No. _____

6th Circuit
21-1126

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IN THE
*Supreme Court of the United States*

JENNIFER B. MILLER (FKA FOSGITT),
PETITIONER,

*v.*

THE BANK OF NEW YORK MELLON, SUCCESSOR TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR F/B/O HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STERNS ALT-A TRUST 2005-10, MORTGAGE PASS-THROUGH CERTIFICATES 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 COUNTS II, III, V, VI, VIII and IX SHOULD BE DISMISSED PURSUANT To FED.R.CIV. P. 12(B)(6)?

i. Petitioner answered “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 COUNTS I, IV AND VII SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 56(a)?

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

## PARTIES TO THE PROCEEDING

JENNIFER B. MILLER (FKA FOSGITT),

PETITIONER,

v.

THE BANK OF NEW YORK MELLON, SUCCESSOR TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR F/B/O HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STERNS ALT-A TRUST 2005-10, MORTGAGE PASS-THROUGH CERTIFICATES AND SELECT PORTFOLIO SERVICING, INC.,

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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for the Sixth Circuit and the opinion of the United States District Court for the Eastern District of Michigan were unpublished opinions.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 January 5, 2021. 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

The subject matter of this action is situated in Midland County, State of Michigan more fully described as follows: **5004 Bristlecone Drive, Midland, MI 48642.** Petitioner, JENNIFER B. MILLER (FKA FOSGITT), claimed as interest in the above-described property as follows: Quit Claim Deed. Respondent, Trustee, claimed an interest in the same property as follows: Mortgagee. Respondent, SPS, claimed an interest in the same property as follows: Servicer. The Petitioner purchased the subject property in 2005, and the Petitioner is currently residing in the subject property On or about October 17, 2005, Petitioner and Richard L. Fosgitt II, obtained a $423,600 loan from CMX Mortgage Company, LLC (the "Loan"). As security for the Loan, Petitioner granted the Mortgage Electronic Registration Systems, Inc ("MERS") a mortgage (the "Mortgage") encumbering real property located at 5004 Bristlecone Dr, Midland, Michigan (the "Property").

On November 23, 2016, the Mortgage was assigned to The Bank of New York Mellon, Successor Trustee to JPMorgan Chase Bank, National Association, as Trustee F/B/O Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns ALT-A Trust 2005-10, Mortgage Pass-Through Certificates, Series 2005-10 ("Trustee") via Assignment of Mortgage.

The Assignment was recorded on December 21, 2016, in Liber 1602, Page 100, Midland County records. *Id.* SPS is the servicer of the Mortgage.

On or about December 1, 2015, Petitioner contacted Chase to request modification of the loan. The Petitioner was told verbally that she could not apply until she actually was behind and could not make full payments. On January 22, 2016, RMA sent to Chase Mortgage via Fax and USPS Priority Mail. (

On March 20, 2016, Petitioner received a letter from Chase Requesting Additional Information 1) Stated RMA had expired 2) Requiring a New IRS Form 4506T-EZ (Document Not Clear), 3) Requesting signed proof of rental agreement (had received but needed more info). On April 1, 2016, Petitioner sent additional information via fax w/confirmation. On April 11, 2016, Petitioner received a Letter from SPS stating they were the new servicer.

On or about April 17, 2016, Petitioner contacted SPS - Spoke with Andrej Benadick and was informed they had all of Petitioner's RMA information and Petitioner should be all set. On June 28, 2016, RMA sent to SPS.

On November 8, 2016, Petitioner sent $18,000 payment to SPS on Account. On November 23, 2016, Petitioner sent email to SPS providing updated bank statements requested and asking for update on RMA. On December 12, 2016, Petitioner received letter stating her application was complete by SPS.

On December 21, 2016, Petitioner emailed SPS regarding letter received dated December 15, 2016, asking for additional information. Information was sent - Pay Stubs, Lease Agreement, and Tax Returns again. The email also documented verbal conversation with Andrej Benadick confirming that Petitioner did

not receive retirement benefits as she was only 45 years old.

On January 24, 2017, Petitioner emailed SPS email sent regarding letter from SPS dated January 13, 2017, that claimed additional information required even though a letter stating the application was complete dated December 12, 2016, was received. Additional documentation - full application sent again.

On February 17, 2017, after receiving yet another letter requesting current pay stubs, Petitioner sent another email w/pay stubs attached. On February 21, 2017, email directed to Andrej Benadick (also stated that Petitioner had tried to talk to him verbally). Email stated that Petitioner had received another request dated January 26, 2017, requesting the additional (same information). Petitioner provided copy of pay checks, current month to month lease, full copy of taxes and also stated that current renter would be willing to make a short sale offer in amount of $350,000.

On March 7, 2017, Petitioner sent USPS Overnight mail - that was a full RMA again. On March 22, 2017, Petitioner sent email providing the same information that was again requested - bank statement showing deposit of rent monies. On March 24, 2017, Petitioner sent email asking for status of her RMA - Addressing the fact that she gets harassing calls for payment and yet no response on RMA. On March 27, 2017, Petitioner sent email to Michigan Attorney General-Complaint regarding treatment and non-reply/harassment by SPS, and correspondence that was sent to SPS.

On April 3, 2017, Petitioner sent email providing proof of homeowner dues payment to SPS. On May 6, 2017, Petitioner sent to SPS - providing a summary of her frustration and requesting just a fair review of her RMA. On May 13, 2017, Petitioner sent email providing additional information requested by SPS Ombudsmen dated 05/08/2017 - Requesting breakdown of a March 2017, rent deposit. Email explained that Petitioner had a committed renter who would pay $3,000 per month and Petitioner requested a modification to allow for her to rent the home and make the payment. NO RESPONSE from SPS was ever received. Also, Petitioner reiterated short sale offer, and the fact the home was listed for sale.

On June 9, 2017, and May 23, 2017, SPS sent an encrypted message requesting additional information.) On June 16, 2017, Petitioner sent email expressing concern about harassing phone calls from SPS, not from her relationship manager, and requesting that they review the RMA's and information and hold true to their statements on their letters of "WE want to help.

On June 23, 2017, Petitioner received email from Ombudsman SPS response to Petitioner request for information on Loss Mitigation/Modification, relationship manager contact, and harassment. On July 6, 2017, Petitioner sent email with additional information as requested. On August 16, 2017, Email confirming yet another receipt of correspondence requested information by August 21, 2017.

On August 25, 2017, Petitioner received email from Miranda Evans at SPS requesting clarification of where Petitioner was living, etc. On August 30, 2017,

Petitioner sent email acknowledging Miranda Evans requested information. and requesting an end to the harassment calls during work hours On October 5, 2017, Petitioner sent email stating facts of lack of response, changing of RMA forms (3 full RMAS submitted), explanation of hardship - stating additional clarifications.

On November 24, 2017, Petitioner sent email stating complete and utter harassment and that Petitioner would be sending another complete RMA to them -- still no response. Petitioner sent email regarding letter from SPS dated January 13, 2017, that claimed additional information required even though a letter stating the application was complete dated December 12, 2016, was received. Additional documentation - full application sent again.

On February 21, 2018, Petitioner sent email - Completely new RMA, clarification, email notes Petitioner never received a denial, nor received an answer. Petitioner received a letter that her mortgage had been referred for legal action (i.e. foreclosure) Also included letter from Trott stating they planned to foreclose.

On February 26, 2018, Petitioner emailed to SPS regarding letter received that the foreclosure sale was rescheduled to March 27, 2018. Also explaining that Petitioner was told that as long as she had applied for a modification, SPS would not foreclose. Petitioner had applied and had NEVER received an answer.

On February 27, 2018, Petitioner received Foreclosure advertisement made by TROTT. On February 27, 2018, Petitioner emailed response to

Trott/SPS regarding status update of February 27, 2018, email to SPS Trott. On March 1, 2018, Petitioner sent Hardcopy of RMA to SPS

On March 8, 2018, Petitioner received email from SPS stating the Foreclosure Sale delayed to April 10, 2018. Also requesting additional RMA information to be submitted as soon as possible (NO DATE). On March 9, 2018, Petitioner sent email to SPS asking how a Foreclosure Sale could be scheduled while a loss mitigation application was under review. Petitioner received email that states that Petitioner resubmit the information most of which was sent on February 21, 2018.

On March 20, 2018, Petitioner sent email serving as formal appeal of denial of the RMA. This denial was from an RMA dated April 14, 2016. On March 20, 2018, Petitioner sent email to Trott confirming the letter received from SPS stating Foreclosure Sale postponed to May 15, 2018.

On April 3, 2018, Petitioner sent email to SPS with full information again. On April 6, 2018, Petitioner sent email to SPS with additional information specifically that Petitioner was not a seasonal worker. On April 17, 2018, Petitioner sent email to SPS confirming foreclosure sale postponement and asking why SPS was meddling in Petitioner's self-provided insurance.

On May 21, 2018, Petitioner sent email to SPS appealing decision as SPS provided no deadline for submittal. On May 30, 2018, Petitioner sent email to SPS signature filing document for tax returns and the RMA on their new form. On June 12, 2018, Petitioner

sent email to SPS requesting postponement of the June 19, 2018, Foreclosure Sale.

On July 17, 2018, Email from BNYM stating that SPS was servicer and that "BNY Mellon is acting as a Trustee, and therefore we do not own the loan or the property. As Trustee, BNY Mellon is not involved in the servicing of the loans or the foreclosure process. This is the responsibility of the Servicer.

On July 17, 2018, Petitioner sent email to SPS requesting postponement of Foreclosure Sale and Proof of Ownership. On July 19, 2018, Petitioner sent email to SPS Appealing closing the RMA and requesting postponement of Foreclosure Sale.

## REASONS FOR GRANTING THE PETITION

### ARGUMENT

### I. Counts II, III, V, VI, VIII, and IX Should Not Have Been Dismissed Pursuant To FED.R.CIV.P. 12(B)(6)

#### A. Count II Should NOT Have Been Dismissed.

#### i. Quite Title-Plaintiff-Appellant Had Established Legal Violations Sufficient To Demonstrate The Need For Quiet Title.

##### a. The Foreclosure Sale Should Have Been Set Aside Even After the Expiration of the Redemption Period.

The District Court held (t)herefore, without more, Petitioner fails to state a claim for quiet title of the property against Respondents. Petitioners claim for quiet title will be dismissed. (See District Court Opinion) However, in the case at bar, the subject property was sold at a Sheriff's Sale on March 19, 2019. Therefore, Petitioner had until September 19, 2019, to redeem the subject property. The parties entered into a Stipulation to Extend the Redemption Period while the Petitioner attempted to redeem the subject property. Petitioner is still desirous of resolving this matter with the Respondents which includes redeeming or repurchasing the subject property. While the potential expiration of the

redemption period has serious consequences for Petitioner's 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).

Moreover, MCL 600.2932 provides, in pertinent part, as follows:

> (1) Any person, whether he is in possession of the land in question or not, 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, whether the defendant is in possession of the land or not . . . .
>
> (3) If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. In an appropriate case the court may issue a writ of

possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated . . ..

(5) Actions under this section are equitable in nature.

Petitioner alleges that she is the owner of the Subject Property. One or more of the Respondents claim an interest in the Subject Property inconsistent with the interest claimed by Petitioner. For the reasons set forth in infra, Respondents do not actually have an interest in the Subject Property, and their claims to the contrary are therefore without merit.

Petitioner has suffered damages as a result of Respondents wrongful claim to an interest in Petitioner's real property. For the reasons set forth above, the Sheriff's Deed to the Subject Property is void or voidable. For the reasons set forth above, the Sheriff's Deed has created a cloud on the title to the Subject Property that can only be resolved through a quiet title action by Petitioner against Respondents.

Therefore, despite the expiration of the redemption period, Petitioner may challenge the foreclosure of the subject property and request the opportunity to do so based upon the facts of this case, the supporting documentation, the applicable case law and legal argument set forth below.

**b. Non-Compliance With Federal Regulations Can Be Raised As A Defense To Foreclosure**

In the Petitioner's Complaint she alleged that Respondents' violation of 12 CFR 1024.41, ET SEQ. – REGULATION X. In *Mik v. Federal Home Loan Mortgage Loan Corporation,* 743 F3d 149, 165 (6th Cir 2014), the court held that noncompliance with federal regulations can be raised as a defense to eviction actions undertaken pursuant to a foreclosure. The *Mik* Court further held that violations of the PFTA can be used "offensively" to establish a state law cause of action, positively citing *Wigod v. Wells Fargo Bank, N A.,673* F.3d 547, 544 (7th Cir. 2012). Id. at 166, 167.

