IN THE UNITED STATES DISTRICT COURT FOR MARYLAND
(Northern Division)

TERRY MASSEY	*	
Plaintiff	*	
v.	*	Case No.: 1-08-cv-00261
ERNEST LEWIS, et al.	*	
Defendants	*	

* * * * * * * * * * *

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS EARNEST LEWIS, MICHAEL K. LEWIS, IN THE HOUSE TECHNOLOGIES INC., CHERYL BROOKE, CORNERSTONE TITLE & SEAN ADETULA

Plaintiff Terry Massey ("Ms. Massey"), by the undersigned counsel, submits this Motion for Partial Summary Judgment Against Defendants Earnest Lewis ("E. Lewis"), Michael K. Lewis ("M. Lewis"), In the House Technologies Inc. ("In the House"), Cheryl Brooke ("Brooke"), Cornerstone Title & Escrow ('Cornerstone"), and Sean Adetula. Specifically, Ms. Massey seeks a judgment as a matter of law that (1) declares, pursuant to Count V (pages 72-76) of her second amended complaint, that the Deed from her to E. Lewis as void *ab initio*; and (2) finds, pursuant to Count IV (pages 67-71) of her second amended complaint that Defendants E. Lewis, M. Lewis, In the House, Brooke, Adetula, and Cornerstone are liable to Ms. Massey for damages, to be determined at trial, pursuant to the Protection of Homeowners in Foreclosure Act ("PHIFA") Protection of Homeowners in Foreclosure Act ("PHIFA"), MD. CODE ANN. REAL PROP. § 7-301 et seq.

(LexisNexis 2003 & Supp. 2006).[1] In support of her Motion, Ms. Massey says:

STATEMENT OF THE CASE

This case arises from a widespread and organized foreclosure rescue scam, designed to steal thousands of dollars in equity from Ms. Massey and which was successful in doing so. Judge Messitte of the U.S. District Court of Maryland described how this kind of scam works in the recent case of *Johnson v. Wheeler*, as follows:

> As home mortgage foreclosures have increased in recent years, so have so-called "foreclosure rescue scams." Typically, a homeowner facing foreclosure is identified by a rescuer through foreclosure notices published in the newspapers or at government offices. The rescuer contacts the homeowner by phone, personal visit, card or flyer, and offers to stop the foreclosure by promising a fresh start through a variety of devices. As the date for the foreclosure approaches and the urgency of the matter becomes greater, the rescuer or some entity with which he is linked agrees to arrange for the pay-off of the mortgage indebtedness and to see to the transfer of title to the property to an investor pre-arranged by the rescuer, often with a leaseback of the property to the homeowner for a period of time, occasionally giving him the right to repurchase the property after the lease ends. The rescuer imposes heavy fees or other charges for his services, in effect stripping some if not all of the homeowner's equity, and does all this with little or no advance notice to the homeowner, who is usually unrepresented by counsel.

492 F.Supp.2d 492, 495-96 (D.Md.,2007), *citing generally* Steve Tripoli & Elizabeth Renuart, National Consumer Law Center, Dreams Foreclosed: The Rampant Theft Of Americans' Homes Through Equity-Stripping Foreclosure "Rescue" Scams (2005) (available at: http://www.consumerlaw.org/news/ForeclosureReportFinal.pdf) (last visited December 9, 2008).

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[1] The Maryland General Assembly made amendments to PHIFA in 2008, however these amendments do not apply to the case at hand since the subject transaction occurred after the initial version of PHIFA became law in May 2005. For the benefit of the Court, hereinafter all PHIFA sections cited are taken from Md. Code Ann. Real Prop. § 7-301 *et seq*.(LexisNexis 2003 & Supp. 2006).

As a result of learning of the illegal nature of the scam to steal her property and equity, Ms. Massey has filed a Complaint seeking several claims for relief, including counts for declaratory relief and for damages pursuant to PHIFA. Specifically, in her Declaratory Judgment count, Ms. Massey asks the Court to enter a judgment declaring Ms. Massey as the absolute owner of the subject property commonly known as

("Property"). In her PHIFA count Ms. Massey seeks a judgment for compensatory and treble damages for certain violations of PHIFA. Defendants Earnest Lewis ("E. Lewis"), Michael K. Lewis ("M. Lewis"), In the House Technologies Inc. ("In the House"), and Cheryl Brooke ("Brooke") have answered the complaint. Defendant Cornerstone has not answered the complaint.

As shown below, there are no material facts in dispute regarding the limited issues subject to this Motion and Ms. Massey is entitled to Partial Summary Judgment as a matter of law. Judgment on these issues will also significantly narrow and focus the issues necessary for trial.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

This matter has many interesting and relevent facts to the overall scheme of the Defendants to illegally acquire an interest in Ms. Massey's home and the Property. However, for purposes of this motion and the relief it seeks, only the following facts are material to questions presented to which there is no dispute:

1. Ms. Massey and Defendant E. Lewis claim to be the owners of the **Property.**

2. E. Lewis claims title by Deed from Ms. Massey to him. **PLAINTIFF'S EXHIBIT NO. 1.**

3. Ms. Massey claims title by her prior deed and by her rescission of the assignment of title to the Defendant E. Lewis pursuant to PHIFA. **PLAINTIFF'S EXHIBIT NO.s 2 & 3.**

4. On June 30, 2006, an order to docket or a petition to foreclose was filed in the Circuit Court for Baltimore City, case no. **24O06001515** against the **Property.** *See* **PLAINTIFF'S EXHIBIT NO. 4**.[2]

5. At all relevant times beginning on June 30, 2006, Defendants E. Lewis, M. Lewis, Brooke, In the House, and Cornerstone knew that Ms. Massey was facing a foreclosure on the **Property. PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 6.**

[2] Docket extract from *Futrovsky v. Massey.*, *Case No.* 24O06001515.

Defendants E. Lewis,[3] M. Lewis,[4] Brooke,[5] and In the House[6] offered to help Ms. Massey save her house from foreclosure and in fact agreed to do so. **PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 7.** However, at not time did either Defendants E. Lewis, M. Lewis, Brooke, Adetula, or In the House Technologies ever provide Ms. Massey with any notices or written contracts that were required by PHIFA. **PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 8**. This purpose is not in dispute as stated in the words of M. Lewis himself: "We -- Earnest did not want the houses. That was -- I brought him into this because I said, "Earnest, you have excellent credit. This is something you can do to help the members." So we sat down

[3] **Plaintiff's Exhibit No. 6,** E. Lewis Dep. at 54-55 (Earnest Lewis freely acknowledged his role. "Q. All right. And in connection with this contract, did you also enter into other agreements with people who were selling real property? A. Yes. They were to lease it and then buy it back. Q. And was that -- I believe the document talks in terms of a mandatory buy-back; is that correct? A.Correct. Q. So it was the intent of each transaction that the person would eventually buy the house back? A. Yes").

[4] **Plaintiff's Exhibit No. 7,** M. Lewis Dep. at 56-57 ("Massey came in and -- you know, because she didn't want to lose her daddy's house, didn't -- when I threw the idea out that, you know, she could do this, 'I don't want to lose my daddy's' -- I said, 'Well, listen. Why don't you call Weinstock, Friedman and Friedman? Talk to them about how to stop this foreclosure, first and foremost.' She called them and then she called me and gave me the answer. And I said, 'Look, this' -- I told all of my members, including Massey, that I have a preparer that will do the bankruptcy for 50 percent less than what the attorneys charge. That's how the referral service came out. So whatever Weinstock, Friedman and Friedman would charge you to prepare the documents, I can get you a discount, if you are an MKL member, of 50 percent less. Take this over to Cheryl Brooke's office. She can do it for you, if you decide to do it").

[5] **Plaintiff's Exhibit No. 8,** Brooke Dep. at 7-8 (where Brooke described to Ms. Massey her role in filing the bankruptcy petitions to stop foreclosures: "Q. And what did she ask you about bankruptcy? A. Well, she said that she was losing her house. She had tried to refinance before and they turned her down. She got -- she didn't get approved. And I told her I don't give legal advice. She has talk to an attorney. Had she talked to an attorney. Does she know if a bankruptcy can stop her foreclosure").

[6] **Plaintiff's Exhibit No. 9,** In the House Corp. Dep. Of Cheryl Brooke at 45-46 (Where Cheryl Brooke explained the purpose of the Defendants' program to save Ms. Massey: "Because people could not get refinanced -- Terry was one of them. She could not get refinanced. She tried every way to keep her house and people were losing their houses. And they just, you know, were crying, and in tears, and everything else. And the pilot came up as trying to find a way to help these people. That's why I can't believe all of this. Q. All right. And what was his way of helping these people? A.Well, he was saying that we needed an -- you know, somebody, an investor that can do a lease back. I mean, it's done every day. And give them their -- that way, they keep their houses and they stay in their houses and not on the street").

individually with each member and told them what needed to be done for Earnest to do it." **PLAINTIFF'S EXHIBIT NO. 7,** M. Lewis Dep. at 34.

6. As part of there foreclosure rescue scheme, Defendants E. Lewis, M. Lewis, Brooke, and In the House did provide certain contracts including a Lease Back and Mandatory Repurchase Agreement. Defendant Earnest Lewis stated:

> Q. All right. And in connection with this contract, did you also enter into other agreements with people who were selling real property? A. Yes. They were to lease it and then buy it back. Q. And was that -- I believe the document talks in terms of a mandatory buy-back; is that correct? A. Correct. Q. So it was the intent of each transaction that the person would eventually buy the house back? A. Yes.

PLAINTIFF'S EXHIBIT NO. 6, E. Lewis Dep. at 46-48; *see also* **PLAINTIFF'S EXHIBIT NOS. 10 & 11.**

7. On or about July 31, 2006, at the direct and indirect instruction of Defendants Brooke, In the House, E. Lewis, and M. Lewis for the purpose of "saving the Property from foreclosure," Ms. Massey sought bankruptcy protection by filing a Chapter 13 bankruptcy petition filed with the assistance of Brooke and In the House. **PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 10; PLAINTIFF'S EXHIBIT NO. 12.**[7]

8. On or about September 13, 2006, Ms. Massey attended a real estate closing organized by Defendant Cornerstone wherein she assigned her interest in the **Property** on a temporary basis to E. Lewis. **PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 11.**

9. Cornerstone ad Adetula conducted this settlement despite the fact that the U.S. Bankruptcy Court of Maryland had not granted Ms. Massey or anyone else on her

[7] Docket extract from *In Re: Massey*, Case No. 06-14497.

behalf permission to convey her interests in the Property. **PLAINTIFF'S EXHIBIT NO. 12.** Cornerstone and Adetula also never asked Ms. Massey if she had received her mandatory PHIFA notices. **PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 13.**

10. Cornerstone prepared a false HUD-1 settlement statement for the September 13, 2006 transaction which indicated that Ms. Massey would receive $30,721.83. **PLAINTIFF'S EXHIBIT NO. 13.** In fact this sum was given weeks later by Cornerstone to M. Lewis and/or his associate and affiliate Winston Thomas of Carteret Mortgage—the mortgage broker in the transaction between E. Lewis and Ms. Massey. **PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 12.** The check was deposited into the account of In the House. **PLAINTIFF'S EXHIBIT NO. 8,** *Brooke Dep.* at 19-24. The funds were then disbursed to reimburse Earnest Lewis for any amounts he paid at settlement and the balance given to M. Lewis and E. Lewis. **PLAINTIFF'S EXHIBIT NO. 6,** E. *Lewis Dep.* at 63, ("Right. So when In The House Technologies reimbursed you, you put it back into that same account? A. Yes. Q. All right. And that was the same thing that you did on all the purchase transactions? A. Yes.").

11. Pursuant to PHIFA, Ms. Massey rescinded her transaction with E. Lewis on October 11, 2006 and recorded that rescission for notice to all potential parties in the land records of Baltimore City, Maryland. **PLAINTIFF'S EXHIBIT NO. 3.** Ms. Massey commenced this action on or about October 20, 2006. **PLAINTIFF'S EXHIBIT NO. 5, AFFIDAVIT ¶ 14.**

12. With notice of Ms. Massey's PHIFA rescission and this lawsuit, Cornerstone caused the rescinded deed, **PLAINTIFF'S EXHIBIT NO. 1,** and E. Lewis's fraudulent Deeds of Trust to be recorded in the land records of Baltimore City, Maryland

on December 21, 2006. **PLAINTIFF'S EXHIBITS NO. 14 & 15.**

13. As of the date of the alleged assignments of the **Property** from Ms. Massey to Defendant E. Lewis, a foreclosure action had been docketed against the **Property** and the **Property** was subject to the provisions of **PHIFA**.[8]

14. On or about September 13, 2006, Defendant E. Lewis encumbered the **Property** by Deeds of Trust and recorded the instrument in the land records of Baltimore City with the assistance of Cornerstone. **PLAINTIFF'S EXHIBITS NO. 14 & 15.**

15. As a closing agent for several different title insurers, Cornerstone knew about PHIFA and the strict requirements it placed upon it but utterly failed to comply with the basic law and therefore acted outside the scope of its license. **PLAINTIFF'S EXHIBIT NO. 16.**

16. Cornerstone knew before it recorded the instruments that the proceeds from the transaction had been paid to In the House and not Massey. **PLAINTIFF'S EXHIBIT NO. 17.**

17. Defendants E. Lewis, M. Lewis, Brooke, and In the House are foreclosure consultants as regards the **Property** and this transaction. Defendant E. Lewis is also a foreclosure purchaser as regards to the Property.[9]

STANDARD OF REVIEW

Rule 56(c) of the *Federal Rules of Civil Procedure* provides that summary judgment should be granted where "the pleadings, depositions [and] answers to interrogatories ... show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." F.R.C.P. 56. The

[8] *See*, Real Prop., § 7-301(b), (d), (f), (i), and (j).

[9] *See*, argument below.

Supreme Court has construed Rule 56(c) "mandate the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). The Court explained that, "[i]n such situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Id.* at 323.; *see also Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 254 (1986).

ARGUMENT

I. THE DEED FROM MS. MASSEY TO E. LEWIS IS VOID *AB INITIO*

There are three separate legal reasons by which the Deed from Ms. Massey to E. Lewis is void as a matter of law: (i) E. Lewis illegally obtained title to the property while acting directly and indirectly as a foreclosure consultant; (ii) the deed was illegally recorded during Ms. Massey's period of PHIFA rescission; and (iii) the September 13, 2006 deed violated the automatic stay of Ms. Massey's Chapter 13 Bankruptcy.

i. A Foreclosure Consultant May Not Pursuant to PHIFA Acquire Any Interest in a Property for Whom the Consultant Provides Direct or Indirect Services.

The transparent ploy of using front businesses in furtherance of foreclosure rescue frauds is a well known and a traditional method of executing foreclosure rescue scams. This ploy was anticipated by the authors of PHIFA and addressed at Real Prop. § 7-307

> Prohibited actions. A foreclosure consultant may *not*: … (5) *Acquire any interest, directly or indirectly*, or by means of a *subsidiary, affiliate, or corporation in which the foreclosure consultant* or a member of the foreclosure consultant's immediate family *is a primary stockholder*, in a residence in foreclosure from a homeowner with whom the foreclosure consultant has contracted.

Md. Code Ann., Real Prop. § 7-307 (emphasis added).

In this case, E. Lewis' conduct directly and indirectly, through In the House, M. Lewis, and Brooke, established him as a foreclosure consultant. Md. Code Ann., Real Prop. § 7-301(b). First, E. Lewis contacted and solicited Ms. Massey with offers to save the Property from foreclosure. E. Lewis dealt directly with Ms. Massey throughout the transaction. E. Lewis and his affiliates then presented Ms. Massey with the opportunity to save the Property to the "pilot" project he had created with In the House, M. Lewis, and Brooke for the same purpose of "saving the Property from foreclosure." The scheme allowed Ms. Massey an opportunity to lease the property for a period of time and then repurchase it. E. Lewis, In the House, M. Lewis, and Brooke all freely admit their efforts for Ms. Massey would stop the pending foreclosure.

There is no dispute of material fact that E. Lewis acted as a foreclosure consultant directly and indirectly through his affiliates. There was no doubt then that he therefore acquired an illegal interest in the Property in violation of the express mandate of PHIFA. Md. Code Ann., Real Prop. § 7-307(5). A declaratory judgment confirming the Deed from Mr. & Mrs. Boyd to New Towne void was therefore appropriate and reasonable. To say otherwise would render Real Prop., § 7-307(5) meaningless.

Such a ruling that the deed was void is also entirely consistent with more than eighty years of case law starting with the Court of Appeals' ruling in *Bond v. May & City Council*, 118 Md. 158, 166 (1912) where it said:

> A mandatory provision in a statute is one the omission to follow which renders the proceedings to which it relates illegal and void; while a directory provision is one the observance of which is not necessary to the validity of the proceedings. Whether a particular statute is mandatory or directory does not depend upon its form, but upon the intention of the

> Legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other…Mere words do not control. The whole surroundings, the purposes of the enactment, the ends to be accomplished, the consequences that might result from one meaning rather than another…must all be considered in determining whether particular words shall have mandatory or directory effect ascribed to them….And generally, when no rights will be impaired, provisions with no negative words or implications concerning the time and manner in which official persons shall perform designated acts are directory.

Id. (internal citations and quotations omitted).

ii. The Deed Was Illegally Recorded in the Land Records of Baltimore City, Maryland.

PHIFA contains clear prohibitions against the filing of a deed if the provisions of PHIFA have not been met. See (i) §§ 7-310(k) and § 7-311(b)(6)(i), which prohibit the recording of documents, including deeds and deeds of trust, affecting title to protected properties during the period of rescission; (ii) § 7-311(b)(6)(ii) which prohibits foreclosure purchasers from transferring or encumbering protected properties during the period of rescission; and (iii) § 7-307(5) which prohibits a foreclosure consultant from acquiring a direct or indirect interest in the protected property.

The interest claimed by E, Lewis is from the deed from Ms. Massey. This recorded deed is void under Maryland law since it was done in violation of the express prohibitions set forth in PHIFA. PHIFA does not just regulate foreclosure rescue transactions but it also prohibits certain conduct. For example, Real Prop., (i) §§ 7-310(k), 7-311(b)(6)(i), which prohibit the recording of documents, including deeds and deeds of trust, affecting title to protected properties during the period of rescission; (ii) Real Prop., § 7-311(b)(6)(ii), which prohibits foreclosure purchasers from transferring or

encumbering protected properties during the period of rescission; and (iii) Real Prop. § 7-307(5), which prohibits a foreclosure consultant from acquiring a direct or indirect interest in the protected property. Ms. Massey's position in this regard is also entirely consistent with Maryland law. *Bond v. May & City Council*, 118 Md. 158.

If the court affords protections to illegal acts, e.g., recording instruments in violation of the law, the issue of rescission under PHIFA still remains. There are a number of instruments, documents, disclosures, and notices addressed by PHIFA. One of these documents is the foreclosure consultant contract. A foreclosure consultant contract is defined at Real Prop., § 7-301(c): "Foreclosure consulting contract means a written, oral, or equitable agreement between a foreclosure consultant and a homeowner for the provision of any foreclosure consulting service or foreclosure reconveyance." Md. Code Ann., Real Prop. § 7-301(c).

There are different provisions within PHIFA for the rescission of a foreclosure consultant contract and a foreclosure reconveyance. The language of Real Prop., § 7-305 regarding the homeowners' right to rescind a foreclosure consultant contract is clear and unambiguous: "(a) In addition to any other right under law to cancel or rescind a contract, a homeowner has the right to: (1) Rescind a foreclosure consulting contract at any time; … (b) Rescission occurs when the homeowner gives written notice of rescission to the foreclosure consultant … ." Md. Code Ann., Real Prop. § 7-305.

Unlike the common law, PHIFA provides that a homeowner entitled to its protections does not have to elect between the remedy of rescission or damages. As described above, homeowners entitled to the protections of PHIFA have the absolute

right to rescind any transaction. In addition to and not in lieu of this right, homeowners also have the right to seek damages, including treble damages for willful and knowing conduct. Md. Code Ann., Real Prop. § 7-320.

In this case, the uncontroverted evidence in the lower court was that Ms. Massey had the absolute right to rescind the foreclosure reconveyance at any time because E. Lewis and his affiliates, In the House, M. Lewis, and Brooke, never gave Ms. Massey the required statutory notices. Md. Code Ann., Real Prop. § 7-310(e).[10] The period of time to rescind a foreclosure reconveyance does not commence until after the homeowner receives a number of mandatory notices and disclosures to insure the homeowner is given at least some hint of her rights. *Id.*

Pursuant to PHIFA, Ms. Massey lawfully rescinded her foreclosure reconveyance and recorded the Statutory Rescission in the land records for Baltimore City on October 11, 2006, so that notice was effective on every interested party.

If the expressly prohibited act recordation of the Deed during Ms. Massey's period of rescission was void *ab initio*, then E. Lewis could not obtain any legal interest in the subject property.

iii. The Deed from Ms. Massey to E. Lewis Violated the Automatic Stay

Massey was in bankruptcy at the time of the transfer. Upon filing the bankruptcy, the automatic stay under 11 U.S.C. § 362 became effective. Without the automatic stay, there would be nothing to prevent debtors and the Bankruptcy court, to preserve the

[10] "The time during which the homeowner may rescind the contract or transfer does not begin to run until the foreclosure purchaser has complied with this section."

status quo and allow debtors like Ms. Massey from seeking a fresh start with respect to their property after the petition is filed. *Id.* at 370.

The bankruptcy courts of the U.S. District Court of Maryland have long held "to the general rule that violations of the bankruptcy stay are void…[and] the automatic stay being a bedrock policy upon which the Code is built and a fundamental debtor protection of the bankruptcy law." *In re Lampkin*, 116 B.R. 450, 453 (1990) (internal citations omitted). *See also In re Miller*, 10 B.R. 778 (BC Md. 1981), aff's 22 B.R. 479 (D.MD 1982); *Anglemeyer v. Unided States*, 115 B.R. 510 (D.Md 1990).

In re Lampkin involved a request of a creditor to reopen a dismissed bankruptcy case in order to seek relief from the automatic stay *nunc pro tunc*. *In re Lampkin*, 116 B.R. at 451. With apparent notice of the debtor's bankruptcy petition and the automatic stay, the creditor carried out a foreclosure sale and subsequently requested the state court to ratify the foreclosure sale. *Id.* Apparently after the fact that it had acquired title to the debtor's property from the state court, did the creditor seek relief from the automatic stay of the debtor's bankruptcy.

Judge Mannes denied the creditor's request and further explained the public policy rationale behind the automatic stay. "The stay is the ship upon which debtors embark on their fresh start…Although this may punish innocent parties, the Code allows no other solution. The cost is relatively small for the comfort required by those who seek to insure the title of property such as that at issue here. To rule otherwise rewards violation of the stay." *Id.* at 453. Other courts across the country in the "First, Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits [also] believe that violations of the stay are void *ab initio.*" *Id.* at 453.

The execution of the deed from Ms. Massey while in bankruptcy without the permission the bankruptcy court, was void as matter of law and provided further evidence that E. Lewis could not obtain any legal interest in the subject property.

II. Defendants E. Lewis, M. Lewis, In the House, Brooke, Adetula, and Cornerstone are Liable as a Matter of Law to Ms. Massey for Damages Pursuant to PHIFA

PHIFA allows a homeowner, like Ms. Massey, entitled to its protections to **"**bring an action for damages incurred as the result of a practice prohibited by [the statute]." Md. Code Ann., Real Prop. § 7-320(a). As described herein, there is no dispute of material fact that each of the Defendants identified in this Motion violated PHIFA. While it may be necessary at trial for the purposes of determining whether the Defendants' conduct was willful or knowing, for purposes of the Court determining liability there only needs to be just one violation of PHIFA by the Defendants. However, as demonstrated above, the defendants subject to this motion have several different violations upon which they are liable as a matter of law. These include:

i. *E. Lewis' PHIFA Violations:*

- Acted as a foreclosure consultant and purchaser in violation of § 7-307(5).
- Did not provide Ms. Massey with mandatory rescission notices in violation of §7-306 & 7-310.

ii. *M. Lewis' PHIFA Violations:*

- Did not provide Ms. Massey with mandatory rescission notices in violation of §7-306.

iii. *Brooke's PHIFA Violations:*

- Did not provide Ms. Massey with mandatory rescission notices in violation of §7-306.

iv. *In the House's PHIFA Violations:*

- Did not provide Ms. Massey with mandatory rescission notices in violation of §7-306.

v. *Adetula's PHIFA Violations:*

- Conducted September 13, 2006 settlement in violation of PHIFA by aiding conveyance to E. Lewis while acting as a foreclosure consultant and purchaser in violation of § 7-307(5).
- Conducted September 13, 2006 settlement in violation of PHIFA by aiding conveyance from E. Lewis to third party lenders during Ms. Massey's period of rescission in violation of § 311(b)(6)(ii).
- Recorded the Deed from Ms. Massey to E. Lewis after he had notice that the Deed had been rescinded in violation of §§ 7-310(k) and 7-311(b)(6)(i).
- Recorded the Deeds of Trust from E. Lewis to lenders after he had notice that the Deed had been rescinded in violation of §§ 7-310(k) and 7-311(b)(6)(i).

vi. *Cornerstone's PHIFA Violations:*

- Conducted September 13, 2006 settlement in violation of PHIFA by aiding conveyance to E. Lewis while acting as a foreclosure consultant and purchaser in violation of § 7-307(5).
- Conducted September 13, 2006 settlement in violation of PHIFA by aiding conveyance from E. Lewis to third party lenders during Ms. Massey's period of rescission in violation of § 311(b)(6)(ii).
- Recorded the Deed from Ms. Massey to E. Lewis after he had notice that the Deed had been rescinded in violation of §§ 7-310(k) and 7-311(b)(6)(i).
- Recorded the Deeds of Trust from E. Lewis to lenders after he had notice that the Deed had been rescinded in violation of §§ 7-310(k) and 7-311(b)(6)(i).

CONCLUSION

Based on the foregoing, Ms. Massey respectfully requests the Court enter partial summary judgment. Specifically, Ms. Massey seeks a judgment as a matter of law that (1) declares, pursuant to Count V of her second amended complaint, that the Deed from her to E. Lewis as void *ab initio* for the reasons stated herein; and (2) finds, pursuant to Count IV (of her second amended complaint) that Defendants E. Lewis, M. Lewis, In the

House, Brooke, Adetula, and Cornerstone violated PHIFA and are liable to Ms. Massey for damages, to be determined at trial as allowed by PHIFA.

Respectfully submitted,

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Attorneys for Terry Massey

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 9th day of December, 2008, a copy of the foregoing was served via this Court's ECF system and/or first-class mail, postage prepaid, upon:

William J. Hickey, Esquire
Robert M. Gittins, Esquire
Law Offices of William J. Hickey, LLC

Attorneys for Cornerstone Title & Escrow, Inc. and Adetula

I HEREBY FURTHER CERTIFY, that on this 9th day of December, 2008, a copy of the foregoing was served via US Mail, postage prepaid, upon the following pro se defendants:

In the House Technologies
Michael K. Lewis
Earnest Lewis
Cheryl Lynn Brooke

_____//s//
Phillip Robinson

Table of Exhibits

Exhibit Number	Description
1.	Massey Deed to E. Lewis
2.	Massey's Prior Deed
3.	Massey's PHIFA Rescission
4.	Massey Foreclosure Docket
5.	Massey Affidavit
6.	E. Lewis Deposition Excerpts
7.	M. Lewis Deposition Excerpts
8.	Brooke Deposition Excerpts
9.	In the House Corporate Designee Deposition Excerpts
10.	Massey Mandatory Lease Back and Mandatory Repurchase Agreement
11.	Massey Sales Contract
12.	Massey Bankruptcy Docket
13.	HUD-1 Settlement Statement
14.	E. Lewis DOT 1
15.	E. Lewis DOT 2
16.	Security Title Bulletin for PHIFA
17.	Cornerstone Check endorsed to In the House

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern District)

TERRY MASSEY	:	
	:	
Plaintiff	:	
	:	
vs.	:	Case No: 1:08-cv-00261
	:	
CORNERSTONE TITLE & ESCROW, INC., et al.	:	
	:	
Defendants/Cross-Plaintiffs	:	
	:	
EARNEST LEWIS, et al.	:	
	:	
Defendants/Cross-Defendants	:	

DEFENDANTS/CROSS-PLAINTIFFS CORNERSTONE TITLE & ESCROW, INC. AND SEAN ADETULA'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Defendants/Cross-Plaintiffs Cornerstone Title & Escrow, Inc. ("Cornerstone") and Sean Adetula ("Adetula"), by and through their counsel, William J. Hickey, Esquire and Robert M. Gittins, Esquire of the Law Offices of William J. Hickey, pursuant to FRCP 56 and hereby oppose Plaintiff's Motion for Partial Summary Judgment ("Motion"). In support thereof, Cornerstone and Adetula state as follows:

I. INTRODUCTION

This lawsuit arises from a purported scheme to defraud Plaintiff in relation to the sale of her home to Defendant Earnest Lewis. Plaintiff alleges, *inter alia*, that Defendants Earnest Lewis, Michael Lewis, Cheryl Lynn Brooke and In the House Technology, Inc. (collectively the "Lewis Defendants") conspired to defraud Plaintiff through the services the Lewis Defendants

provided as debt, bankruptcy and mortgage foreclosure consultants. Plaintiff further alleges, albeit without specificity and sufficient information permitting Cornerstone and Adetula to ascertain the nature of the vexing claims asserted, that these Defendants somehow participated in the Lewis Defendants' scheme by providing settlement services typically provided by title companies throughout Maryland.

At issue in the instant Motion, pertaining to Cornerstone and Adetula, is Count IV of Plaintiff's Second Amended Complaint that requests relief for perceived violations of the Protection of Homeowners in Foreclosure Act ("PHIFA"), Md. Code Ann., Real Prop. §§ 7-301, *et seq*. In essence, the sole claim asserted against Cornerstone and Adetula is that they provided the settlement services they were retained to provide in the same manner in which they, and each of the other title and settlement entities in the State of Maryland, provide settlement services on a daily basis. Cornerstone and Adetula's only role here is the facilitation of the underlying transaction for the sale of Plaintiff's real property; a transaction freely entered into by Plaintiff in order to save her home and attempt to resolve personal and household financial issues that had arisen. Cornerstone and Adetula's actions simply do not constitute illegal or improper conduct as alleged by Plaintiff, and as the discussion below demonstrates, said conduct does not violate PHIFA. Plaintiff has attempted to "lump" Cornerstone and Adetula into the questionable and potentially illegal and improper actions and/or omissions of the Lewis Defendants without a sufficient factual or legal basis. Cornerstone and Adetula have not violated PHIFA, a statute from which they are expressly exempted, and Plaintiff is not entitled to summary judgment of this statutory claim.

II. DISPUTED MATERIAL FACTS

1. Cornerstone provided the settlement services for Plaintiff's property sale ( ) to Mr. Earnest Lewis. This closing occurred on September 13, 2006 and was scheduled upon the express request and instructions of Plaintiff who desired to expedite the sale of her property. *See* Adetula Affidavit, ¶ 3, attached hereto as **Exhibit 1**.

2. Cornerstone and Adetula became aware that Plaintiff had filed a Chapter 13 bankruptcy petition (Case No. 06-1197). Prior to conducting Plaintiff's settlement, Cornerstone processor Uche Okoli spoke with a Clerk at the U.S. Bankruptcy Court for the District of Maryland who confirmed that Plaintiff had filed a voluntary dismissal of her bankruptcy petition, but the Court had not yet granted her motion. Adetula notified Plaintiff that her settlement could proceed as she had requested, but that the transaction could not be completed and/or finalized and that no settlement funds could be disbursed until Cornerstone was in receipt of a copy of the Court's Order dismissing Plaintiff's bankruptcy petition. Plaintiff indicated that she understood these conditions and that she wanted to move forward with her property sale and settlement. Consequently, Cornerstone provided the requisite settlement services and did not complete and/or finalize the transaction or disburse the settlement proceeds until it received a copy of the Court's Order dismissing Plaintiff's bankruptcy petition. *See* **Exhibit 1**, ¶ 4.

3. Neither Cornerstone, nor Adetula was aware that Plaintiff's property was in or facing a foreclosure at the time of settlement. In fact, due to the filing of Plaintiff's bankruptcy petition, Cornerstone and Adetula were aware that Plaintiff's property was not in foreclosure pursuant to the automatic stay imposed by 11 U.S.C. § 362. *See* **Exhibit 1**, ¶ 5.

4. Cornerstone and Adetula did not inquire if Plaintiff had received any PHIFA notices due to the fact that there was no information that Plaintiff's property was in foreclosure. In addition, Plaintiff was requested to provide a new mailing address on her HUD-1 Settlement Statement and she provided a new address where she indicated she would be residing after the sale of the property to Mr. Earnest Lewis, which was different than the address of the property sold. At no time did Plaintiff, or anyone else, communicate that Plaintiff had agreed to enter into a sale/leaseback transaction, nor was Cornerstone shown or provided copies of any of the sale/leaseback transactional documents. Finally, there was no evident foreclosure proceeding given Plaintiff's bankruptcy. *See* **Exhibit 1**, ¶ 6.

5. Cornerstone prepared a HUD-1Settlement Statement based upon the information and representations made by Plaintiff, Mr. Earnest Lewis, and Plaintiff's mortgage broker, Mr. Winston Thomas of Carteret Mortgage. If there was any inaccurate information contained within the subject HUD-1 Statement it was due to inaccurate and/or false information provided by the listed individuals (i.e., the false mailing address provided by Plaintiff indicating that she was moving out of the 4104 W. Coldspring Lane property after the sale to Mr. Earnest Lewis). Said HUD-1 Settlement Statement indicated that Plaintiff was to receive $30,721.83 in settlement proceeds. As a result, Cornerstone drafted a check to Plaintiff in the amount of $30,721,83. *See* **Exhibit 1**, ¶ 7.

6. Plaintiff requested that Cornerstone provide her settlement check to Mr. Winston Thomas of Carteret Mortgage, Plaintiff's mortgage broker, who was to pick up the check from its office. Cornerstone complied with Plaintiff's instructions and delivered Plaintiff's settlement check to Mr. Thomas upon receipt of the U.S. Bankruptcy Court's Order dismissing Plaintiff's

bankruptcy petition. No one from Cornerstone was present when Mr. Thomas delivered the settlement check. However, Cornerstone received notice that Plaintiff had received and endorsed her check. Cornerstone was not made aware that Plaintiff intended to provide her settlement proceeds to In the House Technology, Inc. or that Plaintiff elected or was required to pay for any fees incurred by Mr. Earnest Lewis. Once Cornerstone arranged for the delivery of Plaintiff's settlement, pursuant to Plaintiff's instructions, Cornerstone was not involved in, and did not have any knowledge of, what Plaintiff intended and/or agreed to do with her settlement proceeds. *See* **Exhibit 1**, ¶ 8.

III. LEGAL STANDARD

FRCP 56(c) provides that summary judgment is appropriate only:

> [I]f the pleadings, the discovery and disclosure materials on file, and any affidavits show ***that there is no genuine issue as to any material fact*** and that the movant is entitled to judgment as a matter of law.

(emphasis added); *see also Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990). In adjudicating a motion for summary judgment, "the facts and all reasonable inferences must be viewed in the light most favorable to the nonmovant." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Furthermore, the movant bears the initial burden of proof demonstrating that the movant is entitled to a grant of summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, Plaintiff has not established her initial burden as there are material facts at issue rendering Plaintiff's PHIFA claim inappropriate for resolution via summary judgment.

IV. ARGUMENT

A. Plaintiff is not entitled to summary judgment given that Cornerstone is a title insurance provider that is expressly exempted from PHIFA.

As previously identified, Count IV of Plaintiff's Second Amended Complaint alleges violations of PHIFA. This statute, in effect at the time of the subject transaction and prior to the 2008 amendments, provided an express exemption for "a title insurance producer licensed in the State, while performing services in accordance with the person's license." Md. Code Ann., Real Prop. § 7-302(a)(6). In Maryland, a "title insurance producer:"

> (1) means a person that, for compensation, solicits, procures, or negotiates title insurance contracts.
>
> (2) includes a person that ***provides escrow, closing, or settlement services*** that may result in the issuance of a title insurance contract.

Md. Code. Ann., Insurance, § 10-101(i) (emphasis added).

Plaintiffs aver in their Complaint that:

> 13. Cornerstone Title & Escrow, Inc. is a licensed title producer and real estate settlement agent in the State of Maryland with offices at various locations….
>
> 14. Sean Adetula is the President and Vice-President of Cornerstone and officer of Cornerstone….

See Plaintiff's Second Amended Complaint, ¶¶ 13-14. Given Plaintiff's averments that Cornerstone is a "licensed title producer" and "real estate settlement agent," and Adetula is an Officer of said "title insurance producer," there can be no argument that these Defendants are "title insurance producers" as defined by the Maryland Code. As there is a specific carve-out written into PHFIA exempting "title insurance producers" from the provisions of this statute, Cornerstone and Adetula, by law, cannot be liable for any claims that they violated the Act. It

necessarily follows that Count IV of Plaintiff's Second Amended Complaint against these Defendants is not viable and certainly not ripe for summary judgment.

B. Alternatively, Plaintiff has not presented sufficient undisputed material facts that Cornerstone and Adetula have violated PHIFA.

To the extent that Cornerstone and Adetula are somehow not exempted from PHIFA, the fact remains that Plaintiff has not met her threshold burden in demonstrating that there are no material facts at issue and sufficient to preemptively resolve this statutory claim. The attached Adetula Affidavit and referenced exhibits demonstrates that;

> 1. Plaintiff's closing was scheduled upon the express request and instructions of Plaintiff who desired to expedite the sale of her property. *See* **Exhibit 1**, ¶ 3;
>
> 2. Plaintiff was notified that, due to her pending bankruptcy petition and request to voluntarily dismiss same, her settlement could proceed as she had requested, but that the transaction could not be completed and/or finalized and that no settlement funds could be disbursed until Cornerstone was in receipt of a copy of the Court's Order dismissing Plaintiff's bankruptcy petition. Plaintiff agreed to this procedure, which was carried out upon the parties' afore-described understanding. *See* **Exhibit 1**, ¶ 4;
>
> 3. Neither Cornerstone, nor Adetula was aware that Plaintiff's property was in or facing a foreclosure at the time of settlement. In fact, due to the filing of Plaintiff's bankruptcy petition, Cornerstone and Adetula were aware that Plaintiff's property was not in foreclosure pursuant to the automatic stay imposed by 11 U.S.C. § 362. *See* **Exhibit 1**, ¶ 5;
>
> 4. Cornerstone and Adetula did not inquire if Plaintiff had received any PHIFA notices because they had no reason to do so. Plaintiff indicated that she was moving into a new property as evidenced by the new mailing address she provided on the subject HUD-1 Settlement Statement. In addition, Cornerstone and Adetula were not told about Plaintiff's sale/lease transaction or her intent to continue to reside in the property sold to Mr. Earnest Lewis. Finally, there was no evident foreclosure proceeding given Plaintiff's bankruptcy. *See* **Exhibit 1**, ¶ 6;

5. Cornerstone prepared a HUD-1Settlement Statement based upon the information and representations made by Plaintiff, Mr. Earnest Lewis and Plaintiff's mortgage broker, Mr. Winston Thomas of Carteret Mortgage. If there was any inaccurate information contained within the subject HUD-1 Statement it was due to inaccurate and/or false information provided by the listed individuals (i.e., the false mailing address provided by Plaintiff indicating that she was moving out of the 4104 W. Coldspring Lane property after the sale to Mr. Earnest Lewis). *See* **Exhibit 1**, ¶ 7;

6. Said HUD-1 Settlement Statement indicated that Plaintiff was to receive $30,721.83 in settlement proceeds. As a result, Cornerstone drafted a check to Plaintiff in the amount of $30,721.83. *See* **Exhibit 1**, ¶ 7;

7. Plaintiff requested that Cornerstone provide her settlement check to Mr. Winston Thomas of Carteret Mortgage, Plaintiff's mortgage broker, who was to pick up the check from its office. Cornerstone complied with Plaintiff's instructions and delivered Plaintiff's settlement check to Mr. Thomas as requested. *See* **Exhibit 1**, ¶ 8;

8. No one from Cornerstone was present when Mr. Thomas delivered the settlement check. However, Cornerstone received notice that Plaintiff had received and endorsed her check. *See* **Exhibit 1**, ¶ 8; and

9. Cornerstone was not made aware that Plaintiff intended to provide her settlement proceeds to In the House Technology, Inc. or that Plaintiff elected or was required to pay for any fees incurred by Mr. Earnest Lewis. Once Cornerstone arranged for the delivery of Plaintiff's settlement check, pursuant to Plaintiff's instructions, Cornerstone was not involved in, and did not have any knowledge of, what Plaintiff intended and/or agreed to do with her settlement proceeds. *See* **Exhibit 1**, ¶ 8.

Given these factual disputes identified herein and within Plaintiff's Motion, summary judgment is not appropriate pursuant to the standard articulated in FRCP 56. Cornerstone and Adetula had no way of knowing the agreement(s) reached between Plaintiff and Mr. Earnest Lewis, or anyone else for that matter, pertaining to any mortgage foreclosure rescue services, sale/leaseback transaction or Plaintiff's actual intent of remaining in the property she sold to Mr. Earnest Lewis. Plaintiff and one or more of the Lewis Defendants conspired to prevent

Cornerstone and Adetula from possessing the very knowledge that would have enabled these Defendants to prevent the transaction from being effectuated and giving rise to this dispute. Plaintiff surely cannot be rewarded for her active role in facilitating this undertaking while seeking to recoup losses from the settlement company she requested expedite her property sale while misleading Cornerstone and Adetula as to the true nature of the transaction. Plaintiff's Motion against these Defendants fails upon the facts provided above, as well as the underlying statutory claim asserted.

V. CONCLUSION

WHEREFORE, Cornerstone and Adetula respectfully request that the Court enter the proposed Order appended hereto, deny Plaintiff's Motion as to Count IV of Plaintiff's Second Amended Complaint.

Respectfully submitted,

/s/
William J. Hickey, Esquire
Robert M. Gittins, Esquire
Law Offices of William J. Hickey

Counsel for the Defendants
Cornerstone & Adetula

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2008, a copy of the foregoing Opposition was served via electronic case filing or sent first-class mail, postage prepaid, to:

Philip R. Robinson, Esquire
Michael Morin, Esquire
Civil Justice, Inc.

Scott Borison, Esquire
Legg Law Firm, LLC

Michael K. Lewis

Ernest Lewis

Cheryl Brooke

In the House Technology, Inc.

/s/
Robert M. Gittins

IN THE UNITED STATES DISTRICT COURT FOR MARYLAND
(Northern Division)

TERRY MASSEY	*	
Plaintiff	*	
v.	*	Case No.: 1-08-cv-00261
ERNEST LEWIS, et al.	*	
Defendants	*	

* * * * * * * * * * *

PLAINTIFF'S REPLY TO DEFENDANTS' CORNERSTONE TITLE & ESCROW, INC. AND SEAN ADETULA'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Terry Massey ("Ms. Massey"), by the undersigned counsel, submits this reply to the limited opposition of Defendants Cornerstone Title & Escrow ('Cornerstone") and Sean Adetula ("Adetula") to her Motion for Partial Summary Judgment. In her motion Ms. Massey requested that the Court enter a partial summary judgment against Defendants Cornerstone, as to liability only, for their violations of the Protection of Homeowners in Foreclosure Act ("PHIFA") Protection of Homeowners in Foreclosure Act ("PHIFA"), MD. CODE ANN. REAL PROP. § 7-301 *et seq*. (LexisNexis 2003 & Supp. 2006).[1] Cornerstone and Adetula have in their opposition conceded certain material facts by failing to respond or even address those facts in their opposition. In addition, Cornerstone and Adetula freely admit that neither acted within the scope of their licenses from the State of Maryland and Maryland Insurance Administration in Ms.

[1] The Maryland General Assembly made amendments to PHIFA in 2008, however these amendments do not apply to the case at hand since the subject transaction occurred after the initial version of PHIFA became law in May 2005. For the benefit of the Court, hereinafter all PHIFA sections cited are taken from Md. Code Ann. Real Prop. § 7-301 *et seq*. (LexisNexis 2003 & Supp. 2006).

Massey's transaction—thereby there is no material dispute as a matter of law that they are not exempt from PHIFA liability and are therefore liable to Ms. Massey for the damages for their violations.

ARGUMENT

1. Standard for Opposition to Summary Judgment

Rule 56 provides in relevant part that

> [w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, *its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial*. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

MD. R. 56(c) (emphasis added).

However, opposition affidavits should not carry significant weight to create a genuine issue for trial when they conflict with earlier testimony of the same witness about the same set of core facts. *See U.S. v. Dercacz*, 530 F.Supp. 1348 (D.C.N.Y.1982) (when an affidavit conflicts with former testimonial evidence, the question is whether the affidavit raises genuine issues of fact; however, triable issues of fact cannot be created merely by sworn statements, conflicting with previous testimony, submitted for the purpose of opposing summary judgment); *Shearer v. Homestake Mining Co.*, 557 F.Supp. 549 (D.C.S.D.1983) (When a witness has given testimony both by affidavit and by deposition, the two forms should be considered on a motion for summary judgment, but greater reliability is usually attributed to the deposition and summary judgment may be granted based on the deposition testimony if the court is satisfied that the issue potentially created by the affidavit is not genuine); and

Van T. Junkins & Assocs., Inc. v. U.S. Industries, Inc. 736 F.2d 656 (11th Cir. 1984) (a party has given clear answers to unambiguous deposition questions that negate the existence of any genuine issue of material fact, that party cannot thereafter create an issue and thereby defeat summary judgment with an affidavit that merely contradicts, without explanation, the deposition testimony).

In addition, the Fourth Circuit has "consistently held that a party cannot create a triable issue in opposition to summary judgment simply by contradicting his deposition testimony with a subsequent affidavit." *Hernandez v. Trawler Miss Vertie Mae, Inc.,* 187 F.3d 432, 438 (4th Cir.1999).

2. Adetula and Cornerstone Concede Certain Facts As to Liability Pursuant to PHIFA

As Ms. Massey stated in her opening motion, there are many interesting facts and sub-texts to this case which are relevant to the overall scheme to defraud her and tens of other vulnerable homeowners. However, these facts do not create genuine issues of material fact rendering Plaintiff's Motion for Partial Summary Judgment inappropriate. Rather than draw the Court's attention and resources to those facts which are not appropriate for summary judgment, Ms. Massey focused her motion against Adetula and Cornerstone on those facts not in dispute concerning their liabilities under PHIFA. Those material facts presented by Ms. Massey to which Cornerstone and Adetula have provided no response in their opposition include:

- **Material Fact #9:** Cornerstone and Adetula knowingly conducted the subject transaction in violation of the automatic stay of Ms. Massey's bankruptcy case.

- **Material Fact #10:** Cornerstone prepared a false HUD-1 Settlement statement and converted or misappropriated funds intended for Ms. Massey to Winston Thomas.

- **Material Fact #11:** Cornerstone and Adetula had notice of Ms. Massey's PHIFA rescission recorded in the land records on or about October 11, 2006.

- **Material Facts #12 & #16:** With notice of Ms. Massey's PHIFA rescission and this lawsuit Cornerstone and Adetula recorded E. Lewis' fraudulent mortgages and deed to be recorded in the land records of Baltimore City months after Ms. Massey had lawfully rescinded the transaction.

- **Material Fact #14:** Cornerstone and Adetula assisted Earnest Lewis in encumbering Ms. Massey's property.

- **Material Fact #15:** Cornerstone and Adetula knew about PHIFA and its requirements and ignored them.

Having not sufficiently responded to these material facts presented and supported in Ms. Massey's opening motion,[2] Cornerstone and Adetula concede Ms. Massey's belief that there is no dispute as to these material facts.

3. PHIFA's Exemption for Title Insurance Producers

Cornerstone and Adetula argue that they are exempt from liability under PHIFA because each is a licensed title producer and PHIFA specifically exempts such professionals from liability under its provisions. *See generally* Opp. 6-7.

It is true that PHIFA provides a limited exception from its coverage for "[a] title insurance producer licensed in the State, while performing services in accordance with the person's license." MD. CODE ANN. REAL PROP. §7-302(a)(6) (2008) (emphasis supplied). However, no exception is available for a licensed insurance producer while

[2] The Defendants do respond by sharing with the Court with a series of facts which are not relevant to Ms. Massey's motion as to PHIFA liability and remain in dispute.

not performing services in accordance with their license. The Insurance Article states in relevant purposes as follows:

> A title insurance producer may not convert or misappropriate money received or held in escrow or trust while: (1) acting as a title insurance producer; or (2) providing any escrow, closing, or settlement services.

MD. CODE ANN. INS. §10-121(a) (2006).

Judge Titus has previously explained regarding this identical PHIFA exemption "I do not find that the exemption -- the licensing exemption brings them outside the scope of [PHIFA] because the activities here are misappropriation of money. That's an activity that's not authorized by their license which, as I said before, is not a license to steal." Hearing Transcript, Unreported Opinion & Order, *Proctor et al. v. Metropolitan Money Store et al.*, No. RWT-07-1957 slip op. trans. at page 105 (attached hereto as **Exhibit 1**).

There is no dispute that Ms. Massey has averred and alleged[3] and Adetula and Cornerstone freely admit that as part of the subject transaction that it either (1) converted or (2) misappropriated money held in escrow to Winston Thomas of Carteret Mortgage and not to Terry Massey.[4] Adetula admits in his opposition affidavit "Cornerstone…delivered Plaintiff's settlement check to Mr. Thomas." Aff. of Sean Adetula, Exhibit 1 to Opp. at ¶ 8.

At the time of the transaction, September 13, 2006, Mr. Adetula certified, while aware that making false statements on the HUD-1 for the transaction was a federal crime, that "[t]he HUD-1 Settlement Statement which I have prepared is a true and accurate

[3] Plaintiff's Exhibit 5, Affidavit ¶ 12.

[4] There is a dispute as to whether or not Ms. Massey requested and/or authorized Cornerstone to provide her settlement check to Winston Thomas. However, this dispute is not relevant to the fact that Adetula and Cornerstone converted and/or misappropriated the funds to Winston Thomas and therefore acted outside the scope of any exemption PHIFA might have otherwise provided them.

account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement." Exhibit A, Opp. at page 2 (Sean Adetula's signature and certification). He even acknowledged at the time of the transaction to the funding lender that he was not permitted to hold any escrows by the lender, Millennium Bank, NA, without its prior authorization. **Exhibit 2**, Lender Closing Instructions at 1, 3.

While Adetula attempts in his affidavit in opposition to summary judgment to create a genuine issue of material fact, his affidavit is directly contradictory to his previous, contemporaneous certifications under penalties of perjury and other representations to third parties and should not be given little or no weight. *Hernandez, ,* 187 F.3d 432 . Adetula's affidavit also contradicts his previous deposition testimony concerning his understanding of PHIFA and the red flags for a licensed title producer was required to look out for and avoid in the related state court litigation, *Consumer Protection Division v. Michel K. Lewis et al.*, Cir. Ct. of Baltimore City, Md. No. 24-C07-007811. (February 27, 2008), on this and a series of similar transactions involving Adetula and Cornerstone and the Lewis Defendants. In this deposition testimony Adetula he explained this understanding as follows:

> So the first thing that we were told to do was to make sure there was a payoff, make sure there's a payroll, make sure it's being paid off because the last thing you want to do is you want to get a loan for 300,000 or 200,000 and nothing gets paid off. And the property is still going to be foreclosed, but somebody has walked away with almost $200,000. So make sure there's a payoff.
>
> The next thing is to make sure the person is moving out because the PHIFA law only kicks in when the property is leased back to the seller and in which case, it starts to look like a bailout, which lenders have been talking about, you know, tor the longest time anyway. So make sure it's not a bailout, make sure that the person who's selling it is a genuine seller and they're selling the property to this person and they're going to walk away.

> *Make sure there are no bogus entries on the HUD-1, no bogus entries on the HUD-1, everything on the HUDs are genuine* and, as much as possible, if you're not sure, call. And we do that. We call all the time.

Dep. Testimony of S. Adetula, *Consumer Protection Division v. Michel K. Lewis et al.*, Cir. Ct. of Baltimore City, Md. No. 24-C07-007811 (February 27, 2008) at page 329 (attached hereto as **Exhibit 3**) (emphasis added).

Adetula's state court deposition provides further support that the opposition affidavit of Sean Adetula is not reliable and contradicts his true understanding of the transaction and PHIFA.[5] In his deposition, he testified that he was aware that it was important that the HUD-1 be correct and accurate. Yet in his opposition affidavit he claims the HUD-1 for the transaction was merely a preliminary document subject to Ms. Massey's bankruptcy case. Again, since Mr. Adetula's opposition affidavit is contradictory to his previous, contemporaneous deposition testimony, it should be given little or no weight. *Hernandez,* 187 F.3d 432.

CONCLUSION

The issue now ripe for the Court's consideration since there is no genuine issue of material fact is whether Cornerstone and Adetula are liable to Ms. Massey pursuant to PHIFA for damages she has a sustained as a result of the subject transaction. The import of this decision is whether the so-called professionals who facilitated the theft of her home are liable for their actions while knowing their actions violated the federal and state laws including the recordation of documents that are prohibited from recordation under PHIFA. Based on the foregoing and her opening motion, Ms. Massey respectfully requests the Court enter partial summary judgment pursuant to Count IV (of her second

[5] It's not relevant for civil liability under PHIFA that Mr. Adetula misunderstood the law and that it in fact applies to more than just lease-back transactions.

amended complaint) that Defendants Adetula, and Cornerstone violated PHIFA and are liable to Ms. Massey for damages, to be determined at trial as allowed by PHIFA.

Respectfully submitted,

/s/
Phillip R. Robinson, Esquire
Civil Justice, Inc.

/s/
Scott C. Borison, Esquire
Legg Law Firm, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 6th day of January, 2009, a copy of the foregoing was served via this Court's ECF system and/or first-class mail, postage prepaid, upon:

William J. Hickey, Esquire
Robert M. Gittins, Esquire
Law Offices of William J. Hickey, LLC

0
Attorneys for Cornerstone Title & Escrow, Inc. and Adetula

I HEREBY FURTHER CERTIFY, that on this 6th day of January, 2009, a copy of the foregoing was served via US Mail, postage prepaid, upon the following pro se defendants:

In the House Technologies
Michael K. Lewis
Earnest Lewis
Cheryl Lynn Brooke

_____//s// _____
Phillip Robinson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern District)

TERRY MASSEY	:	
	:	
Plaintiff	:	
	:	
vs.	:	Case No: 1:08-cv-00261
	:	
CORNERSTONE TITLE & ESCROW, INC., et al.	:	
	:	
Defendants/Cross-Plaintiffs	:	
	:	
EARNEST LEWIS, et al.	:	
	:	
Defendants/Cross-Defendants	:	

DEFENDANTS/CROSS-PLAINTIFFS CORNERSTONE TITLE & ESCROW, INC. AND SEAN ADETULA'S SURREPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Defendants/Cross-Plaintiffs Cornerstone Title & Escrow, Inc. ("Cornerstone") and Sean Adetula ("Adetula"), by and through their counsel, William J. Hickey, Esquire and Robert M. Gittins, Esquire of the Law Offices of William J. Hickey, and hereby submits this surreply memorandum in opposition to Plaintiff's Motion for Partial Summary Judgment ("Motion"). In support thereof, Cornerstone and Adetula state as follows:

I. INTRODUCTION

Plaintiff's instant Motion requests, *inter alia*, that partial summary judgment be entered against these Defendants due to the typical settlement services they provided to the Plaintiff when she elected to sell her property to Earnest Lewis in a final attempt to save her home due to the financial difficulties she was experiencing. After these Defendants filed their memorandum

in opposition to Plaintiff's Motion, Ms. Massey undertook to file a reply memorandum introducing new arguments and evidence that these Defendants have not yet had an opportunity to respond to or appropriately brief the Court.

These new arguments and evidence include the following:

a. The weight that should be given to opposition affidavits;

b. These Defendants' response, or purported lack of response, to a number of material facts that Plaintiff mistakenly contends are undisputed;

c. The alleged "converted and/or misappropriated" settlement funds at issue in this litigation; and

d. The relevancy of Defendant Adetula's prior deposition testimony.

In response to these vexing assertions, Defendants Cornerstone and Adetula present the arguments below.

II. ARGUMENT

A. Mr. Adetula's Affidavit does not conflict with prior testimony and his prior deposition testimony does not support Plaintiff's position.

Plaintiff argues in her reply memorandum that Mr. Adetula's Affidavit, submitted in support of these Defendants' opposition memorandum, is contrary to "previous, contemporaneous certifications under penalties of perjury and other representations to third parties." *See* Plaintiff's Reply Memorandum, p. 6. Plaintiff contends that Mr. Adetula's preparation of the HUD-1 Settlement Statement is one such contradictory statement. This is puzzling given Mr. Adetula's express affirmation that the subject HUD-1 Statement was produced based upon representations made by the Plaintiff and that any inaccurate information included on the HUD-1 Statement was without the knowledge of these Defendants ***and with the***

full and express knowledge of the Plaintiff who was required to review and sign this document during the settlement of the subject transaction. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶ 7. This is a significant factual dispute as these Defendants have never conceded, and rather have consistently argued to the contrary, that they prepared a false HUD-1 Statement.

Plaintiff further argues that the referenced Lender Closing Instructions somehow indicate that these Defendants were not permitted to hold any escrows. It is unclear how the Lender Closing Instructions constitute any type of representation, contradictory or otherwise, to Plaintiff from these Defendants. Nor is it clear how these Closing Instructions are in any way relevant to Plaintiff's Motion. These Defendants did not complete or finalize the subject settlement until it received a copy of the United States Bankruptcy Court Order dismissing Plaintiff's voluntary petition. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶ 2. Plaintiff requested that her settlement take place prior to this Order being entered and these Defendants accommodated this request upon informing Plaintiff that the settlement could not be completed and that no funds could be disbursed until the voluntary petition was dismissed. *Id.* Plaintiff agreed to this arrangement due to her desire to complete the settlement transaction as quickly as possible. *Id.* Again, there are material facts at issue in regard to the procedural aspects of this transaction that make summary judgment inappropriate at this time.

Plaintiff next contends that Mr. Adetula provided deposition testimony which contradicts Mr. Adetula's Affidavit pertaining to the HUD-1 Statement at issue in this litigation. *See* Plaintiff's Reply Memorandum, p. 6. Initially, it should be noted Mr. Adetula's deposition testimony pertains generally to settlements performed by Cornerstone and Adetula and does not

address Plaintiff's specific settlement. *See* Exhibit 3 to Plaintiff's Reply Memorandum. Mr. Adetula's Affidavit does not even suggest that the HUD-1 Statement at issue, or that are typically prepared, is an unimportant document or one that was prepared "as a preliminary document subject to Ms. Massey's bankruptcy case." *See* Plaintiff's Reply Memorandum, p. 7. Rather, Mr. Adetula attests that:

> a. Cornerstone provided the settlement services for Plaintiff's property sale (4104 W. Coldspring Lane, Baltimore, Maryland 21215) to Mr. Earnest Lewis. This closing occurred on September 13, 2006 and was scheduled upon the express request and instructions of Plaintiff who desired to expedite the sale of her property; and
>
> b. Cornerstone prepared a HUD-1 Settlement Statement based upon the information and representations made by Plaintiff, Mr. Earnest Lewis, and Plaintiff's mortgage broker, Mr. Winston Thomas of Carteret Mortgage. If there was any inaccurate information contained within the subject HUD-1 Statement it was due to inaccurate and/or false information provided by the listed individuals (i.e., the false mailing address provided by Plaintiff indicating that she was moving out of the 4104 W. Coldspring Lane property after the sale to Mr. Earnest Lewis). Said HUD-1 Settlement Statement indicated that Plaintiff was to receive $30,721.83 in settlement proceeds. As a result, Cornerstone drafted a check to Plaintiff in the amount of $30,721.83.

See Exhibit 1 to Defendants' Opposition Memorandum, ¶¶ 3, 7. Plaintiff's disingenuous attempt to interpret this statement in such a way as to indicate that the applicable HUD-1 Statement was not truthful or accurate should be ignored and Mr. Adetula's Affidavit given the full and complete weight to which it is entitled.

B. These Defendants Have Not Conceded To Any Facts as to Liability Pursuant to PHIFA.

Plaintiff mistakenly identifies the following "Material Facts" as having not been responded to by these Defendants:

a. **Material Fact #9:** Cornerstone and Adetula knowingly conducted the subject transaction in violation of the automatic stay of Ms. Massey's bankruptcy case;

b. **Material Fact #19:** Cornerstone prepared a false HUD-1 Settlement statement and converted or misappropriated funds intended for Ms. Massey to Winston Thomas;

c. **Material Fact #11:** Cornerstone and Adetula had notice of Ms. Massey's PHIFA recission recorded in the land records on or about October 11, 2006;

d. **Material Facts #12 & #16:** With Notice of Ms. Massey's PHIFA recission and this lawsuit Cornerstone and Adetula recorded E. Lewis' fraudulent mortgages and deed to be recorded in the land records of Baltimore City months after Ms. Massey had lawfully rescinded the transaction;

a. **Material Fact #14:** Cornerstone and Adetula assisted Earnest Lewis in encumbering Ms. Massey's property; and

b. **Material Fact #15:** Cornerstone and Adetula knew about PHIFA and its requirements and ignored them.

See Plaintiff's Reply Memorandum, p. 7.

It would appear that Plaintiff neglected to carefully review these Defendants Opposition Brief and the attached Affidavit of Mr. Adetula. Wherein, the following disputed facts and arguments were presented:

a. Cornerstone provided the settlement services for Plaintiff's property sale) to Mr. Earnest Lewis. This closing occurred on September 13, 2006 and was scheduled upon the express request and instructions of Plaintiff who desired to expedite the sale of her property. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶ 3.

b. Cornerstone and Adetula became aware that Plaintiff had filed a Chapter 13 bankruptcy petition (Case No. 06-1197). Prior to conducting Plaintiff's settlement, Cornerstone processor Uche Okoli spoke with a Clerk at the U.S. Bankruptcy Court for the District of Maryland who confirmed that Plaintiff had filed a voluntary dismissal of her bankruptcy petition, but the Court had not yet granted her motion. Adetula notified Plaintiff that her settlement could proceed as she had requested, but that the transaction could not be completed and/or finalized and that no settlement funds could be disbursed until Cornerstone was in receipt of a copy of the Court's Order dismissing Plaintiff's bankruptcy petition. Plaintiff indicated that she understood these conditions and that she wanted to move forward with her property sale and settlement. Consequently, Cornerstone provided the requisite settlement services and did not complete and/or finalize the transaction or disburse the settlement proceeds until it received a copy of the Court's Order dismissing Plaintiff's bankruptcy petition. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶ 4.

c. Cornerstone and Adetula did not inquire if Plaintiff had received any PHIFA notices due to the fact that there was no information that Plaintiff's property was in foreclosure. In addition, Plaintiff was requested to provide a new mailing address on her HUD-1 Settlement Statement and she provided a new address where she indicated she would be residing after the sale of the property to Mr. Earnest Lewis, which was different than the address of the property sold. At no time did Plaintiff, or anyone else, communicate that Plaintiff had agreed to enter into a sale/leaseback transaction, nor was Cornerstone shown or provided copies of any of the sale/leaseback transactional documents. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶ 6.

d. Cornerstone prepared a HUD-1 Settlement Statement based upon the information and representations made by Plaintiff, Mr. Earnest Lewis, and Plaintiff's mortgage broker, Mr. Winston Thomas of Carteret Mortgage. If there was any inaccurate information contained within the subject HUD-1 Statement it was due to inaccurate and/or false information provided by the listed individuals (i.e., the false mailing address provided by Plaintiff indicating that she was moving out of the 4104 W. Coldspring Lane property after the sale to Mr. Earnest Lewis). Said HUD-1 Settlement Statement indicated that Plaintiff was to receive $30,721.83 in settlement proceeds. As a result, Cornerstone drafted a check to Plaintiff in the amount of $30,721.83. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶ 7.

e. Plaintiff requested that Cornerstone provide her settlement check to Mr. Winston Thomas of Carteret Mortgage, Plaintiff's mortgage broker, who was to pick up the check from its office. Cornerstone complied with Plaintiff's instructions and delivered Plaintiff's settlement check to Mr. Thomas upon receipt of the U.S. Bankruptcy Court's Order dismissing Plaintiff's bankruptcy petition. No one from Cornerstone was present when Mr. Thomas delivered the settlement check. However, Cornerstone received notice that Plaintiff had received and endorsed her check. Cornerstone was not made aware that Plaintiff intended to provide her settlement proceeds to In the House Technology, Inc. or that Plaintiff elected or was required to pay for any fees incurred by Mr. Earnest Lewis. Once Cornerstone arranged for the delivery of Plaintiff's settlement proceeds, pursuant to Plaintiff's instructions, Cornerstone was not involved in, and did not have any knowledge of, what Plaintiff intended and/or agreed to do with her settlement proceeds. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶ 8.

Based upon Mr. Adetula's Affidavit and the arguments presented within these Defendants Opposition Memorandum, it seems self-evident that these Defendants have in fact responded and contradicted the "material facts" outlined above.

Specifically, Plaintiff's settlement was not conducted in violation of the automatic stay of Ms. Massey's bankruptcy case. Plaintiff requested that the settlement occur in advance of the dismissal of her bankruptcy. Cornerstone and Adetula acquiesced to this request upon confirmation from Plaintiff that she understood the settlement could not be finalized and no funds disbursed until these Defendants were in possession of the Court Order dismissing her bankruptcy.

The HUD-1 Statement was true and accurate given the information provided by other Defendants to this action, as well as the Plaintiff herself. There is no dispute that Ms. Massey received her settlement check and endorsed it. *See* Exhibit 17 to Defendants' Opposition Memorandum. No one from Cornerstone was present when Plaintiff elected to endorse her check or was aware of what happened to the settlement funds properly provided to Plaintiff. It

beggars credulity that these Defendants could have converted or misappropriated any funds intended for Plaintiff given the settlement check was provided to Plaintiff and her undertaking to endorse it to another entity without providing any notice of this decision to these Defendants.

These Defendants have also asserted, without any affirmative response from Plaintiff, that they were unaware of any pending foreclosure and that material facts were withheld from them preventing Cornerstone and Adetula from discovering that Plaintiff's property sale fell within the purview of PHIFA. *See* Exhibit 1 to Defendants' Opposition Memorandum, ¶¶ 5-7. At no time did these Defendants take any action that violated PHIFA. While Cornerstone and Adetula were aware of the applicable statutory requirements, Plaintiff's endeavors to willfully and knowingly withhold material information from these Defendants prevented Cornerstone and Adetula from discovering that Plaintiff's property sale was a transaction governed by PHIFA. It beggars credulity that Plaintiff would be rewarded for her active role in misleading these Defendants as to the true nature of her transaction with other Defendants in this litigation.

Plaintiff's allegations as to the recordation of Defendant Earnest Lewis' deed are red-herrings. First, these Defendants were not aware that the underlying property sale was a PHIFA transaction. Second, and as argued in their Opposition Memorandum, these Defendants are exempted from PHIFA as title insurance producers pursuant to Md. Code Ann., Real Prop. § 7-302(a)(6). Third, these Defendants have never obtained an interest in or encumbered in any way Plaintiff's property. Said property was sold to Defendant Earnest Lewis and he is the only party with the ability to obtain an interest in or encumber Plaintiff's property. These Defendants were not parties to the subject transaction.

In summary, these Defendants have responded to, addressed and countered each of the supposed undisputed material facts identified by Plaintiff. This was accomplished by Affidavit provided by Mr. Adetula, which as discussed above, should be given full weight and consideration in adjudicating Plaintiff's Motion. Therefore, Plaintiff has still not yet fulfilled her burden in proving there are sufficient material facts in dispute warranting the grant of partial summary judgment as to her PHIFA claim.

III. CONCLUSION

WHEREFORE, Cornerstone and Adetula respectfully request that the Court enter the proposed Order appended to its previously submitted opposition memorandum, deny Plaintiff's Motion as to Count IV of Plaintiff's Second Amended Complaint.

Respectfully submitted,

/s/
William J. Hickey, Esquire
Robert M. Gittins, Esquire
Law Offices of William J. Hickey

Counsel for the Defendants
Cornerstone & Adetula

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2009, a copy of the foregoing Surreply was served via electronic case filing or sent first-class mail, postage prepaid, to:

Philip R. Robinson, Esquire
Michael Morin, Esquire
Civil Justice, Inc.

Scott Borison, Esquire
Legg Law Firm, LLC

Michael K. Lewis

Ernest Lewis

Cheryl Brooke

In the House Technology, Inc.

/s/
Robert M. Gittins

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TERRY MASSEY,	:	
Plaintiff	:	
	:	
v.	:	CIV. NO. AMD 08-261
	:	
ERNEST LEWIS, et al.,	:	
Defendants	:	

...o0o...

MEMORANDUM OPINION and ORDER

Plaintiff Terry Massey ("Massey") filed this action in the Circuit Court for Baltimore City seeking equitable relief and damages in asserting claims under federal and state law arising out of her efforts to avoid the foreclosure of the mortgage on her home. Certain defendants removed the action to this court. Plaintiff's claims are brought against the following defendants: Michael Lewis ("M. Lewis"), Ernest Lewis ("E. Lewis"), Cheryl Brooke ("Brooke"), In the House Technologies, Inc. ("In the House"), Sean Adetula ("Adetula"), Cornerstone Title and Escrow, Inc. ("Cornerstone"), and Carteret Mortgage Company ("Carteret"). Now before the court is plaintiff's motion for partial summary judgment as to her claims under the Maryland Protection of Homeowners in Foreclosure Act, Md. Code Ann., Real Prop. §7-301, et seq. (2005 & Supp. 2006) ("PHIFA"). Only defendants Adetula and Cornerstone have filed responses to the plaintiff's motion and a hearing has been held. For the reasons stated in this opinion, the motion for partial summary judgment shall be granted.

I.

When the events underlying the amended complaint occurred, M. Lewis ran the "MKL African-American Business Network" ("the Network"). The Network was an enterprise that purported to help Maryland consumers facing foreclosure. Using television and radio advertisements and flyers, M. Lewis and his wife Brooke marketed their foreclosure rescue business through their corporation, In the House.

On June 30, 2006, a foreclosure action was filed against Massey's home for an unpaid mortgage debt of $109,902.08. Massey learned about the Network and contacted M. Lewis. She met with him and enrolled in his "MKL Financial Diet," agreeing to pay a monthly membership fee, attend bi-weekly budget sessions, and apply to refinance her mortgage with Carteret.

M. Lewis and Brooke arranged for Massey to avoid the loss of her home by transferring the Property to M. Lewis' brother, E. Lewis. The plan required Massey to sell her home to E. Lewis who, with his good credit history, would secure a new, lower-rate mortgage on the Property in his name. Massey would remain in her home as a "tenant" and send "rent" checks to E. Lewis to cover the new mortgage payments. Through this scheme, E. Lewis effectively "loaned" his good credit to Massey.

Massey cooperated with the scheme, believing (or at least, hoping) that the title transfer was temporary and that she would eventually be able to repurchase her home. Defendants drew up contracts for the sale and lease-back of the Property with an option to repurchase, which Massey signed on July 13, 2006. Massey denies she ever received copies

of any of the signed contracts. Notably, the contracts also did not include language explaining the homeowner's right to rescind, nor were rescission notices attached.

M. Lewis suggested that Massey investigate filing for bankruptcy in order to stall the ongoing foreclosure action. Massey complied and defendants helped her file a Chapter 13 petition in the bankruptcy court on July 31, 2006. On September 13, 2006, with the bankruptcy case still open, Massey went to Cornerstone for settlement, which was conducted by Adetula. She signed the deed and other documents, including the HUD-1, to transfer the Property to E. Lewis for $159,900.00. E. Lewis obtained two mortgage loans to cover the purchase price of Massey's home.

After settlement, Adetula did not disburse the full amount of the proceeds from the sale. Specifically, the HUD-1 form indicated that Massey would receive $30,721.83 but the escrow check from Cornerstone, which was issued some time later (after the bankruptcy case had been dismissed) totaled only $29,356.33. Additionally, Massey never received the check at all; M. Lewis brought it to Massey at her place of employment and told her she could keep the check and move out of her house or she could endorse the check payable to his brother and stay in the house. Massey endorsed the check and, apparently, all of the proceeds were collected by defendants.

On October 11, 2006, Massey signed the paperwork cancelling the conveyance of her home to E. Lewis and timely filed the rescission notice in the Baltimore City land records.[1]

[1]Md. Code Ann., Real Prop. §7-306(e) states: "The time during which the homeowner may rescind the contract does not begin to run until the foreclosure consultant has complied with this section," which includes (1) providing the homeowner with signed and dated copies of contracts providing foreclosure consulting service or foreclosure reconveyance and (2) attaching a Notice of Rescission immediately upon execution of such contracts. Plaintiff received neither signed and dated copies of her contracts nor a notice of right to rescind.

The following month, Massey filed this action against E. Lewis, M. Lewis, Brooke and In the House. In December 2006, Massey learned that Cornerstone had recorded the deed to the Property in the Baltimore City land records and thereupon joined it and Adetula as defendants.

II.

Massey seeks judgment as a matter of law on two issues: (1) whether the deed granting E. Lewis title to her home should be voided; and (2) whether defendants are liable under PHIFA.

A.

No party in interest opposes the first issue presented by plaintiff's motion for summary judgment, i.e., the validity of the deed of conveyance from Massey to E. Lewis. For the reasons alleged and supported with admissible evidence by plaintiff in her motion, and as described briefly above and below, Massey's request to void the deed shall be granted and an appropriate order shall issue declaring that she retains title to the Property.

B.

Only Adetula and Cornerstone filed a response to the second issue presented by Massey's motion. They contend that PHIFA does not apply to them and that, even were PHIFA to apply, they cannot be held liable because they had no knowledge that they presided over a foreclosure reconveyance. For Adetula and Cornerstone to avoid summary judgment, they must generate a genuine dispute of material fact. Fed.R.Civ.P. 56(c). They have failed to do so.

1.

Cornerstone and Adetula argue that they are exempt from PHIFA because they are licensed settlement agents. Although PHIFA does have an exception for licensed settlement agents, it only applies to title insurance producers "acting in accordance with the person's license." Md. Code Ann., Real Prop. §7-302(a)(6). Thus, those performing services *not* in accordance with their license are not entitled to an exemption from PHIFA.

Cornerstone and Adetula performed services beyond the scope of their license when they misappropriated funds. The HUD-1 settlement sheet showed that Massey was owed $1,365.50 more than the amount for which the escrow check was ultimately issued. Massey received no notice or explanation regarding this discrepancy. Massey did not give defendants oral or written permission to withhold the $1,365.50. In fact, as was made clear at the hearing on the motion, after more than two years of litigation, defendants still cannot explain why Massey did not receive the full amount of the settlement proceeds.

In keeping with Judge Titus' previous observation, the PHIFA exemption for title and settlement companies does not extend to misappropriation of funds: defendants have a license to provide title insurance and settlement services, "not a license to steal."[2] In this case, Adetula and Cornerstone acted outside their license and therefore may not claim exemption from PHIFA.

2.

[2] *See* Tr. of Mot. Hr'g. 12/6/07, *Melvin Proctor, Jr. et al. v. Metropolitan Money Store, Inc. et al*, (No. RWT-07-1957 D.Md.) at 105.

Next, Cornerstone and Adetula argue that, even were PHIFA to apply to their activities in this case, they are not liable because their activity does not qualify as the type of "foreclosure consultant" service PHIFA regulates. Under PHIFA, foreclosure consultants must obey PHIFA's statutory requirements. A foreclosure consultant is anyone who arranges "for the homeowner to become a lessee or renter entitled to continue to reside in the homeowner's residence;" arranges "for the homeowner to have an option to repurchase the homeowner's residence;" or engages "in any documentation, grant, conveyance, sale, lease, trust, or gift by which the homeowner clogs the homeowner's equity of redemption in the homeowner's residence." Md. Code Ann., Real Prop. §7-301(b)(1). Foreclosure consultants may not induce, or attempt to induce, any homeowner to enter into a foreclosure consulting contract that does not comply in all respects with the law. Md. Code Ann., Real Prop. §7-307. PHIFA gives homeowners the right to bring an action for damages "incurred as the result of a practice prohibited by this sub-title." Md. Code Ann., Real Prop. §7-320(a). "If the court finds that the defendant willfully or knowingly violated this subtitle, the court may award damages equal to three times the amount of actual damages." Md. Code Ann., Real Prop. §7-320(c).

As a matter of law in the light of this record, Adetula and Cornerstone are deemed "foreclosure consultants" because they provided the settlement services for a foreclosure reconveyance. They arranged for Massey to become a lessee residing in her home with an option to repurchase and they helped create documentation that "clogged" Massey's equity of redemption in her own home.

Adetula and Cornerstone argue that they cannot be deemed "foreclosure consultants" as a matter of law because, at a minimum, a reasonable juror might reasonably find that they had no knowledge that the property transfer was a "foreclosure reconveyance." This assertion is simply and fatally undermined by the evidence before the court in the summary judgment record. First, Adetula and Cornerstone ordered a title abstract search and provided a title examination. It can be and must be inferred that they looked at the title work because they admit they were aware of the open bankruptcy case. Even a cursory glance at title work would show the open foreclosure proceeding on the Property.

Second, Adetula's own affidavit shows he asked Massey to provide a new address for him to write onto the pre-prepared HUD-1 form, a strange request to make in the middle of a settlement. At the very least, Massey's failure to provide an address before settlement should have tipped off Adetula that he was presiding over a foreclosure lease-back arrangement. Far worse, there is the suggestion that Adetula made his request for an address in order to induce Massey into going forward with an illegal foreclosure reconveyance.

At bottom, a reasonable juror would necessarily find under the circumstances here that Adetula and Cornerstone violated PHIFA by inducing, or attempting to induce, Massey into an illegal foreclosure consulting contract that did not comply with Maryland law. Massey received no copies of the documents she signed and none of the documents contained the necessary notices.

Finally, even had Cornerstone and Adetula been unaware of their role in a foreclosure reconveyance, they still violated PHIFA when they recorded the rescinded deed and

accompanying mortgages.[3] Thus, by acting as foreclosure consultants in violation of PHIFA, Adetula and Cornerstone are jointly and severally liable for any damages Massey incurred as a result of the settlement services they provided.

III.

For the reasons set forth above, plaintiff's motion for partial summary judgment is GRANTED and appropriate Orders carrying into effect the above determinations shall be submitted by counsel for plaintiff.

February 24, 2009

/s/
André M. Davis
United States District Judge

[3] *See supra* note 1.

--- F.Supp.2d ----, 2009 WL 2516361 (D.Md.)
(Cite as: 2009 WL 2516361 (D.Md.))

HOnly the Westlaw citation is currently available.

United States District Court,
D. Maryland.
Melvin J. PROCTOR, et al., Plaintiffs,
v.
METROPOLITAN MONEY STORE CORP., et al., Defendants.
Civil Action No. RWT-07-1957.

Aug. 13, 2009.

Background: Home mortgagors filed a class action complaint setting forth various claims under both federal and state law against numerous title insurers and their agents based on their alleged participation in a mortgage foreclosure rescue scam, relating to purported credit repair and refinancing services. Defendants filed motions to dismiss. The District Court, Roger W. Titus, J., 579 F.Supp.2d 724, dismissed without leave to amend as to two title insurers, dismissed with leave to amend as to two settlement agents, and denied without prejudice the motion for class certification. Mortgagors filed amended complaint, and the two settlement agents counterclaimed for fraud, fraudulent concealment, negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy to commit mortgage fraud.

Holdings: The District Court, Roger W. Titus, J., held that:
(1) home mortgagors met requirement of pleading fraud with particularity, with respect to mail fraud and wire fraud, as predicate acts for civil claim under Racketeer Influenced and Corrupt Organizations Act;
(2) limitations periods for claim under Real Estate Settlement Procedures Act was equitably tolled;
(3) mortgagors stated a claim for violation of Maryland's Protection of Homeowners in Foreclosure Act;
(4) mortgagors stated a claim for gross negligence under Maryland law; and
(5) for purposes of res judicata bar to settlement agents' counterclaims, mortgagors were in privity with their attorneys, with respect to an earlier action by settlement agents against mortgagors' attorneys.

Motion to dismiss mortgagors' claims denied; motion to dismiss settlement agents' counterclaims granted.

West Headnotes

[1] Federal Civil Procedure 170A 0

170A Federal Civil Procedure
On a motion to dismiss for failure to state a claim, the court looks at whether the complaint alleges enough facts to state a claim to relief that is plausible on its face. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 0

170A Federal Civil Procedure
To survive a motion to dismiss for failure to state a claim, factual allegations in the complaint must be enough to raise a right to relief above a speculative level. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 0

170A Federal Civil Procedure
On a motion to dismiss for failure to state a claim, the court is not required to accept as true a legal conclusion couched as a factual allegation, conclusory allegations devoid of any reference to actual events, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 0

170A Federal Civil Procedure
To satisfy the requirement of pleading fraud with particularity, the complaint must allege the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[5] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
When mail and wire fraud are asserted as predicate acts in a civil claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), each must be pled with particularity. 8 U.S.C.A. § 1961 et seq.; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 0

170A Federal Civil Procedure
A court should hesitate to dismiss a complaint, based on failure to plead fraud with particularity, if the court is satisfied: (1) that the defendant has been made aware of the particular circumstances for which he will have to prepare a defense at trial, and (2) that the plaintiff has substantial pre-discovery evidence of those facts. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[7] Postal Service 306 0

306 Postal Service
Mail fraud and wire fraud have similar core elements that must be proven: (1) defendant's knowing participation in a scheme to defraud, and (2) the mails or interstate wire facilities were used in the furtherance of the scheme, but they need not be an essential element of the scheme.

[8] Postal Service 306 0

306 Postal Service
For purposes of mail fraud or wire fraud, the mailings or wirings do not have to contain the misrepresentation that defrauded the plaintiff, but must merely be in furtherance of the fraudulent, material misrepresentation upon which the plaintiff relied to his detriment, and may even include mailings and wirings directed at nonparties.

[9] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Home mortgagors met requirement of pleading fraud with particularity, as to mail fraud and wire fraud, as predicate acts for civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO) against settlement agents for their alleged participation in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services; complaint detailed the issuance of false and deceptive HUD-1 settlement statements and other loan documents and instruments, fraudulent and false mail correspondence, and bank wired monies, it provided detailed examples for each named plaintiffs including dates, locations, documents, exact monetary figures, and details about alleged acts undertaken by settlement agents, and it alleged that settlement agents effectuated some of the mailings and wirings that formed the predicate acts of mail fraud and wire fraud. 18 U.S.C.A. § 1962(a, c, d); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[10] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
With respect to civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO), requirement of pleading fraud with particularity applied only to predicate acts of mail fraud and wire fraud, and not to other elements of RICO claim, such as existence of a conspiracy. 18 U.S.C.A. § 1962(a, c, d); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[11] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
An enterprise, for purposes of Racketeer Influenced and Corrupt Organizations Act (RICO), requires proof of three elements: (1) an ongoing organization; (2) associates functioning as a continuing unit, even if some leave, as long as the organization remains the same; and (3) the enterprise is an entity separate and apart from the pattern of activity in which it engages. 18 U.S.C.A. § 1961(4).

[12] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations

Home mortgagors' allegations against settlement agents, who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, were sufficient allegations of an enterprise, for purposes of stating a civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO); complaint alleged that enterprise consisted of association in fact of settlement agents and other defendants to implement and conduct a "foreclosure reversal program" which had operated over the course of at least a two-year period through use of mail, wire, and tax fraud and collection of unlawful debts, that each defendant willingly participated directly or indirectly in operation of the enterprise, and that defendants engaged in legitimate real estate transactions over same period of time for purpose of further concealing the true intent of their enterprise. 18 U.S.C.A. §§ 1961(4), 1962(a, c).

[13] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Predicate acts are "related," for purposes of a pattern of racketeering, as element for violation of Racketeer Influenced and Corrupt Organizations Act (RICO), if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. 18 U.S.C.A. § 1961(5).

[14] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Predicate acts for violation of Racketeer Influenced and Corrupt Organizations Act (RICO) may be committed by a variety of persons such that each defendant may not have direct participation in each act, but evidence of those acts is relevant to the RICO charges against each defendant because it tends to prove the existence and nature of the RICO enterprise. 18 U.S.C.A. § 1961(4).

[15] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
To constitute a pattern of racketeering activity, as element for violation of Racketeer Influenced and Corrupt Organizations Act (RICO), the criminal activity does not need to be currently ongoing; rather it may be a closed period of repeated conduct or past conduct that by its nature projects into the future with a threat of repetition. 18 U.S.C.A. § 1961(5).

[16] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
The determination of whether a pattern of racketeering activity exists, as element for violation of Racketeer Influenced and Corrupt Organizations Act (RICO), is a commonsensical, fact-specific inquiry. 18 U.S.C.A. § 1961(5).

[17] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Home mortgagors' allegations against settlement agents, who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, were sufficient allegations of pattern of racketeering activity, for purposes of stating a civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO); complaint alleged more than two predicate acts of mail fraud or wire fraud by settlement agents that occurred over substantial period of time and that were related in that they had similar purpose of siphoning off equity from distressed mortgagors and they used same methods of commission. 18 U.S.C.A. §§ 1961(5), 1962(a, c).

[18] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Home mortgagors' allegations against settlement agents, who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, were sufficient alle-

gations of collection of unlawful debts, for purposes of stating a civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO); complaint alleged multiple collections of unlawful debts in terms of "sale-leaseback" arrangements that could be characterized as mortgage loans which violated state's usury limit. 18 U.S.C.A. §§ 1961(6), 1962(a, c).

[19] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
An allegation of collection of unlawful debts requires only a single act of collection as a predicate for liability under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. §§ 1961(6), 1962.

[20] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
The offender who commits the racketeering activity need not be different from the enterprise in which the proceeds of that activity are invested, and may be identical. 18 U.S.C.A. § 1962(a).

[21] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Home mortgagors' allegations against settlement agents, who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, were sufficient allegations that settlement agents received income from their pattern of racketeering activity or collection of unlawful debts and then used or invested that income in an enterprise, for purposes of stating a civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO); complaint alleged that title company, due to its association with other RICO defendants, received large volume of referrals and then charged excessive fees which benefited the settlement agents, that settlement agents reinvested fees into title company and channeled fees to two other entities, and that fees were then reinvested in the mortgage foreclosure rescue scam, which resulted in additional referrals to title company and settlement agents. 18 U.S.C.A. § 1962(a, c).

[22] Conspiracy 91 0

91 Conspiracy
A defendant who agrees to do something illegal and opts into or participates in a conspiracy is liable for the acts of his co-conspirators even if the defendant did not agree to do or conspire with respect to a particular act.

[23] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Home mortgagors' allegations against settlement agents, who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, were sufficient allegations of conspiracy, for purposes of stating a civil claim for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO); complaint alleged that settlement agents were aware of issues surrounding propriety and legitimacy of transactions that another entity was engaging in and were aware of activities of their employee and subordinate in terms of settlements he was conducting, that RICO defendants, including settlement agents, associated together for common purpose of engaging in scheme to strip equity, that all RICO defendants were aware of each other's existence as part of scheme to defraud, and that settlement agents joined the scheme to generate a large volume of referrals for their settlement business from other RICO defendants. 18 U.S.C.A. § 1962(d).

[24] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Home mortgagors' allegations against settlement agents, who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, were sufficient allegations of injury from predicate acts of mail fraud and wire fraud, for purposes of stating a civil claim for conspiracy to violate Racketeer Influenced and Cor-

rupt Organizations Act (RICO); mortgagors alleged they were charged fees that should not have been charged and that they had their equity-rich homes stolen from them based on illegal services by the enterprises. 18 U.S.C.A. § 1962(a, c).

[25] Racketeer Influenced and Corrupt Organizations 319H 0

319H Racketeer Influenced and Corrupt Organizations
Civil penalties available under the Racketeer Influenced and Corrupt Organizations Act (RICO) were enacted with the explicit policy that they be liberally interpreted. 18 U.S.C.A. § 1964.

[26] Limitation of Actions 241 0

241 Limitation of Actions
The doctrine of equitable tolling prevents a defendant from concealing a fraud, or committing a fraud in a manner that it concealed itself, until the defendant could plead the statute of limitations to protect it.

[27] Limitation of Actions 241 0

241 Limitation of Actions
Under the doctrine of equitable tolling, when the fraud has been concealed or is of such a character as to conceal itself, the plaintiff is not negligent or guilty of laches, and the limitations period does not begin to run until the plaintiff discovers the fraud.

[28] Limitation of Actions 241 0

241 Limitation of Actions
Limitations period was equitably tolled, as to home mortgagors' claims under Real Estate Settlement Procedures Act (RESPA) against settlement agents who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services; complaint alleged that settlement agents concealed the true nature of their scheme through the use of inaccurate HUD-1 statements, representations, and other settlement and loan documents, thereby preventing mortgagors from discovering or filing their claims. 12 U.S.C.A. § 2614.

[29] Limitation of Actions 241 0

241 Limitation of Actions
Doctrine of equitable tolling focuses on excusable delay by the plaintiff, inquires whether a reasonable plaintiff would have known of the existence of a possible claim within the limitations period, and does not depend on any wrongful conduct by the defendant.

[30] Consumer Credit 92B 0

92B Consumer Credit
Home mortgagors' allegations against settlement agents, who allegedly participated in mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, were sufficient to state a claim for business referrals prohibited by Real Estate Settlement Procedures Act (RESPA); complaint alleged that settlement agents were affiliated with entity that was settlement services provider for title insurance for settlement transactions involving mortgagors and that settlement agents received valuable referral business and resulting commissions and income as result of their participation in scheme to funnel the equity in mortgagors' properties to the other defendants. Real Estate Settlement Procedures Act of 1974, § 8(a), 12 U.S.C.A. § 2607(a).

[31] Consumer Credit 92B 0

92B Consumer Credit
The qualified defense under Real Estate Settlement Procedures Act (RESPA), for an affiliated business arrangement, did not apply, for purposes of settlement agents' motion to dismiss for failure to state a claim, in action by home mortgagors alleging prohibited business referrals and splitting of charges, as to settlement agents' alleged participation in a mortgage foreclosure rescue scam relating to purported credit repair and refinancing services; complaint alleged that settlement agents were not bona fide providers of settlement services due to the inaccuracies and misrepresentations in HUD-1 statements and other settlement documents. Real Estate Settlement Procedures Act of 1974, § 8(a, b), (c)(4), 12 U.S.C.A. § 2607(a, b), (c)(4).

[32] Antitrust and Trade Regulation 29T 0

29T Antitrust and Trade Regulation

Home mortgagors sufficiently alleged that settlement agents acted as foreclosure consultants, as required to state a claim under Maryland's Protection of Homeowners in Foreclosure Act (PHIFA) for failure to provide a foreclosure contract; complaint alleged that settlement agents solicited mortgagors indirectly at the very least and made representations that resulted in clogging of equity of redemption in mortgagors' properties, that settlement agents received many valuable referrals in foreclosure reconveyance scheme of which they were aware and in which they provided settlement services, and that settlement agents helped create false documentation that siphoned off equity from mortgagors' homes. West's Ann.Md.Code, Real Property, §§ 7-301(b, c, d, e), 7-306(a), 7-307.

[33] Negligence 272 0

272 Negligence
Home mortgagors stated a claim for gross negligence, under Maryland law, against settlement agents who allegedly participated in a mortgage foreclosure rescue scam relating to purported credit repair and refinancing services; complaint outlined numerous irregularities in settlement and title documents in addition to manner in which money was transferred among parties, and settlement agents' employee was alleged to have signed and/or prepared fraudulent documents under direction and supervision of settlement agents, who were alleged to have, as a result of their expertise, licenses, and position, violated their duties to mortgagors by permitting the fraudulent documents to be used in conjunction with real estate settlements involving mortgagors.

[34] Negligence 272 0

272 Negligence
Under Maryland law, a gross negligence claim requires a plaintiff to prove that the defendant intentionally failed to perform a duty in reckless disregard of its consequences to the life or property of another.

[35] Federal Civil Procedure 170A 0

170A Federal Civil Procedure
A tort claim for negligence, including gross negligence, is subject to the general notice-pleading standard, not the heightened "plead with particularity" standard associated with fraud allegations. Fed.Rules Civ.Proc.Rules 8(a)(2), 9(b), 28 U.S.C.A.

[36] Federal Civil Procedure 170A 0

170A Federal Civil Procedure
Federal rules of civil procedure apply when the district court is sitting in diversity, even when the substance of the claim is based upon state law.

[37] Judgment 228 0

228 Judgment
The doctrine of res judicata, which is also known as claim preclusion, is that a prior judgment bars the relitigation of claims that were raised or could have been raised in the prior litigation between the same parties.

[38] Judgment 228 0

228 Judgment
Under Maryland law, res judicata requires proof of three elements: (1) the parties in the present litigation must be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction.

[39] Judgment 228 0

228 Judgment
Home mortgagors were in privity with their attorneys, for purposes of home mortgagors asserting res judicata under Maryland law, with respect to earlier action in which settlement agents had sued attorneys, which action arose from same transactions underlying the counterclaims that settlement agents subsequently asserted against home mortgagors for fraud, fraudulent concealment, negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy to commit mortgage fraud, which counterclaims were asserted in mortgagors' subsequent action alleging settlement agents participated in a mortgage foreclosure rescue scam relating to purported credit repair and refinancing services; settlement agents could have joined home mortgagors as defendants in the earlier action but did not do so before they voluntarily dismissed the earlier action with prejudice.

--- F.Supp.2d ----, 2009 WL 2516361 (D.Md.)
(Cite as: 2009 WL 2516361 (D.Md.))

[40] Judgment 228 0

228 Judgment
For purposes of res judicata under Maryland law, settlement agents' counterclaims against home mortgagors for fraud, fraudulent concealment, negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy to commit mortgage fraud, which counterclaims were asserted by settlement agents in home mortgagors' action alleging settlement agents participated in a mortgage foreclosure rescue scam relating to purported credit repair and refinancing services, could have been asserted in settlement agents' earlier action against home mortgagors' attorneys; both earlier action and counterclaims in subsequent action sought recovery of damages to settlement agents' business and reputation on account of home mortgagors' allegations of impropriety relating to same underlying transactions.

[41] Judgment 228 0

228 Judgment
To determine whether claims in earlier and subsequent actions arise from same transaction or series of transactions, for purposes of res judicata under Maryland law, court must consider whether the facts of each case are related in time, space, origin, or motivation.

[42] Judgment 228 0

228 Judgment
A voluntary dismissal with prejudice is a final adjudication of the matters asserted, for purposes of res judicata under Maryland law. Md.Rule 2-506.
Scott C. Borison, Janet Sue Legg, Legg Law Firm LLC, Frederick, MD, Peter A. Holland, The Holland Law Office PC, Annapolis, MD, Phillip R. Robinson, Civil Justice Inc., Baltimore, MD, for Plaintiffs.

Leticia Nicholls, Takoma Park, MD, pro se.

Sidney S. Friedman, Rosemary E. Allulis, Weinstock Friedman and Friedman PA, Baltimore, MD, Erwin RoderickE. Jansen, Jr., The Law Offices of Erwin R E Jansen LLC, Lanham, MD, for Defendants.

Joy Jenis Jackson, Boyds, MD, pro se.

MEMORANDUM OPINION

ROGER W. TITUS, District Judge.

Plaintiffs brought this action against numerous Defendants, who are legal entities and persons associated with them, who are alleged to have been involved in a mortgage foreclosure rescue scam. Plaintiffs allege that their status as homeowners with substantial equity in their homes, but who were nevertheless facing foreclosure, made them targets of Defendants' promise of credit repair and foreclosure avoidance, which, in actuality, involved fraudulent representations and transactions designed to siphon off the equity in the homeowners' homes, thus leaving them in a far worse position than before.

This matter has come before the Court on numerous occasions and, thus, the Court need not repeat the entire factual and procedural of the case. *See Proctor v. Metro. Money Store Corp.*, 579 F.Supp.2d 724 (D.Md.2008). Rather, the pertinent procedural history is that on September 30, 2008, the Court issued a Memorandum Opinion [Paper No. 143] that dismissed all counts of the Plaintiffs' First Amended Complaint against Defendants Alexander J. Chaudhry and Ali Farahpour and granted Plaintiffs leave to file a Second Amended Complaint against those Defendants along with a renewed motion to certify a class against the Defendants, appoint a class representative, and appoint class counsel. *Id.* In dismissing the First Amended Complaint in general against Farahpour and Count VII against Chaudhry, the Court found that the Plaintiffs had not sufficiently alleged what each of those Defendants had done to fulfill their respective roles in the scheme. *Id.* at 744-45.

Plaintiffs filed their Second Amended Complaint [Paper No. 150] on November 14, 2008, along with their Amended Motion to Certify Class [Paper No. 151]. On January 9, 2009, Chaudhry and Farahpour filed their Motions to Dismiss the Second Amended Complaint as well as their Motion to Stay Class Proceedings and Opposition to the Plaintiffs' Amended Motion to Certify Class [Paper Nos. 162, 163, 164, & 165], which were opposed by the Plaintiffs [Paper No. 175].

On January 22, 009, Chaudhry and Farahpour filed Counterclaims against the Plaintiffs for fraud, fraudulent concealment, negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy to commit mortgage fraud. [Paper No. 166]. Plaintiffs moved to dismiss and strike the Counterclaims [Paper Nos. 166 & 171], which Chaudhry and Farahpour opposed [Paper Nos. 173 & 174].

A hearing was held on July 6, 2009 on all of the pending motions, and on the following day, the Court entered an order filed on July 8, 2009 that disposed of all of the motions for reasons stated on the record and "that will follow in an opinion to be filed." The Court now enters that Opinion.

ANALYSIS

Chaudhry and Farahpour have moved to dismiss the Second Amended Complaint on the following grounds: (1) Plaintiffs have failed to plead fraud with the particularity that is required under Fed.R.Civ.P. 9(b); and (2) Plaintiffs have failed to state a claim for RICO (Counts I-III), RESPA (Count IV), PHIFA (Count V), and gross negligence (Count VI) against Chaudhry and Farahpour.

I. Standard of Review

[1][2] A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) tests the sufficiency of the complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929 (2007), the Supreme Court declared the "retirement" of the long-cited "no set of facts" standard first announced in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).[FN1] The Court in *Twombly* looked instead to whether the Petitioner alleged "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974 (observing that "[p]etitioner's obligation to provide grounds for his entitlement to relief requires more than labels and conclusions, and formalistic recitation of the elements of a cause of action will not do"). In sum, "factual allegations must be enough to raise a right to relief above a speculative level." *Id.* at 1965; *see also Ashcroft v. Iqbal*, No. 07-1015, 556 U.S. ----, slip op. at 14-15 (May 18, 2009) (holding that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

[3] No matter the standard used, the Court must consider all well-pled allegations in a complaint as true, *see Albright v. Oliver*, 510 U.S. 266, 268, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), and must construe factual allegations in the light most favorable to the plaintiff, *see Lambeth v. Bd. of Comm'rs of Davidson County*, 407 F.3d 266, 268 (4th Cir.2005). Nevertheless, the Court is not required to accept as true "a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), conclusory allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir.1979), or "allegations that are merely conclusory, unwarranted deductions of fact or unreasonable inferences," *Veney v. Wyche*, 293 F.3d 726 (4th Cir.2002).

II. The Requirement of Federal Rule of Civil Procedure 9(b) that Fraud Be Pleaded with Particularity

Chaudhry and Farahpour argue that Plaintiffs have still not cured the deficiencies present in their prior two complaints because the Second Amended Complaint fails to plead the alleged fraud committed by those two Defendants with the requisite degree of particularity required under Fed.R.Civ.P. 9(b).

[4] Fed.R.Civ.P. 9(b) provides that "[i]n alleging fraud ... a party must state with particularity the circumstances constituting fraud...." In alleging fraud, the complaint must allege the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir.1999).

[5][6] When mail and wire fraud are asserted as predicate acts in a civil RICO claim, each must be pled with particularity, pursuant to Rule 9(b). *See Scott v. WFS Fin., Inc.*, Civil Action No. 2:06cv349, 2007 WL 190237, at *5 (E.D.Va. Jan.18, 2007) (citing *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir.1989)). "Rule 9(b) requires pleading the time, place, and content of the false representations, the person making them, and what that person gained from them." *Id.*

(citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir.1999)). "However, '[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which he will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.' " *Id.*

[7][8] Both mail and wire fraud have similar core elements that must be proven: (1) defendant's knowing participation in a scheme to defraud; and (2) the mails or interstate wire facilities were used in the furtherance of the scheme, but they need not be an essential element of the scheme. *Choimbol v. Fairfield Resorts, Inc.*, 428 F.Supp.2d 437, 443 (E.D.Va.2006); *United States v. ReBrook*, 58 F.3d 961, 966 (4th Cir.1995). A "scheme to defraud" includes "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The mailings or wirings do not have to contain the mispresentations that defrauded the plaintiff, but must merely be in furtherance of the fraudulent, material mispresentation upon which the plaintiff relied to his detriment and may even include mailings and wirings directed at nonparties. *Kerby v. Mortgage Funding Corp.*, 992 F.Supp. 787, 798-99 (D.Md.1998); *GE Investment Private Placement Partners II v. Parker*, 247 F.3d 543, 548-49 (4th Cir.2001).

In a factually analogous case, the United States District Court for the Eastern District of Virginia held that plaintiffs, who brought an action arising out of a alleged mortgage foreclosure rescue scam, met the particularity requirement of Rule 9(b) in the complaint's allegations regarding the predicate acts of mail and wire fraud. *Williams v. Equity Holding Corp.*, 498 F.Supp.2d 831, 842 (E.D.Va.2007). Specifically, the district court noted that plaintiffs' "broad alleg[ations]" that defendants used the mails and interstate telephone system "in furtherance of said pattern of racketeering activity and collection of unlawful debt and to otherwise defraud plaintiffs" coupled with plaintiffs' recitation of an "outline [of] the alleged scheme to defraud them of their home and pled a time frame for the scheme, specific persons, entities, and times connected with the fraud, and the general contents of the alleged fraudulent communications between defendants and the Williams" sufficed to meet the requirements of Rule 9(b). The district court found that these factual allegations sufficed "to put defendants on notice of the circumstances for which they will have to prepare a defense." *Id.*

[9] Similarly here, Plaintiffs have met Rule 9(b)'s requirement of particularity. First, Plaintiffs have pleaded the predicate acts of mail and wire fraud with particularity against the background of a grand mortgage foreclosure rescue scam that involved the sale and leaseback of Plaintiffs' properties from which Chaudhry and Farahpour among others would siphon off and transfer the equity illegally. Second Am. Compl. ¶¶ 1, 8, 107, 137, 151. The Second Amended Complaint details "the issuance of false and deceptive HUD-1 settlement statements and other loan documents and instruments, fraudulent and false correspondence, and bank wired monies." Second Am. Compl. ¶ 237. It also provides detailed examples for each of the named plaintiffs that include dates (and time stamps down to the hundredths of a second, in some cases), locations, documents, exact monetary figures, and details about the alleged acts undertaken by Chaudhry and Farahpour among others. For the sake of brevity, the allegations concerning the Simon Family provide a representative [FN2] sample of the level of detail pleaded in the Second Amended Complaint:

- "The transfer of title to the Simon property and the settlement and closing of the New Century loans was accomplished through the use of the U.S. Mail. Additionally the transaction made use of electronic wires. Specifically, funds were wired to Sussex's accounts, controlled by Chaudhry, by New Century in two separate wires for Clark: (1) 1:40:05 p.m. and (2) 1:40:06 p.m on July 24, 2006." Second Am. Compl. ¶ 125.

- "Sussex wired proceeds from the transaction on at least two separate occasions to [MMS]'s account at SunTrust bank on July 26, 2006 in the amounts of $17,611 and $1,500 respectively. Upon information and belief, the wires from Sussex's bank account could only be approved or allowed by an authorized signer on Sussex's account which was Chaudhry and/or Farahpour." Second Am. Compl. ¶ 126.

- "The disbursement sheet prepared by Sussex for the transaction also shows a payment of $64,232 in the form of a wire transfer to the Simon Family ... but this wire transfer was never made to the Simon Family." Second Am. Compl. ¶ 132.

- "The HUD-1 for the Simon Family's July 24, 2006 transaction shows that the remaining equity of more than $64,232.79 was all going to Simon, but Jackson, McCall, Mr. Fordham, [MMS] and F & F actually illegally took more than $64,232.79 of the Simon Family's money, as shown by a disbursement sheet. Jackson, McCall, Mr. Fordham, [MMS] and F & F were only able to obtain these funds through the complicity, concealment, and affirmative misrepresentations set forth in documents prepared in connection with the loans made to the straw purchaser. These documents included the Deed of Trust prepared by or under the supervision of Chaudhry that contained a representation as to occupancy, the HUD-1 that showed payment to Simon and the disbursement of funds made by checks signed by Defendant Chaudhry." Second Am. Compl. ¶ 131.

The Second Amended Complaint alleges that Chaudhry and Farahpour effectuated some of these mailings and wirings that would form the predicate acts of mail and wire fraud. Second Am. Compl. ¶¶ 199-202, 218, 224. Even though some of the mailings may have contained accurate information, the fact remains that *some* of the mailings contained fraudulent material. *United States v. Murr*, 681 F.2d 246, 248-49 (4th Cir.1982) (" 'The use of the mails need not in itself be fraudulent to constitute an offense under the statute' ... the mailed material may be totally innocent, and yet it still may be found that a scheme to defraud exists.") (citation omitted).

Even a cursory review of the allegations involving the Simon Family reveals that Plaintiffs have more than surmounted the particularity threshold set out in Rule 9(b). Plaintiffs have not only provided a general outline of the alleged mortgage foreclosure scheme that was intended to defraud them of their homes but they have also included specific dates and times that this scheme was alleged to have been conducted, the specific individuals and entities alleged to be responsible, and the specific fraudulent information communicated in written loan and title documents. *Williams*, 498 F.Supp.2d at 842. Furthermore, the Second Amended Complaint describes how Farahpour and Chaudhry participated in the execution of the mortgage foreclosure rescue scam by supervising the fraudulent transactions with willful blindness, preparing false HUD-1 statements, by representing to the plaintiffs and class members that the transactions and supporting documents were accurate, and aiding and abetting the scheme by laundering the proceeds from the settlement transactions to make disbursements appear legitimate when, in fact, those disbursements were illegal and for different parties than those represented on the settlement documents, which permitted the other defendants to evade taxes. Second Am. Compl. ¶¶ 26, 28-57, 60, 77(e), 99, 138, 147, 152, 154, 178, 197-98, 212-13, 215, 220, 225, 228, 238, 245, 248-49, 255-56, 264(c), 272-73, 283-84. The Second Am. Compl. also alleges that the plaintiffs and class members relied upon the legitimacy and legality of the RICO enterprise to their detriment, and that the HUD-1 statements (which contained misrepresentations) contributed to the impression of legitimacy upon which they relied. Second Am. Compl. ¶¶ 155, 207, 247, 250. The plaintiffs were entitled to honest credit repair and refinancing services, to which they which they were deprived by this mortgage foreclosure rescue scam. Undoubtedly, this puts Chaudhry and Farahpour "on notice of the circumstances for which they will have to prepare a defense." *Id* .

Given the striking factual similarity between the case currently before this Court and the court in *Williams*, the Court finds that the Plaintiffs have fully satisfied their burden of pleading fraud with particularity in terms of the predicate acts of mail and wire fraud in support of the RICO claims (Counts I-III).

[10] Moreover, Chaudhry and Farahpour are simply mistaken that Rule 9(b)'s requirement of particularity applies to the other elements of the RICO claims (e.g. existence of a conspiracy) *in addition to* the predicate acts of mail and/or wire fraud. *Williams*, 498 F.Supp.2d at 842. For the remaining RICO elements and the remaining non-RICO claims, Plaintiffs' allegations are construed under the more liberal pleading standard of a "short and plain statement of the claim showing that the pleader is entitled to lief." Fed.R.Civ.P. 8(a)(2); *see also Baltimore County v. Cigna Healthcare*, 238 Fed.Appx. 914, 921 (4th Cir.2007) (holding that the "notice pleading" standard of Fed.R.Civ.P. 8 applies to allegations of non-fraudulent conduct and thus plaintiff's claim of negligent misrepresentation did not need to be pleaded with particularity under Fed.R.Civ.P. 9(b)). Because the remaining claims in Plaintiffs' complaint do not allege fraudulent conduct (rather, they consist of the other elements of the RICO claims in addition to

claims under RESPA, PHIFA, and a gross negligence claim), the lower pleading standard applies.

Plaintiffs have also sufficiently pleaded the other claims in the complaint with the requisite degree of particularity under either Rule 9(b) [FN3] or the lower threshold of "notice pleading" under Rule 8(a)(2), which is discussed in greater detail in the sections of the Opinion that follow.

III. Chaudhry and Farahpour's Motions to Dismiss

Chaudhry and Farahpour contend that Plaintiffs have failed to state a claim upon relief can be granted on the following counts of the complaint.

As an initial matter, the Court notes that Chaudhry and Farahpour spill much ink on disputing the allegations in the complaint and offer their contradictory accounts of events. While this may be relevant if this motion were one for summary judgment, this case is at the motion to dismiss stage, in which the Court must view the well-pleaded allegations as true and must construe factual allegations in the light most favorable to the Plaintiffs. *Albright*, 510 U.S. at 268; *Lambeth*, 407 F.3d at 268.

A. Counts I-III: RICO

Chaudhry and Farahpour contend that the three RICO counts in the complaint should be dismissed because Plaintiffs have failed to state a claim.

Counts I through III of the Second Amended Complaint allege violations of RICO subsections (a) [FN4], (c) [FN5], and (d) [FN6]. 18 U.S.C. § 1962(a), (c), and (d). Chaudhry and Farahpour contend that Plaintiffs have failed to plead allegations in support of the elements of "an enterprise," a "pattern," "racketeering activity," and injury to the plaintiff, which are necessary elements common to all three subsection claims.

Under Rule 9(b), a plaintiff's RICO claim based on predicate acts of mail and wire fraud must "[a]t a minimum ... identify the time, place, contents, and speaker of the alleged misrepresentation, along with what was obtained by the statement." *Orteck Int'l, Inc. v. TransPacific Tire & Wheel, Inc.*, Civ. No. DKC-05-2882, 2006 WL 2572474, *16 (D.Md. Sept.5, 2006). As discussed in greater detail above, the Plaintiffs here have satisfied Rule 9(b)'s requirement of particularity with regard to the predicate acts of mail and wire fraud.

In terms of the other elements of the RICO claims, the Court will address them in turn.

1. Enterprise

[11] An "enterprise" is defined under RICO as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An "enterprise" requires proof of three elements: (1) an ongoing organization; (2) associates functioning as a continuing unit (even if some leave as long as the organization remains the same); and (3) the enterprise is an entity separate and apart from the pattern of activity in which it engages. *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir.1985).

[12] In this case, the Second Amended Complaint's allegations sufficiently allege an ongoing organization between all of the RICO defendants (Jackson, McCall, Fordham, MMS, F & F, Chaudhry, Farahpour, and Ballesteros). Specifically, the Second Amended Complaint alleges that "[t]he enterprise consisted of an association in fact of the Defendants Jackson, McCall, Fordham, [MMS], F & F, Sussex, Chaudhry, Farahpour and Ballesteros, to implement and conduct the "Foreclosure Reversal Program," which has been operated over the course of at least a two-year period through the use of mail, wire, and tax fraud and the collection of unlawful debts, and involving hundreds of victims[, and e]ach Defendant willingly participated directly or indirectly in the operation of the enterprise." Second Am. Compl. ¶ 172. The Second Amended Complaint alleges that the defendants "had each previously set up, operated, invested in and conspired to create other illegal real estate related enterprises to conduct various settlement services that used a pattern of racketeering activity and the collection of unlawful debts to conduct its business," which included their conspiracy with one another to engage in illegal activities such as falsifying HUD-1 statements and other loan and title documents, failing to disclose statutorily-required information and docu-

ments to the Plaintiffs (i.e. regarding their rights to rescind), and misrepresenting the role that the defendants were playing (i.e. that they were siphoning off the equity in the properties rather than repairing the plaintiffs' credit and aiding them in avoiding foreclosure). *See, e.g.*, Second Am. Compl. ¶¶ 211-31.

Despite Chaudhry's and Farahpour's contentions otherwise, the Second Amended Complaint sets forth the following factual allegations, all of which support a finding that the Second Amended Complaint sufficiently meets the "liberal notice pleading" standard of Rule 8(a)(2). Though Chaudhry and Farahpour focus on the fact that the Second Amended Complaint does not allege that they "directed" the enterprise, proof of *participation* in the *operation* **or** *management* of the enterprise is *only* required. *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

First, the organization of the enterprise is set forth as follows in the Second Amended Complaint:

- Jackson, McCall, Fordham, MMS, and F & F "solicited the business of the named Plaintiffs and other class members. Namely, Fordham and McCall arranged for "credit repair" for the named Plaintiffs and other class members. Second Am. Compl. ¶ 213.

- "Sussex, through the efforts of Chaudhry and Farahpour, which included directing Ballesteros, settled and closed the transactions of named Plaintiffs and the other members of the class, fraudulently facilitating and concealing the illegal transactions and channeling funds back to the other defendants Jackson, McCall, and Fordham, MMS, and F & F to launder funds and evade taxes." *Id.*

- The defendants' association with one another "served as the vehicle through which the unlawful acts described herein were conducted" and that "[w]ithout the association of these persons, the unlawful acts described herein would not have been possible." Second Am. Compl. ¶ 214.

- The enterprise among the defendants had "an organizational structure or chain of command, including phases for soliciting and recruiting victim homeowners, preparing contracts including sales contracts and leases, preparing loan documents, brokering loans, obtaining title insurance, settling and closing real estate transactions, falsifying distribution records to evade taxes and creating the appearance of a legitimate credit repair business." Second Am. Compl. ¶ 215.

In particular, Sussex's role (as well as those of Chaudhry, Farahpour, and Ballesteros) is described as follows:

- These transactions were settled and closed by Sussex, through the coordinated efforts of Ballesteros obtaining signatures on documents, Chaudhry and Farahpour paying Ballesteros to obtain signatures and other tasks, Chaudhry preparing documents or having them prepared under his supervision and Chaudhry or Farahpour authorizing disbursements from the transactions through checks or wires. The transactions included causing documents or disbursements to be sent through mail or wires. The transactions were settled and closed by Sussex for the enterprise and Sussex participated and functioned as part of the enterprise from its inception until about August 2006, closing hundreds of transactions as part of the enterprise. Second Am. Compl. ¶ 218.

- Sussex is alleged to been "the umbrella for the actions of Chaudhry, Farahpour and Ballesteros ... [when they] prepared fraudulent settlement statements and closing documents for named plaintiffs and the other members of the class which were transmitted through the interstate mail and/or wires, and prepared improper documents purporting to permit Chaudhry and Farahpour to split proceeds of the settlement transactions that were to go to named plaintiffs and the other members of the class, to instead be paid to Jackson, McCall, Fordham, [MMS], F & F, which were also transmitted through interstate mail or wires." Second Am. Compl. ¶ 224.

- These false settlement statements, which misrepresented that the funds were to be paid to the named plaintiffs and class members (when they were in actuality paid to other defendants) allowed Jackson, McCall, Fordham, MMS, and F & F to evade paying taxes on the funds they received from the scam. Second Am. Compl. ¶ 225.

- Sussex, through Chaudhry and Farahpour facilitated the channeling of funds to F & F by authorizing wires or other disbursements, which in turn divided these funds among Jackson, McCall, Fordham, MMS, F & F, the straw buyers, and others "to further conceal the true nature of their enterprise." Second Am. Compl. ¶ 227.

- The fraudulent HUD-1 settlement statements "implicates all of the defendants who received or disbursed funds as an additional kickbacks and illegal splits, oversaw the closings, and/or prepared closing documents, including the defendants Jackson, McCall, Fordham, MMS, F & F, Chaudhry, and Farahpour." Second Am. Compl. ¶ 229.

Farahpour's role is further alleged as controlling and operating an entity called Money Tree Funding that "brokered loans from various mortgage lenders, including New Century, for the straw purchasers who would take title to the homes of the named plaintiffs and the other members of the class." Second Am. Compl. ¶ 222.

Second, the continuity of the alleged RICO enterprise is alleged sufficiently by the Second Amended Complaint as follows: the defendants "participated and engaged in the enterprise and functioned as continuing units identifiable over a period of time [and] ... were involved in the transactions involving the named plaintiffs and other members of the class over a period spanning at least two years and involving at least a hundred transactions." Second Am. Compl. ¶ 217. The Second Amended Complaint alleges a myriad of repeat transactions. Second Am. Compl. ¶¶ 28-57.

Finally, the Second Amended Complaint alleges a pattern of racketeering activity that is separate and apart from the enterprise. The Second Amended Complaint alleges that "[o]n information and belief, the enterprises described above did not exist solely for the purpose of engaging in predicate acts violative of RICO, but the enterprises also engaged in legitimate real estate transactions over the same period of time for the purpose of further concealing the true intent of their enterprise." Second Am. Compl. ¶ 220. *See* *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) (holding that proof of racketeering activity and proof of the existence of an enterprise may "coalesce" but are "separate element[s]" that must be proven.").

Given the level of detail that is pleaded in the Second Amended Complaint, especially when taken in context of the detailed factual allegations of the predicate acts of mail and wire fraud discussed above, the Court finds that the Second Amended Complaint has sufficiently alleged the element of an "enterprise." The Second Amended Complaint has pleaded factual allegations that the defendants, including Chaudhry and Farahpour, engaged in an ongoing organization that continued as a functioning unit, in which Chaudhry and Farahpour concealed illegal transactions by their supervisory and management positions at Sussex Title, and that the enterprise existed separate from the pattern of criminal activity itself.

2. Pattern

The Plaintiffs must also prove the existence of a "pattern" of racketeering activity or the "collection of an unlawful debt" in order to satisfy this element of their RICO claims. 18 U.S.C. § 1962.

[13][14][15][16] To prove a "pattern" of racketeering activity, there must be "at least two acts of racketeering activity" that occur within a ten-year period that are related and "amount to or pose a threat of continued criminal activity." 18 U.S.C. § 1961(5). Predicate acts are "related" if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *Healthandbeautydirect.com v. Schulberg*, 2004 WL 2005783, at *2 (D.Md. Sept.1, 2004). These acts may be committed by a variety of persons such that each defendant may not have direct participation in each act but evidence of those acts is relevant to the RICO charges against each defendant because it tends to prove the existence and nature of the RICO enterprise. *United States v. DiNome*, 954 F.2d 839, 843 (2d Cir.1992). The criminal activity does not need to be currently ongoing; rather it may be a "closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). The determination of whether a "pattern" of racketeering activity exists is a "commonsensical, fact-specific inquiry." *Id.* at 237-38; *Anderson v.*

Found. for Advancement, Educ., & Employment of Am. Indians, 155 F.3d 500, 506 (4th Cir.1998).

[17] In this case, the Second Amended Complaint's allegations suffice to state a "pattern" of racketeering activity because it alleges (1) more than two predicate acts (in addition to the named plaintiffs, it alleges hundreds more); (2) that occurred over a substantial period of time (at least two years); (3) that were related (the acts were ones that had the similar purpose of siphoning off equity from distressed homeowners and the same methods of commission (misrepresenting the role that Sussex was going to take in ensuring that the settlement was legitimate, that the disbursements were transferred in accordance with the HUD-1 statements, that the HUD-1 and settlement documents were accurate, and that the settlement itself was a legitimate and proper transaction that purported to be what it advertised as [credit repair and foreclosure rescue] rather than what it was [equity siphoning off refinancing proceeds]); (4) that the predicate acts of mail and wire fraud were undertaken with the intent and in furtherance of the scheme; (5) that Chaudhry and Farahpour are alleged to have engaged in similar acts and predicate acts for several years spanning hundreds of transactions; (6) resulted in losses to the named plaintiffs and other class members of more than $60 million; and (7) this conduct was a "closed period of repeated conduct" that started in early 2005 and ended in mid-2006 and, but for the intervention of law enforcement, would likely have "project[ed] into the future with a threat of repetition" as the named plaintiffs and other class members face foreclosure proceedings against their properties and the deleterious effect of defendants' actions on their credit histories. Second Am. Compl. ¶¶ 1, 2, 28-57, 151, 155, 166, 250, 257.

[18] In the alternative, the Second Amended Complaint also has sufficient factual allegations in support of the "collection of unlawful debts" to satisfy this element of a RICO claim. Under RICO, an "unlawful debt" is defined as a debt that is

> (A) ... unenforceable under State or Federal law in whole or in part as to the principal or interest because of the laws relating to usury, and (B) which was incurred in connection with ... the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1962(6).

[19] Notably, an allegation of "collection of unlawful debts" requires only a single act of collection as a predicate for RICO liability. *H.J. Inc.*, 492 U.S. at 232; *United States v. Weiner*, 3 F.3d 17, 23-24 (1st Cir.1993).

Here, the Second Amended Complaint alleges multiple collections of unlawful debts in terms of the "sale-leaseback" arrangements that characterized the mortgage foreclosure rescue scam. Indeed, the Second Circuit held in a factually-similar case involving a "sale-leaseback" arrangement that this arrangement could be characterized as a equitable mortgage. *In re PCH Assocs.*, 940 F .2d 585 (2d Cir.1991). The Second Circuit held that

> mortgage financing and sale-leaseback structures are similar in several respects. In both transactions, the "borrower" retains possession of the property and is responsible for the maintenance and carrying costs thereof. A mortgage financing transaction necessarily entails the loaning of money to the mortgagor, and a sale-leaseback may be viewed as a loan of the fee owner's property to the lessee. The consideration paid in a mortgage financing transaction is denominated "interest,' and the consideration in a leasing transaction is called "rent." At the expiration of the term of the mortgage financing transaction, the mortgagee receives the balance of the funds loaned to the mortgagor; at the expiration of the lease term, the lessor receives possession of the real property which had been leased. A lessor under a true lease ... and a mortgagee ... are both accorded recourse to the subject property (among other remedies) for satisfaction of the obligations owing to them.

Id. (citing L. Cherkis, Collier *Real Estate Transactions and the Bankruptcy Code* ¶ 2.02[2], at 2-35 (1990)).

Similarly, Maryland law provides that

> every deed which by any other writing appears to have been intended only as security for payment for an indebtedness or performance of an obligation, though expressed as an absolute grant is considered

> a mortgage. The person for whose benefit the deed is made may not have any benefit or advantage from the recording of the deed, unless every other writing operating as a defeasance of it, or explanatory of its being intended to have the effect only of a mortgage, also is recorded in the same records at the same time.

Md.Code Ann., Real Prop. § 7-101(a). The Court of Appeals of Maryland has held that a scheme in which the transfer of title to prevent foreclosure that permitted the seller to continue to occupy the property in exchange for monthly "rent" payments to the purchaser was a mortgage, not an absolute sale, under Maryland law. *Thomas v. Klemm*, 185 Md. 136, 140-41, 43 A.2d 193 (1945). The court there emphasized that

> [t]he doctrine is firmly established that a conveyance, although purporting to be an absolute sale, and without any accompanying written defeasance, contract of repurchase, or other agreement, may be treated in equity as a mortgage as between the original parties and against all persons deriving title from the grantee who are not bona fide purchasers for value and without notice, if it is shown to have been intended merely as security for an existing debt or a contemporaneous loan.

Id. at 139, 43 A.2d 193.

Here, the Court similarly finds that the sale-leaseback provision constitutes a mortgage (loan) under Maryland law such that the allegedly high interest rates charged by Defendants constitute the collection of an "unlawful debt" under Maryland law because the loans made to the named plaintiffs and other class members are alleged to be in excess of twice the usury limit in Maryland and plaintiffs were required to repay these loans at the end of one year or they would be evicted from their homes as their equitable mortgage would be foreclosed. *See, e.g.* Second Am. Compl. ¶¶ 102, 133, and 230.

3. Reinvestment of Income in the Enterprise

[20] Another common element of a RICO claim is that the plaintiff must allege that the defendants received income from their pattern of racketeering activity and that they then used or invested this income in an enterprise. *Busby*, 896 F.2d at 837. A defendant may be liable if he committed the act directly, but also if he "aids, abets, counsels, commands, induces or procures its commission" or "willfully causes an act to be done.' 18 U.S.C. § 2. The offender who commits the racketeering activity needs not be different from the enterprise in which the proceeds of that activity are invested and may be identical. *Busby*, 896 F.2d at 841.

[21] Here, the Second Amended Complaint sufficiently alleges that both Chaudhry and Farahpour received income from their involvement in the pattern of racketeering (or their collection of unlawful debts). The Second Amended Complaint alleges that, due to its association with other RICO defendants, Sussex Title received "a large volume of referrals" and that it then charged "excessive fees," which benefitted both Chaudhry and Farahpour in addition to the commissions they received. Second Am. Compl. ¶¶ 77(c), 226, 240. The Second Amended Complaint alleges that Chaudhry and Farahpour reinvested these funds into Sussex and channeled fees to MMS and F & F, which were then reinvested in the mortgage foreclosure rescue scam, which then resulted in additional referrals to Sussex, Chaudhry, and Farahpour. Second Am. Compl. ¶¶ 68, 213, 226-27, 243, 283. In particular, these fees were channeled in the Simon and Proctor families' transactions such the proceeds from those settlement transactions were laundered to make the disbursements to MMS and other Defendants appear legitimate when, in fact, those disbursements were illegal and for different parties than those represented on the settlement documents which permitted MMS and other Defendants to evade taxes and continue the scheme undetected. Second Am. Compl. ¶¶ 96, 102, 132. Moreover, Chaudhry and Farahpour were paid their income from Sussex as a result of these transactions. Second Am. Compl. ¶¶ 1, 10, 16, 29.

Therefore, the Court finds that the Second Amended Complaint has stated a claim for this element of a RICO violation.

4. Conspiracy

[22] RICO also requires that the plaintiff allege and later prove that the defendants knew of the RICO violations of the enterprise and agreed to facilitate those activities. 18 U.S.C. § 1962(d). Like other conspiracies, a defendant who agrees to do something

illegal and opts into or participates in a conspiracy is liable for the acts of his co-conspirators even if the defendant did not agree to do or conspire with respect to a particular act.

[23] Here, the Second Amended Complaint alleges that both Chaudhry and Farahpour were aware of the issues surrounding the propriety and legitimacy of the transactions that MMS was engaging in (which was before the transactions involving the Proctor family, other named Plaintiffs, and other class members) and that they were aware of the activities of their employee and subordinate Ballesteros in terms of the settlements he was conducting. Second Am. Compl. ¶¶ 77, 78, 90-92, 96, 263. The Second Amended Complaint further alleges that the RICO defendants, including Chaudhry and Farahpour, "associated together for a common purpose of engaging in a course of conduct, which was to engage in a scheme to strip equity, and that all of them "were aware of each other's existence as part of the scheme to defraud," and that Chaudhry and Farahpour joined the scheme to "generate a large volume of referrals" for their settlement business from the other RICO defendants. Second Am. Compl. ¶¶ 210, 212, 245-46.

The Second Amended Complaint alleges that both Chaudhry and Farahpour agreed to facilitate the RICO violations of the other defendants by supervising or making disbursements themselves that contradicted the disbursement schedule on the HUD-1 statements, which permitted the other RICO defendants to evade taxes on (and detection) the funds channeled to them from those settlements. Second Am. Compl. ¶¶ 97-98, 102, 105-06, 125-26, 210, 212-13, 218. The Second Amended Complaint also alleges that Chaudhry falsely informed Maryland Department of Labor Licensing and Regulation investigators that he had never audited Ballesteros's work or was aware that funds were being disbursed that were not in accordance with HUD-1 settlement statements or that Sussex had closed multiple repeat transactions in which the same straw purchasers were involved. Second Am. Compl. ¶¶ 66-68, 78, 79. Moreover, Chaudhry is alleged to have stated that Sussex and MMS had a business referral relationship and that he had meetings with **Joy Jackson** about that business relationship. Second Am. Compl. ¶ 78.

Accordingly, the Court finds that the Second Amended Complaint has adequately pleaded the element of a conspiracy under RICO.

5. Injuries to Plaintiffs

[24] Chaudhry and Farahpour contend that Plaintiffs have not properly alleged that they have suffered injury to their business or property as a result of the alleged predicate RICO activity by them. They contend that intervening factors have broken the chain of proximate causation such that they should not be held liable for the Plaintiffs' injuries. Specifically, they contend that MMS's solicitation of the Plaintiffs caused the injuries rather than their actions at settlement. Moreover, they contend that Sussex's role in wiring the equity did not implicate either of them.

As noted earlier, this factual issue is best resolved at the summary judgment stage or at trial by the trier of fact. In any event, the Second Amended Complaint alleges that the Plaintiffs were charged fees that should not have been charged and that they "had their equity rich homes stolen from them for illegal services by the enterprises." Second Am. Compl. ¶¶ 208, 258, 265, 266, 274, 291, 303, 323.

Plaintiffs have met their burden under the liberal notice pleading standard of Rule 8(a)(2) of alleging their injuries in terms of the loss of their property and the resultant damage to their finances for compensatory damages.

6. Conclusion

[25] Given that the civil penalties available under RICO were enacted with the "explicit policy" that they be "liberally interpreted," *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838 (4th Cir.1990), Plaintiffs have satisfied the heightened particularity requirements for Rule 9(b) with regard to the predicate acts of mail and wire fraud and have satisfied that standard for the remaining RICO elements and *a fortiori*, the more lenient "notice pleading" standard under Rule 8(a)(2).

B. Count IV: RESPA

Chaudhry and Farahpour contend that the Second Amended Complaint fails to state a claim against them under RESPA because they argue that: (1) the Proc-

tors' RESPA claim is time-barred and the Second Amended Complaint did not plead sufficient facts to trigger the application of the doctrine of equitable tolling; (2) Chaudhry's participation in similar transactions with the other defendants (MMS, F & F, etc) over a period of time does not support the inference that he was on notice that the transactions were referred pursuant to an agreement or understanding; (3) the "vast discrepancy" in the amount of money Chaudhry earned as a result of the scheme as compared to what MMS earned undermines a RESPA claim against him; and (4) there are no facts supporting the conclusion that they were affiliates or partners of the other named Defendants in the case such that a RESPA disclosure was required.

RESPA sought to provide consumers with a better understanding of the home purchase and settlement process, and to reduce, when possible, "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601. RESPA prohibits certain business referrals and splitting of charges. In particular, RESPA provides that

(a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) No person shall give and no person shall accept any portion, split or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(a)-(b).

A "settlement service" includes any service that is provided in connection with a real estate settlement. 12 U.S.C. § 2602(3).

A RESPA claim brought by a private litigant must be brought within 1 year from the date of the occurrence of the violation. 12 U.S.C. § 2614. It is undisputed that the Proctors' settlement with Sussex occurred on January 24, 2006, but that they did not bring their case until July 24, 2007, which is outside of the one-year statute of limitations.

[26][27] As a threshold matter, the Court must determine whether equitable tolling applies. The doctrine of equitable tolling prevents a defendant from "concealing a fraud, or ... committing a fraud in a manner that it concealed itself until the defendant could plead the statute of limitations to protect it." *Mullinax v. Radian Guar., Inc.*, 311 F.Supp.2d 474, 487 (M.D.N.C.2004) (quoting *Supermarket of Marlington, Inc. v. Meadow Gold Diaries, Inc.*, 71 F.3d 119 (4th Cir.1995)). Thus, "when the fraud has been concealed or is of such a character as to conceal itself, the plaintiff is not negligent or guilty of laches, the limitations period does not begin to run until the plaintiff discovers the fraud." *Id.*

[28] The Second Amended Complaint alleges that because the Defendants concealed the true nature of their scheme through the use of inaccurate HUD-1 statements, representations, and other settlement and loan documents, Plaintiffs and other class members were prevented from discovering or filing their claims. Second Am. Compl. ¶ 170. Indeed, the Second Amended Complaint alleges that this scheme was so thorough and the transactional paperwork so voluminous and complex (given the disbursements to the other defendants that occurred contrary to the information stated in the HUD-1 statements) that Plaintiffs and other class members "did not and could not reasonably learn from their transactions' correspondence the fact that the Foreclosure Reversal Program was a sham and not operating according to law." Second Am. Compl. ¶ 196.

[29] The argument by Chaudhry and Farahpour misses the mark as it concerns equitable *estoppel* more so than equitable *tolling*. The Court will adopt similar reasoning as that employed by the United States District Court for the Western District of Washington in *Blaylock v. First Am. Title Ins. Co.*, 504 F.Supp.2d 1091, 1108 (W.D.Wash.2007). The *Blaylock* court explained that though the defendants argued that equitable tolling "turned on a plaintiff's ability to show that the defendant fraudulently concealed the actions that form the basis of the plaintiff's claim ... and [they] must allege some fraud on [d]efendants' part," defendants were in fact addressing the doctrine of equitable estoppel. *Id.* The *Blaylock* court noted that the doctrine of equitable tolling "focuses on excusable

delay by the plaintiff," "inquires whether 'a reasonable plaintiff would ... have known of the existence of a possible claim within the limitations period," and *does not* depend on any wrongful conduct by the defendant. *Id.* (internal citations omitted).

Here, the Court therefore finds that the doctrine of equitable tolling does not require proof (or allegations pleaded with particularity) of any wrongful conduct by the defendants. Applying the doctrine of equitable tolling, the Court finds that the doctrine should apply [FN7] because, as the Second Amended Complaint alleges, the disbursements were not made in accordance with the HUD-1 statements and the documents were not recorded in the manner in which the Plaintiffs were told, such that the Plaintiffs were reasonably unaware that the disbursements, loans, and title recording were different than what was represented, which supports a finding that their delay of over a year in bringing their RESPA claims is reasonable. Moreover, given the procedural posture of the litigation at this early motion to dismiss stage, the principles of equitable tolling should apply.

[30] Turning to the merits of the RESPA claims, the Second Amended Complaint asserts a claim under subsection (a) of § 2607 alleging that Chaudhry and Farahpour were affiliated with MMS (as noted in Orig. Compl. Ex. 21, which demonstrated that Sussex was the "required settlement services provider" for title insurance and that MMS had a "relationship" with it) in terms of the settlement transactions involving the plaintiffs and other class members. It also alleges that they received valuable referral business and resulting commissions and income as a result of their participation in this scheme to funnel the equity in those properties to the other defendants. Second Am. Compl. ¶¶ 282, 288.

Furthermore, the Second Amended Complaint states a claim under subsection (b) of § 2607 because Chaudhry and Farahpour are alleged to have split the fees and charges they received as a result of these real estate settlement transactions among themselves (and their employee Ballesteros) in addition to the other Defendants. Second Am. Compl. ¶¶ 77, 224, 249, 280.

[31] Finally, the RESPA qualified defense for "an affiliated business arrangement" does not apply in this case because the Second Amended Complaint alleges that Chaudhry and Farahpour were not "bona fide providers of settlement services" due to the inaccuracies and misrepresentations in the HUD-1 statements and other settlement documents. *See* 12 U.S.C. § 2607(c)(4); *see also Benway v. Resource Real Estate Servs., LLC*, 239 F.R.D. 419, 423 (D.Md.2006) (citations omitted).

Accordingly, the Court finds that the Second Amended Complaint states a claim under both subsections of RESPA.

C. Count V: PHIFA

[32] Chaudhry and Farahpour contend that Plaintiffs have failed to state a claim under PHIFA because their complaint alleges that other individuals acted as the foreclosure consultants (rather than Chaudhry and Farahpour themselves) and that Chaudhry and Farahpour did not know about the foreclosure contracts.

PHIFA applies to "foreclosure consultants, services, and purchasers." Md.Code. Ann., Real Property § 7-301(b), (d), (e). PHIFA requires that "foreclosure consultants" and "foreclosure consulting services" provide a "foreclosure consulting contract" to the homeowner in foreclosure; this contract must fully disclose the exact nature of the foreclosure and the consulting services to be provided. *Id.* § 7-306(a); *Johnson v. Wheeler*, 492 F.Supp.2d 492, 503 (D.Md.2007).

A "foreclosure consultant" is defined as a person who:

(1) Solicits or contacts a homeowner in writing, in person, or through any electronic or telecommunications medium and directly or indirectly makes a representation or offer to perform any service that the person represents will:

(i) Stop, enjoin, delay, void, set aside, annul, stay, or postpone a foreclosure sale;

(ii) Obtain forbearance from any servicer, beneficiary or mortgagee;

(iii) Assist the homeowner to exercise a right of reinstatement provided in the loan documents or to refinance a loan that is in foreclosure and for

which notice of foreclosure proceedings has been published;

(iv) Obtain an extension of the period within which the homeowner may reinstate the homeowner's obligation or extend the deadline to object to a ratification;

(v) Obtain a waiver of an acceleration clause contained in any promissory note or contract secured by a mortgage on a residence in default or contained in the mortgage;

(iv) Assist the homeowner to obtain a loan or advance of funds;

(vii) Avoid or ameliorate the impairment of the homeowner's credit resulting from the filing of an order to docket or a petition to foreclose or the conduct of a foreclosure sale;

(viii) Save the homeowner's residence from foreclosure;

(ix) Purchase or obtain an option to purchase the homeowner's residence within 20 days of an advertised or docketed foreclosure sale; or

(x) Arrange for the homeowner to become a lessee or renter entitled to continue to reside in the homeowner's residence after a sale or transfer; or

(2) Systematically contacts owners of residences in default to offer foreclosure consulting services.

Id. § 7-301(c)(1).

A "foreclosure consultant" may not induce, or attempt to induce, any homeowner to enter into a foreclosure consulting contract that does not comply in all respects with the law. Md.Code Ann., Real Property § 7-307. Though PHIFA does have an exception for licensed settlement agents, the exception only applies to those title insurance producers who are "acting in accordance with the person's license." *Id.* Thus, those settlement agents who are "performing services that are *not* in accordance with their license are not entitled to an exemption from PHIFA." *Massey v. Lewis*, No. AMD-08-261, (D.Md. Feb. 24, 2009) (Davis, J .) Mem. Op. & Order at 5.

In a factually similar case in the summary judgment context, Judge André Davis of this Court found that the settlement agent who prepared the fraudulent HUD-1 form and that agent's settlement company were "foreclosure consultants" under the PHIFA. *Id.* The foreclosure rescue scam in that case also involved straw buyers who would help distressed homeowners secure refinanced lower-rate mortgages and permit those homeowners to remain in their homes as "tenants" who would then send "rent" checks to the straw buyer to cover the purported new mortgage payment, when in actuality that money was being siphoned off to the defendants. *Id.* at 1-3. The HUD-1 forms and other settlement and title documents had misrepresented to whom payments and fees were made. *Id.* The plaintiffs in that case did not receive the required "Notice of Rescission" from the settlement agent nor did the contracts include any reference to the homeowners' right to rescind. *Id.* at 3.

Judge Davis, who cited this Court's earlier *Proctor* opinion multiple times, found that the settlement agent and the settlement company were subject to PHIFA because they "performed services beyond the scope of their license when they misappropriated funds" from the settlement as demonstrated by the discrepancy between what the HUD-1 form provided would be paid to the Plaintiffs ($1,365.50 more than what was paid) and what was actually paid to the Plaintiffs. *Id.* at 5. Judge Davis then found that the settlement agent and the settlement company were "foreclosure consultants" because they provided the settlement services for a foreclosure reconveyance, in which they arranged for the plaintiff to reside in her home as a tenant and they helped to create documentation that "clogged" the equity of redemption in plaintiff's home. *Id.* at 6.

In so finding, Judge Davis explicitly addressed and rejected the defendants' contention that they had no knowledge that the property transfer was a "foreclosure reconveyance." Reviewing the factual record before him on summary judgment, Judge Davis found that the defendants had knowledge because they ordered a check of the title, asked plaintiff to provide a "new" address for the HUD-1, and they never gave plaintiffs any of the documents they signed. *Id.* at 7. Judge Davis then granted summary judgment in the

plaintiff's favor. *Id.* at 8.

The Court will apply a similar analysis here. The Second Amended Complaint alleges sufficient facts in support of the allegation that both Chaudhry and Farahpour were "foreclosure consultants" under PHIFA and thus subject to its requirements of providing homeowners with a "foreclosure contract." Specifically, the Second Amended Complaint alleges that they solicited homeowners indirectly (at the very least) and made representations that resulted in the clogging of the equity of redemption in the plaintiffs' properties. Both Chaudhry and Farahpour, similar to the settlement agent, provided settlement services for a foreclosure reconveyance scheme, in which they received many valuable referrals, and they helped created documentation (i.e. either by preparing themselves or supervising Ballesteros's preparation of the fraudulent HUD-1s that siphoned off the equity from the named Plaintiffs' homes). Sussex Title was under the management and control of Chaudhry and Farahpour, and Sussex Title recorded encumbrances against the Proctor property before the right to rescind had expired. Second Am. Compl. ¶¶ 16-17, 23, 62 104, 105, 298(b)-(c). These encumbrances were recorded along with a check for fees signed by Chaudhry. Second Am. Compl. ¶ 104. Furthermore, the Second Amended Complaint alleges that Farahpour was aware of problems with MMS, which was involved in the Plaintiffs' transactions, in November 2005, which was before the Proctor Family transaction, yet did not advise the Proctors or the other class members or take any steps to avoid or correct the problem. Second Am. Compl. ¶ 77(e). Moreover, Sussex Title ordered a title abstract that demonstrated that the Proctor property was in foreclosure *before* the settlement. Second Am. Compl. ¶¶ 98-99.

The Court finds that the Plaintiffs have stated a claim under PHIFA because the Second Amended Complaint has alleged that the defendants had knowledge of the status of the properties they were settling (i.e. that they were in foreclosure), Chaudhry and Farahpour were aware of the mortgage foreclosure rescue scam, they then falsified HUD-1 statements to "clog" the equity of redemption in plaintiffs' properties (i.e. by recording the encumbrances against their properties before the time for rescission had expired), and by never giving plaintiffs any of the required documents regarding their right to rescind.

D. Count VI: Gross Negligence

[33] Finally, Chaudhry and Farahpour contend that Plaintiffs have failed to state a claim against them for gross negligence because they have failed to allege the basis of the tort duties towards them.

[34] Under Maryland law, a gross negligence claim requires a plaintiff to prove that the defendant intentionally failed to perform a duty in reckless disregard of its consequences to the life or property of another. *See* *Marriott Corp. v. Chesapeake & Potomac Tel. Co. of Maryland*, 124 Md.App. 463, 478, 723 A.2d 454 (1998).

A review of the Second Amended Complaint demonstrates that Plaintiffs have pleaded multiple duties that they contend Chaudhry and Farahpour owed them. The vast majority of these allegations appear for the first time in the Second Amended Complaint in an apparent attempt to remedy the lack of specificity of the FAC, which the Court identified. The duties that Chaudhry and Farahpour are alleged to have breached are as follows:

- A duty to review the settlement and title documents that contained inconsistencies that should have put Chaudhry on notice on the illegal nature of the transactions. Second Am. Compl. ¶ 45.

- A duty stemming from their status as the owner/supervisor of a Maryland licensed title company to not engage in illegal settlement transactions. Second Am. Compl. ¶ 152.

- A duty to exercise due diligence to determine that the transactions of Named Plaintiffs and the other members of the Class describe herein were not illegal in violation of the PHIFA (in the case of the Proctors and Maryland Subclass members), in violation of other law, or otherwise irregular. Second Am. Compl. ¶ 318.

- Duties to inquire into the nature of the transactions of Plaintiffs and the other members of the Class due to the facts that (a) the properties of certain Named Plaintiffs Proctors and other Maryland Subclass Members were residences in foreclosure under the

PHIFA, (b) Ms. Jackson, Ms. McCall, Mr. Fordham, Metropolitan and F & F, were repeatedly involved in transactions involving residences in foreclosure, (c) Ms. Jackson, Ms. McCall, Mr. Fordham, Metropolitan and F & F were repeatedly using their straw purchasers to obtain interests in the properties of Plaintiffs and other members of the Class, and (d) the disbursements of funds shown on the HUD-1 did not comport with reality and Chaudhry and Farahpour had knowledge of those facts, or should have known of those facts, or willfully blinded themselves to those facts. Second Am. Compl. ¶ 318.

- A duty to conduct due diligence inquiries into the transactions of the Plaintiffs and other class members to determine the legitimacy of the transactions, particularly the accuracy of the HUD-1 forms that Chaudhry and Farahpour prepared or which were prepared under the supervision of Chaudhry and Farahpour. Second Am. Compl. ¶ 319-20.

- A duty to flag the transactions of the Plaintiffs and other class members as violative of PHIFA when applicable due to their knowledge that the residences of certain named Plaintiffs and other class members were in foreclosure. Second Am. Compl. ¶ 319-20.

- A duty to refuse to settle the transactions of the Plaintiffs and other class members when they had actual and/or constructive notice of the irregularities and illegalities in the transaction due to the HUD-1 and other settlement and title documents. Second Am. Compl. ¶ 319-20.

- A duty to oversee Ballesteros, who was their employee working under their supervision and receiving payment for tasks he performed for their benefit and the benefit of their company. Second Am. Compl. ¶ 324.

- A duty to not employ Ballesteros after becoming aware that he was engaged in transactions where he took unearned fees, provided false information in connection with loans, failed to notice that persons were making false statements in connection with loan applications and other documents to obtain loans. Second Am. Compl. ¶ 324.

- A statutory duty not to "convert or misappropriate money received or held in escrow" under Maryland Insurance Article § 10-121(a). Pls.' Opp. at 44.

[35] A tort claim for negligence, including gross negligence, is subject to the general pleading standard of Rule 8(a)(2), not the heightened "plead with particularity" standard associated with fraud allegations required under Rule 9(b). *See Baltimore County*, 238 Fed.Appx. at 921 (holding that the "notice pleading" standard of Fed.R.Civ.P. 8 applies to allegations of non-fraudulent conduct and thus plaintiff's claim of negligent misrepresentation did not need to be pleaded with particularity under Fed.R.Civ.P. 9(b)). While "bald and conclusory allegations" will not suffice to state a claim for gross negligence, Plaintiffs have provided the requisite degree of specificity under a "notice pleading" standard because Plaintiffs have outlined numerous irregularities in the settlement and title documents in addition to the manner in which money was transferred among the parties with an explanation of each Defendant's roles in the scheme. Ballesteros is alleged to have signed and/or prepared these fraudulent documents under the direction and supervision of Chaudhry and Farahpour, who are alleged to have, as a result of their expertise, licenses, and position, violated their duties to the Plaintiffs by permitting these fraudulent documents to be used in conjunction with real estate settlements involving the Plaintiffs.

[36] The Court finds that Plaintiffs have pleaded their gross negligence claim with the requisite degree of specificity under Rule 8(a)(2).[FN8]

IV. Plaintiffs' Motion to Dismiss Counterclaims Filed by Alexander Chaudhry and Ali Farahpour [Paper No. 171]

Chaudhry and Farahpour filed counterclaims against the Plaintiffs for fraud, fraudulent concealment, negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy to commit mortgage fraud. These counterclaims were filed on January 22, 2009, which is 548 days after this litigation commenced. [Paper No. 171]. Plaintiffs have moved to dismiss or strike the counterclaims on the basis that they are barred by the doctrines of res judicata and/or collateral estoppel.

[37][38] The doctrine of res judicata, which is also known as claim preclusion, is that a prior judgment bars the re-litigation of claims that were raised or could have been raised in the prior litigation between the same parties. *The* Pittston Co. v. United States, 199 F.3d 694, 704 (4th Cir.1999). Under Maryland law, res judicata requires proof of three elements: "(1) the parties in the present litigation [must] be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction." *Colandrea v. Wilde Lake Cmty. Ass'n*, 361 Md. 371, 389, 761 A.2d 899, 908 (2000) (quoting *deLeon v. Slear*, 328 Md. 569, 580, 616 A.2d 380, 385 (1992)).

[39] Here, all three elements are present and the counterclaims of Chaudhry and Farahpour are barred as a matter of law. First, Chaudhry and Farahpour filed a lawsuit against the Proctors' attorneys arising from the transactions that form the basis of this litigation in the Circuit Court for Montgomery County on June 18, 2008 for the same or substantially similar claims they now assert against the Plaintiffs. Though the Plaintiffs were technically not parties to the claims in that state court action, Maryland courts have declined to require that the party asserting res judicata be a party in the first suit where, as here, the party against whom res judicata is asserted, "deliberately select[ed] his forum and there unsuccessfully present[ed] his proofs." Here, Chaudhry and Farahpour received a full and fair opportunity in state court to present their claims regarding the propriety of the Plaintiffs' actions in this Court (before their voluntary dismissal with prejudice), but chose not to join the Plaintiffs as defendants in their state court action. Therefore, the Court concludes that, for the purposes of res judicata, the Plaintiffs are in privity with their attorneys in the Montgomery County case. *See Jones v. Fisher Law Group, PLLC*, 334 F.Supp.2d 847, 851 (D.Md.2004) (Titus, J.) (holding that counsel was in privity with the defendants in two consolidated state cases even though counsel was not a party in the state cases because counsel had acted in the capacity of counsel for the defendants in those cases and the plaintiff in that state case chose not to join counsel).

[40][41] Moreover, Chaudhry and Farahpour are attempting to relitigate the same claims here as in their state court case. The proper inquiry is whether the claims asserted in this action "could have been litigated in the first suit." *Id.* In the state action, Chaudhry and Farahpour sought to recover damages to their business and reputation, *inter alia*, resulting from the litigation of this case and the claims asserted by the Plaintiffs against them. These are the identical damages sought here as the result of the same conduct. "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19) the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *deLeon*, 616 A.2d at 380 (quoting Restatement (Second) of Judgments § 24 (1982)). Such an inquiry requires the Court to consider whether the facts of each case "are related in time, space, origin or motivation." *Id.* at 590, 616 A.2d 380. Here, the claims of Chaudhry and Farahpour in both the federal and state courts arose out of the same transaction: their professional involvement in the settlement of the Plaintiffs' properties. Therefore, under the transaction test, the second element of res judicata has been met.

[42] Finally, there was a valid final judgment on the merits. A dismissal with prejudice is a final adjudication of the matters asserted. Md. Rule 2-506; *see also Claiborne v. Willis*, 702 A.2d 292, 297 (1997) ("a voluntary dismissal has the same res judicata effect as a final adjudication on the merits favorable to the defendant.") (citation omitted). In the state case, Chaudhry and Farahpour, through the same counsel who is representing them in this matter, signed and filed a "Motion to Enter Voluntary Dismissal" that requested the Circuit Court for Montgomery County to dismiss that state litigation with prejudice. *See* [Paper No. 155]. Thus, the Maryland court decision was a final judgment.

Therefore, because the counterclaims of Chaudhry and Farahpour are barred by res judicata, the Court will grant Plaintiffs' Motion to Dismiss Counterclaims.

CONCLUSION

For the foregoing reasons, the Court concludes that the Second Amended Complaint states a claim while the Counterclaims filed by Chaudhry and Farahpour do

not the case will now be permitted to proceed as a class action.

FN1. *Conley* stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claims which would entitle him to relief."

FN2. Allegations concerning the Proctor Family can be located at ¶¶ 81-110 of the Second Amended Complaint, the Simon Family at ¶¶ 111-156, and allegations concerning the other properties at issue can be located at ¶¶ 28-57. The transactions involved the properties located at 8288 Dellwood, 9800 Huxley, 9603 Huxley Drive, 332 Carmody, 3443 Princess Graces Court, 9109 Doris Drive, 1835 Knoll, 8104 Ashford, 6048 Duckeys Run Road, 7995 Monarch, 1508 Robert Lewis Avenue, 5701 Butterfield Drive, 11567 Dunloring, 1411 Estelle Drive, 10700 Begonia Lane, 7533 Greenleaf Road, 78575 King Arthur Court, 4801 Fable Road, 17111 Livingston Road, 4209 56th Avenue, and 7602 Alloway Lane. Notably, these allegations also contain exact monetary figures, dates, times, and descriptions of the acts undertaken by the Defendants. Chaudhry and Farahpour are alleged to have supervised the fraudulent transactions, which included the preparation of fraudulent HUD-1 statements and wiring funds to parties other than those provided for in the HUD-1 statements. Second Am. Compl. ¶¶ 26, 28-57, 60, 77(e), 99, 138, 147, 152, 154, 178, 197-98, 212-13, 215, 220, 225, 228, 238, 245, 248-49, 255-56, 264(c), 272-73, 283-84.

FN3. While the PHIFA and RESPA claims are not fraud claims in and of themselves, the Second Amended Complaint contains references to the "scam" or "scheme to defraud," and acts of Chaudhry and Farahpour that "deceived," and "fraudulent" the Plaintiffs that could be construed as averring fraud. *See* Second Am. Compl. ¶¶ 5, 143, 173, 179, 212, 213, 216, 224, 229, 237, 250, 263, and 293. In *Hershey v. MNC Fin., Inc.*, 774 F.Supp. 367, 375-76 (D.Md.1991), this Court held that Rule 9(b) applies to "all averments of fraud" and that "its application should depend on the substance on a plaintiff's allegations, not upon the guise in which he portrays them." Assuming without deciding that the heightened particularity of Rule 9(b) applies, the Court finds that the Plaintiffs have also satisfied their burden of sufficiently pleading the merits of their non-RICO claims in the Second Amended Complaint because the Second Amended Complaint includes dates, times, and specific details for the predicate events. *A fortiori*, because Plaintiffs meet the heightened burden under Rule 9(b), they have undoubtedly met the lower threshold of "notice pleading" under Rule 8(a)(2).

FN4. Subsection (a) "is aimed at the use of racketeering proceeds to infiltrate an enterprise." *Benard v. Hoff*, 727 F.Supp. 211, 214 (D.Md.1989). The elements of subsection (a) claim are: (1) a receipt of income from a pattern of racketeering activity, and (2) use or investment of this income in an enterprise. 18 U.S.C. § 1962(a); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 837 (4th Cir .1990).

FN5. Subsection (c) "is aimed at the use of an enterprise to carry out racketeering activities." *Benard*, 727 F.Supp. at 214. The elements of a subsection (b) claim are: (1) conduct of or participation in (2) any enterprise (3) through a pattern (4) of racketeering activity. 18 U.S.C. § 1962(c); *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

FN6. Subsection (d) is aimed at conspiracies to violate subsections (a) through (c) of RICO. 18 U.S.C. § 1962(d). To allege a subsection (d) claim, plaintiff must allege that "each defendant agreed that another coconspirator would commit two or more acts of racketeering." *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.1990).

FN7. Other federal courts have applied the doctrine of equitable tolling to RESPA claims. *See, e.g.*, *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157,

1166-67 (7th Cir.1997); *Carr v. Home Tech Co., Inc.*, 2007 WL 67837, at *8 (W.D.Tenn.2007), *Mullinax v. Radian Guar. Inc.*, 199 F.Supp.2d 311, 328 (M.D.N.C.2002); *Pedraza v. United Guar. Corp.*, 114 F.Supp.2d 1347, 1353 (S.D.Ga.2000). *But see* *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037 (D.C.Cir.1986).

FN8. Chaudhry and Farahpour contend that a higher degree of specificity is required to be pleaded for a request for punitive damages for a gross negligence claim under Maryland law. *See* *Scott v. Jenkins*, 345 Md. 21, 690 A.2d 1000, 1008 (Md.1997). While that may be true for such a claim brought in state court, because this suit is in federal court, federal rules of civil procedure apply even when the substance of the claim is based upon state law. *See* *Hanna v. Plumer*, 380 U.S. 460, 465, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) (holding that federal courts sitting in diversity must apply state substantive law and federal procedural law).

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