IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PERRY AND CHRISTINE HAMUS,

Plaintiffs,

v.

BANK OF NEW YORK MELLON,
COUNTRYWIDE HOME LOANS, INC.,
BAC HOME LOANS SERVICING,
BANK OF AMERICA, N.A., and
MORTGAGE ELECTRONIC
REGISTRATION SYSTEM, INC.,

Defendants.

OPINION AND ORDER

10-cv-682-slc

In 2006, plaintiffs Perry and Christine Hamus signed two notes and mortgages in exchange for a loan from defendant Countrywide for the purchase of a home. Unfortunately, both of the Hamuses later lost their jobs, defaulted on their loan and almost lost their home when their loan servicer, defendant Bank of America, N.A., through its subsidiary, defendant BAC Home Loans Servicing, brought a foreclosure action in state court. In October 2010, however, Bank of America voluntarily dismissed the foreclosure action and offered the Hamuses a loan modification. The Hamuses rejected the offer.

Then the Hamuses went on the offensive, changing the venue to this federal court. In their amended complaint, dkt. 15, plaintiffs allege that Bank of America not only never had standing to bring the foreclosure action, but that it violated the Fair Debt Collection Practices Act and committed common law fraud by representing that it did. Plaintiffs also have sued Mortgage Electronic Registration System, Inc., alleging that it conspired with and abetted Bank of America in committing the fraud by executing a mortgage assignment that made it look like Bank of America had rights that it did not actually have. Separate from these claims, plaintiffs also have sued Countrywide for misrepresentation on the basis of allegedly false information it provided to plaintiffs that induced them to take out a home mortgage loan in the first place, and Countrywide and Bank of America for violating certain duties it had under Fannie Mae's Home Affordable Modification Program. Plaintiffs seek damages as well as a declaration that none of the defendants may foreclose on their home.

Jurisdiction is present for the federal claims under 28 U.S.C. § 1331 and for the state law claims under 28 U.S.C. § 1367 because they arise out facts related to the federal law claims. Diversity jurisdiction under 28 U.S.C. § 1332 may exist as well because plaintiffs allege that they are citizens of Wisconsin and defendants are all citizens of other states, and that the amount in controversy is greater than $75,000.

Before the court is the motion of all defendants to dismiss the amended complaint in its entirety under Fed. R. Civ. P. 12(b)(6). As discussed further below, I am granting defendants' motions on all the claims because the amended complaint does not include the facts necessary to support these claims. I am dismissing the claims without prejudice to plaintiffs filing a second amended complaint that addresses the pleading deficiencies outlined in this opinion.

From the complaint and the exhibits attached or referenced therein, I find that plaintiffs have fairly alleged these facts:

ALLEGATIONS OF THE COMPLAINT

1. The Parties

Plaintiffs Perry and Christine Hamus are husband and wife. They reside in Auburndale, Wisconsin. Defendant Countrywide Home Loans, Inc. is a New York corporation with its principal place of business in Calabasas, California. Defendant Bank of America, N.A. is a North Carolina corporation with its principal place of business in North Carolina. Bank of America purchased defendant Countrywide in July 2008. Defendant BAC Home Loans Servicing, LP (BAC) is a subsidiary of Bank of America and is a Texas limited partnership with its principal place of business in Calabasas, California. (Following plaintiffs' lead, I shall refer to defendants Bank of America and BAC Home Loans Servicing collectively as "BA.")

Defendant Bank of New York Mellon (BKNY) is a global financial investment firm, incorporated in the state of Delaware. Defendant Mortgage Electronic Registration System, Inc. (MERS) is a Delaware corporation with its principal place of business in the State of Virginia.

II. The Hamuses Take Out a Mortgage Loan

In 2006, the Hamuses applied for a home loan from defendant Countrywide Home Loans, Inc. The Hamuses received a "pre-approval certificate" from Countrywide that said the Hamuses would receive a loan of $225,000, with a fixed interest rate of 6.625% and no points. However, the Hamuses actually received two loans from Countrywide totaling $226,000: an interest-only adjustable rate mortgage loan and a second loan that had a balloon payment at the end of its term. No one from Countrywide explained to the Hamuses what an adjustable rate, interest-only loan was or what a balloon payment was before the Hamuses signed the loans, nor did anyone provide the Hamuses with disclosures required by the Truth in Lending Act.

The mortgages signed by plaintiffs as security for the two loans named defendant MERS as the mortgagee of record as a nominee for Countrywide.[1] Both mortgages contained the following terms:[2]

> MERS is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel (888)679-MERS.

The mortgages also stated:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action

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[1] Here is one court's description of the MERS system:

> When a home is purchased, the lender obtains from the borrower a promissory note and a mortgage instrument naming MERS as the mortgagee (as nominee for the lender and its successors and assigns). In the mortgage, the borrower assigns his right, title, and interest in the property to MERS, and the mortgage instrument is then recorded in the local land records with MERS as the named mortgagee. When the promissory note is sold (and possibly re-sold) in the secondary mortgage market, the MERS database tracks that transfer. As long as the parties involved in the sale are MERS members, MERS remains the mortgagee of record (thereby avoiding recording and other transfer fees that are otherwise associated with the sale) and continues to act as an agent for the new owner of the promissory note.

In re: Mortgage Electronic Registration Systems (MERS) Litigation, 659 F. Supp. 2d 1368, 1370 (U.S. Jud. Pan. Mult. Lit. 2009).

[2] Defendants attached a copy of the mortgages to their brief, dkt. 17, exhs. 1 and 2. Because the mortgages are referred to in the complaint and are central to plaintiffs' claims, and because plaintiffs have not disputed the admissibility or authenticity of the copies provided by defendants, I may consider them without converting the motion to a motion for summary judgment. *Hecker v. Deere & Co.*, 556 F.3d 575, 582-83 (7th Cir. 2009).

> required of Lender including, but not limited to, releasing and cancelling this Security Instrument.

Dkt. 17, Exhs. 1 and 2.

After Countrywide made the loans to the Hamuses, it sold the loans on the secondary mortgage market, the first loan to Fannie Mae; the second to a private issuer whose trustee is defendant BKNY. Consistent with industry-wide practice, Countrywide retained the promissory notes and did not deliver them to either of the securitized trusts into which the loans were sold. Countrywide serviced the pool or trust into which the Hamuses' two loans were deposited until Countrywide was purchased by defendant Bank of America, N.A. in July 2008. Thereafter, Bank of America's servicing subsidiary, defendant BAC Home Loans Servicing, serviced the loans.

III. Plaintiffs Default on their Loans

Plaintiffs paid their monthly loan obligations for almost two years. Then, in March 2008, Christine Hamus lost her job; in November 2008, Perry Hamus was laid off from his job. Plaintiffs requested a loan forbearance from Countrywide and spoke to various Countrywide representatives in late 2008 and early 2009 about a forbearance agreement. Countrywide's employees did not always return calls, they gave the Hamuses conflicting information regarding whether they qualified for a forbearance and gave the Hamuses bad financial advice, including advising them to stop paying their credit card bills and to cash in their life insurance policies. Ultimately, the Hamuses were offered a forbearance on the loan secured by the first mortgage, but not on the second. The Hamuses did not accept the forbearance agreement because they could not afford the proposed payments.

The Hamuses eventually defaulted on their mortgage payments. On March 16, 2009, Countrywide sent the Hamuses a notice of intent to accelerate their loans as a result of their default.

IV. The Home Affordable Modification Program (HAMP)

On October 3, 2008, as part of its efforts to avert the impending national financial crisis, Congress enacted the Emergency Economic Stabilization Act of 2008, Pub.L. No. 110-343, 122 Stat. 3765 (codified 12 U.S.C. § 5201 et seq.) ("EESA"). EESA's purpose was to "immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States . . .". 12 U.S.C. § 5201(1). Title I of EESA authorized the Treasury Secretary to establish the Troubled Asset Relief Program ("TARP"), which included directives to the Secretary to take certain measures in order to encourage and facilitate loan modifications. 12 U.S.C. § 5219. Pursuant to this authority, in February 2009, the United States Treasury Department created the Home Affordable Modification Program (HAMP). HAMP's purpose is to stem the tide of home foreclosures by providing affordable loan modifications for eligible homeowners. To be eligible to receive federal funds and participate in the HAMP, a loan servicer must agree to certain terms and conditions, which are set out in a standardized Servicer Participation Agreement ("SPA").

In April 2009, defendant BA entered into a SPA with Fannie Mae, accepting $25 billion in federal funds and additional loan guarantees in exchange for its agreement to participate in the HAMP. As part of the Agreement, BA agreed to comply with the HAMP requirements and to perform loan modification and other foreclosure prevention services described in the program guidelines.[3] As a participating servicer, BA was required to perform these services in accordance with the practices, high professional standards of care and degree of attention, using qualified individuals with suitable training, education, experience and skills.

BA breached its duties under the SPA in various ways, including failing to provide the plaintiffs with the opportunity to participate in a trial modification, failing to provide required written notices and failing to retain, employ and supervise adequately trained staff.

V. The Foreclosure Action

On July 7, 2009, defendant BAC Home Loans Servicing, L.P., filed a foreclosure action against the Hamuses. Before initiating its foreclosure action, BA received an assignment of the first-position mortgage held by MERS. The assignment was signed on June 11, 2009 by "robosigners" employed by defendant BA and recorded on June 22, 2009. The assignment stated:

> Mortgage Electronic Registration Systems, Inc., as a nominee for Countrywide Home Loans, Inc., assignor, for a valuable consideration assigns to BAC Home Loans Servicing, L.P. the mortgage executed by Christine A. Hamus and Perry J. Hamus to Mortgage Electronic Registration Systems, Inc., as a nominee for Countrywide Home Loans, Inc. on May 19, 2006 and recorded in the office of the Register of Deeds of Marathon County, Wisconsin, on May 24, 2006, as Document Number 1344169, together with the note and indebtedness it secures.

Amended Complaint, dkt. 15, Exh. 1, at 6.

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[3]In their complaint, plaintiffs assert that a copy of the agreement can be found at www.financialstability.gov/docs/agreements/04222009, but that is incorrect. Although I was unable to locate Bank of America's 2009 Servicer Participation Agreement, a copy of its recently-amended agreement can be found at http://www.treasury.gov/initiatives/financial-stability/housing-programs/mha/Documents_Contracts_Agreements/093010bankofamericanaSPA(incltransmittal)-r.pdf.

In its foreclosure complaint, BA alleged that on May 19, 2006, the Hamuses executed a note to Countrywide in which they promised to make payments on a principal balance of $180,800 in accordance with the terms and provisions of the note; that to secure the note, the Hamuses executed a mortgage to MERS as a nominee for Countrywide; that MERS subsequently assigned the mortgage to BA; and that plaintiffs failed to comply with the terms of the note and mortgage by failing to pay past due payments as required. Amended Complaint, dkt. 15, Exh. 1. A copy of the note, mortgage and assignment were attached to the foreclosure complaint. The complaint did not include any allegations about who owned the promissory note that was secured by the mortgage or who owned the promissory note that the Hamuses executed for the second loan.

The Hamuses filed an answer to the foreclosure action on July 29, 2009. On January 27, 2010, BA filed an application for dismissal with a right to re-open subject to a potential settlement. On or about August 9, 2010, the Hamuses were once again offered a loan modification, and told that they had 24 hours in which to accept or reject it. The proposed modification contained an outstanding balance without any supporting documentation. The Hamuses rejected the modification agreement. Before the Hamuses received BA's proposed loan modification, additional federal programs designed to help homeowners avoid foreclosure went into effect, including Fannie Mae's Making Home Affordable Foreclosure Alternatives (HAFA) program and its deed for lease (D4L) program. BA never mentioned these programs to plaintiffs.

VI. Plaintiffs' Asserted Causes of Action

Plaintiffs have asserted nine causes of action against the various defendants in this case:

Count	Cause of Action	Defendants
I	Breach of Good Faith/Fair Dealing	Bank of America, N.A. /BAC Home Loans Servicing, L.P
II	Intentional Misrepresentation	Bank of America, N.A./BAC Home Loans Servicing, L.P./MERS
III	Fraudulent Inducement	Countrywide
IV	Unjust Enrichment	Countrywide/Bank of America, N.A./BAC Home Loans Servicing, L.P.
V	Fair Debt Collection Practices Act	Countrywide/Bank of America, N.A./BAC Home Loans Servicing, L.P./MERS
VI	Intentional Misrepresentation	Countrywide
VII	Negligent Servicing	Bank of America, N.A./BAC Home Loans Servicing, L.P
VIII	Defamation	Bank of America, N.A./BAC Home Loans Servicing, L.P/MERS
IX	Civil Conspiracy	MERS/Bank of America, N.A./BAC Home Loans Servicing, L.P.

OPINION

Motions to dismiss are construed in the light most favorable to the plaintiff. *McCready v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006). The court must accept as true "all well-pleaded factual allegations and making all possible inferences from those allegations in" the plaintiff's favor. *Id*. (citation omitted). In order to state a claim, plaintiffs must allege facts that plausibly suggest they are entitled to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *Aschcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (holding that plausibility standard set forth in

Twombly applies to "all civil actions "). For a complaint to state a "plausible" claim for relief under *Twombly* and *Iqbal*, the complaint must include enough detail about what each defendant did to show a real possibility (and not just a guess) that plaintiff might be able to prove each element of his claims after s/he has an opportunity to fully investigate them. *Twombly*, 550 U.S. at 555; *Riley v. Vilsack*, 665 F. Supp. 2d 994, 1004 (W.D. Wis. 2009). In determining whether the details in the complaint satisfy this standard, a district court should disregard "mere conclusory statements" and consider only the factual allegations. *Iqbal*, 129 S. Ct. at 1949. To allege plausible grounds for relief, the complaint must allow a "reasonable expectation" that discovery will reveal evidence of illegality. *Id*. at 556.

I. Count 1: Breach of Contract and Duty of Good Faith and Fair Dealing

Plaintiffs seek damages and equitable relief, including a declaration that defendants may not foreclose on plaintiffs' property, based upon defendant Bank of America's alleged failure to comply with the terms of its SPA with the Treasury Department under the HAMP. Specifically, plaintiffs allege that BA breached the SPA when it failed to provide them with an opportunity to participate in a trial modification, failed to retain, employ and supervise adequate staff, failed to provide written notices required by HAMP and carry out various other requirements of the HAMP as required by the SPA. Although plaintiffs admit that they are not parties to the SPA, they bring their claim under a third party beneficiary theory.

As plaintiffs concede, federal law controls the interpretation of the SPA because one party to that contract is the United States. *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1478-79 (7th Cir. 1985); *Holbrook v. Pitt*, 643 F.2d 1261, 1271 n.16 (7th Cir. 1981). Under federal common law, only intended beneficiaries may enforce a contract. *D'Amato*, 760 F.2d at 1479 (applying Restatement (Second) of Contracts (1981)). Where an agreement was not intended to benefit the third party, the third party is viewed as an "incidental" beneficiary who lacks any legally cognizable rights under the contract. *Holbrook*, 643 F.2d at 1270.

The question whether borrowers have standing under the HAMP or a SPA to bring third-party beneficiary breach of contract claims against their lenders has not been addressed by the Seventh Circuit. However, nearly every district court to have considered this question—and there are many—have held that borrowers are not intended beneficiaries of an SPA entered into under the HAMP between the loan servicer and the Treasury Department. *Singh v. Wells Fargo Bank*, 2011 WL 66167, 7 (E.D. Cal. Jan. 7, 2011); *Steffens v. American Home Mortgage Servicing, Inc.*, 2011 WL 901179, *3 (D.S.C. March 15, 2011); *Hart v. Countrywide Home Loans, Inc.*, 2010 WL 3272623 (E.D. Mich. Aug. 19, 2010); *Zeller v. Aurora Loan Servs., LLC*, 2010 WL 3219134 (W.D. Va. Aug. 10, 2010); *Hoffman v. Bank of America*, 2010 WL 2635773 at *5 (N.D. Cal. June 20, 2010); *Simon v. Bank of America*, 2010 WL 2609436 (D. Nev. June 23, 2010); *Marks v. Bank of America, N.A.*, 2010 WL 2572988 (D. Ariz. June 22, 2010); *Aleem v. Bank of America*, 2010 WL 532330 (C.D. Cal. Feb. 9, 2010); *Williams v. Geithner*, 2009 WL 3757380 at *6 (D. Minn. Nov.9, 2009). Indeed, plaintiffs cite only one decision in which the court reached the opposite conclusion. *Marques v. Wells Fargo*, 2010 WL 3212131, *4 (S.D. Cal. Aug. 12, 2010).[4]

[4] Plaintiffs also cite *Reyes v. Saxon Mortgage Services*, 2009 WL 3738177, *2 (S.D. Cal. Nov. 5, 2009), in which the court denied a motion to dismiss brought in part on the ground that the plaintiff had failed to allege sufficient facts to support a third-party beneficiary theory under HAMP. As defendants point out, however, that same court later found that the borrower plaintiffs lacked standing to enforce the lender's obligations under a HAMP agreement because they were not the intended beneficiaries of the contract. *Villa v. Wells Fargo Bank, N.A.*, 2010 WL 935680, *3 (S.D. Cal. Mar. 15, 2010).

Having read the cases on both sides, I am persuaded that the majority position is correct. In one of the more thorough analyses of the issue, the United States District Court for the District of Arizona examines the HAMP Guidelines and finds nothing suggesting that Congress expressly or implicitly intended to create a private right of action when it established the program. *Marks v. Bank of America, N.A.*, 2010 WL 2572988, *6-*7. The court explained that although distressed homeowners may be part of a class of homeowners that the EESA and the HAMP were intended to benefit, the statute swept more broadly:

> These statutes are addressed to large-scale economic phenomena affecting not only distressed homeowners, but also financial institutions and homeowners at large. The statutes alter the mechanics of home foreclosure in an effort to stem the downward spiral of home prices as a national phenomenon. The economic stimulus effort attempts to promote the welfare of foreclosure parties generally, but it does not connote the power to delay foreclosures.

Id. at *7. The court also explained that allowing borrowers to assert a private cause of action would contravene congressional intent, which vested the right to initiate a cause of action with the Secretary of the Treasury and granted compliance authority to Freddie Mac. *Id*.

For largely the same reasons, the *Marks* court also found that the plaintiff was not a third-party beneficiary under the Servicer Participation Agreement between Bank of America and the Treasury Department. The court noted that the Agreement imposed no obligation on Countrywide to modify plaintiff's loan, but only to consider it. *Id*. at *4. In addition, the court observed that if plaintiff could sue her loan servicer under the contract, "the court would be opening the door to potentially 3-4 million homeowners filing individual claims," which would undermine Freddie Mac's role as compliance officer for the HAMP and would contravene the program's purpose as an administrative tool to effectuate the goals of the EESA. *Id*.

Not only does *Marks* offer convincing reasons for the conclusion that a borrower may not sue under the terms of an SPA, but the correctness of that conclusion is virtually ordained by the Supreme Court's recent opinion in *Astra USA, Inc. v. Santa Clara County*, ___ S. Ct. ___, 2011 WL 1119021 (March 29, 2011). In that case, the Court considered whether entities covered by Section 340B of the Public Health Services Act, 42 U.S.C. § 256b, which imposed price ceilings on drug manufacturers, could enforce Pharmaceutical Pricing Agreements (PPAs) entered into between drug manufacturers and the Secretary of the Department of Health and Human Services under the Act. The PPAs underlying the lawsuit were not "transactional, bargained-for contracts" but rather "uniform agreements that recite the responsibilities § 340B imposes, respectively, on drug manufacturers and the Secretary of HHS." *Astra USA, Inc.*, 2011 WL 119021, *3. To be eligible to participate in state Medicaid programs, a drug manufacturer had to enter into a PPA for covered drugs purchased by 340B entities. *Id*.

Santa Clara County sued Astra and eight other pharmaceutical companies, alleging that the companies were overcharging 340B health care facilities in violation of the PPAs to which the companies subscribed. Although the plaintiffs conceded that the Act underlying their claims, § 340B, did not create a private right of action, they argued that the PPAs implementing the program were enforceable by covered entities as third-party beneficiaries. *Id*., *5. The Court rejected this argument, explaining:

> The County's argument overlooks that the PPAs simply incorporate statutory obligations and record the manufacturers' agreement to abide by them. The form agreements, composed by HHS, contain no negotiable terms. Like the Medicaid Drug Rebate Program agreements, see supra, at ——, the 340B Program agreements serve as the means by which drug manufacturers opt into the statutory scheme. A third-party suit to enforce an HHS-drug manufacturer agreement, therefore, is in essence a suit to enforce the statute itself. The absence of a private right to

> enforce the statutory ceiling price obligations would be rendered meaningless if 340B entities could overcome that obstacle by suing to enforce the contract's ceiling price obligations instead. The statutory and contractual obligations, in short, are one and the same. *See Grochowski v. Phoenix Construction*, 318 F.3d 80, 86 (C.A.2 2003) (when a government contract confirms a statutory obligation, "a third-party private contract action [to enforce that obligation] would be inconsistent with . . . the legislative scheme . . . to the same extent as would a cause of action directly under the statute" (internal quotation marks omitted)).

Id. The Court went on to note that allowing "a multitude of dispersed and uncoordinated lawsuits by 340B entities" would undermine HHS's efforts to administer and enforce both the Medicaid program and § 340B on a uniform, nationwide basis, notwithstanding reports that the agency lacked adequate oversight. *Id*. at *6-7.

Like the § 340B program in *Astra USA*, it is undisputed in this case that the HAMP does not create a private cause of action, but rather assigns responsibility for overseeing compliance with the program with a federal agency, the Department of the Treasury. Further, like the PPAs entered into by the drug manufacturers in *Astra USA*, the SPAs entered into by loan servicers like Bank of America in this case are not bargained-for-contracts, but are uniform agreements that must be signed by loan servicers as a condition to their receiving federal funds under the HAMP. Finally, the HAMP is just one program among many established by the Treasury in a comprehensive effort to restore stability to the United States' financial system, as directed by the EESA. Allowing private borrowers to enforce HAMP by suing under an SPA would undermine the Treasury Department's efforts to oversee and implement what is an enormously complex, ever-evolving approach to a nationwide problem. Even if it is true that HAMP has been an "abysmal failure," as plaintiffs argue, *Astra USA* makes clear that the task of enforcing and improving the program lies with Congress, not individual borrowers.

In sum, because there is no evidence that Congress intended to recognize a private right to enforce programs implemented under the EESA such as the HAMP, plaintiffs may not sue as third party beneficiaries under the SPA between the Treasury Department and defendant Bank of America. Count 1 of the Amended Complaint must be dismissed.

II. Count 2: Intentional Misrepresentation Claim Against Bank of America and MERS

In Count 2, plaintiffs allege that defendants Bank of America and MERS committed fraud by falsely representing that Bank of America "had the right to foreclose" on plaintiffs' home by virtue of the alleged assignment of plaintiffs' first mortgage from MERS to Bank of America. The misrepresentation claim has two components: 1) MERS is merely a nominee for the lender, Countrywide, and as such, lacked any tangible interest in the mortgage that it could assign to Bank of America; and 2) even if MERS validly assigned the mortgage to Bank of America, that assignment was "a legal nullity" because, in the course of the complicated mortgage-backed security process, it was separated from the underlying promissory note that plaintiffs executed. Amended Complaint, dkt. 15, at ¶¶ 19-34. According to plaintiffs, without ownership of the note, Bank of America had no right to bring a foreclosure action, even if it might have had legal title to the mortgage. Plaintiffs assert that they have reason to believe that the lender, Countrywide, still retains legal title to the note. *Id*. at ¶32. By plaintiffs' admission, only the first mortgage note was at issue in the foreclosure action. Plts.' Br. in Opp., dkt. 20, at n.3.[5]

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[5] Plaintiffs allege that they have reason to believe that the holder of the second mortgage note is defendant Bank of New York Mellon, but they do not assert any claims against that defendant. In the complaint, plaintiffs assert that BNYM is a necessary party under Fed. R. Civ. P. 19(a).

Although the parties argue at length whether MERS, as Countrywide's nominee, could legally assign the mortgage to BA, it is unnecessary for purposes of this motion to resolve this dispute. MERS did not bring the state court foreclosure action, BA did. And even if the assignment of mortgage executed by MERS to BA is valid, say plaintiffs, BA still lacked standing to foreclose because it did not own the note. Thus, the only question the court need answer is whether plaintiffs have adequately stated a claim for fraud based upon BA's alleged lack of standing to bring a foreclosure action.

Although defendants appear to agree with the proposition that the note, not the mortgage, controls the right to enforce the payment obligations under the note, *see* dkt. 23, at 7 (citing *Carpenter v. Longan*, 83 U.S. 271, 274 (1872) and *Mitchell Bank v. Schanke*, 268 Wis. 2d 571, 597, 676 N.W. 2d 849, 858 (2004)), and have conceded for purposes of this motion that BA did not own the note when the foreclosure action was filed, they take issue with plaintiffs' contention that this lack of ownership deprived BA of standing to bring a foreclosure action. According to defendants, the Seventh Circuit held in *CWCapital Asset Management, LLC v. Chicago Properties, LLC*, 610 F.3d 497, 500 (7th Cir. 2010), that a loan servicer like BA has standing to bring a foreclosure action even if it does not own the note.

The actual holding of *CWCapital* is not as broad as defendants suggest. The court did not say that *any* loan servicer has standing to bring a foreclosure action for *any* loan that it services, whether it owns the note or not; it said that the particular loan servicer in *that* case acquired standing to foreclose by virtue of the terms of the Pooling and Servicing Agreement between it and the trustee of the mortgages backing the security at issue. *Id*. at 501 (reviewing language of Pooling and Servicing Agreement). *CWCapital* might help BA if the relevant Pooling and Servicing Agreement to which it is a party contains similar language, but no one has produced a copy of that document, so the case does not get BA where it needs to go. In short, defendants have failed to establish that plaintiffs could not prove their allegation that BA lacked standing to bring the state court foreclosure action.

In a throw-away argument, defendants also argue that plaintiffs somehow waived their right to bring this fraud case by failing to object to BA's standing in the state court action. Defendants cite no authority for this proposition, probably because there isn't any. The state judicial proceedings were dismissed summarily without judgment, so *res judicata* or collateral estoppel principles, if that is what defendants are hinting at, simply do not apply.

That said, plaintiffs' accusations about BA's lack of standing, assuming they are true, do sound more like a garden-variety state court objection or a ground for the state-court equivalent of Rule 11 sanctions than a claim for intentional misrepresentation. In Wisconsin, the elements of a cause of action for intentional misrepresentation are: (1) the defendant made a factual representation; (2) the factual representation was false; (3) the defendant made the factual representation knowing that it was untrue or without caring whether it was true or false; (4) the defendant made the representation with intent to defraud or to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied upon that statement to its detriment. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 283 Wis.2d 555, 699 N.W.2d 205, 211 (2005). Further, under Fed. R. Civ. P. 9(b), a plaintiff alleging fraud must do so with particularity; generally speaking, a complaint filed on "information and belief" will not suffice. *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 442 -443 (7th Cir. 2011).

Here, plaintiffs' allegations fail to meet all the elements of a fraud claim. In particular, plaintiffs fail to allege in their complaint how they relied to their detriment on the allegedly improperly-brought lawsuit, which was dismissed. "The gravamen of [a misrepresentation claim] is the nature of the false words used and the reliance which they may reasonably induce." *Ollerman v. O'Rourke Co., Inc.*, 94 Wis.2d 17, 26, 288 N.W.2d 95, 99 (Wis. 1980). Plaintiffs say in their complaint that they "believed [BA]'s representations to their detriment," but such conclusory allegations are insufficient to survive a 12(b)(6) motion; plaintiffs must allege *facts*. Absent any allegations *of fact* that they took some action in reliance upon BA's representations in the foreclosure complaint and suffered damages as a result, plaintiffs have failed to state an actionable misrepresentation claim. "[W]ithout reliance, fraud is harmless." *Dexter Corp. v. Whittaker Corp.*, 926 F.2d 617, 619 (7th Cir. 1991). *See also Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 537 (7th Cir. 2011) (affirming district court's dismissal of fraud claim where plaintiff failed to allege that she had relied on defendants' demands for payment or that she had suffered any damages as a result of those demands).

Even if plaintiffs are able to shore up their fraud claim with facts showing a plausible basis to infer reliance, they have other problems with this claim. For one thing, plaintiffs have not clearly alleged a false statement of fact made by MERS or BA. MERS was not a plaintiff in the state court action and plaintiffs do not allege that MERS made any representation to them, so it is unclear how MERS could be liable for misrepresentation. As for BA, it never represented in the state court complaint that it owned the note, it stated that it was the assignee of the mortgage. Indeed, plaintiffs' fraud claim does not appear to be based upon any particular statement of fact but rather the *impression*, created by BA's filing of the state court action and its attachment of the assignment of the mortgage from MERS, that it had "the right to foreclose" on plaintiffs' property. To the extent this can be viewed as a statement at all, it is more akin to a legal conclusion that an assertion of a fact. Further, even if the act of filing a lawsuit somehow could be deemed to be a "representation of fact" regarding the filer's standing to bring the suit, what basis do the Hamuses have for alleging that BA knew or should have known that it lacked that standing? Plaintiffs simply make the accusation but do not allege facts to support it. I am not dismissing Count 2 on these grounds because defendants have not pressed these arguments, but they are valid concerns in the event plaintiffs choose to file an amended complaint.

In sum, even accepting the allegations in the complaint as true, plaintiffs have failed to allege facts showing that they are entitled to relief on their fraud claim against defendants BA and MERS. Accordingly, Count 2 will be dismissed.

III. Count 5: Fair Debt Collections Practices Act

Congress enacted the FDCPA in order to eliminate "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). To this end, the FDCPA prohibits a debt collector from various forms of oppressive or harassing conduct, including making false or misleading representations related to the character, amount or legal status of any debt. 15 U.S.C. § 1692e(2)(A). According to plaintiffs, the essence of their FDCPA claim mirrors their fraud claims: defendants misrepresented the ownership of plaintiffs' note and thus concealed the fact that BA lacked the capacity to bring the foreclosure action in state court or to collect payments from the Hamuses. Plaintiffs assert these claims against BA and Countrywide, who were "aided and abetted" by MERS. Amended Complaint, dkt. 15, at ¶¶107-109.

As with the fraud claims, defendants expend more energy defending BA's right to bring the state court foreclosure action than addressing the actual elements of a FDCPA claim. And as noted in the previous section, defendants' insistence that the foreclosure action was properly brought (which would mean that no false representation was made) is a conclusion the court cannot reach on the current record.

However, I agree with defendants that the FDCPA claim must be dismissed because it is untimely. 15 U.S.C. § 1692(k)(d) requires an FDCPA action to be brought "within one year from the date on which the violation occurs." Defendants reasonably infer from the complaint that the communications that underlie the FDCPA claims are the May 19, 2009 letter from the Blommer, Peterman law firm identifying BA as the mortgagor and the state court foreclosure complaint, which was filed on July 1, 2009. Plaintiffs' original complaint in this court was filed on November 10, 2010, more than one year after both of these communications.

Plaintiffs do not concede that their FDCPA claims are untimely, but neither do they suggest any other date or event as the start of the limitation period. Instead, plaintiffs argue that even if the FDCPA claims are untimely, the statute should be tolled "by reason of misrepresentation and concealment on the part of Defendants." Dkt. 20, at 13; *Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 327 (7th Cir. 2000) (FDCPA's limitation period not jurisdictional and thus subject to equitable tolling). According to plaintiffs, because of defendants' deception, plaintiffs "had no practical way of knowing or discovering the defects in the state court proceeding against them." Plts.' Br. in Opp., dkt. 20, at 14. Until when, plaintiffs do not say, so I infer that the operative date is "when they met with their lawyer."

Although plaintiffs invoke the term "equitable tolling," their assertions call to mind a number of different equitable doctrines that may expand a limitations period, including the discovery rule and fraudulent concealment. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (explaining differences between various doctrines). None of them, however, appear to help plaintiffs here. The discovery rule does not apply because, although plaintiffs may not have understood they had a basis to challenge BA's standing to foreclose until they talked to their lawyer, their complaint makes clear that plaintiffs knew the "critical facts," *i.e.,* that BA was seeking to foreclose on their home by virtue of an assignment of mortgage executed by MERS, at the time they were served with the foreclosure action. *See generally United States v. Kubrick*, 444 U.S. 111, 122 (1979) (plaintiff's right of action for medical malpractice under the Federal Tort Claims Act accrued when he knew of his potential post-surgery injury and not when he discovered the cause of his injury or the appropriate legal recourse).

The fraudulent concealment doctrine does not apply because plaintiffs have failed to allege, either in their complaint or brief, a separate fraudulent act committed by defendants to conceal the harm apart from the fraud that forms the basis for the plaintiffs' FDCPA claim. *Cada*, 920 F.2d at 451(fraudulent concealment by defendant that tolls limitations period is "above and beyond the wrongdoing upon which the plaintiff's claim is founded").

Finally, equitable tolling does not apply because plaintiffs have failed to make a plausible showing that they exercised reasonable diligence in discovering the basis for their claim. *Springman v. AIG Marketing, Inc.*, 523 F.3d 685 (7th Cir. 2008) (equitable tolling "permits a party to delay filing his suit beyond the expiration of the limitations period if he could not reasonably be expected to have done so sooner"). Plaintiffs were aware that BA was attempting to foreclose on their home and that MERS had executed an assignment of the first-position mortgage to BA. Indeed, as plaintiffs admit, BA attached the allegedly fraudulent assignment executed by MERS to the foreclosure action. Armed with these documents, plaintiffs long ago could have investigated the validity of the assignment and BA's asserted right to foreclose. *Accord Oyegbola v. Advantage Assets, Inc.*, 2009 WL 4738074, *3 (D. Mass. 2009) (no equitable basis existed to toll plaintiff's FDCPA claim based upon alleged invalid assignment of debt by credit card company to collection agency prior to state court collection action where plaintiff could have investigated validity of assignment during state court proceeding).

Accordingly, because the allegations in the complaint indicate that the FDCPA claims are untimely and plaintiffs have failed to plead facts that would support a plausible basis for tolling the one-year limitations period, the FDPCA claims must be dismissed. However, because it is unclear whether plaintiffs seek recovery under the FDCPA for additional communications made by defendants besides the Bloomer, Peterman letter and the state court foreclosure complaint, I will dismiss this count without prejudice to plaintiffs filing an amended complaint setting forth these additional communications, if there are any.

IV. Count 3, 4 and 6: Fraudulent Inducement and Misrepresentation Claims Against Countrywide, and Unjust Enrichment Claim against Countrywide and Bank of America

In Counts 3 and 6, plaintiffs allege that Countrywide intentionally lied to them about their loan terms when it issued a "pre-approval Certificate" stating that plaintiffs were approved for a home loan of $225,000 with a fixed interest rate of 6.625% and no points. (In their briefs, plaintiffs indicate that these claims arise from the same set of facts, so I consider them together.) Plaintiffs allege that, based upon the pre-approval certificate, they "agreed to enter into loans that were not fully disclosed and that were in fact loans for which they did not qualify and that they would not have agreed to had they understood the true nature of the loans." Amended Complaint, dkt. 15, at ¶ 103. According to plaintiffs, no one from Countrywide explained the final loan terms to them before closing, so that plaintiffs entered into an interest-only adjustable rate mortgage loan and a loan with a balloon payment without understanding how the loans worked. In Count 4, plaintiffs allege that defendants Countrywide and Bank of America were unjustly enriched by this deception because they "retained the benefit of receiving high interest payments on an interest only loan." *Id*.

Although defendants raise colorable arguments that plaintiffs' misrepresentation claims are barred by the economic loss doctrine and the parol evidence rule, it is unnecessary to address them because plaintiffs' claims fail for other reasons. First, insofar as plaintiffs are alleging fraud on the ground that the ultimate loan package they received was different from that offered by Countrywide in the conditional loan approval, this claim is not actionable. *Schurmann v. Neau*, 2001 WI App 4, ¶10, 240 Wis. 2d 719, 624 N.W.2d 157 (claim of misrepresentation cannot be brought based on future events or facts not in existence when the representation was made or on unfulfilled promises). *See also Jefferson v. Briner, Inc.*, 2006 WL 1720692 (E.D. Va. June 21, 2006) (plaintiffs could not bring fraud claim based on conditional loan approval because final approval depended on future events); *Aitken v. Taylor Bean & Whitaker Mortgage Corp.*, 2008 WL

755264 (N.D. Ohio 2008) (pre-approval letter does not create enforceable contract for a mortgage loan).

Second, insofar as plaintiffs suggest that someone from Countrywide deceived them about the terms of the loans to which plaintiffs ultimately agreed, this claim is not pled with the particularity required by Fed. R. Civ. P. 9(b). Plaintiffs fail to allege clearly what it is they did not understand about the contracts they entered, what was said by anyone at Countrywide to mislead them, how they relied on any misrepresentations that were made or even when, where or by whom the alleged misrepresentations were made. Although plaintiffs assert in their brief that it is unreasonable to expect them to recall the name of the Countrywide loan officer (who they allege has since left the company), that is the least of their problems. More fundamental is their omission of any details about they were told, how they relied on this information to their detriment, or why it took them more than four years to realize that the terms of their loans were not what they understood them to be. Accordingly, counts 3, 4 and 6 must be dismissed for failure to state a claim.

IV. Count 7: Negligent Loan Servicing

In count 7, plaintiffs allege a "negligent servicing" claim against BA. Plaintiffs contend that BA breached a duty owed to them by "failing to adhere to the various guidelines, including but not limited to the Fannie Mae Single-Family Servicing Guidelines," dkt. 15, at ¶124, and that plaintiffs were harmed by this breach "in that they were effectively prevented from obtaining either a HAMP modification or participation in the Fannie Mae programs." *Id*. at ¶125.

As plaintiffs recognize, Wisconsin has not recognized the tort of negligent servicing. Therefore, the sufficiency of plaintiffs' claim must be analyzed under general negligence law. To state a viable negligence claim, plaintiffs must allege facts adequately establishing: 1) the existence of a duty of care on the part of the defendant; 2) a defendant's breach of that duty of care; 3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury; and 4) actual loss or damage resulting from the injury. *HornBAk v. Archdiocese of Milwaukee*, 2008 WI App 98, ¶ 16, 313 Wis. 2d 294 (citing *Gritzner v. Michael R.*, 2000 WI 68, ¶27, 235 Wis. 2d 781).

Plaintiffs appear to be asking the court to infer that BA owed them a duty arising from the Fannie Mae Single-Family Servicing Guidelines. However, plaintiffs refer only generally to those guidelines. Plaintiffs do not state which of the guidelines defendants allegedly breached, how or when any such breach occurred, or how plaintiffs were damaged by that breach. In light of *Twombly* and *Iqbal*, which caution district courts not to accept factual conclusions as true and which require that a claim must be "plausible on its face," plaintiffs' allegations do not suffice.

As defendants point out, all plaintiffs have alleged is that defendants did not offer them a "HAMP" modification. But as plaintiffs themselves allege in their complaint, defendants twice offered to modify plaintiffs' loans—once before the foreclosure action was brought and once after—but plaintiffs rejected both offers. Although plaintiffs suggest that these were proposed "in house" modifications and not the "HAMP" modifications that they should have been offered, they fail to explain how a HAMP modification would have been different or how they were harmed by not being offered such a modification. In the end, plaintiffs' claim appears to be a tort rehash of their failed third-party beneficiary claim. As explained above, plaintiffs' third-party beneficiary claim fails.

Plaintiffs suggest in their brief that they may be able to establish a duty of care based upon the Pooling and Servicing Agreement that governs the securitized pool into which their loans were deposited, or upon "industry servicing standards," but they need some discovery to see if this is the case. Dkt. 20, at 27. Under *Twombly* and *Iqbal*, this is not enough. *Twombly*, 544 U.S. at 557 (the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) success on the claim reflects threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to show that the pleader is entitled to relief.) If plaintiffs cannot even identify what defendants did wrong, then their complaint has not made the required showing. In any case, plaintiffs have failed to explain how they could recover in tort for an alleged breach of a contract to which they were not a party.

Count 7 must be dismissed because plaintiffs have failed to allege facts sufficient to plausibly suggest that they could recover under a negligent loan servicing theory.

V. Count 8: Defamation Claim against Bank of America, N.A./BA Home Loans Servicing, L.P/MERS

In support of their claim for defamation, plaintiffs allege the following:

> Defendants MERS and BA published information to third parties, including credit reporting agencies that the Hamuses owed debt to Defendants BA that the Hamuses did not in fact owe. These defamatory statements have hurt the Hamuses in the community and have deterred banks from considering them for loans.

Dkt. 15, at ¶ 127.

The elements of a claim for defamation are: 1) a false statement; 2) communicated by speech, conduct or in writing to a person other than the one defamed; and 3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. *Ladd v. Uecker*, 2010 WI App 28 ¶ 8, 323 Wis. 2d 798 (citing *Torgerson v. Journal/Sentinel, Inc.*, 201 Wis. 2d 524, 534, 536 N.W.2 d 472 (1997)).

Again, plaintiffs allegations fail to answer key questions. What was the statement? Who made it? When, how and to whom was it made? Plaintiffs' complaint is too vague to show a real possibility that plaintiffs can establish each element of their defamation claim. Accordingly, count 8 will be dismissed.

VI. Count 9: Civil Conspiracy Claim Against Defendants BA and MERS

Plaintiffs allege that defendants BA and MERS conspired to commit the fraud alleged in count 2. Although Wisconsin does not recognize a civil action for conspiracy, a plaintiff can bring an action for damages caused by acts pursuant to a conspiracy. *Singer v. Singer*, 245 Wis. 191, 195, 14 N.W. 2d 43 (1944). As explained in the analysis of count 2, however, plaintiffs have failed to allege facts sufficient to show that they were damaged by defendants' alleged fraud. Thus, even if it is sufficient to infer from plaintiffs' complaint the existence of an agreement between MERS and BA that could support a conspiracy, this claim fails for the same reasons as count 2.

ORDER

IT IS ORDERED that the motion of defendants to dismiss the amended complaint (dkt. 16) pursuant to Fed. R. Civ. P. 12(b)(6) is GRANTED.

Plaintiffs may have until June 3, 2011 to file an amended complaint addressing the deficiencies identified in this opinion. Defendants may have until June 17, 2011 to file any new motions to dismiss.

Solely for the purpose of preserving this lawsuit's place in the trial queue in the event a trial is needed, the court will hold a telephonic preliminary pretrial conference in mid-June to set a schedule.

Entered this 13th day of May, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge