IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLES GILES, et al.,	:	
	:	**Civil Action**
	:	**No. 11-6239 (JBS-KMW)**
Plaintiffs,	:	
v.	:	
PHELAN HALLINAN & SCHMIEG, LLP, et al.,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Plaintiffs and their counsel respectfully submit this memorandum in opposition to the motion for a protective order filed by Defendants Phelan Hallinan & Schmieg P.C. ("Phelan P.C."), Francis S. Hallinan, Rosemary Diamond, Full Spectrum Services Inc. ("Full Spectrum") and Land Title Services of New Jersey, Inc. ("Land Title" or "LTS") on November 23, 2011 (Docket Item 5).

I. INTRODUCTION

The issues raised by Defendants' motion are gravely serious, but for reasons that are not mentioned in Defendants' brief in support of the motion ("Def. Br.") or in the accompanying Certification of Judith T. Romano ("Romano Cert.").

For the past month, Defendants have been attempting to intimidate and harass Plaintiffs and their counsel by making serial threats to file an independent defamation suit against them in state court. To supplement those threats, Defendants have also said they intend to file motions in this Court for "sanctions pursuant" to Fed. R. Civ. P. 11 and 28

U.S.C. § 1927. *See* Certification of John G. Narkin ("Narkin Cert.") at ¶¶ 3-5 and documents attached thereto as Exhibits A, B, C and D.

Defendants inform the Court that they perceive a "thinly veiled threat" in a recent e-mail message from Plaintiffs' counsel that attaches, without elaboration, a *Buffalo News* article about the self-destructive activities of Steven J. Baum ("Baum"), who once maintained the highest-volume foreclosure practice in New York State. Although no "threat" was intended or made by Plaintiffs' counsel, Defendants ignore a fundamental point of the news article. Before his practice fell apart under the weight of his own misdeeds, Baum attempted to derail a proposed federal class action initiated by attorney Susan Chaska Lusk by charging her with defamation in a baseless lawsuit brought against Ms. Lusk in state court. *See* Jonathan Epstein, *Foreclosure Attorney Baum Sues Peer for Libel*, BUFFALO NEWS (Dec. 9. 2010).[1]

This same tactic, which Defendants say they intend to use against Plaintiffs and their counsel, was an abuse of legal process that brought further unfavorable attention to Baum and exacerbated conditions that led to loss of his credibility and business, not just among publicity adverse clients, but among federal and state law enforcement agencies committed to stopping the kind of mortgage foreclosure abuses also involved in this lawsuit.

Rather than benefitting from Baum's experience, Defendants resorted to the filing of this motion, which asks this Court to impose a sweeping gag order, including a flagrantly unconstitutional injunction prohibiting "plaintiffs and their counsel from initiating any communication with any governmental agency or entity about this case or otherwise with

[1] *See* http://www.buffalonews.com/business/article277825.ece

respect to any of the Defendants and their businesses." (Docket Item 5-3). At the same time, rather than test the merits of their contention that Plaintiffs' counsel has filed this action in bad faith and for vexatious purposes, Defendants have declined their immediate opportunity to file motions under Rule 11 and 28 U.S.C. § 1927. For reasons unclear, they requested and obtained a Clerk's extension to answer or otherwise move against the Complaint until December 9, 2011. (Docket Item 3).

As demonstrated below, the highly irregular motion for a "protective order" that Defendants have filed instead should be denied because:

- All statements made about this lawsuit by Plaintiffs' counsel, in the Complaint or otherwise, are protected by New Jersey's litigation privilege (*see* below at 3-5)
- All statements made about this lawsuit by Plaintiffs' counsel, in the Complaint or otherwise, comport in every respect with the requirements of Local Rule 105.1 governing extrajudicial statements (*see* below at 6-12)
- Defendants have mischaracterized the Complaint and preceding litigation history (*see* below at 13-20)
- Defendants' charges of bad faith and vexatious purpose are unserious and without legal or factual substance (*see* below at 23-27).

II. ARGUMENT

A. THE LITIGATION PRIVILEGE PROTECTS PLAINTIFFS AND THEIR COUNSEL FROM INTIMIDATION AND HARRASSMENT BY DEFENDANTS

In *Rickenbach v. Wells Fargo Bank, N.A.*, 635 F.Supp. 2d 389 (D.N.J. 2009) ("*Rickenbach I*") and 2010 U.S. Dist. LEXIS 21161 (D. N.J. Mar. 8, 2010) ("*Rickenbach II*"),

this Court analyzed the broad scope and application of the litigation privilege, which has "deep roots in the common law of New Jersey." *Rickenbach I*, at 401; *Rickenbach II*, at *10.

The fundamental purpose of the litigation privilege is to insure that "[s]tatements by attorneys, parties and their representatives made in the course of judicial or quasi-judicial proceedings are absolutely privileged and immune from liability." *Rickenbach I*, at 401 (*quoting Peterson v. Ballard*, 679 A.2d 657, 659 (N.J.Super.Ct.App.Div.1996), *citing Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 569 A.2d 793 (1990)).[2]

This privilege is "expansive" and applies to "statements made by attorneys outside the courtroom." *Rickenbach I*, at 401; *Rickenbach II*, at *11. The privilege is "applicable as a general rule" and is not merely an "exception" to any rule that might inhibit protected communications. *Rickenbach I*, at 401-402 (*quoting Loigman v. Twp. Comm. of Twp. of Middletown*, 185 N.J. 566, 889 A.2d 426, 438 (2006); *Rickenbach II*, at *11.

As this Court observed, New Jersey's litigation privilege applies, not just to defamation suits like the one that Defendants threaten to bring against Plaintiffs and their counsel, but to other "causes of action" they threaten to assert, including tortious interference with contractual or advantageous business relationships.[3] *Rickenbach I*, at 402

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[2] The identical interests are protected in other states by what are known as "anti-SLAPP" laws. SLAPP is an acronym for "Strategic Lawsuit Against Public Participation," a "lawsuit filed against individuals or an organization in retaliation for bringing an action or speaking out on an issue of public interest or concern." *See* Rebecca Ariel Hoffberg, *The Special Notice Nequirements of the Massachusetts Anti-SLAPP Statute*, 16 B.U. Pub. Int. L. J. 97 (2006-2007), http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol16no1/documents/16-1HoffbergNote.pdf. Such lawsuits "are generally camouflaged as ordinary civil actions such as defamation or abuse of process, but are generally without merit and brought simply to induce the other party to retract their statements or drop their lawsuits." *Id*.

[3] The lawsuit that defendants threaten to bring against plaintiffs and their counsel is a quintessential SLAPP action. *See* Letter dated November 11, 2011 from Defendants' counsel Ken Goodkind (Narkin Cert. Ex A) ("[T]his is to put you on notice that you (as well as your confederates) [sic] will be held responsible for tortious misconduct, such as communications outside of the court record, which is clearly intended to injure PHS"); Letter dated November 15, 2011 from Ken Goodkind (Narkin Cert. Ex B) ("I reiterate the prior warning that you will also be held liable for defamation and other tortious misconduct"); Letter dated

(*citing Ruberton v. Gabage*, 280 N.J.Super. 125, 654 A.2d 1002 (1995) and *Loigman*, 889 A.2d at 436).

In *Allen ex rel. Martin v. LaSalle Bank, N.A.,* 629 F.3d 364, 369 (3d Cir. 2011),[4] the Third Circuit reiterated the well-established conclusion that New Jersey's litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action."

Each requirement is met here. All communications attacked by Defendants relate directly and exclusively to allegations in judicial proceedings. All of these communications were authored by legal counsel for litigants in judicial proceedings. All such communications were made with the specific purpose of achieving the objectives of this litigation – not only to remedy past injustices done to the representative plaintiffs and similarly aggrieved homeowners, but to prospectively obtain the Court's intervention to put a definitive end to the foreclosure abuses documented in the Complaint and elsewhere in the public record. None of these communications are unconnected with or logically unrelated to this action.

The litigation privilege applies to every public statement made by Plaintiffs' and their counsel about the activities alleged in this case. Although Defendants may (and

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November 18, 2011 from Ken Goodkind (Narkin Cert. Ex C) ("Not only should you expect motion practice under Rule 11, § 1927 and otherwise to ensue absent compliance with this letter, but attorneys Phelan and Schmieg expressly reserve all rights to subject you to further claims -- both within and outside of this litigation -- for a variety of tortious conduct, which at that point would plainly be properly characterized as willful and intentional").

[4] Citing *Hawkins v. Harris*, 141 N.J. 207, 661 A.2d 284, 289 (1995) (internal quotations and citations omitted).

should) be embarrassed about the Complaint and the improper conduct identified in it, for that, Defendants have no one to blame but themselves.

B. LOCAL RULE 105.1 PERMITS EXTRAJUDICIAL STATEMENTS OF THE LIMITED EXTENT AND CIRCUMSCRIBED NATURE INVOLVED HERE

Plaintiffs and their counsel have not abused the litigation privilege, but have adhered scrupulously to Local Rule 105.1 governing extrajudicial statements. While the rule prohibits civil trial lawyers from extrajudicial statements that they "reasonably should know that … will have a substantial likelihood of causing material prejudice to an adjudicative proceeding," it also explicitly provides that:

> [A] lawyer involved in the litigation of a matter may state without elaboration:
>
> (1) the general nature of a claim or defense;
>
> (2) the information contained in a public record; [and]
>
> (3) the scheduling or result of any step in litigation….

The Allegedly Predjudical Statements

In their brief, Defendants identify the Complaint itself as the source of purported prejudice by "innuendo" and "insinuations" that they read into allegations they claim are "designed and intended to impugn the character, credibility and reputations of the PHS Parties." Def. Mem. at 6-7, 9-10.

Defendants contend that the Complaint unfairly compares Phelan Hallinan & Schmieg (the "Phelan firm") to two financially successful law firms that disintegrated after their foreclosure abuses were revealed to the public: Steven J. Baum P.C. (the "Baum firm") of New York and the Law Office of David J. Stern (the "Stern firm") in Florida. Defendants say that the Phelan firm is "nothing like" the Baum and Stern firms "other than that they

practice in the foreclosure and bankruptcy fields." Romano Cert. ¶ 18. They also contrast themselves from the Baum and Stern firms by emphasizing the "good reputation" that the Phelan firm supposedly enjoys with the Courts.[5] *Id*.

The allegations in the Complaint about the Baum and Stern firms have nothing to do with any law firm's "reputation," but everything to do with the improper *manner* in which these firms have conducted their professional affairs. In this respect, there are striking parallels among the Phelan, Baum and Stern firms.

As alleged in paragraph 48 of the Complaint, in 2005, the Phelan firm implemented a so-called "law firm-title business model" in which "default services" companies wholly owned by the firms' partners (Full Spectrum and Land Title) were placed into operation to augment profit margins diminishing because of "drastic changes" in the residential mortgage foreclosure industry, particularly the flat legal fee structure mandated by government-sponsored enterprises like Fannie Mae and Freddie Mac. The Complaint alleges that Full Spectrum and Land Title were principal instruments used by Phelan firm to profit from (1) wrongful foreclosure actions based on falsified legal documents and (2) systematic foreclosure fee overcharges imposed upon distressed homeowners, including

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[5] In fact, the unorthodox *conduct* of the Phelan firm and Full Spectrum was a substantial factor in the December 2010 decision of New Jersey Supreme Court Chief Justice Stuart Rabner to amend court rules governing residential mortgage foreclosures and to require mortgage servicers to demonstrate that their legal documentation practices were sufficiently adequate to allow uncontested foreclosure actions to proceed. Complaint, ¶¶ 155-171, 195-210. Undeterred by that fact, Defendants argue that they cannot be compared to the Baum and Stern firms because "*unlike here*, there were external indicia that the allegations against them may have some validity." Phelan Br. at 7 (emphasis supplied). However, the "external indicia" of the Phelan firm's abusive foreclosure practices are open and in plain sight for all to observe, including the Phelan firm's own clients. *See* below at 11-12, 24-25..
See also Kaja Whitehouse, *Report Rips NJ Foreclosure Robo-signing Notary*, N.Y. POST, Dec. 29, 2010, http://www.nypost.com/p/news/business/sign_of_the_times_wOvGHrYMdbzZqEVgonGR4K; Mary Pat Gallagher, *Law Firm Hit With Racketeering Suit Over Alleged Wrongful Foreclosures*, 206 N.J.L.J, 388 (Oct. 31, 2011) (The Phelan firm "was made an example of last year when the judiciary took action against robo-signing and other improper foreclosure practices"). *See* Romano Cert., Ex. B.

the representative Plaintiffs. *See*, *e.g*., Complaint, ¶¶ 50, 56, 79, 127, 131, 136- 140, 162-170, 202, 260(d), 261(a) and (d), 288.

To accomplish the same ends, the Baum firm implemented an equivalent business model by creating and misusing a "default services" company called Pillar Processing, LLC. Complaint, ¶54 and n.26, 245. For the same purposes, the Stern firm also employed a comparable business model by creating and misusing a "default services" company called DJSP Enterprises, Inc. Complaint ¶21 and n.6, 54, 56 and n. 29, 245.

The business model adopted by the Phelan firm is of direct and unmistakable relevance to the claims at issue in this litigation – not just against the Phelan firm and its controlled entities – but against the Phelan firm's client, Defendant Wells Fargo Bank, N.A. Facts about corresponding business models used by the Baum and Stern firms are important to a proper understanding of Plaintiffs' claims and of the competitive industry-wide milieu within which the Phelan entities and Wells Fargo operated.[6]

Defendants also object to straight-forward and factually accurate allegations in the Complaint relating to compensation paid to the Phelan firm and its affiliated companies during a period when the brother of the firm's senior partner was employed as Fannie Mae's Executive Vice President and Chief Risk Officer. These supposedly "scandalous" allegations do not, as Defendants imagine, "insinuate" that Fannie Mae's business was "improperly steered" to the Phelan firm and controlled entities because of the high-level

[6] In the home page of its web site as it existed in 2009, the Phelan firm attempted to contrast itself from competing foreclosure firms by boasting that "PHS owns and controls the majority of its vendors to ensure as quick as possible turnaround time as humanly possible. We also operate our own investigation services in both states [i.e., New Jersey and Pennsylvania] to locate defendants for service of process. Valuable time is saved in the initial service stage and the crucial sale stage." *See* Narkin Cert. ¶ 6 and Ex.D. This statement was removed from the Phelan firm's web site soon after the proposed amended complaint in *Rhodes v. Diamond* was filed on January 10, 2010, which challenged the propriety the Phelan firm's business arrangement with companies that it owned and controlled, Defendants Land Title and Full Spectrum.

management position held by Kenneth Phelan. Romano Cert. ¶¶ 27-28. Rather, these and related allegations (Complaint ¶¶ 58-62 and n. 32, 214) underscore specific facts that are highly relevant to Plaintiffs' claims:

- On June 13 , 2011, the Federal Housing Finance Agency ("FHFA"), the entity appointed by the United States government as conservator of Fannie Mae's bankrupt operations, informed Congress that Fannie Mae's "retained attorney network" was a "critical safety and soundness concer[n]" requiring "special review" because of "growing concerns about foreclosure activities conducted by third parties"

- On September 30, 2011, the FHFA's Office of Inspector General ("OIG") presented to Congress an Audit Report titled "FHFA's Oversight of Fannie Mae's Default Related Legal Services," which found that Fannie Mae learned as early as 2003 of "extensive foreclosure abuses" among foreclosure lawyers who were members of its retained attorney network, but took no meaningful action to address the abuses.[7]

- On April 13, 2011, the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Insurance Depositor Corporation and the Office of Thrift Supervision published a report that concluded, *inter alia*, that mortgage servicers (including Wells Fargo and other servicers hired by Fannie Mae) failed to provide "guidance, policies, or procedures governing the initial selection, management, or termination of the law firms that handled their foreclosures."

It was the responsibility of Fannie Mae, including its Chief Risk Officer, to ensure that the foreclosure lawyers and default service providers it hired were properly supervised and made to comply with all governing legal requirements. Except for the unadorned facts they set forth, there is nothing "scandalous" about Plaintiffs' allegations

[7] On October 18, 2011, the FHFA announced that it has "directed Fannie Mae and Freddie Mac to transition away from current foreclosure attorney network programs and move to a system where mortgage servicers select qualified law firms that meet certain minimum, uniform criteria." Press Release, *FHFA Directs Fannie Mae and Freddie Mac to Adopt Uniform Improvements to Foreclosure Attorney Networks*, FHFA (Oct. 18, 2011), http://www.fhfa.gov/webfiles/22718/RANDCP101811.pdf. The FHFA stated that this initiative was intended to "lead to greater transparency and benefit delinquent borrowers who become subject to the foreclosure process" and to "support Consent Orders entered into by financial regulators and servicers." *Id*. *See also* Complaint ¶¶ 215-221.

concerning Fannie Mae's Chief Risk Officer or the handsome compensation paid by Fannie Mae to business enterprises owned by the brother of its Chief Risk Officer.

Defendants also maintain that they have been prejudiced by an objective news report about this litigation published electronically by the *New Jersey Law Journal* on October 27, 2011. Romano Cert. ¶22. Defendants attempt to brand this article as the byproduct of a nefarious "Publicity Machine of Plaintiffs' Counsel" (*Id*. ¶ 24) because (a) Plaintiffs' counsel is "quoted" in the report and (b) it is supposedly "unlikely" that an experienced and respected legal journalist could have "read through" the Complaint herself, leading to the "evident" conclusion that "Plaintiffs' counsel steered the reporter and the story to these harmful allegations to create as prejudicial an article to the PHS Parties as possible. "*Id*. at ¶ 22.

The only unlikely thing about the *New Jersey Law Journal* report is Defendants' assertion that they have been unfairly injured or defamed by it.[8]

As illustrated by e-mails exchanged between Judith Romano and staff members of Defendants' law firm on October 28, 2011 (appended in Romano Cert. Ex. B), electronic access to the *New Jersey Law Journal* article is available only to paid subscribers (*see* Narkin Cert. Ex. E) -- which evidently do not include members of the Pennsylvania-New Jersey "region's premier default services operation" and its litigation defense team. The

[8] Like the unembellished news release issued about this litigation by Plaintiffs' counsel (Narkin Cert. Ex. F) and the modest web site maintained about counsel's modest law practice, the article written by *Law Journal* reporter Mary Pat Gallagher ("Journalist Gallagher") does nothing more than describe plaintiffs' allegations and other information already within the public domain. These are precisely the kind of extrajudicial statements authorized by Local Rule 105.1(c). *See also* Local Rule 79.2 ("[I]t is the policy of the Court that counsel should, if reasonably feasible, provide to the media and members of the public access to a copy of the submitted briefs in pending actions for the purpose of review or copying at the requesting party's expense").

circulation of that report, which contained information of obvious public importance and concern, was limited at best.

Moreover, Journalist Gallagher contacted Plaintiffs' counsel at her independent initiative. Narkin Cert. ¶9. Although he was asked to furnish a photograph of himself to accompany her published report, Plaintiffs' counsel declined the invitation. *Id*. Evidencing Plaintiffs' counsel's belief that public discussion about this litigation should focus on substantive issues raised in the Complaint rather than on personalities, the *New Jersey Law Journal* article written by Journalist Gallagher does not quote, but merely paraphrases, a direct response to a solitary question asked by the reporter. The paraphrased statement does not appear until the twentieth paragraph in a twenty-six paragraph article.

Nor are the Phelan firm's mortgage servicer clients likely to be influenced in the least by Journalist Gallagher's news story. As a result of the emergency remedial action undertaken by the New Jersey judiciary in 2010 through earlier this year (Complaint, ¶¶ 155-171, 195-210), Wells Fargo and every major client of the Phelan firm has become acutely aware of allegations of misconduct leveled against their chosen foreclosure law firm. To regain permission to prosecute uncontested residential foreclosures, these servicers were required to demonstrate that their foreclosure processes (including selection and supervision of outside law firms like the Phelan firm) have improved to the point that they could be deemed reasonably reliable by the courts. The servicers' activities in this regard will continue to be monitored by the judiciary for a period of one year.

The issues addressed by the judiciary are of such public significance that tax dollars paid by New Jersey residents have funded the Internet publication of Court orders and mortgage servicer filings on a web site dedicated to proceedings in *In the Matter of*

Residential Mortgage Foreclosure Pleading and Document Irregularities, Docket No. F-059553-10 (N.J. Super. Ch. Div., Mercer Co.).[9] One can confidently presume that none of these circumstances escaped the attention of sophisticated financial institutions that procure and pay for the "services" of the Phelan firm and its controlled entities.

It would be surprising if the Phelan firm were not under the watchful eye of its clients, who (according to vague statements in the Romano Cert. at ¶¶ 18-19) have expressed alarm about damage that the Phelan firm's misconduct may be inflicting upon their own businesses, which the Phelan firm believes could result in client defections to more responsible foreclosure firms with fewer blemishes on their record. Intimately familiar with the manner in which the Phelan firm does operate, mortgage servicers whose own conduct remains under intense scrutiny might well make a rational business decision to eliminate undesirable continuing liabilities.

Again, Defendants have no one to blame but themselves for their hypothetical self-inflicted "injuries."[10]

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[9] See http://www.judiciary.state.nj.us/superior/documents.htm. In *Beals v. Bank of* America, N.A., 2011 U.S. Dist. LEXIS 128376, at *7-*12 and n.2 (D.N.J. Nov. 4, 2011) (Hayden, J.), the Court found that allegations detailing proceedings in *In the Matter of Residential Mortgage Foreclosure Pleading and Document Irregularities* and testimony at congressional hearings are "relevant" to allegations of systematic foreclosure abuses by Bank of America. *Id*., at *7.

[10] Blaming others and "shooting the messenger" is another regrettable characteristic shared by the Phelan and Baum firms. See Nocera, *Baum Weighs in After Uproar*, N.Y.TIMES (Nov. 18, 2011) (quoting e-mails sent by Baum to a nationally respected columnist charging that the country's preeminent newspaper "destroyed" and "t[ore] down" his firm, leaving the columnist with "blood on [his] hands" for reporting negative information about his firm). At the same time that Baum was writing these e-mails, counsel for the Phelan firm was sending his own series of bewildering e-mails to Plaintiffs' counsel, accusing him of defamation and other "tortious misconduct." Narkin Cert ¶¶ 3-5 and Exs. A, B and C.

C. DEFENDANTS MISCHARACTERIZE THE COMPLAINT AND LITIGATION HISTORY

Alleged "Forum Shopping"

Seen for what it truly is, Defendant's motion can be discounted as nothing more than a platform from which the Phelan firm attempts to demonize Plaintiffs' counsel and distract attention from what this litigation is about – Defendants' wrongful conduct.

Although they know better than they reveal to the Court, Defendants represent to the Court that the Complaint and this lawsuit are the result of "forum shopping" by Plaintiffs' counsel.[11] It is nothing of the sort. The origins of this litigation were accurately described in briefs filed with the United States Court of Appeals for the Third Circuit in the matter styled *Rhodes v. Diamond*, No. 10-3431, non-precedential Opinion published at 2011 U.S. App. LEXIS 8813 (3d Cir. April 28, 2011). For a more complete understanding of Defendants' unfounded "forum shopping" charges, this Court is respectfully invited to examine Appellants' Opening Brief at 2-4, 8-11[12] and Appellants' Reply Brief at 5-9.[13]

Briefly summarized, on March 25, 2009, Plaintiffs' counsel and his former professional colleagues filed a proposed class action complaint against the Phelan firm and its partners under the Fair Debt Collection Practices Act, 15 U.S.C. § 1592 *et seq*. ("FDCPA"). That complaint was narrowly confined to the claim that the Phelan firm's failure to amend bankruptcy proof of claims to reflect proper application of its receipt of sheriff's deposit refunds violated the FDCPA. (None of the plaintiffs in *Rhodes v. Diamond* are parties to the instant lawsuit, nor does the Complaint in this action contain any claim under the FDCPA or any claim relating to sheriffs' deposit refunds. *See* below at 16-17).

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[11] *See, e.g.,* Phelan Br. at 2, 5; Romano Cert. ¶31.
[12] *See* http://www.scribd.com/doc/73851954/PHS-3rd-Cir-Brief-12-6-10
[13] See http://www.scribd.com/doc/59953206/PHS-Third-Circuit-Reply-Brief-1-27-11-as-FILED.

Six months after briefing closed on the Phelan firm's then-undecided motion to dismiss the initial Complaint on the ground that the Bankruptcy Code precludes FDCPA claims (a period during which additional investigation by Plaintiffs' counsel revealed a good faith basis to expand the allegations substantially beyond original FDCPA claims and parties), Plaintiffs' counsel and his colleagues filed a motion for leave to file an amended complaint on January 15, 2010. Narkin Cert. ¶10.

Had the proposed amended complaint been ready for filing just a few weeks earlier before amendments to Fed.R.Civ.P. 15(a) took effect on December1, 2009, Plaintiffs could have filed that complaint as a matter of right without leave of the District Court. But the amended complaint, in the still-developing form that it existed on November 30, 2009, did not allow a premature filing. *Id*.

On July 14, 2010, the District Court denied Plaintiffs' Rule 15(a) motion by an Order containing a two-line footnote statement declaring that the proposed amended complaint was "futile" and "moot" because of the Bankruptcy Code preclusion reasons given by the District Court for dismissing with prejudice the substantively different initial Complaint.

On August 12, 2010, Plaintiffs' counsel filed a notice appealing the District Court's dismissal of *Rhodes v. Diamond* to the Third Circuit. Following the submission of the parties' legal briefs, on April 28, 2011, the Third Circuit entered judgment vacating the lower court's order and returning the action to the District Court. Plaintiffs' counsel was satisfied with the Third Circuit's ruling insofar as it related to the interests of homeowners who brought *Rhodes v. Diamond.* Narkin Cert. ¶11. However, the District Court's opinion declaring that the U.S. Bankruptcy Code precludes bankrupt homeowners' claims under the FDCPA had obvious precedential significance, and Plaintiffs' counsel felt professionally

obligated to take the unpromising and financially unrewarding step of filing an application to Third Circuit requesting reconsideration of the bankruptcy preclusion issue *en banc*. *Id* .

The Third Circuit entered an Order denying appellants' application for rehearing *en banc*. On June 2, 2011, after the Third Circuit issued a mandate to the District Court in the form of its April 28, 2011 judgment, Plaintiffs' counsel took prompt steps to advance the long-delayed progress of *Rhodes v. Diamond* in the District Court, including the filing of a motion requesting a Rule 16 conference, the circulation to the Phelan firm of a proposed updated Complaint and the filing of a motion for leave to file that Complaint. Narkin Cert. ¶ 13 and Ex. I.

During the first week of September, 2011, Plaintiffs' counsel's former colleague suddenly announced that he decided to seek a settlement of the individual claims of the three homeowners initially named as plaintiffs in *Rhodes v. Diamond.* Because this unsettling and unexpected announcement called into question the adequacy of these plaintiffs and this attorney to act in a fiduciary capacity on behalf of a class of distressed homeowners under Fed.R.Civ.P 23, the viability of *Rhodes v. Diamond* as a class action was effectively destroyed. Narkin Cert. ¶ 14 and Ex. J.

As Defendants are quick to point out, the District Court at no time approved the filing of an amended complaint in *Rhodes v. Diamond*. This left Plaintiffs in this litigation, New Jersey residents Charles and Diane Giles (who were not yet parties to *Rhodes v. Diamond*) with the untenable choice of abandoning their commitment to the Class they are eager to represent or re-filing their action where they live, here in the District of New Jersey. With the four year statute of limitations governing their claims against Defendants under RICO expiring on October 24, 2011, on that very date, Plaintiffs' counsel withdrew

his appearance in *Rhodes v. Diamond* and immediately thereafter filed the Complaint now before the Court. Narkin Cert. ¶ 15.

Under no stretch of the imagination could any of the foregoing be characterized as "forum shopping," yet that is the insidious conclusion that Defendants ask this Court to draw.[14]

Alleged Improper FDCPA Claims

Although Phelan firm general counsel Judith Romano professes to "realize [that] the Court cannot adjudicate the merits of the case at this time," she nevertheless argues those merits in a manner that suggests that she either has not read the Complaint or is attempting to dissuade the Court from doing so. Romano Cert. ¶¶ 30-36.

According to Ms. Romano, "it is important for the Court to know that this rambling 100-page complaint is largely identical to the complaint in Rhodes v. Diamond, et al, Docket No. 5:09-ev-01302-CDJ filed by plaintiffs' counsel and his former partners in the Eastern District of Pennsylvania in 2009. That case was dismissed by the District Judge on motion practice…." Romano Cert. ¶30. Ms. Romano further asserts that one of the "many, many false 'factual' allegations" in the Complaint now before the Court is that "the complaint asserts Fair Debt Collection Practices Act claims for a purported class which started in 2005, even though the FDCPA statute of limitations is one year." Romano Cert. ¶34.

As noted above, however, none of the plaintiffs in *Rhodes v. Diamond* are parties to the instant lawsuit, nor does the Complaint in this case contain any claim under the FDCPA

[14] Although it recently changed defense counsel, the Phelan firm's "aggressive" manner of advocacy has been on display since the beginning of *Rhodes v. Diamond*. *See* Appellants' Reply Brief at 17 (quoting instances of the "Phelan‟s professed indignation about the homeowners' 'ludicrous,' 'outrageous,' 'reprehensible,' and 'tactically frivolous' RICO enterprise allegations, which were supposedly made by homeowners‟ counsel in 'bad faith'"). Now, in their latest effort to smear Plaintiffs' counsel through inappropriate personal attacks, the Phelan firm has reached a new low by sarcastically describing a revered figure of 20th century jurisprudence as merely "a federal judge who passed away 13 years ago." *See* Narkin Cert. ¶ 12 and Ex. G and H .

or any claim relating to sheriffs' deposit refunds. Conversely, none of the plaintiffs in this action were identified as parties in the supposedly "identical" 30-page Complaint in *Rhodes v. Diamond* Complaint, and none of the legal claims asserted here can be found in that Complaint. For ease of reference, the Complaint of record in *Rhodes v. Diamond* may be reviewed at http://www.scribd.com/doc/73903328/Phelan-Complaint3-25-09-as-Filed.

Unfortunately, this is only one of "many, many" examples of the Phelan firm's habitual inattentiveness to the facts and its addiction to careless representations to federal and state court judges.[15]

Supposed "Concession" of Validity of Foreclosure Judgments and Purported Absence of Damage Allegations

The Phelan firm exhibits a similar disregard for the facts in representing to the Court that Plaintiffs' claims are deficient as a matter of law because the Complaint supposedly "admits the validity" of foreclosure judgments resulting from their fraudulent foreclosure practices." Phelan Br. at 4, 6; Romano Cert. ¶¶ 3, 8, 33.

To underscore what the Complaint already makes clear, Plaintiffs have not "admitted" the validity of any state court foreclosure judgment procured by Defendants' fraud; instead, for limited purposes of this proceeding, Plaintiffs merely decline to raise an issue that a federal court has no subject matter jurisdiction to decide. *See* Complaint ¶ 173

[15] *See* Appellants' Reply Brief at 5-9 and n.6 (Perhaps "[t]he worst example of Phelan's assault on the homeowners here is its formal statement to a bankruptcy court that Charlie Giles is a deceased woman. *See In re Bender*, memorandum at 3, No. 08-21193 (Bankr. E.D.Pa. March 11, 2010), Doc. 84 (identifying Mr. Giles as a "9/11 widow"), https://ecf.paeb.uscourts.gov/doc1/152114259948)). Although not as egregious, the same litigation technique is also evidenced by Ms. Romano's representation that "[*o]n October 31, 2011* -- before the PHS Parties were served with the complaint -- PHS-PA received a call from a major client who was concerned enough about this litigation that they requested a conference call with the partners of PHS-PA to discuss it further…. The PHS Law Firms had to obtain and immediately analyze the 100+ pages of the complaint and provide assurances to their clients that the allegations were unfounded in order to avoid, for the time being, the taking of any of the adverse actions being contemplated by their clients." Romano Cert. ¶¶ 19, 21. In fact, *on October 25, 2011*, Plaintiffs' counsel provided a courtesy copy of the Complaint to Daniel S. Bernheim 3d, Esquire, then-counsel for the Phelan firm, who provisionally agreed to accept service of process on behalf of the Phelan firm and its related entities, including Ms. Romano. Narkin Cert. ¶ 16 and Ex. K.

and n.83. This distinction is critical, and it was made by Plaintiffs for the sole (but evidently hopeless) purpose of avoiding unnecessary motion practice.

In *Rhodes v. Diamond*, the Phelan firm argued that the proposed amended complaint must be dismissed on the ground that federal courts cannot collaterally review state court judgments under *Rooker-Feldman* doctrine. Although that issue was not addressed by the District Court or the Third Circuit, the Phelan firm has had the benefit of legal briefing on the issue,[16] as well as further clarification of this point in the Complaint:

> In the context of these claims, the *Rooker-Feldman* doctrine is no impediment to federal jurisdiction. *See Sheenan v. Mortgage Electronic Registration Systems, Inc.*, 2011 U.S. Dist. LEXIS 88514, at *9-*12 (D.N.J. Aug. 10, 2011) (Kugler, J.), citing, *In re Sabertooth, LLC. v. Simons*, 443 B.R. 671, 681 (Bankr. E.D. Pa. 2011), *quoting, Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 167 (3d Cir. 2010) ("[A] claim that a judgment was procured by fraud is independent of the judgment and, therefore, does not fall within the Rooker-Feldman doctrine").

Id.

Intentionally or not, in falsely maintaining that Plaintiffs have "admitted" the validity of state foreclosure judgments obtained by Defendants' fraud, the Phelan firm has introduced an unnecessary red herring into this complex case.

The same can be said about the Phelan firm's peculiar assertion that Plaintiffs failed to plead damages. Romano Cert. ¶ 35. In fact, Plaintiffs specifically allege the manner and amount in which they have sustained damages. *See* Complaint ¶¶ 103-106 (damages

[16] *See* Appellants' Reply Brief at 14-16 (and cases cited therein).

sustained by Plaintiffs Charles and Diane Giles),[17] ¶¶ 127-149 (overcharges imposed upon Plaintiffs Laurine Spivey),[18] ¶¶ 271, 276, 278, 284 289, 294, 300 (class-wide damages).[19]

While disclaiming any intention to debate the merits of this litigation before a motion a motion to dismiss has been filed and before discovery has been obtained by Plaintiffs, that is just what the Phelan firm has done in its unusual motion -- and in a way that is not even superficially credible. Other than their untrue observation that Plaintiffs' individual claims relating to falsification of mortgage assignments and lack of standing are "aberrational,"[20] the Phelan firm avoids discussion of the issue. It also asks the Court to assume the falsity of Plaintiffs' allegations and, despite concerns expressed about the Phelan firm from its clients and the New Jersey judiciary, it asks the Court to accept the

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[17] See *Beals v. Bank of America, N.A.*, 2011 U.S. Dist. LEXIS 128376, at *44-*45 (D.N.J. Nov. 4, 2011) (recognizing the existence of homeowners' "damages in having to defend against [a] foreclosure and in losing other options to avoid foreclosure if, as alleged, [an] assignment of [a] mortgage was defective").

[18] These overcharges were aggregated in a bankruptcy proof of claim filed by the Phelan firm (Complaint ¶ 131), which were in turn incorporated into the terms of a Chapter 13 restructuring plan paid by Plaintiff Spivey on a regularly scheduled basis.

[19] Plaintiffs' "damages and injuries include, *inter alia*, (a) payment of inflated or manufactured foreclosure fees to avoid dispossession of their homes through Sheriff's Sales; (b) payment of legal fees and costs to their own counsel to challenge Defendants' inflated or manufactured junk fees and/or Defendants' attempt to seize their property through foreclosure actions brought in the name of entities without legal standing to sue; and (c) loss of property value in distress sales or Sheriff's Sales caused by Defendants' wrongful foreclosure activities."

[20] On this point, a press release disseminated by Phelan firm's current defense counsel, Flaster/Greenberg, is illuminating:

"[T]he party bringing [a foreclosure suit must prove, on the date the suit is filed, that the borrower owes the money to the party filing the lawsuit. Furthermore, because the process of securitization is so complex, and *involves so many loans being transferred among so many entities*, gathering that proof in future cases may not always be easy. The ruling may help *borrowers who have been trying in good faith to work out the terms of their loans, by allowing the borrower to be assured that the party asking for the money is really owed the money*.

With the *number of foreclosures surging*, the ruling may renew hope for borrowers who *legitimately question whether they owe money to the party demanding payment*. *In many such cases*, the loans have been conveyed to the point where borrowers cannot ascertain with certainty exactly what entity is the real holder of their loan. But it may present a new challenge for lenders seeking repayment, as they traverse the same convoluted paper trail to prove they own the note and the mortgage on a particular property." Press Release, *Court Rules Against Bank of New York; Dismisses Foreclosure Complaint*, FLASTER/GREENBERG (July 8, 2010) (emphasis supplied), available at http://www.flastergreenberg.com/newsroom-alerts-Court_Rules_Against_Bank_of_New_York_Dismisses_Foreclosure_Complaint.html

blind premise that it is an outstanding and ethically unchallenged law firm instead of one of the principal agents of foreclosure abuse in New Jersey and Pennsylvania.

While there is never an occasion for this sort of sleight-of-hand argument, the time is most certainly not now. As U.S. Supreme Court Justice Louis Brandeis once said, "Sunlight is the best disinfectant." Fearing precisely this consequence, the now-beleaguered Phelan firm seeks refuge under the cover of darkness.

D. DEFENDANTS' RULE 11 THREATS ARE A HALLOW PRETEXT TO JUSTIFY ATTEMPTS TO INTIMIDATE AND HARRASS OPPOSING PARTIES AND COUNSEL

By e-mail and letter dated November 11, 2011 (Narkin Cert. Ex. A), Kenneth S. Goodkind, a local attorney recently retained by the Phelan defendants, introduced himself to Plaintiffs' counsel by threatening (1) to hold Plaintiffs' counsel "responsible" for "tortious misconduct" and other perceived transgressions, which Mr. Goodkind promised to "dea[l] with accordingly" and (2) to seek "monetary sanctions, including payment of attorneys' fees" resulting from what Mr. Goodkind asserted were "a clear violation of Rule 11 and [28 U.S.C.] § 1927."

Mr. Goodkind described the "violation" he claimed this way:

> Although mindful of the irony that todays' date underscored the multiplicity of your violations of Rule 11, I will not enumerate all of the frivolous aspects of your complaint in this letter. For starters, I note that you have named Phelan Hallinan & Schmieg, LLP ("the "LLP") as a defendant. The LLP has its business address and offices in Pennsylvania and conducts its business there. ***The LLP has no relationship with this jurisdiction, and therefore is not subject to personal jurisdiction in this Court***. The most cursory reasonable information would have revealed this information, although I suspect that you knew the facts related in this paragraph and willfully chose to proceed against the LLP anyway.
>
> (Emphasis supplied).

After another e-mail and letter November 15, 2011 ((Narkin Cert. Ex. B), Mr. Goodkind also threatened to (1) hold Plaintiffs' counsel "responsible for defamation and other tortious misconduct," and (2) seek sanctions under Rule 11 and 28 U.S.C. § 1927 because the so-called "100-page" Complaint contains an a single footnote alleging that the Phelan firm's establishment of a wholly owned title company violated Opinion 688 of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court.[21]

By e-mail and letter dated November 18, 2011 (Narkin Cert. Ex. C), Mr. Goodkind refocuses his attention on the "issue" of personal jurisdiction as a pretext for his threat to (1) file an improper "Strategic Lawsuit Against Public Participation" against Plaintiffs' counsel and (2) seek sanctions against Plaintiffs' counsel under Rule 11 and 28 U.S.C. § 1927.

Here, Mr. Goodkind summed up his claimed violation this way:

> As the most cursory investigation by you would have revealed, neither attorney Phelan nor attorney Schmieg is a member of the New Jersey bar or a resident of New Jersey or maintains an office in this District. ***Neither of these attorneys regularly transacts business in New Jersey, nor has the type of association with any business in New Jersey which could subject either to personal jurisdiction in this District.*** Your complaint is devoid of any nonconclusory allegations to the contrary, which is actually as it should be, because no such facts exist.
>
> (Emphasis supplied).

[21] Despite the broad and unqualified statements in Opinion 688 against law firm ownership of title companies, Mr. Goodkind claimed that Plaintiffs' counsel violated Rule 11 because "the companies owned by PHS partners" do not "operate" in precisely the same fashion as the title company at issue in Opinion 688. Oddly enough, the same footnote that Mr. Goodkind finds offensive (Complaint ¶ 48 n.32) also alleges that the Phelan firm's ownership of its title company and other "service providers" violates the New Jersey Professional Services Corporation Act, N.J.S.A. 14A-17-9, which provides that, except for "investments" of a type not relevant here, "[n]o professional corporation shall engage in any business other than the rendering of professional services for which it was specifically incorporated." *See Chulsky v. Hudson Law Offices*, P.C., 2011 U.S. Dist. LEXIS 29781, at *7-*15 (D.N.J. Mar. 22, 2011) (Wolfson, J.). Presumably, Mr. Goodkind and his clients find nothing objectionable about this allegation.

Aside from their menacing nature, Mr. Goodkind's letters and e-mails display an unfathomable lack of familiarity with the law and facts that apply to his charges of sanctionable misconduct by Plaintiffs' counsel.

The law governing motions for sanctions under Rule 11 and 28 U.S.C. § 1927 are elementary and clear. As the Court observed in *Goldenberg v. Indel Corp*., 2011 U.S. Dist. LEXIS 31851, at *5-*6 (D.N.J. Mar. 25, 2011):

> Rule 11 sanctions are warranted "only in the 'exceptional circumstances' where a claim or motion is patently unmeritorious or frivolous." *Watson v. City of Salem*, 934 F. Supp. 643, 662 (D.N.J. 1995) (*citing Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988)). Sanctions are imposed only in those rare instances where the evident frivolousness of a claim or motion amounts to an "abuse[] of the legal system." *Doering*, 857 F.2d at 194.

In *Alphonso v. Pitney-Bowes, Inc*., 356 F. Supp. 2d 442, 452 (D.N.J. 2005), the Court also noted:

> Title *28 of the United States Code, Section 1927* permits a court to impose sanctions upon counsel for engaging in conduct that "multiplies the proceedings in any case unreasonably and vexatiously" and require that counsel personally satisfy "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *See 28 U.S.C. § 1927*. Willful bad faith is required. *Williams v. Giant Eagle Markets, 883 F.2d 1184, 1190-91 (3d Cir. 1989)*; *Ford v. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1986)*. The "intentional advancement of a baseless contention that is made for an ulterior purposes, *e.g.*, harassment or delay," is indicative of bad faith. *Ford, 790 F.2d at 347*. "Bad faith may [also] be inferred 'when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose **[**23]** . . . .'" *D'Auria v. Minniti (In re Minniti), 242 B.R. 843, 850 (Bankr. E.D. Pa. 2000)* (quoting *Estate of Perlbinder v. Dubrowsky (In re Dubrowsky), 206 B.R. 30, 36 (Bankr. E.D.N.Y. 1997)*).

The law governing personal jurisdiction is likewise well established and easily comprehended by an experienced litigator. As the Court observed in *Flagship Interval*

Owners Association, Inc. v. Philadelphia Furniture Mfg. Co., 2010 U.S. Dist. LEXIS 26472, at *

10-11 (D.N.J. Mar. 22, 2010) (citations omitted):

> "A federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state." ... The New Jersey long-arm statute permits the exercise of personal jurisdiction over a nonresident defendant to the extent permitted by the *Fourteenth Amendment of the United States Constitution*. *N.J. Sup. Ct. R. 4:4-4(c)(1)*....
>
> The due process protection of the *Fourteenth Amendment* permits a federal court to exercise personal jurisdiction over a nonresident of the forum only when a two-prong test is satisfied.
>
> First, the defendant must have made sufficient "minimum contacts" with the forum.... [T]he constitutional touchstone of personal jurisdiction is "whether the defendant purposefully established 'minimum contacts' in the forum State"[.] The existence of minimum contacts is determined through of "the relationship among the defendant, the forum, and the litigation." There must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."... These contacts must be of such nature that the individual nonresident defendant "should reasonably anticipate being haled into court there." The minimum contact prong is a "fair warning" requirement, and it is satisfied if the defendant has "purposefully directed" his activities toward residents of the forum State, and the litigation results from alleged injuries that "arise out of or relate to" those activities....
>
> Second, if plaintiff demonstrates sufficient minimum contacts, jurisdiction may be exercised when the court determines, that subjecting the defendant to the court's jurisdiction would comport with traditional notions of "fair play and substantial justice." Once minimum contacts are established, the burden rests with the defendant to show that jurisdiction would be unreasonable.
>
> A court may exercise either "general" or "specific" personal jurisdiction over a defendant. A defendant may be subjected to general jurisdiction when the plaintiff's cause of action arises from the defendant's non-forum related activities, and the defendant has maintained "continuous and systematic" contacts with the forum state. ...

> A defendant may be subjected to specific jurisdiction "when the cause of action arises from the defendant's forum related activities, such that the defendant should reasonably anticipate being haled into court there."... "Specific jurisdiction jurisdiction is established when a non-resident defendant has 'purposefully directed' his activities at a resident of the forum and the injury arises from or is related to those activities."....

In this litigation, Phelan Hallinan & Schmieg, LLP ("Phelan LLP"), Lawrence T. Phelan ("Mr. Phelan") and Daniel G. Schmieg ("Mr. Schmieg") have abundant, longstanding, continuous, regular and currently ongoing contacts with the State of New Jersey. These contacts are so pervasive that assertion of personal jurisdiction, on either a general or special basis, certainly comports with traditional notions of "fair play and substantial justice." Indeed, they have purposefully availed themselves of the privilege of conducting activities within New Jersey, thus invoking the benefits and protections of its laws. These contacts are of such nature that these Defendants should reasonably anticipate being haled into court in New Jersey.

As alleged at paragraph 158 of the Complaint, on March 13, 2008, ***Phelan P.C***. filed a foreclosure action styled *Bank of New York v. Ukpe* in the Superior Court, Chancery Division, for Atlantic County, New Jersey, Docket No. F-10209-08, before the Hon. William C. Todd III ("Judge Todd"). After Judge Todd called into question the propriety of mortgage assignments executed by Francis Hallinan and notarized by Thomas Strain, a Pennsylvania notary employed in the Mount Laurel, New Jersey office of Full Spectrum (Complaint ¶¶ 162-166), Mr. Phelan wrote and signed an *ex parte* letter to Judge Todd (Complaint ¶¶ 167) ***on the letterhead of Phelan LLP*** stating:

> I am a founding partner of ***the*** Phelan Hallinan & Schmieg law firm ... and ***majority shareholder in the present New Jersey professional corporation***. I am taking the unusual step of writing to you directly

> with respect to your Honor's concerns with the notarization process of certain mortgage assignments by ***our office***….
>
> ***[W]e*** have, in an abundance of caution and respect for the Court's concern, filed corrective assignments for each matter in which Thomas Strain was the notary….
>
> On a ***personal*** note, it is particularly distressing to ***me*** to have the integrity of any of ***our firm's processes*** at issue….
>
> ***I*** would respectfully request that notification of ***our*** corrective ***actions*** be circulated to ***[New Jersey] Chancery judges***.

A copy of Mr. Phelan's letter to Judge Todd is appended to the Narkin Certification at Exhibit L.

As alleged at paragraphs 171, 195-203 of the Complaint, the circumstances purportedly "addressed" by Mr. Phelan were specifically highlighted when the "Phelan firm was made an example of last year when the judiciary took action against robo-signing and other improper foreclosure practices." Mary Pat Gallagher, *Law Firm Hit With Racketeering Suit Over Alleged Wrongful Foreclosures*, 206 N.J.L.J, 388 (Oct. 31, 2011) *See* above at 7 and n.5; Romano Cert., Ex. B.

Other close contacts between New Jersey and Mr. Phelan (and Phelan LLP) abound in the public record:

- On the home page of the Phelan firm's web page as it appeared in 2009 (Narkin Cert. Ex. D), the heading reads "Phelan Hallinan & Schmieg, LLP …. Representing Lenders in ***New Jersey*** and Pennsylvania." The web site goes on to state: "***Larry Phelan is the Managing Partner of both the PA and NJ offices***, which combined have 17 attorneys and over 250 support personnel…."

- Mr. Phelan personally executed (or appears to have executed) documents filed with the New Jersey Division of Revenue concerning the Phelan firm, P.C., of which Mr. Phelan is identified by the title of "President." (Mr. Schmieg is identified as "Secretary"). Narkin Cert. Ex. M.
- Mr. Phelan personally executed (or appears to have executed) documents filed with the New Jersey Division of Revenue concerning a company operating in New Jersey, most recently under the name of "Full Spectrum Title." Mr. Phelan is identified by the title of "President." Narkin Cert. Ex. N.
- According to paragraphs 23(f) and (g) of the Romano Certification, Mr. Phelan and Mr. Schmieg, along with Defendant Hallinan, own Full Spectrum and Land Title – the "vendors" that the Phelan firm's web site claimed to "ensure as quick a turnaround time as possible" for its clients and the same entities described by Mr. Phelan in 2005 as the vehicle for the Phelan firm's profit-making "law firm-title operation business model" (*see* above at 7-8 and n.5; Complaint ¶ 48 and Ex. A).
- Phelan P.C., Full Spectrum and Land Title maintain their offices in adjacent floors of an ***office building located at 400 Fellowship Road, Mount Laurel, New Jersey*** 08054. The building, valued at approximately $ 3.4 million, is owned by Camelot Enterprises, LLC, a ***New Jersey*** domestic limited liability company having two "members": Mr. Phelan and his partner Mr. Hallinan. In 2009, the ***company owned by Messrs. Phelan and Hallinan paid $141,376.63 in property taxes in the State of New Jersey***. Narkin Cert. Ex. M.

Although attorney Goodkind threatened Plaintiff counsel repeatedly about dire consequences that would follow unless counsel acceded to his erroneous contention that Phelan LLP, Mr. Phelan and Mr. Schmieg have "no relationship" with New Jersey sufficient to allow this Court to exercise personal jurisdiction, the simple facts, without more, demonstrate otherwise.

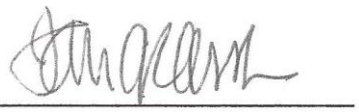
III. CONCLUSION

For all of the above reasons, Plaintiffs and their counsel respectfully request this Court to deny Defendants' Motion for a Protective Order.

Dated: November 28, 2011

Respectfully submitted,

BHN LAW FIRM

By: 

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