ADDITIONAL PARTY PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSTION TO MOTION TO DISMISS ADDITIONAL
PARTY CLAIMS AGAINST COUNTERCLAIM DEFENDANT SERVICER

The Additional Party Plaintiff by and through her undersigned counsel files her Response to Motion to Dismiss Additional Party Claims [Third Party Complaint] against Servicer and states:

Introduction

APC Plaintiff's claims arise out of APC Defendant, the agent of Foreclosure Plaintiff's actions within the scope of their authority, during APC Plaintiff's loss mitigation loss mitigation trial plan – through to the filing of the instant foreclosure lawsuit. APC Plaintiff brings in APC Defendant as an Additional Party Counterclaim Defendant, pursuant to Rule 1.190(h), *Fla. R .Civ. P.*, a necessary party to APC Plaintiff's defense in the above-styled case. She brings two claims, 1) pursuant to 12 C.F.R. § 1024.41(f)(2) of Regulation X of the Real Estate Settlement Procedures Act and 26 U.S.C. § 2605(e), which sets forth default servicing and loss mitigation procedures and remedies for federally related mortgage loans and 2) the Federal Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. §§1692, et seq., which prohibits debt collectors from engaging in any conduct which is false, deceptive, misleading or unfair.

APC Defendant moves to dismiss APC Plaintiff's claims pursuant to Regulation X and RESPA and the FDCPA.

ARGUMENTS IN OPPOSITION TO APC DEFENDANT'S MOTION TO DISMISS

The Subject Mortgage Transaction Relates to a Covered Loan

APC Defendant's claims the subject loan is not a "federally backed" loan. APC Defendant also uses the term "federally related." The latter is the actual phrase used in

Regulation X, specifically 12 C.F.R. 1024.31. APC Defendant claims APC Plaintiff's mortgage is not a HUD mortgage, therefore, is not covered as a federally-related loan.

This argument ignores the fact that "federally **backed**" is very different from "federally **related**." The specific definition of covered mortgage loans is found in 12 C.F.R. 1024.31

> **Mortgage loan** means any federally related mortgage loan, as that term is defined in §1024.2 subject to the exemptions in §1024.5(b), but does not include open-end lines of credit (home equity plans).

The exclusions provided by 1024.5(b) relate to loans assumed without the lenders approval. The complete list of covered loans is provided below

> *Federally related mortgage loan* means:
>
> **(1)** Any loan (other than temporary financing, such as a construction loan):
> **(i)** That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property, upon which there is either:
> **(A)** Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or
> **(B)** Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and
> **(ii)** For which one of the following paragraphs applies. The loan:
> **(A)** Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;
> **(B)** Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:
> ***(1)*** By the Secretary of the Department of Housing and Urban Development (HUD) or any other officer or agency of the Federal Government; or
> ***(2)*** Under or in connection with a housing or urban development program administered by the Secretary of HUD or a housing or related program administered by any other officer or agency of the Federal Government;
> **(C)** Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);
> **(D)** Is made in whole or in part by a "creditor," as defined in section 103(g) of the Consumer Credit Protection Act (15 U.S.C. 1602(g)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of

> any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property;
> **(E)** Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition, by a mortgage broker; or
> **(F)** Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition.
> **(2)** Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.
> **(3)** If the residential real property securing a mortgage loan is not located in a State, the loan is not a federally related mortgage loan.

APC Defendant's list of covered loans omits Sections (D) through (F). In fact the list of covered loans is so extensive, most Florida loans on residential property, than not, are covered except open-end lines of credit and construction loans. The nature of the loan and coverage of Regulation X are factual issues and APC Defendant has not claimed the subject loan is an open-end line of credit or construction loan. With no Florida case directly on point, APC Plaintiff relies upon *Luster v. Investors One Corporation, et al*., 2016 WL 5339353*6 (N.D. Ga.), January 15, 2016. In *Luster*, the Court found

> Additionally, IOC asserts that Ms. Luster has failed to establish that the Note is a "federally related mortgage loan" subject to RESPA. (IOC and C&B Mem. Supp. Mot. Dismiss 16.) IOC's argument is unavailing, as RESPA defines the term so broadly that it is clear the Note qualifies. See 12 C.F.R. § 1024.2(b) (defining "federally related mortgage loan" to include any loan secured by a lien on residential real property made by any lender regulated, insured, guaranteed, or assisted in any way by any agency of the federal government).

APC Plaintiff has alleged that her loan is a federally related loan, therefore, at the motion to dismiss stage this allegation must be taken as true and APC Defendant's motion to dismiss denied. See Paragraphs 20 and 21 of APC Defendant claims. See also *Crews v. Ellis*, 531 So.2d 1372 (Fla. 1st DCA 1988); *Weaver v. The Leon County Classroom Teachers' Association*, 680 So.2d 478 (Fla. 1st DCA 1996); *Fish v. Post of Amvet #85,* 560 So.2d 337, 339 (Fla. 1st DCA

1990) (In analyzing the complaint the trial court is confined to the allegations contained within the four corners of the complaint and may not consider defenses), interpreting the analogous federal rule see *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir.2002).

APC Defendant is Not the Plaintiff in the Lawsuit
This Does Not Preclude a Regulation X/RESPA Claim

APC Defendant claims it did not bring the subject mortgage foreclosure lawsuit, presumably to support its argument that it cannot be liable pursuant to Regulation Z and RESPA. It is unclear whether APC Defendant is arguing that 1) APC Defendant is not acting as Foreclosure Plaintiff's agent for all actions on Foreclosure Defendant's behalf relating to loss mitigation; or 2) it cannot be liable for Regulation Z claims because APC Plaintiff failed to comply with her trial payment plan. As to point one, the Foreclosure Plaintiff, relies upon its agent, APC Defendant, to act on its behalf as a servicer in all things relating to loss mitigation within the Regulation X and RESPA structure. Bankrate.com defines the duties of a servicer as follows

> A mortgage servicer is the company that handles the day-to-day administrative tasks of your loan, including receiving payments, sending monthly statements and managing escrow account.
>
> Bankrate also provides that a servicer
>
> Counsels and helps you to overcome delinquencies if you miss loan payments. For instance, a forbearance, or deferral of principal and interest payments, may be extended to help you out of financial difficulties.
> https://www.bankrate.com/finance/mortgages/mortgage-sold-to-a-servicer.

In other words, this foreclosure does not begin unless it is at the request of the servicer. FORECLOSURE PLAINTIFF claims to be a trust administered by a corporate trustee. Because FORECLOSURE PLAINTIFF is not in human form, it relied upon APC Defendant to handle the

loss mitigation/loan modification and report foreclosure was necessary when it "felt" foreclosure was necessary – in other words, initial the first notice or first filing of the foreclosure contemplated by 12 C.F.R. 1024.41(f). APC Defendant cannot dodge liability just because it is not the named Plaintiff when it was cause of the first filing/first notice.

As to APC Plaintiff's compliance, she alleged in specific detail how she complied with her loss mitigation obligations Paragraphs 7 through 14 and 23 of the Additional Party Claims. Both the question of APC Defendant's liability and APC Plaintiff's compliance are, at best, questions of fact that cannot be decided in a motion to dismiss. *See Crews v. Ellis*, 531 So.2d 1372 (Fla. 1st DCA 1988); *Weaver v. The Leon County Classroom Teachers' Association,* 680 So.2d 478 (Fla. 1st DCA 1996); *Fish v. Post of Amvet #85,* 560 So.2d 337, 339 (Fla. 1st DCA 1990).

APC Plaintiff has Incurred Damages, The Extent of Which is a Factual Determination

APC Defendant claims APC Plaintiff has not incurred any damages. Citing to no Florida case, APC Defendant also claims her damages are not compensable because her damages claimed are merely attorneys' fees and costs. In *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1246–47 (11th Cir. 2016) (late charges and penalties related to violation can be included in actual damages). APC Defendant relies upon the Court's decision in *Whittier v. Ocwen Loan Servicing, LLC,* 594 Fed. Appx. 833 (5th Cir. 2014). This Court is not bound by decisions of the Fifth Circuit and APC Defendant's argument provides an inaccurate statement of APC Plaintiff's claims set out in Paragraph 24 Additional Party Claims. In Paragraph 24 APC Plaintiff seeks sums arising out of the wrongful termination of her loss mitigation application.

The amount of damages to be awarded is a factual issue - not a subject appropriate for dismissal at the preliminary stage of litigation as. *See Crews v. Ellis, supra; Weaver v. The Leon County Classroom Teachers' Association, supra*; *Fish v. Post of Amvet #85, supra*.

Foreclosure is Debt Collection is a Factual Issue that Cannot Be Appropriately Raised in a Motion to Dismiss in the Instant Case

APC Defendant also argues that "Florida court have consistently held that mortgage foreclosure action do not qualify as a "debt collection" pursuant to the FDCPA." This statement is not accurate and has not been accurate for years based upon several Eleventh Circuit cases that will be set out below. *Trent v. Mortgage Electronic Registration Systems, Inc.* 618 F. Supp.2d 1356 (M.D. Fla. 2007) used as the sole Florida support for APC Defendant's arguments has not been "good" law for many years.

The Florida Second District Court of Appeal, in *Gann v. BAC Home Loans Servicing LP*, 145 So.3d 906, 908 (Fla. 2d DCA 2014) reversed the dismissal of an FCCPA claim, the Florida analogue to the FDCPA, that BAC violated §559.72(9), *Fla. Stat*. Specifically, "[i]n collecting consumer debts, no person shall . . . [c]laim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or asserts the existence of some other legal right when such person knows that the right does not exist." In *Gann*, the creditor threatened to begin foreclosure proceedings even though payments were current under the parties' loan modification agreement. The *Gann* Court addressed Judge Corrigan's 2007 *Trent v. Mortgage Electronic Registration Systems, Inc*. decision and recognized that it was no longer good law

> Subsequent to *Trent*, the Eleventh Circuit considered a claim under the Federal Act based on a letter and enclosed documents that a law firm representing the lender sent to the debtors which demanded payment of the debt and threatened to foreclose on the property if the debtors did not pay. *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1214 (11th Cir.2012). The law firm moved to dismiss the complaint for failure to state a claim and argued, among other things, that the letter and documents attached to the complaint did not constitute debt collection activity but instead were only an attempt

> to enforce its client's security interest. *Id.* at 1215. The district court dismissed the claim, and the Eleventh Circuit reversed. *Id.* at 1218–19.in light of *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012); *Birster v. American Home Mortgage Servicing, Inc*., 481 Fed.Appx. 579 (11th Cir. 2012). 145 So. 3d at 908, 909.

To elaborate and add to the cases mentioned in the *Gunn* Court opinion, the United States Supreme Court has held that violations of the FDCPA can be found in debt collection efforts by personal solicitation or by filing a lawsuit. *Heintz v. Jenkins*, 514 U.S. 291 (1995). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010) (summary judgment against foreclosure law firm based upon an improper notice attached to the foreclosure complaint reversed, may not rely on bona fide error defense based upon misinterpretation of the FDCPA).

The Eleventh Circuit in *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, *supra,* reversed the dismissal of an FDCPA complaint based upon a law firm's incorrect characterization of a homeowner and tenant's respective rights in connection with a foreclosure action. Specifically, Plaintiff homeowner's claimed the foreclosure law firm improperly stated the owner after the foreclosure sale would be entitled to immediate possession of the home and that tenants on the property would have to vacate after sale. 678 F.3d at 1615. The *Reese* Court recognized that foreclosure takes on the dual purpose of enforcing the note and mortgage finding a "debt is still a debt even if secured" and remains a debt even after a foreclosure proceeding is commenced. 678 F.3d 1617, 1618.

Although *Reese* has not been overruled or abrogated, the United States Supreme Court in *Obduskey v. McCarthy & Holthus, LLP.*, 139 St. Ct. 1029 (2019), found that a non-judicial foreclosure was different in nature than a judicial foreclosure for purposes of labeling the foreclosure litigation activity as "debt collection" and, therefore, not covered pursuant to the

FDCPA. The *Obduskey* decision is not relevant to this case because as illuminated by Justice Breyer in the decision

> Every State provides some form of judicial foreclosure: a legal action initiated by a creditor in which a court supervises sale of the property and distribution of the proceeds. These procedures offer various protections for homeowners, such as the right to notice and to protest the amount a creditor says is owed. And in the event that the foreclosure sale does not yield the full amount due, a creditor pursuing a judicial foreclosure may sometimes obtain a deficiency judgment, that is, a judgment against the homeowner for the unpaid balance of a debt.
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> About half the States also provide for what is known as nonjudicial foreclosure, where notice to the parties and sale of the property occur outside court supervision. Under Colorado's form of nonjudicial foreclosure, at issue here, a creditor (or more likely its agent) must first mail the homeowner certain preliminary information, including the telephone number for the Colorado foreclosure hotline. Colo. Rev. Stat. § 38–38–102.5(2) (2018). Thirty days later, the creditor may file a "notice of election and demand" with a state official called a "public trustee." The public trustee records this notice and mails a copy, alongside other materials, to the homeowner. These materials give the homeowner information about the balance of the loan, the homeowner's right to cure the default, and the time and place of the foreclosure sale. Assuming the debtor does not cure the default or declare bankruptcy, the creditor may then seek an order from a state court authorizing the sale. Colo. Rule Civ. Proc. 120 (2018); see Colo. Rev. Stat. § 38–38–105. (Given this measure of court involvement, Colorado's "nonjudicial" foreclosure process is something of a hybrid, though no party claims these features transform Colorado's nonjudicial scheme into a judicial one.) In court, the homeowner may contest the creditor's right to sell the property, and a hearing will be held to determine whether the sale should go forward. Colo. Rules Civ. Proc. 120(c), (d).

The *Obduskey* Court focused its decision solely on non-judicial foreclosure nature of the questioned actions and the enforcement of a security interest unaccompanied by dual purpose of seeking sums. 139 St. Ct. 1036. (a non-judicial foreclosure does not seek "a payment of money from the debtor" but rather from sale of the property. In most of the decisions below the Court recognizes the "dual purpose" of Florida judicial foreclosures – to collect money alone or to collect money and a deficiency if needed.

The Eleventh Circuit in *Birster v. American Home Mortgage Servicing, Inc*., 481 Fed.Appx. 579 (11th Cir. 2012) reversed a summary judgment in favor of AHMSI finding that

documents relating to the enforcement of a security interest can also relate to the collection of a debt. The Birsters claimed AHMS was harassing them by telephone and in person when inspecting the property in the foreclosure process. In its communications AHMSI sought sums and if not paid, possession of the property.

In *Bourff v. Rubin Lublin, LLC*, 674 F.3d 1238, 1241 (11th Cir. 2012), the Eleventh Circuit reversed the dismissal of an FDCPA claim relating to BAC's false representation made during its attempts to collect a mortgage debt. Specifically, Rubin claimed BAC was a creditor when it fact it was not. Similarly, in *Shoup v. McCurdy & Candler, LLC*, 465 Fed.Appx 882, 2012 WL 1071196 (11th Cir. 2012) the Eleventh Circuit reversed the dismissal of an FDCPA claim based upon a misleading attempt to collect a mortgage debt in which Mortgage Electronic Registration Systems was improperly listed as the creditor, the very issue raised in *Trent*.

The Eleventh Circuit in *Prescott v. Seterus, Inc*., --- Fed.Appx. ----, 2015 WL 7769235 (11th Cir. 2015) (unpublished), reversed a summary judgment in Seterus' favor relating to Prescott's FDCPA and FCCPA claims. Prescott claimed that Seterus provided inflated reinstatement figures in a mortgage delinquency case. The *Prescott* Court focused on the understanding of the least sophisticated consumer in determining the subsequently refunded fees and costs were deceptively collected.

Judge Corrigan, the *Trent* Judge, entered a judgment for punitive damages in the amount of $100,000.00 against Bank of America for debt collection abuses pursuant to the FCCPA and the FDCPA. *Goodin v. Bank of America, N.A.*, 114 F. Supp. 3d 1197, 1211 (M.D. Fla. 2015). In *Goodin*, Bank of America failed to transfer bankruptcy payments to credit the Goodins' account and proceeded to collect as if the debt was still delinquent. The damages awarded by the Court included damages for emotional distress. *Id.* at 114 F. Supp. 3d 1197, 1211.

Florida foreclosure proceedings are judicial and Plaintiff in its Complaint declares the full amount due under the note and mortgage to be due (Paragraph 7 of the Complaint); claims $104,399.73 plus interest and title search expenses, attorney's fees and costs are due; that also now due are taxes and insurance reimbursements (Paragraphs 8 and 9 of the Complaint); and seeks immediate payment of the all sums due pursuant to the term of the note and mortgage, proceeds of the sale and, potentially a monetary deficiency judgment. (Paragraph 12 of the Complaint). Therefore, FORECLOSURE PLAINTIFF is seeking both the payment or sums or the entry of a judgment for sums and also the foreclosure of the security agreement, therefore, APC Defendant's actions in refusing payment was the act of engaging in debt collection as agent of FORECLOSURE PLAINTIFF acting within the scope of it authority. *See also Freire v. Aldridge Connors, LLP*, 994 F.Supp.2d 1284, 1288 (S.D.Fla.2014) "Because the foreclosure complaint sought to enforce a promissory note, not solely to enforce a mortgage, and because the foreclosure complaint sought a deficiency judgment, a judgment for an amount beyond the collateral, Defendant sought to collect a debt, and therefore Plaintiffs were the object of debt collection activity"); *Battle v. Gladstone Law Grp., P.A.*, 951 F.Supp.2d 1310, 1313 (S.D.Fla.2013) ("[M]oney owed on a promissory note secured by a mortgage is a debt for purposes of the FDCPA."). The practical result of holding otherwise would create a huge loophole in the FCCPA because the actions that the act seeks to curtail would not be prohibited so long as the debt in question was secured. *See Gann*, 145 So.3d at 909; *Reese,* 678 F.3d at 1217–18; *Birster*, 481 Fed.Appx. at 582–83.

In *Lara v. Specialized Loan Servicing, LLC,* 2013 WL 4768004 (S.D. Fla. Sept. 6, 2013) the mortgage loan servicing company sent multiple letters to the borrower after his debt was discharged in bankruptcy court informing him of his default and their intent to foreclose. The

Court refused to enter a defense summary judgment on FCCPA and FDCPA claims that the foreclosure letters holding that the "Notice of Default and Notice of Intent to Foreclosure" was an attempt to collect debt. 2013 WL 4768004*3. *See also, Martorella v. Deutsche Bank National Trust Company*, 931 F.Supp.2d 1218 (S.D. Fla, 2013) (motion to dismiss FCCPA claims denied, force placement of insurance and seeking reimbursement pursuant to the terms of the mortgage is debt collection).

The Southern District of Florida in *U.S. Bank, N.A. v. Capparelli*, 2014 WL 2807648 (S.D. Fla. June 20, 2014) found actions taken in the context of a mortgage foreclosure lawsuit could be the basis for an FDCPA claim. The *Capparelli* Court held "The Eleventh Circuit has now made it clear, 'a communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest.'" 2014 WL 2807648 at *7.

Lastly, APC Defendant's arguments focus on factual matters which cannot be determined on a motion to dismiss. See *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance,* 304 F.3d 1076, 1084 (11th Cir.2002). In *Manrique v. Wells Fargo Bank N.A.*, 116 F.Supp.3d 1320 (S.D. Fla. 2015), Wells Fargo and the servicer were sued for allegedly seeking improperly labeled inspection fees. The servicer moved to dismiss the FDCPA claims which were based upon labels contained in a payoff statement. The charges were labeled as "MISC THIRD PARTY RECOVERABLE Billed" which the plaintiff claimed was "false, misleading, and deceptive description for a 'property inspection' fee." The *Manrique* Court found Wells Fargo's dispute of the debt collector status was a question of fact which could not be decided at the motion to dismiss stage. 116 F. Supp. 3d at 1325-26.

APC Defendant's Argument that its Actions Did Not Violate the FDCPA is a Factual Issue which Cannot Be Appropriately Raised in a Motion to Dismiss in the Instant Case

APC Defendant claims APC Plaintiff failed to state a cause of action because under the circumstances because 1) "inadvertent and unintentional" wrongful application of payments is not unfair or unreasonable and 2) APC Defendant is "ordinarily" not a debt collector. Given that this Court must read all of APC Plaintiff's allegations as true and APC Defendant's arguments only raise more issues of fact than make a case for dismissal. APC Plaintiff alleges APC Defendant is a debt collector. (Paragraph 30 Additional Party Claims) It is this Court's role to determine if the application of payments (and the other violations alleged) was inadvertent and unintentional. It is also this Court's role to determine if, given all of the Florida cases finding servicers have violated the FDCPA.

For the reasons stated above, APC Plaintiff requests this Court to deny APC Defendant's Motion to Dismiss the Additional Party Claims.

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