IN THE
APPELLATE COURT OF MARYLAND

NO. 1013

SEPTEMBER TERM, 2022

BARBARA CLAIR, ASSIGNEE OF DONNA KEMP,
APPELLANT

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE),
APPELLEE

ON APPEAL FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MD.
(THE HONORABLE RONALD RUBIN)

APPELLANT'S OPENING BRIEF

Phillip R. Robinson
CPF # 0006210356
Consumer Law Center LLC
10125 Colesville Road, Suite 378
Silver Spring, MD 20901
(301) 448-1304
phillip@marylandconsumer.com

Scott C. Borison
CPF # 9601290001
Borison Firm, LLC
1400 S. Charles Street
Baltimore, MD 21230
(301) 620-1016
scott@borisonfirm.com

MARCH 6, 2023

ATTORNEYS FOR THE APPELLANT

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INTRODUCTION

In this appeal the Court must consider whether Federal National Mortgage Association ("Fannie Mae") can be held accountable for its knowing and reckless indifference to usurious fees made by its collector and servicer Nationstar Mortgage LLC d/b/a Mr. Cooper (as the successor by merger to Seterus Inc.)("Nationstar"). Fannie Mae has known of the usury conduct by its collector Seterus to Maryland residents for years and never made any effort to stop it. Instead of doing the right thing, Fannie Mae chose to ratify or otherwise ignore in reckless indifference the practice of its collector Seterus.

This action was commenced in December 2017 to hold Fannie Mae accountable. Fannie Mae's barrage of unfounded legal and factual arguments were rejected by this Court and the Supreme Court of Maryland when reversing the Circuit Court's initial dismissal. Fannie Mae did not prevail on any material issue and both appellate courts found it had charged usurious fees and could be held accountable. *Nationstar Mortg. LLC v. Kemp* ("*Kemp II"*), 476 Md. 149 (2021); *Kemp v. Nationstar Mortg. Ass'n ("Kemp I")*, 248 Md. App. 1 (2020). After remand, Fannie Mae raised arguments that it could have raised before and during the first appeal which it voluntarily chose not to do. Fannie Mae is not entitled to multiple opportunities after stops at both of Maryland's appellate courts to address new issues that it waived by not previously raising them. It could have raised these issues before the decision in *Kemp I*, *Kemp II,* and also before the Federal Court[1] after it removed this action some five years ago. Yet, it never did so.

[1] Fannie Mae also previously asserted various legal and factual arguments to the Federal court after it caused the action to be removed on the basis of federal question

Under 12 U.S.C.A. § 1723a(a), Congress has authorized suits against Fannie Mae since 1954 in state and Federal courts. The Supreme Court has explained, "[i]n authorizing Fannie Mae to sue and be sued 'in any court of competent jurisdiction, State or Federal,' it permits suit in any state or federal court already endowed with subject-matter jurisdiction over the suit." *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 93 (2017)(quoting § 1723a(a)). Yet, notwithstanding the clear congressional authorization for Fannie Mae to be sued for alleged conduct relating to "deficiencies" in its acquisition of mortgages and collection activities by foreclosure, *see e.g. Lightfoot*, 580 U.S. at 87, after this action was remanded, and after both *Kemp I* and *Kemp II* held it could be held liable for charging usurious fees, Fannie Mae raised new arguments that it could not be held liable under the Merrill Doctrine and pursuant to the Housing and Economic Recovery Act ("HERA"). E.460-61,468-77,737-38,740-51,823-41. Both of these arguments were available to Fannie Mae before the last round of appeals, but it never raised them at all until all its other prior legal arguments were rejected. E.493-496. Fannie Mae contends these new arguments allow it to avoid responsibility for its usurious conduct against Maryland residents. The Circuit Court considered Fannie Mae's erroneous legal arguments in contravention of the

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jurisdiction. *Kemp v. Seterus, Inc.*, 348 F. Supp. 3d 443 (D. Md. 2018). However, before the Federal court, Fannie Mae also waived these legal arguments. So, before the Federal Court in 2018, the Circuit Court in 2018, and this Court and the Supreme Court of Maryland it in *Kemp I* and *Kemp II*, Fannie Mae had the opportunity to raise its Merrill Doctrine and HERA arguments but it elected not to do so. Instead, for the first time after losing *Kemp I* and *Kemp II* and nearly four years of litigation, Fannie Mae raised the arguments for the first time.

law of the case doctrine, the mandate, and waiver doctrines by applying the Merrill Doctrine and HERA to excuse Fannie Mae's liability for the claims against it. As a result of the Circuit Court judgment, Fannie Mae reaps the benefit of illegal usurious charges imposed, and/or collected from Maryland residents.

The Circuit Court's Order granting summary judgment was sparse. E.759-60. It said nothing more than the motion was granted. It did not discuss the Merrill Doctrine or HERA arguments; nor did Circuit Court identify any facts or issues that warranted judgment in favor of Fannie Mae after it lost in *Kemp I* and *Kemp II*.[2] The Circuit Court's Order also did not set forth any facts to support its conclusion that "there is no just reason (sic) for final judgment" pursuant to MD. RULE 2-602(b). Since the Circuit Court's dismissal of Fannie Mae, Nationstar has asserted arguments and a purported expert opinion that it cannot be held liable because only Fannie Mae, as the lender, is covered by the prohibition under COM. LAW §12-121 despite the appellate rulings in *Kemp I* and *Kemp II* and previous appellate ruling from decades ago *Taylor v. Friedman*, 344 Md. 572 (1997).

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[2] In addition, it should also be noted that Fannie Mae did not identify a single fact in support of any purported affirmative defense in discovery served upon it in August 2018. E.65-94,95-125,507-19. Fannie Mae claimed that it should not be required to respond to discovery. E.184-90,204-18,240-42. The Circuit Court first lifted the stay on discovery imposed before the last appeal. E.203. Later, a second order, with no explanation, only lifted the stay as to Fannie Mae's co-defendant—its agent Nationstar as the successor by merger to Seterus. E.243. And the Circuit Court's summary judgment order in favor of Fannie Mae never addressed Appellant's request for discovery pursuant to MD. RULE 2-501(d). E.759-60.

Although every losing party might wish a do-over to raise new arguments after the arguments it presented fail, there is no basis justifying this special treatment for Fannie Mae. The law of the case doctrine, the mandate rule, and waiver doctrines apply to individuals and corporations alike.

Further, in this case, based upon the continuing record in the Circuit Court, which Appellants have moved to supplement the record of this appeal to include, the Court may note that while this appeal has proceeded, Nationstar (which is also represented by Fannie Mae's counsel) as Fannie Mae's authorized agent has acted inconsistently with Fannie Mae's position and claims its predecessor Seterus was reasonably permitted to impose, charge, and/or collect illegal usury upon Maryland residents. App. 17, 26-28. Notwithstanding the law of the case doctrine and unambiguous appellate decisions in this case in *Kemp I* and *Kemp II*, in the ongoing proceedings below Nationstar is advancing the argument that it was perfectly reasonable for Seterus to ignore the precedent of the *Taylor* decision, official notices from its own state regulator, and even the unambiguous broad, statutory language incorporated into every Fannie Mae contract, and that Nationstar should not be liable for the usurious conduct at issue.

So, the aim of the Defendants' combined arguments is clear: each wishes to retain the ongoing benefit of their illegal conduct and escape review while suffering no consequences, even after all their legal arguments that were raised and could have been raised in *Kemp I* and *Kemp II*, have been resolved in Plaintiff's favor and these latest arguments were waived. Assuming *arguendo* that Fannie Mae was even permitted a do-over after four years of complex legal arguments and appeals, its defenses under the Merrill

Doctrine and HERA do not apply to the facts and disputes in the circumstances presented. Congress never intended to authorize unsafe and unsound conduct by Fannie Mae through its agents like Nationstar or Seterus to violate state usury laws.

Based upon the facts and procedural posture presented in this action, the judgments of the Circuit Court in favor of Fannie Mae are legally erroneous and should be reversed (again).

QUESTIONS PRESENTED

Appellants present the following questions for the Court's review of the Circuit Court's judgments below:

(i) Whether the Circuit Court exceeded the mandates of *Kemp I* and *Kemp II*, or acted contrary to the law of the case doctrine by considering arguments which Fannie Mae waived and forfeited because it could have raised them before and during the prior appeals but voluntarily did not do so?

(ii) Whether the Merrill Doctrine and HERA apply to actual or statutory damages caused by Fannie Mae's voluntary election(s) to not stop the unlawful conduct by its servicer and collector?

(iii) Whether the Circuit Court erred in granting summary judgment to Fannie Mae and denying Appellant's requested partial summary judgment relief?

(iv) Did the Circuit Court err by failing to enter any declaration of law upon certifying its judgment as final pursuant to MD. RULE 2-602(b)?

(v) Do the irregular and improper proceedings below give the objective appearance to reasonable members of the public that Appellants have been denied their right to a fair and impartial day in court?

STATEMENT OF THE CASE

There is no dispute that Fannie Mae acquired the mortgage loans of hundreds of Maryland residents on the secondary market. Its agent Seterus routinely imposed Maryland consumers usury fees for years that were specifically barred by COM. LAW §12-121. Fannie Mae's standard mortgage contracts between it and the Appellants (and each of the class members) do not allow for these illegal fees as they are barred by Maryland law. Yet, Nationstar and Fannie Mae have ratified and maintained the right to retain the unlawful usury and avoid the consequences of their choices—even after this Court and the Supreme Court of Maryland rejected their arguments in *Kemp I* and *Kemp II*.

This action was commenced in December 2017 in the Circuit Court and removed by Fannie Mae to the Federal Court where it raised a number of legal arguments to escape responsibility but it waived any arguments concerning the purported Merrill Doctrine or HERA (both based upon federal questions) whatsoever. After remand to the Circuit Court from the Federal Court, Fannie Mae again raised a barrage of additional arguments but again chose not to raise either the Merrill Doctrine or HERA barred the claims against it. It instead, that the issues and arguments it did raise would resolve the "foundational threshold legal issue of whether [Fannie Mae] [is] subject to" Maryland's usury law at issue

in this action.[3] Fannie Mae further represented that its then "fundamental question of law [was] dispositive of [Plaintiff's] claims and should be decided before proceeding further with this case."[4] Yet, those "fundamental" arguments were rejected and expressly reversed by this Court and the Supreme Court in *Kemp I* and *Kemp II*.

STATEMENT OF THE FACTS

A. Summary of the Relevant Procedural Background

In *Kemp II*, the Supreme Court aptly summarized the relevant facts for this appeal. *Kemp II,* 476 Md. at 163–65.

The Supreme Court also recognized the original decision in the Circuit Court was based solely on Fannie Mae's "fundamental" argument that it was not "subject to the prohibition in CL § 12-121 because [it did not] fit the definition of 'lender' in CL § 12-121(f)." *Id.* at 167. *See also Kemp I,* 248 Md. App. at 7–8 ("Fannie Mae…moved to dismiss, contending that [it is not a] 'lender[]' and that CL § 12-121 doesn't preclude [*it*] from charging inspection fees….We agree with Ms. Kemp that Fannie Mae['s]...construction would defeat the broader statutory purpose and lead to absurd results, and we hold that CL § 12-121 applies to assignees" and the fees charged by Fannie Mae are unlawful usury). Fannie Mae never attempted to raise or preserve any arguments

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3 E.903-04, Motion for Protective Order (August 13, 2018) at Page 1-2.

4 E.908, Mem. in Sup. of Motion for Protective Order (August 13, 2018) at Page 3.

that Plaintiffs' claims were barred by the Merrill Doctrine or HERA before this Court or the Supreme Court.[5]

B. Factual Background and the Irregular Proceedings Upon Remand

Fannie Mae has never substantively answered discovery in this action. After remand to the Circuit Court following *Kemp II*, Plaintiff moved on October 5, 2021 to vacate the Circuit Court's prior Order staying discovery served in August 2018 (E.170-183) which was granted on November 30, 2021 (E.203). Fannie Mae was ordered to "answer the Plaintiff's discovery (sic) request served upon them on August 3, 2018 [by December 30, 2021]." E.203. However, Fannie Mae never provided substantive answers to the 2018 discovery. E.525-649. Instead, without a motion to reconsider, the Circuit Court entered a second order that conflicted with the first and stayed all further discovery (again) from Fannie Mae on January 7, 2022. E.244. A later order was entered on March 10, 2022 denying the Defendants' Motion to Vacate the order that lifted the discovery stay and ordered it to answer. E.244.

Plaintiff moved for entry of partial summary judgment on October 5, 2021 to narrow the scope of issues that remained after the appellate rulings on all the "fundamental" issues

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[5] *See e.g., Kemp v. Nationstar Mortgage LLC d/b/a Mr. Cooper, as Successor by Merger to Seterus, Inc. & Federal National Mortgage Association (Fannie Mae)*, Br. of Appellees., 2019 WL 8062637 (Md.App.). *See also,* Fannie Mae's Petition for Writ of Certiorari (COA-PET-0342-2020)(filed on October 27, 2020); Fannie Mae's Opening Brief in the Supreme Court (COA-REG-0043-2020)(filed on December 28, 2020) and Fannie Mae's Reply Brief in the Supreme Court (filed on February 16, 2021). The Court may take judicial notice of these papers all available on MDEC.

and to focus the Parties on the issues not resolved by the law of the case doctrine, waiver, or mandate rule. E.245-65. Fannie Mae opposed Plaintiff's' partial summary judgment motion (E.266-350), which was denied by the Circuit Court (without prejudice) finding it was premature. E.450,792,806.

Inconsistent with the finding that summary judgment was premature, and before Plaintiff was allowed any discovery from Fannie Mae, the Court entertained a motion for summary judgment filed by Fannie Mae. E.451-89,737-58,817-908. Plaintiff opposed Fannie Mae's relief and renewed her requests for discovery. E.490-504,520-24,525-649, 761-65. At a motion hearing, the former assigned judge to the proceedings presided again and was openly hostile to Plaintiff in argument when by way of background he was reminded that Fannie Mae's prior legal and factual presentations to him, which he erroneously adopted in his 2018 Order dismissing the case, were reversed completely in *Kemp I* and *Kemp II*. E.841-47. Over five months after that hearing, the Circuit Court granted Fannie Mae's motion without making any findings of fact or analysis. E.759-60. The Circuit Court *sua sponte* also certified its Order as final for appeal purposes pursuant to MD. RULE 2-602(b). E.760. However, in making its ruling, the court failed to issue the required declaration of law (even in the negative). E.759-60.

C. Nationstar's Subsequent Tactical Arguments in the Circuit Court Relevant and Material to this Appeal

Given the Circuit Court's *sua sponte* bifurcation of this action (E.759-60) and Appellants' claims against Fannie Mae from the proceedings below which remain against Nationstar, Appellants have moved to supplement the record of this appeal in limited

respect so the Court is aware of the inconsistent arguments and positions of Nationstar below which conflict with Fannie Mae's own arguments. *See* Appellants' Motion to Supplement Record (filed on March 6, 2023 in this appeal). Both Fannie Mae and Nationstar are represented by the same counsel so there is no innocent mistake made by the conflicting arguments. Specifically, below in the remaining proceedings, Nationstar argues through its purported expert that it was reasonable for Seterus to impose, charge, and collect the unlawful usury subject to this action. App. 17, 26-28.[6] Here, however, Fannie Mae's Merrill Doctrine argument conversely claims that it cannot be responsible for Seterus's unlawful and unauthorized conduct. E.460,468-73,737-38,740-48,829-41. It is neither just nor safe and sound for Fannie Mae to escape responsibility by arguing Seterus was acting illegally, while Nationstar argues it was reasonable for Seterus to act illegally and therefore Nationstar is not responsible. Fannie Mae owned each of the class members' loans when its agent Seterus charged the illegal usury and it should be accountable.

STANDARD OF REVIEW

In *Deutsche Bank Nat. Tr. Co. v. Brock*, 430 Md. 714, 726–27 (2013), the Supreme Court explained:

> On review of an order granting or denying summary judgment, we must first determine whether a genuine dispute of material fact was made manifest on

[6] Appellant does not believe this purported report is valid in any way or serves a purpose allowed under the Maryland Rules or Maryland law. However, Appellant does believe this Court is entitled to be aware of the arguments advanced by Nationstar below while this appeal is pending which are inconsistent with Fannie Mae's defenses under the Merrill Doctrine and HERA that it cannot be held accountable for the conduct by Seterus.

> the record before the trial court…The mere presence of a factual dispute, however, will not generally render inappropriate summary judgment…Rather, the crux of the inquiry is whether the disputed fact is material, or, "a fact the resolution of which will somehow affect the outcome of the case."…"If no genuine dispute of material fact exists, this Court determines 'whether the Circuit Court correctly entered summary judgment as a matter of law,' " without deference to the lower courts' assessment of the law.

Id. (citations omitted).

This Court also reviews "*de novo* a trial judge's decision involving a purely legal question." *Ehrlich v. Perez,* 394 Md. 691, 708 (2006). Further, determination of whether under the circumstances presented, the trial court proceedings were conducted fairly and impartially or lead to the conclusion that a trial judge's impartially might be reasonably questioned is generally reviewed under an "objective standard." *Surratt v. Prince George's Cty., Md.*, 320 Md. 439, 467 (1990). The Maryland Rules also cannot be used as a short-cut under Maryland's Constitution to deprive a party a reasonable opportunity to seek redress. MD CONST. DECL. OF RIGHTS, ART. 19.

ARGUMENT

I. IN LIGHT OF THE LAW OF THE CASE DOCTRINE THERE WAS NO BASIS FOR THE CIRCUIT COURT TO REVISIT OR RECONSIDER THE LAW OR ANY FACTUAL ISSUES THAT WERE RAISED OR COULD HAVE BEEN RAISED DURING THE *KEMP I* AND *KEMP II* APPEALS.

Maryland has long recognized the "law of the case" doctrine in instances such as this action and applies it to all issues presented in the prior appeal and those which could have been raised before (and also those which were raised but were abandoned). *Baltimore Cty. v. Fraternal Order of Police, Baltimore Cty. Lodge No. 4*, 449 Md. 713, 729–30 (2016). E.491,493-96,842,847-54,858-59.

> [A party] cannot prosecute successive appeals in a case that raises the same questions that have been previously decided by this Court in a former appeal of that same case; and, furthermore, they cannot, on the subsequent appeal of the same case raise any question that could have been presented in the previous appeal on the then state of the record, as it existed in the court of original jurisdiction. If this were not so, any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate. Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record, as aforesaid, such a ruling becomes the 'law of the case' and is binding on the litigants and courts alike, unless changed or modified after reargument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.

Fidelity-Baltimore Nat. Bank & Trust Co. v. John Hancock Mut. Life Ins. Co., 217 Md. 367, 372 (1958). *See also Dabbs v. Anne Arundel Cty.*, 458 Md. 331, 346 (2018).

Simply put, the law of the case doctrine is premised **on the existence of a prior appellate decision on the issue raised or where the issue raised could have been raised**.[7]

To avoid repetitive appeals and the re-litigation of issues and facts already decided by this Court and the Supreme Court during *Kemp I* and *Kemp II*, Appellants moved for partial summary judgment against Fannie Mae. E.245-264,351-65. Under the law of the case doctrine, the Circuit Court was barred from revisiting or deciding issues decided by the appellate courts to conserve judicial resources and end re-litigation of issues decided or abandoned and forfeited. E.255-258,355-61. Without the law of the case doctrine, there

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[7] Maryland law also applies the doctrine of direct estoppel to foreclose re-litigation of issues from a prior appeal. *Wells Fargo Bank, N.A. v. Diamond Point Plaza Ltd. P'ship*, 185 Md.App. 489, 500 (2009). *See also, Felger v. Nichols*, 35 Md. App. 182, 183 (1977).

simply would be no end to litigation and the purpose of the Maryland Rules would be lost. MD. RULE 1-201(a). The reported appellate decisions of the Supreme Court including *Dabbs*, 458 Md. at 346, *Baltimore v. FOP, Lodge 4*, 449 Md. at 729–30; and *Fidelity*, 217 Md. at 372, were "binding on the Circuit Court, which [must] duly follow[] it"). *LVNV Funding LLC v. Finch*, 463 Md. 586, 606, (2019). Yet, the Circuit Court declined to follow the law of the case and after ruling that Appellants' motion for summary judgment was premature, it considered and granted Fannie Mae's motion for summary judgment in the same posture and without allowing Appellants to obtain any discovery from Fannie Mae (or its employees and officers). *See* Argument § IV *infra*.

II. THERE WAS NO BASIS FOR THE CIRCUIT COURT TO DISREGARD THE MANDATE RULE WHICH ALSO FORECLOSED FANNIE MAE FROM SEEKING TO DISREGARD *KEMP I* OR *KEMP II*.

A sister rule to the law of case doctrine, known as the mandate rule, also limited the Circuit Court's scope upon remand. *MAS Associates, LLC v. Korotki*, 475 Md. 325 (2021), reconsideration denied (Sept. 24, 2021)("*Korotki III")*. In *Korotki III*, the Supreme Court held the proceedings on remand may not "exceed[] the scope and intent of the mandate and opinion." *Id.* at 379. *See also Tu v. Maryland*, 336 Md. 406, 416-17 (1994). Essential and relevant to this action, the Supreme Court held the Circuit Court was not permitted on remand to make new rulings on issues that were not properly appealed and preserved. *Korotki III*, 475 Md. at 362.

Here, Fannie Mae had the right and obligation to preserve any issues on appeal and if it did not do so, it could not raise them on remand. E.246,256-58,353,351-65. Before the courts in *Kemp I* and *Kemp II*, Fannie Mae raised a barrage of arguments which were

rejected entirely in favor of Appellants. As a result, based on *Korotki III,* the Defendants are barred from advancing any arguments on remand that are inconsistent with the mandates of *Kemp II* or *Kemp I* (as it was modified by *Kemp II*). Therefore, on these alternative grounds to the law of the case doctrine (*see* Argument § I *supra*), Appellants were entitled to their specifically requested for partial summary judgment relief establishing the legal and factual issues as the law of the case and mandate rule to narrow the remaining issues not promote the re-litigation of issues which were raised or could have been raised by Fannie Mae declined to do so. Fannie Mae also was not permitted to directly or indirectly challenge or disregard the legal and factual issues under the mandate by the Supreme Court.

III. IN LIGHT OF THE LAW OF THE CASE DOCTRINE AND WAIVER DOCTRINE THERE ALSO WAS NO BASIS FOR THE CIRCUIT COURT TO CONSIDER FANNIE MAE'S LEGAL ARGUMENTS THAT COULD HAVE BEEN RAISED DURING THE PRIOR APPEALS TO AVOID THE CONSEQUENCES OF ITS VIOLATIONS OF MARYLAND'S USURY LAWS.

This action, since December 2017 through the present, has always concerned the unlawful usurious charges imposed and collected by Fannie Mae on mortgage loans of Maryland consumers. The history and purpose of Maryland's modern usury laws that have evolved since 1704 as follows:

> The Usury Law defines "usury" as "the charging of interest by a lender in an amount which is greater than that allowed by this subtitle." CL § 12-101(m). Other sections of the law regulate the amount of interest that may be charged. *See, e.g.*, CL §§ 12-101(k), 12-102, 12-103. However, since money is fungible and people are creative, efforts to circumvent the restrictions of the Usury Law have sometimes taken the form of fees or other charges that were assessed to the borrower…:

> Usury is a moral taint wherever it exists and no subterfuge shall be permitted to conceal it from the eye of the law.... "[I]t matters not in what part of the transaction it may lurk, or what form it may take ... or whether it be a pretended sale and lease, or under whatever guise the lender – always fruitful in expedients – may attempt to evade the law, Courts of justice, disregarding the shadow and looking to the substance, will ascertain what in truth was the contract between the parties."
>
> ….
>
> Consistent with this Court's statement in *Brenner*, the Maryland Usury Law covers not only the stated rate of interest, but also, in general, "any compensation" required by a lender "directly or indirectly" related to "the extension of credit for the use or forbearance of money," including "any loan fee, origination fee, service and carrying charge, investigator's fee, time-price differential, and any amount payable as a discount ...." CL § 12-101(e) (definition of "interest"). Thus, various provisions of the Maryland Usury Law address fees or charges that may be imposed in connection with a loan.

Kemp II, 476 Md. at 158–59 (cleaned up).

Below, Fannie Mae sought to avoid (i) any review of its unlawful usury practices done through its agents or (ii) the requirement that it have its authorized agent fix its problem. Fannie Mae's own witness below[8] previously testified under oath that "Fannie

[8] In support of Fannie Mae's Motion, it presented affidavit testimony about Fannie Mae and its relationship with its servicers including Nationstar. E.482-89. However, Fannie Mae never provided any of the alleged facts in the Allen Affidavit through outstanding discovery before it presented its summary judgment motion. E.494,520-24, 525-30. Appellant objected to consideration of the factual testimony not supported by any of Fannie Mae's discovery responses which it had sought to deny Appellant. E.491-92, 494,496,500. Appellant also requested the Circuit Court defer consideration of the purported evidence until appropriate discovery was permitted pursuant to MD. RULE 2-501(d). E.500-01,504,875-77. Yet, the Circuit Court did not rule on those objections and requests and instead granted Fannie Mae's relief without explanation. E.759-60. While it

Mae [usually] doesn't service the loan. They own the loan. They want us to – if we erred, to fix it." E.660 (Page 285, Lines 5-7). However, in this action, Fannie Mae sought on remand to again avoid accountability for the usurious charges or have Nationstar fix its errors by asserting two defenses that could have and should have been raised before the Federal Court or both of Maryland's appellate courts. Instead, Fannie Mae forfeited and abandoned the issues—i.e., the Merrill Doctrine and a defense based on HERA. These defenses were instead first raised by Fannie Mae only after nearly four years of litigation in four different courts. It was simply too late for Fannie Mae to do so, and the Circuit Court erred by granting summary judgment to Fannie Mae by disregarding the binding law of case doctrine presented. *See* Argument § I, II *supra*.[9] The bar against raising defenses that could have been raised is based on "[t]he judicial system's interest in finality and in efficient administration" [which] dictates that, absent extraordinary circumstances, litigants should not be permitted to relitigate issues that they have already had a fair opportunity to contest." *Cowgill v. Raymark Indus., Inc.*, 832 F.2d 798, 802 (3d Cir. 1987).

The law of the case doctrine and mandate rule preclude a party from engaging in piecemeal litigation by raising new issues when there is a prior appellate decision on any issue raised or that could have been raised. *See* Argument §§ I, II *supra.* Both defenses

granted Fannie Mae's requested summary judgment at this juncture, it inconsistently denied Appellant's summary judgment relief as premature. E.450,792,806.

[9] Federal courts are in accord. *See e.g. Howe v. City of Akron*, 801 F.3d 718, 742 (6th Cir. 2015); *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 203 (3d Cir. 2004); *States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002); *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999).

raised by Fannie Mae could have been raised before the appeal but it abandoned these defenses.

Maryland courts have also held that a party, like Fannie Mae here, who fails to raise a purported right waives that right. *See e.g. Cain v. Midland Funding, LLC*, 452 Md. 141, 160 (2017)(holding litigation conduct may constitute waiver of a legal argument or right without requiring a showing of prejudice); *Creveling v. Gov't Emps. Ins. Co.*, 376 Md. 72, 96 (2003)("The doctrine of waiver may work to deprive an insurer of a right it would otherwise possess"); *Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 607 (2019)("Whether a party has waived its right to assert a claim is a question of fact"). *See also Gilchrist v. Jim Slemons Imps., Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986) (holding federal preemption arguments may be waived).

Fannie Mae presented no facts in its argument for summary judgment related to its Merrill Doctrine and HERA arguments that did not also exist at the time it filed its motions and briefs before the Federal Court, before the Circuit Court in 2018, or before both of Maryland's appellate courts. E.493-96. Nor did it disclose any facts in support of its purported defenses in discovery served on it four years ago. E.65-125,525-649. Therefore, it was not permitted to raise these defenses since it "could have raised"[10] them before in multiple federal and state court proceedings but waived[11] the opportunity to do so by

[10] *FOP, Baltimore Cty*, 449 Md. at 729–30; *Fidelity-Baltimore*, 217 Md. at 372; *Dabbs,* 458 Md. at 346.

[11] *Cain,* 452 Md. at 160; *Creveling,* 376 Md. at 96; *Anderson,* 243 Md. App. at 607; *Cowgill,* 832 F.2d at 802; *Medical Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011).

participating in four years of litigation without ever claiming these new theories applied to this action (they do not). There is also no claim that the defenses arise from any changes in the law.

In sum, the Circuit Court's Order granting summary judgment in favor of Fannie Mae should be reversed as the Circuit Court was barred from considering Fannie Mae's Merrill Doctrine and HERA arguments it could have raised before but did not raise, because it is forbidden to proceed in a piecemeal litigation that wastes judicial resources, and accepting the arguments after the fact needlessly prolongs litigation contrary to MD. RULE 1-201(a). E.496. The Circuit Court's actions in this respect are contrary to binding precedents that governed it on remand. *Finch*, 463 Md. at 606; *Cain,* 452 Md. at 160; *Creveling,* 376 Md. at 96; *Anderson,* 243 Md. App. at 607; *Cowgill,* 832 F.2d at 802; *Holder*, 634 F.3d at 834.

IV. ASSUMING *ARGUENDO* THAT THE CIRCUIT COURT ACTUALLY HAD THE DISCRETION TO CONSIDER FANNIE MAE'S MERRILL DOCTRINE ARGUMENT, IT DOES NOT APPLY TO THIS ACTION AND FANNIE MAE DID NOT PRESENT A SUFFICIENT FACTUAL RECORD TO SUPPORT SUMMARY JUDGMENT

Fannie Mae's purported Merrill Doctrine defense is based on the 1947 case of *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). E. 460, 468-73, 737-38, 740-48, 829-41. In *Merrill*, the Supreme Court considered whether a government-owned enterprise writing public insurance to farmers was bound by the acts of an agent who sold the farmer an insurance policy. *Merrill,* 332 U.S. at 382-383. The Court held, "[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for

the Government stays within the bounds of his authority." *Id.* at 384. It further explained that the Federal regulations governing the subject insurance

> were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance…[and all] '[persons] must turn square corners when they deal with the Government,' …expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.

Id. at 385.

The facts of *Merrill* distinguish it from the issues here. E.497-501. Appellants here did not voluntarily choose to enter into any contract made they made with Fannie Mae like the farmer in *Merrill* chose to do. E.497. Rather, Fannie Mae acquired contracts the Appellants made with others as an assignee and Fannie Mae knew when it did so each contract barred it from directly or indirectly collecting usurious charges from Appellants. *Kemp II*, 476 Md. at 153. Kemp and other similar borrowers generally have no choice in picking Fannie Mae's agent who services their loans and that decision is controlled and governed by Fannie Mae.[12] Further, unlike *Merrill*, there is no risk to the 'public treasury' by Appellants' claims in this case because Nationstar has indemnified Fannie Mae by virtue of its contract(s) with it for whatever judgment sums are awarded in this action against Fannie Mae.[13]

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[12] *Nationstar Mortgage LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950, 955 (9th Cir. 2021)(Fannie Mae's officers have testified that "Fannie Mae delegates to its loan servicers to protect Fannie Mae's mortgage loans"). *See also* E.679 (Dep. of E. Ludwig at 32:10-14).

[13] *See* E.660 (Dep. of Loll at 285:5-7); *see also* E.690-95 (Fannie Mae Servicing Guide excerpt regarding indemnification).

If the Merrill Doctrine were applicable, the progeny of case law recognizes that there is an "affirmative misconduct exception" to its application. *Faiella v. Fed. Nat'l Mortg. Ass'n*, 928 F.3d 141, 150 (1st Cir. 2019). *See also Nelson v. Nationstar Mortg., LLC*, 504 F. Supp. 3d 1307, 1327 (S.D. Ala. 2020)("the affirmative misconduct exception would apply only in the presence of affirmative misconduct by the instrumentality (*i.e.*, Fannie Mae), not the agent (*i.e.*, Nationstar)"). The statutory duty that prohibits charging inspection fees is a non-delegable duty. 16 M.L.E. Negligence § 17 ("There are situations wherein the law views a person's duty as so important and so peremptory that it will be treated as nondelegable. Duties imposed by statute are often found to be of this kind,"). Fannie Mae was the lender in Kemp's modification which unlawfully added the fees to Kemp's loan[14] and that is affirmative misconduct by Fannie Mae.

> The loan modification agreement, which was drafted by Nationstar on behalf of Fannie Mae, identified Fannie Mae as the "lender." Ms. Kemp agreed to the loan modification in the belief that the offer included only amounts that Nationstar was lawfully entitled to charge. However, the loan modification agreement had capitalized the property inspection fees into the mortgage principal.

Kemp II, 476 Md. at 165. *See also id*. at FN 15 (recognizing also Nationstar's previous recognition to "to cease and desist from assessing [property inspection] fees and to make restitution of fees assessed with respect to those mortgages"). E.498-99.

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[14] The Court should note that previously Fannie Mae played fast and loose with this issue in obtaining the initial dismissal on the erroneous representation that Seterus had waived the fees in Ms. Kemp's loan modification. *Kemp I*, 248 Md. App. at 8; *Kemp II*, 476 Md. at 165.

Even if the statutory duty was not non-delegable, Appellants argued with specific evidence below that summary judgment was inappropriate since fact issues remained to be resolved as to the level of control exercised by Fannie Mae over Nationstar. E. 496-501. Fannie Mae provides for specific and continuing governance of Nationstar and all of its servicers.[15] The nature of the relationship and Fannie Mae's policing (or lack of policing) of Nationstar's activities became relevant and also required discovery.[16] In addition, Appellants also identified factual issues relating to whether Fannie Mae ratified the actions of Nationstar by allowing the charges without objection and including them in payoff statements sent to borrowers. E.499-500.

In *Tower Oaks Blvd., LLC v. Procida*, 219 Md.App. 376, 405 (2014) this Court explained:

> Under the doctrine, when an actual or apparent agent purporting to act on behalf of a principal did not have authority to act, the principal later may approve the unauthorized act…Thus, the act, although done without authority, becomes binding on the principal who subsequently approves it… The ratified act is effective as if it had been performed with authority to begin with, and therefore relates back in time.

Id. (citations omitted).

Fannie Mae's summary judgment request below never addressed or demonstrated that no genuine issues of material fact remained as to whether the "affirmative misconduct

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15 E.676-78 (Dep. of E. Ludwig at 16:18-18:21).

16 E.680-82 (Dep. of E. Ludwig at 106:15-108:6); E.687-88 (Fannie Mae Servicing Guide excerpt concerning evaluation of servicer performance).

exception" applies in this action or whether it ratified the actions of Nationstar. In light of these fact issues that Appellants argued below, Fannie Mae's motion was premature and before material discovery occurred. E.492,496-501,876-77.[17]

Fannie Mae's reliance on the Merrill Doctrine for summary judgment has been rejected before since it involves fact issues. E.500-01. In *Denton v. Nationstar Mortg. LLC*, the court considered Fannie Mae's Merrill Doctrine arguments and the affirmative misconduct exception and recognized that "[u]nder traditional concepts of agency or contract law, "the government is ordinarily bound by the authorized acts of its agents…Such authorization must be express or implied." No. 18-CV-241-GKF-JFJ, 2020 WL 1917486, at *4–6 (N.D. Okla. 2020). *See also* Argument § VII *infra*. The *Denton* Court relied on a discovery record before it when it denied Fannie Mae's motion finding "a genuine issue of material fact exists as to whether Fannie Mae and Seterus had a principal/agent relationship wherein Seterus acted on Fannie Mae's behalf and subject to Fannie Mae's control." *Id.* at *6. In addition, the *Denton* Court recognized that "the agency inquiry focuses on the entire relationship between the principal and the agent—not simply the acts in question." *Id.* at *5.

Unlike the discovery in *Denton*, Fannie Mae failed to provide Appellants any substantive discovery (E.520-24,525-649) and supported its motion below with snippets of purported evidence that it selected. E.482-89,754-58. Appellants lacked substantive

[17] Fannie Mae's position is also inconsistent with Nationstar's present position that it is perfectly reasonable for a Fannie Mae collector and Servicer to disregard Maryland law. *See supra* P. 4, 9-10 *supra*; App. 1-37.

answers or documents to the discovery requests that were served on Fannie Mae in 2018 (E.520-24,525-649); meanwhile Fannie Mae spent it efforts to stay and block all discovery. E.184-90,204-18,240-42,766-75. Appellants requested the Circuit Court defer consideration of Fannie Mae's arguments before there was discovery related to the application of the affirmative misconduct exception to the Merrill doctrine, Fannie Mae's actual agency relationship(s) or ratification. MD. RULE 2-501(d); E.492,496-501,876-77.

The case law supported Appellants on this point. *Compare Thomas v. Green Tree Servicing LLC*, No. 2:15-CV-1309-RSL, 2019 WL 2224922, at *5 (W.D. Wash. May 23, 2019)(ordering in light of Merrill Doctrine defense advanced by Freddie Mac, that discovery was permitted "to establish an agency relationship between Freddie Mac and [is servicer]"); *Nelson*, 504 F. Supp. 3d at 1327 (granting summary judgment on the Merrill Doctrine when the "record is devoid of evidence (or even allegations) of any affirmative misconduct by Fannie Mae"); *Akowskey v. Nationstar Mortgage, LLC*, No. 21-CV-14487, 2022 WL 3718165, at *10 (S.D. Fla. Aug. 5, 2022), report and recommendation adopted, No. 21-14487-CIV, 2022 WL 3715793 (S.D. Fla. Aug. 29, 2022)(rejecting Fannie Mae's Merrill Doctrine arguments without sufficient evidence and opportunity for discovery to understand its ratification of Nationstar's illegal conduct after it was put on notice of the illegal fees and sums sought to be collected).

Here, the Circuit Court granted Fannie Mae's summary judgment request (E.759-60) without permitting Appellants to conduct any discovery which had been sought and pointed out in opposition to Fannie Mae's summary judgment motion. E.492,496-501, 520-24,525-649,876-77.

V. ASSUMING *ARGUENDO* THAT THE CIRCUIT COURT WAS CORRECT IN CONSIDERING FANNIE MAE'S BELATED HERA ARGUMENT, IT ALSO ERRED BY GRANTING SUMMARY JUDGMENT BASED UPON HERA SINCE CONGRESS NEVER INTENDED TO PERMIT FANNIE MAE TO ENGAGE IN THE UNSAFE AND UNSOUND COLLECTION OF USURY.

Without explanation, the Circuit Court also granted Fannie Mae's alternative grounds for summary judgment based on a purported defense under HERA. E.759-60. Simply put, HERA did not apply to this case at this stage of the proceedings and Congress never intended to sanction or permit Fannie Mae's violation of state usury laws years after extending HERA to it by the temporary placement of it under conservatorship under a newly established Federal agency known as the Federal Housing Finance Agency ("FHFA"). *See e.g.*, HOUSING AND ECONOMIC RECOVERY ACT OF 2008, PL 110–289, July 30, 2008, 122 Stat 2654. E. 501-02.

HERA granted FHFA the power to appoint itself as conservator or receiver of Fannie Mae "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C.A. § 4617(a)(2). While a receivership is generally established to wind down a company, conservatorship is typically used to return entities to a sound and solvent condition in which they can continue to operate.[18] On September 6, 2008, following the Enterprises' "unsuccessful effort to raise capital in the private markets," the FHFA placed Fannie Mae into conservatorship pursuant to this authority. *Perry Cap. LLC v. Lew*,

[18] *See Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751, 759 (1st Cir. 2021), cert. denied, 212 L. Ed. 2d 322, 142 S. Ct. 1360 (2022).

70 F. Supp. 3d 208, 216 (D.D.C. 2014). It remains in conservatorship today. "[A]s conservator, [FHFA is only authorized to] take such action as may be—(i) necessary to put [Fannie Mae] in a sound and solvent condition; and (ii) appropriate to carry on the business of [Fannie Mae] and preserve and conserve the assets and property of [Fannie Mae]." 12 U.S.C.A. § 4617(b)(2)(D). In addition, as a government agency, FHFA's conservatorship powers are subject to its actual statutory powers. *See Volges v. Resol. Tr. Corp.*, 32 F.3d 50, 52 (2d Cir. 1994); *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 407 (3d Cir. 1992). E. 502.

Also, while HERA appointed FHFA as the temporary conservator for Fannie Mae, this did not mean that Fannie Mae is automatically shielded or protected as a government entity. The First Circuit held that FHFA, as Fannie Mae's conservator, did not act as the government after it stepped into Fannie Mae's shoes under HERA and participated in certain non-government, private foreclosure activities. *Montilla,* 999 F.3d at 757. The court further held that Fannie Mae was also not a government actor because even though it was created by the government and for furtherance of governmental objectives, the HERA conservatorship through which the government-controlled Fannie Mae, was temporary. *Id.* at 759. Similarly, Fannie Mae's subject activity of imposing, charging, or collecting unlawful usurious fees from Maryland borrowers – in contravention of state law – cannot be considered to be a governmental activity, and the FHFA shield behind which Fannie Mae sought refuge below should not apply. It should be noted that contrary to its argument to the Circuit Court, Fannie Mae argued in *Montilla* that it and the FHFA were not government actors as related to their mortgage foreclosure activities. 999 F.3d at 755.

After succeeding on that argument in the First Circuit, Fannie Mae is judicially estopped in Maryland courts in this action from arguing differently while imposing usury to borrowers in default. *Bank of New York Mellon v. Georg*, 456 Md. 616, 624–25 (2017). E.502-03,860-67.

The Circuit Court's unexplained adoption of Fannie Mae's HERA defense was legally erroneous for four additional reasons. First, HERA's penalty bar, 12 U.S.C.A. § 4617(j)(4), only protects the FHFA itself and not Fannie Mae. E.503. Second, Fannie Mae identified no evidence that the Circuit Court could conclude that the FHFA through Fannie Mae had any authority under HERA to impose usurious charges to consumers' mortgage accounts years after the enactment of HERA and to overturn existing state laws. E.482-89, 754-58. *See also* E.503. Nor could the FHFA even do so because its power as a conservator requires it to insure Fannie Mae to act safely and soundly, § 4617(b)(2)(D), and imposing usurious charges to mortgage borrowers is anything but safe and sound. Third, at this stage of the proceedings before any judgment, HERA's penalty bar at § 4617(j)(4) does not apply because Nationstar has agreed to indemnify Fannie Mae for its errors and mistakes and there is therefore no risk to the public treasury—Nationstar is contractually responsible for any judgments awarded. *See* E.660 (Dep. of Loll at 285:5-7); *see also* E.690-95 (Fannie Mae Servicing Guide excerpt regarding indemnification). Fourth, even if § 4617(j)(4) did apply at this stage without the opportunity for Appellants to obtain any discovery, HERA does not apply to claims for actual damages which are asserted in the Appellants' complaint. *Compare Denton*, 2020 WL 1917486, at *6–7

(denying Fannie Mae's motion for summary judgment for actual damage claims under HERA's penalty bar). E.503.

For these additional reasons related to HERA, Fannie Mae's summary judgment motion should have been denied and the Circuit Court's erroneous and unexplained grant of summary judgment should be reversed.

VI. FANNIE MAE'S ARGUMENTS IN SUPPORT OF APPLYING THE MERRILL DOCTRINE AND HERA TO APPELLANTS' UNLAWFUL USURY BASED CLAIMS CONFLICT WITH MODERN VIEWS OF FEDERALISM AND MARYLAND'S RIGHTS TO REGULATE FANNIE MAE'S USURY PRACTICES

The development of modern views of federalism and also the powers of the Executive Branch of the Federal government also cast doubt upon the application of the Merrill Doctrine or HERA to Appellants' usury claims against Fannie Mae. It is true, for example, that some Federal laws have from time to time been found to preempt state usury laws like COM. LAW §12-121 as Fannie Mae seeks to do with its Merrill Doctrine and HERA arguments below. *See e.g.*, *Brown v. Inv'rs Mortg. Co.*, 121 F.3d 472, 475 (9th Cir. 1997) (holding the Federal Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") preempts Washington State's usury laws); *Wolfert ex rel. Estate of Wolfert v. Transamerica Home First*, Inc., 439 F.3d 165, 175 (2d Cir. 2006)(finding that New York usury law was preempted by DIDMCA); *Sweeney v. Sav. First Mortg., LLC*, 388 Md. 319, 335 (2005)(also recognizing DIDMCA preempted state laws related to rates or amounts of interest for first lien mortgages).

However, in the aftermath of the Great Recession, Congress sought to reign-in such wide-ranging preemption of state laws after enactment of Dodd-Frank. In 12 U.S.C.A. §

25b Congress established that state laws would only be preempted if that had discriminatory impact on national banks in comparison to the state's regulated banks. This change in policy by Congress effectively overruled the DIDMCA preemption cases which had developed and established a more balanced, Federal approach. *See also* 12 C.F.R. § 190.3(c) ("nothing in this section preempts limitations in state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers").

Here, Fannie Mae's arguments below pursuant to the Merrill Doctrine and HERA's application to permit its clearly unsafe, unsound, and usurious conduct, raises serious federalism concerns for Maryland and other states to regulate unlawful usury, and implicates the "federal cannon" described by Justices Gorsuch and Alito which is intended to:

> To preserve the "proper balance between the States and the Federal Government" and enforce limits on Congress's Commerce Clause power, courts must " 'be certain of Congress's intent' " before finding that it "legislate[d] in areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 459–460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States. See *SWANC*, 531 U.S. at 162, 174, 121 S.Ct. 675.

W. Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2621 (2022)(Gorsuch, J., concurring).

Allowing Fannie Mae to impose, directly or indirectly, illegal usury also evokes the "major questions doctrine" which refers to Federal "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. at 2609 (majority opinion).

Appellants here believe the imposition, charging, and collection of unlawful usury in violation of Maryland's usury statutes should require Fannie Mae to show "clear congressional authorization" for it to do so to allow the Merrill Doctrine or HERA to apply. *Id.* And below, Fannie Mae did not make any such showing the Congress made such an express authorization. E.482-89,754-58. *See also* E.492,503-504,520-24,525-649,876-77. Nor could it in relation to the Merrill Doctrine which was never approved by Congress and HERA was expressly enacted for the opposite purpose to ensure Fannie Mae operate safely and soundly.

To protect Maryland's interest in regulating unlawful usury, the Court should reject the application of the Merrill Doctrine or HERA to Appellants' claims against Fannie Mae since the modern view of federalism calls such application into serious question.

VII. FANNIE MAE'S REQUESTED SUMMARY JUDGMENT SHOULD ALSO HAVE BEEN DENIED SINCE IT RATIFIED NATIONSTAR'S CONDUCT BY ITS WORDS, CONDUCT, AND SILENCE WHICH DOES NOT CURE ITS USURY VIOLATIONS.

Summary judgment in favor of Fannie Mae was also improper since it came before Appellants were permitted to do discovery and Appellants should have been able to conduct some reasonable discovery to investigate its ratification of Seterus' conduct on its behalf. Under Maryland law, even without actual authority, Fannie Mae "can nevertheless become liable if it ratifies the agent's conduct….Ratification requires an intention to ratify…and knowledge of all material facts…Intention to ratify may be inferred by words, conduct or silence on the part of the principal that reasonably indicates its desire to affirm the unauthorized act." *Progressive Cas. Ins. Co. v. Ehrhardt*, 69 Md. App. 431, 441–42 (1986)(citation omitted). *See* E.503-04.

Here of course, Fannie Mae is the named lender in the Kemp modification which imposed the unlawful inspection fees to Kemp's account. *Kemp II*, 476 Md. at 165. In addition, Nationstar has previously admitted under oath that Fannie Mae requires it to fix its errors. *See* E.660 (Dep. of Loll at 285:5-7). Therefore, it was premature without any meaningful discovery to grant summary judgment in favor of Fannie Mae when it never substantively responded to discovery and a reasonable inference at the early stage of the proceedings is clear that Fannie Mae has ratified Nationstar's usury fees by, at a minimum, its conduct or failure to direct that Nationstar to fix the problem. E.492,496-501,504,520-24,525-649,876-77. *See* MD. RULE 2-501(d); E.690-95 (Fannie Mae Servicing Guide excerpt regarding indemnification).

VIII. THE IRREGULAR AND IMPROPER PROCEEDINGS BELOW AFTER REMAND AND THOSE DISCLOSED IN REMAINING ACTION BEFORE THE TRIAL COURT GIVE THE OBJECTIVE APPEARANCE THAT APPELLANTS WERE DENIED THEIR RIGHT TO FAIR AND IMPARTIAL PROCEEDINGS

As discussed *supra*, a series of irregular and improper proceedings wrongfully infected Appellants' right to have their claims considered by a fair and impartial tribunal and a jury of their peers upon remand. *See e.g.*, Argument §§ I-III *supra* (discussing a pattern of legal errors, conflicting and unexplained rulings, and ignored motions). Appellants were denied their request for summary judgment as allegedly premature (E.450,792,806) while Fannie Mae was granted summary judgment (E.759-60) before providing Appellants any discovery from it (E.184-90,204-18,240-42,525-649,766-75). The re-assigned judge was later was openly hostile to Appellants who simply were urging him not to again simply accept Fannie Mae's erroneous factual and legal arguments since

having done so previously led to complete reversal in *Kemp I* and *Kemp II*. E.841-47. Later, months after oral argument the Circuit Court granted Fannie Mae's motion for summary judgment without any analysis, findings of fact, conclusions of law, or deciding what facts or law were undisputed. E.759-60. In doing so and *sua sponte* without the request of any party to do so, the Circuit Court also made its summary judgment order final for appeal purposes pursuant to MD. RULE 2-602(b) (E.759-60) while failing to issue the required declaration of law for Appellants' declaratory claims. *See* Argument § IX *infra.* These actions and proceedings by the Circuit Court were unnecessary and simply are inconsistent with the Maryland Rules and Maryland Constitution. As such, the totality of events certainly gives the appearance again that the trial judge was not acting as a neutral arbitrator of the law as required under Maryland law. *In re Turney*, 311 Md. 246, 253 (1987). The [Supreme Court] has long recognized: "It is, of course, important that the judicial process not only be fair, *but that it appear to be fair*." *Newsom v. Brock & Scott, PLLC*, 253 Md. App. 181, 223 (2021)(citations omitted).

Upon remand and in relation to Appellants' claims against Fannie Mae, the appearance of fairness was denied by the Circuit Court and for these additional grounds, its rulings below should be reversed.

IX. THE IRREGULAR SUMMARY JUDGMENT ORDER FAILED TO ISSUE A REQUIRED DECLARATION THAT DECLARED THE RIGHTS OF THE PARTIES

In their pleading before the Circuit Court, Appellants sought particular declaratory relief. E.42-43. However, in granting Fannie Mae's summary judgment motion, the Circuit Court failed to issue any declaration whatsoever. E.759-60. All it issued was its

sparse order (E.759-60) which is wrong as a matter of basic practice. The Supreme Court has explained:

> As we [have] pointed out..“[w]hile it is permissible for trial courts to resolve matters of law by summary judgment in declaratory judgment actions, the trial court must still declare the rights of the parties.” …[and]

that judgment must be in writing and in a separate document. *Lovell Land, Inc. v. State Highway Admin.*, 408 Md. 231, 255–56 (2009)(citations omitted).

Because the Circuit Court failed to issue the required declaratory judgment, it further erred, and its judgment (E.759-60) should be reversed.

CONCLUSION

WHEREFORE based on the foregoing, Appellants requests that the judgments of the Circuit Court (E.450,759-60) be reversed and this action be remanded with specific instruction that the Circuit Court administer this action (i) without further disregard of the precedents it is required to follow even it disagrees with the law and (ii) with the appearance of fairness given Fannie Mae’s conduct at issue here involves its voluntary usury conduct which is neither safe nor sound under any circumstance.

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Respectfully Submitted,

/s/ Phillip Robinson
Phillip R. Robinson
CPF No. 0006210356
Consumer Law Center LLC
10125 Colesville Rd., Suite 378
Silver Spring, MD 20901
Phone: (301) 448-1304
phillip@marylandconsumer.com

Scott C. Borison
CPF No. 9601290001
Borison Firm, LLC.
1400 S. Charles St.
Baltimore MD 21230
Phone: (301) 620-1016
Scott@Borisonfirm.com

Attorneys for Appellants

STATEMENT AS TO FONT

Times New Roman, Size 13

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 9,100 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This motion complies with the font, spacing, and type size requirements state in Rule 8-112.

Respectfully submitted,

/s/ *Phillip R. Robinson*
Phillip R. Robinson

RULE 20-201 CERTIFICATION

I hereby certify that this filing does not contain any restricted information.

/s/ *Phillip R. Robinson*
Phillip R. Robinson

CERTIFICATE OF SERVICE

I hereby certify and give notice that copies of the foregoing and joint extracts were served through MDEC on the 6th day of March 2023 to the following counsel of record in this case:

Joseph Yenouskas
Goodwin Proctor, LLP
1900 N Street NW
Washington, DC 20036

Paul J. Havenstein
Richard W. Evans
McCarthy Wilson LLP
2200 Research Boulevard, Suite 500
Rockville, MD 20850

Counsel for the Appellees

/s/ *Phillip R. Robinson*
Phillip R. Robinson

MD. CONST. DECL. OF RTS. ART. 19

That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

§ 25b. State law preemption standards for national banks and subsidiaries clarified

(a) Definitions

For purposes of this section, the following definitions shall apply:

(1) National bank

The term "national bank" includes--

(A) any bank organized under the laws of the United States; and

(B) any Federal branch established in accordance with the International Banking Act of 1978.

(2) State consumer financial laws

The term "State consumer financial law" means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.

(3) Other definitions

The terms "affiliate", "subsidiary", "includes", and "including" have the same meanings as in section 1813 of this title.

(b) Preemption standard

(1) In general

State consumer financial laws are preempted, only if--

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County,

N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

(2) Savings clause

Title 62 of the Revised Statutes and section 371 of this title do not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank).

(3) Case-by-case basis

(A) Definition

As used in this section the term "case-by-case basis" refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms.

(B) Consultation

When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.

(4) Rule of construction

Title 62 of the Revised Statutes does not occupy the field in any area of State law.

(5) Standards of review

(A) Preemption

A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.

(B) Savings clause

Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in

making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal laws.

(6) Comptroller determination not delegable

Any regulation, order, or determination made by the Comptroller of the Currency under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.

….

(j) Other Agency exemptions

(1) Applicability

The provisions of this subsection shall apply with respect to the Agency in any case in which the Agency is acting as a conservator or a receiver.

(2) Taxation

The Agency, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the Agency shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of the value of such property, and the tax thereon, shall be determined as of the period for which such tax is imposed.

(3) Property protection

No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency.

(4) Penalties and fines

The Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

(k) Prohibition of charter revocation

In no case may the receiver appointed pursuant to this section revoke, annul, or terminate the charter of an enterprise.

COM. LAW § 12-121

(a) In this section, the term "lender's inspection fee" means a fee imposed by a lender to pay for a visual inspection of real property.

(b) Except as provided in subsection (c) of this section, a lender may not impose a lender's inspection fee in connection with a loan secured by residential real property.

(c) A lender's inspection fee may be charged if the inspection is needed to ascertain completion of:
    (1) Construction of a new home; or
    (2) Repairs, alterations, or other work required by the lender.

(d) This section does not apply to an appraisal of the value of real property by a lender or to fees imposed in connection with an appraisal.

MD. RULE 2-501

(a) Motion. Any party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record. A motion for summary judgment may not be filed: (A) after any evidence is received at trial on the merits, or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2-504(b)(1)(E).

> **Committee note:** This Rule does not prevent the trial court from exercising its discretion during trial to entertain any motions *in limine* or other preclusive motions that may have the same effect as summary judgment and lead to a motion for judgment under Md. Rule 2-519. *See, e.g., Univ. of Md. Medical System Corporation, et al. v. Rebecca Marie Waldt, et al.*, 411 Md. 207 (2009). Such a procedure avoids confusion and potential due process deprivations associated with summary judgment motions raised orally or at trial. *See Beyer v. Morgan State Univ.*, 369 Md. 335, 359, fn. 16 (2002); *see also Hanson v. Polk County Land, Inc.*, 608 F.2d 129, 131 (5th Cir. 1979) (allowing oral motions for summary judgment leads to confusion with each side having a different recollection of what was contended.) Requiring a written motion also insures adequate notice to all sides.

(b) Response. A response to a motion for summary judgment shall be in writing and shall (1) identify with particularity each material fact as to which it is contended

that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

(c) Form of Affidavit. An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

(d) Affidavit of Defense Not Available. If the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires.

(e) Contradictory Affidavit or Statement.
(1) A party may file a motion to strike an affidavit or other statement under oath to the extent that it contradicts any prior sworn statement of the person making the affidavit or statement. Prior sworn statements include (A) testimony at a prior hearing, (B) an answer to an interrogatory, and (C) deposition testimony that has not been corrected by changes made within the time allowed by Rule 2-415.
(2) If the court finds that the affidavit or other statement under oath materially contradicts the prior sworn statement, the court shall strike the contradictory part unless the court determines that (A) the person reasonably believed the prior statement to be true based on facts known to the person at the time the prior statement was made, and (B) the statement in the affidavit or other statement under oath is based on facts that were not known to the person and could not reasonably have been known to the person at the time the prior statement was made or, if the prior statement was made in a deposition, within the time allowed by Rule 2-415(d) for correcting the deposition.

(f) Entry of Judgment. The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. By order pursuant to Rule 2-602(b), the court may direct entry of judgment (1) for or against one or more but less than all of the parties to the action, (2) upon one or more but less than all of the claims presented by a party to the action, or (3) for some but less than all of the amount requested when the claim for relief is for money only and the court reserves disposition of the balance of the amount requested. If the judgment is entered against a party in default

for failure to appear in the action, the clerk promptly shall send a copy of the judgment to that party at the party's last known address appearing in the court file.

Cross reference: Section 521 of the Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501 *et seq.*, imposes specific requirements that must be fulfilled before a default judgment may be entered.

(g) Order Specifying Issues or Facts Not in Dispute. When a ruling on a motion for summary judgment does not dispose of the entire action and a trial is necessary, the court may enter an order specifying the issues or facts that are not in genuine dispute. The order controls the subsequent course of the action but may be modified by the court to prevent manifest injustice.

MD. RULE 2-602

(a) Generally. Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

(1) is not a final judgment;
(2) does not terminate the action as to any of the claims or any of the parties; and
(3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

(b) When Allowed. If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:
(1) as to one or more but fewer than all of the claims or parties; or
(2) pursuant to Rule 2-501 (f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

Source: This Rule is derived from former Rule 605 a and the 1961 version of Fed. R. Civ. P. 54 (b).

12 C.F.R. § 190.3

(a) The provisions of the constitution or law of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any Federally-related loan:

(1) Made after March 31, 1980; and

(2) Secured by a first lien on:

(i) Residential real property;

(ii) Stock in a residential cooperative housing corporation when the loan is used to finance the acquisition of such stock; or

(iii) A residential manufactured home: Provided, That the loan so secured contains the consumer safeguards required by § 190.4 of this part;

(b) The provisions of paragraph (a) of this section shall apply to loans made in any state on or before the date (after April 1, 1980 and prior to April l, 1983) on which the state adopts a law or certifies that the voters of such state have voted in favor of any law, constitutional or otherwise, which states explicitly and by its terms that such state does not want the provisions of paragraph (a) of this section to apply with respect to loans made in such state, except that—

(1) The provisions of paragraph (a) of this section shall apply to any loan which is made after such date pursuant to a commitment therefore which was entered into during the period beginning on April 1, 1980, and ending on the date the state takes such action;

(2) The provisions of paragraph (a) of this section shall apply to any rollover of a loan which loan was made, or committed to be made, during the period beginning on April 1, 1980, and ending on the date the state takes such action, if the mortgage document or loan note provided that the interest rate to the original borrower could be changed through the use of such a rollover; and

(3) At any time after the date of adoption of these regulations, any state may adopt a provision of law placing limitations on discount points or such other charges on any loan described in this part.

(c) Nothing in this section preempts limitations in state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers.