No.:

In The
Supreme Court of the United States

Mortgage Resolution Servicing, LLC, 1st

Fidelity Loan Servicing, LLC,

and S&A Capital Partners, Inc., Petitioner(s)

v.

JPMorgan Chase Bank, National Association,

Chase Home Finance, LLC,

and JP Morgan Chase & Co. Respondent(s)

On Petition For Writ Of Certiorari To The United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals in holding that the damages presented in the summary judgment record were not reasonably certain, by failing to consider the general and special damages presented by 1st Fidelity and S&A, and by failing to allow those damages to be presented to a trier of fact, and, thus, granting summary judgment?

2. Whether the Second Circuit Court of Appeals erred by failing to apply the tolling doctrine of continuing violation when examining the statute of limitations defense raised by the Respondents, and by upholding the trial court's granting of summary judgment for the Respondents when there exists issues of genuine material fact regarding whether Petitioner's damages were caused by the continuing and ongoing breaches of the Parties Agreements by the Respondents, or were solely the result of continuing harm from a single breach?

3. Whether the Second Circuit Court of Appeals erred in ruling that all future breaches by the Respondents regarding more than three thousand five hundred (3,500) mortgage loans which were purchased by Petitioners from Respondents; where Respondents accepted payments from

borrowers and insurance companies for loans which had been sold to Petitioner; Loans that were subsequently either discharged/forgiven by Respondent without the Petitioners' permission or knowledge; where the Respondents re-assigned to themselves mortgages purchased by the Petitioners; or where Respondents took action(s) which interfered with Petitioners' ability to enforce/collect upon their mortgages purchased from the Respondent; are time barred because they relate back to the original breach rather than the Respondents' actions subsequent to the accrual date determined by the trial court, and the Respondents' ongoing breaches demonstrated below?

PARTIES TO THE PROCEEDINGS

PETITIONERS AND PLAINTIFFS-APPELLANTS BELOW

Mortgage Resolution Servicing, LLC, 1st Fidelity Loan Servicing, LLC, and S&A Capital Partners, Inc.

RESPONDENTS AND DEFENDANTS-APPELLEES BELOW

JPMorgan Chase Bank, National Association, Chase Home Finance, LLC, and JP Morgan Chase & Co.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Petitioners 1st Fidelity Loan Servicing, LLC, S&A Capital Partners, Inc. and Mortgage Resolution Servicing, LLC, declare that each of the Petitioners has no parent corporation and no publicly traded corporation that currently owns 10% or more of its stock.

LIST OF DIRECTLY RELATED CASES

United States, ex rel. Laurence Schneider, Petitioner v. JPMorgan Chase Bank, National Association, et al., Case No.: 19-678, United States Supreme Court, Judgment entered April 6, 2020. 140 S.Ct. 2660 (2020)

Mortgage Resolution Servicing, LLC, et al., v. JPMorgan Chase Bank, N.A., et al., United States District Court Southern District of New York, Case No.: 15 CV 293-LTS-RWL, Judgment entered September 27, 2019. 2019 WL 4735387 (U.S. S.D.N.Y 2019).

Mortgage Resolution Servicing, LLC, 1st Fidelity Loan Servicing, LLC, S&A Capital Partners, Inc., v. JPMorgan Chase Bank, N.A., Chase Home Finance, LLC, JPMorgan Chase & Co., Case No.: 21-429, United States Court of Appeals for the Second Circuit, Judgment entered September 27, 2019.

United States, ex rel. Laurence Schneider, Petitioner v. JPMorgan Chase Bank, National Association, et al., Case No.: 19-7025, United States Court of Appeals for the District of Columbia Circuit, Judgment entered August 22, 2019. 2019 WL 4566462 (2nd Cir. 2019)

Schneider v. JP Morgan Chase Bank, National Association et al. United States District Court for the District of Columbia, Case No.: 14-cv-1047-RMC, Order Transferring Case entered on June 19, 2014. 224 F.Supp.3d 48 (D.C. Cir. 2017)

United States of America ex rel. Laurence Schneider v. JPMorgan Chase Bank, N.A., Chase Home Finance, LLC, JPMorgan Chase & Co., United States District Court District of South Carolina, Columbia

Division, Case No.: 13-cv-1223-JFA[1] Judgment entered on December 22, 2016. 224 F.Supp.3d 48 (D.C. Cir. 2016)

[1] It should be noted that the United States District Court for South Carolina's Orders culminating on January 24, 2014, unsealing the Court's entire File despite its repeated sealing [D.E.'s 8, 16, 21, 39, and 42] and requiring service upon the Plaintiff's in the Case *sub judice* despite that Court's sanctioning of a two hundred and fifty-nine (259) delay in violation 31 USC § 3730(c)(2).

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The Second Circuit Court of Appeals upheld the trial court's dismissal of the Petitioner's breach of contract claims based upon Florida's statute of limitations Fla. Stat. 95.11(2)(b) despite their arguments that the equitable tolling doctrine should have served to extend such due to Respondents' ongoing actions contrary to the Petitioners' interests, and that the Petitioners' arguments for the application of the continuing violations doctrine were barred. *See* 2022 WL 211981; App. 1-7.

The Second Circuit Court of Appeals affirmance of the trial court's affirmance of summary judgment found Petitioners also failed to adduce any evidence that they incurred litigation and operating expenses. *Id.* The district court concluded that "[b]ecause Plaintiffs have failed to come forward with evidence from which a jury could infer that they were injured as a result of Chase's issuance of debt forgiveness letters, recordation of lien releases, or retention of borrower payments, Plaintiffs' remaining breach of contract claims are dismissed." *Id.* The Second Circuit Court of Appeals erred in their agreement with the district court that the record does not support Petitioners' claim that they incurred damages, and that such a showing was necessary to survive summary judgment.

JURISDICTION

The Order of the Court of Appeals for the Second Circuit was entered on January 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This Petition was previously timely filed on

April 25, 2022, and on April 27, 2022, the Office of the Clerk of the Supreme Court sent correspondence providing sixty (60) to amend the Petition to comply with the Rules of the Court including Rules 14 and 33.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This is a civil action brought by Petitioners/Plaintiffs 1st Fidelity Loan Servicing, LLC, S&A Capital Partners, Inc. and Mortgage Resolution Servicing, LLC versus Respondents/Defendants J.P. Morgan Chase Bank, N. A., J.P. Morgan Chase & Co. and Chase Home Finance, LLC related to Petitioners purchases of residential mortgages from Respondents, where subsequent to their purchase Respondents failed to assign sold mortgages, collected payments from borrowers for sold mortgages and insurance companies, and received benefits from the United States Government for loans supposedly assigned to Petitioner. The Second Circuit Court of Appeals found the Appellant's breach of contract claims, despite such occurring after their assignment, the Trial Court's accrual date (for Statute of Limitations purposes), and where ongoing damages continue to accrue were barred by Florida's Statute of Limitations, Fla. Stat. § 95.11(2)(b), and that Petitioners' breach of contract claims were barred by the State of New York's requirements to prove damages where damages were substantially demonstrated.

Fla. Stat. § 95.11(2)(b): A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of paragraph *(5)(e), s. 255.05(10), s. 337.18(1), or s. 713.23(1)(e)*, and except for an action for a deficiency judgment governed by paragraph (5)(h).

N.Y. C.P.L.R. § 202: An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

STATEMENT OF THE CASE

Petitioners' 1st Fidelity Loan Servicing, LLC ("1st Fidelity"), S&A Capital Partners, Inc. ("S&A") (together "SA&F") and Mortgage Resolution Servicing, LLC ("MRS") (collectively "Schneider Entities") are Florida entities with principal places of business in Florida. Laurence Schneider ("Schneider") is a principal of Petitioners 1st Fidelity, S&A and MRS. The Schneider Entities initially filed this action in the Supreme Court of the State of New York, County of New York on December 24, 2014, against Respondents, J.P. Morgan

Chase Bank, N. A., J.P. Morgan Chase & Co. and Chase Home Finance LLC (collectively "Chase or Respondents") for various breaches and torts against Schneider's Entities (hereinafter"Petitioners").Respondents/Chase removed the matter to the United States District Court for the Southern District of New York on January 15, 2015. The Petitioners' filed a Second Amended Complaint on March 31, 2015, to which Chase filed a Motion to Dismiss on May 14, 2015. Petitioners their Third Amended Complaint on August 24, 2015. Chase filed a Partial Motion to Dismiss on November 12, 2015. The District Court granted in part and denied in part the Partial Motion to Dismiss the Third Amended Complaint on February 13, 2017. Petitioners filed a Motion for Leave to File a Fourth Amended Complaint on March 6, 2017. The District Court denied the Motion for Leave to File a Fourth Amended Complaint on March 30, 2018. Thereafter the parties filed cross motions for summary judgment.

On September 29, 2019, District Court, Judge Laura T. Swain, granted Respondents' July 2018 motion for partial summary judgment as to a portion of Appellant MRS's breach of contract claims as time-barred; against other breaches of contract claims as lacking proof of damages; and against fraud and negligent misrepresentation claims as duplicative and also time barred, including any claims for punitive damages. The decision went on to grant Respondents/Chase March 2019 motion for partial summary judgment on

Petitioners' contract and damages claims with respect to Petitioners' remaining breach of contract claims, including claims for disgorgement. Based upon these decisions, the Trial Court granted Respondents' March 2019 motion to exclude the testimony of Appellants' expert witness Jeffrey S. Andrien and denied as moot both Petitioners' October 2018 motion for partial summary judgment on its fraud and negligent misrepresentation claims and Petitioners' March 2019 motion for partial summary judgment with respect to breach of contract claims. Finally, the Trial Court denied Petitioners' March 2019 motion for partial summary judgment on any breach of contract claims that remained. On September 30, 2019, the Trial Court entered Judgment. On October 11, 2019, Petitioners moved for partial reconsideration of the Court's September 27, 2019, Memorandum Opinion and Order. Petitioners sought reconsideration of the granting of summary judgment in favor of the Respondents on the grounds that Petitioners failed to raise a triable issue of fact as to the existence of damages for acts that occurred after December 24, 2009, the date the Court determined to be the date of accrual of Petitioners' cause of action; damages which would have been timely according to the Trial Court's reasoning in its September 27, 2019, Memorandum Opinion and Order. The Court denied Petitioners' motion on January 22, 2021.

The various and unique breaches and torts set forth in the Petitioners' Complaint(s) continue to occur up to the present day. The record reflects such actions up to and including March 13, 2017. However, further breaches occurred since the close of the record and have been documented as recently as this week, while this brief was being finalized. For these and the reasons enumerated below, this Court should overturn the decision of the United States District Court affirming the trial court's grant of summary judgment against the Petitioners.

A. Factual Background

1. Historical Compliance with Agreements

1st Fidelity, S&A and MRS utilized a business strategy of purchasing distressed mortgage loans (loans in default) from financial institutions, such as the Chase, at highly discounted prices. After acquiring loans, the Schneider Entities contacted the borrowers directly to arrange for mutually agreeable payment solutions. The Schneider Entities provided a solution, which allowed borrowers to keep their homes. The difference between the cost to acquire the loans and the outstanding principal on the respective loans represents the profits that the Schneider Entities earned on their investments. SA&F generated significant profits via this strategy.

Starting in March 2004, SA&F purchased mortgage loans from Chase under two separate Master Mortgage Loan Sale Agreements ("MMLSA"). On April 12, 2005, Chase and S&A signed the first of their MMLSAs (the "S&A MMLSA"). On September 20, 2010, Chase and 1st Fidelity signed the first of their separate MMLSAs (the "1st Fidelity MMLSA"). Under the MMLSAs, SA&F purchased first and second lien residential mortgages one at a time. In subsequent years, SA&F cumulatively purchased 1,003 individuals first and second lien mortgages from Chase. In those years, Chase sent loan history, post-charge payment history (if applicable), the original file and all documents within it, including the assignment, borrower payments or payment history, RESPA "goodbye-letters" and the assignments on all loans sold to SA&F. In each of the mortgage purchases made by SA&F, Chase informed SA&F of all pertinent information in full compliance with Chase's Recovery One Note Sale Procedure handbook. The information and documentation that Chase historically provided were necessary to board and service loans pursuant to industry practices and regulatory requirements. When SA&F

discovered that documents were missing from the files, Chase, without fail, assisted in locating and transferring these "trailing documents" so that the loans could be serviced.

On February 5, 2009, MRS executed the Mortgage Loan and Purchase Agreements ("MLPA") with Chase. Under the MLPA, MRS agreed to purchase a pool of first lien residential mortgage loans. Both the MMLSAs and the MLPA entitled the Petitioner to principal and interest payments from borrowers. After the execution of the MLPA, Respondents/Chase performed a series of continuous, unique, independent acts that violated the terms of the MLPA. These acts included, but were not limited to, failing to assign significant numbers of mortgages, assigning dozens of mortgages that were not included in the list of loans, and unilaterally releasing hundreds of mortgages included under the MLPA that were the property of MRS, causing harm and damages to MRS.

2. Damaging the Petitioners by a Multitude of Different Methods

In addition to the actions taken with regard to the MLPA loans, Chase abruptly changed from its prior general compliance and began to similarly interfere with the loans purchased by SA&F under the MMLSA, sometimes years after the purchase of said loans. The Schneider Entities commenced this action on December 24, 2014, contending that Chase had breached the MLPA and

MMLSA with respect to thousands of the loans, and had committed fraud and negligent misrepresentation. SA&F have suffered damages. Chase's actions have caused borrowers to stop paying SA&F, sue SA&F and/or otherwise embroil SA&F in costly litigation, causing SA&F significant monetary damages. In its Answer to the Fourth Amended Complaint, Chase admitted that it sent debt forgiveness letters to debtors whose loans it sold and were then owned by SA&F. In its same Answer, Chase admitted that it released liens on loans sold to and owned by SA&F and/or MRS. There are a litany of examples in the record of such damages. Chase issued 27 debt forgiveness letters and released the liens of 788 borrowers whose loans it previously sold to SA&F and/or MRS, equaling unpaid principal balances in the millions of dollars.

Chase used Schneider Entities' loans in consumer relief initiatives. In discovery, Chase identified in 621 lien releases and 23 debt forgiveness letters for mortgages owned by the Schneider Entities, 363 of which occurred after March 1, 2012. Documents produced in discovery also show that 171 additional loans owned by the Schneider Entities received some form of consumer relief by Chase, 36 of which occurred on or after March 1, 2012. Chase was granted some form of consumer relief after March 1, 2012, for 399 loans with a total outstanding balance of $16.18 million owned by the Schneider Entities. To the extent that these loans were used to satisfy the consumer relief requirements, required under the terms of the various government settlement agreements, Chase benefitted by its wrongdoing. Chase received in excess of $557 million from the

Government through MHS, HAMP, NMS and RMBS by issuing debt forgiveness letters and lien releases to borrowers whose loans it sold to Petitioners. SA&F have been unable to service loans since borrowers now claim said loans have been satisfied or released. Petitioners have been forced to defend against accusations that their attempts to service the loans they purchased are unlawful due to acts taken by Respondent/Chase.

RATIONALE FOR GRANTING PETITION

It was an error for the Second District Court of Appeals to uphold the trial court's grant summary judgment on the basis that the evidence proffered by the Appellants/ Plaintiffs was insufficient to frame a genuine issue of material fact with respect to Appellants/Plaintiffs' damages and that SA&F failed to demonstrate the legal viability of its theories of damages. The lower Court applied the incorrect standard. Under New York law, plaintiffs are only required to demonstrate a stable foundation for a reasonable estimate of damages. When viewed in the light most favorable to the Appellants/Plaintiffs, the record demonstrates more than sufficient grounds for a finding by the trier of fact that the non-moving party was damaged. The "hard evidence" standard cited by the Court refers to the fact of damages, not the amount. An actor violating its contract should not be permitted entirely to escape liability because the amount of damage caused is uncertain when that uncertainty stems from the actor's bad acts. When the damages are uncertain because of an actor's bad acts, the burden of uncertainty of damages falls upon the wrongdoer.

It was also an error for the Second Circuit Court of Appeals uphold the trial courts entry of summary judgment against the Petitioners on the basis of the Florida statute of limitations by application of the borrowing statute. While true that New York's "borrowing statute," N.Y. C.P.L.R. 202, provides that, when a nonresident of New York sues on a cause of action accruing outside of New York, the claim must be timely under the limitations period of both New York and the jurisdiction where the claim accrued, that is not the entire rule. The interpretation of the rule also requires that the tolling exceptions to the limitations period of the foreign jurisdiction must be applied to the relevant claims. In this case, the Eleventh Circuit and Florida courts recognize the doctrine of "continuing violations" as a toll to various statutes of limitations. This doctrine is distinguished from a "continuing harm" by the requirement of a new and overt act that invades the interests of the aggrieved party. Without such an exception, wrongdoers, as is occurring here, continue to reap the benefit of their continuing violations with no threat of punitive enforcement. To prevent such an outcome, the applicable statute of limitations runs from the last overt act. Further, whether the actions of the Appellees constitute a continuing violation or continuing harm is a genuine issue of material fact for the trier and is ill-suited for summary judgment. Here, the bad actions of the Appellees continue unabated, with one that occurred while this brief was being drafted. Because the behaviors of the Appellee are unpredictable, unique and escalating, this matter is best suited for a trier of fact to determine whether the acts are continuing violations and therefore whether the statute of limitations commences from the last overt act.

I. CHASE'S WRONGFUL ACTS ARE CONTINUING VIOLATIONS AND TOLL THE STATUTE OF LIMITATIONS

The Second Circuit Court of Appeals erred in upholding the trial court's granting of summary judgment on the basis that MRS's claims for breach of contract, fraud and negligent misrepresentation were time-barred. The Court applied the appropriate New York statute regarding choice of law and reviewed the relevant Florida statute of limitations for the contract, fraud and negligent misrepresentation claims. However, the lower Court failed to properly apply the equitable tolling doctrine of continuing violations to MRS's claims. The application of the doctrine of equitable tolling and the continuing violations doctrine to the dismissed claims restarts the statute of limitations from the date of the last overt act by Chase and is an issue that is best resolved by a trier of fact.

Chase moved for summary judgment against MRS on the basis that the pre-December 24, 2009, breach of contract, fraud and negligent misrepresentation claims were time-barred because they had accrued no later than February 25, 2009, more than five years before this action was commenced on December 24, 2014. Importantly, Chase did not argue that any of the breaches of contract, instances of fraud or negligent misrepresentation should be time barred if they accrued after December 24, 2009. Chase argued that the choice of law provision in the MLPA required the application of the New York borrowing statute

New York's "borrowing statute," N.Y. C.P.L.R. § 202, provides that when a nonresident of New York sues on a cause of action accruing outside of New York, the claim must be timely under the limitations period of both New York and the foreign jurisdiction where the claim accrued.

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall

apply.

N.Y. C.P.L.R. § 202.

Under the applicable Florida statute of limitations, a breach of contract claim must be filed within five years, and an action based in fraud must be filed within four years. Fla. Stat. §§ 95.11(2)(b), 95.11(3)(j).

The interpretation of the rule by the courts requires that the tolling exceptions to the limitations period of the foreign jurisdiction must also be applied to the relevant claims. "Where New York's borrowing statute causes another state's statute to be borrowed, that state's statute and the interpretations given its tolling and other provisions will be applied as a total package." *In re Agent Orange Product Liability Litigation*, 597 F.Supp. 740, 801 (E.D.N.Y. 1984). *See also Lehtonen v. E. I. DuPont DeNemours & Co.*, 389 F.Supp. 633 (D. Mont. 1975). "In borrowing the foreign statute, all the extensions and tolls applied in the foreign state must be imported with the foreign statutory period, so that the entire foreign statute of limitations applies, and not merely its period." *Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 647 N.E.2d 1308, 1316 (N.Y. 1995) (internal quotations omitted). Where, under this section, the sister state limitation period is to be applied, it is not only the limitations period itself, which is borrowed, but logically the court must take it, "fully encumbered with all the foreign state's rules as to tolls, disabilities, etc." *Knieriemen v.*

Bache Halsey Stuart Shields Inc., 427 N.Y.S.2d 10 (App. Div. 1980). *See also American Sur. Co. of N.Y. v. Gainfort*, 219 F.2d 111 (2nd Cir. 1955); *Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640 (S.D.N.Y. 1964); *Antone v. General Motors Corp., Buick Motor Div.*, 473 N.E.2d 742 (N.Y. 1990).

The Eleventh Circuit courts recognize the doctrine of "continuing violations" as a toll to various statutes of limitations, and "The continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006). *See also Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001); *Viera v. City of Lake Worth, Florida*, 230 So. 3d 484 (Fla. Dist. Ct. App. 2017) (separate cause of action accrued for statute of limitations purposes when city missed payments for health insurance benefits); *Rindley v. Gallagher*, 890 F. Supp. 1540 (S.D. Fla. 1995) (for continuing violation, there must be a substantial nexus between time barred acts and the timely asserted acts. Three instructive factors apply: 1) subject matter of the discrimination; 2) frequency of occurrences; and 3) degree of permanence of violation); *S.E.C. v. Huff*, 758 F.Supp.2d 1288 (S.D. Fla. 2010) (holding that the court must distinguish between the present consequences of a one-time violation that do not extend the limitations period, and a continuation of a violation into the present, which does).

In *S.E.C. v. Huff*, the defendants were accused of an elaborate scheme conducted in flagrant disregard of the federal securities laws. The S.E.C. alleged that the defendants had artificially inflated the value of their company and failed to disclose related party transactions that benefitted them. The defendants allegedly overstated their assets by 35% and understated their liabilities by 38-50% from 2001 to 2003. The S.E.C. brought the action against the defendants in 2008, and the defendants claimed that the statute of limitations precluded some of the relief the S.E.C. had sought. The court found that the doctrine of continuing violation applied to the defendants' actions and the remedy sought by the S.E.C.

The court reasoned that the purpose of the Securities and Exchange Act was to protect investors and that congressional intent was to protect good faith investors from unscrupulous acts that would otherwise discourage investment in general. The court further reasoned that application of a hardline statute of limitations, without the application of the continuing violation doctrine, would frustrate congressional intent as certain types of securities violations necessarily take time to detect. The court explained the application of the continuing violations doctrine, stating "[w]hile time passes, however, such violations can inflict significant harm on the investing public. If wrongdoers may continue to reap the benefit of their continuing violations with no threat of punitive enforcement actions, then, for some, the possibility that they may eventually merely have to return what may be left of their ill-gotten gains may become simply a cost of doing business." *S.E.C. v. Huff*, 758 F.Supp.2d 1288, 1341 (S.D. Fla. 2010).

Here, Chase has violated the terms of the MLPA by continuing to take overt actions that breach the contract and harm MRS in a myriad of unique and continuously changing ways. (A-83-162). From advising borrowers to sue MRS to recover past payments, to releasing loans, to assigning new problematic loans, to failing to assign purchased loans, Chase has constantly invaded and eviscerated the Plaintiff's business in new ways that are impossible to track or predict. (A-83-162). Similar to *S.E.C. v. Huff*, if Chase's breaches of contract after the purported passing of the statute of limitations are barred due to the initial breach, then nothing will prevent Chase from breaching the MLPA into perpetuity, harming not only MRS, but harming innocent third parties who own homes. Chase has only partially complied with the terms of the MLPA and continues to breach its obligations to MRS to this day. (A-83-162). Chase will continue to do so, with no consequences whatsoever, if the continuing violations doctrine is not applied.

The doctrine of continuing violations is distinguished from a "continuing harm" by the requirement of a new and overt act that invades the interests of the aggrieved party.

Berry v. Florida Intern. University (FIU) Bd. of Trustees (BOT), No. 06 Civ. 21936, 2008 WL 410129 (S.D. Fla. Feb. 12, 2008) ("we must distinguish between present consequence of a one-time violation, which does not extend the limitations period, and the continuation of the violation into the present, which does"); *Bishop v. State, Division of Retirement*, 413 So.2d 776 (Fla. Dist. Ct. App. 1982) (where debts were payable by installments, the statute of limitations runs against each installment the day it becomes due); *DXS, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462 (6th Cir. 1996) (overt act that restarts the statute of limitations is characterized by two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff); *see also, S.E.C. v. Huff, supra*.

While *DXS, Inc.* is not binding precedent, it provides a thorough explanation of the continuing violations doctrine as opposed to the continuing harm doctrine. In *DXS, Inc.*, the plaintiff was a business that repaired medical equipment that was built and sold by the defendant. The defendant changed its repair and warranty policies retroactively in a way that would financially force the plaintiff's clients to discontinue use of the plaintiff's services. The defendant did not enforce or advise its clients of the altered warranty policy for a period of several years. Eventually, it contacted the plaintiff's clients to inform them that it would be enforcing its new warranty policy. The plaintiff brought suit alleging, among other things, the defendant had violated federal and state antitrust acts.

The trial court dismissed the antitrust claims as untimely filed, stating that the change of the policy began the statute of limitations, not the contacting of the plaintiff's clients. The appellate court reversed the trial court. The appellate court stated that "[a]n antitrust cause of action accrues and the limitation period commences each time a defendant commits an act that injures the plaintiff's business." *DXS, Inc.*, 100 F.3d at 467. Therefore, "[a] continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded." *Id.* "When a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants." *Id.* (quoting *Barnosky Oils, Inc. v. Union Oil Co. of California*, 666 F.2d 74, 81 (6th Cir. 1981). "[E]ven when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Id.* (quoting *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990)).

The court reasoned that the delay in implementation of the new warranty policy for several years after the original notification constituted new and overt acts that constituted a continuing antitrust violation. "An overt act that restarts the statute of limitations is characterized by two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff." *Id.* (internal quotations omitted). The court reasoned that because the defendant had sent the warranty notification and then done nothing for a period of years, the eventual implementation of the warranty constituted a new and overt act. It was not merely "unabated inertial consequences" of the notification. The notification was abated by the defendant's inaction. *Id.* (quoting *Barnosky Oils*, 665 F.2d at 82).

Chase's continued breaches of the MLPA, by continuing to release liens, assign mortgages, and interrupt payments from homeowners, are new and overt acts that constitute continuing violations. Similar to *DXS, Inc. v. Siemens Medical Systems, Inc.*, Chase has repeatedly taken actions that do not flow as a natural, unabated consequence of its initial breach of the MLPA. These actions are new, overt actions. Chase is regularly independently breaching the MLPA and inflicting new and accumulating harm not only to MRS, but also to innocent third party homeowners who are harmed by Chase's actions.

The applicable statute of limitations runs from the last overt act. *United Food Mart, Inc. v. Motiva Enterprises, LLC*, 457 F.Supp.2d 1329, 1339 (S.D. Fla. 2005) ("Antitrust law provides that, in the case of a continuing violation, say a price fixing conspiracy that brings about a series of unlawfully high priced sales of a period of years, each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."); *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir. 1999) (new and independent act required to restart the statute of limitations. "For statute of limitations purposes, the focus is on the timing of the cause of the injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts." (internal citations omitted)); *DXS, Inc.*, supra at 467 ("A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded. When a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants." (internal citations omitted)).

In *United Food Mart, Inc. v. Motiva Enterprises, LLC*, a gasoline distributor sold gasoline to several area gas stations at different prices based on different contracts with the various ownership groups. 457 F.Supp.2d 1329 (S.D. Fla. 2005). One group was repeatedly forced to purchase gasoline at a higher price, making its stations uncompetitive, despite purchasing from the same distributor. The ownership group sued the distributor alleging, among other things, violations of the Florida Motor Fuel Marking Practices Act. The distributor moved for summary judgment stating that the group's claims were untimely brought. The appellate court stated that "[a]ntitrust law provides that, in the case of a continuing violation, say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Id.* at 1339 (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)).

The distributor argued that the only overt act that could have qualified as a violation of the relevant statute was the establishment of the various contracts, which occurred outside the relevant statute of limitations. The appellate court disagreed, highlighting that the price, quantity and date of delivery of each purchase were not fixed by the original contract or the distributor's policies. The court found that the distributor periodically adjusted the general price scheme under the original contract over the life of the commercial relationship, causing the ownership groups' damages to be incapable of precise proof at the execution of the original contract. These factors, the impossibility of precise proof of damages at the time of the original statutory breach, as well as the repeated, independent, overt acts, constituted evidence that the distributors' statutory violations were continuing violations that started the statutory period running again.

Here, it was impossible for MRS to provide precise proof of how it might be damaged at the time of Chase's original breach of the MLPA. Incomplete loan files could not have foreshadowed that Chase would interfere with collection efforts and then advise random borrowers to sue MRS for a return of payments. Incomplete loan files could not have foreshadowed that Chase would approve short sales of properties that had been paying MRS. In the intervening years, Chase has repeatedly released liens, assigned mortgages and/or interrupted payments in a variety of new and inventive ways that were near impossible to anticipate at the time of the original breach. (A-323-331). Similar to *United Food Mart, Inc. v. Motiva Enterprises, LLC*, because each action by Chase over the intervening years has been different in scope, legal effect and damage to MRS, while still representing an independent breach of the MLPA, each constitutes a continuing violation of the contract and should start the statutory period running again at each new, overt act.

Lastly, the continuing violation doctrine is ill suited for summary judgment because it requires that a trier of fact make findings regarding often disputed factual circumstances. *Pearson v. Ford Motor Co.*, 694 So.2d 61 (Fla. Dist. Ct. App. 1997) (whether doctrine of continuing torts (liability not barred by statute of limitations under this doctrine, similar to continuing violation doctrine) applies to the facts of a case is for a trier of fact to decide.); *Petersen v. American*

General Life Insurance Co., 2016 WL 11712974 (M.D. Fla. 2016) ("a ruling based on the continuing violation doctrine would require a conclusion based upon competing material facts. Summary judgment precludes such a result."); *Robinson v. Caulkins Indiantown Citrus Co.*, 701 F. Supp. 208 (S.D. Fla. 1988).

In *Pearson*, a partial owner of a motor vehicle dealership operated the dealership in such a way that it was profitable for several years and then began to lose significant amounts of money for several years following that. The manufacturer provided additional capitalization to the dealership, but it continued to lose money. The partial owner was removed from the management of the dealership. He brought suit for a variety of claims, among them the torts of fraud and breach of good faith. The trial court granted summary judgment to the defendants on these counts finding that they were barred by the applicable statutes of limitations.

The partial owner appealed and argued that the issue of whether the doctrine of continuing torts, similar to the doctrine of continuing violations, applied to the facts of a particular case was for a trier of fact to decide. The appellate court agreed, reasoning that because the alleged fraud occurred prior to his termination and continued after his termination, they were linked in such a way that they may have qualified as continuing torts, which was a question for a jury.

Here, the question of whether the

doctrines of continuing violations and continuing torts apply to Chase's actions is a question for a trier of fact to decide. Chase has repeatedly committed overt acts that cause new and unforeseeable harm to MRS. Accordingly, it is necessary for a trier of fact to determine whether those new, overt and harmful acts are natural consequences of the original breach or if they are distinct yet related enough to qualify as continuing violations.

Even if this Court were to find that Chase's continuing, overt breaches of the contract do not qualify as continuing violations of the MLPA, sufficient to extend the relevant statutes of limitations to encompass the original wrongful conduct, this Court should still find that such acts are independent, overt breaches of contract, actionable on their own.

Chase, in its Motion for Summary Judgment, only argued that the breach of contract claims that occurred prior to December 24, 2009, were time barred. (A-190-193). In doing so, Chase has conceded that wrongful actions occurring after December 24, 2009, are not time-barred but are timely brought claims. From the record in this case, Respondent/Chase has engaged in a long pattern of breaching behavior, including wrongfully issuing lien releases, wrongfully accepting payments and wrongfully assigning loans it no longer owned, all to the detriment of MRS. It is also clear that the vast majority of these wrongful acts occurred well after

December 24, 2009. Therefore, even if these wrongful acts are found to not constitute continuing violations, they are clearly independent wrongful acts that are timely and actionable on their own as separate claims.

Therefore, this Court should find that the Second Circuit Court of Appeals erred in upholding the trial court's grant of summary judgment on the basis that Petitioners' claims for breach of contract, fraud and negligent misrepresentation were time-barred. This Court should find that the Second Circuit Court of Appeals relied upon the appropriate New York statute regarding choice of law and reviewed the relevant Florida statute of limitations for the contract, fraud and negligent misrepresentation claim, but that Second Circuit Court of Appeals affirmance of the trial Court ruling failed to properly apply the equitable tolling doctrine of continuing violations to Petitioners' breach of contract, fraud and negligent misrepresentation claims. Lastly, this Court should find contrary to the Second Circuit Court of Appeals ruling that the application of the doctrine of continuing violations is applicable to the dismissed claims, restarts the statute of limitations from the date of the last overt act by the Respondents, and that significant issues exist for a trier of fact. Even if this Court should find that Respondents' actions do not constitute continuing violations, this Court should find what Respondent has already conceded, that all wrongful acts that occurred after December 24, 2009, are independent wrongful acts that were timely brought.

II. PETITIONERS WERE NOT REQUIRED TO PROVE THE AMOUNT OF DAMAGES, SIMPLY THE FACT OF DAMAGES

The United States Court of Appeals for the Second Circuit erred in upholding the trial courts entry of summary judgment for the Respondents on the Petitioners' claims that Chase breached its contracts with Petitioners (MLPA and MMLSAs) by "among other things, recording lien releases, issuing debt forgiveness letters, and retaining borrower payments on loans sold to MRS, S&A, and 1st Fidelity" on the basis that the Petitioners had failed to produce "hard evidence" of their quantified damages demonstrating a sufficient genuine issue of material fact with respect to Plaintiffs' damages. The Petitioners respectfully assert that the Second Circuit Court of Appeals reliance upon the trial court's application, as well as failing to draw all reasonable inferences in favor of the Petitioners, the non-moving parties, resulted in the Second Circuit Court of Appeal upholding upon the trial court's improper judgment.

Respondents moved for summary judgment on the Petitioners' claims that Chase had breached the MLPA and the MMLSAs, not on statute of limitations grounds as asserted by Chase on the Schneider Entities' other contract claims but on the basis that the Petitioners had "failed to adduce any admissible evidence of damages caused by these alleged breaches." The Trial Court ruled that the Petitioners' claims that "Chase breached the MLPA, the S&A MMLSA and the 1st Fidelity MMLSA by, among other things, recording lien releases, issuing debt forgiveness letters, and retaining borrower payments on loans sold to MRS" was "insufficient to meet Plaintiffs burden at summary judgment to produce 'hard evidence' showing there is a genuine issue of material fact for trial." (citing *Golden Pac. Bancorp v. FDIC*, 375 F. 3rd 196, 200 (2d Cir. 2004)). The Second Circuit Court of Appeals reliance upon the trial court's determination was improper because the Trial Court was obligated to make all reasonable inferences in favor of the Petitioners, as the non-moving parties, as well as to evaluate the evidence in the light most favorable to the Petitioners when reviewing the evidence on sufficiency grounds. *See Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 255 (1986). As proof thereof, the Petitioners alleged that Respondents admitted to mistakenly sending debt forgiveness letters to 23 of Petitioners' borrowers purchased from the Respondents. Respondents/Chase refused and neglected to provide sufficient information to Petitioner to identify all the accounts with specificity, thus preventing the Petitioners from quantifying related damages with specificity. Despite Respondent/Chase admitting that it had breached the agreements between the parties on multiple occasions, and despite refusing to produce documents such that the Petitioners could identify and quantify their losses, the Second Circuit Court of Appeals upheld the Trial Court's erroneous findings that "Chase's admissions did not establish that, as a result of Chase's actions, Petitioners were subsequently denied payments on mistakenly forgiven loans or were otherwise injured by Respondents' recordation of lien releases." It is the Petitioners' position that the Second Circuit Court of Appeals affirmance of the Trial Court's decision that Petitioners were obligated to produce "hard evidence" of their quantified damages to overcome summary judgment was and is error. A non-moving party with the burden of proof at trial when confronted with a motion for summary judgment as to the absence of an essential element of their case, such as damages, need only demonstrate that no reasonable jury could find that the non- moving party had been damaged. The moving party must demonstrate that no evidence exists in the record on damages to support a judgment for the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This error necessitates reversal of the Second Circuit Court of Appeals ruling.

Under New York law, to preclude summary judgment as to general damages, a plaintiff need only have demonstrated a "stable foundation for a reasonable estimate of the damage incurred as a result of the breach." *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89, 110 (2nd Cir. 2007). In the Trial Court, the Petitioners should not have been required to produce "hard evidence" of the nature and numerical certainty of their damages, but a foundation sufficient to demonstrate how the Petitioners were damaged such that the range could be estimated. "Such an estimate necessarily requires some improvisation, and the party who has caused the loss may not insist on theoretical perfection." *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89, 111 (2nd Cir. 2007).

The requirement of "certainty" of damages "refers to the fact of damages, not the amount." *Id.* at 110. In addition, the burden of uncertainty of damages is upon the wrongdoer. "A person violating his contract should not be permitted entirely to escape liability because the amount of damage which he caused is uncertain." *Id.* at 111. Lastly, even if the Petitioners failed to demonstrate they were damaged with requisite certainty, it was error to grant summary judgment on damages without allowing the Petitioners to pursue nominal damages. Nominal damages are available "as a formal vindication of

[Plaintiffs'] legal right to compensation." *NAF Holdings, LLC. V. Li & Fung (Trading) Limited*, 2016WL3098842 (S.D.N.Y. June 10, 2016). New York appellate courts have found that summary judgment on damages is error even if a plaintiff has failed to prove it incurred any actual damages because nominal damages remained available. "Even if it were shown [on summary judgment] that no actual damages have been sustained, plaintiff would seem entitled to proceed to trial at least on its contract cause of action if only to vindicate its right to nominal damages." *Id.* at *3. It is well established that "even if the breach of contract caused no loss or if the amount of the loss cannot be proven with sufficient certainty, the injured party is entitled to recover . . . nominal damages." *Weil v. Theron and Denver Delilah Films, Inc.*, 585 F.Supp.2nd 473, 488 (S.D.N.Y. 2008).[2]

In short, the Second Circuit Court of Appeals affirmance of the Trial Court's dismissal of the actions by Petitioners on the grounds of a failure to prove damages should be reversed and remanded.

[2] In total, and based upon a May 2017 list of loans, Chase issued 649 lien releases, and 25 debt forgiveness letters on loans owned by Plaintiffs.

REASONS FOR GRANTING THE PETITION

The Petition should be granted to deny the Respondents from receiving a windfall from the United States Government's MHS, HAMP, NMS and RMBS Programs by issuing debt forgiveness letters and lien releases to borrowers whose loans it sold to Petitioners, SA&F and/or MRS who will continue to be Respondents' scapegoat for any unwanted or regulatory non-compliant mortgages or equity lines which could eradicate the borrower/consumers eligibility for Federal Assistance.

CONCLUSION

Allowing the Second Circuit Court of Appeals decision to stand upholding the trial court's ruling will continue to allow the manifest chaos as a result of continuing unending litigation and harm, not simply for the Petitioners, but for the countless homeowners and borrowers swept up in the malfeasance created and continued by Respondent/Chase. Such a result is simultaneously inconsistent with the law, unwarranted and needless. Specifically, the Second Circuit Court of Appeals has misapplied two fundamental foundations of New York law.

First, the insistence that the Petitioners defend themselves at summary judgment through a meticulous calculation of damages was error and unfair. The Petitioners' only requirement is that they prove that they were in fact damaged, not how much. In fact, it is fundamental to New York law that the very act of litigating one's rights can be pursued for the simple vindication of those rights. It is axiomatic, therefore, that to insist that damages be calculated to the satisfaction of the Respondents is an illogical requirement that can only lead to an unfair advantage for malefactors.

The Second Circuit Court of Appeals affirmance of the trial court's grant of summary judgment to the Respondent failed to recognize that the breaches occasioned by Respondent/Chase were of a nature that could not logically be encapsulated to a single breach. Respondent's ongoing and broad ranging evils have caused and continue to cause damages to not only the Petitioners, but to the unwitting homeowner borrowers whose first mortgages and equity lines loans were supposed to have been sold to Petitioners by Respondents, but were thereafter forgiven, modified, or lost in limbo due to Respondent's inconsistent actions related to mortgages sold to the Petitioner is unreasonable, in violation to the Parties due process rights, and will persist to Respondent to utilize the Petitioners as a warehouse to dispose of its unwanted and regulatory non-compliant loans which would otherwise be subject federal regulatory and compliance statutes for which they lacked compliance. To call such a course of conduct a single breach would be to excuse and validate the harms visited on the Petitioner and the many borrowers whose loans were transferred by Respondent into an unknown future.

PRAYER FOR RELIEF

Accordingly, for these and all the reasons discussed above, the Petitioners pray that this Court accept the Petitioners' Petition for Writ of Certiorari.

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June 27, 2022

Appendix

2022 WL 211981
Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

MORTGAGE RESOLUTION SERVICING, LLC, 1st Fidelity Loan Servicing, LLC, S&A Capital Partners, Inc., Plaintiffs-Appellants,
v.
JPMORGAN CHASE BANK, N.A., Chase Home Finance, LLC, JPMorgan Chase & Co., Defendants-Appellees.

21-429-cv
|
January 25, 2022

Appeal from the United States District Court for the Southern District of New York (Swain, *C.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order and judgment of said District Court be and it hereby is **AFFIRMED**.

Attorneys and Law Firms

Appearing for Appellant: Roberto L. Di Marco, Foster, Walker, & Di Marco, P.C., Malden, MA.

Appearing for Appellee: Christian J. Pistilli, Covington & Burling LLP (Robert D. Wick, S. Conrad Scott, on the brief), Washington, D.C.

Present: ROSEMARY S. POOLER, DENNY CHIN, SUSAN L. CARNEY, Circuit Judges.

SUMMARY ORDER

***1** Mortgage Resolution Servicing, LLC, 1st Fidelity Loan Servicing, LLC, and S&A Capital Partners, Inc. (collectively, "Plaintiffs") appeal from the January 22, 2021 order and judgment of the United States District Court for the Southern District of New York (Swain, *C.J.*) denying Plaintiffs' motion for reconsideration. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Plaintiffs' notice of appeal ("NOA"), by its plain language, seeks to appeal the district court's January 22, 2021 order denying Plaintiffs' motion for reconsideration. The NOA seeks review of the district court's order entered on January 22, 2021, that "after review, denied Plaintiffs' motion for reconsideration of the Court's judgment entered on September 30, 2019, that granted Defendants' motions for partial summary judgment and to exclude expert witness testimony and denied Plaintiffs' motions for summary judgment, which dismissed and closed the case." App'x at 299. Defendants JPMorgan Chase Bank, N.A., Chase Home Finance, LLC, and JPMorgan Chase & Co. (collectively, "Defendants" or "Chase") argue that this language indicates that Plaintiffs appealed only from the order denying the motion for reconsideration, and we should thus limit our review.

A notice of appeal must "designate the judgment—or the appealable order—from which the appeal is taken." Fed. R. App. P. 3(c)(1)(B). This requirement is jurisdictional. *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012). However, "it is well settled that courts should apply a liberal interpretation to that requirement." *Elliot v. City of Hartford*, 823 F.3d 170, 172 (2d Cir. 2016) (citing *Conway v. Village of Mount Kisco*, 750 F.2d 205, 211 (2d Cir. 1984)). We " 'liberally construe notices of appeal where the appellant's intention is discernable, such as where a notice of appeal from a judgment was filed and withdrawn because of a pending motion to amend the judgment, and the subsequent notice of appeal mentioned only the denial of the motion to amend and not the judgment itself." *PHL Variable Ins. Co. v. Town of Oyster Bay*, 929 F.3d 79, 87 (2d Cir. 2019) (internal quotation marks). Further, we "generally treat an appeal from a denial of a motion for reconsideration that largely renews arguments previously made in the underlying order as bringing up for review the underlying order or judgment." *Van Buskirk v. United Grp. Of Cos., Inc.*, 935 F.3d 49, 52 (2d Cir. 2019).

Here, liberally construed, Plaintiffs' NOA appeals from the district court's judgment entered September 30, 2019. The NOA states that Plaintiffs appeal from the order denying Plaintiffs' motion for reconsideration of the Court's "judgment entered on September 30, 2019." Plaintiffs' motion did not seek reconsideration of the September 30 judgment but rather the "portion of" the September 27 order that "grant[ed] summary judgment in favor of the Defendants on the grounds that Plaintiffs failed to raise a triable issue of fact as to the existence of damages." Accordingly, by its plain language, the

NOA describes a motion for reconsideration that Plaintiffs did not make. However, by mentioning the "judgment entered on September 30, 2019 ... which dismissed and closed the case," Plaintiffs have evinced an intent to appeal from the grant of summary judgment in favor of defendants. We thus proceed with that review.

***2** We review a district court's grant of summary judgment de novo. *Process Am., Inc. v. Cynergy Holdings, LLC*, 839 F.3d 125, 133 (2d Cir. 2016). "Summary judgment is proper '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.' " *Id.* (quoting Fed. R. Civ. P. 56(a)). We construe the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Jaffer v. Hirji*, 887 F.3d 111, 114 (2d Cir. 2018).

First, Plaintiffs argue that that the district court erred in granting summary judgment on the breach of contract claims by failing to apply the continuing violations doctrine, which is an equitable tolling doctrine that extends the period for timely filing certain claims. Both parties agree that the Florida statute of limitations applies here. Florida's relevant statute of limitations requires a breach of contract claim to be filed within five years of accrual, and an action based in fraud to be filed within four years. Fla. Stat. § 95.11(2)(b), (3)(j). Plaintiffs do not dispute that the breach of contract claims accrued on or before February 25, 2009, and they do not contend that those claims would be timely absent the application of the continuing violations doctrine.

Defendants argue that Plaintiffs waived their continuing violations doctrine argument by not raising the argument before the district court. We agree. In opposing summary judgment below, Plaintiffs relied on other equitable tolling arguments in arguing that their claims were timely. However, the district court rejected these equitable tolling doctrines, finding there was no reason that Plaintiffs could not have filed their claims prior to the expiration of the statute of limitations. *Mortg. Resol. Servicing, LLC, v. JPMorgan Chase Bank, N.A.*, No. 15 CV 293-LTS-RWL, 2019 WL 4735387, at *7 (S.D.N.Y. Sept. 27, 2019). Plaintiffs do not argue that the district court erred in rejecting their equitable tolling arguments. Instead, Plaintiffs argue only that the district court erred in not considering an argument Plaintiffs did not make: that their claims were timely under the continuing violations doctrine.

It is a "well-established general rule that a court of appeals will not consider an issue raised for the first time on appeal." *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 118 (2d Cir. 2021). Nevertheless, an appellate court has discretion to consider arguments not raised below "to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding." *Universal Church v. Geltzer*, 463 F.3d 218, 228 (2d Cir. 2006) (quoting *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005)). Plaintiffs concede that they failed to argue the continuing violations doctrine before the district court and make no argument here that a manifest injustice would result if we failed to consider this argument. Therefore, we will not consider the continuing violations doctrine as Plaintiffs have waived this argument.

Plaintiffs next argue that the district court applied the wrong standard in dismissing their breach of contract claim and erroneously required them to prove the actual amount of damages. Under New York law, "a breach of contract claim requires proof of (1) an agreement, (2) adequate performance by the plaintiff, (3) breach by the defendant, and (4) damages." *Fischer & Mandell, LLP v. Citibank, N.A.*, 632 F.3d 793, 799 (2d Cir. 2011). A plaintiff need only demonstrate "a stable foundation for a reasonable estimate of the damage incurred as a result of the breach." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110-11 (2d Cir. 2007) (citation and internal quotation marks omitted). Damages, however, "must be not merely speculative, possible, and imaginary, but they must be *reasonably certain* and such only as actually follow or may follow from the breach of the contract." *Id.* (citations omitted). " 'Certainty,' as it pertains to general damages, refers to the *fact* of damage, not the amount." *Id.*

***3** A review of the district court's opinions and the record shows that the issue was not that district court required the plaintiffs to establish a certain amount of damages; the issue was that Plaintiffs could not show they had been damaged at all. *Mortg. Resol. Servicing, LLC*, 2019 WL 4735387, at *11-12. The district court stated that there were "admitted evidentiary gaps," and reviewed Plaintiffs' arguments as to how they had been damaged, highlighting how Plaintiffs' general claims of damage did not accord with any evidence in the record. *Id.* at * 12. The district court found Plaintiffs also failed to adduce any evidence that they incurred litigation and operating expenses. *Id.* The district court concluded that "[b]ecause Plaintiffs have failed to come forward with evidence from which a jury could infer that they were injured as a result of Chase's issuance of debt forgiveness letters, recordation of lien releases, or retention of borrower payments, Plaintiffs' remaining breach of contract claims are dismissed." *Id.* We agree with the district court that the record does not support Plaintiffs' claim that they incurred damages, and that such a showing was necessary to survive summary judgment.

Finally, Plaintiffs argue that they should have been allowed to seek nominal damages and the district court erred by not granting them. However, Plaintiffs did not request nominal damages below and so this argument is waived. *See Sacerdote*, 9 F.4th at 118.

We have considered the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, the order and judgment of the district court hereby is AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 211981

2019 WL 4735387

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

MORTGAGE RESOLUTION SERVICING, LLC, et al., Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A., et al., Defendants.

No. 15 CV 293-LTS-RWL

|

Signed 09/27/2019

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Memorandum Opinion and Order

LAURA TAYLOR SWAIN, United States District Judge

*1 Plaintiffs Mortgage Resolution Servicing, LLC ("MRS"), 1st Fidelity Loan Servicing, LLC ("1st Fidelity"), and S&A Capital Partners, Inc. ("S&A" and, together with MRS and 1st Fidelity, "Plaintiffs") bring this action for breach of contract, fraud, and negligent misrepresentation against Defendants JPMorgan Chase Bank, N.A., JPMorgan Chase & Co., and Chase Home Finance, LLC (collectively, "Chase" or "Defendants"). On February 13, 2017, the Court granted Chase's motion to dismiss Plaintiffs' conversion, tortious interference, slander of title, and civil RICO claims. (Docket entry no. 140.) On March 30, 2018, the Court denied Plaintiffs' motion for leave to file an amended complaint reinstating its conversion, tortious interference, and civil RICO claims, adding a new claim for promissory estoppel, and adding 1st Fidelity and S&A as plaintiffs to MRS's claims for fraud and fraudulent inducement. (Docket entry no. 288.) The Court granted Plaintiffs leave to amend their complaint to the extent that Plaintiffs sought to augment allegations related to their remaining causes of action. (Id.)

Before the Court are five motions: (1) Chase's July 2018 motion for partial summary judgment seeking dismissal of Plaintiff MRS's breach of contract, fraud, and negligent misrepresentation claims as time-barred, and seeking dismissal of MRS's fraud, negligent misrepresentation and punitive damages claims on the merits (docket entry no. 301); (2) MRS's October 2018 motion for partial summary judgment on its fraud and negligent misrepresentation claims (docket entry no. 321); (3) Plaintiffs' March 2019 motion for partial summary judgment on their breach of contract claims (docket entry no. 350); (4) Chase's March 2019 motion to exclude the testimony of Plaintiffs' damages expert, Jeffrey S. Andrien, under Federal Rule of Evidence 702 (docket entry no. 357); and (5) Chase's March 2019 motion for partial summary judgment dismissing Plaintiffs' contract and damages claims (docket entry no. 360).

The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332. The Court has considered carefully all of the parties' submissions. For the reasons stated below, Chase's July 2018 motion for partial summary judgment is granted to the extent that it seeks dismissal of MRS's breach of contract, fraud, and negligent misrepresentation claims as time-barred, and to the extent that it seeks dismissal of Plaintiffs' claim for punitive damages. Chase's March 2019 motion for partial summary judgment dismissing Plaintiffs' contract and damages claims is granted with respect to Plaintiffs' remaining breach of contract claims, including Plaintiffs' claim for disgorgement. In light of those determinations, the Court grants Chase's March 2019 motion to exclude the testimony of Jeffrey S. Andrien, and denies as moot MRS's October 2018 motion for partial summary judgment on its fraud and negligent misrepresentation claims, as well as Plaintiffs' March 2019 motion for partial summary judgment with respect to any time-barred breach of contract claims. Plaintiffs' March 2019 motion for partial summary judgment on their breach of contract claims is denied in all other respects. Judgment dismissing the case will be entered.

Background

*2 Unless otherwise indicated, the following facts are undisputed.1 Plaintiff MRS is a Florida limited liability corporation with its principal place of business in Florida. (Docket entry no. 302, Def. July 2018 56.1 St. ¶ 2; docket entry no. 311, Pl. Aug. 2018 Resp. ¶ 2.) MRS, 1st Fidelity, and S&A are in the business of buying residential mortgage loans that are not performing according to their original terms. (Docket entry no. 295, Answer ¶ 93.) Laurence Schneider and his wife own 99 percent of MRS and 1st Fidelity, with the remaining one percent owned by Real Estate and Finance, Inc., which is controlled by Schneider. (Docket entry no. 387, Def. Mar. 2019 56.1 St. ¶¶ 3-4.) Schneider and his wife own 65 percent of S&A, with the remaining 35 percent owned by Schneider's brother-in-law and his wife. (Def. Mar. 2019 56.1 St. ¶ 5.)

Sale of mortgage loans to MRS

On February 25, 2009, Chase and MRS signed a Mortgage Loan Purchase Agreement for the sale of certain mortgages. (Def. July 2018 56.1 St. ¶ 18; docket entry no. 304-10, Pistilli Decl. Ex. 10, the "MLPA.") Under the MLPA, Chase agreed to sell "on a servicing-released basis," and MRS agreed to purchase "on a servicing-released basis," "certain nonperforming and/or impaired closed end first lien mortgage loans that are or have been delinquent for 180 days or more and have been or may otherwise be in default." (MLPA at Preamble, § 1.) Specifically, for the purchase price of $200,000, MRS agreed to purchase mortgage loans "having an outstanding aggregate principal balance as of December 22, 2008 ... in the amount of approximately $156,324,399.24 consisting of 3,529 loans." (Id. §§ 1, 3.) The parties agreed that the loans "to be purchased under this Agreement are described in the schedule ... attached hereto as Exhibit A." (Id. § 2.) Exhibit A "shall set forth for each Mortgage Loan the outstanding principal balance thereof as of [December 22, 2008]." (Id.)

In section 6 of the MLPA, Chase made the following representations and warranties to MRS: "(i) [t]he information set forth on the data tape provided by [Chase] to [MRS] with respect to the Mortgage Loans is true and correct in all material respects as of the date such data tape was compiled; (ii) [Chase] is the sole owner of the Mortgage Loans and has full right to transfer and sell the Mortgage Loans to [MRS]; and (iii) [e]ach Mortgage Loan complies in all material respects with all applicable federal, state, or local laws...." (Id. § 6a.) The MLPA further provides that "each Mortgage Loan is being sold by [Chase] with NO REPRESENTATIONS OR WARRANTIES of, by or on behalf of [Chase] and on an 'AS IS, WHERE IS, WITH ALL FAULTS' basis with NO RECOURSE WHATSOEVER and, without in any way limiting the foregoing, WITH NO REPURCHASE OR BUY BACK OBLIGATIONS WHATSOEVER." (Id. § 6c.) The MLPA also provides that "[t]his Agreement shall be deemed to have been made in the State of New York," and that "the obligations, rights and remedies of the parties hereunder shall be determined in accordance with the laws of the State of New York, excluding conflict of laws issues. The parties hereby agree that all disputes arising hereunder shall be submitted to and hereby subject themselves to the jurisdiction of the courts of competent jurisdiction, state and federal, in the State of New York." (Id. § 15.)

On February 25, 2009, Chase employee Eddie Guerrero sent Schneider a spreadsheet of loans as

Exhibit A to the MLPA. (Def. July 2018 56.1 St. ¶ 22.) Schneider testified at his deposition in this action that he informed Chase “immediately” that the spreadsheet was “woefully insufficient.” (Docket entry no. 309-1, DiMarco Decl. Ex. 1, Schneider Dep. 314:2-317:20.) Schneider further testified as follows:

*3 Q. As of March 2012, was it your belief that Chase had breached the MLPA?

A. It was my opinion on February 25th, 2009, and despite all of my efforts, there is nothing that has been able to facilitate getting a useful data tape or the usable information in order to try to collect on any of these loans.

Q. And as of the date that you wrote the e-mail we have been looking at in Exhibit 142, as of March 29th, 2012, did you believe that you had been misled about the loans that you would be getting under the MLPA?

A. Yes, I had, I just thought I had answered that. I believed it as of February 25th, 2009, although several months later when I never received a data tape with the information that was promised, that confirmed in part my suspicions and then I just, it just got uglier from there.

(Def. July 2018 56.1 St. ¶¶ 27-28; Pl. Aug. 2018 Resp. ¶¶ 27-28; docket entry no. 304-1, Pistilli Decl. Ex. 1, Schneider Dep. 435:6-436:3.)

In connection with the instant motion practice, MRS has submitted a declaration from Schneider in which he states, among other things, that after the MLPA was signed, he "repeatedly asked Chase to provide [him] all of the necessary information to properly service the loans." (Docket entry no. 310, Schneider Decl. ¶ 17.) Schneider states that "[t]hrough 2011, Chase continued to tell me that it wanted to continue working with me and sell me more loans, and we even went on a business trip to Las Vegas, which delayed my discovery of the fraud as Chase was actively trying to conceal its fraud." (Id. ¶ 20.) "Based upon Chase's continued assurances that it would comply with the MLPA, and Chase's various rationales for its delay," Schneider states, he "did not consider litigation, or consider Chase in breach of the [MLPA] and/or suspect that I had been defrauded until Omar Kassem sent me an email on March 1, 2013."[2] (Schneider Decl. ¶ 24.)

The email from Chase employee Omar Kassem states, in relevant part, that Kassem was "instructed today by our general counsel to obtain your attorney's contact information ... and address so I can forward it to our litigation department. I've been asked to step aside as it doesn't appear we're going to get things resolved as we originally intended per the original agreement. This will insure your concerns are raised to the right party for resolution."[3] (Docket entry no. 309-56, DiMarco Decl. Ex. 56 (the "Kassem Email").)

*4 MRS alleges that Chase breached the MLPA by, among other things, selling "non-conforming deficiency claims" in place of first lien mortgage loans, withholding information and documents concerning the loans it sold to MRS, selling loans as to which Chase had violated applicable law, selling loans to MRS "where Chase provided a corrupted data tape as Exhibit A to the MLPA," accepting and retaining payments from borrowers and/or insurance companies on loans that Chase had sold to MRS, and, after the sale, changing the loans Chase sold by pulling valuable loans back and adding loans that violated loan servicing and consumer protection laws. (Docket entry no. 293, Fourth Am. Compl. (the "FAC") ¶ 298.) MRS alleges that Chase further breached the MLPA and its implied obligation of good faith and fair dealing by forgiving the debt owed by borrowers on loans Chase sold to MRS or releasing the liens securing loans sold to MRS in order to satisfy Chase's obligations under certain national settlement agreements.4 (FAC ¶ 299.)

In addition, MRS argues in its March 2019 motion for partial summary judgment that Chase breached the warranties contained in section 6 of the MLPA, by failing to "provide a complete and accurate Exhibit A to the MLPA," selling loans that Chase "did not own, but was merely servicing," and not conveying "the number or value of loans as required and bargained for within the MLPA." (Docket entry no. 352, Pls. MSJ at 18.) MRS argues that its breach of contract claims “ripened” on February 26, 2013, when Schneider received the Kassem Email, and that “the full extent” of Chase’s breach became clear on May 29, 2013, when Chase employee Launi Solomon sent Schneider a file titled “MRS Accounts-xlsx.zip.” (Pls. MSJ at 2; docket entry no. 353-96, DiMarco Decl. Ex. 96.) MRS contends that this file contained “sufficient information to discern what [Schneider] actually received.” (Pls. MSJ at 11.)

In its October 2018 motion for partial summary judgment, MRS argues that Chase fraudulently induced MRS to enter into the MLPA by, among other things, misrepresenting that all the liens sold under the MLPA were “first liens,” that Chase had all the necessary information to “board and service” the loans, that the loans complied with federal, state, and local laws, that the loan pool contained “cherries” that had erroneously been “charged off,” and that there would be competition to purchase the loan pool. (Docket entry no. 323 at 13-15.) MRS’s March 2019 and October 2018 motions for partial summary judgment seek judgment in MRS’s favor on its breach of contract, fraud, and negligent misrepresentation claims.

The FAC seeks compensatory and punitive damages for Chase’s alleged breach of its obligations under the MLPA. (FAC at 78.) In connection with their March 2019 motion for partial summary judgment and their opposition to Chase's March 2019 motion for partial summary judgment, Plaintiffs proffer the expert report of Jeffrey S. Andrien, who opines that MRS suffered lost profits in the amount of $31.93 million as a result of Chase's breach of the MLPA. (Docket entry no. 377-1, Pistilli Decl. Ex. 1, Andrien Rep. ¶ 9.) This figure allegedly represents the "proceeds that MRS could reasonably expect to generate" from the MLPA loan pool if, among other things, Chase had provided the proper liens and documentation necessary to service the MLPA loans. (Andrien Rep. ¶¶ 34, 37.) Andrien further opines that Chase is required to disgorge $557.14 million because the MLPA transaction allowed Chase to "qualify for millions of dollars in incentive payments through the [federal government's] Making Home Affordable ("MHA") Program and [the federal government's] Home Affordable Modification Program ("HAMP")" and to "claim credit for their obligations under two settlement agreements with the federal government, and state governments, even though [Chase] no longer owned these loans." (Andrien Rep. ¶ 48.) Specifically, Andrien concludes that Chase was "eligible to receive between $551.1 million ... to $2.10 billion ... in HAMP incentives, that [it] would not have been eligible to receive," and that Chase "received between $6.04 million and $16.18 million of improper credit towards satisfaction of" its consumer relief requirements under certain settlement agreements. (Andrien Rep. ¶¶ 51, 58.) Andrien acknowledged at his deposition that neither of these disgorgement estimates is a "measure of economic harm to the [P]laintiff."

Instead, Andrien testified, they "are measures of economic benefits to the [D]efendants that they would not have gotten ... but for their bad acts related to their dealings with the [P]laintiffs." (Docket entry no. 363-26, Pistilli Decl. Ex. 26, Andrien Dep. at 108:23-109:13.) Plaintiffs do not dispute that they did not identify disgorgement as a damages theory in their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(i). (Def. March 2019 56.1 St. ¶ 53.)

*5 The Andrien Report does not separately quantify any damages specifically resulting from debt forgiveness letters or lien releases allegedly sent on MRS loans (Def. Mar. 2019 56.1 St. ¶ 44; docket entry no. 395, Pl. May 2019 Resp. ¶ 191), and Andrien testified that he has "not specifically" quantified the economic loss caused by Chase's alleged lien releases (Andrien Dep. at 109:20-23). In response to interrogatories asking it to identify each instance in which a borrower's payments to MRS were ceased or interrupted by the borrower receiving a debt forgiveness letter or Chase's recordation of a lien release, MRS stated that it was "unable to specifically identify any particular loan numbers at this time" and "cannot ascertain with any certainty why payments received from borrowers stopped or were interrupted." (Def. Mar. 2019 56.1 St. ¶ 42.) Similarly, when asked to identify each instance where Chase improperly accepted and retained a payment on an MLPA loan, MRS responded that it "is not now in possession of such information." (Def. Mar. 2019 56.1 St. ¶ 47.)

Sale of mortgage loans to S&A and 1st Fidelity

On April 12, 2005, Chase and S&A signed a Master Mortgage Loan Sale Agreement for the purchase of certain mortgage loans (the "S&A MMLSA"). (Def. Mar. 2019 56.1 St. ¶ 9.) On September 20, 2010, Chase and 1st Fidelity signed a separate Master Mortgage Loan Sale Agreement (the "1st Fidelity MMLSA"). (Def. Mar. 2019 56.1 St. ¶ 10.) Between 2005 and 2010, Chase made approximately 1,000 one-off loan sales to S&A and 1st Fidelity. (Def. Mar. 2019 56.1 St. ¶ 6.) S&A and 1st Fidelity allege that Chase breached each of their respective Master Mortgage Loan Sale Agreements, as well as its obligation of good faith and fair dealing, by releasing mortgage liens securing loans previously sold to S&A and 1st Fidelity, forgiving loans Chase had previously sold to S&A and 1st Fidelity, and accepting and retaining payments it received from borrowers and insurance companies on loans it had sold to S&A and 1st Fidelity. (FAC ¶¶ 304-305, 309-310.)

The FAC seeks compensatory and punitive damages for Chase's breach of its obligations under the two

Master Mortgage Loan Sale Agreements. (FAC at 78.) The Andrien Report does not proffer any estimate of compensatory damages in connection with the claims of S&A and 1st Fidelity, and Andrien has testified that he is not offering any opinion relating to damages suffered by S&A and 1st Fidelity. (Def. Mar. 2019 56.1 St. ¶ 45; docket entry no. 403-31, Pistilli Decl. Ex. 31, Andrien Dep. at 111:15-112:12.) When asked to identify each instance where a borrower's payments to S&A or 1st Fidelity were ceased or interrupted by the borrower receiving a debt forgiveness letter or Chase's recordation of a lien release, S&A and 1st Fidelity have stated in their interrogatory responses that they are "unable to specifically identify any particular loan numbers at this time" and "cannot ascertain with any certainty why borrowers from whom they previously received payments stopped making payments and/or why payments were interrupted." (Def. Mar. 2019 56.1 St. ¶ 43.)

The False Claims Act Action

In May 2013, Schneider filed a False Claims Act lawsuit (the "FCA Action") against Chase in the United States District Court for the District of South Carolina. (Pl. Aug. 2018 Resp. ¶ 84; Schneider Decl. ¶ 29.) The FCA Action was sealed and the Department of Justice allegedly instructed

Schneider not to "disclose the FCA case and any related facts." (Schneider Decl. ¶ 30.) The case was subsequently transferred to the United States District Court for the District of Columbia. See United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A., 224 F. Supp. 3d 48, 55 (D.D.C. 2016). The FCA Action principally alleged that Chase made false claims regarding its compliance with national mortgage settlements which "provided Chase with the benefit of credit for consumer relief that it otherwise should not have received," and that Chase submitted false or fraudulent certifications that it had complied with HAMP. Id. at 56-57. MRS filed the instant action on December 24, 2014. (See docket entry no. 1.) The FCA Action has since been dismissed. See United States ex rel. Schneider, 224 F. Supp. 3d at 61-62.

Discussion

*6 Summary judgment is to be granted in favor of a moving party 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). A fact is considered material "if it might affect the outcome of the suit under the governing law," and an issue of fact is a genuine one where "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Holtz v. Rockefeller & Co. Inc., 258 F.3d 62, 69 (2d Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). To defeat summary judgment, the non-moving party "must do more than show that there is some metaphysical doubt as to the material facts." Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002) (internal quotations omitted). The nonmoving party "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful." Golden Pac. Bancorp v. FDIC, 375 F.3d 196, 200 (2d Cir. 2004) (internal quotations omitted).

Statute of Limitations

Chase seeks the dismissal of MRS's fraud and breach of contract claims as barred under Florida's four and five-year statutes of limitations, asserting that both claims accrued no later than February 25, 2009, more than five years before this action was commenced in December 2014. The MLPA provides, in relevant part, that "the obligations, rights and remedies of the parties hereunder shall be determined in accordance with the laws of the State of New York, excluding conflict of laws issues." (MLPA § 15.) Under New York's borrowing statute, when a nonresident plaintiff suffers an injury outside of the state, the plaintiff must satisfy the statute of limitations of the state where the cause of action accrued as well as that of New York, effectively subjecting the cause of action to whichever state's limitations period is shorter. Id.; see also N.Y. C.P.L.R. § 202 ("An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued...."). In New York, an action for fraud or breach of contract must be filed within six years of the date that the cause of action accrued. N.Y. C.P.L.R. §§ 213(2), 213(8). In Florida, where MRS is incorporated and has its principal place of business, breach of contract claims must be filed within five years, and fraud actions must be filed within four years of accrual. Fla. Stat. §§ 95.11(2)(b), 95.11(3)(j). Thus, C.P.L.R. § 202 requires application of the shorter Florida limitations periods to MRS's fraud and breach of contract claims.

The MLPA's exclusion of "conflict of laws issues" does not require a different analysis. As the New York Court of Appeals has explained, "[c]ontractual choice of law provisions typically apply to only substantive issues ... and statutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right." 2138747 Ontario, Inc. v. Samsung C & T Corporation, 31 N.Y.3d 372, 377 (2018). Thus, "the election of New York law" in the MLPA does not "include an election of New York's statutes of limitations unless the parties explicitly indicate such a choice." Myers Indus., Inc. v. Schoeller Arca Systs., Inc., 171 F. Supp. 3d 107, 115 (S.D.N.Y. 2016) (citing Portfolio Recovery Assocs. v. King, 14 N.Y.3d 410, 416 (2010)). Because the MLPA's choice of law provision does not specifically exclude application of CPLR 202 by calling for the use of the statute of limitations applicable to claims that accrue in New York, the MLPA's choice-of-law provision cannot be read as rejecting the borrowing provision of CPLR 202. See Arcadia Biosciences, Inc. v. Vilmorin & Cie, 2019 WL 324213, at *10-11 (S.D.N.Y. Jan. 25, 2019) (finding that a similar contractual choice of law provision did not preclude application of C.L.P.R. § 202).

*7 MRS argues that C.P.L.R. § 202 is inapplicable because its claims did not accrue outside of New York. In support of this argument, MRS cites section 15 of the MLPA, which states that the contract "shall be deemed to have been made in the State of New York." (MLPA § 15.) MRS's argument is unavailing because a claim accrues under New York law at the time and the place of injury and where, as here, the injury is purely economic, "the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." Myers, 171 F. Supp. 3d at 115 (quoting Glob. Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 529 (1999)). Thus, MRS's breach of contract and fraud claims accrued in Florida, where MRS resides (see Pl. Aug. 2018 Resp. ¶ 2), notwithstanding the parties' agreement as to where the contract is deemed to have been made.

MRS also argues that, even if its claims are untimely, they are preserved by equitable tolling. Equitable tolling "is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing." Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988). Generally, the tolling doctrine "has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Id. MRS argues that it was prevented from filing this action sooner because "the parties were diligently working together to complete performance of the MLPA" and because the Department of Justice allegedly instructed Schneider not to "disclose the FCA case and any related facts." (Schneider Decl. ¶ 30.) MRS presents no facts from which the Court can infer circumstances warranting application of the equitable tolling doctrine. MRS's decision to continue working with Chase to complete performance of the MLPA even after it learned that Chase had allegedly failed to perform under the terms of the agreement is insufficient to demonstrate that it was misled or prevented from asserting its rights. That MRS filed the FCA Action in May 2013 premised upon substantially similar assertions only suggests that MRS was aware of the facts giving rise to its claims well before the limitations period had run. Although the FCA Action was sealed and Schneider was purportedly instructed by the Department of Justice not to disclose certain facts in connection with that case, MRS has failed to demonstrate how its obligation to keep the FCA Action confidential prevented MRS from timely commencing the instant action.

Accordingly, for MRS's breach of contract claim to be timely under C.P.L.R. § 202 it must have been filed within five years of its accrual, and its fraud and negligent misrepresentation claims must have been filed within four years of accrual.

1. Breach of Contract Claim

For a breach of contract action, the statute of limitations "runs from the time of the breach, although no damage occurs until later." Med. Jet S.A. v. Signature Flight Support-Palm Beach Inc., 941 So. 2d 576, 578 (Fla. Dist. Ct. App. 2006). Accordingly, MRS's claims are time-barred to the extent that they are premised upon breaches that occurred before December 23, 2009, i.e., more than five years before this action was commenced on December 24, 2014. The parties disagree, however, as to when Defendants breached the MLPA. Defendants argue that, to the extent that MRS's breach of contract claims are based upon Defendants' failure to (1) deliver the types of loans and records allegedly required by the MLPA, (2) deliver a proper Exhibit A to the MLPA, and (3) comply with the warranties set forth in the MLPA, those breaches occurred no later than the MLPA's closing date of February 25, 2009. In support of their argument, Defendants cite Schneider's deposition testimony that it was his "opinion on February 25th, 2009," that "Chase had breached the MLPA," and that, as of that same date, he believed that he "had been misled about the loans that [he] would be getting under the MLPA." (Schneider Dep. 435:6-436:3.)

*8 MRS disputes the date of the breach, arguing instead that its cause of action accrued on February 26, 2013, when Chase employee Omar Kassem emailed Schneider stating that he had been "asked to step aside as it doesn't appear we're going to get things resolved as we originally intended per the original agreement."5 (Kassem Email at 1.) In connection with its argument, MRS proffers the August 20, 2018, Declaration of Laurence Schneider, which states that "[b]ased upon Chase's continued assurances that it would comply with the MLPA, and Chase's various rationales for its delay, I did not consider litigation, or consider Chase in breach of the [MLPA] and/or suspect that I had been defrauded until Omar Kassem sent me an email on [February 26], 2013." (Schneider Decl. ¶ 24.) MRS argues that until February 26, 2013, the parties were "working to get things resolved" and that "Chase continued to send data tapes and otherwise promised Schneider that it would comply with the terms of the MLPA."

MRS's argument is unavailing to the extent that its breach of contract claim is premised upon Chase's failure to deliver the loans and documentation specified in the MLPA or to comply with the warranties in the MLPA. As Schneider's testimony demonstrates, these deficiencies were apparent on the MLPA's closing date, February 25, 2009, when Chase allegedly did not deliver the requisite loans and documentations as promised. (See, e.g., Schneider Dep. 314:2-317:20 (testifying that Schneider informed Chase "immediately" that the spreadsheet provided as Exhibit A was "woefully insufficient.")). That Chase allegedly endeavored for some period of time to provide Schneider with the correct loans and documentation, and then purported to acknowledge in the Kassem Email that it could not do so, does not delay the date of occurrence of, or the accrual of the cause of action for, the breach. Potiker v. Gasiunasen Gallery, No. 09-82356-CIV, 2010 WL 2949943, at *2 (S.D. Fla. Jul. 26, 2010) ("A cause of action accrues, for statute of limitations purposes ... when the action may be brought.... This is so regardless of whether the plaintiff knew that it had a claim and even though plaintiff did not suffer damages until after the alleged breach.") (internal citations and quotations omitted).6

Accordingly, the Court finds that MRS's claims for breach of contract are time-barred to the extent that they are based upon Defendants' failure to deliver the loans and documentation specified in the MLPA or to comply with the warranties in the MLPA.7 In light of this determination, Plaintiffs' March 2019 motion for partial summary judgment is denied as moot to the extent that it seeks judgment in MRS's favor with respect to these claims. Chase's March 2019 motion to exclude the testimony of Jeffrey S. Andrien is granted to the extent that Andrien proffers testimony regarding lost profits arising from these claims, as those portions of Andrien's Report are no longer relevant to any issue in this case. See Fed. R. Evid. 702. Because Chase does not seek dismissal on statute of limitations grounds of MRS's additional claims for breach of contract premised upon, among other things, Chase's recording of lien releases, issuance of debt forgiveness letters, and retention of borrower payments on loans sold to MRS, the Court addresses those claims separately below.

2. Fraud and Negligent Misrepresentation Claims

*9 The limitations period for an action founded upon fraud commences at the time "the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence." Fla. Stat. § 95.031. MRS argues that Chase fraudulently induced MRS to enter into the MLPA by, among other things, misrepresenting that all the liens sold under the MLPA were "first liens," that Chase had all the necessary information to "board and service" the loans, that the loans complied with federal, state, and local laws, that the loan pool contained "cherries" that were erroneously "charged off," and that there would be competition to purchase the loan pool. (Docket entry no. 323 at 13-15.)

Defendants argue that MRS could have and should have known that these statements were false on February 25, 2009, when it executed the MLPA without receiving the promised loans and documentation. Once again, Defendants rely on Schneider's testimony that as of February 25, 2009, he believed that he "had been misled about the loans that [he] would be getting under the MLPA." (Schneider Dep. 435:6-436:3.) Relying principally upon the Schneider Declaration's description of MRS's interactions with Chase after the MLPA was executed, including a 2011 business trip to Las Vegas, Chase's "continued assurances that it would comply with the MLPA," and Chase's "various rationales for its delay," MRS disputes the date on which it should have known about the acts giving rise to its fraud and negligent misrepresentation claims. (See Schneider Decl. ¶¶ 20, 24.) MRS argues that "it was not until Chase ceased complying with the MLPA in [February] 2013 that Plaintiff truly began to understand and investigate whether Chase had intended to defraud Schneider from the inception of the parties' negotiations of the MLPA." (Docket entry no. 308 at 20.)

Here, too, MRS's arguments are unpersuasive. Once MRS assented to the MLPA and was not provided with the items it was promised, it should have known—and indeed, Schneider's testimony suggests that he did know—that the statements allegedly made by Chase to induce Schneider to enter into the MLPA regarding the nature and provenance of the loans were untrue. Evidence of MRS's reliance on any alleged misrepresentations made after the MLPA was signed is insufficient to delay the accrual of its fraud claim because Schneider has admitted that MRS was already on notice of the facts that gave rise to MRS's claims based on alleged pre-closing representations as of February 25, 2009, the MLPA's closing date. To the extent that MRS's fraud and negligent misrepresentation claims are based upon assurances made after February 25, 2009, that Chase would comply with the MLPA or Chase's "various rationales" for its delay, MRS's claims are duplicative of its breach of contract claim. See Wyle Inc. v. ITT Corp., 130 A.D.3d 438, 439 (N.Y. App. Div. 1st Dep't 2015) ("In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim."). Because MRS did not file its fraud and negligent misrepresentation claims until December 24, 2014, more than four years after February 25, 2009, those claims are dismissed as time-barred.

In light of the dismissal of MRS's fraud and negligent misrepresentation claims as untimely, the Court denies as moot Plaintiffs' October 2018 motion for partial summary judgment on those claims.

Punitive Damages Claim

Under New York law, punitive damages are unavailable in connection with a breach of contract claim are available if the plaintiff demonstrates that "(1) that the defendant's conduct is actionable as an independent tort; (2) the tortious conduct [is] of [an] egregious nature; (3) the egregious conduct [is] directed to plaintiff; and (4) [the tortious conduct is] part of a pattern directed at the public generally." N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.), 266 F.3d 112, 130 (2d Cir. 2001) (internal quotation marks omitted). Plaintiffs argue that the "FCA Complaint, and the facts established [in Plaintiffs' opposition to Chase's July 2018 motion for partial summary judgment], clearly establish that Chase violated the law," and that Chase's actions were "morally culpable, and actuated by evil and/or reprehensible motives." (Docket entry no. 308 at 32.) The record makes it clear that Plaintiffs cannot meet their burden. Among other issues, Plaintiffs cite no specific evidence, and the Court can find none in the record submitted in connection with Chase's July 2018 motion for partial summary judgment, from which a reasonable juror could infer that Chase's conduct was directed at the public generally. See Topps Co. v. Cadbury Stani S.A.I.C., 380 F. Supp. 2d 250, 263 (S.D.N.Y. 2005) ("An isolated transaction incident to an otherwise legitimate business.... does not constitute conduct aimed at the public generally.") (internal citations and quotations omitted). Accordingly, Defendants' July 2018 motion for partial summary judgment is granted to the extent that it seeks dismissal of Plaintiffs' claim for punitive damages.

Disgorgement Claim

*10 In conjunction with their proffer of the Andrien Report, Plaintiffs assert a claim against Chase for disgorgement to Plaintiffs of amounts that Chase allegedly received from the federal government pursuant to mortgage-related relief programs. Relying primarily upon the Andrien Report, Plaintiffs seek disgorgement of $557.14 million which they contend Chase received in the form of HAMP incentives and consumer relief credits under certain settlement agreements with the U.S. government. Andrien acknowledged at his deposition that his disgorgement estimate is not a "measure of economic harm to the [P]laintiff," but rather a "measure[ ] of economic benefits to the [D]efendants that they would not have gotten ... but for their bad acts related to their dealings with the [P]laintiffs." (Andrien Dep. at 108:23-109:13.) Under New York law, "the theory underlying damages for breach of contract is to make good or replace the loss caused by the breach." Scienton Techs., Inc. v. Comp. Assocs. Intnat'l, Inc., 703 Fed. App'x 6, 9-10 (2d Cir. 2017). Thus, damages are generally measured by the plaintiff's actual loss, and not the defendant's profits. Id. at 10.

Chase argues that it is entitled to summary judgment dismissing Plaintiffs' disgorgement claim because, among other things, Plaintiffs have waived this claim by failing to include it in either the FAC or their initial disclosures, and because disgorgement is not an appropriate remedy for breach of the MLPA. In response, Plaintiffs contend that Chase was on notice of their disgorgement claim because they had asserted a substantially similar claim in the FCA Action and because the FAC alleges that Chase "has sought to, and still seeks to, benefit from incentive payments that were made available through [HAMP]" and that Chase "began releasing ... liens to avoid compliance with the servicing and consumer relief requirements of [certain national mortgage settlements] and to obtain credit thereunder." (FAC ¶¶ 37, 81.) Plaintiffs do not dispute that they failed to include disgorgement as a damages theory in their initial disclosures. (Def. March 2019 56.1 St. ¶ 53.) Nor can they show that the FAC explicitly asserted any claim against Chase for payment to Plaintiffs of amounts Chase may have received from the federal government.

