No. _____

6th Circuit
20-2005

IN THE
Supreme Court of the United States

BETTIE J. HARRIS, deceased, REGINALD WATKINS and MICHAEL HARRIS,

PETITIONERS,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-2, and SELECT PORTFOLIO SERVICING, INC.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE PETITIONERS DO NOT HAVE STANDING SUFFICIENT TO ESTABLISH STANDING.

i. Petitioners answer: "Yes"
ii. Respondents answered: "No"
iii. The District Court answered "No"
iv. This Court should answer: "Yes"

B. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE STATUTORY REDEMPTION PERIOD HAD EXPIRED WHEN PETITIONERS HAD ALLEGED FACTS SUFFICIENT TO SET ASIDE THE SHERIFF'S SALE?

i. Petitioners answer: "Yes"
ii. Respondents answered: "No"
iii. The District Court answered "No"
iv. This Court should answer: "Yes"

C. WHETHER PETITIONERS HAD ESTABLISHED A QUIET TITLE CLAIM?

i. Petitioners answer: "Yes"
ii. Respondents answered: "No"
iii. The District Court answered "No"
iv. This Court should answer: "Yes"

PARTIES TO THE PROCEEDING

BETTIE J. HARRIS, deceased, REGINALD WATKINS and MICHAEL HARRIS,

PETITIONERS,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-2, and SELECT PORTFOLIO SERVICING, INC.,

RESPONDENTS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the opinion of the United States District Court for the Eastern District of Michigan were unpublished opinions.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the appeal from the District Court's Granting Respondents' Motion for Summary Judgment on September 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Zurich Ins. Co., v. Logitrans, Inc., 297 F.3d 528, 531 (6th Cir. 2002)Kim v. JP Morgan Chase Bank, 493 Mich. 98, 115-116 (2012)

STATEMENT

On August 23, 2019, Petitioners filed the above captioned case against the Respondents in the Oakland County Circuit Court. On October 8, 2019, Respondents removed the case to Federal Court.

On November 21, 2019, Respondents filed a Motion to Dismiss Petitioners' Complaint.

On December 12, 2019, Petitioners filed their Answer to Motion to Dismiss Petitioners Complaint. On March 12, 2020, Respondents filed a Reply to Petitioners Answer to Motion to Dismiss.

On September 16, 2020, the Motion hearing was held and on September 30, 2020, the District Court entered an Order granting Respondents' Motion to Dismiss.

On October 14, 2020, Petitioners timely filed a Notice of Appeal to the 6th Circuit Court of Appeals from the District Court Order granting Respondents' Motion to Dismiss.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

This appeal is from a final order of the District Court which disposed of all parties' claims

REASONS FOR GRANTING THE PETITION

A. THE DISTRICT COURT ERRED IN RULING THAT THE PETITIONERS DID NOT HAVE STANDING SUFFICIENT TO ESTABLISH STANDING.

"In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue." Zurich Ins. Co., v. Logitrans, Inc., 297 F.3d 528, 531 (6th Cir. 2002) (quoting Kardules v. City of Columbus, 95 F.3d 1335, 1346 (6th Cir. 1996)). The "irreducible constitutional minimum" of standing requires that Plaintiffs show: "(1) [they have] suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). Redressability, the only prong contested here, requires "a likelihood that the requested relief will redress the alleged injury." Nader v. Blackwell, 545 F.3d 459, 471 (6th Cir. 2008) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998)).

When a mortgage foreclosure is initiated, Michigan law provides a six-month redemption period for most mortgages; the redemption period is a span of time during which the foreclosed mortgagor can remit the amount owed, thereby averting foreclosure. Mich. Comp. Laws § 600.3240(1)-(2), (8). Generally, once the redemption period expires, so too does the mortgagor's rights in the property. Salman v. U.S. Bank, NA, No. 11-10253, 2011 WL 4945845, at *3 (E.D. Mich. Oct. 18, 2011). The redemption period generally serves as a mortgagor's last chance to avoid losing their home after a valid foreclosure sale. Courts will only interfere

when there is a clear showing of fraud, accident, or mistake. Overton v. Mortg. Elec. Registration Sys., No. 284950, 2009 WL 1507342, at *1 (Mich. Ct. App. May 28, 2009); Freeman v. Wozniak, 617 N.W.2d 46, 48-49 (Mich. Ct. App. 2000) (discussing Senters v. Ottawa Sav. Bank, 503 N.W.2d 639 (Mich. 1993)).

Here, Petitioners attempted to work out a financial accommodation in order to save the subject property. See Mich. Comp. Laws § 600.3240; Salman v. U.S. Bank, NA, No. 11-10253, 2011 WL 4945845, at *3 (E.D. Mich. Oct. 18, 2011). However, while the expiration of the redemption period has serious consequences for Petitioners legal rights, the Court retains the power to rescind the foreclosure sale -- even after the expiration of the redemption period -- if the sale itself was invalid based on a showing of fraud or irregularity. Id.; Overton v. Mortg. Elec. Registration Sys., No. 284950, 2009 WL 1507342, at *1 (Mich. Ct. App. May 28, 2009).

Redressability is thus only lacking if the redemption period has expired, and the foreclosure sale was valid. "Otherwise, statutory foreclosures could never be set aside once the redemption period had expired. While 'statutory foreclosures should not be set aside without very good reason,' it is possible for courts to set statutory foreclosures aside." Hornbuckle v. Mortg. Elec. Registration Sys., Inc., No. 10–14306, 2011 WL 5509214, at *5 (E.D. Mich. Nov. 10, 2011) (quoting United States v. Garno, 974 F. Supp. 628, 633 (E.D. Mich. 1997)). See also Langley v. Chase Home Fin. LLC, No. 10–604, 2011 WL 1130926, at *2 n. 2 (W.D. Mich. Mar. 28, 2011). Therefore, Petitioners have standing to challenge their foreclosure.

Therefore, the Petitioners have established standing to challenge the foreclosure

B. THE DISTRICT COURT ERRED IN RULING THAT THE STATUTORY REDEMPTION PERIOD HAD EXPIRED WHEN PETITIONERS HAD ALLEGED FACTS SUFFICIENT TO SET ASIDE THE SHERIFF'S SALE.

1. BECAUSE OF PETITIONERS DEATH, PETITIONERS COULD NOT TIMELY REDEEM THE PROPERTY AND THEREFORE THE REDEMPTION PERIOD SHOULD HAVE BEEN TOLLED.

The law in Michigan does allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and the posting of notice, in the showing of fraud, irregularity. In the case at bar, the subject property was sold at a Sheriff's Sale on January 22, 2019. Therefore, Petitioners had until July 22, 2019, to redeem the subject property. Petitioners did not redeem the property, because the Petitioner, Bettie J. Harris was deceased and could not redeem the property. Petitioners attempted to utilize the financial accommodation before and after the Sheriff's Sale. Schulthieis v. Barron, 16 Mich . App. 246, 247-48; 167 NW2d 784 (1969).

2. PETITIONERS ESTABLISHED FRAUD OR IRREGULARITY IN THE FORECLOSURE PROCESS

a. Notice of foreclosure allegation

I. Petitioners Have Established A Breach Of MCL 600.3208

MCLA 600.3208, states as follow:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

Respondents failed to provide proper notice of the foreclosure. At the time of the foreclosure in the instant case, there were four notice requirements by statute that a foreclosing entity must satisfy prior to foreclosing by advertisement. First, a copy of the

notice of foreclosure sale must be published in a newspaper where the property is located for four consecutive weeks. MCL 600.3208. This requirement may have been satisfied. Second, "in every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice." MCL 600.3208. It is a question of fact whether this requirement was met. The third notice requirement in effect at the time of foreclosure was that a foreclosing mortgagee must mail the mortgagor with notice of the mortgagor's right to have a Financial Accommodation meeting. MCL 600.3204(4), MCL 600.3205a(3).[2] Here, it is disputed that Respondents sent such notice to the Petitioners. Respondents nor its agents posted a true copy of the aforementioned notice of the subject property within the 15-day statutory timeframe or at any other time. If Respondents or its agents had posted a true copy of the aforementioned notice of the subject property within the 15-day statutory timeframe or at any other time when the Petitioner was alive, Petitioners would have filed a Motion for a TRO to stop the Sheriff's Sale or filed a Motion to Convert the Foreclosure by Advertisement to a Judicial Foreclosure. Jackson Investment Corp v Pittsfield Prod, Inc, 162 Mich App 750, 755-756; 413 NW2d 99 (1987)

The notice with which was provided in this case was deficient which nullifies the foreclosure process in this case.

b. Petitioners Have Established A Claim For Dual-Tracking.

That before the Sheriff's Sale the Petitioners attempted to work out a financial accommodation in order to save the subject property. SPS was amenable to the financial accommodation. Petitioners attempted to utilize the financial accommodation before and after the Sheriff's Sale. Notwithstanding the financial accommodation process and "Dual Tracking" Respondent, SPS, went forward with the Sheriff's Sale on January 22, 2019, without posting a true copy in a conspicuous place upon any part of the premises described in the Notice that the mortgage will be foreclosed by a sale of the mortgaged premises.

"Dual tracking refers to a common tactic by banks that institute foreclosure proceedings at the same time that a borrower in default seeks a loan modification." Kloss v RBS Citizens, NA, 996 F Supp 2d 574, 585 (ED Mich, 2014) (citing Jolley v Chase Home Fin, LLC, 213 Cal App 4th 872, 153 Cal Rptr 3d 546 (Cal COA, 2013) (discussing dual tracking under California law)). "The result is that the borrower does not know where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it." Id. (quoting Jolley, 153 Cal Rptr at 572). See also Dahl v First Franklin Loan Servs, 2014 US Dist LEXIS 165472 (ED Mich, Nov 26, 2014) and Bey v LVN Corp, 2015 US Dist. LEXIS 98064, at *25-26 (ED Mich, July 28, 2015). The Real Estate Settlement Procedures Act,

12 USC 2605 ("RESPA"), provides two avenues to protect homeowners against dual tracking:

(1) During the first 120 days of delinquency, (the "pre-foreclosure review period) the Servicer is prohibited from taking the first step to initiate foreclosure under state law. 12 CFR 1024.41(f)(i). In Michigan, the first step to initiate foreclosure is the first publication under MCL 600.3208.

(2) If a borrower submits a complete loss mitigation application more than 37 days before a scheduled foreclosure sale, the servicer must not conduct a sale until the application has been evaluated and notice of decision is given, with a few exceptions. 12 CFR 1024.41(g)

The case of Houle v Green Tree Servicing, 2015 US Dist LEXIS 53414, 6-8 (ED Mich, Apr 23, 2015), the Court stated that "[b]orrowers have a private right of action against lenders who evaluate a loss mitigation application while at the same time pursuing foreclosure." It also clarified that 12 CFR 1024.41 allows the recovery of actual damages resulting from a servicer's failure to follow the rule, plus the borrower's costs and attorney fees incurred in bringing the action. Id

ii. Petitioners "Breach of Request for Mortgage Assistance" claim (Count III) establishes a claim.

Before the Sheriff's Sale the Petitioners attempted to work out a financial accommodation in order to save the subject property. SPS was amenable to the financial accommodation. Petitioners attempted to utilize the financial accommodation before and after the Sheriff's Sale. Notwithstanding the financial accommodation process and "Dual Tracking" Respondent, SPS, went forward with the Sheriff's Sale on January 22, 2019, without posting a true copy in a conspicuous place upon any part of the premises described in the Notice that the mortgage will be foreclosed by a sale of the mortgaged premises.

Petitioners relied, to their detriment, upon the representations of Respondent, SPS in that Petitioners, would not have attempted to utilize the financial accommodation if Petitioners had known that Respondent, SPS would proceed, nonetheless, with the Foreclosure during this time (a practice commonly referred to as "dual tracking" and now expressly prohibited. Dual-tracking has been determined to be one of the most egregious forms of servicer misconduct, addressed and now precluded under the terms of the National Mortgage Settlement of 2012, amendments to Reg. X of the Real Estate Settlement and Procedures Act, (12 CFR part 1024).

Petitioners have suffered prejudice in that they would have been in a better position to preserve their interest in the real property 1.) if Respondents had not gone forward with the Sheriff's Sale without notice and 2.) if before the Sheriff's Sale Respondents had allowed Petitioners to complete the financial accommodation or had allowed Petitioners to reinstate the loan and not having gone forward with the

Sheriff's Sale during the financial accommodation process or "Dual Tracking."

1. PETITIONERS HAVE MET THEIR BURDEN IN CREATING A VOIDABLE SALE, AND THEY HAVE ESTABLISHED PREJUDICE.

In Kim v. JP Morgan Chase Bank, 493 Mich. 98, 115-116 (2012), the court held that defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void ab initio. It left to the trial court the determination of whether, under the facts presented, the foreclosure sale of plaintiffs' property was voidable.

The court defined voidable in the following manner:

> In this regard, to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant's failure to comply with MCL 600.3204 [or in this case by failure to abide by CFPB regulations].
>
> To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute. (emphasis added)

Taking the allegations as pled by Petitioners as true, Petitioners' Complaint meets the requisite standard for demonstrating prejudice pursuant to Kim, supra. Petitioners' Complaint clearly states that Petitioners attempted to utilize the financial accommodation before and after the Sheriff's Sale and notwithstanding the financial accommodation process and "Dual Tracking" Respondents, SPS, went forward with the Sheriff's Sale on January 22, 2019, without posting a true copy in a conspicuous place upon any part of the premises described in the Notice that the mortgage will be foreclosed by a sale of the mortgaged premises.

In Mik, supra, the court held that a violation of federal law can support a state law claim, even when, or perhaps especially when, it does not provide for a private right of action under a federal statute. (Citing to Wigod, supra)

In Loewke v. Ann Arbor Ceiling & Partition Co., 489 Mich 157 (2011), the Michigan Supreme Court clarified the confusion in the law from the misinterpretation of its prior decision in Fultz v. Union Commerce Associations, 470 Mich 460 (2004), with regard to the duty owed to a third party by a contractor who breaches a contract, or in this case, a federal regulation.

In Loewke, 489 Mich at 161, the court first reviewed the elements that must be met to make a prima facie case of negligence: (1)the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff s damages.

The court then discussed under what circumstances a duty of care arises between a party to a contract and a non-contracting third party - when two parties enter into a contract and a non-contracting third party, i.e., one who is a stranger to the contract.

The Michigan Supreme Court noted that since Fultz had been decided, "courts have erroneously interpreted this court's decisions as rejecting accepted tort-law principles and creating a legal rule 'unique to Michigan tort law,' which bars negligence causes of action on the basis of a lack of duty if a third-party plaintiff alleges a hazard that was the- subject of the defendant's contractual obligations with another." Id at 163.

> The court held: Thus, under Fultz, while the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort, "the existence of a contract does not extinguish duties of care otherwise existing. ... if one, "having assumed to act, does so negligently", then liability exists as to a third party for "failure of the defendant to exercise care and skill in the performance itself."
> Id. at 171.

The court concluded:

> In this case, defendant - by performing an act under the contract - was not

> relieved of its existing pre-existing common-law duty to use ordinary care in ord. r to avoid physical harm to foreseeable persons and property in the execution of its undertakings. That duty, which is imposed by law, is separate and distinct from defendant's contractual obligation with the general contractor.
> Id. at 172.

Respondents have a common law duty to exercise reasonable care to avoid harm to foreseeable third parties in exercising these contractual and regulatory duties. Petitioners were a foreseeable third party who were damaged by Respondents breach of their duty to use reasonable care in performing under its obligations pursuant to the financial accommodation process and "Dual Tracking" regulations.

In Speleos v. BAC Home Loans Servicing, L.P., 755 F. Supp. 2d 304, 311 (D. Mass. 2010), the court upheld Plaintiff's negligence claim on facts similar to the present case, holding:

> Violations of a statute or regulation may constitute evidence of negligence. A claim for negligence based on a statutory or regulatory violation can survive even where there is no private cause of action under that statute or regulation. Here, evidence of a violation of the HAMP Guidelines may constitute evidence of

> breach of a duty because the harm that the Plaintiffs allegedly incurred is of the kind that the Guidelines were designed to prevent, and the Plaintiffs are within the class of persons that the Guidelines are intended to benefit.

Thus, the Petitioners have stated a defect in the foreclosure procedure.

C. PETITONERS HAVE ESTABLISHED A QUIET TITLE CLAIM (COUNT I)

In the case at bar, the subject property was sold at a Sheriff's Sale on January 22, 2019. Therefore, Petitioners had until July 22, 2019, to redeem the subject property. Petitioners did not redeem the property, because the Petitioner, Bettie J. Harris was deceased and could not redeem the property. Once the estate was open the estate attempted to redeem and repurchase the subject property to no avail, because the Respondents refused to allow the Estate to redeem the subject property.

While the potential expiration of the redemption period has serious consequences for Petitioner, Bettie J. Harris' legal rights, the Court retains the power to rescind the foreclosure sale -- even after the expiration of the redemption period -- if the sale itself was invalid based on a showing of fraud or irregularity. Overton v. Mortg. Elec. Registration Sys., No. 284950, 2009 WL 1507342, at *1. Otherwise, statutory foreclosures could never be set aside once the redemption period had expired. While 'statutory foreclosures should not

be set aside without very good reason,' it is possible for courts to set statutory foreclosures aside." Hornbuckle v. Mortg. Elec. Registration Sys., Inc., No. 10–14306, 2011 WL 5509214, at *5 (E.D. Mich. Nov. 10, 2011) (quoting United States v. Garno, 974 F. Supp. 628, 633 (E.D. Mich. 1997)). See also Langley v. Chase Home Fin. LLC, No. 10–604, 2011 WL 1130926, at *2 n. 2 (W.D. Mich. Mar. 28, 2011).

CONCLUSION

Petitioners request that the District Court's September 30, 2020, Opinion and Order Granting Respondents Motion to Dismiss be reversed and that this matter be remanded to the District Court.

Respectfully submitted,

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Dated: February 7, 2022

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: September 10, 2021

Ms. Laura C. Baucus

Mr. Darwyn Prentiss Fair

Mr. Ryan Jason VanOver

Ms. Jill Margaret Wheaton

Re: Case No. 20-2005*, Bettie Harris, et al v. US Bank National Association, et al*
Originating Case No. 2:19-cv-12935

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Virginia Lee Padgett
Case Manager
Direct Dial No. 513-564-7032

cc: Ms. Kinikia D. Essix

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

No. 20-2005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Sep 10, 2021

DEBORAH S. HUNT, Clerk

BETTIE J. HARRIS, Deceased; REGINALD WATKINS; MICHAEL HARRIS,

Plaintiffs-Appellants,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

US BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-2; SELECT PORTFOLIO SERVICING, INC.,

Defendants-Appellees.

ORDER

BEFORE: MOORE, COOK, and STRANCH, Circuit Judges.

Reginald Watkins, Michael Harris, and their deceased mother, Bettie J. Harris, appeal through counsel the district court's dismissal of their civil action against U.S. Bank National Association, as Trustee for Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-2; and Select Portfolio Servicing, Inc. for lack of standing and failure to state a claim. The suit involved the allegedly improper foreclosure of Bettie J. Harris's real property. The district court held that the plaintiffs either lacked standing or failed to state a claim on which relief may be granted. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a).

In 2003, Bettie J. Harris obtained a loan secured by a mortgage on real estate in Pontiac, Michigan, that she had purchased in 1992. In 2015, Bettie J. Harris passed away. In 2018, that mortgage was assigned to U.S. Bank, and Select Portfolio Servicing serviced it. In that same year, the loan went into default, and U.S. Bank began foreclosure proceedings on the mortgaged real estate. In January 2019, the property went to the sheriff's sale, and U.S. Bank purchased it. Both before and after the sheriff's sale, Watkins and Michael Harris attempted to work out a financial accommodation with Select Portfolio Servicing, and the company was allegedly open to it. Nevertheless, in July, the six-month period under Michigan law in which a mortgagor can redeem a foreclosed property expired without redemption.

Watkins and Michael Harris, purporting to act as heirs of Bettie J. Harris, along with the deceased Bettie J. Harris, sued in Michigan state court alleging that Select Portfolio Servicing went forward with the

sheriff's sale without posting the required notice, without allowing the plaintiffs to complete the financial accommodation or reinstate the loan, and despite engaging in the financial-accommodation process or what they term "Dual Tracking." They asserted a quiet-title claim under Michigan law; breach of Michigan Compiled Laws § 600.3208, the notice statute; and breach of their request for mortgage assistance, in violation of the Real Estate Settlement Procedures Act ("RESPA"), "Reg X," and regulations in 12 C.F.R. Part 1024. They sought a judgment granting them legal title to the property, damages, costs and attorneys' fees, and an injunction tolling the redemption period.

After removing the case to federal court, see 28 U.S.C. § 1441, because the plaintiffs alleged a claim under federal law, see 28 U.S.C. § 1331, the defendants moved to dismiss the complaint. They argued that the plaintiffs lacked standing, see Fed. R. Civ. P. 12(b)(1), or, in the alternative, that they failed to state a claim on which relief could be granted, see Fed. R. Civ.
P. 12(b)(6). The district court granted that motion on both theories and dismissed the plaintiffs' complaint. Harris v. U.S. Bank Nat'l Ass'n as Tr. for Structured Asset Inv. Loan Tr. Mortg. Pass- Through Certificates, Series 2004-2, No. 19-12935, 2020 WL 5819563 (E.D. Mich. Sept. 30, 2020). In determining that the plaintiffs lacked standing, the district court held that Watkins and Michael Harris were not parties to the mortgage either individually or as representatives of the estate of Bettie J. Harris; therefore, they alleged no legal interest in the property and, consequently, no actual injury. Id. at *3-4. The district court also held that, even if the plaintiffs could establish standing,

their claims failed because the state-law redemption period had expired and they had not alleged facts that could support setting aside the sheriff's sale. Id. at *4. The district court also refused to review several additional claims that the plaintiffs alleged in their response to the defendants' motion to dismiss.

On appeal, the plaintiffs argue that the district court erred in holding that they lacked standing because their injury would be redressable by an order rescinding the sheriff's sale. They also argue that they alleged sufficient facts to establish fraud or irregularity in the foreclosure process, to show violations of RESPA and the related federal regulations, and to establish a quiet- title claim.

"This court reviews de novo a district court's dismissal of a complaint for lack of subject- matter jurisdiction. In doing so, we take the allegations in the complaint as true." Buchholz v. Meyer Njus Tanick, 946 F.3d 855, 860 (6th Cir. 2020) (citation omitted).

To establish the jurisdictional requirement of standing under Article III of the Constitution, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

The district court held that the "Plaintiffs have failed to demonstrate that they have suffered an injury in fact." Harris, 2020 WL 5819563, at *4. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Spokeo, Inc., 136 S. Ct. at 1548 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

The plaintiffs alleged that the defendants violated state and federal law when they foreclosed on the mortgage and obtained title to the real property owned by Bettie J. Harris. Watkins and Michael Harris did not allege that they were parties to the mortgage; instead, they alleged an interest as "Heirs of Bettie J. Harris." But, as the district court held, they did not allege that Bettie J. Harris left the property to them in a valid will, that they otherwise obtained an interest in the property following her death, or that they had been appointed as the representatives of her estate. And because Watkins and Michael Harris did not plead a legal interest in the mortgage or the real estate, they did not plead that they were injured by the defendants' actions. Therefore, they did not establish that they had standing to sue.

In their appellate brief, the plaintiffs argue that, with regard to the district court's standing ruling, "[r]edressability [is] the only prong contested." They then assert that the injury is redressable by a ruling in their favor because Michigan courts can, in certain circumstances, set aside statutory foreclosures after the redemption period has closed. But that assumes that the plaintiffs suffered an injury at all, which is "the '[f]irst and foremost' of standing's three elements." Id. at 1547 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998)). And as the district court explained, they did not plead as much in their complaint. See Turaani v. Wray, 988 F.3d 313, 317 (6th Cir. 2021). Indeed, in their appellate brief, Watkins and Michael Harris merely reiterate that they "claim as interest in the subject property as follows: Heirs of Bettie J. Harris." The district court correctly explained why that allegation was insufficient to plead a legally cognizable interest that

could support an injury in fact. And Article III does not permit a plaintiff to seek a favorable court ruling (and the benefits it might bring) without first establishing an injury in fact. See Spokeo, Inc., 136 S. Ct. at 1547. Therefore, the district court did not err in holding that it lacked jurisdiction because the plaintiffs failed to establish standing.

There is also the issue of Betty J. Harris's status as a litigant, which the district court did not specifically address. The complaint named her as a plaintiff and noted that she was deceased at the time of filing. But it is "self-evident" that "a dead person, qua a dead person (as opposed to the dead person's estate . . .) cannot sue, be sued, or be joined to a lawsuit." LN Mgmt., LLC v. JPMorgan Chase Bank, N.A., 957 F.3d 943, 950 (9th Cir. 2020) (Boggs, J.). The plaintiffs also never attempted to substitute the representative of her estate or some other "real party in interest" in her place. Fed. R. Civ. P. 17(a)(1). In short, because "a deceased plaintiff lacks Article III standing," House v. Mitra QSR KNE LLC, 796 F. App'x 783, 784 (4th Cir. 2019), we must dismiss Betty J. Harris's appeal. See also id. at 788-89 ("Rule 17 does not allow for substitution when a plaintiff is deceased at the time suit is filed.").

Accordingly, we **AFFIRM** the district court's judgment.

ROGERS, J., concurring.

I concur in affirming the judgment of the district court in large part because the plaintiffs lack Article III standing to challenge the sheriff's sale. To the extent that plaintiffs seek other relief that would concretely benefit them individually, I would affirm on

the substantive legal grounds set forth by the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTIE J. HARRIS, deceased,
REGINALD WATKINS and
MICHAEL HARRIS,

Plaintiffs,

Case No. 19-cv-12935

v.

Paul D. Borman
United States District
Judge

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-2, and SELECT PORTFOLIO SERVICING, INC.,

Defendants.

_____/

JUDGMENT

For the reasons stated in an Order issued this same day, it is ORDERED ANDADJUDGED that Defendants' Motion to Dismiss (ECF No. 5) is GRANTED and this case is DISMISSED.

IT IS SO ORDERED.

s/Paul D. Borman
Paul D. Borman
United States District
Judge

Dated: September 30, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTIE J. HARRIS, deceased,
REGINALD WATKINS and
MICHAEL HARRIS,

Plaintiffs, Case No. 19-cv-12935

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-2, and SELECT PORTFOLIO SERVICING, INC.,

Defendants.
_____/

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (ECF NO. 5)

This action arises out of a completed foreclosure of real property. Plaintiffs, claimed heirs to the deceased property owner, challenge the validity of the foreclosure of the property based on alleged procedural errors and the improper handling of purported loan modifications. They name as defendants the entity that foreclosed on the property, US Bank, and the servicer of the mortgage loan, Select Portfolio, in an attempt to restore title to the property in the Heirs-Plaintiffs' names. Now before the Court is Defendants' motion to dismiss Plaintiffs' complaint pursuant to

Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The motion is fully briefed. The Court held a hearing using Zoom videoconference technology on September 16, 2020, at which counsel for Plaintiffs and Defendants appeared. For the reasons that follow, the Court GRANTS Defendants' Motion to Dismiss (ECF No. 5).

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Complaint

This case involves real property commonly known as 104 Westway, Pontiac, Michigan 48342 (the "Property"). (ECF No. 1-1, Plaintiffs' Complaint 7, PgID 7.)On or about November 13, 2003, Plaintiff Bettie J. Harris (the "Borrower"), obtained a loan in the amount of $86,400.00 (the "Loan") from BNC Mortgage, Inc. (the "Lender"), which was evidenced by a note (the "Note") (ECF No. 5-2, Note, PgID 84-87), and secured by a mortgage (the "Mortgage") in favor of the Mortgage Electronic Registration Systems, Inc. ("MERS"). (ECF No. 5-3, Mortgage, PgID 89-106.) The Mortgage was recorded on March 3, 2004, in Liber 32367, page 411, Oakland County Register of Deeds. (*Id.*)

Harris passed away on November 4, 2015. (Compl. 12, citing Ex. 3, Certificate of Death, PgID 28.)

On October 26, 2018, the Mortgage was assigned to Defendant U.S. Bank National Association, as Trustee for the Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2004-2 ("US Bank"), via Assignment of Mortgage, which was recorded on

November 15, 2018, in Liber 52365, Page 618, Oakland County Register of Deeds. (ECF No. 5-5, Corporate Assignment of Mortgage ("Assignment"), PgID 110.) Defendant Select Portfolio Servicing, Inc. ("SPS") is the servicer of the Mortgage Loan. (*Id.*)

Harris defaulted on her Loan, and, as a result, US Bank initiated foreclosure by advertisement proceedings. A Notice of Foreclosure was published weekly in the Oakland County Legal News on December 3, December 10, December 17, and December 24, 2018. (ECF No. 1-1, Ex. 2 to Complaint, Sheriff's Deed on Mortgage Foreclosure, PgID 22.) On December 5, 2018, the Notice of Foreclosure was posted in a conspicuous place on the subject premises. (*Id.* at PgID 23.)

A sheriff's sale occurred on January 22, 2019 (the "Sheriff's Sale"), where US Bank purchased the Property for $46,400.00 and received a Sheriff's Deed on Mortgage Foreclosure (the "Sheriff's Deed") in exchange. (*Id.* at PgID 17-26.) The Sheriff's Deed was recorded on January 29, 2019. (*Id.*) The six-month statutory redemption period expired on July 22, 2019. (*Id.*) The Property was not redeemed and Plaintiffs do not allege they attempted to redeem the Property during that time. (*See* Compl.; *see also* ECF No. 7, Pls.' Resp. at p. 13, PgID 230 ("Plaintiffs did not redeem the property, because the Plaintiff, Bettie J. Harris was deceased and could not redeem the property.").)

Plaintiffs Reginald Watkins and Michael Harris claim an interest in the Property solely as "Heirs of Bettie J. Harris." (Compl. ¶ 9, PgID 8.) The Heirs- Plaintiffs claim that they attempted to work out a financial accommodation in order to save the property before and after the Sheriff's Sale, and that SPS was amenable to the financial accommodation,

but that Defendant US Bank nevertheless went through with the Sheriff's Sale. (*Id.* ¶¶ 14-16, citing Ex. 4, PgID 30, 32-33.) Plaintiffs assert they have "suffered prejudice in that they would have been in a better position to preserve their interest in the real property 1.) if Defendant(s) had not gone forward with the Sheriff's Sale without proper notice, and 2.) if before the Sheriff's Sale Defendant(s) had allowed Plaintiffs to complete the financial accommodation or had allowed Plaintiffs to reinstate the loan, and not having gone forward with the Sheriff's Sale during the financial accommodation process or 'Dual Tracking.'" (*Id.*
¶ 19, PgID 8-9.) Plaintiffs further assert that "there are [unidentified] tenants currently residing in the subject property who are in danger of being evicted in violation of the Protecting Tenants at Foreclosure Act." (*Id.* ¶ 18, PgID 8.)

B. Procedural History

Plaintiffs filed this action in the Oakland County Circuit Court on or about August 23, 2019, and Defendants timely removed it to this Court based on federal question jurisdiction on October 8, 2019. (ECF No. 1.) Plaintiffs allege the following counts: Count I – Quiet Title; Count II – Breach of MCL § 600.3208; Count III – Breach of Request for Mortgage Assistance; and, Count IV – Injunction and Other Relief. (ECF No. 1-1, Compl.)

Defendants filed the present Motion to Dismiss on November 21, 2019. (ECF No. 5, Defs.' Mot.) Plaintiffs filed their Response to Defendants' Motion and Request to Extend the Expiration of the Redemption Period and Request for Facilitation on

December 12, 2019 (ECF No. 7, Pls.' Resp.), and Defendants filed their Reply on March 12, 2020 (ECF No. 11, Defs.' Reply).

II. STANDARD OF REVIEW

A. Fed. R. Civ. P. 12(b)(1)

Challenges to subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), including challenges to standing, "come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods., Inc. v. Sherwin–Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007); *see also Kepley v. Lanz*, 715 F.3d 969, 972 (6th Cir. 2013) ("Standing goes to [a c]ourt's subject matter jurisdiction."). Under a facial attack, all of the allegations in the complaint must be taken as true, much as with a Rule 12(b)(6) motion. *Gentek*, 491 F.3d at 330 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). Under a factual attack, however, "the district court must weigh the conflicting evidence to arrive at the factual predicate that subject-matter does or does not exist." *Id.* Where the defendant brings a factual attack on the subject matter jurisdiction, "no presumptive truthfulness applies to the allegations" of the complaint and the court may consider documentary evidence in conducting its review. *Id.* If the district court must weigh conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist, it "has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.*

A. Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." Handy-Clay v. City of Memphis, 695 F.3d 531, 538 (6th Cir. 2012). To state a claim, a complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he complaint 'does not need detailed factual allegations' but should identify 'more than labels and conclusions.'" Casias v. Wal– Mart Stores, Inc., 695 F.3d 428, 435 (6th Cir. 2012) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The court "need not accept as true a legal conclusion couched as a factual allegation, or an unwarranted factual inference." Handy-Clay, 695 F.3d at 539 (internal citations and quotation marks omitted). In other words, a plaintiff must provide more than a "formulaic recitation of the elements of a cause of action" and his or her "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555-56. The Sixth Circuit has explained that "[t]o survive a motion to dismiss, a litigant must allege enough facts to make it plausible that the defendant bears legal liability. The facts cannot make it merely possible that the defendant is liable; they must make it plausible." Agema v. City of Allegan, 826 F.3d 326, 331 (6th Cir. 2016) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

In ruling on a motion to dismiss, the Court may consider the complaint as well as: (1) documents that are referenced in the plaintiff's complaint and that are

central to plaintiff's claims; (2) matters of which a court may take judicial notice; (3) documents that are a matter of public record; and (4) letters that constitute decisions of a governmental agency. Thomas v. Noder-Love, 621 F. App'x 825, 829 (6th Cir. 2015) ("Documents outside of the pleadings that may typically be incorporated without converting the motion to dismiss into a motion for summary judgment are public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies.") (internal quotation marks and citations omitted); Armengau v. Cline, 7 F. App'x 336, 344 (6th Cir. 2001) ("We have taken a liberal view of what matters fall within the pleadings for purposes of Rule 12(b)(6). If referred to in a complaint and central to the claim, documents attached to a motion to dismiss form part of the pleadings. [C]ourts may also consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies."); Greenberg v. Life Ins. Co. of Virginia, 177 F.3d 507, 514 (6th Cir. 1999) (finding that documents attached to a motion to dismiss that are referred to in the complaint and central to the claim are deemed to form a part of the pleadings). Where the claims rely on the existence of a written agreement, and plaintiff fails to attach the written instrument, "the defendant may introduce the pertinent exhibit," which is then considered part of the pleadings. QQC, Inc. v. Hewlett-Packard Co., 258 F.Supp.2d 718, 721 (E.D. Mich. 2003). "Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document." Weiner v. Klais and Co., Inc., 108 F.3d 86, 89 (6th Cir. 1997), abrogated on other grounds by Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

Based on the above, in addition to Plaintiffs' allegations in their Complaint, and the documents attached to the same, the Court will also consider three additional documents attached to Defendants' motion which are referenced in the pleadings and central to Plaintiffs' claims and/or publicly available documents: (1) the Note, the Mortgage, and (3) the Assignment. (ECF Nos. 5-2, 5-3 and 5-5, Defs.' Mot. Exs. 1, 2 and 4.)

III. ANALYSIS

A. The Heirs-Plaintiffs' Article III Standing to Bring Claims Challenging to the Foreclosure

Defendants argue that "it is uncontested that the Heirs-Plaintiffs [Reginald Watkins and Michael Harris] are not a party to the Note or the Mortgage" and that they therefore lack standing, in their individual capacities or as "Heirs of Bettie J. Harris [Borrower]" to assert claims related to the foreclosure of the Mortgage. (Defs.' Mot. at pp. 6-7, PgID 63-64.) Defendants assert that under Michigan law, "to be effective to prove the transfer of property, or to nominate a personal representative, a will must be declared valid by a register's order or informal probate or by a court's adjudication of probate," and that the Heirs-Plaintiffs have not pleaded that a court appointed either of them as a personal representative of the estate of Borrower Bettie J. Harris or any facts to show that they have a legal interest in the Property. (Id. at pp. 7-8, citing Mich. Comp. Laws § 700.3102.)

The United States Supreme Court has noted that standing is "the threshold question in every

federal case." Warth v. Seldin, 422 U.S. 490, 498 (1975). "To satisfy Article III's standing requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; the injury must be 'fairly traceable' to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury[.]" Coyne v. American Tobacco Co., 183 F.3d 488, 484 (6th Cir. 1999) (citations omitted). In addition, "a plaintiff must 'assert his own legal rights and interest, and cannot rest his claim to the relief on the legal rights and interest of third parties." Id. The burden is on the party invoking federal jurisdiction to demonstrate Article III standing. Stalley v. Methodist Healthcare, 517 F.3d 911, 916 (6th Cir. 2008). "[S]tanding cannot be inferred … from averments in the pleadings, but rather must affirmatively appear in the record." Spencer v. Kemna, 523 U.S. 1, 10-11 (1998) (internal quotation marks omitted).

In this case, the Heirs-Plaintiffs' claims arise from the Mortgage signed by the decedent Borrower, Bettie J. Harris. The Heirs-Plaintiffs plead that they "claim a[n] interest in the subject property as follows: Heirs of Bettie J. Harris." (Compl. ¶ 9, PgID 8.) Plaintiffs have not otherwise pleaded a possessory or ownership interest in the Property and have not pleaded any facts to show that they have a legal interest to the Property. Neither of the Heirs-Plaintiffs was a party to that Mortgage and they have not pleaded that a court has appointed either of them as a personal representative of the estate of Borrower Bettie J. Harris.

Under Michigan law, "to be effective to prove the transfer of property, or to nominate a personal

representative, a will must be declared valid by a register's order of informal probate or by a court's adjudication of probate." Mich. Comp. Laws § 700.3102. Plaintiffs have not pleaded that the Borrower had a will that was declared valid or that her estate went through probate proceedings, and they therefore cannot assert any claims against the Mortgage in this Court. See Sesi v. Fannie Mae, No. 10-12966, 2012 WL 831759, at *6 (E.D. Mich. Mar. 12, 2012) ("Because the plaintiff [son] cannot establish that he has an interest [on behalf of his deceased parents] in the property that was the subject of foreclosure, nor did he have the authority to speak as a representative of his deceased parents' estate, he cannot show that he himself suffered an injury in fact; nor can he show that he is attempting to enforce his own legal rights or that his complaints falls within the zone of interests protected by the law he has invoked" and thus he "has no standing.") (emphasis in original); see also Roberts v. Fed. Nat'l Mortg. Assoc., No. 18-10740, 2018 WL 1399264, at *2 (E.D. Mich. Mar. 20, 2018) (collecting cases holding that "tenants, like plaintiff, lack standing to challenge the validity of a foreclosure of that property"); Dietrich v. JPMorgan Chase Bank, N.A., No. 16-cv-13566, 2017 WL 57240, at *3 (E.D. Mich. Jan. 5, 2017) (holding plaintiff (property owner's father) "fails to meet the requirements of Article III standing" because "[i]n contrast to owners, … mere occupants or tenants of a property lack standing to challenge a foreclosure"); Hurst v. Fed. Nat'l Mortg. Assoc., 14-CV-10942, 2015 WL 300275, at *3 (E.D. Mich. Jan. 22, 2015) (collecting cases holding that tenants, who have no purchase interest in the property at issue, lack standing to challenge the validity of a foreclosure of that property), aff'd, 642 F.

App'x 533 (6th Cir. 2016); but see United States v. Currency $267,961.07, 916 F.2d 1104, 1107 (6th Cir. 1990) (commenting that a "property interest less than ownership, such as a possessory interest, is sufficient to create [constitutional] standing" to challenge a judicial foreclosure proceeding).

Given the lack of evidence noted above that the Heirs-Plaintiffs have any type of ownership or possessory interest in the Property, the Court finds that Plaintiffs have failed to demonstrate that they have suffered an injury in fact and that they have Article III standing to bring their claims in this case. However, even if the Heirs- Plaintiffs could demonstrate some sort of possessory interest in the subject Property sufficient to establish Article III standing, their claims are nevertheless dismissed for the reasons that follow.

B. The Statutory Redemption Period Has Expired and Plaintiffs Failto Allege Facts Sufficient to Set Aside the Valid Sheriff's Sale

Plaintiffs seek to set aside the completed Sheriff's Sale of the Property and to"[g]rant[] Plaintiffs all legal title to the subject property," (Compl. ¶¶ 30, 34, 41, Counts I - III), and seek to "stay[] and toll[] the expiration of the Redemption Period." (*Id.* ¶ 51, Count IV.) Defendants argue that all of Plaintiffs' claims fail because the statutory redemption period has expired and Plaintiffs have failed to allege facts sufficient to set aside the valid Sheriff's Sale.

1. Plaintiffs failed to timely redeem the Property

Foreclosures by advertisement are governed by statute under Michigan law. Conlin v. Mortg. Elec. Registration Sys., Inc., 714 F.3d 355, 359 (6th Cir. 2013) (citing Munaco v. Bank of America, 513 F. App'x 508, 511 (6th Cir. 2013)). These statutes set forth "certain steps that the mortgagee must go through in order to validly foreclose" and provide the mortgagor six months after the sheriff's sale in which to redeem the foreclosed property. Id. (citing Mich. Comp. Laws § 600.3240(8) and Mitan v. Fed. Home Loan Mortg. Corp., 703 F.3d 949, 951 (6th Cir. 2012), abrogated on other grounds by Kim v. JPMorgan Chase Bank, N.A., 493 Mich. 98, 115 (2012)). "Once this statutory redemption period lapses, however, the mortgagor's right title, and interest in and to the property are extinguished." Id. (internal quotations omitted).

After this, the mortgagor must clear a high bar to have the foreclosure and sale reversed. See Conlin, 714 F.3d at 359 (explaining that "the ability for a court to set aside a sheriff's sale has been drastically circumscribed") Specifically, "Michigan courts have held that once the statutory redemption period lapses, they can only entertain the setting aside of a foreclosure sale where the mortgagor has made 'a clear showing of fraud, or irregularity.'" Id. (quoting Schulthies v. Barron, 16 Mich. App. 246, 247-48 (1969)). But not any type of fraud will suffice; rather, "the misconduct must relate to the foreclosure procedure itself." Id. at 361. In addition, plaintiffs seeking to set aside a foreclosure sale "must show that they were prejudiced by defendant's failure to comply with [the foreclosure-by-advertisement statutes]. To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant's

noncompliance with the statute." Kim v. JPMorgan Chase Bank, N.A., 493 Mich. 98, 115-16 (2012).

In this case, the Sheriff's Sale took place on January 22, 2019, and the redemption period expired on July 22, 2019. (Sheriff's Deed, PgID 21-26.) Plaintiffs did not redeem the Property prior to the expiration date of the redemption period, and did not even file their Complaint in this action until on or about August 23, 2019, a month after the expiration of the redemption period. (See Compl.) Therefore, Plaintiffs can only challenge the foreclosure if they make a "clear showing of fraud, or irregularity" relating to the foreclosure proceeding itself, and that they were prejudiced. Conlin, 714 F.3d at 359-61.[1]

2. Plaintiffs fail to plausibly allege fraud or irregularity in the foreclosure process

Plaintiffs allege that: (1) Defendants "failed to post a true copy [of the Notice]in a conspicuous place upon any part of the premises described in the Notice that themortgage will be foreclosed by a sale of the mortgaged premises in violation of MCLA 600.3208;" and that (2) Defendants engaged in "Dual Tracking." (Compl.¶¶ 17, 24, 27-28, 33, 39-40.) Neither of these

[1] To the extent Defendants argue that Plaintiffs lack statutory standing to challengethe completed foreclosure because the statutory redemption period has expired (Defs.' Mot. at pp. 9-10, PgID 66-67), the Sixth Circuit has stated that the expirationof the statutory redemption period does not create a standing issue. *See Elsheick v.Select Portfolio Servicing, Inc.*, 566 F. App'x 492, 497 (6th Cir. 2014).

allegations are sufficient to set aside a completed Sheriff's Sale.

a. Notice of foreclosure allegation

Plaintiffs challenge the Sheriff's Sale based on alleged failure to post a notice of the foreclosure. Plaintiffs also assert a separate claim for "Breach of MCL 600.3208" (Count II), claiming that they did not receive proper notice of the foreclosure. Michigan law requires the notice of foreclosure to be published for four successive weeks, at least once per week, in a newspaper published in the county where the premises to be sold are situated. Mich. Comp. Laws § 600.3208. Additionally, a notice of foreclosure must be posted "in a conspicuous place upon any part of the premises described in the notice" within fifteen days after the first publication of the notice." *Id.*

The Sheriff's Deed, attached as an exhibit to Plaintiffs' Complaint, includes an affidavit of publication by Cindy C. Lawler and an affidavit of posting by Nate Cook. (Compl. Ex. 2, PgID 22-23.) The affidavit of publication states that the notice "was published in Oakland County Legal News[,] a newspaper circulated in Oakland County[,] on December 3, December 10, December 17, December 24, 2018 A.D." (*Id.* at PgID 22.) In the affidavit of posting, Nate Cook avers that "on the 5th date of December, 2018 A.D." he "posted a notice, a true copy of which is annexed hereto, in a conspicuous place upon the premises described in said notice by attaching the same in a secure manner to 140 Westway, Pontiac, MI 48342." (*Id.* at PgID 23.) The notice, included on the same page of the Sheriff's Deed as Cook's affidavit,

identified the premises and stated that a foreclosure sale was to be held on January 22, 2018, and that the redemption period "shall be 6 months from the date of such sale[.]" (*Id.*)

Plaintiffs' allegation that they did not receive proper notice of the foreclosure sale therefor conflicts with the affidavits in the Sheriff's Deed. However, in such a case, the affidavit prevails. Mich. Comp. Laws § 600.3256(1)(c) provides that "[a]ny party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure … [a]n affidavit setting forth the time, manner and place of posting a copy of such notice of sale to be made by the personposting the same." Further, Mich. Comp. Laws § 600.3264 provides that such affidavits "shall be presumptive evidence of the facts therein contained." Accordingly, Plaintiffs' conclusory allegations that they did not receive the statutorily-required notice do not serve to rebut the affidavits included in the Sheriff's Deed. *See Crowton v. Bank of America*, No. 18-cv-10232, 2019 WL 423505, at *3 (E.D. Mich. Feb. 4, 2019) (citing *Derbabian v. Bank of Am., N.A.*, 587 F. App'x 949, 956 (6th Cir. 2014) ("[T]he bare assertion that the defendants failed to give 'required notices' does not meet the minimal pleading standards of Rule 8. More importantly, the sheriff's deed reflecting the foreclosure sale shows that the [plaintiffs] were given the statutorily required notices.")); *Haywood v. RoundPoint Mortg. Serv. Corp.*, No. 18-10111, 2018 WL 3159624, at *4 (E.D. Mich. June 28, 2018) (where plaintiff alleged that notice of intent to foreclose was not posted on the property, and defendant provided a copy of the affidavit in the Sheriff's Deed attesting that it was, "[t]he affidavit prevails").

Therefore, Plaintiffs have failed to allege an irregularity in the foreclosure proceedings such that the foreclosure should be set aside after the redemption period has expired based on their alleged failure of notice, and their claim for "Breach of MCL 600.3208" (Count II) is dismissed.

b. "Dual Tracking" allegations

Plaintiffs also challenge the Sheriff's Sale based on allegations of "Dual Tracking" – that Defendants instituted the foreclosure proceedings at the same time that Plaintiffs were seeking a loan modification. (Compl. ¶¶ 14-17, 22-24, PgID 8- 9.) Plaintiffs also allege a separate claim in their Complaint titled "Breach of Requestfor Mortgage Assistance" (Count III) based on their "Dual Tracking" allegations. (*Id.* ¶¶ 35-41, PgID 11-13.) Plaintiffs allege that they "relied, to their detriment, uponthe representations of Defendant, SPS" that it was amenable to financial accommodations, and assert that they "would not have attempted to utilize the financial accommodation if Plaintiffs had known that Defendant, SPS, would proceed, nonetheless, with the Foreclosure during this time[.]" (*Id.* ¶ 40.) Plaintiffs claim that Dual Tracking is "precluded under the terms of the National Mortgage Settlement of 2012, amendments to Reg. X of the Real Estate Settlement andProcedures Act, (12 C.F.R. part 1024)" ("RESPA"). (*Id.*)

i. Plaintiffs' "dual-tracking" allegations areinsufficient to set aside the mortgage foreclosure

As explained above, "not just any type of fraud [or irregularity] will suffice to set aside a foreclosure. Rather, '[t]he misconduct must relate to the foreclosure procedure itself.'" Conlin, 714 F.3d at 361 (citation omitted). There is an important distinction between loan modification irregularities and foreclosure irregularities, and "[a]n alleged irregularity in the loan modification process … does not constitute an irregularity in the foreclosure proceeding." Campbell v. Nationstar Mortg., 611 F. App'x 288, 294 (6th Cir. 2015) (citing William v. Pledged Prop. II, LLC, 508 F. App'x 465, 468 (6th Cir. 2012)). "Following these principles, courts in th[is] District have consistently held that the practice of 'dual tracking' – i.e., 'a common tactic by banks [of] institut[ing] foreclosure proceedings at the same time that a borrower in default seeks a loan modification' – 'relate[s] to the loan modification process rather than the foreclosure process,' and is therefore not a valid basis for setting aside a foreclosure sale for fraud or irregularity." Haywood, 2018 WL 3159624, at *3-4 (collecting cases, and finding "[t]he decisions discussed above make clear that dual- tracking allegations do not amount to allegations of fraud or irregularity in the foreclosure process, which are required to set aside a foreclosure by advertisement."); *Buttermore v. Nationstar Mortg., LLC*, No. 16-14267, 2017 WL 2306446, at *3-4 (E.D. Mich. May 26, 2017) ("Courts in this District have repeatedly held that dual-tracking allegations do not constitute allegations of irregularities in the foreclosure process, as required to set aside a foreclosure by advertisement.").

Therefore, the Complaint's "dual-tracking' allegations do not constitute allegations of irregularities in the foreclosure process, as required to set aside a foreclosure by advertisement. And, as

Plaintiffs have failed to sufficiently plead claims of fraud or irregularity in the foreclosure process, their challenges to the validity of the foreclosure under Michigan law fail as a matter of law.

ii. Plaintiffs' "Breach of Request for Mortgage Assistance" claim (Count III) fails to state a claim

Next, Plaintiffs' broad allegations in Count III of their Complaint, "Breach of Request for Mortgage Assistance," that "dual tracking" is "precluded under the terms of the National Mortgage Settlement of 2012, amendments to Reg. X of the Real Estate Settlement and Procedures Act, (12 CFR part 1024)"[2] are insufficient tostate a claim against Defendants.

As a threshold issue, and as Defendants contend, there does not appear to be a cause of action under Michigan law for "breach of request for mortgage assistance." "There is no provision found in RESPA under which Plaintiff[s] can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification." *Caggins v. Bank of N.Y. Mellon*, No. 15-11124, 2015 WL 4041350, at *2 (E.D. Mich. July 1, 2015); *see also Servantes v. Caliber Home Loans, Inc.*, No. 14-cv-13324, 2014 WL 6986414, at *1 (E.D. Mich. Dec. 10, 2014) (dismissing RESPA claim "because the principal relief sought by Plaintiffs – to stay or set aside the sheriffs

[2] Regulation X's enabling statute is the Real Estate Settlement Procedures Act("RESPA"), 12 U.S.C. § 2605.

sale, or alternatively, to permit the matter to proceed to judicial foreclosure – is unavailable to them under RESPA").

To the extent Plaintiffs purport to allege a violation of Reg. X, Plaintiffs fail to specify which provision(s) of 12 C.F.R. Part 1024 they allege were violated. Narrowing Plaintiffs' claim to the only RESPA section providing for a private rightof action – those regulations related to "Mortgage Servicing," 12 C.F.R § 1024. 41 ("Loss mitigation procedures")[3] – that provision states, in part:

> Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforcethe terms of any agreement between a servicer and the owner orassignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

12 C.F.R. § 1024.41(a). In addition, a servicer is only required to follow the procedures described in the loss mitigation rule for a single "complete loss mitigation application." 12 C.F.R. § 1024.41(l). Therefore, the rule does not requirethat the borrower actually receive a loan modification; rather, it merely requires thata

[3] *See Buttermore*, 2017 WL 2306446, at *7 (recognizing that under Regulation X,only 12 C.F.R. § 1024.41 can be the basis for a private action).

completed application be properly processed and considered.

Plaintiffs' Complaint fails to allege any specific financial accommodation thatwas discussed or allegedly offered and does not allege that Plaintiffs submitted a "complete loss mitigation application," as required by § 1024.41(b)(1), but instead only alleges that Plaintiffs "attempted to utilize" or "attempted to work out" a financial accommodation. (Compl. ¶¶ 36, 38, 40.) A party must allege that she submitted "[a] complete loss mitigation application" as a prerequisite for recovery under 12 C.F.R. § 1024.41(g), and failure to submit a complete loss mitigationapplication is fatal to claims brought under 12 C.F.R. § 1024.41(g). *See Rader v. Ditech Fin., LLC*, No. 17-13566, 2018 WL 6589982, at *4 (E.D. Mich. Dec. 14, 2018) (finding that, even taking plaintiff's allegations that the parties were activelyengaged in loan modification, "without knowing the date of [plaintiff's] completed loss mitigation application, this RESPA claim is not plausible"); *Burns v. Deutsche Bank Nat. Trust Co.*, No. 1:15-CV-264, 2015 WL 4903422, at *2 (W.D. Mich. Aug. 17, 2015) ("Section 1024.41(g) does not apply, however, because Plaintiffs do not allege that they submitted a complete loss-mitigation application more than 37 daysprior to the foreclosure sale."). Plaintiffs' claim therefore is dismissed for failure tostate a claim.[4]

[4] To the extent Plaintiffs allege that Defendants made an oral promise of accommodation, such a claim would be barred by the Michigan financial statute of frauds, Mich. Comp. Laws § 566.132(2), which "plainly states that a party is precluded from bringing a claim – no matter its label – against a financial

Therefore, for all these reasons, Plaintiffs' claim founded upon RESPA and/orRegulation X in Count III of their Complaint fails as a matter of law.

3. Plaintiffs fail to sufficiently allege prejudice

Even if Plaintiffs sufficiently alleged fraud or irregularities with the foreclosure process (which they have not), their request to set aside the Sheriff's Sale still fails because they have not alleged any specific prejudice as a result. *See Conlin*, 714 F.3d at 361 (stating that, in addition to alleging an irregularity in the foreclosure, a plaintiff must allege that they were prejudiced as a result of the defect and that they "would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute").

The only allegation of prejudice connected to Plaintiffs' claims in the Complaint is their bald assertion that they "would have been in a better position to preserve their interest in the real property" if Defendants had not gone forward with the Sheriff's Sale or had allowed Plaintiffs to "complete the

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institution to enforce the terms of an oral promise[.]" *Crown Tech. Park v. D&N Bank, FSB*, 242 Mich. App. 538, 550 (2000); *see Hubbard v. Select Portfolio Serv., Inc.*, No. 16-11455, 2017 WL 9470640 (E.D. Mich. Mar. 16, 2017) (SPS, a "registered mortgage servicer," is a "financial institution" within the meaning of Mich. Comp. Laws § 566.132(3)), *report and recommendation adopted by* 2017 WL 3725475 (E.D. Mich.Aug. 30, 2017), *aff'd*, 736 F. App'x 590 (6th Cir. 2018).

financial accommodation" or "to reinstate that loan." (Compl. ¶ 41, PgID 12.) Plaintiffs restate these conclusory allegations in their Response brief. (Pls.' Resp. at p. 21, PgID 238; *see id.* at p. 25, PgID 242 (claiming that "[t]hey may have been able to procure the money to reinstate the loan, but they were unsure of the status of the loan").) Plaintiffs' allegations do not elaborate on these bare and formulaic statements, or otherwise explain why it was the case. This sort of allegation does not plead the requisite prejudice with sufficient plausibility. *See Wypych v. Deutsche Bank Nat'l Trust Co. on behalf of Holders of the Accredited Mortg. Loan Trust 2005-2 Asset Backed Notes*, No. 16-cv-13836, 2017 WL 1315721, at *5 (E.D. Mich. Apr. 10, 2017) ("Here, [the plaintiff] has not alleged prejudice. He alleges only that absent the alleged irregularities, he 'may' have been in a position to avoid foreclosure …. That is not enough."); *Goodman v. Citimortgage, Inc.*, No. 15-12456, 2015 WL 6387451, at *3 (E.D. Mich. Oct. 22, 2015) (plaintiffs did not sufficiently allege prejudice when they "fail[ed] to suggest how, if at all, they would have been in a better position had [the defendant] complied with the notice requirements under Mich. Comp. Laws § 600.3204"); *Thomas v. JPMorgan Chase Bank, N.A.*, No. 14-CV-14183, 2015 WL 8965629, at *5 (E.D. Mich. Dec. 16, 2015) (finding plaintiffs failed to sufficiently allege prejudice where they "made no allegation that they possessed the funds to bring the Loan current prior to the Sheriff's Sale, that they attempted to redeem the Property following the sale or would have been able to make the payment necessary to redeem, or that they were in any way negatively impacted by Defendants' failure to include Bernice Thomas's name on the notice of foreclosure").

Plaintiffs' remaining arguments in their Response brief regarding common law negligence have nothing to do with prejudice under Michigan's foreclosure statutes. (See Pls.' Resp. at pp. 21-23, PgID 238-40, citing *Loewke v. Ann Arbor Ceiling & Partition Co.*, 489 Mich. 157 (2011) (holding that whether a subcontractor owed a common law duty to avoid physical harm to its employee was not governedby the contents of a contract between the subcontractor and contractor).) Plaintiffs do not allege a claim of negligence against Defendants, and, as Defendants point outin their reply brief, Plaintiffs never even use the words "duty" or "negligence" in their Complaint. (See Defs.' Reply at p. 5, PgID 283.)

Plaintiffs' reliance on the out-of-circuit case, *Speleos v. BAC Home Loans Servicing, L.P.*, 755 F. Supp. 2d 304, 311 (D. Mass 2010), in which that district courtfound that the plaintiffs stated a negligence claim in a foreclosure action against lenders and services, is similarly misplaced. As Defendants properly explain in their reply brief, *Speleos* is an outlier and does not support Plaintiffs' position. (Defs.' Reply at p. 4 & n.2, PgID 282.) Indeed, the holding in *Speleos* "has essentially been overruled by the First Circuit" in *MacKenzie v. Flagstar Bank, FSB*, 738 F.3d 486, 495-96 (1st Cir. 2013) (rejecting a HAMP-based negligence claim). *Santos v. U.S. Bank Nat'l Assoc.*, 89 Mass. App. Ct. 687, 699-700 & n. 13 and 14 (2016). In addition, another court in this District previously declined to follow *Speleos*, dismissing the plaintiff's negligence claim and noting "the overwhelming case law finding that plaintiffs do not have a private right of action to sue for a violation of HAMP." *Ahmad v. Wells Fargo Bank, NA*, 861 F. Supp. 2d 818, 827-28 (E.D. Mich. 2012) (citations omitted).

Therefore, Plaintiffs have failed to allege facts sufficient for this Court to set aside the valid Sheriff's Sale, and because the Property was not redeemed within the six-month redemption period, Plaintiffs have no legally protected interest in the Property.

