UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTGAGE RESOLUTION SERVICES, LLC, 1ST FIDELITY LOAN SERVICING, LLC, and S & A CAPITAL PARTNERS, INC.,	
Plaintiffs,	
	No. 15 CV 293-LTS-JCF
-against-	
JPMORGAN CHASE BANK, N.A., CHASE HOME FINANCE LLC, and JPMORGAN CHASE & CO.,	
Defendants.	

<u>PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION</u>

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Plaintiffs S&A Capital Partners, Inc. ('S&A"), Mortgage Resolution Services, LLC ("MRS"), and 1st Fidelity Loan Servicing, LLC ("1st Fidelity") (collectively, "Plaintiffs" or the "Schneider Entities") submit this Memorandum of Law in support of their motion for a temporary restraining order and preliminary injunction against Defendants JPMorgan Chase Bank, N.A., Chase Home Finance LLC, and JPMorgan Chase & Co. (collectively, "Defendants" or "Chase").

PRELIMINARY STATEMENT

Plaintiffs contracted with Defendants to acquire portfolios of federally related residential mortgage loans. These loans (3,529 sold to MRS and over 1,000 sold to S&A and 1st Fidelity) are subject to the Real Estate Settlement Procedures Act ('RESPA"), 12 U.S.C. § 2601 et seq. As servicers of these loans at the time they purportedly sold them to Plaintiffs, Defendants are governed by legal requirements that mandate that Defendants keep certain documents in the ordinary course of business for each such federally related mortgage loan. 12 C.F.R. § 1024.38(c).

When Defendants purported to sell these loans to Plaintiffs, they did not provide the documents and information about these loans to Plaintiffs. After this lawsuit commenced, Defendants have continued to hold back these documents and information from Plaintiffs about each of these loans. However, when the borrowers on these loans contact Defendants about these loans, Defendants suddenly are able to find all the pertinent information and documents for these loans, and proceed to prepare invalid documents purporting to release the liens on the properties or assigning mortgages to Plaintiffs.

Plaintiffs have been thwarted in their efforts to properly service these loans from the outset by Defendants' refusal to produce these documents and information, which actions continue unabated through the present day as Defendants refuse to produce documents and information despite this Court's July 14, 2016 Order (D.E. No. 111) and this Court's May 18, 2017 Order (D.E. No. 184), with irreparable consequences for Plaintiffs' businesses and their future ability to survive as going concerns. Defendants' ongoing, irresponsible handling of these loans, particularly the release of liens or the assignment of mortgages on properties purportedly sold to Plaintiffs, must stop immediately pending the final resolution of this matter. The proverbial bell cannot be unrung later.

Therefore, Plaintiffs request the entry of a temporary restraining order and a preliminary injunction to maintain the status quo on the loans sold to Plaintiffs so that Defendants cannot engage in any further actions that would injure Plaintiffs' business and property interests reflected in the sold loan portfolios. In particular, Plaintiffs request this Court oversee the handling of any such loans if a borrower contacts Defendants about any of these loans purportedly sold to Plaintiffs, or in its discretion, appoint a special master pursuant to Fed. R. Civ. P. 53 to do so. Such supervision is necessary to oversee the exchange of documents and information with the borrowers, and ensure that no final actions are taken by Chase which would impair Plaintiffs' interests in these loans.

BACKGROUND

Plaintiffs are in the business of buying defaulted residential mortgage loans, including both the note obligation and the security interest, and then working out payment plans with the borrowers of those loans. (Laurence Schneider Declaration ("Schneider Decl."), ¶ 3). Unfortunately, Plaintiffs sometimes cannot work out terms that would allow the homeowner on the defaulted loan to stay in the home, and Plaintiffs then have to pursue foreclosure or other remedies to avoid being left with just loan documents on properties that Plaintiffs had acquired, but which are not generating any cashflow for Plaintiffs. Schneider Decl., ¶ 3.

From 2005 to 2010, Plaintiffs acquired literally thousands of first and second lien residential mortgage loans from Defendants, first on behalf of S&A and then 1st Fidelity. Schneider Decl., ¶ 4. During this time-frame, S&A acquired about 650 individual defaulted first and second residential mortgage loans, and 1st Fidelity acquired about 350 individual defaulted first and second residential mortgage loans. Schneider Decl., ¶¶ 5-6.

Defendants then approached the Schneider Entities to purchase a larger pool of closed end first lien residential mortgage loans. Defendants called these loans "First Lien Walks" because these were loans Defendants had decided to "walk away from." Defendants did not provide the full and customary servicing information on these loans to Plaintiffs, as required by RESPA, but instead provided Laurence Schneider a spreadsheet on November 8, 2008 by e-mail ("November 2008 Data Tape"), which incomplete spreadsheet listed about 5,785 loans without all the loan servicing information for those loans. Schneider Decl., ¶¶ 7-8.

Thereafter, on February 4, 2009, Defendants sent Laurence Schneider the Mortgage Loan Purchase Agreement ("MLPA"), which Laurence Schneider signed on behalf of MRS on February 25, 2009. Pursuant to the MLPA, MRS agreed to purchase non-performing first lien mortgage loans from Defendants. Schneider Decl., ¶¶ 9-10. The MLPA referenced an Exhibit A, a Mortgage Loan Schedule, but there was no Exhibit A attached at the time the MLPA was signed. MRS and Defendants intended that this Schedule would consist of 3,529 loans with an outstanding principal balance as of December 22, 2008 of $156 million. Schneider Decl., ¶ 11.

On February 25, 2009, Defendants sent Plaintiffs a supposedly updated data tape of the loans sold to MRS through the MLPA, but this updated data tape still lacked the information that Exhibit A to the MLPA was supposed to contain. Schneider Decl., ¶ 12.

Because Defendants did not provide the necessary information about the loans sold to MRS at the time they were sold, as required by RESPA, nor have they done so at any time since the sale of those loans, Plaintiffs have been forced to resort to their own devices to get information about the borrowers on the loans purchased from Defendants to try to work out payment plans on those loans with the borrowers.

However, in the course of trying to work out payment plans, Plaintiffs have faced numerous instances of ongoing misconduct by Defendants, including the following: (a) Defendants' false representations to borrowers that either Defendants or collection agencies hired by Defendants are indeed the authorized servicer or owner of the loans that had been sold to Plaintiffs; (b) Defendants' collection of mortgage and insurance payments on loans sold to Plaintiffs, and refusal to forward these collected monies to Plaintiffs; (c) Defendants' continued approval of short sales on properties encumbered by loans sold to Plaintiffs; (d) Defendants' false representations to state and federal enforcement agencies that Plaintiffs are responsible for the loan servicing violations being committed by Defendants when those agencies receive complaints; (e) Defendants' false representations to certain borrowers that their loans had been transferred to Plaintiffs, even though the loans were not actually transferred, prompting those borrowers to file complaints with state and federal agencies; (f) Defendants' mailing of debt forgiveness letters to numerous borrowers whose loans were sold to Plaintiffs before those letters were sent; (g) Defendants' wrongful release and discharge of liens, through third-party agents such as Nationwide Title Clearing, Inc. ("NTC") and PiersonPatterson LLP ("PiersonPatterson") on properties that served as collateral for loans that Defendants had already sold to Plaintiffs when those liens were released, which lien releases appear to have been "robo-signed" by certain employees of Defendants, and/or their authorized third-party agents such as NTC and PiersonPatterson[1]; (h) Defendants' unsuccessful attempts to restore the Plaintiffs' position on the loans for which Defendants wrongfully released the liens by filing documents that purport to vacate those lien releases; and (i) Defendants' communications with Plaintiffs to get Plaintiffs to sign documents relating to the loans that were purportedly sold to Plaintiffs whenever a borrower contacts Defendants, despite never having given Plaintiffs any of the loan documents for the loans at the time the loans were sold to Plaintiffs, in an effort to shift liability for Defendants' mishandling of these loans to Plaintiffs. Schneider Decl., ¶ 13.

The most recent lien release occurred in March 2017, and several more took place in 2016. Compounding the problems caused by the issuance of lien releases are Defendants' mailing of wrongful Forgiveness Letters and statements via its representatives that borrowers no longer owe money to the Plaintiffs or that their loans were "charged off." Three examples of borrowers who received these Forgiveness Letters are Joseph Davis, Mary Schmidt, and Willie Holmes.

Joseph Davis contacted Plaintiffs in February 2015 after having first been contacted by Defendants, who told him that they sold his loan to MRS. While Plaintiffs let Mr. Davis know they were willing to work with him, they advised him that they couldn't do anything until Chase prepared and filed an assignment of mortgage to MRS. Plaintiffs reached out to Chase repeatedly

[1] In fact, as NTC has engaged in obstructionist tactics in this action to prevent Plaintiffs from deposing one of their employees, Erika Lance, who signed many of these lien releases but refused to answer questions based on her personal knowledge during her deposition (the subject of which tactics is subject to a separate Motion currently pending before the Court), Plaintiffs can expect cold comfort from Defendants that they will cooperate in stopping these lien releases from continuing without the requested intervention of this Court.

to make this happen without success. Then, in October 2015, Mr. Davis informed Plaintiffs that Chase provided him with a copy of the recorded assignment of mortgage, even though Chase never sent a copy to Plaintiffs directly. Then, in January 2016, Mr. Davis filed a complaint against the Plaintiffs with the Illinois and Florida Attorney Generals' Offices. Because Defendants refuse to provide the full documentation on loans sold to Plaintiffs, Plaintiffs now stand in the unenviable position of violating federal loan servicing regulations if they forgive loans such as Mr. Davis's loan because there is no record in Plaintiffs' position that the Davis loan was ever sold by Chase to MRS. Schneider Decl., ¶ 15.

Mary Schmidt was interested in selling her home in March 2016, and learned there was a lien on the property relating to a line of credit that she had opened with Chase. Chase would not release the lien because they claimed they did not own the loan, but had not provided Plaintiffs with any of the loan documentation either, including the assignment of mortgage. During the efforts between Plaintiffs and Chase to resolve the matter involving Ms. Schmidt, Chase initially sent Plaintiffs a purported assignment of mortgage to MRS, which appeared to be "robo-signed." Plaintiffs refused to accept this fraudulent document, and insisted that Chase prepare and deliver a valid assignment of mortgage, which Chase eventually provided just as Ms. Schmidt was trying to close on the sale of her home. Again, Chase's actions (and earlier inactions) caused unnecessary delays and expenses upon Plaintiffs and Ms. Schmidt because Chase failed to turn over the loan file and execute documents when the loan sale to Plaintiffs was first executed. Schneider Decl., ¶ 16.

Most recently, in May 2016, Willie J. Holmes contacted Chase about his mortgage, and received a letter back from Chase that as far as Chase was concerned, his loan carried a zero loan balance. Mr. Holmes then contacted Plaintiffs to ask for a release. Chase, however, never provided Plaintiffs with the loan file, including an assignment of mortgage for this loan, at the time it was sold to Plaintiffs. Then, in February 2017, Mr. Holmes approached Chase again to get this assignment of mortgage to MRS because Mr. Holmes wanted to sell his home before the end of March 2017. Schneider Decl., ¶ 17.

The borrowers are energized by these statements and documents from Defendants to stop making payments on the loans, and if not satisfied with what Plaintiffs can do as a matter of law with the paucity of documents in their possession for a given loan because of Defendants' failure to produce complete loan files, pursue complaints with state and federal regulatory authorities and litigation. Schneider Decl., ¶¶ 15-17, Exhibits 4-6.

Defendants only choose to be proactive in delivering loan documents to the Plaintiffs when prompted by borrowers and when it serves their own self-interest; namely, to shift liabilities from Defendants to the Plaintiffs. Otherwise, there is no effort by Defendants to keep the Plaintiffs informed, much less to provide them with the loan documents that should have been provided for each loan when they were sold by Defendants to the Plaintiffs. Schneider Decl., ¶ 18.

A review of the May 31, 2017 document production that Defendants have made subsequent to the Court's May 18th, 2017 Memorandum and Order ("Order") on the most recent Motion to Compel Discovery further confirms that Defendants cannot be trusted with ensuring that no further damage is done to the Plaintiffs. One example is evidenced in the fact that the recent production identifies certain loans as being part of the MRS pool, even though they were not part of the pool (although Plaintiffs considered them the "cherries" of the potential pool) and were in fact already lien released on July 28, 2008, several months *before* they were even put on a list to be sold and represented as 1st Lien Mortgage loans. Schneider Decl., ¶ 20.

Further, a review of Defendants' most recent document production shows that these releases of liens on loans that have been identified as having been sold to the Plaintiffs not only continues through the present date (with the most recent instance happening in March of this year), but actually started on October 17, 1998, continuing on unabated through 2004, before the Plaintiffs even began conducting business with Defendants. By that time, according to Defendants' document production, they had already lien released approximately 250 loans before they began representing and marketing to Plaintiffs that they were selling federally related mortgage loans. From 2005 through March 2017, the lien releases on loans that were sold to the Schneider Entities has not stopped. Schneider Decl., ¶ 21.

In addition, Defendants' most recent document production after the Court's Order inexplicably omitted information on more than 300 loans, including at least thirteen loans for which Plaintiffs provided information about their lien releases to Defendants in this action as exhibits to earlier filings, including the recently heard Motion to Compel. Schneider Decl., ¶ 22.

Similarly, as reflected in the Declaration submitted by Douglas E. Lord, who was retained by counsel for Plaintiffs and who testified at the May 10, 2017 hearing on Plaintiffs' Motion to Compel and who reviewed the May 31st document production from Defendants, the discovery produced by Defendants is still incomplete in several areas that directly relate to why Plaintiffs are seeking the relief requested in the subject Motion and supporting Memorandum.

As Mr. Lord has noted, with respect to Plaintiffs S&A and 1st Fidelity, the loan data that has been produced by Defendants only relates to between about 424 of the 647 loans bought by

S&A, and 195 of the 358 loans bought by 1st Fidelity. Douglas E. Lord Declaration ("Lord Decl.", ¶ 5). As it relates to debt forgiveness letters sent by Defendants to borrowers on loans bought by 1st Fidelity and S&A, the most recent production by Defendants reveals data on only twelve debt forgiveness letters sent to borrowers on loans purchased by either of those two Plaintiffs, even though Mr. Lord's prior due diligence efforts identified at least twenty-two debt forgiveness letters sent to such borrowers. Lord Decl., ¶ 12. Without complete data on debt forgiveness or loan modification letters from Defendants to borrowers on loans bought by either Plaintiff S&A or 1st Fidelity, these Plaintiffs are critically hampered in their efforts to operate their businesses and defend themselves from potential lawsuits from borrowers or other third parties relating to the handling of these loans.

Further, as Mr. Lord notes, with respect to data on lien releases by Defendants on loans sold to any of the Plaintiffs, Defendants' most recent production shows that of the 195 loans identified as being sold to 1st Fidelity (of the total 358 such loans), 24 were lien released; of the 424 loans identified as being sold to S&A (of the total 647 such loans), thirty-six were lien released; and of the 3,682 loans identified as being sold to MRS (of the total of 3,705 such loans), 545 were lien-released. Lord Decl., ¶ 15. Apart from the incompleteness of this data, the data now provided by Defendants further raises serious concerns about how Defendants are in fact continuing to treat these loans. Previous discovery from Defendants on lien releases indicated that the bulk of the lien releases occurred in approximately 2012 and 2013, ostensibly as part of Defendants' efforts to assert consumer relief credit under the National Mortgage Settlement Agreement ("NMSA"). Lord Decl., ¶ 16. Prior discovery from Defendants indicated that

Defendants lien-released 25 loans sold to S&A, 32 liens sold to 1st Fidelity, and somewhere between 550 and 700+ loans sold to MRS. Lord Decl., ¶ 16.

However, the most recent production by Defendants on May 31, 2017 suggests that numerous liens on loans sold to Plaintiffs were released before the loans were sold to Plaintiffs, dating back to 1998, and have continued through the present day, with 9 taking place in 2015, 5 in 2016, and one already earlier this year. Lord Decl., ¶ 16. This pattern of lien releases should not be taking place.

The ongoing threat of potential lien releases is paralyzing Plaintiffs from pursuing foreclosure or other remedies with respect to mortgages where the need arises. Borrowers could also attempt to rely on the lien releases, loan forgiveness letters and other inappropriate actions by Defendants as defenses or counterclaims in foreclosure actions brought by the Plaintiffs. More importantly, it is impossible for the Plaintiffs to check county recorders in dozens of states across the United States daily, necessitating that some lien releases will fall through the cracks. Schneider Decl., ¶ 24.

Plaintiffs' inability to pursue such remedies also adversely affects mortgage loan restructuring negotiations with borrowers, which is at the heart of Plaintiffs' business model. Borrowers with whom one or more of the Plaintiffs have or would otherwise have worked out payment plans can cease making payments or refrain from entering into new payment plans. Schneider Decl., ¶ 25. Plaintiffs also face the risk that state and local governments could attempt to hold Plaintiffs liable for breaches of consumer protection laws, and/or attempt to impose liability on Plaintiffs for community blight, failure to maintain properties and other public kinds of damages for which governments have aggressively sought to hold lenders liable in recent years. Schneider Decl., ¶ 26.

Because of the retaliatory nature of the lien releases and because Defendants have ceased all regular business communications with the Plaintiffs, Plaintiffs receive irregular and minimal notice (and often not advance notice) regarding when Defendants file additional releases or which of the Plaintiffs' loans are affected. Because of the lien releases are still happening, Plaintiffs must check on an almost daily basis to see if further releases have been issued. This is a time-consuming process that imposes continuing administrative burdens and title search expenses on Plaintiffs. Schneider Decl., ¶ 27.

Plaintiffs have suffered, and continue to suffer, grave injury to their business relationships and reputations. Plaintiffs' business model relies on goodwill between borrowers and Plaintiffs. Defendants' misconduct, including its continued wrongful release of liens, has entangled Plaintiffs in ongoing disputes with borrowers and governmental agencies with whom Plaintiffs previously enjoyed positive working relationships. Defendants' misconduct has harmed and continues to harm Plaintiffs' reputation by effectively portraying Plaintiffs as predatory businesses attempting to collect payments on loans that had been forgiven or released, when, to the contrary, Plaintiffs only took action to which they were legally entitled as the rightful owners of the loans at issue. Schneider Decl., ¶ 28.

Plaintiffs would like to believe that Defendants could be trusted to provide the full information that has been requested, and to refrain from any further activity regarding any of the loans. However, Plaintiffs' history of dealings with Defendants has been marked by repeated efforts to obtain necessary documents and information from Defendants, with mixed results at best and punitive consequences at worst.

As early as February 2009, upon receiving the MLPA spreadsheet purportedly representing the 1st lien mortgage loans, Plaintiffs notified various Chase representatives, from Mr. Guerrero to Ms. Launi Solomon, that Plaintiffs needed the proper data and collateral files. Schneider Decl., ¶¶ 29-30. For a time, Chase was slightly cooperative. Schneider Decl., ¶ 31. For example, on December 18, 2009, Ms. Solomon informed Plaintiffs that several collection agencies were continuing in their collection efforts on loans that were supposedly sold to the Plaintiffs and that she was going to forward the payments due to MRS. In fact, Ms. Solomon knew there was a way to determine which loans were purportedly sold to MRS, despite Defendants' ongoing misrepresentations since that time that they cannot determine which loans were sold to MRS, which misrepresentation they finally admitted was wrong on May 8, 2017 in a letter from their counsel on the eve of the Court's hearing on the Plaintiffs' Motion to Compel Discovery, in which letter Defendants sheepishly admitted at long last that they ***can determine*** which loans were sold to MRS. Schneider Decl., ¶ 32, Ex. 7.

Yet, Plaintiffs' hope for a breakthrough in receiving all documents they were entitled to from Chase to properly service the loans was short-lived. After having requested a data tape of the loans sold to MRS pursuant to the MLPA, Plaintiffs requested Ms. Solomon of Chase provide an updated "Exhibit A" list of loans sold to MRS. On December 29, 2009, Ms. Solomon provided an updated list of the MLPA loans with five data fields, two of which fields were searchable identifiers of the loans sold to MRS: the Agency Number being "MRS209" and the Collector Code being "Sold." Schneider Decl., ¶ 34. Unfortunately, shortly after receiving this e-mail and data tape from Ms. Solomon, Plaintiffs were informed that the payments that had been collected by certain third parties relating to loans that had been sold to Plaintiffs would not be sent to Plaintiffs after all. Schneider Decl., ¶ 35.

On August 28, 2012, Plaintiffs contacted Ms. Solomon about two borrowers who had recently been contacted by third-party debt collector Real Time Resolutions ("RTR") about making payment arrangements on their loans. In fact, RTR filed a transfer of Plaintiffs' claims on these loans in federal bankruptcy court. This claim transfer caused the Bankruptcy Trustee to stop making payments to 1st Fidelity on the loans, until Plaintiffs proved the fraudulent transfer of the claim, which RTR eventually retracted. Schneider Decl., ¶ 36. Later that same day, Plaintiffs received an e-mail from Ms. Solomon, which contained an e-mail exchange between Ms. Solomon and Mr. Omar Kassem of Chase, in which Ms. Solomon informs Mr. Kassem that the Garcia loan, the loan that Plaintiffs were asking Defendants about to get more information because they did not have the loan file, "was already in the DOJ Queue." Plaintiffs submit the DOJ queue was the coding in the Collector Code ("CLTR") field in the Recovery system. The DOJLTR queue was the holding identifier for the eventual mailing by Defendants of 33,456 2nd Lien Extinguishment Letters to various borrowers, including borrowers on loans owned by the Plaintiffs. Schneider Decl., ¶ 37.

On September 5, 2012, Mr. Kassem of Chase wrote to Plaintiffs, stating: "In an effort to comply with new corporate asset sale practices across all lines of business of Chase, Chase Mortgage Banking recovery will no longer be providing support as it relates to portfolio and note sales that funded prior to October 2011. Issues related to the following items must be remediated/addressed prior to Friday, October 12 2012: Lost note affidavits, Assignments of mortgage, Pay histories, Repurchases. All requests will be reviewed by the Recovery Portfolio Manager and a final assessment **will be made on a case by case basis.** Repurchase requests will not be considered absent an identifiable breach of the reps and warranties by Chase in the purchase and sale agreement. Thank you for your attention to this matter." The communication was sent at a time Defendants knew that loans owned by the Plaintiffs were going to be impacted by the upcoming 2nd Lien Extinguishment Program. Schneider Decl., ¶ 38.

Despite this communication from Defendants, Plaintiffs continued trying to correspond with them. Later on September 5, 2012, Plaintiffs engaged in e-mail communications with Mr. Kassem, sharing with him correspondence Plaintiffs had received from another borrower, Mr. Dubinski, in an effort to get information that had not been provided from the outset by Chase. Plaintiffs did their best to send out RESPA letters to borrowers they could identify once the MLPA was executed, having no reason to suspect that the MRS loans were not 1st lien mortgages. Schneider Decl., ¶ 39.

Despite the purported transfer of the various loans to Plaintiffs, Plaintiffs' borrowers' loans have been repeatedly sent by Chase to a collection agency to extract monies from these borrowers and to assert consumer relief credit under the NMSA before the borrowers were sent 2nd Lien Extinguishment letters on September 13, 2012 as part of an overall set of 33,456 letters from Chase that went out that same day. Schneider Decl., ¶ 40. Under the cover of not providing full documentation on these loans to Plaintiffs, Chase ensured that these various borrowers would get swept up by Chase's dragnet of fraud, to either circumvent its mortgage servicing obligation or to assert consumer relief credit unlawfully.

The next day, September 14, 2012, Plaintiffs were contacted by a borrower, Robert Warwick, whose loan was purchased from Chase several years before. The borrower had made consistent payments for several years after Plaintiffs acquired his loan from Chase. However, he was not calling about a payment that he was making, but rather about a 2nd Lien Extinguishment letter he received from Chase, and to notify Plaintiffs that he would no longer be making payments on the loan. Plaintiffs immediately contacted Mr. Kassem of Chase to resolve this matter with this borrower, and to inquire if any other borrowers whose loans the Plaintiffs had bought from Chase would be receiving a similar letter. Schneider Decl., ¶ 41. Plaintiffs followed up with Chase over the ensuing months to see what could be done to retract these debt forgiveness letters that had been sent to Plaintiffs' borrowers and to assist other borrowers, but these efforts were fruitless. Schneider Decl., ¶¶ 42-44.

Plaintiffs eventually discovered that Chase's obstructionism was part of a larger scheme of fraud perpetrated by Chase upon both Plaintiffs as well as the borrowers who had originally obtained loans from Chase, as well as the United States government and various states who had worked to negotiate the NMSA. As a prelude to a separate lawsuit that Mr. Laurence Schneider filed under the False Claims Act ("FCA"), 31 U.S.C. § 3730 *et seq.*, on March 28, 2013, Plaintiffs' prior legal counsel sent a letter to Eric Holder, the then United States Attorney General, accompanied by the Relator's Disclosure Statement required by the FCA. Then, on May 6, 2013, Mr. Schneider's FCA whistleblower case was filed under seal in the United States District Court for the District of South Carolina, and the following day, his counsel sent a copy of the FCA complaint to Attorney General Eric Holder. Schneider Decl., ¶¶ 45-46.

While this FCA case was still under seal and purportedly being investigated by the U.S. Department of Justice ("DOJ"), Chase executed its Alternative Foreclosure Process ("AFP") on numerous loans owned by the Plaintiffs. This special project, in which Chase concealed the 1st Lien Recovery loans from government regulatory scrutiny, was specifically known as the Pre DOJ Lien Release Project. As part of this undertaking, Chase made note in the Mortgage Servicing Platform ("MSP") of all the loans in which borrowers, whose loans were owned by the Plaintiffs, were lien released. Schneider Decl., ¶ 47. While Chase were purporting to deny the allegations contained in the FCA case to the DOJ, Chase was simultaneously setting the wheels in motion to actively release loans owned by the Plaintiffs, as part of the AFP. Schneider Decl., ¶ 49.

On February 8, 2014, after the United States and the States party to the NMSA and RMBS Settlements declined to intervene in the FCA case, Plaintiffs received word from a Chase employee of the following: "Looks like they have done it again. Heard someone outside of our group may have processed 800-900 lien releases on Recovery sold loans." Schneider Decl., ¶ 50. On February 21, 2014, Plaintiffs received confirmation from the same Chase employee that the 1st lien mortgages, which had been identified in the FCA case as the AFP, had been released. Unlike the 2nd Lien Extinguishment Program, in which Chase harmed a couple dozen of the Plaintiffs' loans to seek credit for 2nd mortgages under the NMSA, the AFP impacted most of the Plaintiffs' 1st lien mortgages. The communications also confirmed that unlike the 2nd Lien Extinguishment Program, in which borrowers were notified about the forgiveness, the borrowers whose 1st lien mortgages were released, to avoid being included in the NMSA metrics testing, did not receive notification. Schneider Decl., ¶ 51.

On March 5, 2014, prior to the filing of this lawsuit, Plaintiffs' prior legal counsel sent a hand-delivered letter to Stephen Cutler, Chase's then-General Counsel, outlining the scope of the ongoing harms that Chase has been committing against the Plaintiffs, including the rampant and unchecked release of liens on loans previously sold by Chase to the Plaintiffs, as well as the rogue actions taken by Chase through the AFP and the 2nd Lien Extinguishment Program. Schneider Decl., ¶ 52, Ex. 13.

Then, starting on May 2, 2014, Ingrid Whitty, a purported Vice-President of Chase, executed the various fraudulent Vacation of Modification of Mortgage and Vacation of Release of Mortgage documents which were prepared by Erika Lance of NTC. NTC then proceeded to knowingly record these fraudulent documents in the various county recorders' offices. Schneider Decl., ¶ 53.

On June 27, 2014, Plaintiffs' prior counsel wrote to Chase again, stating that "[t]he scope of harm caused by [Chase's] actions is mushrooming," and further detailing how Chase's lien releases and attempts "to 'revive' recordings of the liens whose releases [Chase] recorded" were exposing the Plaintiffs to liability under various laws. Schneider Decl., ¶ 54, Ex. 14.

STANDARD OF REVIEW

Rule 65 of the Fed. R. Civ. P. provides the Court with the power to issue a temporary restraining order and/or a preliminary injunction in favor of Plaintiffs to enjoin Defendants' ongoing unlawful handling of the loan portfolios that were previously sold to Plaintiffs. The standard for issuing a temporary restraining order and a preliminary injunction in this Circuit are the same. *Local 1814, Int'1 Longshoremen's Ass'n v. N.Y. Shipping Ass'n, Inc.*, 965 F.2d 1224, 1228-29 (2d Cir. 1992); *Safe-Step Walk-In Tub Co., v. CKH Industries, Inc.*, 2015 WL 6504284, No. 15-CV-07543 (NSR) (S.D.N.Y. Oct. 26, 2015). In general, the district court may grant a preliminary injunction if the moving party establishes (1) "irreparable harm," and (ii) either (a) "a likelihood of success on the merits" or (b) "sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs*., 769 F.3d 105, 100 (2d Cir. 2014) (quoting *Lynch v. City of New York*, 589 F.3d 94, 98 (2d Cir. 2009)). As the Supreme Court reaffirmed in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), a plaintiff seeking a preliminary injunction must demonstrate not just that they have some likelihood of success on the merits and will suffer irreparable harm absent an injunction, but also that the "the balance of equities tips in his favor[] and ... an injunction is in the public interest." Id. at 20, 129 S.Ct. 365. The party seeking the injunction carries the burden of ensuring "by a clear showing" that the necessary elements are satisfied. See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

ARGUMENT: A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION IS WARRANTED IN FAVOR OF PLAINTIFFS.

A. Plaintiffs Have Been Irreparably Harmed By Defendants' Repeated Contractual Breaches and Unlawful Handling of the Loans Sold to Plaintiffs.

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex. Rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999) (citation and internal quotation marks omitted). In order to demonstrate irreparable harm, a plaintiff must show an injury that is "actual and imminent" and that "cannot be remedied by an award of monetary damages." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (citation and internal quotations omitted); *accord Moore v. Consol. Edison Co. of N.Y., Inc.,* 409 F.3d 506, 510 (2d Cir. 2005) ("Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances."). If an injury can be appropriately compensated by an award of monetary damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief. *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir.1991).

However, irreparable harm may be found where damages are difficult to establish and measure. *Ticor Title Ins. Co. v. Cohen* 173 F.3d 63, 69 (2d Cir.1999). Courts have found, for example, that injunctive relief is appropriate where it would be "very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come." *Id.* at 69. Courts have similarly found irreparable harm and issued a temporary restraining order when it is difficult to estimate "with any precision the amount of the monetary loss which has resulted and which would result in the future." *Register.com v. Verio, Inc.* 126 F.Supp.2d at 248 (S.D.N.Y. 2000).

Moreover, as the Second Circuit held in *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101 (2d Cir. 2003), the mere fact that the actions that a party moving for a temporary restraining order or preliminary injunction seeks to enjoin may give rise to compensable damages for breach of a contract does not automatically negate the existence of an irreparable injury. The breaches of the contract may give rise to irreparable harm, which the Wisdom court defined as "certain and imminent harm for which a monetary award does not adequately compensate." Wisdom, 339 F.3d at 113, citing *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995).

Here, Plaintiffs seek and require the temporary restraining order and preliminary injunction because in its absence, the unchecked practices of Defendants will run Plaintiffs out of business permanently. On any given day, Plaintiffs face the real prospect that another loan sold to them by Defendants, for which loan Defendants never gave Plaintiffs the entire loan file, will be compromised by an unlawful step taken by Defendants, whether that be the release of a lien on the property subject to a mortgage owned by Plaintiffs, or the issuance of a debt forgiveness letter, or some other similar activity. Damages will not make Plaintiffs whole at the end of this litigation without this injunctive relief in the interim, relief which will ensure that the spigot of Defendants' unlawful activity is turned off while Plaintiffs continue to maintain their business and hopefully grow it once more. In fact, Plaintiffs are already facing the actual problem of being sued by borrowers, or having to sue borrowers, on the very loans that were purportedly sold to Plaintiffs by Defendants because of the actions that Defendants have been taking without advance consultation with Plaintiffs. These unchecked practices can best be controlled and managed by the appointment of a third-party monitor through whom all future actions prompted by a borrower inquiry to Defendants about any of the loans purportedly sold to Plaintiffs would be managed and routed during the pendency of this litigation.

B. Plaintiffs Are Likely to Succeed In Proving Defendants Breached The Contracts At Issue Upon Which Plaintiffs Seek The Temporary Restraining Order and Preliminary Injunction.

In addition to establishing irreparable harm, a party moving for a temporary restraining order or preliminary injunction before this Court must also show the following: "either . . . that it is likely to succeed on the merits of the action, or . . . that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, provided that the balance of hardships tips decidedly in favor of the moving party." *Safe Step Walk-In Tub Co.*, at *1, quoting *Mullins v. City of New York*, 626 F.3d 47, 52-53 (2d Cir. 2010), citing *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34-35 (2d Cir. 2010).

To establish a likelihood of success on the merits, a plaintiff "need not show that success is certain, only that the probability of prevailing is 'better than fifty percent.'" *BigStar Entm't, Inc. v. Next Big Star, Inc.*, 105 F.Supp. 2d. 185, 191 (S.D.N.Y. 2000) (quoting *Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

Under New York law, the elements of breach of contract are: "(1) the existence of a contract; (2) performance by the party seeking recovery; (3) non-performance by the other party; and (4) damages attributable to the breach." *RCN Telecom Servc., Inc. v. 202 Centre St. Realty LLC*, 156 Fed App'x 349, 350-51 (2d Cir. 2005).

Here, Plaintiffs move this Court for an order enjoining Defendants from engaging in any further activity relating to the loans that were sold to Plaintiffs, which activities Defendants continue to engage in without authority and in breach of the various agreements entered into with Plaintiffs through the present day, without the supervision of the third-party monitor that Plaintiffs request this Court appoint.

Defendants cannot deny the existence of the various contractual agreements that were entered with Plaintiffs when Defendants sold the various loans to Plaintiffs. Further, Plaintiffs have fully performed under those same agreements with Defendants.

However, as discussed above, continuing through the present day, Defendants have not lived up to their end of the bargain of those agreements with Plaintiffs. Defendants have routinely and persistently been interfering with the Plaintiffs' interests in the loans sold by Defendants to

Plaintiffs in numerous ways, ranging from the release of liens associated with those loans to the issuance of debt forgiveness letters to the failure to provide Plaintiffs with the complete loan files for each sold loan from the date each loan was sold to Plaintiffs. None of these unlawful actions are permissible under the contractual agreements between the parties.

Moreover, as discussed above, Defendants' ongoing pattern of unlawful activity has, and continues to, severely injure Plaintiffs' abilities to effectively run and grow their businesses. When Defendants sold the various loans to Plaintiffs, Plaintiffs expected that it would be able to service these loans in the manner that it deemed appropriate and consistent with its own business objectives. Plaintiffs had no reason to expect that Defendants would continue to take steps, large and small, that interfered so seriously with Plaintiffs' ability to service the purchased loans. Yet, those steps continue unabated, leaving Plaintiffs at the complete mercy of Defendants, while the ongoing prospects of Plaintiffs diminish further every day.

Finally, the hardships that have been faced, and which would continue to be faced, by the parties if the requested temporary restraining order and preliminary injunction are not issued would squarely fall on the overburdened shoulders of the Plaintiffs. The requested relief would serve merely to protect Plaintiffs' rights as the owners of the loans sold to them by Defendants, so that Plaintiffs could continue to service them without the never-ending risk that Defendants take yet another, unauthorized and illegal step that compromises those loans. The Defendants do not own the loans, and have not owned them since they sold them to Plaintiffs. They have absolutely no rights to take any steps, small or large, that affect those loans. The entry of a temporary restraining order or preliminary injunction and the appointment of a third-party monitor would not prevent them from doing something they are otherwise entitled to do. The requested relief would merely ensure that they would refrain from the actions they already should not be taking, while giving Plaintiffs a chance to survive and ultimately thrive as this litigation continues.

C. Plaintiffs Do Not Believe A Bond Is Necessary For the Issuance of the Requested Relief.

Fed. R. Civ. 65(c) generally provides for the giving of security by the party moving for a temporary restraining order or preliminary injunction for the payment of costs or damages suffered by a party who is found to have been wrongly enjoined or restrained.

However, the Rule gives the Court wide discretion in setting the amount of the bond, and even to eliminate the need for a bond altogether in a given matter. In particular, "where there has been no proof of likelihood of harm, or where the injunctive order was issued 'to aid and preserve the court's jurisdiction over the subject matter involved'", the elimination of a bond as a prerequisite for the issuance of a temporary restraining order or preliminary injunction has been held to be warranted. *Time Warner Cable, Inc. v. DirectTV, Inc.*, 2007 WL 1296205, No. 06 Civ. 14245 (LTS)(MHD)(S.D.N.Y. May 2, 2007), *quoting Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996).

Here, Plaintiffs request this Court oversee the handling of the loans that were sold to Plaintiffs if a borrower contacts Defendants about these loans, or in its discretion, appoint a special master pursuant to Fed. R. Civ. P. 53 to do so. Plaintiffs are requesting relief reasonably tailored to protect their interests in the sold loans by requesting that Defendants take no actions with respect to these loans (which loans they have no rights to anyways) without the approval of the Court or a special master. In these circumstances, Plaintiffs submit that no bond is necessary as a prerequisite for the requested relief, as Defendants face no threat of damages from refraining to take actions with respect to property in which, as a matter of contract, they had already transferred to Plaintiffs.

REQUESTED RELIEF

Therefore, for the foregoing reasons and to ensure that no further irreparable injury is suffered by Plaintiffs, pursuant to Rule 65 of the Fed. R. Civ. P., Plaintiffs MRS, 1st Fidelity, and S&A move this Honorable Court to oversee, or in its discretion to appoint a special master to oversee, the handling of the loans sold by Defendants to Plaintiffs, to ensure that Defendants and their respective officers, directors, employees, agents, successors, and assigns do not take any of the following actions without first informing and getting the approval of the Court or the special master:

(a) releasing or discharging liens on properties that serve as collateral for loans Defendants have sold to Plaintiffs and which Plaintiffs rightfully own,

(b) recording any release or discharge of such liens;

(c) discharging, modifying or otherwise declaring to be satisfied any such loans Defendants have sold to the Schneider Entities;

(d) receiving and keeping payments from borrowers on loans the Defendants sold to the Schneider Entities pursuant to the Mortgage Loan Purchase Agreement between Defendants and MRS, the Master Mortgage Loan Sale Agreement between Defendants and S&A, and the individual note sale agreements between Defendants and 1st Fidelity;

Date: June 15, 2017

Respectfully Submitted,

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