UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTGAGE RESOLUTION SERVICING, LLC, 1ST FIDELITY LOAN SERVICING, LLC, and S & A CAPITAL PARTNERS, INC., *Plaintiffs,*	:	No. 15-CV-00293 (LTS)(JCF)
- v. -	:	
JPMORGAN CHASE BANK, N.A., CHASE HOME FINANCE, LLC, and JPMORGAN CHASE & CO., *Defendants.*	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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Defendants JPMorgan Chase Bank, N.A., Chase Home Finance, LLC, and JPMorgan Chase & Co. ("Chase" or "Defendants") submit this Memorandum of Law in support of their motion to dismiss.[1]

PRELIMINARY STATEMENT

In 2009, Plaintiff Mortgage Resolution Servicing, LLC ("MRS") purchased a pool of distressed mortgage loans from Chase. Although the total face value of the loans exceeded $150,000,000, Plaintiff paid only $200,000 for the pool. Consistent with this low purchase price, Plaintiff agreed to buy the loans "AS IS" and with "NO RECOURSE WHATSOEVER." Plaintiffs nevertheless filed this action after becoming dissatisfied with the loans.

The crux of Plaintiffs' claim is that Chase breached the terms of the mortgage purchase contract by delivering loans that did not conform to Chase's alleged representations regarding the nature and quality of the loans. Based on the same set of allegations, Plaintiffs also assert a laundry list of quasi-contractual and tort claims against Chase. Plaintiffs allege, for example, that Chase committed fraud by misrepresenting the quality of the loans purchased by MRS. These claims are wholly duplicative of Plaintiffs' breach of contract claims and should be dismissed for that reason, among others.

Separate and apart from their contractual and quasi-contractual claims, Plaintiffs allege that Chase has engaged in a wide-ranging conspiracy to evade its legal obligations to the federal government by "dumping" problematic loans on Plaintiffs. Based on these fanciful allegations, Plaintiffs seek punitive and treble damages on intentional tort and civil RICO

[1] Solely for purposes of this motion, Chase assumes the truth of all of the allegations in the Second Amended Complaint.

theories. Even accepting Plaintiffs' allegations as true, however, they fail to plead the elements of either their intentional tort or RICO claims.

For these reasons, as more fully explained below, the Court should dismiss Plaintiffs' claims in their entirety.

BACKGROUND

Plaintiffs MRS, 1st Fidelity Loan Servicing, LLC, and S&A Capital Partners, Inc. (collectively, "Plaintiffs") filed this lawsuit on December 24, 2014, in New York State Supreme Court. After Chase timely removed the action to this Court, Plaintiffs filed the operative Second Amended Complaint ("SAC" or "complaint") on March 31, 2015.[2] In the SAC, Plaintiffs assert a series of common law claims under New York law, as well as a federal RICO claim and a New Jersey consumer protection claim.

The allegations in the complaint fall into three general categories: (1) allegations that Chase breached a contract to sell a pool of loans to MRS; (2) allegations relating to post-sale communications from Chase regarding a handful of loans it sold to Plaintiffs; and (3) allegations relating to a purported conspiracy by Chase to evade its alleged obligations under federal law. These three categories are discussed below.

A. Allegations Regarding The Mortgage Loan Purchase Agreement

The complaint alleges that Plaintiff MRS entered into a Mortgage Loan Purchase Agreement ("MLPA") with Defendant Chase Home Finance, LLC to acquire certain distressed mortgage loans on or about February 25, 2009. *See* SAC ¶¶ 9, 35. Although the balance due on

[2] A true and correct copy of the Second Amended Complaint is attached as Exhibit A to the declaration of Michael M. Maya, submitted herewith.

the loans in question exceeded $150,000,000, MRS paid only $200,000 for the loans – less than a penny on the dollar. *See id.* ¶¶ 32-33, 35.

Consistent with the low price it paid for the loans, MRS agreed (with limited exceptions) to acquire the loans "AS IS," with "NO RECOURSE" against Chase:

> Purchaser acknowledges that it has had an opportunity to conduct a due diligence review of each Mortgage Loan. Purchaser acknowledges and agrees that, notwithstanding the results of such due diligence and notwithstanding any failure of Purchase[r] to conduct a due diligence review of any Mortgage Loan, Purchaser will purchase the Mortgage Loans pursuant to this Agreement AS IS with no representations and warranties except as expressly provided herein, and with NO RECOURSE whatsoever to Seller.

MLPA § 4; *see also id.* § 6(c) ("Except as otherwise expressly provided herein, each Mortgage Loan is being sold . . . on an 'AS IS, WHERE IS, WITH ALL FAULTS' basis with NO RECOURSE WHATSOEVER. . . .").[3]

Notwithstanding these provisions, Plaintiffs allege that Chase breached the MLPA, *inter alia*, by (1) including loans other than "first lien mortgage loans" in the loan pool, (2) failing to provide certain "servicing information" relating to the loans, and (3) "failing to disclose that the loans sold to Plaintiffs were not serviced in accordance with state and federal law." SAC ¶¶ 154, 156. These same allegations form the basis for most of Plaintiffs' quasi-contractual and tort claims. *See, e.g.*, *id.* ¶¶ 160-62, 164-67, 177-81, 190-98, 201-07, 234-38.

B. Allegations Regarding Post-Sale Communications By Chase

Between September 2012 and January 2013, Chase allegedly sent more than 50,000 "debt forgiveness letters" to borrowers pursuant to a settlement (the National Mortgage Settlement or "NMS") that Chase and other mortgage servicers entered into with the federal

[3] A true and correct copy of the MLPA is attached as Exhibit B to the Declaration of Michael M. Maya, submitted herewith.

government.[4] *See* SAC ¶¶ 89-91. The complaint asserts that Chase mistakenly sent a handful of these letters to borrowers whose loans previously had been purchased by Plaintiffs. *Id.* ¶ 92. According to Plaintiffs, the error occurred because Chase's database prevented it "from being able to determine which borrowers' loans had previously been sold by Chase." *Id.* ¶ 102.

As the complaint acknowledges, after learning that a small number of debt forgiveness letters had been sent in error, Chase apologized and offered to buy back the affected loans from Plaintiffs. SAC ¶¶ 98-99. In total, Chase has already paid Plaintiffs more than $400,000 to buy back loans – a sum that doubles what MRS paid Chase to purchase the entire loan pool addressed in the MLPA. *See* SAC ¶¶ 103-04.

Plaintiffs similarly allege that, in late 2013, Chase erroneously recorded releases of liens that secured a number of the loans purchased by Plaintiffs. SAC ¶¶ 106-07. According to the complaint, these erroneous releases were the result of "corrupted . . . data." *See id.* ¶ 146. As Plaintiffs acknowledge, Chase corrected a number of erroneously recorded releases shortly after they were sent. *Id.* ¶ 108. Plaintiffs fail to identify any injury they sustained as a result of the filing (or subsequent withdrawals) of the lien releases at issue.

Based on these allegations, Plaintiffs assert a number of common law tort claims against Chase, including tortious interference with contract, defamation, and slander of title. *See* SAC ¶¶ 182-88, 208-32.

C. Allegations Regarding Purported Mortgage Servicing Violations

Plaintiffs also allege that Chase is engaged in a wide-ranging, criminal conspiracy designed to evade its obligations under (1) federal laws governing mortgage servicing; (2) the

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[4] The NMS, among other things, required lenders to forgive or modify the terms of certain consumer mortgage loans. *See* SAC ¶¶ 90, 94.

NMS, and (3) the federal Home Affordable Modification Program ("HAMP").[5] *See, e.g.*, SAC ¶¶ 5, 38,135-36, 149; *see generally id.* ¶¶ 112-149, 246-48.

According to Plaintiffs, Chase created a "hidden" set of books – known as Recovery One or RCV1 – that it used to circumvent its obligations under the NMS, HAMP, and federal law. *See, e.g.*, SAC ¶¶ 2-4, 51-54, 114-18. Plaintiffs allege that the RCV1 database is plagued by corrupt data and "is not a platform which can perform the normal, customary and required servicing functions for federally related mortgages." SAC ¶ 53. As a result, Plaintiffs assert that the loans contained in RCV1 are not "capable of being serviced, updated or maintained . . . in compliance with applicable laws," *id.*, do not meet the "requirements established for them to qualify for incentive payments through [HAMP]," *id.* ¶ 136, and violate various requirements imposed by the NMS, *see id.* ¶¶ 138, 141, 149.

According to the complaint, Chase sought to "conceal" these alleged violations by "dumping" the purportedly problematic loans on Plaintiffs and setting Plaintiffs up as a "scapegoat" for Chase's allegedly improper conduct. SAC ¶¶ 130-32, 248. On this basis, Plaintiffs assert that Chase committed intentional tort and RICO violations. *E.g.*, *id.* ¶¶ 246-50.

STANDARD OF REVIEW

To overcome a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

[5] Under HAMP, the federal government provides incentive payments to participating mortgage servicers that agree to modify the terms of qualified mortgage loans. SAC ¶ 135.

misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Claims grounded in fraud also must satisfy the heightened pleading standards of Rule 9(b), requiring that a plaintiff "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Allegations of fraud thus must specify the fraudulent statement, the time, place, speaker and content of the alleged misrepresentations, and factual circumstances giving rise to a strong inference that the defendant had the requisite fraudulent intent." *Morin v. Trupin*, 778 F. Supp. 711, 716 (S.D.N.Y. 1991) (internal citations omitted).

ARGUMENT

I. PLAINTIFFS' RICO CLAIM SHOULD BE DISMISSED.

A civil RICO action "is an unusually potent weapon – the litigation equivalent of a thermonuclear device." *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) (citation and quotation marks omitted), *aff'd*, 113 F.3d 1229 (2d Cir. 1997). For this reason, "courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Id.* (citation and quotation marks omitted). Here, Plaintiffs' RICO claim should be dismissed because they fail properly to allege the existence of a valid RICO "enterprise."

In order to state a RICO claim, a plaintiff must allege "facts supporting the existence of an 'enterprise.'" *Walzer v. Town of Orangetown*, 2015 WL 1539956, at *11 (S.D.N.Y. Apr. 7, 2015). In their original complaint (¶ 122), Plaintiffs alleged the existence of an enterprise consisting solely of Chase and its corporate affiliates.[6] As Chase pointed out in a pre-motion letter, however, a RICO plaintiff must allege a RICO "enterprise" that is distinct

[6] A true and correct copy of Plaintiffs' original complaint in this case is attached as Exhibit C to the declaration of Michael M. Maya, submitted herewith.

from the RICO "person" named as the defendant, and this distinctness requirement is not satisfied by alleging an enterprise consisting solely of a defendant corporation and its corporate affiliates. *See Zito v. Leasecomm Corp.*, 2003 WL 22251352, at *6, (S.D.N.Y. Sept. 30, 2003) ("[A] corporation and its wholly-owned subsidiary are not 'distinct' for the purposes of RICO . . . ."). In a strained attempt to overcome this flaw in their RICO claim, Plaintiffs now allege a RICO enterprise consisting of Chase, Plaintiffs, and the "homeowners on the loans that [Chase] sold to [Plaintiffs]." SAC ¶ 243. Under settled law, Plaintiffs' attempt to satisfy the distinctness requirement by asserting that the alleged *victims* of the RICO violations were part of the RICO enterprise is defective.

A RICO enterprise is "a group of persons associated together for a common purpose." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Accordingly, to plead an informal association-in-fact enterprise, a plaintiff must allege facts sufficient to demonstrate the "hierarchy, organization, and activities" of the enterprise and that "its members functioned as a unit." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174-75 (2d Cir. 2004) (citation and quotation marks omitted). The mere "naming of a string of entities does not adequately allege an enterprise." *Id.* (citation and quotation marks omitted).

Here, the complaint fails to allege any facts suggesting that Chase, Plaintiffs, and mortgage borrowers "have united together to 'function as a continuing unit' that has an actual existence, organization, and structure." *Manhattan Telecommcn's Corp. v. DialAmerica Marketing, Inc.*, 156 F. Supp. 2d 376, 382 (S.D.N.Y. 2001) (citing *Turkette*, 452 U.S. at 583). Rather, the complaint merely alleges a series of discrete commercial transactions between Chase and individual borrowers, on the one hand, and between Chase and Plaintiffs, on the other. These allegations fall far short of establishing the existence of a RICO enterprise. *See id.*

(dismissing alleged enterprise consisting of defendant and its customers as "a fiction created by plaintiff to circumvent the distinctness requirement"); *see also In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 82, 98-99 (D. Conn. 2014) (holding that "a classic 'hub-and-spoke' formation in which the spokes are separate, distinct and unassociated and whose actions are uncoordinated does not possess the requisite structure to constitute a RICO enterprise"); *Bonadio v. PHH Mortg. Corp.*, 2014 WL 522784, at *3 (S.D.N.Y. Jan. 31, 2014) (dismissing RICO claim where plaintiff's "only factual allegations relating to the enterprise are that its members had ongoing business relationships").

Nor do Plaintiffs adequately allege that the members of the purported enterprise shared a "common purpose." *Turkette*, 452 U.S. at 583. According to Plaintiffs, the "purpose of the enterprise was to [1] enable Defendants properly to unload defaulted mortgage loans, [2] enable [Plaintiffs] to build profitable servicing businesses with strong portfolios and high levels of recovery, and [3] enable homeowners to rebuild their credit and stay in their homes." SAC ¶ 243. By its terms, however, that allegation does not establish a *common* purpose among the members of the alleged enterprise. Rather, it amounts to little more than an allegation that Chase, Plaintiffs, and individual borrowers each had *separate* purposes that they achieved by entering into arm's-length commercial transactions with one another. Plaintiffs' enterprise allegations therefore fail as a matter of law. *See, e.g.*, *Manhattan Telecommcn's Corp.*, 156 F. Supp. 2d at 382-83 (collecting cases holding that a "vendor and its customers" do not share a common purpose).[7]

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[7] The Second Circuit, moreover, "requires that a nexus exist between the enterprise and the racketeering activity that is being conducted." *First Capital Asset Mgmt.*, 385 F.3d at 174. Here, none of the predicate acts alleged in the complaint – which consist of allegedly fraudulent mailings and wires sent by Chase to conceal its allegedly improper loan servicing activities (*see* (continued…)

Plaintiffs' enterprise allegations are further undermined by their assertion that Chase's purpose was to victimize Plaintiffs by "dumping" problematic loans on Plaintiffs and setting Plaintiffs up as a "scapegoat" for Chase's allegedly improper conduct. SAC ¶¶ 129-30; *see id.* ¶ 248. Indeed, "it makes little sense to say that [Plaintiffs] w[ere] participant[s] in an enterprise whose guiding purpose was to bilk [Plaintiffs]." *Hansel 'N Gretel Brand, Inc. v. Savitsky*, 1997 WL 543088, at *3 (S.D.N.Y. Sept. 3, 1997), *abrogated on other grounds by Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212 (2nd Cir. 2004); *see R.C.M. Exec. Gallery Corp. v. Rols Capital Co.*, 1997 WL 27059, at *8 n.8 (S.D.N.Y. Jan. 23, 1997) (rejecting "allegation that the plaintiffs were part of an associated-in-fact enterprise to defraud themselves"); *see also Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994) ("[T]he 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity."); *Neiman Marcus Grp. v. Dispatch Transp. Corp.*, 2011 WL 1142922, at *7 ("[I]n the context of a § 1962(c) claim [the claimant] must allege that the enterprise is 'the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.'" (quoting *Nat'l Org. for Women, Inc.*, 510 U.S. at 259)).

In sum, Plaintiffs' RICO claims fail because they make no "concrete factual assertions as to the nature of the [enterprise members'] common interests and the mechanics of the interactions among [them]." *Cont'l Petroleum Corp. v. Corp. Funding Partners*, LLC, 2012 WL 1231775, at *6 (S.D.N.Y. Apr. 12, 2012).

SAC ¶¶ 247-48) – has any nexus with the entirely benign enterprise alleged in paragraph 243 of the complaint.

II. PLAINTIFFS' BREACH OF CONTRACT CLAIM SHOULD BE DISMISSED.

Plaintiffs assert that Chase breached the MLPA by allegedly selling loans of an inferior quality and by failing to provide certain information regarding the loans. *See* SAC ¶ 154. This claim is belied by the plain language of the MLPA, which states that the loans were being sold "as is" and without any further recourse against Chase. *See* MLPA §§ 4, 6(c).

In the MLPA, MRS acknowledged that – before purchasing any loans from Chase – it "had an opportunity to conduct a due diligence review of each Mortgage Loan." MLPA § 4. MRS, moreover, expressly agreed that

> notwithstanding the results of such due diligence and *notwithstanding any failure of Purchase[r] to conduct a due diligence review of any Mortgage Loan*, Purchaser will purchase the Mortgage Loans pursuant to this Agreement *AS IS* with no representations and warranties except as expressly provided herein, and *with NO RECOURSE whatsoever to Seller*.

Id. § 4 (emphasis added). The MLPA's representations and warranties, in turn, emphasized that, "[e]xcept as otherwise expressly provided herein, *each Mortgage Loan is being sold . . . on an 'AS IS, WHERE IS, WITH ALL FAULTS' basis* with *NO RECOURSE WHATSOEVER*." *Id.* § 6(c) (emphasis added).

These provisions foreclose Plaintiffs' breach of contract claim. The MLPA stipulates that Plaintiffs were given the opportunity to conduct as much due diligence regarding the loans as they wished, and further provides that Plaintiffs would have no recourse against Chase once they purchased the loans. The plain terms of the MLPA therefore preclude Plaintiffs

from asserting a claim regarding the quality of either the loans that they purchased or the loan documentation that they received.[8]

Plaintiffs fare no better with their assertion that Chase breached an implied covenant of good faith and fair dealing. *See* SAC ¶¶ 157. Under New York law, "the duty of good faith does not imply obligations inconsistent with contractual provisions." *Chase Equip. Leasing Inc. v. Architectural Air, L.L.C.*, 922 N.Y.S.2d 69, 70 (App. Div. 2011). Here, Plaintiffs improperly seek to imply obligations that are "flatly contradicted by the 'as is' clause and related disclaimer provisions" of the MPLA. *See, e.g.*, *Bd. of Managers of Chelsea 19 Condo. v. Chelsea 19 Assocs.*, 905 N.Y.S.2d 8, 10 (App. Div. 2010) (dismissing breach of contract claim).

III. PLAINTIFFS' COMMON LAW CLAIMS SHOULD BE DISMISSED.

In addition to their breach of contract claims, Plaintiffs assert a wide array of claims under New York common law.[9] Many of these claims, however, merely duplicate Plaintiffs' breach of contract claim. Under settled law, these duplicative claims have no independent force and therefore should be dismissed. *See, e.g.*, *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193-94 (N.Y. 1987) (dismissing tort and quasi-contractual claims as barred by the existence of a written agreement governing the same subject matter).

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[8] Plaintiffs also allege that Chase breached the MLPA by failing to service the loans in accordance with applicable law and argue that they "could . . . be[] held responsible" for Chase's purported servicing violations. *See* SAC ¶ 156. Plaintiffs, however, do not cite any basis (either in the MLPA or elsewhere) for the propositions (1) that Chase was required to continue "servicing" loans after they were charged off, or (2) that Plaintiffs could be held liable for Chase's alleged servicing violations. Nor do Plaintiffs identify who, if anyone, in fact has tried to hold them responsible for the purported servicing violations.

[9] Because Plaintiffs assert their common-law claims under New York law, *see* ECF Doc. No. 29-1, at 13-18 (attached as Exhibit D to the declaration of Michael M. Maya, submitted herewith), Defendants rely on New York law for purposes of this motion to dismiss.

For this reason and the additional reasons explained below, each of Plaintiffs' common law claims should be dismissed.

A. Unjust Enrichment

"The basic elements of an unjust enrichment claim in New York require proof that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). Moreover, "claims for unjust enrichment . . . are non-contractual, equitable remedies that are inapplicable if there is an enforceable contract governing the subject matter." *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 60 (2d Cir. 1997).

Plaintiffs assert that Chase improperly retained "post-sale loan payments" and other benefits after Chase sold the loans to MRS. SAC ¶ 177. The MLPA, however, contains express terms that govern the parties' entitlement to such payments. *See* MLPA § 3. Plaintiffs' unjust enrichment claim therefore fails as a matter of law. *E.g.*, *Clark-Fitzpatrick, Inc.*, 516 N.E.2d at 193 ("It is impermissible [] to seek damage in an action sounding in quasi contract . . . where [a valid written agreement] clearly covers the dispute between the parties.").

Plaintiffs also allege that Chase was unjustly enriched by a purported "fail[ure] to satisfy . . . legal liabilities for breach of servicing obligations." SAC ¶ 179. This allegation, too, fails to state a claim for relief because it duplicates Plaintiffs' breach of contract allegations. *See id.* ¶ 156 (alleging that Chase breached the MLPA by "failing to disclose that the loans sold to Plaintiffs were not serviced in accordance with state and federal laws").

This branch of the unjust enrichment claim is also defective because the claim requires a showing that the defendant received either money or a specific and direct benefit "at the expense of [the plaintiff]." *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000); *see MJ*

Savitt, Inc. v. Savitt, 2009 WL 691278, at *10 (S.D.N.Y. Mar. 17, 2009) ("It is not sufficient for defendant to receive some indirect benefit – the benefit received must be 'specific and direct' to support an unjust enrichment claim."). Plaintiffs do not allege any facts indicating that Chase's alleged failure to satisfy legal liabilities conferred a specific and direct benefit on Chase *at Plaintiffs' expense*. Accordingly, the unjust enrichment claim should be dismissed.

B. Promissory Estoppel

Plaintiffs' promissory estoppel claim likewise should be dismissed as duplicative of the breach of contract claim.

The existence of a written contract precludes recovery under a promissory estoppel theory if the claim arises out of the same subject matter covered by the contract. *See Grossman v. New York Life Ins. Co.*, 935 N.Y.S.2d 643, 991-92 (App. Div. 2011) (citing *Goldman v. Met. Life Ins. Co.*, 841 N.E.2d 742 (N.Y. 2005)). Here, Plaintiffs allege that Chase broke a promise to "deliver a materially complete Exhibit A" to the MLPA containing "sufficient information to permit proper servicing of the loans being sold." SAC ¶ 160. The MLPA, however, addresses the contents of Exhibit A and makes clear that Plaintiffs "had an opportunity to conduct a due diligence review" of the loans listed in that exhibit. *See* MPLA §§ 1, 2, 4. Alleged deficiencies in the contents of Exhibit A, moreover, are at the heart of Plaintiffs' breach of contract claim. *E.g.*, SAC ¶¶ 37, 41, 154. Because Plaintiffs' promissory estoppel claim arises out of the same subject matter as their breach of contract claim, it should be dismissed.

C. Conversion

Plaintiffs' conversion claim alleges that Defendants (1) "releas[ed]" liens "on loans previously sold to Plaintiffs" and (2) "collect[ed] payments on [loans] previously sold" to Plaintiffs. SAC ¶ 165. For the reasons explained below, neither of these allegations states a claim for relief.

Plaintiffs' allegation that Chase interfered with their contractual rights under certain mortgage liens fails to state a claim for conversion because an intangible contract right cannot support a conversion claim. Under New York law, a plaintiff asserting a conversion claim "must demonstrate legal ownership or an immediate superior right of possession to a *specific identifiable thing* and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights." *Hamlet at Willow Creek Dev. Co. v. Ne. Land Dev. Co.*, 878 N.Y.S.2d 97, 118 (App. Div. 2009) (emphasis added) (internal quotation marks omitted). Accordingly, "a claim for conversion will not arise where the claim involves appropriation of 'intangible property.'" *Anthracite Capital, Inc. v. MP-555 West Fifth Mezzanine, LLC*, 2005 WL 1155418, at *9 (S.D.N.Y. May 17, 2005) (quoting *Sporn v. MCA Records, Inc.*, 448 N.E.2d 1324, 1331 (N.Y. 1983)).

Here, Plaintiffs allege only that Defendants interfered with their "rights and interests" as lienholders (SAC ¶ 165); they do not allege that Chase exercised dominion over any tangible, personal property belonging to them. Their conversion claim should therefore be dismissed. *See Anthracite Capital*, 2005 WL 1155418, at *9 (holding that a "security interest is intangible property" and therefore "not subject to a conversion claim").

Plaintiffs' allegation that Chase improperly "collected payments on previously sold loans" also fails to support a conversion claim. *First*, where a conversion claim is "based on the same facts as [a] cause of action to recover damages for breach of contract, and fail[s] to allege [a] distinct, cognizable cause[] of action," the claim should be dismissed. *See Orok Edem v. Grandbelle Int'l, Inc.*, 988 N.Y.S.2d 244, 245 (App. Div. 2014); *see also In re Chateaugay Corp.*, 10 F.3d 944, 958 (2d Cir. 1993) (holding that claim for conversion "will not arise where plaintiff is essentially seeking enforcement of the bargain" (internal quotation marks omitted)).

Here, the MLPA contains express terms governing the parties' entitlement to payments made on the loans purchased by Plaintiff. *See* MLPA § 3. Accordingly, this branch of the conversion claim should be dismissed as duplicative of the breach of contract claim.

Second, New York law "requires the plaintiff to have 'ownership, possession or control of the money' before its conversion." *Traffix, Inc. v. Herold*, 269 F. Supp. 2d 223, 228 (S.D.N.Y. 2003) (citation omitted). Here, Plaintiffs do not allege – and cannot allege – that they had "ownership, possession or control" of the monies allegedly paid to Chase by homeowners immediately prior to the alleged conversion. For this reason, too, Plaintiffs' conversion claim should be dismissed.

D. Misrepresentation

Plaintiffs accuse Chase of fraud, fraudulent omission, and negligent misrepresentation on the ground that Chase allegedly made "misrepresentations and omissions regarding the nature and quality of the loans sold to Plaintiff MRS under the MLPA." SAC ¶ 201; *see also id.* ¶¶ 189-207. Each of their claims fails as a matter of law.

Under New York law, a misrepresentation claim should be dismissed as "duplicative of [a] breach of contract claim" where the alleged "misrepresentations relate[] to defendants' obligation under their agreements with [plaintiffs]." *RGH Liquidating Trust v. Deloitte & Touche LLP*, 851 N.Y.S.2d 31, 32-33 (App. Div. 2008).[10] Here, Plaintiffs' misrepresentation claims relate exclusively to Defendants' alleged failure to provide Plaintiffs

[10] *Accord MMCT, LLC v. JTR College Point, LLC*, 997 N.Y.S.2d 374, 376 (App. Div. 2014) ("[T]he fraudulent inducement claim duplicates the breach of contract claim because plaintiff has not alleged any representation that is collateral to the contract."); *Stewart v. Maitland*, 835 N.Y.S.2d 39, 40 (App. Div. 2007) ("The cause of action for fraud and negligent misrepresentation was duplicative of plaintiff's contract claim, inasmuch as it alleged no factual basis for recovery other than defendants' failure to keep promises. . . .").

with (1) "first lien, properly serviced loans," and (2) "full and customary servicing information" regarding those loans. *E.g.*, SAC ¶ 190. Because the MLPA is the exclusive source of any obligation that Chase had regarding the nature and quality of the loans sold to Plaintiffs and the accompanying loan documentation, Plaintiffs' fraud and negligent misrepresentation claims should be dismissed as duplicative of their contract claim.

Plaintiffs' negligent misrepresentation and fraudulent omission claims should be dismissed for an additional reason: Chase did not owe a duty of disclosure to Plaintiffs. *See Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1108 (N.Y. 2011) (holding that the existence of a "fiduciary duty" is required for a fraudulent omission claim); *id.* at 1009 (holding that the "existence of a special or privity-like relationship imposing a duty on the defendant" is required for a negligent misrepresentation claim). Here, the complaint fails adequately to allege the existence of anything more than an ordinary, arm's-length business relationship between Plaintiffs and Chase. Under well-established law, these allegations do not give rise to a disclosure obligation on the part of Chase. *See, e.g.*, *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) ("A duty to speak cannot arise simply because two parties may have been on opposite sides of a bargaining table when a deal was struck between them, for under New York law the ancient rule of *caveat emptor* is still alive and well."); *Silva Fun Worldwide, Ltd. v. Gaming Lottery Corp.*, 1998 WL 167330, at *11 (S.D.N.Y. Apr. 8, 1998) ("Something more than the trust and reliance between an ordinary buyer and seller must be established. An arm's length business transaction is insufficient." (internal quotation marks and citation omitted); *K.M.L. Labs., Ltd. v. Hopper*, 830 F. Supp. 159, 168 (E.D.N.Y. 1993) ("[A] conventional business relationship, without more, does not become a fiduciary relationship by mere allegation.").

E. Negligence

Plaintiffs' negligence claim fails for three independent reasons.

First, Plaintiffs' negligence claim is barred by New York's economic loss rule, which holds that "a plaintiff cannot recover in tort for purely economic losses caused by a defendant's negligence." *E.g.*, *King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 863 F. Supp. 2d 288, 302 (S.D.N.Y. 2012) (collecting cases), *rev'd in part on other grounds by* 2012 WL 11896326 (S.D.N.Y. Sept. 28, 2012). Because Plaintiffs fail to allege that they suffered any non-monetary harm as a result of Defendants' purported negligence, their negligence claim fails as a matter of law.

Second, under New York law, a negligence claim does not lie unless the defendant owed a duty to the plaintiff. *E.g.*, *OTG Brands, LLC v. Walgreen Co.*, 2015 WL 1499559, at *10 (S.D.N.Y. Mar. 31, 2015). "The duty must be independent of any contract" and there is generally "no duty of care between parties to an arm's-length business relationship." *Id.* (internal citations and quotation marks omitted). Here, Plaintiffs allege that Chase sent erroneous communications to borrowers (SAC ¶ 236), but they fail to allege any basis for asserting that Chase owed Plaintiffs a duty with respect to those communications – let alone a duty that is independent of the MLPA. For this reason, too, Plaintiffs' negligence claim should be dismissed.

Third, Plaintiffs' negligence claim is duplicative of their contract claim. Under New York law, a negligence claim that is "based on the same facts as the cause of action to recover damages for breach of contract" should be dismissed as duplicative. *See Orok Edem*, 988 N.Y.S.2d at 245. Here, the crux of Plaintiffs' negligence claim is that Chase failed "to exercise reasonable care and skill in performing [its] contract obligations." SAC ¶ 234. Under settled law, this allegation fails to state a claim. *See, e.g.*, *Clark-Fitzpatrick, Inc.*, 516 N.E.2d at

194 ("Merely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim.").

F. Tortious Interference with Contractual Relations

Under New York law, the elements of a claim for tortious interference are "(1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's *intentional and improper* inducement of the third party to breach that contract, and (4) damages." *Schmidt & Schmidt, Inc. v. Town of Charlton*, 962 N.Y.S.2d 393, 396 (App. Div. 2013) (emphasis added). Here, Plaintiffs allege that Chase interfered with their loan contracts by erroneously (1) "releas[ing] hundreds of liens," and (2) "notif[ying] certain borrowers that their loans had been discharged or forgiven." SAC ¶ 185. These allegations fail to satisfy the required elements of intent and damages.

First, Plaintiffs fail to allege that they were damaged by Chase's conduct. With respect to the allegation that Chase wrongfully released liens, Plaintiffs merely speculate about the possibility that future harm may result from the lien releases, notwithstanding Chase's subsequent withdrawal of those releases. *See* SAC ¶ 108. Plaintiffs do not, however, allege that any actual borrower has breached a contractual obligation because of an erroneous lien release – or even that any borrower was *aware* of such a release. Because their non-conclusory allegations of damages are "entirely speculative, the cause of action for tortious interference with prospective business relations should be dismissed." *Am. Preferred Prescription, Inc. v. Health Mgmt., Inc.*, 678 N.Y.S.2d 1, 5 (App. Div. 1998).

Similarly, with respect to the allegation that Chase sent erroneous debt forgiveness letters to certain borrowers, Plaintiffs' own allegations show that the Plaintiffs were not harmed. According to the complaint, shortly after Chase discovered that it had erroneously sent a small number of debt forgiveness letters regarding loans previously purchased by

Plaintiffs, Chase offered to buy back those loans. SAC ¶¶ 98-99. Plaintiffs, moreover, accepted Chase's offer and sold most of the loans at issue back to Chase at a premium – for more than $400,000, in total. *Id.* ¶¶ 103-04. Accordingly, Plaintiffs have not suffered damages as a result of the debt forgiveness letters.

Second, Plaintiffs fail to allege any facts indicating that Chase acted with the specific intent to interfere with Plaintiffs' contracts. In order to state a claim for tortious inference, a plaintiff must allege that "the defendant's procurement of the alleged breach was *solely malicious*." *Schmidt & Schmidt, Inc.,* 962 N.Y.S.2d at 396 (emphasis added) (internal quotation marks and citations omitted). Conduct that is "merely negligent" or "incidental to some other, lawful[] purpose" cannot give rise to a tortious interference claim. *Id.*

With respect to the debt forgiveness letters, Plaintiffs do not adequately allege that the letters were sent as part of a malicious attempt to injure Plaintiffs. To the contrary, the complaint alleges that Chase sent tens of thousands of these letters as part of the National Mortgage Settlement and that a relatively small number of them were erroneously sent to borrowers whose loans had been purchased by Plaintiffs. *See* SAC ¶¶ 89-91. Furthermore, to the extent that the complaint offers any conclusory allegations that Chase intended to harm Plaintiffs, those allegations are contradicted by the specific *facts* alleged in the complaint. For example, according to the complaint, the debt forgiveness letters were sent to Plaintiffs' customers because the RCV1 database did not accurately identify the loans that had previously been sold to Plaintiffs. *Id.* ¶¶ 101-02. These allegations at most suggest inadvertent error or negligence on the part of Chase, not the sort of malicious conduct required to state a claim for tortious interference.

Plaintiffs' allegations regarding the lien releases fail for similar reasons. Here again, Plaintiffs allege that the releases were filed as part of a bank-wide program, not that the releases were maliciously targeted at properties securing Plaintiffs' loans. SAC ¶ 106. Plaintiffs also acknowledge that, shortly after Chase discovered that certain releases had been recorded in error, it took steps to rescind the releases. *Id.* ¶¶ 107-08. Under these circumstances, Plaintiffs fail plausibly to allege that Chase recorded the releases with the specific intent to harm Plaintiffs.

G. Defamation

Plaintiffs' defamation claim should be dismissed because it is barred by the statute of limitations and does not satisfy the elements of the cause of action.

The statute of limitations for defamation claims is one year. *See* N.Y.C.P.L.R. § 215(3) (McKinney 2006). This one-year period begins to run on the date the defamatory statement is made; the discovery rule is inapplicable in defamation actions. *See Gelbard v. Bodary*, 706 N.Y.S.2d 801, 802 (App. Div. 2000) ("A cause of action for defamation accrues on the date of the first publication."). Here, Plaintiffs' defamation claim is based on debt forgiveness letters that Chase allegedly sent between September 13, 2012 and January 31, 2013. *See* SAC ¶ 91. Plaintiffs filed their original complaint in this action approximately two years later, on December 24, 2014. The defamation claim is therefore time-barred.[11]

Plaintiffs' defamation claim also fails on the merits. In order to state a claim for defamation, a plaintiff must allege that (1) the defendant made a false statement concerning the plaintiff, (2) the defendant published the statement to a third party without privilege or

[11] To the extent Plaintiffs mean to assert a defamation claim based on communications other than the debt forgiveness letters, the claim fails because Plaintiffs do not specifically identify any allegedly defamatory statement made by Chase after December 24, 2013. *See, e.g.*, *Rohn Padmore, Inc. v. LC Play Inc.*, 679 F. Supp. 2d 454, 460 (S.D.N.Y. 2010) (plaintiff must specifically allege the "time and manner" of each allegedly defamatory statement).

authorization, and (3) the statement either caused special harm or constitutes defamation per se. *See Salvatore v. Kumar*, 845 N.Y.S.2d 384, 388 (App. Div. 2007). The plaintiff, moreover, must "state the particular person or persons to whom [the] allegedly slanderous or libelous comments were made as well as the time and manner in which the publications were made." *Rohn Padmore, Inc. v. LC Play Inc.*, 679 F. Supp. 2d 454, 460 (S.D.N.Y. 2010). Plaintiffs' allegations fall far short of satisfying these requirements.

First, Plaintiffs have not identified a specific false statement that Chase published "of and concerning" Plaintiffs. *See Springer v. Viking Press*, 458 N.E.2d 1256 (N.Y. 1983). A statement cannot be "of and concerning" an entity if the entity is not mentioned in the publication. *See Carlucci v. Poughkeepsie Newspapers, Inc.*, 442 N.E.2d 442 (N.Y. 1982) (holding as a matter of law that an article was not "of and concerning" a corporation because the article never mentioned the corporation). Because Plaintiffs failed specifically to identify a statement made by Chase that mentioned Plaintiffs, their defamation claim is defective.

Second, Plaintiffs have not properly pleaded the required element of "special damages."[12] "Special damages consist of the loss of something having economic or pecuniary value" and "must flow directly from the injury to reputation caused by the defamation." *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 179 (2d Cir. 2000). A claim for special damages "must be fully and accurately stated, with sufficient particularity to identify actual losses." *Thai*

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[12] Plaintiffs are required to plead special damages because Chase's alleged statements would not constitute defamation *per se*. *See Salvatore*, 845 N.Y.S.2d at 388. Under New York law, a written statement is *per se* defamatory only "if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1309 (N.Y. 1977) (internal quotation marks and citations omitted). Here, Chase's allegedly defamatory written statements do not even mention Plaintiffs, let alone cast aspersions on them.

v. Cayre Group, Ltd., 726 F. Supp. 2d 323, 330 (S.D.N.Y. 2010) (internal quotation marks and citation omitted)); *see* Fed. R. Civ. P. 9(g) ("If an item of special damage is claimed, it must be specifically stated."). Here, while Plaintiffs allege that they have suffered "great loss and damage in their business as a result of Defendants' false statements" (SAC ¶ 219), this vague and conclusory allegation falls far short of pleading special damages with the requisite particularity.

For all these reasons, Plaintiffs' defamation claim should be dismissed.

H. Slander of Title

Plaintiffs' slander of title claim should be dismissed for the same reasons as their defamation claim: it is barred by the statute of limitations, and Plaintiffs have failed to plead the elements of the cause of action.

Like defamation, a slander of title claim is subject to a one-year statute of limitations. *See* N.Y.C.P.L.R. § 215(3) (McKinney 2006); *see also Memory's Garden, Inc. v. D'Amico*, 445 N.Y.S.2d 45, 46 (App. Div. 1981) ("Slander causes of action accrue on the day the alleged slander is uttered, not on the date of discovery."). Plaintiffs' slander of title claim is based on the same communications as their defamation claim, *see* SAC ¶ 227, and is therefore time-barred for the same reasons as their defamation claim. *See* Part III.G, *supra*.

Plaintiffs' slander of title allegations also fail to state a claim for relief. To bring a claim for slander of title, a plaintiff must plead a communication that (1) falsely casts doubt on the validity of the plaintiff's title, (2) was reasonably calculated to cause harm, and (3) caused special damages. *See 39 College Point Corp. v. Transpac Capital Corp.*, 810 N.Y.S.2d 520, 521 (App. Div. 2006). The complaint must "allege facts with sufficient particularity so that the falsehood and intent to cause harm are clear." *Pawaroo v. Countrywide Bank*, 2010 WL 1048822, at *6 (E.D.N.Y. Mar. 18, 2010).

As with their tortious interference claim, Plaintiffs have not alleged any facts suggesting that Chase sent debt forgiveness letters – or made any other statements – with the specific intent to injure Plaintiffs. *See* Part III.F, *supra*. Their slander of title claim therefore fails as a matter of law. *See Fink v. Shawangunk Conservancy, Inc.*, 790 N.Y.S.2d 249, 251 (App. Div. 2005) (affirming dismissal of slander of title claim where there was "no evidence of the malicious intent necessary to support a cause of action for slander of title").

Finally, as with their defamation claim, Plaintiffs have not identified any special damages resulting from the alleged slander. Although Plaintiffs offer a wholly conclusory assertion that they "are incurring special damages" (SAC ¶ 231), they fail to plead these damages with the required specificity. *See Pawaroo*, 2010 WL 1048822, at *6; *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1116 (S.D.N.Y. 1992); *see also* Part III.G, *supra*.

I. Unfair Competition

Plaintiffs' unfair competition claim should be dismissed because the complaint does not adequately allege the elements of such a claim. "[T]o sustain [an unfair competition claim], the plaintiffs must show [1] that the defendants misappropriated the plaintiffs' labors, skills, expenditures, or good will and [2] displayed some element of bad faith in doing so." *Abe's Rooms, Inc. v. Space Hunters, Inc.*, 833 N.Y.S.2d 138, 140 (App. Div. 2007). "By definition, competition is fundamental to any unfair competition claim. Where there is no competition, there can be no unfair competition." *EMI Music Mktg. v. Avatar Records, Inc.*, 317 F. Supp. 2d 412, 423 (S.D.N.Y. 2004).

Plaintiffs' unfair competition claim fails because Chase and Plaintiffs are "engage[d] in different businesses" and "are not competitors in any sense of that word." *See id.* Plaintiffs allege that they were injured by Chase in its capacity as Plaintiffs' supplier, not their competitor. Moreover, Plaintiffs allege only that Defendants "unfairly misappropriated

Plaintiffs' property" (SAC ¶ 171) – not their "labor, skills, expenditures, or good will." Accordingly, Plaintiffs' unfair competition claim fails as a matter of law.[13]

IV. PLAINTIFFS' NEW JERSEY CONSUMER FRAUD CLAIM SHOULD BE DISMISSED.

Plaintiffs' New Jersey Consumer Fraud Act ("NJCFA") claim should be dismissed because New Jersey law does not apply to Plaintiffs' claims.

Under New York conflicts-of-law rules, courts must employ an "interest analysis" in order to determine whether Plaintiffs may bring a consumer protection claim under a New Jersey statute. *See, e.g.*, *Watts v. Jackson Hewitt Tax Serv. Inc.*, 579 F. Supp. 2d 334, 345 (E.D.N.Y. 2008). Under this analysis, the court must determine the jurisdiction that has "the greatest interest in the litigation," as determined by the "facts or contacts which . . . relate to the particular law in conflict." *Id.* (internal quotation marks and citation omitted). Because New Jersey is not the jurisdiction with the greatest interest in the outcome of this litigation, the NJCFA claim should be dismissed. *See id.*

The allegations of the complaint belie any assertion that New Jersey has a substantial interest – let alone the "greatest interest" – in this matter. The gravamen of the parties' dispute relates to Chase's conduct under an alleged contract governed by New York law. *See* MLPA § 15. At the time the suit was filed, none of the Defendants was located in New Jersey. SAC ¶¶ 10-12. Plaintiffs are located in Florida, not New Jersey. *See id.* ¶¶ 7-9. Finally, none of the conduct or injuries asserted in the complaint is alleged to have occurred in New

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[13] Where a complaint "concludes that [defendants] acted in bad faith without proffering any facts to make that conclusion plausible," the unfair competition claim "will be dismissed." *Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.*, 2011 WL 1327137, at *6 (S.D.N.Y. Mar. 31, 2011). Here, Plaintiffs' conclusory allegation that Chase acted in "bad faith" by sending debt forgiveness letters and recording lien releases (*see* SAC ¶¶ 171-74) is not plausible. *See* Part III.F, *supra*. For this reason, too, Plaintiffs' unfair competition claim should be dismissed.

Jersey. Accordingly, the NJCFA claim fails as a matter of law. *See Watts*, 579 F. Supp. 2d at 345 (dismissing NJCFA claim because New Jersey did not have the greatest interest in applying its consumer protection law to the facts of the case).

CONCLUSION

For the foregoing reasons, the complaint should be dismissed in its entirety.

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