No. 16-17008

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLORIA STITT, et al.,

Plaintiffs-Appellants,

vs.

CITIBANK, N.A., a national association;
CITIMORTGAGE, INC., a New York corporation,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:12-cv-03892-YGR
The Honorable Yvonne Gonzalez Rogers

ANSWERING BRIEF OF DEFENDANTS-APPELLEES CITIBANK, N.A. AND CITIMORTGAGE, INC.

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CORPORATE DISCLOSURE STATEMENT

70% of the shares of CitiMortgage, Inc. are owned by Citibank, N.A., and the remaining 30% are owned by Citi Retail Services LLC.

80% of the shares of Citi Retail Services LLC are owned by Citicorp USA, and the remaining 20% are owned by CFNA Receivables (MD), Inc.

Citicorp USA and CFNA Receivables (MD), Inc. are each wholly-owned subsidiaries of Citibank, N.A.

Citibank, N.A. is a wholly-owned subsidiary of Citicorp.

Citicorp is a wholly owned subsidiary of Citigroup Inc.

Citigroup Inc. is a publicly traded corporation.

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INTRODUCTION

As the district court observed, the claims asserted by Plaintiffs Gloria and Ronald Stitt and Mark and Terri Zirlott "have transformed repeatedly and significantly." ER27. Plaintiffs, whose mortgages are serviced by CitiMortgage, Inc. (with Citibank, N.A., "Citi"), initially filed this putative class action primarily alleging that Citi marked-up the cost of property-inspection fees charged to delinquent borrowers. Discovery revealed, however, that this allegation is false. Citi simply passes along the cost of property inspections charged by its vendor to the borrowers whose defaults necessitated the inspections.

Plaintiffs then shifted their focus to alleging that Citi concealed fees for "unnecessary" property inspections by listing the fees as "delinquency expenses" on monthly billing statements. This was a theory in search of a motive. Citi has no incentive to order "unnecessary" inspections because Citi loses money on inspections. Plaintiffs' concealment theory is also, as the district court found, "unsubstantiated." ER33. Citi sent pre-inspection letters to Plaintiffs stating that it would inspect their properties and list the resulting fees "as a delinquency expense on your monthly billing statement." ER83. Citi's billing statements later charged Plaintiffs for the inspections under the category "delinquency expenses," which the statements defined to include "property inspection fees." SER75.

Plaintiffs then retreated to simply challenging property-inspection fees as

"unnecessary." But rather than sue for breach of contract, Plaintiffs pursued fraud-based claims asserting that Citi's billing statements implicitly misrepresented that Plaintiffs' mortgages authorized the fees.

The district court rejected Plaintiffs' claims, just as this Court and others have done in addressing substantially similar claims filed by the same lawyers who represent Plaintiffs. *E.g.*, *Vega v. Ocwen Fin. Corp.*, 676 F. App'x 647 (9th Cir. 2017). The court dismissed Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") because Plaintiffs did not plead facts showing that Citi's contractual relationship with its property-inspection vendor constituted a RICO enterprise. The court granted summary judgment for Citi on Plaintiffs' fraud and fraud-based unjust-enrichment claims because Plaintiffs did not identify a misrepresentation of fact.

The district court also denied class certification, a ruling that Plaintiffs do not appeal. Plaintiffs' appeal is thus limited to challenging $310.50 in property-inspection fees, as well as the district court's order denying Plaintiffs' motion for attorneys' fees based on the notion that their lawsuit was "successful."

JURISDICTIONAL STATEMENT

Citi accepts Plaintiffs' Jurisdictional Statement.

STATEMENT OF THE ISSUES

1. Did the district court correctly dismiss Plaintiffs' RICO claims where

the complaint did not plead facts showing that (a) Citi's property-inspection vendor shared a common purpose to defraud borrowers, (b) Citi and its vendor conducted an enterprise, and (c) Citi engaged in racketeering?

2. Did the district court correctly grant summary judgment for Citi on Plaintiffs' fraud claims where: (a) Plaintiffs abandoned their concealment theory, Citi disclosed all material facts, and Plaintiffs did not rely on any omission; and (b) Plaintiffs did not plead their implicit-misrepresentation theory, which in any event asserts only a non-actionable misrepresentation of law and breach of contract?

3. Did the district court correctly grant summary judgment for Citi on Plaintiffs' unjust-enrichment claims where: (a) Plaintiffs based their claims on their failed concealment theory; and (b) Plaintiffs' mortgages govern their claims?

4. Should the judgment be affirmed because Plaintiffs' mortgages authorized the property-inspection fees?

5. Did the district court abuse its discretion by denying Plaintiffs' motion for attorneys' fees because Plaintiffs' lawsuit was not successful?

STATEMENT OF THE CASE

I. Citi's Property-Inspection Practices

It is a standard industry practice to inspect properties subject to delinquent mortgages. SER330. Inspections seek to preserve the value of the property securing the loan in two ways. First, they enable the servicer to verify that

borrowers occupy the property. SER273. Delinquent borrowers frequently abandon their property without notice, leaving it inadequately secured. SER336. Second, inspections enable the servicer to view the property's condition. SER273. Delinquent borrowers often lack the resources to maintain their property. An inspection finding property damage or abandonment allows the servicer to take corrective measures. SER338.

Due to these benefits, loan investors and cities often require inspections. *E.g.*, SER190, SER336. Investors publish property-inspection guidelines that identify "*minimum* requirements" for servicers to follow. SER334. Investors may penalize servicers that fail to protect a property's value. SER335.

Citi uses an automated system called "CitiLink" to order and charge for inspections. SER274. During the period at issue here, CitiLink generally ordered an initial inspection 45 days after borrowers defaulted. *Id.* Citi continued to order inspections at 30-day intervals thereafter if the borrowers remained in default. SER273. This followed industry practice. SER330. Borrowers who are 45 days delinquent have missed two payments. SER331. The servicing industry considers these borrowers more likely to allow the property to deteriorate or abandon it altogether. *Id.*

Citi used a vendor, Safeguard Properties, to conduct inspections. SER273; *see* SER529-67 (Citi-Safeguard contract). When Citi ordered inspections, a

Safeguard inspector visited the property to determine its occupancy and condition. SER257-60. The inspector photographed the property and completed a report. SER261-62. Safeguard reviewed the reports and, if a property were abandoned or damaged, arranged for corrective services. SER262-69. Citi audited a sample of Safeguard's reports to verify their results. SER276.

When Citi charged borrowers for inspections, it passed along the cost imposed by Safeguard without markup. *Id.* Borrowers often do not pay the fees (SER277), however, and inspections entail substantial overhead costs. SER276-77. Citi thus loses money on inspections. SER341-43.

II. Property-Inspection Fees Charged To The Stitts

In 2005, the Stitts obtained a $1 million mortgage from ABN AMRO Mortgage Group on a Manhattan apartment. SER20. The mortgage provides: "Lender may charge me fees for services performed in connection with my default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including … attorneys' fees, property inspection and valuation fees." ER210.

Citi began servicing the Stitts' mortgage in 2007. SER20. In 2009, Citi sent a letter notifying the Stitts that they were in default. ER83. The default letter explained:

> As a result of the default status of this account and in accordance with the terms of the Mortgage Note/Deed of Trust or as required by the

> Investor/Guarantor of this loan, an exterior inspection of the property will be conducted and the cost for this inspection will be added to the total amount outstanding on this account. The expense will be reflected as a delinquency expense on your monthly billing statement. While the account remains in default, monthly inspections may continue and the expense for each inspection will be charged to this account.

Id. The Stitts promptly cured their default, so Citi did not order an inspection. SER472.

The Stitts defaulted again in 2010. SER34. Before ordering an inspection, Citi sent a letter notifying the Stitts of their default, making the same disclosures as the 2009 letter. *Id.* This time, however, the Stitts did not cure their default. Citi therefore did what its default letters said it would do. Citi asked Safeguard to inspect the Stitts' property. SER473; *see* SER288 (¶6). Safeguard visited the Stitts' apartment building, wrote a report, and billed Citi $13.50. SER36-38, SER295. Citi's billing statement then charged the Stitts $13.50 under the category "Delinquency Expenses." SER39. The statement explained: "Delinquency expenses are third-party expenses such as property inspection fees, property preservation costs, appraisal costs, and attorney fees incurred by [Citi] as a result of default." *Id.*

Citi ordered five additional inspections in 2010 while the Stitts remained in default, each costing $13.50. SER41-55, SER296-300. In total, Citi charged the Stitts for six inspections, costing $81.

In September 2010, the Stitts sought to cure their default. SER56. Citi gave the Stitts an itemized breakdown of the reinstatement amount, including $81 for "Inspections/Pending Inspections." SER56-58. A few weeks later, the Stitts paid the full reinstatement amount. SER478.

III. Property-Inspection Fees Charged To The Zirlotts

In June 2006, the Zirlotts obtained a mortgage from Sunset Mortgage Co. on an Alabama house. ER217-24. Section 5 of the mortgage provides: "Lender may inspect the Property if … the loan is in default." ER219. Section 7 provides that upon default, "Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property." ER220. "Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower." *Id.*

Citi began servicing the Zirlotts' mortgage in July 2006. SER24. In December 2006, Citi sent a letter notifying the Zirlotts that they were in default. SER63. The default letter contained the same disclosures provided to the Stitts: an "inspection of the property will be conducted"; inspection fees "will be reflected as a delinquency expense on your monthly billing statement"; and "monthly inspections may continue and the expense for each inspection will be charged to this account." *Id.* The Zirlotts promptly cured their default, so Citi did not order an inspection. SER483.

The Zirlotts defaulted again in 2008. SER65. Citi sent the Zirlotts another default letter containing the same disclosures as before. *Id.* Because the Zirlotts did not cure their default this time, Citi asked Safeguard to inspect the Zirlotts' property. SER484. Safeguard did so and billed Citi $15. SER76-69, SER301. Shortly thereafter, Citi modified the Zirlotts' loan. SER484-85.

The Zirlotts defaulted a third time in 2009. SER70. Citi sent the Zirlotts another default letter providing the same disclosures. *Id.* The Zirlotts did not cure their default, so Citi asked Safeguard to inspect the Zirlotts' property. SER486. Safeguard conducted the inspection and billed Citi $15. SER72-74, 302. Citi's billing statement charged the Zirlotts $15 for the inspection under the category "Delinquency Expenses." SER75. The billing statement defined "Delinquency Expenses" the same way as the Stitts' statements, specifically including "property inspection fees." *Id.* While the Zirlotts remained in default through February 2010, Safeguard conducted eleven more monthly inspections, each costing $13.50 or $15. SER77-114, SER303-13. Citi's billing statements charged the Zirlotts for the inspections, with the amount increasing $13.50-$15 each month. SER115-36.

In February 2010, Citi modified the Zirlotts' loan again. SER137-39. In the agreement, the Zirlotts "acknowledg[ed]" that "Lender has incurred, paid or otherwise advanced … expenses necessary to protect or enforce its interest in the Note and Security Instrument, and that such … expenses in the total amount of

$7,805.04 have been added to the indebtedness." SER137. Those expenses included $162 in "Delinquency Expenses" (SER141)—the charges for the first eleven inspections resulting from the Zirlotts' 2009-2010 default. That amount was later increased to $175.50 following the twelfth inspection. SER28-29.

The Zirlotts defaulted a fourth time in 2011. SER147. Citi sent the Zirlotts the same default letter discussed above, making the same disclosures. *Id.* Because the Zirlotts did not cure their default, Citi ordered four inspections in 2011, costing $13.50 apiece. SER149-64, SER314-17. Citi's billing statements charged the Zirlotts for those costs under the category "Delinquency Expenses." SER165-72.

IV. The District Court's Decisions

In April 2012, Plaintiffs and Judi Shatzer sued Citi in *Bias v. Wells Fargo*, No. 12-664 (N.D. Cal.), an action that included other plaintiffs' claims against JPMorgan Chase and Wells Fargo. ER3. After the district court *sua sponte* severed the cases, Plaintiffs filed this action against Citi. ER227-28.

A. The district court dismissed Plaintiffs' RICO claims.

The original complaint principally alleged that Citi charged Plaintiffs for inspections and broker's price opinions ("BPOs") that were marked-up from their cost, "often by 100% or more." ER228-29, ER239-40. It also alleged that Citi charged for "unnecessary" inspections and BPOs. *Id.* According to the complaint, Citi's billing statements "conceal[ed]" fees by listing them as "Delinquency

Expenses." ER231. Based on these allegations, Plaintiffs asserted two RICO claims and claims for fraud and unjust enrichment. ER249-57.

The district court dismissed Plaintiffs' RICO claims because the complaint inadequately pled an "enterprise" comprised of Citi and its property inspectors/BPO brokers. ER64-66. The complaint lacked allegations showing that Citi associated with inspectors and brokers for the asserted "common purpose" of "fraudulently concealing" fees. ER65. The court authorized Plaintiffs to amend their complaint if discovery "reveals a factual basis for a RICO claim." ER66.

The court upheld Plaintiffs' state-law claims. ER67-71. As the court later explained, it allowed these claims to proceed "chiefly based upon plaintiffs' … mark-up allegations." ER4.

B. The district court dismissed Plaintiffs' amended RICO claims.

After Plaintiffs engaged in discovery for over one year (ER49), Plaintiffs filed an amended complaint asserting the same four claims. ER119-52. Critically, however, the amended complaint abandoned the mark-up allegations that had formed the principal basis for the original complaint. ER40. The amended complaint instead alleged that Citi "conceal[ed]" charges for "unnecessary" inspections and BPOs. ER122.

Plaintiffs further narrowed the amended complaint after its filing. In response to Citi's motion to dismiss the amended RICO claims, Plaintiffs withdrew

their BPO allegations. SER209. And despite having alleged that Citi charged Shatzer "for more than 30 property inspections" (ER134), Plaintiffs dismissed Shatzer's claims because Citi did not charge her for any inspections. SER199-201.

The district court dismissed Plaintiffs' claim under 18 U.S.C. § 1962(c) because the amended complaint inadequately pled an enterprise consisting of Citi and Safeguard. ER43-47. The court explained that the complaint lacked factual allegations showing that Safeguard shared "the alleged common purpose" "***to defraud borrowers***." ER44-45. Rather, Plaintiffs alleged only that "Safeguard acted pursuant to [its] ordinary contractual obligation to perform inspections when Citi sent a request." ER47. The court alternatively rejected the section 1962(c) claim because the complaint failed to plead facts showing that Citi and Safeguard "participated in the conduct of the '*enterprise's* affairs, not just their *own* affairs.'" *Id.* Because Plaintiffs' section 1962(c) claim failed, the court dismissed Plaintiffs' dependent conspiracy claim under 18 U.S.C. § 1962(d). ER48.

With "the close of discovery … near," the court denied leave to amend the RICO claims. ER48-49. Plaintiffs "had well over a year to engage in discovery intended to uncover facts supporting their RICO theory," yet the complaint "remains deficient." ER49. In fact, as the court stated at oral argument, Plaintiffs' abandonment of their mark-up theory made the amended complaint "much

weaker." SER197. "I don't think there are allegations here in any way, shape, or form that get to the bar of RICO." *Id.*

C. The district court denied class certification.

Plaintiffs moved for certification of a nationwide unjust-enrichment class as well as Alabama and New York fraud classes, each comprised of borrowers who paid property-inspection fees to Citi. ER29-30. The court denied Plaintiffs' motion. First, the court rejected Plaintiffs' "unsubstantiated theory" that Citi's billing statements fraudulently concealed property-inspection fees by listing them as "delinquency expenses." ER33. The court explained: "the same mortgage statements defined 'delinquency expenses' to include property inspection fees." *Id.*

Second, the court rejected class certification based on Plaintiffs' theory that Citi's billing statements implicitly misrepresented that borrowers' mortgages authorized property-inspection fees. "Under Plaintiffs' theory," property-inspection fees "must have been invalid" under borrowers' mortgages "for Citi to have made a misrepresentation." ER33-34. That theory required putative class members "to establish that *the circumstances in fact did not warrant* a property inspection or charge," precluding class certification. ER35.

D. The district court denied Plaintiffs leave to assert a new class theory.

Plaintiffs requested leave to seek certification of an amended class of borrowers who paid fees for inspections that could not determine property

occupancy. SER280-81. The district court denied Plaintiffs' request. The court explained: "Plaintiffs' claims have transformed repeatedly and significantly since the initial complaint was filed." ER27. Yet Plaintiffs "provided no justification for their belated attempt … to proceed on refashioned theories of liability." ER26-27. The court declined "to provide yet another opportunity for Plaintiffs to litigate the latest incarnation of the theory of their case." ER27.

E. The district court granted summary judgment for Citi.

After denying class certification, the district court granted summary judgment for Citi on Plaintiffs' fraud and unjust-enrichment claims. ER15-25. As for fraud, the court noted that Plaintiffs abandoned their fraudulent-concealment theory after the court's class-certification ruling. ER17. The court rejected Plaintiffs' implicit-misrepresentation theory because it asserted a "misrepresentation of law"—i.e., "Citi's legal opinion that it was contractually authorized to pass along the property inspection fees to plaintiffs" under their mortgages. ER19-20. The court found "support[]" for its conclusion in precedent barring fraud claims asserting only breaches of contract. ER21.

The court also rejected Plaintiffs' unjust-enrichment claims. ER24. Plaintiffs cannot use "fraud-based" unjust-enrichment claims to remedy defects in their underlying fraud theory. *Id.*

F. The district court denied Plaintiffs' motion for attorneys' fees.

Plaintiffs moved for attorneys' fees under Cal. Code Civ. P. § 1021.5, arguing that their lawsuit catalyzed changes that Citi made to its property-inspection policies in 2013 and 2014. ER4. Lacking evidence supporting their theory, Plaintiffs sought an "inference of causation" from the "chronology" of events. ER9. The district court denied Plaintiffs' motion.

The court found that Plaintiffs did not primarily seek the changes that Citi made (*id.*)—e.g., modifying CitiLink to consider borrower communication in deciding whether to charge for inspections. Rather, Plaintiffs "primarily sought to end the alleged practice of mark-up[s] on property inspection fees" until abandoning those allegations in May 2014—after Citi changed its practices. ER11. The "drastic evolution of plaintiffs' grievances throughout the litigation" precluded Plaintiffs from showing that their lawsuit caused Citi's changed practices. ER13.

Alternatively, the court found that Citi changed its practices to comply with the National Mortgage Settlement ("NMS"), "not in response to this lawsuit." ER11. The NMS—a consent judgment between Citi, the federal government, and 49 States—was approved two days before Plaintiffs sued. ER3. It imposed restrictions on "the circumstances under which Citi could charge" property-inspection fees. *Id.* "[C]ontemporaneous" Citi documents confirmed that Citi changed its practices due to the NMS. ER11.

SUMMARY OF ARGUMENT

The district court correctly dismissed Plaintiffs' RICO claims because Plaintiffs failed to plead facts supporting their theory that Safeguard shared a common purpose to defraud borrowers. Indeed, Safeguard was in no position to defraud borrowers: it could conduct inspections only when ordered to do so by Citi, and had nothing to do with the billing statements that supposedly concealed fees.

Plaintiffs assert that they could have cured this flaw by reversing course and alleging that Safeguard was an unwitting participant in the scheme. But the court-ordered deadline for amended pleadings had long since passed when the court dismissed Plaintiffs' RICO claims, and Plaintiffs lack good cause to excuse their failure to assert their new theory earlier. Moreover, Plaintiffs engaged in discovery for one year before filing their amended complaint. With just weeks before the fact-discovery deadline, it was far too late to plead new theories.

In any case, Plaintiffs' unwitting-participant theory is futile. Courts have repeatedly held that a contractual relationship between an unwitting service provider and an alleged fraudster cannot support RICO claims. Otherwise, plaintiffs could routinely convert state-law fraud claims into treble-damage RICO conspiracies. Plus, in *Vega*, this Court affirmed dismissal of similar claims because they inadequately pled fraud. The same logic applies here—even more so because

Plaintiffs litigated their state-law claims through summary judgment, yet lack evidence of mail fraud.

The district court also correctly granted summary judgment on Plaintiffs' fraud claims. Plaintiffs abandoned the fraud claim pled in the complaint—that Citi's billing statements concealed property-inspection fees—after the district court declined to consider that theory on class certification. Beyond waiver, Plaintiffs' concealment theory is meritless. Citi's default letters disclosed that property-inspection fees would be listed as "delinquency expenses" on Plaintiffs' billing statements, and the billing statements defined "delinquency expenses" to include property-inspection fees. And if there were any confusion about what "delinquency expenses" were, all Plaintiffs had to do was call and ask. Plaintiffs' failure to do so precludes them from establishing reliance.

Plaintiffs did not plead their other fraud theory—that Citi's billing statements implicitly misrepresented the validity of property-inspection fees—so Plaintiffs cannot pursue that theory now. Regardless, the district court correctly held that Plaintiffs' theory challenges only an alleged misrepresentation of law—i.e., Citi's opinion that Plaintiffs' mortgages authorized the fees. And as the district court noted, Plaintiffs' implicit-misrepresentation theory is predicated on the notion that Citi breached Plaintiffs' mortgages. But under governing law, Plaintiffs may not convert an ordinary breach-of-contract action into a claim for fraud.

The district court correctly rejected Plaintiffs' unjust-enrichment claims too. Plaintiffs based those claims on their fraudulent-concealment theory, so the failure of the latter dooms the former. In addition, Plaintiffs have repeatedly maintained that Citi's actions are governed by the standards set forth in Plaintiffs' mortgages. But settled law holds that unjust-enrichment claims are unavailable when a contract addresses the subject matter at hand.

Alternatively, the Court may affirm because Plaintiffs' mortgages authorized the challenged fees. Courts have repeatedly held that identically worded mortgages permit property-inspection fees where, as here, borrowers are in default. At the very least, Citi could not have committed ***fraud*** by interpreting Plaintiffs' mortgages exactly the same way as many courts have done.

Finally, the district court did not abuse its discretion by denying Plaintiffs' motion for "successful party" attorneys' fees under section 1021.5. Plaintiffs have not been remotely "successful." The court dismissed Plaintiffs' RICO claims twice, granted summary judgment for Citi on Plaintiffs' remaining claims, denied class certification, and denied Plaintiffs' request to pursue another class theory. And although Plaintiffs assert that this case caused Citi to change its property-inspection policies in 2013, those changes provided no relief to Plaintiffs.

Moreover, Plaintiffs' assertion is false. Plaintiffs' primary theory through May 2014 was that Citi marked-up property-inspection fees. But Citi's 2013

changes had nothing to do with markups. Citi changed its practices to consider the adequacy of its communications with borrowers in deciding whether to charge for inspections. That change was required by the NMS, which was approved two days ***before*** Plaintiffs filed this lawsuit. Numerous contemporaneous Citi documents confirm that Citi changed its practices due to the NMS, not this suit.

STANDARD OF REVIEW

This Court reviews *de novo* orders granting motions to dismiss and for summary judgment. *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 665 (9th Cir. 2017). The Court may affirm if the judgment "'is supported by any ground in the record.'" *Id.* at 670.

This Court reviews decisions denying attorneys' fees "for abuse of discretion … and must affirm unless the district court applied the wrong legal standard or its findings of fact were illogical, implausible, or without support in the record." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012).

ARGUMENT

I. The District Court Correctly Dismissed Plaintiffs' RICO Claims.

A. Plaintiffs Failed To State A Claim Under Section 1962(c).

RICO makes it unlawful for anyone "associated with any enterprise" to participate "in the conduct of such enterprise's affairs through a pattern of racketeering." 18 U.S.C. § 1962(c). Plaintiffs inadequately pled RICO's "enterprise," "conduct," and "racketeering" elements.

1. Plaintiffs inadequately pled an enterprise.

RICO defines "enterprise" to include "any union or group of individuals associated in fact." 18 U.S.C. § 1961(4). An "association-in-fact enterprise is 'a group of persons associated together for a common purpose of engaging in a course of conduct.'" *Boyle v. United States*, 556 U.S. 938, 946 (2009).

Plaintiffs alleged that Citi and Safeguard formed an "association-in-fact enterprise" "to defraud borrowers and obtain money from them by means of false pretenses." ER130-31, ER141. Specifically, Citi and Safeguard allegedly "associated together for the common purpose of routinely, and repeatedly, ordering, conducting, and assessing borrowers' accounts for unnecessary" inspections. ER141. As the district court noted, these allegations "necessarily assert[] fraudulent intent" by enterprise members, "including" Safeguard. ER44. The court thus correctly found that Plaintiffs pled an enterprise "formed for the common purpose of effectuating the fraud." *Id.*

The district court observed that Plaintiffs' opposition to Citi's motion to dismiss "underscore[d] the fraudulent nature of the common purpose alleged." *Id.* Plaintiffs argued that Safeguard "possessed intent to effect the common, fraudulent purpose," asserting that Safeguard "***clearly knew***" that it was "***probably doing unnecessary … inspections***." *Id.* Moreover, the court noted that Safeguard was the "only" entity that "could directly profit" from inspections because Citi did not

mark-up fees. *Id.* Thus, the court found, Safeguard's "participation in the fraudulent common purpose … is central to plaintiffs' RICO theory." *Id.*

Plaintiffs did not plead facts showing that Safeguard and Citi shared a fraudulent common purpose. As the district court observed, the amended complaint focused "almost exclusively" on Citi. ER45. It alleged that "Citi" programmed CitiLink to order and charge for inspections, and that "Citi" concealed fees on billing statements. ER141-42, ER128-31. By contrast, the court noted, Safeguard "acted pursuant to [its] ordinary contractual obligation to perform inspections when Citi sent a request." ER47; *see* ER142. The court thus correctly held that Plaintiffs "offered no factual allegations to render plausible their claim" that Safeguard even "knew of the alleged fraudulent common purpose," much less shared it. ER45.

Cirino v. Bank of America, N.A., 2015 WL 3669078, at *4 (C.D. Cal. Feb. 10, 2015), found the district court's reasoning "persuasive" in dismissing "a very similar" RICO claim filed by the same lawyers representing Plaintiffs. In *Cirino*, the complaint alleged that Bank of America formed an enterprise with Safeguard to conduct and charge for unnecessary inspections. *Id.* "Like in *Stitt*," therefore, "the alleged common purpose" was "fraudulent in nature." *Id.* But as here, the *Cirino* complaint offered no allegations showing that Safeguard "shared the alleged fraudulent purpose." *Id.* at *5. To the contrary, Bank of America was "'the only

entit[y] positioned to have a fraudulent purpose'" because it ordered inspections and allegedly concealed the resulting charges. *Id.* at *4. Safeguard "'merely carr[ied] out the inspections ordered'" by Bank of America. *Id.*; *see also Hill v. Nationstar Mortg. LLC*, 2015 WL 4478061, at *4 (S.D. Fla. July 6, 2015).

Plaintiffs offer five responses. First, Plaintiffs argue that because the complaint supposedly pled the roles played by Citibank and CitiMortgage in the alleged scheme, it does not matter whether the complaint pled Safeguard's role. Br. 33-34. The initial problem with this argument is that Plaintiffs did not make it below. SER202-24. Plaintiffs therefore waived the point.

Plaintiffs' new theory also fails on the merits. Plaintiffs alleged that Safeguard was an enterprise member essential to the purported scheme. ER141-42. Plaintiffs cite no authority allowing RICO plaintiffs to evade the common-purpose requirement as to one enterprise member if other members shared a common purpose. Regardless, as explained below, Plaintiffs' new theory does not identify a distinct "person" and "enterprise."

Second, Plaintiffs contend that by requiring allegations that Safeguard shared Citi's purportedly fraudulent purpose, the district court contradicted cases stating that an enterprise's common purpose need not be fraudulent. Br. 34. In fact, the court agreed with Plaintiffs that an enterprise's "purpose does not need to be fraudulent." ER43. The court required allegations that Safeguard shared a

fraudulent purpose because Plaintiffs themselves alleged that the common purpose "is fraudulent." *Id.* "Accordingly, plaintiffs' protestations that there need not be a fraudulent purpose … is inapposite." ER44; *accord Cirino* 2014 WL 9894432, at *10 (C.D. Cal. Oct. 1, 2014). Cases cited by Plaintiffs (at 34) are therefore inapplicable. And if Plaintiffs had pled that Safeguard lacked a fraudulent purpose, the claim would fail for reasons discussed below.

Third, Plaintiffs assert that the district court demanded compliance with Fed. R. Civ. P. 9(b). Br. 35. In fact, the court held that Plaintiffs failed to plead a "common purpose even under … Federal Rule of Civil Procedure 8." ER45.

Fourth, Plaintiffs argue that they adequately pled Safeguard's fraudulent purpose, citing allegations that Safeguard inspected properties, wrote inspection reports, and reviewed the reports. Br. 35-37. Plaintiffs waived this argument. SER198. Regardless, Plaintiffs did not allege that Safeguard played any role whatsoever in the purported fraud—concealing property-inspection fees on Citi's billing statements. Rather, as the district court noted, Plaintiffs "allege[d] only that Safeguard acted pursuant to a service contract" by conducting inspections when ordered to do so. ER46. "Such allegations do not render plausible plaintiffs' theory" that Safeguard "'devised a scheme to defraud borrowers.'" *Id.*; *see Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1352-55 (11th Cir. 2016) (dismissing RICO claim because complaint inadequately pled that vendors shared defendant's

purpose to conceal fees on website designed by vendors where vendors lacked control over website content).

Fifth, Plaintiffs assert that the district court based its ruling on the notion that parties to a service contract cannot be enterprise members. Br. 37-38. The court did no such thing. It observed that the complaint suggested only that "Safeguard acted pursuant to a service contract" in the course of explaining why Plaintiffs failed to plead facts showing that Safeguard had a fraudulent purpose. ER46-47.

2. Plaintiffs inadequately pled distinct conduct.

RICO requires "two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). This requires that "'defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs.'" *Id.* at 163.

Plaintiffs alleged that Citi ordered and charged for inspections, while Safeguard "conduct[ed] the inspections." ER142. These allegations suggest only that Citi and Safeguard "had a commercial relationship" in which they sought "to advance their individual self-interests," not that they "joined together to create a distinct entity for purposes of" defrauding borrowers. *United Food & Commercial Workers Unions v. Walgreen Co.*, 719 F.3d 849, 854-55 (7th Cir. 2013). The

district court therefore correctly ruled that Plaintiffs did not plead "distinct enterprise conduct." ER48.

In their only challenge to this ruling, Plaintiffs quote the complaint's allegation that Citi engaged in enterprise conduct "distinct" from its loan-servicing business by implementing policies that supposedly led to "unnecessary" inspections. Br. 32. That allegation does not even purport to show that Safeguard participated in the enterprise's affairs. Nor does it explain why Citi's policy implementation was distinct from its loan-servicing business.

Beyond this, Plaintiffs cannot state a RICO claim by excising Safeguard from the enterprise. Without Safeguard, the alleged enterprise consists of Citibank, CitiMortgage, and their "directors, employees, and agents." ER141. An "enterprise" consisting of a company and its employees "fail[s] for lack of distinctiveness." *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005). Otherwise, every company would be a RICO enterprise. *See Cirino*, 2014 WL 9894432, at *11 ("the generalized claim that unnamed 'directors, employees, [and] agents' were part of the associated-in-fact enterprises … is far too vague to support a plausible claim").

Moreover, this Court has held that an enterprise comprised of a parent and its subsidiary "fails to meet" RICO's "distinctiveness requirement." *Chagby v. Target Corp.*, 358 F. App'x 805, 808 (9th Cir. 2009); *accord, e.g.*, *Moran v.*

Bromma, 675 F. App'x 641, 645 (9th Cir. 2017); *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 121 (2d Cir. 2013); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003). The distinctiveness requirement "would be eviscerated" if "affiliated" corporate entities could, without more, constitute an enterprise. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411 (3d Cir. 1993). And far from pleading distinctiveness, Plaintiffs sought to hold Citibank and CitiMortgage liable on an "agency" theory. ER125. Nor does the district-court authority cited by Plaintiffs (at 33-34) help them. In suggesting that parents and subsidiaries are always distinct for RICO purposes, those cases "disregard[ed] the weight of authority from other circuits" (*Watts v. Allstate Indem. Co.*, 2009 WL 1905047, at *6 (E.D. Cal. July 1, 2009))—authority that this Court joined in *Chagby* and *Moran*.

