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

VITO J. FENNELLO, JR. and BEVERLY H. FENELLO, **Plaintiffs,** **v.** **BANK OF AMERICA, N.A., and THE BANK OF NEW YORK MELLON (as Trustee for CWALT, Inc.),** **Defendants.**	**1:11-cv-4139-WSD**

OPINION AND ORDER[1]

This matter is before the Court on Bank of America, N.A. ("BANA") and The Bank of New York Mellon, as Trustee for CWALT, Inc.'s ("BONYM," collectively "Defendants") Motion to Dismiss [6].

I. BACKGROUND

On January 30, 2007, Plaintiffs Vito and Beverly Fenello purchased 289 Balaban Circle, Woodstock, Georgia 30188 (the "Property") with an "Interest Only Fixed Rate Note." (Compl. ¶ 14). In late 2007, Plaintiffs, who are real-estate professionals wholly compensated through commissions on real-estate

[1] The Court withdraws the reference to the Magistrate Judge.

transactions, experienced a severe drop in income due to the financial collapse of the national economy. (Id. ¶ 15).

In early 2008, Plaintiffs contacted BANA—the "apparent loan servicer at the time"—and inquired about available options involving their loan, "including a mortgage modification, a short sale, and a deed in lieu of foreclosure." (Id. ¶ 16). BANA responded that no relief was available until Plaintiffs missed at least two monthly payments, and BANA suggested that Plaintiffs skip the next two payments and then contact BANA again to apply for relief under the Home Affordable Modification Program ("HAMP"). (Id. ¶ 17). Relying on this suggestion, Plaintiffs skipped the next two monthly payments and on April 24, 2010, applied for relief under the HAMP. (Id. ¶ 18).[2]

After applying for relief under the HAMP, Plaintiffs called BANA numerous times, submitted four complete applications and numerous supplementary documents, were subjected to "misinformation, harassment, and other forms of abuse," and "c[ame] within 24 hours of foreclosure" before receiving a "Special Forbearance Agreement" modification offer on June 13, 2011. (Id. ¶¶ 20-21). The proposed modification would have more than doubled Plaintiffs' original monthly,

[2] Plaintiffs' Complaint is silent regarding actions they took concerning their loan between early 2008 and April 2010. (Compl. ¶¶ 16-18).

interest-only payment. (Id. ¶ 21). BANA told Plaintiffs that they could accept the modification or refuse it and re-apply in thirty days. (Id. ¶ 22).

On July 7, 2011, Plaintiffs received a letter (the "July 7th Letter") from BANA stating that effective July 1, 2011, servicing of their loan was transferred to BANA. (Id. ¶ 44; Ex. 7 to Compl.). The July 7th Letter states that "[u]nder the federal Fair Debt Collections [sic] Practices Act and certain state laws, [BANA] is considered a debt collector" and "that this communication is from a debt collector attempting to collect a debt . . . ." (Ex. 7 to Compl. at 1). The July 7th Letter asserted that, as of July 7, 2011, Plaintiffs owed $198,432.72 to "BANK OF NY (CWALT 2007-5CB) G1" and that Plaintiffs were required to dispute the debt within thirty (30) days or else BANA would assume it was valid. (Id. at 3). The July 7th Letter further stated that if Plaintiffs disputed the debt, BANA would obtain verification of the debt and mail it to them. (Id.).

On July 27, 2011, "Plaintiffs sent a certified letter disputing the debt, indicating that the purported creditor was unknown to Plaintiffs, and demanding that Bank of America provide 'documentation that BANK of NY is the legal holder in due course, along with proof of each and every transfer in the chain of assignments that resulted in BANK of NY attaining this status.'" (Compl. ¶ 46;

Ex. 8 to Compl.). Plaintiffs claim they never received verification of the debt from BANA. (Compl. ¶ 47).

On August 4, 2011, Plaintiffs turned down the "Special Forbearance Agreement" modification offer from BANA and indicated that they would re-apply for a loan modification in thirty days. (Id. ¶ 22).

On September 7, 2011, Plaintiffs called BANA to re-apply and were informed that only a verbal application was possible. (Id. ¶ 23). After completing the application over the phone, Plaintiffs were told that they were preliminarily approved for a modification, pending the note-holder's approval, and that they would receive a formal written modification offer within ten days. (Id. ¶ 23).

On September 8, 2011, Plaintiffs received a letter from BANA indicating that they had been assigned a "Dedicated Customer Relationship Manager," Ms. Latecia Salters, and from that point on BANA's "automated attendant" would automatically route all calls to her. (Id. ¶ 24).

Also on September 8, 2011, Shuping, Morse & Ross, LLP ("Shuping Morse"), acting on behalf of BANA, sent Plaintiffs a letter (the "September 8th Letter") stating that "[i]t is anticipated that foreclosure proceedings will be forthcoming;" seeking to collect on Plaintiffs' indebtedness to BANA; and stating "[u]nless you notify us within 30 days from the date of your receipt of this notice

that you dispute the validity of this debt or any portion thereof, we will assume the debt is valid." (Id. ¶¶ 48-49; Ex. 9 to Compl.).

On September 12, 2011, Plaintiffs called their Dedicated Customer Relationship Manager, Ms. Salters, regarding their loan modification request, but were unable to reach her. (Compl. ¶ 25). Ms. Salters' voice-mail message said she would return all calls within twenty-four hours and Plaintiffs left her a message. (Id.).

On September 14, 2011, Plaintiffs replied to the September 8th Letter from Shuping Morse, disputed the debt, and demanded "written documentation that CWALT, Inc. is indeed the current creditor/beneficiary, that it is indeed the Holder in Due Course, and that it has Standing to pursue collections and/or foreclosure in this matter." (Compl. ¶ 50; Ex. 10 to Compl.).

On September 19, 2011, Shuping Morse replied to Plaintiffs' demand for verification of their indebtedness and provided a "Payoff Demand Statement" from BANA and a copy of the promissory note Plaintiffs signed when they obtained their loan. (Compl. ¶ 51; Exs. 11-13 to Compl.).

On September 21, 2011, not having received a formal written modification offer or a return phone call from Ms. Salters, Plaintiffs called BANA again and were routed to "Jackie," Ms. Salters' "apparent assistant." (Compl. ¶ 26). After

Plaintiffs' verified some of their contact information on the account, the call was disconnected. (Id.). Plaintiffs immediately called back, were unable to reach "Jackie," and were only able to leave a message for Ms. Salters, which they did. (Id.). On September 26, 2011, Plaintiffs again called and left a message for Ms. Salters. (Id. ¶ 27).

Also on September 26, 2011, Plaintiffs replied to the verification of indebtedness provided by Shuping Morse, asserted that it was deficient, and stated that the Fair Debt Collection Practices Act requires Shuping Morse and BANA to "cease collection efforts until" they are able to verify their claims of indebtedness against Plaintiffs. (Compl. ¶ 52; Ex. 14 to Compl.).

On September 29, 2012, Shuping Morse, acting on behalf of BANA, sent Plaintiffs a demand letter stating that "foreclosure proceedings are being instituted in the manner provided in the Promissory Note and Deed to Secure Debt;" seeking to collect on their indebtedness to BANA; and stating "you have 10 days from the date of your receipt of this notice to pay the entire principal balance and accrued interest due on the Promissory Note" without being required to also pay attorney's fees. (Compl. ¶ 53; Ex. 15 to Compl.).

On October 3, 2011, Plaintiffs sent a letter to the Attorney General of Georgia and copied several members of the press. (Compl. ¶ 28). Within hours,

Plaintiffs received a phone call from an individual named Julie Grippa, who apologized for the multiple unreturned phone calls and indicated that Ms. Salters had a death in the family. (Id.). According to Ms. Grippa, Plaintiffs "did have an open file in modification," but several additional documents were needed, which Plaintiffs promptly provided. (Id. ¶ 29). Ms. Grippa "had no explanation" for "the phone application, the preliminary approval, and the missing formal offer." (Id.).

On October 21, 2011, Plaintiffs, proceeding together *pro se*, filed this action in the Superior Court of Cherokee County, Georgia, against Shuping Morse, BANA, and BONYM, alleging violations of various federal and state laws pertaining to the foreclosure of the Property. (Notice of Removal ¶¶ 1-3; Compl. passim).[3] Plaintiffs requested a temporary restraining order "and/or" preliminary injunction enjoining the foreclosure on the Property; a permanent injunction, until "standing of the Defendants" can be verified; production of the "Original Promissory note, with all 'wet letter' assignments and allonges;" proof of "any

[3] A "document filed *pro se* is 'to be liberally construed,' . . . , and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" Erikson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)); see also Mederos v. United States, 218 F.3d 1252, 1254 (11th Cir. 2000) (discussing that *pro se* filings are entitled to liberal construction); Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990). Although the Court construes *pro se* documents liberally, they must also comply with the procedural rules that govern pleadings. See McNeil v. United States, 508 U.S. 106, 113 (1993).

assignments, liens or any other instruments that prove any claims by an alleged Holders in Due Course;" validation of the debt; all "court costs and court related fees;" and any other relief the Court deemed just and proper. (Compl. at 22-23).

On November 30, 2011, BANA and BONYM removed the action to this Court. (Notice of Removal at 1).

On December 6, 2011, the parties consented to the dismissal of Shuping Morse [4].

On December 7, 2011, Defendants filed their Motion to Dismiss [6]. On December 19, 2011, Plaintiff Vito Fenello filed his response [9],[4] as well as his

[4] Although Mr. Fenello's response was styled as "Plaintiffs' Response to Defendants' Motion to Dismiss, Etc.," the response itself is only in the name of Mr. Fenello, and is signed only by him. To the extent that Mr. Fenello has attempted to represent Mrs. Fenello in this case, such action is not allowed. Title 28 U.S.C. § 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." The plain language of § 1654 requires those persons who seek to represent themselves in federal courts to do so "personally." Nonlawyers, such as Mr. Fenello, therefore, may not represent another individual in an action. See Jacox v. Dep't of Defense, Civil Action No. 5:06-cv-182 (HL), 2007 WL 118102, at *1 (M.D. Ga. Jan. 10, 2007) ("28 U.S.C. § 1654 requires *pro se* litigants to conduct their own cases personally and does not authorize nonlawyers to conduct cases on behalf of individuals."); see also Michel v. United States, 519 F.3d 1267, 1270 (11th Cir. 2008) (citing Gonzalez v. Wyatt, 157 F.3d 1016 (5th Cir. 1977)) ("A party cannot be represented by a nonlawyer, so a pleading signed by a nonlawyer on behalf of another is null."); Lindstrom v. Illinois, 632 F. Supp. 1535, 1537 (N.D. Ill. 1986) (holding that nonlawyer could not represent his spouse or his church in federal lawsuit). Section 1654, therefore, precludes Mr. Fenello from representing Mrs.

Motion for Judicial Disclosure and Recusal [10]. On January 5, 2012, Defendants filed their reply [16]. On January 12, 2012, Mr. Fenello filed his "second response" [18] to Defendants' Motion to Dismiss.

On January 26, 2012, Defendants filed their Motion to Strike Plaintiffs' Second Response in Opposition to Defendants' Motion to Dismiss [19] on the grounds that it was a procedurally improper surreply, and without merit.

On May 24, 2012, the Court denied Plaintiff Vito Fenello's Motion for Judicial Disclosure and Recusal and granted Defendants' Motion to Strike [23].[5]

Liberally construing Plaintiffs' Complaint, the Court finds Plaintiff has attempted to assert four federal claims and ten state-law claims. These asserted claims include violations of the federal Fair Debt Collection Practices, Truth in Lending, and Real Estate Settlement Procedures Acts; a violation of a federal Consent Order entered into by the Office of the Comptroller of Currency; fraud; "bad faith;" equitable estoppel; "defective/fraudulent assignment;" "failure to

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Fenello in this action, and any purported response on her behalf is null. As a result, Mrs. Fenello has not responded to the motion to dismiss. Because courts generally do not grant a motion to dismiss based on a *pro se* plaintiff's failure to respond to a motion to dismiss, the Court will consider the Defendants' Motion to Dismiss on its merits as to both Plaintiffs. Johnson v. Am. Meter Co., 412 F. Supp. 2d 1260, 1262 n.3 (N.D. Ga. 2004) (Carnes, J.); Daniel v. United States, 891 F. Supp. 600, 602 n.1 (N.D. Ga. 1995) (Hull, J.); see also McCall v. Pataki, 232 F.3d 321, 322-23 (2d Cir. 2000).

[5] The Court also granted Defendants' Motion to Exceed Page Limitation [5].

prove holder in due course status;" "failure to prove damages;" "failure to prove standing;" "defective foreclosure closing notice;" "direct contradiction by verbal representation;" and a claim for injunctive relief.

II. DISCUSSION

A. Standard on motion to dismiss

The law governing motions to dismiss pursuant to Rule 12(b)(6) is well-settled. Dismissal of a complaint is appropriate "when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993).

In considering a motion to dismiss, the Court accepts the plaintiff's allegations as true and considers the allegations in the complaint in the light most favorable to the plaintiff. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007); see also Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999) ("At the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff."). The Court, however, is not required to accept a plaintiff's legal conclusions. See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009) (citing

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)), abrogated on other grounds by Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012). Nor will the Court "accept as true a legal conclusion couched as a factual allegation." See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Ultimately, the complaint is required to contain "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.[6]

To state a claim to relief that is plausible, the plaintiff must plead factual content that "allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "Plausibility" requires more than a "sheer possibility that a defendant has acted unlawfully," and a complaint that alleges facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (citing Twombly, 550 U.S. at 557). "To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims."

[6] The Supreme Court explicitly rejected its earlier formulation for the Rule 12(b)(6) pleading standard: "'[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Twombly, 550 U.S. at 577 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Court decided that "this famous observation has earned its retirement." Id. at 563.

Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1263 (11th Cir. 2004) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.") (citations omitted).[7]

B. Fair Debt Collection Practices Act

Defendants contend that Plaintiffs' Fair Debt Collection Practices Act ("FDCPA") claim fails because mortgage originators, lenders, and servicers are not debt collectors under the FDCPA, and because foreclosing on a security interest is not debt-collection activity for the purposes of 15 U.S.C. § 1692g. (Defs.' Mot. to Dismiss at 17-18).

Mr. Fenello disputes the argument that BANA is not a debt collector, asserting that "the exemption only applies when the bank is attempting to collect a debt in their own portfolio," and BANA is not acting as a bank or servicer of "its own loan portfolio," but is instead acting as a debt collector for BONYM. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 5-6). Mr. Fenello notes that Exhibit 7 to his Complaint, a letter sent by BANA to Plaintiffs, contains an admission by BANA that it "is considered a debt collector" under the FDCPA. (Id. at 6; Ex. 7 to

[7] Federal Rule of Civil Procedure 8(a)(2) requires the plaintiff to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In Twombly, the Supreme Court recognized the liberal minimal standards imposed by Federal Rule 8(a)(2) but also acknowledged that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555.

Compl.). Finally, Mr. Fenello contends that "the exemptions cited are invalid if the debt collector 'takes or threatens to take any nonjudicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest.'" (Pl.'s Resp. to Defs.' Mot. to Dismiss at 6 (citing 15 U.S.C. § 1692f(6))).

In reply, Defendants contend that simply sending a letter stating that one is a debt collector does not change one's status to that of a "debt collector." (Defs.' Reply in Supp. of Mot. to Dismiss at 4-5). Defendants further argue that Plaintiffs' argument fails to the extent they allege that Defendants violated § 1692f(6) on the grounds that BONYM did not have the present right to possession of the Property. (Id. at 5).

The FDCPA "sought 'to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'" LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1190 (11th Cir. 2010) (quoting 15 U.S.C. § 1692(e)). To prevail on a FDCPA claim, a plaintiff must establish that:

> (1) [he][has] been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a "debt collector" under the Act; and (3) the

> defendant has engaged in a prohibited act or has failed to perform a requirement imposed by the FDCPA.

Buckley v. Bayrock Mortg. Corp., Civ. No. 1:09-cv-1387-TWT, 2010 WL 476673, at *6 (N.D. Ga. Feb. 5, 2010) (Thrash, J., adopting Vineyard, M.J.) (alteration in original) (quoting Beadle v. Haughey, No. Civ. 04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005), and Russey v. Rankin, 911 F. Supp. 1449, 1453 (D.N.M. 1995) (alteration in original)); accord McCorriston v. L.W.T., Inc., 536 F. Supp. 2d 1268, 1273 (M.D. Fla. 2008).

Here, Plaintiffs allege a violation of 15 U.S.C. § 1692g. (Compl. ¶ 48). Under § 1692g, "if a consumer notifies a debt collector in writing that a debt is disputed, the collector must cease collection of that debt until the debt collector verifies the debt and mails a copy of the verification to the consumer." Warren v. Countrywide Home Loans, Inc., 342 F. App'x 458, 460 (11th Cir. 2009) (citing 15 U.S.C. § 1692g(b)). The unpublished Warren decision 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 except for the provisions of section 1692f(6)[[8]]," Warren, 342 F. App'x at 460-61 (quoting Chomilo v. Shapiro,

[8] Section 1692f(6) prohibits a debt collector from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if" (1) "there is no present right to possession of the property claimed as collateral through an enforceable security interest"; (2) "there is no present intention to take

Nordmeyer & Zielke, LLP, No. 06-3101, 2007 WL 2695795, at *3-4 (D. Minn. Sept. 12, 2007), and citing Montgomery v. Huntington Bank, 346 F.3d 693, 699-700 (6th Cir. 2003) (finding that enforcer of security interest falls outside of FDCPA provisions)). While that aspect of the Warren decision is still good law, the Eleventh Circuit has since held that a dual-purpose communication designed to give the borrower notice of foreclosure and demand payment on the underlying debt may also relate to the collection of a debt within the meaning of § 1692e. See Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211 (no pincite available) (11th Cir. 2012) (citing Ausar-El ex rel. Small, Jr. v. BAC (Bank of America) Home Loans Servicing LP, 448 F. App'x 1, 1 (11th Cir. 2011)).

The Reese case is relevant to the present dispute because Exhibit 7 to Plaintiffs' Complaint is a letter from BANA stating that "this communication is from a debt collector attempting to collect a debt" and that BANA "is considered a debt collector" under the FDCPA. (Ex. 7 to Compl.). While this statement is relevant to Plaintiff's FDCPA claim, it does not establish that BANA is a "debt collector" within the meaning of the FDCPA or suffice for satisfying Plaintiffs' procedural pleading requirements. See Reese, 678 F.3d at ---- (discussing similar

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possession of the property"; or (3) "the property is exempt by law from such dispossession or disablement." 15 U.S.C. § 1692f(6). For purposes of § 1692f(6), a debt collector includes a person in the business of enforcing security interests. See 15 U.S.C. § 1692a(6).

language in a collection notice and proceeding to discuss whether the complaint plausibly alleged that the defendant was a "debt collector" within the meaning of the FDCPA).

Under the FDCPA, a "debt collector" is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Unlike Reese, where the complaint plausibly alleged a defendant was a "debt collector," Plaintiffs' Complaint does not allege this element, even conclusorily. See 678 F.3d --- ("The complaint alleges that the law firm is 'engaged in the business of collecting debts owed to others incurred for personal, family[,] or household purposes.'"); (Compl. ¶¶ 43-53). The Court thus finds Plaintiffs' Complaint, as presently pled, fails to state a claim for a violation of the FDCPA.

C. Truth in Lending Act

Defendants argue that Plaintiffs' Truth in Lending Act ("TILA") claim fails because 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 they fail to allege that the letter was untimely. (Defs.' Mot. to Dismiss at 19).

Mr. Fenello responds that TILA requires that Defendants provide the same type of notification whenever the "actual loan (promissory note)" is sold, transferred, or assigned, and this has not occurred. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 7).

In reply, Defendants state that Plaintiffs also fail to allege that either defendant is a "creditor" under 15 U.S.C. § 1641(g), fail to identify which Defendant purportedly violated the statute, and fail to allege actual damages related to a purported failure to provide the notice of assignment, which they must allege if basing their claim on a failure to comply with the requirements imposed on lenders under Section 1641(g)(1). (Defs.' Reply in Supp. of Mot. to Dismiss at 6-7).

Here, Plaintiffs' Complaint asserts that Defendants, without specifying which Defendant, failed to adhere to TILA's requirement that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer." See 15 U.S.C. § 1641(g)(1); (Compl. ¶ 55). This is a conclusory allegation that is not supported by a single factual allegation apart from the general assertion that "Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth

herein." (Id. ¶ 54). Further, Plaintiffs do not identify the Defendant that allegedly violated the provision, nor do they demonstrate that entity is a "creditor" within the meaning of TILA. Finally, Plaintiffs' Complaint does not seek damages and TILA does not provide injunctive relief for private litigants. See In re Consolidated Non-Filing Ins. Fee Litigation, 431 F. App'x 835, 838-39 (11th Cir. 2011); (Compl. at 22-23).[9]

For these reasons, the Court finds Plaintiffs fail to state a claim for a violation of TILA and this claim is dismissed.

D. Real Estate Settlement Procedures Act

Defendants contend that Plaintiffs' Real Estate Settlement Procedures Act ("RESPA") claim fails because Plaintiffs fail to allege that a qualified written request was tendered and fail to allege that any of the other correspondence cited in their Complaint satisfies RESPA's requirements to be treated as a qualified written request. (Defs.' Mot. to Dismiss at 19-20).

Mr. Fenello responds that Exhibit 8 to the complaint is a qualified written request, and the requisite elements "are included in this letter." (Pl.'s Resp. to Defs.' Mot. to Dismiss at 7).

[9] The Court notes, however, that Plaintiffs also seek "all court costs and court related fees." (Compl. at 23).

In reply, Defendants state that Plaintiffs' purported qualified written request seeks information unreasonably, and even assuming the letter constitutes a valid qualified written request, any RESPA claim fails because there is no allegation of actual damages, which is required to obtain relief on a RESPA claim. (Defs.' Reply in Supp. of Mot. to Dismiss at 7-8).

In their Complaint, Plaintiffs allege a violation of "RESPA, SEC 3500.21e," apparently a reference to 24 C.F.R. § 3500.21e, although if so, the purported quotation in Plaintiffs' Complaint is actually a paraphrase rather than a quotation. (Compl. ¶ 57). The relevant portion of that provision states that

> Within 20 business days of a servicer of a mortgage servicing loan receiving a qualified written request from the borrower for information relating to the servicing of the loan, the servicer shall provide to the borrower a written response acknowledging receipt of the qualified written response. This requirement shall not apply if the action requested by the borrower is taken within that period and the borrower is notified of that action in accordance with the paragraph (f)(3) of this section.

24 C.F.R. § 3500.21(e)(1).[10] Failure to comply with this section results in liability to the borrower for each failure "in an amount equal to the sum of any actual

[10] A "qualified written request"

> means a written correspondence (other than notice on a payment coupon or other payment medium supplied by the servicer) that includes, or otherwise enables the servicer to identify, the name and account of the borrower, and includes a statement of the

damages sustained by the individual as the result of the failure and, when there is a pattern or practice of noncompliance with the requirements of this section, any additional damages in an amount not to exceed $1,000." 24 C.F.R. § 3500.21(f)(1)(i).

Here, as with the TILA claim, Plaintiffs' Complaint provides no information at all with respect to the RESPA claim or resulting damages. Only in Mr. Fenello's response does it become clear that the purported qualified written request is Exhibit 8 to Plaintiffs' Complaint. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 7). Even assuming that Exhibit 8 constitutes a qualified written request, any RESPA claim premised on 24 C.F.R. § 3500.21(e) fails because Plaintiffs have not alleged actual damages based on a failure to respond to the purported qualified written request.[11] The Court finds Plaintiffs fail to state a claim for a RESPA violation and this claim is dismissed.

> reasons that the borrower believes the account is in error, if applicable, or that provides sufficient detail to the servicer regarding information relating to the servicing of the loan sought by the borrower.

24 C.F.R. § 3500.21(e)(2)(i).

[11] The same would hold true had Plaintiffs alleged a violation of the analogous statutory provision, 12 U.S.C. § 2605(e). See Frazile v. EMC Mortg. Corp., 382 F. App'x 833, 836 (11th Cir. 2010) (holding that plaintiff failed to state a claim under 12 U.S.C. § 2605 because she "failed to allege facts relevant to the necessary element of damages caused by assignment").

E. "Failure to Comply with the Consent Order between Bank of America, N.A. and the Comptroller of the Currency, Department of the Treasury, signed April 13, 2011. (AA-EC-11-12)"

Defendants argue that Plaintiffs' claim based on the alleged violations of the Consent Order—which the Court liberally construes as an attempt by Plaintiffs to assert a federal claim—fails because the Consent Order does not prevent BANA from instituting foreclosure proceedings against any borrower, and the Consent Order unequivocally states that it does not create a private right of action. (Defs.' Mot. to Dismiss at 24-25).

Mr. Fenello states that Plaintiffs included this cause of action to show that Defendants do not have standing and that Defendants have violated numerous state and federal laws and regulations. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 7).

Defendants reply that Plaintiffs' argument does nothing to repair the problems with their claims. (Defs.' Reply in Supp. of Mot. to Dismiss at 14).

The Court finds that the Consent Order, much like the HAMP and the Emergency Economic Stabilization Act of 2008 ("EESA") that were intended to provide relief to homeowners, neither expressly, nor impliedly, creates a cause of action or vests a mortgagor with third party beneficiary rights to enforce provisions of the Consent Order under state law. See Miller v. Chase Home Finance, LLC, 677 F.3d 1113 (no pincite available) (11th Cir. 2012) (citing cases and examining

whether HAMP or EESA provides a private cause of action); Nelson v. Bank of Am., N.A., 446 F. App'x 158, 158 (11th Cir. 2011) (citing cases); Warren v. Bank of Am., No. 4:11-cv-70, 2011 WL 2116407, at *2-*5 (S.D. Ga. May 24, 2011) (citing cases and discussing third party beneficiary rights under Georgia law); Danjor, Inc. v. Corporate Constr., Inc., 613 S.E.2d 218, 220-21 (Ga. Ct. App. 2005) (quoting Rowe v. Akin & Flanders, Inc., 525 S.E.2d 123, 125 (Ga. Ct. App. 1999) ("[i]n order for a third party to have standing to enforce a contract under OCGA § 9-2-20(b), it must clearly appear from the contract that it was intended for his benefit. The mere fact that he would benefit incidentally from performance of the agreement is not alone sufficient.").

Even if a failure to comply with a consent order entered into by the Comptroller of the Currency constituted a cause of action—which the Court finds it does not—Plaintiffs' Complaint fails to allege facts to support a plausible claim that the Consent Order was violated or that the Consent Order was intended for their benefit. This claim is required to be dismissed.[12]

[12] The Court also concludes that this cause of action should be dismissed as abandoned as to Mr. Fenello. Although Mr. Fenello provided a response with respect to this particular claim, he has not addressed Defendants' arguments in any way. Plaintiffs' persistence in prosecuting seemingly baseless claims without bothering to offer anything more than a *pro forma* response suggests that all of their claims may have been interposed solely for purposes of delay. Whatever the

F. Exercise of Supplemental Jurisdiction

Having considered Plaintiffs' asserted federal claims, the Court next addresses the appropriateness of exercising supplemental jurisdiction over Plaintiffs' state-law claims. Supplemental jurisdiction exists "over all other claims that are so related to claims" over which a court has original jurisdiction that "form part of the same case or controversy." 28 U.S.C. § 1367(a). "In deciding whether a state law claim is part of the same case or controversy as a federal issue, [courts] look to whether the claims arise from the same facts, or involve similar occurrences, witnesses or evidence." Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 455 (11th Cir. 1996); see also Lucero v. Trosch, 121 F.3d 591, 597 (11th Cir. 1997) (noting that the case or controversy standard "confers supplemental jurisdiction over all state claims which arise out of a common nucleus of operative fact with a substantial federal claim").

Here, Plaintiffs' claims concern Plaintiffs' mortgage loan or the foreclosure proceedings. Indeed, each of Plaintiffs' causes of action rely on the same factual allegations. (Compl. ¶¶ 31, 37, 39, 43, 54, 56, 58, 64, 68, 71, 80, 82, 85 ("Plaintiffs repeat and reallege the allegations set forth in the preceding

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reason, Mr. Fenello has not responded to Defendants' arguments regarding this claim and he has therefore abandoned this claim.

paragraphs, as if fully set forth herein.")). As such, the Court may exercise supplemental jurisdiction over these claims.

However, "[t]he decision to exercise supplemental jurisdiction over pendent state claims rests within the discretion of the district court." Raney v. Allstate Ins. Co., 370 F.3d 1086, 1088-89 (11th Cir. 2004) (citing Mergens v. Dreyfoos, 166 F.3d 1114, 1119 (11th Cir. 1999)); see also Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C., 596 F.3d 1313, 1327-28 (11th Cir. 2010).

> The district court's discretionary decision whether or not to entertain pendent state claims is guided generally by four factors: (1) whether the state law claims predominate in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy sought; (2) whether comity considerations warrant determination by a state court (i.e., is the state claim novel or particularly complex such that an accurate definitive interpretation of state law is necessary); (3) whether judicial economy, convenience, and fairness to the litigants would best be served by trying the federal and state claims together; and (4) whether "the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong."

L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 428 (11th Cir. 1984).

A district court may decline to exercise supplemental jurisdiction over a claim if:

> (1) the [state] claim raises a novel or complex issue of state law;

> (2) the [state] claim substantially predominates over the claim or claims over which the district court has original jurisdiction;[13]
>
> (3) the district court has dismissed all [federal] claims over which it has original jurisdiction; or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c); see also Dockens v. DeKalb Cnty. Sch. Sys., 441 F. App'x 704, 709 (11th Cir. 2011) ("A district court may decline supplemental jurisdiction if 'the district court has dismissed all claims over which it had original jurisdiction.'"). In evaluating exceptional circumstances, courts are to consider factors of judicial economy, convenience, fairness to the parties, whether all claims would be expected to be tried together, and avoiding "multiplicity in litigation." Parker, 468 F.3d at 745-46.

Here, the Court concludes that for the purposes of judicial economy, fairness, and avoiding multiplicity in litigation, the Court should exercise supplemental jurisdiction over Plaintiffs' state-law claims. This action was removed to this Court more than seven months ago and has been subject to substantial amounts of briefing. It would be a wasteful exercise to remand this

[13] The Eleventh Circuit has noted that "'[a] federal court will find substantial predominance when it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage.'" Parker v. Scrap Metal Processors, Inc., 468 F.3d 733, 744 (11th Cir. 2006) (quoting McNerny v. Neb. Pub. Power Dist., 309 F. Supp. 2d 1109, 1117-18 (D. Neb. 2004)).

case to state court for another lengthy round of briefing, particularly given the clear general lack of merit of Plaintiffs' claims. See Parker, 468 F.3d at 745-47; Sullivan v. Chappius, 711 F. Supp. 2d 279, 286 (W.D.N.Y. 2010) ("In the case at bar, it would hardly promote the interests of fairness or judicial economy to leave the door open for plaintiff to refile his . . . claim in state court, and require defendants to litigate there, when that claim is so obviously lacking in merit."); see also Mauro v. S. New Eng. Telecommc'ns., Inc., 208 F.3d 384, 388 (2d Cir. 2000) (upholding district court's decision to retain jurisdiction over state claims after sole federal claim had been dismissed, where declining jurisdiction over state claims "would have furthered neither fairness nor judicial efficiency" and the state causes of action did not require district court "to resolve any novel or unsettled issues of state law"); Waterman v. Transp. Workers' Union Local 100, 8 F. Supp. 2d 363, 369 n.2 (S.D.N.Y. 1998) ("One reason to retain jurisdiction is if the outcome of the claim is plain.").[14]

[14] The Court also notes that this action was removed on November 30, 2011, on the basis of federal question jurisdiction. (Notice of Removal ¶¶ 8-9). Shuping Morse, a Georgia law firm, was dismissed on December 6, 2011 [4]. Thus, it now appears there is complete diversity between the parties and the amount in controversy exceeds $75,000. While there is no diversity jurisdiction in this action based on the facts in existence at the time of removal, the Court finds that the dismissal of Shuping Morse and appearance of diversity jurisdiction also supports the exercise of supplemental jurisdiction over Plaintiffs' state-law claims. See In re Carter, 618 F.2d 1093, 1101 (5th Cir. 1980) ("It is a fundamental principle of

G. Fraud

Defendants contend that Plaintiffs' fraud claim fails because: (1) it is not alleged with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure; (2) it was not reasonable or justifiable for Plaintiffs to rely on any alleged misrepresentations because there is no fiduciary or confidential relationship between the parties; (3) the proximate cause of any damage was Plaintiffs' default, not any alleged misrepresentations; (4) representations as to future events, such as the alleged representation that the loan modification decision would be timely, are not sufficient to state a claim for fraudulent misrepresentation; and, (5) any fraud and intentional-misrepresentation claims are barred by the statute of frauds. (Defs.' Mot. to Dismiss at 7-14).

In a single response to Defendants' arguments regarding Plaintiffs' fraud, "bad faith," and equitable estoppel claims, Mr. Fenello states the following:

> Plaintiffs have included these charges for the purpose of judicial economy. They are preemptive in nature, and dependent on the big issue: Does the client CWALT, Inc. have standing to pursue foreclosure against the Plaintiffs?
>
> In light of this, Plaintiffs are agreeable to removing these three Causes of Action, without prejudice, provided they are subject to reinsertion pending the outcome of the balance of the case.

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law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed.").

> With regard to specificity, the Plaintiffs are in possession of detailed notes of the many conversations with Bank of America, including date, the person spoken to, and the details of the conversation. Further, Bank of America is presumably in possession of the original recordings of these conversations, which the Plaintiffs will pursue in discovery.
>
> If the Court decides to leave these Causes intact, and since the Plaintiffs are appearing *pro se*, they ask that their complaint be liberally construed . . . [and that] they be allowed to amend their Complaint to correct any deficiencies in these Causes as filed.

(Pl.'s Resp. to Defs.' Mot. to Dismiss at 3-4).

In reply, Defendants reiterate that Plaintiff has not stated a claim for fraud, and they state that Plaintiff appears to concede that the claim is improperly pleaded. (Defs.' Reply in Supp. of Mot. to Dismiss at 2-3).

Based on Mr. Fenello's response, it appears that he has abandoned his fraud claim and dismissal is appropriate. See Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1228 n.2 (11th Cir. 2005) (explaining that when a party fails to offer argument on an issue or makes only passing references to it, the brief is insufficient to raise a claim and the issue is abandoned). Even assuming the fraud claim had not been abandoned by Mr. Fenello, Plaintiffs' Complaint fails to state a claim for fraud.

To establish fraud under Georgia law, a plaintiff must prove five elements: "false representation; scienter; intent to induce the plaintiff to act or refrain from

acting; justifiable reliance; and damage proximately caused by the representation." JarAllah v. Schoen, 531 S.E.2d 778, 780 (Ga. Ct. App. 2000). Rule 9(b) of the Federal Rules of Civil Procedure requires that when fraud is alleged, "a party must state with particularity the circumstances constituting fraud," Fed. R. Civ. P. 9(b), and therefore claims of fraud are an exception to the notice-pleading requirements that generally apply to federal civil claims. The Eleventh Circuit has noted that "[p]articularity means that 'a plaintiff must plead facts as to time, place, and substance of the defendant's alleged fraud, specifically the details of the defendant['s] allegedly fraudulent acts, when they occurred, and who engaged in them.'" United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1357 (11th Cir. 2006) (quoting United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1310 (11th Cir. 2002)) (alteration in original) (internal quotation marks omitted); see also Corsello v. Lincare, Inc., 428 F.3d 1008, 1012 (11th Cir. 2005).

Since Plaintiffs are proceeding *pro se*, their complaint, "'however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" Erickson, 551 U.S. at 94 (citation omitted). Nonetheless, even where a plaintiff is proceeding *pro se*, the particularity requirements of Rule 9(b) apply. See Elemary v. Phillip Holzmann A.G., 533 F. Supp. 2d 116, 137 (D.D.C. 2008); Floyd v. Brown & Williamson Tobacco Corp., 159 F. Supp. 2d 823, 832 (E.D. Pa.

2001); see also Keane v. Keane, No. 08-cv-10375(WCC), 2009 WL 1490686, at *5 (S.D.N.Y. May 27, 2009) (noting that while *pro se* pleadings are afforded more leniency, "they are still subject to dismissal where the pleadings fail to comply with Rule 9(b)"); Futch v. HSBC Bank, N.A., No. CV407-109, 2007 WL 3143715, at *4 (S.D. Ga. Oct. 24, 2007) (R&R) ("Although the Court is mindful of the need to construe a *pro se* litigant's complaint liberally, the bare allegations in [plaintiff]'s complaint do not come within shouting distance of Rule 9(b)'s particularity requirement.").

The Court concludes that the fraud claim must be dismissed because Plaintiffs cannot show that any damage they suffered was proximately caused by BANA's representations. As to the allegedly false representations, Plaintiffs assert BANA falsely claimed that: (1) pursuing alternative relief required Plaintiffs to miss payments; (2) any decision regarding alternative relief would be timely; and, (3) the bank had the authority to negotiate a modification, when in fact all negotiations were subject to the approval of the purported note holder. (Compl. ¶ 32). While the Court understands that Plaintiffs may have been confused about the proper course of action to take after not making the two payments, applying for a modification, and still not hearing back from BANA for a lengthy period, Plaintiffs alleged that BANA advised them to skip two payments, not to stop

paying on the mortgage loan altogether. There is no claim by Plaintiffs in their Complaint that they began making payments again after skipping two payments, and the Court finds they did not do so based on their Complaint. (See id. ¶ 36 ("Plaintiffs were harmed due to the ongoing delays, resulting in over $100,000 in combined late fees, missed payments, and the corresponding deprec[i]ation of the value of the Residence over the 15 month period."); Ex. 6(d) to Compl. (indicating arrearage as of June 13, 2011, from April 2010 through June 2011 of $1,291.00 per month or $19,365.00)). Under these circumstances, the proximate cause of any damages was not BANA's alleged misrepresentations. Rather, Plaintiffs' default beyond the initial two months of missed payments caused their alleged damages, and thus their fraud claim fails.[15] Because Plaintiffs fail to state claim for fraud, this claim is dismissed.[16]

[15] This reasoning tracks the causation analysis with respect to wrongful-foreclosure claims. "'Georgia law requires a plaintiff asserting a claim of wrongful foreclosure to establish a legal duty owed to it by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury it sustained, and damages.'" DeGolyer v. Green Tree Servicing, LLC, 662 S.E.2d 141, 147 (Ga. Ct. App. 2008) (quoting Heritage Creek Dev. Corp. v. Colonial Bank, 601 S.E.2d 842, 844 (Ga. Ct. App. 2004)). Failure to make the proper loan payments defeats any wrongful-foreclosure claim. See Warque v. Taylor, Bean, & Whitaker Mortg. Corp., Civil Action No. 1:09-CV-1906-ODE-CCH, 2010 U.S. Dist. LEXIS 142129, at *14-15 (N.D. Ga. July 30, 2010) (Hagy, M.J.) (citing Heritage Creek, 601 S.E.2d at 845 (finding that plaintiff's injury was "solely attributable to its own acts or omissions both before and after the foreclosure" because it defaulted on the loan payments, failed to cure the default, and did not bid on the property at the

H. "Bad Faith"

Defendants argue that there is no claim for "bad faith," and that even if Plaintiffs intended to allege a breach of the duty of good faith and fair dealing, this claim fails because there is no such claim outside of a claim for breach of contract. (Defs.' Mot. to Dismiss at 14-15).

Plaintiffs' response with respect to this claim is the same as their response with respect to their fraud claim. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 3).

In reply, Defendants reiterate their original arguments in their Motion to Dismiss. (Defs.' Reply in Supp. of Mot. to Dismiss at 3-4). Defendants note that they did not argue that the claim for "bad faith" failed for a lack of specificity, but rather that no such law exists, and any claim for the breach of good faith and fair dealing fails because there is no claim for breach of contract. (Id.). Defendants

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foreclosure sale)) (finding causation not established where plaintiff had failed to make payments on loan), adopted at 2010 U.S. Dist. LEXIS 1421119 (N.D. Ga. Aug. 18, 2010) (Evans, J.); cf. Taylor v. Wachovia Mortg. Corp., No. 1:07-cv-2671-TWT, 2009 WL 249353, at *5 n.6 (N.D. Ga. Jan. 30, 2009) (Thrash, J., adopting Vineyard, M.J.) ("Plaintiff has not provided any evidence showing that he tendered the full amount of the loan or any portion thereof. Thus, under Georgia law, plaintiff has no standing to bring an action to enjoin the foreclosure sale.").

[16] The Court also finds Plaintiffs fail to state a claim for fraud because they have not satisfied Federal Rule of Civil Procedure 9(b)'s requirement to plead this claim with particularity and Plaintiffs' claim of reliance on statements by BANA regarding a potential loan modification is not justifiable.

also state that Mr. Fenello appears to concede that the claim is improperly pleaded. (Id. at 2-3).

As with Plaintiffs' fraud claim, Mr. Fenello has abandoned his bad faith claim and dismissal is appropriate as to him. Even assuming the claim has not been abandoned by him, the Court is unaware of any independent cause of action for "bad faith" with respect to the allegations in this case, and Plaintiffs, to include Mrs. Fenello, have failed to demonstrate that such a cause of action exists.

To the extent Plaintiffs are alleging a breach of the covenant of good faith and fair dealing, a claim on that basis fails because there is no such claim outside of a claim for breach of contract. See Cheryl Stone Trust ex rel. Stone v. BAC Home Loans Servicing, LP, Civil Action No. 1:11-cv-0494-RWS, 2011 WL 2214672, at *2 (N.D. Ga. June 7, 2011) (Story, J.); see also ServiceMaster Co., L.P. v. Martin, 556 S.E.2d 517, 521 (Ga. Ct. App. 2001) ("A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law.") (footnote and citations omitted). Additionally, Plaintiffs have not alleged that any independent duty is or was owed to them by Defendants. In any event, a "bad faith" claim based on the breach of a covenant of good faith and fair dealing would fail because Plaintiffs' default on their mortgage payments is the cause of any damages. For

these reasons, Plaintiffs fail to state a claim for bad faith and this claim is dismissed.

I. Equitable Estoppel

Defendants argue that Plaintiffs' equitable estoppel claim fails because Plaintiffs provide no indication as to when the false representations were made, what specific acts Plaintiffs' claim to have relied upon to their detriment, how any representation reasonably relied upon caused their damages, or how they have clean hands, given that they have not tendered, or indicated that they are willing to tender, the full amount due under the note. (Defs.' Mot. to Dismiss at 15-17).

Plaintiffs' response with respect to this claim is the same as the response with respect to their fraud claim. (See Pl.'s Resp. to Defs.' Mot. to Dismiss at 3).

In reply, Defendants state that Plaintiffs appear to concede that this claim is improperly pleaded. (Defs.' Reply in Supp. of Mot. to Dismiss at 2-3).

As with Plaintiffs' claims for fraud and "bad faith," Mr. Fenello also appears to have abandoned any equitable estoppel claim, and thus dismissal is appropriate as to him. Even assuming the claim has not been abandoned by Mr. Fenello, Plaintiffs' Complaint fails to state a claim for equitable estoppel.

The elements of equitable estoppel under federal common law are: "(1) the party to be estopped misrepresented material facts; (2) the party to be estopped was

aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation." Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1326 (11th Cir. 2008) (quoting Nat'l Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc., 929 F.2d 1558, 1572 (11th Cir. 1991), abrogated on other grounds by Geissal v. Moore Med. Corp., 524 U.S. 74 (1998)).

Here, Plaintiffs' claim for equitable estoppel fails. As with Plaintiffs' fraud claim, Plaintiffs cannot be said to have detrimentally relied on any alleged misrepresentation because any detriment they suffered was caused by Plaintiffs' failure to make payments on their loan after skipping the two payments. Cf. Miller, 677 F.3d at --- (no estoppel where plaintiff did not allege that mortgage company promised to permanently modify loan); Adams v. JPMorgan Chase Bank, No. 1:10-CV-4226-RWS, 2011 WL 2532925, at *1-3 (N.D. Ga. June 24, 2011) (Story, J.) (in the context of a promissory estoppel claim, no detrimental reliance in making reduced payments pursuant to a loan modification agreement given that plaintiff "was bound by the Note to make his payments anyway"); Caselli v. PHH

Mort. Corp., Civil Action No. 1:11-CV-2418-RWS, 2012 WL 124027, at *6 (N.D. Ga. Jan. 13, 2012) (finding no detrimental reliance where plaintiff "actually benefitted from PHH's willingness to accept reduced payments and allow her to remain in her home for over one year."). The Court finds Plaintiffs fail to state a claim for equitable estoppel and this claim is dismissed.

J. Defective/Fraudulent Assignment

Defendants contend that Plaintiffs' "defective/fraudulent assignment" claim fails because: (1) Georgia courts have repeatedly recognized MERS' authority as a nominee; (2) through the loan transaction, Plaintiffs acknowledged MERS' involvement in the security deed as grantee and nominee of the lender and that MERS and the originating lender could transfer and assign the security deed to others, including BONYM; and, (3) Plaintiffs' reliance on U.S. Bank National Association v. Gordon, 709 S.E.2d 258 (Ga. 2011), is unavailing because even if there are facial defects in the attestation and acknowledgment of an assignment, an executed deed is still valid between the parties to it. (Defs.' Mot. to Dismiss at 20-24).

Mr. Fenello responds that the assignment is "faulty" for two reasons. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 10-11). First, he alleges that the signature of the Assistant Secretary for MERS "has three parts, whereas the notarized allonge

attached to the assignment only has two." (Id. at 10). Mr. Fenello questions why the purported defect was not corrected and cites recent reports of over 100,000 alleged fraudulent assignments being "perpetrated by banks including Bank of America" as a basis for investigating the assignment of his security deed through discovery in this action to determine if the Gordon case would apply. (Id. at 10-11). Second, Mr. Fenello questions whether Pulte Mortgage, LLC ("Pulte") could assign the security deed in 2011 after it sold its interest in the promissory note in 2007. (Id. at 11).

In reply, Defendants state that these "reports" are irrelevant to this case and fail to identify an actual dispute between the parties here. (Defs.' Reply in Supp. of Mot. to Dismiss at 14).

In their Complaint, Plaintiffs contend that the validity of the assignment is "highly suspect," and that under Georgia law, foreclosure is illegal without proper recordation of the security deed. (Compl. ¶¶ 61, 63). However, this claim by Plaintiffs based on the purported invalidity of the assignment fails because Plaintiffs were not parties to the assignment and therefore do not have standing to challenge its validity. Adams v. Mortg. Elec. Registration Sys. Inc., Civil Action No. 1:11-CV-4263-RWS, 2012 WL 1319453, at *8 (N.D. Ga. Apr. 16, 2012) (Story J.) (citing Breus v. McGriff, 413 S.E. 2d 538, 539 (Ga. Ct. App. 1991)

("Appellants are strangers to the assignment contract . . . and thus have no standing to challenge its validity.")). Nor does recordation affect the ability to foreclose. As noted by a Bankruptcy Judge in this District,

> In Georgia, a deed is valid and conveys title to real property when 1) it is a written instrument purporting to convey title; 2) contains words of conveyance; 3) has a sufficient description of the land; 4) is signed by the grantor; and 5) is delivered to the grantee or someone on the grantee's behalf. O.C.G.A. § 44-5-30; Daniel Hinkel, 2 PINDARS GEORGIA REAL ESTATE LAW AND PROCEDURE § 19-15 (6th ed. 2004). Recording a deed only goes to the priority of lienholders and purchasers, not the deed's validity. "A deed not executed in precisely the manner prescribed in O.C.G.A. § 44-5-30 is not properly recordable and therefore does not give constructive notice to all the world. As between the parties themselves, however, the deed is valid and binding . . . ." Duncan v. Ball, 172 Ga. App. 752 (1984). And as stated in PINDARS, "filing deeds for record is not . . . a duty, since failure to file is not made a misdemeanor and the instrument is still valid between the parties." Hinkel, 2 PINDARS at § 19-116. The penalty for failing to record a deed is the "loss of priority over subsequent purchasers or lienholders." Id. Filing a deed in county property records does no more than put the world on notice that the transfer occurred, thereby protecting the transferee from subsequent purchases or liens by third-parties. Id. at § 19-115.

In re Kyu Sup Mun, 458 B.R. 628, 631-32 (Bankr. N.D. Ga. 2011). Because the deed is valid between the parties, improper recordation would not prevent foreclosure on the Property. Thus, to the extent "defective/fraudulent assignment" is a valid cause of action, the Court finds Plaintiffs' Complaint fails to state a claim and this purported claim is required to be dismissed.

K. "Failure to Prove Holder in Due Course Status"

With respect to this claim, Defendants offer the same arguments for dismissal that they made with respect to the "defective/fraudulent assignment" claim and regarding the validity of the assignment of the security deed between the parties to that assignment. (Defs.' Mot. to Dismiss at 20-24).

Mr. Fenello responds that without knowing the path the note traveled from origination to the current holder, it impossible to know whether the note was subject to fraudulent transfers, whether the note and security instruments have bifurcated, and whether there is a right to foreclose. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 8).

In reply, Defendants assert that the documents attached to Plaintiffs' Complaint show that the security deed was assigned to BONYM, Georgia law states that an assignee may exercise the power of sale in a security deed, a security deed that includes a power of sale is a contract whose provisions are controlling as between the parties to it, and the failure to be a holder in due course does not make the loan obligation automatically disappear or bar the note holder from enforcing the note. (Defs.' Reply in Supp. of Mot. to Dismiss at 9-11).

In their Complaint, Plaintiffs cite the following provision of the Georgia Code:

> In an action with respect to an instrument, the authenticity of and authority to make each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity . . . .

O.C.G.A. § 11-3-308. Plaintiffs then state that despite repeated demands, "Defendants have continued to pursue foreclosure without establishing the validity of the assignment of the note." (Compl. ¶ 70).

Plaintiffs do not explain the relevance of O.C.G.A. § 11-3-308, but as explained above, any claim based on the purported invalidity of the assignment fails because Plaintiffs were not parties to the assignment and therefore do not have standing to challenge its validity. Adams, 2012 WL 1319453 at *8 (citing Breus, 413 S.E. 2d at 539). The Court thus finds Plaintiffs fail to state a claim with respect to their "failure to provide holder in due course status" claim and, to the extent this may constitute a cause of action, it is dismissed.

L. "Failure to Prove Damages"

Defendants state that Plaintiffs "appear to allege that any default under their loan will be covered by at least one of the credit default swaps in place," and assert Plaintiffs lack standing to assert this claim because they fail to allege that they are a party to the pooling and servicing agreement ("PSA") filed with the Securities and Exchange Commission or sufficient facts to support standing as a third-party

beneficiary. (Defs.' Mot. to Dismiss at 25-27). Further, Defendants state that even if Plaintiffs' mortgage was pooled into a securitized trust, this would not absolve Plaintiffs from having to make payments on the loan or shield the Property from foreclosure. (Id. at 27).

In response, Mr. Fenello contends that the theories of unjust enrichment and the "one satisfaction rule" apply because CWALT, Inc. ("CWALT") "has credit default swaps insuring the performance of tranches within their portfolio, given that excess returns within a tranche will be shared with the next tranche, and given that CWALT is the likely beneficiary of a negotiated settlement between Bank of America and The Bank of New York Mellon." (Pl.'s Resp. to Defs.' Mot. to Dismiss at 9).

In reply, Defendants again assert that even if Plaintiffs' mortgage was pooled with other loans into a securitized trust, this does not absolve Plaintiffs from having to make loan payments or shield the Property from foreclosure. (Defs.' Reply in Supp. of Mot. to Dismiss at 13 (citing Searcy v. EMC Mortgage Corp., No. 1:10-cv-0965-WBH, 2010 Dist. LEXIS 119975 (N.D. Ga. Sept. 30, 2010)).

The Court is not aware of any claim for "failure to prove damages," nor does the Court understand how the fact that damages may or may not have been

incurred by a non-party, CWALT, could have any effect on Plaintiffs' contractual obligations to make payments on their mortgage loan. Plaintiffs were not parties to or intended beneficiaries of the PSA discussed in their Complaint, and they have not shown how the PSA in any event could alter their obligations under the loan. See Searcy, 2010 Dist. LEXIS 119975, at *2 ("While it may well be that Plaintiff's mortgage was pooled with other loans into a securitized trust that then issued bonds to investors, that fact would not have any effect on Plaintiff's rights and obligations with respect to the mortgage loan, and it certainly would not absolve Plaintiff from having to make loan payments or somehow shield Plaintiff's property from foreclosure."). The Court finds Plaintiffs cannot state a claim for "failure to prove damages," and this purported claim is dismissed.

M. "Failure to Prove Standing"

With respect to this claim, Defendants state that they have addressed Plaintiffs' standing arguments with respect to the assignment at issue, and the assignment defeats this cause of action. (Defs.' Mot. to Dismiss at 27-28). Defendants state that it is inconceivable how Plaintiffs believe no damage was suffered by Defendants given that Plaintiffs admit that they failed to timely make the payments required by the terms of the loan. (Id. at 28).

Mr. Fenello states that "[b]ased on the discussion above, Defendants have failed to prove standing of their client, and violated numerous state and federal laws and regulations in the process." (Pl.'s Resp. to Defs.' Mot. to Dismiss at 10).

In reply, Defendants state that the holder of a security deed is the entity entitled to foreclose upon the borrower's default, regardless whether it also holds the promissory note. (Defs.' Reply in Supp. of Mot. to Dismiss at 9, 11-12 (discussing this Court's rejection of "split the note" arguments)). Further, Defendants state that BANA, as servicer of Plaintiffs' loan, was entitled to enforce the lender's rights under the note and security deed. (Id. at 10-11). Defendants also contend that documents attached to Plaintiffs' Complaint show that the security deed was assigned to BONYM, Georgia law states that an assignee may exercise the power of sale in a security deed, a security deed that includes a power of sale is a contract whose provisions are controlling as between the parties to it, and the failure to be a holder in due course does not make the loan obligation automatically disappear or bar the note holder from enforcing the note. (Id. at 9-11).

In their Complaint, Plaintiffs' sole contention with respect to this purported cause of action is that

> Since the Defendants have failed prove that their client is the current creditor/beneficiary, failed to prove that their client is the

> Holder in Due course, and failed to prove that their client has incurred damages, therefore they have failed to prove that their client has standing to pursue collections and/or foreclosure in this matter.

(Compl. ¶ 81). This does not state a cause of action, and it recycles arguments already rejected above. Plaintiffs do not contend that they were not in default, and therefore it is inconceivable that they could receive the injunctive relief their Complaint demands. The Court finds Plaintiffs fail state a claim based on "failure to prove standing" and, to the extent this could be construed as a cause of action, this claim is dismissed.[17]

N. "Defective Foreclosure Closing Disclosure"

Defendants contend that this claim fails because Plaintiffs' admit that their loan was originated by Pulte, not by any of the defendants. (Defs.' Mot. to Dismiss at 28).

Mr. Fenello responds that it does not matter who originated the loan because "the Statute," the Georgia Residential Mortgage Act ("GRMA"), O.C.G.A. § 7-1-

[17] Further, Mr. Fenello's response to the motion to dismiss with respect to this asserted claim is entirely conclusory and non-substantive—"Based on the discussions above, Defendants have failed to prove standing of their client, and violated numerous state and federal laws and regulations in the process"—and therefore he has also abandoned this claim. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 10).

1000 et seq., applies to foreclosures in general and to this one in particular. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 12).

Defendants reply that Plaintiffs' response argument does not repair the problems with their claims. (Defs.' Reply in Supp. of Mot. to Dismiss at 14-15).

Pursuant to the GRMA cited in Plaintiffs' Complaint,

> Any mortgage lender required to be licensed or registered under this article shall disclose to each borrower of a mortgage loan that failure to meet every condition of the mortgage loan may result in the loss of the borrower's property through foreclosure. The borrower shall be required to sign the disclosure at or before the time of the closing of the mortgage loan.

O.C.G.A. § 7-1-1014; see also Hartford Fire Ins. Co. v. iFreedom Direct Corp., 718 S.E.2d 103, 105 (Ga. Ct. App. 2011). Georgia courts have further held that the GRMA does not apply to foreclosure sales. See Geary v. Wilshire Credit Corp., 673 S.E.2d 15, 18 & n.8 (Ga. Ct. App. 2009); Roylston v. Bank of America, N.A., 660 S.E.2d 412, 416 (Ga. Ct. App. 2008) ("In a foreclosure sale, title to the property is sold and transferred to the highest bidder, but the security interest itself is not sold or transferred; instead, it is extinguished altogether upon satisfaction of the debt from the sale proceeds."). Courts within this district have also found that a private cause of action does not arise under the GRMA, which does not explicitly create a private action and which contains a robust public enforcement scheme. See Jordan v. PHH Mortg. Corp., No. 1:10-cv-967, 2010 WL 5058638, at *7-8

(N.D. Ga. Nov. 5, 2010), adopted by 2010 WL 5055809 (N.D. Ga. Dec. 6, 2010); Reese v. Wachovia Bank, N.A., No. 1:08-cv-3461-GET, 2009 U.S. Dist. LEXIS 94802, at *5-*8 (N.D. Ga. Feb. 23, 2009).

To the extent the GRMA provides Plaintiffs a cause of action, Plaintiffs' claim under this provision fails because they have not alleged—or even suggested—that either of the Defendants is a "mortgage lender required to be licensed or registered under [the Act]." O.C.G.A. § 7-1-1014. Further, the document Plaintiffs cite as proof that a violation occurred indicates that the lender was Pulte, who is a non-party. See O.C.G.A. § 7-1-1014; (Ex. 18 to Compl.). Defendants thus are not liable for violations of the GRMA because the statute makes clear that the relevant time for disclosure is at or before the closing of the mortgage loan. See id. The Court finds Plaintiffs fail to state a "defective foreclosure closing disclosure" claim and this purported claim is required to be dismissed.

O. "Direct Contradiction by Verbal Representation by Bank of America"

Defendants contend that to the extent this allegation is an attempt to assert a fraud or negligent misrepresentation claim, this claim fails for the same reasons described above, and because Plaintiffs have not asserted that Defendants misrepresented or provided false information to them, or that they reasonably

relied on the alleged misrepresentations. (Defs.' Mot. to Dismiss at 29-30). Defendants reiterate that no reliance would be reasonable because there is no confidential relationship in the creditor-debtor context. (Id. at 30-31). Defendants also reiterate that an oral agreement to suspend foreclosure would be in violation of the Statute of Frauds. (Id.).

Mr. Fenello responds that BANA canceled the foreclosure as it said it would, so this cause of action is "currently moot" and may be dismissed without prejudice. (Pl.'s Resp. to Defs.' Mot. to Dismiss at 12). Consequently, Defendants note that Plaintiff concedes that this claim is moot and subject to dismissal. (Defs.' Reply in Supp. of Mot. to Dismiss at 15).

The Court finds that because the alleged foreclosure sale has been cancelled and oral agreements regarding real property are unenforceable under the Statute of Frauds, Plaintiffs cannot state a "direct contradiction by verbal representation" claim based on the allegations in their Complaint. This claim is dismissed.

P. Injunctive Relief

Although Plaintiffs do not include an "injunctive relief" cause of action in their Complaint, Defendants included in their Motion to Dismiss arguments related to the injunctive relief requested in their Complaint. Defendants argue that injunctive relief is not warranted because Plaintiffs' Complaint fails to state a

claim upon which relief can be granted, because Plaintiffs do not deny that they failed to make payments under the note, and Plaintiffs have not made an offer to tender any security to the Court. (Defs.' Mot. to Dismiss at 31-33).

"A district court may grant [preliminary] injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009) (quoting Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989) (quotation marks omitted).

Because Plaintiffs have failed to allege any claim in their Complaint upon which relief can be granted or a substantial likelihood of success on the merits of

any of their claims, Plaintiffs' request for injunctive relief is required to be denied.[18, 19]

[18] In his response to Defendants' Motion to Dismiss, Mr. Fenello cites expansive language from an 1883 decision by the Supreme Court of Georgia, Weems v. Coker, 70 Ga. 746, 749 (1883) ("Could there be a more conclusive defence to the foreclosure than that the party prosecuting it was not the holder of the debt or demand secured by the mortgage, which he failed to produce when called on, and offered nothing to show that he controlled it, or to explain why it was not forthcoming at the trial?"), in support of his contention that injunctive relief is appropriate. Whatever the law in 1883, this does not appear to be the law today. In Atlanta Dwellings, Inc. v. Wright, 527 S.E.2d 854, (Ga. 2000), the Supreme Court of Georgia noted a trial court's broad discretion to decide whether to grant a request for an interlocutory injunction to preserve the status quo, holding that "the trial court was authorized to find significant questions concerning construction of the forbearance agreement and course of conduct, both of which, if proved, could constitute a waiver of strict performance of the deed to secure debt." 527 S.E.2d at 856. The Atlanta Dwellings court also noted a case where foreclosure was improperly enjoined because "the instruments were unambiguous and the evidence showed conclusively that the deed to secure debt was in default." Id. at 856 (citing Tybrisa Co. v. Tybeeland, Inc., 139 S.E.2d 302, (Ga. 1964)). Thus, it appears to remain the law in Georgia—given Tybrisa, a unanimous decision by the Supreme Court of Georgia—that an injunction is not the appropriate remedy where the debtor is in default. See 139 S.E.2d at 306 ("It would have been lawful for the grantee to even hope the grantor would violate the covenant and thus accelerate maturity. They both fully agree that such could be the result of the breach. They are conclusively presumed to have intended such result, else it would not have been written into the deed. The grantor has a complete means of keeping his land and the improvements he has made thereon, and that is by paying the matured debt."). Here, as in Tybrisa, there does not appear to be any question that Plaintiffs were in default. Thus, under current Georgia law, Plaintiffs may not obtain injunctive relief. Plaintiffs further cite In re Cummings, 173 B.R. 959, 963 (Bankr. N.D. Ga. 1994), where the court stated, without citation, that "Common sense suggests that an assignee of a note and security deed cannot foreclose upon the security until there has been an actual assignment. Since Anderson had no assignment of the Fleet note and security deed, his foreclosure of the subject

Q. Leave to amend

Prior to dismissal of a claim filed by a *pro se* party, a district court should afford that party an opportunity to amend where a more carefully drafted complaint might state a claim upon which relief could be granted. See Taylor v. McSwain, 335 F. App'x 32, 33 (11th Cir. 2009) (error to dismiss complaint by a *pro se* litigant with prejudice without first giving the plaintiff an opportunity to amend the complaint if a more carefully drafted complaint might state a claim). "[I]n the exercise of sound discretion, the granting of leave to amend can be conditioned in order to avoid prejudice to the opposing party." Garfield v. NDC Health Corp., 466 F.3d 1255, 1271 (11th Cir. 2006) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). "[C]onditions placed on a plaintiff's right to amend its Complaint must be reasonable" and can include requiring that any amendment be filed by a specified date and limiting "amendment to the legal theories already asserted." Id.

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property is null and void." However, because Plaintiffs' "defective/fraudulent assignment" claim fails as explained above, Plaintiffs do not having standing to contest the validity of the assignment. The Court therefore finds that the statement in In re Cummings is inapplicable to this case and does not support Plaintiffs' claim that they are entitled to an injunction enjoining a foreclosure sale of the Property.

[19] Even if injunctive relief was available, it could not be granted to Plaintiffs because they did not tender or offer to provide security for the costs and damages they claim, as required by Rule 65(c), if it was determined that Defendants were wrongfully enjoined or restrained in the foreclosure. Fed. R. Civ. P. 65(c).

The Court has considered whether it should provide Plaintiffs an opportunity to amend their Complaint prior to dismissal of their claims and concludes that, with the exception of their FDCPA claim, all of their claims are implausible, unfounded, without merit, and amendment would be futile. See Taylor, 335 F. App'x at 33; Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262-63 (11th Cir. 2004) (citing Foman, 371 U.S. at 182). Because Plaintiffs may be able to state a plausible claim under the FDCPA, they shall be permitted an opportunity to amend this claim.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss [6] is **GRANTED** with respect to all claims except for Plaintiffs' FDCPA claim.

IT IS FURTHER ORDERED that Plaintiffs may amend their Complaint on or before August 3, 2012, regarding their FDCPA claim. The amended complaint shall: (1) not exceed fifteen pages; (2) not include any claims that have been dismissed in this action; (3) explain how each Defendant qualifies as a "debt collector" within the meaning of the Act; (4) specify which section of the FDCPA was violated, how it was violated, when it was violated, and by which Defendant; and (5) clearly state the relief requested. Plaintiffs are admonished that a failure to

file an amended complaint that complies with the Court's instructions on or before August 3, 2012, may result in dismissal of this action pursuant to Local Rule 41.3, NDGa.

SO ORDERED this 17th day of July, 2012.

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE