
IN THE

COURT OF APPEALS OF MARYLAND

September Term 2021

Misc. No. 11

ALISON ASSANAH-CARROLL,

Appellant

V.

LAW OFFICES OF EDWARD J. MAHER, P.C., ET AL.,

Appellees.

On Certification of Legal Question from the United States District Court of Maryland
The Honorable Catherine C. Blake

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case is a certified question from the United States District Court for the District of Maryland regarding whether a Maryland consumer can maintain an action under the Maryland Consumer Debt Collection Act and Maryland Consumer Protection Act against a landlord who, despite an ordinance that explicitly prohibited the landlord from collecting or retaining rent, collected and is retaining illegal rent.

Appellant Alison Assanah-Carroll is a resident of an apartment building located at 2601 Madison Ave, Baltimore, MD 21217 (the "Property"), which is owned and operated by Appellees E.T.G. Associates '94 LP ("E.T.G.") and Roizman Development, Inc. ("Roizman"). The Property was unlicensed from August 15, 2019 to July 14, 2020. Baltimore City Code, Art. 13 § 5-4(a)(2) specifically provides that "no person may… [c]harge, accept, retain, or seek to collect any rental payment or other compensation for providing to another the occupancy of all or any part of any rental dwelling unless the person was licensed under this subtitle at both the time of offering to provide and the time of providing this occupancy." Nevertheless, E.T.G. and Roizman collected and retained rent from tenants for the period that the Property was unlicensed, have refused to return that illegal rent, and have sought to collect unpaid rent from that period of time when they were unlicensed.

Assanah-Carroll filed a complaint in the United States District Court for the District of Maryland against E.T.G. and Roizman, as well as the debt collectors they were using to pursue unpaid rent - the Law Offices of Edward J. Maher, P.C. (the "Law Office") and Edward J. Maher ("Maher"). The complaint is on behalf of herself and a class of other

tenants of the Property during the unlicensed period. E.T.G. and Roizman filed a motion to dismiss, arguing, among other things, that Assanah-Carroll and members of the putative class would not be entitled to the return of rental payments made while the Property was unlicensed unless they could show that their apartments were uninhabitable. Before any ruling was made on the motion to dismiss, this Court granted *certiorari* in *Aleti v. Metropolitan Baltimore, LLC*, Sept. Term 2021 No. 39, which involves a similar lawsuit raising different causes of action. The parties filed a consent motion to certify questions, and the Honorable Catherine C. Blake certified questions to this Court regarding the impact of the specific prohibition in Baltimore City Code, Art. 13 § 5-4(a)(2) for an unlicensed landlord to collect or retain rent.

QUESTIONS PRESENTED

1) Can a tenant who paid rent to a landlord in Baltimore City who lacked a license pursuant to Baltimore City Code, Art. 13 § 5-4 maintain a lawsuit under either the Maryland Consumer Debt Collection Act (the "MCDCA") or the Maryland Consumer Protection Act (the "MCPA") to recover the rent paid without a showing of any damages separate from the rental payment itself?
2) Does a currently licensed landlord violate either the MCDCA or the MCPA by collecting rent from a tenant or pursuing ejectment actions against a tenant who has failed to pay rent during a prior period when the landlord, or a prior landlord, was not licensed under Baltimore City Code, Art. 13 § 5-4, where the tenant does not allege any damages separate from the rental payment itself?

FACTS AND BACKGROUND

I. Baltimore City Licensing Requirements

Baltimore City's 2018 revisions to the Baltimore City Code expanded licensing requirements and consequences for unlicensed landlords as part of an effort to protect renters from unsafe conditions and increase the quality of the rental housing in the City. Before Baltimore City Council Bill 18-0185, only multiple-family dwellings were required to be registered and licensed to rent in Baltimore City. Baltimore City Council Bill 18-0185 extended those requirements to all landlords and added in new requirements and consequences for unlicensed landlords.

Under the 2018 bill, all Baltimore landlords are required to register their properties with the Baltimore City Commissioner of Housing and Community Development. Baltimore City Code, Art. 13 § 4-5. Additionally, Baltimore landlords must obtain a license to rent their property from the Baltimore City Commissioner of Housing and Community Development. Baltimore City Code, Art. 13 § 5-4. In order to obtain the license, the property must, among other things, 1) be registered, 2) pass a public or private inspection by an authorized inspector concluding that the property meets the health and safety standards set by the City, and 3) not have any open code violations that have not been addressed within 90 days of issuance. Baltimore City Code, Art. 13 § 5-6 and § 5-7. There is no fee for the license. Baltimore City Code, Art. 13 § 5-8.

Most critically for this case, Baltimore City Council Bill 18-0185 specified the consequences for a landlord who is unlicensed. Before, Baltimore City Code, Art. 13 § 5-4 provided: "No person may operate any multiple-family dwelling or rooming house

without a license to do so from the Commissioner." That section now reads in relevant part:

> [N]o person may:
>
> (1) rent or offer to rent to another all or any part of any rental dwelling without a currently effective license to do so from the Housing Commissioner; or
>
> (2) charge, accept, retain, or seek to collect any rental payment or other compensation for providing to another the occupancy of all or any part of any rental dwelling unless the person was licensed under this subtitle at both the time of offering to provide and the time of providing this occupancy.

Baltimore City Code, Art. 13 § 5-4(a).

Violations of § 5-4(a) are criminal misdemeanors and are also punishable by environmental citations. Baltimore City Code, Art. 13 § 5-25(a) and § 5-26. The Baltimore City Council also made it clear that those enforcement mechanisms are not intended to be exclusive, explicitly stating that "[t]he issuance of an environmental citation to enforce this subtitle does not preclude pursuing any other civil or criminal remedy or enforcement action authorized by law." Baltimore City Code, Art. 13 § 5-25(b).

The various public entities that wrote reports in favor of the bill highlighted its important role in protecting the health and safety of Baltimore City renters. The Baltimore Development Corporation supported Baltimore City Council Bill 18-0185, writing:

> BDC believes that the cost of regulatory compliance in this case is relatively small, and all property owners should bear the cost of bringing a property into habitable, code-compliant condition. BDC

> believes that the potential negative effects of this legislation are far outweighed by the positive benefits of safe housing for Baltimore City residents. The licensing component of this legislation, in particular, provides a meaningful mechanism for reducing the amount of sub-standard housing offered by non-compliant landlords, and BDC hopes that it will lead to a substantial reduction in sub-standard housing throughout the City.

January 31, 2018 Memorandum from the Baltimore Development Corporation to Baltimore City Council Regarding Baltimore City Council Bill 18-0185.[1] The Baltimore City Department of Housing & Community Development similarly supported Baltimore City Council Bill 18-0185, stating of the new licensing requirements:

> The new requirements will largely eliminate substandard conditions in the one segment of the affordable housing market where such conditions are prevalent. This will improve the living standards of the many thousands of households that depend on the private market for affordable housing, and will also extend the amount of time that these units will remain part of the affordable housing inventory.

February 13, 2018 Memorandum Regarding Baltimore City Council Bill 18-0185 by the Baltimore City Department of Housing & Community Development.[2]

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[1] Retrieved from https://baltimore.legistar.com/View.ashx?M=F&ID=5809521&GUID=31DD6536-47E0-4D2B-A174-3FA41A47E4CE.

[2] Retrieved from https://baltimore.legistar.com/View.ashx?M=F&ID=5803501&GUID=F1652546-12C4-45BC-AEF2-A87FB99206B3.

II. E.T.G. and Roizman's Collection of Illegal Rent

The First Amended Complaint filed by Assanah-Carroll contains the following allegations: E.T.G. is a Pennsylvania limited partnership and is the owner of the Property. App 4, at ¶ 7. Roizman is the general partner of E.T.G. and, as the general partner, operates E.T.G.'s management of the Property. App 4, at ¶ 8. E.T.G. and Roizman acquired the Property approximately 25 years ago, and over the years have allowed it to deteriorate and develop numerous problems, including non-working elevators, issues with water pressure and plumbing, and rodent infestations. App 4-5, at ¶ 12. As the First Amended Complaint states: "Whether out of that same general neglect, problems passing inspection, or intentional avoidance because they knew that the Property would fail the inspection required for a license, Defendants E.T.G and Roizman allowed their license to rent the Property to expire on August 15, 2019." App 5, at ¶ 13. E.T.G. and Roizman were immediately aware of the lapse of the license, but at a minimum were made aware when, on February 4, 2020, a judge in the District Court of Maryland for Baltimore City explicitly ruled against them on the licensing issue. App 5, at ¶¶ 14-15.

Despite the clear prohibition in Baltimore City Code, Art. 13 § 5-4(a)(2) from charging, accepting, retaining or seeking to collect rent unless a property is licensed both at the time the rental is offered and at the time the occupancy is provided, E.T.G. and Roizman did not inform their tenants at the Property that the Property was no longer licensed and that rent could no longer be collected. App 5, at ¶ 16. Instead, E.T.G. and Roizman continued to aggressively pursue rent from the tenants of the Property during the entire period that the Property was unlicensed. App 5, at ¶ 16. For example, a March

25, 2020 Letter from the Law Office and signed by Maher that was sent to every tenant of the Property falsely claimed that "ALL RENT AND ANY OTHER MONIES DUE UNDER YOUR LEASE ARE PAYABLE AS USUAL ON THE DUE DATE" (emphasis in original). App 5, at ¶ 17.

Throughout the time that the Property was unlicensed, the Property itself was in such disrepair that it could not meet the health and safety requirements necessary to obtain a new license because of unresolved code violations. App 6, at ¶ 22. Despite having an inspection performed in February of 2020 for the purposes of obtaining a license, E.T.G. and Roizman were not able to secure a new license until July 14, 2020. App 6, at ¶ 22. E.T.G. and Roizman have not returned any of the rent collected from their tenants during the period that the Property was unlicensed, and continue to pursue all unpaid rent from tenants allegedly incurred during that period. App 6, at ¶ 23.

III. Facts Specific to Assanah-Carroll

Assanah-Carroll has lived at the Property since April 1, 2019. App 7, at ¶ 26. She was unaware that E.T.G. and Roizman had lost their license to rent the Property and continued to pay rent into September of 2019 despite various issues with the disrepair at the Property. App 7, at ¶ 27-28. However, on October 3, 2019, Assanah-Carroll was trapped in an elevator at the Property (for the second time in her six months living at the Property). App 7, at ¶ 28. She missed a job interview as a result and ended up asking for a rent concession from E.T.G. and Roizman, which was denied. App 7, at ¶¶ 28-29. Subsequently, Assanah-Carroll fell behind on her rent payments. App 7, at ¶ 29.

In November, 2019, E.T.G. and Roizman, through the Law Office and at the direction of Maher, sued Assanah-Carroll in a failure to pay rent action (the "First Failure to Pay Rent Case"). App 7-8, at ¶ 30. The First Failure to Pay Rent Case sought to have Assanah-Carroll evicted if she did not pay $772.54 in alleged rent due for October and November of 2019. App 7-8, at ¶ 30. A default judgment was entered against Assanah-Carroll when she was unable to make the December 9, 2019 trial date. App 8, at ¶ 30.

Thereafter, Assanah-Carroll discovered that the Property was unlicensed. App 8, at ¶ 31. On January 8, 2020, E.T.G. and Roizman, through the Law Office and at Maher's direction, filed a new failure to pay rent case against Assanah-Carroll (the "Second Failure to Pay Rent Case") seeking an eviction if Assanah-Carroll did not pay $1,680, representing rent for December 2019 and January 2020. App 8, at ¶ 31. A February 4, 2020 trial occurred in the Second Failure to Pay Rent Case and Assanah-Carroll prevailed because the Property was unlicensed. App 8, at ¶ 32.

Despite the outcome of the Second Failure to Pay Rent Case, and with knowledge that a judge had ruled against them regarding the licensing issue, E.T.G. and Roizman moved forward to try to evict Assanah-Carroll under the default judgment that they obtained in the First Failure to Pay Rent Case. App 8, at ¶ 33. E.T.G. and Roizman obtained a warrant of restitution directing the Baltimore City Sheriff's Office to evict Assanah-Carroll on February 18, 2020. App 8, at ¶ 33. To avoid eviction, Assanah-Carroll paid $800 to cover the $772.54 that represented rent for October and portions of November, 2019, while the Property was unlicensed, right before the sheriff would have otherwise evicted her at E.T.G. and Roizman's direction. App 8-9, at ¶ 33.

Assanah-Carroll did not resume paying rent until she learned that the Property had gained a new license in July of 2020. App 9-10, at ¶ 37. E.T.G. and Roizman have, on numerous occasions, sought to collect the unpaid rent from Assanah-Carroll representing the period that the Property was unlicensed. App 9-10, at ¶¶ 34-38. Although E.T.G. and Roizman, through the Law Office and at the direction of Maher, filed a third failure to pay rent action on July 27, 2020 seeking to evict Assanah-Carroll from her home for unpaid rent obligations incurred during the period that the Property was unlicensed, that matter was voluntarily dismissed by E.T.G. and Roizman without prejudice. App 10, at ¶ 38.

IV. Procedural Background

Assanah-Carroll filed a Class Action Complaint in the United States District Court for the District of Maryland against E.T.G., Roizman, the Law Office and Maher on August 17, 2020, which she subsequently amended on January 14, 2021. App 1-22. The First Amended Complaint is filed on behalf of Assanah-Carroll and the following proposed class:

> All tenants of 2601 Madison Ave, Baltimore, MD 21217 who rented an apartment or unit between August 15, 2019 and July 14, 2020 and/or who entered into or renewed a lease for an apartment or unit between August 15, 2019 and July 14, 2020.

App 10, at ¶ 39. The First Amended Complaint raises the following claims on behalf of Assanah-Carroll and the proposed class:

> Count 1: damages against the Law Office and Maher under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p;

> Count 2: a declaration under Md. Code, Cts. & Jud. Proc., § 3-409 that E.T.G. and Roizman are not permitted to collect or retain rent for the period of time that the Property was unlicensed or pursuant to a lease entered into or renewed during the period the Property was unlicensed;
>
> Count 3: damages under the MCDCA in the amount of any illegal rent collected by E.T.G. and Roizman;
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> Count 4: damages under the MCPA in the amount of any illegal rent collected by E.T.G. and Roizman; and
>
> Count 5: a money had and received claim against E.T.G. and Roizman seeking disgorgement of any illegal rent collected.

App 13-21.

E.T.G. and Roizman filed a motion to dismiss the First Amended Complaint (the "Motion to Dismiss"), arguing, among other things, that the MCDCA only applies to methods of collection and does not include the collection of invalid debts (a position that this Court has since rejected)[3] and that, under *CitaraManis v. Hallowell*, 328 Md. 142, 613 A.2d 964 (1992), Assanah-Carroll and the proposed class could not recover rent paid while the Property was unlicensed without a showing of other damages than the illegal rent. App 26-63.

Assanah-Carroll opposed the Motion to Dismiss, arguing that the MCDCA does apply to the collection of invalid debts and that *CitaraManis* is not applicable because the

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[3] *Chavis v. Blibaum & Associates, P.A.*, ___ Md. ____, ____, ___ A.3d ____, 2021 WL 3828655 (2021), slip op. at 18-24; *Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 190, 258 A.3d 296, 320 (2021).

ordinance at issue in that case did not, unlike § 5-4(a)(2), specifically prohibit an unlicensed landlord from collecting or retaining rent. App 92-125.

Before the court made a ruling on the Motion to Dismiss, the Court of Special Appeals issued its ruling in *Aleti*, this Court issued its ruling in *Chavis*, and this Court granted *certiorari* in *Aleti*. E.T.G. and Roizman and Assanah-Carroll updated the United States District Court of the District of Maryland of these developments, and ultimately all parties filed a consent motion to certify questions, and the Honorable Catherine C. Blake certified the questions presented that are provided above. App 144-157.

STANDARD OF REVIEW

This case comes before the Court on a Certification Order under the Maryland Uniform Certification of Questions of Law Act, Md. Code, Cts. & Jud. Proc. §§ 12-601, *et seq.*, and Md. Rule 8-305. There is no standard of review because the federal district court certified the question to this Court to make the initial decision. For purposes of its analysis, this Court "accept[s] the facts as submitted by the certifying Court" and "confine[s] [its] legal analysis and final determinations of Maryland law to the questions certified." *Parler & Wobber v. Miles & Stockbridge, P.c.*, 359 Md. 671, 681, 756 A.2d 526, 531 (2000). The Court retains discretion to reformulate the certified question. Md. Code, Cts. & Jud. Proc. §12-604.

ARGUMENT

I. Baltimore City Code, Art. 13 § 5-4(a)(2) Controls the Outcome of this Case and Specifically Prohibits E.T.G. and Roizman from Collecting or Retaining the Rent at Issue in this Case

When Baltimore City passed an ordinance providing that no person may "charge, accept, retain, or seek to collect any rental payment or other compensation for providing to another the occupancy of all or any part of any rental dwelling unless the person was licensed under this subtitle at both the time of offering to provide and the time of providing this occupancy," it made the public policy determinations that control the outcome of this case. Baltimore City Code, Art. 13 § 5-4(a)(2). The plain language of § 5-4(a)(2) clearly prohibits a landlord from collecting, seeking to collect or retaining rent for any property that was unlicensed at the time that the occupancy was provided.

Maryland courts have often cited to the Restatement (First) of Contracts with regard to the determining the rights of parties to an illegal contract. *Gannon & Son, Inc. v. Emerson*, 291 Md. 443, 452, 435 A.2d 449, 454 (1981); *Harry Berenter, Inc. v. Berman*, 258 Md. 290, 294, 265 A.2d 759, 762 (1970). As explained in the Restatement (First) of Contracts § 580 cmt. a (1932): "[t]he legislature can prohibit the formation of any bargain and thereby make it illegal. The question whether the legislature has done so depends on interpretation of the legislative action." It is indisputable that § 5-4(a)(2) is an express prohibition on the collection or retention of rent where a property was unlicensed at the time the occupancy was provided or at the time it was offered.

There are three critical consequences to § 5-4(a)(2)'s express prohibition on the collection or retention of rent, something not present in any of the other landlord

licensing ordinances that have been addressed by Maryland courts. First, Maryland law is clear that E.T.G. and Roizman are legally prohibited from recovering any unpaid rent from Assanah-Carroll and the members of the putative class. Second, the express policy decision made in the prohibition found in § 5-4(a)(2) prevents the Court from making its own policy decision regarding whether to disregard the illegality as "slight." Finally, the express prohibition in § 5-4(a)(2) allows a party who is not *in pari delicto*, which is Latin for "in equal fault," to recover sums paid pursuant to the illegal contract.

A. Baltimore City Code, Art. 13 § 5-4(a)(2) Prohibits a Landlord from Entitlement to any Unpaid Rent for the Period it Was Unlicensed or for Leases Entered Into When it was Unlicensed

Under the Restatement (First) of Contracts § 598 (1932), "[a] party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value, except as stated in §§ 599- 609." *See also Thorpe v. Carte*, 252 Md. 523, 529, 250 A.2d 618, 621–22 (1969) ("[g]enerally a party to an illegal bargain cannot recover either damages for its breach or, after rescission, the performance he has rendered or its value"); *Cunningham v. A. S. Abell Co.*, 264 Md. 649, 657, 288 A.2d 157, 161 (1972). There can be no question that § 5-4(a)(2) is part of a licensing regime put in place by Baltimore City to protect the public interest, as the letters by the Baltimore Development Corporation and the Baltimore City Department of Housing & Community Development supporting Baltimore City Council

Bill 18-0185 confirm.[4] As explained in the next subsection of this brief, the explicit prohibition found in § 5-4(a)(2) prevents E.T.G. and Roizman from fitting into the narrow exception to the general rule of unenforceability. Accordingly, E.T.G. and Roizman are not able to recover damages for any breach by Assanah-Carroll or their other tenants of the illegal provisions in their leases purporting to require tenants to pay rent in violation of § 5-4(a)(2).

B. Article 13, § 5-4(a)(2) Acts to Prevent Any Avoidance of the Illegality of the Contract

It is true that under the narrow circumstances, outlined in the Restatement (First) of Contracts § 600 (1932), a "slight illegality" can potentially be disregarded for public policy reasons, but this exception only applies where "the bargain is not prohibited by statute." *Id*. This is the exact principle that formed the basis for the rulings in *Citaramanis* and its progeny. *See Citaramanis*, 328 Md. 142, 613 A.2d 964; *Galola v. Snyder*, 328 Md. 182, 186, 613 A.2d 983, 985 (1992) and *McDaniel v. Baranowski*, 419 Md. 560, 587, 19 A.3d 927, 943 (2011). However, the public policy analysis engaged in by the *Citaramanis* Court and repeated by *Galola* and *McDaniel* can only be undertaken where the statute does not specifically address the issue.

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[4] The relevant text of the January 31, 2018 Memorandum from the Baltimore Development Corporation to Baltimore City Council Regarding Baltimore City Council Bill 18-0185 and the February 13, 2018 Memorandum Regarding Baltimore City Council Bill 18-0185 by The Baltimore City Department of Housing & Community Development is produced in Facts and Background section above.

In *Citaramanis*, this Court addressed whether a tenant was entitled to recover rent voluntarily paid to an unlicensed landlord under the Howard County Code, either under restitution or the MCPA. Critically, the ordinance at issue was silent as to the question of whether an unlicensed landlord could accept or retain rent. *Citaramanis*, 328 Md. at 145 n. 1, 613 A.2d at 965 n. 1 (producing the text of the relevant ordinance in full). The Court began its analysis with the notion that "[u]nenforceability of a contract because of illegality is a function of the strength of the public policy involved together with the degree of the violation of that policy under the facts of the case." *Id*. at 158, 613 A.2d at 971-72. The Court quoted extensively from *Schloss v. Davis*, 213 Md. 119, 124–25, 131 A.2d 287, 290–91 (1957), which ruled that a construction manager could still sue on a contract even though the construction manager violated a local building code by beginning work on the foundation and frame without a building permit. *Id*. The *Citaramanis* Court determined that because the purpose of the Howard County landlord licensing ordinance was simply "identification of premises to be inspected in order to determine compliance with housing codes," it was similar to the requirement for obtaining a building permit prior to building, and determined and since the construction manager in *Schloss* was able to recover on the contract despite the code violation, then a landlord should not have to pay back rent collected without a license. *Citaramanis*, 328 Md. at 162, 613 A.2d at 973.

However, nothing in *Citaramanis*, *Schloss* or any authority cited by E.T.G. and Roizman indicates that a Court may engage in this type of policy balancing where the legislature has already established the public policy by specifically prohibiting collection

or retention of payment pursuant to an illegal contract. Indeed, the extensive quotation of *Schloss* in *Citaramanis* included reliance on the Restatement (First) of Contracts § 600 (1932) and other authorities that explicitly recognize that if the legislature has addressed the issue, the potential exception to the general rule of unenforceability is unavailable. Restatement (First) of Contracts § 600 (1932). *See also John E. Rosasco Creameries v. Cohen*, 276 N.Y. 274, 278, 11 N.E.2d 908, 909 (N.Y. 1937) ("if the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied"). Any ruling to the contrary would be a massive shift away from traditional rules regarding separation of powers, allowing a court to override a legislature's policy determination that specifically prohibits collection or retention of payment on an illegal contract.

The 2018 changes to the licensing regime in Baltimore City were very comprehensive and are much more extensive than the Howard County licensing regime addressed in *Citaramanis*. However, the analysis presented in this case is not whether the greater scrutiny given to landlords under the new licensing requirements of the Baltimore City Code means that public policy should prevent a non-compliant landlord from recovering. Instead, the Baltimore City Council has already explicitly made that public policy determination in § 5-4(a)(2). E.T.G. and Roizman can cite no authority for the proposition that such a specific determination can be overridden.

C. Because Assanah-Carroll and the Other Tenants are Not *In Pari Delicto*, They can Recover Rent Payments Made in Violation of § 5-4(a)(2)

For the reasons just explained, E.T.G. and Roizman cannot take advantage of the narrow exception for "slight illegality" outlined in the Restatement (First) of Contracts § 600 to the general rule of non-recovery in § 598. In contrast, Assanah-Carroll and the members of the proposed class fall under the exception to the general rule of non-recovery for parties not *in pari delicto*. Restatement (First) of Contracts § 604 (1932). *See also Mitchell Tracey v. First Am. Title Ins. Co.*, 950 F. Supp. 2d 807, 811 (D. Md. 2013); *Bourgeois v. Live Nation Entm't, Inc.*, 3 F. Supp. 3d 423, 452 (D. Md. 2014), as corrected (Mar. 20, 2014). There can be no question that the tenants, who would have no reason to know that E.T.G. and Roizman were unlicensed and are members of the class of persons the relevant ordinance was attempting to protect, could be considered *in pari delicto* with E.T.G. and Roizman. Notably, this ability to recover if not *in pari delicto* is available regardless of whether it is necessary to prevent unjust enrichment. *See* Restatement (Third) of Restitution and Unjust Enrichment § 32(1) (2011) (a person who renders performance under an agreement that is illegal may receive restitution "whether or not necessary to prevent unjust enrichment, if restitution is required by the policy of the underlying prohibition"). Thus, as the Restatement drafters noted, "[c]ases within [that rule] are those in which—although not specifically directed by statute—restitution is clearly required by the policy of the statute that makes the underlying contract illegal. If the demands of policy require a forfeiture, restitution need not depend on unjust

enrichment (Illustrations 1-2)." *Id*. at cmt. c. The cited illustration is particularly helpful and applicable:

> Undercover police officers pay $50,000 in cash to a suspected drug dealer in exchange for his promise to deliver cocaine. Dealer performs the contract, the drugs are seized, and Dealer is arrested. City is entitled by the rule of § 32(1) to recover the $50,000 paid to Dealer. Restitution in this instance does not depend on a showing that Dealer has been unjustly enriched.

Id. at Illustration 1-2.

Accordingly, the plain language of § 5-4(a)(2) requires forfeiture of the prohibited rent regardless of whether there the apartments were uninhabitable. E.T.G. and Roizman's position that they should be permitted to retain the rent is the equivalent of the drug dealer in Illustration 1-2 arguing that there was no unjust enrichment because there was nothing wrong with the cocaine. It is simply not germane to whether the explicit policy determination made in the legislation will allow the retention of the money illegally gained. Indeed, as extreme as that example may seem, it is actually a weaker case, because unlike § 5-4(a)(2), the situation discussed in Illustration 1-2 does not indicate the existence of a law specifically criminalizing retention of funds from the sale of drugs. *Accord Vista Designs, Inc. v. Silverman*, 774 So. 2d 884, 887 (Fla. Dist. Ct. App. 2001) (New Jersey attorney must disgorge fees earned representing client in case in Florida where attorney was not admitted to practice in Florida). The mechanism for this recovery at common law is by way of an action for money had and received.

With these guiding principles in place due to the illegality of the rental payments under § 5-4(a)(2), each of the challenges raised by E.T.G. and Roizman should be denied.

II. E.T.G. and Roizman Are Liable Under the Maryland Consumer Debt Collection Act For Collecting Rent When Specifically Prohibited by Law

Assanah-Carroll has set forth a viable cause of action under the MCDCA. The MCDCA applies to "a person collecting or attempting to collect an alleged debt arising out of a consumer transaction." Md. Code, Comm. L. § 14-201. Notably, unlike the FDCPA, the MCDCA applies to original creditors such as Defendants E.T.G. and Roizman. *Mills v. Galyn Manor Homeowner's Ass'n, Inc.*, 239 Md. App. 663, 674, 198 A.3d 879, 885 (2018), *aff'd sub nom. Andrews & Lawrence Prof'l Servs., LLC v. Mills*, 467 Md. 126, 223 A.3d 947 (2020). Alleged debts arising out of residential leasing are covered by the MCDCA. *See Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp. 2d 582, 595 (D. Md. 1999). Under the MCDCA, a person subject to the act is prohibited from doing certain things while "collecting or attempting to collect an alleged debt," including threatening force, using obscene language, or, most relevantly, claiming, attempting or threatening "to enforce a right with knowledge that the right does not exist" or doing anything that would violate §§ 804 through 812 of the FDCPA. Md. Code, Comm. L. § 14-202(8) and (11). Further, as this Court has consistently observed, the "MCDCA, along with the MCPA" are "remedial consumer protection ... statutes," the "overarching purpose and intent" of which "is to protect the public from unfair or deceptive trade practices by creditors engaged in debt collection activities." *Andrews & Lawrence Prof'l Servs., LLC v. Mills*, 467 Md. 126, 132, 223 A.3d 947, 950 (2020). Thus, the MCDCA, as well as the MCPA, "must be liberally construed, in order to effectuate its broad remedial

purpose." *Id*. at 162, 223 A.3d at 968. As explained below, E.T.G. and Roizman are liable under both § 14-202(8) and § 14-202(11) of the MCDCA.

A. E.T.G. and Roizman Knowingly Collected an Unauthorized Charge – the Rent that is Specifically Prohibited - and Thus are Liable Under § 14-202(8)

To plead a claim under § 14-202(8) of the MCDCA, "a complainant must establish two elements: (1) the debt collector did not possess the right to collect the amount of debt sought; and (2) the debt collector attempted to collect the debt knowing that [it] lacked the right to do so." *Chavis v. Blibaum & Associates, P.A.*, ––– Md. ––––, ––––, ––– A.3d ––––, 2021 WL 3828655 (2021), slip op. at 15. This Court ruled in *Chavis* that the MCDCA does not only apply to prohibited methods of debt collection, but also applies "when the amount claimed by the debt collector includes sums that the debt collector, to its knowledge, does not have the right to collect." *Id*. at 23-24. The knowledge element under § 14-202(8) can be established "with actual knowledge or with reckless disregard as to the falsity of the existence of the right." *Id*. at 27. As the Court of Special Appeals recently summarized:

> The *Chavis* Court also agreed with the statement in *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp. 2d 582, 594 (D. Md. 1999), that the knowledge requirement "does not immunize debt collectors from liability for mistakes of law." The *Chavis* Court opined that the language in the *Spencer* opinion saying that "debt collectors 'must be held to be aware of laws affecting the validity of their collection efforts' means that, where the law is settled at the time a collector takes a contrary position in claiming a right, the collector's recklessness in failing to discover the contrary authority is equivalent to 'aware[ness]' (i.e., actual knowledge) of the authority." *Chavis*, ––– Md. at ––––, ––– A.3d ––––, Slip op. at 30-31 (quoting *Spencer*, 81 F. Supp 2d at 595).

Newsom v. Brock & Scott, PLLC, —— Md. App. ——, ——, —— A.3d ——, 2021 WL 5504781 (2021), slip op. at 27. Thus, "a debt collector does not escape liability under § 14-202(8) whenever, in the absence of controlling authority, the collector makes a mistake of law." *Chavis*, slip op. at 33.

When E.T.G. and Roizman collected the alleged rental debt from their tenants for a period when they were unlicensed, they clearly "enforce[d] a right with knowledge that the right does not exist." As the First Amended Complaint alleges, they were immediately aware that their rental license had expired, yet continued to collect rent. App 5, at ¶ 14. As collectors under the MCDCA, they must be held to be aware of laws affecting the validity of their collection efforts. *Chavis*, slip op. at 30-31. Because Defendants E.T.G. and Roizman were thus collecting illegal rent with knowledge that there was no license, and thus that collecting or retaining rent was prohibited under § 5-4(a), they are liable under § 14-202(8).

B. E.T.G. and Roizman Are Also Liable Under § 14-202(11) Because Their Collection of an Illegal Debt Would Violate § 808 of the FDCPA

Moreover, E.T.G. and Roizman are liable under § 14-202(11) of the MCDCA. § 14-202(11) is a new provision that went into effect in 2018 which prohibits persons subject to the MCDCA such as E.T.G. and Roizman from "[e]ngag[ing] in any conduct that violates §§ 804 through 812 of the federal Fair Debt Collection Practices Act." Section 808 of the FDCPA, 15 U.S.C. § 1692f, prohibits the use of unfair or unconscionable means to collect or attempt to collect any debt, which includes, among other things, the "collection of any amount (including any interest, fee, charge, or

expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). That subsection clearly establishes that it is a violation of the FDCPA for a collector to collect illegal debts. *See Tuttle v. Equifax Check*, 190 F.3d 9, 13 (2d Cir. 1999); *Nance v. Ulferts*, 282 F. Supp. 2d 912, 917–18 (N.D. Ind. 2003). *See also* Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50,097, 50,108 (Fed. Trade Comm'n 1988).

E.T.G. and Roizman cannot dispute that their collection of rent that is prohibited by Article 13, § 5-4(a)(2) would be unfair or unconscionable under Section 808 of the FDCPA. Instead, in their Motion to Dismiss, they incorrectly asserted that since they are original creditors that would not be subject to the FDCPA, § 14-202(11) does not apply to them. App 37, at n. 6. This argument has already been rejected by the United States District Court for the District of Maryland, which held that § 14-202(11) applies to all persons subject to the MCDCA, not just persons who qualify as debt collectors under the FDCPA:

> Significantly, section 14-202(11) does not simply state that any violation of the FDCPA is also a violation of the MCDCA. As a matter of the plain language of section 14-202, while the MCDCA incorporates prohibited conduct under the FDCPA, the statute explicitly applies to the actions of a "collector," which is defined broadly under the MCDCA as a "person collecting or attempting to collect an alleged debt arising out of a consumer transaction." Md. Code Ann., Com. Law § 14-201 (b). This term encompasses a broader range of actors than the term "debt collector" under the FDCPA and would include a creditor such as NASA FCU that does not meet the federal definition of "debt collector." See 15 U.S.C. § 1692a(6). Where the statutory text provides that the MCDCA specifically uses the term "collectors" to refer to the entities and parties who can be held liable for engaging in "conduct" that violates certain sections within the FDCPA, the Court finds that violations under § 14-202(11)

> are measured based on the actions that would violate the FDCPA but apply to this broader set of actors covered under the MCDCA. Thus, the Court finds that the MCDCA prohibits "collectors" such as NASA FCU from engaging in the type of conduct described in the relevant provisions of the FDCPA, such as using "false, deceptive, or misleading representations or means" in connection with debt collection, 15 U.S.C. § 1692e, using "unfair or unconscionable means" to collect a debt, 15 U.S.C. § 1692f, or communicating "with a consumer in connection with the collection of any debt" knowing that "the consumer is represented by an attorney with respect to such debt," 15 U.S.C. § 1692c(a).

Armstead v. Feldman, No. CV TDC-19-0614, 2020 WL 4753837, at *5 (D. Md. Aug. 17, 2020).

This result is consistent with the legislative history of § 14-202(11) and the broad remedial purpose of the MCDCA. § 14-202(11) was added as part of the Financial Consumer Protection Act of 2018, 2018 Maryland Laws Ch. 731. As the Preamble to that Act states, the Act implements numerous recommendations of the Maryland Financial Consumer Protection Commission, which was created by statute in 2017 "to monitor changes in Washington and on Wall Street and make recommendations for action to the Governor, the General Assembly of Maryland, and the Maryland Congressional delegation as necessary to safeguard Maryland consumers." 2018 Maryland Laws Ch. 731, at p. 5. The Act specifically states that it was passed, among other reasons, in response to "recent federal action to roll back certain financial consumer protections [that] may prove detrimental to Marylanders." *Id*. In 2017, the Supreme Court issued its opinion in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721, 198 L. Ed. 2d 177 (2017) which generally excluded from the definition of "debt collector" under the FDCPA purchasers of defaulted consumer debts. Accordingly, the immediate

recommendation of the Maryland Financial Consumer Protection Commission to amend the MCDCA to include actions that would violate the FDCPA is a clear response to the Supreme Court's ruling excluding debt buyers from the definition of "debt collector" under the FDCPA, and clearly reflects an intent to protect Marylanders from conduct that would violate those sections of the FDCPA regardless of whether the collector under the MCDCA would fit into the definition of "debt collector" under the FDCPA. As the statute "must be liberally construed, in order to effectuate its broad remedial purpose," *Mills*, 467 Md. at 132, 223 A.3d at 950, and the legislative history shows the intent to broaden the application of FDCPA's protections for Maryland consumers, this Court should rule that § 14-202(11) applies to all collectors under the MCDCA, and not just a "debt collector" under the FDCPA.

C. The Damages for Collecting Illegal Charges, Such as Rent Prohibited Under Baltimore City Code, Art. 13 § 5-4(a)(2), is the Amount of Illegally Collected Charge

Assanah-Carroll and the other tenants of the Property suffered damages under the MDCDA in the amount of all illegal charges collected by E.T.G. and Roizman that were prohibited under Baltimore City Code, Art. 13, § 5-4(a). The MCDCA provides that "[a] collector who violates any provision of this subtitle is liable for damages proximately caused by the violation, including damages for emotional distress or mental anguish suffered with or without accompanying physical injury." Md. Code, Comm. L. § 14–203. E.T.G. and Roizman violated § 14-202(8) and § 14-202(11) by collecting rent in violation of the City Code, and thus illegally took and are currently retaining money from Assanah-Carroll and other tenants of the Property. These are illegal payments extracted

from tenants on threat of eviction, as can be seen by the filing to evict Assanah-Carroll for alleged rent incurred during the eviction. App 10. This is the injury Assanah-Carroll and the proposed class are seeking to address; but-for the illegal collection and retention of rent, in violation of § 14-202(8) and § 14-202(11), the tenants would have that money.

This result is consistent with recent opinions from this Court. In *Chavis*, this Court held that the plaintiffs had stated a claim under the MCDCA against debt collection attorneys who were charging the general 10% post-judgment interest on judgments obtained against tenants for unpaid rent, despite a specific Maryland statute stating that the "interest on a money judgment for rent of shall be at the rate of 6 percent per annum on the amount of the judgment." *Chavis*, slip op. at 38. Thus, because the law said that the rate is 6 percent, knowingly charging any more than what is legal is a violation of the MCDCA and the former tenants had stated a claim under the MCDCA. *Id*. This analysis did not require some determination that the 10% interest illegally being charged was not "fair," only that it exceeded the amount permitted by law.

Similarly, in *Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 258 A.3d 296 (2021), this Court held that the plaintiff had "adequately pled the elements of a cause of action under CL § 14-202(8)" by pleading that Nationstar knowingly assessed property inspection fees that were prohibited by law. *Id*. at 193, 258 A.3d at 322. Again, this holding did not require a determination that the property inspection fees were not "fair" or that the plaintiff did not have their property inspected, only that the charges were not permitted by law.

III. E.T.G. and Roizman Are Liable under the Maryland Consumer Protection Act Because They Collected Illegal Rent

E.T.G. and Roizman also violated the MCPA by collecting and retaining rent in violation of § 5-4(a)(2). The MCPA prohibits the use of any unfair, abusive or deceptive trade practice in "[t]he sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services" Md. Code, Comm. L. § 13-303 (1). Under Md. Code, Comm. L. § 13-301 (14)(iii), any violation of the MCDCA is included in the definition of "[u]nfair, abusive, or deceptive trade practices." Moreover, "[u]nfair, abusive or deceptive trade practices include … False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers; [and] Failure to state a material fact if the failure deceives or tends to deceive." Md. Code, Comm. L. § 13-301 (1), (3).

There can be little question that the collection or rent in violation of § 5-4(a)(2) is an "unfair, abusive or deceptive trade practice" under the MCPA. Damages are also clear, as § 5-4(a)(2) explicitly states that a landlord may not "accept [or] retain [] any rental payment" if they were unlicensed at the time the alleged rent was incurred or at the time the property was offered for lease. This is in sharp contrast to the ordinance at issue in *Citaramanis*, which was silent as to the question of whether an unlicensed landlord could accept or retain rent. *Citaramanis*, 328 Md. at 145 n. 1, 613 A.2d at 965 n. 1. The violation at issue in this case is not simply the unlicensed rental – it is the collection and retention of rent in direct violation of § 5-4(a)(2). Thus, while the plaintiffs in

Citaramanis were obligated to specify some injury from the fact that the property was unlicensed, here, Assanah-Carroll and other tenants who paid illegal rent are only required to show how they were injured by paying money that they were not legally required to pay and E.T.G. and Roizman were not legally permitted to accept or retain.

E.T.G. and Roizman may argue that if this framing of the violation and damages were permitted to be successful, then the plaintiffs in *Citaramanis* should have used the same framing and succeeded in that case. However, because the ordinance at issue in *Citaramanis* was silent as to whether an unlicensed landlord could collect rent incurred while the landlord was unlicensed, that argument would have begged the question of whether a landlord would be entitled to seek such rent without a license under the Howard County ordinances. Indeed, the *Citaramanis* Court explicitly avoided that question: "[h]ere we need not decide whether lack of the required rental housing license, in and of itself and without regard to the condition of the premises, would be sufficient to bar a landlord's claim for unpaid rent or for use and occupation." *Citaramanis*, 328 Md. at 158–59, 613 A.2d at 972. In contrast, because § 5-4(a)(2) explicitly decides that issue against the landlords and in favor of tenants, the collection of illegal rent constitutes damages.

This Court's recent opinion in *Velicky v. Copycat Bldg. LLC*, ––– Md. ––––, ––––, ––– A.3d ––––, 2021 WL 5562319 (2021) does not change this result. In *Velicky*, this Court ruled that an unlicensed Baltimore City landlord can still pursue a statutory action for tenant holding over, because unlike situations where an unlicensed landlord is attempting to enforce a contract (such as seeking rent) that is illegal, a landlord pursuing

a tenant holding over action is only enforcing a statutory right for the owner to regain possession. *Velicky*, slip op. at 42-43. In contrast, this case involves rent obligations under the contract, meaning that it directly implicates the general rules regarding illegal contracts in Maryland outlined above, including the requirement to defer to the legislature's determination of public policy that rent cannot be collected or retained.[5]

CONCLUSION

For the foregoing reasons, Assanah-Carroll respectfully requests the Court to rule that she has stated valid causes of action for the return of illegal rent under the MCDCA and MCPA.

Respectfully Submitted,

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[5] Although *Velicky* does cite *Citaramanis*, stating that a tenant could bring a private cause of action under the MCPA "where a landlord violates a local rental license law, and where the tenant can prove that the tenant suffered actual injury or loss in connection with the unlicensed status of the property," *Velicky*, slip op. at 31-33, this statement was made in the context of discussing various protections available to Maryland consumers, rather than a holding precluding a tenant from seeking damages for rent that is specifically prohibited by a valid ordinance.

VERBATIM TEXT OF PERTINENT STATUTES AND ORDINANCES

Baltimore City Code, Art. 13 § 5-4

(a) In general.

Except as provided in subsection (b) of this section, no person may:

(1) rent or offer to rent to another all or any part of any rental dwelling without a currently effective license to do so from the Housing Commissioner; or

(2) charge, accept, retain, or seek to collect any rental payment or other compensation for providing to another the occupancy of all or any part of any rental dwelling unless the person was licensed under this subtitle at both the time of offering to provide and the time of providing this occupancy.

(b) Exception.

A license is not required under this subtitle for any rental dwelling that is owned and operated by the Housing Authority of Baltimore City.

Md. Code, Comm. L. § 13-301

Unfair, abusive, or deceptive trade practices include any:

(1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;

…

(3) Failure to state a material fact if the failure deceives or tends to deceive;

…

(14) Violation of a provision of:

…

(iii) Title 14, Subtitle 2 of this article, the Maryland Consumer Debt Collection Act;

….

Md. Code, Comm. L. § 13-303

A person may not engage in any unfair, abusive, or deceptive trade practice, as defined in this subtitle or as further defined by the Division, in:

(1) The sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services;

(2) The offer for sale, lease, rental, loan, or bailment of consumer goods, consumer realty, or consumer services;

…

(5) The collection of consumer debts; or

….

Md. Code, Comm. L. § 13-408

(a) In addition to any action by the Division or Attorney General authorized by this title and any other action otherwise authorized by law, any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title.

(b) Any person who brings an action to recover for injury or loss under this section and who is awarded damages may also seek, and the court may award, reasonable attorney's fees.

(c) If it appears to the satisfaction of the court, at any time, that an action is brought in bad faith or is of a frivolous nature, the court may order the offending party to pay to the other party reasonable attorney's fees.

(d) Notwithstanding any other provision of this section, a person may not bring an action under this section to recover for injuries sustained as a result of the professional services provided by a health care provider, as defined in § 3-2A-01 of the Courts Article.

Md. Code, Comm. L. § 14-201

(a) In this subtitle the following words have the meanings indicated.

(b) “Collector” means a person collecting or attempting to collect an alleged debt arising out of a consumer transaction.

(c) “Consumer transaction” means any transaction involving a person seeking or acquiring real or personal property, services, money, or credit for personal, family, or household purposes.

(d) “Person” includes an individual, corporation, business trust, statutory trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity. In addition to any action by the Division or Attorney General authorized by this title and any other action otherwise authorized by law, any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title.

Md. Code, Comm. L. § 14-202

In collecting or attempting to collect an alleged debt a collector may not:

(1) Use or threaten force or violence;

(2) Threaten criminal prosecution, unless the transaction involved the violation of a criminal statute;

(3) Disclose or threaten to disclose information which affects the debtor's reputation for credit worthiness with knowledge that the information is false;

(4) Except as permitted by statute, contact a person's employer with respect to a delinquent indebtedness before obtaining final judgment against the debtor;

(5) Except as permitted by statute, disclose or threaten to disclose to a person other than the debtor or his spouse or, if the debtor is a minor, his parent, information which affects the debtor's reputation, whether or not for credit worthiness, with knowledge that the other person does not have a legitimate business need for the information;

(6) Communicate with the debtor or a person related to him with the frequency, at the unusual hours, or in any other manner as reasonably can be expected to abuse or harass the debtor;

(7) Use obscene or grossly abusive language in communicating with the debtor or a person related to him;

(8) Claim, attempt, or threaten to enforce a right with knowledge that the right does not exist;

(9) Use a communication which simulates legal or judicial process or gives the appearance of being authorized, issued, or approved by a government, governmental agency, or lawyer when it is not;

(10) Engage in unlicensed debt collection activity in violation of the Maryland Collection Agency Licensing Act; or

(11) Engage in any conduct that violates §§ 804 through 812 of the federal Fair Debt Collection Practices Act.

Md. Code, Comm. L. § 14-203

A collector who violates any provision of this subtitle is liable for any damages proximately caused by the violation, including damages for emotional distress or mental anguish suffered with or without accompanying physical injury.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 7,904 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

3. This brief was prepared in Times New Roman 13-point font.

/s/ Joseph Mack
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CERTIFICATE OF SERVICE

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