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# [***Stone v. Ocwen Loan Servicing, LLC***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RBH-C7X1-F04D-24WG-00000-00&context=)

United States District Court for the Northern District of Georgia, Atlanta Division

October 19, 2017, Decided; October 19, 2017, Filed

CIVIL ACTION NO. 1:17-CV-668-AT

**Reporter**

2017 U.S. Dist. LEXIS 214127 \*

CHRISTINE STONE, Plaintiff, v. OCWEN LOAN SERVICING, LLC, et al., Defendants.

**Core Terms**

***antitrust***, mortgage, alleges, motion to dismiss, servicers, monopolization, ***anti trust*** law, borrowers, Defendants', foreclosed, defaulted, foreclosure, banks, buy, anticompetitive, Amend, monopoly power, lenders, fails, ***antitrust*** violation, restraint of trade, short sale, conspiracy, survive, loans, bowling, centers, prices

**Counsel:** **[\*1]**For Christine Stone, Plaintiff: Sam Louis Levine, LEAD ATTORNEY, Law Office of Sam Levine, LLC, Atlanta, GA.

For Ocwen Loan Servicing, LLC, Bank of New York Mellon, N.A., formerly known as Bank of New York, N.A., successor in interest to JPMorgan Chase Bank, N.A., Trustee for the Certificate - Holders of Popular, ABS, Inc. Pass - Through, Certificates Series 2005-2, Defendants: Robert P. Edwards, Jr., LEAD ATTORNEY, Troutman Sanders, Atlanta, GA; Katie Lamb Balthrop, Troutman Sanders, LLP-ATL, Atlanta, GA.

**Judges:** Amy Totenberg, United States District Judge.

**Opinion by:** Amy Totenberg

**Opinion**

**ORDER**

This matter is before the Court on Defendants' Motion to Dismiss [Doc. 24] and Plaintiff's Second Motion to Amend [Doc. 27]. Plaintiff Christine Stone alleges that Defendants Ocwen Loan Servicing, LLC ("Ocwen") and Bank of New York Mellon N.A. ("New York Mellon") violated federal ***antitrust*** laws in the way that they foreclosed on her house, refused to allow her to buy her own defaulted loan in a short sale, and kept homeowners like herself from viewing their own loan files on the MERS[[1]](#footnote-0)1 system. Stone argues that Defendants' actions constitute a conspiracy to restrain trade and an attempt to monopolize the market. For the reasons**[\*2]** set forth below, the Court **GRANTS** Defendants' Motion to Dismiss and **DENIES** Plaintiff's Second Motion to Amend.

**I. STANDARD FOR MOTION TO DISMISS**

A complaint should be dismissed under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) only where it appears that the facts alleged fail to state a "plausible" claim for relief. [*Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=); [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). The plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *See* [*Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NWM-S330-004B-Y00V-00000-00&context=) (citing [*Bell Atlantic v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=); [*Fed. R. Civ. P. 8(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). In ruling on a motion to dismiss, the court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See* [*Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47YX-KWV0-0038-X308-00000-00&context=).

A claim is plausible where the plaintiff alleges factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). A plaintiff is not required to provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [*Twombly, 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). The plausibility standard requires that a plaintiff allege sufficient facts "to raise a reasonable expectation that discovery will reveal evidence" that supports**[\*3]** the plaintiff's claim. [*Id. at 556*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). A complaint may survive a motion to dismiss for failure to state a claim even if it is "improbable" that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely "remote and unlikely." *Id.*

**II. BACKGROUND**[[2]](#footnote-1)2

In 2002, Stone purchased a home in Cobb County, Georgia. (First Am. Compl., Doc. 22 ¶ 8.) In 2004, she refinanced the loan on her house. (*Id.*) At some unspecified time, Stone defaulted on her loan and made "large payments to clear her default." (*Id.* ¶ 18.) Her loan was originally serviced by "Popular Financial/Popular Mortgage Servicing," which agreed to help Stone refinance the loan at "fair and reasonable rates." (*Id.*)

The servicer's posture changed when Stone's loan was sold to Litton.[[3]](#footnote-2)3 Litton refused to honor the earlier agreement to assist Stone in refinancing her loan. (*Id.* ¶¶ 18-19.) Additionally, Stone alleges she was no longer delinquent in her loan payments but that Litton refused to acknowledge this. (*Id.* ¶ 19.) Litton then "unexpectedly" foreclosed on her home in February 2010, after she had been assured that her house was being pulled from the auction. (*Id.* ¶ 20.) The home sold for $650,000 at the auction.**[\*4]** (*Id.* ¶ 23.)

New York Mellon, which at the time of foreclosure owned the mortgage note for Stone's home, successfully sued Stone in Cobb County State Court for a writ of possession.[[4]](#footnote-3)4 (*Id.* at ¶ 21.) As a result, Stone alleges that she paid $5,100 upfront into the state court registry, as well as monthly rent for five-and-a-half years. She alleges she paid over $82,000 in total into the state court registry for that time period, before the court ordered no more payments to be made. (*Id.* ¶ 22.) She further alleges that she owed approximately $100,000 to satisfy her loan at the time she started making these rent payments. (*Id.* ¶ 23.)

Ocwen (formerly Litton) decided to conduct a second foreclosure on Stone's same house and her same loan approximately six years after the first foreclosure attempt. (*Id.* ¶ 24.) Stone filed a complaint with the Consumer Financial Protection Bureau regarding the second foreclosure, and Ocwen responded that "the rent money had reinstated the loan that had been foreclosed upon in 2010." (*Id.* ¶ 25.) Stone alleges that "some foreclosures are not being consummated," which allows companies like Ocwen "to either begin collecting monthly payments on the foreclosed upon**[\*5]** loan, or to reinstate the loan, and foreclose a second time on the same loan and property that had previously been foreclosed upon. . . ." (*Id.* ¶ 26.)

In addition, Stone alleges that both Defendants have "a policy of not permitting a homeowner-mortgagor\borrower who is in default to purchase the secured property directly or indirectly." (*Id.* ¶ 30.) She claims Ocwen and New York Mellon conspired with other banks and loan companies in "refusing to offer the borrowers the same deal on purchasing the loan . . . that is offered to other banks, services, investors, venture capital funds, vulture funds or other third persons." (*Id.* ¶ 32.) In particular, Defendants do not allow defaulted borrowers the opportunity to buy their own properties through a short sale.[[5]](#footnote-4)5 According to Stone, there "is no economic justification" for this "short sale policy" of not allowing borrowers to buy their own defaulted mortgage loan. (*Id.* ¶¶ 32, 43.)

Stone further alleges that Defendants and other banks engaged in a "conspiracy" to "fix, control, raise and stabilize prices of the loans for the purchase of real estate . . . ." (*Id.* ¶ 40.) She claims Defendants effectuated this conspiracy by "sharing information about**[\*6]** the available foreclosed upon loans on the MERS system." (*Id.* ¶ 41.)

On February 2, 2017, Stone filed a lawsuit against Defendants for certain ***antitrust*** violations. (Doc. 1). She subsequently filed a First Amended Complaint, and Defendants filed a motion to dismiss her claims in their entirety. (Motion to Dismiss, Doc. 24.) Stone then filed a motion for leave to amend the First Amended Complaint, to which she attached a copy of the proposed Second Amended Complaint. (Motion to Amend, Doc. 27.)

**III. ANALYSIS**

Stone brings two ***antitrust*** claims under *§§ 1-2 of the Sherman Act* against Defendants. In her first claim, Stone asserts that Defendants — along with other major banks and loan servicers (i.e., "co-conspirators") - engaged in various anti-competitive activities that constitute "a boycott and conspiracy or agreement in unreasonable restraint of trade and monopoliz[ation of] the market." (First Am. Compl., Doc. 22 ¶¶ 37, 44.) Defendants' anticompetitive activities include refusing to approve short sales to defaulted borrowers, refusing to allow defaulted borrowers to buy their own mortgage notes while offering the same deal to other investors, and failing to consummate foreclosures only to**[\*7]** foreclose on the same loan a second time. (*Id.* ¶¶ 37-39.) Stone claims that Defendants and their co-conspirators often act in concert with one another by sharing information through the MERS system. (*Id.* ¶ 41.) She also claims Defendants account for a "substantial proportion" of the loan servicing and securitized trusts markets. (*Id.* ¶ 35.)

In her second claim, Stone asserts that Defendants and other banks and loan servicers bought and sold mortgage notes among themselves, all while keeping the relevant loan records in the MERS system where borrowers like Stone cannot view them. She claims that she has tried to obtain information on her loan but that "the information was refused." (*Id.* ¶ 58.) This effectively denied her "the same opportunities as banks, lenders, [and] servicers" and results in a "a boycott and conspiracy or agreement in unreasonable restraint of trade and monopolizing the market." (*Id.* ¶¶ 54-55.

Defendants move to dismiss the First Amended Complaint in its entirety. They first argue that Stone does not allege an ***antitrust*** injury, or even an injury in fact, and therefore she lacks standing to bring ***antitrust*** claims. Alternatively, they argue that Stone fails to allege**[\*8]** facts supporting a plausible claim of conspiracy in restraint of trade or a plausible claim of monopolization. The Court will consider Defendants' standing argument first.

**a. *Antitrust* Injury**

Under [*§ 4 of the Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=), people harmed by ***antitrust*** violations can sue those who engaged in the activities that violate the ***antitrust*** laws. The statute provides that "any person who shall be injured in his business or property by reason of anything forbidden in the ***antitrust*** laws may sue therefor in any district court of the United States . . . ." [*15 U.S.C. § 15(a) (2016)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=). Some commentators have noted that the wording is "deceptively simple in its language." 8-161 [***Antitrust*** *Laws and Trade* ***Regulation****, 2nd Edition § 161.02*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5KW1-32B0-R03K-H2PY-00000-00&context=) (2017).

"[T]he federal courts . . . have not interpreted [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) as expansively as its literal language suggests." [*Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GS80-008H-V50G-00000-00&context=). In particular, the Eleventh Circuit has articulated a two-prong standard for when a plaintiff had standing to sue for an ***antitrust*** violation: "First, a court should determine whether the plaintiff suffered '***antitrust*** injury'; second, the court should determine whether the plaintiff is an efficient enforcer of the ***antitrust*** laws, which requires some analysis of the directness or remoteness of the plaintiff's injury." [*Id. at 1449*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GS80-008H-V50G-00000-00&context=).

The Supreme Court in *Brunswick****[\*9]*** *Corp. v. Pueblo Bowl-O-Mat, Inc.* defined "***antitrust*** injury" as follows:

[It is i]njury of the type the ***antitrust*** laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

[*429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=) (quoting [*Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F880-003B-S1K4-00000-00&context=). "The ***antitrust*** injury requirement ensures that the plaintiff, although motivated by private interests, is seeking to vindicate the type of injury to the public that the ***antitrust*** laws were designed to prevent. " *Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010)* (citing [*Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1389-90 (11th Cir. 1990))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4G80-003B-5243-00000-00&context=).

For example, in *Brunswick*, the Supreme Court found that the plaintiffs, a group of bowling centers, did not suffer an ***antitrust*** injury. [*429 U.S. at 490*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). The plaintiffs sued one of the largest manufacturers of bowling equipment for ***antitrust*** violations after the manufacturer purchased a number of bowling centers near the plaintiffs' bowling centers. [*429 U.S. at 479*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). The plaintiffs claimed that they were harmed because the acquired bowling centers would have failed if they had not been acquired by the defendant, and thus the plaintiffs were denied**[\*10]** an anticipated increase in market shares because of these acquisitions. [*Id. at 480*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). The Supreme Court explained that this type of injury is not an ***antitrust*** injury. The plaintiffs would have suffered loss of anticipated market share if the other centers had obtained refinancing, for instance, instead of being acquired by the defendant. "The damages [plaintiffs] obtained are designed to provide them with the profits they would have realized had competition been reduced. The ***antitrust*** laws, however, were enacted for the protection of competition[,] not competitors." [*Id. at 488*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=) (internal quotations omitted).

The Eleventh Circuit's decision in *Florida Seed Co., Inc. v. Monsanto Co.* expounds on *Brunswick*'s reasoning on what does and does not constitute ***antitrust*** injury. [*105 F.3d 1372, 1375 (11th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JB30-00B1-D2Y6-00000-00&context=). Florida Seed bought certain herbicides from Monsanto and then sold them to consumers, but following Monsanto's merger with another company, Florida Seed's distributorship agreement with Monsanto was terminated. Florida Seed sued Monsanto for violating ***antitrust*** law by dealing only with its own distributor for anticompetitive purposes. Citing to *Brunswick*, the Eleventh Circuit held that Florida Seed had not suffered an ***antitrust*** injury because**[\*11]** it "complains not about higher prices or about injury to competition, but about injury to itself." *Id.*

In contrast, the Eleventh Circuit in *Palmyra Park Hosp. Inc. v. Phoebe Putney Memorial Hospital* found that Palmyra Park Hospital suffered an ***antitrust*** injury when Phoebe Putney Memorial Hospital, located in the same city, leveraged its monopoly power to force insurers to exclude Palmyra from their provider networks. *604 F.3d at 1296*. By excluding Palmyra from the network, patients seeking in-network coverage for their medical needs could only go to Phoebe Putney. Phoebe Putney could then "demand higher reimbursement rates" for in-network services. *Id. at 1301-02*. The Eleventh Circuit held that, as a result of Phoebe Putney's actions, "there [was] less competition[,] . . . higher prices and fewer choices for consumers," which "is precisely the type of harm that we allow plaintiffs to vindicate through the ***antitrust*** laws." *Id. at 1303*.

Defendants argue that Stone does not have standing to sue under [*§ 4 of the Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) because she does not allege that she suffered an ***antitrust*** injury. (Motion to Dismiss, Doc. 24 at 1-2.) They argue that she fails to allege facts that "would link Plaintiff being denied the 'opportunity' to write-down**[\*12]** the amount secured by the Mortgage or to access information through MERS to any asserted lessening of competitive market conditions." (*Id.* at 14-15.) Moreover, she is asking for relief — the reduction of her mortgage obligation to the foreclosure value of her home — which "bears no relation to any alleged or plausible suppression of competition." (*Id.* at 15.) In response, Stone argues that she did suffer an ***antitrust*** injury because she was prohibited from buying her loan from the bank and that she "would have gladly purchased her Note when it was sold." (Response, Doc. 25 at 9.) She asserts that when "banks, lenders, [and] servicers" are trading mortgage notes and deeds among themselves, "it would not hurt them to sell the properties back to borrowers for pennies on the dollar." (*Id.* at 16.) Borrowers such as herself "would also greatly benefit from the same opportunities" to participate in such transactions. (*Id.*) She further asserts that, as a result of not being able to buy her own mortgage, she suffered actual injury in that "she has lost a home, lost a business, [and] lost respect in her community." (*Id.* at 12.)

Upon review of the First Amended Complaint, the Court does not see how Stone has alleged an ***antitrust*** injury.**[\*13]** Stone alleges that she was excluded from a particular deal: the opportunity to buy her own defaulted mortgage loan from New York Mellon. But she does not allege how her exclusion from this particular deal, or how other exclusions of similar borrowers from buying their own loans, results in an anticompetitive effect in the mortgage market. She admits that "banks, servicers, investors, venture capital funds, vulture funds or other third persons" were all allowed to purchase her loan, with her as the one exception. (First Am. Compl., Doc. 22 ¶ 32.) Thus, she does not plausibly allege that Defendants, by excluding only her from this sale, are effectively fixing prices so as to drive out competition. Nor does she claim that competition in the sale of loans is somehow harmed by her inability to purchase her own loan. She simply seeks to have the opportunity to buy her own loan "at the same price it is offered to others" (*Id.* ¶ 38) - an injury that does not flow from illegal ***antitrust*** activity. *See, e.g.*, [*Florida Seed, 105 F.3d at 1374-75*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JB30-00B1-D2Y6-00000-00&context=). And while Stone pleads that she also suffered injury by losing her home, after Defendants refused to allow her to refinance and allegedly foreclosed upon her home twice, she similarly**[\*14]** does not show how this injury is linked to an ***antitrust*** violation.

Losing a home, especially in the manner that Stone alleges in the First Amended Complaint, is devastating. But these allegations alone are not enough to establish an ***antitrust*** injury.[[6]](#footnote-5)6 The Court is bound to follow Congress's intent when it enacted the Sherman Act and subsequent case law interpreting the Act. [*Todorov, 921 F.2d at 1448*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GS80-008H-V50G-00000-00&context=) ("Congress did not intend the ***antitrust*** laws to provide a remedy in damages for all injuries that might conceivably be traced to an ***antitrust*** violation.") (quoting [*Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n. 14, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D9N0-003B-S4BG-00000-00&context=).

**b. Restraint of Trade and Monopolization Claims (*§§ 1-2 of the Sherman Act*)**

Even assuming that Stone has standing to sue, she must still allege a plausible claim that Defendants violated the ***antitrust*** laws. Defendants present two arguments as to why Stone's claims fail. First, Defendants argue that Stone's claim of restriction of trade fails because she only alleged parallel conduct and not concerted conduct. (Motion to Dismiss, Doc. 24 at 16-17.) Second, Defendants argue that Stone's claim of monopolization or attempted monopolization fails because she "has not alleged that any individual Defendant has dominance or threatened dominance in a relevant market."**[\*15]** (*Id.* at 19.)

The Court first considers Stone's claim that Defendants conspired to restrict trade. In order to bring a claim under *§ 1 of the Sherman Act*, a plaintiff needs to prove that there "is 'an agreement to restrain trade'" which "exists between two or more persons" and shows "'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" [*City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 569 (11th Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V14-G310-0038-X1D8-00000-00&context=) (quoting [*Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G540-008H-V33P-00000-00&context=). "A plaintiff cannot state an ***antitrust*** claim by merely showing parallel conduct and from it divine that an agreement must be the source from which the parallel conduct arose." [*In re Delta/AirTran Baggage Fee* ***Antitrust*** *Litig., 733 F. Supp. 2d 1348, 1359 (N.D. Ga. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50TT-7PX1-652H-G0BG-00000-00&context=) (quoting [*In re LTL Shipping Servs.* ***Antitrust*** *Litig., No. 1:08-MD-01895-WSD, 2009 U.S. Dist. LEXIS 14276, 2009 WL 323219, at \*8 (N.D. Ga. Jan. 28, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPF-2TW0-TXFP-M2SF-00000-00&context=)).

Stone has not alleged facts showing that Defendants had a "unity of purpose" or "a meeting of minds" to engage with the other lenders and banks. At most, Stone alleges instances of parallel conduct. She claims that Defendants and other "co-conspirators" have the same policy of not allowing borrowers to purchase their own defaulted mortgage loans. She also claims that Defendants and other lenders and servicers can view the same mortgage information on the MERS system. These allegations, without more, do not plausibly suggest that Defendants had an agreement**[\*16]** to restrain trade in some way.

Moreover, Defendants have articulated an economic justification for this parallel conduct that is not anticompetitive in nature. Defendants assert that "[f]ew lenders would be willing to offer mortgages if a mortgagor could simply stop making payments and obtain the right to have the mortgage on his property released for mere 'pennies on the dollar.'" (Reply, Doc. 26 at 5.) In other words, Defendants do not want to incentivize borrowers to cease making payments on their mortgage in order to get out of it and try to get a better deal. Thus, it is equally (if not more) plausible that other lenders have such a "short sale" policy not to restrain trade but because it makes good business sense — as a form of "conscious parallelism." *See* [*Bell Atlantic, 550 U.S. at 553-54*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) ("Even conscious parallelism, a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful.") (internal quotations omitted). Even Stone acknowledges the need to show that Defendant "are engaged in more than mere conscious parallelism" in order to survive a motion to dismiss. (Response, Doc. 25 at 16.) Stone's**[\*17]** claim under *§ 1* therefore cannot survive a motion to dismiss because she does not allege any facts showing concerted activity on the part of Defendants.

The Court turns to Stone's claim of monopolization or attempted monopolization under *§ 2 of the Sherman Act*. To state a claim of monopolization, a party must show: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [*United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=). For a claim of attempted monopolization, a party must show: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." [*Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S5B-0D20-003B-R505-00000-00&context=). "Monopoly power is defined as 'the power to control prices or to exclude competition.'" [*In re Delta/AirTran Baggage Fee* ***Antitrust*** *Litig., 733 F. Supp. 2d at 1366*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50TT-7PX1-652H-G0BG-00000-00&context=) (quoting [*Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98, 111-12 (3d Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0910-008H-V3DJ-00000-00&context=)). The existence of monopoly power "ordinarily may be inferred from the predominant share of the market." [*Grinnell Corp., 384 U.S. at 571 (1966)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=).

Here, Stone does not allege sufficient facts showing that Defendants, together or separately, monopolized or attempted to monopolize the market. In particular, Stone does not allege that either Defendant**[\*18]** has "monopoly power" in a relevant market or has threatened to achieve such power. She broadly states that "Defendants account for a substantial proportion of loan servicing and the trusts of securitized trust performed in connection with the loans, and servicing thereof in the United States." (First Am. Compl., Doc. 22 ¶ 35.) This statement not only fails to allege monopoly power (i.e., a dominant share of the market) by either Defendant, but it also fails to "clearly designate the specific markets in which a dangerous probability of monopolization allegedly arose." [*In re Delta, 733 F. Supp. 2d at 1366*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50TT-7PX1-652H-G0BG-00000-00&context=). Stone's conclusory allegations that Defendants had a monopoly or attempted to monopolize are not enough to save her *§ 2* claim from a motion to dismiss.

Therefore, Stone's First Amended Complaint has not stated plausible claims under either *§ 1* or *§ 2 of the Sherman Act*.

**c. Proposed Second Amended Complaint**

The Court considers Stone's proposed Second Amended Complaint in conjunction with Defendants' Motion to Dismiss. The Court need not grant leave for Stone to amend again if the Second Amended Complaint would not survive a motion to dismiss. [*Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1255 (11th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TMS-Y790-TX4N-G0VK-00000-00&context=) ("Because justice does not require district courts to waste their time on hopeless cases,**[\*19]** leave may be denied if a proposed amendment fails to correct the deficiencies in the original complaint or otherwise fails to state a claim.").

In the Second Amended Complaint, Stone does not add any new claims but instead alleges additional facts — to the point that she nearly doubles the size of the First Amended Complaint. Some of these facts include: details about Stone's interactions with Ocwen up to and during the foreclosure process (Motion to Amend, Doc. 27 ¶¶ 26-34); Defendants' filing of "bogus 1099" forms with the Internal Revenue Service ("IRS") regarding Stone's property so that IRS officials would show up during her bankruptcy proceedings to monitor her claims and intimidate her (*id.* ¶¶ 14, 38, 67, 68); Defendants' entering into several previous settlements regarding their "criminal and unconscionable activities carried out during their foreclosure process" (*id.* ¶ 20); general allegations about how the MERS system operates and only allows MERS members to access information (*id.* ¶ 55-57); and details about the harm that Stone's business suffered as a result of Defendants' actions (*id.* ¶¶ 67, 71, 105-06).

However, the additional facts in the Second Amended Complaint do not**[\*20]** cure the deficiencies in the First Amended Complaint. Stone still does not sufficiently allege an ***antitrust*** injury, nor does she state a plausible claim for how Defendants either conspired to restrict trade or monopolized the relevant market. As the Second Amended Complaint would not survive a motion to dismiss, the Court **DENIES** Stone's Second Motion to Amend.

**IV. CONCLUSION**

The Court understands that Stone believes the short sale rule is not a fair one. The Court also acknowledges that she raises a number of serious concerns about the mortgage industry as a whole. But ***antitrust*** law is complex, and it does not provide relief based on the facts alleged here. For the foregoing reasons, the Court **GRANTS** Defendants' Motion to

Dismiss [Doc. 24] and **DENIES** Plaintiff's Second Motion to Amend [Doc. 27].

**IT IS SO ORDERED** this 19th day of October, 2017.

/s/ Amy Totenberg

**Amy Totenberg**

**United States District Judge**

**End of Document**

1. 1MERS stands for Mortgage Electronic Registration Systems, Inc., which is a privately run electronic registry that tracks the ownership and servicing rights of individual mortgages in the United States. [↑](#footnote-ref-0)
2. 2This factual background summarizes the allegations in Plaintiff's First Amended Complaint, which the Court construes in the light most favorable to Plaintiff at this stage. [↑](#footnote-ref-1)
3. 3The company's full name appears to be Litton Loan Servicing LP. Stone refers to Litton and Ocwen interchangeably in this portion of the Complaint, since Ocwen subsequently acquired Litton in September 2011 and assumed Litton's obligations. [↑](#footnote-ref-2)
4. 4However, apparently New York Mellon never took possession of the home. [↑](#footnote-ref-3)
5. 5A short sale describes a transaction where the lender and other entities, which have a recorded interest in the borrower's property that is being foreclosed upon, agree to a sale of the property that is less than the full balance remaining on the mortgage loan. [↑](#footnote-ref-4)
6. 6The Court need not address the second prong of ***antitrust*** standing — whether Stone is an "efficient enforcer" of the ***antitrust*** laws — since she has not satisfied the first prong. [↑](#footnote-ref-5)