No. 120763

In the

Supreme Court of Illinois

THE PEOPLE EX. REL. LISA MADIGAN,
Attorney General of Illinois,

Plaintiff-Appellee,

v.

MATTHEW R. WILDERMUTH, GEORGE KLEANTHIS, Individually and as Managing Member of Legal Modification Network, LLC and LEGAL MODIFICATION NETWORK, LLC,

Defendants-Appellants.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-14-3592.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 11 CH 33666.
The Honorable **Diane J. Larsen**, Judge Presiding.

REPLY BRIEF OF DEFENDANTS-APPELLANTS MATTHEW R. WILDERMUTH, GEORGE KLEANTHIS and LEGAL MODIFICATION NETWORK, LLC

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POINTS AND AUTHORITIES

ARGUMENT

In this matter of first impression under Illinois law, this Court must adjudicate several critical issues. In the interest of streamlining the deliberative process, Defendants first respectfully identify certain contentions raised in the Brief of the Plaintiff-Appellee People of the State of Illinois ("Response Br.") and the Amicus Brief of the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. And Other Amici Listed Herein ("Amicus Br.") that the Court need not decide:

- Whether African-American and Hispanic citizens in Illinois historically have been subjected to pervasive discrimination on multiple fronts, including but not limited to acquiring and retaining real property and obtaining financing for same (Response Br. at 30-32; Amicus Br. at 2-6); Defendants do not contest that minorities generally and African-American and Hispanic citizens specifically have been victims of discrimination. That said, none of that anecdotal history is instructive in resolving the instant appeal, particularly where neither Plaintiff nor Amicus cite directly to any authoritative legislative history with respect to the contested provisions of the Illinois Human Rights Act ("IHRA");
- Whether, in the face of significant social crises (whether natural, economic or health-related), unscrupulous actors (including "professionals") prey upon those most adversely affected by such crises (Response Br. at 30-32; Amicus Br. at 7-15); Defendants acknowledge that, historically, such conduct is well-documented;

such general anecdotal commentary, however, is not relevant here, where the issue is not whether laws should be enacted to discourage such behavior but, rather, is the scope of the provisions Illinois legislators already passed and, in doing so, consciously patterned the provisions of the IHRA after the federal civil rights statutes discussed in Defendants' Opening Brief and below; and

- Whether individuals licensed as Illinois attorneys who engage in transactions with consumers in a capacity outside the scope of a traditional attorney-client relationship are subject to regulation under Illinois' consumer protection statutes (Response Br. at 34-36; Amicus Br. at 31-33); previously this Court has suggested that attorneys who are not engaged in the practice of law could be held liable under consumer protection statutes (*cf. Cripe v. Leiter*, 184 Ill. 2d 185, 195 (1998)); critically, the conduct of the attorneys in those cases is readily distinguishable from the instant complaint, in which Plaintiff expressly alleges that each of the "consumer illustration" borrower clients (and all other clients) entered into a traditional attorney-client relationship for Wildermuth and his firm to perform services that, under long-standing Illinois precedent, constitute the "practice of law" – conduct this Court consistently has deemed to be exempt from application of such statutes (*see generally id*).

Though providing some general context the Court may consider when assessing the parties' respective contentions in this appeal, the aforementioned topics should not

distract the Court's focus from the critical legal framework that must be employed to resolve the issues properly presented for review, namely:

A. What facts did Plaintiff competently allege about Defendants' conduct in Count IV of the Fourth Amended Complaint?

B. What specific conduct does § 3-102 of the IHRA prohibit?

C. Whether this Court should accord greater weight to apposite existing precedent from appellate and district courts within the Seventh Circuit interpreting comparable provisions of the federal Fair Housing Act than state and district courts outside Illinois? and

D. Whether applying § 3-102 of the IHRA in the manner Plaintiff and Amicus promote infringes upon this Court's exclusive authority to regulate the conduct of Illinois-licensed attorneys where individual clients retain such attorneys for the express purpose of counseling them regarding their respective rights and obligations under documents of independent legal significance, defending those rights against untoward encroachment and assist them in achieving resolutions that require the use of specialized legal knowledge, experience and acumen?

