IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO;

RYAN MCCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University;

PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University;

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and

ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), MARK EMMERT, individually and as President of the NCAA, and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

And

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Civil Division

Docket No. 2013-2082

ADDENDUM TO MEMORANDUM IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFFS' FIRST AMENDED COMPLAINT

MEMORANDUM IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFFS' FIRST AMENDED COMPLAINT

ADDENDUM: UNPUBLISHED CASES

Not Reported in A.3d, 2011 WL 3338236 (Conn.Super.), 52 Conn. L. Rptr. 232
(Cite as: 2011 WL 3338236 (Conn.Super.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.
AMICA MUTUAL INSURANCE COMPANY
v.
FASSARELLA PRO PAINTING & DESIGN, LLC.

No. FSTCV106003636S.
July 8, 2011.

DAVID R. TOBIN, J.

***1** The plaintiff, Amica Mutual Insurance Company, has brought this subrogation action seeking to recover funds that it paid to its insureds following a fire on August 8, 2008, which severely damaged premises covered by a fire insurance policy issued by the plaintiff. In its complaint, the plaintiff alleges that the fire was caused by the negligence of the defendant, Fassarella Pro Painting & Design, LLC. Presently before the court is the plaintiff's motion to strike dated February 24, 2011. In that motion, the plaintiff seeks to strike the defendant's first and second special defenses and the defendant's first and second counterclaims dated February 8, 2011.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any [pleading] ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves,* 262 Conn. 480, 498 (2003). "A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike." *Barasso v. Rear Still Hill Road, LLC,* 64 Conn.App. 9, 13 (2001). In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency. *Connecticut National Bank v. Douglas,* 221 Conn. 530, 536, (1992). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied ... It is fundamental that in determining the sufficiency of a complaint challenged by [an opposing party's] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted ... Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Violano v. Fernandez,* 280 Conn. 310, 318 (2006).

DEFENDANT'S PROCEDURAL OBJECTION TO MOTION TO STRIKE

In it's opposition to the plaintiff's motion to strike dated March 16, 2011, the defendant claims that the plaintiff failed to comply with Practice Book § 10–41, which requires that a motion to strike "shall separately set forth each such claim of insufficiency and shall distinctly specify the reason or reasons of such claimed insufficiency." After reviewing the plaintiff's motion to strike and the memorandum filed in support thereof, the court finds that the plaintiff's motion complies with the foregoing Practice Book requirement.

DEFENDANT'S FIRST AND SECOND SPECIAL DEFENSES

The defendant's first special defense alleges: "Plaintiff has failed to state a legally cognizable cause of action for breach of contract, negligence and/or subrogation of damages." The plaintiff claims that this special defense fails to allege any facts to support the defense. The defendant's second special defense al-

leges: "Plaintiff lacks standing to assert the claims in its Third Amended Complaint." The plaintiff also claims that this special defense fails to allege any facts to support the defense.

*2 Practice Book § 10–50 provides in relevant part: "Facts which are consistent with [the plaintiff's complaint] but show, notwithstanding, that the plaintiff has no cause of action, must be specifically alleged." In its opposition to the plaintiff's motion to strike, the defendant does not address the motion as it relates to its first and second special defenses. The court agrees with the plaintiff that neither of the defendant's first two special defenses allege facts adequate to support a special defense. Accordingly, the plaintiff's motion to strike those special defenses is granted.

DEFENDANT'S FIRST COUNTERCLAIM—SPOLIATION OF EVIDENCE

The defendant's first counterclaim alleges that the plaintiff intentionally engaged in spoliation of evidence, thereby hindering the defendant's defense of the plaintiff's claims. The plaintiff moves to strike the first counterclaim on the ground that the tort of spoliation of evidence is available only to a "first party plaintiff." In its opposition to the motion to strike, the defendant argues that there is no logical reason why a defendant who is harmed by an adversary's intentional spoliation of evidence should not be able to collect damages commensurate with the harm that resulted from the spoliation.

A cause of action for intentional spoliation of evidence was first recognized by our Supreme Court in *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225 (2006). The Court defined intentional spoliation of evidence as the "intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." (Internal quotation marks omitted.) *Id.*, at 243. The Court held that a cause of action for intentional spoliation of evidence includes the following essential elements: "(1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages." *Id.*, at 244–45.

The Court reasoned that the cause of action is appropriate when a first-party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case. *Id.*, at 235. As the Court noted, an adverse impact on a plaintiff's case is "a critical element of the intentional spoliation tort." *Id.*, at 230, citing M.M. Koesel & T.L. Turnbull, Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation (2d Ed.2006), p. 93. The Court explained "the plaintiff's burden of proof with respect to causation and damages. To establish proximate causation, the plaintiff must prove that the defendants' intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a prima facie case in the underlying litigation." *Id.*, at 246, citing *Smith v. Atkinson*, 771 So.2d 429, 434 (Ala.2000) ("in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment").

*3 Under the Court's reasoning, the cause of action for spoliation of evidence is a substitute for the underlying cause of action, which the plaintiff can no longer successfully pursue because of the defendant's wrongful destruction of evidence. In the present case, the defendant does not claim that the evidence alleg-

edly destroyed by the plaintiff or the plaintiff's subrogors was essential to an underlying cause of action. Instead, it claims that the evidence was essential to its defense of the claims brought by the plaintiff. The defendant's counterclaim lacks one of the essential elements of the tort of spoliation of evidence as outlined in *Rizzuto:* the inability of a plaintiff to establish a prima facie case without the spoliated evidence.

The defendant is not without remedies if, in fact, any evidence potentially relevant to its defense was wrongfully destroyed. In *Beers v. Bayliner Marine Corp.*, 236 Conn. 769, 777–79 (1996), the Court held that "an adverse inference may be drawn against a party who has destroyed evidence only if the trier of fact is satisfied that the party who seeks the adverse inference has proven the following. First, the spoliation must have been intentional ... By this, we do not mean that there must have been an intent to perpetrate a fraud by the party or his agent who destroyed the evidence but, rather, that the evidence had been disposed of intentionally and not merely destroyed inadvertently ... Second, the destroyed evidence must be relevant to the issue or matter for which the party seeks the inference. For example, the spoliation of a machine may raise an adverse inference with respect to a claim that that particular machine was defective, but such an inference may not be drawn with respect to a claim based upon design defect when the destruction would not hinder the defense ... Third, the party who seeks the inference must have acted with due diligence with respect to the spoliated evidence. For example, the spoliator must be on notice that the evidence should be preserved ... If the spoliated evidence was necessary for inspection or testing, the party who seeks the inference must have taken all appropriate means to have the evidence produced. This may include, if necessary, an attempt to obtain a court ordered inspection ... Finally, the jury, if it is the trier of fact, must be instructed that it is not required to draw the inference that the destroyed evidence would be unfavorable but that it may do so upon being satisfied that the above conditions have been met." (Citations omitted.)

In *Rizzuto,* the Court reiterated that "the trier of fact may draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it ... To be entitled to this inference, the victim of spoliation must prove that: (1) the spoliation was intentional, in the sense that it was purposeful, and not inadvertent; (2) the destroyed evidence was relevant to the issue or matter for which the party seeks the inference; and (3) he or she acted with due diligence with respect to the spoliated evidence ... [T]he adverse inference is permissive, and not mandatory ..." (Citations omitted; internal quotation marks omitted.) *Rizzuto v. Davidson Ladders, Inc., supra,* 280 Conn. at 237.

*4 Therefore, the defendant may have remedies if the plaintiff wrongfully destroyed any evidence potentially relevant to the defendant's defense. At the same time, the court finds that Connecticut does not recognize a cause of action in favor of a defendant for a plaintiff's spoliation of evidence. Accordingly, the court grants the plaintiff's motion to strike the defendant's first counterclaim.

DEFENDANT'S SECOND COUNTERCLAIM—DECLARATORY JUDGMENT

The defendant's second counterclaim alleges that prior to the date of the fire, the plaintiff had issued a fire insurance policy to Wayne Jarvis and Heather Jarvis insuring the premises located at Cat Rock Road for $1,559,000. The defendant further alleges that after the fire it was discovered that neither Wayne Jarvis nor Heather Jarvis had any interest in the premises and that title was, in fact, held in the name of Cat Rock Nominee Trust and/or Catrock Nominee Trust. The defendant alleges that after the fire the

plaintiff reformed the fire insurance policy that it had issued to name Cat Rock Nominee Trust and/or Catrock Nominee Trust as insureds and to increase the coverage under the policy to $1,627,000. The defendant seeks a declaratory judgment that the policy reformation was void and that the policy in effect on the date of the fire is the controlling policy for purposes of the pending litigation.

The plaintiff moves to strike the defendant's second counterclaim on the ground that only a party to the contract or a third-party beneficiary may bring an action for contract reformation. The plaintiff thus argues that the defendant lacks standing to bring its second counterclaim. In its opposition to the motion, the defendant argues that it has standing to seek reformation of the contract, as the reformation directly affected the rights and interests of the defendant to certain defenses and also exposed it to claims of subrogation that did not exist immediately after the fire.

Practice Book § 17–55 provides: "A declaratory judgment action may be maintained if all of the following conditions have been met: (1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations; (2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and (3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure." Moreover, "[t]he defendant in any appropriate action may seek a declaratory judgment by a counterclaim." Practice Book § 17–56(a)(5).

In addition to the three elements mentioned above for seeking declaratory relief, the plaintiff also must have standing. "The question of standing [to pursue a declaratory judgment] is essentially one of aggrievement ... A party bringing suit must demonstrate a legal interest in the controversy that can be distinguished from the interest of the general public." (Citations omitted; internal quotation marks omitted.) *American States Ins. Corp. v. Peci,* Superior Court, judicial district of Danbury, Docket No. 319343 (July 7, 1995, Stodolink, J.) (15 Conn. L. Rptr. 97, 98); see also *Tasini v. New York Times Co.,* 184 F.Sup.2d 350, 356 (S.D.N.Y.2002) ("[t]he determination of whether a plaintiff has standing ... is antecedent to any declaratory judgment determination. A court must first satisfy itself that the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment").

***5** The party must have standing not only to seek the declaratory judgment action, but also to bring a claim on the underlying action. "Since it is the underlying cause of action of the defendant against the plaintiff that is actually litigated in a declaratory judgment action, a party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action." 22A Am.Jur.2d, Declaratory Judgments § 218 (2011). Thus, in determining whether a party may bring a declaratory judgment action, the question becomes whether the party would have standing to bring suit on the underlying cause of action. This principle applies to contract cases. *Id.* ("[t]he rules with respect to standing in declaratory judgment actions have been applied to contract actions)." Accordingly, if a party lacks standing to pursue a contract cause of action, then that party cannot bring a declaratory judgment action regarding that contract.

Given that framework, it is necessary to examine

fundamental principles of standing as they relate to contract law. "It is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract ..." (Internal quotation marks omitted.) *Dow & Condon, Inc. v. Brookfield Development Corp.*, 266 Conn. 572, 579 (2003). With regard to third parties, "the ultimate test to be applied [in determining whether a person has a right of action as a third party beneficiary] is whether the *intent of the parties to the contract* was that the promisor should assume a direct obligation to the third party [beneficiary] and ... that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties." (Emphasis in original; internal quotation marks omitted.) *Grigerik v. Sharpe*, 247 Conn. 293, 311–12 (1998). "[A] third party seeking to enforce a contract must allege and prove that the *contracting parties intended* that the promisor should assume a direct obligation to the third party." (Emphasis in original; internal quotation marks omitted.) *Id.*, at 315. Accordingly, absent intent by the contracting parties that one of the parties had an obligation to the third party, that third party lacks standing to enforce the contract.

In addition to there being specific standing rules to enforce a contract, cases have delineated standing principles for voiding or rescinding a contract. [FN1] "The general rule is that only a party (actual or alleged) to a contract can challenge its validity ... Obviously, the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract." (Citation omitted; internal quotation marks omitted.) *Spanish Oaks, Inc. v. Hy–Vee, Inc.*, 265 Neb. 133, 138, 655 N.W.2d 390 (2003). Thus, only parties to a contract have standing to void it.

FN1. Connecticut cases have not addressed the question of whether a non-party to a contract has standing to void that contract or a reformation to that contract. Nevertheless, other jurisdictions have dealt with that issue.

*6 This rule extends to parties who want to void a reformation of a contract. As a preliminary matter, "[r]eformation is appropriate in cases of mutual mistake-that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction ... [R]eformation is also available in equity when the instrument does not express the true intent of the parties owing to mistake of one party coupled with fraud, actual or constructive, or inequitable conduct on the part of the other." (Citations omitted; internal quotation marks omitted.) *Harlach v. Metropolitan Property & Liability Ins. Co.*, 221 Conn. 185, 190–91 (1992). "[O]nly parties and their privies have standing to seek reformation of a contract." *American Teleconferencing Services, Ltd. v. Network Billing Systems, LLC*, 293 Ga.App. 772, 778, 668 S.E.2d 259 (2008). "Reformation is an action on a written contract and may be had only by the immediate parties thereto and by those standing in privity with them. Even a person with a substantial interest in the contract may not maintain an action for reformation if he is not a party or privy thereto." *Merrimack Mutual Fire Ins. Co. v. Allied Fairbanks Bank*, 678 S.W.2d 574, 577 (Tex.App.1984). "Reformation of a liability insurance policy may be sought only by the contracting parties, their assignees or the intended beneficiaries of the insurance contract." *International Service Ins. Co. v. Gonzales*, 194 Cal.App.3d 110, 118–19, 239 Cal.Rptr. 341 (1987). Thus, a non-party to a contract cannot seek reformation.

To the extent that only parties to a contract can seek a reformation, it follows that only parties to a

contract can bring an action to void a reformation. "[I]f all the parties to a contract request reformation of the contract, an outsider has no right to oppose it. If a person not in privity to a contract has no right to maintain an action on that contract, he does not have the right to oppose an action by the parties on the contract." *Merrimack Mutual Fire Ins. Co. v. Allied Fairbanks Bank, supra,* 678 S.W.2d at 577; see also *Wright v. Sampson,* 830 N.E.2d 1022, 1026 (Ind.Ct.App.2005) (regarding reformation of property deeds, holding that "the general rule is that one must be a party to or in privity with a party to the deed to be entitled to reform a deed"). Therefore, if a party lacks standing to bring a cause of action as to a contract, that party further lacks the ability to raise any objection to a reformation of that contract.

The court finds that the defendant lacks standing to bring a declaratory judgment action with respect to the fire insurance policy issued by the plaintiff, as the defendant was not a party to that contract. Accordingly, the plaintiff's motion to strike the defendant's second counterclaim is granted.

Conn.Super.,2011.
Amica Mut. Ins. Co. v. Fassarella Pro Painting & Design, LLC
Not Reported in A.3d, 2011 WL 3338236 (Conn.Super.), 52 Conn. L. Rptr. 232

END OF DOCUMENT

Not Reported in A.3d, 2011 WL 10878246 (Pa.Cmwlth.)
(Cite as: 2011 WL 10878246 (Pa.Cmwlth.))

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Only the Westlaw citation is currently available.

THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

Commonwealth Court of Pennsylvania.
John W. GRACEY, Appellant.
v.
CUMRU TOWNSHIP, Allen Madeira, individually and in his official capacity, Envirotech, individually and in its official capacity, Jeanne Johnston, individually and in her official capacity, Michael Setley, individually and in his official capacity, Shea Brianna Scharding, individually and in her official capacity, E. Kenneth Remp, individually and in his official capacity, Edward L. Gottschall, individually and in his official capacity, David Kalin, individually and in his official capacity, Ruth O'Leary, individually and in her official capacity, Barry E. Rohrbach, individually and in his official capacity, and Tony J. Sacco, individually and in his official capacity.

No. 2604 C.D.2010.
Submitted May 6, 2011.
Decided Dec. 27, 2011.

MEMORANDUM OPINION
PER CURIAM.

*1 John W. Gracey appeals, *pro se,* the order of the Court of Common Pleas of Berks County (trial court) sustaining the preliminary objections of Cumru Township (Township) and a number of other defendants (collectively, Defendants) [FN1] and dismissing Gracey's complaint. We now affirm.

FN1. The other defendants named in Gracey's complaint are: Allen Madeira, individually and in his official capacity; Envirotech, individually and in its official capacity; Jeanne Johnston, individually and in her official capacity; Michael Setley, individually and in his official capacity; Shea Brianna Scharding, individually and in her official capacity; E. Kenneth Remp, individually and in his official capacity; Edward L. Gottschall, individually and in his official capacity; David Kalin, individually and in his official capacity; Ruth O'Leary, individually and in her official capacity; Barry E. Rohrbach, individually and in his official capacity; and Tony J. Sacco, individually and in his official capacity.

Gracey owns a single-family house located at 1613 Meade Street in the Township.[FN2] On December 23, 2009, Remp, the Township's building inspector, inspected the house due to complaints by Gracey's tenants regarding its habitability. (Reproduced Record (R.R.) at 97a.) On December 28, 2009, Remp sent Gracey a letter warning Gracey of violations of the 2003 edition of the International Property Maintenance Code (IPMC) that were found to exist on the premises during the inspection. (R.R. at 96a–98a.) On February 18, 2010, Envirotech became the Township's code enforcement agency. (R.R. at 28a.) On March 4, 2010, Madeira, an employee of Envirotech, conducted another inspection of the house. (R.R. at 26a, 99a.) On March 16, 2010, the Township's Board of Commissioners enacted Ordinance No. 694 which adopted the 2009 edition of the IPMC. (R.R. at 88a, 89a.) On March 30, 2010, Madeira sent Gracey a notice of maintenance code violations. (R.R. at 26a, 30a–31a, 99a–100a.) The letter outlined a number of violations

of the 2009 edition of the IPMC provisions and stated that the property was condemned as unfit for occupancy. (R.R. at 26a, 99a–100a.)

> FN2. Cumru Township is a first class township. 119 The Pennsylvania Manual 6–73 (2009). Section 1502 of the First Class Township Code (Code), Act of June 24, 1931, P.L. 1206, *as amended,* 53 P.S. § 56502, vests the Township's corporate power in its board of commissioners, and it specifically empowers the Board to enact ordinances adopting the provisions of a standard or nationally recognized code or parts thereof. 53 P.S. § 56502(d). Section 1502 of the Code also empowers the Township to enact and enforce suitable ordinances to govern and regulate all housing designed or used for human habitation or occupancy. 53 P.S. § 56519. Section 1502 also empowers the Township "[t]o provide for the inspection of the construction and repair of buildings and housing, including the appointment of one or more building inspectors and housing inspectors...." 53 P.S. § 56520.

On October 4, 2010, Gracey filed a complaint in the trial court that was 16 pages in length with a number of exhibits and did not contain separately numbered paragraphs or separate counts. (R.R. at 6a–48a.) The complaint was divided into five sections: section A. provided the summary statement of the case; section B. provided an introduction to the plaintiff and the defendants; section C. provided background of the case; section D. provided the nine legal issues involved; and section E. provided the remedy and relief requested. (*Id.*)

Part I of the legal issues in section D. of the complaint related to Remp's December 28, 2009, letter and alleged an unspecified "Lack of Due Process." (R.R. at 11a.) Part II of the legal issues in section D. related to Madeira's March 30, 2010, letter and alleged: "Violation of Pennsylvania Constitution: Article 1 section 17; Ex Post Facto, Impairment of Contracts"; "Lack of authority for private individual and company to condemn property"; "[Sewer Enforcement Officer] Lacks authority to condemn property for Codes"; "Months later, Madeira became Codes Enforcement" [FN3].; "Willful misconduct to send Madeira to Gracey property"; "Malice, and Arbitrary"; "Arbitrariness and Animosity"; and "Disregard for the provision of the IPMC 2009—concerning Vacant Structures." (R.R. at 12a–20a.[FN4,FN5])

> FN3. The third, fourth, and fifth legal issues in the complaint related to the condemnation of property under the Eminent Domain Code, 26 Pa.C.S. §§ 101–1106. (R.R. at 14a.)
>
> FN4. There are no factual allegations in the complaint relating to Johnston, Setley, Scharding, Remp, Gottschall, Kalin, O'Leary, Rohrbach, or Sacco as individuals. (R.R. at 12a–20a.)
>
> FN5. Section E. of the complaint stated, in pertinent part:
>
> > John Gracey is requesting the release of his property and removal of condemnation, as well as monetary damages including the following:
> >
> > actual monetary damages; the reduction of the property's value due to the condemnation; the full financial value of the total property if the condemnation and taking is not removed; past, present, and future loss of income and earnings from the property during the condemnation; other costs and expenses; attorney fees; interest (at Penn-

sylvania legal rate); plus punitive damages....

(R.R. at 21a.)

On October 19, 2010, the Defendants filed preliminary objections alleging: (1) the complaint failed to conform to Rules 1022 and 1024 of the Pennsylvania Rules of Civil Procedure [FN6]; (2) the complaint was legally insufficient [FN7]; and (3) the complaint included scandalous and impertinent matter. (R.R. at 53a–60a.) Although Gracey filed a reply to the preliminary objections on November 8, 2010, (R.R. at 67a–100a.), he never sought to amend his complaint.

FN6. Rule 1022 states that "[e]very pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation." Pa.R.C.P. No. 1022. Rule 1024 provides, in pertinent part:

> (a) Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. The signer need not aver the source of the information or expectation of ability to prove the averment or denial at the trial. A pleading may be verified upon personal knowledge as to a part and upon information or belief as to the remainder.
>
> * * *
>
> (c) The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her knowledge and the reason why verification is not made by a party.
>
> Pa.R.C.P. No. 1024(a), (c).

FN7. Rule 1028 provides, in pertinent part:

> (a) Preliminary objections may be filed by an party to any pleading and are limited to the following grounds:
>
> * * *
>
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
>
> * * *
>
> (4) legal insufficiency of a pleading (demurrer);
>
> * * *
>
> (c)(1) A party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections. If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.
>
> Pa.R.C.P. No. 1028(a)(2), (4), (c)(1).

***2** On November 17, 2010, the trial court issued the instant order sustaining the preliminary objections

and dismissing Gracey's complaint. Gracey filed this appeal of the trial court's order.[FN8]

> FN8. This Court's scope of review of a trial court order granting preliminary objections is limited to determining whether the trial court committed legal error or abused its discretion. *Bell v. Township of Spring Brook,* —— A.3d ——, —— (Pa.Cmwlth., No. 2119 C.D.2010, filed September 28, 2011) (citation omitted).

In this appeal, Gracey claims [FN9]: (1) the trial court erred in sustaining the preliminary objections and dismissing the complaint; (2) the condemnation was a nullity as it was void from the start; (3) the condemnation was inappropriate because it was based on non-existent or erroneous IMPC requirements and the house was not unfit for human habitation; and (4) the condemnation violated his constitutional due process and ex post facto rights.

> FN9. We consolidate and reorder the claims raised by Gracey in this appeal in the interest of clarity.

Gracey first claims that the trial court erred in sustaining the preliminary objections and dismissing the complaint. We do not agree.

Rule 1028(a)(2) of the Rules of Civil Procedure states that preliminary objections may be filed where a complaint fails "[t]o conform to law or rule of court...." Pa.R.C.P. No. 1028(a)(2). In turn, Rule 1022 states that "[e]very pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation." Pa.R.C.P. No. 1022.

In general, the test of compliance with Rule 1022 is the difficulty or impossibility in filing an answer to the complaint. *General State Authority v. Sutter Corporation,* 24 Pa.Cmwlth. 391, 356 A.2d 377, 380 (Pa.Cmwlth.1976). The complaint in this case utterly fails to conform to the requirements of Rule 1022 as it is not divided into consecutively numbered paragraphs with each containing only one material allegation. (R.R. at 6a–22a.) The Defendants' inability to craft an appropriate answer to the instant complaint is manifest.

Rule 1024(a) states, in pertinent part, that "[e]very pleading containing an averment of fact not appearing of record in the action ... shall state that the averment ... is true upon the signer's personal knowledge or information and belief and shall be verified...." Pa.R.C.P. No. 1024(a). In addition, Rule 1024(c) provides, in pertinent part, that "[t]he verification shall be made by one or more of the parties filing the pleading...." Pa.R.C.P. No. 1024(c). The Explanatory Comment to Rule 1024 provides, in pertinent part:

> These amendments extend the concept of the verified statement to the Rules of Civil Procedure generally. The definitions of "affidavit" and "verified" in Rule 76 [FN10] have been enlarged to include two alternatives: an affidavit or verified document may contain (1) the usual oath or affirmation before a notary or other person authorized to administer oaths or (2) a statement by the signer that it is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

> FN10. In turn, Rule 76 provides, in pertinent part:
>
> > "[V]erified," when used in reference to a written statement of fact by the signer, means supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S.

§ 4904 relating to unsworn falsification to authorities.

Pa.R.C.P. No. 76.

Pa.R.C.P. No. 1024 cmt.1981.

As the Superior Court has stated:

"[T]he requirement of a verification is not waivable because without it a pleading is mere narration, and amounts to nothing." 2 Goodrich Amram 2d § 1024(a):1. While our cases acknowledge that amendment should be liberally allowed to cure technical defects in a verification, *see, e.g., George H. Althof, Inc. v. Spartan Inns of America, Inc.*, [441 A.2d 1236 (Pa.Super.1982)]; *Monroe Contract Corp. v. Harrison Square, Inc.*, [405 A.2d 954 (Pa.Super.1979)], there is no doubt but that the verification attached to the complaint in the instant case falls so far short of the statutory mandate that the verification is wholly defective and inadequate to support entry of a ... judgment against appellants.

***3** *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340, 344 (Pa.Super.2003), *appeal denied*, 577 Pa. 676, 843 A.2d 1236 (2004).

Likewise, the complaint in this case utterly fails to conform to the requirements of Rule 1024 as it is not verified at all. (R.R. at 6a–48a. [FN11]) The complete absence of a verification falls so far short of the requirement imposed by Rule 1024 that the instant complaint is patently insufficient. *Atlantic Credit and Finance, Inc.*, 829 A.2d at 344 ("[T]here is no doubt but that the verification attached to the complaint in the instant case falls so far short of the statutory mandate that the verification is wholly defective and inadequate to support entry of a ... judgment against appellants.").

FN11. Although Gracey never sought to amend his complaint he inserted a defective "supplemental verification" in his reply to the preliminary objections. (R.R. at 82a.)

Finally, Rule 1028(a)(4) states that preliminary objections may be filed based on the "legal insufficiency of a pleading (demurrer) ." Pa.R.C.P. No. 1028(a)(4). In the preliminary objections, the Defendants claimed that the nine legal issues raised in Gracey's complaint failed to state claims for which relief could be granted. (R.R. 55a–57a.)

As this Court recently noted:

[A] demurrer can only be sustained where the complaint clearly is insufficient to establish the pleader's right to relief. A preliminary objection in the nature of a demurrer admits as true all well-pled material, relevant facts and every inference fairly deducible from those facts. Conclusions or averments of law are not considered to be admitted as true by a demurrer. Since the sustaining of a demurrer results in a denial of the petitioner's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim upon which relief may be granted. If the facts as pleaded state a claim for which relief may be granted under any theory of law, there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.

Bell, —— A.3d at —— n. 7.

Rule 1019(a) states that "[t]he material facts on which a cause of action ... is based shall be stated in a concise and summary form." Pa.R.C.P. No. 1019(a). In addition, Rule 1020(a) provides, in pertinent part,

that "[e]ach cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Pa.R.C.P. No. 1020(a).

In *Steiner v. Markel,* 600 Pa. 515, 524–25 n. 11, 968 A.2d 1253, 1258–59 n. 11 (2009) (citations omitted and emphasis in original), the Supreme Court explained:

> "legal theory" and a "claim" are two different concepts. Black's Law Dictionary defines a "legal theory" as "the principle under which a litigant proceeds, or on which a litigant bases its claims or defenses in a case." A "claim" is defined as "the aggregate of operative facts giving rise to a right enforceable by a court." Pennsylvania courts have recognized this distinction, holding that:
>
> > *4 The purpose behind the rules of pleading is to enable parties to ascertain, by using their own professional discretion, the claims and defenses in the case. This purpose would be thwarted if courts, rather than the parties, were burdened with the responsibility of deciphering the causes of action from a pleading of facts which obscurely support the claim. *While it is not necessary that the complaint identify the specific legal theory of the underlying claim, it must apprise the defendant of the claim being asserted and summarize the essential facts to support that claim.* If a plaintiff fails to properly plead a separate cause of action, the cause he did not plead is waived.
>
> A plaintiff need not disclose a particular theory in the complaint, but the plaintiff must clearly plead a claim which can then be pursued under whatever theory the plaintiff determines is prudent.

Although Rule 1019(a) is to be liberally construed,[FN12] "[l]iberal construction does not permit unpled elements [to] be pulled from thin air and grafted onto the pleading; it does not excuse the basic requirements of pleading...." *McShea v. City of Philadelphia,* 606 Pa. 88, 98, 995 A.2d 334, 340 (2010). In addition, " '[t]he requirement of [Rule 1020(a)] that the plaintiff set forth each cause of action against each defendant in a separate count under a separate heading is mandatory and the complaint will be stricken for failing to comply with this requirement....' " *General State Authority v. Lawrie and Green,* 24 Pa.Cmwlth. 407, 356 A.2d 851, 853 (Pa.Cmwlth.1976) (citation omitted).

FN12. Rule 126 states:

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceedings may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pa.R.C.P. No. 126.

The nine legal issues raised by Gracey in his complaint are not divided into separate counts for each cause of action against each defendant, are not supported by any verified facts for each element of each of those claims, and they do not each contain a separate demand for relief. (R.R. at 11a–20a.) Based on the foregoing, it is clear that the trial court did not err in granting the Defendants' preliminary objections and dismissing the complaint as it is patently insufficient to establish Gracey's right to relief.[FN13]

FN13. *See Kovalev v. Sowell,* 839 A.2d 359, 367 (Pa.Super.2003), *appeal denied,* 580 Pa. 698, 860 A.2d 124 (2004) (holding that a *pro se* litigant is not entitled to any particular

> advantage due to his lack of legal training because any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove to be his undoing).

Accordingly, the trial court's order is affirmed.[FN14]

> FN14. Due to our disposition of this allegation of error, we need not address the remaining claims raised in this appeal.

ORDER

AND NOW, this 27th day of December, 2011, the November 17, 2010 order of the Court of Common Pleas of Berks County is affirmed.

Pa.Cmwlth.,2011.
Gracey v. Cumru Tp.
Not Reported in A.3d, 2011 WL 10878246 (Pa.Cmwlth.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2002 WL 1397449 (E.D.Pa.)
(Cite as: 2002 WL 1397449 (E.D.Pa.))

C

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
LEOPOLD GRAPHICS, INC., Plaintiff,
v.
THE CIT GROUP/EQUIPMENT FINANCING, INC. a/k/a Tyco Capital and Graphics International, Inc., Defendants.

No. CIV.A. 01–CV–6028.
June 26, 2002.

MEMORANDUM

BUCKWALTER, J.

*1 Plaintiff Leopold Graphics, Inc. ("Plaintiff") brings this action against Defendants The CIT Group/Equipment Financing, Inc. a/k/a Tyco Capital ("CIT") and Graphics International, Inc., ("Graphics") (CIT and Graphics, collectively, "Defendants"), alleging, *inter alia,* claims for breach of contract, interference with contract and interference with prospective contractual advantage. Presently before the Court are Defendants' Motions to Dismiss Counts VI and VII of the Complaint, which set forth Plaintiff's tort claims for (1) interference with contract and (2) interference with prospective contractual advantage. Defendants also seek to strike Plaintiff's request for punitive damages. For the reasons stated below, Defendants' Motions are GRANTED.

I. FACTS

According to the Complaint, in the late summer and early fall of 2000, Plaintiff, a commercial printer, negotiated with Graphics, an equipment broker, to purchase an industrial printing press with color and high speed capabilities. Graphics represented that it could deliver a used press to Plaintiff that met those specifications in December 2000. Plaintiff and Graphics negotiated and executed a conditional sales and security agreement through which Plaintiff would receive credit for trading in its then-current press. CIT was engaged to provide financing for the transaction, and would lease the printer to Plaintiff. According to Plaintiff, Graphics was obligated to inspect the press, which was in use by another company, before its delivery to Plaintiff to ensure that it was in conforming condition. In October, the printer was inspected with a Graphics representative present. Plaintiff relied on the press' arrival in December 2000 in contracting for various printing jobs and in preparing its budget.

However, Graphics failed to deliver the press—which was still in use by the other firm—to Plaintiff in December 2000. As the delay wore on, in January 2001, Graphics loaned a press to Plaintiff. However, the loaned press did not have the same capabilities as the bargained-for press, and in any event did not function properly. As a result, Plaintiff incurred additional costs to perform the printing jobs for which it had already contracted, and had to forego additional jobs. Plaintiff alleges that Graphics assured it that, due to the length and nature of the delay in delivering the press, it would be re-inspected by Graphics before its delivery to Plaintiff.

By the second quarter 2001, Graphics still had not provided the bargained-for press to Plaintiff. At that time, Plaintiff alleges that CIT and Graphics began to pressure Plaintiff to execute the lease documents—which would cause payment from CIT to Graphics to become due and would trigger Plaintiff's obligations to make lease payments to CIT—even though it had not received or inspected the bargained-for press. Plaintiff, it alleges, was under duress to execute the documents. Fearing the disruption to its business if it did not agree to do so because it could not arrange to receive another printer quickly, Plaintiff's

representatives executed the lease agreement and a certificate acknowledging acceptance of the bargained-for press without actual receipt or inspection. Additionally, Plaintiff contends that at about this same time, at CIT's request, Graphics indemnified Plaintiff against any losses due to failure to deliver the press, and warrantied the condition of the press for six months.

Several weeks later, the bargained-for press was actually delivered to Plaintiff. Plaintiff alleges that it had in fact not been re-inspected by Graphics and did not work up to its capacity in terms of speed, rendering it unfit for its intended use. Both Graphics and the manufacturer attempted to fix the press, but to no avail. Plaintiff contends that, while certain parts of the press have been temporarily repaired, it remains unfit for its intended use to this day.

*2 Plaintiff's obligations to make monthly lease payments to CIT on the press began in or about July 2001. Plaintiff admits that it has made only one such payment—under threat of default and repossession of the press—since it contends that Graphics is responsible for these payments. On November 27, 2001, in a letter from counsel, CIT declared Plaintiff in default of the lease and demanded return of the press and lease payments of $36,000. CIT has also reported Plaintiff as delinquent to Dun & Bradstreet, which resulted in negative information being placed in Plaintiff's credit report. Plaintiff states that it is depositing its disputed lease payments with counsel until the rights of the parties are adjudicated.

The instant suit was filed in December 2001. Defendants now move to dismiss Counts VI and VII of the Complaint, which set forth Plaintiff's tort claims for (1) interference with contract and (2) interference with prospective contractual advantage. In these counts, Plaintiff asserts that Defendants have acted to interfere with its current and prospective printing contracts with its customers. Defendants also seek to strike Plaintiff's request for punitive damages. Since Defendants' Motions are identical, the Court will consider them together.

II. LEGAL STANDARD

Under Fed.R.Civ.P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.), *cert.denied,* 501 U.S. 1222, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991). To prevail, the movant must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80, (1957). In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court must only consider those facts alleged in the complaint. *See ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir.1994). The reviewing court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *See Jenkins v. McKeithen,* 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. *Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir.1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

III. DISCUSSION

A. Choice of Law

*3 As a preliminary matter, the parties disagree on the substantive state law to be applied to the claims at issue. Defendants argue that North Carolina law governs. Plaintiff contends that Pennsylvania law applies. Therefore, the Court must first determine the law governing these claims. In making this determi-

nation, the Court looks first to the conflict of laws rules of the forum state of Pennsylvania. *See Kirschbaum v. WRGSB Assocs.*, 243 F.3d 145, 151 (3d Cir.2001). For substantive tort law issues, Pennsylvania uses a combination of the "government interest" and "significant relationship" approaches to conflict of laws analysis. *Id.* Under this analysis, "a court must evaluate 'the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.' " *Id.* (quoting *Troxel v. A.I. duPont Inst.*, 431 Pa.Super. 464, 636 A.2d 1179, 1181 (1994)).

The tort claims advanced by Plaintiff allege that Defendants interfered with its ability to perform existing contracts and to seek out new printing contracts with its customers. Performance of these contracts was to take place in Pennsylvania by Plaintiff, a Pennsylvania corporation with its principal place of business in Pennsylvania. Furthermore, the harm suffered by Plaintiff occurred in Pennsylvania. North Carolina's only direct connection with these tort claims is that one of the alleged tortfeasors (Graphics) is a North Carolina corporation with its principal place of business in North Carolina. In light of the above, the Court concludes that Pennsylvania law governs these tort claims.[FN1] The Court notes that, as described *infra*, North Carolina law does not appear to differ on the point upon which the Court decides Defendants' Motions.

> FN1. . Defendants also assert that North Carolina law should govern these claims because the conditional sales and security agreement entered into by Plaintiff and Graphics states that North Carolina law governs it. This choice of law provision may well be dispositive as to the law to be applied to Plaintiff's breach of contract claim against Graphics. However, Plaintiff's *tort* claims are conceptually distinct from its breach of contract claims, principally in that their focus is on the Defendants' interference with Plaintiff's relationships with third parties. To the extent that Plaintiff asserts these independent tort claims, the Court's determination of applicable tort law is independent of, and may be different from, its determination as to the applicable law governing a related contract dispute. *See, e.g., Kirschbaum v. WRGSB Assocs.*, 243 F.3d 145, 151 (3d Cir.2001) (tort claim governed by Pennsylvania law, but related contract claim governed by Illinois law pursuant to choice of law provision). In this case, these independent torts may (in part) involve actions that constitute breach of a contract governed by North Carolina law. However, this alone is not a persuasive reason to apply North Carolina *tort* law. For the reasons set out *supra*, the Court will apply Pennsylvania tort law.

B. Interference with Contract

Defendants argue, *inter alia*, that the allegations made by Plaintiff fail to state a claim for intentional interference with contract because Plaintiff alleges that Defendants directed tortious activity only at it, rather than at any third party with which it had a contract.[FN2] Indeed, Pennsylvania courts analyze claims for intentional interference with contract under Section 766 of the Restatement (Second) of Torts. *See Peoples Mortgage Co. v. Federal Nat'l Mortgage Ass'n*, 856 F.Supp. 910 (E.D.Pa.1994); *Windsor Securities, Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 659 (3d Cir.1993) (citing *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 429–31, 393 A.2d 1175, 1181–83 (1978), *cert. denied*, 442 U.S. 907, 99 S.Ct. 2817, 61 L.Ed.2d 272 (1979)). Section 766 provides that:

> FN2. . Specifically, Defendants argue that "[Plaintiff] cannot and does not allege that [Defendants] contacted any of its customers or in any way 'induced' [them] not to perform a contract with [Plaintiff]."

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contact, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

*4 Section 766 "addresses disruptions caused by an act directed not at the plaintiff, but at a third person: the defendant causes the promisor to breach its contract with the plaintiff." *Windsor Securities,* 986 F.2d at 660. As noted above, in the Complaint, Plaintiff alleges that it was hindered in its ability to perform its contracts for its customers, not that its customers were induced to breach their contracts with it. Therefore, it does not state a claim against Defendants under § 766.

In contrast to § 766, § 766A of the Restatement (Second) of Torts "covers situations where, as here, the defendant's alleged tortious interference is directed toward the plaintiff, rather than toward a third person with whom the plaintiff has a contractual relation." *Peoples Mortgage,* 856 F.Supp. at 931. In such a case, the defendant impedes plaintiff's own performance. Section 766A states that:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Plaintiff has not directed this Court to any Pennsylvania case in which a court specifically applied § 766A or recognized a cause of action for tortious interference with contract in the absence of any alleged act directed toward a third party. In *Windsor Securities,* the Third Circuit concluded that courts in Pennsylvania have not adopted § 766A, and criticized that section as likely duplicating protection already afforded through contract or other tort law, chilling socially valuable conduct, and creating new liability of uncertain dimensions. *Id.* at 659–63. Shortly thereafter, in *Gemini Physical Therapy & Rehabilitation, Inc. v. State Farm Mut. Auto. Ins. Co.,* 40 F.3d 63, 66 (3d Cir.1994), it predicted that the Pennsylvania Supreme Court would not adopt § 766A. In the absence of any evidence from Pennsylvania courts to the contrary, federal district courts have followed suit. *See, e.g., Allen v. Washington Hosp.,* 34 F.Supp.2d 958, 964 (W.D.Pa.1999); *The New L & N Sales and Marketing, Inc., v. Menaged,* No. 97–4966, 1998 WL 575270, at *9 (E.D.Pa. Sept.9, 1998). As a result, this Court also declines to recognize a cause of action under § 766A.[FN3] Therefore, Plaintiff's interference with contract claim, as pled, must be dismissed since it does not allege that Defendants directed any action toward Plaintiff's customers in an attempt to induce them to breach their contracts with Plaintiff.

> FN3. . The Court notes that a claim for interference with contract under North Carolina law also requires that a defendant induce a third party to breach a contract with the plaintiff. Under North Carolina law, the tort of interference with contract has five elements: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. *See United Laboratories, Inc. v. Kuykendall,* 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles,* 240 N.C. 667, 674, 84 S.E.2d 176, 181–82 (1954)).

Defendants also make a variety of other arguments in support of dismissal of this claim. However, since Plaintiff has not stated a claim under Pennsylvania law for the reasons stated *supra,* the Court need not address them.

C. Interference with Prospective Contractual Advantage

***5** Plaintiff's claim for interference with prospective contractual advantage must also be dismissed for substantially the same reason as its claims for interference with existing contracts. Restatement (Second) of Torts § 766B sets out such a cause of action. It states:

> One who intentionally and improperly interferes with another's prospective contractual relation ... is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Section 766B(a) focuses on acts directed at third parties, and is therefore analogous to § 766. *See Allen,* 34 F.Supp.2d at 964; *Peoples Mortgage,* 856 F.Supp. at 932 n. 15. Section 766B(b), which addresses acts directed toward the plaintiff, is analogous to § 766A. *See Allen,* 34 F.Supp.2d at 964; *Peoples Mortgage,* 856 F.Supp. at 932 n. 15. As described earlier, in the Complaint Plaintiff alleges that it was hindered in its ability to engage prospective customers, not that prospective customers were influenced not to enter into contracts with it. Therefore, although Plaintiff does not so state, its claim for interference with prospective contractual advantage is governed by § 766B(b). While Pennsylvania courts look in part to § 766B to define the tort of interference with prospective contract, they have not adopted that section in its entirety. *See Allen,* 34 F.Supp.2d at 964.

As with its claim for interference with existing contracts, Plaintiff has not directed this Court to any Pennsylvania case specifically adopting § 766B(b), or in which a Pennsylvania court recognized a cause of action for tortious interference with a prospective contract in the absence of any alleged act directed toward a third party. For reasons similar to those pertaining to § 766A, federal courts have been equally unwilling to interpret Pennsylvania law as recognizing a cause of action under § 766B(b). *See Alpern v. Cavarocchi,* No. 98–3105, 1999 WL 257695, at *13 n. 13 (E.D.Pa. Apr.28, 1999); *Allen,* 34 F.Supp.2d at 964–965; *The New L & N Sales and Marketing,* 1998 WL 575270, at *9; *Peoples Mortgage,* 856 F.Supp. at 933–34. This Court also declines to do so.[FN4] Therefore, the Court will also dismiss Plaintiff's claims for interference with prospective contracts.

> FN4. . Again, North Carolina law does not appear to differ with Pennsylvania law on this point. In order to maintain an action for tortious interference with prospective advantage in North Carolina, a plaintiff must show that a defendant induced a third party to refrain from entering into a contract with the plaintiff without justification. *See Daimlerchrysler Corp. v. Kirkhart,* 561 S.E.2d 276, 286 (N.C.App.2002).

Again, although Defendants also make a variety of other arguments in support of dismissal of this claim, the Court need not address them.

D. Punitive Damages

***6** For the reasons stated above, the Plaintiff has failed to state a tort claim in the Complaint, and only contract-based claims remain. Pennsylvania law is "clear that punitive damages are not recoverable in an action for breach of contract." *See Nelson v. State Farm Mut. Auto. Ins. Co.,* 988 F.Supp. 527, 529 (E.D.Pa.1997) (citing *AM/PM Franchise Ass'n v.*

Atlantic Richfield Co., 526 Pa. 110, 584 A.2d 915, 927 (1990) & *Thorsen v. Iron and Glass Bank,* 328 Pa.Super. 135, 476 A.2d 928, 932 (1984)). Therefore, Defendants' request to strike Plaintiff's request for punitive damages is granted.

IV. CONCLUSION

The Court grants Defendants' Motions to Dismiss Counts VI and VII of the Complaint. These counts, which set forth Plaintiff's tort claims for (1) interference with contract, and (2) interference with prospective contractual advantage, are dismissed because Plaintiff has failed to allege that Defendants directed any tortious activity at a third party, inducing that party to breach a contract or fail to contract with Plaintiff. Furthermore, Defendants' request to strike Plaintiff's demand for punitive damages is granted since, after these claims' dismissal, no valid tort claims remain.

In its sur-reply, Plaintiff requests leave to amend the Complaint to set forth additional tort claims against Defendants, such as fraudulent inducement, and perhaps to re-plead its tortious interference claims. Under Fed.R.Civ.P. 15(a), leave to amend is to be "freely given when justice so requires." Furthermore, Defendants have not objected to this request. Therefore, the Court will permit Plaintiff to file an amended complaint within ten (10) days.

An order follows.

ORDER

AND NOW, this 26th day of June 2002, upon consideration of Defendants' Motions to Dismiss Counts VI and VII of Plaintiff's Complaint (Docket Nos. 9 and 13), Plaintiff's opposition thereto (Docket No. 19), Defendants' Replies (Docket Nos. 20 and 21), and Plaintiff's Sur-reply (Docket No. 22), it is hereby ORDERED that Defendants' Motions are GRANTED. It is further ORDERED that:

(1) Counts VI and VII of the Complaint are dismissed.

(2) Plaintiff's demand for punitive damages is stricken.

(3) Plaintiff is granted leave to file an amended complaint. Such complaint shall be filed within ten (10) days of this Order.

Additionally, Plaintiff's Request for Oral Argument on Defendant CIT's Motion for Writ of Seizure is GRANTED. ORAL ARGUMENT is set for *Wednesday, July 10, 2002 at 9:30 a.m. in Courtroom 14A.*

E.D.Pa.,2002.
Leopold Graphics, Inc. v. CIT Group/Equipment Financing, Inc.
Not Reported in F.Supp.2d, 2002 WL 1397449 (E.D.Pa.)

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Court of Common Pleas of Pennsylvania.
Lancaster County
RETTEW & ASSOCIATES, INC., Plaintiff,
v.
Reese, LOWER, Patrick & scott and Unionville-Chadds Ford School District, Defendants.
No. CI-01-05949.
January 14, 2004.

Opinion

James G. Wiles, Esquire, Law Offices of James G. Wiles, P.O. Box 442, Yardley, PA. 19067, George C. Werner, Esquire, 126 East King Street, Lancaster, PA. 17602-2893, Robert A. Prentice, Esquire and Gregory B. Lare, Esquire, Duane Morris LLP, One Liberty Place, Philadelphia, PA. 19103-7806.

Paul K. Allison, Judge.
BY: ALLISON, J: January 13, 2004

In this case, Defendant, Unionville-Chadds Ford School District, raised three preliminary objections to the Plaintiffs Amended Complaint. The Court has determined that each of the three objections should be sustained and, accordingly, the Plaintiffs case will be dismissed. The following is a brief explanation of the Court's reasoning for such a decision.

Unjust Enrichment

With respect to the Defendant's objection concerning the Plaintiffs unjust enrichment claim, the Court agrees with the Defendant's legal analysis and conclusion. Consequently, Defendant's preliminary objection will be sustained and the claim dismissed. The applicable case law cited by the Defendant clearly addresses the factual situation present in this case and directs the outcome reached by this Court. Specifically, *D.A. Hill Co. v. Clevetrust Realty Investors,* 524 Pa. 425, 432, 573 A.2d 1005, 1009 (1990) provides that, "the owner's retention of the benefit without paying any compensation to the subcontractor would not be unjust if the owner did not contract directly with or mislead the subcontractor.". Paragraph nine of the Plaintiff's amended complaint explains the circumstances under which the services at issue were negotiated. The Plaintiff states that "Reese was requested to perform, and did perform, Additional Services under the Rettew Contract... pursuant to a verbal authorization by George Lower, a principal of the Reese Firm." The complaint further explains that, "Mr. Lower directed that Rettew provide the Additional Services to the School District and stated that the Reese Firm would be paid for the services." As is evident from the Plaintiffs own complaint, the Plaintiff did not contract with the Defendant, Unionville-Chadds Ford School District, for the performance of the services at issue. Further, the Plaintiffs do not allege in their complaint or argue in their brief opposing Defendant's preliminary objections that Plaintiffs were misled. As the applicable case law dictates, absent a contractual relationship between the owner and subcontractor or evidence that the owner mislead the subcontractor, a claim for unjust

enrichment will not lie. Neither of these have been alleged or argued in Plaintiff's pleadings, accordingly it is proper for the Plaintiffs unjust enrichment claim to be dismissed.

Third-Party Beneficiary

The Defendant's preliminary objection to the Plaintiff's Third-Party Beneficiary claim is also sustained based on the Defendant's appropriate analysis of the issue. The Court in *Scarpitti v. Weborg,* 530 Pa. 366, 370, 609 A.2d 147, 149 (1992) cited by both parties, states that, "in order for a third party beneficiary to have standing to recover on a contract, both contracting parties must have expressed an intention that the third party be a beneficiary, and that intention must have affirmatively appeared in the contract itself." The Court further stated that the Restatement (Second) of Contracts § 302 (1979) has been adopted and should act as a "guide for analysis of third party beneficiary claims in Pennsylvania." Restatement (Second) § 302 states, "unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

In this case it is clear that no intention existed between the contracting parties, Reese and Unionville-Chadds Ford School District, to benefit the third party, Rettew. On the contrary, the contracting parties made every effort to avoid the appearance of such an intention by specifically contracting otherwise. Subparagraph 1.3.7.5 states that, "nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either Owner or Architect." Absent such an intention, the case law dictates that the third party will not have standing to recover on the contract. Accordingly, the Court sustains the preliminary objection of the Defendants and dismisses the Plaintiffs Third Party Beneficiary claim.

Declaratory Judgment Act

The Defendant's preliminary objection to Plaintiffs Declaratory Judgment Act claim is also sustained and the claim dismissed. The Court's basis for such decision is based on much the same reasoning as was given with respect to the unjust enrichment and third party beneficiary claims, that the Plaintiff was not a party to the contract nor was the Plaintiff an intended third party beneficiary. The Declaratory Judgment Act provides that a, "person interested under a ... written contract... or whose rights, status, or other legal relations are affected by a... contract... may have determined any question of construction or validity arising under the ... contract... and obtain a declaration or rights, status, or other legal relations thereunder." 42 Pa. C.S.A. § 7533. The Plaintiff does not constitute a person "interested under a written contract" or one "whose rights, status, or other legal relationships are affected by a contract" because, as previously discussed, the Plaintiff was not a party to the relevant contract and was not a third party beneficiary of that contract. In short, the Plaintiff is not a contemplated party entitled to relief under the Act. As such, the Defendant's preliminary objection is sustained and the claim is dismissed.

Venue

This Court, having granted all preliminary objections posed by the Defendant, has effectively disposed of the Plain-

tiffs Amended Complaint and will not, therefore, address the Defendant's request for transfer to Chester County based on the Agreement and the applicable Pennsylvania Rules of Civil Procedure, as the Court finds it unnecessary under the circumstances.

Accordingly, the Court enters the following:

OREDR

AND NOW, this *13th* day of January, 2004, upon consideration of the Preliminary Objections of Defendant Unionville-Chadds Ford School District to the Amended Complaint of Plaintiff, Rettew & Associates, Inc., it is hereby ORDERED that the Preliminary Objections are SUSTAINED and Plaintiffs Amended Complaint is DISMISSED.

BY THE COURT:

<<signature>>

PAUL K. ALLISON

JUDGE

Attest:

Copies to:

James G. Wiles, Esquire

Law Offices of James G. Wiles, P.O. Box 442, Yardley, PA. 19067

George C. Werner, Esquire

126 East King Street, Lancaster, PA. 17602-2893

Robert A. Prentice, Esquire and Gregory B. Lare, Esquire

Duane Morris LLP, One Liberty Place, Philadelphia, PA. 19103-7806

Rettew & Associates, Inc. v. Lower
2004 WL 5904862 (Pa.Com.Pl.) (Trial Order)
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STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Docket No. BCD-WB-CV-10-53

NICOLE RICHMAN, JULIE HOWARD, JOHN THIBODEAU, and MARYANN CARROLL
On behalf of themselves and others similarly situated,

Plaintiffs

v.

POSSIBILITIES COUNSELING SERVICES, INC., WENDY L. BERGERON, AFFILIATE FUNDING, INC., EMILE L. CLAVET, KEVIN DEAN, and FOSTER CARE BILLING, LLC d/b/a PROVIDER FINANCIAL

Defendants

ORDER ON AFFILIATE DEFENDANTS' MOTION TO DISMISS COUNT XII AND PLAINTIFFS' MOTION TO AMEND COMPLAINT

Before the court are two motions: a Motion to Dismiss Count XII, pursuant to M.R. Civ. P. 12(b)(6), filed by Affiliate Funding, Inc. (AFI), Emile L. Clavet, Kevin Dean, and Foster Care Billing, LLC (collectively, the "Affiliate Defendants"); and a Motion to Amend the Consolidated Complaint filed by the Plaintiffs to add a count for violations of the Unfair Trade Practices Act (UTPA), 5 M.R.S. §§ 206-214 (2010). The court heard oral argument on these motions on April 26, 2011.

Background

Possibilities Counseling Services, Inc. (PCS) is a mental health agency licensed by the State of Maine to provide therapy services. AFI is a corporation located in Auburn; Defendants

Dean and Clavet are AFI's principals or owners. Defendant Dean is also involved with Foster Care Billing, LLC, which does business as Provider Financial.

Plaintiffs are four social workers who entered into identical reimbursement contracts with PCS. PCS handled Plaintiffs' claims for reimbursement of fees from MaineCare or other private insurers for therapy services that Plaintiffs and other similarly situated clinicians rendered. Pursuant to those contracts, PCS was obligated to make payment to Plaintiffs for each MaineCare occasion of service within two weeks of the week when the services were performed, regardless of whether or not PCS in fact had been compensated for those services by MaineCare. In exchange, Plaintiffs agreed to a reduced amount of reimbursement than they would otherwise be entitled to had they submitted the claims to MaineCare themselves.

In order to pay the claims in a timely fashion, PCS entered into a contract with AFI's predecessor in 2006, whereby PCS sold its account receivables to AFI for 75% of the face value and AFI advanced funds to PCS. Plaintiffs were not parties to this contract, but allege that they were intended third-party beneficiaries to the contract between PCS and AFI. At the end of 2009 and throughout the summer of 2010, PCS made incomplete and untimely payments to Plaintiffs and other clinicians. AFI ceased advancing funds to PCS, and in September of 2010, AFI sued PCS for breach of contract. Plaintiffs allege that because AFI stopped advancing funds to PCS, Plaintiffs were not paid the amounts owed to them pursuant to their individual contracts with PCS. PCS ceased doing business on October 31, 2010.

Plaintiffs commenced suit individually and later consolidated their suits into a class action complaint filed in November of 2010. The Consolidated Complaint alleged 12 counts, but the only count relevant to the pending motions is Count XII. In Count XII, Plaintiffs allege that PCS and AFI entered into a factoring agreement that violates both state and federal law and

Plaintiffs' contract with PCS, because the latter agreement prohibits PCS from assigning any of its rights or responsibilities enumerated in the contract. As relief, Plaintiffs request a declaratory judgment that the factoring contract is illegal and that the assignment of contractual rights by PCS to AFI violates Plaintiffs' contract with PCS. The Affiliate Defendants moved to dismiss Count XII on December 6, 2010.

Plaintiffs moved to amend their complaint on February 11, 2011, to add a count for UTPA violations (Count XIII) by Defendants AFI, Clavet, Dean, Provider Financial, PCS, and Bergeron,[1] alleging that: 1) Defendants committed unfair methods of competition or unfair or deceptive acts or practices; and 2) Plaintiffs utilized services from Defendants primarily for personal purposes, and as a result of Defendant's deceptive practices, Plaintiffs have suffered ascertainable loss. PCS, Bergeron, and the Affiliate Defendants oppose the amendment.

In the interim, the court appointed a referee to aid the court in adjudicating the issues regarding the processing and payment of claims raised by the named Plaintiffs for themselves and on behalf of the proposed class of clinicians. The referee established a bank account into which the State has deposited funds for MaineCare services rendered by Plaintiffs and other former PCS clinicians.

Discussion

Motion to Dismiss Count XII

The Affiliate Defendants allege that because Plaintiffs were not parties to the contract between AFI and PCSI, they do not have standing to ask the court to declare the contract illegal

[1] Plaintiffs assert in their motion that their amendment only adds a claim for UTPA violations, and make no mention of adding party defendants. However, a comparison of the Consolidated Complaint and the Second Amended Complaint reveals that Plaintiffs have added a Defendant, Agency Billing Services, LLC (ABS). ABS is a Maine limited liability company managed by Jane Clavet, Defendant Clavet's wife; Plaintiffs assert that AFI, Clavet, Dean, and Provider Financial acted in concert with ABS with respect to their dealings with PCS and its providers. ABS has been added as a defendant to Count VII (negligence), Count VIII (money had and received), Count IX (unjust enrichment), Count X (conversion), and Count XI (constructive trust). The court considers Plaintiffs' motion to amend as presented: to add a UTPA claim.

and unenforceable.[2] A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, the material allegations of the complaint must be taken as admitted." *Shaw v. S. Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quotation marks omitted). When reviewing a motion to dismiss, the court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.*

Standing to sue in Maine is prudential, rather than of constitutional dimension, and a "court may limit access to the courts to those best suited to assert a particular claim." *Lindemann v. Comm'n on Govtl. Ethics and Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538, 541-42 (quotation marks omitted); *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966, 968. At a minimum, "[s]tanding to sue means that the party, at the commencement of the litigation, has sufficient personal stake in the controversy to obtain judicial resolution of that controversy." *Halfway House v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)). Typically, a party's personal stake in the litigation is evidenced by a particularized injury to the party's property, pecuniary, or personal rights. *See, e.g., Mortg. Elec. Registration Sys. v. Saunders*, 2010 ME 79, ¶ 7, 2 A.3d 289, 294; *Great Hill Fill & Gravel v. Bd. of Envt'l Prot.*, 641 A.2d 184, 184 (Me. 1996). The standing requirement is equally applicable to actions pursuant to the Declaratory Judgment Act, 14 M.R.S. §§ 5951-63 (2010). *See McCafferty v. Gartley*, 377 A.2d 1367, 1370 (Me. 1977).

[2] The Affiliate Defendants also assert that the contract between AFI and PCSI is not illegal, but whether in fact the contract is illegal is not properly before the court on a motion to dismiss.

In their opposition to the motion to dismiss, Plaintiffs argue that they are third party beneficiaries of the PCS-AFI contract and therefore have standing to enforce that contract.[3] *See Perkins v. Blake*, 2004 ME 86, ¶ 8, 853 A.2d 752, 754-55; *accord* Restatement (Second) of Contracts § 302 (1981). An intended third party beneficiary may enforce the contract, but an incidental beneficiary to a contract has no standing to enforce third party beneficiary rights. *See F.O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992). Whether a party is an intended third-party beneficiary to a contract "is gathered from the language of the written instruments and the circumstances under which they were executed." *Id.*

Plaintiffs assert that they are intended third party beneficiaries because the payments that AFI was to advance to PCS were for the Plaintiffs' benefit. Viewing the facts set out in the complaint in the light most favorable to the Plaintiffs, this statement would be enough to survive a motion to dismiss for a claim based on enforcing the contract. Plaintiffs, however, are not in fact seeking to enforce the duties and obligations on the PCS-AFI contract. Plaintiffs are seeking to challenge the contract's legality and render it unenforceable. The question before the court is thus whether an intended third party beneficiary to a contract has standing to challenge the contract's legality and ultimately, nullify the contract.

The court concludes that Plaintiffs do not have standing, for several reasons. First, the court agrees with the reasoning in *DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, 384 F.3d 338 (7th Cir. 2004), which explained that illegality of contract only has applicability between the contracting parties. This reasoning comports with illegality in Maine being a *defense* to the enforcement of a contract that can be asserted by the parties to the

[3] In their opposition, Plaintiffs cite *Luce Co. v. Hoefler*, 464 A.2d 213, 221 (Me. 1983), for the proposition that "when contracting parties manifest an intent to benefit a third-party, the third-party is in privity of contract and has standing to enforce the rights and obligations set forth in the contract." Plaintiffs neglect to note that their citation is to the dissent of A.R.J. Dufresne. 464 A.2d at 221-22. Further, this case and others cited by Plaintiffs only discuss the right to enforce; they do not address a third-party beneficiary's alleged right to invalidate the agreement.

contract. *See* M.R. Civ. P. 8(c); *State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶ 41, 995 A.2d 651, 665 ("We will not enforce a contract if it is illegal, contrary to public policy, or contravenes the positive legislation of the state.") In addition, an illegal and unenforceable contract creates no rights in the purported third-party beneficiary. Restatement (Second) of Contracts § 309(1) & illus. 1.

Finally, Plaintiffs have not been able to articulate what harm or injury they suffer from the existence of the AFI-PCS contract, other than the fact that they allege it constitutes a breach of their agreement with PCS. To the extent that Count XII is a breach of contract claim against PCS, Count I of the Consolidated Complaint covers any breach of contract between the Plaintiffs and PCS that resulted from the PCS-AFI contract. Because Plaintiffs are not parties to the contract, and are not attempting to enforce the contract, they have no standing to challenge its legality.

Motion to Amend Consolidated Complaint

The Affiliate Defendants, Bergeron, and PCS oppose the addition of Count XIII and argue, among other theories, that UTPA is a consumer protection statute that has no applicability to commercial relationships and the court should deny the motion to amend the complaint. After a responsive pleading is served, a plaintiff may amend its complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." M.R. Civ. P. 15(a); *accord Efstathiou v. Aspinquid, Inc.*, 2008 ME 145, ¶ 21, 956 A.2d 110, 118. "Whether to allow a pleading amendment rests with the court's sound discretion." *Holden v. Weinschenk*, 1998 ME 185, ¶ 6, 715 A.2d 915, 917 (quoting *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609, 616 (Me. 1992)). Courts should freely allow an amendment to a complaint except for bad faith, dilatory tactics, or undue delay resulting in prejudice to the

opponent. *See Longley v. Knapp*, 1998 ME 142, ¶ 19, 713 A.2d 939, 945; 1 Field, McKusick & Wroth, *Maine Civil Practice* § 15.4 at 303-04 (2d ed. 1970). However, where "a proposed amended complaint would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend." *Glynn v. City of S. Portland*, 640 A.2d 1065, 1067 (Me. 1994).

Maine's UTPA declares that "[u]nfair methods and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful, 5 M.R.S. § 207, and provides a cause of action for "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for *personal, family or household purposes* and thereby suffers any loss of money or property, real or personal" as a result of unfair methods, acts, or practices, 5 M.R.S. § 213(1) (emphasis added). Plaintiffs argue that because they have alleged that they used the services of AFI and PCS for personal purposes, the court must accept that allegation as true at this procedural stage and allow them to amend their complaint. *See Shaw*, 683 A.2d at 503.

The Law Court has not defined the scope of "personal, family or household purposes," but consistently has referred to the UTPA as a consumer protection statute. *See State v. Weinschenk*, 2005 ME 28, ¶ 11, 868 A.2d 200, 205 ("Maine's UTPA provides protection for *consumers* against unfair and deceptive trade practices." (emphasis added) (citation omitted)); *Jolovitz v. Alfa Romeo Distribs. of N. Am.*, 2000 ME 174, ¶ 9 n.1, 760 A.2d 625, 629 (stating that the UTPA "provides a private remedy to *consumers* of personal, family or household goods, services or property" (emphasis added)); *Bangor Publ'g Co. v. Union St. Mkt.*, 1998 ME 37, ¶ 7, 706 A.2d 595, 597 (explaining that unlawful practices under UTPA "must not be outweighed by any countervailing benefits to *consumers* or competition that the practice produces; and it must be an injury that *consumers* themselves could not reasonably have avoided" (emphasis added));

accord 5 M.R.S. § 214 ("Any waiver by a *consumer* of the provisions of this chapter . . . shall be void." (emphasis added)); *cf. Roach v. Mead*, 722 P.2d 1229, 1234 (Ore. 1986) (explaining that the scope of Oregon's UTPA to be whether the good or service in question is customarily bought by a substantial number of purchasers and for what purpose the good or service is designed to serve). Indeed, the types of transactions that support a private cause of action under UTPA mirror general definitions of consumer transactions. *See* Black's Law Dictionary 335 (8th ed. 2004) (defining a consumer transaction as a "bargain or deal in which a party acquires property or services primarily for a *personal, family, or household purpose*" (emphasis added)).

Based on the allegations in the complaint, it is clear that the relationship between PCS and Plaintiffs is not a consumer transaction and does not fall under UTPA. Plaintiffs allege that PCS is a mental health agency that contracted with Plaintiffs to provide billing services for the mental health services Plaintiffs provided to patients and Plaintiffs are independent contractor affiliates of PCS. *Cf. State v. DeCoster*, 653 A.2d 891, 896 (Me. 1995) (holding that UTPA does not apply to an employer-employee relationship). The arrangement is clearly a business or commercial transaction between a sole proprietor and a corporation and not meant to fall under a consumer protection statute; Plaintiffs' allegation that they purchased services from PCS for personal purposes is simply inaccurate.

Even if the statute were to apply to this relationship,[4] the court agrees that, without a direct relationship with AFI or the other Affiliate Defendants, Plaintiffs cannot assert a UTPA violation claim against them. Plaintiffs' arguments regarding a "joint enterprise" theory are unavailing. Parties are engaged in a joint enterprise when there exists "a community of interest in and the joint prosecution of a common purpose under such circumstances that each participant

[4] Were the UTPA to apply to the transaction between the Plaintiffs and PCS in the first instance, in the alternative, the court would conclude that it is excepted from the statute by virtue of 5 M.R.S. § 208.

has authority to act for all in directing and controlling the means of agency employed." *Morey v. Stratton*, 2000 ME 147, ¶ 7, 756 A.2d 496, 499 (quoting *Illingworth v. Madden*, 135 Me. 159, 164, 192 A. 273, 276 (1937)). The doctrine of joint enterprise imputes the *negligence* of one member of the enterprise to the other enterprise members. *See Welch v. Jordan*, 159 Me. 436, 444, 194 A.2d 841, 845 (1963). While Plaintiffs contend they will show AFI and PCS were engaged in a joint enterprise in their pursuit of the UTPA claim, the Law Court has never applied the doctrine of joint enterprise outside of a negligence claim. *See Morey*, 2000 ME 147, ¶ 7, 756 A.2d at 499.; *Welch*, 159 Me. at 444, 194 A.2d at 845; *Illingworth*, 135 Me. at 164, 192 A. at 276; *Bonefant v. Chapdelaine*, 131 Me. 45, 52, 158 A. 857, 860 (1932); *Trumpfeller v. Crandall*, 130 Me. 279, 286-87, 155 A. 646, 650 (1931); *Skillin v. Skillin*, 130 Me. 223, 224, 154 A. 570, 570 (1931); *Cullinan v. Tetrault*, 123 Me. 302, 306, 122 A. 770, 772 (1923). Whether the Law Court would expand the doctrine to the UTPA seems doubtful, especially under these circumstances when the gravamen of the charge would seem to be an attempt to completely disregard their separate corporate identities.

Based on the foregoing analysis, the court concludes and orders:

1. Defendants' Motion to Dismiss Count XII is GRANTED as to all named Defendants.

2. Plaintiffs' Motion to Amend their Complaint is DENIED in full.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: May 2, 2011

A. M. Horton
Justice, Superior Court

Not Reported in F.Supp.2d, 2012 WL 7009007 (M.D.Pa.)
(Cite as: 2012 WL 7009007 (M.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.
Lorayne E. SOUDERS, Plaintiff
v.
BANK OF AMERICA, et al., Defendants.

Civil Action No. 1:CV–12–1074.
Dec. 6, 2012.

Lorayne E. Souders, Etters, PA, pro se.

Andrew J. Soven, Reed Smith LLP, Philadelphia, PA, for Defendants.

REPORT AND RECOMMENDATION

THOMAS M. BLEWITT, United States Magistrate Judge.

I. BACKGROUND.

***1** On June 6, 2012, *pro se* Plaintiff Lorayne E. Souders' Complaint, originally filed in the Pennsylvania Court of Common Pleas, York County Civil Division under the Docket Number 2012–SU–001845–93, was removed to the United States District Court for the Middle District of Pennsylvania, by Defendants Bank of America, Bank of New York, Mellon Trustee CWABS 2007–12 Asset–Backed Certificates (hereinafter "Bank of New York, Mellon"), and MERSCORP (hereinafter "MERS") by Notice of Removal under 28 U.S.C. § 1446(d). (Doc. 1). Attached to the Notice of Removal, as required by 28 U.S.C. § 1446(a), marked as Exhibit A is Plaintiff's Complaint. (Doc. 1, p. 2). Also, Plaintiff's Complaint had Exhibits attached to it, namely, Exhibits A to C. Defendants based their Notice of Removal on the following statutes: (1) diversity jurisdiction under 28 U.S.C. §§ 1332(a)(1) and 1441(b); and (2) federal question jurisdiction under 28 U.S.C. § 1331, as Plaintiff asserts claims for damages under two federal statutes, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq,* and the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* (Doc. 1, p. 4; Exhibit A, Complaint ¶¶ 2, 3, and 9 and Requests for Relief ¶¶ 2–4). This case was then referred to the undersigned for issuance of a Report and Recommendation.

On June 7, 2012, Disclosure Statements pursuant to Federal Rule of Civil Procedure 7.1 were provided identifying each of the three Defendants, and on June 11, 2012, Plaintiff filed a Demand for a Trial by Jury. (Docs. 2 & 5, respectively).

On June 13, 2012, Defendants filed a Motion to Dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6). **(Doc. 6).** On June 20, 2012, Defendants filed a Brief in Support of their Motion to Dismiss with an attached Exhibit and an Appendix consisting of copies of unpublished decisions. (Doc. 8). On July 2, 2012, Plaintiff filed a Brief in Opposition to Defendants' Motion to Dismiss (Doc. 9), and on July 13, 2012, Defendants responded to Plaintiff's Opposition Brief by filing a Reply Brief. (Doc. 12).

On July 16, 2012, Plaintiff then filed an Addendum to her Document 9 Brief in Opposition. (Doc. 13). On July 20, 2012, Defendants then filed an Unopposed Motion for Leave to File a Response to Plaintiff's Addendum. (Doc. 14). Defendants' Document 14 motion was granted by an Order of the Court. (Doc. 15). On July 26, 2012, Defendants filed their Response to Plaintiff's Document 13 Addendum. (Doc. 16). On August 2, 2012, Plaintiff filed an Addendum containing information being entered into the case as a matter of record. (Doc. 17). Lastly, on Oc-

tober 5, 2012, Plaintiff filed a Motion for Judicial Notice. (Doc. 19).

We now turn to discuss the Defendants' Document 6 Motion to Dismiss Plaintiff's Complaint and the documents that followed in relation and response to this Motion (Docs. 8, 9, 12, 13, and 16).

II. STANDARD OF REVIEW.

A. MOTION TO DISMISS

*2 In *Reisinger v. Luzerne County,* 712 F.Supp.2d 332, 343–44 (M.D.Pa.2010), in describing the motion to dismiss standard, the Court stated:

> The Third Circuit Court of Appeals recently set out the appropriate standard applicable to a motion to dismiss in light of the United States Supreme Court's decisions *Bell Atlantic Corp. v. Twombly,* 550 U.S. 433 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim that relief is plausible on its face.' " *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 570). The Court emphasized that "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. Moreover, it continued, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (citation omitted). *McTernan v. City of York,* 577 F.3d 521, 530 (3d Cir.2009). The Circuit Court discussed the effects of *Twombly* and *Iqbal* in detail and provided a road map for district courts presented with a motion to dismiss for failure to state a claim in a case filed just a week before *McTernan, Fowler v. UPMC Shadyside,* 578 F.3d 203 (3d Cir.2009).
>
> [D]istrict courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. [*Iqbal,* 129 S .Ct. at 1949.] Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. In other words, a complaint must do more than allege a plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. *See Philips [v. Co. of Allegheny*], 515 F.3d [224,] 234–35 [(3d Cir.2008)]. As the Supreme Court instructed in *Iqbal,* "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.' " *Iqbal,* 129 S.Ct. at 1949. This "plausibility" determination will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. Fowler,* 578 F.3d at 210–11.
>
> > The Circuit Court's guidance makes clear that legal conclusions are not entitled to the same deference as well-pled facts. In other words, "the court is 'not bound to accept as true a legal conclusion couched as a factual allegation.' " *Guirguis v. Movers Specialty Services, Inc.,* No. 09–1104, 2009 WL 3041992, at *2 (3d Cir. Sept.24, 2009) (*quoting Twombly,* 550 U.S. at 555) (not precedential).

*3 Where the parties submit exhibits with their filings, a court must determine what documents may be considered with a motion to dismiss. In reviewing a motion to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Third Circuit Court of Appeals had held that "a

court can consider certain narrowly defined types of material without converting the motion to dismiss" to one for summary judgment. *In re Rockefeller Center Properties, Inc. Securities Litigation,* 184 F.3d 280, 287 (3d Cir.1999). Specifically, a court can consider "a document integral to or explicitly relied upon in the complaint ... [and] an indisputably authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." (*Id.* (internal citations and quotation omitted)). The Circuit Court explained the rationale for these exceptions: "the primary problem raised by looking to documents outside the complaint-lack of notice to the plaintiff-is dissipated where plaintiff has actual notice and has relied upon these documents in framing the complaint." FN11 *Id.* (internal citations and quotations omitted)). Matters of public record, including government agency records and judicial records, may be considered. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.,* 458 F.3d 244, 257 n. 5 (3d Cir.2006) (citation omitted); *Pension Benefit Guarantee Corp. v. White Consol. Indus.,* 998 F.2d 1192, 1196 (3d Cir.1993).

See also Santiago v. Warminster Tp., 629 F.3d 121, 133 (3d Cir.2010).

III. ALLEGATIONS OF COMPLAINT.

Plaintiff's Complaint was originally filed on April 30, 2012, in the Pennsylvania Court of Common Pleas, York County Civil Division, Docket No. 2012–SU–001845–93. As stated, Defendants filed a Notice of Removal on June 6, 2012, in this Court. Plaintiff's Complaint filed in the Court of Common Pleas, York County Civil Division, was attached to Defendants' Notice of Removal as Exhibit A. Defendants' Motion to Dismiss Plaintiff's Complaint will be addressed in this Report and Recommendation.

In her Complaint, Plaintiff alleges that on June 26, 2007, she executed an Adjustable Rate Note and a Mortgage refinance with Countrywide Home Loans (n/k/a Bank of America) for one hundred twenty thousand dollars ($120,000.00). (Doc. 1, Complaint, ¶ 11, and attached Exhibit "A"). However, when Plaintiff went to the York County Register of Deeds office, she discovered that on October 14, 2011, her mortgage had been assigned by MERS to Bank of New York, Mellon Trustee to CWABS 2007–12 Asset–Backed Certificates. (Complaint, ¶ 12, Exhibit "B").

Based on these facts, Plaintiff alleges Defendants are liable for fraud, misrepresentation, and deceptive and unfair trading practices. (Complaint, ¶ 8). More specifically, she states that her loan number 171186255 was verified as being listed in the Securities and Exchange Commission's website, and that once the loan was sold to investors on Wall Street, thereby secured and converted, it lost its security making the assignment of the loan from MERS to the Bank of New York, Mellon after August 1, 2007 (allegedly the cut-off date for mortgage assignments to enter the pool according to the Trust, CWABS 2007–12, prospectus page 7) invalid, improper, fraudulent, and, according to Plaintiff, in violation of "New York Law." (Complaint, ¶¶ 13–14).

***4** Plaintiff also questions the Mortgage's legitimacy based on the "law of 1871, Cannot separate the Note from the Mortgage," averring that if the Mortgage was never correctly endorsed by all parties according to the Trust's pooling and servicing agreement or if the Note was not conveyed with the Mortgage, the Mortgage becomes null and void. (Complaint, ¶ 15).

Additionally, Plaintiff states that there is no evidence that Countrywide endorsed the Note to anyone or that the Mortgage was properly assigned to the present purported holder-in-due-course Bank of New York, Mellon. She states that this alleged lack of ev-

idence that the Note was endorsed puts the Note out of eligibility and makes the Mortgage null and void. (Complaint, ¶¶ 15–16).

Furthermore, Plaintiff alleges that Defendants fraudulently "concealed their wrongdoings and prevented Plaintiff from discovering her cause of action" and that she "has been injured by the fraud by Defendants and has remained in ignorance of it without any fault or want of diligence or care on her part." (Complaint, ¶¶ 17–18). She also states that Defendants made misleading statements "that the loan contained certain terms desirable to the consumer when it did not" and that "Defendant's use of deceit or trickery caused Plaintiff to act to her disadvantage." (Complaint, ¶¶ 19–20).

As relief, Plaintiff requests the following: (1) judgment against Defendants as jointly and severally liable for all issues in excess of one million dollars ($1,000,000.00); (2) costs and attorneys fees pursuant to 18 U.S.C. § 1964(c) and 18 U.S.C. § 1692(k); (3) actual and statutory damages for FDCPA violations under 18 U.S.C. § 1692(k); (4) rescission of the mortgage and note amount to clear title to property with fixtures; (5) damages for "unfair and deceptive acts and practices"; (6) damages in the amount of three times the interest paid and clear title to the property stemming from "the exorbitant interest"; (7) return of down payment and other payments as well as interest on the above matter; (8) cost of litigation pursuant to 15 U.S.C. § 1601 *et. seq.*; (9) pre-judgment and post-judgment interest at the maximum rate allowable by law; (10) compensatory and punitive damages; (11) punitive damages as allowed by law; and (12) any relief the court deems just and appropriate. (Complaint, Requests for Relief ¶¶ 1–13).

IV. RESPONSIVE PLEADINGS.

A. MOTION TO DISMISS

In response to Plaintiff's Complaint, Defendants filed a Motion to Dismiss and Brief in Support. (Docs. 6 and 8, respectively). Defendants state that Plaintiff alleges she executed a Note and Mortgage in favor of the original lender, Countrywide Home Loans, n/k/a Defendant Bank of America, for one hundred twenty thousand dollars ($120,000.00), on June 26, 2007. (Doc. 8, p. 3). Defendants avers that according to Plaintiff's Complaint, Exhibit "A" shows that MERS was the named mortgagee on the Mortgage, as nominee for Lender Countrywide Home Loans, Inc. (*Id.*). Defendants then aver that on October 14, 2011, MERS assigned the Mortgage to Bank of New York, Mellon, Trustee to CWABS, 2001–12 Asset Backed Certificates. (*Id.*). On October 24, 2011, the Assignment was recorded by the York County Recorder of Deeds. (*Id*.).

***5** In their Brief, Defendants presented the following "Statement of Questions Involved":

1. Should Plaintiff's Complaint be dismissed with prejudice for lack of standing to challenge the Mortgage Assignment on which her entire claim is based?

Suggested Answer: Yes.

2. Should Plaintiff's Complaint be dismissed with prejudice for failure to state any claim upon which relief may be granted?

Suggested Answer: Yes.

3. Does Plaintiff's Complaint fail to comply with Federal Rule of Civil Procedure 8(a)?

Suggested Answer: Yes.

4. Should the lis pendens be stricken upon dismissal or in the alternative on equitable grounds?

Suggested Answer: Yes.

(Doc. 8, p. 5).

Therefore, Defendants argue that Plaintiff's Complaint should be dismissed with prejudice based on three (3) grounds: (1) lack of standing; (2) failure to state both a RICO and FDCPA claim in accordance with 12(b)(6); and (3) failure to comply with Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. (*Id.*). Defendants also aver that because the Complaint should be dismissed with prejudice, the Lis Pendens Plaintiff filed against Defendants in state court should be stricken upon dismissal or, alternatively, on equitable grounds. (*Id.*, p. 14). As Exhibit 1 to their Brief (Doc. 8), Defendants attached a copy of the Notice of Lis Pendens Plaintiff filed against them on June 1, 2012, in the Court of Common Peals of York County. (Doc. 8–1).

B. PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On July 2, 2012, Plaintiff filed a Brief in Opposition to Defendants' Motion to Dismiss. (Doc. 9). In this brief, Plaintiff avers that Defendants' Motion to Dismiss is untimely because Defendants received a copy of the Complaint filed with the Court of Common Pleas of York County on May 4, 2012, but untimely filed their Notice of Removal on June 6, 2012, and their Motion to Dismiss on June 13, 2012, because both documents were filed after the thirty (30) day time period to respond to the Complaint expired. (Doc. 9, p. 1). Plaintiff also asserts that Defendants have "committed fraudulent acts upon the Plaintiff," under the following statutes: (1) mortgage fraud under 12 CFR § 1731.2; (2) forging endorsements under 18 U.S.C. § 510; (3) counterfeit endorsements under 18 U.S.C. § 473; (4) fraudulent destruction under 18 Pa.Cons.Stat. § 4103; (5) Article 9 of the UCC; (6) notary fraud in the State of California; and (7) a RESPA violation under 12 U.S.C. § 2605. (Doc. 9, pp. 1–2). Regarding the RESPA claim, Plaintiff argues that because Defendants failed to provide verified and certified copies and "originals" of the debt proof Plaintiff requested, Defendants were in violation of RESPA. (Doc. 9, pp. 1–2). However, because Plaintiff did not raise any of these new claims in her original Complaint, she is precluded from raising them in her Brief in Opposition, but rather would have to file a Motion to Amend her Complaint and a support brief. *See* Fed.R.Civ.P. 15.

***6** In *Commonwealth of Pennsylvania ex. rel. Zimmerman v. PepsiCo, Inc.*, the Third Circuit stated "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." 836 F.2d 178, 181 (3d Cir.1988) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1984)).

Therefore, based on the *Commonwealth of Pennsylvania ex. rel. Zimmerman* rationale, any claims Plaintiff has not raised in her Complaint, but has attempted to raise in her Brief in Opposition and subsequent Addendums to her Brief in Opposition, will not be considered by the undersigned in this Report and Recommendation.

Furthermore, in her Brief in Opposition, Plaintiff asks the Court to "sustain [ ] a Motion for Default Judgment." (Doc. 9, p. 5). We will recommend that this request be denied since Plaintiff has not complied with Rule 55 of the Federal Rules of Civil Procedure, which governs Default and Default Judgment procedure. An entry of default under Rule 55(a) of the Federal Rules of Civil Procedure must precede an entry of default judgment under Rule 55(b)(2). *See Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance*

Club, Inc., 175 Fed. App'x 519, 521 n. 1 (3d Cir.2006). In the present case, there has not been default entered against Defendants. Thus, Plaintiff cannot request default judgment against Defendants. In the case at hand, the Clerk has not entered default against Defendants, nor has Plaintiff filed a Motion for Entry of Default with an accompanying Support Brief as required by Middle District Local Rule 7.5. While Plaintiff states that the Court must enter default judgment against Defendants based on her argument that Defendants failed to timely file their Notice of Removal and subsequent Motion to Dismiss, we find that the entry of default judgment against Defendants is not appropriate as discussed above. Also, as discussed below, Plaintiff waived her claim that Defendants did not timely remove this case from state court when she failed to timely move to remand the case to state court.

Therefore, we will recommend that Plaintiff's request for Default Judgment against Defendants be denied.

C. DEFENDANTS' REPLY BRIEF

On July 13, 2012, Defendants filed a Reply in Support of their Document 6 Motion to Dismiss Plaintiff's Complaint. (Doc. 12). Defendants argue that, first of all, Plaintiff's Opposition Brief did not provide a basis for denying their Motion to Dismiss. As discussed hereinafter, we agree with Defendants that Plaintiff failed to provide a basis for denying Defendants' Motion to Dismiss. Rather, Plaintiff, as discussed above, improperly attempted to raise new claims in her Opposition Brief, and failed to provide any factual information or arguments in response to Defendants' Motion to Dismiss or in support of her claims raised in her Complaint.

In their Reply Brief, Defendants also respond to Plaintiff's Opposition Brief argument that Defendants' Notice of Removal and subsequent filings were untimely and therefore should be dismissed. Plaintiff also states that this case should be remanded back to state court based on Defendants' untimely removal of it. Defendants state that Plaintiff waived her right to challenge the timeliness of their Removal and subsequent filings because Plaintiff did not timely file a motion to remand the case to state court within thirty days of its removal, and she did not file objections to Defendants' Notice of Removal. (Doc. 12, p. 1). We address Defendants' removal of this case from state court to federal court below regrading Plaintiff's Addendum.

*7 Furthermore, Defendants argue that Plaintiff's Opposition Brief RESPA claim is irrelevant to the issues at hand in the Motion to Dismiss because Plaintiff failed to file any such RESPA claim in her Complaint, and had not amended her pleadings to contain a RESPA claim. (Doc. 12, p. 2). Lastly, Defendants aver that in her Opposition Brief, Plaintiff has failed to properly raise a fraud claim against Defendants in an attempt to defeat their Motion to Dismiss because she has failed to state both a RICO and FDCPA claim. (*Id.*). Defendants claim that Plaintiff has failed to satisfy Rule 9(b)'s factual specificity requirements for a fraud claim, and that Plaintiff's attempt to justify her fraud claim based on a case from New Jersey is irrelevant because in that case, the plaintiff survived a 12(b) Motion to Dismiss due to specific allegations regarding a loan modification. However, Plaintiff has only alleged generalized allegations of "bad faith" in Plaintiff's Complaint and Opposition Brief without supporting her allegations with factual specificity. (Doc. 12, p. 3).

D. PLAINTIFF'S ADDENDUM TO HER OPPOSITION BRIEF

On July 16, 2012, Plaintiff filed, sans leave of court, an Addendum to her Opposition Brief. (Doc. 13). In this Addendum, Plaintiff attempted to clarify her argument that Defendants' Notice of Removal was

not timely and therefore the Court should remand this case to state court. Plaintiff states that Defendants Bank of America and MERS received the Complaint on May 3, 2012, and Defendant Bank of New York, Mellon received the Complaint on May 4, 2012. Plaintiff attached Exhibits showing service on Defendants to her Doc. 13 Addendum. Plaintiff argues that in their Notice of Removal filed on June 6, 2012, Defendants incorrectly stated that they received the Complaint on May 7, 2012, and that because Defendants did not file the Notice of Removal until after the thirty (30) day responsive pleading time period had concluded, the Complaint should be remanded back to the Court of Common Pleas, York County Civil Division. (Doc. 13, p. 2). More specifically, Plaintiff refers to 28 U.S.C. § 1446(b)(1), which states the following:

> (b) Requirements; Generally.-
>
> (1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> (Doc. 13, p. 2).

Therefore, Plaintiff is arguing that based on 28 U.S.C. § 1446(b) (1), because Defendants did not filed their Notice of Removal until June 6, 2012, after the thirty (30) day time period had concluded, Defendants Notice of Removal and subsequent Motion to Dismiss were not timely filed and therefore should be dismissed and the case remanded back to the Court of Common Pleas of York County.

E. DEFENDANTS' RESPONSE TO PLAINTIFF'S ADDENDUM

***8** On July 20, 2012, upon an Order granting Defendants leave to respond to Plaintiff's Addendum, Defendants filed a Response to Plaintiff's Document 13 Addendum. (Doc. 16). In their response, Defendants aver that Plaintiff lost her opportunity to argue that Defendants' Notice of Removal was untimely filed because Plaintiff failed to file a Motion to Remand within thirty (30) days after Defendants filed their Notice of Removal as required by 28 U.S.C. § 1447(c). (Doc. 14–1, p. 3; Doc. 16, p. 2).

We agree with Plaintiff that Defendants did not timely file their Notice of Removal. Defendants now concede (Doc. 16, p. 2, n. 2) that Plaintiff (Doc. 13) is correct with respect to her assertion that the last Defendant in this case was served on May 4, 2012, not on May 7, 2012, as Defendants previously stated, and that Defendants' Notice of Removal filed on June 6, 2012, was not timely.

However, as Defendants correctly point out (Doc. 12, p. 1), Plaintiff failed to file a motion to remand this case back to state court. Defendants contend that since Plaintiff failed to timely file a motion to remand case back to state court within thirty days of its removal, that her case had to remain in federal court even though their removal was not timely filed since this was a procedural defect and not a jurisdictional defect under *Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 614 (3d Cir.2003). (Doc. 16, p. 2).

28 U.S.C. § 1447 addresses procedure after removal, and § 1447(c) states that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447(c); *see also Ramos v. Quien*, 631 F.Supp.2d 601, 606–607 (E.D.Pa.2008).

Defendants point to several Third Circuit cases in which the Court refused to determine whether a defendant's notice of removal was filed more than thirty (30) days after the receipt of the complaint because, absent of any subject matter jurisdiction defects, the plaintiff had waived objection to removal by virtue of plaintiff's failure to timely file a motion to remand within the thirty (30) day time period required by 28 U.S.C. § 1447(c). (Doc. 14–1, pp. 3–4; Doc. 16, p. 2–3). *See Ariel Land Owners v. Dring,* 351 F.3d 611 (3d Cir.2003) (holding that 28 U.S.C. § 1447(c) "is clear that, if based on a defect other than [subject matter] jurisdiction, remand may only be effected by a timely motion" brought within thirty (30) days of the notice of removal filing.); *see also Farina v. Nokia, Inc.,* 625 F.3d 97 (3d Cir.2010) (The Court refused to determine whether defendant's removal notice was filed more than thirty (30) days after the Complaint's receipt because Plaintiff failed to file a Motion to Remand within the thirty (30) days after the filing of the Notice of Removal and therefore waived objection to removal); *see also McGlinchey v. Hartford Acc. & Indem. Co.,* 866 F.2d 651 (3d Cir.1989) ("In particular, it is well established that the 30–day time limit for removal in the first paragraph of 1446(b) is procedural, and that a case may not be remanded for failure to comply with the 30–day time limit absent a timely motion.").

***9** As such, we agree with Defendants that because Plaintiff failed to timely file a motion to remand within the thirty (30) day time period after Defendants filed their Notice of Removal, and because Plaintiff's argument contesting Defendants' removal notice as untimely is based on a procedural defect, not a subject matter jurisdiction defect, and we find that this case should not be remanded to state court as Plaintiff requests. *See Ramos v. Quien,* 631 F.Supp.2d 608("A motion to remand based on an objection to a procedural defect in the removal process is clearly waived it if is not raised within thirty days after the filing of the notice of removal.") (citations omitted). Therefore, because Plaintiff has waived her opportunity to oppose Defendants' removal of this case to the Middle District of Pennsylvania, this case should remain in federal court. Thus, we will address the merits of Defendants' Motion to Dismiss.

Furthermore, we note that based on the aforementioned *Zimmerman* rationale that "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," in our analysis of Defendants' Motion to Dismiss and the subsequent briefs and addendums that Plaintiff filed, we will not be addressing the claims or relief requests that Plaintiff attempted to raise in her briefs and addendums, but had failed to raise in her Complaint. *See Ex. rel. Zimmerman, supra.* Therefore, we will respectfully recommend that the following claims and relief requests raised by Plaintiff in her Opposition Brief and Addendums, but not raised in her Complaint, be dismissed with prejudice: (1) Mortgage Fraud under 12 CFR § 1731.2; (2) Forging Endorsements under 18 U.S.C. § 510; (3) Counterfeit Endorsements under 18 U.S.C. § 473; (4) Fraudulent destruction under 18 Pa.Cons.Stat. § 4103; (5) Article 9 of the UCC; (6) Notary Fraud in the State of California; (6) a RESPA violation under 12 U.S.C. § 2605; and (7) a request for default judgment against Defendants. Furthermore, we have already addressed the timeliness of removal issue, and, therefore, we will not be addressing that issue in the discussion that follows. Instead, we will be analyzing the following issues raised by Defendants in their Motion to Dismiss and Plaintiff's direct responses to these issues, including: (1) standing; (2) failure to state both a RICO and FDCPA claim under 12(b)(6); (3) rescission of the mortgage as a remedy; and (4) violations of Rules 8(a) and 9 of the Federal Rules of Civil Procedure.

V. DISCUSSION.

A. STANDING

1. Assignment of Mortgage

As mentioned, Plaintiff essentially challenges the validity of a Mortgage Assignment. Plaintiff asserts claims under RICO and the FDCPA in connection with the Mortgage Assignment. Since we have detailed the allegations of Plaintiff's Complaint above, we do not repeat them. (*See also* Doc. 8, pp. 3–4).

First, we turn Defendants' argument that Plaintiff's Complaint alleging improper assignment of her mortgage based on an alleged assignment "cut-off date" should be dismissed because Plaintiff lacks standing to challenge the Assignment of the Mortgage in the first place. (Doc. 8, p. 7). Defendants argue that Plaintiff lacks standing because the mortgage assignment is a contract to which she is not a party or third-party beneficiary, and therefore Plaintiff is effectively barred from filing any claims challenging the validity of the mortgage assignment. (*Id.*); *see* 6 Am.Jur.2d Assignments § 1 (an assignment is a contract); *see also Ira G. Steffy & Son, Inc.*, 7 A.3d 278, 287–88 (Pa.Super.Ct.2010) (a plaintiff does not have standing to challenge alleged misconduct if a plaintiff is not a party to or third-party beneficiary of the contract that is the basis for a plaintiff's claims); *see also Shuster v. Pa. Turnpike Commonwealth*, 395 Pa. 441, 149 A.2d 447, 452 (1953) (one who is not a party to a contract lacks standing to argue that the contract is invalid).

***10** The Third Circuit has held that "[t]o satisfy the Article III case or controversy requirement, a Plaintiff must establish that he or she has suffered an 'injury in fact' that is both 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Doe ex rel. v. Lower Merion School Dist.*, 665 F.3d 524, 542 (3d Cir.2011) (citation omitted). Thus, in addressing Defendants' contention that Plaintiff does not have standing to challenge the validity of the assignment of her mortgage, initially we must determine if Plaintiff can show that she has suffered or will suffer "injury in fact." "If a borrower cannot demonstrate potential injury from the enforcement of the note and mortgage by a party acting under a defective assignment, the borrower lacks standing to raise the issue." *In re Walker*, 466 B.R. 271, 285–86 (Bkrtcy.E.D.Pa.2012) (citations omitted).

Plaintiff does not allege that she is a party to the mortgage assignment made on October 14, 2011, nor does the mortgage assignment state that she is either a party to or third-party beneficiary of the assignment. (Complaint, Ex. "B"). In order for Plaintiff to be considered a third-party beneficiary to the mortgage assignment, the assignment would have had to explicitly state intent to name Plaintiff a third-party beneficiary to the assignment. *Ira G. Steffy & Son, Inc., supra.* However, in examining the language of the Assignment of Mortgage, Plaintiff is not a stated party of the Assignment of Mortgage nor does the Assignment of Mortgage explicitly state its intent to afford Plaintiff third-party beneficiary status. The October 14, 2011 Assignment of Mortgage document states the following:

> For Value Received, the undersigned holder of a Mortgage (herein "Assignor") whose address is **3300 S.W. 34th Avenue, Suite 101 Ocala, FL 34474** does here grant, sell, assign, transfer and convey unto **THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2007-12** whose address is **101 BARCLAY ST-4W, NEW YORK, N.Y. 10286** all beneficial interest under that certain Mortgage described below together with the note(s) and obligations therein

described and the money due and to become due thereon with interest and all rights accrued or to accrue under said Mortgage.

(Complaint, Exhibit "B").

Therefore, the Assignment of Mortgage does not name Plaintiff as a party to or third-party beneficiary of the assignment, but instead states outright that all beneficial interest is bestowed upon the Bank of New York, Mellon. (*Id.*). Also, we do not find that Plaintiff can show she suffered or will suffer "injury in fact." As the Court explained in the case of *In re Walker,* 466 B.R. at 286, even if the above October 14, 2011 Assignment were defective and the original assignor still had ownership rights in the Note, Plaintiff's payments to the assignee would still satisfy her liability under the Note.

***11** Furthermore, it is well-established that a borrower (in this case, Plaintiff) does not have standing to challenge the validity of mortgage assignments, because, according to 6A C.J.S. Assignments § 132, "the only interest or right which an obligor or a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice." 6A C.J.S. Assignments § 132; *see also Ward v. Security Atl. Mortgage Elec. Registration Systems, Inc.,* 858 F.Supp.2d 561,568 (E.D.N.C.2012) ("Plaintiffs lack standing to challenge the validity of any such assignment [of mortgage]."); *see also Livonia Property Holdings, LLC v. 12840–12976 Farmington Road Holdings, LLC,* 717 F.Supp.2d 724, 735–37 (E.D.Mich.2010) ("hold[ing] that Borrower may not challenge the validity of assignments to which it was not a party or third-party beneficiary, where it has not been prejudiced, and the parties to the assignments do not dispute (and in fact affirm) their validity.").

Therefore, we will recommend that the Court dismiss with prejudice Plaintiff's claim that Defendants improperly and fraudulently assigned her mortgage in violation of an alleged "cutoff" date for mortgage assignment and grant Defendants' Motion to Dismiss Plaintiff's fraud claim regarding the assignment of the mortgage because Plaintiff lacks standing to raise these claims because the contract underlying her claims is the assignment of the mortgage, to which she is neither a party nor third-party beneficiary. Based on the foregoing and the cited case law, we find futility and prejudice to Defendants in allowing Plaintiff to amend her stated claims against Defendants, and we will not recommend that the Court grant Plaintiff leave to file an amended complaint regarding these claims. The Third Circuit has held that a Plaintiff whose Complaint fails to state a cognizable claim is entitled to amend his pleading unless the Court finds bad faith, undue delay, prejudice, or futility. *See Grayson v. Mayview State Hospital,* 293 F.3d 103, 111 (3d Cir.2002); *Alston v. Parker,* 363 F.3d 229, 235–236 (3d Cir.2004).

2. RICO

In their Motion to Dismiss, Defendants also assert that Plaintiff not only lacks standing to raise her claims because she is not a party to or third-party beneficiary of the mortgage assignment contract underlying her claims, but also because she has not met the standing requirements necessary to raise a RICO claim. (Doc. 8, p. 10). Defendants state that the RICO statute "confers standing upon '[a]ny person injured in his business or property by reason of a violation of section 1962 ...' 18 U.S.C. § 1964(c)." (*Id.*). Defendants also state that the "Third Circuit has construed § 1964(c) 'as requiring a RICO plaintiff to make two related but analytically distinct threshold showings ...:(1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the defendant's violation of 18 U.S.C. § 1962.' *Maio v. AETNA, Inc.,* 221 F.3d 472, 482–83 (3d Cir.2000)." (Doc. 8, p. 10). We agree with

Defendants. *See Clark v. Conahan,* 737 F.Supp.2d 239, 255 (M.D.Pa.2010) ("In order to have standing to bring a RICO claim pursuant to 18 U.S.C. § 1962(c), ..., Plaintiffs must plead injury to his (sic) business or property and that Defendants proximately caused such injury.") (citations omitted). The Clark Court also stated that "injury for RICO purposes requires proof of concrete financial loss, not mere injury to an intangible property interest." *Id.* (citing *Maio v. AETNA, Inc.,* 221 F.3d 472, 483 (3d Cir.2000)).

***12** Defendants argue that based on this aforementioned RICO standing requirements and case law, because Plaintiff has not alleged that she has suffered any injury to her property or business caused by any Defendant, her RICO claim should be dismissed. (*Id.*). We agree with Defendants analysis of Plaintiff's RICO claim because Plaintiff has not alleged that she has suffered an injury to her business or property. *See Maio v. AETNA, Inc., supra; Clark v. Conahan, supra.* No foreclosure action has even been initiated against Plaintiff's property. Therefore, because Plaintiff has failed to allege any injury to her property or business in accordance with the RICO requirements of § 1964(c) which are necessary to state a claim, we will recommend that Plaintiff's RICO claims be dismissed with prejudice and, Defendants' Motion to Dismiss Plaintiff's Complaint be granted with regards to Plaintiff's RICO claims due to Plaintiff's lack of standing under RICO. *See Maio v. AETNA, Inc., supra; Clark v. Conahan, supra.* Based on the foregoing, we find futility and prejudice to Defendants in allowing Plaintiff to amend her RICO claims against Defendants, and we will not recommend that the Court grant Plaintiff leave to file an amended complaint regarding these claims. *See Grayson v. Mayview State Hospital,* 293 F.3d at 111; *Alston v. Parker,* 363 F.3d at 235–236.

B. FAILURE TO STATE A CLAIM UNDER 12(b)(6)

1. RICO Claims

Even if Plaintiff has standing to raise her RICO claims against Defendants, and we find that she does not, we will recommend that Plaintiff's RICO claims be dismissed based upon her failure to adequately allege activity that satisfies requisite acts under RICO. As the Court stated in *Pagnotti Enterprises, Inc. v. Beltrami,* 787 F.Supp. 440, 444 (M.D.Pa.1992):

> A " 'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). Racketeering activity is defined as (A) certain acts chargeable under state law, (B) acts indictable under specific provisions of Title 18 of the United States Code, (C) acts indictable under specific provisions of Title 29 of the United States Code, (D) any offense involving fraud in connection with a case under Title 11, fraud in the sale of securities, or the felonious manufacture or distribution of drugs, or (E) any act indictable under the Currency and Foreign Transactions Reporting Act. 18 U.S.C. § 1961(1).

More recently, in *Morales v. Superior Living Products, LLC,* 398 Fed.Appx. 812, 814 (3d Cir.2010), when discussing the standard for a prima facie case under RICO, the Third Circuit Court stated:

> [A] claimant must allege '(1) conduct (2) of an enterprise (3) through a pattern (4) of a racketeering activity.' *Lum. v. Bank of Am.,* 361 F.3d 217, 223 (3d Cir.2004). Because appellants present a fraud-based RICO claim, they must plead with particularity the circumstances of the alleged fraud. *Id.* They may meet this requirement by pleading the 'date, place or time' or by 'injecting precision and some measure of substantiation into their allegations.' *Id.* at 224 (citation omitted).

***13** In their Motion to Dismiss, Defendants aver the following:

> Plaintiff's allegations do not allege a period, object or any certain illegal action by any alleged Defendant [with regards to her RICO claim]. Plaintiff merely alleges that it was improper for MERS to assign the Mortgage to the Bank of New York, Mellon due to a misunderstood and mischaracterized "cut off date" relating to the Trust, that this was a violation of an unspecified New York law, and that Defendants had knowledge of same. *See supra;* see Complaint, ¶¶ 13–20. Furthermore, despite Plaintiff's theory, there is nothing criminal about securitizing a mortgage loan or assigning a Mortgage, and broad allegations like Plaintiff's should be disregarded in evaluating a RICO conspiracy claim. *See Am. Dental Ass'n. v. CIGNA Corp.*, No. 09–12033, 2010 WL 1930128, at *8 (11th Cir. May 14, 2010) ("In analyzing the [RICO] conspiracy claim ... *Iqbal* instructs us that our first task is to eliminate any allegations in Plaintiffs' complaint that are merely legal conclusions.").
>
> (Doc. 8, p. 12).

We agree with Defendants' analysis of Plaintiff's RICO claims. We find that Plaintiff's RICO claims against Defendants are vague and based on legal conclusions, completely failing to assert with factual sufficiency any particular conduct that would indicate Defendants were engaged in predicate acts of racketeering. *See id* . Plaintiff's Complaint fails to sufficiently describe the structure, purpose, function and course of conduct of the enterprise. Rather, Plaintiff relies on vague and conclusory allegations in her attempt to allege a RICO claim, which are is not sufficient enough to properly allege a RICO claim. *See Warden v. McLelland,* 288 F.3d 105, 114 (3d Cir.2002) (Court held that with respect to RICO claims, Plaintiff must allege fraud with the heightened pleading particularity required by Fed.R.Civ.P. 9(b)).

Therefore, we will recommend that the Court dismiss with prejudice Plaintiff's RICO claims against Defendants due to her failure to allege that Defendants were engaged in conduct of an enterprise acting in a pattern of racketeering, and grant Defendants' Motion to Dismiss. As discussed above, we find futility and prejudice to Defendants in allowing Plaintiff to amend her RICO claims.

2. FDCPA CLAIM

Plaintiff also asserts that Defendants violated the FDCPA when they assigned Plaintiff's mortgage. Under the FDCPA, debt collectors are restricted from using unfair collection methods and from making misleading or false representations. 15 U.S.C. §§ 1692e, 1692f.

"The primary goal of the FDCPA is to protect consumers from abusive, deceptive, and unfair debt collection practices, including threats of violence, use of obscene language, certain contacts with acquaintances of the consumer, late night phone calls, and simulated legal process." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir.1997) (citation omitted). "A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve the right to be treated in a reasonable and civil manner." *Id.* (citation omitted). "In the most general terms, the FDCPA prohibits a debt collector from using certain enumerated collection methods ... to collect a 'debt' from a consumer." *Bass,* 111 F.3d at 1324. The FDCPA prohibits debt collectors from: engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person," 15 U.S.C. § 1692d; from using "any false, deceptive, or misleading representations or means in connection with the collection of any debt," 15 U.S.C. § 1692e; or

from using unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. § 1692f.

***14** Consumers have a private cause of action against debt collectors. 15 U.S.C. § 1692k. "The FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation." *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir.2011). Further, the FDCPA is a "remedial statute" and courts construe the FDCPA broadly to ensure its purpose to protect all consumers, even the least sophisticated consumers, is given effect. *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir.2006) (citations omitted).

In their Motion to Dismiss, Defendants argue that Plaintiff's FDCPA claim should be dismissed with prejudice because: (1) she has not alleged violation of any specific section of the FDCPA; (2) she has not alleged that any of Defendants are "debt collectors" under the FDCPA; (3) she has not alleged any abusive, confusing or otherwise improper behavior; and (4) she has not alleged that Defendants have engaged in any debt collection activity. (Doc. 8, p. 13).

While there is no question that Defendants are indeed debt collectors under the definition of a debt collector as defined by 15 U.S.C. § 1692(a)(6) of the FDCPA, Plaintiff has failed to properly allege a claim under the FDCPA because she has not alleged her claim with factual sufficiency, but rather legal conclusions. *Oppong v. First Union Mortgage Corporation*, 215 Fed. Appx. 114, 118 (3d Cir.2007) (stating that a mortgagee is a "debt collector" under the FDCPA's definition in § 1692(a)(6)). While Plaintiff has stated that Defendants were "fraudulent" and used "misrepresentations," she failed to specifically state what provision of the FDCPA Defendants allegedly violated and failed to allege any facts to support these purportedly legal conclusions that Defendants engaged in fraudulent activities and made misrepresentations. As stated above, in evaluating a Complaint in response to a Motion to Dismiss, a complaint's allegations must be supported with factual sufficiency, and not just mere legal conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 433, 455 (2007). In *Bridgenorth v. American Education Services*, 412 Fed.Appx. 433, 435 (3d Cir.2011), the Third Circuit cited to *Iqbal* and stated that "merely reciting an element of a cause of action or making a bare conclusory statement is insufficient to state a claim." We agree with Defendants and find that Plaintiff's Complaint regarding the alleged violations under the FDCPA is not sufficient under *Twombly* and *Iqbal* to state a claim.

In her Complaint, Plaintiff has failed to state what, if any, FDCPA section Defendants had allegedly violated. Nor does Plaintiff attempt to clarify, in her Brief in Opposition, what sections of the FDCPA Defendants had violated. Therefore, we will recommend that Defendants' Motion to Dismiss be granted and Plaintiff's FDCPA claims be dismissed for failure to allege any such claim with factual sufficiency required to survive a 12(b)(6) Motion to Dismiss. *See Kimmel v. Phelan Hallinan & Schmieg, PC*, 847 F.Supp.2d 753, 769–770 (E.D.Pa.2012) (Plaintiff had to "link each alleged violation of the FDCPA to the predicate factual allegations giving rise to the violation in order to state a claim under Fed.R.Civ.P.8."). However, in an abundance of caution, we will recommend that the Court dismiss without prejudice Plaintiff's FDCPA claims. Based on the foregoing and the cited case law, we find that it is not clear whether it is futile for the Court to allow Plaintiff to amend her FDCPA claims against Defendants, and we will recommend that the Court grant Plaintiff leave to file an amended complaint regarding these claims.

3. RESCISSION AS REMEDY

***15** As part of her request for relief, Plaintiff has requested that the Court rescind the Mortgage based

on chain of title issues. (Complaint ¶ 15; Prayer for Relief ¶ 5). Defendants aver that because Plaintiff has not alleged any "legal or factual basis for rescission of the Mortgage, nor has she averred her ability to tender the balance owing under the Mortgage," rescission is not an available remedy "even if Plaintiff had stated any viable claim for relief...." (Doc. 8, p. 13).

It would be futile to delve into the elements necessary to properly request rescission of Plaintiff's mortgage in this Report and Recommendation because of our recommendation that Plaintiff's Complaint be dismissed with prejudice due to lack of standing, failure to state a claim under 12(b)(6), and failure to conform to Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. Insofar as we are recommending that Plaintiff's Complaint be dismissed with prejudice, we find that it is unnecessary to delve into the Complaint's prayer for relief. However, to the extent that Defendants contend in their Motion to Dismiss that this Court should dismiss Plaintiff's request that her mortgage be rescinded, we will recommend that the Court dismiss with prejudice Plaintiff's mortgage rescission prayer for relief and grant Defendants' Document 6 Motion to Dismiss in this regard. *See Gehman v. Argent Mortg. Co. LLC,* 726 F.Supp.2d 533, 542 n. 13 (E.D.Pa.2010) (Court held that under the Truth in Lending Act (TILA), 15 U.S.C. § 1635, rescission is not an available remedy for "residential mortgage transactions."). We also agree with Defendants that in order for Plaintiff to request rescission of the Mortgage, and for Defendants to remove the mortgage lien, Plaintiff must tender the balance owing under the Mortgage. *See American Mortg. Network, Inc. v. Shelton,* 486 F.3d 815, 820–21 (4th Cir.2007); *Valentine v. Influential Sav. & Loan Ass'n,* 572 F.Supp. 36, 40–41 (E.D.Pa.1983). Otherwise, Plaintiff would realize a windfall, *i.e.,* both a free and clear property and retention of the mortgage loan monies. As Defendants point out, Plaintiff has not averred she has the ability to tender the balance owing under the Mortgage. (Doc. 8, p. 13).

C. RULES 8(a) AND 9(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

1. RULE 8(a) VIOLATION

Rule 8(a) states that "A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief ...." Fed.R.Civ.P. 8(a). Defendants argue that Plaintiff's Complaint is not in accordance with Rule 8(a) and therefore should be dismissed. They also aver that "the Complaint purports to bring claims against three separate Defendants, but the cause or causes of action upon which Plaintiff seeks to recover as to each or any Defendant remains unclear. *See* Complaint ¶¶ 13–20." (Doc. 8, p. 13). Paragraphs thirteen (13) through twenty (20) of Plaintiff's Complaint state the following:

> ***16** 13. The Plaintiff suspected fraud because according to the Trust, CWABS 2007–12 the prospectus on page 7 states that the cut off date for mortgage assignments to enter the pool is August 1, 2007. From the Securities and Exchange Commission's website, incorporated herein and marked Exhibit "C".
>
> 14. The Plaintiff's loan number 171186255 was verified as being listed in the Securities and Exchange Commission's website and converted into stock. It is then sold to investors on Wall Street. Once the loan was securitized and converted, it forever lost its security. MERS making the assignment to the Trustee after August 1, 2007 is a violation of New York Law.
>
> 15. The Plaintiff is questioning the legitimacy of the mortgage and if there is a break in the chain of title.

If the Mortgage was never correctly endorsed by all parties according to the Trust's pooling and servicing agreement, the mortgage becomes null and void. Also, if the Mortgage is separated from the Note it becomes null and void. Law of 1871, Cannot separate the Note from the Mortgage.

16. There is no evidence that Countrywide endorsed the Note to anyone or that the Mortgage was properly assigned to the now purported holder-in-due-course the Bank of New York, Mellon. According to New York law, the note would be put out of eligibility. *Ibanez v. Wells Fargo,* MA Jan. 7, 2011 MA Supreme Court.

17. Defendants fraudulently concealed their wrongdoings and prevented Plaintiff from discovering her cause of action.

18. Plaintiff has been injured by the fraud by Defendants and has remained in ignorance of it without any fault or want of diligence or care on her part.

19. Defendants made many misleading statements that the loan contained certain terms desirable to the consumer when it did not.

20. Defendant's use of deceit or trickery caused Plaintiff to act to her disadvantage.

(Complaint, ¶¶ 13–20).

In analyzing Defendants' argument that Paragraphs thirteen (13) through twenty (20) of Plaintiff's Complaint fail to conform to Rule 8(a), we find that even under the most liberal construction, Plaintiff's Complaint is not in conformity with Rule 8(a). It does not give Defendants fair notice of what Plaintiff's claims against them are and the grounds upon which the claims rest. Plaintiff claims that Defendants are liable for fraudulent, misrepresentative conduct, but yet fails to point to any facts or statutes to support her general allegations. *See* Complaint, ¶¶ 13–20. Clearly, Plaintiff's allegations found in paragraphs thirteen (13) through twenty (20) of her Complaint do not give Defendants fair notice as to what her claims against them are and the grounds upon which they rest. Therefore, due to Plaintiff's failure to comply with Rule 8(a), we will recommend that Plaintiff's Complaint be dismissed. However, based on our above discussions regarding Defendants' Motion to Dismiss, we will recommend that Plaintiff's Complaint be dismissed with prejudice due to futility in allowing leave to amend and, that Defendants' Motion to Dismiss be granted.

2. RULE 9(b) VIOLATION

***17** Defendants also contend that Plaintiff's Complaint is in violation of Rule 9(b) of the Federal Rules of Civil Procedure because Rule 9(b) requires specific factual averments of misrepresentation in order for a plaintiff to properly raise a claim for fraud or conspiracy. (Doc. 8, p. 13). The Third Circuit has determined that in order to comply with Rule 9(b)'s particularity requirement of a fraud claim, the following elements must be pled: (1) a specific false representation of material facts; (2) knowledge by the person who made the misrepresentation as to its falsity; (3) ignorance of its falsity by the person to whom the representation was made; (4) the intention that the representation should be acted upon; and (5) the plaintiff acted upon the false representation to his or her damage. *Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96, 99 (3d Cir.1983). Rule 9(b) is satisfied if a Complaint sets forth precisely what omissions or statements were made in what documents or oral statements and the manner in which they misled the plaintiff, and what benefit the defendant gained as a consequence of the fraud. *In re Theragenics Corp. Securities Litigation,* 105 F. Su pp.2d 1342, 1348 (N.D.Ga.2000) (citing *Brooks v. Blue*

Cross and Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir.1997)). Furthermore, in accordance with 15 U.S .C. § 78u–4(b)(2), a complaint must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). Furthermore, according to the Supreme Court, a strong inference "is more than merely plausible or reasonable-it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 314, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In light of the specific elements that must be pled in order to successfully state a claim for fraud in accordance with Rule 9(b) and in light of the factual sufficiency case law standards provided above necessary to allege a defendant's fraudulent state of mind, we find that Plaintiff's averments against Defendants, as stated in Paragraphs thirteen (13) through twenty (20) in her Complaint, clearly lack factual sufficiency because Plaintiff has not alleged any of the five elements necessary to properly plead a claim for fraud. Furthermore, as discussed above in the section titled "Failure to State a Claim under 12(b)(6)," we find that Plaintiff has failed to state both RICO claims and FDCPA claims with the required factual sufficiency, and that Plaintiff has attempted to support her allegations with sweeping legal buzz words and conclusions.

Furthermore, in her Brief in Opposition to Defendants' Motion to Dismiss and in her Addendums, Plaintiff did not provide any more factual information to support her claims and to oppose Defendants' Motion to Dismiss argument based on violations of Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. Therefore, because Plaintiff's Complaint does not conform to the standards of either Rule 8(a) or Rule 9(b) of the Federal Rules of Civil Procedure, and because Plaintiff did not attempt to provide sufficient facts to support her claims in her Brief in Opposition or Addendums, we will recommend that Plaintiff's Complaint be dismissed with prejudice based on violations of Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure and, that Defendants' Motion to Dismiss (Doc. 6) be granted.

D. LIS PENDENS

***18** Lastly, Defendants aver that should the Court grant Defendants' Motion to Dismiss, and that the Lis Pendens Plaintiff filed in York County Court attached to Defendants' Brief (Doc. 8–1) should be stricken. (Doc. 8, p. 14). Defendants base their argument on the Pennsylvania Superior Court case *Psaki v. Ferrari,* in which the Superior Court stated, "a party is not entitled to have his case indexed as lis pendens unless title to real estate is involved in litigation." 377 Pa.Super. 1, 546 A.2d 1127, 1128 (Pa.Super.Ct.1988). Defendants point out that presently there is not any foreclosure action pending against Plaintiff.

In the alternative, Defendants argue that even if their Motion to Dismiss is denied, the Court should still strike Plaintiff's Lis Pendens on equitable grounds because "Defendants will likely prevail on the merits of the litigation and because Plaintiff is in no way prejudiced by its removal. *See e.g., Rosen v. Rittenhouse Towers,* 334 Pa.Super. 124, 482 A.2d 1113, 1116 (Pa.Super.Ct.1984) (courts should weight the equities when deciding the propriety of a lis pendens)." (Doc. 8, p. 14). Defendants argue that Plaintiff has no likelihood of success on her Complaint and therefore "cannot claim prejudice by striking the lis pendens since Plaintiff's pursuit of more than $1,000,000.00 in monetary damages clearly outweighs the value of any purported issue affecting title that might arise from an assignment of Plaintiff's $120,000.00 Mortgage loan." (Doc. 8, pp. 14–15).

Even though we will recommend that the Court dismiss with prejudice all of Plaintiff's claims against Defendants except her FDCPA claims, we will also

recommend that the Court strike Plaintiff's Lis Pendens, as Defendants request. Thus, even though we are not recommending that the Court dismiss Plaintiff's entire Complaint with prejudice, we find that based on equitable grounds, the Court should strike Plaintiff's Lis Pendens because Plaintiff's one million dollar ($1,000,000.00) prayer for relief far surpasses the amount in controversy, which is the one hundred twenty thousand dollar ($120,000.00) mortgage amount.

VI. RECOMMENDATION.

Based on the foregoing discussion, we respectfully recommend that the Court **GRANT** Defendants' **Document 6 Motion to Dismiss** and **DISMISS WITH PREJUDICE** the following:

1. Plaintiff's claim that Defendants' Notice of Removal and Document 6 Motion to Dismiss were untimely filed.

2. Plaintiff's request for default judgment against Defendants.

3. Plaintiff's Complaint with respect to all claims except her FDCPA claims against Defendants.

We recommend that the Court **DISMISS WITHOUT PREJUDICE** Plaintiff's FDCPA claims against Defendants, and that Plaintiff be granted leave to amend only these claims.

We also recommend that Defendants' request for the Court to strike Plaintiff's Lis Pendens filed against Defendants in York County Court be **GRANTED.**

M.D.Pa.,2012.
Souders v. Bank of America
Not Reported in F.Supp.2d, 2012 WL 7009007 (M.D.Pa.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Addendum to Preliminary Objections to Plaintiffs' First Amended Complaint containing Unreported Cases, by First Class Mail and email to:

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161
Email: tjw@goldbergkatzman.com

Wick Sollers
L. Joseph Loveland
Mark A. Jensen
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
mjensen@kslaw.com
aparrish@kslaw.com

Paul V. Kelly
John J. Commisso
JACKSON LEWIS P.C.
75 Park Plaza
Boston, MA 02116
Telephone: (617) 367-0025
Email: Paul.Kelly@jacksonlewis.com
John.Commisso@jacksonlewis.com

Counsel for Plaintiffs

Daniel I. Booker
Jack B. Cobetto
Donna M. Doblick
William J. Sheridan
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: (412).288-3131
Email: dbooker@reedsmith.com
jcobetto@reedsmith.com
ddoblick@reedsmith.com
wsheridan@reedsmith.com

Michael T. Scott
REED SMITH LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103
Telephone: (215) 851-8248
Email: mscott@reedsmith.com

Joseph P. Green
LEE, GREEN & REITER, INC.
115 East High Street
P.O. Box 179
Bellefonte, PA 16823-0179
Telephone: (814) 355-4769
Email: jgreen@lmgrlaw.com

Counsel for The Pennsylvania State University

Via FedEx Overnight Delivery
The Honorable John B. Leete
Senior Judge, Specially Presiding
Potter County Courthouse, Room 30
One East Second Street
Coudersport, PA 16915

Dated: March 17, 2014

Thomas W. Scott
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
Telephone: (717) 232-1851
Email: tscott@killiangephart.com

Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray