RECORD NO. 20-2359

In The

United States Court Of Appeals

For The Fourth Circuit

ASHLY ALEXANDER; CEDRIC BISHOP,
On behalf of themselves individually and similarly situated persons,

Plaintiffs - Appellants,

v.

CARRINGTON MORTGAGE SERVICES, LLC,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The Maryland Consumer Debt Collection Act ("MCDCA") incorporates sections of the federal Fair Debt Collection Practices Act ("FDCPA") to broadly prohibit "[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," 15 U.S.C. § 1692f(1), as incorporated at Md. Code Ann., Com. Law § 14-202(11). Despite this clear language, Defendant-Appellee Carrington Mortgage Services, LLC ("Carrington") attempts to argue that it was perfectly within its rights to charge borrowers—whose mortgage debt it collects—payment processing fees ("Pay-to-Pay Fees") not authorized by their mortgage agreements or permitted by any Maryland or federal law. This attempt is unavailing.

Carrington first argues that the MCDCA does not apply to its mortgage servicing conduct, relying on the district court's erroneous interpretation of the MCDCA. While the MCDCA broadly defines "collectors" as those "collecting or attempting to collect an alleged debt arising out of a consumer transaction," Md. Code Ann., Com. Law § 14-201, the district court imposed the additional requirement that the debt in question be in default. This interpretation relied on cases interpreting the FDCPA, which in turn more narrowly defines "debt collectors" as those collecting on debt acquired while in default. 15 U.S.C.

§ 1692a(6)(F). RB 15-19;[1] *see* JA 305-06. There is no dispute that Carrington collects payments from Plaintiffs in servicing their mortgage debt, thereby meeting the MCDCA definition of "collectors."

Carrington next argues that its Pay-to-Pay Fees are "permitted by law" because it entered into separate clickwrap agreements with borrowers. But the statute provides only one way to contract around its prohibition on the collection of fees: expressly in the agreement creating the debt. Carrington's interpretation that it can contract around the prohibition at any time would render this term a nullity. And Carrington ignores the purpose of statutes like this one: to protect consumer borrowers by placing limits on the freedom of contract. Because Carrington is prohibited from collecting Pay-to-Pay Fees, its conduct in collecting such fees also violates Md. Code Ann., Com. Law § 14-202(8), and is unfair and deceptive under the Maryland Consumer Protection Act ("MCPA").[2]

Ultimately, Carrington offers no reason why the district court's decision should not be reversed in full. Indeed, it offers little in the way of new analysis, but

[1] Citations to Carrington's Response Brief shall appear as "RB," and citations to Plaintiffs' Opening Brief shall appear as "OB."

[2] Footnote 2 of Plaintiffs' opening brief mistakenly included Count III, the alternative FDCPA claim, among the issues on appeal. Plaintiffs are seeking review of only state-law claims asserted under Count I of the Amended Complaint. (JA 32-36).

instead misstates many holdings on which it relies and, to distract from the issues, repeatedly asserts that Plaintiffs "abandoned" or "waived" challenges to certain details of the district court's decision. But the issue here is not a minor squabble over the sufficiency of the pleadings; it is rather a more fundamental problem regarding the district court's misinterpretation of the consumer protection statutes at issue. Indeed, this Court's review is *de novo*, and Plaintiffs' central argument is that the district court was wrong in its interpretation of the conduct and actors covered by the MCDCA and therefore erroneous in its application of the law to the facts alleged in the Complaint. This Court should reverse the decision of the district court.

ARGUMENT

A. Carrington's mortgage servicing conduct constitutes debt collection under the MCDCA.

Courts have consistently held that the MCDCA covers loan servicers who engage in the collection of borrowers' monthly mortgage payments. OB 19 (citing cases). Indeed, the MCDCA broadly defines "collector" to cover any person or entity "collecting or attempting to collect an alleged debt arising out of a consumer transaction." Md. Code Ann., Com. Law § 14-201(b). OB 15. The FDCPA, on the other hand, applies more narrowly, as it regulates only "debt collectors" who acquired the debt in default. 15 U.S.C. § 1692a(6).

Notwithstanding the different statutory schemes, Carrington makes two flawed arguments in support of the district court's decision to rely on the FDCPA's

narrower definition to hold Carrington was not a "collector" under the MCDCA. Both arguments ignore the plain text of the MCDCA.

1. The MCDCA defines "collector" more broadly than Carrington and the district court interpreted it.

Carrington wrongly asserts that the district court used the correct MCDCA definition of "collector," arguing that Plaintiffs-Appellants simply failed to allege adequate facts in support of that element. This argument is incorrect.

The district court dismissed Plaintiffs-Appellants' claims because they had not included "allegations that Carrington treated Plaintiffs' loans as if they were in default, such as sending notices of default, making collection calls, reporting to credit reporting agencies, or foreclosing on Plaintiffs' properties." JA 305. In other words, the district court determined as a matter of law that Plaintiffs-Appellants' loans needed to be in default to be protected by the MCDCA. But the MCDCA does not limit the definition of "collector" to those engaged in the collection of debt in default.[3] OB 15-19. As discussed in the opening brief, the district court relied on federal law in so holding, and as such, the decision was in error. OB 18-19.

[3] To be sure, Plaintiffs did plausibly allege that Carrington was acting as a debt collector within the meaning of this definition when it collected the Pay-to-Pay Fees. JA 17, 21-22, AC ¶¶ 28, 43. Plaintiffs also pled that their loans were believed to be in default at the time Carrington was retained to collect them. JA 16, 20-21, AC at ¶¶ 25, 40. While these allegations are more than enough, if the district court had issues with their sufficiency, dismissal should have been without prejudice with leave to amend. *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014).

Carrington counters that the district court did apply Maryland law to reach its conclusion that Carrington was not a "collector," RB 17, but this argument is without merit. The main Maryland case on which the district court relied made only the general observation that one must allege that a loan servicer is engaged in debt collection. *See* OB at 21 (discussing *Seghetti v. Flagstar Bank FSB*, No. 16-cv-519, 2016 WL 3753143 (D. Md. July 13, 2016)).[4] It does not establish that a collector must be in the act of collecting on defaulted debt at the time of the challenged activity, nor was it cited by the district court for that proposition. Of course, Plaintiffs-Appellants did plead such facts, as the complaint included allegations that Carrington's business is the collection of monthly mortgage payments from borrowers and that it has collected the illegal processing fees at issue thousands of times over. JA 9-10, 26. These allegations, which are governed by Rule 8 as Carrington concedes, RB 16, set forth a plausible basis to conclude that Carrington was in fact a "collector," engaged in the collection of debt at the time Plaintiffs-Appellants paid their mortgages and challenged fees.

[4] Carrington notes that the district court also cited *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp. 2d 582 (D. Md. 1999), but like *Seghetti*, that case does not impose any requirement that one plead that a loan servicer is engaged in the collection of defaulted debt. The court in *Spencer* cited the MCDCA generally for the dictum that debt must be "delinquent." *Id.* at 598 (citing Md. Code Ann., Com. Law §§ 14-201 to 14-204). Notably, the question of what debt is covered was not before *Spencer*, so the statement does not follow any sort of longer analysis.

To the extent Carrington contends that Plaintiffs-Appellants needed to allege that the fees were in direct response to a demand for payment for Carrington to be a "collector" under the statute, it identifies no section of the statute nor any case law to support this proposition. Nor are Plaintiffs-Appellants aware of any such law; indeed, this Court has already reversed a district court for imposing such a requirement in the context of the FDCPA. *See McCray v. Fed. Home Loan Mortg. Corp.*, 839 F.3d 354, 359 (4th Cir. 2016) ("The FDCPA's definition of debt collector, however, does not include any requirement that a debt collector be engaged in an activity by which it makes a 'demand for payment.'") Thus, this heightened requirement that Carrington and the district court have imposed is not required under either the FDCPA or the broader MCDCA.

Carrington then argues that the district court's decision turned not on the definition of "collector," but whether it was engaged in a "method of collection" when it assessed the fees. But this is a distinction without a difference, as it presupposes that one must be paying on defaulted debt at the time the fees were collected for Carrington to be acting as a "collector."[5] More importantly, while the

[5] Notably, this is not even a requirement under the FDCPA, which broadly defines "debt" to encompass all debt. *See* 15 U.S.C. § 1692a(5). The FDCPA exempts from the definition of "debt collector" those collecting debt not in default when acquired. *Id.* § 1692a(6)(F)(ii). But the debt need not be in default for a violation of the statute to have occurred. *See Deitemyer v. Ryback*, No. CV ELH-18-2002, 2019 WL 3587883, at *8 (D. Md. Aug. 6, 2019).

MCDCA regulates "methods of collection," those "methods" are the acts and prohibitions enumerated throughout section 14-202. *See Allstate Lien & Recovery Corp. v. Stansbury*, 101 A.3d 520, 529 (2014) (upholding judgment for plaintiff where the assessment of a processing fee was found to be a method of debt collection because it violated section 14-202(8)), *aff'd*, 126 A.3d 40 (2015).[6] Where one has already pled a substantive violation of a least one subsection of 14-202, that aspect of the law, to the extent it is a pleading requirement, is satisfied.[7] This error should be reversed.

2. The Maryland legislature intended for collectors regulated by the MCDCA to be liable for FDCPA violations.

Carrington next makes the unsupported argument that because Plaintiffs-Appellants' claims are premised on section 14-202(11) of the MCDCA, which in turn references the FDCPA, the definition of "debt collector" in the FDCPA

[6] The scope of the MCDCA concerning methods of collection in such circumstances is currently before the Maryland Court of Appeals. *See e.g. Nationstar Mortg. LLC v. Kemp*, 241 A.3d 870 (2020); *Chavis v. Blibaum & Assoc., P.A.*, 240 A.3d 852 (2020). That said, neither *Kemp* nor *Chavis* concern the application of section 14-2012(11) of the MCDCA.

[7] Carrington and the district court misunderstand the holding in *Stansbury*. There, the consumer asserted a violation of section 14-202(8) where the collector imposed a fee on top of the debt. 219 Md. App. at 591. The Court of Special Appeals upheld the judgment for the consumer because the dispute was not over the amount of the underlying debt, but because the fee assessment was "the method of collecting the debt." To the extent Carrington cites *Stansbury* for the proposition that it can only be a method of debt collection if the fee is mandatory, it should be noted that *Stansbury* pre-dates the amendment to the MCDCA which incorporated violations of the FDCPA.

controls for purposes of any section 14-202(11) claim. RB 32-33. Carrington misunderstands the plain language of the MCDCA.

The MCDCA is a complete statutory scheme that prohibits collectors from engaging in a wide array of unfair and unconscionable conduct, with its own definitions section and remedies. *See generally* Md. Code Ann., Com. Law §§ 14-201-203. In the section enumerating the various acts of prohibited conduct, the MCDCA is clear that the list sets forth what a "a *collector* may not" do. *Id.* § 14-202 (emphasis added). In 2018, the Maryland General Assembly amended that list of acts by including an eleventh enumerated prohibition, decreeing that "a ***collector*** may not… [e]ngage in any conduct that violates §§ 804 through 812 of the federal Fair Debt Collection Practices Act." *Id.* § 14-202 (11) (emphasis added).

Carrington argues that because sub-section (11) of section 14-202 refers to sections of the FDCPA, this Court must disregard the fact that the MCDCA instructs that all ***collectors*** may not engage in the acts enumerated under subsections (1) through (11). Instead, Carrington asks that this Court treat subsection (11) as a stand-alone statute, with its own unwritten definitions and remedial protections. In Carrington's view, to establish a violation of sub-section (11), one must prove every element of an FDCPA violation, including the definitions thereto, while ignoring the definitions set forth in the MCDCA. Carrington is wrong.

Fatal to Carrington's argument is the fact that when the Maryland legislature amended the MCDCA to add section 14-202(11), it ***did not*** create a stand-alone statute, or even a section of the statute. It instead elected to import conduct prohibited by the FDCPA into the pre-existing framework and list of enumerated activities that regulated "collectors." Notably, sub-section (11) incorporates only subsections 804 through 812 of the FDCPA, which are the acts of "conduct" to be regulated. But sub-section (11) does not import the definitions appearing in section 803 of the FDCPA, nor other provisions such as the statute of limitations, civil remedies, or affirmative defenses. Instead, the Maryland legislature inserted the reference to the FDCPA's acts of conduct into the MCDCA's pre-existing statutory framework and retained the MCDCA's *own* definitions and civil remedies. The better reading of section 14-202(11) is therefore that it imposes new obligations to comply with the FDCPA's proscriptions ***on those entities already regulated under the MCDCA***. As such, it would be improper to use an incorporated definition when the definition of "collector" in the MCDCA controls for purposes of claims under section14-202(11).

Carrington's citation to legislative history does not compel a different conclusion.[8] Carrington looks to an earlier version of section 14-202(11), which

[8] Carrington also cites *Boosahda v. Providence Dane LLC*, 462 F. App'x 331 (4th Cir. 2012), wherein this Court simply recited the well-settled elements of an FDCPA claim but did not apply them to the *Maryland* state statute at issue here.

read "engage in any conduct prohibited under §§ 804 through 812," and notes that it was later changed to "engage in any conduct that violates §§ 804 through 12." Carrington posits that this change reflects an intent to incorporate "violations" of those sections, and that there can be no MCDCA violation without a violation of the FDCPA. But in both versions of the statute, the MCDCA did not incorporate the FDCPA's definitions. More importantly, the change appears to have been necessary to cure an obvious vagueness problem created by the original "conduct prohibited" language, given that sections 804 through 812 describe both acts of misconduct that are prohibited and affirmative acts of conduct that are required.[9] By only making "prohibited conduct" actionable, the earlier version could have been read to deprive Maryland borrowers of the right to sue when collectors failed to comply with the affirmative obligations of the FDCPA. The broader "conduct that violates" language cures that problem.

Ultimately, there is simply no basis to substitute the FDCPA's definitions for the definitions set out in the MCDCA. Indeed, at least one district court has found that for purposes of section 14-202(11), the MCDCA's definitions control.

[9] For example, sections 804 through 808 and section 810 describe what debt collectors "shall not" or "may not" do. On the other hand, section 809 sets forth what a debt collector shall do when a consumer seeks to validate the debt. And section 811 describes the conditions that a debt collector must meet before bringing a lawsuit. Neither section contains language expressly prohibiting anything.

See Ellis v. Palisades Acquisition XVI LLC, No. JKB-18-03931, 2019 WL 3387779, at *6 (D. Md. July 26, 2019) (recognizing and applying the MCDCA definition of another uniquely defined term, "consumer transaction," to a § 14-202(11) claim). Accordingly, this Court should disregard Carrington's unsupported argument as to the best way to read section 14-202(11).

B. The MCDCA does not give collectors unlimited rights to charge new fees.

Carrington cleverly structures its brief, arguing that there is no violation of section 14-202(8) of the MCDCA before it argues that there is no violation of section 14-202(11). But section 14-202(8) prohibits debt collectors from knowingly enforcing rights they do not have, and so it cannot be analyzed without first considering the merits of Plaintiffs-Appellants' section 14-202(11) claim.

1. The statute does not require that a fee be mandatory to be a prohibited "incidental" fee.

Plaintiffs-Appellants allege that Carrington violated section 14-202(11) of the MCDCA when it collected Pay-to-Pay fees. Section 14-202(11) incorporates 1692f(1) of the FDCPA, which prohibits "[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." 15 U.S.C. § 1692f(1). Of course, it is well settled that "courts must presume that a legislature says in a statute what it means and

means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Nevertheless, Carrington argues that the district court did not err when it found that the fees are not "incidental" to the debt. It is wrong.

Carrington asserts that the district court was correct because the fees were imposed only as a result of the Plaintiffs-Appellants' voluntary decision to pay their fees online. RB 34-35. But the statute is not limited to fees taken by force; rather, it clearly applies to "***any*** amount." 15 U.S.C. 1692f(1) (emphasis added). Carrington offers no persuasive argument as to why the district court was correct; instead, it only points to a couple district court opinions that have reached the same conclusion. RB 34-36 (discussing JA 311). Chief among them is *Flores v. Collection of Consultants*, No. 14-cv-0771, 2015 WL 4254032 (C.D. Cal. Mar. 20, 2015), which has been roundly criticized. OB 25-26 (citing cases). In particular, *Flores*, like the district court's opinion, summarily concludes that a voluntary payment can never violate the statute without actually referencing the statute. 2015 WL 4254032 at *10.

Unlike the conclusory reasoning in *Flores*, the courts that have undertaken a thorough analysis of the statute have rejected the idea that a fee must be mandatory to be incidental. *See* OB 25-29 (discussing cases). For example, in another case involving Pay-to-Pay fees, one court compared the option to "upgrade" a method of payment to something more convenient to the option to upgrade to a first class ticket. Both "upgrades" would be "incidental" within the meaning of section 1692f(1):

> 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 v. Arvest Cent. Mortg. Co., 498 F. Supp. 3d 1134, 1136 (N.D. Cal. 2020). Other courts have engaged in similar analyses. *See*, *e.g.*, OB 29 (discussing *Fusco v. Ocwen Loan Servicing LLC*, No. 20-cv-80090, 2020 WL 2519978 (S.D. Fla. Mar. 2, 2020)); *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*, No. 2:19-cv-309, 2020 WL 5494414, at *3 (S.D. Tex. Sept. 10, 2020)).

Carrington offers no reason why the majority of district courts who have either outright rejected *Flores* or simply concluded otherwise are wrong. Rather, it supplies only a string cite of cases supporting its view in a footnote without further discussion. RB 35 n.15. But many of those cases do not discuss whether the fees are "incidental," and others simply accept *Flores* without discussion.[10]

[10] *See*, *e.g.*, *Meintzinger v. Sortis Holdings, Inc.*, No. 18-cv-2042, 2019 WL 1471338 (E.D.N.Y. Apr. 3, 2019) (omitting any discussion of whether the convenience fee was incidental to the debt); *Austin v. Lakeview Loan Serv., LLC*, No. RDB-20-1296, 2020 WL 7256564 (D. Md. Dec. 10, 2020) (same); *Duffee v. Collecto, Inc.*, No. 3–12–CV–0187–B, 2012 WL 652228 (N.D. Tex. Feb. 8, 2012)

Ultimately, Carrington's failure to offer any competing rationale reflects a recognition that there simply is not one. The policy concerns buttressing *Flores*—even if they were legitimate—are irrelevant here. Indeed, the *Lembeck* court even acknowledged that there may have been policy reasons why the *Flores* court was reluctant to apply the FDCPA to this type of conduct, but it rejected those concerns, explaining that "where a transaction falls so obviously within the plain language of the statute, the possibility that Congress wouldn't have intended the result is not relevant." *Lembeck*, 498 F. Supp. 3d at 1136. For the same reasons, this Court should reverse the district court's ruling here.

2. The statute should be read to limit the rights of collectors to charge fees, not expand them.

Carrington next contorts the plain language of the statute to argue that instead of limiting collectors' rights, it actually permits Carrington to solicit unauthorized fees from borrowers and that it cannot be liable if those borrowers voluntarily pay the fees. But 15 U.S.C. § 1692f(1), as incorporated into the MCDCA via section 14-202(11) prohibits the collection of any funds whatsoever from consumers, subject to just two, limited exceptions: (1) where the amount is

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(same); *Lish v. Amerihome Mortg. Co., LLC*, No. 2:20-cv-07147, 2020 WL 6688597 (C.D. Cal. Nov. 10, 2020) (adopting *Flores* reasoning wholesale); *Thomas-Lawson v. Carrington Mortg. Serv., LLC*, No. 2:20-cv-07301, 2021 WL 1253578, at *5 (C.D. Cal. Apr. 5, 2021) (declining to conclude whether fees were incidental to mortgage debts).

"expressly authorized by the agreement creating the debt;" and (2) where the amount is "permitted by law." 15 U.S.C. § 1692f(1). *See Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011) ("The *only* inquiry under § 1692f(1) is whether the amount collected was expressly authorized by the agreement creating the debt or permitted by law." (emphasis added)).

If the fees do not fall under either of these two exceptions, then in seeking to collect them, Carrington would have also violated section 14-202(8) of the MDCDA, which prohibits collectors from knowingly asserting rights they do not have. In its opposition brief, Carrington ignores plain language of the statute, and turns the analysis of the claims on its head, ignoring that Plaintiffs-Appellants' section 14-202(8) claim is predicated on a violation of section 14-202(11). When all the terms of section 14-202(11) are given effect and read in a way to ensure no term is superfluous, it is clear that Carrington and the district court are incorrect.

i. The statute prohibits debt collectors from seeking any incidental fees unless there is a pre-existing right to those fees.

Section 1692f(1) is best understood as ***prohibiting collectors from seeking from borrowers any incidental fees unless there is a pre-existing right to those fees***. *See* 15 U.S.C. § 1692f(1); *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.")[11] Such a reading gives effect to the language chosen by the legislature and avoids any superfluous text, rendering it consistent with statutory interpretation principles. *Connecticut Nat. Bank*, 503 U.S. at 253-54.

There is no dispute that the mortgage agreements at issue in this case do not expressly authorize Pay-to-Pay fees, and as such, the first exception does not apply. Thus, Carrington may only assess these fees is if they are "permitted by law." Rather than identify laws permitting the fees, Carrington urges the Court to read "permitted by law" to mean that it is permitted to enter into *new* contracts to circumvent the statute's prohibition. More specifically, it argues that because clickwrap agreements are enforceable contracts in Maryland, debt collectors are "permitted by law" to charge consumers fees set forth in clickwrap agreements. This argument runs afoul of basic rules of statutory interpretation and would in effect give collectors and debt collectors broad new rights to engage in the kind of conduct that Congress and the Maryland legislature sought to eliminate.

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[11] *See also Lembeck*, 498 F. Supp. 3d at 1137 ("Any separate contract to pay an incidental fee is prohibited unless 'permitted by law'—that is, by some state or federal statute or regulation."); *Booze v. Ocwen Loan Serv., LLC*, No. 20-cv-80135, 2020 WL 10223002, at *3 (S.D. Fla. Mar. 2, 2020) (finding that defendant must identify some statute which "permits, i.e. authorizes or allows, in however general a fashion, the fees or charges in question," and reasoning that "'permitted by law' . . . implies that legal permission must be affirmatively given"); *West v. Costen*, 558 F. Supp. 564, 582 (W.D. Va. 1983) ("Simply stated, 'permitted by law' is different from 'not prohibited by law.' Permission requires an affirmative authorization, not just indulgent silence.").

First, the statute provides only one exception by which parties may contract around the prohibition on the collection of fees incidental to the debt: if the parties do so expressly in the agreement creating the debt. 15 U.S.C. § 1692f(1). Reading "permitted by law" so broadly as to allow for *any* contractual agreement to avoid the statutory prohibition on such fees would render this statutory exception for fees "expressly authorized by the agreement creating the debt" superfluous and must be rejected. *See Connecticut Nat. Bank*, 503 U.S. at 253 ("[C]ourts should disfavor interpretations of statutes that render language superfluous."); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 35–36 (1992) (favoring a construction that "attaches practical consequences" to a term over one that "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect").

Second, Carrington's proposed reading cannot be squared with the fact that 1692f(1) prohibits the "***collection*** of any amount," nor with the fact that making a contractual offer involving new, incidental fees to a borrower is an effort to ***collect*** those prohibited incidental fees. In other words, section 1692f(1) prohibits collectors from offering to borrowers the opportunity to enter into new contracts for fees, regardless of whether or not the borrower accepts. *See Fuentes v. AR Res., Inc.*, No. CV157988FLWLHG, 2017 WL 1197814, at *7 (D.N.J. Mar. 31, 2017) ("§ 1692f prohibits even the attempt to collect an unauthorized fee.") Carrington's

proposed interpretation of "permitted by law" turns on the acceptance of the prohibited offer to collect. In interpreting "permitted by law" as broadly as Carrington advocates, the statute would only prohibit the offer to the extent it is not successful; those actually injured by the prohibited collection effort will never have a cause of action, simply because they were successfully duped or desperate. [12] This Court should reject this absurd interpretation.

By interpreting the statute to protect consumers against both voluntary and involuntary collections of fees, this Court would give effect to the remedial goal of the legislation to protect even the most unsophisticated borrowers. *See, e.g.*, *Andrews & Lawrence Pro. Servs., LLC v. Mills*, 467 Md. 126, 132 (2020) ("The overarching purpose and intent of these remedial consumer protection and licensing statutes is to protect the public from unfair or deceptive trade practices by creditors engaged in debt collection activities."); *Jeter v. Credit Bureau,* 760 F.2d 1168, 1173-74 (11th Cir. 1985) ("It would be anomalous for the Congress . . . to have intended that the legal standard under the FDCPA be *less* protective of consumers"), *cited with approval in United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 136 (4th Cir. 1996); *Clomon v. Jackson,* 988 F.2d 1314, 1318 (2d Cir. 1993)

[12] Section 1692f(1)'s use of the term "collection," which encompasses both voluntary and involuntary acts of taking fees, reflects that Congress did not intend to limit the scope of the statute to fees taken involuntarily.

("[T]he FDCPA protects all consumers, the gullible as well as the shrewd."). On the other hand, Carrington's interpretation would create new rights for debt collectors to induce borrowers to pay new fees via an online checkbox, which is exactly the kind of unfair and unconscionable conduct that the legislature no doubt had in mind in drafting section 1692f.[13] *See Lembeck*, 498 F. Supp. 3d at 1137 ("Indeed, the point of this provision is to prohibit certain kinds of contracts, just as minimum wage laws, child labor laws, and antitrust laws prohibit other kinds of contracts."). Indeed, given the text of the statute and the policy behind it, it is not surprising that nearly every court to have considered this issue has read "permitted by law" to mean that there must be a *statute* that affirmatively permits the specific fees that are being charged. *See* fn. 12, *supra*. This Court should do the same.

[13] Carrington faults Plaintiffs-Appellants for declining to engage in the district court's inherently flawed "clickwrap" analysis. RB 20-25, discussing JA 308-309. Plaintiffs take no position on whether the clickwrap agreement would have otherwise been a valid contract; indeed, discovery into the online process may be required to make that determination. The general validity of the clickwrap agreement is irrelevant because the existence of a valid clickwrap agreement is neither an exception nor defense to a statute that, by its own terms, prohibits the collection of fees via the creation of those clickwrap agreements.

ii. Because violations of section 14-202(8) are predicated on violations of section 14-202(11), the only relevant inquiry for both sub-sections is whether the fees fall under one of the two exceptions to the prohibition on the collection of fees.

As to the claim under section 14-202(8), Carrington contends that the district court was correct in finding that there was no violation of the MCDCA because the fees are not expressly prohibited by Plaintiffs-Appellants' mortgage agreements and no law prohibited the fees. RB 25-26.[14] But the district court analyzed the claims under 14-202(8) without referencing 14-202(11). If the fees are prohibited under section 14-202(11) of the MCDCA, then, in collecting those fees, Carrington would be asserting rights it does not have in violation of section 14-202(8). Thus, because 1692f(1) by way of 14-202(11) requires that the fees be expressly authorized by the agreement creating the debt or permitted by law, Carrington is wrong in its assertion that silence in the agreement is dispositive of both claims. Rather, neither exception to 1692f(1) allows fees to be charged when there is no express prohibition. As such, for the reasons identified in the preceding sections, the holding here should be reversed.

[14] The district court noted that one of the Plaintiffs' contracts stated that "the absence of express authority in this Security instrument to charge a specific fee to a Borrower shall not be construed as a prohibition on the charging of such fee." JA 300, 307-08. Carrington points to this fact to argue that the fee is therefore permitted. But while that provision might be pertinent to a claim for breach of contract, it is not a defense to a statutory requirement that one have express authorization in the contract creating the debt to charge fees.

C. Plaintiffs-Appellants sufficiently pled that Carrington knowingly collected convenience fees.

Carrington asserts that Plaintiffs-Appellants have abandoned the argument regarding the adequately pleading of the "knowledge" element of section 14-202(8) of the MCDCA. RB 29. But the district court did not make any findings regarding whether Plaintiffs-Appellants had sufficiently alleged Carrington's knowledge that the right to collect these fees did not exist. *Id.* Presumably, the district court agreed these allegations were sufficient. In particular, these allegations that Carrington disregarded the terms of the loans as well as those of many absent class members and had knowledge of the laws governing the parties' relationships, JA 9-21, FAC at ¶¶ 13-22, 26-28, 41-43, were more than sufficient at the pleading stage. *See Prescott v. Seterus, Inc.*, 684 Fed. Appx. 947, 949 (11th Cir. 2017) (actual knowledge may be alleged by a loan servicer collecting fees not authorized by the mortgage agreement). All persons, including license mortgage collectors like Carrington, know the law. Therefore, Carrington acted with the requisite knowledge required at this stage of the proceedings.

D. Plaintiffs-Appellants adequately pled their MCPA claim.

Carrington does not dispute that Plaintiffs-Appellants pled a Section 13-301(14)(iii) MCPA claim, which is predicated on violations of the MCDCA. RB 41. *See Best v. Newrez LLC*, No. GJH-19-2331, 2020 WL 5513433, at *21 (D. Md. Sept. 11, 2020) (allowing MCPA claim to proceed where MCDCA claim was

plausibly alleged). As such, the reversal of the dismissal of the MCDCA claim should warrant the same here.

With respect to the stand-alone MCPA claim for unfair or deceptive practices, Plaintiffs-Appellants explained in their opening brief that they pled an omission-based theory arising from Carrington's failure to state material facts. OB 33; JA 35, AC ¶ 83. Carrington argues that because there was no misrepresentation or deceit alleged, the claims are not actionable under the MCPA. RB 42-43. But Carrington misconstrues the claims.

The MCPA prohibits "fifteen broad categories of unfair or deceptive trade practices," *Reed v. Bank of Am. Home Loans*, No. PJM 13-3265, 2016 WL 3218720, at *7 (D. Md. June 10, 2016), including misrepresentations and omissions of all types. Indeed, it was enacted upon the Maryland General Assembly's determination that the "State 'should take strong protective and preventative steps . . . to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland.'" *Wheeling v. Selene Fin. LP*, 250 A.3d 197, 215 (Md. Ct. App. 2021). "The General Assembly further instructed that the MCPA shall be 'construed and applied liberally to promote its purpose.'" *Id.* (quoting § 13-105).

While Carrington argues that because the fees were disclosed, there cannot be any MCPA claim, Carrington ignores the fact that the claims are premised on

the non-disclosure of material information that the fees were illegal, inflated surcharges, which is actionable. OB 33-35. *See also Golt v. Phillips*, 517 A.2d 328, 332 (Md. Ct. App. 1986) (finding an MCPA claim actionable where consumers implied that a landlord had the legal right to lease a building); *Flournoy v. Rushmore Loan Mgmt. Servs., LLC*, No. 8:19-cv-00407-PX, 2020 WL 1285504, at *8 (D. Md. Mar. 17, 2020) (finding an MCPA claim against a mortgage servicer actionable where a disclosed fee was not accurately described). None of the case law cited by Carrington compel a different conclusion. RB 43-44,

While Carrington notes that the deceptive act must be material, it misstates the requirement for materiality. In particular, "[a]n omission is deemed material if a significant number of unsophisticated consumers would attach importance to the information in determining a choice of action." *Golt*, 517 A.2d at 332. In addition, typically, the question of whether an omission is material "is a question of fact for the jury and not a question of law for the court." *Green v. H & R Block, Inc.*, 735 A.2d 1039, 1059 (1999). Here, Plaintiffs-Appellants plausibly alleged Carrington's material omissions of fact to withstand the motion to dismiss.

Plaintiffs-Appellants also sufficiently alleged each of the remaining elements of the stand-alone MCPA claim. *See Currie v. Wells Fargo Bank, N.A.*, 950 F.Supp. 2d 788, 796 (D. Md. 2013) (listing elements of an MCPA claim as a deceptive act; reliance; and injury). Plaintiffs-Appellants relied on the deceptive

omissions, demonstrated by Carrington's communications regarding the unlawful charges and Plaintiffs-Appellants' payment in turn. JA 35, AC ¶ 85. Reliance in turn is a fact-based inquiry and cannot be resolved on a motion to dismiss. *Price v. Berman's Automotive, Inc.*, No. CCB-14-763, 2014 WL 5686550, at *6-7 (D. Md. Nov. 4, 2014). And Plaintiffs-Appellants suffered actual injury in the amount of fees pad. JA 36, AC ¶ 86. Thus, the dismissal of this claim should also be reversed.

CONCLUSION

For the reasons stated herein and in their opening brief, Plaintiffs-Appellants ask the Court to reverse the district court's dismissal of Count One of Plaintiffs-Appellants' Amended Complaint.

Respectfully submitted,

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