Defendants respectfully submit that the Court's determination of these issues leads to the conclusion that, as plead, Count IV of Plaintiff's Fourth Amended Complaint does not state a viable claim under the IHRA against any individual Defendant and therefore should be dismissed in its entirety.

I. Plaintiff's Allegations Cannot Be Construed So Liberally as to Assert Facts Not Plead

The lynchpin of a motion to dismiss under 735 ILCS 5/2-615 is an examination of the facts competently plead, taken as true with all reasonable inferences therefrom and construed in the light most favorable to the non-movant. *City of Chi. v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). As applied to the instant Complaint, however, this general standard does not entitle Plaintiff to substitute through argument facts it wishes it had plead. Nor does it permit Plaintiff to engage in leaps of faith unsupported by specific factual statements describing Defendants' actual conduct with respect to individual borrower clients. As set forth in the ensuing two sections, the details regarding facts Plaintiff actually plead and the arguments it advanced in purported reliance on those "facts" are worlds apart.

A. Plaintiff Takes Liberties with the Allegedly Admitted Facts

First, although a § 2-615 motion to dismiss admits all well-pleaded facts in the complaint and its incorporated exhibits, such a motion does not admit conclusions of law or conclusions of fact unsupported by allegations of specific fact. *Quake Constr., Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 289 (1990); *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426 (1981). Plaintiff's improperly contends that its pejorative descriptions of Defendants' conduct must be treated as "facts deemed admitted" for purposes of this appeal. These mischaracterizations include but are not limited to accusing Defendants of engaging in conduct that was "predatory," was "targeted" against African-American and Hispanic borrowers or that Defendants otherwise "intentionally discriminated" against the firm's clients. (*See* Response Br. at 10-12.) As detailed herein, stripped of rhetorical

flourish, the allegations of Count IV do not provide the factual predicate necessary to state a viable claim against any Defendant under the IHRA.

B. The Trial and Appellate Courts' Decisions Derive from Legal Arguments Dissociated from Plaintiffs' Actual Allegations

A word-by-word search of all 61 pages of Plaintiff's Fourth Amended Complaint discloses that Count IV's allegations, read liberally, do not in fact:

1. State facts identifying any specific transaction in which any Defendant engaged with respect to a borrower client as a "mortgage broker;"
2. State facts identifying any specific transaction in which any Defendant engaged with respect to a borrower client as a "real estate broker;"
3. State facts identifying any specific transaction in which any Defendant engaged with respect to a borrower client as a "real estate salesman;"
4. State facts identifying any specific transaction in which any Defendant owned any real property for sale, exchange, rental or lease. *Compare* 775 ILCS 5/3-101(B) *with* Fourth Am. Compl., R. Vol. 5, C01128-01193;
5. State facts identifying any specific transaction in which any Defendant was involved in or influenced the terms and conditions under which a borrower client obtained the subject property;

6. State facts identifying any specific transaction in which any Defendant influenced the means by which the borrower client financed his or her acquisition of the property;
7. State facts identifying any specific transaction in which any Defendant "altered" any "term, condition or privilege" with respect to any services rendered to an individual borrower client "because of unlawful discrimination;"
8. State facts identifying specific "facilities or services" that any Defendant altered "because of unlawful discrimination" the manner in which said "facilities or services" were furnished to any individual borrower client;
9. State facts identifying any specific transaction in which any Defendant engaged with respect to a borrower client that reasonably could be read to constitute a "sale[ ] of interests in real property;"
10. State facts identifying any specific transaction in which, prior to the borrower client's acquisition of the subject property, any Defendant engaged with respect to a borrower client that constitutes "the brokering or appraising of residential real property";
11. State facts identifying any specific transaction in which any Defendant engaged with respect to a borrower client that is equivalent to "the making or purchasing of loans or providing

other financial assistance" for "purchasing, constructing improving, repairing or maintaining a dwelling" as federal courts have interpreted and applied those definitions under the FHA. *Compare* 775 ILCS 5/3-101(B) *with* Fourth Am. Compl., R. Vol. 5, C01128-01193;

12. State facts identifying what constitute a "short sale;"
13. State facts identifying a specific transaction in which any Defendant engaged with respect to a borrower client that constitutes a "short sale."

To the contrary, Plaintiff's affirmative allegations and its incorporation by reference of the retention agreements for each of the four "consumer illustration" borrower clients executed with Wildermuth, establish that each borrower client retained Wildermuth to provide legal services associated with the clients' pre-existing financial relationships with their lenders for properties the clients already owned. (Fourth Am. Compl., 14-15, ¶¶ 92, 96, Ex. 4-5 R. Vol. 5, C01141-1142, 01247-01249, 01251-01269.)

The first time the term "mortgage broker" appears in the record in connection with Defendants' Motion to Dismiss Count IV of the Complaint is in Plaintiff's Response to Defendants' Motion to Dismiss Count IV of the Fourth Amended Complaint, where Plaintiff contends that Defendants were "brokering residential real estate." (R. Vol. 7, C01563.) Similarly, although it recites the provisions of § 3-102, the Complaint contains no direct allegation that any Defendant acted as a "real estate broker [or] salesman" with respect to any individual transaction with any individual borrower client. Indeed, Plaintiff contended for the first time that Defendants were operating as "real estate

brokers" in its "Brief of Plaintiff-Appellee" filed with the appellate court. The only reference to Defendants having anything to do with "short sales" (which term Plaintiff neglected to define) appears in Paragraph 121 of the Fourth Amended Complaint, which states only that "[i]n instances when Defendants were not able to obtain a loan modification, they would suggest listing the consumer's property as a short sale." (R. Vol. 5, C01145.) Again, there is no factual allegation that any Defendant even had a discussion with the four "consumer illustration" borrower clients or any other individual client about what a short sale is or what any Defendants' role might be in any such transaction.

The trial court's reliance on Defendants' alleged status as "mortgage brokers" thus was an ad-libbed invention that has no specific factual support in any allegation in the Complaint. The appellate court's determination that Defendants' conduct implicated the "sales of interests in real property" likewise originated completely outside the scope of any well-plead allegation in the Complaint. *People ex rel. Madigan v. Wildermuth*, 2016 IL App (1st) 143592, ¶ 23. The appellate court's corollary finding that Defendants' conduct was not "too far removed" from the mortgage lending industry thus also was not supported by any well-plead allegation of the Complaint. *Id.* ¶ 27. Because both the trial court's and appellate court's ultimate holdings were based on purported "facts" that were never plead, the "reasonable inference" rule of construction does not come into play in the first instance. As a result, both decisions are manifestly erroneous on this ground alone.

II. The Appellate Court's "Pick and Choose" Interpretation of the IHRA is Illogical and Unsound

As noted in Defendants' Opening Brief, the appellate court abandoned all traditional statutory construction frameworks for construing the provisions of the IHRA, electing instead to ignore dozens of applicable federal court decisions interpreting and applying §§ 3604 and 3605 of the FHA. (Appellants' Opening Br. at 23-31.) Free of the recognized limitations on the scope of each of these threshold provisions of the FHA, the appellate court then proceeded to "mix and match" terminology appearing in either § 3604 or § 3605 until it achieved a result through which liability could be imposed upon Defendants. *Madigan*, 2016 IL App (1st) 143592, ¶¶ 14, 25.

The appellate court's reliance on *Eva v. Midwest Nat'l. Mortg. Bank, Inc.*, 143 F. Supp. 2d 862 (N.D. Ohio 2001), an Ohio federal district court decision that neither party cited previously, illustrates the fallacy of this approach. In *Eva,* the plaintiffs accused a web of interconnected individuals and companies of conspiring to engage in predatory lending practices through a refinancing scheme directed toward female homeowners and then carrying out their scheme through misrepresentation, equity stripping and other illegal devices. Among other claims, the *Eva* plaintiffs contended that the defendants operated as a RICO "enterprise" and, through participation in that enterprise, each of the defendants violated the plaintiffs' rights by charging dramatically higher interest rates and fees than promised, using the [Equity Acceleration Program ("EAP")] disclosures to misrepresent loan terms (including the length of the loan and the rate of interest charged), using the EAP program to generate additional fees to an affiliate, making loans to borrowers that the borrowers would be unable to repay and soliciting inflated appraisals of the homes. *Eva*, 143 F. Supp. 2d at 872-73. Plaintiffs further accused the Defendants

of engaging in "reverse redlining" by "targeting" older females with substantial equity in their homes. *Id.*

Defendant U.S. Mortgage Reduction, Inc. ("USMR") allegedly managed a program identified as the "Equity Acceleration Program" that the plaintiffs contend was used to misrepresent the operative loan terms as to maturity date, rate and amortization schedule under the loans. *Id.* at 872-75. USMR also apparently collected "excessive" fees from the plaintiff borrowers each time USMR processed a loan payment made under the new loan. *Id.* at 875-80. USMR and the other defendants moved to dismiss the plaintiffs' claims under § 3604 of the FHA because none of the defendants' conduct affected the plaintiffs' rights to acquire housing in the first instance. *Id.* Some defendants (including USMR) also sought dismissal of plaintiffs'§ 3605 claims on the grounds that USMR was not alleged to have interacted directly with any of the individual borrowers and did not actually lend any money to them or control the terms and conditions of the credit extended to such borrowers. *Id.* at 888-90.

Before turning to USMR's Motion, the district court first addressed certain other defendants' motions to dismiss the plaintiffs' allegations under §§ 3604 and 3605. As pertinent here, the district court noted that the transactions at issue arose in the context of refinancing of existing mortgages rather than the original purchase of property. The district court, citing to numerous cases decided under § 3604(a) pertaining to "access to housing," held that:

> It is clear that § 3604 relates to acquiring a home, while § 3605 applies to the making or purchasing of loans or providing other financial assistance for maintaining a dwelling previously acquired. Based upon the foregoing, the Court finds that while § 3604(a) applies to transactions beyond the literal sale or rental of a dwelling, it is inapplicable to the facts and circumstances of the instant matter. The circumstances presented here fit

> squarely within the provisions of § 3605 and, as such, the Midwest Defendants' Motion to Dismiss is granted to the extent that Plaintiffs attempt to bring that claim pursuant to § 3604(a).

Eva, 143 F. Supp. 2d at 886. Turning to the plaintiffs' claims under § 3604(b) (prohibiting discrimination in the terms and conditions of the borrowers' acquisition of housing), the district court stated as follows:

> Plaintiffs also make the argument that redlining and reverse redlining violate § 3604(b). (Doc. # 52 at 6). In making this argument, Plaintiffs examine a litany of cases that hold a claim is actionable under § 3604(b) if the defendant's conduct unreasonably interferes with the use or enjoyment of the property because of race, color, religion, sex, familial status, or national origin. Id. at 9-12. As with § 3604(a), the Court finds Plaintiffs' argument in this regard to be without merit. ...
> This case involves refinancing of homes previously owned by Plaintiffs — the very circumstances presented by § 3605 of the FHA. To expand the scope of § 3604 would be to say that the issue of refinancing is ambiguous under the statute and that, consistent with its purpose, the statute should provide a remedy with respect to this topic. Such a remedy, however, is already contained in § 3605, which is clear and unambiguous.

Id. The district court therefore granted the motions of USMR and the other defendants as to the plaintiffs' claim pursuant to § 3604(b). *Id.*

As to USMR's motion to dismiss the plaintiffs' claims based on § 3605, the district court cited to plaintiffs' allegations that USMR's misrepresented the refinance loan terms through documents it provided to the plaintiff borrowers at the loan closing and to USMR's collection and remittance of monthly fees to the mortgagee under the EAP as sufficient to survive the motion to dismiss. *Id.* at 889-90. It was in this context that the district court found that USMR – as the mortgage lender's disclosed agent participating in the disclosure of loan fees and the collection of mortgage payments — was "not too far removed" from the traditional mortgage lending process to fall outside the scope of § 3605's application to those persons or entities engaged in real estate

related transactions as part of its overall functioning. *Id.* at 889.

Unlike the district court in *Eva,* the appellate court here made no effort to distinguish Defendants' conduct as having occurred only ***after*** the client borrowers acquired housing and executed the corresponding mortgages for same. *See generally Wildermuth*, 2016 IL App (1st) 143592. This is critical, as the prohibition against discrimination in the "provision of services or facilities" on which the Opinion relies so heavily appears only in § 3604 of the FHA, which the Seventh Circuit consistently and unambiguously has held is a relevant consideration only as it pertains to the acquisition of or access to housing. *See Halprin v. Prairie Homes of Dearborn Park,* 388 F.3d 327 (7th Cir. 2004). There is no dispute that each of the "consumer illustration" borrower clients owned their homes prior to retaining Wildermuth, so none of the provisions of the IHRA that parallel § 3605 of the FHA apply to any of the Defendants. (*See* Fourth Am. Compl., ¶¶ 163-249, R. Vol. 5, C01153-01163.) Accordingly, and with all due respect, to the extent the Opinion relies on Defendants' alleged conduct in "the furnishing of facilities or services" in connection with the sale and financing of homes (including the purported "sales of interests in real property"), the appellate court's logic is inherently flawed. *Wildermuth*, 2016 IL App (1st) 143592, ¶¶ 1, 8, 27.

III. The Trial and Appellate Courts' Refusal to Acknowledge and Accord Deference to Apposite Federal Authority on § 3605 is Inexplicable

The appellate court's decision to gloss over Defendants' citation to multiple federal decisions on point declaring the scope of § 3605 to apply only to those parties who served as the lender, broker or appraiser of the loan at issue or otherwise provided financial assistance to the borrower by seemingly distinguishing the decision in *Davis v. Wells Fargo* is ineffectual. Whether the appellate court's highly technical focus on whether certain arguments were advanced on appeal is accurate or not, neither the trial court nor the appellate court rebutted the application of other federal decisions that squarely support Defendants' position. For example, Defendants cited to *Jones v. Countrywide Home Loans, Inc.*, No. 09 C 4313, 2010 U.S. Dist. LEXIS 11846 (N.D. Ill. Feb. 11, 2010), in which the district court confirmed that § 3605 is not a "catch-all" provision intended to apply to any person or entity having some connection to a real estate transaction. (*See* Defendants' First District Opening Br. at 20 and Defendants' Reply Br. at 9.) Rather, the *Jones* court explicitly held that § 3605 applies only to those parties who served as the lender, broker or appraiser of the loan at issue or otherwise provided financial assistance to the borrower. *Jones,* 2010 U.S. Dist. LEXIS 11846, at *19-21 (emphasis added). There can be no dispute that the Complaint is devoid of any allegation that any Defendant is in the business of making or purchasing loans or otherwise directly providing financial assistance to borrowers of any race acquiring funds to purchase or renovate a dwelling. (*Compare* Fourth Am. Compl., R. Vol. 5, C01128-01193 *with Davis*, 685 F. Supp. 2d at 844; *Jones*, 2010 U.S. Dist. LEXIS 11846, at *19-21.)

The Seventh Circuit Court of Appeals consistently and unambiguously has held that Section 3604 of the FHA (the source of the "provision of services or facilities" language on which Plaintiff relies) governs discrimination arising only in the context of the acquisition of or access to housing, as contrasted with Defendants' involvement, which initiated only *after* the borrower has already acquired housing through a mortgage. *See Halprin v. Prairie Homes of Dearborn Park,* 388 F.3d 327 (7th Cir. 2004). The Seventh Circuit reviewed the text and legislative history of Section 3604 and concluded that this provision of the FHA "contains no hint either in its language or its legislative history of a concern with anything but ***access to housing***." *Id.* at 329 (emphasis added).

This proposition finds further support in the regulations promulgated by the Department of Housing and Urban Development ("HUD") to effectuate the FHA. Specifically, HUD provides its interpretation of what conduct constitutes unlawful housing discrimination under Section 3604 through the regulations appearing at 24 C.F.R. §§ 100.50-.90, .200-205. The regulations notably omit any reference to mortgage loans. In contrast, when HUD provides its interpretation of the conduct that is unlawful housing discrimination under Section 3605 of the FHA (at 24 C.F.R. §§ 100.110-.148), the regulations explicitly refer to loans and mortgages. As the Seventh Circuit has expressly acknowledged, "HUD's views about the meaning of the FHA are entitled to 'great weight.'" *Bloch v. Frischolz*, 587 F.3d 771, 781 (7th Cir. 2009). Plaintiff's claims under § 3-102 based on virtually identical language within the provisions of § 3604 of the FHA are not viable as a matter of law.

Likewise, the appellate court made no effort to distinguish Defendants' citation to *Davis v. Fenton*, 26 F.Supp.3d 727 (N.D. Ill. 2014), in which the District Court expressly

rejected the plaintiff's § 3605 claims against the attorney she retained to assist her in defending against a foreclosure proceeding and potentially obtaining a restructure of her delinquent mortgage. The District Court summarized the defects in the plaintiff's § 3605 claims against her attorney as follows:

> Section 3605 of the FHA prohibits discrimination by any person or other entity whose business includes engaging in residential real estate-related transactions. 42 U.S.C. § 3605(a). The FHA defines residential real estate-related transactions as "[t]he making or purchasing of loans or providing other financial assistance" related to residential real estate, and "[t]he selling, brokering, or appraising of residential real property." 42 U.S.C. § 3605(b). Although Plaintiff has alleged in the complaint that Defendants have violated section 3605, courts in this District have held that section 3605 applies only to transactions involving defendants that are lenders, brokers, or appraisers of mortgage loans. *See Davis v. Wells Fargo Bank,* 685 F.Supp.2d 838, 844 (N.D.Ill.2010); *Jones v. Countrywide Home Loans, Inc.*, No. 09 C 4313, 2010 WL 551418, at *7 (N.D. Ill. Feb. 11, 2010) (finding that section 3605 did not apply to defendant because defendant "was neither the lender, nor the broker, nor the appraiser of [plaintiff's] mortgage loan, nor did it provide any other financial assistance in the transaction"); *Moore v. F.D.I.C.*, No. 08 C 596, 2009 WL 4405538, at *5 (N.D. Ill. Nov. 30, 2009) (dismissing a section 3605 claim because plaintiffs had not alleged that they attempted to engage in a real estate-related transaction with defendant, but rather alleged misconduct occurring post-default). Defendants are not lenders, brokers, or appraisers, and so Plaintiff's attempt to bring a claim against them under section 3605 is misguided.

Id. at 741. There being no viable basis on which to distinguish *Fenton* and the cases on which it relied, the appellate court apparently found the prudent course to be to simply ignore it. Respectfully, to do so in the face of what it acknowledged was an issue of first impression under Illinois law was error.

The appellate court provided no explanation for why the precise language regarding "providing other financial assistance" related to "maintaining a dwelling" was intended to mean anything other than what the federal courts interpreting § 3605 of the FHA consistently have read it to mean, namely, as pertinent here, the extension of credit

to the borrower ***after*** the borrower has already acquired the subject property at issue. *Wildermuth*, 2016 IL App (1st) 143592, ¶¶ 33-37. The appellate court's effort to distinguish *Davis,* without addressing the merits of the holdings in *Halprin, Bloch and Davis-Fenton*, belie the appellate court's first-time interpretation of what it deems to be "very similar" provisions of the IHRA. *Id.* ¶¶ 28, 31.

Finally, to the extent the appellate court relied on *Eva* as a basis for imposing liability, Defendants respectfully contend that the appellate court's analysis is in error. USMR was an expressly disclosed agent of the mortgage lender and, pursuant to the terms of the mortgage and servicing agreements the borrower signed at the time he or she executed the operative note and mortgage, USMR collected payments from the borrower to be paid to the mortgage lender. *Eva,* 143 F. Supp. 2d at 879. USMR received its compensation from or through the mortgage lender and the fees and costs attributable to the services USMR rendered added to the total monthly mortgage amount the mortgage lender received. *Id.* The borrower did not have the option to reject USMR's involvement in the transaction and the plaintiffs alleged USMR's disclosures about the "extra payment program" misrepresented the true cost of the loans obtained from the mortgage lender. *Id.*

The Fourth Amended Complaint acknowledges that Defendants represent the borrower clients <u>*against the mortgagees*</u> both through negotiations directed toward restructuring the delinquent loans to be more affordable to the borrowers and by defending the homeowners in pending foreclosure actions through which the mortgagees seek to enforce the terms of the previously acquired loans. (Fourth Am. Compl., ¶¶ 163-249, R. Vol. 5, C01153-01163.) Prior to the Opinion, no court in the country purported

to extend an anti-discrimination provision to professionals working ***with*** the borrower and ***against*** the lender to renegotiate the original terms to which the borrowers previously agreed. There is no reason for this Court to do so.

IV. Wildermuth Rendered Legal Services to His Clients and Was Engaged in the Practice of Law

Plaintiff contends that Defendants forfeited the right to have this Court address its contentions regarding the "separation of powers" because Defendants "fail[ed] to raise it in the circuit or appellate courts." (Response Br. at 33.) A cursory review of the appellate court's Opinion and Plaintiff's own brief demonstrates that Plaintiff is incorrect. At paragraph 9 of its Opinion, the appellate court notes that "Defendants moved to dismiss count IV of the fourth-amended complaint ... asserting the complaint failed to state a violation of section 3-102(B) of the Act because Wildermuth rendered legal services and was not engaging in real estate transactions as defined in the Act." *Madigan*, 2016 IL App (1st) 143592, ¶ 19. Plaintiff itself acknowledges that Wildermuth argued before the trial court that he was exempt from application of the FHA because he "rendered legal services." (Response Br. at 12.) Accordingly, no waiver or forfeiture occurred.

Responding in substance, Plaintiff contends that enforcing the IHRA in the manner authorized by the trial and appellate courts in the instant action would not impinge on this Court's exclusive authority to regulate the conduct of the attorneys it permits to practice in this state. (Response Br. at 33-36.) This statement can be discounted as little more than wishful thinking. The fact that the highest ranking legal officer in the State elects to allow non-attorneys in its "Loan Modification Unit" to interact directly with consumers and their lenders to renegotiate the terms and conditions

of collateralized debt obligations is not the operative test for what constitutes the practice of law in Illinois. (*See* Response Br. at 33.) Rather, as Plaintiff should well recognize from her direct participation in the briefing and argument in *Grafner v. Department of Employment Sec.*, 393 Ill. App. 3d 791 (1st Dist. 2009) that

> The "practice of law" has been defined as "'the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.'" *Barasch,* 406 Ill. at 256, 94 N.E.2d at 150, quoting *People ex rel. Illinois State Bar Ass'n v. Schafer,* 404 Ill. 45, 50, 87 N.E.2d 773, 776 (1949). . . . Activities performed by an individual considered to be the "practice of law" include 'appearing in court or before tribunals representing one of the parties, counseling, advising such parties and preparing evidence, documents and pleadings to be presented. It has been defined as preparing documents the legal effect of which must be carefully determined according to law. It has been defined as referral to attorneys for service; advising or filling out of forms; negotiations with third parties and, in short, engaging in any activities which require the skill, knowledge, training and responsibility of an attorney." ISBA Op. No. 93-15, at 2 (March 1994), citing *Barasch,* 406 Ill. at 256, 94 N.E.2d at 150.

Grafner, 393 Ill. App. 3d at 798. Here, Plaintiff affirmatively alleges that Defendants — on behalf of the "consumer illustration" individual borrowers — contacted lenders, explained loan restructuring proposals, counseled about the respective rights and obligations under the operative loan documents, the significance of foreclosure proceedings and related issues. (*See* Fourth Am. Compl., ¶¶ 163-249, R. Vol. 5, C01153-01163.) Plaintiff made no meaningful effort to distinguish between work performed by Wildermuth and others and, in any event, Plaintiff concedes that every individual borrower client at issue executed a bilateral attorney-client representation agreement with Wildermuth. (Response Br. at 6-7; Fourth Am. Compl. ¶ 93, R. Vol. 5, C01142.) Accordingly, Plaintiff cannot now seek to claim separation between what was and was not *bona fide* attorney work.

As Plaintiff acknowledges in its Response, from at least 2010, each borrower client engaged Wildermuth's law firm to "analyze his or her debt situation" and provide legal services with respect to options the borrower client might have in connection with his/her existing mortgage obligations, including pursuing loss mitigation options such as:

> a forbearance agreement, payment moratorium, loan restructure, short sale payoff, deed in lieu of foreclosure transaction, submitting pleadings in opposition to the lender's foreclosure complaint, extending the deadlines in the foreclosure process, opposing or vacating entry of a judgment of foreclosure, obtaining a postponement of any sale of the property, deferral of the lender's post-sale possession of the property or negotiation of a payment to client in exchange for an agreement to surrender possession of the property early[.]

(Response Br. at 6 (quoting from Exhibit C to Plaintiff's Fourth Am. Compl., R. Vol. 5, C01263).)

The notion that some or all of the services described above do not require the use of legal acumen and can be accomplished through the mere "filling out of forms" is preposterous. Clients walked in the door to Wildermuth's offices with stacks of documents written by bankers and lawyers primarily for the benefit and protection of the lending institution. Such circumstances are not within the "ordinary understanding of the average consumer"; not by a long shot. Accordingly, Plaintiff's contention that Wildermuth was not using his accumulated knowledge and acumen as a commercial litigator and trial attorney in assessing each client's personalized situation is simply wrong.

Moreover, Plaintiff affirmatively alleged in its Complaint that the radio broadcasts "targeted" toward African-American and Hispanic listeners prominently featured testimonials "from satisfied consumers." (Fourth Am. Compl. ¶¶ 83, 86, R. Vol. 5, C01141.) Though Plaintiff does not specifically allege as much, it is reasonable to

infer that the "satisfied consumers" providing testimonials on stations "targeting" African-American listeners were African-Americans as well, and the same for Hispanic testimonials. Plaintiff does not allege that **any** of the testimonials were untrue or that any of the participants on the radio shows were not Wildermuth's actual clients for whom he had obtained the results upon which the testimonials were based. Thus, by Plaintiff's express allegations, Wildermuth was performing legal services for African-American and Hispanic clients to a sufficient degree of success that his borrower clients were willing to share their stories with scores of listeners in the Chicago Metropolitan area. Plaintiff's allegations on their face thus fundamentally undermine the propositions that (a) Wildermuth did not actually provide legal services to his African-American and Hispanic clients; and (b) that none of Wildermuth's African-American or Hispanic clients obtained favorable results after retaining Wildermuth's firm to assist them with their delinquent mortgages. Plaintiff's allegations fail on this score as well.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Honorable Court:

a) reverse the decision of the appellate court finding that Count IV of Plaintiff's Complaint states a viable claim against Defendants under § 3-102 of the IHRA;

b) remand this matter to the trial court with instructions to dismiss Count IV of the Fourth Amended Complaint with prejudice against all Defendants; and

c) grant Defendants such other and further relief that the Court deems necessary and proper under the circumstances.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,597 words.

Robert E. Browne, Jr.