IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE N0.: 502017CA003860XXXXMB AG

HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR SG MORTGAGE SECURITIES TRUST 2005 OPTI ASSET-BACKED CERTIFICATES SERIES 2005-OPTI,

Plaintiff/Counter-Defendant,

vs.

MONIQUE L'ITALIEN, and STEFANIE L'ITALIEN, etc., et. ux., et al.,

Defendants/Plaintiffs-in-Counterclaim,

vs.

HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR SG MORTGAGE SECURITIES TRUST 2005 OPTI ASSET-BACKED CERTIFICATES SERIES 2005, and OCWEN LOAN SERVICING, LLC,

Defendants-in-Counterclaim.
_____/

CLASS PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Class Representative, MONIQUE L'ITALIEN ("L'ITALIEN") and the Class Plaintiffs (together "Class Plaintiffs") by and through their undersigned counsel, and pursuant to Fla. R. Civ. P. 1.510, hereby file this Motion for Partial Summary Judgment and in support thereof state:

I. INTRODUCTION

Class Plaintiffs are entitled to a partial summary judgment on issues of liability as to the claims asserted in the Third Amended Counterclaim because the discovery obtained, the pleadings filed, and the sworn testimony of OCWEN LOAN SERVICING LLC'S, ("OCWEN") corporate representatives, OCWEN'S attorneys/agents and other knowledgeable individuals, establish there is no genuine dispute as to any material fact. Fla. R. Civ. P. 1.510(a). The established facts include the following:

1. L'ITALIEN is the title owner and mortgagor of the real property located at 623 36th Street, West Palm Beach, Florida ("the property"), which is the property subject to the foreclosure action brought against L'ITALIEN by the Plaintiff/Counter-Defendant, HSBC BANK, N.A. (Statement of Facts) (SOF 1 and 2).
2. Counter-Defendant, OCWEN LOAN SERVICING, LLC ("OCWEN") is the loan servicer for the loan subject to this litigation. (SOF 3). HSBC BANK, N.A. delegated to OCWEN the authority to service the loan on its behalf, pursuant to a power of attorney attached to the foreclosure complaint as Exhibit D. (SOF 4). This power of attorney allows OCWEN to attempt to collect obligations or debts such as service of process fees, attorney fees, and maintenance fees. (SOF 5).[1]
3. OCWEN sent to L'ITALIEN and the other Class Plaintiffs, monthly Mortgage Account Statements (MASs) (SOF 10, 11 and 15). OCWEN created the format of

[1] PHH Mortgage Corporation is the successor in interest to OCWEN Loan Servicing, LLC ("OCWEN") via a merger. The new name for OCWEN Financial Corporation, the parent of OCWEN Loan Servicing, LLC, is ONITY Group, Inc. (See Gina Feezer Class Certification testimony, Tr. 711). Throughout this litigation, PHH Mortgage Corporation and ONITY Group, Inc., has been collectively referred to as "OCWEN" and this will continue for purposes of this Motion for Partial Summary Judgment as well as the Statement of Facts. (See Feezer Class Certification Hearing testimony Tr. 711 to 712).

the MASs, including the language utilized, and decided what charges to include in the MASs sent to borrowers. (SOF 32 and 36 - 40).

4. The MASs were debt collection communications, which OCWEN used to seek to collect, and collected improper and misleading charges which were not legitimate. More specifically, the Class Plaintiffs are entitled to partial summary judgment on the following:

   (a) That OCWEN through the MASs improperly charged and collected service of process fees for an unknown tenant(s) and/or unknown spouse(s) in violation of the Florida Consumer Collection Practices Act (FCCPA), section 559.55 et. seq., and the Florida Deceptive Unfair Trade Practice Act (FDUTPA), section 501.201 et. seq., and the mortgage contracts.

   (b) That OCWEN through the MASs improperly charged and collected attorneys' fees in uncontested foreclosure cases, without OCWEN or its attorneys keeping any time records, as required by Florida law, and has attempted to collect and collected attorney's fees for activities that were not performed, in violation of the FCCPA, FDUPTA, and the mortgage contract.

   (c) That OCWEN through its MAS has misleadingly described and improperly charged and collected a "Property Maintenance Expense" where no maintenance on the property was performed. Alternatively, Class Plaintiffs who own property in West Palm Beach, Florida were improperly charged a registration fee, where their properties were neither vacant nor abandoned, as required by the applicable West Palm Beach City Ordinance, (Section 18-

209 and 18-210). These practices also violate the FCCPA, FDUPTA, and the mortgage contracts.

(d) That OCWEN through its MASs improperly attempted to collect and collected mortgage payments which were not due until the following month, which also violates the FCCPA, FDUPTA, and the mortgage contracts.

These improper service of process charges, attorneys' fee charges, and property maintenance expense charges, if unpaid, were added to the Class Plaintiffs' mortgage debt. The violations of the FCCPA, FDUTPA and the mortgage contract would warrant declaratory and injunctive relief, as well as monetary relief, including statutory damages.

II. SUMMARY JUDGMENT STANDARDS

In 2020 and 2021, the Florida Supreme Court amended Fla. R. Civ. P. 1.510 to adopt the federal summary judgement standard set out in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 1986. *In re: Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020);*In re: Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72 (Fla. 2021). Under Fed. R. Civ. P. 56(a), summary judgment is appropriate if the movant shows there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law. *Tolan v. Cotton,* 572 U.S. 650, 656-57 (2014) (quoting Fed. R. Civ. P. 56(a)). Under the federal standards, "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** facts". *Anderson*, 477 U.S. at 247-248 (emphasis added). An issue is "genuine" if a reasonable trier of fact, viewing all record evidence, could rationally find in favor of the non-moving party in light of his burden of proof. *Harrison v. Culliver,* 746 F. 3d 1288, 1298 (11th Cir. 2014). Also, under the federal standards, a fact is

"material" if "under the applicable substantive law, it might affect the outcome of the case". See *Hickson Corp. v. N. Crossarm Co.,* 357 F. 3d 1256, 1259-60 (11th Cir. 2004). Therefore, "[W]here the material facts are undisputed and do not support a reasonable inference in favor of the non-movant, summary judgment may properly be granted as a matter of law". *DA Realty Holdings, LLC v. Tenn Land Consultants,* 631 Fed. Appx. 817, 820 (11th Cir. 2015). For a non-moving party to prevail on motion for summary judgment, "the non-moving party must offer more than a mere scintilla of evidence for its position; indeed, the non-moving party must make a showing sufficient to permit the jury to reasonably find on its behalf". *Urquilla-Diaz v. Kaplan Univ.*, 780 F. 3d 1039, 1050 (11th Cir. 2015).

The Class Plaintiffs have the burden of proving their claims, and the Counter Defendants have the burden of proving their defenses. *Custer Med. Ctr. v. United Auto Ins. Co.,* 62 So.3d 1086, 1097 (Fla. 2010) (the defendant has the burden of proving an affirmative defense). "A movant for summary judgment need not set forth evidence when the non-movant bears the burden of persuasion at trial". *In re: Rule 1.150,* 317 So. 3d at 75.

Here, Class Plaintiffs are entitled to partial summary judgment because there are no genuine disputes as to any material facts, and OCWEN's affirmative defenses are insufficient as a matter of law.

III. THE MORTGAGE ACCOUNT STATEMENTS SENT TO CLASS PLAINTIFFS ARE DEBT COLLECTION COMMUNICATIONS

There is no genuine factual dispute that one of the purposes of the OCWEN MAS is debt collection, which must comply with the FCCPA and FDUTPA. In *Daniels v. Select Portfolio Servicing, Inc.,* 34 F. 4th 1260, 1266 (11th Cir. 2022), the court explained that the definition of "debt" for purposes of the FCCPA, and its federal counterpart, the Federal Debt Collection Practices Act (FDCPA)", is "any obligation or alleged obligation of a consumer to pay money

arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment". (Citting Fla. Stat. § 559.55(6); and 15 U.S.C. § 1692(a)(5)). Both the FCCPA and the FDCPA define "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium". *Id.* citing Fla. Stat. § 559.55(2); and 15 U.S.C. §1692(a)(2). *Daniels* specifically found that the mortgage statements sent to the plaintiff constituted a "communication" under the FCCPA, since the information conveyed in the MAS related to an obligation of a borrower to pay a promissory note, secured by a mortgage on one's home, which is a "debt". *Id.*

Daniels also reviewed the language and contents of the mortgage account statements, which further established that one of its purposes was debt collection. First and foremost, the MAS in *Daniels* expressly stated that **"This is an attempt to collect a debt. All information obtained will be used for that purpose".** *Id.* at 1264. (emphasis supplied). Second, the mortgage account statements had entries for "loan due date", "payment due date", "amount due", "total amount due", "interest bearing principal", and "interest rate". *Id.* at 1268. Third, "the statements attached a monthly coupon at the bottom of the first page with Select Portfolio's address". *Id.* Additionally, the mortgage account statements in *Daniels* warned borrowers about reporting negative credit to a collection reporting agency:

> [Select Portfolio] furnishes information to consumer reporting agencies. You are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your note and mortgage.

Id. at 1265.

Comparing the mortgage account statements in *Daniels* to OCWEN's MAS demonstrates their close similarity. First and foremost, under the heading **"Important Information"** and **"Important Notice"**, OCWEN's MAS states:

> **Important Notice** - "This communication is from a debt collector attempting to collect a debt; any information obtained will be used for that purpose...

(SOF 18 and 19).

Under this same heading, OCWEN's MAS contained a similar warning regarding negative credit information:

> **Important Credit Reporting Notification** - "We may report information about the account to credit bureaus. Late Payments, Missed Payments, or other defaults on the account may be reflected in your credit report.

(SOF 18 and 19).

Additionally, OCWEN's MAS, as in *Daniels*, contained the Total Amount Due, the Due Date, the Outstanding Principal, and the Interest Rate. (SOF 22). Similar to *Daniels,* OCWEN's MAS has on its first page a payment coupon with the "Amount Due" and with OCWEN's address. (SOF 23). This comparison of the MASs shows that most of the significant language and content that *Daniels* found related to debt collection was also present in OCWEN's MAS.

Daniels reversed an order granting a motion to dismiss and found that the plaintiff pled a plausible cause of action under the FCCPA and FDCPA. Regarding summary judgment, the court stated, "At summary judgment, the results may or may not be the same. "[W]hether a communication was sent in connection with an attempt to collect a debt is a question of objective fact, to be proven like any other fact". *Daniels*, 34 F.4th at 1268. So here, in addition to OCWEN stating that its MASs are from **a debt collector attempting to collect a debt**, and with the other contents of Ocwen's MAS that *Daniels* found was evidence of debt collection, OCWEN's corporate representative, Jason Jastrzemski admitted that OCWEN was the debt collector referred

to in the MAS, attempting to collect a debt. (SOF 20 and 21). In the order denying OCWEN's motion for summary judgment, the court pointed out the significance of this testimony:

> Thus, OCWEN's corporate representative did not deny that the mortgage account statement was a debt collection communication or deny that OCWEN was acting as a debt collector, but candidly admitted that OCWEN is the debt collector, referred to in all of the mortgage account statements sent to L'ITALIEN.

(D.E. 293, pg. 3).

OCWEN has not presented any testimony to contradict Mr. Jastrzemski or brought forth any evidence that debt collection was not one of the purposes of its MASs. OCWEN previously contended that the monthly MASs were sent in compliance with the Truth In Lending Act (TILA) and its regulations, and were not communications in connection with the collection of a debt under the FCCPA and the FDCPA. This was the same argument made by *Select Portfolio,* which the court in *Daniels* rejected. *Daniels,* 34 F. 4th at 1269 – 1271. There, the court explained that the language, "This communication is from a debt collector attempting to collect a debt; any information will be used for that purpose **is not required by TILA or its regulations."** *Daniels* 34 F. 4th at 1270. (emphasis supplied). Therefore, the purpose of including this language in the MAS would only be for debt collection. The court in *Daniels* also explained that a mortgage account statement, like any communication can have "dual purposes" such as providing a consumer with information as required under TILA, and demanding payment of a debt. 34 F. 4th at 1267 (citing *Reese v. Ellis Painter, et al*, 678 F. 3d 1211, 1216, (11th Cir. 2013)). *Daniels* also approvingly cited *Lear v. Select Portfolio Servicing, Inc.,* 309 F. Supp. 1237, 1240 (S.D. Fla. 2018), which holds that a communication can have more than one purpose, such as providing information to a debtor, as well as collecting a debt, and that use of the language **"this is an attempt to collect a debt,"** would indicate that the mortgage statements are debt collection communications. *Daniels* 34 F. 4th at 1271 (emphasis supplied).

Finally, in *Lamirand v. Fay Servicing, LLC,* 38 F. 4th 976, 978 (11th Cir. 2022), the 11th Circuit affirmed its holding in *Daniels* that periodic mortgage statements mandated by TILA can also serve as debt collection communications subject to compliance with the FCCPA and the FDCPA. These federal cases are particularly significant because Fla. Stat. § 559.77(5) requires that trial courts give **"due consideration" and "great weight"** to federal court opinions interpreting federal debt collection statutes when construing Florida's debt collection statutes. (emphasis supplied.).

Therefore, based on the language of OCWEN'S MASs sent to Class Plaintiffs, along with the testimony of OCWEN's own corporate representative, and the relevant case law, the Court should find there is no genuine dispute of material facts as to whether the MASs are debt collection communications that must comply with the FCCPA and FDUPTA.

IV. IT IS IMPROPER FOR OCWEN TO CHARGE CLASS PLAINTIFFS SERVICE OF PROCESS FEES FOR AN UNKNOWN SPOUSE AND UNKNOWN TENANT

OCWEN has regularly attempted to collect service of process fees for an unknown spouse and an unknown tenant in possession of the property. (SOF 41). In L'ITALIEN'S case, OCWEN charged $65 for service of process of three unknown persons for a total of $195. (SOF 43). These service of process charges for "unknowns" were part of the $325 service of process charge listed on the MAS sent to L'ITALIEN, which was added to L'ITALIEN's mortgage debt. (SOF 25, 26, 43 and 45). L'ITALIEN and the other Class Plaintiffs assert that these charges are improper and not legitimate, because it is well-established that a summons for an unknown spouse or an unknown tenant, when the actual person is not named in the complaint, is not valid service of process. *Gilliam v. Smart*, 809 So.2d 905, 907 (Fla. 1st DCA 2002); *see alsoGrantham v. Blount, Inc.,* 683 So.2d 538 (Fla. 2nd DCA 1996); *Liebman v. Miami-Dade County Code Compliance*

Office, 54 So.3d 1043 (Fla. 3rd DCA 2011);*Unknown Persons in Possession of the Subject Property v. MTGLQ Investors, L.P.*, 217 So.3d 1193 (Fla. 3rd DCA 2017).

The corporate representative for the Van Ness Law Firm, which represented OCWEN in L'ITALIEN's foreclosure case, was David Friedman. (SOF 34). The Van Ness firm has represented OCWEN in residential foreclosure cases hundreds if not thousands of times. (SOF 35). One of the Van Ness attorneys assigned to the L'ITALIEN foreclosure case was Evan Heffner. (SOF 48). Both Friedman and Heffner testified that when representing OCWEN, an unknown tenant in possession of the property was always named in a residential foreclosure complaint, and a separate summons would be issued for an unknown tenant in possession of the property. (SOF 49). Also, when representing OCWEN, it was the policy and practice to name an unknown spouse of the borrower as a defendant in the foreclosure complaint and issue a separate summons for the unknown spouse of the borrower, when OCWEN did not have information as to whether the borrower had married. (SOF 50). As was the case with L'ITALIEN, OCWEN then sought to collect these unknown service of process charges from the borrower and if unpaid, added these charges to the mortgage debt. (SOF 41 and 92 – 96).

It was acknowledged by OCWEN's counsel that the only reason to obtain a separate summons for an unknown spouse and/or unknown tenant, is so the process server can serve these unknowns, if there is an actual spouse or an actual tenant. (SOF 51). This, of course, wrongfully assumes that it is valid service of process to serve a real spouse or a real tenant with a complaint and summons that it is the name of "unknown spouse" or "unknown tenant". In fact, OCWEN's counsel acknowledged that if valid jurisdiction was not established by service of process on an unknown spouse or an unknown tenant when the real tenant or real spouse is not named in the foreclosure complaint, there would be no justification for issuing a separate summons for an

unknown tenant or an unknown spouse. (SOF 52). There is no testimony to the contrary and no legal authority supports a contrary position.

The case law establishes that serving a person with an "unknown" spouse or tenant summons, where the complaint does not contain the name of the real tenant or real spouse is invalid. In *Gilliam v. Smart, supra*, the court explained:

> The service of process on an individual cannot be used to broaden the scope of the pleadings to add a defendant who is not named as a party in the complaint. See *Lebanon Trust and Savings Bank v. Ray*, 10 Ill. App. 3d 345,293 N.E. 2d 623 (1973) (holding that court does not obtain jurisdiction by having service made upon party not named in lawsuit, and service of process can neither broaden scope of pleadings nor add a party not theretofore made a defendant); *Chamness v. Minton*, 39 Ill. App. 2nd 325, 188 N.E. 2d 873 (1963) **([S]ervice of process is merely [a] step in obtaining jurisdiction over person already named as party defendant in a lawsuit, and that process of itself cannot make a person a party defendant). Florida law sets out the proper procedure for adding parties, see Fla. R. Civ. P. 1.250(c) but these procedures were not followed here.**

Id. at 909 (emphasis added).

Gilliam relied on *Grantham v. Blount, supra*, where the court ruled that service of process on a real party with a John Doe summons does not commence an action against a real party, nor does it toll the statute of limitations against that party. See *Grantham*, 683 So.2d at 541-542. In reaching that conclusion, the court determined that such service was not authorized by statute and conflicted with established principles of Florida law. As the court instructed:

> Some states have statutes or rules of civil procedure that permit a plaintiff to file a fictitious or "John Doe" pleading if the true name of the defendant is not known. Once the true identity of the defendant is ascertained, the plaintiff then files an amendment naming the defendant. This amendment relates back to the date the original complaint was filed. (Citations omitted). **Florida is not one of these states.**

Id. at 540-541. (emphasis added).

Grantham and *Gilliam* remain the controlling authority on this issue. *See Liebman v. Miami-Dade County Code Compliance Office*, 54 So.3d 1043 (Fla. 3rd DCA 2011) (affirming

motion to quash service utilizing a "John Doe" Complaint). In *Unknown Person in Possession of the Subject Property v. MTGLQ Investors, L.P.*, 217 So.3d 1193 (Fla. 3rd DCA 2017), a residential foreclosure case, the court reversed an order denying a motion to quash service utilizing a summons titled "Unknown Person(s) in Possession of the Subject Property," and cited *Gilliam* as authority.

These same cases are referred to by Professor Trawick in his well-respected treatise on civil procedure where he explains:

> In some areas lawyers are applying foreign practice by using "John Doe" for the name of an unknown defendant and having the sheriff serve whomever he or she finds at the location of service. **This accomplishes nothing. Parties have to be named except as otherwise authorized by statute.** Clerks should not issue process to "John Does". (E.S.)

Trawick, "Florida Practice and Procedure, both the 2022 and 2023 Editions, Section 4.2 FN 6, pp. 40-42. Professor Trawick makes clear that serving a real party with an unknown summons is invalid. He writes:

> **Florida does not permit issuance of summons to unknown persons**, such as the practice in some states of issuing a summons to "John Doe" ... (E.S.)

In the footnote to this sentence, Professor Trawick again cites *Graham* and *Gilliam*, and further comments on foreclosure lawyers using this improper method of service:

> The 2008 recession spawned numerous mortgage foreclosures in which ignorant foreclosing lawyers designated defendants as "Spouse 1; "Tenant 1; and so forth". **This resulted in unnecessary costs.** (E.S.).

See Trawick, "Florida Practice and Procedure," both 2022 and 2023 Editions, Section 10.3, and (FN14), pp. 157, 153-155.

This Court recognized these well-established principles in its Order Denying OCWEN's Motion for Summary Judgment. There, the Court found that "Even if a single borrower has married or there are now tenants residing on the property, the borrower should not be charged for what is

still invalid service of process, since the proper procedure is for the real spouse or real tenant to be first named in the complaint, and then to be served process in their names." (D.E. 293, p. 21). Ocwen has ignored these principles and case law and continually sought to collect and collected service of process fees for unknowns, which is legally ineffective, completely unnecessary and neither reasonable nor legitimate.

In a similar case, *Hewitt v. Law Offices of David Stern, P.A., et al.,* Case No.: 502009CA036046XXXXXMB AH, involving this very same issue, former Circuit Judge, the Honorable Lucy Brown granted summary judgment and ruled as follows:

> **The Court finds that these service of process charges are not legitimate and the attempt to collect these charges from the Hewitts and similarly situated borrowers by including these charges as additional costs set forth in reinstatement letters, violates the Florida Consumer Collection Practices Act (FCCPA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).**
>
> The Court finds that there is no legal basis or justification for issuing a summons made out to an unknown tenant or spouse in an effort to obtain service of process on a real tenant or spouse....
>
> It is well settled that service of process on a real tenant with a John Doe summons, when the real tenant is not named in the complaint, is not valid service of process. See *Grantham vs. Blount*, 683 So. 2d 538 (Fla. 2d DCA 1996); *Gilliam vs. Smart,* 809 So. 2d 905, 909 (Fla. 1st DCA 2002); and, *Liebman vs. Miami-Dade County Code Compliance Office,* 54 So. 3d 1043 (Fla. 3d DCA 2011). Serving a real defendant with a John Doe or Jane Doe summons does not provide adequate notice; it does not vest jurisdiction by the court over the real defendant nor does it commence a legal action against a real party. Additionally, serving a real tenant with a John Doe or Jane Doe summons does not broaden the scope of the pleadings to add the name of the real tenant to the complaint. **In fact, valid service of process can be accomplished only after the real party is added to the complaint.** See *Grantham vs. Blount, Inc.* supra, *Gilliam vs. Smart*, supra, and *Liebman vs. Miami-Dade County Code Compliance Office*, supra.) Therefore, a John/Jane Doe summons is of no legal affect and serves no legitimate purpose.

(See attached Order marked as Exhibit 1)(emphasis added).

Therefore, based on these material facts and the well-established case law, there is no genuine dispute that charging borrowers for service of process fees for an unknown tenant and unknown spouse is improper and not legitimate.

V. CHARGING ATTORNEY FEES , WITHOUT TIME RECORDS, AND CHARGING FOR SERVICES THAT WERE NOT PERFORMED IS IMPROPER

OCWEN's standard practice in uncontested foreclosure cases is to charge borrowers such as the Class Plaintiffs, attorneys' fees that OCWEN pays its foreclosure counsel during the foreclosure litigation, without regard to whether specific services were actually performed, or the actual time spent rendering these services. (SOF 54). For example, the MAS of May 17, 2017, sent to L'ITALIEN contained an attorney's fees charge of $690.00. This was the amount OCWEN paid its foreclosure counsel for the time interval after the Complaint was filed up through the service of process. (SOF 56). OCWEN identifies this time interval as a "milestone". (Cook Dep., pps. 211 – 212). If the attorney's fees are not paid by the borrower upon receipt of the MAS, OCWEN adds these charges to the borrower's debt. (SOF 57).

Neither OCWEN nor its attorneys keep time records in uncontested foreclosure cases to determine what work is performed, and how much time was involved in performing these legal services. (SOF 58, 59, 60, 61, 62, 63 and 64). Instead of maintaining time records, OCWEN's counsel submits a form affidavit that is not case specific and does not include the work performed in any specific case but lists activities that may be performed in any uncontested foreclosure case. (SOF 65). OCWEN's counsel admitted that the activities and time contained in the form "Affidavit of Time and Effort" are calculated so that the amount of the attorneys' fees adds up to the amount OCWEN pays its attorneys as a flat fee, regardless of whether the specified services were performed, and without regard for how much time was actually spent in performing these services. (SOF 66). Neither OCWEN nor its counsel adjusts, corrects, modifies or makes any reduction to

the amount of time even when OCWEN knows the activities listed in the affidavit did not occur. (SOF 67).

OCWEN's practice of charging attorneys' fees in uncontested foreclosure cases, without regard to whether services were actually performed and the time actually spent in performing services, violates the well-established principle mandated by the Florida Supreme Court that a party who seeks attorneys' fees from someone other than their client must present accurate time records of the work done, and the time spent in performing that work. *Florida Patient Compensation Fund v. Rowe.,* 472 So. 2d 1145, 1150 (Fla. 1985). This same principle applies to contractual attorney's fees, where there is an attorneys' fee provision, such as in standard residential mortgage contracts. *Bell v. U.S.B. Acquisition Company, Inc.,* 734 So. 2d 403, 406, (Fla. 1999).

OCWEN admits that the attorneys' fees charged to borrowers in uncontested foreclosure cases are not based on the lodestar formula adopted by the Florida Supreme Court in *Rowe* and Bell *but* are based on a flat fee agreement OCWEN has with its attorneys. (SOF 54 - 64). It is undisputed that OCWEN has no flat fee agreement with L'ITALIEN or any other Class Plaintiff. As a result, this flat fee agreement is not a legitimate basis for computing the amounts Ocwen charges the borrowers. As the Florida Supreme Court made clear:

> [B]ecause the party paying the fee has not participated in the fee arrangement between the prevailing party and the party's attorney, the arrangement must not control the fee award.

Rowe 472 So. 2d at 1151.

In L'ITALIEN's case, OCWEN charged $690.00 for work allegedly done after the Complaint was filed and through service of process. (SOF 68). Mr. Friedman from the Van Ness Law Firm testified he was not aware of any legal work performed during this period. (SOF 69).

The only activities he was aware of after the Complaint was filed and through service of process was sending the summons to the process server and receiving the returns of service back from the process server. (SOF 70).

Evan Heffner, who represented OCWEN in L'ITALIEN's foreclosure case, admitted that he signed, swore to, and filed the Affidavit of Time and Effort to support OCWEN's attorney's fee claim against L'ITALIEN. (SOF 71). One of the entries in the Affidavit signed and sworn to by Mr. Heffner was for 1.25 hours, with the following explanation:

> **Review of Returns of Service** – communications with process server regarding additional service attempts or amended service returns as appropriate. Review affidavits of diligent search as needed. Review and revise service list. Preparation and filing notice of action as needed. Review proof of publication as needed. Review and filing of notice of dropping defendants as appropriate.

