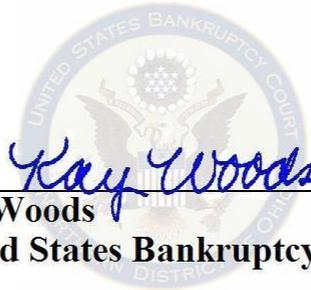


IT IS SO ORDERED.



Dated: August 10, 2010
08:42:51 AM

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

VIRGINIA D. VILLWOCK,

Debtor.

CASE NUMBER 07-40796

* * * * *

VIRGINIA D. VILLWOCK,

Plaintiff,

ADVERSARY NUMBER 09-04319

v.

CITI RESIDENTIAL LENDING,
et al.,

HONORABLE KAY WOODS

Defendants.

MEMORANDUM OPINION REGARDING SECOND MOTIONS TO DISMISS
FILED BY AMERICAN HOME MORTGAGE SERVICING, INC. AND
CITI RESIDENTIAL LENDING

This cause is before the Court on: (i) Defendant American Home
Mortgage Servicing, Inc.'s Motion to Dismiss Second Amended

Adversary Complaint ("AHMS's Second Motion") (Doc. # 67), filed by AHMS¹ on June 21, 2010; and (ii) Defendant Citi Residential Lending's Motion to Dismiss the Plaintiff's Second Amended Complaint ("Citi Residential's Second Motion") (Doc. # 68), filed by Citi Residential on June 21, 2010. On July 13, 2010, Plaintiff filed Plaintiff's Memorandum in Opposition to Defendant American Home Mortgage Servicing, Inc.'s Motion to Dismiss 2nd Amended Adversary Complaint ("Second Response to AHMS") (Doc. # 72) and Plaintiff Virginia D. Villwock's Motion [sic] in Opposition to Defendant Citi Residential Lending's Motion to Dismiss 2nd Amended Adversary Complaint ("Second Response to Citi Residential") (Doc. # 73).

For the reasons set forth below, this Court will deny AHMS's Second Motion and Citi Residential's Second Motion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. PROCEDURAL AND FACTUAL BACKGROUND

On November 18, 2009, Plaintiff filed Complaint (Doc. # 1), which commenced the instant adversary proceeding. In the Complaint,

¹ All capitalized terms, unless defined herein, have the same meanings as used in the Memo Opinion (as defined *infra* at 3).

Plaintiff alleged Defendants assessed and collected improper charges during the pendency of and following Plaintiff's bankruptcy case, which caused her Mortgage to be in default following completion of her Plan and entry of the Discharge Order. (See Compl.) Plaintiff asserted Defendants' actions constituted, *inter alia*, violations of the discharge injunction in 11 U.S.C. § 524 and Discharge Order. (*Id.* at 10-11, 15-16.) Defendants moved to dismiss this adversary proceeding (AHMS's Mot.; Citi Residential's Mot.) and Plaintiff opposed Defendants' Motions to dismiss (Resp. to AHMS; Resp. to Citi Residential). On April 12, 2010, this Court entered Memorandum Opinion Regarding Motions to Dismiss Filed by American Home Mortgage Servicing, Inc. and Citi Residential Lending (Doc. # 44) and Order: (i) Granting, in Part, and Denying, in Part, Defendants' Motions to Dismiss; and (ii) Granting Plaintiff Fourteen (14) Days to File an Amended Complaint (Doc. # 45) (collectively, "Memo Opinion"). The Court denied Defendants' Motions to dismiss Plaintiff's claims that Defendants violated the discharge injunction and Discharge Order, but granted Citi Residential's Motion for a more definite statement with respect to those claims. (See Memo Op.)

On June 4, 2010, Plaintiff filed Second Amended Complaint ("Second Complaint") (Doc. # 64). Plaintiff asserts there is "no question" that her Mortgage Arrearage was paid in full through her Plan or that her Mortgage payments were current when the Discharge Order was entered on January 9, 2009. (Second Compl. ¶ 21.) Two weeks later, on January 23, 2009, Defendants jointly sent a Mortgage

statement to Plaintiff indicating she owed \$622.77 for "unpaid late charges" and \$1,385.00 for "other charges." (*Id.* ¶¶ 19-21.)

Plaintiff states:

The Plaintiff believes that estate money was misapplied to fees and/or costs including late fees being assessed on current payments and/or other default related charges (e.g. property inspections, BPOs etc.) . . . These charges were assessed with every intention to collect from the [Plaintiff] and increase the amount of the [M]ortgage lien. Moreover, the assessment of these charges (including the improper late fees) and the believed misapplication of payments were the cause of the reactivation of the foreclosure proceeding in which the foreclosure complaint sought to enforce the [M]ortgage lien and seek personal judgment from the [Plaintiff].

(*Id.* ¶ 21.)

Plaintiff asserts Citi Residential violated the discharge injunction in § 524 and Discharge Order by: (i) assessing and collecting improper charges during the pendency of her bankruptcy case and following entry of the Discharge Order, which caused Plaintiff's Mortgage to be in default when Plaintiff emerged from bankruptcy; and (ii) transferring the improper charges to AHMS following entry of the Discharge Order with knowledge that AHMS intended to collect the improper charges from Plaintiff. (*Id.* ¶ 29.) Plaintiff asserts AHMS violated the discharge injunction and Discharge Order by attempting to collect the improper charges with knowledge of Plaintiff's discharge (Defendants' alleged violations of the discharge injunction and Discharge Order collectively, "Claim One"). (*Id.* ¶ 30.) Finally, Plaintiff asserts Citi Residential willfully violated the automatic stay in 11 U.S.C. § 362(a) by: (i) assessing improper charges to Plaintiff's Mortgage during the

pendency of her bankruptcy case with the intent to later collect those charges from Plaintiff; and (ii) applying Plan payments from the Chapter 13 Trustee and/or Mortgage payments from Plaintiff to the improper charges ("Claim Two"). (*Id.* ¶¶ 36-41.)

On June 21, 2010, AHMS filed AHMS's Second Motion. AHMS moves, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Claim One for failure to state a claim upon which relief can be granted "because [Claim One] is based on the faulty premise that post-confirmation fees and charges on a mortgage loan are discharged in a Chapter 13 bankruptcy. . . . Thus, AHMS cannot be found to have violated [Plaintiff]'s discharge injunction even if the allegations in her [Second Complaint] were true." (AHMS's Second Mot. at 1-2.) AHMS states, "As many courts have recognized, post-petition/pre-discharge assessments **are not discharged.**" (*Id.* at 4 (emphasis in original).) AHMS moves to dismiss Claim Two "because [Claim Two] alleges claims against only co-defendant [Citi Residential]." (*Id.* at 2.)

On June 21, 2010, Citi Residential filed Citi Residential's Second Motion. Citi Residential moves, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiff's Second Complaint for failure to state a claim upon which relief can be granted. With respect to Claim One, Citi Residential "adopts its arguments set forth in [Citi Residential's Motion]. . . ." (Citi Residential's Second Mot. ¶ 11.) With respect to Claim Two, Citi Residential contends Plaintiff fails to state a cause of action because,

"Plaintiff never asserts that Citi Residential engaged in collection activities; . . . a creditor's assessing of charges, but never requesting that a debtor pay those charges is not a violation of the automatic stay. . . ." (*Id.* ¶ 13.) Citi Residential asserts it kept records of charges assessed to Plaintiff's Mortgage, but never asked Plaintiff to pay those charges. (*Id.* ¶ 18.) Citi Residential also notes that, pursuant to § 362(c)(2)(C), the automatic stay terminated upon entry of the Discharge Order. (*Id.* ¶ 16.) Thus, Citi Residential contends any actions taken following entry of the Discharge Order could not have violated the automatic stay. (*Id.*)

On July 13, 2010, Plaintiff filed Second Response to AHMS. Plaintiff asserts AHMS "has essentially asked this Court to reverse its prior ruling and find that improper and illegal fees assessed to a mortgage debt during the pendency of the Chapter 13 plan are not subject to the discharge injunction." (Second Resp. to AHMS at 1.) Plaintiff contends the "literal" interpretation of § 524 endorsed by AHMS allows a creditor to assess unauthorized charges during the pendency of a bankruptcy case (without notice to the court or debtor) and, thus, frustrates a debtor's ability to obtain a fresh start upon emerging from bankruptcy. (*Id.* at 2-3.) As a result, Plaintiff requests the Court to deny AHMS's Second Motion to dismiss Claim One. Finally, Plaintiff notes that she is "not alleging that Defendant [AHMS] violated the automatic stay." (*Id.* at 5.)

On July 13, 2010, Plaintiff filed Second Response to Citi

Residential. Plaintiff again asserts: (i) this "Court has already ruled that the Plaintiff has stated a cause of action for violation of the discharge injunction" (Second Resp. to Citi Residential at 2); and (ii) the interpretation of § 524 endorsed by Citi Residential frustrates a debtor's ability to obtain a fresh start (*id.* at 2-4). Therefore, Plaintiff requests the Court to deny Citi Residential's Second Motion to dismiss Claim One. With respect to Claim Two, Plaintiff states, "Both the misapplication of payments and the posting of illegal fees to the [Plaintiff's] account during the pendency of the chapter 13 case causing the [Plaintiff] to be delinquent on her [M]ortgage post discharge violates [sic] the automatic stay." (*Id.* at 4.) As a result, Plaintiff also requests the Court to deny Citi Residential's Second Motion to dismiss Claim Two.

II. STANDARD FOR REVIEW AND ANALYSIS

Federal Rule of Civil Procedure 8(a)(2), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7008(a), requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8 (West 2010); FED. R. BANKR. P. 7008 (West 2010). The complaint does not have to contain "detailed factual allegations," but it must contain more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Federal Rule of Civil Procedure 12(b)(6), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), provides that a claim can be dismissed if it fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2010); FED. R. BANKR. P. 7012 (West 2010). Accordingly, a complaint will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

When determining whether a claim alleges enough facts to state a claim upon which relief can be granted, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *see also Twombly*, 550 U.S. at 555. However, the court need not accept as true legal conclusions or unwarranted factual inferences. *Iqbal*, 129 S. Ct. at 1949-50; *Directv, Inc.*, 487 F.3d at 476.

A. Claim One.

In Claim One, Plaintiff alleges: (i) Citi Residential assessed and collected improper charges during the pendency of Plaintiff's bankruptcy case and following entry of the Discharge Order (Second Compl. ¶ 29); (ii) Citi Residential transferred the improper charges

to AHMS following entry of the Discharge Order with knowledge that AHMS intended to collect the improper charges (*id.*); and (iii) AHMS attempted to collect the improper charges with knowledge of Plaintiff's discharge (*id.* ¶ 30). As a result, Plaintiff contends Defendants violated the discharge injunction and Discharge Order. (*Id.* ¶¶ 29-34.) Defendants, on the other hand, contend the charges, even if improper, were not discharged because post-petition charges applied to a long-term debt provided for under § 1322(b)(5) are excepted from discharge. (See AHMS's Second Mot. at 1-2; Citi Residential's Second Mot. ¶ 11.) Therefore, Defendants contend Claim One fails to state a claim upon which relief can be granted.

Defendants' arguments that Plaintiff has failed to state an actionable claim for violations of the discharge injunction and Discharge Order were previously presented to this Court in AHMS's Motion and Citi Residential's Motion. In fact, in its Second Motion, Citi Residential "adopts its arguments set forth in [Citi Residential's Motion] as to the Plaintiff's claim against Citi Residential alleging willful violation of the discharge injunction and [D]ischarge [O]rder, as if set forth fully herein." (Citi Residential's Second Mot. ¶ 11.) The Court gave full consideration to Defendants' arguments and denied AHMS's Motion and Citi Residential's Motion to the extent they asserted Plaintiff failed to state a valid cause of action for violations of the discharge injunction and Discharge Order. (See Memo Op. at 27-28 ("Plaintiff has pled sufficient facts to state a contempt action against

Defendants for violations of the discharge injunction"); ("Plaintiff has pled a plausible claim for violations of the Discharge Order, and Defendants' motions to dismiss . . . will be denied to the extent they contend otherwise".) The Court will not reconsider its prior ruling.² Accordingly, Defendants' Second Motions to dismiss Claim One will be denied.

B. Claim Two.

AHMS moves to dismiss Claim Two, as it pertains to AHMS, because "[t]he allegations in [Claim Two] do not allege any wrongdoing or liability on the part of AHMS." (AHMS's Second Mot. at 11.) In response, Plaintiff agrees she is "not alleging that Defendant [AHMS] violated the automatic stay." (Second Resp. to AHMS at 5.) Because Claim Two does not allege AHMS violated the automatic stay, AHMS's Second Motion to dismiss Claim Two will be denied as moot.

In Claim Two, Plaintiff alleges Citi Residential willfully violated the automatic stay by: (i) assessing improper charges to Plaintiff's Mortgage during the pendency of her bankruptcy case with the intent to later collect those charges from Plaintiff; and (ii) applying Plan payments from the Chapter 13 Trustee and/or

² The Court notes that it previously granted Citi Residential's Motion for a more definite statement with respect to Plaintiff's claims alleging violations of the discharge injunction and Discharge Order. The Court ordered Plaintiff to: (i) clarify the relief being sought; and (ii) specify, to the extent Plaintiff could do so prior to discovery, (a) the improper charges, (b) when the improper charges were imposed, and (c) which Defendant imposed the improper charges. (Memo Op. at 33.) Plaintiff has clarified the relief being sought and has specified, to the extent possible prior to discovery, the details surrounding the alleged improper charges.

Mortgage payments from Plaintiff to the improper charges. (Second Compl. ¶¶ 36-41). Citi Residential contends it could not have violated the automatic stay because it never engaged in collection activities. (Citi Residential's Second Motion ¶ 13.) Citi Residential asserts it merely kept records of charges assessed to Plaintiff's Mortgage, but never took action to collect those charges from Plaintiff. (*Id.* ¶ 18.) Citi Residential also contends the automatic stay terminated upon entry of the Discharge Order and, thus, any actions taken following entry of the Discharge Order could not have violated the automatic stay. (*Id.* ¶ 16.) As a result, Citi Residential requests the Court to dismiss Claim Two for failure to state a claim upon which relief can be granted.

Plaintiff asserts Citi Residential's actions violated the automatic stay in § 362(a)(3), (a)(4), (a)(5), and/or (a)(6). (Second Compl. ¶¶ 36-41.) Section 362(a) states, in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of-

* * *

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim

against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C. § 362 (West 2010). "Stated broadly, the automatic stay, which is set forth in 11 U.S.C. § 362(a), stops all collection activities related to the recovery of a prepetition debt against the debtor." *In re Perviz*, 302 B.R. 357, 365 (Bankr. N.D. Ohio 2003). "The purpose of the stay is twofold: (1) to ensure the orderly liquidation of the debtor's bankruptcy estate; and (2) to provide the debtor with a breathing spell from creditors' collection efforts." *Id.* (citing *U.S. v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d. Cir. 1988)). Generally, the automatic stay continues, as to acts against property of the estate, until the property is no longer property of the estate and, as to any other acts, until the case is closed, dismissed, or a discharge is granted or denied. See § 362(c).

Plaintiff and Citi Residential dispute whether allegations of misapplication of chapter 13 plan payments and/or long-term debt payments made outside the chapter 13 plan state a cause of action for violation of the automatic stay. The Sixth Circuit Court of Appeals has not addressed this issue and a split of authority exists outside the Sixth Circuit. See, e.g., *Galloway v. EMC Mortg. Corp.* (*In re Galloway*), 2010 Bankr. LEXIS 286, *13 (Bankr. N.D. Miss. 2010) (finding that the misapplication of payments violates the automatic stay); but see, *Rodriguez v. Countrywide Home Loans, Inc.* (*In re Rodriguez*), 421 B.R. 356, 368-69 (Bankr. S.D. Tex. 2009) (finding that the misapplication of payments does not violate the

automatic stay). For the reasons set forth below, this Court finds that allegations of misapplication of plan payments from the trustee or payments made outside the plan by the debtor are sufficient to state a cause of action for violation of the automatic stay in § 362(a).

In *Myles v. Wells Fargo Bank, N.A. (In re Myles)*, 395 B.R. 599 (Bankr. M.D. La. 2008), the debtors' chapter 13 plans provided that their pre-petition mortgage arrearages would be cured through the plans and that their post-petition mortgage payments would be made directly to the creditor. The debtors filed a class action against the creditor, alleging the creditor violated the automatic stay by: (i) continuing to treat the debtors' mortgage debts as though they were in default, rather than current, following the debtors' petition dates; and (ii) improperly applying post-petition plan payments and mortgage payments to charges that were generated as a result of treating the mortgage debts as though they were in default. The creditor argued its alleged improper payment allocations and deposits were merely bookkeeping entries to its internal records that did not implicate the automatic stay. The bankruptcy court concluded that the debtors asserted a valid claim for violation of the automatic stay and denied the creditor's motion for judgment on the pleadings. The bankruptcy court stated:

[The creditor] characterizes its action as merely making bookkeeping entries. However, the amended complaint alleges that [the creditor] did more than keep incorrect records on the debtors' mortgage loans. It alleges that [the creditor] actually billed for and collected from the debtors amounts that it was not owed

as a result of its misapplication of the debtors' plan payments. The allegations state a claim for violation of the automatic stay under 11 U.S.C. §362(k).

Id. at 606-07.

Similarly, in *Sanchez v. Ameriquest Mortg. Co. (In re Sanchez)*, 372 B.R. 289 (Bankr. S.D. Tex. 2007), the debtors' chapter 13 plan provided that their pre-petition mortgage arrearage would be cured through the plan and that post-petition mortgage payments would be made directly to the creditor. During the pendency of the debtors' bankruptcy case, the creditor allegedly applied legal fees, property inspection fees, and other charges to the debtors' mortgage account, which caused the debtors to be in default. However, the debtors had made each of their mortgage payments since the petition date. The debtors brought an adversary proceeding against the creditor, alleging, *inter alia*, violation of the automatic stay. The bankruptcy court concluded that the creditor violated the automatic stay in § 362(a)(3) by taking estate property without the court's approval. The bankruptcy court stated:

In the instant case, the [creditor] has violated § 362(a)(3) by taking property of the estate without this Court's approval. The [creditor] assessed the [debtors] post-petition charges comprising attorney's fees, costs, and property inspection fees. The [creditor] then satisfied these charges with the mortgage payment it received from the Chapter 13 Trustee—monies which came from the [debtors]' post-petition earnings. Thus the Defendant satisfied post-petition charges with the [debtors]' post-petition earnings, which constituted a taking of property of the estate and severely impaired the [debtors]' ability to comply with the terms of the [chapter 13 plan].

