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

PLAINTIFFS' SECOND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COMES NOW, Plaintiff VITO J. FENELLO, JR., and hereby files this RESPONSE pursuant to Defendants' Reply In Support Of Motion To Dismiss filed January 5, 2012.

BACKGROUND

Can Bank of America foreclose on a homeowner, without showing any evidence that their client actually owns the promissory note? That is the big question in this case. Almost all of the other Causes of Action are a direct consequence of this question.

To date, Bank of America has refused to provide any evidence that their client, CWALT, Inc., has any ownership in the Plaintiffs' promissory note. This is despite the fact that the Plaintiffs have demanded this information at least four times, in writing, dating back to April, 2011. This is despite the fact that Bank of America, in refusing to provide this information, has broken several state and federal laws and regulations in the process. (The laws and regulations broken are summarized in the Plaintiffs' Complaint and First Response)

ANSWER

With their latest Reply, Defendants continue their pattern of picking apart the pieces, rather than addressing the big question. Bank of America would rather argue over whether they are considered a "debt collector," rather than address questions about the standing of their client, CWALT, Inc.

Bank of America takes these actions even though it has been caught doing this before, and even though it had agreed to stop doing these practices in a consent decree it signed in April, 2011. Bank of America takes these actions even though it is facing lawsuits by the Nevada Attorney General, the Massachusetts Attorney General, and the FHA for practices like these, and is facing a fine from the Federal Reserve as well.

For example, the Nevada lawsuit (Case 3:11-cv-00135-RCJ) 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.
>
> **Bank of America's misconduct in misrepresenting its mortgage modification program continues through the present and has been confirmed in interviews with consumers, former employees, and other third parties and through review of relevant documents. (emphasis added)**

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. (emphasis added)**

The Nevada suit concludes with:

> Taken together and separately, Defendants' deceptive practices have resulted in an explosion of delinquencies and unauthorized and unnecessary foreclosures in the State of Nevada. These foreclosures have had a devastating impact on Nevada's homeowners, communities, and economy, stripping homeowners of their assets (including those who do not have loans originated or serviced by Defendants, but whose property values have fallen dramatically), dislocating families, blighting neighborhoods, and deeply disrupting the State's housing market.

Plaintiffs believe that the same conclusions apply to the State of Georgia as well.

One question that remains is, why would Bank of America choose to foreclose on homeowners, when solutions financially beneficial to all parties were available? Why wouldn’t Bank of America accept a modification that provided a higher return to their client than a foreclosure would? (60 Minutes recently reported on foreclosures in Detroit that sat empty for months, until they were condemned and demolished by the city – resulting in a 100% loss to the note holder.)

Plaintiffs believe that these apparently illogical decisions are a result of hidden incentives that are built in to the current capital structure of mortgage backed securities. For example, according to former Congressman Grayson of

Florida, banks receive very little profit from servicing loans, but make $6,000 every time they foreclose. In this scenario, the banks as servicers are choosing to make a few thousand dollars, while forcing their clients to lose as much as $100,000 or more per foreclosure.

While significant, Plaintiffs further believe that other, hidden incentives exist as well. This is the reason Plaintiffs have included the principals of the One Satisfaction Rule and Unjust Enrichment. They believe that significant profits are accruing to the servicer, through excess returns on credit default swaps, and other cash flows that exist between the major parties. Plaintiffs have already referenced the current negotiations between the two Defendant's and their pending settlement.

There also exists significant cash flows that have been provided by government agencies to compensate banks who acquire portfolios of toxic assets (i.e. Bank of America assuming Countrywide's portfolio), as well as performance guarantees that kick in if certain default targets are met. Finally, other government programs have provided public funding to the banks for the expressed purpose of modifying loans. (One Georgia judge has already found a bank guilty of accepting billions of dollars in HAMP money, but not following through on modifications as agreed (see Otis Wayne Phillips vs. U.S. Bank, NA Case #11-CV-00504))

When taken together, apparently illogical foreclosure actions by the banks, may in fact be profit-maximizing strategies given the public and hidden agreements that exist behind the scenes.

CONCLUSION

According to case law presented by Bank of America, "simply sending a letter stating that one is a "debt collector" does not change one's status to that of a "debt collector."" If Bank of America were to have its way, their clients could no longer rely on any communications from the bank. Every policy, notice, and letter would be considered suspect, and subject to interpretation from the courts.

According to case law presented by Bank of America, they should be allowed to collect on any debt, without providing any proof as to who owns that debt. If Bank of America were to have its way, any debtor anywhere could be subject to a collection action based on the mere allegation of a debt by the bank.

Collectively, these two positions would obliterate any appearance of fair dealing between the bank and the public, and would decimate the long standing legal traditions surrounding commercial paper and promissory notes.

Conversely, Plaintiffs have responded with their own legal claims and supporting case law, and have shown multiple lawsuits supporting their position. Their arguments in support of the big question are based on sound law, and have

already been affirmed by Judge Totenberg (see Delicia T. Williamson vs. Bank of America, NA Case 1:11-cv-01161-AT Document 5).

They have also shown that the Nevada Attorney General's case supports the Plaintiffs' claim that Bank of America induced them into a default position, and is part of a pattern of fraud and deception which includes Defective Assignments.

Admittedly, Plaintiffs proceeding pro se have had to learn a tremendous amount of law in very short amount of time. While they are comfortable with their response to the big question, they have asked the court to dismiss without prejudice the charges of Fraud, Bad Faith, and Equitable Estoppel. They have included the reference to the Nevada Attorney General's allegations against the bank to show just cause why these charges are valid, and why they should be subject to pursuit pending the outcome of the big question.

Finally, Plaintiffs have shown cash flows between tranches and major players, and have shown good reason to believe that these impact the potential damages incurred by the purported promissory note holder, if any, as well as the modification decisions made by the loan servicer.

Since the purpose of this motion is not to decide these issues of law, but merely to decide if there exists enough evidence for this case to move forward, and

for the reasons stated herein, the Defendant’s Motion to Dismiss should therefore be denied.

Respectfully submitted,

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