No. 20-2359

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ASHLY ALEXANDER, *ET AL.*

Plaintiffs-Appellants

v.

CARRINGTON MORTGAGE SERVICES, LLC

Defendant-Appellee

On Appeal from the United States District Court
For the District of Maryland, No. 1:20-cv-02369
Before the Honorable Richard Bennett

APPELLANTS' OPENING BRIEF

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April 2, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-2359 Caption: Alexander v. Carrington Mortgage Services LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ashly Alexander
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Phillip Robinson Date: 1/4/21

Counsel for: Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- Counsel has a continuing duty to update the disclosure statement.

No. 20-2359 Caption: Alexander v. Carrington Mortgage Services LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Cedric Bishop
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

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Signature: /s/ Phillip Robinson Date: 1/4/21

Counsel for: Appellants

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

Defendant Carrington Mortgage Services, LLC removed this action to the district court asserting it had original jurisdiction of the claims asserted pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d) pursuant to 28 U.S.C. §§ 1441 and 1453. JA 323. The district court's federal question jurisdiction was based on violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA") as alleged by the Appellants. The District Court also had supplemental jurisdiction of the state claims pursuant to 28 U.S.C. § 1367(a).

This appeal is from the district court's order granting Carrington's motion to dismiss and dismissing Plaintiff-Appellants' claims in their entirety. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

The district court entered its order on December 11, 2020. JA 298. Plaintiff-Appellants filed a timely notice of appeal on December 19, 2020. JA 318.

Because the issues in this appeal largely concern issues of first impression under state law, Plaintiff-Appellants previously moved to certify several questions of law to the Maryland Court of Appeals. ECF No. 16. This Court denied that motion. ECF. No. 24. The Court may, however, still choose on its own initiative to certify the original proposed questions of law or others to the Maryland Court of Appeals. *Gardner v. Ally Fin. Inc*., 61 A.3d 817, 821 (Md. Ct. App. 2013).

STATEMENT OF ISSUES

1. Does a licensed Maryland mortgage servicer who collects or attempts to collect consumer mortgage debts arising from a mortgage transaction on its behalf or on behalf of another qualify as a collector pursuant to Md. Code Ann., Com. L., § 14-201(b)?

2. May a licensed Maryland mortgage servicer charge a fee for collecting (in whole or in part) consumer mortgage payments by telephone or the Internet in relation to residential real property if the fee is not expressly authorized by law or written contracts signed by all parties to the mortgage?

3. May a person subject to the Maryland Consumer Debt Collection Act or Maryland Consumer Protection Act assert a common law defense to a statutory claim that was not included in the statutory scheme by the Legislature?

STATEMENT OF THE CASE

This case is one of many filed nationwide in recent years seeking to hold Defendant-Appellee Carrington Mortgage Services, LLC ("Carrington") and other mortgage servicers accountable for their unfair and deceptive conduct in collecting fees from borrowers simply for paying their monthly mortgage bills online or over the phone ("Pay-to-Pay" or "convenience" fees). In routinely collecting these $5 fees, Carrington has created a massive illegal profit center for itself. Plaintiff-Appellants' mortgage agreements do not expressly authorize the collection of convenience fees, nor does Maryland or federal law affirmatively permit their collection. Because the convenience fees are neither authorized by contract nor permitted by law, Carrington's collection of them violated the Maryland Consumer Debt Collection Act ("MCDCA"), Md. Code Ann., Com. L., §§ 14-202(8) and 14-202(11) and the Maryland Consumer Protection Act ("MCPA"), Md. Code Ann., Com. L., § 13-301, *et seq*., which incorporate violations of certain provisions of the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692b-1692j as prohibited conduct.

Despite the straightforward prohibitions of this conduct under the statutes, mortgage servicers like Carrington have succeeded in having these claims dismissed in a minority of cases, including this one. The district courts that have dismissed the claims have done so based on misunderstandings regarding statutory definitions and

applications such as, in this instance, applying flawed and constrictive definitions of "debt collection," or allowing a "voluntary payment" defense absent from the statute to defeat the claims at the pleading stage. But the overwhelming majority of courts nationwide have recognized, when confronting similar motions to that filed below, that because Pay-to-Pay fees are neither authorized by contract nor permitted by law, servicers' collection of such fees violates consumer protection statutes. *See Langston v. Gateway Mortg. Group*, No. 5:20-cv-01902, 2021 WL 234358, at *2 (C.D. Cal. Jan. 15, 2021); *Elbert v. Roundpoint Mortg. Serv. Corp.*, No. 20-cv-00250-MMC, 2020 WL 6940941, at *3 (N.D. Cal. Nov. 25, 2020)*; McWhorter v. Ocwen Loan Serv., LLC*, No. 2:15-cv-01831, 2017 WL 3315375, at *7 (N.D. Ala. Aug. 3, 2017); *Torliatt v. Ocwen Loan Servicing, LLC*, No. 19-cv-04303-WHO, 2020 WL 1904596, at *2 (N.D. Cal. Apr. 17, 2020); *Barnett v. Caliber Home Loans, Inc.*, No. 2:19-cv-309, 2020 WL 5494414, at *3-4 (S.D. Tex. Sept. 10, 2020); *Fox v. Ocwen Loan Servicing, LLC*, No. 9:20-cv-80060-MIDDLEBROOKS (S.D. Fla. Mar. 2, 2020), *cert. for interlocutory appeal denied* (Mar. 11) (Doc. 64-3); *Caldwell v. Freedom Mortgage Corp*., No. 3:19-cv-2193-N, 2020 WL 4747497, at *3-4 (N.D. Tex. Aug. 14, 2020); *Johnson-Morris v. Santander Consumer USA, Inc*., 194 F. Supp. 3d 757, 765 (N.D. Ill. 2016).[1]

[1] Underscoring the scheme's illegality as well as the clear application of Maryland law to this scheme, Maryland's attorney general is one of thirty-three attorney generals who recently filed a joint amicus curiae brief opposing a settlement in one

Plaintiff-Appellants now ask this Court to correct the district court's errors and find instead that Defendant's method of collection by imposing unlawful convenience fees violates both the state and federal debt collection laws.

I. Procedural History of the Case Below

Plaintiff-Appellant Ashly Alexander originally filed the Complaint in the Circuit Court for Montgomery County, Maryland on July 10, 2020. Defendant Carrington Mortgage Services, LLC ("Carrington") removed the action to the district court. JA 2. Plaintiff-Appellant Bishop joined the action while it was in the district court through the Amended Complaint. JA 5.

Carrington moved to dismiss the Amended Complaint. JA 4. Plaintiff-Appellants opposed Carrington's motion. JA 200. The district court did not hold a hearing but issued a written order and opinion dismissing Plaintiff-Appellants' individual claims with prejudice on December 11, 2020. JA 317.[2]

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of these cases, arguing that allowing the loan servicer defendants in that case to collect these fees would allow the servicers to "charge excessive, unnecessary and likely illegal fees to borrowers, in violation of some states' laws which prohibit these types of fees, as well as most states' [including Maryland's] statute of frauds." Brief of Amicus Curiae Attorney Generals, at 1, *Morris v. PHH Mortg. Corp.*, Case No. 20-CV-60633 (S.D. Fla. Jan. 29, 2021) (ECF No. 118-2).

[2] In this appeal Appellants seek review for the state law claims asserted under Count I of the Amended Complaint (JA 32-36, AC at ¶¶ 72-87) and their alternative claim in Count III of the Amended Complaint arising under federal law (JA 38-40, AC at ¶¶ 97-104). Appellants are not seeking review of their claim(s) under Count II or III of the Amended Complaint (JA 36-40, AC at ¶¶ 88-104).

II. The Alexander Facts

Ashly Alexander took out a residential mortgage loan from America's Wholesale Lender to secure the purchase of her property in Baltimore County. JA 9, 15-16, AC at ¶¶ 11, 23. The loan was assigned to The Bank of New York Mellon, f/k/a the Bank of New York as Trustee for the Certificate holders of the CWABS Inc., Asset-Backed Certificates, Series 2005-13 ("CWABS"), which retained Carrington to service the loan on its behalf. JA 16 AC at ¶¶ 24, 25. At the time CWABS retained Carrington to act as its collector, Ms. Alexander's loan was believed to be in default. JA 16, AC at ¶25.

The documents memorializing Alexander's loan do not expressly permit CWABS, Carrington or any other party concerning the loan to impose convenience fees for accepting payments by phone or Internet. JA 16, AC at ¶ 26. Nor did CWABS, Carrington, or anyone on their behalf ever execute or return to Alexander any agreement expressly authorizing imposition and collection of convenience fees incidental to the collection of her mortgage payments. JA 16, AC at ¶ 27.

Despite the absence of any written agreement authorizing imposition or collection of convenience fees, Carrington, by its vendors Western Union, Speedpay, and/or ACI Worldwide, imposed and collected from Alexander convenience fees for collecting her payments (which included principal payments) on the Alexander Loan due to CWABS over the Internet on the following dates: 9/16/2019, 8/30/2019,

7/1/2019, 6/3/2019, 4/8/2019, 3/4/2019, 2/4/2019, 1/3/2019, 12/3/2018, 11/5/2018, and 10/2/2018. JA 13-15, 17, AC at ¶¶ 21-22, 28-29. Carrington also reported the convenience fees to Alexander on her subsequent periodic mortgage statements incidental to her mortgage on 9/16/2019, 8/30/2019, 7/1/2019, 6/3/2019, 4/8/2019, 3/4/2019, 2/4/2019, 1/3/2019, 12/3/2018, 11/5/2018, and 10/2/2018. JA 17, AC at ¶ 29.

After she became aware that she had been paying additional convenience fees to Carrington while making her payment via the internet, Alexander wrote to Carrington to obtain information about the basis, authorization, and actual cost of the convenience fees. JA 17-18, AC at ¶ 30. Carrington received the letter and responded by generally asserting that its fees were reasonable and permitted by law, ignoring Alexander's inquiry regarding whether her loan documents authorized such fees. JA 18, 19, AC at ¶¶ 31-32, 34. However, Carrington did admit by its response that convenience fees were related to the servicing of the mortgage loan. JA 19, AC at ¶ 33. Carrington never refunded the fees it collected from Alexander. JA 19, AC at ¶ 35. Due to Carrington's improper and deceptive collection practices, Alexander has suffered economic, non-economic, and statutory damages. JA 19-20, AC at ¶¶ 37, 38.

III. The Bishop Facts

Cedric Bishop took out a residential FHA mortgage loan to refinance his

property in Montgomery County. JA 9, 20, AC at ¶¶ 12, 39. Carrington was retained to service and collect on Mr. Bishop's loan. JA 20-21, AC at ¶ 40. At the time Carrington was retained to act as a collector, the Bishop loan was believed to be in default. JA 20-21, AC at ¶ 40. The documents memorializing Bishop's loan do not expressly permit the owner of Bishop's loan or any other party, including Carrington, to impose convenience fees for accepting payments by phone or Internet. JA 21, AC at ¶ 41. Nor did any of the parties who held an interest in the loan ever execute or return to Bishop any agreement expressly authorizing imposition and collection of convenience fees incidental to the collection of his mortgage payments. JA 21, AC at ¶ 42.

Despite the absence of any written agreement authorizing imposition or collection of convenience fees, Carrington, by its vendors Western Union, Speedpay, and/or ACI Worldwide, imposed and collected from Bishop convenience fees for collecting his payments (which included principal payments) on the Bishop Loan over the Internet on the following dates: 12/16/2019, 11/16/2019, 10/11/2019, 8/16/2019, 7/15/2019, 6/15/2019, 5/15/2019, 4/12/2019, and 3/15/2019. JA 21-22, AC at ¶¶ 43, 44. Carrington also reported the convenience fees to Bishop on his subsequent periodic mortgage statements incidental to his mortgage on 12/16/2019, 11/16/2019, 10/11/2019, 8/16/2019, 7/15/2019, 6/15/2019, 5/15/2019, 4/12/2019, and 3/15/2019. JA 22, AC at ¶ 44.

After paying off his loan (JA 22, AC at ¶ 45), Bishop wrote to Carrington to obtain information about its accounting of his loan, including all amounts and fees paid on the loan and all periodic statements for the period during which Carrington had serviced the loan. JA 22, AC at ¶ 46. Carrington received the letter and responded by providing the last twelve billing statements generated for Bishop's account, many of which disclosed the convenience fee Carrington imposed on Bishop's loan. JA 23, AC at ¶¶ 47-48. Carrington's response letter confirmed that the convenience fees it collected were in fact incidental to its servicing of the mortgage loan. JA 23, AC at ¶ 49. Carrington never refunded the fees it collected from Bishop. JA 23, AC at ¶ 50. Due to Carrington's improper and deceptive collection practices, Bishop has suffered economic, non-economic, and statutory damages. JA 23-24, AC at ¶¶ 52-53.

IV. Carrington Knowingly Collected Convenience Fees.

Carrington is a licensed Maryland lender/servicer. JA 9-10, AC at ¶ 13. As a mortgage lender/servicer under Maryland law, Carrington had no legal or equitable right to impose the fees summarized above. But it collected Pay-to-Pay fees anyway, while disregarding the terms of Alexander's and Bishop's loans and Maryland and federal laws and regulations. JA 16-17, 21-22, AC at ¶¶ 26-28, 41-43. Plaintiff-Appellants further alleged below that Carrington's knowledge of its errors is demonstrated by its duties under the law and knowledge of the laws governing its

relationship to Alexander and Bishop (and the putative class members). JA 10-15, AC at ¶¶ 14-22.

SUMMARY OF ARGUMENT

This case concerns Carrington's fee harvesting practices. Plaintiff-Appellants, who have residential mortgages serviced by Carrington, alleged that Carrington's imposition of $5 "convenience fees" for collecting online payments – fees that were not explicitly authorized by Plaintiff-Appellants' loan agreements – violated the MCDCA, the MCPA, and the FDCPA. By imposing these fees not authorized by Maryland law or the written mortgage contracts, Carrington claims a right to churn profits from thousands of small-dollar fees imposed upon borrowers that it is otherwise not permitted to collect based upon a method of collection by accepting payments by Internet or by phone.

As relevant here, unlike the more narrowly focused FDCPA the MCDCA prohibits a "collector," which it defines as a "person collecting or attempting to collect an alleged debt arising out of a consumer transaction," Md. Code Ann., Com. L., § 14-201(b), from engaging in certain conduct. Among the prohibited conduct are "[c]laim[ing], attempt[ing], or threaten[ing] to enforce a right with knowledge that the right does not exist," Md. Code Ann., Com. L., § 14-202(8), and "any conduct that violates §§ 804 through 812 of the federal Fair Debt Collection Practices Act," *id.* § 14-202(11). This case focuses on the MCDCA's incorporation

of the FDCPA's prohibition on the "collection of any amount (including any interest, fee charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1).

Even though the MCDCA provides its own broad definition of a "collector" covered by the statute, the district court below did not cite to that definition in finding Carrington was not covered by the statute. Instead, the court looked to federal cases interpreting the meaning of "debt collector" under the FDCPA. The district court also imposed a requirement, not supported by the plain language of the MCDCA, that debt be assigned to a servicer "'solely for the purpose of collection' of the debt,'" JA 305 (quoting *Ademiluyi v. PennyMac Mortg. Inv. Tr. Holdings LLC*, 929 F. Supp. 2d 502, 525 (D. Md. 2013)). Importantly, *Ademiluyi* and the other cases cited by the district court were interpreting the *FDCPA* in issuing their rulings. But unlike the narrower FDCPA definition of "debt collector," which requires that the debt collected be in default, 15 U.S.C. § 1692a(6), the definition of "collector" in the MCDCA contains no such limitation; it broadly applies to any person collecting "debt arising out of a consumer transaction," Md. Code Ann., Com. L., § 14-201(b), regardless of the status of the debt. In turn, the MCDCA defines the term consumer transaction to "mean[] any transaction involving a person seeking or acquiring real or personal property, services, money, or credit for personal, family, or household

purposes." Md. Code Ann., Com. L., § 14-201(c). On its face, the MCDCA then plainly applies to residential mortgage loans, like those subject to this action, whether they are in default or not.

After incorrectly finding Carrington was not a collector under the MCDCA, the district court analyzed whether Carrington could have theoretically violated the substantive provisions of the law at issue. In particular, it looked at whether Carrington violated section 14-202(11) of the MCDCA, which borrows the FDCPA's prohibited "conduct" and makes that "conduct" independently actionable under the MCDCA's statutory scheme. Among other prohibited conduct incorporated into MCDCA, the Maryland statute provides a right of action to borrowers protected thereunder that is predicated on the FDCPA's prohibition on the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). Notwithstanding the plain language of the statutory text, the district court concluded that licensed Maryland debt collectors like Carrington are permitted to impose and charge incidental fees in the collection of mortgage loans even though neither the agreement creating the debt – the mortgage loan documents – nor Maryland law authorizes the fees.

The district court's decision on this point was in error. Notably, the district

court *did not find* that the underlying mortgage agreements authorized the fee, nor did it identify any Maryland law permitting such fees. Rather, the court based its conclusion on a factual determination that the fines were voluntarily incurred. JA 309. In so holding, the district court did not find support from any state appellate court decisions, but instead noted that several federal cases interpreting the FDCPA or out-of-state consumer protection statutes were in accord. *Id.* These cases not only represent the minority view of federal courts on this matter,[3] but are problematic because their outcomes are premised on out-of-state common law defenses or other policy preferences not part of the MCDCA's statutory scheme. Indeed, the majority of courts to have considered the issue have found that plaintiffs in Pay-to-Pay cases do indeed state a claim under state consumer statutes like the MCDCA. The district court's legal conclusions effectively create disfavored judicial exclusions to the scope of the legislation not supported by the text of the statutes themselves. The district court also erred by finding that the fees were permissible because the Plaintiff-Appellants purportedly paid them voluntarily, a factual issue that cannot be used as the basis for dismissal under Fed. R. Civ. P. 12(b)(6) stage and is further

[3] *See, e.g.*, *Caldwell v. Freedom Mortg. Corp.*, No. 3:19-CV-2193-N, 2020 WL 4747497, *3 (N.D. Tex. Aug. 14, 2020) (collecting cases, and holding that "[t]his Court is persuaded, like the majority of courts that have opined on the issue, that convenience fees derived from debt-payment methods are 'incidental' to the debt being paid").

incorrect because the MDCA does not incorporate a voluntary payment defense.

The district court erred in interpreting the remedial statutes and substituting its desired policy choices for those enacted by the Legislature, resulting in a decision against the weight of authority nationally finding that these Pay-to-Pay schemes are illegal under comparable statutes.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the district court's determinations of law *de novo*. *Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991). In addition, because this action was dismissed pursuant to Fed. R. Civ. P. 12(b)(6), the Court should accept as true the totality of facts stated in and incorporated by the Complaint and draw all inferences in Plaintiff-Appellants' favor. *Bender v. Elmore & Throop, P.C.*, 963 F.3d 403, 405 (4th Cir. 2020); *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020).

II. PLAINTIFF-APPELLANTS SUFFICIENTLY PLED THAT CARRINGTON'S COLLECTION OF PAY-TO-PAY FEES VIOLATES THE MCDCA.

The MCDCA is clear that Carrington is not permitted to utilize fee harvesting programs like those alleged in this case unless it is expressly authorized to do so by either law or agreement. And Carrington is *not* expressly authorized under Maryland law or any contract to impose Pay-to-Pay fees on Plaintiff-Appellants or Maryland mortgage borrowers. The district court erred in its overly narrow interpretation of the remedial MCDCA in favor of Carrington

acting as a collector and in its reliance on materially distinguishable provisions of the FDCPA (never incorporated by the Legislature) to find that the MCDCA does not prohibit Carrington's conduct.

A. The MCDCA defines collection more broadly than the FDCPA does, and applies to Carrington regardless of whether it is a debt collector under the FDCPA.

The primary underlying statutes at issue in this appeal, that is the MCDCA and MCPA, are remedial, consumer-protection statutes intended to protect consumers like Plaintiff-Appellants. *Andrews & Lawrence Prof. Servs., LLC v. Mills*, 223 A.3d 947, 950 (Md. Ct. App. 2020). The MCDCA, by its terms, applies to any "person collecting or attempting to collect an alleged debt arising out of a consumer transaction." Md. Code Ann., Com. L., § 14-201(b). The definition of "person" means "an individual, corporation, business trust . . . or any other legal or commercial entity." *Id.* § 14-201(d). And a "consumer transaction" includes "transaction involving a person seeking or acquiring real . . . property." *Id.* § 12-201(c). The MCDCA does not exempt from its coverage any categories of "persons." It thus applies to mortgage servicers like Carrington if they otherwise meet the definition of "collector."

As the Maryland Court of Appeals explained just last year, "[r]eading additional exemptions into a remedial statute limits the possibility of remedies beyond what the Legislature intended. 'It is not our proper function to add

to the statute another class of exemptions. That is a legislative function.'" *Andrews*, 223 A.3d at 968 (quoting *Dutta v. State Farm Ins. Co.*, 363 Md. 540, 553, 769 A.2d 948 (2001)). In *Andrews,* the court declined to expand the exempted class of individuals subject to the Maryland Consumer Protection Act to include lawyer's clients "where no such exemption exists in the plain language of the statute, and where such an expanded interpretation would run contrary to the purpose and intent of this remedial statute." *Id.* at 969.

Materially, when the Maryland General Assembly recently amended the MCDCA's list of prohibited conduct to incorporate conduct prohibited by the FDCPA, it chose *not* to import the FDCPA's narrow definitions of "debt collector" or "debt" into the state statute. *See, e.g.*, Financial Consumer Protection Act of 2018, 2018 Maryland Laws Ch. 731 (H.B. 1634) (codified at Md. Code Ann., Com. L., § 14-202(11)) (prohibiting "*any conduct* that violates §§ 804 through 812 of the Federal Fair Debt Collection Practices Act," but *not* incorporating the definitions of "debt" and "debt collector" set out in § 803 of the FDCPA (emphasis added)). Thus, it is clear that the legislature intended to make the FDCPA's prohibited conduct independently actionable under the rubric of the MCDCA's statutory scheme.

Because the MDCA applies broadly to those "collecting or attempting to collect an alleged debt arising out of a consumer transaction," Md. Code, Com. L., § 14-201(b), the MCDCA is broader in scope than the FDCPA, which, for loan

servicers, applies only to those servicers who acquired the debt while it was in default, and which does not apply to creditors at all.[4] By contrast, the MCDCA applies to *both* creditors and loan servicers. *See, e.g., Aghazu v. Severn Savings Bank, FSB,* No. PJM-15-1529, 2017 WL 1020828, at *8 n.21 (D. Md. Mar. 16, 2017) ("[T]he point is that the MCDCA applies more broadly than the FDCPA."); *Awah v. Cap. One Bank, NA,* No. DKC-14-1288, 2015 WL 302880, at *4, n.8 (D. Md. Jan. 22, 2015) ("The MCDCA contains a broader definition of 'collector' than the definition of 'debt collector' under the FDCPA."). That is true even where the

[4] *See* 15 U.S.C. § 1629a(6) (defining "debt collector" as "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" and specifically excluding "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person"); *see also Yarney v. Ocwen Loan Servicing, LLC*, 929 F. Supp. 2d 569, 575 (W.D. Va. 2013) ("[M]ortgage servicers are considered debt collectors under the FDCPA if they became servicers after the debt they service fell into default. At the time Ocwen became the servicer on Plaintiff's home loan, the loan was already in default. Therefore, Ocwen is a debt collector seeking to collect an alleged debt for the purposes of FDCPA liability in this case."); *Ayres v. Ocwen Loan Servicing, LLC*, 129 F. Supp. 3d 249, 277 (D. Md. 2015) (same); *Allen v. Bank of Am., N.A.*, 933 F. Supp. 2d 716, 729 (D. Md. 2013) (same); *Garner v. Select Portfolio Servicing, Inc.*, No. 17-1303, 2017 WL 8294293, at *3 (6th Cir. Oct. 27, 2017) ("A loan servicer is a 'debt collector' if the loan was in default, or the loan servicer has treated the loan as if it were in default, at the time it acquired the servicing rights to the loan." (citing *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 359, 362 (6th Cir. 2012)). Here the limited record shows Carrington presented itself as a debt collector to the Appellants in written correspondence as well. *See e.g.* JA 260 ("This communication is from a debt collector…"); JA 265 (same).

plaintiff uses section 14-202(11) of MCDCA to claim that the defendant engaged in conduct prohibited by the FDCPA; in those cases, courts hold that the MCDCA's standards and definitions control. *See, e.g., Ellis v. Palisades Acquisition XVI LLC*, No. JKB-18-03931, 2019 WL 3387779, at *6 (D. Md. July 26, 2019) (applying MCDCA definition of "consumer debt" to 14-202(11) claim).

The district court here erred by failing to apply Maryland law to Plaintiff-Appellants' MCDCA claim. Instead, it relied on cases applying federal law and the FDCPA's distinctive definitions. JA 304-5. For example, the district court cited *Ademiluyi v. PennyMac Mortg. Inv. Tr. Holdings, LLC*, 929 F. Supp. 2d 502, 525 (D. Md. 2013), and *Henson v. Santander Consumer USA, Inc.*, No. RDB-12-3519, 2014 WL 1806915, at *5 (D. Md. May 6, 2014), for the proposition that a loan servicer needed to "exclusively engage in debt collection" and that courts must look to whether "the servicer was assigned 'solely for the purpose of collection' of debt." JA 305. Both cases involved FDCPA claims against debt purchasers. *See also, e.g.*, JA 305-6 (citing *Arostegui v. Bank of America*, No. PJH-13-6009, 2014 WL 1230762, at *6 (N.D. Cal. Mar. 21, 2014), a case dismissing an FDCPA claim upon finding the defendant was not a debt collector for numerous reasons, including the absence of an allegation that the debt was in default when the defendant acquired servicing rights, or that the defendant in any way attempted to collect a debt, and *Allen v. Bank of America, N.A.*, 933 F. Supp. 2d 716, 729 (D. Md. 2013), a case

holding that a mortgage servicer was not subject to the FDCPA because it did "not acquire the mortgage primarily to collect any amount that may have been in default.").

Based upon the plain language of the MCDCA, the Complaint properly alleges that Carrington acted as a "collector" when it charged and collected convenience fees from Plaintiff-Appellants for making mortgage loan payments over the telephone or the Internet.

B. The MCDCA applies to mortgage servicers.

After incorrectly relying on FDCPA cases for the definition of debt collection, the district court further erred by finding that Carrington – a mortgage loan servicer – is not subject to the MCDCA because its loan servicing conduct does not fall under the statute's purview. JA 304-5. This finding was flawed, as it is well settled that the MCDCA applies to loan servicers who, like Carrington, engage in debt collection activity when they collect borrowers' monthly mortgage payments. *See, e.g.*, *Ervin v. JP Morgan Chase Bank NA*, No. GLR-2080, 2014 WL 4052895 (D. Md. Aug. 13, 2014) (The MCDCA "govern[s] the activities of mortgage servicers in the state of Maryland."); *Flournoy v. Rushmore Loan Mgmt. Servs., LLC*, No. 8:19-cv-00407-PX, 2020 WL 1285504, at *8 (D. Md. Mar. 17, 2020) (finding plaintiff stated a claim against mortgage servicer under section 14-202(8) for seeking to collect attorney's fees when it had no right to do so); *Cole v. Seterus Nat'l Mortg. Ass'n*, No. GJH-15-

3960, 2017 WL 623465, at *7-8 (D. Md. Feb. 14, 2017) (finding plaintiff stated a claim against owner of mortgage loan under section 14-202(8) for seeking to collect foreclosure costs and attorney's fees when it had no right to do so); *Moss v. Ditech Fin., LLC*, No. PWG-15-2065, 2016 WL 4077719, at *6-7 (D. Md. Aug. 1, 2016) (finding plaintiff stated a claim under section 14-202(8) where mortgage servicer allegedly collected corporate advances it had no right to collect); *Ayres v. Ocwen Loan Servicing, LLC*, 129 F. Supp. 3d 249, 271-72 (D. Md. 2015) (finding plaintiff stated an MCDCA claim against mortgage servicer).

Of course, it makes sense that the MCDCA would apply to loan servicers doing their routine and customary jobs, as the statute applies to persons "collecting or attempting to collect an alleged debt arising out of a consumer transaction," which in turn includes "any transaction involving a person seeking or acquiring real… property," i.e., a mortgage. *See* Md. Code Ann., Com. I., § 14-201(a)-(b). Judicially exempting mortgage servicers, which are responsible for collecting mortgage payments, from the MCDCA would be inconsistent with the statute's plain language. And in that regard, Plaintiff-Appellants did plead that Carrington engaged in debt collection activity by pleading that she made her loan payments to Carrington and in the process of collecting those payments, Carrington impermissibly also collected convenience fees. JA 17, 21-22, AC ¶¶ 28, 43.

Instead of citing to the plain language of the MCDCA or this well settled body of case law applying the MCDCA to loan servicers, the district court turned to an unrelated statute, the Real Estate Settlement Procedures Act ("RESPA"), which is not before the Court in this case. Nor do the cases on which the district court relied to reach the incorrect conclusion that loan servicers are not subject to the MCDCA. In addition to the FDCPA cases discussed above, the district court erroneously cited to the distinguishable *Seghetti v. Flagstar Bank FSB*, No. CV ELH-16-519, 2016 WL 3753143 (D. Md. July 13, 2016). In that case, the court found that the plaintiffs' allegation that defendant's agents had ransacked their home and changed their locks did not amount to "debt collection." *Id.* at *3. Those facts stand in stark contrast to the facts here, where the allegations stem from the routine act of collecting payments on mortgage debt. As such, *Seghetti* does not support the district court's restrictive understanding of the application of the MCDCA in this case. Its finding that Carrington's loan servicing conduct does not subject it to the MCDCA should be reversed.

C. The Pay-to-Pay Fees Imposed, Charged, and Collected by the Defendants for Accepting Payments by Telephone Violate the MCDCA Because They are Not Expressly Authorized by Plaintiff-Appellants' Uniform and Standard Loan Documents or Maryland or Federal Law Governing Their Mortgages.

Under the MCDCA, it is illegal to engage in conduct that violates sections "804 through 812 of the federal Fair Debt Collection Practices Act." Md. Code,

Com. L., § 14-202(11). Accordingly, one specific method of debt collection practice barred by section § 14-202(11) is a collector's "unfair or unconscionable means to collect or attempt to collect any debt . . . [including] [t]he collection of any amount (including **any interest, fee, charge, or expense incidental to the principal obligation**) unless such amount is **expressly authorized** by the agreement creating the debt or permitted by law." FDCPA § 808, 15 U.S.C. § 1692f (emphasis added). In addition, any violation of the MCDCA is also a *per se* violation of the MCPA. Md. Code, Com. L., § 13-301(14)(iii).

The district court plainly misunderstood the statute in finding that, "Plaintiffs' argument that their Deeds of Trust did not expressly grant Defendant the right to collect such a fee does not mean such a fee is prohibited." JA 307. Indeed, this absence of authority is *precisely* why the fees are prohibited: Pay-to-Pay fees violate this prohibition on the collection of amounts "incidental to the principal obligations" where, as here, they are not "expressly authorized" by the Mortgage Agreement. *See, e.g., Langston, supra,* 2021 WL 234358, at *3 ("[I]t is not within this Court's discretion to determine whether a . . . convenience fee is unfair or unconscionable; Congress has already made that determination. The plain language of § 1692f is unambiguous: the collection of any amount . . . not expressly authorized by the agreement creating the debt or permitted by law is impermissible.") (quoting *Simmet v. Collection Consultants of California*, No. 16-02273, 2016 WL 11002359, at *6

(C.D. Cal. July 7, 2016) (alterations in original)); *Lembeck v. Arvest Central Mortg. Co.*, No. 20-cv-03277-VC, __ F. Supp. 3d __, 2020 WL 6440502, at *1-2 (N.D. Cal. Nov. 3, 2020) (finding FDCPA violation because convenience fee neither expressly authorized nor permitted by law); *see also McWhorter v. Ocwen Loan Serv., LLC*, No. 2:15-cv-01831, 2017 WL 3315375, at *7 (N.D. Ala. Aug. 3, 2017); *Lindblom v. Santander Consumer USA, Inc.*, No. 1:15-cv-990-LJO-BAM, 2016 WL 2841495, at *6 (E.D. Cal. May 9, 2016); *Liable v. Rockport Fin., LLC*, No. 4:15-cv-00306-ERW, 2015 WL 4771664, at *3 (E.D. Mo. Aug. 12, 2015); *Wittman v. CB1, Inc.*, No. CV1505BLGSPWCSO, 2016 WL 1411348, at *5 (D. Mont. Apr. 8, 2016), *report and recommendation adopted*, 2016 WL 3093427 (D. Mont. June 1, 2016).

Nor did Carrington or the district court below offer any authority for the proposition that the fees are permitted by Maryland or federal law. To the contrary, Maryland law prohibits the fees. As a licensed mortgage lender in Maryland (JA 9-10, AC at ¶ 13), Carrington (as authorized by Md. Code FIN. INST. § 11-503) "has a duty of good faith and fair dealing in communications, transactions, and course of dealings with a borrower…" MD. CODE REGS. 09.03.06.20. Carrington also is not permitted to enter into agreements with borrowers unless (i) the agreement is in writing, (ii) the agreement is executed by all parties, and (iii) exact copies of the original documents executed by all parties are promptly provided to the borrowers. MD. CODE REGS. 09.03.06.08(A). As part of that duty of good faith,

Carrington is not permitted to "impos[e]… a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower." 12 C.F.R. § 1024.35(b)(5) which is a requirement for Carrington to comply pursuant to MD. CODE REGS. 09.03.06.09(A)(4) ("A mortgage lender[/servicer] [s]hall comply with all State and federal laws and regulations applicable to a particular loan"). In other words, Maryland regulations, which complement federal laws and regulations governing Carrington, forbid the imposition and collection of fees in which there is no written agreement as required by MD. CODE REGS. 09.03.06.08(A).

Notwithstanding the well pled facts of the Amended Complaint, the district court concluded that Carrington was permitted to impose and collect the convenience fees from the Plaintiff-Appellants because their loan documents did not expressly *prohibit* the fees. JA 307. That legal conclusion was erroneous because in the absence of federal or state law permitting such fees, the fees may only be imposed and collected if "expressly authorized" by the underlying mortgage agreement. *McWhorter*, 2017 WL 3315375, at *7 ("[T]he Court agrees . . . that 'the word "permitted" requires that the defendants identify some state statute which "permits," *i.e*. authorizes or allows, in however general a fashion, the fees or charges in question.'") (citation omitted); *Tuttle v. Equifax Check*, 190 F.3d 9, 13 (2d Cir. 1999) ("If state law neither affirmatively permits nor expressly prohibits service charges, a service charge can be imposed only if the customer expressly agrees to it

in the contract."). The district court's holding below simply rewrites the plain language of the statute that requires the fee to be expressly authorized by agreement or expressly permitted by law.

Authority holding otherwise is sparse; the most well-known case is *Flores v. Collection Consultants of California*, No. SA CV 14-0771-DOC, 2015 WL 4254032 (C.D. Cal. Mar. 20, 2015), which has been rejected by nearly every court to consider it. *See, e.g.*, *Wittman*, 2016 WL 1411348, at *5 (rejecting *Flores*, noting it "takes a minority position in regard to transaction fees"); *see also Torliatt*, 2020 WL 1904596, at *2 (declining to follow *Flores* and stating that the court would "follow the majority of cases in this circuit that have held that convenience fees may violate the FDCPA"). As one court explained, courts that "have considered *Flores* have found fault with at least three aspects of its reasoning." *Fuentes v. AR Resources, Inc.*, No. 15-7988-FLW-LHG, 2017 WL 1197814, at *7 (D.N.J. Mar. 31, 2017). Among those faults are (1) failing to recognize that the "mere fact that an unauthorized fee is offered as an alternative to authorized fees does not mitigate the fact that the fee itself is still prohibited," *id.*; (2) "failing to inquire into the facts that would establish that the benefit had 'passed through' to a third party other than the debt collector," *id.*; and (3) failing to recognize that "it is not for the courts to independently assess whether a particular convenience fee is 'unfair' or 'unconscionable' 'because Congress has already made that determination.'" *Id.* at

*8 (quoting *Lindblom*, 2016 WL 2841495, at *6–7). In short, *Flores* does not provide a basis for affirming dismissal, particularly since the district court indeed failed to recognize that the "alternative" nature of the fees does not mitigate their unlawfulness, and because Plaintiff-Appellants allege Carrington profited from charging Pay-to-Pay Fees, JA 7-8, AC ¶ 3, thereby negating any "pass-through defense." *See Johnson-Morris*, 194 F. Supp. 3d at 765 (distinguishing *Flores* on the basis that the fees at issue in *Flores* "'did not inure benefits to the collector.'")).

D. The District Court also erred in dismissing the Amended Complaint by finding that the convenience fees are not "incidental" to Plaintiff-Appellants' loans and therefore do not allegedly violate COM. L., § 14-202(11).

The district court also erred by finding that the "convenience fees were not incidental to their mortgage debt." JA 311. Like the MCDCA, the FDCPA, §1692f provides, in part:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The collection of any amount (including any interest, fee, charge, or expense ***incidental to the principal obligation***) unless such amount is expressly authorized by the agreement creating the debt or ***permitted by law***. (emphasis added)

The question of whether Pay-to-Pay fees are incidental to the underlying debt and, therefore, subject to FDCPA (and in turn, MCDCA), has been litigated in multiple cases throughout the country and has been overwhelmingly answered in the

affirmative. The District Court for the Northern District of California examined the meaning of the "incidental" in the statute, astutely reasoning as follows with respect to telephonic convenience fees (referred to as "IVR" fees):

> The IVR fee is incidental to the payment of the principal obligation. The only plausible reading of the word "incidental" in this context is as a reference to something that is connected to but far less significant than the underlying debt. That describes the IVR fee well. The borrower's purpose in using the IVR system—and so incurring the IVR fee—is to make their mortgage payment.
>
> [Defendant] points out that: (i) the fee is paid for the benefit of using an expedited means of making the mortgage payment; (ii) this method of payment is not specified in the mortgage contract; (iii) the payment methods that *are* specified in the contract are still available to the borrower; and (iv) the borrower is not charged a fee for using those methods. But none of this makes the fee any less "incidental" to the payment of the principal obligation. ***The borrower is still paying the fee in connection with the loan payment, and there would be no reason to pay the fee but for the need to pay the principal obligation. The fact that there are other payment methods not involving a fee or the fact that it's a method the borrower has selected does nothing to take the take the fee outside the plain language of the statute***. If you buy a plane ticket in advance and then decide at the airport to pay a fee to upgrade from "economy" to "premium economy," that fee is incidental to your purchase of the flight, even though you received an added benefit for the fee and had the option of just staying in economy.

Lembeck, 2020 WL 6440502, at *1 (emphasis added).

Like the *Lembeck* court, the overwhelming number of courts analyzing Pay-to-Pay fees under FDCPA § 1692f(1) and analogous state debt-collection statutes have found that such fees are "incidental" to the debt, regardless of the availability of other payment options. *See Langston,* 2021 WL 234358, at *2 (rejecting

contention that Pay-to-Pay fee is "entirely divorced from the status of the underlying debt" and noting courts in Ninth Circuit "reject arguments that Pay-to-Pay fees constitute a separate agreement between the lender and borrower and are independent of the underlying debt"), *Elbert,* 2020 WL 6940941, at *3 (finding decisions deeming such fees incidental more persuasive than district courts reaching opposite conclusion); *McWhorter*, 2017 WL 3315375, at *7 (rejecting the argument that Pay-to-Pay fees cannot violate 1692f(1) because they are "optional" or "avoidable"); *Torliatt*, 2020 WL 1904596, at *2 (noting the argument has "been rejected by the majority of courts in [the Ninth] circuit that have addressed this question"); *Barnett,* 2020 WL 5494414, at *3-4 (recognizing that "alternative options do not change the pay-to-pay fees' incidental relationship to the underlying debt"); *Caldwell,* 2020 WL 4747497, at *3-4 ("This Court is persuaded, like the majority of courts that have opined on the issue, that convenience fees derived from debt-payment methods are 'incidental' to the debt being paid."); *Johnson-Morris*, 194 F. Supp. 3d at 765 ("convenience fees" to make payments online and over the phone are "incidental" to the underlying debt within the meaning of § 1692f, regardless of availability of other payment methods, because they are incurred in connection with efforts to collect the debt); *Shami v. Nat'l Enter. Sys*., No. 09-CV-722 (RRM)(VVP), 2010 WL 3824151, at *3-4 (E.D.N.Y. Sept. 23, 2010) (transaction fees for payments by phone or internet were "incidental to Plaintiff's

purported actual debt" prohibited by § 1692f(1)); *Quinteros v. MBI Associates, Inc.*, 999 F. Supp. 2d 434, 439 (E.D.N.Y. 2014) (transaction fees were incidental to the principal obligation even though not part of the underlying debt or principal amount owed); *Liable v. Rockport Financial, LLC*, No. 4:15-CV-00306-ERW, 2015 WL 4771664, at *3 (E.D. Mo. Aug. 12, 2015) (denying motion to dismiss, rejecting argument that convenience fee for paying by credit card was not "incidental" to debt because other payment options existed); *Simmet,* 2016 WL 11002359, at *5 (rejecting argument that online payment fee did not violate 1692f(1) because it was connected to optional payment method and thus was not "incidental" to debt); *Lindblom,* 2016 WL 2841495, at *7 (finding that a Pay-to-Pay fee collected for optional online and telephone debt payments violated § 1692f and the corresponding state debt collection statute); *Wittman*, 2016 WL 1411348, at *5 (following "the majority of courts" in finding a "transaction fee imposed for using a certain payment method" are incidental to the underlying debt and therefore impermissible).

The rationale of these cases is straightforward and faithful to the statutory text. As explained by the Southern District of Florida in *Fusco v. Ocwen Loan Servicing LLC*, Case No. 20-cv-80090, 2020 WL 2519978 (S.D. Fla. Mar. 2, 2020), the plain, ordinary meaning of "incident" is "a dependent, subordinate, or consequential part." Because the Pay-to-Pay fees are "dependent on the payment of Plaintiff's debt," they are incidental to that debt within the meaning of §1692f. Put another way, "there

could be no [Pay-to-Pay] fee without a payment to make more 'speedy.'" *Fusco*, 2020 WL 2519978, at *2;[5] *see also Caldwell*, 2020 WL 4747497 at *4 (noting that the debt collector in that case "charges and collects the associated fee only when its borrowers make a payment on their debt"). The district court's determination that the convenience fees were not incidental to the mortgage debts was legally erroneous, and led to its flawed holding that Plaintiff-Appellants failed to state claims under the MCDCA and MCPA. This determination should be reversed.

E. The district court erred in dismissing the claims on the basis of Plaintiff-Appellants' purported "voluntary payment."

Further contributing to its incorrect decision to dismiss the claims, the district court wrongly found that the payment of the convenience fees was "voluntary"

[5] The *Fusco* court further recognized that the FTC Staff Commentary on the FDCPA is instructive in this regard noted that the Commentary provides illustrations of service charges and fees as being activity covered by the Act. *See, Fusco,* at *2. That FTC Staff Commentary explained that a "debt collector may establish an 'agreement' without a written contract. For example, he may collect a service charge on a dishonored check based on a posted sign on the merchant's premises allowing such a charge, if he can demonstrate that the consumer knew of the charge . . . *at the time that she entered into the agreement creating the debt*." *Id.* at *2, *4 (emphasis original) (citing *Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act* 53 Fed. Reg. 50097-02 (Dec. 13, 1988)). The *Fusco* court was persuaded that this "example illustrates that charging a fee for a dishonored check *is* the type of activity which would be covered by the Act. Otherwise, the Commentary would not have addressed the situations in which a service charge could be imposed, as the Act would have no authority to regulate that activity." *Id.* at *2.

because of Plaintiff-Appellants' purported assent to the payments through a clickwrap method. JA 309.

Critically, in Maryland, courts do not apply the voluntary payment defense to statutory consumer protection claims, "because to preclude recovery under the voluntary payment doctrine would undermine the legislative purpose in enacting those statutes." *Braan v. Wells Fargo Home Mortg., Inc. by Wells Fargo Bank, N.A.,* No. CV PX-17-0380, 2017 WL 3315253, at **6–7 (D. Md. Aug. 3, 2017) (collecting cases). In *Braan*, the court found that the voluntary payment defense did not bar plaintiff's claims under the MCPA and another Maryland consumer statute, the Maryland Mortgage Fraud Protection Act, as applying the defense would "improperly allow an equitable doctrine to nullify the goals and intent of the legislature." *Id.* Applying the same reasoning under Texas law, the court in *Barnett,* 2020 WL 5494414, found the voluntary payment defense inapplicable to claims that Pay-to-Pay fees violated Texas's consumer protection statute because the Texas statute (like the MCDCA) "creates a right of action even if payment is made voluntarily." *Barnett*, at *3. The district court relied on no Maryland authority for its remarkable determination that this common law defense could overcome claims raised under Maryland's consumer protection statutes. *Andrews*, 223 A.3d at 968 (declining to apply exceptions to the remedial statutes no enacted by the Legislature itself).

Other courts have also rejected this "voluntary payment" defense at the motion to dismiss stage, noting that the defense requires full knowledge of the facts at the relevant time. *See, e.g.*, *Caldwell,* at *4 (voluntary payment defense involves factual issues inappropriate for resolution at 12(b)(6) stage); *Langston*, 2021 WL 234358, at fn. 4 (rejecting argument that application of the Rosenthal Act is precluded by plaintiff's "voluntary election of a payment method associated with a Pay-to-Pay fee" and noting "affirmative defenses may not be raised on a motion to dismiss where the defense is not apparent as a matter of law on the face of the complaint, as here"); *Torliatt*, 2020 WL 1904596, at *2 (holding that optional nature of convenience fee did not preclude application of the FDCPA or Rosenthal Act and collecting cases).

The application of the voluntary payment defense here was further erroneous because in Maryland, voluntary payment is an affirmative defense that only bars recovery if the defendant proves the plaintiff had "full knowledge of all the facts." *Bourgeois v. Live Nation Entertainment, Inc.*, 3 F. Supp. 3d 423, 455-56 (D. Md. 2014) (citing *Poe's Pleading & Practice,* 6th ed. § 119 (1970)). Here, no such findings were made, and for that affirmative defense to apply here, it would have been Carrington's burden to prove that the Plaintiff-Appellants did not know that Carrington did not have the legal right to charge these fees. The district court's

dismissal of the claims on this basis is unsupported by the plain language and purpose of the MCDCA and was in error.

III. PLAINTIFF-APPELLANTS STATED CLAIMS UNDER THE MCPA.

In addition to their claim for violation of the MCPA as derivative of their MCDCA claim, Plaintiff-Appellants pled a standalone claim for unfair and deceptive practices under the MCPA. JA 34-36, AC ¶¶ 80-87. Plaintiff-Appellants alleged both that (1) Carrington's use of unlawful methods of collection of fees and charges constitutes unfair and deceptive practices in violation of Md. Code, Com. L., § 13-301(1)(3) and §§ 13-303(4)(5); and (2) Carrington's practice of inflating charges far in excess of its actual costs is unfair and deceptive. JA 35.

The district court first found that Plaintiff-Appellants were required to plead their standalone MCPA claim with particularity because it "sounds in fraud." JA 312 (citing *Marchese v. JPMorgan Chase Bank, N.A.*, 917 F. Supp. 2d 452, 465 (D. Md. 2013)). But Plaintiff-Appellants did not plead an MCPA claim sounding in fraud for which a heightened standard would apply (i.e. § 13-301(9)). Instead, because Plaintiff-Appellants pled non-fraud unfair and deceptive practices in violation of sections 13-301(1)(3) and 13-303(4)(5), the heightened standard does not apply. *See Gillis v. Household Fin. Corp. III*, No. GJH-18-3923, 2019 WL 3412621, at *9 (D. Md. July 29, 2019) (citing *McCormick v. Medtronic, Inc.*, 219 Md. App. 485 at 529–30 (2014)). In *McCormick*, the Maryland Court of Special Appeals explained that

under some provisions of the MCLA, a "party can allege an 'unfair and deceptive trade practice' without replicating a claim for common-law fraud." 219 Md. App. at 529. The court explained further:

> For example, an "unfair or deceptive trade practice" may include a "[f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers", or the "[f]ailure to state a material fact if the failure deceives or tends to deceive." To prove those violations, it is unnecessary to prove scienter. It is, therefore, unnecessary to allege those violations with particularity.

McCormick, 219 Md. App. at 529-30 (citations omitted).

After misstating the relevant standard, the district court went on to dismiss the standalone claim upon finding that "Plaintiffs have failed to allege any unfair practice or misrepresentation that they relied upon," and focused on the $5 fees as not constituting a representation. In doing so, the district court overlooked the actual claim pled, which enveloped a far broader array of misconduct, including, as Plaintiff-Appellants alleged, failure to state material facts if the failure deceives or tends to deceive. JA 35, AC ¶ 83. Indeed, Plaintiff-Appellants specifically alleged that they and class members "reasonably relied upon the direct and indirect material acts and actions of Carrington" in charging the convenience fees. JA 35, AC ¶ 84. This allegation, as well as the allegation that Carrington's "inflated charges far in excess of its actual costs is unfair or deceptive," *id.,* constitute unfair and deceptive practices under Maryland law, and the claim should not have been dismissed. *See*

McCormick, 219 Md. App. at 529; *Gillis*, 2019 WL 3412621 at *9 (finding that plaintiffs sufficiently alleged standalone MCPA claim for unfair or deceptive practice by alleging they relied on defendants' misrepresentations by continuing to make payments even though their payments were being partially diverted towards unauthorized charges, and plaintiffs relied on their reasonable belief that a "licensed mortgage lender would not violate the law"); *Goshen Run Homeowners Ass'n, Inc. v. Cisneros*, 467 Md. 74, 102, 114 (2020) (noting MCPA must be construed "in a way that will advance the statute's purpose, not frustrate it" and declining to narrow the statute's prohibition on the use of confessed judgment clauses).

Based on the foregoing Plaintiff-Appellants' stated claims under the MCPA that should be permitted to proceed and district court's decision should be reversed.

CONCLUSION

For the above reasons, the district court's order should be REVERSED with instructions to the District Court to DENY Carrington's motion to dismiss Count I of the Amended Complaint and permit this matter to proceed in the normal course.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(f), the brief contains 8,730 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2018 in 14 point Times Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Respectfully submitted,

/s/ Phillip R. Robinson

Phillip R. Robinson

CERTIFICATE OF SERVICE

I hereby certify than on April 2, 2021, I cause the foregoing document to be filed through the CM/ECF system and sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Respectfully submitted,

/s/ Phillip R. Robinson

Phillip R. Robinson

ADDENDUM OF STATUTES, REGULATIONS, AND OTHER MATERIAL AUTHORITIES

15 U.S.C.A. § 1692a

As used in this subchapter--

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means 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.

(5) The term "debt" means 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.

(6) The term "debt collector" means 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. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.
(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

15 U.S.C.A. § 1692f

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.
(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.
(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.
(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--
(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
(B) there is no present intention to take possession of the property; or
(C) the property is exempt by law from such dispossession or disablement.
(7) Communicating with a consumer regarding a debt by post card.
(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

Md. Code Ann., Com. L., § 13-301

Unfair, abusive, or deceptive trade practices include any:
(1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;
(2) Representation that:
(i) Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;
(ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;
(iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or
(iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not;
(3) Failure to state a material fact if the failure deceives or tends to deceive;

(4) Disparagement of the goods, realty, services, or business of another by a false or misleading representation of a material fact;
(5) Advertisement or offer of consumer goods, consumer realty, or consumer services:
(i) Without intent to sell, lease, or rent them as advertised or offered; or
(ii) With intent not to supply reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition;
(6) False or misleading representation of fact which concerns:
(i) The reason for or the existence or amount of a price reduction; or
(ii) A price in comparison to a price of a competitor or to one's own price at a past or future time;
(7) Knowingly false statement that a service, replacement, or repair is needed;
(8) False statement which concerns the reason for offering or supplying consumer goods, consumer realty, or consumer services at sale or discount prices;
(9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:
(i) The promotion or sale of any consumer goods, consumer realty, or consumer service;
(ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or
(iii) The subsequent performance of a merchant with respect to an agreement of sale, lease, or rental;
(10) Solicitations of sales or services over the telephone without first clearly, affirmatively, and expressly stating:
(i) The solicitor's name and the trade name of a person represented by the solicitor;
(ii) The purpose of the telephone conversation; and
(iii) The kind of merchandise, real property, intangibles, or service solicited;
(11) Use of any plan or scheme in soliciting sales or services over the telephone that misrepresents the solicitor's true status or mission;
(12) Use of a contract related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(13) Use by a seller, who is in the business of selling consumer realty, of a contract related to the sale of single family residential consumer realty, including condominiums and town houses, that contains a clause limiting or precluding the buyer's right to obtain consequential damages as a result of the seller's breach or cancellation of the contract;

(14) Violation of a provision of:

(i) This title;

(ii) An order of the Attorney General or agreement of a party relating to unit pricing under Title 14, Subtitle 1 of this article;

(iii) Title 14, Subtitle 2 of this article, the Maryland Consumer Debt Collection Act;[1]

(iv) Title 14, Subtitle 3 of this article, the Maryland Door-to-Door Sales Act;[2]

(v) Title 14, Subtitle 9 of this article, Kosher Products;

(vi) Title 14, Subtitle 10 of this article, Automotive Repair Facilities;

(vii) Section 14-1302 of this article;

(viii) Title 14, Subtitle 11 of this article, Maryland Layaway Sales Act;[3]

(ix) Section 22-415 of the Transportation Article;

(x) Title 14, Subtitle 20 of this article;

(xi) Title 14, Subtitle 15 of this article, the Automotive Warranty Enforcement Act;[4]

(xii) Title 14, Subtitle 21 of this article;

(xiii) Section 18-107 of the Transportation Article;

(xiv) Title 14, Subtitle 22 of this article, the Maryland Telephone Solicitations Act;[5]

(xv) Title 14, Subtitle 23 of this article, the Automotive Crash Parts Act;[6]

(xvi) Title 10, Subtitle 6 of the Real Property Article;

(xvii) Title 14, Subtitle 25 of this article, the Hearing Aid Sales Act;[7]

(xviii) Title 14, Subtitle 26 of this article, the Maryland Door-to-Door Solicitations Act;[8]

(xix) Title 14, Subtitle 31 of this article, the Maryland Household Goods Movers Act;[9]

(xx) Title 14, Subtitle 32 of this article, the Maryland Telephone Consumer Protection Act;[10]

(xxi) Title 14, Subtitle 34 of this article, the Social Security Number Privacy Act;[11]

(xxii) Title 14, Subtitle 37 of this article, the Online Child Safety Act;

(xxiii) Section 14-1319, § 14-1320, or § 14-1322 of this article;

(xxiv) Section 7-304 or § 8-801 of the Criminal Law Article;
(xxv) Title 7, Subtitle 3 of the Real Property Article, the Protection of Homeowners in Foreclosure Act;
(xxvi) Title 6, Subtitle 13 of the Environment Article;
(xxvii) Section 7-405(e)(2)(ii) of the Health Occupations Article;
(xxviii) Title 12, Subtitle 10 of the Financial Institutions Article;
(xxix) Title 19, Subtitle 7 of the Business Regulation Article;
(xxx) Section 15-311.3 of the Transportation Article;
(xxxi) Section 14-1324 of this article;
(xxxii) Section 14-1326 of this article;
(xxxiii) The federal Military Lending Act;
(xxxiv) The federal Servicemembers Civil Relief Act; or
(xxxv) § 11-210 of the Education Article; or

(15) Act or omission that relates to a residential building and that is chargeable as a misdemeanor under or otherwise violates a provision of the Energy Conservation Building Standards Act,[12] Title 7, Subtitle 4 of the Public Utilities Article.

Md. Code Ann., Com. Law § 13-303

A person may not engage in any unfair, abusive, or deceptive trade practice, as defined in this subtitle or as further defined by the Division, in:

(1) The sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services;
(2) The offer for sale, lease, rental, loan, or bailment of consumer goods, consumer realty, or consumer services;
(3) The offer for sale of course credit or other educational services;
(4) The extension of consumer credit;
(5) The collection of consumer debts; or
(6) The purchase or offer for purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

Md. Code Ann., Com. Law § 14-201

(a) In this subtitle the following words have the meanings indicated.
(b) "Collector" means a person collecting or attempting to collect an alleged debt arising out of a consumer transaction.
(c) "Consumer transaction" means any transaction involving a person seeking or acquiring real or personal property, services, money, or credit for personal, family, or household purposes.
(d) "Person" includes an individual, corporation, business trust, statutory trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

Md. Code Ann., Com. Law § 14-202

In collecting or attempting to collect an alleged debt a collector may not:
(1) Use or threaten force or violence;
(2) Threaten criminal prosecution, unless the transaction involved the violation of a criminal statute;
(3) Disclose or threaten to disclose information which affects the debtor's reputation for credit worthiness with knowledge that the information is false;
(4) Except as permitted by statute, contact a person's employer with respect to a delinquent indebtedness before obtaining final judgment against the debtor;
(5) Except as permitted by statute, disclose or threaten to disclose to a person other than the debtor or his spouse or, if the debtor is a minor, his parent, information which affects the debtor's reputation, whether or not for credit worthiness, with knowledge that the other person does not have a legitimate business need for the information;
(6) Communicate with the debtor or a person related to him with the frequency, at the unusual hours, or in any other manner as reasonably can be expected to abuse or harass the debtor;
(7) Use obscene or grossly abusive language in communicating with the debtor or a person related to him;
(8) Claim, attempt, or threaten to enforce a right with knowledge that the right does not exist;
(9) Use a communication which simulates legal or judicial process or gives the appearance of being authorized, issued, or approved by a government, governmental agency, or lawyer when it is not;
(10) Engage in unlicensed debt collection activity in violation of the Maryland Collection Agency Licensing Act; or

(11) Engage in any conduct that violates §§ 804 through 812 of the federal Fair Debt Collection Practices Act.

Md. Code Ann., Fin. Inst. § 11-503

The Commissioner may adopt rules and regulations to carry out the provisions of this subtitle.

Md. Code Regs. 09.03.06.08

A. Written Agreements.

(1) Agreements between a borrower and a licensee shall be:

(a) In writing; and

(b) Provided promptly to the borrower following execution by all parties.

(2) Exact copies of original documents may be provided to the borrower to satisfy this section.

B. Agreements in Blank.

(1) A person may not obtain a borrower's or guarantor's signature on any of the following documents if blanks remain to be filled in after execution by the borrower:

(a) A note;

(b) A deed of trust;

(c) A mortgage;

(d) An affidavit by the borrower;

(e) Any written certification or statement by the borrower as to use of loan proceeds;

(f) Any other instrument granting a security interest in property;

(g) Any other document which constitutes a debt obligation of the borrower; and

(h) A finder's fee agreement required under Commercial Law Article, § 12-805, Annotated Code of Maryland.

(2) The prohibitions of § B(1) of this regulation do not apply to blanks for the signatures of a:

(a) Notary public;

(b) Witness who is not a borrower, guarantor, or obligor on the loan; or

(c) Person required to sign a certification or affidavit required by law for recordation.

C. Undisclosed Fees.

(1) Unless disclosed in written agreements signed by the borrower, a licensee may not, directly or indirectly, impose any fee or charge payable by or on behalf of the borrower.

(2) In this section "written agreements" includes all closing documents signed by the borrower.

(3) Compliance with applicable disclosures under 12 CFR §§ 1026.37 and 1026.38 shall be deemed compliance with § C(1) and (2) of this regulation.

(4) This section does not apply to changes in amounts collected to be placed in an escrow account maintained after the loan is made.

D. Security Instruments. Licensees shall comply with the requirements relating to security instruments to be recorded in connection with the inclusion of the name and licensee number of the mortgage lender and mortgage originator, or an affidavit in lieu thereof, as set forth in Real Property Article, § 3-104.1, Annotated Code of Maryland.

Md. Code Regs. 09.03.06.09

A. A mortgage lender:

(1) May not cause or permit any loan to be characterized as a commercial loan if there are circumstances known to the licensee which indicate that any portion of the loan proceeds will not be used for commercial purposes;

(2) Which cannot guarantee acceptance of a borrower's application into a particular loan program, shall disclose that fact to the applicant in writing;

(3) Shall keep an applicant generally informed of the progress of the processing of a loan application in the event that problems arise in the processing or underwriting of a loan which may delay closing; and

(4) Shall comply with all State and federal laws and regulations applicable to a particular loan.

B. If a mortgage lender elects to make a loan under Commercial Law Article, Title 12, Subtitle 9 or Subtitle 10, Annotated Code of Maryland, the lender shall make that election in writing in the:

(1) Agreement, note, or other evidence of an extension of closed end credit; or

(2) Agreement governing a revolving credit plan.

Md. Code Regs. 09.03.06.20

A. Good Faith and Fair Dealing. A licensee has a duty of good faith and fair dealing in communications, transactions, and course of dealings with a borrower in connection with the advertisement, solicitation, making, servicing, purchase, or sale of any mortgage loan, including, but not limited to:

(1) The duty to recommend to a borrower or induce a borrower to enter into only a mortgage loan refinancing that has a net tangible benefit to a borrower, considering all of the circumstances, including the terms of a loan, the cost of a loan, and the borrower's circumstances;

(2) The duty to provide to a borrower who is offered a higher-priced mortgage loan information about the non-higher-priced mortgage loans that the licensee can make available and for which the borrower may qualify; and

(3) The duty when servicing mortgage loans to:

(a) Promptly provide borrowers with an accurate accounting of the debt owed when borrowers request an accounting;

(b) Make borrowers in default aware of loss mitigation options and services offered by the licensee;

(c) Provide trained personnel and telephone facilities sufficient to promptly answer and respond to borrower inquiries regarding their mortgage loans; and

(d) Pursue loss mitigation when possible.

B. Method to Determine Net Tangible Benefit.

(1) When determining whether a refinance of a mortgage loan will provide a net tangible benefit to the borrower, a licensee shall make a reasonable inquiry of the borrower to determine what net tangible benefit, if any, the borrower will receive from a mortgage loan. Net tangible benefits may include, but are not limited to:

(a) Obtaining a lower interest rate;

(b) Obtaining a lower monthly payment, including principal, interest, taxes, and insurance;

(c) Obtaining a shorter amortization schedule;

(d) Changing from an adjustable rate to a fixed rate;

(e) Eliminating a negative amortization feature;

(f) Eliminating a balloon payment feature;

(g) Receiving cash-out from the new loan in an amount greater than all closing costs incurred in connection with the loan;

(h) Avoiding foreclosure;

(i) Eliminating private mortgage insurance; and

(j) Consolidating other existing loans into a new mortgage loan.

(2) A licensee is considered to have conducted a reasonable inquiry of whether a refinance of a mortgage loan provides a net tangible benefit to a borrower if the mortgage lender has the borrower complete and sign a net tangible benefit worksheet on the form prescribed by the Commissioner, or a form that is substantially similar to the form prescribed by the Commissioner.