(Dep. Ex. 75). (SOF 72).

Both Friedman and Heffner admitted there were no additional service attempts or amended service returns, no affidavit of diligent search, no notice of action, or proof of publication. (SOF 73 and 74). Heffner admitted that when he signed, swore to, and filed the Affidavit of Time and Effort, he knew these activities never took place. (SOF 74); (Heffner Dep., pp. 122-123).

OCWEN knows that it is improper and illegitimate to seek attorneys' fees from a borrower for legal services that were not actually performed. OCWEN's own written policy regarding the nature of the fees it can charge borrowers states:

1. Servicer may collect a default related fee if the fee is for reasonable and appropriate services **actually rendered**...

2. Attorney's fees...[a]ttorney's fees charged in connection with a foreclosure action or bankruptcy proceeding **shall only be for work actually performed and shall not exceed reasonable and customary fees for such work.**

(SOF 75 and 76) (emphasis added).

The Florida Supreme Court holdings in *Rowe* and *Bell* and their progeny make no exception for mortgage servicers or lenders that would justify OCWEN charging L'ITALIEN or any Class Plaintiff attorneys' fees without accurate and current time records.[2] Nor is there any exception that would justify OCWEN seeking to collect attorneys' fees for activities not actually performed.

Therefore, based on the material facts and the relevant case law, there is no genuine dispute that OCWEN's attempt to collect attorney's fees in uncontested foreclosure cases is improper and not legitimate.

VI. CHARGING A PROPERTY MAINTENANCE EXPENSE WHEN NO MAINTENANCE OCCURRED IS IMPROPER

The MAS sent to L'ITALIEN on July 17, 2017 contains a "**Charge – Property Maintenance Expense**" of $250. (SOF 78). OCWEN's corporate representative, Jason Jastrzemski, acknowledged that this $250 was added to L'ITALIEN's debt, even though no maintenance was ever performed on L'ITALIEN's property. (SOF 78 and 84). According to Mr. Jastrzemski, this practice is in accordance with OCWEN's standard policies and practices. (Jastrzemski Dep., p. 120). OCWEN contends that this $250 property maintenance expense is a registration fee required by the City of West Palm Beach to register properties in foreclosure. (SOF 79). The July 17, 2017, MAS does not refer to this $250 expense as a registration fee, nor make any reference to a West Palm Beach ordinance or any obligation owed to West Palm Beach. (SOF 80). L'ITALIEN and the Class Plaintiffs maintain that referring to this $250 charge as a property

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[2] The requirement that a fee award be supported by specific findings as to the *Rowe* factors was recently reaffirmed by the Fourth District in *Jones v. Bank of Am., N.A.*, Case No. 4D2023-2648, 2024 WL 4829995, *1 (Fla. 4th DCA Nov. 20, 2024), in which the court held:

> [A] judgment for attorney's fees order [is] "fundamentally erroneous on its face" when it fails to include specific findings as to the *Rowe* factors.

maintenance expense is a deceptive act and unfair practice, and therefore, improper and not legitimate.

The terms "deceptive act" and "unfair practices" are not defined in FDUTPA, but the Act incorporates the standards of federal law and requires FDUTPA's terms to be construed liberally in favor of consumers. See Fla. Stat. § 501.202 (Rule of Construction); see also § 501.204(2) (great weight should be given to interpretation of unfair competition under federal law). Florida cases define a "deceptive practice" as one that is "likely to mislead" a consumer. See *Rollins v. Butland*, 951 So. 2d 860, 869 (Fla. 2nd DCA 2006) (quoting *Davis v. Powertel, Inc.*, 776 So.2d 971, 974 (Fla. 1st DCA 2000)). A deceptive act is an objective standard, so proof of any subjective reliance is unnecessary for purposes of FDUTPA. See *State Office of Att'y Gen. v. Comm. Leasing, LLC*, 946 So. 2d 1243, 1258 (Fla. 1st DCA 2007); *Office of Att'y Gen., Dep't. of Legal Affairs v. Wyandham Int'l., Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004). Referring to a registration cost as a property maintenance expense, where no maintenance is performed, is certainly a practice that is "likely to mislead a consumer."

Further, OCWEN's defense that this $250 charge is a registration fee required by the City of West Palm Beach should also be rejected as a matter of law. Up until 2020, there was no City of West Palm Beach ordinance that required any kind of registration fee simply because one's property was in foreclosure. The ordinance required the property to be vacant or abandoned in order for registration with the City to be required. OCWEN has admitted that L'ITALIEN's property was never vacant or abandoned. (SOF 81 and 82).

The West Palm Beach city ordinance that was applicable when L'ITALIEN received the July 2017 MAS were sections 18-209 and 18-210. Section 18-209 states:

> Registration by Owner. **Every owner of vacant property shall register within the City by filing a registration application prescribed by the City within ten days of vacancy.** (E.S.)
>
> Vacant property is defined in section 18-07 as:
>
> *Vacant property* means any parcel of land in this City that contains any building or structure that **is not lawfully occupied or inhabited by human beings as evidenced by the conditions set forth in the definition of "Evidence of Vacancy" above, which is without a lawful tenant or lawful occupant or without a certificate of occupancy**...(E.S.)

Similarly, section 18-210(a) applies only to abandoned real property which incorporates the definition of vacant property:

> **This section applies to abandoned real property located within the City which property is in or has been in mortgage foreclosure or where ownership has been transferred to a lender or mortgagee by any legal method.** (E.S.)
>
> Section 18-207 defines abandoned real property as:
>
> *Abandoned real property means any real property that is **vacant and is under public notice of default or is pending a mortgage foreclosure or notice of mortgagee sale.*** (E.S.)

Here, in the Order Denying Summary Judgment, Judge Delgado determined that for L'ITALIEN's property to be considered "abandoned" for purposes of requiring a registration fee, the property had to be both vacant and in foreclosure. (D.E. 293, pp. 29-30). Since L'ITALIEN's property was never vacant, no registration fee was owed.

OCWEN also argues that a later version of section 18-209, which required a registration fee if a property was in foreclosure, should apply. Essentially, OCWEN is arguing that the 2020 municipal ordinance 18-209 should be applied retroactively. This argument was also rejected by Judge Delgado. (D.E. 293, pp. 30-31). As Judge Delgado recognized, in determining whether a statute or ordinance can be applied retroactively, a two-step process is required:

> First, the court must ascertain whether the legislature (city commission) intended for the statute (ordinance) to apply retroactively. Second, if such an intent is clearly

> expressed, the court must determine whether retroactive application would violate any constitutional principles.

Metro Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 (Fla. 1999). *Id.*

OCWEN has not presented any evidence that the West Palm Beach City Commission intended the amendment to section 18-209 to be applied retroactively. The Florida Supreme Court has stated that trial courts should presume that in the absence of an expressed legislative enactment, a statute or ordinance is to apply prospectively. *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422, 425 (Fla. 1994). Secondly, since the change in the ordinance is clearly substantive, it would violate constitutional principles to retroactively increase the burdens on property in a retroactive manner. *State Farm Mut. Auto., Inc. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995). Therefore, as Judge Delgado found, OCWEN cannot rely on a municipal ordinance that was not in effect at the time that OCWEN charged Class Plaintiffs property maintenance expenses. (D.E. 293, p. 31).

VII. OCWEN'S ATTEMPT TO COLLECT MORTGAGE PAYMENTS NOT YET DUE IS IMPROPER

OCWEN'S corporate representative, Christian Kennedy, conceded that the MASs sent to L'ITALIEN and the other Class Plaintiffs, attempt to collect mortgage payments not yet due as of the date of the MAS. (SOF 12 and 85). For example, the June 19, 2017, MAS sent to L'ITALIEN lists the total amount **Due Now** as $93,610.82. (emphasis supplied). (SOF 86). Mr. Kennedy confirmed that that this amount included the mortgage payment for July 2017, which on June 19, 2017, was not due. (SOF 87). Mr. Kennedy also acknowledged that the MAS does not advise the borrower that the total amount Due Now includes the next month's mortgage payment. (SOF 88).

This attempt to collect next month's mortgage payment before the payment is due also applies to the amount required to reinstate one's mortgage. (SOF 89). In the May 17, 2017, MAS sent to L'ITALIEN, the reinstatement amount listed was $18,687.20. (SOF 90). Mr. Kennedy

admitted that this reinstatement amount included the June 1, 2017, mortgage payment that was not due on May 17, 2017. (SOF 91). Mr. Kennedy admitted that seeking to collect a mortgage payment not yet due was OCWEN's standard practice. (SOF 97).

It is improper to state an amount of a debt in a debt collection communication that is different from the current amount of the debt which is due. *Miller v. McCalla, Ram, et al.*, 214 F. 3d 872, 875 (7th Cir. 2000). This practice violates the Federal Fair Debt Collection Practices Act (FDCPA) and it is no excuse that the amount of the debt changes daily. *Veach v. Sheeks*, 316 F. 3d 390, 393 (7th Cir. 2003) (violation of the FDCPA because the amount of the debt provision is designed to inform the debtor of what the current obligation is, not what the debt might be in the future). As stated previously, these federal cases interpreting the FDCPA are significant, because Florida Stat. § 559.77(5) requires trial courts to give due consideration and great weight to the interpretations of Federal courts relating to the FDCPA. Further, Fla. Stat. § 559.552 provides that any inconsistency between the FCCPA and the FDCPA, the provision which is more protective of the consumer or debtor shall prevail. Therefore, it is improper and not legitimate for OCWEN to seek to collect a mortgage amount that is not yet due.

VIII. OCWEN'S USE OF THE MAS TO COLLECT IMPROPER CHARGES VIOLATES THE FCCPA, FDUTPA AND IS IN BREACH OF THE MORTGAGE CONTRACT

A. FCCPA

The purpose of the FCCPA is to protect Florida consumers from the illegal and/or unscrupulous practices of debt collectors and other persons. *Schauer v. General Motors Acceptance Corp.*, 819 So.2d 809, 811-812 (Fla. 4th DCA 2002). A cause of action under the FCCPA requires (1) that the defendant is a debt collector; (2) plaintiffs were the object of collection activity arising from the consumer debt; and (3) defendant engaged in in an act or omission

prohibited by the FCCPA. *Garrison v. Caliber Home Loans, Inc.,* 233 F. Supp. 3d. 1282, 1290 (M.D. Fla. 2017). The FCCPA prohibits a debt collector from claiming, attempting, or threatening to enforce a debt which such person knows is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist. Fla. Stat. § 559.72(9). OCWEN knows that it seeks to collect and collects from borrowers through its MASs, service of process charges for an unknown tenant and an unknown spouse, which as explained herein are not legitimate charges, since there is no legal right to collect these charges. These charges and OCWEN's attempts to enforce these debts through the MASs are in accordance with OCWEN's standard policies and practices. (SOF 92 – 96).

OCWEN also knows that in uncontested foreclosure cases, it charges attorneys' fees not based on any time records indicating the specific legal services performed in that case but based on a flat fee arrangement it has with its foreclosure attorneys. OCWEN has no flat fee agreement with L'ITALIEN or the Class Plaintiffs, and this violates the requirements for seeking fees from a non-client. *Rowe,* supra. OCWEN knows that it can only charge attorneys' fees for services performed, since OCWEN's own policies state that attorney fees charged to borrowers, "**shall only be for work actually performed.**" (emphasis supplied). (SOF 76).

OCWEN also knows it is improper and not legitimate to charge a property maintenance expense where no maintenance on the property was performed. Again, OCWEN's own policies state that OCWEN can charge only for services "**actually rendered.**" (SOF 75) (emphasis added). Further, OCWEN failed to disclose to borrowers, like L'ITALIEN, that this property maintenance expense is a registration cost. OCWEN also knowingly charges West Palm Beach property owners

a registration cost when such cost was not required because the property was not vacant or abandoned. (SOF 78 - 82).

Finally, OCWEN is aware that the amount included in the MASs for "Total Amounts Due" and "Reinstatement Amounts" includes the next months' mortgage payments, which are not "Due Now" as the MASs indicate. (SOF 97).

These charges are included in the MASs sent to borrowers with OCWEN'S knowledge and intent and in accordance with OCWEN's standard policies. (SOF 92 - 96). There has been no evidence presented of any error or mistake. It also has been recognized that sending the MASs, debt collection communications, to borrowers "**seeking to collect unlawful charges, triggers the violation of the FCCPA**." (emphasis supplied). *Cole v. Echevarria, et al.*, 965 So.2d 1228, 1231 (Fla. 1st DCA 2007); see also *Law Offices of David J. Stern, P.A. v. Banner*, 50 So. 3d 1221, 1222 (Fla. 4th DCA 2010); *Law Office of David J. Stern v. Hewitt,* 106 So. 3d 489, 490 (Fla. 4th DCA 2013).

It also must be emphasized that the case law which established that these charges are improper and illegitimate were decided as early as 1985 (*Rowe),* or since 1996 (*Grantham)* or 2002 (*Gilliam*). These cases have been affirmed and reaffirmed on a number of occasions. OCWEN, which has its own law department staffed by attorneys and paralegals, and which also hires outside counsel whose primary practice is handling foreclosure litigation, is obligated to know the law as to what charges are illegitimate. (Feezer Depo., pp. 13 – 14). In *Read v MFP*, 85 So. 3d 1151, 1155 (Fla. 2d. DCA 2012), the court explained that "a plaintiff may establish a violation of section 559.72(9) by showing that the debt collector garnished wages in violation of the statutory requirements for garnishment." (*citing Cliff v Payco Gen. Am. Credits, Inc.* 363 F. 3d 1113, 1124 (11th Cir. 2004)). Thus, it is not a defense for OCWEN to claim a lack of knowledge of basic legal

principles that apply to foreclosure cases. As the United States Supreme Court made clear in *Jerman v. Carlisle, McNellie, et al.*, 130 S. Ct. 1605 (2010) :

> We have long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally. (Citations omitted).

B. FDUTPA

OCWEN's attempts to collect these charges through the MASs also violates FDUTPA. The purpose of FDUTPA is to protect consumers from those "who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202(2). To effectuate this goal, courts have been instructed to liberally construe FDUTPA's provisions. *Id.*

In *Schauer v. General Motors Acceptance Corp.,* 819 So. 2d 809, 812 (Fla. 4th DCA 2002), the court found that a violation of the FCCPA is also a violation of FDUTPA. In *Martorella v. Deutsche Bank National Trust Company*, 161 F. Supp. 3d 1209, 1220, (S.D. Fla. 2015) which was a class action case arising from a mortgage servicer's attempts to collect improper charges, the court found that seeking to collect fees outside the scope of the servicer's legal entitlement, and billing borrowers for specific services that were unauthorized fall within the scope of "trade and commerce" and therefore is in violation of FDUTPA. See also *Consumer Financial Protection Bureau v. OCWEN Financial Corporation*, 2020 W.L. 1969375*5 (S.D. Fla. April 22, 2020) (FDUTPA applies to a mortgage servicer that seeks to collect fees outside the scope of its legal entitlement and for which the services were unauthorized or never performed)(*Alhassid v Bank of Am., N.A.,* 60 F. Supp 3d 1302 (S.D. Fla. 2015)). As with the FCCPA, it is Ocwen's act of sending

the MASs, attempting to collect these improper charges which triggers the FDUTPA violation. See *Cole*, supra, *Banner,* supra, and *Hewitt*, supra.

Further, OCWEN's actions in attempting to collect service of process charges on unknown defendants and charging attorney's fees unsupported by accurate and current time records, violates established public policy, which meets the FDUTPA definition of an "unfair practice". See *Martorella v. Deutsche Bank Nat. Trust Co.,* 931 F. Supp. 2d 1218, 1223 – 1224 (S.D. Fla. 2013)(citing *Samuels v. King Motor Co. of Ft. Lauderdale,* 782 So. 2d 489, 499 (Fla. 4th DCA 2001)). Also, as previously mentioned, charging a property maintenance expense when no maintenance was performed, but is instead an undisclosed registration cost, is a "deceptive practice" that is "likely to mislead a consumer" and violates FDUPTA. See *Rollins v. Butland,* 951 So. 2d 860, 869 (Fla. 2d DCA 2006) (quoting *Davis v. Powertel, Inc.* 776 So. 2d 971, 974 (Fla. 1st DCA 2000)). Additionally, these charges are injurious to consumers, which under the broad definition of FDUTPA, would clearly result in a FDUPTA violation.

C. BREACH OF CONTRACT

In the Court's Order Denying Summary Judgment, the Court referred to paragraph 28 of the mortgage contract. (D. E. 293, p. 36). This provision specifically provides that borrowers shall reimburse the lender for any and all costs, fees and expenses provided that the costs, fees and expenses are "**permitted by applicable law**" (emphasis supplied). As explained herein, the service of process charges, the attorneys' fees, and the property maintenance expense, are not permitted by applicable law and therefore, OCWEN's attempt to collect these charges is in violation of paragraph 28 of the mortgage provision.

D. OCWEN'S AFFIRMATIVE DEFENSES ARE INSUFFICIENT AS A MATTER OF LAW

A motion for summary judgment **need not set forth evidence** when the non-movant bears the burden of persuasion at trial. *In re Amends,* 317 So. 3d at 75 (emphasis added). However, it is important to point out that OCWEN has raised affirmative defenses which have already been ruled upon as insufficient as a matter of law. The Court has ruled that OCWEN's fourth affirmative defense, the litigation privilege, does not apply to OCWEN's mortgage account statements. (D. E. 293, pp. 12 – 15). Similarly, OCWEN's third affirmative defense that there is a TILA preemption, was rejected by *Daniels v. Select Portfiolio Servicing, Inc.,* 34 F.4th at 1270 - 1271, supra, which holds that a MAS which also serves as a debt collection communication is not preempted by TILA. (See also D. E. 293, pp. 4 – 5, where the Court rejected the TILA preemption defense). Additionally, OCWEN's 12th affirmative defense based on the statute of limitations for TILA actions, was also rejected by the Court which found there is no TILA cause of action asserted in this case, so the one-year TILA statute of limitations does not apply. (D. E. 293, pp. 5 – 6). Ocwen's eleventh affirmative defense alleges a failure to join West Palm Beach as a necessary party relating to the property maintenance expense. However, the Court ruled that L'ITALIEN's dispute was not with the City of West Palm Beach, but with OCWEN. (D. E. 293, pp. 31 – 32). The Court also rejected Ocwen's 13th affirmative defense which claims a lack of standing, specifically ruling that L'ITALIEN has standing to bring her claims:

> In summary, the court finds that OCWEN's mortgage account statement containing the alleged improper charges, triggered the causes of action for unfair debt collection and unfair trade practices, and adding these charges to L'ITALIEN's mortgage payment debt and threatening to report her lack of payment to credit bureaus, established L'ITALIEN's standing to bring her counterclaim.

(D.E. 293 p.12).

OCWEN has also raised affirmative defenses without any factual basis. Its ninth affirmative defense it claims that there is no FCCPA violation because any violation would have resulted from a "bona fide error." OCWEN has brought forth no evidence that the charges referred

to herein, included in the MAS, were the result of a "bona fide error." In the 10th affirmative defense, OCWEN claims that the service of process fees "complied with Florida statutes and Florida rules." Yet OCWEN has not provided any Florida statute or Florida rule which justify service of process fees for an unknown spouse or an unknown tenant. As far as the remaining affirmative defenses are concerned, they are mostly denials rather than affirmative defenses, and have either been ruled upon, or have been discussed fully in this motion.

CONCUSION

As shown herein, there is no genuine dispute as to any material facts. Ocwen sent the MASs to Class Plaintiffs. One of the purposes of the MASs was debt collection. The MASs contained the charges discussed herein, which, according to well-established case law, were illegitimate, unfair and deceptive, and breach paragraph 28 of the mortgage contract. Therefore, the motion for partial summary judgment as to each specified liability issue should be granted.

We hereby certify a true and correct copy of the foregoing was filed and served via an automatic email generated by the Florida Courts E-filing Portal in compliance with Fla. R. Gen. Prac. & Jud. Adm. 2.516 on those listed on the Serv ice List, this 23rd day of January 2025.

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IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO.: 50 2009 CA 036046 XXXXX MB AH

RORY HEWITT

Plaintiff,

v.

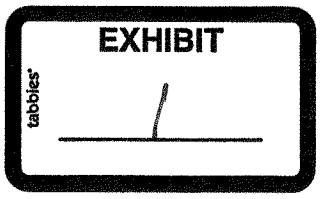
LAW OFFICES OF DAVID J. STERN, P.A.,
and DAVID J. STERN, individually

Defendants.
_____/

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO SERVICE OF PROCESS AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO SERVICE OF PROCESS

THIS MATTER came before the Court on September 6, 2012, upon Plaintiff and Class Representative, Rory Hewitt's, Motion for Summary Judgment and the Defendants' Cross Motion for Summary Judgment regarding the charges set forth in reinstatement letters for service of process on John Doe, Jane Doe, Unknown Tenants, and an Unknown Spouse, that were passed through to borrowers as additional costs that were required to be paid in order to reinstate their mortgages. The Court having reviewed the Motions and having conducted a full hearing and having heard argument of counsel, and being otherwise advised in the premises, finds as follows:

All of the material facts were stipulated. The Defendants admitted that in every foreclosure case, it was their standard practice to name as Defendants in the foreclosure complaint, John Doe and Jane Doe, Unknown Tenants in Possession, when foreclosing on a single-family home, condominium or townhouse. Similarly, it was the



Defendants' standard practice to name as a Defendant an Unknown Spouse, when at the time of the execution of the mortgage, the borrower was unmarried.

The Defendants also admitted that it was their standard practice to obtain a separate summons for both John Doe and Jane Doe, as unknown tenants, and to attempt service of process on each of these unknown tenants. Likewise, when the borrower was unmarried at the time of the execution of the mortgage, it was the Defendants' standard practice to obtain a separate summons for an unknown spouse and to attempt service of process on the unknown spouse.

Further, testimony revealed and the Defendants stipulated that they do not conduct any investigation before filing the foreclosure complaint and attempt service of process as described above, to determine whether any tenants reside on the property or whether the borrower has since married. The only exception to all of these policies was in three (3) Florida counties where the Clerks of these counties will not issue a summons for an unknown Defendant.

For each summons that is issued for each Defendant, known or unknown, where service of process is attempted, there is a charge of $45.00. This charge is passed through to the borrower as an additional cost required to be paid by the borrower in order to reinstate their mortgage. In the present case, the Hewitts were charged $90.00 for attempts to serve a summons on two (2) unknown tenants, even though the Hewitts never had any tenants residing on the property.

The Court finds that these service of process charges are not legitimate and the attempt to collect these charges from the Hewitts and similarly situated borrowers by including these charges as additional costs set forth in reinstatement letters, violates the Florida Consumer Collection Practices Act (FCCPA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

The Court finds that there is no legal basis or justification for issuing a summons made out to an unknown tenant or spouse in an effort to obtain service of process on a real tenant or spouse. The fundamental purpose of service of process is to give notice to a defendant that he or she is answerable to the claim of the plaintiff, and when service of process is accomplished, the Court obtains jurisdiction over that defendant and is able to proceed to judgment. See *Borden v. East European Insurance Company*, 921 So.2d 587 (Fla. 2006). Strict compliance with the requirements to obtain service of process is necessary in order to obtain jurisdiction over a party. *Vidal v. Suntrust Bank*, 41 So.3d 401 (Fla. 4th DCA 2010).

It is well settled that service of process on a real tenant with a John Doe summons, when the real tenant is not named in the complaint, is not valid service of process. See *Grantham v. Blount, Inc.* 683 So.2d 538 (Fla. 2nd DCA 1996); *Gilliam v. Smart*, 809 So.2d 905, 909 (Fla. 1st DCA 2002); and, *Liebman v. Miami-Dade County Code Compliance Office*, 54 So.3d 1043 (Fla. 3rd DCA 2011). Serving a real defendant with a John Doe or a Jane Doe summons does not provide adequate notice, it does not vest jurisdiction by the Court over the real defendant, nor does it commence a legal

action against a real party. Additionally, serving a real tenant with a John Doe or a Jane Doe summons does not broaden the scope of the pleadings to add the name of the real tenant to the complaint. In fact, valid service of process can be accomplished only after a real party is added to the complaint. See *Grantham v. Blount, Inc.*, supra; *Gilliam v. Smart*, supra; and, *Liebman v. Miami-Dade County Code Compliance Office*, supra. Therefore, a John/Jane Doe summons is of no legal effect and serves no legitimate purpose.

Moreover, there is no legitimate basis for requiring a separate summons to be issued to an unknown defendant, simply to determine whether any real tenant or spouse exists. The non-existence of any real tenant or spouse can easily be noted on the return of service that is filed, once service of process is obtained on the borrower. The fact that it is the Defendants' standard practice to obtain a separate summons for each unknown party and then attempt to serve each summons does not justify the Defendants passing through the service of process charges to the borrowers as additional costs required to be paid by borrowers in order to reinstate their mortgages.

Further, the Court finds that the Defendants, who are a law firm and its managing partner, have knowledge of the law and have knowledge that they are attempting to collect a debt that is not legitimate. Additionally, by adding these charges to the amount that is set forth in the reinstatement letters as amounts required to be paid in order to reinstate the mortgage, the Court finds that borrowers would be misled as to the validity of these charges in violation of Fla. Stat. §501.204.

The Court GRANTS the Plaintiff's Motion for Summary Judgment as to Service of Process and DENIES the Defendants' Cross Motion for Summary Judgment as to Service of Process.

The Court reserves ruling as to the amount of actual and statutory damages and injunctive relief until such time as the parties have met and determined the actual damages and the number of class members who would be entitled to statutory damages. The Court also reserves ruling on prevailing party attorneys' fees and costs.

DONE AND ORDERED in West Palm Beach, Palm Beach County Florida, this _____ day of _____, 2012.

SIGNED & DATED
SEP 27 2012
JUDGE LUCY CHERNOW BROWN

JUDGE LUCY CHERNOW BROWN
CIRCUIT JUDGE

Copies furnished to:

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