**UNITED STATES DISTRICT COURT FOR THE**

**NORTHERN DISTRICT OF GEORIGA**

**ATLANTA DIVISION**

**Wekesa O. Madzimoyo,
Plaintiff,**

**v.**

 **THE BANK OF NEW YORK**

**MELLON TRUST COMPANY, NA., formerly known as The Bank of New
York Trust Company, N.A., JP MORGAN
CHASE BANK, NA, GMAC MORTGAGE, LLC , MCCURDY AND CANDLER, LLC
and ANTHONY DEMARLO, Attorney**

**CIVIL ACTION FILE**

**No. 1:09-CV-02355-CAP-GGB**

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**Defendants**

**PLAINTIFF’S OPPOSITION TO**

**DEFENDANTS MOTION TO STRIKE AMENDED COMPLAINT**

Come now the Plaintiff, WEKESA O. MADZIMOYO AND move the Court to deny **THE BANK OF NEW YORK MELLON TRUST COMPANY, NA.,
 formerly known as The Bank of New York Trust Company, N.A., JP MORGAN CHASE BANK, NA, GMAC MORTGAGE, and LLC’s Motion** to strike Plaintiff’s Amended Complaint and to have full force and affect as a part of the record.

**Plaintiff’s Opposition to Introduction and Statement of Facts**

The Plaintiff opposes Defendants version of the facts and submits:

1. It is not disputed that in April, 2009, the plaintiff was current on his mortgage.
2. It is also not disputed that on April 13th, 2009 Plaintiff Wekesa Madzimoyo requested verification of lender documentation and servicing authority to HOMECOMINGS FINANCIAL, LLC pursuant to Fair Debt Collection Practices Act, 15 USC Sec.1692g.
3. It is not disputed and is documented by return receipts (ORIGINAL COMPLAINT; See Return receipts dated May 6 – July 21, 2009) for three consecutive months, Plaintiff Wekesa Madzimoyo consistently asked each of the alleged servicers and lenders for official verification; they – the Defendants consistently refused to provide it.
4. It is not disputed that based on Defendant’s Original Complaint, Dekalb County Superior Court Judge Tangela M. Barrie on July 29th, 2009 ORDERED the Defendants to appear in court with “proper evidence of chain of title on said property” (852 Brafferton Place, Stone Mountain, GA).
5. The petition to Dekalb County Superior Court was the last of many attempts starting April 13, 2009 to get the Defendants to provide lender documentation and servicing authority.(ORIGINAL COMPLAINT)
6. Even though the Plaintiff never signed a security deed with any of the Defendants, and even though none of the Defendants appear in the Dekalb County Superior Court’s real estate records as the secured creditor or assignee (as required by GA State law OCGA § 44-14-162.2 (a-c)) for said property at 852 Brafferton PL Stone Mountain, GA 30083, the Defendants repeatedly refused to provide such information to validate their standing as agent, attorney, debt collector, lender, note holder, servicer, investor, trustee, attorney-in-fact or otherwise.
7. The Plaintiff, fearing that he was a victim of fraud or a predatory lending scam, sought the protection of the court to stop the Defendants’ move to illegally foreclose on his home at 852 Brafferton PL. Stone Mountain, GA 30083. OCGA § 44-14-162.2 (a-c) requires that foreclosure action must proceed from the **secured creditor**. The Defendants have never properly established their status as such.
8. The Plaintiff has never defaulted on his loan. (ORIGINAL COMPLAINT)
9. The Plaintiff has never owed money to any of the Defendants.

**OPPOSITION TO DEFENDANTS’ ARGUMENTATION AND CITATION OF AUTHORITIES**

1. While the Plaintiff seemed to have erred in assuming that settling the matter of jurisdiction effectively moved the calendar, and apparently has missed the window for automatically filing an amendment without need for the Defendants’ agreement or Leave from the Court, the plaintiff contends:
2. That the amended complaint should stand for the very reason that Defendants oppose – to avoid undue delay in this case moving forward.
3. Pursuant to Federal Rule of Civil Procedure 15(a) Plaintiff contemplates that the court will freely grant leave to an amended complaint when the interest of justice so require.
4. The interest of justice require acceptance of this amended complaint because:

## This is the first time the plaintiff has amended the complaint

## The jurisdictional questions were outstanding until September 29, 2010.

## Settlement of the jurisdictional question directly affects the Plaintiff’s pleadings, since Plaintiff’s state complaint purposefully contained no federal claims for the GA State Superior Court judge to rule on.

##  The Defendants, in their Motion for Removal, ignored the actual state claims and focused on the documents attached to Plaintiff’s state Complaint which sited Fair Debt Credit Protection (FDCPA) and TILA as a basis for Motion for Removal.

## The Plaintiff Madzimoyo sited FDCPA and TILA as the basis for his right to request verification of servicer and lender standing, but never included them as a part of his Original Complaint to State Superior Court Judge Tangela Barrie.

## Those claims were intentionally left out of the State pleadings to avoid asking the State Court to rule on Federal issues in a request for a temporary TRO.

## Since Defendants site FDCPA and TILA references by the Plaintiff as the basis of the case’s removal to this Court, justice can only be served by allowing the Plaintiff’s Amended Complaint which directly articulates the laws, the Defendants’ violations, and the subsequent and anticipated harm to the Plaintiff.

## Since the jurisdiction question was finally settled against the Plaintiff’s Motion for Remand, the Original Complaint’s claims needed amending to account for the scope of this Court, and to include both state and federal claims.

1. There is no prejudice to any Defendant. No Defendant is harmed by this action.
2. Delay is not an issue because Defendants have already requested delays in calendaring.

**Plaintiff opposes Defendant’s claim that late filing is unduly prejudicial.**

1. Defendants contend that there are only 29 days left for discovery, yet Federal Rule 26 (c) regarding INITIAL DISCLOSURE stipulates: “In general, a party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) Conference.”
2. Two Defendants, MCCURDY and CANDLER, LLC and Anthony DeMarlo, Attorney, have not filed INITIAL DISCLOSURES at all,
3. Defendants **THE BANK OF NEW YORK MELLON TRUST COMPANY, NA., formerly known as The Bank of New York Trust Company, N.A., JP MORGAN CHASE BANK, NA, GMAC MORTGAGE, LLC** only filed their INITIAL DISCLOSURES on November 23, 2010 as required by FRCP 26 (a)(1)
4. No INITIAL CONFERENCE been held.
5. All of this (11-14) plus the recent settling of the jurisdiction issue suggests that we are at the beginning of discovery, not the end of discovery.
6. The Defendants’ claim that the filing comes “14 months after Plaintiff filed the original Complaint” - completely ignores the relevance of settling the jurisdiction question. The Plaintiff, had he amended his Complaint for Federal Court, would have been at a disadvantage if the case had been REMANDED back to State Court.

**The Plaintiff opposes the Defendant’s claim of
 that the Plaintiff Original and Amended Complaints are “futile.”**

1. The Plaintiff chooses to let the Courts determine the “futility” of his Complaints that, among other things, assert:
	1. The Defendants have no standing in the issue of Plaintiff’s mortgage.
	2. The Defendants violated GA state laws OCGA § 44-14-162.2 (a-c) in moving to illegally foreclose on the property occupied by the Plaintiff at 852 Brafferton PL Stone Mountain, GA 30030.
	3. The Defendants violated various state and federal laws as specified in Plaintiffs’ Original and Amended Complaint.
	4. Such actions have and will continue to injure the Plaintiff unless injunctive and declaratory relief is granted as requested in the ORIGINAL AND AMENDED COMPLAINTS.
2. The Plaintiff, Madzimoyo, brought this case to the State Superior Court of DeKalb County. Successful removal of the case to Federal Court does not give the Defendants the right to define, redefine, limit or ignore the claims that were and are the basis for the Plaintiff’s seeking protection by the State, and now Federal Court.
3. Neither Removal nor claims of futility give the Defendants the right to ignore or be released from DeKalb Court Superior Court Judge Tangela Barrie’s order of July 29th, 2009 ordering the Defendants to appear in court with “proper evidence of chain of title on said property”

**Plaintiff opposes Defendant’s “shotgun” argument as a reason to strike.**
4. If the Plaintiff’s pleadings seem “shotgun” it is because the Defendants’ egregious and illegal actions are broad and new to the area of home mortgage borrowing and lending. When mortgage lending consisted of simpler transactions between bankers and borrowers, the claims, violations, and remedies were simpler too.
5. For example, law firms didn’t have to be told by legislation and judges to make sure their bank or lender clients have the proper state required paper work before bringing a foreclosure case because it was standard industry practice for Banks and mortgage lenders to follow state law. (Amended Complaint)
6. For example, by their own admission, the Defendants have used the Plaintiff’s mortgage (without his awareness and/or consent) as a Wall Street security instrument and as a part of an elaborate process that often bring things like credit default swaps, tranches, and “robo-signing” into the mortgage picture. (Original Complaint attached McCurdy and Candler, LLC Foreclosure Document)
7. This apparently lucrative process of mortgage-to-securities is now the industry rule, not the exception.
8. It has brought with it new complexities and violations that home owners, the courts, state legislators, and even lenders themselves are ferreting out.
9. The range of the Plaintiff’s Amended Complaint and the supporting information provided therein is needed to help explain, ferret out, and protect the Plaintiff from the actions of the various Defendants.
10. Defendants change hats from servicers, to lenders, to trustees, to debt collectors seemingly at will, and in apparent disregard of State and Federal mortgage, real estate, contract, and securities laws.
11. The breach of these laws has caused substantial harm to the Plaintiff.

**CONCLUSION**

WHEREFORE, Plaintiff prays that the Court deny Defendants’ Motion to Strike and, in the interest of justice, let stand Plaintiff’s Amended Complaint.

Submitted this \_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_, 2010

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Wekesa O. Madzimoyo

 Pro See Litigant

852 Brafferton Place

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**FONT VERIFICATION**

Pro se Litigant, Wekesa Madzimoyo, certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1C, namely Times New Roman (14 point).

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 Wekesa O. Madzimoyo

 Pro se Litigant

**CERTIFICATE OF SERVICE**

 I hereby certify that I have served the foregoing on the following by electronic mail or by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this the 26th day of October, 2010 to:

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