C. Plaintiffs' Quiet Title Claim (Count I)

Defendants argue that the Court should dismiss Plaintiffs' quiet title claim (Count I) for the additional reason that quiet title is a remedy, not a separate cause of action under Michigan law. (Defs.' Mot. at p. 17, PgID 74, citing, in part, *Goryoka v. Quicken Loans, Inc.*, 519 F. App'x 926, 929 (6th Cir. 2013).)[5] Defendants further contend that Plaintiffs fail to allege facts

[5] Defendants cite to an unpublished Sixth Circuit opinion holding that quiet title is aremedy, not a separate cause of action. (Defs.' Mot. at p. 17, PgID 74, citing *Goryoka v. Quicken Loans, Inc.*, 519 F. App'x 926, 929 (6th Cir. 2013).) *See also Jarbo v. Bank of New York Mellon*, 587 F. App'x 287, 290 (6th Cir. 2014) ("Like a request for an injunction or disgorgement, a request for quiet title is only cognizable when paired with some recognized cause of action."). However, "[c]ourts in this district have held that the statute does create a cause of action for quiet title and have addressed it 'in the interest of completeness' even in light of *Jarbo* and *Goryoka*." *Bell v. Cameron-Hall*, No. 14-cv-11486, 2015 WL 4617424, at *4 (E.D. Mich. July31, 2015) (citing *Berry v. Main St. Bank*, 977 F. Supp. 2d 766, 776 (E.D. Mich. 2013("Michigan law does, however, provide a statutory mechanism for quieting title, which the Court addresses in the interest of completeness.")); *see also Gagacki v. Green Tree Servicing LLC*, No. 14-11378, 2015 WL 93476, at *3 n.1 (E.D. Mich. Jan. 7, 2015)). This Court likewise will address Plaintiffs' quiet title claim "in the interest of completeness."

sufficient for this Court to quiet title to the Property in themselves and that the doctrine of unclean hands should prevent the Court from quieting title of the Property with Plaintiffs. (*Id.* at pp. 17-19, PgID 74-76.) In Plaintiffs' Response, they assert that they have established a breach of Mich. Comp. Laws § 660.2932 (Pls.' Resp. at pp. 17-18, PgID 234-35) (although Plaintiffs fail to expressly mention that statute in their Complaint). Plaintiffs contend in their Response that they are "in possession of the land and claiming 'title to' or an 'interest' in the land … until such time as a court concludes that the Defendants properly performed the foreclosure by advertisement." (*Id.*)

In Michigan, "[a]ny person … who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff[.]" Mich. Comp. Laws § 600.2932(a). "In Michigan, a plaintiff suing to quiet title has 'the burden of proof and must make out a prima facie case of title.'" *Nance v. Bank of Am., N.A.*, 638 F. App'x 476, 479 (6th Cir. 2016) (citation omitted). "If the plaintiffs make out a prima facie case, the defendants then have the burden of proving superior right or title in themselves." *Beulah Hoagland Appleton Qualified Pers. Residence Trust v. Emmet Cnty. Rd. Comm'n*, 236 Mich. App. 546, 550 (1999) (citation omitted). "Establishing a prima facie case of title requires a description of the chain of title through which ownership is claimed." *Sembly v. U.S. Bank Nat. Ass'n*, No. 11-12322, 2012 WL 32737, at *3 (E.D. Mich. Jan. 6, 2012), *aff'd sub nom.*, *Sembly v. U.S. Bank Nat. Ass'n ND*, 508 F. App'x 443 (6th Cir. 2012) (citations omitted). In addition, Michigan Court Rule

3.411 provides that complaints asserting quiet-title claims under Mich. Comp. Laws § 600.2932 must allege "(a) the interest the plaintiff claims in the premises; (b) the interest the defendant claims in the premises; and (c) the facts establishing the superiority of the plaintiff's claim." Mich. Ct. R. 3.411(B)(2).

As explained above, Plaintiffs have failed to allege facts sufficient for this Court to set aside the valid Sheriff's Sale, and because the Property was notredeemed within the six-month redemption period, Plaintiffs have no legally protected interest in the Property as a matter of law, and their request that the Court"quiet title" in their favor is denied. *See Wilson v HSBC Bank, N.A.*, 594 F. App'x 852, 857 (6th Cir. 2014) ("Because Wilson did not redeem the property within the six-month statutory redemption period, she currently has no title to the property andcannot state a claim to quiet title against HSBC."); *Buttermore*, 2017 WL 2306446, at *12 (dismissing quiet title claim because plaintiff failed to establish title to the subject property as he failed to assert a basis for setting aside the foreclosure by advertisement and he lost title to the property when the redemption period ran out).

D. Plaintiffs' Claim for Injunctive Relief (Count IV)

Plaintiffs request in Count IV of their Complaint an injunction "[s]taying and[t]olling the [e]xpiration of the Redemption Period." (Compl. ¶ 51, PgID 14.) However, as Defendants correctly note, the statutory redemption period expired over a month before Plaintiffs' filed their Complaint and thus there is no expiration date to toll.

Further, as Defendants correctly argue, Plaintiffs' claim for injunctive relief fails because "'an injunction is a form of remedy, not a separate cause of action.'" (Defs.' Mot. at pp. 19-20, PgID 76-77, quoting *Underwood v. Wells Fargo Home Mortg., Inc.*, No. 16-10226, 2016 U.S. Dist. LEXIS 74343, *14-15 (E.D. Mich. 2016).) *See Skidmore v. Access Grp., Inc.*, 149 F. Supp. 3d 807, 809 n.1 (E.D. Mich. 2015) ("Injunctive relief is a remedy, however, not an independent cause of action.") (collecting cases); *Goryoka v. Quicken Loan, Inc.*, 519 F. App'x 926, 929 (6th Cir. 2013) (holding in a foreclosure-by-advertisement case that where the plaintiff argued "that the district court erred in dismissing her requests to quiet title and for injunctive relief," the district court "correctly found that these requests are remedies and are not separate causes of action" and dismissed the claims accordingly).

E. "Claims" Asserted For First Time in Plaintiffs' Response Brief

Plaintiffs appear to assert new claims for the first time in their Response brief for promissory estoppel, breach of duty of good faith, breach of contract, fraud and judicial foreclosure. (Pls.' Resp. at pp. 18-19, 24-26, PgID 235-36, 241-43.) These claims were not asserted in Plaintiffs' Complaint and may not be considered when asserted for the first time in a response brief. See Guzman v. Dep't of Homeland Sec., 679 F.3d 425, 429 (6th Cir. 2012) (declining to review claim made for first time in response to defendants' motion to dismiss because when ruling on a motion under 12(b)(6), "courts consider whether the complaint states a claim upon which relief could be granted, not whether the plaintiff has stated–or could state–such a claim elsewhere.") (emphasis in original); Kumar v.

U.S. Bank Nat'l Assoc., 555 F. App'x 490, 492 (6th Cir. 2014) (holding that plaintiff's "failure to raise this claim in the amended complaint or to seek leave to amend forecloses its consideration here"). The Court therefore declines to consider these claims.

Moreover, a fraud claim fails as a matter of law. Fed. R. Civ. P. 9(b) governs fraud claims and "[r]equire[s] that a plaintiff allege the time, place and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." Farnsworth v. Nationstar Mortg., LLC, 569 F. App'x 421, 430 (6th Cir. 2014) (quoting Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 877 (6th Cir. 2006)). "If a complaint alleging fraud does not conform to the strictures of Rule 9(b), it is subject to dismissal. See id. Plaintiffs fail to allege any of these fact and accordingly fail to plead a fraud claim with the specificity required under Rule 9(b).

In addition, Plaintiffs' argument for the first time in their Response that they are entitled to judicial foreclosure also fails because the rule in Michigan is that "any conversion to a judicial foreclosure, if allowed, must occur before the redemption period expires (or earlier)." Haskins v. Wilmington Sav. Fund Soc'y, No. 1:16-cv- 941, 2017 WL 1396149, at *7 (W.D. Mich. Jan. 5, 2017) (emphasis added); see also Miller v. The Bank of New York Mellon, No. 19-12826, 2020 WL 475324, at *9 (E.D. Mich. Jan. 29, 2020) (holding plaintiff failed to state a claim for judicial foreclosure because "[t]here is nothing in the foreclosure statutes providing for the conversion of a foreclosure by advertisement to a judicial foreclosure" and "[e]ven if there were legal grounds to convert the foreclosure to a judicial

foreclosure, there is no foreclosure to convert" because "the house has already been foreclosed upon and the statutory redemption period has expired") (internal quotation marks and citations omitted).[6]

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** Defendants' Motion to Dismiss (ECF No. 5). Plaintiffs' request in their Response for facilitation is **DENIED** because this Order resolves the case.

IT IS SO ORDERED.

s/Paul D. Borman
Paul D. Borman
United States District Judge

Dated: September 30, 202

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[6] The statute that allowed the conversion of a pending foreclosure by advertisement to a judicial foreclosure, Mich. Comp. Laws § 600.3205(c), has been repealed and "no longer offers any possible remedy" to Plaintiffs. *See Winters v. Deutsche BankNat'l Tr. Co.*, No. 15-13456, 2016 WL 5944717, at *4 (E.D. Mich. Sept. 14, 2016)

(dismissing plaintiff's claim for "equitable mortgage and/or for conversion tojudicial foreclosure under M.C.L. § 600.3101, *et seq.*" because "[t]he Court cannot give power to a repealed statute"), *report and recommendation adopted by* 2016 WL 5930528 (E.D. Mich. Oct. 12, 2016).