No. 19-1379

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Rodney W. Harrell,

Plaintiff-Appellant,

v.

Freedom Mortgage Corp.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

Hon. Anthony J. Trenga

Case No. 1:18-cv-275

Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Plaintiff-Appellant and Reversal

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INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau is an agency of the United States charged with promulgating rules and issuing interpretations under the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 *et seq*., as well as enforcing compliance with RESPA's requirements. *See* 12 U.S.C. §§ 2617, 5512(b), 5564(a); *see also id*. § 5481(12), (14) (including RESPA in the list of "Federal consumer financial laws" that the Bureau administers).

This case presents the question of how to interpret the key term "servicer," as defined in RESPA and its implementing regulation, in the common event that the right to service a consumer's mortgage loan is sold or transferred between companies. Many of the substantive consumer-protection provisions in RESPA and its implementing regulation apply to "servicers." Accordingly, the Bureau has a substantial interest in the Court's resolution of the question presented.

STATEMENT

A. RESPA and Regulation X

1. Congress enacted the Real Estate Settlement Procedures Act in 1974 in order to help consumers navigate the costly and complicated process of settling a residential real-estate transaction. *See* Pub. L. No. 93-533, §2, 88 Stat. 1724, 1724 (codified at 12 U.S.C. § 2601). Soon after it enacted RESPA, Congress amended the law to give the Department of

Housing and Urban Development the authority to "prescribe such rules and regulations" and "make such interpretations" "as may be necessary to achieve [RESPA's] purposes." Pub. L. No. 94-205, § 10, 89 Stat. 1157, 1159 (1976) (codified at 12 U.S.C. § 2617 (1976)).

In 1990, Congress further amended RESPA by adding a new Section 6 that addressed mortgage servicing.[1] Pub. L. No. 101-625, § 941, 104 Stat. 4079, 4405–11 (codified at 12 U.S.C. § 2605). In doing so, Congress was particularly concerned with ensuring that "mortgage borrowers are properly informed about and protected during the practice of the transfer, sale, and assignment of mortgage servi[ci]ng." H. Rep. No. 101-943, at 510 (1990) (conf. rep.); *see also* 136 Cong. Rec. 21,261–62 (1990) (statement of Rep. LaFalce) (recounting at length the "wide-ranging complaints" from consumers about mortgage servicing transfers, "including escrow accounts being mishandled, taxes and insurance going unpaid, [and] consumers misinformed or uninformed about whom to pay and when"); GAO, HOME OWNERSHIP: MORTGAGE SERVICING TRANSFERS ARE INCREASING AND CAUSING

[1] Mortgage servicers undertake the day-to-day management of mortgage loans and are typically responsible for billing borrowers, collecting and allocating payments, maintaining escrow accounts, and pursuing collection activities against delinquent borrowers. CFPB, Mortgage Servicing Rules Under RESPA, 78 Fed. Reg. 10,696, 10,699–701 (Feb. 14, 2013) (providing overview of servicers' key role in the multitrillion-dollar mortgage market).

BORROWER CONCERN (Nov. 1989) (describing a dramatic increase in servicing transfers and resulting confusion for consumers), *available at* www.gao.gov/assets/220/211839.pdf.

Accordingly, Section 6 requires servicers to give detailed disclosures to consumers when the right to service a loan is transferred or sold, and to investigate and respond to certain borrower inquiries. 12 U.S.C. § 2605(a)–(c), (e). It defines a "servicer" as, generally, "the person responsible for servicing of a loan." *Id.* § 2605(i)(2). And it defines "servicing" as

> receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in [12 U.S.C. § 2609], and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

Id. § 2605(i)(3).

Section 6 also provides that, for loans that require borrowers to pay into an escrow account for the satisfaction of taxes or similar charges relating to the property, "the servicer shall make payments from the escrow account for such … charges in a timely manner as such payments become due." *Id.* § 2605(g). With this provision, Congress aimed to ensure that servicers "continue their current practice of making escrow payments even when borrowers' escrow accounts are less than the amount required to cover payments due." H. Rep. No. 101-943, at 513.

To enforce compliance with the requirements of Section 6, Congress included a private right of action allowing affected borrowers to pursue remedies against "[w]hoever fails to comply with any provision" of that section. 12 U.S.C. § 2605(f); *see also id.* § 2614 (jurisdictional grant to district courts to hear such cases).

The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, bolstered the consumer-protection measures in Section 6. Among other changes, it restricted servicers' use of force-placed insurance, required servicers to promptly refund escrow balances when consumers pay off their loans, and raised the statutory damages available in private suits. Pub. L. No. 111-203, § 1463, 124 Stat. 1955, 2182–84. The Dodd-Frank Act also transferred authority to implement and enforce RESPA from HUD to the Bureau. *Id.* §§ 1061(b)(7), 1098, 124 Stat. at 2038, 2103–04.

2. The federal regulations implementing RESPA are codified in what is known as Regulation X. *See* 12 C.F.R. pt. 1024. These rules were initially promulgated by HUD pursuant to its former authority under RESPA. *See* 12 U.S.C. § 2617 (1976). They included requirements governing how lenders and servicers establish and maintain borrower escrow accounts, 24 C.F.R. § 3500.17 (2010), and setting out their responsibilities upon the sale or transfer of servicing rights, *id.* § 3500.21 (2010).

Shortly after the Dodd-Frank Act transferred responsibility for RESPA to the Bureau, the Bureau republished HUD's RESPA regulations without material change. *See* 76 Fed. Reg. 78,977 (Dec. 20, 2011) (codified at 12 C.F.R. pt. 1024). The Bureau later issued revisions to Regulation X that implemented the Dodd-Frank Act's new provisions on mortgage servicing. 78 Fed. Reg. 10,696 (Feb. 14, 2013). The new measures included requirements that servicers have policies and procedures in place reasonably designed to ensure that they can oversee certain types of entities with whom they contract for assistance in servicing a loan, 12 C.F.R. § 1024.38(b)(3), and to ensure that relevant information and documents concerning a loan are transmitted to a new servicer when servicing rights are transferred, *id.* § 1024.38(b)(4).

In issuing these revisions, the Bureau noted the "systemic problems in the mortgage servicing industry" that had arisen before and during the financial crisis. 78 Fed. Reg. at 10,700–03. These problems include the inability of servicers' typical high-volume, low-margin business model to cope with issues affecting a large number of loans at once. *Id.* at 10,700. The Bureau further observed that "[s]ervicers are generally not subject to market discipline from consumers because consumers have little opportunity to switch servicers." *Id.*

B. Factual and Procedural Background

Plaintiff Rodney Harrell is a Virginia homeowner. Defendant Freedom Mortgage Corp. is the current servicer of his residential mortgage loan. NYCB Mortgage Co. was the original lender and servicer of that loan. App. 2, ¶ 6. The terms of the loan require that Mr. Harrell make regular payments into an escrow account for the purpose of assuring payment of local property taxes and private insurance premiums on the property. App. 2, ¶ 8. Mr. Harrell has made all scheduled payments on time. App. 3, ¶ 9.

In June 2017, Freedom announced that it had agreed to buy nearly $500 million in residential mortgage assets from NYCB, including "the right to service over $20 billion in residential mortgage loans." App. 5, ¶ 26. Mr. Harrell's loan was among the transferred servicing accounts. App. 3, ¶ 12. The transfer agreement provided that NYCB would sell and transfer to Freedom all of its rights and interests as servicer of these loans, including the "related Servicing obligations as specified in each Servicing Agreement." App. 94, 97, 100.

Article V of that contract, titled "Additional Agreements," further provided that NYCB would pay most tax obligations for the transferred servicing accounts that fell due within 30 days of the transfer. App. 136. In the event NYCB failed to do so, it agreed to indemnify Freedom for any

costs and penalties Freedom incurred as a result. NYCB also agreed to transfer any escrow balances connected with the accounts to Freedom within three days after the transfer of servicing rights. App. 133.

As a result of this agreement, servicing of Mr. Harrell's loan transferred from NYCB to Freedom. App. 3, ¶ 12. As required by RESPA, NYCB and Freedom provided Mr. Harrell with notices informing him of the change. App. 228–31; *see also* 12 U.S.C. § 2605(b)–(c). The notice from NYCB, which was dated October 9, 2017, directed Mr. Harrell to begin sending his payments to Freedom on November 1 and provided the address for doing so. App. 228. The notice from Freedom, which was dated November 8, stated that "[t]he servicing of your mortgage loan … has transferred to us, effective 11/01/17." App. 229.

Property taxes on Mr. Harrell's residence were due two weeks after the transfer, on November 15. App. 3, ¶ 10. Neither NYCB nor Freedom made the payment on time. App. 3, ¶¶ 13–14. As a result, Mr. Harrell was assessed penalties, and his total tax liability increased by nearly $900 because he was unable to deduct the unpaid property taxes on his 2017 state and federal income taxes. App. 3–4, ¶¶ 16–19. Freedom eventually paid the property tax bill, including the penalty, in February 2018, after Mr. Harrell called and provided written notice to Freedom about the issue.

App. 4–5, ¶¶ 21, 23. Freedom notified Mr. Harrell of the payment in a letter stating that "payment of these taxes is our responsibility." App. 233.

Mr. Harrell alleges that changes to the 2018 tax code mean he cannot now recoup the extra income-tax liability he incurred as a result of his servicer's error. App. 4, ¶ 20. (He also alleges a number of other harms, including the time and effort spent attempting to determine why his taxes had not been paid and seeking to correct the error. App. 7, ¶ 41.)

Mr. Harrell filed suit under RESPA, alleging that Freedom's failure to pay the property taxes on time violated 12 U.S.C. § 2605(g), which requires "servicers" to "make payments from the escrow account for such taxes, insurance premiums, and other charges [as are provided for under the mortgage loan] in a timely manner as such payments become due." He alleged that Freedom engaged in similar failures with respect to numerous other mortgage loans in its servicing portfolio. App. 5–6, ¶¶ 23, 28–32.

Freedom moved to dismiss, arguing that it was not a "servicer"—at least for purposes of the November 2017 tax payment—because its agreement with NYCB provided that NYCB would handle the payment. Freedom claimed that the transfer agreement meant NYCB was the sole entity "responsible" for that aspect of servicing the loan, and was thus the sole "servicer" for the tax payment as defined in 12 U.S.C. § 2605(i)(2).

The district court granted Freedom's motion, but on different grounds. App. 214–21. The court focused on RESPA's definition of "servicing" as "receiving any scheduled periodic payments from a borrower," including amounts payable into escrow, and making required "payments with respect to the amounts received from the borrower." 12 U.S.C. § 2605(i)(3). Because Mr. Harrell had paid money for the taxes to NYCB—i.e., NYCB had "received" the relevant "scheduled periodic payments"—the court concluded that NYCB was the sole entity responsible for making the tax payment, and thus the sole servicer as to that duty. The court stated that the transfer agreement between NYCB and Freedom "did not change this statutory obligation, but rather affirmed it." App. 218.

SUMMARY OF ARGUMENT

Under RESPA, a "servicer" is "the person responsible for servicing of a loan." 12 U.S.C. § 2605(i)(2). Freedom acquired responsibility for servicing Plaintiff's mortgage loan when it acquired from his former servicer (NYCB) all rights to service the loan, including the right to collect Plaintiff's payments. Those payments first became due to Freedom on November 1, 2017. As the holder of all rights to service the loan from that point on, Freedom was a "servicer" under RESPA starting November 1, with an obligation to ensure timely payment of property taxes from Plaintiff's

escrow account. *Id.* § 2605(g). Plaintiff plausibly alleged that Freedom violated this requirement when it failed to pay property taxes that fell due on November 15, two weeks after it began to service the loan.

The district court erred in holding that Freedom was not a servicer for purposes of the missed tax payment because Plaintiff had previously paid money to his former servicer (NYCB) that was meant to satisfy the tax payment. Under RESPA, an entity's obligation as a servicer to make timely payments from an escrow account does not depend on when the consumer paid funds into the account. The district court's contrary view is inconsistent with the provisions of RESPA's implementing rule, Regulation X, that govern escrow accounts. Those provisions treat funds in an escrow account as fungible and generally require servicers to make tax and similar payments even when the account balance is deficient. The district court's view would also mean that a company could not transfer all rights to service a loan, along with any escrowed funds, without remaining potentially liable as a servicer for however long it took for all escrowed funds to be paid out.

For its part, Freedom is mistaken when it argues that it was not a servicer because it arranged by contract for NYCB to handle the tax payment. Regulation X expressly contemplates that servicers may contract with others to assist in servicing a loan. Nowhere does the regulation imply

that, by doing so, the holder of the right to service the loan also contracts away its status as a "servicer" and the obligations that come with it under federal law. Such a rule would undermine the protections afforded mortgage borrowers under RESPA by obscuring who exactly is a "servicer" with respect to different servicing obligations. Consumers might be unaware that the company they thought was their servicer had in fact subcontracted out that status piecemeal, via side agreements to which the consumers were not a party. RESPA was intended instead to make clear to consumers and companies alike which entities are responsible for which duties, particularly in the common event that servicing rights are transferred between companies.

ARGUMENT

FREEDOM BECAME A "SERVICER" OF PLAINTIFF'S LOAN, WITH A RESPONSIBILITY TO ENSURE TIMELY PAYMENTS FROM HIS ESCROW ACCOUNT, WHEN IT ACQUIRED ALL RIGHTS TO SERVICE THE LOAN

A. An Entity Becomes a Servicer Under RESPA When It Acquires All Rights to Service a Mortgage Loan, Including the Right to Collect Borrower Payments

Under RESPA, a company becomes a "servicer" when it becomes "responsible for servicing of a loan." 12 U.S.C. § 2605(i)(3). Freedom became responsible for servicing Plaintiff's loan on November 1, 2017, after it acquired all rights to service the loan from NYCB and when Plaintiff's payments first became due to Freedom.

Freedom's transfer agreement with NYCB specified that Freedom would receive "all right, title and interest of [NYCB] … as Servicer under the Servicing Agreements" that governed the transferred loans. Freedom also acquired "the Related Escrow Accounts" for those loans. And it assumed "the related Servicing obligations as specified in each Servicing Agreement, including the obligations to administer and collect the payments of or relating to the Serviced Loans." App. 94, 133. The agreement provided that Freedom would assume these servicing obligations after the "Servicing Transfer Date," meaning, in short, the "effective date of the transfer." App. 94–95, 100. Both RESPA and Regulation X define "effective date of transfer" as "the date on which the mortgage payment of a borrower is first due to the transferee servicer." 12 U.S.C. § 2605(i)(1); 12 C.F.R. § 1024.2(b).

Here, the effective date of transfer was November 1, when Plaintiff's payments first became due to Freedom. *See, e.g.*, App. 230 (notice from Freedom to Plaintiff stating that November 1 is "the effective date of the transfer of loan servicing"). The transfer agreement provided that at that point Freedom would assume—i.e., be responsible for—all "Servicing obligations as specified in each Servicing Agreement." The agreement also transferred to Freedom "all" of NYCB's "right, title and interest" as servicer of Plaintiff's loan. As the holder of all rights to service the loan, including

the right to collect payments, Freedom had the final say on how to fulfill these obligations. It was thus "responsible" for all aspects of servicing the loan under the ordinary, common meaning of that term. So Freedom became a "servicer" of the loan, including for purposes of making tax payments from Plaintiff's escrow account, after its deal closed with NYCB and it began to collect Plaintiff's payments on the loan.

That straightforward application of the statutory definition of "servicer" is in keeping with the purposes of RESPA Section 6, which was intended to address the potential for confusion, and resulting injury to consumers, that can be caused by servicing transfers. Congress sought to do so by ensuring that consumers and regulated entities alike would understand which entities were responsible for what duties both during and after a servicing transfer. *See, e.g.*, H. Rep. No. 101-943, at 510 ("The conferees want to insure that mortgage borrowers are properly informed about and protected during the practice of the transfer, sale, and assignment of mortgage servi[ci]ng").

Section 6 thus specifically defines the term "effective date of transfer." 12 U.S.C. § 2605(i)(1). It requires that transferor servicers send a notice to consumers—known informally as a "Good-bye Letter"—before the effective date of transfer, providing them with information about the transfer and

about their new servicer. *Id.* § 2605(b). It requires that transferee servicers provide a second, similar notice to the consumer—a "Hello Letter"—within 15 days after the transfer. *Id.* § 2605(c). It provides a 60-day grace period following the effective date of transfer during which servicers cannot charge a late fee if consumers mistakenly send payment to their old servicer. *Id.* § 2605(d). And it sets out a process for consumers to request information from their servicer or seek to correct errors in their accounts. *Id.* § 2605(e).

It is consistent with the statutory scheme Congress established, and the clear handoff from servicer to servicer that it envisions, to read RESPA's definition of "servicer" as applying to the entity that acquires all rights to service a mortgage loan, including the right to collect borrower payments. By contrast, a view that such an entity might in fact *not* be a servicer—at least with respect to certain servicing obligations—would thwart the objectives of RESPA Section 6, and sow confusion for both consumers and companies, by muddying exactly that which Congress sought to make clear.

Furthermore, while the transfer agreement in this case is sufficient to establish that Freedom was a servicer of Plaintiff's loan, including for purposes of the tax payment, numerous other facts confirm that conclusion. Indeed, Freedom said as much itself. For example, on November 8, 2017, a week before the tax payment was due, Freedom sent Plaintiff the "Hello

Letter" required by 12 U.S.C. § 2605(c) informing him of the transfer. The letter stated that "the servicing of your mortgage loan … has transferred to us [i.e., Freedom], effective 11/01/17." App. 229. It referred to NYCB as Plaintiff's "prior servicer." And it said nothing to suggest that any aspect of servicing had *not* been transferred or to otherwise inform Plaintiff about the specific terms of Freedom's agreement with NYCB.

One of those terms provided that Freedom could seek indemnification from NYCB for the failure to pay tax obligations on time. App. 136. The inclusion of this indemnification clause provides further evidence that the companies understood that Freedom, as the owner of the right to service the loan, would be responsible for any missed tax payment in the first instance. Consistent with that understanding, it was Freedom that eventually paid the delinquent tax bill (albeit too late for Plaintiff to avoid the costly income-tax consequences he alleges here). App. 4, ¶ 20.

When Freedom did pay the bill, in February 2018, it sent Plaintiff a letter candidly acknowledging that "the payment of these taxes is our responsibility." App. 238. Freedom was correct. Indeed, there appears to have been no confusion that Freedom was a servicer of Plaintiff's loan, including with respect to the tax payment, right up until it filed its motion to dismiss in this case, abruptly disclaiming that status.

Because Freedom was a servicer responsible for servicing Plaintiff's loan at the time of the RESPA violation alleged here, this Court should reverse the district court's dismissal of Plaintiff's Complaint.

B. An Entity's Obligations as a Servicer Do Not Depend on When Consumers Pay Funds Into Their Escrow Accounts

The district court erred in holding that NYCB remained the sole servicer of Plaintiff's loan for purposes of the tax payment that was due *after* NYCB had transferred servicing rights. The district court based its conclusion on RESPA's definition of "servicing" as "receiving any scheduled periodic payments from a borrower," including amounts payable into escrow, and making required "payments with respect to the amounts received from the borrower." 12 U.S.C. § 2605(i)(3). The district court held that because NYCB had received past payments from Plaintiff, some part of which went into escrow for later payment of the tax obligation, NYCB was the sole servicer for purposes of paying that tax obligation. App. 217–18.

That conclusion, however, does not follow from the text of the statute. Nothing in the statutory definition of "servicing," or any other part of RESPA, states that the entity that receives borrower payments into escrow must be the same one that pays those monies out. The definition of servicing simply says *what* servicing is. It does not itself say *who* is responsible for doing the servicing. The fact that NYCB received into escrow

the funds meant to pay Plaintiff's property tax bill did not mean that NYCB remained solely responsible for paying that bill even after it transferred all rights to service the loan to Freedom.

The district court's interpretation would also produce bizarre results. Under the district court's view, a servicer would be unable to transfer away all servicing rights, including any accrued funds in an escrow account, without retaining responsibilities as a servicer for some indeterminate period of time afterward. Having previously received borrower payments into escrow, the company would remain a servicer under federal law until all the escrowed funds had been properly paid out. It would thus face potential liability—including possibly for statutory damages, *see* 12 U.S.C. § 2605(f)—for violations that occurred after it gave up all rights to service a loan and ceased to exercise any control over such servicing.[2]

The district court's interpretation is also inconsistent with the provisions of RESPA's implementing rule, Regulation X, governing escrow

[2] To be sure, transferor servicers retain certain obligations even after they transfer the right to service a loan. *E.g.*, 12 C.F.R. § 1024.33(c)(2) (establishing requirements for how transferor servicers must handle borrower payments mistakenly sent to them within the 60-day grace period after the servicing transfer). But in contrast to what would result from the district court's analysis, these responsibilities are limited in time and scope, and concern only matters within the control of the transferor servicer.

accounts. Under the district court's view, identifying the servicer of a loan would involve a "traceability" inquiry into when particular monies were first deposited into an escrow account. Regulation X's rules for escrow accounts do not require any such tracing between particular borrower payments in and particular tax or similar payments out. The rules instead treat escrow funds as fungible, requiring servicers to calculate in advance what regular payments the borrower must pay into escrow, 12 C.F.R. § 1024.17(c)–(d), generally requiring servicers to make timely payments even when the escrow balance is deficient, *id.* § 1024.17(k), and providing a process by which servicers can then recover that deficit over time from the borrower, *id.* § 1024.17(f).

Moreover, Regulation X specifically provides that when a mortgage loan is transferred, the new servicer "shall treat shortages, surpluses and deficiencies in the transferred escrow account according to the procedures [that generally apply to escrow accounts]." *Id.* § 1024.17(e)(2). This provision—which contemplates that the new servicer will become responsible for the escrow account and handle it in the ordinary course—contradicts the district court's view that the prior servicer retains sole

responsibility for the escrow account until the monies it collected have been fully paid out.[3]

C. An Entity That Holds the Right to Service a Loan Does Not Stop Being a Servicer Simply Because It Contracts With Another Entity to Assist in Servicing the Loan

For its part, Freedom is incorrect when it contends that the holder of the right to service a mortgage ceases to be a "servicer" under RESPA—at least for certain purposes—when it contracts with others to perform certain servicing obligations on its behalf. As described above, Freedom acquired from NYCB all rights to service Plaintiff's mortgage loan, as well as all "related Servicing obligations." Freedom was therefore the entity with ultimate control over, and responsibility for, the servicing of Plaintiff's loan and so was a RESPA "servicer" from that point forward.

The fact that the two companies arranged by contract for NYCB to assist in servicing the loan, by paying tax obligations that fell due within 30 days of the transfer, does not alter Freedom's status as a "servicer" under

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[3] The district court seems also to have overlooked that the transfer agreement provided that NYCB would send all escrowed funds to Freedom within three days of transferring the servicing rights—i.e., more than a week before the tax payment was due. App. 133. This provision is difficult to square with the district court's conclusion that NYCB retained sole responsibility for making the tax payment from Plaintiff's escrow account.

RESPA.[4] It is common for servicers to enlist others for help carrying out some or all of their servicing responsibilities.[5] Doing so, however, does not mean that the holder of the right to service a loan can ignore its obligations as a servicer under federal law.

The contrary view would undermine the purposes of RESPA Section 6 and the protections it provides consumers by allowing companies to contract away their legal status as "servicers" in piecemeal fashion, creating confusion for borrowers and companies both. A consumer might, for example, be entirely unaware that his or her servicer has subcontracted for others to assist in carrying out certain servicing functions. Such a consumer may have no way to know about these side agreements, to which the consumer of course would not be a party. Under Freedom's view, the consumer would seem to have no redress in the event of a RESPA violation unless he or she could successfully unmask the "real" servicer at issue.

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[4] Because NYCB is not a party to this case, and because Freedom itself was a servicer for purposes of the November 2017 tax payment, the Court need not decide the separate question whether NYCB may also have been a servicer for purposes of that tax payment.

[5] *See* Fed. Reserve Bd. et al., REPORT TO THE CONGRESS ON THE EFFECT OF CAPITAL RULES ON MORTGAGE SERVICING ASSETS 34 (June 2016) (describing the growth of the subservicing industry and estimating that $1.5 trillion in mortgage loans was being subserviced by the end of 2015), *available at* www.federalreserve.gov/publications/2016-capital-rules-mortgage-servicing-assets-preface.htm.

Regulation X further rebuts Freedom's theory. A number of provisions in the rule expressly contemplate that servicers may contract with others to carry out certain servicing responsibilities. Nowhere, however, does the rule imply that, by doing so, the holder of the right to service a mortgage loan also contracts away its legal status as a servicer.

The rule, for example, includes a definition of "master servicer" as "the owner of the right to perform servicing" and states that the master servicer "may perform the servicing itself or do so through a subservicer." 12 C.F.R. § 1024.31(b). It further defines the terms "subservicer" as "a servicer that does not own the right to perform servicing, but that performs servicing on behalf of the master servicer," and "service provider" as "any party retained by a servicer that interacts with a borrower or provides a service to the servicer for which a borrower may incur a fee." *Id.* Thus, the rule envisions that "the owner of the right to perform servicing" may arrange for other entities to carry out various servicing responsibilities—but does not suggest that doing so means the owner is no longer a "servicer."

Courts have rejected similar efforts by debt collectors to rely on contractors to attempt to avoid their obligations under the Fair Debt Collection Practices Act. *See, e.g.*, *Janetos v. Fulton Friedman & Gullace, LLP*, 825 F.3d 317, 325 (7th Cir. 2016) ("A debt collector should not be able

to avoid liability for unlawful debt collection practices simply by contracting with another company to do what the law does not allow it to do itself."); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 405 (3d Cir. 2000) ("an entity that is itself a 'debt collector'—and hence subject to the FDCPA—should bear the burden of monitoring the activities of those it enlists to collect debts on its behalf"). This Court should confirm that, just as a debt collector may not shirk its responsibilities simply by hiring others to help carry out its work, a company cannot contract away its obligations as a servicer while continuing to hold all rights to service a loan.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

August 2, 2019

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Certificate of Compliance

This brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5). The brief is 4,925 words, excluding the portions exempted by Rule 32(f). The brief's typeface and type style comply with Rule 32(a)(5) and (6).

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I hereby certify that on August 2, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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