As explained above, contract damages normally focus on the restoration of losses allegedly suffered by the plaintiff, and Plaintiffs have proffered no authority from New York or any other American jurisdiction that recognizes disgorgement of benefits received from third parties as a proper element of damages for breach of contract. However, citing the Restatement (Third) of Restitution and Unjust Enrichment § 39, Plaintiffs argue that "the collateral damage caused by Chase's fraudulent inducement, and opportunistic and intentional breach of the contracts, cannot go unpunished" and that "[j]ustice and equity require Chase's ill-gotten gains, received at the expense of Plaintiffs, to be disgorged." (Docket entry no. 388, Pls. Opp. at 24.)

The Court finds that Plaintiffs have waived their disgorgement claim. The FAC only seeks compensatory and punitive damages, and the paragraphs identified by Plaintiffs are not sufficient to give Chase fair notice that Plaintiffs intended to assert a claim against Chase for disgorgement to

Plaintiffs of amounts Chase received under certain government programs. See Gershanow v. County of Rockland, No. 11-CV-8174 (CS), 2014 WL 1099821 (S.D.N.Y. Mar. 20, 2014) (disallowing claim for money damages where complaint sought only declaratory and injunctive relief and pleaded no facts that could lead to a reasonable inference that money damages were sought). Furthermore, Plaintiffs offer no explanation for their failure to include this theory in their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1), which are required to include damages computations and backup materials. The Andrien Report was not provided in Plaintiffs' Rule 26(a)(1) disclosures or any amendment of the disclosures, and thus is properly excluded from the evidentiary record. See Fed. R. Civ. P. 37(c) ("If a party fails to provide information or identify a witness as required by Rule 26(a) ... the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.") Without the Andrien Report, which Chase argues is insufficient in any event to provide a factual basis for the disgorgement claim, there is nothing in the record to supply factual or legal support for Plaintiffs' disgorgement claim.

*11 The disgorgement claim also fails on the merits. Plaintiffs have proffered no legal foundation for their claim other than their citation of a Restatement provision that has not been adopted by any New

York court. See Kansas v. Nebraska, 135 S. Ct. 1042, 1064 (2015) (Scalia J., concurring and dissenting) (noting that section 39 constitutes a "novel extension" of the law that finds little, if any, support in case law). Even that provision—Restatement (Third) of Restitution and Unjust Enrichment § 39—only allows for disgorgement of profits gained by an opportunistic contract breach where "the available damage remedy affords inadequate protection to the promisee's contractual entitlement." Plaintiffs proffer no argument or evidence to suggest that traditional contract damages would be insufficient to make Plaintiffs whole here.

Under these circumstances, the Court finds no reason to depart from the ordinary rules that "damages for a breach of contract should put the non-breaching party in the position it would have occupied but for the breach" and "the injured party should not recover more from the breach than the party would have gained had the contract been fully performed." Topps, 380 F. Supp. 2d at 269. Because Plaintiffs' disgorgement claim does not seek to quantify any economic harm to Plaintiffs caused by Chase's alleged breach of the MLPA, and seeks recovery of amounts greater than what Plaintiffs would have gained had Defendants performed under the MLPA, Plaintiffs' claim for disgorgement is meritless and will be dismissed. In light of this determination, the Court grants Chase's March 2019 motion to exclude the testimony of Jeffrey S. Andrien to the extent that Andrien proffers testimony regarding disgorgement damages, as that testimony is no longer relevant. See Fed. R. Evid. 702.

Plaintiffs' Remaining Claims for Breach of Contract

Plaintiffs' remaining claims for breach of contract assert that Chase breached the MLPA, the S&A MMLSA, and the 1st Fidelity MMLSA by, among other things, recording lien releases, issuing debt forgiveness letters, and retaining borrower payments on loans sold to MRS, S&A, and 1st Fidelity pursuant to those agreements. Chase moves for summary judgment dismissing these claims, arguing that Plaintiffs have failed to adduce any admissible evidence of damages caused by these alleged breaches. Chase points to Plaintiffs' interrogatory responses and the Andrien Report's failure to separately quantify any losses resulting from these alleged breaches. For example, MRS's interrogatory response states that it is "unable to specifically identify" any instance where a borrower's payments to MRS were ceased or interrupted because the borrower received a debt forgiveness letter or Chase recorded a lien release, and that it "is not now in possession of" information regarding any instance where Chase improperly accepted and retained a payment on an MLPA loan. (Def. Mar. 2019 56.1 St. ¶¶ 42, 47.) Similarly, S&A and 1st Fidelity have stated that they are "unable to specifically identify any particular loan numbers" where a borrower's payments to S&A or 1st Fidelity were ceased or interrupted because the borrower received a debt forgiveness letter or Chase recorded a lien release, and that they "cannot ascertain with any certainty why borrowers from whom they previously received payments stopped making payments and/or why payments were interrupted." (Def. Mar. 2019 56.1 St. ¶ 43.)

Moreover, although the Andrien Report estimates that MRS lost profits in the amount of $31.93 million as a result of Chase's various alleged breaches of the MLPA, the Report does not separately quantify the lost profits attributable to these remaining aspects of MRS's causes of action (i.e., those resulting from lien releases, debt forgiveness letters, or the retention of borrower payments), and Andrien has testified that he has "not specifically" quantified the economic loss caused by Chase's alleged lien releases. (Def. Mar. 2019 56.1 St. ¶ 44; Pl. May 2019 Resp. ¶ 191; Andrien Dep. at 109:20-23.) The Andrien Report also does not estimate any compensatory damages for the claims of S&A and 1st Fidelity, and Andrien has testified that he is not offering any opinion relating to damages suffered by S&A and 1st Fidelity, including damages arising from lien releases. (Def. Mar. 2019 56.1 St. ¶ 45; Andrien Dep. at 111:15-112:12.)

*12 Despite these admitted evidentiary gaps, Plaintiffs contend that summary judgment is unwarranted because “there exists ample proof of substantial direct damages to Plaintiffs.” (Pl. Opp. at 6.) In support of their assertion, Plaintiffs raise several unpersuasive arguments regarding the appropriate measure of damages and cite evidence which fails to establish a genuine factual dispute as to the issue of damages. For example, Plaintiffs cite the Andrien Report’s assertion that Chase received between $6.04 million and $16.18 million in consumer relief credit under certain government settlement agreements, arguing that the “recorded lien releases and debt forgiveness letters sent by Chase to borrowers interfered with over $16 million in secured debt after March 1, 2012 alone.” (Pl. Opp. at 5-6.) As explained above, however, Defendants’ alleged gains are not the appropriate measure for breach of contract damages. Moreover, Plaintiffs have proffered no evidence connecting any amounts allegedly claimed or received by Chase under federal government programs with loans covered by agreements with Plaintiffs. Thus, Chase’s alleged receipt of consumer relief credits is insufficient to establish that Plaintiffs were injured by Defendants’ issuance of debt forgiveness letters, recordation of lien releases, or retention of borrower payments.

Plaintiffs also point to Chase’s admission that Defendants mistakenly sent debt forgiveness letters to 23 1st Fidelity and S&A borrowers and released liens on certain MRS, S&A, and 1st Fidelity loans, arguing that it “defies logic” for “Chase to now argue that Plaintiff did not suffer a direct monetary loss as a result of [the] same.” (Answer ¶¶ 192-193, 271-273; Pl. Opp. at 5.) On their own, however, Chase’s admissions do not establish that, as a result of Chase’s actions, Plaintiffs were subsequently denied payments on mistakenly forgiven loans or were otherwise injured by Defendant’s recordation of lien releases. Plaintiffs also contend that, because Chase bought back certain mistakenly forgiven loans, Plaintiffs are entitled to the unpaid balance of any remaining released or forgiven loans. (Pl. Opp. at 7.) Once again, however, Plaintiffs identify no loans mistakenly forgiven by Chase for which Plaintiffs have not already been compensated, nor do they offer any evidence from which a jury can infer that Plaintiffs would have recovered the entire unpaid balance on each remaining loan but for Chase’s breach.

Similarly, Plaintiffs argue that they have incurred litigation and operating expenses that “logically and directly resulted from Chase’s actions,” including “having to defend lawsuits brought by borrowers and municipalities,” but fail to proffer any evidence of legal expenses directly attributable to Chase’s conduct, asserting instead that “Schneider will testify” to these expenses at trial. (Pl. Opp. at 6.) Plaintiffs’ promise to produce evidence of damages at a later stage “through trial testimony, as well as through evidence offered by Schneider, Chase’s own witnesses, and records that Mr. Andrien reviewed to form his opinion," is insufficient to meet Plaintiffs burden at summary judgment to produce "hard evidence" showing that there is a genuine issue of material fact for trial. Golden Pac. Bancorp, 375 F.3d at 200.

Because Plaintiffs have failed to come forward with evidence from which a jury could infer that they were injured as a result of Chase's issuance of debt forgiveness letters, recordation of lien releases, or retention of borrower payments, Plaintiffs' remaining breach of contract claims are dismissed.[8] In light of this determination, Plaintiffs' March 2019 motion for partial summary judgment with respect to any of the remaining breaches of contract is denied.

Conclusion

*13 For the foregoing reasons, Chase's July 2018 motion for partial summary judgment is granted to the extent that it seeks dismissal of MRS's breach of contract, fraud, and negligent misrepresentation claims as time-barred, and to the extent that it seeks to dismiss Plaintiffs' claim for punitive damages. Chase's March 2019 motion for partial summary judgment on Plaintiffs' contract and damages claims is granted with respect to Plaintiffs' remaining breach of contract claims, including Plaintiffs' claim for disgorgement. In light of those determinations, the Court grants Chase's March 2019 motion to exclude the testimony of Jeffrey S. Andrien, and denies as moot MRS's October 2018 motion for partial summary judgment on its fraud and negligent misrepresentation claims, as well as Plaintiffs' March 2019 motion for partial summary judgment with respect to any time-barred breach of contract claims. Plaintiffs' March 2019 motion for partial summary judgment on any remaining breach of contract claims is denied. The Clerk of Court is respectfully requested to enter judgment accordingly and to close this case. This Memorandum Opinion and Order resolves docket entry nos. 301, 321, 350, 357, and 360.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 4735387

Endnote 6

The Court is similarly unpersuaded by MRS's argument in its March 2019 motion for partial summary judgment that the "the full extent" of Chase's breach only became clear on May 29, 2013, when Chase employee Launi Solomon sent Schneider a file containing "sufficient information to discern what [Schneider] actually received." (Pls. MSJ at 2.) As discussed above, the date on which

Schneider came to realize that the MLPA had been breached is not relevant under Florida law.

Endnote 7

To the extent that MRS argues that Chase breached an implied covenant of good faith and fair dealing by abandoning its efforts to comply with the MLPA on February 26, 2013, MRS has not demonstrated how that claim, which also appears to be premised on Chase's failure to deliver the promised loans and documentation, is distinct from its claim that Chase breached the MLPA by failing to deliver a proper Exhibit A. See Harris v. Provident Life and Acc. Ins. Co., 310 F.3d 73 (2d Cir. 2002) ("New York law ... does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.").

Endnote 8

Plaintiffs' opposition to Defendants' March 2019 motion for partial summary judgment raises additional breach of contract theories. For example, Plaintiffs also argue that they were injured by Chase's failure to provide "RESPA letters," Chase's recall of certain profitable loans, Chase's retention of a $264,980.09 title insurance payment, Chase's failure to provide loan assignments, and Chase's assignment of loans to the wrong Plaintiff. (See Pl. Opp. at 8.) Although Plaintiffs cite voluminous documentary evidence which they contend demonstrates that Chase engaged in these actions, Plaintiffs have not identified any evidence showing that they were entitled, as an initial matter, to these payments under the terms of their respective agreements with Chase, or that Chase's actions caused Plaintiffs to lose payments which Plaintiffs would otherwise have obtained, or to otherwise quantify the losses associated with these actions. Instead, Plaintiffs argue that "Schneider has, can and will testify at trial that [these] actions have caused direct damages in significant amounts." (Id.) Plaintiffs' conclusory and self-serving assertion that they will prove their case at trial is plainly insufficient to meet their burden at summary judgment, and accordingly these claims are also dismissed.