UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS FOUR THROUGH NINE OF PLAINTIFFS' THIRD AMENDED COMPLAINT

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Defendants JPMorgan Chase Bank, N.A., JPMorgan Chase & Co., and Chase Home Finance, LLC (collectively, "Chase" or "Defendants") submit this Memorandum of Law in support of their motion to dismiss counts four through nine of the Third Amended Complaint ("TAC" or "complaint").[1]

PRELIMINARY STATEMENT

The crux of Plaintiffs' allegations is that Chase breached the terms of certain contracts to sell distressed mortgage loans to Plaintiffs. Plaintiffs, however, improperly seek to transform a straightforward breach of contract case into a sprawling dispute about whether Chase violated the RICO statute and committed a series of intentional torts. The Court should dismiss Plaintiffs' far-fetched RICO and tort claims on multiple grounds.

The RICO Claim. Plaintiffs allege that Chase engaged in a widespread criminal conspiracy to evade its obligations under a pair of settlement agreements with the federal government. According to the complaint, Chase purported to forgive certain mortgage loans that it no longer owned in a fraudulent effort to obtain "credit" for consumer relief that it was required to provide under the settlements. On that basis, Plaintiffs accuse Chase of violating the RICO statute and seek treble damages for the injuries they supposedly suffered at the hands of the alleged conspiracy. Even assuming the truth of these extraordinary allegations, this claim fails for two independent reasons.

First, Plaintiffs do not adequately allege the existence of a RICO enterprise. Under RICO, a plaintiff must allege the existence of a criminal enterprise with both an identifiable "structure" and a "common purpose." Plaintiffs vaguely allege the existence of an

[1] A true and correct copy of the TAC (ECF Doc. No. 67) is attached as Exhibit A to the declaration of Michael M. Maya, submitted herewith. Solely for purposes of this motion, Chase assumes the truth of the allegations in the TAC.

enterprise consisting of Chase and unidentified third parties that allegedly assisted Chase by mailing improper debt forgiveness letters and filing improper lien releases. But the complaint fails to plead any facts regarding the supposed interactions among the unnamed members of the purported enterprise. Nor does the complaint adequately allege that these unnamed parties shared a common purpose with Chase. Accordingly, Plaintiffs' enterprise allegations fall far short of establishing the existence of a RICO enterprise.

Second, Plaintiffs' allegations fail to satisfy RICO's "continuity" requirement. To state a civil RICO claim, a plaintiff must allege a series of related predicate acts that amount to or pose a threat of *continued* criminal activity. Here, Chase's purported criminal acts consisted of sending improper debt forgiveness letters and filing improper lien releases from late 2012 through late 2013. Under Second Circuit precedent, these allegations are far too limited in time and scope to satisfy the continuity requirement.

The Tort Claims. Separate and apart from the RICO claim, the complaint alleges that Chase breached the terms of a February 2009 contract under which it agreed to sell certain distressed mortgage loans to Plaintiff Mortgage Resolution Servicing, LLC ("MRS"). According to Plaintiffs, the loans that Chase delivered under the contract failed to meet the quality standards supposedly set forth in the contract. Plaintiffs also allege that Chase breached both the February 2009 contract and a handful of similar contracts by sending improper debt forgiveness letters and filing improper lien releases in connection with loans it had previously sold to Plaintiffs.

Plaintiffs go on to allege that the very same conduct that forms the basis of their breach of contract claims also subjects Chase to liability under a number of intentional tort theories. Under settled law, however, Plaintiffs' tort claims should be dismissed as duplicative

with the breach of contract claims. The tort claims also should be dismissed on the ground that Plaintiffs have not pleaded all of the elements of these claims.

BACKGROUND

A. Factual Allegations

The factual allegations in the complaint fall into three general categories: (1) allegations relating to the purported February 2009 debt sale contract between Chase and MRS, (2) allegations relating to the debt forgiveness letters and lien releases sent by Chase in 2012 and 2013, and (3) allegations relating to a purported conspiracy by Chase to evade its obligations under settlement agreements with the government. Each of these categories is discussed separately below.

1. Allegations Regarding The MLPA

The complaint alleges that Plaintiff MRS entered into a Mortgage Loan Purchase Agreement ("MLPA") with Chase to acquire certain distressed mortgage loans on or about February 25, 2009. TAC ¶¶ 1, 38. Although the balance due on the loans purchased by MRS exceeded $150 million, MRS paid only $200,000 for the loans – less than a penny on the dollar. *Id.* ¶¶ 38, 40. Consistent with the low price it paid for the loans, MRS agreed (with certain enumerated exceptions) to acquire the "nonperforming and/or impaired" loans "AS IS," with "NO RECOURSE" against Chase. *Id.* ¶¶ 38, 42. MRS nevertheless filed this action after becoming dissatisfied with the loans, seeking a jaw-dropping $300 million in damages. *Id.* at 44.

According to Plaintiffs, Chase breached the MLPA, *inter alia*, by (1) providing a "grossly deficient" schedule identifying the loans covered by the contract, (2) failing to provide certain "information and documents" relating to the purchased loans, (3) including loans other than "first lien mortgage loans" in the group of loans delivered to MRS, and (4) breaching a representation that the purchased loans had been serviced in accordance with "applicable law."

Id. ¶ 151; *see id.* ¶¶ 46-79. These same allegations form the basis for MRS's fraud and negligent misrepresentation claims. *Id.* ¶¶ 178, 186-87.

2. Allegations Regarding Debt Forgiveness Letters And Lien Releases

Under the April 2012 National Mortgage Settlement ("NMS"), Chase and four other loan servicers are required to forgive or modify the terms of certain mortgage loans. *Id.* ¶ 97. The complaint alleges that, between September 2012 and January 2013, Chase mailed approximately 50,000 "debt forgiveness letters" to borrowers with the "intent of fulfilling its consumer relief obligations under the NMS." *Id.* ¶ 103-04. The complaint further asserts that Chase mistakenly sent a small number of debt forgiveness letters to borrowers whose loans previously had been purchased by Plaintiffs. *Id.* ¶ 105. Plaintiffs acknowledge, however, that Chase promptly apologized for the error and offered to buy back the affected loans. *Id.* ¶ 109-10. Plaintiffs also concede that Chase has already paid them more than $400,000 to buy back three of these loans at "their full face value." *Id.* ¶ 119.

Plaintiffs similarly allege that, in October and November of 2013, Chase erroneously recorded releases of liens that secured a number of the loans purchased by Plaintiffs. *Id.* ¶¶ 135-37, 142-44. According to the complaint, Chase released these liens to avoid purported anti-blight responsibilities and, in its "eagerness," signed the releases without "any knowledge as to the relevant facts concerning each lien." *Id.* ¶¶ 134, 138, 140. Although the complaint asserts that Chase mistakenly released "hundreds" of liens that belonged to Plaintiffs, they identify only two instances in which they purportedly were harmed by an erroneous release. *Id.* ¶¶ 134, 142-43. Based on these allegations, Plaintiffs assert breach of contract claims, as well as claims for conversion, tortious interference with prospective economic advantage, and slander of title. *Id.* ¶¶ 152, 157, 162, 168-69, 172-73, 194.

3. Allegations Regarding Chase's Purported Criminal Conspiracy

Plaintiffs further allege that Chase engaged in a criminal conspiracy designed to evade its consumer relief obligations under both the NMS and a separate settlement relating to residential mortgage-backed securities (the "RMBS settlement"). *See, e.g.*, TAC ¶¶ 103, 132-33, 146-48; *see generally id.* ¶¶ 206-20. Based on these remarkable allegations, Plaintiffs seek treble damages and attorneys' fees under RICO. *Id.* ¶¶ 201-20; *see id.* at p. 45.

According to the complaint, Chase participated in a criminal enterprise whose "goal . . . was to induce the government[] . . . to believe that [Chase] had fulfilled [its] obligation to provide $8.2 billion of consumer relief when, in fact, [it] had not done so." *Id.* ¶ 210. Plaintiffs allege that this enterprise consisted of (1) Chase, (2) unidentified "outside services" purportedly involved in sending debt forgiveness letters, (3) employees of unspecified "entities" that assisted Chase in releasing liens, and (4) unnamed "debt collection agencies." *Id.* ¶ 204. The complaint makes no effort to explain the role that any of these unidentified participants allegedly played in the purported enterprise. Nor does it identify the manner in which the enterprise allegedly conducted its affairs.

The complaint also alleges that Chase engaged in "predicate acts" of criminal mail and wire fraud in furtherance of the alleged enterprise. *Id.* ¶ 209. The principal predicate acts alleged in the complaint – *i.e.*, the sending of improper debt forgiveness letters and lien releases – all are described as occurring between late 2012 and late 2013. *Id.* ¶ 212. Although Plaintiffs also assert that Chase committed RICO predicate acts in connection with the negotiation of the MLPA in 2008 and 2009, *see id.*, they do not explain how conduct that allegedly occurred in 2008 and 2009 supposedly furthered a scheme to evade Chase's obligations under the NMS and RMBS settlements that came into existence in 2012 and 2013, respectively.

B. Procedural History

Plaintiffs filed their original complaint in New York State Supreme Court in December 2014. The following month, Chase removed the action to this Court. Plaintiffs filed the operative Third Amended Complaint in this action on August 24, 2015.

Earlier, on May 22, 2015, Chase moved to transfer this action to the U.S. District Court for the District of Columbia. On October 28, 2015, Magistrate Judge Francis denied that motion. Judge Francis denied the motion largely because the MLPA contract contains a New York forum selection clause and because "[i]n one way or another, the plaintiffs' claims all stem from" mortgage purchase contracts. ECF Doc. No. 75, at 2; *see also id.* at 9 ("As a factual matter," Plaintiffs' tort claims "all arise from the business relationship created by the MPLA").[2]

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 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), which requires a plaintiff to "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

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[2] A true and correct copy of the Court's Memorandum and Order (ECF Doc. No. 75) is attached as Exhibit B to the declaration of Michael M. Maya, submitted herewith.

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). Rule 9(b)'s requirement to plead with particularity has "even greater urgency in civil RICO actions." *Id.* (internal quotation marks 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 Plaintiffs (1) have not adequately alleged a valid RICO enterprise, and (2) have not satisfied RICO's continuity requirement.

A. Plaintiffs Fail To Allege The Existence Of A Valid RICO Enterprise.

Plaintiffs' RICO claim should be dismissed because they fail to 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, Plaintiffs alleged the existence of an enterprise consisting solely of Chase and its corporate affiliates.[3] As Chase pointed out in a pre-motion letter, however, a RICO plaintiff must allege an "enterprise" that is distinct from the RICO "person" named as the defendant, and this distinctness requirement cannot be satisfied by

[3] Compl. ¶ 122. 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.

alleging an enterprise consisting solely of a corporation and its corporate affiliates. *See, e.g.*, *Zito v. Leasecomm Corp.*, 2003 WL 22251352, at *6 (S.D.N.Y. Sept. 30, 2003).

In the latest iteration of their complaint, Plaintiffs attempt to circumvent the distinctness requirement by alleging an enterprise consisting of (1) Chase, (2) unnamed "debt collection agencies," (3) unnamed "outside services" that Chase allegedly used to help send debt forgiveness letters, and (4) unnamed third-party vendors who allegedly assisted Chase "in releasing liens on collateral that had been transferred to the Plaintiffs." TAC ¶ 204. Under settled authority, however, Plaintiffs' "veiled attempt to bypass the distinctness requirement" fails as a matter of law. *Manhattan Telecommc'ns Corp. v. DialAmerica Mktg., Inc.*, 156 F. Supp. 2d 376, 382 (S.D.N.Y. 2001).

A RICO enterprise is "a group of persons associated together for a common purpose." *United States v. Turkette*, 452 U.S. 576, 583 (1981). To plead an informal association-in-fact enterprise – as Plaintiffs attempt to do here – the complaint 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 (2d Cir. 2004) (citation and quotation marks omitted). The mere "naming of a string of entities does not adequately allege an enterprise." *Id.* at 175 (citation and quotation marks omitted).

Plaintiffs' complaint is entirely devoid of any factual allegations that Chase and its unidentified third-party service providers "have united together to 'function as a continuing unit' that has an actual existence, organization, and structure." *Manhattan Telecommc'ns Corp.*, 156 F. Supp. 2d at 382 (citing *Turkette*, 452 U.S. at 583). For example, the complaint "fail[s] to make any concrete factual assertions as to the mechanics of the interactions among" Chase and

the third parties with whom it allegedly partnered in a criminal enterprise. *Cont'l Petroleum Corp. v. Corp. Funding Partners, LLC*, 2012 WL 1231775, at *6 (S.D.N.Y. Apr. 12, 2012). Indeed, the complaint does not even identify the members of the purported enterprise by name. Nor does the complaint allege that the purported enterprise has any "organizational pattern or system of authority other than that embedded in the organization of [Chase]." *Manhattan Telecommcn's Corp.*, 156 F. Supp. 2d at 382 (internal citation and quotation marks omitted). Accordingly, Plaintiffs' allegations fall far short of establishing the structure and organization required of a RICO enterprise. *See id.* (dismissing alleged enterprise consisting of a vendor 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 the "only factual allegations relating to the enterprise are that its members had ongoing business relationships").

Plaintiffs likewise fail to 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 alleged enterprise was to induce the government "to believe that [Chase] had fulfilled [its] obligation to provide $8.2 billion of consumer relief" under the NMS and RMBS settlement "when, in fact, [Chase] had not done so." TAC ¶ 210. But Plaintiffs do not allege any facts even remotely suggesting that this alleged purpose was a *common* purpose shared by the various third-party vendors that allegedly participated in the enterprise. To the contrary, the only plausible inference from the facts asserted in the complaint is that any such vendors assisted Chase with

the mailing of debt forgiveness letters and the filing of lien releases for a fee, pursuant to arm's-length commercial transactions for the provision of mundane administrative support services.[4] Plaintiffs' conclusory allegation that Chase and its third-party vendors shared a common purpose therefore fails as a matter of law. *Manhattan Telecommc'ns Corp.*, 156 F. Supp. 2d at 382-83 (collecting cases holding that vendors and customers do not share a common purpose); *see Cont'l Petroleum Corp.*, 2012 WL 1231775, at *6 (dismissing RICO claim where there were no "concrete factual assertions as to the nature of the [enterprise members'] common interests"); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (liability under RICO "depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs" (citation and quotation marks omitted)).

In short, "no amount of artful pleading can create an enterprise out of such a loose connection of separate and independent business entities" as those alleged in the complaint. *Manhattan Telecommcn's Corp.*, 156 F. Supp. 2d at 383. Plaintiffs' RICO claim should therefore be dismissed for failure to plead the existence of a RICO enterprise.

B. Plaintiffs Do Not Satisfy RICO's Continuity Requirement.

Plaintiffs' RICO claim also fails because it does not satisfy RICO's continuity requirement. The RICO statute requires a plaintiff to establish that the defendant engaged in a "pattern of racketeering activity." 18 U.S.C. §§ 1961(5), 1962(c). Under settled precedent, a plaintiff must show that the predicate acts constituting the pattern "are related, *and* that they

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[4] Plaintiffs' allegations with respect to unnamed debt collection agencies fall especially far from the mark because Plaintiffs do not allege any facts suggesting that those agencies played any role in the purported scheme to evade Chase's obligations under the government settlements. *See First Capital Asset Mgmt., Inc.*, 385 F.3d at 174 ("This Court . . . requires that a nexus exist between the enterprise and the racketeering activity that is being conducted."); *see also Barnes v. MBNA Am. Bank, N.A.*, 2007 WL 2405010, at *3 (E.D. Wash. Aug. 17, 2007) (holding that the use of third-party debt collectors to collect a debt "does not constitute a RICO 'enterprise'").

amount to or pose a threat of *continued* criminal activity." *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (second emphasis added). Here, Plaintiffs have failed to allege that Chase engaged in the type of "continued criminal activity" necessary to establish a "pattern."

The continuity necessary to establish a pattern can be either "closed-ended" or "open-ended." *See id.* at 239, 241. In order to establish closed-ended continuity, a plaintiff must allege "a series of related predicates extending over a substantial period of time." *Id.* at 242. To establish open-ended continuity, the plaintiff must allege facts suggesting "a threat of continuing criminal activity beyond the period during which the predicate acts were performed." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999). Here, Plaintiffs' allegations fail to establish either type of continuity.

1. Open-ended continuity. Plaintiffs have not adequately pleaded open-ended continuity because Chase's purported efforts to evade its settlement obligations necessarily ends along with its settlement obligations. Where, as here, the defendants' business is not "primarily or inherently unlawful," a plaintiff seeking to establish open-ended continuity must allege either (1) "that the predicate acts were the regular way of operating that business" or (2) that "the nature of the predicate acts themselves implies a threat of continued criminal activity." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 185 (2d Cir. 2008). No such allegations exist here. To the contrary, the complaint alleges that the sole purpose of the purported RICO enterprise was to evade Chase's obligations under the NMS and RMBS settlement. TAC ¶ 206. Any such scheme would, by definition, conclude when Chase's settlement obligations terminate. Under established precedent, such "an 'inherently terminable' scheme does not imply a threat of continued racketeering activity." *Cofacredit, S.A.*, 187 F.3d at 244; *GICC Capital Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463, 466 (2d Cir. 1995) ("It defies logic to suggest that a threat of

continued looting activity exists when . . . there is nothing left to loot."); *see also Spool*, 520 F.3d at 186 (no open-ended continuity where complaint "alleges only 'a serious, but discrete and relatively short-lived scheme to defraud'").

Here, moreover, the operative complaint – which was filed in August 2015 – fails to allege any predicate acts occurring after 2013. As the Second Circuit has recognized, the failure to plead any recent predicate acts is fatal to the assertion that a defendant's alleged conduct poses an ongoing threat of criminal activity. *See First Capital Asset Mgmt., Inc.*, 385 F.3d at 181 (no threat of continued criminal activity where the last predicate act allegedly occurred approximately two years before the filing of the amended complaint). Accordingly, Plaintiffs have failed to plead open-ended continuity.

2. Closed-ended continuity. Nor have Plaintiffs adequately pleaded closed-ended continuity, *i.e.*, "a series of related predicates extending over a substantial period of time." *H.J., Inc.*, 492 U.S. at 242. Since the Supreme Court decided *H.J., Inc.*, the Second Circuit has "never held a period of less than two years to constitute a 'substantial period of time'" for purposes of this requirement. *Reich v. Lopez*, 38 F. Supp. 3d 436, 452 (S.D.N.Y. 2014); *accord Aronov v. Mersini,* 2015 WL 1780164, at *5 (S.D.N.Y. Apr. 20, 2015). Here, all of the relevant predicate acts alleged in the complaint occurred over a 15-month period beginning in 2012, when Chase allegedly mailed its first batch of debt forgiveness letters, and ending in 2013, when Chase executed the final, allegedly improper lien release referenced in the complaint. TAC ¶ 212(g)-(h); *see also id.* ¶¶ 103-04, 142-44. Accordingly, Plaintiffs' allegations regarding the lien releases and debt forgiveness letters are insufficient to establish closed-ended continuity as a matter of law.

To be sure, the complaint also alleges a different set of predicate acts relating to the negotiation of the MLPA in 2008 and 2009. *Id.* ¶ 212(a)-(f). In order to constitute part of a "pattern of racketeering activity," however, the predicate acts must be "related." *H.J., Inc.*, 492 U.S. at 239; *see McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992) (disregarding "unrelated" predicate acts for purposes of the continuity requirement). "Predicate acts are 'related' for RICO purposes" only "when they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 97 (2d Cir. 1997) (internal quotation marks omitted). Here, the purported purpose of the supposed RICO enterprise was to enable Chase to evade its obligations under settlement agreements entered into in 2012 and 2013. Plainly, predicate acts that pre-date the settlements by more than two years could not have been done in furtherance of a scheme to evade Chase's settlement obligations. Accordingly, Plaintiffs may not rely on these earlier, "unrelated predicate acts" in order to "extend the duration of the [alleged] scheme." *Ray Larsen Assocs., Inc. v. Nikko Am., Inc.*, 1996 WL 442799, at *7 (S.D.N.Y. Aug. 6, 1996); *see Schlaifer Nance & Co.*, 119 F.3d at 97 (disregarding allegations regarding schemes to defraud that were "unrelated to the underlying enterprise").[5]

Plaintiffs have therefore failed to satisfy RICO's continuity requirement.

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[5] Nor do the 2008-09 alleged predicate acts, standing alone, give rise to a valid RICO claim. Among other infirmities, there is absolutely no nexus between the RICO enterprise alleged in the complaint (whose purported purpose was to evade obligations under 2012 and 2013 settlements) and the 2008-09 predicate acts (which relate entirely to a debt sale contract between Chase and Plaintiff MRS). *See, e.g.*, *First Capital Asset Mgmt., Inc.*, 385 F.3d at 174 ("This Court . . . requires that a nexus exist between the enterprise and the racketeering activity that is being conducted.").

II. PLAINTIFFS' TORT CLAIMS FAIL AS A MATTER OF LAW.

In addition to their RICO and breach of contract claims, Plaintiffs assert a number of tort claims under New York law. As Magistrate Judge Francis recognized, however, these tort claims all arise from Plaintiffs' debt-purchase contracts with Chase.[6] As a result, the tort claims should be dismissed as duplicative of Plaintiffs' breach of contract claims. *See, e.g.*, *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193-94 (N.Y. 1987) (dismissing tort claims as barred by the existence of a written agreement governing the same subject matter). The tort claims also should be dismissed for the additional reasons set forth below.

A. The Conversion Claim Should Be Dismissed.

Plaintiffs' conversion claim should be dismissed for several reasons.

First, the conversion claim is wholly duplicative of Plaintiffs' breach of contract claims. Under New York law, 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 a claim for conversion "will not arise where plaintiff is essentially seeking enforcement of the bargain" (internal quotation marks omitted)). That principle is dispositive here because the grounds for Plaintiffs' conversion claim and their breach of contract claims are identical. The conversion claim alleges that "Chase wrote forgiveness letters to borrowers whose loans it had sold to the Plaintiffs and released liens securing loans that Chase had sold to the

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[6] Maya Decl. Ex. B, at 9 ("[A]s a factual matter, MRS' claims for conversion, tortious interference, fraudulent inducement, negligent misrepresentation and slander of title all arise from the business relationship created by the MPLA."); *see also id.* at 2 ("In one way or another, the plaintiffs' claims all stem from their purchase of mortgage loans from the defendants.").

Plaintiffs." TAC ¶ 168. The breach of contract claims similarly allege that Chase breached its contracts by "forgiving loans it had previously sold to [Plaintiffs]" and "releasing mortgage liens securing loans previously sold to [Plaintiffs]." *Id.* ¶¶ 157, 162; *see also id.* at 152 (comparable allegations regarding MRS). The conversion claim should therefore be dismissed.

Second, Plaintiffs fail to allege essential elements of a conversion claim. Under New York law, "the mere right to payment cannot be the basis for a cause of action alleging conversion." *Barker v. Amorini*, 995 N.Y.S.2d 89, 91-92 (App. Div. 2014). Rather, 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, 113 (App. Div. 2009) (emphasis added) (internal quotation marks omitted); *accord Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985) (conversion requires "the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor"). Here, the complaint makes no effort to identify any "specific thing" over which Chase exercised unauthorized dominion and control, let alone anything over which Chase exercised dominion and control *to the complete exclusion* of Plaintiffs. Accordingly, the conversion claim fails as a matter of law.

Third, to the extent that Plaintiffs mean to argue that Chase exercised unauthorized dominion over certain payment obligations or liens, their conversion claim fails for an additional reason: a conversion claim requires the taking of *tangible* property. *See Anthracite Capital, Inc. v. MP-555 West Fifth Mezzanine, LLC*, 2005 WL 1155418, at *9 (S.D.N.Y. May 17, 2005) ("[A] claim for conversion will not arise where the claim involves appropriation of

'intangible property.'" (quoting *Sporn v. MCA Records, Inc.*, 448 N.E.2d 1324, 1327 (N.Y. 1983)), *aff'd*, 165 F. App'x 875 (2d Cir. 2005); *Star Contracting Co. v. McDonald's Corp.*, 608 N.Y.S.2d 327, 327 (App. Div. 1994) ("no cause of action lies for the conversion of intangible property"). Because payment obligations and liens are not tangible property, Plaintiffs' conversion claim should be dismissed. *See, e.g.*, *Anthracite Capital*, 2005 WL 1155418, at *9 (holding that a "security interest is intangible property" and therefore "not subject to a conversion claim").

B. The Tortious Interference Claim Should Be Dismissed.

Plaintiffs' claim for tortious interference with prospective economic advantage should be dismissed as duplicative of their contract claims and for failure to state a claim.

Plaintiffs' tortious interference claim is plainly duplicative of their contract claims. The gist of the claim is that Chase interfered with Plaintiffs' prospective economic advantage by "sending out forgiveness letters to borrowers whose loans it had sold to the Plaintiffs, and by releasing liens securing loans it had sold to the Plaintiffs." TAC ¶ 173. As explained above, these very same allegations form the basis for a portion of Plaintiffs' breach of contract claims. *Supra* pp. 4, 14-15; *see* TAC ¶¶ 152, 157, 162. Accordingly, the tortious interference claim should be dismissed. *See, e.g.*, *Plasticware, LLC v. Flint Hills Res., LP*, 852 F. Supp. 2d 398, 403 (S.D.N.Y. 2012) (dismissing tortious interference claim where "the crux of Plaintiff's allegations" was an alleged breach of contract); *Diario El Pais, S.L. v. The Nielsen Co.*, 2008 WL 4833012, at *6 (S.D.N.Y. Nov. 6, 2008) (dismissing tortious interference claim "[b]ecause Plaintiffs' claims are encompassed by the Contract").

Plaintiffs also fail to satisfy the "extremely high pleading standard" applicable to a claim for tortious interference. *Id.* at *7. "[A]n essential element of this tort is that the complaining party would have consummated a contract *but for* the interference of a third party."

Brown v. Bethlehem Terrace Assocs., 136 A.D.2d 222, 224 (N.Y. App. Div. 1988). Here, Plaintiffs make no effort to identify any contract that they would have consummated "but for" Chase's alleged tortious interference. Accordingly, their claim for tortious interference with prospective business advantage should be dismissed. *Id.*; *see Diario El Pais, S.L.*, 2008 WL 4833012, at *7 ("Plaintiffs must provide some factual allegations that but-for Defendant's alleged acts, Plaintiffs would have entered into contracts with specific [people].").

Plaintiffs also allege in passing that defendant JPMorgan Chase Bank tortiously interfered with contracts between Plaintiffs and JPMorgan Chase Bank's former subsidiary, Chase Home Finance. TAC ¶ 172. Even if Plaintiffs had asserted a claim for tortious interference with contract (and they did not), this claim would fail for several reasons. First, Plaintiffs have not alleged any facts indicating that the debt forgiveness letters and lien releases were sent with the "malicious" intent to harm Plaintiffs, as is required to state a claim for tortious interference with contract. *See Schmidt & Schmidt, Inc. v. Town of Charlton*, 103 A.D.3d 1011, 1013 (App. Div. 2013) ("merely negligent" conduct insufficient); *see also infra* pp. 18-19. Second, a parent company generally cannot tortiously interfere with the contracts of its subsidiaries. *See, e.g.*, *Houbigant, Inc. v. Dev. Specialists, Inc.*, 229 F. Supp. 2d 208, 222 (S.D.N.Y. 2002) ("[A] defendant cannot tortiously interfere with a contract if he is not a third party unrelated to the contract." (internal quotation marks omitted)). Third, as the complaint acknowledges, Chase Home Finance "merged into" JPMorgan Chase Bank in 2011. TAC ¶ 7. Because a party cannot tortiously interfere with its own contract, a claim of tortious interference against JPMorgan Chase Bank would fail as a matter of law. *See, e.g.*, *Finley v. Giacobbe*, 79 F.3d 1285, 1295 (2d Cir. 1996) ("[A] plaintiff bringing a tortious interference claim must show that the defendants were *not parties to the contract*.").

C. The Slander Of Title Claim Should Be Dismissed.

Plaintiffs' slander of title claim should be dismissed for each of the following reasons.

First, the slander of title claim is duplicative of the breach of contract claims. The basis for the slander of title claim is that Chase improperly sent debt forgiveness letters and filed lien releases in connection with loans it had sold to Plaintiffs. TAC ¶ 194. As explained above, the exact same assertions are among the grounds for Plaintiffs' breach of contract claims. *Supra* pp. 4, 14-15; *see* TAC ¶¶ 152, 157, 162. Accordingly, the slander of title claim should be dismissed. *See, e.g.*, *Clark-Fitzpatrick, Inc.*, 516 N.E.2d at 193-94.

Second, Plaintiffs fail to allege that Chase acted with the requisite intent. To state a claim for slander of title, a plaintiff must "allege that the defendant acted with 'malice.'" *Pawaroo v. Countrywide Bank*, 2010 WL 1048822, at *6 (E.D.N.Y. Mar. 18, 2010). "This requires that the complaint allege facts with sufficient particularity so that the . . . intent to cause harm [is] clear." *Id.* Here, Plaintiffs have not alleged any facts indicating that Chase sent debt forgiveness letters or released liens with the malicious intent to injure Plaintiffs. To the contrary, Plaintiffs allege that Chase recorded the lien releases "to avoid liability for urban blight" and that, in its "eagerness" to evade these purported obligations, Chase signed the releases without "any knowledge as to the relevant facts concerning each lien." TAC ¶¶ 138, 140. Similarly, the complaint alleges that Chase sent the forgiveness letters with the "intent of fulfilling its obligations" under the NMS. *Id.* ¶ 103. Plaintiffs, moreover, acknowledge that Chase "apologize[d]" after it realized that it had sent the letters in error and "offered to buy back the loans that it had forgiven." *Id.* ¶¶ 109-10. Accordingly, the complaint's specific factual allegations belie any assertion that Chase recorded the lien releases or sent the forgiveness letters with the specific intent of injuring Plaintiffs. The slander of title claim therefore fails as a matter

of law. *See, e.g.*, *Fink v. Shawangunk Conservancy, Inc.*, 790 N.Y.S.2d 249, 251 (App. Div. 2005) (affirming dismissal where there was "no evidence of the malicious intent necessary to support a cause of action for slander of title").

Third, Plaintiffs fail to allege the essential element of "special damages" with the requisite particularity. *E.g.*, *id.* "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 v. Cayre Grp., 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, the complaint fails to plead that Plaintiffs suffered any damages flowing directly from the alleged injury to their reputation, let alone with sufficient particularity to identify any actual losses. Their claim for slander of title should therefore be dismissed.[7]

Finally, Plaintiffs' claim is time-barred under New York's one-year statute of limitations. *See* N.Y.C.P.L.R. § 215(3) (McKinney 2006). Here, Plaintiffs' slander of title claim is based on (1) debt forgiveness letters that Chase allegedly sent between September 2012 and January 2013, and (2) lien releases that Chase allegedly executed in October and November of

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[7] Plaintiffs provide slightly more detail with respect to harm they purportedly suffered as a result of two specific debt forgiveness letters. *See* TAC ¶¶ 120-31. Even if the Court concludes that these allegations satisfy the heightened pleading standard for special damages (and it should not), Plaintiffs' vague and conclusory allegations regarding *other* purportedly slanderous communications are plainly insufficient.

2013. *See* TAC ¶¶ 103-04, 142-43, 194. Plaintiffs filed their original complaint on December 24, 2014. The slander of title claim is therefore time-barred.[8]

D. The Misrepresentation Claims Should Be Dismissed.

Plaintiff MRS also asserts claims for fraudulent inducement, fraud, fraudulent omission, and negligent misrepresentation in connection with the MLPA. *See* TAC ¶¶ 176-92. These allegations fail to state a claim for the reasons explained below.

First, the misrepresentation claims should be dismissed as duplicative of the contract claims. Under New York law, "where a fraud claim arises out of the same facts as plaintiff's breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties, the fraud claim is redundant and plaintiff's sole remedy is for breach of contract." *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 280 F.3d 175, 196 (2d Cir. 2001) (internal quotation marks omitted); *accord Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19 (2d Cir. 1996) (holding that "intentionally-false statements by [defendant] indicating his intent to perform under the contract" were "not sufficient to support a claim of fraud under New York law"). Thus, an allegedly false statement may give rise to a claim for fraud between contracting parties only if the statement was "collateral or extraneous to the contract." *Id.* at 20.[9]

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[8] To the extent Plaintiffs purport to assert a slander of title claim based on communications other than those identified with specificity in the complaint, the claim fails because slander of title claims must be pleaded with particularity. *See*, *e.g.*, *Pawaroo*, 2010 WL 1048822, at *6.

[9] New York law also permits a plaintiff to maintain a separate claim for fraud where the defendant owed the plaintiff "a legal duty separate from the duty to perform under the contract." *Bridgestone/Firestone*, 98 F.3d at 20. Chase, however, did not owe MRS any fiduciary or other duty giving rise to an independent disclosure obligation. *See infra* pp. 21-22.

Here, Chase's alleged misrepresentations were not collateral or extraneous to the MLPA. According to the complaint, Chase "induce[d]" MRS to enter into the MLPA by misrepresenting that (1) Chase "would provide a complete Exhibit A to the MLPA," (2) Chase "would provide all original loan documentation to MRS," (3) "the loans sold to MRS under the MLPA consisted of first lien mortgage loans," and (4) the loans had been "made and serviced in full compliance with applicable law." TAC ¶¶ 177-78. Plaintiffs allege, however, that the MLPA contained express terms addressing each of these items. *See id.* ¶ 49 (alleging that Chase had a "contractual obligation to provide a complete Exhibit A"); *id.* ¶ 65 (alleging that "Chase breached the MLPA by failing to provide MRS with assignments of the notes and mortgages for each of the loans"); *id.* ¶ 50 (alleging that Chase breached a contractual "obligation to sell MRS 'closed end first lien mortgage loans'"); *id.* ¶ 59 (alleging that Chase breached a "warranty that 'Each mortgage loan complies in all material respects with all applicable . . . laws'"); *see also id.* Ex. 3 (attaching MLPA). The misrepresentation claims should therefore be dismissed as duplicative of MRS's contract claim. *See, e.g.*, *RGH Liquidating Trust v. Deloitte & Touche LLP*, 851 N.Y.S.2d 31, 32-33 (App. Div. 2008) (affirming dismissal of fraud claims as "duplicative" where the alleged misrepresentations "related to defendants' obligation under their agreements" with the plaintiff).[10]

Second, the negligent misrepresentation and fraudulent omission claims also should be dismissed because Chase did not owe a duty of disclosure to MRS. *See Mandarin*

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[10] *See also 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."); *Four Finger Art Factory, Inc. v. Dinicola*, 2000 WL 145466, at *5 (S.D.N.Y. Feb. 9, 2000) (dismissing fraudulent inducement claim where "the contract contain[ed] a specific provision" relating to the subject matter of the alleged fraud).

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 fraud claim premised on omission or concealment); *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 to allege the existence of anything more than an ordinary, arm's-length business relationship between MRS 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." (quotation marks and citation omitted)).

CONCLUSION

For the foregoing reasons, counts four through nine of the complaint should be dismissed.

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