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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Kevin J. Matthews, Plaintiff, *v.* GMAC Mortgage, LLC Defendant.	Adv. Proc. 12-01933 (MG)
In re RESIDENTIAL CAPITAL, LLC, *et al.*, Debtors	Case No. 12-12020 (MG) Chapter 11 Jointly Administered

DEBTORS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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STATUTES

Defendant GMAC Mortgage, LLC ("GMACM"), a debtor and debtor in possession in the above-captioned chapter 11 cases (collectively with all affiliated debtors and debtors in possession, the "Debtors"), submits this response (the "Response") to Plaintiff Kevin J. Matthews's ("Plaintiff" or "Matthews") *Motion for Partial Summary Judgment as to Liability Against Defendant GMAC Mortgage Co., LLC* (the "Motion") [ECF # 5], filed in the above-captioned adversary proceeding (the "Adversary Proceeding"). In support hereof, GMACM respectfully represents:

I. INTRODUCTION

1. On January 17, 2013, Matthews filed the Motion requesting partial summary judgment as to liability on each of the three claims asserted against GMACM in his complaint [ECF #1] (the "Complaint"). However, Matthews fails to demonstrate that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law as to liability on any of his claims. As an initial matter, as explained in detail herein, Matthews' counsel demonstrates a startling lack of candor to this Court by blatantly and intentionally failing to disclose Maryland case law that is directly on point and contrary to legal arguments contained in the Motion, including omitting references to cases in which Matthews's counsel himself was involved.

2. Moreover, Matthews's argument is based entirely on documents submitted in connection with a prior foreclosure action that was voluntarily dismissed by GMACM in January 2011. Those documents are of two types: (1) documents that list three Substitute Trustees of GMACM on the signature block but contain only one signature (the "Substitute Trustee Documents," which are attached to the Motion as Exhibits 2, 5, 6, 7, 8, 9, and 10); and (2) documents that bear the signature of Jeffrey Stephan (the "Stephan Documents," which are

attached to the Motion as Exhibits 1, 13, 14, and 15), an employee of GMACM who, in 2010 in an unrelated case in state court in Maine, gave deposition testimony concerning his review and execution of foreclosure documents. Matthews offers no showing of a claim of liability or of damages flowing from such documents and, as set forth in GMACM's *Motion for Dismissal of Adversary Proceeding Pursuant to Bankruptcy Rules 7009 and 7012(b) and FRCP 9, 12(b)(5) and 12(b)(6)* [ECF # 6] (the "Motion to Dismiss"),[1] Matthews is estopped from relying on them in connection with the claims asserted in the instant Adversary Proceeding. In fact, each of Matthews's claims should be dismissed for failure to state a claim upon which relief can be granted, as well as for insufficient service of process, for the reasons set forth in the Motion to Dismiss. Accordingly, and as set forth in more detail below, the Motion lacks merit and should be denied.

II. RESPONSE TO MATTHEWS'S STATEMENT OF MATERIAL FACTS

3. **GMACM's Response to Matthews's Material Fact 1**: Matthews's statement that Substitute Trustee Carrie Ward ("Ward") and Jeffrey Stephan ("Stephan") "are authorized agents" of GMACM is a legal conclusion rather than a material fact to which a response is required. GMACM does not dispute that Ward was one of the Substitute Trustees who instituted the foreclosure action that was filed on March 29, 2010 in the Circuit Court for Baltimore City, Maryland (the "First Foreclosure Action"), which was dismissed without prejudice, upon GMACM's own motion, on January 14, 2011. Nor does GMACM dispute that Stephan signed certain documents in connection with the First Foreclosure Action.

4. **GMACM's Response to Matthews's Material Fact 2**: GMACM disputes Matthews's characterization of documents submitted in support of the First Foreclosure Action

[1] The Motion to Dismiss is also scheduled to be heard on April 11, 2013.

as "improper and irregular." Matthews has offered no evidence that any of the documents is inaccurate, incomplete, or misleading in any way.

5. **GMACM's Response to Matthews's Material Fact 3**: GMACM does not dispute that one Maryland Circuit Court determined in an unrelated case that an affidavit identifying three names and one signature is not a proper form for an affidavit. However, the decision cited by Matthews is inapplicable to the case at bar for the reasons stated below.

6. **GMACM's Response to Matthews's Material Fact 4**: Upon information and belief, GMACM does not dispute that Judge Leasure's decision was never appealed. However, the decision is inapplicable to the case at bar for the reasons stated below.

7. **GMACM's Response to Matthews's Material Fact 5**: Matthews's statement that Stephan and Ward were GMACM's "authorized agents" is a legal conclusion rather than a material fact to which a response is required. GMACM does not dispute that Ward was one of the Substitute Trustees who instituted the First Foreclosure Action, which was dismissed without prejudice, upon GMACM's own motion, on January 14, 2011. Nor does GMACM dispute that Stephan signed certain documents in connection with the First Foreclosure Action.

8. **GMACM's Response to Matthews's Material Fact 6**: GMACM disputes Matthews's characterization of documents submitted in support of the First Foreclosure Action as "improper and irregular." Matthews has offered no evidence that any of the documents is inaccurate, incomplete, or misleading in any way.

9. **GMACM's Response to Matthews's Material Fact 7**: Upon information and belief, GMACM disputes Matthews's characterization of documents signed by Stephan because those assertions are based on deposition testimony in an unrelated case in a different state involving a different borrower.

III. ARGUMENT

A. Summary Judgment Standard.

10. Summary judgment is appropriate when no genuine dispute as to any material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "The substantive law governing the suit identifies the essential elements of the claims asserted and therefore indicates whether a fact is material; a fact is material if it 'might affect the outcome of the suit under the governing law.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)." *Bronx Household of Faith v. Bd. of Education of the City of New York*, 876 F.Supp.2d 419, 425 (S.D.N.Y. 2012). "[T]he dispute about a material fact is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (quoting *Anderson,* 477 U.S. at 248).

11. Further, to determine whether a genuine dispute of material fact exists, a court must review the record in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986); *Lucente v. IBM Corp.*, 310 F.3d 243, 253 (2d Cir. 2002). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . ." FED. R. CIV. P. 56(c)(1)(A). "Ultimately, the court must grant summary judgment "if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Bronx Household of Faith*, 876 F.Supp.2d at 425 (quoting *Anderson*, 477 U.S. at 250).

B. The Doctrine of Offensive Non-Mutual Collateral Estoppel Does Not Apply.

12. Matthews argues that a decision of the Circuit Court for Howard County, Maryland collaterally estops GMACM "from relitigating [in this case] several of the material

facts and legal findings identified [by Matthews]." (Matthews's Brief ("Brief") at 7). Because Matthews was not a party to that Howard County case and he asks this Court to employ the concept in support of his affirmative claims, his argument requires the application of the "offensive non-mutual collateral estoppel doctrine." (Id. at 8 (emphasis added)).