3. Plaintiffs neither pled nor produced evidence of racketeering.

In *Vega*, borrowers asserted RICO, fraud, and unjust-enrichment claims based on allegations that Ocwen charged unnecessary property-inspection fees. Like here, the complaint alleged that Ocwen (a) automatically ordered monthly inspections upon default, (b) did not review property-inspection reports, and (c) violated Fannie Mae guidelines. 676 F. App'x at 648; 2015 WL 3441930, at *1-*2 (C.D. Cal. May 28, 2015). The district court dismissed the complaint because it

improperly "trie[d] to spin a breach of contract claim into a fraud case." 2015 WL 1383241, at *4 (C.D. Cal. Mar. 24, 2015).

This Court affirmed. While rejecting the notion that the borrowers "could bring only a breach-of-contract claim," *Vega* held that the complaint inadequately pled fraud under Rule 9(b). 676 F. App'x at 648. *Vega* supports affirmance on the alternative ground that Plaintiffs' similar claims inadequately pled racketeering.

Plaintiffs distinguish *Vega* because while it involved itemized fees, Citi's billing statements supposedly concealed property-inspection fees by listing them as "Delinquency Expenses." Br. 54. But *Vega* did not suggest that servicers owe a duty to itemize. A "'failure to disclose'" cannot support a RICO claim absent an "'independent duty.'" *Eller v. EquiTrust Life Ins. Co.*, 778 F.3d 1089, 1092 (9th Cir. 2015). Neither Plaintiffs' mortgages nor any other authority in effect at the time imposed a duty to itemize. *See Giotta v. Ocwen Fin. Corp.*, 2016 WL 4447150, at *7-*8 (N.D. Cal. Aug. 24, 2016) (dismissing RICO claim because mortgage servicer lacked duty to "breakdown" fee), *appeal pending*, No. 16-16665 (9th Cir.); *Bradley v. Franklin Collection Serv.*, 2013 WL 1346714, at *7 (N.D. Ala. Mar. 28, 2013), *aff'd in relevant part*, 739 F.3d 606 (11th Cir. 2014).

Rather than require itemization, *Vega* distinguished Judge Gonzalez Rogers' pleadings decision in *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915 (N.D. Cal. 2013), which involved allegations that Wells Fargo labeled marked-up fees as

"'other charges' to disguise their true nature." 676 F. App'x at 648; *see also Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006 (S.D. Iowa Oct. 27, 2009) (denying motion to dismiss complaint similar to *Bias*). Unlike *Bias*, the amended complaint conceded that Citi's billing statements defined "Delinquency Expenses" to mean "third-party expenses such as property inspection fees, property preservation costs, appraisal costs, and attorneys fees." ER133-35. Thus, as the district court stated, Citi's billing statements did not conceal property-inspection fees because the statements "defined 'delinquency expenses' to include property inspection fees." ER33.

Plaintiffs also argue that Citi's billing statements "implicitly misrepresented" that property-inspection fees were "valid." Br. 54. The amended complaint's RICO claim, however, alleged a scheme to "fraudulently conceal" fees. ER144-46. And neither of Plaintiffs' oppositions to Citi's motions to dismiss mentioned an implicit-misrepresentation theory. SER237-55, SER202-24. To the contrary, Plaintiffs told the district court that this "is a fraudulent concealment case." SER227-28. Plaintiffs cannot pursue a claim that they did not plead. Regardless, Plaintiffs' implicit-misrepresentation theory fails to state a claim for two reasons described below:

- It asserts only "misrepresentations of the law," which "are not actionable" under RICO. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 940 (9th Cir. 2006); *see*

Westways World Travel, Inc. v. AMR Corp., 265 F. App'x 472, 474 (9th Cir. 2008) (evidence that defendant "communicated its interpretation of the contracts to [plaintiffs] and demanded payment pursuant to this interpretation" did not support RICO claim).

- It asserts only "a breach of contract." *Tardibuono-Quigley v. HSBC Mortg. Corp.*, 2017 WL 1216925, at *10-*13 (S.D.N.Y. Mar. 30, 2017) (dismissing RICO claim challenging property-inspection fees). Plaintiffs "cannot rely on a breach of contract" as a "predicate act[] of racketeering activity" under RICO. *Annulli v. Panikkar*, 200 F.3d 189, 192 (3d Cir. 1999), *overruled on other grounds*, *Rotella v. Wood*, 528 U.S. 549 (2000); *accord Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 152-53 (6th Cir. 1987) ("Sending a financial statement which misconstrues the prime rate provided by the terms of the contract may breach the contract but it does not amount to a RICO" claim); *Carr v. Tillery*, 591 F.3d 909, 918 (7th Cir. 2010).

Even if the amended complaint adequately ***pled*** racketeering, Plaintiffs litigated their fraud claims through summary judgment. As explained below, the summary-judgment record shows that Citi did not commit fraud. Any error in dismissing Plaintiffs' RICO claims on the pleadings was therefore harmless. *See Quinn v. St. Louis Cnty.*, 653 F.3d 745, 750 (8th Cir. 2011) (affirming dismissal

based on summary-judgment record); *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 538 (7th Cir. 2011) (same); 28 U.S.C. § 2111.

B. Plaintiffs Failed To State A Claim Under Section 1962(d).

Section 1962(d) makes it unlawful to "conspire" to violate RICO's substantive provisions. Because Plaintiffs neither pled nor produced evidence demonstrating a "substantive" RICO violation, they cannot state a RICO conspiracy claim. *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). The district court therefore correctly dismissed Plaintiffs' section 1962(d) claim.

C. The District Court Correctly Denied Leave To Amend.

Plaintiffs argue that the district court abused its discretion by denying leave to amend under Fed. R. Civ. P. 15(a), asserting that they could have alleged that "the common purpose was not fraudulent." Br. 40-41. Plaintiffs ignore that the case-management order required amended pleadings by November 2013. SER225. Plaintiffs thus "must first show 'good cause' for amendment under Rule 16(b)" and then "demonstrate that amendment was proper under Rule 15." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992).

Rule 16 "primarily considers" the moving party's "diligence." *Id.* at 609. Plaintiffs sued Citi in April 2012. ER3. Plaintiffs pursued the amended complaint's RICO theory until its dismissal in January 2015 (ER49), 14 months after the case-management order's deadline. Plaintiffs therefore failed to act diligently.

Moreover, Plaintiffs had notice of the problems with their RICO claims before November 2013. In its April 2013 order dismissing the original complaint's RICO claims, the district court noted that the alleged "common purpose" was to "fraudulently conceal[]" fees. ER65. The court faulted that complaint for lacking allegations that Safeguard "*associated*" with Citi "*for* that alleged common purpose." *Id.* Despite this warning, the amended complaint retained the same theory as the original—that enterprise members "devised a scheme to defraud borrowers." ER131, ER239.

Plaintiffs also must satisfy Rule 15, which considers "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Plaintiffs sued Citi in *Bias* in April 2012 (ER3), filed their complaint in this action in July 2012 (ER227), and filed their amended complaint in May 2014 (ER119). Thus, "Plaintiffs had three bites at the apple, and the court acted well within its discretion in disallowing a fourth." *Destfino v. Reiswig*, 630 F.3d 952, 958-59 (9th Cir. 2011). Indeed, Plaintiffs must show a "'gross abuse'" of discretion to file another complaint. *Rich v. Shrader*, 823 F.3d 1205, 1209 (9th Cir. 2016).

Far from committing a gross abuse of discretion, the district court correctly denied leave to amend. As explained above, Plaintiffs unduly delayed. Granting

leave also would have prejudiced Citi. The January 2015 dismissal order noted that the case was "near the close of discovery" (ER48-49), and Plaintiffs' class-certification motion was due in May 2015. ER279. Thus, if the court had granted leave to amend, Citi would have been required to litigate a third pleadings motion while simultaneously working on class-certification issues—without knowing whether the RICO claims would survive.

Granting leave to amend also would have been futile: Plaintiffs could not have stated a claim based on allegations that Safeguard was an unwitting participant. Although courts have taken varying approaches, a "consensus" holds that "RICO liability must be predicated on a relationship more substantial than a routine contract between a service provider and its client." *Gomez v. Guthy-Renker, LLC*, 2015 WL 4270042, at *11 (C.D. Cal. July 13, 2015); *see Eclectic Props. E. v. Marcus & Millichap Co.*, 751 F.3d 990, 997-98 (9th Cir. 2014) ("When companies … act as routine participants in American commerce," this Court requires "a significant level of factual specificity" to show "that such conduct is plausibly part of a fraudulent scheme").

Some courts hold that enterprise members "'must share a common purpose to engage in a particular fraudulent course of conduct.'" *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004). A service provider that is an unwitting participant in its client's fraudulent scheme by definition does not share

its client's fraudulent purpose. Under this view, Plaintiffs' proposed amendment fails because it concedes that Safeguard lacked a fraudulent purpose.

Plaintiffs assert that *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988), held that "a fraudulent common purpose is not required." Br. 34. But as a post-*Feldman* case cited by Plaintiffs acknowledged, this Court "has not addressed" the issue. *Friedman v. 24 Hour Fitness USA*, 580 F. Supp. 2d 985, 991 (C.D. Cal. 2008). In *Feldman*, the indictment alleged that defendant associated with his brother and defendant-formed businesses "'for the purpose of defrauding insurance companies and others through repeated acts of arson'" to the businesses' property. 853 F.2d at 655. This Court held that an enterprise existed because defendant "was the principal in each" business, defendant's brother "was his coprincipal," and there was "overlap in personnel and organizational structure among the businesses." *Id.* at 658. Plaintiffs did not allege similar "interconnections" here. *Id.*

"Even among courts that haven't required the common purpose to be fraudulent," some have "found this element unmet when the alleged association-in-fact is merely a routine contract for services" because the enterprise members are "pursuing their individual economic interests, rather than any shared purpose." *Gomez*, 2015 WL 4270042, at *9 (citing cases). Under this view, Plaintiffs' proposed amendment fails because it concedes the district court's point that "Safeguard acted pursuant to [its] ordinary contractual obligation." ER47.

Beyond RICO's common-purpose requirement, "a routine contractual relationship between two parties is not sufficiently distinct from the contracting parties themselves." *Gomez*, 2015 WL 4270042, at *10. In *Crichton v. Golden Rule Insurance Co.*, 576 F.3d 392 (7th Cir. 2009), the defendant-insurer failed to disclose that plaintiff's premiums would increase under a policy offered to members of a consumer federation to which plaintiff belonged. The Seventh Circuit affirmed dismissal of plaintiff's RICO claim because the alleged enterprise consisting of the insurer and consumer federation was "a garden-variety marketing arrangement." *Id.* at 400. Plaintiff alleged "a fraud perpetrated by [the insurer], not an association-in-fact enterprise directed and controlled by [the insurer]." *Id.* Plaintiffs' proposed amendment fails under *Crichton*.

Circuit precedent cited by Plaintiffs (at 38) is inapposite. The enterprises in *Living Designs* and *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), did not include unwitting participants. In *Odom*, the complaint alleged that enterprise members contracted with "the common purpose" of increasing Microsoft's business "through fraudulent means." *Id.* at 552; *see In re Jamster Mktg. Litig.*, 2009 WL 1456632, at *6 (S.D. Cal. May 22, 2009). And in *Living Designs*, DuPont did not dispute that other enterprise members—its outside counsel and experts—knowingly participated in the scheme to fraudulently withhold evidence. 431 F.3d at 361-66; *see In re E.I. DuPont de Nemours & Co.-Benlate Litig.*, 918 F.

Supp. 1524, 1536-37 (M.D. Ga. 1995) (related case finding that DuPont, its outside lawyers, and its expert fraudulently withheld evidence), *rev'd on other grounds*, 99 F.3d 363 (11th Cir. 1996).

Admittedly, the district court's decision in *Friedman* supports Plaintiffs. The complaint there alleged that the defendant-gym used unwitting payment processors to fraudulently withdraw fees from former members' accounts. *Friedman* held that the gym and processors formed an enterprise with the common purpose "to effectuate [electronic-fund-transfer] payments." 580 F. Supp. 2d at 991. Other courts have "declined to follow *Friedman*." *Gomez*, 2015 WL 4270042, at *7. For good reason: companies routinely contract with vendors to obtain services. Thus, if a company and its unwitting vendor constituted an enterprise, plaintiffs could almost always convert run-of-the-mill fraud claims into treble-damage RICO suits.

Finally, as explained below, Plaintiffs failed to produce evidence of fraud. Plaintiffs' proposed amendment is therefore "futile" because it "would not survive a motion for summary judgment." *Sound of Music Co. v. Minn. Mining & Mfg. Co.*, 477 F.3d 910, 923 (7th Cir. 2007).

II. The District Court Correctly Granted Summary Judgment on Plaintiffs' Fraud Claims.

Plaintiffs assert that Citi's billing statements (1) concealed property-inspection fees and (2) implicitly misrepresented that property-inspection fees were

valid. Br. 53-61. The district court correctly rejected both theories under the law of Alabama (for the Zirlotts) and New York (for the Stitts).

A. Plaintiffs' Fraudulent-Concealment Theory Is Meritless.

The amended complaint alleged that Citi's billing statements concealed property-inspection fees by listing them as "Delinquency Expenses." ER148-50. The district court declined to consider this theory "for purposes of class certification" because it was "not supported by the record." ER33. "Heeding" the class-certification ruling, Plaintiffs' summary-judgment opposition announced: "Plaintiffs are no longer pursuing fraud claims based on a concealment theory." SER283. Plaintiffs therefore abandoned their concealment theory. Regardless, the theory fails on the merits for two reasons.

1. Citi disclosed the fees.

The district court correctly found Plaintiffs' concealment theory to be "unsubstantiated." ER33. First, Plaintiffs' mortgages disclosed that Citi could assess property-inspection fees. ER210, ER219-20. Plaintiffs were thus "on notice that inspections could occur in the event of a default," and that the costs "'shall become the additional debt of borrower.'" *Walker v. Countrywide Home Loans*, 98 Cal. App. 4th 1158, 1177 (2002).

Second, each time Plaintiffs defaulted, Citi sent them letters before ordering inspections. These default letters explained that an "inspection of the property will

be conducted," and "[t]he expense will be reflected as a delinquency expense on your monthly billing statement." ER83. "While the account remains in default, monthly inspections may continue and the expense for each inspection will be charged to this account." *Id.*

Third, Citi's billing statements defined "Delinquency Expenses" to mean "third-party expenses such as property inspection fees" and other specified charges. SER75. As the district court noted, "grouping" property-inspection fees under "delinquency expenses" could not be a misrepresentation. ER33. The Zirlotts thus admitted that Citi disclosed property-inspection fees. SER183-86.

Plaintiffs' sole response is that Citi did not "itemize" property-inspection fees. Br. 54. That response fails for the same reason that it does not support Plaintiffs' RICO claims: concealment claims require "a duty to disclose." *Flying J Fish Farm v. Peoples Bank of Greensboro*, 12 So. 3d 1185, 1192 (Ala. 2008); *Swartz v. Swartz*, 44 N.Y.S.3d 452, 461 (App. Div. 2016). No authority imposed a duty to itemize going beyond what Citi's default letters and billing statements did.

2. Plaintiffs did not rely on any omission.

The Court can also affirm summary judgment on the alternative ground that Plaintiffs failed to demonstrate "reliance." *Mantiply v. Mantiply*, 951 So. 2d 638, 658 (Ala. 2006); *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1108 (N.Y. 2011). The complaint alleged that Plaintiffs would not have paid property-

inspection fees had Citi disclosed them. ER149. But none of the testimony that Plaintiffs cite (at 19-20) supports that theory. *See Ellis v. J.P. Morgan Chase & Co.*, 2016 WL 5815733, at *9 (N.D. Cal. Oct. 5, 2016) (dismissing fraud claims because there was no evidence that plaintiffs would have refused to pay property-inspection fees had they been adequately disclosed), *appeal pending*, No. 16-17005 (9th Cir.).

The Stitts' reliance theory is particularly weak. They admit receiving a "breakdown" of fees owed, when Citi sent them a reinstatement letter that included $81 for "Inspections/Pending Inspections." SER56-58, SER176. The Stitts paid the full reinstatement amount shortly thereafter. SER478. This conclusively refutes the Stitts' reliance theory.

Moreover, fraud claims fail "if the true facts could have been ascertained by the plaintiffs 'by means available to them through the exercise of ordinary intelligence.'" *Vasquez v. Soto*, 877 N.Y.S.2d 467, 468 (App. Div. 2009); *accord AmerUS Life Ins. Co. v. Smith*, 5 So. 3d 1200, 1207 (Ala. 2008). If Plaintiffs did not know what "Delinquency Expenses" were, all they had to do was ask. Citi's billing statements provided a toll-free phone number to call with questions. *E.g.*, SER75-76. Indeed, when Plaintiffs asked for itemized fee histories shortly before suing, Citi complied. SER59-62, SER142-46. Before that, however, Plaintiffs never asked. SER23, 31. Under these circumstances, Plaintiffs did not justifiably or

reasonably rely on any omissions. *See Tardibuono-Quigley*, 2017 WL 1216925, at *15 (dismissing New York statutory-fraud claim alleging that servicer inadequately disclosed property-inspection fees where "billing statements explicitly direct homeowners to contact the bank if they have any questions").

Some cases cited by Plaintiffs on this point (at 59-60) support Citi. *E.g.*, *Corva v. United Servs. Auto. Ass'n*, 485 N.Y.S.2d 264, 265-66 (App. Div. 1985) (reversing dismissal of insurer's claim that insured's lawyer breached duty to investigate insurer's misrepresentation). *Diduck v. Kaszycki & Sons Contractors*, 974 F.2d 270, 278 (2d Cir. 1992), held only that the district court did not clearly err by finding that trustees relied on their fiduciary's work where it was not "'obvious'" that the fiduciary concealed facts. In the remaining cases, unlike here, defendants made explicit misrepresentations that plaintiffs could not easily unravel. *E.g.*, *Ex parte Seabol*, 782 So. 2d 212, 216-17 (Ala. 2000) (plaintiff sold property to his attorney in reliance on attorney's misrepresentation that lender could immediately foreclose where it was "difficult" to determine that lien was invalid).

B. Plaintiffs' Implicit-Misrepresentation Theory Is Meritless.

Plaintiffs argue that Citi's billing statements "implicitly misrepresented" that property-inspection fees were valid. Br. 54. Plaintiffs' fraud claim, however,

asserted only concealment. ER148-50. Plaintiffs cannot pursue a theory that they did not plead. In any case, Plaintiffs' theory lacks merit.

1. Plaintiffs assert only a misrepresentation of law.

A fraud claim generally cannot be based on "'misrepresentations of law.'" *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004); *accord Epps Aircraft, Inc. v. Exxon Corp.*, 859 F. Supp. 533, 538 (M.D. Ala. 1993), *aff'd*, 30 F.3d 1499 (11th Cir. 1994). Fraud thus "cannot be predicated on misrepresentations as to the legal effect of a written instrument" such as a "mortgage." 37 Am. Jur. 2d Fraud & Deceit § 102; *see Randazzo v. Harris Bank*, 262 F.3d 663, 671 (7th Cir. 2001); *Lefferts v. Lefferts*, 276 N.Y.S. 809, 811 (App. Div. 1935). One party's interpretation of a contract is merely an "expression of an opinion as to the law," upon which the other party cannot rely. *Mut. Life Ins. Co. v. Phinney*, 178 U.S. 327, 342-43 (1900).

As the district court held, any implicit representation that Plaintiffs' mortgages authorized property-inspection fees was merely Citi's "legal opinion." ER20. Plaintiffs had all the information they needed to evaluate Citi's opinion before paying: Citi disclosed the fees, so Plaintiffs needed only to read their mortgages to determine whether they agreed. Under these circumstances, Plaintiffs could not have justifiably or reasonably relied on any implicit misrepresentation.

Indeed, Plaintiffs have never explained what changed between the time they paid the fees and the time they sued to convince Plaintiffs that the fees were improper.

Plaintiffs respond that Citi's billing statements are actionable under the Restatement (Second) of Torts § 545, because they "incorporated" misrepresentations of fact—including that inspections "took place." Br. 57. Plaintiffs asserted a different "misrepresentation" of fact below—that their mortgages "authorized" property-inspection fees. SER285. Again, Plaintiffs may not change theories on appeal.

Plaintiffs' new theory also fails on the merits. Under the Restatement, fraud claims may be based on misrepresentations of law that include a "misrepresentation of fact" if "the recipient does not know the facts." Restatement (Second) of Torts § 545(1) & cmt. c. Regardless of whether Plaintiffs' mortgages authorized property-inspection fees, Citi did not make factual misrepresentations because the inspections "took place."

The Zirlotts suggest that Safeguard did not inspect their property because Safeguard's reports contained "discrepancies" (e.g., one report said that the property was "red brick" while another said "white frame"). Br. 19. In fact, Safeguard's reports included different pictures of the same house (which has brick ***and*** framing). *E.g.*, SER152, SER156, SER160. Plus, many of the reports show

that Safeguard left "door hangers" at the Zirlotts' house, asking them to call Citi. *E.g.*, SER96, SER98; *see* SER271.

Admittedly, Safeguard was unable to view the Stitts' apartment because it is in a gated building. But each time that Citi charged the Stitts for inspections, Safeguard went to the Stitts' building, wrote a report, and charged Citi. SER36-38, SER41-55, SER295-300. Moreover, the Stitts knew the relevant facts—Citi disclosed the fees, and the Stitts believed that inspections "could not even have been occurring" because they lived in a gated building. ER560.

Cases cited by Plaintiffs (at 55-56) are distinguishable. *ChampionsWorld LLC v. United States Soccer Federation*, 726 F. Supp. 2d 961, 973 (N.D. Ill. 2010), addressed a motion to dismiss non-fraud claims on statute-of-limitations grounds. In the remaining cases, the challenged representations were "primarily factual,"[1] impeding plaintiffs' ability to evaluate defendants' legal representations.[2]

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[1] *Nagashima v. Busck*, 541 So. 2d 783, 783-84 (Fla. Dist. Ct. App. 1989) (seller failed to disclose that property "was zoned for a duplex, not a triplex"); *see Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 607-08, 614 (3d Cir. 1991) (real-estate agent misrepresented buyer's identity and threatened property owners with condemnation if they did not sell).

[2] *Queen's Med. Ctr. v. Kaiser Found. Health Plan*, 948 F. Supp. 2d 1131, 1140, 1152-53 (D. Haw. 2013) (HMO withheld documents allegedly supporting discounts on hospital services, impeding hospital's ability to determine whether HMO was entitled to discounts); *Wal-Mart Stores v. AIG Life Ins. Co.*, 901 A.2d 106, 114-16 (Del. 2006) (defendants "failed to disclose" information about life-insurance plans, impeding plaintiff's ability to determine whether plans offered tax benefits); *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 317, 320 (Ind. Ct. App. 1991) (cont'd)

Beyond Citi's billing statements, Plaintiffs cite language in Citi's default letters indicating that property-inspection fees were "in accordance with" Plaintiffs' mortgages "or" required by the loans' owners. Br. 4; ER83. The amended complaint did not mention these letters, so Plaintiffs cannot invoke them now. Regardless, like the billing statements, the default letters simply provided Citi's legal opinion that property-inspection fees were valid. *See U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, 2013 WL 791462, at *8 (S.D.N.Y. Mar. 5, 2013) (statement that rate increases were "in accordance with the terms" of insurance policies was non-actionable "opinion of law"). Moreover, there is no evidence that the Zirlotts relied on the default letters in paying property-inspection fees. And although Plaintiffs admit that Citi mailed default letters to the Stitts (SER20-21, ER449), the Stitts denied receiving them. SER23. The Stitts could not have relied on letters that they supposedly did not receive.

2. Plaintiffs assert only a breach of contract.

Fraud claims fail "'when the only fraud alleged relates to a breach of contract.'" *Bibbo v. 31-30, LLC*, 963 N.Y.S.2d 303, 306 (App. Div. 2013); *accord Ex parte Hugine*, 2017 WL 1034467, at *22 (Ala. Mar. 17, 2017). Plaintiffs have repeatedly conceded that their fraud claims are based on the notion that their mortgages did not authorize property-inspection fees. For example, Plaintiffs

(financial advisors misrepresented supplemental-income plan's structure, impeding plaintiffs' ability to determine whether plan was tax deductible).

stated: "[t]he seminal issue in this case is whether Defendants' practices violate the disclosures contained in the Fannie Mae/Freddie Mac Uniform Mortgage Contract." SER192; *see also* SER178-79. Thus, in opposing summary judgment, Plaintiffs argued that "Defendants significantly exceeded their authority under the Fannie Mae/Freddie Mac uniform mortgage contract" by charging fees that were not "'reasonable or appropriate'" or "'necessary.'" SER284-85.

The district court therefore correctly held that "[t]his case hinges on a contract dispute." ER34. The court explained: "Under Plaintiffs' theory, a given property inspection charge must have been invalid under the … mortgage agreement for Citi to have made a misrepresentation." ER33-34. Citi's liability thus "rises or falls on whether a … property inspection fee was authorized by the borrower's mortgage." ER34. "This is a classic breach of contract claim inappropriately repackaged as fraud." ER21; *see W.B. David & Co. v. DWA Commc'ns, Inc.*, 2004 WL 369147, at *3-*5 (S.D.N.Y. Feb. 26, 2004) (dismissing fraud claim alleging that billing statements charged plaintiffs "for services that were never performed" under contract because "failure to perform the services paid results in a breach of contract claim").

Plaintiffs argue that the district court's analysis contradicts *Vega*'s statement that, under California law, the borrowers were not limited to a breach-of-contract claim. Br. 53. Plaintiffs read *Vega* far too broadly. *Vega* suggested that the

borrowers might have stated a fraud claim if, for example, the servicer "disguise[d]" the fees or "omitted" that the fees "included undisclosed markups." 676 F. App'x at 648; *see Young*, 671 F. Supp. 2d at 1033-35 (pleadings case holding that borrowers were not limited to fraud claim where complaint alleged that servicer "conceal[ed]" fees). That sort of concealment is arguably collateral to the mortgage and thus may be subject to non-contract claims.

Vega did not suggest, however, that borrowers can state fraud claims based on allegations that property-inspection fees breached a mortgage. Otherwise, every party to a contract could challenge a charge imposed under the contract not just under a breach-of-contract theory, but also by asserting fraud. That is not the law. To the contrary, in dismissing substantially similar claims filed by the lawyers representing Plaintiffs here, a court recently cited *Vega* in holding that the borrowers did not plead fraud. *Kirchner v. Ocwen Loan Servicing*, 2017 WL 2800146, at *7-*8 (S.D. Fla. June 27, 2017), *appeal pending*, No. 17-13442 (11th Cir.).

Plaintiffs also argue (at 57-58) that the rule barring fraud claims based on contract breaches applies only if the parties are in privity of contract, citing *Mazzei v. Money Store*, 829 F.3d 260 (2d Cir. 2016). As the district court noted, Plaintiffs raised this issue "[f]or the first time at oral argument" on summary judgment. ER22. Plaintiffs therefore "failed to raise the issue timely." ER23.

Beyond waiver, the district court correctly found Plaintiffs' reliance on *Mazzei* to be "misplaced." *Id.* In *Mazzei*, plaintiff alleged breaches of his mortgage. The court affirmed decertification of a class of borrowers whose loans were owned or serviced by defendants because plaintiff offered no class-wide evidence that borrowers whose loans were merely serviced by defendants had privity of contract.

The *Mazzei* plaintiff did not assert fraud, so the court did not even address the rule barring fraud claims based on contract breaches. Moreover, *Mazzei* did not hold that all borrowers lack authority to sue their servicer for breach of contract. Rather, *Mazzei* affirmed the district court's ruling that privity may exist between a borrower and servicer, "depend[ing] on the nature of the[ir] relationship … and whether there has been a valid assignment of contractual duties to the servicer." 308 F.R.D. 92, 110 (S.D.N.Y. 2015); *see In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 645 (7th Cir. 2007). As the district court observed, "plaintiffs presented no evidence" showing that they lack "privity" with Citi, even though it was "plaintiffs' burden to do so." ER23. To the contrary, Plaintiffs relied on putative expert Adam Levitin, who testified in *Mazzei* (albeit "generally") that servicers are "assigned rights" by loan investors and thus may be sued by borrowers "for breach of contract." 829 F.3d at 271; *accord* SER174-75 (Levitin testified that Citi acts as "agent" or "assignee" for investor).

III. The District Court Correctly Granted Summary Judgment On Plaintiffs' Unjust-Enrichment Claims.

Plaintiffs' unjust-enrichment claims alleged that Citi's billing statements "fraudulently conceal" property-inspection fees. ER147; *see* SER253 (Plaintiffs stated that original complaint based unjust-enrichment claims on "fraudulent concealment"). The district court correctly held that because Plaintiffs' fraud claims fail, their "fraud-based" unjust-enrichment claims fail too. ER24.

Plaintiffs respond that their unjust-enrichment claims do not "necessarily" rise or fall with their fraud claims. Br. 61-62. Plaintiffs did not make that point below, arguing instead that their unjust-enrichment claims should survive if their fraud claims do. SER286. The district court correctly "read[] this as an implicit concession by plaintiffs that their fraud-based unjust enrichment claims are defeated if the underlying fraud claims fail." ER24.

Beyond waiver, Plaintiffs' new argument contradicts *Vega*, which dismissed the "fraud-based" unjust-enrichment claim because the complaint did not adequately plead fraud under Rule 9(b). 676 F. App'x at 648-49. Plaintiffs' fraud-based "unjust enrichment claim[s]" similarly "cannot remedy the defects" in their fraud claims. *Corsello v. Verizon N.Y.*, 967 N.E.2d 1177, 1185 (N.Y. 2012).

Cases cited by Plaintiffs (at 61-62) are distinguishable. In *Nuss v. Sabad*, 2016 WL 4098606, at *11 (N.D.N.Y. July 28, 2016), the unjust-enrichment claim did not require proof of "all" elements of plaintiffs' tort claims. Here, by contrast,

Plaintiffs based their unjust-enrichment claims on fraud and thus must establish all fraud elements to prevail. *Jewett v. Boihem*, 23 So. 3d 658 (Ala. 2009), is irrelevant because the issue is not whether Plaintiffs must choose one of two viable claims to pursue, but whether Plaintiffs have any viable claims at all. Plaintiffs' remaining cases suggest only that unjust-enrichment claims depend on the facts. They do not support Plaintiffs' suggestion that all unjust-enrichment claims must be tried—a suggestion irreconcilable with *Vega*, *Flying J Fish*, and *Corsello*.

Even if the district court's reasoning were incorrect, however, the judgment should be affirmed. A contract "governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987); *accord Vardaman v. Florence City Bd. of Educ.*, 544 So. 2d 962, 965 (Ala. 1989). Plaintiffs' mortgages govern the subject matter at issue—Citi's ability to charge property-inspection fees. Thus, as many courts have held, borrowers cannot use an unjust-enrichment theory to challenge property-inspection fees. *See, e.g.*, *Tardibuono-Quigley*, 2017 WL 1216925, at *19 (New York law); *Kirchner*, 2017 WL 2800146, at *9; *Ellis*, 2016 WL 5815733, at *5 (citing cases).

The Stitts asserted below that New York law permits unjust-enrichment claims despite the existence of a contract governing the subject matter at issue if the defendant was not a party to the contract, principally citing *Seiden Associates v.*

ANC Holdings, Inc., 754 F. Supp. 37 (S.D.N.Y. 1991). "But *Seiden* and its reasoning have been consistently rejected by New York" courts, "such that it is no longer considered good law." *Mueller v. Michael Janssen Gallery*, 225 F. Supp. 3d 201, 207-08 (S.D.N.Y. 2016) (citing cases). Rather, New York courts "'have consistently held that claims for unjust enrichment may be precluded by the existence of a contract governing the subject matter of the dispute even if one of the parties to the lawsuit is not a party to the contract.'" *Id.*; *accord Norcast S.AR.L. v. Castle Harlan, Inc.*, 48 N.Y.S.3d 95, 98 (App. Div. 2017); *see also Selman v. CitiMortgage, Inc.*, 2013 WL 838193, at *13 (S.D. Ala. Mar. 5, 2013).

The Zirlotts argued below that they could assert unjust enrichment under Alabama law because a contract claim would not afford complete relief. The Zirlotts failed, however, to explain why an unjust-enrichment claim would provide relief that a contract claim would not.

IV. Plaintiffs' Mortgages Authorized The Property-Inspection Fees.

Plaintiffs' claims all hinge on the notion that Citi breached Plaintiffs' mortgages by charging property-inspection fees. As explained below, however, Plaintiffs' mortgages authorized the fees. The judgment may be affirmed on this alternative ground.

A. The Challenged Fees Complied With Plaintiffs' Mortgages.

The Zirlotts' mortgage authorizes charges for "whatever is necessary to protect the value of the Property and Lender's rights in the Property." ER220. Courts have held that identical provisions "'unequivocally [permitted]'" charging delinquent borrowers for inspections. *Walker*, 98 Cal. App. 4th at 1177 (quoting *Majchrowski v. Norwest Mortg., Inc.*, 6 F. Supp. 2d 946, 964-65 (N.D. Ill. 1998)); *accord Mann v. Chase Manhattan Mortg. Corp.*, 2002 WL 32157516, at *5 (D.R.I. Mar. 7, 2002), *aff'd*, 316 F.3d 1 (1st Cir. 2003). In *Walker*, the servicer's computer program automatically ordered and charged for monthly inspections while borrowers were delinquent. 98 Cal. App. 4th at 1165-66. The court held that the inspections were "necessary," explaining that delinquent borrowers "might be unable to maintain the property and [are] less likely to occupy the property than a borrower current on a loan." *Id.* at 1176-77. "Even if an initial inspection reveals that the home continues to be occupied and maintained," these reasons support "reinspect[ing] the property every 30 to 60 days." *Id.* at 1176.

Even if inspections of properties subject to delinquent loans were not *per se* necessary, the Zirlott inspections were necessary under their facts:

- In 2008, Citi charged for one inspection after the Zirlotts defaulted for the second time. SER520. Even Plaintiffs have suggested that initial inspections are proper. ER131-32.

- Citi charged for inspections in 2009-2010 after the Zirlotts breached a loan modification, defaulting for the third time. SER511-17. The Zirlotts acknowledged in signing their second loan modification that these charges were "necessary." SER28-29.
- Citi charged for inspections in 2011 after the Zirlotts breached the second loan modification. SER505-07. These inspections were necessary because the Zirlotts had defaulted for the fourth time, breaching yet another loan modification, making them a heightened risk to abandon the property or allow it to deteriorate. *E.g.*, ER456 (Fannie Mae required inspections if borrower showed "disregard" for mortgage or breached "promises" to cure default).

As for the Stitts, section 14 of their mortgage specifically authorizes "property inspection" fees without limiting that authorization to "reasonable or appropriate" fees. ER210. Although section 9 authorizes "reasonable or appropriate" fees, it does not mention property-inspection fees. ER208. Under standard contract-interpretation principles, the specific inspection-fee authorization in section 14 controls over the "more general" section 9. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1099 (9th Cir. 2006).

As the district court noted, multiple courts "have agreed with Citi" on this point. ER35 (citing cases); *accord Kirchner*, 2017 WL 2800146, at *7; *Mendez v. Bank of Am. Home Loans*, 840 F. Supp. 2d 639, 656-57 (E.D.N.Y. 2012). The

district court in *Vega* explained: section 9 permits fees for "reasonable acts done in furtherance of protecting [the lender's] interest" and section 14 "specifically list[s]" property-inspection fees "as a charge authorized for acts done in furtherance of protecting [the lender's] interest," so "a property inspection *must* be a reasonable act under the mortgage." 2015 WL 1383241, at *4.

Even if Citi misinterpreted Plaintiffs' mortgages, however, Citi did not ***fraudulently*** misrepresent its right to charge fees by adopting the very same interpretation as many courts. Citi simply "communicated its interpretation of the contracts to [Plaintiffs] and demanded payment pursuant to this interpretation." *Westways*, 265 F. App'x at 474. These "demands do not … evidence a specific intent to defraud." *Id.*

B. Investor Guidelines Do Not Support Plaintiffs' Claims.

Plaintiffs rely on Fannie Mae and HUD guidelines, as well as a HUD audit, in an attempt to show that Citi breached Plaintiffs' mortgages. Br. 13-15, 25-28. These authorities do not support Plaintiffs' claims.

First, neither Fannie Mae nor HUD guidelines apply to the Stitts' loan because it is owned by a private investor. SER293. And although the Zirlotts' loan is insured by the FHA and thus is subject to HUD rules, most of the challenged fees pre-date the 2010 HUD audit.

Second, courts have "uniformly" held that borrowers may not "enforce"

investor guidelines. *McKenzie v. Wells Fargo Bank*, 931 F. Supp. 2d 1028, 1044 (N.D. Cal. 2013) (citing cases); *see Vega*, 2015 WL 3441930, at *4 (alleged violations of Fannie Mae guidelines do "not give rise to any cause of action").

Third, Plaintiffs misinterpret the authorities they cite. *See* SER393-96. For example:

- Section 203.04 of Fannie Mae's guidelines, stating that "repetitive" property-inspection fees are "generally" impermissible unless "circumstances warrant multiple inspections" (ER407-08), cannot be used to interpret Plaintiffs' mortgages. That clause took effect in 2004 (ER407), ***after*** Plaintiffs' form mortgages were drafted (ER204, ER217), and has since been abandoned. SER394. Plaintiffs' interpretation also contradicts Fannie Mae's practice of reimbursing servicers for repeat inspections. SER346.
- As for 1994 HUD guidelines prohibiting property-inspection fees if servicers "knew" that borrowers were "in occupancy" (ER462), Safeguard sent pre-inspection "mailers" asking HUD borrowers to call if they remained in the property, cancelling inspections if borrowers responded. ER444. Moreover, beginning in 2007, HUD revised its guidelines to conform to its prior practice of allowing servicers to charge borrowers for inspections despite borrower communication. SER395-96.

- The audit letter stated only that HUD was "considering" an administrative action based on its view that Citi incorrectly charged property-inspection fees to borrowers who were communicating with Citi. ER409-10. Contrary to Plaintiffs' characterization, internal Citi e-mails discussing the audit simply show that Citi disagreed with HUD's finding and believed that HUD would change its position. The e-mails explain that Citi's "practice has been discussed in prior audits that did not result in a finding," and that Citi's "mailer" policy (discussed above) reduced the likelihood that Citi would charge communicative borrowers. ER444. Citi's position proved correct: Citi challenged HUD's finding, and HUD did not file an administrative action. SER278, SER521-28.

V. The District Court Acted Within Its Discretion In Denying Attorney Fees.

In June 2013, Citi temporarily stopped charging borrowers for inspections while Citi modified CitiLink to incorporate Quality Right Party Contact ("QRPC"). ER304, SER278. QRPC is a tool used to measure the adequacy of servicer-borrower communication, considering factors such as whether "the reason for delinquency" is "temporary" and whether the borrowers "commit" to cure the delinquency. SER187-88. Citi resumed charging for inspections in August 2013, taking QRPC into account. ER304, SER460.

Plaintiffs contend that their lawsuit caused Citi to make these changes and on that basis seek attorneys' fees. The district court acted well within its discretion in rejecting Plaintiffs' theory.

A. Plaintiffs Did Not Satisfy Section 1021.5.

Section 1021.5 authorizes "successful part[ies]" to recover attorneys' fees under certain circumstances. Plaintiffs' lawsuit has not resulted in a "judicially recognized change in the legal relationship between the parties." *Tipton-Wittingham v. City of L.A.*, 34 Cal. 4th 604, 608 (2004). Thus, to satisfy the successful-party requirement, Plaintiffs must establish that their lawsuit was "a catalyst motivating" Citi "to provide the primary relief sought." *Id.*

1. Plaintiffs did not obtain the primary relief sought.

To demonstrate that they obtained the primary relief sought, Plaintiffs "must establish 'the precise factual/legal condition that [they] sought to change.'" *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 576 (2004). Yet as the district court observed, Plaintiffs' "claims have transformed repeatedly and significantly." ER27. The court found that through mid-2013—when Citi changed its practices—"plaintiffs primarily sought to end the alleged practice of mark[ed]-up" fees. ER11. Far from being "illogical, implausible, or without support in the record" (*Rodriguez*, 688 F.3d at 653), the court's finding was correct.

The court observed that the "gravamen" of the original complaint alleged mark-ups. ER3. True, the complaint also asserted "unnecessary" fees. But that was plainly secondary to Plaintiffs' mark-up theory. Moreover, the complaint never alleged that inspections were unnecessary if QRPC existed—the issue that Citi addressed in 2013.

Plaintiffs' opposition to Citi's motion to dismiss confirmed that Plaintiffs primarily challenged markups. In a section entitled "Summary of Plaintiffs' Allegations," Plaintiffs asserted that Citi "marked-up" fees by "100% or more." SER238-39. Plaintiffs emphasized the mark-up allegations throughout their brief. SER241-44. By contrast, Plaintiffs largely ignored their unnecessary-fee theory and never asserted that fees were unnecessary if QRPC existed. Indeed, as the district court noted, Plaintiffs "explicitly disavowed" challenging the "appropriateness of when Citi assessed" fees. ER10.

Plaintiffs repeated these points during a joint hearing on motions to dismiss filed by Citi, JPMorgan Chase, and Wells Fargo. While discussing Citi's motion, Plaintiffs stated: "Our case is saying that the property inspection vendor charged $5 and the bank went on to charge the borrower 20. That's the problem. … It's the fact that there was a duty to only charge for the actual costs, and they charged a markup." SER230. While discussing JPMorgan's motion, the court engaged in the following colloquy with Plaintiffs:

> THE COURT: Does the complaint allege that the frequency of intervals was inappropriate?
>
> [Plaintiffs' Counsel]: No. The complaint alleged every time they charge a fee, the amount was wrong.

ER178. Plaintiffs never mentioned "unnecessary" fees during the hearing, much less argued that inspections are unnecessary if QRPC existed.

Plaintiffs assert that the district court erred by citing the colloquy on JPMorgan's motion. Br. 47. But Plaintiffs made essentially the same point in opposing Citi's motion. Plus, Plaintiffs' suits against Citi, JPMorgan, and Wells Fargo were substantially similar, which is why Plaintiffs originally sued all three in the same complaint. Indeed, Plaintiffs told the court in *Bias* that "the legal theories are identical and the factual predicate for the case[s] is identical; namely, these three banks subscribe to an industry-wide practice of marking up fees." *Bias*, *supra*, ECF 58 at 14; *accord id.* ECF 49 at 5. Plaintiffs confirmed this during the motion-to-dismiss hearing, stating that the banks were engaged in "exactly the same practice." SER229; *accord* SER236.

Plaintiffs also argue that the district court's attorney-fee ruling contradicted its motion-to-dismiss ruling because the latter cited the complaint's unnecessary-fee allegations. Br. 47-48. But the question is what relief Plaintiffs ***primarily*** sought. And again, Plaintiffs never sought the "precise" relief that Citi provided—modifying CitiLink to incorporate QRPC. *Graham*, 34 Cal. 4th at 576.

Indeed, not only did Plaintiffs fail to obtain the primary relief sought, they obtained ***no*** relief at all. Citi did not refund property-inspection fees or otherwise provide Plaintiffs relief due to this lawsuit. *See Ellis*, 2016 WL 5815734, at *9 (denying catalyst-fee award because plaintiffs were not refunded property-inspection fees and thus were not "successful"). Nor may Plaintiffs rely on benefits that others supposedly received: the successful-party requirement "refers to a party to litigation." *Graham*, 34 Cal. 4th at 570.

2. This lawsuit did not cause Citi to change its practices.

Because Plaintiffs' primary theory through May 2014 alleged markups, the district court held that Plaintiffs were "not entitled to an inference" that their lawsuit caused Citi to change its practices. ER11. The court alternatively held that Citi rebutted any inference of causation, finding that Citi changed its practices "to comply with … the NMS—not in response to this lawsuit." *Id.* Far from being "illogical, implausible, or without support in the record" (*Rodriguez*, 688 F.3d at 653), the court's finding was correct.

On April 4, 2012—two days before Plaintiffs sued Citi—Citi entered into the NMS with the United States and 49 States. SER6-18. The NMS provided that Citi may "collect a default-related fee only if the fee is for reasonable and appropriate services" and is permitted by "law," the "loan instruments," and the NMS. SER16. The NMS specifically prohibited "unnecessary or duplicative

property inspection … fees." SER17. This prohibition "include[ed]" a mandate that "[n]o property inspection fee shall be imposed on a borrower any more frequently than the timeframes allowed under GSE or HUD guidelines." *Id.*

Contemporaneous documents show that Citi understood the NMS to "require[] that inspection fees be charged only according to GSE guidelines." SER438; *see* SER9 ("SSRCP" means NMS's Servicing Standards and Consumer Relief Requirements). And because GSEs incorporated QRPC in their guidelines governing inspection frequency and charges (*e.g.*, SER194-95)), the NMS required Citi to consider QRPC.

As the district court observed, "plaintiffs try to shift the focus away from the nearly concurrent timing of the NMS and the complaint" to the court's April 2013 order partially denying Citi's motion to dismiss. ER11. But Citi began working to comply with the NMS even before it was approved. In February 2012, Citi drafted a presentation entitled "NMS–Servicing Standards," which described the NMS's "Property inspection fee restrictions." SER403, SER438. Under the question "What are we going to do?", the presentation answered: "Redefine logic for passing property inspection fee[s] to borrowers" to comply with "GSE guidelines." SER438.

Citi employee Kim Krakoviak—who managed Citi's property inspections—testified: "I would not say that any of the changes were a result of the lawsuit."

ER313; *see* ER527-29. Indeed, Krakoviak did not even learn about this lawsuit until "towards the end of 2013." SER5. Contemporaneous internal Citi documents confirm Krakoviak's testimony:

- On April 12, 2013—before the motion-to-dismiss ruling—Krakoviak e-mailed: "We are working on NMS initiatives that warrant a loan level review to determine if inspections completed were required by the Investor/Insurer servicing guides." SER450.
- In May 2013, Citi diagrammed changes for assessing property-inspection fees in a document entitled "NMS–Process flow for Property Inspection." SER451.
- In June 2013, Citi employee Suzanne Rancilio e-mailed: "Joanne Thebau is currently writing [Business Requirements] for further changes associated with fee assessments related to NMS requirements." SER455. "Jennifer Sweeney has been making changes to the Property Inspection results processing pertaining to NMS requirements." SER455-56.
- In July 2013, Rancilio e-mailed: "Krakoviak had [Safeguard] stop sending results from June 1st until we could stop processing the data as there are issues with NMS requirements around charging inspection fees back to the customer." SER457. "We are working on a more permanent fix … ." *Id.*
- In June 2014, Krakoviak e-mailed: "[i]n August 2013, as a result of NMS initiatives, Citi implemented a control leveraging the QRPC." SER460.

Plaintiffs offer two main responses. First, Plaintiffs cite the gap between the 2012 NMS and Citi's 2013 actions. Br. 48. The 314-page NMS imposed a litany of mandates on Citi, requiring substantial time to implement. *E.g.*, SER403-49. More important, the documentary evidence shows Citi working on the NMS's property-inspection requirements both before and after the April 2013 order.

Second, Plaintiffs suggest that Citi may not rely on Krakoviak's testimony because Citi invoked the attorney-client privilege when Plaintiffs asked why Citi changed its practices. Br. 49-50. But as the district court noted, Krakoviak testified that "the changes were not related to plaintiffs' lawsuit." ER12. And as the court also noted, Citi's documentary evidence shows that "Citi made the changes in response to the NMS" (*id.*), making Plaintiffs' complaints about testimonial objections irrelevant.

Plaintiffs also cite *MacDonald v. Ford Motor Co.*, 142 F. Supp. 3d 884 (N.D. Cal. 2015). *MacDonald* awarded fees after Ford voluntarily recalled cars due to the precise defect that plaintiffs challenged all along, providing the primary relief sought. Plus, as the district court noted, "Ford's rebuttal evidence was significantly weaker than Citi's." ER13. Ford supposedly issued the massive recall due to a single incident. 142 F. Supp. 3d at 892. Citi, by contrast, changed its practices due to a consent judgment with federal and state governments supervised

by a court-appointed monitor and a federal court that retained jurisdiction "to enforce" it. SER9-11.[3]

In district court, Plaintiffs also argued that their lawsuit caused Citi to modify CitiLink in April 2014 to stop charging borrowers for inspections when occupancy could not be determined. Plaintiffs do not mention the 2014 changes on appeal, waiving the issue. In any case, Plaintiffs did not assert claims based on inspections returning unknown-occupancy results until January 2016, when Plaintiffs requested leave to file another class-certification motion. The district court rejected Plaintiffs' request, calling Plaintiffs' unknown-occupancy claim a "refashioned theor[y] of liability." ER27. Furthermore, the record shows that Citi stopped charging borrowers for inspections returning unknown-occupancy results due to the NMS, not Plaintiffs' lawsuit. SER2-3, SER463-71.

B. California Attorney-Fee Law Is Inapplicable.

Plaintiffs' catalyst theory fails for another reason: California law does not apply. Plaintiffs' mortgages contain choice-of-law provisions. The Zirlotts' loan is governed by federal and Alabama law (ER221); the Stitts' loan is governed by

[3] Plaintiffs' other cases are distinguishable for similar reasons. *Edwards v. Ford Motor Co.*, 2016 WL 1665793, at *5-*6 (S.D. Cal. Jan. 22, 2016) (Ford provided "substantially all of the relief Plaintiff requested" to remedy precise defect that plaintiff always challenged, and Ford's rebuttal evidence "undermine[d]" Ford's assertion that it provided relief due to government inquiries); *Henderson v. J.M. Smucker Co.*, 2013 WL 3146774, at *5-*7 (C.D. Cal. June 19, 2013) (defendant provided primary relief requested by plaintiff and offered "little contemporaneous evidence" showing intent to comply "independent of Plaintiff's lawsuit").

federal and New York law. ER210. With inapplicable exceptions, the Supreme Court has rejected the catalyst theory under federal law. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Alabama and New York do not recognize the theory either.

In deciding whether choice-of-law provisions govern attorney-fee disputes in diversity actions in California federal court, this Court applies California choice-of-law rules. *First Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1153 (9th Cir. 2015). California courts enforce choice-of-law provisions unless: (a) there is no "'reasonable basis'" for the chosen state's law; and (b) California law would apply "'in the absence of an effective choice of law.'" *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466-67 (1992).

There is a reasonable basis for selecting Alabama and New York law: Plaintiffs live there. And California law would not apply absent the choice-of-law provisions: Plaintiffs are Alabama and New York citizens; Plaintiffs' properties are in Alabama and New York; and Citi is not a California citizen. ER124-25; *see ABF Capital Corp. v. Berglass*, 130 Cal. App. 4th 825, 838-39 (2005) (applying New York attorney-fee law because "California law would not apply if the parties had not made a choice of law").

It is irrelevant for choice-of-law purposes that Plaintiffs base their attorney-fee demand on non-contract claims because Plaintiffs' claims arise out of their

mortgages. It also is irrelevant that Citi was not a party to Plaintiffs' mortgages. The choice-of-law provisions do not depend on who seeks to enforce them. Plus, Citi serviced Plaintiffs' loans under authority of the loans' owners, and Plaintiffs cannot evade the mortgages' choice-of-law provisions after relying on the mortgages to prove their claims. The choice-of-law provisions therefore require application of Alabama and New York attorney-fee law. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 641 (9th Cir. 1988) (choice-of-law provision requiring Alaska law governed attorney-fee dispute in Washington case); *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 916-19 (9th Cir. 2003).

Beyond the choice-of-law provisions, this Court has stated: "When California plaintiffs prevail in federal court on California claims, they may obtain attorneys' fees under section 1021.5. [Plaintiff] does not dispute that section 1021.5 does not apply in federal court when a plaintiff does not plead any California claims." *Klein v. City of Laguna Beach*, 810 F.3d 693, 701 (9th Cir. 2016) (citation omitted); *accord Chin v. Chrysler LLC*, 538 F.3d 272, 277 (3d Cir. 2008) ("Section 1021.5 … does not apply for the very fundamental reason that no substantive provision of California law was ever pled"). Plaintiffs are neither California citizens nor did they plead California claims. Plaintiffs therefore may not invoke section 1021.5.

This is consistent with the "presumption against extraterritorial application" of California statutes. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011). Courts "presume the Legislature did not intend a statute to be 'operative, with respect to occurrences outside the state, ... unless such intention is clearly expressed or reasonably to be inferred." *Id.* Section 1021.5 lacks any hint that it applies to suits brought by non-California plaintiffs against non-California defendants under non-California laws based on non-California conduct. Indeed, applying section 1021.5 would violate due process because this case lacks "significant contact[s]" with California. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

Plaintiffs have never cited a case applying section 1021.5 absent California plaintiffs asserting California-law claims. Plaintiffs instead noted below that state attorney-fee law applies in diversity actions. That does not address the issue here: ***which*** state's law applies?

Plaintiffs also cited *Arno v. Club Med Boutique Inc.*, 134 F.3d 1424 (9th Cir. 1998). *Arno* did not involve a choice-of-law provision, which "is a significant consideration in determining whether an attorney's fees statute is substantive or procedural for state choice-of-law purposes." *Boyd Rosene & Assocs. v. Kan. Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999). Nor did *Arno* implicate the

presumption against extraterritoriality: plaintiff was a Californian who sought fees under French law, not a California statute.

CONCLUSION

The district court's judgment and orders should be affirmed.

Dated: September 22, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Citi certifies that *Ellis v. J.P. Morgan Chase & Co.*, No. 16-17005 (9th Cir.), is related to this case because it raises closely related issues.

s/ Stephen J. Kane
Stephen J. Kane

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Answering Brief of Defendants-Appellees Citibank, N.A. and CitiMortgage, Inc. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 22, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen J. Kane
Stephen J. Kane

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-17008

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant: s/ Lucia Nale

Date: 9/22/2017

("s/" plus typed name is acceptable for electronically-filed documents)