IN THE SUPREME COURT OF MISSOURI

Case No. SC93769

SHELBY E. WATSON,
Appellant,

vs.

WELLS FARGO HOME MORTGAGE,
a Division of WELLS FARGO BANK, N.A., et al,
Respondents.

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL CIRCUIT COURT,
THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

RESPONDENTS' SUBSTITUTE BRIEF

HAZELWOOD & WEBER, LLC
David T. Hamilton, #28166
John H. Kilper #60997
200 North Third Street
St. Charles, Missouri 63301
(636) 947-4700 – Office
(636) 947-1743 – Facsimile
dhamilton@hazelwoodweber.com
jkilper@hazelwoodweber.com
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

On August 25, 2006, Appellant, Shelby Watson ("Appellant") purchased a loft condominium located at 1136 Washington Ave., Unit 210, St. Louis Missouri ("Property"). L.F. 62, 184 (Statement of Fact ("SOF"), ¶ 1; Exhibit A (Watson Depo., 9:19-10:4)). In connection with her purchase of the Property, Appellant obtained a loan from Mortgage Resources in the Midwest in the amount of One Hundred Eighty Three Thousand Three Hundred Fifty Dollars and 00/100 ($183,350.00) and signed a promissory note ("Note") providing for repayment of the loan. L.F. 62, 184 (SOF, ¶ 2; Exhibit A (Watson Depo., 17:15-19); Exhibit B (Note)). Repayment of the Note was secured by a deed of trust ("Deed of Trust") also signed by Appellant on August 25, 2006. L.F. 62, 185 (SOF, ¶ 3; Exhibit A (Watson Depo., 17:20-18:5), Exhibit C (Deed of Trust)).

Respondents were not a party to the original 2006 loan transaction. L.F. 63, 185 (SOF, ¶ 6; Exhibit A (Watson Depo., 13:7-9); Exhibit B (Note); Exhibit C (Deed of Trust)). Respondents made no statements to Appellant in connection with her efforts to obtain the loan to purchase the Property. L.F. 63, 185 (SOF, ¶ 7; Exhibit A (Watson Depo., 12:13-16, 22-25)).

In 2007, Appellant began having difficulty making payments under the Note. L.F. 63, 186 (SOF, ¶ 10; Exhibit A (Watson Depo., 19-:7-15)). Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. ("Wells Fargo"), began servicing the loan on February 1, 2007. L.F. 63, 186 (SOF, ¶ 8; Stipulated Fact). In February 2009, Appellant requested a loan modification from Wells Fargo. L.F. 63, 186 (SOF, ¶ 13; Exhibit A

(Watson Depo., 24:1-6)). Between 2009 and June 18, 2010, Appellant and Wells Fargo were engaged in discussions related to a loan modification. L.F. 33-34 (Second Amended Petition, ¶¶ 10-19). However, the modification agreement was not consummated and the Property was sold at a foreclosure sale on June 24, 2010 to Federal National Mortgage Association ("Fannie Mae"). L.F. 63 (SOF, ¶¶ 14-15; Exhibit D (Successor Trustee's Deed); Exhibit E (Kozeny & McCubbin, L.C. Business Records Affidavit)).

On July 2, 2010, Appellant filed suit against Wells Fargo asserting a single claim under the Missouri Merchandising Practices Act, § 407.010 *et seq*. RSMo. ("MPA"), arising out of the 2006 loan transaction. L.F. 10 (Verified Petition). Appellant subsequently amended her Petition in March 2011, adding Fannie Mae as a Defendant, *see* L.F. 21 (First Amended Petition), and then again in April 2012, amending the prayer for relief to include a request that the foreclosure sale be rescinded. L.F. 32 (Second Amended Petition).

In her Second Amended Petition, Appellant alleges categorically that the operative consumer transaction supporting her claim under the MPA was the initial 2006 loan transaction. Specifically, Paragraph 26 of the Second Amended Petition alleges: "Defendant, WF, used deception, fraud, false pretense, false promise, misrepresentation or unfair practice, or concealed, suppressed, or omitted a material fact ***in connection with the sale of the mortgage loan*** . . . ." L.F. 35 (emphasis added).

Respondents filed a joint motion for summary judgment on May 4, 2012. L.F. 60. On May 23, 2012, Appellant filed a Motion for Leave to File a Verified Third Amended

Petition ("Motion for Leave") seeking leave to add an additional claim for specific performance, which Respondents opposed. L.F. 162, 178.

On November 1, 2012, the Trial Court denied Appellant's Motion for Leave finding Appellant had "offered no satisfactory explanation for her failure to add a claim for specific performance at an earlier time." L.F. 276.[1] On that same date, the Trial Court granted Respondents' Motion for Summary Judgment. L.F. 278.

[1] Appellant has not raised any issue on appeal with respect to the denial of the Motion for Leave.

SUMMARY OF ARGUMENT

The sole issue on appeal is whether the Missouri Merchandising Practices Act ("MPA") reaches the conduct described by the allegations contained in the Second Amended Petition. In her Second Amended Petition, Appellant claims the operative consumer transaction supporting her MPA claim was the 2006 loan transaction. L.F. 35 (Second Amended Petition, ¶ 25). However, Appellant alleges Respondents, who had no involvement with the 2006 loan transaction, committed an unfair practice during negotiations to modify the terms of her loan, negotiations that occurred several years after the loan was originated. L.F. 35-36 (Second Amended Petition, ¶ 26).

Significantly, there are no allegations that either of the Respondents committed any act that was unfair or deceptive in connection with enforcement of the terms of the original financing documents. For example, there is no allegation that either Respondent demanded payments in excess of the stated payment or unfairly changed the interest rate or imposed unfair penalties. The original financing documents specifically provided that Respondents had no obligation to modify the loan terms.

Under the plain language of the statute and existing case law, the MPA does not reach the alleged conduct because the undisputed evidence establishes there was no relationship in fact between the origination of Appellant's loan in 2006 and the alleged deceptive practices. Respondents are therefore entitled to summary judgment on Appellant's claim because the undisputed facts and Appellant's own pleadings negate an essential element of her claim—that Respondents engaged in an unlawful ***practice in***

connection with the sale or advertisement of merchandise. The Trial Court's Judgment should be affirmed.

ARGUMENT

I. The trial court did not err in granting summary judgment in favor of Respondents, because the undisputed evidence establishes Appellant's claim under the Missouri Merchandising Practices Act ("MPA") fails as a matter of law, in that Appellant cannot demonstrate any relationship in fact between the alleged unfair practice that allegedly occurred while she was undergoing review for a loan modification and the origination of the 2006 loan

A. Standard of Review

"When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The reviewing court must "accord the non-movant the benefit of all reasonable inferences from the record." *Id.* The review is *de novo* because the "propriety of summary judgment is purely an issue of law." *Id.*

A defendant may establish a right to summary judgment by showing (1) facts that negate any one of the elements of the plaintiff's claim, (2) that the plaintiff cannot produce evidence sufficient to allow the trier of fact to find the existence of any one of the plaintiff's elements, or (3) "that there is no genuine dispute as to the existence of each of the facts necessary to support the [defendant's] properly-pleaded affirmative defense." *Id*. at 381. Once the defendant has met this burden, the plaintiff must show by reference

to the record that "one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed." *Id.*

B. Appellant's claim for violation of the MPA fails because the alleged wrongful acts were not made "in connection with" the sale or advertisement of merchandise.

Appellant's claim for violation of the MPA fails because the undisputed evidence establishes there was no relationship in fact between the origination of Appellant's loan in 2006 and the alleged deceptive practices. As such, Appellant cannot establish an essential element of her claim under the MPA—that Respondents engaged in an unfair practice in connection with the sale or advertisement of merchandise—and therefore, Respondents are entitled to summary judgment.

(1) The MPA requires a relationship in fact between the alleged unfair practices and the sale or advertisement of merchandise.

Section 407.025 creates a private right of action for actions deemed unlawful under § 407.020 RSMo (2000). Section 407.025 RSMo. (2000);[2] *see also Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007). Section 407.025 provides:

> Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by

[2] All further statutory references are to RSMo (2000) unless otherwise indicated.

> another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages.

Section 407.020 of the MPA provides in relevant part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact ***in connection with the sale or advertisement of any merchandise*** in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

§ 407.020.1 RSMo (emphasis added).

Thus, to state a claim under the MPA, a plaintiff must identify an operative sale or advertisement of merchandise and establish the defendant's alleged unlawful conduct occurred "in connection with" that sale or advertisement of merchandise. *Id*.; *see also* MAI 39.01 [2014 New] – Verdict Directing—Violation of Missouri Merchandising Practices Act (Effective January 1, 2014).[3]

[3] A copy of MAI 39.01 is included in Respondents' Appendix see page A 71.

The Eastern District first addressed the reach of the provision in the MPA requiring that the alleged wrongful act be "in connection with" the sale or advertisement of merchandise when it upheld the dismissal of two cases filed by the Missouri Attorney General in *State of Missouri, ex rel. Chris Koster v. Prof. Debt Mgmt., LLC*, 351 S.W.3d 668 (Mo. App. E.D. 2011) and *State ex rel. Koster v. Portfolio Recovery Associates*, 351 S.W.3d 661 (Mo. App. E.D. 2011).[4]

In *Portfolio Recovery Associates*, the Attorney General filed suit against the defendant alleging the defendants violated the MPA by engaging in unfair practices while attempting to collect debts. 351 S.W.3d at 662-63. The Attorney General made no allegations that the defendants were a party to the initial transaction with the consumer or that there were any unfair practices made with regard to the initial consumer transaction. *Id*. at 663. The trial court granted the defendant's motion to dismiss finding the alleged unfair acts were not performed "in connection with the sale or advertisement of any merchandise," as required by the MPA, and the Attorney General appealed. *Id*.

The Eastern District affirmed the dismissal, holding that the MPA does not extend to activities of persons who were not parties to the initial sale and have no connection to

---

[4] On December 6, 2011, this Court denied the Attorney General's Applications for Transfer in both *Prof. Debt Mgmt., LLC* and *Portfolio Recovery Associates*. Because the holding and analysis in *Prof. Debt Mgmt., LLC* and *Portfolio Recovery Associates* is virtually identical, Respondents will only cite *Portfolio Recovery Associates*.

representations made before or at the time of the sale. *Id*. at 667. The Court reasoned "[w]e are not persuaded that actions occurring after the initial sales transaction, which do not relate to claims or representations made before or at the time of the initial sales transaction, and which are taken by a person who is not a party to the initial sales transaction, are made 'in connection with' the sale or advertisement of merchandise as required by the MPA." *Id*. Rather, the Court held that in order to meet the "in connection with" requirement of the MPA, there must be a "relationship in fact" between the alleged unfair practice and the actual advertising and sale of the merchandise at issue. *Id*. at 665. The Court concluded that because the defendants' deceptive or unfair practices did not occur either before or at the time of the initial sales transaction, the Attorney General's petition was properly dismissed. *Id*. at 668.

Shortly after issuing the Opinion in this case, the Eastern District again adopted the holding and reasoning of *Portfolio Recovery Associates* in affirming the dismissal of a MPA claim against a mortgage loan servicer. In *Conway v. Citimortgage, Inc.*, the plaintiffs sued the defendants alleging the defendants violated the MPA by engaging in unfair practices and acting in bad faith that resulted in the foreclosure of the plaintiffs' property. ED 99836, 2013 WL 6235864, at *1 (Mo. App. E.D. December 3, 2013).[5] Specifically, the plaintiffs alleged the defendants "used 'fraud, false pretense, false promise, misrepresentation or unfair practices, and/or concealment, suppression, or

[5] Copies of the *Conway* opinion and the federal cases cited herein are included in Respondents' Appendix.

omission of a material fact'" in connection with the sale of the original mortgage loan; however, the plaintiffs did not allege the defendants had any involvement with the origination of the loan. *Id*. at *1. The trial court granted the defendants' motion to dismiss, and the plaintiffs appealed. *Id.* at *2.

The Eastern District affirmed, holding there was no relationship in fact between the defendants' alleged unfair practices, which occurred approximately two years after the plaintiffs' obtained the mortgage loan, and the initial loan transaction. *Id*. at *3. Citing *Portfolio Recovery Associates*, the Court reasoned "[d]eceptive or unfair post-sale conduct is covered by the MPA, but only when such conduct relates directly to the advertisement or sale of merchandise." *Id.*

A number of federal courts sitting in Missouri have interpreted the "in connection with" requirement of the MPA in the same manner. For example, in *Williams v. Regency Financial Corp.*, a case decided before *Portfolio Recovery Associates*, the Eighth Circuit held that the MPA did not apply to the plaintiff's claims against a financing company because the alleged wrongful conduct, which related to the repossession and subsequent sale of the plaintiff's vehicle, did not occur in conjunction with the initial sale or advertisement to the plaintiff. 309 F.3d 1045, 1050 (8th Cir. 2002).