Consistent with the Sixth Circuit decision in *Mik,* supra, even if this Court was to hold that HAMP does not create a private cause of action, this Court should still hold that Petitioner was entitled to raise the failure of Respondents to properly evaluate her application for mortgage assistance as a defense to her foreclosure. Petitioner is asserting that Respondents' failure to properly evaluate her for a loan modification under HAMP is a defense to the foreclosure. Courts similarly have recognized in the context of the Truth in Lending Act, that a claim for rescission inviolation of the TILA can be interposed as a defense to foreclosure even when it might be barred as an independent damage claim. *Family Financial Services* v. *Carmen Spencer,* 41 Conn App 754 (1996).

In *Brown* v. *Lynn,* 392 F Supp 559, 562, 563 (ND IL 1975), the court held that even where violation of *HUD* servicing guidelines did not create an independent cause of action, this did not limit the power of state courts from exercising their equity powers by refusing to grant foreclosures where

mortgagees have disregarded the forbearance provisions of the HUD handbook, and where mortgagors raise non-compliance as a defense to foreclosure.

In *First National Mortgage Association v. Lecrone,* 1985 US Dist LEXIS 23468, the U.S. District Court for the Southern Ohio Eastern Division cited *Brown,* supra, for the principle that "on the theory that the guidelines are sensible, equitable standards of conduct, consistent with, and issued in furtherance of the national housing policy, foreclosure courts can, and in appropriate circumstances should, direct the parties to purse and exhaust alternatives to foreclosure enumerated." The court noted that this is not just the view of Ohio courts, but of state courts generally. In addition, in the Michigan Court of Appeals case of *Dumas* v. *Midland Mortgage Co.,* 2012 Mich App LEXIS 1801, while the court held that HAMP did not create an independent cause of action for the homeowner, in footnote 4 it cited to the case of *Wells Fargo Home Mtg, Inc* v. *Neal,* 398 Md. 705 (2007), for the principle that "Regulatory noncompliance can be used as a shield against unauthorized foreclosure actions."

In this case, Respondents were obligated to meet specific guidelines to evaluate Petitioner for a loan modification in accordance with HAMP, and to suspend foreclosure activity while such evaluation was being undertaken. Their refusal to do so constitutes a defense to the foreclosure in this case.

Petitioner maintains that Respondents were negligent in their processing of Petitioner's request for mortgage assistance pursuant to 12 CFR

1024.41, which is enforceable under 12 U.'SC 2605(f), which is clearly defined as part of the mortgage on pages 2 and 3 (Defendant/Appellees Motion to Dismiss, R. 3-3 Mortgage), which states as follows:

> (0) "RESPA" means the Real Estate Settlement Procedures Act (12U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation thatgoverns the same subject matter. As used in this Security Instrument,"RESPA" refers to alI requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does notqualify as a "federally related mortgage loan" under RESPA.

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.)

Petitioner engaged in a pattern or practice of non-compliance with RESPA's mortgage-servicer provisions by, among other offenses, pursuing loss mitigation options contemporaneously with active foreclosure proceedings.

Thus, for the reasons stated above, the District Court erred in granting the Respondents Motion to Dismiss.

**ii. Illegal Foreclosure (Count III) Should NOT Have Been Dismissed.**

**a. Petitioner had established a showing of defect in the foreclosure procedures. The Sheriff's Sale was improper due to fraud and Respondent's failure to follow Michigan's foreclosure statutes, thereby causing prejudice to Petitioner.**

The District Court held (a)n unattached alleged email from BNYM is insufficient to meet the "'high standard'" in order to have a foreclosure set aside after the lapse of the statutory redemption period as required by Michigan law considering the other evidence she provided. *Conlin*, 714 F.3d at 360. Plaintiff's claim for Count III – illegal foreclosure under MCL 600.3204 will be dismissed.

"The Michigan Supreme Court has held that statutory foreclosures will only be set aside if 'very good reasons' exist for doing so." *Kubicki v Mort Elec Registration Sys*, 292 Mich App 287; 807 NW2d 433 (2011). As Petitioner has plainly shown, Respondents acted fraudulently when they told them that there would be no foreclosure sale while their loan modification application was under review.

In the case of *Jarchow* v *CitiMortgage, Inc*, 2014 US Dist LEXIS 61095 (ED Mich, 2014) the Court stated:

> . . . if the Court were to dismiss Plaintiff's wrongful foreclosure claims as a matter of law,

> as Defendants suggest it should, the Court would be establishing poor public policy. In this case, the Court is presented with a person who was (or at least had a good faith belief that she was) engaged in a loan modification process with an employee/agent/representative of CMI, the foreclosing party. Based on Plaintiff's allegations, it would defy both logic and equitable principles to hold that the foreclosing party could conduct a foreclosure sale months after the homeowner began pursuing a loan modification review directly with the foreclosing party and the foreclosing party: (1) repeatedly represented that it was reviewing Plaintiff's application for loan modification, (2) made regular requests to Plaintiff for documentation, (3) told Plaintiff that her application was in order and in process, and (4) never notified Plaintiff that her loan modification application had been denied.

Petitioner also alleges that Respondents failed to properly notify her of any impending foreclosure sale as they are required to do under relevant Michigan statutes. Failure to properly follow the requirements of the statute are proper grounds for rescinding the sheriff's deed, setting aside the foreclosure sale and restarting the foreclosure process from the beginning in order to properly follow MCL 600.3201, et seq. or MCL 600.3101, as requested below.



Were she properly notified of the foreclosure and sale, Petitioner would have been in a much better

position to preserve her interests in her home. She may have been able to procure the money to reinstate the loan, but she was unsure of status of the loan. The prejudice to Petitioner caused by Respondents fraud and improper foreclosure is obvious; she would not have lost her home if the foreclosure would have not been allowed to stand.

**Petitioner was Not sent a Notice of Default.**

Respondents failed to provide the Notice of Default under Section 22 of the Mortgage ("Notice of Default"). Respondents privately accelerated the Mortgage without first providing the Notice of Default. Respondents published and posted a notice of sale without first providing the Notice of Default. Petitioner was severely damaged by this omission in that her common law "right to cure" was lost without notice replaced with a less valuable collection of rights, to wit, a contractual right to reinstate the loan and a right to pay the entire accelerated loan balance in full.

**Petitioner had met her burden in creating a voidable sale, and she had 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 Petitoner 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 Petitioner as true, Petitioner's Complaint meets the requisite standard for demonstrating prejudice pursuant to *Kim, supra*. Petitioner's Complaint clearly states that Respondents were negligent in evaluating Petitioner for a loan modification pursuant to CFPB regulations. Pursuant to CFPB regulations, a servicer shall not refer any loan to foreclosure or conduct a scheduled foreclosure sale unless the borrower is evaluated for all home retention options and determined to be ineligible, citing the specific programs they were evaluated for.



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 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



Defendants 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. Petitioner was a foreseeable third party who was damaged by Respondents breach of their duty to use reasonable care in performing under its obligations pursuant to



CFPB regulations, the National Mortgage Settlement, and Michigan Law by denying Petitioner a loan

modification evaluation after Petitioner submitted a loss mitigation application with updates thereafter. Pursuant to Michigan law, Respondents are liable for damages caused by their negligence.

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 Petitioner has stated a defect in the foreclosure procedure and the District Court erred in granting the Respondents Motion to Dismiss.

**iii. Petitioner Had Established a Viable Claim Under RESPA, therefore Count V, VI and IX should not have been dismissed.**



The District Court held, Petitioner's three claims under RESPA – Count V for violations of 12 CFR 1024.41 which is based on RESPA, Count VI – Damages

under the RESPA, and Count IX – Dual- tracking violation from RESPA will be dismissed for failure to state a claim due to Petitioner's failure to plead actual damages as required by RESPA.

**i. 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 Petitioner 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, Petitioner requests the extension of the redemption period expired. *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 Petitioner's 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, Petitioner has standing to challenge her foreclosure.

**ii. Non-Compliance With Federal Regulations Can Be Raised As A Defense To Foreclosure.**

In her Complaint, Petitioner alleged that Respondents engaged in a pattern or practice of non-compliance with RESPA's mortgage-servicer provisions by, among other offenses, pursuing loss mitigation options contemporaneously with active foreclosure proceedings.

In *Mik v. Federal Home Loan Mortgage Loan Corporation,* 743 F3d 149, 165 (6th Cir 2014), the court held that noncompliance with federal regulations can be raised as a defense to eviction actions undertaken pursuant to a foreclosure. The *Mik* Court further held that violations of the PFTA can be used "offensively" to establisha state law cause of action, positively citing *Wigod v. Wells Fargo Bank, N A.,673* F.3d 547, 544 (7th Cir. 2012). Id. at 166, 167.

Consistent with the Sixth Circuit decision in *Mik,* supra, even if this Court was to hold that HAMP



does not create a private cause of action, this Court should still hold that Petitioner was entitled to raise the failure of Respondents to properly evaluate her application for mortgage assistance as a defense to her

foreclosure. Petitioner is asserting that Respondents' failure to properly evaluate her for a loan modification under HAMP is a defense to the foreclosure. Courts similarly have recognized in the context of the Truth in Lending Act, that a claim for rescission inviolation of the TILA can be interposed as a defense to foreclosure even when it might be barred as an independent damage claim. *Family Financial Services* v. *Carmen Spencer,* 41 Conn App 754 (1996)

In *Brown* v. *Lynn,* 392 F Supp 559, 562, 563 (ND IL 1975), the court held that even where violation of *HUD* servicing guidelines did not create an independent cause of action, this did not limit the power of state courts from exercising their equity powers by refusing to grant foreclosures where mortgagees have disregarded the forbearance provisions of the HUD handbook, and where mortgagors raise non-compliance as a defense to foreclosure.

In *First National Mortgage Association v. Lecrone,* 1985 US Dist LEXIS 23468, the U.S. District Court for the Southern Ohio Eastern Division cited *Brown,* supra, for the principle that "on the theory that the guidelines are sensible, equitable standards of conduct, consistent with, and issued in furtherance of the national housing policy, foreclosure courts can, and in appropriate circumstances should, direct the parties to purse and exhaust alternatives to foreclosure enumerated." The court noted that this is



not just the view of Ohio courts, but of state courts generally.

In addition, in the Michigan Court of Appeals case of *Dumas* v. *Midland Mortgage Co.,* 2012 Mich App LEXIS 1801, while the court held that HAMP did not

create an independent cause of action for the homeowner, in footnote 4 it cited to the case of *Wells Fargo Home Mtg, Inc* v. *Neal,* 398 Md. 705 (2007), for the principle that "Regulatory noncompliance can be used as a shield against unauthorized foreclosure actions."

In this case, Respondents were obligated to meet specific guidelines to evaluate Petitioner for a loan modification in accordance with HAMP, and to suspend foreclosure activity while such evaluation was being undertaken. Their refusal to do so constitutes a defense to the foreclosure in this case.

Petitioner maintains that Respondents were negligent in their processing of Petitioners request for mortgage assistance pursuant to 12 CFR 1024.41, which is enforceable under 12 U.'SC 2605(f), which is clearly defined as part of the mortgage on pages 2 and 3 which states as follows:

> (0) "RESPA" means the Real Estate Settlement Procedures Act (12U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation thatgoverns the same subject matter. As used in this Security Instrument,"RESPA" refers to alI requirements and restrictions that are imposed inregard to a "federally related



> mortgage loan" even if the Loan does notqualify as a "federally related mortgage loan" under RESPA.

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.)

Respondents' negligence is due to a failure to adhere to the regulations set forth by RESPA as stated in the contract. Respondents acted negligently in their dealing with Petitioner's request for a loan modification, carelessly letting documents expire, and continually requesting new documents from Petitioner instead of completing the required loan modification review and evaluation as required by the HAMP guidelines. Petitioner suffered damages by Respondents' breach of their duty of reasonable care in evaluating Petitioner for a loan modification. Had Respondents properly evaluated Petitioner for a loan modification, she would not be facing the potential loss of the family home to foreclosure.

**iii. Petitioner had established a claim against Respondents for failure to respond to her qualified written request under RESPA.**

As shown above Petitioner sent two requests to Respondents.

The letters were "qualified written requests" to a servicer under RESPA at 12 USC 2605(e).



Defendants/Appellees acknowledged receipt of both Qualified Written Requests. (See ECF No.12-49, Page ID 1767-1771). Respondents did not provide all of the information sought in the letters. In accordance with

this position, Respondents did not provide the information. In response to the QWR, Respondents demonstrated that its general policy was not to provide the type of information sought therein.

Respondents have made it a practice, based on the above policy, not to comply with the QWR provisions as set forth in RESPA at 12 USC 2605. Petitioner was inconvenienced and incurred expenses in seeking the information that Respondents refused to provide. Petitioner is unable to completely present her case against Respondents due to Respondents' refusal to provide the information.

Respondents are therefore liable to Petitioner under RESPA at 12 USC 2605(f) for actual damages, including, but not limited to (1) out-of-pocket expenses incurred dealing with the RESPA violation including expenses for preparing, photocopying and obtaining certified copies of correspondence, (2) lost time and inconvenience to the extent it resulted in actual pecuniary loss, (3) late fees and (4) denial of credit or denial of access to full amount of credit line, additional damages in the amount of $2,000.00, plus attorney's fees, the costs of this lawsuit, and litigation expenses.

**iv. Petitioner Had Established A Claim for Dual-Tracking, and therefore Count IX Should NOT Have Been Dismissed.**



On March 1, 2018, a Hardcopy of the RMA was sent to SPS. On March 8, 2018, Petitioner received an email from SPS stating the Foreclosure Sale delayed to April 10, 2018. Also requesting additional RMA

information to be submitted as soon as possible On March 9, 2018, Petitioner sent email to SPS asking how a Foreclosure Sale could be scheduled while a loss mitigation application was under review. Email stated that Petitioner resubmitted the information most of which was sent on February 21, 2018.

On March 20, 2018, Petitioner sent email serving as formal appeal of denial of the RMA. This denial was from an RMA dated April 14, 2016. On March 20, 2018, Petitioner emailed Trott confirming the letter received from SPS stating Foreclosure Sale postponed to May 15, 2018. On April 3, 2018, Petitioner emailed SPS with full information again.

"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*

Thus, for the reasons stated above, the District Court erred in granting the Respondents Motion to Dismiss.

**II. Counts I, IV, VII, should not have been dismissed pursuant to Fed. R. Civ. P. 56(a).**



**A. *Count IV and VII Should NOT Have Been Dismissed-Illegal Foreclosure – Respecting Notice Of Default and Breach Of Contract.***

**Fed.R.Civ.P. 12(b)(6)**
**Count IV**

The District Court held, (t)he only reference to a statute, case, rule, or contract in Count IV is "the Notice of Default under Section 22 of the Mortgage." It is not alleging a MCL § 600.3204 claim. Accordingly, Defendants argument that Plaintiff has not provided a clear showing of fraud is without merit. Defendants' motion to dismiss Count IV will be denied.

**Count VII**

The District Court held, (i)n this case, Plaintiff alleged two categories of breach of contract – 1) breach of the express provision of the contract (failure to provide the stated notices) and 2) multiple allegations of failure to follow the implied covenant of good faith and fair dealing regarding Defendants' execution of unspecified terms in the contract (i.e., terms left to a party's discretion). Plaintiff has properly pled a breach of contract claim with two separate, and properly pled, allegations for the breach. Defendants' motion to dismiss on the breach of contract claim will be denied. (See District Court Opinion)

**Fed. R. Civ. P. 56(a).**
**Count IV**

The District Court held, Petitioner's bare assertion that she did not receive the notice of default was sufficient to prevail on the Motion to Dismiss, but she cannot rely on allegations from her Complaint to defeat a motion for summary judgment. Respondents' Motion for Summary Judgment on Count IV will be granted.

**Count VII**

The District Court held, Respondents' Motion for Summary Judgment on the breach of contract claim under the first theory of liability will be granted.

**Discussion**

Generally, "'[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.'" *Davis* v *Sears, Roebuck & Co,* 873 F2d 888, 894 (6th Cir, 1989) (quoting Restatement (Second) of Contracts § 205). It is well settled that, "[a]n implied covenant of good faith and fair dealing in the performance of contracts is recognized by Michigan law only where one party to the contract makes its performance a matter of its own discretion." *Stephenson* v. *Allstate Ins Co,* 328 F3d 822, 826-827 (6th Cir, 2003) (citing *Hubbard Chevrolet Co* v *General Motors Corp,* 873 F2d 873, 876 (5th Cir, 1989).

Moreover, "[i]n recognizing an implied covenant courts have sought to protect the reasonable

expectations of the contracting parties. Discretion arises when the parties have agreed to defer decision on a particular term of the contract" *Id.* Therefore, "if [defendant's] performance was a matter of its own discretion, then this court will imply the covenant." *Paradata Computer Networks* v *Telebit Corp,* 830 F Supp 1001, 1005 (ED Mich, 1993).

It is well established that the covenant of good faith and fair dealing is an implied duty and that every contract contains this implied covenant. Moreover, here Respondents have made the approval of the loan modification application a matter left to their own discretion.

Respondents breached the contract as well as the implied covenant of good faith and fair dealing in the contract with Petitioner by, among other things, doing the following: Failing to send Petitioner the notices required by the Mortgage; Dual tracking Petitioner; Disingenuously negotiating loss mitigation assistance with Petitioner; Misleading Petitioner about approval and extension of loss mitigation assistance as an alternative to foreclosure.

Thus, for the reasons stated above, the District Court erred in granting the Respondents Motion for Summary Judgment

## CONCLUSION

WHEREFORE Petitioner requests that the District Court's decision dismissing Counts I, II, III, IV, V, VI VII VIII and IX be reversed and remanded for further proceedings.

Dated: March 1, 2022

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## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: December 01, 2021

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Re: Case No. 21-1126, Jennifer Miller v. Bank of New York Mellon, et al Originating Case No. : 1:19-cv-12826

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/ Cathryn Lovely
Opinions Deputy

cc: Ms. Kinikia D. Essix

Enclosure

Mandate to issue

**NOT RECOMMENDED FOR PUBLICATION**
File Name: 21a0554n.06
No. 21-1126

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Dec 01, 2021
DEBORAH S. HUNT, Clerk

JENNIFER B. MILLER, fka Jennifer B. Fosgitt,

Plaintiffs-Appellants,

v.

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

BANK OF NEW YORK MELLON, Successor Trustee to JPMorgan Chase Bank, National Association, as Trustee F/B/O Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust 2005-10, Mortgage Pass- Through Certificates; SELECT PORTFOLIO SERVICING, INC.,

Defendants-Appellees.

OPINION

BEFORE: McKEAGUE, GRIFFIN, and KETHLEDGE, Circuit Judges.

**McKEAGUE, Circuit Judge.** Jennifer Miller bought a house in Midland, Michigan, in 2005 and took out a mortgage. After a decade, she ran into trouble making her payments. She unsuccessfully sought a loan modification from defendants, the successors in interest to her mortgage. In 2018, defendants initiated foreclosure proceedings against Miller, and after nearly a year of forbearance, the property was sold at a sheriff's auction in March 2019. Miller then brought this suit, alleging that the foreclosure was a breach of contract as well as violative of state and federal law. The district court dismissed a portion of her claims and granted summary judgment on the remainder. For the reasons set forth below, we AFFIRM.

## I.

Plaintiff-Appellant Jennifer B. Miller (then Fosgitt) and her then-husband Richard Fosgitt II purchased 5004 Bristlecone Drive, Midland, Michigan, from Strata Homes LLC on October 17, 2005. She obtained a $423,600 loan from CMX Mortgage Company LLC and she and Fosgitt granted Mortgage Electronic Registration Systems, Inc. (MERS) a mortgage encumbering the property. Miller lived in the house from 2005 until 2011 and returned in 2017. As of August 2020, Miller lived at the property.

Miller's loan changed hands during this period. When payments began in December 2005, the loan was transferred from CMX Mortgage Company to Bear Steans ALT-A Trust 2005-10, Mortgage Pass-Through Certificates, Series 2005-10. In March 2016, Miller was

told that her loan servicer changed from JP Morgan Chase Bank N.A. to Defendant-Appellee Select Portfolio Servicing, Inc. (SPS). In November 2016, the mortgage was assigned to Defendant-Appellee The Bank of New York Mellon, Successor Trustee to JPMorgan Chase Bank, National Association, as Trustee F/B/O Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust 2005-10, Mortgage Pass-Through Certificates, Series 2005-10 ("the Trust.")

Miller fell behind on her payments. Her last payment appears to have been made in 2017. By January 2019, SPS understood her to be 29 payments past due.

Beginning in December 2015, Miller began contacting her servicer regarding a loan modification. The record reflects many emails, letters and phone calls between Miller and her servicer, with her servicer typically responding that she needed to provide more documentation for her application to be complete. SPS first mailed Miller a notice of default on May 10, 2017. The notice of default provided 30 days to cure. Absent a cure payment, SPS was allowed to initiate foreclosure and require payment of the full unpaid amount.

On February 22, 2018, SPS mailed notice to the property that a foreclosure sale was scheduled for March 27, 2018. (Miller testified that she believed that she was residing at the property at the time.) Notice was also posted to Miller's door and published in the local newspaper. The sale was adjourned every week until March 19, 2019.

On May 16, 2018, SPS mailed Miller a letter denying her application for a loan modification on the basis that she had not supplied the documents requested by SPS in a March 6, 2018 mailing. She appealed this decision with SPS and was again denied.

The sheriff's sale finally took place on March 19, 2019. The Trust purchased the home for $413,650.00. The Trust agreed to extend the statutory six-month redemption period until October 19, 2019, but Miller did not redeem the property.

In August 2019, Miller filed this lawsuit in state court. Defendants removed the case and filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss. In January 2020, the district court dismissed all but three claims. After discovery, the defendants filed a motion for summary judgment. Miller did not respond to this motion. In January 2021, the district court granted summary judgment, dismissing the remainder of Miller's claims with prejudice. Miller then brought this appeal.

## II.

The District Court dismissed seven of ten counts of Miller's complaint, and then granted summary judgment on the remainder. Miller appeals the dismissal and grant of summary judgment as to nine counts of her claim.[1]

We review a ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss de novo. *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008). The complaint is viewed in the light most favorable to the plaintiffs, the complaints' allegations are accepted as true, and reasonable inferences are drawn in favor of the plaintiffs. A "legal conclusion couched as a factual allegation" need not be accepted as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint

[1] Miller did not appeal the district court's denial of injunctive relief which was styled as a count of her complaint.

must state a claim that is "'plausible on its face'" such that a court can make a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570).

We review a grant of summary judgment de novo. *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 811 (6th Cir. 2020). A motion for summary judgment should be granted if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

**A. Illegal Foreclosure.**

Miller made two claims that defendants' foreclosure was illegal. First, she alleged that defendants failed to follow Michigan's requirements for foreclosure by advertisement, Mich. Comp. Laws § 600.3204. Second, she alleged that defendants' foreclosure was illegal for a varietyof reasons stemming from their alleged failure to provide a notice of default as required by the mortgage. The district court dismissed the first and granted summary judgment on the second, andwe affirm both.

First, we address the foreclosure-by-advertisement requirements. Michigan law controls the steps a mortgagee must take in order to properly foreclose, as well as "the rights of both the mortgagee and mortgagor once the sale is completed." *Conlin v. Mortg. Elec. Registration Sys,, Inc.*, 714 F.3d 355, 359

(6th Cir. 2013). The statute provides certain mortgagors with six months following the sale to redeem the property. Mich. Comp. Laws § 600.3240(8). The filing of a lawsuit cannot toll the redemption period. *Conlin*, 714 F.3d at 360. Once the redemption period expires, the sheriff's deed vests in the grantee and the "mortgagor's 'right, title and interest in and to the property' are extinguished." *Id.* at 359 (quoting *Piotrowski v. State Land Office Bd.*, 4 N.W.2d 514, 517 (Mich. 1942)). Courts can only consider setting aside a foreclosure sale if there is a "'clear showing of fraud, or irregularity'" in the foreclosure process itself. *Id.* at 359–60 (quoting *Schulthies v. Barron*, 167 N.W.2d 784, 785 (Mich. Ct. App. 1969)). To prove a foreclosure defect claim, plaintiffs must show that they were prejudiced by a defendant's defect such that "they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.* at 361 (quoting *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012)).

In her complaint, Miller alleged that the Trust[2] did not own the Note. Therefore, she argued, the foreclosure by the Trust did not meet the requirements of Mich. Comp. Laws § 600.3204(1)(d). But the district court properly concluded that this was contradicted by the corporate assignment of the mortgage and the sheriff's deed, both included with the complaint.

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[2] Miller used the acronym "BONYTC," which the district court construed as Bank of New York Mellon. We will similarly construe the term to refer to Bank of New York Mellon as trustee, or the Trust.

Miller also argues that defendants' alleged violations of the federal regulations on so-called dual-tracking justifies setting aside the foreclosure as an illegal foreclosure-by-advertisement Dual-tracking refers to the practice of reviewing an application for loan modification simultaneously with foreclosure proceedings. 12 C.F.R. § 1024.41(f) prohibits mortgagees from beginning foreclosure proceedings once a mortgagor has requested a loan modification. Defendants do not deny Miller's allegations that they initiated foreclosure proceedings before resolving Miller's outstanding application for a loan modification. But the regulations do not require a mortgagee to grant loan modification; they only require a mortgagee to consider a loan modification. 12 C.F.R. § 1024.41(a). And 12 C.F.R. § 1024.41(i) merely requires that the mortgagee considers one application for loan modification, not duplicative requests. The record shows that defendants sent notice denying Miller's loan modification application from March 2018and provided her an opportunity to appeal.

This leaves the question of whether defendants' alleged violation of 12 C.F.R. § 1024.41(f) was an irregularity that prejudiced Miller from being in a better position to preserve her interest inthe property absent the violation. Even if the regulatory violation is sufficient to constitute fraud or irregularity, Michigan law requires a further showing of prejudice to set aside a mortgage afterthe redemption window has closed. *See Conlin*, 714 F. 3d at 361 (citing *Kim*, 825 N.W.2d at 337). But Miller offers no evidence in pleading beyond the asserted regulatory violation to support a showing of prejudice. Particularly because defendants went on to consider her modification request and then continued to delay the foreclosure sale for nearly another year after,

Miller is unable to establish a claim. The district court properly dismissed Miller's claim that the foreclosure should be set aside as a result of defendants' defects in the foreclosure process.

Miller also challenges the foreclosure sale as improper by the terms of her mortgage because she alleged that she never received a notice of default. The district court granted summaryjudgment because the record established that there was no genuine issue of material fact as to whether Miller was provided with the notice of default. The record demonstrates that Miller wasmailed a copy of the notice of default on May 10, 2017. Nothing in the record substantiates the allegations made in the complaint that Miller did not receive the notice of default. Summary judgment was appropriate.

**B. Damages for RESPA Violations.**

Miller brought claims alleging violations of the Real Estate Settlement Practices Act (RESPA) and its associated regulations. She claims that defendants failed to adequately respond to her qualified written requests as required by 12 U.S.C. § 2605(e). She also claims that defendants violated the prohibition on dual tracking by pursuing a foreclosure while simultaneously reviewing Miller's loan modification.

The district court dismissed all claims for lack of standing, determining that Miller had failed to plead sufficient damages to constitute an injury-in-fact. "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.*

*v. Robins*, 578 U.S. 330, 339, (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Miller alleged in two counts that the defendants failed to respond adequately to her qualified written requests in violation of 12 U.S.C. § 2605(e). Specifically, "[d]efendants did not provide all of the information sought in the letters," and that she "was inconvenienced and incurred expenses in seeking the information that [d]efendants refused to provide." R. 1-2, P. 29. For that violation, Miller requested:

> actual damages, including, but not limited to (1) out-of-pocket expenses incurred dealing with the RESPA violation including expenses for preparing, photocopying and obtaining certified copies of correspondence, (2) lost time and inconvenience to the extent it resulted in actual pecuniary loss, (3) late fees and (4) denial of credit or denial of access to full amount of credit line, additional [statutory] damages in the amount of $2,000.00, plus attorney's fees, the costs of this lawsuit, and litigation expenses.[3]

R. 1-2, P 29.

12 U.S.C. § 2605(e) does not require a servicer to respond in full to a borrower's request. It requires a lender to provide "information requested by the

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[3] The district court asserted incorrectly that this request for specific damages originated in Miller's response to defendants' motion to dismiss and determined that it could not properly consider them on defendants' Rule 12(b)(6) motion. Because these damages were, in fact, included within her complaint, we consider them here.

borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer." 12 U.S.C. § 2605(e)(2)(C)(i). So merely not providing some of the information Miller sought cannot be enough to seek damages. And Miller does not deny that SPS replied to her qualified written requests. We have held that the bar for adequately pleading RESPA violations dealing with qualified written requests is low. *See Marais v. Chase Home Fin. LLC*, 736 F.3d 711, 720–21 (6th Cir. 2013) (plaintiff stated a claim for damages when, due to deficient response, bank misapplied payments); *Mellentine v. Ameriquest Mortg. Co.*, 515 F. App'x 419, 422–25 (6th Cir. 2013) (plaintiffs stated a claim where the defendant missed the statutory deadline for a response and plaintiff sought "damages in an amount not yet ascertained"). But here, Miller has not pleaded a clear violation of the statute—SPS did not violate a statutory deadline or any procedural requirements, but provided information responsive to only some of her requests as allowed by statute. She also has not provided any theory for how the alleged violations caused her asserted actual damages. She does not put forward anything resembling a misapplied payment or other error that SPS failed to correct in its responses. Without more, she has not adequately plead a concrete injury-in-fact to survive dismissal.

As to Miller's claim for statutory damages, 12 U.S.C. 2605(f) allows for $2,000 in damages, in addition to fees and costs, only in a "case of a pattern or practice" of violation. Miller pleaded only the conclusion that there was a pattern or practice of violation without factual support for that conclusion. Given that her complaint fails to establish that there was a violation of 12 U.S.C. § 2605(e)(2)(C)(i), she is unable to establish

a claim for statutory damages either. Taken together, she is unable to plausibly state a claim for relief for violations of 12 U.S.C. § 2605(e).

Miller claimed damages in another count for defendants' alleged violations of the dual- tracking prohibition in 12 C.F.R. 1024.41. For those, she requested only that the court "award Plaintiff actual damages, additional damages of $2000, attorney's fees, costs and litigation expenses." R. 1-2. P. 32. Miller asserts no evidence of what harm she suffered as a result of the dual-tracking violations. She pleads only a regulatory violation and a prayer for relief. Such an allegation of a "bare procedural violation, divorced from any concrete harm" is insufficient to establish standing. *Spokeo, Inc.*, 578 U.S. at 341. As to her request for statutory damages for dual-tracking, she merely asserts that there was a pattern or practice without any other pleading to support the claim. Taken together, she has failed to "state a claim to relief that is plausible on its face." *Bell Atl. Corp.*, 550 U.S. at 570.

**C. Action to Quiet Title.**

Miller sought to quiet title, arguing that the defendants' interest in the property was invalid. As already discussed, the Trust validly took title upon the expiration of the redemption period. Nothing about the foreclosure process requires setting the sheriff's deed aside. The district court properly dismissed this claim.

**D. Conversion to Judicial Foreclosure.**

Miller argues that the district court improperly dismissed her claim for conversion to judicial foreclosure. The district court determined that there

was no such cause of action. Miller states that the district court was mistaken but offers only a description of the judicial foreclosure process in lieu of argument.

Under a Michigan statute that was repealed before Miller defaulted, a borrower could obtain conversion of foreclosure by advertisement to a judicial foreclosure if the lender failed to properly engage in a loan modification process. *See* Mich. Comp. Laws § 600.3205a(5); *Estate of Doreen Bessette v. Wilmington Trust N.A.*, 2016 WL 6947480 at *3, n.2 (E.D. Mich. Nov. 28, 2016). That remedy is not available under current law and was not available at the time of the foreclosure on Miller's home. *See id.*; Mich. Comp. Laws § 600.3101.

**E. Breach of Contract.**

Miller also made a claim for breach of contract. She alleged that "Defendants failed to provide Plaintiff the notices required by the Mortgage prior to foreclosing, constituting a breach of contract," and that defendants breached the implied covenant of good faith and fair dealing by "b. Dual tracking Plaintiff; c. Disingenuously negotiating loss mitigation assistance with Plaintiff; [and] d. Misleading Plaintiff about approval and extension of loss mitigation assistance as an alternative to foreclosure." R. 1-2, P. 30.

First, on the notice issue, the district court properly determined that defendants met their contractual obligations. As discussed above, Miller is unable to establish a genuine issue of fact as to whether she received the notice of default. She does not offer evidence that any other notice was insufficient or was not given beyond her own testimony that she does not remember seeing notice of the sheriff's sale posted on

her door on February 28, 2019. Indeed, the years of correspondence between Miller and her servicer, including the yearlong delay of the sheriff's sale, undermine the notion that notice was insufficient.

Next, summary judgment was also appropriate as to the good faith and fair dealing claims. Michigan law recognizes a claim for breach of contract where a defendant has failed to meet the standards of good faith and fair dealing where "one party 'makes the manner of its performance a matter of its own discretion.'" *Brimm v. Wells Fargo Bank, N.A.*, 688 F. App'x 329, 331 (6th Cir. 2017) (quoting *Burkhardt v. City Nat'l Bank of Detroit*, 226 N.W.2d 678, 680 (Mich. 1975)). As defendants note, the mortgage specifically states that forbearance or loan modification is not required by the mortgage, nor does it waive or preclude the exercise of their rights.

To be sure, the record does not suggest that SPS's loan modification scheme was a picnic. The record is replete with emails and communications from Miller that make clear that she spent well over a year stuck in bureaucratic purgatory—unable to get a representative on the phone and unable to get SPS to decide that her application complete. But throughout 2018 and 2019, her servicer evaluated her application for modification, delayed her sale weekly for a year, and responded to her requests. Miller is unable to identify any terms of the contract where defendants' discretionary performance breached the duty of good faith and fair dealing. *See id.* Thus, the district court properly found no genuine issue of material fact as to whether defendants breached their implied covenant.

**F. Declaratory Judgment.**

Finally, Miller sought a declaratory judgment. The district court granted summary judgment. A declaratory judgment is not an independent cause of action. *See Davis v. United States,* 499 F.3d 590, 594 (6th Cir. 2007). Because Miller's other claims have all been dismissed, a declaratory judgment is not available to her.

## III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JENNIFER B. MILLER (FKA FOSGITT),

Plaintiffs, Case No. 19-CV-12826

v.

Honorable Thomas L. Ludington

THE BANK OF NEW YORK MELLON, SUCCESSOR TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR F/B/O HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STERNS ALT-A TRUST 2005-10, MORTGAGE PASS-THROUGH CERTIFICATES AND SELECT PORTFOLIO SERVICING, INC.,

Defendants.
_____/

**JUDGMENT**

In accord with the opinion and order entered on this date,

It is hereby **ORDERED** that Defendants' Motion for Summary Judgment, ECF No. 22, is

**GRANTED**.

It is further **ORDERED** that Plaintiff's Complaint, ECF No. 1, is **DISMISSED**

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: January 5, 2021,

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JENNIFER B. MILLER (FKAFOSGITT),

Plaintiffs, Case No. 19-CV-12826

v.

Honorable Thomas L. Ludington

THE BANK OF NEW YORK MELLON, SUCCESSOR TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR F/B/O HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STERNS ALT-A TRUST 2005-10, MORTGAGE PASS-THROUGH CERTIFICATES AND SELECT PORTFOLIO SERVICING, INC.,

Defendants.
_____/

**OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S COMPLAINT**

On August 28, 2019, Plaintiff, Jennifer Miller, filed a complaint against Defendants Bankof New York Mellon and Select Portfolio Servicing, in Midland County Circuit Court. ECF No. 1-2 at PageID.15–35. Plaintiff asserts ten counts in her Complaint—seeking declaratory relief, asserting quiet title, alleging illegal foreclosure under Michigan law and violations of the federal Real Estate Settlement Procedures Act, alleging

breach of contract, requesting conversion to judicial foreclosure, and seeking injunctive relief. *Id.* The case was removed on September 27, 2019. ECF No. 1. On October 18, 2019, Defendants filed a motion to dismiss. ECF No. 5. The Motion to Dismiss was granted in part and denied in part. ECF No. 14. Three claims remain, Counts I, IV, and VII.

On November 13, 2020, Defendants filed a Motion for Summary Judgment. ECF No. 22. Plaintiff's response was due on December 4, 2020. However, no response was received.

## I.

A motion for summary judgment should be granted if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying where to look in the record for evidence "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the opposing party who must set out specific facts showing "a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citation omitted). The Court must view the evidence and draw allreasonable inferences in favor of the non-movant and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one partymust prevail as a matter of law." *Id.* at 251–52.

## II.

Plaintiff obtained a $423,600 loan from CMX Mortgage Company LLC on October 17, 2005. ECF No. 22-7 at PageID.2071. Plaintiff and her former spouse[1] "Richard L. Fosgitt II, granted Mortgage Electronic Registration Systems, Inc. ('MERS') a mortgage [ ] encumbering real property located at 5004 Bristlecone Dr, Midland, Michigan" ("the property"). ECF No. 22-7 at PageID.2072. She lived at the property from 2005 or 2006 until 2011 and returned in 2017. ECF No. 22-8 at PageID.2531–32. As of August 27, 2020, she lived in the house. ECF No. 22-8 at PageID.2531. She testified that she read the mortgage and Note prior to signing them. ECF No. 22-8 at PageID.2540.

**A.**

Part of the mortgage provides,

> All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address bynotice to Lender. Borrower shall promptly notify Lender of

[1] Plaintiff and Richard Fosgitt were divorced in September 2011. ECF No. 22-8 at PageID.2533

Borrower's change of address.

ECF No. 22-3 at PageID.2050–51. It also states,

> **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before saleof the Property pursuant to any power of sale contained in this Security Instrument;
> (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no accelerationhad occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender mayreasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more

> of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

ECF No. 22-3 at PageID.2051–52. Additionally, it explains,

> **22. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless
>
> Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the datethe notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to

> acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.
>
> If Lender invokes the power of sale, Lender shall give notice of sale to Borrower in the manner provided in Section 15. Lender shall publish and post the notice of sale, and the Property shall be sold in the manner prescribed by Applicable Law. Lender or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order; (a) to all expenses of the sale, including,but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled toit.

ECF No. 22-3 at PageID.2053.

**B.**

The record includes a Note dated October 17, 2005 for a $423,600.00 loan. ECF No. 22-2.The lender's name is CTX Mortgage Company, LLC. ECF No. 22-2 at PageID.2036. Monthly payments were to begin on December 1, 2005 at a rate of $2,206.25. ECF No. 22-2 at PageID.2036. A late charge can be added for any

payment paid 15 days late. ECF No. 22-2 at PageID.2038. Thenote also specifies

> **(B) Default**
> If I do not pay the full amount of each monthly payment on the date it is due, I willbe in default.
> **(C) Notice of Default**
> If I am in default, the Note Holder may send me a written notice telling me that if Ido not pay the overdue amount by a certain date, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal
> that has not been paid and all the interest that I owe on that amount. That date mustbe at least 30 days after the date on which the notice is mailed to me or delivered by other means.
> . . .
> **(E) Payment of Note Holder's Costs and Expenses**
> If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

ECF No. 22-2 at PageID.2038. The Note also provides,

> **8. Giving of Notices**
> Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or

> by mailing it first class mail tome at the Property Address above or at a different address if I give the Note Holdera notice of my different address. Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail tothe Note Holder at the address stated in Section 3(A) above or at a different addressif I am given a notice of that different address.

ECF No. 22-2 at PageID.2038.

**C.**

On December 1, 2005, the loan was transferred from CMX Mortgage Company to Bear Stearns ALT-A Trust 2005-10, Mortgage Pass-Through Certificates, Series 2005-10. ECF No. 22- 7 at PageID.2072. On March 22, 2016, Plaintiff was notified that her loan servicer changed from JP Morgan Chase Bank N A to Select Portfolio Servicing (SPS). ECF Nos. 22-4; 22-7 at PageID.2072, 2491. In November 2016, the mortgage was assigned from Mortgage Electronic Registration Systems, Inc. "as nominee for CTX Mortgage Company, LLC" to The Bank of New York Mellon, Successor Trustee to JPMorgan Chase Bank, National Association, as Trustee F/B/O Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust 2005-10, Mortgage Pass-Through Certificates, Series 2005-10. ECF No. 22-5 at PageID.2061.

**D.**

Plaintiff fell behind in her payments. Her most recent payment was $500 on March 27, 2017. According to SPS records, this payment "brought the due date on the Loan to September 1, 2016." ECF No. 22-7 at PageID.2073, 2498. SPS explained in a letter to the Michigan Attorney General that as of January 18, 2019, the account was 29 payments past due. ECF No. 22-14 at PageID.2785.

On May 10, 2017 a notice of default and right to cure was mailed to the property. ECF No.22-6. Plaintiff testified she "believe[s]" she was residing at the property when the notice was mailed. ECF No. 22-8 at PageID.2549. The notice stated that the Borrower

> failed to make payments under the Note and Security Instrument. This letter is a formal demand for payment.
>
> **Action Require to Cure the Default**
> To cure this default, you must pay the Amount Required to Cure together with payments which may subsequently become due, on or before the Cure Date listed below.
>
> **Amount Required to Cure the Default**
> As of the date of this letter, the total amount due and required to cure the default onyour loan is

> $32,114.17 (Amount Require to Cure) as itemized below[2]

ECF No. 22-6 at PageID.2063–65. The letter indicated that if the amount to cure payment is not received by the cure by date, "SPS may initiate foreclosure and require immediate payment in fullof the entire outstanding unpaid amount on the account. In other words, SPS may accelerate all payments owing and sums secured by the Security Instrument." ECF No. 22-6 at PageID.2065.

> Plaintiff attempted to obtain a loan modification. She testified at her deposition, I have a full record of multiple times that SPS sent application forms and asked formore information, all of which I had provided multiple times, complete applications. I'm not sure what the magic number was on how many times I was supposed to submit the same information. applications. I'm not sure what the magic number was on how many times I was supposed to submit the same information.

ECF No. 22-8 at PageID.2564–65. She continued,

> [SPS] sent multiple forms and all forms were always completed, always sent back.They got to the point that I was sending them back via email and mail, usually sending them back at the end being via tracked mail because it just seemed to end up in an abyss somewhere. God only knows where they ended up.

---

[2] The letter states that $32,904.36 is owed on the loan for back payments from September 1, 2016, plus a $14.00 advance on the behalf of the customer for a total of $32,918.36 owed. Less an unapplied balance of$804.19. The total owed is $32,114.17. The letter indicated it must be paid by June 9, 2017 to cure the default. ECF No. 22-6 at PageID.2065.

ECF No. 22-8 at PageID.2565. She testified that she had two complete applications but was never given any options for loan modification. ECF No. 22-8 at PageID.2566. However, she did not respond to the instant motion and there is no evidence in the record of these complete applications.

On May 16, 2018, "SPS sent correspondence to Plaintiff via first class mail advising her that her request for a loan modification had been denied." ECF No. 22-7 at PageID.2073. The letter explained,

> You were sent an Assistance Review Application on 03/06/2018. This application listed all documents required from you to complete a loss mitigation application so we could evaluate your account for loss mitigation assistance. The notice clearly stated the deadline for returning these documents. SPS did not receive the required documents within the timeline specified. As such, we did not evaluate this account for loss mitigation and have closed this request for review.

ECF No. 22-7 at PageID.2512 (emphasis omitted). An SPS employee averred in an affidavit,

> SPS sent correspondence to Plaintiff via first class mail in response to Plaintiff's request for appeal of the denial of her loan modification request. In this letter, SPS advised Plaintiff that the denial was accurate and that the foreclosure was moving forward.

ECF No. 22-7 at PageID.2073, 2515–16.

**E.**

On February 22, 2018, SPS mailed Plaintiff a notice that a foreclosure sale was scheduled for March 27, 2018. ECF No. 22-13 at PageID.2676. Shannon Guilbeaux swore that she posted the notice of foreclosure on the front door of the property on February 28, 2018, noticing a sheriff's sale for March 27, 2018. ECF No. 22-9. However, Plaintiff testified that she did not see the notice posted to her door on February 28, 2018. ECF No. 22-8 at PageID.2590–92. A Midland Daily News[3] editor swore the notice of foreclosure was published in the newspaper for four consecutive weeks, beginning February 27, 2018. ECF No. 22-9. Plaintiff testified that she was "not aware of whether it was published or not published." ECF No. 22-8 at PageID.2559.

The sheriff's sale was adjourned weekly from March 27, 2018 to March 19, 2019. ECF No. 22-10. SPS mailed multiple letters notifying Plaintiff of the adjourned sheriff's sales. ECF No. 22-13 at PageID.2677–80, 2683. The sheriff's sale was conducted on March 19, 2019 and Defendant Trust purchased the property for $415,650.00. ECF Nos. 22-7 at PageID.2073, 2518; 22-9.

**III.**

After the Opinion and Order Granting in Part Defendants' Motion to Dismiss, there are three remaining claims, Count I – declaratory judgment, Count IV – which is construed as a breach of contract claim, and Count VII – breach of contract.

---

[3] A Midland County newspaper

**A.**

Count IV is titled "Illegal foreclosure – respecting notice of default." ECF No. 1-2 at PageID.26–27. Plaintiff alleges that Defendants "failed to provide the Notice of Default under Section 22 of the Mortgage," "privately accelerated the Mortgage without first providing the Notice of Default," "published and posted a notice of sale without first providing the Notice of Default." *Id.* As a result, Plaintiff alleges she "was severely damaged by this omission in that her common law 'right to cure' was lost without notice replaced with a less valuable collection of rights, to wit, a contractual right to reinstate the loan and a right to pay the entire accelerated loan balance in full." *Id.* Plaintiff does not expressly state the common law right she alleges was violated for her claim, but based upon her final paragraph in the claim, it will be construed as a breach ofcontract claim based upon Defendants alleged failure to offer her an opportunity to cure her default.

The elements for a Michigan breach of contract claim are "(1) there was a contract, (2) theother party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of Am., N.A. v. First Am. Title Ins. Co.*, 878 N.W. 2d 816, 829 (Mich. 2016).

In response, Defendants articulate several arguments. First, they argue "this breach claim is barred by Plaintiff's prior material breach (failure to make payments)." ECF No. 22 atPageID.1993. Second, they contend there "is no genuine issue of material fact that the [notice of default] was sent and that the notices of foreclosure complied with the Mortgage and Michigan's foreclosure by advertisement statute." *Id.* at PageID.1994 (citation omitted). Third, "Plaintiff's claim

to have been damaged allegedly by losing her right to cure is baseless; the Mortgage allowed her to reinstate by curing the default any time up to five days before the sheriff's Sale. Plaintiff never availed herself of that right." *Id.* (citation omitted). As such, "there is no causation between an alleged failure to send a [notice of default] and Plaintiff's alleged loss of a right to cure." *Id.*

All three of Plaintiff's claims regarding the breach of contract are premised on the assertion that Defendants did not provide Plaintiff a notice of default. However, Defendants included a copy of the notice of default and right to cure that was mailed to Plaintiff on May 10, 2017. This was mailed months prior to the initial notice of foreclosure sale and newspaper publication in February and March 2018. Plaintiff also testified that she believes she was residing at the property on that date. Plaintiff has offered no evidence demonstrating that she never received the notice of default or that it was not mailed as demonstrated by Defendants. Plaintiff's bare assertion that she did not receive the notice of default was sufficient to prevail on the Motion to Dismiss, but she cannot rely on allegations from her Complaint to defeat a motion for summary judgment. Defendants' Motion for Summary Judgment on Count IV will be granted.

**B.**

In Count VII, Plaintiff claimed Defendants breached their contract, *i.e.*, the note and mortgage, with Plaintiff. ECF No. 1-2 at PageID.29-30.

Again, the elements for a Michigan breach of contract claim are "(1) there was a contract, the other party breached the contract, and (3) the breach resulted

in damages to the party claiming breach." *Bank of Am., N.A. v. First Am. Title Ins. Co.*, 878 N.W. 2d 816, 829 (Mich. 2016).

Defendants first argue that Plaintiff first breached the contract by failing to pay her mortgage in September 2016. ECF No. 22 at PageID.1983. Second, Defendants refute the four alleged breaches of contract identified in Plaintiff's Complaint. As articulated in this Court's previous Opinion, Plaintiff's four claims are divided into two separate theories of breach of contract liability. First, "a. Failing to send Plaintiff the notices required by the Mortgage;" is an allegation of a breach of the express terms of the contract. Second,

> b. Dual tracking Plaintiff;
> c. Disingenuously negotiating loss mitigation assistance with Plaintiff;
> d. Misleading Plaintiff about approval and extension of loss mitigation assistance as an alternative to foreclosure

are allegations of breach of the implied covenant of good faith and fair dealing. ECF No. 1-2 atPageID.30; ECF No. 14 at PageID.1879.[4]

**i.**

In the Opinion and Order Granting in Part Defendants' Motion to Dismiss, this Court held

[4] "Plaintiff alleged two categories of breach of contract – 1) breach of the express provision of the contract(failure to provide the stated notices) and 2) multiple allegations of failure to follow the implied covenant of good faith and fair dealing regarding Defendants' execution of unspecified terms in the contract (i.e., terms left to a party's discretion.)"

> [w]hether she did receive a notice of default is a question that could be resolved with a Rule 56

> motion. However, in a 12(b)(6) motion,the facts alleged by Plaintiffare presumed to be true. And in this case, Plaintiff alleges she never received a notice of default and as a result, she lost her home to foreclosure. If true, this wouldbe a breach of contract.

ECF No. 14 at PageID.1877. Unlike in the previous Opinion and Order, Plaintiff cannot now relysolely on the allegations in her Complaint. She alleges that Defendants failed to send the notice ofdefault required by the mortgage. However, Defendants offered evidence that Plaintiff was maileda notice of default, that they worked with her on potential loan modifications, that the notice of thesheriff's sale was posted to her door and in the local newspaper, and the sheriff's sale was adjourned for almost a year. Plaintiff's testimony that she does not remember the notice of sheriff's sale being posted to her door on February 28 is insufficient to create a question of material fact whether Defendants breached the contract by failing to send the notice required by the mortgage. Defendants' Motion for Summary Judgment on the breach of contract claim under the first theoryof liability will be granted.

**ii.**

For the second, third, and fourth allegations (*i.e.*, the claims regarding loss mitigation), Defendants first argue, "Plaintiff does not identify which clause of the Mortgage or Note include modification duties or which Defendants breached . . . [and] Defendants cannot breach a contractterm that does not exist." ECF No. 22 at PageID.1989.

As this Court previously concluded, these three claims are for breach of the implied duty of good faith and fair dealing, not the express contract terms. Therefore, the fact that the contract did not include these terms is not a persuasive argument against the breach of contract claim. Defendants' Motion for Summary Judgment on this theory will be denied.

In Defendants' Motion for Summary Judgment, they proffer three arguments why they didnot violate the duty of good faith and fair dealing.

> First, there is no genuine issue of material fact that all contract notices were sent. There can be no breach of good faith and fair dealing[] where the contract has not been breached. Second, there is no genuine issue of material fact that the Note andMortgage do not have any clauses requiring modification. Defendants cannot be liable for violating a good faith and fair dealing duty, when there is no contract dutyin the first place. Third, there is nothing in the Note or Mortgage that made the 'manner of its performance a matter of its own discretion' and Defendants are permitted to advance the Trust's interest by foreclosing.

ECF No. 22 at PageID.1993 (emphasis and citation omitted).

This Court previously explained that Michigan courts have held that a plaintiff may bringa breach of contract claim based upon a defendant's alleged failure to meet the standards of goodfaith and fair dealing in executing contract provisions when left to their own discretion. *Liggett Rest. Grp., Inc. v. City of Pontiac*, 2005 WL 3179679 at *1 (Mich. Ct. App. Nov. 29, 2005) ("A breach of contract may be found where bad faith or

unfair dealing exists in the performance of a contractual term when the manner of performance was discretionary."); *Brimm v. Wells Fargo Bank, N.A.*, 688 Fed. Appx. 329, 331 (6th Cir. 2017) ("Michigan recognizes an implied covenant of good faith and fair dealing only when one party 'makes the manner of its performance a matterof its own discretion.'") (quoting *Burkhardt v. City Nat'l Bank of Detroit*, 226 N.W.2d 678, 680 (1975))).

As Defendants argued, the mortgage does not require the mortgage owner to engage in loan modification discussions. Despite the lack of contractual provisions, Defendants responded both to Plaintiff's request for a loan modification and her appeal. Defendants have offered evidence that the reason it could not proceed with Plaintiff's request for loan modification was a lack of sufficient information provided by Plaintiff. Plaintiff has proffered no evidence demonstrating her compliance with Defendants' requests, absent her unsubstantiated testimony. She has offered no evidence of a letter stating her application was complete or that she supplied the specific documents requested by Defendants. In addition, the foreclosure sale was delayed weekly for a year. Plaintiff has not identified any terms of the contract where Defendants' breached the duty ofgood faith and fair dealing in their discretionary execution of the terms of the contract. Defendants have demonstrated there is no genuine issue of material fact that they did not breach the duty of good faith and fair dealing. Defendants' Motion for Summary Judgment on Count VII will be granted.

**C.**

In Count I of her Complaint, "Plaintiff prays this Court declare the rights and interests of the parties and if Plaintiff's rights are superior to that of Defendants' rights." ECF No. 1-2 at PageID.23. Michigan Court Rule 2.605 provides power to Michigan courts to enter declaratory judgments. Specifically, the rule provides

> (A) Power to Enter Declaratory Judgment.
>
> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or couldbe sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

"Because declaratory judgment acts are procedural in nature and do not affect underlyingsubstantive rights, the *Erie* doctrine, mandates application of the Declaratory Judgment Act, 28 U.S.C. § 2201, to [plaintiff's] request for declaratory relief based on state law." *Horn v. City ofMackinac Island*, 938 F. Supp.2d 712, 714 n.1.

The Sixth Circuit has explained there are two principles courts should use "in determiningwhether a declaratory ruling is appropriate." *Grand Truck W. R.R. Co. v. Consol. Rail Corp.*, 746F.2d 323, 326 (6th Cir. 1984). First is whether "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue" and second is if the declaratory judgment "will

terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* These two principles should be applied by analyzing five factors

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata;' (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective." *Id.*

This Court denied Defendants' Motion to Dismiss on Count I because Plaintiff alleged that she did not receive notice of the foreclosure proceedings. ECF No. ECF No. 14 at PageID.1868–70. However, Defendants now submit evidence that Plaintiff did receive notice of the foreclosure proceedings.

In their Motion for Summary Judgment, Defendants argue "[b]ecause the redemption period expired, Plaintiff also lacks standing to bring any claim seeking declaratory relief as to the Property." As this Court found in Counts IV and VII, Plaintiff was given proper notice of her default, the pending sheriff sale, and the redemption period. In addition, all claims in her Complaint have been or will be dismissed at the conclusion of this opinion. Accordingly, a declaratory judgment for Plaintiff will not "serve a useful purpose in clarifying and settling the legal relations in issue." In

fact, the opposite is true. Defendants' Motion for Summary Judgment on Count I willbe granted.

## IV.

Accordingly, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment, ECF No. 22, is **GRANTED**.

It is further **ORDERED** that Plaintiff's Complaint, ECF No. 1, is **DISMISSED**.

Dated: January 5, 2021

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JENNIFER B. MILLER (FKAFOSGITT),

Plaintiffs, Case No. 19-12826

v.

Honorable Thomas L. Ludington

THE BANK OF NEW YORK MELLON, SUCCESSOR TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR F/B/O HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STERNS ALT-A TRUST 2005-10, MORTGAGE PASS-THROUGH CERTIFICATES AND SELECT PORTFOLIO SERVICING, INC.,

Defendants.
_____/

**ORDER CORRECTING SCRIVENERS ERROR**

On January 29, 2020, this Court entered an order granting in part and denying in part Defendant's motion to dismiss that contained a scrivener's error.

Accordingly, it is **ORDERED** that the Court's Order, ECF No. 14, dated January 29,2020, at page 19, Section III is **CORRECTED** to read the following:

Accordingly, it is hereby **ORDERED** that Defendants' motion to dismiss,ECF No. 5, is

**GRANTED IN PART AND DENIED IN PART**. Defendants' motion to dismiss is granted on Counts II, III, V, VI, VIII, IX, and X. Defendants'motion to dismiss is denied as to Counts I, IV, and VII.

It is further **ORDERED** that Counts II, III, V, VI, VIII, IX, and X ofComplaint, ECF No. 1, are **DISMISSED WITH PREJUDICE**.

In all other respects the Order is unchanged.

Dated: February 11, 2020

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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Defendants.
_____/

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PARTDEFENDANTS' MOTION TO DISMISS**

On August 28, 2019, Plaintiff, Jennifer Miller, filed a complaint against Defendants Bank of New York Mellon and Select Portfolio Servicing, in Midland County Circuit Court. ECF No. 1-2 at PageID.15-35. Plaintiff asserted ten counts in her complaint—seeking declaratory relief, asserting quiet title, alleging illegal foreclosure under Michigan law and violations of the federal Real Estate Settlement Procedures Act, alleging breach of contract, requesting conversion to judicial

foreclosure, and seeking injunctive relief. Id. The case was removed on September 27, 2019. ECF No. 1. On October 18, 2019, Defendants filed a motion to dismiss. ECF No. 5. As explained below, Defendants' motion will be granted in part and denied in part.

## I.

A pleading fails to state a claim under Rule 12(b)(6) if it does not contain allegations that support recovery under any recognizable legal theory. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In considering a Rule 12(b)(6) motion, the Court construes the pleadings in the non-movant's favor and accepts the allegations of facts therein as true. See Lambert v. Hartman, 517 F.3d 433, 439 (6th Cir. 2008). The pleader need not provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In essence, the pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678–79 (quotations and citation omitted). Also, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id.

Documents attached to a complaint "become part of the pleadings and may be considered on a motion to dismiss." Commercial Money Ctr., Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 335–36 (6th Cir. 2007); Fed. R. Civ. P. 10(c). In addition, "when the exhibits contradict the general and conclusory allegations of the pleading,

the exhibits govern." Griffin Industries, Inc. v. Irvin, 496 F.3d 1189, 1206 (11th Cir. 2007); Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union, No. 513, 221 F.2d 644, 647 (6th Cir. 1955); Hamilton Foundry & Mach. Co. v. Int'l Molders & Foundry Workers Union of N. Am., 193 F.2d 209, 216 (6th Cir. 1951); Simmons
Peavy–Welsh Lumber Co., 113 F.2d 812, 813 (5th Cir.1940) ("Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.").

**II.**

The allegations in a plaintiff's complaint are presumed true in addressing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See Lambert v. Hartman, 517 F.3d 433, 439 (6th Cir. 2008). A summary of the facts from Plaintiff's complaint follow.[1]

Plaintiff and Richard Fosgitt II purchased 5004 Bristolcone Dr., Midland, MI by a quit claim deed from Strata Homes LLC on October 17, 2005. ECF No. 1-2 at PageID.16, 61. On or about October 17, 2005, Plaintiff and Richard Fosgitt II obtained a $423,600 loan from CTX Mortgage Company, LLC. Plaintiff's complaint refers to "CMX Mortgage Company, LLC" but the attached mortgage lists "CTX Mortgage Company, LLC" as the lender. ECF No. 1-2 at

[1] The alleged facts have multiple gaps, but any omissions are due to Plaintiff's complaint

PageID.38. Plaintiff and Richard Fosgitt II granted Mortgage Electronic Registration Systems, Inc. ("MERS") a mortgage securing the loan. Id. at PageID.17.

On November 23, 2016, the mortgagee's interest in the mortgage was assigned from MERS to Bank of New York Mellon ("BNYM"), who became Trustee of the mortgage. Id.; ECF No. 1- 2 at PageID.64. The assignment of the mortgage was recorded on December 21, 2016. Id. Defendant Select Portfolio Servicing, Inc. ("SPS") is the current servicer for the mortgage. ECF No. 1 at PageID.17.

At some point, Plaintiff and Richard Fosgitt II obtained a divorce. See ECF No. 1-2 at PageID.90. In one of the documents Plaintiff submitted to SPS, she refers to herself as the only borrower on the mortgage. ECF No. 1-2 at PageID.90. She explains that she and Richard Fosgitt II are both parties to the mortgage, but that the loan is "my responsibility via court order." ECF No. 1-2 at PageID.93. In the documents attached to her complaint, Plaintiff also alleges the property was the family home prior to the divorce, but it is now a rental property.[2] ECF No. 1-2 at PageID.90.

On or about December 1, 2015, Plaintiff contacted "Chase"[3] to request modification of the loan and was verbally told she could not apply for modification until she was behind on payment. Id. On January 22, 2016, Plaintiff mailed a request for mortgage assistance ("RMA") to Chase Mortgage.[4]

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[2] This conflicts with facts alleged in Plaintiff's complaint where she asserts that she lives at the property and if the foreclosure is not reversed, she will be evicted. ECF No. 1-2 at PageID.16, 32-33.

[3] It is unclear who Plaintiff contacted. The mortgage was still owned by CTX Mortgage Company as of December 2015, but Chase would seem to refer to Bank of New York Mellon who is the successor trustee for JP Morgan ChaseBank.

[4] Plaintiff does not explain whether she was in arrears on mortgage payments at this date.

On March 20, 2016, Plaintiff received a response from Chase that stated the RMA had expired and requested additional information. Id. On April 1, 2016, Plaintiff mailed the additional information. Id.

On April 11, 2016, Plaintiff received a letter from SPS stating they were the new servicer for her mortgage. Id. at PageID.18. On June 28, 2016, Plaintiff mailed her updated RMA to SPS. On December 12, 2016, Plaintiff received a letter from SPS indicating that her RMA application was complete. ECF No. 1-2 at PageID.64. However, on December 21, 2016, Plaintiff received a letter indicating SPS needed additional information. Id. Plaintiff resent her full application on January 24, 2017 and resent her pay stubs on February 17, 2017 after they were requested again. Id. On March 7, 2017 Plaintiff resent her RMA application. Id. at PageID.19. On March 22, 2017, she resent information regarding her bank statement. Id. On March 24, 2017, Plaintiff reports she emailed SPS to obtain the status of her RMA and asked why she is receiving "harassing calls for payment." Id.

On March 27, 2017 Plaintiff emailed the "Michigan Attorney General-Complaint" regarding her treatment by SPS. Id. In April and May she continued to seek an update from SPS and provide information as requested. *Id.* She also attempted to obtain a loan modification so shecould rent the home[5] or to sell the home. *Id.* at PageID.19-20. Plaintiff continued to receive communication from SPS including multiple requests for additional information, submitted the requested information to SPS, and sought to understand the status of her RMA. *Id.* at PageID.20.

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5 It is unclear why she needed a modification for her to rent the home because Plaintiff indicated in her first updated

On June 23, 2017, Plaintiff received an email from the SPS Ombudsman, but Plaintiff does not specify the content of the email.[6] *Id.*

On February 21, 2018, Plaintiff sent an email to SPS with a "completely new RMA, clarification, email notes Plaintiff never received a denial, nor received an answer." *Id.* at PageID.21. She also "received a letter that her mortgage had been referred for legal action (i.e. foreclosure) [and a] letter from Trott[7] stating they planned to foreclose." *Id.* On February 26, 2018, Plaintiff received a letter stating the foreclosure sale was rescheduled to March 27, 2018, but foreclosure would not occur if she had applied for a modification. *Id.* The next day, Plaintiff received a foreclosure advertisement. She submitted a hardcopy of the RMA on March 1, 2018. *Id.* On March 8, 2018, Plaintiff received an email from SPS providing the foreclosure sale was rescheduled for April 10, 2018 and requested additional RMA information. *Id.*

On March 20, 2018, Plaintiff "sent email serving as formal appeal of denial of the RMA." Id. at PageID.22. Plaintiff received a letter rescheduling the foreclosure sale to May 15, 2018. Id. On May 21, 2018, "Plaintiff sent email to SPS appealing decision as SPS provided no deadline for submittal," but it is unclear what exactly Plaintiff appealed as she indicated she emailed SPS on March 20, 2018 appealing an alleged denial of her RMA. Id. On June 12, 2018, Plaintiff sent an email to SPS requesting that the foreclosure sale be postponed beyond June 19, 2018 (which assumes SPS had delayed the foreclosure sale yet again to the June

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[6] Plaintiff indicates in her complaint that the email is in exhibit 24. However, her complaint only has eight numberedexhibits and this particular email is not included.

[7] Plaintiff does not explain who Trott is.

19, 2018 date). Id On July 17,2018, Plaintiff received an email from BNYM "stating that SPS was servicer [of the loan] and that'BNY Mellon is acting as a Trustee, and therefore we do not own the loan or the property. As Trustee, BNY Mellon is not involved in the servicing of the loans or the foreclosure process. This is the responsibility of the Servicer.'" ECF No. 1-2 at PageID.22-23. Plaintiff does not explain what prompted the email from BNYM. On July 2018 Plaintiff emailed SPS requesting the foreclosure sale be postponed again and seeking proof of ownership.[8] *Id.* at PageID.23. A sheriff's sale on the property occurred on March 19, 2019. *Id.* at PageID.34, 67. BNYM purchased the property at the sale. ECF No. 1-2 at PageID.67.

**A.**

Defendants argue Plaintiff fails to state a claim for declaratory relief because she "does notcontest that she defaulted under the terms of the Note and Mortgage and do[es] not allege that [s]he paid off the debt." ECF No. 5 at PageID.172. She also has "failed to allege a defect in the foreclosure proceeding and resulting prejudice." ECF No. 5 at PageID.172.

In her complaint, "Plaintiff prays this Court declare the rights and interests of the parties and if Plaintiff's rights are superior to that of Defendants' rights." ECF No. 1-2 at PageID.23. Michigan Court Rule 2.605 provides power to Michigan courts to

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[8] It is unclear what she is seeking proof of ownership over, her mortgage, the loan, the property, or something else.

enter declaratory judgments. Specifically, the rule provides

> (A)Power to Enter Declaratory Judgment.
>
> (1)In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or couldbe sought or granted.
>
> (2)For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than adeclaratory judgment.

"Because declaratory judgment acts are procedural in nature and do not affect underlyingsubstantive rights, the *Erie* doctrine, mandates application of the Declaratory Judgment Act, 28
U.S.C. § 2201, to [plaintiff's] request for declaratory relief based on state law." *Horn v. City of Mackinac Island*, 938 F. Supp.2d 712, 714 n.1.

The Sixth Circuit has explained there are two principles courts should use "in determiningwhether a declaratory ruling is appropriate." *Grand Truck W. R.R. Co. v. Consol. Rail Corp.*, 746F.2d 323, 326 (6th Cir. 1984). First is whether "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue" and second is if the declaratory judgment "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* These two principles should be applied by analyzing five factors

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory

> action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata;' (4) whetherthe use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is analternative remedy which is better or more effective." *Id.*

Here, Plaintiff alleges she did not receive a notice of default. ECF No. 1-2 at PageID.26-27 Defendants respond by providing evidence to refute Plaintiff's claim (ECF 5-4 at PageID.210-213) alleging that Plaintiff attached a notice of default in a previous case.[9] However, a motion to dismiss focuses solely on the facts alleged in the complaint and not evidence provided inDefendant's motion or Plaintiff's response. *See Ross v. PennyMacLoan Sers., LLC*, 761 Fed. Appx. 491, 494 (6th Cir. 2019); *I.L. by and through Taylor v. Tenn. Dep't of Educ.*, 739 Fed. Appx.319, 321 (6th Cir. 2018). An analysis of the Grand Trunk factors is not necessary at this juncture because Defendants have not established that Plaintiff fails to state a claim. Plaintiff has pled sufficient facts, specifically lack of notice of her foreclosure, to establish an alleged defect in the foreclosure proceeding to prevail on a motion to dismiss the declaratory judgment count.

[9] Plaintiff's complaint in a previously voluntarily dismissed case, 19-10644, explains that "[o]n or about July 06, 2016, Defendant Select Portfolio, Inc. sent Notice of Default – Right to Cure ("Notice") listing Defendant The Bank of New York Mellon (Bank of New York Trust) as the Noteholder" and attaching the notice of default as an exhibit. ECF No. 1-2 at PageID.15 in 19-10644.

**B.**

> Plaintiff's second claim is for quiet title. MCL 600.2932(1) provides
>
> Any person, whether he is in possession of the land in question or not, 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, whether the defendant is in possession of the land or not.

Plaintiff alleges that she "is the owner of the Subject Property" and "[o]ne or more of the Defendants claim an interest in the Subject Property inconsistent with the interest claimed by Plaintiff." ECF No. 1 at PageID.24. Her factual allegations alone are sufficient to prevail on a motion to dismiss. However, Plaintiff included a copy of the quit claim deed conveying title of the property to Richard L. Fosgitt, II and Jennifer B. Fosgitt as an attachment to her complaint. ECF No. 1-2 at PageID.61. Therefore, Plaintiff's assertion that she is the sole owner of the property is contradicted by her exhibits. "This is not a case where the plaintiff has pleaded too little, but where [s]he has pleaded too much and has refuted h[er] own allegations by setting forth the evidence relied on to sustain them. . . . Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control." *Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir. 1940); *Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union, No. 513*, 221 F.2d 644, 647 (6th Cir. 1955) ("The allegation in the complaint 'that the Union violated the contract in

taking said discharge to arbitration,' is a conclusion on the part of the pleader, which the Court is not required to accept if [it is] in conflict with the facts stated in the complaint."). She furnishes no explanation or documentation showing that title for the property was later transferred solely to her. Plaintiff explains in a document she submitted to SPS that she has a legal obligation to pay the mortgage on the property, but there is no information explaining that after the divorce title to the property was conveyed to her alone. Therefore, without more, Plaintiff fails to state a claim for quiet title of the property against Defendants. Plaintiff's claim for quiet title will be dismissed.

**C.**

In the third count of Plaintiff's complaint she alleges Defendants failed to follow the requirements for Michigan's foreclosure by advertisement statute. Michigan law not only provides the process for foreclosures by advertisement, but "also controls the rights of both the mortgagee and mortgagor once the sale is completed." *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 359. Unless the property is redeemed within six months after the foreclosure sale, the sheriff's deed becomes operative and vests in the grantee. MCL §§ 600.3236, 600.3240(8). "The mortgagor's 'right, title and interest in and to the property' are extinguished" after the six month redemption period expires. *Conlin*, 714 F.3d at 359. "Michigan courts have held that once the statutory redemption period lapses, they can only entertain the setting aside of a foreclosures sale where the mortgagor has made 'a clear showing of fraud, or irregularity'" regarding the foreclosure procedure. *Id.* (quoting

*Schulthies v. Barron*, 167 N.W.2d 784, 785 (Mich. App. 1969)).

The requirements for a foreclosure by advertisement are,

> (1) A party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage or, if an action or proceeding has been instituted, either the action or proceeding has been discontinued or an execution on a judgment rendered in the action or proceeding has been returned unsatisfied, in whole or in part. . . .
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.
>
> . . .
>
> (3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title must exist before the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage. MCL § 600.3204.

In this case, the foreclosure sale occurred on March 19, 2019. Plaintiff filed suit on August 28, 2019. The six month redemption period ended in September 2019.

Plaintiff's attempt to allege fraud or irregularity in the foreclosure process is her claim that "BONYTC does not own the Note . . . does not own an interest in the Note, . . . [and] was not the servicer of the Mortgage." ECF No. 1-2 at PageID.26. Therefore, "BONYTC did not satisfy the requirements of MCL 600.3204(1)(d) needed to foreclose by advertisement." *Id.* Plaintiff does not explain the acronym BONYTC, nor does she use the acronym in any other location in her complaint. It appears Plaintiff is referring to Bank of New York Mellon, although it is unclear why she uses this acronym with no explanation. Therefore, for purposes of the motion to dismiss, the Court will assume the BONYTC is BNYM. Accordingly, despite Plaintiff's allegations of an email from BYNM explaining it was a Trustee of the loan and it "do[es] not own the loan or the property" (which presumably is the fact is she was relying on in making this assertion), Plaintiff provides a corporate assignment of mortgage between MERS and Bank of New York Mellon with her complaint. ECF No. 1-2 at PageID.64. In addition, Plaintiff includes the sheriff's deed to the property which states

> a certain mortgage was granted by Jennifer B. Fosgitt, a married woman and Richard L. Fosgitt II, her husband, mortgagor(s), to Mortgage Electronic Registration Systems, Inc., Mortgagee, dated October 17, 2005, and recorded on October 24, 2005 in Liber 1316 on page 703, and modified by Affidavit or Order recorded on November 9, 2016 in Liber 1601 on Page 113, and assigned by said Mortgagee to The Bank of New York Mellon, successor trustee to JPMorgan

> Chase Bank, National Association, as Trustee f/b/o holders of Structured Asset Mortgage Investments II Inc., Bear Stearns ALT-A Trust 2005-10, Mortgage pass-Through Certificates, Series 005-10 as assignee as documented by an assignment dated November 23, 2016 recorded on December 21, 2016 in Liber 1602 on Page 100, inMidland County Records, Michigan. ECF No. 1-2 at PageID.67.

The Court must construe allegations in favor of Plaintiff for a motion to dismiss. Here, however, Plaintiff provides documentation that undermines her factual allegations. Accordingly, Plaintiff fails to allege fraud that BONYTC does not own the loan when she furnishes documentation showing the assignment of the loan to BNYM and the sheriff's deed that corroborates the assignment. Therefore, she has failed to state a claim for fraud in the foreclosure process. An unattached alleged email from BNYM is insufficient to meet the "'high standard'" in order to havea foreclosure set aside after the lapse of the statutory redemption period as required by Michigan law considering the other evidence she provided. *Conlin*, 714 F.3d at 360. Plaintiff's claim for Count III – illegal foreclosure under MCL 600.3204 will be dismissed.

**D.**

Plaintiff further alleges "illegal foreclosure-respecting notice of default" for Count IV of her complaint. ECF No. 1-2 at PageID.26-27. Defendants combine their analysis of Counts III and IV into a single MCL § 600.3204 argument. They argue there is no clear showing of fraud from the foreclosure, and even if there

were, Plaintiff has not alleged prejudice from the fraud. ECF No. 5 at PageID.173-178. However, Plaintiff does not refer to MCL § 600.3204 in Count IV and there is no similarity between Count III and Count IV, except for the beginning of each count including the language "illegal foreclosure." The only reference to a statute, case, rule, or contract in Count IV is "the Notice of Default under Section 22 of the Mortgage." It is not alleging a MCL § 600.3204 claim. Accordingly, Defendants argument that Plaintiff has not provided a clear showing of fraud is without merit. Defendants' motion to dismiss Count IV will be denied.

**E.**

Count V of Plaintiff's complaint alleges violations of Regulation X also known as 12 CFR 1024.41. ECF No. 1-2 at PageID.27. Regulation X allows "a borrower [to] enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f))." 12 CFR § 1024.41(a). It requires prompt notification of receipt of a loss mitigation application, prohibits first notice of a foreclosure unless certain conditions are met, prevents a servicer for moving for an order of sale if a borrower has submitted a loss mitigation application that has not been denied, allows a borrower to appeal a loss mitigation application denial, and requires loss mitigation applications to be transferred between servicers, if necessary. For Count V, Plaintiff has alleged that Defendants violated the prohibition on dual tracking. ECF No. 1-2 at PageID.27.

Defendants argue Plaintiff fails to state a claim under RESPA because she "failed to plead facts showing actual damages." ECF No. 5 at PageID.179. RESPA only allows recovery for actual damages, statutory

damages up to $2000 for repeated violations, and litigation costs if plaintiff is successful. 12 U.S.C. § 2605(f); Szczodrowski v. Specialized Loan Servicing, LLC, 2015 WL 1966887 at *7 (E.D. Mich. 2015). Courts in this district have previously held that for a plaintiff "[t]o successfully plead a RESPA claim, [she] must allege actual damages, which resulted from the Bank Defendants' failure" to comply with RESPA. Battah v. ResMAE Mortgage Corp., 746 F. Supp. 2d 869, 876 (E.D. Mich. 2010). "The complete absence of alleged damages warrants a dismissal of Plaintiff's RESPA claim." Id. In a similar case where a plaintiff's principal relief was to set aside a sheriff's sale of their property, Judge Steeh concluded that that relief "is unavailable to him under RESPA." Houle v. Green Tree Servicing, LLC, 2015 WL 1867526 at *4 (E.D. Mich. 2015). Judge Steeh granted the defendant's motion to dismiss because the plaintiff in that case failed to allege monetary damages. Id. ("In order to seek monetary damages for a RESPA violation, plaintiff is required to make damage allegations, which are absent in this plaintiff's complaint.").

In her prayer for relief, Plaintiff sought "[a]gainst Defendants, for their violations of RESPA, award Plaintiff actual damages, additional [statutory] damages of $2000, attorney's fees, costs and litigation expenses." ECF No. 1-2 at PageID.35. She also seeks "an order requiring Defendants to remove or otherwise rescind any and all negative information transmitted to any credit agency which appears on Plaintiff's credit report/s [sic] in relation to the illegal foreclosure." ECF No. 1-2 at PageID.35. The Sixth Circuit has held that when a plaintiff alleged "Chase provided information to consumer reporting agencies regarding overdue payments that were related to her QWR during the

prohibited 60-day period [it was] sufficient[] [to] state[] a RESPA violation." Marais v. Chase Home Fin., LLC, 736 F.3d 711, 721 (6th Cir. 2013). Here, however, Plaintiff does not mention any actual damages she suffered—any monetary loss from mailing in RMA forms, any additional interest she was required to pay, or even any allegation that one of the Defendants submitted information to a credit reporting agency. The closest Plaintiff gets to alleging damages is her statement that she "was inconvenienced and incurred expenses in seeking the information the Defendants refused to provide" or her prayer for relief to a possible, unspecified damage to her credit report. ECF No. 1-2 at PageID.29, 35. However, 12 U.S.C. § 2605 only requires Defendants to promptly reply and either provide the information or explain why they are not providing it. 12 U.S.C. § 2605(e). It does not require them to provide any and all information. Also, her prayer for relief as to unalleged negative information on her credit report is insufficient to state a claim for damages under RESPA.

Plaintiff attempts to rectify the need for damages in her response by arguing she suffered "actual damages, including, but not limited to (1) out-of-pocket expenses incurred dealing with the RESPA violation [the QWR violation] including expenses for preparing, photocopying and obtaining certified copies of correspondence, (2) lost time and inconvenience to the extent it resulted in actual pecuniary loss, (3) late fees and (4) denial of credit or denial of access to full amount of credit line, additional damages in the amount of $2,000.00, plus attorney's fees, the cost of this lawsuit, and litigation expenses." ECF No. 8 at PageID.392. Plaintiff could have sought to amend her complaint in response to the motion to dismiss. However, Plaintiff chose to insert the new allegations into her response to

the motion instead. Motions to dismiss are decided on the facts alleged in the complaint and as such, Plaintiff's additional facts included in her response will not be considered.

Accordingly, Plaintiff's three claims under RESPA – Count V for violations of 12 CFR 1024.41 which is based on RESPA, Count VI – Damages under the RESPA, and Count IX – Dual- tracking violation from RESPA will be dismissed for failure to state a claim due to Plaintiff's failure to plead actual damages as required by RESPA.

**F.**

In Count VII, Plaintiff claimed Defendants breached their contract, i.e., the note and mortgage, with Plaintiff. ECF No. 1-2 at PageID.29-30. The elements for a Michigan breach of contract claim are "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." Bank of Am., N.A. v. First Am. Title Ins. Co., 878 N.W. 2d 816, 829 (Mich. 2016).

The first alleged breach occurred when "Defendants failed to provide Plaintiff the notices required by the Mortgage prior to foreclosing, constituting a breach of contract." Id. at PageID.30. In their motion to dismiss, Defendants assert "Plaintiff's claim fails because the Notice of Default makes clear that Defendants complied with the notice provisions of Paragraph 22 of the Mortgage." ECF No. 5 at PageID.184. Additionally, Defendants argue "Plaintiff has not alleged any damages related to the claimed breach" and as such, has not stated a claim for damages. Id. Defendants included an alleged Notice of Default that was sent to Plaintiff in their motion. However,

Plaintiff did not attach a notice of default to her complaint and in fact, alleges she did not receive a notice of default. Whether she did receive a notice of default is a question that could be resolved with a Rule 56 motion. However, in a 12(b)(6) motion, the facts alleged by Plaintiff are presumed to be true. And in this case, Plaintiff alleges she never received a notice of default and as a result, she lost her home to foreclosure. If true, this would be a breach of contract. Accordingly, Plaintiff prevails on the motion to dismiss the breach of contract claim.

The second allegation asserted that Defendants "breached . . . the implied covenant of good faith and fair dealing in the contract with Plaintiff by . . . a. Failing to send Plaintiff the notices required by the Mortgage; b. Dual tracking Plaintiff; c. Disingenuously negotiating loss mitigation assistance with Plaintiff; [and] d. Misleading Plaintiff about approval and extension of loss mitigation assistance as an alternative to foreclosure." Id. Defendants argue the breach of contract claim should also be dismissed because Michigan courts do not recognize a claim for breach of the implied covenant of good faith and fair dealing. ECF No. 5 at PageID.183; ECF No. 13 at PageID.1782.

It is well-established that a plaintiff cannot assert an independent cause of action for breach of an implied covenant of good faith and fair dealing in a contract. The implied covenant of good faith and fair dealing "is not enforceable as an independent cause of action in Michigan." Gorman
v. Am. Honda Motor Co., 839 N.W. 2d 223, 235 (Mich. Ct. App. 2013). However, Michigan courts have held that a plaintiff may bring a breach of contract claim based upon defendant's alleged failure to meet the standards of good faith and fair dealing in executing

contract provisions when left to their own discretion. Liggett Rest. Grp., Inc. v. City of Pontiac, 2005 WL 3179679 at *1 (Mich. Ct. App. Nov. 29, 2005) ("A breach of contract may be found where bad faith or unfair dealing exists in the performance of a contractual term when the manner of performance was discretionary.").

The question of whether a plaintiff can sue for breach of implied duty of good faith and fair dealing is resolved by footnote in Ann Arbor Acquisition Corp. v. General Motors Corp., "In Belle Isle Grill Corp. v. Detroit, this Court stated in response to the plaintiff's argument-that every contract contains an implied covenant of good faith and fair dealing-that Michigan did not recognize this type of claim. However, this Court cited Ulrich v. Fed Land Bank of Saint Paul [to justify the conclusion], which held that Michigan did not recognize a separate tort action for breach of an implied covenant of good faith." 2005 WL 658761 at *3 n.1 (Mich. Ct. App. 2005) (emphasis in original). Michigan law prohibits an independent claim for breach of implied duty of good faith and fair dealing. Liggett Rest. Grp., Inc. v. City of Pontiac, 2005 WL 3179679 at *1 (Mich. Ct. App. Nov. 29, 2005) ("Michigan does not recognize a separate cause of action for breach of an implied covenant of good faith and fair dealing apart from a claim for breach of the contract itself."). However, a plaintiff is allowed to bring a breach of contract claim premised on alleged violations of good faith and fair dealing, as long as the violations relate to defendant's discretionary actions to fulfill the terms of the contract. Brimm v. Wells Fargo Bank, N.A., 688 Fed. Appx. 329, 331 (6th Cir. 2017) ("Michigan recognizes an implied covenant of good faith and fair dealing only when one party 'makes the manner of its performance a matter of its own discretion.'" (quoting

Burkhardt v. City Nat'l Bank of Detroit, 226 N.W.2d 678, 680 (1975))); see also 5504 Reuter, LLC v. Deutsche Bank Nat. Tr. Co., 2014 WL 7215197 at *4 (Mich. Ct. App. Dec. 18, 2014) ("In order to succeed on a breach of contract claim, plaintiff would need to show a breach of the terms of the contract itself; it cannot premise a breach of contract action on a breach of the implied duty of good faith and fair dealing.").

In this case, Plaintiff alleged two categories of breach of contract – 1) breach of the express provision of the contract (failure to provide the stated notices) and 2) multiple allegations of failure to follow the implied covenant of good faith and fair dealing regarding Defendants' execution of unspecified terms in the contract (i.e., terms left to a party's discretion). Plaintiff has properly pled a breach of contract claim with two separate, and properly pled, allegations for the breach. Defendants' motion to dismiss on the breach of contract claim will be denied.

**G.**

In Count VIII Plaintiff requests her foreclosure by advertisement be converted to a judicial foreclosure. ECF No.1-2 at PageID.30-31. Plaintiff cites the statute governing judicial foreclosure and explains the requirements for a judicial foreclosure. Id. Then, Plaintiff pleads "[i]f they are legally allowed to do so, there would be no prejudice to Defendants if they [were] required to foreclose judicially instead of simply by advertisement." Id. Defendants argue Michigan law does not allow a foreclosure to be converted from a foreclosure by advertisement to a judicial foreclosure, nor does Plaintiff provide any law authorizing a court to convert a foreclosure by advertisement to a judicial

foreclosure. ECF No. 5 at PageID.184-185. Michigan courts have held that "[i]f no cause of action [for converting foreclosure by advertisement to judicial foreclosure] exists under the statute, then plaintiff has failed to state a claim for which relief may be granted, and summary disposition is appropriate because that count would be unenforceable as a matter of law and because no amount of factual development could possibly justify a right to recovery." Long v. Chelsea Cmty. Hosp., 557 N.W.2d 157, 159 (1996) (distinguished by Feyz v. Mercy Mem'l Hosp., 692 N.W.2d 416, (Mich. Ct. App. 2005) (vacated by Feyz v. Mercy Mem'l Hosp., 719 N.W.2d 1 (Mich. 2006) (no adverse holding to quoted language))); Lash v. City of Traverse City, 720 N.W.2d 760, 763 (Mich. Ct. App. 2006) (affirmed in part, reversed in part, on other grounds, Lash v. City of Traverse City, 735 N.W.2d 628 (Mich. 2007)); Estate of Doreen Bessette v. Wilmington Tr., N.A., 2016 WL 6947480 at *3 (E.D. Mich. 2016). Additionally, specifically on this point, Judge Rosen has concluded that "[t]here is nothing in the foreclosure statutes providing for the conversion of a foreclosure by advertisement to a judicial foreclosure." Estate of Doreen Bessette, 2016 WL 6947480 at *3. Plaintiff has failed to assert any legal foundation to convert a foreclosure by advertisement to judicial foreclosure. In addition, the house has already been foreclosed upon and the statutory redemption period has expired. Even if there were legal grounds to convert the foreclosure to a judicial foreclosure, there is no foreclosure to convert because it has already occurred. Holliday v. Wells Fargo Bank, N.A., 569 Fed. Appx. 366, 370 (6th Cir. 2014). Plaintiff has failed to state a claim for conversion and the count will be dismissed.

**H.**

Plaintiff's final count is for "injunction and other relief." ECF No. 1-2 at PageID.32-33. Plaintiff identifies multiple elements that she alleges meet the standard for a temporary restraining order, "great likelihood of success on the merits of the case," "irreparable harm," "no adequate remedy at law," "harm to the Defendants is considerably less if the Temporary Retraining Order is issued than the harm to the Plaintiff if the Temporary Restraining Order does not issue," "granting of this Temporary Restraining Order will further the public interest," and "that Notice to the Defendants was not required because such notice would precipitate further injury to Plaintiff as any efforts to evict Plaintiff must be discontinued immediately." Id. A temporary restraining order is a motion that can be filed ex parte by a plaintiff. Fed. R. Civ. P. 65(b). However, it must be filed as a motion, not buried as a count in a complaint. If Plaintiff seeks a temporary restraining order or a preliminary injunction, a motion must be filed with this Court and Plaintiff must follow FRCP 65.

Also under Count X Plaintiff "prays that this Honorable Court shall grant her Motion and stay and Toll the Redemption Period," alleges "[t]hat the right to have equitable controversies dealt with by equitable methods is as sacred as the right of trial by jury," and explains that "after hearing the evidence, the court may grant a constructive trust over the property in favor of Plaintiff." Id. These are all forms of relief, not claims of misconduct. Because Plaintiff has not alleged a violation of any statute or law in Count X, Defendants' motion for failure to state a claim as to Count X will be granted.

## III.

Accordingly, it is hereby **ORDERED** that Defendants' motion to dismiss, ECF No. 5, is **GRANTED IN PART AND DENIED IN PART**. Defendants motion to dismiss is granted on Counts II, III, V, VI, IX, and X. Defendants motion to dismiss is denied as to Count I, IV, and VIII.

It is further **ORDERED** that Counts II, III, V, VI, IX, and X of Complaint, ECF No. 1, are

**DISMISSED WITH PREJUDICE.**

Dated: January 29, 2020

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge