UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHIRLEY M. GREEN, *et al.*, Plaintiffs, v. WELLS FARGO BANK, N.A., successor by merger to Wells Fargo Home Mortgage, Inc., Defendant.	Civil No. 8:12-cv-01040

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

Respectfully submitted,

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Dated: June 11, 2012

I. INTRODUCTION

This is a civil action where the plaintiff homeowners have sued their mortgage servicer for claims arising out of misrepresentations and negligent conduct in connection with a loan modification request. The amended complaint states claims for violations of the Maryland Consumer Protection Act (MCPA), promissory estoppel, negligence, negligent misrepresentation, and fraud.

The claims asserted in this action are similar to the claims asserted in the case of *Allen v. Citimortgage, Inc.*, No. CCB-10-2740 (D. Md. Aug. 4, 2011).[1] In *Allen*, Judge Blake allowed the plaintiffs' claims for breach of contract, promissory estoppel, and violations of the MCPA – all of which arose in connection with a mortgage loan modification request – to proceed.

The *Allen* plaintiffs did not assert claims for negligence, negligent misrepresentation, or common law fraud. However, given that an MCPA claim is essentially a mini-fraud claim, the rationale in *Allen* likely would have permitted such claims had they been asserted.

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[1] It is true that *Allen*, unlike the present matter, involved a private mortgage servicer's misconduct in connection with a modification request under the U.S. Treasury's Home Affordable Modification Program (HAMP). However, as explained below, given that this Court analyzed the plaintiffs' claims, not as attempts to assert a private right of action under HAMP, but rather allegations of well recognized, viable tort, contract and statutory claims, *Allen* is instructive.

II. FACTUAL ALLEGATIONS

Plaintiffs own their home in Upper Marlboro, Maryland. (Am. Compl. ¶ 14.) Defendant services the mortgage, which is pursuant to a promissory note secured by a the Deed of Trust dated May 31, 2006, and recorded among the land records of Prince George's County, Maryland in liber 25400 folio 053. (Am. Compl. ¶ 15.)

Due to financial hardship, Plaintiffs began struggling to make mortgage payments in October 2010. (Am. Compl. ¶ 17.) In late-March or early-April 2011, Plaintiffs were in a position to regain control of their finances, and contacted Defendant to request a loan modification. (Am. Compl. ¶ 18.)

On April 8, 2011, Defendant promised that it would "process [Plaintiffs'] request for Loan [sic] Modification", in a manner consistent with an intent to "ensure you have every opportunity to retain your home", (Am. Compl. Ex. 3), thereby adopting as part of the promise its "underwriting standards or other known procedures or protocols that it used to determine [eligibility]" (Am. Compl. ¶ 28), in return for Plaintiffs' act of supplying the requested documents (Am. Compl. Ex. 3). Defendant never had the present intent to keep the promise. (Am. Compl. ¶ 29.9.)

Plaintiffs submitted all requested documents on May 24, 2011. (Am. Compl. Ex. 2.) Although Defendant's April 8, 2011 letter instructed the Greens to submit the documentation within ten days thereof (Am. Compl. Ex. 3), and Plaintiffs did not submit the documentation until May 24, 2011 (Am. Compl. Ex. 2), Defendant waived the deadline by thereafter purporting to work with Plaintiffs (*See* Am. Compl. Ex. 4.)

Importantly, Defendant's waiver of the deadline is not proof that it actually had the present intent to keep its April 8, 2011 promise. Rather, Defendant waived the deadline only so it could pretend to work with Plaintiffs, in order to string them along so late fees and penalties (from which mortgage services earn revenue in the event of a foreclosure sale) continued to accumulate. (Am. Compl. ¶ 29.9.)

Thereafter, Defendant continually lost paperwork, and told Plaintiffs that they never provided any "input" (even though they had in fact provided all requested documentation). (Am. Comp. ¶¶ 23-25.) Defendant even filed a false affidavit in the foreclosure action it initiated against Plaintiffs. (Am. Compl. ¶ 31.1.) To date, Defendant has failed to properly process the modification request, and instead continues to pursue foreclosure. (*Id.*)

III. ARGUMENT

A. Banks Are Not Immune From Liability For False Representations Or Unreasonable Conduct That Results In Compensable Damages Merely Because Their Conduct Involves Loss Mitigation

Defendant seems to argue throughout its motion that it cannot be held accountable for negligent or fraudulent conduct, so long as the conduct occurs within the context of a loan modification request. This argument is at odds with the recent decision by this Court in *Allen v. Citimortgage, Inc.*, No. CCB-10-2740 (D. Md. Aug. 4, 2011).

It is true that, unlike the present matter, the *Allen* decision dealt with a mortgage modification request under the Home Affordable Modification Program (HAMP). However, this difference is not significant.

Consumer Protection Violations and Fraud

The *Allen* Court recognized that the Maryland Consumer Protection Act (MCPA) applies to false statements by a bank in connection with a modification request. *Allen* at * 9. In the present matter, Plaintiffs allege that Defendant made the false representations outlined in paragraphs 37.1 through 37.3. A bank may be held liable for the actionable damages caused by its misrepresentations, even if the statements were made in connection with a modification request.

Promissory Estoppel

Moreover, in *Allen*, this Court allowed the plaintiffs' promissory estoppel claim to proceed because the defendant promised that, if the plaintiffs "met the criteria for a HAMP modification, then they would receive a permanent HAMP

modification." 2011 WL 3425665 at * 8. Similarly, in the present matter, Plaintiffs allege that Defendant promised to "determine [their] eligibility for payment assistance." (Am. Compl. Ex. 4.) Plaintiffs then allege that they were eligible under Defendant's "underwriting standards or other known procedures or protocols that it uses to determine [eligibility]". (Am. Compl. ¶ 28.)[2] Thus, Plaintiffs' allegations are similar to the allegations upheld in *Allen*, as both involve (a) eligibility standards plus (b) the false promise of a modification if the standards were met.

Breach of Contract

Contrary to Defendant's argument that there is no contractual duty between a bank and its customers (*see* Def.'s Memo. 9), the *Allen* decision recognized that the "relationship of a bank to its customer in a loan transaction is ordinarily a contractual relationship …" *Allen* at * 8. Since Defendant's promise to provide a loan modification if Plaintiffs were eligible is akin to the promises that formed a contractual relationship in *Allen*, Defendant simply cannot deny that a contractual relationship existed in the present matter (assuming, again, that discovery does ultimately show that Plaintiffs were eligible under Defendant's underwriting standards).

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[2] Plaintiffs are not privy to these underwriting standards, procedures or protocols. However, given the hundreds of thousands of loans serviced by Defendant, Plaintiffs believe there must be some such standards to help Defendant efficiently determine such matters. As a result, discovery is needed for Plaintiffs to fully investigate the matter, and Defendant's argument that Plaintiff has failed to identify the underwriting standards would be more appropriate for a summary judgment motion after the close of discovery. (*See* Def.'s Memo. 9.)

Negligence and Negligent Misrepresentation

The *Allen* decision did not analyze whether a bank owes a tort duty to its customer in the context of a loan modification request. However, as explained below, the case of *Jacques v. First Nat. Bank of Md.*, 307 Md. 527 (1986) is instructive. There, the bank owed a tort duty in connection with a loan application because the plaintiffs risked losing their $10,000 deposit. *Id.* at 542. In the case *sub judice*, Plaintiffs risked losing not simply $10,000, but their entire home. The argument for the imposition of a tort duty in the present matter is clearly stronger than the argument that did lead to the imposition of a tort duty in *Jacques*.

B. MCPA: The Amended Complaint Alleges False Representations

Defendant argues that the amended complaint fails to allege any false representations. (Def.'s Memo. 16.) This overlooks the following allegations:

(1) Defendant promised that it would "process [Plaintiffs'] request for Loan [sic] Modification", in a manner consistent with an intent to "ensure you have every opportunity to retain your home", (Am. Compl. Ex. 3), thereby adopting as part of the promise its "underwriting standards or other known procedures or protocols that it uses to determine [eligibility]" (Am. Compl. ¶ 28), in return for Plaintiffs' act of supplying the requested documents (Am. Compl. Ex. 3).

– The statement was false because Defendant did not intent to properly process the modification request and Defendant had no intention of doing anything that could help Plaintiffs retain their home, because Defendant intended only to string Plaintiffs along in order to allow late fees and penalties to increase, so Defendant could recover the late fees and penalties from the proceeds of a foreclosure sale (Am. Compl. ¶ 29.9.)

– This is plausible because late fees and penalties are a huge revenue source for servicers (unlike the lender or secured party, which obtains the remainder from a foreclosure sale). [3]

– Fed. R. Civ. P. 9(b) is satisfied because Am. Compl. Ex. 3 shows the author and contents of the correspondence, and the date it was sent to Plaintiffs. [4]

(2) Defendant promised to "determine [Plaintiffs'] eligibility for payment assistance" (Am. Compl. Ex. 4), thereby

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[3] A lender or secured party takes no action on the loan other than benefitting from principal and interest payments. A mortgage servicer, on the other hand, is separate from the lender or secured party. The mortgage servicer is the entity appointed by the lender or secured party to collect payments from the homeowner, to then transfer back to the lender or secured party – essential a sort of "middle man". Thus, since the servicer benefits from late fees and penalties (and not principal and interest payments), the servicer has a financial motive to artificially inflate late fees and penalties. (Am. Compl. ¶ 29.1 – 29.9.)

[4] *See Allen*, *supra*, 2011 WL 3425665 at * 9 (Ruling that MCPA claim complied with Fed. R. Civ. P. 9(b), "The plaintiffs have pled the dates and contents of numerous contradictory letters sent by CitiMortgage that they allege were both misleading and false.").

adopting as part of the promise its "underwriting standards or other known procedures or protocols that it uses to determine [eligibility]" (Am. Compl. ¶ 28), in return for Plaintiffs' act of supplying the requested documents (Am. Compl. Ex. 4).

- The statement was false because Defendant did not intend to determine any eligibility, but instead intended only to string Plaintiffs along in order to maximize late fees and penalties to increase, so Defendant could recover the late fees and penalties as revenue from the proceeds of a foreclosure sale. (Am. Compl. ¶ 29.9.)
- This is plausible because late fees and penalties are a huge revenue source for servicers (unlike the lender or secured party, which obtains the remainder from a foreclosure sale).
- Fed. R. Civ. P. 9(b) is satisfied because Am. Compl. Ex. 4 shows the author and contents of the correspondence, and the date it was sent to Plaintiffs.

(3) Defendant made false representations to Plaintiffs when it told them they had not submitted all required documentation on June 20, 2011 (Am. Compl. Ex. 4) and

all occasions thereafter as reflected by Defendant's computer records[5] (Am. Compl. ¶ 37.2).

- The statement was false because Plaintiffs had already sent in all required documentation. (Am. Compl. ¶ 37.2, Ex. 2, Ex. 5.)
- Fed. R. Civ. P. 9(b) is satisfied because Am. Compl. Ex. 4 shows the author and contents of the correspondence, and the date it was sent to Plaintiffs, and Defendant is able to refer to its computer records.

(4) Defendant made false representations on November 4, 2011 when it stated that Plaintiffs had not provided any "input" in connection with the loan modification request, and that Defendant had been making attempts to contact Plaintiffs. (Am. Compl. Ex. 6.)

- The statements were false because, not only had Plaintiffs provided some "input", they had provided all required documentation (Am. Compl. Ex. 2, Ex. 5); and Defendant had not made the stated attempts to contact Plaintiffs (Am. Compl. Ex. 7).
- Fed. R. Civ. P. 9(b) is satisfied because Am. Compl. Ex. 6 shows the author and contents of the correspondence, and the date it was sent to Plaintiffs.

[5] Discovery is needed to obtain and investigate the computer records.

(5) Defendant made a false representation in its Final Loss Mitigation Affidavit filed with the Circuit Court for Prince George's County, No. CAE11-11908, on May 16, 2011, when it stated, "Servicer has not received all information from the borrower…. Documents needed – Page 2 of 2009 [tax returns]". (*See* Am. Compl. ¶ 37.5.)

– The statement was false because the documents filed with this Court (before Defendant filed the bogus affidavit) show that Plaintiffs provided page 2 of their 2009 tax returns. (Am. Compl. Ex. 2, RSG82.)

– Fed. R. Civ. P. 9(b) is satisfied because the Final Loss Mitigation Affidavit is signed by "Shakanda L. Byers – VP of Loan Documentation [for Defendant]", contains the contents cited above and the date it was signed.

Further, as to Fed. R. Civ. P. 9(b), in addition to the exhibits to the amended complaint, which show the authors, contents, and dates of the statements, the amended complaint further alleges:

> During the operative period of the complaint, Wells Fargo Bank, N.A. s/b/m to Wells Fargo Home Mortgage, Inc. acted through its actual or apparent agents, servants, or employees, who acted within the scope of their said agency, and over whom Wells Fargo Bank, N.A. s/b/m to Wells Fargo Home Mortgage, Inc. asserted actual or constructive direction, control, or authority. The identities of said agents may be ascertained from Wells Fargo Bank, N.A. s/b/m to Wells Fargo Home Mortgage, Inc.'s vast computer records.

(Am. Compl. ¶ 11.) Discovery may well reveal the identities of any additional declarants. In any event, Defendant cannot realistically deny that the amended complaint has given it sufficient notice to be able to locate the information.

Clearly, the amended complaint alleges that Defendant made false representations, and further satisfies Fed. R. Civ. P. 9(b). Unlike a common law fraud claim, there is no requirement under the MCPA to allege any scienter. *See* Md. Code, Com. Law § 13-301(1). Nor does the MCPA require a plaintiff to allege justifiable reliance. *See Id.* Rather, a plaintiff need only allege a "False … or misleading oral or written statement … which has the capacity … of deceiving or misleading consumers[.]" *Id.* The amended complaint alleges that the above false statements had the capacity to deceive or mislead consumers. (Am. Compl. ¶ 37.4.)

For these reasons, and in accordance with *Allen, supra*, which allowed a MCPA claim in connection with a modification request to proceed, the amended complaint states a claim upon which relief may be granted.

C. Negligent Misrepresentation, Fraud

As asserted in Section III(B), the amended complaint clearly alleges that Defendant made false representations. As the basis for the common law fraud claim (Count II), Plaintiffs cite the following two misrepresentations:

(1) Defendant promised that it would "process [Plaintiffs'] request for Loan [sic] Modification", in a manner consistent with an intent to "ensure you have every opportunity to retain your home". (Am. Compl. Ex. 3.)

(2) Defendant made false representations to Plaintiffs when it told them they had not submitted all required documentation on June 20, 2011 (Am. Compl. Ex. 4) and all occasions thereafter as reflected by Defendant's computer records.[6] (Am. Compl. ¶ 37.2.)

The reasons why each statement is false, and alleged in such a manner to satisfy Fed. R. Civ. P. 9(b), are outlined in Section III(B). The only remaining issues for consideration include scienter, justifiable reliance and damages.

Promise As Basis For A Fraud Claim

Preliminarily, as to the first misrepresentation, Maryland law is clear that a promise may be an actionable misrepresentation of a material fact if the defendant did not have the present intent to keep the promise. *Levin v. Singer*, 227 Md. 47, 63-64 (1961); *Mathis v. Hargrove*, 166 Md. App. 286, 312-13 (2005) (". . . in reliance on promises . . . which . . . Mathis and his attorney had no intention to keep . . ."); *Travel Committee, Inc. v. Pan America World Airways, Inc.*, 91 Md. App. 123, 179 (1992) (". . . promissory statements and predictions are not actionable as fraud unless a promise is made with the present intent not to perform it.") (citing *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 232 (1984)).

[6] Discovery is needed to obtain and investigate this information.

Promise Was Specific As It Adopted Defendant's Underwriting Standards

To the extent Defendant argues the promise was not specific enough to be an actionable promise, the context of the promise ("At Wells Fargo, it is our goal to ensure you have every opportunity to retain your home") necessarily made the promise ("to process [Plaintiffs'] request for Loan [sic] Modification") a promise to not only process the request, but to do so **properly**. In other words, the amended complaint alleges that the promise necessarily adopted Defendant's underwriting standards, procedures or protocols. (Am. Compl. ¶ 28.)

The likely detailed nature of the standards, therefore, makes the promise itself sufficiently detailed to be actionable. *See Wigod v. Wells Fargo Bank, N.A.*, -- F.3d -- , No. 11-1423, 2012 WL 727646 (7th Cir. Mar. 7, 2012) ("In this case, HAMP guidelines provided precisely this 'existing standard' by which the ultimate terms of Wigod's permanent modification were to be set.").

Fraudulent Intent

Defendant's argument that none of its employees had the requisite fraudulent intent is equally flawed. Fed. R. Civ. P. 9(b) expressly provides that intent is not subject to the heightened pleading standards:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. **Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally**.

As a result, Plaintiffs need not allege whether any particular speaker had fraudulent intent, or rather whether discovery may show that Defendant has internal rules, systems and controls to train employees to unwittingly advance an

institutional motive. The amended complaint is sufficient where it outlines Defendant's institutional motive – to string distressed homeowners along in order to inflate late fees and penalties that Defendant can then recover from the proceeds of a foreclosure sale.

Justifiable Reliance

As indicated by the various documents Plaintiffs sent to Defendant in an attempt to pursue a modification request, and as further confirmed by the online docket for the Circuit Court for Prince George's County, No. CAE11-11908, Plaintiffs did not challenge foreclosure proceedings from the date they were filed, May 16, 2011, until March 2, 2012. Thus, as alleged by the amended complaint:

> Plaintiffs justifiably relied to their detriment on the false representations by defendant, by taking time out of their lives to submit and re-submit documentation ([Am. Compl.] Exs. 2 and 5); and also by being lead into the false state of comfort, as further outlined in paragraph 29.9 of this [amended] complaint [¶ 29 discussing, *inter alia*, not challenging foreclosure proceedings].

(Am. Compl. ¶ 44.) This is consistent with this Court's ruling that detrimental reliance was sufficiently alleged in *Allen*, *supra*. 2011 WL 3425665 at * 8 ("The Allens also allege they detrimentally relied on CitiMortgage's promises by relinquishing other remedies to save their home …").

Damages

Perhaps for some unknown reason, Defendant's final attack on the fraud claim involves an argument that the elements of a wholly separate tort – intentional infliction of emotional distress – should somehow govern the matter. (Def.'s Memo. 17.) The argument is nonsense.

The amended complaint properly requests compensation for noneconomic damages for mental anguish that manifested physically, meaning stress and frustration that ultimately manifested through "vomiting, headaches, sleep loss, and other physical symptoms". (Am. Compl. ¶¶ 31, 39, 46, 55, 63.) *See Vance v. Vance*, 286 Md. 490, 501 (1979) (evidence of crying and sleep loss was sufficient for award of noneconomic damages on negligent misrepresentation claim).

D. Plaintiff States A Claim For Promissory Estoppel

To the extent Defendant's promise to properly process Plaintiffs' modification request was lacking in detail, Defendant's alleged underwriting standards (Am. Compl. ¶ 28) implicitly filled-in the missing details. *See Wigod v. Wells Fargo Bank, N.A.*, -- F.3d -- , No. 11-1423, 2012 WL 727646 (7th Cir. Mar. 7, 2012) ("In this case, HAMP guidelines provided precisely this 'existing standard' by which the ultimate terms of Wigod's permanent modification were to be set.").

Concerning detrimental reliance, in *Allen*, *supra*, this Court permitted a claim for promissory estoppel, in connection with a modification request, where the reliance consisted of "rel[ying] on CitiMortgage's promises by relinquishing other remedies to save their home …" 2011 WL 3425665 at * 8. In the present matter, As

indicated by the various documents Plaintiffs sent to Defendant in an attempt to pursue a modification request, and as further confirmed by the online docket for the Circuit Court for Prince George's County, No. CAE11-11908, Plaintiffs did not challenge foreclosure proceedings from the date they were filed, May 16, 2011, until March 2, 2012. Thus, as alleged by the amended complaint:

> Plaintiffs justifiably relied to their detriment on the false representations by defendant, by taking time out of their lives to submit and re-submit documentation ([Am. Compl.] Exs. 2 and 5); and also by being lead into the false state of comfort, as further outlined in paragraph 29.9 of this [amended] complaint [¶ 29 discussing, *inter alia*, not challenging foreclosure proceedings]

(Am. Compl. ¶ 44.)

