IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VITO J. FENELLO, JR. and BEVERLY H. FENELLO Plaintiffs, v. BANK OF AMERICA, N.A., and THE BANK OF NEW YORK MELLON (as Trustee for CWALT, Inc.), Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-04139-WSD JURY TRIAL DEMANDED

MEMORANDUM OF LAW SUPPORTING PLAINTIFFS' MOTION FOR RECONSIDERATION

BACKGROUND

This Action concerns the events leading up to, including, and subsequent to the attempted wrongful foreclosure of the Plaintiffs' home, which was purchased on January 30, 2007, and financed in part by an Interest Only Fixed Rate Note issued by Pulte Mortgage, LLC.

In early 2010 (mistakenly reported as 2008 in prior Complaints – see Exhibit #24), after experiencing a precipitous drop in their income in the prior years, after depleting their savings to keep their mortgage current, Plaintiffs contacted Bank of America (the apparent loan servicer at the time) seeking relief (as instructed by the Obama administration), informing them that they were experiencing financial distress, and inquiring about options available to them including a mortgage modification, a short sale, and a deed in lieu of foreclosure.

Bank of America responded that no options or relief would be available until Plaintiffs had missed at least two monthly payments. Plaintiffs then skipped the next two monthly payments and promptly applied for relief under HAMP, as instructed by the Bank, on April 24, 2010.

Because two of the options discussed would have resulted in the Plaintiffs losing their home, and because Plaintiffs had been led to believe that a prompt decision from the Bank would be forthcoming, Plaintiffs decided to make no further payments until a decision was rendered.

Instead of a prompt decision as expected, after more than 15 months of attempting to work with Bank of America, after skipping contractual obligations on the advice of the Bank, after submitting no less than 4 complete applications,

after submitting many more supplementary documents, after calling the Bank weekly/monthly, after being subjected to misinformation, harassment, and other forms of abuse, after coming within 24 hours of foreclosure, after asking for options including deed in lieu of foreclosure, a short sale, or a modification, Plaintiffs finally received a modification offer on June 13, 2011, an offer that provided no relief, an offer that would have more than doubled their original monthly payment. (Exhibit #6)

It was during this extended period that Plaintiffs first began to suspect that Bank of America was not being truthful in their exchanges, was not playing fair, was being deceptive, and was taking advantage of their clients.

It was also during this time that Plaintiffs first learned that Bank of America was being investigated by numerous state and federal agencies, and had signed a Consent Order with the Comptroller of the Currency on April 13, 2011 (Exhibit #25) whereby they had agreed to stop many of the egregious practices that the Plaintiffs had experienced to date.

It was during this time that Plaintiffs first began to suspect that Bank of America was servicing a debt from a purported note holder, who likely had no legal authority to collect on the Promissory Note.

As a result of these suspicions, the Plaintiffs sent their first certified letter disputing the debt on April 25, 2011, where they asked for "written documentation that CWALT, Inc. is indeed the current beneficiary, that it is indeed the Holder in Due Course, and that it has Standing to pursue collections and/or foreclosure in this matter." (Exhibit #2)

In the subsequent months, the Plaintiffs continued to work in good faith to resolve the outstanding dispute with the Bank, to no avail. To date, no proof has ever been offered showing that CWALT, Inc has any interest in and/or is entitled to collect on the Promissory Note.

Instead, the Bank has attempted to foreclose on the Plaintiffs twice, and CWALT, Inc. continues to pursue these actions without showing any evidence that they have any right to collect the outstanding debt.

In an effort to seek justice and prevent the wrongful foreclosure of their home, Plaintiffs have contacted numerous state and federal agencies, congressmen, and the press, to no avail. With few options remaining, Plaintiffs decided to file their original lawsuit in state court on October 21st, 2011. Since they couldn't afford to hire an attorney, they decided to proceed pro se, relying on their

Constitutionally guaranteed rights to property, due process, and justice in the courts.

(To be clear, Plaintiffs do not dispute that they owe money on a Promissory Note. They simply allege that, under Georgia law, any foreclosure by CWALT, Inc. would be wrongful, since it has no apparent interest in the underlying Promissory Note)

ARGUMENT AND CITATION TO AUTHORITY

The right of a party to a legal action to represent his or her own cause before the courts "pro se" has long been recognized in the United States, and is even written into the rules authorizing the Federal Court system:

> *In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. (28 U.S.C. Sec. 1654)*

These rights flow naturally from the civil liberties guaranteed in the U.S. and Georgia Constitutions, the supreme law of the their respective jurisdictions.

Fairness and justice are also built into the system, regardless of the wealth and power of the parties to an action. So fundamental are these rights, they are

referenced in the U.S. and Georgia Constitutions, and are even included in the oaths of office every federal judge takes upon entering their office:

> *"I, _____ XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and* ***do equal right to the poor and to the rich****, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God." (28 U.S.C. Sec.) (emphasis added)*

While this Court has repeatedly quoted that a "document filed *pro se* is 'to be liberally construed,' . . . , and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" the end result is that these standards have been applied in biased ways, one that has not met the standards of fairness and justice.

> *"The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Justice Black in Conley v. Gibson, 355 U.S. 41 at 48 (1957)*

Specifically, while Plaintiffs have documented the many ways that have been lied to and wronged by Bank of America, they had had no prior experience translating these actions into legal Causes of Action. Further, they had little understanding of the concepts of Res Judicata, and why their complaint had to allege every single Cause of Action in their initial complaint.

When interpreting pro se papers, the Court should use common sense to determine what relief the party desires. S.E.C. v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992).

"the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974))

As a result, Plaintiffs inartfully plead their initial complaint. Then, based on this Court's ruling on Defendants initial Motion to Dismiss, 12 of 13 of their Causes of Action were dismissed, apparently with prejudice, and they were precluded from fixing any deficiencies in their initial Causes except for their FDCPA claim.

The end result is, Plaintiffs' Complaint has been sliced and diced, with each Cause of Action then being dismissed on sometimes valid, sometimes biased, and sometimes simply wrong standards.

Pursuant to Rule 60(b) (Fed. R. Cvl. P.), relief from a final judgment or order may be granted in the following circumstances:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

What follows is a discussion of the instances where such relief is justified:

WRONGFUL FORECLOSURE

From their initial Complaint, through all of their Motions and their Amended Complaint, Plaintiffs have challenged the right of CWALT, Inc. to foreclose on their home without showing any evidence that they are the bonafide note holder. (see Lines #63,68-70,80-81 in Original Complaint, and Answer 2. Defendants' Refusal to Prove Standing in PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS)

All of the Causes of Action to prevent this injustice from happening were dismissed by this Court, apparently with prejudice, in their July 17th Order, which stated: "The amended complaint shall:...(2) not include any claims that have been dismissed in this action."

However, on July 12, 2012, unbeknownst to the Plaintiffs at the time, Reese v. Provident Funding Assocs., LLP was decided by a seven-judge panel of the Georgia Court of Appeals (730 S.E.2d 551 (Ga. Ct. App., July 12, 2012)).

This ruling affirmed that, under Georgia law (OCGA '144-14-162.2), only a "secured creditor" may initiate a foreclosure under power of sale proceedings. To be considered a "secured creditor" as required in Georgia, the entity attempting to foreclose has to hold: 1) a properly assigned Promissory Note (proof of the debt), and 2) a properly assigned Security Deed (proof of the security).

This is consistent with all of the Plaintiffs' filings, and as far as the Plaintiffs understand it, this is binding law on this Court. Consequently, the Court's decision to dismiss these Causes of Action, however inartfully plead, should be vacated and set aside.

Discussion

While the Court dismissed the claims related to O.C.G.A. § 11-3-308, it is silent on all of the Plaintiffs' claims related to O.C.G.A. § 44-14-160 - § 44-14-164 (see Lines #63,80-81 in the Original Complaint, and Answer 2. Defendants' Refusal to Prove Standing in PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS)

Pursuant to controlling Georgia law, Plaintiff definitely stated a claim based on lack of standing, because (1) controlling law defines the term "secured creditor" as "the owner of the loan"; (2) controlling Georgia law requires the foreclosure to be performed in the name of the "secured creditor," i.e., the owner of the loan (even if foreclosure proceedings are commenced and the sale is cried through an agent); and (3) CWALT, Inc. was the "secured creditor," yet has provided no evidence that it is the bonafide holder of the Promissory Note.

A foreclosure **must** be conducted in the name of the secured creditor. See O.C.G.A. § 44-14-162(b). The statute does not define the term "secured creditor." However, "[t]he fundamental rules of statutory construction require [the Court] to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage." Couch v. Red Roof Inns, Inc., 291 Ga. 359, 362 (July 9, 2012) (internal quotes, punctuation and citation omitted). If the grantee of the Security Deed was the "secured creditor" *ipso facto*, then there would be no purpose for the "or assignment thereof" language of O.C.G.A. § 44-14-162(b), and that language would be "mere surplusage."

Applying these controlling rules of statutory interpretation to the foreclosure statutes, Northern District of Georgia Judge Amy Totenberg stated as follows in Stubbs v. Bank of Am.:

> "Secured creditor" is not defined in the statute and is therefore to be given its ordinary meaning. *See O'Neal v. State*, 288 Ga. 219, 220-21, 702 S.E.2d 288 (Ga. 2010) ("we apply the fundamental rules of statutory construction that require us to construe the statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage"). Merriam-Webster's Dictionary defines creditor as "one to whom a debt is owed; a person to whom money or goods are due." Black's Law Dictionary (9th ed.) defines creditor as "one to whom a debt is owed; one who gives credit for money or goods," and secured creditor as "a creditor who has the right, on the debtor's default, to proceed against collateral and apply it to the payment of the debt." Thus, according to the plain language of the statute, the secured creditor - **the entity to whom the debt is owed** - is authorized to foreclose pursuant to Georgia's nonjudicial foreclosure statute. Stubbs v. Bank of Am., 844 F. Supp. 2d 1267, 1270 (N.D. Ga. 2012) (emphasis added).

Finally, she states as follows:

> ...[T]he statute requires clear disclosure of the secured creditor and the entity with authority to modify the loan and does not permit obfuscation and subterfuge on these material points.

Reese v. Provident Funding Assocs., LLP (317 Ga. App. 353 (2012))—a controlling case that relies heavily on Stubbs throughout— clearly, explicitly, and unequivocally adopts Stubbs' definition of the term "secured creditor." See Reese, 317 Ga. App. at 355 (stating that "RFC was the secured creditor, i.e., owner of the loan, and Provident was merely the loan servicer"). In so doing, Stubbs' definition of "secured creditor" became a definitive rule of law.

Though it is true that most security deeds in this State give the named grantee the right to exercise the power of sale, the foregoing points of law trump the terms of a private agreement. See Stubbs, 844 F. Supp. 2d at 1269 (citing O.C.G.A. § 23-2-114 for the proposition that powers of sale "shall be strictly construed," which necessarily implies that they must be exercised in strict compliance with the foreclosure statutes); Tampa Inv. Group, Inc. v. Branch Banking & Trust Co., 290 Ga. 724, 727 (2012) (for the proposition that the foreclosure statutes, "being in derogation of common law, must be strictly construed"). The foregoing points of law clearly state that the Legislature only intended for the **owner** of the loan to have the power to foreclose. This is precisely *why* the Legislature imposed the requirement that the security instrument be transferred into the name of the **owner** prior to foreclosure if the owner is not the grantee on the security instrument.

In summary, Plaintiffs have stated a case for wrongful foreclosure based on lack of standing; and this Court should reconsider its Order on this point.

UNFAIR AND UNJUST BEHAVIOR BY BANK OF AMERICA

In all of their Complaints and supporting Motions, Plaintiffs have alleged that Bank of America has lied, negotiated in bad faith, and treated Plaintiffs in an unjust and unethical manner. They have shown evidence to this Court that these allegations were not unique, as evidenced by the Banks' consent decree with the Comptroller of the Currency (Exhibit #25), as evidenced by the Banks' lawsuit with the State of Nevada (Case 3:11-cv-00135-RCJ-WGC, Dist. - NV), and as evidenced by the whistle-blower lawsuit showing that the Bank has perpetrated these events deliberately, as a matter of policy (Case 1:II-cv-03270-SLTRLM, E. Dist. - NY).

In their inartfull pleadings, Plaintiffs attempted to translate these real world events with real world consequences, into legal Causes of Actions. To date, all of the Causes of Action directed at these injustices have so far been dismissed.

Today, Plaintiffs realize that Fraud was a very difficult standard to prove, and that "Fraud in the Inducement," or "Deceptive Trade Practices" would have been better pled. In either case, Plaintiffs find it hard to fathom that this Court could find no possible theory under which Bank of America, a company that has to

date paid over $40 BILLION dollars to settle Mortgage claims like these, could be sued. And since this Court precluded Plaintiffs from revisiting these claims, they had no choice but to abandon them in their FAC despite the real damages they incurred.

Plaintiffs hereby request that this Court allow them to file an amended Complaint, under such Causes of Action the Court deems would serve justice.

Discussion

Through the various motions and pleadings submitted by the Plaintiffs, they have provided this Court with ample evidence that they had been subject to unjust and unethical behavior from Bank of America. For example, the Nevada lawsuit alleges almost verbatim the same allegations made by Plaintiffs, stating that Bank of America mislead consumers by:

- promising to act upon requests for mortgage modifications within a specific period of time, usually one or two months, but instead stranding consumers without answers for more than six months or even a year;
- falsely assuring them that their homes would not be foreclosed while their requests for modifications were pending, but sending foreclosure notices, scheduling auction dates, and even selling consumers' homes while they waited for decisions;
- misrepresenting the eligibility criteria for modifications and providing consumers with inaccurate and deceptive reasons for denying their requests for modifications;
- offering modifications on one set of terms, but then providing them with agreements on different terms, or misrepresenting that consumers have been approved for modifications.

> Bank of America represents publicly, and federal rules require, that consumers need not be delinquent to be eligible for a modification ... Yet Bank of America representatives frequently advised consumers that they must miss payments in order to be considered for loan modifications.

The Nevada suit also addresses the big question:

> Bank of America misrepresented, both in communications with Nevada consumers and in documents they recorded and filed, that they had authority to foreclose upon consumers' homes as servicer for the trusts that held these mortgages. Defendants knew (and were on notice) that they had never properly transferred these mortgages to those trusts, failing to deliver properly endorsed or assigned mortgage notes as required by the relevant legal contracts and state law. Because the trusts never became holders of these mortgages, Defendants lacked authority to collect or foreclose on their behalf and never should have represented they could.[1]

As if that weren't bad enough, on or about March 11th, 2012, Plaintiffs learned of a whistle-blower lawsuit against Bank of America that alleges that the Bank has perpetrated these events deliberately, as a matter of policy:

> In a case filed in July 2011 and unsealed March 7, [2012] former BoA subcontractor employee Gregory Mackler alleges that BoA misled borrowers to keep them from

---

[1] It should be noted that, consistent with Plaintiffs' prior claims regarding CWALT, Inc.'s lack of standing to foreclose, and consistent with this explanation by the State of Nevada, the Plaintiffs' Note, in all likelihood, was not properly endorsed and transferred to the Trustee pursuant to the Pooling and Servicing Agreement ("PSA") for CWALT, Inc. (Exhibit #28); and Plaintiff's Security Deed indisputably was not assigned to the Trustee prior to the Trust's closing date in violation of the PSA. In other words, neither the Plaintiffs' Note nor the Plaintiffs' Security Deed was ever transferred to the Trust before it closed. Thus any foreclosure actions pursued by the Trust would be considered wrongful under New York State Trust law. (The PSA contains a choice of law provision stating that New York law applies.) See e.g. New York Consolidated Law Service, Estates, Powers, and Trusts Law (NY CLS EPTL) §§ 7-1.18, 7-2.1, 9-1.5, 7-2.4 ("If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void"); c.f. Brown v. Spohr, 180 N.Y. 201, 209-210 (N.Y. 1904); Sussman v. Sussman, 61 A.D.2d 838, 402 N.Y.S.2d 421, 423 (2d Dept. 1978), aff'd 47 N.Y.2d 849, 418 N.Y.S.2d 768, 392 N.E.2d 881 (1979) (stating that "[u]ntil the delivery to the trustee is performed by the settlor...no rights of the beneficiary in a trust created without consideration arise"); see also O.C.G.A. § 1-3-9 (regarding when Georgia courts should honor a contractual choice of law provision); Convergys Corp. v. Keener, 276 Ga. 808, 810-811 (2003) (same).

> participating in the taxpayer subsidized Home Affordable Modification Program (HAMP), because mortgage modifications cost BoA money.
>
> Among the tactics allegedly used were stalling the review of applications by assigning them to employees who were on vacation or who had actually already been fired. Concerned borrowers were also told that their complaints were still being reviewed when in fact they had secretly been labeled as "incomplete." (Exhibit #26)

Finally, under the Georgia Law covering **all** commercial transactions, "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement" (GA. Code 11-1-203). This appears to be at odds with this Court's dismissal of the Plaintiffs' "Bad Faith" Cause of Action.

In summary, Plaintiffs have stated a case for unfair and unjust behavior by Bank of America; that *"the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory"* (Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975)); and that this Court should reconsider its Order on this point.

THE ONE SATISFACTION RULE

Given the bias shown in dismissing other valid claims of the Plaintiffs, they would like to revisit the Court's opinion that the One Satisfaction Rule could not

apply to the Plaintiffs because they were not a party to the Collateral ("Corridor") Agreement between Credit Suisse and CWALT, Inc. (Exhibits #27,28)

Imagine if this case had been about an auto accident, where the Plaintiffs were driving an old jalopy with no insurance and no cash in the bank, and they ran a stop sign and hit a limousine driven by the Defendants. Then imagine that the Defendants used their own insurance to repair the damages to their limousine. Now imagine that, after being made whole through their own insurance policy, Defendants tried to sue the Plaintiffs. Would the Court claim that the Plaintiffs would have to pay again, because they were not a party to the Defendants' insurance policy? This does not seem just to the Plaintiffs, and they seek the Court's opinion in this matter.

Discussion

Plaintiffs have provided the Court with ample evidence that CWALT, Inc. has likely received insurance payment reimbursements for its portfolio losses from Credit Suisse, and is currently the beneficiary of an $8.5 Billion settlement with Bank of America over defects in their loan portfolios (Original Complaint, lines 74-79).

One cardinal principle of law states that, in the absence of punitive damages, a plaintiff can recover no more than the loss actually suffered.

> "When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." Lovejoy v. Murray, 70 U.S.(3 Wall.) 1, 17, 18 L.Ed. 129 (1865).

Under Georgia Law, the One Satisfaction Rule is codified as:

> (a) Subject to subsection (b) of this Code section, an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument; and (ii) to a person entitled to enforce the instrument. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Code Section 11-3-306 by another person. (GA. Code 11-3-602):

In summary, the Plaintiffs have stated a case for Unjust Enrichment and Violation of the One Satisfaction Rule; and ask that this Court to reconsider its Order on this point.

FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

In the events leading up to the attempted Wrongful Foreclosure by Bank of America, Plaintiffs have received numerous notices that explicitly stated that the

Bank "was considered a Debt Collector under the Fair Debt Collection Practices Act." Two of those notices are included in the original exhibits (Exhibit #6, 7).

The former, it could be argued, had a dual purpose: Notice and collections. The latter appears to have had only a single purpose: Notice only. The Judge, in footnote 9, page 17 of the February 15th, 2013 Opinion and Order, appears to agree with the Plaintiffs.

Plaintiffs believe that the Court can't have it both ways. Either the Bank was really acting as a Debt Collector under the Act, or the FDCPA notice in the single purpose letter was fraudulent.

The consequences of this issue are significant. If the notice was fraudulent, it must have been there to mislead consumers as to the Banks roles and obligations in its communications. It resulted in many of the Banks' clients sending FDCPA notices, expecting the Bank to act accordingly.

Instead, the Bank routinely ignored its obligation, thereby baiting its customers into a false level of expectation for performance in response to any FCDPA requests. And when those expectations were not met, baiting these customers into filing court actions that easily allowed the Bank to remand these mostly state-based actions into Federal Court. All the while, knowing full well that

Federal Court would dismiss these claims because the Bank acting as a servicer is not considered a "Debt Collector" under the Act.

Just like the other actions of the Bank, this is another example of Bank of America perpetrating at most Fraud in the Inducement, or at least, Deceptive Trade Practices.

Since the Bank has "an obligation of good faith in its performance or enforcement" (GA. Code 11-1-203), Plaintiffs hereby ask the Court to reconsider its ruling in this matter, and clarify which of the two options apply in this situation.

TRUTH IN LENDING ACT (TILA)

In dismissing Plaintiffs TILA Cause of Action, apparently with prejudice and no right to amend, this Court found that the Plaintiffs' cause was deficient for 1) failing to identify the proper Defendant, 2) failing to allege actual damages, and 3) failing to provide any proof that the new owner of the debt had failed to provide notice of transfer (Judges Opinion and Order, page 17, par. 2,3)

Plaintiffs respond that all of these are easily cured, and given that this was their first Complaint and filed pro se, the Court should have allowed them to file an amended complaint.

ISSUES NOT RESOLVED – JUSTICE NOT SERVED

The end result of the current ruling is complicated by the fact that while waiting for the most recent decision from the Court, Bank of America sold the servicing rights to the Plaintiffs' mortgage to Select Portfolio Services (SPS) (Exhibit #29).

Because the loan was in default at the time, and because the Plaintiffs notified SPS that the loan was in dispute before it transferred (Exhibit #30), and because this Court has already ruled on the required essential elements for a loan servicer to be considered a "Debt Collector" under the Act, Plaintiffs hereby move the Court for Judicial Notice that SPS be considered a Debt Collector under the FDCPA for any future court actions.

Further, it is not clear from the Judgment entered by the Clerk whether this case has been dismissed with prejudice or not, and to whether it applies to both Defendants or not. Since Mellon Bank was only attached to this lawsuit due to their being the Trustee to the purported holder of the note, and because this issue remains unresolved, Plaintiffs feel that it would be unfair and unjust for Mellon Bank to be precluded from future actions. This is especially true since any future actions will involve a new loan servicer (SPS), and a new series of events.

According to Dees v. Washington Mut. Bank (M.D. Ga., 2010): Dismissal with prejudice is an "extreme sanction" and "is plainly improper unless and until

the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct." Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1338-39 (11th Cir.2005).

Finally, the Supreme Court has held that where a statute permits attorney's fees to be awarded to the prevailing party, the attorney who prevails in a case brought under a federal statute as a pro se litigant is not entitled to an award of attorney's fees (Kay v. Ehrler, 499 U.S. 432 (1991)). Plaintiffs move the Court to confirm that attorney fees are not included in any Judgment entered in this case.

MOTION FOR RECUSAL

In dismissing Plaintiffs Motion for Recusal, Judge Baverman's opinion was that the motion should be denied because the Plaintiffs failed to give any factual basis for the motion, nor any evidence that bias has been exhibited in this case.

With the cumulative rulings against the Plaintiffs so far in this case, there now appears to be evidence that the Court's "impartiality might reasonably be questioned." In the event that an appeal may be necessary, attached are details of the three seminars referenced in the motion, one of which was moderated by the opposing council's firm (Exhibits #31,32,33 respectively).

CONCLUSION

Plaintiffs filed this lawsuit as a last resort, in order to protect their Constitutionally guaranteed rights to property and due process, and relying on the Court's mandate to seek justice without regard to the wealth and power of the litigants.

With this brief, Plaintiffs show that justice has not been served in this case. Further, Plaintiffs show that with the most recent verdict, this case is now more confused than ever, with several items of law undecided, and new parties involved.

For these reasons, Plaintiffs hereby move the Court to vacate and set aside its Order granting Defendants' Motion to Dismiss; to reinstate Plaintiff's case and direct the Clerk to re-open the case; and to grant Plaintiffs' request for leave to amend their Complaint.

In the event the Court grants none of the above, the Plaintiffs further move the court to grant Judicial Notice that Select Portfolio Services is to be considered a "Debt Collector" under the FDCPA; to clarify whether the Judgment as entered by the Clerk means that this case is dismissed with or without prejudice, against one or both parties, and whether attorney fees are to be included; and for such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted this 15th day of March, 2013.

Vito J. Fenello, Jr.
289 Balaban Circle
Woodstock, GA 30188
770-516-6922

Beverly H. Fenello
289 Balaban Circle
Woodstock, GA 30188