UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

BRIAN T. SMITH AND
JONATHAN C. CALIANOS,

Plaintiffs,

CASE NO. 2:11-cv-00676-JES-DNF

vs.

BANK OF AMERICA,
N.A. and MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW

Defendants Bank of America, N.A., (hereinafter, "BANA"), and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively, "Defendants"), by and through counsel, submit the following Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. Defendants assert that there is no genuine issue as to any material fact, and that they are entitled to judgment as a matter of law for the following reasons as set forth more fully herein.

1. BANA is entitled to summary judgment on Plaintiffs Brian Smith and Jonathan C. Calianos'ss (collectively, "Plaintiffs") cause of action under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) ("Declaratory Judgment") and on BANA's Counterclaim for a declaration under the same statute because (i) there is no controversy with respect to the First Note and (ii) the indebtedness at issue has never been discharged.

2. BANA is entitled to summary judgment on Count II of Plaintiffs' cause of action under the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b) ("FCRA") because BANA conducted a timely investigation in response to Plaintiffs' credit disputes.

3. BANA is entitled to summary judgment on Plaintiffs' common law fraud claim because Plaintiffs fail to show (i) an actionable misrepresentation by either Defendant or (ii) any detrimental reliance on same.

4. Defendants are entitled to summary judgment on Plaintiffs' cause of action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) ("RICO") because Plaintiffs fail to show (i) a RICO enterprise or (ii) a single act of fraud.

5. Defendants are entitled to summary judgment on Plaintiffs' punitive damages claim under Fla. Stat. § 768.72 because Plaintiffs cannot show any conduct giving rise to a claim for punitive damages.

I. Introduction

Through this action, Brian Smith and Jonathan Calianos seek declaratory relief and damages because their loan servicer sought monthly mortgage payments on a mortgage loan that Plaintiffs admit that they have never paid off. Plaintiffs claim to "hold" the original note ("First Note") that was returned to them, and they deny executing a second note ("Superseding Note") in 2006, which BANA asserts was executed to replace the First Note and is now held by BANA and owned by Fannie Mae. Contorting state and federal law, Plaintiffs seek to avoid repaying funds which they used to purchase their property and, even more confoundingly, seek title to that property free and clear.

Fortunately, the law on this subject is not complicated. As a matter of law, it makes no difference whether the First Note was returned in error or whether Plaintiffs' signatures on the Superseding Note are authentic. Indeed, either the signatures on the Superseding Note are valid (and the First Note is cancelled) or the debt evidenced by the First Note is valid because it was never *intentionally* discharged. In either case, Plaintiffs are not entitled to declaratory judgment, BANA is entitled to a declaratory judgment as to the underlying debt, all credit reporting was accurate, and there has been no fraud.

In addition to confirming the validity of the debt owed to BANA, the Court must dismiss Plaintiffs' fraud claims, as well as the accompanying RICO claims against BANA and MERS. Neither the allegations contained within Plaintiffs' Complaint, nor the factual discovery generated during two years of litigation suggests any fraudulent activity. Instead, an admitted debt remains unpaid, while Defendants are required to continue defending Plaintiffs' frivolous claims.

II. Procedural Background

This lawsuit has been pending for nearly two years. Plaintiffs filed a Complaint on November 30, 2011, for claims related to a promissory note and mortgage (collectively, the "Loan") secured by a property located at 28111 Tamberine Court, Unit 1321, Bonita Springs, Lee County, Florida (the "Property"). Plaintiffs asserted that they now possess the First Note, indorsed in blank and stamped void, and that their debt was, therefore, cancelled. Plaintiffs asserted claims for (i) declaratory relief (Count I), (ii) RESPA violations (Count II), (iii) RICO violations (Count III), (iv) common law fraud (Count IV), (v) punitive damages (Count V); and (vi) unjust enrichment.

Defendants moved to dismiss Plaintiffs' Complaint on January 30, 2012. (D.E. 13). Plaintiffs filed their First Amended Complaint ("FAC") on or about February 21, 2012, which Defendants also sought to dismiss on March 6, 2012. (D.E. 17; D.E. 19). On December 19, 2012, this Court dismissed the FAC with leave to amend. (D.E. 51). Plaintiffs filed a Second Amended Complaint ("SAC") on January 9, 2013, adding Fannie Mae as a defendant to Plaintiffs' claim for declaratory judgment, and further adding a claim against BANA under the FCRA. (D.E. 53). On February 1, 2013, Defendants BANA and MERS moved to dismiss the SAC, and, on February 21, 2013, Fannie Mae joined their motion. (D.E. 66).

On August 13, 2013, the Court entered an Order on Defendants' Motion to Dismiss. (D.E. 81). In its decision, the Court dismissed Fannie Mae as a party and dismissed Plaintiffs' claims under RESPA and the FCRA without prejudice. (*Id*.) The Court denied Defendants' Motion to Dismiss on Plaintiffs' claims for declaratory judgment as to BANA, fraud as to BANA and violations of RICO as to BANA and MERS. (*Id.*) On September 30, 2013, Plaintiffs filed a Third Amended Complaint ("TAC"), revising their claim under the FCRA. (D.E. 98). As set

forth below, the undisputed material facts clearly establish that all of Plaintiffs' claims are unsupported by evidence. Therefore, there is no genuine issue of material fact that Defendants are entitled to summary judgment as a matter of law.

III. Undisputed Material Facts

The Loan Origination

On August 4, 2005, Plaintiffs obtained a home mortgage loan in the amount of $240,000 from MLD Mortgage, Inc. ("MLD") by executing a mortgage and promissory note. (D.E. 17, ¶¶ 2, 13). The Loan was secured by the Property. (*Id.*)

Post-Origination Transfers of the Loan

Shortly after closing, on September 14, 2005, MLD sold the Loan to Countrywide Home Loans, Inc. ("CHL"). (D.E. 44-1, BANA Exh. 1, CHL Aff. ¶ 4).[1] On September 22, 2005, CHL sold the Loan to Federal Home Loan Mortgage Corporation ("Freddie Mac"). (*Id.* at ¶ 5). On November 29, 2005, CHL repurchased the Loan from Freddie Mac. (*Id.* at ¶ 9). On November 10, 2006, CHL sold the Loan to Fannie Mae. (*Id.* at ¶ 15).

BANA, through its predecessors Countrywide Home Loans Servicing, LP, and BAC Home Loans Servicing, LP, has been the servicer on the Loan since September 2005. (D.E. 44-2, BANA Exh. 2, BANA Aff. ¶ 4).

On February 10, 2012, the mortgage lien on the Property was held by MERS. (D.E. 17, Exh. C; Exh. 2, ¶ 6.). However, on February 10, 2012, MERS assigned the mortgage to BANA. (D.E. 44-2, BANA Exh. 2, Exh. A).

[1] BANA's six original Exhibits in support of its initial motion for summary judgment were previously filed as document entries 44-1 through 44-6.

Corrections to the Promissory Note

On October 7, 2005, CHL notified MLD that the First Note needed to be corrected so that it could be certified for placement with Freddie Mac in accordance with applicable guidelines. (D.E. 44-1, ¶¶ 6-7). In essence, the guidelines required that the capacity in which the borrowers were signing be clearly stated below their signatures, as well as the date of any trust involved in the purchase. (*Id.*; *compare* D.E. 17, Exh. A *with* Exh. E). CHL engaged in extensive discussions with MLD and Plaintiff Calianos about the need to correct the First Note. (D.E. 44-1, ¶¶ 7-12). Plaintiff Calianos initially refused the request but subsequently consented after discussions with CHL. (*Id.*)

On or about April 11, 2006, CHL received a message from MLD informing CHL that the re-execution was completed, a corrected note (the "Superseding Note") was being forwarded to CHL, and MLD considered the matter resolved. (*Id.* ¶¶ 11-12 and Exh. B). On or about April 14, 2006, CHL received the Superseding Note from MLD, together with an allonge. (D.E. 44-1, ¶¶ 11-12). CHL immediately forwarded the Superseding Note to the document custodian. (*Id.* ¶ 13). The Loan was subsequently sold to Fannie Mae in November of 2006. (*Id.* ¶ 15).

Release and Current Status of the Notes

Plaintiffs do not remember the month and year that the First Note was returned to them, but Plaintiff Calianos believes it was in 2007. Before it was returned to Plaintiffs, the First Note was stamped "VOID." (D.E. 17, ¶ 20). Plaintiffs are in possession of the First Note, which was stamped "VOID" prior to any transfer. Fannie Mae is the current owner of the Loan and Superseding Note, which BANA is servicing. (D.E. 44-2, ¶ 5).

Plaintiff Calianos Disputes the Debt

On January 28, 2011, Plaintiff Calianos contacted BANA by phone asserting that he held the "original note" and that the debt was no longer valid. (D.E. 44-2, ¶ 7).[2] Plaintiff Calianos asserts that the First Note, rather than the Superseding Note, was provided in response to his inquiry. Nonetheless, Plaintiff Calianos acknowledges that *he neither believed nor relied on BANA's representations about holding the First Note*. (D.E. 17, ¶ 125).

Plaintiff Smith did not dispute the debt prior to filing suit. (D.E. 44-4, BANA Exh. 4, Smith Dep., p. 29:21-24).

Payments on the Debt and Credit Reporting

Plaintiffs remained current on the monthly payments owed under the Loan through November 2011. (D.E. 44-2, ¶ 8). However, Plaintiffs stopped making payments in November 2011 and made no other payment thereafter. (*Id.*, ¶ 9). On January 13, 2012, BANA reported to the major credit reporting agencies that Plaintiffs failed to make their December 2011 payment and were 30-days delinquent. (BANA Exh. 7, ¶ 4).

Regardless of any disputes over the First and Superseding Notes, BANA has maintained only one account for this Loan, with only one principal balance. (*Id.*, ¶ 10). All payments received from Plaintiffs have been credited to that account. (*Id.*) As of November 1, 2012, the unpaid principal balance on the Loan was $239,872.54. (*Id.*, ¶ 8). Plaintiffs have made no payments since November 2011.

Plaintiffs' Dispute their Signatures on the Superseding Note

Plaintiffs commenced this action on November 30, 2011. On January 20, 2012, counsel for Defendants provided Plaintiffs a copy of the Superseding Note. (D.E. 17, Exh. E). On

[2] Plaintiffs do not recall when they began disputing the debt. (BANA Exh. 8, Pls' Responses to FNMA's First Interrogatory Nos. 1-3.)

February 21, 2012, Plaintiffs amended their complaint to deny the authenticity of their signatures on the Superseding Note. (D.E. 17, ¶¶ 112-113). Plaintiffs have not asserted that they have repaid their loan obligation. (*See generally*, D.E. 17 and 98).

Plaintiffs Dispute the Credit Report

During the pendency of this action, Plaintiffs have disputed the accuracy of BANA's January 13, 2012, report through the major credit reporting agencies. BANA received six dispute notifications. (BANA Exh. 7). BANA conducted a timely investigation with respect to each dispute. (*Id.*) With respect to each dispute, BANA reviewed its loan servicing system and verified the account information. (*Id.*) BANA reported the results of its investigation through the E-OSCAR system. (*Id.*) BANA did not make corrections to its reporting because Plaintiffs had stopped paying on the Loan.

MEMORANDUM OF LAW

I. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). This Court can appropriately grant summary judgment if the record evidence shows that there is no genuine issue as to any material fact. *Id*. Further, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," this Court should grant summary judgment to the movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In addition, the non-moving party may not "rest upon the mere allegations and denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 250. Overall, if the non-moving party insufficiently presents proof concerning an essential element to its case, such "failure . . . necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment." *Celotex*, 477 U.S. at 323.

II. Plaintiffs' Declaratory Judgment Claim Fails Because the Obligations Under the First Note Were Not Discharged

In their Declaratory Judgment claim, Plaintiffs request that this Court declare that (i) the First Note in their possession is void and ineffective, (ii) that the Superseding Note is "forged," and (iii) that BANA is required to release the lien. (D.E. 98, ¶ 52). Plaintiffs further seek to have the Court order a refund of all the payments they made under the note, with interest. (*Id.*, Wherefore Clause, Count I). Generally, Plaintiffs assert that BANA has no legal right to collect money from Plaintiffs because the First Note was returned to them.

There is no dispute, however, that Plaintiffs obtained a loan and signed a promissory note and mortgage in connection with the Loan. Thus, the first question in this case is whether the return or surrender of the First Note effects a discharge of that debt. Because it does not, the debt remains valid and it does not matter whether the Superseding Note was properly executed.

A. The evidence unmistakably shows that Plaintiffs' obligations were not intentionally discharged.

Significantly, Plaintiffs *cannot* prevail under their theory - even if they persuade the trier of fact that they did not execute the Superseding Note - because there is *no* evidence that CHL or anyone else *intended* to discharge their obligation. Rather, *all of the evidence in this case*, demonstrates that the debt obligation *has not been paid* and that CHL stamped void and surrendered the First Note because CHL received the Superseding Note from MLD. Numerous decisions hold that *no discharge results under these circumstances.*

Under Fla. Stat. § 673.6041(1)(a), a person entitled to enforce an instrument may discharge the obligation of a party to pay the instrument by an "*intentional*, voluntary act" such as "cancellation or striking out of the party's signature" or otherwise adding "words to the instrument indicating discharge." Florida has also clearly held that unintentional or mistaken acts of cancellation do not change the debt obligation. *Gover v. Home & City Sav. Bank*, 574 So. 2d. 306 (Fla. 1st DCA 1991) ("cancellation or renunciation of an instrument is ineffective if it is unintentional or procured by mistake"); *All Real Estate Title Servs, Inc. v. Vuu*, 67 So. 3d 260, 262 (Fla. 2d DCA 2010) (lender's "unintentional renunciation of the note . . . did not, and could not, have extinguished their rights"). Other jurisdictions are in accord. *In re Sarno*, 463 B.R. 163, 168 (Bankr. D. Mass. 2011) ("The Massachusetts Appeals Court has held that the mistaken cancellation of a note is not an effective discharge . . ."); *G.E. Capital Mortgage Servs., Inc. v. Neely*, 135 N.C. App. 187, 191-92 (1999) (stamping a note "paid" by mistake did not cancel the obligation on the debt because the debt had not been paid); *FDIC v. Sergei,* No. 10-11061, 2010 U.S. Dist. LEXIS 73868 (E.D. Mich. July 22, 2010) (even an innocent debtor remains liable for a debt marked as "paid" if the lender was equally unaware of a fraud committed by a third party).

Importantly, the question of whether a payee *intended* to discharge the obligation through surrender of the instrument has arisen with some frequency in the context of the execution of renewal notes. *See* White, Summers, Hillman, *Uniform Commercial Code*, Vol. 2, § 17:40 (6th Ed.). In other words, Plaintiffs are not the first debtors to claim that they did not execute a subsequent note and that surrender of the original note cancelled their debt. These claims by borrowers who have not repaid the debt have been roundly rejected in multiple jurisdictions. *Id.*

Overwhelming authority holds that "surrender of an instrument acts as a discharge only if the instrument is surrendered with the intention of discharging it." *Id.* (emphasis added). In fact, this rule prevailed under the pre-1990 version of UCC Section 3-604, i.e. 3-605, that surrender could establish a discharge even under a rule that did not require a showing of intent to discharge an obligation. *Id.*; *see also Ohio Cas. Ins. Co. v. Yaklich,* 768 P.2d 1274, 1275 (Colo. App. 1989) ("cancellation or renunciation has no effect . . . [if] made unintentionally or by mistake"). Thus, the act of surrendering the note to the payor -- as Plaintiffs allege here -- without the intent to discharge the obligation does not discharge the debtor. *Gloor v. BancorpSouth Bank*, 925 So. 2d 984, 989 (Ala. Civ. App. 2005) ("The majority of courts in other jurisdictions have held that the cancellation and surrender of an instrument has no effect when it is the product of mistake or clerical error.") (citing *Guaranty Bank & Trust Co. v. Dowling*, 4 Conn. App. 376, 494 A.2d 1216 (1985); *Gover*, 574 So. 2d 306; *Richardson v. First Nat'l Bank of Louisville*, 660 S.W.2d 678 (Ky. Ct. App. 1983); *FirsTier Bank, N.A. v. Triplett*, 242 Neb. 614, 620 (Neb. 1993)*; Los Alamos Credit Union v. Bowling*, 108 N.M. 113, 767 P.2d 352 (1989); and *Peoples Bank of South Carolina, Inc. v. Robinson*, 272 S.C. 155, 249 S.E.2d 784 (1978)). Generally, proof (i) that a debt was never satisfied, (ii) that after the alleged cancellation the parties still believed the obligation still existed, or (iii) a credible denial of intent to discharge is sufficient to demonstrate

that a surrender of the note did not effect a discharge. White, Summers, Hillman, *Uniform Commercial Code*, Vol. 2, § 17:40 (6th Ed.).

Here, there is no dispute that the First Note was marked "VOID" – not "Paid" – which does not suggest an intent to discharge the obligation through surrender. Further, there is no dispute that CHL documented at the relevant time that it "will never send orig note back to the borrower until we receive new orig note." (BANA, Exh. 1, ¶ 12). Additionally, there is no dispute that the First Note was not returned to Plaintiffs until *after* CHL received the Superseding Note from MLD in April 2006 with a representation that the "Note re-execution had been completed" and "the issue has been resolved." (*Id.*)

Moreover, there is no dispute that, after receiving the Superseding Note, CHL sold the Loan to Fannie Mae relying on the Superseding Note. Further, there is no dispute that Plaintiffs continued to pay this debt through November 2011. Thus, not only did CHL act in a manner inconsistent with a discharge, Plaintiffs' conduct was equally inconsistent with a discharge. Indeed, it is difficult to conceive of circumstances less likely to reflect an intentional discharge.

Lastly, it makes no difference in this matter that the First Note was indorsed in blank. Under Fla. Stat. § 673.1041(4), a note is rendered non-negotiable if it contains a conspicuous statement indicating that it is not negotiable. It is undisputed that the First Note was stamped "VOID" before it was sent to Plaintiffs. This stamp clearly indicated that the First Note could no longer be negotiated, irrespective of its indorsements. In fact, there is no other possible purpose for this stamp as there was no intent to discharge Plaintiffs' obligation under the instrument. As a result, Plaintiffs took nothing from the physical transfer of the First Note because the debt evidenced therein could no longer be transferred by possession of the instrument.

Thus, there is no genuine issue as to whether CHL intended to discharge Plaintiffs' obligation. The act of marking the First Note "VOID" and surrendering it to Plaintiffs had no legal effect on Plaintiffs' debt because it was not intended to discharge Plaintiffs' debt. *See Sergei*, No. 10-11061, 2010 U.S. Dist. LEXIS 73868 (even an innocent debtor remains liable for a debt marked as "paid" if the lender was equally unaware of a fraud committed by a third party). As a result, *it does not matter* whether Plaintiffs' signatures on the Superseding Note are authentic because the debt remains valid even if the signatures are inauthentic.

B. To the extent the Court concludes that a controversy exists, it should grant BANA a declaration that the debt remains valid.

To state a basis for a declaratory judgment, Plaintiffs must allege an "actual controversy," 28 U.S.C. § 2201(a), based on facts which, if accepted as true, show that they are entitled to "relief." Fed. R. Civ. P. 8(a). In determining whether there is "controversy" within the meaning of the Declaratory Judgment Act, the basic question is whether "the facts alleged, *under all circumstances*, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v Pac. Coal & Oil Co.*, 312 US 270, 273 (1941) (emphasis added). Declaratory judgment is a remedy committed to judicial discretion. *A. L. Mechling Barge Lines, Inc. v United States*, 368 US 324 (1961).

Based on the evidence presented, BANA respectfully requests that the Court enter a declaration in favor of BANA providing that the terms of the First Note and Superseding Note are identical, that the debt evidenced by the First Note remains valid even if Plaintiffs are not responsible for the signatures on the Superseding Note, and that BANA has at all relevant times held a valid right to collect the debt and to enforce any accompanying security instrument.

III. Plaintiffs Have No Evidence Supporting a Claim Under the FCRA Because it is Undisputed that BANA Conducted an Investigation.

Plaintiffs allege that they are entitled to damages under the FCRA because BANA "willfully failed to conduct any investigation" of Plaintiffs' credit disputes. (D.E. 98, ¶ 83.) This allegation is frivolous because the record evidence clearly establishes that BANA conducted an investigation into every credit dispute Plaintiffs have made.

The Court's Order on Defendants' Motion to Dismiss clearly sets forth the requirements for a claim under the FCRA, therefore, Defendants will not repeat them here. (D.E. 81, pp. 10-11). The instant case has been greatly simplified by the Court's Order on Defendants' Motion to Dismiss and Plaintiffs' TAC. In its Order, the Court instructed Plaintiffs to clarify whether they were alleging that BANA "failed to conduct any investigation" or whether the investigation conducted failed to meet the requirements of the statute. (D.E. 81, p. 11) (emphasis in original). In response Plaintiffs clarified that they sought leave to amend for the purpose of alleging that BANA failed to conduct any investigation and the TAC alleges only that BANA failed to conduct any investigation. (D.E. 98, ¶ 94).

As shown herein, there is no dispute that Plaintiffs did not make their December 2011 payment. There is also no dispute that BANA investigated each of Plaintiffs' disputes, found no inaccuracy, and notified the credit reporting agencies of the results. (BANA, Exh. 7, ¶ 8). As a result, there is no genuine issue of material fact as to whether BANA conducted any investigation in response to Plaintiffs' disputes, and BANA is entitled to judgment as a matter of law.

Additionally, although irrelevant based on the above discussion, Plaintiffs' allegations are also reliant on flawed interpretations of BANA's admissions and the requirements of the FCRA. First, Plaintiffs contend that BANA reported Plaintiffs as delinquent for both their December

2011 and January 2012 payments and cite to BANA's responses to Plaintiffs' First Request for Admissions in support of this assertion. (D.E. 98, ¶ 73). Plaintiffs further allege that "under no circumstance" could their January 2012 payment be deemed late on January 13 because of the 15-day payment grace period. (*Id.*, ¶ 95).

As an initial matter, Plaintiffs did not specifically raise this subject in their dispute letter and cannot even begin to assert that it was communicated to BANA by a credit reporting agency. (*Id*., Exhs. K and L). More fundamentally, however, Plaintiffs have constructed their claim on a misreading of BANA's response to Plaintiffs' Request for Admissions. A careful reading of BANA's response to Request for Admission 15 unmistakably reveals that BANA only admitted reporting Plaintiffs as delinquent "for December 2011 on January 13, 2012" and otherwise denied the Request. (*Id.*, Exh. I, Resp. to RFA 15) (emphasis added). In other words, BANA only reported Plaintiffs' December 2011 payment as 30-days delinquent and only after it had become 44 days delinquent. BANA did not report Plaintiffs' January 2012 delinquency to the credit reporting agencies at any time.

Second, Plaintiffs impliedly contend that BANA was prohibited from reporting their delinquency because they disputed the debt. This assertion misapprehends the FCRA entirely. Furnishers are not prohibited from reporting on a debt that is in dispute. Such a rule would effectively abolish credit reporting because debtors could dispute all debts and avoid all reporting.

In fact, a furnisher is not liable *under any circumstances* for making any report to a credit reporting agency, even a report that is false, because the FCRA does not authorize a private right of action for an alleged failure to provide accurate information. *Green v. RBS Nat'l Bank*, 288

Fed. Appx. 641, 642 (11th Cir. 2008). As shown herein, BANA is only liable under the FCRA based on its response to a properly initiated dispute after a report has been made.

Consequently, Plaintiffs' assertion that they had disputed that they owed the debt, as well as their allegations that BANA has "retaliated" against them by making one lone report about their manifest delinquency, which was automatically generated by the servicing system, are unactionable and entirely irrelevant.

IV. Plaintiffs' Common Law Fraud Claim Fails Because the Debt is Valid, Plaintiffs Have No Evidence of any Actionable Misrepresentations, and Plaintiffs Acknowledge the Absence of Reliance.

Plaintiffs seek recovery on the basis of common law fraud. (D.E. 98, ¶¶ 104-134). BANA is unable to summarize Plaintiffs' claim for fraud because the claim defies any succinct characterization. (*Id.*) Under their general allegations, Plaintiffs vaguely allege that, on some unspecified date, Plaintiff Calianos came into possession of the First Note. (D.E. 98, ¶ 19). Thereafter, on some other unspecified date, Plaintiff Calianos began receiving payment requests from BANA. (D.E. 98, ¶ 21). Then, at some other unknown point in time, Plaintiff Calianos contacted BANA and was informed that BANA had the First Note. (*Id.* at ¶ 25). Plaintiffs then made their monthly payments "under protest." (*Id.* at ¶ 23).

Under the portion of the TAC directed specifically to their fraud claim, Plaintiffs make a number of additional and confusing allegations related to Plaintiff Calianos's conversations with BANA about whether BANA "could make" negative credit reporting and foreclose. (*Id.* at ¶ 116-117). Importantly, Plaintiffs then attempt to relate their fraud claim to those allegations – and not to any representation about the actual amount owed. (*Id.* at 118-122).

As a result, Plaintiffs appear to allege three categories of false statements: (1) monthly payment demands, (2) communications between BANA and Plaintiff Calianos over some

unestablished period of time concerning possession of the note and (3) communications between Plaintiff Calianos and BANA over some other period of time concerning whether BANA "could make" negative credit reports, inspect the property and foreclose.

A. The law of Massachusetts applies to this specific cause of action.

As to tort claims, Florida follows the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws § 145. *Trumpet Vine Invs., N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1115-1116 (11th Cir. Fla. 1996) (citing *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)). Section 145 provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Restatement (Second) of Conflicts of Law §145.

In the instant case, if any injury occurred as a result, which Defendants deny, it occurred to Plaintiffs in Massachusetts. The Property in this case has suffered no injury. Additionally, none of the conduct constituting fraud occurred in Florida. Plaintiffs do not contend that they communicated with BANA from Florida, that BANA communicated with them from Florida or that Plaintiffs made payments to BANA in Florida. The Plaintiffs also reside in Massachusetts while BANA is a resident of North Carolina. Only the relationship of the parties suggests that Florida may be the appropriate forum, as the parties' relationship centers on a property located in

Florida. However, Comment 2(e) of Restatement 45 notes that it is "rare" that the relationship of the parties will be the most important factor.

Consequently, BANA submits that the law of Massachusetts governs Plaintiffs' fraud and punitive damages claims because the first three factors in Restatement Section 145(2) all militate in favor of the law of Massachusetts. Defendants are aware of no substantive difference between the common laws of these states as to the elements of fraud, however, as shown herein, punitive damages are not available under Massachusetts common law.

To establish a cause of action for fraud in Massachusetts, a plaintiff must show "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing [the plaintiff] to act thereon, and that [the plaintiff] relied upon the representation as true and acted upon it to his damage." *Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165, 172 (D. Mass. 1997) (citing *Danca v. Taunton Sav. Bank,* 429 N.E.2d 1129 (Mass. 1982)). A plaintiff satisfies the scienter requirement by showing either a conscious intent to defraud or a high degree of recklessness. *ACA Financial Guaranty Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (citations omitted).

B. Plaintiffs fail to show a misrepresentation that was intended to deceive.

i. <u>Representations concerning the First Note were not intended to deceive</u>.

The only representation that was even arguably incorrect concerns Plaintiff Calianos's assertion that BANA informed him that it possessed the First Note. While this representation may have been inaccurate, there is no evidence that it was knowingly false or that BANA engaged in any conduct that was intended to deceive Plaintiffs. *See VMark Software, Inc. v. EMC Corp.*, 642 N.E.2d 587, 621 (Mass. App. 1994) (proof of scienter requires more than knowledge of falsity).

Generally, as shown herein, the debt remains valid and Plaintiffs' claim for fraud is simply irrelevant. Moreover, even if the debt were not valid, Plaintiffs cannot show that any individual with whom they communicated was aware that any representation concerning the note was false. (Exh. 4, Smith Dep., p. 48:5-11). Plaintiffs have no facts to support that these individuals were involved in CHL's acquisition of the Superseding Note in April 2006 or that any individual with whom they dealt was actually aware that the First Note had been corrected and replaced by the Superseding Note. (Exh. 6 (noting facts of fraud claim limited to facts alleged in FAC)). Indeed, the entire transaction related to the Superseding Note, which was completed before Plaintiff Calianos began demanding that BANA cease collections, was handled by CHL and not BANA.

Moreover, in light of the existence of the Superseding Note, BANA could only have intended to induce a loss if BANA were attempting to collect payments on the debt twice. Plaintiffs do not make this allegation and BANA maintained only one account for the Loan and credited all payments made by Plaintiffs to that account. (D.E. 44-2, ¶ 10). Plaintiffs cannot possibly show any intention to defraud when BANA holds a presumptively valid note, the Superseding Note, and was actually reducing the debt in accordance with its terms. Thus, Plaintiffs "collecting on a void note" theory is completely unsupported. Irrespective of any statements to the contrary, BANA, as the servicer, was crediting all payments to the only account for the Loan.

In layman's terms, what Plaintiffs label as fraud suggests a simple mistake, and there are no facts to show any intent to deceive. Plaintiff Calianos initiated all discussions about this subject and BANA's employee simply responded, which, as this Court has already concluded, BANA, as the loan servicer, had no legal obligation to do under RESPA. (D.E. 81, p. 19).

ii. Representations as to payment demands were not false or intended to deceive.

The remaining categories of alleged representations also fail to establish any aspect of fraud. With respect to any demands for payment, it is undisputed that BANA holds a promissory note -- the Superseding Note -- which is presumably valid and entitles BANA to every payment demanded. *See* Fla. Stat. § 673.3081(1) ("the signature [of an instrument] is presumed to be authentic and authorized . . ."). The Superseding Note simply continues the debt obligation created at origination through replacement of the original instrument. (*Compare* D.E. 98, Exh. A *with* Exh. E). Plaintiffs have adduced no evidence whatsoever suggesting that BANA or its employees knew, or even could have known, that the Superseding Note was forged – which remains a disputed and unproven assertion. Indeed, Plaintiffs did not even deny that they executed the Superseding Note until after this action was filed and Plaintiffs cannot possibly base a fraud claim on an unproven allegation. Lastly, as demonstrated herein, BANA is entitled to enforce the debt irrespective of whether the Superseding Note was validly executed because the debt was not discharged. *Supra*, Memorandum of Law. Sec. I.

Accordingly, BANA did not attempt to collect payments that it knew, or even could have known, were not owed. At most, BANA's representatives provided Plaintiffs with the *wrong* basis for debt (i.e. the First Note as opposed to the Superseding Note). BANA did not, however, seek to induce payments on a debt for which it knew there was no basis.

iii. Statements as to whether BANA "could make" reporting or take action were not representations, were not false and were not intended to deceive.

Additionally, Plaintiffs assertion that BANA misrepresented whether it "could make" negative credit reporting, inspect the property, or foreclose are not representations of fact, not false and not intended to deceive. In Massachusetts, it is established that "false statements . . .

of conditions to exist in the future, or of matters promissory in nature are not actionable." *Hinkley v. Vital*, 1992 Mass. App. Div. 91, 94 (1992) (*citing Yerid v. Mason,* 341 Mass. 527, 530 (1960)); *see also Elias Bros. Rests., Inc. v. Acorn Enters., Inc*., 831 F. Supp. 920, 926 (D. Mass. 1993). Whether BANA would or could take action in the future as a result of non-payment is clearly related to future events and/or promissory in nature and, therefore, not actionable.

In any event, as noted above, the Superseding Note is presumptively valid, and Plaintiffs have no evidence even remotely suggesting that BANA knew that this assertion was false. Moreover, as Plaintiffs allege, BANA did make one negative credit report, which tends to reflect that any assertion made to Plaintiffs on this point was accurate.

C. Plaintiffs cannot show reliance or damages.

Plaintiffs cannot show any actual reliance on the alleged misrepresentations or any consequent injury. A party cannot rely on what it knows to be untrue. *Massachusetts Laborers' Health & Welfare Fund. v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 243 (D. Mass 1999). Plaintiffs possessed the First Note, knew that they possessed the First Note, and knew that BANA's purported representations concerning whether it possessed the First Note were erroneous. In fact, Plaintiff Calianos was so certain of his position that he made multiple attempts to convince BANA that BANA did not possess the First Note and he even acknowledges that he did not believe any representation made by BANA with respect to the First Note. (D.E. 17, ¶ 125). (*See also* BANA, Exh. 9, Calianos Deposition Tr., p. 34, ln. 24 – p. 35, ln. 22 ("you can't have the original. I'm holding it … I have the original. You don't have the [original].").

Moreover, Plaintiffs' contention that any payments that they remitted were made under "protest," (D.E. 98, ¶ 23), is the polar opposite of relying on that assertion as true. Thus,

Plaintiffs have no claim for fraud because they did not rely on any representation. Rather, Plaintiffs repeatedly insisted that the representations were false.

Finally, Plaintiffs have put forth nothing to show that they have incurred any damages. Plaintiffs simply paid a debt as was always contemplated by the Loan.

For all the reasons asserted above, Plaintiffs' fraud claim fails, and BANA is entitled to judgment as a matter of law.

V. Plaintiffs' RICO Claim Fails Because Plaintiffs Fail to Show a Single Element of a RICO Claim.

Unfortunately, it remains unclear whether Plaintiffs are proceeding under 18 U.S.C. § 1962(a) or (c) as the TAC appears to conflate these two discrete bases for RICO liability.[3] (D.E. 98, ¶ 147) (citing § 1962(a) as basis for claim but pleading standard under §1962(c)). Section 1962(a) prohibits a defendant from using or investing any income derived from a "pattern of racketeering activity" to acquire an interest in or control of an "enterprise." *Id.* Section 1962(c) prohibits conducting or participating in an "enterprise's" "pattern of racketeering activity." Nevertheless, there are no facts in the record to support either claim.

[3] The Court's Order on Defendants' Motion to Dismiss eloquently sets forth the requirements for a civil RICO claim, therefore, Defendants will not repeat them here. (D.E. 81, pp. 13-15).

A. Plaintiffs cannot prove a violation of either §§ 1962(a) or (c).

i. Plaintiffs have no facts to support a violation of § 1962(a).

Plaintiffs' § 1962(a) claim is fundamentally flawed because Plaintiffs cannot show that BANA or MERS acquired any interest in any enterprise, let alone that Defendants acquired that interest through a "pattern of racketeering activity" or that Plaintiffs suffered an "investment injury" as a result of Defendants' acquisition. *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132 (6th Cir. Mich. 1994) (violation of § 1692(a) requires injury caused by the investment of income into the racketeering enterprise, distinct from any injuries "caused by the predicate acts of racketeering"); *see also Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350, 1371 (M.D. Fla. 2005). Additionally, to the extent Plaintiffs seek to prove that BANA controls or directs MERS, that quest is irrelevant because Plaintiffs have not alleged that MERS is the target enterprise. As a result, Plaintiffs have no triable § 1962(a) claim.

ii. Plaintiffs have no facts to support a violation of § 1962(c).

Plaintiffs' § 1962(c) claim also clearly fails because the record is devoid of any acts of mail or wire fraud, each of which require a scheme to defraud through a false representation, pretense or promise and the requisite intent to defraud. 18 U.S.C. §§ 1341 and 1343. As an initial matter, Plaintiffs' common law fraud claim is confined to BANA, yet their RICO claim asserts that both Defendants engaged in fraud. Plaintiffs' attempt to demonstrate that BANA engaged in a mail and wire fraud fails for all of the reasons stated with respect to Plaintiffs' claim for common law fraud. Plaintiffs' assertion that MERS violated RICO is fundamentally flawed because Plaintiffs attribute no fraudulent conduct to MERS.

To summarize, Plaintiffs cannot prove mail fraud or wire fraud on BANA's part because BANA has always been authorized to enforce the presumptively valid Superseding Note that

entitled it to every payment requested, BANA credited every payment received on the one account for this Loan, and because Plaintiffs did not even deny their signatures until after this action was commenced. *Supra*, III.B.

Plaintiffs' assertion that MERS engaged in fraud is patently frivolous. Plaintiffs have no facts to support the assertion that they do not contend MERS provided false information. (D.E. 98, ¶ 155).

Plaintiffs have failed to identify any statutory or contractual duty that MERS owed to undertake any investigation that they assert it was obligated to conduct. Even if such a duty did exist, Plaintiffs have no evidence to show that MERS knowingly participated in a scheme to defraud by failing to undertake such investigation.

B. Plaintiffs can show no reliance and, therefore, no proximate injury.

To establish a RICO claim, Plaintiffs must prove an injury proximately caused by the RICO violation specifically. *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1287 (11th Cir. 2006). Although first-party reliance is not an element of a RICO claim, where fraud is alleged, a plaintiff must show that *someone* relied on the misrepresentations to show either "but for" or proximate causation. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008); *Numrich v. JPMorgan Chase Bank, N.A.*, No. 3:11-cv-1254, 2012 U.S. Dist. LEXIS 74687, at *26 (D. Or. May 30, 2012) (dismissing similar RICO claim for absence of reliance or other proximate cause).

Since Plaintiffs have already explicitly acknowledged that they did not believe any representation concerning BANA's possession of the First Note, they have no triable issue here for Plaintiffs to show any reliance or any injury.

For these reasons, Defendants are entitled to summary judgment as a matter of law.

VI. Plaintiffs' Punitive Damages Claim Fails Because There Is No Basis For Punitive Damages, And Plaintiffs Have No Compensatory Damages.

Plaintiffs have no entitlement to punitive damages because in Massachusetts, punitive damages may be awarded only by statute. *Boott Mills v. Boston & M. R. R.*, 218 Mass. 582, 589 (Mass. 1914) ("In this commonwealth there is no such thing known to common law as the recovery of punitive damages"). Plaintiffs have not advanced any claim under any Massachusetts statute entitling them to punitive damages.

WHEREFORE, Defendants respectfully request that the Court grant their Motion for Summary Judgment in its entirety, award fees and costs incurred in defending this matter, and such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and a copy has been furnished via Electronic Mail to *pro se* Plaintiffs at:

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