UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Clerk of Court

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November 15, 2018

Debra P. Hackett
U.S. District Court
PO BOX 711
MONTGOMERY, AL 36101-0711

Appeal Number: 18-11764-J
Case Style: Steven Thomason v. One West Bank, FSB, Indy Mac B, et al
District Court Docket No: 2:12-cv-00604-MHT-TFM

The enclosed copy of the Clerk's Entry of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court. See 11th Cir. R. 41-4.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C. Burney-Smith, J
Phone #: (404) 335-6183

Enclosure(s)

DIS-2 Letter and Entry of Dismissal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11764-J

STEVEN THOMASON,

Plaintiff - Appellant,

versus

ONE WEST BANK, FSB, INDY MAC BANK,
MORTGAGE ELECTRIC REGISTRATION SYSTEMS, INC.,
EVA BANK,
DEUTSCHE BANK NATIONAL TRUST COMPANY,
OCWEN LOAN SERVICING, LLC,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Steven Thomason has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective November 15, 2018.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Davina C. Burney-Smith, J, Deputy Clerk

FOR THE COURT - BY DIRECTION

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11764-J

STEVEN THOMASON,

Plaintiff-Appellant,

versus

ONE WEST BANK, FSB, INDYMAC BANK,
MORTGAGE ELECTRIC REGISTRATION SYSTEMS, INC., et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

ORDER:

Steven Thomason moves for leave to proceed in forma pauperis ("IFP") to appeal the District Court's dismissal of his claims and grant of summary judgment in favor of the defendants.

I. BACKGROUND

On July 11, 2012, Mr. Thomason filed a pro se complaint alleging OneWest Bank, FSB, and IndyMac Mortgage Services, a division of OneWest, refused to let

him modify his mortgage loan after his wife died in 2009, and instead attempted to foreclose on his home. As amended in later complaints, Mr. Thomason alleged his wife executed two promissory notes in 2005 with Eva Bank to borrow money for a mortgage loan. Due to Mr. Thomason's credit rating, only his wife could obtain the loan, and she was listed as the primary borrower. He alleged the terms of the loan were predatory and were implemented because he and his wife were African American. He also alleged there was an oral agreement between him and Eva Bank, wherein it agreed to refinance the loan in two years and add his name to the notes. The loan was secured by two mortgages on Mr. Thomason and his wife's home. The loan was later transferred to Deutsche Bank National Trust Company, while OneWest, the servicer of the loan, transferred service to Ocwen Loan Servicing, LLC ("Ocwen").

Mr. Thomason alleged that when his wife defaulted on the loan, they attempted to obtain a loan modification, but were denied because of their race. When his wife passed away in 2009, the loan again fell into default, and foreclosure proceedings were initiated. Mr. Thomason alleged he sent six qualified written requests ("QWRs"), between 2010 and 2015, to IndyMac and Ocwen, informing them of his wife's death and seeking information about modifying the loan.

After they refused to respond or modify the loan, he filed this lawsuit, claiming racial discrimination with respect to the original loan and the defendants' refusal to modify the loan after his wife's death. In his 2016 amended complaint, he contended the defendants had violated the Equal Credit Opportunity Act ("ECOA")(Count One), the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 1982 (Count Two), the Real Estate Settlement Procedures Act ("RESPA")(Count Three), the Fair Housing Act ("FHA")(Counts Four, Five, and Six), the Fair Debt Collection Practices Act ("FDCPA") and Alabama Deceptive Trade Practices Act ("ADTPA")(Count Seven), and the Racketeer Influenced and Corrupt Organization Act ("RICO") (Count Eight).[1] He named as defendants OneWest, IndyMac, Eva Bank, Deutsche Bank, Ocwen, and Mortgage Electronic Registration Systems, Inc. ("MERS"), which originally held the security interest on the loan as nominee.

The defendants moved to dismiss the complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Mr. Thomason filed a motion for leave to further amend his complaint, seeking to incorporate all

[1] Mr. Thomason's initial complaint, filed in 2012, also raised claims under the Home Affordable Modification Program ("HAMP"), Home Affordable Foreclosure Alternatives Program ("HAFA"), and RESPA. Shortly after filing, he sought leave to amend his complaint. The District Court dismissed the complaint for failure to state a claim, and denied leave to amend. Mr. Thomason appealed, and this Court affirmed the dismissal of his HAMP and HAFA claims, but remanded to allow Mr. Thomason to amend his RESPA claim and raise any additional claims. Mr. Thomason filed his first amended complaint on March 3, 2015. After the defendants moved for a more definite statement, the District Court referred Mr. Thomason to a volunteer attorney in the court's legal assistance program, who helped him draft a second, and final, amended complaint in June 2016.

previous complaints and to attach 59 exhibits that had been left out of his amended complaint.

The Magistrate Judge entered a report and recommendation ("R&R"), recommending that Mr. Thomason's motion for leave to amend his complaint be denied, as he already had been given leave to amend his complaint, and did so with the help of a volunteer attorney. It further found that the documents he sought to attach were not appropriate for review on a Rule 12(b)(6) motion because Mr. Thomason could not demonstrate they were central to his claim or were of undisputed authenticity.

The Magistrate Judge also recommended granting the defendants' motions to dismiss Mr. Thomason's claims under the ECOA, FDCPA, ADTPA, and RICO. As to his ECOA claim (Count One), the R&R stated Mr. Thomason had made no plausible allegation of racial discrimination because he had not alleged that similarly-situated loan applicants of other races were offered more favorable loan terms or modifications. As to the FDCPA claim (Count Seven), it found that none of the defendants—all of which were mortgage loan servicers or banks—were debt collectors, or in the business of collecting debts, as required under that statute. The R&R further found that the ADTPA (Count Seven) did not apply to mortgage loans, and Mr. Thomason had failed to allege a pattern of racketeering activity to support a RICO claim (Count Eight).

The Magistrate Judge also recommended granting the defendants' motions to dismiss Mr. Thomason's civil rights and FHA claims, in part. As to his civil rights claim (Count Two), the R&R found the two-year statute of limitations barred his claims with respect to loan modification proceedings occurring more than two years prior to the filing of the first amended complaint. As to his FHA claims (Counts Four, Five, and Six), the Magistrate Judge found, again, that the two-year statute of limitations barred his claims with respect to the initial loan, but not to the modification requests. Lastly, the Magistrate Judge recommended denying the defendants' motion to dismiss as to the RESPA claim (Count Three), finding that his claim that the defendants had failed to respond to the QWRs stated a cause of action.

Over Mr. Thomason's and the defendants' objections, the District Court adopted the R&R, with the exception that it reserved ruling on the timeliness of Mr. Thomason's civil rights claims. Thus, the District Court found Mr. Thomason's surviving claims were his civil rights claim (Count Two), his RESPA claim (Count Three), and his FHA claims, but only as to loan modification proceedings occurring after March 3, 2013 (Counts Four, Five, and Six).

The parties proceeded to discovery, which, by court order, was to be completed on or before September 5, 2017. On August 18, Mr. Thomason filed a motion for contempt against OneWest and Ocwen. They had produced in

discovery a loan modification offer that had been sent to Mr. Thomason's wife before she died, but Mr. Thomason argued this offer was false and had never been sent. He also argued the document should have been provided to him earlier, as required by a consent order in a California case involving these defendants. The District Court denied the contempt motion, finding that the California consent order was inapplicable to this proceeding, and the defendants had not violated any court order in this case.

On September 5, 2017, the last day of the discovery period, Mr. Thomason filed a discovery request to OneWest and IndyMac concerning an unnamed third party with relevant information to the suit, and sought to add the third party as a defendant. He alleged this third party had the contact information for an employee who had handled one of Mr. Thomason's modification requests. The District Court denied the request as untimely and further found that, to the extent Mr. Thomason sought leave to amend his complaint to add a new defendant, leave was denied because Mr. Thomason already had been given leave to amend his complaint, and did so with the help of a volunteer attorney.

After the close of discovery, Mr. Thomason and the defendants moved for summary judgment. The Magistrate Judge entered an R&R recommending summary judgment be granted to the defendants as to all remaining claims. It found first that the undisputed facts showed that Mr. Thomason was not a borrower

under the promissory notes—only his wife executed the notes—and had no obligation to pay the loan. The R&R noted that Mr. Thomason had testified in his deposition that his previous home had been foreclosed upon, and Thomas Russell, an officer with Eva Bank, attested that Mr. Thomason's previous foreclosure impaired his credit to the extent that he could not qualify for the loan. It also noted that, although Mr. Thomason had signed the mortgages securing the loan, the mortgages expressly provided that he had no obligation to pay the loan. Further, Mr. Thomason explained in his deposition that was turned down for loan modifications after his wife's death because he was not a borrower on the original loan. Although defendant Ocwen sent Mr. Thomason a family transfer package in 2015 which would allow him to transfer the loan to his name, he did not return the package because he already had initiated this lawsuit and "did not trust [the defendants]."

Based on these facts, the Magistrate Judge found there was no evidence to support Mr. Thomason's conclusory allegation that he was denied the original loan or a modification because of his race. Instead, the evidence showed Mr. Thomason could not obtain the original loan due to his poor credit, and could not obtain a loan modification because he was not the borrower on the original loan. Mr. Thomason also had not alleged or shown that similarly-situated applicants of other races were approved under these same circumstances. Therefore the Magistrate Judge found

he could not show racial discrimination as required by the FHA and 42 U.S.C. §§ 1981 and 1982. As to Mr. Thomason's RESPA claim, the Magistrate Judge found he had no standing to bring such a claim because he had no obligation under the note, nor were his claimed damages—stress and the threat of foreclosure—actual injuries under RESPA.

Over Mr. Thomason's objections, the District Court adopted the R&R, and granted summary judgment to the defendants on all remaining claims.

Mr. Thomason then filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e), which the District Court summarily denied. Mr. Thomason appealed the final judgment and the denial of his motion for reconsideration, and the District Court denied leave to proceed IFP on appeal. Mr. Thomason now seeks IFP status from this Court.

II. LEGAL STANDARD

Because Mr. Thomason has moved for IFP status, his appeal is subject to a frivolity determination. See 28 U.S.C. § 1915(e)(2)(B); Pace v. Evans, 709 F.2d 1428, 1429 (11th Cir. 1983) (per curiam). "[A]n action is frivolous if it is without arguable merit either in law or fact." Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002) (quotation marks omitted). In making this determination, "[p]ro se pleadings are held to a less stringent standard than pleadings drafted by attorneys

and will, therefore, be liberally construed." Hughes v. Lott, 350 F.3d 1157, 1160 (11th Cir. 2003) (quotation marks omitted).

III. MOTION TO DISMISS

This Court reviews "dismissals pursuant to Rule 12(b)(6), de novo, taking all the material allegations of the complaint as true while liberally construing the complaint in favor of the plaintiff." Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998). To survive a motion to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp., v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). The threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (quotation marks omitted). A District Court may properly dismiss a complaint if it rests only on "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts." Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003).

A. Count One: ECOA

The ECOA prohibits creditors from discriminating against applicants "on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1). Mr. Thomason alleged that, because he is African American, he and his wife were given a predatory loan, he was not approved for the original

loan, and he was denied a loan modification after his wife's death. However, nothing in Mr. Thomason's amended complaint, other than these conclusory statements, raised a plausible inference that any defendant discriminated against him based on his race. The complaint also contained allegations that the original loan terms were based on a poor credit rating, and that Mr. Thomason was denied a loan modification because he was not a borrower under the original loan. Thus, the conclusory allegations of racial discrimination failed to sufficiently allege that any defendant was subject to liability under the ECOA. See Davila, 326 F.3d at 1185.

B. Counts Four, Five, and Six: FHA

Mr. Thomason alleged the defendants violated the FHA by offering him a predatory loan, and then denying him a loan modification, because of his race. The District Court found these claims, with respect to the original loan and any loan modification proceedings occurring on or before March 3, 2013, were barred by a two-year statute of limitations.

An individual may bring an FHA suit "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). The statute of limitations begins to run when "facts supportive of the cause of action are or should be apparent to a reasonably prudent

person similarly situated." Hipp v. Liberty Nat'l Ins. Co., 252 F.3d 1208, 1222 (11th Cir.2001) (per curiam) (quotation marks omitted).

Mr. Thomason initiated this action in 2012, but first raised his FHA claim in his first amended complaint, filed on March 3, 2015. Thus, any claim concerning the 2005 original loan was time-barred, as the terms of that loan would have been apparent to him in 2005.

As to the loan modification proceedings—which occurred between 2010 and 2015—it is not clear if the District Court considered whether Mr. Thomason's FHA claims, filed in 2015, would relate back to the filing of his original complaint in 2012. See Fed. R. Civ. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading."). However, even if the amended complaint did relate back, such that the District Court erred in finding that the statute of limitations barred any claim prior to March 3, 2013, the defendants would still be entitled to judgment as a matter of law on the merits of these FHA claims, as discussed below.

C. Count Seven: FDCPA and ADTPA

The FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt."

15 U.S.C. § 1692e. "[I]n order to state a plausible FDCPA claim under § 1692e, a plaintiff must allege, among other things, (1) that the defendant is a 'debt collector' and (2) that the challenged conduct is related to debt collection." Reese v. Ellis, Painter, Ratterrre & Adams, LLP, 678 F. 3d 1211, 1216 (11th Cir. 2012). This Court has determined that banks are not debt collectors when their principal purpose of business is not to serve as third-party debt collectors. Davidson v. Capital One Bank (USA), N.A., 797 F.3d 1309, 1311 (11th Cir. 2015). Further, "a non-originating debt holder [does not qualify as] a 'debt collector' for purposes of the FDCPA solely because the debt was in default at the time it was acquired." Id. at 1316.

Here, Mr. Thomason did not allege that any defendant—all of which were banks or loan servicers—was a debt collector, that their principal purpose was debt collection, or that they regularly collected on debt due to another at the time of collection. Thus, the amended complaint failed to sufficiently allege that any defendant was subject to liability under the FDCPA.

The ADTPA provides a private cause of action for deceptive trade practices involving consumers, which it defines as "[a]ny natural person who buys goods or services for personal, family or household use." Ala. Code §§ 8-19-3(2), 8-19-10(a). Prior to filing an action under the ADTPA, the claimant must provide a written demand for relief "reasonably describing the unfair or deceptive act or

practice," and allow 15 days for the respondent to address or reject the claim. Id. § 8-19-10(e).

Mr. Thomason alleged Eva Bank violated the ADTPA by making an unlawful mortgage contract with his wife. Even assuming mortgage loans fell within the ADTPA, Mr. Thomason did not allege that he was a consumer—as the loan was made to his wife—nor did he allege that he provided the required written notice. Thus, the amended complaint failed to sufficiently allege that Eva Bank was subject to liability under the ADTPA.

D. Count Eight: RICO

Mr. Thomason's amended complaint alleged "the Defendants [] attempted to foreclose on the property while pretending to offer a modification. . . [constituting] a fraud scheme of false hope for the Defendants only to try [to] take the property again." He also alleged "the defendants were using false and misleading tactics in the making of the loan and when attempting to [] foreclose. . . [constituting] mail and wire fraud."

To establish a RICO violation under 18 U.S.C. § 1962(c), a plaintiff must prove a pattern of racketeering activity, showing "at least two racketeering predicates that are related, and that they amount to or pose a threat of continued criminal activity." See Am. Dental Ass'n. v. Cigna Corp., 605 F.3d 1283, 1290–91 (11th Cir. 2010). In a civil RICO action based on fraud, a plaintiff must allege:

"(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." Id. at 1291 (applying Fed. R. Civ. P. 9(b)'s heightened pleading standard to RICO claims). "The plaintiff must allege facts with respect to each defendant's participation in the fraud." Id.

Here, the amended complaint does not meet the heightened pleading standard for a RICO claim. Not only did Mr. Thomason not distinguish between each of the defendants, but he did not allege the precise misrepresentations made, when they were made, or who made them. Further, his claim that the defendants engaged in a "fraud scheme of false hope" is not a recognized racketeering activity under § 1961. Thus, the amended complaint failed to sufficiently allege a RICO violation.