13. Maryland's high court, however, has expressly declined to apply offensive non-mutual collateral estoppel. In *Burruss v. Board of County Comm'rs of Frederick County*, 46 A.3d 1182, 427 Md. 231 (2012), the Court of Appeals of Maryland stated as follows:

> We decline the invitation to apply the doctrine of collateral estoppel to the circumstances of this case. In *Rourke*, we acknowledged that this Court has recognized the doctrine of defensive non-mutual collateral estoppel. We explained in that case that the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), declined to embrace the doctrine of offensive non-mutual collateral estoppel. This Court has not, since we issued our opinion in *Rourke*, adopted or applied the doctrine of offensive non-mutual collateral estoppel, and we deem the Supreme Court's analysis in *Parklane* persuasive.

Id., 46 A.3d at 1194, 427 Md. 252 (internal citations omitted; emphasis added). Because Maryland has not adopted the doctrine, and its high court finds "persuasive" the United States Supreme Court's rejection of it, offensive non-mutual collateral estoppel has no application in the instant case.

14. In his brief, Matthews's counsel cites *Rourke v. Amchem Prods., Inc.*, 863 A.2d 926, 384 Md. 329 (Md. 2004) (Brief at 6), but he neglects to point out that the Court of Appeals rejected the doctrine in that decision (as it would do again in *Burruss* eight years later), stating as follows: "For one thing, for plaintiffs to prevail, we would have to apply, as Maryland law, offensive non-mutual collateral estoppel, and, as noted, we have not yet embraced that aspect of non-mutuality and decline to do so in this case." *Id.*, 863 A.2d at 940, 384 Md. at 352, n.11 (emphasis added). Moreover, quoting the United States Supreme Court, the Maryland high court

recognized that the application of the doctrine may be unfair to a defendant "for several reasons," including: "(1) that '[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable,' (2) offensive use may be unfair as well 'if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant,' and (3) such use may be unfair 'where the second action affords the defendants procedural opportunities unavailable in the first action that could readily cause a different result.'" *Id.*, 863 A.2d at 938, 384 Md. at 350 (quoting *Parklane Hosiery*, 439 U.S. at 330-31).

15. In an even more striking lack of candor to this Court, Matthews's counsel chose to omit *Burruss* entirely from his brief to this Court. In a brief he filed on Mr. Matthews's behalf four months earlier in the Circuit Court for Baltimore City, Maryland -- in a case involving the very same facts as the instant case and in which GMACM was also a party until it was voluntarily dismissed by Matthews in favor of his pursuit of this Adversary Proceeding -- Matthews's counsel did cite *Burruss*. (Excerpts from that brief, including the section (pages 10-15) in which Matthews articulates his collateral estoppel argument, are attached collectively as **Exhibit 1**). The bottom of page 12 of the state court brief (the quote from the *Mendoza* decision) through the end of the last full paragraph on page 13 is identical to page 6 (of 21) of the brief counsel submitted to this Court with one exception -- the citation at the end of the last full paragraph to the *Burruss* decision is deleted and replaced by a quote from the *Rourke* decision.[2]

16. Also incredibly, Matthews's counsel chose not to disclose to this Court that other Maryland Circuit Courts—courts of equal jurisdiction and dignity to the Circuit Court for

[2] Also noteworthy, GMACM, in the brief it submitted in the state court case in reply to Matthews's response, cited and quoted from *Burruss* in support of its position that the doctrine does not apply. (Relevant excerpts of that GMACM brief are attached hereto as **Exhibit 2**).

Howard County that decided *Geesing v. Willson*, Case No. 13C10082594, upon which Matthews relies—have considered the same factual circumstances and determined, contrary to *Willson*, that it was unnecessary and inappropriate to delay (much less dismiss) the pending foreclosure as a result of the form or method related to the signature on affidavits. *See, e.g., Geesing v. Jones*, Circuit Court for Prince George's County, Case No. CAE10-08803, Official Transcript of Proceedings, July 6, 2011, at 17 ("I am aware that other judges in other cases in other factual settings have reached other decisions. This of course is the court, and of course the judge that raised this issue in August 2010. I'm not unaware of the corrective affidavit and the single difficult to read signature and the multiple names underneath, they are not however in the absence of a contradiction of any statement in any affidavit or statement, a sufficient reason to upset the sale schedule for this morning . . . .") (emphasis added; a copy of the transcript from *Geesing v. Jones* is attached hereto as **Exhibit 3**).[3]

17. To be sure, there are several other reasons offensive non-mutual collateral estoppel does not apply here, including the following:

a. The court's decision in *Geesing v. Willson* did not provide for any type of private right or remedy to the homeowner but rather only required that the foreclosure in that case be re-filed; and that relief is precisely what has already occurred here -- the first foreclosure action was dismissed without prejudice.

[3] As noted above, the Court of Appeals of Maryland in *Rourke* recognized this very issue as one of the problems with applying non-mutual collateral estoppel offensively against a defendant. ("[O]ffensive use may be unfair as well 'if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant,' …." *Rourke*, 863 A.2d at 938, 384 Md. at 350 (quoting *Parklane Hosiery*, 439 U.S. at 330-31).

b. The decision in *Geesing v. Willson* was expressly limited to that case (Transcript at 10: "I'm not addressing any case other than the one that is before me and I'm going to grant the motion to dismiss without prejudice.").

c. The decision in *Geesing v. Willson* is by no means an outcome mandated by the Maryland foreclosure statutes and rules; MD. R. 14-207.1 provides only that a court "may" notify parties that it will dismiss a foreclosure action, or, it may issue some "other appropriate order" for non-compliance with governing requirements. *See Shepherd v. Burson*, 50 A.3d 567, 578, 427 Md. 541, 559 (Md. 2012).

d. Even if the Order in *Geesing v. Willson* had any precedential effect, it would not here because the *Geesing v. Willson* Order was entered on November 30, 2010 and the foreclosure case that forms the basis of Matthews's claims was filed in April 2010. (See Compl. ¶ 74). An order that has not yet been entered is not binding *nunc pro tunc* to all cases that preceded it in all other courts.

18. For all of these reasons, Matthews's "offensive non-mutual collateral estoppel" argument lacks merit and should be rejected.

C. Each Of Matthews's Causes Of Action Fails To State A Claim Upon Which Relief Can Be Granted.

19. In the Debtors' Motion to Dismiss, GMACM explains why Matthews cannot recover on any of his claims. In the interests of efficiency and economy, GMACM respectfully refers the Court to those arguments and incorporates them into this brief by reference rather than restating them in their entirety. For the simple reason that Matthews cannot recover on any of his claims (and GMACM's motion to dismiss should be granted), Matthews's summary judgment motion should be denied.

D. Matthews Is Not Entitled To Judgment As A Matter Of Law On His Claim For Violations Of The Maryland Consumer Protection Act (Count I).

20. The Maryland Consumer Protection Act ("MCPA") permits a private right of action when an individual seeks "to recover for injury or loss sustained by him as the result of a practice prohibited by this title." The Court of Appeals of Maryland has instructed that an individual may bring a claim under the MCPA only if he can "establish the nature of the actual injury or loss that he or she has allegedly sustained as a result of the prohibited practice." *Lloyd v. General Motors Corp.*, 916 A.2d 257, 280 (Md. 2007) (quoting *Citaramanis v. Hallowell*, 613 A.2d 964, 968 (Md. 1992)). In other words, a plaintiff must show that he suffered actual loss of money or property as a result of the alleged violation. *See, e.g.*, *DeReggi Constr. Co. v. Mate*, 747 A.2d 743, 752 (Md. 2000) ("[T]o receive protection under the Consumer Protection Act, appellees must show they were actually injured by appellants' violation of the Act…."); *Citaramanis*, 613 A.2d at 969 (tenants were not entitled to restitution of rents paid because they were not harmed by landlord's failure to disclose that premises were not licensed for occupancy).

21. Here, Matthews offers no evidence at all that he sustained any injury or loss as a result of the Substitute Trustee Documents or the Stephan Documents about which he complains. That the Motion seeks summary judgment only as to liability does not relieve Plaintiff of the obligation to offer evidence of damages because proof of damages flowing from the allegedly prohibited practice is an element of each of his claims. For this reason alone, Matthews has failed to demonstrate that he is entitled to judgment as a matter of law on his MCPA claim, and his motion should be denied.

22. In support of his argument, Matthews states: "There is no material dispute that the Defective Matthews Foreclosure Papers and Affidavits failed as a matter of law to comply

with the mandatory requirements for commencing a foreclosure against Mr. Matthews signed by the purported signer Stephan." (Brief at 14). Matthews cites no authority for that statement.

23. Also, Matthews contends that the documents he calls "Defective Matthews Foreclosure Papers and Affidavits" amount to a "false material representation" (Brief at 14), but he does not identify any representation in any of the documents in support of that statement.

24. Further, Matthews states that "GMAC had the duty to Mr. Matthews [sic] independently verify all information sworn to by its agents" (Brief at 14), but he fails to identify a single piece of information in any foreclosure document that was inaccurate, incomplete, or misleading in any way.

25. Matthews also states baldly that "[i]f corporate persons such as GMAC are permitted to maintain foreclosure proceedings on the basis of faulty or fraudulent affidavits, consumers like Mr. Matthews will continue to be harmed." (Brief at 15). This statement completely ignores that GMACM dismissed the First Foreclosure Action voluntarily. Matthews also provides no evidence in support of the implication that he has been harmed as a result of the alleged faultiness of documents submitted in connection with the First Foreclosure Action.

26. Finally, Matthews's MCPA claim fails as a matter of law and should be dismissed for the reasons set forth in GMACM's Motion to Dismiss. Indeed, within the past year in a case very similar to the one at bar that was also handled by Matthews's counsel, the United States District Court for the District of Maryland (the "Maryland District Court") rejected the very same arguments made on behalf of Plaintiff in the Motion, and granted the defendant substitute trustees' motion to dismiss. In *Stewart v. Bierman*, 859 F.Supp.2d 754, 757 (D. Md. 2012). The facts in *Stewart*, as related by the Maryland District Court, were as follows:

> The Lembachs fell behind on their mortgage payments, and the lender for the Lembach Property, Deutsche Bank, appointed BGWW as substitute trustee under

> a deed of trust on or about September 22, 2009. Plaintiffs maintain that employees of BGWW fabricated signatures on the Order to Docket and other papers containing the alleged signatures of the trustees (Bierman, Geesing, and Ward). BGWW filed an Order to Docket a Foreclosure against the Lembach Property on September 28, 2009. *Id.* ¶ 122. Defendants dismissed the first foreclosure proceeding on December 14, 2009, and later docketed a second foreclosure action on March 17, 2010. Plaintiffs allege that Defendants relied on fraudulent documents in the second proceeding, which "was dismissed by the state court."

Id. at 758 (internal citations omitted). As in the Matthews First Foreclosure Action, the substitute trustees in *Stewart v. Bierman* were attorneys Howard Bierman, Jacob Geesing, and Carrie Ward of the law firm Bierman, Geesing, Ward & Wood, LLC ("BGWW").

27. In dismissing the MCPA claim in *Stewart*, the Maryland District Court stated:

> … Plaintiffs fail to indicate how the alleged forgeries of the foreclosure documents materially impacted the debtors' conduct or how the signatures caused Plaintiffs a specific harm separate from the debt owed. The manner or procedure of affixing signatures to documents that are accurate in every other way except for the signature does not affect the accuracy of the underlying debt. Plaintiffs have conceded that they were late on their mortgage payments. The actual process and method of affixing signatures to court documents is immaterial to a debtor where the existence of the debt and a default are not disputed.

Id. at 769 (emphasis added).

28. In yet another recent case handled by Matthews's counsel in which he made similar allegations concerning foreclosure documents submitted by Ward's firm as substitute trustees, the Maryland District Court rejected these same arguments as follows:

> While the Plaintiffs have not made a plausible showing that they suffered any actual concrete injury at the hands of the Defendant, it is clear that to the extent they did suffer some injury, that injury was a result of the Plaintiffs' own failure to keep current on their mortgage, and not on the allegedly "bogus" documents filed by BGW in the course of the dismissed foreclosure proceeding.

Casey v. Litton Loan Servicing LP, No. Civ. A RDP-11-0787, 2012 WL 502886, at * 4 (D. Md. Feb. 14, 2012) (emphasis added). For this reason (and others), the Maryland District Court denied the plaintiffs' motion for partial summary judgment and granted the defendant's motion

to dismiss the plaintiffs' three claims -- the same statutory claims brought in the instant case by Matthews.

29. That the *Stewart* and *Casey* cases did not involve "Stephan Documents" (along with the "Substitute Trustee Documents") is immaterial. Matthews, like the plaintiffs in those cases, offers no evidence that he suffered any damages as a result of any of the documents about which he complains, and that failure alone is fatal to his claims. *See also, Bank of America v. Jill P. Mitchell Living Trust*, 822 F. Supp. 2d 505, 532 (D. Md. 2011) ("Consumers must prove that they relied on the misrepresentation in question to prevail on a damages action under the MCPA. A consumer relies on a misrepresentation when the misrepresentation substantially induces the consumer's choice.") (citations omitted).

30. For the reasons set forth above, Matthews's argument that he is entitled to summary judgment on his MCPA claim lacks merit and should be rejected.

E. Matthews Is Not Entitled To Judgment As A Matter Of Law On His Claim For Violations Of The Maryland Mortgage Fraud Protection Act (Count II).

31. Like the MCPA, the Maryland Mortgage Fraud Protection Act (the "MMFPA") only permits a private plaintiff to pursue "an action for damages incurred as the result of a violation" of the MMFPA. MD. CODE REAL PROP. § 7-406(a) (emphasis added). As discussed above, Matthews has offered no evidence of damages. *Cf. Thomas v. Nadel*, 48 A.3d 276, 453 (Md. 2012) ("There is no allegation that the Thomases were tricked into signing, that there was any misrepresentation, or that the signing was otherwise unlawful. There is no question that the Thomases are bound by the note and no question that they did not fulfill their obligations under it . . . Additionally, there is no allegation that any fraud, misrepresentation, or unfairness contributed to the Thomases' failure to fulfill their loan obligations, failure to redeem the property prior to sale, or failure to raise these exceptions prior to [the foreclosure] sale.").

32. In support of his contention that he is entitled to summary judgment on his MMFPA claim, Matthews cites the unreported decision *Stovall v. SunTrust Mortgage, Inc.*, No. Civ. A RDB-10-2836, 2011 WL 4402680 (D. Md. Sept. 20, 2011) and states as follows: "The *Stovall* court held that the lender's alleged and similar misstatements and omissions in the foreclosure process, such as those subject to this action 'are sufficient to plead a violation of the MMFPA.'" (Brief at 16). Of course this statement is a far cry from supporting Matthews's argument that he is entitled to summary judgment on his MMFPA claim.

33. More importantly, and in yet another stunning exhibition of lack of candor to this Court, Matthews's counsel fails to disclose that in the very same *Stovall* case -- in which Matthews's counsel was counsel of record -- the Maryland District Court issued a later decision that dismissed the plaintiff's MMFPA claim after the lender re-filed its motion to dismiss once discovery had concluded. In *Stovall v. SunTrust Mortgage, Inc.*, No. Civ.A RDB-10-2836, 2012 WL 5879132 (D. Md. Nov. 20, 2012), the Maryland District Court dismissed the plaintiff's MMFPA claim "because Stovall [did] not [make] an adequate showing that she suffered an injury due to the Trustees' practice … [and] [a]ny injury suffered by Stovall is a result of falling delinquent on her loan rather than by the manner in which the Trustees affixed its signatures to the foreclosure documents." *Id.*, at *7.

34. Similarly, in both *Stewart* and *Casey*, which are cited and discussed above, the Maryland District Court dismissed the plaintiffs' MMFPA claims for the same reasons that their MCPA claims were dismissed. For the reasons discussed above, the same analysis applies here.

35. Here, Matthews has offered no evidence whatsoever of damages, let alone "injury due to the [ ] practice" of submitting the so-called "Defective Matthews Foreclosure Papers and Affidavits." For this reason alone, Matthews's Motion should be denied.

F. Matthews Is Not Entitled To Judgment As A Matter Of Law On His Cause of Action Under The Maryland Consumer Debt Collection Act (Count III).

36. The Maryland Consumer Debt Collection Act (the "MCDCA") states, *inter alia*, that "[i]n collecting or attempting to collect an alleged debt a collector may not … [c]laim, attempt, or threaten to enforce a right with knowledge that the right does not exist[.]" MD. CODE COMMERCIAL LAW § 14-202(8). As explained by the Maryland District Court:

> For purposes of this statute, "knowledge" has been construed to include "actual knowledge or reckless disregard as to the falsity" of the existence of the right. . . . [T]o establish "reckless disregard," a plaintiff must show "the defendant either (1) made the statement with a 'high degree of awareness of ... probable falsity'; or (2) actually entertained serious doubts as to the truth of the statement."

Allen v. Bank of Am. Corp., No. Civ. CCB-11-33, 2011 WL 3654451, at * 9 (D. Md. Aug. 18, 2011).

37. Here, Matthews has offered no evidence that GMACM attempted to collect a debt with the requisite high degree of awareness of its probable nonexistence, or that GMACM actually doubted the existence of such debt. To the contrary, it is clear that GMACM did and does have the right to enforce the mortgage loan debt. Matthews's own allegations in his Complaint state that he was several months in arrears when the First Foreclosure Action was instituted. *See* Complaint ¶¶ 51, 74. GMACM was a party entitled to enforce the Note, *see id*. at ¶ 110c., and, again, Matthews does not allege otherwise. Nor does Matthews claim that he was current on his mortgage loan obligation such that GMACM did not have the right to seek to enforce the debt when it did. In other words, GMACM had every right to attempt to enforce the Note or, at the very least, a very reasonable belief that it had such a right. As a matter of law, GMACM cannot be found to have violated the MCDCA for seeking to enforce a right that GMACM actually has.

38. As discussed above, the Maryland District Court in *Stewart v. Bierman* recently dismissed the plaintiffs' MCPA claims, but it also dismissed the plaintiffs' MCDCA claim, stating as follows:

> Defendants argue that "Plaintiffs have failed to sufficiently allege the knowledge element of the MCDCA." Doc. No. 32 at 40. They also note that Plaintiffs concede that "the right to foreclose on Plaintiffs' property did exist." *Id.* (citing Am. Compl. ¶ 116). In their opposition memorandum, Plaintiffs did not address the issue of knowledge under the MCDCA. Again, Defendants' argument is persuasive.
>
> The Orders to Docket were correct in every way except for the signatures that were affixed with the authority of the purported signer, but not in fact signed by the person whose name was affixed. Plaintiffs fail to allege any facts that demonstrate that Defendants had knowledge that the right to initiate foreclosure proceedings did not exist. In fact, Plaintiffs concede they were in default on their mortgage payments. *See* Am. Compl. ¶ 116 ("The Lembachs fell behind on their mortgage payments."). Although Plaintiffs take issue with the method used by Defendants to attach signatures to foreclosure documents, the MCDCA allows for recovery against creditors that attempt to collect debts when there is no right to do so. It does not, as the Plaintiffs appear to contend, allow for recovery in errors or disputes in the process or procedure of collecting legitimate, undisputed debts.

Stewart, 859 F.Supp.2d at 769-70 (emphasis added). *See also, Casey*, cited *supra*.

39. For these reasons, Matthews is not entitled to summary judgment on his MCDCA claim.

IV. CONCLUSION

40. For the reasons set forth herein, GMACM respectfully requests that the Court deny the Motion and grant such other relief as is just and proper.

Dated: March 1, 2013
New York, New York

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EXHIBIT 1

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

LAURA H.G. O'SULLIVAN, *et al.* Plaintiffs **v.** **KEVIN J. MATTHEWS** Defendant	Case No. **24O12000286**
KEVIN J. MATTHEWS Counter Plaintiff v. **GMAC MORTGAGE LLC, *et al.*** Counter Defendants	

DEFENDANT/COUNTER PLAINTIFF KEVIN J. MATTHEWS' COMBINED OPPOSITION TO COUNTER DEFENDANTS' GMAC MORTGAGE LLC, CARRIE WARD'S, AND JEFFREY STEPHAN'S MOTIONS TO DISMISS THE COUNTER PLAINTIFF'S COUNTER COMPLAINT (DOCs. 18, 20, 21)

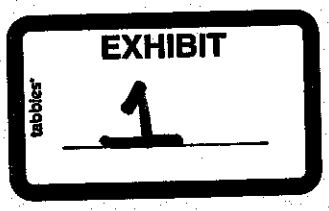
&

REQUEST FOR HEARING

Counter Plaintiff/Defendant Kevin J. Matthews ("Mr. Matthews"), by his undersigned counsel, hereby files this opposition to Counter Defendant's GMAC Mortgage LLC ("GMAC"), Carrie Ward ("Ward"), and Jeffrey Stephan's ("Stephan")(collectively "Counter Defendants") Motions to Dismiss (Docs. 18, 20, 21) Mr. Matthews' Counter Complaint (Doc. 1/1) and says:

INTRODUCTION

Despite the voluminous Motions to Dismiss by each of the Counter Defendants



and a cause of action other than defamation must be employed to redress such a wrong").[4]

The rationale of Keys is important and consistent with the general "rule...that where a statute and the common law are in conflict, the common law yields to the statute to the extent of the inconsistency, but where the legislative intent is shown to encompass an entire area then that statute preempts the common law." *Watkins v. State*, 42 Md. App. 349, 354, 400 A.2d 464, 467 (1979). Further, to adopt GMAC's reasoning that the common law defense of witness immunity applies to Mr. Matthews' statutory claims would simply eviscerate the protections intended by the legislature which did not provide for such a defense or exemption in any of the statutes and be a violation of the Maryland Constitution's separation of powers requirement. MD. DEC. OF R. ART. 8.

For these reasons, Mr. Matthews requests the Court to reject Ward's and GMAC's immunity arguments which are not in fact based on Maryland law and have no application to the actual claims before the Court.

III. MR. MATTHEWS HAS PROPERLY STATED MATERIAL FACTS WHICH WILL ENTITLE HIM LATER TIME IN THESE PROCEEDINGS TO JUDGMENT AS A MATTER OF LAW AGAINST GMAC AND WARD

Because of the automatic stay and its application to Ward, as an appointed agent

[4] Further, as to Ward's immunity contention, the issue before the this Court concerning her collected practices related to testimony in the First Foreclosure action, the Court of Appeals expressly declined to hold that immunity of court appointed trustees was available under Maryland law in such instances. *D'Aoust v. Diamond*, 424 Md. 549, 595, 36 A.3d 941, 967 (2012).

of GMAC, Mr. Matthews does not request this Court to enter partial judgment against Ward based upon collateral estoppel. However, in order to determine whether certain of the well facts demonstrate certain facts which support Mr. Matthews' claims against Ward and those against GMAC as Ward's principal, Mr. Matthews provides this summary of the factual basis of the claims to which there can be no dispute.

The factual basis for most, but not all of Mr. Matthews' claims related to Ward concern the following relevant, material, and well pled facts as to which there is no genuine dispute include:

1. GMAC appointed Ward as one of the substitute trustees authorized to carry out the First Foreclosure Action against Mr. Matthews and his Property. CC at ¶¶ 12.
2. Specifically, in commencing the First Foreclosure Action against Mr. Matthews and his home, GMAC agent, Ward, proffered to the Circuit Court of Baltimore City, Maryland multiple improper and irregular sworn affidavits, declarations, or other papers as the basis of GMAC's foreclosure action. CC at ¶¶ 79.
3. These documents purport to be signed by either Carrie Ward, Jacob Geesing, or Howard Bierman but only contain a single indecipherable signature. CC at ¶¶ 79(i).
4. The Circuit Court for Howard County, Maryland has already determined as a matter of law an affidavit/declaration identifying one of three possible affiants is not legally proper for commencing a Maryland foreclosure action. In a final order of that court in the matter of *Geesing v. Willson*, the Honorable Diane O. Leasure judicially determined that such form affidavits/declarations are improper and cannot properly maintain a foreclosure action in a Maryland court. CC at ¶¶ 34.

See generally Exhibit 1. Judge Leasure specifically found and determined as follows:

> I have a problem with the fact, and I think it is, you know, something that you also need to address, these affidavits have three names and one signature. It is indicated that the undersigned substitute trustee – I have no idea which of the three names and one signature. It is indicated that the undersigned substitute trustee – I have no idea which of the three that is...I am not aware of the propriety of any affidavit with three names indicated and one signature.
>
> *Ex. 1 at Page 7, Lines 19-24.*

I mean. [the use of three names below the signature is] just improper.

Ex. 1 at Page 8, Line 1.

> I think the affidavit needs to be properly prepared and the three names underneath and one squiggle and the reference above the affidavit indicating that the substitute trustee, singular, appeared and you've got three names, I just don't think it's proper form. So I'm going to, on that basis, grant the motion to dismiss.
>
> *Ex. 1 at Page 8, Lines 19-25.*

5. Judge Leasure's findings and order in *Geesing v. Willson* is final and has were never appealed by Howard Bierman, Jacob Geesing, Carrie Ward, or any other party. Exhibit 1.

These well pled facts and findings of the Circuit Court of Howard County, Maryland will support the application of the doctrine of non-mutual offensive collateral estoppel.

> Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff

> from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.

U.S. v. Mendoza, 464 U.S. 154, 159, n. 4 (1984) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979)). In *Parklane* the Supreme Court resolved a conflict among the circuits and held that federal, "trial courts [have the] broad discretion to determine when [offensive use of collateral estoppel] should be applied." *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 331, (1979) (footnote omitted).

Under Maryland law, a party must meet a four-prong test before a court may permit the use of offensive collateral estoppel:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? [and]
4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Rourke v. Amchem Products, Inc., 835 A.2d 193, 205 (Md. Ct. Spec. App. 2003) *aff'd*, 863 A.2d 926 (2004). *See also Culver v. Maryland Ins. Com'r*, 931 A.2d 537, 542 (quoting *Leeds Fed. Sav. & Loan Ass'n v. Metcalf,* 630 A.2d 245,250 (Md. 1993)). *See also Rourke v. Amchem Prods., Inc.,* 863 A.2d 926, 938 (Md. 2004). *See also Burruss v. Bd. of County Commissioners of Frederick County*, 427 Md. 231, 46 A.3d 1182, 1194 (2012)(declining to apply the doctrine of non-mutual offensive collateral estoppel when the prior litigation's holding was reversed on appeal).

In this case all four factors will be present for the Court at the appropriate time, when the automatic stay is lifted, to apply offensive collateral estoppel to the well pled facts and Mr. Matthews' claims. Therefore, the well pled facts demonstrate that Ward is collaterally estopped from relitigating several of the relevant, material, and well pled

facts identified above.

First, the Circuit Court of Howard County has already determined the issue of whether a Maryland foreclosure to collect a debt filed with affidavits/declarations identifying three potential affiants but only single indecipherable signature was proper. That court held that the foreclosure was improper because such affidavits are not the proper form. Second, the judgment of the Circuit Court is a final judgment. It was never appealed by any party. Third, there is no question or dispute that Ward is the party with whom the Howard County judgment was entered against and she is the same Counter Defendant in this action. Fourth, Ward and her co-paries were given a fair opportunity to be heard on the core issue and were represented by counsel in the Howard County case before Judge Leasure.

For the reasons stated herein, Ward will be collaterally estopped from disputing these relevant, material, and well pled facts and whether the First Foreclosure Action was proper and legal for Ward to acquire the jurisdiction of the circuit court as part of GMAC's debt collection practices. These issues of fact and law are identical to those in *Geesing v. Willson* which has been been determined in a final judgment. *Parklane,* 439 U.S. 322; *U.S. v. Mendoza*, 464 U.S. 154; and *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219.

Further, in this action as well as the First Foreclosure Action, GMAC and its appointed agents have improperly acquired the jurisdiction of the Court before an accurate and correct Notice of Intent to Foreclose ("NOI") was ever provided to Mr. Matthews and instead relied upon a false. CC at ¶ 76, 116(b). Mr. Matthews' argument concerning these improper NOIs has been adopted by the Court of Appeals last week.

Shepherd v. Burson, 110 SEPT.TERM 2011, 2012 WL 3553310,*7 (Md. Aug. 20, 2012)("In our view, the statutory purpose of providing the borrower with advance notice and information to seek a loan modification or to negotiate some other alternative to foreclosure is best served by identifying all secured parties—particularly any that will share in the proceeds of a foreclosure sale—in the Notice of Intent to Foreclose").

Finally, as to Mr. Matthews's claims related to his illegal eviction by GMAC and its agents, GMAC's arguments are also simply without merit since the foreclosure sale was never ratified by this Court. As explained last week by the Court of Appeals in *Curtis v. U.S. Bank Nat. Ass'n*, 86 SEPT.TERM 2011, 2012 WL 3553316, *4 (Md. Aug. 20, 2012), "[a] purchaser at a foreclosure sale is ordinarily entitled to possession of the property upon ratification of the sale, payment of the purchase price, and conveyance of legal title. *Legacy Funding LLC v. Cohn,* 396 Md. 511, 516, 914 A.2d 760 (2007); RP § 7–105.6(a)."

IV. MR. MATTHEWS HAS PROPERLY PLED HIS CLAIMS PURSUANT TO THE MARYLAND CONSUMER PROTECTION ACT UNDER COUNT II AGAINST ALL COUNTER DEFENDANTS

The Court of Appeals has explained:

> An 'unfair or deceptive trade practice' includes any false or misleading statement or representation which has the capacity, tendency, or effect of deceiving or misleading consumers and encompasses a representation that consumer realty has a characteristic that it does not have or is of a particular standard or quality that is not the case. Commercial Law Art. § 13-301. Section 13-408 of that article provides for a private cause of action to recover for loss or injury sustained as the result of a practice forbidden by the CPA.

should simply be disregarded. Mr. Matthews' claims relate to the fraudulent, unfair, and deceptive debt collection practices employed by GMAC and its agents and employees and the losses, damages, and injuries that arose as a result of those practices. Also, a foreclosure matter in this Court which does not result in a ratified sale, will always be dismissed without prejudice as a practical matter unless the subject loan is paid in full. To argue otherwise would simply be disingenuous and to suggest that Mr. Matthews has so argues is plain wrong.[11]

CONCLUSION

Based upon the foregoing argument and the well pled facts of the Counter Complaint, Mr. Matthews asks this Court to deny the relief sought by the Counter Defendants. Should the Court perceive any deficiencies, Mr. Matthews requests leave to amend as appropriate.

Respectfully Submitted,

Phillip R. Robinson
Legg Law Firm LLC
5500 Buckeystown Pike
Frederick, MD 21703
(301) 620-1016

[11] Contemporaneously with this filing Mr. Matthews has dismissed his claims for Fraud and Fraudulent Concealment under Count I of the Counter Complaint but reserves his right to reassert these claims as appropriate and necessary in the future.

EXHIBIT 2

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

LAURA H.G. O'SULLIVAN, *et al.* Plaintiffs, v. KEVIN J. MATTHEWS Defendant	Case No.: 24O12000286

KEVIN J. MATTHEWS Counter Plaintiff v. GMAC MORTGAGE, LLC, *et al.* Counter Defendants.	

REPLY MEMORANDUM IN SUPPORT OF
GMAC MORTGAGE, LLC'S MOTION TO DISMISS

INTRODUCTION

Similar to his Combined Opposition to the Counter Defendants' Motions to Dismiss ("Opposition"), Matthews' Counter Complaint - consisting of fifty-seven (57) pages and one-hundred and eighty seven (187) paragraphs - takes a meandering course that is difficult to track. However, and as GMAC established in its Motion to Dismiss, repeated readings of the Counter Complaint demonstrate that its "five causes of action stem from [Matthews'] allegations that GMAC failed to offer and give him a loan modification and that the First Foreclosure Action was

associated with the First Foreclosure Action should be dismissed as a matter of law. Taken together with GMAC's showing that Matthews' claims relating to GMAC's alleged loss mitigation errors and omissions fail as a matter of law, GMAC has established that all of Matthews' causes of action fail as a matter of law.

III. Matthews' Attempt To Invoke The Doctrine Of Offensive Non-Mutual Collateral Estoppel, A Doctrine That The Maryland Court Of Appeals Has Declined To Adopt, Is Unavailing.

In his Opposition, Matthews argues that his allegations "will support the application of the doctrine of non-mutual offensive collateral estoppel." Opposition at p. 12. According to Matthews, in the case of *Geesing v. Wilson,* Circuit Court for Howard County, Civil Case No. 13-3-10-82594, "[t]he Circuit Court for Howard County, Maryland has already determined as a matter of law an affidavit/declaration identifying one of three possible affiants is not legally proper for commencing a Maryland foreclosure action." *Id.* at p. 11. Matthews devotes several pages to this argument which, as established by Counter Defendant Ward in her Reply Memorandum at p. 4, ¶ 5, is an obvious nonstarter.

GMAC adopts and incorporates the arguments made by Ward and adds to them that, in a case which Matthews, himself, cites, the Maryland Court of Appeals expressly stated its long-time refusal to adopt the doctrine of offensive non-mutual collateral estoppel:

> In *Rourke* [*v. Amchem Prods.*], we acknowledged that this Court has recognized the doctrine of defensive non-mutual collateral estoppel. *Rourke,* 384 Md. at 349, 863 A.2d at 938. We explained in that case that the United States Supreme Court in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), declined to embrace the doctrine of offensive non-mutual collateral estoppel. *Rourke,* 384 Md. at 349–50, 863 A.2d at 938. This Court has not, since we issued our opinion in *Rourke,* adopted or applied the doctrine of offensive non-mutual collateral estoppel, and we deem the Supreme Court's analysis in *Parklane* persuasive.

Burruss v. Board of County Commissioners of Frederick County, 427 Md. 231, 252, 46 A.3d 1182, 1194 (2012) (emphasis added).

Accordingly, non-mutual offensive collateral estoppel has no application here and Matthews' attempted assertion of it is unavailing.

IV. Even If This Court Were To Conclude That Matthews' Claims Survive GMAC's Showing As To The General Overarching Grounds For Dismissal, Matthews' Claims Still Fail As A Matter Of Law In The Face Of The Grounds For Dismissal GMAC Established That Are Specific To Each Claim.

In its underlying Motion to Dismiss, GMAC went through each cause of action and, for each, demonstrated why it should be dismissed for reasons that are in addition to and separate from the overarching grounds set forth above and in GMAC's underlying Motion to Dismiss. GMAC's Motion to Dismiss at pp. 15-30. Matthews' Opposition, like his Counter Complaint, does not survive GMAC's more specific showing as to why each of his individual causes of action fails as a matter of law. Instead, and as Counter Defendant Ward so aptly put it in her Reply Memorandum, "Matthews' Opposition is unnecessarily convoluted while at the same time managing to avoid nearly every dispositive issue." Ward Reply Memorandum at p. 1.

GMAC will not unnecessarily burden the Court by restating the arguments it made it in its Motion To Dismiss that are specific to Matthews' individual causes of action. Instead, GMAC respectfully refers the Court to GMAC's arguments and its showing that each of Matthews' remaining causes of action - for alleged violations of the MCPA, MCDCA, MMFA and FDCPA - fails as a matter of law. *See* GMAC's Motion to Dismiss at pp. 15-30.

Absent from the conclusory assertions and discursive statements contained in Matthews' Opposition is any substantive rebuttal to GMAC's showing, *inter alia*, that (i) Matthews was and continues to be in default on his mortgage loan obligations; (ii) GMAC's conduct did not cause Matthews to take any action that he would not have otherwise taken or caused Matthews a

Dated: September 17, 2012

Respectfully submitted,

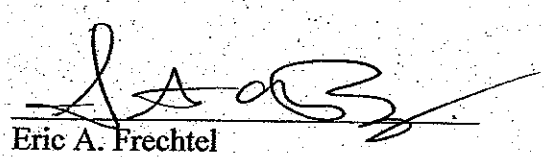


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EXHIBIT 3

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

GEESING,

Plaintiff,

vs.

Case Number:
CAE10-08803

JONES,

Defendant.
_____/

OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motion Hearing)

Upper Marlboro, Maryland

Wednesday, July 6, 2011

BEFORE:

HONORABLE THOMAS P. SMITH

APPEARANCES:

For the Plaintiff:

JAMES TRAVIS, ESQUIRE

For the Defendant:

JOHN BACHETO, ESQUIRE

Electronic Proceedings Transcribed by: Dawn South

C O N T E N T S

-oOo-

P R O C E E D I N G S

(9:03 a.m.)

THE CLERK: CAE10-08803, Geesing versus Jones.

MR. BACHETO: Good morning, Your Honor, John Bacheto (phonetic) for the Defendant, Sophia Jones.

MR. TRAVIS: Good morning, Your Honor, James Travis on behalf of the Plaintiffs.

THE COURT: All right. We're here on the motion to stay foreclosure sale and other relief, docket entry 6. It's your motion.

MR. BACHETO: Good morning, Your Honor, thanks very much.

First let me get out on the table the obviously problem for my client, and that is obviously

this motion to stay is quite late in the process. I've explained in my motion the events leading up to today.

The Defendant was faced with an eminent foreclosure sale about a year ago, she actually filed bankruptcy at that point to stop the sale, the bankruptcy was Chapter 13, it was converted to a 7, there were motions to -- for relief from stay at that point by Wells Fargo as trustee. She opposed those motions and was discharged from bankruptcy, motions were withdrawn.

At that point she was prepared to seek a loan modification -- was hoping to get a loan modification under the (indiscernible - 9:05:07) program or some other program. At that -- and that's the point that she was left off.

Nothing else happened on the loan modification or her requests, nothing subsequent happened, and then she has then received a notice of intent to foreclose and a foreclosure, and was served with the order of the docket, and here we are at this point.

She is late in coming to this Court for relief; however, I believe that the issues I've expressed in my motion to stay and my motion to show cause are significant, and that is the situation leading up to today's hearing.

So if Your Honor would find that there's good cause to proceed with the hearing, or would you just like me to summarize my case?

THE COURT: It's your motion.

MR. BACHETO: All right, thank you, Your Honor.

THE COURT: You filed it yesterday.

MR. BACHETO: Yes, Your Honor.

THE COURT: Or the day before yesterday. Oh, yesterday.

MR. BACHETO: Filled yesterday. Yes, Your Honor. The sale was set for later on this morning.

Basically our case is that with Exhibits 5A through E we have documents that were purported to be -- to support the order of the docket.

Our case is, is very simply the Court's jurisdiction did not attach to this foreclosure

because the order of the docket was improperly supported, because the affidavits that are required by 14-207(b) were not properly executed.

The Court cannot tell -- there are basically three signatures --

THE COURT: Uh-huh.

MR. BACHETO: -- Howard Bierman, Jacob Geesing, Carrie Ward, you've seen the documents, Your Honor, they're in the motion, exhibit -- at Exhibit 5. There's a signature, we don't know whose signature it is. These documents purport to be affidavits. Affidavits have to be the sworn testimony of the affiant.

Rule -- Rule 1-311 requires that any pleading or paper to be signed by an attorney with address and telephone number.

Judge Jashrow (phonetic) in Anne Arundel County, I believe that's at Exhibit 7, found that requiring the Court to guess which attorney signed these documents defeats the purpose of the rule, the purpose of the rule being the affiant must be identified so that we can tell what the Court would be

able to inquire, the Defendant may be able to inquire as to the voracity of the affidavit and as to whether the basis being personal knowledge or not.

Also Judge Leasure in Howard County, and I've attached that as Exhibit 6 in a long transcript expressed extreme disapproval of this method of signing same plaintiffs, same situation, three names, one signature, can't tell who signed it, no address, no phone number, and Judge Leasure dismissed that case, it was also a motion to stay and dismissed because she said these types of errors cannot be remedied, and that is at -- I can read that to Your Honor if you like.

THE COURT: No, I read it, thank you.

MR. BACHETO: It's at Exhibit 6.

Basically Judge Leasure said these types of remedies cannot -- these types of errors cannot be remedied.

And so again, our case is that the order to docket here was not properly supported, is not supported period. Without filing an order to docket the Court's jurisdiction didn't attach to this case.

THE COURT: Well, there is an order to docket.

MR. BACHETO: This is an order to docket. It's not --

THE COURT: It's signed by Howard Bierman with an address and a phone number. You said there was -- they didn't have that.

MR. BACHETO: No. Oh, excuse me, Your Honor, what I said was the affidavits --

THE COURT: Oh.

MR. BACHETO: -- supporting the order of the docket required by 14-207(b) at Exhibit 5 in my motion. Exhibit 5A, B, C, D, and E are improperly formed. We can't tell who signed those affidavits.

THE COURT: Are you suggesting that the affidavit of the deed of trust debt and military service or non-military service have to have to name, address, and telephone number?

MR. BACHETO: They are affidavit -- they purport to be affidavits. I'm not suggesting it, Your Honor, the rule requires it. Rule 1-311 requires it.

This is the same finding that was found by Judge Jashrow in Anne Arundel County in Eisig (phonetic) versus McCormick, and I've included that order as Exhibit 7 in my motion, and I'm asking the Court to make the same finding. Because those affidavits are improperly formed, according to Judge Leasure, unable to be remedied they should be at least -- the Plaintiff should be required to show cause why those documents should not be -- those affidavits should not be stricken from the record, should not be -- and the case dismissed under 14-207.1.

And I suggest to Your Honor that one of the -- one of the prayers for relief here is to provide a temporary stay under conditions that Your Honor deems reasonable, that would give time for the Plaintiffs to show cause or correct the record or however they want to fix the problem, and give -- also give time for discussions -- settlement discussions to take place in terms of possible loan remedy -- loan modification.

THE COURT: You were counsel of record in the bankruptcy case were you not?

MR. BACHETO: I am, Your Honor.

THE COURT: All right. Anything else?

MR. BACHETO: That's about it, Your Honor.

MR. TRAVIS: Your Honor, respectfully I didn't hear any argument whatsoever challenging the substance of any of the affidavits that were filled herein. It seems the entirety of the argument is based on borrowers or the Defendant's dislike of the form of the signature block of those affidavits.

I would also like to note that the rules cited by opposing counsel refers to the signing of pleadings, not the rule regarding the signing of affidavits. The rule regarding signing of affidavits simply sets forth the language that is acceptable in Maryland and acknowledged and as a valid affidavit. It does not have any signature block requirements, it just simply says the statement here needs to be set forth and the person attesting are affying (sic) to the contents of the paper preceding that statement must sign the document, and that has happened in each of the instances here. Howard Bierman has signed each of those affidavits.

And just for purposes of clarity, the motion, the opposition that was filed in this case in response to the motion to stay, Howard Bierman also filed another affidavit attesting to the signatures he had already signed in this case.

So I think we have more than enough evidence of Mr. Bierman's acknowledgment of his signature and the contents of each of the papers filed herein.

THE COURT: His signature has not improved over 15 months.

Anything else?

MR. TRAVIS: That's all I have, Your Honor.

THE COURT: Any response?

MR. BACHETO: Yes, Your Honor.

We're now told that Howard Bierman -- and I've seen the filing and I don't have any reason to doubt the sincerity of Mr. Bierman's filing last night; however, it's a little late in the process now. The affidavits in which the statements and the averments were made to support the case, there's no way to know that Howard Bierman signed them. There's three names there. Judge Leasure said this can't be

remedied. This type of error can't be remedied. There's three names on that affidavit.

THE COURT: I'm aware of that.

MR. BACHETO: To now come to court and say oh, yeah, well, I signed those, that's fine, but you didn't sign the statements, the affidavits that you're purporting to support your case with.

That's our argument, Your Honor.

THE COURT: I've gone over this file fairly carefully. Let me try to dispose of some issues.

I just made a note when you said the affidavits didn't have name and address, et cetera. Pursuant to Maryland Rule 1-311 the order to docket is the pleading filed in this court and it fully complies with Maryland Rule 1-311.

If there was some objection to a statement or affidavit certainly in the 15 or 14 months that your client has had the pleading and the attachments, you acknowledge service on the 22nd of April, the affidavit of service in the file is April 9th that it was posted and mailed, some -- whether it's the 9th of April of 2010 or the 22nd of April 2010, more than

adequate time has existed to challenge both the form of the documents filed whether they are pleadings or affidavits, and the content.

I noted in my review that not a single affidavit statement or the order to docket the substance of the information contained is contested by you.

This case started with an order to docket filed March 30th, 2010. I note you had two objections. One was that the trustees were form reasons that you have articulated in the one signature multiple typed names, had that problem. I note some time between the filing and service of this docket and months and months ago you could have filed a pleading to strike or a request for any type of relief short of what you have requested literally on the morning of trial.

Your next -- morning of sale. Your next objection is that the trustees are improperly proceeding under the deed of appointment.

I note that the note in question was endorsed and then endorsed in blank, and the copy in

the file is sufficient evidence for the purpose of these proceedings that the Plaintiff is in possession of the original note, and under Judge Salmon's (phonetic) off quoted December decision is adequate for them to proceed in this case.

As I've noted the affidavit of service is April 9th, posted and mailed. You admit in your pleadings that you were served on April 22nd, yet these motion -- this motion was not filed until July 5th. The rule of course gives you 15 days, not almost 15 months to seek relief from the Court.

Your observations were that your client went into bankruptcy, apparently the bankruptcy was filed on or about May 31st, 2010, so your client certainly could have filed this motion between April 22nd and May 31st, been within the 15 days, and the Court would have had the opportunity to review this matter, and if appropriate to set it for a hearing.

I do note that even though your client filed a bankruptcy petition in May of 2010, your client was discharged October 20th, 2010, and as you've

acknowledged you are counsel of record in the bankruptcy case.

So certainly from October 20th, 2010 your client knew first that there was a motion for relief from stay that this Plaintiff intended to proceed, and second, since there was no bankruptcy the Plaintiff was free to proceed, and you had the opportunity at that point to seek the same relief you now seek on the morning of the sale, and the Court would have had the opportunity to have reviewed the entire pleadings, take testimony, if necessary.

You have requested ADR. You could have requested ADR at any time that the case was not in bankruptcy, pre or post, and it's not a question of mediation under post July 1st, 2010 filings, but ADR, which the Court has the authority to order under the rules and under its inherent authority.

I have dealt with the issue of standing.

You have asserted that Mers, M-E-R-S, is the beneficiary of this trust. I read the trust. Mers is the nominee for the lender, its successors, and assigns. This is a successor and assign as I note,

the note was originally endorsed and then subsequently endorsed and blank.

I note as your opponent did that your client has not controverted any statement in any affidavit, pleading, or the -- of the order to docket or any document attached to it.

No useful purpose would be accomplished by me reviewing each of the pleadings filed and affidavits filed attached to the order to docket.

I find first that the motion to stay and motion to show cause are denied.

I do that for the reasons I have outlined in this brief oral opinion, and because your client has sat or her rights for almost 15 months and could have at any time, certainly after the bankruptcy, and in the brief time before her bankruptcy, sought the equivalent relief.

To grant a stay at that point would simply promote the filing of late pleading to dissuade last minute sales or to prohibit last minute sales when the matters could have been asserted substantially in advance.

I am aware that other judges in other cases in other factual settings have reached other decisions. This of course is the court, and of course the judge that raised this issue in August 2010. I'm not unaware of the corrective affidavit and the single difficult to read signature and the multiple names underneath, they are not however in the absence of a contradiction of any statement in any affidavit or statement, a sufficient reason to upset the sale schedule for this morning, and a rules citation I believe is 1-201(a) with respect to the enforcement of the rules.

I find having considered all of the matters that I have stated that madam clerk docket entry 6, the motion to stay and for other relief is denied.

Thank you all very much.

MR. TRAVIS: Thank you.

MR. BACHETO: Thank you.

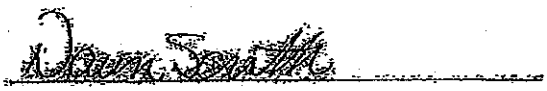
(At 9:21 a.m., proceeding concluded.)

REPORTER'S CERTIFICATE

This is to certify that the proceedings in the matter of Geesing versus Jones, Case No. CAE10-08803, heard in the Circuit Court for Prince George's County on July 6, 2011, were electronically recorded.

I hereby certify that the proceedings, transcribed by me to the best of my ability, in complete and accurate manner, constitute the official transcript thereof.

In witness whereof, I have hereunto subscribed my name this 26th day of July, 2011.



Dawn, Smith