In *Willis v. US Bank NA*, the plaintiffs brought a MPA claim against the loan servicer after the servicer foreclosed. 2012 WL 3043023, at *1 (E.D. Mo. July 25, 2012). The court dismissed the claim, finding the servicer was not a party to the initial purchase and had not supplied any money to the plaintiffs to purchase the property. *Id*. at *3. The

court concluded that the plaintiffs failed to establish the necessary relationship in fact between the alleged wrongful conduct and the operative transaction. *Id*.

Similarly, in *Ball v. Bank of New York*, the plaintiffs brought a MPA claim against various loan servicers alleging the servicers had concealed the fact that they did not have a legal right to foreclose on the plaintiffs' property, as well as the "true identity of the mortgagee and the party in interest who would ultimately seek to foreclose." 2012 WL 6645695, at *5-6 (W.D. Mo. December 20, 2012). The court dismissed the plaintiffs' claim, finding the servicers' actions were not sufficiently "in connection with" any sale or advertisement to support a claim under the MPA because they were strangers to the original loan transaction. *Id*. at *6. Further, the court reasoned that payments to a subsequent owner or holder of a promissory note "cannot reasonably be viewed as a separate transaction under the [MPA] because they are conditions bargained for in the [p]laintiffs' original creation of the mortgage note—a transaction to which these [d]efendants were strangers." *Id*.[6]

[6] *See also Barnes v. Federal Home Loan Mortgage Corp.*, 2013 WL 1314200, at *6-7 (W.D. Mo. March 28, 2013) (dismissing MPA claim because defendant loan servicers were "complete strangers to the initial loan transaction here and so cannot be liable."), *aff'd*, 2014 WL 67894 (8th Cir. Jan. 9, 2014); *Wivell v. Wells Fargo Bank, N.A.*, 2013 WL 3665529, at *6 (W.D. Mo. July 12, 2013) (finding plaintiffs failed to state a claim under the MPA arising from the foreclosure of their home because plaintiffs did not purchase or lease anything beyond the initial purchase of their home); *Reitz v. Nationstar*

(2) Plaintiff's Claim Fails

Under the plain language of the MPA and the standard enunciated in *Portfolio Recovery Associates* and its progeny, Appellant's claim against Respondents fails.

Appellant alleges in the Second Amended Petition that the operative consumer transaction supporting her claim was the 2006 loan transaction. L.F. 35 (Second Amended Petition, ¶¶ 25-27). Indeed, in Paragraph 26 of the Second Amended Petition, Appellant alleges: "Defendant, WF, used deception, fraud, false pretense, false promise, misrepresentation or unfair practice, or concealed, suppressed, or omitted a material fact ***in connection with the sale of the mortgage loan*** . . . ." L.F. 35 (emphasis added). However, the allegations of wrongdoing relate solely to the lengthy loan modification negotiations with Wells Fargo that began in February 2009, well after Appellant consummated the 2006 transaction. L.F. 63, 186 (SOF, ¶ 13; Exhibit A (Watson Depo., 24:1-6); L.F. 35 (Second Amended Petition, ¶ 26(a)-(e)).

Mortg., LLC, 2013 WL 3282875, at *19 (E.D. Mo. June 27, 2013) (finding "under Missouri law, the defendant as a 'loan servicer' who was not a party to the initial loan transaction and who may subsequently foreclose on that loan is not liable under the [MPA]."); *Hess v. Wells Fargo Home Mortg.*, 2012 WL 872752, at *4 (E.D. Mo. March 14, 2012) (dismissing MPA claim because none of the alleged unfair practices occurred in connection with the initial sales transaction).

Appellant admits Wells Fargo was not a party to the original 2006 loan transaction. L.F. 63, 185 (SOF, ¶ 6; Exhibit A (Watson Depo., 13:7-9)). Appellant also admits Wells Fargo made no statements to her in connection with her obtaining the loan to purchase the Property. L.F. 63, 185 (SOF, ¶ 7; Exhibit A (Watson Depo., 12:13-16, 22-25)). Thus, while Appellant alleges Wells Fargo used "deception, fraud . . . in connection with the sale of the mortgage loan," Appellant admits Wells Fargo had no involvement with the loan until it began serving the loan in February 2007. L.F. 63, 185 (SOF, ¶¶ 8-9; Stipulated Fact; Exhibit A (Watson Depo., 11:14-12:2)).

Appellant does not contend, and the undisputed evidence does not establish, that the possibility of modification of her payment obligations under the Note and Deed of Trust executed in 2006 induced or affected Appellant's decision to execute those documents. Appellant admits that at the time she entered into the Note and Deed of Trust, the lender was under no obligation to thereafter renegotiate the terms of the loan. L.F. 62, 185 (SOF, ¶ 4; Exhibit A (Watson Depo., 64:23-65:12)). Indeed, the language of the Deed of Trust expressly provides that the lender—which at the time of origination was not Wells Fargo—was under no obligation to modify the original terms of the Note and Deed of Trust:

> Lender shall not be required to commence proceeding against any Successor in Interest of Borrower or refuse to extend time for payment or ***otherwise modify amortization of sums secured by this Security Instrument by reasons of any demand made by the original Borrower*** or any Successor in Interest of Borrower. Any forbearance by Lender in

> exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successor in Interest of Borrower or in amounts less than the amounts due, shall not be a waiver of or preclude exercise of any right or remedy.

L.F. 131 (Exhibit C, ¶12) (emphasis added).

Appellant admits she did not begin to have problems paying her mortgage until 2007, due to a series of events that occurred after the origination of her loan. L.F. 63, 186 (SOF, ¶ 10, 11; Exhibit A (Watson Depo., 19:7-15, 14:11-17:1)). Appellant admits Wells Fargo was not involved in the circumstances that caused her financial hardship. L.F. 63, 186 (SOF, ¶ 12; Exhibit A (Watson Depo., 16:24-17:2)). Thus, the undisputed evidence establishes that neither Respondent was a party to the original 2006 loan transaction.

Further, Appellant makes no allegations that either Respondent committed any unfair or deceptive act in connection with enforcement of the terms of the original financing documents. For example, there is no allegation that either Respondent demanded payments in excess of the stated payment, unfairly changed the interest rate, imposed unfair penalties, or was harassing Appellant about making payments on the loan. Rather, all of the allegations of wrongdoing relate solely to the modification agreement negotiations with Wells Fargo that began in February 2009. L.F. 35-36 (Second Amended Petition, ¶ 26(a)-(e)).