Indeed, Maryland law does not require much for the existence of legal consideration. *See Vogelhut v. Kandel*, 308 Md. 183, 190-91 (1986) (attorney's act of surrendering file constituted consideration, holding, "It is basic contract law that courts generally will not inquire as to the adequacy of consideration…. Legal detriment means '… doing or refraining from doing something which he was then privileged not to do, or not to refrain from doing.' 1 S. Williston, *A Treatise on the Law of Contracts, supra,* § 102A at 382.").

E. Defendant Owed A Tort Duty To Plaintiffs

In *Jacques v. First Nat. Bank of Md.*, 307 Md. 527 (1986), Maryland's highest court held that, when a bank agrees to process a loan application for a customer, it owes the customer a duty of reasonable care in the processing and determination of that application. In *Jacques*, the Court first recognized that the facts showed

contractual privity – although there was no mortgage already in existence, the bank orally agreed to process a loan application, giving rise to a verbal contract. *Id.* at 537-38.

Indeed, the Court of Appeals would later recognize, in *Blondell v. Littlepage*, 413 Md. 96, 120-21 (2010), "[C]ourts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent." As discussed in Section III(A), this Court recognized in *Allen*, *supra*, that the "relationship of a bank to its customer in a loan transaction is ordinarily a contractual relationship …" 2011 WL 3425665 at * 8, 4 (allowing breach of contract claim in connection with modification request to proceed).

Turning back to *Jacques*, in addition to contractual privity, the Court found the following factors significant in ultimately ruling that a tort duty existed:

(a) "The banking business is affected with the public interest" (*Id.* at 542);

(b) As analogized by the Court, **since objective underwriting standards could be shown (the plaintiff's expert in *Jacques*; the Defendant's alleged underwriting standards (Am. Compl. ¶ 28) in the case *sub judice*), the bank's assertion that its underwriting involved discretion was no more meritorious than a physician attempting to avoid medical malpractice liability by arguing that medical care involves discretion** (*Id.* at 543-44); and

(c) The Court candidly recognized that, although also a contractual duty, a plaintiff may properly decide to assert the claim in a well-pleaded tort action to seek greater damages (*Id.* at 545).

The facts in *Jacques* are similar to the facts in the case *sub judice*. First, Plaintiffs shared contractual privity with Defendant – Defendant was an assignee under the Promissory Note and Deed of Trust. Second, the banking business remains affected with the public interest (obvious from the predatory lending that ruined our economy, and which lead to a $700 billion taxpayer bank bailout based on the fear by the U.S. Treasury that banks were "too big to fail"). Third, Plaintiffs allege an identifiable standard – Defendant's underwriting standards. (Am. Compl. ¶ 28.)

Lastly, the *Jacques* court found it significant that it was foreseeable that negligent processing of the plaintiff's loan application could have forfeited the plaintiff's 10,000 deposit for review of the application. *Id.* at 542. In the case *sub judice*, it is foreseeable that negligent processing of the modification request could result in the loss of an entire home worth much more than $10,000. The gravity of foreseeable harm due to negligence is greater in this case than in *Jaques*, thus Plaintiffs' argument for imposition of a tort duty is stronger. Since a duty was imposed in *Jacques*, a duty must exist in this case.

IV. CONCLUSION

For the reasons stated above, the amended complaint states a claim upon which relief may be granted. The Court should issue an order denying Wells Fargo Bank, N.A.'s motion to dismiss.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: June 11, 2012

CERTIFICATE OF SERVICE

I certify that, on this day, June 11, 2012, a copy of the aforegoing Memorandum in Support of Plaintiffs' Response to Defendant's Motion to Dismiss Amended Complaint was filed with the Court and served on all counsel through the ECF system.

Respectfully submitted,

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