IV. SUMMARY JUDGMENT

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court reviews de novo the district court's grant of summary judgment, "view[ing] the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolv[ing] all reasonable doubts

about the facts in favor of the non-movant." Carter v. City of Melbourne, 731 F.3d 1161, 1166 (11th Cir. 2013) (per curiam) (quotation marks omitted).

"A party moving for summary judgment has the burden of showing that there is no genuine issue of fact." Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990) (quotation marks omitted). "A party opposing a properly submitted motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." Id. (alteration adopted and quotation marks omitted).

A. Count Two: 42 U.S.C. §§1981 and 1982:

Mr. Thomason alleged the defendants violated 42 U.S.C. §§ 1981 and 1982 by offering a predatory loan and denying him a loan modification because of his race. Section 1981 prohibits racial discrimination during the making of contracts. Webster v. Fulton Cty., 283 F.3d 1254, 1256 (11th Cir. 2002). The statute provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1982 states "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by

white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

To prevail on a claim of racial discrimination, a plaintiff must show "(1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (in this case, the making and enforcing of a contract)." Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1235 (11th Cir. 2000). To satisfy the second prong, a plaintiff must show each defendant had an actual intent to treat him less favorably because of the plaintiff's race. Id.

Mr. Thomason has not demonstrated that the terms offered in the loan differed from the terms offered to similarly-situated borrowers of other races. Also, the defendants presented evidence that they denied Mr. Thomason's modification requests because he was not a borrower on the loan. Mr. Thomason put forth no specific facts to contradict this, other than his conclusory allegations that the defendants denied his requests because of his race. Therefore the defendants were entitled to summary judgment on this claim.

B. Count Three: RESPA

Mr. Thomason alleged the defendants violated RESPA by failing to respond to his QWRs, and he sought actual and statutory damages under that statute. RESPA provides that a mortgage loan servicer must acknowledge receipt of a

QWR from a "borrower" within five days, "unless the action requested is taken within [that] period." 12 U.S.C. § 2605(e)(1)(A). Within 30 days of receipt of a QWR, the servicer must either "make appropriate corrections in the account of the borrower," or "provide the borrower with a written explanation or clarification" explaining why the account is correct or why the information requested is unavailable. Id. § 2605(e)(2)(A)–(B). If the servicer fails to comply with these provisions, it is "liable to the borrower" for any actual damages as a result of the failure. Id. § 2605(f)(1)(A).

Assuming that Mr. Thomason's letters to the defendants qualified as QWRs, as the District Court did, Mr. Thomason was not a borrower under the loan because he had no obligation to repay the loan. Thus, he was not owed a response to his QWRs. Mr. Thomason conceded that his name was not on the original loan—as evidenced by his claim that defendant Eva Bank falsely promised to refinance the loan in two years to add him as a borrower—and the undisputed documentary evidence of the notes and mortgages at issue confirm that he was not a borrower. Mr. Thomason did not sign the notes, and the mortgages signed by him expressly state that because he did not execute the notes, he was not obligated to pay the loan. Therefore defendants could not have violated RESPA by failing to respond to his QWRs.

C. Counts Four, Five, and Six: FHA

Mr. Thomason alleged the defendants violated the FHA by offering him a predatory loan, and then denying him a loan modification, because of his race. As discussed above, his claims with respect to the original loan were time-barred.

As to his claims concerning the loan modification proceedings, the FHA prohibits any person or entity "whose business includes engaging in residential real estate-related transactions" from discriminating against any person "in making available such a transaction, or in the terms or conditions of such a transaction," due to that person's "race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a). The statute defines a "residential real estate-related transaction" to include the "making or purchasing of loans or providing other financial assistance" for purchasing or maintaining a dwelling, or where the loan or financial assistance is secured by residential real property. Id. § 3605(b)(1).

This Court has not decided in a published opinion whether a mortgage loan modification from a plaintiff's loan servicer is sufficiently related to the meaning of "real estate-related transaction" under the FHA to give rise to a right of action. See Molina v. Aurora Loan Servs., 635 F. App'x 618, 624–25 (11th Cir. 2015) (per curiam) (unpublished) (noting "defendants do not cite to any authority, and we found none, indicating [whether] a mortgage loan modification from a plaintiff's loan servicers . . . qualif[ied] as a 'real estate-related transaction' under the FHA").

In the general context of racial discrimination under the FHA, however, a plaintiff must establish that (1) he is a member of a protected racial class, (2) he applied for and was qualified to participate in a real estate transaction, (3) he was denied permission to participate in the transaction, and (4) the transaction remained available afterwards. Sec'y, United States Dep't of Hous. & Urban Dev., ex rel. Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990).

Here, the defendants showed that Mr. Thomason could not obtain a modification because he was not a borrower under the loan. Mr. Thomason has made no attempt to show that a non-borrower could obtain a loan modification, meaning he could not show he was qualified to participate in the transaction. See id. Thus, summary judgment for the defendants was proper on these claims.

V. MOTION FOR RECONSIDERATION

For a Rule 59(e) motion to be granted, a party must identify "newly-discovered evidence or manifest errors of law or fact." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (per curiam) (quotation marks omitted). Further, "[t]he decision to alter or amend judgment is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion." Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc., 763 F.2d 1237, 1238–39 (11th Cir. 1985)

Here, Mr. Thomason did not offer any new facts or arguments of merit to demonstrate the District Court erred, and merely reiterated the previous arguments made in his pleadings. Thus, any appeal of the District Court's denial of Mr. Thomason's motion for reconsideration would be without arguable merit.

VI. LEAVE TO AMEND THE COMPLAINT

A District Court may deny leave to amend "in the exercise of its inherent power to manage the conduct of litigation before it." Reese v. Herbert, 527 F.3d 1253, 1263 (11th Cir. 2008). Denial of leave to amend is reviewed for abuse of discretion. Burger King Corp. v. Weaver, 169 F.3d 1310, 1315 (11th Cir. 1999). However, "where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001) (quotation marks omitted).

After this case was remanded to the District Court, Mr. Thomason filed an amended complaint, and then filed a further amended complaint that was drafted with the help of volunteer legal assistance. The defendants moved to dismiss the latest complaint, and Mr. Thomason then sought leave to amend so he could reincorporate claims from his previous pleadings and attach 59 new exhibits.

The District Court did not abuse its discretion in denying leave to amend. Mr. Thomason had already been given more than one opportunity to amend his

complaint. See id. To the extent he sought leave to incorporate claims from earlier complaints, this Court already affirmed the dismissal of his prior HAMP and HAFA claims, so he could not re-plead those claims. See Thomas v. United States, 572 F.3d 1300, 1303 (11th Cir. 2009) ("Under the law of the case doctrine, both district courts and appellate courts are generally bound by a prior appellate decision in the same case." (quotation marks omitted)). Further, to the extent Mr. Thomason sought to attach the exhibits to his amended complaint so as to be considered in response to the motions to dismiss, the Magistrate Judge reviewed the 59 exhibits Mr. Thomason sought to attach and found that they were not appropriate for review on a Rule 12(b)(6) motion. See Day v. Taylor, 400 F. 3d 1272, 1276 (11th Cir. 2005) ("[A] court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed."). Because those documents would have played no role in the District Court's consideration of the motions to dismiss, Mr. Thomason was not prejudiced by the denial of leave to amend further.

Thus, any appeal of the District Court's denial of Mr. Thomason's motion for leave to amend would be without arguable merit.

VII. DISCOVERY MOTION

This Court reviews the denial of a discovery motion for abuse of discretion. Moorman v. UnumProvident Corp., 464 F.3d 1260, 1264 (11th Cir. 2006). This Court "will not overturn discovery rulings unless it is shown that the District Court's ruling resulted in substantial harm to the appellant's case." Iraola & CIA, S.A. v. Kimberly-Clark Corp., 325 F.3d 1274, 1286 (11th Cir. 2003) (quotation marks omitted).

The District Court entered an order directing that all discovery should be completed on or before September 5, 2017. Mr. Thomason's discovery request seeking a defendant employee's contact information was filed on September 5, 2017, meaning the defendant could not reasonably respond before the end of discovery. Thus the District Court did not err in finding the motion was untimely. Further, Mr. Thomason provided no information as to the relevance of the information sought, or otherwise state why it was necessary, meaning he has not shown substantial harm. There would be no arguable merit in an appeal of the District Court's order denying Mr. Thomason's discovery motion.

VIII. CONTEMPT

A party may be sanctioned, including by finding that party in contempt, if it fails to comply with a court order. See Fed. R. Civ. P. 37(b)(1); see also Serra Chevrolet, Inc. v. Gen. Motors Corp., 446 F.3d 1137, 1147 (11th Cir. 2006) ("Civil

contempt may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. A finding of a failure to comply with discovery orders is a finding of civil contempt." (citation and quotation marks omitted)). A District Court's decision on whether to find a party in contempt is reviewed for abuse of discretion. Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991).

Mr. Thomason alleged OneWest and Ocwen produced a false offer of a loan modification. However, other than his claim that he had not seen the offer before, he provided no evidence to show the document was fabricated or known to be false. He next argued the defendants violated a consent order from a California case by not turning the document over to him sooner. But Mr. Thomason did not point to any order by the District Court in this case that defendants had violated. Therefore Mr. Thomason would be unable to show the District Court abused its discretion by denying his motion for contempt.

IX. CONCLUSION

Any appeal in this case would lack arguable merit, meaning Mr. Thomason's request to proceed IFP is DENIED. See Napier, 314 F.3d at 531.

Barbara B. Martin
UNITED STATES CIRCUIT JUDGE

B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

STEVEN THOMASON,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	2:12cv604-MHT
	)	(WO)
ONE WEST BANK, FSB, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the memorandum opinion entered today, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Plaintiff's objections (doc. no. 111) are overruled, except to the extent set forth in the opinion entered today.

(2) Defendants' objections (doc. nos. 109 & 110) are overruled with leave to renew the arguments at the summary-judgment stage.

(3) The United States Magistrate Judge's recommendation (doc. no. 108) is adopted, with the

exception set forth in the opinion entered today.

(4) Defendants' motions to dismiss (doc. nos. 93, 94, & 99) are granted in part, without prejudice, and denied in part, as follows:

(a) The motions to dismiss are denied as to plaintiff's claims pursuant to the Real Estate Settlement Procedures Act, 12 U.S.C § 2601.

(b) The motions to dismiss are granted as to plaintiff's claims brought pursuant to the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a); the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a; the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 and 18 U.S.C. § 1341; and the Alabama Deceptive Trade Practices Act, 1975 Ala. Code §§ 8-19-1 et seq.

(c) The motions to dismiss are denied as to plaintiff's claims brought pursuant to 42 U.S.C. §§ 1981 & 1982.

(d) The motions to dismiss are granted as to plaintiff's claims under the Fair Housing Act, 42

U.S.C. § 3605, with respect to the loan origination proceedings.

(e) The motions to dismiss are denied as to plaintiff's claims under the Fair Housing Act, 42 U.S.C. § 3605, with respect to any loan modification proceedings occurring after March 3, 2013.

(5) Plaintiff's motion for leave to amend the complaint (doc. no. 98) is denied without prejudice.

(6) Defendant Eva Bank's motion to strike affidavit (doc. no. 104) is granted to the extent it requests the court disregard the affidavit (doc. no. 102-1) attached to plaintiff's response brief (doc. no. 102).

(7) Plaintiff's motion for leave to file an affidavit and motion for summary judgment (doc. no. 105) are denied without prejudice.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

This case is not closed, and is referred back to

the magistrate judge for further proceedings.

DONE, this the 22nd day of March, 2017.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13205-J

STEVEN THOMASON,

Plaintiff-Appellant,

versus

ONE WEST BANK, FSB, INDY MAC BANK,
MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.,
EVA BANK,
DEUTSCHE BANK NATIONAL TRUST COMPANY,
OCWEN LOAN SERVICING, LLC,

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Alabama

Before: MARCUS, WILSON and JULIE CARNES, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED, *sua sponte*, for lack of jurisdiction.

Plaintiff-Appellant Steven Thomason appeals from the district court's June 8, 2017 order overruling his objection to a magistrate's judge's May 16, 2017 order, which denied Mr. Thomason's request for certain discovery. No final judgment has been entered in the case, as several claims survived the motions to dismiss, and discovery is proceeding. In any event, the court's order denying discovery is not immediately appealable as a collateral order. *See Doe No. 1 v. United States*, 749 F.3d 999, 1004 (11th Cir. 2014). Rather, this order is reviewable in an appeal from the final judgment, and Thomason can challenge it then. *See Rouse Constr. Int'l,*

Inc. v. Rouse Constr. Corp., 680 F.2d 743, 745 (11th Cir. 1982); *Plaintiff A v. Schair*, 744 F.3d 1247, 1252-53 (11th Cir. 2014).

Accordingly, this appeal is hereby dismissed for lack of jurisdiction. *See* 28 U.S.C. § 1291. All outstanding motions are DENIED as moot. Nothing in this order shall prevent Mr. Thomason from filing an appeal from any final or otherwise appealable order of the district court. No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir. R. 27-2 and all other applicable rules.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

STEVEN THOMASON,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	2:12cv604-MHT
	)	(WO)
ONE WEST BANK, FSB, INDY MAC BANK, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the memorandum opinion entered today, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Plaintiff's objections (doc. no. 212) are overruled.

(2) The United States Magistrate Judge's recommendation (doc. no. 205) is adopted.

(3) Defendants' motions for summary judgment (doc. nos. 175 & 182) are granted.

(4) Plaintiff's motion for summary judgment (doc. no. 186) is denied.

(5) All other pending motions are denied as moot.

(6) Judgment is entered in favor of defendants and against plaintiff, with plaintiff taking nothing by his complaint.

It is further ORDERED that costs are taxed against plaintiff, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

This case is closed.

DONE, this the 26th day of March, 2018.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

A copy of this checklist is available at the website for the USCA, 11th Circuit at www.ca11.uscourts.gov
Effective on December 1, 2013, the fee to file an appeal is $505.00

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. § 1291:** Final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. § 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983) (citing *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(b); *Perez-Priego v. Alachua County Clerk of Court*, 148 F.3d 1272 (11th Cir. 1998). However, under 28 U.S.C. § 636(c)(3), the Courts of Appeals have jurisdiction over an appeal from a final judgment entered by a magistrate judge, but only if the parties consented to the magistrate's jurisdiction. *McNab v. J & J Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b). *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201, 108 S.Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. § 1292(a):** Under this section, appeals are permitted from the following types of orders:
      i. Orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions; However, interlocutory appeals from orders denying temporary restraining orders are not permitted. *McDougald v. Jenson*, 786 F.2d 1465, 1472-73 (11th Cir. 1986);
      ii. Orders appointing receivers or refusing to wind up receiverships; and
      iii. Orders determining the rights and liabilities of parties in admiralty cases.

   (d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P. 5:** The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93

L.Ed. 1528 (1949); *Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. *Rinaldo v. Corbett*, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

(a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the order or judgment appealed from is entered. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD – no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P. 4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P. 4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend or reopen the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time to file an appeal may be reopened if the district court finds, upon motion, that the following conditions are satisfied: the moving party did not receive notice of the entry of the judgment or order within 21 days after entry; the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice, whichever is earlier; and no party would be prejudiced by the reopening.

(e) **Fed.R.App.P. 4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. *See also* Fed.R.App.P. 3(c). A *pro se* notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court lacks jurisdiction, *i.e.*, authority, to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

STEVEN THOMASON,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	2:12cv604-MHT
	)	(WO)
ONE WEST BANK, FSB, INDY MAC BANK, et al.,	)	
	)	
Defendants.	)	

OPINION

Plaintiff filed this lawsuit asserting various claims arising from the handling of his "application for a loan modification" by one of the defendants. This lawsuit is now before the court on the recommendation of the United States Magistrate Judge that defendants' motions for summary judgment should be granted and plaintiff's motion for summary judgment denied. Also before the court are plaintiff's objections to the recommendation. After an independent and de novo review of the record, the court concludes

that plaintiff's objections should be overruled and the magistrate judge's recommendation adopted.

An appropriate judgment will be entered.

DONE, this the 26th day of March, 2018.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

STEVEN THOMASON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 2:12-cv-604-MHT-TFM**
	)	**[wo]**
ONE WEST BANK, FSB, et. al.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

I. Introduction

Pursuant to 28 U.S.C. § 636(b)(1), this case was referred to the undersigned United States Magistrate Judge for review and submission of a report with recommended findings of fact and conclusions of law. (Docs. 4, 78). Pending before the Court is:

(1) Defendant Eva Banks's Motion for Summary Judgment (Doc. 175, filed 10/05/2017)

(2) Defendants', One West Bank, FSB ("OWB") [1], Ocwen Loan Servicing, LLC ("Ocwen", Deutsche Bank National Trust Company as trustee for Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2006-A, Home Equity Mortgage

[1] OWB is improperly identified by Plaintiff in the Amended Complaint as "One West Bank, FSB, Indy Mac Bank". OWB states for purposes of its Motion for Summary Judgment that it has treated Plaintiff's allegations against "IndyMac Mortgage Services" as directed at OWB, since Indy Mac Mortgage was a division of OWB. However, Indy Mac Mortgage Services, is a separate legal entity from the now-defunct Indy Mac Bank, FSB, which has not been served with process in this action. (Doc 183 at p.1, fn.1). Indeed, the FDIC advised Plaintiff by letter of November 1, 2012, that "[a]lthough not properly served" the FDIC had been appointed receiver for Indy Mac Bank, FSB which "no longer exists as a legal entity". (Doc. 197-34).

Loan Asset-Backed Certificates Series INABS 2006-A ("Deutsche Bank")[2] and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively referred to as "Defendants") Motion for Summary Judgment (Doc. 182, filed 10/16/2017) and Brief in Support (Doc. 183, filed 10/16/17);

(3) Plaintiff's Motion for Summary Judgment with Attachments (Doc. 186, Exs. 1-57 filed 10/16/2017) and Brief in Support (Doc. 196, filed 11/28/2017) and Amended Appendix of Attachments. (Doc. 197, Exs. 1-75).

II. FACTUAL BACKGROUND

On October 19, 2005, Ms. Thomason, Plaintiff's wife, sought assistance in applying for a mortgage loan with Lucious Trimble and his brokerage, Chase Mortgage Company[3] to purchase a home at 901 Seibles Road in Montgomery, Alabama. (Doc. 175, Eva Bank MSJ, Thomason Depo., Ex. 1 at pp. 129-130; Ex. 4 at pp.1-5 and 8-9). Previously in 2005, Wachovia Bank foreclosed on a loan taken out solely in Plaintiff's name on property located at Alamont Drive in Montgomery, Alabama. (Doc. 175, Eva Bank MSJ, Ex. 5A). Because of the foreclosure's negative effect on Plaintiff's credit, he could not qualify to obtain another mortgage loan at that time. (Doc. 175, Eva Bank MSJ, Ex. 1 Thomason Depo. at pp. 70-71, 81-83; Ex 2. Affidavit of Thomas Russell).

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[2] Deutsche Bank is improperly identified in the Amended Complaint as "Deutsche Bank National Trust Company."

[3] EvaBank maintains that neither Trimble nor Chase acted on behalf of EvaBank and that EvaBank exercised no control or direction over him or his brokerage. (Eva Bank MSJ, Doc. 175, Ex. 2 Affidavit of Thomas Russell.)

Thereafter, on November 28, 2005, Ms. Thomason individually borrowed $78,375.00 from EvaBank ("the Loan") pursuant to two promissory notes. (Doc. 183, Defendants' Brief in support of MSJ, Ex. 2-A). Plaintiff did not sign the notes, did not borrow any money from EvaBank, undertook no obligation to repay the same, and was not a borrower under the terms of the notes. *Id.* To secure the Loan, Ms. Thomason and Plaintiff signed two mortgages to MERS, as nominee for EvaBank and its successors and assigns. (Doc. 183, Defendants' Brief in support of MSJ, Ex. 2-B). Plaintiff signed the mortgages solely as an accommodation mortgagor, as the Seibles Road Property was to be his and Ms. Thomason's residence. *Id.* Both mortgages specifically state as follows:

> "any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of Security Instrument or the Note without the co-signer's consent"

Id. at ¶13 (first mortgage), ¶11 (second mortgage). In November 2005, Eva Bank sold the Plaintiff's mortgage to Indy Mac Bank. (Doc. 89 at ¶18).

The Loan subsequently fell into various degrees of default. (Doc. 183, Defendants' Brief in support of MSJ; Affidavit of Katherine Ortwerth, Ex. 2 at ¶13). Over the following years, Ms. Thomason was provided with two separate loan modification offers. Ms. Thomason never applied for a loan modification with Eva Bank; rather she applied to Indy Mac Bank in 2007, but was denied. (Amended Complaint, Doc. 89 at ¶¶ 22-23). Later in July 2008, Ms. Thomason was offered a loan modification, and a second loan modification was offered in June 2009. (Doc. 183,

Defendants' Brief in support of MSJ, Ex. 2-D). Ms. Thomason accepted the 2008 modification offer and returned the necessary paperwork to implement the same. *Id.* The signed documents necessary to accept the subsequent 2009 modification offer were never returned. (Doc. 183, Defendants' Brief in support of MSJ; Affidavit of Katherine Ortwerth, Ex. 2 at ¶13). Ms. Thomason passed away in October 2009. Payments continued on the Loan for a year after Ms. Thomason's death but eventually ceased. The last payment on the Loan was made on November 4, 2010 and was applied to the payments due on August 1 and September 1, 2010. (Doc. 183, Defendants' Brief in support of MSJ, Affidavit of Katherine Ortwerth, Ex. 2 at ¶ 14; Ex. 2-C).

The record includes a March 24, 2010 copy of a letter from Plaintiff addressed to Indy Mac Mortgage Services wherein Plaintiff advised of his wife's death. However, there is no confirmation in the record of its mailing by Plaintiff or of its receipt by IndyMac Mortgage Services. (Doc. 186-16, Plaintiff's Motion for Summary Judgment). The record also includes a November 30, 2011 copy of a letter wherein Plaintiff advised he had faxed a copy of his wife's death certificate and responded that he did not need to respond to the request for executor of estate because he was a borrower on the original loan. Again, however, there is no confirmation in the record of its mailing by Plaintiff or of its receipt by any Defendant. Moreover, the letter contains no indication of the addressee. (Doc. 197-29, Plaintiff's Motion for Summary Judgment).

Plaintiff claims that these and other letters are qualified written requests ("QWRs") under the Real Estate Setttlement Procedures Act ("RESPA"). (Amended Complaint, Doc. 89 at ¶¶ 53, 56, 76, 77, 100). Specifically, Plaintiff claims to have sent QWRs dated November 30, 2011,

March 24, 2012,[4] May 10, 2012, and June 4, 2012 to IndyMac Mortgage, and QWRs dated January 28, 2015 and February 4, 2015 to Ocwen. (*Id.*; Doc. 196 at pp. 13-20, Plaintiff's Motion for Summary Judgment). Plaintiff admits that none of the alleged QWRs were sent to MERS or Deutsche Bank. (Defendants' Brief in support of MSJ, Doc. 183; Ex. 1 Thomason Depo. at pp. 331, 336, 352).

On November 1, 2013, servicing of the Loan transferred to Ocwen. (Doc. 183, Defendants' Brief in support of MSJ, Ex. 2-E). On April 14, 2015, Ocwen sent Plaintiff a family transfer package for the Loan. (Doc. 183, Defendants' Brief in support of MSJ, Ex. 2-J). Plaintiff never returned the Family Transfer Package needed to transfer the Loan into his name. (Doc. 183, Defendants' Brief in support of MSJ; Affidavit of Katherine Ortwerth, Ex. 2 at ¶25; Ex. 1 Thomason Depo. at 390, 392). However, Plaintiff was aware that he needed to complete the Family Transfer Package in order to receive a loan modification, but testified that he did not return the package because he did not trust the companies. (Doc. 183, Defendants' Brief in support of MSJ; Ex. 1 Thomason Depo. at 390, 392).

When questioned about the reasons stated by IndyMac Mortgage and Ocwen for not giving him a loan modification, Plaintiff testified that "[t]he reason that we've cleared today on the record was that I wasn't on the note . . . It had nothing to do with my income . . . But they've already said that I didn't qualify because I wasn't on the loan." (Doc. 183, Defendants' Brief in support of MSJ; Ex. 1 Thomason Depo. at 534). In fact, Plaintiff acknowledged as early as May 2012 that he was

[4] The Court has carefully reviewed the record and fails to find any correspondence from Plaintiff dated March 24, 2012. Thus, the Court understands that Plaintiff has mistakenly referenced the correspondence dated March 24, 2010.

advised by letter he could not obtain a loan modification because he was not a borrower on the Loan. (Doc. 186-19, Plaintiff's Motion for Summary Judgment; Doc. 183, Defendants' Brief in support of MSJ; Ex. 1 Thomason Depo. at 301-302). Plaintiff also admits in his pleadings that he "was told by Indy Mac that he was not approved for the loan modification because he was not named on the note on the first mortgage." (Amended Complaint, Doc. 89 at ¶ 48). Because Plaintiff never became a borrower under the Notes, he has not been approved for or offered a loan modification or other loss mitigation assistance. (Doc. 183; Defendants' Brief in support of MSJ; Affidavit of Katherine Ortwerth, Ex. 2 at ¶26).

III. Procedural History

On July 11, 2012, Plaintiff filed a Complaint with this Court alleging various claims arising from Defendant OWB's handling of his "application for a loan modification". (Doc. 1). OWB filed a Motion to Dismiss the Complaint. (Doc. 6). A Report and Recommendation was entered wherein it recommended granting the Motion to Dismiss and dismissing the Complaint with prejudice. (Doc. 15). Thereafter, Plaintiff filed a Motion to Amend the Complaint to add additional claims and parties. (Doc. 17). A Supplemental Report and Recommendation was entered which recommended denying Plaintiff's Motion to Amend the Complaint. (Doc. 27). By Opinion and Judgment, the Court adopted both the initial Recommendation and the Supplement Recommendation, dismissing Plaintiff's Complaint with prejudice and denying Plaintiff's Motion to Amend. (Docs. 30, 31).

Plaintiff appealed the dismissal to the Eleventh Circuit. (Doc. 32). On December 16, 2014, the Eleventh Circuit entered its opinion affirming the dismissal of Plaintiff's Complaint, but

reversing the denial of Plaintiff's motion to amend and remanding "with instructions to the district court to allow Mr. Thomason to amend his RESPA claim and to address the proposed new claims and defendants." (Doc. 42 at p. 12). On remand, the Court entered an order requiring Plaintiff to file an amended complaint setting out the factual allegations that supported his claims and adding any new defendants. (Doc. 44). In his Amended Complaint, Plaintiff added MERS, Ocwen, Deutsche Bank, and EvaBank as parties and stated various causes of action. (Doc. 49). On April 3, 2015, OWB, Ocwen, Deutsche Bank and MERS filed a Motion to Dismiss the Amended Complaint pursuant to Rules 8 and 12(b)(6) of the Federal Rules of Civil Procedure. (Doc 56). On April 17, 2015, Eva Bank also filed a Motion to Dismiss the amended complaint or to require a more definite statement. (Doc. 66). Thereafter, the Court entered an Order denying Defendant's Motions to Dismiss with leave to renew but requiring Plaintiff to amend his Complaint once again to set forth a more definite, comprehensible statement of the case. (Doc. 78).

The Court also referred Plaintiff to the Pro Se Assistance Program5 for aid in drafting an amended complaint that complied with the Court's orders and the Federal Rules of Civil Procedure. (Docs. 76 and 79). On June 10, 2016, Plaintiff filed his most recent Amended Complaint. (Doc. 89). The Amended Complaint was essentially a restatement of the factual allegations contained in the previous filings regarding unlawful discrimination, civil rights violations, conspiracy and bank fraud. Plaintiff incorporated these allegations into another claim

[5] PSAP provides assistance to unrepresented plaintiffs from volunteer attorneys in preparing an amended complaint. The volunteer attorney does not ultimately represent the plaintiff, but will assist the plaintiff in drafting an amended complaint.

for civil rights violations and discrimination, as well as claims for violation of the ECOA, RESPA, FHA, FDCPA ADTPA, and RICO. Thereafter, Defendants OWB, Ocwen, Deutsche Bank and MERS filed another Motion to Dismiss (Doc. 93) and Defendant Eva Bank also filed another Motion to Dismiss. (Doc. 94).

By Opinion and Judgment entered on March 22, 2017, the District Judge adopted the March 1, 2017 Recommendation, with exception. (Docs. 108, 112 and 113). The Court's Opinion and Judgment on Defendants' Motion to Dismiss dismissed Plaintiff's claims under the ECOA, FDCPA, RICO, and ADTPA. *Id.* The Court also dismissed Plaintiff's FHA claim with respect to allegations concerning loan origination and with respect to modification proceedings occurring before March 3, 2013. *Id.* Accordingly, the Court ruled that the claims surviving the Motions to Dismiss were as follows:

1) Claims for violations of the Real Estate Settlement Procedures Act. 12 U.S.C §2601 ("RESPA");
2) Claims for racial discrimination brought pursuant to 42 U.S.C. §§ 1981 and 1982;
3) Claims brought pursuant to the Fair Housing Act, 42 U.S.C. §3605, ("FHA') with respect to any loan modification proceedings occurring after March 3, 2013.

(Doc. 113 at pp. 2-3).

On April 14, 2017, the Court issued an Order requiring the parties to file a discovery plan pursuant to the Federal Rules of Civil Procedure, Rule 26(f). (Doc. 114). Thereafter, in accordance with the Court's Order, the Defendants submitted a Rule 26 (f) Report which they stated "was provided to the Plaintiff and he was asked for his views and proposals, but he did not

respond." (Doc. 115). On May 5, 2017, the Court entered an Order requiring that discovery "*shall be completed* on or before September 5, 2017" and that dispositive motions be filed on or before October 16, 2017. (Doc. 116). (Emphasis added). On June 2, 2017, Plaintiff served his first set of requests for admission to the Defendants. (Doc. 129). This was the only discovery taken by Plaintiff; he did not timely or properly issue any additional written discovery, nor did he take any depositions or issue any third-party subpoenas. Indeed, on September 21, 2017, the Court denied Plaintiff's Motion for Discovery filed on September 5, 2017 (Doc. 152) on the basis that is was filed outside the time for completion of discovery. (Doc. 168).[6]

VI. Standard of review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." This standard can be met by the movant, in a case in which the ultimate burden of persuasion at trial rests on the nonmovant, either by submitting affirmative evidence negating an essential element of the nonmovant's claim, or by demonstrating that the nonmovant's evidence itself is insufficient to establish an essential element of his or her claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Jeffery v Sarasota White Sox, Inc.,* 64 F.3d 590, 593 (11th Cir. 1995); *Edwards v. Wallace Cmt'y Coll.,* 49 F.3d 1517, 1521 (11th Cir. 1995). The burden then shifts to the nonmovant to make a showing sufficient to establish the existence of an essential element of his claims, and on which he bears the burden of proof at trial.

[6] The Guidelines to Civil Discovery Practice in the Middle District of Alabama I. (H) state "[t] Court applies the discovery cutoff to mean that discovery must be completed by that date."

Id. To satisfy this burden, the nonmovant cannot rest on the pleadings, but must, by affidavit or other means, set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e).

The court's function in deciding a motion for summary judgment is to determine whether there exist genuine, material issues of fact to be tried; and if not, whether the movant is entitled to judgment as a matter of law. *See Dominick v. Dixie Nat'l Life Ins. Co.,* 809 F.2d 1559 (11th Cir. 1987). It is substantive law that identifies those facts which are material on motions for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 258 (1986); *See also DeLong Equip. Co. v. Washington Mills Abrasive Co.,* 887 F.2d 1499 (11th Cir. 1989).

When the court considers a motion for summary judgment, it must refrain from deciding any material factual issues. All the evidence and the inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Earley v. Champion Int'l Corp.,* 907 F.2d 1077, 1080 (11th Cir. 1990). *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The movant bears "the exacting burden of demonstrating that there is no dispute as to any material fact in the case."

V. Discussion and Analysis

A. The RESPA Claim (Count 3)

Plaintiff has filed an amended RESPA claim wherein he alleges that "Defendants, OneWest Bank, FSB Indy Mac Bank [and] Ocwen Loan Servicing"[7] "violated" his multiple qualified

[7] Plaintiff does not bring a RESPA claim against Eva Bank. (Doc. 89 at ¶ 100; Doc. 108 at p. 15 fn. 5) Indeed, the Court notes that Defendant Eva Bank was not the servicer of the loan; and therefore, Plaintiff has no RESPA claim against Eva Bank.12 U.S.C. §2605(e)(1)(B) and (f).

written requests dated November 30, 2011, March 24, 2012, May 10, 2012, and June 4, 2012, to Indy Mac Mortgage and qualified written requests dated January 28, 2015 and February 4, 2015 to Ocwen[8] because they "denied Plaintiff's ownership of property" which lead to "discriminating against borrowers on a prohibited basis in approving or denying loan modifications." (Doc. 89 ¶¶ 53, 56, 76, 77, 100). Under RESPA, a "qualified written request" is defined as the following:

> A "qualified written request" is defined as a "written correspondence . . . that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower . . . that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower."

(Doc. 42 p. 9 citing 12 U.S.C. § 2605(e)(1)(B)). Furthermore, a servicer is obligated to respond to a written request from a borrower within sixty days of receipt of the qualified written request. *Id.* citing 12 U.S.C. § 2605(e) (2). If a servicer fails to comply with its obligations under RESPA or its regulations, plaintiff can recover "any actual damages to the borrower as a result of the failure." 12 U.S.C. §1605(f)(1)(A). Thus, under RESPA "[w]hoever fails to comply . . . shall be liable *to the borrower* for each such failure." 12 U.S.C. §1605(f). Moreover, in order for Plaintiff to succeed on a claim for a RESPA violation, Plaintiff must produce sufficient evidence of actual damages caused by the servicer's failure to comply with RESPA in responding to the request for information relating to her mortgage loan. *See Baez v. Specialized Loan Servicing,* 2017 WL 4220292 *1 (11th Cir. 2017) (Granting summary judgment in favor of servicer on RESPA claim because Plaintiff, borrower, had not demonstrated "actual damages.")

[8] For purposes of this analysis, the Court assumes without deciding that Plaintiff's letters to Defendants satisfied the "qualified written request" requirements.

Plaintiff alleges that Defendants failed to respond to his written requests which resulted in his inability to get a loan modification for his home following the death of his wife. In order to have standing to bring a claim under RESPA, Plaintiff must have an obligation under the note. *Johnson v. Ocwen Loan Servicing*, 374 F. App'x. 868, 874 (11th Cir. 2010) (Plaintiff did not have standing under RESPA because he "was not a borrower or otherwise obligated on the Ocwen loan and, therefore, did not suffer an injury-in-fact."); *Shedd v. Wells Fargo Home Mortg. Inc.*, 2015 WL 6479537 at *3-4. (S.D. Ala. 2015) (Plaintiff did not have standing under RESPA "because he did not sign, and therefore was not obligated to repay, the promissory note.") The evidence before the Court is undisputed that only Ms. Thomason, and not Plaintiff, signed the promissory notes in this case. (Doc. 183; Defendants' Brief in support of MSJ, Ex. 2-A). Thus, on this basis alone the Court could conclude that Plaintiff lacks standing to bring a RESPA claim. However, the Court will assume without deciding for the sake of providing a thorough analysis that Plaintiff might be considered a borrower on the promissory notes and on that basis will consider whether the Plaintiff has standing to bring this RESPA claim.

To establish standing a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Yeager v. Ocwen Loan Servicing, LLC,* 237 F. Supp. 3d 1211, 1215 (M.D. Ala. 2017) (quoting *Spokeo, Inc. v. Robins,* __U.S.__, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). "To establish injury in fact, a plaintiff is required to show that he or she 'suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *Id.* at 1215-16. "To be concrete, the injury must be 'real', and

not 'abstract.'" *Id.* at 1216. While the injury need not be tangible, Plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation." *Spokeo,* 136 S. Ct. at 1550. Moreover, under RESPA, it is well-settled that Plaintiff must establish "a causal link between the claimed damages and defendant's alleged RESPA violation." *Tallent v. BAC Home Loans,* 2013 WL 2249107 *2-5 (N.D. Ala. 2013) (Plaintiffs' allegations that Defendant instituted foreclosure proceedings on home insufficient to establish actual damages).

Plaintiff alleges that the Defendants failed to respond or failed to respond sufficiently to his QWR's and as a result he was denied a modification on a loan to which he was not a party. However, there is no evidence before the Court that this alleged failure caused Plaintiff any harm. Indeed, Plaintiff testified that Defendant's failure caused him "stress" and "almost cost . . . [him his] home because by not responding they moved ahead with foreclosure." (Doc. 183, Defendants' Brief in support of MSJ, Ex. 1, Thomason Depo. at 421). These alleged damages, however, do not satisfy the concrete injury requirement under *Spokeo* or the actual injury requirement under RESPA. Furthermore, these allegations in no way demonstrate that the Defendant's alleged deficient response "prevented . . . [Plaintiff] from taking some important action." *Bates v. JPMorgan Chase Bank, NA.,* 768 F. 3d 1126 (11th Cir. 2014) (Summary judgment granted in favor of Defendant bank on RESPA claim because Plaintiff failed to demonstrate harm). Thus, the Court concludes that Plaintiff has failed to present sufficient evidence to create a question of fact as to his allegations of damages. Accordingly, the Court concludes that Defendants' Motion for Summary judgment is due to be granted on Plaintiff's RESPA claim.

B. The 42 U.S.C. §§ 1981, 1982 Claims (Count 2)

Plaintiff also brings claims for civil rights violations pursuant to 42 U.S.C. §§ 1981 and 1982. Specifically, Plaintiff claims that he was denied a loan modification based on his race. (Doc. 89 pp. 23-24). Section 1981 states

> "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1981(a). Section 1982 then states that

> "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

42 U.S.C. § 1982 (2012).

Under Sections 1981 and 1982, a "plaintiff must prove intentional discrimination by the defendants." *Latimore v. Citibank, F.S.B.*, 979 F. Supp. 662, 664 (N.D. Ill 1997)[9]; *see also Boyd v. Walgreen Co.*, 2006 WL 2239192 at *3 (M.D. Ala. Aug 4, 2006) citing *Brown v. Am. Honda Motor Co.*, 393 F.2d 946, 949 (11th Cir.1991) and *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1338, 1235 (11th Cir. 2000). "Adopting the burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the courts have articulated the same prima facie requirements for [both Sections 1981 and 1982.]" *Latimore*, 979 F. Supp. at 664-65.

9 The Court recognizes that a district court case from another district is only persuasive authority. However, the Court cites *Latimore* because the facts of that case – alleged discrimination in the loan application process – are almost identical to the facts of the instant action.

> Thus, in a case where the plaintiff alleges that her loan application was discriminatorily denied, she must prove (1) that she is a member of a protected class, (2) that she applied for and was qualified for a loan, (3) that the loan was rejected despite her qualifications, and (4) that the defendants continued to approve loans for applicants with qualifications similar to those of the plaintiff.

Id. at 665 citing *Bell v. Mike Ford Realty Co.,* 857 F. Supp. 1550, 1556 (S.D. Ala. 1994); *see also Terry Properties, Inc., v. Standard Oil Co.,* 799 F.2d 1523, 1534 (11th Cir. 1986).

The Court does not understand Plaintiff to bring a claim for discrimination based on the origination of this loan. However, any claim for discrimination based on the origination of the loan would fail because Plaintiff has presented no evidence that he was denied based on his race. Indeed, the undisputed evidence before the Court indicates that in 2005, prior to the transaction which is the subject of this action, Wachovia Bank foreclosed on a loan taken out solely in Plaintiff's name on property located at Alamont Drive in Montgomery, Alabama. (Doc. 175, Eva Bank MSJ; Ex. 5A). Because of the foreclosure's negative effect on Plaintiff's credit, he could not qualify to obtain another mortgage loan at that time. (Doc. 175, Eva Bank MSJ, Ex. 1 Thomason Depo. at pp. 70-71, 81-83; Doc. 175-1, Ex. Affidavit of Thomas Russell, Ex. 2). Thus, on November 28, 2005, Ms. Thomason individually borrowed $78,375.00 from EvaBank ("the Loan") pursuant to two promissory notes. (Doc. 183, Defendants' Brief in support of MSJ, Ex. 2-A). Therefore, the Court concludes that Plaintiff fails to make a prima facie case of discrimination based on the origination of the loan.

With respect to Plaintiff's claim that he was discriminated against because he was denied a loan modification following his wife's death, the undisputed evidence before the Court demonstrates that Plaintiff did not execute the Notes and did not borrow any money from EvaBank.

Rather, Plaintiff's wife is the sole borrower on the loan. (Doc. 183, Defendants' Brief in support of MSJ, Ex. 2-A). The undisputed evidence before the Court also demonstrates that the reason Plaintiff was not approved for or offered a loan modification was because he did not sign the Notes and thus, had not assumed any responsibility for the loan. (Doc. 183, Defendants' Brief in support of MSJ, Ex. 2, Ortwerth Aff., ¶¶24-27. Indeed, Plaintiff testified in deposition that he was not given a loan modification because "[t]he reason that we've cleared today on the record was that I wasn't on the note . . . It had nothing to do with my income . . . But they've already said that I didn't qualify because I wasn't on the loans." (Doc. 175, Eva Bank MSJ, Ex. 1 Thomason Depo. at pp. 534:11-17.) Later Plaintiff again testified, "Ocwen told me I wasn't on the note as to why they were not modifying [the Loan]." *Id.* at. p. 537:14-15. Thus, the Court concludes Plaintiff fails to create a prima facie case of discrimination with respect to the loan modification because Plaintiff fails to demonstrate that he was qualified for the loan.

Plaintiff fails to meet his prima facie burden to establish discrimination for another reason as well. Indeed, Plaintiff has produced no evidence that other similarly situated applicants – that is non-minority applicants who are surviving non-borrowing spouses – were approved for loan modifications. Plaintiff testified in deposition that his evidence of intentional discrimination was outlined in his Amended Complaint (Doc. 175, Eva Bank MSJ, Ex. 1 Thomason Depo. at pp. 413:11-16.). However, the Amended Complaint, while not evidence, fails to contain even simple allegations of similarly situated applicants receiving loan modifications. (Doc. 89). Indeed, Plaintiff testified that he did not have any evidence to support his discrimination claims but would find some during discovery. Specifically, Plaintiff testified as follows:

> Q. And as we sit here today, you can't direct me to any examples of husbands who are not African-American, so who are Caucasian husbands, whose wives died and they were given loan modifications? You don't have any of those as we sit here today?
>
> A. As we sit here today, no, but I am informing you that your discovery package has about a hundred questions related to that very issue where I am requesting those documents.

(Doc. 175, Eva Bank MSJ, Ex. 1 Thomason Depo. at pp. 460:11-20.) Pursuant to this Court's Order of May 5, 2017 discovery closed in this matter on September 5, 2017. (Doc. 116). Plaintiff filed a Notice with this Court of filing Discovery on September 5, 2017. (Doc. 151) Also on September 5, 2017, Plaintiff also filed a cursory Motion for Discovery. In that Motion, Plaintiff sought "information as to employees . . . that handled the modification request for OneWest and Indy Mac Bank . . .therefore request is made that the third parties be disclosed to the court and also be added to the Lawsuit under Joiner {sic} Rules ." (Doc. 152). The Court denied the Motion for Discovery as untimely and further construed the Motion as containing a Motion to Amend the Complaint and denied that as well. (Doc. 168). Plaintiff has failed to adduce any evidence which demonstrates that similarly situated individuals were approved for loan modifications. Indeed, Plaintiff's blanket allegations and his untimely discovery request are insufficient to raise a racial discrimination claim. Therefore, the Court concludes that because Plaintiff fails to meet his prima facie burden, summary judgment is due to be granted on Plaintiffs' claims for discrimination under Sections 1981 and 1982.

C. The Fair Housing Act Claim (Counts 4, 5 and 6)

Plaintiff alleges Defendants violated the Fair Housing Act, 42 U.S.C. § 3605, during the

process of originating the loan and during the process of his repeated attempts to have the loan modified due to the death of this wife. The Court previously concluded that these claims "with respect to any modification proceedings occurring after March 3, 2013" survived Defendants' Motions to Dismiss. Thus, the Court dismissed the Fair Housing Act claim which Plaintiff brought with respect to the loan origination proceedings and any loan modification proceedings occurring before March 3, 2013. (Docs. 108, 113).

Plaintiff alleges that Defendants violated the Fair Housing Act by engaging in "race-based predatory pricing and servicing of home equity loans.[10]" (Doc. 89 at ¶ 105). The Eleventh Circuit has defined this type of FHA claim as "reverse redlining" which is "'the practice of extending credit on unfair terms' because of the plaintiff's race and geographic area." *Steed v. EverHome Mortg. Co.*, 308 F. App'x 364, 368 (11th Cir. 2009) (quoting *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000)). In order to succeed on this claim, Plaintiff must show that specific loan terms offered by Defendants were "unfair and predatory, *and* that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race." *Id.* (Emphasis in original).

To the extent Plaintiff brings this FHA claim for discrimination in the origination process, that claim fails because the Court has previously concluded the origination proceedings fell outside of the statute of limitations and was dismissed. With respect to the FHA claim for discrimination in the modification process, the Court concludes that claim fails for the reasons more specifically

[10] At the outset, the Court notes that Plaintiff is factually incorrect; the loan at issue in this action is not a "home equity loan." (Defendants' Brief in Support of MSJ, Doc. 183, Exs. 2-A and 2-B.)

stated above in Section D. 2 pertaining to Plaintiff's Section 1981 and 1982 claims. Indeed, the undisputed evidence demonstrates that because of previous foreclosure proceedings, Plaintiff could not qualify for the loan at issue and so his wife individually borrowed the money pursuant to two promissory notes. Further, the undisputed evidence demonstrates that Plaintiff did not qualify for a modification because he was not on the loan. *See Molina v. Aurora Loan Servs., LLC.,* 635 F. App.'x 618, 626 (11th Cir. 2015) (FHA claim dismissed where Plaintiff was not otherwise qualified for a loan modification.) Moreover, Plaintiff has failed to show that others, outside the protected class, received preferential treatment in the loan modification process. *Id.* at 625. Additionally, Plaintiff fails to present any evidence that the loan terms were "unfair and predatory" or that he was "intentionally targeted" because of his or that there was "a disparate impact" on the basis of his race. *Steed,* 308 F. App'x at 368. Thus, the Court concludes that summary judgment is due to be granted on Plaintiff's FHA claim.

VI. Conclusion

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the Defendants' Motions for Summary Judgment (Docs. 175 and 182) be GRANTED in full that Plaintiff's Motion for Summary Judgment (Doc. 186) be DENIED and that all other pending motions be DENIED as Moot.

It is further ORDERED that the Plaintiff file any objections to this Recommendation on or before **February 26, 2018.** Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party is objecting. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this

Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); *see Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982); *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

DONE this 12th day of February, 2018.

/s/Terry F. Moorer
TERRY F. MOORER
UNITED STATES MAGISTRATE JUDGE