Ademiluyi v. PennyMac Mortgage Investment Trust Holdings I, LLC et al

2015 | Cited 0 times | D. Maryland | May 22, 2015

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND CHRISTIE ADEMILUYI, Plaintiff, v. PENNYMAC MORTGAGE INVESTMENT TRUST HOLDINGS I, LLC n/k/a PENNYMAC HOLDINGS, LLC, Defendants.

Civil Action No. ELH-12-00752

MEMORANDUM OPINION This action arises out of the attempt by defendant PennyMac Holdings, LLC 1

to collect without a debt collection license, allegedly in violation of the Fair Debt Collection Practices Act (or , 15 U.S.C. §§ 1692 et seq., as well as the Maryland Collection Agency Licensing Act -301 of the Business Regulation See seeks statutory damages as Id. at 27. Plaintiff initially filed her Complaint in March 2012, as a putative class action, alleging violations of the FDCPA, MCALA, and other provisions of Maryland and federal law, seeking damages in excess of eight million dollars. ECF 1. Plaintiff named as defendants both PennyMac and a related entity, Id. at 1.

1 PennyMac was formerly known as PennyMac Mortgage Investment Trust Holdings I, LLC. See ECF 69 (cross-motion for summary judgment) at 1. PennyMac generally refers to

PennyMac and Trust filed a motion to dismiss in May 2012, ECF 10 , with exhibits. After substantial briefing by the parties, see ECF 11, 12, 15, 16, 20, 22, 23, 24, 25, I MTD Motion. See MTD ECF 27 (rder) (Ademiluyi v. PennyMac Mortgage Inv. Trust Holdings I, LLC, 929 F.

Supp. 2d 502 (D. Md. 2013)). , and certain claims against PennyMac. ECF 27. But, I denied Motion with respect to part of , see ECF 27, a claim which plaintiff has since abandoned. Compare Complaint, ECF 1 (Complaint) with Amended Complaint, ECF 53. I also denied Motion with respect to s FDCPA claim, see ECF 27, which is the only claim that remains pending. See ECF 53. See also Bradshaw v. Hilco Receivables, LLC, 765 F. Supp. 2d 719, 728-31 (D. Md. 2011) (holding failure to obtain license required by MCALA is a violation of the FDCPA). Plaintiff filed an Amended Complaint in March 2014, near the end of discovery, which and her claim for actual damages under the FDCPA. Id. It also included new factual allegations gleaned in discovery. Id.

Plaintiff subsequently , with a supporting memorandum of law (ECF 62- and a Motion to Certify a

Class (ECF 61, PennyMac filed a Cross-Motion for Summary Judgment (ECF , with a supporting memorandum of law (ECF 69- , and opposed both p the Class Motion. See ECF 68. Plaintiff has replied and has

Both sides see long with numerous exhibits.

In February 2015, for the reasons described in a Memorandum Opinion issued on February 10, 2015, I denied the Class Motion. See ECF 97 (Memorandum); ECF 98 (Order). Plainti briefed, and no hearing is necessary to resolve them. See Local Rule 105.6. For the reasons that

follow, I will grant (ECF 62).

I. Factual Background 2

A. The Parties Christie Ademiluyi is a licensed real estate broker who, at all relevant times, has resided on See -21 at 9-10, 4-5.

Penny See Jeffrey P. -2 at 5. And, as the owner of the assets, id. at 4, it

2 In order to contextualize the dispute at issue, I rely throughout the Factual Background on certain exhibits filed by defendant in support of the earlier MTD Motion. Plaintiff has not challenged the authenticity of these documents at any stage in the litigation, and they remain part of the record.

Additionally, because many of the exhibits and the arguments in legal memoranda rely on personally identifiable financial information, see ECF 71-1 (consent motion to seal), some of the information on which I rely comes from documents submitted to the Court under seal. However, because I have not included in this Memorandum Opinion any of personally identifiable financial information, I need not seal or redact the Memorandum Opinion. Additionally, unsealed, are filed at ECF 71-5 and ECF 71- is unsealed and redacted.

Id. at 5-6. According to Jeffrey P. Grogin, wh as of June 2014, 3

see ECF 67-19 ¶ Grogin Depo., ECF 60-2 at 5. Id loans that can be modified so that borrowers ge Id.

It is undisputed that, at the commencement of this action, PennyMac did not have a debt collection license in the State of Maryland. Nor was it licensed as a mortgage lender in Maryland. See ECF 57 (Answer to Amended Comp

PennyMac is a subsidiary of former defendant Trust. Grogin Depo., ECF 60-2 at 5. specialty finance company that invests primarily in residential mortgage loans and mortgage-

-K filed with the SEC for FY ending Dec. 31, 2011 - -6 at 5. Trust does not have any employees. Id. at 8. It is managed by PNMAC Capital Management, LLC , which is a wholly-owned subsidiary of Private NMAC Id. at 5. M Trust wholly-owned PennyMac subsidiary, PennyMac Loan Services, LLC . Id. , PCM, mortgage assets that are sold by financial institutions including banks, thrifts, and non- 3

It is not clear from the record when Grogi

Form 10-K, ECF 10-6 at 6. Services escrow account payments, if any, with respect to mortgage loans, as well as managing loss

mitigation, which may include, among other things, collection activities, loan workouts, modifications and refinancings, foreclosures, short sales, sales of REO [4]

and financing to Id. at 7-8. servicing to the [PNMAC] funds and Id. at 8.

In briefings on the MTD Motion, PennyMac asserted that Services was, at all relevant See ECF 10-1 at 12; see also ECF 69-1 at

12. Plaintiff has not disputed this contention, nor has she named Services as a defendant.

B. The Debt & The Forbearance On April 30, 2007, plaintiff executed an Adjustable Rate Note for $465,000 (with lender ABN AMRO . See Note, MTD Motion Ex. A, ECF

10-3. The Note was secured by the Property, as reflected in the Deed of Trust dated April 30, 2007 . Deed, MTD Motion Ex. B, ECF 10-4. The Deed was recorded in the land Id.

estate sales business, plaintiff fell behind on her mortgage payments due under the Note. See

Facts Ex. E, ECF 67-6 at 30 (letter from plaintiff to mortgage servicer dated September 2009). It appears that ote by that time.

4 been foreclosed upon by lenders or taken by deed-in-lieu of foreclosure in full or partial , L. DISTRESSED REAL ESTATE § Id.

See C. Ademiluyi Depo., ECF 67-21 at 13-14; Note, ECF 10-3 at 5 (Note Allonge referencing undated transfer of interest in the Note to Citi as successor by merger with ABN); ECF 67-6 at 30 (2009 letter to Citi).

In the Fall of 2009, plaintiff filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. See Amended Complaint, ECF 53 ¶ 34; In re Ademiluyi, 09-24463 (D. Md. Bankr. filed Aug. 5, 2009). She also applied for a federally subsidized loan modification through Citi. 5

See Facts Program Hardship Affidavit, -5 Facts Ex. 6, Deposition of April Ademiluyi, Esq., dated ECF 67-24 at 12. 6

In October 2009, plaintiff entered into a trial modification program with Citi, A. Ademiluyi Depo., ECF 67-24 at 12, with significantly lower monthly payments than called for by the Note. C. Ademiluyi Depo., ECF 67-21 at 16. Plaintiff completed her bankruptcy proceeding in November 2009. See In re Ademiluyi, 09- closure of case). Although the parties have not provided any details regarding the bankruptcy

matter, it appears that obligation with respect to the Note survived the proceedings. Cf. In re Ademiluyi, 09- ,

5 HAMP is an acronym for See, e.g., ECF 67-5 MAKINGHOMEAFFORDABLE.GOV growing number of foreclosures by encouraging loan services to reduce monthly mortgage

See also Thomas M. Schehr & Matthew Mitchell, The Home Affordable Modification Program and A New Wave of Consumer Finance Litigation, 91-JUN MICH. B.J. 38, 38 (2012) HAMP works by providing financial incentives to participating mortgage servicers to modify the terms of certain eligible loans to a level that is affordable for borrowers now and sustainable over the long term.

6 and her current attorney.

showing plaintiff intended to reaffirm her debt owed to Citi and secured by the Property). 7 Further, it appears that plaintiff successfully made all payments due under her trial loan modification. See C. Ademiluyi Depo., ECF 67-21 at 16 (plaintiff stating she made her payments under the trial agreement).

Plaintiff entered into a permanent loan modification with Citi in June 2010, which required higher monthly payments than the trial modification agreement. A. Ademiluyi Depo., ECF 67-24 at 14; ECF 53 ¶ 35. Plaintiff maintains that she unintentionally entered into this agreement by opening an e-mail. C. Ademiluyi Depo., ECF 67-21 at 16-19. With the help of her daughter, April Ademiluyi, Esquire, plaintiff disputed with Citi that she had actually agreed to the modification, and continued to seek a new agreement with Citi until, in January 2011, plaintiff submitted a new loan modification application to Citi. A. Ademiluyi Depo., ECF 67-24 at 14-17; ECF 53 ¶ 36, 38; C. Ademiluyi Depo., ECF 67-21 at 21.

Meanwhile, in December 2010, plaintiff entered into a forbearance agreement (the Facts Ex. 12, ECF 67-30 at 2 (copy of Forbearance agreement between plaintiff and Citi with signature dated Dec. 28, 2010); Facts Ex. 23, ECF 67-41 at 2 (letter from plaintiff to Citi dated Nov. 30, 2010 requesting forbearance); A.

7 agreement is an agreement between a debtor and a creditor that the L. DISTRESSED REAL

ESTATE § 28A:80 (2014); see also 4-524 COLLIER ON BANKRUPTCY P 524.04 (16th ed. 2009) (outlining requirements for enforceability of reaffirmation agreements). In her ¶ 51. However, that assertion does not comport with the evidence in this case, i.e., with the undisputed facts that plaintiff remained in her home after bankruptcy and that she continued to make payments due under the Note. In any event, even if it were true s discharged in bankruptcy, for reasons described below, that would not change the outcome of this case because, either way, PennyMac was not a

Ademiluyi Depo., ECF 67-24 at 16. The Forbearance provided, in relevant part, as follows, ECF 67-30 at 2: 8

In return for CitiMortgage, Inc., foreclosure [9]

of my mortgage loan, which is still in default under the original security instruments, we agree to the following terms and conditions: Monthly Payments: 12/28/10 in certified funds. Payments will b every month of $418.33 plus the regular mortgage payment of $2187.35 totaling

$2605.68 for SEVENTEEN (17) consecutive months beginning on 1/30/11 and ending 05/30/12, with a last payment amount totaling $2605.08. Regular monthly payments of $2187.35 will resume on 06/01/12.

*** We understand that if the above terms and conditions or the terms of the original security instrument are not met, a default will occur and this forbearance will be voided. If a default occurs, [Citi] may proceed with foreclosure immediately. There is no grace period for late or partial payments and you will not receive an additional 30-day demand letter. All funds will be applied first towards outstanding fees, as allowed by applicable law. Once fees are paid in full, funds will then be applied towards principal, interest, and, if applicable, escrow amounts. We understand that all the rights and obligations of the original note and security instrument, except as changed by this payment plan, remain in full

mortgage loan delinquency across seventeen months, to be paid in addition to the regular payment due under the Note. Id. In exchange, Citi agreed terms of the Forbearance. Id.

It appears that plaintiff made a substantial payment on December 27, 2010, see Forbearance, ECF 67-30 at 2 (handwritten notation), and that the first payment due under the

8 I have subs -emphasis with my own. 9 There is no indication in the record that Citi took any formal steps to initiate foreclosure at this time; the agreement presumably references a threatened pending foreclosure.

Forbearance was received in full on or before December 30, 2010. Facts Ex. K, ECF 67- hile loan was serviced by Citi) at 2; 10

C. Ademiluyi Depo., ECF 67-21 at 22 (showing plaintiff agrees she made full payment of . history while her loan was serviced by Citi (ECF 67-12, the first full payment due under the Forbearance was applied to satisfy payments due under the Note in August and September, presumably of 2010. ECF 67-12 at 2.

On or before January 28, 2011, plaintiff made another payment of $2187.35. Citi Payment Record, ECF 67-12 at 2. According to the Forbearance, that amount was equal to -30 at 2. Citi applied that payment to satisfy the payment due under the Note in October 2010. Id. The Citi Payment Record also shows a ame time, i.e., on or before January 28, 2011. ECF 67- 12 at 2. That amount is equal to the extra monthly payment due under the Forbearance. See Forbearance, ECF 67-30 at 2.

According to PennyMac, it before was due under the Forbearance. PennyMac relies on an Affidavit by Michael Drawdy, Senior Vice President for Asset Management of Services, to support this assertion. See Facts Ex. 1, Affidavit of Michael Drawdy , ECF 67- 1 ¶ 14 (relying on Drawdy Aff. ¶ 7 -1 ¶ 14 for date of acquisition). Drawdy avers, in relevant part:

10 The exhibit is described and authenticated in an affidavit of Michael Drawdy, Senior Vice President for Asset Management of Services, dated June 2014. See 1, ECF 67-1 ¶ 12.

[i.e., PennyMac] -1 ¶ 7. Additionally, in her Amended Complaint, plaintiff avers that PennyMac sent her a letter dated March 28, 2011, in which PennyMac ¶ 40. 11

See also A. Ademiluyi Depo., ECF 67-

In her Reply, plaintiff disputes She asserts Id. In support, plaintiff Id. (citi -9). The Assignment shows that an

assignment of the mortgage from Citi to PennyMac was executed on March 9, 2011. Id. at 2; see also MTD Motion Ex. C, ECF 10-5 at 2 (copy of same document).

From February 28, 2011, throug loan on behalf of PennyMac. See Drawdy Aff., ECF 67-1 ¶ 7. On March 26, 2011, Services

assumed the servicing of of PennyMac. Id.; Amended Complaint, ECF 53 ¶ 42. loans, that is, the right to collect payments from you, is being assigned, sold or transferred from

Facts Ex. M, ECF 67-14 at 2. The notice further instruc would stop accepting payments on March 25, 2011, that the new servicer would start accepting

11 To the best of my knowledge, a copy of the letter plaintiff references in her Amended Complaint is not in the record. At the very least, no one has pointed the Court to it.

payments on March 26, 2011, and that all payments due on or after March 26, 2011, should be sent to the new servicer, Services. Id.

In her Amended Complaint, plaintiff states that PennyMac through ¶ 41. The Citi Payment Record

ich is equal to the full monthly payment (regular mortgage payment plus extra) due under the Forbearance. ECF 67-12 at 2. The Citi Payment Record also appears to show that Citi registered the November 2010 payment due under the original Note as paid on March 1, 2011. Id. The Citi Payment Record does not show any transactions on any date after March 28, 2011. Id. The last transaction on the Citi Payment Record is an entry dated March 28, 2011, Id. For reasons that are neither explained nor apparent, the Citi Payment Record also shows a $366.40 charge on the same day, March 28, 2011, Late Charge. Id. Under the ayment was not due until March 30, 2011. ECF 67-30 at 2. I am unaware of any communications in the record between Citi and plaintiff during the period when PennyMac.

submitted by PennyMac 2011, in an amount equal to the monthly payment due under the Forbearance, i.e., $2,605.68.

-13 at 11. It appears that plaintiff actually made the payment on March 31, 2011, but that the payment went to Citi and had to be re-routed. See ECF 53 ¶ 41 payments made on or about March 1, 2011 and March 31, 201 made, inter alia, on

allocated $2187.35 of the payment to satisfy the amount due under the original Note on December 1, 2010, and held the remainder, $418.33, in suspense. Id. The most recent transaction date listed on the Services Payment Record is September 27, 2013. Id. at 2. It does not show any other mortgage payments received from plaintiff after April 13, 2011, and on or before September 27, 2013. Id. at 2-11. In other words, it appears that plaintiff did not make any mortgage payments during that period.

conduct with respect to plaintiff and her debt, beginning in early April 2011 and stretching

beyond commencement of this action. E.g. -C, ECF 60-6 at 18 (letter from Services to plaintiff dated April 25, 2011); Ex. 10, ECF 60-10 (transcript of call between plaintiff and representative of Services); -15 (letters to plaintiff from Services with dates ranging from April 7, 2011 through August 8, 2012); Ex. P, ECF 67-17 (correspondence between Services and Fannie Mae 12

and HAMP Solution Center regarding

12 entity known as the Mo See TIME (July 14, 2008), available at http://content.time.com/time/business/article/

0,8599,1822766,00.html. uy Id. In 1968, it Id. Today, Fannie Mae states that -scale access to affordable mortgage credit in all WWW.FANNIEMAE.COM (Feb. 20, 2015).

-26 (bank statements submitted by plaintiff to Services); Ex. 9, ECF 67-27 (same); Ex. 10, ECF 67-28 (same); Ex. 14, ECF 67-32 (correspondence between Services and A. Ademiluyi regarding new loan modification).

In brief, Services did not know that plaintiff had entered into a Forbearance agreement with Citi when it began working with her. C. Ademiluyi Depo., ECF 67-21 at 38; A. Ademiluyi Depo., ECF 67-24 at 19-20. Apparently, Services regarded debt as in default. See, e.g., -10; C. Ademiluyi Depo., ECF 67-21 at 38; Facts Ex. N, ECF 67-15 at 40. However, it agreed to pick up where Citi had left off in reconsidering a second HAMP modification. E.g. A. Ademiluyi Depo., ECF 67-24 at 17-20. But, in February 2012, Services ultimately rejected the possibility of a second HAMP modification and offered plaintiff its own proprietary loan modification, which plaintiff rejected. E.g., id. at 20-29; -18 at 2.

Plaintiff filed this lawsuit in March 2012, shortly after she rej loan modification. ECF 1. Roughly five months later, in mid October 2013, plaintiff received a 0 Repl. Vol.), § 7- See -11 . In list form, it stated oan Payment Was - 11 at 3. PennyMac, via Services and substitute trustees, see -8 , filed the Foreclosure Notice in the Circuit Court for

See -10 ¶ 7; see also WBGLMC v.

Ademiluyi, Case No. CAEF-14-05517 . Plaintiff has submitted to this Court additional documents from the Foreclosure Proceeding, Pursuant to Maryland RP 7-105.1(c)(ii)(1) and Md Rule 14- ECF 72-6 at 2. PennyMac of Trust securing the Note which is the subject of this proceeding, occurred on January 02, 2011

when the defendant(s) did not tender the payment due on January 01, 20 Id.

According to the Foreclosure Proceeding docket, the Foreclosure Proceeding is not yet resolved. See WBGLMC v. Ademiluyi, Case No. CAEF-14-05517. A docket entry dated October 14, 2014, indicates that the Maryland State court judge ordered that the foreclosure sale may go Id. But, the most recent entry, dated October 17, 2014, shows that Id. It appears the entry is referencing Ademiluyi for bankruptcy under Chapter 13 of the U.S. Bankruptcy Code in the District of Maryland. See In Re Ademiluyi, Bankr. Case No. 14-25763 (D. Md. Bankr. 2014). In that case, on November 11, 2014, she opened an adversary proceeding against Citi, PennyMac, and Services. See Ademiluyi v. CitiMortgage, Inc., et al., Adv. Pro. Case No. 14-00806 (D. Md. Bankr. 2014). The bankruptcy judge filed a Motion for Withdrawal of Reference, sua sponte, which has been assigned to this Court. See Ademiluyi v. CitiMortgage, Inc. et al., ELH-15- 00777 (D. Md. opened Mar. 16, 2015) (ECF 1). I granted the Motion for Withdrawal of Reference on April 27, 2015 (ECF 3).

Additional facts are included in the Discussion.

II. Standard of Review Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is See Celotex Corp. v. Catrett, 477 U.S.

317, 322-24 (1986). The non-moving party must demonstrate that there are disputes of material fact so as to preclude the award of summary judgment as a matter of law. Matsushita Elec. Indus. Co. Ltd. v. Zenith, Radio Corp., 475 U.S. 574, 586 (1986).

The Supreme Court has clarified that not every factual dispute will defeat the motion. By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 247-48 (1986) (emphasis in original). Id. There is a genuine issue as

Id.; see Dulaney v. Packaging Corp. of Am., 673 F.3d 323, 330 (4th Cir. 2012).

Bouchat v. Baltimore Ravens Football Club,

Inc., 346 F.3d 514, 522 (4th Cir. 2003) (quoting former Fed. R. Civ. P. 56(e)), cert. denied, 514 U.S. 1042 (2004); see also Celotex, 477 U.S. at 322-24. In resolving a summary judgment motion, a court must view all of the facts, including reasonable inferences to be drawn from

them, in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. Ltd., 475 U.S. at 587; see also Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 721 F.3d 264, 283 (4th Cir. 2013); FDIC v. Cashion, 720 F.3d 169, 173 (4th Cir. 2013).

The evidence and determine the truth of the matter but to determine whether there is a genuine issue Anderson, 477 U.S. at 249. Thus, in considering a summary judgment motion, the court may not make credibility determinations. Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562, 569 (4th Cir. 2015); Mercantile Peninsula Bank v. French, 499 F.3d 345, 352 (4th Cir. 2007); Black v. Decker Corp. v. United States, 436 F.3d 431, 442 (4th Cir. 2006); Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 644-45 (4th Cir. 2002). For example, in the face of conflicting evidence, such as competing affidavits, summary judgment ordinarily is not appropriate, because it is the function of the fact-finder to resolve factual disputes, including matters of witness credibility. See, e.g., Boone v. Stallings 174, 176 (4th Cir. Sept. 11, 2014) (per curiam).

However, to defeat summary judgment, conflicting evidence must give rise to a genuine dispute of material fact. Anderson, 477 U.S. at 247-48. a dispute of material fact

precludes summary judgment. Id. at 248; see Libertarian Party of Va. v. Judd, 718 F.3d 308, 313 (4th Cir. 2013). On the other hand, summary judgment is appropriate one-sided that one party must prevail a Anderson, 477 U.S. mere existence of a scintilla of evidence in support of the position will be

insufficient; there must be evidence on which the jury could reasonably find for the [movant] Id.

When, as here, the parties have filed cross-motions for summary judgment, the court Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th

Cir. 2003) (citation omitted), cert. denied, 540 U.S. 822 (2003); see Mellen v. Bunting, 327 F.3d issue of material fact. But if there is no genuine issue and one or the other party is entitled to

10A Wright, Miller & Kane, Federal Practice & Procedure § 2720, at 336 37 (3d ed. 1998, 2012 Supp.).

III. Discussion A. The FDCPA Congress enacted the FDCPA in 1977, see Pub. L. 95 109, 91 Stat. 874 (1977), to protect air debt collection practices, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against collection abuses. see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 576 (2010) (same); Inc., 98 F.3d 131, 135 (4th Cir.

whose debts are placed in the hands of the professional debt collectors DeSantis v. Computer Credit, Inc., 269 F.3d 159, 161 (2d Cir. 2001); see also Ruth v. Triumph Partnerships, 577 F.3d 790, 797 (7th Cir. 2009). Case 1:12-cv-00752-ELH Document 108 Filed 05/22/15 Page 17 of 35 ctices by debt collectors . Brown v. Card Service Center, 464 F.3d 450, 453 (3d Cir. 2006). Because the FDCPA is a remedial statute, id., it is construed liberally in favor of the debtor. See, e.g., Russell v. Absolute Collection Servs., Inc., 763 F.3d 385, 393 (4th Cir. 2014) (citing Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 561 62 (1987) (recognizing the canon of statutory interpretation that remedial statutes are to be construed liberally)); Glover v. F.D.I.C., 698 F.3d 139, 149 (3d Cir. 2012); Hamilton v. United Healthcare of La., 310 F.3d 385, 392 (5th Cir. 2002). Section 1692e(5) of Title 15 of the United States Code provides: A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: The threat to take any action that cannot legally be taken or that is not intended to be taken. inter alia A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.

To establish a claim under the FDCPA, (1) the plaintiff has been the object of collection activity arising from consumer debt; (2) the defendant is a debt collector as defined by the FDCPA; and (3) the defendant has engaged in an act or omission prohibited by the FDCPA. Boosahda v. Providence Dane LLC, 3 (4th Cir. 2012) (quoting Ruggia v. Wash. Mut., 719 F. Supp. 2d 642, 647 (E.D. Va. 2010)); see Stewart v. Bierman, 859 F. Supp. 2d 754, 759 (D. Md. 2012). Debt collectors that violate the FDCPA are liable to the debtor for actual damages, s fees. 15 U.S.C. § 1692k(a)(1), (a)(3). Russell The FDCPA also provides the

potential for statutory damages up to $1,00 s discretion. Id. § 1692k(a)(2)(A). Id. The Act any person who uses any instrumentality of interstate commerce or the mails in any business the principal

purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Therefore, to be subject to the FDCPA 15 U.S.C. § 1692a(6); see Schlegel v. Wells Fargo Bank, N.A., 720 F.3d 1204, 1208-

09 (9th Cir. 2013); , 225 F.3d 379, 404 (3d Cir. 2000).

However, the Act further specifies that an entity that Id. § 1692(a)(6)(F)(iii). Generally speaking, entities servicing or collecting a debt

they were assigned before default are considered creditors under the Act. A any person who offers or extends credit creating a debt or to whom a debt is owed,

but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another. 15 U.S.C. § 1692a(4). collect Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 538 (7th Cir. 2003); see F.T.C. Check

Investors, Inc. specific debt, one cannot be both a accord, e.g., Bradford v. HSBC Mortgage Corp., 829 F. Supp. 2d 340, 348 (E.D.

Va. 2011). under the FDCPA. Schlosser, 323 F.3d at 536.

under the FDCPA, the status of the entity (i.e., debt collector versus creditor) in any given case is

determined with respect to the particular debt at issue, and depends on the purpose for which the entity is assigned the debt. See 15 U.S.C. § 1692a(4) receives an assignment or transfer of a debt in default solely for the purpose of

facilitating collection of such debt) (emphasis added); id. § 1692(a)(6)(F)(iii) a debt which was not in default at the time it was obtained

. If the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt. Schlosser, 323 F.3d at 536. On the other hand, if [the entity] simply acquires the debt for collection, it is acting more like a debt collector. Id. To distinguish between these two possibilities, the Act uses the status of the debt at the Schlosser, 323 F.3d at 536; see also 15 U.S.C. § 1692a(4); id. § 1692(a)(6)(F)(iii); 13

-1 at 12-13 (quoting Ruth, supra, 577 F.3d at

13 Of course, an entity that does § 1692a(6), would not be subject to the FDCPA even if it were

assigned a debt already in default.

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The Sixth Circuit has summarized the basic analysis as follows, Bridge v. Ocwen Federal Bank, FSB, 681 F.3d 355, 359 (6th Cir. 2012):

For an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired. [ ]

The same is true of a loan servicer, which can either stand in the shoes of a creditor or become a debt collector, depending on whether the debt was assigned for servicing before the default or alleged default occurred. Accord, e.g., Yarney v. Ocwen Loan Servicing, LLC, 929 F. Supp. 2d 569, 575 (W.D. Va. 2013). However, the legal status of the debt itself at the time of assignment i.e., whether it was in default or not in default is not dispositive. In order to prevent absurd results under such a upon assignment. An entity that mistakenly believes a debt was in default when the entity acquired the debt, for example, and treats it as such, is not freed from the strictures of the Act by its own error. Schlosser, 323 F.3d at 358; see also Bridge, 681 F.3d at 362-63; Gritters v. Ocwen Loan Servicing, LLC, 14-C- 00916, 2014 WL 74151682, at *4 (N.D. Ill. Dec. 31, 2014); Belin v. Litton Loan Servicing, LP, 8:06-cv-760-T-24 EAJ, 2006 WL 1992410, at *3 (M.D. Fla. July 14, 2006). As the Seventh Circuit explained in Schlosser, 323 F.3d at 358 It makes little sense, in terms of the conduct sought to be regulated, to exempt an assignee from the application of the FDCPA based on a status it is unaware of and that is contrary to its assertions to the debtor. The assignee would have little incentive to acquire accurate information about the status of the loan because, in the context of the mistake in this case, its ignorance s requirements.

Similarly, a creditor that acquired a debt in default, but for the purpose of servicing it, § 1692a(4), See Henson v. Santander Consumer USA, Inc., RDB-12-3519, 2014 WL 1806915, at *5 (D. Md. May 6, 2014) (determining that although plaintiffs alleged defendant purchased their debts after they went into default, plaintiffs did not properly allege that the defendant was a ectio Allen v. Bank of America, N.A., 933 F. Supp. 2d 716, 729 (D. Md. 2013) (finding defendant was

collect any amount that may have been in Salvato v. Ocwen Loan Servicing, 12-CV- 0088 JLS (POR), 2012 WL 3018051, at *5 (S.D. Cal. July 24, 2012) Padgett v. OneWest Bank, FSB, 3:10-CV-08, 2010 WL 1539839, at *15 (N.D. W.Va. Apr. 19, 2010)

Notably, tSee 15 U.S.C. § 1692a; Fontell, Alibrandi v. Financial Outsourcing Servs., 333 F.3d 82, 86 (2d Cir. 2003). immediately upon a debt

Fontell published opinion, the Second Circuit has said t that is

merely outstanding, emphasizing that only after some period of time does an outstanding debt go Alibrandi, 333 F.3d at 86.

Indeed, after surveying judicial decisions and various federal regulations defining default in certain contexts, the Second Circuit well after a

Id. at 87 (emphasis ad -debtor objectives would not be served if [it] adopted [the] argument

[proffered by plaintiff-debtor Id. The court reasoned, id.:

s position involves a curious role reversal a debtor arguing that his debt was in default at the earliest possible time and has the paradoxical effect of immediately exposing debtors to the sort of adverse measures, such as acceleration, repossession, increased interest rates, and negative reports to credit bureaus, from which the Act intended to afford debtors a measure of protection. We believe it ill-advised to adopt an approach that precipitously visits these consequences upon debtors. See also, e.g., Gacy v. Gammage & Burnham, No. 04-CV-1934-PHX-FJM, 2006 WL 467937, at *2 (D. Ariz. Feb. 23, 2006) (holding plaintiff failed to show a genuine dispute of fact regarding whether debt was in default where [p]laintiff se[t]forth no definiti and no rationale for concluding that plaintiff has defaulted on her medica Absent other governing law, such as student loan regulations, most courts faced with the issue have thought it sensible to consider the parties own relevant agreement to define default. See, e.g., De Dios , 641 F.3d 1071, 1074 (9th Cir. 2011) Although the Act does not define courts interpreting § 1692a(6)(F)(iii) look to any underlying contracts and applicable l McKinney v. Cadleway Properties,

Inc., 548 F.3d 496, 502 n.2 (7th Cir. 2008) (observing that ; Alibrandi, 333 F.3d at 87 will best be served by affording creditors and debtors considerable leeway contractually to define their own periods of default, according to their respective circumstances and business interests see also Fontell (suggesting that the Prince v. NCO Financial Servs., Inc., 346 F. Supp. 2d 744, 747-48 (E.D. Pa. 2004) (discussing

Federal Trade Commission staff opinion letter referencing terms of agreement to determine default). In Bailey v. Security National Servicing Corp., 154 F.3d 384, 385 (7th Cir. 1998), the plaintiff, a debtor, sued the defendants for alleged violations of the FDCPA. The defendants to the FDCPA. Id. at 386. The Seventh Circuit found that the plaintiff-debtor, who was

delinquent on an underlying agreement, but current on a superseding debt agreement i.e., a forbearance agreement wa Id. at 387. The Bailey Court reasoned, id. on sense and the plain meaning of the statute require that we distinguish between an individual who comes collecting on a defaulted debt and one who seeks collection on a debt owed under a brand new payment plan, or forbearance superseded by a new payment plan, even one that clearly benefitted both parties at the time it

Id. at 388. Observing that defendants pursued the debt under the forbearance

agreement rather than the underlying agreement, the Bailey Court grant of summary judgment for the defendants, explaining, id.:

[Defendants] sought to collect the debt under the forbearance agreement, which both parties agree was not in arrears at the time the defendants obtained it (and obviously not in default). Because the debt under the forbearance agreement pursued by [defendants] was not in default, the district court was correct that they debt collectors and thus not subject to the requirements of the [FDCPA]. Relying largely on Bailey, other courts faced with similar facts have also concluded that a FDCPA when, at the time of reassignment, the debtor is current in payments due under a superseding agreement. For example, in De Dios, 641 F.3d 1071, the defendant was assigned unpaid rental payments due to a landlord

after the landlord entered into a forbearance agreement with the debtor-tenant. Although the plaintiff was delinquent in rental payments due when the defendant was assigned the debt, the debt was not in default under the forbearance agreement. De Dios, 641 F.3d at 1074-76, 1074 n.2. Similarly, in Dolan v. Fairbanks Capital Corp., 930 F. Supp. 2d 396, 415-16 (E.D.N.Y. 2013), the court reasoned:

Here, as of November 22, 2000 when [defendant] began servicing s mortgage, the August 2000 Forbearance Agreement was in effect. That agreement noted that the original loan was in default, (Bhimani Decl., Ex. D at ¶ B), but that [the note holder] pending plaintiff's compliance with a new payment schedule. (Id. ¶ C.) There is no evidence that plaintiff had defaulted on his obligations under the August 2000 Forbearance Agreement as of November 22, 2000. [ ]

(See 2d Am. Compl., Ex. 1, Doc. 2 (evidencing that plaintiff submitted his required monthly payment for October 2000 to TMS).). Thus, following the rationale of the Seventh Circuit in Bailey, the Court concludes that the relevant debt is the debt plaintiff owed pursuant to the August 2000 Forbearance Agreement and because plaintiff was within the meaning of the FDCPA.

See also Tedder v. Deutsche Bank Nat. Trust Co., 863 F. Supp. 2d 1020, 1034 (D. Haw. 2012) (reciting defendants argument that if the Forbearance Agreement was not in default, then the servicer is not trying to collect on a debt for FDCPA purposes and citing Bailey); In Re Tolliver, Adv. No. 09- performing on her forbearance plan at the time [defendant] purchased the Loan, [defendant] is .

B. The Contentions FDCPA because, inter alia ECF 62-1 at 7, and Id. at 11. 14

Specifically, plaintiff asserts that PennyMac is i.e. Id. at 15. Ademiluyi argues that she is entitled to summary judgment because, in short, she was the ollection activity arising from consumer debt, i.e., her mortgage -1 at 8, 14- meaning of the Act, id. at 9-15; and defendant violated 15 U.S.C. §§ 1692e(5) and 1692(f) 15

14 As stated, supra, there are multiple statutory elements that a plaintiff must prove in See 15 U.S.C. § 1692a(6). Some are discussed in Pl See ECF 62-1 at 8- ry definition.

15 . o collect or attempt collection of a debt.

when it engaged in collection activities without obtaining the requisite debt collection license under the MCALA. ECF 62-1 at 15-19. In response, PennyMac argues that it is entitled to summary judgment because it is not a ing of the Act. Defe -1 at 21-34. It frames the issue as follows, id. at 9: [PennyMac] should be PennyMac advances

three potentially dispositive arguments on this point.

owned was therefore not collecting a debt of the statute. ECF 69-1 at 22-24 (citing, e.g., 15 U.S.C. § 1692a(4)). Second, even it if it was collecting a y for the purpose of collection, before ultimately seeking foreclosure. Id. at 24-29 (citing, e.g., 15 U.S.C. § 1692a(4)). Finally,

default at the time [PennyMac] acquired it, Id. at 29-34 (citing, e.g. not in default at the date of acquisition are creditors)) (emphasis in D). 16

16 to PennyMac before filing, See ECF 69-1 at 35. However, I need not reach this argument because PennyMac is not a debt collector under the FDCPA has advanced this preliminary defense for the first time more than two years after

For the reasons discussed below, I agree with PennyMac that, with respect to in default when PennyMac acquired it, nor did PennyMac, through its agent, Citi, treat the debt as if it were in default at acquisition. It is undisputed that in December 2010 Ademiluyi entered into the Forbearance with Citi. Forbearance, ECF 67-30 at 2; Amended Complaint, ECF 53 ¶ 38. And, there is no genuine dispute that plaintiff was current on her payments due under the Forbearance when PennyMac acquired the debt in early 2011. See, e.g., C. Ademiluyi Depo., ECF 67- time that you received notice that your loan had been transferred to Pennymac [sic], were you current in the payments to) (examination by counsel for defendant); id. Did you make a payment in February 2011 pursuant to the terms of the forbearance agreement? A. Yes. Citi Payment Record, ECF 67-12 at 2 (showing Citi received full payments due under Forbearance at the end of December 2010, January 2011, and February 2011). 17

commencement of the action. See ECF 10-1 (memorandum in support of MTD Motion) (lacking this argument).

17 -1 at 31, PennyMac that Plaintiff, by February 28, 2011 when [PennyMac] became the owner of her loan,

[Citi] Forbearance, Plaintiff remitted the agreed down payment of $4,374.70 by paying two Id. Further Plaintiff also remitted the first monthly payment of $2,187.35 (mistakenly, the amount required under the mortgag Id.; see also id. Forbearance when PennyMac acquired her debt). Although PennyMac implies that plaintiff did not make the full payment due under the Forbearance on January 28, 2011, the Citi Payment Record submitted by PennyMac, and unchallenged by plaintiff, shows a transaction titled

To be sure, Ademiluyi has asserted that PennyMac conceded, in discovery, that she was not current in her payments under the Forbearance when it acquired the debt. See Amended In support of this contention, plaintiff relies on PennyMacnswer to her Amended Complaint (ECF 57 ¶ 44, and on the testimony of Drawdy, Senior Vice President for Asset Management of Services (ECF 67-1 ¶ 1), at - See 8 n.39. by plaintiff, PennyMac had stated that it that Plaintiff was meeting her obligation under the forbearance E.g., ECF 60 at 8 n.39 (quoting Answer, ECF 57 ¶ 44). PennyMac explains that April 2011, [she] attempted to make her April mortgage payment to [Services] pursuant to the forbearance agreement she executed with [CitiMortgage]; however, [Services] refused to accept her payment -1 at 32 (accurately quoting Amended Complaint, ECF 53 ¶ 44) (alterations and emphasis in original). Thus, PennyMac argues that

Id. I agree with PennyMac that the cited statement does not concede, Forbearance when PennyMac acquired the debt.

transaction titled 8, 2011, which add up to the full amount due on that date under the Forbearance. ECF 67-12 at 2.

Plaintiff also relies, see ECF 53 ¶ 40(c), (d); ECF 60 at 8 n.39, on the following deposition testimony of Drawdy, ECF 60-3 at counsel:

Q. Okay. And the loan history you looked at, did it show that it was current at the time that PennyMac obtained it? A. Not current, but on a repayment plan. Q. So PennyMac understood it was under a repayment plan? A. Yes. Q. delinquent? A. She she would be considered current on the repayment plan, delinquent under her mortgage obligation. Q. A. So you would be up to date on your repayment plan. So if a payment was due in a very particular month, you would be current on that. But since would be delinquent. Plain deposition, ECF 60-3 at 7: Q. more than one month? [(quoting letter sent by Services to plaintiff date April 8, 2011)] A. Yes. Q. So when PennyMac Loan Services took over this servicing, this was more than one month in arrears; correct? A. Correct.

*** Q. The monthly payments due under the repayment plan would be greater than the original mortgage payments? A. Correct. Q. ? Why would it be greater than? A. What CitiCorp did was to take the delinquency and spread it over 17 months. So you would take the payment plus the additional amount of the delinquency spread over months and that would increase the payment.

believed [plaintiff] was more than one month behind on her mortgage loan when it acquired her

mortgage ; offered to [plaintiff] did not bring her loan current ; and that See ECF 53 ¶ 40(c), (d); ECF 60 at 8 n.39.

[PennyMa Quite the contrary: as Bailey recognizes, a loan may be current for purposes of a forbearance 9-1 at 33. Defendant adds that, when plaintiff relies on the April 2011 letter sent by Services, period. Id. at 33.

Again, I agree with PennyMa -30 at 2. No one disputes that plaintiff fell into default under her

original Note; that she entered into the Forbearance; and that the original Note was considered in default even after plaintiff signed the Forbearance. However, as recognized by the Bailey Court, the point of a forbearance agreement is to enable a debtor to move into a superseding, non- default status where she is safe from foreclosure and, ideally, eventually able to pay back the full delinquency on more manageable terms, without suffering more onerous legal consequences. See Bailey, 154 F.3d at 387-88; see also Dolan, 930 F. Supp. 2d at 415. Thus, to accept can only come out of default by full payment on the debt, and never via a superseding agreement with her lender, would work a perverse harm

on debtors. Id.; see also Alibrandi of

To be sure, the parties dispute the exact date that PennyMac acquired the debt. Plaintiff argues that defendant acquired the debt on March 9, 2011, see ECF 72 at 7, ECF 53 ¶ 39, while defendant asserts the earlier date of February 28, 2011. ECF 67-1 ¶ 7. But, the dispute is immaterial because plaintiff was current under the Forbearance on both dates. E.g., ECF 67-12 at 2; see It is undisputed that Ademiluyi made her first three payments due under the Forbearance in December 2010, January 2011, and February 2011, id., and that her next payment was not due until March 30, 2011. Forbearance, ECF 67-30 at 2. Additionally, plaintiff argues that PennyMac did not consider her to be current in her payments under the Forbearance when it acquired her debt. In her Reply, she contends:

earl -

ECF 60-11 at 3, dated Id. at 7-8. She concludes: the Defendant believed at the time and it is undisputed that PennyMac believed Ms. Ademiluyi

was in default when it acquired her mortgage note. Id. at 8. 18

18 Of course, PennyMac disputes this point.

In response, PennyMac summarizes its argument as follows, ECF 74 at 3-4:

2011 da

agreement with [Citi], whereby she would make 17 forbearance payments in order to cure her delinquency under the original loan terms. Plaintiff made a down payment on the forbearance plan in December 2010, and a few additional payments to [Citi] in early 2011. The forbearance payments were credited to past due amounts through December 1, 2010. Plaintiff stopped making payments in defaulted 011

and thereafter, her loan has only been paid through December 2010 and is due and owing for January 2011. Nonetheless, because Plaintiff was current on the default.

I agree with PennyMac that the statements cited by plaintiff are consistent with the debt was not in default when defendant acquired it. And, the statements do not support an inference that PennyMac believed the debt was in default when it was acquired. As stated, supra itself state unequivocally ECF 67-30 at 2. Proceeding are consistent with that understanding.

Further, the Forbearance also states that it -30 at

2. It is undisputed that plaintiff stopped making payments due under the Forbearance after, at the latest, April 13, 2011. E.g., Services Payment Record, ECF 67-13. Thus, by the time PennyMac sent the letters plaintiff cites in support of her argument, in May 2011 and October 2013, see ECF 72 at 7-8, plaintiff was also in default under the terms of the Forbearance. ECF 67-30 at 2;

Fontell mes, the Forbearance was void and the relevant payment date was that due under the original Note. And, b payments under the Forbearance agreement had brought payments due under the original Note

current only through December 2010, see ECF 67-12, ECF 67-13, it follows that, as of May 2011 and October 2013, plaintiff owed payments due through January 2011. Viewing the facts in the light most favorable to Ademiluyi, it is also noteworthy that there is no evidence that PennyMac treated the debt as in default until early April 2011. See, e.g., ECF 67-15 at 40 (letter from , Services, to plaintiff dated April 8, 2011, ur records show that you are extremely past due on your mortgage payments and we are therefore pur ; ECF 53 ¶ 40 (summarizing relevant alleged facts gleaned in discovery). At best for plaintiff, the evidence shows only agent, Services, treated the loan as in default at the time Services was assigned the debt, or soon after. Id. Under the circumstances present here, no reasonable juror could find that evidence showing Services believed the loan was in default when Services obtained the debt also shows that PennyMac, via its agent Citi, believed the loan was in default when PennyMac acquired the debt roughly one month earlier. Again, there is no evidence that Citi treated the debt as in default under the Forbearance agreement while it was servicing the debt on behalf of PennyMac, i.e., in PennyM See also -7. There is nothing showing, for example, that Citi behaved like a debt collector, rather than a See Amended -1; ECF 72.

FDCPA when PennyMac acquired it, see Bailey, 154 F.3d at 387-88; De Dios, 641 F.3d at 1074,

and because there is no evidence that PennyMac, through its agent, Citi, treated it as in default when PennyMac acquired the debt, see Schlosser, 323 F.3d at 358; Bridge, 681 F.3d at 362, PennyMac was . Therefore, in this case, PennyMac is not subject to the FDCPA, and it is entitled to summary judgment.

Conclusion For the Motion (ECF 69). A separate Order follows, consistent with this Memorandum.

Date: May 22, 2015 /s/

Ellen Lipton Hollander United States District Judge