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,

v.

JPMORGAN CHASE BANK, N.A., CHASE HOME FINANCE, LLC, and JPMORGAN CHASE & CO.,

Defendants.

ORAL ARGUMENT REQUESTED

No. 15-cv-00293(LTS)(JCF)

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiffs S&A Capital Partners, Inc. ("S&A"), Mortgage Resolution Servicing, LLC ("MRS") and 1st Fidelity Loan Servicing, LLC ("1st Fidelity"), submit this memorandum of law in opposition to the motion of Defendants JPMorgan Chase Bank, N.A., JPMorgan Chase & Company, and Chase Home Finance LLC (collectively, "Chase" or "Defendants"), to dismiss counts four through nine of the Third Amended Complaint ("TAC").

PRELIMINARY STATEMENT

Plaintiffs purchased thousands of defaulted residential mortgage loans from Chase with the goal of working out payment plans with the borrowers to enable them to remain in their homes. (TAC ¶¶ 12, 13). Plaintiffs have asserted, in the first three counts of the Complaint, claims for breach of contract, which Chase has not moved to dismiss. However, the facts alleged in the Complaint constitute far more than simply a breach of contract. Chase obligated itself to provide $8 billion of consumer relief to homeowners under two separate settlement agreements with the government. As part of its concerted scheme to cheat the government and the homeowners out of that consumer relief, Chase engaged in a scheme to defraud that caused direct injury to the Plaintiffs.

Thus, the Complaint sets forth valid claims for Conversion (Count Four), Tortious Interference (Count Five), Fraud (Count Six), Negligent Misrepresentation (Count Seven), Slander of Title (Count Eight), and civil RICO (Count Nine). With regard to the common law tort claims, Chase argues that the claims are duplicative of the contract claims. However, New York law does not shield a party from tort liability simply because there is a contract in existence between the parties. Where a defendant's conduct is so egregious as to be outside the contemplation of the contract, New York provides a remedy in tort.

With regard to the RICO claim, Defendants' argument for dismissal ignores the Supreme Court's holding in *Boyle v. United States,* 556 U.S. 938, 948 (2009), that plaintiffs do not have to plead facts to show the intricate hierarchy, structure and activities of a RICO enterprise. Such an enterprise can indeed exist, as alleged here, where third party vendors "assist" Defendants in their criminal scheme. It is not necessary that the common purpose of a RICO enterprise be an improper one, although, in this case, we can show that the common purpose was improper. Moreover, Defendants' wrongful acts both predate their obligations under the settlements with the government in 2012 and 2013 and post-date the settlements, as demonstrated by illegal lien releases recorded as late as October 2014. Thus, the complaint satisfies the continuity requirement.

For the reasons set forth herein, Defendants' motion to dismiss should be denied in its entirety.

RELEVANT ALLEGATIONS IN THE THIRD AMENDED COMPLAINT

THE RICO SCHEME

Plaintiffs have pled that the Defendants, together with certain debt collection agencies, the outside services that sent out thousands of debt forgiveness letters, and the persons and entities that released liens on collateral that Chase had previously sold to the Plaintiffs, formed an enterprise as set forth in 16 U.S.C. § 1962(c) (TAC ¶ 208).[1] Defendants' purpose, through control of the enterprise, was to dump massive liabilities onto the Plaintiffs so that Defendants could not only be relieved of liability for urban blight but also so that Defendants could fulfill (fraudulently) their obligations to the government under the terms of the NMSA Consent Judgment and the RMBS Settlement which required Chase to provide $8.2 billion of consumer relief. (TAC ¶¶ 206-07, 210).

The scheme included multiple predicate acts. The first predicate act occurred when Chase's head of loan recovery knowingly misrepresented to Plaintiffs in 2008 that Chase was selling "closed end first lien residential mortgage loans" from which Defendants had decided to "walk away" based on a cost benefit analysis (TAC ¶ 212 a) when, in fact, Chase had decided to dump massive liabilities

[1] While by their very nature, some of the facts, including the identities of members of the enterprise, are known only to the Defendants prior to discovery, the facts that are known to the Plaintiffs are set forth in the TAC and below.

associated with the mortgage loans secured by homes in blighted urban areas onto the Plaintiffs. (TAC ¶ 212 a). Moreover, the majority of these loans were deficiency claims, not first lien mortgages. (TAC ¶¶ 212 a, 212 b). The scheme continued when Chase, using the assistance of numerous outside vendors, mailed out thousands of letters to homeowners forgiving loans Chase had sold to the Plaintiffs more than three years earlier and, beginning in September 2012, releasing vast numbers of mortgage liens on properties on which the mortgages had been sold to Plaintiffs. This conduct has continued at least through October 2014. (TAC ¶¶ 212 g, 212 h).

Past Dealings Between the Parties

S&A and 1st Fidelity respectively purchased 650 and 350 first and second lien mortgage loans from Defendants between 2005 and 2010, none of which were unsecured loans or deficiencies. (TAC ¶¶ 13-15). Through September 2008, there were no significant problems with these purchases. (TAC ¶ 17). Pursuant to the Master Mortgage Loan Sales Agreement ("MMLSA") between Chase as seller and S&A as purchaser, Chase duly provided all of the original documentation for each purchased loan and all of the files and records in its possession. (TAC ¶ 16).

Representations Regarding The First Lien Pool

In 2008, Chase represented to Plaintiffs that Chase wanted to sell a portfolio of first lien residential mortgages, mostly in parts of the country hardest hit by the housing crisis which "the highest levels of management" had made it an urgent priority to sell. In order to encourage plaintiffs to purchase the loan package, Chase represented that it contained some "cherries"—valuable loans that had been erroneously 'charged off,' removed from its primary System of Records and ported to Chase's Recovery department. (TAC ¶¶ 19-21).