Consequently, the undisputed facts establish there is no relationship in fact between the alleged wrongful conduct and the only sale/advertisement of merchandise

identified by Appellant—the 2006 loan transaction. § 407.020 RSMo.; *Portfolio Recovery Associates*, 351 S.W.3d at 665-67. Like the defendant in *Portfolio*, Wells Fargo is a stranger to Appellant's initial loan transaction, and all of Appellant's allegations against Wells Fargo concern activities occurring after she obtained the loan. Thus, none of the alleged unfair conduct occurred "in connection with the sale or advertisement of any merchandise."

In an attempt to circumvent the analysis and holding in *Portfolio Recovery Associates*, Appellant asserts for the first time in Part I of the Substitute Brief, that the loan modification itself is a separate "sale" of merchandise. *See* Substitute App. Brief, p. 18. However, this assertion is contrary to Appellant's Second Amended Petition, which expressly identifies the operative consumer transaction as the 2006 loan transaction. L.F. 35 (Second Amended Petition, ¶¶ 25-27). Indeed, Appellant has never alleged in her Petition, Amended Petition, or Second Amended Petition that the loan modification constituted a separate "sale" under the MPA. L.F. 10-44. *See M.F.A. Mut. Ins. Co. v. Hill*, 320 S.W.2d 559, 562-63 (Mo. 1959) ("The pleader is bound by the allegations in his petition."); *Atlanta Cas. Co. v. Stephens*, 825 S.W.2d 330, 333 (Mo. App. W.D. 1992) (holding appellant who never asserted claim for negligent entrustment could not argue that theory on appeal).

Moreover, Appellant did not raise this issue in either her response to Respondents' Motion for Summary Judgment or in her briefing before the Eastern District. *See* L.F. 253-58; Appellant's Brief filed in ED99253. Appellant is therefore barred from raising

this issue for the first time herein. *See* Rule 83.08(b);[7] *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999) (holding this Court will not review a claim not raised before the court of appeals); *Barner v. The Missouri Gaming Co.*, 48 S.W.3d 46, 50 (Mo. App. W.D. 2001) ("Appellate review of a grant of summary judgment is limited to those issues put before the trial court.").[8]

Further, although there are no Missouri state court decisions on point, the District Court for the Western District of Missouri recently addressed a similar issue in *Corpe v. Bank of America, N.A.*, 2013 WL 1316328, at *6 (W.D. Mo. March 29, 2013). In *Corpe*, the plaintiffs alleged the servicer violated the MPA by engaging in negotiations concerning a possible modification of the plaintiffs' mortgage and creating a "deliberate impression that it would grant a loan modification." *Id.* The court dismissed the plaintiff's MPA claim against their loan servicer, finding the plaintiffs' failed to allege the servicer offered any "merchandise" as defined by the MPA. *Id.* The court reasoned the MPA required that there be some type of fraud or unfair practice with regard to the

[7] Rule 83.08(b) provides in relevant part: "The substitute brief . . . shall not alter the basis of any claim that was raised in the court of appeals brief."

[8] *See also Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 370 n.2 (Mo. banc 2012) ("To preserve an issue for appeal, it must be presented to the trial court."); *Vance Bros., Inc. v. Obermiller Cost. Service, Inc.*, 181 S.W.3d 562, 563 (Mo. banc 2006) ("a litigant must preserve a claim of error in the trial court in order to be afforded appellate review.").

advertising or selling of new merchandise and concluded that the servicer was not "advertising or selling new merchandise," to the plaintiffs, but rather was merely offering to modify "the repayment terms of merchandise—Plaintiffs' home loan—that was previously sold in trade or commerce." *Id.*

Under the plain language of the statute and *Portfolio Recovery Associates*, the MPA does not reach the alleged conduct because the undisputed evidence establishes there was no relationship in fact between the origination of Appellant's loan in 2006 and the alleged deceptive practices. The MPA simply does not apply or extend to Wells Fargo's alleged conduct, and Appellant cannot demonstrate any relationship between the alleged unfair practice that occurred while she was undergoing review for a loan modification and the origination of the 2006 loan. *Portfolio Recovery Associates*, 351 S.W.3d at 674; *Conway*, 2013 WL 6235864, at *3; *Willis*, 2012 WL 3043023, at *3; *Ball*, 2012 WL 6645695, at *6.

As such, Respondents are entitled to summary judgment on Appellant's claim for alleged violation of the MPA, and the Trial Court's judgment should be affirmed.

II. The "Before, During, and After" Language of the MPA Does Not Eliminate the Requirement that the Alleged Unfair Practice be "In Connection With" an Advertisement or Sale of Merchandise

In Part D of the Substitute Brief, Appellant argues the MPA's language "before, during or after the sale," found in the last sentence of § 407.020.1 RSMo extends the reach of the MPA to include the alleged wrongful conduct by Wells Fargo after the initial

loan transaction. Substitute App. Br., pp. 11-12. The Attorney General and the National Consumer Law Center ("NCLC") assert similar arguments.

The crux of Appellant's, the Attorney General's, and the NCLC's (collectively, the "Opponents") argument is that the Trial Court erred in applying the holding in *Portfolio Recovery Associates*—that the "in connection with" requirement requires the unlawful practice be "made before or at the time of the advertising or purchase of the merchandise"—because the holding is contrary to the "before, during or ***after*** the sale" language of the MPA. The Opponents also assert *Portfolio Recovery Associates* conflicts with the Southern District's holding in *Schuchmann v. Air Services Heating & Air Condition, Inc.*, 199 S.W.3d 228 (Mo. App. S.D. 2006) and the Western District's holding in *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191 (Mo. App. W.D. 2013).

A nearly identical argument was rejected by the Eastern District in *Portfolio Recovery Associates*. Indeed, in *Portfolio Recovery Associates*, the Attorney General argued that the "language 'before, during or after' the sale extends the reach of the MPA to third-party debt collections who acquire the debt *after* the sale is completed, and who have no other involvement with the sales transaction under the MPA," citing *Schuchmann*. 351 S.W.3d at 667 (emphasis in original). The Court distinguished *Schuchmann*, reasoning that although the improper conduct in that case—failing to honor a lifetime warranty—occurred after the sale, the seller made the promise to provide the warranty in connection with the sale. *Id*. The Court concluded that "[t]he 'before, during or after the sale' language of the MPA ***does not eliminate, but merely modifies*** the

requirement that the unfair trade practice be made 'in connection with' the sale." *Id.* (emphasis added).

Indeed, the holding in *Portfolio Recovery Associates* appropriately gives effect to all of the MPA's provisions as required by the cannons of statutory construction. *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992) ("if possible, all provisions must be harmonized and every clause given some meaning."). The "before, during or after the sale" language appears in the final sentence of § 407.020.1 RSMo and states:

> Any act, use or employment ***declared unlawful*** by this subsection violates this subsection whether committed ***before, during or after the sale***, advertisement or solicitation.

(Emphasis added).

Thus, the phrase "committed before, during or after the sale," applies only if the "act, use or employment [is] ***declared unlawful*** by this subsection." § 407.020.1 RSMo. (emphasis added). To determine whether an act is "declared unlawful," one must look to the first sentence of § 407.020.1 RSMo, which defines an "unlawful practice" as "any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression or omission of any material fact ***in connection with*** the sale or advertisement of any merchandise in trade or commerce . . . ." *Id* (emphasis added). Thus, by its plain terms, the MPA requires that an "unlawful practice" be made "in connection with" a sale or advertisement of merchandise. *See also* MAI 39.01. Therefore, as the *Portfolio Recovery Associates* Court correctly concluded, the "before,

during or after the sale," clause does not eliminate but rather modifies the requirement that the alleged unlawful activity be made "in connection with" the sale or advertisement. 351 S.W.3d at 667.

Further, the key distinction between *Schuchmann* and *Portfolio Recovery Associates* is that in *Schuchmann* there ***was*** a relationship in fact between the defendant's misconduct and the initial sales transaction. 199 S.W.3d at 230-31. Specifically, in *Schuchmann*, the seller made a false representation ***at the time of the initial sales transaction*** that it would provide a lifetime warranty. 199 S.W.3d at 230-31. It is that representation, made at the initiation of the sale and "in connection with the sale," that gave rise to liability when the defendant refused to honor the warranty given to the buyer ***after*** the sale. *Id*. at 233-34.

Thus, *Schuchmann* exemplifies how the "before, during, and after" language of the MPA modifies but does not eliminate the requirement that the alleged unfair practices be made "in connection with" the initial sale or advertisement of merchandise.[9]

Peel is also distinguishable from *Portfolio Recovery Associates* and the case at bar. In *Peel*, the plaintiff sued a used vehicle dealer and a vehicle financing company (the "defendant") under the MPA after the plaintiff purchased a vehicle but never received the vehicle's title. 408 S.W.3d at 195. The plaintiff obtained a default judgment

[9] *See also Conway*, 2013 WL 6235864, at *5 ("We agreed with *Schuchmann* that the plain language of the MPA applies to post-sale conduct, 'but only when such conduct directly relates to the sale or advertisement of merchandise.'").

against the dealership, and the case proceeded to a jury trial against the defendant. *Id*. at 196-97. The jury found in favor of the plaintiff, and the defendant appealed asserting the plaintiff failed to show the defendant committed any unfair practice in connection with the sale of the vehicle. *Id*. at 197.

The Western District affirmed, holding there was sufficient evidence establishing the defendant's actions were in connection with the sale because the defendant (1) provided the financing that enabled the sale to take place; (2) provided the sales contract and all related documents to close the sales transaction; and (3) had an ongoing relationship with the dealership through a contract that pre-existed the plaintiff's purchase. *Id*. at 206. The Western District therefore concluded that, "unlike *Portfolio Recovery*, where the debt was sold long after the underlying transaction, [the defendant] had a relationship with the buyer ***from the outset of the initial transaction***." *Id*. at 208 (emphasis added).

The Western District's commentary questioning the holding in *Portfolio Recovery Associates* is, as the Opponents correctly acknowledge, merely dicta because as discussed above the Court held there was sufficient evidence to establish the necessary relationship in fact between the defendant's actions and the initial consumer transaction as required by the MPA. 408 S.W.3d at 208. Thus, *Peel* did not address the scope of the "in connection with" requirement of the MPA.[10]

[10] The NCLC also cites *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. banc 2009) to support the argument that the MPA applies to conduct after the sale.

The holdings in *Schuchmann* and *Peel* are therefore entirely consistent with *Portfolio Recovery Associates*—to state a claim under the MPA, there must be some unfair practice made "in connection with" the initial sales or lease transaction in order to create liability under § 407.025 RSMo. Appellant, however, makes no allegations that either Respondent committed any act that was unfair or deceptive in connection with execution or enforcement of the terms of the original financing documents. Further, as discussed above, the Deed of Trust expressly provides that Wells Fargo had no obligation to agree to modify Appellant's loan, and Appellant admits that at the time she obtained the loan in 2006, the original lender likewise was under no obligation to modify her payments at some point in the future. L.F. 121 (Exhibit C, ¶12); L.F. 62, 185 (SOF, ¶ 4; Exhibit A (Watson Depo., 64:23-65:12)). Thus, Appellant cannot satisfy the "in connection with" requirement of the MPA.

Moreover, the Opponents' interpretation of the "before, during or after the sale" language would render the phrase "in connection with" meaningless in that under Opponents' theory, a consumer could state a claim under the MPA against a commercial entity even if the commercial entity had no involvement with the initial consumer transaction. Indeed, the District Court for the Western District of Missouri recognized the importance of the MPA's "in connection with" requirement in *Deperalta v. Dlorah*,

---

However, in *Huch* the dispositive issue was whether the defendant could rely on the voluntary payment doctrine as an affirmative defense to a MPA claim. *Id*. at 724, 726. *Huch* did not address the "in connection with" issue at all.

Inc., 2012 WL 4092191 (W.D. Mo., Sept. 17, 2012). In *Deperalta*, the plaintiff sued the defendant, a for-profit university, under the MPA alleging the defendant engaged in unfair practices by paying its admissions counselors in a manner that violated regulations promulgated by the U.S. Department of Education. *Id*. at *7. The court granted the defendant's motion for summary judgment, finding that even assuming the defendant had engaged the alleged unfair practice, the plaintiff failed to establish any connection between the unfair practice and the sale of merchandise (i.e., plaintiff's enrollment in a certificate program). The court reasoned:

> [p]ermitting Plaintiff's claim would give her a roving commission to ferret out violations of law and seek damages, regardless of how attenuated those violations are to her transaction. For instance, suppose Defendant violated federal tax laws, or violated laws regarding the payment of overtime to its workers, or violated OSHA regulations. These violations could be characterized as violations of public policy, but none have anything to do with the transaction in question.

Id. at *8.

The holding in *Portfolio Recovery Associates* appropriately gives effect to all of the MPA's provisions as required by the rules of construction. Had the General Assembly intended that the "before, during or after the sale" language to be as expansive

as the Opponents suggest, it could have made that clear when drafting the statute.[11] However, as the Eastern District appropriately acknowledged in *Portfolio Recovery Associates*, the courts "cannot undertake a legislative role and write into the MPA language that simply does not exist." 351 S.W.3d at 668.

Unlike the defendants in *Schuchmann* and *Peel*, it is undisputed that Respondents had no involvement in Appellant's initial loan transaction. Therefore, Appellant cannot establish an essential element of her claim under the MPA—that Respondents engaged in an unfair practice in connection with the sale or advertisement of merchandise. As such, Respondents are entitled to summary judgment, and the Trial Court's judgment should be affirmed.

III. ***Portfolio Recovery Associates* is Consistent with this Court's Holding in *Gibbons v. J. Nuckolls, Inc.***

The crux of Appellant's argument under Part E of the Substitute Brief is that the Trial Court erred in following the holding of *Portfolio Recovery Associates* because *Portfolio* is inconsistent with this Court's holding in *Gibbons v. J. Nuckolls, Inc.*, 216

[11] For example, the New Jersey Consumer Fraud Act defines unlawful practice as conduct "in connection with the sale or advertisement . . . *or with the subsequent performance of such person as aforesaid*."). N.J. Stat. Ann. § 56:8-2 (West 2013) (emphasis added).

S.W.3d 667 (Mo. banc 2007). The Attorney General and NCLC assert similar arguments.[12]

In *Gibbons*, the plaintiff purchased a vehicle from a used car dealership that had purchased the vehicle from a wholesaler ("Nuckolls"). 216 S.W.3d at 668. The plaintiff sued the dealership and Nuckolls under the MPA alleging that he was told the vehicle had never been in an accident when, in fact, the car had been in an accident before the dealership purchased the vehicle from Nuckolls. *Id*. The trial court granted Nuckolls' motion to dismiss finding there was lack of privity between the plaintiff and Nuckolls, and the plaintiff appealed. *Id*.

This Court reversed, holding that because a wholesaler like Nuckolls met the definition of a "person" as defined under § 407.010(5), the plaintiff could pursue his MPA claim directly against Nuckolls without establishing privity of contract. *Id*. at 668-69.

The Opponents assert *Portfolio Recovery Associates* conflicts with *Gibbons* because *Portfolio* requires a plaintiff to establish privity of contract. The Opponents' assertion is based on a fundamental misreading of *Gibbons*. As the Eastern District correctly noted in *Portfolio Recovery Associates*, this Court's holding in *Gibbons* did not eliminate the requirement that a plaintiff must show the defendant engaged in unfair practices "in connection with the sale or advertisement of any merchandise in trade or

[12] Again, a nearly identical argument was rejected by the Eastern District in *Portfolio Recovery Associates*. 351 S.W.3d at 665-66.

commerce." 351 S.W.3d at 666. Rather, the sole issue in *Gibbons* was whether a wholesaler fell within the broad definition of "person" under the MPA such that the plaintiff could sue Nuckolls directly. *Id*. at 668.

Indeed, in *Gibbons*, the "in connection with" requirement was met because, although Nuckolls had no direct involvement with the sale, its misrepresentation about the accident history were made before the plaintiff purchased the vehicle and therefore occurred "in connection with" the sale of the car to the dealership, and subsequently to the plaintiff. *Portfolio Recovery Associates*, 351 S.W.3d at 668. In contrast, the undisputed facts of this case establish Respondents had no involvement in Appellant's initial loan transaction. There is no relationship in fact between the initial sale and the alleged wrongful conduct in the case at bar.

Thus, contrary to the Opponents' assertions, there is no conflict between *Portfolio Recovery Associates* and *Gibbons*. Therefore, the Trial Court's judgment should be affirmed.

IV. Pleading Lack of Good Faith Does Not Eliminate the "In Connection With" Requirement of the MPA

Appellant cites *Ward v. West County Motor Co., Inc.*, 403 S.W.3d 82, 86 (Mo. banc 2013) for the proposition that breach of the duty of good faith constitutes an unfair practice and argues Respondents' alleged failure to act in in good faith when negotiating the loan modification establishes a relationship in fact between the foreclosure of Appellant's property and the initial extension of credit. Substitute App. Br. pp. 15-16.

In *Ward*, the plaintiffs sued the defendant, a car dealership, alleging the defendant failed to honor a ***pre-sale promise*** that it would return the plaintiffs' initial deposits in the event the plaintiffs decided not to purchase a vehicle. 403 S.W.3d at 83-84. The trial court granted the defendant's motion to dismiss, and the plaintiffs appealed. *Id*. at 84. This Court reversed, holding the plaintiffs' allegations that the defendant breached the duty of good faith were sufficient to state a claim under the MPA. *Id.* at 86. In so holding, the Court relied in part on 15 CSR § 60-8.040(1), which provides:

> It is an unfair practice for any person ***in connection with*** the advertisement or sale of merchandise to violate the duty of good faith in solicitation, negotiation and performance, or in any manner fail to act in good faith . . . .

Id. at 86 (emphasis added).

Thus, *Ward* involved a car dealership's alleged failure to honor a ***pre-sale promise*** made in connection with the sale of a vehicle. *Id*. at 84. *Ward* does not stand for the proposition that a plaintiff can avoid the obligation to prove the "in connection with" element simply by pleading breach of the duty of good faith. *Id*. at 86. Indeed, as 15 CSR § 60-8.040(1) expressly provides, the unfair practice (i.e., breaching the duty of good faith) must still be made "in connection with the advertisement or sale of merchandise." *See also* § 407.020.1 RSMo; *Portfolio Recovery Associates*, 351 S.W.3d at 667-68.

V. The "Nature of the Merchandise" is Irrelevant

Appellant also asserts the Trial Court erred by not considering the nature of the merchandise and the relationship between the parties when determining whether Appellant could meet the "in connection with" requirement of the MPA. Substitute App.

Br., pp. 16-17. Appellant acknowledges the "merchandise" in this case is the initial extension of credit to Appellant by the original lender but argues the merchandise can be traced from the point of sale in 2006 to the alleged unlawful acts because Wells Fargo "unlawfully foreclosed on the deed of trust that secured the same mortgage loan." Substitute App. Br., p.17. Appellant relies on *In re Shelton*, 481 B.R. 22 (Bankr. W.D. Mo 2012).

In *Shelton*, the debtor brought a claim against the loan servicer under the MPA after the servicer foreclosed. 481 B.R. at 24. The debtor alleged the loan servicer engaged in unfair practices by failing to consider the debtor for loss mitigation opportunities before initiating the foreclosure. *Id*. at 31. Specifically, the debtor claimed the deed of trust incorporated various Department of Housing and Urban Development ("HUD") regulations that required the loan servicer to evaluate the debtor's loan for possible loss mitigation programs. *Id*. at 29-32. The servicer filed a motion to dismiss relying on *Portfolio Recovery Associates*. *Id*. at 32. The bankruptcy court denied the motion finding the debtor had alleged sufficient facts to establish a connection between the servicer's alleged failure to comply with the HUD regulations and the original mortgage transaction because the regulations were incorporated into the deed of trust and therefore were bargained-for terms of the agreement. *Id*. The court also found that the debtor had sufficiently pled that she did not receive the benefit of her mortgage insurance. *Id*. at 32-33.

Shelton is distinguishable for several reasons. First, in *Conway*, the Eastern District expressly held that the *Shelton* court's interpretation of the MPA "deprives the

statutory phrase "in connection with" of any significant meaning." *Conway*, 2013 WL 6235864, at *4. The Eastern District therefore concluded that "the bankruptcy court's opinion on this issue to be neither binding nor persuasive." *Id*.

Further, unlike *Shelton*, Appellant's claim is not premised on express or incorporated terms of the Note or Deed of Trust. Rather, Appellant's allegations of wrongdoing relate solely to the loan modification negotiations with Wells Fargo occurring well-after Appellant received the loan.

Moreover, the Deed of Trust expressly provides that Wells Fargo had no obligation to modify Appellant's loan. Also, Appellant admits that when she obtained the loan in 2006, the original lender likewise was under no obligation to modify her payments at some point in the future. L.F. 121 (Exhibit C, ¶12); L.F. 62, 185 (SOF, ¶ 4; Exhibit A (Watson Depo., 64:23-65:12)). Appellant has not presented any evidence linking representations made or facts concealed during the origination of the loan in 2006 and the failed loan modification negotiation three years later. Appellant cannot establish the relationship in fact necessary to state a claim under the MPA.

In summary, nothing in the MPA or any of the cases cited by Appellant suggests that the "nature of the merchandise," rather than the relationship between the alleged unfair practice to a sale or advertisement, is determinative of whether a claim falls under the MPA—the nature of the merchandise at issue is simply irrelevant.

As such, Respondents are entitled to summary judgment on Appellant's claim for alleged violation of the MPA, and the Trial Court's judgment should be affirmed.

VI. Appellant's Reliance on *Huffman*, *Narramore*, and *Beals* is Misplaced

In Part J of the Substitute Brief, Appellant argues other courts have refused to follow *Portfolio Recovery Associates*, citing *Huffman v. Credit Union of Texas*, 2011 WL 6645695 (W.D. Mo. 2011), *Narramore v. HSBC Bank USA, N.A.*, 2010 WL 2732815 (D. Ariz. July 7, 2010), and *Beals v. Bank of America, N.A.*, 2011 WL 5415174 (D.N.J. Nov. 4, 2011).[13] However, these cases do not support Appellant's position.

In *Huffman*, the court found the defendant ***was a party***, through its agent, to the initial financing transaction at issue, making that case distinguishable from "cases involving strangers to the original transaction." 2011 WL 6645695, at *6 (W.D. Mo. 2011). As discussed above, the undisputed evidence establishes Respondents were ***not*** involved in the 2006 loan transaction and are, in fact, "strangers to the original transaction." Appellant's MPA claim therefore fails. *Portfolio Recovery Associates*, 351 S.W.3d at 674.

Narramore and *Beals* involve the interpretation of Arizona's Consumer Fraud Act and New Jersey's Consumer Fraud Act, respectively, and do not constitute controlling precedent in Missouri courts. *Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 823 (Mo. App. E.D. 2010) ("Though meriting our respect, decisions by the federal district and intermediate appellate courts and decisions of other state courts are not binding on us.").

[13] Appellant also cites *Peel* and *In re Shelton*. These cases are distinguished in Sections II and V, *supra*.

Moreover, contrary to Appellant's assertion, the court in *Narramore* did not conduct any in-depth analysis of whether the alleged wrongful acts by the servicer occurred "in connection with" the plaintiff's original loan transaction under the Arizona statute. 2010 WL 2732815, at *13. Rather, the court found that the plaintiff had generally pleaded enough facts to assert a plausible claim to avoid dismissal under Fed.R.Civ.P. 12(b)(6). *Id*.

Appellant's reliance on *Beals* is also misplaced. The New Jersey Consumer Fraud Act (the "N.J. Act") incorporates a broader definition of an "unlawful practice" than the MPA. Specifically, the N.J. Act defines "unlawful practice" as "the act, use or employment of any person of any unconscionable commercial practice . . .in connection with . . . ***or with the subsequent performance of such person as aforesaid***, whether or not any person has in fact been misled, deceived, or damaged thereby." *Id*. at *16 (emphasis added). Thus, in *Beals*, the court did not need to determine whether the loan servicer's activities were "in connection with" the initial loan transaction because it found the alleged unlawful activity was a "subsequent performance" under the New Jersey statute—a provision that does not exist under the MPA. *Id*. at *17.

VII. The Attorney General and NCLC's Policy Argument Against *Portfolio Recovery Associates* is Untenable

Both the Attorney General and the NCLC argue that as a matter of policy, *Portfolio Recovery Associates* should be overruled because it permits "the unscrupulous" a path to avoid liability under the MPA by "laundering" its good faith duties by merely

assigning a consumer contract. *See* Attorney General Br., pp. 11-12; NCLC Br., p. 25. This is based on a fundamental misreading of *Portfolio*.

Under the MPA's plain language and the holding in *Portfolio Recovery Associates*, any prospective defendant that engages in unlawful conduct ***in connection with*** the sale or advertisement of merchandise could be liable regardless of whether the defendant involved a third-party assignee or agent, and such liability would continue after the sale, as demonstrated by *Schuchmann*. For example, a car dealership that engages in fraud to convince a plaintiff to finance the purchase of a vehicle through the dealership would still be liable to the plaintiff, even if the dealership latter sells or assigns the loan to a third party, because the fraud occurred in connection with the initial purchase. *See Portfolio Recovery Associates*, 351 S.W.3d at 667-68.

Portfolio Recovery Associates in no way allows a bad actor to avoid liability under the MPA by simply transferring or assigning its rights to a third-party. Rather, as discussed above, *Portfolio Recovery Associates* appropriately gives effect to all of the MPA's provisions, which expressly require that the alleged unlawful conduct be made "in connection with" the sale or advertisement of merchandise.

VIII. The NCLC's Survey of Other States' Consumer Law Statutes and Jurisprudence is Unavailing

The NCLC urges this Court to consider the Iowa Supreme Court's interpretation of Iowa's Consumer Fraud Act in *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518 (Iowa 2005). Of course, neither *Cutty* nor any of the other

non-Missouri cases cited by NCLC constitute controlling precedent in Missouri courts. *Doe*, 311 S.W.3d at 823. Moreover, *Cutty's* is readily distinguishable.

In *Cutty's*, the Iowa Attorney General sued the defendant, a camping club (the "Club"), alleging the Club engaged in unlawful practices to collect annual fees from its members who had previously purchased an interest in a campground. *Id*. at 522-23. The evidence established that the Club's parent company (the "Developer") developed the campground in 1980 and began selling small interests in the campground to consumers. *Id*. at 520-21. At the same time it started selling interests in the property, the Developer formed the Club to manage and operate the campground, as well as to collect annual fees. *Id*. at 521. The evidence established that Developer retained control of the Club's Board of Directors since its formation due in part to the fact that the Developer did not sell all of the plots. *Id*. at 522. In 2001, the Club initiated a collection campaign to collect unpaid dues from those who purchased an interest in the campground. *Id*. at 522-23. The trial court granted the defendant's motion for summary judgment, and the intermediate appellate court affirmed, holding the Iowa Consumer Fraud Act did not regulate the defendant's activity because it was unrelated to the sale. *Id*. at 525.

The Iowa Supreme Court reversed, holding there was a genuine issue of fact concerning whether the Club's collection campaign was "in connection with the sale of merchandise," under the Iowa Consumer Fraud Act. *Id*. at 528. Specifically, the Court held that a trier of fact could find a nexus between the Developer's sale of the interests and the Club's collection campaign in light of the fact that the Developer "conceived, created, and has retained control over the Club throughout the years to the present day."

Id. The Court further reasoned that a trier of fact could find that at the time the consumers purchased an interest in the campground, "they had every reason to believe all shares would be sold, or at least that any shares the Developer or Club owned would be dues-paying shares." *Id*.

In contrast, the undisputed evidence in the case at bar establishes that neither Respondent had any involvement with the original 2006 loan transaction. Indeed, Appellant admits that Wells Fargo was not a party to the original 2006 loan transaction. L.F. 63, 185 (SOF, ¶ 6; Exhibit A (Watson Depo., 13:7-9)). Appellant also admits that Wells Fargo made no statements to her in connection with her obtaining the loan to purchase the Property. L.F. 63, 185 (SOF, ¶ 7; Exhibit A (Watson Depo., 12:13-16, 22-25)). Thus, none of the alleged unfair conduct occurred "in connection with" the 2006 loan transaction and Appellant's claim therefore fails.

The NCLC also devotes a significant portion of its brief to discussing other states' consumer law statutes and cases discussing those statutes. However, the other states' statutes cited by the NCLC read differently than the MPA, and therefore the cases interpreting those statutes are not persuasive. In fact, in a number of the other states identified by the NCLC, courts have expressly held that the state's consumer protection statute ***does not*** apply to residential mortgage loan servicers. *See, e.g., Barber v. National Bank of Alaska*, 815 P.2d 857, 860-61 (Alaska 1991) (distinguishing the *O'Neill* case cited by the NCLC and holding that mortgage loan servicing did not fall under Alaska Unfair Trade Practices and Consumer Act); *Jenkins v. BAC Home Loan Servicing, LP*, 822 F.Supp.2d 1369, 1375 (M.D. Ga. 2011) (finding plaintiff could not state a claim

under Georgia's Fair Business Practices Act for claims arising from a private mortgage transaction); *Anderson v. Barclay's Capital Real Estate, Inc.*, 989 N.E.2d 997, 1000-03 (Ohio 2013) (holding Ohio's Consumer Sales Practices Act does not apply to mortgage loan servicing because "transactions between mortgage-service providers and homeowners are not 'consumer transactions' within the meaning of the CSPA."); *Ayala v. American Home Mortg. Servicing, Inc.*, 2011 WL 3319543, at *3 (D. Utah June 8, 2011) (finding Utah's Consumer Sales Practices Act does not apply to a mortgage loan because it is not a "consumer transaction" within the scope of the Act).

CONCLUSION

The MPA does not reach the conduct Appellant contends is unlawful. As the Eastern District correctly held in *Portfolio Recovery Associates*, in order to meet the "in connection with" requirement of the MPA, there must be a "relationship in fact" between the alleged unfair practice and the actual sale or advertising of the merchandise at issue. Appellant has failed to proffer any evidence to create a genuine issue of material fact as to a deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact ***in connection with*** the origination of Appellant's loan in 2006. To the contrary, the undisputed facts establish there was no unfair practice at the time of the initial origination of the loan as it related to the possibility of future loan modification and that Respondents had absolutely no involvement in the original loan transaction.

Under the plain language of the MPA and *Portfolio Recovery Associates*, Appellant's claim against Respondents fails, and Respondents are entitled to summary

judgment. Therefore, Respondents respectfully request this Court affirm the Trial Court's Judgment in favor of Respondents and for such other and further relief as the Court deems proper.

Respectfully Submitted,

HAZELWOOD & WEBER LLC

By: **/s/ David T. Hamilton**
David T. Hamilton, #28166
John H. Kilper, #60997
200 North Third Street
St. Charles, Missouri 63301-2890
Office: 636-947-4700
Facsimile: 636-947-1743
dhamilton@hazelwoodweber.com
jkilper@hazelwoodweber.com

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) in that the Brief contains 9,664 words, exclusive of the cover, certificate of service, certificate required by Rule 84.06(c), signature block and, and as determined by Microsoft Office Word software;

2. This Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13-point Times New Roman.

3. That a true and correct copy of the attached brief was served by the Court's electronic filing system, on this 24th day of February, 2014, to:

Mitchell B. Stoddard, #38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, MO 63141
Office: 314-692-2001
Facsimile: 314-692-2002
mbs@clalaw.com
Attorney for Appellant

Chris Koster, Attorney General
James R. Layton, Solicitor General
Brian T. Bear
Supreme Court Building
P.O. Box 899
Jefferson City, Mo 65102
Office: (573) 751-1800
Facsimile: (573) 751-0774
james.layton@ago.mo.gov
brian.bear@ago.mo.gov
Amicus Curiae

Dale K. Irwin
Gina Chiala
Slough Connealy Irwin & Madden LLC
1627 Main St., Ste. 900
Kansas City, MO 64108
Office: (816) 531-2224
Facsimile: (816) 2147
dirwin@scimlaw.com
chiala@scimlaw.com
Amicus Curiae

Bernard E. Brown
Lee R. Anderson
The Brown Law Firm
1627 Main St., Ste. 800
Kansas City, MO 64108
Office: (816) 283-3100
Facsimile: (888) 919-0123
brlawofc@swbell.net
andersonl@swbell.net
Amicus Curiae

/s/ David T. Hamilton