Id. at 313. The bankruptcy court noted that its finding promoted

a debtor's ability to obtain a fresh start:

"The filing of a bankruptcy is supposed to be a respite for a debtor, allowing time for reorganization. It stops the accrual of unnecessary fees and costs as well as additional interest and charges on past due amounts in an effort to allow debtors a fresh start. The automatic stay prohibits the collection of any amounts owed by a debtor during the administration of the case in order to effect these goals."

Id. at 314 (quoting *Jones v. Wells Fargo Home Mortg. (In re Jones)*, 366 B.R. 584, 600 (Bankr. E.D. La. 2007)).

In the instant case, Plaintiff alleges Citi Residential "misapplied payments from the [Chapter 13 Trustee] and/or [Plaintiff's] funds with knowledge of the automatic stay. The misapplication of these payments substantially contributed to the Plaintiff being behind upon successful completion of her [Plan]." (Second Compl. ¶ 38.) To the extent Plaintiff alleges Citi Residential misapplied Plan payments from the Chapter 13 Trustee and/or Mortgage payments from Plaintiff during the pendency of Plaintiff's bankruptcy case, Plaintiff has pled sufficient facts to state a claim for violation of the automatic stay. Accordingly, Citi Residential's Second Motion to dismiss Claim Two will be denied.

III. CONCLUSION

In the Memo Opinion, the Court previously denied Defendants' Motions to dismiss Plaintiff's claims that Defendants violated the discharge injunction in § 524 and Discharge Order. Defendants present no new arguments in their Second Motions to dismiss Claim One. Accordingly, Defendants' Second Motions to dismiss Claim One

will be denied.

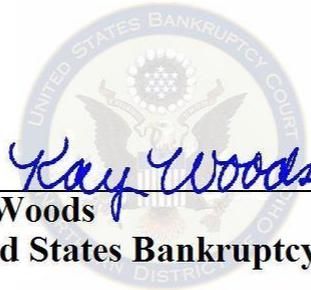
Claim Two applies to Defendant Citi Residential only. As a result, AHMS's Second Motion to dismiss Claim Two, as it pertains to AHMS, will be denied as moot.

The Court finds that Plaintiff has pled sufficient facts by alleging misapplication of Plan payments and/or Mortgage payments during the pendency of her bankruptcy case to state a cause of action for violation of the automatic stay in § 362(a). Accordingly, Citi Residential's Second Motion to dismiss Claim Two will be denied.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: August 10, 2010
08:42:51 AM

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

VIRGINIA D. VILLWOCK,

Debtor.

CASE NUMBER 07-40796

* * * * *

VIRGINIA D. VILLWOCK,

Plaintiff,

ADVERSARY NUMBER 09-04319

v.

CITI RESIDENTIAL LENDING,
et al.,

HONORABLE KAY WOODS

Defendants.

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

This cause is before the Court on: (i) Defendant American Home Mortgage Servicing, Inc.'s Motion to Dismiss Second Amended Adversary Complaint ("AHMS's Second Motion") (Doc. # 67), filed by

AHMS on June 21, 2010; and (ii) Defendant Citi Residential Lending's Motion to Dismiss the Plaintiff's Second Amended Complaint ("Citi Residential's Second Motion") (Doc. # 68), filed by Citi Residential on June 21, 2010. On July 13, 2010, Plaintiff filed Plaintiff's Memorandum in Opposition to Defendant American Home Mortgage Servicing, Inc.'s Motion to Dismiss 2nd Amended Adversary Complaint (Doc. # 72) and Plaintiff Virginia D. Villwock's Motion [sic] in Opposition to Defendant Citi Residential Lending's Motion to Dismiss 2nd Amended Adversary Complaint (Doc. # 73).

For the reasons set forth in this Court's Memorandum Opinion Regarding Second Motions to Dismiss Filed by American Home Mortgage Servicing, Inc. and Citi Residential Lending entered on this date: (i) AHMS's Second Motion is denied; and (ii) Citi Residential's Second Motion is denied.

IT IS SO ORDERED.

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