The November 2008 Data Tape

In October 2008 Chase sent Plaintiffs a preliminary data tape of the loan package, which was grossly incomplete (TAC ¶ 22). This was followed by a second data tape in November 2008 (the

"November 2008 Data Tape"), which contained approximately 5,785 mortgage loans with an aggregate charge off balance of approximately $230 million, clearly identified the loans as first lien mortgages, but still lacked information including certain borrower names and collateral addresses. (TAC ¶ 24). In response to Plaintiffs' inquiry, Chase represented that it had all of the missing information from its recent acquisition of Washington Mutual, but had not yet converted the relevant data from Washington Mutual's system. (TAC ¶ 26).

<u>The "Cherries"</u>

Plaintiffs' due diligence revealed that the largest two loans on the November 2008 Data Tape, belonging to Ali Sayed and Ricardo Salinas, were both in excess of $500,000, fully secured and located in areas with houses valued over $1 million. (TAC ¶25). Chase represented that the loan sale had to close before the end of the year so that Chase could "get the loans off its books". (TAC ¶ 29). Despite these "cherries," in December 2008, Plaintiffs informed Defendants that they were not interested in making a competitive bid on the loans. (TAC ¶ 29).

Chase then offered to sell the loans to Plaintiffs for only $200,000 (TAC ¶ 30). Plaintiffs accepted this, based on their evaluation of the "cherries" on the November 2008 Data Tape, and Plaintiffs sent a formal offer to purchase approximately $100 million of "impaired first lien mortgage loans" on December 22, 2008 (TAC ¶¶ 31-32).

<u>The MLPA</u>

On February 4, 2009 Defendants finally provided Plaintiffs with the Mortgage Loan Purchase Agreement ("MLPA") for signature. It provided for the sale of 4,271 loans with an outstanding balance of over $172 million (more than $72 million more than Defendants had previously represented), but Defendants did not provide the list of loans being sold, to be drawn from the November 2008 Data Tape, which was supposed to form Exhibit A to the MLPA. (TAC ¶ 35). Plaintiffs requested a copy of the final data tape of the loans so it could be reviewed before signing the MLPA. Defendants represented that it would provide the final data tape after signature. (TAC ¶ 36).

The fully-executed version of the MLPA which Defendants sent to Plaintiffs on February 25, 2009 provided for the sale of 3,529 "nonperforming and/or impaired closed end first lien mortgage loans that are or have been delinquent for 180 days or more and have been or may otherwise be in default" with an outstanding balance of a little over $156 million. (TAC ¶ 38). Defendants then sent a data tape containing what purported to be Exhibit A (the "Corrupted List"). (TAC ¶¶ 39, 46).

<u>False Representations and Warranties in the MLPA</u>

Defendants made three key representations and warranties in the MLPA: (1) that the information on the data tape—*i.e.* the Corrupted List—"is true and correct in all material respects as of the date such data tape was compiled"; (2) that Defendants are the sole owner of the loans with full authority to sell them; and (3) that each loan "complies in all material respects with all applicable . . . laws" (TAC ¶ 43, TAC Exhibit 3 §6)

<u>Exhibit A was not true and correct</u>

The warranties made by Chase were false at the time they were made, both before and in connection with the MLPA. First, the Corrupted List, which Defendants did not even give to Plaintiffs until *after* the MLPA was executed, did not include the basic information necessary to service the loans. (TAC ¶ 46). Defendants represented that they would supplement the Corrupted List, representing that the deficiency was due to the difficulty of converting Washington Mutual's data to Chase's system when in fact the loans had not been originated by Washington Mutual and thus would not be on Washington Mutual's data system. (TAC ¶¶ 47-48). These deficiencies compelled Defendants to spend considerable amounts of time and money to research the borrower identities and information that had not been provided. (TAC ¶ 49).

Moreover, there were at least 685 duplications on the Corrupted List, with an approximate value of $22 million, some of which duplications even showed differing amounts for the same loan. (TAC ¶¶ 61-62). Even many of the unduplicated loans on the Corrupted List did not contain an accurate principal balance, but instead showed the amount Defendants charged off. (TAC ¶ 64).

Defendants sold loans they did not own

Contrary to the representation and warranty that Defendants owned the loans, the Corrupted List contained loans it had previously sold to third parties and loans Defendants had never owned. (TAC ¶ 60h). They belonged to various RMBS trusts with which Defendants had a servicing relationship. Defendants included them in the sale to avoid "non-reimbursable advances and expenses" (TAC ¶ 56) which increased MRS' liabilities on the loans.

The loans did not comply with applicable law

The loans did not comply with nearly all applicable laws. (TAC ¶¶ 59-60). For example, Defendants: (a) transferred the servicing of the loans to and from multiple unlicensed and unregulated debt collection agencies; (b) provided them with false and misleading information; (c) failed to keep proper records of escrow accounts; (d) stripped most of the origination documentation from the loan files, including federal disclosures and good faith estimates, such that Plaintiffs could not respond to borrower or regulatory inquiries; (e) failed to provide accurate borrower payment histories; and (f) knowingly assigned mortgages that Defendants knew had already been foreclosed and sold to third parties. (TAC ¶ 60).

Conduct Subsequent to Execution of the MLPA

In addition to the multiple misrepresentations Defendants made prior to the parties' execution of the MLPA, Plaintiffs allege that Defendants subsequently breached the MLPA by, among other things, (1) failing to provide MRS with assignments of the notes and mortgages for the loans (TAC ¶ 65); (2) sending letters, either from Defendants themselves or from collection agencies, misrepresenting Defendants as owners of the loans and directing borrowers of some loans to make payments to Defendants instead of MRS or its designees (TAC ¶ 68); (3) collecting payments from insurance companies pursuant to title insurance claims related to the mortgage loans sold to MRS (TAC ¶¶ 69-70); (4) "recalling" certain loans, including the "cherries" offered as an inducement for Plaintiffs to purchase the loans, in direct violation of the MLPA (TAC ¶¶ 71-74); (5) contacting certain borrowers and misrepresenting that Defendants had reacquired the loans and that the borrowers had to pay Defendants, not MRS or its designees (TAC ¶ 85); (6) collecting and retaining payments on certain of the loans (TAC ¶ 86); (7) changing loan numbers of certain performing loans (TAC ¶ 87).

Misrepresentation of Loan Ownership to Government Agencies

Plaintiffs further allege that Defendants misrepresented to certain government enforcement agencies that MRS, not Chase, was responsible for the pre-sale conduct of Defendants regarding loans that had been sold (TAC ¶ 88), and that MRS, not Chase, was responsible for violations regarding loans that Defendants had never sold to MRS (TAC ¶ 89).

The National Mortgage Settlement and Residential Mortgage Backed Securities Settlement

Plaintiffs have pled that Defendants were party to the National Mortgage Settlement Agreement ("NMS"), reflected in a consent judgment (the "NMS Consent Judgment") in settlement of a complaint filed by the Federal Government, 49 states (all states except Oklahoma) and the District of Columbia in 2012 against numerous banks and loan servicing companies regarding misconduct related to their origination and servicing of single family residential mortgages (TAC ¶¶ 92-97).

The NMS Consent Judgment provided both federal and state releases to the financial institutions in exchange for their promise, among other things, to adhere to certain specified servicing standards and to provide consumer relief to borrowers. (TAC ¶ 97-99). Among other things, Defendants were required to provide $4.2 billion of consumer relief to borrowers whose loans they owned. (TAC ¶ 100).

In order to obtain consumer relief credit without any cost to Chase, beginning in September 2012, Defendants sent over 50,000 letters to borrowers forgiving their mortgage loans. However, among these loans Defendants purportedly forgave thousands it did not own, including multiple loans it had sold to the Plaintiffs. (TAC ¶¶ 102-08). To the extent Plaintiffs have evidence of such forgiveness letters, Plaintiffs have listed them in exhibits to the TAC. However, Defendants have refused to give Plaintiffs a complete list of the loans they forgave so that Plaintiffs can check it against Exhibit A to the MLPA. (TAC ¶¶ 107-08).

Plaintiffs have pled that Defendant JPMC entered into a $13 billion settlement with the Department of Justice on November 19, 2013 (the "RMBS Settlement") under the terms of which JPMC agreed to pay $13 billion in return for complete civil immunity. (TAC ¶ 146). Pursuant to the RMBS Settlement, these payments included $4 billion of consumer relief. Again, Defendants wrongfully claimed credit for the full indebtedness owed by borrowers whose loans Defendants had previously sold to Plaintiffs. (TAC ¶ 147).

The Pre-DoJ Lien Release Project

Plaintiffs allege that, starting in October 2013, Defendants released liens on thousands of properties on which they had abandoned their servicing responsibilities in violation of legal requirements. (TAC ¶ 134). These liens included loans owned by Plaintiffs (TAC ¶¶ 135-37, 140), which caused Plaintiffs to lose revenue and also exposed them to litigation and regulatory action. (TAC ¶¶ 141-43). The releases appear to have been robo-signed. (TAC ¶¶ 138, 144).

As set forth below, these facts provide more than sufficient basis for Plaintiff's claims.

STANDARD ON A MOTION TO DISMISS

In deciding a motion to dismiss under Rule 12(b)(6), the court must accept the factual allegations in the complaint as true and must draw all reasonable inferences in the plaintiff's favor. *Roth v. Jennings,* 489 F.3d 499, 501 (2d Cir.2007); *see also Ashcroft v. Iqbal,* 556 U.S. 662 (2009). "When deciding a motion raising any of the enumerated Rule 12(b) defenses, the pleading will be read as a whole, and will be viewed broadly and liberally in conformity with the mandate in Rule 8(f) that pleadings be construed 'to do substantial justice.' Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1363 (3d ed.)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "*Iqbal,* 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. As demonstrated below, the Complaint meets these standards in all respects and this Court should deny Defendants' motion to dismiss in its entirety.

ARGUMENT

POINT I

PLAINTIFFS HAVE PLED A CIVIL RICO CLAIM

In order to state a civil RICO claim, a plaintiff must plead four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). Defendants argue that the TAC fails to allege a RICO enterprise because it does not demonstrate a 'hierarchy, organization, and activities' (Def. Mem. at 8), and because it does not demonstrate sufficient continuity to form a "pattern" of racketeering activity. As set forth below, Defendants are wrong. They have ignored Supreme Court precedent directly on point.

Plaintiffs' Have Alleged An 'Enterprise' Under *Boyle v. United States*

In *Boyle v. United States,* 556 U.S. 938, 948 (2009), the Supreme Court revisited its analysis, in *United States v. Turkette,* 452 U.S. 576 (1981), of what constitutes an 'enterprise' for the purposes of RICO, terming it as "a continuing unit that functions with a common purpose." Relying on case law decided well before *Boyle*, Defendants argue that a RICO complaint must still allege facts sufficient to demonstrate "hierarchy, organization, and activities." Def. Mem. at 8, *citing First Capital Asset Mgmt., Inc. v. Satinwood, Inc.* , 385 F.3d 159, 174 (2d Cir. 2004)[2]. This is simply not the law. In *Boyle,* the Supreme Court rejected the notion that a RICO enterprise requires a hierarchy, a chain of command, fixed roles, regular meetings, or rules and regulations. *Id.* Instead, the Court held that an association-in-fact enterprise only needs three structural features: (1) "a purpose," (2) "relationships among those associated with the enterprise," and (3) "longevity sufficient to permit these associates to pursue the enterprise's purpose" *Boyle*, 556 U.S. at 947.

As courts in the Second Circuit have interpreted *Boyle*, it "establishes a low threshold for pleading such an enterprise." *Alkhatib v. New York Motor Group, LLC,* 2015 WL 3507340 at *9 (E.D.N.Y. Jun. 3, 2015); *Delgado v. Ocwen Loan Servicing, LLC*, No. 13-CV-4427 NGG RML, 2014 WL 4773991, at *16 (E.D.N.Y. Sept. 24, 2014) (holding that under *Boyle,* "formal hierarchy, role differentiation, regular meetings, or established procedures are not required").

The TAC alleges more than sufficient facts to show the existence of a RICO enterprise. It refers to the Defendants, their officers, and external entities including debt collection agencies, the outside services that sent out thousands of debt forgiveness letters, and the persons and entities that released liens on collateral that had been transferred to the Plaintiffs and others. (TAC ¶ 204). Defendants' contention that they are not identified by name is unavailing. (Def. Mem. at 8). Some of Defendants' employees are named, such as the late Eddie Guerrero, Patrick Boyle and Omar Kassem, (*see e.g.* TAC ¶¶ 18, 104, 116), and at least one lien releasing entity, NTC, is identified in Exh.12 to the TAC.[3]

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[2] Even before the Supreme Court decided *Boyle*, courts in the Southern District of New York had questioned the validity of *Satinwood* in light of other Second Circuit precedent. *See, e.g.* Judge Koetl's discussion in *JSC Foreign Econ. Ass'n Technostroyexport v. Weiss*, No. 06 CIV. 6095 (JGK), 2007 WL 1159637, at *9 (S.D.N.Y. Apr. 18, 2007).

[3] Documents attached to the Complaint are properly considered as part of the pleadings in opposition to a motion to dismiss. Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes."). So too are those documents referred to and relied upon in the complaint, even if not attached. *See Int'l Audiotext Network v. AT&T Co.,* 62 F.3d 69, 72 (2d. Cir. 1995); *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir. 1991); *Doehla v. Wathne Ltd., Inc.,* No 98 Civ. 6087 CSH, 1999 WL 566311, *3 (S.D.N.Y. 1999).

Defendants' claim that Plaintiffs have not shown a "common purpose" (Def. Mem. at 9-10) is also misplaced. The purpose of the enterprise may be to carry out a legitimate goal, with the Defendant commanding the resources of the enterprise in a RICO-prohibited fashion. "A RICO enterprise need not be illegitimate or illegal, and the enterprise itself (or the members of an associated-in-fact enterprise) need not commit any of the racketeering acts at all. Indeed, the enterprise frequently is itself a victim of the racketeering activity perpetrated by its participants." *Chevron Corp. v. Donziger*, 974 F. Supp.2d 362, 575-76 (S.D.N.Y. 2014) (holding that a litigation team whose goal was to pursue the recovery of money from Chevron via litigation, whether by settlement or by enforceable judgment, coupled with the exertion of pressure on Chevron to pay, constituted an enterprise even though there was no suggestion that all of them committed acts of racketeering or even acted inappropriately in any way). Even the court in *Satinwood* acknowledged that "an enterprise may be found where there is simply a discrete economic association existing separately from the racketeering activity." *Satinwood*, 385 F.3d at 173.

Moreover, Defendants are wrong to assert that vendors and their customers cannot constitute a RICO enterprise because they do not share such "a common purpose." (Def. Mem. at 10). The court in *Fuji Photo Film U.S.A., Inc. v. McNulty*, 640 F. Supp. 2d 300 (S.D.N.Y. 2009), found that Fuji had properly pled an enterprise consisting of an individual and the vendors that he caused Fuji's Computer Products Division to retain. *Fuji*, 640 F. Supp.2d at 314 (main defendant "exercised authority and control over the CPD," retained "outside vendors, most of which were single-person entities owned and operated by McNulty's wife and friends," and this "association-in-fact was united by a common purpose, namely that of defrauding Fuji").

In an analogous situation, the court in *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1028 (S.D. Iowa 2009), held that the plaintiff had properly pled a RICO enterprise where it alleged that Wells Fargo had an "association-in-fact business arrangement" with certain property inspection vendors, the property inspectors conducted a "drive by" inspection, and then, through its computer system, Wells Fargo charged the Plaintiffs and others a grossly inflated fee. The vendors simply conducted the inspections that Wells Fargo had ordered. At a minimum, the allegations here allege a similar enterprise.

A. The TAC Satisfies RICO's Continuity Requirement

A RICO pattern is established by showing that the Defendants committed predicate acts that "amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239 (1989). The element of continuity may be satisfied by a showing of either "open ended continuity" or "closed ended continuity." *H.J., Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 241–42 (1989); *SKS Constructors, Inc. v. Drinkwine*, 458 F. Supp.2d 68, 77 (E.D.N.Y. 2006).

Plaintiffs' RICO cause of action articulates multiple predicate acts of mail and wire fraud, the earliest dating from September 2008, when Defendants' head of loan recovery knowingly misrepresented to Plaintiffs that Chase was selling "closed end first lien residential mortgage loans" from which Defendants had decided to "walk away" based on a cost benefit analysis (TAC ¶ 212a) when they really intended to dump massive liabilities associated with the loans on Plaintiffs. (TAC ¶ 212a). The latest predicate act specifically pled took place in December 2013, when Defendants arranged for the recording of a lien release associated with a loan it had sold to Plaintiffs over three years before. (TAC ¶ 212h).

1. There is Open-Ended Continuity

Defendants claim that Plaintiffs have not pled open-ended continuity both because the TAC failed to allege any predicate acts occurring after 2013 (Def. Mem. at 12) and because Defendants' settlement obligations under the RMBS and NMBS Settlement eventually end (Def. Mem. at 11). This is untrue. Plaintiffs allege that "Defendants used the mails and the wires to implement the Pre DoJ Lien Release Project which they knew included the release of liens they did not own." (TAC ¶212i).

This allegation does not include a specific date and, indeed, Defendants continued to release liens on loans they had sold to Plaintiffs at least as late as September and October 2014. (*See* Chaitman Decl. **Exhs. 1 and 2** respectively, lien release for loan 10001410011493929 dated September 10, 2014, and lien release for loan 00173080008, dated October 3, 2014[4]). These loans appear on the lists of loans sold to S&A Capital and 1st Fidelity and attached to the TAC as Exhibits 1 and 2 respectively (*See* Chaitman Dec. **Exh. 3**, p.7, and **Exh. 4**, p.3, line 183).

2. There is Closed-Ended Continuity

Defendants' contention that this constitutes neither open-ended nor closed-ended continuity necessarily overlooks the facts, pled as part of the scheme, that demonstrate that Defendants first had to induce Plaintiffs to buy the loans before they could dump their liabilities or convince the government that they were legitimately complying with their consumer relief obligations. Defendants cannot disregard these predicate acts simply by designating them as "unrelated" (Def. Mem. at 13) and saying that they "could not have been done in furtherance of a scheme to evade Chase's settlement obligations." (Def. Mem. at 13).

None of the cases cited by Defendants provide a basis for dismissing Plaintiffs' claims. In *McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992), which Defendants cite for the proposition that "unrelated" predicate acts should be disregarded, the court held the acts there to be unrelated merely because they "have conflicting goals." The court held that since the purpose of the scheme was to assist one party in "monopolizing the HUD market in Hartford," allegations that the defendants had also sought to induce a competitor to acquire a project were conflicting and could not

[4] *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.,* 369 F.3d 212, 217 (2d Cir. 2004) ("we may also look to public records, including complaints filed in state court, in deciding a motion to dismiss"); *Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 75 (2d Cir.1998) ("It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6) ...."). Thus, the Court may properly take judicial notice of the releases, recorded and publicly available documents, without converting this motion into one for summary judgment.

be predicate acts. Similarly, in *Schlaifer Nance & Co. v. Estate of Warhol,* 119 F.3d 91, 97 (2d Cir. 1997), the court held certain of the acts to be unrelated because the goals conflicted: "The goal of Scheme B was to induce SNC into the contract, while the goal of the other schemes was to force SNC out of the agreement." Finally, in *Ray Larsen Assocs., Inc. v. Nikko Am., Inc.,* 1996 WL 442799 at *7 (S.D.N.Y. Aug. 6, 1996), the only connection between the challenged predicate acts was that each would "have the effect of generally increasing defendants' funds"

Here, there is no conflict between the goals of any of the alleged predicate acts: They were all undertaken by the Defendants so that they could enrich themselves at the expense of the Plaintiffs, the homeowners who were the intended beneficiaries of the government settlements, and the governments (both state and federal).

POINT II

PLAINTIFFS' TORT CLAIMS ARE NOT DUPLICATIVE OF THEIR CONTRACT CLAIMS

Where a party to a contract commits crimes which victimize the other party to the contract, New York law provides a remedy beyond a claim for breach of contract.

> It simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by incorporating it verbatim into a contract.

MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 928 N.Y.S.2d 229, 234 (App. Div. 2011), *quoting In re CINAR Corp. Sec. Litig.*, 186 F. Supp.2d 279, 303 (E.D.N.Y. 2002). In their pinched, narrow reading of the TAC, Defendants would have this Court immunize them from liability in tort for their criminal conduct in dumping massive liabilities on Plaintiffs in the form of loans Defendants falsely represented to have been handled in full accordance with the law. Contrary to Defendants' argument, the tort claims are not duplicative of the contract claims. Defendants argue that the only things Plaintiffs have pled is that "the loans that Chase delivered under the contract failed to meet the quality standards supposedly set forth in the contract" (Def. Mem. at 2) and that Defendants breached "a handful" of contracts by sending improper debt forgiveness letters and filing improper lien releases. *Id.*

The law does not insulate Defendants from tort liability merely because some of their conduct can also be seen as a breach of warranty. Further, Defendants place undue reliance upon Magistrate Judge Francis's decision denying their motion to transfer this case when they claim he recognized that Plaintiffs' tort claims are duplicative because they "all arise from Plaintiffs' debt-purchase contracts with Chase" (Def. Mem. at 14). The Court did not say that. Instead, the decision refers to tort claims that "arise from the *business relationship* created by the MLPA" (Decision at 9; emphasis added) or that "stem from [Plaintiffs'] *purchase* of mortgage loans" (Decision at 2; emphasis added). Similarly, the Decision cites to case law clearly referring to valid tort claims that arise "in relation to the contract" or arise out of the business relationship. *See, e.g. Montoya v. Cousins Chanos Casino, LLC*, No. 651353/11, 2012 WL 118475 (Sup.Ct. N.Y. Cty. Jan 12, 2012) at *5. Here, the tort claims certainly arise out of the relationship between the parties established by contract and by definition, Defendants could not have committed them had there not been a business relationship, but as set forth below, they are not duplicative and should not be dismissed.

A. <u>MRS Has Properly Pled Claims Of Fraud, Fraudulent Inducement and Negligent Misrepresentation</u>

1. <u>MRS' claims of fraud should not be dismissed</u>

MRS has alleged, among other things, that Defendants fraudulently induced it to enter into the MLPA in part by including certain warranties in the contract. (*E.g.*, TAC ¶¶ 43, 178). Defendants' erroneous contention that they are insulated from liability for fraud, fraudulent inducement and negligent misrepresentation (the Sixth and Seventh Claims for Relief, TAC ¶¶ 176-192) because they also breached these warranties, grossly mischaracterizes both Plaintiffs' claims and New York law. Under New York law, it is well-settled that:

> in order to state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury.

GoSmile, Inc. v. Levine, 915 N.Y.S.2d 521, 524 (App. Div. 2010), *lv. dismissed*, 952 N.E.2d 1077 (N.Y. 2011). *See also Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 502 N.E.2d 1003, 1004 (N.Y. 1986) (affirming refusal to dismiss fraud claim where the defendant allegedly had no intention of restricting itself to selling goods pursuant to a contract in a specific geographical area). Where there is also a breach of contract claim, the misrepresentation of present fact must be "collateral to the contract." *Wyle, Inc. v. ITT Corp.*, 13 N.Y.S.3d 375, 376 (App. Div. 2015), *quoting Credit Alliance v. Hable Co.*, 682 N.Y.S.2d 160 (App. Div. 1998).

A contractual warranty, however, "is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim." *Wyle, Inc.*, 13 N.Y.S.3d at 378, *quoting First Bank of Ams. v. Motor Car Funding*, 690 N.Y.S.2d 17, 21 (App. Div. 1999).

In *First Bank*, the plaintiff had purchased loans made on used cars from the defendant. The agreement contained warranties that the loans would comply with underwriting guidelines. The plaintiff alleged that the defendant had misrepresented the quality of the loans, which induced it to buy less valuable loans, resulting in loss. The Appellate Division for the First Department sustained the fraudulent inducement claims as well as those of breach of contract, on the grounds that the defendant had allegedly "misrepresented material facts about various individual loans so that they would appear to satisfy" warranties in the contract. *First Bank,* 690 N.Y.S.2d at 21.

Similarly, in *MBIA Ins. Corp.* 928 N.Y.S.2d at 232, plaintiff alleged that Countrywide committed fraud and breached certain contracts in connection with the securitization of pools of residential mortgages. In order to make the pools of mortgages more marketable, Countrywide engaged the plaintiff to provide financial guarantee insurance. In so doing, however, Countrywide misrepresented the quality of the loans. The court affirmed the denial of a motion to dismiss the fraud claims as duplicative because the plaintiff had pled, among other things, that Countrywide had provided false information in data tapes, prospectuses and

> falsely represented that the loans were made in strict compliance with its underwriting standards and guidelines, as well as industry standards. In fact, MBIA claims, Countrywide abandoned those guidelines by knowingly lending to borrowers who could not afford to repay the loans, or who committed fraud in loan applications or whose applications could not satisfy basic criteria for responsible lending.

This is very similar to what Plaintiffs have alleged here. As set forth above, Defendants made three key representations and warranties in the MLPA: (1) that the information on the data tape—*i.e.*, the Corrupted List—"is true and correct in all material respects as of the date such data tape was compiled"; (2) that Defendants are the sole owner of the loans with full authority to sell them; and (3) that each loan "complies in all material respects with all applicable . . . laws" (TAC ¶ 43, TAC Exhibit 3 §6). Plaintiffs have also alleged, in considerable detail, that these representations were false: that the Corrupted List was far from true and correct (TAC ¶¶ 46-48); that other entities, not Defendants, owned some of the loans (TAC ¶¶ 55-56) and that the loans did not, in fact, comply with applicable law. (TAC ¶¶ 59-60).

Further, and completely missing from the terms of the MLPA, are Defendants' misrepresentations that the details of the loans in question could not be provided because Defendants were having difficulty in transferring information from Washington Mutual's data to its own when, in fact, the loans had not even been originated by Washington Mutual. (TAC ¶¶ 47-48).

Defendants' cases are not to the contrary. *RGH Liquidating Trust v. Deloitte & Touche LLP,* 851 N.Y.S.2d 31, 32-33 (App. Div. 2008), defendant Deloitte had contracted with plaintiffs to audit their financial statements. The court dismissed claims of fraudulent misrepresentation as duplicative because those claims "related to defendants' obligation under their agreements . . . to conduct audits of financial statements with due care." Here, as set forth above, MRS' allegations of fraud include misrepresentations entirely unconnected to the manner in which Defendants were bound to carry out their obligations under the MLPA. In Defendants' other cases, the alleged fraud directly related to a concealed intent not to perform as promised, which is not what is alleged here. *Stewart v. Maitland*, 835 N.Y.S.2d 39, 40 (App. Div. 2007) ("no factual basis for recovery other than defendants' failure to keep promises"); *Telecom Int'l Am. Ltd. v. AT&T Corp.*, 280 F.3d 175, 196 (2d Cir. 2001) (no fraud where the facts show that the Defendant intended to keep its promises when made); *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19 (2d Cir. 1996) (duplicative fraud claim premised on allegedly false statements to plaintiff that defendant intended to pay it all monies due under their agreement).

Moreover, in one case cited by Defendants, *Four Finger Art Factory, Inc. v. Dinicola*, No. 99 CIV. 1259 (JGK), 2000 WL 145466, at *4 (S.D.N.Y. Feb. 9, 2000), the court noted that New York's Court of Appeals considers that "engag[ing] in conduct outside the contract but intended to defeat the contract," is also an "example[ ] of conduct which is sufficiently collateral to state a proper claim in tort." *citing New York University v. Continental Ins. Co.,* 87 N.Y.2d 308, 316 (1995); *Deerfield,* 68 N.Y.2d at 956 ("a promise . . . made with a preconceived and undisclosed intention of not performing it . . . constitutes a misrepresentation" and is not duplicative of a breach of contract claim.)

Plaintiffs have certainly pled fraud claims distinct from their breach of contract claims and, as such, Defendants' motion to dismiss the sixth and seventh claims must be denied.

2. **<u>MRS' allegations of negligent misrepresentation state a claim for relief</u>**

Finally, this Court should disregard Defendants' desire to apply the "ancient rule of *caveat emptor*" here to defeat MRS' claims of negligent misrepresentation or omission. (Def. Mem. at 22). Defendants argue that they had no obligation to disclose their intentions to dump massive liabilities on MRS (TAC ¶ 180), or that the servicing of the loans had violated the law (TAC ¶ 179), or, indeed, not to misrepresent that they were in the process of compiling a complete Exhibit A (TAC ¶ 181) because they did not have a fiduciary duty or special, privity-like relationship with MRS. (Def. Mem. at 22). First, this is not a basis for dismissal of Plaintiffs' fraud claims because each of Defendants' notable omissions as pled in the TAC was also accompanied by affirmative and fraudulent misrepresentations of the same subject matter. For example, Defendants' concealment of their intention to dump massive liabilities on Plaintiffs and of the fact that the loans all violated the law is simply the flipside of Defendants' affirmative and fraudulent representations that the loans all complied with all applicable laws.

Second, courts in the Second Circuit generally consider the question whether there is a sufficiently special relationship to sustain a claim for negligent misrepresentation to be "highly fact-specific and generally not susceptible to resolution at the pleadings stage." *Century Pac., Inc. v. Hilton Hotels Corp.,* No. 03 Civ. 8258(SAS), 2004 WL 868211, at *8 (S.D.N.Y. Apr. 21, 2004) (internal citation and quotation marks omitted). Even if not generally present in an arms-length relationship, such a duty will be found where there is "some identifiable source of a special duty of care" and includes not only those with a fiduciary duty or privity-like relationship, but "those persons who possess unique or specialized expertise" such that "in morals and good conscience the one has the right to rely upon the other for information." *J.P. Morgan Securities, Inc. v. Ader*, 9 N.Y.S.3d 181, 182 (App. Div. 2015) (not finding such a duty with regard to the plaintiff's superior knowledge of the hedge fund business).

Specialized knowledge imposes such a duty where a party (1) has superior knowledge, (2) that is not available to the other party by reasonable inquiry, and (3) the first party knows that the second party is acting on the basis of mistaken knowledge. See *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.,* 404 F.3d 566, 582 (2d Cir.2005); see also *Jana L. v. West 129th Street Realty Corp.,* 802 N.Y.S.2d 132 (App. Div. 2005) (holding that the "special facts" doctrine requires that the information be "peculiarly within the knowledge" of the defendant and not discoverable by the plaintiff through the "exercise of ordinary intelligence").

Here, MRS has pled that the identities and information with regard to each loan set forth on the Corrupted List were within the superior knowledge of Defendants and could not reasonably be discovered by MRS without "enormous personnel time" and effort. (TAC ¶¶ 180-81). Further, Defendants certainly knew that MRS was acting on the basis of mistaken knowledge of the contents of Exhibit A because Defendants provided it. Therefore, MRS' claim of negligent misrepresentation should not be dismissed.

B. Plaintiffs Have Properly Pled A Claim Of Conversion

Plaintiffs' conversion claim (the Fourth Claim) is not duplicative of Plaintiffs' breach of contract claims because success on the conversion claim may entitle the Plaintiffs to special damages. In *St. John's Univ., New York v. Bolton*, 757 F. Supp.2d 144, 178 (E.D.N.Y. 2010), St. John's sued to recover for valuable patents in their employees' work which the employees had never revealed, the court permitted pleading of both breach of contract and conversion claims because a conversion claim could entitle the plaintiff to an award of punitive damages. The court explained that "[p]unitive damages 'may be recovered for an act of conversion where the circumstances establish that the conversion was accomplished by malice or reckless or willful disregard of the plaintiff's right.'" *quoting Ashare v. Mirkin, Barre, Saltzstein & Gordon, P.C.,* 106 Misc.2d 866, 870, 435 N.Y.S.2d 438 (N.Y.Sup.Ct.1980), *modified on appeal to delete punitive damages,* 81 A.D.2d 650, 650, 441 N.Y.S.2d 408 (2d Dep't 1981), *aff'd,* 54 N.Y.2d 891, 892, 444 N.Y.S.2d 918, 429 N.E.2d 425 (1981). In *St John's*, the court found it reasonable to assume from the complaint that the defendants knew of the university's rights in the patents but nonetheless chose to ignore them.

Here, there can be no question that Defendants knew of Plaintiffs' rights in the loans because they sold the loans to them. *See also Caballero v. Anselmo,* 759 F.Supp. 144, 153–54 (S.D.N.Y.1991) (punitive damages available for conversion where Defendant has malice or reckless disregard of Plaintiff's rights). Moreover, Plaintiffs have pled that Defendants acted with "malice and an intent to enrich" themselves at the expense of the Plaintiffs. (TAC ¶ 168). "The act is malicious when the thing done is with the knowledge of plaintiff's rights, and with the intent to interfere therewith. In a legal sense it means a wrongful act, done intentionally, without just cause or excuse." *Lamb v. S. Cheney & Son,* 125 N.E. 817 (1920).

Defendants are equally wrong in their assertion that Plaintiffs have not properly pled conversion. In order to state a claim for conversion, a plaintiff must plead the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 403-04 (2d Cir. 2006), *quoting Vigilant Ins. Co. of Am. v. Hous. Auth.*, 660 N.E.2d 1121 (N.Y. 1995).

Plaintiffs have met all of these pleading requirements and their claim of conversion should not be dismissed. Defendants' cases do not compel a contrary result. For example, in *Anthracite Capital, Inc. v. MP-55 West Fifth Mezzanine, LLC,* 2005 WL 1155418, at *9 (S.D.N.Y. May 17, 2005), the court held on summary judgment that the defendants, who had refinanced debt on a number of properties they owned, were not liable for conversion based on allegations by the plaintiff REIT, which owned a portion of defendants' securitized loan, that they had improperly filed UCC statements terminating plaintiff's security interest in some of the property without paying it a contractual fee. Without citation, the court stated that the security interest was "intangible property" and therefore not subject to a conversion claim. Similarly, in *Barker v. Amorini*, 995 N.Y.S.2d 89 (App. Div. 2014), the court affirmed dismissal of a conversion claim on the basis that the proceeds of a sale of a business could not form the basis of such a claim.[5]

[5] Although the court's decision was somewhat bare on facts, the briefs of the parties are available on Westlaw and reveal that the allegation in question was that "Defendant converted all of the funds received from the sale of the business and forwarded none of said funds" to the plaintiff. *Barker v. Amorini*, 2014 WL 7665566 (App. Div. 2014).

The New York Court of Appeals holds that a conversion claim may apply to "things represented by valuable papers, such as certificates of stock, promissory notes, and other papers of value" as well as compilations of electronic information. *Thyroff v. Nationwide Mut. Ins. Co.*, 864 N.E.2d 1272, 1276 (N.Y. 2007) (answering certified question). Further, under New York law, money may be the subject of a conversion claim where the funds in question are specific and identifiable. *See, e.g. Newbro v. Freed*, 409 F. Supp. 2d 386, 394 (S.D.N.Y. 2006) (collecting cases) *aff'd*, No. 06-1722-CV, 2007 WL 642941 (2d Cir. Feb. 27, 2007). Accounts receivable may also be the subject of a conversion claim, s*ee, e.g. Goldberger v. Rudnicki*, 944 N.Y.S.2d 157, 159 (App. Div. 2012), as may mortgage documents. *E. River Sav. Bank v. Sec'y of Hous. & Urban Dev.*, 702 F. Supp. 448, 455 (S.D.N.Y. 1988) (holding that complaint did not state a claim for conversion since the allegations were regarding conversion of real property, rather than the mortgage documents).

Here, in addition to their claims that Defendants improperly released liens, Plaintiffs have also alleged that the Defendants wrongfully forgave multiple loans that belonged to the Plaintiffs. (TAC ¶ 168). Plaintiffs have also alleged that Defendants withheld a proper Exhibit A and "stripped most of the origination documentation from the loan files, including federal disclosures and good faith estimates, such that Plaintiffs could not respond to borrower or regulatory inquiries; and failed to provide accurate borrower payment histories" (TAC ¶ 60). In addition to the specific, identifiable mortgages, Plaintiffs properly allege that Defendants withheld identifiable, tangible items and their conversion claim should not be dismissed. *See, e.g OneWest Bank N.A. v. Lehman Bros. Holding Inc.*, No. 14-CV-8916 JMF, 2015 WL 1808947, at *1 (S.D.N.Y. Apr. 20, 2015) (declining to dismiss conversion claim where Defendants allegedly withheld mortgage servicing files from the Plaintiff).

C. The Tortious Interference Claim Should Not Be Dismissed

Defendants' contention that the tortious interference claim (Fifth Claim) should be dismissed rests on two very shaky foundations: that Plaintiffs purportedly did not identify the "contracts they would have consummated" but for Defendants' interference—which they did—and that the law requires that there be a "malicious" intent to harm Plaintiffs—which it does not. (Def. Mem. at 16-17).

First, Plaintiffs identified "contracts they would have consummated," giving at least two specific examples. Plaintiffs clearly pled that 1st Fidelity had entered into a payment plan with the Warwicks after recording an assignment of mortgage from Plaintiffs on December 11, 2009. The Warwicks were making monthly payments in accordance with the plan (TAC ¶ 114), at which point Defendants sent the Warwicks a letter extinguishing the mortgage and cancelling the debt. (TAC ¶ 115). As a result, the Warwicks stopped paying. (TAC ¶ 117). Similarly, Plaintiffs pled that 1st Fidelity entered into a payment plan with Teresa Hancock-Roberts, after recording a mortgage assignment on November 4, 2009. Ms. Hancock-Roberts was making payments in accordance with the plan (TAC ¶ 126) until Defendants wrongfully sent a forgiveness letter and cancelled the debt. (TAC ¶ 127). Ms. Hancock-Roberts stopped paying. (TAC ¶ 128).

Second, the law provides that rather than pleading malice, a plaintiff may also plead that the interference was accomplished by wrongful means. *See, e.g. Carvel Corp. v. Noonan,* 818 N.E.2d 1100 (N.Y., 2004); *Jacobs v. Continuum Health Partners,* 776 N.Y.S.2d 279 (App. Div. 2004). " 'Wrongful means' include[s] physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" *Carvel,* 3 N.Y.3d at 191. Here, as just described, Plaintiffs have properly pled that Defendants sent out false and fraudulent loan forgiveness letters and wrongfully released liens they did not own. (TAC ¶ 173).

D. Plaintiffs' Claim Of Slander Of Title Is Properly Pled

Defendants' contention that Plaintiffs' claim of slander of title (Eighth Claim) is barred by the statute of limitations is wrong. According to the New York Court of Appeals in *Rosenbaum v. City of New York*, 861 N.E.2d 43 (N.Y. 2006) (dismissing claim against the City based on inadequate notice of claim), the one year statute of limitations does not begin to run until the time that "pecuniary loss is incurred." Here, Defendants contend that the only relevant allegations are that Plaintiffs pled that they sent debt forgiveness letters between September 2012 and January 2013, and executed lien releases in October and November 2013. (Def. Mem. at 20, TAC ¶¶ 103-04, 142-43, 194).

However, Defendants completely ignore the allegations that Defendants falsely informed borrowers, insurance companies, collection agencies and others that Defendants owned loans when the loans had been sold to Plaintiffs, presumably because they cannot attach dates that would place them outside the statute of limitations. (TAC ¶ 194). The original complaint was filed on December 24, 2014. Even with regard to the allegations including the debt forgiveness letters and lien releases, the owners of the mortgaged properties whose liens were wrongfully released or whose mortgages were wrongfully forgiven could only have stopped paying Plaintiffs, thus triggering the running of the statute of limitations, after receiving notice that the liens had been released. As such, the statute of limitations did not begin to run until December 24, 2013.

Defendants are wrong in arguing that Plaintiffs have not properly pled malice simply because Defendants can come up with other explanations for their actions. (Def. Mem. at 18) Under the well-settled standard for demonstrating malice in claims of defamation not associated with title, the Supreme Court holds that malice need not be the sole motivating factor. *New York Times v. Sullivan,* 376 U.S. 254, 279–80 (1964) (a plaintiff need not prove that actual ill will was the sole motivating factor for the publication of the defamatory statement, but "must demonstrate that the 'statements [were] made with [a] high degree of awareness of their probable falsity'); *see also Cty. Vanlines, Inc. v. Experian Info. Sols., Inc.*, 317 F. Supp. 2d 383, 391 (S.D.N.Y. 2004) *aff'd,* No. 04-2982-CV, 2005 WL 3117211 (2d Cir. Nov. 22, 2005).

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Dismiss should be denied in its entirety. However, in the event that it is granted, Plaintiffs hereby request the right to file an amended complaint to deal with any found deficiencies in the allegations. As the Second Circuit recently held in *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC,* 797 F.3d 160, 190 (2d Cir. 2015), a court must allow a plaintiff the opportunity to amend the complaint after decision on a motion to dismiss. Otherwise, the plaintiff is presented with "a Hobson's choice: agree to cure deficiencies not yet fully briefed and decided or forfeit the opportunity to replead. Without the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies." Accordingly, while Plaintiffs believe that the allegations in the TAC are sufficient to state each of their claims, they reserve the right to file an amended complaint in the event that this Court grants the motion either in whole or in part.

Dated: New York, New York
December 7, 2015

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