IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VITO J. FENELLO, JR. and BEVERLY H. FENELLO, Plaintiffs, v. SHUPING, MORSE & ROSS, LLP; BANK OF AMERICA, N.A., and THE BANK OF NEW YORK MELLON (as Trustee for CWALT, Inc.), Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-04139-WSD

MOTION TO DISMISS AND
INCORPORATED MEMORANDUM OF LAW

COME NOW, Defendants Bank of America, N.A. ("BANA"), and The Bank of New York Mellon, as Trustee for CWALT, Inc. ("BNYM") (collectively "Defendants"), by and through their undersigned counsel, and respectfully move this Court to dismiss Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 8(a) for failing to provide a short, plain statement of the claim and failing to show that Plaintiffs are entitled to any relief; and Fed.R.Civ.P. 12(b)(6) for failing to state a claim upon which relief may be granted. In support thereof, Defendants provide the following memorandum of points and authorities.

PROCEDURAL HISTORY

Plaintiffs Vito J. Fenello, Jr. and Beverly H. Fenello ("Plaintiffs") filed this lawsuit against Defendants BANA, BNYM and Shuping, Morse & Ross, LLP in the Superior Court of Cherokee County, State of Georgia on October 21, 2011. Defendants BANA and BNYM timely removed this matter to the United States District Court for the Northern District of Georgia on November 30, 2011 based upon federal question jurisdiction.

INTRODUCTION AND BACKGROUND[1]

This case arises out of the servicing of a mortgage on a parcel of residential property owned by the Plaintiffs and located at 289 Balaban Circle, Woodstock, Georgia, 30188 (the "Property"). (Compl. ¶¶ 1, 6.) Plaintiffs admit that they received a loan modification offer from BANA and yet assert a wide variety of claims based on their failure to secure a loan modification they considered favorable and advantageous. Having failed to do so, Plaintiffs assert a hodge-podge of legal and factually insufficient claims challenging the chain of title related to the Property. (*See generally* Compl.) Ultimately, none of Plaintiffs' claims have any legal merit or are supported by factual allegations that, taken as true, would state a claim for relief. This Complaint is a clear attempt to stall a

[1] The allegations in the Complaint are treated as true for the purposes of this motion only.

pending foreclosure sale, by throwing any possible theories for why a foreclosure should not take place against the wall to see what sticks, without regard for relevant facts or law. Pursuant to Rule 12(b)(6), the Court should dismiss it with prejudice.

On or about January 30, 2007, Plaintiffs purchased the Property in part by an Interest Only Fixed Rate Note issued by Pulte Mortgage, LLC, which was secured by the Property. (Compl. ¶ 14 and Exh. 13.)[2] In late 2007, Plaintiffs who are real estate professionals, experienced a drop in income. (Compl. ¶ 15.) At some point thereafter, Plaintiffs allege they contacted Bank of America to discuss a mortgage modification, short sale, and a deed in lieu of foreclosure. (Compl. ¶ 16.) Plaintiffs were displeased with the loan modification offer that followed. (Compl. ¶ 21.) In fact, Plaintiffs' chief allegation appears to be frustration with the "15-month" loan modification process, although Plaintiffs willingly admit that they refused the loan modification offered to them and chose to reapply seeking better terms. (Compl. ¶¶ 22-23.) Without alleging how or why they were entitled to a more favorable modification, Plaintiffs seek to place the blame on Defendants for Plaintiffs' failure to fulfill their obligations under the Note.

[2] A copy of Plaintiffs' Security Deed is attached hereto as Exhibit A. This Court may take judicial notice of public records not attached to a complaint when considering a motion to dismiss. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1272, 1280 (11th Cir. 1999).

In addition to the baseless claims arising directly from the modification process, Plaintiffs' Complaint incorporates several other claims typical of "shotgun" complaints resisting foreclosure. In this case, Plaintiffs dispute the subsequent assignment of the Deed of Trust by the Mortgage Electronic Registration System ("MERS") which preceded the foreclosure of their property. Plaintiffs also assert various violations of federal and state law, including the Truth in Lending Act, the Real Estate Settlement Practices Act, and the Fair Debt Collection Practices Act. Elsewhere, Plaintiffs seek to recover based on rights they purport to have under two contracts to which they are not party: A consent order between BANA and the Comptroller of the Currency and a Pooling and Servicing Agreement between the parties to a trust in which they assert their loan was placed as part of a securitization transaction.

Based on these allegations, Plaintiffs assert 13 general allegations and claims for relief.[3] Plaintiffs allege that the Defendants engaged in fraud and misrepresentations. (Compl. ¶¶ 32-35, 86-88); Plaintiffs claim Defendants acted in bad faith (Compl. ¶ 38); that equitable estoppel applies (Compl. ¶¶ 40-42); that Defendants failed to make certain disclosures in violation of state and federal laws

[3] Although Plaintiffs' Complaint includes 13 boldfaced and underlined allegations, many of Plaintiffs' claims are repetitive and, for the purpose of addressing each claim efficiently, Defendants will consolidate its handling of each claim to the extent possible.

(Compl. ¶¶ 48, 55, 57, 83); they claim that the Defendants created and used fraudulent and fabricated assignment documents (Compl. ¶¶ 59-63, 68-70); that Defendants fail to comply with the Consent Order between BANA and the Comptroller of the Currency, Department of the Treasury (Compl. ¶¶ 65-67), and that Defendants have failed to prove damages and standing to foreclose (Compl. ¶¶ 72-79, 81.)

Out of an abundance of caution, Defendants attempt to address all recognizable claims that can be deciphered from Plaintiffs' "shotgun" Complaint. In sum, Plaintiffs have fallen far short of the necessary standard to properly set forth a claim against Defendants – with the result being that Plaintiffs' Complaint cannot survive a motion to dismiss.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." In ruling on the pending motion to dismiss, while all of the well-pleaded factual allegations in Plaintiff's Complaint must be accepted as true, "unsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Young Apartments. Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1037

(11th Cir. 2008); *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1036 n.16 (11th Cir. 2001).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *Bell Atl. Corp. v. Twombly*, 550 U, S. 544, 555 (2007) (citations and quotations omitted). More specifically, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quotation omitted). To survive a Rule 12(b)(6) motion, "the plaintiff's factual allegations, when assumed to be true, 'must be enough to raise a right to relief above the speculative level.'" *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1270 (11th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555).

LEGAL ARGUMENT

Plaintiffs' Complaint fails to state a claim because it is filled with labels and conclusions and it is merely a formulaic recitation of the elements of several causes

of action with insufficient factual or specific allegations. As such, Defendants cannot reasonably formulate a response to the pleading, and Plaintiffs' Complaint should be dismissed with prejudice. In addition, each individual legal theory cited by Plaintiffs is clearly erroneous or improperly pled and each is subject to dismissal as a matter of law for failure to state a cognizable claim.

I. EACH OF PLAINTIFFS' INDIVIDUAL CLAIMS FAILS AS A MATTER OF LAW.

Although Plaintiffs' Complaint should be dismissed for the foregoing reasons alone, each individual legal theory contained in the Complaint is clearly erroneous or improperly pled and subject to dismissal as a matter of law for failure to state a cognizable claim. As listed in the following sections, each of Plaintiffs' thirteen (13) claims fails as a matter of law.

A. Plaintiffs' First Cause of Action for Fraud Fails Because Plaintiffs Fail to Allege Fraud With the Necessary Particularity and Plaintiffs' Claim is Barred by the Statute of Frauds.

Count 1 of Plaintiffs' Complaint conclusively alleges that Defendants engaged in fraud by inducing the Plaintiffs' to default on their contractual obligations. (Compl. ¶¶ 2, 32-33.) However, Plaintiffs cannot assert a fraud or intentional misrepresentation claim against Defendants for similar reasons because Defendants owe no duty outside of the contract. In addition, Plaintiffs have not

made particularized allegations of fraud and do not even allege a valid framework for fraud.

Plaintiffs have failed to sufficiently plead their fraud claim under the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Under Rule 9(b), a party must state with particularity "the circumstances constituting fraud" and "include all the elements of fraud." *Currie v. Cayman Res. Corp.*, 595 F. Supp. 1364, 1372 (N.D. Ga. 1984). In Georgia, the common law tort of fraud requires five elements: (1) false representation by defendant; (2) with scienter, or knowledge of falsity; (3) with intent to deceive plaintiff or to induce plaintiff into acting or refraining from acting; (4) on which plaintiff justifiably relied; (5) with proximate cause of damages to plaintiff. *Worsham v. Provident Cos.*, 249 F. Supp. 2d 1325, 1331 (N.D. Ga. 2002).

Under Fed.R.Civ.P. 9(b), a party must state with particularity "the circumstances constituting fraud." *Currie v. Cayman Res. Corp.*, 595 F. Supp. 1364, 1372 (N.D. Ga. 1984) (holding under Rule 9(b), a pleader must "include all the elements of fraud" and must "specifically aver the circumstances constituting fraud"). To allege fraud with particularity, and avoid dismissal for failure to comply with Rule 9(b), a plaintiff's complaint must set forth the following:

> (1) Precisely what statements were made in what documents or oral representing or what omissions were made; and (2) the

> time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same; and (3) the content of such statements and the manner in which they misled the plaintiff; and (4) what the defendants obtained as a consequence of the fraud.

Brooks v. Blue Cross and Blue Shield of Fla., 116 F.3d 1364, 1371 (11th Cir. 1997).

1. Plaintiffs' Allegations of Misrepresentations are Insufficient.

Plaintiffs fail to allege with any specificity what statements were made that they relied upon to their detriment. Specifically, Plaintiffs allege that BANA "materially misrepresented facts" by asserting: "(a) The only options available to Plaintiffs required missing two payments; (b) [t]hat any decision would be timely; and (c) [t]hat the bank had the authority to negotiate a modification, when in fact, all negotiations were subject to approval by the purported note holder." (Compl. ¶ 32a-c.) Although Plaintiffs' Complaint appears to express frustration with the loan modification process, no person or persons are identified as having made *these* particular representations that later caused their reliance and harm. In fact, Plaintiffs themselves state that Defendants failed to contact them regarding their loan modifications. (*See generally* Compl.)

Plaintiffs clearly fail to meet the standards outlined in *Brooks* requiring specificity in the circumstances of the misrepresentations, including identification

of the person making the statements, the dates and times of the misrepresentations, and that the alleged misrepresentations were intentionally made to benefit Defendants. 116 F.3d at 1371. Moreover, not only do Plaintiffs fail to identify the person making these statements but Plaintiffs also fail to allege that the person making the statements was aware they were false at the time the statements were made, other than baldly asserting that BANA made the representations with the "intent to defraud, as evidenced by their stringing the Plaintiffs along for 15 months…" (Compl. ¶ 34.)

2. Plaintiffs Did Not Justifiably Rely on the Alleged Misrepresentation.

Second, Plaintiffs fail to explain how they justifiably relied upon the alleged misrepresentation, other than to baldly state that "Plaintiffs justifiably relied upon Bank of America … due to the superior knowledge the bank had as to its own policies and procedures." (Compl. ¶ 35.) In sum, Plaintiffs fail to allege reasonable reliance on the possibility of a loan modification or that they otherwise could have cured the arrearage on the loan. In addition, such blind reliance would "show a lack of due diligence which is unjustified as a matter of law." *Hartsfield v. Union City Chrysler-Plymouth*, 218 Ga. App. 873, 874 (1995).

In Georgia, the "law does not create a confidential or fiduciary relationship between a financial institution and those with whom it deals." *Gilliard v. Fulton*

Fed. Savs. & Loan Assn, 182 Ga. App. 678, 679 (1987). "There is . . . particularly no confidential relationship between lender and borrower or mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests." *Pardue v. Bankers First Fed. Savs. & Loan Assn.*, 175 Ga. App. 814, 815 (1985) (emphasis in original); *see also Arp v. United Community Bank*, 272 Ga. App. 331, 334 (2005).

In these circumstances, even assuming, *arguendo*, Defendants misled Plaintiffs with regard to their loan, Plaintiffs would not be entitled to rely on any such representation, but, instead, would be "under a duty to prosecute his own inquiries" concerning the loan. *Pardue*, 175 Ga. App. at 814 (quoting *Citizens & So. Nat'l Bank v. Arnold*, 240 Ga. 200, 201 (1985)); *see Arp*, 272 Ga. App. at 334; *Dollar v. Nations Bank of Ga., N.A.*, 224 Ga. App. 116, 117 (2000) (holding a borrower has "a duty to exercise ordinary diligence to protect her own interests" from the bank, and a borrower is "not entitled to rely" on representations regarding a determination done for the benefit of the bank). Accordingly, it was not reasonable or justified for Plaintiffs to rely on the alleged representations and take no further actions in an attempt to protect their interest in the Property.

3. The Alleged Misrepresentation Did Not Proximately Cause Any Damage to Plaintiff.

Third, Plaintiffs have failed to allege how any reliance upon the alleged misrepresentation was the proximate cause of any damages. Plaintiffs baldly assert that the ongoing delays resulted in "over $100,000 in combined late fees, missed payments, and the corresponding depreciation of the value of the Residence over the 15 month period." (Compl. ¶ 35.) However, Plaintiffs do not allege that any BANA agent told them that they would not be liable for any late fees incurred during the loan modification process. Plaintiffs also fail to allege they were able to cure the arrears and bring the loan current, nor do they allege that the Defendants sought any benefit from them. It is entirely unclear why Plaintiffs did not make attempts to cure their default. As such, any alleged misrepresentation did not proximately cause any damage to Plaintiffs — the foreclosure was caused by Plaintiffs' default and their subsequent failure to cure that default.

4. Representations That Are Made to Future Event Will Not Suffice to Make a Case for Fraudulent Misrepresentation.

Moreover, Plaintiffs assert that Defendant BANA misrepresented that the loan modification decision would be timely. (Compl. ¶ 32(b)). However, representations that are made as to future events will not suffice to make a case for fraudulent misrepresentation.

Under Georgia law, a fraud claim must be based on past or existing facts and cannot arise out of broken promises to complete future events. *Bridges v. Reliance Trust Co.*, 205 Ga. App. 400, 403, 422 S.E.2d 277, 280, 1991 Ga. App. LEXIS 1206 at 9, 92 Fulton County D. Rep. 1864 (1992). Accordingly, any "representations" relating to future performance are nothing more than "statements of intention" and, therefore, never form a valid basis for fraud.

5. Plaintiffs' Fraud and Intentional Misrepresentations Claims are Barred by the Statute of Frauds.

Plaintiffs fail to plead that they provided any sort of consideration in exchange for the alleged modification of their loan. (*See Compl*. generally.) Further, even assuming, *arguendo*, that BANA's agent promised Plaintiffs a loan modification, such an oral statement would be insufficient to modify the express written terms of the Security Deed as a result of the statute of frauds.

Under Georgia's statute of frauds, any mortgage or commitment to lend money "must be in writing and signed by the party to be charged therewith" to make the obligation binding. O.C.G.A. § 13-5-30(4); O.C.G.A. § 13-5-30(7). When a contract is controlled by the statute of frauds, any modification to that contract also is controlled by the statute of frauds. *See Hendricks v. Enterprise Fin. Corp.*, 199 Ga. App. 577, 579, 405 S.E.2d 566, 568 (Ga. App. 1991).

Accordingly, to the extent Plaintiffs' fraud and misrepresentation claims turn on purported verbal representations to modify their mortgage, the statute of frauds would bar proof of that agreement to support the fraud.

In sum, Plaintiffs' sparse and conclusory allegations simply fail to meet Rule 9(b)'s pleading requirements. Simply put, blanket allegations of "misrepresentation" like the type set forth here are insufficient to meet the requisite pleading standard. Accordingly, Plaintiffs' fraud claim must be dismissed.

B. Plaintiffs' Second Cause of Action for "Bad Faith" Fails as a Matter of Law.

In Count 2 of Plaintiffs' Complaint, Plaintiffs purport to assert a claim for "bad faith." In sum, Plaintiffs allege that Defendant BANA acted in "bad faith" by: (a) failing to fulfill verbal assurances; (b) refusing to document verbal assurances; (c) failing to provide a reliable phone system; and (d) harassing Plaintiffs with an automated phone attendant. Although Plaintiffs baldly assert that these acts and practices enumerated in the Complaint constitute bad faith, Defendants are unable to locate a federal or Georgia law by that name remotely applicable to the claims at bar.

Out of an abundance of caution, Defendants will respond under the assumption that Plaintiffs intended to assert a claim for breach of duty of good faith and fair dealing. Even if such a claim were properly pled, however, it would

fail because "[t]he law is clear that there exists no independent cause of action for breach of good faith and fair dealing *outside of a claim for breach of contract*." *Cone Fin. Group, Inc. v. Emplrs Ins. Co.*, 2010 U.S. Dist. LEXIS 82820 at 4-5 (M.D. Ga. 2010) (emphasis added). Plaintiffs fail to allege that Defendants actually breached any express term of the Note, the Security Deed, or any contract for that matter. Without a breach of a contract and a specific provision thereto, there can be no independent claim that Defendants breached the implied covenant of good faith and fair dealing. *See Cone Fin. Group, Inc*, 2010 U.S. Dist. LEXIS 82820 at 4-5 (M.D. Ga. 2010). As such, to the extent one could glean a claim for contractual breach of the implied covenant of good faith and fair dealing from the Complaint, such a claim must be dismissed for failure to state a claim upon which relief can be granted.

C. Plaintiffs' Third Cause of Action for Equitable Estoppel Fails as a Matter of Law Because Plaintiffs fail to Plead Sufficient Facts and Plaintiffs Have "Unclean Hands."

In Count 3 of the Complaint, Plaintiffs allege a claim for equitable estoppel. Plaintiffs' allegation that "the bank has engaged in Equitable Estoppel," misapprehends the legal principle. (Compl. ¶ 42.) Even if properly alleged, however, the Complaint fails to state a claim for equitable relief.

Federal courts have the power to fashion equitable relief, such as applying the doctrine of estoppel but only when facts warranting such relief are pleaded and proved. *Xanadu of Cocoa Beach, Inc. v. Zetley*, No. 86-3346, 1987 U.S. App. Lexis 986, at *987 (11th Cir. 1987). The doctrine of equitable estoppel may apply "to prevent a party from denying at the time of litigation a representation that was made by that party and accepted and reasonably acted upon by another party with detrimental results to the party that acted thereon." *Diamond Crystal Sales, LLC v. Food Movers International, Inc*., No. CV407-42, 2008 U.S. Dist. LEXIS 55279, at *15 (S.D. Ga. July 21, 2008). To benefit from the Court's equitable powers, a party must have relied and acted upon the acts or declarations of the party sought to be estopped, and not upon his own judgment or upon any reliance upon some future act to be done or future execution of some instrument by the party sought to be estopped. *Peacock v. Horne*, 159 Ga. 707, 725-26 (Ga. 1925).

Plaintiffs' claim fails because of the lack of any detrimental reliance on their part. Plaintiffs baldly assert that BANA "through its false representations and concealment of material facts, could reasonably expect the Plaintiffs to act as induced, with full knowledge of the implications of the Plaintiffs' actions." (Compl. ¶ 40.) Again, Plaintiffs provide no indication as to when the false representations were made, what specific acts Plaintiffs' claim they relied upon to

their detriment, or how any "representation" reasonably relied upon that caused Plaintiffs' damages.

Moreover, a party's conduct must reflect the maxim of clean hands in order for that party to invoke the doctrine of equitable estoppel. *Morgan Stanley DW, Inc. v. Frisby*, No. 1:01-CV-2150-TWT, 2001 U.S. Dist. LEXIS 18334, at *1380 (N.D. Ga. Oct. 1, 2001). "To seek any relief regarding a pending or past foreclosure sale, plaintiff must tender the amount owed under the loan." *Taylor v. Wachovia Mortgage Corp*., Civil Action File No. 1:07-CV-2671-TWT, 2009 WL 249353, at *5 n.6 (N.D. Ga. Jan. 30, 2009), adopted at *1. Here, Plaintiffs have made no allegation that they have tendered the full amount due under the Note or that they are willing to tender the full amount. For all of these reasons, Plaintiffs' claim for equitable estoppel must be dismissed.

D. Plaintiffs' Fourth Cause of Action Fails Because Defendants are Not Debt Collectors and Because the FDCPA Does not Apply to Real Estate Foreclosure.

In Count 4 of the Complaint, Plaintiffs allege that Defendants continue to "collect on a debt" in violation of FDCPA. (Compl. ¶¶ 44-48.) However, this theory is misplaced because the FDCPA does not apply to Defendants. In order to prevail on a claim under the FDCPA, Plaintiffs must allege that the defendant attempting to collect the debt qualifies as a "debt collector" under the Act. *Buckley*

v. Bayrock Mortg. Corp, 2010 U.S. Dist. LEXIS 10636, at *21-22 (N.D. Ga. Jan. 12, 2010). It is well-established that mortgage originators, lenders and servicers are not debt collectors, and therefore are not subject to the FDCPA. 15 U.S.C. § 1692a(6); *Hennington v. Greenpoint Mortg. Funding, Inc.*, No. 1:09cv676, 1:09cv962, 2009 WL 1372961, *6 (N.D. Ga. May 15, 2009) (holding defendants "were not debt collectors because they were attempting to collect their own debt"); *see also Warren v. Countrywide Home Loans, Inc.*, 342 Fed. App'x 458, 460 (11th Cir. 2009)*Buckley v. Bayrock Mortg. Corp.*, No. 1:09-CV-1387-TWT, 2010 WL 476673, at *6 n.8 (N.D. Ga. Feb. 5, 2010). Furthermore, even if Defendants were debt collectors under the FDCPA, the Eleventh Circuit has held that "foreclosing on a security interest is not a debt collection activity for purposes of 15 U.S.C. 1 § 1692g." *Warren v. Countrywide Home Loans, Inc.*, 342 Fed. App'x 458, 460 (11th Cir. 2009) (p*er curiam)* (noting "[S]everal courts have held that an enforcer of a security interest, such as a [mortgage company] foreclosing on mortgages of real property . . . falls outside the ambit of the FDCPA . . .") (internal marks and citations omitted)). Thus, the Bank Defendants did not violate § 1692g (Section 809(b)) or any other part of the FDCPA when the non-judicial foreclosure proceedings on the Property were initiated.

E. Plaintiffs' Fifth Cause of Action for Violation of TILA is Insufficiently Pled and Fails on its Face.

In Count 5 of the Complaint, Plaintiffs baldly assert that Defendants violated TILA. (Compl. ¶ 55.) Without further support, Plaintiffs allege that the Defendants violated "TILA, Sec. 404. (g)," which requires that creditors notify borrowers in writing when a mortgage loan is sold, transferred or assigned. (Compl. ¶ 55.) Yet Plaintiffs admit that they received a letter on or about July 7, 2011 from BANA indicating that the servicing of the Loan had been transferred and fail to allege that the letter was untimely. (Compl. ¶ 44.) The Complaint contains no other allegation with respect to any purported failure of notice required by TILA. Based on their own allegations, Plaintiffs' Fifth Cause of Action fails.

F. Plaintiffs' Sixth Cause of Action Fail To State a Claim For Violations of the Real Estate Settlement Procedures Act ("RESPA").

In count 6, Plaintiffs baldly assert that Defendants violated "RESPA § 3500.21e." (Compl. ¶ 57.) To the best of Defendants' understanding, Plaintiffs are asserting a claim under 24 C.F.R. § 3500.21(e)(1)-(2), which governs the obligation of a loan servicer to respond to a Qualified Written Request ("QWR") from a borrower. Plaintiffs conspicuously fail to state that they *ever* tendered a QWR and fail to allege that any of the other correspondence cited in the Complaint meets the requirements to be treated as a QWR and trigger the obligations under 24

C.F.R. § 3500.21(e). Having failed to allege that a QWR was submitted, Plaintiffs cannot recover for the Defendants purported failure to respond to such a communication and this Sixth Cause of Action must be dismissed.

G. Plaintiffs' Seventh and Ninth Causes of Action Challenging the Validity of MERS's Assignment of the Deed of Trust Fail to State a Claim for Defective/Fraudulent Assignment.

In Counts 7 and 9 of the Complaint, Plaintiffs unsuccessfully attempt to assert a claim for unlawful foreclosure based on a challenge to the validity of the assignment by MERS of the Deed of Trust securing Plaintiffs' indebtedness. To the best of Defendants' understanding, Plaintiffs contend that the assignment was invalid because Pulte Mortgage LLC was no longer a party to the Note on April 14, 2011, when the assignment was executed. (Compl. ¶¶ 60.) This allegation is meritless and fails to state a claim for recovery.

Plaintiffs' arguments concerning the legitimacy of the MERS assignment are premised on a fundamental misunderstanding of the MERS system generally and applicable law relating to assignments by MERS. Plaintiffs' arguments are not grounded in fact, are often openly in conflict with the express language of the controlling documents, including the Security Deed itself, and are based on incorrect and unsupported legal theories. (Security Deed, Exh. A, pp. 3 and 11, clause 20.) Georgia courts have consistently and repeatedly recognized MERS's

authority as a nominee. *See, e.g., The Harpagon Company, LLC v. Moore, et. al.,* Fulton County Superior Court No. 2009-CV-167758 (Feb. 1, 2011) (validating a MERS security deed assignment by ruling that lender-assignee was the current and legally proper holder of the security deed which MERS had previously assigned prior to foreclosure); *Brown v. Fed. Nat'l Mortgage Ass'n*, 2011 U.S. Dist. LEXIS 31478 (N.D. Ga. Feb. 28, 2011), *approved and adopted by* 2011 U.S. Dist LEXIS 31471 (N.D. Ga. Mar. 24, 2011) (holding that a security deed conveyed to MERS by Borrower gave MERS the right to exercise all of the interests granted by the security deed). The Georgia Supreme Court has explained:

> MERS, which began operating in 1997, is a private company created by the mortgage banking industry for the purpose of establishing a centralized, electronic system for registering the assignments and sales of residential mortgages, with the goal being the elimination of costly paper work every time a mortgage loan is sold. Under the MERS system, the borrower and the original lender name MERS as the grantee of any instrument designed to secure the mortgage loan. The security instrument is then recorded in the local land records, and the original lender registers the original loan on MERS's electronic system. Thereafter, all sales or assignments of the mortgage loan are accomplished electronically under the MERS system.

Taylor, Bean & Whitaker Mortg. Corp. v. Brown, 276 Ga. 848, 849, 583 S.E.2d 844, 845 n.1 (2003).

In concluding their loan transaction, not only did Plaintiffs acknowledge MERS's involvement in the Security Deed as grantee and nominee of the lender, but Plaintiffs also acknowledged that MERS and the originating lender could transfer and assign the Security Deed to others, including BNYM. The Security Deed expressly states that MERS "is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the grantee under this Security Instrument." (Security Deed, Exh. A, p. 1.) In the Security Deed, Plaintiff agreed to MERS's role in the transaction:

> [Plaintiff] understands and agrees that MERS holds only legal title to the interests granted by [Plaintiff] 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 required of Lender including, but not limited to, releasing or canceling this Security Instrument.

(Security Deed, Exh.A, p. 3.)

Not only have Plaintiffs acknowledged MERS's involvement in the Security Deed as grantee and nominee of the lender, but Plaintiffs also acknowledged that MERS and the originating lender could transfer and assign the Security Deed to others. Plaintiffs cannot now seek to avoid the consequences of the agreement they freely and willingly executed that clearly states that MERS would hold legal

title as nominee for Pulte Mortgage LLC's successors and assigns. *See In re Corley,* No. 10-04033-LWD at *10 (Bankr. S.D. Ga. Feb. 7, 2011) (MERS was entitled to hold legal title under the express terms of the security deed and finding the trustee's argument to the contrary "disingenuous"); *Lacosta v. McCalla Raymer, LLC*, 2011 U.S. Dist. LEXIS 5168 at *3 (N.D. Ga. Jan. 18, 2011) (as a contract, the terms of the security deed "are controlling as to the rights of the parties thereto"). It is beyond debate that Georgia law recognizes the ability to freely transfer mortgage loans, including contracts such as security deeds, by way of assignment, such as the one at issue here. *See* O.C.G.A. § 44-14-64; *Quality Food, Inc. v. Smithberg*, 288 Ga. App. 47, 54, 653 S.E.2d 486, 492 (2007); *Palmetto Capital Corp. v. Smith*, 284 Ga. App. 819, 820-21, 645 S.E.2d 9, 11 (2008). Plaintiffs cannot now be heard to complain of a process to which they openly consented.

Plaintiffs insist that the *Gordon* case entitles them to relief for unlawful foreclosure. The *Gordon* Court held that a properly recorded and indexed security deed containing a grantor's signature but completely lacking both a notary's official attestation and an unofficial attestation by a witness did not provide constructive notice to subsequent bona fide purchasers. *Gordon*, 289 Ga. at 12. It is beyond dispute that even with facial defects in attestation or acknowledgement,

which Defendants specifically deny occurred here, an executed deed is still valid as "between the parties thereto." O.C.G.A. § 44-2-2(c). Plaintiffs fail to allege, nor could they, any third party purchasers involved in the instant matter and therefore Plaintiffs' reliance upon *Gordon* is unfounded and Plaintiffs claim must be dismissed.

H. Plaintiffs' Eighth Cause of Action Fails Because the Consent Order Does Not Create a Private Right of Action.

In Count 8 of the Complaint, Plaintiffs reference a "Consent Order" dated April 13, 2011 issued by the Comptroller of the Currency of the United States of America ("U.S. Comptroller"). (Compl. ¶¶ 65-67.) Plaintiffs claim that BANA is violating the Consent Order by attempting to foreclose on the Property. (Compl. ¶ 67.) A complete copy of the thirty-four (34) page Consent Order is attached hereto as Exhibit B. The Consent Order reflects a mutually agreed upon course of action between BANA and the U.S. Comptroller to correct and identify problems in residential mortgage servicing and in BANA's handling of foreclosures. *See* attached Exhibit B. However, despite Plaintiffs' claims, the Consent Order does not prevent BANA from instituting foreclosure proceedings against them or any other borrower.

Furthermore, the Consent Order unequivocally states that it does not create a private right of action. *See* attached Exhibit B. Pursuant to Article XIII, Section

10, (and repeated in Article II, Section 7 of Stipulation and Consent to the Issuance of a Consent Order) the Consent Order clarifies the following:

> (10) Nothing in the Stipulation and Consent or this Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under the Stipulation and Consent or this Order.

See attached Exhibit B, 27.

Due to the fact that the Consent Order neither prevents foreclosure of the Plaintiffs' property nor creates a private right of action, Plaintiffs' claim for relief in Count 8 of the Complaint fails to state a claim upon which relief can be granted and must be dismissed as a matter of law.

I. Plaintiffs' Tenth Cause of Action for "Failure to Prove Damages" Fails Because Plaintiffs Lack Standing to Avoid Foreclosure Based on Allegations Related to a Contract to Which They Are Not a Party or Intended Beneficiary.

In Count 10 of the Complaint, Plaintiffs' allege that according to the Pooling and Servicing Agreement ("PSA") filed with the SEC for CWALT, Inc., Alternative Loan Trust, Mortgage Pass-Through Certificates, Series 2007-5CB, "in the event of default, some loans will be made whole through the credit default swap, and some loans will be made partially whole through the excess reimbursements." (Compl. ¶ 75.) Although Plaintiffs' claim is difficult to

decipher, Plaintiffs appear to allege that any default under their loan will be covered by at least one of the credit default swaps in place. (Compl. ¶ 77.) On this ground, Plaintiffs allege that Defendants have no standing to foreclose. However, Plaintiffs lack standing to assert this claim and any purported "credit default swap" does not absolve Plaintiffs of their obligations under the loan.

First, Plaintiffs do not allege that they are parties to the PSA cited in their Complaint yet they seek to be absolved from performing their obligations under the Loan claiming that CWALT has sustained no damages. (Compl. ¶¶ 72-78.) Plaintiffs' entire tenth cause of action hinges on the alleged "credit default swap" under the PSA and yet the Plaintiffs fail to allege that they are a party to that agreement with standing to assert any action based on any purported right and/or benefits there under.

Nor have Plaintiffs sufficiently alleged facts to support standing as a third-party beneficiary of the PSA. "Because third-party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to nonsignatories, . . . a person aspiring to such status must show with special clarity that the contracting parties intended to confer a benefit on him." *McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994). "A third party has standing to enforce … [a] contract [only] if it clearly appears from the contract that it was intended for his

benefit; the mere fact that he would benefit from performance of the contract is insufficient." *Dominic v. Eurocar Classics*, -- S.E.2d --, No. A11A0628, 2011 WL 2697056, at *3 (Ga. App. July 13, 2011). Plaintiffs have failed to make any allegation to demonstrate that the PSA was intended for his benefit and accordingly, they have no standing to assert any claims arising from that contractual relationship.

Moreover, while it might be that Plaintiffs' mortgage was at some point pooled into a securitized trust, that fact has no "real effect on Plaintiffs' rights with respect to their loan, and it certainly would not absolve Plaintiff from having to make payments on their loan or somehow shield Plaintiffs' property from foreclosure." *Merkerson v. Bank of America, et al*., No. 1:10-CV-0050-WBH (N.D. Ga 2010). In return for the loan the Plaintiffs received, Plaintiffs agreed to pay the principal, plus interest, to the order of the Lender. (*See* Loan, attached to Compl. as Exh. 13, ¶1.) Plaintiffs failed to do so. (Compl. ¶¶ 17-19). Plaintiffs' assertion that no damage was suffered is baseless.

J. Plaintiffs' Eleventh Cause of Action for Failure to Prove Standing Fails as a Matter of Law and is Consistently Rejected by Georgia

In Count 11 of the Complaint, Plaintiffs allege that "Defendants" lack standing to pursue foreclosure because Defendants have failed to prove that their client is "the Holder in Due course" and "has incurred damages." (Compl. ¶ 81.)

Defendants have addressed the flaws in Plaintiffs' standing argument above in connection with the similarly groundless challenge to the assignment at issue in this matter. The Assignment attached to Plaintiffs' own Complaint defeats this Cause of Action. (Compl. Ex. 17.) Moreover, it is inconceivable how Plaintiffs believe no damage was suffered by Defendants when Plaintiffs admit that they have failed to timely make the payments required by the terms of their loan. (Compl. ¶¶ 17-19.) Plaintiffs' Claim fails as a matter of law and must be dismissed.

K. Plaintiffs' Twelfth Cause of Action Against BANA or BNYM For Defective Foreclosure Fails Because Neither BANA or BNYM Originated the Loan and the Statute is Entirely Inapplicable.

In Count 12 of the Complaint, Plaintiffs contend that Defendants violated O.C.G.A. § 7-1-1014 (3), which requires certain disclosures be made "at or before the time of the closing of the mortgage loan.". O.C.G.A. § 7-1-1014 (3). Yet Plaintiffs' admit that their loan was originated by Pulte Mortgage, LLC, not by any of the Defendants. (Compl. ¶ 14 and Exh. 13). Thus, Plaintiffs fail to allege how BANA or BNYM allegedly violated O.C.G.A. § 7-1-1014 (3) and this Cause of Action must be dismissed.

L. Plaintiffs' Thirteenth Cause of Action Fails to State a Claim for "Direct Contradiction to Verbal Representations" and is Barred by the Statute of Frauds.

Similar to their fraud allegations, Plaintiffs in Count 13 purport to assert a claim for "Direct Contradiction to Verbal Representation." In sum, Plaintiffs allege that "based on verbal representations by [BANA], as well as prior experience with a previously scheduled foreclosure sale, foreclosure will not be pursed by the bank if [Plaintiffs] have an open case pending within two weeks of the scheduled foreclosure." (Compl. ¶ 87.) To the extent the Plaintiffs intended to bring allegations under the theory of fraud or negligent misrepresentation, as they are most on point with Plaintiffs' classification of "Direct Contradiction to Verbal Representation," Plaintiffs fail to state a claim.

As set out more fully in Section A, *supra*, Plaintiffs fail to state sufficient facts to assert a fraud claim. To the extent Plaintiffs' thirteenth cause of action purports to state a claim for negligent misrepresentation rather than fraud, it nevertheless fails for the same reasons. A claim for negligent misrepresentation requires that the plaintiff plead "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." *Hardaway Co. v. Parsons,*

Brinckerhoff, Quade, & Douglas, 267 Ga. 424, 426 (Ga. 1997). Plaintiffs have not asserted that Defendants misrepresented or provided false information to them, or that they reasonably relied on the alleged misrepresentations.

As a threshold matter, it seems Plaintiffs are attempting to hold Defendants liable for their own inability to make the loan payments that they admit they contracted to make. (Compl. ¶¶ 14-15.) However, Plaintiffs fail to identify any specific misrepresentations purportedly made, or provide any real explanation or clarification as to how any information specifically relates to Plaintiffs' claims against Defendants. Instead, Plaintiffs baldly assert that "based on verbal representations by [BANA], as well as prior experience with a previously scheduled foreclosure sale, foreclosure will not be pursued by the bank if they have an open case pending within two weeks of the scheduled foreclosure date." (Compl. ¶ 87.) This type of generalized statement is insufficient to support any cognizable claims upon which relief can be granted.

Additionally, reasonable reliance is an essential element of any negligent misrepresentation claim. *Anderson v. Atlanta Committee for the Olympic Games*, Inc., 261 Ga. App. 895, 900, 584 S.E.2d 16 (2003). As stated above, there is particularly no confidential relationship in the creditor-debtor context, and Plaintiffs cannot rely on the banks representations. *Pardue*, 175 Ga. App. at 814-

815 (citing *Citizens & So. Nat'l Bank*, 240 Ga. at 201 (1985)); *Dollar v. Nations Bank of Ga., N.A.*, 224 Ga. App. 116, 117 (2000) (holding a borrower has "a duty to exercise ordinary diligence to protect her own interests" from the bank, and a borrower is "not entitled to rely" on representations regarding a determination done for the benefit of the bank). Therefore, since Plaintiffs could not reasonably rely on any alleged negligent misrepresentations of Defendants, Plaintiffs' claim should be dismissed with prejudice.

Even if Plaintiffs had alleged misrepresentations by Defendants on which they reasonably relied to their own detriment, which they have not, Plaintiffs' claims would nevertheless fail to the extent the alleged misrepresentations purported to modify the terms of Plaintiffs' loan. An oral agreement to suspend foreclosure would also be in violation of the Statute of Frauds, since any contract related to the sale or interest in land must be in writing. O.C.G.A. § 15-5-30(4). On these grounds alone, Plaintiffs' claim should be dismissed.

M. Plaintiffs Fail to State a Claim for Injunctive Relief.

Lastly, Plaintiffs seek to enjoin the foreclosure. (Compl. ¶ 5.) It is well settled law in this Circuit that a temporary restraining order is an "extraordinary and drastic remedy[.]" *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985). To obtain such relief, a movant must demonstrate:

> (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest.

Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1246-47 (11th Cir. 2002). For the reasons articulated above, Plaintiffs have failed to allege – much less demonstrate – such a showing here. Accordingly, Plaintiffs cannot demonstrate a substantial likelihood of success on the merits. Because Plaintiffs' Complaint fails to state a valid claim against any of the Dependents upon which relief can be granted, a temporary restraining order in this instance is inappropriate. *Lacosta v. McCalla Raymer*, LLC, 2011 U.S. Dist. LEXIS 5168, 4-5 (N.D. Ga. Jan 18, 2011).

Additionally, Rule 65(c) states: "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." *LaCosta*, 2011 U.S. Dist. LEXIS 5168 at 4-5. Plaintiffs do not deny that they failed to make payments in accordance with the Note (Compl. ¶ 36). Nor have they made any offer to tender any security in conjunction with the injunctive remedy they seek.

(*See generally* Compl.) Accordingly, Plaintiffs' motion for injunctive relief must be denied.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, this Court should grant Defendants' Motion to Dismiss pursuant to Rule 8(a), for failing to provide a short, plain statement of the claim showing that the Plaintiffs are entitled to any relief, and pursuant to Rule 12(b)(6), for failure to state a claim upon which relief may be granted; and grant Defendants such other and further relief as the Court deems equitable and appropriate under the circumstances.

This 7th day of December, 2011.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VITO J. FENELLO, JR. and BEVERLY H. FENELLO, Plaintiffs, v. SHUPING, MORSE & ROSS, LLP; BANK OF AMERICA, N.A., and THE BANK OF NEW YORK MELLON (as Trustee for CWALT, Inc.), Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-04139-WSD

CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that on December 7, 2011, I electronically filed the foregoing *Motion to Dismiss and Incorporated Memorandum of Law* with the Clerk of the Court using the CM/ECF System and served a true and correct copy of same on *Pro Se* Plaintiffs via First-Class Mail, postage prepaid, addressed to:

Vito J. Fenello, Jr.
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I further certify that I prepared this document in 14 point Times New Roman font and complied with the margin and type requirements of this Court.

/s/ Andrew G. Phillips
Andrew G. Phillips