

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHERYL A. SMITH, on behalf of herself and
all others so similarly situated,

,

Plaintiff,

v.

OCWEN LOAN SERVICING, LLC n/k/a
PHH MORTGAGE CORPORATION, HSBC
BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR FREEMONT HOME
LOAN TRUST 2006-E, MORTGAGE
BACKED CERTIFICATES, SERIES 2006-E

,

Defendants.

Case No. 1:20-cv-11315

NOTICE OF REMOVAL

TO THE HONORABLE JUDGES AND CLERK OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

Pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, the Defendants, Ocwen Loan Servicing, LLC (“Ocwen”) n/k/a PHH Mortgage Corporation (“PHH”), and HSBC Bank USA, National Association, as Trustee For Freemont Home Loan Trust 2006-E, Mortgage Backed Certificates, Series 2006-E (“HSBC Bank as Trustee”) (collectively, the “Defendants”), by and through their undersigned counsel, hereby remove the above-captioned action to this Court from the Massachusetts Superior Court, Worcester County. In support thereof, Defendants state the following:

I. PROCEDURAL BACKGROUND AND NATURE OF ACTION

1. On or about May 5, 2020, the Plaintiff, Cheryl A. Smith (“Plaintiff”), filed a complaint in the Worcester County Superior Court, on behalf of herself only, which was captioned *Cheryl Smith v. PHH Mortgage Corporation, HSBC Bank USA, National Association,*

As Trustee For Fremont Home Loan Trust 2006-E, Mortgage Backed Certificates, Series 2006-E, and docketed at Case No. 2085CV0047 (“Complaint”).

2. Defendants were served with the Complaint on or about May 21, 2020.

3. On or about June 16, 2020, Plaintiff filed a purported amended class action complaint in the Worcester County Superior Court, which was captioned *Cheryl A. Smith, On Behalf of Herself and All Others So Similarly Situated v. Ocwen Loan Servicing, LLC n/k/a PHH Mortgage Corporation, HSBC Bank USA, National Association, As Trustee For Fremont Home Loan Trust 2006-E, Mortgage Backed Certificates, Series 2006-E*, and docketed at Case No. 2085CV00477. A copy of the amended state court complaint (“Amended Complaint”) is attached hereto as Exhibit A.

4. In addition to transforming the Complaint into a purported class action, the Amended Complaint also added as a named defendant Ocwen Loan Servicing, LLC n/k/a PHH Mortgage Corporation.

5. On or about June 17, 2020, counsel for the Defendants received a courtesy copy of the Amended Complaint via electronic mail. However, to date, the Defendants have not been served a copy of the Amended Complaint, and the state court docket does not reflect any affidavits of service.

6. By her Amended Complaint, Plaintiff claims that Defendants “breached the mortgage contracts in violation of Mass Gen Laws Ch. 244 § 14 as well as violated Mass. Gen. Laws Ch. 244 §35A by sending purported default notices in accordance with the mortgage contract and right to cure notices pursuant to Mass. Gen. Laws Ch. 244 §35A that contained materially misleading statements.” Am. Compl. ¶ 1. Plaintiff further claims that Defendants “are in violation of G. L. c. 183, § 21 for failure to first comply with the terms of the mortgage prior

to exercising the power of sale, rendering any default or right to cure notice with the above described verbiage, as well as any acceleration, any foreclosure notice, any foreclosure auction, and any foreclosure deed made subsequent to said void default/ right to cure notices void.” Am. Compl. ¶ 50. Plaintiff’s Amended Complaint asserts these claims on behalf of herself and also alleges purported class action claims for all those similarly situated.

7. Plaintiff seeks an unidentified amount of damages relating to: (1) “fees and costs and expenses for certified mail, advertising costs, legal fees, auctioneer costs and other charges which were reflected in their monthly mortgage statements”; (2) “hiring attorneys, in regard to the improper actions of Defendants”; (3) “emotional injuries and damages”; (4) “legal fees for the prosecution of this action”; and (5) “additional harm from Defendants’ breach, including but not limited to losses of their property interest, higher principle balances, improper negative reporting to credit bureaus; inappropriate fees and charges assessed to them, including broker price opinion fees, inspection fees, attorney’s fees, “process management” fees, late fees and other charges associated with delinquency and default, and increased accrued interest.” Am. Compl. ¶¶ 70-75.

II. THE COURT HAS DIVERSITY JURISDICTION OVER THIS ACTION

A. This Court Has Original Jurisdiction Pursuant to 28 U.S.C. § 1332(a)

8. The United States District Court for the District of Massachusetts has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because the action is between citizens of different states and the matter-in-controversy exceeds the sum or value of \$75,000.00. *See* 28 U.S.C. 1322(a)(1).

9. First, there is complete diversity of citizenship under 28 U.S.C. § 1332(a). According to her Amended Complaint, Plaintiff is a citizen of Massachusetts and resides at the

the real property that is the subject of this action located at 124 Ashby Road, Ashburnham, Massachusetts (the “Property”). Am. Compl. ¶ 12.

10. Plaintiff filed this action against “HSBC Bank USA, National Association,” which is a national banking association organized and existing under the laws of the United States of America with its main office in Mclean, Virginia, and a principal office in New York, New York. See 28 U.S.C. § 1332(c)(1) (“a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”); *Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) (stating that a national bank is a citizen of the State designated in its articles of association as its main office).

11. PHH is a corporation organized under the laws of the state of New Jersey, with its principal place of business in New Jersey. Therefore, under 28 U.S.C. § 1332(c)(1), PHH is a citizen of New Jersey for diversity purposes.

12. Ocwen is a limited liability company organized under the laws of the State of Delaware, and has a principal place of business in Florida. However, the citizenship of a limited liability company is determined by the citizenship of all of its members. *See, e.g., Pramco, LLC ex. rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54-55 (1st Cir. 2006) (“every circuit to consider this issue has held that the citizenship of a limited liability company is determined by the citizenship of all of its members”). Ocwen Loan Servicing, LLC’s sole member is Ocwen Financial Corporation, which is incorporated in the state of Florida and has a principal place of business in the State of Georgia. Accordingly, Ocwen Loan Servicing, LLC is a citizen of Florida and Georgia for purposes of determining diversity jurisdiction. *Pickens v. U.S. Bank Nat’l Ass’n*, No. 3:12-CV-2210-O-BK, 2013 WL 866171, at *5 (N.D. Tex. Jan. 8, 2013) (“Defendant Ocwen, a limited liability company, has citizenship of its members.”).

13. Thus, Plaintiff and Defendants are citizens of different states for diversity purposes, and the complete diversity requirement of 28 U.S.C. § 1332(a)(1) is satisfied in this case.

14. Second, the amount-in-controversy exceeds \$75,000.00. Plaintiff's Amended Complaint seeks, *inter alia*, a declaration of rights based upon a loan provided to Plaintiff in the original principal amount of \$200,000.00 and a mortgage which secured payment of that loan on the Property, as well as emotional damages, attorneys' fees, loss of interest in the Property and other fees and costs.

15. Where the right to enforce a mortgage loan is at issue, the original principal amount of the mortgage may constitute the amount in controversy for diversity jurisdiction purposes. *See McKenna v. Wells Fargo Bank, N.A.*, 693 F.3d 207, 211-12 (1st Cir. 2012) (considering, among other potential tests, the loan amount as amount in controversy in cases where complaint seeks to invalidate a loan secured by a mortgage); *McLarnon v. Deutsche Bank National Trust Company*, C.A. 15-11799-FDS, 2015 WL 420127, at *3 (D. Mass. July 10, 2015) (holding that amount in controversy can be determined by the face value of the loan in question); *Larace v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d. 147, 151 (D. Mass. 2013) (“[I]t is reasonable to designate the amount in controversy as the value of the mortgage, since Plaintiffs’ petition does not specify a damage amount and Defendants’ mortgage interest would be extinguished if Plaintiffs were ultimately successful.”). The amount in controversy with regarding to the Plaintiff's individual claims, therefore, exceeds \$75,000.00, exclusive of interest and costs.

16. Accordingly, this Court has jurisdiction over this action based upon diversity of citizenship and the amount in controversy pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

B. This Court Also Has Jurisdiction Pursuant to the Class Action Fairness Act

17. In addition to having original jurisdiction over this action pursuant to 28 U.S.C. § 1332, this Court also has jurisdiction over the purported class action claims pursuant to the Class Action Fairness Act of 2005 (CAFA).

18. On February 18, 2005, CAFA, became law and granted federal courts jurisdiction over qualifying class actions in which there is minimal diversity, the aggregate amount in controversy exceeds \$5,000,000, and there are 100 or more class members. *See* 28 U.S.C. §§ 1332(d)(2)(A), 1332(d)(5)(B), 1332(d)(6). It applies to any class action that is “commenced” on or after its effective date, i.e., February 18, 2005. *See* 28 U.S.C. § 1332 note.

19. CAFA was enacted by Congress in 2005 “to facilitate adjudication of certain class actions in federal court.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014). As a result, “no antiremoval presumption attends cases invoking CAFA” *Id.*

20. This Court has jurisdiction over this purported class action under CAFA because: (1) “any member of a class of plaintiffs is a citizen of a State different from any defendant”; (2) the “number of members of all proposed plaintiff classes in the aggregate is [not] less than 100”; and (3) “the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.” *See* 28 U.S.C. § 1332(d)(2), (d)(5)(B).

i. The Parties Meet the Minimum Diversity Requirements for the Same Reasons Discussed Above

21. CAFA’s minimal diversity requirement is satisfied when any member of a class of plaintiffs is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A).

22. According to her Amended Complaint, Plaintiff is a citizen of Massachusetts. Am. Compl. ¶ 12.

23. Consequently, CAFA permits removal since none of the defendants named in this action are citizens of Massachusetts.

24. As discussed above, HSBC Bank as Trustee is a citizen New York, PHH is a citizen of New Jersey, and Ocwen is a is a citizen of Florida and Georgia for the purposes of diversity jurisdiction.

25. Thus, CAFA's diversity requirements are saitsified. *See* 28 U.S.C. § 1332(d)(10); *see also Alabama Ins. Guar. Ass'n v. FrankCrum 1 Inc.*, No. 11-CV-3228, 2012 U.S. Dist. LEXIS 168148, at *6 n.3 (N.D. Ala. November 27, 2012) ("28 U.S.C. § 1332(d)(10) invests federal courts with subject matter jurisdiction when there is "minimal diversity.") (citing *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 702 (4th Cir. 2010)); *Kelmer v. DFS Servs. LLC*, No.10-050-GPM, 2010 U.S. Dist. LEXIS 10756, *3 (S.D. Ill. February 8, 2010) (acknowledging that §1332(d)(10) applies to qualifying class actions).

ii. Plaintiff Alleges That The Putative Class Is Sufficiently Numerous

26. Pursuant to CAFA's numerosity requirement, the number of putative class members cannot be "less than 100." 28 U.S.C. § 1332 (d)(5)(B).

27. Plaintiff brings her putative class action on behalf of a nationwide class. (Am. Compl. ¶ 38.)

28. According to the Amended Class Action Complaint, "Defendant has made tens of thousands of loans nationwide, including loans in Florida." (Am. Compl. ¶ 39.)

29. While Defendants dispute that the proposed class definitions—or any other—meet the requirements for certification, the proposed class contains more than 100 members. For example, Plaintiff brings her claims on behalf of "all erroneous and potentially deceptive and

misleading default/ right to cure notices sent by [Defendants] as described in this Complaint and all resulting foreclosures initiated and conducted subsequent to such notices.”

30. Accordingly, based on the Plaintiff’s purported class action allegations in the Complaint, there are more than 100 putative class members. ADF Decl. at ¶ 5. *See* 28 U.S.C. § 1332(d)(5)(B). Plaintiff’s allegations therefore satisfy CAFA’s numerosity requirement.

iii. Plaintiff’s Class Action Allegations Also Satisfy the Amount in Controversy

31. For jurisdiction to exist under CAFA, “the matter in controversy [must] exceed[] the sum or value of \$5,000,000, exclusive of interest and costs” and “the claims of the individual class members shall be aggregated . . .” 28 U.S.C. § 1332(d)(2), (d)(6).

32. To satisfy CAFA, defendants do not need to prove this amount with any specificity. *See Dart Cherokee*, 574 U.S. at 84 (explaining a notice of removal “need not contain evidentiary submissions”).

33. Here, the Amended Complaint alleges that Defendants made numerous mortgage loans, all of which she contends are invalid, stating: “and void, declare that any notice of mortgagee’s foreclosure sale made to the Class Plaintiffs subsequent to such void default notices and void right to cure notices be null and void, enjoin the Defendants from conducting any foreclosure auction or conveyance of the subject properties and declare any foreclosure deed for said Class Plaintiffs null and void. Class Plaintiffs also seek declaratory relief, injunctive relief, actual, monetary, punitive and exemplary damages, restitution, an accounting, attorney’s fees and costs, and all other relief provided by law for Defendants’ wrongful acts.” Am. Compl. ¶ 2.

34. As the Plaintiff’s proposed class definition is broad enough to include thousands of Defendants’ customers, the disgorgement sought (at the alleged range of loan amounts and

interest rates), which alone exceeds \$5,000,000, coupled with the statutory damages and attorneys' fees, satisfy the threshold amount in controversy.

35. Accordingly, CAFA's amount in controversy requirement is satisfied because, if Plaintiff is successful in certifying the alleged class, the total amount in controversy potentially exceeds \$5,000,000, exclusive of interests and costs. *See* 28 U.S.C. § 1332(d)(6) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.").¹

36. Therefore, for the reasons stated above, this Court has original jurisdiction over the Action pursuant to 28 U.S.C. § 1332(d), and the Action is removable pursuant to 28 U.S.C. §§ 1441, 1453 and 28 U.S.C. § 1446(a) because Plaintiff's claims concern the Property, which is located in Ashburnham, Worcester County, Massachusetts, and Plaintiff commenced this action initially in Massachusetts Superior Court, Worcester County.

III. DEFENDANTS HAVE COMPLIED WITH ALL PREREQUISITES FOR REMOVAL

37. Removal is timely based on several grounds. First and foremost, this notice of removal is timely because it is filed within 30 days of July 1, 2020, the date upon which tolling ended and from which deadlines are to be calculated pursuant to the Massachusetts Supreme Judicial Court Order, entitled Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic dated May 26, 2020 ("SJC Order Regarding Exigent Circumstances") ("[A]ll deadlines set forth in statutes or court rules, standing orders, tracking orders, or guidelines that expired or will expire at any time from March 17,

¹ To be clear, the recitation of Plaintiff's allegations and requests for relief above is not a concession that Plaintiff's claims or legal theories have merit, including her class allegations and claims, which they do not. Defendants reserve the right to assert all applicable defenses in this matter.

2020, through June 30, 2020, are tolled until July 1, 2020, when the tolling period shall end . . .”). Accordingly, pursuant to the SJC Order Regarding Exigent Circumstances, any deadlines relating to the filing and serving of the Complaint are tolled through June 30, 2020 and start to run on July 1, 2020 and, thus, the deadline to filing the notice of removal is on or before July 30, 2020.

38. Moreover, the notice of removal is timely because the Amended Complaint materially changed the nature of the action by converting it into a purported class action and invoking the CAFA. As discussed above, Defendants’ counsel were served with a courtesy copy of the Amended Complaint on or about July 17, 2020. Thus, this notice of removal is timely pursuant to 28 U.S.C. § 1446(b) because it is filed within 30 days after receiving notice of the Amended Class Action Complaint. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

39. Finally, this notice of removal is timely under 28 U.S.C. §1446(b) as the Amended Complaint includes a new defendant and fewer than 30 days have elapsed since Ocwen was served with process. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (“one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend”).

40. In accordance with 28 U.S.C. § 1446(d), written notice of the filing of this removal notice will be given to Plaintiff following the filing of this Notice of Removal.

41. Certified or attested copies of all records and proceedings before the Massachusetts Superior Court will be filed with this Court within twenty-eight (28) days in accordance with LR 81.1.

42. In submitting this Notice of Removal, PHH, Ocwen, and HSBC Bank as Trustee reserve all defenses.

43. In the event any question arises as to the propriety of the removal of this matter, Defendants request the opportunity to submit briefs and be heard at oral argument in support of its position that removal is proper.

WHEREFORE, Defendants, Ocwen Loan Servicing, LLC, PHH Mortgage Corporation, HSBC Bank USA, National Association, As Trustee For Freemont Home Loan Trust 2006-E, Mortgage Backed Certificates, Series 2006-E, respectfully request that this case proceed in this court as an action properly removed to it.

Respectfully submitted,

Attorney for Defendants OCWEN LOAN
SERVICING, LLC nka PHH MORTGAGE
CORPORATION, HSBC BANK USA,
NATIONAL ASSOCIATION, AS TRUSTEE
FOR FREEMONT HOME LOAN TRUST
2006-E, MORTGAGE BACKED
CERTIFICATES, SERIES 2006-E

By: Their Attorney

/s/ Steven E. DiCairano

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Dated: July 13, 2020

CERTIFICATE OF SERVICE

I, Steven E. DiCairano, hereby certify that the documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Steven E. DiCairano

Steven E. DiCairano

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

WORCESTER, ss

_____)	
CHERYL A. SMITH On behalf of herself and)	
all others so similarly situated,)	
)	C.A. NO.
<i>Plaintiff,</i>)	
)	
)	CLASS ACTION COMPLAINT
vs.)	
)	JURY TRIAL DEMANDED
OCWEN LOAN SERVICING, LLC, nka)	
PHH MORTGAGE CORPORATION, HSBC)	
BANK USA, NATIONAL ASSOCIATION,)	
AS TRUSTEE FOR FREMONT HOME LOAN)	
TRUST 2006-E, MORTGAGE BACKED)	
CERTIFICATES, SERIES 2006-E)	
)	
<i>Defendants.</i>)	
_____)	

INTRODUCTION

1. The Representative Plaintiff Cheryl A. Smith, on behalf of herself and all others so similarly situated, brings this action as described in the paragraphs set forth herein. This class action complaint alleges that Defendants, PHH Mortgage Corp/Ocwen Loan Servicing, LLC and/or HSBC Bank USA, National Association, as Trustee for Fremont Home Loan Trust 2006-E, Mortgage Backed Certificates, Series 2006-E (HSBC), breached of the terms of those certain mortgages noted herein, given by Class Plaintiffs as secured by their real properties and in the case of the representative Plaintiff, secured by real property located at 124 Ashby Road, Ashburnham, MA as well as the real properties of those Plaintiffs in the class. The Defendants breached the mortgage contracts in violation of Mass Gen Laws Ch. 244 § 14 as well as violated Mass. Gen. Laws Ch. 244 §35A by sending purported default notices in accordance with the mortgage contract

and right to cure notices pursuant to Mass. Gen. Laws Ch. 244 §35A that contained materially misleading statements. Representative Plaintiff, on behalf of herself and all those similarly situated, alleges that all default/right to cure notices described in this Class Action Complaint that were sent by Defendant Ocwen/PHH Mortgage on behalf on mortgagees presently known and unknown are invalid and resulted in void foreclosures for violating M.G.L. Ch 244 Section 14. Defendants' breaches resulted in void default notices pursuant to the terms to the mortgages (paragraphs 19 and 22), void right to cure notices in accordance with Mass. Gen. Laws Ch. 244 §35A, void foreclosure notices, void foreclosure auctions pursuant to said mortgages, void foreclosure sales and void foreclosure deeds.

2. The Representative Plaintiff, on behalf of herself and all others so similarly situated, pray that this Honorable Court find that the Defendants breached the terms of the mortgages and further find said default notices are invalid and void. Further said Plaintiff prays that this Honorable Court find that the Defendants violated Mass. Gen. Laws Ch. 244 §35A and further find that the right to cure notices sent pursuant to said statute are null and void as well. In addition, said Plaintiffs ask that this Court find that any foreclosure sales conducted by the Defendants and foreclosure deeds granted subsequent to the invalid default notices be declared null and void regardless of whether or not said invalid foreclosure deeds were recorded. Representative Plaintiff asks that this Honorable Court declare that any such default notices sent to the Class Plaintiffs as described in this complaint be null and void, declare that any right to cure notices pursuant to Mass. Gen. Laws Ch. 244 §35A as described in this complaint be null and void, declare that any notice of mortgagee's foreclosure sale made to the Class Plaintiffs subsequent to such void default notices and void right to cure notices be null and void, enjoin the Defendants from conducting any foreclosure auction or conveyance of the subject properties and declare any foreclosure deed for

said Class Plaintiffs null and void. Class Plaintiffs also seek declaratory relief, injunctive relief, actual, monetary, punitive and exemplary damages, restitution, an accounting, attorney's fees and costs, and all other relief provided by law for Defendants' wrongful acts.

JURISDICTION AND VENUE

3. This Honorable Court has subject matter jurisdiction as the subject property at issue is located in the Commonwealth of Massachusetts, and Plaintiff resides at said subject property.

4. Venue is proper in this Honorable Court in that the events or omissions giving rise to this claim have occurred, and the real property that is subject of the action is situated within the Commonwealth of Massachusetts.

5. Pursuant to Mass. R. Civ. P. Rule 23(a)(1), this complaint is a putative class action in which the class is so numerous that joinder of all members is impracticable.

6. Pursuant to Mass. R. Civ. P. Rule 23(b)(1), there are questions of law and fact common to the class.

7. Pursuant to Mass. R. Civ. P. Rule 23(a)(3), the claims or defenses of the Representative Plaintiff are typical of the claims or defenses of the class.

8. Pursuant to Mass. R. Civ. P. Rule 23(a)(4), the Representative Plaintiff will fairly and adequately protect the interests of the class.

9. Pursuant to Mass. R. Civ. P. Rule 23(b), prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; and (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the

individual adjudications and may substantially impair or impede their ability to protect their interests.

10. Pursuant to Mass. R. Civ. P. Rule 23(b), the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

11. Pursuant to Mass. R. Civ. P. Rule 23(b), the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

PARTIES

12. Representative Plaintiff Cheryl A. Smith is a citizen of Massachusetts and the owner of the subject property located at 124 Ashby Road, Ashburnham, MA.

13. Defendant, Ocwen Loan Servicing, LLC (“Ocwen”), is a residential mortgage servicing company, located at 1661 Worthington Road, Ste 100, West Palm Beach, FL. Class Plaintiffs hereby challenge the validity all erroneous and potentially deceptive and misleading default/ right to cure notices sent by Ocwen as described in this Complaint and all resulting foreclosures initiated and conducted subsequent to such notices.

14. Defendant, PHH Mortgage Corporation, is a residential mortgage servicing company, located at 1 Mortgage Way, Mount Lurel, NJ 08054. Class Plaintiffs hereby challenge the validity all erroneous and potentially deceptive and misleading default/ right to cure notices sent by PHH or Ocwen as described in this Complaint and all resulting foreclosures initiated and conducted subsequent to such notices

15. Defendant, HSBC Bank USA, National Association, as Trustee for Fremont Home Loan Trust 2006-E, Mortgage Backed Certificates, Series 2006-E (HSBC), is a purported trustee of a securitized mortgage backed trust. HSBC is located at 1800 Tysons Blvd, Tysons, VA.

16. At all times herein mentioned, Defendants, PHH Mortgage/Ocwen and HSBC both individually and collectively, are and were agents and/or joint venturers of each other, and in doing the acts alleged herein were acting within the course and scope of such agency.

17. Defendants, PHH Mortgage/Ocwen and HSBC had actual and/or constructive knowledge of the acts of the other as described herein, and ratified, approved, joined in, acquiesced in, and/or authorized the acts of the other, and/or retained the benefits of said acts.

ALLEGATIONS OF THE REPRESENTATIVE PLAINTIFF

18. Representative Plaintiff, Cheryl A. Smith, resides at and claims to be the owner of real property located 124 Ashby Road, Ashburnham, MA, which is the subject property as referenced herein.

19. Representative Plaintiff Smith brings this action on behalf of herself and all others so similarly situated.

20. On July 31, 2006, the subject property was granted to Representative Plaintiff Smith. The Deed evidencing transfer of the ownership of the subject property was recorded in the Worcester Registry of Deeds in Book 6193 at Page 114 on July 31, 2006.

21. On July 31, 2006, Representative Plaintiff Smith was granted a Mortgage loan, secured by the subject property, in the amount of \$200,000.00, which was recorded in the Worcester Registry of Deeds in Book 6193 at Page 118 on July 31, 2006. (the Smith Mortgage) The Mortgage identified Fremont Investment & Loan as the Lender and Mortgage Electronic Registration Systems (“MERS”) as mortgagee.

22. The Smith Mortgage states at paragraph 22 as follows;

“22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument...The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys’ fees and costs of title evidence.

If Lender invokes the STATUTORY POWER OF SALE, Lender shall mail a copy of a notice of sale to Borrower as provided in Section 15. Lender shall publish the notice of sale, and the Property shall be sold in the manner prescribed by Applicable Law. Lender or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys’ fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.”

23. Paragraph 22 of the Smith Mortgage required that prior to acceleration and foreclosure the Defendants were required to send Representative Plaintiff Smith a Default Notice which informed Representative Plaintiff Smith that she had a “right to reinstate after acceleration”. The “right to reinstate after acceleration” contained in the Smith Mortgage is described in Paragraph 19 of the Mortgage as follows:

“19. Borrower’s Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before the sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower’s right to reinstate; or (c) entry of judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no

acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. *Upon reinstatement* by Borrower, this Security Instrument and *obligations* secured hereby *shall remain fully effective as if no acceleration had occurred*. However this right to reinstate shall not apply in the case of acceleration under Section 18."

(emphasis added)

24. On March 29, 2013, MERS assigned the Smith Mortgage to Defendant, HSBC as Trustee. Said assignment was recorded in the Worcester Registry of Deeds in Book 7884 at Page 133 on April 12, 2013.

25. Prior to March 19, 2020 Defendant, Ocwen/PHH Mortgage, allegedly sent to Representative Plaintiff Smith a form default/ right to cure letter which stated "after (the right to cure date/ acceleration date), "you can still avoid foreclosure by paying the total past due amount before a foreclosure sale takes place . . . to avoid foreclosure". This statement presents an affirmative misstatement in the default/ right to cure letter because Paragraph 19 of the mortgage only allows reinstatement of the mortgage after acceleration "*prior to the earliest of: (a) five days before the sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Defendant's right to reinstate; or (c) entry of judgment enforcing this Security Instrument*". Furthermore since Paragraph 19 states that the Plaintiffs may cure the default prior to 5 days before the sale the above

noted language is a violation of Paragraph 22(c) which requires the notice state a date by which the default may be cured.

26. Since there is no Applicable Law specifying the termination of the right to reinstate and there is no entry of judgment enforcing the mortgage, the Representative Plaintiff Smith's right to reinstate and avoid foreclosure expired five days before the foreclosure sale in accordance with Paragraph 19 of the mortgage. Therefore, the default/ right to cure letter's assertion that the Representative Plaintiff Smith could pay the "total past due amount before a foreclosure sale take place...to avoid foreclosure" is potentially misleading and deceptive because the letter omits the conditions of paragraph 19 of the mortgage.

27. In addition, the failure of the default/ right to cure letter to inform Representative Plaintiff Smith that the right to reinstate expires 5 days before the foreclosure sale in accordance with paragraph 19 of the Smith Mortgage, is a violation of Mass. Gen. Laws ch. 244 §35A(c)(2) which required the right to cure letter to inform Representative Plaintiff Smith of "the date by which the mortgagor shall cure the default to avoid . . . a *foreclosure or other action to seize the home*". (emphasis added).

28. Plaintiffs further allege that the right to cure letter failed to inform Plaintiffs that the right to reinstate after acceleration is to be done "prior to . . . five days before the sale" in violation of M.G.L. ch 244 §35A(c)(2) which requires the Defendants to notify the Plaintiffs of "the date by which the mortgagor shall cure the default to avoid . . . a *foreclosure or other action to seize the home*." (emphasis added).

29. M.G.L. ch 244 §35A(d) also provides that "The Mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 90 day notice to cure has ended."

30. Defendants failure to notify the Plaintiffs of the right to reinstate after acceleration prior to five days before the sale is also a violation of the notice provision provided in M.G.L. ch 244 §35A(d).

31. As such, the Defendants failed to provide the Plaintiffs proper Notice of Right to Cure in violation of M.G.L. c. 244 §35A(c)(2) and M.G.L. ch 244 §35A(d).

32. In taking account the record and discovery to date, Representative Plaintiff alleges in that the purported Default/ Right to Cure Letters sent by Ocwen/PHH Mortgage fail to fully and “properly” describe the Plaintiff “right to reinstate after acceleration” and the “date by which the default may be cured” as required by and detailed in Paragraphs 19 and 22 of the Mortgages. Therefore, the Defendants’ failure to include such information is a breach of contract and a violation of the Statutory Power of Sale pursuant to M.G.L. ch. 244 §21 for failing to provide a “proper” default notice in accordance with Paragraph 22 of the Mortgage as a condition precedent to foreclosure and a violation of Mass. Gen. Laws Ch. 244 §35A(c)(2) and 35A(d).

33. Representative Plaintiff alleges that the notices sent purporting to state compliance with paragraph 22 of the Smith Mortgage and the notices sent to the Class Plaintiffs failed to contain the required information as described in said paragraph 22 of the Class Plaintiffs’ mortgages, contained a misleading and potentially deceptive statement that claimed that the Representative Plaintiff could pay the “total past due amount before a foreclosure sale take place...to avoid foreclosure”, and further failed to state with specificity the conditions Representative Plaintiff are required to meet in order to exercise their right to reinstate the mortgage after acceleration and the date by which the mortgage may be cured pursuant to paragraph 19 of the Smith Mortgage.

34. Representative Plaintiff further alleges that the default/right to cure letter failed to inform Representative Plaintiff that the right to reinstate after acceleration is to be done “prior to . . . five

days before the sale” in violation of M.G.L. ch 244 §35A(c)(2) and 35A(d) which require the Defendants to notify the Representative Plaintiff of “the date by which the mortgagor shall cure the default to avoid . . . a foreclosure or other action to seize the home.” And the right to reinstate after acceleration (emphasis added).

35. As such, the Defendants failed to provide the Representative Plaintiff proper Notice of Default in breach of the Mortgage contract and are in violation of G. L. c. 183, § 21 for failure to first comply with the terms of the mortgage prior to exercising the power of sale, rendering any acceleration, foreclosure, and sale void.

36. On March 19, 2020 the Defendants conducted a void foreclosure sale. The Foreclosure Deed to Defendant HSBC was recorded in the Worcester North registry of Deeds Book 9587 Page 144 on April 8, 2020.

CLASS ALLEGATIONS

37. The Representative Plaintiff repeats and re-alleges every allegation above as if set forth herein in full.

38. The Representative Plaintiff brings this Action on behalf of herself and all others so similarly situated.

39. The Representative Plaintiff sues on behalf of herself and all homeowners or former homeowners who were sent default/ right to cure letters by Ocwen/PHH Mortgage which state or imply that Class Plaintiffs could pay the “total past due amount before a foreclosure sale take place...to avoid foreclosure” is potentially misleading and deceptive because the letter omits the 5 day prior to the sale reinstatement conditions of paragraph 19 of the mortgage as well as the date by which the default may be cured.

40. The Representative Plaintiff, on behalf of herself and all others so similarly situated, pray that this Honorable Court find that the Defendants breached the terms and condition precedents of the mortgages and further find said default notices and the subsequent foreclosures are invalid and void.

41. The Representative Plaintiff, on behalf of herself and all others so similarly situated, pray that this Honorable Court find that the Defendants violated Mass. Gen. Laws Ch. 244 §35A and further find said right to cure notices are invalid and void.

42. Representative Plaintiff ask that this Court find that any foreclosure sales conducted by the Defendants and foreclosure deeds granted subsequent to the invalid default/ right to cure notices be declared null and void regardless of whether or not said invalid foreclosure deeds were recorded.

43. Representative Plaintiff, on behalf of herself and all others so similarly situated, ask that this Honorable Court declare that any such default/ right to cure notices sent to the Class Plaintiffs as described in this complaint be null and void, declare that any notice of mortgagee's foreclosure sale made on said properties of the Class Plaintiffs subsequent to such void default notices be null and void, declare that any foreclosure auction conducted subsequent to such void default notices be null and void, declare that any foreclosure deed granted subsequent to such void default notices be null and void, and enjoin the Defendants from conducting any foreclosure auction or conveyance of the subject properties.

44. Class Plaintiffs seek declaratory relief, injunctive relief, actual, monetary, punitive and exemplary damages, restitution, an accounting, attorney's fees and costs, and all other relief provided by law for Defendants' wrongful acts.

45. The Representative Plaintiff and members of the class suffered quantifiable damages such as loss of equity in their homes, money spent on funding bankruptcy, legal defense of foreclosure and eviction, and moving and relocation expenses.

46. The Representative Plaintiff and members of the class have suffered general damages such as loss of property interests, negative impact to credit ratings, loss of their homes, lost opportunities to rectify their situations through loss mitigation and mediation of their mortgage delinquencies, and extreme mental and emotional distress.

47. The Representative Plaintiff and members of the class seek actual, exemplary, punitive, and monetary damages.

COUNT I
DECLARATORY JUDGMENT

48. Representative Plaintiff, on behalf of herself and all others so similarly situated, repeat and reincorporate by reference all paragraphs above as if fully articulated herein.

49. Representative Plaintiff, on behalf of herself and all others so similarly situated, allege that the notices sent purporting to state compliance with paragraph 22 of the Mortgages and Mass. Gen. Laws Ch. 244 §35A failed to contain the required information as described in said paragraphs of the mortgages and Mass. Gen. Laws Ch. 244 §35A, contained misleading statements that claimed that the Class Plaintiffs could pay the “total past due amount before a foreclosure sale take place...to avoid foreclosure”, and further failed to state with specificity the conditions Class Plaintiffs are required to meet in order to exercise their right to reinstate the mortgage after acceleration pursuant to paragraph 19 of the Mortgages.

50. As such, the Defendants failed to provide the Class Plaintiffs compliant Notices of Default/ Right to Cure in accordance with Mass. Gen. Laws Ch. 244 §35A in breach of their Mortgage contracts and are in violation of G. L. c. 183, § 21 for failure to first comply with the terms of the

mortgage prior to exercising the power of sale, rendering any default or right to cure notice with the above described verbiage, as well as any acceleration, any foreclosure notice, any foreclosure auction, and any foreclosure deed made subsequent to said void default/ right to cure notices void.

51. Representative Plaintiff, on behalf of herself and all others so similarly situated, respectfully ask that this Honorable Court declare that any said default letter/ right to cure notices containing misleading statements that claim or imply that the Class Plaintiffs could pay the “total past due amount before a foreclosure sale take place...to avoid foreclosure” are null and void.

52. Representative Plaintiff, on behalf of herself and all others so similarly situated, ask that this Honorable Court declare that any such default/ right to cure notices sent to the Class Plaintiffs by Ocwen/PHH Mortgage as described in this complaint be null and void, declare that any notice of mortgagee’s foreclosure sale made on said properties of the Class Plaintiffs subsequent to such void default notices be null and void, declare that any foreclosure auction conducted subsequent to such void default notices be null and void, declare that any foreclosure deed granted subsequent to such void default notices be null and void, and enjoin the Defendant from conducting any foreclosure auction or conveyance of the subject properties.

53. The Class Plaintiffs are entitled to a declaratory judgment determining that the accelerations of all sums due under the notes, the attempted foreclosures, and the attempted mortgagee’s foreclosure sales of the subject property are all void.

54. The Class Plaintiffs are entitled to an injunction preventing the transfer of the right, title, and interest in their property.

55. The Class Plaintiffs are entitled to cancellation costs and fees assessed to them for wrongful foreclosure, together with additional damages.

56. The Class Plaintiffs are entitled to be returned to their status and circumstances prior to the wrongful foreclosures and sales.

57. The Class Plaintiffs are entitled to actual, monetary, punitive and exemplary damages, restitution, an accounting, attorneys' fees and costs, equitable relief and all other relief as provided by state law.

COUNT II
MORTGAGE POWER OF SALE

58. Representative Plaintiff, on behalf of herself and all others so similarly situated, repeat and reincorporate by reference all paragraphs above as if fully articulated herein.

59. Massachusetts permits non-judicial foreclosure under the statutory power of sale contained at G. L. c. 183, § 21, so long as the terms of the mortgage and the statutes related to the power of sale are strictly complied with. The statute states:

Section 21. The following "power" shall be known as the "Statutory power of Sale", and may be incorporated in any mortgage by reference:

(POWER)

But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by public auction on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, on or near one of said parcels, or at such place as may be designated for that purpose in the mortgage, **first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale**, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.

(Emphasis added).

60. As emphasized above, the foreclosure by power of sale requires that a foreclosing bank must "comply [] with the terms of the mortgage..." G.L. c. 183, § 21.

61. If a bank fails to strictly comply with the power of sale and the terms of the mortgage, then a foreclosure is void. U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 428 (2014) (“Failure to comply strictly with the power of sale renders the foreclosure void.”).

62. The mortgages given by Class Plaintiffs, secured by the subject properties state at 22 as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument...The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys’ fees and costs of title evidence.

If Lender invokes the STATUTORY POWER OF SALE, Lender shall mail a copy of a notice of sale to Borrower as provided in Section 15. Lender shall publish the notice of sale, and the Property shall be sold in the manner prescribed by Applicable Law. Lender or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys’ fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

63. Paragraph 22 of the Mortgages require that prior to acceleration and foreclosure the Defendant is required to send the Borrowers a Default Notice which informs the Borrowers that they have a “right to reinstate after acceleration”. The “right to reinstate after acceleration” contained in the Mortgage are described in Paragraph 19 of the Mortgages as follows;

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time *prior to the earliest of: (a) five days before* the sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of judgment enforcing this Security Instrument. Those *conditions* are that Borrower: (a) *pays Lender all sums which then would be due* under this Security Instrument and the Note *as if no acceleration had occurred*; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. *Upon reinstatement* by Borrower, this Security Instrument and *obligations* secured hereby *shall remain fully effective as if no acceleration had occurred*. However this right to reinstate shall not apply in the case of acceleration under Section 18."

(emphasis added)

64. Representative Plaintiff, on behalf of herself and all others so similarly situated, allege that the notices sent purporting to state compliance with paragraph 22 of the Mortgages failed to contain the required information as described in said paragraph, contained a misleading statement that claimed that the Class Plaintiffs could pay the "total past due amount before a foreclosure sale take place...to avoid foreclosure", and further failed to state with specificity the conditions Class Plaintiffs are required to meet in order to exercise their right to reinstate the mortgage after acceleration pursuant to paragraph 19 of the Mortgages.

65. As such, there was no compliance with the terms of the mortgage which would have allowed the Defendants to exercise the statutory power of sale as indicated above.

66. No proper Notices of Default were sent by Ocwen/PHH Mortgage to Class Plaintiffs in accordance with the terms of the mortgage.

67. As a result, no acceleration letter could be sent to Class Plaintiffs, nor could the mortgagee exercise the statutory power of sale on said mortgages in the Class.

68. Pursuant to the terms of the Mortgages, compliance with the obligations of the Lender as set forth in paragraphs 19 & 22 of the Mortgages are condition precedents to the accelerations and the exercise of the statutory power of sale.

69. Class Plaintiffs thus never received an acceleration notice or Notice of Default pursuant to the terms of the Mortgages.

70. Due to this failure to comply with the terms of the mortgage, no entity was contractually authorized to exercise the statutory power of sale and foreclose on the Mortgages and sell the subject properties at mortgagee's foreclosure sale. These actions constituted a breach of contract, resulting in damages to the Class Plaintiff.

71. As a result of the above noted improper and invalid exercises of the statutory power of sale and purported foreclosure sales, Class Plaintiffs mortgage loan accounts were charged fees and costs and expenses for certified mail, advertising costs, legal fees, auctioneer costs and other charges which were reflected in their monthly mortgage statements.

72. The Class Plaintiffs have incurred damages in hiring attorneys, in regard to the improper actions of Defendants in sending Notices of Foreclosure Sale and conducting sales without first complying with the terms of the mortgages in violation of G. L. c. 183, § 21.

73. Class Plaintiffs have also incurred emotional injuries and damages due to the improper foreclosure of their home without Defendants first complying with the terms of the mortgages.

74. The Class Plaintiffs have incurred legal fees for the prosecution of this action as a result of Defendants' violation of G. L. c. 183, § 21 due to the breaches of contract by Defendants as noted herein.

75. Class Plaintiffs have suffered harm and are threatened with additional harm from Defendants' breach, including but not limited to losses of their property interest, higher principle balances, improper negative reporting to credit bureaus; inappropriate fees and charges assessed to them, including broker price opinion fees, inspection fees, attorney's fees, "process management" fees, late fees and other charges associated with delinquency and default, and increased accrued interest.

76. The Defendants' breach of contract and failure to comply with terms of the mortgage as noted herein above, are the direct cause of the harms alleged herein and not Class Plaintiff' failure to make their mortgage payments.

77. Therefore, Class Plaintiffs would not have suffered the harms as noted herein were it not for the Defendants' breach of the mortgage contract as noted herein.

78. The Defendants' failure to comply with the terms of the mortgage is in violation of G. L. c. 183, § 21. The foreclosures are therefore void. U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 647 (2011) ("the terms of the power of sale, G.L. c. 183, § 21, must be strictly adhered to"); See also Paiva v. Bank of New York Mellon, USDC Mass. 14-1453, August 11, 2015 (Burroughs, A.) ("Because the Court finds that Countrywide's notice ... did not strictly comply with the requirements of paragraph [22] of the mortgage, the foreclosure sale is void.").

79. The Class Plaintiffs are entitled to a declaratory judgment determining that the accelerations of all sums due under the notes, the attempted foreclosures, and the attempted mortgagee's foreclosure sales of the subject property are all void.

80. The Class Plaintiffs are entitled to an injunction preventing the transfer of the right, title, and interest in their property.

81. The Class Plaintiffs are entitled to cancellation costs and fees assessed to them for wrongful foreclosure, together with additional damages.

82. The Class Plaintiffs are entitled to be returned to their status and circumstances prior to the wrongful foreclosures and sales.

83. The Class Plaintiffs are entitled to actual, monetary, punitive and exemplary damages, restitution, an accounting, attorneys' fees and costs, equitable relief and all other relief as provided by state law.

COUNT III
**BREACH OF CONTRACT AND FAILURE TO COMPLY WITH CONDITIONS
PRECEDENT TO EXERCISE THE STATUTORY POWER OF SALE**

84. Representative Plaintiff, on behalf of herself and all others so similarly situated, repeat and re-allege every allegation above as if set forth herein in full.

85. As described above, the mortgage contract entered into by Representative Plaintiff constitutes a valid offer.

86. Upon Class Plaintiffs executing the mortgage contracts and giving it to their Lender, the Lender accepted that offer.

87. Alternatively, Class Plaintiffs execution of the mortgage contracts thereby giving a security interest in their properties to their Lender constitutes offers. Acceptance of those offers occurred when Defendants accepted payments made by Class Plaintiffs pursuant to the mortgage contracts.

88. The mortgage contracts were supported by consideration. Class Plaintiff' payments to Defendants constitutes consideration.

89. Class Plaintiffs and Defendants thereby formed valid contracts and Class Plaintiffs were, are, and remain ready willing and able to perform under said contracts.

90. Defendants breached the mortgage contract of Class Plaintiffs by failing to keep its obligations pursuant to the terms as agreed to found at paragraphs 19 & 22 of the Mortgages which state in pertinent part;

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument...The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the STATUTORY POWER OF SALE, Lender shall mail a copy of a notice of sale to Borrower as provided in Section 15. Lender shall publish the notice of sale, and the Property shall be sold in the manner prescribed by Applicable Law. Lender or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before the sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument,

including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However this right to reinstate shall not apply in the case of acceleration under Section 18."

(emphasis added)

91. In Massachusetts, a contract containing an obligation of the Lender is construed as a condition precedent, which requires strict compliance.

92. In Massachusetts, a mortgagee agreeing to abide certain obligations pursuant to the mortgage before acceleration, foreclosure, and sale, must adhere to those obligations, with the level of specificity as agreed.

93. In Massachusetts, the power to sell by foreclosure sale is derived from the mortgage and statute, and strict compliance with the requirements of paragraphs 19 & 22 of the mortgage is an obligation of the mortgagee. Failure send proper Notice of Default pursuant to paragraphs 22 & 19 as noted herein is a breach of mortgage contract renders any acceleration, attempted foreclosure, and sale of the subject property void.

94. Representative Plaintiff, on behalf of herself and all others so similarly situated, allege that the notices sent purporting to state compliance with paragraph 22 of the Mortgages failed to contain the required information as described in said paragraph, contained a misleading statement that claimed that the Class Plaintiffs could pay the "total past due amount before a foreclosure sale take place...to avoid foreclosure", and further failed to state with specificity the conditions Class

Plaintiffs are required to meet in order to exercise their right to reinstate the mortgage after acceleration pursuant to paragraph 19 of the Mortgages.

95. As such, there was no compliance with the terms of the mortgage which would have allowed the Defendants to exercise the statutory power of sale as indicated above.

96. No default letter was sent to Class Plaintiffs pursuant to the terms of the mortgage. As such the Defendants could not exercise the statutory power of sale on their properties.

97. Pursuant to the terms of the mortgages proper Notices of Default are a condition precedents to acceleration and the exercise of the statutory power of sale.

98. Class Plaintiffs thus never received default acceleration notices pursuant to the terms of their mortgages.

99. Due to these failures to comply with the terms of the mortgages, no entity was contractually authorized to exercise the statutory power of sale, foreclose, and sell the subject properties at mortgagee's foreclosure sale. These actions constituted breaches of the contracts, resulting in damages to the Class Plaintiff.

100. As a result of the above noted improper and invalid exercises of the statutory power of sale and purported foreclosure sales, Class Plaintiff' mortgage loan accounts were charged fees and costs and expenses for certified mail, advertising costs, legal fees, auctioneer costs and other charges which were reflected in their monthly mortgage statements.

101. The Class Plaintiffs have incurred damages in hiring attorneys, in regard to the improper actions of Defendants in sending a Notices of Foreclosure Sale and seeking to conduct sales without first complying with the terms of the mortgages in violation of G. L. c. 183, § 21 and in breach of their contracts.

102. Class Plaintiffs have also incurred emotional injuries and damages due to the improper foreclosures of their homes without Defendants first complying with the terms of the mortgages and breaches of contracts.

103. Class Plaintiffs have incurred legal fees for the prosecution of this action as a result of Defendants' violation of G. L. c. 183, § 21 due to the breaches of contracts by Defendants as noted herein.

104. Class Plaintiffs have suffered harm and are threatened with additional harm from Defendants' breach, including but not limited to loss of property interests, higher principle balances, improper negative reporting to credit bureaus; inappropriate fees and charges assessed to their accounts, including broker price opinion fees, inspection fees, attorney's fees, "process management" fees, late fees and other charges associated with delinquency and default, and increased accrued interest.

105. The Defendants' breaches of contracts and failure to comply with terms of the mortgages as noted herein above, are the direct cause of the harms alleged herein and not Class Plaintiff failure to make their mortgage payments.

106. Therefore, Class Plaintiffs would not have suffered foreclosure, sale, or the harms as noted herein were it not for the Defendants' breaches of the mortgage contracts as noted herein.

107. The Defendants' failure to comply with the terms of the mortgages are a breaches of the mortgage contracts and also are in violation of G. L. c. 183, § 21. The foreclosure is therefore void. U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 647 (2011) ("the terms of the power of sale, G.L. c. 183, § 21, must be strictly adhered to"); See also Paiva v. Bank of New York Mellon, USDC Mass. 14-1453, August 11, 2015 (Burroughs, A.) ("Because the Court finds that Countrywide's

notice ... did not strictly comply with the requirements of paragraph [22] of the mortgage, the foreclosure sale is void.”).

108. The Class Plaintiffs are entitled to a declaratory judgment determining that the acceleration of all sums due under the notes, the foreclosures, and mortgagee’s foreclosure sales of the subject properties are in breach of contract and all void.

109. The Class Plaintiffs are entitled to an injunction preventing the transfer of the right, title, and interest in their properties.

110. The Class Plaintiffs are entitled to cancellation costs and fees assessed to them for wrongful foreclosures, together with additional damages.

111. The Class Plaintiffs are entitled to be returned to their status and circumstances prior to any wrongful acceleration, foreclosure and sale.

112. The Class Plaintiffs are entitled to actual, monetary, punitive and exemplary damages, restitution, an accounting, attorneys’ fees and costs, equitable relief and all other relief as provided by state law.

COUNT IV
VIOLATION OF M.G.L. c. 244 §35A

113. Representative Plaintiff, on behalf of herself and all others so similarly situated, repeat and reincorporate all paragraphs above as if fully articulated herein.

114. Pursuant to M.G.L. c. 244 §35A, Defendants were required to notify Plaintiff of “...the nature of the default claimed on such mortgage of such residential real property and of the mortgagor’s right to cure the default by paying the sum of money required to cure the default...before...accelerat[ing] the maturity of the unpaid balance of such mortgage obligation or otherwise enforce[ing] the mortgage.” (See: M.G.L. Ann. c. 244 §35A.). (Emphasis Added).

115. Furthermore, “[W]here a homeowner who is facing foreclosure claims that the mortgage holder has failed to provide timely and adequate written notice of the right to cure the default in payment of the mortgage, in violation of § 35A, the homeowner may file an equitable action . . . seeking to enjoin the foreclosure. . . [T]he foreclosure may not proceed if the mortgagor proves that the mortgage holder has failed to give the required notice. . . [In that case,] the mortgage holder must provide the proper notice required by § 35A and wait to see if the borrower will cure the default within the required time period before recommencing the foreclosure proceeding.” (See: U.S. Bank Nat. Ass’n v. Schumacher, 467 Mass. 421, 431 (2014)).

116. Defendants sent what they purported to be right to cure notices pursuant to M.G.L. c. 244 §35A. However, said notices materially misstated that the Class Plaintiffs could pay the “total past due amount before a foreclosure sale take place. . . to avoid foreclosure” in contradiction to paragraph 19 of the Mortgages.

117. Representative Plaintiff further alleges that the default/right to cure letter failed to inform Representative Plaintiff that the right to reinstate after acceleration is to be done “prior to . . . five days before the sale” in violation of M.G.L. ch 244 §35A(c)(2) and 35A(d) which require the Defendants to notify the Representative Plaintiff of “the date by which the mortgagor shall cure the default to avoid . . . *a foreclosure or other action to seize the home.*” And the right to reinstate after acceleration (emphasis added).

118. As such, the Defendants failed to provide the Class Plaintiffs compliant Notices of Default/ Right to Cure in accordance with Mass. Gen. Laws Ch. 244 §35A in breach of their Mortgage contracts and are in violation of G. L. c. 183, § 21 for failure to first comply with the terms of the mortgage prior to exercising the power of sale, rendering any default or right to cure notice with

the above described verbiage, as well as any acceleration, any foreclosure notice, any foreclosure auction, and any foreclosure deed made subsequent to said void default/ right to cure notices void.

119. Representative Plaintiff, on behalf of herself and all others so similarly situated, respectfully ask that this Honorable Court declare that any said default letter/ right to cure notices containing misleading statements that claim or imply that the Class Plaintiffs could pay the “total past due amount before a foreclosure sale take place...to avoid foreclosure” are null and void.

120. Therefore, said notice is inadequate, ineffective, and fails to comply with M.G.L. c. 244 §35A in such a manner as to render any and all foreclosure actions subsequent to such right to cure notice fundamentally unfair. As such, the acceleration and attempted foreclosure of the Class Plaintiff Mortgages and the attempted mortgagee’s foreclosure sales are invalid, void, and without force and/or effect.

121. Due to Defendants’ failure to comply with M.G.L. c. 244 §35A, no entity was contractually authorized to exercise the statutory power of sale and attempt to foreclose on the Class Plaintiff Mortgages and sell their properties at mortgagee’s foreclosure sale. These actions constituted breach of contracts, resulting in damages to the Plaintiff.

122. As a result of the above noted improper and invalid exercise of the statutory power of sale and purported foreclosure sale, Plaintiff mortgage loan accounts were charged fees and costs and expenses for certified mail, advertising costs, legal fees, auctioneer costs and other charges which were reflected in their monthly mortgage statements.

123. The Plaintiff have incurred damages in hiring attorneys, in regard to the improper actions of Defendant in failing to send Class Plaintiffs proper and accurate notices of right to cure pursuant to M.G.L. c. 244 §35A, and seeking to conduct a foreclosures and sales without first complying with M.G.L. c. 244 §35A.

124. Class Plaintiffs have also incurred emotional injuries and damages due to the improper foreclosure and sale of their homes without Defendant first complying with M.G.L. c. 244 §35A.

125. The Class Plaintiffs have incurred legal fees for the prosecution of this action as a result of Defendant's violation of M.G.L. c. 244 §35A as noted herein.

126. Class Plaintiffs have suffered harm and are threatened with additional harm from Defendant's failure to abide by M.G.L. c. 244 §35A, including but not limited to potential loss of property interests, higher principle balances, improper negative reporting to credit bureaus; inappropriate fees and charges assessed to them, including broker price opinion fees, inspection fees, attorney's fees, "process management" fees, late fees and other charges associated with delinquency and default, and increased accrued interest.

127. The Defendant's failure to proper notice of Class Plaintiff's rights to cure as noted herein above, is the direct cause of the harms alleged herein and not Class Plaintiff's failure to make their mortgage payments.

128. Therefore, Class Plaintiffs would not have suffered the harms as noted herein were it not for the Defendant's failure to abide by statute as noted herein.

129. The Class Plaintiffs are entitled to a declaratory judgment determining that the acceleration of all sums due under the notes, the attempted foreclosures, and the attempted mortgagee's foreclosure sales of the subject properties are all void.

130. The Class Plaintiffs are entitled to an injunction preventing the transfer of the right, title, and interest in their properties.

131. The Class Plaintiffs are entitled to cancellation costs and fees assessed to them for wrongful foreclosure, together with additional damages.

132. Class Plaintiffs are entitled to be returned to their status and circumstances prior to the wrongful attempted foreclosures and sales.

133. Class Plaintiffs are entitled to actual, monetary, punitive and exemplary damages, restitution, an accounting, attorneys' fees and costs, equitable relief and all other relief as provided by state law.

Dated: June 17, 2020

Respectfully Submitted, Plaintiff,
By their Attorney,
Todd S. Dion, Esq.

/s/ Todd S. Dion
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15 Cottage Avenue, Ste 202
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

CHERYL A. SMITH, on behalf of herself and all others similarly situated

(b) County of Residence of First Listed Plaintiff WORCESTER (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) TODD S. DION 15 COTTAGE AVENUE, SUITE 202 QUINCY, MA 02169

DEFENDANTS

OCWEN LOAN SERVICING, LLC, nka PHH MORTGAGE CORPORATION, HSBC BANK USA, National Association, as Trustee

County of Residence of First Listed Defendant PALM BEACH COUNTY (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) STEVEN E. DICAIRANO HINSHAW & CULBERTSON LLP, 53 State Street, 27th Floor Boston, MA (617) 213-7013

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff 2 U.S. Government Defendant 3 Federal Question (U.S. Government Not a Party) 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location. Includes categories like Citizen of This State, Citizen of Another State, and Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. Sections 1332, 1441 and 1446 Brief description of cause: Plaintiff challenges Defendants' authority to foreclose and seeks to assert class action claims against Defenants

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 07/13/2020 SIGNATURE OF ATTORNEY OF RECORD /s/ Steven E. DiCairano

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) CHERYL A. SMITH v. OCWEN LOAN SERVICING, LLC nka PHH MORTGAGE CORPORATION

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

- I. 160, 400, 410, 441, 535, 830*, 835*, 850, 891, 893, R.23, REGARDLESS OF NATURE OF SUIT.
II. 110, 130, 190, 196, 370, 375, 376, 440, 442, 443, 445, 446, 448, 470, 751, 820*, 840*, 895, 896, 899.
III. 120, 140, 150, 151, 152, 153, 195, 210, 220, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 367, 368, 371, 380, 385, 422, 423, 430, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 560, 625, 690, 710, 720, 740, 790, 791, 861-865, 870, 871, 890, 950.

*Also complete AO 120 or AO 121. for patent, trademark or copyright cases.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES [] NO [x]

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES [] NO [x]

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES [] NO []

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES [] NO [x]

7. Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES [] NO [x]

A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division [] Central Division [] Western Division []

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division [] Central Division [x] Western Division []

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES [] NO []

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME STEVEN E. DICAIRANO

ADDRESS HINSHAW & CULBERTSON LLP, 53 STATE STREET, 27TH FLOOR, BOSTON, MA 02109

TELEPHONE NO. (617) 213-7013

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Action Claims Ocwen/PHH Mortgage Provided 'Misleading' Default Notices Before Home Foreclosures](#)
