be used to secure a deficiency judgment post-discharge. The creditor and its counsel were in contempt of the discharge injunction, and the debtor was entitled to attorney's fees and costs.

***In re Denny*, No. 15-51918, 2018 Bankr. LEXIS 1118 (Bankr. E.D. Ky. Apr. 12, 2018)**

Issues: Whether an attorney had violated the Kentucky Rules of Professional Conduct in his handling of funds received from his client.

Facts: The attorney who filed the debtor's Chapter 13 petition had a small business checking account and a personal savings account. He did not have an escrow account as required by the Kentucky Rules of Professional Conduct.

The attorney deposited into his checking account a personal check from the debtor in the amount of $3,425.52, which included the notation "Chapter 13 Payoff." The attorney also deposited into his checking account a personal check from the debtor's husband in the amount of $250, for the payoff fee, which he had been ordered to turn over.

After depositing the funds, the attorney wrote a check to "Cash" on his business account for $3,000, leaving a balance of $1,331.26 after the check was cashed and other debits and credits were considered. The attorney deposited $2,700.00 of the cash withdrawal into his savings account on the same day, and withdrew the same amount the next day.

Having determined the attorney had not delivered the payoff funds, the Trustee filed a motion for sanctions, seeking turnover of the payoff funds and an accounting of the attorney's receipt and disposition of the funds. The attorney did not respond in the record or attend the hearing. Based on the information provided by the Trustee, the Court ordered the attorney to immediately turnover the payoff funds to the Trustee, and to (1) file an affidavit of compliance; (2) file an accounting of his receipt and disposition of the payoff funds; (3) produce all records related to the payoff funds; and (4) disclose any and all compensation received from the debtor since the petition date.

The attorney filed an affidavit of compliance that showed he waited almost two weeks after the turnover order was entered before he sent the payoff funds to the Trustee. The Trustee filed a status report indicating that she had received the payoff funds, but not the attorney's records as required by the order. The Trustee also filed a memorandum asserting that the attorney had gone on vacation shortly after withdrawing the funds, and that he and his wife had filed a bankruptcy petition.

The attorney filed a late response, and admitted at the hearing that he did not have an escrow account and that he used his savings account for personal expenses. His main dispute with the Trustee's filings was that his mother had paid for his trip, not the payoff funds. He also blamed his problems on the "disarray" caused by the vacation, the need to relocate after his lease was not renewed, the debtor's matter being "lost in the shuffle," the overextension of his practice, and the "paralysis and embarrassment over the situation." A final hearing was scheduled so the attorney could obtain replacement counsel and mount a defense, but neither the attorney nor counsel for him appeared.

Holdings: The attorney violated the Kentucky Rules of Professional Conduct when he took funds the Chapter 13 debtor and her husband gave him to pay off debts they owed under their bankruptcy plan, placed those funds in his business account, withdrew the funds shortly thereafter, and used them to pay business and personal expenses. Severe sanctions, including suspension from practicing law before the court were warranted because this was not the first time the court sanctioned the attorney for professional misconduct and he breached his fiduciary duties to his client, caused her to incur legal fees of $550 to hire a new attorney, and failed to timely comply

with the court's order to turn over the money he received from the debtor and her husband to the bankruptcy trustee.

***In re Mercury Data Sys.*, Case No. 18-50183; 586 B.R. 260; 2018 Bankr. LEXIS 1714** (U.S. Bankr. E.D. Ky. June 8, 2018)**

Issues: Whether the involuntary Chapter 7 debtor was entitled to relief from the order of relief, dismissal, or conversion.

Facts: John Taylor, the sole owner and president of Mercury, a software company attempting to develop high accuracy navigation technology, solicited investors. Mercury entered a Note Purchase Agreement with several investors, including Quantum and PSP. Mark O'Reilly, owner of PSP and Head of Innovation at Quantum, signed the Note Purchase Agreement on behalf of the investors.

Mercury encountered financial problems despite the funds received from the investors. Quantum agreed to provide additional funds. However, because O'Reilly had concerns about the investment, Mercury agreed to develop an updated business plan and provide Katherine Bennett, a certified public accountant hired by Mercury, full access to Mercury's financial records.

Bennett was given the promised access, but Taylor did not prepare an updated business plan. Therefore, O'Reilly and Bennett worked on an updated business plan to facilitate solicitation of additional financing, which they presented to Taylor for review.

Shortly thereafter, Mercury ran out of money and stopped paying its debts. Key employees quit. Bennett continued to perform work for Mercury, but her invoices were not paid. Mercury's landlord threatened a forcible detainer action. Taylor continued to work on the TrakPoint system, but his visits to the office to perform his managerial duties dwindled to the point that he appeared in the office only once or twice a month.

The loss of employees, potential for eviction, and approaching maturity of the convertible promissory notes caused significant concern for O'Reilly and Bennett. Taylor acknowledged the problems and agreed they had cause for worry. O'Reilly attempted to find ways to fund development of the TrakPoint system and pay Mercury's creditors without success. Taylor rebuffed O'Reilly's efforts and took no action to find additional funding for Mercury or address Mercury's financial crisis.

PSP, Bennett, and others filed an involuntary Chapter 7 petition against Mercury. Mercury did not respond, so the Order for Relief was entered and the trustee took possession of Mercury's assets. When Taylor learned of the bankruptcy filing, he moved to set aside the Order of Relief and dismiss the Bankruptcy on grounds including bad faith and the validity of the creditors' claims.

Holdings: (1) The involuntary Chapter 7 petition satisfied Code § 303 and the involuntary debtor received proper notice of the petition; thus, the order for relief could not be set aside on this basis. (2) The involuntary debtor could not use Code § 707 to present evidence it should have presented in a contesting hearing under Code § 303 and cause did not exist to dismiss the case under Code § 707(a). (3) Civil Rule 60(b)(2) did not apply because prior knowledge prevented any conclusion

that the debtor was faultless in failing to raise a bad faith argument or claim dispute before entry of order for relief. (4) The debtor was not entitled to conversion under Code § 706 as evidence demonstrated that a successful reorganization was not feasible.

***In re Mercury Data Sys.*, Case No. 18-50183; 2018 Bankr. LEXIS 3067** (U.S. Bankr. E.D. Ky. September 25, 2018)**

Issues: Whether the former president of the involuntary Chapter 7 debtor was entitled to administrative expense priority for compensation.

Facts: John Taylor was the prior sole owner and president of the involuntary Chapter 7 debtor Mercury, a software company that attempted to develop high accuracy navigation technology. Taylor applied for administrative expenses for compensation.

Holdings: For an administrative expense to have priority under Code § 503(b)(1)(A), it must have been an actual cost that is necessary to the preservation of the estate. Taylor's claim was denied to the extent that he had no expectation of payment, since the work was done prior to entry of the Order for Relief and therefore there was no estate for which work was done. Taylor's claim for work done to prepare a final invoice was given priority over the trustee's objection, since preparation of a timely invoice the trustee would not have been able to complete was preservation of an asset of the estate.

***In re Keokuk*, Case No. 17-30370; 2018 Bankr. LEXIS 3653* (U.S. Bankr. E.D. Ky. November 20, 2018)**

Issues: Whether the Chapter 13 debtor's plan complied with Code § 1325(a)(5) regarding a manufactured home.

Facts: The Chapter 13 debtor scheduled real property and a mobile home located thereon. The creditor filed a proof of claim for approximately $87,000 on a note secured by liens on the real property and the mobile home. The liens were not disputed, and the mobile home was treated as personal property under Kentucky law.

The debtor initially proposed a plan that valued the creditor's secured claim at $20,000.00, payable in equal monthly installments at 5.25% interest. The creditor objected to the proposed cram down value and a hearing was scheduled to determine the amount of the secured claim pursuant to § 506(a). The parties agreed before the hearing, and it was therefore ordered, that the value of the mobile home was $36,000 and the value of the real estate was $22,500. The debtor filed an amended plan. Instead of merely adjusting the initial secured value to the agreed secured value, the debtor proposed to retain the real estate in exchange for equal monthly payments based on the agreed value, and surrender the mobile home. The creditor objected, arguing that Code § 1325(a)(5) does not allow treatment of its allowed secured claim under both Code § 1325(a)(5)(B) and (C).

Holdings: Code § 1325(a)(5) recognizes that a creditor and debtor may agree on a proposed treatment. If they do not, the debtor has two choices: (1) "cram down" the claim to its secured value under Code § 1325(a)(5)(B), or (2) surrender the collateral under Code § 1325(a)(5)(C). When a debtor chooses the cram down option, the amount of the allowed secured claim is determined according to the requirements of Code § 506(a), and replacement value governs. The debtor's plan was not confirmable because it did not propose to pay the creditor its allowed secured claim, and surrender of the mobile home would not be treated as a distribution under Code § 1325(a)(5)(B)(ii).

***Farm Credit Mid-Am., PCA v. Tingle (In re Tingle)*, Case No. 17-30531; 2018 Bankr. LEXIS 3654* (U.S. Bankr. E.D. Ky. November 21, 2018)**

Issues: Whether the creditor was entitled to summary judgment that the Chapter 7 debtors' obligations were non-dischargeable pursuant to Code § 523(a)(2)(A), 2(B), 4, and/or 6.

Facts: The debtors obtained multiple loans from the creditor to support cattle and tobacco operations. As part of the applications processes, the debtors supplied balance sheets that valued investments in growing crops, cattle, livestock, and equipment. The loans were secured by a lien on crop insurance proceeds, livestock, equipment and crops.

The creditor sued the debtors after they defaulted on the notes and was granted judgment in the amount of over $305,000. The debtors filed a Chapter 13 petition in 2014, which was dismissed without a discharge in 2016. The debtors ceased farming operations while the Chapter 13 case was active, and liquidated the remaining farming assets after the case was dismissed.

The debtors then filed a Chapter 7 case in 2017. The schedules listed the creditor as an unsecured creditor with a claim for $180,000. The creditor then filed an adversary proceeding seeking a determination that the debtors' obligations were non-dischargeable pursuant to Code § 523(a)(2)(A), (2)(B), (4), and (6). In the alternative, the creditor sought denial of a discharge in pursuant to Code § 727(a)(3), (4), (5), and (7).

Holdings: (1) The creditor's motion for summary judgment was denied in part because a trial was required to resolve its Code § 523(a)(2)(A) and (2)(B), (4), and (6) claims, in light of the debtors' defenses including lack of actual fraud, preparation of the balance sheets by the creditor rather than the debtors, and payment. (2) The creditor's motion for summary judgment was granted to the extent that the debtors were denied a discharge pursuant to Code § 727(a)(3) and (a)(5), based on the debtors' failure to keep or preserve records and adequately explain the loss of assets.

WESTERN DISTRICT OF KENTUCKY

JUDGE JOAN C. LLOYD

***Dean v. Lane (In re Lane)*, Case No. 17-32237(1)(13), AP No. 17-03062, 2018 Bankr. LEXIS 472 (U.S. Bankr. W.D. Ky. February 21 2018)**

Issues: Whether the bankruptcy court had jurisdiction to liquidate or estimate a personal injury claim.

Facts: The plaintiffs entered into a contract for the purchase of the debtor's home. It was later discovered that the basement of the home was contaminated with mold. The plaintiffs sued in state court, and the case was dismissed after the parties agreed to binding arbitration. After the arbitrator entered an award in favor of the plaintiffs, the debtor filed a Chapter 13 petition.

The debtor's Petition listed the plaintiffs as creditors holding a secured claim in the amount of $128,895.57 secured by the debtor's home. The debtor also listed the plaintiffs as having a contingent, unliquidated, disputed claim in an unknown amount. The debtor's 13 Plan was confirmed over the plaintiffs' objection, and was later amended to provide for a 100% payout to the plaintiffs on their claim.

The plaintiffs initiated an adversary proceeding against the debtor objecting to the discharge of their unsecured personal injury claim in the amount of $300,000. They contended that the agreement to arbitrate their claims was meant to bifurcate their claim into a property damage claim, which resulted in the arbitration award of $130,608.57, and a personal injury claim of $300,000. The plaintiffs argued they were not able to proceed with the personal injury claim due to the imposition of the automatic stay pursuant to 11 U.S.C. § 362.

The debtor moved to dismiss the adversary proceeding because the personal injury claim was never adjudicated by the arbitrator and thus, the claim was both contingent and unliquidated.

Holdings: The Court granted the debtor's motion to dismiss the nondischargeability action, holding it does not have jurisdiction to liquidate or estimate the claim because personal injury claims had not been referred to the bankruptcy court, pursuant to LR 83.12(a).

***In re Lane*, Case No. 17-32237(1)(13), 2018 Bankr. LEXIS 303* (U.S. Bankr. W.D. Ky. February 5, 2018)**

Issues: Whether a creditor's motion to dismiss the debtor's case as being filed in bad faith would be granted, where the debtor's Chapter 13 Plan had been confirmed.

Facts: The Chapter 13 debtor listed the creditors as holding a claim in the amount of $128,895.57 secured by the debtor's home. The claim was over secured as the property was valued at $180,000, and the debtor listed the creditors as having a contingent, unliquidated disputed claim.

In her Chapter 13 Plan, the debtor proposed to pay general nonpriority unsecured claimants 98 cents on the dollar, and that the judgment lien held by the creditors would be avoided under 11 U.S.C. § 522. The creditors objected to the debtor's Plan, stating that the judgment they obtained was not subject to lien avoidance under 11 U.S.C. § 522(a)(1) since it did not impair any exemption raised by the debtor. The creditors also claimed that since their claim was over secured, they were entitled to post-petition interest, and they disputed the rate of interest on the claim. The debtor responded that she was permitted to modify the creditors' claim under 11 U.S.C. § 1322(b) since the lien filed by the creditors was not a consensual lien. The debtor also argued that the statutory rate of interest in Kentucky is 6% per KRS 360.040 and that under *Till v. SCS Credit Corp*., 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), the debtor may cramdown the interest rate on the claim to 4.25%, the prime rate.

After a hearing, the Court entered an Order overruling the creditors' Plan objection, and setting the appropriate rate of interest on the creditors' claim at 4.25% pursuant to *Till*. The Court also entered an Order confirming the Debtor's Plan. The creditors, after their attorney withdrew, filed a motion to dismiss the debtor's case on the basis that her Plan was not feasible or filed in good faith.

Holdings: The creditors' motion to dismiss the debtor's confirmed plan was denied. The order of confirmation was now a final order and the issues of feasibility and good faith were waived because they could have been raised by the creditors and their counsel when they objected to confirmation of the plan, but were not.

***In re Lane*, No. 17-32237(1)(13), 2018 Bankr. LEXIS 1294 (Bankr. W.D. Ky. May 2, 2018)**

Issues: Whether the debtor's counsel was entitled to an amendment of the confirmation order to allow counsel to file an application for additional fees.

Facts: Included in the Chapter 13 debtor's Petition was a Disclosure of Compensation of Attorney for Debtor form in which the debtor's attorney indicated he had agreed to accept a flat fee of $3,750 for legal services provided to the debtor pursuant to 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b).

The debtor's Plan was confirmed, and provided for a 100% payment to the creditors on their unsecured claim, with interest at 4.25% over 60 months. The creditors then filed an adversary proceeding against the debtor seeking to revoke the debtor's discharge. The adversary proceeding was dismissed, and the creditors appealed. The creditors also filed another adversary proceeding against the debtor, seeking a revocation of the Order confirming the Plan based on fraud.

Holdings: Administrative Rule 5.3 regarding flat fees in Chapter 13 cases was implemented to prevent a debtor's counsel from "double dipping" and gaining extra compensation for normal legal services that should be covered by the flat fee. The Rule was not designed to prohibit a debtor's counsel from filing fee applications for extra work performed on matters outside the realm of an ordinary Chapter 13 case. A case in which an unsecured creditor was to be paid 100% plus interest,

but had nevertheless filed two adversary proceedings and an appeal, was not an "ordinary" case. To deny a debtor's attorney additional fees in such a matter would discourage all debtors' lawyers from representing debtors in any resulting litigation, causing debtors additional expense and extreme prejudice by loss of the counsel who may be the most knowledgeable about the debtor's case. The fee application was allowed.

***In re Lane*, No. 17-32237(1)(13), 2018 Bankr. LEXIS 1295 (Bankr. W.D. Ky. May 2, 2018)**

Issues: Whether the creditors were entitled to production of the debtor's taxes and other documents.

Facts: The creditors, whose unsecured claim was to be paid at 100% plus interest pursuant to the debtor's Plan, requested that the Court require the debtor to turnover to them copies of her tax returns for the four years prior to the date of confirmation of the debtor's Plan.

The debtor's Chapter 13 Plan was confirmed over the creditors' objection. Before confirmation, legal arguments were made on behalf of the creditors, and at no point was there any mention of alleged misrepresentation by the debtors in her Petition or Plan. Additionally, there was no request prior to confirmation for the debtor to produce her tax returns.

The creditors cited 11 U.S.C. § 521 in support of their request, which provides that a party-in-interest may request a Chapter 13 debtor to file with the court a copy of each Federal income tax return required with respect to each tax year of the debtor ending while the case is pending, annually after the plan is confirmed and until the case is closed. The creditors stated that the purpose for requesting the documents was for "comparison against the Debtor's income and other misrepresentations listed in the Debtor's Chapter 13 Plan and Petition." The creditors also stated that they requested the tax return information for the purpose of "assuring that their rights in property are fully protected."

Holdings: The Court denied the creditors' motion under 11 U.S.C.S. § 521(f) for an order requiring the debtor to produce copies of her tax returns for the four years prior to confirmation of her Chapter 13 plan, which paid the creditors' claim at 100 percent with interest, as there was no request for a modification of the plan under 11 U.S.C.S. § 1329 and it appeared that the request served no purpose other than to harass debtor. Further, if the request was to gather information for a pending adversary proceeding, nothing in either 11 U.S.C.S. §§ 521(f) or 1329 indicated that they were intended to be used as a discovery tool in another proceeding. The creditors made no showing that the requested information could not be obtained from other sources and that they had a demonstrated need for the information or that it would aid in administration of the case as required by 11 U.S.C.S. § 521(g)(2).

***In re Alliance Mgmt. Servs., LLC*, Case No. 16-31239(1)(7), AP No. 17-3034, 2018 Bankr. LEXIS 148 (U.S. Bankr. W.D. Ky. January 23, 2018)**

Issues: Whether the Trustee was entitled to summary judgment on a preferential transfer complaint, where the creditor had failed to timely respond to requests for admission.

Facts: The debtor filed a voluntary petition seeking relief under Chapter 11. The Chapter 11 Trustee obtained an order to convert the debtor's case to a Chapter 7, and a Chapter 7 Trustee was appointed. The Trustee filed a complaint against the defendant OKT to avoid preferential transfers pursuant to 11 U.S.C. § 547(b).

The defendant filed an answer to the complaint, but did not timely respond to the Trustee's discovery requests. One day after the thirty day deadline to respond to requests for admissions, counsel for the defendant sent counsel for the Trustee an email stating, "FYI Mr. McClelland has promised to come into my office next week and sign the discovery responses. I hope this is fine with you." The Trustee's counsel responded by email, "Because the thirty days have already passed, the requests are deemed admitted by operation of the federal rules."

The Trustee filed a motion for summary judgment against the defendant, contending that the defendant, by its failure to respond to the request for admissions had, as a matter of law, admitted each material element of a voidable preference pursuant to 11 U.S.C. § 547(b) and that the Trustee was entitled to judgment as a matter of law pursuant to Fed. R. Bankr. P. 7056. The defendant filed a response to the motion for summary judgment, and a motion to extend time to provide responses to the Trustee's request for admissions.

Holdings: Pursuant to 11 U.S.C.S. § 547(b), the Trustee met his burden of proving each element establishing that he was entitled to void the two preferential transfers made by the debtor for the benefit of defendant. The Trustee also established that the defendant could not prove the affirmative defenses it asserted in its answer. Thus, pursuant to Fed. R. Bankr. P. 7056, the Trustee was entitled to summary judgment in his favor as a matter of law.

***Smith v. Smith (In re Smith)*, Case No. 17-10067(1)(12), AP No.17-1010; 2017 Bankr. LEXIS 4152* (U.S. Bankr. W.D. Ky. December 6, 2017)**

Issues: Whether structures erected on the Chapter 12 debtor's farm were permanent fixtures, such that the first mortgage lien holder had a claim to insurance proceeds issued when the structures were destroyed in a windstorm.

Facts: The debtor and Andrea Smith gave a mortgage to the creditor ESB in the principal sum of $412,000. The mortgage covered 96.810 acres of real property owned by the debtor and Andrea. ESB recorded its mortgage. The debtor's father Lonnie Smith executed a personal guarantee for his son in favor of ESB in the amount of $214,000.

Several years later, the debtor borrowed funds from another source to build two very large tobacco pole barns on the farm. The construction was not financed by an additional mortgage, but was

secured by other means. Despite the debtor's stated intent to dismantle the pole barns and reconstruct them on another farm once he stopped farming tobacco, the pole barns were similarly constructed in a manner that would make it difficult or impossible to remove the barns from the land without destroying them.

Over the course of a few years, the debtor and Andrea borrowed in excess of $560,000 from SCB, and executed and delivered to SCB, promissory notes evidencing each loan. To secure repayment of the loans, the debtor granted SCB a security interest in all of his farm equipment and business machinery. SCB filed UCC Financing Statements with the Kentucky Secretary of State's Office.

About a year later, Pinnacle obtained an agreed judgment against the debtor in the amount of $327,278, plus attorney fees and expenses, based upon a loan it made to the debtor, upon which he defaulted. Pinnacle contended its claim was secured by a lien on the debtor's crops and equipment, as evidenced by a UCC Financing Statement filed with the Kentucky Secretary of State's Office.

A windstorm destroyed both of the pole barns. The debtor's insurance company ECM issued two checks, one for $129,000 and one for $130,000, for the loss of each barn. The checks were issued with the debtor, ESB and SCB as payees on each of the checks.

The debtor filed a Chapter 12 bankruptcy. As part of the bankruptcy, the farm was sold by auction.

ESB instituted an adversary proceeding seeking a declaratory judgment regarding the liens asserted by ESB, SCB and Pinnacle in the insurance proceeds issued by ECM after the destruction of the barns. ESB contended it was entitled to the insurance proceeds based on the fact that the pole barns were permanent improvements to the debtor's realty and covered by the ESB mortgage. SCB contended the pole barns were the debtor's farm equipment covered by its security agreement and protected by the UCC Financing Statement filed with the Kentucky Secretary of State. Pinnacle contended its lien, which secured the debtor's indebtedness to it, encumbered the insurance proceeds issued on the barns.

Holdings: The first mortgage holder on the farm met its burden of proof in meeting the required elements of the three part test of *Heflin* to characterize the tobacco pole barns as permanent fixtures to the realty. As such, the insurance checks issued by the debtor's insurance company following the destruction of the barns by a windstorm constituted a part of the collateral of said mortgage holder under its mortgage with the debtor. Therefore, the two insurance checks from the insurance company in the amount of $129,000 and $130,000 had to be turned over to the first mortgage holder as they did not constitute the collateral of two other creditors. The court was convinced by the testimony regarding the structure of the barns, the way in which they were constructed and their use that they were integral to the debtor's tobacco farming operation and meant to be permanent fixtures to the farm.

***Edmonton State Bank v. Smith (In re Smith)*, Case No. 17-10067(1)(12), AP No. 17-1010, 2018 Bankr. LEXIS 853*; 2018 WL 1466080 (U.S. Bankr. W.D. Ky. March 22, 2018)**

Issues: Whether the creditor's lien extended to two pole barn structures on the debtor's property.

Facts: After a trial, the Court determined that two tobacco pole barns located on the debtor's property were permanent fixtures, and thus part of the real estate upon which ESB had a valid mortgage. For this reason, two insurance checks issued after the total destruction of the barns in a wind storm were subject to the senior creditor ESB's mortgage.

The creditor, which had a security interest in all of the debtor's farm equipment and business machinery, moved the Court to amend its findings. Specifically, it requested a finding that it had an interest in the insurance checks junior to that of the senior creditor, so it would collect any proceeds remaining after the senior creditor's debt was satisfied.

The Court denied the creditor's motion, finding that its lien was solely on the debtor's farm equipment and business machinery. Since the Court had specifically determined that the pole barn structures were permanent fixtures that became part of the realty, they were subject to the senior creditor's mortgage but not the creditor's lien.

Holding: The creditor's lien was only on equipment and did not apply to two pole barn structures, which were fixtures and subject to another creditor's mortgage on the debtor's real property.

***In re Hole*, Case No. 17-32875(1)(7), 2018 Bankr. LEXIS 594* (U.S. Bankr. W.D. Ky. March 2, 2018)**

Issues: Whether the bankruptcy court's equitable authority allowed it to extend the deadline to file a non-dischargeability complaint pursuant to 11 U.S.C. § 105(a).

Facts: The creditors sought an extension of the deadline to file a non-dischargeability action, contending that critical bank records of the debtor, which the debtor had failed to produce in the state court litigation between the parties, were not turned over to the creditors and the Chapter 7 Trustee until only four days before the filing deadline.

Holdings: The Court granted the creditors' motion for an extension of time to file a non-dischargeability complaint where the motion was filed one day after the deadline for filing such complaints, because the creditors had been diligent in pursuing their claims, the debtor was not prejudiced by the delay, and the circumstances warranted extending the deadline pursuant to 11 U.S.C. § 105(a).

***In re Blankenship*, Case No. 17-32785(1), 2018 Bankr. LEXIS 711*; 2018 WL 1357360 (U.S. Bankr. W.D. Ky. March 14, 2018)**

Issues: Whether the debtor was entitled to judgment avoiding the liens on the interest of his non-debtor spouse under § 522(f).

Facts: The Chapter 7 debtor listed Kimberly Hunt as a creditor with a secured claim of $2,500,000, by virtue of a judgment lien owed by the debtor secured by the debtor's real estate. The debtor also listed Lisa Ensey as a creditor with a secured claim of $1,500,000, by virtue of a judgment lien secured by the same piece of real estate.

Hunt and Ensey filed a motion that they be removed as creditors in the case, since the judgment was not against the debtor, but rather his non-debtor wife. At the hearing, Hunt and Ensey's attorney notified the Court that the debtor's counsel said he would remove them as creditors from the petition.

The debtor later filed a motion to avoid the judgment liens, stating that Ensey and Hunt were creditors of the debtor's wife, that the two judgment liens were filed against property solely in the debtor's name, and that the judgment liens impaired his exemption in the property. Ensey and Hunt each objected to the motion to avoid the judgment liens, stating that at the time the judgment liens were obtained against the debtor's wife, the real estate was owned jointly by the debtor and his wife, but the title to the property was later changed to reflect the debtor as the sole owner.

Holdings: The Court denied the debtor's motion to avoid the judicial liens under 11 U.S.C.S. § 522(f). The judicial liens did not affix to an interest of the debtor in the property and were not impairing his exemptions because the judgments were not obtained against him, but rather were obtained against his non-debtor spouse. To the extent the debtor sought to avoid the liens on the interest of his non-debtor spouse, this was an impermissible use of § 522(f).

***Ryan v. Morris (In re Morris)*, Case No. 15-10860(7)(1), AP No.16-1007, 579 B.R. 422*; 2017 Bankr. LEXIS 4310* (U.S. Bankr. W.D. Ky. December 19, 2017)**

Issues: Whether a debt owed to the creditor was nondischargeble, where the debtor used sale proceeds of several properties that had been purchased with the creditors' money by depositing them in a joint bank account with his wife and used the funds for personal expenses and to purchase other properties in the debtors' name.

Facts: The debtors Brandon – a real estate agent – and Dana Morris began the quick purchase, moderate improvement and quick resale of homes ("flipping") while Brandon was out of work. Brandon and Charlie Ray set up One Stop Realty, LLC, so that Brandon would not have to work as an independent contractor. A couple of years later, Brandon obtained his broker's license so he could ultimately do short sale transactions and handle the entire transaction through One Stop Realty, which at one point was dissolved and later reactivated by Brandon.

Brandon and the sons of the plaintiffs, the Ryans, were friends since being boys. Brandon and the Ryans' sons, who were also involved in the real estate business, began purchasing properties on short sales. Brandon learned from one of the Ryans' sons that if the property was purchased and sold in the name of a trust, the transactions would move along much quicker. The trust would also provide him with personal protection from liability should someone get hurt on the property and file a lawsuit.

Brandon would find property owners who were either in foreclosure or about to be foreclosed upon and convince them to transfer title to the property into his wife's Trust for little or no money. He would then negotiate a short sale of the property with a lender. Brandon determined that he could further streamline the transaction by setting up a trust and naming his wife as the Trustee.

After Brandon discussed the issue of the delay involved with banks and obtaining credit for the short sales, Joe Ryan agreed to set up a line of credit with his bank, BB&T, for Brandon and his sons to have credit available quickly to purchase properties. Brandon and the Ryans agreed they would use the line of credit to obtain funds to purchase the property and then he would repay the Ryans the borrowed funds upon the sale of the particular properties. The Ryans would not receive any profit upon the resale of the property and Brandon Morris would pay the interest owed on the line of credit.

As the property became available, Brandon would contact the Ryans and tell them the amount of money needed for a particular purchase. The agreement between Morris and the Ryans was that the Ryans would then write him a check for the purchase and Morris would repay the funds to the Ryans when the property was sold. Sometimes Brandon would take the money from the short sale and roll it into the purchase of another property without telling the Ryans. The Ryans were also unaware that at the time they advanced funds to Brandon for the purchase of properties, some of the titles to the properties were being transferred into the Trust. Brandon never provided the Ryans with a closing statement or deed to any of the properties purchased with their funds from the line of credit.

In 2008, when the real estate market began to slow down, Brandon told the Ryans that the properties were not selling because he was having trouble getting contractors to perform necessary renovations or that the repairs were taking longer than anticipated. Ultimately, Brandon failed to pay the $283,000 out on the line of credit, and the properties in Brandon's "inventory" would not sell for enough to pay the debt. In addition, the Ryans learned that Brandon had sold at least one house purchased with the Ryans' line of credit and kept the money.

After determining that Brandon did not have the funds to pay off the line of credit, the Ryans decided to sever their relationship with him, and had him sign a promissory note in the amount of $283,500 with interest of 4.750%. Brandon defaulted on the note after making a few payments, and the Ryans filed a state court action to collect the debt alleging fraud.

The debtors filed a Chapter 7 bankruptcy petition, but failed to provide the required list of properties transferred by them to a self-settled trust or similar device of which the debtor is a beneficiary within ten years immediately preceding the case. Upon questioning, the debtor Dana testified that she was unaware of any properties that had been sold in her name, and that she simply

signed whatever Brandon told her to sign. She also testified that she did not know what happened to any of the funds transferred on the transactions, and that she had no copies of any documents.

In response to Question 10 on the Schedule of Financial Affairs, requiring a list of all properties transferred in the ordinary course of business or financial affairs in the two years immediately preceding the date of the filing of the Petition, the debtors listed only four transactions. Brandon either had not maintained business records of all of the real estate transactions, or he concealed the. He testified that as a licensed real estate agent and broker, he was required to maintain business records for only five years.

The Ryans filed an adversary proceeding seeking a judgment that the debt owed by Brandon to them was nondischargeable.

Holdings: The debt was nondischargeable under 11 U.S.C.S. § 523(a)(6) because the preponderance of the evidence established that the debtor committed conversion by exercising dominion and control over the sale proceeds of several properties that had been purchased with the creditors' money when he deposited those funds in a joint bank account with his wife and used those funds for personal expenses and to purchase other properties in the debtors' name. The creditors also established all of the elements for nondischargeability under § 523(a)(2)(A). The discharge was denied under 11 U.S.C.S. § 727(a)(3) where, inter alia, the debtors failed to produce records of over 87 real estate transactions. The discharge was denied under § 727(a)(4), as he debtor testified falsely in his Rule 2004 examination that he did not possess any documents because they were destroyed when his computer was seized.

***Ryan v. Morris (In re Morris)*, Nos. 15-10860(1)(7), 16-1007, 2018 Bankr. LEXIS 1208 (Bankr. W.D. Ky. Apr. 23, 2018)**

Issues: Whether the debtors were entitled to an order vacating the judgment determining they were not entitled to a discharge.

Facts: The debtors moved to vacate the judgment determining they were not entitled to a discharge pursuant to 11 U.S.C. § 727(a)(3) and (a)(4), and that the debt owed to the plaintiffs by debtor two was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6).

Debtor Dana Morris contended the Court's Judgment denying her a discharge pursuant to 11 U.S.C. § 727(a)(3) should be vacated because the plaintiffs did not have standing to bring an action against her objecting to her discharge. She stated that under 11 U.S.C. § 727(c)(1), only the trustee, creditors, or the United States Trustee may object to a debtor's discharge. Since Dana did not sign the Promissory Note with the plaintiffs, she argued they were not creditors and thus had no standing to object to her discharge. She also claimed there was no evidence to support the Court's Judgment denying her discharge under 11 U.S.C. § 727(a)(3).

Debtor Brandon Morris contended that the Judgment failed to give full credit for payments he made on the debt, but he did not indicate what payments he made that were not credited. He also

claimed the Court erred in using an interest rate of 4.750%, which was the rate agreed to by the parties when the promissory note was signed.

Holdings: The fact that debtor one did not sign a note payable to plaintiffs did not mean they were not creditors with standing to object to her discharge, as there was no challenge to their proof of claim, and thus no finding it had been disallowed. The court declined to vacate its judgment denying debtor one a discharge under 11 U.S.C.S. § 727(a)(3) for failing to maintain adequate records, as a reasonably prudent person in the same or similar circumstances would not have relied on her husband to maintain all of the business records. There was no merit to debtor two's challenge to the judgment on the grounds that it did not credit him for all payments he made on the debt, as he did not indicate what payments he made that were not credited. The court declined to vacate its award to plaintiffs of pre-judgment interest at the contract rate, as it made them whole.

***Wheatley v. Johnson (In re Johnson)*, Case No. 16-31815 (1)(7), AP No. 16-3081; 579 B.R. 796; 2017 Bankr. LEXIS 438558* (U.S. Bankr. W.D. Ky. December 21, 2017)**

Issues: Whether the trustee was entitled to a judgment against the defendant for a preferential transfer under 11 U.S.C. §§ 547, 548, 550, 551 and KRS § 378.010, et seq. in light of alleged constructive fraud.

Facts: The debtor filed a Chapter 7 bankruptcy and received her discharge in 2016. Prior to this case, the debtor had filed three other bankruptcy cases: a Chapter 7 in which the debtor received a discharge in 2006; a Chapter 13 which was dismissed in 2014 for failure to make Plan payments; and a Chapter 13 which was dismissed in 2016 for failure to make Plan payments.

The creditor Navient Solutions, Inc. on behalf of the Department of Education Loan Services filed Proofs of Claim in the three later bankruptcy cases.

The Trustee filed an adversary complaint against the debtor's son, defendant Robert Keaton Johnson. At the 341 Meeting of Creditors, the debtor testified that she had deposited her federal tax refund check of $9,460.02, and the defendant's federal tax refund check of $5,433.03, into her Fort Knox Credit Union account. On the same day the checks were deposited, the debtor withdrew $14,440 from the account, leaving only $3.48. She testified that she gave her son his tax refund, and that she used the remaining $9,006.97 to pay her son's bills, including his rent, medical bills, and utilities. No records were produced to show payment of the bills. The debtor received nothing of value from her son in exchange for the $9,006.97 that she used to pay her son's bills.

The defendant testified that his wife was admitted to the hospital for complications with her pregnancy. She remained in the hospital for two and one-half months, during which time the debtor lived with him and paid some of his bills. The debtor claimed the defendant's children as dependents on her taxes. Contrary to the debtor's testimony, the defendant testified that the debtor lived with him prior to his wife being hospitalized.

Holdings: The transfer from the debtor to the defendant transferee met the elements of a preference under 11 U.S.C.S. § 547(b). Therefore, judgment in favor of the Trustee was

appropriate. The facts established the existence of several badges of fraud. The Trustee was entitled to judgment in his favor under 11 U.S.C.S. § 548(a)(1)(A) (actual fraud). The Trustee was also entitled to judgment against the defendant for constructive fraud under § 548(a)(1)(B). The evidence precluded the court from making a finding in favor of the defendant on the defense that the funds the debtor transferred constituted rental payments to the defendant in exchange for the debtor being allowed to live with his family. The court rejected the "no harm, no foul" rule (i.e. wildcard exemption is not fully used, but could have been used for the subject funds). The Trustee was entitled to turnover of the value of the avoided transfer under 11 U.S.C.S. §§ 541(a)(4), 550.

CNH Indus. Capital Am. LLC v. Williams (In re Williams), **Nos. 17-10722(1)(7), 17-1026, 2018 Bankr. LEXIS 1047 (Bankr. W.D. Ky. Apr. 5, 2018)**

Issues: Whether a debt was nondischargeable where the debtor sold the collateral without paying the creditor, but intended to pay the creditor at a later time.

Facts: The debtor and the creditor entered into two Retail Installment Sale Contracts and Security Agreements and UCC Financing Statements under which the creditor loaned money to the debtor to purchase farm equipment, with the loans secured by the equipment.

The debtor filed a Chapter 7 bankruptcy. At the Section 341 Meeting, he admitted that he sold some of the equipment to pay for feed for his cattle. The debtor stated that he intended to pay the creditor later. The creditor filed an adversary proceeding to except the debts from discharge under 11 U.S.C. § 523(a)(6).

Holdings: Because the debtor admitted that he sold some of the equipment securing the creditor's loans and failed to pay the proceeds of those sales to the creditor, the debt was nondischargeable under 11 U.S.C.S. § 523(a)(6), because by converting the equipment and selling it without the creditor's consent, the debtor's actions were "willful" per § 523(a)(6). The same facts established that he acted "maliciously" because his actions were in conscious disregard of the creditor's security interest. To the extent the debtor intended to eventually pay the creditor back, such intent was insufficient to negate the elements of § 523(a)(6).

Campbell v. Butz (In re Butz), **Case No. 15-103401(1)(7), AP No. 16-1013, 2018 Bankr. LEXIS 27* (U.S. Bankr. W.D. Ky. January 5, 2018)**

Issues: Whether a loan made to the debtors for a failed business was a nondischargeable debt in light of the creditor's allegations of fraud.

Facts: The debtors Thomas and Shawn Butz, neither of whom had any experience in owning/operating a retail business, began discussing the idea of opening a fashion boutique selling specialty footwear. Shawn met Donald Ray, who owned the web based footwear brand, and they decided to open a retail location to sell the footwear on Waikiki Beach in Hawaii.

The debtors used Thomas's prior employment severance package, and their retirement accounts and savings, as capital for the new business. Thomas drew up a business plan estimating the start-

up cost to be about $750,000, but having no previous retail experience, the debtors were unable to obtain financing from a bank. Thomas's parents agreed to loan the debtors $100,000, and the plaintiffs, Shawn's parents, agreed to a $240,000 loan. The debtors gave the plaintiffs a note, a security agreement in unidentified personal property and equipment, and a UCC-1 statement which was properly filed. The debtors also signed personal guaranty agreements.

After the debtors obtained the family financing, they began searching for real estate upon which to build the store. The initial building costs and inventory were higher than the debtors anticipated, and the plaintiffs loaned them an additional $60,000. The parties executed an Addendum to the initial loan agreement to cover this loan.

The debtors had the store built out and entered into an inventory agreement with Ray. Ultimately, the debtors failed to pay the builder, the store failed, the debtors defaulted on their payments to the plaintiffs, and the plaintiffs sued for breach of contract, unjust enrichment and fraud in the inducement based on the debtors' actions in inducing them to enter into the loan agreements and failing to repay the loans.

The debtors were unable to show that they used their own funds to finance the business, because they had lost many of their records. Nonetheless, it was shown that the debtors regularly transferred funds from their business account to cover their personal and living expenses, including purchases from QVC, Nordstrom, and Macy's, as well as plastic surgery. Thomas paid himself $8,000 per month. They also made hourly wage payments to themselves in order to have the business cover their health insurance. The debtors used over $36,000 to stay at a Trump Hotel in Hawaii, and paid almost $10,000 for their son to stay at the Outrigger Reef Hotel. They also paid $30,000 to send their son to a private camp.

Upon the debtors filing a Chapter 7 bankruptcy petition, the plaintiffs initiated an adversary proceeding seeking a judgment of nondischargeability and denying the debtors a discharge.

Holdings: Debt resulting from sums loaned to the debtors by the debtor wife's parents was nondischargeable under 11 U.S.C.S. § 523(a)(2)(A) because there was ample evidence that the debtors induced the parents to make the loans for use in their retail business but then transferred the funds into their own personal account and used such funds to pay their own lavish personal and living expenses. The debtors were not entitled to a discharge pursuant to 11 U.S.C.S. § 727(a)(3) because where the debtors were both educated, sophisticated business people, failure to produce basic business documents showed the debtors did not adequately preserve or maintain records in order to ascertain the debtors' financial condition. The debtors also were not entitled to a discharge pursuant to 11 U.S.C.S. § 727(a)(6) because they refused to obey a lawful order of the court seeking documents.

***Campbell v. Butz (In re Butz)*, Nos. 15-10340(1)(7), 16-1013, 2018 Bankr. LEXIS 1176 (Bankr. W.D. Ky. Apr. 19, 2018)**

Issues: Whether a debt owed to the creditor was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6).

Facts: The debtors moved on six grounds to alter or vacate judgment entered for the plaintiffs on their complaint to have the debt owed to them declared nondischargeable pursuant to 11 U.S.C.S. § 523(a)(2)(A) and (a)(6) and to deny the debtors a discharge.

First, the debtors claimed the Court failed to adequately set forth facts regarding the knowledge of the plaintiffs regarding the risky nature of the loan. The Court rejected this assertion, because the evidence showed the debtors believed they had a great business plan that would be profitable and successful, and they put in writing to the plaintiffs that because the debtors personally guaranteed the loan, there was no risk to the plaintiffs. Further, whether the plaintiffs knew the loan was risky was irrelevant, since it was a loan and not an investment.

Second, the debtors claimed the Court failed to "set forth undisputed facts regarding the [plaintiffs'] knowledge and consent to using funds from the [plaintiffs] for living expenses and the use of those funds in lieu of payment and salary." The Court rejected this claim as the evidence showed that the plaintiffs had no knowledge that the debtors were using the loan proceeds to support their lavish lifestyle, nor did they consent to such use.

Third, the debtors claimed the Court erred in failing to state in the Opinion "that other family members made similar loans and those funds were used by the Debtors for both living expenses and business expenses." The Court found this to be irrelevant, as the other family members who provided loans did not file suit against the debtors on their loans, nor did any of them testify at trial.

Fourth, the debtors claimed the Court erred by failing to consider their efforts in providing documents and that the debtors "provided all documents in their possession including copies of tax returns." The Court rejected this argument because the evidence showed that the debtors lost many of their business records, could not produce the business records necessary to support their claims, and failed to provide the plaintiffs with enough information to track their financial dealings with "substantial completeness." *Bergeron v. Ross (In re Ross)*, 367 B.R. 577 (W.D. Ky. 2007).

Fifth, the debtors claimed that while they were well educated, they were not good business people and this fact should not have been held against them. The Court noted the debtor Thomas Butz' educational and professional experience as one of the reasons the plaintiffs were induced to loan the debtors money for the business. These facts were also relevant as to whether the debtors' lack of business records were justified.

Finally, the debtors took issue with the Court's use of the contract interest rate of 15% on the Judgment declaring the debt nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (a)(6). Instead, the debtors contended the rate of interest on judgments pursuant to 28 U.S.C. § 1961, 40 U.S.C. § 258e-1, and 18 U.S.C. § 3612 should have been used for a rate of 1.8% on the date of the Judgment. The Court found that the parties' agreement provided for some pre-judgment interest on the debt, but neither party put on proof of any other pre-judgment interest owed on the debt after September of 2012. In keeping with the parties' agreement, the Court agreed to amend the Judgment to provide for pre-judgment interest up to September, 2012.

Holdings: The court rejected the debtors' claim that the court failed to adequately set forth facts as to plaintiffs' knowledge regarding the risky nature of the loan. The record did not support the debtors' claim that the court failed to set forth undisputed facts as to plaintiffs' knowledge and consent to using funds from plaintiffs for living expenses. The court would amend the judgment to clarify that any interest awarded was pre-judgment interest on the debt, for a total debt of $328,589. Since the interest rate at issue was pre-judgment interest only, it was governed by state law, specifically Ky. Rev. Stat. Ann. § 360.010.

***In re Abell*, No. 17-32555(1)(13), 2018 Bankr. LEXIS 1117 (Bankr. W.D. Ky. Apr. 12, 2018)**

Issues: Whether the creditor had a secured claim, where its interest attached to the collateral pre-petition, but its lien was not perfected until post-petition.

Facts: On August 9, 2017, the debtors filed their Voluntary Petition seeking relief under Chapter 13. They listed "Auto Perks Car Sales" as an unsecured creditor for a debt of $8,132.40 incurred in March, 2017 for a loan, and listed the claim as "disputed."

On September 12, 2017, the debtors' Chapter 13 Plan, which proposed to pay unsecured creditors at a rate of 34%, was confirmed. The debtors filed a Schedule of Allowed Claims listing three unsecured claims that had been proven, which did not include Auto Perks.

On September 25, 2017, Auto Perks filed a Proof of Claim in the amount of $8,196, for money loaned for the purchase of an automobile. Auto Perks represented the claim as secured by a motor vehicle, and the basis for perfection was "title lien statement Washington County Clerk." The debtors objected to the claim, asserting that Auto Perks' lien was not filed until August 21, 2018, after the bankruptcy petition was filed. The debtors further argued that the post-petition filing violated 11 U.S.C. § 362, and since there was no lien shown on the automobile's Certificate of Title issued on July 31, 2017, Auto Perks' claim was not perfected and at most, was unsecured. Auto Perks responded that the date the lien was filed on the Certificate of Title was irrelevant, because its lien was a purchase money security interest that attached when the debtors executed the Security Agreement and received the collateral, citing KRS 355.9-311(1).

Holdings: The undisputed facts of the case established that the creditor did not strictly comply with the requirements of KRS § 186A.190 until August 21, 2017. This was two weeks after the debtors filed their Chapter 13 Petition, and accordingly, the creditor's claim was an unsecured claim. KRS § 355.9-311(1) simply states that the filing of the financing statement is not necessary to perfect a security interest in motor vehicles which were covered by KRS ch. 186A. However, ch. 186A provides the method for perfection, which is by notation of the lien on the Certificate of Title. The creditor never had a secured claim against the debtor. Therefore, the court could not amend the Order of Confirmation to treat the creditor's claim as secured, but the court was unaware of any reason why the claim could not be treated as unsecured.

***Parrish v. Lincoln Nat'l Bank*, Nos. 17-31087(1)(13), 18-3005, 2018 Bankr. LEXIS 1398 (Bankr. W.D. Ky. May 10, 2018)**

Issues: Whether the debtor's avoidance action under 11 U.S.C.S. § 544 would be dismissed, where the debtor did not first seek an order from the court for leave to file the avoidance action.

Facts: The debtor filed a Chapter 13 Petition, listing Lincoln as a secured creditor in the amount of $5,355.21 for a "note loan secured by miscellaneous household goods." The debtor's Plan was confirmed, and provided that a scheduled secured claim of Lincoln in the amount of $5,355.21 would be paid over the life of the 60 month Plan with interest at 3.9%.

The debtor then filed an adversary proceeding against Lincoln, claiming that Lincoln's actions in setting off the debt owed to it with funds from the debtor's bank account 20 days before the debtor filed for bankruptcy protection, constituted a preferential transfer under 11 U.S.C. § 547.

Lincoln moved to dismiss the complaint, claiming the debtor lacked standing to assert a preference action and that the Complaint failed to state a claim on which relief may be granted because the debtor could not prove an essential element of his preference claim under 11 U.S.C. § 547(b)(5).

Holdings: Where a debtor brought an avoidance action under 11 U.S.C.S. § 544, without first seeking an order from the court for leave to file the avoidance action, the case had to be dismissed without prejudice for lack of standing. The court would not grant the debtor's Motion for Derivative Standing because the Complaint, based on 11 U.S.C.S. § 547(b)(5), did not state a claim upon which debtor was entitled to relief.

JUDGE ALAN C. STOUT

***Owens v. Coffey (In re Coffey)*, Case No. 17-31506, Chapter 13, AP No. 17-3040; 2018 Bankr. LEXIS 564* (U.S. Bankr. W.D. Ky. March 1, 2018)**

Issues: Whether the debtor's motion for judgment on the pleadings of the creditor's adversary complaint for nondischargeability would be granted, where the confirmed Plan did not expressly provide that the creditor's claims were deemed dischargeable.

Facts: While the debtor and the creditor were engaged to be married, the creditor made several transfers of money and property to the debtor. Eventually, the relationship ended. The creditor filed suit in the state court, alleging the debtor committed fraud by inducing the creditor to give her money and purchase a vehicle for her. Because the debtor failed to fully respond to the creditor's discovery requests, the creditor filed a motion to compel. Before a hearing on the motion, the debtor filed for Chapter 13 bankruptcy relief.

The creditor did not timely object to dischargeability, did not attend the 341 Meeting of Creditors, and did not object to the debtor's Plan, which made no specific provision for payment of the creditor's claim. The Plan was ultimately confirmed.

The creditor filed a proof of claim, to which the debtor objected. The creditor did not respond to the objection, and the Court entered an order sustaining it and disallowing the creditor's claim. The creditor then filed a timely adversary complaint pursuant to 11 U.S.C. § 523(a)(2)(A), seeking to except from discharge the debts incurred by the debtor's alleged false pretenses, false representations or actual fraud. The creditor also filed a motion for stay relief in the main bankruptcy case, so the state court litigation could be completed. The debtor filed a motion for judgment on the pleadings, arguing that the creditor's nondischargeability claims were barred by res judicata, as the Chapter 13 plan had already been confirmed.

Holdings: The Court denied the debtor's motion for judgment on the pleadings in the adversary case, and granted the creditor's motion for stay relief in the main bankruptcy case. The Plan did not expressly provide that the creditor's claims were deemed dischargeable, and thus the creditor did not have notice. And, the debtor's arguments as to the merits of the underlying claim should be asserted in the state court action, and could not defeat the nondischargeability claims at this stage of the litigation.

TAB
B

Beth A. Buchanan was appointed as United States Bankruptcy Judge for the Southern District of Ohio on May 10, 2011. Prior to her appointment, Judge Buchanan was a member of Frost Brown Todd LLC in the Bankruptcy and Restructuring Practice Group where she practiced exclusively in the areas of bankruptcy and insolvency law, representing debtors, creditors' committee, secured lenders and unsecured creditors in numerous complex chapter 7, 11 and 15 bankruptcy proceedings. Prior to obtaining her law degree, Judge Buchanan worked in banking for over eight years with two major financial institutions.

Judge Buchanan is a member of the American Bankruptcy Institute, the American Bar Association, the Thomas F. Waldron American Bankruptcy Law Forum and is the Chairperson of the Chapter 11 Subcommittee and member of the Standing Committee of the Local Bankruptcy Rules Committee for the Southern District of Ohio.

Judge Buchanan graduated in 1986 from The Ohio State University with a B.S.B.A. degree and earned her J.D. degree in 1997 from the University of Dayton School of Law, where she graduated *summa cum laude*.

Honorable Jeffery P. Hopkins

U.S. Chief Bankruptcy Judge

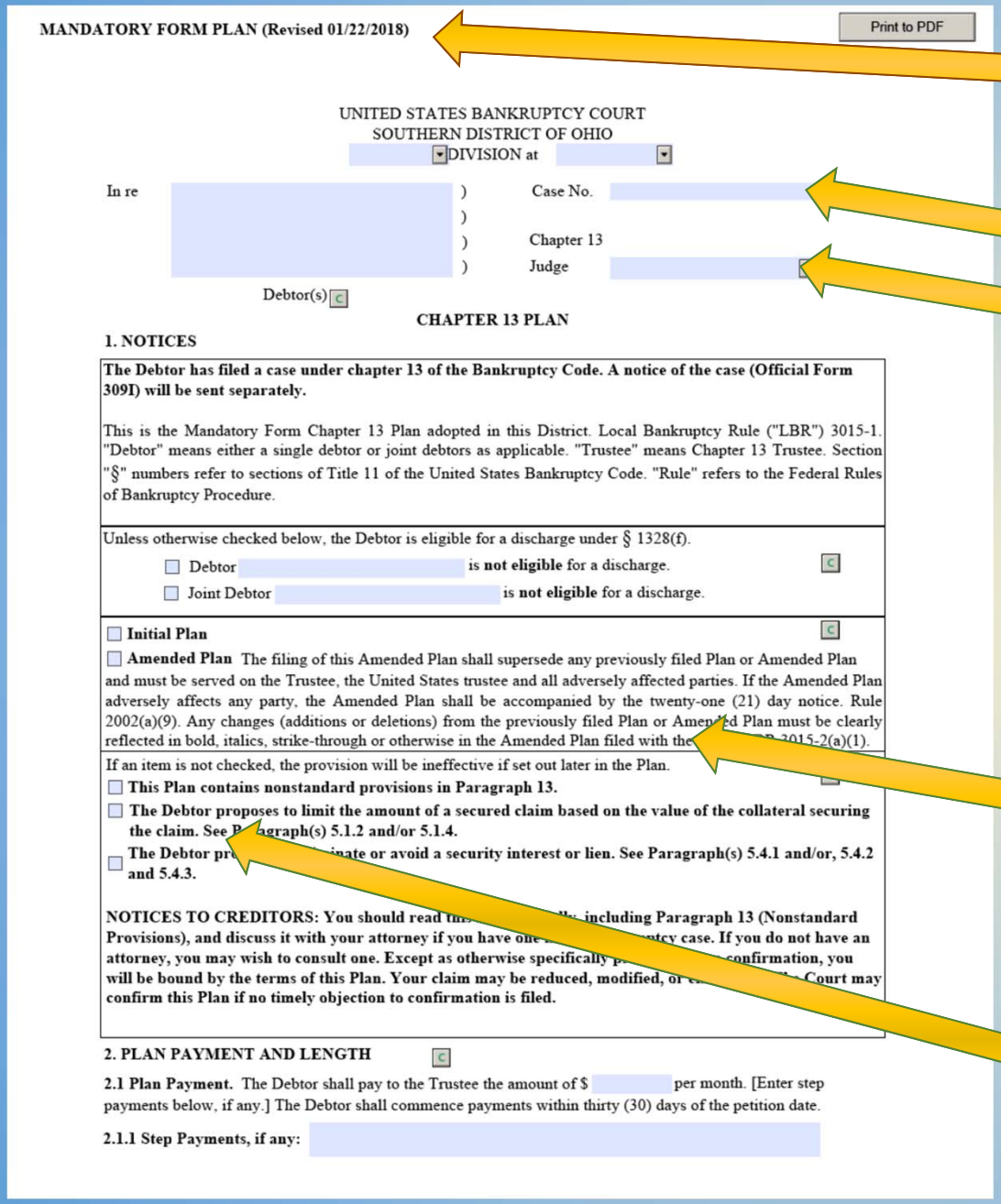
Hon. Jeffery P. Hopkins was appointed to the U.S. Bankruptcy Court for the Southern District of Ohio on April 1, 1996, and has authored over 80 published opinions and articles mostly on consumer bankruptcy law. In 2010, Judge Hopkins received the Hon. William K. Thomas Distinguished Jurist Award from his alma mater, the Moritz College of Law at The Ohio State University. He has been elected as a member of the American Law Institute and Fellow of the American College of Bankruptcy. Judge Hopkins is the past President of the National Conference of Bankruptcy Judges, past Director of the American Bankruptcy Institute, and past member of the Advisory Committee on Bankruptcy Rules. Currently, Judge Hopkins serves, by appointment of Chief Justice John Roberts, Jr., on the Committee on the Judicial Branch, where he co-chairs the subcommittee on Civic Engagement. He is also an editor for Bloomberg on Bankruptcy. Judge Hopkins was in private practice for three years with a global law firm working in the litigation group and has an extensive public service record. In 1990, he was appointed an Assistant U.S. Attorney for the Southern District of Ohio, and from 1993 until 1996, served as Chief of the Civil Division of that office. During his tenure as an AUSA, Judge Hopkins prosecuted civilly health care providers and defense contractors under the False Claims Act, and defended multiple federal agencies and employees, including the Air Force and Marine Corps against civil suits. Prior to his appointment to the bench, Judge Hopkins clerked on the United States Court of Appeals for the Sixth Circuit for Honorable Alan E. Norris. He is an alumni of Middlesex School in Concord, Mass. (1978), received his A.B. degree in government and legal studies from Bowdoin College (1982), and his Juris Doctor degree from Ohio State (1985). Judge Hopkins is married and has two children, the eldest of whom is considering a career as an attorney.

(Hopefully) Helpful Hints for Chapter 13 Plans

Excerpt from October 26, 2018 presentation prepared by:

Neil Berman, Law Clerk to Bankruptcy Judge Guy R. Humphrey

Colleen Militello, Law Clerk to Bankruptcy Judge Beth A. Buchanan



MANDATORY FORM PLAN (Revised 01/22/2018) Print to PDF

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
DIVISION at

In re) Case No.
)
) Chapter 13
) Judge

Debtor(s)

CHAPTER 13 PLAN

1. NOTICES

The Debtor has filed a case under chapter 13 of the Bankruptcy Code. A notice of the case (Official Form 309I) will be sent separately.

This is the Mandatory Form Chapter 13 Plan adopted in this District. Local Bankruptcy Rule ("LBR") 3015-1. "Debtor" means either a single debtor or joint debtors as applicable. "Trustee" means Chapter 13 Trustee. Section "§" numbers refer to sections of Title 11 of the United States Bankruptcy Code. "Rule" refers to the Federal Rules of Bankruptcy Procedure.

Unless otherwise checked below, the Debtor is eligible for a discharge under § 1328(f).

☐ Debtor is **not eligible** for a discharge.
☐ Joint Debtor is **not eligible** for a discharge.

☐ **Initial Plan**
☐ **Amended Plan** The filing of this Amended Plan shall supersede any previously filed Plan or Amended Plan and must be served on the Trustee, the United States trustee and all adversely affected parties. If the Amended Plan adversely affects any party, the Amended Plan shall be accompanied by the twenty-one (21) day notice. Rule 2002(a)(9). Any changes (additions or deletions) from the previously filed Plan or Amended Plan must be clearly reflected in bold, italics, strike-through or otherwise in the Amended Plan filed with the

If an item is not checked, the provision will be ineffective if set out later in the Plan.
☐ **This Plan contains nonstandard provisions in Paragraph 13.**
☐ **The Debtor proposes to limit the amount of a secured claim based on the value of the collateral securing the claim. See Paragraph(s) 5.1.2 and/or 5.1.4.**
☐ **The Debtor pr inate or avoid a security interest or lien. See Paragraph(s) 5.4.1 and/or, 5.4.2 and 5.4.3.**

NOTICES TO CREDITORS: You should read th lly, including Paragraph 13 (Nonstandard Provisions), and discuss it with your attorney if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one. Except as otherwise specifically p confirmation, you will be bound by the terms of this Plan. Your claim may be reduced, modified, or t Court may confirm this Plan if no timely objection to confirmation is filed.

2. PLAN PAYMENT AND LENGTH

2.1 Plan Payment. The Debtor shall pay to the Trustee the amount of $ per month. [Enter step payments below, if any.] The Debtor shall commence payments within thirty (30) days of the petition date.

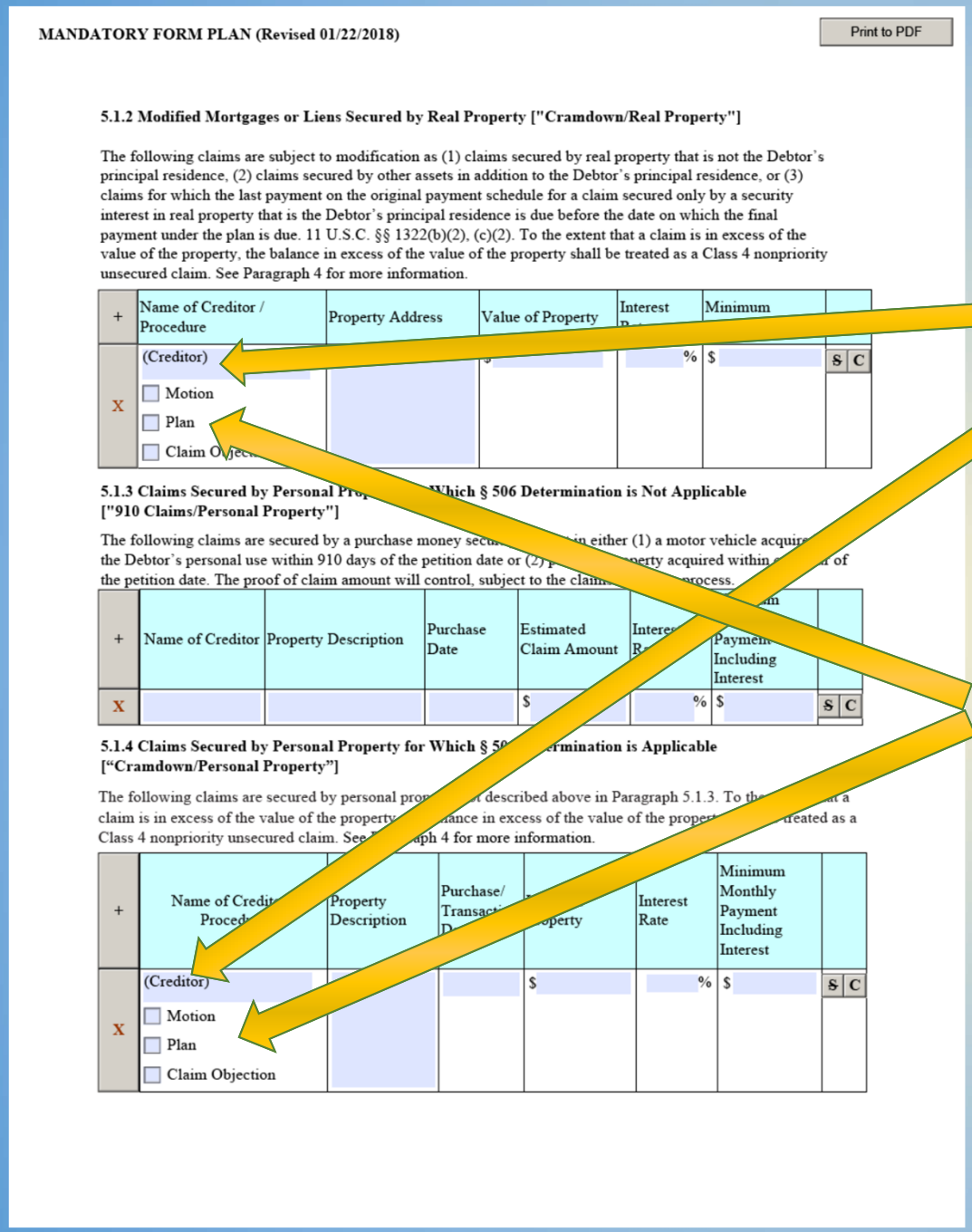
2.1.1 Step Payments, if any:

Is the plan the current version?

Plan needs to be filed with a complete caption, including the Judge and case number. Do not file the plan until after the petition is filed and the case number and Judge is assigned.

If more than one amended plan is filed, highlight only the changes from the previously filed plan.

Check the boxes on page 1 when they apply. National Rules require this provision in the Plan



MANDATORY FORM PLAN (Revised 01/22/2018)

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5.1.2 Modified Mortgages or Liens Secured by Real Property ["Cramdown/Real Property"]

The following claims are subject to modification as (1) claims secured by real property that is not the Debtor's principal residence, (2) claims secured by other assets in addition to the Debtor's principal residence, or (3) claims for which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the Debtor's principal residence is due before the date on which the final payment under the plan is due. 11 U.S.C. §§ 1322(b)(2), (c)(2). To the extent that a claim is in excess of the value of the property, the balance in excess of the value of the property shall be treated as a Class 4 nonpriority unsecured claim. See Paragraph 4 for more information.

+	Name of Creditor / Procedure	Property Address	Value of Property	Interest	Minimum	
X	(Creditor) ☐ Motion ☐ Plan ☐ Claim Objection			%	$	S C

5.1.3 Claims Secured by Personal Property for Which § 506 Determination is Not Applicable ["910 Claims/Personal Property"]

The following claims are secured by a purchase money security interest in either (1) a motor vehicle acquired for the Debtor's personal use within 910 days of the petition date or (2) property acquired within one year of the petition date. The proof of claim amount will control, subject to the claim objection process.

+	Name of Creditor	Property Description	Purchase Date	Estimated Claim Amount	Interest Rate	Payment Including Interest	
X				$	%	$	S C

5.1.4 Claims Secured by Personal Property for Which § 506 Determination is Applicable ["Cramdown/Personal Property"]

The following claims are secured by personal property not described above in Paragraph 5.1.3. To the extent that a claim is in excess of the value of the property, the balance in excess of the value of the property shall be treated as a Class 4 nonpriority unsecured claim. See Paragraph 4 for more information.

+	Name of Creditor / Procedure	Property Description	Purchase/ Transaction Date	Value of Property	Interest Rate	Minimum Monthly Payment Including Interest	
X	(Creditor) ☐ Motion ☐ Plan ☐ Claim Objection			$	%	$	S C

Always fill in name of the creditor.

Rule 7004 service only required when cramdown pursuant to the Plan; Always choose one of the options.

MANDATORY FORM PLAN (Revised 01/22/2018)

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5.1.5 Domestic Support Obligations (On-Going) - Priority Claims under § 507(a)(1)

If neither box is checked, then presumed to be none.

☐ **Trustee disburse**

☐ **Debtor direct pay**

The name of any holder of any domestic support obligation as defined in § 101(14A) shall be listed below. If the Debtor becomes subject to a domestic support obligation during the Plan term, the Debtor shall notify his or her attorney and the Trustee.

+	Name of Holder	State Child Support Enforcement Agency, if any	Monthly Payment Amount	
X			$	S C

5.1.6 Executory Contracts and Unexpired Leases

The Debtor rejects the follow... ...ired leases.

Notice to Creditor of Deadline to File Claim for Rejection Dama...
A proof of claim for rejection damages must be filed by the creditor within seventy (70) days from the date of confirmation of the Plan. Rule 3002(c)(4). Such claim shall be treated as a Class 4 nonpriority unsecured claim.

+	Name of Creditor	Property ...escripti...	
X			S C

The Debtor assumes the following executory contracts and unexpired leases. Unless otherwise ordered by the Court, all motor vehicle lease payments shall be made by the Trustee. LBR 3015-1(d)(2). Any prepetition arrearage shall be cured in monthly payments prior to the expiration of the executory contract or unexpired lease. The Debtor may not incur debt to exercise an option to purchase without obtaining Trustee or Court approval. LBR 4001-3.

Trustee disburse.

+	Name of Creditor	Property Description	Regular Number of Payments Remaining as of Petition Date	Monthly Contract/Lease Payment	Estimated Arrearage as of Petition Date	Contract/ Lease Termination Date	
X				$	$		S C

Debtor direct pay.

+	Name of Creditor	Property Description	Regular Number of Payments Remaining as of Petition Date	Monthly Contract/Lease Payment	Estimated Arrearage as of Petition Date	Contract/ Lease Termination Date	
X				$	$		S C

Assume or Reject all Executory Contracts and Unexpired Leases Listed On Schedule G.

MANDATORY FORM PLAN (Revised 01/22/2018)

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5.4.1 Wholly Unsecured Mortgages/Liens

The follow…tgages/liens are wholly unsecured and may be modified and eliminated. See *In re Lane*, 280 F.3d 663 (6th Ci… …e Paragraph 4 for additional information. Preferred form motions and orders are available on the Court's websit… …ohsb.uscourts.gov.

	+	Name of Creditor / Pr…	Property Address	
1	X	(Creditor) ☐ Motion ☐ Plan		S C

	Value of Property	SENIOR Mortgages/Liens (Amount/Lienholder)		Amount of Wholly Unsecured Mortgage/Lien	
1	$	$	(Lienholder) + X C		S C

5.4.2 Judicial Liens Impairing an Exemption in Real Property

The following ju… …the Debtor's exemption in real property and may be avoided under § 522(f)(… (A). See Paragraph 4 for addi… …ferred form motions and orders are available on the Court's website at www.ohsb.uscourts.gov.

	+	Name of Creditor / Procedure	Property Address		…emption	
1	X	(Creditor) ☐ Motion ☐ Plan		$ Debtor's Interest $	$ Statutory Basis §	

	OTHER Liens or Mortgages (Amount/Lienholder Name)		Judicial Lien	Amount of Judicial Lien to be Avoi…	
1	$	(Lienholder) + S	$	…ffective Upon:	S C

5.4.3 Nonpossessory, Nonpurchase-Money Security Interest in Exempt Property

The following nonpossessory, nonpurchase-money security interests impair the Debtor's exemption in personal property and may be avoided under § 522(f)(1)(B). See Paragraph 4 for additional information. Preferred form motions and orders are available on the Court's website at www.ohsb.uscourts.gov.

+	Name of Creditor / Procedure	Property Description	Value of Property	Exemption	Amount of Security Interest to be Avoided	
X	(Creditor) ☐ Motion ☐ Plan		$	$ Statutory Basis §	$ Effective Upon:	S C

If filing motions under these sections, be sure the legal theory in the motion is consistent with the Plan. 7004 service only required if the lien is being avoided by the Plan.

13. NONSTANDARD PROVISIONS

The nonstandard provisions listed below are restricted to those items applicable to the particular circumstances of the Debtor. Nonstandard provisions shall not contain a restatement of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules or the Mandatory Chapter 13 Form Plan. Any nonstandard provision placed elsewhere in this Plan is void and shall have no binding effect.

+	Nonstandard Provisions	
X		S C

What is Acceptable Language for a Special Plan Provision?

ACCEPTABLE

A short description or clarification of treatment being provided to creditor, identifying a) who the creditor is ("the first mortgagee on the primary residence, XYZ bank"); b) appropriate account or other identifying information (without personal identifiers listed in Rule 9037); c) value and/or amount of the claim if appropriate and applicable; d) specific treatment being provided, including whether a separate motion or adversary proceeding will be filed.

NOT ACCEPTABLE

Description of the entire history of the parties' relationship, positions of the parties, etc.

Providing for avoidance of a lien, determination of dischargeability of a debt, injunction or other relief which must be pursued by an adversary proceeding under Rule 7001.

- *In re Phile*, 490 B.R. 250 (Bankr. S.D. Ohio 2011) (Buchanan, J.) (determination of the dischargeability of a domestic relations debt must be pursued by an adversary proceeding).
- *In re Evans*, 242 B.R. 407 (Bankr. S.D. Ohio 1999) (Hopkins, J.) (dischargeability of a student loan must be pursued by an adversary proceeding.

Restatement of the law, including the Bankruptcy Code or Rules

- *In re Poff*, Case No. 11-15869, 2012 WL 7991472 (Bankr. S.D. Ohio March 16, 2012) (Buchanan, J.) (form should not include boilerplate language, and statements of the law).

Event List	Event Name
Answer/Response	Answer to Complaint
Answer/Response	Answer to Third Party Complaint
Answer/Response	Answer to Counterclaim
Answer/Response	Answer to Crossclaim
Answer/Response	Involuntary Answer
Answer/Response	Objection
Answer/Response	Reply to Response/Objection
Answer/Response	Response

Appeal	Acknowledgement of Request for Transcript of Testimony
Appeal	Addendum to Record on Appeal
Appeal	Agreed Statement in Lieu of ROA
Appeal	Appellee Designation
Appeal	Appellant Designation
Appeal	Certification of No Transcript Ordered
Appeal	Cross Appeal
Appeal	Joint Certification of Direct Appeal to Court of Appeals
Appeal	Notice of Appeal and Statement of Election
Appeal	Notice of Referral of Appeal to BAP
Appeal	Objection to Referral to BAP
Appeal	Request for Certification of Direct Appeal
Appeal	Response to Statement of Evidence in Lieu of Transcript
Appeal	Statement of Issues on Appeal
Appeal	Appellee Statement of Election
Appeal	Statement of Evidence in Lieu of Transcript
Appeal	Transcript Ordered Re: Notice of Appeal

Claim Actions	Amended Objection to Claim
Claim Actions	Assignment of Claim
Claim Actions	Notice of Postpetition Mortgage Fees, Expenses and Charges
Claim Actions	Objection to Claim
Claim Actions	Notice of Mortgage Payment Change
Claim Actions	Proof Claim Attachment 3001(c)(1) and (d)
Claim Actions	Response to Notice of Final Cure Payment Rule 3002.1

Event List	Event Name
Claim Actions	Withdrawal of Claim
Claim Actions	Withdrawal

Complaint/Summons	Alias Summons Issued
Complaint/Summons	Third-Party Complaint
Complaint/Summons	Amended Complaint
Complaint/Summons	Summons Service Executed
Complaint/Summons	Summons Service Unexecuted
Complaint/Summons	Counterclaim
Complaint/Summons	Crossclaim
Complaint/Summons	Registration of Foreign Judgment
Complaint/Summons	Summons Issued
Complaint/Summons	Summons Issued and Served

Motions/Applications	Application to Compromise Controversy
Motions/Applications	Application for Compensation
Motions/Applications	Amended Application
Motions/Applications	Amended Motion
Motions/Applications	Amended Motion for Unclaimed Funds
Motions/Applications	Application to Defer Fee
Motions/Applications	Application to Employ
Motions/Applications	Application for Administrative Expenses
Motions/Applications	Generic Application
Motions/Applications	Application to Have Chapter 7 Filing Fee Waived
Motions/Applications	Application to Pay Filing Fees in Installments
Motions/Applications	Motion to Dismiss Debtor(s)/Case and Notice of Hearing
Motions/Applications	Extension of Time Re: Transcript
Motions/Applications	Motion for Interpleader Disbursement (28 U.S.C. Section 1335)
Motions/Applications	Motion for Interpleader Deposit (28 U.S.C. Section 1335)
Motions/Applications	Motion to Declare Secured Claim Satisfied and Lien Released
Motions/Applications	Motion for Examination
Motions/Applications	Motion to Compel Abandonment
Motions/Applications	Motion for Abstention Under Section 305
Motions/Applications	Motion for Adequate Protection

Event List	Event Name
Motions/Applications	Motion to Allow Post Petition Debt
Motions/Applications	Motion to Allow Claims
Motions/Applications	Motion to File Amended Proof of Claim
Motions/Applications	Motion to Amend
Motions/Applications	Motion to Appoint Trustee
Motions/Applications	Motion to File Approve Compromise under Rule 9019
Motions/Applications	Motion to Approve Mortgage Loan Modification
Motions/Applications	Motion to Appoint Creditors Committee
Motions/Applications	Motion to Appoint Examiner
Motions/Applications	Motion to Allow Payment Arrearages
Motions/Applications	Motion to Assume or Reject Lease or Executory Contract
Motions/Applications	Motion to Impose Automatic Stay
Motions/Applications	Motion to Avoid Lien on Household Goods 522(f)(1)(B)(i)
Motions/Applications	Motion to Avoid Lien
Motions/Applications	Motion to Bar Debtor
Motions/Applications	Motion to Borrow
Motions/Applications	Motion for Authority to Obtain Credit under Section 364
Motions/Applications	Motion to Cancel Meeting of Creditors
Motions/Applications	Motion for Certification of Direct Appeal to Court of Appeals
Motions/Applications	Motion to Compel
Motions/Applications	Motion to Convert Case From Chapter 12 to 11
Motions/Applications	Motion to Convert Case From Chapter 13 to 11
Motions/Applications	Motion to Convert Case From Chapter 7 to 11
Motions/Applications	Motion to Consolidate
Motions/Applications	Motion to Continue/Reschedule Hearing
Motions/Applications	Motion for Contempt
Motions/Applications	Motion to Convert Case to Chapter 12
Motions/Applications	Motion to Convert Case to Chapter 13
Motions/Applications	Motion to Convert Case to Chapter 7
Motions/Applications	Motion to Convert One Joint Debtor
Motions/Applications	Motion to Deconsolidate Case Association
Motions/Applications	Motion for Default Judgment
Motions/Applications	Motion for More Definite Statement
Motions/Applications	Motion to Delay Discharge

Event List	Event Name
Motions/Applications	Motion to Deposit Funds into Court Registry
Motions/Applications	Motion to Dismiss Document
Motions/Applications	Motion to Dismiss Adversary Proceeding
Motions/Applications	Motion to Dismiss Debtor(s)/Case
Motions/Applications	Motion to Dismiss Party
Motions/Applications	Motion to Determine Mortgage Fees and Expenses
Motions/Applications	Determine Final Cure and Mortgage Payment Rule 3002.1
Motions/Applications	Motion to Enforce
Motions/Applications	Motion for Waiver of Credit Counseling
Motions/Applications	Motion to Extend/Limit Exclusivity Period
Motions/Applications	Motion for Exemption from Financial Management Course
Motions/Applications	Motion for Determination of Exigent Circumstances as to Credit Counseling
Motions/Applications	Motion to Expedite Hearing
Motions/Applications	Motion for Exemption from Means Test
Motions/Applications	Motion to Expunge
Motions/Applications	Motion to Extend Time to Appeal under Rule 8002(c)
Motions/Applications	Motion to Extend Time for Credit Counseling
Motions/Applications	Motion to Extend Deadline to File Schedules
Motions/Applications	Motion to Extend Plan Payments
Motions/Applications	Motion to Extend Automatic Stay
Motions/Applications	Motion to Extend/Shorten Time
Motions/Applications	Motion Regarding Chapter 11 First Day Motions
Motions/Applications	Final Decree
Motions/Applications	Generic Motion
Motions/Applications	Generic Motion Two Part
Motions/Applications	Motion for Hardship Discharge
Motions/Applications	Motion to Set Hearing
Motions/Applications	Motion for Preliminary Injunction
Motions/Applications	Motion to Intervene
Motions/Applications	Motion for Joint Administration
Motions/Applications	Motion for Jury Trial
Motions/Applications	Motion to File Claim after Claims Bar Date
Motions/Applications	Motion to Limit Notice
Motions/Applications	Motion for Limited Admissions

Event List	Event Name
Motions/Applications	Motion for Leave to Appeal
Motions/Applications	Motion for Damages for Creditor Misconduct
Motions/Applications	Motion to Deem Mortgage Current
Motions/Applications	Motion Objecting to Discharge
Motions/Applications	Motion to Modify Plan
Motions/Applications	Motion to Pay
Motions/Applications	Motion to Prohibit Cash Collateral
Motions/Applications	Motion to Appear pro hac vice
Motions/Applications	Motion Setting Property Value
Motions/Applications	Motion for Protective Order
Motions/Applications	Motion to Reconsider
Motions/Applications	Motion for Approval of Reaffirmation
Motions/Applications	Motion to Recuse Judge
Motions/Applications	Motion to Redact
Motions/Applications	Motion to Redeem
Motions/Applications	Motion to Reinstate Case
Motions/Applications	Motion to Release Funds
Motions/Applications	Motion to Adjust Real Estate Mortgage
Motions/Applications	Motion to Reopen Case
Motions/Applications	Motion to Reopen Adversary
Motions/Applications	Motion to Retain
Motions/Applications	Motion for Relief from Co-Debtor Stay
Motions/Applications	Motion for Relief From Stay
Motions/Applications	Motion to Remove Professional
Motions/Applications	Motion to Remove Trustee
Motions/Applications	Motion to Restrict Public Access
Motions/Applications	Motion for Sanctions
Motions/Applications	Motion to Show Cause
Motions/Applications	Motion to Seal
Motions/Applications	Motion to Sell
Motions/Applications	Motion for Summary Judgment
Motions/Applications	Motion To Stay
Motions/Applications	Motion to Stay Pending Appeal
Motions/Applications	Motion to Strike

Event List	Event Name
Motions/Applications	Motion to Substitute Attorney
Motions/Applications	Motion to Suspend Plan Payments
Motions/Applications	Motion to Determine Tax Liability
Motions/Applications	Motion to Require Debtor(s) to File Income Tax Return(s)
Motions/Applications	Motion to Confirm Termination or Absence of Stay
Motions/Applications	Motion to Transfer Case
Motions/Applications	Motion to Transfer Adversary Case
Motions/Applications	Motion for Turnover of Property
Motions/Applications	Motion for Access to Tax Documents
Motions/Applications	Motion for Unclaimed Funds
Motions/Applications	Motion to Use Cash Collateral
Motions/Applications	Motion for Continuation of Utility Service
Motions/Applications	Motion to Vacate
Motions/Applications	Motion to Vacate Discharge
Motions/Applications	Motion to Withdraw as Attorney
Motions/Applications	Motion for Withdrawal of Reference
Motions/Applications	Motion to Waive Appearance
Motions/Applications	Motion to Waive Pay Order
Motions/Applications	Motion to Split Case

Notices	Notice of Proposed Abandonment
Notices	Notice of Conversion of One Joint Debtor
Notices	Notice to Take Deposition
Notices	Notice of Default
Notices	Notice of Intent to Allow/Pay Claims
Notices	Notice of Intent to Allow/Pay Claims
Notices	Notice of Intent to Sell
Notices	Notice of Intent to Pay Governmental Claims
Notices	Notice of Intent to Pay Governmental Claims
Notices	Notice of Substitution of Counsel
Notices	Notice
Notices	Notice of Stipulated Dismissal in an Adversary Proceeding
Notices	Notice of Voluntary Conversion to Chapter 7
Notices	Notice of Commencement of Chapter 15 Case

Event List	Event Name
Notices	Notice of Dismissal (AP)
Notices	Notice of Final Cure Mortgage Payment
Notices	Notice of Foreign Representative's Intent to Commence Case
Notices	Notice of Proposed Use, Sale or Lease or Property
Notices	Notice of Override of Preferred Address 342(e)
Notices	Notice of Plan Completion
Notices	Notice to Court to Remove Transcript Access Restriction

Other	Statement 1015-2 with No Prior
Other	Statement 1015-2 with Prior Filing
Other	Chapter 11 Final Report and Account
Other	Chapter 15 Final Report
Other	20 Largest Unsecured Creditors
Other	Notice of Change of Address
Other	Affidavit
Other	Amended List of Creditors
Other	Amended Document
Other	Amended Statement of Current Monthly and Disposable Income Form 122
Other	Amendment to Petition
Other	Amended Schedules
Other	Amended Schedules A-C, G-J
Other	Amended Statement of Social Security Number-Form 121
Other	Appraisal of Property
Other	Attachment to Ch 11 Voluntary Petition
Other	Balance Sheet
Other	Bankruptcy Petition Preparer's Notice, Declaration, and Signature (Form 119)
Other	Brief
Other	Business Income and Expenses
Other	Chapter 13 Calculation of Disposable Income
Other	Chapter 7 Means Test Calculation
Other	Certification Regarding Submission of Payment Advices
Other	Cash Flow Statement
Other	Chapter 15 List
Other	Statement of Corporate Ownership

Event List	Event Name
Other	Corporate Resolution
Other	Creditor Disk
Other	Involuntary Creditor List
Other	Creditor's Request for Copies
Other	Certificate of Service
Other	Certification of Ballots
Other	Certificate of Credit Counseling
Other	Cure of Residential Judgment
Other	Debtor's Certification Regarding Issuance of Discharge Order
Other	Certification of Intent to Cure Default
Other	Certification of No New or Changed Creditors
Other	Certification of No Response
Other	Certification of Plan Payment
Other	Certification Regarding Notice to Debtor
Other	Protection of Property from Damage
Other	Certificate of Service
Other	Certificate of Service of Tax Information
Other	Chapter 11 Statement of Monthly Income
Other	Chapter 13 Statement of Monthly Income
Other	Chapter 7 Statements - Monthly Income (122A-1) / Exemption Presumption of Abuse (122A-1Supp) (12/15)
Other	Debtor Repayment Plan
Other	Statement of Good Faith Filing
Other	Debtor Electronic Noticing Request
Other	Declaration by BPP
Other	Declaration of Exemption from Means Test
Other	Declaration About Individual Debtor's Schedules
Other	Declaration
Other	Declaration Under Penalty of Perjury
Other	Disclosure of Compensation of Attorney for Debtor
Other	Document
Other	Equity Security Holders
Other	Statement About Payment of Eviction Judgment (Form 101B)
Other	Initial Statement of Eviction Judgment (Form 101A)
Other	Exhibit

Event List	Event Name
Other	Exigent Circumstance Waiver
Other	Expenses Re: FVPS
Other	Exhibit List
Other	Financial Management Course
Other	Personal Financial Management Course Certificate
Other	Initial Disclosures
Other	Interrogatories
Other	Liquidation Analysis
Other	Statement of Military Service
Other	Master Service List
Other	Nondischargeable Debt
Other	Request for Notice
Other	Notice of Appearance
Other	Notice to Debtor by Non-Attorney BPP
Other	Objection to Debtor's Claim of Exemptions
Other	Objection to Homestead Exemption
Other	Objection to Valuation
Other	Ombudsman Report
Other	Operating Report
Other	Proof of Insurance
Other	Pretrial Statement
Other	Reaffirmation Agreement
Other	Reaffirmation Agreement Cover Sheet
Other	Reaffirmation Disclosure Statement
Other	Statement in Support of Reaffirmation Agreement
Other	Rescission of Reaffirmation Agreement
Other	Redemption Agreement
Other	Release from Active Duty
Other	Request for Entry of Default and Affidavit
Other	Request for Hearing
Other	Request for Separate Notice
Other	Request for Debtor's Tax Information
Other	Request for Taxpayer Identification Number
Other	Report to Court

Event List	Event Name
Other	Debtor's Rebuttal of Presumption of Abuse
Other	Subpoena
Other	Debtor's Election of Small Business Designation
Other	Schedule A - Real Property
Other	Schedule A/B: Property
Other	Schedules A-J
Other	Schedules A-J and Statement of Financial Affairs
Other	Schedule B - Personal Property
Other	Schedule C
Other	Schedule D - Creditors Having Claims Secured by Property
Other	Schedule E - Creditors Holding Unsecured Priority Claims
Other	Schedule E/F - Creditors Who Have Unsecured Claims
Other	Schedule F - Creditors Holding Unsecured Nonpriority Claims
Other	Schedule G - Executory Contracts and Unexpired Leases
Other	Schedule H - CoDebtors
Other	Schedule I - Your Income
Other	Schedule J - Current Expenditures
Other	Schedule J-2 Expenses for Separate Household of Debtor2
Other	Statement of Social Security Number-Form 121
Other	Statement of Financial Affairs
Other	Statement of Intent
Other	Chapter 11 Statement of Current Monthly Income - Form 22B
Other	Statement of Operations
Other	Stipulation
Other	Stipulation of Secured Collateral
Other	Substitute PDF
Other	Submission of Transcript for Court Review
Other	Suggestion of Death
Other	Summary of Assets and Liabilities
Other	Involuntary Summons Service Executed
Other	Involuntary Summons Service Unexecuted
Other	Support Document
Other	Domestic Support Obligations
Other	Tax Documents

Event List	Event Name
Other	Transcript
Other	Notice of Intent to Request Transcript Redaction
Other	Transcript Redaction Request
Other	Update EOUST Stats
Other	Update Statistical Data
Other	Withdrawal
Other	Witness List

Plan	Chapter 11 Plan
Plan	Ch 11 Small Business Plan
Plan	Chapter 12 Plan
Plan	Chapter 13 Plan
Plan	Chapter 9 Plan
Plan	Amended Chapter 11 Small Business Plan - Prior to Confirmation
Plan	Amended Chapter 11 Plan - Prior to Confirmation
Plan	Amended Chapter 12 Plan - Prior to Confirmation
Plan	Amended Chapter 13 Plan - Prior to Confirmation
Plan	Amended Chapter 9 Plan - Prior to Confirmation
Plan	Amended Disclosure Statement
Plan	Amended Objection to Confirmation of Plan
Plan	Chapter 11 Ballot
Plan	Disclosure Statement
Plan	Small Bus Disclosure Statement
Plan	Objection to Confirmation of the Plan

Chapter 13 Confirmation and Mega Dockets

The Court actively encourages parties to seek alternative resolutions to their disputes rather than resorting to the Court's judgment. In an effort to facilitate consensual resolutions and to reduce the dockets to matters that require adjudication, the Court has instituted the following procedures to report resolutions and withdrawals prior to hearings and to make requests to reschedule hearings.

I. Agreed Orders and Withdrawals:

Preliminary hearing dockets will be posted to the Court's website by 4:00 PM on the day before the Confirmation or Mega Docket.

Parties who have agreed to the entry of an order to a matter on the Confirmation or Mega Docket may report such agreement to chambers by uploading the agreed order and reporting it via e-mail at [J_Hopkins_Orders@ohsb.uscourts.gov or J_Buchanan_Orders@ohsb.uscourts.gov] **by 10:00 AM on the day of the scheduled hearing**.

Withdrawals will also be accepted **until 10:00 AM on the day of the scheduled hearing**.

All agreed orders and withdrawals will be reviewed by the Court prior to Noon on the day of the scheduled hearing, at which time the final docket will be posted.

Compliance with this procedure shall excuse attorneys from attendance during the Confirmation or Mega Docket. However, any such submission presented to chambers after 10:00 AM on the day of the scheduled hearing will still appear on the docket for the day, and attorneys' attendance shall not be excused. Attorneys are responsible for checking the final docket.

The Confirmation and Mega Dockets will begin promptly at 2:00 PM, irrespective of ongoing discussions between the Chapter 13 Trustee and counsel.

II. Request to Reschedule First Hearing of Matter:

The Court will liberally grant a request to reschedule the **first** hearing of a matter on the Confirmation or Mega Docket. Any directly affected party may make such request by (i) filing a motion and uploading a proposed order or (ii) by uploading an agreed order. The request shall also be reported to chambers by e-mail at [J_Hopkins_Orders@ohsb.uscourts.gov or J_Buchanan_Orders@ohsb.uscourts.gov].

Any request to reschedule the first hearing of a matter on the Confirmation or Mega Docket must be made **no later than 3 business days prior to the day of the scheduled hearing**. For example, if the hearing is to be held on Thursday, a request for a first rescheduled hearing must be received by the preceding Monday. If the hearing is to be held on a Tuesday, a request for a first rescheduled hearing must be received by the preceding Thursday.

All requests for a first rescheduled hearing will be reviewed by the Court prior to Noon on the day of the schedule hearing, at which time the final docket will be posted. If the matter does not appear on the final docket, attorneys are excused from attending the hearing.

III. Subsequent Request to Reschedule Hearing of Matter:

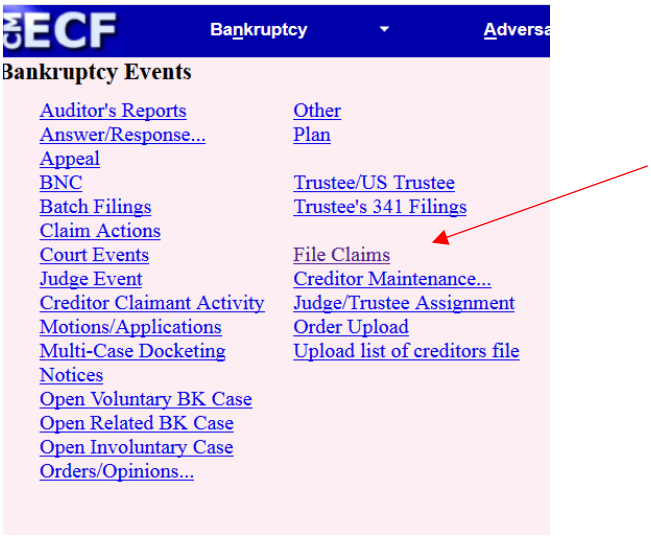
Any **second** request to reschedule the hearing of a matter on the Confirmation or Mega Docket must be made by motion and state with particularity the basis for the need to reschedule the hearing. Fed. R. Bankr. P. 9013, L.B.R. 9013-1. Such request shall be made **no later than 3 business days prior to the day of the scheduled hearing**.

Second requests for a rescheduled hearing will be reviewed by the Court prior to Noon on the day of the schedule hearing, at which time the final docket will be posted. If the matter does not appear on the final docket, attorneys are excused from attending the hearing.

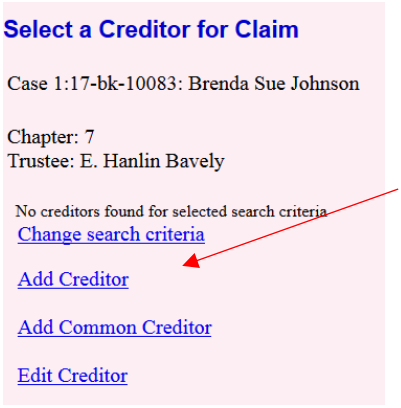
Any subsequent requests for a rescheduled hearing must be by motion, which will be heard and ruled upon by the Court from the bench.

Procedure For Filing A Proof of Claim On Behalf Of A Creditor

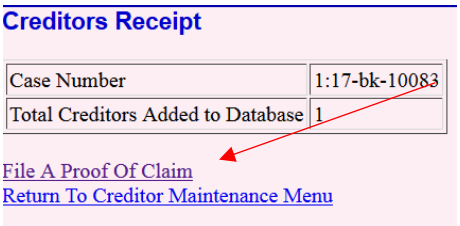
1. Select File Claims from the Bankruptcy Events menu.



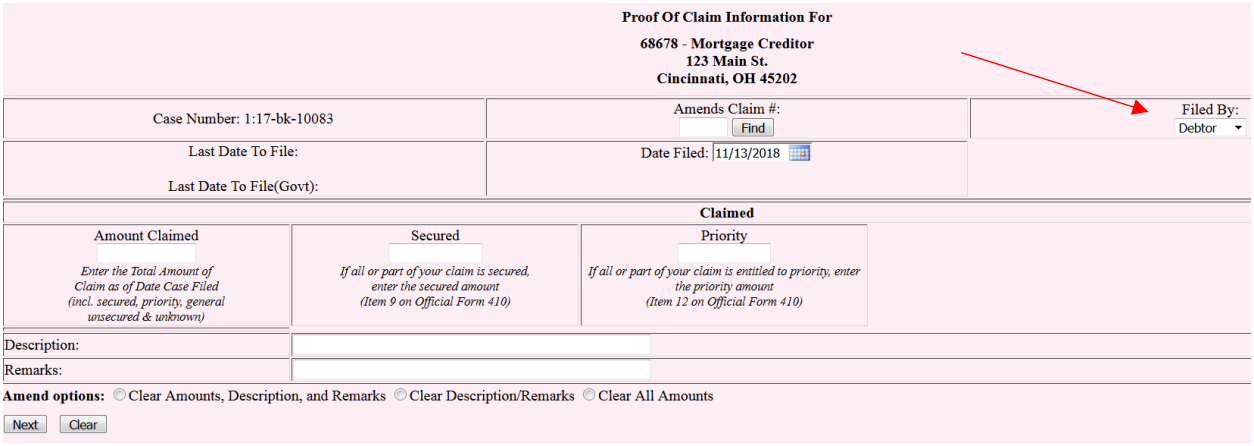
2. If the creditor you are seeking to file a claim for is not already in the system select Add Creditor.



3. Once the creditor is added select File A Proof of Claim.



4. Enter in the claim information. From the drop-down menu there will be 4 options: Creditor, Debtor, Trustee and Attorney. <u>The only selection that should be used is Debtor</u>. Using Debtor allows the Clerk's office to get notice the filed claim. The Clerk's office then sends a notice to the affected creditor is accordance with the Clerk's duties under the Bankruptcy Rule 3004.



Proof Of Claim Information For

68678 - Mortgage Creditor
123 Main St.
Cincinnati, OH 45202

Case Number: 1:17-bk-10083	Amends Claim #: Find	Filed By: Debtor
Last Date To File: Last Date To File(Govt):	Date Filed: 11/13/2018	

Claimed

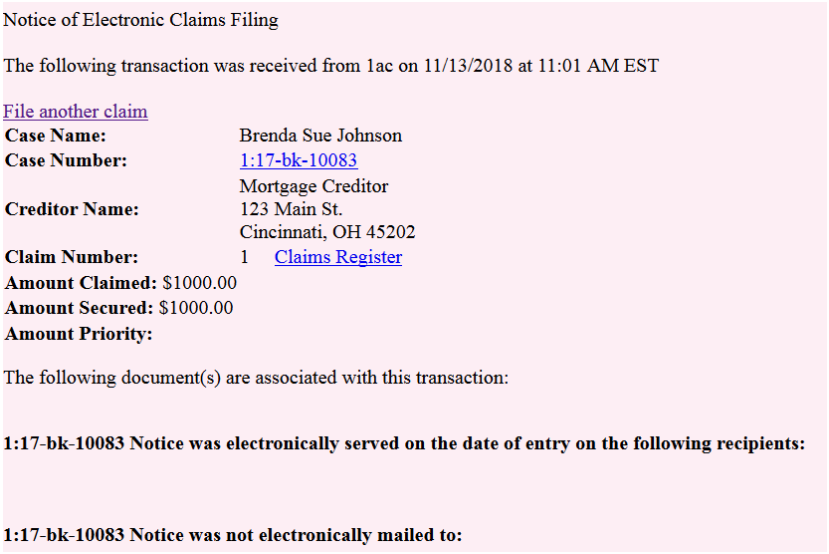
Amount Claimed	Secured	Priority
Enter the Total Amount of Claim as of Date Case Filed (incl. secured, priority, general unsecured & unknown)	*If all or part of your claim is secured, enter the secured amount (Item 9 on Official Form 410)*	*If all or part of your claim is entitled to priority, enter the priority amount (Item 12 on Official Form 410)*

Description:	
Remarks:	

Amend options: Clear Amounts, Description, and Remarks | Clear Description/Remarks | Clear All Amounts

Next | Clear

5. Attach your proof of claim form and supporting documents (if any). Then file the claim. When completed you will receive the Notice of Electronic Claims Filing.



Notice of Electronic Claims Filing

The following transaction was received from 1ac on 11/13/2018 at 11:01 AM EST

File another claim

Case Name: Brenda Sue Johnson
Case Number: 1:17-bk-10083
Creditor Name: Mortgage Creditor
123 Main St.
Cincinnati, OH 45202
Claim Number: 1 Claims Register
Amount Claimed: $1000.00
Amount Secured: $1000.00
Amount Priority:

The following document(s) are associated with this transaction:

1:17-bk-10083 Notice was electronically served on the date of entry on the following recipients:

1:17-bk-10083 Notice was not electronically mailed to:

TAB
C

Carolyn B. Buffington, Esq.

Carolyn received her law degree from the University of Cincinnati College of Law. She practiced at Porter, Wright, Morris and Arthur and served as a law clerk to the Hon. J. Vincent Aug, Jr. and the Honorable Beth A. Buchanan. She has been the Chief Deputy Clerk for the Bankruptcy Court for the Southern District of Ohio since June, 2016.

Margaret A. Burks, Esq.
Chapter 13 Trustee

Appointed Chapter 13 Trustee for the Cincinnati area in July, 1992.
Former Law Clerk to the Honorable J. Vincent Aug, Jr.
Former Counsel – PNC Bank
Graduated Salmon P. Chase College of Law 1985
Law Review – Chase College of Law
Active in the Cincinnati Bar Association Bankruptcy Committee – former Chairperson
Graduated University of Cincinnati 1977 – Magna Cum Laude
Member Phi Beta Kappa
Past President – National Association of Chapter 13 Trustees (NACTT)
Speaker at various seminars including NACTT, ABI, Midwest, and Cincinnati Bar Association

Francis J. DiCesare

Francis J. DiCesare has been a Staff Attorney for Margaret A. Burks, Chapter 13 Trustee for Cincinnati, since November, 2001. He received his Bachelor of Arts at Carnegie Mellon University in 1984, with University Honors, and his Juris Doctor, *cum laude*, from Tulane University in 1987.

OFFICE OF THE TRUSTEE
CHAPTER 13
600 Vine Street, Suite 2200
CINCINNATI, OHIO 45202
(513) 621-4488
(513) 621-2643 Facsimile

MARGARET A. BURKS
Ch. 13 Trustee
mburks@cinn13.org

CHAPTER 13 PRACTICE

AND

PROCEDURE MANUAL

for

CINCINNATI

Updated December 2018

This Manual has been designed to assist Counsel for Debtors and Creditors with their Chapter 13 practice. The Manual will be updated as the practice of Chapter 13 dictates. The information in this Manual cannot be construed as legal advice.

TABLE OF CONTENTS

Contact Information and Websites

(513) 62l-4488 – main number / (513) 621-4495 – attorneys only

Creditor's meeting room – Suite 106, 600 Vine Street, Cincinnati, Ohio 45202

The Chapter 13 Web Site: www.13network.com
Local Rules for the Southern District of Ohio: www.ohsb.uscourts.gov/LBRFP.htm

Case information through National Data Center, Inc. ("NDC"): www.ndc.org

Upload CMI Ledger, pay advices and tax returns through 13Documents: www.13documents.com

TFS www.tfsbillpay.com Please refer to page 12 for more information.

1.	**Mandy Meyer** – Financial Analyst and Office Manager	mmeyer@cinn13.org
2.	**Ethelyn Gover (Cookie) –** Floor Supervisor/ Case Auditor	egover@cinn13.org
3.	**Frank Dicesare –** Staff Attorney	fdicesare@cinn13.org
4.	**Tammy Stickley** – Staff Attorney	tstickley@cinn13.org
5.	**Brad Fortuna** – Computer Analyst/ Team Leader	bfortuna@cinn13.org
6.	**Allison Atkinson** – Computer Analyst	aatkinson@cinn13.org
7.	**Karen Reed –** Confirmation Clerk/Assistant Floor Supervisor/Team Leader	kreed@cinn13.org
8.	**Celia Martin –** Case Auditor	cmartin@cinn13.org
9.	**Shanna Estes-Martin** – Paralegal/Trustee Legal Assistant	smartin@cinn13.org
10.	**Linda Hillner –** Paralegal/ Team Leader	lhillner@cinn13.org
11.	**Kathy Hipple –** Dismissals Clerk	khipple@cinn13.org
12.	**Shurdina Shepard –** Posting Clerk/ Case Auditor	sshepard@cinn13.org
13.	**Tina Hall** – Claims Examiner/ Team Leader	thall@cinn13.org
14.	**Alex Eddins** – 341 Noticing Clerk/Team Leader	aeddins@cinn13.org
15.	**Tonya Shorten –** Assistant Paralegal	tshorten@cinn13.org
16.	**Yolanda Means –** Claims Examiner/ 341 Noticing Clerk	ymeans@cinn.13.org
17.	**Christina Hehn** – Claims Examiner	chehn@cinn13.org
18.	**Erin Wilson –** Computer Analyst	ewilson@cinn13.org
19.	**Ashley Jump –** Claims Examiner	ajump@cinn13.org
20.	**Kelly Keefer** – Financial Assistant	kkeefer@cinn13.org
21.	**Nathan Beck –** Claims Examiner	nbeck@cinn13.org

WHAT'S NEW

1. Adding Creditors – Prepetition Creditors vs. Postpetition creditors

a. Can you add pre-petition creditors late in the case?

Case No. 16-10507 In re: Bailey (decided 9/6/18 by Judge Hopkins) - says NO.

Text of the Decision is below.

See also LBR 1007-1

ORDER DENYING MOTION TO ADD CREDITOR

Before the Court is Scott E. Bailey's (the "Debtor") Motion to Add Additional Creditor (the "Motion"). (Doc. 64). DirecTV (the "Creditor") holds a pre-petition claim against the Debtor for utility services in the amount of $435.00. (Doc. 56, Sch. E/F, ¶ 4.1; Doc. 64). The Motion seeks (1) an order binding the Creditor "to the treatment of the Plan" and (2) an order requiring the Creditor "to file a claim with sixty (60) days" of the entry of such an order. If the Creditor were to file a proof of claim within that sixty day period, Margaret A. Burks, the chapter 13 trustee (the "Trustee") would be "ordered to administer such claim(s) as provided under the Plan."

The Motion is an apparent attempt by the Debtor to modify the confirmed chapter 13 plan (Doc. 35) (the "Plan") pursuant to 11 U.S.C. § 1329(a).1 The Debtor seeks to change the terms of the Plan so that it will "provide[] for" the Creditor's pre-petition claim, presumably to allow the Debtor to be discharged of that debt. *See* 11 U.S.C. § 1328(a).

"Congress intended to circumscribe a party's ability to amend a post-confirmation plan to only those modifications specifically described in [§ 1329(a)]." *In re Moore*, 247 B.R. 677, 683 (Bankr. W.D. Mich. 2000). "[T]he Bankruptcy Code does not permit postconfirmation amendments to Chapter 13 plans to add omitted creditors." *In re Plummer*, 378 B.R. 569, 575 (Bankr. C.D. Ill. 2007); *see also Moore*, 247 B.R. at 683 ("this court is unable to find within the clear language of Section 1329(a)(1) even a weak implication that creditors may be added to a plan post-confirmation."). As such, this Court cannot grant the relief requested. WHEREFORE, the Motion is **DENIED**.

b. And See 11 USC Section 1305 for post petition debts.

If you wish to add post petition creditors I think you need to amend the Schedules and file a motion with details. (See LBR 1009-1(e))

2. Special Circumstances - Lanning language.

Attached and below - please find the 'old" Lanning Paragraph which used to be in the Cinn plan prior to Dec. 2016. It was removed when we went to the Uniform plan but is now included in the Trustee Report.

We think it's a good idea to add it to paragraph 13 of the plan so the Court can see your analysis and special circumstance reasons.

Lanning Special Circumstances:

ABOVE MEDIAN INCOME

Current monthly income (CMI) minus means test expenses (IRS amounts) = Disposable income (D/I)
D/I (line 45 of the means test) $ _____ TIMES 60 = $_____ (fill in the blanks)

***In re: Lanning 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010)* Circumstances:**
Debtor(s) are unable to meet the disposable income amount to unsecured creditors because ….. *(fill in a reasonable explanation).* Debtor(s) will provide tax returns and paystubs to counsel by April 15th of every year. Counsel will file a Status Report on Debtor(s)' income and state whether Lanning circumstances still exist by April 30th of every year, and file amended schedules I, J and Motion to Modify Plan if income increases. This is a 60 month plan.

3. Motions to Pay off Case Early – Judge Hopkins said NO unless 100% case.

Case No. 14-10622 In re: Moreland (decided 11/29/18 by Judge Hopkins).
Case No. 15-12184 In re: Underwood (decided 11/30/18 by Judge Hopkins)

If you file a motion to pay off early - include the reasons and please 'do the math' to show you have made or are going to make 36/60 payments.

My office always checks the math for 36/60 payments, but it's a good idea to let the Court know too.

As always - include caselaw.
Is this a Section 1329 mod?

We used to have a 'pay off early' section in our Cinn plan prior to Dec 2016. Of course one had to meet the 36/60 payment analysis.

We want to use this sparingly for special situations (home sale; cash gift) and close to the case's end - in my opinion.

Consider Motion to Modify Plan

Consider Hardship Discharge

4. The Matter Calendar has been added to our 13network website

At this time, this is only a reference only. Please still rely on the Calendar from Court.

We will only populate the Calendar Matters. We will not modify the Matters. For example: When a Motion to Dismiss is resolved, we will not remove the matter. When a response has not been filed on a Motion for Relief, we will not remove the matter.

To use the Matter Calendar on 13network:
Sign onto my website.
Click on the "Matter Calendar" link in the top right tool bar.
Click on a calendar date on the right to populate the Calendar date field on the left.

Select more options or leave them as default.
Click on “Display Case list”
You may need to move the bottom line to resize the window so you can see more cases and less calendar.

5. **REMINDERS**

Regarding Status Reports and Annual Tax Returns

a. They are due April 30.
b. Please provide tax returns and LET US Know when uploaded to 13documents
c. Amend I, J and plan (MTM) if needed
d. File motion to retain if needed
e. For business cases -
Let us know if tax deposits have been made.
If not - why not? And how will they be made up?

DO NOT SEND TAX RETURNS BY MAIL, FAX OR REGULAR EMAIL.
THEY MUST BE SENT THROUGH 13DOCUMENTS WITH ALL PII INFORMATION REDACTED.

Regarding Motions to Retain

Please HOLD funds going to my office in your account so you can send upon order being granted. If your request is ‘iffy’ - hold All of the funds until order goes on.

It is a good idea to check with your clients on the status of any Tax Refunds over $3,000 total, Inheritance, Insurance Claim, Bonuses, Commissions, Personal Injury, Worker’s Comp and Social Security claims and REMIND them NOT to spend the funds absent Court order.

ALSO remind Debtors NOT to withdraw from 401(k) or Borrow from 401(K) without Prior Court approval.

TAX REFUNDS for Older cases -The old $800/$1600 amount pertains to tax refunds prior to Dec. 2016.

Regarding Plan payments:

Attorneys can sign up for your free TFS Attorney Portal at http://attorney.tfsbillpay.com

The Portal will give you access to your client's accounts, allow you to send a MoneyGram card to clients for emergency payments, and even give you the option to help your clients create a TFS account at the petition signing before the case is filed. The Portal is also needed to create an eWage account.

Questions may be directed to Jen at email and phone no below.
Jennifer Reda
Vice President, Business Development

TFS Bill Pay
500 North Broadway, Suite 240, Jericho, NY 11753
P: (516) 858-2595 | E: jen@tfsbillpay.com

We always prefer a payroll order but TFS is working well.

6. New Court Practice and Procedures for Confirmation and Mega Dockets:

"Chapter 13 Confirmation and Mega Docket Policy and Procedure:
This Court actively encourages parties to seek alternative resolutions to their disputes rather than resorting to this Court's judgment. In that spirit, the Court has instituted the following procedure for pre-marking matters that have been resolved prior to hearing.

Preliminary hearing dockets will be posted to the Court's website by 4:00 PM on the day before the Confirmation or Mega Docket.
Agreed orders, settlements, withdrawals and requests for continuances will be accepted up to 10:00 AM the day of the scheduled hearing for the Chapter 13.

Confirmation and Mega dockets.
I. Agreed Orders, Settlements and Withdrawals:
Parties who have agreed to the entry of an order to a matter on the Confirmation or Mega Docket may report such agreement to chambers by uploading the agreed order and reporting it via e-mail by 10:00 AM on the day of the scheduled hearing. Withdrawals will also be accepted until 10:00 AM. All agreed orders and settlements will be reviewed by the court prior to Noon at which time the final docket will be posted.

Withdrawals will be processed and the hearing cancelled prior to the final docket being posted. Compliance with this procedure shall excuse attorneys from attendance during the Confirmation or Mega Docket. However, any such submission presented to chambers after 10:00 AM will still appear on the docket for the day, and attorneys' attendance shall not be excused. Attorneys are responsible for checking the final docket.

The Confirmation and Mega Dockets will begin promptly at 2:00 PM, irrespective of ongoing discussions between the Chapter 13 Trustee and counsel.

7. Filing Fee Applications for Personal Injury, Worker's Comp, Social Security Attorneys and other employed attorneys

"An application for attorney fees must be filed and approved before such compensation can be received or paid."

8. Baud Agreed Orders increasing Plan Percentage

We have also added the sentence -
'The Plan percent is subject to further adjustment should circumstances change,' to all Baud orders and notices. As you know, your case percent can change because of attorney fees, payments, suspensions, taxes, etc.

9. Claims:

a. Filing Proofs of claims for Creditors:

The Court has sent materials which I have included on the attorney list serve.

See attorney list serve of November 13, 2018.

b. Trustee is sending reminders to Debtors' Counsel and Creditors that deadline is approaching on car claims as well as mortgage claims.

Sample letter is below:

Dear Counsel and Creditor:

Creditor is listed on the above Chapter 13 plan to be paid through the plan for the 2013 Hyundai Elantra.

Creditor has not yet filed a proof of claim.

The bar date is approaching – 11/26/2018.

Pursuant to Fed. R. Bankr. P. 3002(c) for cases filed after December 1, 2017, deadlines to file proof of claims changed and all claims (secured and unsecured) must be filed within 70 days of the date of the filing of the bankruptcy petition. If your claim is not filed timely, the Trustee must file an objection to the claim as being late and disallowed pursuant to the revised Federal Rules of 12/1/2017.

Our office cannot make any payments on the vehicle until a proof of claim is filed.

The Trustee asks Debtors' Counsel to monitor and if creditor has not filed their claim, please file a claim on their behalf of the creditor to ensure claim is filed in a timely basis. Please refer to Rule 3004.

When filing the claim for the creditor, please use the following address:
Creditor
P.O. BOX 12345
CITY, CA 92623

Sincerely,

Claims Examiner

10. Mortgage Statements:

As you may be aware, on April 19, 2018, mortgage servicers will be required to send monthly statements to Ch 13 debtors who have a mortgage. These statements are being sent to the DEBTOR, not to the TRUSTEE.

Encourage your debtors to get on the NDC website as my records and the mortgage company's records may not always be the same.

I am adding additional coding to my Computer so that the servicers can properly post the payments sent to them by my office.

11. <u>Motions to Sell Real Estate and Applications to Incur Debt for purchase of real estate.</u>

Trustee wants to confirm that sales of real estate have taken place. Therefore, any Order or Agreed Order on Motion to Sell should include the following language:

Within 45 days of the filing of the within Agreed Order /Order, counsel shall file a report to Court as to the Status of the closing on sale of the real property.

Trustee wants to confirm that Debtors have closed on purchase of home and/or home refinance. Therefore any Approval of Application to Incur Debt for these purposes will include the following language:

Within 45 days of the filing of the within approval, counsel shall file a report to Court as to the Status of the home purchase or closing on refinance. Should the purchase/closing not occur within that 45 days, then this approval shall be deemed VOID and a new application to incur debt should be submitted.

12. <u>Motions to Dismiss now include payment information and hearing date set</u>

The Motion to Dismiss includes an attachment with the previous six (6) months of payments. However, check the website for most recent receipts of payments applied to the case.

Our office sets the hearing date at the time of filing of the Motion to Dismiss. The Court will keep the hearing on the docket awaiting the response deadline. If you do not respond to the Motion to Dismiss, please check the Court docket to make sure the hearing has been vacated. Otherwise you may need to inform the Court that there is no opposition to the motion, so that the hearing can be removed from the docket.

GENERAL PRACTICE POINTERS

- **Social Security Numbers:**

Debtor(s)' full Social Security number should not be put on the petition page or other court filings.

- **Debtor Education:**

Our office no longer provides a "live" 2 hour program, but the Trustee will carry the cost, if debtor wishes to take TEN program course offered by a number of Chapter 13 Trustees.

REGISTRATION INFORMATION

This is the information necessary for registering:
1) The website is www.13class.com
2) Trustee Identifier Number (for cases assigned to **Margaret Burks**, enter **016** after **TEN13** which is already printed in the box)
3) name as it appears **exactly** on the bankruptcy petition,
4) case number,
5) an email address,
6) last four of the Social Security number. (This number is used for identity verification so it must be typed in again sometime during the course.)
7) Must choose "Yes" for certificate needed (TEN will file the certificate with the Court.)
8) Must create a Username and Password. (Write this down as you will need it to log-in.)
9) Must accept Terms and Conditions.
10) Attorney last name and email address can be provided. You may want to have your bankruptcy paperwork nearby as the course refers to some of the Schedules. (optional)
11) After registering, a message containing a link will be sent to the email address provided. The link must be clicked which confirms the registration.

There are video tutorials including one for registration which may be helpful. Please complete an evaluation at the end of the program.

- **Individual Attorney and Staff Training is available:**

Please call or email my Paralegal, Linda Hillner or Staff Attorneys, Frank DiCesare and Tammy Stickley, to arrange date/time.

- **Real Estate Appraisals:**

LBR 3015-3(e)(3) Appraisals of Real Property. Unless otherwise ordered by the court, an appraisal performed within the preceding twelve (12) months must be filed and served on the trustee on or before the § 341 meeting of creditors for each parcel of real property in which the debtor has a legal, equitable, or beneficial interest. An auditor's valuation is an acceptable appraisal unless the property is subject to lien avoidance, cramdown, or bifurcation.

- **Cars and Insurance:**

If the car is "totaled" during the Chapter 13 Plan, per Plan terms, the proceeds must be turned over to the Trustee. If the Debtor(s) desire to keep funds above the amount which will pay off the secured Creditor, a motion to retain such funds must be filed. If Debtor(s) wish to seek substitution of collateral, please use form on our website; Debtor(s)'Counsel must shepherd funds and ensure that Creditor's lien appears on the title of the substituted collateral.

If your client has notified you that there was a car accident or other claim for insurance proceeds, please provide our office the following information regarding the totaled vehicle and/or other claim for loss:

- Date of loss
- The insurance agents contact information - name/email/phone number
- Lienholder
- Vehicle make/model/year
- Insurance claim number
- The amount of insurance funds our office will be receiving including GAP insurance

- **Claim Transfers or Assignments:**

The Chapter 13 Office continually receives claim assignments and transfers. If you represent Creditors, please make sure they file a proper claim transfer or assignment and Notice of Change of Address. The form is available on the Trustee's website.

- **Inheritances, Annual Bonuses, Personal Injury or other lawsuit recovery:**

Pursuant to the Confirmation Order, if Debtor(s) wish to retain *any portion* of the items listed above, the applicable Motion to Retain must be filed with the Court.

Applications to Employ Professionals and Applications to Approve Fees for Personal Injury, Social Security, Worker's Compensation, etc. Attorneys

You need to file an Attorney Fee application for work done by a social security, workers comp, personal injury lawyer, etc., before that attorney may be paid.

The Application to Employ Professional was updated with regard to Rule 2016 as follows: "An application for attorney fees must be filed and approved before such compensation can be received or paid."

It is a good idea to check with your clients on the status of these claims and REMIND them NOT to spend the funds absent Court order.

- **Retention of Tax Refunds:**

Debtor(s) should not spend their tax refund. Ask Debtors to provide copies of Federal, State and local tax return (if required). Review the returns and make a recommendation to the Debtors.

The District Wide Chapter 13 Plan provides:

> Notwithstanding single/joint tax filing status, the Debtor may annually retain the greater of (1) any earned income tax credit and/or additional child tax credit or (2) $3,000 of any federal income tax refund for maintenance and support pursuant to § 1325(b)(2) and shall turnover any balance in excess of such amount to the Trustee. Unless otherwise ordered by the Court, tax refunds turned over to the Trustee shall be distributed by the Trustee for the benefit of creditors. Any motion to retain a tax refund in excess of the amount set forth above shall be filed and served pursuant to LBR 9013-3(b).

NOTE: If the Debtors owe any amount of Federal, State or Local taxes, any portion beyond the above-cited threshold may be offset by the amount of taxes owed.

If a Motion to Retain is filed, it must account for the **ENTIRE AMOUNT** to be retained (including the greater of the EIC/additional CTC or $3,000, as applicable).

- **Trustee's Objection to Balance of Creditor's Claim:**

The Trustee's office files these objections under the following circumstances:

- The Trustee receives notice that the balance of the claim has been paid or should not be paid.
- The Trustee receives a returned check indicating that the address is changed or is not accurate.

- **Local Rules:**

The Local Bankruptcy Rules are effective December 1, 2017 as revised by **General Order No. 22-2 on the Bankruptcy Court's website**. The Chapter 13 Local Bankruptcy Rules for Cincinnati, Dayton and Columbus are uniform. Please read the Rules in tandem with this Attorney Manual. Local Bankruptcy Rules are available on the Clerk's website: www.ohsb.uscourts.gov.

- **Large certified checks/money orders:**

If your client is going to send a large certified check or money order to the Trustee's lockbox (other than the Plan payment), please have them specify the source. Provide an order determining how to disburse these proceeds to a specific creditor or creditors, otherwise the funds will be disbursed pursuant to the Plan.

- **Interest on Real Estate Arrearage:**

Effective October 22, 1994, the Bankruptcy Reform Act of 1994 added the following language to the Code:

> 11 U.S.C. Section 1322(e) - Notwithstanding subsection (b)(2) of this section and 506(b) and 1325(a)(5) of this title, if it is proposed in a Plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law.

This section only applies to agreements entered into after the date of the enactment of the Act and should remove the necessity to pay interest as part of the cure of a mortgage arrearage.

- **Web site and Printouts:**

The website address is www.13network.com. The website is similar to the printouts you receive via fax or mail and is updated daily. A Plan calculation form is available on the website as well. Please contact Allison Atkinson to obtain an access agreement.

- **Disbursement/Refund Checks:**

All stale outstanding disbursement/refund checks must be cancelled/voided or reissued within 90 days of the issue date pursuant to the Handbook for Chapter 13 Standing Trustees. If the case is active, the funds will be distributed pursuant to the Plan. If the Trustee has filed her Final Certification, the funds are sent to the Registry Fund.

- **Payments Should be Sent to the Trustee Lockbox:**

The Chapter 13 Trustee does not accept payments in person. Please ask Debtor(s) to mail their cashier's checks or money orders to:

> Office of the Trustee
> P.O. Box 290
> Memphis, TN 38101-0290
> (Include Debtor(s)' name(s), case number and address)

If debtor is unable to have a payroll deduction, then Electronic Payments can be made through TFS bill pay:

The Chapter 13 office has transitioned electronic payments from e-pay to the TFS bill pay program. We have handouts at the 341 meeting room to distribute to debtors.

If your case was filed after August 2017 please sign up for TFS and not e-pay.
If your client is having difficulty with e-pay for an older case then he or she can transition to the TFS program.

Website information for individuals and attorneys as well as phone number are below.

TFSbillpay.com
Attorney.tfsbillpay.com
888-729-2413

WORKING WITH THE CHAPTER 13 OFFICE

- **Please use the Trustee's standard forms** (available at www.13network.com, not in the LBR)

WHY: The Chapter 13 Staff is trained to understand and use the forms. Using these forms reduces errors.
HOW: Ensure that you are using the latest forms, dated 20**18**. Please proofread what you file and *explain* in **detail** what you are requesting for the Debtor(s). FILL IN THE BLANKS and ANSWER ALL questions.

- **Orders**

The Trustee's forms generally include orders. Orders should be generic, and uploaded only after the expiration of the applicable response time.

- **Return Phone Calls and Emails:**

Please return phone calls or emails from the Staff of the Office of the Chapter 13 Trustee within 24 hours, if possible. If you are unable to respond in that time frame, please call or email with an estimated time you will be able to respond.

You can assume the Trustee has asked the Staff member to call or email and that a return call or email is necessary.

Do not email the Trustee's "Cincinnati" email address. This address is reserved for ECF notices, and is routed to our IT department to hand-sort. Emails sent to this address will be delayed in reaching us.

- **Notice of Intention to Pay Claims:**

When the Notice of Intention to Pay Claims is filed, if you do not agree with the listed claim and/or amount, Counsel must object to the *claim*, not to any Notice from the Chapter 13 Office.

- **Obtaining Trustee's Website Printouts:**

1. Access the Trustee web site at www.13network.com
2. Choose the case you wish to access.
3. Choose "Print Inquiry" from Menu on the right of the screen.
4. Choose the Status Report parameters (i.e. date, claims, payment history, etc.) or do not choose parameters and you get all information on the case that is available in the Report.
5. Click on "Submit" and print from your computer.

- **Trustee Status Reports:**

Trustee status reports are mailed to Debtor(s) and Counsel annually (generally in February).

PRECONFIRMATION CONSIDERATIONS

- **Form 1015-2:**

If the Debtor(s) has filed bankruptcy within the last eight (8) years, it must be noted on the petition and Form 1015-2. Form 1015-2 **must** be filed in every case. See LBR 1015-2(b) and Form 1015-2 for a list of all prior and/or related cases that must be included.

- **Application to pay filing fee in installments**

If an application to pay filing fees in installments is filed, the fees **must be paid** within 120 days. A 60-day extension can be requested at the Clerk's office. The fees must be paid prior to confirmation.

LBR 3015-1(b)
(b) Service of Plan. The debtor shall serve the chapter 13 plan on the trustee and all creditors and parties in interest. The debtor shall file a certificate of service evidencing compliance. The certificate of service shall specify the method of service as to each entity served.

As a reminder, the certificate of service should comply with the following:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing (specific name of filing) was served (i) electronically on the date of filing through the court's ECF System on all ECF participants registered in this case at the email address registered with the court and (ii) by ordinary U.S. Mail on (month), (day), (year) addressed to:

(Name)
(Mailing address)

(iii) by certified mail on (month), (day), (year) pursuant to Rule 7004 and addressed to:

(Name)
(Mailing address)

- **Time Schedule on Chapter 13 Cases:**

The 34l Meeting of Creditors is scheduled not less than 20 days and not more than 50 days after the date of filing.

If you must reschedule 341:

1. Contact the Trustee's office by emailing Trustee, Staff Attorneys and paralegals as soon as you become aware that you cannot attend 341 Meeting set and noticed by the Clerk's service. You need to have a good reason.
2. Staff attorney will contact counsel with a continued date/time.
3. Counsel prepares the Joint Notice of Re-Set 341 Meeting, which must include a signature line for debtor's counsel and Trustee/Trustee's Counsel. Certificate of Service, however, is signed only by debtor's counsel.
4. Debtor's Counsel files the Joint Notice on ECF using the "Notice" category of ECF functions. Counsel must also:
    a. serve same via ordinary mail to all parties not receiving ECF notice, and
    b. ADVISE TRUSTEE AND HER COUNSEL VIA EMAIL that this was done.
5. Trustee's staff will re-file using the Trustee's ECF function for re-calendaring 341 Meetings.
6. If there is insufficient time to properly notice a rescheduling of the 341 Meeting, you should plan to appear and request an adjournment on behalf of your client or engage substitute counsel on your behalf for this purpose. Notify debtor(s) and any creditors expected to attend that the 341 Meeting will be called, but not conducted on the originally scheduled date.

- **34l Meeting of Creditors:**

The 34l meeting of Creditors is scheduled within 20 to 50 days of the Plan filing. If you have a complicated case and need more time for a 34l hearing, email Alex Eddins and copy the Trustee and staff attorneys so that a time can be set aside for your client. All meetings are held in downtown Cincinnati, Ohio.

PRIOR TO THE 341 MEETING

- Submit **CMI Ledger, pay advices** and **copies of tax returns** via 13Documents at least seven (7) days prior to the date for the 341 Meeting pursuant to LBR 4002(1)(b) (see pg. 5 of this Manual for further information on 13Documents). It is not necessary to file a Certification of Service of pay advices with the Court.

- Advise the Debtor(s) that they must bring **ALL** required items listed on the memorandum at the end of this Manual to the 341 meeting.

- Advise the Debtor(s) of their rights and responsibilities under the Chapter 13 plan. Request a copy of the Chapter 13 Pamphlet which is distributed at 341 meetings.

- **Advise Debtor(s) of the importance of regular payments to the Trustee.**

- **Attorneys should bring copies of any documents, amended schedules/Plan, etc. that have been filed since the initial petition to the 341 meeting**. Nevertheless, documents are frequently missing at the 341 meeting. Please refer to the end of this manual for a list of required documents.

- **Translator Needed -** let the Trustee's office know at the time that the petition is filed, that your client requires a translator. The Trustee can then make the necessary arrangement to have the 341 meeting conducted through the U.S. Trustee's phone service.

- **If one of your clients needs to be excused from the 341 meeting for a medical reason or other extenuating circumstance**, you must file a motion to excuse your client's attendance with the Court, and should attached documentation in support of the request. Trustee will seek confirmation that you have met with your client, not only debtor(s)' spouse or POA, if such a motion is filed. Absent extraordinary circumstances, debtor(s) should appear.

13Documents

We have a service called 13Documents to accept tax returns and pay advices in a more secure manner. Documents will be uploaded to this secure site. Documents will no longer need to be encrypted prior to upload.

Prior to the initial 341 Meeting, the following documents only should be tendered to 13Documents:

1. Tax Returns in **PDF** format (Adobe);
2. CMI in **PDF** format (Adobe); and
3. Pay Advices in **PDF** format (Adobe)

After the initial 341 Meeting, please use continue to use 13Documents to tender Tax Returns, and any documents that contain personal identifiers (including and especially social security numbers).

For any other documents tendered after the initial 341 Meeting, please simply email the document to the following email addresses:

mburks@cinn13.org, tstickley@cinn.13.org, fdicesare@cinn13.org, and the 341 team (see pg. 2)

Please continue to email all other documents to the regular email addresses as you have done in the past.

BUSINESS CASES

- If Debtor(s) are engaged in any form of self-employment (D/B/A, daycare, insurance sales, real estate commissions, LLC., partnership, separate corporation, even former business winding down, etc.) please contact our office to schedule a business meeting **PRIOR** to the date of the 341 meeting. Email the following person(s): lhillner@cinn13.org, Trustee mburks@cinn13.org, Staff Attorneys fdicesare@cinn13.org and tstickley@cinn13.org with your request. You will be given a few dates and times when a Staff Attorney is available to meet with you.

- The Debtor(s) MUST attend the meeting and you MUST bring CMI ledger with 6 months of Profit and Loss statements and at least the last 3 years of tax returns.

- The Trustee requires annual status reports on the Business Status report form for all business cases. This replaces the requirement to file quarterly profit and loss statements. This report must be completed and FILED with the Court **NO LATER THAN APRIL 30th EACH YEAR.** The form is available on the Trustee's website. Debtor(s) should bring to you a copy of the filed federal tax return and counsel is expected to review the tax return and complete the Business Status Report with assistance from Debtor(s). It must indicate whether taxes are owed. If reports are not filed by late October, the Trustee will move to dismiss under 11 U.S.C. §§ 1304 and 1307(c)(1).

- Trustee reserves the right to request additional reporting and/or documentation on less than an annual basis if necessary for her administration of the case.

ADJOURNED 341 MEETINGS

If you do not want to attend the adjourned docket, **you must follow the procedure, below:**

- Email (do not fax or send by regular mail) all of the following to: tshorten@cinn13.org, lhillner@cinn13.org, smartin@cinn13.org, mburks@cinn13.org, fdicesare@cinn13.org, and tstickley@cinn13.org.

    1. A copy of the Trustee's Report in .pdf format **with list of requested documents in the body of the email that you send.**
    2. A copy of the documents requested in .pdf format. Send file-stamped copies of documents that are required to be filed with the Court.

- **The items above must be emailed the Wednesday before the Monday continued 341 docket or at least 3 business days prior to any other date of continued 341 docket.**

We will review and let you know if you must attend.
If you don't hear from us, please follow up by email or phone.
If you get no affirmative response, please appear with the documents on the adjourned date.
If you have more than 2 cases, you should appear at the continued 341 meeting date.

- **Debtor(s)' budget (Schedules I & J)**

INCOME (SCHEDULE I)

- *Itemize deductions.* Do not lump everything together into one sum. For example, itemize deductions for health insurance, child support, union dues, etc. Schedule I provides space for individual listing.

- *401(k) loan deductions* break out individual loans and specify the date that the loan is expected to be paid off. When the loan is paid, the monthly plan payment should increase (i.e., a step plan).

- *Business income* – Although Schedule I provides a line for net business income, business debtor(s) must complete a supplemental statement showing gross income less identified and itemized expenses (including expected income taxes).

EXPENSES (SCHEDULE J)

- *Insurance* – Unless health insurance is payroll deducted, include an amount for health insurance in Debtor(s)' budget. Debtor(s) should also include auto insurance, homeowners insurance, etc.

- *Food* – Always allow enough money for food: $200 to $300 per person per month. **This amount includes toiletries**.

- *Real estate taxes* – If taxes are not escrowed in the monthly mortgage payment, they must be in Debtor(s)' budget.

- *Budget Billing* – Tell Debtor(s) to fill out the application or to request budget billing online www.duke-energy.com with Duke Energy so they know exactly what their expenses are each month. We have Budget Billing information is available at the 34l meetings, but ask that you Call Duke Energy for the Budget Billing amount **as you prepare the schedules**.

  Advise Debtor(s) to watch their budget – items on the budget must be paid (i.e., Duke Energy, Cincinnati Bell, etc.)

See budgeting form at the end of the manual for breakdown of normal monthly expenses.

- **Adversary release form**

To facilitate the filing of adversary complaints, the Trustee will ask Counsel and Debtor(s) to sign an Adversary Agreement at the 341 meeting. See Trustee's website for form called "Adversary Release." Be sure to provide all documentation from any closing and/or refinance including the title company information.

→NOTE – If Trustee asks Debtor to pursue the adversary proceeding:

a. Debtor(s)' counsel should obtain Agreed Judgment in Lieu of Adversary as possible.
b. The Trustee's proffered plan paragraph 13 language regarding avoidance of a lien secured by a motor vehicle is available on the Trustee's website.

- **Domestic Support Obligations (DSO) (child/spousal support)**

The Obligee's name and address must be included on the Plan, Schedule E and mailing matrix.
If the Debtor(s) and Counsel are unable to secure the current mailing address for the Obligee after exhausting all available avenues, a motion may be filed with the Court requesting that the Court find that Debtor(s) have complied with 11 U.S.C. § 1302. (See Form for DSO due diligence). The Motion should state in detail the efforts that were made to locate the Obligee.

The State of Ohio Child Support Payment Center address must be included on Schedule E AND the Mailing Matrix. The current address is:

ODJFS/Office of Child Support
P. O. Box 183203
Columbus, OH 43218-3203

→NOTE – Inclusion of the County Agency is NOT sufficient.

If the DSO Obligation originated from a Court Order issued in a State other than the State of Ohio or if the Obligee lives in a State other than the State of Ohio, then the address of that particular State agency must be included on Schedule E and the Mailing Matrix, as well. (See UST website for addresses of other State Agencies).

DO NOT PROPOSE LANGUAGE IN PARAGRAPH 13 THAT COULD BE CONSTRUED AS A DETERMINATION OF A DIVORCE OBLIGATION'S DISCHARGEABILITY. See In re Phile, Buchanan, J., 11-12017.

- **Attorney fees**

LBR 2016-1(b)(2) itemizes services included in the $3,700.00 "no-look" fee.

If attorney fees are above $3,700, the attorney must file a separate fee application which itemizes the entire fee in tenths of hours. The Court may require itemization even when fees are below $3,700.

Attorney fees are approved in the Confirmation Order, unless over $3,700.

Counsel must file an *initial fee disclosure* in every case, using LBR Form 2016-1(b).

- **Liquidation analysis**

Use the Liquidation Analysis form on the Trustee's website. Please include automobiles, stock, etc. in your liquidation analysis incorporating these items into the formula on the form.

ALWAYS COMPLETE the math equation at the bottom of the form to show a resulting percentage.

The District Wide Plan no longer recites the liquidation analysis. This form must be filed in every case.

- **Tax Returns**

Pursuant to 11 U.S.C. § 1308(a) – the Debtor(s) must have filed all tax returns for the four (4) tax

years preceding the date of the bankruptcy filing, no later than the day before the first date set for the meeting of Creditors.

If the returns are not filed, the Trustee may file a Motion to dismiss the case, because the Trustee cannot determine the feasibility of the Plan.

Future income tax returns must be filed by April 15th of each calendar year and must be kept current.

- **Trustee's Report and Objection to Confirmation**

After the 34l meeting of Creditors, a Trustee's Report is filed. The Trustee will serve the Trustee's Report and any Trustee's Objection upon Debtor(s)' Counsel, Debtor(s), the U.S. Trustee, and any objecting Creditor's Counsel.

The Confirmation Hearing is held only if the Trustee or Creditor objects to the Plan or if the Judge sets the case for hearing; otherwise the case may be confirmed without a hearing being conducted.

Pursuant to the Local Rules, you have fourteen (14) days to object after the 34l meeting is concluded. The objection must be filed in writing and served on the Debtor(s), Debtor(s)' Counsel, UST, and the Chapter 13 Trustee. See L.B.R. 3015-3.

➔ *Note on Appraisals:* LBR 3012-1(d) states that creditor's attorney and debtor's attorney *shall* hold a settlement conference to arrange a timely appraisal. Failure by the parties to cooperate may result in sanctions. Attendance at the § 341 meeting is strongly encouraged.

Try to file your objection as early as possible. If the objection is late, you must file a Motion to Allow the Objection out of Time at the same time as you file the objection, and email Trustee and Debtor(s)' Counsel.

Objections to Confirmation should be settled at least three (3) days prior to the Confirmation hearing date so that all parties, including the Trustee, may review the terms of settlement, proposed Agreed Orders and any required amendments to plan or schedules. Once the Court posts the Confirmation docket on the Court's website www.ohsb.uscourts.gov (under each Judge's "hearing schedules"), the parties must appear in person at the scheduled Confirmation hearing time to report any settlements entered into after the docket is posted.

PLAN FORM AND CONTENT

Mandatory District Wide Chapter 13 Plan

The new plan is effective December 1, 2017. Updated forms are on the Court's website. Check periodically to make sure you have the latest form.

Updated non-standard provisions (paragraph 13) are available on the Trustee's website.

Of particular note to Cincinnati Practitioners:

- Claims are organized/paid according to a class system. See page 3 of plan.
- Plan defaults to conduit mortgage payments beginning month after petition. See para. 5.1.1.
- Motions to avoid must be filed on or before the § 341 Meeting and must be served pursuant to Rule 7004. Counsel can also avoid liens by plan terms. See para. 5.4.1.
- For § 544 avoidance actions not pursued by the Trustee, derivative standing motion not required, provided "colorable claim exists that would benefit the estate." See para. 5.4.4.
- Debtor(s) may annually retain the greater of the EIC/additional CTC or $3,000 of any federal income tax refund. See para. 8.2.
- All real/personal property insurance information must be set forth in the plan. See para. 10.
- Plan defaults to vesting in Debtor upon discharge. See para. 12.
- Language in para 4 is new Re: Treatment, Timing and Service requirements

1. Local Bankruptcy Rules – Amended Effective **December 1, 2017**

See General Order No. 22-2 on the Bankruptcy Court's website with following:

Effective December l, 2017, any chapter 13 plan or amended plan filed in this District must conform to the revised District Wide Mandatory Form Chapter 13 Plan adopted in this District, which is available on the Court's website at www.ohsb.uscourts.gov. Provided, if an initial chapter l3 plan was filed before December l, 2017, and it is necessary to amend that chapter l3 plan, then the Mandatory Form Chapter 13 Plan (Revised 5/24/l7 version) shall be used.

LBR 2016-1(b)(2)(A) and LBR Form 2016-l(b) are amended to increase the no-look fee from $3,500 to **$3,700.**

LBR 2016-1(b)(2)(A)(iv) and LBR Form 2016-1(b) (Section II.5.d) are amended in their entirety to state as follows:
Preparation and filing of the chapter 13 plan and any preconfirmation amendments thereto that may be required; provided, legal services performed relative to Paragraphs 5.4.1,5.4.2

and 5.4.3 of the chapter 13 plan are not covered by the no-look fee and may be compensated through a separate application for fees; however, in such event, no additional compensation will be allowed for the preparation and filing of a motion pursuant to Rule 5009(d).

LBR 3007-1(a) is amended in its entirety to state as follows:
Service. An objection to a proof of claim that seeks to affect a secured claim under Paragraph 5.1.2, 5.1.4 or 5.4.1 of the chapter 13 plan shall be served pursuant to Rule 7004.

2. Federal Rules – Amended Effective **December 1, 2017**

REMINDER – Regarding Filing Fees in Installments and Attorney Fees:

Federal Rule 1006 (b)(3)- if you pay the filing fee in installments you must postpone payment of attorney fees
(3) Postponement of Attorney's Fees. All installments of the filing fee must be paid in full before the debtor or chapter 13 trustee may make further payments to an attorney or any person who renders services to the debtors in connection with the case.

Federal Rule 3002 (c) Time for Filing a Proof of Claim – reduced to 70 days from date of the Order for Relief or the date of the order of conversion to a case under Chapter 13.

4. **Service of Plan, Objections and Motions by Fed.R.Bankr.P. 3007(a)(2) & 7004(b) & (h)**

See attached Flow Chart for service on FDIC and Corporations.

YOU MUST USE the District Wide Chapter 13 Plan effective December 1, 2017 and any updates thereafter, subject to limited exceptions. See LBR 3015-1(a)(2).

- **PAYMENTS BY THE TRUSTEE**

In addition to the Local Rules cited below, it is the Trustee's policy that all **mortgage** and **vehicle** payments be paid through the plan, as this greatly reduces the filing of motions for relief from the automatic stay.

- Unless otherwise ordered by the court, **ongoing mortgage payments s**hould be paid through the Plan if monthly payments are in arrears as of the petition filing date. See LBR 3015-1(e)(1).

- Unless otherwise ordered by the court, **all vehicle payments, whether lease or loan**, shall be made by the Trustee. Plan should specify the month in which the Trustee's disbursement to vehicle creditor should begin. See LBR 3015-1(d)(2).

Student loans should be paid through the Plan at the same percentage as other unsecured claims. The balance of the loan will survive the Discharge if the plan percentage is less than 100%.

Effective October 1, 201**8**, the Trustee's fee is **5.8** %, but use 6% when calculating amount

needed to fund your plan so you leave room for unexpected events. (Trustee fee may change per budget and approval with U.S. Trustee.)

- **ABOVE MEDIAN DEBTORS**

STEP 1: Calculate disposable monthly income ("DMI")

If Debtor is above median income (calculated by completing Form 22C-1), complete the means test (Form 22C-2). Determine line 45.

- If line 45 is negative, then DMI = the negative number (this allows us to determine whether a change in a means test deduction is material).
- If line 45 is positive, multiply line 45 times 60 months = X

STEP 2: Calculate DMI percentage

Divide $X by unsecured pool of creditors ($Y)

- Y = total on Schedule F + unsec'd portion of Schedule D

$X divided by $Y = percentage to be proposed to be paid to unsecured creditors.

If $X is greater than $Y, plan percentage should be 100%.

→*Note: If debtor(s) cannot meet the DMI required plan percent, the Trustee will require annual reporting on debtor(s)' income with copies of annual tax returns and amended I & J/modified plan, if warranted.*

- **ALL DEBTORS (ABOVE OR BELOW MEDIAN)**

PLAN PAYMENT

Schedule I and J must be reviewed (See I & J preparation guidance, below). The plan payment is determined by Schedule J, but case must pay enough to meet the liquidation minimum. Round up, and avoid partial percentages (e.g., 3.57%).

When due: 11 U.S.C. § 1326 (a)(1)(A) – "Unless the Court orders otherwise, the Debtor(s) shall commence making payments not later than **30 days after** the date of the filing of the Plan or the Order for Relief, whichever is earlier, in the amount . . . proposed by the plan to the Trustee . . . ."

How made: Payments shall be by employer deduction, money order, certified check or TFS. Trustee will verify that the Debtor(s) have made the first payment at the 341 meeting. Counsel should upload the Payroll Deduction Order when the petition is filed. If this is not possible prior to the 341 meeting because of Debtor(s)' current employment status or there are changes during the life of the Plan, Trustee will request that Counsel upload the Payroll Order at such later time following the 341 meeting. **The plan**

payment must be made through a payroll deduction unless there are extenuating circumstances. Payroll deduction plans are more successful than self-pay plans. See LBR 3015-1(f).

How much: The Plan payment must cover all priority payments and the Trustee fee. The Trustee fee for the 2018-2019 fiscal year is 5.8%. Leave a cushion of 6% in your Plan in case the Trustee fee increases. The Trustee fee is derived from our budget which is approved by the U.S. Trustee on a yearly basis. The Trustee fee is based upon receipts**.**

Example (based upon 6% Trustee fee):

Priority payment:	$ 80.00 (car loan)
Priority payment:	$50.00 (mortgage arrears)
Priority payment:	$50.00 (Attorney Fee)
Conduit Mortgage:	$900.00
	$1,080.00
6% of $1,080.00	$ 64.80

TOTAL PAYMENT**:** $1,144.80 (round up to $1,145.00)

Alternate method of calculation:
$1,080.00 X 1.06 = $1,144.80 (round up to $1,145.00)

If you contact our office, we will send you a Plan calculation on problem cases. Priority payments **must** at least cover the interest portion of the proposed priority payment. If not, the debt may never be paid.

PLAN LENGTH

Plan length must be 36 months at a minimum for below median case but no longer than 60 months. Plan length must be 60 months for above median cases. This applies even if Line 45 is negative. Plan length may be less than 36 months or 60 months only if 100% is being paid to unsecured creditors.

EXECUTORY CONTRACTS

The plan requires specific designation regarding whether executory contracts such as gym memberships, cell phone contracts, and timeshare maintenance fees are assumed or rejected by the Debtor(s).

ADEQUATE PROTECTION

If Trustee is to pay the car lease payments prior to confirmation, the plan should provide for adequate protection payments to the Creditor. Trustee will pay prior to confirmation, provided Creditor has filed a Proof of Claim.

STUDENT LOANS

The Mandatory District Wide Plan does not contain a provision regarding student loans. If different treatment is proposed, it must be set forth in para. 5.5, 5.6 or para. 13. Any treatment must comply with 11 U.S.C. § 1322(b)(1). Payment of student loans direct by debtor through income driven repayment plans or other repayment and debt forgiveness plans should be explicitly stated in paragraph 5.6, schedule J expenses and a detailed explanation outlined in paragraph 13. as to why other general unsecured creditors are not unfairly discriminated against by this direct payment with bold and capital print, so as to give other unsecured creditors appropriate notice to object.

If debtors' proposed plan incorporates an income based or income driven treatment of student loan(s), the Trustee asks that debtors' counsel utilize the agreed order form, and paragraph 13 language proffered by the U.S Attorney's office in the Southern District of Ohio.

INTEREST RATE ON SECURED CLAIMS

Interest is calculated per the Supreme Court's decision in Till v. SCS Credit, 541 U.S. 465 (2004). This is the prime rate plus a risk factor. Interest rates should be specifically listed in the Plan. If you are providing different interest rates for different creditors, specifically state that in the Plan.

SPECIAL/ADDITIONAL PROVISIONS

Use **paragraph 13** of Plan for all provisions that deviate from the mandatory form plan. The Trustee requests that you use "suggested language" in paragraph 13, which is available on the Trustee's website, when:

- surrendering real or personal property,
- providing for adversary proceedings
- regarding treatment of student loans
- providing for the balance of any debt to survive discharge, and
- any other special provisions.

This is suggested language for clarity when certain situations arise. If Creditors object, then both sides can work out the terms for resolution. If a matter is to be determined post confirmation (i.e. lien avoidance by adversary), case law requires that the matter be reserved for further determination.

DURING THE CHAPTER 13 CASE

- **Change of Address and Other Changes**

If there is any change, (such as change of address, job change, separation or divorce), please advise the Chapter 13 Office in writing immediately, file the Notice of Address Change with the Court and serve per the Local Rules. In the case of divorce or separation, ascertain who is now responsible for the Chapter 13. This information is necessary for the Chapter 13 Office to administer Debtor(s)' case. See District Wide Plan para. 9.

- **Postconfirmation Attorney Fees**

Postconfirmation attorney fees are paid by the Chapter 13 Office. You should file an application for fees and order at the **same time** you file the substantive motion. Always provide dates of service itemized in tenths of hours and an explanation. See LBR 2016-1(c).

Although the local rule allows fee applications to be submitted within 6 months of the date tha the work was performed, please file your fee applications as soon as possible. *Particularly* if it is nearing the end of the case, we ask that you file immediately and email the Trustee and staff attorneys a courtesy copy of your application.

- **Suspensions/ Temporary Motion of Modification of Plan**

Let the Debtor(s) know how suspensions work. Debtor(s)' Counsel must notify the employer when the suspension begins and when it ends. Put the exact dates in the Motion and Order and make sure the case is not over 60 months and there is no conduit being paid by the Trustee. See LBR 3015-2(e).

If the Trustee is paying mortgage payments or car lease payments through the plan, then plan payments should only be partially suspended to allow Trustee to continue to make such payments to Creditors. The Motion to partially suspend should specify the amount being suspended and should state that Debtor will continue to pay the mortgage and/or lease car payments plus Trustee fee during the suspension period.

- **The Notice of Intention to Pay Claims**

This document is mailed approximately eight (8) months after the case is filed. Counsel should check to make sure secured creditors filed their claims. See Federal Rule of Bankruptcy Procedure 3002(c). See Rule 3004, which allows Debtor(s) or Trustee an additional thirty (30) days to file a claim on behalf of Creditor if Creditor fails to file its own claim. *OBJECT to the claim itself* and not to the Notice of Intention to Pay Claims.

Disbursement of funds to creditors usually occurs the 3rd week of each month.

- **Communication with your Clients Post-Filing**

Please make yourself available to the Debtor(s) AFTER the case is filed and after the 34l meeting of Creditors for questions. This is a traumatic time for most Debtor(s). When they arrive home after their meeting with Counsel, or after the 34l meeting, most Debtor(s) have many questions. You should be available for questions during the entire duration of the Plan and beyond if questions arise. PLEASE REMIND YOUR CLIENTS THAT THE TRUSTEE'S OFFICE CANNOT GIVE LEGAL ADVICE.

Let your clients know there may be attorney fees which must be paid through the Chapter 13 Plan if post confirmation work is performed. Attorney fees must be itemized and fees must be paid through the Chapter 13 Trustee.

- **Postconfirmation Plan Adjustments**

PLAN FALLING UNDER 36 MONTHS REQUIRED BY 11 U.S.C. § 1322(d)

If the plan is determined to be projecting under 36 months, the Trustee will serve a notice upon debtor and Counsel and increase the percentage. Our office adds tax refunds, bonuses, commissions, insurance proceeds, inheritances and any additional funding to the plan to be disbursed to creditors when determining the plan percentage for any below 36-month plan. Therefore, these payments are considered additional funding to plan up and above the required plan funding and may increase the plan percentage as a result of the total amount of claims filed, disallowed or otherwise not filed by creditors.

If you do not agree with the percentage increase you should let our office know when email is sent, otherwise the plan percentage will be increased ***by filed Notice with Court.***

DISPOSABLE MONTHLY INCOME TEST (ABOVE MEDIAN DEBTORS)

After Confirmation and after claims bar date, use the following formula to determine whether your plan meets the DMI calculation:

Multiply line 45 of the means test times 60 months = $X
Divide $X by total amount of unsecured claims "actually filed" by Creditors = $Z
$X divided by $Z = % percentage for DMI calculation **after** claims filed

If DMI calculation percentage is higher than plan percentage and our office is auditing case, you may receive an email request for an agreed order to increase plan percentage or request that you file a Motion to Modify Plan if increased percentage is not feasible for debtor during the 60 months.

SIXTY MONTHS OF FUNDING (*BAUD*) (ABOVE MEDIAN DEBTORS)

If the plan is determined to be above median and under 60 months, the Trustee will serve a notice upon debtor and Counsel and increase the percentage. Our office adds tax refunds, bonuses, commissions, insurance proceeds, inheritances and any additional funding to the plan to be disbursed to creditors when determining the plan percentage for a 60-month plan. Below is a sample email to Counsel.

> Case Name
> Dear Counsel:
>
> We have reviewed this Case and the plan is currently projected to complete in less than 60 months.
>
> **UNLESS we hear otherwise from you- we will file a Notice within 14 days from today adjusting the plan percentage.**
>
> **We plan to increase the plan percentage from 1% to 100%. Please review the large claims that haven't been filed.**
>
> We have calculated the plan percentage taking into consideration the following factors:

1. The requirement that at least 60 monthly plan payments must be made.
2. The total amount paid to date.
3. All claims that have been filed to date.

This calculation does not include the following:

a. Any additional attorney fees which you may request.
b. Any proofs of claim for deficiency balances or otherwise that may be filed in the future.
c. Any objections to claims that have not been filed.

- **Motions to Modify**

  - **Use the form provided by the Trustee. The form is on the Trustee website.**

  - If you are reducing the Plan percentage, review the Trustee's website and make sure that the Trustee has not disbursed more than your proposed percentage to unsecured creditors; otherwise, the modification may not be approved. Complete the form at bottom choosing what plan percentage was required of Debtor(s) at time of filing.

- If Debtor(s) are below median, the Plan percentage may not fall below the greater of the following; the plan percentage already disbursed by the Trustee, the liquidation analysis percentage or the plan percentage required for a 36-month plan.

- If Debtor(s) are above median, the Plan percentage may not fall below the greater of the following; the plan percentage already disbursed by the Trustee, the liquidation analysis percentage or the plan percentage required for a 60-month plan.

- Always round up to the next higher percentage. Do NOT utilize partial percentages, unless otherwise agreed upon by the Trustee.

- If Debtor(s) were above median at the time of filing be sure to state whether Debtor(s) are still able to meet the DMI calculation requirements, and if not, explain in detail any change in circumstances since filing (i.e. reduction in income).

- If there is a **change in circumstances** post confirmation and Debtor is no longer able to meet DMI, then file a Motion to Modify Plan (pursuant to 11 U.S.C. § 1329) and state that: "Debtors are currently unable to meet DMI because __**(give the reason why Debtor is unable to meet DMI at that time (i.e. job loss, continued medical illness or injury, death, etc.)**___**.** If Debtor(s) income subsequently increases in the future, then amended schedules and motion to modify plan will be filed at that time as warranted by such increase in annual income."

- If there is a **temporary change in circumstances**, such as a job loss, explore plan suspension and/or be prepared to submit annual status reports in April of each remaining year of the plan should circumstances improve or change.

- When filing a Motion to Modify, **always attach** new Schedules I and J to show any change in income and/or expenses.

- Please address Trustee's objection to Motion to Modify when proposing an Agreed Order, and complete all relevant information requested on the suggested form. (i.e. fill in paragraph d. with additional terms and conditions). Copy the Trustee, both staff attorneys, and Linda Hillner.

- **Motions to Dismiss**

  - We ask that you do the following when presenting resolutions to the Trustee, to help us respond more quickly:

    a. Send proposed Agreed Order resolving to the Trustee, both staff attorneys, and Kathy Hipple, using the Trustee's suggested form.

    b. Answer the following questions in your email:

       How many payments have been missed? _____.

       What is the monthly payment? $_____.

Payroll or direct pay? Can we do a payroll? If not, why? _____.

Is there a conduit in place? _____.

Is the case above or below median? _____.

What is the plan's current length? _____ months.

Was a recent motion to modify filed? _____.

If case is projecting over 60, is a motion to modify (and amended I&J) necessary? _____.

If case is projecting over 60, can we increase monthly plan payment by up to approximately $100.00 per month by Agreed Order to bring within 60 by adjusting budget to accommodate the minimal increase in plan payment?

With respect to the last question, we suggest the following Agreed Order language to modify plan in conjunction with resolving motion to dismiss with the following language if amount necessary is approximately $100.00/month or less:

> The parties further agree that Debtor(s)' plan is hereby modified to increase plan payments to $_____ per month beginning with the plan payment due for _____20____, so that the plan may complete within 60 months in compliance with 11 U.S.C. 1322 (d). Debtors will adjust monthly expenses to accommodate this **$___** /per month plan increase or has filed Amended Schedules I & J in conjunction with this agreed order demonstrating Debtor(s) current budget. Trustee will increase monthly payments to remaining unpaid creditors per the confirmed plan. No other creditor or party in interest is adversely affected by this plan modification.

THE TRUSTEE RESERVES THE RIGHT TO ASK FOR AN AMENDED BUDGET ON A CASE BY CASE BASIS, AND COUNSEL SHOULD HAVE AMENDED SCHEDULES PREPARED FOR ANY CASE THAT HAS NOT UPDATED THE BUDGET IN OVER 1 YEAR.

- **<u>Selling Real Estate</u>**

*All Motions to Sell Real Estate **<u>must be</u>** filed with the Court.*
Include whether Debtor will retain any proceeds and what for and Attach Purchase Agreement.
File Application to Employ Realtor with Affidavit of Realtor and copy of listing contract.
Be sure to review the closing statement yourself to ascertain that all secured Creditors have been paid at the closing or by the Chapter 13 Office.

Sale of personal property should be done by application to the Trustee, as opposed to motion, per LBR 6004, unless the property is encumbered.

- **Incurring Debt**

If the Debtor(s) wish to obtain credit (including a mortgage refinance), Counsel must submit an Application to Incur Debt to the Trustee and obtain the Trustee's Approval. Email the completed application and supporting documents to mburks@cinn13.org, tstickley@cinn13.org, smartin@cinn13.org, and tshorten@cinn13.org. Email the approval form in Word format and the application in PDF format. The form approval should be completely filled out except for the date. **SERVE the application on ALL Creditors and their respective Counsel, if known,** at the same time the application is submitted to the Trustee. Remember to attach a copy of the loan agreement, good faith estimate or other loan documentation as separate PDF documents. Advise how the Debtor(s) will be able to fit the new debt payment into the budget. Submit amended Schedules I and J, if necessary. You must file the application even if the Debtor(s) are using the funds to pay off the Chapter 13. Be sure to go over the cost of any refinancing with the Debtor(s). Costs, such as points to refinance, can really add up.

If Debtor(s) are refinancing real estate to pay off the Plan, make sure to utilize the Trustee's form approval, which has specific conditions and requirements for the real estate closing to be completed.

Court Proffered Motions to Avoid

The Court has proffered three forms/orders, which are available on the Court's as well as the Trustee's website:

- Motion for Determination that Mortgage/Lien is Wholly Unsecured and Void
- Motion to Avoid Judicial Lien on Real Property Pursuant to 11 U.S.C. § 522(f)(1)(A)
- Motion to Avoid Nonpossessory, Nonpurchase-Money Security Interest in Exempt Property of Debtor Pursuant to 11 U.S.C. § 522(f)(1)(B)

Note that further form motions may be coming. Stay tuned, and monitor the Court's website. Also note: that lien avoidance can be accomplished by plan provision effective 12/1/2017.

- **Loan Modifications**

If Debtor(s) is in the loan modification process at the time of the bankruptcy filing, the Trustee suggests the following language in paragraph 13:

> **Pending Loan Modification:**
>
> Debtor(s) have completed and submitted paperwork for a mortgage modification to Creditor (Insert name of Creditor) regarding the real property located at: (insert address or description of property). Trustee will not pay on any mortgage arrearage claim to this

Creditor until or unless an amended plan or Motion to Modify plan is filed with the Court directing the Trustee to do so.

Debtor(s) will continue to make the ongoing monthly mortgage payment directly to Creditor OR provide for the Trustee to make the monthly mortgage payment to Creditor through the plan beginning with the month of _____, 20___.

Debtor(s) will file a Status Report and/or file a Motion to Approve Trial/Permanent Mortgage Loan Modification (and Motion to Modify Plan, if applicable) no later than **six months** from date of confirmation to indicate the status of the pending loan modification. If the loan modification is successful, the plan continues as confirmed.

If the loan modification is still in process six months after confirmation, the Status Report shall indicate the status and Trustee will maintain status quo of confirmed plan until or unless a Motion to Modify plan is filed or other agreed order is entered into between the parties. The status report should indicate a date certain for a follow up status report.

If the loan modification is not successful, then Debtor must indicate such in the filed Status Report and either file a Motion to Modify plan to incorporate funding for the mortgage arrears directing the Trustee to commence payment on such arrears, OR provide for surrender of the real property. Creditor shall have 270 days from the date of the filed Status Report to file any deficiency claim which will be paid as a general unsecured claim, if timely filed. If the deficiency claim is not timely filed, then the claim shall be deemed disallowed and discharged upon completion of Chapter 13 Plan and entry of Discharge Order.

Chapter 13 Cases—Mortgage Loan Modification. Any party seeking court approval of a trial mortgage loan modification or a permanent mortgage loan modification may file a motion directed to the court. Any such motion shall state whether the trustee should continue or cease distributions on any arrearage. If applicable, a motion to modify the plan shall be filed pursuant to LBR 3015-2.

Please note the following when filing the appropriate Motions:

1. The updated forms are located on the Trustee's website: www.13.network.com.
2. Amended Schedules I and J reflecting updated income should be filed with the
3. Motion to Approve Trial Mortgage Loan Modification, but must be filed no later than with the Motion to Approve Permanent Mortgage Loan Modification.
4. Per LBR 2083-1, the Motion *shall* direct the Trustee whether to continue disbursements on any arrearage pre petition or post petition. If there are post-petition arrearages, specify how the Trustee should handle.
5. File all documentation of the trial or permanent mortgage loan modification as an attachment to the Motion to Approve. Attachments should show monthly payment breakdown with Principal and Interest and amount for escrow of taxes and insurance.

6. Counsel must upload an Order Approving the Motion within 25 days of the filed Motion.
7. Trustee will not authorize an early disbursement without an Order. A Motion to Shorten Time must be filed along with the Motion.
8. Serve all affected Creditors.
9. The Trustee asks that you review the following in connection with these Motions:

    - Review changes being made to the mortgage amount, mortgage payment, interest rate, and mortgage arrearage. Compare old terms to the new terms and see what changes are being made.
    - Is the mortgage payment a conduit or direct pay?
    - Will the Trustee continue or discontinue the conduit payment?
    - Is the Trustee paying the Mortgage arrearages? If so, check to see whether they need to be stopped.
    - Review case status: Below Median or Above Median? Is case below 36 or 60 months, as applicable? Is case funding regularly?
    - Does the mortgage payment include taxes and insurance?

- **Motions for Relief from Stay**

The Chapter 13 Office will discontinue payments to the Creditor once the Order Granting the Motion for Relief is entered pursuant to the Local Bankruptcy Rules.

Divorce

You should obtain relief from the automatic stay or modification of the automatic stay to proceed or continue with any divorce action.

Agreed Order on Relief from Stay

The Trustee's office must approve the terms for any agreed order on Motions for Relief from the Automatic Stay PRIOR to the matter being reported settled to the Judge's clerk. Email to the Court should indicate that Trustee and all parties have signed off. Please submit your AO to the Trustee with answers to the following questions:

- How will Debtors cure the arrearage?
- The Trustee expects any motion to modify the plan to accommodate the arrearage and any Supplemental Proof of Claim be prepared and ready to file when the AO is presented. Are these prepared?
- If cure is direct, which is **not** the Trustee's preference, does the AO recite the source of funds used for the cure?
- If the mortgage fell behind while debtor(s) paid directly, will case create a conduit going forward? The Trustee's staff must obtain her express permission to allow direct payment to resume under these circumstances.

LBR 9019-1(b) requires that Settlements shall be reported as promptly as possible to the Chapter 13 Trustee via email.

If the parties have resolved the matter and Trustee declines to sign the proposed agreed order, please report the Trustee's signature as "HAVE SEEN". Please allow the Trustee and Staff Attorneys time to review agreed orders and terms for resolution.

If relief from stay is granted, Trustee will no longer pay on Creditor's claim. Be sure to object to the claim on any 2nd mortgage or other claim which you no longer wish for the Trustee to pay, otherwise funds may be directed to pay a claim for real estate or personal property which Debtor(s) wish to surrender.

- **Claims**

Pursuant to Federal Rule 3002 (c)

In order to have a claim allowed and participate in the distribution of any dividend, a non-governmental Creditor must file a proof of claim within 70 days from filing of petition. You are encouraged to file your claim electronically.

Governmental units have 180 days from the date the petition was filed to file a claim. These dates are printed on the 341 meeting notice. The Trustee will schedule all IRS and State of Ohio claims as filed, notwithstanding the Plan treatment, unless an objection to claim is also filed.

If the secured Creditor has not filed a proof of claim – Debtor(s) may file a claim on behalf of the Creditor pursuant to Federal Rule of Bankruptcy Procedure 3004. This Rule allows Debtor(s) an additional thirty (30) days within which to file the claim. Check Pacer after the 70 or 180 days has run. **Do not file a claim for a Creditor until the Creditor's time has expired**. **See also Federal Rule 3002 (c) (6) & (7) for extensions to file under certain circumstances and additional time to supplement certain claims.**

When filing claims which include multiple account numbers - please state the claim amounts for each account number. Individually list the dates and amount of each debt, and state whether they should be grouped as one debt, and the nature of the debt. Please provide account numbers for all debts listed when filing the claim. **Always attach supporting documents such as a Financing Statement, car titles, etc.**

Disputed Claims – If a claim is listed as disputed and a claim is filed, the Chapter 13 Office will file a Notice of Disputed Claim which requires that Debtor(s)' Counsel file an objection within thirty (30) days or the claim will be paid as filed. The Trustee instituted this procedure so that disputed claims would not languish until the end of the case.

Mortgage Claims should include an addendum with the following information:
Creditors should be using the claim form and attachment as required by Rule 3001(Official Form 10 with Attachment A). Also see Trustee's web site for the MORTGAGE PROOF OF CLAIM ATTACHMENT form.

Debtor(s)' attorneys should routinely review mortgage claims and file appropriate claim objections.

NOTICE OF MORTGAGE PAYMENT CHANGE

- Creditor(s)' counsel - file Notice as required by Official Form B10 (supplement 1) as updated December 2011 and relate to the outstanding claim (See Fed. R. Bankr. P. 3002.1 (b) and http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_010S1.pdf).

- Debtor(s)' counsel – if you do not agree with Notice of Payment change file an objection to the Notice and request a hearing to Determine current payment amount. Many counsel have recently filed responses based on escrowed analysis and/or post-petition defaults.

- Conduit cases over 60 - The Trustee will notify counsel if such new payment causes the plan to exceed sixty (60) months and request a resolution between the parties and/or plan modification to address the over 60 month issue. Trustee will maintain status quo on last notice of payment change and/or original proof of claim amount until or unless the Notice and objection thereto is resolved with Motion to Modify Plan to accommodate and/or withdrawal or amendment to Notice.

Note that the current rule change states that any timely filed Notice of Payment Change becomes effective if no objection is asserted in twenty-one (21) days.

There is also an exemption from the Notice requirements for HELOC loans.

NOTICE OF FINAL CURE AND RESPONSE BY CREDITOR INDICATING ARREARAGE ON A DIRECT PAY MORTGAGE

See Fed. R. Bankr. P. 3002.1(f) and (g)

- If parties agree with arrears - use proposed Agreed Order Form to resolve any post-petition mortgage arrears so that case can complete and close.

- If parties do NOT agree – Debtors(s)' counsel should file a Motion to Determine post-petition mortgage arrears and request a hearing. See Fed. R. Bankr. P. 3002.1(h)

Use Trustee's suggested form: AGREED ORDER NOTICE OF FINAL CURE PAYMENT

If Creditor's response reflects a substantial post-petition of a direct pay mortgage, the Trustee may hold her administration until Debtor(s) and Creditor reach a resolution regarding how the loan will be brought current. Recent case law reflects a trend of such cases being dismissed or denied discharge.

NOTICE OF POST-PETITION MORTGAGE FEES, EXPENSES, AND COSTS

- Creditor(s)' counsel - file Notice as required by Official Form B10 (supplement 2) and relate to the outstanding claim on the claims register.
  See Fed. R. Bankr. P. 3002.1(c) and (d)

- Debtor(s)' counsel – if you do not agree with Notice, file an objection and request a hearing or determination of charges.
  See Fed. R. Bankr. P. 3002.1(e)

- Conduit cases - Trustee will send the following email to Debtor(s)' counsel and request a response as to whether Debtor(s) agree with the charges, then file a Motion to Allow or Disallow such charges based on counsel's reply to the email. If paying such fees and costs will cause the plan to exceed 60 months, then the Trustee will require a Motion to Modify Plan to be filed by Debtor(s)' counsel to accommodate such fees and charges.

  Dear Counsel:

  We are in receipt of a Notice of Post-Petition Mortgage Fees, Expenses and Charges (Supplement 2) filed by Wells Fargo Bank, N.A. in the amount of $15.00 filed on 10/8/12 (Docket #___).

  THIS IS A CONDUIT CASE.

  Please advise if you will be filing a Motion objecting to this Notice.

  The Trustee will file a Motion to allow or disallow this Post-Petition Notice if no action is taken by debtor(s) Counsel.

  By copy of this email, The Trustee is requesting additional information from Creditor's Counsel.

  If you are not objecting to this Notice, please confirm if you want the Trustee to pay the fees through the plan.

  Thank you.

- Non Conduit cases - Trustee will file a Notice stating that Trustee will not pay these additional fees and costs unless the plan is modified to accommodate such fees and charges. If Debtor(s) want these fees and costs paid, then counsel should file a Motion to allow such charges and a Motion to Modify plan to accommodate such charges.

- **Motions to Dismiss**

Our Office works diligently to resolve Motions to Dismiss ***prior to*** the hearing date, so we do not need to appear before the Judge to explain why the Motion has not yet been resolved. Please refer to list on pg. 24-25 for questions to be answered when submitting resolutions of Motions to Dismiss.

The following must be approved by the Trustee and/or filed with the Court on or before the date set for hearing:

a. Certification of Payment by the Debtor(s)' attorney of funds being sent to the Trustee's lockbox. Debtor(s) should bring payment to counsel and counsel should send payment.

b. Proposed draft of an Agreed Order resolving the motion should be approved. For older cases, the Trustee will require that the Agreed Order contain language that the case complete and pay off on or before the 60th month from the date of confirmation.

c. Motion to Modify Plan to bring it within 60 months as required by 11 U.S.C. § 1322(d).

d. Objection to any Proof of Claim.

e. Notice to Convert to Chapter 7 or other Chapter under the Bankruptcy Code.

The Trustee is willing to allow additional time for good cause, such as death in family, illness, problem with payroll, etc. if such special conditions are outlined in the response to the Motion to Dismiss and Counsel proposes a reasonable time frame to resolve the Motion to Dismiss.

Conduit Delinquency: If the Trustee is paying monthly mortgage payments through the Chapter 13 Plan and the Debtor(s) are delinquent in Trustee payments, the Debtor(s) must make a payment "prior to the hearing date" that is sufficient to cure all delinquent mortgage payments due **plus** the mortgage payments for the month in which the hearing is held.

YOU MUST APPEAR AT THE HEARING WITH THE DEBTOR(S), UNLESS…

you have uploaded an Agreed Order resolving the Motion to Dismiss which has been reviewed and approved by the Trustee AND you have reported to the appropriate Court Clerk that the agreed order has been uploaded and confirmed that the matter has been removed from the docket (via email address listed, above, with Trustee and Staff Attorneys copied), AND you have verified on Pacer or with the Court that the hearing has been canceled.

See the specific Judge's web page for the posted docket prior to the actual hearing date.

Review each individual Chambers' policy for its settlement report deadline. In some cases, once the docket is posted, you must appear if your case is listed.

Please do not ask the Trustee's office whether you need to appear, as each Chambers determines when appearances are necessary. When in doubt, appear.

- **Reporting resolutions of hearings to the Court**

Email notice of any settlement to the appropriate Judge PRIOR TO hearing at the following addresses:
J_Buchanan_Orders@ohsb.uscourts.gov
J_Hopkins_Orders@ohsb.uscourts.gov

Include the terms of the settlement and when the Order will be submitted. Copy the Trustee with the e mail.

In subject line of settlement email please put the case no., name, issue and date of hearing. The Trustee's Office sorts emails by what is in the subject line. Providing this information helps our Office better serve you and handle the matter with expediency. Help us help you!

COMPLETING/CONVERTING THE CASE

- **Debtor(s)' Final Certification for Discharge**

Counsel must make sure that the following conditions have been met and the form has been filed before Debtor(s) can receive a discharge;

The Chapter 13 Trustee has filed a Certification of Final Payment in this case.

Debtor(s) has completed a financial management instructional course approved by the U.S. Trustee and has filed the certificate with the Court.

That Debtor(s) is either not required to pay any domestic support obligation OR if required to pay has paid all amounts due under any domestic support obligation required by a judicial or administrative order, or by statute.

Debtor(s) has provided the name, address, and telephone number of the State child support enforcement agency for this domestic support obligation.

Debtor(s) has provided his/her/their most recent address.
Debtor(s) has provided the name and address of most recent employer(s).

Debtor(s) has provided the name of each creditor that holds a claim that is not discharged under 11 U.S.C. §523 (a) (2) or (a) (4) or a claim that was reaffirmed under 11 U.S.C. §524(c).

Debtor(s) has certified that he/she/they HAVE NOT received a discharge in a case filed under chapter 7, 11, or 12 of this title during the 4 year period preceding the date of the order for relief under this chapter (See 11 U.S.C. section 1328(f).) OR if such a discharge has been received, Debtor(s) has stated the name of the court, case number, and date of discharge.

Debtor(s) has certified that he/she/they HAVE NOT received a discharge in a case filed under chapter 13 of this title during the 2 year period preceding the date of the order for relief under this chapter. (See 11 U.S.C. sections 1328(f).) OR if such a discharge has been received, Debtor(s) has stated the name of the court, case number, and date of discharge.

Debtor(s) has stated that 11 U.S.C. section 522 (q) (1) is not applicable to his/her/their case and there is not pending any proceeding in which he/she/they may be found guilty of a felony of the kind described in section 522(q) (1) (A) or liable for a debt of the kind described in section 522(q) (1) (B). (See11 U.S.C. section 1328(h).)
The terms of settlement should be agreed upon by ALL parties, **prior to** hearing date, and proposed agreed orders should be uploaded with the Court **prior to** hearing date.

- **Closing of Cases**

When a Plan has been completed, a final audit is performed. If all claims have been properly docketed and paid according to the Plan, the case is closed in the Chapter 13 Office. A Notice of Termination of Payroll Deduction Order is sent to Debtor(s)' employer and a Trustee's Final Certification is filed with the Court. A Final Discharge Order is then issued by the Court. After all checks have cleared the bank, the Trustee files a Final Report.

When a case is completed, a letter is sent to the Debtor(s) encouraging them to contact a credit reporting agency to make sure the credit report is accurate. Names and addresses of the credit agencies are provided.

THE DEBTOR(S)' ATTORNEY MUST ALSO FILE A CERTIFICATION IN ORDER FOR DEBTOR(S) TO RECEIVE A DISCHARGE. THE FORM IS AVAILABLE ON THE TRUSTEE'S WEBSITE AND IS TITLED DEBTOR(S)' CERTIFICATION REGARDING ISSUANCE OF DISCHARGE ORDER.

- **Cases Over Five Years or Under 36 Months**

Cases should not go beyond five (5) years, or under thirty-six (36) months. If a case is going to run long or short, the Chapter 13 Office sends a letter or email which states your options to bring the Plan within the time frame, along with a Plan percentage calculation and/or a proposed agreed order to resolve the length of the Plan.

- **Conversion from Chapter 13 to Chapter 7, Voluntary Dismissal or Hardship Discharge**

If you are converting from a Chapter 13 to a Chapter 7 case, filing a voluntary dismissal, or a motion for a finding of hardship discharge, have your secretary or paralegal follow up with the Chapter 13 Office to make sure that the notice has been received. A conversion can be done by notice, but a voluntary dismissal requires a motion. See available forms on the Trustee's website: Notice to Proceed under Chapter 7, Motion for Voluntary Dismissal and Motion for Finding of Hardship.

The Motion for Finding of Hardship should be filed with supporting amended schedules I and J to demonstrate Debtor(s)' budget at the time the motion is filed. Please **explore plan modification before resorting to hardship discharge.**

- **Cases Converted from Chapter 7 to Chapter 13**

Debtor(s) who convert their cases from Chapter 7 either voluntarily or by Agreed Order with the U.S. Trustee's office should keep in mind that the following should occur within thirty (30) days of the date of the conversion and/or entry of Agreed Order to Convert:

a. Amended Schedules, Chapter 13 plan and Liquidation Analysis must be filed with the Court.

b. The first plan payment should be tendered to the Trustee's lockbox.

Also, CMI Ledger, pay advices and copies of tax returns should be submitted via 13Documents at least seven (7) days prior to the date for the 341 Meeting pursuant to LBR 4002(1)(b) (see pg. 5 of this Manual for further information on 13Documents). It is not necessary to file a Certification of Service of pay advices with the Court. You should also amend your disclosure of compensation, if applicable.

- **Delinquent Payments**

If payments to the Chapter 13 Office become delinquent, either an email will be sent to the Debtor(s)' attorney or a Motion to Dismiss will be filed by the Trustee. Motions to Dismiss for nonpayment are filed every month. Motions to Dismiss for nonpayment may also be filed by the Trustee because payments are short or being made in partial amounts. Partial payments may be caused by insufficient amounts being deducted by the Employer and/or Debtor(s)' failure to cover the short payments. Check the "Pay Schedules" tab on the Trustee's website to review Debtor(s)' payments and amount of delinquency when responding to a Motion to Dismiss.

- **Vacate Order of Dismissal**

Serve the Trustee with any Motion to Vacate Order of Dismissal. Make sure the Debtor(s) begin making payments immediately. Call the Clerk's office to ascertain if the Motion to Dismiss has been granted. If the case is also closed by the Court, you must also file a Motion to Reopen the case and give all affected parties/Creditors notice.

Thank you for taking the time to read this Manual.
Please telephone or email the office should you have any questions.

2018

OFFICE OF THE TRUSTEE
CHAPTER 13
600 Vine Street, Suite 2200
Cincinnati, Ohio 45202
(513) 621-4488
(513) 621-2643 Fax

MARGARET A. BURKS, ESQ
TRUSTEE

Re: 341 hearing documents

Please provide the following documents at the 341 meeting:

- Driver's license or picture identification
- Verification of social security number – Social Security card preferred, but the Trustee may accept W-2 form, etc.
- Car titles, Memoranda of Title and Lease Agreements for automobiles
- Copies of Recorded Mortgages and Deeds and loan modification documents
- Three years of FILED Income Tax returns, including AMENDED Tax returns.
- Two most recent paystubs for the month that the 341 meeting is being held
- LBR Form 1015- 2
- A Motion to Retain Income tax refund, if income taxes have been spent
- First payment in money order form or cashier's check mailed within 30 days of bankruptcy filing
- Appraisal of real property
- Liquidation analysis
- CMI Ledger
- Bank statements – showing balance as of the date of the bankruptcy filing. (Bring six months if U.S.T. audit)
- Copies of any amended schedules, Plans or other documents filed with court after initial petition filed
- Anything else which is pertinent to Debtor(s)' life – Divorce Decree, Separation Agreement, Land Contract, Probate/Inheritance documents, etc.

OFFICE OF THE CHAPTER 13 TRUSTEE
600 VINE STREET, SUITE 2200
CINCINNATI, OHIO 45202
TELEPHONE: (513)621-4488
FACSIMILE: (513)621-2643

MARGARET A. BURKS, CHAPTER 13 TRUSTEE

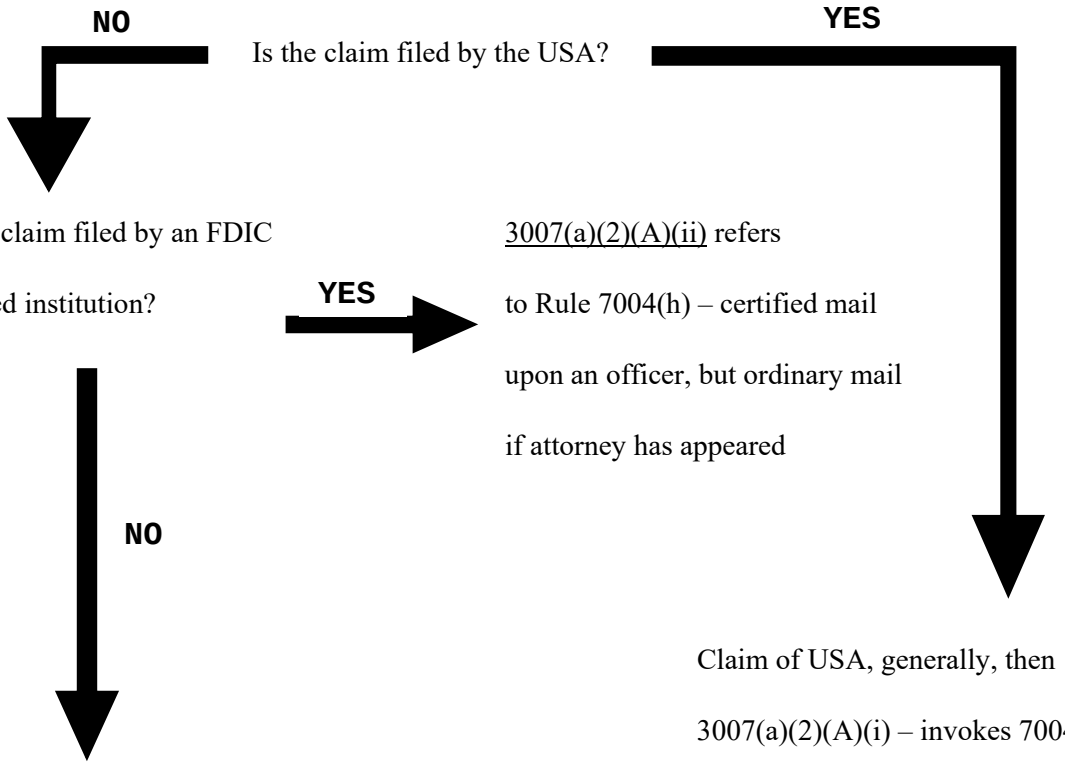
DEBTOR(S)' EXPENSES

1. Keep a list of Daily Expenses.
2. Keep a list of Weekly Expenses.
3. Then make a list of Monthly Expenses.

EXPENSES	***DAILY***	***WEEKLY***	***MONTHLY TOTAL***
Rent or Mortgage Payments	$	$	$
Property Tax	$	$	$
Property Insurance	$	$	$
Home Maintenance	$	$	$
Utilities (Gas, Electric, Propane)	$	$	$
Water	$	$	$
Telephone	$	$	$
Cell Phones	$	$	$
Cable – Basic Only	$	$	$
Internet – Basic Only	$	$	$
Food	$	$	$
Meals Outside Home	$	$	$
Clothing	$	$	$
Laundry/Dry Cleaning	$	$	$
Medical and Drug Expenses	$	$	$
Medical Insurance	$	$	$
Transportation (Gas, Maintenance, etc.)	$	$	$
Recreation	$	$	$
Charitable Contributions	$	$	$
Insurance (Not Paid By Employer Life & Medical)	$	$	$
Alimony, Maintenance, or Support	$	$	$
School Expenses and Activities	$	$	$
Cigarettes ($60 Max Per Month If Applicable)	$	$	$
Pet Expenses ($50 Max Per Month or Receipt Proof)	$	$	$
Daycare	$	$	$
Hair Care	$	$	$

Tuition	$	$	$
Miscellaneous (During Chapter 13)	$	$	$
Miscellaneous (After Chapter 13 Completed)	$	$	$
Student Loan Payments	$	$	$
Hobbies	$	$	$
Savings	$	$	$
Vacation	$	$	$

FLOW CHART FOR SERVICE OF OBJECTIONS TO CLAIMS – FED.R.BANKR.P. 3007(a)(2)



Service per Rule 7004.

Corporation, partnership or unincorporated association service:

Rule 7004(b)(3) requires service upon a corporation, partnership, or unincorporated association by FIRST CLASS mail to the attention of an OFFICER, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

United States service:

Rule 7004(b)(5) requires service upon a United States agency by first class mail to (1)the civil process clerk at the Office of the United States attorney for the district; (2) the Attorney General of the United States in Washington D.C. and (3) the agency itself.

Insured Depository Institution - Certified Mail (includes Credit Unions)

Rule 7004(h) requires that service on an insured depository institution in a contested matter shall be made by CERTIFIED mail addressed to an OFFICER of the institution.

Cincinnati Bar Association Bankruptcy Institute
December 13, 2018
Chapter 13 Update

Carolyn Buffington, Esq., Chief Deputy, U.S. Bankruptcy Court, S.D. of Ohio

- Rule 3002.1(b) – Is it an Objection or a Motion?
- Anticipated Changes to the District Wide Plan
- Attorney Advisory Committee – Update
- Introduction of the Incoming Chief Deputy

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION.

(1) *Notice*. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) *Objection.* A party in interest who objects to the payment change may file a motion to determine

whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

* * * * *

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

* * * * *

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO

In re	)	
	)	GENERAL ORDER 30-1
ORDER REGARDING COMPLEX	)	
CHAPTER 11 CASES	)	
	)	

The term "Complex Chapter 11 case" means a case – (1) filed under Chapter 11 of the Bankruptcy Code; (2) that is not filed by an individual debtor, as single asset real estate case, or as small business case as defined in 11 U.S.C. § 101(51C); and (3) with aggregate debt of all affiliated debtors of at least $10 million or involving a debtor with publicly traded debt or equity.

Concurrent with the filing of the petition, a debtor whose case is eligible to be treated as a Complex Chapter 11 case may file a designation electing treatment as a Complex Chapter 11 case. Verification of the designation will occur prior to or at the beginning of any first day hearings. Only debtors that elect Complex Chapter 11 case treatment and are verified as Complex Chapter 11 cases shall be subject to Complex Chapter 11 case procedures.

Complex Chapter 11 cases will be assigned randomly between two designated judges. The two designated judges will be chosen by the Court from a majority vote of the judges. One designated judge will sit in the Eastern Division and one designated Judge will sit in the Western Division. Initially, one designated judge will serve a term of four (4) years and one designated judge will serve a term of three (3) years. Thereafter, the terms will be three (3) year terms. The initial two judges shall be the Honorable John E. Hoffman, Jr., from the Eastern Division and the Honorable Guy R. Humphrey from the Western Division.

In modification of LBR 1071-1, the filing location of the case, i.e., Cincinnati, Dayton, or Columbus, will not be determinative of the judge assigned to the Complex Chapter 11 case. Further, notwithstanding the filing location of the case, the Complex Chapter 11 case, along with all related cases and the proceedings and matters arising in or related to such Complex Chapter 11 case and all related cases, will be heard in the assigned judge's court location. The judge assigned to a Complex Chapter 11 case will retain the case independent of his or her term length.

A debtor whose case is eligible to be treated as a Complex Chapter 11 case but chooses not to file a designation will not be subject to any Complex Chapter 11 case procedures. Further, the case will be assigned to a judge pursuant to LBR 1071-1.

The Attorney Advisory Chapter 11 Subcommittee is hereby authorized to prepare proposed local rules, guidelines and forms for Complex Chapter 11 cases. The Honorable John E. Hoffman, Jr. and the Honorable Guy R. Humphrey shall serve as advisory members to the subcommittee. These proposed local rules, guidelines and forms will be subject to the same approval process followed for amendments to the

Local Bankruptcy Rules in this District. No case will be eligible for treatment as a Complex Chapter 11 case until such proposed local rules, guidelines and forms are effective.

This Order is issued pursuant to 28 U.S.C. § 154(a). It is effective upon entry.

IT IS SO ORDERED.

Dated: 9/28/2018

Chief Judge Jeffery P. Hopkins
United States Bankruptcy Court
Southern District of Ohio

April 26, 2018

Honorable Paul D. Ryan
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Sincerely,

April 26, 2018

Honorable Michael R. Pence
President, United States Senate
Washington, DC 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Sincerely,

April 26, 2018

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and new Part VIII Appendix.

[*See infra* pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION.

(1) *Notice*. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) *Objection.* A party in interest who objects to the payment change may file a motion to determine

whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

* * * * *

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

* * * * *

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Electronic Filing and Signing.*

(A) *By a Represented Entity—Generally Required; Exceptions.* An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a

local rule that includes reasonable exceptions.

(C) *Signing.* A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(5), (e)–(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

* * * * *

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings, except that proceedings to enforce a judgment are stayed for 14 days after its entry.

Rule 8002. Time for Filing Notice of Appeal

(a) IN GENERAL.

* * * * *

(5) *Entry Defined.*

(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):

(i) when it is entered in the docket under Rule 5003(a), or

(ii) if Rule 7058 applies and Rule 58(a) F.R.Civ.P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:

- the judgment, order, or decree is set out in a separate document; or

- 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a).

(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) F.R.Civ.P. does not affect the validity of an appeal from that judgment, order, or decree.

(b) EFFECT OF A MOTION ON THE TIME TO APPEAL.

(1) *In General.* If a party files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

(1) *In General.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).

* * * * *

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

* * * * *

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES.

(1) *How Accomplished.* A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(2) *Supplemental Statement by the Court.* Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.

* * * * *

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT.

(1) *In General.* Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a bond or other security provided to obtain a stay of judgment;

* * * * *

(c) FILING A BOND OR OTHER SECURITY. The district court, BAP, or court of appeals may condition relief on filing a bond or other security with the bankruptcy court.

(d) BOND OR OTHER SECURITY FOR A TRUSTEE OR THE UNITED STATES. The court may require a trustee to file a bond or other security when the

trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

* * * * *

Rule 8010. Completing and Transmitting the Record

* * * * *

(c) RECORD FOR A PRELIMINARY MOTION IN THE DISTRICT COURT, BAP, OR COURT OF APPEALS. This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a bond or other security provided to obtain a stay of judgment; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.

Rule 8011. Filing and Service; Signature

(a) FILING.

* * * * *

(2) *Method and Timeliness.*

(A) *Nonelectronic Filing.*

(i) *In General.* For a document not filed electronically, filing may be accomplished by mail addressed to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(A)(ii) and (iii), filing is timely only if the clerk receives the document within the time fixed for filing.

(ii) *Brief or Appendix.* A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:

- mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid; or
- dispatched to a third-party commercial carrier for delivery within 3 days to the clerk.

(iii) *Inmate Filing.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(A)(iii). A document not filed electronically by an inmate confined in an institution is timely if it is deposited in the institution's internal mailing system on or before the last day for filing and:

- it is accompanied by a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or
- the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies this Rule 8011(a)(2)(A)(iii).

(B) *Electronic Filing.*

(i) *By a Represented Person—Generally Required; Exceptions.* An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) *Same as a Written Paper.* A document filed electronically is a written paper for purposes of these rules.

(C) *Copies.* If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

* * * * *

(c) MANNER OF SERVICE.

(1) *Nonelectronic Service.* Nonelectronic service may be by any of the following:

(A) personal delivery;

(B) mail; or

(C) third-party commercial carrier for delivery within 3 days.

(2) *Electronic Service.* Electronic service may be made by sending a document to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person served consented to in writing.

(3) *When Service Is Complete.* Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) PROOF OF SERVICE.

(1) *What Is Required.* A document presented for filing must contain either of the following if it was

served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

* * * * *

(e) SIGNATURE. Every document filed electronically must include the electronic signature of the

person filing it or, if the person is represented, the electronic signature of counsel. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

Rule 8013. Motions; Intervention

* * * * *

(f) FORM OF DOCUMENTS; LENGTH LIMITS; NUMBER OF COPIES.

* * * * *

(2) *Format of an Electronically Filed Document.* A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the length limits under paragraph (3).

(3) *Length Limits.* Except by the district court's or BAP's permission, and excluding the accompanying documents authorized by subdivision (a)(2)(C):

(A) a motion or a response to a motion produced using a computer must include a

certificate under Rule 8015(h) and not exceed 5,200 words;

(B) a handwritten or typewritten motion or a response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must include a certificate under Rule 8015(h) and not exceed 2,600 words; and

(D) a handwritten or typewritten reply must not exceed 10 pages.

* * * * *

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers

(a) PAPER COPIES OF A BRIEF. If a paper copy of a brief may or must be filed, the following provisions apply:

* * * * *

(7) *Length.*

(A) *Page Limitation.* A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with subparagraph (B).

(B) *Type-volume Limitation.*

(i) A principal brief is acceptable if it contains a certificate under Rule 8015(h) and:

- contains no more than 13,000 words; or

- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in item (i).

* * * * *

(f) LOCAL VARIATION. A district court or BAP must accept documents that comply with the form requirements of this rule and the length limits set by Part VIII of these rules. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all the form requirements of this rule or the length limits set by Part VIII of these rules.

(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and

quotations count toward the limit, but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(h) CERTIFICATE OF COMPLIANCE.

(1) *Briefs and Documents That Require a Certificate.* A brief submitted under

Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) *Acceptable Form.* The certificate requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.

Rule 8016. Cross-Appeals

* * * * *

(d) LENGTH.

(1) *Page Limitation.* Unless it complies with paragraph (2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-volume Limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) contains no more than 13,000 words; or

(ii) uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) contains no more than 15,300 words; or

(ii) uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in subparagraph (A).

* * * * *

Rule 8017. Brief of an Amicus Curiae

(a) DURING INITIAL CONSIDERATION OF A CASE ON THE MERITS.

(1) *Applicability.* This Rule 8017(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) *When Permitted.* The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a district court or BAP may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

(3) *Motion for Leave to File.* The motion must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(4) *Contents and Form.* An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

(A) a table of contents, with page references;

(B) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(C) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(D) unless the amicus curiae is one listed in the first sentence of subdivision (a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—

contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(E) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and

(F) a certificate of compliance, if required by Rule 8015(h).

(5) *Length.* Except by the district court's or BAP's permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) *Time for Filing.* An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief

of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) *Reply Brief.* Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

(8) *Oral Argument.* An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

(b) DURING CONSIDERATION OF WHETHER TO GRANT REHEARING.

(1) *Applicability.* This Rule 8017(b) governs amicus filings during a district court's or BAP's

consideration of whether to grant rehearing, unless a local rule or order in a case provides otherwise.

(2) *When Permitted.* The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) *Motion for Leave to File.* Rule 8017(a)(3) applies to a motion for leave.

(4) *Contents, Form, and Length.* Rule 8017(a)(4) applies to the amicus brief. The brief must include a certificate under Rule 8015(h) and not exceed 2,600 words.

(5) *Time for Filing.* An amicus curiae supporting the motion for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days

after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Rule 8018.1. District-Court Review of a Judgment that the Bankruptcy Court Lacked the Constitutional Authority to Enter

If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

Rule 8021. Costs

* * * * *

(c) COSTS ON APPEAL TAXABLE IN THE BANKRUPTCY COURT. The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

(1) the production of any required copies of a brief, appendix, exhibit, or the record;

(2) the preparation and transmission of the record;

(3) the reporter's transcript, if needed to determine the appeal;

(4) premiums paid for a bond or other security to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

* * * * *

Rule 8022. Motion for Rehearing

* * * * *

(b) FORM OF THE MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Except by the district court's or BAP's permission:

(1) a motion for rehearing produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and

(2) a handwritten or typewritten motion must not exceed 15 pages.

Rule 9025. Security: Proceedings Against Security Providers

Whenever the Code or these rules require or permit a party to give security, and security is given with one or more security providers, each provider submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

Appendix:
Length Limits Stated in Part VIII of the Federal Rules of Bankruptcy Procedure

This chart shows the length limits stated in Part VIII of the Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g).
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate required by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:
  - -- You must use the word limit if you produce your document on a computer; and
  - -- You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Motions	8013(f)(3)	• Motion • Response to a motion	5,200	20	Not applicable
	8013(f)(3)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	8015(a)(7)	• Principal brief	13,000	30	1,300
	8015(a)(7)	• Reply brief	6,500	15	650

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Parties' briefs (where cross-appeal)	8016(d)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	8016(d)	• Appellee's principal and response brief	15,300	35	1,500
	8016(d)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	8014(f)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	8017(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Motion for rehearing	8022(b)	• Motion for rehearing	3,900	15	Not applicable

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 4, 2017

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1 of the Federal Rules of Bankruptcy Procedure, along with proposed new Part VIII Appendix, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION.

(1) *Notice.* The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

[1] New material is underlined; matter to be omitted is lined through.

(2) *Objection.* A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

* * * * *

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest~~the debtor or trustee~~ filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

32 * * * * *

Committee Note

Subdivision (b) is subdivided and amended in two respects. First, it is amended in what is now subdivision (b)(1) to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, what is now subdivision (b)(2) is amended to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under subdivision (b)(1). The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion has been filed on or before the day before the change is to take effect, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b)(2), leading to a suspension of the payment change, a determination that the payment

change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge.

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Electronic Filing and Signing~~by Electronic Means~~.*

(A) *By a Represented Entity—Generally Required; Exceptions.*~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for

good cause or is allowed or required by local rule.

(B) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) *Same as a Written Paper.* A paper ~~document~~filed electronically~~by electronic means in compliance with a local rule constitutes~~ is a written paper for ~~the~~purposes of ~~applying~~these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing

by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.

A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. A person's electronic-filing account means an account established by the court for use of the court's electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court.

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)~~(1)~~(5), (e)–(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

* * * * *

Committee Note

In 1996, Rule 7004(a) was amended to incorporate by reference F.R.Civ.P. 4(d)(1). Civil Rule 4(d)(1) addresses the effect of a defendant's waiver of service. In 2007, Civil Rule 4 was amended, and the language of old Civil Rule 4(d)(1) was modified and renumbered as Civil Rule 4(d)(5). Accordingly, Rule 7004(a) is amended to update the cross-reference to Civil Rule 4.

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings, except that proceedings to enforce a judgment are stayed for 14 days after its entry.

Committee Note

The rule is amended to retain a 14-day period for the automatic stay of a judgment. F.R.Civ.P. 62(a) now provides for a 30-day stay to accommodate the 28-day time periods under the Federal Rules of Civil Procedure for filing post-judgment motions and the 30-day period for filing a notice of appeal. Under the Bankruptcy Rules, however, those periods are limited to 14 days. *See* Rules 7052, 8002, 9015, and 9023.

Rule 8002. Time for Filing Notice of Appeal

(a) IN GENERAL.

* * * * *

(5) *Entry Defined.*

(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):

(i) when it is entered in the docket under Rule 5003(a), or

(ii) if Rule 7058 applies and Rule 58(a) F.R.Civ.P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:

- the judgment, order, or decree is set out in a separate document; or

• 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a).

(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) F.R.Civ.P. does not affect the validity of an appeal from that judgment, order, or decree.

(b) EFFECT OF A MOTION ON THE TIME TO APPEAL.

(1) *In General.* If a party ~~timely~~ files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

(1) *In General.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an inmate ~~confined in an institution~~ files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing~~. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth~~

~~the date of deposit and state that first-class postage has been prepaid.~~ and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).

* * * * *

Committee Note

Clarifying amendments are made to subdivisions (a), (b), and (c) of the rule. They are modeled on parallel provisions of F.R.App.P. 4.

Paragraph (5) is added to subdivision (a) to clarify the effect of the separate-document requirement of F.R.Civ.P. 58(a) on the entry of a judgment, order, or decree for the purpose of determining the time for filing a notice of appeal.

Rule 7058 adopts F.R.Civ.P. 58 for adversary proceedings. If Rule 58(a) requires a judgment to be set out in a separate document, the time for filing a notice of appeal runs—subject to subdivisions (b) and (c)—from when the judgment is docketed and the judgment is set out in a separate document or, if no separate document is prepared, from 150 days from when the judgment is entered in the docket. The court's failure to comply with the separate-document requirement of Rule 58(a), however, does not affect the validity of an appeal.

Rule 58 does not apply in contested matters. Instead, under Rule 9021, a separate document is not required, and a judgment or order is effective when it is entered in the docket. The time for filing a notice of appeal under subdivision (a) therefore begins to run upon docket entry in contested matters, as well as in adversary proceedings for which Rule 58 does not require a separate document.

A clarifying amendment is made to subdivision (b)(1) to conform to a recent amendment to F.R.App.P. 4(a)(4)—from which Rule 8002(b)(1) is derived. Former

Rule 8002(b)(1) provided that "[i]f a party timely files in the bankruptcy court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in F.R.App.P. 4(a)(4), the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Bankruptcy Rules will not qualify as a motion that, under Rule 8002(b)(1), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Bankruptcy Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Subdivision (c)(1) is revised to conform to F.R.App.P. 4(c)(1), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

* * * * *

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES.

(1) *How Accomplished.* A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(2) *Supplemental Statement by the Court.* Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.

* * * * *

Committee Note

Subdivision (c) is amended to provide authority for the court to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all of the parties to the appeal. It is a counterpart to subdivision (e)(2), which allows a party to file a similar statement when the court certifies direct review on the court's own motion.

The bankruptcy court may file a supplemental statement within 14 days after the certification, even if the appeal is no longer pending before it according to subdivision (b). If the appeal is pending in the district court or BAP during that 14-day period, the appellate court is authorized to file a statement. In all cases, the filing of a statement by the court is discretionary.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT.

(1) *In General.* Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a ~~supersedeas~~bond or other security provided to obtain a stay of judgment;

* * * * *

(c) FILING A BOND OR OTHER SECURITY. The district court, BAP, or court of appeals may condition relief on filing a bond or other ~~appropriate~~security with the bankruptcy court.

(d) BOND OR OTHER SECURITY FOR A TRUSTEE OR THE UNITED STATES. The court may

require a trustee to file a bond or other ~~appropriate~~security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B), (c), and (d) conform this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a "bond or other security."

Rule 8010. Completing and Transmitting the Record

* * * * *

(c) RECORD FOR A PRELIMINARY MOTION IN THE DISTRICT COURT, BAP, OR COURT OF APPEALS. This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a ~~supersedeas~~bond~~,~~ or other security provided to obtain a stay of judgment~~additional security on a bond or undertaking on appeal~~; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record

designated by a party to the appeal or a notice that those parts are available electronically.

Committee Note

The amendment of subdivision (c) conforms this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a "bond or other security."

Rule 8011. Filing and Service; Signature

(a) FILING.

* * * * *

(2) *Method and Timeliness.*

(A) *Nonelectronic Filing.*

~~(A)~~(i) *In General.* ~~Filing~~For a document not filed electronically, filing may be accomplished by ~~transmission~~mail addressed to the clerk of the district court or BAP. Except as provided in subdivision ~~(a)(2)(B) and (C)~~ (a)(2)(A)(ii) and (iii), filing is timely only if the clerk receives the document within the time fixed for filing.

~~(B)~~(ii) *Brief or Appendix.* A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid~~, if the district court's or BAP's procedures permit or require a brief or appendix to be filed by mailing~~; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery within 3 days to the clerk~~, if the court's procedures so permit or require~~.

~~(C)~~(iii) *Inmate Filing.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(A)(iii). A document not filed electronically by an inmate confined in an institution is timely if it is deposited in

the institution's internal mailing system on or before the last day for filing~~. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

- it is accompanied by a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp)

showing that the notice was so deposited and that postage was prepaid; or

- the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies this Rule 8011(a)(2)(A)(iii).

(B) *Electronic Filing.*

(i) *By a Represented Person—Generally Required; Exceptions.* An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) *Same as a Written Paper.* A document filed electronically is a written paper for purposes of these rules.

~~(D)~~(C) *Copies.* If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are

required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

* * * * *

(c) MANNER OF SERVICE.

(1) *Nonelectronic Service.* ~~*Methods.* Service must be made electronically, unless it is being made by or on an individual who is not represented by counsel or the court's governing rules permit or require service by mail or other means of delivery. Service~~ Nonelectronic service may be ~~made by or on an unrepresented party~~ by any of the following ~~methods~~:

(A) personal delivery;

(B) mail; or

(C) third-party commercial carrier for delivery within 3 days.

(2) *Electronic Service.* Electronic service may be made by sending a document to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person served consented to in writing.

~~(2)~~(3) *When Service ~~is~~Is Complete.* Service by electronic means is complete on ~~transmission~~filing or sending, unless the ~~party~~person making service receives notice that the document was not ~~transmitted successfully~~received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) PROOF OF SERVICE.

(1) *What ~~is~~Is Required.* A document presented for filing must contain either of the following if it was

served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

* * * * *

(e) SIGNATURE. Every document filed electronically must include the electronic signature of the

person filing it or, if the person is represented, the electronic signature of counsel. ~~The electronic signature must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes.~~ A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

Committee Note

The rule is amended to conform to the amendments to F.R.App.P. 25 on inmate filing, electronic filing, signature, service, and proof of service.

Consistent with Rule 8001(c), subdivision (a)(2) generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule.

Subdivision (a)(2)(A)(iii) is revised to conform to F.R.App.P. 25(a)(2)(A)(iii), which was recently amended

to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Subdivision (c) is amended to authorize electronic service by means of the court's electronic-filing system on registered users without requiring their written consent. All other forms of electronic service require the written consent of the person served.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means receives notice that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

As amended, subdivision (d) eliminates the requirement of proof of service when service is made through the electronic-filing system. The notice of electronic filing generated by the system serves that purpose.

Subdivision (e) requires the signature of counsel or an unrepresented party on every document that is filed. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. A person's electronic-filing account means an account established by the court for use of the court's electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court.

Rule 8013. Motions; Intervention

* * * * *

(f) FORM OF DOCUMENTS; ~~PAGE~~LENGTH LIMITS; NUMBER OF COPIES.

* * * * *

(2) *Format of an Electronically Filed Document.* A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the ~~page~~length limits under paragraph (3).

(3) *~~Page~~Length Limits.* ~~Unless the district court or BAP orders otherwise:~~Except by the district court's or BAP's permission, and excluding the accompanying documents authorized by subdivision (a)(2)(C):

(A) a motion or a response to a motion ~~must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by subdivision (a)(2)(C)~~ produced using a computer must include a certificate under Rule 8015(h) and not exceed 5,200 words; ~~and~~

(B) ~~a reply to a response must not exceed 10 pages.~~a handwritten or typewritten motion or a response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must include a certificate under Rule 8015(h) and not exceed 2,600 words; and

(D) a handwritten or typewritten reply must not exceed 10 pages.

* * * * *

Committee Note

Subdivision (f)(3) is amended to conform to F.R.App.P. 27(d)(2), which was recently amended to replace page limits with word limits for motions and responses produced using a computer. The word limits were derived from the current page limits, using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); Official Form 417C suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 8013(a)(2)(C) and any items listed in Rule 8015(h).

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers

(a) PAPER COPIES OF A BRIEF. If a paper copy of a brief may or must be filed, the following provisions apply:

* * * * *

(7) *Length.*

(A) *Page ~~l~~Limitation.* A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with subparagraph (B) ~~and (C)~~.

(B) *Type-volume ~~l~~Limitation.*

(i) A principal brief is acceptable if it contains a certificate under Rule 8015(h) and:

- ~~it~~ contains no more than ~~14,000~~ 13,000 words; or

- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in item (i).

~~(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.~~

~~(C) *Certificate of Compliance.*~~

~~(i) A brief submitted under subdivision (a)(7)(B) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

- ~~the number of words in the brief; or~~
- ~~the number of lines of monospaced type in the brief.~~

~~(ii) The certification requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.~~

* * * * *

(f) LOCAL VARIATION. A district court or BAP must accept documents that comply with the ~~applicable~~ form requirements of this rule and the length limits set by Part VIII of these rules. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all ~~of~~the form requirements of this rule or the length limits set by Part VIII of these rules.

(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;

- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(h) CERTIFICATE OF COMPLIANCE.

(1) *Briefs and Documents That Require a Certificate.* A brief submitted under Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-

processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) *Acceptable Form.* The certificate requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.

Committee Note

The rule is amended to conform to recent amendments to F.R.App.P. 32, which reduced the word limits generally allowed for briefs. When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. Amended F.R.App.P. 32 applies a conversion ratio of 260 words per page and reduces the word limits accordingly. Rule 8015(a)(7) adopts the same reduced word limits for briefs prepared by computer.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (f) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (f) already established this authority as to the length limits in Rule 8015(a)(7); the amendment makes clear that this authority extends to all length limits in Part VIII of the Bankruptcy Rules.

A new subdivision (g) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in subdivision (a)(7)(C) is relocated to a new subdivision (h) and now applies to filings under all type-volume limits (other than Rule 8014(f)'s word limit)—including the new word limits in Rules 8013, 8016, 8017, and 8022. Conforming amendments are made to Official Form 417C.

Rule 8016. Cross-Appeals

* * * * *

(d) LENGTH.

(1) *Page Limitation.* Unless it complies with paragraph~~s~~ (2)~~ and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-volume~~Volume~~ Limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) ~~it~~ contains no more than ~~14,000~~ 13,000 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) ~~it~~ contains no more than ~~16,500~~ 15,300 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in subparagraph (A).

~~(D) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral~~

~~argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.~~

~~(3) *Certificate of Compliance*. A brief submitted either electronically or in paper form under paragraph (2) must comply with Rule 8015(a)(7)(C).~~

* * * * *

Committee Note

The rule is amended to conform to recent amendments to F.R.App.P. 28.1, which reduced the word limits generally allowed for briefs in cross-appeals. When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in F.R.App.P. 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. Amended F.R.App.P. 32 and 28.1 apply a conversion ratio of 260 words per page and reduce the word limits accordingly. Rule 8016(d)(2) adopts the same reduced word limits.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (d) is amended to refer to new Rule 8015(h) (which now contains the certificate-of-compliance provision formerly in Rule 8015(a)(7)(C)).

Rule 8017. Brief of an Amicus Curiae

(a) DURING INITIAL CONSIDERATION OF A CASE ON THE MERITS.

(1) *Applicability.* This Rule 8017(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) *When Permitted.* The United States or its officer or agency or a state may file an amicus ~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a district court or BAP may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

~~(b)~~(3) *Motion for Leave to File.* The motion must be accompanied by the proposed brief and state:

~~(1)~~(A) the movant's interest; and

~~(2)~~(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

~~(c)~~(4) *Contents and Form.* An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

~~(1)~~(A) a table of contents, with page references;

~~(2)~~(B) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

~~(3)~~(C) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

~~(4)~~(D) unless the amicus curiae is one listed in the first sentence of subdivision (a)(2), a statement that indicates whether:

~~(A)~~(i) a party's counsel authored the brief in whole or in part;

~~(B)~~(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

~~(C)~~(iii) a person—other than the amicus curiae, its members, or its counsel—

contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

~~(5)~~(E) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and

~~(6)~~(F) a certificate of compliance, if required by Rule 8015~~(a)(7)(C) or 8015(b)~~(h).

~~(d)~~(5) *Length.* Except by the district court's or BAP's permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(e)~~(6) *Time for Filing.* An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~(7) *Reply Brief.* Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

~~(g)~~(8) *Oral Argument.* An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

(b) DURING CONSIDERATION OF WHETHER TO GRANT REHEARING.

(1) *Applicability.* This Rule 8017(b) governs amicus filings during a district court's or BAP's consideration of whether to grant rehearing, unless a local rule or order in a case provides otherwise.

(2) *When Permitted.* The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) *Motion for Leave to File.* Rule 8017(a)(3) applies to a motion for leave.

(4) *Contents, Form, and Length.* Rule 8017(a)(4) applies to the amicus brief. The brief must include a certificate under Rule 8015(h) and not exceed 2,600 words.

(5) *Time for Filing.* An amicus curiae supporting the motion for rehearing or supporting

neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Committee Note

Rule 8017 is amended to conform to the recent amendment to F.R.App.P. 29, which now addresses amicus filings in connection with petitions for rehearing. Former Rule 8017 is renumbered Rule 8017(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the district court's or BAP's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a motion for rehearing. Subdivision (b) sets default rules that apply when a district court or BAP does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with motions for rehearing and the procedures when such filings are permitted.

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of or permit the striking of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment

does not alter or address the standards for when an amicus brief requires a judge's disqualification. It is modeled on an amendment to F.R.App.P. 29(a). A comparable amendment to subdivision (b) is not necessary. Subdivision (b)(1) authorizes local rules and orders governing filings during a court's consideration of whether to grant rehearing. These local rules or orders may prohibit the filing of or permit the striking of an amicus brief that would result in a judge's disqualification. In addition, under subdivision (b)(2), a court may deny leave to file an amicus brief that would result in a judge's disqualification.

Rule 8018.1. District-Court Review of a Judgment that the Bankruptcy Court Lacked the Constitutional Authority to Enter

If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

Committee Note

This rule is new. It is added to prevent a district court from having to remand an appeal whenever it determines that the bankruptcy court lacked constitutional authority to enter the judgment, order, or decree appealed from. Consistent with the Supreme Court's decision in *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014), the district court in that situation may treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law. Upon making the determination to proceed in that manner, the district court may choose to allow the parties to file written objections to specific proposed findings and conclusions and to respond to another party's objections, *see* Rule 9033; treat the parties' briefs as objections and responses; or prescribe other procedures for the review of the proposed findings of fact and conclusions of law.

Rule 8021. Costs

* * * * *

(c) COSTS ON APPEAL TAXABLE IN THE BANKRUPTCY COURT. The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

(1) the production of any required copies of a brief, appendix, exhibit, or the record;

(2) the preparation and transmission of the record;

(3) the reporter's transcript, if needed to determine the appeal;

(4) premiums paid for a ~~supersedeas~~bond or other security ~~bonds~~ to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

* * * * *

Committee Note

The amendment of subdivision (c) conforms this rule with the amendment of F.R.Civ.P. 62, which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a "bond or other security."

Rule 8022. Motion for Rehearing

* * * * *

(b) FORM OF THE MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. ~~Unless the district court or BAP orders otherwise, a motion for rehearing must not exceed 15 pages.~~Except by the district court's or BAP's permission:

(1) a motion for rehearing produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and

(2) a handwritten or typewritten motion must not exceed 15 pages.

Committee Note

Subdivision (b) is amended to conform to the recent amendment to F.R.App.P. 40(b), which was one of several appellate rules in which word limits were substituted for page limits for documents prepared by computer. The word limits were derived from the previous page limits using the assumption that one page is equivalent to 260

words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); completion of Official Form 417C suffices to meet that requirement.

Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 8015(g).

Rule 9025. Security: Proceedings Against ~~Sureties~~ Security Providers

Whenever the Code or these rules require or permit ~~the giving of security by a party~~a party to give security, and security is given ~~in the form of a bond or stipulation or other undertaking~~with one or more ~~sureties~~security providers, each ~~surety~~provider submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

Committee Note

This rule is amended to reflect the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062. Rule 62 allows a party to obtain a stay of a judgment "by providing a bond or other security." Limiting this rule's enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into the rule by these amendments.

Appendix:
Length Limits Stated in Part VIII of the Federal Rules of Bankruptcy Procedure

This chart shows the length limits stated in Part VIII of the Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g).
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate required by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:
  - -- You must use the word limit if you produce your document on a computer; and
  - -- You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Motions	8013(f)(3)	• Motion • Response to a motion	5,200	20	Not applicable
	8013(f)(3)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	8015(a)(7)	• Principal brief	13,000	30	1,300
	8015(a)(7)	• Reply brief	6,500	15	650

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Parties' briefs (where cross-appeal)	8016(d)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	8016(d)	• Appellee's principal and response brief	15,300	35	1,500
	8016(d)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	8014(f)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	8017(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Motion for rehearing	8022(b)	• Motion for rehearing	3,900	15	Not applicable

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

*Rules ***** Recommended for Approval and Transmission*

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, new Part VIII Appendix, *****, with a recommendation that they be approved and transmitted to the Judicial Conference.

Most of these proposed changes were published for comment in 2016, and the others were recommended for final approval without publication. The Standing Committee recommended Rule 7004 ***** for final approval at its January 2017 meeting, and recommended the remaining rules ***** for final approval at its June 2017 meeting.

Rules ***** Published for Comment in 2016

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). Rule 3002.1(b) and (e) apply with respect to home mortgage claims in chapter 13 cases. These provisions impose notice requirements on the creditor to enable the debtor or trustee to make mortgage payments in the correct amount during a pending bankruptcy case.

There were three comments submitted in response to the publication. The commenters each expressed support for the amendments, with some suggested wording changes. One commenter noted that although the published rule purported to prevent a proposed payment

change from going into effect if a timely objection was filed, under time counting rules the deadline for filing the objection was actually later than the scheduled effective date of the payment change. The advisory committee revised the proposed amendment to eliminate this possibility.

Rule 5005 (Filing and Transmittal of Papers). Rule 5005(a)(2) addresses filing documents electronically in federal bankruptcy cases. The amendments published for public comment in August 2016 sought consistency with the proposed amendments to Civil Rule 5(d)(3), which addresses electronic filing in civil cases. The publication of changes to Bankruptcy Rule 5005 and Civil Rule 5 were coordinated with similar proposed changes to the criminal and appellate electronic filing rules: Criminal Rule 49 and Appellate Rule 25.

The advisory committee received six comments on the proposed amendments to Rule 5005(a)(2). Most comments addressed the wording of subdivision (a)(2)(C), the intent of which was to identify who can file a document and what information is required in the signature block. Other advisory committees received similar comments with respect to the parallel provision in their rules, and the advisory committees each worked to coordinate language to clarify the provisions.

In addition, the advisory committee received one comment (also submitted to the other advisory committees) opposing the default wording in the rule that pro se parties cannot file electronically. Along with the other advisory committees, the Bankruptcy Rules Committee chose to retain a default against permitting electronic filing by pro se litigants. It reasoned that under the published version of the rule pro se parties would be able to request permission to file electronically, and courts would be able to adopt a local rule that mandated electronic filing by pro se parties, provided that such rule included reasonable exceptions.

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

The Standing Committee approved the proposed amendments to Rule 5005(a)(2), as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

Proposed amendments to conform Bankruptcy Appellate Rules to recent or proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"). A large set of FRAP amendments went into effect on December 1, 2016. The amendments to Bankruptcy Rules, Part VIII, Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022, Official Forms 417A and 417C, and the Part VIII Appendix discussed below bring the Bankruptcy Rules into conformity with the relevant amended FRAP provisions. One additional amendment to Rule 8011 was proposed to conform to a parallel FRAP provision that was also published for comment last summer.

- Rules 8002 (Time for Filing Notice of Appeal) and 8011 (Filing and Service; Signature), and Official Form 417A (Notice of Appeal and Statement of Election).

Bankruptcy Rules 8002(c) and 8011(a)(2)(C) include inmate-filing provisions that are virtually identical to, and are intended to conform to, the inmate-filing provisions of Appellate Rules 4(c) and 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed by inmates if certain specified requirements are met, including that the documents are deposited in the institution's internal mail system on or before the last day for filing. To implement the FRAP amendments, a new appellate form was adopted to provide a suggested form for an inmate declaration under Rules 4 and 25. A similar director's form was developed for bankruptcy appeals, and the advisory committee published an amendment to Official Form 417A (Notice of Appeal and Statement of Election) that will alert inmate filers to the existence of the director's form.

Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of post-judgment motions that toll the time for filing an appeal. The 2016 amendment to Appellate Rule 4(a)(4)

added an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. A similar amendment to Rule 8002(b) was published in August 2016.

No comments were submitted specifically addressing the proposed amendments to Rule 8002, Rule 8011, or Official Form 417A.

- Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), 8016 (Cross-Appeals), and 8022 (Motion for Rehearing), Official Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements), and Part VIII Appendix (length limits). The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 converted page limits to word limits for documents prepared using a computer. For documents prepared without using a computer, the existing page limits were retained. The FRAP amendments also reduced the existing word limits of Rules 28.1 (Cross-Appeals) and 32 (Briefs).

Appellate Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in FRAP. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) was amended to reflect the changed length limits. Finally, a new appendix was adopted that collects all the FRAP length limits in one chart.

The advisory committee proposed parallel amendments to Rules 8013(f), 8015(a)(7) and (f), 8016(d), and 8022(b), along with Official Form 417C. In addition, it proposed an appendix to Part VIII that is similar to the FRAP appendix.

In response to publication, no comments were submitted that specifically addressed the amendments to these provisions or to the appendix.

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

- Rule 8017 (Brief of an Amicus Curiae). Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The recent amendment to Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule previously did not address the topic; it was limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment does not require courts to accept amicus briefs regarding rehearing, but it provides guidelines for such briefs as are permitted. The advisory committee proposed a parallel amendment to Rule 8017.

In August 2016 the Appellate Rules Advisory Committee published another amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit or strike the filing of an amicus brief if the filing would result in the disqualification of a judge. The Bankruptcy Rules Advisory Committee proposed and published a similar amendment to Rule 8017 to maintain consistency between the two sets of rules.

Two comments were submitted in response to publication of Rule 8017. One commenter opposed the amendment because amicus briefs are usually filed before an appeal is assigned to a panel of judges, and thus the amicus and its counsel would not know whether recusal would later be required. The advisory committee rejected this comment because the proposed amendment merely permits, but does not *require*, striking amicus briefs in order to address recusal issues. The other commenter opposed the wording of the amendment, suggesting instead a more extensive and detailed rewrite of the rule. The advisory committee rejected this comment as beyond the scope of the proposed amendment.

Additional Amendments to the Bankruptcy Appellate Rules. In addition to the conforming amendments to Part VIII rules discussed above, amendments to Bankruptcy Appellate Rules 8002, 8006, and 8023 and new Bankruptcy Appellate Rule 8018.1 were published last summer. None of the comments submitted in response to publication specifically

addressed these amendments. Following discussion of the amendments at its spring 2017 meeting, the advisory committee recommended final approval of each rule as published, except for Rule 8023, which the advisory committee sent back to a subcommittee for further consideration.

- Rule 8002 (Time for Filing Notice of Appeal). The proposed amendment to Rule 8002(a) adds a new subdivision (a)(5) defining entry of judgment. The proposed amendment clarifies that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and either (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

- Rule 8006 (Certifying a Direct Appeal to the Court of Appeals). The proposed amendment to Rule 8006 adds a new subdivision (c)(2) that authorizes the bankruptcy judge to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.

- Rule 8018.1 (District Court Review of a Judgment that the Bankruptcy Court Lacked Constitutional Authority to Enter). New Rule 8018.1 authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determines that the bankruptcy court lacked constitutional authority to enter a final judgment. The procedure would eliminate the need to remand an appeal to the bankruptcy court merely to recharacterize the judgment as proposed findings and conclusions.

* * * * *

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

Conforming Changes Proposed without Publication

*Rules ***** Considered at the January 2017 Committee Meeting*. At the Standing Committee's January 2017 meeting, the advisory committee recommended final approval without publication of technical conforming amendments to Rule 7004(a)(1) *****.

- Rule 7004 (Process; Service of Summons, Complaint). Rule 7004 incorporates by reference certain components of Civil Rule 4. In 1996, Rule 7004(a) was amended to incorporate by reference the provision of Civil Rule 4(d)(1) addressing a defendant's waiver of service of a summons.

In 2007, Civil Rule 4(d) was amended to change, among other things, the language and placement of the provision addressing waiver of service of summons. The cross-reference to Civil Rule 4(d)(1) in Rule 7004(a), however, was not changed at that time.

Accordingly, the advisory committee recommended an amendment to Rule 7004(a) to refer to Civil Rule 4(d)(5). Based on its technical and conforming nature, the advisory committee also recommended that the proposed amendment be submitted to the Judicial Conference for approval without prior publication.

* * * * *

*Rules ***** Considered at the June 2017 Standing Committee Meeting*. At the Standing Committee's June 2017 meeting, the advisory committee recommended that the changes described below to Rules 7062, 8007, 8010, 8011, 8021, and 9025,***** be approved and transmitted to the Judicial Conference.

- Rule 8011 (Filing and Service; Signature). Rule 8011 addresses filing, service, and signatures in bankruptcy appeals. At the time the advisory committee recommended publication of the proposed amendments to Rule 5005 regarding electronic filing, service, and signatures in coordination with the other advisory committees' e-filing rules, it overlooked the

need for similar amendments to Rule 8011. It accordingly recommended that conforming amendments to Rule 8011 consistent with the e-filing changes to Rule 5005 and its counterpart, Appellate Rule 25, be approved without publication so that all of the e-filing amendments could go into effect at the same time. The Standing Committee accepted the advisory committee's recommendation, approving amendments to Rule 8011 after incorporating stylistic changes it made to the other e-filing amendments at the meeting.

- Rules 7062 (Stay of Proceedings to Enforce a Judgment), 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings), 8010 (Completing and Transmitting the Record, 8021 (Costs), and 9025 (Security: Proceedings Against Sureties). The advisory committee recommended conforming amendments to Rules 7062, 8007, 8010, 8021, and 9025, consistent with proposed and published amendments to Civil Rules 62 (Stay of Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety) that would lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using instead the broader term "bond or other security." The Advisory Committee on Appellate Rules also published amendments to Appellate Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs) that would adopt conforming terminology.

Because Bankruptcy Rule 7062 incorporates the whole of Civil Rule 62, the new security terminology will automatically apply in bankruptcy adversary proceedings when the civil rule goes into effect. Rule 62, however, also includes a change that would lengthen the automatic stay of a judgment entered in the district court from 14 to 30 days. The civil rule change addresses a gap between the end of the judgment-stay period and the 28-day time period for making certain post-judgment motions in civil practice. Because the deadline for post-judgment motions in bankruptcy is 14 days, however, the advisory committee recommended an amendment to Rule 7062 that would maintain the current 14-day duration of the automatic stay

of judgment. As revised, Rule 7062 would continue incorporation of Rule 62, "except that proceedings to enforce a judgment are stayed for 14 days after its entry."

Because the amendments to Rules 7062, 8007, 8010, 8021, and 9025 simply adopt conforming terminology changes from the other rule sets that have been recommended for final approval, and maintain the status quo with respect to automatic stays of judgments in the bankruptcy courts, the advisory committee recommended approval of these rules without publication.

* * * * *

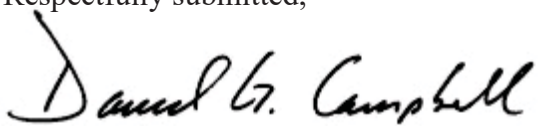
The Standing Committee voted unanimously to support the recommendations of the advisory committee.

Recommendation: That the Judicial Conference:

a. Approve proposed amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and the new Part VIII Appendix, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

* * * * *

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Gregory G. Garre	Rod J. Rosenstein
Daniel C. Girard	Amy J. St. Eve
Susan P. Graber	Larry D. Thompson
Frank M. Hull	Richard C. Wesley
Peter D. Keisler	Jack Zouhary

TAB
D

Eileen Field
Eileen Filed Law Offices LLC

Eileen Field was born in Cincinnati, Ohio. She completed her education at the University of Cincinnati. She holds a BA (1978), MA (1979) and JD (1982) degree. In addition, she holds the honorable "Phi Beta Kappa" membership. Eileen was admitted to bar in 1982 and focuses her practice on bankruptcy law.

Experience

- Law Clerk to Honorable Burton Perlman, US Bankruptcy Judge, 1982-1984
- Member Cincinnati Bar, 1982-Present
- Member Bankruptcy Committee, Chair, 1989-1991
- Areas are Bankruptcy Law and General Practice Law

Eric W. Goering is a partner with the Law Office of Goering & Goering, LLC. He has over 20 years of experience in bankruptcy law. His practice concentrates in business and consumer bankruptcy, including loan workouts and commercial loan restructuring for the large business client. He handles an average of 100 cases per month as Trustee and Debtors counsel. Eric was appointed in 2003 as a Chapter 7 Trustee in the Southern District of Ohio. He is a past President of the Cincinnati Bar Association, former school board member, member of the Judicial Liaison Committee, Bankruptcy Local Rules Committee, Volunteer Lawyers, and Executive Committee Member of the Midwest Regional Bankruptcy Seminar. He is a frequent lecturer throughout the country regarding Chapter 7, Chapter 11, and Chapter 13 bankruptcy issues. He is married with three wonderful children.

CURRENT CHAPTER 7 BANKRUPTCY ADMINISTRATION ISSUES

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I. PETITION

A. Verify if Jr. or Sr.

B. AKA, DBA, FDBA

C. DO NOT put LLC or Inc. on front of petition

1. Should be listed on Sch B and SFA
2. List business debts as "Disputed potential contingent liability" and click the boxes

D. Claim your exemptions and itemization for the trustee, if necessary.

1. EIC & Child Tax
2. Amendments (Notify Trustee please)

E. Documents Follow-up

1. Liquidation

II. MEETING PURSUANT TO 11 USC 341

A. Proper ID & SS Verification (See attached)

B. Telephonic (See attached form)

1. Attorney at 341 meeting. Notary with Debtor to swear in and verify ID & SS number.
2. Complete form
3. Confirm date/time with UST to use conference room

C. At location of Debtor

1. Set up with Trustee

D. Motion to excuse attendance

1. 11 USC 343
2. In re Emmerson, 215 Bankr. Lexis 1112
3. In re Owens, 221 B.R. 199 (Tenn)

E. Power of Attorney

1. General POA Insufficient
2. In re Curtis, 262 BR 619 (Bankr. D. Vt. 2001)
3. ORC 1337.53
4. No Motion necessary, but please provide Trustee with a copy prior to meeting

F. Foreign language/Deaf Interpreter

1. Please contact Trustee prior to meeting
2. Deaf interpreter must be coordinated with UST

G. Credit Counseling/Education Certificate: POA and Waiver

1. In re Pryor 18-11883 Judge Hopkins
2. POA can complete course. Certificate must list Debtor, legal representative and title
3. USDOJ web site
4. Waiver due to disability
    a. In re Oliver 17-14255 Judge Hopkins

H. Filing fee waiver

1. Trustee does not receive compensation
2. New court procedure
3. Trustee may object
    a. In re Lineberry, 344 B.R. 487 (Bankr. W.D. VA 2006)
4. Poverty guidelines
5. Tax refund
6. Assets to pay

7. Lifestyle: We may check the bank statements.
8. Totality of the Circumstances

I. Reschedule 341 LBR 2003-1

1. If prior to 341, must notify all creditors
2. At 341 meeting

J. New location

1. New Federal ID requirements

III. NON-FILING SPOUSE

A. Pay Stubs must be provided

B. Note Preference Issue created by 11 USC 547 (i)

1. Deprizio theory

C. SFA # 18

D. Be prepared for questions from Trustee

IV. RETIREMENTS/ANNUITIES/MISC.

A. Employee Stock Ownership Plan (ESOP)

1. ERISA qualified

B. Employee Stock Purchase Plan (ESPP)

1. Not ERISA

C. Flex spending account (FSA)

D. Health savings account (HAS)

E. Annuities

1. Auto accident
2. Government
3. Retirement

V. TUITION/FRAUDULENT CONVEYANCE

A. Pergament v. Brooklyn Law School 2nd Cir,

VI. EXEMPTIONS

A. Preferences

1. Voluntary or involuntary

2. If Debtor wants to pursue under 11 USC 522

a. Must be listed in SFA
b. Must be claimed exempt
c. abandoned

3. Defective car liens

B. Property of Estate 11 USC 541

1. Life insurance proceeds

a. In re Schramm, 431 B.R. 397 (6th Cir. BAP 2010)

2. Inherited IRA

a. In re Fay Ch 7 14-12781

3. Mesh implant/Medical devices

a. Personal injury or defective medical device?

4. Real Estate

a. Does the trustee still have a case?
b. Property in Trust In re Starr, 485 B.R. 835

5. Tax refunds

6. Pre planning

a. Pay lease rental
b. Change beneficiary
c. Pay insurance

d. Pay current medical

VII. CONVERT CHAPTER 7 TO 13

A. Chapter 13 to Chapter 7

1. FRBP 4003 and 1019
2. Conversion opens new exemption objection period

B. Chapter 7 to Chapter 13

1. Must file Motion
2. Need draft of schedules and plan for Trustee to review
3. Good faith

VIII. BANKRUPTCY CRIMES

A. Petition provides the following language:

"I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $ 250,000, or imprisonment for up to 20 years, or both. 11 USC 152, 1341, 1519 and 3571."

B. 18 USC 152

IT IS SO ORDERED.

Beth A. Buchanan
United States Bankruptcy Judge

Dated: September 29, 2015

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re	)	
	)	
Kevin P. Fay	)	**Case No. 14-12781**
	)	
Debtor	)	**Chapter 7**
	)	**Judge Buchanan**

ORDER (1) OVERRULING TRUSTEE'S OBJECTION TO AMENDED EXEMPTIONS AND (2) DENYING DEBTOR'S MOTION TO DISMISS

Kevin Fay filed a bankruptcy petition for chapter 7 relief on June 30, 2014. On July 18, 2014, Mr. Fay's aunt passed away, leaving him a one-sixth beneficiary of her estate. Mr. Fay amended his bankruptcy schedules to list the property that he inherited and to claim an exemption for the individual retirement account that was a portion of the inheritance. Mr. Fay then sought to dismiss his bankruptcy case. The trustee objected to the exemption of the individual retirement account and the motion to dismiss. At a hearing, this Court orally overruled the trustee's objection to Mr. Fay's exemption in the inherited individual retirement account and denied Mr. Fay's motion to dismiss. This order memorializes this Court's oral ruling.

I. OBJECTION TO EXEMPTION

Kevin Fay (the "Debtor") inherited a one-sixth interest in his late-aunt's individual retirement account (the "Inherited IRA"), as well as a one-sixth interest in other investment and profit sharing accounts. The parties stipulated that the Debtor's interest in the other investment and profit sharing accounts was not exempt. The parties' dispute focusses solely on whether the Debtor's interest in the Inherited IRA is exempt under Ohio's exemption statute.

The United States Supreme Court recently addressed the issue of whether a debtor may exempt an inherited IRA under the *federal* exemption statute relating to retirement funds. Under the federal statute, a debtor may exempt "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code." 11 U.S.C. § 522(b)(3)(C).[1] In *Clark v. Rameker*, 134 S. Ct. 2242 (2014), the Supreme Court held that funds held in an inherited IRA are not retirement funds within the meaning of 11 U.S.C. § 522(b)(3)(C) that could be exempted from a debtor's bankruptcy estate. Acknowledging that the federal exemption provision in *Rameker* is not applicable in this case, the Trustee seeks guidance as to whether the outcome is nonetheless the same under Ohio's exemption statute.[2]

The Debtor originally claimed that his interest in the Inherited IRA was exempt under Ohio Revised Code § 2329.66(A)(10)(c), which provides that a person domiciled in the State of Ohio may exempt:

> Except for any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as

[1] Unless otherwise indicated, the terms "Bankruptcy Code," "Section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. § 101 *et seq*. References to the "Bankruptcy Rules" are to the Federal Rules of Bankruptcy Procedure.

[2] Ohio has opted out of the federal exemptions, meaning that the exemptions available to a debtor domiciled in Ohio are based on Ohio law. *See* 11 U.S.C. § 522(b)(2); Ohio Rev. Code Ann. § 2329.66 (2015). While a debtor in an "opt-out" state may still exempt retirement funds under § 522(b)(3)(C), the Debtor has not claimed the federal exemption in this case.

> provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's rights or interests in the assets held in, or to directly or indirectly receive any payment or benefit under, any individual retirement account, individual retirement annuity, "Roth IRA," "529 plan," or education individual retirement account that provides payments or benefits by reason of illness, disability, death, retirement, or age or provides payments or benefits for purposes of education, to the extent that the assets, payments, or benefits described in division (A)(10)(c) of this section are attributable to or derived from any of the following or from any earnings, dividends, interest, appreciation, or gains on any of the following:
>
> (i) Contributions of the person that were less than or equal to the applicable limits on deductible contributions to an individual retirement account or individual retirement annuity in the year that the contributions were made, whether or not the person was eligible to deduct the contributions on the person's federal tax return for the year in which the contributions were made;
>
> (ii) Contributions of the person that were less than or equal to the applicable limits on contributions to a Roth IRA or education individual retirement account in the year that the contributions were made;
>
> (iii) Contributions of the person that are within the applicable limits on rollover contributions under subsections 219, 402(c), 403(a)(4), 403(b)(8), 408(b), 408(d)(3), 408A(c)(3)(B), 408A(d)(3), and 530(d)(5) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended;
>
> (iv) Contributions by any person into any plan, fund, or account that is formed, created, or administered pursuant to, or is otherwise subject to, section 529 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.

The Debtor later amended his schedules to claim his interest in the Inherited IRA as exempt under Ohio Revised Code § 2329.66(A)(10)(e), which also exempts:

> The person's rights to or interests in any assets held in, or to directly or indirectly receive any payment or benefit under, any individual retirement account, individual retirement annuity, "Roth IRA," "529 plan," or education individual retirement account that a decedent, upon or by reason of the decedent's death, directly or indirectly left to or for the benefit of the person, either outright or in trust or otherwise, including, but not limited to, any of those

> rights or interests in assets or to receive payments or benefits that were transferred, conveyed, or otherwise transmitted by the decedent by means of a will, trust, exercise of a power of appointment, beneficiary designation, transfer or payment on death designation, or any other method or procedure.

While Ohio Revised Code § 2329.66(A)(10)(c) applies to retirement accounts derived from a debtor's own contributions, § 2329.66(A)(10)(e) expressly applies to retirement accounts received by a person upon the death of the previous account holder.

Conceding that the plain language of § 2329.66(A)(10)(e) supports the Debtor's claimed exemption, the only argument the Trustee raises against the statute's application is that the Debtor is unable to claim an exemption in an asset that becomes property of the estate under 11 U.S.C. § 541 (a)(5). As is relevant to this case, § 541(a)(5) provides that an inheritance received by a debtor within 180 days after the petition date becomes property of the estate. The Trustee argues that a debtor has no right to claim an exemption in property of the estate acquired post-petition because a debtor's right to an exemption is determined as of the petition date. The Trustee offered no case law in support of this argument.

The express language of the Bankruptcy Code and the Bankruptcy Rules provide to the contrary. Section 522 of the Bankruptcy Code governs exemptions in bankruptcy. Under § 522(b)(1), "an individual debtor may exempt *from property of the estate* the property listed in [the federal or state exemption statutes, as applicable]." 11 U.S.C. § 522(b)(1) (emphasis added). This provision in no way suggests that a debtor's ability to exempt property excludes property acquired post-petition. *See In re Cutignola*, 450 B.R. 445, 448 (Bankr. S.D.N.Y. 2011) ("The superiority of § 522(b)(1), the right to exempt property, extends to all subsections of Bankruptcy Code § 541, including § 541(a)(5)(A), which concerns property filed post-petition.")[3]; *In re*

[3] In *In re Cutignola*, the court held that an inherited IRA is exempt under § 522(d)(12) of the Bankruptcy Code. Arguably the court's holding as to this issue is abrogated by *Rameker* given that the language of § 522(d)(12)

Magness, 160 B.R. 294 (Bankr. N.D. Tex. 1993) (holding that at debtor may exempt property inherited post-petition).

As further support, the definition of "value" for purposes of § 522 is not limited to a debtor's interest in property on the petition date but rather expressly extends to property acquired after the petition date. *See* 11 U.S.C. § 521(a)(2) ("'value' means fair market value as of the date of the filing of the petition *or with respect to property that becomes property of the estate after such date*, as of the date such property becomes property of the estate")(emphasis added). Similarly, Bankruptcy Rule 1007(h)—dealing with "Interests Acquired or Arising After the Petition"—expressly directs a debtor that acquires property of the type specified in § 541(a)(5) to supplement his or her schedules to assert any exemption claimed for such property. Fed. R. Bankr. P. 1007(h) ("If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall . . . file a supplemental schedule. *If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule.*") (emphasis added).

Given that exemption statutes are to be construed liberally in favor of debtors, *In re Wengerd*, 453 B.R. 243, 247 (B.A.P. 6th Cir. 2011), it seems illogical—and indeed unfair—to interpret §§ 522 and 541(a)(5) to require debtors to supplement the bankruptcy estate with post-petition property but deny them the ability to claim an exemption that they could have claimed if they owned the property on the petition date. Accordingly, the Trustee's Objection is OVERRULED. The Debtor may exempt his one-sixth interest in the Inherited IRA pursuant to O.R.C. § 2329.66(A)(10)(e).

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mirrors the language of § 522(b)(3). *Rameker*, however, did not involve a post-petition inheritance. Accordingly, the *Cutignola* court's conclusion that a debtor may exempt assets acquired post-petition remains sound.

II. MOTION TO DISMISS

The Debtor seeks to dismiss this case pursuant to § 727(a) "for cause." In light of the inheritance, the Debtor believes that he could negotiate arrangements to pay his creditors in full outside of bankruptcy. He is further concerned that the Trustee may pursue a preference action to recover a payment made by the Debtor to settle a state court lawsuit, which the Debtor fears might revive claims against him. Finally, in light of a serious medical condition, the Debtor believes that he would be in a better position to plan his financial future if he was permitted to work directly with his creditors to satisfy his financial obligations.

"The decision to dismiss under § 707(a) is an equitable determination and is within the bankruptcy court's discretion." *Simon v. Amir (In re Amir)*, 436 B.R. 1, 16 (B.A.P. 6th Cir. 2010). This Court finds that it is in the best interest of all parties concerned that this case should proceed. The claims bar date has passed and the Trustee projects there will be a very significant distribution to creditors. The Trustee further indicated that he may decide not to pursue the potential preference action given the projected distribution to creditors and the costs and risks of litigation. Regardless, even if the Trustee were to pursue and succeed in the preference litigation, any resulting claim would be a claim against the Debtor's estate and not the Debtor. *See* 11 U.S.C. §§ 501(d), 502(h) and Fed. R. Bankr. P. 3002(c)(3). Finally, if this case proceeds, the Debtor will be discharged of his debts and the Trustee will handle paying the Debtor's creditors leaving the Debtor free to focus on his health and plans for his financial future.

Accordingly, the Debtor's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

Copy to:
Default List

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This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Jeffery P. Hopkins
United States Bankruptcy Judge

Dated: January 18, 2018

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re	:	
	:	
CHARLES E. OLIVER	:	Case No. 17-14255
DOROTHY OLIVER	:	Chapter 7
	:	Judge Hopkins
Debtors	:	

ORDER ON MOTION FOR WAIVER OF CREDIT COUNSELING DUE TO DISABILITY

Presently before the Court is Debtor Charles E. Oliver's Motion for Waiver of Credit Counseling Due to Disability (the "Motion"). (Doc. 12). The Motion indicates that the Debtor is suffering from dementia and significant health issues.

In order to be a debtor under the bankruptcy code, compliance with 11 U.S.C. § 109(h) is necessary. A debtor must obtain credit counseling from an approved nonprofit budget and credit counseling agency 180 days before filing a petition. 11 U.S.C §109(h).

Under Section 109(h)(4), certain debtors may be exempted from the required credit counseling: "The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of disability. For the purposes of this paragraph . . .'disability' means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1)."

Few courts have determined when disability warrants an exemption from obtaining credit counseling. However, the Court finds the reasoning in *In re Tupler*, 345 B.R. 322 (Bankr. D. Colo. 2006) to be persuasive. In *Tupler*, the court developed a three prong test to determine if a debtor's disability warranted an exemption from credit counseling. A debtor is entitled to an exemption if: (1) the debtor demonstrates a severe physical impairment; (2) the debtor demonstrates that he or she made a reasonable effort to participate in pre-petition credit counseling and; (3) the debtor demonstrates that as result of the impairment he or she is unable to meaningfully participate in a briefing. *Id*. at 325.

Accordingly, the Court will hold the Motion in abeyance until **February 5, 2018** to afford the Debtor an opportunity to supplement the record with an affidavit, signed by the Debtor's physician, substantiating the allegations set forth in the Motion. The affidavit should not disclose the underlying medical condition; rather, it must merely state the medical reasons why Debtor's condition prevents him from participating in credit counseling in person, over the telephone, or on the Internet. If the Debtor fails to do so, the Motion will be denied without further notice or hearing.

IT IS SO ORDERED.

Copies to:

Default List

IT IS SO ORDERED.

Dated: June 18, 2018

Jeffery P. Hopkins
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re	:	
JAMES LENELL PRYOR	:	
	:	Case No. 18-11883
	:	Chapter 7
Debtor	:	Judge Hopkins
	:	

ORDER REGARDING CERTIFICATE OF CREDIT COUNSELING

This matter is before the Court on its own motion and pursuant to its authority under 11 U.S.C. §105(a). On May 17, 2018, Debtor's mother, Annette Collins, filed this chapter 7 petition on behalf of her son seeking relief for him from creditors (Doc. 1). Ms. Collins also filed with the petition a Power of Attorney which provided that she was filing the case on behalf of the Debtor. Ms. Collins, however, failed to indicate in Part 5 of the petition whether she had completed credit counseling or would be seeking waiver of this requirement under 11 U.S.C. § 109(h). Instead, Ms. Collins attached a statement to the petition, explaining that: "My son James Pryor can't do the credit counseling do to [sic] him

been [sic] lock up now. I am file [sic] this because I can't afford to pay his bills." (Doc. 1).

The Law

With very few exceptions, none of which apply in this case, 11 U.S.C. § 109(h) requires that an individual must obtain credit counseling within the 180-days prior to the petition being filed in order to be eligible to be a debtor.[1] In addition, the U.S. Trustee program which is part of the Department of Justice has informally advised all persons seeking bankruptcy relief that, when the actual Debtor is unable to complete credit counseling, the individual who is serving as his Power of Attorney is required to receive the

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[1] 11 U.S.C. § 109 (h)provides in relevant part:

(3)

(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and “disability” means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

counseling on his behalf.[2]

Debtor or Debtor's Power of Attorney
Required to Receive and File Credit Counseling Certificate

In the present case, the Court cannot determine whether Debtor's Power of Attorney actually obtained the required credit counseling on behalf of Debtor before the 180-day period prior to the date of filing the petition, in compliance with §109(h). Because there is no indication that Ms. Collins, as the Power of Attorney for Debtor, received credit counseling within the 180-day period prior to the date of filing the petition and because appears that Debtor (or Debtor's Power of Attorney) does not qualify under any of the exceptions to the §109(h) credit counseling requirement, the Debtor may be ineligible for relief under chapter 7.

If Ms. Collins obtained credit counseling on behalf of Debtor in the present case within the 180–days before the petition was filed, she will need to file the certificate counseling within fourteen days (14) from the entry of this Order. If the credit counseling certificate is not filed in 14 days from entry of this Order, the case will be dismissed. In order for Debtor to be eligible for relief under chapter 7, either Debtor or Ms. Collins on his behalf will need to obtain the credit counseling within the 180–days before the petition and re-file the petition in compliance with §109(h).

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[2] The United States Department of Justice website page titled Frequently Asked Questions (FAQS)- Credit Counseling provides the following guidance:

Q: May an individual with a power of attorney for a client (such as an incarcerated client) complete credit counseling on behalf of that client?

A: Yes, if the power of attorney is valid under state law and grants the representative the authority under state law to file a bankruptcy petition. The credit counseling certificate must list both the name of the client and the name of the representative along with that representative's legal capacity (e.g. John Doe, as Attorney-In-Fact for Jane Doe). United States Department of Justice, *Frequently Asked Questions (FAQS)-Credit Counseling*, https://www.justice.gov/ust/frequently-asked-questions-faqs-credit-counseling#taking2 (last visited June 12, 2018).

IT IS SO ORDERED.

Copies:

All Creditors and Parties in Interest

Debtor:
Counsel: Phone: ( )
Trustee: Phone: ( )
341 Date:

STATEMENT REGARDING VERIFICATION OF IDENTITY AND SSN

1) I personally verified the identity of the debtor by checking his/her **original** photo identification;
   _____ Drivers License, (State & number) _____
   _____ State Identification (State & number)_____
   _____ Passport (Country, number, Expiration Date) _____
   _____ Military identification (branch & ID number) _____
   _____ Other (Describe, attach copy) _____

2) I personally inspected the following **original** document as proof of the debtor's social security number and the number is _____:
   _____ Social security card
   _____ Social security statement
   _____ W2
   _____ Recent payroll stub
   _____ Employers health card
   _____ Other (Describe, attach copy)
   _____

Dated: _____ _____
Signature

PLEASE FAX COMPLETED FORM TO THE CHAPTER 7 TRUSTEE AT (513) _____ ALONG WITH A COPY OF THE DEBTOR'S DRIVER'S LICENSE AND SOCIAL SECURITY CARD, OR OTHER PROOF OF SAME.

At the meeting of creditors, each individual debtor must present original government-issued photo identification and confirmation of the social security number listed in the notice of the meeting of creditors received by the trustee. 11 U.S.C. § 521(h) and Fed. R. Bankr. P. 4002(b)(1).

Acceptable forms of picture identification (ID) include: driver's license, U.S. government ID, state ID, student ID, passport (or current visa, if not a U.S. citizen), military ID, resident alien card, and identity card issued by a national government authority.

Acceptable forms of proof of social security number include: social security card, medical insurance card, pay stub, W-2 form, IRS Form 1099, and Social Security Administration (SSA) Statement.

If a debtor fails to provide the required forms of identification, the trustee may proceed with the normal questioning at the meeting of creditors, but must continue the meeting to the trustee's next scheduled meeting date for production of the identification.

TAB
E

RESPA and TILA
REGULATIONS X & Z

Dann Law

Brian Flick is the managing attorney of the Cincinnati Office of DannLaw and one of six partners in the firm. Brian's practice is focused in Consumer Law primarily in the areas of Consumer Bankruptcy, Foreclosure Defense, Bankruptcy Litigation, Mortgage Servicing Litigation under RESPA/TILA, and Consumer Litigation. He practices in the Southern District of Ohio, Northern District of Ohio, Eastern District of Kentucky, Western District of Kentucky, Northern District of Illinois, Northern District of Indiana, Eastern District of Tennessee, and the Eastern District of Michigan, as well as throughout the State of Ohio and State of Kentucky. He is an active member of the Cincinnati Bar Association, the Kentucky Bar Association, the National Association of Consumer Bankruptcy Attorneys where he is the Sixth Circuit Listserv Community Leader, and the National Association of Consumer Advocates where he is the State Chair for Ohio. He received his B.A. degree from Adrian College and his J.D. degree from the Ohio Northern University Pettit College of Law.

Brian resides in Amelia, Ohio with his wife, two dogs, one permanent foster cat, one cat, and turtle.

How We Got Here:

- In the Summer of 2007, Senator Elizabeth Warren published an article in the *Democracy Journal of Ideas* entitled "Unsafe at Any Rate." The article outlined the need for consumer protection in the financial industry.
- Emergency Economic Stabilization Act of 2008.
  - HAMP
- Dodd–Frank Wall Street Reform and Consumer Protection Act in 2010. Pub.L. 111–203, H.R. 4173.
  - Shifting Regulation of Truth in Lending Act (TILA) and Real Estate Settlement Protection Act (RESPA) to newly create Consumer Finance Protection Bureau (CFPB).
  - CFPB formed on July 21, 2011.

How We Got Here (cont.):

- In February 2012, 49 state attorneys general, the District of Columbia and the federal government announced a historic joint state-federal settlement with the country's five largest mortgage servicers
  - Significant Reform
  - No Right of Enforcement

Dann Law

The Regulations

- On January 13, 2013, the CFPB issued amendments to 12 CFR § 1024 (Regulation X – RESPA) and 12 CFR § 1026 (Regulation Z – TILA).
  - Effective January 10, 2014.
  - Codifying many terms of the National Mortgage Settlement and creating a Private Right of Action
  - CFPB Docket No. 2012-0033 (Regulation Z)
  - CFPB Docket No. 2012-0034 (Regulation X)

Dann Law

Regulation X Now Addresses Two Areas Not Previously Regulated

- Force-Placed Insurance
  12 CFR § 1024.37

- Loss Mitigation
  12 CFR § 1024.41

Dann Law

Borrowers Entitled to Information Without a Dispute

12 CFR 1024.36—Requests for information.

Substantial information available without the need for a dispute.

Dann Law

The Error Resolution Process Becomes More Robust

12 C.F.R. 1035:

Creates Notice of Error

Servicers on the Clock to Correct Errors

Failure to Correct Actionable under RESPA

Dann Law

Let’s take a closer look…

Dann Law

Regulation X

1. Bookmark this website: http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/
2. 1024.31 defines ***service provider*** as "any party retained by a servicer that interacts with a borrower or provides a service to the servicer for which a borrower may incur a fee."

Dann Law

Requests for Information

- Requests for Information (RFI) replace Qualified Written Requests
- No need for a dispute
- Much more information is available
- Tight response times
  - 10 to 30 business days
- Send a Notice of Error (NOE) if response is not timely, or if information provided is incorrect
- Tight Response Times on NOEs
- **ALL SUBJECT TO SUIT, STATUTORY PENALTIES, DAMAGES AND SHIFTING OF ATTORNEYS FEES**

Dann Law

Recent Case suggests Dual Liability for servicer and investor

- Servicers are primary targets of RESPA Regulation X
- Investors and Master Servicers and Servicers May be targets of TILA Regulation Z
- Recent case law suggests some dual liability under RESPA

Dann Law

Notice of Error – 12 C.F.R. §1024.35

1. **12 C.F.R. §1024.36(a)**

Must include

- Name of borrower
- Information to identify loan account
- Error thought to have occurred

Dann Law

Types of Errors – 12 C.F.R. §1024.35(b)

- (b)(1) – Failure to accept payment
- (b)(2) – Failure to apply accepted payment
- (b)(3) – Failure to credit payment to account
- (b)(4) – Failure to pay/refund escrow
- (b)(5) – Improperly charging of a fee
- (b)(6) – Failure to provide accurate payoff balance

Types of Errors – 12 C.F.R. §1024.35(b)

- (b)(7) – Failure to comply with Early Intervention Requirements
- (b)(8) – Failure to accurately/timely transfer information about servicing of loan to new servicer
- (b)(9) – Improperly initiating foreclosure process

Notice of Error

Types of Errors – 12 C.F.R. §1024.35(b)

- (b)(10) – Improperly moving for foreclosure judgment or order of sale
- (b)(11) – Any other error in servicing of loan

No Injunctive Relief

- No specific provisions in the rules or statutes for injunctive relief.
- Federal Doctrine of Abstention and Rooker–Feldman Doctrine make federal court interference in state court proceedings unlikely.
- State courts not bound regulations at all

Dann Law

Summary of Damages in Regulations X and Z Lawsuits

- Civil Penalties
  - Up to $2,000 per violation under RESPA
  - Up to $4,000 per violation under TILA
- Actual Damages
  - Legal fees in defending foreclosure
  - Damage to credit
  - Permanent Damage from public record of wrongly filed foreclosure
  - Emotional Distress (Medical Care not necessary)
  - Shifting of Attorney's Fees

RESPA AREAS TO KNOW AS A BANKRUPTCY ATTORNEY

- FORECLOSURE/DUAL TRACKING
- LOSS MITIGATION
- POST-PETITION DISBURSEMENTS OF MORTGAGE PAYMENTS - CONDUIT/NON-CONDUIT
- NOTICES OF PAYMENT CHANGE
- RULE 3002 Notice of Final Cure

Prohibition on Foreclosure Referrals

- 1024.41(f) states that a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:
  - (i) A borrower's mortgage loan obligation is more than 120 days delinquent;
  - (ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or
  - (iii) The servicer is joining the foreclosure action of a subordinate lienholder.

What Is a Foreclosure Referral?

- The commentary states:
- i. Where foreclosure procedure requires a court action or proceeding, a document is considered the first notice or filing if it is the earliest document required to be filed with a court or other judicial body to commence the action or proceeding (e.g., a complaint, petition, order to docket, or notice of hearing).
- ii. Where foreclosure procedure does not require an action or court proceeding, such as under a power of sale, a document is considered the first notice or filing if it is the earliest document required to be recorded or published to initiate the foreclosure process.

What Is a Foreclosure Referral? (cont.)

- iii. Where foreclosure procedure does not require any court filing or proceeding, and also does not require any document to be recorded or published, a document is considered the first notice or filing if it is the earliest document that establishes, sets, or schedules a date for the foreclosure sale.
- iv. A document provided to the borrower but not initially required to be filed, recorded, or published is not considered the first notice or filing on the sole basis that the document must later be included as an attachment accompanying another document that is required to be filed, recorded, or published to carry out a foreclosure.

Dann Law

Loss Mitigation: Foreclosure Sale

- *Prohibition on foreclosure sale.* If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:
  - (1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

Loss Mitigation: Foreclosure Sale (cont.)

  - (2) The borrower rejects all loss mitigation options offered by the servicer; or
  - (3) The borrower fails to perform under an agreement on a loss mitigation option.

- A servicer not moving for foreclosure judgment includes:
  - Not moving for summary judgment
  - Not moving for default judgment of the borrower currently be considered for loss mitigation
- A servicer must take reasonable steps to avoid a ruling on a pending motion that would result in a foreclosure judgment against a borrower

Loss Mitigation – Less than 37 days

- If a complete loss mitigation application is received less than 37 days before a scheduled foreclosure sale, a servicer is under no obligation to conduct a loss mitigation review. See 1024.41(c)(1).

Dann Law

Critical Loan Modification Related Information Quickly Accessible VIA RFI's

- Who is the investor
  - Critical for determining modification restrictions
- Servicer's view of the current state of Escrow
- Amount of alleged arrearage that is composed of servicer imposed charges such as:
  - Excessive Number of Appraisals
  - Excessive Inspections
  - Forced Place Insurance
- This is especially important with all of the servicing transfers going on right now

Loss Mitigation – Timing

- So a lender receives a request for assistance. What deadlines are triggered? Section 1024.41(b)(2)(1)(B) states:
  - Within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete.

Dann Law

Loss Mitigation – What Triggers Obligations under the Regulation?

- A lender is under no obligation to review a borrower without a request for loss mitigation.
- If a borrower makes a request for loss mitigation, to what extent can the Regulations be triggered?
- Section 1024.31 defines a loss mitigation application as:
  - "an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option."
  - "*Loss mitigation option* means an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower."

Loss Mitigation Timing on a Complete Application

- Pursuant to Section 1024.41(c), If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, it is required to, within 30 days of the date the application was considered complete:
  - (i) Evaluate the borrower for all loss mitigation options available to the borrower; and
  - (ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage.

Loss Mitigation – What Triggers Obligations under the Regulation?

- Thus, a request for assistance accompanied by the statement "I make $1,000 a month" could trigger the obligations under this Regulation.

Loss Mitigation – Timing

- If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower ***shall include a statement*** that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options."
  - The Notice also "must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete."

Loss Mitigation Timing on a Complete Application (cont.)

- The servicer shall include in this notice the amount of time the borrower has to accept or reject an offer of a loss mitigation program as provided for in paragraph (e) of this section, if applicable, and a notification, if applicable, that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for making an appeal."
  - Servicer must allow 14 days (7 days if the sale is within 45 days) for borrower to decide on the offer of a loss mitigation program

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Loss Mitigation – Timing (what is reasonable)?

- When attempting to offer guidance on what constitutes a significant period of time, the CFPB simply stated that it may include consideration of the timing of the foreclosure process. As an example, the CFPB said that "if a borrower is less than 50 days before a foreclosure sale, an application remaining incomplete for 15 days may be a more significant period of time under the circumstances than if the borrower is still less than 120 days delinquent on a mortgage loan obligation" (and thus the foreclosure would not have been filed yet due the pre-foreclosure review period).

Loss Mitigation – What If the Application Was Facially Complete?

- Under Section 1024.41(c)(2)(iv), where an application is considered facially complete upon the first review and the borrower is informed of the same in the "five day letter" required under 1024.41(b)(2)(i)(B), but it is later determined that information is missing, presuming the borrower timely provides a complete package, the lender is required to consider the application "complete" as of the date it was facially complete.

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Loss Mitigation – What If the Application Was Facially Complete?

- What does this mean? If a lender receives a loss mitigation package and determines it is facially complete on April 1st, but later determines it is incomplete on April 15th, so long as the borrower provides the missing documentation within a reasonable period, the evaluation must be complete under 1024.41(c)(1).

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Loss Mitigation – Appeals of Denials

- Under Section 1024.41(h), a servicer is required to let the borrower to appeal the denial of any trial or permanent loan modification offers if it is issued 90 days or more before a foreclosure sale (or during the 120 period before the matter can be referred to foreclosure).
  - The servicer is required to give the borrower 14 days to appeal.
  - Pursuant to 1024.41(h)(3), an appeal must be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

Loss Mitigation – Appeals of Denials (cont.)

- Notice must be given to the borrower.
- The stay on foreclosure remains in place during the appeal.
- The borrower may also send a NOE.
- The servicer is required to provide a response to the appeal within 30 days. See 1024.41(h)(4).
  - The borrower shall be given 14 days to accept or reject any offers.

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Bankruptcy Issues Related to Dual Tracking

- New Filers may have been Dual Tracked.
- Claims Must Be Scheduled
- Having to File Bankruptcy would be Damages

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Loss Mitigation – How Many Bites at the Apple?

- A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.

Loss Mitigation – the Risk

- (3) Costs: In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorney's fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

Dann Law

QUESTIONS?

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Rule 3002.1

Deja Vu All Over Again…

NACBA Conference * May 4, 2017

Michelle Kainen, Kainen Law Office, PC
Sarah Mancini, National Consumer Law Center

Mortgage Cure Issues: What Should Happen ?

- In a perfect world, mortgage creditor should…
  - Timely file accurate proof of claim for prepetition arrearage
  - Properly calculate postpetition PITI payment
  - Apply payments in accordance with confirmed plan
  - Conduct annual escrow account analysis that reflects payments made under confirmed plan
  - Send accurate payment change notices, with attachments for RESPA escrow account statement or TILA rate change notice
  - Timely file accurate response to notice of final cure
  - Conduct a case closing audit

2

Application of Payments

- *Rake v. Wade*, 508 U.S. 464, 473 (1993) ("As authorized by § 1322(b)(5), the plans essentially split each of respondent's secured claims into two separate claims-the underlying debt and the arrearages.")
- Once plan is confirmed, postpetition "maintenance" payments should be applied in accordance with original loan amortization as if no prepetition default exists
- Payments on arrearages are paid separately, disbursed by the trustee, and should be applied only to arrearages
- *In re* Ogden, 2016 WL 1077355 (D. Colo. Mar. 18, 2016) (affirming actual and punitive damages award against servicer, noting that servicer maintained two sets of books in accounting for debtor's postpetition mortgage payments, which caused the debtor to be treated as not "contractually current").

3

Application of Payments

Fannie Mae Servicing Guide - Servicer must:

- Monitor and separately account for all prepetition and postpetition payments
- Maintain several sets of records during the term of the reorganization plan:
  - one that reflects application of the payments under the terms of the reorganization plan,
  - one that reflects application of the payments under the original terms of the mortgage loan, and
  - one that reflects application of any scheduled interest that must be remitted to Fannie Mae if the mortgage loan has a scheduled/actual remittance type

4

Rule 3002.1 Amendments

Amendments effective Dec. 1, 2016 seek to clarify three matters:

(1) rule applies whenever plan provides for payment of ongoing mortgage payments, regardless of whether a prepetition default is being cured;

(2) rule applies regardless of whether it is the debtor or the trustee who makes the mortgage payments; and

(3) unless court orders otherwise, rule ceases to apply when an order granting relief from the stay becomes effective with respect to debtor's residence

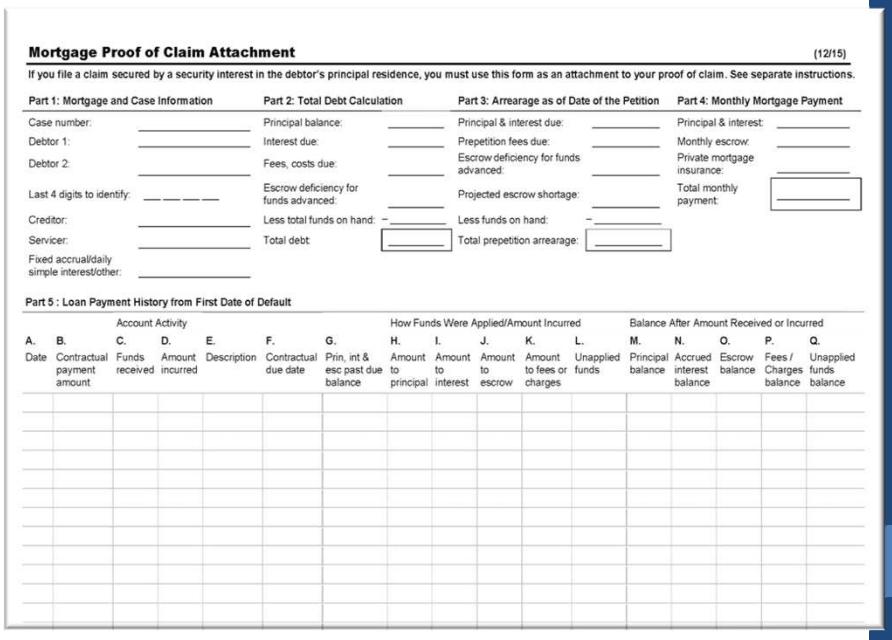
Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

The Initial Claim

- Rule 3001(c)(2) - For security interest in debtor's principal residence:
  - Proof of Claim - Official Form 410
  - Attachment A, Official Form 410A , with escrow statement prepared as of petition date
- For claims filed on or after December 1, 2015, itemization of prepetition arrearage is provided as part of a loan payment history

7



Mortgage Proof of Claim Attachment (12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:		Principal balance:		Principal & interest due:		Principal & interest:	
Debtor 1:		Interest due:		Prepetition fees due:		Monthly escrow:	
Debtor 2:		Fees, costs due:		Escrow deficiency for funds advanced:		Private mortgage insurance:	
Last 4 digits to identify:	__ __ __ __	Escrow deficiency for funds advanced:		Projected escrow shortage:		Total monthly payment:	
Creditor:		Less total funds on hand:	–	Less funds on hand:	–		
Servicer:		Total debt:		Total prepetition arrearage:			
Fixed accrual/daily simple interest/other:							

Part 5 : Loan Payment History from First Date of Default

		Account Activity						How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A. Date	B. Contractual payment amount	C. Funds received	D. Amount incurred	E. Description	F. Contractual due date	G. Prin, int & esc past due balance	H. Amount to principal	I. Amount to interest	J. Amount to escrow	K. Amount to fees or charges	L. Unapplied funds	M. Principal balance	N. Accrued interest balance	O. Escrow balance	P. Fees / Charges balance	Q. Unapplied funds balance

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Form 410A – Escrow Amounts

Part 2

Escrow deficiency for funds advanced

Part 2: Total Debt Calculation	
Principal balance:	
Interest due:	
Fees, costs due:	
Escrow deficiency for funds advanced:	
Less total funds on hand:	–
Total debt:	

- Amount of any prepetition payments for taxes and insurance servicer made out of its own funds and for which it has not been reimbursed

9

Form 410A – Escrow Amounts

Part 3

Projected escrow shortage

Part 3: Arrearage as of Date of the Petition	
Principal & interest due:	
Prepetition fees due:	
Escrow deficiency for funds advanced:	
Projected escrow shortage:	
Less funds on hand:	–
Total prepetition arrearage:	

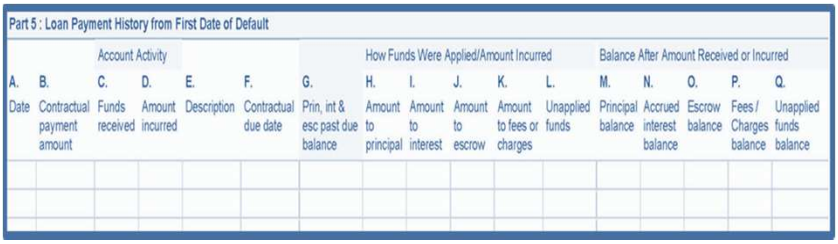
Instructions for Official Form 410A state:

"The projected escrow shortage is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held. The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O."

10

Form 410A – Loan History

- Part 5 - Loan Payment History from First Date of Default



Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

11

Form 410A – Loan History

- Loan history must start with the first date of default
- Instructions for Official Form 410A state:
  - "The first date of default is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable."

12

Payment Change Notices

- Notice of payment change must be filed and served **21 days** prior to change – Rule 3002.1(b)
  - Official Form 410S-1, Supplement 1
- If change based on escrow account or adjustable rate mortgage, mortgage creditor must attach to Supplement 1 an escrow account statement or rate change notice prepared in form consistent with RESPA and TILA
- Pay attention to escrow change at first year anniversary!
  - Is the "present payment" shown on the first change statement the same as the "new payment" on statement filed on petition date?

13

Notice of Fees, Expenses or Charges

- Notice of fees imposed during the chapter 13 case, no later than **180 days** after fees incurred – Fed. R. Bankr. P. 3002.1(c)
  - Official Form 410S-2, Supplement 2
- Notice must be sent no later than 180 days after fees **incurred**
  - Date fees, expenses and charges are "incurred" under Rule 3002.1(c) is the date the service is performed, not the date the servicer was invoiced by the third-party service provider
  - *In re Raygoza*, 556 B.R. 813(Bankr. S.D. Tex. 2016)

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Notice of Fees, Expenses or Charges

- What if fee is "tracked" but not noticed, and case later dismissed?
  - *In re Owens*, 2014 WL 184781 (Bankr. W.D.N.C. Jan. 15, 2014)
- What if fee is "waived" and not noticed, but keeps reappearing?
  - *In re Gravel*, 556 B.R. 561 (Bankr. D. Vt. 2016)

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Notice of Final Cure

- Notice of final cure filed by trustee no later than **30 days** after plan completion – Rule 3002.1(f)
- If trustee does not file notice and debtor believes all cure and plan payments have been made, debtor may file notice
- Notice informs mortgage creditor of obligation to file response
- Although there is no Official Form for the Notice of Final Cure Payment, an optional Director's Form (Form 4100N) may be used by trustees or the debtor

16

Response by Mortgage Creditor

- Within **21 days** after service of cure notice, mortgage creditor must file a response - Rule 3002.1(g)
- Response must state:
  - whether creditor agrees that debtor has paid in full amount required to cure
  - whether debtor is otherwise current on all postpetition payments consistent with § 1322(b)(5)
  - any cure or postpetition amounts, separately itemized, that the creditor claims are due as of the response date
- Director's Form 4100R, Response to Notice of Final Cure Payment, may be used by creditor

17

Dispute Procedure

- On motion filed by debtor or trustee within 21 days after statement, court shall determine if debtor has cured default and paid all required postpetition amounts – Rule 3002.1(h)
- If mortgage creditor does not file response, debtor should file motion seeking order that debtor has cured default and paid all amounts
- *In re Bodrick*, 498 B.R. 793 (Bankr. N.D. Ohio 2013) – court rejected creditor argument that rule provides the exclusive procedure for a court determination or that debtor is estopped from seeking a determination in an adversary proceeding filed after the twenty-one day period expired

18

Case "Closing Audit"

- Goodin v. Bank of Am., N.A., 114 F. Supp. 3d 1197, 1202 (M.D. Fla. 2015) - trial testimony was that "bankruptcy department members are trained to perform this eight-step closing audit upon a customer's discharge from bankruptcy:
  - (1) review all disbursements from the bankruptcy trustee to ensure they were received and applied;
  - (2) review the proof of claim;
  - (3) review the manner in which Bank of America applied funds;
  - (4) review escrowed amounts;
  - (5) review fees charged to see if they are still owed or should be reclassified post-discharge;
  - (6) identify missing payments or outstanding balances to determine why they are outstanding;
  - (7) follow up on requests for additional documentation or action; and
  - (8) reconcile all payments and fees."

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Possible Claims

Possible claims if creditor treats loan in default post-bankruptcy after final cure order:

- Rule 3002.1(i) sanctions
- Section 105 sanctions (and court's inherent powers)
- Contempt of confirmation order
- Section 524(i) violation
- FDCPA or state debt collection statute violation
- FCRA violation
- TILA prompt crediting rule violation
- RESPA notice of error violation
- State UDAP statute violation
- Breach of implied covenant of good faith and fair dealing

20

Sanction - Rules 3001(c)(2)(D) and 3002.1(i)

If the holder of a claim fails to provide any information required by [Rule 3001(c) and Rule 3002.1(b), (c), or (g)], the court may, after notice and hearing, take either or both of the following actions:

1) preclude the holder from presenting the omitted information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless, or

2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

21

Remedy after Case Closed

- Committee Note to Rule 3002.1(i):

  "If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i)."

22

Other Appropriate Relief

- *In re Gravel*, 556 B.R. 561 (Bankr. D. Vt. 2016)
  - $375,000 in sanctions under Rule 3002.1(i) and § 105 awarded to nonprofit legal services entity
  - "Court deliberately levies this substantial penalty on PHH to convey a clear message to PHH, and other mortgage creditors, that they may not violate court orders with impunity and will suffer significant monetary sanctions if they conduct their mortgage accounting operations in a manner that fails to fully comply with Rule 3002.1, violates court orders, or threatens the fresh start of Chapter 13 debtors."

23

Contempt

- Contempt – willful disregard for the court's authority
  - Direct contempt – committed in the presence of the court
  - Indirect contempt – actions occurring out of the court's presence, which tend to obstruct or defeat the administration of justice.
- Civil contempt – a party's failure to do something ordered by the court, for the benefit of another party to the proceeding.
- Criminal contempt – an act directed against the dignity of the court.
- Whether contempt is criminal or civil is determined by the purpose and nature of the sanction, not on the label affixed to it by the court. *In re Kave,* 760 F.2d 343, 351 (1st Cir. 1985).

24

Civil Contempt

- Designed to coerce compliance
- Contemnor may purge the contempt to avoid the sanction. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)
- May be crafted to compensate an injured party
- Not crafted to punish for past behavior. *In re Grand Jury Proceedings*, 744 F.3d 211, 214 (1st Cir. 2014)

25

Criminal Contempt

- Designed to punish. *United States v. Henry*, 519 F.3d 68, 72-73 (1st Cir. 2008)
- Unconditional fine or imprisonment (no provision for contemnor to purge)
- Contemnor must be afforded due process
  - Notice which states the essential facts
  - Trial
  - Time to prepare a defense
  - Right to counsel
  - Court may summarily punish for direct criminal contempt
  - Federal Rule of Criminal Procedure 42
- Bankruptcy courts do not have authority to hold someone in criminal contempt unless the act occurs in the presence of the court. *Matter of Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990).

26

Sanctions

- Pursuant to rule or statute
- Contempt powers
- Court's inherent authority. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

27

Inherent-Power Sanctions

- Bankruptcy courts have the inherent power that exists within Article III courts to impose sanctions. *In re Rainbow Magazine*, 77 F.3d 278, 284 (9th Cir. 1996).
- Bad-faith analysis not required unless court is employing its inherent powers to impose attorneys fees. *In re Charbono*, 790 F.3d 80, 88 (1st Cir. 2015)

28

Section 524(i)

- Willful failure of creditor to credit payments in the manner required by the plan is violation of injunction under section 524(a)
- *In re Scott*, 2015 WL 9986691 (Bankr. N.D. Okla. July 28, 2015)
  - after debtors received a discharge and trustee filed a Rule 3002.1(f) notice stating that debtors were postpetition current, creditor violated § 524(i) by sending statements to debtors alleging they were delinquent and that late fees were owed from period while chapter 13 case was pending
  - court noted that "[t]he suggestion that a sophisticated lender does not have the ability to properly track and apply payments on a secured loan is incredible"
  - court found creditor acted willfully - "the test for willfulness is simple and rather undemanding: did the creditor intend to credit the payments received in the manner in which it did? For purposes of § 524(i), willfulness does not require a finding of evil intent"

29

FDCPA and State Debt Collection Laws

- Check if servicer or other potential defendants are collectors under the statute
  - *Sokoloski v. PNC Mortg*., 2014 WL 6473810 (E.D. Cal. Nov 18, 2014) (denying motion to dismiss debtors' UDAP and debt collection statute claims against servicer who initiated a postbankruptcy foreclosure proceeding after failing to file a response pursuant to Rule 3002.1(g) to the final cure notice)
  - *In re Trevino*, 535 B.R. 110 (Bankr. S.D. Tex. 2015) (Rule 3002.1 does not preclude relief under the FDCPA because the Bankruptcy Code and the FDCPA are not in conflict; however, Texas state debt collection statute was preempted by the Code)
  - *Goodin v. Bank of Am., N.A*., 114 F. Supp. 3d 1197, 1206 (M.D. Fla. 2015) (statements sent to debtors after final cure and case closing that misstated the loan balance, falsely represented the amount of the debt and as being in collection, and sought allegedly overdue payments, violated the FDCPA)

30

Fair Credit Reporting Act

- *May v. Nationstar Mortgage, LLC*, 2014 WL 6607191 (E.D. Mo. Nov. 19, 2014) (motion to dismiss) and 2015 WL 9185408, (E.D. Mo. Dec. 17, 2015) ($500,000 jury award on invasion of privacy and negligent violation of FCRA claims)
- Jury was instructed to return a verdict for plaintiff if:
  - she disputed the completeness or accuracy of information Nationstar reported to a CRA, and
  - upon receiving notice of the dispute, Nationstar failed to comply with its duties
- Evidence before jury was that Nationstar "consistently failed to correct its records on Plaintiff's mortgage; repeatedly disregarded Plaintiff's many efforts to correct the records, including ignoring its own documents showing Plaintiff to be right; and, up to six months before trial, steadfastly persisted in treating Plaintiff's account as being in arrears."

31

Can Servicer Fix Problem by Amending the Claim?

- *In re Mason*, 520 B.R. 508 (Bankr. S.D. Miss. 2014) (permitting creditor to amend proof of claim to add $12,608 to prepetition arrearage, after response to final cure was filed, would be unfairly prejudicial)
- *In re Alonso*, 525 B.R. 195 (Bankr. D.P.R. 2015) (disallowing amended proof of claim, filed three months before debtor's completion of plan payments, that sought additional prepetition arrearage amount)
- *In re Galindez*, 514 B.R. 79 (Bankr. D. Puerto Rico 2014) (creditor who did not object to notice of final cure may not use amended proof of claim seeking higher arrearage amount to collaterally attack final plan confirmation order)

32

Notice of Final Cure: a Double-Edged Sword

- Recent trend of chapter 13 Trustees seeking denial of discharge for failure to maintain post-petition mortgage payments
- *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. June 9, 2015); *In re Formaneck*, 534 B.R. 29 (Bankr. D. Colo. July 13, 2015); *In re Cherry*, 10-25318 TBM (Bky. D. Colo. Jan. 19, 2016) (granting time to cure default); *In re Payer*, 2016 WL 5390116 (May 5, 2016) (granting time to cure default); *In re Diggins,* 561 B.R. 782 (Bankr. D. Colo. Dec. 20, 2016) (loan modification satisfied "all payments" requirement).
- *In re Foster*, 670 F.2d 478 (5th Cir.1982)
- *In re Perez*, 339 B.R. 385, 390 n. 4 (Bankr. S.D. Tex. 2006); *In re Kessler*, 2015 WL 4726794 (Bankr. N.D.Tex. June 9, 2015); *In re Hankins*, 62 B.R. 831, 835 (Bankr. W.D.Va.1986); *In re Russell*, 458 B.R. 731, 739 (Bankr. E.D.Va.2010).

33

Questions?

34

TILA and RESPA Cases since Enactment of Regs X and Z

I. Cases Favorable to Plaintiff/Borrower

A. Damages

2014

Vargas v. JP Morgan Chase Bank, NA, 30 F. Supp. 3d 945 - Dist. Court, CD California July 15, 2014

https://scholar.google.com/scholar_case?case=8848594163076003926&hl=en&lr=lang_en&as_sdt=40006&as_vis=1

…But Vargas had adequately pleaded that he is entitled to statutory damages and attorneys' fees under § 1640(a). (Compl. ¶ 38.) A plaintiff may suffer a violation of a statutory right without suffering actual damages whenever a statutory cause of action does not require proof of actual damages. *Robins v. Spokeo, Inc.,* 742 F.3d 409, 413 (9th Cir. 2014). Although there is a current split among district courts regarding whether a plaintiff must plead actual damages to establish liability for a § 1641(g) violation, it is well established in the Central District of California that such a violation allows for independent recovery of both actual damages and statutory damages. *Dinh,* 2013 WL 80150; *Wise v. Wells Fargo Bank, N.A.,* 850 F.Supp.2d 1047 (C.D.Cal.2012); *Brown v. U.S. Bancorp,* No. CV 11-6125 CAS PJWX, 2012 WL 665900 (C.D.Cal. Feb. 27, 2012); *Enuke v. Am.'s Wholesale Lender,* No. CV 11-6661 PA SPX, 2011 WL 11651341 (C.D.Cal. Dec. 18, 2011). The Court finds no reason to depart from this line of cases.

While the Ninth Circuit has not directly addressed this niche issue, the court has stated that under 15 U.S.C. § 1640(a), a consumer may recover actual damages and "[a] consumer may also obtain statutory damages." *In re Ferrell,* 539 F.3d 1186, 1190 (9th Cir. 2008). Moreover, the plain language of the statute clearly sets out that a creditor who violates § 1641(g) is subject to liability for the sum of actual damages, statutory damages between $400 and $4,000 for individual actions arising from credit transactions secured by real property, attorney's fees, and limited costs. 15 U.S.C. § 1460(a); *Ferrell,* 539 F.3d at 1190; *Enuke,* 2011 WL 11651341 at *6. Congress explicitly listed § 1641(g) as an applicable subsection under § 1640(a)—the section providing for actual and statutory damages.

Defendants' argument that actual damages are required for a § 1641(g) claim is unsuccessful. Defendants' assertion relies on a rather irregular statutory interpretation of § 1640(a). Cases that require a showing of actual damages construe § 1640(a)(2) as qualifying subsection (a)(1). *See Beall v. Quality Loan Serv. Corp.,* No. 10-CV-1900-IEG WVG, 2011 WL 1044148, at *6 (S.D.Cal. Mar. 21, 2011). But if this construction is implemented when reading the statute as a whole, subsection (a)(3)—which allows for attorney's fees—would also qualify section (a)(1). Defendants have provided no persuasive reason for the adoption of this construction instead of a plain meaning construction. *See id.* Had Congress wished for § 1640(a)(2) to qualify subsection (a)(1), the statute could easily have been structured to reflect such a dependent relationship. As it did not, a plain language reading of the statute establishes 952*952 liability for actual damages, statutory damages, and attorney's fees. *See Ferrell,* 539 F.3d at 1190; *Brown,*2012 WL 665900 at *6.

Bulmer v. MidFirst Bank, Dist. Court, D. Massachusetts November 14, 2014

https://scholar.google.com/scholar_case?case=8039082429007687326&q=Bulmer+v.+MidFirst+Bank,+FSA,+59+F.+Supp.+3d+271,+279+(D.+Mass.+2014)+&hl=en&as_sdt=40000006

Accordingly, under the mortgage, the transferee servicer, here Defendant, cannot simply stick its head in the sand when information is requested regarding a prior servicer's records. Rather, Defendant was required to provide all servicing information relevant to Plaintiff's QWR, even if solely attributable to its predecessors. Interestingly enough, it appears that Defendant may well have had this information in its possession, as its own affiant avers:

When servicing transferred, Wells Fargo transmitted to Midland a file which contained numerous documents related to [Plaintiff's] servicing history, including a payment history, correspondence and a Loan Modification agreement. These documents are maintained in [Defendant's] records.

(Defendant's Affidavit in Support of Motion for Summary Judgment, ¶ 7). Accordingly, Defendant could have shared salient aspects of this information with Plaintiff in its response to his QWR and, if not, was bound to explain why. *See* *Santander Bank,* 2013 WL 6046012, at *14. Defendant did neither.

In any event, there is no question that Plaintiff's attorney's May 23, 2012 letter was a QWR for purposes of RESPA. (Doc. No. 34, P. 8, n. 2.) It is likewise undisputed that that QWR called on Defendant to see if Wells Fargo made a mistake when applying Plaintiff's January 2010 payoff, and that Defendant's response provided little if any insight into that query. In short, Defendant's response, in the court's view, violated the RESPA statute. *See* 12 U.S.C. §§ 2605(e)(2)(C) and (f).

2015

Billings v Seterus, WD Michigan, April 24, 2015
https://scholar.google.com/scholar_case?case=14319564607021279157&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
"Defendant asserts that Plaintiff is not entitled to protections under RESPA because Plaintiff did not timely provide a complete loss mitigation application as required, and Plaintiff failed to sufficiently plead a RESPA violation because he did not allege actual damages. (Def.'s Br. at 17.)Plaintiff has offered evidence that he timely submitted required documentation to support a complete loss mitigation application. Specifically, Plaintiff points to the April 25 notification letter which demonstrates that Defendant had received the required documentation, but allowed the documents' effective dates to lapse prior to evaluating his application. (April 25 Notification Letter, ECF No. 5, Ex. 7.) Defendant is correct that Plaintiff cannot seek equitable relief under RESPA, but Plaintiff has properly alleged actual damages, including monetary damages in the amount he owes in arrears and costs and attorney fees. Accordingly, Plaintiff has submitted sufficient evidence to survive Defendant's motion to dismiss the RESPA claim."

Braat v Wells Fargo, WD Michigan, September 8, 2015

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Defendant is correct that Plaintiff cannot seek equitable relief under RESPA, but Plaintiff has properly alleged actual damages, including arrearage resulting from Defendant's actions and costs and attorney fees. (Compl. ¶ 29). See Billings v. Seterus, 2015 WL 1885627 (W.D. Mich. Apr. 24, 2015) (finding the plaintiff's allegation of "monetary damages in the amount he owes in arrears and costs and attorney fees" sufficient to survive a motion to dismiss). Accordingly, Plaintiff has submitted sufficient evidence to survive Defendant's motion to dismiss this claim.

Moore v Caliber Home Loans, SD Ohio, September 3, 2015
https://scholar.google.com/scholar_case?case=9071986248423084902&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiffs have sufficiently alleged plausible violations of the statutory provisions. Nothing in these statutory provisions excuses a loan servicer from fulfilling its obligations thereunder, including the availability of discovery in litigation or a prior response to a CFPB complaint. See Figard v. PHH Mortg. Corp., 382 B.R. 695, 712 (Bankr. W.D. Pa. 2008); see also 12 C.F.R. § 1024, Supplement I, ¶ 35(e)(3)(i)(B) (indicating servicer compliance with section 1024.35(e) required even when foreclosure sale pending). Plaintiffs also have pled actual damages relating to the misapplication of payments to their account, the dismissal of a foreclosure action "without prejudice," and out-of-pocket costs of representation to try to resolve the issue. (Doc. 1, PageId 5). From those allegations, it is reasonable to infer that Plaintiffs may also have incurred other actual damages. See Marais v. Chase Home Fin. LLC, 736 F.3d 711, 720 (6th Cir. 2013). As for Defendants' position that its prior response to the CFPB complaint negates any actual damages resulting from the alleged violations of the RESPA, that argument presents matters outside the pleadings and not central to the Complaint that the Court need not consider in ruling on a motion to dismiss. In any event, the response to the CFPB complaint merely creates issues of fact as to whether each of the alleged violations caused Plaintiffs' alleged actual damages. Turning to the second issue, the Court agrees with Plaintiffs that they have sufficiently alleged three separate violations of RESPA. Section 2605(f) indicates that a failure to comply with "any provision" gives rise to damages for "each such failure," such that a company's failure to comply with three provisions of the statute can render them liable for separate damages for each such failure. But each of those violations stem from one QWR sent by Plaintiffs to Caliber. Aside from conclusory statements, Plaintiffs point to no other factual allegations from which a pattern or practice may reasonably be inferred. The alleged failure to respond to a single QWR does not plausibly show a pattern or practice of noncompliance with RESPA to justify an award of statutory damages. See, e.g., Toone v. Wells Fargo Bank, N.A., 716 F.3d 516, 523 (10th Cir. 2013); In re Maxwell, 281 B.R. 101, 123024 (Bankr. D. Mass 2002). Accordingly, Plaintiffs have failed to sufficiently plead a pattern or practice necessary to recover statutory damages under RESPA.

York & Miles v BOA, ND California, October 20, 2015
https://scholar.google.com/scholar_case?case=15856574999723291913&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiff's Complaint avers that Champion violated RESPA by failing to respond adequately to the plaintiffs' QWR. Plaintiffs' first attempt to plead a RESPA claim failed because the FAC "lack[ed] a clear description of damages plaintiffs may have suffered as a proximate result of Champion's alleged shortcomings in responding to York's inquiry." R. 80 at 8 (Order Re: Mots. to Dismiss FAC). In the SAC, York avers that he "incurred the cost of traveling to the County Recorder's, as well as, the costs of photocopying documents." SAC ¶ 45. In addition, Miles claims that she also incurred the cost of photocopying and that "as a result of Champion's failure to respond to the QWR, in that as a

result of a forged deed, her credit reports indicated that her half of the Home was encumbered by a reverse mortgage," which "limited her access to further credit." Id. Under RESPA, 12 U.S.C. § 2605(e), a loan servicer that receives a QWR from a borrower or borrower's agent must respond in writing. To state a cognizable harm under RESPA, plaintiffs must aver "actual, cognizable damages resulting from theDefendants' failure to respond to QWRs." Tamburri v. Suntrust Mortg., Inc., 875 F. Supp. 2d 1009, 1014 (N.D. Cal. 2012) (emphasis in original). RESPA does not provide for injunctive relief, and therefore "actual damages and, in the case of a pattern or practice, statutory damages, are the only remedies available when a servicer violates the above provisions." Id. at 1013. (citing 12 U.S.C. § 2605(f)(1)). "Courts have interpreted this requirement to plead pecuniary loss liberally." Allen v. United Fin. Mortg. Corp., 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) (internal quotation marks and brackets omitted). Examples of cognizable pecuniary losses include the failure properly to credit payments made on the mortgage, incorrectly calculating interest, and reporting late payments to credit bureaus. Tamburri, 875 F. Supp. 2d at 1014-15 (collecting cases). Costs incurred to repair credit also qualify as cognizable pecuniary losses. Johnson v. HSBC Bank USA, Nat'l Ass'n,No. 3:11-cv-2091-JM-WVG, 2012 WL 928433, at *6 (S.D. Cal. Mar. 19, 2012). "[F]iling suit generally does not suffice as a harm warranting actual RESPA damages," however, "because, if it did, every RESPA suit would have a built-in claim for damages." Soriano v. Countrywide Home Loans, Inc., No. 09-CV-02415-LHK, 2011 WL 2175603, at *4 (N.D. Cal. June 2, 2011) (internal quotation marks and brackets omitted). Only some of the pecuniary losses averred in the complaint qualify as cognizable actual damages proximately caused by Champion's failure to respond to York's QWR. Champion contends that the only pecuniary losses averred in the complaint arguably caused by its failure to respond satisfactorily to the QWR are the travel and copying costs, which are merely costs connected with filing suit, and are therefore unrecoverable under RESPA. However, construing the facts in the complaint in favor of plaintiffs, they have adequately pleaded facts reflecting that they incurred travel and copying expenses in their quest to uncover information about their tax and insurance obligations—information that should have been disclosed in the response to the QWR. Miles, by contrast, has not pleaded actual damages from the alleged RESPA violation because, by her admission, the forged deed caused only her negative credit ratings. She has yet to connect Champion's failure to respond to the QWR to such ratings problems.

Clark v Ocwen, WD Michigan, October 20, 2015
https://scholar.google.com/scholar_case?case=7220498995833673095&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt Ocwen contends that Plaintiff has not sufficiently alleged actual damages that are "a result of" its failure to comply with the statute. 12 U.S.C. § 2605(f). District courts in the Eastern District of Michigan have dismissed many RESPA claims with facts similar to this one on the basis that the plaintiff failed to plead actual damages resulting from the defendant's actions. See, e.g., Caggins, 2015 WL 4041350, at *2; Szczodrowski v. Specialized Loan Servicing, LLC, No. 15-10668, 2015 WL 1966887, at *7 (E.D. Mich. May 1, 2015); Servantes v. Caliber Home Loans, No. 14-13324, 2014 WL 6986414, at *1 (E.D. Mich. Dec.10, 2014). Defendants rely on similar cases. See, e.g., Battah v. ResMAE Mortg. Corp., 746 F. Supp. 2d 869 (E.D. Mich. 2010); Fredericks v. Allquest Home Mortg. Corp., No. 15-10429, 2015 WL 1966856 (E.D. Mich. Apr. 30, 2015). Generally, these cases require a plaintiff to allege specific damages flowing from the RESPA violation, or to allege "how a purported violation [of RESPA] resulted in actual damages."Fredericks, 2015 WL 1966856, at *3. The Sixth Circuit, however, has applied a more lenient standard. See Mellentine v. Ameriquest Mortg. Co., 515 F. App'x 419, 424-25 (6th Cir. 2013) (allegation that defendant failed to respond to a written request in a timely fashion and that plaintiffs sustained "damages in an amount not yet ascertained, to be proven at trial" sufficed to state a RESPA claim). Courts in this district have done the same. See, e.g., Braat v. Wells Fargo Bank,

NA, No. 1:15-CV-483, 2015 WL 5225604, at *2 (W.D. Mich. Sept. 8, 2015) (allegation that plaintiff accrued "arrearage resulting from Defendant's actions and costs and attorney fees" sufficed to survive a motion to dismiss); Billings v. Seterus, No. 1:14-CV-1295, 2015 WL 1885627, at *3 (W.D. Mich. Apr. 24, 2015) (allegation of "monetary damages in the amount [plaintiff] owes in arrears and costs and attorney fees" sufficed to survive a motion to dismiss). None of the aforementioned cases from the Eastern District discusses or applies Mellentine or Marais. Thus, they are not persuasive. Defendants also contend that Plaintiff cannot recover damages for the loss of his home. The regulations required Ocwen to review his application for a loan modification, but they did not require Ocwen to provide him with a specific option for modifying the terms of his loan. 12 C.F.R. § 1024.41(a). Thus, Defendants argue that the foreclosure was solely the result of Plaintiff's failure to comply with his mortgage obligations; it was not the result of Ocwen's failure to comply with RESPA. Even accepting Ocwen's argument, however, Plaintiff alleges other damages that are not tied to the loss of his home. For instance, he alleges that he suffered emotional damages, sustained costs, and accrued arrearage as a result of Defendants' actions. Emotional damages are recoverable under RESPA, provided the plaintiff can show that they are caused by the RESPA violation. Houston v. U.S. Bank Home Mortg. Wisconsin Serv., 505 F. App'x 543, 548 n.6 (6th Cir. 2012). In addition, any expenses incurred by Plaintiff in preparing and updating an application that was allegedly ignored by Ocwen might qualify as damages. See Marais, 736 F.3d at 721 (remanding to the district court to consider whether the expense of preparing a written request would qualify as damages where the financial institution provides a deficient response).

Obazee v BONY, ND Texas, December 10, 2015
https://scholar.google.com/scholar_case?case=16754946658292466002&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
This court has held that allegations of late fees and additional interest resulting from a RESPA violation are sufficient to plead actual damages. See Enis v. Bank of Am., N.A., 2013 WL 840696, at *3 (N.D. Tex. Mar. 7, 2013) (Fitzwater, C.J.). Other courts have concluded that actual damages include the following: (1) out-of-pocket expenses incurred dealing with the RESPA violation including expenses for preparing, photocopying and obtaining certified copies of correspondence, (2) lost time and inconvenience, such as time spent away from employment while preparing correspondence to the loan servicer, to the extent it resulted in actual pecuniary loss[,] (3) late fees[,] and (4) denial of credit or denial of access to full amount of credit line.
McLean v. GMAC Mortg. Corp., 595 F.Supp.2d 1360, 1366 (S.D. Fla. 2009) (citing cases), aff'd, 398 Fed. Appx. 467 (11th Cir. 2010).
Obazee has sufficiently pleaded that he suffered actual damages resulting from the alleged RESPA violation. For example, Obazee alleges that he incurred actual expenses in the form of attorney's fees paid to RBC Law Center as a result of defendants' alleged failure to timely respond to his request for loan modification. Accordingly, the court denies defendants' motion to dismiss Obazee's RESPA claim based on the contention that he has failed to adequately allege that he suffered actual damages.

2016

Lucero v Cenlar, WD Washington, January 28, 2016
https://scholar.google.com/scholar_case?case=12309892576767002494&q=Lucero+v.+Cenlar&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

Cenlar's failure to timely respond to RFI's and failure to justify mounting attorney's fees added to Lucero's account after a loan mod had been established caused her to feel sick, overwhelmed, ad unfocused. She ultimately lost her job. Court found Cenlar's actions violated 12 USC 2601, awarding economic and emotional distress damages. Court also found for Lucero on her claims of breach of contract, breach of implied duty of good faith, and contract outrage, awarding an amount equal to the attorney's fees that were added to the account, her own attorney's fees, lost and reduced wages, and additional emotional distress damages in amounts of up to $500 per day. The total award equaled $213,888.

Santangelo v. Comcast Corp, ND Illinois, February 8, 2016
https://scholar.google.com/scholar_case?case=4173043540130628706&hl=en&lr=lang_en&as_sdt=8006&as_vis=1&oi=scholaralrt
And as the Court explained in the previous order, "even if the $50.00 deposit were fully refundable, Santangelo still has standing based on the lost time-value of the money." *Santangelo,* No. 15-CV-0293, 2015 WL 3421156, at *3 (citing*Habitat Educ. Ctr. v. U.S. Forest Serv.,* 607 F.3d 453, 457 (7th Cir. 2010) ("Every day that a sum of money is wrongfully withheld, its rightful owner loses the time-value of the money.").[2]

Lindsay v. Rushmore Loan Management, Services, LLC, D. Maryland, March 25, 2016
https://scholar.google.com/scholar_case?case=8616220001065624349&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
RESPA provides for recovery of "any actual damages to the borrower as a result of the failure" to follow its requirements. *See* 12 U.S.C. § 2605(f). Rushmore argues that the Lindsays have failed to allege or assert actual damages, *id.,* and state that "Plaintiff did not allege a claim for emotional distress and therefore cannot now argue damages under emotional distress if such cause of action is not pled in the Amended Complaint." Opp'n 1. However, the Lindsays *did* allege actual damages in the form of emotional distress twice in with respect to this count. *See* Am. Compl. ¶¶ 94-95. Emotional distress has been recognized as actual damages with respect to RESPA claims. *See Carter v. Countrywide Home Loans, Inc.,* No. 3:07CV651, 2009 WL 1010851, at *5 (E.D. Va. Apr. 14, 2009). For these reasons, Rushmore's motion to dismiss with respect to Count I is denied.

Federal National Mortgage Association v. OBRADOVICH, ND Illinois, March 29, 2016
https://scholar.google.com/scholar_case?case=12735589797853009990&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

The Counter-Defendants correctly observe that § 505/10a of the ICFA limits relief under the statute to plaintiffs who have suffered actual damage. *See* 815 ILCS 505/10a. They argue that the Obradoviches have alleged no actual damage because their counterclaim concedes that they were offered the opportunity to deliver a deed to their property in lieu of foreclosure. But the Obradoviches also allege that the Counter-Defendants' actions caused $25,000 in damage to their home. (Countercl. ¶ 49, Dkt. No. 14.) Although the parties focus much of their argument on the downstream consequences of these damages and their presumed impact following the Obradoviches' loss of the property, the pleadings do not suggest that the Obradoviches' interest in the property has been terminated. The allegation of $25,000 in actual damages to property in which they still have an ownership interest is sufficient to meet the ICFA's actual damages requirement. Since the

Obradoviches allege that they have suffered actual damages, they are entitled to bring their ICFA counterclaim under § 505/10a, which permits suit by any "person" who suffers actual damages. Safeguard's assertion that they cannot bring a claim under the statute because they are not "consumers" as defined by the act must therefore be rejected. *Williams Elecs. Games, Inc. v. Garrity,* 366 F.3d 569, 579 (7th Cir. 2004). The Counter-Defendants' motions to dismiss are denied as to Count III.

GEOFFRION v. NATIONSTAR MORTGAGE LLC, Dist. Court, ED Texas April 21, 2016
https://scholar.google.com/scholar_case?case=17015822978394148850&q=geoffrion&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1
Note: Remember this is just a QWR case without the more concrete damages that Reg X violations can generate. This case is a great example.

On September 10, 2015, the jury rendered a verdict finding that Plaintiffs submitted QWRs to Defendant on December 16, 2013 (the "December 16 Communication"), and on January 3, 2014 (the "January 3 Communication") (Dkt. #76 at p. 1). The jury also found that Defendant failed to respond or provided an inadequate response to the January 3 Communication (Dkt. #76 at p. 2). The jury found that Plaintiffs were entitled to recover damages caused by Defendant's failure to respond to Plaintiffs' written inquiry, in the amounts of $23,500 for pecuniary loss and $151,500 for mental anguish that Plaintiffs suffered in the past (Dkt. #76 at p. 3). The jury verdict also stated that Defendant engaged in a pattern or practice of noncompliance with the requirements of RESPA and that Plaintiffs were entitled to an accounting of the Account (Dkt. #76 at pp. 4-5)...

[REGARDING] PECUNIARY DAMAGES

However, *McLean* involved a very different set of facts. In *McLean,* the court found that damages arising from the mortgagor's unfulfilled professional opportunities, which allegedly resulted from time spent prosecuting RESPA claim violations, were speculative. *Id.* at 1370. However, the mortgagor in *McLean* had not been working for several years due to an injury. *Id.* The damages that Plaintiffs seek in the current case are much less speculative than the damages at issue in *McLean. See*Trial Tr. 9/9/15 at 85:24-90:14 (Kasmir stating that they met with a real estate agent who told them that they could lease the property for $4,500-$5,500 per month in fall of 2014); Trial Tr. 9/9/15 at 115:2-116:3 (Geoffrion remarking that Plaintiffs knew an individual who wanted to lease the house, but were advised that they could not rent the house while there was a cloud on the title, were concerned about liability if they were to rent, and believed that renting would be morally wrong); Trial Tr. 9/9/15 at 94:13-95:2 (Kasmir testifying that Plaintiffs still owned the house, that they had lived there for four months last year, and that they had lived in the house for a few months the previous year).
Given the facts stated above, it would have been reasonable for the jury to find that Plaintiffs would have received rental income for up to eight months of the last year. Renting the house for eight months would have resulted in rental income of $36,000-$44,000 if the range that the real estate agent told Plaintiffs was reasonable was accurate. The evidence presented during trial was sufficient to support an award of $23,500 for pecuniary loss…

[REGARDING EMOTIONAL DISTRESS:]

Recoverable Under RESPA

Defendant argues that the jury's award of $151,500 in mental anguish should be set aside because mental anguish damages are not recoverable under RESPA (Dkt. #89 at pp. 10-11). The Fifth Circuit and the Supreme Court have not yet addressed whether mental anguish damages are recoverable under RESPA.

Of the circuits that have addressed the issue, two have indicated that emotional distress damages should be allowed, while no circuit appears to have ruled that emotional damages are not allowed. *See* *Houston v. U.S. Bank Home Mortg. Wisconsin Servicing,* 505 F. App'x. 543, 548, 548 n.6 (6th Cir. 2012) (remanding case for further fact-finding about alleged emotional damages arising from servicer's failure to respond to QWR and holding that "[w]e find nothing in the text of § 2605(f), or in RESPA more broadly, to preclude `actual damages' from including emotional damages, provided that they are adequately proven"); *Catalan v. GMAC Mortg. Corp.,* 629 F.3d 676, 696 (7th Cir. 2011) (acknowledging that the defendant conceded that RESPA allowed for recovery of emotional distress damages). Additionally, the Eleventh Circuit explained that a plaintiff alleging a RESPA violation "arguably may recover for non-pecuniary damages, such as emotional distress and pain and suffering . . ." *McLean v. GMAC Mortg. Corp.,* 398 F. App'x. 467, 471 (11th Cir. 2010) (rejecting emotional distress damages in RESPA claim because plaintiffs failed to adequately demonstrate causation).

The two district courts within the Fifth Circuit that have addressed this issue have concluded that mental anguish damages are not permitted under RESPA (Dkt. #89 at p. 11). *See* *Steele v. Quantum Servicing Corp.,* No. 3:12-CV-2897-L, 2013 WL 3196544, at *7-8 (N.D. Tex. June 25, 2013); *Trahan v. GMAC Mortg. Corp.,* No. EP-05-CA-0017-FM, 2006 WL 5249733, at *8 (W.D. Tex. July 21, 2006) ("The statute does not permit mental anguish damages and this court is not at liberty to award damages which are not provided for in the statute."). But other district courts have allowed for the recovery of mental anguish damages for a RESPA claim. *See* *Rawlings v. Dovenmuehle Mortg., Inc.,* 64 F. Supp.2d 1156, 1166-67 (M.D. Ala. 1999) (citing cases that have held that nonpecuniary damages for emotional distress are available under RESPA); *but see* *Katz v. Dime Sav. Bank, FSB,* 992 F. Supp. 250, 255-56 (W.D.N.Y. 1997) (concluding that nonpecuniary damages are not available under RESPA).

All of the cases that have allowed for the recovery of mental anguish damages for a RESPA claim have turned on whether or not RESPA is a remedial consumer-protection statute. This is because courts construe remedial consumer-protection statutes "liberally in order to best serve Congress' intent." *Rawlings v. Dovenmuehle Mortgage, Inc.,* 64 F. Supp. 2d 1156, 1165 (M.D. Ala. 1999) (citing *Ellis v. General Motors Acceptance Corp.,* 160 F.3d 703, 707 (11th Cir. 1998)). Therefore, the Court must determine if RESPA is a remedial consumer-protection statute.

The first step for the Court in construing a statute is to interpret the statutory language. Section 2605 of RESPA provides for the recovery of "any actual damages to the borrower" as a result of a servicer's failure to comply with said section. 12 U.S.C. § 2605(f)(1)(A). "A basic canon of statutory construction is that words should be interpreted as taking their ordinary and plain meaning." *United States v. Yeatts,* 639 F.2d 1186, 1189 (5th Cir. 1981) (citing *Perrin v. United States,*444 U.S. 37, 42 (1980)). We must assume that Congress used the words of the statute as they are commonly and ordinarily understood. *Id.* Section 2605 of RESPA provides for the recovery of "any actual damages to the borrower" as a result of a servicer's failure to comply with said section. 12 U.S.C. § 2605(f)(1)(A). "The term `actual damages,' however, `has no consistent legal interpretation' because `the interpretation var[ies] with the context of use.'" *Rawlings,* 64 F. Supp. 2d at 1165 (quoting *Fitzpatrick v. Internal Revenue Serv.,* 665 F.2d 327, 329 (11th Cir. 1982)). Therefore, "[b]ecause `actual damages' has no `plain meaning' in legal lexicon," the court "attempt[s] to discern Congressional intent on this issue." *Id.*

First, the Court finds that the statutory language of RESPA demonstrates Congress' intent that RESPA be a remedial consumer-protection statute. Indeed, RESPA states its purpose clearly when it says,

Congress finds that significant reforms in the real estate settlement process are needed to insure that *consumers throughout the Nation*are provided with greater and more timely information on the nature and costs of the settlement process and *are protected* from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.

12 U.S.C. § 2601(a) (emphasis added). Additionally, the Court agrees with the analysis in *Rawlings* that found that RESPA's legislative history demonstrates that it was designed to be remedial in nature, and that it was intended to protect consumers. 64 F. Supp. 2d at 1164-67.

The Court also agrees with the line of cases that has determined that RESPA is a remedial consumer-protection statute. *See* *Medrano v. Flagstar Bank, FSB,* 704 F.3d 661, 665-666 (9th Cir. 2012) (finding that "Congress intended RESPA to serve consumer-protection purposes" and stating that the statute has a remedial purpose); *Cohen v. JP Morgan Chase & Co.,* 498 F.3d 111 (2d Cir. 2007) (stating that "RESPA's overall goal [is] to protect consumers from abusive practices that result in unnecessarily high settlement charges.") (citation omitted); *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006) (finding that "RESPA is a consumer protection statute that regulates the real estate settlement process"); *Carter v. Countrywide Home Loans, Inc.,* No. CIV. 3:07-CV651, 2009 WL 1010851, at *4 (E.D. Va. Apr. 14, 2009) (stating that "the statutory language is clear that Congress intended for RESPA to be a remedial consumer protection statute"); *Wienert v. GMAC Mortgage Corp.,* No. 08-CV-14482, 2009 WL 3190420, at *10-11 (E.D. Mich. Sept. 29, 2009) (citing cases that found that RESPA was a remedial consumer-protection statute and concluding that "recovery for emotional distress damages is available under § 2605(f) of RESPA"); *Ploog v. HomeSide Lending, Inc.,* 209 F. Supp. 2d 863, 870 (N.D. Ill. 2002) (holding that "RESPA is a consumer protection statute and RESPA's actual damages provision includes recovery for emotional distress"); *Johnstone v. Bank of Am., N.A.,* 173 F. Supp. 2d 809, 816 (N.D. Ill. 2001) (finding that the express terms of RESPA clearly indicate that it is, in fact, a consumer protection statute); *Rawlings v. Dovenmuehle Mortgage, Inc.,* 64 F. Supp. 2d 1156, 1164-67 (M.D. Ala. 1999) (finding that the statutory language clearly demonstrates Congress' intention that RESPA be a remedial consumer-protection statute).

In reaching this conclusion, the Court is also persuaded by Fifth Circuit cases addressing other consumer-protection statutes that are remedial in nature, wherein the Fifth Circuit has found "actual damages" provisions to include damages for mental anguish. *See, e.g.,* *Stevenson v. TRW, Inc.,* 987 F.2d 288, 296 (5th Cir. 1993) (stating that the Fair Credit Reporting Act ("FCRA") "authorizes a consumer to recover actual damages, which include humiliation or mental distress, even if the consumer has suffered no out-of-pocket losses"); *Fischl v. General Motors Acceptance Corp.,* 708 F.2d 143, 148 (5th Cir. 1983) (holding that actual damages include mental anguish under the Equal Credit Opportunity Act, 15 U.S.C. § 1691(e)). Therefore, the Court finds that RESPA is a remedial consumer-protection statute, and because statutes must be construed liberally in this context, the Court finds that mental anguish damages are included within RESPA's actual damages provision.

PROVING EMOTIONAL DISTRESS EVIDENCE:

(Trial Tr. 9/9/15 at 92:24-93:7). Likewise, Geoffrion also differentiated the emotional distress she experienced from the illness and death of her niece from the stress that was caused by Defendant's failure to respond to Plaintiffs' request for information.[9] *See* Trial Tr. 9/9/15 at 119:1-3 (agreeing that she was able to compartmentalize the two "stressers" and explaining that they are "completely different").

It is true that Plaintiffs are not permitted to recover for mental anguish allegedly caused by claims for which they did not recover at trial. *See City of Dall. v. Rodriguez,* No. 05-97-00280-CV, 1999 WL

689615, at *9 (Tex. App.-Dallas Sept. 7, 1999, no pet.) (denying recovery for mental anguish damages specifically attributed to a claim for which the plaintiff did not recover at trial). However, causation is an inherently fact-sensitive issue. *See, e.g.,* *Millhouse v. Wiesenthal,* 775 S.W.2d 626, 627 n.2 (Tex. 1989) (holding determination of causation is a question of fact for the jury); *Farley v. MM Cattle Co.,* 529 S.W.2d 751, 756 (Tex. 1975); *see* *Lynch v. Ricketts,* 314 S.W.2d 273, 276 (Tex. 1958) (describing causation as an "ultimate fact issue"). Additionally, the jury was instructed that they could only award compensatory damages for injuries that "Plaintiffs prove were proximately caused by Nationstar's allegedly wrongful conduct." (Dkt. #74 at p. 8).[10] The evidence presented at trial, in conjunction with the instructions given to the jury, are more than sufficient to uphold the jury's verdict as it relates to the inherently fact-intensive issue of causation.

BEVERLY M BENNETT Plaintiff v BANK OF AMERICA NA Defendant, D. Ct. MD Fla, May 6, 2016
https://scholar.google.com/scholar_case?case=18000303417618758732&q=beverly+bennett+v+bank+of+america&hl=en&as_sdt=6,36&as_ylo=2016
RESPA provides that a servicer may be liable for actual damages, statutory damages not to exceed $2,000, and costs and attorney's fees. 12 U.S.C. § 2605(f)(1), (3). Actual damages under RESPA include both pecuniary and non-pecuniary damages, e.g., emotional distress.McLean v. GMAC Mortg. Corp., 595 F. Supp. 2d 1360, 1366 (S.D. Fla. 2009).

To recover statutory damages, a plaintiff must show "a pattern or practice of noncompliance."12 U.S.C. § 2605(f)(1)(B). "[C]ourts have interpreted the term 'pattern or practice' in accordance with the usual meaning of the words." McLean, 595 F. Supp. 2d at 1365 (citation omitted). Further, "[t]he term suggests a standard or routine way of operating." Id. (citations omitted) (holding two violations insufficient and noting five violations sufficient).

Although Bank of America argues Bennett failed to adequately plead damages, a review of the Complaint establishes that Bennett sufficiently alleged damages. (Doc. # 1 at ¶¶ 96-106). For example, Bennett alleges that due to Bank of America's putative violations of Regulation X she will be forced to pay more under her loan modification than if the violations had not occurred. In addition, Bennett alleges Bank of America's alleged violations of Regulation X caused her emotional distress. Furthermore, Bennett alleges 4 violations of Regulation X. At this preliminary stage, the Court finds the Complaint's allegations sufficient.

Accordingly, it is

ORDERED, ADJUDGED, and DECREED:

Defendant Bank of America, N.A.'s Motion to Dismiss Complaint for Damages (Doc. # 15) isDENIED as to Counts I-IV, but Count V is DISMISSED.

*7 DONE and ORDERED in Chambers in Tampa, Florida, this 6th day of May, 2016.

Wirtz v. JPMorgan Chase Bank, NA, Dist. Court, Minnesota, May 9, 2016
https://scholar.google.com/scholar_case?case=2015041389966274669&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

As set forth above, SLS is liable under RESPA and MOSLA. A servicer who fails to comply with RESPA is liable to the borrower for "any actual damages to the borrower as a result of the failure." 12 U.S.C. § 2605(f)(1)(A). A borrower injured by a MOSLA violation has the right to receive: (1) actual, incidental, and consequential damages; (2) statutory damages equal to the amount of all lender fees included in the amount of the principal of the loan; (3) punitive damages if appropriate; and (4) court costs and reasonable attorney fees. Minn. Stat. § 58.18, subd. 1. Wirtz seeks remedies under the first, third, and fourth prongs.

A. Bank Statement Charge

Actual damages "must be causally related to a failure to properly respond to a QWR." Marais v. Chase Home Fin., LLC, 24 F. Supp. 3d 712, 727 (S.D. Ohio 2014). Wirtz incurred the $80 to obtain the bank statements as a direct result of SLS's failure to conduct its own investigation and its request that Wirtz provide that information. Under RESPA and MOSLA, SLS is liable to Wirtz for that fee.

B. Late Fees

SLS assessed Wirtz $418.17 in late fees, which may constitute damages. However, because SLS has waived some of the fees, the court is unable to determine what, if any, damages should be awarded. Accordingly, the parties shall submit information to the court sufficient to resolve the issue.

C. Credit Reports

Wirtz claims to have been damaged by SLS's inaccurate reporting to consumer reporting agencies. Actual damages include "any losses or injury resulting from damaged credit as a result of [a servicer's] improper reporting to consumer reporting agencies." Marais, 24 F. Supp. 3d at 728. However, Wirtz has not provided the court with any damages calculation or supporting documentation. Without that information, the court cannot award damages on this basis. SeeMcLean v. GMAC Mortg. Corp., 595 F. Supp. 2d 1360, 1373 (S.D. Fla. 2009)(noting plaintiffs' failure to support their assertion — that a lender denied them a loan based on their poor credit store — with any documentation, and concluding that "negative reporting to credit agencies alone is insufficient to establish damages"). The court will allow Wirtz the opportunity to provide such information as set forth below.
Further, SLS is ordered to immediately stop reporting Wirtz's payments as delinquent so far as any such report relates to the misapplied payment. The court also orders SLS to correct its error with any consumer reporting agency to which it reported Wirtz's payments as delinquent.

D. RESPA Damages for a Pattern or Practice of Noncompliance

A servicer may also be liable for statutory damages "in an amount not to exceed $2,000" if the court finds that there was "a pattern or practice of noncompliance" with RESPA. 12 U.S.C. § 2605(f)(1)(B). Wirtz first contacted SLS about the error nearly three years ago. After various efforts to get SLS to correct the error, Wirtz hired an attorney and submitted QWRs. In each response letter, SLS referenced its previous correspondence and considered the matter resolved. SLS never asked Chase for Wirtz's complete servicing records, repeatedly placed the burden to investigate on Wirtz, and continues to report him as delinquent. Under these circumstances, the court finds that SLS has engaged in a pattern or practice of noncompliance with RESPA, and is liable for $2,000 in statutory damages.

E. Costs of the Action and Attorney's Fees

A servicer is also liable, "in the case of any successful action" under RESPA, for "the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances." 12 U.S.C. § 2605(f)(3). That language parallels the language of Minn. Stat. § 58.18, subd. 1(4), for MOSLA violations. Wirtz has successfully pleaded claims under RESPA and MOSLA, and is entitled to costs and attorney's fees. Wirtz shall submit documentation to that effect.
Consistent with the foregoing, the parties shall submit additional briefing regarding damages, costs, and attorney's fees under 12 U.S.C. §§ 2605(f)(1)(A) and (f)(3), and Minn. Stat. § 58.18, subd. 1(1), (2), and (4). Wirtz shall submit his papers no later than 14 days from the date of this order, and SLS shall submit a response no later than 28 days from the date of this order.

Abramson v. BANK OF NEW YORK MELLON, Dist. Court, D. New Jersey, May, 12 2016
https://scholar.google.com/scholar_case?case=16996327324479308865&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

While BANA argues that Abramson has not sufficiently pleaded damages, the Court finds otherwise. Under RESPA, a violator may be liable to the borrower in "an amount equal to the sum of — (A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000." 12 U.S.C. § 2605(f)(1). Abramson specifically alleges that he suffered damages as a result of BANA's inaction with regard to the loss mitigation application, including "time spent putting together the loss mitigation application and time spent communicating with Defendants regarding the loss mitigation application."[2] (Compl. ¶ 62.)

GEOFFRION v. NATIONSTAR MORTGAGE LLC, Dist. Court, ED Texas May 12, 2016

https://scholar.google.com/scholar_case?case=6604514493075399813&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

…The computation of a reasonable attorneys' fee award is a two-step process.***Rutherford v. Harris County, Texas*, 197 F.3d 173, 192 (5th Cir. 1999)** (citation omitted). First, the court must utilize the lodestar analysis to calculate a "reasonable" amount of attorneys' fees. *Id.* The lodestar is equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work. *Id.* Second, in assessing the lodestar amount, the court must consider the twelve *Johnson* factors before final fees can be calculated. *Id.*

The *Johnson* factors are:

(1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9)

counsel's experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the client; and (12) awards in similar cases.

Id. at 192 n.23 (citing ***Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)**).

After considering the twelve *Johnson* factors, the court may adjust the lodestar upward or downward. ***Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993)**. "If the plaintiff obtained limited success, the hours reasonably spent on the case times the reasonable hourly rate may be excessive." ***Verginia McC v. Corrigan-Camden Indep. Sch. Dist.*, 909 F. Supp. 1023, 1032 (E.D. Tex. 1995)**. "`[T]he most critical factor' in determining the reasonableness of an attorney's fee award `is the degree of success obtained.'" ***Giles v. Gen. Elec. Co.*, 245 F.3d 474, 491 n.31 (5th Cir. 2001)**(quoting ***Farrar v. Hobby*, 506 U.S. 103, 113 (1992)**); *see also* ***Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)**. "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." ***Verginia McC*, 909 F. Supp. at 1032** (quoting***Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)**).

The fee applicant bears the burden of proof on this issue. *See* ***Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996)**; ***Louisiana Power & Light Co. v. KellStrom*, 50 F.3d 319, 324 (5th Cir. 1995)**. "Many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate and should not be double-counted." ***Jason D.W. v. Houston Indep. Sch. Dist.*, 158 F.3d 205, 209 (5th Cir. 1998)** (internal citations omitted).

The United States Supreme Court has barred any use of the sixth factor as a basis for enhancement of attorneys' fees. *See* ***Walker v. United States Dep't of Hous. & Urban Dev.*, 99 F.3d 761, 772 (5th Cir. 1996)** (citing ***City of Burlington v. Dague*, 505 U.S. 557, 567 (1992)**). In addition, three of the *Johnson* factors — complexity of the issues, results obtained, and preclusion of other employment — are fully reflected and subsumed in the lodestar amount. ***Heidtman v. Cty. of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999)**. "[T]he court should give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation and ability of counsel." ***Migis*, 135 F.3d at 1047** (citation omitted).

The lodestar is presumptively reasonable and should be modified only in exceptional cases. ***Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993)**. The fee-seeker must submit adequate documentation of the hours reasonably expended and of the attorney's qualifications and skill, while the party seeking reduction of the lodestar must show that a reduction is warranted. ***Hensley*, 461 U.S. at 433**; ***Louisiana Power & Light Co.*, 50 F.3d at 329**.

Wood v. GREEN TREE SERVICING LLC, Dist. Court, ND Alabama, May, 18 2016
https://scholar.google.com/scholar_case?case=16308632738965645041&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Moreover, the Woods alleged that they suffered emotional distress and mental anguish. The Woods admitted that they did not draft the August 27, 2014 QWR, never saw it, did not have a copy, and had no knowledge of its existence. Although they both testified in their depositions about suffering emotional distress, they did not mention the August 27, 2014 QWR. Rather, the Woods attributed their distress to their house burning and to the overall dispute with Green Tree about the mortgage. However, even though they had no knowledge of the August 27, 2014 QWR, their alleged emotional

distress could have been reduced if Green Tree had made the corrections that the QWR requested. Thus, the best way to decide whether there is a causal link between the Woods' emotional distress and the alleged RESPA violation is through evidence at trial. Accordingly, a genuine issue of material fact exists as to the damages incurred as a result of the alleged RESPA violation.

Brown v. Wells Fargo Home Mortgage, Dist. Court, D. New Hampshire, June, 20 2016
https://scholar.google.com/scholar_case?case=7776254282142535815&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

Wells Fargo's challenge to the sufficiency of the Browns' damages allegations does not fare so well. Though not particularly clear, detailed, or precise, the Browns have alleged facts which, taken in the light most favorable to them, recite at least some damages, including emotional distress damages. The Browns further allege a causal relationship between those damages and Wells Fargo's alleged RESPA violation. See Moore v. Mortgage Elec. Registration Sys., Inc., 848 F. Supp. 2d 107, 123 (D.N.H. 2012)(emotional distress damages amount to "actual damages" under RESPA where plaintiffs allege that they result from the RESPA violation). Accordingly, the court grants Wells Fargo's motion to dismiss this count in part, denying it as to the Browns' claim for damages under RESPA.

Sylvester v. BAYVIEW LOAN SERVICING LLC, Dist. Court, SD New York, June 24, 2016
https://scholar.google.com/scholar_case?case=11187357079274956511&hl=en&as_sdt=0,36

To support the argument that Plaintiffs' claim is unripe, Defendants point to two cases in which courts dismissed dual tracking claims because the relevant foreclosure proceedings were still pending. For actual damages to accrue such that a claim is ripe, these cases explain, the plaintiff must have "lost his or her property to foreclosure." *Simmons v. Wells Fargo Bank, N.A.,* No. 14-CV-333, 2015 WL 4759441, at *4 (D.N.H. Aug. 11, 2015); *accord Wenegieme,* 2015 WL 2151822, at *2. In those cases, the foreclosure proceedings were ongoing, so the plaintiffs had not suffered the "negative outcome" causing harm. *Wenegieme,* 2015 WL 2151822, at *2; *see Simmons,* 2015 WL 4759441, at *2. Here, in contrast, the court ordered a foreclosure sale in June 2015, and Plaintiffs aver that they have been approached by someone claiming to have bought the property. (Dkt. No. 19.) The dual-tracking injury to Plaintiffs is no longer speculative: insofar as the foreclosure proceeding continues, it proceeds only for the purpose of completing the foreclosure sale. Plaintiffs have no hope of winning in the state court. *Cf. Wenegieme,* 2015 WL 2151822, at *2. Indeed, as discussed below, Defendants argue for abstention on the ground that the state-court judgment was rendered *before* proceedings here commenced. Accordingly, as of now, Plaintiffs' claim is ripe. *See* Wright & Miller, Fed. Prac. & Procedure § 3532.7 (citing *Hargrave v. Vermont,* 340 F.3d 27, 34 (2d Cir. 2003) (noting that "[r]ipeness should be decided on the basis of all the information available to the court," including intervening events).

Watson v. Bank of America, NA, Dist. Court, SD California June 30, 2016

https://scholar.google.com/scholar_case?case=9754163356172059749&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

RESPA requires a borrower to demonstrate actual damages as a result of the servicer's failure to comply with RESPA. 12 U.S.C. § 2605(f). "A number of courts have read the statute [12 U.S.C. §

2605(f)] as requiring a showing of pecuniary damages in order to state a claim." Allen v. United Fin. Mortg. Corp., 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009); Ghuman v. Wells Fargo Bank, N.A., 989 F. Supp. 2d 994, 1006-07 (E.D. Cal. 2013) (a "RESPA's claim's failure to allege a pecuniary loss resulting from a failure to respond is fatal to the claim."). Courts have "liberally" interpreted the requirement to plead actual damages. Yulaeva v. Greenpoint Mortg. Funding, Inc., No. 09-1504 LKK KJM, 2009 WL 2880393, at *15 (E.D. Cal. Sept. 9, 2009) (allegation that plaintiff was required to pay a referral fee adequate alleged pecuniary loss). Costs incurred by a debtor in mailing QWRs to loan servicer were "actual damages" as a result of the servicer's failure to comply with RESPA. Marais v. Chase Home Finance, LLC, 24 F. Supp. 3d 712, 728 (S.D. Ohio 2014). In addition, the over calculation and overpayment of interest on a loan, the costs of repairing the plaintiff's credit, the reduction and/or elimination of the plaintiff's credit limits, and attorney's fees and costs are sufficient to allege actual damages. Pendleton v. Wells Fargo Bank, N.A., 993 F. Supp. 2d 1150, 1153 (C.D. Cal. 2013). Furthermore, emotional distress and mental anguish fall may constitute "actual damages" under RESPA. Hutchinson v. Delaware Sav. Bank FSP, 410 F. Supp. 2d 374, 383 n. 14 (D.N.J. 2006) ("It is unclear whether `actual damages' under RESPA encompasses emotional distress. The district courts are split and no Court of Appeals has addressed the issue.") (citing cases); Phillips v. Bank of America Corp., No. 10cv4561 EJD, 2011 WL 4844274, at * 5 (N.D. Cal. Oct. 11, 2011) (noting also that district courts in California are divided on whether damages for emotional and mental distress are pecuniary damages to support a claim under RESPA but appears that more cases hold that emotional harm is sufficient to recover actual damages under RESPA).

Here, Plaintiffs allege damages of expending time and money to correct the errors, including costs of copying documents, postage fees, loss of work fees, traveling expenses to and from the attorney's office, interest and penalties on the loan, emotional and psychological trauma. (Dkt. No. 8, FAC ¶ 126.) Based on the cases cited, the Court concludes that Plaintiffs have sufficiently alleged actual damages for violations of Regulation X.

Binder v. WestSTAR MORTGAGE, INC., Dist. Court, ED Pennsylvania July 13, 2016
https://scholar.google.com/scholar_case?case=14431333250227261285&q=binder++v.+Westar&hl=en&as_sdt=400006

Actual Damages

The LoanCare/Fannie Mae Memo first argues that Mr. Binder's RESPA claims must be dismissed because he has failed to allege actual damages. This argument lacks merit.

"A plaintiff claiming a RESPA violation must allege not only a breach of a duty required to be performed under RESPA, but must also show that the breach caused him to suffer damages." *Wilson v. Bank of Am., N.A.*, 48 F. Supp. 3d 787, 799 (E.D. Pa. 2013) (quoting *Hutchinson v. Del. Sav. Bank FSB*, 410 F. Supp. 2d 374, 383 (D.N.J. 2006)). "Actual damages encompass compensation for any pecuniary loss including such things as time spent away from employment while preparing correspondence to the loan servicer, and expenses for preparing, photocopying and obtaining

certified copies of correspondence." *Id.* (quoting *Cortez v. Keystone Bank, Inc.*, No. 98-2457, 2000 WL 536666, at *12 (E.D. Pa. May 2, 2000)); *accord* *Benner v. Bank of Am., N.A.*, 917 F. Supp. 2d 338, 364 (E.D. Pa. 2013).

Mr. Binder's Amended Complaint alleges the type of damages specifically referenced by the decisions in *Wilson*, *Benner* and *Cortez*:

Being forced to spend additional time in attempting to communicate with Defendants, in writing and by phone, to get his account and statements corrected to match payments made (Binder offered time estimates in written communications with WestStar in the attempt to correct problems, including: 4-5 hours by September 28, 2012; 8 hours by January 18, 2013; and 60-70 hours to date through this lawsuit)

Being forced to spend additional money, including overpaying on his mortgage monthly, postage (including regular or certified mailings on, inter alia, February 20, 2013, April 12, 2013 and May 28, 2013 totaling approximately 10.00), incurring the time of his insurance broker and accountant, printing (including approximately 140 pages of material at an approximate cost of 7-10 cents per page), and the like;

Amended Complaint at ¶ 5. The Court finds that Mr. Binder has alleged that he suffered actual damages as a result of the defendants' supposed conduct. Therefore, the Court denies the motion to dismiss as to failure to plead such damages

Hernandez v. JP Morgan Chase Bank, NA, Dist. Court, SD Florida July 22, 2016
https://scholar.google.com/scholar_case?case=10641525909420953134&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
In the Third Amended Complaint, Plaintiff alleges that "[h]is damages include[] unwarranted fees and charges applied to his account, legal fees associated with defending himself from the wrongful foreclosure, damage to his credit rating, emotional distress, and the costs of preparing and mailing the Notices of Error, including, but not limited to, the Notice of Error that he sent to Bayview after Chase failed to adequately respond." [ECF No. 84, p. 14].

…the Undersigned… recognizes, as an acceptable form of recoverable damages, that Chase's "`RESPA violation could plausibly have exacerbated the foreclosure proceedings and led Plaintiff to suffer additional harm that he would not have experienced absent the violation.'" [ECF No. 110, p. 15] (quoting *Burdick v. Bank of America, N.A.*, 99 F. Supp. 3d 1372, 1380 (S.D. Fla. 2015)).

Furthermore, Plaintiff also claims that the RESPA violation required the additional expense of sending a second notice of error to Chase's successor. Such an expense could also be recoverable in addition to the damages of an exacerbated foreclosure process. *See Miranda v. Ocwen Loan Servicing, LLC,* ___ F. Supp. 3d ___, No. 15-61434-CIV, 2015 WL 7767209, *4 (S.D. Fla. Dec. 2, 2015) ("alleged photocopying costs, postage costs, and reasonable attorney's fees incurred after an incomplete or insufficient response to a [notice of error] are actionable under RESPA.")

(citing *Rodriguez v. Seterus, Inc.,* No. 15-61253-CIV, 2015 WL 5677182, *2-3 (S.D. Fla. Sept. 28, 2015); *Russell v. Nationstar Mortg., LLC,* No. 4-61977-CIV, 2015 WL 541893, *2 (S.D. Fla. Feb. 10, 2015).

Finally, Plaintiff points to *Renfroe v. Nationstar Mortgage, LLC,* 822 F.3d 1241 (11th Cir. 2016), to support his contention that he can still assert damages concerning the fees and charges applied to his account even though they were eventually removed.

…While *Renfroe* is not precisely on point factually, the Court still finds it instructive. Just as in *Renfroe,* RESPA would be rendered meaningless in this case if the "unwarranted fees and charges" applied to Plaintiff's account do not constitute damages because they were refunded at a later time, *after* the lawsuit was already initiated. RESPA directs servicers to "make appropriate corrections in the account of the borrower [when there is an error], *including the crediting of any late charges or penalties.*" 12 U.S.C. § 2605(e)(2)(A).

Chase's reading of RESPA, if adopted, would have an illogical and unfair effect. A servicer could, in effect, conduct no investigations and deny every notice of error without consequence, just as long as it corrected the error *if* ever it were confronted about this practice (such as in a federal lawsuit, for instance). Thus, in these hypothetical circumstances, RESPA would be ineffective and provide no relief for those without the knowledge and/or wherewithal to bring a federal lawsuit. In the words of the Eleventh Circuit, accepting Chase's "argument would mean gutting RESPA." *Renfroe,* 822 F.3d at 1246.

… Plaintiff has established genuine issues of material fact to be resolved by the jury as to damages.

Shaw v. CitiMortgage, Inc., Dist. Court, D. Nevada August 17, 2016

https://scholar.google.com/scholar_case?case=17565659805714924287&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Although not presently before the court, the court notes for the benefit of the parties that it would consider a motion for attorney's fees filed by Shaw pursuant to NRS §18.010 and 12 U.S.C. §2605(f)(3), as Shaw is the prevailing party in this action under his declaratory relief, tortious breach of the implied covenants, and RESPA claims. Therefore, the court shall grant Shaw leave to file a motion for attorney's fees, if any, within twenty (20) days of entry of this order. Such motion shall comply with Local Court Rule 54-14.

IT IS THEREFORE ORDERED that the clerk of court shall enter judgment in favor of plaintiff Leslie Shaw and against defendant CitiMortgage, Inc. on Shaw's claim for declaratory relief and breach of contract in accordance with this order.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in the amount of $239,850.00 in favor of plaintiff Leslie Shaw and against defendant CitiMortgage, Inc. on plaintiff's claim for breach of the implied covenants of good faith and fair dealing.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in the amount of $6,000.00 in favor of plaintiff Leslie Shaw and against defendant CitiMortgage, Inc. on plaintiff's claims for violation of the Real Estate Settlement Procedures Act.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of defendant CitiMortgage, Inc. and against plaintiff Leslie Shaw on plaintiff's claim for intentional interference with prospective economic advantage.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in the amount of $719,550.00 in favor of plaintiff Leslie Shaw and against defendant CitiMortgage, Inc. for punitive damages.

IT IS FURTHER ORDERED that plaintiff shall serve a copy of this order upon junior lien holders Katherine Barkley and Janice Shaw within (10) days of entry of this order.

IT IS FURTHER ORDERED that plaintiff shall have twenty (20) days from entry of this order to file a motion for attorney's fees in accordance with this order, if any.

Hopper v. Nationstar Mortgage, LLC, Dist. Court, D. Oregon September 20, 2016
https://scholar.google.com/scholar_case?case=15021264884795218 78&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[RESPA Claim alleging Actual Damages Survives MTD]

A well-pleaded complaint under RESPA must contain allegations of actual damages stemming from the conduct of the defendant. *See*Medrano v. Flagstar Bank, FSB, 704 F.3d 661, 665 (9th Cir. 2012) ("If the servicer fails to respond properly to [a qualified written request], the statute entitles the borrower to recover actual damages and, if there is a `pattern or practice of noncompliance,' statutory damages . . ."); *Lettenrnaier v. Federal Horne Loan Mortg. Corp.,* No. 11-156HZ, 2011WL3476648, at *12 (D. Or. Aug. 8, 2011).
Here, plaintiff adequately alleges factual content in his Complaint that allows the court to draw the reasonable inference that defendant's alleged RESPA violation is the cause of plaintiffs harm. Plaintiff alleges: "Plaintiff would save approximately $800 per month by refinancing the Property" and "[a]s a direct result of Defendant's Failure to Respond to QWR 1, Plaintiff is unable to refinance the Property." Compl. at ¶ 18. The loss of $800 per month due to an inability to refinance qualifies as actual pecuniary damages. Taking all factual allegations in the Complaint as true, it is reasonable to infer that defendant's failure to respond to plaintiff's QWR may have adversely affected plaintiffs ability to refinance, resulting in financial harm. Thus, construing the facts alleged in favor of plaintiff, I find that he sufficiently alleges defendant failed to comply with RESPA's response requirements resulting in actual damages.

Wirtz v. JPMorgan Chase Bank, NA, Dist. Court, Minnesota September 26, 2016
https://scholar.google.com/scholar_case?case=4362807409030854362&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Thorough Discussion of Fee Award in RESPA Case]

A. Reasonableness of Billing Rate

Wirtz requests up to $275 per hour for his attorneys and $85 per hour for law clerks and support staff. That request is supported by an affidavit setting forth the education and experience of each billing person. Eaton Decl. ¶¶ 1-15. Wirtz's counsel also submitted an expert declaration attesting to the reasonableness of the hourly rates based on his experience, reputation, and ability. Barry Decl. ¶¶ 29-37.

SLS objects only to the increase in hourly rates that occurred during this litigation. However, that increase was based on a pre-suit fee agreement between counsel and Wirtz. Eaton Decl. ¶ 11. Moreover, the increase is modest and entirely reasonable based on the nature of the work. In light of the skills, experience, and reputation of Wirtz's counsel, the court believes that the hourly rates are reasonable and consistent with prevailing market rates. See Blum v. Stenson, 465 U.S. 886, at 895 n.11 (1984).

B. Reasonableness of Hours Expended

The court next considers the reasonableness of the hours expended. Wirtz's counsel seeks reimbursement for 273.51 attorney and support staff hours. SLS challenges certain hours as excessive and relating to dismissed claims. SLS also challenges the hours expended on Wirtz's claims against Chase, and seeks disclosure of Chase's settlement agreement with Wirtz.

SLS's argument that Wirtz's counsel's hours were excessive is unfounded. Wirtz's counsel expended a reasonable number of hours on this lawsuit, which dealt with multiple parties, protracted attempts to avoid litigation, and detailed review of voluminous financial documents.

The parties dispute whether Wirtz's dismissed claims against SLS — breach of the implied covenant of good faith and fair dealing and violation of the FDCPA — closely relate to his successful RESPA and MOSLA claims. "When a plaintiff obtains substantial relief and the lawsuit consists of closely related claims, the award is not reduced because plaintiff did not prevail on every argument asserted." Shrader v. OMC Aluminum Boat Group, Inc., 128 F.3d 1218, 1220 (8th Cir. 1997). Claims are closely related when they involve a common core of facts. Id. at 1221; Hensley, 461 U.S. at 434-35. Wirtz's dismissed claims relate closely to SLS's assertion that Wirtz had missed a mortgage loan payment. Consequently, the court will not reduce the fee award on this basis.

SLS also argues that Chase, which is no longer a party, may have already paid Wirtz for some of the fees at issue pursuant to the settlement agreement. However, Wirtz has asked the court to reduce its award of attorney's fees by the settlement amount paid by Chase and supports its request with adequate documentation. The court will reduce Wirtz's attorney's fees request accordingly.[3] As a result, the court awards Wirtz $45,468.50 in attorney's fees.

C. Costs

Wirtz seeks reimbursement for, among other costs, a $400.00 filing fee and a $6.00 parking expense that Wirtz incurred while both Chase and SLS were parties to the suit. He also seeks reimbursement for $25.00 spent to serve Chase and $62.92 for a car rental fee. SLS objects to the costs incurred while Chase was a party to the lawsuit, and argues that the car rental fee is unreasonably high. All of those costs — except for the service of process charge, and half of the filing fee and parking expense — are reasonable and will be awarded to Wirtz. Wirtz is entitled to $1,286.83 in costs.

Payne v. Seterus Inc., Dist. Court, WD Louisiana October 26, 2016

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[Certified mail costs and plausible Credit Damage Sufficient to trigger RESPA Liability]

The Court disagrees with Defendant's contention that Plaintiff's postage charges were "manufactured." Plaintiff has pleaded that, but for providing a payoff statement, Seterus ignored all three of his initial faxed communications and correspondences uploaded to Seterus's website. [doc. #1, ¶¶5-10]. After receiving no response, only then did Plaintiff mail two letters via certified mail to the Defendant and incur postage costs. *See id.* ¶ 9; doc. #27, ¶ 20. Contrary to Defendant's argument, Plaintiff had a reasonable basis for sending correspondence via certified mail when Seterus was wholly unresponsive to Plaintiff's faxes and online requests. In sum, Payne's postage costs resulted from Seterus' RESPA violation, *i.e.* its failure to respond. *Compare Giordano v. MGC Mortg., Inc.,* 160 F.Supp.3d 778, 780 (D. N.J. 2016) (no actual damages found for costs of postage and fees related to sending the initial matter—prior to any alleged violation); *and Skaggs v. HSBC Bank USA, N.A.,* No. 10-247, 2011 WL 3861373, *15 (D. Haw. Aug. 31, 2011) (no actual damages where Plaintiff sought costs of mailing a QWR itself, not any subsequent costs incurred by the failure to respond to that QWR).

"To constitute actual damages, the negative credit rating must itself cause damage to the plaintiff as evidenced by, for example, failing to qualify for a home mortgage." *Anokhin v. BAC Home Loan Servicing, LP,* No.2:10-CV-00395-MCE-EFB, 2010 WL 3294367, *3 (E.D. Cal. Aug. 20, 2010). Plaintiff alleges that Seterus' adverse credit reports resulted in him twice being denied a car loan, and ultimately paying a higher interest rate. Had Seterus responded properly, Payne could have possibly avoided damage to his credit and addressed billing issues. These allegations are sufficient to link the alleged damage to Defendant's alleged violation of RESPA. *See Durland,*2011 WL 805924, at *3; *Anokin,* 2010 WL 3294367, at *3; *Hutchinson v. De. Sav. Bank FSB,* 410 F.Supp.2d 374, 383 (D. N.J. 2006); *Cortez v. Keystone Bank, Inc.,*No. 98-2457, 2000 WL 536666, *12 (E.D. Pa. May 2, 2000) (holding that servicer would be liable for any resulting damages including any denial of credit because of the reporting of delinquent payments to credit reporting agencies). At this stage, Plaintiff need only allege facts showing that it is plausible that the claimed damages resulted from the Defendant's alleged violation of RESPA. *See Phillips v. Bank of Am. Corp.,* No. 5-10-CV-04561 EJ, 2011 WL 4844274, *5 (N.D. Cal. Oct. 11, 2011).

In sum, Plaintiff's RESPA claim for failure to adequately respond to the QWRs sets forth sufficient facts to support the element of actual damages.

Martinez v. Shellpoint Mortgage Servicing, Dist. Court, SD Florida, November 8, 2016

https://scholar.google.com/scholar_case?case=14520970546774500 14&q=martinez+v+shellpoint&hl=en&as_sdt=3,36&as_ylo=2016

[Actual and Statutory Damages for RESPA Violation Adequately Pled to Survive MTD]

Although Plaintiff is not entitled to the costs incurred in preparing and submitting the original October 12, 2015 RFIs (because no RESPA violation had occurred at that point), see *Miranda,* 148 F. Supp. 3d at 1355, she is entitled to seek the damages sustained after Defendant failed to timely respond to RFIs, *see id.* at 1354. She has also alleged "a pattern and practice of noncompliance with the requirements of the RESPA and Regulation X, allowing for the recovery of statutory damages pursuant to § 2605(f)(b)." [ECF No. 6, ¶ 26].

[Statutory Damages for TILA Violation Adequately Pled to Survive MTD]

However, Counts VIII and IX also allege entitlement to **statutory** damages. [ECF No. 6, ¶¶ 73, 77]. Specifically, they allege that Defendant violated 15 U.S.C. §1640(a)(2) of TILA in connection with a "credit transaction not under an open end credit plan that is secured by real property or a dwelling[.]"15 U.S.C. §1640(a)(2). Detrimental reliance is not an element of a TILA claim for statutory damages. *See Brown v. SCI Funeral Servs. Of Fla.,* 212 F.R.D. 602, 606 (S.D. Fla. 2003)("The *Turner* decision clearly holds that detrimental reliance is not a necessary element for a statutory damage claim.")(citing *Turner,* 242 F.3d. at 1028).

Castillo v. Nationstar Mortgage LLC Dist. Court ND California, November 22, 2016

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While Defendants are correct that emotional distress damages and consequential damages such as litigation expenses are not proper contract damages, the Castillos have met their burden with respect to the fact of contract damages. The undisputed evidence demonstrates that the Castillos overpaid their mortgage and continue to receive refunds from Nationstar, which is sufficient to demonstrate the fact of damages. *See Johnson v. Pac. Lighting Land Co.,* 817 F. 2d 601, 608 (9th Cir. 1987). At the hearing, Defendants argued that the reason for the refunds remains in question, creating a genuine issue of material fact upon which reasonable minds could differ. Defendants further suggested that the refunds could have been caused by other matters unrelated to overpayment, such as a change in taxes or insurance, and the Plaintiffs have not satisfied their burden of showing they were improper. The Court does not find this argument persuasive, as Defendants have offered no evidence to support such a conclusion and because Plaintiffs have provided evidence of the continuing refund payments.

In light of the evidence presented, the Court finds that Plaintiffs have met their burden of proof with regard to breach of contract and GRANTS Plaintiffs' motion for partial summary judgment as to liability on their first cause of action against all Defendants. Plaintiffs do not seek summary adjudication of the amount of damages and that issue remains for trial.

Malifrando v. Real Time Solutions, Inc. Dist. Court, E.D. California, November 26, 2016

https://scholar.google.com/scholar_case?case=7441073747908759209&q=malifrando+v+real+time+solutions&hl=en&as_sdt=6,36

According to Watson, "courts have `liberally' interpreted the requirement to plead actual damages." 2016 WL 3552061, at *12, citing Yulaeva v. Greenpoint Mortg. Funding, Inc., No. 09-1504 LKK KJM, 2009 WL 2880393, at *15 (E.D. Cal. Sept. 9, 2009). Watson also states that actual damages may include overpayment of interest, costs of repairing plaintiff's credit, reduction in plaintiff's credit limit, attorney's fees and costs, and possibly emotional distress and mental anguish. Id.

Although the FAC does not clarify or explain the damage allegations, they are sufficient under Watson as currently pled, at least adequate enough to survive a motion to dismiss. See 12 U.S.C. § 2605(f) (actual damages must have been suffered as a result of the failure).

Nevertheless, whether these damage allegations are sufficient to impose liability on Real Time in the long run is another question. Plaintiff does not allege what damage he suffered as a result

of Real Time's alleged failure to properly and timely respond to his QWR in 2015. In fact, as Real Time points out, plaintiff does not allege that he made any payments to Real Time after he submitted a QWR in April, 2015. Moreover, plaintiff concedes he was in default on his loan, and that he eventually stopped making payments because he could no longer afford it.[6] (FAC ¶¶ 27, 28, ECF No. 18 at 6.)

Furthermore, Real Time accurately points out that plaintiff's bankruptcy was filed in 2012, and therefore any failure or inadequate response by Real Time to his QWR in 2015, years later, could not have caused his bankruptcy. See RJN Ex. C, ECF No. 22 at 13-19. Additionally, the bankruptcy documents indicate that plaintiff was aware of the second loan in 2012, when he filed the bankruptcy documents under penalty of perjury, refuting his statement that "he was not aware of the Second Loan until he consulted knowledgeable third parties and submitted a qualified written request on April 14, 2015." (RJN Ex. C, ECF No. 22 at 17-19; Opp'n, ECF No. 24 at 4:10-12.) See Lal v. Am. Home Servicing, Inc., 680 F.Supp.2d 1218, 1223 (E.D. Cal. 2010) (to comply with RESPA, plaintiff must plead actual damages incurred *as a result of* the failure) (emphasis in original).

In spite of the conclusory manner in which damages are alleged in the FAC, and the undersigned's doubts as to Real Time's failure to respond to a QWR being the cause of these alleged damages, Watson permits the case to proceed on the FAC as the damages are currently pled. Therefore, Real Time's motion to dismiss will be denied on this basis until the issue of damages can be further fleshed out.

Helm v. Freedom Mortgage Corporation, Dist. Court ED Michigan, Southern Division, December 20, 2016

https://scholar.google.com/scholar_case?case=8617591001317604385&q=Helm+v.+Freedom+Mortgage&hl=en&as_sdt=3,36&as_ylo=2016

This Court reviews de novo the portions of the R&Rs to which a party has objected. *See* Fed. R. Civ. P. 72(b)(3).

In support of their argument, Defendants cite two unpublished opinions of this court that held that a plaintiff must allege *actual* damages when pleading a RESPA violation. (*Id.* at 10-12, Pg. ID 965-967.) Defendants assert that Plaintiffs did not plead actual damages in the Amended Complaint, and instead only sought damages for "emotional distress, indignity and humiliation." (*Id.* at 11, Pg. ID 966.) However, Defendants fail to address the Sixth Circuit's published opinion in *Marais v. Chase Home Finance LLC,* 736 F.3d 711 (2013). In *Marais,* the 6th Circuit cautioned against dismissing claims under 12 U.S.C. 2605(e) "on the basis of inartfully-pleaded actual damages." *Id.* at 722. *See also, Mellentine v. Ameriquest Mortg. Co.,* 15 Fed. App'x. 419, 424-25 (6th Cir. 2013); *Houston v. U.S. Bank Home Mortg. Wis. Servicing,* 505 Fed. App'x. 543, 548 (6th Cir. 2012). Defendants make no attempt to reconcile their attack on Plaintiffs' alleged damages with the Sixth Circuit's decisions in these cases.

Here, Plaintiffs allege that they "suffered damages as a result of Defendants' above-referenced misconduct, including but not limited to ... emotional distress, indignity, humiliation [and] various costs and attorney fees." (Am. Compl. at 21, Pg. ID 338.) Plaintiffs use of the phrase "above-referenced misconduct" should be read to include Defendants' violation of Section 2605(e)(2). Thus,

Plaintiffs have sufficiently pleaded that they suffered actual damages as a result Defendants' violation of Section 2605(e)(2).

Cole v. Federal National Mortgage Associsation, Dist. Court D. Maryland, February 13, 2017

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Here. Defendant argues that "Plaintiff was provided with sufficient account documentation to identify interest and other costs and fees accruing on the Mortgage Account." ECF No. 21-1 at 8-9. Defendant further argues that Plaintiff has failed to show "detrimental reliance" and "actual damages." *Id.* at 9. In response. Plaintiff points to several allegations in the Complaint demonstrating that Defendants failed to transmit periodic mortgage statements to her, and indicating that when she did receive mortgage statements, they did not provide the "statutorily required information," such as the amount of interest assessed on the account and certain late payment fees, ECF No. 25 at 4-6 (citing ECF No. 17). Plaintiff further contends that she detrimentally relied on Defendants to provide the statutorily required information because if she had received the mortgage statements. "Plaintiff would have know[n] that Seterus is charging interest, fees, and costs and the Plaintiff would have paid or challenge[d] those assessments and precluded any interest, fees, or costs resulting from late payments." ECF No. 17 ¶ 73. Plaintiff also asserts that she sustained damages because she "did not have mortgage statements to provide the private lender," so she was "unable to obtain the personal loan to cure the default." *Id.* ¶ 71. The Court agrees that Plaintiff has alleged evidence sufficient to state a claim, and Defendant's Motion to Dismiss is thus denied.

2017

Nunez v. JP Morgan Chase Bank NA Dist. Court M.D. Florida, Orlando Division, February 24, 2017

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Here, Plaintiff has alleged that she and Chase entered into a valid mortgage modification agreement with the objective of keeping Plaintiff in her home. Despite this agreement, Chase failed to timely request postponement of the pending foreclosure action and the foreclosure sale proceeded. Plaintiff notified Chase of the mistake, but Chase responded that the loan modification had been cancelled due to the inability to rescind the foreclosure sale. Eventually, the foreclosure sale was successfully rescinded, and Chase agreed to reinstate the original modification agreement if Plaintiff paid certain arrears. Plaintiff made the payment and Chase accepted it. Despite the renewed agreement, Chase continued sending Plaintiff letters claiming she was in default and threatening another foreclosure. Plaintiff repeatedly notified Chase of all of the above, but Chase flatly denied any error.

Accepting all of the above facts as true and construing them in favor of Plaintiff, there is a plausible claim that Chase's servicing of Plaintiff's loan was so wanting in care that it constituted indifference to Plaintiff's right to be free from continued foreclosure and collection efforts. *See* *Goodin v. Bank of Am., N.A.,* 114 F. Supp. 3d 1197, 1215 (M.D. Fla. 2015) (finding that the defendant bank was liable

for punitive damages after it took no action to prevent errors from occurring, even after repeated notifications from the plaintiffs).

It is, therefore, ORDERED that the Defendant's Motion for Partial Judgment on the Pleadings (Doc. 82) is DENIED.

Gray v. CitiMORTGAGE, INC., Dist. Court, ED Michigan March 21, 2017

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CMI also argues that the amended complaint does not sufficiently plead causation or damages. First, CMI claims that it is insufficient to allege that eviction "as a result of" its alleged breach constitutes irreparable harm. See Def. Br. at 8 (quoting Am. Compl. ¶ 23). CMI argues that "any eviction results from [Gray]'s default under the terms of the Mortgage in 2010." Id.

In the presence of a contractual obligation to modify a loan if certain conditions are met, however, this argument is without merit. Simply put, if Gray fulfilled his end of the deal, a breach by CMI is the but-for cause of an eviction. Gray alleged that, pursuant to the contract between the parties, CMI promised to review him for a loan modification and, if Gray qualified, to offer him that loan modification. See Am. Compl. ¶ 6. Gray further alleged that he qualified for a loan modification under CMI's criteria, id. ¶ 18, meaning that he was contractually entitled to a loan modification. Notwithstanding whether Gray defaulted in 2010, he sufficiently alleges that CMI's breach will lead to eviction and that, but for the breach, eviction would not occur. See also Am. Compl. ¶¶ 22-23 ("A consequence of the Defendant's breach of contract is that Plaintiff now faces imminent eviction. Plaintiff will be irreparably harmed if he is evicted as a result of the Defendant's breach of contract."). And, crucially, CMI presents no legal authority, in any form, in support of its claim that Gray's default somehow relieves it of an independent contractual obligation.

Ali v. OCWEN LOAN SERVICING, INC., Dist. Court, ED Pennsylvania March 29, 2017

https://scholar.google.com/scholar_case?case=5384198833146808118&q=1024.35&hl=en&scisbd=2&as_sdt=6,40

It is clear that Mr. Ali relied upon the defendants' representations that the HAMP modification had been rejected, and that his reliance resulted in ascertainable losses. Mr. Ali identified several ways in which has paid money after the defendants misled him into believing that they would not treat his mortgage as if it had been modified through HAMP. These losses include administrative fees; late fees; expense charges; a property inspection fee; a loan document copy fee; an undisclosed fee of $53.34; two years of homeowner's insurance paid by Mr. Ali twice, once directly and once through his contractual mortgage payment; and one year of property taxes, again paid by Mr. Ali twice, once through his contractual mortgage payment and once directly. I also note that Mr. Ali has never received any refund from the defendants stemming from the double payment of the $4,132 in property taxes. Mr. Ali also alleges that he incurred costs associated with disputing this quandary with the defendants. All of these losses are similar to what this court has found sufficient to allege ascertainable loss, specifically money losses caused by a defendant. Walkup v. Santander Bank, N.A., 147 F.Supp.3d 349 (E.D. Pa. Dec. 3, 2015); Allen v. Wells Fargo, N.A., No. 14-cv-5283, 2015 U.S. Dist. LEXIS 114310 (E.D. Pa. Aug. 27, 2015); Benner v. Bank of Am., N.A., 917 F. Supp. 2d

338, 360 & n. 16 (E.D. Pa. 2013); and Yelin v. Swartz, 790 F.Supp.2d 331, 336-37 (E.D. Pa. 2011). Regardless of the defendants' argument to the contrary, Mr. Ali has properly and sufficiently pleaded justifiable reliance and ascertainable losses. Accordingly, I will deny the defendants' motion to dismiss Count II.

Batton v. WELLS FARGO BANK, NA, Dist. Court, SD West Virginia March 31, 2017

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Taking all of the plaintiffs' allegations as true, the plaintiffs have sufficiently alleged actual damages under RESPA. *See* 12 U.S.C. § 2605(f)(1)(A); *see also* *Johnstone v. Bank of Am., N.A.*, 173 F. Supp. 2d 809, 816 (N.D. Ill. 2001) (deciding that a plaintiff sufficiently stated a claim to recover under RESPA for time spent on the case and for inconvenience, insofar as the plaintiff could establish actual pecuniary loss); *cf.* *Rawlings v. Dovenmuehle Mortg., Inc.*, 64 F. Supp. 2d 1156, 1165 (M.D. Ala. 1999) ("Regarding the damages provision of [RESPA], the court reads `actual damages' broadly so as to encompass mental anguish damages.").

As discussed above, the plaintiffs stated that they suffered damages regarding wasted time, annoyance, inconvenience, and paid filing fees. *See* Compl. ¶ 15.d. Accordingly, the court FINDS that the plaintiffs have sufficiently stated a claim upon which relief can be granted.

Khan v. ONEWEST BANK, FSB, Dist. Court, ND Illinois April 12, 2017

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Ocwen contends that it did not violate RESPA because it responded to Azeem's letter in writing, its escrow calculations were correct, and the complaint fails to allege damages or how Ocwen's response is noncompliant with RESPA. Azeem's complaint, however, alleges that Ocwen's written response was insufficient because Ocwen did not make corrections to the account or conduct a reasonable investigation. She argues that the response letter did not sufficiently explain the escrow shortage or make corrections to escrow calculations, and that the letter showed Azeem being charged $967.50 in outstanding default-related fees, which should have been corrected.[8]

Ocwen's letter responds to the general subject matter raised by Azeem's request and the escrow shortage calculations appear to be accurate. But that leaves unresolved whether Ocwen was justified in charging Azeem default-related fees after the purported June 1, 2015 effective date of the loan modification, and whether Ocwen should have corrected those fees after a reasonable investigation. Ocwen also argues that Azeem failed to allege damages from Ocwen's alleged RESPA violation. Azeem, however, alleges that she has suffered emotional distress as well as improper default-related charges and fees, *see* [1] ¶ 57, and these allegations are sufficient to allege damages. *See, e.g.*, *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 696 (7th Cir. 2011) ("[E]motional distress damages are available as actual damages under RESPA, at least as a matter of law."). Further factual and legal development may show that Ocwen's response was sufficient under RESPA, but at this stage, dismissal of Azeem's RESPA claim is unwarranted.

Nash v. PNC BANK, NA, Dist. Court, D. Maryland April 20, 2017

https://scholar.google.com/scholar_case?case=14472787522497071771&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In light of the CFPB's guidance that the denial of a loan modification option based on an investor requirement is "insufficient" if it does not provide "the specific applicable requirement" that was not met, the Court concludes that Nash has adequately alleged that the Denial Letter's explanation for denying his HAMP loan modification "may lack the specificity required by 12 C.F.R. 1024.41(d)." See Wiggins, 2016 WL 7115864, at *5. Accordingly, the Motion is denied as to the alleged violation of 12 C.F.R. § 1024.41(d).

With respect to actual damages, Nash has pled sufficient detail to state a claim under RESPA. Nash alleges damages of $7,000 consisting of expenses for "yard maintenance, electric and water bills, and other miscellaneous repairs" incurred during the time period when the inadequate explanation of the reason for the denial of his loan modification caused him to continue to maintain the Property under the false hope that a loan modification could be secured. Am. Compl. §§ 26-27. Drawing all reasonable inferences in favor of Nash, as is required at the this stage of the proceedings, the Court finds that Nash has adequately alleged that PNC's failure to provide sufficient detail about the reasons for the denial caused him to incur these expenses. Courts have denied motions to dismiss based on considerably less detailed, more tenuous claims. *See Mellentine v. Ameriquest Mortg. Co.,* 515 F. App'x 419, 425 (6th Cir. 2014) (finding that plaintiffs adequately pleaded damages by stating that the defendant's alleged violation of RESPA caused "damages in an amount not yet ascertained, to be proven at trial"); *Bennett v. Bank of America, NA.,* 126 F. Supp. 3d 871, 880-81 (E.D. Ky. 2015) (finding that the plaintiffs adequately alleged damages where the provision of inadequate information "hindered their ability to evaluate their past and present loss mitigation options based on the actual investor guidelines"); *Colonial Sav., FA v. Gulino,* No. CV-09-1635-PHX-GMS, 2010 WL 1996608, at *7 (D. Ariz. May 19, 2010) (finding that the plaintiffs sufficiently alleged damages stemming from a violation of RESP A by claiming that the refusal to respond to requests for information "creates uncertainty as to the validity of the title to their property"). Accordingly, the Court will not dismiss the Complaint on this basis.

Nunez v. JP Morgan Chase Bank, NA, Dist. Court, MD Florida May 1, 2017

https://scholar.google.com/scholar_case?case=6023610358305093815&q=nunez+v+jp+morgan+chase+bank+na&hl=en&lr=lang_en&as_sdt=40006

She also testified that her emotional distress continued after Chase transferred service to M&T and Bayview because "nothing ha[d] been resolved." (*Id.* at 80.) Thus, a reasonable jury could find that if Chase had fully complied with RESPA, Nunez would have had the information to solve any remaining problems with her loan and would have avoided foreclosure and collection notices from

Chase, Bayview, and M&T; and any continued emotional distress. (Doc. 24-4 at 1, 5, 6; Doc. 24-7 at 4, 18.)

Second, Nunez claims she was damaged in the form of attorneys' fees, costs, and related expenses flowing from both her continued effort to resolve the errors brought to Chase's attention in her Second NOE, and the subsequent foreclosure action brought by Bayview. Nunez was represented by both pro bono and for-profit counsel throughout her interactions with Bayview and M&T. A reasonable jury could find that if Chase had complied with RESPA, Nunez would not have required further advice of counsel. Therefore, Nunez has presented sufficient evidence of actual damages to withstand a motion for summary judgment.

Delia v. DITECH FINANCIAL LLC, Dist. Court, MD Florida June 1, 2017

https://scholar.google.com/scholar_case?case=23697546054666387 6&q=Delia+v.+Ditech&hl=en&lr=lang_en&as_sdt=3,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381

Ditech argues that the damages Delia complains of are not attributable to its RESPA response, but to the fact that he had defaulted on his loan yet again; a status he had retained before he sent the QWR. But, while much of the damage Delia complains of may have existed before Ditech sent its RESPA response, the Court can reasonably infer that Ditech's alleged failure to provide the information that Delia requested exacerbated the frustrations and difficulties that he may have already been suffering. Thus, Delia has sufficiently established actual damages under RESPA, and Count VI survives Ditech's motion.

VILKOFSKY v. SPECIALIZED LOAN SERVICING, LLC, Dist. Court, WD Pennsylvania June 14, 2017

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Presently, Plaintiff has pled "enormous" and "extreme" emotional distress, stemming from worry caused by his sense that SLS ignored his cries for help; his concern regarding SLS's failure to investigate his claims; his belief that he has been cheated by SLS; and his concern that he is not being taken seriously by SLS, all of which may result in the loss of Plaintiff's home. While Plaintiff's terminology may not be sufficiently severe to persuade SLS of the existence of emotional distress, it is more than the "threadbare allegation" of "stress" rejected by the district court in *Szczodrowski,* 2015 WL 1966887, at *8. *Cf.* *Giordano,* 160 F.Supp.3d at 785 ("The Court finds that Plaintiff's bare allegations are insufficient as they do not establish that the alleged distress was `as a result of' the failure to respond to the RF1/QWR letter as opposed to the financial hardships she was already experiencing."). Plaintiff has nudged his claim across the line from conceivable to plausible. *Phillips,* 515 F.3d at 234-35. Thus, the Court will deny SLS's Motion to the extent is seeks dismissal of Count III.

Laws v. US Bank National Association, Dist. Court, North Carolina July 11, 2017

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Nationstar also argues that its response to the May 19, 2014 letter was sufficient under RESPA. The May 19, 2014 letter referred Nationstar to Laws's August 16, 2013 letter. [D.E. 37-6] 43. The letter itself stated no specific reason for Laws's objection except that Laws denied having "not properly paid his mortgage." Id. The August 16, 2013 letter, however, did state that the information that Laws had missed payments when BANA was the loan's servicer was false. Id. at 24-25. On May 29, 2014, Nationstar responded that it had "conducted an investigation, and . . . determined the error asserted within your correspondence did not occur on the account. The payment history appears to be reported accurately. . . ." Id. at 45. Nationstar's response purported to attach a "Transaction History Report," although that report is not in the record. See id. The relevant question, however, is whether Nationstar actually conducted an investigation. Here, a reasonable jury would have a sufficient evidentiary basis to find that Nationstar conducted no investigation.

As for Nationstar's argument that Laws suffered no actual damages as a result of its alleged RESPA violation, a reasonable jury would have a legally sufficient basis to find that, had Nationstar conducted an investigation, it would have discovered that Laws was not in default. It is not Nationstar's failure to respond, but its failure to perform any investigation that could be the source of damages. A jury would have a legally sufficient basis to find that, had Nationstar conducted an investigation, it would have discovered that Laws was not in default on the Note. In that case, Nationstar would have been legally required to report Laws's credit information to credit reporting agencies, and Nationstar does not argue that a plaintiff cannot recover for credit damage under RESPA.

Wood v. NATIONSTAR MORTGAGE, LLC, Dist. Court, D. Oregon August 14, 2017

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A reading of the plain language of the statute does not support this interpretation. The statute allows for damages equal to the *sum* of 1) actual damages and 2) additional damages up to $2000 in the case of a pattern or practice of noncompliance. 12 U.S.C. § 2605(f)(1). The statute does not make actual damages a prerequisite for the recovery of additional damages.

Plaintiffs have alleged facts sufficient to state a plausible claim under either § 2605(f)(1)(A) or § 2605(f)(1)(B). Plaintiffs allege "actual damages" in the form of late fees which were assessed by the transferee, Nationstar, based upon Ocwen's alleged accounting errors. Plaintiffs have alleged a pattern or practice of noncompliance by pleading facts that Ocwen: 1) held an inappropriately high sum of money in Plaintiffs' escrow account; 2) failed to take timely action to respond to a borrower's request to correct errors relating to allocation of payments, etc.; and 3) reported a delinquency to a credit agency within 60 days of receiving a QWR contesting that delinquency. While Ocwen may dispute facts alleged in the SAC, taken together with the QWR, it plausibly states a case that Ocwen violated RESPA.

Askin v. Ocwen Loan Servicing, LLC, Dist. Court, SD Ohio September 15, 2017

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Plaintiff alleges emotional, actual, and statutory damages, including claims that he incurred actual damages in the form of postage and copying costs from mailing the QWRs, the cost of counsel's time in preparing the QWRs as well as damages "to be determined at trial." (Amend. Compl. ¶¶ 45-46.) Until *Marais v. Chase Home Fin., LLC,* 736 F.3d 711 (6th Cir. 2013), courts have held that plaintiff borrowers fail to state a claim as a matter of law if they are unable to show actual damages because "[r]ecovery under RESPA requires more than establishing a violation; a plaintiff must suffer actual, demonstrable damages, and the damages must occur `as a result of' that specific violation." *Tsakanikas v. JP Morgan Chase Bank N.A.,*Case No. 2:11-cv-888, 2012 WL 6042836, at *2 (S.D. Ohio Dec. 4, 2012) (finding plaintiffs did not allege actual damages) (citation omitted). In *Marais,* however, the Sixth Circuit Opinion "implies a new course for the courts in this circuit" as illustrated by the Court's finding on remand:

In addition [to the other reasons Marais competently alleged damages], the district court's determination that costs Marais incurred associated with preparing her QWR did not constitute actual damages, did not take into account Marais's argument that those costs were for naught due to Chase's deficient response, i.e., her QWR expenses became actual damages when Chase ignored its statutory duties to adequately respond. The district could [sic] should consider this argument on remand.

Marais v. Chase Home Fin., LLC, 24 F. Supp. 3d 712, 727 (S.D. Ohio 2014) (quoting *Marais,* 736 F.3d at 720-22.) On two other occasions the Sixth Circuit has determined plaintiffs sufficiently pled claims under RESPA where alleged damages were similar to the case at hand. For example, in *Melletine,* the Sixth Circuit reversed the district court's dismissal of RESPA claims where the dismissal was based on plaintiffs' "failure to plead either actual damages or a pattern or practice of noncompliance." The Sixth Circuit instead held that plaintiffs met their burden by pleading "damages in an amount not yet ascertained, to be proven at trial." *Id.* at 425; *see also Houston v. United States Bank Home Mortg. Wis. Serv.,* 505 F. App'x 543, n.6 (6th Cir. 2012) (finding "nothing in the text of § 2605(f), or in RESPA more broadly, to preclude "actual damages" from including emotional damages, provided that they are adequately proven.").

Accordingly, the Court finds that Plaintiff sufficiently pled damages at this stage. Accordingly, Defendant's Motion for Judgment on the Pleadings is DENIED with respect to Plaintiff's claims under RESPA.

Bowen v. Ditech Financial LLC, Dist. Court, D. Maine September 19, 2017

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Although the First Circuit has not addressed the requirements for pleading actual damages under RESPA, other courts have held that in order to survive a motion to dismiss, a plaintiff must plead sufficient facts to show that he suffered actual, demonstrable damages and that the damages occurred as a result of the specific violation. *Renfroe v. Nationstar Mortg., LLC,* 822 F.3d 1241, 1246 (11th Cir. 2016); *Toone v. Wells Fargo Bank, N.A.,* 716 F.3d 516, 523 (10th Cir. 2013); *Hintz v. JPMorgan Chase Bank, N.A.,* 686 F.3d 505, 511 (8th Cir. 2012); *see also Moore v. Mortg. Elec. Registration Sys., Inc.,* 848 F. Supp. 2d 107, 122 (D.N.H. 2012); *Okoye v. Bank of N.Y. Mellon,* No. 10-11563-

DPW, 2011 WL 3269686, at *17 (D. Mass. July 28, 2011). Courts have interpreted the statutory term "actual damages" to include not only pecuniary losses but also damages for emotional distress, humiliation, or mental anguish. *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 696 (7th Cir. 2011); *McLean v. GMAC Mortg. Corp.*, 398 F. App'x 467, 471 (11th Cir. 2010); *see also Moore*, 848 F. Supp. 2d at 123.

In this case, Mr. Bowen has pleaded sufficient facts to suggest that he has suffered emotional distress and that his distress was caused by Ditech's RESPA violations. He explains that he felt relieved after "his counsel's efforts to resolve the issue" and after Ditech eventually admitted to the violations, which the Court infers refers to the initial QWR sent by his counsel. *See Am. Compl.* ¶¶ 127, 150-54. However, Mr. Bowen explains that after Ditech failed to correct the error, continued to collect fees not owed, and failed to investigate his claims appropriately as it was required to do under RESPA, he grew anxious and fearful again. *See id.* ¶ 127. These facts are sufficient to suggest that his emotional distress was caused by, or was a result of, Ditech's RESPA violations.

Althaus v. Cenlar Agency, INC., Dist. Court, Minnesota October 10, 2017

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Cenlar argues that Althaus's allegations are insufficient to adequately plead a pattern or practice under RESPA. A plaintiff may establish a pattern or practice of noncompliance by showing that the servicer has repeated the same violation against different borrowers. *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1247-48 (11th Cir. 2016). Some courts have dismissed requests for statutory damages under RESPA where a plaintiff failed to allege a pattern of practice of wrongful conduct. *See Miranda v. Ocwen Loan Servicing, LLC*, 148 F. Supp. 3d 1349, 1355-56 (S.D. Fla. 2015) (finding the plaintiff's allegations "that the defendant refused to supply some requested information to unidentified nonparties, without identifying any wrongfully withheld information" was insufficient for statutory damages under RESPA); *Rodriguez v. Seterus Inc.*, No. 15-61253, 2015 WL 5677182, at *3 (S.D. Fla. Sept. 28, 2015) (finding the plaintiff's allegations regarding "numerous correspondences" without any identification of particular provisions of RESPA the servicer had allegedly violated or the identities of the affected borrowers were too conclusory and too vague to survive a motion to dismiss). But "[d]isclosing the identities of other borrowers, the dates of the letters, and the specifics of their inquiries is not a prerequisite to pleading statutory damages." *Renfroe*, 822 F.3d at 1247-48.

Here, Althaus alleged that Cenlar failed to make timely tax payments on several occasions and failed to correct its errors within the safe harbor provision's time frame. For example, Althaus's allegations include a website post stating "[m]y mortgage was bought by Cenlar only 3-4 months ago. I am already having trouble with my escrow money since they do not want to release any funds for property taxes . . . I ended up having to pay real estate taxes from my own funds." (Am. Compl. ¶ 47-48 (alteration in original).) Taking Althaus's allegations as true, they allege facts sufficient to plausibly suggest at the pleading stage a pattern or practice of violating the same provision of RESPA alleged by Althaus. 12 U.S.C. § 2605(g).

Weisheit v. Rosenberg & Associates, LLC, Dist. Court, D. Maryland November 15, 2017

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As a final attempt to dismiss Plaintiff's RESPA claims, Bayview correctly asserts that in order to survive a motion to dismiss, Plaintiff must allege actual damages attributable to the alleged RESPA violations. *See* 12 U.S.C. § 2605(f)(1); (Bayview Mot. Dismiss Mem. Supp. 15 (citing *Minson v. CitiMortgage, Inc.,* Civ. No. 12-2233, 2013 WL 2383658, at *5 (D. Md. May 29, 2013).) Bayview, however, incorrectly asserts that Plaintiff has not done so.

Plaintiff alleged that she has paid and been charged for Attorneys' fees and costs associated with the scheduling of the foreclosure sale, both those assessed to her mortgage account and whatever she has had to pay in order to get a stay in state court; all of which fees and costs she would not have had to pay if Bayview had not violated RESPA and proceeded with foreclosure. She is not seeking damages simply to punish Bayview for its alleged failure to follow the letter of the law in regard to RESPA. Plaintiff is seeking to be compensated for the fees she has allegedly had to expend in state court fighting to prevent a foreclosure that, according to her, would have never occurred if Bayview had followed the letter of the law. These are actual damages, and Plaintiff has properly alleged them in her complaint.[4]

Carlos v. Beneficial Financial I Inc., Dist. Court, ND Illinois November 21, 2017

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[Emotional Distress Damages Sufficient to Survive MTD]

With respect to the allegation that Beneficial failed to adequately respond to Plaintiffs' QWRs, both parties raise several issues of fact that are not properly decided on a motion to dismiss. Thus, this basis for the dismissal of this claim is denied. Beneficial's assertion that Plaintiffs have failed to allege damages is also unavailing given Plaintiffs' allegation that they suffered emotional distress, and the contention in their response brief that they had to pay an attorney to send subsequent QWRs after Beneficial failed to properly respond to the first one. *See* *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 696 (7th Cir. 2011) ("[E]motional distress damages are available as actual damages under RESPA.") Construing Plaintiffs' allegations in a light most favorable to them, as the Court must do on a motion to dismiss, the Court finds that Plaintiffs have sufficiently pled damages resulting from the alleged violations of RESPA; accordingly, the motion to dismiss the RESPA claim is denied.

Jackson v. Bank of America, NA, Dist. Court, WD New York November 21, 2017

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[Statutory Damages Survives MTD]

To obtain statutory damages[8] under RESPA, Plaintiffs must establish that Defendant has a "pattern or practice of noncompliance" with the statute. *Kapsis v. Am. Home Mortg. Servicing Inc.,* 923 F. Supp. 2d 430, 445 (E.D.N.Y. 2013). There is no "magic number of violations that create a" pattern or practice of noncompliance, but another court in the Second Circuit has stated that more than two

violations of RESPA are sufficient to support a claim for statutory damages. *Id.*at 449. Additionally, allegations that a servicer violated RESPA in servicing a class of similarly situated individuals also support a finding of a pattern or practice of noncompliance. *Id.*

[Actual Damages Sufficiently Pled to Survive MTD]

In addition to late fees, Plaintiffs allege they incurred administrative costs "such as postage, photocopying, scanning, and travel expenses that they would not have incurred if" Defendant had complied with RESPA, as well as "lost time and inconvenience" and a "ruined credit score." ECF No. 11 at 18-19. Many courts have held that these sorts of damages are recoverable under RESPA. *E.g., McCray v. Fed. Home Loan Mortg. Corp.*, No. 13-1518, 2014 WL 293535, at *14 (D. Md. Jan. 24, 2014) (stating that expenses including sending certified mail, traveling to and from the post office, copying documents, and researching information are recoverable under RESPA); *Marais v. Chase Home Fin., LLC,* 24. F. Supp. 3d 712, 728 (S.D. Ohio 2014) (stating that actual damages under RESPA include losses resulting from damaged credit). Plaintiffs will have to substantiate these allegations moving forward, but Plaintiffs have satisfied their initial burden to plausibly allege damages at the pleadings stage.

Pollack v. Seterus, Inc., Dist. Court, SD Florida December 7, 2017

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Here, the Pollacks agree they can only recover damages they incurred *after* Seterus provided its incomplete or insufficient response to their information request. Seterus's failure to properly respond to the Pollacks' initial request resulted, at a minimum, in the Pollacks' incurring costs, no matter how insignificant, related to submitting further correspondence to Seterus. The Pollacks have therefore sufficiently pleaded their claim for actual damages.

Necak v. Select Portfolio Servicing, Inc., Dist. Court, ND Ohio December 8, 2017

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[Abstention Doctrine Does Not Apply to RESPA]

This action and the state court case at issue have different defendants, and the issues, although possible related, are not substantially similar. Resolution of the claims between U.S. Bank and Mrs. Necak will not determine SPS's liability on the fraud and RESPA claims. The state case involves contract and estoppel claims related to the ownership and potential forfeiture of real property. This case involves potential violations of RESPA, allegations of fraud, and a request for monetary damages. It has no direct effect on the ownership of real property. As the Sixth Circuit has recognized, a "foreclosure claim is a contract claim governed by Ohio state law, where [p]laintiff's RESPA claim require[s] an interpretation of federal statutory law." *Marais v. JPMorgan Chase Bank,* N.A., 676 Fed. App'x 509, 513 (6th Cir. 2017). In addition, as in the Sixth Circuit case of *Crawley v. Hamilton County Comm'rs,* 744 F.2d 28 (6th Cir. 1984), the claims in this federal court were not raised in the state court action, and resolution of the state forfeiture case will not definitively resolve the federal law question of whether SPS violated RESPA in the servicing of the

mortgage loan. In such cases, the Sixth Circuit has repeatedly held that application of the Colorado River abstention doctrine is not appropriate.

Castillo v. Nationstar Mortgage LLC, Dist. Court, ND California December 20, 2017

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[Pre-Litigation Attorney's Fees Found to be Reasonable]

The Castillos request $27,777.50 for 51.6 hours spent on pre-suit efforts to resolve the dispute and the preparation of the complaint. Mr. Kennedy spent 25.1 hours on pre-suit legal analysis, research, and sending five RESPA Notices of Error over the course of nine months in an effort to resolve Nationstar's mishandling of the Castillos' mortgage. Letcher Decl. ¶ 10, ECF 123. Mr. Kennedy spent another 19.8 hours preparing the complaint. *Id.* Ms. Letcher was brought into the case once it become apparent that the Castillos would have to file suit. Letcher Decl. ¶ 10, ECF 10. She seeks 6.7 hours for time spent helping to prepare the complaint. *Id.*

Defendants challenge these hours on the basis that it was unreasonable "to have run up 51.6 hours writing five notices of error." Defs.' Opposition at 9, ECF 127. Defendants mischaracterize the 51.6 hours, which counsel explains were spent not only on the five RESPA Notices of Error, but on legal research and analysis and preparation of the complaint.

The Court concludes that 51.6 hours were reasonably incurred in attempting to resolve Nationstar's errors over the course of nine months and in preparing the complaint. Accordingly, the Court will award the Castillos attorneys' fees in the amount of $27,777.50 for this category.

2018

Meaney v. Nationstar Mortgage Dist. Court, D. Maryland, February 21, 2018

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Here, Meaney has provided sufficient evidence to support her claim that she has suffered emotional distress damages as a result of Nationstar's actions. First, Meaney has established that the Consent Order should have brought her current on the mortgage through September 2014, and Nationstar's continued allegations that she was delinquent objectively supports an "objective and inherently reasonable factual context for her resulting claims of emotional distress." *Id.*Second, in the midst of her dealings with Nationstar, Meaney revealed in an email to Nationstar dated January 19, 2016 that having "spent many hours on the phone with Nationstar," she had "suffered much stress and loss of sleep over this mortgage." J.R. 492 Third, Meaney has connected the impact of this stress to a medical condition. For several years, Meaney has suffered from various abdominal issues, which were documented by healthcare providers in March 2014 and August 2015. Although her physician, in August 2015, attributed her abdominal pain to past abdominal surgeries, Meaney has testified that her symptoms "flare up" in times of stress. J.R. 402. Significantly, in April 2017, her gastroenterologist noted that she continued to suffer abdominal pain and that the symptoms and failed to respond to treatment. Meaney has presented evidence consistent with her position that

Nationstar's activities exacerbated her ongoing abdominal pain. Thus, Meaney has provided more than mere conclusory allegations of emotional distress injury. Although Nationstar correctly argues that the evidence does not conclusively establish its responsibility for Meaney's admittedly long-existing health problems, summary judgment on the issue of emotional distress damages is not appropriate based on this record.

Benner v. Wells Fargo Bank, N.A., as trustee for the certificate holders of Master Asset-Backed Securities Trust 2007-NCW, Mortgage Pass-Through Certificates, Series 2007-NCW et al. Dist. Court D. Maine March 29, 2018

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The Defendants attempt to brush aside the fact that Ms. Benner has submitted a declaration that describes concrete symptoms of her distress and expressly connects them to SLS's repeated document requests…

…The rule against sham affidavits does not apply here because Ms. Benner's declaration is consistent with her previous testimony. Ms. Benner did not testify that she was unaware that "SLS kept requesting more documents," she testified that Mr. Thomas requested additional documents from her. Benner Depo. Tr. 73:2-9. Ms. Benner also testified that she had to make repeated trips to visit Mr. Thomas to drop off documents, SMF ¶ 206, and it is undisputed that Mr. Thomas emailed Ms. Benner to ask for documents that SLS had requested. *See* SMF ¶ 93. It would be unreasonable to assume that Ms. Benner received Mr. Thomas's emails or provided him with additional documents without understanding that they had been requested for use in her loss mitigation application. I accordingly consider Ms. Benner's declaration as evidence that she suffered emotional distress because of the Defendants' purported RESPA violations.[11]

…"[A]ttorney's fees are recoverable as actual damages under RESPA if they are not incurred in connection with bringing a suit under the statute." McGahey, 266 F. Supp. 3d at 441.[12] Thus, while Ms. Benner cannot claim as damages her attorney's fees for the case at bar, she may claim any fees that she incurred during the foreclosure action solely as a result of the Defendants' purported misconduct. See id. at 441-42 (plaintiff could claim as damages attorneys' fees spent to draft a QWR, where the QWR would not have been drafted but for defendants' failure to respond to earlier RESPA communications).

Here, Ms. Benner has presented as evidence her attorney's billing records. Those records reflect that some of the fees that Ms. Benner paid to her attorney went to time spent responding to SLS's document requests. To the extent that Ms. Benner can ultimately show that those requests would have been unnecessary but for SLS's RESPA violations, Ms. Benner may claim those fees as damages.

Ford v. Nationstar Mortgage, LLC Dist. Court D. Nevada May 28, 2018

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The Ninth Circuit has not defined "actual damages" for purposes of RESPA, and courts are divided on whether plaintiffs can recover certain categories of damages under the statute. Several district courts in this circuit have held that borrowers cannot recover actual damages for nonpecuniary losses under RESPA. See Lal v. Am. Home Servicing, Inc., 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010); Allen v. United Fin. Mortg. Corp., No. 09-2507, 660 F. Supp. 2d 1089, 2009 U.S. Dist. LEXIS 83680, 2009 WL 2984170, at *5 (N.D. Cal. Sept. 15, 2009); Shepherd v. Am. Home Mortg. Servs., No. 2:09-1916, 2009 U.S. Dist. LEXIS 108523, 2009 WL4505925, at * 3 (E.D. Cal. Nov. 20, 2009); Fullmer v. JPMorgan Chase Bank, No. 2:09-cv-1037, 2010 U.S. Dist. LEXIS 3551, 2010 WL 95206, at *6 (E.D. Cal. Jan. 6, 2010). At least two circuits have noted in unpublished opinions that nonpecuniary damages such as pain and suffering and emotional distress could be recoverable under RESPA, provided they are adequately proven. See Houston v. United States Bank Home Mortg. Wis. Servicing, 505 Fed. Appx. 543, 548 n.6 (6th Cir. November 20, 2012) ("We find nothing in the text of § 2605(f), or in RESPA more broadly, to preclude `actual damages' from including emotional damages, provided that they are adequately proven"); McLean v. GMAC Mortg. Corp., 398 Fed. Appx. 467, 471 (11th Cir. September 30, 2010) ("Construing the term `actual damages' broadly, and based on the interpretations of `actual damages' in other consumer-protection statutes that are remedial in nature, plaintiffs arguably may recover for nonpecuniary damages, such as emotional distress and pain and suffering, under RESPA"). The Seventh Circuit has also held that emotional distress damages are recoverable under RESPA, provided the harm is not "too attenuated from the alleged violation to cross the proximate-cause threshold." Perron v. J.P. Morgan Chase Bank, N.A., 845 F.3d 852, 858 (7th Cir. 2017). Considering Perron and the statutory scheme itself, the Court finds that given the nature of the statute as it relates for example to compliance and the requirement to inform individuals about the correction of errors that emotional distress damages may be available if such damages can be directly linked to the violations of the statute. The Court will allow Plaintiffs to present evidence of emotional distress at trial, in addition to evidence of pecuniary damages and statutory damages for a pattern or practice of noncompliance.

Plaintiffs have presented some evidence of damages caused by Defendant's violation of § 1024.35(e). Plaintiffs have testified that they had to pay at least some out-of-pocket expenses for pre-litigation costs such as gas and postage to mail the letters to Defendant. They have also testified regarding potential emotional distress damages, including anxiety, depression, embarrassment, and declining mental and physical health. They stated that they refrained from buying a chair lift that Mr. Ford needed to assist with mobility issues because they were worried about making the improperly calculated payments. The Court finds that these potential damages are sufficient to allow the § 1024.35(e) claims to proceed to trial.

Pope v. Carrington Mortgage Services, LLC., Dist. Court ND Ohio June 12, 2018

…Additionally, Plaintiff's loan modification appeal denial letter appears to be a form letter with minimal individualized content. Viewed in Plaintiff's favor, that form letter appears to be totally unresponsive to Plaintiff's request for an appeal. The letter seemingly incorrectly, denies the Plaintiff has a right to appeal. It provides none of the additional information that Plaintiff requested about the merits of Carrington's initial denial decision and does not even acknowledge that this information was requested. Other courts have recognized and this Court agrees that an unresponsive form letter can provide evidence of pattern or practice…

…But other courts have held, and the Sixth Circuit suggested that a plaintiff can establish actual RESPA damages when the plaintiff expenses submitting paperwork to a lender, but the lender

“ignored statutory duties to adequately respond.” That is what Plaintiff Pope alleges happened here. He incurred costs preparing his appeal, and Defendant Carrington ignored its statutory duty to perform an independent appeal…

The Plaintiff Pope has adequately pleaded statutory and actual damages. The Court therefore DENIES Defendant Carringtons’ motion to dismiss on this ground.

Vilofsky v. Specialized Loan Servicing, LLC., Dist. Court WD Pennsylvania June 12, 2018

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After considering the factors set out above, the Court finds that they weigh against striking the proffered testimony and expert report. First, Defendants have not expressly claimed prejudice related to the disclosures provided here pursuant to Rule 37(c)(1). Indeed, Defendants were given the opportunity to cross-examine Bishop at her deposition and did in fact question her regarding the bases for her opinions and all facts and data she used in forming those opinions. Further, as SLS notes, Bishop did not rely on any documents to form or support her opinions, she has not published in the area of counseling or psychology, she has not conducted any peer-reviewed studies or research, and she has never testified as an expert at trial or deposition. (*Bishop Depo.* at 7-8, 13-14). Thus, prejudice to the Defendants is minimal given the contents of the Bishop Letter and the Bishop deposition, both of which the Defendants have challenged under Rule 702 and *Daubert,* as discussed in the next section of this opinion. Secondly, Bishop's proffered testimony is arguably a significant part of Vilkofsky's case and there is no evidence that the Rule 26 violation was made in bad faith or that the underlying information was willfully withheld. *See* *Konstantopoulos,* 112 F.3d at 719. Accordingly, the SLS Motion is denied to the extent it asserts that Bishop's testimony and report should be excluded pursuant to Rules 26 and 37.

Diehl v. The Money Source, Inc., Dist. Court. SD Alabama Southern Division June 13, 2018

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Third, TMS moves for summary judgment on Count I on the ground that "Plaintiff failed to properly plead and establish evidence of damage caused by the alleged violations of RESPA by TMS." (Doc. 92, at 17.) This contention overlooks pleadings and evidence to the contrary. To be sure, "[d]amages are `an essential element' of a RESPA claim." *Lage v. Ocwen Loan Servicing LLC,* 839 F.3d 1003, 1011 (11th Cir. 2016) (citation omitted). However, the Amended Complaint contains detailed allegations of actual damages claimed by Diehl under Count I, including (i) "mental anguish and emotional distress resulting from TMS' decision . . . to continue its wrongful attempts to collect money not owed;" (ii) "unlawful fees, interest and other charges incurred as a result of TMS's false claims of default and its failure to correct its error;" (iii) "loss of equity as a result of TMS' failure to correct its failure to apply or recognize payments;" and (iv) "damage to Plaintiff's credit and reputation." (Doc. 58, ¶ 73.) TMS advances no showing that record evidence is lacking as to any of these types of damages, which have been recognized as supporting cognizable RESPA claims. *See, e.g.,* *Renfroe,* 822 F.3d at 1246-47 (concluding that "[w]hen a plaintiff plausibly alleges that a servicer violated its statutory obligations and as a result the plaintiff did not receive a refund of erroneous charges, she has been cognizably harmed" for purposes of RESPA's "actual damages"

requirement); *Baez v. Specialized Loan Servicing, LLC,* 709 Fed.Appx. 979, 983 n.2 (11th Cir. Sept. 22, 2017) (recognizing that "a plaintiff could establish actual damages [under RESPA] where a servicer fails to respond to a notice of error by fixing past errors and issuing refunds of erroneous charges"); *Hernandez v. J.P. Morgan Chase Bank N.A.,* 2016 WL 3982496, *9-10 (S.D. Fla. July 22, 2016) (finding genuine issue of material fact as to RESPA damages where "[i]f a jury were to find that Chase's investigation was insufficient and that there was in fact an error with Plaintiff's account, then Chase would have been obligated under RESPA to refund to Plaintiff the various fees and charges that his account was charged," but "Chase did not do that"). This ground for dismissal of Count I is not meritorious.

Anderson v. Wells Fargo Bank, N.A., Dist. Court, ND Texas, Dallas Division July 13, 2018

https://scholar.google.com/scholar_case?case=10501982296608037176&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt&hist=qA2oI8IAAAAJ:12985798418689659395:AAGBfm3CQ8tKJjGBc_ocqlsyZzD3lldR8g

The Court now holds that emotional damages are recoverable under RESPA. As an initial matter, the Court agrees that RESPA is a remedial consumer protection statute. *See Geoffrion,* 182 F. Supp. 3d at 664 (collecting cases and determining that RESPA is a remedial consumer protection statute). And "courts construe remedial consumer-protection statutes `liberally in order to best serve Congress' intent.'" *Id.* at 665 (quoting *Rawlings v. Dovenmuehle Mortg., Inc.,* 64 F. Supp. 2d 1156, 1165 (M.D. Ala. 1999)). Thus, construing RESPA's damages provision broadly, the Court holds that emotional distress damages are available under the statute.

The Court also holds that the Andersons have produced sufficient evidence of emotional distress to survive summary judgment. The actual damages portion of RESPA can be interpreted in a manner similar to the Fair Debt Collection Practices Act ("FDCPA"). *Geoffrion,* 182 F. Supp. 3d at 666 n.8 (citing *McLean v. GMAC Mortg. Corp.,* 595 F. Supp. 2d 1360, 1370 (S.D. Fla. 2009), *aff'd,* 398 Fed. App'x 467 (11th Cir. 2010)). The Andersons may therefore establish emotional damages under RESPA via their own testimony. *Geoffrion,* 182 F. Supp. 3d at 666 n.8(citations omitted) (rejecting defendant's argument that plaintiffs could not recover mental anguish damages due to lack of expert testimony or health record evidence); *see also Guajardo v. GC Servs., LP,* 498 Fed. App'x 379, 385 (5th Cir. 2012) (finding sufficient evidence to support award of damages for mental anguish and emotional distress under FDCPA even where jury heard contradictory proof from plaintiff). Here, Mr. Anderson asserts that he experienced emotional distress in the form of stress, anxiety, insomnia treated with Nortriptyline and/or Ambien, and cluster headaches treated with Zomig and/or oxygen therapy. Mrs. Anderson in turn asserts that she experienced stress, anxiety, and sleeping difficulties and that she used over-the-counter medications such as NyQuil to help her sleep. Viewing the evidence in the light most favorable to the Andersons, the Court concludes that they have adduced sufficient evidence of emotional distress damages to survive Wells Fargo's summary judgment motion.

The Andersons have sufficiently set forth evidence of damages — namely, credit report charges, postage, emotional distress, and attorneys' fees and costs associated with disputing Wells Fargo's actions before the commencement of litigation — that they incurred as a result of Wells Fargo's actions. Genuine fact issues exist regarding the extent of these damages and whether the Andersons incurred some or all of them in connection with Wells Fargo's purported RESPA violations. The

Court thus denies Wells Fargo's summary judgment motion with respect to the Andersons' RESPA claim.

B. Cause of Action

2014

Cezair v Chase, D Maryland, August 29, 2014
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Plaintiff also alleges violation of 15 U.S.C. § 1641(f)(2), which requires a servicer, upon written request by the obligor, to provide "to the best knowledge of the servicer, [] the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation." Plaintiff's complaint alleges that he wrote letters on September 25, 2012 and August 1, 2013 to Chase requesting the identity of the owner of the loan. (ECF No. 11 [16] ¶¶ 24 and 26). In the motion to dismiss, Defendants argue that at the time of the September 2012 letter, Plaintiff was well aware of the owner of the loan based on the above referenced June 2012 notice of intent to foreclose. But as discussed above, that document is not appropriately considered at this time. As to the August 2013 letter, Defendants refer to Plaintiff's admission that he received the foreclosure order to docket on August 28, 2013 and that that order identified FHMLC as the owner or secured creditor of the mortgage (Id. ¶¶ 29 and 34). Defendants provide the Ownership Affidavit, which was part of the foreclosure action, which states that FHLMC is the owner of the loan. (ECF No. 14-20). But as Plaintiff correctly points out, at a minimum, this affidavit does not list FHLMC's address or phone number as required to be provided by the servicer, if known. Plaintiff has stated a claim for violations of Section 1641(f)(2) of TILA.

2015

Dionne v Federal National Mortgage Assn & JP Morgan, D New Hampshire, June 16, 2015
https://scholar.google.com/scholar_case?case=28443505994133703 9&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Defendants contend that the Dionnes never submitted a complete loss mitigation application. This argument is unavailing. RESPA provides that "[a] complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower." Id. at § 1024.41(b)(1). The Verified Petition plainly alleges that the Dionnes provided all of the information that Chase requested, often providing documents multiple times as Chase could not locate items that had previously been submitted. Verified Petition ¶¶ 18-21. What is more, the Dionnes have alleged that they were assured on at least two occasions that their loan modification application was complete and under review. Id. ¶¶ 21, 25. These allegations are adequate to support a claim that the Dionnes submitted a complete loss mitigation application.

Burdick v BOA, Dist. Court, SD Florida, July 28, 2015
https://scholar.google.com/scholar_case?case=11249724128300183285&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
The record on summary judgment permits a reasonable factfinder to conclude that Green Tree failed to conduct the required inquiry in response to Plaintiff's February 11, 2014, Qualified Written Request. Viewed in the light most favorable to Plaintiff, his attorneys' Qualified Written Request states a belief that Plaintiff's mortgage servicers failed to receive or misapplied several payments that Plaintiff made from June 2010 to "well into 2011." [DE 85-5 at 6.] The Request asks Green Tree to "investigate the concerns raised in this letter" and correct any errors. [Id.]
Green Tree's response included no information related to these alleged errors. [DE 85-6 at 1.] Instead, the letter disavows Green Tree's obligation to examine the provenance of Plaintiff's payments. [Id.] Green Tree states that "[Plaintiff's] assertions of improper servicing by Bank of America are not timely and must be made within the context of [his] bankruptcy; not via a Notice of Error." [Id.] This response does not constitute the required "written explanation or clarification" of the issues Plaintiff raised in his Qualified Written Request. See § 2605(e)(2)(B)&(C). Further, the Court rejects Defendant's arguments that Plaintiff has suffered no damages and that Plaintiff's intervening bankruptcy relieved Green Tree of its obligation to respond to the issues identified in the Request. [See DE 105 at 7-8.] As to the latter, the Court is persuaded by the Eastern District of Michigan's analysis in Conley v. Central Mortg. Co. that a servicer's obligation to respond to Qualified Written Requests under RESPA is not undone by the mortgagor's bankruptcy. 414 B.R. 157, 161 (E.D. Mich. 2009). As to damages, Plaintiff has at least provided sufficient evidence that his attorney had to send another letter to Green Tree to obtain the requested information. Plaintiff may recover this expense under RESPA. See Cezair v. JPMorgan Chase Bank, N.A., No. DKC 13-2928, 2014 WL 4295048, at *8 (D. Maryland Aug. 29, 2014) (collecting cases for the proposition that the costs of such subsequent letters can be recovered as RESPA damages).

Combs v BANA, D Maryland, August 20, 2015
https://scholar.google.com/scholar_case?case=17863865596884412673&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiff alleges that BANA failed to respond to her May 1, 2014 request that BANA provide her the names of each entity that has owned the promissory note. SeeECF No. 1 at 19 & ECF No. 1-27 at 2. BANA contends that 15 U.S.C. § 1641(f)(2) only applies when the servicer and owner of a loan are different entities. See ECF No. 13 at 4. That is not the case. See Kievman v. Fed. Nat'l Mortg. Ass'n, 901 F.Supp. 2d 1348, 1352-53 (S.D. Fla. 2012) ("In the case of an owner-servicer, then, failure to comply with subsection (f) does subject it to liability.") (citations omitted); see also 15 U.S.C. § 1641(f)(3) & 12 U.S.C. § 2605(i)(1) (defining servicer to include holder of loan if such a person also services the loan). Accepting Plaintiff's allegations as true, Plaintiff has stated a claim against BANA for violation of 15 U.S.C. § 1641(f)(2). See Cezair v. JPMorgan Chase Bank, N.A.,DKC-13-2928, 2014 WL 4295048 at *6 (D. Md. Aug. 29, 2014) (finding plaintiff had stated a TILA claim where servicer did not provide address or phone number of obligation owner).

Srok v BOA, ED Wisconsin, November 6, 2015
https://scholar.google.com/scholar_case?case=5711864702481352524&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
I find that the Sroks' pleadings alleging that Bank of America provided incorrect information in response to their QWR states a claim upon which relief can be granted under § 2605(e)(2) and the defendants' motion with respect to the same will be denied. See Friedman v. Maspeth Federal Loan and Sav. Ass'n, 30 F. Supp. 3d 183, 194 (E.D.N.Y. 2014) (finding that complaint stated valid claim under RESPA when defendant gave incorrect information in response to a QWR).

Pineda v Nationstar, ND Texas, September 29, 2015
https://scholar.google.com/scholar_case?case=9253075103544617760&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
As to whether the application was complete, Plaintiff alleges that "he was in the preforeclosure review period when he sent in his loan modification on or about August of 2014," and that he "complied with this [loan modification] process and provided Nationstar with the required documents," which included "pay stubs, old tax filings, and a statement in writing explaining why he fell behind on his payments." Doc. 9 at 4, 9. While Defendants are correct that it is the servicer, not the borrower, who determines whether a loss mitigation application is complete, see 12 C.F.R. § 1024.41(b), they fail to state exactly what Nationstar, as servicer, required for a complete application or otherwise give the Court any basis to conclude that Plaintiff's allegation is incorrect. Furthermore, Defendants' argument that Plaintiff was "gathering documents" and thus had not compiled a complete application is contrary to Plaintiff's explicit allegations in his complaint. As the Court must accept Plaintiff's well-pled allegations as true at this stage, Defendants' argument that Plaintiff failed to state a claim for RESPA violations fails.
As to partial payments, "any servicer that retains a partial payment, meaning any payment less than a periodic payment, in a suspense or unapplied funds account shall . . . [d]isclose to the consumer the total amount of funds held in such suspense or unapplied funds account on the periodic statement on the periodic statement . . . [and] on accumulation of sufficient funds to cover a periodic payment in any suspense or unapplied funds account, treat such funds as a periodic payment received." 12 C.F.R. 1026.36(c)(1)(ii). Defendants' arguments on this claim are unavailing. They point to no decisive basis for the Court to conclude that they complied with the TILA's requirement to apply partial payments as periodic payments as sufficient funds allow. Thus, the Court finds Plaintiff has sufficiently stated a claim under this section of the TILA under Section 1026.36(c)(1)(ii).

Beale v Ocwen, ND Alabama, June 17, 2015
https://scholar.google.com/scholar_case?case=4962019371070294471&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
The complaint sets out the statement that was made (that the Beales would avoid "late charges and other penalties" if they cancelled the check and made the payment by phone instead), how it was made (orally over the phone), the person who made the statement (an "Ocwen representative"), the way in which the Beales were mislead by the statement, and what Ocwen thereby obtained (an additional fee). While the complaint fails to state the date on which the statement was made, it does say that the statement was made during the same phone call as when the Beales paid their December 2013 bill. This sets out with sufficient particularity facts supporting the alleged misrepresentations concerning the December 2013 payment, and therefore Ocwen's motion is due to be denied as to Count VI of the Beales' complaint.

Wells Fargo v Awadallah, COA Ohio, Ninth Dist, September 16, 2015
https://scholar.google.com/scholar_case?case=7105057685070761635&hl=en&lr=lang_en&as_sdt=4,36&as_vis=1&oi=scholaralrt
Court rules that the FHA-mandated “face to face” meeting is a condition precedent to granting summary judgment on a foreclosure action.

Clark v Ocwen, WD Michigan, October 20, 2015
https://scholar.google.com/scholar_case?case=7220498995833673095&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Plaintiff's contention that Ocwen repeatedly informed him that his application was complete but failed to provide any response over the course of a year suggests a "pattern or practice" of non-compliance that might qualify for statutory damages. See 12 U.S.C. § 2605(f)(1). In short, the Court is satisfied that Plaintiff's allegations suffice to state a RESPA claim.

Johnson v JP Morgan, WD Washington, June 2, 2015
https://scholar.google.com/scholar_case?case=16892937804041435993&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Third Amended Complaint alleges that SPS was a service provider to JPMorgan Chase Bank N.A. as defined by § 1002(26) of the Dodd-Frank Act. Id. The proposed Third Amended Complaint asserts that SPS began servicing the file on August 1, 2013.Id. It alleges that "[i]nstead of addressing the `bait and switch' issues with the modification . . . SPS continued to negatively report plaintiffs' credit to credit bureaus." Id. It maintains that on January 7, 2015, Plaintiffs signed a mortgage loan modification agreement with SPS, and have been making timely payments since. Id. Plaintiffs assert that SPS received Plaintiff's first payment under the modification on February 5, 2015, but failed to post the payment until February 24, 2015. Id. It then failed to "remove its negative reporting in connection with plaintiffs in the three months since plaintiffs signed the modification agreement." Id. The proposed Third Amended Complaint alleges that SPS statements do not match when the payments are received, and that SPS is not correctly applying payments in accord with the Deed of Trust. Id. The proposed Third Amended Complaint argues that in delaying crediting Plaintiffs' timely payments "and falsely maintain a delinquency as `Past Due 180 Days' even after modification of the loan, SPS predestines the modification's deferred balance forgiveness clause to fail rendering the stated principal forgiveness impossible to achieve." Id. Plaintiffs make claims against Defendants Chase and SPS for: 1) the breach of the implied duty of good faith and fair dealing, 2) negligence and wrongful foreclosure, 3) violation of the Washington Consumer Protection Act violations RCW 19.86, et. seq., 4) violation of the Washington Collection Agency Act, RCW 19.16.250, et. seq., 5) violation of the Washington Consumer Loan Act, RCW 31.04, et. seq., 6) violation of the Washington Lending and Homeownership Act, RCW 19.144.080, 7) violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq., 8) violation of the Truth-in-Lending Act, 12 U.S.C. § 1635, et seq., and 9) violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691, et seq. Dkt. 61-1. Plaintiffs seek damages, costs, attorneys' fees and other statutory relief.

Forgues v SPS, ND Ohio, December 8, 2015
https://scholar.google.com/scholar_case?case=13133382831509447466&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt
Plaintiff also alleges claims under the Fair Debt Collection Practices Act and Fair Credit Reporting Act that do not depend on finding that her mortgage may have been rescinded.
The FDCPA was enacted "to eliminate abusive debt collection by debt collectors."[38]
Under the statute, the term "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for persona, family, or household purposes, whether or not such obligation has been reduced to judgment."[39] The parties do not dispute that this includes Plaintiff's mortgage and the foreclosure judgment. The FDCPA covers certain third-party debt collectors, as opposed to creditors who originated the debt.[40] A mortgage servicer is a debt collector under the FDCPA if the debt was in default at the time the servicing rights were assigned.[41] SPS has not disputed that it is a debt collector under the FDCPA.

An FDCPA debt collector is prohibited from taking particular actions while collecting on a debt covered under the statute. Under 15 U.S.C. § 1692c, a debt collector may not communicate with a consumer at "a time or place known or which should be known to be inconvenient to the consumer." Plaintiff alleges that she "warned SPS not to call her" between 8:00 a.m. and 9:15 a.m.[42] Plaintiff alleges that despite this warning "SPS repeatedly called" during this time frame.[43] Defendant contends that these statements are insufficient to plausibly state a claim for relief under Section 1692c. However, Plaintiff is not required to specify every detail of her claim at this stage. She has met the pleading requirements by alleging that SPS should have known that this period of time was "inconvenient" and yet nevertheless persisted in calling her.
The Court DENIES Defendant's motion as to this claim. Under 15 U.S.C. § 1692d, "a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." Plaintiff alleges that SPS called Plaintiff "numerous" times, calling "repeatedly or continuously for no purpose or intent other than to annoy, abuse, or harass."[44] In opposing this argument, Defendant cites to case law from district courts in other circuits holding that generalized use of the word "numerous" is insufficient to state a claim under Section 1692d.[45] This is not so. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim for relief that is plausible on its face.'"[46] Plaintiff has sufficiently satisfied this standard by identifying the repeated and continuous phone calls.[47] The Court DENIES Defendant's motion as to this claim.

Shedd v Wells Fargo, SD Alabama, October 26, 2015
https://scholar.google.com/scholar_case?case=10289183801170515719&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
The statute requires a mortgage servicer to respond to a QWR[18] within 30 days in one of three ways: (1) "make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction;" (2) "after conducting an investigation, provide the borrower with a written explanation or clarification that includes, to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer" or (3) after conducting an investigation, provide the borrower with a written explanation or clarification that includes information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer." 12 U.S.C. § 2605(e)(2).[19]
Wells Fargo argues that the May 20th letter, as a matter of law, satisfied its duty to respond under RESPA, although it neglects to say how it does so or which category of response it falls under. Clearly, the first category does not apply because Wells Fargo made no corrections to Plaintiffs' account. Nor does the second category apply because the letter does not address many of the numerous errors pointed out in the QWR. That leaves only the third category — information requested by the borrower or an explanation of why that information is unavailable. The letter, in the Court's judgment, falls woefully short of satisfying those requirements as a matter of law. First, the letter addresses only two errors identified in the QWR, while completely ignoring the other eight. Second, with respect to the bankruptcy issue the letter is a textbook example of a nonresponsive response. In a nutshell, its states that Wells Fargo is working on problems with its system related to the bankruptcy modifications and, at that at some unidentified point in the future, Wells Fargo will be able to provide information about the account.[20] This claim survives the motion to dismiss.

Tomlinson v Ocwen, D Kansas, December 3, 2015
https://scholar.google.com/scholar_case?case=15411525372226180337&q=tomlinson+v+ocwen&hl=en&as_sdt=80000006

Tomlinson sufficiently alleges that Ocwen unconscionably induced her participation in a consumer transaction from which she did not materially benefit.
Tomlinson also alleges that it was unconscionable for Ocwen to solicit her participation in a consumer transaction from which she did not benefit. Unlike her 1099-C claim, this claim falls within one of the KCPA's enumerated examples of unconscionable conduct. Under § 50-627(b)(3), it is unconscionable for a supplier to induce a consumer into a transaction from which she is unable to receive any material benefit. Here, Tomlinson has sufficiently stated a claim of unconscionable conduct under the KCPA.
Ocwen solicited Tomlinson's participation in the shared appreciation offer. She completed the agreement and made timely payments, but Ocwen did not modify her loan. Instead, she lost her property when it was sold at the sheriff's sale. In short, Ocwen solicited Tomlinson's participation in a transaction from which she received no material benefit. And given her allegation that she complied with the offer's requirements, it is plausible that a loan modification was never an actual possibility.[34] This allegation adequately tracks the statutory language and the definition of unconscionability under Kansas law.[35]

Aurora Loan Services v Murphy, COA Massachusetts, December 11, 2015
No. 13-P-874
On appeal, Murphy claims that Pinti, 472 Mass. at 231-244, (holding that the failure to comply strictly with the notice of default provisions in the mortgage renders the foreclosure sale void, not merely voidable) ought to apply to cases pending on appeal when that claim was raised and preserved.[3] Applying the principles governing application of new doctrines to cases pending on appeal determined inGaliastro v. Mortgage Electronic Registration Sys., Inc., 467 Mass. 160, 165-170 (2014), we agree.
In Pinti, supra at 235-236, the SJC held that a notice of default provision (nearly identical to Murphy's) in paragraph 22 of the plaintiff's mortgage required strict compliance as a necessary component of the power of sale in the mortgage and the statutory power of sale in G. L. c. 183, § 21. The court explained that the errant notice, which informed the defaulting mortgagors of their right to bring a court action, did not strictly comply with the provisions of paragraph 22 of the mortgage because the notice did not inform the mortgagors of their right and the need to initiate legal action to challenge the validity of the foreclosure, a necessary step in a nonjudicial foreclosure State like Massachusetts. Pinti, supra at 237. Therefore, because the notice failed to strictly comply with paragraph 22 of the mortgage, the court held the subsequent foreclosure sale was void, not voidable. Id. at 238, 240-243.
Specifically, the court distinguished the requirements for strict compliance with paragraph 22, the focus of Pinti, from the less stringent notice requirements of § 35A. Id. at 239-240. The court previously had determined that "strict or exact compliance with all the provisions of § 35A was not a prerequisite of a valid foreclosure" because § 35A was designed to protect existing and new homeowners from foreclosure and loan acceleration by providing a grace period. Id. at 239, citing Schumacher, 467 Mass. at 430-431. Because of this distinct purpose, § 35A is not a foreclosure sale statute within the meaning of G. L. c. 183, § 21. Pinti, supra at 239, citingSchumacher, supra at 431.

Pauley v BOA, ED Michigan, January 19, 2016
https://scholar.google.com/scholar_case?case=13073864288152360615&q=pauley+v+boa&hl=en&as_sdt=80000006
An alleged failure to comply with a servicing guide announcement in connection with a loan modification review does not create a private right of action or potential remedy for Plaintiff. See 12 C.F.R. § 1024.41. Furthermore, even if a violation of the regulation is alleged, RESPA does not

provide Plaintiff with the principal relief sought — to set aside the foreclosure sale or to grant a loan modification. See 12 U.S.C. § 2605(f).

Schatzman v Partners for Payment Relief LLC, SD Ohio, January 5, 2016
https://scholar.google.com/scholar_case?case=15084234936934379291&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt
Both PPR and Barham Legal indicated to Plaintiff that Barham Legal was the designated address for sending QWRs. But previously, the Plaintiff attorney involved had sent QWRs directly to Defendant in care of the Barham attorney, and Defendants had not objected. The Court ruled that receipt of a QQWR, and not the arrival at a certain address, triggers the statutory requirements under RESPA, so long as the appropriate statutory language is contained in the QWR.

Voss v BOA, ND New York, December 30, 2015
https://scholar.google.com/scholar_case?case=16618168911855998222&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiff alleges that Bank of America breached its loan contract with Plaintiff by delegating its loan servicing to other entities who have "negligently or in bad faith serviced the mortgage such that [Plaintiff's] HAMP modification was a practical impossibility, despite her eligibility." Compl. ¶ 17. She alleges that a promisee would reasonably expect the promisor to properly handle the loan file, process paperwork, calculate her balance, and apply payments in good faith and fairly. Opp'n at 5. While Defendants argue that Plaintiff's failure to make her mortgage payments on time constitutes a breach of contract in its own right, Mem. at 7, Plaintiff argues that her default on her mortgage payments triggers an additional duty on the part of Defendants to act reasonably and provide Plaintiff with access to mortgage relief programs that were being offered. Opp'n at 5. Defendants do not specifically address Plaintiffs' good faith and fair dealing claim, instead addressing their arguments to a traditional "breach of contract" claim. See Mem. at 6-8. The Court finds that the Complaint contains multiple allegations of intentional conduct by Defendants that could support a finding of breach of good faith and fair dealing. See Adams, 2010 WL 3522310, at *16 (finding defendant's conclusory statement that plaintiff's breach of good faith and fair dealing claim was insufficiently pleaded could not support motion to dismiss); see also Leghorn v. Wells Fargo Bank, N.A., 950 F. Supp. 2d 1093, 1120 (N.D. Cal. 2013) ("[T]he Plaintiffs here have stated a claim under the implied covenant that Defendants abused this discretion by acting in bad faith and outside the reasonable expectations of the parties. Whether Defendants' acts were done in bad faith and not within the reasonable expectations of the parties is a question of fact that cannot be decided at the pleading stage."). Accordingly, Defendants' Motion to dismiss Plaintiff's breach of the implied covenant of good faith and fair dealing claim is denied.

Voss v BOA, ND New York, December 30, 2015
https://scholar.google.com/scholar_case?case=16618168911855998222&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Defendants argue that Plaintiff has not alleged that Defendants engaged in any challenged practice that is consumer-oriented or that was misleading. Mem. at 5. In response, Plaintiff requests leave to amend the Complaint. Opp'n at 3. Plaintiff contends that the amended complaint will "clarify that what happened to [Plaintiff] was a part of a systemic policy that deceived the public into believing that the Defendants' servicers were acting in good faith and servicing loans in good faith, when the Defendants were engaged in systemic deceptive practices aimed at foiling consumers' abilities to

have their loans properly serviced or modified." Id. It must be noted that in her Opposition, Plaintiff does not seek leave to amend, but rather, Plaintiff requests leave to file a motion to amend.

2016

McClain v. Citimortgage, ND IL, January 21, 2016

https://scholar.google.com/scholar_case?case=15681478984037285778&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

First and most obviously, the mortgage statement on which Citi seeks to rely is dated April 8, 2015, while the letters at issue were all sent in 2012 or 2013. Citi has quite understandably pointed to no authority to support the mind-boggling notion that the designation of an exclusive address could possibly be retroactive in effect.[9] ...

That decision stands squarely for the proposition that a servicer cannot defeat a borrower's recovery under RESPA based on a strained reading of the statute under which the borrower or her agent is invariably compelled to mail the QWR directly to the servicer.[11] Rather, if the servicer receives a QWR by a different route called for by the circumstances of the case, that QWR will trigger a response requirement notwithstanding how it reached the servicer.[12]

LSREF3 Sapphire Trust 2014 v. Barkston, ND IL, January 25, 2016
https://scholar.google.com/scholar_case?case=14274078431167955028&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Sapphire states that the loan was given to Barkston, a business entity that files a corporate tax return and kept corporate records that were monitored as part of the loan agreement; the Rices were merely guarantors of the loan. Defendants respond that the original purpose of the loan was "to fund significant construction on Mr. and Mrs. Rice's personal residence located at 9110 Barkston Drive in Alpharetta, Georgia," and Barkston did not even exist until the Rices applied to Harris Bank for the loan; Harris Bank required them to form a business entity to serve as the formal recipient of the funds, and the Rices formed Barkston purely for that purpose.

This explanation is surprising. The borrowed sum of $9,400,000 (Countercl. ¶ 16) seems excessive for the stated purpose of "fund[ing] significant construction on Mr. and Mrs. Rice's personal residence" (Opp'n Br. 14), unless "significant" is a bit of an understatement. Further, in the materials they submitted in support of their motion for entry of preliminary injunction before Judge Chang, defendants themselves (through different counsel) frequently referred to the loan as "the Commercial Real Estate Loan." *See* Pls.' Mem. Supp. Mot. Prelim. Inj., *Rice v. LSREF3 Sapphire Trust 2014,* Case No. 14 C 8675, ECF No. 10.

However, on a motion to dismiss, courts assume the truth of the allegations made by the pleading party, as well as any factual statements made in a response brief to the extent that they are consistent with the allegations of the challenged pleading. *See* *Geinosky,* 675 F.3d at 745 n. 1. The Court must assume at this stage that defendants are correct that the loan was only formally a commercial loan and was in substance a personal, consumer loan.

Bush v. JP Morgan Chase, ND AL, January 27, 2016
https://scholar.google.com/scholar_case?case=4321369080553609372&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Nonetheless, Bush does allege that he sent QWRs to Chase on April 29, 2013 and October 19, 2014; that Chase never responded to the QWRs; and that he was damaged by Chase's failure to provide him with the requested information about his loan because, without the requested information, he was unable to stop the foreclosure proceedings on his own and had to retain and pay an attorney to stop the foreclosure. (Doc. 12 at ¶ 92). The court is satisfied that these allegations are sufficient to state a claim for violation of RESPA that is at least plausible on its face and provides Chase with fair notice of the basis of the claim. Accordingly, the Defendants' motion to dismiss Bush's RESPA claim will be denied.

Wolf v. GMAC, Oregon Court of Appeals, February 18, 2016
https://scholar.google.com/scholar_case?case=17746227583992231038&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt
Because *former* ORS 86.770(1) (2011) applies only to a "trustee's sale," it cannot preclude a post-sale challenge to the sale of Wolf's property by someone who was not, in fact, the trustee, which is what Wolf alleged—and GMAC did not dispute on summary judgment—happened here. We, thus, conclude that the trial court erred in granting summary judgment based solely on the ground that Wolf had actual notice of the trustee's sale and took no action to delay or stop it prior to the sale. The trial court's error in construing *former* ORS 86.770(1) (2011) requires reversal on this record.

Ishee v. FNMA, 5th Circuit COA, March 14, 2016

https://scholar.google.com/scholar_case?case=17782161299994597706&q=Ishee+v.+FNMA+5th+Circuit&hl=en&as_sdt=6,36

Simply put, this evidence regarding the way in which Form 176s were used undercuts Fannie Mae's assertions that its loan servicers are able to conduct their routine servicing duties without the need for Fannie Mae's direct involvement or approval. Stated differently, the Form 176s, when viewed in the light most favorable to Ishee, arguably show that Fannie Mae expected to be informed when insurance proceeds were received by a servicer, and that Fannie Mae had input regarding how those insurance proceeds were to be applied to the plaintiff's account. Drawing all reasonable inferences in favor of Ms. Ishee, a jury could find that these documents show that Fannie Mae exercised a degree of control over its loan servicers — including GMAC — sufficient to establish an agency relationship.

Thamathitikhun v. Bank of America, NA, Dist. Court, ED Texas March 18, 2016

https://scholar.google.com/scholar_case?case=7972842773139374013&q=thamathitikhun&hl=en&lr=lang_en&as_sdt=3,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1

Plaintiffs have also brought two other claims under RESPA: (1) SMS's alleged failure to provide accurate payoff information pursuant to 12 C.F.R. § 1026.36(c)(3) and (2) SMS's alleged failure to provide monthly statements pursuant to 12 C.F.R. § 1026.41. In their response, Plaintiffs unambiguously waived their claim that SMS did not provide them with accurate payoff information. Accordingly, the Court GRANTS Defendants' Motion for Summary Judgment on this issue.

With respect to Plaintiffs' contention that SMS failed to provide them with monthly statements pursuant to 12 C.F.R. § 1026.41, Plaintiffs-in their response-did not address Defendants' contention that SMS did in fact provide those statements. See Doc. No. 63. Therefore, the Court considers Defendants' argument undisputed for purposes of the Motion. L.R.-CV-7(d). As such, the Court GRANTS Defendants' Motion for Summary Judgment as to Plaintiff's allegation that SMS failed to provide them with monthly statements.

Merice v. Wells Fargo SD FL, March 24, 2016
https://scholar.google.com/scholar_case?case=7051686514769629700&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Among other arguments, the Eleventh Circuit addressed whether Rooker-Feldman applied to the claims for common law fraud and violations of the Florida RICO Act.Id. at 674. The court explained that the claims would not effectively nullify the state court judgment because the plaintiffs "seek money damages for alleged criminal and fraudulent conduct in the generation of foreclosure related documents." Id. at 675. The court also noted that there was no indication that the plaintiffs raised the issue of fraud in the state foreclosure proceeding. Id. "Instead of seeking to nullify the state court judgment," the plaintiffs sought "to bypass any findings in the state court judgment that would be adverse to them in this suit." Id. In such a situation, where "a plaintiff seeks to relitigate a suit that has been decided against him, he is not so much attacking as trying to bypass the judgment in that suit; and the doctrine that blocks him is res judicata." Id. (quoting Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995))

The court also explained a second, independent reason Rooker-Feldman did not apply. The injuries of which the plaintiffs complained "flow[ed] at least in part from the generation of the foreclosure documents and not solely from the issuance of the state court judgment." Id. The court distinguished between cases where the plaintiff sought relief from a state-court judgment itself as opposed to where the plaintiff sought damages for an adversary's actions in a prior proceeding. Id. at 675-76 (comparing Alvarez v. Attorney Gen. for Fla., 679 F.3d 1257, 1263 (11th Cir. 2012), with Truong v. Bank of Am., N.A., 717 F.3d 377, 383 (5th Cir. 2013)). The plaintiffs' claims, the Eleventh Circuit concluded, were the type of "independent claims" contemplated in Exxon as they were "independent claims of criminal or fraudulent conduct that might `den[y] a legal conclusion that a state court has reached.'" Id. at 676 (alterations in original) (quoting Exxon, 544 U.S. at 293)...

As noted supra, Plaintiff seeks both monetary damages and an order vacating the certificate of title and sale. Awarding monetary damages would not void, vacate, reverse, or otherwise modify the state-court judgment. See Sophocleus, 605 F. Supp. 2d at 1215-16 ("[A] federal court may hear claims about a state-court `legal conclusion'—even if the state courts have previously rejected that claim or if it would undermine the state-court judgment—in contrast to its utter prohibition from

hearing claims that would vacate a state-court judgment."). On the other hand, ordering the vacating of the certificate of title and sale would run afoul of Rooker-Feldman.[4] Thus, the Court finds subject matter jurisdiction over the claims for damages, but not the claims for equitable relief. Nationstar's motion to dismiss for lack of subject matter jurisdiction is granted in part and denied in part.

Nunez v. JP Morgan Chase Bank, NA, Court of Appeals, 11th Circuit, April 22, 2016
https://scholar.google.com/scholar_case?case=5187752354861219890&q=nunez+v+JP+Morgan&hl=en&as_sdt=3,36

In concluding that Chase's responses complied with "the letter and spirit of [RESPA]," the district court impermissibly drew inferences in Chase's favor. Despite acknowledging that Chase's finding of no error was "odd conclusion" and "stands in contrast to the history traced out in the loan," the court took it upon itself to offer a "fairer assessment" of Chase's real intentions. The "[q]uizzical[]" responses, the court speculated, were actually a ruse designed to "comply with [RESPA's] binary response options." That is, Chase "chose" to repeatedly state that no error had occurred—despite secretly "conclud[ing] that there was a problem"—because RESPA "does not contemplate errors of the type that cannot be fixed within the thirty day response deadline." According to the district court, Chase's unreasonable assessments of the situation were just an adept workaround. This analysis simply failed to give proper deference to what Nunez said in her pleadings.
Beyond that, the district court ignored another set of Nunez's allegations and again construed facts favorably to the defendants. Throughout this case, Nunez has clearly alleged that Chase failed to properly implement and honor the loan-modification agreement, and she has attached documents that support this claim. See, e.g., Doc. 1 at 6 ("[A]s the documents attached hereto as Exhibit `D' reflect, Chase continues to fail to honor the loan modification agreement, and is once again pursuing foreclosure and collection activity."); Doc. 24 at 7 ("[A]s the documents attached hereto as Exhibit `D' and `F' reflect, Chase continued to fail to honor the[] loan modification agreement, and continued to pursue foreclosure and collection activity for the entire time that it serviced Plaintiff's loan."); Id. at 10 ("[Chase] fail[ed] to properly handle and implement [Plaintiff's] approved loan modification."). In deciding Rule 12(b)(6) motions to dismiss, the district court was required to accept these allegations as true and construe all facts in the light most favorable to Nunez. Ironworkers Local Union 68, 634 F.3d at 1359. Instead, the court ignored these allegations and concluded that Chase "[did] the best it could," "fix[ed] the problem," and "put [Nunez] in her desired modified repayment program." These conclusions were not proper in deciding Rule 12(b)(6) motions...
Attempting to justify the improper standard applied by the district court, the defendants argue that the court merely favored facts from Nunez's attachments over her "conclusory and unwarranted accusations." **However, the "facts" that the defendants allude to are taken from Chase's own letters**.(my emphasis) For example, in response to Nunez's claim that Chase failed to properly implement the loan-modification agreement, the defendants point to: (1) Chase's second letter denying any error, and (2) Chase's letter enclosing the renewed loan-modification agreement.[4]These documents do not contain "specific factual details" that "foreclose recovery as a matter of law." Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1206 (11th Cir. 2007)(quotation omitted). They are legal documents, drafted by one of the movants, which contain disputed accounts of the facts. Elevating claims in Chase's own letters over the plaintiff's allegations in the amended complaint and in other attachments would turn the standard for considering a Rule 12(b)(6) motion on its head.

Thomas v. WELLS FARGO BANK, NA, Dist. Court, SD California April, 28 2016

https://scholar.google.com/scholar_case?case=15537702171483547870&q=%22Martha+A.+Thomas%22&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

First, Defendant argues that Regulation X does not apply because of Plaintiffs' repeated loan modification requests. § 1024.41(i) states:

(i) Duplicative requests. A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account."

Defendant argues that Plaintiffs have made two "complete loss mitigation applications" since Regulation X came into effect: a "completed Loan Modification request" on or around January 14, 2014, Am. Compl. 7, and the "completed loan modification package" provided on September 9, 2015, Am. Compl. 8. Def. Mot. 4.[2]

Plaintiffs respond that "each time Plaintiff tendered a Loan Modification they believed they were complete [sic], but Defendant ultimately placed Plaintiffs' [sic] back on the Loan Modification roller coaster by requesting more documents, or simply denying the request without explanation." Pl. Opp. 3. In the amended complaint, Plaintiffs state that they submitted a "completed Loan Modification request" on January 14, 2014, Am. Compl. 7, but that "[b]ecause Defendant failed to assign a single point of contact, Plaintiff's [sic] were never able to determine the current status of their loan modification request, and were never able to determine exactly what information Defendant required to conclude a Loan Modification, and were never provided with accurate and/or consistent information regarding the status of the modification or the status of the now pending nonjudicial foreclosure," *id.* at 8. Plaintiffs then allege that "[o]n September 9, 2016 [sic] Plaintiffs provided Defendant Wells Fargo with a renewed and COMPLETED LOAN MODIFICATION PACKAGE pursuant to the specific request of the Defendants." *Id.* Defendant then "acknowledged receipt of the LOAN MODIFICATION PACKAGE submitted by the Plaintiffs."

Defendant seeks to hoist Plaintiffs upon the petard of having characterized their January 14, 2014 loan modification "request" as "complete." But the Court observes that the amended complaint appears to distinguish between the "complete . . . request" of January 14, 2014 and the "COMPLETED . . . PACKAGE" of September 9, 2015, that § 1024.41(b) requires a servicer to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application, and that Plaintiffs allege that Defendants made a "specific request" for the "renewed" loan modification "package" submitted on September 9, 2015. A plausible interpretation of the facts as alleged is thus that Plaintiffs submitted a loan modification application on January 14, 2014, Defendant considered that application incomplete and requested additional information, and upon that information being provided by Plaintiffs on September 9, 2015, Defendant acknowledged receipt of what Defendant then considered a "complete" application. It would be absurd to find that a borrower sending a "renewed" set of materials at the request of a loan servicer renders that borrower's initial loss modification request duplicative, and hence allows the servicer to escape the reach of Regulation X. The Court thus declines to find Plaintiffs' loan modification requests repetitive.

Second, Defendant argues that §§ 1024.41(b) & (c) do not apply due to the timing of the application. In relevant part, § 1024.41(b) states:

(2) Review of loss mitigation application submission.

(i) Requirements. If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:

(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and

> (B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete.

In relevant part, § 1024.41(c) states:

(1) Complete loss mitigation application. If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:

(i) Evaluate the borrower for all loss mitigation options available to the borrower; and

(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage.

As alleged by the Plaintiffs, Plaintiffs submitted their complete loan modification package on September 9, 2015, fifty-eight (58) days in advance of the foreclosure sale which took place on November 6, 2015. Am. Compl. 11-12. Defendant argues, however, that the foreclosure sale was originally set for September 10, 2015, the day before Plaintiffs' submission, and that "the plain and common sense meaning of the words in the CFR indicate that time is measured from the date of the submission of an application to the date of the scheduled foreclosure sale at the time the application is submitted." Def. Mot. 5.

Defendant's argument is unpersuasive for two independent reasons. First, Plaintiffs do not allege in the amended complaint that a foreclosure sale was ever scheduled for September 10, 2015. Defendant points again to Plaintiffs' original state court complaint, RJN Ex. D, at 21, but as discussed above, the Court gave Plaintiffs leave to amend the complaint, and at the motion to dismiss stage, we accept as true the factual allegations in the amended complaint. *See* *Leatherman,* 507 U.S. at 164. Second, even if Plaintiffs had so alleged, Defendant's interpretation of the relevant subsections of § 1024.41 is unconvincing. By their plain terms, § 1024.41(b) applies where a servicer receives a loss mitigation application "45 days or more before a foreclosure sale," and § 1024.41(c) applies where a servicer receives a loss mitigation application "more than 37 days before a foreclosure sale." Neither phrase states "before the date a foreclosure sale is scheduled," "before a scheduled foreclosure sale," or any such similar formulation, and Defendant provides no authority to support the proposition that these phrases should be so interpreted. Thus, the Court construes these two phrases to have their plain meaning: when a servicer receives a loss mitigation application the requisite amount of days before a foreclosure sale occurs, the servicer must comply with the applicable requirements of §§ 1024.41(b) & (c).

Finally, Defendant argues that Defendant did not violate § 1024.41(b), which requires the servicer to "[n]otify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete," because Plaintiffs allege in the amended complaint that "Wells Fargo acknowledged receipt of the Loan Modification Package submitted by the Plaintiffs." Def. Mot. 5-6 (citing Am. Compl. 9). However, Plaintiffs also allege that Wells Fargo either did not do so within the five (5) days required or did not indicate to Plaintiffs whether the application was complete or incomplete. Am. Compl. 11. Thus, the Court finds that Plaintiffs have plausibly alleged that Defendant violated § 1024.41(b).

The Court thus DENIES Defendant's motion to dismiss Plaintiffs' 12 C.F.R. §§ 1024.41(b) & (c) claims.[3]

Willson v. Bank of America, N.A. Dist. Ct. SD Fla, May 2, 2016

Rooker-Feldman only applies to federal actions filed "after the state proceedings have ended." *Nicholson v. Shafe*, 558 F.3d 1266, 1275 (11th Cir. 2009). "[S]tate proceedings have not ended for purposes of *Rooker-Feldman* when an appeal from the state court judgment remains pending at the plaintiff commences the federal court action[.]" *Id.* At 1279.

Here, Plaintiff is currently pursuing an appeal in state court from the foreclosure judgement. …Because an appeal of the state court judgment remains pending, the state proceedings have not ended and *Rooker-Feldman* does not apply. This Court, therefore, has jurisdiction over this action.

…Counts IV, V, and VI allege violation under § 1024.35€, for failing to properly respond to the First and Second Notice. Defendant argues § 1024.35 does not provide a private right of action. (DE 52 at 17) (citing *Miller v. HSBC Bank U.S.A., N.A.*, No. 13 CIV. 7500, 2015 WL 585589 (S.D.N.Y. Feb. 11, 2015)). In Response, Plaintiff argues the case to which Defendant cites, *Miller*, is "incorrect." (DE 56 at 16). Plaintiff contends that § 1024.35 was promulgated under RESPA, and that RESPA provides a private right of action under 12 U.S.C. § 2605(f). (*Id.* At 17).

While § 2605 generally provides a private right of action for RESPA violations, 12 C.F.R. § 1024.35 does not. Other sections promulgated under RESPA, such as § 1024.41, explicitly provide a private cause of action by referring to remedies under § 2605(f). 12 C.F.R. § 1024.41(a) ("A borrower may enforce the provisions of this section pursuant to section 6(f) RESPA (12 U.S.C. 2605(f)"). However, Section 1024.35 makes no such reference and therefore does not provide a private right of action. *See, e.g., Gresham v. Wells Fargo Bank, N.A.*, No. 15-40748, 2016 WL 1127717, at 3 (5th Cir. Mar. 21, 2016) ("Unlike Section 1024.41, Section 1024.39 does not explicitly convey a private right of action). Accordingly, summary judgment is granted in favor of Defendant as to Counts IV, V, and VI.

Wirtz v. JPMorgan Chase Bank, NA, Dist. Court, Minnesota, May 9, 2016
https://scholar.google.com/scholar_case?case=2015041389966274669&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

SLS argues that Wirtz's QWRs do not specify where exactly the error occurred, and that RESPA does not require a servicer to perform a full audit. RESPA required Wirtz to state his "reasons for the belief ... that the account is in error." 12 U.S.C. § 2605(e)(1)(B). Wirtz met his obligation by explaining that he was not delinquent because he had "made all required monthly payments." Eaton Aff. Ex. Q. SLS, and not Wirtz, was in a position to determine when and how the error occurred. Although Wirtz was unable to identify the point of error, he provided as much information as possible. SLS made minimal effort to investigate the error and failed to provide the requested information, thereby violating RESPA. As a result, the court grants summary judgment to Wirtz on the RESPA claim.

Abramson v. BANK OF NEW YORK MELLON, Dist. Court, D. New Jersey, May, 12 2016
https://scholar.google.com/scholar_case?case=16996327324479308865&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

However, looking only at the well-pleaded allegations of the complaint, as required by the now familiar *Iqbal/Twombly* pleading standard, Abramson has sufficiently pleaded that he submitted a complete loss mitigation application in the spring of 2013. He also pleaded that more than 30 days passed without written notice of Abramson's loss mitigation options; these showings are all that 12 C.F.R. § 1024.41 (c) requires to present a violation of RESPA. Both parties concede that if BANA transferred the entire loss mitigation application to RCS within the 30 day period that may be sufficient to dismiss the claim against BANA. But at this stage in the litigation, there is a factual dispute over the timeline for the receipt and transfer of the application

SILJEE v. ATLANTIC STEWARDSHIP BANK, Dist. Court, D. New Jersey, May 12, 2016
https://scholar.google.com/scholar_case?case=18482516905643918 04&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Count 2 (RESPA violation) stands on a separate footing. It appears to be a modest claim for damages based upon failure to respond to a QWR. Such noncompliance with RESPA does not implicate the validity of the mortgage or Atlantic's standing. It is not inconsistent with the existence of a final judgment of foreclosure. Where the federal plaintiff presents "some independent claim," i.e., one that does not implicate the validity of the state court judgment, the *Rooker-Feldman* doctrine does not apply. *Exxon Mobil,* 544 U.S. at 292 (quoted in *Turner v. Crawford Square Apartments III, L.P.,* 449 F.3d 542, 547-48 (3d Cir. 2006)).[2]

Wood v. GREEN TREE SERVICING LLC, Dist. Court, ND Alabama, May, 18 2016
https://scholar.google.com/scholar_case?case=16308632738965645041&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Neither RESPA nor its accompanying regulations define what constitutes receipt of a QWR. However, in other contexts, the Eleventh Circuit has found that a "`presumption of receipt' arises upon proof that the item was properly addressed, had sufficient postage, and was deposited in the mail." *Konst v. Florida East Coast Ry. Co.,* 71 F.3d 850, 851 (11th Cir. 1996) ("The common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee."). This presumption is, of course, rebuttable by the party claiming it did not receive a correspondence. *See id.* The Court sees no reason why this presumption should not apply in this context, but even if it does not, the parties have presented facts sufficient to create a genuine dispute of material fact.
The Woods have provided evidence showing that they properly addressed and mailed the August 27, 2014 QWR. The attorney representing the Woods at the time swore in an affidavit that she properly

addressed and mailed via certified mail a letter to Green Tree at P.O. Box 6176, Rapid City, South Dakota XXXXX-XXXX. (Doc. 37-11 at 11). The Woods also provided the tracking information showing the QWR was delivered and a signature indicating receipt. (Doc. 37-11 at 9-11). Although the QWR itself is undated, the tracking information and signature show it was delivered on September 5, 2014. These undisputed facts are sufficient to create a presumption of receipt. Green Tree does not dispute that the Woods sent the QWR to the correct address. Rather, they dispute whether they actually received it at their office, noting that the tracking and signature do not show that the QWR was actually delivered to the correct mailbox. Additionally, Green Tree's Vice President of Collections testified in his deposition that Green Tree did not have any record of receiving the Woods' QWR. This testimony is enough to dispute whether Green Tree received the QWR, resulting in a genuine issue of material fact.

Dionne v. Federal National Mortgage Association, Dist. Court, D. New Hampshire, June 14, 2016
https://scholar.google.com/scholar_case?case=2162389045752790257&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In Count I of their amended complaint, the Dionnes allege that Chase violated Regulation X of the Real Estate Settlement and Procedures Act ("RESPA"), 12 C.F.R. § 1024.41, by (1) conducting a foreclosure sale prior to acting on their complete loss mitigation application and (2) failing to act with reasonable diligence by repeatedly asking them for documents that they had already submitted to Chase.[7]

> A. Conducting the Foreclosure
In relevant part, RESPA provides that

> [i]f a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then,within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall: (i) [e]valuate the borrower for all loss mitigation options available to the borrower; and (ii) [p]rovide the borrower with a notice in writing stating the servicer's determination. . . .

12 C.F.R. § 1024.41(c). RESPA further provides that "[i]f a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any . . . foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not . . . conduct a foreclosure sale. . . ." Id. § 1024.41(g).

Defendants advance two arguments in support of dismissing the Dionnes' RESPA claim based on the foreclosure sale. First, they argue that the Dionnes did not submit a complete loss mitigation application more than 37 days before the foreclosure sale. This argument is unavailing. RESPA provides that "[a] complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower." § 1024.41(b)(1). The Dionnes allege that they provided all of the information that Chase requested, often providing documents multiple times as Chase could not locate items they had previously submitted. The Dionnes also allege that the application was complete on or before October 17, 2014, more than the required 37 days before the scheduled foreclosure. Doc. no. 21 at ¶ 44. These allegations are

sufficient to support a claim that the Dionnes submitted a complete loss mitigation application more than 37 days prior to the foreclosure sale.

Defendants' second argument is that the timing of events precludes relief as to a RESPA claim based on the foreclosure sale. They assert that the notices of foreclosure the Dionnes received in August and December of 2014 were not the "first" such notices. In support, defendants attach as an exhibit to their motion to dismiss a notice of foreclosure from Harmon to Denise dated May 2, 2012. See doc. no. 23-6. Defendants argue that this notice precludes any relief under RESPA for a claim arising out of the foreclosure sale.

Even if the court could consider the May 2, 2012 notice for purposes of the motion to dismiss, that notice is not dispositive of the Dionnes' RESPA claim based on the foreclosure. The Dionnes pled violations of 12 C.F.R. § 1024.41(f)(2) and § 1024.41(g) in the alternative. Section 1024.41(f)(2) prohibits a loan servicer from foreclosing under certain circumstances if the borrower submits a complete loss mitigation application before the servicer has made "the first notice or filing required by applicable law" for a non-judicial foreclosure. Section 1024.41(g) prohibits a servicer from foreclosing under certain circumstances if a borrower has submitted a complete loss mitigation application after "the servicer has made the first notice of filing required by law." Thus, even if defendants had shown that the 2012 notice was the first foreclosure notice, which would preclude relief under § 1024.41(f)(2), that would not be dispositive of the Dionnes' claim based on defendants' alleged violation of § 1024.41(g).[8] …

Although defendants urge dismissal of Count I in its entirety, they do not address the Dionnes' RESPA claim based on Chase's failure to exercise reasonable diligence. RESPA provides that a "servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application." 12 C.F.R. § 1024.41(b)(1). The Dionnes allege that Chase violated this regulation by repeatedly requesting documents they had already submitted multiple times, and by requesting documents even when it had previously told the Dionnes that it did not need anything further from them. Further, Chase claimed certain faxed documents were illegible, but the Dionnes verified that faxed copies of those documents were legible. These allegations set forth a plausible claim that Chase did not exercise reasonable diligence in obtaining documents and information to complete the Dionnes' loss mitigation application.

Blanton v. Roundpoint Mortgage Servicing Corp. Dist. Court, ND Illinois, June 17, 2016,

https://scholar.google.com/scholar_case?case=17945504506075956178&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

B. RESPA Claim…

… Roundpoint further argues that plaintiff's remaining RESPA claim, based on its alleged improper response to the April 12 notice of error, also fails because its obligation to respond under RESPA was never triggered. Roundpoint contends that pursuant to 12 C.F.R. § 1024.35(c) it had a designated address that borrowers were required to use when sending notices of error.

… 12 C.F.R. § 1024.35(c) provides that "A servicer may, by written notice provided to a borrower, establish an address that a borrower must use to submit a notice of error in accordance with the procedures in this section." The subsection, however, requires that the servicer's notice to the borrower include "a statement that the borrower *must* use the established address to assert an error." 12 C.F.R. § 1024.35(c) (emphasis added). The January 2014 mortgage statement attached to Roundpoint's motion to dismiss does not include any such statement. Instead, the mortgage statement merely states in the "General Information" section that "[t]o provide [Roundpoint] with a Notice of Error about the servicing of your loan . . . please write to [Roundpoint] at" the designated address. This statement, which is more of an invitation to use the designated address than a command, does not meet the statutory requirements of notifying the borrower that notices of error "must" be sent to the designated address. Accordingly, Roundpoint's obligations pursuant to RESPA were in fact triggered by plaintiff's April 12 notice of error.

Roundpoint next argues that plaintiff's RESPA claim fails because it "properly responded to [her] letter within the timeframes set out by RESPA," and its response contained all of the required information. Although plaintiff does not dispute that Roundpoint timely responded to the notice, she contends in her response and alleges in her second amended complaint that the substance of the response was inadequate pursuant to 12 C.F.R. § 1024.35. Specifically, plaintiff alleges that Roundpoint's response "summarily pronounced that their `records indicate the account is due for the February payment.'" Plaintiff further alleges that the errors she complained about in her April 12 notice were caused by Roundpoint's mistakes. Accordingly, the court finds that plaintiff has sufficiently stated a claim under 12 C.F.R. § 1024.35(e)(1)(i)(B) that Roundpoint failed to conduct a reasonable investigation of the alleged errors, and therefore inadequately responded to her notice of error. The court therefore denies Roundpoint's motion to dismiss all RESPA claims (Counts 9 through 26), and will grant leave to plaintiff to file a single such claim.

… Defendants' motion is granted… [on]… all but one of plaintiff's RESPA claims.

Brown v. Wells Fargo Home Mortgage, Dist. Court, D. New Hampshire, June, 20 2016
https://scholar.google.com/scholar_case?case=7776254282142535815&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

Wells Fargo's challenge to the sufficiency of the Browns' damages allegations does not fare so well. Though not particularly clear, detailed, or precise, the Browns have alleged facts which, taken in the light most favorable to them, recite at least some damages, including emotional distress damages. The Browns further allege a causal relationship between those damages and Wells Fargo's alleged RESPA violation. See Moore v. Mortgage Elec. Registration Sys., Inc., 848 F. Supp. 2d 107, 123 (D.N.H. 2012)(emotional distress damages amount to "actual damages" under RESPA where plaintiffs allege that they result from the RESPA violation). Accordingly, the court grants Wells Fargo's motion to dismiss this count in part, denying it as to the Browns' claim for damages under RESPA.

Sylvester v. BAYVIEW LOAN SERVICING LLC, Dist. Court, SD New York, June 24, 2016
https://scholar.google.com/scholar_case?case=11187357079274956511&hl=en&as_sdt=0,36

To support the argument that Plaintiffs' claim is unripe, Defendants point to two cases in which courts dismissed dual tracking claims because the relevant foreclosure proceedings were still

pending. For actual damages to accrue such that a claim is ripe, these cases explain, the plaintiff must have "lost his or her property to foreclosure." *Simmons v. Wells Fargo Bank, N.A.,* No. 14-CV-333, 2015 WL 4759441, at *4 (D.N.H. Aug. 11, 2015); *accord Wenegieme,* 2015 WL 2151822, at *2. In those cases, the foreclosure proceedings were ongoing, so the plaintiffs had not suffered the "negative outcome" causing harm. *Wenegieme,* 2015 WL 2151822, at *2; *see Simmons,* 2015 WL 4759441, at *2. Here, in contrast, the court ordered a foreclosure sale in June 2015, and Plaintiffs aver that they have been approached by someone claiming to have bought the property. (Dkt. No. 19.) The dual-tracking injury to Plaintiffs is no longer speculative: insofar as the foreclosure proceeding continues, it proceeds only for the purpose of completing the foreclosure sale. Plaintiffs have no hope of winning in the state court. *Cf. Wenegieme,* 2015 WL 2151822, at *2. Indeed, as discussed below, Defendants argue for abstention on the ground that the state-court judgment was rendered *before* proceedings here commenced. Accordingly, as of now, Plaintiffs' claim is ripe. *See* Wright & Miller, Fed. Prac. & Procedure § 3532.7 (citing *Hargrave v. Vermont,* 340 F.3d 27, 34 (2d Cir. 2003) (noting that "[r]ipeness should be decided on the basis of all the information available to the court," including intervening events).

Bryant v. Bank of America, NA, Dist. Court, ND Texas, June 27, 2016
https://scholar.google.com/scholar_case?case=5591858780783413740&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

For the reasons that follow, the Court finds that the Bryants have adequately pled their failure to respond to loan modification requests claim. BANA conflates what a plaintiff must ultimately prove under section 1024.41(c) with what a plaintiff must plead in order to survive a motion to dismiss. In Obazee v. The Bank of New York Mellon, 2015 WL 4602971, the plaintiff "allege[d] that[,] on July 1, 2014[,] he submitted a complete loss mitigation application; that his request has neither been approved nor denied; that `[i]n fact Plaintiff has received no notice or communication in connection to his request for mortgage assistance,' . . . and that[,] despite defendants' failure to comply with the notice provision in 12 C.F.R. § 1024.41(c)(1)(ii), they noticed his property for a March 3, 2015 foreclosure sale." Id. at 3 (internal citations omitted). The Court found that "[t]hese allegations, taken as true and viewed favorably to [the plaintiff], [we]re sufficient to plausibly plead a violation of 12 C.F.R. § 1024.41." Id.[6]

Here, the Bryants allege the following: (1) "[they] sent . . . BANA a complete loss mitigation application [for a loan modification] on or about January 13, 2014"; (2) "[a]fter five weeks had elapsed without receiving any response from this first modification application . . . Larry R. Bryant sent . . . BANA [a second application] . . and spoke with a BANA representative named Nathan who helped him fill out the application"; (3) "[a]fter four [more] weeks elapsed without receiving any response from this second loan modification application, . . . Larry R. Bryant sent another completed loan modification application . . . [to which he] did not receive a response"; and that (4) "[b]etween January 2014 and November 2014, [the Bryants] submitted four applications for modifications to [BANA] . . . [but] never received a written response informing them of whether they had been approved or denied." Doc. 10, Second Am. Compl. ¶¶ 6-7. Comparing these allegations to the Obazee plaintiff's, the Court finds them far more detailed, and therefore sufficient to withstand BANA's Motion to Dismiss.

ROJECKI v. Bank of America, NA, Dist. Court, D. New Jersey, June 27, 2016
https://scholar.google.com/scholar_case?case=18238381506677006324&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

BANA argues that Rojecki "fails to state a cognizable claim for relief because her own Complaint acknowledges that the loan modification package submitted in May 2015 was incomplete." (Def. Mov. Br. at 10). It asserts that her "own Complaint makes it irrefutably clear that she did not provide a complete loan modification package to BANA more than thirty-seven (37) days before the scheduled sale" and, even if "the package Plaintiff submitted on May 18, 2015 was complete, though it was not, the package was not provided more than thirty-seven (37) days before the scheduled sale on June 5, 2015." (Id. (citing Compl. ¶¶ 36, 38)).

In opposition, Rojecki argues that the "issue of whether or not the package submitted on May 18, 2015 was a complete package is a question of fact," and if "[h]olding the facts, as set forth in the complaint, in a light most favorably to the non-moving party, the package in question was complete." (Pl. Opp. Br. at 2). So, Rojecki asserts that, "[h]olding the facts, as set forth in the complaint, in a light most favorably to the non-moving party, the complete package, submitted on May 18, 2015, was submitted thirty-seven (37) days prior to any known scheduled sale date." (Id. at 2-3).

The Court declines to dismiss Rojecki's RESPA claim based on BANA's arguments. Under RESPA's "Regulation X," 12 C.F.R. § 1024.41, a loan servicer cannot refer a mortgage for foreclosure proceedings under certain circumstances. See, e.g., Beard v. HSBC Mortg. Servs., No. 15-1232, 2016 WL 3049310, at *3 (W.D. Mich. May 31, 2016); Wilson v. Bank of Am., N.A., 48 F. Supp. 3d 787, 799 (E.D. Pa. 2014). In relevant part, 12 C.F.R. § 1024.41(g) provides that "[i]f a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale."[2]

Watson v. Bank of America, NA, Dist. Court, SD California June 30, 2016

https://scholar.google.com/scholar_case?case=9754163356172059749&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

RESPA includes a provision which states that a servicer must respond "within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan." 12 U.S.C. § 2605(k)(1)(D); 12 C.F.R. § 1024.36(d)(2)(i)(A). Because RESPA and Regulation X specifically provide timelines to respond to a request for the contact information of the owner or assignee of the loan, the Court can only conclude that a request for information for the identity of the owner of the loan falls under RESPA and Regulation X. 12 C.F.R. § 1024.36(d)(2)(i)(A); 12 U.S.C. § 2605(e)(2).

Plaintiffs seek numerous documents that pertain to the servicing of her loan such as the name and address of the owner or assignee of the loan, the full name and address of the master servicer for the loan, the full name and address of the current servicer for the loan, the date and amount of the last payment received, the amount required to bring the loan current and the last mortgage statement. Therefore, the Court concludes Plaintiffs have sufficiently alleged a claim under 12 C.F.R. § 1024.36 for these documents.

He v. OCWEN LOAN SERVICING, LLC, Dist. Court, ED New York July 14, 2016

https://scholar.google.com/scholar_case?case=13131484769136527 72&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

A mortgage servicer need not consider a loss mitigation application received less than thirty-seven days before a foreclosure sale. 12 C.F.R. § 1024.41(c)(1), (g)(1); see also Gresham, 2016 WL 1127717, at *2. In this case, however, the Complaint alleges that the foreclosure sale was not scheduled at the time Defendant received Plaintiff's application. While such a situation is not addressed within Section 1024.41, according to the CFPB's official commentary, "[i]if no foreclosure sale has been scheduled as of the date that a complete loss mitigation application is received, the application is considered to have been received more than 90 days before any foreclosure sale." Consumer Financial Protection Bureau's Official Staff Commentary on Regulation X, 2014 WL 2195779, at *3 (June 2016). Of course, the CFPB's Commentary is not controlling legal authority. Here, however, the Court finds the Commentary to be highly persuasive because it fills a gap in the text of Section 1024.41 and squarely addresses the factual situation described in the Complaint. According to the Complaint, Plaintiff's Application was received by Defendant before the foreclosure sale was scheduled. Thus, the application must be "considered to have been received more than 90 days before any foreclosure sale." Id. Defendants therefore may not rely upon the thirty-seven-day window as a basis to dismiss the Complaint.

Herbert v. CITIMORTGAGE, INC., Dist. Court, SD Mississippi July 18, 2016
https://scholar.google.com/scholar_case?case=6625169459687646982&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

First, regarding Defendants' argument related to distinguishing between actions committed by each Defendant, the Court adopts the same reasoning as in *Griffin v. HSBC Mortgage Services, Inc.,* No. 414cv00132DMBJMV, 2016 WL 1090578 (N.D. Miss. Mar. 18, 2016). Namely, Plaintiffs have "essentially alleged that each defendant participated in the misconduct described in the Complaint." *See id.* at *3. This is sufficient for pleading purposes, although "it may be appropriate to narrow the focus of the case" at a later time.[1] *See id.*

Second, the Amended Complaint contains painstaking factual detail. Defendants do not take issue with the factual allegations, but, rather, with Plaintiffs' allegations of violations of state and federal law, without identifying the specific law. "But, Rule 8(a)(2) of the Federal Rules of Civil Procedure[2] does not treat legal descriptions of a claim the same as factual averments." *Johnson v. Honda,* No. 3:15cv223-DPJ-FKB, 2015 WL 5794449, at *3 (S.D. Miss. Oct. 1, 2015). Indeed, "[t]he Supreme Court has made clear that a Rule 12(b)(6) motion turns on the sufficiency of the `*factual*allegations' in the complaint. [Therefore, a] complaint need not cite a specific statutory provision or articulate a perfect `statement of the legal theory supporting the claim asserted.'" *Smith v. Bank of Am., N.A.,* 615 F. App'x 830, 833 (5th Cir. 2015) (citing *Johnson v. City of Shelby,* 135 S. Ct. 346, 347 (2014)) (emphasis in original). "Having informed [Defendants] of the factual basis for their complaint, [Plaintiffs a]re required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *See Johnson v. City of Shelby,* 135 S. Ct. at 347; *see also, e.g., Johnson v. Honda,* 2015 WL 5794449, at *3 ("In the present case, the failure to identify the theory of the pleadings would not be a sufficient basis to dismiss the case . . . .").

Accordingly, the Court turns to the only grounds stated for dismissal based on the factual allegations of the Complaint. *See Smith,* 615 F. App'x at 833. Specifically, Defendants state that "Plaintiffs'

[RESPA] claims related to QWRs are due to be dismissed" pursuant to the applicable RESPA section, 12 U.S.C. § 2605(e). (*See*Defs.' Mem. 7, ECF No. 11)…

…"To state a viable claim under Section 2605(e), [the plaintiffs must] plead that their correspondence met the requirements of a QWR, that [the defendant] failed to make a timely response, and that this failure caused them actual damages." *See id.*Defendants do not contend that Plaintiffs have failed to sufficiently plead these elements, and, having reviewed the Amended Complaint in detail, the Court finds that Plaintiffs have sufficiently alleged RESPA claims related to QWRs. *See, e.g., Peters v. Bank of Am. Corp.,* No. 4:12cv635, 2013 WL 3354441, at *3 (E.D. Tex. July 2, 2013).

Instead, Defendants argue that other district courts have held that litigation discovery requests such as the ones described in the Amended Complaint do not qualify as QWRs. No courts within this Circuit have held as much, however, and the Court will not dismiss these claims on this ground. In doing so, the Court offers no opinion on the viability of these claims at the summary judgment stage or otherwise. But at the motion to dismiss stage, the Court finds that Plaintiffs have sufficiently stated facts "to raise a right to relief above the speculative level and into the realm of plausible liability as to whether [each of the identified communications qualifies as] a QWR. [These] claim[s] should remain at this time." *See id.* (citation and quotation marks omitted).

Swanson v. Bayview Loan Servicing, LLC, Dist. Court, MD Florida July 19, 2016

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[Borrower can submit loss mitigation application through servicer's counsel]

In its motion to dismiss, Bayview argues that Counts I and II fail to state claims because Swanson alleges that he submitted his loss application to Bayview's counsel rather than to Bayview. Bayview contends that Swanson is required to allege in the Complaint the date and time that Bayview — rather than Bayview's counsel — received the loss mitigation application. Bayview cites no authority for this proposition. Swanson responds that Bayview's counsel was Bayview's agent and that the Complaint's allegations are sufficient.

Neither party has cited any case law specific to the issue at hand. The Court finds Counts I and II sufficiently pleaded. The regulation imposes requirements on a servicer who "receives" a loss mitigation application. Swanson adequately alleges that Bayview received his application. The Complaint alleges that Bayview erroneously denied Swanson's application on July 10, 2014, and that Bayview affirmatively acknowledged receiving the application. (Compl. ¶¶ 32, 59). Bayview's motion to dismiss Counts I and II therefore will be denied.

Hall v. Nationstar Mortgage LLC, Dist. Court, ND Alabama July 25, 2016
https://scholar.google.com/scholar_case?case=9020596016521750841&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

On February 14, 2014 and April 14, 2014, counsel for the Halls sent Nationstar letters purporting to be NOEs under Regulation X of RESPA. Nationstar responded to the Halls on April 18, 2014 and May 2, 2014. In its May 2 letter, Nationstar indicated that it was enclosing documents such as the Nationstar servicing transfer notice, the 2013 proposed Nationstar modification agreement, and the 2014 modification denial letter. Again, these enclosures were not provided to the court as evidence. Without these enclosures, the court is unable to assess whether Nationstar did in fact provide complete responses that complied with the provisions of RESPA. The court is also unable to determine whether the amount of the Halls' principal balance and total debt, as represented by Nationstar, was supported by Nationstar's records and the Halls' payment history, or whether Nationstar should have made a correction to the Plaintiffs' account, as required by RESPA. Accordingly, the court finds that genuine issues of material fact exist regarding whether Defendant Nationstar complied with the provisions of RESPA. Therefore, the court will DENY the Defendants' Motion for Summary Judgment as to the Halls' RESPA claim against Nationstar.[5]

Bomar v. PACIFIC UNION FINANCIAL, LLC, Dist. Court, ND Illinois August 10, 2016
https://scholar.google.com/scholar_case?case=6022712712365798762&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Claims survive Motion to Dismiss on failure to meet 1024.41 guidelines and failure to follow FHA Hamp guidelines]

Count I alleges that Pacific Union violated the Real Estate Settlement Procedures Act (RESPA). That act provides, in pertinent part, that when a borrower appeals a loan servicer's denial of a loss mitigation application the loan servicer must "provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based on the appeal" within 30 days of the borrower's appeal. 12 C.F.R. § 1024.41(h). A borrower's failure to comply with section 1024.41 is actionable under 12 U.S.C. § 2605(f), which provides a general cause of action for violations of the Real Estate Settlement Procedures Act (RESPA).

Here, Pacific Union alleges that it sent Bomar a timely response to his appeal. Pacific Union has also attached a dated copy of its response to Bomar's appeal to its answer. Accordingly, Pacific Union contends that it has provided notice to the borrower in accordance with the regulation's requirements. Pacific Union, however, has provided no evidence establishing whether the attached letter was actually mailed or whether Bomar received it. Moreover, Pacific Union has provided this Court with no legal basis to conclude that mailing the letter was sufficient to "provide notice" under the statute. Accordingly, because this Court must take Bomar's allegations as true at this stage of the proceedings, this Court cannot grant judgment on the pleadings on Count I.

Cole v. JPMorgan Chase Bank, NA, Dist. Court, SD Ohio August 25, 2016

https://scholar.google.com/scholar_case?case=12107972621423013396&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[Failure to Properly Consider Modification Applications is Conduct Actionable Under RESPA]

Plaintiff is not alleging that his loan modification application was improperly denied. Rather, he alleges that Chase is not complying with the provisions of 12 U.S.C. § 2605(k):
(k) Servicer Prohibitions

(1) In General. A servicer of a federally related mortgage shall not —
* * *
(C) fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, *or avoiding foreclosure, or other standard servicer's duties.*
* * *
(E) fail to comply with *any other obligation found by the Bureau of Consumer Financial Protection, by regulation,* to be appropriate to carry out the consumer protection purposes of this chapter. (*emphasis added*).
(ECF No. 34, at p. 13.)
Plaintiff asserts that his letters were sent in relation to avoiding foreclosure, and that Chase "was avoiding an evaluation of Plaintiff's loan since July 12, 2012 by repeatedly claiming that Plaintiff's loss mitigations were incomplete." (Compl., ECF No. 30, at p. 3, ¶ 8.)
Plaintiff asserts that concerns about servicer conduct in evaluating loss mitigation applications, particularly in circumstances where a foreclosure action had already been initiated, were an issue in the "National Mortgage Settlement," and that this concern is embodied in the new regulatory scheme as set forth in 12 C.F.R. § 1024.41. Specifically, the regulation creates a duty for the servicer to "exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application." 12 C.F.R. § 1024.41 (b)(1).
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. At this stage of the proceedings, Plaintiff has provided sufficient factual allegations, taken as true, to state a plausible claim. Determination of whether evidence supports these claims will have to wait until summary judgment or trial. Defendant's Motion to Dismiss is DENIED.

Payne v. Seterus Inc., Dist. Court, WD Louisiana August 26, 2016
https://scholar.google.com/scholar_case?case=2930525998287302843&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Courts are divided as to whether RESPA is preempted by the Bankruptcy Code. *See, e.g., In re Figard,* 382 B.R. 695, 2008 WL 501356 (Bankr. W.D. Pa. 2008) (court finds that Bankruptcy Code does not preempt provisions of RESPA, 12 U.S.C. § 2605(e)(2)); *In re Holland,* 374 B.R. 409 (Bankr. D. Mass. 2007) (Bankruptcy Code does not preempt RESPA); *In re Nosek,* 354 B.R. 331 (D. Mass. 2006) (court finds Bankruptcy Code preempts RESPA and state statutory and common law). However, even if the Bankruptcy Code's automatic stay were to trump the response procedures under RESPA, defendant does not provide any support for the proposition that servicers may not respond to inquiries initiated by debtors. *In re Henry,* 266 B.R. 457, 473 (Bankr. C.D. Cal. 2001) (creditor may properly respond to communication initiated by the debtor). Seterus did not provide the information requested by Payne or otherwise explain why the monthly statements requested were either unavailable or unobtainable. *See* 12 U.S.C. § 2605(e)(2). Instead, Seterus cites the pending bankruptcy proceeding with no explanation as to why the proceeding would bar it from providing the requested information. Moreover, the pending bankruptcy proceeding apparently did not impede Seterus from directly notifying Payne that it had become the servicer and debt collector on his mortgage. *See* Compl., ¶ 2.
In sum, even if the court were to consider the evidence adduced by Seterus, it does not establish that Seterus responded adequately to plaintiff's requests. Rather, plaintiff has alleged sufficient facts to support this element of his claim for violation of 12 U.S.C. § 2605(e)(2).

Stephens v. Capital One NA, Dist. Court, ND Illinois September 6, 2016

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[RESPA Foreclosure doesn't have to occur for RESPA Claim to be Ripe]

Defendant argues that Plaintiffs' RESPA claim is not ripe due to Defendant's voluntary dismissal of the original foreclosure complaint and the fact that foreclosure of Plaintiffs' home is still a future possibility. Ripeness is a justiciability doctrine derived from "Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 807-08 (2003) (quoting *Reno v. Catholic Social Servs., Inc.,* 509 U.S. 43, 53 (1993)); see *Sprint Spectrum L.P. v. City of Carmel, Ind.,* 361 F.3d 998, 1002 (7th Cir. 2004). The Supreme Court has held that a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Texas v. United States,* 523 U.S. 296, 300 (1998). Despite Defendant requesting dismissal under Fed. R. Civ. P. 12(b)(6), the issue of ripeness is a question of subject matter jurisdiction, and best analyzed under Rule 12(b)(1). See *Union Tank Car Co. v. Aerojet-General Corp.,* 2005 WL 2405802 at *2 (N.D. Ill. Sept. 27, 2005). Under 12(b)(1) analysis, the Court "must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in plaintiff's favor." *United Transp. Union v. Gateway Western Ry. Co.,* 78 F.3d 1208, 1210 (7th Cir. 1996).
As Plaintiffs' response clarifies, Defendant fails to cite authority that illustrates 12 C.F.R. § 1024.41(a) has a requirement of losing property in order to be deemed ripe. The Court therefore finds no requirement. Under 12 U.S.C. § 2605(f), damage occurs when a party fails to comply with any provision of RESPA. There is no text that indicates the taking of property is the only way to fail to comply with any of RESPA's provisions. Additionally, "the express terms of RESPA clearly indicate that [RESPA] is, in fact, a consumer protection statute." *Johnstone,* 173 F. Supp. 2d at 816. Numerous courts have held that "consumer protection statutes are to be interpreted broadly in order to give effect to their remedial purposes." *Katz v. Dime Sav. Bank, FSB,* 992 F. Supp. at 255-56. Therefore, the Court concludes that the taking of property is not required for Plaintiffs' claimed violation of RESPA to be ripe.

Nguyen v. Madison Management Services, LLC, Dist. Court, D. Oregon September 7, 2016
https://scholar.google.com/scholar_case?case=17312975271720130720&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[1023.35 and 1024.36 Claims Actionable]

Section 6 of RESPA, codified at 12 U.S.C. § 2605, requires a loan servicer to comply with certain disclosure requirements when a QWR is received from the borrower. On January 10, 2014, new regulations were enacted in the form of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub.L. No. 111-203, 124 Stat. 1376 (July 21, 2010), which became known as Regulation X of RESPA[4] and codified at Title 12 C.F.R. § 1024.

Regulation X was promulgated pursuant to Section 6 of RESPA and subject to Section 6(f), which gives borrowers a private right of action to enforce such regulations. *See* 78 Fed. Reg. at 10715 n.64. These regulations, which were promulgated by the Agency charged with regulatory authority under RESPA rather than by the Legislature, constitute the basis of a claim for violation of RESPA.

Defendant contends the regulations "on their face" do not reference any enforcement provision. Although the Ninth Circuit has not directly addressed this issue, Defendants rely on decisions from district courts in other jurisdictions to support its position.

For example, in *Watson v. Bank of America, N.A.,* No. 16cv513-GPC, 2016 WL 3552061 (S.D. Cal. June 30, 2016), the plaintiff brought a claim for violation of Regulation X under RESPA. …When addressing the defendants' motion to dismiss for failure to state a claim, the court specifically analyzed each request and notice sent by the plaintiffs for compliance with §§ 1024.35 and 1024.36 of Regulation X. The court concluded some of plaintiffs' allegations were sufficient to state a claim while others were not. Accordingly, the court granted in part and denied in part the defendants' motion to dismiss plaintiffs' claims for violation of Regulation X. Although the *Watson* court did not address the specific issue of standing, it implicitly recognized by its detailed analysis of each claim for compliance with the regulations that there was a basis for asserting such claims.

Here Plaintiff brings claims in her FAC "for violations of the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.* (RESPA)." FAC at ¶ 2. In Claims 2-11 Plaintiff alleges violations of the specific regulations as to each RFI and NOE sent to Defendant by Plaintiff.

On this record the Court concludes Plaintiff has standing to assert claims for violation of these regulations.

Bucy v. PennyMac Loan Services, LLC Dist. Court, SD Ohio, September 30, 2016

https://scholar.google.com/scholar_case?case=8907178148612924301&q=bucy+v+penny+mac&hl=en&as_sdt=6,36

PennyMac insists that this TILA claim (Count 1) should be dismissed because its alleged failure to send Plaintiff an accurate payoff balance within seven business days "is not material." (MERS & PennyMac Reply Br. at 2 [ECF No. 29].) PennyMac alludes to 15 U.S.C. § 1640(a)(4), which provides that "in the case of a failure to comply with any requirement under section 1639 of this title, paragraph (1) or (2) of section 1639b(c) of this title, or section 1639c(a) of this title, [a creditor is liable in] an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material." PennyMac, however, has pointed to no legal authority that excuses violations of *§ 1639g* on the basis of materiality. (*See id.* at 1-2.) And, in fact, hinging violations of § 1639g to a finding of materiality conflicts with Sixth Circuit precedent, which has "repeatedly stated that TILA is a remedial statute and, therefore, should be given a broad, liberal construction in favor of the consumer." *Begala,* 163 F.3d at 950. Accordingly, the Court denies PennyMac's motion to dismiss Count 1.

PennyMac argues, lastly, that Plaintiff's request for damages under Count 3 fails because a claim for damages under TILA must be brought "`within one year from the date of the occurrence of the violation.'" (MERS & PennyMac Mot. to Dismiss at 10 (quoting 15 U.S.C. § 1640(e)).) But as Plaintiff explains, his request for damages stems from PennyMac's failure to honor his purported rescission, which he sent on July 10, 2015. (See Mem. in Opp'n to PennyMac & MERS Mot. at 11-12 [ECF No. 28].) Plaintiff then filed his Complaint on October 14, 2015 — less than a year later. (Compl. at 17 [ECF No. 1].)

Plaintiff, in sum, has pleaded a plausible TILA claim for rescission and damages based on PennyMac's alleged failure to deliver two rescission notices and PennyMac's subsequent failure to honor that purported rescission. As such, the Court denies PennyMac's motion to dismiss Count 3.

[TILA Claim against Owner/Master Servicer Survives MTD]

But even if the Court were to assume that Ginnie Mae is the mortgage owner here, Plaintiff alleges, and PennyMac's response to the July 10, 2015 written request appears to confirm, that PennyMac did not provide Plaintiff with Ginnie Mae's telephone number. (Am. Compl. at 12; July 10, 2015 Wetzel Ltr. to PennyMac at PageID 181 [ECF No. 22-1]; Aug. 13, 2015 PennyMac Ltr. to Wetzel at PageID 186-87 [ECF No. 22-2].) Given that Plaintiff requested the mortgage owner's telephone number but PennyMac failed to provide it, Plaintiff has pleaded a plausible claim for relief under § 1641(f)(2). See Justice v. Ocwen Loan Servicing, No. 2:13-cv-165, 2015 WL 235738, at *14 (S.D. Ohio Jan. 16, 2015) ("[T]he Justices also inquired about the `address[] and telephone number of the owner of the note' and Ocwen did not provide this information. Therefore, the Court finds a violation of TILA as to the First Loan.").

As to Plaintiff's request for the name of the master servicer, PennyMac contends that its identification of itself as "the current loan servicer" and its statement that "all subsequent payments would need to be sent directly to PennyMac," satisfied Plaintiff's request. (PennyMac Resp. at PageID 186-87 [ECF No. 22-2]; see MERS & PennyMac Reply Br. at 3.) PennyMac, however, has not offered any binding precedent to support that contention. (See MERS & PennyMac Reply Br. at 3.) Plaintiff requested the name of the master servicer, not the name of the current loan servicer. See Justice, 2015 WL 235738, at *14 (explaining that a servicer must respond to an obligor's written request "based on the nature of the obligor's request — not based on whatever piece of information the servicer itself wants to send").

Plaintiff has pleaded a plausible claim for relief stemming from PennyMac's alleged failure to provide the name of the mortgage loan's owner and master servicer. PennyMac's motion to dismiss Count 4 is, thus, denied.

Joussett v. Bank of America, NA, Dist. Court, ED Pennsylvania October 6, 2016

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[Court Clearly states distinction in Interpretation of Claims under old QWR and RFI NOE Process under Regs.]

Defendants' reliance on *Smallwood v. Bank of America, N.A.,* No. 15-336, 2015 WL 7736875, at *6-7 (S.D. Ohio Dec. 1, 2015), is misplaced, because that case focused on RESPA's *statutory* provisions, and not the rules the CFPB was empowered to issue. Ordinarily, regulations issued under a statute would be limited by the terms of the statute itself, but here, the CFPB created an alternative path for consumers to follow. Section 1024.36(a) explicitly covers *more* than just requests relating to loan servicing, extending to "any written request for information from a borrower." I therefore join my former colleague Judge Buckwalter in holding that § 1024.36(a) encompasses requests relating to

loan modification such as those involved here. *See* ***Wilson v. Bank of Am., N.A.*, 48 F. Supp. 3d 787, 806-07 (E.D. Pa. 2014)**.

[Claim related To transfer survives MTD]

The remaining disclosure claim against Newlands, while inartfully phrased, is sufficiently pled. Section 1026.39 provides that when a mortgage is transferred, the new owner must disclose to the borrower in writing certain information, namely notice of the transfer and the new owner's contact information. *Id.* § 1026.39(d)(1). This disclosure must occur "on or before the 30th calendar day following the date of the transfer." *Id.* § 1026.39(b). Defendants argue, and I recognize, that Joussett's claim is relatively sparse. *See* SAC ¶ 72 ("Plaintiff's mortgage was recently transferred or assigned to Newland without notice to Plaintiff.") But I will not require a plaintiff bringing a lack-of-disclosure claim to plead specifics about information he alleges was not disclosed. At the Rule 12(b)(6) stage, I am asked only whether I can "draw the reasonable inference that the defendant is liable for the misconduct alleged," ***Iqbal*, 556 U.S. at 678,** and here I can. Joussett's § 1026.39 claim against Newlands will remain.

Second, Joussett claims "Defendants did not provide periodic statements that contained information required under Regulation Z." SAC ¶ 94. Joussett seems to be referring to Regulation Z's requirement that a servicer, creditor, or assignee provide the borrower with periodic billing statements. 12 C.F.R. § 1026.41. While this claim is also somewhat lacking in detail, it will survive for largely the same reasons as the § 1026.39 claim.

Buyea v. Select Portfolio Servicing, Inc., Dist. Court, SD Florida October 11, 2016

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[On Servicing]

While this Court agrees that servicing may end prior to foreclosure and judicial sale, the Court sees an important distinction between the definitions of servicing and servicer that the *Toscione* court appears to have overlooked. In the instant case, Plaintiff was in default at the time he delivered his RFI to Defendant, and had been for over a year. Defendant therefore was not "servicing" his loan. However, the fact that Defendant was not servicing the loan does not mean that Defendant was no longer a servicer. As defined under RESPA, "[t]he term `servicer' means the person *responsible for* servicing of a loan." 12 U.S.C § 2605(i)(2) (emphasis added). Whether or not Defendant was actively servicing the loan, Defendant remained responsible for servicing the loan at the time it received Plaintiff's RFI. Defendant was therefore a servicer and was obligated to respond to Plaintiff's RFI.

[Inadequate Response to RFI]

While Defendant provided Plaintiff with the identity of the owner of the loan, it did not provide Plaintiff with either "the address or other relevant contact information" for the owner of the loan, as requested by Plaintiff. Its response to Plaintiff's RFI was therefore insufficient under RESPA and Regulation X. Because Defendant's response was insufficient, the Court need not address whether Defendant's response was timely.

Fox v. Manley, Deas, & Kochalski, LLC, Dist. Court, ND Illinois October 19, 2016
https://scholar.google.com/scholar_case?case=16015303892432014332&q=Fox+V+Manley&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

[Moving forward with attempt at sale after TPP in place violation 1024.41]

But the alleged conduct by Seterus goes beyond the sort of incidental conduct to a prior foreclosure judgment that is permitted under the CFPB's commentary. The company did not merely publish notice of an already-scheduled foreclosure but actively participated in rescheduling the foreclosure after Fox took unilateral action to prevent the initial sale from taking place. Fox alleges Seterus was considering offering Fox a permanent loan modification while at the same time it was ensuring that a new foreclosure date was on the calendar. This is exactly the sort of dual tracking that § 1024.41(g) prohibits. Even if Seterus's actions did not directly result in a sale, the actions *would* have caused a sale had Fox not taken action on her own to obtain a stay. Seterus is not permitted to evade RESPA liability purely because of the borrower's unilateral steps to thwart a foreclosure sale. *See Lindsay v. Rushmore Loan Mgmt.,* No. PWG-15-1031, 2016 WL 1169957, at *2 (D. Md. Mar. 25, 2016) (denying the defendant's motion to dismiss a § 1024.41(g) claim when "the only reason why the sale was cancelled was because Plaintiffs requested and received an emergency stay").

By alleging that Seterus was engaged in conduct that would cause a foreclosure sale, even after the borrower had complied with the TPP, Fox sufficiently stated a claim under § 1024.41(g). Seterus's motion to dismiss the RESPA claims is denied.

Dixon v. Ocwen Loan Servicing, LLC, Dist. Court, ND Texas October 24, 2016

https://scholar.google.com/scholar_case?case=15366183493147700286&q=dixon+v+ocwen&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

[Pleading Failure to Receive Statements under TILA is enough]

Lastly, the defendants contend that the Dixons' TILA claim should be dismissed because the Dixons pled that they did not "receive" monthly statements rather than pleading that the defendants did not "transmit" the statements, as § 1638(f) states. *See* Reply at 5-6. However, this minor discrepancy does not render the Dixons' claim implausible. Rather, taking the Dixons' allegations as true, the court can reasonably infer that the defendants failed to transmit the statements. See *Iqbal,* 556 U.S. at 678 ("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."). Therefore, the defendants' motion is denied as to this claim.

Block v. Seneca Mortgage Servicing, Dist. Court D. New Jersey, October 31, 2016

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[Trial Modification Offer]

Accordingly, it is not a reasonable reading of the TMA to find, as Defendants suggest, that this provision gave Defendant unbridled discretion to deny Plaintiff a permanent modification for any reason, unrelated to her financial wherewithal, so as to make the existence of the TMA dependent upon Defendant's action and render the provision illusory. Defendant promised to provide a permanent modification if certain conditions were met by Plaintiff. Furthermore, Plaintiff has alleged in her Complaint that "[d]uring the Trial Modification Agreement payment period, Plaintiff did not experience a material adverse change in her financial status or any other change in circumstances that rendered Plaintiff ineligible for a permanent modification." Compl. ¶ 29. On this motion to dismiss, the Court must accept Plaintiff's allegation as true.

[FDCPA Claim]

Furthermore, the Third Circuit's FDCPA jurisprudence dictates that because the "least sophisticated debtor" is an objective standard, the determination of how debt collection communications would be perceived by the "least sophisticated debtor" is a matter of law, which can be decided on a motion to dismiss. *See* *Wilson,* 225 F.3d at 353 n. 2; *Caprio,* 709 F.3d at 147; *see also* *Bodine v. First Nat'l Collection Bureau, Inc.,* No. 10-CV-2472, 2010 WL 5149847, at *2 (D.N.J. Dec. 13, 2010) (citing *Wilson,* 225 F.3d at 353 n. 2) ("The question of whether a collection letter or notice violates the provisions of the FDCPA is a question of law to be determined by the Court.").

Plaintiff has alleged that she received monthly statements from Defendant Ocwen with erroneous information concerning the interest owed on her loan and the tax and insurance escrows on her loan, and providing information about the amount due on her loan. Under the Third Circuit's broad standard, these statements are therefore communications in connection with a debt as they provide information concerning Plaintiff's loan payments and seek to induce Plaintiff's payment thereof. The most recent court to address this question in this District found the same. In *Langley v. Statebridge Co., LLC,* "Defendant assert[ed] that the conduct that Plaintiff complainp[ed] about, the transmission of a monthly account statement, is not the type of activity that Congress sought to prevent when adopting the FDCPA." No. CIV.A. 14-6366 JLL, 2014 WL 7336787, at *2 (D.N.J. Dec. 22, 2014). The district court disagreed, finding that "[a] debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate. Here, Plaintiff has sufficiently alleged that the statements sent by Defendant violated the FDCPA by making false statements as to the amount owed upon the debt." *Langley,* 2014 WL 7336787, at *3 (quotation omitted). Similarly, accepting Plaintiff's allegations as true on this motion, this Court finds that Ocwen's monthly statements to Plaintiff are subject to the FDCPA. Plaintiff, however, will still need to prove any alleged misrepresentation on the merits.

Plouffe v. Bayview Loan Servicing, LLC Dist. Court, ED PA, October 31, 2016

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Plouffe's amended complaint contains sufficient information to conclude that Defendants are debt collectors under the FDCPA. The amended complaint alleges Bayview repeatedly represented that it was a debt collector for purposes of the FDCPA. Plouffe has also produced letters sent from Bayview to Plouffe indicating that Bayview is acting on behalf of M & T Bank to collect a debt. (Doc. No. 25 at 9-14). Defendants rely on case law holding that mortgage lenders and servicers are not considered debt collectors under the FDCPA. Although this is sometimes the case, it is far from an absolute truth. To be sure, a lender or servicer will be considered a debt collector if the

mortgage at issue was already in default at the time the servicer or lender began servicing the loan. E.g., Pollice, 225 F.3d at 403 ("[A]n assignee of an obligation is not a `debt collector' if the obligation is not in default at the time of the assignment; conversely, an assignee may be deemed a `debt collector' if the obligation is already in default when it is assigned"); Conklin v. Purcell, Krug & Haller, Civ. Action No. 1:05-CV-1726, 2007 WL 404047, at *5 (M.D. Pa. Feb. 1, 2007) (noting same); Owens v. JP Morgan Chase Bank, Civ. Action No. 12-1081, 2013 WL 2033149, at *3 (W.D. Pa. May 14, 2013) (same). That is the case here. Plouffe's amended complaint clearly alleges that Bayview began servicing his mortgage at a time when Plouffe was already in default on that mortgage. (Am. Compl. ¶¶ 13-16). It also states that Defendants continuously misrepresented whether M & T or Bayview serviced the mortgage. (Id. ¶¶ 62-64). Therefore, Plouffe has sufficiently alleged that Defendants are debt collectors for purposes of the FDCPA.

Dionne v. Federal National Mortgage Association, Dist. Court D. New Hampshire, November 21, 2016.

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The Dionnes' case is clearly different than the situations in Garmou and Lage. In those cases, the servicer postponed the foreclosure sale after receiving the borrower's complete loss mitigation application. At the time the servicer received the complete application, a foreclosure sale was scheduled to occur in 37 days or less. Here, however, Chase cancelled the foreclosure sale before receiving the Dionnes' complete application on October 17, 2014. Although the foreclosure sale was originally scheduled for October 1, 2014, that date passed without a sale occurring.

Pursuant to § 1024.41(b)(3), the determination of the application's timeliness for RESPA purposes had to be made as of October 17. On that date, no foreclosure sale was scheduled to occur in 37 days or less and, in fact, there was no pending foreclosure sale as of that date. The court therefore rejects defendants' argument that even if the Dionnes submitted a complete loss mitigation application on October 17, it was untimely under RESPA.

Accordingly, defendants are not entitled to summary judgment on the Dionnes' RESPA claim based on § 1024.41(c)…

…In addition, defendants do not cite, and the court is not aware of, any authority for the proposition that a complete loss mitigation application is rendered incomplete as a matter of law when the lender later discovers that part of the application was inaccurate when submitted.[8] RESPA states that an application is complete when a servicer receives all the information it requires from a borrower, but says nothing about the accuracy of such information. See § 1024.41(b)(1). Further, defendants provide no authority to support the conclusion that a borrower has a duty to correct information that becomes outdated while an application is pending, or that such mistakes or misrepresentations render an otherwise complete application incomplete for purposes of RESPA.[9]

Chase first learned that Denise's employment information in the application was not current during discovery in this case. When the application was submitted, therefore, Chase had no reason to question the employment information. Defendants have not shown that misrepresentations or mistakes related to Denise's employment status that it learned of years later excuse its failure to act in accordance with RESPA.

Martins v. Wells Fargo Bank NA Dist Court D. Maryland, December 5, 2016

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"RESPA is a consumer protection statute," *Hardy v. Regions Mortg., Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006), and should be liberally construed to most effectively advance Congress's intent, *see* *McLean v. GMAC Mortg. Corp.*, 398 F. App'x 467, 471 (11th Cir. 2010) (per curiam); *cf.* *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 985-86, n. 5 (6th Cir. 2009) (stating that because RESPA is a "remedial statute[]," it "should be construed broadly to extend coverage and [its] exclusions or exceptions should be construed narrowly"). Thus, to the extent possible, courts should allow borrowers some flexibility with respect to their requests for information, and perfect compliance is not necessarily required.

In Re Wiggins v. Hudson City Savings Bank, Bankr. Court, D. New Jersey, December 6, 2016

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33. The denial letter identifies Hudson City Savings Bank as the investor and sets forth three separate loss mitigation programs for which Plaintiffs were reviewed: (1) loan modification; (2) cap to reinstate; and (3) repayment plan. (Amended Complaint, Ex. A).

34. In regard to the loan modification and cap to reinstate programs, the letter states that Wells Fargo did "not have the contractual authority to modify [Plaintiffs'] loan because of limitations in our servicing agreement." In a subsequent letter dated May 12, 2015, (Amended Complaint, Ex. F), Wells Fargo also indicated that Plaintiffs could not qualify for a loan modification "that met investor guidelines." The Court agrees with Plaintiffs' contention that these responses may lack the specificity required by 12 C.F.R. § 1024.41 and the Bureau's guidelines. Thus, it cannot conclude that claims based on these responses would be futile under 12 C.F.R. § 1024.41.

Alford v. JP Morgan Chase Bank NA, Dist. Court ND California, December 22, 2016

https://scholar.google.com/scholar_case?case=5154775670201997408&q=alford+v.+chase&hl=en&as_sdt=3,36

1. Chase's motion to dismiss Plaintiff's entire complaint for failure to allege actual damages is DENIED. Plaintiff alleges that as a result of Chase's improper attempts to collect over $6,000 in delinquent taxes that Plaintiff did not owe and Chase'ssubsequent credit to Plaintiff's escrow account, Plaintiff was forced "to pay an additional $6,000.00 in income taxes." Dkt. No. 1 ("Compl.") ¶ 45. Chase fails to cite any authority in support of its argument that such damages are "de minimis and overly speculative in nature." *See* Dkt. No. 12 at 5 n. 6. Accordingly, the Court finds that these allegations sufficiently allege actual damages for each of Plaintiff's claims.

2. Chase's motion to dismiss Plaintiff's RESPA claim is DENIED. Even if Chase eventually corrected the alleged error by crediting Plaintiff's account, Plaintiff alleges that Chase did not credit his escrow account until almost two years after he submitted his first notice of error. *See* Compl. ¶¶ 12-15, 44.

This length of time is far longer than the forty-five business days RESPA permits loan servicers to correct any errors. *See* 12 C.F.R. § 1024.35(e) (1)(i)(A)). Similarly, even if Chaseresearched Plaintiff's complaint for months, the Court cannot determine at this stage whether Chase conducted a "reasonable investigation" in response to Plaintiff's notice of error as alternatively required by RESPA. *See* 12 C.F.R. § 1024.35(e)(1)(i)(B). This is especially true in light of Plaintiff's allegations that Chase initially informed him that the delinquent taxes were owed for the years 2007, 2008, and 2009, and later represented that the delinquent taxes were for only the 2008 tax year. *See* Compl. ¶¶ 15, 21; *see also Guccione v. JPMorgan Chase Bank, N.A.,* No. 3:14-CV-04587 LB, 2015 WL 1968114, at *12 (N.D. Cal. May 1, 2015) (finding contradictory explanations sufficient to allege a violation of section 1024.35(e)(1)(i)(B)); *Wilson v. Bank of Am., N.A.,* 48 F. Supp. 3d 787, 805 (E.D. Pa. 2014). The Court finds that Plaintiff has adequately pled a RESPA violation at the pleading stage.

[RFDCPA]

The motion to dismiss Plaintiff's RFDCPA claim is DENIED. "As a number of courts have recognized, the definition of `debt collector' is broader under the [RFDCPA] than it is under the FDCPA, as the latter excludes creditors collecting on their own debts." *Reyes v. Wells Fargo Bank, N.A.,* No. C-10-01667 JCS, 2011 WL 30759, at *19 (N.D. Cal. Jan. 3, 2011) (collecting cases). Plaintiff's allegations plausibly support a finding that Chase was acting as a "debt collector" under the RFDCPA, which broadly and unambiguously defines the term as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." Cal. Civ.Code § 1788.2(c); *see also Guccione,* 2015 WL 1968114, at *14 (N.D. Cal. May 1, 2015) (finding Chase a debt collector under the RFDCPA's "broad definitions"). Moreover, while courts in this district have found that "foreclosing on a property pursuant to a deed of trust is not the collection of a debt within the meaning of the RFDCPA," *Rosal v. First Fed. Bank of California,* 671 F. Supp. 2d 1111, 1135 (N.D. Cal. 2009), at least one court has distinguished between "improper billing and collection practices" and "foreclosure." *See Guccione,* 2015 WL 1968114, at *13 (N.D. Cal. May 1, 2015); *see also Reyes,* 2011 WL 30759, at *19 (N.D. Cal. Jan. 3, 2011) (recognizing that "[w]here the claim arises out of debt collection activities `beyond the scope of the ordinary foreclosure process,' however, a remedy may be available under the Rosenthal Act"). Here, Plaintiff alleges that Chase engaged in "improper billing and collection practices" when it attempted to collect over $6,000 in allegedly delinquent taxes that Plaintiff did not owe, not that Chase attempted to foreclose on Plaintiff's home. *See generally* Compl. As such, the Court finds that Plaintiff has adequately pled that Chase acted as a "debt collector" collecting a "debt" under the RFDCPA.

Rodrigues v. Wells Fargo Bank NA, Dist. Court D. New Jersey, December 23, 2016

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Here, the State Action challenged the validity and assignment of the mortgage, claimed that it violated federal HUD regulations and RESPA, and sought rescission. To some degree, then, it appears that Mr. Rodrigues may be asserting some of the same matters in this Federal Action. To the extent he is, this Court would lack jurisdiction.

It does not appear to me, however, that this Court lacks all jurisdiction. This Court could find in Mr. Rodrigues's favor on at least some of his federal court claims without disturbing the basis of the State

Action. Satisfied that I possess subject matter jurisdiction, then, I proceed to consider the defendants' non-jurisdictional challenges to the complaint, such as *res judicata* or the statute of limitations.

Heyer v. Pierce & Associates, PC Dist. Court ND Illinois, January 9, 2017

https://scholar.google.com/scholar_case?case=16890267759475474912&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Pierce contends that the Notice of Sale is unlike the communications at issue in *Gburek* and *Melnarowicz* because it said nothing about settlement or repayment options. (Doc. 83, at 14, 15). While not every filing in a foreclosure case will automatically meet the "in connection with" standard, the Notice here constituted an attempt to sell the Property, and the entire purpose of the sale was to collect on Plaintiff's mortgage debt. 735 ILCS 5/15-1507(c). Viewed objectively, given the purpose of the sale referenced in the Notice, combined with the fact that Plaintiff's only relationship with Pierce was in the context of debt collection, this Court is satisfied that the Notice was sent "in connection with" an attempt to collect a debt.

Pierce disagrees, claiming that the Notice purportedly "addressed the public at large" as opposed to Plaintiff in particular. (Doc. 83, at 13, 15). There is no dispute, however, that Pierce mailed the Notice directly to Plaintiff, and that it contains language addressed to him as the mortgagor: "IF YOU ARE THE MORTGAGOR (HOMEOWNER), YOU HAVE THE RIGHT TO REMAIN IN POSSESSION FOR 30 DAYS AFTER ENTRY OF AN ORDER OF POSSESSION, IN ACCORDANCE WITH SECTION 15-1701(C) OF THE ILLINOIS MORTGAGE FORECLOSURE ACT." (Doc. 73-2, at 15, 16). Pierce's motion for summary judgment on the "in connection with" element of Plaintiff's Section 1692e(11) claim is denied.[5]

2017

Harry V. American Brokers Conduit Dist. Court D. Massachusetts January, 12, 2017

https://scholar.google.com/scholar_case?case=7542939372765565567&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

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. Inc.*,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).

Sutton v. CitMortgage, Inc., Dist. Court SD New York, January 12, 2017

https://scholar.google.com/scholar_case?case=3544805869386631957&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

At base, Plaintiff seeks to use RESPA and Regulation X to renegotiate her loan modification. That is, Plaintiff is not contending that Defendant acted in derogation of the modification agreement she executed in October 2013; instead, she contends that the modification was itself implemented in error because it lacked a term extension. Framing her claims in the language of RESPA, Plaintiff faults Defendant for not sufficiently responding to her requests for information concerning why a term extension was not included in her loan modification (i.e., not substantiating SASCO's refusal to include a term extension), and for not "correcting" the error of failing to include a term extension. (*See* FAC ¶¶ 76-84). Plaintiff has very carefully pled the FAC in an effort to circumvent various RESPA provisions that foreclose a private right of action for certain claims; ultimately, the Court concludes that Plaintiff's pleading gambit is unsuccessful, and grants Defendant's motion to dismiss...

…For its part, the CFBP has stated that "regulations established pursuant to section 6 of RESPA are subject to section 6(f) of RESPA, which provides borrowers a private right of action to enforce such regulations." *Mortgage Servicing Rules,* 78 Fed. Reg. at 10714 n.64. The Court will assume, for purposes of this motion, that such a private right of action exists, given the CFPB's statements, the remedial purposes of RESPA and Regulation X, and the provision of a private right of action in 12 U.S.C. § 2605(k)(1)(E) (through § 2605(f)), for "fail[ures] to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter").

Johnson v. Specialized Loan Servicing, LLC, Dist. Court MD Florida, Jacksonville Division, January 17, 2017

To the extent that Defendants assert that a mortgage subject to HAMP guidelines is not subject to a RESPA claim, a review of case law suggests otherwise.3 See, e.9., Thomason v. OneWest Bank, FSB, 596 F. App'x 736, 739-740 (11ih Cu.2014) (flnding that the plaintiff sufficiently pled RESPA claim where HAMP claim was properly dismissed); Stroman v. Bank of Am. Corp., 852 F.

Supp. 2d 1266, 1372-74 (N.D. Ga. 2012) (same): Collins v. BAC Home Loans, No.2:12-cv-3721-1SC, 2013 WL 2249123, at.3-6 (N.D. Ala. May 21,2013) (same). As such, the Court rejects Defendants' argument that the RESPA claim must be dismissed because HAMP does not provide a private cause of action.

ln order to recover statutory damages under RESPA, a plaintiff must show "a pattern or practice of noncompliance." 12 U.S.C. S 2605(fX1XB). "The courts have interpreted the term "pattern or practice" in accordance with the usual meaning of the words." McLean,595 F. Supp. 2d at 1365. "ln another context, a 'pattern or practice' has been defined as a 'standard operating procedure-the regular rather than the unusual practice."' Refroe v. Nationstar Mort., LLC,822 F .3d 1241, 1247 (11th Cir. 2016) (citing lnt'l Brotherhood of Teamsters v. United Sfafes, 431 U.S. 324, 336 (1977)). Although there is no magic number of violations that create a "pattern or practice of noncompliance," the

Eleventh Circuit has deemed five violations adequate to plead statutory damages. Renfroe, 822 F .3d al 1247 48.

Here, Plaintiff cites Renfroe in support of her position that she adequately pled statutory damages under RESPA because she has alleged five separate RESPA violations. The problem with her argument, however, is that Renlroe also adopted the Tenth Circuit's holding that a plaintiff must allege some RESPA violations "with respect to other borrowers." Renfroe,822 F.3d al 1247 (citing Toonev. Wells Fargo Bank, N.A.,716 F.3d 516,523 (10th Cir.2013))(emphasis added). Here, Plaintiff has not alleged anyviolations with respect to other borrowers. Plaintiff has only alleged "a pattern and practice of noncompliance with Regulation X of [RESPA] in connection with [her] loan." (Doc. 18-2 at7 (emphasis added).) Thus, under the Eleventh Circuit's reasoning in Renfroe, Plaintiff has not alleged an impermissible "standard or routine way of operating," and has not stated a plausible claim for statutory damages. See Mclean, 595 F. Supp. 2d at 1365. Defendants' request to dismiss Plaintiff s statutory damages claim is due to be granted and the claim is due to be dismissed without prejudice.

Timlick v. Bank of America, NA Dist. Court WD Washington, Tacoma January 17, 2017

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RCS moves to dismiss Timlick's RESPA claim. Dkt. 14 at 22-24. First, RCS argues that Timlick's Notice of Error is not a proper correspondence under RESPA and, even if it was, RCS timely responded on October 26, 2016. *Id.* Timlick, however, alleges as follows:
RCS violated RESPA for failing to timely respond to Plaintiff's Notice of Error issued in September 2015. When RCS finally responded in November of 2015, it failed to conduct a reasonable investigation into the items requested as evidenced by RCS' conclusory statement that "RCS is under no obligation to provide you with proof or documents."
Dkt. 1, ¶ 98. The Court finds that these allegations are sufficient to state a claim that RCS violated both the 30-day response rule as well as the duty to perform a reasonable investigation. *See* 12 C.F.R. § 1024.35(e).
Second, RCS argues that Timlick failed to allege damages. Dkt. 14 at 24. Timlick, however, has alleged that "RCS has deprived Plaintiff the opportunity to correct any errors in the Loan and precluded any effort by her to address the payment obligations under the loan documents." Dkt. 1, ¶ 99. The Court finds that this allegation is sufficient to withstand RCS's motion. Therefore, the Court denies RCS's motion on this issue.

Vicks v. Ocwen Loan Servicing, Court of Appeals, 4th Circuit, January 25, 2017

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Here, Appellants' first four claims for relief seek either a declaration that Appellee has no rights to the loan proceeds or damages against Appellee for violations of the Real Estate Settlement Procedures Act ("RESPA"), see 12 C.F.R. § 1024.35 (2016), and several provisions of North Carolina state law. While success on these claims could call into question the validity of the state court's May 2011 order authorizing foreclosure, the claims do not seek appellate review of that order or fairly allege injury caused by the state court in entering that order. We therefore conclude that the district court erred in applying the Rooker-Feldman doctrine to bar Appellants' claims. Further, while we are not precluded from affirming the dismissal of these claims on alternative grounds,

see Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), upon review of the record and the parties' submissions on appeal, we conclude that prudence counsels in favor of reserving further judgment on the propriety of Appellants' claims to the district court in the first instance. We therefore vacate the district court's dismissal of Appellants' first four claims for relief and remand for further proceedings.

Kelmetis v. Federal National Mortgage Association, Dist. Court ND New York, January 27, 2017.

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Since *Younger* does not bar claims for damages, the Court next considers Plaintiff's claims under TILA and RESPA.

Ogebar v. JP Morgan Chase, Dist Court D. New Jersey, February 7, 2017.

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With respect to Count Three, Plaintiffs allege that the M&T Defendants did not provide Plaintiffs with loss mitigation options prior to the sale of the Residential Property, and that the M&T Defendants scheduled and conducted the Sheriff's Sale, even though Plaintiffs had a loss mitigation application pending with Bayview. Unlike the other Counts, Plaintiffs' RESPA claim stands on different footing, since it does not challenge either the validity of the underlying mortgage or Chase's right to foreclose. See Great W. Mining & Mineral Co., 615 F.3d at 166 (stating that the Rooker-Feldman doctrine does not bar claims where the source of the injury is the defendant's action, not the state court judgment); see also Siljee v. Atl. Stewardship Bank, 2016 WL 2770806, at *5 (concluding that the Rooker-Feldman doctrine did not bar the RESPA claim because "noncompliance with RESPA does not implicate the validity of the mortgage or Atlantic's standing. It is not inconsistent with the existence of a final judgment of foreclosure."). Indeed, Plaintiffs allege that the conduct of the M&T Defendants occurred after the judgment of foreclosure was entered. Accordingly, Plaintiffs' RESPA claim is not barred under the Rooker-Feldman doctrine, because the source of injury is not the foreclosure action, nor is the claim inextricably intertwined with the state court judgment.

Nevertheless, with respect to Count Three, Plaintiffs' RESPA claim does not arise out of the mortgage transaction that was the subject of the state foreclosure action; rather, Plaintiffs accuse the M&T Defendants of violating RESPA after the judgment of foreclosure occurred, but before the sale of the Residential Property. In particular, Plaintiffs' claim against the M&T Defendants arise from Plaintiffs' submission of a loss mitigation application and the scheduling and conducting of the Sheriff's Sale. Clearly, the RESPA claim was unknown and unaccrued when the state court entered the uncontested foreclosure judgment. In re Mullarkey, 536 F.3d at 229. As a result, Plaintiffs did not have an opportunity to assert the RESPA claim in the state court action based on that conduct. See Heir, 218 F. Supp. 2d at 636; see also Great W. Mining & Mineral Co., 882 F. Supp. 2d at 761 (stating that "the entire controversy doctrine should not be applied when "joinder would result in significant unfairness [to the litigants] or jeopardy to a clear presentation of the issues and just result.") (internal quotation marks and citation omitted) (alteration in original). Accordingly, the entire controversy doctrine does not bar the RESPA claim against the M&T Defendants in Count Three.[17]

Blake v. Seterus Inc, Dist. Court SD Florida, February 9, 2017

https://scholar.google.com/scholar_case?case=2513823698567027610&q=blake+v+seterus&hl=en&as_sdt=6,36

However, the cases Defendant relies upon are distinguishable from the instant matter. Specifically, the estimated costs delineated in the *Sandoval* and *Prescott* reinstatement letters attributed each estimated cost to a specific expense, such as estimated attorney's fees or property inspection fees. Here, in addition to itemizing amounts for estimated attorney, broker, and property inspection fees, Defendant's letters included amounts simply labeled "other estimated costs," without any further explanation.[3] Given the distinction between the reinstatement letter in the instant case and those in the cases relied upon by Defendant, the Court finds that, viewing the facts in the light most favorable to the Plaintiff, Defendant's Motion to Dismiss on the RESPA claim must be denied.

Kilpatrick v. Ocwen Loan Servicing, LLC Dist. Court, SD Florida February 10, 2017

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As described in the case law and above, a RESPA claim for failure to respond to a QWR requires that a Plaintiff sufficiently allege: "(1) Defendant is a loan servicer; (2) Defendant received a QWR from Plaintiff; (3) the QWR relates to servicing of [a] mortgage loan; (4) Defendant failed to respond adequately; and (5) Plaintiff is entitled to actual or statutory damages." *Porciello,* 2015 WL 899942, at *3. Plaintiff has done so, alleging that an RFI was mailed and that a certified mail receipt provides a means to confirm the date of receipt. Based on the foregoing, the Court denies Defendant's Motion to Dismiss on failure to allege that the RFI was sent to Defendant's designated address for customer inquiries.

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Pacifico v. Nationstar Mortgage LLC, Dist. Court E.D. Michigan, Southern Division, February 10, 2017

https://scholar.google.com/scholar_case?case=13016665250768607 32&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

…And in order to survive Nationstar's motion to dismiss, Pacifico was required to allege "facts which would establish actual damages or a pattern or practice of non-compliance." *Id. See also Servantes v. Caliber Home Loans, Inc.*, No. 14-CV-13324, 2014 WL 6986414, at *1 (E.D. Mich. Dec. 10, 2014) ("To the extent Plaintiffs may wish to proceed with a RESPA claim for monetary damages only, the Court dismisses the claim because Plaintiffs have not alleged that Defendant's alleged violations . . . resulted in actual damages.").

Here, Pacifico requests "all damages to which she is entitled under RESPA, including emotional damages, elimination of all arrearage added to [her] mortgage loan that resulted from [Nationstar's] illegal activity, and costs and attorney fees." [ECF No. 1-2, PageID 21]. Pacifico failed to allege her

claim for emotional damages with sufficient particularity. *Austerberry,* 2015 WL 8031857, at *7. However, Pacifico's request for "elimination of all arrearage added to [her] mortgage loan that resulted from [Nationstar's] illegal activity, and costs and attorney fees" are a "valid claim for actual damages under RESPA." *Id.* On this ground, Pacifico's claim on should survive defendants' motion to dismiss.[2]

Wick v. GreenPoint Mortgage Funding, Inc. Dist. Court ND Ohio , February 10, 2017

https://scholar.google.com/scholar_case?case=14758245701012098237&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Under the facts and circumstances in this case, Plaintiffs have presented sufficient evidence to rebut the presumption of delivery of the disclosures required under TILA. The question of whether the Wicks' Notice of Rescission was timely depends on whether or not GreenPoint complied with TILA's disclosure requirements, which is disputed by the Parties. Likewise, genuine issues of material fact persist with regard to the circumstances under which the loan documents were executed; the alleged TILA violations committed at closing; and, the relationship of James Chapman/Precision Funding and Greenpoint, all of which are relevant to a determination as to whether GreenPoint violated TILA when it rejected the Wicks' attempted loan rescission. Accordingly, GreenPoint's Motion for Summary Judgment is denied as to the TILA claim asserted by John and Shirley Wick.

Cole v. Federal National Mortgage Associsation, Dist. Court D. Maryland, February 13, 2017

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[TILA]

Here, Defendants argue that Plaintiff did not allege she was improperly charged a fee or that her mortgage was "a high-cost mortgage," warranting dismissal of her claims as a matter of law. As Plaintiff correctly points out, however, she is not required to allege an improper fee or a high-cost mortgage to bring a claim under this subsection. *See Aghazu,* 2016 WL 808823, at *5 (noting that "[a] mortgage loan servicer's failure to provide accurate payoff figures when asked may . . . provide the basis of a TILA claim by a mortgage loan consumer."): *Lucien v. Fed. Nat. Mortg. Ass'n,* 21 F. Supp. 3d 1379, 1384 (S.D. Fla. 2014) (noting that "§ 1639 does not have a blanket provision stating that it applies only to high-cost mortgages" and declining to dismiss plaintiff's claim on this basis). Hence, Defendants' Motion to Dismiss this claim is denied.

[RESPA]

Additionally, 12 U.S.C. § 2605(e) provides for a grace period protecting a borrower's credit rating after a servicer receives a QWR:

> During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower

> and relating to such period or qualified written request, to any consumer reporting agency.

12 U.S.C. § 2605(e)(3). Plaintiff claims that Defendants violated this provision by "providing information to credit reporting agencies regarding delinquent and/or overdue payments owed by Plaintiff during the sixty (60) day period following Seterus' receipt of Plaintiff's `qualified written requests.'" ECF No. 17 ¶ 84. Defendants' argument on this point once again relates to whether Plaintiff's requests qualified as QWRs. As the Court has already determined that Plaintiff's requests did qualify as QWRs. Defendants' Motion to Dismiss Plaintiffs' claim pursuant to 12 U.S.C. § 2605(e) is denied.

Reed v. Select Portfolio Servicing, Inc. Dist. Court ED Tennessee February 16, 2017

https://scholar.google.com/scholar_case?case=2392225066282320788&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Section 1024.41 preserves a borrower's right, before a foreclosure sale, to submit and have a servicer review a "loss mitigation application," 12 C.F.R. § 1024.41(b), which is a request for an alternative to foreclosure that the servicer may make available to the borrower, *id.* § 1024.31. To invoke this right, a borrower must submit a complete loss mitigation application to the servicer more than thirty-seven days before a foreclosure sale is scheduled. *Id.* § 1024.41(c)(1). If a borrower meets this criterion, a servicer must notify the borrower within thirty days "of which loss mitigation options, if any, it will offer to the borrower." *Id.* § 1024.41(c)(1)(ii). A borrower may bring suit under 12 U.S.C. § 2605(f), the Real Estate Settlement Procedures Act ("RESPA"), if a servicer violates § 1024.41's loss mitigation provisions. *Id.* § 1024.41(a).[5] Select Portfolio moves the Court to dismiss the alleged violation of § 1024.41 because Ms. Reed "does not allege that she ever submitted an application." [Def.'s Br. at 7].

The Court disagrees. In paragraph seventeen, Ms. Reed alleges that she did make a request for loss mitigation and that Select Portfolio, without completing the necessary review, initiated proceedings for the foreclosure of her home: "[Select Portfolio] fail[ed] to properly review Ms. [Reed's] request for loss mitigation, [and Select Portfolio] proceeded with a non-judicial foreclosure sale of her home." Incidentally, Ms. Reed raises this same allegation in her claim for wrongful foreclosure: "[Select Portfolio] . . . refus[ed] to evaluate the borrower's request for loss mitigation relief." [Am. Compl. ¶ 29]. Because the Court is bound to accept as true Ms. Reed's allegations in paragraph seventeen, it must refrain from dismissing the claim.

O'Steen v. Wells Fargo Bank NA Dist. Court MD Florida, March 1, 2017

https://scholar.google.com/scholar_case?case=14571153285134431131&q=o%27steen+v+wells+fargo&hl=en&as_sdt=6,36

Rushmore's argument is not so much that an issue is not in controversy as much as it is that the Amended Complaint fails to sufficiently plead facts showing a plausible claim to relief. A fair reading of the Amended Complaint shows that there is an extant controversy between the parties with respect to whether Rushmore violated RESPA and breached a contract. Whether Rushmore's actions or inactions actually violated RESPA or whether a contract actually existed remains to be seen. But for now, at this preliminary stage, Count VI is sufficient to survive Rushmore's Motion.

Neto v. Rushmore Loan Management Services, LLC Dist. Court D. Maryland, March 7, 2017

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Defendants next argue that Plaintiff's claims are barred under the *Rooker-Feldman* doctrine…

…Here the relevant state court judgment is the foreclosure and sale of Plaintiff's former property. Although Defendants argue that Plaintiff is merely mounting a collateral attack on the foreclosure sale, Plaintiff maintains that "the state court judgment is not the source of the injury" here; rather, the injury he alleges is that Defendants "knowingly and intentionally" violated RESPA. (ECF No. 7, at 14). As discussed above, Plaintiff is not challenging the foreclosure sale, but rather the "fraudulent denial" of his loan modification and the corresponding monetary losses due to the rejection of his loan modification application. (ECF No. 1 ¶ 42). Because the harm alleged is distinct from the foreclosure judgment, Plaintiff's claim is not barred under the *Rooker-Feldman* doctrine.

McCann v. Rushmore Loan Management Services, LLC, Dist. Court, ED New York March 16, 2017
https://scholar.google.com/scholar_case?case=13312961962042407006&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Rooker Feldman Does Not Apply]

In the current case, the Court finds that Plaintiffs claims under RESPA are independent from the state court judgment of foreclosure and thus subject matter jurisdiction exists. Plaintiff seeks only money damages for the actions or inactions of the loan servicer, Rushmore, and does not seek to challenge or overturn the foreclosure order. Moreover, a finding by this Court that Plaintiff is entitled to money damages from Rushmore would not necessarily challenge the state court's decision regarding the Foreclosure Action or require a finding on the merits of the state court's decision.[2] Accordingly, Defendant's motion to dismiss pursuant to Rule 12 (b)(1) is denied.

Gray v. CitiMORTGAGE, INC., Dist. Court, ED Michigan March 21, 2017

https://scholar.google.com/scholar_case?case=16965552080050001119&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

This Court already has confronted the issue of a complaint's plausibility vis-à-vis a 31% housing-expense-to-income ratio (albeit the 31% ratio that was applicable to HAMP modifications, not a bank's in-house loan modification policies). In Maraulo v. CitiMortgage, Inc., No. 12-CV-10250, 2013 WL 530944, at *10 (E.D. Mich. Feb. 11, 2013) (Goldsmith, J.), this Court stated as follows:

Plaintiffs have alleged that their housing debt was more than 31% of their combined gross income, and that this qualified them for HAMP. . . . These facts are specific and rise above the level of conclusory allegations. If this Court accepts them as true, then CitiMortgage failed to meet its requirement of offering in good faith a loan modification program. . . . The Court concludes that the allegations in Count 2 are sufficiently specific to state a claim and to put Defendants on notice of the claim. Therefore, Defendant's motion to dismiss for failure to state a claim is denied.[3]

The amended complaint in Maraulo, like the amended complaint in this case, never quantified the plaintiffs' income or their monthly combined housing expenses. Furthermore, relying only on Iqbal and Twombley, CMI provides no context-specific argument or authority demonstrating that Gray's pleadings are insufficient.

Moreover, Gray states that CMI modified his monthly payment by $300 to skew the results of its loan modification review, and that this bad-faith adjustment to his income caused the modification denial. See Am. Compl. ¶¶ 13, 16-18, 21-22. This allegation alone is sufficiently specific to create a plausible breach-of-contract claim. See also Maraulo, 2013 WL 530944, at *10 (deeming sufficient plaintiffs' allegation that a $200 surplus of expenses over income qualified the plaintiffs for an in-house modification).

In Re Jackson v. Flagstar Bank, FSB Bank. Court, S.D. Alabama, Southern Division, March 23, 2017.

https://scholar.google.com/scholar_case?case=12824566565664935148&q=Jackson+v+Flagstar,+FSB&hl=en&as_sdt=3,36&as_ylo=2017

Under Reg. X, once a loss mitigation application is complete, the servicer must, within thirty days, evaluate the borrower for all mitigation options available to him and must notify the borrower in writing which loss mitigation option(s) will be offered; the amount of time the borrower has to accept or reject the offer of mitigation; and must also inform the borrower of his right to appeal the denial of any option and the amount of time within which he must do so. § 1024.41(c)(1)(i)-(ii). Additionally, if a borrower's complete loss mitigation application is denied, the servicer must also include in that thirty-day notice the reasons why the servicer denied the application. § 1024.41(d)…

…To recap, § 1024.41(c)-(d) requires Flagstar to notify Mr. Jackson of its resolution of his loan modification application. That notification must include whether the application was approved or denied, the amount of time Mr. Jackson had to accept or reject the offer if one was given, and must inform Mr. Jackson of his right to and time within which to appeal, if his application was denied. Flagstar acknowledged these duties by way of its May 21, 2014 letter.

Flagstar admits that it never sent any written notification to Mr. Jackson that his application for a permanent loan modification was denied, (Doc. 56-2 at 6), thereby placing it in violation of § 1024.41(c) and (d). Consequently, despite sending a loss mitigation offer in the form of a forbearance plan, Flagstar also failed to notify Mr. Jackson of his right to and time within which to appeal the denial, as well as the reasons his application was denied. Therefore, this Court finds that no genuine issue of material fact exists as to Flagstar's violation of § 1024.41(c) and (d). Flagstar's Motion for Summary Judgment is therefore denied as to those allegations in Count II of Plaintiff's Second Amended Complaint; and Plaintiff's Motion for Summary Judgment on this portion of his Count II is granted.

Carson v. OCWEN LOAN SERVICING LLC, Dist. Court, D. Maine March 29, 2017

https://scholar.google.com/scholar_case?case=9954520933549622668&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[MSJ Denied to Plaintiff and Defendants]

Because the enforceability of the contract cannot be determined until the material misrepresentation issue is resolved, summary judgment is unavailable to both sides on the following claims: violation of the bankruptcy stay; violation of the bankruptcy discharge; violation of the Maine UTPA; violation of RESPA; fraud; fraudulent misrepresentation; breach of contract; and promissory estoppel. There is one exception, however. Because it is undisputed that Bank of New York was a disclosed principal, while Litton and Ocwen were only its agents, the breach of contract and promissory estoppel claims can lie only against Bank of New York.[91]

BOEDICKER v. RUSHMORE LOAN MANAGEMENT SERVICES, LLC, Dist. Court, D. Kansas April 20, 2017

https://scholar.google.com/scholar_case?q=Boedicker+v+Rushmore&hl=en&lr=lang_en&as_sdt=3,31&case=17221316530924470627&scilh=0

Rushmore argues that the regulations did not require it to provide a waterfall analysis. Dkt. 11 at 4-5. It further argues that plaintiffs do not specify how Rushmore failed to comply with the procedures required by § 1024.35. *Id.* at 5. Although plaintiffs' complaint is not a model of clarity, it alleges a plausible claim for violation of 12 CFR § 1024.35(e), which requires a servicer to respond to a notice of error either by correcting the error or by conducting a reasonable investigation, and, in either case, by providing the borrower with a written explanation of its determination. The complaint fairly alleges that plaintiffs notified Rushmore of an error in the amount of their income with respect to the HAMP determination, but that Rushmore failed to respond with the explanation required by § 1024.35(e)(1). *See* § 1024.41(b)(7) (failure to provide accurate information to a borrower regarding loss mitigation options is an error subject to this section). The motion to dismiss count 3 is therefore denied.

BERENE v. NATIONSTAR MORTGAGE LLC, Court of Appeals, 11th Circuit April 20, 2017

https://scholar.google.com/scholar_case?case=12211371957223669932&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Although Nationstar would prefer us to rigidly apply the Rooker-Feldman doctrine by considering only the facts that existed when the Appellants filed their initial federal complaint, the Supreme Court's Rooker-Feldman precedents favor a more practical approach given these unique facts. Clearly, concerns of a district court reviewing a final state-court judgment are not implicated here due to the subsequent vacatur. Indeed, the lack of a final judgment makes the present situation more akin to concurrent state and federal jurisdiction rather than federal appellate jurisdiction over a state-court judgment. Exxon, 544 U.S. at 283 ("[T]he doctrine has sometimes been construed [by district courts] to extend far beyond the contours of the Rooker and Feldman cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts. . . ."). Tellingly, if, rather than filing their operative complaint, the Appellants had simply refiled their action after the state court judgment had been vacated, the Rooker-Feldman doctrine would not prevent the district court from exercising jurisdiction over the refiled action. Rather than require Appellants to "jump through these judicial hoops merely for the sake of hypertechnical jurisdictional

purity[,]" Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837 (1989), we conclude that Appellants are not "state-court losers" for the purposes of Rooker-Feldman where they were granted leave to file and did file the operative complaint after the state court vacated its foreclosure judgment. Accordingly, we need not reach the inextricably intertwined issue. See, e.g., Lozman, 713 F.3d at 1074.

Nash v. PNC BANK, NA, Dist. Court, D. Maryland April 20, 2017

https://scholar.google.com/scholar_case?case=14472787522497071771&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Although the CFPB's commentary is not binding authority, courts have found its official interpretations to be "highly persuasive" when they fill "a gap in the text of Section 1024.41 and squarely address[] the factual situation described in the Complaint." *He v. Ocwen Loan Servicing, LLC,* No. 15-CV-4575(JS)(AKT), 2016 WL 3892405, at *2 (E.D.N.Y. July 14, 2016) (relying on the official interpretations of 12 C.F.R. § 1024.41(c) and (g)); *see also Sutton v. CitiMortgage, Inc.,*___ F. Supp. 3d ___, No. 16-Civ-1778 (KPF), 2017 WL 122989, at *6, *11 (S.D.N.Y. Jan. 12, 2017) (relying on the official interpretations of 12 C.F.R. §§ 1024.35 and 1024.36 and 12 U.S.C. § 2605(k)(1)(C)); *Zaychick v. Bank of America, NA.,* No. 9:15-CV-80336-ROSENBERG, 2015 WL 4538813, at *2 (S.D. Fla. July 27, 2015) (relying on official commentary to 12 C.F.R. §§ 1024.35 and 1024.36 found in the Amendments to the 2013 Mortgage Rules Under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 60382-01 (Oct. 1, 2013))). *Cf Ohio Valley Envtl. Coal. v. Aracoma Coal Co.,* 556 F.3d 177, 193 (4th Cir. 2009)(stating that an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation" (quoting *Auer v. Robbins,* 519 U.S. 452, 461 (1997))). One court has specifically relied on the CFPB's official interpretation of 12 C.F.R. § 1024.41(d) to allow a plaintiff to proceed with an amended complaint asserting the precise claim before this Court: that a servicer violated 12 C.F.R. 1024.41(d) by providing only a general explanation that a loan modification was denied based on a failure to meet investor guidelines. *In re Wiggins,* No. 12-26993 (JKS), 2016 WL 7115864, at *5 (Bankr. D.N.J. Dec. 6, 2016).

In light of the CFPB's guidance that the denial of a loan modification option based on an investor requirement is "insufficient" if it does not provide "the specific applicable requirement" that was not met, the Court concludes that Nash has adequately alleged that the Denial Letter's explanation for denying his HAMP loan modification "may lack the specificity required by 12 C.F.R. 1024.41(d)." *See Wiggins,* 2016 WL 7115864, at *5. Accordingly, the Motion is denied as to the alleged violation of 12 C.F.R. § 1024.41(d).

McMahon v. JPMorgan Chase Bank, NA, Dist. Court, ED California April 25, 2017

https://scholar.google.com/scholar_case?case=4825286137575633406&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

…McMahon alleges he sent "an NOE and/or RFI" on May 26, 2014, December 5, 2015, December 29, 2016, and January 20, 2017. FAC ¶ 153. SPS contends it responded to McMahon's December 5, 2015 NOE. Mot. at 8. SPS argues after it responded to McMahon's December 5 NOE, it did not need to respond to the subsequent NOEs because the assertions of error were duplicative of the December

5 NOE. Mot. at 8-9. McMahon responds that even if SPS found the asserted errors duplicative, SPS had to notify McMahon of its decision, which McMahon alleges SPS did not do.

SPS's argument ignores the plain text of the regulation, which states that a servicer has to notify a borrower in writing if the servicer determines an NOE is duplicative. 12 C.F.R. § 1024.35(g)(2). According to McMahon's allegations, SPS did not respond to his subsequent NOEs, even to tell him they were duplicative, and therefore SPS violated § 1024.35(g)(2).

The Court denies SPS's motion to dismiss McMahon's claim based on 12 C.F.R. §§ 1024.35(d), (e)…

…A servicer need not comply with this section if the information requested "is substantially the same as information previously requested by the borrower." 12 C.F.R. § 1024.36(f)(1)(i). But a servicer still has to notify the borrower of its determination that it is not required to comply with § 1024.36(d). 12 C.F.R. § 1024.36(f)(2). McMahon alleges that SPS did not send the requested information or notify McMahon that SPS did not need to send him the information. FAC ¶ 155. SPS does not dispute this allegation…

Smith v. SPECIALIZED LOAN SERVICING, LLC, Dist. Court, SD California May 3, 2017

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Here, the complaint alleges that over a period of 22 month period, Smith received seventeen allegedly unlawful letters that stated her application was under review without specifying whether her application was either complete or incomplete.[6](Dkt. No. 1, Compl. ¶ 83.) Plaintiff has sufficiently stated a "pattern or practice of noncompliance" subject to 12 U.S.C. § 2605(f)(1)(B).

Washington v. GREEN TREE SERVICING LLC, Dist. Court, SD Ohio May 5, 2017

https://scholar.google.com/scholar_case?case=4261155383492131303&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Green Tree failed to exercise reasonable diligence in violation of 12 C.F.R. § 1024.41(b)(1).

Here, it is undisputed that plaintiff submitted a loan modification application on May 6, 2014 and defendant Green Tree received it on May 9, 2014. (*See* Exh. F, Doc. 52-6; Exh. G, Doc. 52-7 at 29-30; Doc. 56-1 at 66-67). Defendant Green Tree first sent a letter to plaintiff concerning the application on May 22, 2014. (*See* Exh. I, Doc. 52-9). Thus, defendant Green Tree failed to show reasonable diligence inasmuch as it did not comply with Regulation X's requirement that a servicer "[n]otify the borrower in writing within 5 days . . . after receiving the loss mitigation application that the servicer . . . has determined that the loss mitigation application is either complete or incomplete." 12 C.F.R. § 1024.41(b)(1) and (b)(2)(i)(B). Further, similar to *Paz,* defendant Green Tree sent plaintiff a letter on May 22, 2014 stating that her application was incomplete, only to send a letter on May 30, 2014 stating the application was complete. (*See* Exh. I, Doc. 52-9; Exh. J, Doc. 52-10). Because of these deficiencies in Green Tree's handling of the loan modification application, Green Tree failed to comply with § 1024.41(b)(1)'s reasonable diligence requirement. *See Paz,* 2016 WL 3948053, at *5. Green Tree has failed to submit any evidence disputing these facts to establish a

genuine issue for trial concerning its failure to exercise reasonable diligence in handling plaintiff's loan modification application. Thus, summary judgment for plaintiff is appropriate as to this violation of Regulation X.

Motion for an order of sale violated 12 C.F.R. § 1024.41(g).

However, plaintiff has presented evidence that her application was complete when submitted on May 6, 2014 and that she did not submit any additional information after the May 22 letter before Green Tree declared her application to be complete on May 30, 2014. (*See*Exh. F, Doc. 52-6; Exh. G, Doc. 52-7 at 27; Exh. I, Doc. 52-9; Exh. J, Doc. 52-10). Thus, even though Green Tree received plaintiff's complete loss mitigation application, it moved for an order of sale on May 22, 2014 in violation of § 1024.41(g). (Exh. H, Doc. 52-8). Because defendants have not presented any argument or evidence to show there are genuine issues of material fact concerning this violation of Regulation X, summary judgment for plaintiff is appropriate as to this violation.

Green Tree violated § 1024.41(c)(1) by not providing timely notice of loss mitigation options.

Here, defendant Green Tree received plaintiff's complete loss mitigation application on May 9, 2014. (*See* Exh. F, Doc. 52-6; Exh. G, Doc. 52-7 at 27-30; Doc. 56-1 at 66-67, 72-73). However, Green Tree did not send plaintiff a letter with notice of available loss mitigation options until July 3, 2014. (Exh. K, Doc. 52-11). This notice was sent more than 30 days after Green Tree's receipt of plaintiff's complete loss mitigation application in violation of § 1024.41(c)(1)(ii). Because defendants have not presented any argument or evidence to show that there are genuine issues of material fact concerning this violation of Regulation X, summary judgment for plaintiff is appropriate as to this violation.

Green Tree violated § 1024.41(e)(2) by not providing sufficient time to accept on offer of a loss mitigation option.

On December 17, 2014, Green Tree sent plaintiff a letter indicating that she was denied a loan modification because she "failed to provide the final executed modification documents within the required time frame." (Exh. Q, Doc. 52-17). Thus, Green Tree offered plaintiff a loss mitigation option on December 4, 2014 and denied plaintiff the offered loan modification only 13 days later in violation of Green Tree's own January 3, 2015 deadline and the 14-day acceptance requirement of § 1024.41(e)(1). Further, no reasonable jury could find that Green Tree complied with § 1024.41(e)(2)(ii) when it denied plaintiff's loan modification on December 17, 2014 for failing to complete Green Tree's remaining requirements when Green Tree previously told plaintiff she had until January 3, 2015 to complete those requirements. (*See* Exh. M, Doc. 52-13; Exh. Q, Doc. 52-17).

Green Tree violated § 1024.41(g) by selling plaintiff's home at a foreclosure sale.

Despite plaintiff's efforts to complete her performance under the agreement before Green Tree's deadline, Green Tree unilaterally denied her a loan modification on December 17, 2014 for failure to complete Green Tree's requirements before the deadline for completing those requirements had expired. Thus, the failure of plaintiff to complete her performance under the agreement was attributable to Green Tree's premature denial of her modification and the third exception is not applicable. Thus, under these circumstances, Green Tree violated § 1024.41(g) by proceeding to a foreclosure sale. Because defendants have failed to identify any evidence showing that there are genuine issues of material fact concerning this violation of Regulation X, summary judgment for plaintiff is appropriate as to this violation.

Duffy v. WELLS FARGO BANK, NA, Dist. Court, D. New Jersey May 31, 2017

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Under 12 C.F.R. § 1024.41(e)(2)(i), "a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (e)(1) of this section to have rejected the offer of a loss mitigation option." Here, Plaintiffs have adequately pled a claim under § 1024.41(e) of RESPA. In their Complaint, Plaintiffs specifically allege that Wells Fargo "extended [Plaintiffs] a HAMP permanent modification agreement," which they then "accepted and executed" on multiple occasions, *i.e.,* both John Duffy and Karen Duffy signed and returned Final Agreements 1 and 2. Compl., ¶¶ 75-76. Nevertheless, as pled by Plaintiffs, Defendant erroneously "deemed the Duffys to have rejected the HAMP permanent modification pursuant to 12 C.F.R. 1024.41(e)(2)(i)." Compl., ¶ 80. While Defendant argues that Catherine did not sign Final Agreement 3, which was issued, according to Defendant, because of purported errors in the execution of the aforementioned Agreements, neither Final Agreement 1 nor 2 appear to have required Catherine's signature; indeed, the signature lines on those two agreements solely provide for the signatures of "John Duffy" and "Karen Duffy." An explanation for the discrepancy between the various versions of the agreements has not been provided by Defendant. But, at this pleading stage, Plaintiffs' allegations, if taken as true, are sufficient to establish that Defendant abused its discretion under 12 C.F.R. § 1024.41(e). *See Covington,*710 F.3d at 118 ("[A] claimant does not have to set out in detail the facts upon which he bases his claim. The pleading standard is not akin to a probability requirement; to survive a motion to dismiss, a complaint merely has to state a plausible claim for relief."). Accordingly, Plaintiffs may proceed under Count One of the Complaint.

Moreover, 12 C.F.R. § 1024.41(h)(4), provides as follows:

Within 30 days of a borrower making an appeal [of denial], the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal and, if applicable, how long the borrower has to accept or reject such an offer or a prior offer of a loss mitigation option.

12 C.F.R. § 1024.41(h)(4). Plaintiffs have also sufficiently pled a claim under this provision of RESPA. Plaintiffs assert that Wells Fargo denied the final modification agreement on or around August 3, 2015. Compl., ¶ 92. In response to the denial, Plaintiffs allege that "[o]n or around August 17, 2015, within thirty (30) days of the date of the Denial, [Plaintiffs], through their attorney Scunziano, faxed an appeal and complaint to [Wells Fargo.]" Compl., ¶ 97. However, Plaintiffs assert that Defendant "did not provide a response to Appeal within the thirty (30) day timeframe required by §1024.41(h)." Compl., ¶ 98. In fact, Plaintiffs aver that Wells Fargo "did not perform an independent review of [its] denial . . ., or if such a review was performed, [Wells Fargo] never stated their determination of such to [Plaintiffs]." Compl., ¶ 99. When construed in the light most favorable to Plaintiff, these allegations adequately establish a violation of 12 C.F.R. § 1024.41(h)(4). Thus, Plaintiffs may also proceed under Count Two of the Complaint.

Schroeder v. NATIONSTAR MORTGAGE, LLC, Dist. Court, WD Washington June 8, 2017

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The Court concludes that Plaintiffs' prior application does not preclude their RESPA claim. "RESPA's provisions relating to loan servicing procedures should be `construed liberally' to serve the statute's remedial purpose." *Medrano,* 704 F.3d at 665-66 (quoting *In re Herrera,* 422 B.R. 698, 711 (B.A.P. 9th Cir. 2010)). Consistent with this principle, it would be unreasonable to conclude that Defendants could have complied with Regulation X's loan evaluation requirements before Regulation X took effect. Other courts are in accord. *Billings v. Seterus, Inc.,* 170 F. Supp. 3d 1011, 1015 (W.D. Mich. 2016) ("Defendant could not possibly have `compl[ied] with the requirements of [12 C.F.R. § 1024.41] for a single complete loss mitigation application for [Plaintiff's] mortgage loan account' at a time when the statute did not exist and the term `complete loss mitigation application' was not defined."); *Bennett v. Bank of Am., N.A.,* 126 F. Supp. 3d 871, 884 (E.D. Ky. 2015) (concluding that loan servicer "was still required to comply with the requirements of section 1024.41 at least once after the section became effective"); *see also Dionne v. Fed. Nat'l Mortg. Ass'n,* No. 15-CV-56-LM, 2016 WL 6892465, at *4 (D.N.H. Nov. 21, 2016) ("Federal courts have consistently held that a loan servicer must comply with the requirements of § 1024.41 at least once after the January 10, 2014 effective date of the regulation, regardless of whether the servicer evaluated a borrower's prior loss mitigation application prior to that date."); *Garmou v. Kondaur Capital Corp.,* No. 15-12161, 2016 WL 3549356, at *3 (E.D. Mich. June 30, 2016)); *but see Trionfo v. Bank of Am., N.A.,* No. CIV. JFM-15-925, 2015 WL 5165415, at *4 (D. Md. Sept. 2, 2015).

VILKOFSKY v. SPECIALIZED LOAN SERVICING, LLC, Dist. Court, WD Pennsylvania June 14, 2017

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The Second Amended Complaint now states that Plaintiff sent his error notice to SLS at P.O. Box 636005 which, while not the P.O. Box claimed by SLS in the Motion to Dismiss to be designated for receipt of same, was nonetheless previously provided to Plaintiff by SLS for sending error notices. (Docket No. 58 ¶¶ 42-46). Plaintiff also argues that SLS's response to his error notice — without any mention of the need to use another address — is further evidence that he utilized the correct address. (*Id.* ¶ 47-48). The Court agrees. A pleading party need only "put forth allegations that `raise a reasonable expectation that discovery will reveal evidence of the necessary element[s].'" *Fowler,* 578 F.3d at 213 (citation omitted). For purposes of surviving a motion under Rule 12(b)(6), Plaintiff has pled a sufficient factual basis as to this issue so that it may proceed through discovery.

Puche v. WELLS FARGO NA, Dist. Court, D. New Jersey June 22, 2017

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Because Plaintiffs seek only damages, there is no question that a finding for them in this Court would not render the state court's judgment ineffectual. As in *Nivia,* an award of damages in this case would not effect transfer of the real property effectuated by the foreclosure. Nor would it imply that the state court's decision was incorrect. Violations of RESPA, or of Defendant's contractual duty of good faith and fair dealing, do not implicate the validity of the foreclosure judgment. Had Defendant

evaluated Plaintiffs' loss mitigation application differently, this might have had the effect of staying the foreclosure proceedings. However, the fact that they did not, does not mean that the state court erred in its judgment. The state court acted based on the factual circumstances that existed at the time of its judgment. A finding that those factual circumstances might have been different had the Defendant followed the law does not mean that the state court's evaluation of those circumstances was incorrect or invalid.

Plaintiffs' federal claims are not inextricably intertwined with the previous foreclosure adjudication of the state court. Consequently, the *Rooker-Feldman* doctrine does not bar our consideration of this matter.

TANASI v. CitiMORTGAGE, INC., Dist. Court, D. Connecticut June 30, 2017

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Rooker Feldman

The Tanasis allege that Defendants improperly processed their loan modification applications, failed to respond to their requests for information, and "engaged in a pattern or practice of non-compliance with RESPA and Regulation X." Compl. ¶ 96. In all three causes of action, the Tanasis "pointedly avoid" arguing that their foreclosure was wrongly decided or seeking injunctive relief against the foreclosure. *See McCann,* 2017 WL 1048076 at *4. They argue, rather, that CitiMortgage committed independent violations of RESPA, CUTPA, Regulation X, and all of which grant the Tanasis independent rights as consumers and borrowers.

At this stage of the proceedings, the Court concludes the Tanasis' claims are sufficiently "independent" from the Foreclosure Action and do not invite the Court's "review and rejection of that judgment." *Hoblock,* 422 F.3d at 85; *see also Zeller v. Ventures Tr.,* No. 15-cv-01077, 2016 WL 745373, at *21-22 (D. Colo. Feb. 1, 2016) (the plaintiff's claim for relief under RESPA and Regulation X was "independent" because it "alleges that [the defendant] failed to respond to a Qualified Written Request . . . . Nothing about Ms. Zeller's RESPA claim pertains to the foreclosure proceedings or would require the court to engage in appellate-type review of a state court judgment.").

Res Judicata

In their second cause of action, the Tanasis allege that CitiMortgage negligently failed to review mortgage modification requests (id. at ¶¶ 109-114), negligently failed to provide a single point of contact to the Tanasis (id. at ¶¶ 119-127), and "continually" and "actively" solicited mortgage modification applications that it never intended to consider, seeking to accrue 261*261 higher interest rates by postponing the Tanasis' inevitable default (id. at ¶¶ 132-134) The allegations regarding CitiMortgage's negligent provision of a single point of contact and negligent solicitation of mortgage modification applications do not relate to the "making, validity or enforcement of the mortgage note," Rodrigues, 109 Conn.App. at 133, 952 A.2d 56, and are not barred by res judicata.

Bulpitt v. CARRINGTON MORTGAGE SERVICES, LLC, 2017 DNH 134 - Dist. Court, D. New Hampshire July 10, 2017

https://scholar.google.com/scholar_case?case=18445490363453508864&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The defendants assumed that the plaintiffs were relying on their request for mortgage assistance that was submitted on November 24, 2015, as the ground for their RESPA claim. Indeed, it is hard to understand why the plaintiffs would request mortgage assistance if they had an application for loan modification pending. Further, the plaintiffs provide no documentation to support Gary Bulpitt's representations about the process used for the 2013 application. Nevertheless, the plaintiffs rely on the October of 2013 application and the appeal, and the defendants did not address that application, despite the representations in Gary Bulpitt's affidavit.

As the defendants explain in detail in their motion for summary judgment and their reply, the plaintiffs' November of 2015 request did not trigger Regulation X protections because it was submitted after the plaintiffs received notice of the foreclosure sale and less than thirty-seven days before the foreclosure sale. The plaintiffs do not dispute that result. Therefore, the defendants are entitled to summary judgment to the extent Count III was based on the request for mortgage assistance made in November of 2015.

The defendants, however, did not address the plaintiffs' RESPA claim based on an application submitted by Gary Bulpitt in October of 2013. Because the defendants do not seek summary judgment on the plaintiffs' claim based on the 2013 application, that part of Count III avoids summary judgment.

Milton v. Ocwen Mortgage Servicing, Inc., Dist. Court, ED New York July 14, 20172

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The Court declines, however, to adopt Judge Orenstein's recommendation that the Court dismiss Plaintiff's RESPA claim based on issue preclusion because there is no indication that the RESPA claim was raised in any state or federal litigation. Moreover, even if the issue was raised in the Foreclosure Proceeding, because the state court entered a default judgment against Plaintiff in that proceeding, the claims were not "actually litigated" as required for a determination of issue preclusion. *See Glob. Gold Mining, LLC v. Ayvazian,* 612 F. App'x 11, 15 (2d Cir. 2015) (holding that a defendant's "argument that [a] [d]efault [j]udgment had preclusive effect [was] meritless[,] because [i]ssue preclusion applies only where the issue was `actually litigated' in the prior proceedings") (quoting *Wyly v. Weiss,*97 F.3d 131, 141 (2d Cir. 2012)); *Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan,* 263 F.3d 196, 202 n.7 (2d Cir. 2001) (holding that a claim may not be issue precluded because the doctrine of issue preclusion "forecloses only those issues that have been actually litigated and determined in a prior action, and an issue is not actually litigated if there has been a default" (citation omitted)).

McGahey v. Federal National Mortgage Association, Dist. Court, D. Maine July 17, 2017

…The reasoning in Wilson—especially to the extent it comports with the Eleventh Circuit's apparent approach in Renfroe and Nunez—is persuasive. Because Regulation X was promulgated to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act, it is reasonable to interpret the regulation's added qualification that investigations be "reasonable" as expanding the substantive obligations of servicers under RESPA. Cf. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (purpose of Act to improve "accountability and transparency in the financial system"). Under Regulation X, servicers have a duty to perform a reasonably thorough investigation in response to a borrower's Qualified Written Request or Notice of Error, and to provide a reasonably thorough response to a borrower's questions and concerns. See Wilson, 48 F. Supp. 3d at 804; cf. Renfroe, 822 F.3d at 1245.

McGahey alleges a number of specific violations of RESPA. On June 12, 2015, for example, McGahey sent a notice captioned as a Notice of Error to PHH, alleging that PHH had incorrectly stated that McGahey had failed to complete a previous HAMP offer, and therefore wrongfully denied his latest HAMP application. McGahey Case 2:16-cv-00219-JDL Document 39 Filed 07/17/17 Page 33 of 40 PageID #: 1637 34 alleges that he also submitted a complaint to the Bureau of Consumer Financial Protection (CFPB) at the same time. PHH responded to the CFPB complaint, but not to the Notice of Error, on July 10, 2015. PHH's July 10 response alleges that McGahey was offered a HAMP modification in 2009. The response did not advise McGahey of his right to request the records on which PHH's determination was based, as required by 12 C.F.R. § 1024.35(e)(1)(i)(B). In a letter dated December 1, 2015, PHH apparently reversed itself, and stated that McGahey had been offered a standard modification, rather than a HAMP modification, in 2009. It is reasonable to infer from these facts that the investigation conducted by PHH as a result of McGahey's June 12 Notice of Error was not sufficient to satisfy PHH's obligations under RESPA as defined by Regulation X, as it failed to uncover the fact that the modification offered to McGahey in 2009 was a standard modification, rather than a HAMP modification. Further, it is reasonable to infer that this information was readily available to PHH, and a reasonable investigation would have discovered it. McGahey's Complaint therefore plausibly claims that PHH's responses to his Qualified Written Requests and Notices of Error were not sufficient to satisfy RESPA…

Shaffer v. BANK OF NEW YORK MELLON, Dist. Court, MD Florida July 19, 2017

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But, in the Second Amended Complaint, Shaffer acknowledges that she provided further information and documentation to Shellpoint to complete the application. (Doc. # 28 at ¶¶ 13-15). Shaffer does not elaborate on what information and documents she provided Shellpoint, and has not attached these documents as exhibits. Therefore, the supposed flaws or misrepresentations Defendants point out in the initial application do not show that Shaffer never completed the application. And the Court will not look outside the four corners of the Second Amended Complaint to evaluate whether the supplemental information submitted by Shaffer failed to complete the application, as Shellpoint alleges. See St. George, 285 F.3d at 1337.

Because Shaffer may have clarified the apparent inconsistencies or errors in her September 14, 2016, application more than 37 days before the foreclosure sale, the Court cannot determine from the face of the Second Amended Complaint and exhibits that Shaffer never completed her application before the 37-day deadline. Therefore, this claim survives the motion to dismiss stage.

Rios v. Rushmore Loan Management Services, LLC, Dist. Court, SD Florida July 23, 2017

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Defendant argues that Count II fails to state a cause of action because (1) Regulation X does not provide Plaintiffs with a private right of action; (2) the claim that Defendant failed to reasonably investigate and correct the concerns raised in Plaintiffs' second NOE is contradicted by Exhibit O attached to the complaint; and (3) Defendant complied with Regulation X, which only requires Defendant to conduct a reasonable investigation into Plaintiffs' claims and communicate to Plaintiffs the reasons Defendant concluded that there has not been a servicing error.

Defendant cites no authority for its first argument, that Plaintiffs' RESPA claim fails because Regulation X does not provide borrowers with a private right of action. The plain language of the Regulation states the exact opposite however. "Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts . . ." 12 U.S.C. § 2605(f); *see also, Lage v. Ocwen Loan Servicing LLC,* 839 F.3d 1003, 1007 (11th Cir. 2016) ("[i]f the servicer fails to respond adequately to the borrower's notice of error, then the borrower has a private right of action to sue the servicer under RESPA"); *Renfroe v. Nationstar Mortg., LLC,* 822 F.3d 1241, 1245-46 (11th Cir. 2016) (RESPA makes violators liable to individual borrowers for any actual damages to the borrower and any additional damages as the court may allow); *Berene v. Nationstar Mortgage LLC,* 2016 WL 3787558, at *2 (S.D. Fla. 2016).

Pearson v. Specialized Loan Servicing, LLC, Dist. Court, ED Tennessee July 24, 2017

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…Ms. Pearson alleges that Select Loan Servicing encouraged her to halt payment on her first loan modification, elicited a new application from her, rejected that application by intentionally relying on inaccurate information, and then referred her home for foreclosure. [Am. Compl. ¶¶ 41-45, 56]. These allegations are serious, partly because once a servicer denies a loss-mitigation application, it can then take action to refer a property to foreclosure, so long as a borrower is not eligible for an appeal or has not requested one within fourteen days. 12 C.F.R. § 1024.41(f)(2)(i); *id.* § 1024.41(h)(1)-(2). The seriousness of these allegations, however, does not make them actionable; instead, to be actionable, these allegations have to support a plausible claim for relief under § 1024.41. And the Court believes that they do, based on a plain reading of the regulation as a whole. *See King v. St. Vincent Hosp.*, 502 U.S. 215, 220 (1991) (following the "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context" (internal citation and citation omitted))…

…If a regulation is ambiguous—that is, "not free from doubt," *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-51 (1991) (quotation omitted)—a court may look to an agency's interpretation of that regulation, *see Auer v.Robbins*, 519 U.S. 452, 461-63 (1997); *see also Christensen v. Harris County*, 529 U.S. 576, 588 (2000). …

…Rather, Specialized Loan Servicing's contention is that § 1024.41(a)'s plain language exempts it from liability for the alleged inaccurate review that occurred during the evaluation process.[5] [Def.'s Br. at 10; Def.'s Reply at 4, 5]. Section 1024.41(a)'s plain language, however, contains no such exemption. Specialized Loan Servicing, in proposing otherwise, grafts words into § 1024.41(a) that are not there—while ignoring the bulk of § 1024.41, which is in large part a compendium of standards that servicers have to abide by to ensure the integrity of every application's evaluation. *See* *King*, 502 U.S. at 220 (emphasizing the "cardinal rule that a statute is to be read as a whole" (internal citation and citation omitted)); *see also* *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[.]" (quotation omitted)). In sum, Specialized Loan Servicing, with the argument it raises under § 1024.41(a), does not convince the Court that Ms. Pearson lacks a cause of action under § 1024.41. The Court will therefore permit her to move forward with her claim under the RESPA—but only to the extent she maintains that Specialized Loan Servicing purposefully, and not negligently, relied on inaccurate information when it reviewed and rejected her application.

Payne v. SETERUS INC., Dist. Court, WD Louisiana July 26, 2017

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Seterus's response does not indicate that it made any "corrections" to Payne's account, nor did the response provide "a statement of reasons" for why it believes Payne's account was correct, so subsections (A) and (B) are not applicable. Arguably, Seterus's response can be construed as a "written explanation or clarification that includes" "an explanation of why the information requested is unavailable," in compliance with subsection (C).

However, Seterus's response does not indicate that the requested information was "unavailable"; rather, Seterus refused to provide the requested information on the unfamiliar basis that Payne's bankruptcy was only discharged and not yet terminated at that time. Seterus provides no authority for the proposition that Payne's bankruptcy discharge prevented it from providing him with the requested information. *See, e.g.,* *In re Jacques,* 416 B.R. 63, 72-73 (E.D. N.Y. 2009) (noting that debtors may assert a RESPA claim in the context of a bankruptcy case); *In re Thompson,* 350 B.R. 842, 852 (E.D. Wisc. 2006) (servicer violated § 2605(e) where bankruptcy debtors "never received any meaningful action on their requests."). Moreover, Seterus does not provide any reason to justify its refusal to transmit its response directly to Payne, as opposed to his bankruptcy counsel. *See Payne v. Seterus Inc.,* No. 16-203, 2016 WL 4521659, *5-*6 (W.D. La. Aug. 26, 2016); *see, e.g.,* *In re Julien,* 488 B.R. 502, 504 (D. Mass. 2013) (servicer responding directly to bankruptcy debtor). Seterus's sole response to Payne's bankruptcy attorney does not establish that Seterus responded adequately to Plaintiff's QWRs.

The Bank of New York Mellon v. Brooks, Pa: Superior Court August 28, 2017

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Appellee argues that Regulation X is inapplicable to this case, because short payoff applications such as Appellant's Application do not fall within the CFPB's official interpretation of a "loss mitigation option." Appellee's Brief at 8. We disagree. The CFPB's "Official Bureau Interpretation" provides:

Loss mitigation options include temporary and long-term relief, including options that allow borrowers who are behind on their mortgage payments to remain in their homes or to leave their homes without a foreclosure, such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, and loss mitigation programs sponsored by a locality, a State, or the Federal government.

Appellee's Reply Brief In Further Support of Mot. For Summ. J., Ex. 1, at 4 (emphasis added). The phrase "without limitation" demonstrates that this list of loss mitigation options is not exclusive. Appellee admits as much in its brief. Appellee's Brief at 8 ("that list does not purport to be exclusive"). Since this list is merely illustrative instead of exhaustive, we conclude that a short payoff is a viable loss mitigation option under Regulation X.

O'Steen v. Wells Fargo Bank, NA, Dist. Court, MD Florida September 25, 2017

https://scholar.google.com/scholar_case?case=12956612940883389184&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

In order to ascertain whether Wells Fargo or Rushmore's actions violated § 1024.41(g), it is necessary to determine whether (1) either of the Defendants moved for an order of sale, or conducted a foreclosure sale, and (2) either of the Defendants did so while an appeal by the Plaintiffs was pending. It is unclear what roles Rushmore and Wells Fargo played with respect to the ultimate foreclosure sale. It appears that Rushmore was the Plaintiffs' loan servicer during the time leading up to foreclosure. Still, Wells Fargo moved to reset the foreclosure sale on May 23, 2016, after it alleges it was no longer servicing the Plaintiffs' loan.[8] The evidence is also inconclusive as to whether the Plaintiffs "appealed" the loan modification denial for purposes of Subsection (g), and, if they did, whether Wells Fargo or Rushmore denied that appeal. While the Plaintiffs faxed Wells Fargo a Dispute Request Form, there is some question as to whether this constituted an appeal. A review of the Dispute Request Form reveals that rather than actually disputing Wells Fargo's basis for the decision—that the Plaintiffs had failed to submit the required documentation—the Plaintiffs were asking Wells Fargo to allow the TPP "to continue until Chapter 7 bankruptcy is complete and judgments are discharged and released." *See* Dispute Request Form, Doc. 95-2 at 1.

Thus, genuine disputes of material facts persist as to whether Wells Fargo or Rushmore violated Subsection (g) by pursuing the foreclosure sale without first resolving any pending appeal. Accordingly, Wells Fargo's Motion is DENIED as to Count IV and Rushmore's Motion is DENIED as to Count V.

McCleary v. DLJ Mortgage Capital, Inc., Dist. Court, SD Alabama October 11, 2017

https://scholar.google.com/scholar_case?case=5396030375450667514&q=McCleary+v.+DLJ+&hl=en&lr=lang_en&as_sdt=40006&as_vis=1

As to the defendants' first contention, the plaintiff described in her deposition the challenged elements of her monthly statements. (Doc. 107-1 at 51-54). Despite this testimony, the defendants say she "failed to provide proof" of the violations because she was insufficiently specific in her testimony, because she offered no documentation to prove her claims, and because she did not know the amounts of the challenged charges. (Doc. 108 at 13). The defendants have neither identified the "specifics" the plaintiff failed to provide, shown that she admitted to having no additional information regarding the claim, nor demonstrated that a plaintiff is required on penalty of dismissal to provide more detail than she provided. Likewise, the defendants have not shown that a plaintiff may not lawfully proceed on such a claim absent documentation.[29] Nor have they shown that a plaintiff sitting in her deposition is required by law to know by heart the dollar amount of the charges she contests or else suffer dismissal of her claim as the penalty of her ignorance. As previously stated, the Court will not develop and support arguments raised by the defendants only as *ipse dixit.*

As to the defendants' second contention, it may be that the plaintiff can show no causal connection between any timely raised TILA violation and some element of actual damage from the violation. The Court need not consider that possibility because the plaintiff also demands statutory damages and asserts she need not prove actual damages as a predicate to recovery of statutory damages. (Doc. 77 at 22). *See, e.g.,* *Shroder v. Suburban Coastal Corp.,* 729 F.2d 1371, 1380 (11th Cir. 1984) ("[T]he statutory civil penalties must be imposed for such a violation regardless of the district court's belief that no actual damages resulted. . . .") (internal quotes omitted). The defendants have not addressed this issue, and the Court will not do so on their behalf.

For the reasons set forth above, the defendants are entitled to summary judgment as to Count Seven to the extent, and only to the extent, it is based on nondisclosures preceding January 20, 2014.

Absent a pattern or practice of noncompliance, RESPA provides for recovery of "actual damages." 12 U.S.C. § 2605(f)(1). "We join our sister Circuits in recognizing that damages are an essential element in pleading a RESPA claim." *Renfroe v. Nationstar Mortgage, LLC,* 822 F.3d 1241, 1246 (11th Cir. 2016). But what are actual damages? "We have not defined `actual damages' under RESPA, and that term is not defined in the statute itself." *Baez v. Specialized Loan Servicing, LLC,* ___ Fed. Appx. ___, 2017 WL 4220292 at *3 (11th Cir. 2017). Noting *Renfroe*'s command that RESPA should be construed liberally, the *Baez*Court assumed without deciding that the term includes non-pecuniary losses. *Id.*The defendants have not attempted to define the reach of "actual damages" under RESPA, and without such a definition they cannot meet their burden of showing the plaintiff cannot prove any such damages. Moreover, they did not ask the plaintiff in her deposition about her RESPA damages, so even if they had a working definition of such damages they could not show her inability to prove such damages.[31]

Alfaro v. Wells Fargo NA, Dist. Court, D. New Jersey November 1, 2017

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In response to a "notice of error," Wells Fargo must (among other things) conduct "a reasonable investigation." *See* 12 C.F.R. § 1024.35(e)(1)(i)(B). "[T]he term `error' refers" to a litany of "categories of covered errors," including "[a]ny other error relating to the servicing of a borrower's mortgage loan." *Id.* § 1024.35(b)(11). As noted, Alfaro alleges that the June 6, 2016 notice-of-error response contradicted the May 20, 2014 correspondence concerning the NPV. (*See* Compl. ¶¶ 40-41,

43, 58). In view of the Court's review of the allegations in this case, the Court finds that there is a plausible claim of relief for non-compliance with 12 C.F.R. § 1024.35(e). *Cf.* *Wilson v. Bank of Am., N.A.*, 48 F. Supp. 3d 787, 805 (E.D. Pa. Sept. 24, 2014) ("Defendant . . . sent [Plaintiff] two letters with contradictory explanations for why her loan could not be modified. She then submitted her requests for information and Notice of Error, the responses to which were contradictory. Given the varying explanations Defendant offered for the treatment of the Loan account, Plaintiff now properly and adequately asserts that no `reasonable investigation' has occurred with respect to her Notice of Error.").

Sandaler v. Wells Fargo Bank, NA, Dist. Court, MD Florida November 14, 2017

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Rooker Feldman

The Court disagrees that the third test applies here. The foreclosure action solely involved state law. Thus, the state court could not have "finally resolved all the federal questions in the litigation"; there were never any federal questions for the state court to litigate. However, even if the third test did apply here, there is a procedural issue that prevents the application of *Rooker-Feldman.*

The Supreme Court has cautioned courts on the narrow application of *Rooker-Feldman.* "In *Exxon Mobil,* the Court reminded lower courts that *Rooker-Feldman* only applies to cases brought by those `complaining of injuries caused by state-court judgments rendered *before* the district court proceedings commenced . . . ." *Velazquez v. S. Fla. Fed. Credit Union,* 546 F. App'x 854, 858 (11th Cir. 2013)(emphasis added) (quoting *Exxon Mobil,* 544 U.S. at 284). While the instant action was initiated on February 24, 2015, the state court did not enter a final judgment in the foreclosure action until April 22, 2016. Moreover, the fact that SAC was not filed until February 10, 2017, after the state court judgment was rendered, is of no import. Under the Federal Rules of Civil Procedure, Plaintiff's SAC relates back to the date of his original pleading. *See* Fed. R. Civ. P. 15(c)(1)(B). Accordingly, the state court judgment had not been rendered when this action commenced. It therefore follows that when Plaintiff filed this action, he was not a state-court loser complaining of injuries caused by a state-court judgment. Thus, *Rooker-Feldman* cannot apply here…

Compulsory Counterclaim

…While it appears that several of Plaintiff's claims arose during the pendency of the foreclosure action, claims that mature or are acquired by the pleader after he serves his pleading are permissive, not compulsory. *Inter-Active Servs.,* 809 So. 2d at 904 (citing Fla. R. Civ. P. 1.170). And while Plaintiff arguably could have included the majority of his claims in his Answer to the Amended Complaint in the state foreclosure action—which Plaintiff submitted on July 6, 2015— at that time, Plaintiff had already initiated the instant action. Furthermore, Plaintiff was not required as a matter of law to include in his Answer to the Amended Complaint claims that had subsequently accrued. *See. id.* ("recognizing that it is not the function of an amendment to a pleading to cover subsequently accruing rights" (citing *Daytona Beach Racing & Recreational Facilities Dist. v. Volusia Cty.,* 355 So. 2d 175 (Fla. 1st DCA 1978), *aff'd,* 372 So. 2d 419 (Fla. 1979))).

In sum, the logical relationship test is not met here. Plaintiff's claims are not based upon the same aggregate of operative facts as the foreclosure action. Nor did the filing of the foreclosure action activate additional legal rights that Plaintiff would not otherwise have. Additionally, the chronology demonstrates that the claims Plaintiff asserts in the instant action had not yet accrued when he filed his Answer to the original Complaint in the foreclosure action. Therefore, to the extent Defendant's Motion seeks dismissal of Plaintiff's claims based on Florida's compulsory counterclaim rule, the Motion will be denied.

Judicial Estoppel

The facts of the cases Defendant relies upon are markedly different from the facts in the instant case, where—based on Plaintiff's allegations—it appears that Plaintiff did not disclose his claims against Defendant in his bankruptcy action because at the time Plaintiff's bankruptcy action was pending (1) Plaintiff's claims had not arisen; or (2) Plaintiff was unaware that he had claims to assert against Defendant.

The Supreme Court has recognized that judicial estoppel's "purpose is to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine,* 532 U.S. 742, 749-50 (2001) (quotation omitted). This purpose would not be served by applying judicial estoppel here. Defendant's request to dismiss Plaintiff's claims based on judicial estoppel will be denied.

Weisheit v. Rosenberg & Associates, LLC, Dist. Court, D. Maryland November 15, 2017

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[Dual Tracking Claim Survives MTD]

If Bayview's December 29 letter was an insufficient denial, then the loss mitigation process did not end on December 29. The provision of Regulation X that prohibits dual-tracking states that once a complete loss mitigation application is submitted by the borrower more than thirty-seven days before a foreclosure sale, the "servicer shall not . . . conduct a foreclosure sale, unless" the borrower has been notified that they are not eligible for loss mitigation and has failed to appeal, "*or the borrower's appeal has been denied.*" 12 C.F.R. 1024.41(g)(1) (emphasis added). A denial that purports to rest on an investor restriction but does not provide the name of the investor or the substance of the restriction, is not a sufficient denial for purposes of Section 1024.41(d) *and* for purposes of Section 1024.41(g). That is why, assuming the veracity of Plaintiff's complaint and making all inferences in her favor, the Court agrees with the conclusion of the state court: as of March 8, 2017 loss mitigation had not been completed. Scheduling a foreclosure sale when loss mitigation is not complete constitutes dual-tracking, and therefore Plaintiff has stated a claim of dual-tracking in violation of RESPA.

Plaintiff has alleged sufficient facts from which a factfinder could conclude that her letter to Bayview on February 28 was a QWR, and therefore that Bayview's failure to respond was a violation of RESPA. First, the letter included the name of the account and the borrower, and provided a detailed

explanation of the errors that Plaintiff believed Bayview had made. Second, the February 28 letter stated that a foreclosure sale had been scheduled for March 9, 2017 and that Plaintiff believed this sale was in violation of RESPA's dual-tracking prohibition. The February 28 letter may have largely been an appeal of Bayview's reasons for denial set forth in its December 29 letter, and if the February 28 letter had *only* been an appeal, it would likely not have been a QWR. But this letter did more than appeal a loss mitigation application denial — it asserted an error related to the servicing of Plaintiff's loan, i.e. the improper scheduling of a foreclosure sale. Third, because the February 28 letter included notice of this error, and was not entirely another appeal of Bayview's denial, this notice was not "duplicative." This was the first time Plaintiff had notified Bayview that she believed Bayview had improperly scheduled a foreclosure sale. Both in form and, at least partially, in substance Plaintiff's February 28 letter plausibly falls within the requirements of a QWR under Regulation X.

Jackson v. Bank of America, NA, Dist. Court, WD New York November 21, 2017

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[Lack of Reasonable Diligence under 12 C.F.R. § 1024.41(b)]

Plaintiffs allege a sufficient number of Section 1024.41(b) violations to establish that Defendant had a pattern or practice of not complying with the statute. They allege that hundreds of consumers like Plaintiffs complained to the CFPB about Defendant's mishandling of their mortgage assistance applications, and share five of these grievances in detail in their complaint. At the pleadings stage, these allegations are sufficient to establish that Defendant violated RESPA in servicing a class of similarly situated individuals.

Plaintiffs have sufficiently alleged that Defendant violated Section 1024.41(b) in handling Plaintiffs' initial application for mortgage assistance.[4] From the time Plaintiffs submitted their application in January — to Defendant's rejection of that application as incomplete in June 2014, Defendant repeatedly asked Plaintiffs for documents, such as tax returns and social security letters, that they had already submitted. Defendant also repeatedly notified Plaintiffs that their application was incomplete, without specifying which documents the Defendant was missing, in plain violation of Section 1024.41. While Defendant referred Plaintiffs to its website to determine which documents were missing, the website merely listed documents that any borrower may need to submit to make their application complete, regardless of whether the borrower had already submitted those documents or "whether the documents were even pertinent to a specific borrower's financial situation." ECF No. 1 at 26. And since Defendant kept asking Plaintiffs for documents they had already submitted, they had no way of knowing which documents, if any, Defendant actually still needed from Plaintiffs…

…But it was not necessarily reasonable for Defendant to wait nearly four months before notifying Plaintiffs that they needed to submit a new hardship affidavit. Indeed, Section 1024.41(b) required Defendant to notify Plaintiffs within five days of receiving their application. There is an exception to this rule if a servicer "later discovers additional information or corrections to a previously submitted document," 12 C.F.R. § 1024.41(c)(2)(iv), but it is not clear why Defendant took so long to discover that the hardship affidavit was insufficient— particularly when that insufficiency was readily apparent from Plaintiffs' January 2014 application…

The regulations required Defendant to "exercise reasonable diligence in obtaining documents and information to complete" Plaintiffs' mortgage assistance application, 12 C.F.R. § 1024.41(b)(1), but Defendant's confusing, conflicting and belated communications to Plaintiffs frustrated and ultimately thwarted their first attempt to receive mortgage assistance. While discovery may eventually discredit Plaintiffs' allegations against Defendant, the Court must credit these allegations at the pleadings stage. See Dionne v. Fed. Nat'l Morg. Assn., 110 F. Supp. 3d 338, 343 (D.N.H. 2015) (crediting the plaintiff's allegations that defendant mortgage servicer repeatedly asked plaintiff to submit documents that defendant had already received).

James v. Ocwen Loan Servicing, LLC, Dist. Court, SD Ohio December 12, 2017

https://scholar.google.com/scholar_case?case=17452535220038072733&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

[12 C.F.R. § 1024.41(b)(2) Claim Survives MSJ Proof of Mailing at Issue]

The averment of Defendant's Senior Loan Analyst that the January 23 letter was sent is not based on personal knowledge of mailing by the third party. Instead, that averment is based on information gleaned from the business records of Defendant that are discussed above. (Doc. 29-1, PageID 259). The credibility of that averment therefore depends upon whether the evidence contained within Defendant's business records is found to be the most convincing on the issue of mailing. As that determination is within the province of the jury, the Senior Loan Analyst's averment cannot be conclusive evidence of mailing.

Finally, Defendant's reliance on the "mailbox rule" (Doc. 32, PageID 568; Doc. 35, PageID 612) is misplaced. The mailbox rule presumes the fact of mailing. *Reynolds v. Reliance Standard Life Ins. Co.,* No. C-3-06-010, 2006 WL 2990385, at *7 (S.D. Ohio Oct. 18, 2006) ("The `mailbox rule' provides that once a notice is mailed, it is presumed to be received in due course.") (emphasis added). Here, there are genuine issues of material fact as to whether Defendant actually mailed the January 23 letter in the first instance, which make the rule inapplicable to this analysis.

Boler v. Bank of America, NA, Dist. Court, ND Alabama December 22, 2017

https://scholar.google.com/scholar_case?case=6417684727967326684&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

[Failure to Respond to Notice of Error Survives MTD]

Here, the Court is satisfied that at least two of Boler's letters to BANA are sufficient to support his RESPA claim against BANA and to allow the claim to go forward. The second letter Boler allegedly sent to BANA on March 8, 2016, notified BANA it had "made an error force placing insurance" on his property and asked BANA to fix the error by, among other corrective actions, refunding any money he had been "improperly charged."[4] (Doc. 12, Ex. D at 91). Likewise, the first letter Boler allegedly sent to BANA on June 10, 2016, questioned "over $4,000 of fees and expenses" listed in his servicing file and pointed out that his file reflected "at least 30 if not 40 property inspections on March 16, 2016" as well as charges for "yard maintenance and photos and something called `Boarding.'" (*Id.,* Ex. G at 111). Boler asked BANA for information regarding "all the charges listed in the servicing file and . . . all expenses/fees reflected in the mortgage statement" and to fix any

errors. (*Id.*) Both of these letters identify the imposition of fees or charges that Boler claims BANA improperly imposed upon him, and he alleges that BANA failed to respond to the letters in a timely and substantive manner.

2018

Hines v. Regions Bank, Dist. Court, ND Alabama February 15, 2018

https://scholar.google.com/scholar_case?case=15148612618084371846&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Regions argues that, regardless of the sufficiency of Mr. Hines's factual allegations, he cannot bring an action based on the cited sections of Regulation X because neither section provides a private right of action. Although Regions may be correct with respect to Mr. Hines's claim under § 1024.40, the Court is not persuaded that § 1024.39 does not support a private right of action.

The Eleventh Circuit has not definitively answered the question of whether either section 1024.39 or 1024.40 includes a private right of action. See Cilien v. U.S. Bank Nat'l Ass'n, 687 Fed. Appx. 789, 792 n.2 (11th Cir. 2017) (observing that neither section expressly provides a private right of action but first evaluating the sufficiency of the plaintiff's factual allegations). Still, the Consumer Financial Protection Bureau's 2013 amendment of Regulation X indicates that a private action exists under section 1024.39. The Bureau's official commentary to its Regulation X amendments divides the amendments' purposes into nine discreet areas. See Mortgage Servicing Rules, 78 Fed. Reg. at 10696-97. The Bureau expressly notes that no private right of action exists in two of these areas: (1) general servicing policies and procedures as well as (2) policies and procedures relating to continuity of contact with delinquent borrowers. Mortgage Servicing Rules, 78 Fed. Reg. at 10697-98.

However, the Bureau's decision to expressly preclude a private right of action only for claims of inadequate servicer policies implies that a private right of action exists in Regulation X's other areas of concern. Among these are the servicer's obligation "to establish live contact with borrowers by the 36th day of their delinquency," to "inform such borrowers, where appropriate, that loss mitigation options may be available," and to "provide a borrower a written notice with information about loss mitigation options;" the same obligations covered by section 1024.39. Mortgage Servicing Rules, 78 Fed. Reg. at 10698. This implication arises from the principle of statutory interpretation that when specific language is used in one provision but is omitted in another provision of the same statute or regulation, the Court presumes that the omission is purposeful and indicates an intended difference in the treatment of the those sections. See Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002); Cremeen v. City of Montgomery, 602 F.3d 1224, 1227 (11th Cir. 2010) (holding that courts apply the canons of construction used to interpret statutes to interpret regulations).

The implication that a private right of action exists for a servicer's violation of certain RESPA obligations would be of no importance if the underlying statute provided no private right of action. See Alexander v. Sandoval, 532 U.S. 275, 291 (2001) ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."). Here, however, § 2605(f) of RESPA provides a private right of action against a servicer that "fails to comply with any provision of this section." 12 U.S.C. § 2605(f). Within § 2605 is the requirement that "[a] servicer of a federally related mortgage shall not . . . fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be

appropriate to carry out the consumer protection purposes of this chapter." 12 U.S.C. §2605(k)(1)(E). Mr. Hines alleges that Regions failed to comply with such a regulatory obligation. Therefore, the Court denies Regions's motion with respect to Mr. Hines's RESPA claims under § 1024.39.

Vance v. Wells Fargo Bank, N.A. Dist. Court, WD Virginia February 20, 2018

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Wells Fargo cites Brown v. Bank of N.Y. Mellon for the proposition that "there is no private right of action for an alleged violation of . . . § 1024.39." Def.'s Mem. Supp. Mot. Dismiss, ECF No. 12, at 2. In Brown, the court concluded in one sentence "[w]ith respect to plaintiff's Regulation X claims . . . defendants correctly argue that 12 C.F.R. § 1024.35, 1024.39, and 1024.40 do not explicitly provide a cause of action to private individuals." No. 1:16-cv-194 (LMB/IDD), 2016 WL 2726645, at *2 (E.D. Va. May 9, 2016). In reaching its conclusion, the court relied on Gresham v. Wells Fargo Bank, N.A., 642 F. App'x 355 (5th Cir. 2016), for the proposition that Section 1024.39 does not convey a private right of action. See id.

In Gresham, the plaintiff claimed that Wells Fargo violated the "early intervention" rule at 12 C.F.R. § 1024.39. 642 F. App'x at 359. The court stated that "[u]nlike Section 1024.41, Section 1024.39 does not explicitly convey a private right of action to borrowers." Id. But, the court went on to say "[b]ecause [plaintiff] has failed to support his claim with any facts, we need not reach the issue of whether a private right of action could be available under Section 1024.39." Id. at 359 n.16. So, the court did not analyze whether Section 1024.39 conveys a private right of action to borrowers. Therefore, Gresham cannot stand for proposition that Brown claims it does.

Moss v. Manufacturers and Traders Trust Company et. Al. Dist. Court ED Virginia March 13, 2018

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In the spring of 2016, Moss sent two QWRs in which she (1) asked M&T about the status of the insurance proceeds; (2) requested that M&T apply the proceeds to her loan balance in order to bring her loan up to date; (3) requested that M&T stop its planned foreclosure sale; and (4) asked for an explanation of the $7,800 in fees on her account. M&T's briefing does not address its failure to respond to her request about the $7,800 in fees. Further, M&T's response to the QWRs incorrectly stated that it would apply her insurance proceeds to her loan, and months later it reneged on that statement and said it would not actually apply the proceeds to her loan. As a result of M&T's insufficient responses, Moss alleges that she has suffered damage to her credit, incurred fees and interest on her mortgage, and spent money to prevent the foreclosure on her home. Moss has therefore alleged a plausible violation of RESPA.

Nirk v. Seterus Inc. et. al. Dist. Court ND Florida March 21, 2018

…RESPA is a remedial consumer protection statute, and should be construed liberally. *Renfroe* 822 F. 3d at 1244. Thus in light of the clear evidence of an intent that Section 1024.35 provide a private

right of action and the decisions from the Eleventh Circuit and other jurisidications recognizing such a right, the Court concludes that Plaintiffs' Motion should be denied…

Weber v. Seterus, Inc. Dist. Court ND Illinois March 28, 2018

https://scholar.google.com/scholar_case?case=2277522254889776183&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Seterus is correct that some courts have held that there is no private right of action for violations of 12 C.F.R. § 1024.35. *E.g., Brown v. Bank of N.Y. Mellon*, 2016 WL2726645, at *2 (E.D. Va. May 9, 2016). But the weight of recent authority — including decisions by courts in this district — is to the contrary. *E.g., Lage,* 839 F.3d at 1007 (recognizing private right of action); *Blanton v. Roundpoint Mortg. Servicing Corp.*, 2016 WL 3653577, at *5-6 (N.D. Ill. July 7, 2016) (same); *Starke v. Select Portfolio Servicing, Inc.*, 2017 WL 6988657, at *4-5 (N.D. Ill. Dec. 18, 2017) (same and collecting cases).

This Court finds the reasoning adopted by courts finding a private right of action persuasive. The Supreme Court has directed courts to refer to the statute pursuant to which a regulation was promulgated to assess whether the regulation provides a private cause of action. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). "Where a statute provides for enforcement through a private cause of action, a regulation may also be enforced in the same way." *Starke,* 2017 WL 6988657, at *5 (citing *Alexander,* 532 U.S. at 291).

As the *Starke* court explained, "in enacting the relevant sections of Regulation X, the Consumer Financial Protection Bureau (`CFPB') tied § 1024.35 to a privately enforceable statute, stating that it implements `section 6(k)(1)(C) of RESPA, and to the extent the requirements are also applicable to qualified written requests, sections 6(e) and 6(k)(1)(B) of RESPA.'" *Id.* (citing *Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X)* ("*Mortgage Servicing Rules*"), 78 Fed. Reg. 10696, 10737 (Feb. 14, 2013)). And again, RESPA explicitly provides a private cause of action. *Catalan,* 629 F.3d at 681. Like the court in *Starke,* this Court concludes that § 1024.35 therefore "effectuates a privately enforceable statutory right." 2017 WL 6988657, at *5.

Benner v. Wells Fargo Bank, N.A., as trustee for the certificate holders of Master Asset-Backed Securities Trust 2007-NCW, Mortgage Pass-Through Certificates, Series 2007-NCW et al. Dist. Court D. Maine March 29, 2018

https://scholar.google.com/scholar_case?case=4144507413911382006&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The CFPB has not deviated from this approach. When it amended the language of § 1024.41(i) in October of 2016, the CFPB again emphasized that transferee servicers must comply with § 1024.41's requirements:

Section 1024.41(i) provides that a servicer need not comply with § 1024.41 for a subsequent loss mitigation application from a borrower where certain conditions are met. *A transferee servicer and a transferor servicer, however, are not the same servicer.* Accordingly, a transferee servicer is required

to comply with the applicable requirements of § 1024.41 upon receipt of a loss mitigation application from a borrower whose servicing the transferee servicer has obtained through a servicing transfer, even if the borrower previously received an evaluation of a complete loss mitigation application from the transferor servicer.

12 C.F.R. Pt. 1024, Supp. I, cmt. 41(i)(2) (2017) (emphasis added).[9]

SPS's review of Ms. Benner's loss mitigation application is therefore of no consequence to SLS's obligations: Once servicing transferred to SLS, SLS was required to comply with the provisions of § 1024.41 anew. The Defendants are not entitled to summary judgment on Ms. Benner's RESPA claims on the basis of § 1024.41(i).

Adt v. Nationstar Mortgage, LLC Dist. Court ED Virginia March 30, 2018

https://scholar.google.com/scholar_case?case=15534586911732763134&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Second, Plaintiffs contend that Nationstar breached § 1024.41[17] by scheduling the Property for a foreclosure sale (Count I-C, the "Wrongful Foreclosure Subclaim")…

Taking the allegations in the Complaint as true, Nationstar lacked authorization to refer the loan to foreclosure, and Plaintiffs state a claim in Count I-C for a violation of 12 C.F.R. § 1024.41, the Wrongful Foreclosure Subclaim.

Lohman v. Beneficial Financial I, Inc. Dist. Court SD Ohio Western Division March 30, 2018

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… Courts in this district have found that a servicer's failure to provide the requested telephone number violates § 1641(f)(2). *See e.g., Bucy v. PennyMac Loan Servs.,*LLC, 2016 U.S. Dist. LEXIS 136306, *21 (S.D. Ohio, Sept. 30, 2016); *Richard v. Caliber Home Loans, Inc.,* 2017 U.S. Dist. LEXIS 161569, *34-37 (S.D. Ohio, Sept. 29, 2017).

Plaintiffs' QWR requested the "name, address, and *telephone number* of the owner of [the Plaintiffs'] note, plus the name of the master servicer. . ." (Doc. 4-1, PageID 27) (emphasis added). Upon review, Defendants provided the current name and mailing address of the note holder and servicer — HRC. Noticeably absent from Defendants' response, however, was the phone number. While Defendants' response included a phone number for Jim Ikonomou, a "Mortgage Serviving Specialist," he is not the owner of the loan. "TILA requires the name and address of the owner, not the contact information of a note owne"s surrogates, assignees, or agents." *Richard,* 2017 U.S. Dist. LEXIS 161569, *37…

Accordingly, construing the Complaint in the light most favorable to Plaintiffs and accepting its allegations as true, Plaintiffs state a claim under § 1641(f)(2).

Diffely v. Nationstar Mortgage, LLC. Dist. Court WD Washington April 11, 2018

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First, with respect to Defendants' arguments regarding on-boarding, the Court finds this argument inapplicable. Plaintiff does not appear to allege a violation related to on-boarding. *See* Dkt. #23. Rather, Plaintiff sets forth an allegation for the wrongful on-boarding of information as background to his claim. *Id.* at ¶ 40. Therefore, Count One is not time barred. Next, with respect to Nationstar's alleged failure to "provide information as requested regarding property inspection and preservation," Defendants do not address these allegations. *See id.* Specifically, Plaintiff argues that "although he has been charged with fees relating to Property Inspection, for all the time that he lives at the property, he had never witnessed any such event," Dkt. #26 at 3, and that "[Nationstar] refused to provide [him] with the invoice or proof of payment." *Id.* at 4. Instead of addressing the alleged failure to "provide information as requested," Defendants argue that Plaintiff cannot articulate an error for fees incurred for inspecting the property because Plaintiff's "Deed of Trust permits the lender to assess fees for protecting lender's interest and adding those fees as additional debt under the Loan." Dkt. #24 at 8. Plaintiff does not allege that the Deed of Trust does not authorize property inspection charges. Rather, he alleges that Defendants have failed to produce the documentation as requested to substantiate Nationstar's charges to his loan. *See*Dkt. #23 at ¶ ¶ 40-41. Because Defendants have not adequately addressed Plaintiff's allegations, the motion to dismiss is DENIED as to Count One.

…Defendants argue that "the within lawsuit was commenced 6 days later, which would have severed communication between Plaintiff's counsel and Nationstar," Dkt. #24 at 10, and that Defendants are not required to respond to RFIs which request substantially similar information as previously requested. *Id.* at 11

…RESPA does not express that litigation extinguishes a servicer's duty to respond to a borrower's requests, and Defendants have failed to show legal authority to the contrary. *See* *In re Payne,* 387 B.R. 614, 636 (Bankr. D. Kan. 2008) (holding that a premature lawsuit does not excuse servicer's compliance to respond to borrower's QWR under RESPA). Further, the September 5 letter requested "proof of payment for each of the Escrow and Itemized Fees and Costs . . . in connection with the Loan." Dkt. #23, Ex. J at 29. That letter requested different information than Plaintiff's August 11 RFI and NOE. Thus, the Court finds the September 5 letter is not so substantially similar to Plaintiff's previous requests as to extinguish Nationstar's duty to respond…

Brancato v. Specialized Loan Servicing, LLC. Dist. Court D. New Jersey June 8, 2018

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The record reflects that SLS may have timely responded to Plaintiffs QWSs (SLS Statement at 3-4); however, the question of whether the corrections made by SLS's representative to Plaintiffs account were considered "appropriate" per § 2605(e)(2)(A) is for the trier of fact to decide, not this Court, thereby precluding summary judgment.

For the above reasons, Defendant's motion for summary judgment on Count II is denied.

Pope v. Carrington Mortgage Services, LLC., Dist. Court ND Ohio June 12, 2018

Defendant Carrington's interpretation is plausible, but Plaintiff's interpretation of the letter and the events leading to the letter's creation is equally plausible. Choosing between two plausible interpretations is not the Court's job when deciding a Rule 12(b)(6) motion to dismiss. Instead, the Court must merely determine whether the factual allegations in a plaintiff's complaint plausibly allege a legal violation. Because Plaintiff Pope has plausibly alleged a RESPA violation, the Court DENIES Defendant Carrington's motion to dismiss.

Diehl v. The Money Source, Inc., Dist. Court. SD Alabama Southern Division June 13, 2018

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First, TMS maintains that Diehl inadequately pleaded a RESPA cause of action because her Amended Complaint lacked proof that she actually sent a Notice of Servicing Error to TMS, much less that TMS ever received it. (Doc. 92, at 16.) That argument is unfounded. As part of her summary judgment submission, Diehl attached copies of both her May 9 letter and TMS's response dated June 6. Furthermore, TMS's own evidentiary submission confirms that TMS received the May 9 letter in a timely manner, and responded via letters dated May 12 and June 6. (Cooper Decl., ¶¶ 28-30.) Given these undisputed record facts, TMS's insistence that it is entitled to summary judgment on Count I because Diehl has not proven that she actually mailed the May 9 letter to TMS or that TMS ever received it is unavailing.

Second, TMS contends that Diehl's RESPA claim should be dismissed because plaintiff's own evidence demonstrates that TMS timely and fully responded to her May 9 letter. (Doc. 92, at 16-17.) Diehl counters that genuine issues of material fact remain as to whether TMS complied with RESPA's "reasonable investigation" requirement, thereby precluding entry of summary judgment. In so arguing, Diehl reasons that any reasonable investigation by TMS in response to her May 9 letter would have alerted it that (i) TMS allowed the EAP to collect and remit Diehl's mortgage payments; (ii) the EAP withdrew the missing payments from Diehl's account, such that Diehl had actually made all payments; and (iii) corrective action was needed by TMS because Diehl was not actually in default. There being no indication in TMS's evidence that its investigation of the May 9 letter reached any such conclusions, the Court agrees with plaintiff that a jury question remains as to whether TMS performed any reasonable investigation, or whether it simply skipped the investigation step altogether upon learning of the EAP's involvement and unhelpfully passed Diehl's concern off by directing her to contact the EAP instead. *See, e.g.,* *Nunez v. J.P. Morgan Chase Bank, N.A.,* 648 Fed.Appx. 905, 909-10 (11th Cir. Apr. 22, 2016) (plaintiff raised plausible RESPA claim of failure to conduct reasonable investigation where plaintiff repeatedly notified servicer that errors had occurred, but servicer flatly denied any error and engaged in "unreasonable assessments of the situation"); *Finster v. U.S. Bank Nat'l Ass'n,* 245 F. Supp.3d 1304, 1316 (M.D. Fla. 2017) (indicating that RESPA claim predicated on lack of reasonable investigation is actionable where servicer's responses "failed to address the substance of [borrower's] Notices of Error, gave contradictory explanations, or were factually incorrect") (citations omitted). Simply put, Diehl persuasively maintains that TMS's failure to perform a reasonable investigation may be inferred from its unhelpful and largely unresponsive June 6 letter, in which it failed to acknowledge the facts of the situation or

the clear evidence that Diehl had timely made all payments to the authorized EAP vendor, such that corrective action on TMS's part was necessary to collect the missing funds held by the EAP and to credit Diehl's account for payments she had actually made. Summary judgment is not warranted on the issue of TMS's compliance with RESPA.[11]

Ho v. Wells Fargo Bank, N.A., Court of Appeals, Eleventh Cir. June 21, 2018

https://scholar.google.com/scholar_case?case=9423379547489439885&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

We've described ourselves as "Erie-bound" to apply Florida's litigation privilege to "state-law claims adjudicated in federal court." Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1274-75 (11th Cir. 2004). However, there is no published opinion of this court, in which Florida's litigation privilege was held to bar a federal claim. Under the facts alleged in Ho's complaint, the Florida litigation privilege is preempted by RESPA. See 12 U.S.C. § 2616 ("This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency." (emphasis added)). Applying the Florida litigation privilege to bar Ho's RESPA claim is inconsistent with the cause of action authorized by § 1024.41(a) and (g). These subsections permit a borrower to sue a servicer that moves for "foreclosure judgment, or order of sale" in a state foreclosure proceeding after the borrower submits a "complete loss mitigation application." 12 C.F.R. § 1024.41(a), (g). Because application of the litigation privilege is inconsistent with the cause of action authorized by RESPA, it cannot bar Ho's RESPA claim.

McLaughlin v. Ocwen Loan Servicing, LLC, Dist. Court ND Alabama June 26, 2018

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… This leaves the court with the parties' dueling assertions as to whether the Defendants timely responded to the two undisputed QWRs. *See* docs. 32-1 at 25; 40 at 5-6. This issue is a quintessential dispute of material fact for a jury to resolve. Accordingly, the motion is due to be denied solely as to the two QWRs the Defendants acknowledge receiving.

Loconsole v. Wells Fargo Home Mortgage, Dist. Court, D. New Jersey June 28, 2018

https://scholar.google.com/scholar_case?case=3993758991269633883&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt&hist=qA2oI8IAAAAJ:12985798418689659395:AAGBfm3CQ8tKJjGBc_ocqlsyZzD3lldR8g

12 C.F.R. § 1024.41, the loss mitigation procedure section, appears to distinguish between a final judgment and a foreclosure sale. *See, e.g.,* 12 C.F.R. § 1024.41(g) (stating that under certain circumstances "a servicer shall not move for *foreclosure judgment or order of sale, or conduct a foreclosure sale* . . ") (emphasis added); *see also* *Bennett v. Bank of Am., N.A.,* 126 F. Supp. 3d 871, 876 (E.D. Ky. 2015)(finding that the plaintiffs stated a plausible claim under Section 1024.41 when

the issue arose after the "state court ordered the property foreclosed and issued an order of sale" but before the sale took place).

Moreover, the relevant RESPA regulations contain a preemption provision. 12 C.F.R. § 1024.5(c)(1), in relevant part, reads: "[s]tate laws that are inconsistent with RESPA or this part are preempted to the extent of the inconsistency." *Cf.* 12 U.S.C. § 2605(h) (addressing RESPA's statutory preemption provision). Thus, the Court concludes that New Jersey law could arguably be preempted. The parties, however, did not raise the issue of preemption, and the Court declines to decide the issue *sua sponte.* Instead, for purposes of this motion only, the Court will assume that RESPA, 12 C.F.R. § 1024.41, applies here, meaning that RESPA's loss mitigation procedures apply after a New Jersey court has entered a final judgment of foreclosure but before a foreclosure sale has taken place.

Vethody v. National Default Services Corporation, Dist. Court, ND California July 16, 2018

https://scholar.google.com/scholar_case?case=13070725739959211530&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt&hist=qA2oI8IAAAAJ:12985798418689659395:AAGBfm3CQ8tKJjGBc_ocqlsyZzD3lldR8g

At the hearing, counsel for defendants acknowledged that a dispute existed concerning when SPS received certain documents from the Vethodys—in particular, the outstanding N.V. Hospitality salary breakdown by employee. The Vethodys argue that the documents were submitted on June 10, 2016, whereas the defendants contend that that information was not provided to SPS until August 10, 2016. Mrs. Vethody states in somewhat conclusory fashion that during the month of May 2016, the Vethodys submitted "all information and documents needed for the application, including . . . a profit and loss statement," and that on August 10, SPS requested another P&L statement for Arjun Vethody. Dkt. No. 101-1 ¶¶ 11, 23. The SPS contact record indicates that it received the salary breakdown on August 10, 2016. Dkt. No. 100-1, Ex. I at 16.

Thus, the issue of whether defendants were reasonably diligent in their efforts to obtain complete information concerning the P&L statement requires determining whether Mrs. Vethody's testimony or SPS's business records are more credible, and also requires determining whether the information the Vethodys provided to SPS explaining the P&L statements was sufficient and should have been deemed so by SPS. These are not determinations that can be made on summary judgment. *See James v. Ocwen Loan Servicing, LLC,* No. 1:17-cv-0501, 2017 WL6336770, at *5-6 (S.D. Ohio Dec. 12, 2017) (denying summary judgment where determination of credibility of defendant's business records versus plaintiff's self-serving declaration lay within the province of the jury).

Baker v. Nationstar Mortgage, LLC, Dist. Court, SD Ohio, Eastern Division July 20, 2018

https://scholar.google.com/scholar_case?case=8135526945764230340&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt&hist=qA2oI8IAAAAJ:12646610003395978004:AAGBfm3wNxVjT5kLTsaEHvALfxLk-21iPw

This Court, however, disagrees with the district courts that have held that inquiries regarding appraisals and property inspection fees cannot create RESPA liability. Under the plain language of 12 U.S.C. § 2605(e), the only subsection that explicitly requires a borrower's inquiry to relate to the servicing of a loan is 12 U.S.C. § 2605(e)(1)(A), requiring the servicer to acknowledge receipt of a

"qualified written request from the borrower . . . for information *relating to the servicing* of such loan . . . within 5 days." 12 U.S.C. § 2605(e)(1)(A) (emphasis added). The statutory text does not limit the definition of QWR, found in the next subsection, to correspondences related to servicing. Nor does the text mention the word "servicing" in the section at issue here — 12 U.S.C. § 2605(e)(2). Where, as here, "Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States,* 508 U.S. 200, 208 (1993) (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983)). Congress could have, but did not, include the word "servicing" in the definition of QWR or in explaining the options a servicer who receives a QWR must take within thirty days to fulfill its obligations under RESPA. This Court will not read the word "servicing" into the statute where it is not, and thus holds that the information sought by the borrower need not relate to servicing to constitute a QWR, and a servicer must fulfill its obligations under 12 U.S.C. § 2605(e)(2) regardless of whether such information relates to the statutory definition of "servicing." Any other reading of the statute would render the words "relating to the servicing of such loan" in 12 U.S.C. § 2605(e)(1)(A) a mere surplusage. *See Hibbs v. Winn,* 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal citations omitted).

The Seventh Circuit's reasoning in *Catalan v. GMAC Mortg. Corp.,* 629 F.3d 676 (7th Cir. 2011) is persuasive. In *Catalan,* the mortgage servicer argued that if a borrower "merely dispute[s] a debt or request[s] information" the servicer's "obligations under section 2605" are not triggered. 629 F.3d at 686. In making its argument, the defendant-servicer relied on numerous district court cases finding such requests do not relate to "servicing." *Id.* The Seventh Circuit rejected that argument, finding that if it accepted the servicer's argument, "a lender would have no obligation to respond to a borrower who expressed her belief that her account was in error but was unable to provide specific reasons for that belief, an untenable result under the language of the statute." *Id.* The court thus held that "any request for information made with sufficient detail is enough under RESPA to be a qualified written request and thus to trigger the servicer's obligations to respond." *Id.* at 787. This Court agrees. The Bakers' request seeking information about appraisals and property values triggered Nationstar's obligation to respond, regardless of whether such inquiry relates to "servicing."

Further, the Court finds that even if the information sought in the QWR must pertain to servicing, the statutory definition of "servicing" is broad enough to encompass appraisals and inspection charges. RESPA defines "servicing" to mean:

receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

12 U.S.C.A. § 2605 (i). Defendants argue that the definition is limited to the receipt and application of a borrower's payments. (ECF No. 36 at 7). While it is undisputed that Nationstar did not actually receive any payments for inspection or appraisal fees from the Bakers, the Court does not read the definition of servicing to be so limited.

Green-Wright v. JP Morgan Chase Bank, N.A., Dist. Court, D. Maryland August 7, 2018

https://scholar.google.com/scholar_case?case=18681468496568774 77&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt&hist=qA2oI8IAAAAJ:12985798418689659395:AAGBfm3CQ8tKJjGBc_ocqlsyZzD3lldR8g

However, plaintiff clearly states a claim for RESPA violations against Rushmore. The Rushmore Motion addresses plaintiff's RESPA claim in three scant paragraphs, and fails to explain why the claim should be dismissed. *See* ECF 21 at 11-12. First, Rushmore contends that because filings in the State court foreclosure action indicate that plaintiff was attempting to sell the property prior to the foreclosure sale, "she cannot now claim to have been engaged in a loan modification review at the time of sale." *Id.* Rushmore fails to elaborate on this proposition, and cites no authority for its application.

Next, citing 24 C.F.R. § 1024.41(i) for the rule that a servicer need only comply with Regulation X for a single loss mitigation application, Rushmore asserts that plaintiff's loan modification application "ended in an approval for a trial modification plan going from January through March 2015." ECF 21 at 12. According to Rushmore, this trial modification served as the single loss mitigation application, and therefore Rushmore was not obliged to comply with Regulation X. *Id.* This contention is erroneous. There is no basis to conclude that the trial period of three monthly payments, which plaintiff alleges she timely made (ECF 18, ¶ 11), constituted a final decision on plaintiff's loan modification application. Plaintiff's RESPA claim against Rushmore survives.

In Re Rosa v. Wells Fargo Bank, N.A., U.S. Bankruptcy Ct., D. New Jersey August 9, 2018

https://scholar.google.com/scholar_case?case=6689154679710145904&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt&hist=AO1tF0IAAAAJ:13298300086867927005:AAGBfm2yDPMoX4Wt3P5Kh6Qdlm054NhG6g

This Court agrees with the analysis in Mannarino and Loconsole. As noted, adopting Wells Fargo's position that "servicing" under RESPA ceases post-foreclosure judgment, and therefore there can be no "servicer" after that event would have the effect of making several regulations superfluous. In addition to § 1024.41(g), 12 C.F.R. § 1024.35(b)(10) lists "moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j)" as a covered notice of error requiring a response from the servicer. A foreclosure sale cannot occur absent a final judgment in foreclosure being entered. If the definition of "servicer" only extends to the date of the final judgment, as Wells Fargo submits, then there would be no need to enact any regulations related to foreclosure sales. It would be illogical to allow for a scenario where a borrower submits a notice of error regarding a foreclosure sale under the plain, unambiguous language of § 1024.35(b)(10), which explicitly contemplates and allows for such a request, only to find that there is no "servicer" who would be required to comply under RESPA. Because foreclosure sales are referenced, the only reasonable reading of the regulations is that a party must still be considered a "servicer" up to at least that point, despite the entry of a final judgment in foreclosure.

Finding Wells Fargo to be a "servicer" is not at odds with the "merger" doctrine in New Jersey, due to the distinction between the definitions of "servicing" and "servicer". A party can remain a "servicer" without "servicing" a loan. *See* Buyea v. Select Portfolio Servicing, Inc., 2016 WL 5904502, at *2 (S.D. Fla. Oct. 11, 2016). In Buyea the borrower sent a written request for information to the defendant requesting information as to the current owner or assignee of the loan.

Id. at *1. He alleged that the response was both insufficient and untimely under RESPA. The court in Buyea considered the issue of whether, in light of the borrower's admitted default, the defendant fit the definition of "servicer" under RESPA. It reviewed the Seventh Circuit's decision in Daws, however, it analyzed the statutory language of §§ 2605(i)(2) & (3) in finding that while servicing may end prior to foreclosure and judicial sale:

The Court sees an important distinction between the definitions of servicing and servicer. . . the fact that Defendant was not servicing the loan does not mean that Defendant was no longer a servicer. As defined under RESPA, "[t]he term `servicer' means the person *responsible for* servicing of a loan." 12 U.S.C. § 2605(i)(2) (emphasis added). Whether or not Defendant was actively servicing the loan, Defendant remained responsible for servicing the loan at the time it received Plaintiff's RFI. Defendant was therefore a servicer and was obligated to respond to Plaintiff's RFI.

Id. at *3. It is noted that in Buyea the borrower was only at the point of default, which is not when the "merger" doctrine applies, and not when the loan is extinguished. There is a reasonable position that under Buyea a party remains a "servicer" after default, but not after judgment. However, when read in connection with the provisions of RESPA and Regulation X requiring servicer action through foreclosure sale, it is apparent that to the extent that a party is not "servicing" a loan, it may still be a "servicer" post-judgment.

Finally, Wells Fargo's own actions belie its contention that it is not a servicer. While we analyze the term only under the specific statute or regulation from which it derives, in this case RESPA, it is nonetheless notable that at every relevant step since final judgment Wells Fargo has held itself out to be, or specifically referenced itself as, a servicer. Both the Application Denial and the Appeal Denial appear to have been written in a manner which demonstrate knowledge of and attempted compliance with RESPA and Regulation X, despite Wells Fargo's present position that those regulations were inapplicable to its relationship with Rosa. Additionally, the Application Denial and the Appeal Denial both referred to Wells Fargo as the "account servicer." Even continuing into this bankruptcy, Wells Fargo has filed a proof of claim relating to the Property on behalf of another entity and referred to itself as "servicer" in the documents supporting the proof of claim. It is disingenuous of Wells Fargo to act as a servicer at all times when dealing with Rosa and then claim it does not fill that role only after its methods were questioned.

For these reasons we find that Wells Fargo fits the definition of "servicer" under 12 U.S.C. § 2605(i)(2).

C. Standing

2015

Stoimenova v SPS, ND California, August 14, 2015
https://scholar.google.com/scholar_case?case=12545214366368681451&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Plaintiffs allege that defendants violated the ECOA by failing to timely respond to plaintiffs' May 2014 loan modification request. FAC ¶ 56; 15 U.S.C. § 1691(d)(1) ("Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application."). Defendants to move to dismiss the ECOA claim on the basis that (1) Darinka lacks standing as she is not a borrower under the mortgage; (2) Bogdan lacks standing because he is not an owner-occupant of the Property; and (3) a "complete application" was never submitted. Court finds that both Darinka and Bogdan have standing to pursue the ECOA claim, as both parties made the loan modification request, and there does not appear to be any requirement in the ECOA that a borrower continually occupy the property. Defendants cite California Civil Code § 2924.15, which limits the application of certain California statues "only to first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units." To the extent that Section 2924.15 would be a basis for denying Bogdan's loan modification application, the ECOA still requires defendants to promptly inform Bogdan of that fact. Section 2924.15 does not appear to limit application of the ECOA. Finally, plaintiffs affirmatively plead that they submitted a complete application in May 2014, but defendants "dragged out the modification process by requesting Plaintiffs to resubmit documents which they had already submitted." FAC ¶¶ 18, 45.

Gritters v Ocwen, ND Illinois, November 6, 2015
https://scholar.google.com/scholar_case?case=10990094773161738247&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Ocwen contends that all of plaintiff's claims are property of the bankruptcy estate "because the events giving rise to them occurred before Gritters filed her Chapter 7 Petition" and "Gritters could have asserted each of her claims prior to her filing of the Chapter 7 Petition." (R. 88, Ocwen's Mot. at 6 (emphasis omitted).) The salient question, however, is when plaintiff's claims accrued. Ocwen presents little to no analysis on this issue and does not acknowledge that many, and likely most, of plaintiff's claims may have accrued not when the alleged misconduct occurred, but when plaintiff discovered or should have discovered her injuries. Rather, Ocwen simply assumes that at the time Gritters filed her bankruptcy petition, she knew or should have known about all of her injuries allegedly caused by Ocwen, and it further argues that Gritters "concealed" those claims during the bankruptcy proceeding. (Ocwen's Mot. at 6-7.) In response to Ocwen's motion, plaintiff argues that she did not have knowledge of the basis for her claims until after she filed for bankruptcy relief and the bankruptcy proceeding was concluded. Court rules for Gritters, allowing her claims to stand against Ocwen's motion to dismiss.

Hepworth v Wells Fargo, DCA Florida, December 9, 2015
https://scholar.google.com/scholar_case?case=15143690453487596555&q=hepworth+v+wells+fargo&hl=en&as_sdt=80000006
The analyst testified that records showed Option One took possession of the original promissory note on October 21, 2005. The note was transferred from Homefield to Option One to the PSA trust through the PSA. The physical note then went to the custodian for the PSA trust. He noted that the PSA trust had a closing date of February 3, 2006, but said he had no personal knowledge of when the note was physically transferred into the trust, absent business records that make it appear as though it was at some point. The analyst did not know when the allonges were executed or when they were affixed to the back of the note.
We agree with the borrowers that Wells Fargo had no standing in this case. "The first lesson in `Foreclosures 101': a lender must prove it had standing before the complaint is filed to foreclose on a mortgage." Peoples v. Sami II Trust 2006-AR6, 40 Fla. L. Weekly D2328, D2328 (Fla. 4th DCA

Oct. 14, 2015). "[S]tanding may be established from the plaintiff's status as the note holder, regardless of any recorded assignments." McLean v. JP Morgan Chase Bank Nat'l Ass'n, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). "If the note does not name the plaintiff as the payee, the note must bear a special endorsement in favor of the plaintiff or a blank endorsement." Id.The plaintiff may also show "an affidavit of ownership to prove its status as the holder of the note." Id.
"A "plaintiff alleging standing as a holder" must prove it is a holder of the note and mortgage both as of the time of trial and also that [it] had standing as of the time the foreclosure complaint was filed." Kiefert v. Nationstar Mortg., LLC, 153 So. 3d 351, 352 (Fla. 1st DCA 2014) (emphasis added).
Such a plaintiff must prove not only physical possession of the original note but also, if the plaintiff is not the named payee, possession of the original note endorsed in favor of the plaintiff or in blank (which makes it bearer paper). If the foreclosure plaintiff is not the original, named payee, the plaintiff must establish that the note was endorsed (either in favor of the original plaintiff or in blank) before the filing of the complaint in order to prove standing as a holder. Id. at 353 (internal citations omitted). "A plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed and cannot be established retroactively by acquiring standing to file a lawsuit after the fact." LaFrance v. U.S. Bank Nat'l Ass'n, 141 So. 3d 754, 756 (Fla. 4th DCA 2014) (citation omitted) (internal quotation marks omitted).

2016

Pauley v BOA, ED Michigan, January 19, 2016
https://scholar.google.com/scholar_case?case=13073864288152360615&q=pauley+v+boa&hl=en&as_sdt=80000006
As a threshold matter, Plaintiff failed to disclose in bankruptcy his claims against Bank of America. Pursuant to 11 U.S.C. § 541, "property of the estate includes the debtor's interest in a cause of action." When a debtor fails to list claims on the bankruptcy petition, the claims remain the property of the bankruptcy estate because the trustee never had the opportunity to abandon them. In re Prochnow, 467 B.R. 656, 664 (C.D. Ill. 2012). Therefore, the Chapter 7 trustee, not the debtor, is the party with standing to pursue these claims.

2017

Washington v. GREEN TREE SERVICING LLC, Dist. Court, SD Ohio May 5, 2017

https://scholar.google.com/scholar_case?case=4261155383492131303&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Under these amendments, a successor in interest is "confirmed" when "a servicer has confirmed the successor in interest's identity and ownership interest in a property that secures a mortgage loan." *Id.*(amending 12 C.F.R. § 1024.31). In enacting these amendments, the CFPB explained its rationale for considering confirmed successors in interest to be borrowers:

Although a confirmed successor in interest will not necessarily have assumed the mortgage loan obligation under State law, the successor in interest, after the transfer of ownership of the property, will have stepped into the shoes of the transferor borrower for many purposes. . . . [T]he successor in interest will typically need to make payments on the loan in order to avoid foreclosure on the property. The successor in interest's ability to sell, encumber, or make improvements to the property will also be limited by the lien securing the loan. In other words, the property rights of the confirmed successor in interest, like those of the transferor borrower, are subject to the mortgage loan.

Id. at 72183.

Even though these amendments will not become effective until April 2018 and were not in effect at the time of defendants' conduct at issue here, the Court finds that these amendments and the CFPB's explanation of their purpose are persuasive authority. *See In re Carter,* 553 F.3d 979, 987-88 (6th Cir. 2009) ("[T]he views of an agency charged with applying a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). *See also Rogers v. City of San Antonio,* 392 F.3d 758, 762 (5th Cir.2004) (finding proposed regulations by Secretary of Labor, while not binding, to be persuasive authority); *Callum v. CVS Health Corp.,* 137 F. Supp. 3d 817, 850 (D.S.C. 2015) (proposed regulations of Health and Human Services provide persuasive authority to support a finding that defendant "administers health programs or activities" within the meaning of the statute); *Hoffman v. Carefirst of Fort Wayne, Inc.,* 737 F. Supp. 2d 976, 985 n.1 (N.D. Ind. 2010)(finding proposed regulations issued by EEOC identifying "cancer" as an example of "impairments that are episodic or in remission" and therefore a "disability" to be a useful tool in gleaning the intended meaning of the ADAAA amendments); *Galati v. D & R Excavating, Inc.,* No. CV04-1684, 2006 WL 839057, at *3 (D. Ariz. Mar. 30, 2006) (proposed Treasury regulations are at least persuasive authority for interpreting the COBRA provisions of ERISA) (and numerous cases cited therein). The amendment to Regulation X supports the conclusion reached in *Frank* that the widow/successor in interest had standing to bring claims under the RESPA and Regulation X. So too, this Court concludes that plaintiff here, as her deceased mother's successor in interest, has standing to bring her claims under the RESPA and Regulation X as a borrower.

McGahey v. Federal National Mortgage Association, Dist. Court, D. Maine July 17, 2017

As a threshold matter, Defendants assert that McGahey lacks standing to assert the claims in his Complaint because each attempts to indirectly enforce the Fannie Mae guidelines pertaining to HAMP modifications. While the First Circuit has held that borrowers do not have standing as third-party beneficiaries to enforce HAMP's terms, see Mackenzie v. Flagstar Bank, FSB, 738 F.3d 486, 490-93 (1st Cir. 2013), the Magistrate Judge correctly observed that McGahey does not seek direct redress for alleged HAMP violations under a third-party beneficiary or breach of good faith theory, see ECF No. 30 at 21.

Rather, McGahey asserts that the alleged HAMP guideline violations constitute separate violations of the Maine Unfair Trade Practices Act and Maine Consumer Credit Code, as well as fraud. See Markle v. HSBC Mortg. Corp. (USA), 844 F. Supp. 2d 172, 185 (D. Mass. 2011) (recognizing that lack of private right of action under HAMP does not preclude a violation of HAMP guidelines from forming basis of a claim under Chapter 93A, the analogous Massachusetts consumer protection statute); see also Gaul v. Aurora Loan Servs. LLC, 2013 WL 1213065, at *9 (D. Mass. Feb. 7, 2013) (same). If McGahey properly alleges a violation of the UTPA, the lack of third-party beneficiary

standing or a private right of action under HAMP itself will not preclude his claim from going Case 2:16-cv-00219-JDL Document 39 Filed 07/17/17 Page 21 of 40 PageID #: 1625 22 forward. See Blackwood v. Wells Fargo Bank, N.A., 2011 WL 1561024, at *4 (D. Mass. Apr. 22, 2011) (noting that consumer protection statute is "the appropriate avenue" for seeking remedy for violation of statute that does not provide for a private remedy). I therefore turn to evaluate whether the Complaint sufficiently states a claim under each individual count…

2018

Washington v. Green Tree Servicing, LLC, Dist. Court, SD Ohio March 9, 2018

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In sharp contrast, the original borrower in this case, Plaintiff's mother, died on September 8, 2007. (Doc. 52-3 at PageID 521.) After her mother's death, Plaintiff Jonna Washington became the sole owner of the property, paid the mortgage on the property for years, personally completed a loss mitigation application, and made all three temporary payment plan payments Defendants demanded. (Doc. 52-4 at PageID 523). She signed and returned the modification offer Defendant Green Tree provided to her on October 16, 2014. *Id.* at PageID 524-525. She corresponded with Defendant Green Tree extensively, and it is clear Defendants have treated Plaintiff Jonna Washington as a borrower standing in the shoes of her deceased mother for a number of years. (*See* Attachments to Doc. 52 at PageID 700-722). Thus, the case at bar is very clearly distinguishable from the Court's decision in *Cooper,* and Defendants' repeated claims to the contrary are pointless.

Abbatematteo v. Federal Housing Finance Agency, Dist. Court, D. Rhode Island July 17, 2018

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The Real Estate Settlement Procedures Act was enacted to "provide consumers with greater information and protect them from certain abusive practices." First Fed. Sav. & Loan Ass'n v. Greenwald, 591 F.2d 417, 420 n.5 (1st Cir. 1979) (citing 12 U.S.C. §§ 2601 (2018)). Enacted pursuant to RESPA, 12 C.F.R 1024.41 — i.e., "Regulation X" — provides home-loan borrowers with various protections, see, e.g., 12 C.F.R. § 1024.41(b)(1), some of which Plaintiff accuses Chase of violating, (see Compl. ¶¶ 78, 84-85, 88-90, 131).

Chase argues its relationship to Plaintiff is not covered by Regulation X because she was not a party to the note. Plaintiff was, however, named as a "Borrower" in the mortgage and subject to the covenants therein. (See Objection 18; Compl., Ex. 17, 1-5, 15, ECF No. 1-17.) She can thus sue under Regulation X. 12 C.F.R. § 1024.41(a) ("A borrower may enforce the provisions of [Regulation X] pursuant to section 6(f) of RESPA."); see also Frank v. J.P. Morgan Chase Bank, N.A., No. 15-cv-5811-LB, 2016 WL 3055901, at *4 (N.D. Cal. May 31, 2016) (finding Deed of Trust referring to plaintiff as "borrower" sufficient for RESPA to apply, though she did not sign promissory note).

Thomas v. Ocwen Loan Servicing, LLC, Dist. Court, WD Washington July 26, 2018

https://scholar.google.com/scholar_case?case=16856627705620028890&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt&hist=qA2oI8IAAAAJ:12985798418689659395:AAGBfm3CQ8tKJjGBc_ocqlsyZzD3lldR8g

The Court next turns to Defendants' argument that the Complaint must be dismissed because Plaintiffs fail to establish Article III standing. Dkt. #25 at 10-11. To establish Article III standing, plaintiffs must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,*136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Under Article III's injury in fact element, Plaintiff must show that they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560 (internal quotations omitted). "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo,* 136 S.Ct. at 1549. However, "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* Accordingly, *Spokeo*distinguishes between "bare procedural violation[s]" and violations that "cause harm or present any material risk of harm." *Id.* at 1549-50.

In this case, the Court finds that Plaintiffs have standing to bring their claims. Plaintiffs started this suit after a foreclosure notice was issued, and Defendants admit that a notice of trustee's sale was recorded on April 11, 2017, in King County, WA, noticing a trustee's sale scheduled for August 11, 2017. Dkts. #1 at ¶ 14 and #24 at ¶ 14. Defendants then stipulated to a preliminary injunction to enjoin the foreclosure. Dkt. #22. "[S]tanding is determined as of the commencement of litigation." *Yamada v. Snipes,* 786 F.3d 1182, 1203 (9th Cir. 2015) (quoting *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, 1171 (9th Cir. 2002) (brackets omitted)); *see also Lujan,* 504 U.S. at 569 n.4 ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.") (quoting *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 839, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)). Thus, Plaintiffs have satisfied the requirements for Article III standing in this action.

D. Timing

2015

Dionne v Federal National Mortgage Assn & JP Morgan, D New Hampshire, June 16, 2015
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Defendants contend that the timing of events precludes relief under RESPA. RESPA restricts a lender's right to conduct a foreclosure sale where the borrower, after receiving a "first notice or filing required by applicable law for any . . . foreclosure process," submits a complete loss mitigation application at least 37 days before a foreclosure sale. 12 C.F.R. § 1024.41(g). To briefly summarize, Chase sent a letter dated August 12, 2014, indicating that a foreclosure sale would occur on October 1, 2014. The Dionnes allege that they submitted their complete loss mitigation application on August 27, 2014. After the October 1 sale did not occur, the Dionnes received a second letter noticing a

foreclosure sale. This letter was dated December 11, 2014, and indicated that the sale would occur on January 12, 2015. The Dionnes allege that they never received a response from Chase as to whether their loss mitigation application had been accepted or rejected, but that the foreclosure sale took place as scheduled on January 12, 2015... Separately, the Defendants contend that the Dionnes' loss mitigation application was not submitted at least 37 days prior to the foreclosure sale, as RESPA requires. See 12 C.F.R. § 1024.41(g). To support this argument, the Defendants note that the August 12 letter noticed a foreclosure sale which was to occur on October 1, 2014. Therefore, when the Dionnes submitted their application on August 27, 2014, they did so just 35 days before the date of the scheduled sale. Section 1024.41(g) obliges the borrower to submit the loss mitigation application "more than 37 days before a foreclosure sale. . . ." The Defendants would have the court identify October 1 as the date of the foreclosure sale for purposes of calculating the timeliness of the application, even though it is undisputed that the sale did not actually occur until January 12, 2015. The Defendants do not cite authority supporting this contention, and it strikes the court as contrary to the plain wording of Section 1024.41(g). The Dionnes have pled facts sufficient to suggest that their application was submitted on August 27, 2014, which was far greater than 37 days prior to the actual foreclosure sale date of January 12, 2015. In sum, the Verified Petition plausibly alleges that the Dionnes timely submitted a complete loss mitigation application, and that the Defendants subsequently violated RESPA by conducting a foreclosure sale prior to acting on the application. Thus, the Defendants are not entitled to dismissal of the Dionnes' RESPA allegations.

White v Wells Fargo, ED Michigan, April 22, 2015
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Defendants maintain that RESPA does not apply because Plaintiffs did not request a loan modification after the date RESPA became effective. The same argument was presented and rejected in Lage. Id. at *9. The court reasoned that as a consumer protection statute, RESPA should be "`construed liberally in order to best serve Congress' intent.'" Id. (quoting McLean v. GMAC Mortg. Corp., 398 F. App'x 467, 471 (11th Cir. 2011)). Accordingly, the court found that the defendants' "harsh interpretation appears to conflict with the nature and purpose of the statute." Id. Perhaps most persuasively, Lage cites to a non-binding consumer guide published by the Consumer Financial Protection Bureau, which states:
These new rules became effective on January 10, 2014. Any borrower who files a complete loss mitigation application on or after January 10, 2014 and more than 37 days before a foreclosure sale is entitled to an evaluation of the complete loss mitigation application for all available loss mitigation options (so long as the conditions of 12 C.F.R. 1024.41 are met). The servicer must conduct this evaluation even if the borrower previously filed for, was granted, or was denied a loss mitigation plan before January 10, 2014.
CFPB, Help for Struggling Borrowers: A guide to the mortgage servicing rules effective on January 10, 2014, at 8 (January 28, 2014) (available at http://files.consumerfinance.gov/f/201402_cfpb_mortgages_help-for-strugglingborrowers.pdf) (emphasis added). The Court agrees with the conclusions set forth in Lage and declines to find that RESPA is inapplicable in a case where the loan modification request was made prior to the effective date and the foreclosure took place after the effective date. Accordingly, dismissal is inappropriate as to Plaintiffs' RESPA claim.

Cooper v Fay Servicing, SD Ohio, July 17, 2015
http://www.burrconsumerfinancelitigationblog.com/tag/cooper-v-fay-servicing/
The mortgagors sued the servicer of their real estate loan asserting claims for alleged violations of Regulation X relating to the loss mitigation process. Critical to this case was the timing of the loss

mitigation process that resulted in the alleged Regulation X violations, the date of the foreclosure filing, and the date of the foreclosure sale. Specifically, the foreclosure proceeding was initiated on January 4, 2014, six days prior to the effective date of the CFPB's new Mortgage Rules, while the alleged Regulation X violations occurred in December 2014. The foreclosure sale had not been completed.

Defendants argued that Plaintiffs were precluded from enforcing their Regulation X claims because the complaint initiating the foreclosure action was filed on January 4, 2014, six days prior to Regulation X's January 10, 2014 effective date. Citing Campbell v. Nationstar Mortg., 2015 WL 2084023, Defendants argued that applying Regulation X would be impermissibly retroactive. However, the District Court distinguishedCampbell, where both the loss mitigation process and foreclosure sale occurred before the January 10, 2014 effective date. Here, the foreclosure sale had not yet occurred.

Relying on White v. Wells Fargo Bank, 2015 WL 1842811 and Lage v. Ocwen Loan Servicing LLC, 2015 WL 631014, the District Court held that Plaintiffs' Regulation X claims did not constitute an impermissible retroactive application of Regulation X because the language of 12 C.F.R. § 1024.41 contemplates that a party may seek to enforce his or her rights after a foreclosure complaint is filed, which was presumably during the effective time period of the new CFPB Mortgage Rules. Specifically, the District Court held that "while it would constitute retroactive application to apply 12 C.F.R. § 1024.41 to a case where the date of enactment [of the new Mortgage Rules] trailed the foreclosure sale, the regulation contemplates application after a foreclosure action has been brought." Therefore, since Plaintiffs are permitted to assert their loss mitigation rights up to 37 days prior to the foreclosure sale (during the effective time period of the new Mortgage Rules), their Regulation X claims were not impermissibly retroactive.

2016

Frank v. JP Morgan Chase Bank, NA, Dist. Court, ND California, May 31, 2016
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The RESPA provisions that Ms. Frank sues under apply only to "borrowers" but RESPA does not define the term. *See* 12 U.S.C. § 2605; 12 C.F.R. §§ 1024.35(a), 1024.36(a). In light of this requirement, courts have dismissed RESPA claims where plaintiffs did not sign the mortgage documents or otherwise obligate themselves under the mortgage. *See Johnson v. Ocwen Loan Servicing,* 374 Fed. Appx 868, 873-74 (11th Cir. 2010) (holding that the plaintiff lacked standing because he "was not a borrower or otherwise obligated on the Ocwen loan[.]");*Aldana v. Bank of Am., N.A.,* No. CV 14-7489-GHK FFMX, 2014 WL 6750276, at *3 (C.D. Cal. Nov. 26, 2014) (dismissing RESPA claim where the plaintiff was "not a borrower, did not assume obligations under the loan, and was not a third-party beneficiary of the [Deed of Trust]."); *Green v. Central Mortgage Co.,* No. 14-cv-04281-LB, 2015 WL 5157479, at *4-5 (N.D. Cal. Sep. 2, 2015) (collecting cases). Many such cases, however, are distinguishable from Ms. Frank's because the plaintiffs did not sign any of the mortgage documents, and thus were not obligated whatsoever. *Compare Ambers v. Wells Fargo Bank, N.A.,* No. 13-CV-03940 NC, 2014 WL 883752, at *5 (N.D. Cal. Mar. 3, 2014) (plaintiff did not sign the deed of trust or assert any other basis for standing); *Cabrera v. Countrywide Fin.,* No. C 11-4869 SI, 2012 WL 5372116, at *8 (N.D. Cal. Oct. 30, 2012) (dismissing RESPA claim where only husband was "signatory to the initial mortgage"); *Bianchi v. Bank of America,*

N.A., No. 12cv750-MMA (MDD), 2012 U.S. Dist. LEXIS 69260, at *3-4 (S.D. Cal. May 17, 2012) ("According to the Deed of Trust executed on July 16, 2003, the borrower to the loan and the sole signatory on the mortgage contract is `Lewis S. Bianchi, a single man.'"); *with Signh v. Wells Fargo Bank N.A.,* No. CIV 2:11-cv-0401-GEB-JFM (PS), 2011 WL 2118889, at *1 (E.D. Cal. May 27, 2011) (dismissing RESPA claim where the plaintiff had signed the deed, but not the note); *Wilson v. JPMorgan Chase Bank, N.A.,* No. CIV 2:09-863 WBSGGH, 2010 WL 2574032, at *1 (E.D. Cal. June 25, 2010) (same).

In contrast, in *Washington v. American Home Loans,* the plaintiff had standing to sue notwithstanding having failed to sign the promissory note. 2011 WL 11651320 at *2. In that case, the plaintiff sought a preliminary injunction under RESPA, the UCL, and a host of other laws. *Id.* The defendants argued that because the plaintiff did not sign the promissory note, she was not a "borrower" and lacked standing.*Id.* The plaintiff, however, was "obligated on the loan" because she "signed the deed of trust as a joint tenant with her son . . . [and therefore stood] to lose the equitable interest that she [had] in the subject property in the event of a default on her son's loan." *Id.* "As such, she [had] Article III standing to proceed with [the] action." *Id...*
The court finds the defendant's reliance on *Singh* and *Wilson* unpersuasive for four reasons. First, the *Singh* court did not explain its reasoning and thus does not provide context for its decision. Second, unlike the plaintiff in *Wilson,* Ms. Frank does not allege that she is not a "borrower." To the contrary, she repeatedly asserts that she is a borrower under the mortgage terms (albeit, not a signatory to the note).

Third, the court agrees more with the reasoning in *Washington.* Ms. Frank is obligated under the mortgage because her interest in the property is at stake and, even if she was not obligated to make note payments,[49] the Deed of Trust (which calls her a "Borrower") obligates her to certain other conditions. For example, Ms. Frank grants her property interest "under the terms of [the Deed of Trust,]" indicating she must comply with the instrument's non-payment covenants (*e.g.*property and mortgage insurance, occupancy, preservation and maintenance, and other covenants).[50] The threat of default, possible foreclosure, and these additional covenants surely obligate her under the mortgage.

Fourth, the Franks owned the home as "husband and wife, with right of survivorship."[51] The loan, which was secured by the home (a joint asset), is community debt, *see* *In re Marriage of Fischer,* 78 Cal. App. 3d 556, 561 (1976),*disapproved of on other grounds by* *In re Marriage of Epstein,* 24 Cal. 3d 76, 85 n.2 (1979); 11 Witkin, Summary 10th (2005) Comm. Prop., § 99. Upon Mr. Frank's death, Ms. Frank became personally liable for making the note payments. *See* Cal. Prob. Code §§ 13550 *et seq.;* *Packard v. Arellanes,* 17 Cal. 525, 525 (1861); *In re Estate of Bonanno,* 165 Cal. App. 4th 7, 20 (2008). At the time of Chase's alleged misconduct — after Mr. Frank's death — Ms. Frank was therefore obligated to make the loan payments. *See* *Barzelis v. Flagstar Bank, F.S.B.,* 784 F.3d 971, 977-78(5h Cir. 2015) (reaching a similar conclusion based on Texas community-property law).
In this context, then, where Ms. Frank is a "Borrower" under the Deed of Trust and a surviving spouse obligated to make debt payments, she is a "borrower" for the purposes of RESPA (and her other claims), and therefore has standing.

2017

Cole v. Federal National Mortgage Associsation, Dist. Court D. Maryland, February 13, 2017

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Defendant further argues that the most recent assignment of the Deed of Trust was made in 2012, and therefore any claim arising from such transfer is barred by the one-year statute of limitations under TILA. *See* 15 U.S.C. § 1640(e). In response, Plaintiff argues that her TILA claim is not barred by the one-year statute of limitations because the allegations in the Complaint unequivocally state that Defendants did not disclose Fannie Mae's ownership of the loan until March 2015, and that Defendants concealed this information from Plaintiff. ECF No. 25 at 2 n. 1. The Court agrees that at this juncture, dismissal of Plaintiff's case on statute of limitations grounds would be improper. *See Ward v. Branch Banking & Trust Co.,* No. CIV.A. ELH-13-01968, 2014 WL 2707768, at *13 (D. Md. June 13, 2014) (declining to dismiss TILA claim on statute of limitations grounds where "plaintiff ... alleged sufficient facts to receive the benefit of equitable tolling"): *see also Roach v. Bank of Am. Corp.,* No. 3:14-CV-703-J-39JBT, 2014 WL 7771740, at *2 (M.D. Fla. Dec. 9, 2014) (noting that "[d]ismissal on such grounds is appropriate *only* if it is apparent from the lace of the complaint that the claim is time-barred and *only* if it appears beyond a doubt that [a plaintiff] can prove no set of facts that toll the statute.") (emphases in original). Plaintiff has alleged that disclosure was first made in March 2015, and that Defendants otherwise concealed this information from her prior to that date. Taking the allegations in the Complaint as true, the Court denies Defendants' Motion to Dismiss this claim.

E. Venue

2016

Cole v. JPMorgan Chase Bank, NA, Dist. Court, SD Ohio August 25, 2016

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Plaintiff asserts that Ohio has a greater interest than Colorado in resolving this RESPA dispute, inasmuch as this dispute requires the Court to apply federal law and interpret federal regulations, where the cause of action at issue arose in Ohio, and involved the business policies and practices of an Ohio corporate office. Furthermore, because this action arises under RESPA, a federal statute, both courts are equally familiar with the controlling law and each would be competent to adjudicate that claim. *See* Kay, 494 F. Supp. 2d 857.
Finally, although the conservation of judicial resources slightly favors transfer, this factor does not overcome the other factors weighing against transfer. As Chase points out, the docket of the Colorado district is less "congested," in that the "U.S. District Courts — Judicial Caseload Profile for this Court and the Colorado Federal Court" show that the "Colorado Federal Court's Docket is less congested than this Court's." (ECF No. 20, at 9.) Defendant highlighted that Colorado is 2.5 months faster on average. Although the conservation of judicial resources slightly favors transfer, this factor does not overcome the other factors weighing against transfer.

In sum, Chase has failed to meet its burden to demonstrate that the District of Colorado is a more convenient forum. Rather, the Court concludes that the balance of the private and public factors weigh against transfer. Chase's Motion to Transfer Venue is, therefore, DENIED.

Santoro v. Altisource Solutions, SÀ RL, Dist. Court, D. Oregon October 11, 2016
https://scholar.google.com/scholar_case?case=8362793592714389939&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[Motion to dismiss for lack of personal jurisdiction denied]

With respect to the second prong of the specific jurisdiction test, it is clear that this claim arises out of Kitsap's property preservation services performed on plaintiffs former home, and thus this prong is satisfied. The only remaining consideration is reasonableness. I find the exercise of specific jurisdiction reasonable here. While I am aware that defendant may be inconvenienced by a ruling in favor ofpersonal jurisdiction, that inconvenience carries limited weight because the S.à.r.l. is a large corporation with many subsidiaries all around the United States. Furthermore, this district appears to be the most efficient forum for adjudicating the dispute. *Caruth v. Int'l Psychoanalytical Ass'n,* 59 F.3d 126, 129 (9th Cir. 1995). Since the events took place in Oregon, most if not all material witnesses reside nearby, and the bulk of evidence can likely be found in Oregon. Also, Oregon has a very strong interest in furnishing its citizens with a forum to remedy their injuries. *Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1333 (9th Cir. 1984). Thus I find that jurisdiction is reasonable and all three requirements for specific jurisdiction are satisfied.

2017

Willson v. Bank of America, NA, Court of Appeals, 11th Circuit April 10, 2017

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[No abuse of discretion for abstention]

The district court found three factors favored abstention: factor one, that the Florida court had jurisdiction over Willson's property; factor four, that the Florida court was post-trial while the federal suit was not; and factor eight, that RESPA's grant of concurrent jurisdiction indicated a policy in favor of abstention. The first factor favors abstention because the Florida court already had jurisdiction over Willson's property and the federal court necessarily would decide whether the foreclosure judgment was correct. See Forehand v. First Ala. Bank of Dothan, 727 F.2d 1033, 1035 (11th Cir. 1984) (the first factor applies where both the federal and state courts are "determining rights in property over which one court has first taken jurisdiction"). The fourth factor also favors abstention because the district court properly looked to the relative progress of the two suits and found the Florida court had progressed beyond trial. See Moses H. Cone, 460 U.S. at 21-22, 103 S. Ct. at 940 ("[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions."). And although Willson argues the RESPA issue was not squarely before the Florida court at the foreclosure trial, the district

court correctly found the RESPA claim was premised on Bank of America proceeding with the foreclosure trial despite Willson's pending loan-modification application.

We note that the district court did err in its finding on the eighth factor that RESPA's concurrent jurisdiction "indicates a policy in favor of abstention." Colorado River requires more. Although it is true that the statute at issue in Colorado River granted concurrent state and federal jurisdiction, 424 U.S. at 809, 96 S. Ct. at 1242, it was "[t]he clear federal policy . . . [for] the avoidance of piecemeal adjudication of water rights in a river system" that evinced a policy favoring abstention. Id. at 819, 96 S. Ct. at 1247. Even recognizing this error, it does not reach the level of a clear error of judgment or affect the district court's finding that the exceptional circumstances of the other two factors warranted abstention. See Jackson-Platts, 727 F.3d at 1133. As a result, we affirm.

F. Discovery

2017

Fuchs v. Selene Finance LP, Dist Court SD Ohio, April 7, 2017

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Plaintiffs have requested Selene's Policies, Procedures, and Servicing Guidelines ("Policies"). Selene agreed to provide these subject to a protective order due to the proprietary nature of some of the information in them. Selene asserts that it sent a draft protective order to Plaintiffs' counsel as early as April of 2016. (Doc. 72-9, p. 3). Due at least in part to a change in Plaintiffs' counsel, there seems to be disagreement and confusion between the parties as to who should have drafted a protective order or confidentiality agreement. Selene now argues that it should not have to produce the Policies because discovery is closed and the parties have filed and fully briefed motions for summary judgment.

However, as the Court has previously ruled, Plaintiffs' motion to compel was timely. They are entitled to the Policies, which are clearly within the scope of permissible discovery under Rule 26(b). The parties are directed to draft a protective order or enter into a mutually acceptable confidentiality agreement, and Selene will be directed to provide the Policies to Plaintiffs subject to that Order or confidentiality agreement.

II. Cases Negative to Plaintiff/Borrower

A. Damages

2014

Bulmer v. MidFirst Bank, Dist. Court, D. Massachusetts November 14, 2014

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Here, the court concludes, the RESPA violation did not cause Plaintiff any *actua l*damage, which, as alleged, boils down to an assertion that the violation somehow placed him on an irreversible path to foreclosure. That damage, however, could not have been caused by Defendant's failure to adequately respond to the QWR on July 6, 2012, after pre-foreclosure proceedings were well underway. Still, Plaintiff seems to argue that, had Defendant only remedied the January 2010 payoff error identified in the QWR in 2012—if error it was—then the intervening events would somehow have been negated. This argument cannot carry the day; as described, Plaintiff's claim that Defendant miscalculated the balance due after his January 2010 payoff had long before been forfeited when he executed the April 2011 forbearance agreement, which definitively set forth a precise balance due.

Nor has Plaintiff put forth any evidence that he might succeed on a claim for *statutory* damages under RESPA. For the court to grant such damages, there needs to be a showing that Defendant engaged in "a pattern or practice of noncompliance." *Urbon v. JPMorgan Chase Bank, N.A.,* 2013 WL 1144917, at *3 (D.Mass. Mar. 18, 2013). Granted, Plaintiff argues that Defendant's responses to his telephone inquiries about the payoff were consistently non-responsive. RESPA, however, contains no provision requiring that servicers provide thorough responses to borrowers' telephone inquiries. *See McCarley v. Household Fin. Corp., III,* 2008 WL 276330, *1 n. 5 (M.D.Ala. Jan. 30, 2008) (oral communications do not "invoke a duty to respond under RESPA"). Accordingly, the only RESPA violation Plaintiff has supported is Defendant's failure to adequately respond to one written QWR. Simply put, that one failure is not enough to demonstrate a pattern or practice of noncompliance for purposes of statutory damages. *See, e.g., In re Maxwell,* 281 B.R. at 123 (citing more egregious cases and concluding that "just two" RESPA violations does not establish a pattern or practice). Accordingly, summary judgment is appropriate in Defendant's favor with respect to Count 1.

2015

Bertschy-Gallimore v US Bank, WD Michigan, June 24, 2015
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Even if a borrower does prove a violation of RESPA, the statute provides that the remedy of setting aside the Sheriff's sale is unavailable; § 2605(f) provides that only actual monetary damages are available. Id. At *4. Further, the plaintiff must plead damage allegations in order to seek such monetary relief.

Lage v Ocwen, SD Florida, November 18, 2015
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Plaintiffs demonstrated non-pecuniary harm, yet Ocwen asserts that Plaintiffs have failed to distinguish their stress and emotional harm RESPA violation from the harm arising from the

foreclosure action itself. The flaw in Plaintiffs' purported emotional harm is not the validity of its harm itself. Instead, the concern is whether Plaintiffs have demonstrated the necessary causal link between the Ocwen's remaining alleged RESPA violation regarding Plaintiffs' NOE and the emotional harm suffered.

Patrick v Citifinancial, MD Alabama, September 8, 2015
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As to the allegation of negative credit reporting, the mere fact that negative credit reporting occurred does not state a violation. Phillips v. Bank of Am. Corp., No. 5:10-CV-04561 EJD, 2011 WL 4844274, at *4 (N.D. Cal. Oct. 11, 2011) (stating ["w]ithout further factual allegations showing that Phillips had other loans pending on which he paid higher interest, the assertion that Bank of America's continued reporting `caused increased interest rates in his other credit accounts' is not sufficient to nudge his claims across the line from conceivable to plausible."). Patrick has not alleged facts to show that negative credit reporting resulted in damage or was causally related to CitiFinancial's failure to respond to the QWR Patrick sent after the foreclosure sale. As to emotional distress, Patrick has made a bare allegation that he is seeking damages for mental anguish, and has not pled any facts to show a causal connection between CitiFinancial's failure to appropriately respond to a QWR and any mental anguish Patrick has suffered. See, e.g., Durland v. Fieldstone Mortgage Co., No. 10CV125, 2011 WL 805924, at *3 (S.D. Cal., Mar. 1, 2011) (concluding that mere allegations of fees assessed, negative credit reporting, and emotional distress were insufficient to establish a causal link between the alleged RESPA violations and plaintiff's claimed damages). The damages Patrick has sought in other sections of his Amended Complaint link his damages to the servicing of and foreclosure on his mortgage loan.

Long v RCS, SD Florida, August 21, 2015
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Plaintiff fails to allege actual damages with any specificity, and costs incurred while preparing a qualified written request for information from a servicer cannot serve as a basis for damages because, at the time those expenses are incurred, there has been no RESPA violation. See Steele v. Quantum Serv. Corp., 12-CV-2897, 2013 WL 3196544 (N.D. Tex. June 25, 2013). To hold otherwise would mean that every RESPA claim has damages built-in to the claim. See Lal v. Am. Home Serv., Inc., 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010). Courts have so held because the wording of the relevant RESPA regulation only provides for "actual damages to the borrower as a result of the failure" to comply with RESPA. 12 U.S.C. § 2605(f)(1)(A) (emphasis added).

Stoimenova v SPS, ND California, August 14, 2015
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Bogdan's allegation of actual damage is insufficient. Bogdan alleges harm in that "Defendant SPS violated 12 U.S.C. § 2605(e)(3) by continuing to report Plaintiffs late to credit reporting agencies during the 60 day period beginning on January 26, 2015." FAC ¶ 39. Merely alleging a negative credit report is not sufficient. See, e.g., Petrovich v. Ocwen Loan Servicing, LLC, 2015 WL 3561821, at *2 (N.D. Cal. June 8, 2015) ("a reduction in credit rating is not sufficient damage to support a RESPA claim"); Anokhin v. BAC Home Loan Servicing, LP, 2010 WL 3294367, at *3 (E.D. Cal. Aug. 20, 2010) ("Plaintiff's conclusory statement that she suffered negative credit ratings does not itself establish actual [RESPA] damages."). Bogdan must allege that he suffered actual pecuniary harm from the negative reporting.

Freeman v BNC Mortgage, ED California, June 16, 2015
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Plaintiff's Complaint is deficient with respect to damages. Plaintiff's conclusory claim that he "suffered damages in an amount to be proven at trial" is insufficient to survive a motion to dismiss for failure to state a claim. Plaintiff appears to realize as much in his Opposition. See Pl.'s Opp'n at 5, ECF No. 6 (conceding that his pleading "of TILA and RESPA damages are convoluted and would benefit from separation of the two for clarity," and requesting leave to amend to better articulate the alleged damages). In a judgment on the case issued October 9, 2015, based upon an amended Complaint, Freeman lists physical ailments of family members as the damages, stating that they are Plaintiffs. However, the judge points out that the names of these family members are not on any captions as Plaintiffs on any filings. The judge further notes that, even if the family members were listed Plaintiffs, the allegations as presented were still insufficient to survive a motion to dismiss.

Hogan v Visio Financial, ED Michigan, June 2, 2015
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Hogan did not demonstrate his entitlement to money damages because he fails to allege what his damages are, and to the extent there are any, how they might be traceable to Visio's conduct. As a result, Hogan's claim for wrongful foreclosure under RESPA should be dismissed.

Caggins v BONY, ED Michigan, July 1, 2015
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Plaintiff's claimed RESPA violation alleges that the Defendants pursued loss mitigation options contemporaneously with active foreclosure proceedings. Plaintiff seeks three remedies: (1) that the foreclosure proceedings be declared null and void; (2) that the Defendants be ordered to negotiate in good faith a reasonable loan modification with Plaintiff; and (3) any further relief the court deems just and equitable. The first and second remedies sought by the Plaintiff are unavailable under Section 2605(f) of RESPA which limits damages to "actual damages to the borrower as a result of the [breach]." 12 U.S.C. §2605(f)(1). There is no provision found in RESPA under which Plaintiff can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification. 12 U.S.C. §2605(f)(1); see also Servantes v. Caliber Home Loans, Inc., No. 14-CV-13324, 2014 U.S. Dist. LEXIS 170667, at *2 (E.D. Mich. Dec. 10, 2014). To the extent Plaintiff intends to state a RESPA claim for monetary damages, the court dismisses the claim because Plaintiff does not allege any facts which would establish actual damages or a pattern or practice of non-compliance.

Diedrich v Ocwen, ED Wisconsin, April 24, 2015
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Even if the Diedrichs' testimonies were sufficiently detailed, they have not established a causal connection between the RESPA violation (Ocwen's failure to respond to the qualified written request for information) and their emotional distress. Specifically, the Diedrichs do not testify that their emotional distress was the result of Ocwen's failure to respond to their qualified written request for information.

Diedrich v Ocwen, ED Wisconsin, July 8, 2015
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Here again, the judge found that the emotional distress damages alleged still were not caused by the RESPA violations and he refused to reconsider or vacate his summary judgment ruling in favor of Ocwen. Its not enough to allege the damages. A RESPA plaintiff also has to prove proximate cause. This was a Pre Reg X case making the causal connection to emotional distress much more difficult to prove.

Arant v JP Morgan, D Nevada, July 13, 2015
https://scholar.google.com/scholar_case?case=13037998901751052634&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiff does not allege that he suffered pecuniary loss — only unspecified "emotional damages," (dkt. no. 47 ¶ 47) — arising out of an alleged failure to respond to his letter, as required by RESPA.See Moon v. Countrywide Home Loans, Inc., No. 3:09cv-00298-ECR, 2010 WL 522753, at *5 (D. Nev. Feb. 9, 2010). Plaintiff thus fails to state a claim under RESPA.

Zaychick v BOA, SD Florida, July 27, 2015
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With respect to emotional damages and other unspecified actual damages (to be proven at trial and which stem from the RESPA violation), this is a closer question. SeeMellentine v. Ameriquest Mortg., 515 F. App'x 419, 424-25 (6th Cir. 2013) (accepting the mere allegation of "damages in an amount not yet ascertained, to be proven at trial"). It is true (as Plaintiff argues) that there is no heightened pleading requirement for RESPA claims. Even viewing the allegations in the Complaint in the light most favorable to Plaintiff, the Court cannot conclude that Plaintiff has plausibly stated, with sufficient particularity under Twombly, a claim for emotional damages when Plaintiff's emotional damages could easily be inferred to arise from: (i) Plaintiff's default on her mortgage, (ii) the commencement of foreclosure proceedings on Plaintiff's home, (iii) the entry of final judgment in the foreclosure proceeding against her, (iv) the sale of her home at foreclosure, and (v) eviction proceedings against Plaintiff. Under the allegations of the Complaint, Plaintiff's RESPA claim did not accrue until all of the foregoing had already occurred, and eviction proceedings were either pending or imminent. Moreover, accepting the allegations in the Complaint as true, Plaintiff's loss mitigation application was denied and, as Plaintiff would appear to concede, Defendant was not obligated to approve Plaintiff's loss mitigation application. Defendant provided a reason for its denial. Plaintiff appealed the denial. Plaintiff's appeal was unsuccessful. Now, after her home has been foreclosed upon and eviction proceedings are pending, Plaintiff alleges that she sought more specificity as to why her loss mitigation application had been denied six months previously. The Court is unable to plausibly infer how Defendant's alleged failure to provide greater specificity on this matter generated emotional damages, in light of the fact that Plaintiff's appeal of her loss mitigation application denial had already been unsuccessful. It is not immediately apparent what causal connection may be inferred between Plaintiff's alleged emotional damages and her RESPA claim, in the context of Plaintiff's other allegations. Plaintiff must plead a plausible causal connection for her emotional damages. See, e.g.,Henson v. Bank of Am., 935 F. Supp. 2d 1128, 1145 (D. Colo. 2013); Kapsis v. Am. Home Mortg. Serv. Inc., 923 F. Supp. 2d 430, 445 (E.D.N.Y. 2013). The same holds true for Plaintiff's unspecified actual damages to be proved at trial. Even though some courts have found these allegations to be sufficient for RESPA claims on different facts, in light of all of the allegations in this case, Plaintiff must plead a plausible causal connection.

As a final matter, with respect to statutory damages, Plaintiff has failed to allege any basis for Defendant's behavior to have been a part of a regular pattern or practice. There is only one instance alleged here. This is insufficient. See McLean v. GMAC Mortg. Co.,595 F. Supp. 2d 1360, 1365 (S.D. Fla. 2009) (finding that two RESPA violations was insufficient to support a pattern or practice); Ploog v. HomeSide Lending, Inc., 209 F. Supp. 2d 863, 868 (N.D. Ill. 2002) (failure to respond to qualified written requests on five occasions was sufficient to establish a pattern or practice); In re Holland, No. 04-18099-JNF, 2008 WL 4809493, *11 (Bankr. D. Mass. Oct. 30, 2008) (finding no pattern or practice where plaintiff offered no documents or testimony to establish that the loan servicer had a standard or institutionalized practice of RESPA violations). The Court therefore grants Defendant's Motion to Dismiss on the issue of damages and Plaintiff's Complaint is dismissed without prejudice for Plaintiff to have the opportunity to re-plead her case as more fully specified above.

Russell v Nationstar, SD Florida, August 26, 2015
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Plaintiff sent multiple requests for entire loan history and other documents, and alleged mistakes were made in applying payments, resulting in a balance higher than what was really due. Most documents were furnished by servicer, but servicer provided less than the full loan history. The response from servicer was canned response stating the other documents were proprietary, non-public, confidential, or that they didn't relate to the servicing of the loan. The servicer also stated that the allegations of misapplied funds weren't specific enough. Plaintiff threatened to stop making payments and eventually did, leading servicer to initiate foreclosure proceedings. The judge found that any distress that Plaintiffs suffered from this thorny situation was self-inflicted. The necessary causal link to Defendant was unclear at best. Plaintiffs failed to make payments that they knew they owed. As Defendant argues, "they cannot establish proximate causation in any event as they are unable to distinguish between injury allegedly caused by Nationstar's alleged RESPA violation and the subsequent foreclosure resulting from their own conduct." ECF No. [85] at 4-5 (Defendant's Reply); see Rourk v. Bank of American Nat. Ass'n, 587 Fed. App'x 597, 600 (11th Cir. Sept. 30, 2014) ("Under these circumstances, Rourk had an obligation to continue making payments she knew she owed, and Rourk's nonpayment is fatal to her claim for breach of contract and wrongful foreclosure, as her alleged injury was solely attributable to her own acts or omissions.") (citation omitted); Moody Nat'l RI Atlanta H, LLC v. RLJ III Fin. Atlanta, LLC, 2010 WL 163296, at *9 (N.D. Ga. Jan. 14, 2010) (rejecting plaintiffs' argument that defendant's demand of default interest caused and excused plaintiffs' nonperformance in not making a timely payment, stating that plaintiffs "took a calculated risk by not making a timely payment, knowing that doing so was a breach of the Note"). Nationstar could not have provided Plaintiffs with any information that would have mitigated the damages they claim to have suffered. Under the circumstances presented, Plaintiffs did not sustain damages by Defendant's responses or any lack thereof.

Andrade v Carrington & BOA, WD Michigan, November 13, 2015
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Plaintiffs allege that Defendants violated § 1024.41 by, among other things, failing to timely evaluate Plaintiffs for all FHA-HAMP (Home Affordable Modification Program) loss mitigation options, requesting additional loan modification documents, reassigning personnel to the case over five times, proceeding with a foreclosure without having evaluated Plaintiffs' request, and proceeding to notice and then hold a sheriff's sale on January 7, 2015. Although RESPA does provide a right of action to recover actual damages resulting from a servicer's failure to follow § 1024.41, see id. at *7, Plaintiffs

fail to allege damages "that can be linked to defendant[s'] RESPA violations." Houle v. Green Tree Servicing, LLC, No. 14-CV-14654, 2015 WL 1867526, at *4 (E.D. Mich. Apr. 23, 2015).

Martini v JP Morgan Chase, 6th Circuit COA, December 10, 2015
https://scholar.google.com/scholar_case?case=14118325363664866524&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt
Even if we assume, arguendo, that Chase violated RESPA and that the Martinis' letters qualified as QWRs, the Martinis fail to adequately plead the required associated damages. The damages alleged in Marais resulted from Chase's RESPA violation—namely, that Chase's failure to respond resulted in continued prejudicial practices, costing the plaintiff money. 736 F.3d at 720-22. Here, the Martinis allege damages that are due to their inability to pay their mortgage, not the alleged RESPA violation. See Houston v. U.S. Bank Home Mortg. Wis. Serving, 505 F. App'x 543, 548 (6th Cir. 2012) (concluding "that there is no genuine dispute that, by virtue of [the plaintiff's] continued non-payment of undisputed debts, [the bank's] RESPA violation did not result in her foreclosure"). Therefore, the Martinis fail to adequately allege a RESPA claim.

Germain v US Bank, ND Texas, November 17, 2015
https://scholar.google.com/scholar_case?case=6942767857152548569&q=%22Germain+v.+U.S.+bank%22&hl=en&lr=lang_en&as_sdt=3,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_ylo=2014&as_yhi=2017
In the case at hand, Germain's pleadings state: Plaintiff has been harmed by Defendants' noncompliance as he is now forced to incur additional fees and expenses associated with defending himself against this noncompliant foreclosure action as well as increased delay of a fair consideration of his loss mitigation application. Such delay and any mounting arrearage will only serve as a pretext to eventually deny Plaintiff's modification request. Further, Defendants are liable for statutory damages for their violations. This is the exact language used by the plaintiff in Obazee. See Obazee, 2015 WL 4602971, at *4. Just as the plaintiff in Obazee "failed to plausibly allege that he has suffered actual damages as a result of defendants' alleged violations of 12 C.F.R. § 1024.41 and RESPA, 12 U.S.C. § 2605(f)" so has Germain. Therefore, Germain's claim cannot survive the motion to dismiss, and the Court recommends that this claim be dismissed.

Murphy v Nationstar, ED Michigan, December 8, 2015
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Regulation X does not impose a duty on a servicer to provide loss mitigation options to a borrower. 12 C.F.R. § 1024.41(a). In addition, it creates no right for a borrower to enforce a loss mitigation agreement with the servicer. *Id.* Therefore, Defendant has no duty to provide Plaintiff with any loss mitigation options. But if a borrower submits a complete loss mitigation application before the foreclosure process has been initiated, the servicer cannot make the first foreclosure notice or filing unless: (1) the servicer has given the borrower notice that he is not eligible for loss mitigation options; (2) the borrower rejects all loss mitigation options; or (3) the borrower fails to perform under the agreement on a loss mitigation option. 12 C.F.R. § 1024.41(f)(2). In this case, Defendant's letter directly contradicts Plaintiff's claim that the foreclosure was invalid because he was not given notice that he was ineligible for loss mitigation options. Defendant's letter evidences that Plaintiff either rejected or withdrew his request for loss mitigation options. (Docket no. 7-5.) Further, Plaintiff fails to set forth any factual allegations regarding how Defendant was contemporaneously negotiating a loan modification and initiating foreclosure proceedings.

Assuming, arguendo, that Plaintiff had stated a proper claim under Regulation X, Plaintiff would not be entitled to the damages he seeks. Regulation X refers to 12 U.S.C. § 2605 in regard to damages. 12 C.F.R. § 1024.41(a). Remedies available under § 2605(f)(1) are limited to actual monetary damages, which Plaintiff does not request. As Defendant notes, Plaintiff's requests to set aside the sheriff's sale and grant a loan modification are not available remedies under § 2605 of RESPA. (Docket no. 7 at 7.) Therefore, Plaintiff has failed to state a claim for wrongful foreclosure under Regulation X of the Real Estate Settlement Procedures Act.

2016

Dent v Investment Corp., ED Michigan, January 12, 2016
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Plaintiffs have failed to demonstrate that they suffered any harm as a result of Defendant's actions. Plaintiffs' generalized allegation of "emotional strain of living under fear of losing their home to foreclosure" is insufficient to sustain a claim under RESPA. *See Austerberry,* No. 15-CV-13297, 2015 WL 8031857, at *7 (holding that a plaintiff seeking compensation for emotional damage under RESPA must provide more than "threadbare" claims which show "how Defendant allegedly caused these damages."); *Szczodrowski v. Specialized Loan Servicing, LLC,* No. 15-10668, 2015 WL 1966887, at *7 (E.D. Mich. May 1, 2015) ("mere `stress' is not enough to meet the minimum pleading standards under RESPA."); *see alsoMcLean v. GMAC Mortgage Corp.,* 398 F. App'x 467, 471 (11th Cir. 2010) (finding that plaintiffs raising RESPA claims based on emotional damages must present "specific evidence to establish a causal link between the financing institution's violation and their injuries."). Plaintiffs do not argue that Defendant engaged in a "pattern or practice" of RESPA violations, thus statutory damages are unavailable.*See Austerberry,* No. 15-CV-13297, 2015 WL 8031857, at *6. As to financial damages, because Plaintiffs have failed to present any evidence that they submitted a complete request for mortgage assistance to Defendant, it cannot be said that Plaintiffs' loss of their home resulted from Defendant's failure to respond to their request for assistance. Rather, Plaintiffs' home was foreclosed upon because they failed to make payments to their servicer. *See Collins v. Wickersham,* 862 F. Supp. 2d 649, 659 (E.D. Mich. 2012) ("The alleged injuries plainly resulted from Plaintiffs' failure to make loan payments and the ensuing foreclosure. Plaintiffs have not pleaded actual harm resulting from the alleged RESPA violations; their claim is therefore futile."); *Benford v. CitiMortgage, Inc.,*No. 11-12200, 2011 WL 5525942, at *5 (E.D. Mich. Nov. 14, 2011) ("Although Plaintiff desired an explanation of the amounts owed on his loan, Citi's alleged failure to provide him with that information did not result in foreclosure. Rather, Plaintiff's failure to make the loan payments triggered this course of events.").

Kuc v Christiana Trust ARLP 3, January 6, 2016
https://scholar.google.com/scholar_case?case=14549913946141942649&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Kuc fails to allege facts demonstrating that he suffered actual damages as a result of Defendants' alleged failure to respond. This is also grounds for dismissal of Kuc's RESPA claim. *See Amaral v. WachoviaMortg. Corp.,* 692 F. Supp. 2d 1226, 1232 (E.D. Cal. 2010) ("Absent factual allegations suggesting that Plaintiffs suffered actual damages, Plaintiffs' RESPA claim is insufficiently pled and subject to dismissal."). The complaint contains no factual allegations relating to actual damages. Kuc's RESPA claim is dismissed.

Wallace v. Wells Fargo ND, January 27, 2016

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Here, assuming their Letter constitutes a valid QWR under RESPA,[6] Plaintiffs fail to allege facts to support that Wells Fargo's failure to respond caused their claimed damages. Plaintiffs assert that "they have been damaged by not having all monies [sic] properly credited to their mortgage loan account" and that "they would not have been in default if they had received all credits for the money they have paid on their mortgage loan account." (Compl. ¶¶ 72-73). That Plaintiffs admit that they defaulted on their loan payments in 2010 — and before their loan was assigned to Wells Fargo — undercuts their assertion that Wells Fargo's failure to respond to their September 13, 2014, Letter caused their alleged damages. (See id. ¶ 13); see also Thepvongsa v. Reg'l Tr. Servs. Corp., 972 F. Supp. 2d 1221, 1229 (W.D. Wash. Sept. 25, 2013) ("[p]laintiff has not identified actual damages suffered as a result of [servicer's] failure to respond adequately to the QWR" because "[t]he lack of information did not cause plaintiff to send his payments to the wrong entity, for example, or result in the accrual of late fees or penalties that could have been avoided had defendants timely responded [because] *plaintiff was already in default when the QWR was sent*") (emphasis added); Brothers v. Bank of Am., N.A., No. 5:12-cv-3121-EJD, 2012 WL 4471590, at *3 (N.D. Cal. Sept. 26, 2012) (claim that plaintiff was "damaged in the amount of ongoing penalties, fees and interest charged by [d]efendants" not sufficient to state a RESPA claim for failure to respond to QWR because "[t]hese damages do not flow from any lack of response to the QWR; to the contrary, these `damages' are a result of [p]laintiff's failure to make loan payments"); Russell, 2015 WL 5029346, at *6 ("Conclusory and speculative allegations about the effects of failure to respond to a QWR's `laundry list' of request for information are insufficient in the absence of showing how the failure to respond to the QWR[] caused any of these things.").

Plaintiffs fail to allege facts to support that Wells Fargo's failure to respond to their Letter caused their claimed damages, and they do not otherwise assert that Wells Fargo engaged in a pattern or practice of violating RESPA such that they could recover statutory damages. See 12 U.S.C. §§ 2605(f)(1)(A)-(f)(1)(B); Marks, 2011 WL 5439164 at *3. Plaintiffs fail to state a claim for violation of RESPA, and this claim is required to be dismissed. See Frazile v. EMC Mortg. Corp., 382 F. App'x 833, 836 (11th Cir. 2010) (allegation of damages is a necessary element of any claim under Section 2605). Plaintiffs' objection on this ground is overruled.

Phillips v. Green Tree ED MI

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Plaintiff fails to allege actual damages, instead requesting that the court set aside the foreclosure sale and order defendant to complete a loan modification. RESPA does not provide a basis to set aside a completed foreclosure sale. Therefore, plaintiff's claims under RESPA are dismissed as a matter of law.

Robinson v. SPS D SC, January 28, 2016

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Here, Plaintiffs seek monetary damages and state that they have "more than sufficiently enumerated their injuries suffered at the hands of Defendant . . . to be entitled to actual damages." [Doc. 36 at 6; *see* Doc. 1 at 5, 24.] However, beyond this conclusory statement, Plaintiffs have failed to contend they suffered any pecuniary loss or to provide any facts to allege actual damages as a result of Defendant's purported delay in acknowledging receipt of their letter. Accordingly, Defendant's motion to dismiss should be granted with respect to this claim.

As this Court previously stated in dismissing Plaintiff's original complaint, in order to bring a claim under RESPA, a plaintiff "must sufficiently allege one of two types of damages: (1) actual damages to the borrower as a result of the failure to comply with § 2605; or (2) statutory damages in the case of a pattern or practice of noncompliance with the requirements of § 2605." (Nov. 3 Order ¶ 4 (quoting*Gorbaty v. Wells Fargo Bank, N.A.,* No. 10-CV-3291, 2012 WL 1372260, at *5 (E.D.N.Y. Apr. 18, 2012)).) Additionally, when basing a claim on actual damages, "the borrower has the responsibility to present specific evidence to establish a causal link between the financing institution's violation and their injuries." *Straker v. Deutsche Bank Nat'l Trust,* No. 2012 WL 7829989, at *11 (M.D. Pa. Apr. 26, 2012) (internal quotations omitted); *see also Gorbaty,* 2012 WL 1372260, at *5 ("A plaintiff seeking actual damages under § 2605 must allege that the damages were proximately caused by the defendant's violation of RESPA."); *Hutchinson v. Delaware Sav. Bank FSB,* 410 F. Supp. 2d 374, 383 (D.N.J. 2006) ("[A]lleging a breach of RESPA duties alone does not state a claim under RESPA. Plaintiffs must, at a minimum, also allege that the breach resulted in actual damages.") (citing 12 U.S.C. § 2605(f)(1)(A)). Defendant argues that Plaintiff's amended complaint again fails to adequately plead damages...

Giordano v. MGC, D NJ***, February 16, 2016***

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Plaintiff is reading a general phrase out of context with the actual findings of those cases. Neither case found that the costs of postage and fees related to sending the initial letter — prior to any alleged violation — sufficiently alleged actual damages under RESPA. The court in *Palmer*found that allegations of "a forced default in her mortgage payment obligations, injury to Plaintiff's reputation, out-of-pocket expenses, physical, emotional and mental pain and anguish and pecuniary loss" were sufficient to state a claim. *See id.* at *6. The Court in *Cortez* found that "Plaintiffs have presented competent evidence that their available credit was decreased by the amount of outstanding interest charges on the account during any given week and they were thus unable to earn interest on other accounts. Insofar as a denial of access to the full amount of the credit line resulted from an

improper failure to correct the assessment of interest charges, this would constitute actual damages for which Keystone could be liable." 2000 WL 536666, at *12.

Courts that have directly considered the issue of pre-violation letter preparation costs have found that such costs are not actual damages under RESPA because RESPA requires the damages to flow as a result of the violation. *See Zeich v. Select Portfolio Servicing, Inc.,* No. 15-1005, 2015 U.S. Dist. LEXIS 151519, at *5 (D. Or. Oct. 30, 2015) ("[T]o the extent plaintiff incurred fees for postage, he cannot recover for mailing the qualified written request itself."); *Steele v. Quantum Servicing Corp.,* No. 12-2897, 2013 U.S. Dist. LEXIS 88812, at *27 (N.D. Tex. June 25, 2013) ("[T]he costs allegedly incurred by Plaintiffs in preparing and sending the March 30, 2012 letter to Quantum are not actionable under RESPA because any such costs would have necessarily been incurred *before* the alleged RESPA violation.") (emphasis in original); *Gorton v. Wells Fargo Bank NA,* No. 12-1245, 2012 U.S. Dist. LEXIS 168158, at *23 (E.D. Ca. Nov. 27, 2012) ("Plaintiff alleges she incurred copying and postage costs, but that [was] the result of her sending of the QWR, not to any failure to respond adequately to it."); *Skaggs v. HSBC Bank USA, N.A.,* No. 10-247, 2011 U.S. Dist. LEXIS 98057, *46 (D. Haw. Aug. 31, 2011) ("Plaintiff seeks the cost of mailing a QWR itself, not any*subsequent* costs incurred by the failure to respond to that QWR. [*Cortez*] did not find that such QWR costs constituted `actual damages' under RESPA.") (emphasis in original).

Aghazu v. Severn D MD, March 2, 2016

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While Aghazu belatedly states on affidavit that she did not receive a Borrower Welcome Letter or other notice from FCI about the transfer of servicing of the Loan, no such allegation is expressly made in the Complaint. While Aghazu does state that "Transferee Servicer failed to give notice to Aghazu not less than 15 days before the effective date of the transfer of servicing," Compl. ¶ 60, the Court finds this conclusory statement impossible to credit, in light of the fact that a Borrower Welcome Letter from FCI, dated February 4, 2014, was actually included as one of Aghazu's Exhibits attached to the Complaint. Compl. Ex. 15 at 0059.[18]

In any case, the Court notes that Aghazu's claims for damages are simply not cognizable as a matter of law. "Time away from her business to tend to these matters" and "emotional and physical distress" are not compensable under RESPA. RESPA requires that a plaintiff plead "actual damages," that is—pecuniary or economic damages that flow directly from FCI's failure to provide notice. *See Offiah v. Bank of Am., N.A.,* No. CIV.A. DKC 13-2261, 2014 WL 4295020, at *3-4 (D. Md. Aug. 29, 2014); *Minson v. CitiMortgage, Inc.,* No. CIV.A. DKC 12-2233, 2013 WL 2383658, at *5 (D. Md. May 29, 2013). Nor would Aghazu's claims for "costs" and "counsel fees" in bringing the suit be compensable, so long as she could posit no cognizable actual damages. *See Bullock v. Ocwen Loan Servicing,* LLC, No. CIV. PJM 14-3836, 2015 WL 5008773, at *11 (D. Md. Aug. 20, 2015). Fundamentally, insofar as Aghazu claims actual damages because FCI's failure to provide adequate notice under RESPA led to the loss of an opportunity to refinance the mortgage on her home, that claim, without more, borders on the fanciful. How could failure to receive the notice of the transfer of the servicing of the Loan lead to a lost opportunity to refinance? Perhaps some logic and facts

exist to support this assertion — improbable as that may seem. But for now, the claim has no substance whatsoever. Many more facts would have to be pled to make this claim seem plausible.

Amarchand v. Citimortgage***, MD FL, March 9, 2016***

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Lastly, Defendant's contention that the Amended Complaint fails to allege a sufficient factual basis for an award of statutory damages is well taken. Plaintiff's conclusory allegations in ¶¶ 28 and 45 are not supported by factual allegations. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal,* 556 U.S. at 679.

Lundy v. Selene ND CA, March 17, 2016
https://scholar.google.com/scholar_case?case=16596187413046098782&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In other portions of his brief, Plaintiff points to damages alleged in his complaint, such as the imminent loss of his home, emotional distress, damages to his creditworthiness, and money wrongly paid to the defendants. Complaint ¶¶ 41, 71, 77. Similarly, under his fourth count he alleges that "Selene has been collecting mortgage payments on behalf of an invalid beneficiary which has no authority to receive them," and that "Plaintiff's loan account is incorrect and must be adjusted to cure the error." Complaint ¶ 61. These alleged damages, however, resulted from the alleged wrongful foreclosure and the defects in the assignments of Plaintiff's deed of trust, not from Defendants' failure to respond to Plaintiff's QWRs. As a result, they are not sufficient to support a RESPA claim. See, e.g., Guidi v. Paul Fin., LLC, No. 13-CV-01919-LHK, 2014 WL 60253, at *5 (N.D. Cal. Jan. 7, 2014)(alleged damages of additional charges for interest, penalties, and default fees were not casually connected to alleged failure to respond to QWRs).[6]

Barrett v. GREEN TREE SERVICING, LLC, Dist. Court, SD Ohio, May 4, 2016
In this case the parties settled and agreed to submit the issue of attorney's fees to the court.
https://scholar.google.com/scholar_case?case=13297902092524406101&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

While the Court would be inclined to award Plaintiffs attorney's fees in the lodestar amount discussed *supra* if they are deemed prevailing parties, the issue of whether Plaintiffs are, in fact, "prevailing parties" under the law has not been detailed by the parties in their briefing. *See Harris v. Jacobs Marsh, LLC,* No. 12-CV-356, 2016 WL 1584018, at *1-4 (W.D.N.Y. Mar. 21, 2016). Accordingly, at this time, the Court DENIES Plaintiffs' motion for attorney's fees (doc. 17) WITHOUT PREJUDICE to refiling. Should the parties not resolve the attorney's fees issue amongst themselves, and should Plaintiffs resubmit a motion for attorney's fees — which the undersigned

hereby GRANTS Plaintiffs leave to do within 30 days of this Order — the parties are ORDERED to brief the issue as to whether, in light of the settlement agreement, Plaintiffs are "prevailing parties" entitled to an award of attorney's fees. Should the parties resolve the issue of attorney's fees amongst themselves, they shall advise the Court immediately.

KASSEM v. OCWEN LOAN SERVICING, LLC, Dist. Court, ED Michigan, May, 11 2016
https://scholar.google.com/scholar_case?case=11517283436635921898&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

This response to Ocwen's motion does not demonstrate that there is a factual dispute warranting a jury's resolution. Even if "Ocwen ha[d] charged [the Kassems] excessive fees," this is not evidence that the Kassems were damaged by Ocwen's failure to *explain* those fees. And that is the basis of the Kassems' RESPA claim. As for allegations in "prior pleadings," this too does not help the Kassems carry their summary-judgment burden. *See* *Celotex,* 477 U.S. at 324; Fed. R. Civ. P. 56 advisory committee's note to 1946 amendment ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."). Finally, pointing out what Jamel Kassem did not say, i.e., that she did not testify that she was *not* harmed, is not evidence that the Kassems were harmed. In short, the Kassems have failed to demonstrate that, on this record, a reasonable jury could find that the Kassems suffered damages from Ocwen's (assumed) non-compliance with 12 U.S.C. § 2605(e)(2)(B). *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

Garrow v. JPMorgan Chase Bank, NA, Dist. Court, ED Michigan, April 27, 2016
https://scholar.google.com/scholar_case?case=9094166045284886498&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

At the April 4, 2016 hearing, Garrow's counsel waived her argument that JPM violated TILA regulation 12 C.F.R. § 226.39 because the bank failed to notify her that it had assumed ownership "of [the] existing mortgage loan." 12 C.F.R. § 226.39(a)(1). In any event, this contention is undermined by Garrow's concession that she participated in loan modification discussions with JPM as late as March 2015 and, therefore, must have known that JPM was the new mortgage owner. [1, Ex. A at ¶¶ 42, 67]. In addition, Garrow does not have standing to pursue a claim under TILA because she was not a party to the note. *See Britt v. Flagstar Bank,* 2011 U.S. Dist. LEXIS 150463, at *11-12 (holding that "[b]ecause Plaintiff was not a party to the mortgage or note, Plaintiff cannot assert . . . TILA claims.").

Willson v. Bank of America, N.A. Dist. Ct. SD Fla, May 2, 2016

Damages for Emotional Distress. Moving to Plaintiff's alleged damages for emotional distress, including "emotional damages, physical impairment to his non-party wife via increased anxiety, stress to their non-party daughter, emotional distress, and damage to his real estate business." Defendant argues Plaintiff cannot establish such damages. I agree. Plaintiff has not presented any evidence beyond conclusory assertions of these damages. (DE 52 at 13); *see also* (DE 56 at 13).

Plaintiff has likewise not cited to any record evidence supporting these damages, except his deposition testimony generally discussing the stress he and his family experienced throughout the foreclosure process.

While "a plaintiff's testimony along could support an award of compensatory damages for emotional distress[] ... the testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a violation occurred supports an award for compensatory damages." *McLean v. GMAC Mortgage Corp.,* 398 F. App'x 467, 471 (11th Cir. 2010) (affirming district court's grant of summary judgment in favor of the defendant where the plaintiffs' conclusory statements that they suffered emotional damage were insufficient to establish actual damages) (citing *Akouri v. Fla. Dep't of Transp.*, 408 F.3d 1338, 1345 (11th Cir. 2005)) (internal quotations omitted).

Further, Defendant argues that Plaintiff has not established that Defendant's alleged RESPA violations caused the emotional distress, as opposed to Plaintiff's own failure to make his mortgage payments. (DE 52 at 13). A plaintiff must "present specific evidence to establish a causal link between the financing institution's ciolation and [his] injuries." *McLean*, 398 F. app'x 467 at 471; *see also Lage,* No. 14-CV-81522, 2015 WL 7294854. Plaintiff did not cite to any evidence in the record establishing a link between any RESPA violation of his emotional injuries. For these reason, Defendant's Motion for Summary Judgment is granted as to Plaintiff's damages for emotional distress.

2. Statutory Damages

Defendant also contends there is no evidence of "pattern or practice of noncompliance" sufficient to warrant statutory damages. (DE 52 at 14, 21). In response, Plaintiff contends Defendant committed six violations of Regulation X in dealing with Plaintiff. (DE 56 at 14).

RESPA provides for statutory damages "in the case of a pattern or practice of noncompliance." 12 U.S.C.A. § 2605(f)(1)(B). The provision does not define what constitutes a pattern or practice. However, the Eleventh Circuit has held that two violations do not constitute a pattern or practice. *McLean*, 398 F. App'x at 471 (affirming district court's summary judgement finding no statutory damages based on two violations).

Here, Plaintiff alleges, at most, five violation of RESPA within a few months, all related to one borrower, and all related to the handling of one mortgage. Such violations are insufficient to

establish a pattern or practice of noncompliance. *See Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 523 (10th Cir. 2013) (finding lack of pattern or practice based on complaint's "failure to allege any violations with respect to other borrowers"). As to statutory damages, summary judgment is granted in favor of Defendant.

3. Punitive Damages

Third, Defendant contends Plaintiff is not entitled to punitive damages for RESPA violations. (DE 52 at 21). Plaintiff did not respond to this argument. Because § 2605 does not provide for punitive damages, and his claims are entirely based on violations of RESPA, I find Plaintiff is not entitled to recover punitive damages.

Reed v. BANK OF AMERICA HOME LOANS, Dist. Court, D. Maryland, June 10, 2016
https://scholar.google.com/scholar_case?case=11979688379317326315&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The Reeds also claim mental and emotional damages stemming from BANA's alleged refusal to recognize the existence of a valid modification agreement and as a result of repeated notifications of intent to foreclose. Am. Compl. ¶¶ 14, 17, 32, 40. These claims may be viable under the FDCPA[8] and MCPA. *Dorris v. Accounts Receivable Mgmt., Inc.,* No. CIV.A. GLR-11-3453, 2013 WL 1209629, at *7 (D. Md. Mar. 22, 2013) ("Actual damages under the FDCPA include damages for emotional distress."); *Barry v. EMC Mortgage Corp.,* No. CIV.A. DKC 10-3120, 2012 WL 3595153, at *8 (D. Md. Aug. 17, 2012) (noting that emotional damages constitute an actual injury or loss compensable under the MCPA). Such harms, however, would generally *not* be recoverable, however, under RESPA,[9] nor would they be in connection with state law claims for breach of contract and fraud. *Aghazu v. Severn Sav. Bank,* No. PJM 15-1529, 2016 WL 808823, at *10 (D. Md. Mar. 2, 2016) (noting that damages under RESPA are usually limited to "pecuniary or economic damages that flow directly" from violation of the Act); *Richter v. N. Am. Van Lines, Inc.,* 110 F. Supp. 2d 406, 413 (D. Md. 2000) (citing Restatement (Second) of Contracts, § 353 (1981)) ("The general rule is that emotional disturbance is not a damage recognized for breach of contract."); *Hoffman v. Stamper,* 867 A.2d 276, 298 (Md. 2005) (holding that a plaintiff in a fraud action seeking noneconomic damages for emotional injury must show some objectively ascertainable consequential physical injury).

Binder v. WestSTAR MORTGAGE, INC., Dist. Court, ED Pennsylvania July 13, 2016

https://scholar.google.com/scholar_case?case=14431333250227261285&q=binder++v.+Westar&hl=en&as_sdt=400006

Statutory Damages

WestStar and J.G. Wentworth, in addition to joining in the LoanCare/Fannie Mae motion to dismiss, have filed their own motion seeking to dismiss certain aspects of the Amended Complaint. The WestStar/Wentworth Memo argues that, as a matter of law, Mr. Binder is not entitled to the $250,000 in statutory damages he claims under RESPA. The defendants assert that, in addition to any alleged actual damages suffered, the plaintiff may only recover an additional $2,000 in damages if he shows a "pattern or practice of noncompliance with the requirements of the section. 12 U.S.C. § 2605(f)(1). Mr. Binder counters by arguing that he is entitled to $2,000 in additional damages for *each* violation of the statute.

The statute provides that, should Mr. Binder establish one or more violations, he may be entitled to damages as follows:

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of—

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000.

12 U.S.C. § 2605(f).

The defendants' sole authority in support of their argument that the Court should find Congress intended to impose a blanket $2,000 cap on additional statutory damages is a decision from the Western District of New York. *See Katz v. The Dime Savings Bank*, 922 F. Supp. 250 (W.D.N.Y. 1997). Here a mortgagor brought suit to enjoin the foreclosure of his mortgage after he defaulted on payments and for violations of RESPA against his servicer. Among other things, the mortgagor sought statutory damages under RESPA. After holding that statutory damages are recoverable, even in the absence of any actual damages as a result of the RESPA violation, the court then went on to consider whether the language of § 2506(f)(1) implies a $2,000 per violation cap, or an overall cap on additional statutory damages which may be imposed if the court finds the defendants' conduct constituted a "pattern or practice of noncompliance." *Id.* at 258. The court identified two key phrases in the statutory language. The first is the requirement that the plaintiff show a "pattern or practice" of noncompliance with the statute in order to impose statutory damages. *Id.* The second key phrase is the allowance of recovery of damages for "each such failure" of the statute. Similar to the parties here, the *Katz* defendants argued the additional damages should be capped at $2,000 *in toto*—

regardless of the number of proven instances of statutorily violative behavior. Mr. Binder and the plaintiff in *Katz* both argue that the $2,000 cap constitutes the maximum additional damages that can be applied "for each such failure" or violation of the statute. While the *Katz* decision ultimately withheld judgment pending briefing on whether a court could find a pattern of conduct based only on allegations regarding the defendants' conduct vis-à-vis a single plaintiff, the reasoning laid out in the decision suggests that the statute should not be read to imply $2,000 in statutory damages may be tacked on for each separate violation of the statute. The court stated that "[o]ne would think that if Congress had intended that statutory damages be available for single violations of the Act, it would have not inserted the phrase `in the case of a pattern or practice of noncompliance.'" *Id.* at 258. The court cites to similar language used in other federal statutes, namely the Telemarkeitng and Consumer Fraud and Abuse Prevention Act and the Telephone Consumer Protection Act, where the phrase "pattern or practice" is read to imply its "plain meaning." *Id.*

In the defendants' reply briefing, they cite a second decision which adopts the analysis in *Katz*. *See* *Ploog v. HomeSide Lending, Inc.*, 209 F. Supp. 2d 863, 869 (N.D. Ill. 2002) ("This Court agrees with the analysis in *Katz v. Dime Savings Bank, FSB*, in which the court determined that RESPA intended for individual statutory damages to be capped at $1,000 for proving a pattern or practice of noncompliance and not $1,000 for each instance.").

The Court has independently reviewed the case law and found only a handful of additional cases which address the issue. These cases reach the same conclusion as in *Katz*. *See Serfass v. CIT Grp./Consumer Fin., Inc.*, No. CIV.A. 8:07-90-WMC, 2008 WL 4200356, at *5 (D.S.C. Sept. 10, 2008) ("Neither the Supreme Court nor any circuit courts have yet addressed the issue, but district courts considering the issue have held that a plaintiff can recover statutory damages no greater than $1,000 by proving a pattern or practice of noncompliance."); *Davis v. Greenpoint Mortgage Funding, Inc.*, No. 09-2719, 2011 WL 7070222, at *5 (N.D. Ga. Sept. 19, 2011) (Noting that "Courts also have authority to award additional or statutory damages not to exceed $1,000 in cases where there is a `pattern or practice of noncompliance' with Section 2605. 12 U.S.C. § 2605(f) (1)(B)" but ultimately holding that pleadings failed to show a pattern or practice of noncompliance.).

Mr. Binder does not provide any authority contradicting the reasoning offered by *Katz* and its progeny. Rather, he argues that regardless of whether the Court were to accept the analysis applied in *Katz*, his Amended Complaint actually alleges *multiple* patterns or practices, each of which would entitle the plaintiff to separate statutory damages under § 2605(f)(1)(B). However, aside from citing to a number of decisions which generally hold that the existence of a pattern or practice is a question of fact, the determination of which is generally not appropriate on a motion to dismiss, Mr. Binder provides no explanation as to how his Amended Complaint alleges distinct practices or patterns of behavior. Moreover, Mr. Binder's argument does not address the question at issue, namely whether statutory damages are capped based upon individual violations of the statute or the entirety of a practice or pattern of behavior.

Ultimately, in light of the rulings on the LoanCare/Fannie Mae Motion, the Court determines that it need not address the question. Despite Mr. Binder's assertions that he has adequately averred the existence of multiple practices and patterns of conduct by the defendants which violate RESPA, the defendants have successfully argued that much of conduct complained of in the Amended Complaint does not establish liability under the statute. As laid out above, of the specific conduct referenced in the defendants' briefing, Mr. Binder has only properly alleged a RESPA violation with regards to a single qualified written request, sent to WestStar in October 2013. Numerous courts have held that a

plaintiff cannot properly establish entitlement to additional statutory damages based upon a single violation of the statute. *See e.g.* *Gorbaty v. Wells Fargo Bank, N.A.*, No. 10-3291, 2012 WL 1372260, at *5-6 (E.D.N.Y. April 18, 2012) (two violations of RESPA insufficient to establish a pattern or practice under § 2506(f)(1)(B)); *McLean v. GMAC Mortg. Corp.*, 595 F. Supp. 2d 1360, 1365-66 (S.D. Fla. 2009) (finding defendant's insufficient response to two QWRs insufficient to establish "pattern or practice"); *In re Tomasevic*, 273 B.R. 682 (Bankr. M.D. Fla. 2002) (failure to respond to one QWR did not amount to "pattern or practice" under the statute). Mr. Binder has only properly alleged a single RESPA violation and the Court holds that he has not alleged the existence of a pattern or practice of conduct by the defendants. Therefore, Mr. Binder is not entitled to statutory damages in addition to his actual damages.

Dolan v. Select Portfolio Servicing, Dist. Court, ED New York August 2, 2016

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[RESPA does not apply post-sale]

In reaching this conclusion, the Court recognizes that standing and damages are not synonymous. But just as various Courts of Appeal utilized the plain language of Section 2607's liability provision to determine whether Congress intended to confer standing only on plaintiffs who were overcharged due to alleged kickback or fee-splitting schemes, the Court now finds that Section 2605's liability provision makes clear that Congress intended to confer standing only on those individuals who suffered harm, meaning actual damages, from a loan servicer's failure to comply with the requirements of Section 2605.[5]

Hawk v. Carrington Mortgage Services, LLC, Dist. Court, MD Pennsylvania August 17, 2016
https://scholar.google.com/scholar_case?case=13291528538844281900&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
[MSJ on RESPA granted because Plaintiff fails to allege causally connected damages]

In addition, in support of their argument that they incurred actual damages caused by the RESPA violation, the Hawks assert (without any citations to the record) that:

At all times relevant the Hawks had the funds available to bring their mortgage current. However, they were never able to obtain the documents needed from Carrington. The Hawks alleged in the complaint that they were trying to avoid foreclosure on their home, that they were disputing portions of the forced placed flood insurance on the property, and that they were questioning numerous other charges billed to their account. On January 30, 2014, they sent a RESAP [sic] letter to Carrington. They never received a response. They initiated their suit on May 30, 2014, in part to avoid foreclosure on their home. By September 19, 2014, Christiana began state court foreclosure proceedings against them seeking payment of the full amount of the disputed funds. While the Hawks have not paid the invoices, they have been litigating this separate suit and the unexplained fees and `corporate advances' that Christiana is seeking in the foreclosure action has increased phenomenally. All this flows from Carrington failing to provide the Hawks with astatutorily required response.

(Doc. 50, at 2-3).

A review of the record leads the Court to conclude that the Hawks failed to adequately allege RESPA damages, let alone present sufficient evidence of damages to survive a motion for summary judgment. *See Jobe v. Bank of Am., N.A.,*Civil Action No. 3:10·1710, 2013 WL 1402970, at *7 (M.D. Pa. Apr. 5, 2013) (concluding that Plaintiffs "broad allegations of damages . . . are not adequate to establish the type of specific actual damages" required under RESPA). The Court agrees with the Magistrate Judge, who correctly rejected the Hawks' arguments and found that Carrington's Motion For Summary Judgment should be granted because the Hawks "have failed to show a direct causal connection between any alleged failure to respond to this written request and financial injuries suffered by the plaintiffs."[5] (Doc. 47, at 8). Accordingly, the Court will overrule Plaintiffs' Objections to the Second R&R.

Sutton v. Ocwen Loan Servicing, LLC, Dist. Court, SD Florida August 18, 2016

https://scholar.google.com/scholar_case?case=8159856508748879239&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

For related reasons, the Court must also dismiss Count II, Plaintiffs' "pattern or practice" claim for statutory damages. "The following damages are recoverable under RESPA for a section 2605 violation: `(A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.'" *McLean v. GMAC Mortgage Corp.,* 595 F. Supp. 2d 1360, 1365 (S.D. Fla. 2009), *aff'd,* 398 F. App'x 467 (11th Cir. 2010) (quoting 12 U.S.C. § 2605(f)(1)). "[D]amages are an essential element in pleading a RESPA claim." *Renfroe v. Nationstar Mortgage, LLC,* 822 F.3d 1241, 1246 (11th Cir. 2016). In *Renfroe,* the Eleventh Circuit recently "observe[d] without ruling on the question, that the use of `additional'" at § 2605(f)(1) "seems to indicate that a plaintiff cannot recover pattern-or-practice damages in the absence of actual damages." *Id.* at 1247 n.4. Shortly thereafter, the Supreme Court issued its decision in *Spokeo, Inc. v. Robins,* instructing lower courts as to the standing requirements necessary for a claim asserting a statutory violation. As the Supreme Court explained, standing requires a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.,* 136 S. Ct. at 1547 (internal citations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered `an invasion of a legally protected interest' that is `concrete and particularized' and `actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992)). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* (quotations omitted).

Stephens v. Capital One NA, Dist. Court, ND Illinois September 6, 2016
https://scholar.google.com/scholar_case?case=16485762441202987482&q=stephens+v+capital+one+na&hl=en&lr=lang_en&as_sdt=6,31&as_vis=1

[Failure to allege actual damages]

When determining whether a plaintiff has plausibly alleged actual damages, the Court draws all reasonable inferences in Plaintiffs' favor for the purpose of this motion. However, in ¶¶ 13-15,

Plaintiffs fail to state how the alleged RESPA violation was causally connected to the claimed actual damages.

Furthermore, in ¶ 13 of the complaint, Plaintiffs fail to make any claim that could allow the Court to make an inference that Defendant's pursuit of foreclosure was in violation of RESPA. Section 13 merely states that Defendant "continued its pursuit of foreclosure while simultaneously engaging the Stephens in loan modification review." [1-1] at ¶ 13. The Court is unable to draw any inference in Plaintiffs' favor that this conduct is connected to a RESPA violation or that there are any actual damages alleged. In ¶ 14, the complaint simply states that ". . . [Defendant] voluntarily dismissed its Complaint on July 30, 2015." [1-1] at ¶ 14. Here, there are no actual damages that could be inferred nor any alleged RESPA violation that could be inferred to have been causally connected to any actual damages. In ¶ 15, the complaint states, "To date, Capital One has not corrected the Mortgage to remove late fees, attorneys fees, and foreclosure fees for its wrongful foreclosure. Nor has Capital One removed the negative reporting to the credit bureaus." [1-1] at ¶ 15. Plaintiffs fail to show how not removing any late, attorney, or foreclosure fees equate to actual damages causally connected to and based upon a violation of RESPA.

Consequently, Plaintiffs' complaint lacks any claim of actual damages under RESPA. While non-pecuniary damages (like those plaintiff claims are stated in ¶¶ 13-15) can be recovered if they are actual damages that are causally connected to an alleged RESPA violation, Plaintiffs have failed to adequately allege such damages.

Waite v. Specialized Loan Servicing, LLC, Dist. Court, SD Florida September 9, 2016
https://scholar.google.com/scholar_case?case=13242013193157310258&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Failure to properly allege pattern and practice]

With respect to the request for statutory damages in count two of the Complaint, the Court concludes it is inadequately pled. Courts have interpreted the term "pattern or practice" as "a standard or routine way of operating." McLean v. GMAC Mortgage Corp., 595 F. Supp. 2d 1360, 1365 (S.D. Fla. 2009) (quoting In re Maxwell, 281 B.R. 101, 123 (Bankr. D. Mass. 2002)). Failing to respond to one or two RFI does not constitute a "pattern or practice." Id.; In re Tomasevic, 273 B.R. 682, 686 (Bankr. M.D. Fla. 2002). The Eleventh Circuit has found five allegations of RESPA violations to be sufficient to state a pattern or practice claim. Renfroe v. Nationstar Mortgage, LLC, 822 F.3d 1241, 1247 (11th Cir. 2016). Here, the Complaint alleges in a conclusory fashion that Defendant violated RESPA "with respect to numerous loans it services," and contains no factual allegations supporting a "pattern or practice." (Compl. ¶ 33.) Thus, count two is dismissed. Plaintiff is given leave to amend this count, assuming he can do so in good faith.[3]

Lage v. Ocwen Loan Servicing LLC, Court of Appeals, 11th Circuit October 7, 2016

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[Pattern and Practice cannot be inferred]

The Borrowers argue that Ocwen's use of a template to respond to their notice of error supports a reasonable inference that Ocwen engaged in a pattern of providing insufficient responses to notices of error lodged by other borrowers. More specifically, they argue that it is "entirely reasonable to infer that Ocwen generated this inadequate form letter in order to send it to a large number of borrowers in response to any [notice of error] that Borrowers, or any similarly situated borrower, may have sent. Indeed, it would be unreasonable to believe that Ocwen generated a nonresponsive form letter[] and *only* sent it to Borrowers." Appellants' Br. at 20-21.

The Borrowers assume too much. Simply using a template to respond to a notice of error does not violate RESPA. The Borrowers presented no evidence from which we can infer that Ocwen had a pattern or practice of issuing form letters that *were unresponsive to borrowers' notices of error. Cf. Renfroe,* 822 F.3d at 1247 (holding that allegations that a nonresponsive form letter was sent to borrowers on five separate occasions was sufficient to plead a pattern or practice of RESPA noncompliance). Accordingly, the Borrowers failed to present evidence of a pattern or practice of RESPA noncompliance that would support a claim for statutory damages. The district court did not err in granting summary judgment in favor of Ocwen on the Borrowers' notice of error claim.

Shaw v. CitiMortgage Dist. Court D. Nevada November 3, 2016

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Once a party has established its entitlement to an award of attorney's fees under an applicable statute, the court must then determine the reasonableness of such an award. *In re: USA Commer. Mortg. Co.,* 802 F. Supp. 2d at 1178. In his motion, Shawrequests attorney's fees in the amount of $439,091.00 based upon the expected contingency fee that Shaw's counsel is to receive from the court's judgment. *See* ECF No. 224. In the Ninth Circuit, however, an award of attorney's fees is calculated using the "lodestar" method, which is derived from multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate for the work performed. *In re: USA Commer. Mortg. Co.,* 802 F. Supp. 2d at 1178; *see also, GCM Air Group, LLC,* 2009 U.S. Dist. LEXIS 58152, at *4 (D. Nev. 2009). Because Shaw's motion seeks attorney's fees under a standard that is not accepted in the Ninth Circuit, the court shall deny Shaw's present motion for attorney's fees without prejudice and allow Shaw to file a renewed motion for attorney's fees under the appropriate legal standard. Any new motion for attorney's fees shall comply with all the requirements of Local Rule 54-16.

Martinez v. Shellpoint Mortgage Servicing, Dist. Court, SD Florida, November 8, 2016

[Actual Damages Claim for TILA dismissed for Failure to show detrimental reliance]

Here, Count VIII alleges that Defendant failed to timely respond to Plaintiff's written request for payoff information, in violation of 12 C.F.R. § 1026.36(c)(3). [ECF No. 6, ¶¶ 68-73]. Count IX alleges that Defendant failed to provide a periodic statement of her mortgage loan, in violation of 12 C.F.R. § 1026.41 [ECF No. 6, ¶¶ 74-77]. However these counts do not allege that Plaintiff detrimentally relied on any information provided.

Darby v. PNC Mortgage, NA Dist. Court D. Maryland, December 13, 2016

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Plaintiff must show evidence of a pattern or practice of noncompliance or actual damages…

…Plaintiff's attorney's fees and costs in this action are not actual damages, but her attorney's fees incurred in connection with the foreclosure action would not be recoverable as attorney's fees under RESPA…

Plaintiff incurred legal fees in the foreclosure action because she and Mr. **Darby** defaulted on their mortgage loan. The undisputed record shows that Defendant worked with Plaintiff and Mr. **Darby** for three years, regularly communicating with them about the deficiencies in their loss mitigation applications and repeatedly delaying the foreclosure proceedings to allow them to submit a complete loss mitigation application. Plaintiff has shown no evidence of actual damages caused by Defendant's alleged RESPA violations, and this court has an affirmative obligation to prevent factually unsupported claims from going to trial. *Drewitt,* 999 F.2d at 778-79. Plaintiff has not demonstrated that there is a genuine dispute of material fact on her RESPA claim, and Defendant is entitled to summary judgment.

Perron v. JP Morgan Chase Bank, Court of Appeals, 7th Circuit, January 11, 2017

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A few additional words are in order regarding the couple's allegation that Chase's RESPA violation contributed to the dissolution of their marriage. Emotional-distress damages are recoverable under RESPA, *Catalan,* 629 F.3d at 696, but the breakdown of a marriage is not the type of harm that faithful performance of RESPA duties avoids. This kind of claimed harm is far too attenuated from the alleged violation to cross the proximate-cause threshold. *See* RESTATEMENT (SECOND) OF TORTS § 281 cmt. f (1965) ("Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor's conduct, the actor is ordinarily not liable.").

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Johnson v. Specialized Loan Servicing, LLC, Dist. Court MD Florida, Jacksonville Division, January 17, 2017

ln order to recover statutory damages under RESPA, a plaintiff must show "a pattern or practice of noncompliance." 12 U.S.C. S 2605(fX1XB). "The courts have interpreted the term "pattern or practice" in accordance with the usual meaning of the words." McLean,595 F. Supp. 2d at 1365. "ln another context, a 'pattern or practice' has been defined as a 'standard operating procedure-the regular rather than the unusual practice."' Refroe v. Nationstar Mort., LLC,822 F .3d 1241, 1247 (11th Cir. 2016) (citing lnt'l Brotherhood of Teamsters v. United Sfafes, 431 U.S. 324, 336 (1977)). Although

there is no magic number of violations that create a "pattern or practice of noncompliance," the Eleventh Circuit has deemed five violations adequate to plead statutory damages. Renfroe, 822 F .3d al 1247 48.

Here, Plaintiff cites Renfroe in support of her position that she adequately pled statutory damages under RESPA because she has alleged five separate RESPA violations. The problem with her argument, however, is that Renlroe also adopted the Tenth Circuit's holding that a plaintiff must allege some RESPA violations "with respect to other borrowers." Renfroe,822 F.3d al 1247 (citing Toonev. Wells Fargo Bank, N.A.,716 F.3d 516,523 (10th Cir.2013))(emphasis added). Here, Plaintiff has not alleged anyviolations with respect to other borrowers. Plaintiff has only alleged "a pattern and practice of noncompliance with Regulation X of [RESPA] in connection with [her] loan." (Doc. 18-2 at7 (emphasis added).) Thus, under the Eleventh Circuit's reasoning in Renfroe, Plaintiff has not alleged an impermissible "standard or routine way of operating," and has not stated a plausible claim for statutory damages. See Mclean, 595 F. Supp. 2d at 1365. Defendants' request to dismiss Plaintiff s statutory damages claim is due to be granted and the claim is due to be dismissed without prejudice.

Silberstein v. Federal National Mortgage Association Dist. Court WD Arkansas, January 17, 2017

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Paragraph 18 of the Amended Complaint, which contains the damages allegation, is no more than a "[t]hreadbare recital[] of the elements of a cause of action." *Ashcroft,*556 U.S. at 678. It merely states that "as a result of' PHH's "failure to reply and respond in accordance" with the RESPA, the Silbersteins have sustained certain damages. This assertion is the epitome of a "legal conclusion" or "conclusory statement[]" that the Court need not accept as true for purposes of a motion to dismiss. *Id.* The Amended Complaint does not contain a single factual allegation explaining how PHH's supposed violations of the RESPA *caused* the Silbersteins any damages whatsoever.

The Court further notes that the Silbersteins' Amended Complaint fails to state a claim for statutory damages under the RESPA. A court may award plaintiffs "any additional damages," not to exceed $2,000, "in the case of a pattern or practice of noncompliance with the requirements' of the RESPA. 12 U.S.C. § 2605(f)(1)(B). While the Amended Complaint does allege that PHH violated the RESPA on three occasions, its only damages allegation pertains to the actual damages allegedly incurred by the Silbersteins. To the extent the Silbersteins sought to include a claim for statutory damages under the RESPA, then, their Amended Complaint falls short of the notice pleading standard required by Federal Rule of Civil Procedure 8. *See Erickson,* 551 U.S. at 93 (stating that a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." (quoting *Twombly,* 550 U.S. at 555)).

Kelmetis v. Federal National Mortgage Association, Dist. Court ND New York, January 27, 2017.

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Since the state court action remains pending, granting the declaratory relief Plaintiff requests would interfere with the state court's jurisdiction. Plaintiff's requests for declaratory relief concern Defendants' ability to foreclose on the Property. For example, Plaintiff requests that the Court declare "whether the unrecorded Assignment of Mortgage by FANNIEMAE is fraudulent and void by statute." *See* Dkt. No. 1 at ¶ 51. Therefore, the Court abstains from granting Plaintiff's requested relief. *See Santana,* 2016 WL 3149731, at *1-2 (holding that *Younger* barred the court from issuing an order "declaring the foreclosure void" and granting "injunctive relief holding the mortgage void and unenforceable"); *see also* *Clark v. Bloomberg,* No. 10-CV-1263, 2010 WL 1438803, *2 (E.D.N.Y. Apr. 12, 2010) ("Both sets of state-court proceedings are pending, both concern the disposition of real property and hence implicate important state interests, and there is no reason to doubt that the state proceedings provide Clark with an adequate forum to make the arguments he seeks to raise in this court. Abstention doctrine thus bars Clark's claims to enjoin the foreclosure action and the eviction proceedings").
Moreover, the Court finds that it would be futile to grant Plaintiff leave to amend her claim for declaratory relief. *See Santana,* 2016 WL 3149731, at *5 ("The Court will dismiss the Plaintiff's claims for injunctive relief with prejudice to repleading in this Court pursuant to the Younger doctrine, as repleading such claims here would be futile"); *see also Haynie v. N.Y. Hous. Auth.,* No. 14-CV-5633, 2015 WL 502229, *3 (E.D.N.Y. Feb. 5, 2015) ("Here, given that Haynie's complaint is, at bottom, a challenge to his state court eviction over which the Court does not have jurisdiction, amending the complaint would be futile. The Court therefore declines to grant Haynie leave to amend his complaint"). Therefore, the Court dismisses Plaintiff's claim for declaratory relief with prejudice.

Parker v. HSBC Mortgage Services, Inc. Dist. Court, ED Missouri, February 8, 2017

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The Court finds that Plaintiff's Complaint fails to sufficiently allege a causal connection between HSBC's alleged RESPA violations and her actual damages, and that her RESPA claim must therefore be dismissed. Plaintiff's damages allegation is no more than a "`threadbare recital[ ] of the elements of a cause of action.'" *See Silberstein,* 2017 WL 187165 at *4 (quoting *Ashcroft,* 556 U.S. at 678) (where complaint stated that as result of defendant's failure to respond in accordance with RESPA plaintiffs had sustained damages in form of attorney's fees, mental anguish, damage to their credit and reputation, and potential decrease in property value, Plaintiffs' assertion was "the epitome of a legal conclusion"); *see also Gorbaty v. Wells Fargo Bank, N.A.,* No. 10-CV-3291, 2014 WL 4742509, at *5 (E.D.N.Y. Sept 23, 2014) (dismissing plaintiff's RESPA claim where plaintiff generally alleged that she suffered emotional distress, reputational harm, loss of equity in her home, and costs of litigation as result of defendant's RESPA violations); *Lal v. Am. Home Servicing, Inc.,* 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010).

In addition, Plaintiff's damages allegation is not specific to her RESPA claim. Rather, Plaintiff asserts the same damages allegation in connection with her MMPA claim, and the Complaint contains no factual allegations indicating how her damages resulted from HSBC's alleged failure to comply with the RESPA, as opposed to HSBC's underlying failure in servicing the loans. *See Dunn-Mason v. JP Morgan Chase Bank,* N.A., No. 11-cv-13419, 2013 WL 5913684, *10 (E.D. Mich. Nov. 1, 2013). The Court notes that in her Response to HSBC's Motion, Plaintiff alleges that her emotional damages resulted from the stress of constantly being told she was in default on her loans without explanation and not receiving accurate documentation. Plaintiff also alleges therein that she suffered

actual monetary damages in hiring an attorney to send a QWR to HSBC and to assist her in the problems she was having with HSBC. Plaintiff's Complaint, however, is devoid of such factual allegations. *See id.; see also Lawther v. Onewest Bank,* No. C 10-0054 RS, 2010 WL 4936797, at *7 (N.D. Cal. Nov. 30, 2010) ("It is the plaintiff's pleading obligation to point to some colorable relationship between his injury and the actions or omissions that allegedly violated RESPA.").

For the foregoing reasons, the Court concludes that Count I of the Complaint fails to state a claim. Plaintiff's RESPA claim will therefore be dismissed.

Congdon v. Wells Fargo Bank NA, Dist Court WD Washington, February 17, 2017

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Defendant argues plaintiff failed to plead damages from the alleged RESPA violation. Dkt. #19 at 16-17. Specifically, defendant asserts "[a]llegations that a plaintiff suffered actual damages in higher payments and interest for wrongful continued credit reporting while the QWR was pending unresolved" are insufficient. Dkt. #19 at 17. Plaintiff asserts she has suffered "pecuniary damages that include costs related to damage to Plaintiff's credit." Dkt. #21 at 11.

Plaintiff's allegations of damages are legally and factually insufficient. Plaintiff's complaint does not identify a causal link between the alleged RESPA violation and her alleged financial losses. Assuming defendant did not respond, plaintiff does not make clear how that affected her credit history or caused any financial loss. Neither has plaintiff pleaded facts allowing an inference that her account was in error or that defendant disclosed any overdue payment to a consumer reporting agency in the relevant period. Finally, a purported failure to respond to one letter does not adequately plead a pattern or practice of RESPA noncompliance entitling plaintiff to statutory damages. Plaintiff's RESPA claim must be dismissed.

Yeager v. Ocwen Loan Servicing, LLC Dist Court MD Alabama, February 22, 2017

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Here, the Yeagers allege a notice delay of 13 days and nothing more. There is no evidence that the delay has in any way undermined the FDCPA's goal of providing a consumer with notice of, and an opportunity to challenge, a creditor's debt information. Surely, the Spokeo common-sense principle dictates that this delay, unaccompanied by any harm or material risk of harm, does not "entail a degree of risk sufficient to meet the concreteness requirement." Id. What the Yeagers have is a minnow; the trout are still out there. The Yeagers, therefore, lack standing to bring this lawsuit. Cf. Nicklaw v. Citimortgage, Inc., 839 F.3d 998, 1001 (11th Cir. 2016)(holding that, because there was no evidence of harm or material risk of harm, the plaintiff lacked standing to bring a suit for statutory damages based on the defendant's belated recordation of a certificate of discharge of the plaintiff's mortgage, which a New York statute required to be recorded within 30 days after satisfaction of the mortgage);[5] Dutta v. State Farm Mut. Auto. Ins. Co., No. 3:14-cv-04292-CRB, 2016 WL 6524390, at *3 (N.D. Cal. Nov. 3, 2016) (Breyer, J.) (concluding that plaintiff lacked

standing to sue insurance company under the FCRA where company's disclosure of information to consumer three days after the statutory deadline caused no harm), appeal docketed, No. 16-17216 (9th Cir. Dec. 1, 2016).[6]

At oral argument on February 15, 2017, the court inquired of counsel for the Yeagers whether, if allowed to amend their complaint, they could allege any harm or material risk of harm that attended the delay. Counsel said no. Therefore, an amendment would be futile.

Because the Yeagers have failed to establish they suffered a concrete injury sufficient to sustain Article III standing, this court may not entertain their FDCPA suit.[7] Ocwen Loan's objection to the magistrate judge's recommendation will be sustained, the recommendation will be rejected, and Ocwen Loan's renewed motion for judgment on the pleadings will be granted.
An appropriate judgment will be entered.

Hager v. CitiMortgage Inc. Dist. Court, D. New Jersey, February 27, 2017

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Finally, looking, as the parties do in briefing, to the damages claimed by Plaintiff in his fraud counts (Counts II and IV) only, these allegations too fail to set forth actual damages sufficient to state a claim under RESPA. Plaintiff alleges that he was damaged by Defendant Selene's "misrepresentations," including Defendant Selene's failure to respond to the QWR, by 1) having to pay amounts towards his loan that were higher than those contractually agreed upon; 2) losing equity in the Property; 3) paying unnecessary interest to Defendants; and 4) suffering embarrassment, loss of reputation, and severe anxiety and emotional distress due to the foreclosure of his home. Compl. ¶ 44. It is clear on the face of Complaint however, that these damages were not *causally linked* to the failure to respond to the QWR. The alleged additional payments of principal and interest are clearly alleged to have been caused by Defendant Selene's alleged failure to honor the permanent modification granted by Defendant Citi. *Id.* at ¶ 41(e) ("The Selene Trial Mod attempted to bill Plaintiff for past escrow amounts when the Permanent Mod had originally recapitalized all past amounts that were due prior to October 16, 2016"); ¶ 44 ("Defendants' refusal to modify the Loan payments at the contractually agreed upon amounts *have caused* . . .") (emphasis added). Moreover, the loss of equity in the Property and Plaintiff's alleged emotional distress are clearly alleged to have been directly caused by the foreclosure, an event which preceded Defendant Selene's alleged failure to respond to the QWR by over a year. Without any allegations of actual damages, caused by Defendant Selene's alleged noncompliance with the obligations of RESPA, Plaintiff's RESPA claim cannot proceed and is dismissed.

Meeks v. Ocwen Loan Servicing, LLC Court of Appeals 11th Circuit, March 1, 2017

https://scholar.google.com/scholar_case?case=13979062748774013614&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

12 C.F.R. § 1024.36(c). As the district court acknowledged, whether a Certified Receipt qualifies as a "written response acknowledging receipt" is an issue of first impression. As to Count I, under the undisputed factual circumstances of this case—where Meeks's attorney sent the RFI on behalf of Meeks as a borrower and Meeks's attorneys unquestionably received the Certified Receipt in

response signed by Ocwen's agent—we agree with the district court that Regulation X was satisfied.[3]
As to Count II, we also agree with the district court that Meeks has not suffered a concrete injury in fact and, thus, does not have Article III standing to assert a claim for statutory damages. See Spokeo, Inc. v. Robins, 578 U.S. ___, ___, 136 S. Ct. 1540, 1548-49, 1550 (2016) (holding that, while an injury need not be tangible to be "concrete," a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation"). Here, Meeks (and his attorneys) had undisputed actual knowledge of receipt of the RFI, although they dispute that its form was sufficient to meet Regulation X's requirements. Thus, Meeks suffered at most "a bare procedural violation," and he cannot show that he suffered a real, concrete injury from Ocwen's actions. See id. at 1548, 1550.
In sum, under the circumstances of this case, we affirm the district court.[4]

Vilkofsky v. Specialized Loan Servicing, LLC Dist. Court WD Pennsylvania, March 3, 2017

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Plaintiff's Amended Complaint simply states that "Plaintiff has experienced emotional distress as a result of Defendants' actions." (Docket No. 13 ¶ 49). Upon review of the single notice of error sent to SLS, in conjunction with the allegations in the Amended Complaint, it appears that there was some degree of emotional distress as a result of prior attempts to resolve Plaintiff's unpaid mortgage balance; but, Plaintiff does not indicate how SLS's purported violation of 12 C.F.R. 1024.35(e)(1) caused — or contributed to — this emotional distress. A plaintiff must plead facts demonstrating a clear causal link between a defendant's violations and his injuries. *Hager v. CitiMortgage, Inc., et al.,* 2017 WL 751422 *9 (D.N.J. Feb. 27, 2017). Here, even viewed in the light most favorable to Plaintiff, it seems that his emotional distress was primarily connected to conditions existing before SLS responded to the notice of error — defeating said claim against SLS. The same cannot be said of alleged emotional distress stemming from Rushmore's conduct. Plaintiff has pled sufficient factual matter to connect his emotional distress to Rushmore's allegedly continual failure to properly respond to notices of error. Thus, the Court will dismiss the RESPA claim against SLS to the extent non-pecuniary actual damages from emotional distress are claimed, but will deny Rushmore's motion as to same.

Floyd v. U.S. Bank NA, Dist. Court S.D. Indiana, Indianapolis Division, March 16, 2017

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Linderman asserts that the January 30 Fax was a QWR; the Court cannot agree. The January 30 Fax fails to meet the requirements for a valid QWR because it does not allege an account error and does not request any information from U.S. Bank. Instead, it merely provides U.S. Bank with information relating to Linderman's agreement with her selected contractor, R&S. *See* Linderman Aff., Ex. A. Therefore, even in the broadest permissible sense, the January 30 Fax cannot qualify as a QWR under RESPA.

Linderman also asserts that the September 9 Letter was a QWR. Determining whether that correspondence serves as a valid QWR, however, presents a more difficult question for the Court in light of the most recent precedent available, *Catalan* and *Perron.* While Linderman clearly seeks information from U.S. Bank regarding her loan in the September 9 Letter, it is not as clear as to

whether the September 9 Letter actually requests information related to the servicing of the loan, as required under *Perron.* However, the Court need not determine whether the September 9 Letter meets the requirements for a QWR because, even assuming *arguendo* that it is a QWR under 12 U.S.C. § 2605(e), Linderman has not established that U.S. Bank's failure to respond to the September 9 Letter proximately caused Linderman's alleged harms or that it was part of a pattern or practice of noncompliance with RESPA…

…Despite the harm alleged, Linderman has not demonstrated how her damages are causally linked to U.S. Bank's failure to respond to the September 9 Letter. While Linderman asserts that her damages could have been minimized if U.S. Bank had dispersed funds to her to repair the Home, she does not provide any evidence proving that U.S. Bank's failure to respond directly caused the frequent vandalisms and storm damage to the Home, or her emotional distress and concomitant relationship issues. Because Linderman's alleged damages were incurred well before she sent the September 9 Letter, no reasonable trier of fact could find that her damages were the result of U.S. Bank's alleged failure to respond to the September 9 Letter. Furthermore, while a plaintiff can recover emotional distress damages under RESPA, harms associated with the breakdown of a marriage, like those alleged by Linderman, are "far too attenuated from the alleged violation" to support an award of actual damages. *Perron,* 845 F.3d at 858. Therefore, because Linderman cannot prove that her alleged damages are causally connected to U.S. Bank's failure to respond to the September 9 Letter, she is not entitled to an award of actual damages.

Chadee v. Ocwen Loan Servicing, LLC Dist. Court M.D. Florida, Tampa Division, March 17, 2017

https://scholar.google.com/scholar_case?case=5072872405389596449&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Ocwen argues dismissal of Counts I and II is appropriate because the late receipt of this information did not cause Chadee any actual damages. Instead, Chadee's claimed damages were incurred when Korte & Wortman dispatched the NOEs. But the NOEs were sent well after Korte & Wortman had already received the requested information.

Regulation X imposes three deadlines on loan servicers that are relevant to this case. Upon receipt of a borrower's request for information, a loan servicer must (1) within five business days, acknowledge receipt of that request, 12 C.F.R. § 1024.36(c); (2) within ten business days, provide the borrower with the identity, address, and other relevant contact information for the owner or assignee of the mortgage loan, 12 C.F.R. § 1024.36(d); and (3) within thirty business days, conduct a reasonable search for the requested information, providing the borrower with a written notification stating the servicer has determined that the requested information is unavailable to the servicer, providing the basis for the servicer's determination, and providing contact information for further assistance, 12 C.F.R. § 1024.36(d). Aggrieved borrowers may seek actual damages "as a result of" the loan servicer's failure, and "any additional damages . . . in the case of a pattern or practice of noncompliance." 12 U.S.C. § 2605(f)(1).

Chadee has not stated any factual basis for actual damages incurred "as a result of" Ocwen's conduct. Chadee argues "damages borne of *having to file* a subsequent NOE is sufficient to articulate a damages pleading." Doc. 7 at 5 (emphasis added). But he has not established there was ever a need to file the NOEs here. The only actual damages Chadee claims are related to the drafting and mailing of his various NOEs, all of which were prepared and dispatched months after Korte & Wortman had

already received Ocwen's substantive response to the RFI. Because Korte & Wortman had already received all of the information Chadee requested related to servicing before the NOEs were mailed, there was no *need* to mail the NOEs—certainly no need that arose "as a result of" Ocwen's conduct.

Consequently, drawing all inferences in favor of Chadee, it is evident that the expenses incurred in preparing and sending the NOEs were not causally linked to Ocwen's conduct…

…Given the foregoing, the Court finds Chadee's allegations of inadequacy are belied by the documents attached to his complaint, and it concludes that his allegations of a bare procedural violation of untimeliness are insufficient to establish a concrete injury—and, by extension, Article III standing.

Wilson v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Dist. Court, ED Michigan March 20, 2017

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In his Response, Plaintiff does not maintain that he has in fact alleged actual damages. Instead, Plaintiff characterizes his references to Regulation X violations as more for the purpose of establishing Defendants' liability for wrongful foreclosure under Michigan law. Regulation X provides that a borrower may enforce its provisions through a RESPA action, Plaintiff argues, but "nothing in the regulation itself or in RESPA limits a borrower from using these irregularities to defend against a wrongful foreclosure as the borrower has done in the case at bar." (Pl.'s Resp. at 7.) In this vein, Plaintiff draws an analogy to the law of negligence, in which context a tort claimant can use the defendant's violation of a statute or regulation as proof in his or her common-law negligence case, even if the statute or regulation does not provide the plaintiff with a private cause of action.

As discussed above, Plaintiff has failed to state a wrongful foreclosure claim under Michigan law because he has not alleged the requisite fraud or irregularity. But the Regulation X dimension of this case further demonstrates why this claim must fail. RESPA grants plaintiffs a cause of action for money damages in some circumstances, while the Michigan statutory framework governing wrongful foreclosure claims provides an equitable remedy in others. If every violation of Regulation X were *per se* sufficient to set aside a Michigan foreclosure, many of the state-created restrictions on plaintiffs seeking that form of equitable relief would be rendered superfluous. Courts in this District have recognized that the two laws create significantly different remedies.

CITIBANK, NA v. NAJDA, Dist. Court, D. Massachusetts March 29, 2017

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In any event, the Najdas have failed to offer admissible evidence tending to show that they suffered any actual damages from any failure to respond adequately to a genuine QWR. See Bulmer v. MidFirst Bank, FSA, 59 F. Supp. 3d 271, 279 (D. Mass. 2014) (granting summary judgment in favor of defendant servicer for failure to show actual damages under RESPA). In support of their RESPA claim, the Najdas only make conclusory allegations that SLS's failure to respond led to fees and

overcharges, but they have not produced evidence that supports the conclusion. That failure to produce evidence on a necessary element of their claim warrants summary judgment in favor of SLS. See Celotex, 477 U.S. at 322-23 (1986).

Brown v. CitiMORTGAGE, INC., Dist. Court, D. Massachusetts April 11, 2017

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Here, Plaintiffs allege that they have suffered actual damages—including damages to their credit, monetary damages, mental anguish, emotional distress and the loss of their home— "[a]s a result of CMI's violations." Doc. 46 at ¶ 183. However, Plaintiffs fail to allege *how* the stated damages were actually caused by the alleged RESPA violations. Plaintiffs have not stated how any of these were distinctive damages specifically caused by Defendant's failure to properly respond to their letters. See Okoye, 2011 WL 3269686, at *17 (finding Plaintiffs' RESPA claim futile because they failed to allege that they suffered any "distinct damages *as a result of* [the defendant]'s alleged noncompliance"). Nor have Plaintiffs described how the alleged RESPA violations exacerbated these general damages associated with their default and foreclosure proceeding. Foregger, 2013 WL 6388665, at *5 (stating that to show a causal relationship between the defendant's RESPA violation and damages such as emotional distress and various costs, the plaintiffs had to show that the existing damages were somehow enhanced or exacerbated by the alleged violation).

Plaintiffs also allege that they are entitled to statutory damages under 12 U.S.C. § 2605(f)(1)(B). But statutory damages under this section are available only if Plaintiffs sufficiently allege a pattern or practice of noncompliance with RESPA. See Afridi v. Residential Credit Sols., Inc., 189 F. Supp. 3d 193, 200 (D. Mass. 2016); Bulmer v. MidFirst Bank, FSA, 59 F. Supp. 3d 271, 279 (D. Mass. 2014). Here, after alleging Defendant's failure to respond to their own qualified written requests ("QWR"), Plaintiffs make the following conclusory statement: "Upon information and belie[f] we allege that CMI has engaged in a much broader pattern and practice of failing to comply with RESPA by not responding to QWRs." Doc. 46 at ¶ 182. This is insufficient. See Toone v. Wells Fargo Bank, N.A., 716 F.3d 516, 523 (10th Cir. 2013) (finding the plaintiffs' allegations insufficient when they merely asserted that a pattern or practice could be inferred from the defendant's failure to respond to their own requests and failed to allege any violations with respect to other borrowers); see also Perron on behalf of Jackson v. J.P. Morgan Chase Bank, N.A., 845 F.3d 852, 858 (7th Cir. 2017) (suggesting that some evidence of coordination is needed to recover statutory damages); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (finding, in a different context, that a "pattern or practice" means a company's "standard operating procedure" rather than isolated instances).[2]

Bomar v. PACIFIC UNION FINANCIAL, LLC, Dist. Court, ND Illinois April 25, 2017

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Even if this Court was to consider this newly raised argument, moreover, Bomar has offered no legal authority to support his conclusory assertion that section 1024.41(h)(1)(3) requires review by a different department (as opposed to different individuals) and no evidence to controvert Pacific

Union's evidence establishing that an independent review occurred. Bomar has accordingly failed to establish a genuine dispute of material fact with respect to his RESPA claim.

Buttermore v. NATIONSTAR MORTGAGE LLC, Dist. Court, ED Michigan May 26, 2017

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Plaintiff has not, however, plausibly alleged damages arising from the dualtracking he claims Nationstar committed. RESPA, as implemented by Regulation X, permits the recovery of two forms of damages: "actual money damages and statutory damages for `a pattern or practice of noncompliance.'" *Winters v. Deutsche Bank Nat'l Trust Co.,* No. CV 15-13456, 2016 WL 5944717, at *2 (E.D. Mich. Sept. 14, 2016) (dismissing a Regulation X claim in an action brought by Plaintiff's counsel where the plaintiff "failed to allege with sufficient particularity any actual monetary damages, or a pattern or practice of noncompliance on the part of defendants"), *report and recommendation adopted,* 2016 WL 5930528 (E.D. Mich. Oct. 12, 2016). In Count VII, Plaintiff alleges vaguely that Nationstar "engaged in a pattern or practice of non-compliance by, among other offenses, pursuing loss mitigation options contemporaneously with active foreclosure proceedings." (Compl. ¶ 134.) Plaintiff has alleged no specific facts to support his allegation of such a "pattern or practice" as required for statutory damages under RESPA, and has not alleged any particular basis for actual damages either. Count VII will be dismissed accordingly.

Counts IX and X fail for the same reason. As another court in this District recently explained in another case brought by Plaintiff's counsel, a RESPA complaint "must allege facts showing that damages occurred as a result of the alleged violations. Naked claims of damages, unconnected to such facts, are not enough to state a claim." *Mrla v. Fed. Nat'l Mortg. Ass'n,* No. 15-CV-13370, 2016 WL 3924112, at *3 (E.D. Mich. July 21, 2016) (internal citations and quotation marks omitted).

Schroeder v. NATIONSTAR MORTGAGE, LLC, Dist. Court, WD Washington June 8, 2017

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The court agrees. The extent of Plaintiffs' emotional damages claim is that they "suffered emotional distress, confusion, and other stress related symptoms due to Nationstar's failure to complete the [RESPA] review." Compl. ¶ 204. This is insufficient to place Defendants on notice about the substance of Plaintiffs' emotional damages claim. *See Austerberry v. Wells Fargo Home Mortg.,* No. 15-CV-13297, 2015 WL 8031857, at *7 (E.D. Mich. Dec. 7, 2015) (dismissing RESPA claim for emotional damages where "Plaintiff made a threadbare claim for `emotional damages' without any detail as to the symptoms or severity of the emotional distress or how Defendant allegedly caused these damages"). Plaintiffs' claim for emotional damages arising from Defendants' alleged RESPA violation is dismissed.

JUDAN v. Wells Fargo Bank, NA, Dist. Court, ND California July 21, 2017

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Finally, Defendant asserts with relation to both causes of action that Plaintiff has failed to plead facts to support actual damages attributable to the alleged violations. Mot. at 6; *see also* 12 U.S.C. § 2605(f)(1) (providing for recovery of "any actual damages to the borrower as a result of the [defendant's] failure" to comply); *Flate v. Nationstar Mortg., LLC,* No. 16-55500, 2017 WL 2829531, at *1 (9th Cir. June 30, 2017) (affirming dismissal of causes of action under several provisions of 12 C.F.R. § 1024.41 because "Plaintiffs plead nothing more than conclusory allegations that Defendant's alleged violations caused actual damages"). Plaintiff responds by pointing to two portions of the operative complaint as allegedly pleading actual damages. Opp. at 10 (citing FAC ¶¶ 67, 94). However, paragraph 94 is unrelated to these causes of action, instead focusing on the harm that Plaintiff allegedly suffered as a result of "Defendant's interference with Plaintiffs' contractual rights" by failing to make a determination on Plaintiffs' original loan modification application between approximately 2011 and January 2015. *See* FAC ¶¶ 15-16, 92-94. Consequently, the legal issue boils down to whether actual damages for the alleged violation of 12 C.F.R. § 1024.41(g) are plausibly supported by the allegation that recording the notice "plac[ed] the Property in imminent risk of foreclosure." *See* FAC ¶ 67. Plaintiff cites no authority in support of this proposition, and the Court has found authority to the contrary. *See Padayachi v. Indymac Bank,* No. C 09-5545 JF (PVT), 2010 WL 1460309, at *1, 4 (N.D. Cal. Apr. 9, 2010) (dismissing for failure to allege actual damages resulting from Defendant's alleged RESPA violations, where the defendant had recorded a notice of trustee's sale that was scheduled to occurr within weeks of when the complaint was filed); *Allen v. United Fin. Mortg. Corp.,* 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) ("[A] number of courts have read [12 U.S.C. § 2605(f)] as requiring a showing of pecuniary damages in order to state a claim."). Consequently, the third and fourth causes of action are dismissed for failure to state facts plausibly showing that actual damages resulted from the alleged violations.

Krick v. Driscoll, Md: Court of Special Appeals August 3, 2017

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Ms. Krick raises multiple contentions regarding the loss mitigation applications submitted before 2014; however, because the parties continued to negotiate, the relevant loss mitigation application in this appeal is the application that she submitted on August 31, 2014. Regulation X does apply, but Ms. Krick failed to demonstrate to the circuit court that the August 31 application was complete. Ms. Krick also did not include the August 31 application in the record extract on appeal to demonstrate that she submitted a complete application as required by Regulation X. Therefore, we can only rely on the January 5, 2015, motion to stay or dismiss hearing transcript and circuit court's record. Both seem to indicate that Nationstar notified Ms. Krick in a letter dated November 25, 2014, that documents were missing from her August 31 application. As the regulation clearly states, the prohibition on dual-tracking applies when the borrower has submitted a complete loss mitigation application. 12 C.F.R. § 1024.41(g) (emphasis added). In any event, the circuit court, in its July 15, 2015, order denying Ms. Krick**'s** motion to stay or dismiss the foreclosure action, ordered the parties to continue loss mitigation discussions and Appellees, in their brief, indicated their willingness to continue those discussion prior to scheduling another foreclosure sale.

Vethody v. National Default Servicing Corporation, Dist. Court, ND California August 4, 2017

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Here, Plaintiffs allege that "[a]s a result" of Defendants' lack of diligence in the application review process, they suffered the "active foreclosure of their property, which necessitate[d] the filing of this lawsuit . . . and costs to save their home." Dkt. No. 52, ¶ 69. To the extent that "costs to save their home" relate to the costs of filing of this lawsuit, such expenses are not sufficient to plead actual damages under RESPA. *Soriano,* 2011 WL 1362077, at *6. To the extent that these costs refer to other expenses, the allegation as currently plead is conclusory. As for the active foreclosure of the property, Plaintiffs have not alleged the loss of their house or any actual losses related to the active and ongoing foreclosure. As such, Plaintiffs have not shown any actual damages suffered as a result of the RESPA violation.
Plaintiffs allege emotional distress as a source of damages related to their negligence claim.[1] Since the case law is clear that Plaintiffs must prove that the damages suffered are caused by the RESPA violation, damages listed under the negligence claim are not sufficient.
As Plaintiffs fail to plead actual damages caused by the RESPA violation, their Section 1024.41(b) claim fails, and the court grants Defendants' motion to dismiss as to this claim. As Plaintiffs may be able to allege actual damages, the court grants Plaintiffs leave to amend.

Lorang v. Ditech Financial LLC, Dist. Court, WD Wisconsin September 5, 2017

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But submitting a complete loss mitigation application is only one element of the Lorangs' claim. They must also "submit[] adequate evidence of injury under [RESPA] to survive a motion for summary judgment." *Diedrich v. Ocwen Loan Servicing, LLC,* 839 F.3d 583, 591 (7th Cir. 2016). The Lorangs submit no evidence of actual injury. The Lorangs argue that they can wait until trial to prove damages. But they are confusing proof of the amount of damages with proof of injury. To withstand summary judgment, the Lorangs "had to come forward with evidence sufficient to support an award of actual damages to pursue their RESPA claims." *Id.* In other words, they needed to adduce evidence not just that Ditech failed to evaluate their complete application, "but specifically, that [Ditech's] failure[] to comply with [§ 1024.41(c)(1)(ii)] caused their injury." *Id.* "`[S]imply having to file suit' as a result of a loan servicer's alleged failure to [comply with] RESPA `does not suffice as a harm warranting actual damages.'" *McNeal v. J.P. Morgan Chase Bank, N.A.,* No. 16-cv-3115, 2016 WL 6804585, at *5 (N.D. Ill. Nov. 17, 2016) (quoting *Diedrich,* 839 F.3d at 593).
Here, the Lorangs do not show evidence of any injury arising from Ditech's purported violation of § 1024.41. They contend generally that Ditech caused the Lorangs to lose their modification and the opportunity to refinance. But they attribute this injury to Ditech's failure to respond to the December 28 email, to the January 20 letter, and to Ditech's demands for inconsistent amounts due on the loan (to be discussed in the next section). At no point do the Lorangs actually show that Ditech's violation of § 1024.41—the failure to evaluate their modification application—caused them actual injury. They adduce no evidence (or even make the argument) that had Ditech evaluated the application, they would have been approved, and that they could have made the modified payments and kept their house. Bear in mind that the Lorangs had been in default since 2009, and that they had not been able to avoid foreclosure after six years of litigation in state court. The Lorangs' injuries stem from their

failure to pay their home loan and the resulting foreclosure; they have not shown how they have been harmed by the alleged RESPA violation.

Bukowski v. Wells Fargo Bank, NA, Dist. Court, D. New Jersey September 14, 2017

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Here, pursuant to 12 U.S.C. §§ 2605 (e) and (f), the Complaint alleges that Wells Fargo failed to: (1) "timely or properly respond to [Plaintiffs'] Requests for Information[,]" (2) "respond to [Plaintiffs'] Notice of Error[,]" and (3) "correct errors in [Plaintiffs'] loan modification documents." (Compl. ¶¶ 113-17.) Specifically, Plaintiff alleges that Wells Fargo failed to correct errors in Plaintiffs' loan modification documents and respond to Plaintiffs' requests and, therefore, demands specific performance in the form of a permanent loan modification, actual damages, statutory damages, attorneys' fees and costs, and other relief the Court deems just and equitable. (*Id.* ¶ 117.) Plaintiffs, however, fail to plead actual damages. *See* 12 U.S.C. § 2605(f)(1)(A) (permitting recovery of "any actual damages to the borrower as a result of [ ] failure" to comply with any provision of [RESPA]). Furthermore, Plaintiff fails to allege specific damage as a result of the alleged RESPA violations and does not identify a causal link between the alleged violations and alleged damages. *See* *Oliver v. Bank of Am. N.A.*, No. 13-4888, 2014 WL 562943, at *3 (D.N.J. Nov. 15, 2012). Accordingly, the Court dismisses Count One of the Complaint.

McGhee v. Ditech Financial LLC, Dist. Court, ED Michigan September 18, 2017

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Conceivably, the McGhees could have a valid claim under RESPA itself, even though their claim for wrongful foreclosure under Michigan law fails. Generously construed, that is the sort of relief sought in the Complaint. But RESPA provides only monetary relief, not equitable relief. *See* *Servantes v. Caliber Home Loans, Inc.*, No. 14-CV-13324, 2014 WL 6986414, at *1 (E.D. Mich. Dec. 10, 2014). And a plaintiff who brings a claim under RESPA "must allege actual damages[.]" *Battah v. ResMAE Mortg. Corp.*, 746 F. Supp. 2d 869, 876 (E.D. Mich. 2010). Here, the Complaint principally seeks equitable relief, and though it asserts that the amount in controversy exceeds $25,000 and seeks a generic award of "damages incurred," ECF 1, PgID 9, 13, nowhere does it assert actual damages. The Complaint therefore fails to state a claim under RESPA.

Davis v. Deutsche Bank National Trust Company, Dist. Court, ED Pennsylvania September 19, 2017

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With respect to actual damages, Plaintiffs allege that they suffered "actual damages including but not limited to anxiety, worry, distress, . . . and enhanced damages." Compl., ¶ 104. The Defendants argue that the Plaintiffs cannot show actual damages due to their failure to establish a causal link between the alleged RESPA violations and any actual damages. Plaintiffs claim that the causal link is shown from paragraphs 92 through 101 of the Complaint. Those paragraphs, however, contain only averments that the Plaintiffs sent Ocwen qualified written requests for information. "Actual damages

encompass compensation for any pecuniary loss including such things as time spent away from employment while preparing correspondence to the loan servicer, and expenses for preparing, photocopying and obtaining certified copies of correspondence." Wilson v. Bank of Am., N.A., 48 F. Supp. 3d 787, 799 (E.D. Pa. 2014)(quoting Cortez v. Keystone Bank, Inc., No. Civ.A. 98-2457, 2000 WL 536666, at *12 (E.D. Pa. May 2, 2000)).
The Defendants contend that there is no connection between the Plaintiffs' allegations of RESPA violations by Ocwen and actual damages that Plaintiffs may have suffered therefore the claim for violations of RESPA should be dismissed as a matter of law, citing Hawk v. Carrington Mortg. Servs., LLC, Civ. A. No. 3:14-1044, 2016 WL 4414844, *12 (M.D. Pa. June 23, 2016), for the statement that "[w]hen a plaintiff fails to plead or prove a direct causal connection between the RESPA violation and some specific and identifiable damages, the loan servicer is entitled to judgment as a matter of law." The procedural posture of the Hawk case and the court's statement was at the summary judgment stage. At this earlier stage in the instant litigation, the Motion will be granted but the Plaintiffs may amend their Complaint as to this claim, setting forth a more specific damages claim providing a causal connection between Ocwen's actions and Plaintiffs' damages.

Anderson v. Wells Fargo Home Mortgage, Dist. Court, ED California September 20, 2017

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It is undisputed that Defendant sent Plaintiffs a copy of the Note, Security Instrument, and Payment History. Moreover, Defendant informed Plaintiffs that, "[t]he account is due for May 01, 2011, through October 01, 2015, monthly payments totaling $385,815.94. We've paid $38,243.66, toward property taxes and insurance." [10/13/15 Letter at 1.] The Payment History includes all of the information necessary for Plaintiffs to easily determine the total amount they would need to pay to satisfy their obligations. Further, Plaintiffs do not state that the Payment History is inaccurate. Instead, they allege that "[t]he Reg. Z requirement provides a borrower with an up-to-date and itemized payoff statement in order to allow the borrower to determine its validity and the feasibility of bringing the loan current," and that "[a] borrower cannot and is not required to discern this from a payment history provided by the loan servicer that may not include all fees charged to the account." [Mem. in Opp. at 8.] Plaintiffs do not provide any citation to support their position. Nor do Plaintiffs specifically allege that they were not informed about certain fees or that some fees were not included on the Payment History, and that information about these fees was needed to determine "the feasibility of bringing the loan current." See Mem. in Opp. at 8. In sum, Plaintiffs have not established a concrete harm, and have therefore failed to show that they have standing to bring their Regulation Z claim. Accordingly, to the extent that Count I alleges a claim for violation of Regulation Z, it must be dismissed without prejudice.[8]

Baez v. Specialized Loan Servicing, LLC, Court of Appeals, 11th Circuit September 22, 2017

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Finally, Baez argues that Specialized Loan's deficient response— specifically its failure to produce the March 2015 and May 2015 letters to Baez, among others—caused her "to forego immediately bringing a § 1024.41 claim" alongside the claim for failure to adequately respond to her RFI. Baez

casts § 1024.34 as an investigative tool for borrowers to discover other RESPA violations. If a servicer frustrates that investigation by failing to respond or by providing a deficient response, Baez reasons, it also frustrates a borrower's ability to enforce its other rights under RESPA. As a result, according to Baez, a servicer should be held liable in circumstances where, as here, its response was deficient. Otherwise, she reasons, servicers can frustrate a borrower's ability to enforce its RESPA rights with relative impunity.

We have recognized that a plaintiff could potentially prove actual damages for purposes of RESPA by showing that the servicer's deficient response "prevented her from taking some important action." *Bates v. JPMorgan Chase Bank, NA,* 768 F.3d 1126, 1135 (11th Cir. 2014) ("[Bates] has not explained why her lack of knowing why she received the check in March somehow caused her additional damages or prevented her from taking some important action."). But there is still a need for causation, which Baez does not dispute. And the plaintiff, in order to have standing to bring such a claim, must establish "a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1549 (2016).

We need not resolve this issue here, however, because, in any case, she has not properly preserved it for appeal. Throughout the proceedings before the district court, Baez never claimed, as she does on appeal, that the lack of information itself was the damages. In her motion for summary judgment, her response in opposition to Specialized Loan's motion for summary judgment, and her reply to the Specialized Loan's response to her motion for summary judgment, the only "actual damages" Baez requested were the cost of postage ($4.70) and her attorney's review time ($75.00). Her reply makes this explicit: she requested "a judgment in the amount of $79.70, plus attorney's fee and costs." To be sure, in her filings below, she addressed the interplay between § 1024.34 and § 1024.41 and the importance of receiving complete loss-mitigation information from the servicer in response to an RFI, but she never put forth the specific argument that she advances on appeal—that the failure to produce information due in response to an RFI is itself "actual damages."

Johnson v. US Bank National Association, Dist. Court, ED Michigan September 25, 2017

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With respect to Count VII, Defendant's argument begins: "[Plaintiff] alleges that [Defendant] did not comply with RESPA by `pursuing loss mitigation options contemporaneously with active foreclosure proceedings.' Dkt. No. 1, Complaint ¶ 120. [Plaintiff]'s allegation is refuted by the undisputed facts." Dkt. No. 3, PgID 81 (emphasis added). Defendant then sets forth a slew of facts about how Plaintiff's loss modification applications, mortgage transactions, and foreclosure proceedings transpired. Although Plaintiff did not respond to Defendant's argument regarding Count VII, Defendant's argument is contingent on findings of fact by the Court-which is not appropriate when considering a motion to dismiss.

Defendant further argues that "[n]othing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option." Citing 12 C.F.R. § 1024.41(a). Defendant contends that RESPA does not permit equitable relief in the form of setting aside a sheriff's sale, citing *Servantes v. Caliber Home Loans, Inc.,* No. 14-13324, 2014 U.S. Dist. LEXIS 170667, at **2-3 (E.D. Mich. Dec. 10, 2014), and a plaintiff must "allege actual damages resulting from a violation of § 2065." *Avila v. JPMorgan Chase Bank, N.A.,* 2015 U.S. Dist. LEXIS 47944, at *3 (S.D. Tex. Apr.

13, 2015). *See also Mrla v. Fed. Nat'l Mortg. Ass'n.,* No. 15-CV-13370, 2016 WL 3924112, at *3 (E.D. Mich. July 21, 2016).

The Court finds that Plaintiff has failed to allege in his Complaint that any violation of § 2065 (sic) by Defendant caused Plaintiff to suffer actual damages, and Plaintiff did not respond to Defendant's argument regarding Count VII. Accordingly, Count VII is dismissed.

Galli v. Astoria Bank, Dist. Court, ED New York September 27, 2017

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Alternatively, Plaintiff's Complaint alleges that the RFIs and NOEs underlying these Causes of Action were sent to "fight the foreclosure," *see* Compl. ¶ 36, and because of Defendant's actions in failing to respond, he sustained actual damages in the form of bankruptcy filing fees and emotional distress damages. *See* Pl. Br. at 17; *see also* Compl., ¶¶ 81, 83, 90, 92, 99, 101, 108, 110, 116, 118. However, Plaintiff's Complaint concedes that the foreclosure sale had already occurred and bankruptcy filing fees already paid prior to the date that the RFIs and NOEs were mailed out. Therefore, Plaintiff cannot plausibly allege that Defendant's failure to respond to the RFIs and NOEs proximately caused him to sustain his actual damages. Moreover, Galli's claims of emotional distress damages are not recoverable under RESPA. *See Wenegieme v. Bayview Loan Servicing,* No. 14 CIV. 9137, 2015 WL 2151822, at *2 (S.D.N.Y. May 7, 2015) ("The Plaintiffs cannot recover for emotional stress, as RESPA is limited by its terms to "actual damages . . ."). This absence of damages is fatal to Plaintiff's claims. *See Bonadio v. PHH Mortg. Corp.,* No. 12-CV-3421, 2014 U.S. Dist. LEXIS 20719, at *14 (S.D.N.Y. Jan. 13, 2014) ("Although RESPA permits recovery of both actual and statutory damages, proof of actual damages is mandatory to recover on a § 2605 [] violation, and a § 2605[] claim cannot stand on statutory damages alone.") (quotation marks omitted). Accordingly, both because these claims are abandoned, and because plausible allegations of actual damages are absent, Galli has failed to adequately allege an injury-in-fact necessary to confer standing, and the Court dismisses these Causes of Action.

Guzman v. Nationstar Mortgage LLC, Dist. Court, ND Texas December 8, 2017

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Plaintiff cites *McLean v. GMAC Mortg. Corp.*to argue that other federal courts have concluded that actual damages can include lost time and inconvenience, such as time spent away from employment while preparing correspondence to the loan servicer. ECF No. 7 at 5 (citing *McLean v. GMAC Mortg. Corp.,* 595 F. Supp. 2d 1360, 1366 (S.D. Fla. 2009) (citations omitted), *aff'd,* 398 Fed. App'x. 467 (11th Cir. 2010)).

The provisions of RESPA limit the recovery of actual damages to those that result from a failure to comply with the statute and the costs allegedly incurred by a plaintiff. *See Law v. Ocwen Loan Servicing, L.L.C.,* 587 Fed.Appx. 790, 795 (5th Cir. 2014) ("Because [the plaintiff] alleged no facts upon which his injuries could be viewed as resulting from [the defendant's] failure to provide him with notice under RESPA, we conclude that the district court correctly dismissed his claim."); *Hurd v. BAC Home Loans Servicing, LP,* 880 F.Supp.2d 747, 768 (N.D. Tex. 2012) (Ramirez,

J.) (dismissing claim under RESPA where plaintiff failed to "alleg[e] any facts giving rise to a reasonable inference that she suffered actual damages from the alleged violation of . . . RESPA."), *rec. adopted,* 880 F.Supp.2d 747 (N.D. Tex. 2012) (Lynn, J.).

Davis v. Deutsche Bank National Trust Company, Dist. Court, ED Pennsylvania December 12, 2017

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[No Statutory Damages Two Violations Not Enough for Pattern and Practice]

As further support of their claim for statutory damages, the Plaintiffs again offer their four letters to Ocwen and provide evidence that Ocwen did not respond to two of the four letters. However, this is insufficient to prove a pattern or practice of violations of RESPA on Ocwen's part. See Gorbaty, 2012 U.S. Dist. LEXIS 55284, at *19 (mere failure to respond to two letters is not sufficient to establish a pattern or practice). Thus, Plaintiffs' claim for statutory damages pursuant to alleged RESPA violations must be dismissed. See 12 U.S.C. § 2605(f)(1)(B).

[Attorney's Fees not Actual Damages under RESPA]

Turning now to actual damages, Plaintiffs allege that they suffered "actual damages including payment of counsel fees to defend the foreclosure and prosecution of this case but also limited to anxiety, worry, distress, . . . and enhanced damages." Am. Compl., ¶ 104. The Defendants argue that Plaintiffs' supplementation of their actual damages to include counsel fees in bringing the instant lawsuit do not constitute actual damages under RESPA. The Defendants further argue that Plaintiffs fail to link their alleged actual damages to Ocwen's failure to respond to the Plaintiffs' letters. Plaintiffs contend that they have provided sufficient evidence of a causal link because "[r]ather than properly and timely respond to [Plaintiffs'] letters, Ocwen ignored the [escrow] problem" and "triggered a default," which "subsequently lead (sic) to Ocwen bringing an improper foreclosure action." Pl. Br., p. 12.

…RESPA expressly requires that the actual damages arise "as a result of the failure" of the loan servicer to comply with the provisions of RESPA. See 12 U.S.C. § 2605(f). Moreover, numerous courts have found that litigation expenses are insufficient to satisfy the actual damages requirement of a RESPA claim because RESPA also allows Plaintiffs to recover fees and expenses in addition to actual damages. See Giordano v. MGC Mortg., Inc., 160 F. Supp. 3d 778, 783 (D.N.J. 2016) (collecting cases). Thus, Plaintiffs' allegation that they suffered actual damages in the form of "payment of counsel fees to defend the foreclosure and prosecution of this case" is insufficient to support a RESPA claim. Am. Compl., ¶ 104.

Plaintiffs also contend that they suffered actual damages in the form of "anxiety, worry, [and] distress[.]" Id. Several courts have determined that non-pecuniary damages may be recoverable under RESPA…However, even if such damages are recoverable, "bare conclusory statements . . . fail to satisfy Rule 8(a) much less RESPA's requirement that damages be `as a result of[']the alleged violation." Giordano, 160 F. Supp. 3d at 784.

James v. Ocwen Loan Servicing, LLC, Dist. Court, SD Ohio December 12, 2017

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[One RESPA Violation Not Enough for Pattern and Practice]

Here, Plaintiffs have abandoned all but three of their claims under RESPA and Regulation X. Those three claims, however, are based on the same January 23 letter and present alternate theories of liability based on whether the January 23 letter was or was not mailed to Plaintiffs. If the letter was not mailed, then Plaintiffs are asserting only one violation of RESPA and Regulation X. If the letter was mailed, then Plaintiffs are asserting, at most, two violations of RESPA and Regulation X that concern the content of the same January 23 letter. One of those alleged violations, however, has been dismissed above, leaving Plaintiffs with only one potential violation based upon the content of the January 23 letter. Certainly one violation of RESPA and Regulation X cannot constitute a pattern of practice of noncompliance. But even if Plaintiffs still could assert two violations of RESPA, those alleged violations are based on the content of the same January 23 letter, which is insufficient to establish a pattern or practice of noncompliance.

Alford v. JP Morgan Chase Bank, NA, Dist. Court, ND California December 27, 2017

https://scholar.google.com/scholar_case?case=3652973932230518708&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Emotional Damages Not Enough to Survive MSJ]

The only evidence in the record that Plaintiff points to regarding his response to Defendant's conduct is his own testimony that he "[w]ent through a lot of anguish, a lot of lost sleep thinking they're going to foreclose on [his] house." *See, e.g.,* Dkt. No. 63-3, Ex. U at 19:2-15. He repeated that he had "fear of foreclosure." *Id.* at 20:16-21:10.

This evidence is simply insufficient to survive a motion for summary judgment. *Cf.* *Celotex,* 477 U.S. at 323 ("The moving party is `entitled to a judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof."). Although Plaintiff does not assert an IIED claim here, it is instructive that even "[t]he act of foreclosing on a home (absent other circumstances) is not the kind of extreme conduct that supports an intentional infliction of emotional distress claim." *See, e.g.,* *Quinteros v. Aurora Loan Servs.,* 740 F. Supp. 2d 1163, 1172 (E.D. Cal. 2010); *Davenport v. Litton Loan Servicing, LP,* 725 F. Supp. 2d 862, 884 (N.D. Cal. July 16, 2010) (holding that absent specific allegations that the lending party asserted its rights to foreclose in bad faith, an IIED claim will not lie in a foreclosure case). Defendant's conduct is even one step removed from these IIED cases: Defendant did not actually foreclose on the home, but Plaintiff claims he feared Defendant would do so if Plaintiff did not make his inflated mortgage payments. The evidence in the record does not support an award of emotional distress damages under either RESPA or RFDCPA.

2018

Brutsky v. Capital One, NA, Dist. Court January 23, 2018

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One Violation Not Sufficient for Pattern and Practice]

Under 12 U.S.C. § 2605(f)(1), a servicer can be liable to the borrower for statutory damages where there is a "pattern or practice of noncompliance". However, allegations showing that Defendant failed to respond to one qualified written request is not sufficient to establish a pattern or practice of noncompliance such that statutory damages would be appropriate. *Congdon v. Wells Fargo Bank, N.A.,*No. C16-1629RSL, 2017 WL 661733, at *5 (W.D. Wash. Feb. 17, 2017). As Plaintiffs fail to adequately plead actual or statutory damages resulting from Defendant's alleged violation, Defendant's motion to dismiss Plaintiffs' RESPA claim is GRANTED.

Morse v. Specialized Loan Servicing, LLC, Dist. Court, SD Ohio January 25, 2018

https://scholar.google.com/scholar_case?case=8879959352199408769&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[Attorney's Fees Reduced in Fee Application for RESPA Claims]

Based on the foregoing, the hourly rates requested are a concern—one that has been shared in other cases involving Plaintiffs' counsel. *See Barrett,* 214 F. Supp. 3d at 674 (noting that the Court was concerned "about the reasonableness of the hourly rates requested by Plaintiff's attorneys" because "the fee agreement presented to the Court represents that Mr. Doucet's agreed hourly rate" was less than what the firm ultimately charged). Applying the Court's own knowledge and experience and based upon the attorneys' and paralegals' experience level and geographical location, the Court RECOMMENDS an across-the-board reduction of 20% in all hourly rates *See Szeinbach v. Ohio State Univ.,* No. 2:08-CV-822, 2017 WL 2821706, at *5 (S.D. Ohio June 30, 2017). Thus, the Court RECOMMENDS that the $37,192.87 in attorneys' fees sought for 181.19 hours worked be REDUCED by $7,438.57.

Helm v. Freedom Mortgage Corporation Dist. Court, ED Michigan February 2, 2018

https://scholar.google.com/scholar_case?case=5582483283925843989&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Second, Rodney Helm contends that the Court should deny summary judgment because he has "pled a proper claim" and because there are "genuine issues [of] disputed facts." (Helm Resp. Br., ECF #40 at Pg. ID 1300.) But whether Rodney Helm has pleaded a proper claim has no bearing on whether LoanCare is entitled to summary judgment under Rule 56. And while Rodney Helm says that there are genuine issues of disputed fact, he has not identified any evidence that could create such a dispute. Indeed, Rodney Helm neither attaches to his response, nor directs the Court to, any evidence at all. Under these circumstances, there are plainly no material factual disputes that require resolution by a jury.

Bridges v. The Bank of New York Mellon, Dist. Court, SD Texas February 12, 2018

https://scholar.google.com/scholar_case?case=16003684152550993183&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Defendant argues that Burtzlaff lacks standing to assert a RESPA claim because she is a non-borrower.[31] At least one court held that "the protections of RESPA apply only to borrowers and/or loan applicants." Smith v. JPMorgan Chase Bank, N.A., Civil Action No. 4:15-00682-ALM, 2016 LEXIS 127350, at *30 (E.D. Tex. Aug. 11, 2016) (Magistrate Judge's report recommending dismissal for lack of standing adopted by Smith v. JPMorgan Chase Bank, N.A., Civil Action No. 4:15-682, 2016 WL 4974899, at *7 (E.D. Tex. Sept. 19, 2016)). Because Burtzlaff is a non-borrower, she lacks standing to sue. Moreover, Plaintiffs have failed to allege any other facts that would support Burtzlaffs standing to bring a RESPA claim.

Miller v. Caliber Home Loans, Inc. Dist. Court WD Kentucky, February 16, 2018

https://scholar.google.com/scholar_case?case=2547644938470925443&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Ultimately, the Court finds that a plaintiff may not proceed with a RESPA claim by merely making a "threadbare claim" for actual damages. *Austerberry,* 2015 WL8031857 at *7. Although the Sixth Circuit has counseled against dismissal of RESPA claims on the basis of inartfully-pleaded damages, a plaintiff must still plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Mellentine,* 515 F. App'x at 424(quoting *Iqbal,* 556 U.S. at 678). Here, Miller's allegation of "actual damages" is a bare conclusion with little factual support. *See Rider v. HSBC Mortg. Corp. (USA),*No. 2:12-cv-925, 2013 WL 992510, *6 (S.D. Ohio Mar. 13, 2013) ("Conclusory allegations of actual damages [under RESPA] are not sufficient."); *see generally Phila. Indem. Ins. Co. v. Youth Alive, Inc.,* 732 F.3d 645, 649 (6th Cir. 2013) ("While a complaint will survive a motion to dismiss if it contains either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory . . . legal conclusions masquerading as factual allegations will not suffice." (internal quotations omitted)).

Although Miller's allegation of "emotional damages" is more detailed, it too is insufficient. Even when viewed in a light most favorable to Miller, her complaint does not raise a reasonable inference that she suffered emotional distress as a result of the seven-day gap between SunTrust's filing of foreclosure and providing notice to Miller that her loss-mitigation application had been denied. *See Iqbal,* 556 U.S. at 678. Nor does the complaint raise the reasonable inference that SunTrust's filing of foreclosure prior to the expiration of the appeal period caused Miller emotional distress, particularly given that Miller elected to forgo her right to an appeal four days after receiving notice of the rejection. (D.N. 1, PageID # 3-4) In other words, even if Miller has suffered emotional distress, her complaint does not allege that such damages resulted from SunTrust's violations.

Diffely v. Nationstar Mortgage, LLC. Dist. Court WD Washington April 11, 2018

https://scholar.google.com/scholar_case?case=6815117902741956715&q=diffely&hl=en&as_sdt=6,36

Here, Plaintiff's FAC lacks facts or allegations that he suffered pecuniary loss due to Defendants' alleged RESPA violations. Specifically, Plaintiff does not allege that his damages were caused "as a result of [Nationstar's] failure to respond" to his requests. 12 U.S.C. § 2605(f)(1). Instead, he pleaded a laundry list of alleged damages that happened prior to those requests. Dkt. #23 at ¶ ¶ 29-31. Therefore, the Court finds that Plaintiff's purported damages of "office supply expenses, copy and fax charges, delivery and mail costs, mileage and parking, postage, and other costs" (Dkt. #23 at ¶ 31) are not sufficient to support his claim under RESPA because, as pleaded, they were not actual damages as a result of Nationstar's failure to respond to his requests.

Wagoner v. Everhome Mortgage, Inc., Dist. Court. D. New Jersey May 15, 2018

https://scholar.google.com/scholar_case?case=4159767092637971159&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Upon review of Plaintiff's FAC, the Court finds that Plaintiff's RESPA claim may not proceed. This is because Plaintiff has failed to plead *actual damages* in connection with the alleged RESPA violation. (*See generally* FAC ¶¶ 105-19). Rather, Plaintiff generally alleges that "[a]s a result of the action of Defendants, Plaintiff suffered damages." (FAC ¶ 116). These allegations are insufficient to meet the damages standard discussed in *Oliver.* Therefore, Plaintiff's RESPA claim must be dismissed.

Bias v. Cenlar Agency, Inc., et. al. Dist. Court ND Alabama May 24, 2018

https://scholar.google.com/scholar_case?case=14133335443146874969&hl=en&lr=lang_en&as_sdt=6,40&as_vis=1&oi=scholaralrt

…Additionally, even if Cenlar's response was untimely, Bias failed to show she suffered any actual damages attributable to the alleged RESPA violation. Bias' home was not foreclosed as a consequence of insufficient or untimely information by Cenlar. Instead, the November 24, 2014 foreclosure sale was postponed after Bias sent her QWR, Cenlar provided all requested information in January 2015, and the rescheduled March 18, 2015 foreclosure sale never went forward. (Doc. 50-1 at 6-8). Bias did not take any action in response to receiving Cenlar's January 2015 response to the QWR. There is certainly no evidence she made any attempts to reinstate or pay off the loan.

"Plaintiff[] arguably may recover for non-pecuniary damages, such as emotional distress and pain and suffering, under RESPA." *McLean v. GMAC Mortg. Corp.*, 398 F. App'x. 467, 471 (11th Cir. 2010) (*citing Banai v. Sec'y U.S. Dep't of Hous. & Urban Dev. ex rel. Times,* 102 F.3d 1203, 1207 (11th Cir. 1997) (a case under the Fair Housing Act)). Bias, however, has not presented any competent evidence demonstrating any of her alleged emotional distress injuries were caused by the RESPA violation. Bias' own testimony suggests she did not even know the QWR letter was sent on her behalf. (Doc. 50-2 at 22-23). Therefore, Cenlar is entitled to summary judgment on Bias' RESPA claims because she failed to establish either Cenlar failed to respond adequately or in a timely manner to her QWR or that she suffered actual damages as a result of the alleged RESPA violation.[6]…

Omolewu v. Lakeview Loan Servicing, LLC et. al. Dist. Court. SD Ohio, Western Division May 24, 2018

https://scholar.google.com/scholar_case?case=17025793282623537686&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Omolewu equates § 2605(f)(3)'s reference to "costs . . . together with attorney fees" with "costs including attorney fees" under the plain-meaning rule. She further contends that construing § 2605(f)(3) is warranted because RESPA is a remedial statute that is construed broadly to effectuate its purpose.

Defendants separate attorney fees from costs by reading § 2605(f)(3)'s phrase "costs. . . together with any attorney fees . . ." as synonymous with "costs in addition to any attorney fees." (Doc. #33, *PageID* #351).

Defendants' reading of § 2605(f)(3) is in line with Sixth Circuit's reading of similarly worded statutes. To be clear, there does not appear to be a Supreme Court or Sixth Circuit case holding that § 2605(f)(3) either includes or excludes attorney fees as Rule 68 costs. Guidance is scant from cases outside the Sixth Circuit. Yet in *McCain,* the Sixth Circuit considered whether Rule 68 costs included attorney fees by way of two federal statutes—the Truth in Lending Act, 15 U.S.C. § 1640, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691. *McCain* held that these statutes provided "two separate elements of recovery. . . ." 378 F.3d at 565 (citing 15 U.S.C. §§ 1640(a)(3) and 1691e(d)). The crucial language voiced the distinction as follows: "costs of the action, *together with* a reasonable attorney's fee. . . ." 15 U.S.C. §§ 1640(a)(3), 1691e(d) (emphasis added). So it is under RESPA, which allows "the costs of the action, *together with* any attorneys fees. . . ." 12 U.S.C. § 2605(f)(3) (emphasis added), thus detaching attorney fees from costs.

…Retuning to *Marek,* it explains that for more than 85 years, federal statutes had authorized an award of "costs" to prevailing parties. "Such `costs' generally had not included attorney's fees—under the `American Rule,' each party had been required to bear its own attorney's fees." 473 U.S. at 8. The Court identified several statutory exceptions to the American Rule. Unlike RESPA, 2605(f)(3), those statutes did not include the "costs together with attorney fees" language at issue in the present case. Two examples from *Marek* make the point: the Communications Act of 1934 allowed an award of "`a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit'"; and, the Copyright Act allowed an award of "`a reasonable attorney's fee as part of the costs.'" *Marek,*473 U.S. at 8 (citations omitted). Such obviously inclusive language is not present in RESPA, §2605(f)(3). *Marek*'s holding also helps make the point. "Since Congress expressly included attorney's fees as `costs' [under 42 U.S.C. § 1988] available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68." *Id.* at 9. The present case involves *Marek's* corollary: Where a statute—like RESPA, § 2605(f)(3)— does not capture attorney fees within its universe of costs, attorney fees are not "costs" under Rule 68 and such attorney fees are not subject to Rule 68's cost-shifting provision.

Accordingly, RESPA, §2605(f)(3) does not include attorney fees as awardable "costs" and, as a result, RESPA does not support an award of attorney fees as "costs" under Rule 68.[3]…

Ford v. Nationstar Mortgage, LLC Dist. Court D. Nevada May 28, 2018

https://scholar.google.com/scholar_case?case=15713665836843843955&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

However, the Court finds that Plaintiffs have not presented evidence to sufficiently link any of these damages to Defendant violating § 1024.35(d). Even if Defendant failed to respond to Plaintiff within five days as required, Plaintiffs have not demonstrated that they actually suffered as a result of this oversight. The Court will grant summary judgment to Defendant on Counts 1 and 2. Summary judgment is denied as to Counts 3 and 4.

Vilofsky v. Specialized Loan Servicing, LLC., Dist. Court WD Pennsylvania June 12, 2018

https://scholar.google.com/scholar_case?case=12458802379174774846&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Thus, after reviewing her expert report and deposition testimony, it is this Court's opinion that this proposed expert has not employed sufficiently reliable methods in reaching her conclusions in this case. Therefore, Defendants' Motions are granted to the extent that they assert that Vilkofsky's expert does not meet the reliability prong of the *Daubert* test.[4]

…Here, because her testimony fails the reliability test, Bishop can, at most, comment on her general interactions with Vilkofsky just as any other *fact* witness could do. For example, she can describe Vilkofsky's mood changes or decreased activities which she witnessed. However, Vilkofsky's specific diagnoses and their causation require expert testimony. *See* *Ferris,* 153 F. Supp. 2d at 743-46 (excluding testimony of doctor who was not qualified as an expert as to the causation of the plaintiff's mental conditions); *Villalba v. Consolidated Freightways Corp.,* 2000 WL1154073, at *12-15 (N.D. Ill. 2000). Bishop's testimony will therefore be limited to her personal knowledge and observations. *See* FED. R. EVID. 602. The Court notes that Vilkofsky is also free to testify to these same issues. *See, e.g., Ferris,*153 F. Supp. 2d at 746. Thus, to the extent that Bishop has anything to say, the Court has discretion to exclude such testimony in its entirety as unduly cumulative. *See* FED. R. EVID. 403.B.

No Cause of Action

2015

Schmidt v Penny Mac Loan & BOA, ED Michigan, May 1, 2015
https://scholar.google.com/scholar_case?case=17451954239221324328&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Regulations requiring responsive communications with borrower under 12 C.F.R. § 1024.40 are issued under a section of RESPA that does not allow for private right of action. The CFPB dropped its reliance on RESPA section 6(k)(1)(E). Id.at 10,808-09. The proposed regulation "would have been enforceable through private rights of action," via section 6(k)(1)(E). Id. at 10,808. However, the final ruling states, "the Bureau is adopting § 1024.40 as an objectives-based policies and procedures requirement. . . . [and] the Bureau believes that private liability is not compatible" with such requirements. Id. Explaining a similar decision regarding another section, the CFPB elaborated that "the prospect that many individual suits could be filed could threaten to undermine the basic goal of

an objectives-based system" and would lead to inconsistent court rulings that would inhibit the flexibility envisioned in the regulations. Id. at 10,778. Consequently, "supervision and enforcement by the Bureau and other Federal regulators" would preserve "robust consumer protection without subjecting servicers to the same litigation risk and concomitant compliance costs as civil liability . . . ." Id.
To remove the cause of action linked to the regulation, the CFPB looked to alternative statutory authority for issuing it. No longer relying on section 6(k)(1)(E) of RESPA, the CFPB cited three different statutory sections, none of which give rise to private enforcement of the regulation's requirements. Id. at 10,809. The first section, 12 U.S.C. § 2617(a) provides the CFPB a general grant of authority to issue regulations "necessary to achieve the purposes" of RESPA. The second is similarly broad, listing the objectives for which the CFPB can exercise its authority. 12 U.S.C. § 5511(b). Finally, 12 U.S.C. § 5532(a) gives the CFPB power to enact regulations ensuring that disclosures made to consumers are comprehensible. All three sections are general mandates allowing the CFPB to promulgate regulations that further broad objectives. Statutes of this type do not create private causes of action. See Sandoval, 532 U.S. at 288-89; Parry, 236 F.3d at 307-08. Only the last statute, 12 U.S.C. § 5532(a), arguably hints at a class of "`persons benefited,'" Mik, 743 F.3d at 159 (quotation omitted), but it does not suggest a remedy. See Geiling, 2012 WL 5265551, at *6. Nor do any of the statutes lay out the requirements the CFPB ultimately constructed. The regulation does not effectuate a privately enforceable statutory right, and consequently the judge suggests that Schmidt cannot rely on it to bring this claim.

Zeich v Portfolio Servicing Inc, D Oregon, October 30, 2015
https://scholar.google.com/scholar_case?case=10277885215572210 38&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt
The fact that the February 26, 2015, letter was inaccurate is insufficient as a matter of law to state a RESPA violation. See, e.g., Brunson v. Provident Funding Assocs., 608 Fed. Appx. 602, 612 (10th Cir. 2015) (RESPA only requires a loan servicer to provide a statement of reasons and does not guarantee the statement is correct); Bates v. JPMorgan Chase Bank, NA, 768 F.3d 1126, 1134-35 (11th Cir. 2014) (RESPA does not guarantee a borrower will receive her desired course of action); Galante v. Ocwen Loan Servicing LLC, 2014 WL 3616354, *33 (D. Md. July 18, 2014) (loan servicer complied with RESPA by investigating and responding to borrowers' qualified written request, despite the borrowers' subsequent contention the servicer failed to "make appropriate corrections to [the] account" (quotation marks omitted)) Indeed, plaintiff has not cited, and the Court is not aware of, any authority establishing a plausible RESPA claim where, as here, there is no evidence of bad faith on the defendant's part and the plaintiff ultimately obtained the requested account action after a short delay.

Caggins v BONY, ED Michigan, July 1, 2015
https://scholar.google.com/scholar_case?case=16076604347563788788&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiff's claimed RESPA violation alleges that the Defendants pursued loss mitigation options contemporaneously with active foreclosure proceedings. Plaintiff seeks three remedies: (1) that the foreclosure proceedings be declared null and void; (2) that the Defendants be ordered to negotiate in good faith a reasonable loan modification with Plaintiff; and (3) any further relief the court deems just and equitable. The first and second remedies sought by the Plaintiff are unavailable under Section 2605(f) of RESPA which limits damages to "actual damages to the borrower as a result of the [breach]." 12 U.S.C. §2605(f)(1). There is no provision found in RESPA under which Plaintiff

can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification. 12 U.S.C. §2605(f)(1); see also Servantes v. Caliber Home Loans, Inc., No. 14-CV-13324, 2014 U.S. Dist. LEXIS 170667, at *2 (E.D. Mich. Dec. 10, 2014).

Andrade v Carrington & BOA, WD Michigan, November 13, 2015
https://scholar.google.com/scholar_case?case=11375547480867410352&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiffs allege that Defendants violated § 1024.38 by failing to transfer Plaintiffs' complete pending loss mitigation documentation from BANA to Carrington, failing to properly transfer Plaintiffs' Mortgage, Note, and payment history from BANA to Carrington, and failing to maintain adequate procedures to ensure that Carrington received Plaintiffs' pending complete loss mitigation application and a correct payment history to enable Carrington to properly evaluate Plaintiffs' loss mitigation request. Plaintiffs' claim fails to the extent that it is based on 12 C.F.R. § 1024.38 because Plaintiffs do not have a private right of action under that section. See Sharp v. Deutsche Bank Nat'l Trust Co., No. 14-CV-369-LM, 2015 WL 4771291, at *6-7 (D.N.H. Aug. 11, 2015) (concluding that, based upon the Consumer Financial Protection Bureau's interpretation of § 1024.38, a plaintiff has no private right of action to enforce the rule); Deming-Anderson v. PNC Mortg., No. 15-CV-11688, 2015 WL 4724805, at *4 (E.D. Mich. Aug. 10, 2015) (citing the Consumer Financial Protection Bureau's final rule indicating that enforcement by the Bureau of provisions regarding servicing policies, procedures, and requirements would provide sufficient consumer protection without the necessity of subjecting loan servicers to litigation risk for violations of § 1024.38).

Russell v Nationstar Mortgage, SD Florida, October 5, 2015
https://scholar.google.com/scholar_case?case=15272569726107744774&q=Russell+v+Nationstar&hl=en&as_sdt=80000003
Plaintiff sent multiple requests for entire loan history and other documents, and alleged mistakes were made in applying payments, resulting in a balance higher than what was really due. Most documents were furnished by servicer, but servicer provided less than the full loan history. The response from servicer was canned response stating the other documents were proprietary, non-public, confidential, or that they didn't relate to the servicing of the loan. The servicer also stated that the allegations of misapplied funds weren't specific enough. Plaintiff threatened to stop making payments and eventually did, leading servicer to initiate foreclosure proceedings. The judge found that the servicer's responses met the requirements of 12 USC 2605(e)(2)(C), which requires servicer to conduct an investigation and provide a written explanation that includes why the requested information is not available and the telephone number of someone to assist the debtor.

Beale v Ocwen, ND Alabama, June 17, 2015
https://scholar.google.com/scholar_case?case=4962019371070294471&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
The Beales' complaint states that they made a qualified written request to Ocwen demanding that it correct certain errors in their account, and that Ocwen responded to that request on January 5, 2015. The complaint does not state that the response failed to provide an explanation of why Ocwen believed that the Beales' account was correct; rather, it alleges that Ocwen violated RESPA by failing to correct the alleged errors. However, the requirements of RESPA can be satisfied by either correcting any errors or providing an explanation of why the servicer believes the account is correct. Because the complaint fails to allege a deficiency in Ocwen's response, this count of the complaint is due to be dismissed.

Burns v Deutsche Bank, WD Michigan, August 17, 2015
https://scholar.google.com/scholar_case?case=16659578100167245521&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
The allegations fail to state a claim because the requirements of § 1024.36 expressly apply to written requests for information. See12 C.F.R. § 1024.36(a). ("A servicer shall comply with the requirements of this section for any written request for information from a borrower. . . .") (emphasis added); see also 12 U.S.C. § 2605(e)(1) (requiring the servicer to respond to a "qualified written request" from the borrower, which is defined, in part, as a "written correspondence"). Thus, Ocwen did not violate the requirements of 12 C.F.R. § 1024.36 by failing to respond in a timely manner to Plaintiffs' phone calls and oral requests for information. Plaintiff's loan modification applications was not submitted more than 37 days prior to the foreclosure sale. However, Plaintiffs contend that Defendants were in control of the foreclosure sale and could have delayed it until after reviewing Plaintiffs' application. Nothing in § 1024.41 required Defendants to do so. Thus, Plaintiffs do not state a claim under 12 C.F.R. § 1024.41.

Bennett v Nationstar, SD Alabama, August 17, 2015
https://scholar.google.com/scholar_case?case=14355085135047417790&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Bennett's contention that his "viable causes of action [i.e., his RESPA statutory damages claim] should not be frustrated by his inability to ascertain the relevant facts on his own" underscores his inability to meet his pleading burden. (See doc. 28, at 28). Alleging a pattern and practice of noncompliance requires more than a bare assertion that there are "over 20 complaints against Nationstar" in the CFPB database. Simply, "complaints" do not equate to "noncompliance," and the undersigned declines to speculate as to a threshold number of alleged consumer complaints that would sufficiently plead a pattern or practice of noncompliance. See Brooks v. Scheib, 813 F.2d 1191, 1193-1195 (11th Cir. 1987) (in considering whether there was a pattern or practice of excessive force by police officers, "the number of complaints bears no relation to their validity" and it is the validity of an excessive force complaint that is pertinent). Bennett has offered no authority to support the proposition that alleging the existence of consumer complaints in the CFPB database is sufficient factual pleading to sustain a RESPA statutory damages claim.[13] The Court is provided no information as to the author, date, details, merit, or resolution of these supposed complaints. This is exactly the type of barebones "pattern and practice" allegation that does not satisfy minimum pleading requirements for Rule 12(b)(6) purposes. See Selman, 2013 U.S. Dist. LEXIS 37017, *33-*35.

Han v Nationstar, WD Washington, December 1, 2015
https://scholar.google.com/scholar_case?case=4201460186614825536q=han+v+nationstar&hl=en&as_sdt=80000006
Han asserts that "Defendants by and through their actions have committed violation of the Truth in Lending Act . . . ." Comp. 6:21-22. Han does not allege any facts to support this conclusory statement. Mere labels and conclusions are insufficient to state a claim for relief. Twombly, 550 U.S. at 555. Additionally, Han generally asserts "Defendants by and through their actions have committed violation of the . . . Real Estate Settlement [Procedures] Act." Comp. 6:21-22. Han does not specify which provision of RESPA was allegedly violated and by which Defendant. Han also does not allege sufficient facts to support a RESPA claim. Given the scant allegations in Han's complaint, Han fails to state a RESPA claim. The Court dismisses this claim without prejudice.

Delaney v SLS, ND Illinois, December 3, 2015

https://scholar.google.com/scholar_case?case=5981159118650246434&q=delaney+v+sls&hl=en&as_sdt=80000006
There is a substantial likelihood that the state foreclosure action will dispose of all claims presented in Delaney's complaint, which is the critical question in considering whether a state and federal case are parallel. See Huon,657 F.3d at 646 (quotation omitted). If the state court concludes that Delaney defaulted on the mortgage and permits Structured to foreclose on the property, then Delaney's breach of contract claim will be moot because the state court will have determined that Defendants are not bound by the modified mortgage. Likewise, Delaney's RESPA and FDCPA claims will be resolved because they relate to whether Defendants improperly attempted to collect debts that Delaney did not owe. Delaney's ICFA claim will also be disposed of because the state court will hold that Defendants permissibly pursued foreclosure on the mortgage. While the state foreclosure action may not dispose of every component of Delaney's claims it will certainly resolve the bulk of the factual and legal questions "by examining largely the same evidence" as this case. Id. at 647. The fact that the state foreclosure action is not guaranteed to resolve every issue is not fatal to finding the cases parallel because exact replication is not necessary. SeeTruServCorp v. Flegles, Inc., 419 F.3d 584, 592 (7th Cir. 2005) ("lawsuits need not be identical to be considered parallel"); AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001) ("The question is not whether the suits are formally symmetrical, but whether there is a substantial likelihood that the [state court] litigation will dispose of all claims presented in the federal case."). Moreover, any discrepancy between the state foreclosure action and this case does not raise a substantial doubt that the state foreclosure action will be an "adequate vehicle for the complete and prompt resolution of the issues between the parties." Moses H. Cone, 460 U.S. at 28. Accordingly, the state foreclosure action and this case are parallel because they involve a sufficient number of the same parties, arise from an identical set of facts, and present analogous legal issues that the state court has a substantial likelihood of resolving... The state court has assumed jurisdiction over the property in its foreclosure action and the state foreclosure action was filed eight months before the instant federal action, so the first and fourth factors favor abstention. See Adkins, 644 F.3d at 500. In the state foreclosure action, Structured moved for an order of default and judgment for foreclosure and sale.[2] (Dkt. No. 29, Ex. A.) This case in the meanwhile remains in the motion to dismiss phase, and thus the seventh factor favors abstention. Similarly, the third factor regarding the desirability of avoiding piecemeal litigation weighs in favor of abstention because the state foreclosure action will probably dispose of a majority of the factual and legal issues presented in this case. Abstaining therefore would prevent the parties from simultaneously litigating mirror issues in state and federal court and save judicial resources as Colorado River intended. See id.; Colorado River, 424 U.S. at 817. The sixth factor also favors abstention because the state court is fully capable of protecting Delaney's federal rights. Delaney could raise her state law claims for breach of contract and violation of ICPA in the state foreclosure action as well as her claims under the FDCPA, RESPA, and TILA because these statutes grant concurrent jurisdiction in federal and state courts. As such, the eighth factor favors abstention. Finally, Delaney could have removed the foreclosure action to federal court based on diversity jurisdiction but did not, so the tenth factor favors abstention. In sum, because the state and federal cases are parallel and seven of the ten factors weigh in favor of abstention, the Court invokes its right to abstain from exercising jurisdiction under the Colorado River doctrine.

Smallwood v BOA, SD Ohio, December 1, 2015
https://scholar.google.com/scholar_case?case=8503445800149046060&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt
The court determined that requests for information about loan mod applications are not QWRs under the old QWR system, and that response requirements and deadlines for servicers thus do not apply.

With respect to a tertiary issue of whether Defendant improperly responded to requests for information about the owner of the note, the Court finds that "[r]equests for information pertaining to the identity of a note holder or master servicer do not relate to servicing." Kelly v. Fairon & Assoc., 842 F. Supp. 2d 1157, 1160 (D. Minn. 2012).[16] Thus, no violation may be based on the allegation that Defendant improperly identified the owner of the Smallwoods' note.

Warren v Green Tree, D Colorado, December 18, 2015
https://scholar.google.com/scholar_case?case=13223078773353904667&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Because plaintiff did not send any of her letters to the QWR Address, her letters were not QWRs, but instead constituted "general correspondence" insufficient to trigger defendant's duty to respond under RESPA. See Berneike, 708 F.3d at 1145, 1149; 12 U.S.C. § 2605(e)(1)(B)). Thus, the Court finds, viewing the undisputed facts in the light most favorable to Ms. Warren, that defendant is entitled to summary judgment on plaintiff's RESPA claim. Because defendant has shown that it is entitled to summary judgment on its first argument, there is no need to consider defendant's bankruptcy estoppel theory.

Gooden v M&T Bank, ED Michigan, December 11, 2015
https://scholar.google.com/scholar_case?case=7719228411644969504&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiffs' complaint must be dismissed for two reasons. First, the allegations in the complaint are not sufficient under the Twombly standard. As alleged, the facts do not contain more than a sheer possibility that defendant has acted unlawfully. To find a violation under § 1024.41, Plaintiffs must have submitted a completed loss mitigation application more than 37 days before a foreclosure sale. The only statements in the complaint relating to this requirement are: (1) "Plaintiffs submitted a completed loan modification application over 37 days prior to the Sheriff's sale" and (2) "[i]n 2014, Plaintiffs submitted a completed loan modification to [D]efendant." (Dkt. 7, at ¶¶ 21, 9.) The first statement is simply a recitation of the legal standard and the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). The second statement fails to provide any detail regarding when in 2014 the alleged "completed loan modification" was submitted, nor any details about the content of the submission.

Farraj v Seterus, ED Michigan, December 14, 2015
https://scholar.google.com/scholar_case?case=18943574425618462 93&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
For this case to proceed, one of Plaintiff's alleged errors in the December 2014 letter needs to fall within the scope of § 1024.35(b)'s covered errors. Plaintiff's claims for alleged errors arising under Seterus's determination of HAMP eligibility fail for multiple reasons. First, there is no indication that Seterus failed to provide accurate information regarding Plaintiff's HAMP eligibility. Seterus's response to his QWR stated that Plaintiff's income to installment ratio exceeded HAMP's eligibility guidelines, meaning that he did not qualify. Dkt. No. 12-3, p. 2 (Pg. ID No. 214). Plaintiff's allegation of error on this point merely alleges that Seterus did not provide him with the calculations he requested. Dkt. No. 9, pp. 7-8, ¶ 23 (Pg. ID No. 128-29). However, Plaintiff was not entitled to the mathematical calculations for HAMP eligibility, and thus Seterus's failure to include them does not constitute an error. Furthermore, the Sixth Circuit has confirmed that "HAMP and its enabling statute do not contain a federal right of action." Olson v. Merrill Lynch Credit Corp.,576 F. App'x 506, 511 (6th Cir. 2014) cert. denied, 135 S. Ct. 1549 (2015).

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Dent v Investment Corp., ED Michigan, January 12, 2016
https://scholar.google.com/scholar_case?case=11744803256165192453&q=dent+v+investment+corp&hl=en&as_sdt=80000006
Defendant points to the website of One West Bank, FSB, ("One West") the prior mortgage holder, to identify the list of items which a borrower must submit for their application for mortgage relief to count as "complete."[4] Plaintiffs have failed to present any evidence whatsoever that they submitted any application for mortgage assistance, much less a complete application, nor have they demonstrated that Defendant acknowledged receipt of such application. On the contrary, Plaintiffs have impermissibly rested on their pleadings, and have failed to present "significant probative evidence" that they submitted such an application. *See Moore,* 8 F.3d at 339-40; *see also Anderson,*477 U.S. at 248. Contrary to Plaintiffs' pro-forma response, this is not a case in its "early stage of . . . proceedings, where discovery has not yet begun." (Doc. 19 at 15). On the contrary, the discovery cutoff in this case was September 28, 2015, a date which passed over one month before the submission of Plaintiffs' response, and well over two months prior to the issuance of this report and recommendation. (Docs. 10, 11). Despite ample opportunity to obtain discovery from Defendant which could support their positions, Plaintiffs have failed to produce any answers to interrogatories, documentation, or other evidence which could support their allegations that they submitted to Defendant a complete application for mortgage assistance, nor any evidence that Defendant considered that application complete. Plaintiffs have thus failed to demonstrate that a question of material fact exists with regard to whether they submitted a complete application for mortgage relief.

Andress v Nationstar, ED Pennsylvania, January 6, 2016
https://scholar.google.com/scholar_case?case=17985336370156606240&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiffs do not identify the dates or contents of the qualified written requests to demonstrate that the RESPA requirements for a qualified written request were met. Plaintiffs also fail to plead facts which, if true, establish that Nationstar's responses did not satisfy RESPA's requirements. Furthermore, the Second Amended Complaint does not plead facts connecting the alleged RESPA violation—failing to respond to qualified written requests—to the damages sought. Plaintiffs have thus failed to allege sufficient facts, taken as true, to state a plausible claim under RESPA.

Bush v. JP Morgan Chase ND Ala, January 27, 2016
https://scholar.google.com/scholar_case?case=4321369080553609372&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

By its plain language, TILA's private right of action applies only to actions against "creditors." 15 U.S.C. § 1604(a). TILA defines the term "creditor" as follows:

The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

15 U.S.C. § 1602(g). "The definition given in this sentence is restrictive and precise, referring *only* to a person who satisfies *both* requirements." *Cetto v.LaSalle Bank Nat'l Ass'n,* 518 F.3d 263, 270 (4th Cir. 2008) (emphasis in original);*see also Parker v. Potter,* 232 F. App'x 861, 864 (11th Cir. 2007) (noting that a person must satisfy both prongs of the definition in order to be considered a creditor under TILA).

Walker v Driscoll, Court of Appeals MD, February 16, 2016

http://www.mdcourts.gov/appellate/unreportedopinions/2016/1908s14.pdf

The Maryland intermediate appellate court issued an unreported decision today holding a pre-January 2014 loss mitigation application prevented borrower from advancing dual tracking bar to foreclosure sale. The court recognized that Reg X prohibition to dual tracking was not retroactive but held anyway:

We conclude that the objectives of the loss mitigation regulations were met in this case. According to the Final Affidavit filed in the circuit court, appellant was reviewed for loss mitigation on two previous occasions. She was reviewed on September 23, 2013, 7 pursuant to the Home Affordable Modification Program. She was denied a modification because her debt-to-income ratio was less than 31%, and therefore, she did not meet the minimum requirements for modification under that program. She was reviewed again on October 18, 2013, but she declined the modification offered to her. In an affidavit, appellant stated that her "attempt to get a modification through NACA, the Neighborhood Assistance Corporation of America, in 2013 was unsuccessful." It is unclear whether the NACA application is one of the two modification applications referenced in the Final Affidavit or whether the NACA application constituted a third application in 2013. In any event, it is undisputed that appellant was reviewed for at least one loan modification prior to the June 20, 2014 application.

Kralovic v. Chase ND Ohio, February 10, 2016

https://scholar.google.com/scholar_case?case=15716963788666082976&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Furthermore, in the prior action U.S. Bank could only have brought a counterclaim that was ripe and available to it at the time. Plaintiff has not actually alleged that U.S. Bank had a valid claim for foreclosure at the time the prior suit was filed. There is no allegation in this Complaint that there had been a default on the note, or that the foreclosure provisions of the mortgage had been triggered at the time of Plaintiff's prior suit. Although Plaintiff alleged the existence of a "real controversy" regarding the actual amount owed under the note and mortgage, she did not allege that there was any dispute or controversy concerning whether the note was in default or whether foreclosure was permitted or justified under the terms of the mortgage.

Pike v BOA, ND Ohio, February 16, 2016

https://scholar.google.com/scholar_case?case=10477368698442990858&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

On June 24, 2014, over 9 months later, Doucet & Associates sent a second set of QWRs to BANA, virtually identical to the September 19, 2013 QWRs, to a different incorrect address.

Hernandez v. M&T, D NJ, February 25, 2016

https://scholar.google.com/scholar_case?case=15541040415842668781&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

RESPA does not apply to commercial loans. *See* 12 U.S.C. § 2606(a)(1) ("This chapter does not apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes"). *See also* 24 C.F.R. § 3500.5(b)(2) (RESPA exemption for "business purpose loans"). Such a business loan includes, for example, non-owner-occupied rental property:

The TILA exempts credit extended for business or commercial purposes. 15 U.S.C. § 1603(1); Regulation Z, 12 C.F.R. § 226.3(a). The RESPA includes the same exemption for business credit transactions. 12 U.S.C. § 2606(a)(1); 24 C.F.R. § 3500.5(b)(2). The Board of Governors of the Federal Reserve System has directly addressed credit transactions to acquire rental property in its Official Staff Commentary on TILA Regulation Z:

Non-owner-occupied rental property. Credit extended to acquire, improve, or maintain rental property (regardless of the number of housing units) that is not owner-occupied is deemed to be for business purposes. This includes, for example, the acquisition of a warehouse that will be leased or a single-family house that will be rented to another person to live in.

Truth in Lending; Official Staff Commentary, 46 Fed.Reg. 50288, 50297 (Oct. 9, 1981) (as amended 75 Fed.Reg. 7658 (Fed.22, 2010)). Such commentary is "dispositive" unless "demonstrably irrational."*Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565, 100 S. Ct. 790, 63 L.Ed.2d 22 (1980) (deferring to Federal Reserve Board opinions interpreting TILA and Regulation Z). Consequently, courts have consistently held that loans obtained to purchase non-owneroccupied rental property are for a "business purpose" and are not covered by TILA. *Antanuos v. First Nat'l Bank of Arizona,* 508 F. Supp. 2d 466, 470-71 (E.D.Va.2007) (no right to rescind under TILA where loan was secured for commercial rental property and not the mortgagors' principal dwelling); *In re Fricker,* 113 B.R. 856, 866-67 (E.D.Pa. 1990)(loan received by debtors in exchange for mortgage on nonowner-occupied property was for "business purposes," and thus was exempt from TILA); *Puckett v. Georgia Homes, Inc.,* 369 F. Supp. 614, 618-19 (D.S.C.1974) (purchase of mobile home for rental purposes exempt from TILA disclosure requirements).

There is virtually no case law interpreting the RESPA business purpose exemption, but the RESPA regulation incorporates the TILA interpretation, stating in its listed exemptions: "Business purpose loans. An extension of credit primarily for a business, commercial, or agricultural purpose, as defined

by Regulation Z, 12 CFR 226.3(a) (1). Persons may rely on Regulation Z in determining whether the exemption applies." 24 C.F.R. § 3500.5(2). Thus, credit transactions to obtain non-owner-occupied rental property are similarly exempt from the requirements of RESPA. See 46 Fed.Reg. at 50297.

Lind v. New Hope Properties, LLC, 2010 WL 1493003, at *5 (D.N.J. Apr. 13, 2010). The complaint does not state in so many words that the mortgaged premises are non-owner-occupied rental property, but it is clear from the Mortgage itself that the loan is a commercial, not a personal, one.

This commercial loan is not subject to RESPA. The motion to dismiss counts 1 and 2 is GRANTED.

Matthews v. Nationstar WD WA, March 7, 2016

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With respect to plaintiff's remaining claims under the FDCPA and RESPA, defendants have demonstrated that there is an absence of evidence to support these claims as well. See (Mot.) Dkt. # 190, pp. 16-21; (Response to QWR) Dkt. # 10-4. In response, plaintiff again fails to submit any contrary evidence. (Response) Dkt. # 28. Accordingly, defendants are entitled to summary judgment.

Charles v. Deutche Bank SD FL, March 14, 2016

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The Court finds that mortgage's pre-suit notice and cure provisions apply in this case. The Plaintiff alleges that he was unlawfully overcharged for each property inspection. This alleged scheme, together with the Defendants' failure to comply with the Plaintiff's RFI, which sought information relating to the scheme, forms the basis of this action. The property inspections, then, are at the heart of the Plaintiff's suit. In that way, the Plaintiff's claims directly implicate paragraph 9 of the mortgage, which authorizes the Defendants to inspect the Property. [D.E. 1-6 at 24] (authorizing the Defendants' to "do and pay for whatever is reasonable or appropriate to protect the Lender's interests in the Property and rights under [the mortgage], including protecting and/or assessing the value of the Property. . . ."). Indeed, but-for paragraph 9 of the mortgage, the Defendants would not have inspected the Property. Thus, regardless of the causes of action alleged, the Plaintiff's claims are based entirely on the mortgage, arising from conduct done pursuant to the mortgage. Accordingly, the Plaintiff's failure to provide notice and an opportunity to cure requires dismissal of the Complaint.

This is why NOES need to be sent before filing suit simply on a failure to respond to an RFI.

Billings v. Seterus WD MI, March 17, 2016

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The majority of Plaintiff's claims rely on a finding that Plaintiff submitted a complete loss mitigation application. Defendant has provided ample evidence that Plaintiff did not submit a complete loss mitigation application. First, Defendant made the following request for admission: "Please admit that Plaintiff was aware that Seterus could not fully complete an evaluation for a second loan modification until all necessary documents and up-to-date financial information were submitted by Plaintiff to Seterus." (Req. for Admission ¶ 2, ECF No. 23-2.) Plaintiff's failure to respond to this request constitutes an admission. See Fed. R. Civ. P. 36(a)(3) ("A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney."). Moreover, Defendant's repeated notices sent to Plaintiff indicate that additional information was required to complete the application. RESPA and its requirements became effective on January 10, 2014. Defendant provided Plaintiff with notice of missing documents prior to a scheduled mediation in January 2014 (Parker Aff. ¶ 8), in February 2014 (Notice, ECF No. 23-13), and again in April 2014 (Notice, ECF No. 23-14). The evidence shows that Plaintiff did not provide a complete application until two days prior to the sheriff's sale, and RESPA imposes obligations on mortgage servicers who receive a "complete loss mitigation application" more than 37 days before a foreclosure sale. 12 C.F.R. § 1024.41(c), (g).

Footnote:

Pay attention to requests for Admissions.

O'Connell v. Bayview ED WI, March 17, 2016

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The relationship between the parties is that of mortgagor and loan servicer. While Bayview was also a debt collector, the letter was not sent in that role. This is not an instance where the defendant "would not have otherwise sent plaintiff[] those materials unless it was attempting to collect a debt." See Shelley, 2013 WL 4584649, 6 (discussing Ruth, 577 F.3d at 799). In fact, the absence of any prior relationship underscores the purpose of the letter — to inform O'Connell that Bayview was the new servicer of the loan, as required by RESPA, and to provide him information relevant to their relationship. See id. As for O'Connell's argument that the fact that the foreclosure action was nearly complete and the redemption period expired indicates that this letter was sent in connection with an attempt to collect a debt (ECF No. 14 at 10), RESPA makes no distinction between loans in good standing, defaulted loans, or uncollectable loans; the RESPA change in servicer notifications are required regardless.

Gresham v. WELLS FARGO BANK, NA, Court of Appeals, 5th Circuit March 21, 2016

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Gresham also appeals the district court's dismissal of his claim that Wells Fargo violated CFPB rules concerning residential mortgages. These rules are codified in 12 C.F.R. §§1024, *et seq.,* and became effective on January 10, 2014. Here, it is undisputed that Gresham defaulted in 2010, and that Wells Fargo's November 2013 foreclosure proceeding was initiated before the CFPB rules became effective. The CFPB regulations do not apply retroactively.[12] Nonetheless, Gresham argues that Wells Fargo was required to comply with the regulations between their effective date, January 10, 2014, and the date of foreclosure, April 1, 2014.

Specifically, Gresham claims that Wells Fargo violated the regulations with respect to "dual tracking" at 12 C.F.R. § 1024.41 and "early intervention" at 12 C.F.R. § 1024.39. Dual tracking is the term given to situations in which the lender actively pursues foreclosure while simultaneously considering the borrower for loss mitigation options.[13] Section 1024.41(g) prohibits dual tracking, and 1024.41(a) expressly provides for a private right of action in the event the lender violates the provision.[14] However, Section 1024.41(g) only applies where "a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale."[15] Here, Gresham did not plead, nor is there any evidence, that he submitted a complete loss mitigation application more than 37 days before the April 1, 2014 foreclosure sale. The district court therefore correctly concluded that Gresham failed to put forth any factual content to support its claim that Wells Fargo violated dual tracking rules.

Gresham has similarly failed to state a claim in regards to Section 1024.39, which reads

(a) Live contact. A servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options if appropriate.

(b) Written notice.

(1) Notice required. Except as otherwise provided in this section, a servicer shall provide to a delinquent borrower a written notice with the information set forth in paragraph (b)(2) of this section not later than the 45th day of the borrower's delinquency.

Gresham claims that Wells Fargo did not properly give him notice of his delinquency and loss mitigation options under this section. Unlike Section 1024.41, Section 1024.39 does not explicitly convey a private right of action to borrowers.[16] Even it did, Gresham failed to plead sufficient facts or offer any evidence in support of such claim. As the district court concluded, nothing in this section requires a servicer to retrace these steps on the basis of a borrower's continued delinquency. The court therefore did not err in dismissing Gresham's claims under the CFPB rules.

We AFFIRM.

Ryan v. Ocwen ED MI, March 30 2016

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First, Plaintiffs' allegations in support of their claimed violations of RESPA and its corresponding federal regulations are defeated by virtue of the admissions made by Plaintiffs during discovery. In particular, Plaintiffs have admitted (i) that they did not send a complete loss mitigation application to Defendants, (ii) that Defendants nonetheless evaluated them for all available loss mitigation options, and (iii) that Defendant Ocwen sent them a May 1, 2014 letter explaining the grounds for the denial of Plaintiffs' request for a loan modification. (See Defendants' Motion, Ex. D, Requests for Admission Nos. 4, 5, 10, 11; Ex. G, 5/1/2014 Letter.) In light of these admissions, Plaintiffs cannot establish their entitlement to recover under RESPA.

Next, Plaintiffs have failed as a matter of law to establish their entitlement to any of the forms of relief sought in count I of their complaint. To the extent that they seek to set aside the sheriff's sale of the Property, this form of relief is unavailable to them under RESPA and its associated regulations. See Servantes v. Caliber Home Loans, Inc., No. 14-13324, 2014 WL 6986414, at *1 (E.D. Mich. Dec. 10, 2014). In addition, while Plaintiffs seek an award of monetary damages, they have admitted that they suffered no actual damages relating to the allegations of their complaint, (see Defendants' Motion, Ex. D, Requests for Admission No. 12), and a RESPA claim cannot succeed absent proof of actual damages, see Battah v. ResMAE Mortgage Corp., 746 F. Supp.2d 869, 876 (E.D. Mich. 2010). Finally, Plaintiffs' allegation of a violation of 12 C.F.R. § 1024.38 is unavailing, because there is no private right of action to enforce any such violation. See Smith v. Nationstar Mortgage, No. 15-13019, 2015 WL 7180473, at *4 (E.D.

Mich. Nov. 16, 2015).

Westfall v. MERS SD CA, March 30, 2016
https://scholar.google.com/scholar_case?case=4740629639498060599&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Next, Defendant moves to dismiss Plaintiff's TILA claim as time barred. A one-year statute of limitations applies to claims for TILA violations. 15 U.S.C. ¶ 1640e. Plaintiff alleges that the violations occurred at the time of the loan transaction in 2006. She filed this lawsuit in June 2015. It therefore appears from the face of the complaint that, the TILA claim is time barred. Plaintiff argues the statute of limitations should be equitably tolled. (Compl. ¶ 74.)

"Equitable tolling is generally applied in situations `where the claimant has actively pursued his [or her] judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" O'Donnell v. Vencor, Inc., 465 F.3d 1063, 1068 (9th Cir.2006). "Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his [or her] claim. Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir.2000)(focus is on whether plaintiff's delay was excusable); overruled on other grounds by Socop-Gonzalez v. INS, 272 F.3d 1176, 1194-96 (9th Cir. 2001)(en banc). "If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs." Id. at 1178. In the context of TILA damages, "the district courts ... can evaluate specific claims of fraudulent concealment and equitable tolling to determine if the general rule would be unjust or frustrate the purpose of the Act and adjust the limitations period accordingly." King, 784 F.2d at 915.

Mains v. Citibank SD IN, March 31, 2016
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The Rooker-Feldman doctrine is to be applied on a claim-by-claim basis. It is possible for a plaintiff to assert claims that would be barred by the Rooker-Feldman doctrine, while also alleging claims that would not implicate its bar. The Defendants, with the exception of Citibank, as well as Mains, have approached this jurisdictional question using broad strokes, describing Mains's entire complaint as being barred, without diving deep into each individual claim. Despite our conclusion that we must decline jurisdiction, we shall nonetheless analyze each claim independently to ensure that we have carefully considered all that Mains has alleged…

As in Bullock, the problem with Mains's claims here are that in seeking a judgment that Defendants violated RESPA, he disputes precisely what the State Court awarded. The State Court determined that the amounts sought by Citibank were legally due, late fees included, and entered judgment in Citibank's favor in the amount of $271,452.17, as of November 7, 2012. We cannot rule in Mains's favor on his RESPA claim without holding that the State Court erred in its Judgment. This is precisely what the Rooker-Feldmandoctrine forbids. Thus, we lack jurisdiction to consider and resolve Mains's RESPA claim, and it shall be dismissed...

Following the foreclosure of his mortgage, which was finalized on January 21, 2015, which was the date the Supreme Court denied transfer of his appeal, Mains no longer possessed a mortgage to rescind. As stated above, "The trial court granted Citibank's motion for summary judgment and entered an in rem judgment against the real estate and an in personam judgment against Mains for the remaining balance due, costs, and interest. The trial court also entered an order for the foreclosure of the mortgage and for a sheriff's sale of the real estate."Mains, 18 N.E.3d 319, at *1 (Ind. Ct. App. 2014), trans denied (Jan. 21, 2015). Mains's aim in pursuing his TILA claim is to reverse the State Court Judgment.[11]Defendants insist that "Plaintiff would not have suffered any TILA damages but for Citibank and Chase's actions against him to enforce the loan." [Dkt. No. 103 at 9.] According to Defendants, to grant the relief Mains requests based on his alleged TILA violations, this court would have to revisit and invalidate the State Court's Judgment, which is barred by the Rooker-Feldman doctrine. We agree.

Deel v. Wells Fargo ND Ohio, April 1, 2016
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To determine whether *Rooker-Feldman* bars a claim, the Court must look to the "source of the injury the plaintiff alleges in the federal complaint." ***McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006)**; *see* ***Berry*, 688 F.3d at 299**; ***Kovacic*,606 F.3d at 310**. If the source of the plaintiff's injury is the state-court judgment itself, then the *Rooker-Feldman* doctrine bars the federal claim. ***McCormick*, 451 F.3d at 393**. "If there is some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim." *Id.* In conducting this inquiry, the Court should also consider the plaintiff's requested relief. *See* ***Evans v. Cordray*,424 F. App'x 537, 539 (6th Cir. 2011)**.

In this case, plaintiffs ask this Court to reverse the judgment of foreclosure and to enjoin enforcement of that judgment. Plaintiffs clearly seek appellate review of the state court judgment in this context. Thus, this Court lacks jurisdiction to grant that relief.

Bullock v. OCWEN LOAN SERVICING, LLC, Dist. Court, D. Maryland April 15, 2016

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In its present Motion for Summary Judgment on the TILA claim, ECF No. 40, Deutsche Bank affirms that the undisputed material facts show that Bullock's loan was among a number of loans securitized and transferred to it pursuant to the Pooling and Servicing Agreement that closed on May 12, 2006. Kearse Aff. ¶ 11. Because the applicable TILA section did not come into effect until 2009, over three years later, Deutsche Bank argues that the TILA claim fails as a matter of law...

The Court agrees with Deutsche Bank.

Garrow v. WELLS FARGO BANK, NA, Dist. Court, WD Michigan. April 26, 2016
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Plaintiffs' contention that Defendant wrongfully denied their loan modification application "based on a mistaken belief that second homes are not eligible for modification" fails because there is no such thing as a "wrongful denial" under RESPA, so long as the regulation's procedures are followed. *See* 12 C.F.R. § 1024.41(a) ("Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option."); *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X),* 78 Fed. Reg. 10696-01, 10818, 2013 WL 525347 (Feb. 14, 2013) ("Borrowers are entitled to receive certain protections regarding the process (but not the substance) of those evaluations."); *Houle v. Green Tree Servicing, LLC,* No. 14-cv-14654, 2015 WL 1867526, at *2 (E.D. Mich. Apr. 23, 2015) ("The problem for plaintiff in this case is that even if defendant had . . . qualified for a loan modification, the lender is not required to provide one.").

Plaintiffs' claim that Defendant failed to follow the required procedures when evaluating Plaintiffs' loan modification application also fails. Regulation X went into effect on January 10, 2014. *Campbell v. Nationstar Mortg.,* 611 F. App'x 288, 297 (6th Cir. 2013). Loan servicers cannot be held liable under RESPA for conduct violating Regulation X's procedural requirements when that conduct occurred prior to Regulation X's effective date. *See id.* (explaining why Regulation X does not apply retroactively). Plaintiffs note that their initial loan modification application for the Property was denied "on or about June 17, 2013." (Compl. ¶ 15.) Thus, Defendant is not liable for violating Regulation X with regard to this loan transaction.

French v. SPECIALIZED LOAN SERVICING, LLC, Dist. Court, ED Tennessee, May 19, 2016

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Here, plaintiffs' RESPA claim is based upon a December 8, 2011, 24-page letter from plaintiffs' counsel purporting to be a QWR. The letter contained a generic laundry list of document requests and legal arguments, none of which were specific to plaintiffs or their loan. The letter questions whether the "origination" of the loan was lawful and whether "your company" is the "holder in due course" of the note. The letter then sets forth pages of document requests for loan documents, origination documents, agreements, "assignments, transfers, allonges," *etc.* This is not a proper QWR as the letter does not request information required to be responded to under RESPA. *See* *Minson v. CitiMortgage Inc.,* 2013 WL 2383658 at *5 (D.Md. May 29, 2013) (although communication cited RESPA and claimed to be a QWR it was not because it sought copies of loan documents and proof of servicer's authority to service loan); *Au v. State Mortg. Co.,* 948 F.Supp.2d 1086, 1104 (D.Hawaii 2013) (letter which among other things asked for loan documents was not a QWR and [servicer] had no obligation under RESPA to respond); *Barocio v. Bank of America N.A.,* 2012 WL 3945535 at *7 (N.D.Cal. Sept. 10, 2012) (request for loan documents is not a proper subject of a QWR);*McGory v. BAC Home Loan Servs. LP,* 2011 WL 1743475 at *2-3 (N.D.Ohio May 6, 2011) (servicer had no obligation to respond to purported QWR which requested all documents pertaining to the origination of mortgage, as well as certified copies of loan documents, allonges, assignment and transfer receipts). Under the authority cited, the court finds that the December 2011 letter was not a valid QWR, and defendants had no obligation to respond under RESPA.

Additionally, the record shows that defendants provided a sufficient response to the letter. First, on December 15, 2011, defendants sent a letter to plaintiffs' counsel, attaching a copy of plaintiffs' loan payment history, a detailed outline of transactions, servicing expenses paid to third parties, tax and insurance payments, and any late charges assessed and paid. The letter further stated that "if you have any questions, please call us at 1-800-669-6607." Second, on January 4, 2012, defendants sent two additional letters to plaintiffs' counsel referencing counsel's "recent request." In one of the letters, defendant responded to issues raised by counsel and provided a phone number for customer representatives who could provide assistance to plaintiffs. In the other letter, defendants notified plaintiffs that SLS was the new servicer of the loan and provided a phone number and mailing address for SLS, and a phone number for customer service. Based on the record in this case, the court finds that defendants responded to counsel's letter and provided information responsive to plaintiffs' specific requests. Defendants were required to do no more under RESPA. Accordingly, plaintiff's claim for violation of RESPA will be dismissed.

Olivo v. CALIBER HOME LOANS, INC., Dist. Court, SD Texas, June 8, 2016

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Caliber argues that Plaintiffs' RESPA claims fail for a few very basic reasons. First, Plaintiffs never submitted a complete loss mitigation application, a regulatory prerequisite to bar foreclosure

proceedings by a servicer, and, in its absence, Caliber was not legally required to forego foreclosure proceedings. 12 C.F.R. 1024.41(g). As a result, Caliber did not engage in dual-tracking. Second, despite Caliber's abandonment of the July 7, 2015, foreclosure sale in favor of the initial Trial Period Plan accepted by the Plaintiffs, the Plaintiffs defaulted on that Plan as well, thereby clearing the way for Caliber to resume foreclosure proceedings. 12 C.F.R. 1024.41(g)(3). Third, Caliber's two subsequent proposed Trial Period Plans were rejected by Plaintiffs which also removed any potential impediment to pursuing foreclosure. 12 C.F.R. 1024.41(g)(2). Caliber, in fact, was overly generous in its efforts to help the Plaintiffs try to keep their home since RESPA only requires a servicer to complete a single loss mitigation procedure for a borrower. 12 C.F.R. 1024.41(i). The Plaintiffs' claims simply have no foundational merit and they should now, after nearly a year, be dismissed.

Reed v. BANK OF AMERICA HOME LOANS, Dist. Court, D. Maryland, June 10, 2016
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In Count VI, the Reeds claim that BANA violated Regulation X, 12 C.F.R. § 1024.41,[21] when BANA failed to provide the Reeds with the reasons for denying their loan modification application, and when BANA did not provide the Reeds with the results of any calculation used to deny the application. Am. Compl. ¶ 48. In moving to dismiss this Count, BANA argues, among other things, that this Count should be dismissed with prejudice because the conduct at issue occurred in 2013 — a date *before* the effective date of the applicable regulation. Defs.' Mot. Dismiss FAC 9, 11.

The Court agrees with BANA.

Blanton v. Roundpoint Mortgage Servicing Corp. Dist. Court, ND Illinois, June 17, 2016

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A. TILA Claims…

…Roundpoint argues that plaintiff's claims pursuant to the TILA fail because it is a servicer, and therefore not subject to liability under the statute. Plaintiff does not dispute that she alleges in the second amended complaint that Roundpoint is a servicer, and that servicers are generally not subject to TILA liability. Plaintiff, however, argues that Roundpoint is "estopped from availing itself of the servicer exemption in this case" because in a June 2014 letter from Codilis to plaintiff, attached as Exhibit 14 to the second amended complaint, Codilis identifies Roundpoint as the creditor to whom plaintiff owes the debt. According to plaintiff, because the letter is attached to her complaint it is considered a part of the pleadings, and she has thus sufficiently plead that Roundpoint is a creditor. The court disagrees.

As Roundpoint points out, the June 2014 letter was sent pursuant to the FDCPA. Because the FDCPA defines creditor differently than the TILA,[4] Roundpoint's status as a creditor pursuant to the FDCPA is not an admission or allegation concerning its status as a creditor pursuant to the TILA. Moreover, because plaintiff's debt was initially payable to Community Bank of Oak Park and River Forest, Roundpoint cannot satisfy the TILA's statutory definition of a creditor. See, e.g., Banks v. Green Tree Servicing, LLC, No. 14-cv-2825, 2015 WL 1058124, at *5 (N.D. Ill. March 5, 2015)

("TILA applies only to a `creditor,' which is defined in the statute as the person to whom the debt is initially payable."). As the court held in Banks, "[a]lthough courts have recently suggested that a creditor's assignee may be liable under TILA, [plaintiff] has not alleged in the complaint that [the servicer] is also the creditor's assignee." Id. Accordingly, the court dismisses Counts Five through Eight of plaintiff's second amended complaint.

B. RESPA Claims…

Roundpoint argues that plaintiff's eighteen RESPA claims, one for each incorrect mortgage statement Roundpoint sent to plaintiff, fail because the statute does not create a cause of action for sending erroneous mortgage statements, but only for improperly responding to a notice of error. As such, Roundpoint contends that at most plaintiff has a single RESPA claim corresponding to the allegations that it did not properly respond to her April 12, 2014, notice of error. Plaintiff, however, argues that the "sending of the mortgage statements at issue was essentially a continuation and reaffirmation of [Roundpoint's] refusal to correct the errors alleged by and through [her] notice of error." According to plaintiff, Roundpoint's "attempted collection" of the late fees "was an error that Roundpoint refused to correct or abate and as such, was a violation of 12 C.F.R. § 1024.35."

… 12 C.F.R. § 1024.35(a), the corresponding regulations to section 2605(e), provides that "A servicer shall comply with the requirements of this section for any written notice from the borrower that asserts an error. . . ." Subsection 1024.35(b) lists categories of "errors" that trigger a servicer's obligations under the regulation. Among these errors is the "[i]mposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower." 12 C.F.R. § 1024.35(b)(5). Although plaintiff argues that Roundpoint's incorrect mortgage statements fall within this error, § 1024.35(b) merely defines what qualifies as an "error" for purposes of sending a notice; it does not create a cause of action.

As is evident from a review of the statute, section 2605(e) and its corresponding regulations (12 C.F.R. § 1024.35) outline a servicer's obligations with respect to responding to a notice of error. In fact, § 2605(e) does not address a servicer's obligations with respect to sending out mortgage statements at all. As such, plaintiff's lack of authority supporting her position that § 2605 liability can stem from sending erroneous mortgage statements, is not surprising.

Because plaintiff identifies only her April 12, 2014, notice of error as improperly responded to by Roundpoint as the basis for her RESPA claim, she can maintain only a single RESPA claim against Roundpoint. Although plaintiff argues in her response brief that Roundpoint also failed to properly respond to her June 9, 2015, notice of error, Counts Nine through Twenty-Six of her second amended complaint do not include any factual allegations concerning the June 9, 2015, notice of error and do not incorporate the preceding factual allegations of her complaint.

…CONCLUSION

For the foregoing reasons, the court grants in part and denies in part Roundpoint's and Locke Lord's motion to dismiss. Defendants' motion is granted with respect to plaintiff's claims pursuant to the TILA and all but one of plaintiff's RESPA claims…

GARMOU v. KONDAUR CAPITAL CORP., Dist. Court, ED Michigan June 30, 2016

Adjournment of Sale after Application Submitted does not make Application more than 37 Days before Sale

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In his sur-reply, Plaintiff concedes that his application was submitted less than thirty-seven days before the foreclosure sale was originally scheduled, but argues that the regulation's prohibition on foreclosure is still applicable because it was submitted long before the sheriff's sale actually took place. (Dkt. # 17, Pg. ID 341.) After initially scheduling the sale for May 22, 2015, Defendants adjourned the sale on a week-to-week basis for more than year and did not formally conclude foreclosure proceedings until May 6, 2016. (Dkt. #17, Pg. ID 341.) In essence, Plaintiff is arguing that the plain language of the regulation indicates that what matters is the length of time between when the application was received and when the foreclosure sale was ultimately carried out—a time period which grew longer with each adjournment. Thus according to Plaintiff, while Kondour was under no obligation to review Plaintiff's application when it originally received it, it accrued just such an obligation after adjourning the sale for the second time. The court does not agree...

Because the court does not find the Bureau's interpretation to be "plainly erroneous or inconsistent with the statute," it will defer to the Bureau's construction of Regulation X. The court grant this aspect of Defendants' Motion.

Watson v. Bank of America, NA, Dist. Court, SD California June 30, 2016

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In addition, even if the PSA was related to "servicing," the FAC fails to sufficiently allege why BANA's response was inadequate. The FAC alleges that BANA failed to provide any response, (Dkt. No. 8, FAC ¶ 69), and then also, in contradiction, alleges that BANA failed to provide the requested information by the statutory deadline, implying that a response was made but was inadequate. (Id. ¶ 102.) If Plaintiffs allege that BANA's response was inadequate, they must provide facts to provide BANA notice as to why its response was not complete. See Norris v. Bayview Loan Serv., LLC, Case No. CV15-643-MWF(DTBx), 2016 WL 337381, at *5 (C.D. Cal. 2016) (catchall assertion that the defendant did not "provide accurate and complete responses" is insufficient to state claim under Rule 8); see also Saterbak v. Nat'l Default Serv. Corp., Civil No. 15cv956-WQH-NLS, 2015 WL 5794560, at *19 (S.D. Cal. 2015) (allegations not sufficient where Plaintiffs allege that information provided by servicer was "inadequate and incorrect," without providing facts to support the conclusion). A general statement that BANA failed to provide the requested information does not state a claim for violation of Regulation X. Thus, the Court GRANTS BANA's motion to dismiss the Regulation X violations as to the first RFI.

Other documents Plaintiffs seek, such as the investor information, an indemnification agreement, a copy of the mortgage, note, allonge, all endorsement and assignments, current property value, copy of the broker's price opinion, automated valuation, and appraisal, do not relate to servicing but to the loan origination. See id. at 5 (entities to whom the note has been sold or transferred, entities to which Plaintiff's mortgage or deed of trust has been assigned, a copy of the note with all endorsements and any allonge, a copy of each assignment, a copy of each written notice that has been sent to the

plaintiff regarding the sale or transfer or assignment of the note, a copy of all documents furnished to Plaintiff at closing). These documents sought are not "servicing" related requests and do not state a claim under 12 C.F.R. § 1024.36.

For a violation of 12 C.F.R. § 1024.35(e), Plaintiff must allege facts of when the letter was sent, to whom it was directed, why it was sent, and the contents of the letter so that it may determine if the letter qualifies as a NOE. See Kilgore v. Ocwen Loan Serv., LLC, 89 F. Supp. 3d 526, 538 (E.D.N.Y. 2015) (conclusory allegation that a plaintiff submitted an NOE does not state a plausible claim under RESPA).

Here, Plaintiffs summarily allege that the NOE raised an issue as to conflicting figures in the life of the loan history, and fail to assert specific facts as to the conflicting figures given the long length of the loan history. Accordingly, Plaintiffs have not alleged a claim concerning the NOE, and the Court GRANTS BANA's motion to dismiss the Regulation X violations as to the NOE.

In sum, the Court GRANTS in part and DENIES in part BANA's motion to dismiss the claims under Regulation X of RESPA with leave to amend.

Lance v. GREEN TREE SERVICING, LLC, Dist. Court, D. Oregon July 7, 2016

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With respect to Lance's RESPA claim, Green Tree argues that Lance is not a "borrower" under RESPA and therefore lacks standing to assert a claim under RESPA. *See, e.g.,* *Stolz v. OneWest Bank,* 2012 WL 135424, at *4-5 (D. Or. Jan. 13, 2012). However, Lance argues that even if he is not a borrower, the arguments set forth in the article establish he has assumed the position of the borrower and it is contrary to public policy to require lender approval for an heir to assume his deceased mother's mortgage. The issue, therefore, is whether a provision in a deed of trust requiring lender approval in writing before a successor in interest to a deceased borrower can assume the loan is forbidden and void.

For the reasons explained in more detail below, I find that without an express prohibition from the state or federal legislature, deed of trust clauses requiring written lender approval before an heir can assume a deceased family member's mortgage are valid and enforceable. Accordingly, I find the clause requiring Lance to receive written approval from Green Tree before assuming his mother's mortgage is enforceable. Since the clause is enforceable against Lance and since he has not received written approval from Green Tree, he has not assumed the position of a party to the contract nor has he assumed the position of a "borrower" under RESPA. I therefore grant the remaining portions of Green Tree's Partial Motion for Summary Judgement and dismiss Lance's breach of contract and RESPA claims.

Radske v. Federal National Mortgage Association, Dist. Court, ED Michigan July 11, 2016

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The Court finds that Plaintiff has failed to allege a plausible claim of wrongful foreclosure based upon the alleged RESPA violations. All of Plaintiff's allegations are rebutted by Defendants' evidence. To wit: the loan modification efforts and the foreclosure were not in process at the same time and Plaintiff's earlier trial loan modification was denied in June 2014 due to Plaintiff's inability to make the reduced payments. (Ex. F, 6/10/2014 Denial Letter.) Plaintiff was also advised of his loss mitigation options by Defendant Seterus on February 22, 2015 in a Foreclosure Notice Letter. (Ex. G, 2/22/2015 Foreclosure Notice Letter.) Plaintiff was also advised of the transfer of the Loan in January 2015 by non-party CitiMortgage, and advised again in February, 2015 by Defendant Seterus of the same. (Ex. D, 2/10/2015 Transfer of Servicing Notice from Seterus; Ex. H, 1/15/2015 Letter from CitiMortgage noting "effective 2/1/2015 all payments" must be sent to Seterus.)

Bivins v. NATIONSTAR MORTGAGE, LLC, Dist. Court, ND Georgia July 14, 2016

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The RESPA imposes certain requirements on servicers of federally-related mortgage loans, including responding to inquiries and providing certain notices to borrowers. "If the servicer does not comply with RESPA's deadlines, the borrower can recover actual damages from the failure to communicate, but the borrower is limited to actual damages unless there is a `pattern or practice of noncompliance.'" Marks v. PHH Mortg. Corp., No. 5:11-cv-167 (CAR), 2011 WL 5439164, at *3 (M.D. Ga. Nov. 9, 2011) (citing 12 U.S.C. § 2605(f)). To show actual damages, a plaintiff must "demonstrate that [d]efendant's breach proximately caused the alleged damages." Russell v. Nationstar Mortg., LLC, No. 14-61977-CIV, 2015 WL 5029346, at *6 (S.D. Fla. Aug. 26, 2015). An allegation of damages is a necessary element of a RESPA claim. See Frazile v. EMC Mortg. Corp., 382 F. App'x 833, 836 (11th Cir. 2010).

Here, Plaintiff's RESPA claim consists of four (4) sentences: one which simply incorporates the nineteen (19) preceding paragraphs, another that states "[i]t appears that Plaintiff's alledged [sic] loan with Defendant Nationstar is subject to [RESPA]," and the other two which assert that "Defendant never sent Plaintiff notices as required under RESPA," and that "[a]s a result of Defendant's violation of RESPA, the Plaintiff suffered actual damages and is entitled to statutory damages pursuant to RESPA." (Compl. ¶¶ 20-23). Plaintiff fails to identify what provision of RESPA Nationstar allegedly violated or what notices Nationstar was required, but failed, to send Plaintiff. Plaintiff's conclusory assertions are not sufficient to support a claim for violation of RESPA. See Iqbal, 556 U.S. at 678("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); Jackson, 372 F. 3d at 1263 ("[P]laintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims.").

Plaintiff further fails to allege facts to support that Nationstar's alleged failure to send her these unspecified notices caused her damages, and she does not otherwise assert that Nationstar engaged in a pattern or practice of violating RESPA such that she could recover statutory damages. See 12 U.S.C. §§ 2605(f)(1)(A)-(f)(1)(B); Marks, 2011 WL 5439164 at *3. Plaintiff fails to state a claim for violation of RESPA. See Frazile, 382 F. App'x at 836. Plaintiff's RESPA claim is required to be dismissed.[9]

Derrico v. PENNYMACK CORP., Dist. Court, D. Nevada July 14, 2016

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I therefore grant Trustee Corps' motion with prejudice to the extent that Derrico is trying to bring claims against Trustee Corps under RESPA because the statute applies only to loan servicers and thus amendment would be futile. Because I am dismissing the claims against Trustee Corps, I deny as moot Trustee Corps' later motion for summary judgment. ECF No. 30. However, because Derrico has not amended his complaint previously, I will allow him leave to amend the complaint to add facts and allegations that would constitute a valid clam or defense against Trustee Corps on some basis other than RESPA, if he can do so. I caution Derrico that if he chooses to amend the complaint, he must provide a short and plain statement of the claim showing that he is entitled to relief and must state a claim to relief that is plausible on its face to comport with Rule 12(b)(6)'s requirements.

MRLA v. Federal National Mortgage Association, Dist. Court, ED Michigan July 21, 2016

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This leaves two claims under Regulation X: (i) that Defendants engaged in "dual tracking," i.e., "pursuing loss mitigation options contemporaneously with active foreclosure proceedings," Compl. ¶ 78; and (ii) that Defendants foreclosed "despite the fact that a loan modification agreement had been reached between the parties and Plaintiff was in good standing under the loan modification agreement," id. ¶ 88.

These factual assertions cannot coexist. Either foreclosure occurred during negotiations for the loan modification, or foreclosure occurred after the loan modification was granted. Although Federal Rule of Civil Procedure 8(d)(3) permits a plaintiff to state "as many separate claims or defenses as it has, regardless of consistency," this is subject to the strictures of Rule 11(b)(3), which requires factual claims in a pleading to "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." See also Fed. R. Civ. P. 8, Note to 2007 Amendment ("The former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion."). Accordingly, courts have held that Rule 8(d)(3)'s "alternative pleadings rule" does not cover inconsistent assertions of fact when the pleader holds the knowledge of which of the inconsistent facts is the true one. See, e.g., Am. Int'l Adjustment Co. v. Galvin, 86 F.3d 1455, 1461 (7th Cir. 1996) ("[A] pleader may assert contradictory statements of fact only when legitimately in doubt about the facts in question.") (citing Great Lakes Higher Educ. Corp. v. Austin Bank of Chicago, 837 F. Supp. 892, 894-895 (N.D. Ill. 1993) ("It is a violation of Rule 11 to withhold relevant factual evidence within the knowledge of the pleading party in order to gain the advantage of being able to plead more causes of action than are appropriate. This is also an inappropriate application of the alternative pleadings rule.")); Emkey v. Sec'y of Health & Human Servs., No. 08-160V, 2009 WL 3683390, at *15 (Fed. Ct. Cl. Oct. 20, 2009) ("A party is not free to

plead any and all facts that might entitle it to relief simply because inconsistency of factual allegations is permissible under Rule 8.").

When inconsistent factual allegations are made for reasons other than the pleader's uncertainty as to which allegation was true, dismissal is appropriate. SeeGreat Lakes Higher Educ. Corp., 837 F. Supp. at 895; Gordon v. Matthew Bender & Co., 562 F. Supp. 1286, 1299 (N.D. Ill. 1983) (neither of two causes of action state a claim when founded upon contradictory factual allegations), abrogated on other grounds recognized in Karkomi v. Am. Airlines, Inc., 717 F. Supp. 1340, 1345 n.6 (N.D. Ill. 1989); see also Friendship Med. Ctr., Ltd. v. Space Rentals, 62 F.R.D. 106, 112 (N.D. Ill. 1974) (factual contradiction prevented defendant from properly responding to the complaint, warranting dismissal). Accordingly, Plaintiff's remaining claims under RESPA and Regulation X are dismissed.[2]

Torres v. Select Portfolio Servicing, Inc., Dist. Court, MD Florida July 25, 2016

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"[T]o state a RESPA claim for failure to respond to a qualified written request, a plaintiff must allege: (1) the defendant is a loan servicer under the statute; (2) the plaintiff sent a qualified written request consistent with the requirements of the statute; (3) the defendant failed to respond adequately within the statutorily required days; and (4) the plaintiff has suffered actual or statutory damages." *Correa v. BAC Home Loans Servicing LP,* No. 6:11-CV-1197-ORL-22, 2012 WL 1176701, at *6 (M.D. Fla. Apr. 9, 2012). The bare-bones complaint fails to allege basic facts in support of these four elements. Plaintiff appears to concede that her complaint is deficient: she states in her response that she filed this case in Pinellas County Small Claims Court, where the pleading standard is more lenient.

Meeks v. Ocwen Loan Servicing LLC, Dist. Court, SD Florida July 25, 2016

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Although RESPA is a remedial statute, the Court need not construe it (or its implementing regulation) so as to create a cause of action where none exists. Plaintiff sent a request for information. Plaintiff received confirmation from Defendant within five days, pursuant to Plaintiff's own certified mailing, that Defendant had received that request. Plaintiff then timely received a substantive response to his request. Five months later, after having received the response Plaintiff desired, Plaintiff's attorney sent a factually incorrect letter to Defendant in an effort to create a federal cause of action. Plaintiff's unsupported argument that the Certified Receipt does not constitute a "written response" within the meaning of § 1024.36(c) is an argument based entirely in semantics that the Court, while forced to entertain, finds unpersuasive. The Certified Receipt conclusively shows that Count I of the Complaint must fail, and it is dismissed with prejudice.

Moreover, courts have interpreted the term "pattern or practice" in accordance with the usual meaning of the words, suggesting "a standard or routine way of operating."*McLean,* 595 F. Supp. 2d at 1365 (quoting *In re Maxwell,* 281 B.R. 101, 123 (Bankr. D. Mass. 2002)). Failure to respond to one, or even two qualified written requests does not amount to a "pattern or practice." *See id.*; *In re*

Tomasevic, 273 B.R. 682 (Bankr. M.D. Fla. 2002). In *Renfroe,* the Eleventh Circuit held that statutory damages may be sufficiently plead where, in addition to the alleged RESPA violation against a plaintiff, the complaint alleges unrelated RESPA violations. *See* 822 F.3d at 1247. While a plaintiff need not plead the "identities of other borrowers, the dates of the letters, and the specifics of their inquiries" to survive dismissal, *Iqbal* and *Twombly* still require that a plaintiff plead "enough facts to state a claim to relief that is plausible on its face." *Id.*(quoting *Twombly,* 550 U.S. at 570). In this case, Plaintiff has alleged merely that "[t]hrough its own conduct and the conduct of its designated counsel Defendant has shown a pattern of disregard to the requirements imposed upon Defendants by Federal Reserve Regulation X." Amended Complaint ¶¶ 18, 34. This does not provide sufficient facts to plausibly allege an impermissible "standard or routine way of operating," and Count II is dismissed. *See McLean,* 595 F. Supp. 2d at 1365.

Terry v. Wells Fargo Bank, NA, Dist. Court, ND California July 27, 2016

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The letters sent to plaintiffs on January 14, 15, and 17 allegedly acknowledged receipt of the application but, as alleged, the letters did *not* address whether "the servicer ha[d] determined that the loss mitigation application [was] either complete or incomplete" as required under 12 C.F.R. 1024.41(b)(i)(B). The letters merely stated that Wells Fargo "would inform Plaintiffs if any additional documents were needed" (Amd. Compl. ¶ 24).

This order therefore concludes that the letters sent on January 14, 15, and 17 were *not* "notices" within the meaning of 12 C.F.R. 1024.41(b)(i)(B). To hold otherwise would be to discourage servicers from acknowledging receipt of an application until all missing documentation has been identified. Borrowers benefit from prompt acknowledgment of an application, however, as time is precious when a foreclosure is on the horizon. As long as the bank "promptly" determines completeness, it need not do so "immediately."

To be sure, Wells Fargo had a duty to notify plaintiffs within five days (excluding weekends and holidays) as to whether their application was complete or incomplete. But here, the facts alleged suggest that Wells Fargo complied with that duty by sending a letter on January 20 that requested additional documentation. As opposed to the letters sent on January 14, 15, and 17, this letter was a "notice" within the meaning of 12 C.F.R. 1024.41(b)(i)(B). As such, plaintiffs' application was not "facially complete" as of February 21 when defendants recorded a notice of trustee's sale because plaintiffs had not yet submitted the documentation requested (they did not do so until April 1). Because the application was not "facially complete" on February 21, it did not trigger the prohibitions against dual-tracking.

Amendment would be futile because the proposed amended complaint fails to state a claim under the federal regulations. As such, plaintiffs' motion for leave to amend is DENIED.

Moss v. DITECH FINANCIAL, LLC, Dist. Court, D. Maryland August 1, 2016

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Yet, as noted, § 2605(e)(2) provides the servicer with two alternative responses to a QWR, in lieu of making "appropriate corrections." *See* 12 U.S.C. § 2605(e)(2)(A)-(C). The March 3, 2015 letter states: "Records indicate that additional fees and costs were assessed after the reinstatement quote was provided to you. These are due and payable. We have enclosed a payment history of the account for your review." Am. Compl. Ex. G. Thus, it shows that Defendants reviewed their records, and the letter provides "a written explanation or clarification that includes . . . a statement of the reasons for which the servicer believes the account of the borrower is correct." *See* 12 U.S.C. § 2605(e)(2)(B). On the face of the letter, Defendants complied with § 2605(e)(2)(B). Insofar as Moss challenges the veracity of their response, RESPA is not the proper vehicle for recovering from damages from false or misleading statements. *See* *Yacoubou v. Wells Fargo Bank, N.A.*, 901 F. Supp. 2d 623, 630 (D. Md. 2012) ("Unlike the defamation tort, which depends in part on the truth or falsity of communications, RESPA governs the *timing* of communications." (emphasis added)), *aff'd sub nom. Adam v. Wells Fargo Bank,* 521 F. App'x 177 (4th Cir. 2013). Consequently, Moss fails to state a claim for a violation of RESPA.

[FDCPA and state law claims survive.]

Basora v. JPMorgan Chase Bank, NA, Dist. Court, SD Florida July 29, 2016

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[RFI, NOE and QWR must go to designated address.]

Thus, as Plaintiff admittedly failed to send his correspondence to the designated address, Chase's response obligations under RESPA were never "triggered". *Berneike,*708 F.3d at 1149. As such, Plaintiff has failed to state a claim under RESPA, and Defendant's Motion to Dismiss the Complaint is granted.

Genid v. Federal National Mortgage Association, Dist. Court, D. New Jersey August 2, 2016

https://scholar.google.com/scholar_case?case=8533166464185041062&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

An issue is whether FNMA or Seterus can even be liable under these regulations. FNMA is not subject to Regulation X because it is not a "servicer" of the loan. Regulation X defines "servicer" as "a person responsible for servicing of a federally related mortgage loan (including the person who makes or holds such loan if such person also services the loan)." *Id.*, § 1024.2. Additionally, Seterus was no longer servicing the Property after the judgment of foreclosure. Under New Jersey law, once a judgment of foreclosure is entered, the mortgage loan is extinguished and merges into the final judgment of foreclosure. *See* *Virginia Beach Fed. v. Bank ofNew York,* 299 N.J. Super. 181, 188 (App. Div. 1998). Any repurchase would therefore involve the creation of a new mortgage loan or new purchase agreement. Following the final judgment of foreclosure, Plaintiffs no longer owned the Property and Seterus could not be their servicer. All the communications in question among Plaintiffs, Phelan and Seterus occurred after foreclosure, post-sheriffs sale; it does not appear that RESPA would apply to Seterus here. Count I is dismissed.

Rupli v. Ocwen Loan Servicing, LLC, Dist. Court, D. Maryland August 4, 2016

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[Shotgun Pleading Complaint Dismissed with leave to refile]

Even though the Court acknowledges that Plaintiffs are dealing with complex corporate identities such as these Defendants, this fact does not excuse Plaintiffs from adherence to the Rule 8 and the *Twombly/Iqbal* pleading standards by providing a "short and plain statement" showing why they are entitled to relief from each Defendant. As currently pled, the Court is unable to determine which Defendants are being sued under which counts of the Complaint or what facts support Plaintiffs' claims against each Defendant. Moreover, Plaintiffs contend that each of the named Defendants was acting as an agent or "alter-ego" for all other Defendants and is responsible for the acts and omissions of all Defendants, without providing any factual basis for how such agency or "alter-ego" relationships existed. Compl. [1-1], at 13-14.

Because the Court finds that the current Complaint reflects a shotgun pleading, U.S. Bank, SPS, MERS, and MERSCORP's Motion [27] pursuant to Rule 12 will be granted in part. Plaintiffs will, however, be granted leave to file an Amended Complaint by August 26, 2016, and are cautioned that they "should avoid lumping the defendants together and should instead separately allege the scope of any duties owed and conduct alleged to have breached those duties as to each defendant." *See Ware,* 2013 WL 6805153, at *4. Failure to comply with the Court's direction may result in dismissal of this case.

Copeland v. The Axion Mortgage Group LLC, Dist. Court, SD Mississippi August 11, 2016

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Next, the Court finds persuasive the argument set forth in the Motion [27] for Judgment on the Pleadings filed by Defendants U.S. Bank, SPS, MERS, and MERSCORP, that Plaintiffs' Complaint is subject to dismissal because, as it is currently pled, it constitutes a "shotgun pleading."

Palacios v. Ditech Financial, LLC, Dist. Court, D. Massachusetts August 15, 2016

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[Under Old QWR Modifications are not Servicing]

"Servicing" under RESPA means "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan . . . and making payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3). The five letters referenced as Exhibits K-O do not relate to the servicing of the plaintiff's loan. Rather, they relate exclusively to the plaintiff's efforts to obtain a loan modification or to forestall foreclosure.[6] Because the letters do not relate to the servicing of his loan, they do not qualify as a QWR under RESPA.*Gates v. Wachovia Mortg.* FSB, No. 09-02464-FCD/EFB, 2010 WL 2606511, at *3 (E.D. Cal. June 28, 2010); *see also O'Connor,* 992 F. Supp. 2d at 36 (noting that to be a QWR, a letter from a borrower must relate to servicing, which "ensures that

the statutory duty does not arise with respect to all inquiries or complaints"). Accordingly, the defendant cannot be liable under RESPA for failing to respond to them. *Gates,* 2010 WL 2606511, at *4 (granting motion to dismiss without leave to amend RESPA claim where plaintiff's letter to lender was not a QWR because it did not relate to servicing and therefore "there can be no liability for [lender's] failure to provide a written response"). *See also Consumer Solutions REO, LLC. v. Hillery,* 658 F. Supp. 2d 1002 (N.D. Cal. 2009) (dismissing RESPA claim with prejudice because plaintiff's "QWR" disputed the validity of a loan and not its servicing); *MorEquity, Inc. v. Naeem,* 118 F. Supp. 2d 885, 901 (N.D. Ill. 2000)(dismissing plaintiff's RESPA claim after finding that none of the irregularities alleged in the "QWR" related to servicing as defined by section 2605).

It is not well settled whether a letter that relates in part to something other than the servicing of a loan should properly qualify as a QWR. As one court in this district has noted, the case law on letters mixing servicing and non-servicing requests is "not particularly helpful." *Santander Bank, Nat'l Ass'n v. Sturgis,* No. 11-10601-DPW, *13, 2013 WL 6046012 (D. Mass. Nov. 13, 2013). Courts that have considered the question have generally been able to avoid answering it because the plaintiff's case suffered from other defects — most commonly the failure to allege actual damages. *See id.* at *14 (granting summary judgment on RESPA claim where plaintiff did not suffer any damages); *O'Connor,*992 F. Supp. 2d at 36 (declining to decide whether letter containing both servicing and non-servicing requests was a QWR where the defendant actually had responded to the letter)...

In sum, the Court finds that Count II states a claim for violation of RESPA to the extent the claim is based on the defendant's failure to respond to the portion of the plaintiff's August 30, 2015 letter containing questions about the servicing of the plaintiff's loan. *See McDonald v. OneWest Bank, FSB,* 929 F. Supp. 2d 1079, 1094-95 (W.D. Wash. 2013) (treating mixed request as a QWR, but noting that the lender "may have been justified in ignoring requests for information that were unrelated to the servicing of the plaintiff's loan").

Nest v. Nationstar Mortgage, LLC, Dist. Court, D. New Jersey August 31, 2016

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The *Rooker-Feldman* doctrine bars federal district courts from hearing cases "that are essentially appeals from state-court judgments." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP,* 615 F.3d 159, 165 (3d Cir. 2010). In other words, the *Rooker-Feldman* doctrine bars a suit where "a favorable decision in federal court would require negating or reversing the state-court decision." *Id.* at 170 n.4 (citations omitted). The Third Circuit has specifically held that the *Rooker-Feldman* doctrine bars federal courts from providing relief that would invalidate a state court foreclosure decision. *See Gage v. Wells Fargo Bank, NA AS,* 521 F. App'x 49, 51 (3d Cir. 2013); *Manu v. Nat'l City Bank of Indiana,* 471 F. App'x 101, 105 (3d Cir. 2012); *Moncrief v. Chase Manhattan Mortg. Corp.,* 275 F. App'x 149, 152 (3d Cir. 2008); *Ayres-Fountain v. E. Sav. Bank,* 153 F. App'x 91, 92 (3d Cir. 2005).

Four requirements must be met for the *Rooker-Feldman* doctrine to apply: "(1) the federal plaintiff lost in state court; (2) the plaintiff complain[s] of injuries caused by [the] state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." *Great W. Mining & Mineral Co.,* 615 F.3d at

166 (citing *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). "The second and fourth requirements are the key to determining whether a federal suit presents an independent, non-barred claim" and they are "closely related." *Id.*

Even without all of the relevant factual background, it would appear that the *Rooker-Feldman* doctrine bars the instant case. As to the first prong, the Court can infer that Plaintiff lost in state court.

…As to the second and fourth prongs, it would appear that Plaintiff complains of injuries caused by the foreclosure and that Plaintiff is inviting the Court to review the state court foreclosure judgment. To begin, Plaintiff's prayer for temporary restraints requests that the Court: (1) order that the sheriff's sale be vacated as unlawful and void; (2) temporarily restrain Defendants and their agents from selling or attempting to sell the Property; and (3) declare that Defendants do not legally hold the Note or Mortgage and that they do not have a right to foreclose on the Property. (Pl. Mov. Br. at 7). The last request—a declaration that Defendants do not have a right to foreclose the Property—is sufficient to satisfy the second and fourth prong under *Rooker-Feldman*; it implies that Plaintiff takes issue with the foreclosure judgment and would require an order invalidating the state court foreclosure judgment. *See* *Gage*, 521 F. App'x at 51(holding that federal plaintiff's challenge to foreclosure judgment and sale was barred by *Rooker-Feldman*).

As to the third prong, it is unclear whether the state court judgment was rendered prior to institution of the instant federal case.[1] Nevertheless, it would not be a logical leap to infer that a foreclosure judgment was rendered before the instant case was filed on July 13, 2016.

…Given the high likelihood that a foreclosure judgment was rendered prior to July 13, 2016, it is likely that the *Rooker-Feldman* doctrine bars Plaintiff's request for temporary restraints. Accordingly, the Court likely lacks subject matter jurisdiction.

Gregory v. Select Portfolio Servicing, Inc., Dist. Court, ND Alabama August 31, 2016

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[TILA does not apply to Assignee Servicers]

In the instant case, despite the Gregorys' assertion "Defendants, [sic] are covered by the Act as it [sic] . . . is the person to whom the transaction which is the subject of this action is initially payable," (doc. 18 at ¶ 88), the amended complaint's allegations make it clear none of the defendants are the person to whom the transaction was initially payable, (*id.* at ¶¶ 1, 3, & 16). Although the amended complaint is not terribly clear on the relationship between the three defendants, they are all, at most, assignees of the original creditor. As a result, they could only be held liable for TILA violations in the original disclosure statement and not for any servicing violations subsequent to that document.

Mejia v. Ocwen Loan Servicing, LLC, Dist. Court, SD Florida September 1, 2016

https://scholar.google.com/scholar_case?case=10785210264708447293&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[No Cause of Action for Failure to Provide Telephone Number of Owner/Assignee]

Although the regulation does specify that a servicer must provide "contact information, including a telephone number, for further assistance," this same inclusion is conspicuously missing from the applicable provision specifying the information that must be included in response to a request for the identity of the owner or assignee of the loan. *See* 12 C.F.R. § 1024.36(d)(1)(i)-(ii). As such, the Court declines to read into the regulation a requirement that servicers must provide a phone number for the owner or assignee in order to satisfy the statutory requirements. Indeed, under the plain meaning of 12 C.F.R. § 1024.36(d), the regulation does not contain a requirement with respect to providing a phone number for the owner or assignee of a loan. Plaintiff has not cited to—nor has the Court identified—any legal authority stating otherwise. Although RESPA is a remedial statute, the Court need not construe it (or its implementing regulation) so liberally as to create a cause of action where none exists. Therefore, Plaintiff's claim with respect to the failure to provide a telephone number must fail, and Count I of the Complaint is dismissed with prejudice.

Bounasissi v. New York Life Insurance and Annuity Corporation, Dist. Court, D. New Jersey September 6, 2016

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[Reg X Foreclosure Stay claims can only be maintained against servicer not owner of loan]

By its own terms, Regulation X applies only to a loan servicer, or "a person responsible for the servicing of a federally related mortgage loan (including the person who makes or holds such loan if such person also services the loan)." 12 C.F.R. § 1024.2. "Servicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan . . . and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required. . . ." Id. Plaintiffs allege in the Amended Complaint that Defendant is "the owner and holder of the Note and Mortgage" and that another company, PHH Mortgage, was Defendant's loan servicer. (Am. Compl. ¶¶ 10 & 26.) Accordingly, Plaintiffs cannot maintain Counts One and Two of the Amended Complaint against this Defendant, and these counts will be dismissed.[3]

Stephens v. Capital One NA, Dist. Court, ND Illinois September 6, 2016
https://scholar.google.com/scholar_case?case=16485762441202987482&q=stephens+v+capital+one+na&hl=en&lr=lang_en&as_sdt=6,31&as_vis=1

[1024.41(f) Claim not Pled with enough specificity]

In ¶ 12 of the complaint, Plaintiffs claim that the mortgage was not in default from April 1, 2013 through June 30, 2013. The mortgage foreclosure complaint was filed on December 12, 2013. From June 30, 2013 until December 12, 2013, 164 days passed. In order to comply with 12 C.F.R. § 1024.41(f)(1), "a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent * * * *" The lapse in time presented here exceeds the statutory minimum laid out in 1024.41(f)(1).

Plaintiffs fail to allege any claim that they were in default for less than 120 days when Defendant filed the foreclosure complaint on December 12, 2013. Although detailed factual allegations are unnecessary, the complaint must have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). It is true that after the December 2013 complaint was filed, Defendant realized a mistake regarding the interest rates that admittedly allowed Plaintiffs to avoid defaulting on the loan during the April, 2013 — June, 2013 period. This mistake was communicated in a letter from Defendant to Plaintiffs on September 4, 2014. [1-1] at 26. However, the fact that Plaintiffs were not in default as of June 30, 2013 does not exclude the possibility of a later default that could meet RESPA's 120-day delinquency requirement. While Plaintiffs argue that 12 C.F.R. § 1024.41(f) has been violated, no facts have been provided that would allow the Court to draw any inferences that the mortgage was not more than 120 days in default at the time that the foreclosure complaint was filed. Accordingly, the Court finds that Plaintiffs have failed to state a claim under Fed. R. Civ. P. 12(b)(6).

Bray v. Green Tree Servicing, LLC, Dist. Court, ND Texas September 26, 2016

https://scholar.google.com/scholar_case?case=12301036638797080347&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Evidence of Actual Damages Insufficient]

To recover damages, Bray must present evidence that would enable a reasonable jury to find that he suffered "actual damages" as a result of Green Tree's RESPA violations. *See Obazee v. Bank of N.Y. Mellon,* 2015 WL 8479677, at *3 (N.D. Tex. Dec. 10, 2015) (Fitzwater, J.). The statute neither defines "actual damages" nor gives examples of what constitutes actual damages. Thus the court "look[s] to the plain meaning of the term." *Hernandez v. U.S. Bank,* N.A., 2013 WL 6840022, at *5 (N.D. Tex. Dec. 27, 2013) (O'Connor, J.) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 388 (1993)). "The term `actual damages' is synonymous with `compensatory damages,' which is defined as `such [damages] as will compensate the injured party for the injury sustained, and nothing more[.]'" *Hernandez,* 2013 WL 6840022, at *5 (quoting *Black's Law Dictionary* 390 (6th ed. 1990)). RESPA also provides for the recovery of "additional damages, as the court may allow, in the case of a pattern or practice of noncompliance . . . in an amount not to exceed $2,000." 12 U.S.C. § 2605(f)(1)(B)...

Each of these decisions relied on the fact that the plaintiff presented evidence of pecuniary damages, or adduced proof of time lost because it was spent away from the plaintiff's employment. *See Johnstone,* 173 F.Supp.2d at 816 ("Johnstone has stated a claim to recover for time spent on this case and her inconvenience, insofar as she can establish actual pecuniary loss."); *Guillermo,* 2015 WL 4572398, at *5 ("The Court concludes that Plaintiffs have sufficiently *alleged* that the . . . lost wages they incurred were the result of the alleged RESPA violations." (emphasis in original)); *Cortez,* 2000 WL 536666, at *12 ("Actual damages encompass compensation for any pecuniary loss including such things as time spent away from employment while preparing correspondence to the loan servicer."). But Bray has neither alleged nor produced any evidence that the 40 hours he spent working on this matter took him away from his employment and caused him to incur a pecuniary loss. Without evidence of such a pecuniary loss, a reasonable jury could not find that Bray suffered actual damages in the form of lost time. Green Tree is therefore entitled to summary judgment dismissing this basis for Bray's damages claim under RESPA

Second, Bray contends that he incurred $20 in damages spent preparing his application for loss mitigation. Bray has cited evidence in opposition to Green Tree's motion that is sufficient to raise a genuine issue of material fact.[5]Accordingly, the court denies Green Tree's motion in this respect.

Third, Bray contends that his credit score suffered as a result of Green Tree's failure to act, resulting in an inability to secure more favorable interest rates for financing. In his affidavit, Bray avers that the high interest rate he received "was due to my poor credit caused by [Green Tree's] derogatory credit reporting in connection to my mortgage loan which could have been brought current by the modification." P. App. 9. In support, he relies on the following evidence: excerpts of two credit reports, with a focus on the Green Tree entry, and evidence of a high interest rate (8.99%) that he received on an automobile loan. Bray contends that a comparison with the national average of 2.99%, and a letter from the financing company citing his poor credit history, establish his damages resulting from Green Tree's actions.

The court concludes that a reasonable jury could not find from this evidence that a Green Tree violation of RESPA caused Bray to suffer the damages he claims. Bray must introduce evidence that would enable a reasonable jury to find that his lower credit score was the result of Green Tree's failure to respond to his loan modification. The excerpts from the credit reports would not enable a reasonable jury to find that Green Tree's conduct was a cause of his low score. He submits no evidence that his credit score was higher before Green Tree reported his history. Nor does he produce any evidence that negative reports from other financial institutions did not cause him to receive a lower score. A reasonable jury could not find from this evidence that Bray's low score was a "result of" any violation of RESPA, as 12 U.S.C. § 2605(f) requires.

Diedrich v. Ocwen Loan Servicing, LLC, Court of Appeals, 7th Circuit October 6, 2016

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[RESPA claim has a statutory requirement of actual damages making Spokeo Analysis Unnecessary. Plaintiff's deposition testimony fails to connect injury to Old QWR Claim]

In order to survive dismissal for lack of standing, the plaintiffs' complaint must contain sufficient factual allegations of an injury resulting from the defendants' conduct, accepted as true, to state a claim for relief that is plausible on its face. *Aschroft v. Iqbal* 556 U.S. 662, 678 (2009), citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).[3] The alleged injury must be concrete and not just a procedural violation divorced from any harm. *Spokeo,* 136 S. Ct. at 1548.

The requirement of facial plausibility means "enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. "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." *Iqbal,* 556 U.S. at 678. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly,* 550 U.S. at 556 (internal citations omitted). Legal conclusions or bare and conclusory allegations, however, are insufficient to state a claim. *Iqbal,* 556 U.S. at 678, 680. Nevertheless, even with the heightened pleading requirements of *Iqbal* and *Twombly,* the pleading requirements to survive a challenge to a motion to dismiss remain low.

In this case, the injury requirement for standing overlaps with the injury requirement under the statute. In other words, as the court explained in *Spokeo,* the plaintiffs must have suffered a concrete injury in order to allege standing as a constitutional matter. *Spokeo,* 136 S. Ct. at 1548. And in this case, the statute does not grant statutory damages for bare procedural violations; it requires an actual injury. Consequently, there is no need to perform a separate *Spokeo* analysis to demonstrate whether a procedural injury alleged under the statute is sufficiently concrete to pass muster for Article III standing. The injury must be "actual," both for standing purposes and for purposes of the statute.

The RESPA section at issue, 12 U.S.C. § 2605, imposes a duty on loan servicers to respond to borrower inquiries.[4] The district court found that Ocwen "violated RESPA by failing to properly respond to the Diedrichs' qualified written request for information." Order at 19 (R. 59, p. 19). Ocwen does not dispute this portion of the court's finding. The district court, however, found that "the Diedrichs have failed to put forth evidence of damages stemming from the violation" *Id.* If they have no injury under the statute, then they fail the first part of the requirement for standing…

…Even taking all of the Diedrichs' facts as true, however, they simply have not alleged any causal connection between the injury they allege, including the claim for emotional damages, and Ocwen's failure to respond to the qualified written request for information, as opposed to the foreclosure on their loan, the loan modification process, or the litigation in general. In fact, Natalie testified that her negative credit reporting was due to the foreclosure action…

Stephanie Chu v. Fay Servicing, LLC, Dist. Court, ND California October 6, 2016

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[Actual Pecuniary Damages Not alleged on RESPA Claim]

Plaintiff does not address Defendants' challenge to her accounting and RESPA cause of action. Plaintiff's failure to respond shall be deemed consent to dismissal of this claim. *See Moore v. Apple, Inc.,* 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014)(finding that plaintiff's failure to address her UCL claim in her opposition to the motion to dismiss "constitutes abandonment of the claim"). Even considering Plaintiff's claim on the merits, Plaintiff has not alleged that she sent Fay a qualified written request; she alleges only that she requested a detailed accounting calculation and summary of the payoff balance on several occasions in 2015, but does not specify if any of these requests were sent to Fay, who only became the loan servicer in November 2015, or if these requests were only sent to Chase. (Compl. ¶ 30.) Plaintiff has also failed to plead pecuniary harm resulting from the alleged violation of RESPA, as a plaintiff bringing a cause of action for failure to respond to a qualified written request must allege actual damages. *See Williams v. Wells Fargo Bank, N.A., Inc.,* C 10-00399 JF (HRL), 2010 WL 1463521, at *8-9 (N.D. Cal. Apr. 13, 2010) (listing cases finding that conclusory allegations of damages were not sufficient); *Allen v. United Fin. Mortg. Corp.,* No. 09-2507 SC, 2010 WL 1135787, at *5 (N.D. Cal. Mar. 22, 2010) (plaintiff must "point to some colorable relationship between his injury and the actions or omissions that allegedly violated RESPA"). Because this is Plaintiff's first complaint, Plaintiff's RESPA claim is dismissed without prejudice. Future failures to address particular claims in opposition to a motion to dismiss will result in dismissal of that claim with prejudice.[3]

Farber v. Brock & Scott, LLC, Dist. Court, D. Maryland October 6, 2016

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[Foreclosure Mill is not a servicer therefore no liability under RESPA]

The Court therefore concludes that Brock & Scott, as a non-servicer, cannot be held liable for violations of 12 U.S.C. § 2605(k) or 12 C.F.R. § 1024.41. Count I will be dismissed...

Joussett v. Bank of America, NA, Dist. Court, ED Pennsylvania October 6, 2016

https://scholar.google.com/scholar_case?case=5410647467244215800&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[No Private Right of Action for Continuous Contact violation]

Section 1024.40's continuous-contact requirement, in plain terms, requires a servicer to be reasonably accessible and helpful to a delinquent borrower. Joussett claims "Defendants failed to provide prompt access to Plaintiff, his housing counselor and accountant documents and servicer personnel that are assigned to assist the borrower," in violation of § 1024.40. SAC ¶ 73. But this claim also fails for lack of a private right of action. As with § 1024.38, the CFPB crafted § 1024.40 so that it would not be privately enforceable, 78 Fed. Reg. at 10,698, and issued § 1024.40 pursuant to general rulemaking authority under section 19(a) of RESPA, *id.* at 10,808-09. Other courts have adopted the CFPB's interpretation. *See, e.g., Brown v. Bank of N.Y. Mellon,* No. 16-194, 2016 WL 2726645, at *2 (E.D. Va. May 9, 2016) ("[D]efendants correctly argue that . . . 1024.40 do[es] not explicitly provide a cause of action to private individuals."); *Schmidt v. PennyMac Loan Servs., LLC,* 106 F. Supp. 3d 859, 867 (E.D. Mich. 2015) ("[N]o private cause of action is available to enforce 12 C.F.R. § 1024.40."). I find them persuasive, and therefore Joussett's § 1024.40 claim will be dismissed without leave to amend.

Lage v. Ocwen Loan Servicing LLC, Court of Appeals, 11th Circuit October 7, 2016

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[Postponement of Sale does not then make claim Valid]

In other words, to determine whether the Borrowers' application was timely, we must ask whether, when the Borrowers submitted their complete loss mitigation application on January 27, more than 37 days remained before the foreclosure sale was scheduled to occur. *Id.* Because we determine timeliness based on the scheduled date of the foreclosure sale as of the date the Borrowers' complete application was received, it is irrelevant to our timeliness analysis that Ocwen subsequently rescheduled the foreclosure sale for a later date. *See id.*

The Borrowers argue that we must use the date when the property was actually sold at foreclosure to assess whether their application was timely…But this interpretation is inconsistent with the final clause of paragraph (b)(3), which plainly states that we must measure the proximity between the date of the foreclosure sale and the receipt of the complete loss mitigation application "as of the date a complete loss mitigation application is received." *Id.* We cannot adopt the Borrowers' interpretation

because it would render this phrase in the regulation meaningless. *See* *Glazer v. Reliance Standard Life Ins. Co.*, 524 F.3d 1241, 1245 (11th Cir. 2008) (applying rule of construction that a court must avoid an interpretation that would render portion of regulation "superfluous").

… the Bureau explained that "for purposes of § 1024.41, timelines based on the proximity of a foreclosure sale to the receipt of a complete loss mitigation application will be determined as of the date a complete loss mitigation application is received." *Id.* at 60397. The Bureau explained that this approach would "provide[] certainty to both servicers and borrowers" and "balance[] consumer protection and servicer needs." *Id.*

The Bureau considered and rejected a proposal that would have altered a borrower's rights and the servicer's corresponding duties if a foreclosure sale was rescheduled after receipt of a complete loss mitigation application—that is, the Bureau expressly disavowed the Borrowers' argument. The Bureau explained that "structuring the rule such that a borrower's rights may be added or removed because a foreclosure sale was moved or rescheduled would not provide the certainty or simplicity created by the proposed rule." *Id.* The Bureau thus made clear that an untimely application should not become timely simply because the servicer rescheduled a foreclosure sale.

The Bureau recognized that allowing a servicer's delay of a foreclosure sale to give a borrower greater rights may discourage servicers from rescheduling foreclosure sales and voluntarily considering untimely applications—actions which benefit borrowers. *See id.* (expressing "concern[] that if moving a foreclosure sale to a later date could trigger new protections, such a policy may provide a disincentive for a servicer to reschedule a foreclosure sale for a later date"). …The Bureau was concerned that the likely result of using the actual date of the foreclosure sale to assess timeliness would be that fewer borrowers would ultimately benefit from loss mitigation options.

Because the Borrowers' loss mitigation application was untimely, the protections of 12 C.F.R. § 1024.41(c) never were triggered. Accordingly, we find no error in the district court's grant of summary judgment to Ocwen on the Borrowers' loss mitigation claim.

Dale v. Selene Finance LP, Dist. Court, ND Ohio October 14, 2016

https://scholar.google.com/scholar_case?case=12513479404703755 21&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[1024.35 Does not Apply Retroactively]

The Sixth Circuit has not addressed whether § 1024.35 applies retroactively. Recently, however, the Sixth Circuit held that § 1024.41 does not apply retroactively. *Campbell, supra,* 611 F. App'x at 295-98. The *Campbell* court addressed a different section of Regulation X, and the facts are distinct from those here. Yet, the *Campbell*court's application of the *Fernandez-Vargas* test is relevant because the court analyzed Regulation X as a whole to reach its conclusion.

With respect to the first inquiry, the *Campbell* court concluded the regulation's effective date "reflects an intent not to apply it to conduct occurring prior to that date." *Id.* at 297. The court continued, "It seems unlikely that the CFPB intended to retroactively apply the rule after establishing

a later effective date in large part based on industry concerns that compliance prior to that date was not possible." *Id.*

…The *Campbell* court then analyzed the second step of the *Fernandez-Vargas* test and concluded retroactive application would both "increase a party's liability for past conduct, [and] impose new duties with respect to transactions already completed." *Id.* at 298 (internal citations and quotation marks omitted). Those "new legal consequences," according to the Sixth Circuit, should not attach to events occurring before the regulation's enactment. *Id.*

Simply put, the Sixth Circuit affirmed the district court's ruling against retroactive application because Regulation X included a specific effective date, and retroactive application would improperly impose new substantive duties on already completed foreclosures. *Id.* at 296-98; *see also Ray v. U.S. Bank Nat'l Ass'n,* 627 F. App'x 452, 456 (6th Cir. 2015) (affirming dismissal of a § 1024.41 claim because the regulation was not in effect at the time of the foreclosure sale of plaintiff's home and does not apply retroactively).

Applying the same analysis to this case, I hold § 1024.35 does not apply retroactively to Selene's designation, which occurred about seven months before § 1024.35's effective date…

Therefore, I conclude § 1024.35 does not apply retroactively.

Batton v. Wells Fargo Bank NA, Dist. Court, SD West Virginia October 18, 2016
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As discussed above, the plaintiffs stated that they suffered damages by being unable to understand their mortgage balance and the fees and other charges they have paid. *See* Am. Compl. 3. The plaintiffs did not allege that they had suffered any pecuniary loss as a result of the defendant's alleged RESPA violation, and the court FINDS that an "inability to understand" their mortgage documents does not constitute "actual damages" under RESPA. Accordingly, the court FINDS that the plaintiffs have failed to state a claim upon which relief can be granted.

Dixon v. Ocwen Loan Servicing, LLC, Dist. Court, ND Texas October 24, 2016

https://scholar.google.com/scholar_case?case=15366183493147700286&q=dixon+v+ocwen&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

[No Private Right of action under 1024.38]

The Dixons' RESPA claim against Ocwen depends on whether § 1024.38 creates a private right of action. Congress enacted RESPA to ensure that mortgage servicers provide timely and accurate information to borrowers. *See* 12 C.F.R. § 1024.38(b). Even though Congress granted the CFPB broad authority to promulgate regulations under RESPA, the CFPB's authority is not unlimited. *See* 12 U.S.C. § 2617(a); 12 C.F.R. § 1024.1. The CFPB may issue regulations, but it may not generate new private rights; it may only invoke existing statutory rights. See *Alexander v. Sandoval,* 532 U.S. 275, 291 (2001) (holding that a regulatory agency may not create a right that Congress has not); see also *Smith v. Nationstar Mortgage,* No. CV 15-13019, 2015 WL 7180473, at *4 (E.D. Mich. Nov. 6, 2015).

The Fifth Circuit has never determined whether § 1024.38 creates a private right of action; the weight of authority, however, is that it does not. See, *e.g., Smith,* 2015 WL 7180473 at *3-4 ("[T]he court holds that violations of § 1024.38 cannot support a private action."); *Joussett v. Bank of America, N.A.,* No. CV 15-6318, 2016 WL 5848845, at *5 (E.D. Pa. Oct. 6, 2016) ("[T]here is no private right of action to enforce § 1024.38. The CFPB explicitly crafted the regulation not to provide for private enforcement."); *Anderson v. Wells Fargo Home Mortgage,* No. CV 14-5013 ADM/JSM, 2016 WL 755615, at *7 (D. Minn. Feb. 25, 2016) ("[T]he [plaintiff's] claim fails because no private right of action was created by [§ 1024.38]."); *Paz v. Seterus, Inc.,* No. CV 14-62513, 2016 WL 3948053, at *5 (S.D. Fla. Apr. 28, 2016) ("Borrowers have no private right of action under § 1024.38"). This court agrees with the conclusions of the foregoing authorities and holds that there is no private right of action under § 1024.38. Thus, the Dixons' claim under § 1024.38 is dismissed with prejudice.

Marte v. Deutsche Bank National Trust Company Dist Court D. New Jersey, October 26, 2016

https://scholar.google.com/scholar_case?case=13999748041962350154&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The doctrine of res judicata bars "relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). Res judicata applies when there has been "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." Morgan v. Covington Tp., 648 F.3d 172, 177 (3d Cir. 2011)(citations omitted). The doctrine "bars not only claims that were brought in a previous action, but also claims that could have been brought." In re Mullarkey, 536 F.3d at 225.

Res judicata precludes all of Plaintiff's claims against Deutsche Bank. First, the March 11, 2015 judgment in the Foreclosure Action was a final judgment on the merits. See Chirch Cert. Ex. H.[5] Second, Defendant Deutsche Bank was the plaintiff in the Foreclosure Action. See id. Third, this suit is based on the same cause of action that was at issue in the Foreclosure Action, specifically the foreclosure of Plaintiff's Mortgage. See Perino v. Fed. Nat. Mortgage Ass'n, No. 2:15-CV-01063 SDW, 2015 WL 4743950, at *3 (D.N.J. Aug. 11, 2015) (finding the plaintiff's suit, which alleged claims identical to those Plaintiff asserts here, was based on the same cause of action at issue in a prior foreclosure action). Accordingly, Plaintiff may not proceed on her claims against Deutsche Bank. See id.

Additionally, "[r]es judicata will apply if a party in the second action is in privity with a party in the first action." Brookshire Equities, LLC v. Montaquiza, 346 N.J. Super. 310, 319 (Super. Ct. App. Div. 2002). By virtue of the assignor-assignee relationship, MERS is in privity with Deutsche Bank,[6] and the doctrine of res judicata will bar Plaintiff's claims against MERS.[7] In the interest of completeness, the Court will analyze Plaintiff's claims against MERS pursuant to Federal Rule of Civil Procedure 12(b)(6).

Ray v. Caliber Home Loans, Inc. Dist. Court, SD Ohio, November 1, 2016

https://scholar.google.com/scholar_case?case=17841131324941372559&q=ray+v+caliber&hl=en&as_sdt=3,36&as_ylo=2016

Nationstar's theory is that the fraud claim was a compulsory counterclaim in the Foreclosure Case but was not raised there and is accordingly barred by res judicata. An affirmative defense such as res

judicata may properly be raised in a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Pierce v. County of Oakland,* 652 F.2d 671 (6th Cir. 1981); *Lundblad v. Celeste,* 874 F.2d 1097 (6th Cir. 1989).

This Court has recognized that the relevant Ohio claim preclusion doctrine is set forth in *Grava*, 73 Ohio St. 3d 379:

In Ohio, a party seeking to invoke the doctrine of *res judicata* must prove four elements: (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action.

Ater v. Follrod, 238 F. Supp. 2d 928, 937 (S.D. Ohio 2002)(Holschuh, J.), *quoting In re Fordu,* 201 F.3d 693, 703-04 (6th Cir. 1999)(construing Ohio law).

There is no doubt that the facts on which Plaintiffs rely for their fraud claim arise out of the same transaction as the Foreclosure Case. In their Statement of Facts in their Opposition, Plaintiffs rely on acts of Nationstar after it began servicing the loan and which, according to Plaintiffs, played a significant part in bringing about the foreclosure (ECF No. 22, PageID 155-56).

Plaintiffs also argue they "were not aware of the complete extent of facts supporting their fraud claim at the time of the original state action." (Opposition, ECF No. 22, PageID 158.) But awareness of all the facts necessary to support a claim at the time for filing a compulsory counterclaim is not the appropriate test. The Ohio Rules of Civil Procedure, like the cognate Federal Rules, assume the parties to litigation will discover significant amounts of evidence supporting (or negating) their claims. To put it another way, the doctrine of res judicata would be meaningless if its operation could be barred by showing the party who did not file the counterclaim now had more facts than at the time the counterclaim was due to be filed.

Clark v. HSBS Bank USA Court of Appeals, 11th Circuit, November 8, 2016

https://scholar.google.com/scholar_case?case=14773306072285144213&q=clark+v.+hsbc&hl=en&as_sdt=3,36

Clark submitted loan modification paperwork on March 25, 2015, only 13 days before the foreclosure sale scheduled for April 7, 2015. Thus, Clark's loan modification application was submitted outside Regulation X's prescribed timelines for both complete and incomplete applications, and therefore, Nationstar was not required to inform Clark of her mitigation options, if any, or stop the foreclosure process. See 12 C.F.R. § 1024.41(b)(2)(i), (c)(1), (g).

Smith v. Ocwen Loan Servicing, LLC Dist. Court D. Maryland, November 16, 2016

https://scholar.google.com/scholar_case?case=14812265858081424564&q=smith+v+ocwen+financial&hl=en&as_sdt=3,36&as_ylo=2016

Moreover, even assuming the Smiths have not abandoned Count I, the Smiths fail to state a claim upon which relief may be granted. Under 12 C.F.R. § 1024.41(b)(2)(i), if a servicer receives a loss

mitigation application forty-five days or more before a foreclosure sale, the servicer must, within five days of receiving the application, notify the borrower in writing and state whether the application is complete. The Smiths allege Ocwen failed to acknowledge receipt of the Smiths' application within five days, but the Smiths do not allege when they submitted their application. The Smiths merely state that on May 28, 2014, Ocwen responded to the Smiths' "recently-submitted loan modification agreement." (Compl. ¶ 62). Without a date of submission, the Court cannot reasonably infer that Ocwen violated the five-day deadline.

The Smiths' remaining allegations fail to state a claim because they utterly belie exhibits from which the Smiths quote in their Complaint. Ocwen presents a May 23, 2014 letter addressed to the Smiths in which Ocwen acknowledged receipt of the Smiths' application and stated their "application [was] complete." (ECF No. 11-4 at 4). In a letter dated June 3, 2014 — just six days after the Smiths allege Ocwenacknowledged receiving the Smiths' application — Ocwen indicated that after evaluating the Smiths "for all loss mitigation options available, including, but not limited to, the Home Affordable Modification Program (`HAMP')," Ocwen was unable to offer any loan modifications. (Compl. ¶ 63). The letter further explained that the reason for the denial was that Ocwen's calculations showed that the Smiths were still able to pay the current mortgage using "income, cash reserves or other assets." (Id.). The May 23 and June 3, 2014 letters trump the Smiths' directly contradictory allegations that Ocwen (1) did not inform the Smiths whether there application was complete, (2) did not evaluate the Smiths' application for all available loss-mitigation options and provide notice of such options within thirty days of receiving the application, and (3) did not provide the Smiths with specific reasons for denial of their application. See RaceRedi Motorsports, 640 F.Supp.2d at 664.

Accordingly, because the Smiths abandon their 12 C.F.R. § 1024.41 claim and their allegations fail to state a claim that Ocwen violated this regulation, the Court will grant Ocwen's Motion as to Count I.

McNeal v. JP Morgan Chase Bank NA,Dist. Court ND Illinois, November 17, 2016

https://scholar.google.com/scholar_case?case=2139458259847456718&q=mcneal+v+jp+morgan&hl=en&as_sdt=3,36&as_ylo=2016

McNeal fails to state a RESPA claim against JPMorgan Chase Bank. Section 2605(e) requires a loan servicer to promptly respond to a borrower's "qualified written request" regarding an account error or request for information. However, § 2605(f) "indicates that the statute was intended to redress actual damages caused by the failure of the loan servicer to provide information to the borrower." Diedrich v. Ocwen Loan Servicing, LLC, No. 15-2573, 2016 WL 5852453, at *4 (7th Cir. Oct. 6, 2016). For these reasons, actual damages are an essential element of a RESPA claim. Id. at *5-7. McNeal fails to allege any actual damages, only alleging that she is entitled to statutory damages and her litigation expenses for the instant action. [1] at 19. But "simply having to file suit" as a result of a loan servicer's alleged failure to respond to a qualified written request in violation of RESPA "does not suffice as a harm warranting actual damages." Diedrich, 2016 WL 5852453, at *6 (marks omitted). McNeal's RESPA claim (based on either letter) fails to state a claim because she does not allege that JPMorgan Chase Bank's alleged failure to comply with RESPA caused her actual damages.

Prudencio v. Capital One, NA Dist. Court, D. Maryland, November 28, 2016

https://scholar.google.com/scholar_case?case=12891522372511582004&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The state court foreclosure action and the present case relate to the same transaction or occurrence: the $272,000 Note and Deed of Trust on the Property and the foreclosure action that resulted when Plaintiffs failed to make payments. Therefore, all of Plaintiffs' present claims could have been raised in the foreclosure action. *See* *Bullock v. Ocwen Loan Servicing, LLC,* No. PJM-14-3836, 2015 WL 5008773, at *5 (D. Md. Aug. 20, 2015) (finding that plaintiff's FDCPA and RESPA "statutory claims [we]re premised on [plaintiff's] contention that the Defendants lacked the legal authority to enforce the note and deed of trust" and therefore "the statutory claims ar[o]se out of the same series of transactions" as the state foreclosure action and were barred under *res judicata*); *Pitkin v. Ocwen Fin. Corp.,* No. 12-00573-AW, 2012 WL 5986480, at *3 (D. Md. Nov. 27, 2012) (dismissing plaintiff's RICO claim under the doctrine of *res judicata,* as "claim arose out of the same series of transactions as the claims in the state [foreclosure] proceeding"); *McCreary v. Benificial Mortg. Co. of Maryland,* No. AW-11-CV-01674, 2011 WL 4985437, at *4 (D. Md. Oct. 18, 2011) (dismissing on *res judicata* grounds plaintiff's claims, *inter alia,* for fraud, fraudulent misrepresentation, intentional infliction of emotional distress, and gross negligence, as "Plaintiff had a fair opportunity to present claims against Defendants during the prior foreclosure proceedings"); *Jones,* 2011 WL 382371, at *5; *Anyanwutaku,* 85 F. Supp. 2d at 571. Thus, Defendants have satisfied the second element of claim preclusion.

Quattlebaum v. Bank of America NA Dist. Court D. Maryland, December 7, 2016

https://scholar.google.com/scholar_case?case=7302984657388746297&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

To the extent that Quattlebaum raises new claims in this case, those claims are also precluded because they arise from the same series of transactions and core of operative facts at issue in *Quattlebaum I,* such that Quattlebaum could have raised them in the earlier action. For this reason, it does not matter that the causes of action in *Quattlebaum I* were grounded in RESPA, TILA, the Uniform Commercial Code, and Maryland common law, while the present case is brought under the Maryland Mortgage Fraud Protection Act, the Bankruptcy Code, the National Housing Act, and the FDCPA. "The determination of whether two suits arise out of the same cause of action . . . does not turn on whether the claims asserted are identical. Rather, it turns on whether the suits and the claims asserted therein arise out of the same transaction or series of transactions or the same core of operative facts." *Pueschel,* 369 F.3d at 355 (internal citations and quotation marks omitted). Although Quattlebaum has asserted claims under some different state and federal statutes than those relied upon *Quattlebaum I,* all of the new claims arise from the same transactions and core of facts relating to the mortgage, bankruptcy, and loan modification and thus could have been asserted in *Quattlebaum I*. Finally, Quattlebaum provides no basis to conclude that any new information asserted in the Complaint was unavailable to him at the time of the first lawsuit. Consequently, his claims are barred. *See* *Covert v. LVNV Funding, LLC,* 779 F.3d 242, 248 (4th Cir. 2015).

In Re Wiggins v. Hudson City Savings Bank, Bankr. Court, D. New Jersey, December 6, 2016

https://scholar.google.com/scholar_case?case=9285186692614862670&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Count Three of Plaintiffs' Amended Complaint also alleges that Defendants have failed to establish policies and procedures reasonably designed to ensure the provision of accurate information regarding loss mitigation options and the proper evaluation of individual borrowers for these options. Plaintiffs allege that this failure violates 12 C.F.R. § 1024.38. (Amended Complaint, ¶¶ 62, 67). This claim was also raised for the first time in the proposed Amended Complaint.

24. RESPA directs mortgage servicers to maintain policies and procedures reasonably designed to provide accurate and timely information to borrowers about their loans, including information related to loss mitigation options. *See* 12 C.F.R. § 1024.38(b)(2). The question here is whether mortgage servicers should be subject to claims brought by borrowers under 12 C.F.R. § 1024.38 or is the oversight of the Consumer Financial Protection Bureau ("Bureau") enough to incentivize mortgage servicers to comply.

25. During the rulemaking process, the Bureau found that "supervision and enforcement by the Bureau and other Federal regulators for compliance with, and violations of, 12 C.F.R. § 1024.38, respectively, would provide robust consumer protection" and determined that no private right of action exists for borrowers. *See* 78 Fed. Reg. 10696, 10778-79 (Feb. 14, 2013).

26. The courts agree that only the Bureau has the power to enforce 12 C.F.R. § 1024.38.[2]

27. For these reasons, the Court finds that Plaintiffs' claims in the Third Count of the proposed Amended Complaint that are based on violations of 12 C.F.R. § 1024.38 would be futile.

Tripicchio v. Seterus Inc., Dist. Court, ND Illinois, December 20, 2016

https://scholar.google.com/scholar_case?case=4785368095260430865&q=tripicchio&hl=en&as_sdt=6,36&as_ylo=2016

As an initial matter, this Court notes that the Tripicchios have failed to establish how issuing a notice of sale constitutes either "mov[ing] for a foreclosure judgment" or "conduct[ing] a foreclosure sale" as those terms are used within the regulation. The CFPB's official interpretation of the regulation allows a servicer to proceed with an already-pending foreclosure process so long as the steps taken, including issuing required publications, do not result in the issuance of a foreclosure judgment or the conduct of a foreclosure sale. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696-01, at 10897-98 (Feb. 14, 2013). The Tripicchios offer no authority to support their assertion that the notice of sale was all that was needed to bring about a foreclosure sale.

Moreover, as previously discussed, the evidence attached to the complaint shows that the Tripicchios failed to perform under the TPP. Thus, Seterus was not prohibited from proceeding with the foreclosure sale in light of section 1024.41(g)(3).

Rodrigues v. Wells Fargo Bank NA, Dist. Court D. New Jersey, December 23, 2016

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For the reasons stated in Section III.B. 1, immediately preceding, the entire controversy doctrine contains no requirement that the causes of action be legally identical. Indeed, quite the opposite. Because the factual circumstances and transactions giving rise to both actions are the same, the necessary connection is present. The current claims are precluded under the claims component of the entire controversy doctrine.

Three of the defendants in this Federal Action seem to be identical to the defendants in the State Action. Also named in this Federal Action are three additional defendants: MERS, WMC, and GE. Their alleged involvement, however, is tightly bound to the parties and transactions that are at issue in both the State and Federal actions. WMC was the original mortgagee on the 2005 mortgage. The Complaint alleges that WMC is now defunct, and that its parent corporation is GE. (Cplt. ¶ 5) MERS is alleged to be the nominee for the beneficial owner of the original 2005 mortgage and is named as the entity that released that mortgage in connection with the refinancing in 2007. (Cplt. ¶¶ 27-29) These parties are part and parcel of the mortgages and the mortgage transactions that Mr. Rodrigues challenged and attempted to invalidate in the State Action.

For all these reasons, then, the claims in this Federal Action, as against all six defendants, are barred by the entire controversy doctrine. The motion to dismiss on Rule 12(b)(6) grounds is therefore granted

Suszko v. Specialized Loan Servicing, LLC Dist. Court M.D. Florida Tampa Division, December 27, 2016

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Federal Rule of Civil Procedure 12(f) provides that the Court may order "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" be stricken from a pleading. Fed. R. Civ. P. 12(f). In evaluating a motion to strike, the court must treat all well pleaded facts as admitted and cannot consider matters beyond the pleadings. *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 683 (M.D. Fla. 2002). A motion to strike will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties. *Harvey v. Home Depot U.S.A., Inc.*, No. 8:05-CV-936-T-24EAJ, 2005 WL 1421170, at *1 (M.D. Fla. June 17, 2005) (citing *Scelta v. Delicatessen Support Services, Inc.*, 57 F. Supp. 2d 1327, 1347 (M.D. Fla.1997)).

"An affirmative defense will only be stricken . . . if the defense is insufficient as a matter of law." *Microsoft Corp.*, 211 F.R.D. at 683. An affirmative defense is insufficient as a matter of law only if: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law. *Harvey*, 8:05-cv-936-T-24EAJ, 2005 WL 1421170, at *1. To the extent that a defense puts into issue relevant and substantial legal and factual questions, it is sufficient and may survive a motion to strike, particularly when there is no showing of prejudice to the movant. *Id.* (citing *Reyher v. Trans World Airlines, Inc.*, 881 F. Supp. 574, 576 (M.D. Fla.1995)).

Plaintiff argues Specialty Loan's Affirmative Defenses Nos. 1-4 should be stricken because they lack specificity and factual support. (Doc. 46, pp. 2-3). District courts within the Eleventh Circuit have taken conflicting positions on the issue of how much factual support must be pleaded within affirmative defenses, and the Eleventh Circuit has not yet resolved these conflicting positions. This Court agrees with the courts that do not apply the heightened pleading standard set forth in *Bell Atlantic Corp. v. Twombley,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), to affirmative defenses. The persuasive reasoning for this position is "based upon the rationale that there is a difference in the language of Rule 8(a)—which deals with the pleading requirements for complaints—and Rule 8(b) and (c), which deal with the pleading requirements for defenses. *Desilva v. SunTrust Bank,* No. 8:15-cv-1045-T-24TGW, 2015 WL 5638073, at *1 (M.D. Fla. Sept. 23, 2015) (quoting *Smith v. Wal-Mart Stores, Inc.,* No. 1:11-cv-226-MP-GRJ, 2012 WL 2377840, at *2 (N.D. Fla. June 25, 2012).

As explained more specifically by one court:

Although Rule 8(a)(2) requires a complaint to include a "short and plain statement of the claim *showing* that the pleader is entitled to relief," Rules 8(b)(1)(A) and 8(c)(1) only require that a party *states* his defenses. The Supreme Court in *Twombly* and *Iqbal* relied on the specific language of Rule 8(a)(2), which requires a "showing" of entitlement to relief, when it established the plausibility requirement for complaints. Thus, it follows that the plausibility requirement [for complaints] should not apply to affirmative defenses because the language in the rule governing affirmative defenses notably lacks any "showing" requirement. Secondly, requiring affirmative defenses to contain the factual specificity needed to meet a plausibility standard would be unfair to defendants, who lack time to conduct investigations within the twenty-one day period to respond to complaints.

Id. (emphasis in original); *see also Woodman v. Bravo Brio Restaurant Group, Inc.,* 6:14-cv-2025-Orl-40TBS, 2015 WL 1836941, at * 1 (M.D. Fla. April 21, 2015).

Santos v. Ocwen Loan Servicing, LLC Dist. Court ND California, December 28, 2016

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Here, Santos alleges two instances in which the defendants failed to respond to QWRs he sent to them. Two violations, however, do not constitute a "standard or routine way of operating," and do not make up a pattern or practice. *Frase v. U.S. Bank, N.A.,* No. C11-1293JLR, 2012 WL 1658400, at *6 (W.D. Wash. May 11, 2012) (holding that the failure to respond to two QWRS did not "constitute a `pattern or practice' sufficient to warrant the award of statutory damages . . . ."); *Espinoza v. Recontrust Co., N.A.,* No. 09-CV-1687-IEG (RBB), 2010 WL 2775753, at *4 (S.D. Cal. July 13, 2010) ("A failure to respond to two requests does not state `a pattern or practice of noncompliance.'"); *McLean v. GMAC Mortg. Corp.,* 595 F. Supp. 2d 1360, 1365 (S.D. Fla. 2009) (holding that two violations did not constitute a pattern or practice); *In re Maxwell,* 281 B.R. 101, 123 (D. Mass. 2002) ("the Court is unpersuaded that Debtor has established a `pattern of practice' for purposes of RESPA's statutory damage provision by showing just two violations.").

Santos thus fails to allege sufficient facts to support a claim for either actual or statutory damages, and, as a result, the court grants the motion to dismiss the RESPA claim.

Verthody v. National Default Services Corporation Dist. Court ND California, December 28, 2016

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Nevertheless, the court is not persuaded that Plaintiffs have stated a claim for relief under 1024.41(g). The regulation, by its plain language, prohibits a servicer from "mov[ing] for foreclosure judgment or order of sale, or conduct[ing] a foreclosure sale." It does not prohibit servicers from taking steps to prepare for a foreclosure sale. The Consumer Financial Protection Bureau's comments on the regulation support this reading:

"Nothing in § 1024.41(g) prevents a servicer from proceeding with the foreclosure process, including any publication, arbitration, or mediation requirements established by applicable law, when the first notice or filing for a foreclosure proceeding occurred before a servicer receives a complete loss mitigation application so long as such steps in the foreclosure process do not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale, in violation of § 1024.41."

78 Fed. Reg. 10696, 10897-90 (Feb. 14, 2013). These comments suggest that Section 1024.41(g) is concerned, in the non-judicial foreclosure context, with the actual "conduct of a foreclosure sale," not the preceding steps, as long as these steps do not ultimately cause the foreclosure sale. The *Fox* court found that a borrower stated a claim under 1024.41(g) *despite* this comment where the servicer had been aggressively moving to complete the foreclosure sale. But no such facts are alleged here. Additionally, *Katica* is not persuasive, as the court in that case ultimately declined to entertain the relevant argument because it was made for the first time in the defendant's reply brief.

Plaintiffs have not currently alleged sufficient facts to suggest that Defendants' actions constitute the "conduct of a foreclosure sale" pursuant to Section 1024.41(g), and they thus fail to state a claim under that section. As a result, the court grants the motion to dismiss this claim without prejudice (as it may ultimately become ripe, or Plaintiffs may allege additional facts suggesting that Defendants' actions could be considered "conduct of a foreclosure sale.").

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Decker v. Servis One, Inc. Dist Court W.D. Texas, Austin Division, Janaury 5, 2017

https://scholar.google.com/scholar_case?case=7846206653062206033&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Plaintiff has filed two motions to strike Defendant's evidence offered in support of the Motion for Summary Judgment filed by BSI and MRH. (Dkts. 39, 40). In her first Motion, Plaintiff argues that the Court must strike the affidavits of April Smith and Becky Howell because these witnesses were not identified in Defendants' Rule 26 disclosures. (*See* Dkt. 39). Because these affidavits serve to authenticate the attached exhibits, Plaintiff argues that the exhibits also must be excluded. In her second Motion, Plaintiff objects to a letter sent from CMI to Plaintiff notifying her of a delinquency in her payments. (*See* Dkt. 40). Plaintiff argues that the document is hearsay not within any exception.

Defendants concede that they did not identify April Smith or Becky Howell in their initial disclosures. However, they point out that both witnesses were disclosed to Plaintiff long ago in prior motions. Considering that fact, the importance of the evidence, and the lack of prejudice to Plaintiff, the Court finds that the witnesses' omission from Defendants' disclosures was harmless. *See Bitterroot Holdings, LLC v. MTGLQ Inv'rs, L.P.,* 648 Fed. App'x 414 (5th Cir. 2016) (holding that district court did not abuse its discretion in admitting evidence omitted from Rule 26 disclosures where evidence was central to the case and had been attached to earlier motion).

In her second Motion, Plaintiff argues that the notice from CMI is offered by a co-defendant and is not otherwise authenticated, thus making it inadmissible hearsay. As Defendants point out, however, this document was authenticated by virtue of Plaintiff's production of it in discovery. *See Hannon v. Kiwi Servs.,* No. 3:10-CV-1382-K-BH, 2011 WL 7052795, at *2 (N.D. Tex. 2011) (citing *F.T.C. v. Hughes,* 710 F. Supp. 1520, 1523 (N.D. Tex. 1989) ("The FTC need not produce live witness testimony to demonstrate that a document is a business record; documentary evidence, affidavits, party admission, and other materials will suffice.").

Plaintiff's Motions to Strike are DENIED. (Dkts. 39, 40).

Garrision v. Caliber Home Loans, Inc. Dist. Court, MD Florida, January 9, 2017

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RESPA obligates furnishers of information to promptly (not later than 30 days after receipt of a qualified written request ("QWR")): (1) "make appropriate corrections in the account of the borrower" 12 U.S.C. § 2605(e)(2)(A); or (2) "after conducting an investigation, provide the borrower with a written explanation or clarification" ("RESPA Response"), which provides either—(a) "a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer" (*id.* § 2605(e)(2)(B)(i)); or (b) "information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer" (*id.* § 2605(e)(2)(B)(ii)). In addition, for 60 days after receipt of a QWR that relates "to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment . . . to any [CRA]." *See id.* § 2605(e) (3). In Count Five, Plaintiff claims that Defendant did not fulfill these RESPA obligations.

Defendant argues that the Court should dismiss Count Five because Plaintiff did not properly allege that Defendant's purported RESPA violations caused her "actual harm." (Doc. 19, p. 10 (asserting that Count Five "must be dismissed for failure to put forth more than conclusory allegations . . . .").) Plaintiff provided no response to this argument; instead, her defense of Count Five confusingly references Plaintiff's "contractual cure and reinstatement rights and her statutory redemption rights." (*See* Doc. 21, pp. 16-17.)

Like Counts Three and Four, Count Five simply parrots certain statutory provisions and indiscriminately incorporates by reference paragraphs 1 through 58. (*See* Doc. 1, ¶¶ 109-18.) In the context of such obtuse allegations, Plaintiff's responses to Defendant's RESPA Argument make no sense. (*See* Doc. 21, pp. 16-17.) In contrast, Defendant's argument that Count Five is conclusory and insufficiently pled is well-founded. Thus, Defendant's request to dismiss Count Five is due to be granted.

RESPA requires mortgage servicers to correct account errors and disclose account information when a borrower sends a written request for information. In 2011 Perronand Jackson sent two such letters accusing Chase of erroneously paying the wrong homeowner's insurer using $1,422 from their escrow account. The mistake was their own fault; they had switched insurers without telling Chase. When the bank learned of the change, it promptly paid the new insurer and informed the couple that their old insurer would send a refund check. The bank also told them to forward the refund check in order to replenish the depleted escrow.

They didn't. When the refund came, they pocketed the money instead. So the bank adjusted their monthly mortgage payment to make up the shortfall. When the couple refused to pay the higher amount, the mortgage went into default. Instead of curing, they sent Chase two letters requesting information under RESPA and demanding that *the bank* reimburse their escrow. In response Chase sent a complete account history, including a detailed escrow statement.

The couple then sued Chase claiming that its response was inadequate under RESPA and caused more than $300,000 in damages—including the loss of their marriage. They tacked on a claim for breach of the implied covenant of good faith and fair dealing. The district judge entered summary judgment for Chase.

We affirm. Chase's response almost perfectly complied with its RESPA duties. To the extent that any requested information was missing, Perron and Jackson suffered no actual damages and thus have no viable claim. Nor did Chase breach the duty of good faith and fair dealing, assuming that Indiana would recognize the implied covenant in this context.

Sutton v. CitMortgage, Inc., Dist. Court SD New York, January 12, 2017

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In short, the Court agrees with Defendant that RESPA (through Regulation X) regulates many aspects of loss mitigation practices, but does not regulate the correctness of a loss mitigation decision, and certainly does not encompass errors in loss mitigation decisions within the catch-all provision in the definition of "covered errors." (*See* Def. Reply 2). For all of these reasons, the Court finds that Plaintiff has failed to allege an actionable claim under RESPA.[14]

Mader v. Wells Fargo Bank NA , Dist. Court D. New Hampshire, January 17, 2017

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The Maders appear to be asserting a claim under 12 CFR § 1024.41, a regulation under RESPA requiring servicers to follow certain procedures in evaluating a borrower's loss mitigation application. In certain circumstances, a servicer is required to evaluate a borrower's complete loss mitigation application for all available loss mitigation options. However, the provisions of § 1024.41 do not require a servicer to offer a borrower a loan modification. 12 CFR § 1024.41(a).

The Maders allege that they sent Wells Fargo a letter of hardship and a complete set of financial records in their loan modification application. Although the Maders assert that Wells Fargo failed to

respond to their request to avoid foreclosure, the Maders acknowledge that Wells Fargo eventually denied their modification application. See doc. no. 11 at ¶ 17. Thus, the Maders' amended complaint establishes that Wells Fargo did in fact respond to the Maders' request to avoid foreclosure and evaluate their modification application. While the Maders were dissatisfied with Wells Fargo's ultimate decision to deny their application, RESPA does not require Wells Fargo to grant them a modification. Therefore, the Maders have not alleged a plausible claim under RESPA. Accordingly, Count VI is dismissed.

Marais v. JP Morgan Chase Bank NA, Court of Appeals 6th Circuit, January 20, 2017

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Rule 13(a) provides, in relevant part, that "[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." The Rule does not—and could not—require a pleader to state a counterclaim that the pleader does not yet possess. *See, e.g., Davenport v. Richfood,* No. 3:07-CV-595, 2008 U.S. Dist. LEXIS 51297, at *15 (E.D. Va., June 13, 2008) ("By definition, an after-acquired counterclaim does not exist at the time of serving of the original answer and counterclaim. Therefore, an after-acquired claim is not considered a compulsory counterclaim under Rule 13(a), and failure to introduce it will not bar its assertion in a later lawsuit."). Further, a claim for foreclosure requires that the lender be entitled to enforce both the note and the mortgage. *See Deutsche Bank Nat'l Tr. Co. v. Holden,* 60 N.E.3d 1243, 1250 (Ohio 2016).

Plaintiff did not allege any facts showing that Defendant was entitled to enforce the note and mortgage against her at the time of its answer to the RESPA claim in 2011, nor that she was provided the requisite notice of default and acceleration that is needed to entitle Defendant to bring a claim for foreclosure. Ohio law is clear that requirements of default notice and acceleration in a mortgage are contractual conditions precedent to a claim for foreclosure. *See, e.g., U.S. Bank, N.A. v. Stallman,* No. 102732, 2016 Ohio App. LEXIS 12, ¶ 21 (Ohio Ct. App. Jan. 7, 2016); *Nat'l City Mortg. Co. v. Richards,* 913 N.E.2d 1007, 1013 (Ohio Ct. App. 2009). In fact, Plaintiff expressly denied in her answer to the Foreclosure Complaint that Defendant had complied with the conditions precedent necessary for Defendant to bring a proper foreclosure claim. *See* Marais Answer to Foreclosure Complaint, ¶¶ 7-8 (Aug. 1, 2013).

Coury v. Caliber Home Loans, Inc. Dist. Court ND California February 6, 2017

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Coury now abandons his claim Caliber violated 12 C.F.R. § 1024.41(c) and instead alleges a violation of section 1024.41(b)(1). As an initial matter, this new claim exceeds the scope of leave to amend granted in the prior order. *See* Order at 11. Previously, Coury was granted leave to amend "Claim 6" of the FAC, which was a claim for violation of section 1024.41(c). *See* FAC ¶ 78.

Regardless, Coury fails to state a claim for violation of 12 C.F.R. § 1024.41(b)(1). That section defines the term "complete loss mitigation application…Coury's suggestion that the final sentence of

subsection (b)(1) can be read as a regulation wholly separate from those that follow is untenable in light of the regulation's structure.

By its plain language, subsection (b)(1) defines a "complete loss mitigation application" for the requirements that follow, not as a distinct requirement in and of itself. The legislative history supports this conclusion. Proposed regulations from 2012 note "reasonable diligence" could include "notifying the borrower within five days of receiving an incomplete application," 2012 RESPA (Regulation X) Mortgage Servicing Proposal, 77 FR 57200-01, 2012 WL 4049789, which is a requirement set out in § 1024.41(b)(2)(i). Moreover, Coury himself seems to tie the "reasonable diligence" definition to the other requirements of § 1024.41(b). To show Caliber did not exercise reasonable diligence, Coury alleges he "was never sent written acknowledgement [sic] that his application materials were received. . ." SAC ¶ 46. Further, Coury claims Caliber failed to inform him "of applicable loss mitigation application deadlines in order to complete the loss mitigation review process." *Id.* These allegations echo the requirements of § 1024.41(b)(2).

Coury has failed to allege that he submitted his application with the timeline prescribed by § 1024.41(b). Subsection (b)'s requirements are triggered only when "a servicer receives a loss mitigation application 45 days or more before a foreclosure sale." 12 C.F.R. § 1024.41(b)(2)(i). Caliber had received nothing from Coury 45 days before the scheduled foreclosure sale. Caliber had only begun servicing Coury's mortgage 49 days before the scheduled foreclosure sale. Coury'sattempt to read the time requirements out of 12 C.F.R. § 1024.41(b), while retaining its standard for reasonable diligence, is unpersuasive. Twice now, Coury has tried and failed to state a claim under RESPA. It seems he cannot do so. Consequently, his claim is dismissed without leave to amend.

Morgan v. Carrington Mortgage Services, Dist. Court ED Oklahoma, February 6, 2017

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It is clear to this court, as it was to the Grossman court, that Plaintiff's First Amended Complaint is comprised of claims and issues that were actually decided or could have been decided in the foreclosure action. Id. at *4. The foreclosure action in state court was filed on October 9, 2012. Plaintiff was represented by counsel in the foreclosure action and filed defenses and counterclaims. Plaintiff was notified that Carrington was her new mortgage servicer in August of 2014. Docket No. 62, Exh. 1, p. 65. The District Court of Muskogee County issued its final judgment on the merits on January 19, 2016. In the span of more than three years during the foreclosure action, Plaintiff had a full and fair opportunity to litigate the claims she now brings in this court. In fact, Plaintiff did raise many of the same arguments she raises here in the state-court action, including that BANA failed to follow proper loss mitigation procedures, failed to follow federal laws and regulations that govern mortgage loan servicers and failed to acknowledge her request for mortgage assistance. See id. at 36-37 and 66-72. Like the plaintiff in Grossman, Plaintiff now essentially seeks to undermine the consequences of the foreclosure action. Id. Plaintiff's claims against both BANA and Carrington are thus barred by the doctrine of claim preclusion.[5]

O'Steen v. Wells Fargo Bank NA Dist. Court MD Florida, March 1, 2017

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…The Wells Fargo Defendants seek to have the claim for breach of contract dismissed on the grounds that it fits within the description of a shotgun pleading; specifically, that the allegations are too conclusory. A review of the breach-of-contract claim, however, demonstrates that the facts, as alleged, are enough to raise the O'Steens' claim into the realm of plausibility. Although the Wells Fargo Defendants assert the Amended Complaint "provide[s] no details . . . as to whether a permanent modification was actually required to be offered . . . and . . . no indication of what the terms of any permanent modification would be," (Doc. # 35 at 6), those types of arguments are more appropriate for summary judgment. At this preliminary stage of the proceedings, when the Court must accept the well-pled allegations, Count I of the Amended Complaint asserts a plausible claim to relief. Accordingly, the Wells Fargo Defendants' Motion is denied as to Count I…

…In their response, the O'Steens concede "paragraph[s] 57-59 of the Amended Complaint do not allege actionable claims under RESPA and therefore withdraw the allegation in those paragraphs." (Doc. # 41 at 7). Furthermore, although the O'Steens do not explicitly withdraw paragraph 61, which alleges that Rushmore engaged in a pattern of violations, they do "acknowledge that the allegation of a single violation does not rise to the `pattern or practice' standard required to recover statutory damages." (Id.). Thus, it is unclear whether the O'Steens intend to still argue that Rushmore engaged in a pattern of violations.

Accordingly, paragraphs 57 through 59 of the Amended Complaint are dismissed. In addition, although the O'Steens acknowledge a single violation is not enough to evince a pattern, they did not withdraw paragraph 61, which alleges a pattern of violations. Thus, uncertainty remains as to what the O'Steens are actually alleging. Count IV is therefore dismissed with leave to amend.

Freeman v. Bayview Loan Servicing, LLC Dist. Ct. M.D. Florida, Tampa Division, March 7, 2017.

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Plaintiff had a reasonable factual and legal basis to allege actual damages

While I strongly question whether negligible incidental expenses incurred by the firm in mailing the NOE constitute actual, compensable damages under RESPA, several district courts in the Southern District have concluded that photocopying costs, postage costs, and reasonable attorney's fees incurred after an incomplete or insufficient response to a RFI constitute actual damages under RESPA.[7] Korte and Wortman was therefore justified in relying on those cases. Objectively, when the case was filed, there was at least an arguable legal basis for that allegation.[8]

In any event, Korte and Workman's contention is now arguably foreclosed. *Meeks,* 2017 WL 782285 at *4 fn.3 ("Alternatively, we affirm because Meeks did not suffer any compensable damages from Ocwen's alleged violation. (citation omitted). Here, we agree with the district court that Meeks's counsel's NOE appeared to "falsely question[] the servicer's receipt in order to create a claim for damages.")

Plaintiff had a reasonable factual basis to continue litigation after receiving the Rule 11 safe harbor letter

As discussed, Attorney Cline testified that after receiving the safe harbor letter, she spoke with Plaintiff, who maintained that she never received the acknowledgment letter. Accordingly, there was a reasonable factual basis to continue litigating the case, at least until Plaintiff was deposed. Two days after Plaintiff equivocated in her deposition, but after expiration of the 21-day safe harbor window, Plaintiff moved to dismiss the case with prejudice. Under the circumstances, I decline to impose sanctions under Rule 11.

Accordingly, Plaintiff's Motion to Dismiss (Dkt. 10) is GRANTED. This case is DISMISSED *with prejudice.* Defendant's Motion for Dismissal and for Sanctions against Betty Freeman and Korte & Wortman, P.A. Pursuant to Fed. R. Civ. P. 11 (Dkt. 11) is DENIED.

Neto v. Rushmore Loan Management Services, LLC Dist. Court D. Maryland, March 7, 2017

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Defendants argue that *res judicata* applies to Counts I-IV because Plaintiff raised these same issues in the Motion to Vacate Sale in the foreclosure case…

Although Plaintiff is correct that the court announced its decision "without explanation or elaboration" (*id.*), he is incorrect that the court did not provide him a full and fair opportunity to litigate the issues or that it did not address the merits of his arguments. The court's docket and order show that the motion was fully briefed by the parties; his opponent filed a response and he filed a reply, giving Plaintiff an opportunity to see and respond to his opponents' counterarguments. (ECF Nos. 5-3, at 3; 5-6 (court's memorandum and order)). When the circuit court ruled on the motion, it specifically stated that Plaintiff had "fail[ed] to identify any *legitimate* procedural irregularity regarding the September 18, 2015 foreclosure sale." (*Id.*). More importantly, in determining that there was no excuse for Plaintiff's untimeliness, the circuit court found that his motion did not "state a valid defense or present meritorious argument." (*Id.*). Plaintiff attempts to overcome these findings by arguing that the circuit court's determination that his arguments were not meritorious "is not to say that the underlying facts presented in support thereof were not meritorious or true." (ECF No. 7, at 15). Plaintiff's hair-splitting reference to the underlying facts does not affect the applicability of issue preclusion here to avoid the relitigation of the same legal issues "in successive actions arising out of the same transaction and asserting breach of the same duty." The state court appears to have considered the merits of Plaintiff's arguments, even if it did not elaborate as to why it found them meritless.[5]Accordingly, *res judicata* applies to Plaintiff's RESPA claims, and they will be dismissed.

Landau v. Roundpoint Mortgage Servicing Corporation Dist. Ct. S.D. Florida, March 13, 2017

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Furthermore, the cases cited by Plaintiff are inapposite to the case at bar. In *Fox,* despite the borrower's completing the trial period plan, she did not receive a permanent loan modification, and the loan servicer did not seek to cancel the sale, but instead published notice of the scheduled foreclosure, and in fact actively sought to reschedule the sale after the borrower took unilateral action to prevent the already scheduled sale from going forward. *Fox,* 2016 WL 6092638, at *2. Here, Plaintiff alleges that she had just accepted the trial modification plan when Random filed the Motion to Cancel Sale. Notably, Plaintiff does not contend that either Random or RoundPoint have sought to reschedule the sale following the Broward County court's granting Plaintiff's Motion to Cancel Sale. And while Plaintiff appears to believe that she was forced to file her own motion to prevent the October 5, 2016 from moving forward, her belief is belied by the record in this case. According to the allegations in the Complaint, Random duly filed its Motion to Cancel Sale a little more than a week after Plaintiff obtained clarification of the terms of the trial modification plan and accepted it. *See* Complaint ¶¶ 33, 41; *see also* Motion to Cancel Sale. Moreover, in *Ramos,* the claimed violation of Regulation X hinged upon the timing of the plaintiff's submission of the complete loss mitigation application, which is not involved in the case at bar. *Ramos,* 2016 WL 233142, at *7. Therefore, these cases do not bolster Plaintiff's position.

The Court recognizes that "RESPA is a consumer protection statute that regulates the real estate settlement process," and that as a "remedial consumer-protection statute . . . RESPA is to be `construed liberally in order to best serve Congress' intent.'" *Hardy v. Regions Mortg., Inc.,* 449 F.3d 1357, 1359 (11th Cir. 2006) (citing 12 U.S.C. § 2601(a)); *Rawlings v. Dovenmuehle Mortg., Inc.,* 64 F. Supp. 2d 1156, 1165 (M.D. Ala. 1999) (quoting *Ellis v. Gen. Motors Acceptance Corp.,* 160 F.3d 703, 707 (11th Cir. 1998)). However, as the Court finds that the plain language of the regulation is dispositive, it need not delve into Congress's intent. *See Birnholz v. 44 Wall St. Fund, Inc.,* 880 F.2d 335, 341 (11th Cir. 1989), *certified question answered,* 559 So. 2d 1128 (Fla. 1990) ("Thus, the cardinal rule of statutory construction is that `[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'") (quoting *Streeter v. Sullivan,* 509 So. 2d 268, 271 (Fla. 1987) (quoting *A.R. Douglass, Inc. v. McRainey,* 102 Fla. 1141, 137 So. 157, 159 (1931))).

Although RESPA is a remedial statute, the Court need not construe it (or its implementing regulation) so liberally as to create a cause of action where none exists. RoundPoint did not move for foreclosure judgment or order of sale, or conduct a foreclosure sale in violation of Regulation X. Plaintiff's unsupported argument that the mere request, by Random, to reschedule the sale violates section 1024.41(g) is an argument based entirely in semantics that the Court finds unpersuasive.[2]Therefore, Count I of the Complaint is dismissed; and because Plaintiff's FDCPA claim is premised upon the alleged violation in Count I, it must also fail. As Plaintiff is represented by counsel and has not requested leave to amend, the claims are dismissed with prejudice. *Meeks v. Ocwen Loan Servicing, LLC,* ___ F. App'x ____, 2017 WL 782285, at *3 n.4 (11th Cir. Mar. 1, 2017) (citing *Wagner v. Daewoo Heavy Indus. Am. Corp.,* 314 F.3d 541, 542 (11th Cir. 2002) ("A district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.")).

McCann v. Rushmore Loan Management Services, LLC, Dist. Court, ED New York March 16, 2017

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[Claim Preclusion Bars RESPA Claim]

"Under New York's transactional approach to res judicata, `once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" *Sosa v. JP Morgan Chase Bank,* 33 A.D.3d 609, 611, 822 N.Y.S.2d 122, 124 (2006) (quoting *O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158)). Res judicata will apply, even if there are variations in factual allegations or in the type of relief sought, "if the actions are grounded on the same gravamen of the wrong." *Yeiser,* 353 F. Supp. 2d at 422. Plaintiff here is clearly seeking to recover under the same series of transactions that led ultimately to the foreclosure sale. He lost below, and his proper recourse was to appeal in state court.

GRUTSCH v. WELLS FARGO BANK, NA, Dist. Court, SD Ohio March 23, 2017

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Here, Wells Fargo received Grutsch's loss mitigation application just eight days before the foreclosure sale that was then scheduled to take place. That Wells Fargo managed six days later to have the sale vacated did not make the application timely or invoke the protections of Regulation X. See Lage, 839 F.3d at 1010-11 ("[A]llowing a servicer's delay of a foreclosure sale to give a borrower greater rights may discourage servicers from rescheduling foreclosure sales and voluntarily considering untimely applications — actions which benefit borrowers."). Accordingly, Regulation X does not apply and Wells Fargo is entitled to summary judgment.

Purpura v. JP MORGAN CHASE, Dist. Court, D. New Jersey March 24, 2017

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[Failure Use Designated Address]

There is no dispute that Plaintiff failed to mail his QWR to Chase's designated address. This Court follows the decisions of the Second and Tenth Circuits and dismisses Plaintiff's claim with prejudice. While the Second and Tenth Circuit decisions may appear somewhat draconian, their reasoning is rational. Once a borrower serves a QWR on a servicer, the servicer has only a short period of time in which to respond to that request. *See* 12 U.S.C. § 2605(e)(1)(A) (requiring a servicer to "provide a written response acknowledging receipt of the correspondence within 5 days."). Therefore, to make it feasible for servicers to comply with the quick turn-around time on requests, the regulations permit servicers to establish a designated address where the servicers will receive all requests. Additionally, this holding does not prevent Plaintiff from re-serving Chase with a QWR to the designated address, and if he does not receive a proper response, re-filing a claim. Thus, because Plaintiff did not mail his QWR to Chase's proper address, this Count is dismissed with prejudice.

Finster v. US Bank National Association, Dist. Court, MD Florida March 28, 2017

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Regardless, mere disagreement with the outcome of a reasonable investigation does not establish a RESPA violation. "The statute does not require the servicer to provide the resolution or explanation desired by the borrower; it requires the servicer to provide a statement of its reasons." See Whittaker v. Wells Fargo Bank, N.A., No. 6:12-cv-98-Orl-28GJK, 2014 WL 5426497, at *8 (M.D. Fla. Oct. 23, 2014) (citing Bates, 768 F.3d at 1135).[14] The goal of RESPA is "transparency and facilitation of communication," and U.S. Bank's responses provided Finster with a complete, responsive, and factually-supported explanation of what led to the denial of her loan modification. See Bates, 768 F.3d at 1135. As such, no reasonable fact-finder could conclude on the record before the Court that U.S. Bank failed to conduct a reasonable investigation.[15] Accordingly, U.S. Bank's Motion for Summary Judgment is due to be granted as to Count I of the Amended Complaint.

Gelinas v. Bank of America, NA, Dist. Court, WD Washington March 28, 2017

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Plaintiffs do not allege they submitted a complete loan application to BANA. Dkt. # 1 ¶ 26. In their Complaint, Plaintiffs concede that they "have not provided all required information requested on [the] RMA [Request for Mortgage Assistance] application." *Id.* Plaintiffs allege they were in weekly communication with Ms. Angie Fortunity of BANA's loss mitigation department. *Id.* ¶¶ 25, 26. Plaintiffs also claim they were "in the midst" of an open loan modification. *Id.* ¶ 31; Dkt. # 13 ¶ 9. However, in order for RESPA's foreclosure prohibition to apply, Plaintiffs must first allege facts that they submitted a complete loan application. They have not done so.

Because Plaintiffs have not pleaded sufficient facts to substantiate their claim, the Court DIMISSES Plaintiffs' RESPA claim under 12 C.F.R. 1024.41(g). Plaintiffs must allege facts asserting they have submitted a complete loan modification.

Plaintiffs also allege a "dual tracking" claim under RESPA against BANA. Dkt. # 1 ¶¶ 13. Dual tracking occurs when the "lender actively pursues foreclosure while simultaneously considering the borrower for loss mitigation options." *Gresham v. Wells Fargo Bank, N.A.,* 642 Fed. Appx. 355, 359 (5th Cir. 2016) (unpublished). Similar to their above argument, Defendants assert that a complete loan application is a prerequisite to a dual tracking claim under RESPA. Dkt. # 10 at 11. Defendants cite a Fifth Circuit case for support. *Id.* at 359 (stating that plaintiff's dual tracking claim under Section 1024.41(g) only applied once a complete loss mitigation application was received more than 37 days before the foreclosure schedule).[5] The Court finds the Fifth Circuit persuasive and DIMISSES Plaintiffs' dual tracking claim. Plaintiffs must allege facts asserting they have submitted a complete loan modification.

Mains v. CITIBANK, NA, Court of Appeals, 7th Circuit March 29, 2017

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[MTD Granted due to Rooker Feldman]

Reading through the verbiage of **Mains's** filings, we are left with the impression that the foundation of the present suit is his allegation that the state court's foreclosure judgment was in error because it rested on a fraud perpetrated by the defendants. **Mains** wants the federal courts to redress that wrong. That is precisely what *Rooker-Feldman* prohibits, however. If we were to delve into the question whether fraud tainted the state court's judgment, the only relief we could give would be to vacate that judgment. That would amount to an exercise of *de facto* appellate jurisdiction, which is not permissible. **Mains's** remedies lie in the Indiana courts. Indiana allows a party to file for relief from judgment based on newly discovered evidence or on the fraud or misrepresentation of an adverse party, either through a motion or through an independent action. See Ind. R. Trial P. 60(B). The state's courts are quite capable of protecting their own integrity.

Mains's claim under RESPA, 12 U.S.C. §§ 2601-2617, is somewhat more complex. He seeks an accounting of payments to determine whether Chase improperly charged late fees. In that connection, he asserts that the defendants should not have proceeded to collect on the note before conducting a proper accounting. That theory, too, is barred by *Rooker-Feldman.* In effect, it is just another way to try to undo the state court's foreclosure judgment. To the extent that **Mains** may be arguing that he was charged improper late fees some time in 2008 or 2009, long before the state court acted, his claim would be independent of the state court's judgment. See *Iqbal v. Patel,* 780 F.3d 728, 730 (7th Cir. 2015). But that does not help him, because the Indiana court has already determined the amount due, inclusive of late fees, and we must give preclusive effect to its decision on these issues. At best, part of his RESPA claim is beyond our jurisdiction, because of *Rooker-Feldman,* and the remainder has been definitively resolved by the state courts, and so must be dismissed on the merits.

McNutt v. WELLS FARGO BANK, NA, 2017 DNH 67 - Dist. Court, D. New Hampshire April 5, 2017

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Finally, the court considers the plaintiffs' claim under RESPA, 12 U.S.C. § 2605(k). Wells Fargo contends that this claim fails because the plaintiffs have not adequately alleged that they made any requests to correct errors to their account. The plaintiffs object, arguing that they have pleaded "that they e-mailed [Wells Fargo] to confirm there was no balloon payment" and that Wells Fargo "failed to remedy this error in response to this request . . . ." Doc. no. 10, at 6. Wells Fargo has replied to this specific objection, contending that even assuming this e-mail was sent, there are no allegations that this e-mail contained a "notice of error" as required by RESPA. Doc. no. 14.

Under RESPA, the servicer of a mortgage "shall not fail to take timely action to respond to a borrower's requests to correct errors relating to . . . avoiding foreclosure . . . ." 12 U.S.C. § 2605(k)(1)(C); see also 12 C.F.R. § 1024.35(a) ("A servicer shall comply with the requirements of this section for any written notice from the borrower that asserts an error . . . .") (emphasis added). Here, the plaintiffs allege that Wells Fargo confirmed to them by e-mail that there would be no balloon payment under the modification agreement. The plaintiffs have not alleged that this was in response to any request to correct an error made by the plaintiffs. Nor is there any independent allegation in the complaint that the plaintiffs ever made such a request. Thus, the plaintiffs have not stated a claim under § 2605(k)(1)(C).

Accordingly, Wells Fargo's motion to dismiss is granted as to Count VII.

Garcia v. JP Morgan Chase Bank, NA, Dist. Court, D. Arizona April 5, 2017

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Garcia alleges that Defendants violated these rules by initiating foreclosure while her loan modification application was still pending. (Doc. 1-1 at 41 ¶ 203.) The undisputed evidence, however, does not support her claim. Defendants offered Garcia a permanent loan modification in February 2015, but Garcia notified Defendants in writing that she could not accept the offer because of the condition of her home. The offer then expired. (Doc. 234-1 at 16.)

There is no evidence in the record that Garcia thereafter made payments on her loan, nor is there evidence that she repaired the damage to her home and reapplied for a loan modification. In May 2015, after Garcia failed to make payments for several more months, Defendants took the first step toward foreclosure by noticing a trustee's sale of the property. By that time, Garcia had notified Defendants that she could not agree to the permanent modification offered to her in February and she had no other pending modification applications. Defendants therefore are entitled to summary judgment on Count VII because Garcia has proffered no evidence that Defendants initiated foreclosure while her loan modification application was pending. *See Parker,* 2016 WL 1242440, at *3 (noting that "[t]here is no provision found in RESPA under which Plaintiff can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification," and "[t]herefore a borrower may not bring an action for violation of the loss mitigation rule if the borrower has previously availed [herself] of the loss mitigation process") (internal quotations and citations omitted).

BOEDICKER v. RUSHMORE LOAN MANAGEMENT SERVICES, LLC, Dist. Court, D. Kansas April 20, 2017

https://scholar.google.com/scholar_case?q=Boedicker+v+Rushmore&hl=en&lr=lang_en&as_sdt=3,31&case=17221316530924470627&scilh=0

Plaintiffs' allegations fail to show that Rushmore violated this regulation. As Rushmore points out, there is no requirement in § 1024.41(c) that the servicer give notice of all loss mitigation options that were considered. Plaintiffs' allegations suggest that Rushmore used an erroneous income figure in determining plaintiffs' eligibility for HAMP relief. But the facts do not show a violation of the duty to evaluate the plaintiffs for loss mitigation options or to provide notice of the determination. Count 2 fails to state a claim upon which relief can be granted.

Nash v. PNC BANK, NA, Dist. Court, D. Maryland April 20, 2017

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Nevertheless, because the Appeal Letter's request for information about Nash's loan modification denial did not relate to servicing and otherwise did not constitute a QWR in any form, the Court will dismiss Nash's RESPA claim arising from the alleged failure properly to respond to a QWR pursuant to 12 U.S.C. § 2605(e), 12 C.F.R. § 1024.36, or 12 C.F.R. § 1024.35.

The "failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by 12 C.F.R. 1024.39," which identifies information that a servicer must provide to a delinquent borrower within 45 days of delinquency, is a form of covered error. *See* 12 C.F.R. 1024.35(b)(7). However, courts have held that a claim that a loss mitigation application was improperly denied, or that the information provided about such a denial was inadequate, is not a "covered error" under 12 C.F.R. § 1024.35(b). *See Sutton,* 2017 WL 122989, at *15 ("RESPA (through Regulation X) regulates many aspects of loss mitigation practices, but does not regulate the correctness of a loss mitigation decision, and certainly does not encompass errors in loss mitigation decisions within the catch-all provision in the definition of `covered errors.'"); *Farraj v. Seterus, Inc.,* No. 15-cv-11878, 2015 WL 8608906, at *3-4 (E.D. Mich. Dec. 14, 2015) (holding that failure to provide the calculations leading to denial of a HAMP modification is not a "covered error" under 12 C.F.R. § 1024.35); *Wiggins v. Hudson City Sav. Bank,*No. 15-01938 (JKS), 2015 WL 4638452, at *8 (D.N.J. Bankr. Aug. 4, 2015)(holding that a claim that a borrower disagrees with a loan modification decision is not a "notice of error" under 12 C.F.R. 1024.35). If a borrower believes that the denial of a loan modification application is incorrect or that the information provided was insufficient, the remedy is to "challenge it by invoking the appeals process of § 1024.41(h)," just as Nash did, not by pursuing "the error resolution process of § 1024.35(b)." *Wiggins,* 2015 WL 4638452, at *8. Thus, Nash has failed to state a plausible claim that the Appeal Letter was a QWR asserting a "notice of error" that required PNC to satisfy the specific requirements for responding to that form of QWR.

Julius v. WELLS FARGO BANK, NA, 2017 DNH 84 - Dist. Court, D. New Hampshire April 28, 2017

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Plaintiff alleges that Wells Fargo violated this subsection because, while she "has done everything within her power to avoid foreclosure" in that she has "requested and re-requested a forebearance to avoid foreclosure," those "requests have been unreasonably denied."[21]

As Magistrate Judge Johnstone has observed in the face of almost identical allegations, § 2605(k)(1)(C) "does not make it unlawful to fail to respond to any requests to avoid foreclosure, but, as relevant here, to `requests to correct errors relating to[,]' among other things, `avoiding foreclosure.'" Gasparik, 2016 DNH 215, at 18; see also Mader, 2017 DNH 11, at 13. That is, while a servicer is obligated by § 2605(k)(1)(C) to respond to requests to correct errors relating to avoiding foreclosure, § 2605(k)(1)(C) does not impose an obligation on servicers to respond favorably to all requests to avoid foreclosure, as plaintiff would have it do. As in both Gasparik and Mader, the plaintiff here "has nowhere asserted that she made a request to correct an error relating to avoiding foreclosure, let alone that [the defendant] failed to respond to such a request." Gasparik, 2016 DNH

215, at 18; Mader, 2017 DNH 11, at 13. Acknowledging this, the plaintiff withdrew this claim at oral argument. The court, accordingly, dismisses the plaintiff's RESPA claim.

Nunez v. JP Morgan Chase Bank, NA, Dist. Court, MD Florida May 1, 2017

https://scholar.google.com/scholar_case?case=6023610358305093815&q=nunez+v+jp+morgan+chase+bank+na&hl=en&lr=lang_en&as_sdt=40006

Chase found no error was the delinquent status of the loan—a reason that was absent from Chase's second RESPA response. Therefore, Nunez posits, Chase violated RESPA as a matter of law.

Nunez's argument is compelling. Chase likely should have mentioned the loan's delinquency, and a reasonable investigation would have uncovered that problem. But Nunez sent her Second NOE on September 8, 2014, two days before the September 11 letter referenced above, and therefore, the September 11 letter could not be included among the errors Nunez complained of in her Second NOE. Further, the remainder of the Chase representative's testimony is consistent with the "reasons" supporting the conclusion it reached in its second RESPA response. Namely, Chase's representative testified that, due to the need to reverse the cancellation of the mortgage modification, account "adjustments were not made until August 18th." (Doc. 49 at 47:4-8.) The collections letter attached to Nunez's Second NOE reflected "amounts due that were based on the pre-loan modification adjustment numbers that were in the system." Thus, Chase's representative relies on the timing of entries for her support that no error occurred, just as Chase said in its second RESPA response.

Therefore, taking all inferences in a light supporting Chase, a reasonable jury could find that Chase provided the reason or reasons that it found no error. And, thus, Nunez's motion will be denied.

Todd v. OCWEN LOAN SERVICING, LLC, Dist. Court, SD Florida May 1, 2017

https://scholar.google.com/scholar_case?case=4760989384930102296&q=Todd+v.+Ocwen&hl=en&lr=lang_en&as_sdt=3,31

Under these circumstances, the Court cannot conclude that Plaintiff has genuinely challenged the authenticity of the Acknowledgment Letter—which indicates that it was sent to Plaintiff rather than Plaintiff's counsel—simply by pointing out the lack of proof of mailing. *See, e.g., Fiedor,* 2016 WL 4718166, at *2 (observing that "it is clear that **Ocwen** timely provided written acknowledgment to [the plaintiff] of his RFI within the five business days allotted under the statute" without regard to proof of mailing of the acknowledgment letter attached to **Ocwen's** motion to dismiss); *see also GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1385 (10th Cir. 1997) (explaining that, with respect to the rule on converting a motion to dismiss into one for summary judgment, "[i]f the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document"). As a final note, the genuineness (or lack thereof) of Plaintiff's purported dispute with the Acknowledgment Letter is further illuminated by the patently false assertion that the Acknowledgment Letter does not "provide any frame of reference for the `correspondence on the above referenced loan' to which it refers." ECF No. [15] at 8. Quite the contrary, the Acknowledgment Letter, in addition to being specifically addressed to Plaintiff, lists as the loan number and property address to which it corresponds to the same loan number and property address identified on the RFI. *Compare* ECF No. [13-1], *with* ECF No. [1-2] at 15. Even a cursory review of the Acknowledgment Letter would have counseled against making such an assertion.

For all of these reasons, the Court finds that the Acknowledgment Letter, properly considered within the context of Defendant's Motion to Dismiss, conclusively shows that Plaintiff's RESPA claim must fail. Given that leave to amend would be futile, the Complaint is dismissed with prejudice.[3]

Hill v. DLJ MORTGAGE CAPITAL, INC., Court of Appeals, 2nd Circuit May 3, 2017

https://scholar.google.com/scholar_case?case=8591463688348447000&q=Hill+v.+DLJ+MORTGAGE+CAPITAL+INC.&hl=en&lr=lang_en&as_sdt=6,31&as_vis=1

Hill next argues that the District Court erred in dismissing her RESPA claim. Hill alleged that the defendants, when purchasing force-placed insurance on her property, did not provide her with any of the information or requests required by RESPA's Regulation X, 12 C.F.R. § 1024.37(c), and charged her account for the insurance in violation of 12 C.F.R. § 1024.37(h). "Force-placed insurance," as defined by RESPA, is "hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage." 12 U.S.C. § 2605(k)(2). We agree with the District Court that the allegations of Hill's complaint, all conclusory in nature, failed to state a plausible claim for relief under RESPA. Among other things, the RESPA allegations do not specify that Hill's mortgage was "federally related."

Smith v. SPECIALIZED LOAN SERVICING, LLC, Dist. Court, SD California May 3, 2017

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The complaint has not alleged that SLS recorded a notice of default with the San Diego County Recorder's Office. Instead, SLS has sent notices of default and intent to foreclose directly to Smith and charged her foreclosure fees. However, according to the CFPB's interpretation, an unrecorded notice of default does not constitute the "first notice" and Smith has not provided any legal support that imposing foreclosure fees or sending letters entitled "notice of default" to a borrower constitute a "first notice or filing required by applicable law." Accordingly, Plaintiff fails to state a violation of § 1024.41(f).

Schroeder v. NATIONSTAR MORTGAGE, LLC, Dist. Court, WD Washington June 8, 2017

https://scholar.google.com/scholar_case?case=11502450058650724811&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Plaintiffs' allegations concerning the completeness of their application are insufficient. Their opposition brief speaks for itself. They contend that their complaint "provides sufficient factual information to determine that Nationstar *may*have records of a complete loss mitigation application . . . ." Dkt. # 10 at 10 (emphasis added). As for which application they contend was complete, Plaintiffs assert it was "[m]ost likely" one begun in early 2015. *Id.* Plaintiffs contend that the sufficiency of their RESPA allegations is buttressed by the "over 60 attachments" they included with their complaint. *Id.* They do not, however, identify any particular portion of these attachments—which comprise over 500 pages—that supports their assertion that they submitted a complete loss mitigation application. Plaintiffs have failed to state a RESPA claim that is plausible on its face and it must be dismissed. *Bell Atl. Corp.*, 550 U.S. at 568.

Hoy v. AURORA LOAN SERVICES, LLC, Dist. Court, SD Ohio June 5, 2017

https://scholar.google.com/scholar_case?case=15001122743905914807&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

The same cannot be said of RESPA's previous exemption for loans secured by property in excess of 25 acres. Hoy maintains that the 25-acre exemption is unreasonable and arbitrary, as evidenced by the Consumer Financial Protection Bureau's ("CFPB") decision to eliminate the exemption in 2015. The CFPB, however, eliminated this exemption, not because it was inconsistent with the purposes of RESPA, but "to render the [Truth in Lending Act] and RESPA regimes more consistent" and to harmonize disclosure requirements. 78 FR 79757-58. *See Warren v. Capital One, N.A.,* No. C14-0656, 2015 WL 1137517, at *4 (W.D. Wash. Mar. 12, 2015) (rejecting the argument that *Larionoff* required a finding that the 25-acre exemption was invalid as "inconsistent" with RESPA).

In eliminating the exemption, the CFPB noted that most loans secured by property in excess of 25 acres were separately exempt as loans for business, commercial or agricultural purposes. With respect to *consumer* loans secured by property in excess of 25 acres, the CFPB found that the consumers would benefit from the required disclosures just as much as those with loans secured by lesser acreage. 78 FR 79757-58 (citing 12 C.F.R. § 1024.5 (b)(2)). This, however, provides no basis for reading the exemption out of the regulations.

Given that Hoy's loan was secured by property in excess of 25 acres, it was exempt from RESPA requirements during the time in question. Accordingly, Counts One, Two, Three and Four of the Complaint are DISMISSED WITH PREJUDICE. The Court need not address the other arguments raised by Defendants in connection with the RESPA claims.

Puche v. WELLS FARGO NA, Dist. Court, D. New Jersey June 22, 2017

https://scholar.google.com/scholar_case?case=16857724781725648142&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Plaintiffs are not excused from the requirements of the entire controversy rule because Defendant Wells Fargo, the loan servicer, was not a party to the foreclosure action initiated by Deutsche Bank, the investor on the loan. Plaintiffs correctly assert that Rule 4:30, now Rule 4:30A, was modified by the New Jersey Civil Practice Committee to apply only to the mandatory joinder of claims and not of parties. However, they fundamentally misunderstand or misstate the effect of this modification on the operation of the entire controversy rule. The 1998 modification of the entire controversy rule replaced the joinder requirement with a disclosure requirement. *Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co.,* 207 N.J. 428, 444 (2011). That is to say, parties to an action are now required to reveal to the court the existence of any non-party who might have any potential liability to any party, arising out of the same transactional facts. *Id.* (citing to N.J. Ct. R. 4:5-1(b)(2), adopted in 1998 in response to the modification of Rule 4:30). This disclosure obligation attaches at the filing of the first pleading and continues throughout the pendency of the litigation. If circumstances change, and potential claims against a non-party arise during the pendency of the litigation, parties are obligated to disclose these claims to the court. *Id.* at 444-45. It is then up to the court to decide whether to

compel the joinder of that party. Courts may use their discretion to preserve claims against non-joined parties for separate litigation without running afoul of the entire controversy rule. *Id.*

Consequently, the modification of the party joinder aspect of the entire controversy rule does not operate to excuse litigants from the rule's requirements simply because their related claims are against a non-party. Rather, instead of being required automatically to join those parties against whom there are related claims, parties now must raise the issue with the court first. Plaintiffs do not claim that they disclosed their related claims against Wells Fargo in the Bergen County Superior Court. Had they done so, the court might have allowed them to preserve those claims for a separate, later litigation. But, having failed to do so, they are barred by the entire controversy rule from attempting to raise those claims now.

Page v. ROUNDPOINT MORTGAGE SERVICING CORPORATION, Dist. Court, D. Oregon June 29, 2017

https://scholar.google.com/scholar_case?case=7610933733049793974&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

It is clear from the summary judgment record that the loss mitigation application process was confusing and frustrating, particularly for Page, for whom English is a second language. Many of the letters state that some already submitted documents have become outdated and require the submission of new versions of the same documents. Borrowers receiving such notices understandably could feel that the goalposts were continually being moved and that, in retrospect, they had no real or meaningful chance at loss mitigation.

But it is not the job of the courts to decide if the defendant's conduct was the best practice. Courts must decide the narrower question of whether the defendant violated the law. Here, a jury could certainly infer from the summary judgment record that Page did her best to follow defendant's instructions and believed she had submitted all the documentation requested. But under Ninth Circuit precedent, there is simply insufficient evidence in the summary judgment record to permit a factfinder to conclude that plaintiffs *actually submitted* all the necessary documentation before the 37-day pre-foreclosure period began. Because a jury could not find that plaintiffs have proved their application was complete before that period began, plaintiffs' RESPA claims under 12 C.F.R. §§ 1024.41(c)(1) & (d) cannot proceed beyond summary judgment.

Tanasi v. Citimortgage, Inc.Dist. Court. D. Connecticut June, 30, 2017

https://scholar.google.com/scholar_case?case=4070585759021285792&hl=en&lr=lang_en&as_sdt=40006&as_vis=1

In their first cause of action, the Tanasis allege that CitiMortgage violated RESPA and Regulation X by failing to acknowledge or properly review loss mitigation applications (Compl., ¶¶ 71-81), by failing to properly respond to the Tanasis' requests for information (id. at ¶¶ 83-85), mortgage modification applications (id. at ¶ 86), and qualified written requests (id. at ¶ 87), and by engaging in a pattern or practice of non-compliance with RESPA (id. at ¶¶ 96-97). The claims concerning the Tanasis' loss mitigation and mortgage modification applications must be dismissed under res

judicata, because they "reasonably relate [to] the execution of the note and mortgage, and the subsequent default." Sorrentino, 158 Conn.App. at 96-97, 118 A.3d 607. The remaining claims, however, do not "narrowly bear[] on the mortgage note itself or its enforcement," Rodrigues, 109 Conn.App. at 134, 952 A.2d 56, and survive Defendants' motion to dismiss on this ground.

In their second cause of action, the Tanasis allege that CitiMortgage negligently failed to review mortgage modification requests (id. at ¶¶ 109-114), negligently failed to provide a single point of contact to the Tanasis (id. at ¶¶ 119-127), and "continually" and "actively" solicited mortgage modification applications that it never intended to consider, seeking to accrue 261*261 higher interest rates by postponing the Tanasis' inevitable default (id. at ¶¶ 132-134)…The Tanasis, however, cannot make claims concerning Defendants' negligent processing of their loss mitigation or mortgage modification applications.

Walter v. BAC HOME LOAN SERVICING, LP, Dist. Court, ND Illinois July 11, 2017

https://scholar.google.com/scholar_case?case=7952617218058724319&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

However, this argument fails because it is premised on a misreading of *Exxon Mobil,* 544 U.S. at 280. In *Exxon Mobil,* the Supreme Court concluded that *Rooker-Feldman* did not apply because the plaintiff was not asking the federal court to "undo" the state court judgment. 544 U.S. at 293. Rather, the plaintiff had filed parallels suits in federal district court and state court. *Id.* at 292 ("When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court."). In contrast, Plaintiff filed this suit in federal court *after* a final judgment was rendered in state court and specifically seeks to have this Court review and overturn the state court's final judgment. As such, it is exactly the sort of claim over which this Court is barred from exercising subject matter jurisdiction under *Rooker-Feldman.* See *Riddle v. Deutsche Bank Nat. Trust Co.,* 599 F. App'x 598, 600 (7th Cir. 2015) (holding that *Rooker-Feldman* barred plaintiff's claim that foreclosure was invalid because of insufficient service of process in state proceedings); *Kelly v. Med-1 Solutions, LLC,* 548 F.3d 600, 604-05 (7th Cir. 2008) (holding that *Rooker-Feldman* barred district court from reviewing claims that state court judgments were obtained through actions which violated a federal statute); *Schmitt v. Schmitt,* 324 F.3d 484, 487 (7th Cir. 2003)(rejecting as frivolous the argument that *Rooker-Feldman* did not bar district court from reviewing state court decisions regarding jurisdiction).

Rios v. Rushmore Loan Management Services, LLC, Dist. Court, SD Florida July 23, 2017

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However, 12 C.F.R. § 1026.36(c)(3) is cited in paragraph 156, a regulation under the Truth in Lending Act ("TILA") which imposes the requirement on servicers of home loans to provide payoff statements to borrowers. *See,* 15 U.S.C § 1639(g).

The Truth in Lending Act (TILA), rather than RESPA, imposes the requirement on servicers of home loans to provide payoff statements to borrowers. 15 U.S.C § 1639(g). "A creditor or servicer of a home loan shall send an accurate payoff balance within a reasonable time, but in no case more than 7 business days, after the receipt of a written request for such balance from or on behalf of the borrower." *Id.* There is no similar inclusion of payoff statements in RESPA.

Bracco v. PNC Mortgage, 2016 WL 4507925, at *5 (M.D. Fla. 2016). According, the motion to dismiss will be granted as to Count III, with leave to amend should Plaintiffs wish to assert a claim for violation of TILA, 12 C.F.R. § 1026.36(c)(3), for failure to provide a payoff statement.

Lieber v. Everbank Mortgage Company, Dist. Court, ED Michigan July 24, 2017

https://scholar.google.com/scholar_case?case=8055808926518490982&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Even if the January 2014 letter was meant to advance an inquiry regarding servicing, the language of the letter provides no basis for Everbank to identify what, exactly, Plaintiffs were challenging. As such, the letter was not a qualified written request that triggered RESPA obligations. Plaintiffs do not argue in their objections that any of the other correspondence sent to Everbank constituted qualified written requests, and so Judge Morris's analysis of those letters is adopted in full. Additionally, Plaintiffs make only conclusory arguments that Everbank's response to the January 2014 letter was inadequate under RESPA. There is no dispute that Everbank provided some of the requested documents. Plaintiffs have provided no support for the proposition that Everbank's response was legally insufficient under RESPA, especially considering the vague and largely illegible nature of the original request. Thus, even if the January 2014 letter was a qualified written request, RESPA was not violated.

Brown v. Wells Fargo Home Mortgage Dist. Court, D. New Hampshire July 26, 2017

https://scholar.google.com/scholar_case?case=5621130366151584242&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

The Browns do not dispute that Wells Fargo considered their loss mitigation application in 2014 and offered a loan modification.[21] They concede that they received the notification that their application was granted, as well as Wells Fargo's proposed loan modification agreement.[22] They do not argue that the 2014 loan modification process violated Regulation X.[23] Thus, there is no dispute of material fact over whether Wells Fargo complied with its obligations under Regulation X with respect to one loan modification application from the Browns. Nor do the Browns argue that their decision to reject the modification offer and cure the default in 2014 obligated Wells Fargo to comply with the regulations with respect to a second modification application, contrary to the clear language of the regulation.

Accordingly, because the Browns have identified no material fact in dispute supporting the position that Wells Fargo was obligated to comply with the requirements of Regulation X with respect to a second modification after granting a modification in 2014, the court grants the defendants' motion for summary judgment as to the Browns' RESPA claim.

SHILO v. DITECH FINANCIAL LLC, Dist. Court, D. Massachusetts July 26, 2017

https://scholar.google.com/scholar_case?case=16279467627889854812&q=SHILO+v.+DITECH+FINANCIAL+LLC&hl=en&lr=lang_en&as_sdt=6,31&as_vis=1

Fannie Mae is not the entity to whom the debt arising from the consumer credit transaction was initially payable and, as such, Fannie Mae does not satisfy the "creditor" definition as outlined under TILA. See, e.g., id. at 106 (ruling defendant-assignee was not a creditor under TILA because it was not the initial lender on the loans); Faiella v. Green Tree Servicing LLC, No. 16-cv-088-JD, 2017 WL 589096, at *3-4 (D.N.H. Feb. 14, 2017) (concluding Fannie Mae was "not a creditor under TILA because it [was] not the entity to whom [the plaintiff's] note was originally payable").

While TILA also provides for civil liability against specified assignees of the original creditor, Fannie Mae cannot be held liable under that provision either. 15 U.S.C. § 1641(a) provides that a civil action for a TILA violation "may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary." 15 U.S.C. § 1641(a). This includes consumer credit transactions secured by real property. See id. § 1641(e)(1). A violation is apparent on the face of the disclosure statement if "the disclosure can be determined to be incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note, or any other disclosure of disbursement" or "the disclosure statement does not use the terms or format required to be used by [TILA]." Id. § 1641(e)(2).

Fannie Mae contends that the term "disclosure statements" as mentioned in 15 U.S.C. § 1641(e)(2) refers only to "those documents generated in connection with the origination of the loan." D. 42 at 16 (citation and internal quotation marks omitted). That is, "Shilo's TILA claim is not based on any disclosure statements issued to him" but on "Ditech's alleged failure to provide a complete periodic statement after delinquency and notice of a transfer of the Mortgage." Id. at 17. Fannie Mae, therefore, asserts that it cannot be liable as an assignee as the alleged TILA violation occurred after the assignment of the loan to Fannie Mae and was not apparent on the face of the disclosure statement. Id. Shilo does not respond to this argument. D. 49 at 13-14.

Berry v. WELLS FARGO BANK, NA, Court of Appeals, 7th Circuit August 1, 2017

https://scholar.google.com/scholar_case?case=12726410775498970305&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Under Illinois law, claim preclusion bars a second lawsuit when (1) the first suit resulted in a final judgment on the merits rendered by a court of competent jurisdiction; (2) the two suits present the same causes of action; and (3) they have the same parties or privies. The first and third elements are met. An order approving a foreclosure sale is a final judgment under Illinois law. See *EMC Mortgage Corp. v. Kemp,* 982 N.E.2d 152, 154 (Ill. 2012). HSBC, one of the two defendants here, was the plaintiff in the foreclosure suit. Wells Fargo was not a plaintiff in that suit, but its interests as the mortgage servicer are no different from those of HSBC, the legal representative of the mortgagee. "Typically, a mortgage servicer acts as the agent of the mortgagee to effect collection of payments on the mortgage loan. Thus, it will be a rare case in which those two parties are not perfectly identical with respect to successive suits arising out of a single mortgage transaction." *R.G. Financial Corp. v. Vergara-Nuñez,* 446 F.3d 178, 187 (1st Cir. 2006). Berry gives no reason for believing this case

atypical, so we conclude that there was privity between the two companies. See *Cooney v. Rossiter,* 986 N.E.2d 618, 625 (Ill. 2012).

The second element (the two suits present the same causes of action) has also been satisfied; "separate claims are considered the same cause of action for claim-preclusion purposes if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Walczak v. Chicago Board of Education, supra,* 739 F.3d at 1016-17. This includes both "claims actually litigated" and "those that could have been litigated." *Dookeran v. County of Cook, Ill.,* 719 F.3d 570, 576 (7th Cir. 2013).

Berry argues that he had no chance to present in state court the matters advanced in his federal lawsuit. But he did present them in state court. His federal complaint and his state-court filings describe the same "group of operative facts," see *Rose v. Board of Election Comm'rs for the City of Chicago,* 815 F.3d 372, 375 (7th Cir. 2016). He also argues that the state court wrongly rejected his motion for leave to file an affirmative defense under the Fair Housing Act without a detailed written explanation. But if he was dissatisfied with the state court's decision or justifications, his remedy was to appeal, not to start over with a new suit. In any event he can't avoid his previous concession that the two lawsuits describe the same "events and actions." See *Parungao v. Community Health Systems,* 858 F.3d 452, 458-59 (7th Cir. 2017).

Hurley v. DITECH FINANCIAL LLC, Dist. Court, ED Wisconsin August 3, 2017

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Further, the regulation prohibits a servicer from "conducting" a foreclosure sale if it received an application more than thirty-seven days prior. A servicer cannot "conduct" an order confirming a sheriff's sale. The only procedure the servicer can "conduct" is the sheriff's sale. If this court were to adopt the plaintiffs' definition of "foreclosure sale," and define it as a sheriff's sale that has been confirmed by a court, then servicers could "conduct" a sheriff's sale even though the borrower had filed a loss mitigation application more than thirty-seven days before the sale. Such an outcome contradicts the language of the regulation, and the outcome runs counter to the regulation's purpose of preventing "dual tracking"—"situations in which the lender actively pursues foreclosure while simultaneously considering the borrower for loss mitigation options." Gresham v. Wells Fargo Bank, N.A., 642 Fed. Appx. 355, 359 (5th Cir. 2016) (not selected for publication).

Even if the court were to accept the plaintiffs' invitation, and look to Wisconsin law for a definition of "foreclosure sale," the plaintiffs would not prevail. The plaintiffs first cite Shuput v. Lauer, 109 Wis. 2d 164, 171 (1982) for the proposition that "complete foreclosure actions follow two steps: 1.) the judgment of foreclosure and sale; and 2) the proceedings after judgment, including the sale itself, judicial confirmation, and the computation of deficiency." Dkt. No. 17 at 4. That proposition is correct, as far as it goes, but Shuput held that it is the foreclosure action which has two steps, not the sheriff's sale. The Supreme Court explained that the court's "judgment of foreclosure and sale" determines the parties' legal rights; the post-judgment proceedings, including the sheriff's sale, "carry into effect and enforce the judgment of foreclosure and sale." Id. Nowhere does Shuput provide that the definition of a "sale" includes the confirmation order.

Kaplan v. SETERUS, INC., Dist. Court, ND California August 14, 2017

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The Court holds that a loan servicer's practice of accounting for a loan based on the terms of the contract, despite the existence of a confirmed Chapter 13 repayment plan limiting the servicer's ability to collect on those terms, is not in itself an "error" requiring correction under RESPA—so long as the servicer is able to maintain its account in such a way as to ensure that debtor pays no more than is required under the plan and is not subject to improper fees, rejected payments, foreclosure, or other such adverse effects. *Cf.* *In re Jones,* 366 B.R. at 590; *In re Payne,* 387 B.R. at 632-33. The fact that a servicer accounts for the loan based on its original terms is not inherently erroneous, both because—as recognized by many decisions in this district in the context of the FCRA—the original debt remains legally valid, if not presently collectable, until discharge, and also because a servicer may for legitimate reasons wish to remain prepared for the possibility that the Chapter 13 petition might at some point be dismissed or converted to a Chapter 7 proceeding due to noncompliance and the loan might revert to its original terms. *See, e.g.,* *Doster,* 2017 WL 264401, at *5.

Kaplan does not identify any evidence in this case that Seterus's accounting based on the original terms of the loan led to the sort of concrete errors discussed in *Jones* and *Payne.* Moreover, the May 18, 2015 correspondence that Kaplan's November 30, 2015 fax cites as containing an erroneous reference to a June 2014 delinquency describes the loan as "contractually delinquent" at that time, and goes on to explain, albeit with imperfect clarity, the distinction that Seterus draws in which a loan can be current "according to the terms of the Bankruptcy plan" and yet not at "a contractually current status." Kaplan Decl. Ex. C. Because there is uncontroverted evidence that Seterus recognized a distinction between the loan's status under the original contract terms and under Kaplan's bankruptcy plan, and no evidence that Seterus's accounting practices led to concrete adverse effects such as improper charges, the Court holds that a rational finder of fact could not find on this record that Kaplan's November 30, 2015 fax identified an error requiring correction under RESPA, and therefore could not find that Seterus's failure to correct such an error violated 28 U.S.C. § 2605(e)(2)(A). Seterus is entitled to summary judgment on Kaplan's RESPA claim. The Court does not reach the parties' arguments regarding damages.

Bivens v. Bank of America, NA, Court of Appeals, 11th Circuit August 17, 2017

https://scholar.google.com/scholar_case?case=13404559730604549162&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Section 3500.21(e)(1) is more sensibly construed to authorize a servicer to designate a particular office—"separate" from any other office it may have—as its "exclusive" office for receiving QWRs, without regard to any other function that office serves. *Id.* Such a construction accords with § 3500.21(e)(1)'s text and purpose. We conclude that SPS successfully invoked § 3500.21(e)(1) by directing borrowers to mail QWRs to a particular office, even though it used that office for other purposes as well.

Because Bivens failed to address his QWR to SPS's designated address for QWR receipt, SPS had no duty to respond to it. Thus, the district court did not err in granting summary judgment to SPS.[6]

Maloney v. POTESTIVO & ASSOCIATES PC, Dist. Court, ND Illinois August 17, 2017

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RBS moves to dismiss the RESPA claims. Plaintiffs allege in the complaint that RBS violated the "`loss mitigation procedures' as described in 12 CFR 1024.41." (Compl. Par. 12). RBS is correct that Plaintiffs have failed to specify what provision of 12 C.F.R. § 1024.41 (Section 1024.41) was violated. Nor did Plaintiffs provide clarification on that point in their response to the instant motion. Plaintiffs have thus failed to provide RBS with sufficient notice of the RESPA claim brought against them. In addition, the record reflects that the judgment of foreclosure was entered in the RBS Foreclosure Action in February 2013, before Section 1024.41 became effective on January 10, 2014. Nor are there any allegations that Plaintiffs returned the signed Modification Form, which would have modified the HELOC. Nor have Plaintiffs alleged facts that would suggest they suffered actual damages or that there was a pattern or practice of non-compliance with RESPA that could support a RESPA claim. Therefore, RBS's motion to dismiss the RESPA claims is granted.

Rodriguez v. OCWEN FINANCIAL CORPORATION, Dist. Court, SD Florida August 21, 2017

https://scholar.google.com/scholar_case?case=5694031021477479933&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Plaintiff fails to include any allegations regarding the initial notice owed by Ark. Plaintiff instead asserts only conclusory allegation that Defendants failed to evaluate her loan modification application within 30 days of receipt and failed to notify her of her right to appeal the denial. *See* ECF No. [7] at ¶¶ 28-30. This puts the cart before the horse. Without any indication as to the status of Plaintiff's application—the threshold inquiry—there is no way to know whether Ark ever had the evaluation and notification duties Plaintiff claims to have been violated in the first place. *Cf. Paz,* 2015 WL 4389521, at *1, *3 (rejecting the defendant's argument that its three-month delay in responding to the plaintiff's loan modification application could not provide a basis for a RESPA violation because the application was incomplete, reasoning that the defendant was required to either notify the plaintiff of any further information that was needed or treat the application as facially complete, and finding sufficient the plaintiff's specific allegation that the application was "facially complete"). The omission is dispositive.

In short, because the specific Regulation X duties underpinning Plaintiff's RESPA claim in Count I apply only to loan modification applications that are complete or facially complete, Plaintiff's failure to allege same renders her claim deficient. Accordingly, Count I is dismissed without prejudice, and with leave to amend. Should Plaintiff seek to reassert her RESPA claim in any amended version of her Amended Complaint, she would be well-advised to allege specific facts that relate to the status of any loan modification applications that she submitted—including the attachment of any initial notice or notices she received from any of the Defendants, and any actions (or inactions) by any of the parties thereafter. The Court notes that Plaintiff's Amended Complaint refers to an Exhibit 1, S*ee* ECF No. [7] at 10, but Plaintiff fails to attached same to her pleading. Additionally, Defendants correctly point out that, with respect to the various loan modification applications Plaintiff allegedly submitted, the Amended Complaint "fails to specify which dates which documents were sent, which

defendant received which documents, [and] what each defendants' responses were. . . ." ECF No. [22] at 3. Any amended version of the Amended Complaint should therefore allege with specificity which Defendants are responsible for each alleged RESPA violation.

Mikulski v. WELLS FARGO BANK, NA, Dist. Court, ED Wisconsin August 25, 2017

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Mikulski's letter does not allege that his "account is in error." *See* 12 U.S.C. § 2605(e)(1)(B). Rather, it alleges there was an error in his loan modification application. RESPA does not protect borrowers from errors in loan modification applications or provide borrowers a means for correcting such errors.

Nor did the letter relate to the "servicing" of the loan. By the letter, Mikulski simply sought to alter the terms of his loan. That is necessarily outside the definition of "servicing," which relates to payments according to the terms of the loan. 12 U.S.C. § 2605(i)(3).

In substance, the letter was an allegation that the denial of the loan modification was improper and was a request for reconsideration. But such matters are not within the scope of a QWR. *See Nash v. PNC Bank, N.A.,* Civil Action No. TDC-16-2910, 2017 U.S. Dist. LEXIS 60697, at *19 (D. Md. Apr. 20, 2017) (citing *Sutton v. CitiMortgage, Inc.,* 2017 U.S. Dist. LEXIS 4841, *15 (S.D.N.Y. 2017); *Farraj v. Seterus, Inc.,* No. 15-cv-11878, 2015 U.S. Dist. LEXIS 166642, 2015 WL 8608906, at *3-4 (E.D. Mich. Dec. 14, 2015)). Therefore, the court will grant Selene's motion to dismiss Mikulski's claim that Selene violated RESPA.

Lorang v. Ditech Financial LLC, Dist. Court, WD Wisconsin September 5, 2017

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Here, Ditech designated an address for QWRs, and it notified the Lorangs of that address in writing, clearly and conspicuously. Ditech's November 4 and December 11, 2015 letters to the Lorangs provided: "Ditech has designated the following address where mortgage loan customers must send any Qualified Written Request, Notice of Error, or Request for Information: PO Box 6176 Rapid City SD XXXXX-XXXX." Dkt. 1-1, at 2 and Dkt. 1-3, at 1.[6] The notice appeared in the body of the relatively short letters and in the same size font as the rest of the content. So the Lorangs were required to send all QWRs to the designated address. The December 28, 2015 email did not trigger the duty to respond. *See Berneike v. CitiMortgage, Inc.,* 708 F.3d 1141, 1147 (10th Cir. 2013) ("[A] servicer's receipt of a QWR *at the designated address* is required to trigger RESPA duties and liability under § 2605." (emphasis added)); *Roth v. PNC Bank, N.A.,* No. 15-cv-4779, 2015 WL 5731892, at *3 (N.D. Ill. Sept. 30, 2015) ("Because Plaintiffs' attachments unequivocally show that Plaintiffs' February 2014 correspondence was not sent to the designated address, Plaintiffs' February 2014 QWR cannot be a basis of their RESPA claim.").

The January 20, 2016 letter fares no better. Although James Lorang sent the letter to Ditech and Ditech received it, he did not send it to the designated QWR address. *See* Dkt. 1-5. So it did not

trigger the duty to respond. The Lorangs cannot maintain a claim for Ditech's failure to respond to a QWR.

Roman v. Wells Fargo Bank, NA, Dist. Court, D. New Jersey September 14, 2017

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Plaintiffs' arguments miss the mark. This is primarily because Plaintiffs' complaint in essence "seek[s] to attack the state court foreclosure judgment, since Plaintiffs are impliedly challenging the validity of the mortgage and right to foreclose on the. . . . [p]roperty." *Ogbebor,* 2017 WL 449596, at *11. For instance, the complaint repeatedly refers to Defendants' allegedly illegal actions in originating, servicing, and collecting on the mortgage prior to foreclosure, as well as the illegitimate nature of the foreclosure proceeding itself. (*See* Cmpl. ¶¶ 14-26). Plaintiffs commonly refer to the mortgage and note as "illegal and void," (*id.* ¶¶ 5, 14, 17-19, 31, 49), and the complaint's opening states that "[t]his action arises out of a mortgage foreclosure action. . . ." (*Id.* ¶ 1). Plaintiffs' claims, as pled, are therefore "inextricably intertwined" with the underlying state proceeding for the purposes of *Rooker-Feldman.*

While Plaintiffs belatedly attempt to characterize the complaint as stemming from Defendants' *post*-foreclosure servicing of the mortgage, each of Plaintiffs' claims include numerous allegations covering Defendants' *pre*-foreclosure conduct. For example, Count I purports to represent a cause of action under RESPA's provisions for loss mitigation assistance. (*See* Cmpl. ¶¶ 30-42). Plaintiffs plainly allege that Defendants' actions occurred over a period of "not less than five years," i.e., well prior to the foreclosure proceeding. (*Id.* ¶ 30). This fatal infirmity in pleading permeates the entirety of Plaintiffs' original complaint. (*See id.* ¶¶ 30-100).

Plaintiffs also make much of the fact that they seek monetary damages, rather than a modification or reversal of the foreclosure judgment. (Cross-Mot. at 12). However, "[t]he fact that Plaintiffs seek money damages instead of an outright invalidation of the state court foreclosure judgment does not necessarily preclude the application of the *Rooker-Feldman* doctrine." *Ogbebor,* 2017 WL 449596, at *9 (citing *Laychock v. Wells Fargo Home Mort.*, 399 F.App'x 716, 718 (3d Cir. 2010); *Willoughby v. Goldberg & Ackerman, LLC,* No. 13-7062, 2014 WL 2711177, at *6 (D.N.J. Jun. 16, 2014)). Moreover, Plaintiffs have in fact requested that this Court rescind the mortgage and note. (Cmpl. ¶¶ 5, 77). Plaintiffs' contention that they seek solely monetary damages therefore fails.

In sum, the "the gravamen of [Plaintiffs'] complaint . . . `is in essence an attack on the state court judgment of foreclosure,'" *Ogbebor,* 2017 WL 449596, at *10. This Court therefore lacks subject matter jurisdiction over Plaintiffs' claims, and proposed claims, (*see* ECF No. 17-2), to the extent that they derive from the foreclosure judgment. *See Monclova v. US Bank NA,* 675 F.App'x 115, 117 (3d Cir. 2017) ("Accordingly, insofar as [plaintiff] challenges the foreclosure order, her claims are barred by the *Rooker-Feldman* doctrine.").

B. The Entire Controversy Doctrine

…To the extent Plaintiffs allege in their complaint claims arising from Defendants' alleged acts and violations arising out of the mortgage transaction, the Court finds that these claims are barred by the

Entire Controversy Doctrine. Further, to the extent Plaintiffs allege the same in their proposed amended complaint, such claims would also be barred.

Anderson v. Wells Fargo Home Mortgage, Dist. Court, ED California September 20, 2017

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Here: Plaintiffs' own descriptions of the 8/27/15 Requests reveal that they are facially overbroad and go well beyond the proper subject matter for QWRs; the 10/13/15 Letter provided Plaintiffs with the Note, Security Instrument, and Payment History; and "the complaint lacks any specificity as to what in particular was insufficient about Wells Fargo's response," see Brewer, 2017 WL 1315579, at *5 (citation omitted). The Motion, insofar as it seeks dismissal of the Regulation X claims, is granted. However, the dismissal of this claim is without prejudice. See McCliss v. Ward, No. 2:07-cv-01154-MCE-KJM, 2008 WL 3373821, at *3 (E.D. Cal. Aug. 8, 2008) ("A court may determine that amendment of a complaint is futile, and dismiss a claim with prejudice, if the pleadings could not possibly be cured by the allegation of other facts." (some citations omitted) (citing Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990))).[7]

Lambert v. PNC Bank, NA, Dist. Court, ED Michigan September 26, 2017

https://scholar.google.com/scholar_case?case=17963181671433949356&q=Lambert+v.+PNC+ED+MI&hl=en&lr=lang_en&as_sdt=3,31&as_ylo=2017&as_vis=1

PNC contends it never received a complete application and provides incomplete applications as support to its motion. (*See* ECF Nos. 24-16, 24-17.) However, Plaintiff contends that he submitted the "last set of requested documents on January 15, 2015." (ECF No. 25 at Pg ID 579.) For support, Plaintiff cites "Docket No. 1, Exhibit 11, Modification Application" but there is no such exhibit attached to the first docketed item in this matter. As PNC notes, Plaintiff has not provided any evidence that he submitted a complete loan modification in January 2015 or at any point prior, other than his own testimony. However, this Court is "not required to accept unsupported, self-serving testimony as evidence sufficient to create a jury question." *Brooks v. Am. Broadcasting Cos. Inc.*, 999 F.2d 167, 172 (6th Cir. 1993).

The Court finds that PNC proceeded in accordance with RESPA. Therefore, this Court is granting summary judgment as to Count I of Plaintiff's complaint.

Richard v. Caliber Home Loans, Inc., Dist. Court, SD Ohio September 29, 2017

https://scholar.google.com/scholar_case?case=4136479933572507 99&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Defendants allege that they designated a specific address for the receipt of QWRs in accordance with Regulation X. Plaintiff does not dispute that Caliber designated an address in its March 2015 mortgage statement, and instead argues that strict enforcement of Regulation X in this case essentially strips Plaintiff of his ability to use an attorney. However, the Ohio Rules of Professional

Conduct consider such situations in the comments to Rule 4.2. Although it is true that Plaintiff's attorney could not contact Caliber as it knew Caliber was represented in this matter and Plaintiff's attorney did not have permission, the comments make clear that Rule 4.2 does not bar "a lawyer . . . from advising a client concerning a communication that the client is legally entitled to make." Rules of Prof. Conduct 4.2, cmt. 4. Client to client communication is a communication a client is legally entitled to make. *Id.* In fact, Plaintiff's attorney did not cite inability to use counsel when the parties discussed this specific mailing. Instead, he stated that "Mr. Richard's efforts to communicate with Caliber only result in frustration as evidenced by the history of litigation between the parties." (Doc. 74-1, Stipulated Exs. at PAGEID# 189-190). Despite Folland's suggestion that Plaintiff contact Caliber directly, Gerling mailed the purported QWR to Folland. The Court agrees with the Second and Tenth circuits that Plaintiff's failure to mail the QWR to the correct address forecloses his RESPA claim. Defendants' Motion regarding Plaintiff's RESPA claim is GRANTED.

Amenu-El v. Select Portfolio Services, Dist. Court, D. Maryland October 4, 2017

https://scholar.google.com/scholar_case?case=6320967888226416978&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In paragraph 20 of the Complaint, Plaintiff alleges that she "served a Qualified Written Request (QWR) upon SPS and US Bank with all of the attendant time requirements for a response without an answer." (ECF No. 2 at ¶ 20.) She does not attach a copy or provide any additional information about this request. Four counts later, Plaintiff contradicts herself, claiming that SPS did respond to a QWR dated 2/6/2017, but that its response was inadequate. (*Id.* at ¶ 24.) To the extent that Plaintiff's RESPA claim rests on the 2/6/2017 QWR, then her claim fails because she alleges that SPS did respond.
If Plaintiff's RESPA claim rests on other QWRs to which SPS did not respond, she has failed to factually support this allegation. The United States District Court for the District of Virginia recently dismissed a similar RESPA claim in *Vuyyuru v. Bank of America, N.A.,* No. 3:16CV638-HEH, 2017 WL 1740020 (E.D. Va. May 3, 2017). In that case, the court explained that "[c]onspicuously absent from Plaintiff's bald assertions are facts." *Id.* at *4. "[The plaintiff] neither offers specific information related to the letter's request, nor attaches to his Complaint any communication claiming to be that qualified written request." *Id.* Similar to the plaintiff in *Vuyyuru,*Plaintiff has not attached a QWR or pled any facts describing why her account contained an error or why the corrections she requested in her QWR were appropriate. *Id; see also Boston v. Ocwen Loan Servicing, LLC,* No. 3:12CV452, 2013 WL 122151, at *3 (W.D.N.C. Jan. 9, 2013) (dismissing plaintiff's RESPA claim in part because the plaintiff did not attach any documents evidencing her QWR or provide "any specific information about her alleged requests that would satisfy the statutory definition of a QWR"). For these reasons, her RESPA claim is dismissed.

Stanley v. CitiMortgage, Inc., Dist. Court, SD Ohio October 30, 2017

https://scholar.google.com/scholar_case?case=13400487006498223525&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

The first and second elements are satisfied because the parties in this case were also parties to the state court foreclosure action, a case in which there is a final judgment of record. PageID 219-28. The allegations, viewed in a light most favorable to Stanley, establish that he was aware of the facts

underlying his RESPA claims at the time of the state court action and, therefore, such claims could have been litigated at that time. *See McConnell v. Applied Performance Techs., Inc.,* No. C2-01-1273, 2002 U.S. Dist. LEXIS 27599 (S.D. Ohio Dec. 11, 2002). Finally, the RESPA claims arise out of the transaction or occurrence at issue in the foreclosure action, *i.e.,* the servicing of the note. Accordingly, as all four elements of the *Grava* test are satisfied, the undersigned finds that Shawn Stanley's claims are barred by *res judicata* and should be dismissed.

Perez v. Seterus, Inc., Dist. Court, D. New Jersey November 16, 2017

https://scholar.google.com/scholar_case?case=10453847667079360103&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Servicer Not Required to Respond to NOE sent Post Judgement]
Under RESPA, a mortgage loan servicer who receives a qualified written request ("QWR") regarding a mortgage loan is obligated to both conduct a reasonable investigation and respond to the request. 12 C.F.R. § 1024.35(e). Under New Jersey law, a mortgage loan is extinguished once a judgment of foreclosure is entered. *Genid v. Fannie Mae,* No. 15-06787 (PGS), 2016 U.S. Dist. LEXIS 100896, at *10 (D.N.J. Aug. 2, 2016) (dismissing RESPA claim because the QWR and related communications occurred post-foreclosure) (citing *Va. Beach Fed. v. Bank of N.Y./Nat'l Crory. Div.,* 299 N.J. Super. 181, 188 (App. Div. 1998)). Here, Plaintiff sent her QWR letter to Seterus in May 2017. (Compl. ¶ 48). This letter was sent after the foreclosure judgment, which was decided in February 2017. (*Id.* ¶ 43). Therefore, Seterus had no obligation to respond, because the mortgage loan was extinguished before Plaintiff sent the QWR letter. *See Genid,* 2016 U.S. Dist. Lexis at *10. For these reasons, the Court determines that Plaintiff has failed to state a claim under RESPA and dismisses Count IV.

Hua v. Wells Fargo Bank, NA, Dist. Court, ED Pennsylvania November 21, 2017

https://scholar.google.com/scholar_case?case=3401708308342363401&q=Hua+v.+Wells+Fargo&hl=en&lr=lang_en&as_sdt=3,31&as_ylo=2017&as_vis=1

[RESPA Does not apply to Investment Property]

For Hua and Mu to access the consumer protection statutes at issue, the property and loan must have been for personal, rather than commercial, use. Because plaintiffs admit through their counsel that the property here was an investment property, the claims based on violations of the TILA, the FDCPA, the UTPCPL, and the RESPA are dismissed.

All four statutes are triggered by personal, non-commercial use. The TILA applies only to transactions "primarily [intended] for personal, family, or household purposes," 15 U.S.C. § 1602(h), not to "transactions involving extensions of credit primarily for business, commercial, or agricultural purposes," *id.* at § 1603(1). The FDCPA applies only to debts undertaken "primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). The UTPCPL applies only to transactions entered into "primarily for personal, family, or household purposes." 73 Pa. C.S. § 201-9.2(a); *see also Balderston v. Medtronic Sofamor Danek, Inc.*, 152 F. Supp. 2d 772, 776 (E.D. Pa. 2001). The RESPA does not apply to extensions of credit "primarily for business, commercial, or agricultural purposes." 12 U.S.C. § 2606(a)(1); *see also Hinchlife v. Option One Mortg. Corp.*, No. 08-2094, 2009 WL 1708007, at *4 (E.D. Pa. June 16, 2009) (denying a RESPA claim because the plaintiff had not shown that the loan was for personal use).

At oral argument, Hua and Mu's counsel stated that the property at issue was an investment property. Hua and Mu never lived there; instead, they rented it out to others and used the property for collecting rental income. Therefore, all claims based on consumer-protection statutes (counts 2, 3, 4, 8, 9, and 10) are dismissed.

Bulpitt v. Carrington Mortgage Services, LLC, Dist. Court, D. New Hampshire December 7, 2017

https://scholar.google.com/scholar_case?case=15085581273998632819&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[RESPA Claim Prior to 2014 Dismissed]

Because the Bulpitts submitted their application in September of 2013, before the effective date of Regulation X, they cannot bring a RESPA claim for violation of Regulation X. The Bulpitts argue, nevertheless, that the defendants are equitably estopped from asserting that their application was not filed after the effective date because: "There must be a remedy when there is a wrong."

There is no claim in this case for equitable estoppel. Further, the Bulpitts' theory of equitable estoppel lacks merit. They argue that the defendants are estopped "from asserting that the application was not filed after the effective date of Reg X, because had it not been for their wrongdoing, Plaintiffs would have filed again."[8]The Bulpitts have not shown that the defendants engaged in any wrongdoing or that the doctrine of equitable estoppel would apply in this case even if it had been properly raised.

[RESPA Claim Dismissed Application Incomplete]

The Bulpitts alleged that they submitted a complete application in September of 2013. Carrington, however, notified them that the application was not complete. Gary Bulpitt acknowledged in his email dated November 29 that he had not complied with the documentation requirements with respect to the insurance policy. Therefore, they did not submit a complete application within the time allowed.

The defendants are entitled to summary judgment on the Bulpitts' claim in Count III that the defendants violated RESPA by not complying with the requirements of Regulation X.

Kent v. Seterus, Inc., Dist. Court, WD Missouri December 7, 2017

https://scholar.google.com/scholar_case?case=10143851662599137725&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[RESPA Does not apply to Investment Property]

Here, the facts establish the QLI loan was obtained for a commercial purpose. When the QLI loan was executed, the condo had been used as a rental for over a year. *See* *Edwards v. Ocwen Loan Servicing, LLC*, 24 F. Supp. 2d 21, 27 (D.D.C. 2014) (holding because plaintiff did not reside in the home, nor intend to, when she refinanced the mortgage, the debt was not primarily for personal,

family, or household purposes). Further evidencing a commercial purpose is that the QLI loan documents contain a "1-4 Family Rider." *See Gonsalves-Carvalhal v. Aurora Bank, FSB,* No. 1:14-CV-151-SCJ-LTW, 2016 WL 5339695, at *5 (N.D. Ga. July 1, 2016), *report and recommendation adopted,* No. 1-14-CV-151-SCJ, 2016 WL 5376295 (N.D. Ga. Aug. 10, 2016) (finding the 1-4 Family Rider for Assignment of Rents the plaintiff executed as part of his Security Deed suggests that the property was intended to be used as rental property at the time of the transaction). While Kent initially lived in the condo as his personal residence, and states he intends to return, this does not overcome all of the other facts that support finding that the QLI loan was executed for a business purpose. Thus, Plaintiff's RESPA claim in Count I is DISMISSED WITHOUT PREJUDICE.

Guzman v. Nationstar Mortgage LLC, Dist. Court, ND Texas December 8, 2017

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[Failure to Sufficiently Plead RESPA Claim under 1024.41]

Defendants correctly note that Section 1024.41 "only appl[ies] to a borrower's first loss mitigation application." *Jones v. Select Portfolio Servicing, Inc.,* No. 3:16-cv-2331-K-BN, 2016 WL 6581279, at *7-*10 (N.D. Tex. Oct. 12. 2016) (Horan, J.) (citing *Wenztell v. JPMorgan Chase Bank, Nat'l Ass'n,* 627 Fed. App'x. 314, 318 n.4 (5th Cir. Oct. 2, 2015)). "Nothing in Plaintiff's Original Petition allows the Court to infer that this suit concerns Plaintiff's first loan modification request." *Jones,*2016 WL 6581279, at *8. Plaintiff now states that he did not previously submit a loan modification request. However, courts look only to the pleadings in deciding a 12(b)(6) motion. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000). The undersigned therefore concludes that this claim should be dismissed due to the absence of this necessary pleaded fact, but without prejudice because it appears that Plaintiff has not pleaded his best case and has not previously amended his pleadings.

Morgan v. Carrington Mortgage Services, Court of Appeals, 10th Circuit December 12, 2017

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Ms. Morgan also claimed Carrington violated RESPA and its implementing regulation by failing to review her March 16, 2015 loss-mitigation application. Under 12 C.F.R. § 1024.41(c)(1), "if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days," the servicer must evaluate whether the borrower is eligible for any loss mitigation options and notify the borrower of any available options. "But a servicer only has a duty to evaluate a complete loss mitigation application that it receives `more than 37 days before a foreclosure sale.'" *Lage v. Ocwen Loan Servicing LLC,* 839 F.3d 1003, 1106 (11th Cir. 2016) (quoting 12 C.F.R. § 1024.41(c)(1)). Ms. Morgan submitted the March 16, 2015 loss-mitigation application six months *after* the sheriff's sale on September 18, 2014. Thus, Carrington had no duty to evaluate it.

he only factual allegation Ms. Morgan provides is absent from her amended complaint but appears in her opening brief, where she suggests that she was harmed by the lack of notice because she was unable to submit a loss-mitigation application to her true servicer, Carrington, before the sheriff's

sale. This assertion appears in a single sentence in the procedural history section of her brief, and fails to preserve the argument. *See* *Toone,* 716 F.3d at 522. In any event, Ms. Morgan did not allege that she had a pending application with Bank of America before the sale (apart from the August 2012 application, which is subject to claim preclusion), so it is implausible that the alleged lack of notice caused her to be harmed.

2018

Feighery v. Ditech Financial, LLC, Dist. Court, ED California January 11, 2018

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Read fairly, plaintiff's letters to Ditech constitute "allegation[s] of fraud or mistake during the closing of the loan and the drafting of the relevant documentation. Thus, [the letters] concern[] only the loan's validity and terms, not its *servicing.*" *See* *Medrano,* 704 F.3d at 667 (emphasis in original). The letters, as alleged, were not QWRs that triggered Ditech's duty to respond and plaintiff's RESPA claim must be dismissed.

Stanley v. CitiMortgage, Inc., Dist. Court, SD Ohio January 22, 2018

https://scholar.google.com/scholar_case?case=15684647182009916635&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

As to Claim Four, Citi's four allegedly inadequate responses to Shawn's repeated requests for information and loss mitigation applications were dated September 8, 2015; November 17, 2015; December 22, 2015; and January 12, 2016. Doc. #1, ¶¶ 109-116, PAGEID #20-21; Doc. #1-2. In the light most favorable to Plaintiffs, they appear to be arguing that Citi did not violate 12 C.F.R. § 1024.36(d) — the gravamen of Claim Four — until after it had initiated the State Court action. Yet, that regulation requires a loan servicer to respond to a request for information within thirty days of a request for information, 12 C.F.R. § 1024.36(d)(2), and Shawn made his earliest such request on or about January 28, 2015. Doc. #1, ¶¶ 111-12, PAGEID #20-21; Doc. #1-1, PAGEID #45. Thus, Citi's alleged initial violation of 12 C.F.R. § 1024.36(d) occurred no later than February 28, 2015 — more than a month prior to its initiation of the State Court action. Consequently, Claim Four was a compulsory counterclaim, Ohio Civ. R. 13(A), and is barred by *res judicata.*

In Claim Five, Plaintiffs allege that they submitted complete loss mitigation applications on April 13, 2016, and December 20, 2016, and that Defendant failed to perform a complete review of those applications within thirty days of receipt, in violation of 12 C.F.R. § 1024.41(c). Doc. #1, ¶¶ 123-26, PAGEID #23. Yet, Plaintiffs allege that Shawn first submitted a completed loss mitigation application to Defendant on or about January 7, 2015. Doc. #1, ¶ 76, PAGEID #14. Further, Plaintiffs do not claim that Defendant completed the required review of that application or any other. Consequently, Defendant would have breached its duty to review no later than February 7, 2015, more than two months prior to its filing of the State Court action. Thus, Shawn knew or should have been reasonably aware of all the facts giving rise to Claim Five at the time he was served with the foreclosure complaint, making it a compulsory counterclaim. Ohio Civ. R. 13(A). Shawn's subsequent loss mitigation applications, and Defendant's alleged failures to complete review in a timely manner, do not excuse Plaintiffs' failure to raise Claim Five as a counterclaim, and Claim Five is barred by *res judicata.*

In Claim Six, Plaintiffs allege that, on August 4, 2016, Shawn filed a timely appeal of Defendant's denial of his April 13, 2016, loss mitigation application. They further claim that Defendant did not respond to Shawn's appeal within thirty days, in violation of 12 C.F.R. § 1024.41(h)(4). Doc. #1, ¶¶ 132-36, PAGEID #24-25; Doc. #1-3; Doc.

#1-4; Doc. #1-5. Yet, Defendant had informed Plaintiffs' agent of its denial of Shawn's loss mitigation application no later than April 16, 2015. Doc. #1-1, PAGEID #39. Pursuant to the regulation, Shawn was required to appeal Defendant's denial no later than April 30, 2015, 12 C.F.R. § 1024.41(h)(2), and there is no indication in the record that he did so. Moreover, Plaintiffs do not allege that Shawn's April 2016 loss mitigation application differed substantially from his January 2015 application. "Section 1024.41 . . . does not require mortgage services to consider duplicative requests[,]" *Brimm v. Wells Fargo Bank, N.A.,* No. 16-2070, 688 F. App'x 329, 331 (6th Cir. 2017) (quoting 12 C.F.R. § 1024.41(i). Thus, any refusal to consider Shawn's August 2016 appeal cannot form the basis for a viable RESPA claim, and Claim Six, even if not barred by *res judicata,* is properly dismissed for failure to state a claim.

Mastin v. Ditech Financial, LLC, Dist. Court, ED Virginia January 23, 2018

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Plaintiffs' claim under the regulation rises and falls on the notion that Ditech is obligated to accept Plaintiffs' partial payments and hold the payments in a suspense account until Plaintiffs are able to eliminate any arrearage. Id. As explained above, however, 12 C.F.R. § 1026.36(c)(1)(ii) does not require a loan servicer such as Ditech to accept partial payments at all, and the Deed of Trust specifically provides that Ditech may reject payments that are "insufficient to bring the Loan current." (Def. First Reply, Ex. B). Therefore, this claim fails as a matter of law. Moreover, the legal insufficiency of the claim could not be remedied by giving Plaintiffs another opportunity to amend because amendment would be futile for the reason that the theory is not viable as a matter of law. Labor, 438 F.3d at 426 (quoting Johnson, 785 F.2d at 509).

Finster v. US Bank National Association, Court of Appeals, 11th Circuit January 31, 2018

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[Notice of Error Not Specific Enough Regarding Fannie Mae Guidelines Servicier Violated]
Nor does the lack of evidence regarding Fannie Mae's guidelines work in Finster's favor, as she suggests. U.S. Bank did not need to refute her unsupported contention with evidence. Rather, it was Finster's burden, as the party seeking to prevent summary judgment, to submit or identify evidence that created a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986) ("[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.")…

…The gist of Finster's position seems to be that U.S. Bank's actions were unreasonable. And maybe they were. But unreasonable conduct by a servicer does not necessarily amount to a violation of RESPA or Regulation X, even if their requirements seek to establish a baseline of reasonable conduct in many ways. In this regard, the fact that U.S. Bank later granted Finster the loan modification does not create a genuine issue of material fact as to whether U.S. Bank violated RESPA in responding to Finster's notices of error. Specifically, it is not "significantly probative" evidence that U.S. Bank's prior explanation was wrong or insufficient. *See Anderson,* 477 U.S. at 249-50 ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted).

Lawson v. Specialized Loan Servicing, LLC, Dist. Court, ED Tennessee February 6, 2018

https://scholar.google.com/scholar_case?case=5218567158018783304&hl=en&lr=lang_en&as_sdt=6,40&as_vis=1&oi=scholaralrt

Here, the Lawsons assert their December 9, 2016 letter to Shapiro & Ingle, and the letter from their attorney to SLS on December 15, 2016 constitute QWRs. However, neither letter was mailed to the address designated by SLS. SLS informed the Lawsons that all notices of error and requests for information must be sent to Specialized Loan Servicing LLC, P.O. Box 630147, Littleton, CO XXXXX-XXXX. Because the Lawsons did not send their purported QWRs to SLS's designated mailing address, SLS's RESPA obligations were not triggered. As a result, the Lawsons cannot state a claim for relief under RESPA.

Finally, only a loan servicer is required by RESPA to respond to QWRs. The Lawsons have not alleged that Deutsche is a loan servicer; in fact, the record shows that Deutsche is the owner of the Note, and SLS is the loan servicer. Therefore, the Lawsons cannot state a claim for relief against Deutsche Bank under RESPA.

In Re Hatton, Bankr. Court, D. New Hampshire February 7, 2018

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The Bank seeks to dismiss the Debtor's first claim in Count II on the grounds that the Debtor's claim under 12 U.S.C. § 2609 is barred as a matter of law because there is no private right of action under that section of RESPA. The Debtor contends that there is. In support of his position, the Debtor cites Heller v. First Town Mortg. Corp., No. 97 Civ. 8575(JSM), 1998 WL 614197, at *4 (S.D.N.Y. Sept. 14, 1998), a decision from New York that acknowledges that there is "considerable case law" holding that there is no private of action under 12 U.S.C. § 2609 but which ultimately held that a private right of action does exist for claims under this section of RESPA. The Bank, on the other hand, cites a decision from New Hampshire, Fogle v. Wilmington Fin., Civil No. 08-cv-288-JD, 2011 WL 320572, at *6-7 (D.N.H. Jan. 31, 2011), wherein the district court held that no private right of action for claims under 12 U.S.C. § 2603 and 2604 exists because 12 U.S.C. § 2614 only expressly provides a private right of action for actions brought pursuant to 12 U.S. §§ 2605, 2607, and 2608. In support of its position, the district court cited the case of Campbell v. Machias Sav. Bank, 865 F.Supp. 26 (D. Me. 1994), which specifically held that there is no private cause of action for violation of 12 U.S.C. § 2609. Id. at *6.
This Court is persuaded by the reasoning of the cases from the district courts in the First Circuit, not by the case cited by the Debtor. For that reason, the Court holds that there is no private right of action for violations of 12 U.S.C. § 2609.

Boedicker v. Rushmore Loan Management, LLC Dist. Court, D. Kansas February 12, 2018

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12 CFR § 1024.35(b) defines the types of errors that are subject to RESPA resolution procedures. The NOEs cited by plaintiff failed to describe any error within any of these categories. Plaintiffs attempt to get around this fact by characterizing their notices as broadly challenging defendant's eligibility determination. See Dkt. 40 at 11 ("Plaintiffs allege that had Rushmore properly reviewed the loss mitigation application or had revisited is [sic] loan mod review as requested in NOE #1 and

NOE #2, that Rushmore would have discovered its errors and offered an affordable loan modification to the Boedickers."). The notices did not assert errors in the eligibility determination; they requested documents and asked for clarification on two specific points. Those requests did not assert errors within the meaning of § 1024.35. But even if the notices could be construed as asserting such errors, the uncontroverted facts show defendant complied with the regulation by timely responding to plaintiffs' questions and providing the explanation and documentation requested. Accordingly, defendant is entitled to summary judgment on plaintiffs' RESPA claim.

Hines v. Regions Bank, Dist. Court, ND Alabama February 15, 2018

https://scholar.google.com/scholar_case?case=15148612618084371846&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Regions argues that, regardless of the sufficiency of Mr. Hines's factual allegations, he cannot bring an action based on the cited sections of Regulation X because neither section provides a private right of action. Although Regions may be correct with respect to Mr. Hines's claim under § 1024.40, the Court is not persuaded that § 1024.39 does not support a private right of action.

The Eleventh Circuit has not definitively answered the question of whether either section 1024.39 or 1024.40 includes a private right of action. See Cilien v. U.S. Bank Nat'l Ass'n, 687 Fed. Appx. 789, 792 n.2 (11th Cir. 2017) (observing that neither section expressly provides a private right of action but first evaluating the sufficiency of the plaintiff's factual allegations). Still, the Consumer Financial Protection Bureau's 2013 amendment of Regulation X indicates that a private action exists under section 1024.39. The Bureau's official commentary to its Regulation X amendments divides the amendments' purposes into nine discreet areas. See Mortgage Servicing Rules, 78 Fed. Reg. at 10696-97. The Bureau expressly notes that no private right of action exists in two of these areas: (1) general servicing policies and procedures as well as (2) policies and procedures relating to continuity of contact with delinquent borrowers. Mortgage Servicing Rules, 78 Fed. Reg. at 10697-98. This indicates that Mr. Hines does not have a private right of action under § 1024.40 because § 1024.40 concerns the mortgage servicer's general policies and not the borrower's rights.

Vance v. Wells Fargo Bank, N.A. Dist. Court, WD Virginia February 20, 2018

https://scholar.google.com/scholar_case?case=8693446971640958351&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In this case, the complaint alleges that "HJTPC faxed Wells Fargo a loan modification package." Compl. ¶ 20. The Vances fail to allege that the "loan modification package" contained a complete loss mitigation application as defined in Section 1024.41(b)(1). In addition, the Vances fail to allege Wells Fargo actually received a complete loss mitigation application. Thus, like the plaintiffs in Gresham, the Vances fail to allege sufficient facts to support their claim that Wells Fargo violated Section 1024.41(c). The Vances' claim for a violation of Section 1024.41(c) will be dismissed without prejudice for failure to state a claim.

Kajla v. U.S. Bank N.A. as trustee for Credit Suisse First Boston MBS ARMT 2005-8 et. al. Dist. Court, D. New Jersey March 1, 2018

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As an alternative ground for dismissal, Defendants argue that Count One fails to state a claim for relief pursuant to Rule 12(b)(6). (*See* Defs.' Br. at 19-24.) RESPA requires a mortgage loan servicer who receives a QWR to conduct a reasonable investigation to satisfy the inquiry and respond to the request in a certain timeframe. *See* 12 C.F.R. § 1024.36(d).[5] However, a prerequisite for RESPA to apply is an existing mortgage. Defendants argue that Plaintiff's RESPA claim fails as a matter of law because when Plaintiff sent the QWR, the loan had already merged into the final judgment "and there was no longer a `loan' under which to make a QWR inquiry." (Def.'s Br. at 19.) "Under New Jersey law, a mortgage loan is extinguished once a judgment of foreclosure is entered." *Perez,* 2017 WL5513687, at *4 (citing *Genid v. Fannie Mae,* 2016 WL 4150455, at *3-4 (D.N.J. Aug. 2, 2016) (dismissing RESPA claim because the QWR and related communications occurred post-foreclosure)).

Here, the second amended foreclosure judgment was entered in March 2015, and both letters Plaintiff highlights in his Complaint were sent after that time. (*See*Compl. ¶ 3.37 (purported notice of rescission sent in June 2015); *id.* ¶ 3.40 (purported QWR sent in August 2017); *see also* Compl., Ex. B.) By the time Plaintiff sent his letters, the mortgage loan was already extinguished and Plaintiff could not avail himself of RESPA's protections. Count One fails to state a claim and must be dismissed.[6]

Harney v. Select Portfolio Servicing, Inc. Dist. Court ED Louisiana March 7, 2018

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The Court finds that SPS clearly established "P.O. Box 65227, Salt Lake City, Utah 84165 "as the exclusive mailing address for QWRs. *Bivens,* 868 F.3d at 917-21(finding that SPS had designated an exclusive address for receiving QWRs based on the same language contained in SPS' Notice of Transfer). The Plaintiffs' QWRs, however, were not sent to this address. The record reflects that Plaintiffs mailed two letters, captioned "R.E.S.P.A. Qualified Written Request[s]," to "P.O. Box 70369, Pasadena, CA 91117" rather than to SPS' exclusive QWR address. (Rec. Doc. 68-12 at 1, 5). Because a reasonable trier of fact could only find that SPS established an exclusive location at which it would accept QWRs, and that Plaintiffs never sent a proper request to that address, SPS had no duty to respond to Plaintiffs' letters. *Bivens,* 868 F.3d at 917-21 (concluding that SPS had no duty to respond where the plaintiff failed to mail his QWR to SPS' designated QWR address— P.O. Box 65227, Salt Lake City, Utah 84165). SPS' motion for summary judgment is therefore granted as to the RESPA claim.

Kane v. Bank of America N.A. Dist. Court ND Illinois March 9, 2018

https://scholar.google.com/scholar_case?case=9243644483876017794&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Under *Henry* and *Whitaker,* if Kane were to prevail in federal court on his claims— which, as the Banks rightly note, are "premised on allegations that [their] actions . . . caused him to be charged `unnecessary interest charges and fees' and resulted in a foreclosure action that he contends was wrongful," Doc. 155 at 10—this court's decision would nullify the state court's ruling that, "by virtue of the mortgage and the affidavits presented as evidence of indebtedness,. . . [Bank of America established that it] ha[d] a valid and subsisting lien on [Kane's] property" *and* was owed particular sums for the loan's "[p]rincipal, [a]ccrued interest, [a]dvances and other amounts," Doc. 150-3 at 1. It follows that the Banks would satisfy res judicata's identity of causes of action requirement even if they had to show that a victory for Kane here would nullify the state court judgment.

As all of the requirements of res judicata have been satisfied, the state court's judgment of foreclosure precludes Kane's claims in this case. While unnecessary to the court's holding, it bears mention that the opposite result would have unjustly rewarded Kane by allowing him to essentially buy his way out of the preclusive effect of the state foreclosure judgment by paying off his long-overdue mortgage only after he had definitively lost the state case.

Adt v. Nationstar Mortgage, LLC Dist. Court ED Virginia March 30, 2018

https://scholar.google.com/scholar_case?case=15534586911732763134&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

First, they contend that Nationstar violated 12 C.F.R. § 1024.35(e)(3)[14] by not responding to the Notice of Error[15] Mrs. Adt's attorney sent (Count I-A, the "Notice of Error Subclaim"), and § 1024.38(b)[16] by failing to investigate and provide Mrs. Adt with timely disclosures of information (Count I-B, the "Timely Disclosure Subclaim").

Kurzban v. Specialized Loan Servicing, LLC Dist. Court, SD Florida March 30, 2018

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…Defendant has moved to dismiss on several grounds, including that Plaintiff failed to comply with the terms of the Mortgage and provide Defendant with notice and an opportunity to cure the alleged RESPA and FDCPA violations…

…"The notice and cure provision of a mortgage bars a plaintiff's claims where it `applies by its terms to [the] action.'" *Charles v. Deutsche Bank Nat'l Trust Co.,* No. 15-cv-21826-KMM, 2016 WL 950968, at * 2 (S.D. Fla. Mar. 14, 2016) (quoting *St. Breux v. U.S. Bank, Nat'l Ass'n,* 919 F. Supp. 2d 1371 (S.D. Fla. 2013); *see also Telecom Italia, SpA v. Wholesale Telecom Corp.,* 248 F.3d 1109, 1116 (11th Cir. 2001) (holding that a claim "relates to" a contract when "the dispute occurs as a fairly direct result of the performance of contractual duties"). Plaintiff's RESPA and FDCPA claims clearly relate to the Mortgage. Indeed, Count I arises out of Plain-tiff's attempts to modify the Mortgage to avoid foreclosure. Count II arises out of Defendant's notice to Plaintiff that the Mortgage is in default and Count III arises out of alleged errors in the default amounts. There can be no doubt that the notice-and-cure provision applies to these claims. *See Sotomayor v. Deutsche Bank Nat'l Trust Co. et al.,* No. 15-cv-61972, 2016 WL 3163074, at *2-3 (S.D. Fla. Feb. 5, 2016) (enforcing notice-and-cure

provision to bar claims for alleged violations of the FDCPA arising from allegedly inflated property inspection fees and a payoff statement that was inaccurate due to the inclusion of the inflated fees); *Charles,*2016 WL 950968, at * 3 (enforcing notice-and-cure provision to bar claims against loan servicer for al-leged violations of the FDCPA and RESPA arising from purportedly inflated property inspection fees); *Sandoval v. Wolfe,* No. 16-61856-CIV-Dimitrouleas, 2017 WL 244111, at *3-4 (S.D. Fla. Jan. 19, 2017) (dismissing plaintiff's RESPA and FDCPA claims for failure to comply with no-tice-and-cure provision).

Plaintiff also contends that because Defendant is a servicer and not a party to the Mort-gage, the notice-and-cure provision does not apply. However, Courts in this district consistently hold that a notice-and-cure provision in a mortgage applies to actions against a servicer. *See Pierson v. Ocwen Loan Servicing, LLC,* No. 16-cv-62840, 2017 WL 634164, at *3 (S.D. Fla. Feb. 16, 2017) ("Contrary to the position taken in Plaintiff's Response . . . the notice and cure provision of the underlying mortgage is applicable to claims against Defendant as servicer of the loan despite Defendant not being a party to the underlying contract."); *Sotomayor,* 2016 WL3163074 at *2-3 (holding that notice-and-cure provision applied to action against loan servicer); *Charles,* 2016 WL 950968, at *3-4. Accordingly, the Court finds that the notice and cure provi-sion of the Mortgage applies to Plaintiff's claims against Defendant. Because Plaintiff failed to provide Defendant with notice of the purported violations and a reasonable opportunity to cure those violations, the action must be dismissed without prejudice.

Lohman v. Beneficial Financial I, Inc. Dist. Court SD Ohio Western Division March 30, 2018

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The crux of Plaintiffs' RESPA claim rests on Plaintiffs' request for the following documents: (1) a loss mitigation application, (2) copies of "appraisals, property inspections, and risk assessments," and (3) the date Beneficial began servicing the note. The Court addresses each of Plaintiffs' requests in turn.

First, RESPA requires loan servicers to consider "a single complete loss mitigation application," and does not extend this obligation to successive or duplicative requests. *Brimm v. Wells Fargo Bank, N.A.,* 688 Fed. App'x 329, 331 (6th Cir. 2017). Plaintiffs' first loan modification request was denied in 2014. Therefore, Defendants' nonproduction of a loss mitigation application is an insufficient basis for an alleged RESPA claim.

Second, appraisals and property inspections fall outside the scope of RESPA because such documents do not relate to the servicing of the loan. *See Stewart v. Fannie Mae,* 2015 U.S. Dist. LEXIS 132317, *7 (E.D. Mich., Sept. 30, 2015) (holding that the obligation to answer only attaches to those requests within a valid QWR that relate to the servicing of the loan); *see also Watson v. Bank of Am., N.A.,* 2016 U.S. Dist. LEXIS, *22-23 (S.D. Cal., June 30, 2016) (finding requests for appraisals and inspections to be unrelated to servicing).

Finally, despite Plaintiffs' contention that Defendants did not provide information related to the date of servicing, the document titled "Servicing Transfer Disclosure Statement" was clearly provided in Defendants' response. (Doc. 4-2, PageID 72).

Upon review, the Court finds Defendants properly responded to Plaintiffs' requests for information as required under RESPA. Accordingly, Plaintiffs fail to state a claim under RESPA.

Wirtz v. Specialized Loan Servicing, LLC Court of Appeals Eight Cir. April 3, 2018

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We agree with Specialized that Wirtz failed to prove actual damages, because Specialized's failure to comply with RESPA did not cause Wirtz's alleged harm. When a loan servicer fails to comply with § 2605(e), the borrower is entitled to "any actual damages to the borrower *as a result of* the failure." § 2605(f)(1)(A) (emphasis added). Congress's use of the phrase "as a result of" dictates that "there must be a `causal link' between the alleged violation and the damages." *Renfroe,* 822 F.3d at 1246.

Specialized's failures to comply with RESPA all involve the pre-2011 payment history. The servicer failed to comply with the statute by not obtaining and reviewing the pre-2011 payment history, and by not providing the pre-2011 payment history to Wirtz as requested. It is true that Wirtz, as a result of Specialized's failures, had to obtain a copy of the pre-2011 payment history from Chase himself. But Wirtz did not claim that he paid any money for those records, and the district court did not award damages on that basis.

The district court's award of $80 in actual damages was based on Wirtz's expense to obtain a copy of his bank statements from January 16, 2012, through November 17, 2013. These records, however, relate to a separate dispute between Wirtz and Specialized over whether Wirtz failed to make loan payments in February 2012 and February 2013. Specialized's letter of December 9 properly asked Wirtz to provide "front and back of the cancelled checks evidencing that Chase received and processed payments from February 2012 and 2013." *See* 12 C.F.R. § 1024.35(e)(2). Wirtz eventually acknowledged that the records held by Chase showed possible missed payments in early 2012 and 2013; he then maintained that he made catch-up payments in May 2012 and at a later date after Specialized began servicing the loan in June 2013. Specialized complied with its duties under RESPA in responding to Wirtz's inquiries about payments in 2012 and 2013.

The bank records that Wirtz obtained for 2012 and 2013 were irrelevant to the dispute whether Wirtz's loan payments were past due before June 2011. Wirtz did not pay $80 for bank records from 2012 and 2013 "as a result of" Specialized's failure to investigate and provide information about the pre-2011 payment history. We therefore conclude that Wirtz did not submit sufficient evidence of actual damages under RESPA.

Damiani v. Wells Fargo Bank, N.A. Dist. Court D. New Jersey April 10, 2018

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As in *Gage,* here too, the Complaint reveals the true nature of Plaintiffs' claims. Although Plaintiffs are demanding damages, not the reversal of the foreclosure, they are effectively seeking invalidation of the decision of the state court and expressing dissatisfaction with the foreclosure on their property.

Unfortunately, it is not the role of this Court to serve as a court of Appeal to the decisions of the State Court. If Plaintiffs were displeased with the decision of the state court, they should have appealed to the Appellate Division in the Superior Court of New Jersey.

Travis v. Nationstar Mortgage, LLC Court of Appeals Ninth Cir. May 7, 2018

https://scholar.google.com/scholar_case?case=11094357935623395827&hl=en&lr=lang_en&as_sdt=4,60,114,129,156&as_vis=1&oi=scholaralrt

…Further, even though HBOR does not require servicers to provide borrowers with loan modifications or any other specific alternative to foreclosure, *see* Cal. Civ. Code § 2923.4(a), the Homeowners still could have been harmed by Nationstar's failure to communicate with them about the status of their loan modification application and about other alternatives to foreclosure. Had there been such communication, the Homeowners may have been able to pursue either a loan modification or some alternative that would have caused them less harm than the foreclosure that occurred—a standard sale, for example.

In other words, the alleged harm in this case is not that the Homeowners were not offered some specific foreclosure alternative, but that they lost the chance to discuss, pursue, and be evaluated for *any* alternative, from Nationstar or another entity or individual, despite HBOR's various mandates to the contrary. HBOR's private right of action for violations of lenders' obligations promptly to communicate with borrowers would serve no purpose if borrowers could not sue for damages caused by failures to communicate promptly. *See* Cal. Civ. Code § 2924.12(b).

However, the Homeowners' actual allegations require further specification. The Homeowners allege that, if they "were denied for a loan modification they would have . . . sought some other type of foreclosure alternative such as a standard sale of the property." These allegations lack sufficient details to survive a motion to dismiss, including how the foreclosure alternatives the Homeowners would have sought, had they received an answer to their application from Nationstar, would have avoided or reduced the damages they allege.

We thus deny Nationstar and Veriprise's motion to dismiss the Homeowners' appeal, and affirm the district court's dismissal of the Homeowners' claims. We remand to allow the Homeowners to seek to amend their claims under former sections 2923.55, 2923.6, and 2924.10, as well as under sections 2923.7 and 2924.17.

Roman v. Wells Fargo Bank, N.A., Dist. Court. D. New Jersey June 13, 2018

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…Here, the parties do not dispute that final judgment was entered on August 26, 2015, well prior to Plaintiffs' mailing of their loan modification application on November 13, 2015. (*See* Reply at 4-5; Opp'n at 7 ("Initially, it is undisputed that the mortgage merges into the Final Judgment.")). Plaintiffs attempt to distinguish the precedent cited above, arguing that it is only applicable where the property at issue has already been sold in a sheriff's sale. (Opp'n at 8 ("Similar to *Sanchez,* the Genids' property was already post-Sheriff's sale.")). However, at least one court in this district has dismissed claims under RESPA where a letter request was mailed "after the foreclosure judgment," but apparently

prior to the sale of the property. *See Perez,* 2017 WL 5513687, at *4. The Court finds this holding persuasive and therefore concludes that Defendants were not "servicers" under RESPA at the time Plaintiffs submitted their loss modification application.[2]Accordingly, the Court must dismiss Plaintiffs' action for failure to state a claim upon which relief may be granted. *See id.* ("[Defendant] had no obligation to respond, because the mortgage loan was extinguished before Plaintiff sent the QWR letter." (citing *Genid,* 2016 WL 4150455, at *3-4))…

…Here, Plaintiffs maintain that they submitted a complete loss mitigation application on November 13, 2015. The sheriff's foreclosure sale of Plaintiffs' property was, however, initially scheduled for December 8, 2015. In other words, Plaintiffs submitted their application only 25 days prior to the foreclosure sale — indeed, Plaintiffs do not appear to contest this assertion. Rather, Plaintiffs bring forth a novel argument that "Defendants have waived the argument that the loss mitigation application was untimely and they had no obligation to review it." (Opp'n at 9). It is, however, axiomatic that "a pleading may not be amended through briefing." *Fado v. Kimber Mfg., Inc.,* No. 11-4772, 2016 WL 3912852, at *11 (D.N.J. July 18, 2016). The Court accordingly declines to consider Plaintiffs' argument as to waiver at this juncture.[4] Therefore, the Court finds that Plaintiffs fail to state a claim upon which relief would be granted based on their submission of an untimely loss modification application…

…The Court finds that Plaintiffs have failed to plead that Defendant improperly responded, or failed to respond, to their NOEs. Defendants' briefing clearly outlines: (1) how each of Plaintiffs' NOEs fit into one of the enumerated exceptions discussed above, excusing Defendants from compliance with 12 C.F.R. § 1024.35(e); or (2) how Defendants properly responded to Plaintiffs' valid NOE. (*See* Mot. at 10-19). In response, Plaintiffs appear to take issue with only a handful of Defendants' characterizations; indeed, Plaintiffs concede that some of the correspondence at issue "may be duplicative." More specifically, Plaintiffs' opposition brief specifically attempts to rebut three of Defendants' assertions regarding the NOEs. First, in regards to their initial letters of December 18, 2015, Plaintiffs summarily maintain that "there is nothing whatsoever overbroad about the requests." (Opp'n at 10-11). Plaintiffs do not, however, show how the requests were sufficiently tailored so as to require a substantive response from Defendants. Second, Plaintiffs maintain that Defendants' responses to their December 18, 2015 correspondence were inadequate because Defendants' failed to disclose "a first mortgage encumbering the property executed by a Hector Perez." (*Id.* at 11). Plaintiffs again fail to demonstrate how or why Defendants alleged failure to notify Plaintiffs of the mortgage violated Regulation X beyond stating, in conclusory fashion, that the mortgage represented "a lien and a cloud on title preventing loan modification." (*Id.*). Finally, Plaintiffs maintain that Defendants' June 26, 2016 letter was not a response to their correspondence of June 22, 2016 because they aver Defendants utilized the wrong account number in their letter. (*Id.* at 11-12). Plaintiffs do not, however, explain *how* the use of an incorrect account number somehow renders Defendants' response, which was apparently mailed to and received by Plaintiffs, inadequate or inaccurate.[5] The Court accordingly finds that Plaintiffs fail to state a claim against Defendants under 12 C.F.R. § 1024.35…

McLaughlin v. Ocwen Loan Servicing, LLC, Dist. Court ND Alabama June 26, 2018

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The Defendants contend the statute of limitations began to run when the Plaintiffs consummated the loan on March 25, 2004. Doc. 32-1 at 23-24. The Plaintiffs counter that every monthly statement from Ocwen since 2012 has violated the TILA by improperly adding new charges, bringing their claim within the statute of limitations. Doc. 40 at 40-41. However, the TILA "provides remedies for inadequate disclosures, not for the charging of unlawful fees." *Rice v. Seterus, Inc.,* No. 7:17-CV-00732-RDP, 2018 WL 513345, at *10 (N.D. Ala. Jan. 23, 2018). Therefore, this alleged conduct, which is not a TILA violation, has no bearing on the statute of limitations. Thus, as the Plaintiffs do not dispute that they consummated the loan transaction on May 25, 2004, *see* doc. 40, their TILA claim, Count X, is barred by the statute of limitations.

…The question James McLaughlin answered—"[b]esides these two QWRs, are you aware of any other QWRs that were sent to Ocwen?"—is unambiguous, while his answer—"[n]o, sir"—is clear. *See* doc. 32-4 at 37. The Plaintiffs have not presented any explanation for the discrepancy between the deposition and the affidavits. *See* doc. 40. Accordingly, the court disregards, as a matter of law, those portions of the Plaintiffs' affidavits stating that they sent four QWRs to the Defendants, and finds that as to the two disputed QWRs, the Plaintiffs have failed to meet their burden…

Hubbard v. Ditech Financial, LLC. Dist. Court, SD Texas July 3, 2018

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Hubbard did not support her RESPA claim. Hubbard's complaint alleges no specific damages but only declares, quite confidently, that she has indeed suffered actual damages.[4]

Even if Hubbard's claims were not conclusory, many of them are false by her own account. For example, one of her exhibits shows that Ditech supplied a unique mailing address for qualified written requests on June 7, 2016, yet her complaint says it did not. Also, Hubbard sent letters to Ditech by fax rather than to the designated mailing address. As long as a loan servicer designates an address, communications sent to another address fail as qualified written requests even if the loan servicer responds.[5]

Hubbard neither claims nor shows any actual damages because Ditech has not caused her any. Her loss, if any, is self-inflicted.

Mejia v. Ocwen Loan Servicing, LLC Court of Appeals, Eleventh Cir. August 8, 2017

https://scholar.google.com/scholar_case?case=7011396407550542409&q=mejia+v+ocwen&hl=en&as_sdt=6,36

Moreover, courts have interpreted the term "pattern or practice" in accordance with the usual meaning of the words, suggesting "a standard or routine way of operating." *McLean,* 595 F. Supp. 2d at 1365 (quoting *In re Maxwell,* 281 B.R. 101, 123 (Bankr. D. Mass. 2002)). Failure to respond to one, or even two qualified written requests does not amount to a "pattern or practice." *See id.*; *In re Tomasevic,* 273 B.R. 682 (Bankr. M.D. Fla. 2002). In *Renfroe,* the Eleventh Circuit held that statutory damages may be sufficiently plead where, in addition to the alleged RESPA violation against a plaintiff, the complaint alleges unrelated RESPA violations. *See* 822 F.3d at 1247. While a plaintiff need not plead the "identities of other borrowers, the dates of the letters, and the specifics of

their inquiries" to survive dismissal, *Iqbal* and *Twombly* still require that a plaintiff plead "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Twombly,*550 U.S. at 570). In this case, Plaintiff has alleged merely that "[t]hrough its own conduct and the conduct of its designated counsel Defendant has shown a pattern of disregard to the requirements imposed upon Defendants by Federal Reserve Regulation X." Complaint ¶ 35. This does not provide sufficient facts to plausibly allege an impermissible "standard or routine way of operating," and Count II is dismissed. *See McLean,* 595 F. Supp. 2d at 1365.

Loconsole v. Wells Fargo Home Mortgage, Dist. Court, D. New Jersey June 28, 2018

https://scholar.google.com/scholar_case?case=3993758991269633883&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt&hist=qA2oI8IAAAAJ:12985798418689659395:AAGBfm3CQ8tKJjGBc_ocqlsyZzD3lldR8g

After reviewing all of the Complaint's factual allegations and all relevant sections of 1024.41, the Court finds that Plaintiff does not plausibly allege a RESPA violation. Section 1024.41 regulates a servicer's duty to evaluate a borrower's complete application for loss mitigation options. The regulations require thoroughness and communication. They do not require a servicer to offer a loan modification option or to "consider" any of the borrower's representations as determinative. This case is not like *Bennett,* in which a borrower was qualified and approved for a loan modification option that was then not offered to him. Defendant found that Plaintiff was not qualified for a loan modification, *even after* considering Plaintiff's appeal, which contained the higher monthly gross income amount. Further, Plaintiff has provided no plausible allegation that a monthly gross income of $10,511 qualified him for Defendants' loan modification option. Therefore, the Court finds that the Complaint does not plausibly allege a violation under RESPA, 12 C.F.R. § 1024.41. Count One is, therefore, dismissed with prejudice.

B. Timing

2016

Dale v. Selene ND OH, March 25, 2016

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Given the language of § 1640(e), I conclude the one-year limitations period ran from the dates Selene sent its responses, not when Dale received them. E.g., Pike v. Bank of America, N.A., 2015 WL 3824390, *7 (N.D. Ohio) (Nugent, J.) (limitations period for TILA claim "began to run on September 25, 2013, as that is when the alleged inadequate response was sent").

Dixon v. Ocwen Loan Servicing, LLC, Dist. Court, ND Texas October 24, 2016

https://scholar.google.com/scholar_case?case=15366183493147700286&q=dixon+v+ocwen&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

[No Equitable Tolling of TILA claims. Hard one year statute]

The Dixons contend, however, that the defendants' failure to correct the inaccurate statements constitutes an ongoing violation, tolling the limitations period. *See*Response at 5. The Fifth Circuit has held that improper TILA disclosures are not continuing violations that toll the limitations period. See *Moor v. Travelers Insurance Co.,* 784 F.2d 632, 633 (5th Cir. 1986) ("Nondisclosure is not a continuing violation for purposes of the statute of limitations." (quoting *In re Smith,* 737 F.2d 1549, 1552 (11th Cir. 1984)); see also *Val-Com Acquisitions Trust v. Citimortgage, Inc.,* No. 4:10-CV-0567-A, 2011 WL 825096, at *2 (N.D. Tex. Mar. 3, 2011) (McBryde, J.). Therefore, the statute of limitations is not tolled under this theory.

The Dixons' response could also be construed as arguing for equitable tolling of the limitations period. *See* Response at 5. Equitable tolling applies when "the plaintiff(s) [are] actively misled by the defendant about the cause of action or [are] prevented in some extraordinary way from asserting [their] rights." *McCrimmon,* 516 F. App'x at 375 (quoting *Teemac v. Henderson,* 298 F.3d 452, 457 (5th Cir. 2002)). It is used "only in rare and exceptional circumstances." *Id.* (quoting *Teemac,* 298 F.3d at 457). The Dixons have not pled any facts that would constitute a showing of equitable tolling. Therefore, the Dixons' TILA claims arising prior to June 6, 2015 must be dismissed with prejudice because they are barred by the statute of limitations.

Floyd v. PNC Mortgage, Dist. Court, Dist. of Columbia October 24, 2016

https://scholar.google.com/scholar_case?case=8162752677269478867&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[RESPA and TILA do not apply to Investment Properties]

Both of Plaintiff's federal claims rely on statutes — RESPA and TILA — that Congress passed to protect consumers from abuse by creditors. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 361-68 (1973) (explaining history of TILA's passage to remedy problems with consumer credit); Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401, 417 (9th Cir. 2011) (explaining Congress passed RESPA "in 1974 to protect consumers from abusive practices in mortgage closings"). Neither of these statutes, accordingly, applies to loans taken out for commercial or business purposes. See 12 U.S.C. § 2606(a)(1) (RESPA) (exempting "credit transactions involving extensions of credit . . . primarily for business, commercial, or agricultural purposes"); 15 U.S.C. § 1603(1) (TILA) (same). In general, a loan is deemed to be for a business purpose when it is "extended to acquire, improve, or maintain rental property . . . that is not owner-occupied" — *e.g.,* "a single-family house that will be rented to another person to live in." 12 C.F.R. pt. 226, supp. I, cmt. 3(a)(4); accord Johnson, 635 F. 3d at 417.

The fundamental problem with Floyd's federal claims is thus readily apparent. On his 2004 mortgage forms, he explicitly indicated that he intended to use the Property for "investment" purposes. See ECF No. 37-8 (Application) at 1 (indicating "Property will be Investment," rather than "Primary Residence" or "Secondary Residence"). He then confirmed in his deposition in this case that he in fact has used the Property as a rental since refinancing it in 2004 and, indeed, for nearly a decade before doing so. See Floyd Depo. at 12-14. These two facts alone are fatal to his federal claims.

2017

Pierson v. Ocwen Loan Servicing, LLC Dist. Court SD Florida, February 15, 2017

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…"Generally, the district court must convert a motion to dismiss into a motion for summary judgment if it considers materials outside the complaint. Fed. R. Civ. P. 12(b). A court may, however, consider documents attached to a motion to dismiss without converting the motion into one for summary judgment if the documents are (1) central to the plaintiff's claim and (2) undisputed." *Weiss v. 2100 Condo. Ass'n, Inc. @ Sloan's Curve,* 2012 WL 8751122, at *1 (S.D. Fla. Oct. 17, 2012) (citing *Day v. Taylor,* 400 F.3d 1272, 1276 (11th Cir. 2005)). Here, the Acknowledgment Letter is undoubtedly central to Plaintiff's claim. Furthermore, the Court finds there to be no dispute with respect to the Acknowledgment Letter, notwithstanding the "proof issues" raised by Plaintiff. To begin with, Plaintiff in no way challenges the authenticity of the Acknowledgment Letter and, importantly, makes no allegation that she never received the Acknowledgment Letter at her address within the permitted timeframe.[3] *See Day,* 400 F.3d at 1276 ("In this context, `undisputed' means that the authenticity of the document is not challenged."); *see also Sutton v. Ocwen Loan Servicing, LLC,* 2016 WL 4417688, at *2 n.3 (S.D. Fla. Aug. 19, 2016) ("The Acknowledgment Letter is undisputed because Plaintiffs do not challenge its authenticity . . . ."). Moreover, Plaintiff is simply incorrect to assert that the Acknowledgment Letter does not "provide any frame of reference" to the underlying mortgage it purports to refer to. The Acknowledgment Letter is addressed specifically to Plaintiff at Plaintiff's address, lists the same property address that is associated with the mortgage, and is dated only three days after the date on which Defendant received Plaintiff's RFI. *See* ECF No. [7-1], [7-2] at 3. The Court therefore finds that the Acknowledgment Letter, properly considered within the context of Defendant's Motion to Dismiss, conclusively shows that Plaintiff's claim must fail. Given that leave to amend would be futile, the Complaint is dismissed with prejudice.

Although Defendant's first basis for dismissal is dispositive, the Court also finds that Plaintiff's Complaint is subject to dismissal on Defendant's second basis—namely, that Defendant cured any alleged failure to acknowledge the RFI in accordance with the pre-suit notice-and-cure requirement provided in the mortgage. Plaintiff does not dispute that once she notified Defendant of its purported failure to acknowledge her RFI by way of the NOE sent on October 3, 2016, Defendant sent a letter acknowledging receipt of the NOE on October 13, 2016, five days before Plaintiff subsequently filed suit. *See* ECF Nos. [7-3]; ECF No. [8] at 3. Under paragraph 20 of the mortgage, Plaintiff is required to provide notice and a reasonable period of time to take corrective action prior to filing suit. ECF No. [7-2] at 13. Contrary to the position taken in Plaintiff's Response, *see* ECF No. [8] at 8-9, the notice and cure provision of the underlying mortgage is applicable to claims against Defendant as servicer of the loan despite Defendant not being a party to the underlying contract. *See Hill v. Nationstar Mortg. LLC,* 2015 WL 4478061, at *2-3 (S.D. Fla. July 2, 2015) (dismissing all of the plaintiffs' claims against the mortgage loan servicer for the plaintiffs' failure to comply with the notice and cure provision); *Charles v. Deutsche Bank Nat'l Trust Co.,* 2016 WL 950968, at *3-4 (S.D. Fla. Mar. 14, 2016) (rejecting plaintiff's contention that the loan servicer, "as a non-party to the mortgage, cannot enforce the mortgage's pre-suit notice and cure provision" and further noting that "[o]ther courts, moreover, have permitted servicers to enforce other mortgage provisions").

McMahon v. JPMorgan Chase Bank, NA, Dist. Court, ED California May 30, 2017

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To justify equitable tolling on a RESPA claim, a plaintiff must plead facts showing he "could not have discovered the alleged RESPA violations by exercising due diligence." Klepac v. CTX Mortg. Co., LLC, No. 2:11-cv-00752-GEB-GGH, 2012 WL 662456, at *5 (E.D. Cal. Feb. 28, 2012) (quoting Quiroz v. Countrywide Bank, N.A., No. CV 09-5855, 2009 WL 3849909, at *6 (C.D. Cal. Nov. 16, 2009)). It matters not when McMahon learned Chase remained the alleged master servicer on the loan, but rather when McMahon discovered Chase violated RESPA. McMahon does not plead any facts in his FAC which explain why he did not discover, or why he could not have discovered, Chase's alleged RESPA violations in 2013. The statute of limitations thus bars McMahon's RESPA claims against Chase for violations that occurred while Chase serviced McMahon's loan.

D. No Standing

2015

Green v Central Mortgage, ND California, September 12, 2015
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Green inherited her parents home. The court found she lacked standing:
Only "borrowers" have standing to assert the RESPA claims that Ms. Green asserts here. See 12 U.S.C. § 2605; 12 C.F.R. § 1024.41(b)(2)(i), (f)(2). Indeed, the regulation Ms. Green cites in her First Amended Complaint states that "[a] borrower may enforce the provisions of this section pursuant to [12 U.S.C. § 2605(f)]." 12 C.F.R. § 1024.41(a). For this reason, courts have dismissed RESPA claims asserted by those who are not borrowers. See Aldana v. Bank of Am., N.A.,No. CV 14-7489-GHK (FFMx), 2014 WL 6750276, at *3 (C.D. Cal. Nov. 26, 2014) (dismissing RESPA claim where the plaintiff was not a borrower, did not assume obligations under the loan, and was not a third-party beneficiary under the deed of trust when the borrower signed it); Stolz v. OneWest Bank, No. 03:11-cv-00762-HU, 2012 WL 135424, at *5 (D. Or. Jan. 13, 2012) (dismissing two plaintiffs' RESPA claims because, as non-borrowers, they "lack[ed] standing to bring a RESPA claim because they were not entitled to receive any disclosures or responses under RESPA); Mashburn v. Wells Fargo Bank, NA, No. C11-0179-JCC, 2011 WL 2940363, at *3 (W.D. Wash. July 19, 2011) ("Plaintiff Hayakawa also does not have standing to bring the RESPA . . . claims since he was not a borrower and did not apply for a loan. . . . and thus was not entitled to receive any disclosures or responses from Defendant under RESPA."); see also Johnson v. Ocwen Loan Serv., 374 Fed. App'x 868, 873-74 (11th Cir. Mar. 15, 2010) (affirming the district court's dismissal of, among others, the plaintiff's RESPA claim because the plaintiff "was not a borrower or otherwise obligated on the Ocwen loan and, therefore, did not suffer an injury-in-fact"; noting that 12 U.S.C. § 2605(f) provides that "[w]hoever fails to comply with any provision of this section shall be liable to the borrower for each such failure") (italics in original).

2016

Sayles v. BSI, ED Missouri, January 25, 2016
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Plaintiff alleges that defendants violated RESPA by failing to respond to his QWR within the time specified by the statute. 12 U.S.C. § 2605(e). Pursuant to the express language of the statute, however, civil liability under RESPA is limited to "borrowers." 12 U.S.C. § 2605. Multiple courts have held that plaintiffs who are not borrowers lack standing to bring claims arising from foreclosure. See Johnson v. Ocwen Loan Servicing, 374 F. App'x 868, 873-74 (11th Cir. 2010) (unpublished) (plaintiff challenging lender's practices was not borrower and thus did not suffer injury-in-fact and was not in "zone of interest" protected by RESPA and FDCPA); Naylor v. Wells Fargo Home Mortgage, Inc., No. 3:15-CV-116-RJC, 2016 WL 55292, at *6 (W.D.N.C. Jan. 5, 2016) (plaintiff whose husband was borrower did not have standing to challenge foreclosure under RESPA); Green v. Central Mortgage Co., No. 14-CV-04281-LB, 2015 WL 5157479, at *4-5 (N.D. Cal. Sept. 3, 2015) (plaintiff who received title to property by operation of trust on parents' death did not have standing to bring claims arising from foreclosure because she was not debtor); Leblow v. BAC Home Loans Servicing, LP, No. 1:12-CV-00246-MR-DLH, 2013 WL 2317726, at *7 (W.D.N.C. May 28, 2013) (husband of borrower did not have standing to assert RESPA claims); Correa v. BAC Home Loans Servicing LP, 853 F.Supp.2d 1203, 1207 (M.D. Fla. 2012) (plaintiff who provided down payment did not have legal rights of borrower under RESPA). Plaintiff was not a party to the loan and thus lacks standing under RESPA

Nicholas v. Greentree D. MD, March 25, 2016
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Accordingly, Nicholas will be granted 60 days to cure her lack of standing, such as by seeking to reopen the bankruptcy, amend the petition, and allow the Trustee either to be substituted into this case as the real party in interest or abandon the claim and thus allow Nicholas to proceed. See Wolfe v. Gilmour Mfg. Co., 143 F.3d 1122, 1126-27 (8th Cir. 1998) (holding that a trustee had standing to pursue a claim where the original plaintiff filed suit after filing for bankruptcy but then substituted the trustee as plaintiff under Rule 17); Ruffin v. Lockheed Martin Corp.,No. WDQ-13-2744, 2015 WL 127827, at *4 (D. Md. Jan. 7, 2015) (holding that a plaintiff cured her lack of standing to assert an unscheduled claim when she reopened the bankruptcy proceeding and submitted an amended schedule, resulting in the abandonment of the newly scheduled claim); Jones, 2014 WL 6871586 at *6-7. Green Tree may renew the Motion to Dismiss if Nicholas fails to establish standing through one of these means.

2017

Nelson v. NATIONSTAR MORTGAGE LLC, Dist. Court, North Carolina March 28, 2017

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A number of federal courts have held that only individuals who execute the promissory note are "borrowers" with standing to bring a RESPA claim. See Correa, 853 F. Supp. 2d at 1207 (rejecting plaintiff's argument that his payment of the down payment for the mortgage and note transaction made him a borrower with legal rights under RESPA where he did not sign either the note or the mortgage); Green v. Cent. Mort. Co., No. 14-cv-04281-LB, 2015 WL 5157479, at *5 (N.D. Cal. Sept. 2, 2015) (finding that plaintiff, who obtained property subject to mortgage as a result of her parents' death, did not become a borrower under RESPA simply upon obtaining title to the

property); Leblow, 2013 WL 2317726, at *7 (concluding that plaintiff was not a borrower because he did not sign the promissory note and was not a party to the loan, and that plaintiff's wife was the only borrower on the loan at issue); Mitchell v. Mort. Elec. Registration Sys., Inc., No. 1:11-CV-425, 2012 WL 1094671, at *2 (W.D. Mich. Mar. 30, 2012) (holding that plaintiff, who was not a signatory to the mortgage and note at issue, was not a borrower with standing to bring claims under RESPA); see also Johnson v. Ocwen Loan Servicing, 374 F. App'x 868, 873-74 (11th Cir. 2010) (affirming the district court's dismissal of plaintiff's RESPA claim because she was not a borrower or otherwise obligated on the loan). Because plaintiff did not sign the promissory note and has not assumed the loan, she is not a borrower under RESPA. Accordingly, plaintiff lacks standing to assert a RESPA claim, and this claim must be dismissed.

Smith v. SPECIALIZED LOAN SERVICING, LLC, Dist. Court, SD California May 3, 2017

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The parties do not dispute that Regulation X applies only to a "mortgage loan that is secured by a property that is a borrower's principal residence." 12 C.F.R. § 1024.30(c). While the property may have been Smith's principal residence at the time she submitted her application, it is not alleged; therefore, the Court GRANTS Defendant's motion to dismiss for lack of standing with leave to amend.[4]

Ocampo v. Carrington Mortgage Services, LLC, Dist. Court, SD Florida December 27, 2017

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However, when Plaintiff initiated loan modification proceedings, he no longer had an ownership interest in the Property or any obligation under the Note. As a result, Plaintiff could never obtain the modification he was requesting. Plaintiff contends that there can be a RESPA violation even when a mortgagor is not entitled to a mortgage modification. Plain-tiff is twisting the law. To be certain, lenders and servicers are required to comply with RESPA even when a borrower does not ultimately qualify for a mortgage modification due to inadequate income, credit, or other factors. This case is different. Plaintiff was never entitled to even begin the process for mortgage modification — his request was an impossibility. Therefore, his "inju-ries" are conjectural, and quite frankly, a legal fiction. Even if Defendant did fail to meet the requirements of RESPA, Defendant's "bare procedural violations," are simply not enough to cre-ate Article III standing for Plaintiff. *See* *Spokeo,* 136 S. Ct. at 1548-49 (a plaintiff "cannot satis-fy the demands of Article III by alleging a bare procedural violation."); *Meeks v. Ocwen Loan Servicing LLC,* 681 F. App'x 791, 793 (11th Cir. 2017) ("Meeks suffered at most "a bare proce-dural violation," and he cannot show that he suffered a real, concrete injury from Ocwen's ac-tions."); *see also* *Johnson v. Ocwen Loan Servicing,* 374 F. App'x 868, 873-74 (11th Cir. 2010) (finding that plaintiff's complaint "fails to establish Article III standing, because [plaintiff] was not a borrower or otherwise obligated on the Ocwen loan and, therefore, did not suffer an injury-in-fact."). Were the Court to hold otherwise, any individual could initiate loan modification pro-ceedings with a loan servicer, perhaps for their neighbor or family member, in the hopes that the loan servicer would commit a procedural violation subject to attorney's fees. The requirements of Article III of the Constitution prohibit such an absurd result.

2018

LeBauve v. J.P. Morgan Chase Bank, N.A. Dist. Court MD Lousiana March 1, 2018

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Given that RESPA statute specifically states that it applies only to "federally related mortgage loans,"[30] the Court is in agreement with our fellow district courts that a Plaintiff may only have standing to assert at RESPA claim if he or she pleads that the mortgage at issue is federally related. The Court further agrees with the *Lorasco* court that a plaintiff's failure to plead that a mortgage is federally related does not merit dismissal with prejudice given the absence of Fifth Circuit jurisprudence on this issue.

Accordingly, Defendant's motion to dismiss Plaintiffs' RESPA claim is DISMISSED WITHOUT PREJUDICE. Furthermore, Plaintiffs' request for leave to amend their RESPA claim is hereby GRANTED.

E. Venue

2016

Crenshaw v. Specialized Loan Servicing, LLC, Dist. Court, SD Florida August 23, 2016
https://scholar.google.com/scholar_case?case=15952050590461824816&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Venue not proper in Florida when borrower is in Texas and RFI went to Colorado]

"To state a RESPA claim for failure to respond to a [qualified written request ("QWR")], a plaintiff must allege that `(1) the defendant is a loan servicer under the statute; (2) the plaintiff sent a [QWR] consistent with the requirements of the statute; (3) the defendant failed to respond adequately within the statutorily required days; and (4) the plaintiff has suffered actual or statutory damages.'" *Graham v. Ocwen Loan Servicing, LLC,* No. 16-80011-CIV, 2016 WL 1573177, at *2 (S.D. Fla. Apr. 19, 2016) (quoting *Correa v. BAC Home Loans Servicing LP,* No. 6:11-CV-1197-ORL-22, 2012 WL 1176701, at *6 (M.D. Fla. Apr. 9, 2012)). The Court agrees with Defendant's assertion that the location where the violation occurred is not the same as where a plaintiff allegedly incurs damages and the statute specifies only one element of the cause of action, the violation. The Court declines to read more into the statute than what the plain meaning provides. Indeed, "[w]hat Congress meant to do in such circumstances is obvious: limit the districts where claims arising under the pertinent laws could be brought. The Court's function is to interpret laws, not improve upon them." *Price v. Countrywide Home Loans, Inc.,* No. CV205-015, 2005 WL 2354348, at *6 (S.D. Ga. Sept. 26, 2005). The Court agrees with Defendant that a plaintiff "cannot create venue in a particular jurisdiction by hiring counsel who happens to have an office located in that jurisdiction." Mot. at 2.[2] Accordingly, the Court finds that venue is improper in this District.

2017

O'Steen v. Wells Fargo Bank, NA, Dist. Court, MD Florida October 13, 2017

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[Jury Waiver in Mortgage Enforceable in Reg X Claim]

Count IV alleges that Wells Fargo violated Regulation X, 12 C.F.R. § 1024.41(g), when it sought "a foreclosure judgment or foreclosure sale of the property after receipt of a completed loss mitigation application, more than 37 days before a foreclosure sale." Doc. 43 at 8. Wells Fargo argues that because this claim arises out of or is related to the Mortgage or the Note, the Jury Trial Waiver ("Waiver") applies. The Plaintiffs do not dispute that they executed the Mortgage document containing the Waiver, nor do they contend that the Waiver was invalid. Instead, they argue that (1) the Waiver contained in the Mortgage document did not survive the entry of the foreclosure judgment and (2) that their claim arising from the violation of Regulation X is outside the scope of the Waiver. In the alternative, the Plaintiffs request that the Court employ an advisory jury for any claims to which the Waiver applies.

The Plaintiffs first contend that the Waiver did "not survive the termination of the mortgage agreement." Mem. in Opp., Doc. 69, at 2. This argument is creative but meritless. According to the Plaintiffs, the Waiver died with the Mortgage as soon as a final judgment of foreclosure was entered on January 9, 2014. *Id.* However, the applicability of the Waiver does not hinge on whether or not the Mortgage was extinguished. *See Fiora v. Green Tree Servicing, LLC,* No. 14-61755-CIV, 2015 WL 9916717, at *1 (S.D. Fla. Oct. 23, 2015) (stating that the applicability of an identically-worded jury trial waiver was unaffected by whether the claim arose before or after satisfaction of the mortgage). Rather, the Waiver applies "[a]s long as [the] claim arose from or related to [the] [M]ortgage." *Id.* Wells Fargo need not have included language like "until the end of the world," in order for the Waiver to "survive," as the Plaintiffs suggest. *See* Mem. in Opp. at 4. The intent is clear from the Waiver's language: it applies to "any right," "in any action," "in any way related" to the Mortgage. Doc. 18-2 at 17.

The Plaintiffs also argue that their claim for violation of Regulation X is outside the scope of the Waiver. In support of this, the Plaintiffs cite to *Bray v. PNC Bank, N.A.,*196 F. Supp. 3d 1282 (M.D. Fla. 2016). However, *Bray* is distinguishable; in that case, the plaintiff's claims arose from the defendant's attempts to enforce a debt that was discharged in and intervening bankruptcy. *See id.* at 1286. Further, *Bray*did not involve a RESPA claim, but courts in the Middle District of Florida have held identically-worded jury trial waivers contained in mortgage agreements applicable to RESPA claims. *Deleplancque v. Nationstar Mortg.,* LLC, No. 6:15cv1401, 2016 WL 406788, at *2 (M.D. Fla. Jan. 14, 2016), *report and recommendation adopted,* No. 6:15cv1401, 2016 WL 397962 (M.D. Fla. Feb. 2, 2016); *Pearson v. Countrywide Home Loans, Inc.,* No. 8:13cv1075, 2015 WL 506326, at *3 (M.D. Fla. Feb. 6, 2015). Count IV arises out of actions taken by Wells Fargo after receiving the Plaintiffs' loss mitigation application. *See* Second Amend. Compl. at 8-9. The Plaintiffs submitted that loss mitigation application in an effort to modify their loan. *See id.* at 6. The claim is clearly related to the Mortgage. Wells Fargo has shown that the Plaintiffs' jury demand is precluded by the

terms of the Mortgage. Accordingly, the Plaintiffs' jury demand must be stricken with respect to the remaining claim against Wells Fargo.

F. Expert Testimony

2016

Dionne v. Federal National Mortgage Association, Dist. Court, D. New Hampshire August 31, 2016
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The Dionnes also argue that Cipollone's second opinion, that Chase should have regarded the Dionnes' application as "facially complete," is appropriate expert testimony. Although the Dionnes concede that Cipollone's opinion is "couched in terms of the applicable regulatory scheme," they argue that the opinion itself is "squarely factual" and, therefore, admissible. Doc. no. 42-1 at 6. "Expert testimony that consists of legal conclusions cannot properly assist the trier of fact . . . ." Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 100 (1st Cir. 1997)(internal quotation marks and citation omitted). "This is because the judge's expert knowledge of the law makes any such assistance at best cumulative, and at worst prejudicial." Id. (citing Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Each courtroom comes equipped with a `legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.")).

G. Discovery

2016

Shardon v. Wells Fargo Bank NA, Dist. Court ND Texas, Dallas Division, November 1, 2016

[Motion to Compel Successful in receiving policy and procedures for loan modifications]

In this motion, Defendants seek clarification of the Court's September 14, 2016 Order which granted Plaintiffs' request for discovery pertaining to Defendants' policies and procedures, but put a time limitation on the production of the policies and procedures pertaining to Plaintiffs' loan and loan modification applications to the past six years. Order 5, ECF No. 80. Defendants seek clarification as to whether the Court ordered the production of all discovery sought in Plaintiffs' Motion to Compel [ECF No. 67] pertaining to Defendants' policies and procedures or only ordered the production of Defendants' policies and procedures. Mot. 3, ECF No. 81. Defendants' request for clarification with respect to the Court's Order on Defendants' policies and procedures is granted. The Court granted all of Plaintiffs' discovery requests pertaining to Defendants' policies and procedures requested in the Motion to Compel. Pls.' Br. 17-21, ECF No. 68. However, in Plaintiffs' Response to Defendants' Second Motion for Protective Order, Plaintiffs argued that Defendants failed to show that they would be harmed by disclosing the policies and procedures applicable to Plaintiffs' loan and loan

modification applications for the past six years. Resp. 2, ECF No. 77. Therefore, the Court so limited the production of the policies and procedures applicable to Plaintiffs' loan and loan Case 3:14-cv-01171-BF Document 90 Filed 11/10/16 Page 1 of 4 PageID 4130 modification applications to the past six years.

2017

Fuchs v. Selene Finance LP, Dist Court SD Ohio, February 21, 2017

https://scholar.google.com/scholar_case?case=26621775700237540 79&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

First, the Court considers whether allowing amendment of the admissions will aid in presentation of the merits. A court may consider the following factors in making this determination: (1) whether the admission is contrary to the record; (2) whether an admission is no longer true because of changed circumstances; (3) whether, through an honest error, a party has made an improvident admission; and (4) whether the effect of upholding the admissions would practically eliminate presentation on the merits. See Ropfogel v. United States, 138 F.R.D. 579, 583 (D. Kan. 1991). In this matter, it is uncontroverted that the admissions as they stand now are contrary to the record in this case, and it appears by all accounts that the erroneous admissions were not made in bad faith. Moreover, in its original Admission No. 12 Selene indicated only that it "may have" misapplied funds and reserved its right to change its answer upon further investigation. Thus, Plantiffs were at least on notice as to this issue and would have been able to conduct their discovery accordingly. It is in the interest of justice for the record to reflect accurate facts. The Court is not convinced that the Plantiffs will be unfairly prejudiced by allowing the amendment of the admissions to conform to the record. Even if, as they contend, the QWR was received by Selene on March 6 rather than March 9, 2015, Selene acknowledged receipt on March 9, 2015, within the required 5 day period. The QWR was produced in time for Plaintiffs to have conducted questioning on it in the depositions.

The Court finds that both prongs of the test in Fed.R.Civ.P. 36(b) are satisfied. In sum, allowing amendment will further presentation of the merits and will not cause Plantiffs to suffer any unfair prejudice. See e.g. Visteon Global Technologies, Inc. V. Garmin Intern, Inc., 2013 WL 8017532, *12 (E.D. Mich. Oct. 25, 2013); citing Conlon v. United States, 474 F.3d 616, 624 (9th Cir. 2007) ("We agree with the other courts that have addressed the issue and conclude that reliance on a deemed admission in preparing a summary judgment motion does not constitute prejudice); FDIC v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994) ("preparing a summary judgment motion in reliance upon an erroneous admission does not constitute prejudice."). For the reasons set out above, the Court will grant Selene's motion to amend its responses to the Plantiffs' request for admissions as set out above.

2018

Robinson v. Wells Fargo Bank, N.A. Dist. Court SD Ohio March 7, 2018

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Generally, with regard to the attorney-client privilege, "the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged." *Humphreys, Hutcheson & Moseley v. Donovan,* 755 F.2d 1211, 1219 (6th Cir. 1985). Similarly, work product protection generally does not extend to fee agreements. *See* *Montgomery Cty. v. MicroVote Corp.,* 175 F.3d 296, 304 (3d Cir. 1999); *Murray v. Stuckey's Inc.,* 153 F.R.D. 151, 153 (N.D. Iowa 1993). Based on the foregoing — and absent more than a blanket assertion of privilege set forth by the Robinsons — the Court finds privilege does not attach to the Robinsons' fee agreement with counsel. Insofar as privilege may extend to certain billing entries set forth in invoices relating to the Foreclosure action, any such claims of privilege have been waived as a result of the Robinsons' attorney's fees being placed directly at issue in this case. *HID Glob. Corp. v. Leighton,* No. 1:07 CV 1972, 2009 WL 10688914, at *1 (N.D. Ohio Jan. 20, 2009) (finding "that plaintiff has waived the attorney-client privilege and work product protection by placing its attorneys' fees at issue"). Given that the fees are at issue here and claimed as damages, such fees and the fee agreement are relevant and discoverable under Fed. R. Civ. P. 26(b).[2]
IV.

III. One Bite at the Apple

2015

Bertschy-Gallimore v US Bank, WD Michigan, June 24, 2015
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Additionally, "a servicer is only required to follow the procedures described in the loss mitigation rule for a single complete loss mitigation application." Houte v. Green Tree Servicing, LLC,No. 14-cv-14654, 2015 WL 1867526, at *3 (E.D. Mich. April 23, 2015).

Smith v Nationstar, ED Michigan, November 16, 2015
https://scholar.google.com/scholar_case?case=13633529184743795469&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
The regulation provides that "[a] servicer is only required to comply with the requirements of this section for a single complete loss mitigation application." 12 C.F.R. § 1024.41(I). The regulation's requirements only apply to the first application, thereafter, the regulation imposes no obligation to respond to further duplicative requests. Houle v. Green Tree Servicing, LLC, No. 14-14654, 2015 WL 1867526, at *3 (E.D. Mich Apr. 23, 2015). The Complaint states that "Plaintiffs diligently provided Nationstar Mortgage with all documentation requested in order to provide some loss mitigation which included loan modification" and that "Plaintiffs were offered a trial plan on May 13, 2013, but that the trial payments were greater than their previous regular payment under the mortgage." (Compl. ¶¶ 13, 14.) Plaintiffs have not attempted to counter Defendant's argument and explain why this does not satisfy § 1024.41's requirements. Plaintiffs might argue that the trial payments were greater than their previous regular payments and that this somehow invalidates the offer, but the regulation is clear: "[n]othing in § 1024.41 imposes a duty on a servicer to provide a borrower with any specific loss mitigation option." 12 C.F.R. § 1024.41(a). Because "a borrower may not bring an action for violation of the loss mitigation rule if the borrower has previously availed himself of the loss mitigation process," Houle, 2015 WL 1867526, at *3, and Plaintiffs are attempting to do just that, their claims fail as a matter of law and are dismissed.

Trionfo v BOA, D Maryland, September 2, 2015
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The court agrees with Bank of America and finds that the regulations do not apply to the plaintiffs' loan application. In their complaint and motions, the plaintiffs state that they began to fall behind on their mortgage payments in 2010 when Mr. Trionfo lost his job. The first communication that the plaintiffs allege violated RESPA, however, occurred four years later, in March 2014. The plaintiffs argue that what occurred between 2010 and this first communication is irrelevant, but state that during that time, "they implored BofA on numerous occasions to allow them to enter into a payment plan or other loss mitigation option that would enable them to pay the arrearages on their loan to get current." Id. at p. 19. According to plaintiffs, "[t]heir requests were either ignored or BofA falsely claimed it was missing the necessary documentation." Id. This admission makes it clear that March 2014 was not the first time the plaintiffs submitted a loan modification application. In my reading, the statute clearly only applies to those submitting applications for the first time. As Bank of America points out, protection is only extended to first-time applicants for a reason: "provid[ing] appropriate incentives for borrowers to submit all appropriate information in the application and allow[][ing] servicers to dedicate resources to reviewing applications most capable of succeeding on loss mitigation options." Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10836 (Feb. 14, 2013).

Austerberry v Wells Fargo, ED Michigan, December 7, 2015
https://scholar.google.com/scholar_case?case=6430562109690409010&q=austerberry+v+wells+fargo&hl=en&as_sdt=80000006
It is true that a "servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account." 12 C.F.R. § 1024.41(i). Any allegations stemming solely from Plaintiff's second loan modification application, submitted in November 2014, are properly dismissed. However, there is no evidence that Defendant complied with § 1024.41's requirements in evaluating Plaintiff's first application, submitted in December 2013. To the contrary, Plaintiff sufficiently alleges that Defendant violated requirements for loss mitigation procedures in handling the original application. She states that Defendant did not evaluate her for loss mitigation options and provide written notice within 30 days, as required. See Dkt. No. 1-2, p. 10, ¶ 42(a) (Pg. ID No. 19). Instead of evaluating Plaintiff and providing her with a proper denial or offer of modification, Plaintiff asserts that Defendant proceeded forth with a foreclosure sale. See id. at ¶ 42(c), (d). Defendant has not countered Plaintiff's allegations regarding the first application, arguing only that it had no obligation to comply with § 1024.41's requirements as to the second application. Although Defendant had no duty to provide Plaintiff with any specific loan mitigation option, 12 C.F.R. § 1024.41(a), Defendant was required to promptly evaluate and respond to Plaintiff's first loss mitigation application prior to noticing a foreclosure and selling the Property.

2016

O'Toole v. Wells Fargo MD FL, March 8, 2016
https://scholar.google.com/scholar_case?case=18133883309955727216&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In addition, the Court finds that O'Toole had a reasonable opportunity to raise the issues that he is now complaining of when he was a litigant in state court. See Cavero v. One W. Bank, FSB, 617 Fed. Appx. 928, 930-31 (11th Cir. 2015)("there was nothing in the record to suggest that the Caveros were deprived of the opportunity to present the instant [RESPA and FDUTPA] claims before the state court."); Symonette v. Aurora Loan Servs., LLC, No. 14-15220, 2015 U.S. App. LEXIS 19842, at *3-4 (11th Cir. Nov. 16, 2015)(affirming application of Rooker-Feldman doctrine when a pro se complaint alleging RESPA violations "was filed with the intent to attack the state court's August 2009 foreclosure judgment [and] the appellants had a reasonable opportunity to bring their federal claims in state court.").

Amarchand v. Citimortgage***, MD FL, March 9, 2016***

https://scholar.google.com/scholar_case?case=13834717876254601128&q=Amarchand+v.+Citimortgage+&hl=en&as_sdt=6,36

Defendant's second argument is more problematic, and troublesome. Notwithstanding that Defendant initially argued that Plaintiff's complaint was deficient in failing to allege that the subject loss mitigation application was Plaintiff's first, Plaintiff failed to address that in her Amended Complaint. In her response to Defendant's current motion to dismiss, she does not even acknowledge that the regulations only apply to a single complete loss mitigation application. Indeed, Defendant contends that this is Plaintiff's third loss mitigation application, and that Plaintiff "told the state court CitiMortgage's alleged violations occurred on her third loss mitigation application." (Dkt. 23, p. 6). But of course, at this stage, the court is constrained to consider only Plaintiff's well-pled allegations

Billings v. Seterus WD MI, March 17, 2016
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Although Plaintiff's response fails to address this argument, the Court is not persuaded. Defendant could not possibly have "compl[ied] with the requirements of [12 C.F.R. § 1024.41] for a single complete loss mitigation application for [Plaintiff's] mortgage loan account" at a time when the statute did not exist and the term "complete loss mitigation application" was not defined. Accordingly, the Court finds that Defendant "was still required to comply with the requirements of section 1024.41 at least once after the section became effective." See Bennett v. Bank of Am., N.A., No. 15-30-ART, 2015 WL 5063271, at *8 (E.D. Ky. Aug. 26, 2015).

Parker v. Midwest Loan Services ED MI MTD, March 30, 2016
https://scholar.google.com/scholar_case?case=14117324991644159319&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
RESPA is a consumer protection statute intended to ensure consumers receive information about settlement costs and to protect them from high settlement fees and potentially abusive practices of providers. Augenstein v. Coldwell Banker Real Estate LLC, No. 2:10-CV-191, 2011 U.S. Dist. LEXIS 97056, 2011 WL 3837096, at *2 (S.D. Ohio Aug. 30, 2011). RESPA 12 U.S.C § 2605 provides for enforcement of violations of 12 C.F.R. § 1024.41; it allows for an award of actual damages or other damages which might flow from a servicer's wrongful act. Houston v. U.S. Bank Home Mortg. Wis. Servicing, 505 Fed. Appx. 543, 548 n.6 (6th Cir. 2012). Notably, however, "There is no provision found in RESPA under which Plaintiff can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification." Caggins v. Bank of

N.Y. Mellon, No. 1511124, 2015 U.S. Dist. LEXIS 85457, 2015 WL 4041350, at *2 (E.D. Mich. July 1, 2015).

Therefore, a borrower may not bring an action for violation of the loss mitigation rule if the borrower has previously availed himself of the loss mitigation process. And, the rule does not require that the borrower actually have received a loan modification; rather, it merely requires that a completed application be properly processed and considered. Houle v. Green Tree Servicing, LLC, 14-CV-14654, 2015 WL 1867526, at *3 (E.D. Mich. Apr. 23, 2015).

The Plaintiffs previously availed themselves of an approved loan modification agreement and defaulted. Accordingly, they cannot bring an action on this current loan modification agreement. Even if an action could be brought, the monetary damages must be a result of a pattern or practice of noncompliance; Plaintiffs do not allege this in their complaint. Plaintiffs also fail to demonstrate that they suffered harm as a result of Defendants' actions.

Plaintiffs cannot demonstrate that Defendants caused the foreclosure on the Property. Defendants had no obligation to offer mortgage assistance. Also, Plaintiffs fail to present evidence that, but for Defendants' actions, they would have been able to redeem or otherwise preserve their ownership of the Property. This Count fails.

Thomas v. WELLS FARGO BANK, NA, Dist. Court, SD California, April 28, 2016

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Defendant seeks to hoist Plaintiffs upon the petard of having characterized their January 14, 2014 loan modification "request" as "complete." But the Court observes that the amended complaint appears to distinguish between the "complete . . . request" of January 14, 2014 and the "COMPLETED . . . PACKAGE" of September 9, 2015, that § 1024.41(b) requires a servicer to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application, and that Plaintiffs allege that Defendants made a "specific request" for the "renewed" loan modification "package" submitted on September 9, 2015. A plausible interpretation of the facts as alleged is thus that Plaintiffs submitted a loan modification application on January 14, 2014, Defendant considered that application incomplete and requested additional information, and upon that information being provided by Plaintiffs on September 9, 2015, Defendant acknowledged receipt of what Defendant then considered a "complete" application. It would be absurd to find that a borrower sending a "renewed" set of materials at the request of a loan servicer renders that borrower's initial loss modification request duplicative, and hence allows the servicer to escape the reach of Regulation X. The Court thus declines to find Plaintiffs' loan modification requests repetitive...

Finally, Defendant argues that Defendant did not violate § 1024.41(b), which requires the servicer to "[n]otify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete," because Plaintiffs allege in the amended complaint that "Wells Fargo acknowledged receipt of the Loan Modification Package submitted by the Plaintiffs." Def. Mot. 5-6 (citing Am. Compl. 9). However, Plaintiffs also allege that Wells Fargo either did not do so within the five (5) days required or did not indicate to Plaintiffs whether the application was complete or

incomplete. Am. Compl. 11. Thus, the Court finds that Plaintiffs have plausibly alleged that Defendant violated § 1024.41(b).
The Court thus DENIES Defendant's motion to dismiss Plaintiffs' 12 C.F.R. §§ 1024.41(b) & (c) claims.[3]

Willson v. Bank of America, N.A. Dist. Ct. SD Fla, May 2, 2016

…Defendant argues…that Plaintiff is barred from asserting a claim under Regulation X of…("RESPA") 12 C.F.R. § 1024.41, because Plaintiff is seeking review of a duplicative request. (DE 17 at 6-7). Specifically, Defendant contends that, since Defendant already granted Plaintiff a loan modification in 2008, Defendant is not bound by the requirements under 0* § 1024.41. (*Id.* At 8).

In response, Plaintiff contends that the effective date of Section 1024.41 was 2014, after the original loan modification was made, and thus does not apply. *DE 30 at 2). Plaintiff also argues Defendant has not established that the loan modification was based on a complete loss mitigation application. (Id. At 3-4).

… It appears that Defendant granted Plaintiff a loan modification in 2008. However, it is unclear whether the 2008 loan modification was in response to a complete loss mitigation application, as opposed to a request for a loan modification only. A loss mitigation application includes, requests for a loan modification, but it also includes requests for other loss mitigation programs. *See McKinley v. Fed. Home Loan Mortgage Corp.*, No. CV 212-124, 2013 WL 4501327 at 5 (S.D. Ga. Aug. 22, 2013) ("[The defendant] notified [the plaintiff] of various potential loss mitigation options, including a HAMP loan modification, repayment plan, and a short sale of the [p]roperty.") (noting that the defendant advised the plaintiff of the variety of loss mitigation options); *Peterson v. Wells Fargo Bank, N.A.*, No. 13-CV-03392-MEJ, 2015 WL 3397385, at *7 (N.D. Cal. May 26, 2015) ("Defendant notes that it reviewd.. other loss mitigation options, including…the option of payment assistance … , the option of a short sale … , and modification under HAMP") (noting the same). Construing the Complaint in the light most favorable to Plaintiff, Plaintiff's past loan modification may not have been the result of a complete loss mitigation application. Defendant has, therefore, not established that the current loss mitigation application is duplicative request. Accordingly, the Motion to Dismiss is denied.

BRIMM v. WELLS FARGO BANK, NA, Dist. Court, ED Michigan, June 28, 2016
https://scholar.google.com/scholar_case?case=18807516818399168 44&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt
Plaintiff's Complaint alleged that Defendant violated several regulations under RESPA: 12 C.F.R. § 1024.41(c), because it received a complete loan modification package in July 2014, and did not evaluate Plaintiff's request within 30 days; 12 C.F.R. § 1024.41(d), because it "implicitly" denied Plaintiff a loan modification without providing Plaintiff with the reasons for the denial in writing; and 12 C.F.R. § 1024.41(f)(2), because it noticed Plaintiff's home for a foreclosure sale, despite the fact that Plaintiff submitted a complete loss mitigation application package in July 2014, and despite the fact that Plaintiff never failed to perform under a loss mitigation option nor received notice that

he was rejected under a loss mitigation application. After reviewing the evidence presented by the parties, and the relevant legal authorities, it is clear that the record before the Court fails to raise a genuine issue of material fact as to Plaintiff's claims. Consequently, Defendant is entitled to summary judgment.

First, "Regulation X" of RESPA became effective on January 10, 2014. See Campbell v. Nationstar Mortg., 611 Fed. App'x. 288, 297 (6th Cir. 2015). It provides that "[a] servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account" 12 C.F.R. § 1024.41(i) (emphasis added). Defendant already considered, and denied in writing on May 7, 2014, a previous request from Plaintiff for a loan modification (Dkt. 8, Ex. 33).[2] Thus, Plaintiff cannot bring a claim against Defendant that a later - July 2014 - request for a loan modification was somehow ignored.

GARMOU v. KONDAUR CAPITAL CORP., Dist. Court, ED Michigan June 30, 2016

Borrowers entitled to First Bite at the apple with each servicer

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First, Defendants claim that Regulation X does not apply to them because "Plaintiff actually sought and *received* a loan modification in 2013" from Defendants' predecessor. (Dkt. # 10, Pg. ID 98.) The court disagrees. While it is true that "a servicer is only required to comply with the requirements of [12 C.F.R. 1024.41] for a single, complete loss mitigation application for a borrower's mortgage loan account," 12 C.F.R. 1024.41(I), the agency has interpreted this to apply to transferee servicers as well, stating that "a transferee servicer is required to comply with the requirements of section 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer." 10 C.F.R. Pt. 1024, Supp. I. When interpreting administrative rules, courts give deference to an agency's construction of its own regulation, which is "controlling unless `plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 359 (1989)). Defendants have provided the court with no reason to call into question the agency's interpretation of this subsection. Regardless, it is unnecessary to decide whether the agency's interpretation is clearly erroneous or inconsistent with the regulation because the court can decide the matter on other grounds.

Federal courts have consistently held that servicers must "comply with the requirements of section 1024.41 at least once *after* the section became effective."*Bennett v. Bank of Am., N.A.,* No. 16-cv-278-T-33TBM, 2016 WL 2610238, at *2 (M.D. Fla. May 6, 2016); *see also Bennett v. Bank of Am.,* 126 F. Supp. 871 (E.D. Ky. 2015). The loan modification application to which Plaintiff points was filed in 2013—several months before the RESPA loss mitigation regulations came into effect. It cannot alleve Defendants of their obligations under the regulations.

2017

Mangum v. FIRST RELIANCE BANK, Dist. Court, D. South Carolina March 21, 2017

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[Dicta on 1st bite rule]

First, the official interpretation makes clear that after the Bureau requested comment regarding whether borrowers should be entitled to a renewed evaluation for a loss mitigation option if an appropriate time period had passed since the initial evaluation or the borrower experience a material change in circumstances, the Bureau still found it appropriate to limit review to a single complete mitigation application. 78 FR 10696, 10836.[2] Second, the interpretation itself indicates that the proposed rule "would have" required a transferee servicer to comply with the requirements of 1024.41, "notwithstanding whether a borrower has received a determination on a complete loss mitigation application from a transferor servicer," lending further support to the conclusion that the regulation still requires only a single complete loss mitigation application, regardless of whether at the time the subsequent loss mitigation application commences, and the loan is transferred. 78 FR 10696, 10836. Third, the language Plaintiff cites regarding when the transferee servicer is required to comply with the loss mitigation requirements appears to apply in the context of when, during the course of the first application, the transferee receives the loan when "an evaluation for a loss mitigation option is *in process* with a transferor servicer, but a borrower has not finalized an agreement on a loss mitigation option." 78 FR 10696, 10836. (emphasis added). Accordingly, this Court finds that based on the plain language of the regulation, coupled with the commentary to the regulations, RESPA does not apply to Plaintiff's second loss mitigation application. Even if this language were referring to a transfer that occurred during a second loss mitigation review (as opposed to a transfer during the first application review), and somehow alters the plain language of 12 CFR § 1024.41(i), Plaintiff concedes she was considered for and actually received a trial plan from Defendants as a result of the second loss mitigation application in April of 2016. [ECF #1, p. 11]. Accordingly, this Court notes that Defendant Dovenmuehle did actually review and process Plaintiff's loss mitigation application for a subsequent review.

[Claim Fails]

However, even if Plaintiff's RESPA claims were actionable under 12 CFR § 1024.41(i), Defendants argue that Plaintiff fails to state a claim under RESPA because she admits she received continued correspondence from Defendants and received a trial payment plan, albeit one she found unaffordable. RESPA requires that a servicer provide the borrower with a notice stating the determination of the loss mitigation options, if any, it is willing to offer, such notice to include the amount of time the borrower has to accept or reject the offer, and a notification that the borrower has the right to appeal the denial of an option. 12 C.F.R. § 1024.41(c)(1)(ii). Further, 12 C.F.R. §1024.41(a) provides that "[n]othing in §1024.41 imposes a duty upon a servicer to provide a borrower with any specific loss mitigation option." Accordingly, Defendants argue that not only did they actually process Plaintiff's loss mitigation application, but they provided her a trial payment plan, though one Plaintiff felt was not financially affordable.

BRIMM v. WELLS FARGO BANK, NA, Court of Appeals, 6th Circuit May 2, 2017

https://scholar.google.com/scholar_case?case=8103325889857307018&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Wells Fargo in any case could have gone through with the sale nonetheless. Section 1024.41, as it happens, does not require mortgage servicers to consider duplicative requests. The regulation requires a servicer only "to comply with the requirements of this section for *a single* complete loss mitigation application for a borrower's mortgage loan account." *Id.* § 1024.41(i) (emphasis added). As Brimm concedes, Wells Fargo responded to at least seven of his serial loan modification requests over the years, and even granted two of them. For good measure, Wells Fargo also responded to Brimm's first request after § 1024.41 came into effect, letting him know in May 2014 that he was not eligible for any modifications. In light of all that, Wells Fargo had no obligation to respond to Brimm's renewed request in July, much less to postpone the foreclosure sale while considering it. The district court correctly granted summary judgment to Wells Fargo on Brimm's § 1024.41 claim and the related negligence per se claim.

US Bank National Association v. Ferreira, NJ: Appellate Div. August 3, 2017

https://scholar.google.com/scholar_case?case=9087601639376737076&q=US+Bank+National+Association+v.+Ferreira+&hl=en&lr=lang_en&as_sdt=6,31&as_vis=1

Borrowers have a private right of action to enforce the procedural requirements set forth in 12 C.F.R. § 1024.41. However, violations of § 1024.41 are enforced under RESPA, 12 U.S.C. § 2605(f)(1)(A), which authorizes monetary damages only.

Here, defendant acknowledged that he "submitted multiple modification applications" since his 2009 default, all of which were denied. He invokes CFPB rule violations in connection with his latest loan modification appeal. However, regardless of whether or not he was notified that his appeal was denied prior to the sale, the procedural requirements of 12 C.F.R. §1024.41 only apply to a review of a single complete loss mitigation application. Therefore, defendant's latest application was not entitled to the protections of 12 C.F.R. §1024.41(g) pursuant to 12 C.F.R. §1024.41(i). Moreover, defendant's sole recourse for a violation of 12 C.F.R. §1024.41 is monetary damages, not equitable relief.

Allen v. Wells Fargo Bank, NA, Dist. Court, ND Texas August 9, 2017

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First, the court agrees with Wells Fargo's position and holds that, under § 1024.41(i), "[a] servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account," even if the borrower's prior application was made before the regulation took effect on January 10, 2014. "The plain text of 12 C.F.R. § 1024.41 does not require compliance with 12 C.F.R. § 1024.41 for multiple loss mitigation applications—without excluding loss mitigation applications submitted before January 10, 2014." *Bobbitt,* 2015 WL 12777378, at *3; *see also* *Wentzell,* 627 Fed. Appx. at 318 n.4 (stating in *dicta* that servicer's duty under § 1024.41 applied only to borrower's first loss mitigation application, and because borrowers (who had entered into a loan modification agreement in 2006, i.e., before January 10, 2014) were making claims related to later alleged applications, "they ha[d] not stated a claim even under [12 C.F.R. § 1024.41]"). To interpret § 1024.41 otherwise would in effect be to read a key provision—the limitation on "Duplicative requests" of § 1024.41(i)—out of the regulation for an entire category of borrowers, without any clear intent from the Bureau of Consumer Financial

Protection to do so. Such an interpretation would subject loan servicers to regulatory obligations to a potentially vast number of borrowers who had made loss mitigation applications before the regulation took effect, at a time when they were not themselves subject to the corresponding obligations that § 1024.41 imposes on borrowers.[3]

Thomas v. WELLS FARGO BANK, NA, Dist. Court, SD California September 4, 2017

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As Plaintiffs concede, they submitted at least one complete loan modification application to Wells Fargo after Regulation X was promulgated, in May 2014, and Wells Fargo denied the application in due course. *See* ECF No. 48-2 at 3 ("Plaintiffs resubmitted another complete loan modification application in May 2014."); *id.* at 4 ("Wells Fargo determined that they did not qualify for a loan modification and sent two letters dated June 19, 2014 indicating that the application had been denied."). There is no dispute that Wells Fargo notified Plaintiffs of the denial of their application. There is also no dispute that both applications were "complete" for purposes of the regulation. In light of this, the Court concludes that Wells Fargo had no obligation to comply with the requirements of § 1024.41 for any subsequent complete loss mitigation application, including Plaintiffs' September 2015 application. *See Brimm,* ___ F. App'x ___, 2017 WL 1628996 at *2 (concluding that Wells Fargo had no obligation to respond to any renewed loan modification request because Wells Fargo had already reviewed and denied a complete application).

In reaching this conclusion, the Court rejects Plaintiffs' argument that Defendant was nonetheless obligated to abide by the requirements of Regulation X because it had "accepted for consideration Plaintiffs' loss mitigation application." ECF No. 48-1 at 3. Not only does this argument make little sense in light of the plain language of Section 1024.41(i), but Plaintiffs have cited to no binding legal authority supporting their position. In fact, the one case that Plaintiffs cite in support of this position actually contradicts it. *See Coury v. Caliber Home Loans, Inc.,* 2016 WL 6962882, *4 (N.D. Cal. Nov. 29, 2016) ("Coury seems to suggest that his subsequent submissions of complete applications also required Caliber to respond under § 1024.41(c). . . . The regulation, however, does not obligate servicers to respond to multiple applications from a single borrower.").

2018

Germain v. U.S. Bank et. al. Dist. Court ND Texas March 28, 2018

https://scholar.google.com/scholar_case?case=3238004619991456314&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The Court also agrees with Judge Fitzwater's holding in *Allen* that Section 1024.41 only requires a servicer to comply with its requirements for one application, and that it does not exclude applications submitted before its effective date of January 10, 2014. *See Allen,* 2017 WL 3421067, at *4 ("[T]he court . . . holds that, under § 1024.41(i), `[a] servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account,' even if the borrower's prior application was made before the regulation took effect on January 10, 2014."). To construe this section in the manner Plaintiff seeks would, as Judge Fitzwater explained, subject servicers to additional obligations "without any clear intent from the

Bureau of Consumer Financial Protection to do so." *Id.* Therefore the Court agrees with Defendants that their review of pre-2014 applications satisfies Section 1024.41, and that servicers are required to comply with the requirements of this section for one application.

As Defendants argue, the undisputed facts demonstrate, and the case law in the Fifth Circuit support, a finding that Ocwen met its obligations under Section 1024.41. In consideration of the foregoing, summary judgment is granted with respect to Plaintiff's RESPA claim. Furthermore, because Owen fulfilled its obligations under RESPA, Plaintiff is not entitled to damages in connection with this claim.

IV. Injunctive Relief

2015

Blankenchip v Citimortgage, ED California, August 20, 2015
https://scholar.google.com/scholar_case?case=16124526214367262 80&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Not a RESPA or TILA case but great language on discovery relative to pattern an practice.
Citi wants a protective order excusing it from producing certain documents related to a loan modification. The judge finds, "Without knowing what defendant's policies and practices are, it is impossible for plaintiffs to know what was really happening to them. After all, the promise defendant made to them was apparently iron-clad. It did not say that if plaintiffs made these payments, then defendant would consider modifying their loan. Rather, it said (as defendant admits), that if plaintiffs made the payments, and submitted the required documents, their mortgage "will be permanently modified." Since plaintiffs allege that they made all the timely payments and submitted all the required documents (or were foreclosed before the deadline for submission of the documents), and defendant denies wrongdoing, plaintiffs are entitled to know how this could happen." No protective order for Citi.

Morris v Wells Fargo, MD Florida, July 9, 2015
https://scholar.google.com/scholar_case?case=14313914584632269535&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
The Court must deny Plaintiff's Motion because it is procedurally defective in that it is unsupported by a verified complaint or affidavits as required by Local Rules 4.05(b)(2), and Fed. R. Civ. P. 65(b)(1)(A). Furthermore, the Court's ability to stay a pending state court proceeding is limited by the Anti-Injunction Act (the "Act"), 28 U.S.C. § 2283, which states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Act is grounded in guarantees of independence between the state and federal systems, see Leiter Minerals, Inc. v. United States,352 U.S. 220, 225 (1957), thus courts are required to narrowly construe its language. See Smith v. Bayer Corp., 131 S. Ct. 2368, 2371 (2011) (stating that the "Act's specifically defined exceptions, are narrow and are not to be enlarged by loose statutory construction") (citations and internal quotations omitted). No injunction for Plaintiff.

Etts v Deutsche Bank, ED Michigan, August 25, 2015

https://scholar.google.com/scholar_case?case=15475143920806510973&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt
Query: Could this state law claim be a basis for injunctive relief?
Defendants allegedly promised to adjourn the foreclosure sale pending a review of Plaintiffs' request for a loan modification. Yet, Plaintiffs claim that Defendants moved forward with the sale on October 25, 2012, while Plaintiffs believed the review was still pending. If true, this undermined both the statutory requirements and intention behind the notice requirements for conducting a foreclosure by advertisement.[10] Therefore, the Court concludes that the alleged broken promise to adjourn the foreclosure sale is a potential irregularity arising out of the foreclosure process, not just an issue concerning the loan modification negotiations...
Furthermore, Plaintiffs sufficiently allege that they would have been in a better position to preserve their interest in the property, but for the alleged promise to adjourn the foreclosure sale during the review period. See Kim v. JPMorgan Chase Bank, N.A., 825 N.W.2d 329, 331 (Mich. 2012). Plaintiffs claim that, because of this promise, they "forewent other opportunities to save their home, such as seeking another type of loan modification, refinancing the existing loan, pursuing a short sale, restructuring under the bankruptcy code or renting the property and relocating." Second Am. Compl. ¶ 45. The Court concludes this is sufficient to survive a motion to dismiss in this case.

Pineda v Nationstar, ND Texas, September 29, 2015
https://scholar.google.com/scholar_case?case=9253075103544617760&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Plaintiff's mortgage was transferred to a new loan servicer, and the payment mysteriously increased by $200 per month. Plaintiff paid the higher payment for a while -- and kept asking why the payment amount increased -- but got no answer. Plaintiff started sending payments in an amount somewhere between the old and new payment amounts. The servicer kept accepting the payments but didn't apply them because they weren't for the entire amount. Eventually the servicer moved to foreclose. Because of multiple violations of TILA and Reg X, this Plaintiff was able to get an injunctive relief.

2016

Gordon v. OCWEN LOAN SERVICING, D. Connecticut, March 31, 2016
https://scholar.google.com/scholar_case?case=11394961243842376945&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Here, all four requirements are met. Plaintiff lost in state court, and the foreclosure judgment was entered nearly a month before plaintiff filed this action. The gravamen of plaintiff's complaint is that the foreclosure judgment was erroneous; he seeks a temporary restraining order "stop[ping] an improper foreclosure." Compl. (ECF No. 1) at 2; see also id. ("Injunctive Relief with urgency is necessary to protect Plaintiff's equity interest stake and prevent an unenforceable foreclosure. Plaintiff [sic] property is in danger of being foreclosed upon without a pre-foreclosure hearing."). Granting the requested injunction would require this Court to reject the state court judgment. Finally, although plaintiff's complaint references several federal statutes, including RESPA, TILA, and the FDCPA, he provides no allegations supporting claims under these statutes. Construing the language of the complaint in its broadest terms, it is evident that plaintiff complains of injuries caused by the foreclosure judgment and that the purpose of this action is to undo the foreclosure. Under Rooker-Feldman, this Court does not have authority to consider plaintiff's challenge to the validity of the

foreclosure. Cf. Exxon Mobil Corp v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005) (Rooker-Feldman's "`paradigm situation'" is where the plaintiff has "repaired to federal court to undo the [state] judgment" (quoting E.B. v. Verniero, 119 F.3d 1077, 1090-1091 (3d Cir. 1997))).

Garrow v. JPMorgan Chase Bank, NA, Dist. Court, ED Michigan, April 27, 2016
https://scholar.google.com/scholar_case?case=9094166045284886498&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

First, as discussed above, this aspect of Garrow's wrongful foreclosure claim constitutes an irregularity in the loan modification process rather than the foreclosure process. *See* *Campbell,* 611 F. App'x at 294; *Williams,* 508 F. App'x at 468. Second, "[n]othing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option." 12 C.F.R. § 1024.41(a). Third, Garrow seeks injunctive relief in the form of rescission of the sheriff's sale, which is a remedy that is unavailable under both RESPA and Section 1024.41. *Id.* ("A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f))."); *see also* 12 U.S.C. § 2605(f) (exclusively authorizing monetary relief to individual borrowers). And fourth, Garrow has not alleged that she would have qualified for a loan modification had JPM evaluated her application. *See Goodman,* 2015 U.S. Dist. LEXIS 143567, at *9 (Plaintiffs have "not demonstrated or even alleged that [they] would have been eligible for a loan modification if [they] had been evaluated . . .").

MRLA v. Federal National Mortgage Association, Dist. Court, ED Michigan July 21, 2016
https://scholar.google.com/scholar_case?case=3007392729479177429&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Defendants are correct on both counts. Regarding damages, 12 C.F.R. § 1024.41(a) makes clear that RESPA — specifically, 12 U.S.C. § 2605(f) — provides the enforcement mechanism for Regulation X. RESPA limits recovery to "an amount equal to the sum of (A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000." 12 U.S.C. § 2605(f)(1)(A)-(B). "There is no provision found in RESPA under which Plaintiff can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification."Caggins v. Bank of N.Y. Mellon, No. 15-11124, 2015 WL 4041350, at *2 (E.D. Mich. July 1, 2015). Thus, all Plaintiff's claims for non-monetary relief founded upon RESPA and/or Regulation X are dismissed.

Respecting Count I, in which the RESPA and Regulation X claims were made, Plaintiff's request for monetary damages are as follows, in pertinent part:

• Awarding Plaintiff damages for wrongful foreclosure . . .;

• Awarding Plaintiff damages for emotional distress, indignity and humiliation;

• Awarding Plaintiff treble damages for any mortgage payments improperly converted by Defendants;

• Awarding Plaintiff attorney fees and costs. . . .

Wirtz v. JPMorgan Chase Bank, NA, Dist. Court, Minnesota September 26, 2016
https://scholar.google.com/scholar_case?case=4362807409030854362&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Court Reverses on Reconsideration Order for Injunctive Relief]

SLS argues that it should not be required to inform credit reporting agencies that Wirtz is not delinquent on his mortgage or to change its internal accounting to reflect no delinquency because Wirtz is not entitled to equitable relief. Wirtz responds that such equitable relief is available under the court's inherent authority and appropriate because the record establishes that he is not delinquent on his mortgage payments. As noted in the previous order, the record does not establish whether Chase erroneously applied Wirtz's payment. Indeed, neither the court nor SLS is in a position to make such a determination. It seems that Chase, with which Wirtz settled earlier in the litigation, is the only party that can resolve the issue definitively. As such, absent some indication by Chase that it erred in applying Wirtz's payment, the court will not order equitable relief. Further, as SLS notes, RESPA — on which SLS's liability rests — appears to contemplate monetary relief only. See 12 U.S.C. § 2605(f)(1) and (3).

Alford v. JP Morgan Chase Bank NA, Dist. Court ND California, December 22, 2016

https://scholar.google.com/scholar_case?case=5154775670201997408&q=alford+v.+chase&hl=en&as_sdt=3,36

[UCL Claim]

4. **Chase's** motion to dismiss Plaintiff's UCL claim is DENIED. Because the Court found above that Plaintiff's RESPA and RFDCPA claims survive the pleading stage, Plaintiff has sufficiently pled a claim under the UCL's unlawful prong. *Chabner v. United Omaha Life Ins. Co.,* 225 F.3d 1042, 1048 (9th Cir. 2000) (the unlawful prong of the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable"); *Guccione,* 2015 WL 1968114, at *16 (N.D. Cal. May 1, 2015) ("[T]he court already has ruled that Plaintiffs' RESPA and RFDCPA claims survive, and this means that Plaintiffs' `unlawful' UCL claim survives, too.") Additionally, the Court finds Plaintiff's allegations that **Chase** improperly attempted to charge him over $6,000 in delinquent property taxes for almost two years, while sending Plaintiff inconsistent explanations and incorrect documentation, states a claim under the UCL's unfair prong. *See Phipps v. Wells Fargo Bank, N.A.,* No. CV F 10-2025 LJO SKO, 2011 WL 302803, at *16 (E.D. Cal. Jan. 27, 2011) (describing California's three tests under the UCL's unfair prong). Accordingly, the Court finds that Plaintiff's UCL claim survives the pleading stage under both the unlawful and unfair prongs.[3]

2017

Pacifico v. Nationstar Mortgage LLC, Dist. Court E.D. Michigan, Southern Division, February 10, 2017

https://scholar.google.com/scholar_case?case=13016665250768607 32&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Nationstar correctly argues that RESPA permits as relief only actual damages and statutory damages for "a pattern or practice of noncompliance." § 2605(f). "There is no provision found in RESPA under which Plaintiff can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification." *Caggins v. Bank of New York Mellon,* No. 15-11124, 2015 WL 4041350, at *2 (E.D. Mich. July 1, 2015).

O'Steen v. Wells Fargo Bank NA Dist. Court MD Florida, March 1, 2017

https://scholar.google.com/scholar_case?case=14571153285134431131&q=o%27steen+v+wells+fargo&hl=en&as_sdt=6,36

Accordingly, because the state-court proceeding has ended and the claim for relief sought herein is inextricably intertwined with the state-court judgment, Rushmore's Motion is granted to the extent that Count V is dismissed for lack of subject-matter jurisdiction pursuant to the Rooker-Feldman doctrine. Because the Court has dismissed Count V for lack of jurisdiction, the Court declines to opine on Rushmore's alternative argument under the Anti-Injunction Act.

V. Vicarious Liability

2015

Bennett v Nationstar, SD Alabama, August 17, 2015
https://scholar.google.com/scholar_case?case=14355085135047417 90&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
BONYM cannot be liable for violations of the Regulation X provisions cited by Bennett—which each set forth obligations of servicers. (See Doc. 10 ¶¶ 102-106, 143-147). In other words, because BONYM is not a servicer, it cannot "fail[] to comply" with the provisions of RESPA or Regulation X asserted by Bennett so as to incur liability under 12 U.S.C. § 2605(f) ("Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure. . . .").

2016

Hawk v. Carrington Mortgage Services, LLC, Dist. Court, MD Pennsylvania August 17, 2016
https://scholar.google.com/scholar_case?case=13291528538844281900&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In its Objection, Plaintiffs request that the Court adopt the rationale of the New Hampshire District Court in *Rouleau* and hold Defendant CT, the mortgage holder who plays no role in loan servicing, liable under RESPA. Upon review of the applicable statute and case law, the Court agrees with the Magistrate Judge's thoughtful and well-reasoned recommendation and rejects the Plaintiffs argument.[1]This argument, based as it is on general principles of agency, cannot overcome Congress's expressed legislative intent to impose aduty on "any servicer of afederally funded mortgage loan" to respond to a "qualified written request from the borrower," 12 U.S.C. § 2605(e), and to create acause of action in § 2605(e) as to "whoever fails to comply with any provision of this

section. . . ." There is nothing in the language of RESPA that may be read to extend statutory liability to the passive mortgage holder, however salutary such a provision might be had it been included in the Act. Furthermore, even if the Court were to assume that Defendant CT could be vicariously liable on an agency theory of liability, the Court's review of the record reveals that Plaintiffs offer nothing but conjecture and conclusory statements in support of its agency theory of liability.[2] Moreover, notwithstanding our conclusion that RESPA limits liability to loan servicers and does not extend to mortgage holders, we find that even if we, were to accept Plaintiffs' argument that vicarious liability is permissible or available under § 2605(e) so as to allow the cause of action against the mortgage holder, in this case, for the reasons set forth *infra* Part II, we have determined that summary judgment should properly be entered in favor of Defendant Carrington with the result that no vicarious liability claim can be made against CT in any event. Accordingly, Plaintiffs' Objections to the First R&R will be overruled, and summary judgment will be entered in favor of Defendant Christiana Trust. Aseparate order follows.

Other Cases of Interest

2011

Detchon v Wells Fargo, ND Ohio Bankr., December 30, 2011

https://scholar.google.com/scholar_case?case=17465559309825300952&q=midfirst+and+gnma&hl=en&lr=lang_en&scisbd=2&as_sdt=6,40&as_vis=1

Court addressed a note provision identical to paragraph 6(b) of the Note in this proceeding.
In *Detweiler,* the mortgagors argued that (i) the mortgagee failed to comply with HUD regulations prior to filing its complaint in foreclosure; and (ii) such regulations were a condition precedent. The mortgagee, on the other hand, contended that the HUD regulations were merely an affirmative defense to foreclosure.

The court agreed with the mortgagors and stated, "It has been held that a term in a mortgage such as one requiring prior notice of a default and/or acceleration to the mortgagor, is not an affirmative defense but rather a condition precedent." *Id.* at 783 (citing *LaSalle Bank v. Kelly,* 2010 Ohio 2668, *13 (Ohio Ct. App. 2010)). The court concluded that the mortgagee failed to establish that it had complied with all conditions precedent to the mortgage loan and stated:

We find that the mortgage loan in this case is federally insured and by the terms in the Note and Mortgage, it is subject to HUD regulations in the case of default and/or acceleration. The HUD regulations, incorporated within the terms of the default and/or acceleration provisions, include those requirements found in 24 CFR § 203.602 and 24 CFR § 203.604, as stated above. Those requirements, therefore, are conditions precedent.

Id. at 783; *see also* *Kelly,* 2010 Ohio 2668 at * 13 (quotation marks and citations omitted) ("Where prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent[.]")

Pursuant to the express terms of the Note and the Mortgage, quoted *supra* at 23-24, it is apparent that MidFirst was required to comply with the HUD regulations prior to accelerating the Mortgage Loan or initiating a foreclosure action. This Court agrees with the reasoning of the Ohio appellate courts in *Detweiler* and *Kelly* and finds that (i) the HUD regulations are incorporated into the Note and the Mortgage pursuant to the terms of each; and (ii) compliance with HUD regulations is a condition precedent to acceleration and foreclosure.

In the Amended Complaint, the Plaintiffs aver, "Wells Fargo, acting on behalf of MidFirst did not abide by the federal guidelines before foreclosing. . . . [B]ecause the HUD guidelines are a condition precedent to breach then MidFirst wrongfully accelerated the loan in breach of the contract." (Am. Compl. ¶¶ 57, 61.) As a consequence, the Court finds that the Plaintiffs have alleged facts sufficient to state a plausible claim that MidFirst failed to fulfill its contractual obligations.

2014

Marais v. Chase Home Finance SD OH, June 14, 2014
Foreclosure not a Compulsory Counterclaim to RESPA Claim
https://scholar.google.com/scholar_case?case=21985600607108479 10&q=marais&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1
In the case at bar, Plaintiff's RESPA action and any foreclosure action brought by Chase present different legal, factual, and evidentiary questions. Specifically, in Plaintiff's RESPA action, she had to prove that Chase's response to her QWR did not meet the substance of her request under 12 U.S.C. § 2605(e) and she would have to establish that she suffered actual damages as a result of Chase's failure to adequately respond to her QWR. In a foreclosure action, Chase would have to prove that Plaintiff defaulted on her loan and prove the amount due and owing under the note and mortgage to establish damages. Plaintiff attempts to argue that the two claims arose out of the same transaction for purposes of Rule 13(a) analysis by suggesting that her federal action arose out of Chase's attempts to collect an incorrect amount on the mortgage loan. However, it is clear that the underlying action pertains specifically to Plaintiff's QWR request. The facts and legalities of whether a sufficient response was made to Plaintiff's QWR are irrelevant to a foreclosure action. Conversely, the facts and law applicable to a foreclosure action, such as Plaintiff's payment history, the amount owed on the note and the value of the secured property, were not at issue in the RESPA action. The Court therefore finds that the two claims are not logically related and therefore Rule 13(a) is not applicable to this case.

2015

Burke v Nationstar, ED Virginia, July 28, 2015
ECOA claim on denial of FHA HAMP loan modification survives motion to dismiss

McGann v PNC, ND Illinois, August 25, 2015
Illinois state law claims under UDAP and promissory estoppel fail

Bartucci v Wells Fargo, ND Illinois, November 10, 2015
Court denies notion to dismiss claims under ECOA and Illinois UDAP where Plaintiff alleges he was discriminated against based on national origin and age

2016

Deleplancque v. Nationstar, January 24, 2016
https://scholar.google.com/scholar_case?case=16116836011645783243&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
As noted above, the jury trial waiver at issue concerns all actions and claims, "whether in contract or tort, at law or in equity, arising out of or in any way related to this Security Instrument or the Note." Doc. No. 11-1, at 15 ¶ 25. Here, Deleplancque asserts claims under the FDCPA, FCRA, TCPA, RESPA, TILA, and FCCPA. Doc. No. 1. Other courts have already addressed the very waiver at issue here and have determined that it applies to the types of claims raised by Deleplancque. *See, e.g., Newton v. Wells Fargo Bank, N.A.,* No. 3:13-cv-1017-J-32MCR, 2013 U.S. Dist. LEXIS 155562, at *2-6 (M.D. Fla. Oct. 30, 2013) (TCPA);*Ferraro v. Wells Fargo N.A.,* No. 2:13-cv-632-FtM-38DNF, 2013 U.S. Dist. LEXIS 136582, at *2-3 (M.D. Fla. Sept. 24, 2013) (TILA and RESPA); *Deutsche Bank Nat'l Tr. Co. v. Foxx,* 971 F. Supp. 2d 1106, 1120 (M.D. Fla. 2013) (FCRA, FDCPA, and FCCPA). On the information available in the record, the mortgage, including the modification thereto, is the sole source of the parties' relationship. Each of Deleplancque's claims, therefore, is in some way "related to th[e] Security Instrument or the Note." Accordingly, the waiver provision encompasses the claims at issue in this case.

Aghazu v. Severn D MD, March 2, 2016

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A mortgage loan servicer's failure to provide accurate payoff figures when asked may thus provide the basis of a TILA claim by a mortgage loan consumer. *See* 15 U.S.C. § 1640. However, another provision of the TILA, 15 U.S.C. § 1640(e), provides in pertinent part (and with exceptions not relevant here) that a person may bring "any action [under TILA] . . . *within one year* from the date of the occurrence of the violation." (emphasis added); *see also Boardley,* 39 F. Supp. 3d at 704 (applying the one-year statute of limitations for alleged TILA violations to a claim brought under 12 C.F.R. § 1026.36(c)(3)).

Aghazu claims that both Severn and FCI failed to comply with 12 C.F.R. § 1026.36(c)(3). The Court finds, however, that her TILA claims against both Defendants are barred by the TILA statute of limitations under 15 U.S.C. § 1640(e).

IN RE TAVERS, SD TX Bank., March 11, 2016

https://scholar.google.com/scholar_case?case=3190295452916199484&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The court sidesteps rule 3002.1 and holds that failure to seek adjustment of payment schedule bars post discharge liability for debtor.

Great Language For Briefs:

This Court shall decline the Trustee's invitation to disinter Rule 3002.1 and § 1322(b)(5) from the hornbooks by tortuously inserting new language therein. Where the language of a statute or rule is unambiguous, the analysis generally begins and ends with its plain meaning.

The Bottom Line:

To honor the promise and spirit of chapter 13 administrations for the compliant debtor, this Court has determined that the remedy for a mortgage creditor's failure to provide appropriate notice is disallowance of the implicated deficiencies. Notice is vital to an effective rehabilitation, because it offers the opportunity to object and have a day in court, which ultimately allows a case to continue moving forward without ending in a surprise at the end of the case. It is from the twin pillars of a fresh start and the orderly administration of the estate to *all* creditors' benefit that the applicable notice requirements hang. Moreover, notice cannot function without a reasonable expectation that the rules will be followed by all. A mortgagee cannot spring upon the debtor a reticent debt that lingers like a haunting refrain.

Pohl v. US Bank D. CO, March 28, 2016
Judicial Estoppel applies to claims that are not scheduled in Bankruptcy.

https://scholar.google.com/scholar_case?case=12544315237411554541&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt
Regarding the third factor, the Court finds that plaintiffs would gain an unfair advantage if they were not estopped from pursuing their fourth, fifth, and sixth claims for relief, because they would be able to pursue those claims without the risk that the majority of their award would go to their creditors. See Queen v. TA Operating, LLC, 734 F.3d 1081, 1092 (10th Cir. 2013).[5]

Plaintiffs argue that the Court should excuse their representation to the bankruptcy court as inadvertent because they had no motive to hide their rescission given that "the rescission released them from any monetary obligations to Defendants and allowed them to keep their home[.]" Docket No. 156 at 4. As the Tenth Circuit has explained, courts only excuse failure to disclose claims to the bankruptcy court on inadvertence grounds where "the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." Eastman, 493 F.3d at 1157(citations omitted). Plaintiffs' partial disclosure of the results of their investigation to the trustee suggests, at a minimum, that they were aware of the possibility of their claims. Moreover, plaintiffs do not argue that they had no motive to conceal their claims for violation of TILA, RESPA, ECOA, CCPA, and the implied covenant of good faith and fair dealing. The Court finds that plaintiffs are charged with knowledge of those claims and had a motive to conceal them, given that such claims, if disclosed, would have been the property of the bankruptcy estate. Finally, plaintiffs' argument that the Court should not apply judicial estoppel in this case due to US Bank's unclean hands relies on their interpretation of Jesinoski, which the Court has rejected. See 156 at 5.

Federal National Mortgage Association v. OBRADOVICH, ND Illinois, March 29, 2016

https://scholar.google.com/scholar_case?case=12735589797853009990&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

But, as noted above, the right granted to the lender upon breach or abandonment by the borrower was the right to do "whatever is reasonable or appropriate." While securing the property is expressly included within that right by the terms of the document, the extent of the lender's other rights in the event of breach or abandonment is subject to the general requirement that the lender's actions be reasonable or appropriate. Whether actions are reasonable is a question of fact. *See*Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 763 (7th Cir. 2010)(interpretation of "commercially reasonable" contract language is question of fact); *Smith v. Great Am. Restaurants, Inc.*, 969 F.2d 430, 439 (7th Cir. 1992) (plaintiff's common law obligation of "reasonable" mitigation of damages is question of fact). In addition, whether or not the Obradoviches actually breached the mortgage agreement or abandoned the property are facts that have been alleged by Fannie Mae but not yet proven. Although their assertion that they kept current on their payments is conspicuously limited to the period up to September 2013 (*see*Countercl. ¶ 17, Dkt. No. 14), the Obradoviches have denied that they defaulted on the payments. (Answer ¶ 3(J), Dkt. No. 11.) They have also alleged that they did not abandon the property. (Countercl. ¶¶ 39, 127, Dkt. No. 14.)
Thus, the question of whether the Counter-Defendants' right to take steps to protect the property was triggered by a breach or abandonment by the Obradoviches, as well as the question of whether the steps they took were the reasonable or appropriate actions permitted by the contract, cannot be determined at the pleading stage. *Cocroft v. HSBC Bank USA, N.A.,* No. 10 C 3408, 2014 WL 700495 (N.D. Ill. Feb. 24, 2014), *aff'd,* 796 F.3d 680 (7th Cir. 2015), which Fannie Mae cites in support of its position that the Counter-Defendants were granted the right to take the actions they performed, does not indicate a different conclusion. In *Cocroft,* the district court was asked to decide a summary judgment motion rather than a motion to dismiss a pleading and reviewed an evidentiary record that established that the mortgagors had indeed defaulted. 2014 WL 700495, at *5. Since the Counter-Defendants' right to enter the Obradovich property has yet to be determined here, the Court cannot conclude that any such right defeats the trespass claim as a matter of law. The motions to dismiss are accordingly denied as to Count I of the counterclaim.

Slorp v. Lerner Sampson SD OH, March 31, 2016
Court Wont Compel Attorney Client Communication under the Crime Fraud Exception
https://scholar.google.com/scholar_case?case=16243653604961679170&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt
The Court agrees. To the extent any evidence on this issue exists, it affirms Defendants' position. For example, in her unrelated deposition from the Franklin County case, Ms. Hill testified that, in the ordinary course, LSR "receives a . . . foreclosure referral" from LSR's "client" (Doc. 26-2 at 11); and that LSR employees review the relevant documents and prepare the assignments (see Doc. 82-15 at 246). In other words, the evidence indicates that BANA sends its attorneys a foreclosure referral with the idea that its attorneys would take the necessary steps to facilitate a foreclosure. Only then do BANA's attorneys make the choice to involve MERS in executing the assignment. There is no further evidence of BANA acting in a way that ratified the disclosure, meaning that its attorneys alone cannot have waived the privilege.[2]

In reaching this conclusion, the Court notes that the relationship between Defendants as it pertains to the Assignment and the invocation of privilege gives it pause. In a different case involving LSR under similar circumstances, Judge Reece of the Franklin County Court noted:

> This Court admits that it is somewhat concerned about a practice which threatens to shield elements of otherwise discoverable transactions from discovery by having those transactions take place within a law firm carried out by a law firm employee who has obligations of loyalty to both parties in the transaction.

(Doc. 82-22 at 3). Though the Court likewise finds the practice somewhat concerning, it has no basis beyond Plaintiff's conjecture to believe that the privilege was abused or waived in this particular case.

TALMER BANK & TRUST v. Schultz, 2016 Ohio 2726 - Ohio: Court of Appeals, 8th Appellate Dist., April 28, 2016
Abuse of Discretion Not to Stay Sale In Light of Loss Mitigation
https://scholar.google.com/scholar_case?case=11714665997767229674&hl=en&lr=lang_en&as_sdt=4,36&as_vis=1&oi=scholaralrt

{¶13} Thus, we next consider whether the trial court abused its discretion in denying the bank's motion to stay given the court's standing order. That order provided that if the debtor entered into any type of settlement agreement or plan with the plaintiff, "whether it is before judgment or after judgment," the plaintiff must notify the court within 14 days of the agreement or plan. The order further provided that failure to notify the court of such an agreement or plan would result in a show cause hearing.
{¶14} As noted, the bank's ground for its motion to stay was that the parties were in settlement negotiations and discussing loan modification; it was not grounded on an actual agreement. Nonetheless, we find that on its given reason for denying the motion, i.e., "insufficient reason provided," the court abused its discretion.[3]The trial court's standing order was a perfectly reasonable attempt to efficiently control its docket. *See Chou v. Chou,* 8th Dist. Cuyahoga No. 80611, 2002-Ohio-5335, ¶ 38. But it should not be so rigidly applied to work an injustice, especially in a case like this, where there is no evidence of delay, harrassment, or any other improper motive on the part of the party 2011-Ohio-5179, ¶ 7. requesting the stay, and there would be no prejudice to other parties (quite the opposite for the Schultzes). "Once a trial court determines that foreclosure is legally sound, `it must then consider the equities of the situation in order to decide whether foreclosure is appropriate.'" *Christopher Michael Homes, LLC v. Treillage Residence Owners' Assn.,* 12th Dist. Butler No. CA2013-12-238, 2014-Ohio-4754, ¶ 25, quoting *U.S. Bank, N.A. v. Bryant,* 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 7.

Wirtz v. JPMorgan Chase Bank, NA, Dist. Court, Minnesota 2016
Minnesota Mortgage Originator and Servicer Licensing Act
https://scholar.google.com/scholar_case?case=2015041389966274669&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Wirtz argues that SLS violated MOSLA due to its RESPA and FDCPA violations. SLS responds that it did not violate RESPA or the FDCPA, and therefore did not violate MOSLA.

MOSLA prohibits a mortgage servicer from violating "federal law regulating residential mortgage loans." Minn. Stat. § 58.13, subd. 1(a)(8). As discussed above, the court finds that SLS violated

RESPA, a qualifying federal law. Accordingly, SLS also violated MOSLA, and the court grants summary judgment for Wirtz on that claim.

Brown v. Wells Fargo Home Mortgage, Dist. Court, D. New Hampshire, June, 20 2016
ECOA Claim
https://scholar.google.com/scholar_case?case=7776254282142535815&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

Wells Fargo asserts that, instead of informing the Browns that their application remained incomplete after August 13, it simply denied the Browns' forbearance application on August 19. See Reply (document no. 15) at 5. Because the Browns were delinquent, Wells Fargo argues, it need not have informed them of this adverse action. See 15 U.S.C. § 1691(d)(6). But that section of the ECOA only absolves creditors of giving a "statement of reasons" for that adverse action; it does not absolve Wells Fargo of its duty to "notify the applicant of its action on the application." 15 U.S.C. § 1691(d)(1). Here, the Browns allege that they did not receive any notification that their loss mitigation request had been denied. Compl. (document no. 1) ¶ 65. Instead, they allege, Wells Fargo notified them only that it had "not heard from" them — despite Mr. Brown's several contacts — and did not have enough time to review the application. See id. ¶ 46. Wells Fargo then foreclosed.

Accordingly, the court concludes that the Browns have pled facts sufficient to state a claim that Wells Fargo violated Regulation B by failing to notify the Browns about the action, if any, it took in response to their loan modification request, and denies the defendants' motion to dismiss this claim.

FEDERAL NATL. MTGE. ASSN. v. KARASTAMATIS, 2016 NY Slip Op 26209 - NY: Supreme Court June 29, 2016
https://scholar.google.com/scholar_case?case=7473198719379674288&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

With respect to the defendants' assertion of the federally promulgated Regulation X as a ground for denial of this motion, the court finds such assertion to be without merit. While regulatory provisions, particularly those referred to as Regulation X, obligate some mortgage foreclosure plaintiffs to conform to review standards and to seek stays or adjournments of the prosecution of their foreclosure claims in impending or pending action in state courts or elsewhere, they do not provide defendant mortgagors with any viable defense to a New York mortgage foreclosure action or any right to obtain a stay of proceedings in such actions or to obtain a vacatur of or orders or judgments issued in such actions. Instead, the regulations merely provide a federal monetary remedy in favor of the mortgagor borrower against a bank, note holder or other entity subject to such federal regulations, upon proof of their violation of one or more of the regulations (*see* of 12 C.F.R. 1024.41; RESPA at 12 U.S.C. 2605[f]).

That a federal regulation may not be employed as a defense to any facet of a New York mortgage foreclosure action is consistent with long standing principles of the law of the property which govern in rem actions, including, that claims interposed in such actions are governed by the law of the situs of the property at issue (*see*Mallory Associates, Inc. v Barving Realty Co., Inc., 300 NY 297, 90 Ne.2d 468 [1949]). While a mortgage foreclosure action is recognized as being equitable in nature, it differs in various ways from other equity actions and for purposes here, in one very significant aspect. The difference was explained as follows by the Court of Appeals in the case of *Jo Ann Homes v Dworetz* (25 NY2d 112, 302 NYS2d 799 [1969]), in which Chief Judge Burke stated as follows:

"Concededly, a foreclosure action is a proceeding in a court of equity which is regulated by statute (internal citations omitted). Nevertheless, it is well settled that such a proceeding is unlike other equity actions in several ways. Thus, while equity acts only in personam, an action for foreclosure is in the nature of a proceeding in rem to appropriate the land (*Reichert v Stilwell,* 172 NY 83, 89, 64 N.E. 790, 792 [1902]).

Fowler v. CALIBER HOME LOANS, INC., Dist. Court, SD Florida July 8, 2016

Entertaining Decision (If you are not Plaintiff Counsel) on Filed Rate Doctrine Precluding Forced Place Insurance Claims

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"I went to the fortune teller, Had my fortune read I didn't know what to tell her/I had a dizzy feeling in my head"

— The Rolling Stones, from the song, Fortune Teller[1]

Predicting the future is no easy task. It is therefore no surprise that people use different strategies to forecast what is likely to happen, with differing results. Some people use psychics, mediums, crystal balls, horoscopes or tea leaf readers. Weather forecasters use empirical data from myriad sources, supplemented by computer models. Cardiologists analyze blood samples to see if a patient is likely to have hypertension. Some blackjack gamblers use card-counting to determine whether the next card the dealer turns over will cause a bust over 21 (and hope they don't get caught counting cards and get booted out of the casino). Seismologists try to measure how much strain accumulates along a fault to predict earthquakes. And then, of course, there are the classic fortune cookies which are often served for dessert in Chinese restaurants in the United States.

Courts, too, are sometimes in the prognostication business. Trial-level courts, for example, must predict how their appellate court would rule when there is no binding precedent on a specific legal issue. In this case, the Undersigned must predict how the Eleventh Circuit Court of Appeals would rule on a critical, case-dispositive issue raised in the motions to dismiss the class action lawsuit filed against an insurer (American Security Insurance Company) and a mortgage servicing firm (Caliber Home Loans, Inc.) in a force-placed insurance lawsuit.

Specifically, because the appellate court has not yet ruled, all parties agree that the Undersigned must predict whether the Eleventh Circuit would hold that the filed-rate doctrine applies to bar all eight of the counts asserted by Plaintiffs. Plaintiffs concede that all of the claims asserted in their Complaint would be subject to dismissal if the filed-rate doctrine applied here at the motion to dismiss stage...

…For reasons outlined in greater detail below, I predict that the Eleventh Circuit would apply the filed-rate doctrine here, thereby precluding all eight counts and requiring the Undersigned to grant Defendants' motion and dismiss the Complaint with prejudice.

Griffin v. US Bank National Association, Dist. Court, ND Illinois July 11, 2016

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[ICFA (State UDAP) claim against Morris Laing Fails (contrast with our Blanton Case also ND IL):]

"In *Cripe v. Leiter,* 184 Ill. 2d 185 (1998), the Supreme Court of Illinois held that because `the attorney-client relationship . . . is already subject to extensive regulation by [the state supreme court],' the ICFA does not `apply to the conduct of attorneys in relation to their clients.'" *Grant-Hall v. Cavalry Portfolio Servs., LLC,*856 F. Supp. 2d 929, 944 (N.D. Ill. 2012) (quoting *Cripe,* 184 Ill. 2d at 185). "That principle has been extended beyond suits by clients against their lawyers to claims against someone else's attorney." *Id.* at 944; *see Wilbourn v. Advantage Fin. Partners, LLC,* No. 09 CV 2068, 2010 WL 1194950, at *12 (N.D. Ill. Mar. 22, 2010);*Shalabi v. Huntington Nat'l Bank,* No. 01 C 2959, 2001 WL 777055, at *2-3 (N.D. Ill. July 11, 2001). Here, defendant Morris Laing was working on behalf of its clients U.S. Bank and Ocwen Loan Servicing when it engaged in the actions plaintiff alleges are deceptive and unfair in violation of the ICFA. Because Morris Laing was engaged in the practice of law and courts have held that ICFA does not apply to the practice of law, defendant Morris Laing cannot be held liable for violations of the ICFA. Accordingly, Count VI of plaintiff's complaint is dismissed with prejudice.

[ICFA Claim v. Ocwen survives MTD:]

Plaintiff's allegations that Ocwen filed for foreclosure without reviewing him for loss mitigation options and conditioned the dismissal of the foreclosure complaint on plaintiff's dismissal of his counterclaim are sufficient to plead an ICFA claim for unfairness. *See Boyd v. U.S. Bank, N.A. ex rel. Sasco Aames Mortg. Loan Series 2003-1,* 787 F. Supp. 2d 747, 751 (N.D. Ill. 2011) (loan servicer's alleged failure to consider plaintiff's eligibility for a HAMP modification was sufficient for an ICFA claim for unfair conduct). However, the Court finds plaintiff's complaint unclear regarding the allegations that defendant Ocwen failed to consider plaintiff for loan modification prior to filing the foreclosure action. In Count IV, plaintiff alleges that he was not so considered (Compl. ¶¶ 126-128, 130, 138), but Count V alleges he applied for HAMP and was denied. (*Id.* ¶ 145.) These two statements make it unclear whether plaintiff is alleging it was an ICFA violation for Ocwen to not consider him for HAMP and other loan modification programs, or if the alleged violation occurred when plaintiff was denied participation in HAMP. Accordingly, plaintiff is given leave to replead his allegations against Ocwen in Count IV so as to clarify its alleged violation of the ICFA.

Lane v. BAYVIEW LOAN SERVICING, LLC, Dist. Court, ND Illinois July 11, 2016

Great Spokeo Analysis in FDCPA case using 7th Circuit precedent; FDCPA on Statement overshadowing Debt Validation Survives

https://scholar.google.com/scholar_case?case=9602344975832674820&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Bayview contends that Lane lacks standing to bring his FDCPA claim because the complaint only sought statutory damages and because Lane did not suffer any concrete harm as a result of the alleged § 1692g violation. Mot. to Dismiss at 7. The parties' briefing is somewhat confused on this issue, because they seem to equate actual *monetary* loss with the Article III standing requirement that a plaintiff must suffer a *concrete* injury. Specifically, Bayview says that it concedes "actual" damages are not needed for Article III standing, cites two Seventh Circuit cases for that proposition, and concludes its five-sentence argument on standing by saying it is simply preserving an argument based on the then-pending *Spokeo* case in the Supreme Court. *See* Mot. to Dismiss at 7 (citing *Keele v. Wexler,* 149 F.3d 589, 593 (7th Cir. 1998), and *Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076, 1083 (7th Cir. 2013)). In response, Lane also appears to equate actual damages with the Article III concrete-harm requirement, going so far as conceding that he "does not allege nor in good faith could allege any other damage except statutory damages through 15 U.S.C. Section 1692k." R. 17, Pl.'s Resp. Br. at 5.

Actual monetary damages and the Article III concrete-harm requirement are not exactly the same thing. To be sure, if a plaintiff suffers actual monetary damages, then almost surely the Article III concrete-harm requirement is satisfied. But even though actual monetary harm is a sufficient condition to show concrete harm, it is*not* a necessary condition. Put another way, even absent actual monetary damages, it is still possible to satisfy the concrete-harm requirement, although federal courts must be careful to ensure that this crucial Article III requirement is met. *Spokeo,* which the Supreme Court has now decided, makes this clear. In that case, the plaintiff alleged that an online personal-information publisher violated the Fair Credit Reporting Act (FCRA) by publishing inaccurate information about him.136 S. Ct. at 1546. The website got several things wrong, reporting that "he is married, has children, is in his 50s, has a job, is relatively affluent, and holds a graduate degree." *Id.* There was no allegation (at least as the case was presented in the Supreme Court) that the plaintiff had suffered any actual monetary harm. *Id.*Even absent that allegation, however, the Supreme Court reiterated that the concrete-harm requirement does not require that the alleged injury be "tangible."*Id.* at 1549. Instead, the Supreme Court explained, "[a]lthough tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that *intangible* injuries can nevertheless be concrete." *Id.* (emphasis added).[4]

In sorting out which intangible injuries are enough to confer standing and which are not, *Spokeo* laid out basic principles: a "bare procedural violation" of a statute is *not* automatically enough to satisfy Article III's concreteness requirement. 136 S. Ct. at 1549. To be sure, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.*When a federal statute is violated, and especially when Congress has created a cause of action for its violation, by definition Congress has created a legally protected interest that it deems important enough for a lawsuit. The legislative branch, with its fact-finding ability and responsiveness to the public interest, "is well positioned to identify intangible harms that meet minimum Article III requirements," so Congress's judgment on the nature of the injury is "instructive and important." *Id.* But "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right ... . Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

The other principle announced by *Spokeo* is that the *risk* of harm sometimes is enough to satisfy concreteness. 136 S. Ct. at 1549. To illustrate this point, the Supreme Court offered both a historical example and a statute-based example. *Id.*From history, *Spokeo* noted that common-law defamation

cases have long allowed plaintiffs to sue even though their actual damages are difficult to prove. *Id.* From Congress, *Spokeo* cited two information-rights cases, *Federal Election Commission v. Akins,* 524 U.S. 11, 20-25 (1998) and *Public Citizen v. Department of Justice,* 491 U.S. 440, 449 (1989), both of which involved plaintiffs who sought information that Congress had decided to make available to the public. *Spokeo,* 136 S. Ct. at 1549-50. There was no particular *substantive* standard of conduct set by the pertinent provisions of the information-access statutes involved in those cases. Indeed, *Public Citizen* cited to prior cases involving the Freedom of Information Act, and declared, "Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Public Citizen,* 491 U.S. at 449 (citing cases). These *procedural*-rights only cases led *Spokeo* to explain that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress identified." 136 S. Ct. at 1549 (emphasis in original).[5]

The information-access cases cited by *Spokeo* suggest that, in this case, Lane has alleged a sufficiently concrete injury because he alleges that Bayview denied him the right to information due to him under the FDCPA. In its legislative findings, Congress declared that "many" debt collectors use "abusive, deceptive, and unfair debt collection practices[.]" 15 U.S.C. § 1692(a). Without the protections of the FDCPA, Congress determined, the "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." *Id.* § 1692(b). To prevent unsuspecting debtors from paying invalid debts, or paying more than truly owed, Congress equipped debtors with the right to demand verification of the debt (and its amount) within thirty days of receiving an initial debt-collection communication from a debt collector. *Id.* § 1692g(a)(4); *see also Church v. Accretive Health, Inc.,*— Fed. Appx. —, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (unpublished opinion)[6] (§ 1692g claim was sufficiently concrete to satisfy injury-in-fact requirement); *cf. Pollard v. Law Office of Mandy L. Spaulding,* 766 F.3d 98, 102-03 (1st Cir. 2014) (§ 1692g claim conferred standing, though decided pre-*Spokeo*). This right to information is similar to the information-access interests protected by the Freedom of Information Act and other federal laws that authorize access to government records. Indeed, the right to get information to verify a debt is arguably *more* concrete than the right to obtain government records. The debtor is getting information in an attempt to verify a *monetary* obligation that the creditor asserts. In contrast, a FOIA plaintiff is often seeking to vindicate an interest in learning the premise of government decisions. As important as that interest is (and it is extremely important), there is an abstract quality to it when compared to cold, hard cash (figuratively speaking).

There is yet another way in which § 1692g goes even further than other information-access laws that the Supreme Court has deemed sufficient to confer standing. Under the FDCPA, when a debtor invokes the right to verify the debt and the debtor disputes the debt, the debt collector must *stop* collection efforts until the verification is mailed to the debtor:

If the consumer notifies the debt collector in writing within the thirty-day period ... that the debt, or any portion thereof, is disputed ... the debt collector shall *cease* collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt ... and a copy of such verification ... is mailed to the consumer by the debt collector.

15 U.S.C. § 1692g(b) (emphasis added). So, under the FDCPA, the right to information is not merely an end unto itself, but it actually permits the debtor to trigger (by disputing the debt in writing) a

moratorium on collection efforts until the verification information is mailed to the debtor. This further demonstrates the concreteness of the injury arising from a § 1692g violation.

Here, although Lane concedes that he did not suffer actual monetary damages, the complaint does allege that the correspondence sent by Bayview contained "threats which override Plaintiff[']s rights found in the above stated correspondences," namely, the right to verification. Compl. ¶ 26. The concrete harm, then, is the loss of the right to verification, which is enough to satisfy the concreteness requirement of Article III standing.

It is worth noting too that the prior Seventh Circuit decisions addressing the concreteness of FDCPA injuries survived *Spokeo,* which established some general principles but did not contain a holding specific enough to overrule Seventh Circuit law on the FDCPA. As noted earlier, in its dismissal motion, Bayview acknowledges two relevant Seventh Circuit decisions that address standing in FDCPA cases. Mot. to Dismiss at 7 (citing *Keele,* 149 F.3d at 593-94, and *Phillips,*736 F.3d at 1083). Like *Spokeo,* these cases do not hold that *any* statutory violation is enough to meet the injury-in-fact requirement. Instead, *Keele* held that the harm allegedly suffered by the plaintiff—receiving letters containing the debt collector's illegal demand for a $12.50 collection fee—was enough to establish Article III standing. 149 F.3d at 593-94. Even though the plaintiff did not pay the fee, the demand *tried* to add an unauthorized amount to the debt owed—that is, tried to get the plaintiff to pay more than owed—and that was enough for standing.*Id.* at 593. Similarly, *Phillips* held that debtors had standing to sue where the debt collectors filed allegedly unlawful debt-collection suits, even though the debt collectors never served the complaint on the plaintiff. 736 F.3d at 1082-83. *Phillips*reasoned that pending legal actions (even if not served) can "be a red flag to the debtor's other creditors" or "pressure a debtor to pay back the debt informally," and those harms qualified as actual harm that was enough for standing. *Id.* These holdings are consistent with *Spokeo,* which similarly held that "Article III requires a concrete injury even in the context of a statutory violation," but recognized that a "risk of real harm" can satisfy the concreteness requirement. 136 S. Ct. at 1549. Here, because the alleged overshadowing at the very least posed a risk of depriving Lane of his right to verification, he satisfies the concrete-harm requirement. Bayview's standing challenge must be rejected.[7]

[FDCPA and Debt Validation:]

…When viewed in the light most favorable to Lane (as required at the dismissal-motion stage), the allegations here state a valid overshadowing claim based on the October mortgage statement. That statement set a November 1, 2015 deadline for payment and announced a $65.71 late fee as of November 16, 2015.[9] The demand for payment could confuse an unsophisticated consumer because the October statement fails to explain how the deadline and late fee reconcile with Lane's thirty-day right to dispute the debt. *Cf. Bartlett,* 128 F.3d at 500 (observing that the debtor's right to contest the debt and the creditor's right to sue for late or missed payments are "not inconsistent, but by failing to explain how they fit together the letter confuses."). Bayview could have avoided any § 1692g overshadowing claim if the monthly statement acknowledged the October 14 debt-validation letter and the prior notice of Lane's validation rights, and alerted Lane that receipt of the monthly statement and its deadlines did *not* affect his right to dispute the underlying debt. But the October mortgage statement had none of that. Absent any "reconciling statement," the unsophisticated consumer could very well think that the mortgage statement replaced or overrode the debt-validation letter that Bayview sent just two days earlier.[10] *See Horkey v. J.V.D.B. & Assocs., Inc.,*179 F. Supp. 2d 861, 865-66 (N.D. Ill. 2002) ("Even assuming *arguendo* that the December 21, 2000 notice sent from

Defendant's attorney can be construed as a validation notice pursuant to Section 1692g, Defendant's demand on January 9, 2001, that Plaintiff pay the bill in full `now' violated the 30-day validation period and therefore, would have overridden and rendered wholly ineffectual any validation notice."), *aff'd,* 333 F.3d 769 (7th Cir. 2003). On these grounds alone, Bayview's argument against the October mortgage statement must be rejected.

But there's more: the mortgage statement also warned that "late payments, missed payments or other defaults may be reflected in [your] credit report." Exh. D, 10/16/2015 Monthly Mortgage Statement. Without a reconciling statement, the unsophisticated consumer could interpret that warning as a threat of adverse credit-report action if the consumer did not pay up by the deadlines, meaning that the thirty-day window was no longer in effect. *See Vaughn v. CSC Credit Servs., Inc.,* 1995 WL 51402, at *3 (N.D. Ill. Feb. 3, 1995) ("Most unsophisticated consumers would interpret CSC's threat that `this account could be added to your credit bureau record' as what *will* happen if they do not immediately pay the balance due or telephone CSC to discuss the account."). The § 1692g overshadowing claim based on the October mortgage statement survives.[11]

[HAMP Solicitation Letter Claim also survives MTD:]

Like the phrase at issue in *Taylor,* "Act now to get the help you need!" and "TAKE ACTION TODAY — CALL TO LEARN MORE ABOUT YOUR OPTIONS" are rhetorical devices, not overshadowing statements setting new deadlines. Rather than "impose a deadline that contradicted [Lane's] right to a thirty-day validation period," *Zemeckis,* 679 F.3d at 636, the two phrases simply encouraged Lane to ask more (and to be quick to do so) about the HAMP loan modification program. Indeed, the HAMP letter's statements are even less urgent than the statement at issue in *Taylor,* which encouraged the debtor to "Act now to satisfy your *debt.*" 365 F.3d at 575 (emphasis added). Unlike in *Taylor,* the phrases here do not even encourage Lane to pay his debt and to do it fast; rather, they just motivate him to seek out information about HAMP, a federal program which really is designed to help those who are struggling to repay their mortgage loans. *See Matmanivong,* 79 F. Supp. 3d at 872-73 ("The purpose of HAMP ... is to help borrowers maintain home ownership... ."). What's more, the context in which "Act now to get the *help you need*!" appears—underneath bolded text that states "You may be able to *make your payments more affordable*"—further emphasizes that the letter is informing Lane about a federal-government program designed to reduce payments, and further negates any argument that the statements undermine the thirty-day window. Exh. C, 10/23/2015 HAMP Solicitation Letter (emphases added). For these reasons, no § 1692g claim can be asserted based on the HAMP solicitation letter.

Green v. SPECIALIZED LOAN SERVICING, LLC, Dist. Court, WD Wisconsin July 21, 2016

Transfer of Servicing Notice with mini miranda to Discharged Debtor is an FDCPA violation.

https://scholar.google.com/scholar_case?case=3037562012976383175&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The Greens allege that SLS sent communications that were about a debt that had been discharged, and implied that the Greens owed SLS payments on it. The Notice represented that an amount was owed when none was, falsely representing both the amount and legal status of the debt. These allegations state a claim under § 1692e(2). *Turner v. J.V.D.B. & Assocs., Inc.,* 330 F.3d 991, 998 (7th

Cir. 2003) (a communication that "falsely implied that [the recipient] had to pay a debt discharged in bankruptcy" could violate § 1692e).

The Notice also included an insert about sharing the Greens' credit information. The Greens allege that the insert constituted a threat to not only share their information, but to share *false* information, by placing a tradeline on the Greens' credit report when the Greens did not owe any payments to SLS. As alleged, the Notice threatens to communicate false credit information, which constitutes an illegal action. If that kind of threat would mislead or deceive an unsophisticated consumer, measured objectively, then it would violate both § 1692e(5) and (8).*Ruth v. Triumph P'ships,* 577 F.3d 790, 797-800 (7th Cir. 2009). The threat could also be considered a "false representation or deceptive means to collect or attempt to collect any debt or to obtain any information concerning a consumer," violating § 1692e(10). These claims may ultimately be difficult to prove, but the Greens have alleged them sufficiently to state a claim...

The Greens also allege that sharing their credit information by putting a false tradeline on their credit report was an unfair or unconscionable practice. SLS had no legal authority to add a false tradeline to the Greens' credit report, making it improper for SLS to suggest that it could do so or to actually do so. *Lox v. CDA, Ltd.,* 689 F.3d 818, 825 (7th Cir. 2012) ("[I]t is improper under the FDCPA to imply that certain outcomes might befall a delinquent debtor when, legally, those outcomes cannot come to pass."). At this point, these allegations are enough to state a claim...

The Greens allege that SLS's communications lacked the requisite disclosures and follow up information under § 1692g. SLS contends that these allegations fail to state a claim because they do not apply once the debtor has paid the debt. *See* § 1692g(a). It argues that by discharging their debt, the Greens essentially paid it. This argument fails. Paying and discharging a debt through bankruptcy are not the same. And SLS purportedly reached out to the Greens in the first place because it believed that they still had to pay the debt. Thus, the debt collection communications that it sent at that time, and under that belief, needed to comply with the statute, including the requirements about disclosures and follow up letter. Accordingly, the Greens have stated a claim for a violation of § 1692g.

Bomar v. PACIFIC UNION FINANCIAL, LLC, Dist. Court, ND Illinois August 10, 2016
https://scholar.google.com/scholar_case?case=6022712712365798762&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

ICFA (state UDAP)

Count II alleges that Pacific Union violated the Illinois Consumer Fraud and Deceptive Business Practices Act by engaging in unfair acts and practices with regards to Bomar's request for a loan modification. In order to determine whether a defendant's conduct is unfair under ICFA, courts must consider whether (1) the conduct violates public policy; (2) is so oppressive that the consumer has little choice but to submit; or (3) causes consumers substantial injury. *Siegel v. Shell Oil Co.,* 612 F.3d 932, 935 (7th Cir. 2010) (*citing Robinson v. Toyota Motor Credit Corp.,*775 N.E.2d 951, 961, 201 Ill.2d 403 (2002)). All three criteria do not need to be satisfied to support a finding of unfairness; a practice "may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Robinson,* 775 N.E.2d at 961.
Bomar alleges that Pacific Union acted in an unfair manner by requiring Gena's full participation and refusing to modify the mortgage once Gena executed a quit-claim deed. As evidence of this

unfairness, Bomar asserts that FHA-HAMP guidelines allow an occupying co-borrower to be considered for loss mitigation so long as the non-occupying co-borrower has relinquished his or her right in the property via a quitclaim deed. Here, however, Pacific Union viably contends that Bomar's argument is based on the guidelines for the HAMP program and not the FHA-HAMP program and that, in any event, the guidelines that Bomar relies on are permissive in nature. Moreover, Bomar's allegations that Pacific Union acted contrary to "the public policy of Illinois" is wholly conclusory in nature. Pacific Union, however, has not addressed the remaining prongs of the ICFA fairness analysis. *See Siegel,* 612 F.3d at 935. Because all three criteria do not need to be satisfied in order to support a finding of unfairness, Pacific Union has therefore failed to establish that it is entitled to judgment on the pleadings on Bomar's ICFA claim.

Burke v. Nationstar Mortgage LLC, Dist. Court, ED Virginia August 9, 2016
https://scholar.google.com/scholar_case?case=11295070452029527887&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[ECOA claim dismissed because Borrower remained in default]

Nationstar now argues that the pleadings and attachments—previously not before the Court—contradict the Complaint[12] and demonstrate that Burke did not perform as required by the permanent loan modification agreement. The Court agrees. The Loan Modification Agreement expressly instructed Burke to "sign and have the documents notarized," warning him that the "modification will not be processed *unless* Nationstar received[d] the original documents by its due date." Loan Modification Agreement at 8 (emphasis added). Despite this conditional requirement, the Loan Modification Agreement indicates that Burke failed to notarize the document as required.[13] *See id.*at 18. As such, no permanent modification of Burke's Loan was processed,[14] Burke remained in default, and Nationstar was relieved of its "obligation to comply with Subsection 1691(d)(2)'s adverse action notification requirement." *Piotrowski v. Wells Fargo Bank, NA.,* No. CIV.A. DKC 11-3758, 2013 WL 247549, at *8 (D. Md. Jan. 22, 2013); *see also Guthrie,* 2012 WL 6552763, at *6; *Pandit,* 2012 WL 4174888, at *7;*Eichholz,* 2011 WL 5375375, at *9. Accordingly, the Court will dismiss Counts II and III.

Quinn v. Specialized Loan Servicing, LLC, Dist. Court, ND Illinois August 11, 2016
https://scholar.google.com/scholar_case?case=4728001752441574136&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

On Spokeo:

In fact, a number of courts have already confronted *Spokeo*-based standing challenges in FDCPA cases and have rejected the argument that SLS asserts here. For example, in *Mahala A. Church v. Accretive Health, Inc.,* No. 15-15708, ___ Fed. App'x. ____ (11th Cir. July 6, 2016), the plaintiff asserted claims under §§ 1692e(11) and 1692g of the FDCPA, alleging that the defendant had sent her a letter stating that she owed a debt to a hospital without disclosing that it was a debt collector. *Id.* at *3 & n.1. Although the plaintiff claimed that the letter upset her, she did not allege any injury beyond the violation of the statute itself. Nevertheless, the Eleventh Circuit held that the plaintiff "had a right to receive the FDCPA-required disclosures" and that "she has sustained a concrete — *i.e.,* "real" — injury because she did not receive the allegedly required disclosures." *Id.* at *3. The court observed that the violation of the plaintiff's "right to receive the disclosures is not hypothetical or uncertain," and that "[w]hile this injury may not have resulted in tangible economic

or physical harm that courts often expect, the Supreme Court has made clear an injury need not be tangible to be concrete." *Id.* Notably, the court also explicitly rejected the contention advanced by SLS here that the plaintiff had alleged a mere "procedural violation" of the statute. Rather, the court held, "Congress provided Church with a substantive right to receive certain disclosures and Church has alleged that Accretive Health violated that substantive right." *Id.* at *3 n.2.

On ICFA (Illinois UDAP)

I agree. Although the Quinns' amended complaint does allege pecuniary harm in various places, the allegations are conclusory.[3] In their briefing on SLS's motion to strike, the Quinns additionally claim that they have a good-faith basis to believe that SLS charged all class members (including themselves), an $11.35 "property inspection fee" each time an inspector visited a debtor's home. *See* Pls.' Resp. to Mot. to Strike at 13. These fees, however, are not mentioned in the amended complaint. The Quinns also contend that the amended complaint sufficiently alleges pecuniary harm because it includes a request for attorney's fees and costs. However, Illinois courts have squarely held that attorney's fees may constitute pecuniary harm in the context of an ICFA claim only where a defendant's actions are alleged to have caused the plaintiff to become involved in litigation with *third parties. See, e.g., Tolve v. Ogden Chrysler Plymouth, Inc.,* 324 Ill. App. 3d 485, 491, 755 N.E.2d 536, 541 (2001). The Quinns cite no authority for the proposition that the pecuniary harm requirement can be satisfied by seeking attorney's fees in the same suit in which the ICFA claim is alleged. Indeed, the sole case that the Quinns cite, *In re Price,* 103 B. R. 989, 996 (Bankr. N.D. Ill. 1989), did not involve a claim under the ICFA at all.
I therefore grant the motion to dismiss Counts IV and V of the amended complaint. The Quinns may amend the complaint to include more specific allegations of pecuniary harm if they have a good faith basis for doing so.

Prindle v. Carrington Mortgage Services, LLC, Dist. Court, MD Florida August, 16 2016
https://scholar.google.com/scholar_case?case=11947670449122854139&hl=en&as_sdt=6,36#r[9]

The FDCPA unambiguously grants recipients of debt-collection communications (such as Prindle) a right to be free from abusive collection practices. In other words, § 1692e of the FDCPA "create[s] a private duty owed personally to" a consumer to refrain from using false, deceptive, or misleading means or representations in attempting to collect a debt. See Spokeo, 136 S. Ct. at 1554 (Thomas, J., concurring)(quoted). As such, because Prindle had a personal statutory right to be free from abusive debt-collection practices, and because she has alleged facts plausibly showing that Carrington violated that right, she "need not allege any additional harm." See id. at 1549 (emphasis omitted). In light of this conclusion, Carrington's primary argument—that Prindle failed to allege any additional concrete harm, such as economic loss, confusion, lost time, or emotional distress, see Defendant's Supp. Brief at 5-8—is unavailing.[15] Having concluded that Prindle has alleged an injury in fact that is both particularized and concrete, she has standing to bring her claims, and the Court turns to Carrington's challenges to the merits of those claims.

Prather v. Bank of America, NA, Dist. Court, D. Montana August 22, 2016
https://scholar.google.com/scholar_case?case=10308214528121701582&hl=en&as_sdt=0,36

[Continuing Tort Doctrine]

Whether BANA's alleged negligence may appropriately be considered continuing depends upon whether the Prathers' injuries are temporary or permanent. *Id.* at 140. The continuing tort doctrine "applies to a temporary injury that gives rise to a new cause of action each time that it repeats." *Burley v. Burlington N. & Santa Fe Ry. Co.*,273 P.3d 825, 828 (Mont. 2012). If the Prathers' injuries are permanent, the doctrine does not apply. *Christian,* 358 P.3d at 140. "A permanent [tort] is one where the situation has stabilized and the permanent damage is reasonably certain." *Id.* at 140 (citations and internal quotation marks omitted). On the other hand, a temporary tort is "terminable"; "its repetition or continuance gives rise to a new cause of action, and recovery may be had for damages accruing within the statutory period next preceding the commencement of the action." *Id.* at 141 (citations, internal quotation marks, and ellipses omitted). The "dispositive factor" in determining whether a tort is temporary or permanent is "reasonable abatability." *Id.* In other words, the defendant's unwillingness to correct a correctable problem may fairly be seen as the tort for statute of limitations purposes.
Here, the allegations against BANA are allegations of a permanent and not a temporary tort. By the time BANA sent the modification offer to the Prathers in November 2012, the parties' course of dealing had "stabilized," and any damages they suffered were "reasonably certain." *See Christian,* 358 P.3d at 140. At that point, not only were the Prathers' financial liabilities clear and certain, which in and of itself would be sufficient for accrual, but they were subjectively aware of them. The Court cannot reward the Prathers for sleeping on their rights. *See Gomez,* 975 P.2d at 1263. Looking to the allegations of the complaint, the very latest the Prathers' negligence claims could have accrued is November 24, 2012.

U.S. BANK NATIONAL ASSOCIATION v. TAIT W.D. Washington September 21, 2016
http://www.leagle.com/decision/In%20FDCO%2020160922F30/U.S.%20BANK%20NATIONAL%20ASSOCIATION%20v.%20TAIT

[Pro Se Counterclaimant's allegation of violation of State UDAP Sufficient]

U.S. Bank does not dispute, for purposes of its motion to dismiss the counterclaims, that the Taits have provided sufficient allegations on the first three elements of a CPA claim. (Dkt. No. 21 at 5-6.) The Court agrees. However, U.S. Bank argues the Taits have not sufficiently pled the elements of injury or causation. To prove causation, the "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,* 170 P.3d 10, 22 (2007). The Taits allege their injury occurred in the form of a "far more expensive mortgage because [U.S. Bank's] delay permitted the loans [*sic*] principle [*sic*] to bloat by operation of the accrual of capitalization of interest, fees, charges, and fines." (Dkt. No. 19 at 16-17.) U.S. Bank argues the Taits' injury was self-inflicted and caused by their default, not U.S. Bank's bad faith during mediation, and therefore causation is not met. (Dkt. No. 21 at 6-7; Dkt. No. 24 at 5-6.) At this stage of the litigation, the Court need not determine which of the parties' allegations are true as to what caused the Taits' injury of an increased principal. The Court looks only at the face of a complaint to decide a motion to dismiss. *Van Buskirk v. Cable News Network, Inc.,* 284 F.3d 977, 980 (9th Cir. 2002). The Taits have alleged enough facts to survive a motion to dismiss because they have provided facts to support each element of a CPA claim, including causation and injury. Therefore, U.S. Bank's motion is DENIED as to the CPA counterclaim.

McCray v. Federal Home Loan Mortgage Corporation, Court of Appeals, 4th Circuit October 7, 2016

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…The FDCPA's definition of debt collector, however, does not include any requirement that a debt collector be engaged in an activity by which it makes a "demand for payment," as the White Firm and the Substitute Trustees claim. They argue that the notice letters and papers they used to initiate foreclosure proceedings were somehow to be distinguished from letters amounting to actual debt collection efforts, maintaining that foreclosure papers are not an attempt to collect a debt unless, as the district court explained, they contain an "express demand for payment or specific information about her debt." (Internal quotation marks and citation omitted).

…As we have previously explained, however, "nothing in [the] language [of the FDCPA] requires that a debt collector's misrepresentation [or other violative actions] be made as part of an express demand for payment or even as part of an action designed to induce the debtor to pay." Powell v. Palisades Acquisition XVI, LLC, 782 F.3d 119, 123 (4th Cir. 2014) (second emphasis added). To the contrary, we concluded that, "to be actionable under . . . the FDCPA, a debt collector needs only to have used a prohibited practice `in connection with the collection of any debt' or in an `attempt to collect any debt.'" Id. at 124; see also Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 229-34 (4th Cir. 2007); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 375-77 (4th Cir. 2006).

…Defendants' argument, if accepted, would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods.
Id.

These facts, construed in the light most favorable to McCray on a motion to dismiss under Rule 12(b)(6), indeed show that the White Firm and its members were seeking repayment of a debt — i.e., attempting to collect on a debt. See 15 U.S.C. § 1692a(6). They stated in their notice to McCray that they were pursuing foreclosure because McCray had "missed one or more payments." They noted that if McCray did not "bring the loan current . . . such as [by] repayment . . ., a foreclosure action may be filed in court." In addition, they provided McCray with the nature of default and the amount necessary to cure the default, concluding that the communication was "an attempt to collect a debt." Thus, all of the defendants' activities were taken in connection with the collection of a debt or in an attempt to collect a debt…

…In sum, we hold that McCray's complaint adequately alleges that the White Firm and the Substitute Trustees were debt collectors and that their actions in pursuing foreclosure constituted a step in collecting debt and thus debt collection activity that is regulated by the FDCPA.

Farber v. Brock & Scott, LLC, Dist. Court, D. Maryland October 6, 2016

https://scholar.google.com/scholar_case?case=16176139375971409655&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Bringing unlawful foreclosure under RESPA can trigger FDCPA liability]

"More importantly, Brock & Scott's argument fails because knowledge is not an element of. a violation of the FDCPA. The FDCPA contains no scienter requirement and instead "imposes liability on `any debt collector who fails to comply with any provision' of the Act." Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 375 (4th Cir. 2012). Thus, a debt collector can be held liable under the FDCPA "without proof of an intentional violation." Id.; see also Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1030 (9th Cir. 2010) ("The FDCPA is a, strict liability statute that makes debt collectors liable for violations that are not knowing or intentional."). The FDCPA does contain an affirmative defense, permitting a debt collector to escape liability if it "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c); Warren, 676 F.3d at 375. To the extent Brock & Scott wishes to assert such an affirmative defense, it must do so at a later stage in the proceeding.See Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007) ("[A] motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense ...."). Accordingly, the claimed inaccuracy of the allegations relating to Brock & Scott's knowledge does not provide a basis to dismiss the FDCPA claims..."

Fox v. Manley, Deas, & Kochalski, LLC, Dist. Court, ND Illinois October 19, 2016
https://scholar.google.com/scholar_case?case=16015303892432014332&q=Fox+V+Manley&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

[MTD on Breach of contract for failing to convert TPP to permanent mod Denied]

But Seterus's alleged failure to convert the TPP to a permanent mortgage modification does constitute a breach. The TPP states that "after all trial period payments are timely made and you have submitted all the required documents, your mortgage will be permanently modified." Fox has alleged that she submitted all her payments before the end of the month in which they were due, and there are no allegations that Fox failed to submit required documents. Yet despite Fox's performance of her end of the bargain, Seterus never offered a permanent loan modification.

Lanton v. Ocwen Loan Servicing, LLC, Dist. Court, SD Ohio Septemeber 8, 2016

https://scholar.google.com/scholar_case?case=17680889703689996681&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Tortious Interference with Business by Ocwen inadequately pled.]

Plaintiffs' arguments are belied by the pleadings. As Ocwen and U.S. Bank point out, Plaintiffs' statement that they "repeatedly told Defendants that their failure to correct the credit reporting errors prevented Plaintiff from securing financing" do not appear anywhere in the Second Amended Complaint. Doc. #28, PAGEID #304 (emphasis removed) (citing Doc. #27, PAGEID #299). The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the complaint, ***Mayer*, 988 F.2d at 638,** not to evaluate arguments raised in a memorandum *contra* that have no basis in the pleadings. Accordingly, the Court may not consider Plaintiffs' statement that they informed Ocwen and U.S. Bank of their difficulties in securing financing in evaluating Ocwen and U.S. Bank's motion.

Plaintiffs, in the Second Amended Complaint, allege that: (1) at the time they applied for the loan, Cynthia and Blue Ocean had contracts or prospective business relationships with Buckeye Healthcare, Molina Healthcare, and Montgomery County, Ohio; (2) Equifax, Ocwen and U.S. Bank's failure to correct inaccurate credit information caused Cynthia and Blue Ocean to be denied a loan; and (3) as a result of that denial, they could not enter into new contracts or fulfill existing ones. Doc. #32, ¶¶ 2, 83, 154-55, PAGEID #333-34, 342, 350. The Second Amended Complaint and its supporting exhibits are devoid of allegations that Ocwen and U.S. Bank had any knowledge of Plaintiffs' existing contracts or prospective business relationships. Absent such knowledge, Plaintiffs may not plausibly allege that Ocwen and U.S. Bank intended to cause a breach of any contracts that Cynthia and Blue Ocean had with third parties. Nor can they plausibly allege that Ocwen and U.S. Bank intended to induce Buckeye Healthcare, Molina Health Care or Montgomery County, Ohio, not to enter into contracts with Cynthia and Blue Ocean.

Plaintiffs have not met their burden of showing that they are entitled to relief with respect to their claim of Tortious Interference with Business Relationship/Contract. Accordingly, Ocwen and U.S. Bank's motion must be sustained, and Count VI is dismissed as against Ocwen and U.S. Bank.

Block v. Seneca Mortgage Servicing, Dist. Court D. New Jersey, October 31, 2016

https://scholar.google.com/scholar_case?case=12865324998712138901&q=Block+v+Seneca&hl=en&as_sdt=3,36&as_ylo=2016

[Forfeiting Legal Rights under TPP is valuable consideration]

Specifically under the TMA, Plaintiff surrendered valuable legal rights, including (i) acknowledging that default occurred; (ii) acknowledging that the Plaintiff's loan was properly accelerated and is fully due and payable; (iii) acknowledging that mortgage foreclosure proceeding was properly brought against Plaintiff and Plaintiff's property as a result of Plaintiff's default; (iv) agreeing that Plaintiff received proper notice of the loan acceleration; (v) agreeing that no new notice of default, notice of intent to accelerate, notice of acceleration, or similar notice would be necessary to restart the foreclosure action; (vi) waiving all rights to all such notices to the extent permitted by law; (vii) waiving any right to mediation, conciliation, or arbitration in the foreclosure proceeding to the extent permitted by law; and (viii) waiving all claims and defenses of any kind that Plaintiff might allege in the foreclosure proceedings, whether related to the origination of Plaintiff's Loan, payments on Plaintiff's Loan, Plaintiff's default, the right to bring the foreclosure proceeding, or otherwise. The Court is particularly persuaded by the Plaintiff's forfeiture of defenses in the foreclosure action that was pending in June 2014, when Plaintiff signed the TMA, giving up her rights as a defaulting party. As discussed below, the law is clear that the Plaintiff's forfeiture of such valuable legal rights can be sufficient consideration for a new contract.

As alleged the TMA purports to give the Plaintiff the power to accept the agreement through signature and performance, and Plaintiff has alleged that she did so. Coupled with Defendant's alleged acceptance of her performance, the Court finds sufficient allegations of compliance even without "certified funds" at least to survive a motion to dismiss.

As to the second point, Defendant's arguments concerning the untimeliness of Plaintiff's down payment and monthly payments raise a questions of fact not properly before the Court on a motion to dismiss.

[Actual Damages for Breach of TPP]

Defendants further argue that Plaintiff that Plaintiff has failed to allege any damages resulting from Defendant's breach. As in the case of consideration, both Plaintiff and Defendants focus their briefing primarily upon the question of whether the modified mortgage payments themselves can serve as adequate damages. Again the Court need not decide that question because Plaintiff alleges other damages of a type broadly recognized by the courts in the mortgage modification context.

[New Jersey UDAP]

Turning to Defendant Seneca's final argument, this Court agrees that just "any breach of contract . . . is not per se unfair or unconscionable and . . . alone does not violate a consumer protection statute." *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 18, 647 A.2d 454, 462 (1994) (citation omitted). As the New Jersey Supreme Court reasoned in *Cox,* "[b]ecause any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys' fees and costs, the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach." New Jersey Supreme Court precedents since *Cox,* however, have made clear that in the special context of the mortgage loan modification process, NJCFA claims may be brought on the basis of an underlying breach of contract. In *Gonzalez,* the New Jersey Supreme Court concluded:

We do not agree with defendants that the only option available to plaintiff in this case was to seek relief . . . in the chancery court or "to pursue common law claims such as breach of contract and/or fraud." Defendants also argue that a number of federal and state statutes regulate the "mortgage lending and servicing" area, but insist that we declare that the CFA is not an available remedy. That we will not do. The CFA explicitly states that the "rights, remedies and prohibitions" under the Act are "in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State." *N.J.S.A.* 56:8-2.13; *accord Lemelledo, supra,* 150 *N.J.* at 268, 696 *A.*2d 546.

207 N.J. at 584. In short, although Plaintiff's allegations state a claim for breach of contract, they may also support an NJCFA cause of action. Because the alleged breach in this case also involved a fraudulent inducement of Plaintiff to incur legal detriments, Defendant Seneca's motion to dismiss Plaintiff's NJCFA claim is denied.

Zanaty v. Wells Fargo Bank, NA Dist. Court, ND Alabama, November 9, 2016

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[ECOA]

Count Fifteen asserts a claim arising under the Equal Credit Opportunity Act ("ECOA") against Wells Fargo/ASC. Section 1691(a)(1) of the ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction-(1) on the basis of race, color, religion, national origin, sex or marital status, or age . . . [.]" 15 U.S.C. § 1691(a)(1).

Relying upon the 12(b)(6) district court reversal in Schlegel v. Wells Fargo Bank, NA, 720 F.3d 1204 (9th Cir. 2013), Plaintiffs more specifically maintain that Wells Fargo/ASC violated § 1691(d)(2) because Plaintiffs suffered an "adverse action" concerning the termination of their loan modification agreement (Doc. 18 at 27 ¶ 122), but were never provided "a statement of reasons for such action. . . ." 15 U.S.C. Section 1691(d)(2). As Plaintiffs point out, several courts have held that the statement of reasons provision can be violated even in the absence of a substantive discrimination claim. See, e.g., Costa v. Mauro Chevrolet, Inc., 390 F. Supp. 2d 720, 728 (N.D. Ill. 2005) ("Without regard to allegations of discrimination, a creditor's failure to provide a written rejection notice is actionable under the ECOA."); see id. at 728-29 (collection of cases cited therein that stand for same general proposition)…

Having considered both sides' positions and in the absence of any on-point+ controlling authority, the court concludes that the viability vel non of Plaintiffs' ECOA claim is better dealt with on a more developed record that establishes a timeline of key events regarding the status of Plaintiffs' residential loan and any application to restructure that debt as well as clarifies the extent to which any aspect of that timeline is materially disputed. Accordingly, the Motion is DENIED with respect to Count Fifteen.

Castillo v. Nationstar Mortgage LLC Dist. Court ND California, November 22, 2016

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[State FDCPA]

…Second, the procedures that support a valid bona fide error defense must be "reasonably adapted to avoid the specific error at issue." *Reichert,* 531 F.3d at 1006. Nationstar offer no evidence that the procedures identified were adapted to avoid the specific errors at issue. *See* Mot. 12-14. At the hearing, Nationstar argued that this was a unique situation in which a modification resulting from a legal settlement was not executed until after the loan was already transferred. Nationstar further argued that it should not be required to create a procedure for a rare situation. But Nationstar seeks to hide behind a smokescreen of complexity. At the end of the day, there was a loan modification of which Nationstar was put on notice several times, but failed to correct the errors. What's more, these errors were directly attributable to a loan transfer, which Nationstar admitted was a common occurrence at the hearing.

For the foregoing reasons, the Court finds that Nationstar has not raised a triable issue showing that it maintained procedures "reasonably adapted" to avoid the errors it identifies as having caused the wrongful collection. Because Nationstar cannot satisfy its burden under the bona fide error defense, the only defense it raises to liability under the Rosenthal Act, and because Plaintiffs have satisfied their burden of proving a prima facie violation of the Rosenthal Act, the Court GRANTS Plaintiffs' motion as to liability on its second cause of action.

Harrer v. Bayview Loan Servicing, LLC Dist. Court N.D. Illinois, Eastern Division, November 30, 2016

https://scholar.google.com/scholar_case?case=9597665348199213229&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[Bankruptcy disclaimers do not prevent FDCPA]

Whether Bayview's disclaimers are sufficient to demonstrate that Byaview was not attempting to collect a "debt" from Harrer is evaluated under the "unsophisticated consumer" standard. *Wahl v. Midland Credit Mgmt.*, 556 F.3d 643, 645 (7th Cir. 2009). District courts in this circuit applying this standard have found that disclaimers like these are insufficient to demonstrate that the communications were not connected to the collection of a debt as a matter of law. *See* *Radney v. Bayview Loan Servicing, LLC*, 2016 WL 3551677, at *3 (N.D. Ill. June 30, 2016) (denying motion to dismiss by Bayview based on the same disclaimers included in the letters sent to Harrer); *see also* *Azari v. Seterus, Inc.*, 2016 WL 6070361, at *2-3 (N.D. Ill. Oct. 17, 2016); *Price v. Seterus, Inc.*, 2016 WL 1392331, at *4 (N.D. Ill. Apr. 8, 2016); *Whalen v. Specialized Loan Servicing, LLC*, 155 F. Supp. 3d 905, 911 (W.D. Wis. 2016) ("[D]efendant's representation in the disclaimer that the letter was not a demand for payment means little when at the same time defendant was telling plaintiff that she risked foreclosure if she did not pay up."). Other district courts have also held that "[j]ust because a disclaimer says that the communication `is not an attempt to collect a debt,' does not make that true, especially in view of indications on the face of the document that the communication is intended to obtain money and is connected to a present or former obligation to pay an indebtedness." *Roth v. Nationstar Mortg., LLC,* 2016 WL 3570991, at *4 (M.D. Fla. July 1, 2016) (quoting *Donnelly-Tovar v. Selected Portfolio Servicing*, 945 F. Supp. 2d 1037, 1048 (N.D. Neb. 2013)). This is because, as a case cited by Bayview put it, "communications can simultaneously seek to enforce a security interest and collect upon the underlying debt that gave rise to the security interest." *Helman v. Udren Law Offices, P.C.*, 85 F. Supp. 3d 1319, 1325 (S.D. Fla. 2014). Similarly, and more important for this Court, the Seventh Circuit—in a case also cited by Bayview—has held that "several factors . . . come into play in the commonsense inquiry of whether a communication from a debt collector is made in connection with the collection of any debt." *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 385 (7th Cir. 2010). In addition to the disclaimers, the communications in this case all stated that they were contacting Harrer about his monetary obligations. *See* R. 79-1 at 8 ("additional fees and charges may be accruing. Your credit standing could also suffer . . . ."); R. 79-1 at 25 ("we are in hopes of possibly offering you a fresh start by possibly lowering your mortgage payment"); R. 79-1 at 29 ("additional fees and charges may be accruing. Your credit standing could also suffer. . . ."); R. 79-1 at 31 ("additional fees and charges may be accruing. Your credit standing could also suffer. . . ."); R. 79-1 at 33 ("you're approved for a Trial Period Plan to modify your mortgage payment. . . . [Y]ou will be required to make three monthly payments in the amount of $1488.1 each."). "Commonsense" says that despite the disclaimers, the language in the letters is more than a sufficient basis to state a claim that Bayview was contacting Harrer "in connection with" an "obligation of a consumer to pay money."

Anderson v. Portfolio Recovery Associates, LLC Dist. Court ED Missouri, December 13, 2016

https://scholar.google.com/scholar_case?case=8572075612155630979&q=anderson+v+portfolio+recovery+associates&hl=en&as_sdt=3,36&as_ylo=2016

[Denial of Prevailing Attorney’s Motion for Attorneys Fees]

The Court does not find that plaintiff's counsel acted with objectively unreasonable behavior and bad faith by not voluntarily dismissing the suit after mediation. Nor does the Court find that plaintiff vexatiously and unreasonably multiplied the proceedings under 28 U.S.C. § 1927. This is an FDCPA case that was resolved within thirteen months on defendant's summary judgment motion. The case followed the usual course—the parties did not bicker over discovery, take depositions, or engage in voluminous motion practice. The Court has reviewed the filings and correspondence between the parties, and finds no intentional or reckless disregard of any attorney's duties to the court.
BANA also argues that Plaintiff's OUTPA claim is barred by the statute's one year limitations period. O.R.S. 646.638(6). This argument was raised for the first time in BANA's Reply and Plaintiff has not had an opportunity to respond to it. Arguments made for the first time in a reply are improper and the Court has discretion whether to entertain such arguments. Weaving v. City of Hillsboro, No. 10-CV-1432-HZ, 2012 WL 526425, at *15 n.5 (D. Or. Feb. 16, 2012). Accordingly, the Court will not address Defendants' new argument raised in their Reply. Id. Because Plaintiff has otherwise plead a plausible OUTPA claim, BANA's motion to dismiss Claim III is denied.

The only objective evidence the Court has regarding plaintiff's counsel's behavior is that he did not respond to defendant's motion for summary judgment. Although this can be seen as a tacit admission that defendant's summary judgment motion is meritorious, it does not amount to vexatious and unreasonable behavior. The Court is unwilling to enter an attorneys' fee award against plaintiff's counsel on the basis that he should have voluntarily dismissed plaintiff's case after being told by defendant's counsel at mediation that the case was meritless. The Court is mindful of the penal nature of § 1927, and finds that such an award of attorneys' fees in a rather abbreviated and straight-forward FDCPA case would likely "dampen the legitimate zeal of an attorney in representing his client." Lee, 177 F.3d at 718

Dawson v. Bank of New York Mellon Dist. Court D. Oregon, December 13, 2016

https://scholar.google.com/scholar_case?case=2848240203343071606&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[Intentional Interference with Economic Relationship]

…As to BANA, the "third party" element has not been met regarding the beneficiary of the DOT. Consistent with the discussion above, BANA is likely the beneficiary of the DOT. Plaintiff alleges, in relevant part, that BANA is interfering with her relationship with the beneficiary of the DOT. It stands to reason then, that BANA cannot be a third party interfering in its own relationship with Plaintiff. Insofar as Plaintiff's Complaint alleges that BANA interfered in its own economic relationship with Plaintiff, the Complaint fails. To the extent that Plaintiff asserts that BANA interfered with Plaintiff's economic relationship with another entity, however, Plaintiff has stated a plausible claim. Consequently, the Court denies BANA's motion to dismiss Claim II regarding BANA because it is plausible that other entities may be the beneficiaries of the DOT and Note.

The Court finds that Plaintiff has otherwise pleaded a plausible claim for IIER and denies BANA's motion to dismiss. On a motion to dismiss, the Court must accept the allegations from the Complaint as true and construe them in the light most favorable to the non-moving party. Wilson, 668 F.3d at 1140. Defendants challenge the existence of a shared "prospective economic advantage" between Plaintiff and the beneficiaries of the Note and DOT in providing her with a loan modification. Def.

Mot. to Dismiss, 10-11. BANA argues "[w]hether modifying a loan would be in the best interest of the beneficiary of the Note and [DOT] would depend entirely upon the terms of the specific modification in question." Id. at 11. The terms of a particular modification are not dispositive of the issue of whether Plaintiff and the beneficiaries had a "mutual prospective economic advantage in utilizing loss mitigation assistance programs." Compl. ¶ 32. Assuming that the mutual economic advantage existed in the continuation of Plaintiff's mortgage, Plaintiff has alleged a plausible claim that BANA and Ditech intentionally mishandled her modification applications to generate increased fees. As a result of the alleged interference, Plaintiff stated that she was unable to avail herself of a loan modification and suffered serious financial consequences associated with the default on her loan. Compl. ¶¶ 37-38. The Complaint contains sufficient factual allegations to support a plausible IIER claim and BANA's motion to dismiss Claim II is denied.

[UDAP]

BANA argues that Plaintiff's OUTPA claim fails because she does not cite to specific conduct to support her conclusory allegations. Def. Mot. to Dismiss, 12-13. BANA argues that Plaintiff provides no support for the following statements that BANA and Ditech "lacked any financial incentive to modify the loans of homeowners" and "induced the Plaintiff to believe that there were no workable loan modification programs available to them." Id. To make out a valid OUTPA claim, Plaintiff must allege that Defendants engaged in an unlawful practice. SeeO.R.S. 646.608(1)(u); Or. Admin. R. ("O.A.R.") §137-020-0805 (3), (6) (defining unlawful practices under OUTPA which includes unfair or deceptive conduct such as material misrepresentations regarding loan modification and dealing with the borrower in bad faith).

Regarding Defendants' alleged lack of financial incentives, the Court agrees that Plaintiff has not plead sufficient facts in her Complaint to support this allegation. Notwithstanding this deficiency, Plaintiff alleged sufficient facts to support her claim that BANA and Ditech induced her into believing that there were no loan modifications available to her. Plaintiff alleged several instances where BANA and Ditech rejected her loan modification attempts. Compl. ¶¶ 10-22. Plaintiff also alleged several forms of misconduct regarding the mishandling of her modification applications. Compl. ¶ 34. These allegations are sufficient to sustain Plaintiff's OUTPA claim. See O.R.S. 646.608(1)(u); O.A.R. XXX-XXX-XXXX(3), (6).

Bautz v. AR National Services, Inc. Dist. Court E.D. New York, December 23, 2016

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Read together, *Spokeo* and *Strubel* reaffirm the long-standing principle that Congress can recognize new interests— either tangible or intangible—through legislation and confer private rights of action to protect those interests. However, identifying a statutory violation does not automatically establish injury-in-fact for purposes of Article III standing. Where a plaintiff sues to enforce a statutory right, the test for standing under *Spokeo* and *Strubel* is two-fold. *First,* a court must determine whether the purported infraction is procedural in nature. *Second,* if so, a court must determine whether that procedural violation presents a "material risk of harm" to the underlying interest(s) that Congress sought to protect by enacting the apposite statute. If a plaintiff satisfies this standard, then she need not allege "any additional harm"—pecuniary or otherwise—beyond the procedural violation itself…

CONCRETENESS

…Moreover, the fact that a "tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, [did] not negate the simple fact of injury within the meaning of § 804(d)." *Id.* at 374. In other words, the Supreme Court did not require the testers to allege reliance on the discriminatory misinformation and consequential tangible harm, such as pecuniary damages: The mere act of providing misinformation was, in this context, sufficient to establish injury-in-fact. *See also* *Ragin v. Harry MackLowe Real Estate Co.,* 6 F.3d 898, 903-04 (2d Cir. 1993) (plaintiffs had standing under the FHA to challenge discriminatory advertisements even though the defendants alleged, and the Second Circuit accepted as true *arguendo,* that plaintiffs were not in the market for housing when they saw those advertisements).

PARTICULARITY

This argument is meritless. Like the plaintiff in *Strubel,* who, with respect to the claims for which the Second Circuit found standing, "sue[d] to vindicate interests particular to her—specifically, access to disclosures of her own obligations," 842 F.3d at 191, plaintiff filed this action based on the Letter, which was addressed to her, stated that she had an outstanding debt of $849.35, and "offer[ed] to settle [her] account for the reduced amount of $467.15. That's a savings of $382.20." (Compl. ¶¶ 22-23; *id.,* Ex. A.) Thus, the Letter affected plaintiff "in a personal and individual way, and her suit is not a vehicle for the vindication of the value interests of concerned bystanders or the public at large." *Strubel,* 842 F.3d at 191 (citing *Lujan,* 504 U.S. at 560 n.1, and *Valley Forge Christian Coll.,* 454 U.S. at 473). Insofar as defendant argues that plaintiff's "injury is not particularized because it is not distinct from that sustained by other members of the putative class," that argument is also foreclosed by *Strubel,* which held that "Fed. R. Civ. P. 23(a)(3) conditions class actions on the claims or defenses of representative parties being `typical of the claims or defenses of the class.'" *Id.* at 191 n.10. Thus, defendant's "urged interpretation of particularized injury would render class actions inherently incompatible with Article III, a conclusion for which it cites no support in law." *Id.*; *see also* *Jacobson v. Healthcare Fin. Servs., Inc.,* 516 F.3d 85, 91 (2d Cir. 2008) (noting how the FDCPA "enlists the efforts of sophisticated consumers . . . as `private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others").[7]

2017

Gagnon v. JP Morgan Chase Bank NA Dist. Court ND Illinois, January 3, 2017

https://scholar.google.com/scholar_case?case=14224118855466606125&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[FDCPA Claim for False statement collecting a discharge debt survives MTD]

Plaintiff has plausibly alleged that the September 15, 2014 notice of default [63-10] would lead an unsophisticated consumer to believe that Seterus was attempting to collect debt from Plaintiff personally, rather than simply through enforcement of the lien on the proceeds of the foreclosure sale. The letter is addressed to Plaintiff, shows an "Amount Due" of $15,002.71, and a "Due By" date

of October 20, 2014. [63-10] at 2. The letter also demands that Plaintiff bring his loan up to date by "payment of the amount shown," and warns that "[i]f full payment of the default amount is not received" by October 20, 2014, then "we will accelerate the maturity date of your loan and upon such acceleration the ENTIRE balance of the loan . . . shall, at once and without further notice, become immediately due and payable." *Id.* The letter concludes by telling Plaintiff that if he is "having difficulty making [his] payments," to call one of Seterus' loan specialists. *Id.* at 3.

Further, Seterus has not demonstrated, as a matter of law, that its disclaimer language is sufficiently clear that it is implausible that an unsophisticated debtor would believe that Seterus was attempting to collect a debt from the debtor personally. The disclaimer provides: "THIS COMMUNICATION IS FROM A DEBT COLLECTOR AS WE SOMETIMES ACT AS A DEBT COLLECTOR. WE ARE ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. HOWEVER, IF YOU ARE IN BANKRUPCY OR RECEIVED A BANKRUPTYC DISCHARGE OF THIS DEBT, THIS LETTER IS NOT AN ATTEMPT TO COLLECT THE DEBT, BUT NOTICE OF POSSIBLE ENFORCEMENT OF OUR LIEN AGAINST THE COLLATERAL PROPERTY." Seterus has not cited any cases in which a debt collector's motion to dismiss an FDCPA claim for an allegedly misleading notice has been granted based on similar disclaimer language, where other parts of the notice could plausibly be read as an attempt to collect a debt.

[Foreclosure Mill FDCPA claim survives MTD]

The Court concludes that it cannot resolve this issue on a motion to dismiss. Pierce has not demonstrated as a matter of law that the foreclosure action subjected Plaintiff to personal liability in the amount of $213,860.75, such that Plaintiff should be estopped from bringing an FDCPA claim based on Pierce's letter to Plaintiff demanding payment of $208,519.20 and instructing Plaintiff how to make the payment. Although the bank's foreclosure complaint joins Plaintiff as a defendant, [82-1] at 3, it also indicates that Plaintiff is *not* personally liable for any deficiency following foreclosure *id.* at 4-5, and that the action does not seek an *in personam* or *in rem* deficiency judgment if personal liability on the Mortgage Loan was discharged in bankruptcy (which it was), *id.* at 5-6. Further, the "judgment for foreclosure and sale" shows that the property will be subject to a foreclosure sale, [82-4] at 4, not that Plaintiff is personally liable for the amount that the Court determined was due to the bank, *id.* at 2. Therefore, the Court denies Pierce's motion to dismiss Plaintiff's claims for violation of FDCPA §§ 1692e and 1692f.

[ICFA(UDAP) claim against Seterus is dismissed]

The Court concludes that Plaintiff's allegation that he spent time and money consulting with his attorneys is insufficient to survive a motion to dismiss on the damages element of an ICFA claim. "To state a claim under the ICFA, Plaintiffs must allege five elements: (1) a deceptive act or unfair practice occurred, (2) the defendant intended for plaintiff to rely on the deception, (3) the deception occurred in the course of conduct involving trade or commerce, (4) the plaintiff sustained actual damages, and (5) the damages were proximately caused by the defendant's deception." *Blankenship v. Pushpin Holdings, LLC,* 157 F. Supp. 3d 788, 792 (N.D. Ill. 2016). As Plaintiff implicitly concedes, "emotional damages do not constitute actual damages under the ICFA." *Thrasher-Lyon,* 861 F. Supp. 2d at 913. Instead, allegations of "actual pecuniary loss" are required. *Camasta,* 761 F.3d at 739.

Further, Plaintiff cites no Illinois case law supporting his claim that time and money spent meeting with an attorney constitute actual damages under ICFA. Plaintiff's argument relies solely on one unpublished district court case, *Thompson,* 2014 WL 5420137, at *8. However, unlike the plaintiff in *Thompson,* Plaintiff here does not allege that he was required to *defend* a debt collection action initiated by Seterus. Other courts in the district have found *Thompson* inapplicable on this basis. See *Sulaiman v. Biehl & Biehl, Inc.,* 2016 WL 5720476, at *9 (N.D. Ill. Sept. 30, 2016) (finding *Thompson* inapplicable to plaintiff's ICFA claim, where plaintiff had not "expended time and money *defending* a debt collection lawsuit" (emphasis in *Sulaiman*)); see also *Zuber v. Bayview Loan Servicing, LLC,* 2016 WL 6680519, at *2 (N.D. Ill. Nov. 14, 2016) (time spent in administration of FDCPA lawsuit not, by itself, sufficient to constitute actual damages, where there is no indication in complaint that plaintiff defended the debt collection effort or expended money doing so).

Blake v. Seterus Inc, Dist. Court SD Florida, February 9, 2017

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[Florida Consumer Collection Practices Act]

Defendants argue that courts have recognized Florida's litigation privilege as a bar in several FCCPA cases. It is true that courts have frequently applied Florida's litigation privilege to an FCCPA claim on dismissal in cases where the defendant claimed privilege over a document that is obviously related to judicial proceedings, such as the complaint filed in a foreclosure lawsuit. *See, e.g., Gaisser v. Portfolio Recovery Assocs., LLC,* 571 F. Supp. 2d 1273 (S.D. Fla. 2008); *Perez v. Bureaus Inv. Grp. No. H, LLC,* No. 1:09-CV-20784, 2009 WL 1973476 (S.D. Fla. July 8, 2009); *Miceli v. Dyck-O'Neal, Inc.,* No. 615CV1186ORL37KRS, 2016 WL 7666167, at *5 (M.D. Fla. Aug. 9, 2016). But whether a reinstatement letter is substantially related to foreclosure proceedings is less clear. *See Echevarria, McCalla, Raymer, Barret & Frappier v. Cole,* 950 So. 2d 380 (Fla. 2007) (Florida Supreme Court holding that Florida's litigation privilege extends to statutory causes of action, but declining to address whether the litigation privilege protected reinstatement letters from FCCPA and FDUPTA claims).

Notably, in a recent case out of the Southern District of Florida, the Court noted that whether "the conduct in question is inherently related to, and occur[ed] during an ongoing judicial proceeding . . . in the context of [a reinstatement letter] appears to be a factual issue more appropriate for summary judgment or trial." *Sandoval,* 2017 WL 244111, at *5. Accordingly, the Court finds that consideration of the litigation privilege is premature at this time, and dismissal as to the FCCPA claim is denied.

Cox v. Ocwen Loan Servicing, LLC Dist. Court, D. Maine March 5, 2017

https://scholar.google.com/scholar_case?case=11429534262295886517&q=cox+v+ocwen&hl=en&as_sdt=6,36

[Economic Loss Doctrine]

Ocwen and Deutsche Bank first seek dismissal of the Plaintiffs' negligence and *respondeat superior* claims on the basis that those claims are barred by the economic loss doctrine. *See* Motion

at 4-6. "The economic loss doctrine marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care." *Banknorth, N.A. v. BJ's Wholesale Club, Inc.,* 394 F. Supp.2d 283, 286 (D. Me. 2005) (citation and internal quotation marks omitted). "Economic loss has been defined as damages for inadequate value, costs of repair and replacement of defective product, or consequent loss of profits — without claim of personal injury or damage to other property." *Fireman's Fund Ins. Co. v. Childs,* 52 F. Supp.2d 139, 142 (1999) (citation and internal quotation marks omitted)…

…I need not determine, for purposes of the Motion, whether the asserted mortgage assignments are invalid. The Maine Superior Court, it bears noting, has held that lack of privity does not bar application of the economic loss doctrine. *See Arundel Valley,* 2014 Me. Super. LEXIS at *16-*17. In any event, regardless of whether the Law Court would agree, or whether the parties are in privity, the doctrine is inapplicable because, as the Plaintiffs persuasively argue, they allege harm not merely to "the product itself" but also to "other property." *Peachtree,* 659 A.2d at 271 (citation and internal quotation marks omitted).[4]

Ocwen and Deutsche Bank, accordingly, fail to demonstrate entitlement to dismissal on the basis of the economic loss doctrine.

[Negligence Claims Survive MTD]

Ocwen and Deutsche Bank argue that the Complaint fails to allege how they breached a duty owed to the Plaintiffs, instead only vaguely asserting that they failed to maintain the units. *See* Motion at 6. They contend that this is the type of conclusory assertion decried in *Iqbal. See id.* at 6-7; *see also, e.g., United States v. Schultz,* 282 F.2d 628, 631 (1st Cir. 1960) (pursuant to Maine law, "there can be no actionable negligence unless there is a breach of some duty").

While spare, the Complaint plausibly alleges a breach of a duty to maintain Units 5, 7, and 8. The Plaintiffs allege that, on December 1, 2012, after Ocwen and Deutsche Bank had locked them out of the premises and Ocwen had hired Altisource and CoreLogic on behalf of itself and Deutsche Bank to preserve the condition of those units, pipes froze in each, resulting in $465.711.19 of damage to the four units that are the subject of the Complaint and $74,013.72 in damages to their personal property located in those units.

Accepting these facts as alleged, and drawing all reasonable inferences in favor of the Plaintiffs, one can plausibly infer that Altisource and/or CoreLogic was negligent in performing their unit maintenance duties. The Plaintiffs allege in Counts I and II that Ocwen and Deutsche Bank bear responsibility for that breach as a result of their own negligence and/or on a *respondeat superior* theory. In the context of seeking dismissal based on the Plaintiffs' failure to plead a plausible negligence claim, Ocwen and Deutsche Bank do not argue that those theories of liability fail as a matter of law. *See* Motion at 6-7; Defendants['] . . . Reply in Further Support of [Their] Motion To Dismiss Plaintiffs' Complaint (ECF No. 36) at 3-4.

Ocwen and Deutsche Bank, accordingly, fail to demonstrate their entitlement to dismissal of the Complaint on this basis, as well.

Oskoui v. JP Morgan Chase Court of Appeals, 9th Circuit, March 13, 2017

https://www.courtlistener.com/opinion/4374813/mahin-oskoui-v-jpmorgan-chase-bank/?q=oskoui&type=o&order_by=score+desc&stat_Precedential=on

[Breach of Contract for Accepting TPP Payments and Subsequently Denying Modification]

Moreover, in Chase's words, she was "not eligible" for proprietary HAMP modification because her debt to income ratio was "well over the 31% limit." Chase did not timely alert Oskoui to this problem or explain it in its March 2, 2010 letter. Two years after she began this journey and $33,738.00 out of pocket, Oskoui received nothing for her efforts. She argues that "[i]f Chase had told her she was not eligible for a loan modification, she never would have made those payments." This option should have been hers to exercise.

It boils down to this. With its March 1, 2010 letter, Chase deceptively enticed and invited Oskoui into a process with the demonstrably false promise that a loan modification was within her reach if she were to make three monthly payments of $2,988.49 each. The next day – and for the first time – Chase eliminated a HAMP modification from its menu, but neither advised Oskoui what the CHAMP Guidelines required nor suspended additional payments until it could determine her CHAMP eligibility. Chase now says in its brief that the HAMP Guidelines did not have the HAMP loan balance limitation, but conspicuous by its absence in Chase's representation is any reference to the NPV test. Chase's counsel suggested during oral argument that Chase had a valid reason for continuing the process as it did, i.e., that Oskoui's income situation might have improved. On this record, any such expectation would have been patently unreasonable.

We can discern no acceptable utility in Chase's alluring "other alternatives" strategy or tactics. Whether Chase's conduct was intentional or the result of corporate ineptitude – as suggested by Judge Wu – the result is the same: The facts in this record would amply support a verdict on this claim in Oskoui's favor on the ground that she was the victim of an unconscionable process. Chase knew that she was a 68 year old nurse in serious economic and personal distress, yet it strung her along for two years, kept moving the finish line, accepted her money, and then brushed her aside. During this process, Oskoui made numerous frustrating attempts in person and by other means to seek guidance from Chase, only to be turned away.

…The district court erred in failing to acknowledge Oskoui's claim for breach of contract in her pro se complaint. She explicitly styled her complaint on its first page as one for "BREACH OF CONTRACT AND BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALINGS."…

…

Accordingly, we remand this issue to the district court with instructions to permit Oskoui to amend if necessary and to proceed with her complaint for a breach of contract. See Bushell, 220 Cal. App. 4th 915. See also Corvello, 728 F.3d 878; Wigod, 673 F.3d 547.

EGBUKICHI v. WELLS FARGO BANK, NA, Dist. Court, D. Oregon March 29, 2017

https://scholar.google.com/scholar_case?case=5432097455162408183&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[ECOA and Fair Housing Claims survive MTD]

Plaintiffs have alleged sufficient facts to support these allegations. Plaintiffs allege that they are African American. Thus, they are members of a protected class. Plaintiffs also allege that they were qualified for a HAMP modification, and that Defendant discriminated against Plaintiffs by denying their requests for HAMP modifications and refusing to consider all of their income, despite Defendant's acknowledgement that Plaintiffs were qualified for a modification. Plaintiffs also specifically allege that Defendant denied them a HAMP modification "due to their race." This allegation cures the deficiency identified by the Court in Plaintiffs' original complaint. Moreover, in their Amended Complaint, Plaintiffs allege additional facts that support their claim that Defendant denied them credit based on their protected status, namely that Defendant approved similarly qualified white applicants and Defendant has a pattern and practice of discriminating against minorities.

Costa v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Dist. Court, S.D. New York March 30, 2017

https://scholar.google.com/scholar_case?case=17582431569982224550&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Quiet Title Wins based on 6 year Statute of Limitations Expiring]

Plaintiffs move for summary judgment in favor of their RPAPL Article 15 action seeking the cancellation and discharge of record of the Mortgage, a declaration adjudging the Property to be free from an encumbrance relating to the Mortgage, and a declaration discharging Plaintiffs' obligations under the Note (*see* FAC ¶¶ 1, 22-29, 35-39; Pl. Br. 1, 28); and against Defendants' counterclaims and affirmative defenses (Pl. Br. 19-27). Defendants move for summary judgment in favor of their foreclosure and unjust-enrichment counterclaims and against Plaintiffs' claims and affirmative defenses. (*See* Ans. ¶¶ 18-26; Def. Br. 17-39).[7]

These motions turn principally on a single inquiry: whether the statute of limitations to foreclose the Mortgage and enforce the Note has expired. *See* N.Y. R.P.A.P.L. § 1501(4). If it has expired, then the ancillary question is whether Defendants have established a claim of unjust enrichment. Plaintiffs have the better of the arguments on both fronts and, accordingly, their motion is granted in its entirety and Defendants' denied in its entirety.

DOWERS v. NATIONSTAR MORTGAGE, LLC, Court of Appeals, 9th Circuit March 31, 2017

https://scholar.google.com/scholar_case?case=8509637544206958618&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[FDCPA does cover non-judicial foreclosure activity]

The district court erred, however, when it dismissed Plaintiffs' claim under Section 1692f(6) on the ground that Nationstar was not collecting a debt.

Unlike under Sections 1692c(a)(2), 1692d, and 1692e, the definition of debt collector under Section 1692f(6) includes a person enforcing a security interest. 15 U.S.C. § 1692a(6). Section 1692f(6) regulates more than just the collection of a money debt. It prohibits:

[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if-(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. § 1692f(6).

The district court dismissed all four of Plaintiffs' FDCPA claims because Defendants' conduct "relate[d] to non-judicial foreclosure attempts." But Section 1692f(6) regulates nonjudicial foreclosure activity. Again, *Ho* is instructive: when contrasting Section 1692f(6) with the other FDCPA provisions, we noted that ReconTrust was clearly a debt collector for purposes of Section 1692f(6) because ReconTrust was enforcing a security interest. *See Ho,* 840 F.3d at 622. Here, Plaintiffs alleged that Nationstar threatened to take non-judicial action to dispossess Plaintiffs of their home without a legal ability to do so. Such conduct is exactly what Section 1692f(6) protects borrowers against. As a result, the district court should not have dismissed Count Four on the ground that Nationstar was engaging in conduct related to non-judicial foreclosure.

Sultan v. M&T BANK, Dist. Court, ND Illinois April 7, 2017

https://scholar.google.com/scholar_case?q=Sultan+v.+M%26T&hl=en&lr=lang_en&as_sdt=3,31&case=3478647182352315686&scilh=0

[FDCPA Claim Survives MTD]

Sultan's mortgage was already in default, and the letter Bayview sent in connection with the loan modification was surely in the hopes that she would sign the modification agreement and begin making payments on her debt. Bayview had no relationship with Sultan beyond attempting to collect on the defaulted loan. The letter was not an informative communication before a debt was overdue. *Compare Bailey v. Sec. Nat'l Servicing Corp.,* 154 F.3d 384, 389 (7th Cir. 1998) ("A warning that something bad might happen if payment is not kept current is not a dun, nor does it seek to collect any debt, but rather the opposite because it tries to prevent the circumstance wherein payments are missed and a real dun must be mailed."). At least when taking all inferences in Sultan's favor, the letter was plausibly made in connection with collecting the debt (because if she agreed to the modification, she would presumably make payments). Thus, the motion to dismiss the FDCPA claim is denied.

[State UDAP Claim Survives MTD]

As to the defendants' second argument, "[t]he elements of a claim under the ICFA are: (1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce." *Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 574 (7th Cir. 2012)(internal quotation marks omitted). Intent to deceive is not required unless the claim is for

fraud. *See* Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 736-37 (7th Cir. 2014); *see also* *Czerniak v. Servis One, Inc.,* No. 15-CV-06473, 2017 WL 1196886, at *5 (N.D. Ill. Mar. 31, 2017). Here, Sultan meets the basic requirements even under the heightened fraud pleading standard under Rule 9(b): "describing the who, what, when, where, and how of the fraud." *Camasta,* 761 F.3d at 737. Sultan has clearly alleged that the defendants hid over $20,000 of "phantom financing" in her particular loan modification and misrepresented how her modified loan amount had been calculated. She has alleged that the defendants "intended that Plaintiff rely upon their calculations and statements concerning the amounts due and owing on the account at issue." Compl. ¶ 48. The statements plainly occurred in the course of commerce, satisfying the final element of an ICFA claim. The defendants could not reasonably expect more specificity in the complaint.

Finally, the defendants contend Sultan has failed to show actual damages. *Camasta,* 761 F.3d at 739 ("In a private ICFA action, the element of actual damages requires that the plaintiff suffer actual pecuniary loss.") (internal quotation marks omitted). Here, Sultan has alleged that the phantom financing "result[ed] in Plaintiff paying an additional $92.36 per month." Compl. ¶ 15. This is perhaps the simplest of all possible actual damages — being charged additional money not owed due to a lender's deception. Furthermore, the claimed loss per month is a substantial amount that rises to the level of actual damages. *Compare Warciak v. One, Inc.,* No. 16 C 7426, 2016 WL 7374278, at *5 (N.D. Ill. Dec. 20, 2016) (dismissing ICFA claim where claimed injuries were "so negligible from an economic standpoint as to render any damages unquantifiable"). Thus, the motion to dismiss the ICFA claim is denied.

Khan v. ONEWEST BANK, FSB, Dist. Court, ND Illinois April 12, 2017

https://scholar.google.com/scholar_case?case=12045776962789607740&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[FDCPA claim survives MTD]

Viewed in this framework, as *Glazer* explains, mortgage foreclosure can be debt collection because "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.,* forcing a settlement) or compulsion (*i.e.,* obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." 704 F.3d at 461. And no provisions in the FDCPA preclude it from reaching foreclosure or the enforcement of security interests generally. *Id.* at 461-62. Several other appellate courts agree. *See Kaymark v. Bank of Am., N.A.,* 783 F.3d 168, 179 (3d Cir. 2015) ("[F]oreclosure meets the broad definition of `debt collection' under the FDCPA, and it is even contemplated in various places in the statute.") (citations omitted); *Reese v. Ellis, Painter, Ratterree & Adams, LLP,* 678 F.3d 1211, 1218 (11th Cir. 2012) ("A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a [mortgage] security interest."); *Kaltenbach v. Richards,* 464 F.3d 524, 529 (5th Cir. 2006) ("[A] party who satisfies § 1692a(6)'s general definition of a `debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests."); *Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373, 376 (4th Cir. 2006) (initiation of foreclosure proceedings was attempt to collect "debt" under FDCPA); *compare Ho v. ReconTrust Co., NA,* 840 F.3d 618, 621 (9th Cir. 2016)(communications limited to the foreclosure process "do not transform foreclosure into debt collection" under the FDCPA).[6]

Here, Azeem alleges that defendants threatened to sell her home through a judicial sale in an attempt to collect Azeem's defaulted home loan. This sufficiently alleges that defendants acted in collecting on a debt under the FDCPA. *See, e.g., Gburek,* 614 F.3d at 386 (letter that was loan servicer's "opening communication in an attempt to collect [plaintiff's] defaulted home loan—by settlement or otherwise" qualified as a communication in connection with an attempt to collect a debt even though it did not explicitly ask for payment).[7] Dismissal of Azeem's FDCPA claim is not appropriate.

[State UDAP Claim survives MTD]

…While defendants argue that the complaint does not allege that they intended to deceive Azeem, even innocent misrepresentations and honest mistakes are actionable under the ICFA. *See Miller v. William Chevrolet/GEO, Inc.,* 326 Ill.App.3d 642, 655 (1st Dist. 2001) ("Nor need the defendant have intended to deceive the plaintiff; innocent misrepresentations or material omissions intended to induce the plaintiff's reliance are actionable."). More to the point is that Azeem has pled facts plausibly inferring that Ocwen intended Azeem to rely on its representations, for example the instruction to send two monthly payments by cashier's check. Azeem has sufficiently pled an ICFA claim.

[Breach of Contract survives MTD]

Azeem has sufficiently alleged a claim for breach of the loan modification agreement. The elements of a claim for breach of contract are (1) the existence of an enforceable contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages. *Avila,* 801 F.3d at 786. The loan modification agreement entered into by the parties was an enforceable contract. Azeem alleges that she performed under the loan modification agreement but that Ocwen pursued foreclosure and default-related fees in breach of the agreement, requiring her to hire attorneys to forestall the judicial sale of her home and charging her for default-related fees. Ocwen signed the agreement in November 2015, satisfying all conditions precedent and making the loan modification retroactively effective as of June 2015, and Azeem plausibly alleges conduct amounting to a breach after June 2015. She has alleged a prima facie claim for breach of contract.[5]

BOEDICKER v. RUSHMORE LOAN MANAGEMENT SERVICES, LLC, Dist. Court, D. Kansas April 20, 2017

https://scholar.google.com/scholar_case?q=Boedicker+v+Rushmore&hl=en&lr=lang_en&as_sdt=3,31&case=17221316530924470627&scilh=0

[FDCPA Claim Survives MTD]

Several circuit courts have held that a misstatement must be material to sustain a claim under 15 U.S.C. § 1692e. *See e.g., Conteh v. Shamrock Cmty. Ass'n, Inc.,*648 F.App'x 377 (4th Cir. May 19, 2016); *Simon v. FIA Card Svcs. NA,* 639 F.App'x 885, 888 (3rd Cir. Feb. 17, 2016); *Walker v. Shermeta, Adams, Con Allmen, PC,*623 F.App'x 764, 766 (6th Cir. Aug. 10, 2015). To be material, a misstatement "must have the potential to `frustrate [the least sophisticated] consumer's ability to intelligently choose his or her response,' . . . or must be the type of misstatement that `would have been *important* to the consumer *in deciding how to respond* to efforts to collect the debt.'" *Conteh,* 648 F.App'x at 379 (*quoting Powell v. Palisades Acquisition XVI, LLC,* 782 F.3d 119, 126-27 (4th Cir. 2014) [emphasis in *Powell*]). As plaintiffs point out, they allege that over the course

of four days Rushmore reported three different account balances, with an unexplained discrepancy between them approaching $2,000. Under the circumstances, such a false statement could reasonably be viewed by an ordinary consumer as a material misstatement that could affect the consumer's weighing of options and the selection of a response. Rushmore's motion to dismiss this claim is accordingly denied.

Bald v. WELLS FARGO BANK, NA, Court of Appeals, 9th Circuit April 24, 2017

https://scholar.google.com/scholar_case?case=10157460949117247260&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[Dismissal of UDAP Claim Reversed and Remanded]

To violate HRS § 480-2, a practice need only be unfair or deceptive, not both. *See State by Bronster v. U.S. Steel Corp.*, 919 P.2d 294, 313 (Haw. 1996).[1] "A practice is unfair when it [1] offends established public policy and [2] when the practice is immoral, unethical, oppressive, unscrupulous or [3] substantially injurious to consumers." *Hungate*, 391 P.3d at 18 (internal quotation marks omitted). Plaintiffs "need not allege that [Wells Fargo's] actions meet all three of these factors to assert an unfair act or practice." *Id.* Rather, "[a] practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Id.* (quoting *Kapunakea Partners*, 679 F. Supp. 2d at 1210). "A practice may be unfair if it `offends public policy as established by statutes, the common law, or otherwise.'" *Id.* (quoting *Kapunakea Partners*, 679 F. Supp. 2d at 1210).

Plaintiffs sufficiently alleged that Wells Fargo's practices were unfair because they offend public policy as established by the common law. In *Hungate, id.* at 15, the Hawaii Supreme Court clarified that the common law duties established in *Silva v. Lopez*, 5 Haw. 262 (1884), and *Ulrich v. Security Investment Co.*, 35 Haw. 158 (1939), apply to a mortgagee in conducting nonjudicial foreclosures. A mortgagee must exercise its "discretion in an intelligent and reasonable manner, not to oppress the debtor or to sacrifice his estate." *Silva*, 5 Haw. at 265. In conducting a foreclosure sale a mortgagee must "exercise reasonable diligence to secure the best possible prices," *Ulrich*, 35 Haw. at 172, and this duty applies to both real property and chattel mortgages. *Hungate*, 391 P.3d at 15. Although the law does not impose a duty to obtain fair market value in a foreclosure sale, "the mortgagee nonetheless has a duty to use fair and reasonable means to conduct the foreclosure sale in a manner that is conducive to obtaining the best price under the circumstances." *Id.* at 16. Additionally, when the mortgagee purchases the property in a nonjudicial foreclosure sale, the mortgagee "has the burden to establish that the sale was fairly conducted and resulted in an adequate price under the circumstances." *Id.*

Bomar v. PACIFIC UNION FINANCIAL, LLC, Dist. Court, ND Illinois April 25, 2017

https://scholar.google.com/scholar_case?case=14587193855141918012&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Finally, Bomar has failed to put forward any evidence demonstrating that he has suffered a substantial injury. In order to constitute a substantial injury, an injury must be (1) substantial, (2) not weighted by any countervailing benefits to consumers or competition that the practice produces, and (3) be an injury that the consumer could not reasonably have avoided. Siegel, 312 F.3d 935. Bomar

alleges that he suffered credit damage, was denied the opportunity to negotiate a plan to keep his home, and was assessed excessive and unnecessary interest. Bomar has offered no evidence, however, establishing that his credit score was diminished or that he paid excessive or unnecessary interest. The undisputed evidence, moreover, demonstrates that the injuries that Bomar alleges could have been reasonably avoided. Pacific Union clearly explained to Bomar why his applications were denied and, at a minimum, informed him of reasonably available steps that would permit his application to be considered (such as obtaining an amended divorce decree or providing Gena's financial information).

Nardolillo v. JPMorgan Chase Bank, NA, Dist. Court, ND California April 26, 2017

https://scholar.google.com/scholar_case?case=11961663676133021370&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

[State UDAP Dual Tracking when Reset Sale Date Claim survives MTD]

Chase points out that the last recorded Notice of Sale was recorded on July 7, 2016, before Nardolillo submitted his loan modification application on July 22, 2016. Compl. ¶¶ 20, 21; RJN, Ex. F. Chase argues, and I agree, that Nardolillo may not base his claim for violation of Section 2923.6 on the recording of this notice.

However, plaintiff also alleges that Chase has — after Nardolillo submitted his completed loan modification application — continued to notice new trustee's sale dates as evidence of Chase's continuing attempts to pursue foreclosure while the modification application is pending. Compl. ¶ 21. Chase points out that no specific dates are alleged in support of that allegation, but the allegation is clear and specific enough.[5]

Chase also argues that the dual-tracking provision only prohibits recording of notices and conducting sales while the application is pending, but does not expressly cover notices simply continuing the dates for the planned trustee's sale. However, as Nardolillo points out, the purpose of the dual-tracking prohibition is to give homeowners some confidence that they will not have to battle foreclosure while their application is pending. *See, e.g., Jolley v. Chase Home Fin., LLC,* 213 Cal. App. 4th 872, 904 (2013), *as modified on denial of reh'g* (Mar. 7, 2013) (internal citations omitted); *see also Monterossa v. Superior Court of Sacramento Cty.,* 237 Cal. App. 4th 747, 752 (2015), *reh'g denied* (July 6, 2015) (citing *Jolley*). Chase provides no case law holding that re-noticing or otherwise resetting trustee sale dates and informing the mortgagee of the same while a loan modification application is under submission is not prohibited dual-tracking in violation of 2923.6. Plaintiff's allegations are sufficient on this point. Chase next asserts that plaintiff has failed to allege facts showing that Section 2923.6's protections apply to the Property. Section 2923.6(j) provides that the provisions of 2923.6 only apply only to mortgages or deeds of trust described in Section 2924.15. Section 2924.15 explains that coverage is provided only for "first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. For these purposes, `owner-occupied' means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes."

Hill v. DLJ MORTGAGE CAPITAL, INC., Court of Appeals, 2nd Circuit May 3, 2017

https://scholar.google.com/scholar_case?case=8591463688348447000&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Sending Statements is not Debt Collection under FDCPA]

Hill first contends that the District Court erred in dismissing her FDCPA claims. We disagree. Hill's FDCPA claims are premised on monthly statements sent to her by Selene regarding the total amount owing under her Note. As the District Court explained, Selene sent these statements in compliance with the Truth in Lending Act, 15 U.S.C. § 1638(f), as implemented by 12 C.F.R. § 1026.41, which requires mortgage loan servicers to transmit monthly statements to consumers. With this in mind, the monthly statements here do not reflect attempts to collect on the debt evidenced by the Note. Hill thus fails to state a plausible claim for relief under the FDCPA.[2]

Hill's reliance on *Reese v. Ellis, Painter, Ratterree & Adams, LLP,* 678 F.3d 1211 (11th Cir. 2012), is unavailing. The statements sent by the defendant law firm in *Reese* stated that "collection is sought," that the firm was a "debt collector attempting to collect on a debt," and demanded "full and immediate payment of all amounts due." *Id.* at 1217 (internal quotation marks omitted). None of the statements at issue in this case contain any similar debt-demand language.

IN RE SHARAK, Bankr. Court, ND New York May 18, 2017

https://scholar.google.com/scholar_case?case=14694788409221553654&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Discharge Violation]

The facts now before the Court are analogous to those in *In re Bruce,* 2000 Bankr. LEXIS 2210. In that case, the debtor surrendered and vacated his home and the mortgagee obtained relief from the automatic stay to proceed to foreclosure prior to the debtor's discharge. The mortgagee repeatedly communicated with the debtor post-discharge by sending the debtor written statements indicating that payment was due and telephoning the debtor at his place of employment. The court held the mortgagee in civil contempt because its actions went beyond the state law statutory notice requirements of foreclosure and therefore violated the discharge injunction. *Id.* at *11. Likewise, in this case, Deutsche Bank obtained relief from stay causing Debtor to surrender and vacate the Real Property on notice to Deutsche Bank. Bayview received notice of the Discharge Order directly from the Bankruptcy Noticing Center. Bayview then sent six Mortgage Statements to Debtor over the course of eighteen months. Each of these Mortgage Statements include a payment due date, past due amount, threat of a late charge if payment is not received by a date certain, and delinquency notice that warns of both fees and foreclosure if the loan is not brought current. Only four of the Mortgage Statements include an inconspicuous disclaimer. On these facts, the Court finds that the Mortgage Statements seek payment from Debtor and therefore violate the discharge injunction imposed by § 524(a)(2).

Gephart v. THE WIRBICKI LAW GROUP, LLC, Dist. Court, ND Illinois June 2, 2017

https://scholar.google.com/scholar_case?case=13598387037819279433&q=gephart+v.+wirbicki&hl=en&lr=lang_en&as_sdt=3,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381

[Pre-Discharge Demand for Payment not a BK Stay or FDCPA violation]

I agree with defendant. Given that the automatic stay was not in effect and a that a discharge order had not been entered when defendant sent correspondence, defendant did not violate § 362(a)(6) as a matter of law. The falsity or unfairness of demands for payment while a debtor is in bankruptcy is premised on the existence of the automatic stay (or a discharge injunction). Without the stay or discharge, the demands are not "false" under § 1692e(2) or § 1692e(10), and not "unfair" under § 1692f(1). Accordingly, I conclude that the Gepharts have failed to state a claim under the FDCPA.

Defendant's motion to dismiss, [9], is granted. The dismissal is without prejudice; the Gepharts have leave to file an amended complaint because "[d]istrict courts routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss; rather, they generally dismiss the plaintiff's complaint without prejudice and give the plaintiff at least one opportunity to amend her complaint." *Foster v. DeLuca,* 545 F.3d 582, 584 (7th Cir. 2008). If the Gepharts do not file an amended complaint by June 23, 2017 this dismissal will convert to a dismissal with prejudice and final judgment will be entered.

Ebner v. STATEBRIDGE COMPANY, LLC, Dist. Court, D. New Jersey June 9, 2017

https://scholar.google.com/scholar_case?case=3942467420209454216&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

Courts have also indicated "that an assignee of an obligation is not a `debt collector' if the obligation is not in default at the time of the assignment; conversely, an assignee may be deemed a `debt collector' if the obligation is already in default when it is assigned." *Pollice v. Nat'l Tax Funding, L.P.,* 225 F.3d 379, 403 (3d Cir. 2000); *see Bailey 404 v. Sec. Nat'l Servicing Corp.,* 154 F.3d 384, 387-88 (7th Cir. 1998); *Whitaker v. Ameritech Corp.,* 129 F.3d 952, 958-59 (7th Cir. 1997); *Wadlington v. Credit Acceptance Corp.,* 76 F.3d 103, 106-07 (6th Cir. 1996). Here, there is no dispute that the various claims assigned to Statebridge were in default prior to their assignment to Statebridge. Indeed, Defendants concede the loan was default prior to their assignment to Statebridge. (ECF No. 6-1 at 15 (admitting the loan was in default but was later reinstated).) The fact that the "Loan was reinstated" is irrelevant for the purposes of this analysis. Therefore, the Court concludes Statebridge is a "debt collector."

Because the Court finds Statebridge is a "debt collector," the Court denies Defendants' Motion to Dismiss Plaintiff's FDCPA claims against Statebridge as to the September 2016, October 2016, and February 2016 correspondences for the reasons stated above in Section III(A)(i). Accordingly, Defendants' Motion to Dismiss all claims against Statebridge is DENIED as to the September 2016, October 2016, and February Loan History Statement.

Baptiste v. CARRINGTON MORTGAGE SERVICES, LLC, Dist. Court, ED New York July 5, 2017

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[FDCPA Violation for Failure to Notify Borrower Interest Increasing in Servicing Transfer Letter]

Thus, the crucial inquiry is whether the Letter was sent "in connection with the collection of [a] debt." See 15 U.S.C. § 1692e. Carrington argues that only "collection letters" meet this standard. Mem. at 5-8. The Second Circuit rejected precisely this argument in Hart v. FCI Lender Servs., Inc., 797 F.3d 219, 226-27 (2d Cir. 2015). In Hart, the plaintiff challenged a notice sent by his mortgage servicer as required under the Real Estate Settlement Procedures Act ("RESPA"). Id. at 220. The mortgage servicer argued that because the letter "was intended merely to comply with RESPA by providing certain information[,] . . . it was not aimed at collecting a debt[] and thus did not trigger the FDCPA[]." Id. at 223 (alterations and quotation omitted). The Second Circuit rejected this argument, finding that the letter was an attempt to collect a debt. Id. at 226. The factors relevant to this conclusion are as follows:

The Letter references Hart's particular debt, directs Hart to "mail [his] payments . . . to FCI Lender Services, Inc." at a specified address, and refers to the FDCPA by name. More critically, it warns Hart that he must dispute the debt's validity within thirty days after receiving the Letter or his debt will "be assumed to be valid." Finally, and most importantly, the Letter, in its two-page attachment . . . announces itself as an attempt at debt collection. . . . A reasonable consumer would credit the Letter's warning, its instruction to take action within thirty days, and its statement that it represents an attempt to collect a debt.

Id. (citations omitted). Each of these observations also applies to the Letter at issue here. Therefore, the Letter was sent in connection with the collection of a debt. Section 1692e and case law interpreting that section, including Avila, apply.

Next, defendant argues that Avila does not apply to ongoing mortgage loans like plaintiff's debt because "[e]ven the least sophisticated mortgage borrower knows both that interest continuously accrues on the unpaid mortgage balance and [that] fees will be incurred if monthly payments are not timely made." Mot. at 8-9.

Generally, mortgage servicers are exempted from the FDCPA. See 15 U.S.C. § 1692a(6)(F) (exempting from the definition of "debt collector" "any person collecting or attempting to collect any debt owed or due . . . to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person."). However, "[a] mortgage servicer is a `debt collector' within the meaning of the FDCPA if the mortgage was in default at the time the servicer began servicing the debt." Zirogiannis v. Seterus, Inc., 221 F. Supp. 3d 292, 302 (E.D.N.Y. 2016) (citing Kapsis v. Am. Home Mort. Servicing, Inc., 923 F. Supp. 2d 430, 442 (E.D.N.Y. 2013)). Here, plaintiff alleges that his loan was in default at the time Carrington began servicing it. Compl. ¶ 20.

The court is aware of no authority holding that mortgage servicers collecting on a mortgage in default are treated differently than any other debt collector subject to the FDCPA.

Third, defendant argues that, even if Avila applies, the Letter fits within Avila's safe-harbor language because it assures plaintiff that "[n]othing else about [his] mortgage loan will change." Mot. at 7-8; Letter at 1. In Avila, the Second Circuit provided that "a debt collector [is not] subject to liability under Section 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified

date." 817 F.3d at 77. The Letter does neither, and therefore does not fall within Avila's safe harbor.[3]

Finally, defendant argues that any violation of its obligations under Avila is not material. Mot. at 9-10. The Second Circuit has never explicitly imposed a materiality requirement on FDCPA violations, but has indicated in a recent summary order that it would. See Fritz v. Resurgent Capital Servs., LP, 955 F. Supp. 2d 163, 170 (E.D.N.Y. 2013) (citing Gabriele v. Am. Home Mortg. Servicing, Inc., 503 F. App'x 89, 94 (2d Cir. 2012)). In that same summary order, the Circuit defined a material violation as "communications and practices that could mislead a putative-debtor as to the nature and legal status of the underlying debt, or that could impede a consumer's ability to respond to or dispute collection." Gabriele, 503 F. App'x at 96. The Avila court noted that, "if interest is accruing daily, or if there are undisclosed late fees, a consumer who pays the `current balance' stated on the notice will not know whether the debt has been paid in full." Avila, 817 F.3d at 76. Thus, a violation of Avila "could impede a consumer's ability to respond to . . . collection," Gabriele, 503 F. App'x at 96, and such violation is material.

OWENS-BENNIEFIELD v. Nationstar Mortgage LLC, Dist. Court, MD Florida July 25, 2017

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FCRA

Therefore, Owens-Benniefield's claim under § 1681s-2(b) survives to the extent it is based on Nationstar's failure to reasonably investigate the disputes Owens-Benniefield made to the credit reporting agencies Experian and Equifax. The Court also finds Owens-Benniefield has sufficiently alleged willfulness by Nationstar to support the request for statutory and punitive damages. See 15 U.S.C. § 1681n(a) (allowing for recovery of actual or statutory damages, as well as punitive damages, for willful noncompliance with the FCRA). She alleges Nationstar was sent multiple disputes by both Experian and Equifax with documentation showing the debt was forgiven, yet Nationstar persisted in reporting the debt as valid. At this juncture, this allegation plausibly supports a finding of willful noncompliance.

Grubb v. Green Tree Servicing, LLC, Dist. Court, D. New Jersey July 25, 2017

https://scholar.google.com/scholar_case?case=14585905133768123307&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

FDCPA survives MSJ

Spokeo

Moreover, contrary to Defendant's position, Plaintiff's inability to establish that she suffered an economic loss as a result of Green Tree's debt collection letters, is of no significance. As stated above, the FDCPA clearly affords alleged debtors, such as Plaintiff, with the substantive right to be free from abusive debt collection practices. Therefore, because Plaintiff's allegations, in of themselves, demonstrate abusive debt collection practice under the FDCPA, Plaintiff "need not allege any additional harm." *Carney,* 2016 U.S. Dist. LEXIS 177087, at *15 (internal quotations and

citation omitted); *Bock,* 2017 U.S. Dist. LEXIS 81058, at *22 ("Under *Spokeo,* [the plaintiff] need not establish any additional harm to surpass the standing threshold of concrete injury.") (internal quotations and citation omitted); *Prindle,* 2016 U.S. Dist. LEXIS 108386, at *31 ("As the object of allegedly false, deceptive, and/or misleading representations in connection with the collection of a debt . . . [the plaintiff] need not allege any *additional* harm beyond the one Congress has identified") (internal citation and quotations omitted) (alteration in original).

Debt Collector

Tellingly, Green Tree fails to proffer any evidence, such as a sworn affidavit or any corporate document demonstrating the extent to which Green Tree services loans that are in default. Indeed, Green Tree's own submission, in the form of a declaration provided by Stewart Derrick, a "Corporate Litigation Representative" at Green Tree, creates a genuine issue of material fact, preventing the resolution of this dispute on this motion. Declaration of Stewart Derrick (dated July 7, 2016) ("Derrick Dec."), ¶ 1.[2] Specifically, Mr. Derrick, in describing Green Tree's business operations, states as follows: "Green Tree is in the business of servicing both performing and *nonperforming* loans. Among other things, Green Tree collects mortgage, principal and escrow payments from the borrower and *remits portions of these funds to various entities.*" *Id.* ¶ 4 (emphasis added). Mr. Derrick goes on to explain that "Green Tree [would] pay the outstanding taxes and insurance premiums from the escrowed payments." *Id.* Mr. Derrick's statements are equivocal regarding the principal purpose of Green Tree's business. Indeed, from his description, a jury could find that Green Tree regularly provides debt collection services, or that Green Tree services[3] loans in default.[4] *Oppong v. First Union Mortg. Corp.,* 215 Fed. Appx. 114, 119 (3d Cir. 2007) (finding that the defendant, who only serviced 89 out of 141,597 mortgages in default during a three month period, was sufficient for the purposes of finding that the defendant regularly collected on defaulted loans). Significantly, while this case stands on its own facts, this finding is consistent with numerous district court decisions, wherein Green Tree has been determined to be a debt collector. *See, e.g., Ordonez v. Green Tree Servicing LLC,* No. 14-1284, 2016 U.S. Dist. LEXIS 88763 (D. Nev. July 7, 2016); *Napolitano v. Green Tree Servicing, LLC,* No. 15-0160, 2016 U.S. Dist. LEXIS 14122 (D. Me. Feb. 4, 2016); *Adu v. Green Tree Servicing, LLC,* No. 15-0012, 2015 U.S. Dist. LEXIS 182947 (N.D. Ga. Oct. 28, 2015); *Geary v. Green Tree Servicing, LLC,* No. 14-0522, 2015 U.S. Dist. LEXIS 35059 (S.D. Ohio Mar. 20, 2015). The Court, therefore, finds that there is a genuine issue of material fact as to whether Green Tree is a creditor under the FDCPA. Summary Judgment on this basis is not appropriate.

Debt Validation Notice

…In that regard, the Court finds that the misleading information contained in Defendant's debt validation notice—which failed to clearly state an amount owed by Plaintiff, or to provide a calculation as to how that amount was determined—are material, because that information is capable of influencing the least sophisticated debtor. *Compare Cohen,* 2016 U.S. Dist. LEXIS 97016, at *12 (holding that the defendant's failure to correctly identify the owner of the debt was not material, because "the name of the owner of the debt would not have influenced even the least sophisticated debtor."). Indeed, the inconsistent and misleading information would hamper the least sophisticated debtor's ability to dispute whether a debt is owed, as he or she is entitled to do under the FDCPA. For instance, a least sophisticated debtor who receives multiple communications providing various figures possibly representing the alleged debt, would be confused as to which of those debts to dispute. Moreover, due to the accumulation of interest, the amount due under the original loan and

the amount being collected, typically constitute different figures. Thus, a debt collection letter which solely provides for the "total due," without providing an explanation as to how that amount was calculated, fails to provide the least sophisticated debtor with an adequate basis to dispute whether the alleged debt was properly configured, and, in turn, whether that debt should be challenged. *Fields v. Wilber Law Firm, P.C.*, 383 F.3d 562, 566 (7th Cir. 2004) (finding that a debtor's ability to dispute a debt was hindered by a debt collection letter that failed to provide how the alleged debt was calculated, because "an unsophisticated consumer may have lost the bill and forgotten the amount of the debt completely."). Thus, the errors in the May 1 and May 3 Letters are material, because they are "capable of influencing the decision of the least sophisticated debtor." *Jensen*, 791 F.3d at 421 (internal citation omitted).[6] Summary judgment, on this basis, therefore, is also not proper.

Todaro v. Reimer, Arnovitz, Chernek & Jeffrey Co., LPA, Court of Appeals, 6th Circuit July,28 2017

https://scholar.google.com/scholar_case?case=7044275907912351 65&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

No FDCPA Violation for Post Foreclosure Eviction

All the district courts that have addressed this distinction within this Circuit have held that the FDCPA does not apply to post-foreclosure eviction proceedings. *See Bobo v. Trott & Trott, P.C.*, No. 13-14696, 2014 WL 555201, at *2 (E.D. Mich. Feb. 12, 2014); *Bond v. U.S. Bank Nat'l Ass'n*, No. 09-14541, 2010 WL 1265852, at *5 (E.D. Mich. Mar. 29, 2010); *Burks v. Wash. Mut. Bank*, No. 07-13693, 2008 WL 4966656, at *9 (E.D. Mich. Nov. 17, 2008). The reasoning behind this finding is that at the point of eviction, the debt collection process has ended and the plaintiff in an eviction action is seeking possession of the property rather than monetary damages. *Bond*, 2010 WL 1265852, at * 5. It is difficult to disagree with this reasoning. Where the debt has been extinguished in a foreclosure sale, as was the case here, there no longer exists a debt to enforce and any post-foreclosure activity cannot be considered debt collection covered by the FDCPA.

Wood v. NATIONSTAR MORTGAGE, LLC, Dist. Court, D. Oregon August 14, 2017

https://scholar.google.com/scholar_case?case=7934675731704032818&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

FDCPA Claim Survives MTD

Nationstar argues further that Plaintiffs have insufficiently alleged facts to support a claim that Nationstar violated any provision of 15 USC § 1692(e) (relating to false or misleading representations) or § 1692(f) (prohibiting the collection of any amount unless such amount is expressly authorized by the agreement or law). In the SAC, Plaintiffs allege that they communicated to Nationstar that they disputed the delinquency of the payments. If the only facts before this Court were that Nationstar acted as though the debt was delinquent and that the Plaintiffs disputed that fact, the Court might agree with Nationstar. However, the odd circumstances surrounding the transfer from Ocwen to Nationstar immediately after Plaintiffs' discovery that they were $16 short on their mortgage payments for more than a year-along with Plaintiffs' allegations supported by a letter that they were actively attempting to correct the errors with their mortgage-amount to sufficient facts to

allow this case to continue to discovery. The Court finds that Plaintiffs have stated a plausible claim for relief under the FDCPA.
Oregon Unfair Trade Practices Act (UTPA)

Finally, Defendants argue that Plaintiffs have not alleged any facts to demonstrate that Defendants violated the specific sections of the UTPA cited in the SAC. A mortgage loan servicer can violate ORS § 646.608(1)(u) of the UTPA by failing to comply with OAR 137-020-0805 (establishing unfair and deceptive acts in mortgage loan servicing). 646.608(1)(u); *See* ORS 646.608(4) (prohibiting an action under subsection (1)(u) unless the Attorney General has first established a rule declaring the conduct to be unfair or deceptive). Failing to comply with RESPA constitutes a violation under OAR 137-020-0805 (5). As detailed above, Plaintiffs have stated a claim against Ocwen under RESPA, and therefore have also stated a claim against Ocwen under the UTPA. It is also a violation under that same OAR to "assess[] a late fee or delinquency charge for a full payment made on or before the payment's due date or within the grace period applicable for the payment." OAR 137-020-0805 . The SAC clearly states that "Nationstar assessed $40.89 late fee charges" despite the fact that "plaintiffs have made all payments that have come due on time." SAC ¶ 30, 25. The Court assumes that a payment being made "on time" means "on or before the payment's due date or within the grace period." Based on the foregoing, Plaintiffs have alleged sufficient facts to state claims against both defendants under the UTPA.

Defamation Claim on Credit Reporting Survives

To state a claim for defamation under Oregon law a plaintiff must show 1) the making of a defamatory statement; 2) publication of the defamatory material; and 3) a resulting special harm or that the statement was defamatory *per se*. *Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania v. Starplex Corp.*, 220 Or App 560, 584 (2008). Ocwen argues that Plaintiffs have failed to meet the third element by showing a special harm. However, no proof of special harm is required for libel, which is actionable *per se* in Oregon. *Hinkle v. Alexander,* 244 OR 271, 277 (1966). Ocwen's motion to dismiss the defamation claim is denied.

Conversion Claim Fails

Defendant Ocwen argues that it cannot be liable for conversion because conversion of money requires allegations that the money was either wrongfully received or that defendant is obligated to return specific money to plaintiffs. *Waggoner v. Haralampus,* 277 Or. 601, 604 (1977).
The *Waggoner* court found that earnest money deposited in escrow by a defendant after plaintiff agreed that it was alright to disburse those funds could not be the basis for a conversion claim. *Id* at 605. The *Waggoner* court contrasted those facts with another case finding that a claim for conversion existed where a defendant broker violated the trust imposed by the earnest money agreement and, without authority from the plaintiff, converted escrow funds for his own use. *Huszar v. Certified Realty Co.*, 272 Or. 517, 519 (1975). The facts of this case are more similar to *Huszar* than *Waggoner*because Plaintiffs allege that, while Ocwen lawfully obtained the funds, it kept those funds for its own use contrary to law or contract and without Plaintiffs' knowledge. This is sufficient to state a claim for conversion against Ocwen.
The pleadings for the claim for conversion against Nationstar are inadequate. The only money allegedly converted was late fees charged under the Note. While Plaintiff may dispute the delinquency, this is fundamentally a contractual issue and not a conversion claim.

AFEWERKI v. ANAYA LAW GROUP, Court of Appeals, 9th Circuit August 18, 2017

https://scholar.google.com/scholar_case?case=2063429788162169191&q=Afewerki+v.+Anaya+Law+Group&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1

Overstatements in Complaint violate FDCPA

We agree and conclude that Anaya Law Group's $3,000 overstatement of the principal due in the state court complaint,[2] exacerbated by the statement of an inflated interest rate, was material. Just as in *Powell,* the fact that the debt collector corrected its mistake after the debtor challenged it does not mean that a less sophisticated debtor would have been so lucky. Unlike the debtor in *Donohue,* who was served with a complaint that was correct in stating the amount owed, the least sophisticated debtor in Afewerki's position would not have had the option to avoid the lawsuit by simply "pa[ying] the accurately stated sum to settle [the] debt." 592 F.3d at 1034; *see also id.* ("[A]pplying an incorrect *rate* of interest would lead to a real injury. . . ."). Rather, the least sophisticated debtor in Afewerki's position, concerned that he had been sued, may well have simply paid the amount demanded in the complaint and would have overpaid by approximately $3,000.
There are other circumstances in which the errors in the complaint Anaya Law Group filed might have impacted the least sophisticated debtor. One circumstance discussed by the district court and the parties is the possibility that the state court case could have proceeded to default judgment. Contrary to Anaya Law Group's argument, it is not certain that LAFCU would have been required to submit copies of its accounts or otherwise would have proved that the amount it sought was correct prior to entry of a default judgment. The Appellate Division of the Los Angeles County Superior Court has held that a credit card company attempting to collect a debt from a customer need not submit documentary evidence in order to obtain a clerk's default judgment for a definite sum. *HSBC Bank Nev., N.A. v. Aguilar,* 141 Cal. Rptr. 3d 206, 211 (App. Dep't Super. Ct. 2012). This decision could have guided proceedings in the Los Angeles County Superior Court had Afewerki's case proceeded to default judgment. Thus, the least sophisticated debtor in Afewerki's position might not only have been misled as to the amount owed, but could also have had a judgment for an inflated amount entered against him.
For these reasons, we conclude that the incorrect statement of the principal due in the state court complaint, which was further inflated by the incorrect interest rate, was material.[3]

Melville v. The Bank of New York Mellon Corporation Dist. Court, ED Washington September 21, 2017

https://scholar.google.com/scholar_case?case=18250201223984497770&hl=en&lr=lang_en&as_sdt=6,40&as_vis=1&oi=scholaralrt

[FDCPA Claim Survives against Trustee under § 1692f(6)]

Third, Defendants assert that the FDCPA does not apply to foreclosure under *Ho.*ECF No. 21 at 11. However, as discussed in *Mashiri,* the court in *Ho* only exempted trustees acting in nonjudicial foreclosure proceedings from liability under the majority of the FDCPA, and retained liability for trustees under 15 U.S.C. § 1692f(6). 845 F.3d at 990. New York Bank, JPMorgan Chase Bank, and Chase Home Financial were not acting as trustees. Therefore, they are still subject to potential liability under the FDCPA, and the remaining FDCPA claims against them cannot be dismissed on a Fed. R. Civ. P. 12(b)(6) motion. QLS was acting as a trustee. Therefore, the remaining claims under § 1692e against QLS are dismissed, but not the claims under § 1692f(6).

Marquard v. New Penn Financial, LLC, Dist. Court, D. Oregon September 22, 2017

https://scholar.google.com/scholar_case?case=14236926002312874712&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Conversion Claim Re Wrongfully Collected Escrow Survives MTD]

Defendants further argue that because RESPA requires that they account to Plaintiffs any excess funds at the end of 2017, no conversion has occurred. That the allegedly improperly collected funds would have been returned at the end of 2017 speaks to the severity of Defendants' interference with Plaintiffs' right to control those funds, but does not bar Plaintiffs' claim. Paragraph 2 of the *Restatement (Second) of Torts* § 222A identifies the following factors for courts to consider when determining whether the severity of the interference rises to the level of conversion:

(a) the extent and duration of the actor's exercise of dominion or control;
(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
(c) the actor's good faith;
(d) the extent and duration of the resulting interference with the other's right of control;
(e) the harm done to the chattel;
(f) the inconvenience and expense caused to the other.

Mustola, 253 Or. at 663 (quoting *Restatement (Second) of Torts* § 222A (1965)). None of these factors presume permanent deprivation. Rather, they speak to the relative extent and duration of the interference, the defendant's good faith, and the "inconvenience and expense" to the plaintiff. *Restatement (Second) of Torts* § 222A. Plaintiffs have alleged that Defendants wrongfully collected escrow payments between November 2016 and May 31 2017, when the Court issued a preliminary injunction. Defendants continue to retain those funds in escrow. Given Plaintiffs' difficult financial position, these facts are sufficient to establish that Defendants' alleged interference with Plaintiffs' right to control their would-be property tax payment was sufficiently severe to state a claim of conversion.

Richard v. Caliber Home Loans, Inc., Dist. Court, SD Ohio September 29, 2017

https://scholar.google.com/scholar_case?case=4136479933572507 99&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

[FDCPA Claim Granted on MSJ]

Plaintiff also claims that Defendants committed a violation of § 1692e(5) which prohibits debt collectors from threatening "to take any action that cannot legally be taken or that is not intended to be taken." Plaintiff alleges that Defendants violated § 1692e(5) by threatening to report his failure to pay to credit reporting agencies within sixty days of his challenge to his past due amount. Plaintiff argues that "after receiving Mr. Richard's April 15, 2015 QWR, Caliber could not legally report any adverse information about Mr. Richard's credit until June 14, 2015, at the very earliest (60 days from April 15, 2015)." (Doc. 102, Pl.'s Mot. at 21). Plaintiff alleges Caliber improperly threatened action twice. First, in the April 21, 2015 letter to Plaintiff, Caliber stated, "You are notified that this default and any other legal action that may occur as a result thereof may be reported to one or more local and

national credit reporting agencies by Caliber Home Loans, Inc." (Doc. 74, Stipulated Exs. at PAGEID#1262). Second, Caliber's May 1, 2015 past due notice stated "Late payments will be reported to the credit bureaus." (*Id.* at PAGEID# 1272).

Under 12 C.F.R. § 1024.35(i)(1), once a servicer receives a notice of error, "a servicer may not, for 60 days, furnish adverse information to any consumer reporting agency regarding any payment that is the subject of the notice of error." Plaintiff thus alleges that Caliber threatened to report his failure to pay to credit agencies within sixty days of the receipt of the Third QWR. Caliber argues that the language was not threatening imminent action and thus, neither letter violated the FDCPA. The Court agrees with Plaintiff. Caliber's statement that late payments "will be reported to the credit bureaus," when viewed within a letter informing Plaintiff that he was late in paying could clearly confuse the least-sophisticated consumer into believing that Caliber planned to report the late payment to the credit bureaus before 12 C.F.R. § 1024.35(i)(1) allowed Caliber to do so. Plaintiff is entitled to summary judgment on this claim.

Tusen v. M&T Bank, Dist. Court, Minnesota October, 31 2017

https://scholar.google.com/scholar_case?case=3777007023363371468&hl=en&lr=lang_en&as_sdt=8006&as_vis=1&oi=scholaralrt

[FDCPA Claim Survives MTD]

…M&T argues that, because it is attempting to collect a debt on its own account, it is not a debt collector.

The Court does not interpret Henson so broadly. The Supreme Court held that only "individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account" are not debt collectors. Id. Indeed, Henson repeatedly refers only to debts purchased. See, e.g., id. at 1721-22 ("[A] debt purchaser like Santander may indeed collect debts for its own account without triggering the statutory definition in dispute . . . ."); id. at 1724 (classifying Santander as "a company collecting purchased defaulted debt for its own account"); see also Bank of N.Y. Mellon Tr. Co. N.A. v. Henderson, 862 F.3d 29, 34 (D.C. Cir. 2017) (stating that a bank that purchases debt is not a debt collector, even if the debt was already in default). Here, the Fourth Amended Complaint alleges that the mortgage servicing rights were transferred to M&T, but the record contains no allegation that M&T purchased the debt. (4th Am. Compl. ¶¶ 15, 44.)

M&T claims that Henson only requires possession—not ownership—of a debt to fall outside the statutory definition of a debt collector. (Def.'s Reply Mem. (Docket No. 50) at 3.) But this assertion takes the Supreme Court's reasoning out of context, and it is without merit.

In summation, the Court concludes that Henson does not apply here, and M&T is a debt collector under 15 U.S.C. 1692a(6). The Motion on the FDCPA claim is denied.

Capozio v. JP Morgan Chase Bank, NA, Dist. Court, ED Pennsylvania November, 7 2017

https://scholar.google.com/scholar_case?case=7097148517775616661&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[MTD Granted for FDCPA Claim]

…As such, the Supreme Court has now clarified that Congress did not intend for debt buyers to be considered debt collectors for the purposes of the Act, where the debt buyer attempted to collect debts which the debt buyer owned. *Id.* at 1724.

Here, in their amended complaint, Plaintiffs allege that Defendant is a "debt collector" as "defined by [15 U.S.C.] §1692a(6)(F)(iii)" because "Defendant was assigned the Plaintiffs' mortgage while the loan was in default." (Am. Compl. at ¶91). In light of *Henson,* however, the mere assignment of the mortgage loan at issue to Chase while the loan was in default does not make Chase a "debt collector" under the section of the FDCPA on which Plaintiffs expressly rely.

…Therefore, in light of the Supreme Court's recent decision in *Henson,* Plaintiffs have not asserted facts sufficient to show that Defendant is a "debt collector" for purposes of the FDCPA. Accordingly, Plaintiffs' FDCPA claims at Count I are dismissed…

Saccameno v. Ocwen Loan Servicing, LLC, Dist. Court, ND Illinois November 8, 2017

https://scholar.google.com/scholar_case?case=5337746641160258363&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[MSJ Denied for IFCA, Breach of Contract, and Punitive Damages Claims]

ICFA:

Ocwen seeks to minimize the significance of Dr. Sarantos's opinions by noting that he is a general practitioner, not a psychiatrist; but Ocwen cites no authority to suggest that expenses for medications for depression and anxiety are compensable only if prescribed by a psychiatrist. Ocwen additionally notes that Dr. Sarantos was a friend of Saccameno's family: he knew Saccameno's mother; and both Saccameno and her daughter had worked for Sarantos at different times. However, the relevance of this fact is not entirely clear. Ocwen appears to insinuate that Dr. Sarantos might have prescribed the medications for Saccameno even though she did not need them. But based on Dr. Sarantos's testimony and the observations he recorded in Saccameno's medical chart, it can reasonably be inferred that he believed Saccameno's conditions to be real.

Taking yet another tack, Ocwen points to evidence indicating that Saccameno felt depressed and anxious in 2009 when she filed for bankruptcy. Notably, however, the evidence indicates that it was only after the post-discharge problems with Ocwen that Saccameno began taking medication. *See* Saccameno Dep. at 113:1-2 (stating that Saccameno began taking Xanax in September 2013); *id.* at 114:8-19 (stating that Saccameno started taking Wellbutrin in November 2013). According to Ocwen, any expenses relating to Saccameno's purchase of Xanax are not relevant because Saccameno testified that she uses the medication only to sleep, not for anxiety.

Again, this is not entirely correct… It is true that Saccameno is on a very low dose of Xanax and that, according to her own testimony, she refills the prescription only infrequently…However, while this might be used to show that Saccameno's Xanax expenses are modest, they are expenses nonetheless. Ocwen does not contend that the money Saccameno has spent on Xanax is so little as to be *de minimis.* And in any case, this argument does not apply to Saccameno's expenses for Wellbutrin.

Lastly, Ocwen objects that Saccameno has not submitted any evidence in the form of receipts or bills. Ocwen suggests that, in the absence of such evidence, Saccameno's claim to have purchased the medications is not credible. It is unclear whether Ocwen means to suggest that the prescriptions may never in fact have been purchased, or that someone other than Saccameno paid for them. However, Ocwen points to nothing in the record to cast doubt on the claim that Saccameno paid for them herself. Ocwen also argues that documentary evidence is necessary to quantify Saccameno's expenses, and that failure to quantify her expenses is somehow fatal to her claim. While it is clear under the ICFA that actual damages must be quantifiable or calculable. *See, e.g.,* *Hart v. Amazon.com, Inc.,* 191 F. Supp. 3d 809, 823 (N.D. Ill. 2016) ("`Actual damages [under the ICFA] must be calculable and measured by the plaintiff[']s loss.'") (quoting *Morris v. Harvey Cycle & Camper, Inc.,* 911 N.E.2d 1049, 1053 (Ill. App. Ct. 2009)), Ocwen cites no authority for the proposition that, at the summary judgment stage, a plaintiff must quantify her actual damages.

Breach of Contract:

Ocwen's seeks summary judgment as to Saccameno's breach-of-contract claim on the same basis as it sought summary judgment as to Saccameno's ICFA claim: namely, that (1) actual damages are an essential element of a claim for breach of contract, and (2) that Saccameno has failed to present any evidence that she suffered such damages. The court notes that proposition (1) is not entirely true. Under Illinois law, it is possible—albeit in limited circumstances—to recover for emotional injury based on a breach of contract. *See, e.g.,* *Parks v. Wells Fargo Home Mortg., Inc.,* 398 F.3d 937, 940-41 (7th Cir. 2005) ("Illinois ... does not ordinarily allow punitive and emotional distress damages for breaches of contract. Damages for breach will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm, or where defendant had reason to know, when the contract was made, that its breach would cause mental suffering for reasons other than mere pecuniary loss.")…In any case, proposition (2) is incorrect: as as already discussed, Saccameno has presented evidence of actual injury resulting from Ocwen's conduct. Hence, for the reasons previously discussed in connection with Saccameno's ICFA claim, Ocwen's motion for summary judgment fails as to Saccameno's claim for breach of contract.[5]

Punitive:

As a further mitigating factor, Ocwen states that "between the time of her discharge in June 2013, and March 10, 2014 (about eight months), Plaintiff only called Ocwen 15 times, which averages about two calls a month." Defs.' Mem. Supp. Mot. Summ. J. 11, ECF No. 130. It is not self-evident, however, that this militates *against* a finding of punitive damages. The fact that it took so many phone calls and such a long period of time to resolve what would appear to be an easily-corrected error might reasonably lead a jury to conclude that Ocwen exhibited deliberate indifference to Saccameno's rights. Ocwen further contends that "no action was taken by Ocwen in the foreclosure action after Plaintiff received her discharge," and that "no steps were taken to evict Plaintiff from her home." Once again, however, this is disputed. Ocwen acknowledges that the miscoding of the discharge as a dismissal "triggered the already pending foreclosure action that had been in placed

prior to Ocwen servicing the loan." Defs.' L.R. 56.1 Stmt. ¶ 24. Ocwen also acknowledges that in June 2014, one of its contract management coordinators "prepared and executed an Affidavit of Amounts Due and Owing for the Cook County Foreclosure matter stating that as of June 2, 2014, Saccameno owed $129,242.37." Pl.'s L.R. 56.1(b)(3)(c) Stmt. of Add'l Facts ¶ 23, ECF No. 142.

In sum, on this record, the court denies Ocwen's motion for summary judgment as to Saccameno's request for punitive damages on her ICFA and breach-of-contract claims.[7]

Meritage Homeowners' Association v. Watt, Dist. Court, D. Oregon November 20, 2017

https://scholar.google.com/scholar_case?case=14341118521691205657&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[HOA Violates Automatic Stay in Attempt to Collect Debt Post-Petition]

Meritage's post-petition conduct activities were "willful" within the meaning of § 362(k)(l). It is undisputed that Meritage knew about the Watts' bankruptcy filing and the automatic stay. Notwithstanding that knowledge, it chose to pursue its claim for the second special assessment after the Watts filed their Chapter 13 petition. Whether that claim was a prepetition debt subject to discharge or a recoverable post-petition debt was an open question under the law of this circuit. In choosing to attempt to collect the second special assessment postpetition, Meritage bore the risk of violating the automatic stay by attempting to collect a prepetition debt.

I therefore grant the Watts' motion for summary judgment on their first counterclaim.

Munoz v. Rushmore Management Loan Services LLC Dist. Court, SD Ohio November 22, 2017

https://scholar.google.com/scholar_case?case=4597242831775988077&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[FDCPA/TILA Claim Barred Statute Runs From Date of Mailing]

Plaintiff alleges discrete violations by Rushmore. The Sixth Circuit has recognized that for FDCPA purposes, a separate dunning letter may constitute a separate violation of the FDCPA. *Michalak v. LVNV Funding LLC,* 2015 WL 2214792, at *1 (6th Cir. May 12, 2015) See also *Head v. Ocwen Loan Servicing LLC,* 14 CV 1363, (D. Kan. July 14, 2015); *Purnell v. Arrow Fin. Servs., LLC,* 303 F. App'x 297, 301-02 (6th Cir. 2008); accord *Solomon v. HSBC Mortg. Corp.,* 395 F. App'x 494, 497 n.3 (10th Cir. 2010). Rushmore's January 19 letter, however, only moves the closure of the statute of limitations from Defendants' proposed November 2016 to January 19, 2017, a year from the date of mailing.

Plaintiff would have the Court measure by date of receipt. However, Courts apply a "bright-line-rule approach in determining when the statute of limitations accrues for harassing collection letters. Instead of running from the date of receipt, the statute runs from the mailing date, as it is `fixed by objective and visible standards' and `easy to determine.'" *Tyler v. DH Capital Mgmt., Inc.,* 736 F.3d 455, 464 (6th Cir. 2013) (quoting *Mattson v. U.S. West Commc'ns,* 967 F.2d 259, 261 (8th Cir. 1992)). Measuring from the mailing date, Plaintiff's FDCPA claim is barred, unless the Court should

opt to toll the statute of limitations. The Court will consider tolling for the FDCPA and TILA statutes after it considers expiration of the TILA statute of limitations.

However, Munoz also asserts a violation of TILA regulations that apply to servicers who fail to respond or inadequately respond to a notice of error. Munoz alleges that Rushmore failed to account for her payments to Rushmore on January 29, 2016 and that Rushmore continued to treat the loan as in default when it transferred the loan to Select Portfolio Servicing. The statute of limitations does not begin to run until a plaintiff either discovers or had a reasonable opportunity to discover a TILA violation. *Jones v. TransOhio Sav. Ass'n,* 747 F.2d 1037, 1039 (6th Cir. 1984). See also *Ramadan v. Chase Manhattan Corp.,* 156 F.2d 499, 501 (3rd Cir. 1998); *Barrett v. Fifth Third Bank,* 15 CV 00698 (W.D. Ky, Feb. 11, 2016) at Page 4. Thus, Munoz would have the Court compute this time from the date she received the January 19, 2016 letter, which was about February 2, 2016. The complaint was filed January 26, 2017.

Again, the Sixth Circuit would have "the statute run[] from the mailing date, as it is `fixed by objective and visible standards' and `easy to determine.'" *Tyler v. DH Capital Mgmt., Inc.,* 736 F.3d 455, 464 (6th Cir. 2013) (quoting *Mattson v. U.S. West Commc'ns,* 967 F.2d 259, 261 (8th Cir. 1992)). Measuring from the mailing date, Plaintiff's TILA claim is also barred, unless the Court should opt to toll the statute of limitations.

Hunte v. Safeguard Properties Management, LLC, Dist. Court, ND Illinois November 27, 2017

https://scholar.google.com/scholar_case?case=2671889793239961693&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[FDCPA Claim Dismissed Property Preservation Company not a Debt Collector]

Consequently, although the court discussed that very issue with Hunte's counsel at the presentment hearing on Defendants' motions to dismiss the amended complaint, and although Hunte sought leave to further amend for the express purpose of addressing that issue, the second amended complaint still does not plausibly allege that Safeguard is a "debt collector" under the "enforcement of security interests" prong of § 1692a(6). The problem here is not merely that Hunte has failed to plead "facts that bear on the statutory elements of a[n FDCPA] claim"; rather, it is that Hunte's FDCPA claims are implausible because, as to Safeguard's interactions with Hunte, the operative complaint alleges only in-person interactions and gives no hint as to the use of the instrumentalities of interstate commerce or the mails. *Chapman v. Yellow Cab Coop.,* ___ F.3d ___, 2017 WL 5494238, at *1 (7th Cir. Nov. 16, 2017).

With the failure of both of Hunte's efforts to plead that Safeguard is a "debt collector," Hunte's FDCPA claim is dismissed

Srachta v. Ditech Financial LLC, Dist. Court, ND Illinois November 30, 2017

https://scholar.google.com/scholar_case?case=18584587984461996&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

[FDCPA Claim Dismissed Foreclosure Attorney's Fees and Costs Not Deceptive]

First, the loan agreement explicitly permits Defendants to collect on attorneys' fees and costs incurred in pursuit of any remedies to the borrower's breach, not just the actual foreclosure. To this end, including the potential attorneys' fees and costs was permissible and not deceptive. Second, both letters indicated a current payoff amount and estimates of a prospective amount that would only come into effect on a specified future date if ongoing services were necessary. Each expense in the prospective total was itemized and explained in the letter. If there was any confusion about the precise amount or what each fee meant, the letter included a customer service number where the borrower could inquire or obtain a refund if they overpaid. It is inconceivable that an unsophisticated consumer would be confused by a letter containing that level of explanation and detail. Therefore, since Plaintiffs have not demonstrated how the correspondences could be false or deceptive, they have failed to allege an actionable violation of FDCPA. *Cf. Fields,* 383 F.3d at 566(finding that unexplained or non-itemized fees and amounts violate FDCPA).

Count III complains that Defendants violated Section 1692f(1) of the FDCPA by attempting to collect unauthorized attorney's fees. However, the mortgage agreement definitively authorizes a lender to recover attorneys' fees and costs in the event that the borrower breaches the contract. Additionally, the letter, as mentioned above, clearly outlined the nature of the fees and how they would be applied to the total amount owed, which squarely aligns with the expectations of FDCPA. *Singer v. Pierce & Assocs., P.C.,* 383 F.3d 596, 598 (7th Cir. 2004). Given these facts, this Court does not see how the letter could be unclear even to an unsophisticated consumer and so, requesting those permissible fees could not be considered false or a misrepresentation.

Davis v. Deutsche Bank National Trust Company, Dist. Court, ED Pennsylvania December 12, 2017

https://scholar.google.com/scholar_case?case=3677446606020280110&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

[Breach of Contract Fails]

Finally, Plaintiffs contend that Homeward "failed to properly service the mortgage loan, as payments were frequently misapplied to the escrow accounts and not the principal and interest respectively as was required in the contract." Am. Compl., ¶ 76. Plaintiffs' contention in Paragraph 76 of the Amended Complaint is duplicative of their contention in Paragraph 75. Based on a plain reading of Section 3 of the mortgage contract, all payments received were to be applied in the following order: first to prepayment charges due under the note, then to funds for escrow items, then to interest due, then to principal due, and finally to late charges due. Defs.' Br., Ex. 1, p. 3 § 3. Defendants were entitled to apply the Plaintiffs' mortgage payments to the escrow account prior to applying the payment to principal and interest. Plaintiffs' contention directly contradicts the terms of the mortgage contract.

James v. Ocwen Loan Servicing, LLC, Dist. Court, SD Ohio December 12, 2017

https://scholar.google.com/scholar_case?case=17452535220038072733&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

FDCPA Claim Wins on MSJ]

Based on this full context of Defendant's phone calls, the only reasonable inference is that some or all of the approximately 300 phone calls made by Defendant to Plaintiffs between mid- to late-February 2015 and August 19, 2015 conveyed information about Plaintiffs' debt and were intended to be part of a dialogue aimed at facilitating the satisfaction of Plaintiffs' debt with Defendant. *Geary v. Green Tree Servicing,* LLC, No. 2:14-cv-00522, 2015 WL 1286347, at *12-13 (S.D. Ohio Mar. 20, 2015) (citing *McLaughlin v. Phelan Hallinan & Schmieg,*LLP, 756 F.3d 240 (3rd Cir. 2014), *cert. denied,* 135 S. Ct. 487 (2014). Given that even one phone call made to Plaintiffs in connection with the collection of a debt after Defendant knew Plaintiffs were represented by counsel is a violation of § 1692c(a)(2), Plaintiffs have satisfied their burden on summary judgment. *Mann v. Acclaim Financial Servs.,* 348 F. Supp. 2d 923, 926 (S.D. Ohio 2004).[14]

2018

Wigod v. PNC Bank, NA, Dist. Court, ND Illinois February 7, 2018

https://scholar.google.com/scholar_case?case=14732625457726264167&hl=en&lr=lang_en&as_sdt=6,40&as_vis=1&oi=scholaralrt

[ECOA Claim Denied Not Sufficiently Plead]

To this, Wigod says that she *did* bring to PNC's attention its error regarding her income, but that PNC violated the ECOA by "refus[ing] to comply with the notification requirements after being informed of its error." Doc. 39 at 11 (quoting *Sayers,* 522 F. Supp. at 841). The court at this stage accepts Wigod's factual allegation as true. The trouble for Wigod is that she does not explain how this particular action violated any provision of Regulation B or the ECOA as a whole.
As *Sayers* observes, Regulation B provides that "[a] creditor's failure to comply with [§ 1002.9] is not a violation if it results from an inadvertent error," as long as the creditor corrects the error "as soon as possible" after discovering it. 12 C.F.R. § 1002.16(c). But PNC had an obligation to issue a correction only if its error caused it to fail to comply with § 1002.9, and as discussed above, the use of incorrect income inputs did not make PNC's statement unlawfully vague.

If Wigod believes that PNC's use of incorrect inputs violated some other provision of the ECOA or its Regulation B, she may bring such a claim in an amended complaint. But that is not the claim presented in Count II of the operative complaint. Wigod's claim alleges only that PNC's notice did not have the specificity demanded by Regulation B's "statement of specific reasons" provision—after all, she named the putative class seeking relief under Count II the "Vague Notice Class," Doc. 28 at ¶ 33—and for the reasons given above, PNC's notice is not unlawfully vague.

Meaney v. Nationstar Mortgage Dist. Court, D. Maryland, February 21, 2018

https://scholar.google.com/scholar_case?case=5476344692214463256&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

To the extent that Nationstar maintains that Meaney still owed funds for obligations accruing before that date, the transaction history appears to contradict that claim. Despite representing to the

Bankruptcy Court in the Ursin Declaration that $8,782.37 would, combined with $792.68 already paid, cover the five months of delinquent payments as of July 8, 2014, Nationstar credited Meaney for only four months of payments when she paid $8,819.00 on July 30, 2014. Moreover, Nationstar did not credit Meaney for September 2014, or any other month, when she made her final payment under the Consent Order on December 23, 2014.

Even if there were discrepancies in what was owed for the period before September 30, 2014, they were forgiven under the plain language of the Consent Order. Having agreed to such terms, Nationstar may not now assert that Meaney continued to owe additional amounts for obligations accruing before that date. Accordingly, the Court shall grant Meaney's request in Count VIII for a declaratory judgment and finds that Meaney was current on her mortgage through September 2014 once she complied with the terms of the Consent Order. Nationstar was therefore required to apply her payments in a manner consistent with this finding, such as by applying the full monthly payment made on September 30, 2014 to her October 1, 2014 payment, rather than applying some of it to August 2014.

Lusnak v. Bank of America, N.A. Ct. of Appeals 9th Cir. March 2, 2018

https://scholar.google.com/scholar_case?case=18242512511394538 53&q=Lusnak&hl=en&as_sdt=6,36

We reverse. Although Dodd-Frank significantly altered the regulatory framework governing financial institutions, with respect to NBA preemption, it merely codified the existing standard established in *Barnett Bank of Marion County, N.A. v. Nelson,*517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). Applying that standard here, we hold that the NBA does not preempt California Civil Code § 2954.8(a), and Lusnak may proceed with his California Unfair Competition Law ("UCL") and breach of contract claims against Bank of America.

Saccameno v. Ocwen Loan Servicing, LLC. Dist. Court ND Illinois March 9, 2018

https://scholar.google.com/scholar_case?case=10936111899200291243&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

In short, the court's opinion did not rely on any of the evidence whose admissibility Ocwen challenges. That the court did not address the admissibility of the evidence, therefore, affords no basis for reconsidering its opinion.

Ocwen's motion to reconsider raises a number of objections based on the admissibility of Saccameno's evidence. As emphasized above, however, "motions to reconsider [are] not an opportunity to present arguments that could have been raised previously." *Cincinnati Life Ins. Co. v. Beyrer,* 722 F.3d 939, 954 (7th Cir. 2013). Consequently, any such objections have been forfeited for purposes of this motion. *See, e.g., Baker v. Lindgren,* 856 F.3d 498, 503 (7th Cir. 2017) (arguments raised for the first time in a motion to reconsider are waived). These objections may appropriately be raised in motions in limine—and Ocwen has done just that.[5]Nonetheless, for completeness, the court will address the objections raised in Ocwen's motion to reconsider insofar as they bear on the question of summary judgment.

Ocwen insists that Saccameno's testimony alone cannot be "a sufficient basis upon which a jury could reasonably find she suffered damages." Defs.' Reply Mot. Supp. Summ. J. 3. Simply put, that is not the law. The Seventh Circuit has repeatedly held that a plaintiff may defeat summary judgment based solely on his or her own testimony, whether in a deposition, *see, e.g.,* Paz v. Wauconda Healthcare & Rehab. Ctr., LLC, 464 F.3d 659, 664 (7th Cir. 2006) ("We have long held that a plaintiff may defeat summary judgment with his or her own deposition."), or an affidavit, *see, e.g.,* McKinney v. Office of Sheriff of Whitley Cty.,866 F.3d 803, 814 (7th Cir. 2017) ("Our cases for at least the past fifteen years teach that [s]elf-serving affidavits can indeed be a legitimate method of introducing facts on summary judgment. We have tried often to correct the misconception that evidence presented in a `self-serving' affidavit is never sufficient to thwart a summary judgment motion.") (quotation marks and citations omitted).

Ogle v. U.S. Bank National Association, as trustte for Residential Asset Securities, Corporation, Home Equity Mortgage Asset-Backed Pass-Through Certificates, Series 2007-KS3 et. al. Dist. Court. ED Tennessee March 14, 2018

https://scholar.google.com/scholar_case?case=7254365737620658666&q=ogle+v.+U.S.+National&hl=en&as_sdt=6,36&as_ylo=2018

In her response brief, plaintiff suggests that the "confusion caused by [d]efendants' collective actions"—including their uncertain roles in relation to her debt and the lack of communication regarding loss mitigation alternatives—is the conduct that violated § 1692e and § 1692f [Doc. 12 p. 5]. Even if these conclusory allegations were sufficient, however, the Court's review is confined to the four corners of the pleadings and attached documentation. *See infra* p. 2 n.1. Plaintiff cannot meet the Rule 8(a) pleading standard by supplementing her complaint with further factual allegations in an unsworn merits brief filed in response to a Rule 12(c) motion. *See Ludwig v. Ky. Dep't of Military Affairs,* No. 13-174-GFVT, 2015 WL 351863, at *3 (E.D. Ky. Jan. 23, 2015) ("The facts in the Complaint—and not the extraneous ones in [the plaintiff's] Response brief—are the focus of a 12(b)(6) inquiry."); *In re Porsche Cars N. Am., Inc.,* 880 F. Supp. 2d 801, 842 (S.D. Ohio 2012) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." (alteration in original) (quoting *Pa. ex rel. Zimmerman v. PepsiCo, Inc.,* 836 F.2d 173, 181 (3d Cir. 1988))). Thus, plaintiff's complaint fails to provide defendants with "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly,* 550 U.S. at 555.
In sum, while plaintiff has adequately alleged that both defendants qualify as "debt collectors" under the FDCPA, she has failed to state a plausible claim to relief under either § 1692e or § 1692f of that act. Therefore, defendants are entitled to judgment on the pleadings with respect to Count Two.

Sifuentes v. Rushmore Loan Management Services, LLC Dist. Court ND Illinois March 26, 2018

https://scholar.google.com/scholar_case?case=14386344908431513 11&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

Apart from *Alqaq,* which involved foreclosure activity, Safeguard makes no mention of any of this authority. Instead, Safeguard devotes substantial attention in its memorandum to the salutary nature of property preservation services. (Safeguard Memorandum [20], at 2-8.) The court has no doubt that neighborhoods benefit when vacant and abandoned properties are maintained and properly secured.

Plaintiff here alleges, however, that his own property was neither vacant nor abandoned when Safeguard entered it, changed the locks, and seized certain of Plaintiff's personal items. The court agrees with its colleagues that attempting to enforce a mortgage security interest by way of locking a borrower out of his property is conduct prohibited by § 1692f(6) of the FDCPA.

Finley v. Ocwen Loan Servicing, LLC. ND Ohio Eastern Division April 9, 2018

https://scholar.google.com/scholar_case?case=5010491688608557569&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

First, the Finleys allege sufficient facts to show that MDK harassed or abused them by maintaining the foreclosure action after both the bankruptcy judge and Ocwen recognized the 2011 LMA's validity. The bankruptcy court determined that the 2011 LMA was a valid agreement. Additionally, Ocwen sent a personal letter to the Finleys, after investigating the 2011 LMA, verifying that the basis for its foreclosure case was inaccurate. Furthermore, MDK maintained the foreclosure action, despite Ocwen recognizing the LMA's legitimacy, until after the Finleys retained counsel. The foreclosure action was filed on April 1, 2016 but MDK did not move to dismiss the foreclosure suit until August 14, 2017, more than one year later. These are facts which, if proven, show conduct that qualifies as "frightening" or "upsetting" behavior and gives rise to suffering or anguish. MDK should have known about the 2011 LMA before it filed the foreclosure action. And it should have known that Ocwen recognized the 2011 LMA in March 2017. Yet MDK filed the foreclosure action and put the Finleys in fear that they would lose their home over debt they did not owe.

The Finleys also allege that MDK's November 9, 2017 debt validation letter constitutes a violation of § 1692d. The Finleys argue that the letter threatens an imminent foreclosure of their home. In part, MDK's letter states, "*MDK is not required to wait until the end of the thirty (30) day periods, described above before filing a foreclosure action* in court or taking other legal action to collect the debt." (emphasis added). So, nearly 8 months after Ocwen changed its tune and recognized the 2011 LMA, MDK was still sending threatening letters to the Finleys to collect on debt that was not owed. This Court finds that such language would lead homeowners to believe they were at risk of imminent foreclosure. Thus, the Court cannot dismiss the Finleys's § 1692d claim.

Wagoner v. Everhome Mortgage, Inc., Dist. Court. D. New Jersey May 15, 2018

https://scholar.google.com/scholar_case?case=4159767092637971159&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The Court finds that Plaintiff has failed to state a *prima facie* FDCPA claim against any Defendant. First, the various correspondence sent to Plaintiff were done so pursuant to Federal and State laws and regulations. As Defendants Freddie Mac and New Penn correctly note, periodic billing statements must be sent to a borrower under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et. seq.* TILA explicitly requires "[a] servicer . . . [to] provide the consumer, for each billing cycle, a periodic statement" and that said statement contain specific information. 12 C.F.R. § 1026.41(d)(2)(i)(iii). Said statements must also include "the amount of the outstanding principal balances." *Id.*; *see also* 12 C.F.R. § 1026.41(d)(7)(i)-(ii). These period statements are mandatory

under TILA. 12 C.F.R. § 1026.41. Defendants were also required, by New Jersey law, to send Plaintiff the Notice of Intent to Foreclose. *See* N.J.S.A. 2A:50-56. The Notice of Intent to Foreclose is also mandatory and must be given "30 days in advance of such action." N.J.S.A. 2A:50-56(a). Hence, Defendants cannot be liable for FDCPA violations for sending Plaintiff notices that they were required by law to send. *See Block v. Seneca Mortg. Servicing,* 221 F. Supp. 3d 559, 589-90 (D.N.J. 2016) (finding that a plaintiff's FDCPA claim could not lie when the basis for said claim was a legally required periodic mortgage statement).

D'Alessandro v. Ocwen Loan Servicing, LLC Dist. Court. D. New Jersey May 23, 2018

https://scholar.google.com/scholar_case?case=8852245755816688286&hl=en&lr=lang_en&as_sdt=40006&as_vis=1&oi=scholaralrt

Within the consumer fraud count, Plaintiff alleges that Ocwen implemented an inconceivable commercial practice by its "knowing concealment, suppression and omission of material facts" regarding the loan modification application.

More specifically Plaintiff alleges that "Ocwen's actions, in continuously disregarding federal guidelines requiring them to exercise reasonable diligence in reviewing the Plaintiff's loan modification application, is an unconscionable act under the Consumer Fraud Act." (Id. ¶ 159). "Ocwen's actions, in refusing to review the Application and causing Wells Fargo to continue prosecuting the Foreclosure against the Plaintiff, is [another] unconscionable act under the Consumer Fraud Act." (Id. ¶ 160). As to damages suffered as a result of Defendant's conduct, Plaintiff states that she "has been caused to suffer from severe emotional distress and severe anxiety . . ." As a result, Plaintiff seeks treble damages. (Id. at ¶ 162). In order to prevail on a consumer fraud claim, "`1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss.'" *Petinga v. Sears, Roebuck & Co.,* No. 05-5166, 2009 U.S. Dist. LEXIS 48693 (D.N.J. June 9, 2009) (citing *Bosland v. Warnock Dodge, Inc.,* 197 N.J. 543, 557, 964 A.2d 741 (2009) (citations omitted)).

…The showing of an unreasonable business practice also entails a lack of good faith, fair dealing, and honesty." "The capacity to mislead is the prime ingredient of all types of consumer fraud." *Cox v. Sears Roebuck & Co.,* 647 A.2d 454, 462 (N.J. 1994). Mere dissatisfaction does not constitute consumer fraud." *In re Van Holt,* 163 F.3d 161, 168 (3d Cir. 1998). Here, the loan modification actions, as described in the Complaint, may possibly show a pattern to delay or thwart a process. The facts at a minimum could show a lack of good faith.

The second prong of the consumer fraud standard is to show an ascertainable loss. The Plaintiff, as noted above, asserts a claim for emotional distress. The Consumer Fraud Act does not authorize such damages. Generally, ascertainable loss is limited to "money as property, real or personal." N.J.S.A. 56:8-19. *Cole v. Laughrey Funeral Home,* 376 N.J. Super. 135, 144 (App. Div. 2005). Here, a fair reading of the Complaint demonstrates that she has paid for legal fee, postage, and other expenses, in pursuing the loan modification process. This is adequate to show an ascertainable loss at this juncture.

The last point is that Plaintiff must show a causal connection between the unconscionable practice and the ascertainable loss. Here the attorney's fees and costs associated with the ongoing loan modification process and the failure to straighten out the process are causally related. Plaintiff alleged unconscionable acts, and ascertainable damages, though limited to fees and expenses, which were accrued in pursuing the loan modification, thus establishing a connection. Plaintiff has provided sufficient facts to survive a motion to dismiss specifically as to Count VI.

It is to be noted that even if Plaintiff ultimately failed to establish an ascertainable loss, and recover treble damages, she "could nonetheless demonstrate a violation of the CFA and, by doing so, recover attorney's fees and costs." *Watkins v. DineEquity, Inc.*, 591 Fed. Appx. 132, 141 (3d Cir. 2014). *Romano v. Galaxy Toyota,* 399 N.J. Super. 470, 945 A.2d 49, 58 (N.J. Super. Ct. App. Div. 2007)("Even though plaintiff unsuccessfully proved the existence of an ascertainable loss, and was unable to recover treble damages, plaintiff can recover reasonable attorney's fees and costs because defendant committed an unlawful practice."). *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 454, 647 A.2d 454 (1994) ("For the sake of completeness we add that a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages."). For those reasons, the Court finds that the motion to dismiss Count VI should be denied at this time.

County of Cook v. HSBC North America Holdings, Inc. Dist. Court ND Illinois May 30, 2018

https://scholar.google.com/scholar_case?case=12374449990909596589&hl=en&lr=lang_en&as_sdt=4,36,38,111,112,114,126,127,129,156,275,276,280,281,293,294,301,302,303,332,356,357,381&as_vis=1&oi=scholaralrt

For the reasons provided herein, the Court grants in part and denies in part HSBC's motion to dismiss [137] the County's Second Amended Complaint. HSBC's motion is granted as to the following claimed injuries: the County's costs of providing social services to homeowners; costs of demolishing homes; loss of property tax revenue from foreclosed, abandoned and vacant properties; loss of "various revenue" from abandoned or foreclosed properties; diminution of the tax base due to foreclosed homes and surrounding properties; and the costs associated with urban blight. The motion is denied with respect to the County's claimed injuries resulting from HSBC's allegedly improper use of the Mortgage Electronic Registration System, Inc., as well as the additional costs the County incurred for the administration of foreclosure proceedings that resulted from the challenged practices, including the costs of serving eviction notices, conducting judicial and administrative foreclosure procedures, and registering and inspecting foreclosed homes. The motion also is denied in all other respects.

Brancato v. Specialized Loan Servicing, LLC. Dist. Court D. New Jersey June 8, 2018

https://scholar.google.com/scholar_case?case=3147620568890105812&hl=en&lr=lang_en&as_sdt=3,31&as_vis=1&oi=scholaralrt

The Third Circuit rationale applies here. Plaintiff never bought any merchandise or real estate from Defendant, meaning that Plaintiff, as a debtor, is unable to bring a claim against SLS, a mortgage service under the CFA. *See* *Chulsky v. Hudson Offices, P.C.*, 777 F. Supp. 2d 823, 847 (D.N.J.

2011) (finding that "no basis . . . for the CFA to reach the debt collection activities of a debt buyer of defaulted credit card debt.")

For the above reason, Defendant's motion for summary judgment on Count III is granted.

Dann Law

Illinois | New Jersey | New York | Ohio | Oregon

Date *

*
*
*

**Sent via Certified Mail return receipt requested []*

In the Matter of:

Borrower's Name: *
Property Address: *
*
Mortgage Account No.: *

*****If responding to this correspondence by e-mail, please send to notices@dannlaw.com***

Re: Request for Payoff Statement Pursuant to 12 C.F.R. § 1026.36(c)(3)

Dear Sir or Madam:

This is a written request for a payoff statement related to the above-referenced mortgage loan account for which you are the servicer.

All references herein are to Regulation Z of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority from the above-referenced borrower to our law firm for this correspondence is enclosed herewith and incorporated herein by reference.

Pursuant to 12 C.F.R. § 1026.36(c)(3), you "must provide an accurate statement of the total outstanding balance that would be required to pay the consumer's obligation in full as of a specified date" ***within a reasonable time*** after receipt of this request. Under no circumstances are you to fail to provide the requested payoff statement ***within seven business days*** of receipt of this request.

Best Regards,

***THIS BOTTOM FORMATING CAN EASILY BE ADJUSTED VIA WORD FORMAT TO MAKE THIS A 1 PAGE

LETTER

Whitney E. Kaster, Esq.

Enclosure
cc:

Dann Law

Illinois | New Jersey | New York | Ohio | Oregon

Date *

*
*
*

**Sent via Certified Mail return receipt requested []*

In the Matter of:

Borrower's Name: *
Property Address: *
*
Mortgage Account No.: *

*****If responding to this correspondence by e-mail, please send to notices@dannlaw.com***

Re: Request for Information Pursuant to 12 C.F.R. § 1024.36

Dear Sir or Madam:

This is a Request for Information related to your servicing of the above-referenced mortgage loan. All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority of the above-referenced borrower for this request to our law firm is enclosed herewith and incorporated herein by this reference.

Pursuant to 12 C.F.R. § 1024.36(c), you must provide our office with a written response acknowledging receipt of this notice ***within five (5) days*** of such, excluding legal public holidays, Saturdays, and Sundays.

Moreover, pursuant to 12 C.F.R. § 1024.36(d)(ii)(2)(B), you must provide the information requested, *infra*, ***within thirty (30) days*** after your receipt of this request, excluding legal public holidays, Saturdays, and Sundays.

Please provide the following information within the time periods noted herein:

1. An exact reproduction of the life of loan mortgage transactional history for this loan from the contract system of record from your electronic software program for this loan. For purposes of identification, the life of loan transactional history means any software program or system by which the servicer records the current mortgage balance, the receipt of all payments, the assessment of any late fees or charges, and the recording of any corporate advances for any fees or charges including but not limited to property inspection fees, broker price opinion fees, legal fees, escrow fees, processing fees, technology fees, or any other collateral charge. Also, to the extent this life of loan transactional history includes in numeric or alpha-numeric codes, please attach a complete list of all such codes and state in plain English a short description for each such code.

2. Copies of any and all servicing notes related to your servicing of the above-referenced mortgage loan from January 10, 2014.

3. Copies of any and all broker's price opinions you performed or otherwise obtained for the above-referenced property in relation to the above-referenced mortgage loan.

4. The physical location of the original note related to the above-referenced mortgage loan.

5. A true and accurate copy of the original note related to the above-referenced mortgage loan.

6. The identity, address, and other relevant contact information for the custodian of the collateral file containing the original collateral documents for the above-referenced mortgage loan, including, but not limited to the original note.

7. A detailed copy of your last two (2) analyses of the escrow account of the mortgage.

8. A copy of an accurate and up-to-date reinstatement quote and/or reinstatement letter showing the exact amount needed to cure any default on the above-referenced loan as well as a date through which such amount is to remain good and valid.

9. Please state each and every date during the time period from January 10, 2014, to the present on which you received a complete loss mitigation application from the above-referenced borrower. Please note that, pursuant to 12 C.F.R. § 1024.41(b)(1), a "complete loss mitigation application" is defined as "an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the

borrower."

Best Regards,

Whitney E. Kaster, Esq.

Enclosure
cc:

Dann Law

Illinois | New Jersey | New York | Ohio | Oregon

Date *

*
*
*

**Sent via Certified Mail return receipt requested []*

In the Matter of:

Borrower's Name: *
Property Address: *
*
Mortgage Account No.: *

*****If responding to this correspondence by e-mail, please send to notices@dannlaw.com***

Re: Request for Information Pursuant to 12 C.F.R. § 1024.36 and 15 U.S.C. § 1641(f)(2)

Dear Sir or Madam:

This is a Request for Information related to your servicing of the mortgage loan of the above-named borrower. All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority of the above-referenced borrower for this Request to our law firm is enclosed herewith and incorporated herein by reference.

Pursuant to 12 C.F.R. § 1024.36(d), you must respond to this Request no later than ***ten (10) days*** after your receipt of such, excluding legal public holidays, Saturdays, and Sundays.

Please provide the following information within the time periods noted herein:

1. The name, address, and appropriate contact information for the current owner or assignee of the above-referenced mortgage loan.

    a. If the above-referenced mortgage loan is held in a trust for which an appointed trustee receives payments on behalf of such trust and Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Corporation (Freddie Mac) is the owner of such loan or the trustee of the securitization trust in which the loan is held, please also provide the name or number of the trust or pool in which such loan is held.

2. The identity of and address for the master servicer of the above-referenced mortgage loan.

3. The identity of and address for the current servicer of the above-referenced mortgage loan.

Please be advised this request is also being made under 12 U.S.C. § 1641(f)(2) of the Truth in Lending Act (TILA). For each violation of TILA, you may be liable to the borrower for actual damages, costs, attorney fees, and statutory damages of up to Four Thousand Dollars ($4,000.00).

Best Regards,

Whitney E. Kaster, Esq.

Enclosure

cc:

Dann Law

Illinois | New Jersey | New York | Ohio | Oregon

Telephone: 216-373-0539
Facsimile: 216-373-0536
Email: Notices@DannLaw.com

September 17, 2018

Ocwen Research
P.O. Box 24736
West Palm Beach, FL 33416-4736

**Sent via Certified Mail return receipt requested [ ]*

In the Matter of:

Borrowers' Names: [redacted]
Property Address:
Mortgage Account No.:

*****If responding to this correspondence by e-mail, please send to notices@dannlaw.com***

Re: Notice of errors pursuant to 12 C.F.R. § 1024.35(b)(3) for failure to properly apply accepted payments to principal, interest, escrow or other charges under the terms of the mortgage loan and applicable law as of the date of receipt;
Notice of error pursuant to 12 C.F.R. § 1024.35(b)(11) for improperly reversing payments under, and thereby unilaterally and materially breaching, the Loan; and,
Notice of errors under 12 C.F.R. § 1024.35(b)(5) for imposition of fees or charges which the servicer lacks a reasonable basis to impose upon the Borrowers

Dear Sir or Madam:

Please consider this letter to constitute a Notice of Error under 12 C.F.R. § 1024.35 of Regulation X of the Mortgage Servicing Act under the Real Estate Settlement Procedures Act (RESPA). Pursuant to 12 C.F.R. § 1024.35(d), you must send a written response acknowledging receipt of this notice within ***within five (5) business days*** of your receipt of this notice. Pursuant to 12 C.F.R. § 1024.35(e)(3)(i)(C), you must send a written response to this notice in compliance with the express requirements of 12 C.F.R. § 1024.35(e)(1) ***within thirty (30) days*** of your receipt of this notice.

A written authorization from the above-referenced borrowers (the "Borrowers") authorizing our firm to send this notice is enclosed and incorporated by this reference.

The Borrowers previously filed for protection under Chapter 13 of the United States Bankruptcy code in the United States Bankruptcy Court for the District of Ohio, Cincinnati Division, in the matter assigned case number 1:13-bk-14900 (the "Bankruptcy"). The Borrowers completed their Bankruptcy plan, which included paying prepetition arrearages on the Loan as well as ongoing postpetition payments coming due and owing under the loan. On or about August 28, 2017, The Bank of New York Mellon f/k/a The Bank of New York successor in interest to JPMorgan Chase Bank, National Association, as Trustee for GSAMP Trust 2004-SEA2, Mortgage Pass-Through Certificates, Series 2004-SEA2 ("BONY"), the creditor for whom Ocwen Loan Servicing, LLC ("Ocwen") services the loan, filed an "Amended Response to Final Cure Payment" (the "Bankruptcy Notice") in the Bankruptcy stated the following:

1. "[BONY] agrees that the [Borrowers] have paid in full the amount required to cure the prepetition default on the creditor's claim"; and,
2. "[BONY] agrees that the [Borrowers] are current with all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs."

A copy of the Bankruptcy Notice is enclosed for your reference. Since the Borrowers were current on any and all obligations on the Loan as of Ocwen's filing of the Bankruptcy Notice, there was no reasonable basis for Ocwen to impose or to seek payment of amounts for any fees or charges against the Loan outside of charges for principal, interest, and escrow from that point in time onward. The Borrowers received a discharge in the Bankruptcy on September 12, 2017.

Since the filing of the Bankruptcy Notice, the accounting for the loan has been wildly problematic, inconsistent, and incoherent. Ocwen sent a copy of a transaction history for the loan (the "History"), as well as a payoff quote, to the Borrowers on or about June 15, 2018, outlining the constant reversals and applications of payments to and from the loan seemingly without any rhyme or reason.

Further, on or about June 29, 2018, Ocwen sent a mortgage statement to the Borrowers stating that a "Post-Petition Payment" in the amount of $36,373.94 was due and owing on July 1, 2018 despite the Borrowers' monthly payment obligation only being $641.63. ***A copy of said mortgage statement is enclosed for your reference.*** Adding further to the confusion, the History states that as of June 29, 2018, there was at least $16,425.71 in a suspense account for the Loan, which would be enough to satisfy roughly two (2) years' worth of monthly payments on the Loan. Moreover, as of July 3, 2018, the History provides that there was at least $35,108.59 in a suspense account for the Loan, which would be enough to satisfy roughly fifty-four (54) months' or roughly four and a half (4.5) years' worth of monthly payments on the Loan.

Notice of errors pursuant to 12 C.F.R. § 1024.35(b)(3) for failure to properly apply accepted payments to principal, interest, escrow or other charges under the terms of the mortgage loan and applicable law as of the date of receipt:

12 C.F.R. § 1024.35(b) provides, in relevant part: "For purposes of this section, the term "error" refers to the following categories of covered errors:[…](3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 CFR 1026.36(c)(1)."

12 C.F.R. § 1026.36(c)(1) provides that:

> (i) *Periodic payments.* No servicer shall fail to credit a periodic payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in paragraph (c)(1)(iii) of this section. A periodic payment, as used in this paragraph (c), is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle. A payment qualifies as a periodic payment even if it does not include amounts required to cover late fees, other fees, or non-escrow payments a servicer has advanced on a consumer's behalf.

As outlined, *supra*, as of July 3, 2018, at the same time Ocwen sought payment from the Borrowers in excess of Thirty Six Thousand Dollars ($36,000), Ocwen had in its possession funds from the Borrowers in the amount of at least $35,108.59 in a suspense account for the Loan. This amount would be enough to satisfy roughly fifty-four (54) months' worth of monthly payments on the Loan.

Effectively, Ocwen failed to credit a payment to the Borrowers' Loan account as of the date of receipt for fifty-four (54) months' worth of monthly payments.

As such, the Borrower alleges that Ocwen's actions, in failing to credit each of the aforementioned fifty-four (54) payments as of the date of receipt, constitute ***fifty-four (54) clear, distinct, and separate errors*** in the servicing of the Loan pursuant to 12 C.F.R. § 1024.35(b)(3), one (1) such error for each such payment Ocwen failed to properly apply.

Notice of error pursuant to 12 C.F.R. § 1024.35(b)(11) for improperly reversing payments under, and thereby unilaterally and materially breaching, the Loan:

12 C.F.R. § 1024.35(b) provides, in relevant part: "For purposes of this section, the term "error" refers to the following categories of covered errors:[…](11) Any other error relating to the servicing of a borrower's mortgage loan."

As outlined, *supra*, and via the enclosed History, on multiple occasions, including through multiple transactions on May 31, 2018, Ocwen would unilaterally and without notice reverse tens of payments previously applied to the Loan and then demand those same funds be paid by the Borrowers despite already being in possession of the funds for such. These actions constitute significant material breaches of the Loan and Ocwen took such actions on numerous occasions since the filing of the Bankruptcy Notice.

Ocwen's actions in unilaterally committing multiple material breaches of the Loan by reversing funds remitted for and in satisfaction of payment unilaterally and without notice despite the Borrowers' full performance through such time constitutes ***a severe, clear, distinct, and separate error*** in the servicing of the Loan pursuant to 12 C.F.R. § 1024.35(b)(11).

Notice of Error under 12 C.F.R. § 1024.35(b)(5) for imposition of fees or charges which the servicer lacks a reasonable basis to impose upon the Borrowers:

12 C.F.R. § 1024.35(b)(5) provides that it is an error for a servicer to impose a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower. Comment 2 of the Official Interpretations of the Consumer Financial Protection Bureau of 12 C.F.R. § 1024.35(b) provides that:

> For purposes of § 1024.35(b)(5), a servicer lacks a reasonable basis to impose fees that are not bona fide, such as:
>
> i. A late fee for a payment that was not late;
> ii. A charge imposed by a service provider for a service that was not actually rendered;
> iii. A default property management fee for borrowers that are not in a delinquency status that would justify the charge; or
> iv. A charge for force-placed insurance in a circumstance not permitted by § 1024.37.

Again, the Bankruptcy Notice stated the following:

1. "[BONY] agrees that the [Borrowers] have paid in full the amount required to cure the prepetition default on the creditor's claim"; and,
2. "[BONY] agrees that the [Borrowers] are current with all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs."

Since the Borrowers were current on any and all obligations on the Loan as of Ocwen's filing of the Bankruptcy Notice, there was no reasonable basis for Ocwen to impose or to seek payment of amounts for any fees or charges against the Loan outside of charges for principal, interest, and escrow from that point in time onward. Despite such, as outlined in the enclosed History, at various points following the submission of the Bankruptcy Notice and the Borrowers' discharge, Ocwen would impose fees and charges on the Loan related to default servicing, despite the Borrowers not being in default or only being in default due to Ocwen's material breach, *supra*, and would utilize funds paid by the Borrowers for payment of such fees.

For example, as contained on the enclosed History, on May 31, 2018, Ocwen imposed or paid for the following charges on Loan for which they had no reasonable basis to impose or charge for:

1. A $100.00 fee for "Property Valuation";
2. A $316.00 fee for "Title Search"; and,
3. Six (6) separate fees in the amount of $10.50, totaling $63.00, for "Property Inspection" fees.

Frankly, given the confusing state of the accounting on the enclosed History, it is difficult to ascertain just how many wrongful fees such as the ones outlined, *supra*, have been improperly imposed or paid for on the Loan since the Bankruptcy Notice and the Borrowers' discharge.

Regardless, each and every fee imposed, charged, or otherwise paid in regards to the Loan since the filing of the Bankruptcy Notice and the Borrowers' discharge is a *clear, distinct, and separate error* pursuant to 12 C.F.R. § 1024.35(b)(5).

Conclusion and Requested Actions:

In total, the Borrowers hereby assert that Ocwen committed ***an unknown number of signficant errors in excess of fifty-five (55) readily identifiable individual errors*** in regards to the Loan.

Please correct these errors as requested and provide us with notification of the correction, the date of the correction, and contact information for further assistance; or, after conducting a reasonable investigation, provide the Borrowers, **through our firm**, with a notification that includes a statement that you have determined that no such error occurred, a statement of the reason(s) for this determination, a statement of the Borrowers' right to request documents relied upon by the servicer in reaching its determination, information regarding how the Borrowers can request such documents, and contact information for further assistance.

In correcting the error, it is expected that, at a minimum, Ocwen will: (1) Immediately refund the or properly apply to the Loan any funds contained in any suspense account for the Loan in excess of the Borrowers' periodic payment obligation on the Loan; (2) immediately waive any fees, costs, or charges incurred against the Borrower or the Loan since the submission of the

Bankruptcy Notice and return any funds from the Borrowers that were utilized to pay for any such fees at any point following the submission of the Bankruptcy Notice; (3) provide ***significant compensation*** to the Borrowers to cover fees and costs incurred in drafting and sending this and other related correspondence; (4) abstain from reporting any adverse credit information during the timeframe in which these errors occurred; (5) immediately begin reporting the Borrowers as current on any and all of their obligations on the Loan since the submission of the Bankruptcy Notice to Credit Reporting Agencies, including TransUnion, Equifax, and Experian.

Best Regards,

Whitney E. Kaster, Esq.

Enclosure

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	**:**	
	:	**Case No.: 12-52662**
LORI GIVENS	**:**	
	:	**Chapter 13**
Debtor.	**:**	
	:	**Judge: CALDWELL**

DEBTOR'S MOTION FOR CONTEMPT AND SANCTIONS AGAINST FEDERAL NATIONAL MORTGAGE ASSOCIATION, BY AND THROUGH SETERUS, INC., FKA IBM LENDER BUSINESS PROCESS SERVICES, INC.

Now comes Debtor LORI GIVENS ("Debtor"), by and through her undersigned counsel, individually and on behalf of all others similarly situated, and pursuant to Fed. R. Bankr. P. 9014 and 9020, moves the Court to: (1) hold Federal National Mortgage Association, by and through its mortgage servicing agent Seterus, Inc., fka IBM Lender Business Process Services, Inc. (collectively, "Seterus") in contempt for willfully violating the permanent discharge injunction statutorily imposed under 11 U.S.C. § 524; and (2) sanction Seterus in an amount that includes actual damages, reasonable attorneys fees, and additional amounts that will deter Seterus from such misconduct in the future.

In support of this Motion, Debtor states the following based on her own knowledge, information, and belief, formed after inquiry reasonable under the circumstances:

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1334(b) and the general order of reference previously entered in this district.

2. This contested matter involves willful violations of the discharge injunction under 11 U.S.C. § 524. Thus, this matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

3. Venue is appropriate under 28 U.S.C. § 1409.

ALLEGATIONS CONCERNING DEBTOR'S BANKRUUPTCY

4. On March 29, 2012, Debtor filed a voluntary petition for Chapter 13 Bankruptcy with this Court (Doc. 1).

5. At the time Debtor filed her bankruptcy, she had a mortgage loan ("Mortgage Loan") on her principle residence, located at 693 Glenmoor Dr., Columbus, Ohio 43228, that was being serviced by Seterus, Inc. fka IBM Lender Business Process Services, Inc. ("Seterus") on behalf of Federal National Mortgage Association ("Fannie") (Seterus and Fannie hereinafter collectively, "Seterus").

6. Seterus, Inc. is registered with the Ohio Secretary of State as an active foreign corporation, and has appointed as its registered agent CT Corporation System, 1300 East Ninth Street, Cleveland, OH 44114.

7. Fannie was duly scheduled as a secured creditor, and received proper notice of Debtor's bankruptcy case.

8. On July 30, 2012, Fannie filed a proof of claim indicating a total arrearage of $965.84 and a total amount of secured claim of $70,522.15 (Claim No. 7-1).

9. Debtor's Chapter 13 Plan provided that Debtor would make regular monthly payments to the Chapter 13 Trustee (Frank M. Pees) who would in turn disburse regular contractual "conduit" payments to Seterus.

10. Debtor's Chapter 13 Plan was confirmed on May 29, 2012 (Doc. 18).

11. Debtor's confirmed Chapter 13 Plan was subsequently modified twice to increase Debtor's monthly payment amounts to the Trustee (Doc. 39 & 66).

12. During the course of Debtor's bankruptcy, and pursuant to the terms of her Plan as confirmed and subsequently modified, Debtor made her required monthly payments to the Chapter 13 Trustee, and successfully completed her plan in December 2015.

13. Debtor received a letter from the Office of the Chapter Trustee Frank M. Pees dated December 30, 2015 indicating that her Plan was nearing completion and instructing her to resume making her monthly mortgage payments, in the amount of $619.46, directly to Seterus, beginning in January 2016.[1]

14. On January 13, 2016, the Chapter 13 Trustee filed a Motion to Deem Mortgage Current (Doc. 107).

15. Also on January 13, 2016, the Chapter 13 Trustee filed a Notice of Final Cure Mortgage Payment (Doc. 108).

16. On February 2, 2016, Fannie, by and through Seterus, filed its Response to the Trustee's Notice of Final Cure Payment, indicating Fannie/Seterus' agreement that: (1) Debtor had fully paid the amount required to cure the mortgage loan default; (2) that Debtor was current with respect to all payments; and (3) that the loan was due for January 2016 (Doc. 109).

17. On February 4, 2016, Debtor received a Chapter 13 discharge (Doc. 112).

18. On February 12, 2016, the Court issued an Order Granting Trustee's Motion To Deem Mortgage Current ("Deem Current Order") (Doc. 116).

[1] The monthly payment amount indicated by the Trustee included a private mortgage insurance (PMI) component that was cancelled by Seterus in or around January 2016, so the actual monthly payment required by Seterus should be less.

19. The Deem Current Order declared that: (a) All pre-petition arrearage claims of Fannie had been paid in full through the confirmed Chapter 13 Plan; (b) All regular, post-petition mortgage payments had been timely made by the Trustee; (c) The mortgage obligation to Fannie was thereby deemed current as of the "final payment date" of December 2015; and (d) Fannie shall adjust its loan balance to reflect the balance delineated in the original amortization schedule as of December 2015, and any amounts in excess of that balance, including any alleged arrearages, costs, fees or interest were thereby discharged pursuant to 11 U.S.C. § 1328.
20. Debtor's bankruptcy case was closed on April 8, 2016.
21. Pursuant to the December 30, 2015 letter from the Chapter 13 Trustee, on January 15, 2016, Debtor contacted Seterus by phone to arrange her January 2016 payment.
22. At that time, the Seterus representative informed Debtor that there was a positive balance in her "unapplied funds" account that could be transferred to cover a portion of her January 2016 payment. Accordingly, the Seterus representative instructed Debtor to make payment in the amount of $254.89, and assured her that the "unapplied funds" amount would be added to sufficiently process a full payment for January 2016.
23. As instructed, Debtor then made her payment over the phone in the amount of $254.89.
24. Seterus never applied the payment as promised, and the $254.89 amount remained in unapplied funds.
25. Debtor then made every required monthly Mortgage Loan payment directly to Seterus from February 2016 through August 2016.

26. Despite Debtor's payments and the Deem Current Order, Seterus continued to misapply payments and wrongfully show the Mortgage Loan account as past due.
27. Further, Seterus sought to collect (and collected) certain amounts to cover a negative escrow balance Seterus wrongfully carried forward from the bankruptcy.
28. Debtor communicated with Seterus on multiple occasions over the course of several months requesting that Seterus follow the Deem Current Order and make the proper adjustments to bring the Mortgage Loan account current, but Seterus refused.
29. Also, The Chapter 13 Trustee's Office sent a letter to Seterus dated May 31, 2016 instructing Seterus that it had not properly updated its records pursuant to the Deem Current Order, enclosing a copy of the Order, and requesting that the account be properly adjusted. Seterus ignored the letter.
30. When Debtor called Seterus to make her May 2016 payment, the representative asked Debtor what her intentions were since Seterus was showing that she was behind on her payments. After Debtor attempted to convince the representative that her account should be showing as current, the representative stated, "you can expect to receive a notice of intent to foreclose within 7-10 days."
31. Following that phone conversation, On June 14, 2016, Seterus reversed three of Debtor's payments and generated a default notice threatening foreclosure.
32. Seterus then continued to wrongfully show the Debtor as behind on her payments.
33. Debtor exhausted all reasonable efforts to convince Seterus to properly follow the Court's order(s) and properly adjust her account as current.
34. Debtor then sought the assistance of the undersigned legal counsel.

35. On July 12, 2016, Debtor filed a Motion to Reopen her bankruptcy case so that she may be accorded relief from the Court (Doc. 121).

36. Seterus did not respond to Debtor's Motion to Reopen, however counsel for Seterus contacted counsel for Debtor and indicated Seterus was in the process of making adjustments to Debtor's account.

37. On August 10, 2016, the Court issued an Order Granting Debtor's Motion to Reopen (Doc. 122).

38. As of the date of this filing, Debtor remains unsure of the status of her account and has not received anything from Seterus indicating that the account has been properly adjusted.

ALLEGATIONS CONCERNING PUTATIVE CLASS

39. All statements in the preceding paragraphs are incorporated as if fully rewritten herein.

40. Debtor brings this Contempt Motion on behalf of herself, and on behalf of all other similarly situated persons ("Putative Class") who share with Debtor the following common characteristics: (1) A Chapter 13 bankruptcy was filed in the Southern District of Ohio; (2) Pursuant to a Chapter 13 Plan, regular monthly payments were made to the Chapter 13 Trustee, who in turn made regular contractual "conduit" mortgage payments to Seterus; (3) An Order to Deem Mortgage Current was entered by the Court and/or a Notice of Final Cure Payment was filed by the Trustee; (4) Within the past five (5) years, An Order Discharging Debtor(s) was entered by the Court; and (5) Seterus failed to timely adjust the mortgage loan balance to reflect the balance delineated in the original amortization schedule as of the final payment date,

and eliminate any amounts in excess of that balance, including any alleged arrearages, costs, fees or interest.

41. By way of a separate motion, Debtor will be asking the Court to exercise its discretion under Fed. R. Bankr. P. 9023 and apply Fed. R. Civ. P. 23(a) to this contested matter, so that Debtor may propose a class to be considered for certification.

42. Upon information and belief, Seterus is an active corporation that engages in nationwide mortgage debt acquisition and servicing.

43. Upon information and belief, Seterus systematically fails to timely and properly follow orders of the Court, and adjust mortgage loan accounts that have been deemed current, either by direct order, or by virtue of the notice of final cure payment process.

44. Upon further information and belief, Seterus regularly seeks monetary recoveries from Chapter 13 debtors of amounts on mortgage loans in excess of the balance delineated in the original amortization schedule as of the final payment date established in the debtors' bankruptcies, including arrearages, costs, fees and/or interest.

45. Upon further information and belief, by employing its practices as described *supra* ¶¶ 43-44, Seterus not only seeks, but successfully collects discharged mortgage loan amounts from debtors.

46. Upon further information and belief, Seterus will continue to employ its above-described business model unless and until it is sanctioned in a sufficiently large amount to deem such business model no longer profitable.

REQUEST FOR RELIEF

47. All statements in the preceding paragraphs are incorporated as if fully rewritten herein.

48. Regarding Debtor's bankruptcy case, Seterus received notice and therefore had actual knowledge of the orders of this Court, including the Confirmation Order, the Deem Current Order, and the Discharge.

49. Despite this knowledge, Seterus failed to timely comply with the Trustees Notice of Final Cure Payment and the Court's Deem Current Order, as well as other orders of the Court, including the Discharge Order and the Confirmation Order.

50. Seterus' above-described actions/inactions were deliberate in that its actions/inactions were intentional.

51. Seterus' above-described actions/inactions are willful violations of the permanent discharge injunction imposed under 11 U.S.C. § 524.

52. Seterus' violations of the discharge injunction are willful because Seterus had knowledge of Debtor's bankruptcy case, the Notice of Final Cure Payment, the corresponding orders of this Court, and Debtor's discharge, but deliberately ignored the Court's orders.

53. Seterus also ignored Debtor's multiple requests to review Seterus' administration of The Mortgage Loan Accounts and resolve the errors by properly complying with the Court's Deem Current Order and the Notice of Final Cure Payment.

54. Instead, Seterus repeatedly threatened that if Debtor did not pay certain discharged amounts, Seterus would initiate foreclosure proceedings.

55. Seterus has shown a complete and reckless disregard towards Debtor.

56. Seterus has shown a complete and reckless disregard toward the orders of this Court.

57. The actions/inactions of Seterus have cause material injury to Debtor, physically, emotionally, and monetarily, and have caused Plaintiff lost time, undue hardship, stress, and damage to her credit.

58. Seterus should be held in contempt and, pursuant to the Court's inherent powers under 11 U.S.C. § 105, sanctioned in an amount that includes punitive damages that will to deter Seterus from such misconduct in the future.

59. Further, Seterus' interactions with Debtor indicate a systemic problem within Seterus concerning how it processes Chapter 13 bankruptcy orders from the Court and administers mortgage loan accounts, both during the pendency of debtors' bankruptcy cases, and post-discharge.

60. Debtor therefore re-alleges ¶¶ 48-58 *supra* on behalf of each Putative Class member who is similarly situated to Debtor.

WHEREFORE, Debtor, individually and on behalf of all others similarly situated, seeks the following relief:

A. A finding that Seterus' acts/omissions as described herein constitute willful violations of the permanent discharge injunction imposed under 11 U.S.C. § 524 in the bankruptcy cases of Debtor and of the Putative Class members, such that citations of contempt are warranted under the circumstances and necessary to deter Seterus' continued misconduct in the future;

B. An order requiring Seterus to provide an accounting of every mortgage loan account serviced by Seterus and held by a debtor discharged within the past five (5) years in the Southern District of Ohio, and to properly adjust all noncompliant accounts;

C. A finding that a monetary sanction against Seterus is both warranted and required in order for Seterus to purge the contempt citations;

D. A civil judgment against Seterus in favor of Debtor and the Putative Class members, in an amount the Court deems appropriate;

E. A determination that the amount of the sanction and resulting judgment should at least include the following:

i. The costs of the class action;

ii. Reasonable attorney fees and expenses associated with counsel's prosecution of this matter;

iii. A fair and equitable amount this Court deems appropriate to compensate Debtor and each Putative Class member for actual damages resulting from the discharge injunction violations, including disgorgement of all discharged amounts collected by Seterus;

iv. An amount, payable to Debtor and each Class member, that the Court deems just and necessary to deter Seterus from continuing its illegal business practices in the future; and

v. Any other relief that this Court deems legally or equitably just under the circumstances.

Respectfully submitted,

NOBILE & THOMPSON CO., L.P.A.

/s/ Michael B. Zieg
Michael B. Zieg (0066386)
Eric E. Willison (0066795)
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Counsel for Debtor and Putative Class

Form 20A NOTICE

The Attorneys for the Debtor(s) has/have filed papers with this Court requesting the relief sought in the Motion enclosed with this NOTICE.

Your rights may be affected. You should read these papers carefully.

If you do not want the Court to GRANT the relief requested in the enclosed MOTION, or if you want the Court to consider your views on the MOTION, then on or before **twenty-one (21) days after the date of service in the preceding certificate**, you or your attorney must:

1. File with the Court, a written response to the MOTION expressing your objection or viewpoint. The response is to be filed with the Clerk of Courts at 170 N. High St., Columbus, Ohio 43215.

   If you mail your written response to the Court for filing by the Clerk, you must mail it early enough so the Court will **receive** it on or before the date stated above.

2. You must also mail a copy of the written response to **Nobile & Thompson Co., L.P.A. 4876 Cemetery Road Hilliard, Ohio 43026**

3. Finally, you must attend any Court hearing scheduled to consider the enclosed MOTION. The Court will likely schedule an oral hearing and serve only those parties who have in fact filed a written response.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the MOTION and may enter an order granting that relief.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 13, 2016, a true and accurate copy of the foregoing DEBTOR'S MOTION FOR CONTEMPT AND SANCTIONS AGAINST FEDERAL NATIONAL MORTGAGE ASSOCIATION, BY AND THROUGH SETERUS, INC., FKA IBM LENDER BUSINESS PROCESS SERVICES, INC. and FORM 20A was served:

- Via the Court's electronic filing system, upon all parties of record, including:
  The US Trustee
  The Chapter 13 Trustee
  David A. Lockshaw, Jr., Counsel for Seterus

- Via email upon further counsel for Seterus:
  Doran Yitzchaki

- By regular U.S. Mail, postage pre-paid, upon:

  Lori Givens
  693 Glenmoor Dr.
  Columbus, OH 43221

/s/ Michael B. Zieg
Michael B. Zieg (0066386)
Nobile & Thompson Co., LPA

IT IS SO ORDERED.

Charles M. Caldwell
United States Bankruptcy Judge

Dated: January 17, 2018

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	**Case No. 12-52662**
	:	
Lori Givens,	:	Chapter 13
	:	
Debtor.	:	Judge Caldwell

MEMORANDUM OPINION AND ORDER GRANTING DEBTOR LORI GIVENS' MOTION FOR CONTEMPT AND SANCTIONS AGAINST FEDERAL NATIONAL MORTGAGE ASSOCIATION AND SETERUS, INC. (DOC. NO. 128)

This Memorandum Opinion and Order serves as the Court's findings of fact and conclusions of law for a Motion for Contempt and Sanctions (Motion) filed by Lori Givens (Debtor). The targets include the mortgagee, Federal National Mortgage Association, and its servicer, Seterus, Inc. (Creditors). Debtor alleges that Creditors failed to obey an order deeming her mortgage as current, and as a result violated the Court's discharge injunction. On these bases, Debtor requests that the Court hold Creditors in contempt pursuant to United States Bankruptcy Code (Code) Sections 524(a)(2) and 105(a).

Upon review of the pleadings, evidence, and case law, the Court finds and concludes that Debtor has sustained her burden of proof to find Creditors in contempt, and that the Court may award damages in a separate proceeding. A brief history of the case and the bases for the Court's decision follow.

Debtor filed bankruptcy on March 29, 2012, and the Court confirmed her Chapter 13 Plan on May 29, 2012. The Plan as originally confirmed provided monthly conduit mortgage payments to Creditors ($569.00). Approximately three and a half years later, on December 30, 2015, the Chapter 13 Trustee (Trustee) sent Debtor a letter informing her that the Plan was near completion, and that she should resume personally making monthly mortgage payments of $619.46, starting January 2016. On January 13, 2016, the Trustee filed a Notice of Final Cure Payment (Cure Notice) stating Debtor paid all default amounts owed to Creditors.

Debtor called Creditors on or about January 15, 2016, to make her January 2016 payment as directed by the Trustee. Creditors informed her that there was a positive balance in the account, and that she only owed $254.89 for the month. Debtor then paid over the phone the instructed amount. However, from Creditor's payment records, it does not appear that there were appropriate adjustments to record Debtor's account as current.

Meanwhile, on February 2, 2016, Creditors responded to the Cure Notice in agreement. Debtor received her Chapter 13 discharge on February 4, 2016. Twelve days later on February 16, 2016, the Court entered, without any opposition from Creditors, an Order Granting Trustee's Motion to Deem Mortgage Current (Deem Current Order).

The Deem Current Order provides as follows:

(a) All pre-petition arrearage claims…have been paid in full through the confirmed Chapter 13 Plan;

(b) All regular, post-petition mortgage payments have been made by the Trustee through the Final Payment Date as filed in the motion, and that all such "conduit" payments are hereby deemed to have been made on a timely basis;

(c) The mortgage obligation …is hereby deemed current as of the Final Payment Date; and

(d) (Creditors) … shall adjust …(the) loan balance to reflect the balance delineated in the original amortization schedule as of the Final Payment Date. Any amounts in excess of that balance, including any alleged arrearages, costs, fees or interest are hereby discharged pursuant to 11 U.S.C. §1328. (emphasis supplied).

Debtor testified that she called Creditors to make a telephonic payment in the full amount for February 2016, and Creditors' account records reflect receipt on February 19, 2016. Debtor testified that in March 2016, however, Creditor called her at work to say the mortgage payments were late. After work, Debtor testified she called Creditors, and they told her payments were two months in arrears. Debtor explained the Court deemed her mortgage current, and Creditors responded that they would notate this information on her account. After that contact, Creditors' records show that the Debtor made full monthly payments on March 21, 2016, April 15, 2016, and May 13, 2016.

Debtor testified that she contacted the Trustee's office to obtain help having Creditors correct their records. As a result, on May 31, 2016, the Trustee wrote the Creditors stating:

> It has come to our attention that (Creditors have)…not updated their records pursuant to the Order Deeming Mortgage Current (Docket #116). Enclosed please find a copy of the Motion and the Order to assist in the updating of your records. Please feel free to contact our office or the debtor's counsel should you have any questions or need additional information. (emphasis supplied).

However, on June 1, 2016, Creditors issued a delinquency notice to Debtor stating "You are currently 31 days past due under the terms of your loan, but it is not too late to work together to find a solution". The offered solutions included refinance or loan modifications, and Creditors encouraged Debtor to provide updated financial information, as required in an enclosed "Borrower Response Package". As a result, Debtor testified that she called Creditors to explain that her mortgage was current, but Creditors responded that they would send a foreclosure notice in seven to ten days.

Subsequently, Creditors issued a default letter on June 14, 2016, for $1,263.43 due by July 19, 2016. In addition, it appears from Creditors' records that on the same date, they reversed the application of three full payments. The June 14, 2016, default letter went on to state in relevant part:

> If full payment of the default amount is not received by us in the form of a certified check, cashier's check, or money order on or before July 19, 2016, we will accelerate the maturity date of your loan and upon such acceleration the ENTIRE balance of the loan, including principal, accrued interest, and all other sums due thereunder, shall, at once and without further notice, become immediately due and payable…Failure to cure the default on or before July 19, 2016 may result in acceleration of the sums secured by the mortgage and may result in the sale of the premises…". (emphasis supplied).

Even with this information, the Debtor testified she continued to make full monthly payments from June 2016 until September 2016 when Creditor blocked her account access. As a result, Debtor started making payments in the form of electronic transfers from her back account to Creditors. In response to Debtor's testimony, a representative of the Creditor, Enan Del Rio, testified that former bankruptcy counsel erred by not including an escrow shortage in their response to the Trustee's Cure Notice, discussed above. Further, Mr. Del Rio testified Creditors corrected their records by July 2016. This action brought Debtor's mortgage current as of August 1, 2016.

Upon Debtor's motion, the Court reopened this bankruptcy case on August 10, 2016, and Debtor filed the present contempt motion on September 13, 2016. Despite the corrective actions taken by Creditors, the Debtor credibly testified that the collection activities created tremendous stress, and even caused her children to fear losing their home. This of course is in addition to Debtor's time and effort responding to Creditors' actions, contacting the Trustee, and finally consulting attorneys.

The Court now turns to the legal significance and consequences of the preceding events, beginning with the alleged violation of the discharge injunction. Code Section 542(a)(2) provides:

> (a) A discharge in a case under this title—
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

A discharge injunction under Code Section 524(a)(2) operates to prohibit a creditor from proscribed debt collection activity in lieu of the automatic stay, which ceases upon the entry of a discharge. *Kilbourne v.CitiMortgage, Inc.* (*In re Kilbourne)*, 555 B.R. 628, 632 (Bankr. S.D. Ohio 2015). Unlike a violation of the automatic stay (11 U.S.C. §362(k)(1)), there is no specific statutory means of enforcement. Id. Instead, bankruptcy courts address discharge violations through their comprehensive equitable powers (11 U.S.C. §105(a)), and treat them as actions taken in contempt of their orders, possibly leading to sanctions. Id.

To prevail, movant must prove by clear and convincing evidence that the respondent knowingly violated a clear and specific court order, without regard to willfulness or intent. *Liberte Capital Group, LLC, et al. v. Capwill, et al.*, 462 F.3d 543, 550-551 (6th Cir. 2006); *Edmondson v. Gordon, II (In re Gordon)*, 2017 WL 2197799 at *5 (6th Cir. BAP May 18, 2017); *Burton v. Mouser, et al., (In re Burton)*, 2010 WL996537 at *3 (Bankr. W.D. Ky. March 16, 2010). Where

there is a knowing violation, the offending party may avoid sanctions by prompt reversal of the actions, including the return of any funds. *In re Franks,* 363 B.R. 839, 843 (Bankr. N.D. Oh. 2006).

In our case, Creditors knew that Debtor completed all plan payments, as documented by the Trustee, and knew that the Court, by entry of an order, deemed her mortgage current. Rather than immediately adjusting their records, Creditors were persistent in their pursuit of an arrearage. The fact that their former counsel failed to transmit accurate information to the Trustee does not absolve Creditors from responsibility for their actions. While Creditors finally corrected their errors, it required approximately seven months (January to July 2016).

During this period, Creditors received calls and correspondence from the Debtor, her counsel, and the Trustee, all to obtain compliance with this Court's order. Further, in this period Creditors sent collection correspondence, and promised to foreclose if not paid. For these reasons, **THE COURT FINDS CREDITORS IN CONTEMPT** for violating the discharge injunction, and concludes that it will impose appropriate sanctions in a separate damages proceeding, as detailed below.

Regarding damages, Creditors and Debtor disagree whether an award may cover emotional distress. As the parties recognize, there is no controlling precedent in the Sixth Circuit. As such, this Court concludes damages may encompass emotional distress in cases of protracted and aggressive misbehavior. *In re Perviz*, 302 B.R. 357, 371 (Bankr. N.D. Ohio 2003). Consumer debtors are not institutions capable of summoning a mass of attorneys to interpret and shield them from threatened legal action. Rather, they emerge after years of faithfully making monthly payments, with the well-earned expectation that creditors will respect this achievement by acting in a timely manner to honor related court orders. Whether Creditors' actions rise to the requisite

level, is for another day. To avoid further litigation expense, however, the parties should consider an amicable resolution of the damages question.

The Court **GRANTS** Debtor leave to file an itemized damages statement within thirty (30) days of the entry of this Order. Creditors will have thirty (30) days to respond. Upon review, the Court will set a separate damages hearing.

IT IS SO ORDERED.

Copies to:

Default List
Michelle Rahwan, Courtroom Deputy

Rule 3002.1

Deja Vu All Over Again…

NACBA Conference * May 4, 2017

Michelle Kainen, Kainen Law Office, PC
Sarah Mancini, National Consumer Law Center

Mortgage Cure Issues: What Should Happen ?

- In a perfect world, mortgage creditor should…
  - Timely file accurate proof of claim for prepetition arrearage
  - Properly calculate postpetition PITI payment
  - Apply payments in accordance with confirmed plan
  - Conduct annual escrow account analysis that reflects payments made under confirmed plan
  - Send accurate payment change notices, with attachments for RESPA escrow account statement or TILA rate change notice
  - Timely file accurate response to notice of final cure
  - Conduct a case closing audit

2

Application of Payments

- *Rake v. Wade*, 508 U.S. 464, 473 (1993) ("As authorized by § 1322(b)(5), the plans essentially split each of respondent's secured claims into two separate claims-the underlying debt and the arrearages.")
- Once plan is confirmed, postpetition "maintenance" payments should be applied in accordance with original loan amortization as if no prepetition default exists
- Payments on arrearages are paid separately, disbursed by the trustee, and should be applied only to arrearages
- *In re* Ogden, 2016 WL 1077355 (D. Colo. Mar. 18, 2016) (affirming actual and punitive damages award against servicer, noting that servicer maintained two sets of books in accounting for debtor's postpetition mortgage payments, which caused the debtor to be treated as not "contractually current").

3

Application of Payments

Fannie Mae Servicing Guide - Servicer must:

- Monitor and separately account for all prepetition and postpetition payments
- Maintain several sets of records during the term of the reorganization plan:
  - one that reflects application of the payments under the terms of the reorganization plan,
  - one that reflects application of the payments under the original terms of the mortgage loan, and
  - one that reflects application of any scheduled interest that must be remitted to Fannie Mae if the mortgage loan has a scheduled/actual remittance type

4

Rule 3002.1 Amendments

Amendments effective Dec. 1, 2016 seek to clarify three matters:

(1) rule applies whenever plan provides for payment of ongoing mortgage payments, regardless of whether a prepetition default is being cured;

(2) rule applies regardless of whether it is the debtor or the trustee who makes the mortgage payments; and

(3) unless court orders otherwise, rule ceases to apply when an order granting relief from the stay becomes effective with respect to debtor's residence

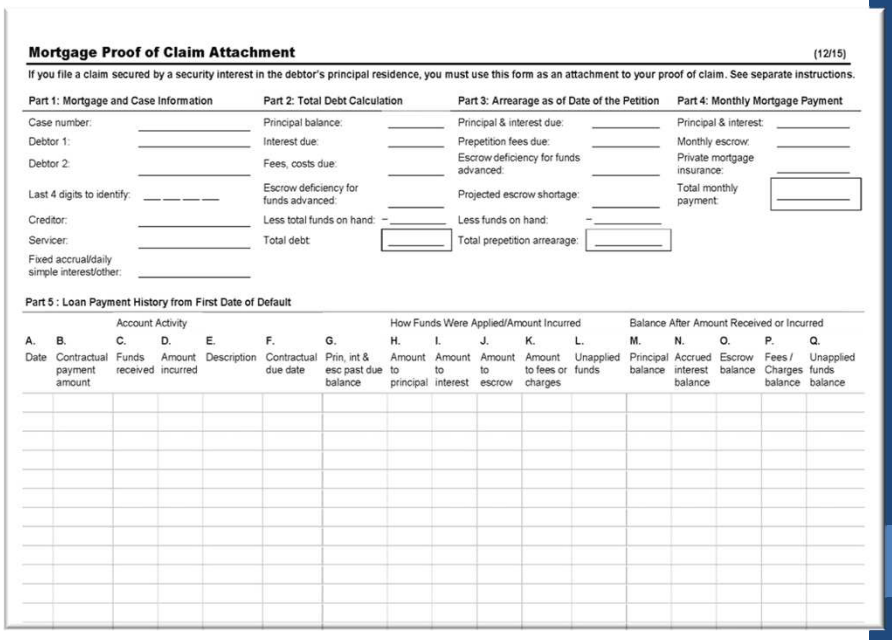
Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

The Initial Claim

- Rule 3001(c)(2) - For security interest in debtor's principal residence:
  - Proof of Claim - Official Form 410
  - Attachment A, Official Form 410A , with escrow statement prepared as of petition date
- For claims filed on or after December 1, 2015, itemization of prepetition arrearage is provided as part of a loan payment history

7



Mortgage Proof of Claim Attachment (12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:		Principal balance:		Principal & interest due:		Principal & interest:	
Debtor 1:		Interest due:		Prepetition fees due:		Monthly escrow:	
Debtor 2:		Fees, costs due:		Escrow deficiency for funds advanced:		Private mortgage insurance:	
Last 4 digits to identify:	__ __ __ __	Escrow deficiency for funds advanced:		Projected escrow shortage:		Total monthly payment:	
Creditor:		Less total funds on hand:	–	Less funds on hand:	–		
Servicer:		Total debt:		Total prepetition arrearage:			
Fixed accrual/daily simple interest/other:							

Part 5 : Loan Payment History from First Date of Default

		Account Activity						How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A. Date	B. Contractual payment amount	C. Funds received	D. Amount incurred	E. Description	F. Contractual due date	G. Prin, int & esc past due balance	H. Amount to principal	I. Amount to interest	J. Amount to escrow	K. Amount to fees or charges	L. Unapplied funds	M. Principal balance	N. Accrued interest balance	O. Escrow balance	P. Fees / Charges balance	Q. Unapplied funds balance

8

Form 410A – Escrow Amounts

Part 2

Escrow deficiency for funds advanced

Part 2: Total Debt Calculation	
Principal balance:	
Interest due:	
Fees, costs due:	
Escrow deficiency for funds advanced:	
Less total funds on hand:	–
Total debt:	

- Amount of any prepetition payments for taxes and insurance servicer made out of its own funds and for which it has not been reimbursed

9

Form 410A – Escrow Amounts

Part 3

Projected escrow shortage

Part 3: Arrearage as of Date of the Petition	
Principal & interest due:	
Prepetition fees due:	
Escrow deficiency for funds advanced:	
Projected escrow shortage:	
Less funds on hand:	–
Total prepetition arrearage:	

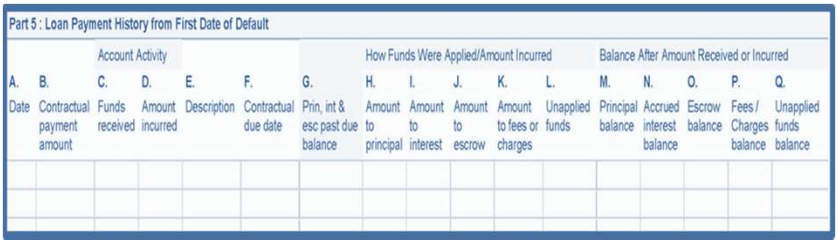
Instructions for Official Form 410A state:

"The projected escrow shortage is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held. The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O."

10

Form 410A – Loan History

- Part 5 - Loan Payment History from First Date of Default



Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

11

Form 410A – Loan History

- Loan history must start with the first date of default
- Instructions for Official Form 410A state:
  - "The first date of default is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable."

12

Payment Change Notices

- Notice of payment change must be filed and served **21 days** prior to change – Rule 3002.1(b)
  - Official Form 410S-1, Supplement 1
- If change based on escrow account or adjustable rate mortgage, mortgage creditor must attach to Supplement 1 an escrow account statement or rate change notice prepared in form consistent with RESPA and TILA
- Pay attention to escrow change at first year anniversary!
  - Is the "present payment" shown on the first change statement the same as the "new payment" on statement filed on petition date?

13

Notice of Fees, Expenses or Charges

- Notice of fees imposed during the chapter 13 case, no later than **180 days** after fees incurred – Fed. R. Bankr. P. 3002.1(c)
  - Official Form 410S-2, Supplement 2
- Notice must be sent no later than 180 days after fees **incurred**
  - Date fees, expenses and charges are "incurred" under Rule 3002.1(c) is the date the service is performed, not the date the servicer was invoiced by the third-party service provider
  - *In re Raygoza*, 556 B.R. 813(Bankr. S.D. Tex. 2016)

14

Notice of Fees, Expenses or Charges

- What if fee is "tracked" but not noticed, and case later dismissed?
  - *In re Owens*, 2014 WL 184781 (Bankr. W.D.N.C. Jan. 15, 2014)
- What if fee is "waived" and not noticed, but keeps reappearing?
  - *In re Gravel*, 556 B.R. 561 (Bankr. D. Vt. 2016)

15

Notice of Final Cure

- Notice of final cure filed by trustee no later than **30 days** after plan completion – Rule 3002.1(f)
- If trustee does not file notice and debtor believes all cure and plan payments have been made, debtor may file notice
- Notice informs mortgage creditor of obligation to file response
- Although there is no Official Form for the Notice of Final Cure Payment, an optional Director's Form (Form 4100N) may be used by trustees or the debtor

16

Response by Mortgage Creditor

- Within **21 days** after service of cure notice, mortgage creditor must file a response - Rule 3002.1(g)
- Response must state:
  - whether creditor agrees that debtor has paid in full amount required to cure
  - whether debtor is otherwise current on all postpetition payments consistent with § 1322(b)(5)
  - any cure or postpetition amounts, separately itemized, that the creditor claims are due as of the response date
- Director's Form 4100R, Response to Notice of Final Cure Payment, may be used by creditor

17

Dispute Procedure

- On motion filed by debtor or trustee within 21 days after statement, court shall determine if debtor has cured default and paid all required postpetition amounts – Rule 3002.1(h)
- If mortgage creditor does not file response, debtor should file motion seeking order that debtor has cured default and paid all amounts
- *In re Bodrick*, 498 B.R. 793 (Bankr. N.D. Ohio 2013) – court rejected creditor argument that rule provides the exclusive procedure for a court determination or that debtor is estopped from seeking a determination in an adversary proceeding filed after the twenty-one day period expired

18

Case "Closing Audit"

- Goodin v. Bank of Am., N.A., 114 F. Supp. 3d 1197, 1202 (M.D. Fla. 2015) - trial testimony was that "bankruptcy department members are trained to perform this eight-step closing audit upon a customer's discharge from bankruptcy:
  - (1) review all disbursements from the bankruptcy trustee to ensure they were received and applied;
  - (2) review the proof of claim;
  - (3) review the manner in which Bank of America applied funds;
  - (4) review escrowed amounts;
  - (5) review fees charged to see if they are still owed or should be reclassified post-discharge;
  - (6) identify missing payments or outstanding balances to determine why they are outstanding;
  - (7) follow up on requests for additional documentation or action; and
  - (8) reconcile all payments and fees."

19

Possible Claims

Possible claims if creditor treats loan in default post-bankruptcy after final cure order:

- Rule 3002.1(i) sanctions
- Section 105 sanctions (and court's inherent powers)
- Contempt of confirmation order
- Section 524(i) violation
- FDCPA or state debt collection statute violation
- FCRA violation
- TILA prompt crediting rule violation
- RESPA notice of error violation
- State UDAP statute violation
- Breach of implied covenant of good faith and fair dealing

20

Sanction - Rules 3001(c)(2)(D) and 3002.1(i)

If the holder of a claim fails to provide any information required by [Rule 3001(c) and Rule 3002.1(b), (c), or (g)], the court may, after notice and hearing, take either or both of the following actions:

1) preclude the holder from presenting the omitted information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless, or

2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

21

Remedy after Case Closed

- Committee Note to Rule 3002.1(i):

  "If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i)."

22

Other Appropriate Relief

- *In re Gravel*, 556 B.R. 561 (Bankr. D. Vt. 2016)
  - $375,000 in sanctions under Rule 3002.1(i) and § 105 awarded to nonprofit legal services entity
  - "Court deliberately levies this substantial penalty on PHH to convey a clear message to PHH, and other mortgage creditors, that they may not violate court orders with impunity and will suffer significant monetary sanctions if they conduct their mortgage accounting operations in a manner that fails to fully comply with Rule 3002.1, violates court orders, or threatens the fresh start of Chapter 13 debtors."

23

Contempt

- Contempt – willful disregard for the court's authority
  - Direct contempt – committed in the presence of the court
  - Indirect contempt – actions occurring out of the court's presence, which tend to obstruct or defeat the administration of justice.
- Civil contempt – a party's failure to do something ordered by the court, for the benefit of another party to the proceeding.
- Criminal contempt – an act directed against the dignity of the court.
- Whether contempt is criminal or civil is determined by the purpose and nature of the sanction, not on the label affixed to it by the court. *In re Kave,* 760 F.2d 343, 351 (1st Cir. 1985).

24

Civil Contempt

- Designed to coerce compliance
- Contemnor may purge the contempt to avoid the sanction. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)
- May be crafted to compensate an injured party
- Not crafted to punish for past behavior. *In re Grand Jury Proceedings*, 744 F.3d 211, 214 (1st Cir. 2014)

25

Criminal Contempt

- Designed to punish. *United States v. Henry*, 519 F.3d 68, 72-73 (1st Cir. 2008)
- Unconditional fine or imprisonment (no provision for contemnor to purge)
- Contemnor must be afforded due process
  - Notice which states the essential facts
  - Trial
  - Time to prepare a defense
  - Right to counsel
  - Court may summarily punish for direct criminal contempt
  - Federal Rule of Criminal Procedure 42
- Bankruptcy courts do not have authority to hold someone in criminal contempt unless the act occurs in the presence of the court. *Matter of Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990).

26

Sanctions

- Pursuant to rule or statute
- Contempt powers
- Court's inherent authority. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

27

Inherent-Power Sanctions

- Bankruptcy courts have the inherent power that exists within Article III courts to impose sanctions. *In re Rainbow Magazine*, 77 F.3d 278, 284 (9th Cir. 1996).
- Bad-faith analysis not required unless court is employing its inherent powers to impose attorneys fees. *In re Charbono*, 790 F.3d 80, 88 (1st Cir. 2015)

28

Section 524(i)

- Willful failure of creditor to credit payments in the manner required by the plan is violation of injunction under section 524(a)
- *In re Scott*, 2015 WL 9986691 (Bankr. N.D. Okla. July 28, 2015)
  - after debtors received a discharge and trustee filed a Rule 3002.1(f) notice stating that debtors were postpetition current, creditor violated § 524(i) by sending statements to debtors alleging they were delinquent and that late fees were owed from period while chapter 13 case was pending
  - court noted that "[t]he suggestion that a sophisticated lender does not have the ability to properly track and apply payments on a secured loan is incredible"
  - court found creditor acted willfully - "the test for willfulness is simple and rather undemanding: did the creditor intend to credit the payments received in the manner in which it did? For purposes of § 524(i), willfulness does not require a finding of evil intent"

29

FDCPA and State Debt Collection Laws

- Check if servicer or other potential defendants are collectors under the statute
  - *Sokoloski v. PNC Mortg*., 2014 WL 6473810 (E.D. Cal. Nov 18, 2014) (denying motion to dismiss debtors' UDAP and debt collection statute claims against servicer who initiated a postbankruptcy foreclosure proceeding after failing to file a response pursuant to Rule 3002.1(g) to the final cure notice)
  - *In re Trevino*, 535 B.R. 110 (Bankr. S.D. Tex. 2015) (Rule 3002.1 does not preclude relief under the FDCPA because the Bankruptcy Code and the FDCPA are not in conflict; however, Texas state debt collection statute was preempted by the Code)
  - *Goodin v. Bank of Am., N.A*., 114 F. Supp. 3d 1197, 1206 (M.D. Fla. 2015) (statements sent to debtors after final cure and case closing that misstated the loan balance, falsely represented the amount of the debt and as being in collection, and sought allegedly overdue payments, violated the FDCPA)

30

Fair Credit Reporting Act

- *May v. Nationstar Mortgage, LLC*, 2014 WL 6607191 (E.D. Mo. Nov. 19, 2014) (motion to dismiss) and 2015 WL 9185408, (E.D. Mo. Dec. 17, 2015) ($500,000 jury award on invasion of privacy and negligent violation of FCRA claims)
- Jury was instructed to return a verdict for plaintiff if:
  - she disputed the completeness or accuracy of information Nationstar reported to a CRA, and
  - upon receiving notice of the dispute, Nationstar failed to comply with its duties
- Evidence before jury was that Nationstar "consistently failed to correct its records on Plaintiff's mortgage; repeatedly disregarded Plaintiff's many efforts to correct the records, including ignoring its own documents showing Plaintiff to be right; and, up to six months before trial, steadfastly persisted in treating Plaintiff's account as being in arrears."

31

Can Servicer Fix Problem by Amending the Claim?

- *In re Mason*, 520 B.R. 508 (Bankr. S.D. Miss. 2014) (permitting creditor to amend proof of claim to add $12,608 to prepetition arrearage, after response to final cure was filed, would be unfairly prejudicial)
- *In re Alonso*, 525 B.R. 195 (Bankr. D.P.R. 2015) (disallowing amended proof of claim, filed three months before debtor's completion of plan payments, that sought additional prepetition arrearage amount)
- *In re Galindez*, 514 B.R. 79 (Bankr. D. Puerto Rico 2014) (creditor who did not object to notice of final cure may not use amended proof of claim seeking higher arrearage amount to collaterally attack final plan confirmation order)

32

Notice of Final Cure: a Double-Edged Sword

- Recent trend of chapter 13 Trustees seeking denial of discharge for failure to maintain post-petition mortgage payments
- *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. June 9, 2015); *In re Formaneck*, 534 B.R. 29 (Bankr. D. Colo. July 13, 2015); *In re Cherry*, 10-25318 TBM (Bky. D. Colo. Jan. 19, 2016) (granting time to cure default); *In re Payer*, 2016 WL 5390116 (May 5, 2016) (granting time to cure default); *In re Diggins,* 561 B.R. 782 (Bankr. D. Colo. Dec. 20, 2016) (loan modification satisfied "all payments" requirement).
- *In re Foster*, 670 F.2d 478 (5th Cir.1982)
- *In re Perez*, 339 B.R. 385, 390 n. 4 (Bankr. S.D. Tex. 2006); *In re Kessler*, 2015 WL 4726794 (Bankr. N.D.Tex. June 9, 2015); *In re Hankins*, 62 B.R. 831, 835 (Bankr. W.D.Va.1986); *In re Russell*, 458 B.R. 731, 739 (Bankr. E.D.Va.2010).

33

Questions?

34

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TRACI ST. CLAIRE Plaintiff, v. DITECH FINANCIAL, LLC, formerly known as GREEN TREE SERVICING, LLC, Defendant.	:	CIVIL ACTION NO. 1:17-cv-3370-AT-JFK

ORDER

This matter filed pursuant to the Homeowner's Protection Act, 12 U.S.C. § 4901, *et seq.*, and the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.*, is before the Court on the Magistrate Judge's Report and Recommendation [Doc. 24] ("R&R") that Defendant's Motion to Dismiss [Doc. 10] should be granted in part and denied in part. For the following reasons, the Court **ADOPTS IN PART** and **DECLINES TO ADOPT IN PART** the R&R.

I. STANDARD

Under 28 U.S.C. § 636(b)(1), the Court reviews the Magistrate Judge's R&R for clear error if no objections are filed to the report. 28 U.S.C. § 636(b)(1). If a party files objections, however, the district court must determine de novo any part of the Magistrate Judge's disposition that is the subject of a proper objection. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b). As Plaintiff filed timely objections to the

Magistrate Judge's R&R, the Court reviews the findings and recommendations contained therein on a de novo basis.

Neither party filed objections to the portions of the R&R denying Defendant's Motion to Dismiss Count I of Plaintiff's Complaint under the Homeowner's Protection Act and denying in part Defendant's Motion to Dismiss select portions of Count II under the Real Estate Settlement Procedures Act. The Court **ADOPTS** those portions of the R&R to which there are no objections, with the exception of the portion of the R&R discussed in footnote 4 *infra*. As explained below, the Court disagrees with several significant parts of the R&R's reasoning and findings, and therefore **DECLINES TO ADOPT** those portions.

II. SUMMARY FACTUAL BACKGROUND[1]

Plaintiff refinanced her home in 2007 with a fixed rate mortgage. The terms of the mortgage loan required Plaintiff to pay for Private Mortgage Insurance ("PMI"). The PMI disclosure document provided to Plaintiff at the real estate settlement closing listed the automatic termination date for PMI as June 1, 2016 (the date on which the remaining unpaid principal balance was scheduled to automatically fall below 78% of the original value of the loan).

In May 2010, Plaintiff modified the terms of her loan to an adjustable rate loan under the Home Affordable Modification Program ("HAMP"). Under the

[1] The following summary of facts is taken from Plaintiff's Complaint, the documents attached thereto, and the documents attached to Defendant's Motion to Dismiss as no party disputes their authenticity or centrality to Plaintiff's allegations. These facts are construed in the light most favorable to Plaintiff but do not represent actual findings of fact.

modified terms and conditions, the automatic termination for PMI was modified to be determined by an amortization schedule in effect at the time of the loan modification.

In July 2013, Defendant purchased the servicing rights of Plaintiff's loan. On December 30, 2013, Defendant provided Plaintiff with an amortization schedule showing that the principal balance of Plaintiff's mortgage was scheduled to fall below the 78% threshold with the September 1, 2015 payment.

On April 1, 2015, the interest rate on the loan increased from 3.75% to 4.75%, thus creating a new amortization schedule. Pursuant to the new terms and conditions of the loan, the automatic termination date for Plaintiff's PMI changed to October 1, 2015. Despite the automatic termination date, Defendant continued to collect PMI premiums through May 1, 2016.

In connection with her HAMP loan modification, Plaintiff was eligible for a "Pay for Performance" Incentive, including a $5,000 principal reduction[2] in her mortgage and the option to recast (or re-amortize) her mortgage based on the reduced balance to lower her monthly mortgage payments for the remainder of the loan. Fannie Mae requires servicing companies like Defendant to provide written notice of the option to re-amortize the unpaid principal balance of the loan at least 60 days (but no more than 120 days) prior to the sixth anniversary of the Fannie Mae HAMP modification effective date.

[2] As part of the "Pay for Performance" Incentive, Plaintiff received additional principal reduction payments each year for five years totaling another $5,000. On February 3, 2016, Plaintiff received the sixth and final incentive payment.

Plaintiff's HAMP Trial Period Plan[3] effective date was January 1, 2010 and the HAMP modification effective date was May 1, 2010. Plaintiff's sixth anniversary of her Fannie Mae HAMP modification effective date was May 1, 2016. According to Plaintiff, Defendant was therefore required to provide Plaintiff with her Recast Letter between January 2, 2016 and March 2, 2016.

Plaintiff received a letter dated March 30, 2016 from Defendant Ditech wherein Ditech offered Plaintiff the opportunity to "recast" her unpaid principal balance over the remaining term of the loan (Plaintiff's "Recast Letter").

III. PLAINTIFF'S CORRESPONDENCE WITH DITECH

Plaintiff's claims against Ditech under the Real Estate Settlement Procedures Act ("RESPA") stem from Ditech's alleged insufficient responses to four letters Plaintiff wrote to Ditech in 2016 complaining of errors and requesting information related to her mortgage loan (referred to as "Plaintiff's Notices of Error" and "Requests for Information").

On June 16, 2016, Plaintiff wrote a letter to Ditech requesting a written explanation of several issues related to her mortgage loan and the timing of the March 30, 2016 Recast Letter. Ditech responded on July 21, 2016.

On August 10, 2016, Plaintiff wrote a letter to Ditech regarding the cancellation of PMI in connection with her mortgage loan. Plaintiff complained

[3] Borrowers eligible for HAMP loan modifications are generally placed on a monthly trial plan to allow the borrowers to demonstrate their ability to make timely payments at the new monthly payment level. If borrowers successfully make all required payments during the trial period, the mortgage company will execute an official modification agreement. This is referred to as the HAMP Trial Period Plan.

about Ditech's alleged failure to timely cancel PMI in accordance with the terms of her loan and requested additional information regarding the calculation of the unearned premium refund check sent to her in the amount of $26.71. Ditech responded on October 10, 2016,

On October 20, 2016, Plaintiff wrote a letter to Ditech complaining about Ditech's alleged improper servicing of her loan, including an (1) error regarding Plaintiff's HAMP Trial Period effective date – the applicable date for the payment of the $5,000 principal balance reduction incentive payment, and (2) an error in the amounts reflected in a Re-Amortization Agreement regarding the principal mortgage balance and the amount of her new monthly payments. Ditech responded on November 9, 2016.

Finally, on November 8, 2016, Plaintiff wrote a letter to Ditech requesting the Fannie Mae Servicing Guidelines Ditech relied on as justification for its delay in processing Plaintiff's acceptance of the re-amortization offer on her Fannie Mae mortgage loan (previously modified under HAMP) by claiming that additional approval was required from Fannie Mae to process her Re-Amortization Agreement. Plaintiff also requested that Ditech provide transcripts and actual recordings of all telephone conversations between Plaintiff and Defendant's employees. Ditech responded on December 19, 2016.

Plaintiff alleges that Defendant violated RESPA by failing to properly and adequately respond to each of her Notices of Error and Requests for Information.

IV. PLAINTIFF'S OBJECTIONS

Plaintiff objects to the R&R's recommendation that the Court should dismiss several aspects of Plaintiff's RESPA claim relating to the adequacy of Defendant's responses to Plaintiff's Notices of Error and Requests for Information. Plaintiff's Objections fall into two basic categories. First, Plaintiff objects to the R&R's conclusion that Plaintiff seeks to use RESPA to assert claims based on HAMP. Second, Plaintiff objects to the R&R's conclusions that Plaintiff failed to state a claim based on violations of RESPA, finding that Ditech complied with RESPA by providing proper responses to Plaintiff's written complaints and requests.

A. RESPA and Regulation X

For the most part, the Court adopts the R&R's summary of the legal principles applicable to a claim under RESPA.

RESPA is "a consumer protection statute that regulates the real estate settlement process." *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006) (citing 12 U.S.C. § 2601(a)). Because RESPA is a "remedial consumer-protection statute, [it] should be construed liberally in order to best serve Congress's intent." *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1244 (11th Cir. 2016). The Consumer Financial Protection Bureau ("CFPB") is tasked with rulemaking authority under RESPA and has issued mortgage servicing regulations to implement RESPA's statutory provisions. 12 C.F.R. § 1024.1; *e.g.*, *Lage v. Ocwen Loan Servicing LLC*, 145 F. Supp. 3d 1172, 1182 (S.D. Fla. 2015),

aff'd, 839 F.3d 1003 (11th Cir. 2016) (citing 12 U.S.C. § 2617(a)). "These rules are codified at 12 C.F.R. pt. 1024 and collectively known as 'Regulation X.'" *Joussett v. Bank of America, N.A.*, 2016 WL 5848845, at *1 (E.D. Pa. Oct. 6, 2016). In 2013, the CFPB amended Regulation X to implement new rules governing mortgage servicing that went into effect January 2014. The new rules addressed servicers' obligations to "provide information about mortgage loss mitigation options to delinquent borrowers," among other things. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696 (Feb. 14, 2013).

RESPA – as implemented by Regulation X – allows borrowers to notify mortgage servicers of possible account errors and make requests for information relating to the servicing of a mortgage loan via "qualified written requests." *See Nunez v. J.P. Morgan Chase Bank, N.A.*, 648 F. App'x 905, 907 (11th Cir. 2016); *see also* 12 U.S.C. § 2605(e); 12 C.F.R. § 1024.35(a) & (b). A qualified written request (or QWR) may come in the form of a Notice of Error or a Request for Information. *See* 12 U.S.C. § 2605(e)(1)(B)(ii) (providing that a "qualified written request" is written correspondence that "includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower"); 12 C.F.R. § 1024.35(a) ("A qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error for purposes of this section, and a servicer must comply with all requirements

applicable to a notice of error with respect to such qualified written request."); 12 C.F.R. § 1024.36(a) ("A qualified written request that requests information relating to the servicing of the mortgage loan is a request for information for purposes of this section, and a servicer must comply with all requirements applicable to a request for information with respect to such qualified written request.").

A servicer[4] of a federally related mortgage loan must respond to a Notice of Error ("NOE") by either:

> (A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or
>
> (B) Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

12 C.F.R. § 1024.35(e)(1)(i). Servicers must provide the borrower with copies of documents and information relied upon by the servicer in making its determination that no error occurred unless the documents relied upon constitute confidential, proprietary or privileged information. *Id.* § 1024.3(e)(4). Similarly, a servicer must respond within 30 days to a borrower's request for

[4] RESPA defines "servicer" as "the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan)," 12 U.S.C. § 2605(i)(2).

information either by (1) "[p]roviding the borrower with the requested information and contact information, including a telephone number, for further assistance in writing," or (2) "[c]onducting a reasonable search for the requested information and providing the borrower with a written notification that states that the servicer has determined that the requested information is not available." *Id.* § 1024.36(d).

"RESPA requires mortgage servicers like [Ditech] to ***reasonably*** respond to Notices of Error." *Renfroe*, 822 F.3d at 1244 (emphasis added). "Basically, a servicer must respond by fixing the error, crediting the borrower's account, and notifying the borrower; or by concluding that there is no error based on a [reasonable] investigation and then explaining that conclusion in writing to the borrower." *Id.* (citing 12 U.S.C. § 2605(e)(2); 12 C.F.R. § 1024.35(e)(1)(i)). Failure to comply with these regulations is a violation of RESPA, and results in a potential claim for actual damages, statutory damages, and attorney's fees. *Beltz v. CitiMortgage, Inc.*, 1:15-CV-2649-AT, 2015 WL 12964644, at *2 (N.D. Ga. Sept. 11, 2015) (Totenberg, J.) (citing 12 U.S.C. § 2605(f)) ("RESPA . . . is the remedial vehicle for violations of [its implementing] regulations.").

B. The R&R erroneously concluded that Plaintiff is attempting to use RESPA to assert claims based on HAMP

The R&R recommends dismissing Plaintiff's claims related to a portion of her June 16, 2016 Notice of Error and her October 20, 2016 Notice of Error because "Plaintiff seeks to use RESPA to assert a claim based on alleged

violations of HAMP," under which there is no private right of action.[5] (R&R at 18, 33.) In her June 16, 2016 Notice of Error, Plaintiff complained to Ditech of its delay in notifying her of the option to recast/re-amortize her mortgage. Specifically, Plaintiff notified Defendant that "[t]he recast offer letter [she] received was late in accordance with Fannie Mae's servicing guide." (Doc. 10-5 at 2.) In her Complaint, Plaintiff points to the January 29, 2015 Fannie Mae Lender Letter LL-2015-01 sent to "All Fannie Mae Single-Family Servicers" entitled

[5] The R&R also concludes that Defendant's failure to respond to Plaintiff's request for a copy of her Loan Modification Agreement is not actionable under RESPA because it does not relate to the loan's servicing. (R&R at 22.) The R&R did find, however, that Plaintiff could bring a claim pursuant to Regulation X based on her request for the Loan Modification Agreement because 12 C.F.R. § 1024.36 "requires the servicer to respond to the borrower's RFI even if the request does not relate to the servicing of a loan." (*Id.* at 23.) Plaintiff does not expressly object to the R&R's finding that requests for information regarding a loan modification do not relate to loan servicing as required to state a claim under RESPA. But this issue is a kissing cousin of the R&R's conclusion that neither RESPA nor its mortgage servicing regulations encompass claims related to a loan modification or other mortgage loss options available to borrowers under HAMP (a federal loan program designed to reduce delinquent and at-risk borrowers' monthly mortgage payments). The Court therefore addresses it and finds it to be clearly erroneous. The R&R's conclusion that Plaintiff's request for a copy of her Loan Modification Agreement is not a violation of RESPA, but is a violation of Regulation X, is unnecessarily parsing. Regulation X was issued by the CFPB to implement RESPA under the authority granted to it by Congress in enacting the statute. 12 U.S.C. § 2617(a) ("The Bureau is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter."); § 2605(j)(3) ("The Bureau shall establish any requirements necessary to carry out this section"); 12 C.F.R. § 1024.1. As the Supreme Court held in *Alexander v. Sandoval*, regulations applying a statutory provision are covered by the cause of action to enforce that statute and "[s]uch regulations, if valid and reasonable, authoritatively construe the statute itself, [cits.] and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–844 (1984)). "[S]ection 6 of RESPA does provide for a private right of action . . . And Congress may explicitly establish a private right of action to enforce regulations made pursuant to a statutory program." *Joussett v. Bank of America, N.A.*, 2016 WL 5848845, *5 (E.D. Penn. Oct. 6, 2016) (internal quotations omitted) (citing 12 U.S.C. § 2605(f) ("Whoever fails to comply with any provision of this section shall be liable to the borrower[.]")).

"Notification of Future Updates to Borrower 'Pay for Performance' Incentives for a Fannie Mae HAMP Modification." (Compl. ¶¶ 33-46; Doc. 1-4.) The Lender Letter, issued pursuant to Fannie Mae servicing guidelines, provides a deadline for servicers to provide borrowers with notice of the re-amortization offer based on the effective date of the borrower's HAMP loan modification.

Plaintiff acknowledges that the recast offer letter is a part of HAMP, but asserts that her Notice of Error involves the servicing of her loan – i.e. offering the recast offer on a timely basis as required by Fannie Mae's servicing guidelines. Plaintiff contends that a loan recast changes the principal and interest payments of the loan and is therefore directly tied to the servicing of the loan.

The R&R concluded that "Plaintiff's arguments about when the HAMP trial offer was effective and when she should have received a recast letter are based on HAMP" for which there is no private right of action. (R&R 18.) This conclusion is based on a flawed reading of Plaintiff's claim and the provisions of RESPA, as implemented by Regulation X, and is contrary to the CFPB's official interpretations of RESPA's requirements.

Under RESPA, borrowers may notify mortgage servicers of possible account errors" and account errors are "broadly defined" by § 1024.35(b) to include a residual category for "[a]ny other error relating to the servicing of a borrower's mortgage loan." *Nunez v. JP Morgan Chase Bank, N.A.*, 648 F. App'x at 907 (quoting 12 C.F.R. § 1024.35(b)(11)) (reversing dismissal of complaint

alleging violations of RESPA by mortgage servicer for failure to reasonably investigate and respond to notices of error concerning proper implementation of a loan modification agreement). Although RESPA defines "servicing" as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan," *id.* § 2605(i)(3), the Dodd-Frank Act amended § 2605 of RESPA to broaden its scope with the addition section (k)(1)(c). Section 2605(k)(1)(c) provides that servicers shall not "fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or ***other standard servicer's duties***," or "fail to comply with ***any other obligation*** found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter." 12 U.S.C. §§ 2605(k)(1)(C), (E) (emphasis added); 78 Fed. Reg. at 10739 (Feb. 14, 2013).

As the CFPB explained in issuing the 2013 amendments to RESPA's Mortgage Servicing Rules in Regulation X,

> Section 6(e) of RESPA requires servicers to respond to "qualified written requests" asserting errors or requesting information relating to the servicing of a federally-related mortgage loan. Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(C)[6], which states that a servicer shall not "fail to take timely action to respond to a borrower's request to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or ***other standard servicer's duties***." The Bureau believes that standard servicer duties are those

[6] Section 6(k)(1)(C) of RESPA is 12 U.S.C. § 2605(k).

> typically undertaken by servicers in the ordinary course of business. ***Such duties include not only the obligations that are specifically identified in section 6(k)(1)(C) of RESPA, but also*** those duties that are defined as "servicing" by RESPA, as implemented by this rule, as well as duties customarily undertaken by servicers to investors and consumers in connection with the servicing of a mortgage loan. These standard servicer duties are not limited to duties that constitute "servicing," as defined in this rule, and include, for example, ***duties to comply with investor agreements and servicing program guides***, to advance payments to investors, to process and pursue mortgage insurance claims, to monitor coverage for insurance (e.g., hazard insurance), to monitor tax delinquencies, to respond to borrowers regarding mortgage loan problems, to report data on loan performance to investors and guarantors, and to ***work with investors and borrowers on options to mitigate losses for defaulted mortgage loans***.

78 Fed. Reg. at 10739 (emphasis added).

Regulation X's "notice of error procedure" specifically states that one error a borrower may raise is a servicer's "[f]ailure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39." 12 C.F.R. § 1024.35(b)(7); *McGahey v. Fed. Nat'l Mortgage Ass'n*, 266 F. Supp. 3d 421, 439 (D. Me. 2017) (holding that Regulation X, "specifically enumerates a "[f]ailure to provide accurate information to a borrower regarding loss mitigation options" as a covered error that may be the subject of a Qualified Written Request or Notice of Error"). Much of the remainder of 12 C.F.R. § 1024.35 describes a variety of other payment-related disputes that have traditionally been associated with loan servicing, and it includes a catch-all allowing borrowers to raise "[a]ny other error relating *to* the servicing of a borrower's mortgage loan." 12 C.F.R. § 1024.35(b). The catch-all indicates that

the previously identified types of errors – including the error of failing to provide accurate information regarding loss mitigation options – are "related" to servicing. The CFPB specifically considered loss mitigation "related" to servicing when it promulgated this section. More, the loss mitigation requirements of Regulation X impose requirements on *servicers* specifically – not loan originators, or loan owners. In short, how can a request for information regarding loss mitigation measures not be considered "related" to loan servicing when the regulations make plain that servicers have significant obligations to engage borrowers in the loss mitigation and foreclosure avoidance process and when in practice servicers are almost always the primary points of contact for borrowers seeking such assistance?

Plaintiff's claim regarding the recast letter raised in her June 16th NOE is based on Defendant's failure to comply with Fannie Mae's Servicing Guide D2-3.2-07 on "Communicating with a Borrower Regarding Eligibility for the Expanded Borrower 'Pay for Performance' Incentive for a Fannie Mae HAMP Modification." (Doc. 1-4.) Providing notice of the recast offer, available to Plaintiff in connection with her HAMP loan modification, qualifies as the type of a loss mitigation and/or foreclosure avoidance activity classified under Regulation X as a standard servicer duty. *See McGahey*, 266 F. Supp. 3d at 439 (finding borrower's communications with his mortgage servicer regarding a HAMP application denial fell under RESPA); *Wilson v. Bank of Am., N.A.*, 48 F. Supp. 3d 787, 805 (E.D. Pa. Sept. 24, 2014) (declining to dismiss RESPA claim

regarding communication about alleged HAMP error). Thus, if a servicer fails to properly investigate a notice of error related to a HAMP modification, that is a violation of RESPA and gives rise to a claim for damages (i.e., the difference between the cost of the loan unmodified vs modified; or cost of the extra interest and fees caused by the delay), assuming the error actually caused damages (i.e., outcome would have been different if your NOE was properly reviewed).

For these reasons, the Court finds that Plaintiff's NOEs regarding Defendant's failure to provide accurate information regarding the recast offer and its failure to follow Fannie Mae servicing guidelines are complaints related to "standard servicer duties" and are thus "related to servicing" of her loan under RESPA. *See Lage v. Ocwen Loan Servicing LLC*, 145 F. Supp. 3d 1172, 1190 (S.D. Fla. 2015) (discussing notice of error procedures as opposed to qualified written requests and acknowledging that a claim under RESPA for a failure to respond to a loan-modification inquiry is viable but granting summary judgment to servicer because plaintiffs failed to establish genuine issue of fact with respect to damages); *McClain v. CitiMortgage, Inc.*, No. 15-C-6944, 2016 WL 269568, at *5 (N.D. Ill. Jan. 21, 2016) (holding that letters that "properly sought clarification as to the status of [plaintiff's] modification and whether further documentation was needed" were QWRs related to servicing).[7] Accordingly, the Court **SUSTAINS**

[7] The Court recognizes that there is case law that holds that these kinds of claims are not "related to servicing" as defined by RESPA. Although many of these cases predate the 2014 amendments to Regulation X, some of these decisions were issued after the new provisions went into effect. *E.g.*, *Bullock v. Ocwen Loan Servicing, LLC*, No. CIV. PJM 14-3836, 2015 WL

Plaintiff's Objection and **DECLINES TO ADOPT** the portion of the R&R concluding that Plaintiff is attempting to assert via RESPA claims under HAMP for errors related to Defendant's untimely notice of Plaintiff's option to recast her loan under Fannie Mae's HAMP servicing guidelines.

C. The R&R failed to properly construe Plaintiff's allegations as required on a motion to dismiss under Rule 12(b)(6) by accepting Defendant's contentions that Ditech complied with RESPA by providing proper responses to Plaintiff's written complaints and requests

1. June 16, 2016 NOE

Plaintiff also objects to the R&R's conclusion that she failed to state a claim for a violation of RESPA as it relates to the portion of her June 16, 2016 Notice of Error regarding Ditech's failure to timely provide a Recast Letter as required under the Fannie Mae servicing guidelines. (R&R 17-18.) In finding that Plaintiff failed to state a claim and had not "alleged facts indicating that Ditech's response was not reasonable," the R&R provides as follows:

> Twelve C.F.R. § 1024.35(a) requires the borrower to provide to the servicer written notice of "the error the borrower believes has occurred." 12 C.F.R. § 1024.35(a). Plaintiff asserted in the letter that "the recast offer letter [she] received was late" because she "should have received it in November 2015." [Doc. 10, Ex. D]. ***However, Plaintiff acknowledges in her complaint that this***

5008773, at *10 (D. Md. Aug. 20, 2015) ("a request for information about loan modification does not constitute a QWR.") But even the more recent cases that hold that loan modification issues are not related to servicing often rely on authorities that predate the 2014 amendments to Regulation X. *See, e.g., id.* (*citing Van Egmond v. Wells Fargo Home Mortgage,* No. SACV 12-0112 DOC, 2012 WL 1033281, at *1 (C.D. Cal. Mar. 21, 2012). These decisions are difficult to square with the revamped Regulation X. The Court is therefore unconvinced that the distinction between "servicing" and loss mitigation activity is tenable in light of Regulation X's 2014 amendments.

> ***assertion was incorrect. Plaintiff now claims that she should have received the recast letter between January 2, 2016, and March 2, 2016, not in November 2015 as she stated in the letter***. [Doc. 1 ¶¶ 45-47].
>
> RESPA states that the servicer is required to conduct an investigation and then "provide the borrower with a written explanation or clarification that includes . . . a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer[.]" 12 U.S.C. § 2605(e)(2)(B)(i) (emphasis added); accord 12 C.F.R. § 1024.35(e)(1)(i). In Ditech's letter dated July 21, 2016, ***the company responded by stating*** that it researched Plaintiff's inquiry. ***Ditech also offered a detailed explanation*** about "why the Recast Offer Letter was mailed on March 30, 2016." [Doc. 10, Ex. E]. Thus, ***Ditech fulfilled its obligations under RESPA and Regulation X*** "by concluding that there is no error based on an investigation and then explaining that conclusion in writing to the borrower." Renfroe, 822 F.3d at 1244 (citing 12 U.S.C. § 2605(e)(2); 12 C.F.R. § 1024.35(e)(1)(i)).

(R&R 17-18) (emphasis added).

Here, the error Plaintiff believed had occurred was that "the recast letter [she] received was late." (Doc. 10, Ex. D.) Plaintiff complained she should have received the recast offer letter before March 30, 2016 (the date of letter) and requested an explanation for the error and how it would be corrected. (*Id.*) At the time Plaintiff wrote the June 16 NOE, she believed the offer letter should have been mailed to her in November 2015. As she explained in her Complaint, however, Plaintiff had confused the Trial Period effective date and the HAMP modification effective date as the trigger for the notice.

Despite her mistake in the actual dates, Plaintiff was not mistaken about the existence of an error.[8] Based on the documents in the record, Plaintiff's contention that the recast letter was late appears entirely accurate. Under the terms of the Lender Letter, as Plaintiff has clarified in her Complaint, Ditech was required to provide notice to Plaintiff of the option to recast/re-amortize the unpaid principal balance on her loan "at least 60 days, but no more than 120 days, prior to the sixth anniversary of the Fannie Mae HAMP modification effective date" of her loan. (Compl. ¶ 43; Doc. 1-4.) Because the effective date of her loan modification was May 1, 2010, Ditech was required to provide the recast letter to Plaintiff between January 2, 2016 and March 2, 2016. (*See* Compl. ¶¶ 40, 45; *see also* Doc. 1-3.) Thus, when Defendant sent the letter on March 30, 2016, it was 28 days late.

The purpose of the recast offer is to inform the borrower that her mortgage loan could be re-amortized on or after the sixth anniversary of the Fannie Mae HAMP modification effective date of her existing loan in order to reduce her monthly payments. (Doc. 1-4.) Plaintiff alleges she was "damaged by receiving the Recast Offer after the Fannie Mae deadline because Plaintiff was delayed in accepting the Recast Offer and thereby paid additional interest that Plaintiff would not have otherwise had to pay if the Recast had been provided in a timely manner." (Compl. ¶ 104.) Had Defendant properly and timely provided Plaintiff

[8] As noted above, covered error includes the "[f]ailure to provide accurate information to a borrower regarding loss mitigation option," and "[a]ny other error relating to the servicing of a borrower's mortgage loan." 12 C.F.R. §§ 1024.35(b)(7), (11).

with the recast letter, she would have been able to begin the recast process sooner, thus allowing her to take earlier advantage of lower payments.

The R&R concludes that Ditech complied with its obligations under RESPA because it "responded by stating that it researched Plaintiff's inquiry" and "offered a detailed explanation about 'why the Recast Offer Letter was mailed on March 30, 2016.'" (R&R 17-18.) But the "detailed explanation" is inaccurate and contrary to Fannie Mae's servicing guidelines as provided in the Lender Letter. According to Defendant's explanation, the Recast Offer Letter was mailed on March 30, 2016 because Plaintiff received her sixth Pay for Performance incentive payment of $5,000 on February 3, 2015. No further explanation is provided. The R&R acknowledges, but fails to accept, Plaintiff's allegations that the information provided by Ditech was "erroneous and misleading" because "the date of the sixth incentive paid by Fannie Mae" is not tied to when the recast letter should have been received. (R&R 16-17 (citing Compl. ¶¶ 49-51).)

These allegations are supported by Defendant's own responses to Plaintiff's NOEs and the Fannie Mae Lender Letter outlining the requirements servicers must comply with in communicating with borrowers on the HAMP Pay for Performance Incentives. According to the Fannie Mae Lender Letter, the recast offer letter must be sent a specified number of days prior to the sixth anniversary of the borrower's HAMP loan modification effective date. Nothing in the Lender Letter indicates that the deadline for providing the required Re-Amortization notice is in any way dependent on the date of the payment of the final incentive.

Despite Plaintiff's allegation that this was in error and the lack of any explanation by Ditech tying the incentive payment to the notice, the R&R accepted Defendant's conclusion in its response letter that there was no error based on its investigation. What is more, Ditech ultimately acknowledged on October 10, 2016 in response to another NOE from Plaintiff that "it is understood that the Recast Offer and Recast Agreement mailed on March 30, 2016 was delayed." (Doc. 10-7.) However, the R&R contains no reference to Ditech's eventual acknowledgement of the error on which Plaintiff's claim is based.[9]

Rather than accept Plaintiff's allegations and construe them in her favor, as required under Rule 12(b)(6), the R&R was critical of Plaintiff's position and inexplicably lenient in construing the facts in favor of Defendant in the face of clear indications of Defendant's error and its failure to reasonably and properly respond to Plaintiff's June 16th letter. *See Nunez*, 648 F. App'x at 909-10 (reversing grant of motion to dismiss RESPA claim because the district court did not properly construe the facts alleged by the plaintiff in accord with the standard under Rule 12(b)(6), construed the defendant's responses to the plaintiff's notices of error as evidence of a reasonable investigation despite plaintiff having attached documents in support of her claims, ignored plaintiff's allegations that defendant

[9] Plaintiff also alleged that the information provided by Ditech was "erroneous and misleading" because "Plaintiff's HAMP trial offer was effective January 1, 2010, not February 1, 2010," as stated in Ditech's response. (Compl. ¶¶ 52-53.) The R&R acknowledges Defendant's error regarding the effective date of Plaintiff's HAMP Trial Period, noting that in its response to a subsequent NOE letter by Plaintiff on October 20, 2016, "Ditech corrected Plaintiff's HAMP trial offer date to accurately reflect the date as January 1, 2010." (R&R 30.)

had failed to properly implement her loan, relied on the defendant's versions of the facts that contradict the allegations in the plaintiff's complaint, and improperly drew inferences in the defendant's favor in concluding that the defendant's responses complied with "the letter and spirit of [RESPA]"); *Renfroe*, 822 F.3d at 1245 (reversing dismissal of plaintiff's RESPA claim, stating "In reviewing Rule 12(b)(6) motions, courts are bound to accept the plaintiff's allegations as true and to construe them in the light most favorable to her. Nationstar asks us to do the opposite. Nationstar suggests we should accept its contrary allegations — that it conducted a reasonable investigation into Mrs. Renfroe's account and found no error — and then to grant its motion to dismiss on that basis. We decline to do that . . . Nationstar's response letter does not contain specific factual details that foreclose Mrs. Renfroe's recovery as a matter of law.").

In doing so, the R&R ignored binding Eleventh Circuit precedent requiring the court to "liberally construe" RESPA as a remedial consumer-protection statute "in order to best serve Congress's intent." *Renfroe*, 822 F.3d at 1244; 12 U.S.C. § 2601(a) ("The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices" in the mortgage industry.) The dismissal of Plaintiff's claim here would be entirely contrary to an express

purpose of RESPA – to ensure that borrowers be provided with "***greater and more timely information***," regarding the nature and costs of their mortgage loans.

Accordingly, the Court **DECLINES TO ADOPT** the R&R's determination that Plaintiff failed to allege facts indicating that Ditech's response was not reasonable. Plaintiff specifically alleged that Ditech's response provided completely erroneous and misleading information. "RESPA requires mortgage servicers like [Ditech] to reasonably respond to Notices of Error." *Renfroe*, 822 F.3d at 1244. RESPA and Regulation X "require more than merely a substantive response to a claimant's NOE. Instead, the provisions also require a servicer to conduct a reasonable investigation into the alleged error. 12 C.F.R. § 1024.35(e)." *Gil v. Citibank*, 16-cv-1923-LMM, Order on Mot. to Amend, Doc. 24 (Sept. 2, 2016) (May, J.) (allowing amendment to include claims under RESPA despite the defendant's arguments that it sufficiently responded to the plaintiff's NOE because the defendant's "response does not tell the Court one way or the other if Seterus' investigation was reasonable," and in fact, "raises concerns that Seterus did *not* conduct a reasonable investigation"). Whether a response that provides inaccurate information is reasonable is a question of fact that cannot be determined in a defendant's favor on a motion to dismiss under Rule 12(b)(6). The Court **SUSTAINS** Plaintiff's Objections and **DECLINES TO ADOPT** the R&R's recommendation that Plaintiff failed to state a claim with respect to the portion of her June 16th NOE regarding the delayed recast offer letter.

2. August 10, 2016 NOE and RFI

Plaintiff also objects to the R&R's conclusion that Ditech provided an adequate response to her August 10, 2016 Notice of Error and Request for Information regarding Ditech's calculation of the automatic termination date of PMI on her loan. According to her Complaint, Plaintiff's NOE informed Ditech that she believed it had miscalculated her PMI automatic termination date and the amount of the unearned premium owed to her as a refund. (Compl. ¶ 61.) She also requested documentation to support its response. Plaintiff alleges that Defendant's October 10th response that June 1, 2016 was the automatic termination date on her loan was "patently false and misleading." (*Id.* ¶¶ 64-66.)

According to Plaintiff's Complaint, June 1, 2016 was the original automatic termination date for PMI when she refinanced her loan in 2007. (*Id.* ¶ 10.) However, because Plaintiff entered into a loan modification, her PMI termination date was subject to recalculation to reflect the modified terms and conditions of the loan. (*Id.* ¶ 16.) Under the loan modification, Plaintiff's loan changed from a fixed interest rate to an adjustable interest rate. (*Id.* ¶¶ 17-18.) As a result, Plaintiff's automatic termination date would have been based not on the date on the "initial amortization schedule" for her original refinancing, but on the "amortization schedule then in effect" at the time of the loan modification. (*Id.* ¶¶ 18-21.) The termination date for PMI is the date on which the principal balance of the mortgage, based on the applicable amortization schedule, irrespective of the outstanding balance for that mortgage on that date, is first

scheduled to reach 78 percent of the original value of the property securing the loan. (Id. ¶ 19; 12 U.S.C. § 4901(18)(B).) According to Plaintiff's Complaint, Plaintiff's PMI was required to automatically terminate on October 1, 2015 pursuant to the terms of her modified loan, following an increase in her interest rate on April 1, 2015, as provided in her loan modification agreement. (*Id.* ¶¶ 23-25.) Plaintiff alleges that Ditech's failure to correct her PMI termination date has caused her damage because she has paid additional PMI she did not owe and Defendant continues to refuse to recognize its error. (*Id.* ¶¶ 120-121.)

The R&R concluded that Plaintiff's allegations reveal that Defendant Ditech complied with the requirements of RESPA and Regulation X because:

> Ditech did not respond with boilerplate language. Instead, Ditech ***explained***, inter alia, that . . . "***based solely on the initial amortization schedule*** for [Plaintiff's] mortgage" and that this occurred on June 1, 2016. Ditech also wrote that the last PMI disbursement occurred in the amount of $151.20 on April 4, 2016, which represented PMI payments for March, April, and May. [Doc. 10, Ex. F]. Ditech explained that a PMI notice was mailed on August 4, 2016, notifying Plaintiff of the cancelled PMI effective June 1, 2016, and including a refund of $26.71, which "was for the unused premium for the last PMI disbursement made, in the amount of $50.40." [*Id.*] . . . . These allegations show that Defendant Ditech responded to Plaintiff's August 10, 2016, letter by: investigating her allegations of error, concluding that no error had occurred based on the investigation, and explaining its reasons for the conclusion to Plaintiff in the October 2016 letter. [*Id.*]. Thus, Ditech complied with RESPA by providing to Plaintiff "a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer[.]" 12 U.S.C. § 2605(e)(2)(B)(i) (emphasis added); *accord Bates v. JPMorgan Chase Bank*, NA, 768 F.3d 1126, 1134-35 (11th Cir. 2014)[10]. ***Nothing more was***

[10] The *Bates* decision cited by the Magistrate Judge is distinguishable on this issue. Bates sent Chase a "qualified written request" about its failure to credit her account with a $3,495 payment.

> ***required of Ditech*** [because] RESPA "does not require the servicer to provide the resolution or explanation desired by the borrower; it requires the servicer to provide a statement of its reasons." *Whittaker v. Wells Fargo Bank, N.A.*, 2014 WL 5426497, at *8 (M.D. Fla. October 23, 2014).

(R&R 28-29.)

Ditech does not explain in its response how or why it determined that Plaintiff's PMI automatic termination date was June 1, 2016 based on "the initial amortization schedule." Ditech purportedly relies on the initial amortization schedule without taking into account the modification of Plaintiff's loan from a fixed rate to an adjustable rate and the resulting impact on the PMI termination date under the Homeowner's Protection Act. Ditech does not provide documentation of the amortization schedule relied on in support of its determination as requested by Plaintiff in her August 10th correspondence.

The R&R gives no credence to Plaintiff's allegations and accepts, without question, Defendant's representations. Contrary to the R&R's characterization of Ditech's response, the October 10th letter provides conclusions without any explanation or support as to the PMI termination date or how it determined the amount of Plaintiff's refund, and there is no documentation attached to the letter

Chase responded, explaining that it had returned the funds from Bates's September and November payments because they were not certified funds and were inadequate to cure default. There is no indication in the decision that the plaintiff had alleged that Chase's straightforward response was erroneous. Thus, the Eleventh Circuit found that Chase's explanation, "'provided the borrower with a written explanation . . . of the reasons for which the servicer believes the account of the borrower is correct.' 12 U.S.C. § 2605(e)(2)(B)(i). Although Bates was confused and/or unsatisfied with this answer, the information provided an explanation to Bates as to what happened to her September payment and provided her with contact information for further support." *Bates v. JPMorgan Chase Bank, NA*, 768 F.3d 1126, 1134–35 (11th Cir. 2014).

from which to determine the accuracy of Ditech's representations. As a result, there is no information from which this Court can judge whether the response is reasonable. *See Rice v. Green Tree Servicing, LLC*, 2015 U.S. Dist. LEXIS 122566 (N.D. W.V. 2015) (describing in complex detail all the statutory provisions relevant to the determination of the applicable PMI termination date under a variety of circumstances). According to the R&R, all that RESPA technically requires is a response, and as long as the response does not contain strictly "boilerplate" language, the substance of the response is irrelevant to a claim under § 2605 of RESPA. The Court rejects this premise as this reading would render RESPA's provisions meaningless and solely a paper game. The R&R's conclusion that Ditech was not required to provide accurate information in response to Plaintiff's NOE and was not required to provide supporting documentation in response to Plaintiff's RFI cannot stand.

Accordingly, for the reasons stated above in Section IV(C)(1) *supra* at pages 20-22, the Court **SUSTAINS** Plaintiff's Objections and **DECLINES TO ADOPT** the R&R's recommendation that Plaintiff failed to state a claim under RESPA related to her August 10, 2016 NOE and RFI.

3. October 20, 2016 NOE and RFI

Plaintiff objects to the R&R's conclusion that she failed to state a claim with respect to her October 20, 2016 Notice of Error and Request for Information. Plaintiff's October 20th letter raising numerous complaints that the R&R considered to be duplicative of her prior requests for which the R&R found

that Ditech had already provided sufficient responses and was under no further duty to respond. The R&R found that Ditech properly responded that it had previously responded to Plaintiff's complaints on a number of occasions because

> Regulation X provides that with regard to RFIs, the servicer is not required to comply with the response requirements of 12 C.F.R. § 1024.36(c) and (d) "if the servicer reasonably determines" that the "information requested is substantially the same as information previously requested by the borrower for which the servicer has previously complied with its obligation to respond[.]" 12 C.F.R. § 1024.36(f)(1)(i). Regulation X also provides that with regard to NOEs, the servicer is not required to comply with the response requirements of 12 C.F.R. § 1024.35(d), (e), and (i) "if the servicer reasonably determines that . . . [t]he asserted error is substantially the same as an error previously asserted by the borrower for which the servicer has previously complied . . . unless the borrower provides new and material information to support the asserted error." 12 C.F.R. § 1024.35(g)(1)(i).

(R&R at 31, 37.) Plaintiff asserts in her objections, however, that "[n]ever, not once, has Ditech explained why its calculations are correct or why Plaintiff's calculations are incorrect, on the PMI automatic termination dates, the recast payment amounts, or the PMI premium refund amount." (Objections at 10.)

More specifically, Plaintiff objects to the R&R's recommendation that Plaintiff's claim related to her October 20th letter should be dismissed because, her NOE described in detail multiple errors by Ditech in the Recast Agreement it forwarded to Plaintiff for her execution. Plaintiff therefore contends that her October 20th NOE provided "new and material information" not previously considered and, thus requiring a response from Ditech pursuant to 12 C.F.R. § 1024.35(g)(i). Indeed, the October 20th letter was the first time Plaintiff had

raised the discrepancies regarding the terms of the Recast Agreement. It does not appear that the Magistrate Judge found that Ditech had previously provided responses regarding these errors. Rather, it appears that the R&R found that the errors regarding the Recast Agreement were an improper attempt to bring a HAMP claim under RESPA. For the reasons stated above in Section IV(B) *supra* at pages 11-15, the Court **DECLINES TO ADOPT** this finding of the R&R.

Additionally, it appears that the Magistrate Judge found that Plaintiff's allegations regarding the inaccuracies in Ditech's November 9th response regarding the applicable principle balance of Plaintiff's loan in the Recast Agreement and the additional errors raised by Plaintiff regarding her PMI termination date[11] were insufficient to state a claim because Plaintiff had "fail[ed] to assert that Ditech's allegedly erroneous responses constituted violations of RESPA." For the reasons stated above in Section IV(C)(1) *supra* at pages 20-22, the Court **DECLINES TO ADOPT** this finding of the R&R. *See also Wilson v. Bank of Am., N.A.*, 48 F. Supp. 3d 787, 805 (E.D. Pa. Sept. 24, 2014) ("Defendant ... sent [Plaintiff] two letters with contradictory explanations for why her loan could not be modified. She then submitted her requests for information and Notice of Error, the responses to which were contradictory. Given the varying explanations Defendant offered for the treatment of the Loan account, Plaintiff now properly and adequately asserts that no 'reasonable investigation' has

[11] In her October 20th NOE, Plaintiff pointed out that on three separate dates, representatives of Ditech had provided her with contradictory information regarding the applicable termination date for her PMI.

occurred with respect to her Notice of Error."). Plaintiff has stated a claim under RESPA and Regulation X related to this portion of her October 20, 2016 NOE.

4. November 8, 2016 NOE and RFI

Finally, with respect to her November 8, 2016 Notice of Error and Request for Information, Plaintiff objects to the R&R's conclusions that: (1) Ditech's reference to a website containing Fannie Mae Re-Amortization servicing guidelines was an adequate response under RESPA, and (2) that Ditech was not required to produce copies of transcripts and recordings of all telephone conversations with Plaintiff because such information was either outside the scope of RESPA or was proprietary, confidential, burdensome or immaterial to the servicing of the account. (R&R at 37 (citing Defendant's December 19, 2016 Letter at Doc. 10-1-and 12 C.F.R. § 1024.36(f)(1)).

In both her October 20, 2016 and November 8, 2016 letters to Ditech, Plaintiff complained that Ditech had delayed in processing her acceptance of the Recast Offer Letter. In its November 9, 2016 response, Ditech informed Plaintiff that "a delay in issuing the permanent Recast Offer Agreement was the result of the investor, Fannie Mae, not providing the final approval until September 2016. Investor approval is required to be received and the time-line for that approval is outside of Ditech's control." (Doc. 10-9.) In her November 8, 2016[12] letter, Plaintiff requested that Ditech provide her with the servicing guidelines from

[12] The Court wonders whether the November 8th date of this letter is a typo (and whether the letter was actually written on December 9th) as Plaintiff would not yet have received Ditech's November 9th response.

Fannie Mae that support Ditech's claim that additional approval from Fannie Mae was required in order to process a HAMP Re-Amortization. She further asked Ditech to "circle or underline specifics to make it clear." (Compl. ¶ 88; Doc. 10-10 at 3.) In its December 19, 2016 response, Ditech referred Plaintiff to a Fannie Mae web page with information regarding Re-Amortization Processing.

Plaintiff alleges in her Complaint that "Defendant's statement regarding 'investor approval' being required is a complete falsehood." (Compl. ¶ 74.) She further alleges that according to the Fannie Mae Guidelines for "Communicating with a Borrower Regarding the Re-Amortization Option Related to the Expanded Borrower 'Pay for Performance' Incentive for a Fannie Mae HAMP Modification" Ditech was "was fully authorized to process the Recast Agreement and was not required to seek 'investor approval'." (*Id*. ¶¶ 75-76.) The R&R's determination that Ditech's reference to a webpage with these same Guidelines was a complete and adequate response to Plaintiff's request ignores the allegations of Plaintiff's Complaint. According to Plaintiff, no such investor approval is required under the Fannie Mae Guidelines referenced on the website, and Ditech has not provided any further support for its justification in delay. Therefore, for the reasons stated above at Section IV(C)(1) at pages 20-22, the Court **SUSTAINS** Plaintiff's Objection and **DECLINE TO ADOPT** this finding of the R&R.

Finally, Plaintiff objects to the R&R's recommended dismissal of her claim related to the transcripts and audio recordings of her telephone calls with Defendant. The Magistrate Judge found Defendant's argument that it was not

required to respond to such a request persuasive because "Plaintiff made no response in any way to Defendant's arguments." (R&R at 37.) However, as Plaintiff points out in her Objections, in response to the Motion to Dismiss, Plaintiff cited *Pollack v. Seterus, Inc.*, which found that "[u]nder Regulation X, a servicer is required to respond, as directed elsewhere in the regulations, to "any written request for information . . . that . . . states the information the borrower is requesting with respect to the borrower's mortgage loan." 2017 U.S. Dist. LEXIS 202827 (S.D. Fla. Dec. 7, 2017) (citing 12 C.F.R. § 1024.36(a)). More enlightening, however, is the CFPB's official interpretation of Regulation X as providing for borrower requests of copies of telephonic communication with a servicer. *See* https://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa-interpretations.pdf (last visited September 7, 2018). "The servicer's personnel have access in the ordinary course of business to audio recording files with organized recordings or transcripts of borrower telephone calls and can identify the communication referred to by the borrower through reasonable business efforts. The information requested by the borrower is available to the servicer." *Id.* (citing 12 C.F.R. § 1024.36(d)(1)(ii)).

Accordingly, the Court **SUSTAINS** Plaintiff's Objection and **DECLINES TO ADOPT** the R&R's determination that Defendant was not required to provide a response to Plaintiff's request for transcripts and audio recordings in her November 9th letter.

V. CONCLUSION

For the foregoing reasons, the Court **ADOPTS IN PART** and **DENIES IN PART** the R&R as set forth above. Defendant's Motion to Dismiss Count II under RESPA is therefore **DENIED**.

The Court **ORDERS** the parties to attend mediation to be conducted by a magistrate judge of this Court. The Clerk is **DIRECTED** to refer this action to the next available magistrate judge for the purpose of conducting the mediation. In light of Ms. St. Claire's current *pro se* status[13], the Court finds that it would be helpful to the mediation process to appoint counsel for Ms. St. Claire solely for the purpose of facilitating the mediation. Accordingly, the Magistrate Judge assigned to conduct the mediation is **DIRECTED** to identify and appoint pro bono counsel for Ms. St. Claire for this limited purpose. The mediation is to be concluded within 50 days of the appointment by the Magistrate Judge of pro bono counsel, unless otherwise extended by the Magistrate Judge. If the case is not settled at the mediation, the parties are **DIRECTED** to file a status report with the Court by that date. All deadlines in this action are **STAYED** and the case is **ADMINISTRATIVELY CLOSED** pending the outcome of the mediation.

[13] It has come to the Court's attention that the residence at issue in this litigation (and where Ms. St. Claire currently resides) is located in Gainesville, and now that Ms. St. Claire is proceeding without counsel, she files her pleadings with the Clerk's office in Gainesville. The Court therefore advises Ms. St. Claire that she may seek to transfer this action to the Gainesville division if she desires, but that the case would then be reassigned to the district judge in Gainesville. In the event Ms. St. Claire intends to seek a transfer, she is **DIRECTED** to do so within 14 days of the conclusion of the mediation if the case is not settled.

IT IS SO ORDERED this 21st day of September, 2018.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

TAB
F

Bethany Hamilton is an Assistant United States Attorney and supervises the Financial Litigation Unit at the U.S. Attorney's Office. She represents federal agencies in bankruptcy cases. She received her BA from Miami University and her JD at The Ohio State University Moritz College of Law.

Tax Issues in Chapter 13

Tips for Anticipating Issues with IRS

BETHANY J. HAMILTON, ASSISTANT U.S. ATTORNEY

CINCINNATI BAR ASSOCIATION WINTER SEMINAR 2018

1

A Federal Tax Lien is Unique

- Statutory Lien –Created by statute
  - Arises immediately upon the assessment of tax by IRS
  - Nothing else is needed for the lien to be perfected
    → it is also perfected upon assessment
- Attaches to "All Property and Rights to Property"
  26 U.S.C. § 6321

2

To What Does a Tax Lien Attach?

How broad is a federal tax lien?

"Stronger language could hardly have been selected [by Congress] to reveal a purpose to assure the collection of taxes."

Glass City Bank v. United States, 326 U.S. 265, 267 (1945).

3

Federal Tax Lien is Not Subject to Avoidance

Since IRS has a statutory lien and not a judicial lien, it may not be avoided under 11 U.S.C. § 522(f)(1)(A)

11 U.S.C. § 101(53)

See In re Wiles, 173 B.R. 92, 93 (Bankr. M.D. Pa. 1994)

In re Fandre, 167 B.R. 837, 840 (E.D. Texas 1994)

Practitioner Tip: If a NFTL is filed and there is no equity in the property for the lien to attach and you want to sell it, you can apply to IRS for a Certificate of Nonattachment of Lien → permits you to sell the property free of the tax lien.

4

Impact of Filing NFTL

Federal Tax Liens are generally perfected upon assessment. 26 U.S.C. § 6622

So why does the IRS file the Notice?

IRS must file a Notice of Federal Tax Lien in order to establish priority over "purchases, holders of a security interests, mechanic's lienors, or judgment lien creditors." 26 U.S.C. § 6323(a)

*** IRS is only filing notice of the lien that already exists. The NFTL is only notice of the lien, not the lien itself.

5

Where Should the NFTL be Filed?

- A NFTL should be filed in the county where the Debtor resides at the time of filing and/or where the real property is located.

  26 U.S.C. § 6323(f); 26 C.F.R. § 301.6323(f)-1

6

How Does IRS Determine Its Secured Claim?

11 U.S.C. § 506(a)

1) The value of the equity in the Debtor's assets
2) A claim that is subject to setoff for an overpayment of tax pursuant to 11 U.S.C. 553
3) Property under seizure at the time of bankruptcy even without a NFTL filed

7

How Does the IRS Determine the Value of the Debtor's Assets

- Generally, IRS relies on the Debtor's schedules to determine the equity in the Debtor's assets.
- IRS also independently investigates assets owned by the Debtor

8

Retirement Accounts

A NFTL does attach to the Debtor's interest in retirement accounts.

McIntyre v. United States, 222 F.3d 655, 660 (9th Cir. 2000)

United States v. Sawaf, 74 F.3d 119, 123-25 (6th Cir. 1996)

However, IRS should not use excluded assets (like 401ks or pensions) to secure its claim.

11 U.S.C. § 506(a)(1) limits secured status to property in which the estate has an interest

See Patterson v. Shumate, 504 U.S. 753 (1992)

9

Practitioner Tip

IRS has the option to levy against retirement accounts AFTER the bankruptcy case is discharged.

In re Snyder, 343 F.3d 1171, 1178-79 (9th Cir. 2003) (holding that the tax lien remained attached to the ERISA account after the bankruptcy, and that IRS can seek relief from stay to collect against the ERISA account)

***Seen this mostly in cases where there is a significant amount of tax due

10

Secured Claim Not Reduced by State or Federal Exemptions

IRS can use the value of Debtor's interest in exempt property, including homesteads and property exempted by state law.

See 11 U.S.C. § 522(c)(2)(B)

United States v. Rodgers, 461 U.S. 677, 700-01 (1983)

IRS can also use the value of the Debtor's interest in property exempt from a federal tax levy.

American Trust v. American Community Mutual Insurance Co., 142 F.3d 920, 924-25 (6th Cir. 1998)

11

Practitioner Tips

1. IRS will collect interest that accrues post-petition on nondischargeable tax debt after the case is discharged

2. General unsecured claims can be non-dischargeable

3. Review Tax Transcripts PRIOR to filing to look for the following:
   1) Late Filed Returns;
   2) Unfiled Returns;
   3) Substitute for Returns (SFRs) filed by IRS; and
   4) Tolling Events

12

Post-Petition Interest on Nondischargeable Tax Debt

Post-petition interest on non-dischargeable tax debt is also non-dischargeable.

Bruning v. United States, 376 U.S. 358 (1964)

Although *Bruning* was decided prior to the Bankruptcy Code, it still applies.

IRS v. Cousins, 209 F.3d 38, 42 (1st Cir. 2000)

Johnson v. United States, 146 F.3d 252, 254 (5th Cir. 1998)

Burns v. United States, 887 F.2d 1541, 1543 (11th Cir. 1989)

Hann v. United States, 872 F.2d 829, 831 (8th Cir. 1989)

13

Don't Let Your Client Be Surprised!

***After a Chapter 13 plan is completed and the discharge is entered, the Debtor will receive a collection notice from the IRS for the interest that accrued during the bankruptcy, even if all the nondischargeable tax was paid during the bankruptcy.

- A Creditor cannot file a claim for unmatured interest - 11 U.S.C. § 502(b)(2)

  Solutions are limited:

  1) Reclassify as a secured claim and provide post-petition interest?

  2) File a 1305 claim for accrued interest before the plan completes?

  Only IRS can file a 1305 claim

- Interest can accrue for up to 3 to 5 years. Depending on the original tax liability → the amount due can be significant

14

Post-BAPCPA Exceptions to Discharge in Chapter 13

1) Tax and interest thereon with respect to which a return was not filed or was filed late after 2 years before the petition date
2) Trust fund taxes (also called 6672 penalties or trust fund recovery penalties)
3) Tax with respect to which a debtor made a fraudulent return or willfully attempted to evade tax

11 U.S.C. § 1328(a)(2)

15

Relevant Code Sections for Determining Dischargeability in Chapter 13

11 U.S.C. § 1328(a)(2)
11 U.S.C. § 523(a)(1)(B)
11 U.S.C. § 523(a)(1)(C)
11 U.S.C. § 507(a)(8)(C)

16

Classification ≠ Dischargeability

Important: Claim classification is independent of the dischargeablity of those taxes

Leading Example: Tax assessed from late-filed returns can be classified as a general unsecured claim, but it is not dischargeable

17

General Unsecured Claims Can Be Non-Dischargeable

***Tax assessed from late filed tax returns can be classified as a general unsecured claim, but the tax is not dischargeable.

IRS will collect this debt post-bankruptcy!

18

Claim Classification

Income tax is classified as a priority claim under 3 conditions:

1) **Three-Year Rule** – Accrued on or before the petition date for which the last due date of the return, including extensions, was within 3 years of the petition date;

2) **240-Day Rule** – Assessed within 240 days, plus any time during which an offer in compromise is pending plus 30 days with respect to such tax was made with the 240 days after such assessment was pending, before the petition date;

3) Not assessed before the petition date but assessable as of that date by agreement or under applicable law.

***Exceptions to this include fraud, unfiled returns, and **late-filed returns**

Code Section: 11 U.S.C. § 507(a)

19

Unfiled or Late-Filed Returns Can be Classified as General Unsecured

***An **unfiled return** or **late-filed return** that was filed within 2 years of the petition date will be classified as **general unsecured claims** if they do not fall within the 3 Year Rule or 240 Day Rule for priority treatment.

Where Do We See This Issue → Returns for older tax years that are filed right before or after the petition date, and the tax isn't assessed prior to the bankruptcy filing

20

Why is this the Rule?

There is an exception written in the "Not Assessed but Assessable Rule" 11 U.S.C. § 507(a)(8)(A)(iii) –

– "**Other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title**" . . .

523(a)(1)(B) – 1) An unfiled tax return (523(a)(1)(B)(i))

2) Late- filed tax return filed less than 2 years before the petition date (523(a)(1)(B)(ii))

523(a)(1)(C) – Where the Debtor made a fraudulent return or willfully attempted to evade the tax

21

How to Identify Unfiled or Late-Filed Tax Returns

Practitioner Tip: Please don't rely solely on representations of your client. They are notoriously unreliable on if returns were filed.

**Many attorneys have provided unsigned copies of returns that were never filed

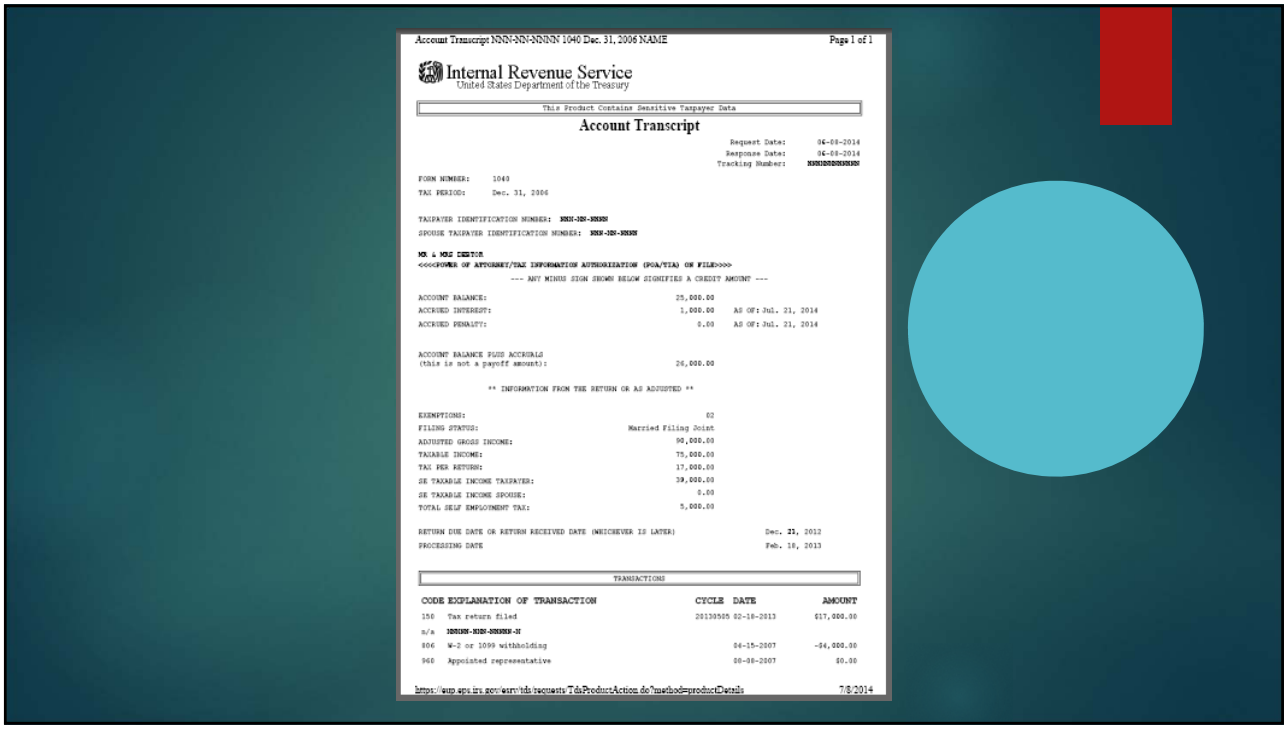
Documents:

1) Tax transcripts

2) 1714 Letter issued by IRS requesting delinquent tax returns

3) Proof of claim filed by IRS can be an indicator of unfiled or late-filed returns

22



Account Transcript NNN-NN-NNNN 1040 Dec. 31, 2006 NAME Page 1 of 1

Internal Revenue Service
United States Department of the Treasury

This Product Contains Sensitive Taxpayer Data

Account Transcript

Request Date: 04-08-2014
Response Date: 04-08-2014
Tracking Number: NNNNNNNNNN

FORM NUMBER: 1040
TAX PERIOD: Dec. 31, 2006

TAXPAYER IDENTIFICATION NUMBER: NNN-NN-NNNN
SPOUSE TAXPAYER IDENTIFICATION NUMBER: NNN-NN-NNNN

MR & MRS DENTON
<<<POWER OF ATTORNEY/TAX INFORMATION AUTHORIZATION (POA/TIA) ON FILE>>>

--- ANY MINUS SIGN SHOWN BELOW SIGNIFIES A CREDIT AMOUNT ---

ACCOUNT BALANCE:	25,000.00	
ACCRUED INTEREST:	1,000.00	AS OF: Jul. 21, 2014
ACCRUED PENALTY:	0.00	AS OF: Jul. 21, 2014
ACCOUNT BALANCE PLUS ACCRUALS (this is not a payoff amount):	26,000.00	

** INFORMATION FROM THE RETURN OR AS ADJUSTED **

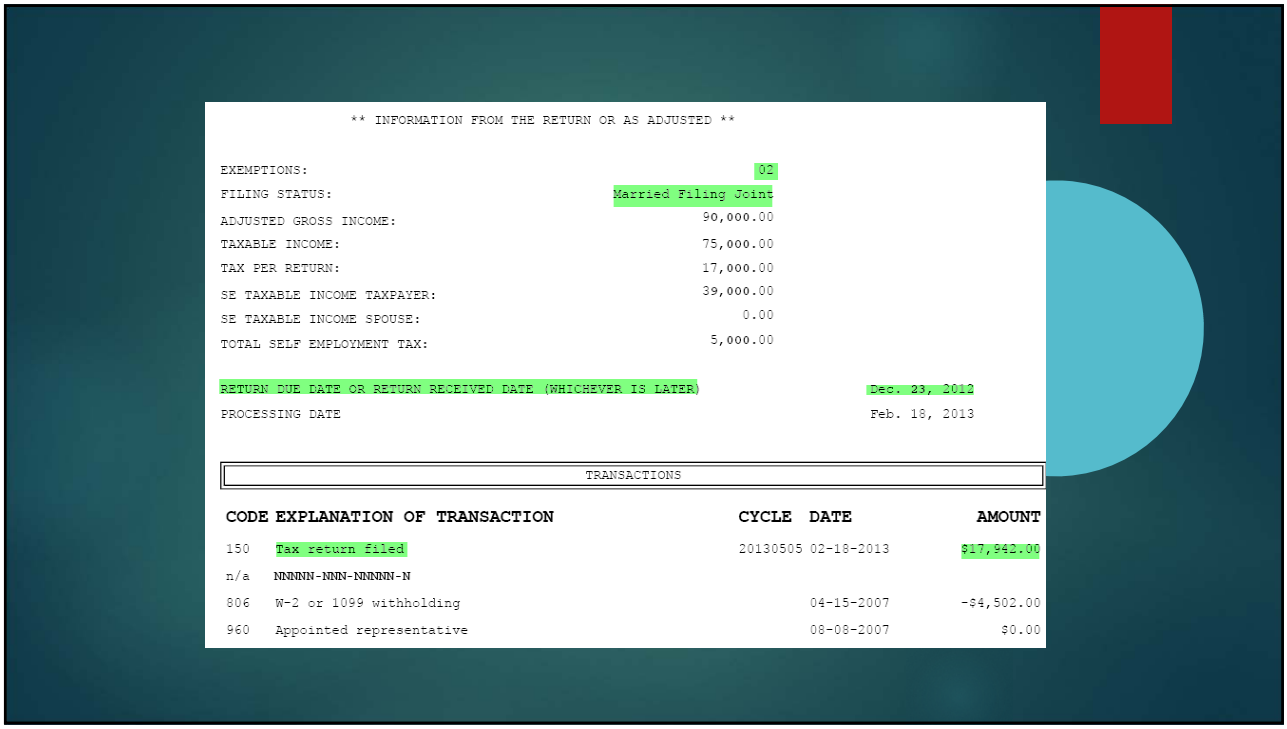
EXEMPTIONS:	02
FILING STATUS:	Married Filing Joint
ADJUSTED GROSS INCOME:	90,000.00
TAXABLE INCOME:	75,000.00
TAX PER RETURN:	17,000.00
SE TAXABLE INCOME TAXPAYER:	39,000.00
SE TAXABLE INCOME SPOUSE:	0.00
TOTAL SELF EMPLOYMENT TAX:	5,000.00
RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER)	Dec. 23, 2012
PROCESSING DATE	Feb. 18, 2013

TRANSACTIONS

CODE	EXPLANATION OF TRANSACTION	CYCLE	DATE	AMOUNT
150	Tax return filed	20130505	02-18-2013	$17,000.00
n/a	NNNNN-NNN-NNNNN-N			
806	W-2 or 1099 withholding		04-15-2007	-$4,000.00
960	Appointed representative		08-08-2007	$0.00

https://sup.sps.irs.gov/esrv/tds/requests/TdsProductAction.do?method=productDetails 7/8/2014

23



** INFORMATION FROM THE RETURN OR AS ADJUSTED **

EXEMPTIONS:	02
FILING STATUS:	Married Filing Joint
ADJUSTED GROSS INCOME:	90,000.00
TAXABLE INCOME:	75,000.00
TAX PER RETURN:	17,000.00
SE TAXABLE INCOME TAXPAYER:	39,000.00
SE TAXABLE INCOME SPOUSE:	0.00
TOTAL SELF EMPLOYMENT TAX:	5,000.00
RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER)	Dec. 23, 2012
PROCESSING DATE	Feb. 18, 2013

TRANSACTIONS

CODE	EXPLANATION OF TRANSACTION	CYCLE	DATE	AMOUNT
150	Tax return filed	20130505	02-18-2013	$17,942.00
n/a	NNNNN-NNN-NNNNN-N			
806	W-2 or 1099 withholding		04-15-2007	-$4,502.00
960	Appointed representative		08-08-2007	$0.00

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Information Available on Proof of Claim

***__Unfiled Returns__: Proof of claim will generally indicate if IRS records reflect that no return has been filed

***__Late-Filed Returns__: If the assessment date is after the normal assessment time for the tax year (for example, an assessment date of 2017 for the 2015 tax year) and the assessment date is within two years of the bankruptcy, the exception to discharge probably applies.

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Proof of Claim for Internal Revenue Taxes

Department of the Treasury/Internal Revenue Service

Form 10
Attachment

In the Matter of: MR & MRS DEBTOR
STREET ADDRESS
CITY, ST NNNNN

Case Number N:14-BK-NNNNN
Type of Bankruptcy Case CHAPTER 13
Date of Petition 06/15/2014

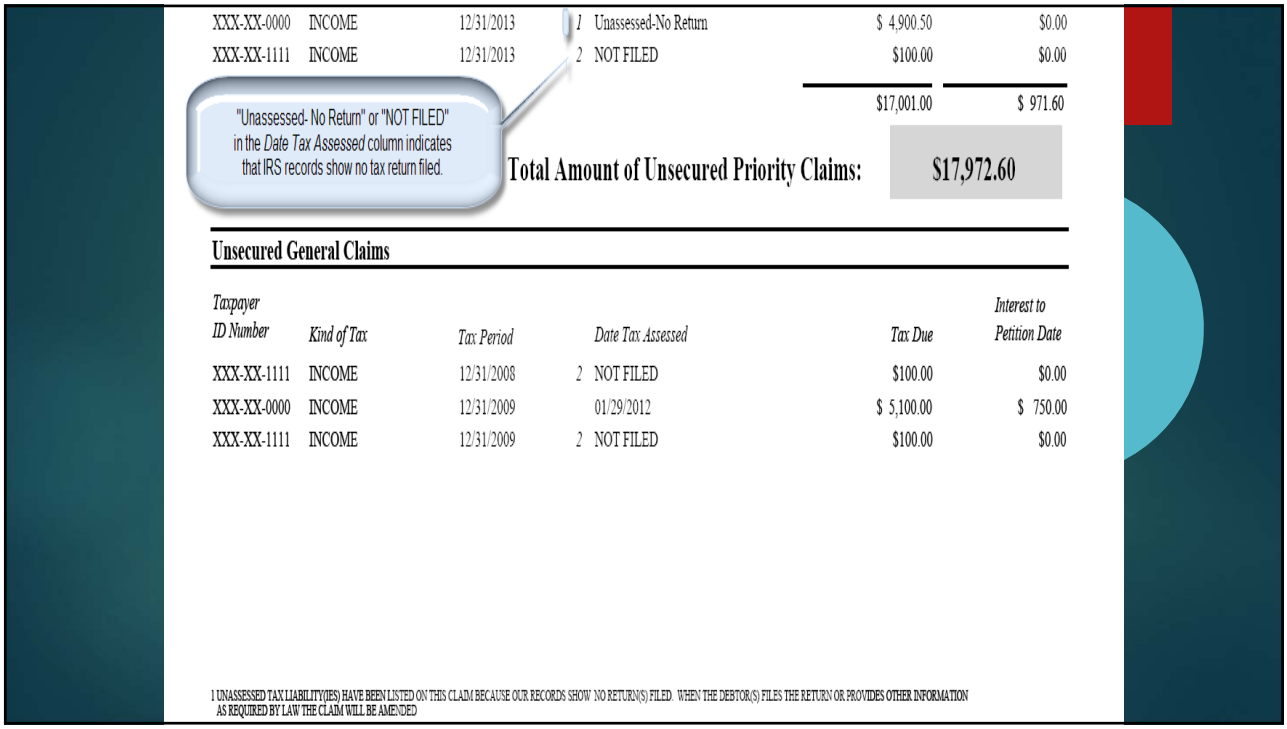
The United States has not identified a right of setoff or counterclaim. However, this determination is based on available data and is not intended to waive any right to setoff against this claim debts owed to this debtor by this or any other federal agency. All rights of setoff are preserved and will be asserted to the extent lawful.

11 USC 523(A)(1)&(7) GENERAL UNSECURED CLAIMS MAY BE NON-DISCHARGEABLE

Secured Claims (Notices of Federal tax lien filed under internal revenue laws before petition date)

Taxpayer ID Number	*Kind of Tax*	*Tax Period*	*Date Tax Assessed*	*Tax Due*	*Penalty to Petition Date*	*Interest to Petition Date*	*Notice of Tax Lien Filed: Date*	*Office Location*

26



XXX-XX-0000	INCOME	12/31/2013	1	Unassessed-No Return	$ 4,900.50	$0.00
XXX-XX-1111	INCOME	12/31/2013	2	NOT FILED	$100.00	$0.00
					$17,001.00	$ 971.60

"Unassessed- No Return" or "NOT FILED" in the *Date Tax Assessed* column indicates that IRS records show no tax return filed.

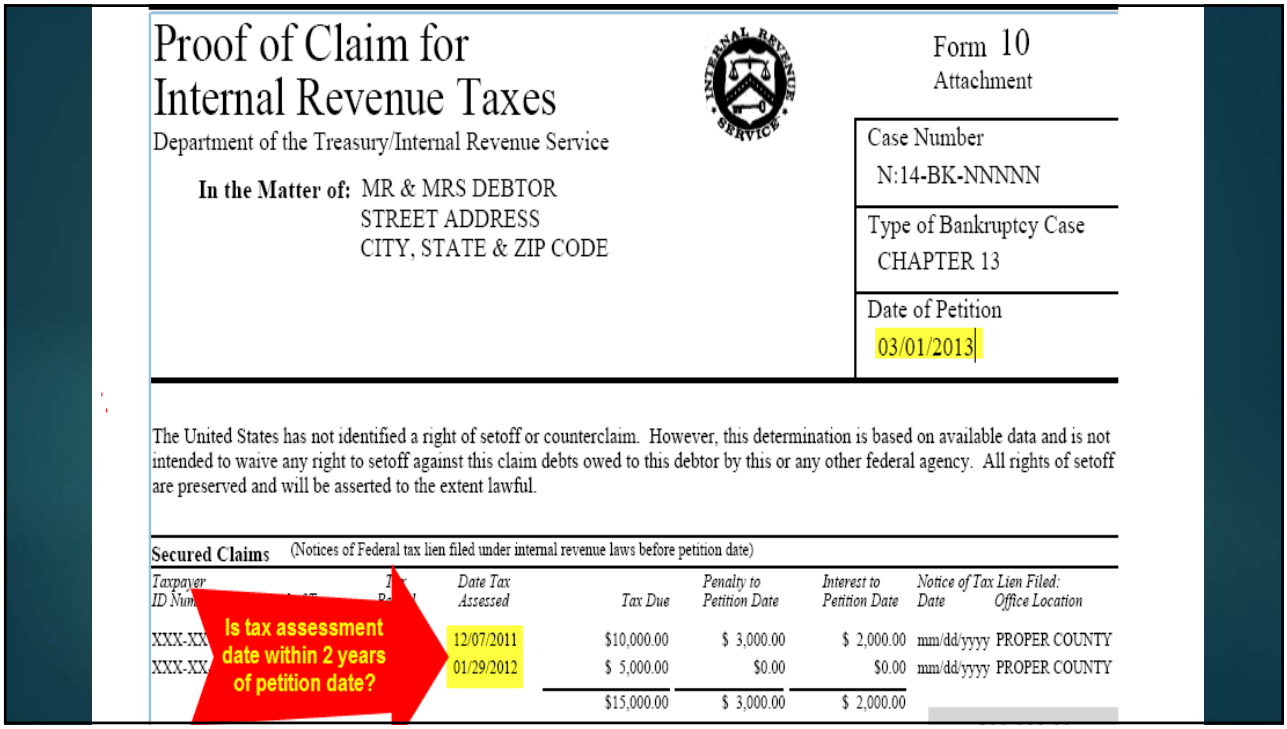
Total Amount of Unsecured Priority Claims: **$17,972.60**

Unsecured General Claims

Taxpayer ID Number	*Kind of Tax*	*Tax Period*		*Date Tax Assessed*	*Tax Due*	*Interest to Petition Date*
XXX-XX-1111	INCOME	12/31/2008	2	NOT FILED	$100.00	$0.00
XXX-XX-0000	INCOME	12/31/2009		01/29/2012	$ 5,100.00	$ 750.00
XXX-XX-1111	INCOME	12/31/2009	2	NOT FILED	$100.00	$0.00

1 UNASSESSED TAX LIABILITY(IES) HAVE BEEN LISTED ON THIS CLAIM BECAUSE OUR RECORDS SHOW NO RETURN(S) FILED. WHEN THE DEBTOR(S) FILES THE RETURN OR PROVIDES OTHER INFORMATION AS REQUIRED BY LAW THE CLAIM WILL BE AMENDED

27



Proof of Claim for Internal Revenue Taxes

Department of the Treasury/Internal Revenue Service

Form 10
Attachment

In the Matter of: MR & MRS DEBTOR
STREET ADDRESS
CITY, STATE & ZIP CODE

Case Number
N:14-BK-NNNNN

Type of Bankruptcy Case
CHAPTER 13

Date of Petition
03/01/2013

The United States has not identified a right of setoff or counterclaim. However, this determination is based on available data and is not intended to waive any right to setoff against this claim debts owed to this debtor by this or any other federal agency. All rights of setoff are preserved and will be asserted to the extent lawful.

Secured Claims (Notices of Federal tax lien filed under internal revenue laws before petition date)

Taxpayer ID Num	*Tax Period*	*Date Tax Assessed*	*Tax Due*	*Penalty to Petition Date*	*Interest to Petition Date*	*Notice of Tax Lien Filed: Date*	*Office Location*
XXX-XX		12/07/2011	$10,000.00	$ 3,000.00	$ 2,000.00	mm/dd/yyyy	PROPER COUNTY
XXX-XX		01/29/2012	$ 5,000.00	$0.00	$0.00	mm/dd/yyyy	PROPER COUNTY
			$15,000.00	$ 3,000.00	$ 2,000.00		

Is tax assessment date within 2 years of petition date?

28

Be on the Lookout for Substitute for Returns Filed by IRS

Case law is pretty settled that a return filed by a Taxpayer after a Substitute for Return is filed by IRS is not considered a "return" for purposes of the Bankruptcy Code. Regardless of its age, tax debt is probably not dischargeable.

United States v. Hindenlang (In re Hindenlang), 164 F.3d. 1029 (6th Cir. 1999)

In re Earls, 549 B.R. 871 (Bankr. S.D. Ohio 2016)

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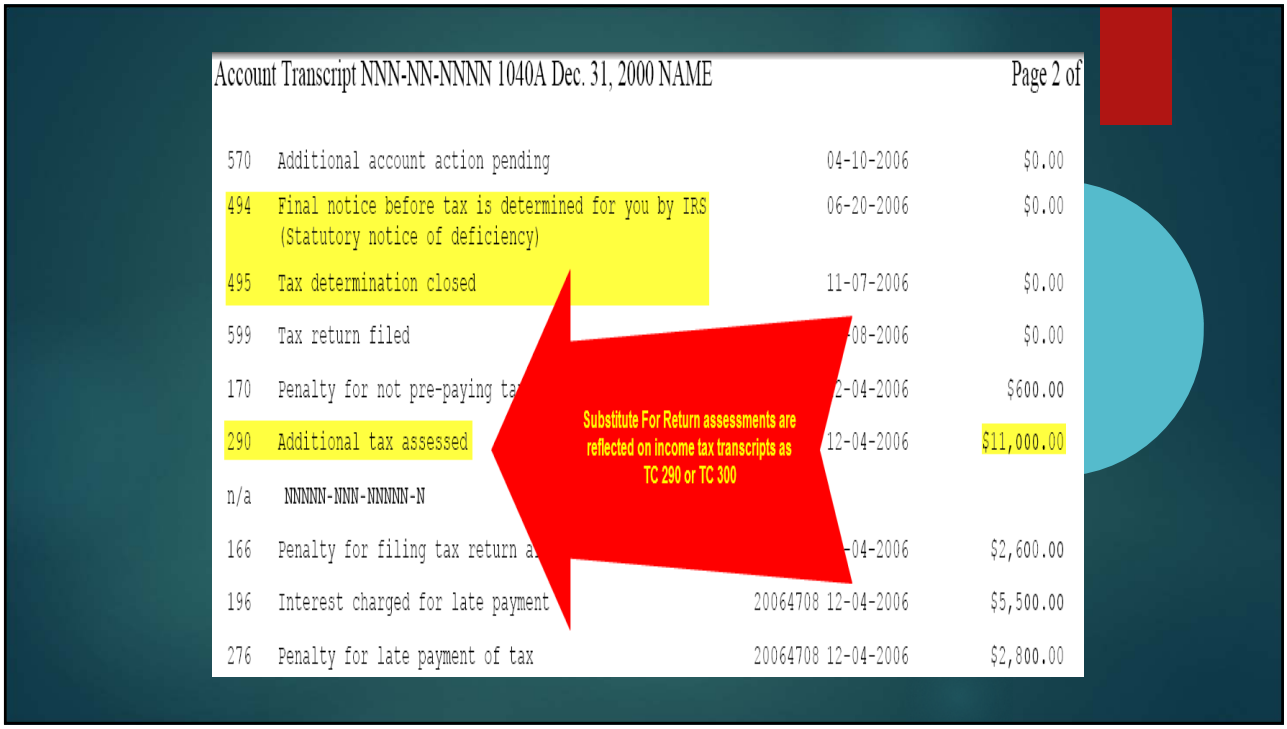
EXEMPTIONS:	00
FILING STATUS:	Married Filing Separate
ADJUSTED GROSS INCOME:	37,500.00
TAXABLE INCOME:	31,500.00
TAX PER RETURN:	0.00
SE TAXABLE INCOME TAXPAYER:	37,500.00
SE TAXABLE INCOME SPOUSE:	0.00
TOTAL SELF EMPLOYMENT TAX:	5,750.00

RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER)	Mar. 14, 2006
PROCESSING DATE	Apr. 10, 2006

TRANSACTIONS

CODE	EXPLANATION OF TRANSACTION	CYCLE	DATE	AMOUNT
150	Substitute tax return prepared by IRS		04-10-2006	$0.00
n/a	NNNNN-NNN-NNNNN-N			
460	Extension of time to file ext. Date 08-15-2001		04-15-2001	$0.00
140	Inquiry for non-filing of tax return		05-30-2002	$0.00

30



31

Tolling Events and the Hanging Paragraph

An otherwise applicable time period used to determine priority classification of taxes pursuant to 11 U.S.C. § 507(a)(8) shall be suspended if Debtor filed a prior bankruptcy or collection due process hearing request related to the outstanding tax liabilities.

In determining priority status based on the tax assessment date, the 240-day period is suspended if an Offer in Compromise was pending or in effect during the 240-day period.

32

Identifying Prior Bankruptcy Filings on IRS Tax Transcripts

520	Bankruptcy or other legal action filed	05-03-2010	$0.00
520	Bankruptcy or other legal action filed	05-03-2010	$0.00
521	Removed bankruptcy or other legal action	09-20-2011	$0.00
971	Tax period blocked from automated levy program	12-03-2011	$0.00
520	Bankruptcy or other legal action filed	01-04-2012	$0.00
520	Bankruptcy or other legal action filed	01-04-2012	$0.00
521	Removed bankruptcy or other legal action	03-30-2013	$0.00

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Identifying Collection Due Process Hearing Requests on IRS Tax Transcripts

971	Collection due process request received timely	02-22-2022	$0.00
971	Collection due process levy (hearing) request or levy and lien (hearing) request received	02-22-2022	$0.00
520	Bankruptcy or other legal action filed	02-22-2022	$0.00
582	Lien placed on assets due to balance owed	03-02-2022	$0.00
971	Issued notice of lien filing and right to Collection Due Process hearing	03-06-2022	$0.00
521	Removed bankruptcy or other legal action	09-29-2022	$0.00

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Mr. and Mrs. Debtor
Chapter 13, Case No. 14-NNNNN
Petition Date 06-15-2014

06-15-2011 Date for determining priority status pursuant to 11 U.S.C. 507(a)(8)(A)(i)
10-18-2013 Date for determining priority status pursuant to 11 U.S.C. 507(a)(8)(A)(ii)
06-15-2012 Date for determining dischargeability pursuant to 11 U.S.C. 523(a)(1)(B)(ii)

TAX PERIOD	RETURN DUE DATE	DATE RETURN FILED	DATE OF ASSESSMENT
12-31-2000	08-15-2001	N/A	11-24-2006*
12-31-2002	04-15-2003	N/A	11-24-2006*
12-31-2003	04-15-2004	N/A	11-24-2006*
12-31-2005	04-15-2006	12-26-2012	02-04-2013
12-31-2006	04-15-2007	01-23-2013	03-25-2013
12-31-2013	04-15-2014	04-15-2014	05-26-2014

*Unagreed Substitute for Return assessments against Mr. Debtor only
No prior Offer in Compromise
No prior Collection Due Process hearing requests
Mr. and Mrs. Debtor filed Chapter 13 on 05-03-2010, Case No. 10-NNNNN, dismissed 09-20-2011
Mr. and Mrs. Debtor filed Chapter 13 on 03-24-2013, Case No. 13-NNNNN, dismissed 03-30-2014

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Hot Topic in Tax: One-Day Late Rule Is Gaining Traction

- The Development of the One-Day Late Rule
- Which Circuits Have Addressed the Issue
- Where is the 6th Circuit on the Issue

36

When is a filed tax return not considered a "return" for purposes of the dischargeability statute?

1) When it's filed after IRS has made a 6020(b) Substitute for Return (SFR) Assessment against the taxpayer

2) When it is filed late, even if by only 1 day

***This is the current rule in the First, Fifth, and Tenth Circuits

37

Discharge Statute 11 U.S.C. § 523

§ 523. Exceptions to discharge

(a) A discharge under section 727, 11411, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or customs duty –

(B) with respect to which a return, or equivalent report or notice, if required—

(i) **was not filed or given**

11 U.S.C. § 523(a)(1)(B)(i)(emphasis added)

38

Courts Use Nonbankruptcy Law to Define "Return"

- Prior to BAPCPA being enacted in 2005, "return" was not defined by the Bankruptcy Code
- "Return" is also not formally defined in the Internal Revenue Code
- The Sixth Circuit relied on a four-part test outlined by a Tax Court in *Beard* to determine what constitutes a "return" for purposes of § 523.

  United States v. Hindenlang (In re Hindenlang), 164 F.3d. 1029 (6th Cir. 1999)

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The *Beard* Test

What Constitutes a "Return":

1. It must purport to be a return;
2. It must be executed under penalty of perjury;
3. It must contain sufficient data to allow calculation of tax; and
4. It must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

Beard v. Commissioner, 82 T.C. 766, 1984 WL 15573 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986)

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Hindenlang's Holding

- Filing at issue: Form 1040 filed after a SFR Assessment
- The Court focuses on 4th element of the *Beard* test – whether the document filed "**represents an honest and reasonable attempt to satisfy the requirements of the tax law.**"
- Court found that a document is not a "return" if it serves no tax purpose or has no effect under the Internal Revenue Code.
- Court decided that a tax form filed after a SFR assessment serves no tax purpose.
- Holding: Tax debt not dischargeable.

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Pre-BAPCPA Cases

Moroney v. United States (In re Moroney), 352 F.3d 902 (4th Cir. 2003)

Same fact pattern, same holding.

Debtor's income tax statements, filed after IRS's SFRs were prepared, did not constitute returns for purpose of discharging his tax liabilities.

United States v. Payne (In re Payne), 431 F.3d 1055 (7th Cir. 2005)

Same fact pattern, same holding.

IRS has no use for the Form 1040 once it has gone to the trouble of estimating the tax liability without the taxpayer's assistance.

However, Court noted that it was not making a *per se* rule. Court would consider evidence that circumstances beyond the taxpayer's control could have prevented him from filing a timely return before the tax was assessed.

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Pre-BAPCPA Cases (continued)

Colsen v. United States (In re Colsen), 446 F.3d 836 (8th Cir. 2006)

Similar fact pattern, different holding.

Here, the post-assessment return changed the calculation of the tax liability.

Court determined that the form was accurate and contained data that was useful to the IRS to accurately calculate the taxpayer's obligations.

Split from Other Circuits: Taxpayer's attempt to comply with tax law should be determined by form itself. "The filer's subjective intent is irrelevant."

Held the 1040 Form was an honest and genuine attempt to satisfy the tax laws.

****Circuit Split**: *W*hether the timing of the filing and why the return was filed late are relevant to the question of dischargeability

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Addition of the Hanging Paragraph

- BAPCPA added a new hanging paragraph to § 523(a) which defined the term "return" for discharge purposes.

11 U.S.C. § 523(a)(*)(emphasis added)

"For purposes of this subsection, **the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)**. Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

44

Post-BAPCPA – New Rule Develops

McCoy v. Mississippi State Tax Commission (In re McCoy), 666 F. 3d 924 (5th Cir. 2012)

-State income tax returns were filed late, but filed more than 2 years prior to the filing of her Chapter 7 bankruptcy petition.

-State tax law required return to be filed by a certain date. It was not timely filed.

-Return did not meet "applicable filing requirements."

-Finding that a state income tax return that is filed late under the applicable state law is not a "return" for bankruptcy discharge purposes under § 523(a).

**** Note – These were just late-filed state tax returns.**
No SFR assessment or similar procedure utilized by taxing authority.

45

Post-BAPCPA – New Rule Develops

Mallo v. Internal Revenue Service (In re Mallo)
774 F.3d 1313 (10th Cir. 2014)

-Form 1040 tax return filed after a SFR assessment made by IRS

-Explaining that the plain language of the phrase "applicable filing requirements" means something that must be done with respect to filing a tax return. 26 U.S.C. § 6072(a) states a federal return shall be filed on or before the 15th day of April.

-Return was not filed timely as required by the statute.

-Because the applicable filing requirements include filing deadlines, § 523(a)(*) plainly excludes all late-filed Form 1040s from the definition of return.

-Applies rule to federal income taxes.

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Post-BAPCPA – New Rule Develops

Fahey v. Massachusetts Department of Revenue (In re Fahey), 779 F.3d 1 (1st Cir. 2015)

-Tax debt was from late-filed tax returns filed more than 2 years prior to the petition date.

-Massachusetts law does require timely filing of its tax returns, it is a "filing requirement," and therefore, a late-filed return is not a "return" for purposes of § 523.

**** Note – Again, just late-filed state tax returns.**

No SFR assessment or similar procedure utilized by taxing authority.

47

"One-Day Late Rule" Defined

- If a tax return is filed late, even if only by 1 day, it is not considered a "return" for purposes of 11 U.S.C. § 523 because it does not comply with the "applicable filing requirements."
- The only identified exception to this rule is a return prepared under 26 U.S.C. 6020(a) by IRS with the assistance of the taxpayer.

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Creation of "One-Day Late Rule"

- Plain meaning of the statute
- "If Congress intended § 523 to define a return through application of the *Beard* test, Congress could simply define a return as one that "satisfies the requirements of applicable nonbankruptcy law," without qualifying the statement with the phrase "including applicable filing requirements."

49

Criticism of "One-Day Late Rule"

- Incredibly harsh result
- Exceptions to discharge must be narrowly construed in favor of the debtor

  See Grogan v. Garner, 498 U.S. 279, 286 (1991)
- Reads the 2-Year Rule for late-filed returns (523(a)(1)(B)(ii)) out of the statute
- Only exception is for returns prepared through 6020(a) seems unfair – called the "6020(a) safe harbor provision"

  Example:

  Taxpayer mails return late by 1 week – debt never dischargeable in bankruptcy

  Taxpayer fails to file return for several years, submits all information to IRS needed to prepare return, IRS prepares a return for taxpayer under 26 U.S.C. § 6020(a), taxpayer signs return – debt dischargeable through the 6020(a) safe harbor exception.

  *Taxpayer has no right to demand that the IRS prepare a return under this provision.

  *Does not encourage self-reporting of tax liability

  *Rarely done due to limited resources

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6020(a) Return v. 6020(b) Return

"Section 6020(a) returns are those in which a taxpayer who has failed to file his or her returns on time nonetheless discloses all information necessary for the I.R.S. to prepare a substitute for return that the taxpayer can then sign and submit. *See* 26 U.S.C. § 6020(a).

In contrast, a § 6020(b) return is one in which the taxpayer submits either no information or fraudulent information, and the I.R.S. prepares a substitute return based on the best information it can collect independently. *See* 26 U.S.C. § 6020(b)."

In re McCoy, 666 F.3d 924, 928 (5th Cir. 2012)

***Substitute for Returns or SFRs refer to procedures outlined in 6020(b)

51

Circuits Still Relying on *Beard* Post-BAPCPA

Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

-Form 1040 tax returns filed late and after SFR assessment by IRS

-Declined to address "One-Day Late Rule"

-BAPCPA's definition of "return" also requires that the return satisfy "the requirements of applicable nonbankruptcy law" and that the term "applicable nonbankruptcy law" incorporates the *Beard* test.

-Joins the majority of Circuits, failure to timely file a return, at least without a legitimate excuse or explanation, evinces the lack of a reasonable effort to comply with the law. Delinquency in filing a tax return is relevant. Rejects 8th Cir. holding in *In re Colsen*.

-Significant factor in Court's decision is the fact that our system of taxation relies on prompt and honest self-reporting by taxpayers.

-Court does not adopt a *per se* rule. "Circumstance not presented in this case might demonstrate that the debtor, despite his delinquency, had attempted in good faith to comply with the tax laws." *Justice*, 817 F.3d at 747, n.8

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Circuits Still Relying on *Beard* Post-BAPCPA

Smith v. United States (In re Smith), 828 F.3d 1094 (9th Cir. 2016)

- Similar fact pattern (return increased tax liability), same holding
- IRS agreed increase in the assessment based on the late-filed form was dischargeable

-Applies *Beard* test

- Adopted test in pre-BAPCPA case, *In re Hatton*, 220 F.3d at 1061, but in that case no returns were actually filed by taxpayer; debtor tried to discharge the actual SFR assessments.

-Also, does not make a *per se* rule.

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Circuits Still Relying on *Beard* Post-BAPCPA

Giacchi v. United States (In re Giacchi), 856 F.3d 244 (3rd Cir. 2017).

-Same fact pattern, same holding

-Declines to rule on "One-Day-Late Rule"

-Adopts *Beard* test as "applicable nonbankruptcy law."

-Joins majority that timing of the filing of a tax form is relevant to determining whether the form evinces an honest and reasonable attempt to comply with tax law and rejects 8th Circuit's holding in *In re Colsen*.

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Circuit Split?

Primary Split:

First, Fifth and Tenth Circuits – Tax debt can never be discharged if return was filed even one day late.

Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits – Using four-part *Beard* test.

Secondary Split:

-Timing of filing of tax form is relevant to determining whether form evidences an honest and reasonable attempt to comply with tax law.

Justice, 817 F.3d at 746; *Payne*, 431 F.3d at 1057-60; *Moroney*, 352 F.3d at 907; *Hatton*, 220 F.3d at 1060-61; and *Giacchi*, 2017 WL 1753244 at 16.

-Timing is not relevant. Inquiry focuses on the content of the form, not circumstances of its filing. Delinquency in filing the return or the reason for the delinquency is irrelevant.

Colsen, 446 F.3d at 840.

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Supreme Court Avoiding Issue

Supreme Court denied cert on 2 occasions:

1) *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014), *cert. denied.* *Mallo v. IRS*, 135 S.Ct. 2889, 192 L.Ed.2d 924 (2015)

2) *In re Smith*, 828 F.3d 1094 (9th Cir. 2016), *cert. denied.* *Smith v. IRS*, No. 16-497 (Feb. 21, 2017)

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Internal Revenue Service's Position

- Chief Counsel's Notice 2010-016 (September 2, 2010)

  Reading § 523(a) to "create the rule that no late-filed return could qualify as a return" would result in a superfluous reading of § 523(a)(*), since all 6020(b) returns are always prepared after the due date." The notice concludes that 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes.

  I.R.S. Chief Couns. Notice No. CC-2010-016 at 2 (Sept. 2, 2010).

- Other Taxing Authorities:

  Ohio Department of Taxation – Also using the *Beard* test

  Local - ??????

  **If asked to review, Judge may find independently even if not raised by creditor

57

What's a Practitioner to Do?

1. Your client filed a Form 1040 after a SFR Assessment was made.

- It's going to be an uphill battle; great weight of the authority against you.

"Forms filed after their due dates and after an IRS assessment rarely, if ever, qualify as an honest or reasonable attempt to satisfy the tax law." *Giacchi*, 3rd Cir.

- Cases have left some wiggle room. *See, e.g., In re Earls*, 549 B.R. 871 (Bankr. S.D. Ohio 2016)
- The right facts may lead to a different conclusion:
  1) Look at the timing - Return filed prior to 6020(b) assessment
  2) Reason for not filing return timely (illness?, hospitalization?)
  3) If filed return increased tax liability, IRS may agree to discharge that tax debt

  See Smith, 9th Cir. and Chief Counsel Notice 2010-016.

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What's a Practitioner to Do?

2. What about late-filed returns generally?

Case law is still developing. The tax debt is not dischargeable in 3 circuits so far.

Sixth Circuit has not directly addressed the issue of the impact on the definition of "return" added to the Bankruptcy Code in BAPCPA.

→ In ***Hindenlang***, the 6th Circuit specifically noted that it was not addressing the issue as it relates to state, municipal, or other tax liability. 164 F.3d at 1033 n. 4.

Judge Walter sternly rejected "one-day-late" rule in ***McBride v. City of Kettering (In re McBride)***, 534 B.R. 326 (Bankr. S.D. Ohio 2015).

We do have 1 unreported decision from N.D. Ohio adopting the "one-day-late" rule. Debtor was pro se. *See In re Links*, Nos. 08-3178, 07-31728, 2009 WL 2966162 (Bankr. N.D. Ohio Aug. 21, 2009).

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In Closing

"Far from achieving its clarifying purpose, § 523(a)(*) stirred more controversy about whether a document qualifies as a return."

McBride v. City of Kettering (In re McBride), 534 B.R. 326, 333 (Bankr. S.D. Ohio 2015).

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Department of the Treasury **Internal Revenue Service** **Office of Chief Counsel**

Notice

CC-2010-016

September 2, 2010

Subject: Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns Filed After Assessment

Cancel Date: Effective until further notice

Purpose

This Notice provides guidance on the application of the discharge exception under section 523(a)(1)(B)(i) of the Bankruptcy Code for a debt with respect to which a return was not filed in cases in which the taxpayer filed a Form 1040 after the due date.

Background

Pursuant to section 523(a)(1)(B)(i), an individual's bankruptcy discharge does not discharge a tax debt for which a required return was not filed. The Government successfully argued in a number of circuits that a Form 1040 filed after assessment does not qualify as a return for discharge purposes under section 523(a)(1)(B)(i). For example, In re Hindenlang, 164 F.3d 1029 (6th Cir.), cert. denied, 528 U.S. 810 (1999), the Sixth Circuit held that a document must qualify as a federal tax return under tax law to be a return for bankruptcy purposes. The court applied the test in Beard v. Commissioner, 82 T.C. 766 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), which held that if a document "contains sufficient information to permit a tax to be calculated" and "purports to be a return" and "is sworn to as such, and "evinces an honest and reasonable attempt to satisfy the law," it is a return. The Hindenlang court concluded that a Form 1040 filed after assessment serves no tax purpose and therefore was not an honest and reasonable attempt to satisfy the tax laws. Other circuits largely followed Hindenlang. See In re Payne, 431 F.3d 1055 (7th Cir. 2005); In re Moroney, 352 F.3d 902 (4th Cir. 2003); In re Hatton, 220 F.3d 1057 (9th Cir. 2000). The Eighth Circuit disagreed in In re Colsen, 446 F.3d 836 (8th Cir. 2006), holding that a document that on its face evinces an honest and reasonable attempt to satisfy the tax laws qualifies as a return, whether or not it was filed after assessment.

Section 523(a) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The following unnumbered paragraph was added to the end of section 523(a), effective for cases filed on or after October 17, 2005:

Distribute to: X All Personnel
X Electronic Reading Room
Filename: CC-2010-016 File copy in: CC:FM:PF

> For the purpose of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State of local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(Emphasis added.) Neither Colsen nor any of the prior decisions of the courts of appeal involved a bankruptcy case filed on or after October 17, 2005. In the dissent in Payne, Judge Easterbrook remarked that, after the 2005 legislation, an untimely return cannot lead to a discharge because of the reference to "applicable filing requirements" in the unnumbered paragraph in section 523(a). 431 F.3d at 1060. In In re Creekmore, 401 B.R. 748, 751 (Bankr. N.D. Miss. 2008), a post-October 17, 2005 case, the bankruptcy court agreed with Judge Easterbrook's dissent and concluded that any late-filed return can never qualify as a return for dischargeability purposes, unless it was prepared pursuant to I.R.C. § 6020(a). The bankruptcy court in Creekmore acknowledged that its reading of the unnumbered paragraph was harsh, but stated that debtors could avoid the problem by taking advantage of the "safe-harbor" of section 6020(a) by having the Service prepare their returns. Creekmore, 401 B.R. at 752.

Discussion

1. For bankruptcy cases filed on or after October 17, 2005, can a tax debt related to a late-filed Form 1040 be discharged?

Yes. Read as a whole, section 523(a) does not provide that every tax for which a return was filed late is nondischargeable. If the parenthetical "(including applicable filing requirements)" in the unnumbered paragraph created the rule that no late-filed return could qualify as a return, the provision in the same paragraph that returns made pursuant to section 6020(b) are not returns for discharge purposes would be entirely superfluous because a section 6020(b) return is always prepared after the due date. It is a cardinal principle of statutory construction that a statute should be construed so that no clause, sentence or word is rendered superfluous. Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (refusing to read one provision of the Bankruptcy Code to render another superfluous).

Section 523(a)(1)(B)(ii) provides that an individual's bankruptcy discharge does not discharge a debt for which a return was filed after the last date, including any extension, the return was due, and after two years before the date of the filing of the petition in bankruptcy. The Creekmore reading would limit the application of section 523(a)(1)(B)(ii) to cases in which the Service prepares a return for the taxpayer's signature under section 6020(a) of the Internal Revenue Code. By presuming that Congress intended to limit section 523(a)(1)(B)(ii)'s long-standing discharge exception for debts with respect to which a late return was filed more than two years before bankruptcy to the minute number of cases in which the Service prepares a return for the taxpayer's signature under section 6020(a), the Creekmore reading also contradicts a special rule for interpreting the Bankruptcy Code. As the Supreme Court stated in Dewsnup v. Timm, 502 U.S. 410, 419 (1992), "This Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." Finally, the supposed "safe harbor" of section 6020(a) is illusory. Taxpayers have no right to demand that the Service prepare a return for them under that provision. We, therefore,

conclude that section 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes.

2. Whether or not a Form 1040 filed after assessment is a return under nonbankruptcy law, is the related tax debt dischargeable?

No. A debt for the portion of a tax that was assessed prior to the filing of a Form 1040 is nondischargeable under 523(a)(1)(B)(i). The debt is not dischargeable because a debt assessed prior to the filing of a Form 1040 is a debt for which is return was not "filed" within the meaning of section 523(a)(1)(B)(i).[1]

For bankruptcy discharge purposes, an income tax for any given year can be partially dischargeable and partially nondischargeable. Section 523(a)(1)(A), together with section 507(a)(8)(A), excepts debts for priority taxes from discharge. Section 507(a)(8)(A) includes three alternative rules that confer priority (and nondischargeability) on income taxes. Two of those rules clearly allow priority to apply to only a portion of the tax for a given year. Section 507(a)(8)(A)(ii) generally confers priority (and nondischargeability) to income taxes that were assessed within 240 days of the bankruptcy petition. If only a portion of a year's income tax was assessed within the 240-day period, only that portion would be excepted from discharge. Section 507(a)(8)(A)(iii) generally confers priority (and nondischargeability) to income taxes that were unassessed but assessable after the bankruptcy case was filed. If only a portion of the income tax for a given year was unassessed but assessable, only that portion would be excepted from discharge. For discharge purposes, therefore, a given income tax is divided into dischargeable and nondischargeable debts if a criterion for discharge applies only to a portion of the tax.

As with section 523(a)(1)(A), a tax liability for any given year can be divided into dischargeable and nondischargeable debts under section 523(a)(1)(B)(i). Section 523(a)(1)(B)(i) excepts from discharge any "debt" for a tax with respect to which a return was not "filed." For bankruptcy discharge purposes, a debt for an income tax recorded by an assessment should be considered independently of any part of the tax for the same tax year that may be assessed later. If at the time of assessment no return has been filed, then the debt recorded by that assessment is a debt with respect to which a return was not filed and section 523(a)(1)(B)(i) applies to except it from discharge. If the taxpayer later files a Form 1040 that reports an additional amount of tax, only the portion of the tax that was not previously assessed would be a dischargeable debt based upon that subsection. The portion of a tax that was assessed before a Form 1040 was filed would be a debt for which no return was "filed" within the meaning of section 523(a)(1)(B)(i), because at the time of assessment the debtor had not met the filing requirements for that portion of the tax and the assessed portion was not calculated based upon the tax reported on the Form 1040. The assessed portion of the tax was a debt for a tax that was legally enforceable by lien or levy before any return was filed. In the case of a debtor who files a Form 1040 after assessment reporting no more tax than was previously assessed, no portion of the tax would be a dischargeable debt.

Conclusion

A Form 1040 is not disqualified as a "return" under section 523(a) solely because it was filed late. Regardless of whether a Form 1040 filed after assessment is a "return" for tax purposes, the portion of a tax that was assessed before the Form 1040 was filed is nondischargeable under

[1] Accordingly, whether a late-filed Form 1040 is a "return" – the issue addressed in Hindenlang and other cases on section 523(a)(1)(B)(i) – is irrelevant.

section 523(a)(1)(B)(i). All bankruptcy cases involving application of the discharge exception under section 523(a)(1)(B)(i) to cases involving a Form 1040 filed after assessment should be coordinated with Branch 5, Office of the Associate Chief Counsel (Procedure and Administration). Questions about this Notice should be directed to Branch 5 at (202) 622-3620.

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

How to Apply for a

Certificate of Non-Attachment of Federal Tax Lien

Under Internal Revenue Code section 6325(e), a Certificate of Non-Attachment of Federal Tax Lien may be issued when any person is, or may be, injured by the appearance that a Federal tax lien attaches their property. A certificate of non-attachment is most commonly requested when a person with a similar name is confused for the taxpayer named on the Notice of Federal Tax Lien; however, a certificate of non-attachment can be requested for other situations to clarify the attachment of the lien to certain property.

Generally, a certificate of non-attachment is not needed to clarify whether the Federal tax lien attaches the property at the address shown on the notice of lien. The address shown under "Residence" is the last known mailing address of the taxpayer. The Federal tax lien attaching that property should only be in question if the taxpayer has or had an interest in that property.

There is no standard application form to request a Certificate of Non-Attachment of Federal Tax Lien. A letter providing the information detailed in this publication will be considered as an application.

Please furnish the following information:

1. Your name and address as the person applying for the certificate of non-attachment under section 6325(e) of the Internal Revenue Code.
2. An explanation as to why the certificate of non-attachment is needed.
3. A description of the property for which you are requesting the certificate of non-attachment. If real property is involved, provide a copy of the title or deed showing the legal description of the property and provide the complete address (street, city, state, and ZIP code).
4. A copy of each Notice of Federal Tax Lien in question or the following information as it appears on each filed notice:
   - The name and address of the taxpayer against whom the notice was filed;
   - The date and place the notice was filed; and
   - The serial number shown on the notice of lien.
5. A statement of whether the taxpayer named on the notice of lien has, or had, an interest in the property for which you are requesting the certificate of non-attachment.
6. Your relationship, if any, to the taxpayer against whom the notice was filed.
7. Your address at the time the notice of lien was filed and other addresses where you have lived since the notice of lien was filed.
8. Your social security number and that of your spouse, if applicable. Also, the employer identification number of any business you own.
9. Any other information that might help in deciding whether a certificate of non-attachment should be issued, such as any divorce decree, partnership agreement, or dissolution agreement that addresses property ownership.
10. A daytime telephone number where you may be reached.
11. The name, address and telephone number of your attorney or other representative, if any.
12. Include the following declaration over your signature and title:

    "Under penalties of perjury, I declare that I have examined this application, including any accompanying schedules, exhibits, affidavits, and statements, and to the best of my knowledge and belief, it is true, correct, and complete."

Additional information may be required before issuing the certificate. If your request for a certificate of non-attachment is denied, you will receive a letter advising you of the reason for the denial and your rights to appeal the decision.

Submit your letter request, and accompanying attachments, to:

Internal Revenue Service
Attn: Advisory Group Manager

at the address of the IRS office corresponding to where the Notice of Federal Tax Lien was filed. (See Publication 4235, *Collection Advisory Group Addresses*, to determine the appropriate office.)

Privacy Act Notice: Sections 6001, 6011, 6109, and 6323 of the Internal Revenue Code authorize us to collect the information requested, including your social security number(s). Providing your social security number(s) is voluntary. We will use it to identify you and determine whether to issue the certificate of non-attachment.