IT IS SO ORDERED.

Kay Woods

Kay Woods
United States Bankruptcy Judge

Dated: December 20, 2010
02:03:21 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
ROBERT E. MILLER, JR. and DENISE E. MILLER,	*	CASE NUMBER 09-40846
Debtors.	*	
* * * * * * * * * * * * * * * *	*	
ROBERT EUGENE MILLER, JR. and DENISE ELIZABETH MILLER,	*	ADVERSARY NUMBER 10-04147
Plaintiffs,	*	
v.	*	
FHLB OF CHICAGO AS TRUSTEE FOR HLBDE-MPF, *et al.*,	*	HONORABLE KAY WOODS
Defendants.	*	

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MEMORANDUM OPINION REGARDING MOTION TO DISMISS
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This cause is before the Court on Motion of Defendants to Dismiss the Complaint Except to the Extent Count Seven Objects to the Proof of Claim of Wells Fargo Bank, N.A. ("Motion") (Doc. # 13)

and Memorandum in Support of Partial Motion to Dismiss ("Memo") (Doc. # 14) (collectively, "Motion to Dismiss") filed by Defendants FHLB of Chicago as Trustee for HLBDE-MPF ("FHLB") and Wells Fargo Bank, N.A. ("Wells Fargo") (collectively, "Defendants") on September 21, 2010. On October 25, 2010, Plaintiffs Robert Eugene Miller Jr. and Denise Elizabeth Miller filed Memorandum in Opposition to Defendants [sic] Partial Motion to Dismiss ("Response") (Doc. # 24).

For the reasons set forth below, the Court will: (i) grant the Motion to Dismiss with respect to Counts[1] Two and Six; (ii) grant the Motion to Dismiss, in part, with respect to Counts One and Eight; (iii) deny the Motion to Dismiss with respect to Counts Three, Four, Seven, and Nine; and (iv) grant the Plaintiffs twenty-one days to amend Count One.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. Resolution of this proceeding, with the exception of Count Four,[2] is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

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[1] All Counts are defined *infra* at 7-8.

[2] The Court has "related to" subject matter jurisdiction over Count Four. *See infra* at 18-20.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Note and Mortgage.

On March 3, 2000, Mr. Miller executed a Note in favor of Norwest Mortgage, Inc. ("Norwest") in the amount of $88,400.00. (Mot., Ex. A, at 6-8.) On that same date, to secure payment of the Note, the Plaintiffs executed an Open-End Mortgage (together with the Note, "Mortgage"), which granted Norwest a security interest in the Plaintiff's real property located at 819 Texas Avenue, McDonald, Ohio 44437 ("Residence"). (Mot., Ex. B.) On January 23, 2008, the Mortgage was assigned to FHLB.[3] (Mot., Ex. C.)

B. First Bankruptcy Case.

On October 8, 2002, the Plaintiffs filed a voluntary petition pursuant to chapter 13 of title 11, which was denominated Case No. 02-44495 ("First Case"). The Plaintiffs' chapter 13 plan ("First Plan") (First Case, Doc. # 2) was filed on October 8, 2002, and confirmed on November 12, 2002. (First Case, Doc. # 7.) The First Plan provided that the Mortgage was to "be paid directly outside the plan." (First Plan ¶ 2(A).)

On January 31, 2003, Wells Fargo Home Mortgage, Inc. f/k/a Norwest Mortgage, Inc. ("WFHM") filed Claim No. 15-1 ("Claim 15"). WFHM asserted the amount due on the Mortgage was $92,919.12, which included "[a]rrearage and other charges at time case filed" in the

[3] On April 14, 2000, Norwest changed its name to Wells Fargo Home Mortgage, Inc. *See* Ohio Sec'y. of State, Document No. 200011000075, filed Apr. 17, 2000, available at www.sos.state.oh.us. On May 5, 2004, Wells Fargo Home Mortgage, Inc. was merged into Wells Fargo Bank, N.A. *See* Ohio Sec'y. of State, Document No. 200427800024, filed Oct. 4, 2004, available at www.sos.state.oh.us. Wells Fargo Bank, N.A. assigned the Mortgage to FHLB. (Mot., Ex. C.)

amount of $5,908.26. (Claim 15 at 1 (emphasis in original).) On August 26, 2003, WFHM filed supplemental Claim No. 16-1 ("Claim 16"), which asserted "[b]ankruptcy costs" in the amount of $75.00 were due at the time the First Case was filed. (Claim 16 at 1, 13.)

On June 17, 2003, WFHM filed Motion for Relief from Stay (First Case, Doc. # 17) regarding the Residence. On July 2, 2007, the Court granted the Motion for Relief from Stay and entered Order for Relief from Stay (First Case, Doc. # 35).[4] The Plaintiffs subsequently moved to vacate the Order for Relief from Stay on the basis that the post-petition Mortgage arrearage had been cured. (First Case, Doc. # 37.) On August 1, 2007, the Court entered Order ("Reinstatement Order") (First Case, Doc. # 40), which: (i) reinstated the automatic stay with respect to the Residence; and (ii) found that "the [Plaintiffs] ha[d] cured their post-petition arrears on the [M]ortgage." (Reinstatement Order at 1.) The Reinstatement Order was approved and executed by counsel for WFHM.[5]

On September 19, 2007 — seven weeks after entry of the Reinstatement Order — the Court entered Order Discharging Debtor after Completion of Chapter 13 Plan ("Discharge Order") (First Case,

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[4] On August 28, 2003, the Court entered Agreed Order Granting Conditional Relief from Stay (First Case, Doc. # 23). On July 2, 2007, WFHM filed Affidavit (First Case, Doc. # 34), in which WFHM attested that the Plaintiffs failed to comply with the Agreed Order Granting Conditional Relief from Stay. Relief from stay was granted based upon the Affidavit.

[5] The Court notes that the Reinstatement Order incorrectly stated that "counsel for Saxon Mortgage has indicated approval to the reinstatement of the stay." (Reinstatement Order at 1.) However, the Order was executed by Faye English, Esq., of Reimer, Lorber & Arnovitz, Co LPA, which served as counsel for WFHM. (*See, e.g.*, Mot. for Relief from Stay.)

Doc. # 48). On December 4, 2007, Michael A. Gallo, Chapter 13 Trustee ("Trustee"), filed Final Report and Account (First Case, Doc. # 50), which provided that Claim 16 and the arrearage and other charges set forth in Claim 15 had been paid in full through the First Plan. The First Case was closed on December 4, 2007. (First Case, Doc. # 51.)

C. Second Bankruptcy Case.

On March 17, 2009 ("Petition Date"), the Plaintiffs filed a second voluntary petition pursuant to chapter 13 of title 11, which was denominated Case No. 09-40846 ("Second Case").[6] The Plaintiffs' chapter 13 plan ("Second Plan") (Second Case, Doc. # 4) was filed on March 17, 2009, and confirmed on May 4, 2009. (Second Case, Doc. # 17.) The Second Plan provides that the Mortgage is to "be paid directly by the [Plaintiffs] 'outside' the [Second] Plan." (Second Plan, Art. 2(E) (emphasis omitted).)

On April 10, 2009, FHLB filed Claim No. 2-1 ("Claim 2"). FHLB asserted the amount due on the Mortgage was $82,251.82, which included "arrearage and other charges at time case filed" in the amount of $21,366.84. (Claim 2 at 1 (emphasis in original).) On March 1, 2010, the Plaintiffs filed Objection to Proof of Claim Due to Improper Unauthorized Fees and Charges ("Claim Objection") (Second Case, Doc. # 23). The Plaintiffs object to Claim 2 on the

[6] The Court will refer to the commencement of the Second Case as the "Petition Date." Thus, when using the terms "pre-petition" and "post-petition" hereafter, the Court is referring to the time periods before and after the Petition Date, respectively.

basis that it overstates the Mortgage arrearage and includes unreasonable and illegal charges. (Claim Obj. at 1-2.) On March 31, 2010, Wells Fargo, on behalf of FHLB, filed a response to the Claim Objection ("Claim Objection Response") (Second Case, Doc. # 24), which states that Claim 2 is "true and correct as filed." (Claim Obj. Resp. at 1.) On July 20, 2010, the Court entered an agreed order holding the Claim Objection in abeyance pending resolution of this adversary proceeding. (Second Case, Doc. # 35.)

Notwithstanding the statement in the Claim Objection Response that Claim 2 was true and correct as filed, on November 4, 2010, FHLB filed Claim No. 2-2 ("Amended Claim 2") (together with Claim 2, "Proof of Claim"). In Amended Claim 2, FHLB asserts the amount due on the Mortgage is $83,641.49, which includes "arrearage and other charges as of time case filed" in the amount of $19,997.28. (Am. Claim 2 at 1 (emphasis in original).) Attached to Amended Claim 2 is Schedule of Claim, which states, "All payments received from the [Trustee] in the [First Case] were applied to reduce the allowed claim of Wells Fargo and, by the end of the [First Case], Wells Fargo's records indicate the claim was paid in full." (*Id.* at 2 n.2.)

On November 5, 2010, the Plaintiffs filed Schedule B — Personal Property — Amended (Second Case, Doc. # 37), which lists the claims asserted against the Defendants in the Complaint as "contingent and unliquidated claims." (Am. Sch. B ¶ 21.)

D. Adversary Proceeding.

On July 6, 2010, the Plaintiffs filed Complaint for Improper and Unauthorized Fees, Violations of Federal and State Law ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding against: (i) FHLB, as the holder of the Mortgage and principal of Wells Fargo; and (ii) Wells Fargo, as the servicer of the Mortgage. (Compl. ¶¶ 11-12.) The Plaintiffs seek relief in the form of sanctions, actual damages, statutory damages, punitive damages, partial disallowance of the Proof of Claim, and legal fees and expenses. (*See* Compl.)

In the Complaint, the Plaintiffs allege Wells Fargo repeatedly assessed improper charges to the Mortgage, acted to collect those charges, and misapplied payments from the Plaintiffs and Trustee. (*Id.* ¶¶ 3-4.) The Plaintiffs assert the actions of Wells Fargo, for which FHLB is vicariously liable, constitute: (i) a violation of the automatic stay in 11 U.S.C. § 362(a)(3) ("Count One") (*id.* ¶¶ 47-51); (ii) a violation of Federal Rule of Bankruptcy Procedure 2016(a) and 11 U.S.C. § 105(a) ("Count Two") (*id.* ¶¶ 52-54); (iii) a violation of the discharge injunction in 11 U.S.C. § 524 ("Count Three") (*id.* ¶¶ 55-62); and (iv) wrongful conversion ("Count Six") (*id.* ¶¶ 79-81). The Plaintiffs further allege the Proof of Claim was fraudulently filed and request the Court to partially disallow the Proof of Claim and sanction the Defendants ("Count Seven"). (*Id.* ¶¶ 82-91.) The Plaintiffs next assert Wells Fargo, on behalf of FHLB, fraudulently misrepresented the amount due on the Mortgage

and the necessary steps to obtain a Mortgage modification ("Count Nine"). (*Id.* ¶¶ 95-96.) Furthermore, the Plaintiffs assert Wells Fargo failed to reasonably investigate a qualified written request in violation of the Real Estate Settlement Procedures Act ("RESPA") ("Count Four"). (*Id.* ¶¶ 63-68.) Finally, the Plaintiffs claim FHLB misapplied Mortgage payments in breach of the Open-End Mortgage and implied covenant of good faith and fair dealing ("Count Eight"). (*Id.* ¶¶ 92-94.)[7]

On September 21, 2010,[8] the Defendants filed the Motion to Dismiss, which seeks to dismiss the Complaint, except to the extent Count Seven objects to the Proof of Claim. (Mot. at 1.) The Defendants move to dismiss on the grounds that the Complaint: (i) fails to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6); and (ii) is barred by judicial estoppel. (*Id.*) On October 25, 2010,[9] the Plaintiffs filed the Response.[10]

II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 8(a)(2), made applicable to the

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[7] The Plaintiffs also claimed Wells Fargo violated the Consumer Sales Practices Act ("Count Five") (Compl. ¶¶ 69-78), but subsequently dismissed Count Five. (Resp. at 3.)

[8] The Defendants were granted two extensions of time to file an answer or otherwise respond to the Complaint (Docs. ## 8, 11).

[9] The Plaintiffs were granted three extensions of time to respond to the Motion to Dismiss (Docs. ## 18, 21, 25).

[10] On November 5, 2010, the Defendants moved for leave to file a reply to the Plaintiffs' Response (Doc. # 29). The Court found that the Defendants failed to state an appropriate basis to grant leave to file a reply and, thus, denied the motion for leave (Doc. # 33).

instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7008(a), requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8 (West 2010); FED. R. BANKR. P. 7008 (West 2010). The complaint does not need to contain "'detailed factual allegations,'" but it must contain more than mere "'labels and conclusions'" or "'a formulaic recitation of the elements of a cause of action.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under FED. R. CIV. P. 12(e) for a more definite statement is the proper avenue rather than under FED. R. CIV. P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (W.D. Tenn. 2003) (citing 5A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1356 (West 1990)).

Federal Rule of Civil Procedure 12(b)(6), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), provides that a claim can be dismissed if it fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2010); FED. R. BANKR. P. 7012 (West 2010). Accordingly, a complaint will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

When determining whether a claim alleges enough facts to state a claim upon which relief can be granted, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *see also Twombly*, 550 U.S. at 555. However, the court need not accept as true legal conclusions or unwarranted factual inferences. *Iqbal*, 129 S. Ct. at 1949-50; *Directv, Inc.*, 487 F.3d at 476.

When a complaint alleges fraud, Federal Rule of Civil Procedure 9(b), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7009, provides that the plaintiff "must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9 (West 2010); FED R. BANKR. P. 7009 (West 2010). "In complying with Rule 9(b), a plaintiff, at a minimum, must 'allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.'" *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007) (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)).

III. ANALYSIS

A. Count One.

1. Arguments.

The Plaintiffs allege that, during the First Case, Wells Fargo, on behalf of FHLB, assessed "improper, unauthorized and unapproved fees and charges" to the Mortgage and applied payments from the Plaintiffs and Trustee to those charges. (Compl. ¶ 48.) The Plaintiffs also allege the Defendants continue to assess improper fees and charges to the Mortgage during the Second Case. (*Id.*) The Plaintiffs contend this conduct is a violation of the automatic stay in § 362(a)(3). (*Id.* ¶¶ 47-51.)

The Defendants move to dismiss Count One on the grounds that, even if the alleged conduct occurred, such conduct is not a violation of the automatic stay. (Memo at 6.) The Defendants assert that the automatic stay in the First Case expired upon entry of the Discharge Order and, as a matter of law, filing a proof of claim cannot violate the automatic stay. (*Id.* at 6-7.) The Defendants further claim the mere assessment of charges, absent some act to collect those charges, is not a violation of the automatic stay. (*Id.* at 7-8.) The Plaintiffs respond that the alleged application of payments to improper fees and charges is a violation of the automatic stay. (Resp. at 4.)

2. Legal Analysis.

Pursuant to § 362(a)(3), the filing of a voluntary bankruptcy petition generally "operates as a stay, applicable to all entities,

of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3) (West 2010). With certain exceptions, "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate." § 362(c)(1). Property of the estate "not otherwise administered at the time of the closing of a case is abandoned to the debtor." 11 U.S.C. § 554(c) (West 2010). As a result, the automatic stay in § 362(a)(3) terminates with respect to unadministered property of the estate when the bankruptcy case is closed. *See* §§ 362(c)(1) and 554(c).

The automatic stay in § 362(a)(3) terminated when the First Case was closed on December 4, 2007. *See* § 362(c)(1). As a consequence, any conduct that occurred after the First Case was closed could not, as a matter of law, have violated the automatic stay in the First Case. To the extent Count One claims the Defendants violated the automatic stay in the First Case after December 4, 2007, the Plaintiffs have failed to state a claim upon which relief can be granted.

In Count One, the Plaintiffs also allege the Defendants violated the automatic stay during the pendency of the First Case. However, the instant adversary proceeding was brought in the Second Case. Any causes of action related to the First Case had to be filed in the First Case, which was closed more than three years ago. Accordingly, the Court finds that the portion of Count One related

to conduct that occurred during the First Case is not properly before the Court. Count One will be dismissed to the extent it claims the Defendants violated the automatic stay in the First Case.

Finally, it is not apparent what facts alleged in Count One pertain only to the Second Case. For example, the Plaintiffs state, "The imposition of the said [sic] unapproved property inspection fees, statutory expenses, [sic] legal fees constitute [sic] unlawful and illegal bankruptcy fees in violation of the automatic stay both in the [First Case] and in the [Second Case]." (Compl. ¶ 49.) As a result, the Court will grant the Plaintiffs twenty-one days to amend Count One to the extent it has not been dismissed — *i.e.*, the claim that the Defendants violated the automatic stay in the Second Case.

B. Count Two.

1. Arguments.

The Plaintiffs claim the Defendants assessed property inspection fees, legal fees, and other expenses during the Second Case without Court approval in violation of Rule 2016(a)[11] and § 105(a).[12] (*Id.* ¶¶ 52-54.) The Defendants move to dismiss Count

[11] Rule 2016(a) states, in pertinent part, "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application . . . ." FED. R. BANKR. P. 2016 (West 2010).

[12] Section 105(a) states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Two because this Court expressly ruled in another case that Rule 2016(a) does not create a private cause of action, even in conjunction with § 105(a). (Memo at 8.) The Plaintiffs concede no private cause of action exists under either Rule 2016(a) or § 105(a), but argue they have standing to requests sanctions for violations of those provisions. (Resp. at 1-2.)

2. Legal Analysis.

In *Villwock v. Citi Residential Lending (In re Villwock)*, Adv. No. 09-04319 (Woods, J., Bankr. N.D. Ohio Apr. 12, 2010), available at www.ohnb.uscourts.gov ("*Villwock I*"), this Court dismissed the plaintiff's claim that the defendants violated Rule 2016(a) and § 105(a) on the grounds that the plaintiff failed to state a claim upon which relief could be granted. *Id.* at 17-20. The Court held that it is "not possible" to commit a violation of § 105(a) because it "does not impose any statutory duties on the parties to a bankruptcy case." *Id.* at 18. The Court further held that the plaintiff could not bring a claim pursuant to Rule 2016(a) because "'[n]o provision for a private remedy under Rule 2016 is found, and it would be extreme bootstrapping for the Court to say that § 105 creates a remedy for a rule violation.'" *Id.* at 20 (quoting *Yancey v. Citifinancial, Inc. (In re Yancey)*, 301 B.R. 861, 868 (Bankr. W.D. Tenn. 2003)).

The allegations in *Villwock I* and Count Two are materially the same — *i.e.*, the assessment of fees and expenses without court

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11 U.S.C. § 105 (West 2010).

approval violated Rule 2016(a) and § 105(a). As this Court previously ruled, § 105(a) does not impose any duties on the parties in a bankruptcy proceeding. *Id.* at 18. Furthermore, Rule 2016(a) does not include a private remedy, and § 105(a) cannot be used to create a private remedy for a violation of Rule 2016(a). *Id.* at 20. The Plaintiffs have asserted no allegations in this proceeding to distinguish Count Two from the claim based on Rule 2016(a) and § 105(a) that was dismissed in *Villwock I*. Accordingly, Count Two will be dismissed for failure to state a claim upon which relief can be granted.

C. Count Three.

1. Arguments.

In Count Three, the Plaintiffs allege Wells Fargo, on behalf of FHLB, is "still trying to collect charges that should have been included and paid in the [First Case] and were discharged," which conduct violates the discharge injunction in § 524.[13] (Compl. ¶ 56.) The Plaintiffs request the Court to "impose sanctions against both Defendants for their misconduct in this case" and award the Plaintiffs damages and legal fees. (*Id.* ¶¶ 60-61.) The Defendants

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[13] Section 524 states, in pertinent part:

(a) A discharge in a case under this title—

* * *

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524 (West 2010).

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move to dismiss Count Three because the "Sixth Circuit has specifically held that a debtor does not have a private right of action against a creditor for violation of the discharge injunction pursuant to 11 U.S.C. §§ 105 and/or 524." (Memo at 9 (citing *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000)).) To the extent this Court has previously allowed claims for violations of the discharge injunction to proceed as requests for sanctions, the Defendants respectfully disagree with those holdings. (*Id.* at 9 n.6.) The Plaintiffs counter that "the request for damages as sanctions provides standing of the debtors to request that this Court hold the Defendants in contempt . . . ." (Resp. at 5 (citing *Motichko v. Premium Asset Recovery Corp. (In re Motichko)*, 395 B.R. 25 (Bankr. N.D. Ohio 2008)).)

2. Legal Analysis.

The Defendants correctly note the Sixth Circuit Court of Appeals has ruled that "§ 524 does not impliedly create a private right of action." *Pertuso*, 233 F.3d at 423. However, it is well-established that a "'violation of the discharge injunction does expose a creditor to potential contempt of court . . . . If the contempt is established, the injured party may be able to recover damages as a sanction for contempt.'" *Motichko*, 395 B.R. at 29-30 (quoting *Lohmeyer v. Alvin's Jewelers (In re Lohmeyer)*, 365 B.R. 746, 749-50 (Bankr. N.D. Ohio 2007) (internal citations omitted)).

It is evident from both the Complaint and Response that Count Three is an action requesting sanctions for contempt. (*See* Compl.

¶ 61 ("[T]his Court must impose sanctions against both Defendants for their misconduct in this case."); Resp. at 5 ("The Plaintiffs have . . . brought actions for contempt and seek damages as sanctions for violating the discharge injunction[.]").) Even though an action for contempt is traditionally brought by motion, to dismiss a request for sanctions because it is brought as an adversary proceeding would "elevate form over substance." *Motichko*, 395 B.R. at 32-33. Furthermore, a party is permitted to request damages as a sanction for contempt. *Id.* at 30. Because the Plaintiffs have properly pled a contempt action, the Motion to Dismiss will be denied with respect to Count Three.[14]

D. Count Four.

1. Arguments.

The Plaintiffs aver Wells Fargo is the servicer of a "federally related mortgage loan" subject to the requirements of RESPA.[15] (Compl. ¶¶ 63-68.) The Plaintiffs further claim they sent a "qualified written request" to Wells Fargo during the Second Case, but Wells Fargo failed to timely conduct a reasonable investigation in violation of RESPA. (*Id.* ¶¶ 37-38, 63-68.) The Defendants argue that, because the conduct serving as the basis for Court Four occurred post-petition, Count Four is not property of the estate and, thus, the Court lacks subject matter jurisdiction over Count

[14] In fact, the Defendants admit, "At best, any conduct of Wells Fargo would be a violation of the Discharge Order, not the automatic stay that arose in the [First Case]." (Memo at 6.)

[15] 12 U.S.C. §§ 2601-2617 (West 2010).

Four. (Memo at 9-10.) The Plaintiffs respond that the Court can exercise subject matter jurisdiction over Count Four because: (i) property acquired post-petition is property of the estate pursuant to 11 U.S.C. § 1306; and (ii) the Second Plan "specifically provides that all property of the estate shall not vest in the [Plaintiffs] until completion of the [Second Plan] payments." (Resp. at 6.)

2. Legal Analysis.

28 U.S.C. § 1334 gives the district court "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b) (West 2010) (emphasis added). 28 U.S.C. § 157(a) gives the district court the authority to refer this jurisdiction to the bankruptcy court. 28 U.S.C. § 157 (West 2010). The United States District Court for the Northern District of Ohio referred jurisdiction to the bankruptcy courts of this district in General Order No. 84, entered on July 16, 1984.

A court need not distinguish between proceedings "arising under," "arising in," or "related to" a case under title 11 because "[t]hese references operate conjunctively to define the scope of jurisdiction. Therefore, for purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy." *Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930

F.2d 1132, 1141 (6th Cir. 1991) (internal citations omitted). A proceeding is "related to" a bankruptcy case if:

> 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy[, in other words,] if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'

Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). "'Bankruptcy jurisdiction will exist <u>so long as it is possible that a proceeding may impact</u> on the debtor's rights, liabilities, options, or freedom of action or <u>the handling and administration of the bankrupt estate</u>.'" *Id.* at 491 (quoting *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991) (internal quotation marks omitted) (emphasis added)).

With certain exceptions, the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (West 2010). Section 1306(a)(1) further states:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title—
>
> (1) <u>all property</u> of the kind specified in such section that <u>the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted</u> to a case under chapter 7, 11, or 12 of this title, whichever occurs first[.]

11 U.S.C. § 1306 (West 2010) (emphasis added). Thus, a chapter 13 estate includes property acquired during the pendency of the

case. *Id.*

The alleged conduct that forms the basis of Count Four occurred during the pendency of the Second Case and, therefore, the cause of action related to such alleged conduct is property of the estate. In addition, the Second Plan provides that the Plaintiffs' property will not re-vest in the Plaintiffs until "the completion of payments called for under the [Second] Plan and the issuance of [Plaintiff]'s discharge." (Second Plan, Art. VIII(a).) The Plaintiffs have neither completed the payments required by the Second Plan nor received a discharge in the Second Case. Because Count Four is property of the estate, its resolution could impact both the Plaintiffs' rights and the administration of the estate. Accordingly, the Court has "related to" subject matter jurisdiction over Count Four.[16] The Motion to Dismiss will be denied with respect to Count Four.

E. Count Six.

1. Arguments.

In Count Six, the Plaintiffs argue that Wells Fargo, on behalf of FHLB, committed wrongful conversion by misapplying and failing to credit Mortgage payments. (Compl. ¶¶ 79-81.) The Defendants

[16] The Defendants cite *Villwock I* in support of their position that the Court cannot exercise subject matter jurisdiction over Count Four because it is not property of the estate. (Memo at 9-10.) However, the instant case is distinguishable from *Villwock I* because, in that case, the causes of action that were dismissed for lack of subject matter jurisdiction were based on alleged conduct that occurred after property of the bankruptcy estate re-vested in the debtor and the case was closed. *See Villwock I*, Adv. No. 09-04319, 3-5 (Woods, J., Bankr. N.D. Ohio Apr. 12, 2010), available at www.ohnb.uscourts.gov.

contend Count Six fails to properly plead wrongful conversion of money. (Memo at 10-12.) The Defendants state that the alleged conduct does not constitute conversion because the "Plaintiffs do not allege that Wells Fargo was obligated to return (or account for) any specific money . . . to them. Rather, the Complaint simply alleges that Wells Fargo failed to adequately and properly credit Plaintiffs' [Mortgage] account, with no reference to the identification of the funds paid to do so." (*Id.* at 11.) In response, the Plaintiffs assert that the failure to account for and credit payments, as alleged in the Complaint, constitutes wrongful conversion. (Resp. at 7-8.)

2. Legal Analysis.

Conversion is the "'wrongful exercise of dominion or control over property belonging to another, in denial of or under a claim inconsistent with his rights.'" *Northampton Rest. Group, Inc. v. FirstMerit Bank, N.A.*, 2010 U.S. Dist. LEXIS 78242, *12 (N.D. Ohio 2010) (quoting *Bench Billboard Co. v. Columbus*, 579 N.E. 2d 240, 244 (Ohio Ct. App. 1989)). "Under Ohio law an action for conversion of *money* arises only where: (1) there exists an obligation on the part of the defendant to deliver to the plaintiff specific money; and (2) the money is capable of identification." *Howard v. McWeeney (In re McWeeney)*, 255 B.R. 3, 5 (Bankr. S.D. Ohio 2000) (citing *Haul Transport of VA, Inc. v. Morgan*, 1995 Ohio App. LEXIS 2240, *9 (Ohio Ct. App. 1995) (emphasis in original)). "[T]he plaintiff must demonstrate that the defendant owes an obligation to deliver

'identical' money as opposed to a certain sum of money. The latter situation creates only an indebtedness stemming from a debtor-creditor relationship." *Id.* (citing *Haul Transport*, 1995 Ohio App. LEXIS 2240 at *9-10) (internal citations omitted). "'Consequently, where there is no obligation to return identical money, but only a relationship of debtor and creditor, an action for conversion of the funds representing the indebtedness will not lie against the debtor.'" *Haul Transport*, 1995 Ohio App. LEXIS 2240 at *10 (quoting 18 Am. Jur. 2d (1985) 151, Conversion, § 8). "In other words, '[a]n action will not lie for the conversion of a mere debt.'" *Northampton Rest. Group*, 2010 U.S. Dist. LEXIS 78242 at *14 (quoting *NPF IV, Inc. v. Transitional Health Servs.*, 922 F. Supp. 77, 82 (S.D. Ohio 1996)).

In the instant proceeding, the Plaintiffs allege the Defendants failed to account for and properly credit the Plaintiff's Mortgage payments. However, the Plaintiffs do not allege the Defendants had an obligation to apply those exact funds to the Mortgage or that the payments were capable of identification upon receipt by the Defendants. As such, the allegations contained in Count Six do not state a claim for wrongful conversion of money.[17] Accordingly, the Motion to Dismiss will be granted with respect to Count Six.

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[17] The Plaintiffs cite *Anderson v. Barclays Capital Real Estate, Inc.*, 2010 WL 2541807 (N.D. Ohio 2010), in support of their position that a mortgage servicer can commit conversion by failing to account for mortgage payments. (Resp. at 7-8.) However, the Court: (i) finds that the holding in *Anderson* is contrary to the weight of authority, including the holding reached by that court in *Northampton Rest. Group, Inc. v. FirstMerit Bank, N.A.*, 2010 U.S. Dist. LEXIS 78242 (N.D. Ohio 2010); and (ii) respectfully declines to follow the holding reached in *Anderson*.

F. Count Seven.

1. Arguments.

The Plaintiffs object to the Proof of Claim on the basis that it includes unreasonable, unauthorized charges, as well as charges paid through the First Plan. (Compl. ¶¶ 82-90.) The Plaintiffs state that the Defendants filed the Proof of Claim "in gross violation of the proof of claim process and complete and utter disregard for the rights of the [Plaintiffs]" and request the Court to sanction the Defendants and award the Plaintiffs damages. (*Id.* ¶ 91.) The Defendants move to dismiss Count Seven to the extent it requests the Court to sanction the Defendants and award the Plaintiffs damages. (Memo at 12-13.) The Defendants argue that the appropriate remedy for filing an incorrect or false proof of claim is disallowance of the claim through the claim objection process, but that no private right of action for damages exists for filing a false proof of claim. (*Id.*) The Plaintiffs, on the other hand, respond that they have standing to request sanctions pursuant to § 105. (Resp. at 1-2.)

2. Legal Analysis.

In Count Seven, the Plaintiffs object to the Proof of Claim and request the Court to disallow any improper charges included in the Proof of Claim. In addition, the Plaintiffs request the Court to sanction the Defendants and award damages. To the extent Count Seven seeks disallowance of the Proof of Claim, the Defendants do not dispute Count Seven is a properly pled claim. Instead, the

Defendants move to partially dismiss Count Seven based on a portion of the relief requested — *i.e.*, sanctions and damages.

The basis for a motion to dismiss pursuant to Rule 12(b)(6) is "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2010). The Defendants do not contend that the Plaintiffs have failed to state a claim upon which relief can be granted. Rather, the Defendants object to a portion of the relief requested, which is not a basis to dismiss an otherwise properly pled cause of action. Because Count Seven contains a claim upon which relief can be granted, the Motion to Dismiss will be denied with respect to Count Seven.

G. Count Eight.

1. Arguments.

The Plaintiffs represent that FHLB breached the Open-End Mortgage by: (i) assessing and collecting illegal and previously paid charges; (ii) misapplying payments; and (iii) charging the Plaintiffs for property inspections conducted without notice. (Compl. ¶ 93.) Furthermore, the Plaintiffs represent that FHLB's conduct breached the implied covenant of good faith and fair dealing. (*Id.*)

The Defendants move to dismiss Count Eight on the grounds that the Open-End Mortgage does not impose any obligations upon Wells Fargo so as to subject Wells Fargo to damages for breach of contract. (Memo at 13-14.) The Defendants assert that the Open-End Mortgage was executed solely for the benefit of the mortgagee, as

evidenced by the fact that the mortgagee did not execute the Open-End Mortgage. (*Id.*) The Defendants also state that "good faith is part of a contract claim and does not stand alone as an independent cause of action." (*Id.* at 14 (quoting *Northampton Rest. Group, Inc.*, 2010 U.S. Dist. LEXIS 78242, *12 (N.D. Ohio 2010) (internal quotation marks omitted).) Having asserted that Wells Fargo did not breach the Open-End Mortgage, the Defendants contend that Wells Fargo could not have breached the covenant of good faith and fair dealing as a result. (*Id.*) In response, the Plaintiffs clarify that Count Eight is brought against FHLB only. (Resp. at 6-7.)

2. Legal Analysis.

In the Memo, the Defendants appear to move to dismiss Count Eight with respect to only Wells Fargo. (*See* Memo at 14 ("The [Open-End] Mortgage does not require any performance by Wells Fargo and, therefore, Wells Fargo cannot have breached it.").) In the Response, the Plaintiffs state that Count Eight "was pled specifically to Defendant FHLB and not as to Defendant Wells [Fargo]." (Resp. at 2.) Accordingly, the Motion to Dismiss will be granted to the extent it seeks to dismiss Count Eight with respect to Wells Fargo.

Notwithstanding the arguments in the Memo, the Defendants do not expressly move to dismiss Count Eight with respect to only Wells Fargo. (*See* Memo at 14 ("Count Eight should be dismissed.").) Instead, the Defendants contend that Count Eight fails to state a breach of contract claim because the Open-End Mortgage does not

require performance by the mortgagee.[18] (*Id.* at 13-14.) The Court finds this position to be contrary to the terms of the Open-End Mortgage.

The Open-End Mortgage, which is attached to the Motion as Exhibit B, imposes duties upon the mortgagee, including, but not limited to: (i) "all payments received by Lender . . . shall be applied . . . ;" and (ii) "Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection."[19] (Mot., Ex. B, at 2, 4 (emphasis added).) Thus, the Defendants' basis to dismiss Count Eight — *i.e.*, the Open-End Mortgage does not impose any duties upon the mortgagee so as to subject the mortgagee to breach of contract — fails per the express terms of the Open-End Mortgage. Because the breach of contract claim survives the Motion to Dismiss, the claim for breach of the implied covenant of good faith and fair dealing also survives. The Motion to Dismiss will be denied with respect to Count Eight against FHLB.

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[18] The Defendants seem to suggest Wells Fargo, rather than FHLB, is the mortgagee when they state, "[A] mortgage is for the benefit of the mortgagee. Wells Fargo did not sign the [Open-End] Mortgage—only Plaintiffs, as mortgagors, executed the [Open-End] Mortgage." (Memo at 13-14 (internal citations omitted).) However, Wells Fargo assigned the Open-End Mortgage to FHLB on January 23, 2008. (Mot., Ex. C.)

[19] The Open-End Mortgage defines "Borrower" as the Plaintiffs and "Lender" as Norwest. (Mot., Ex. B, at 1.) As the current holder of the Open-End Mortgage, FHLB is the successor to the obligations imposed upon Norwest. (Mot., Ex. C.)

H. Count Nine.

1. Arguments.

The Plaintiffs assert Wells Fargo, on behalf of FHLB, fraudulently misrepresented that: (i) the Plaintiffs were behind on their Mortgage payments following the conclusion of the First Case; and (ii) the Plaintiffs could only qualify for a Mortgage modification if they ceased making their Mortgage payments. (Compl. ¶ 96.) The Plaintiffs further assert that the Defendants made these misrepresentations with the intent to collect improper and unauthorized fees and that the Plaintiffs suffered damages as a result of their reliance on the misrepresentations. (*Id.*)

The Defendants move to dismiss Count Nine because the Plaintiffs fail to plead fraud with particularity, as required by Rule 9(b). (Memo at 14-17.) In particular, the Defendants argue that the Plaintiffs fail to state who made the alleged misrepresentations, to whom they were made, and when they were made. (*Id.* at 16.) The Defendants also contend that the Plaintiffs fail to plead the necessary elements of fraud, including fraudulent intent and that the representations were false. (*Id.* at 16-17.) In response, the Plaintiffs argue that the standard for pleading fraud advanced by the Defendants is too exacting. (Resp. at 8-10.)

2. Legal Analysis.

Under Ohio law, the elements of fraud are:

> (1) a representation (or concealment of a fact when there is a duty to disclose) (2) that is material to the transaction at hand, (3) made falsely, with knowledge of

> its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance.

Volbers-Klarich v. Middletown Mgmt., Inc., 929 N.E.2d 434 (Ohio 2010) (citing *Burr v. Stark Cty. Bd. of Commrs.*, 491 N.E.2d 1101, 1105 (Ohio 1986)). Pursuant to Rule 9(b), a plaintiff must plead fraud with "particularity" and, specifically, "must 'allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.'" *Noall v. Howard Hanna Co.*, 2010 U.S. Dist. LEXIS 99137, *12 (N.D. Ohio 2010) (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 163 (6th Cir. 1993)).

"The pleading requirements in Rule 9(b) are to provide fair notice to the defendants, such that the defendants may prepare a pleading in response to the allegations based upon fraud." *Official Comm. of Admin. v. Bricker*, 2010 U.S. Dist. LEXIS 99140, *42 (N.D. Ohio 2010) (citing *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n.*, 176 F.3d 315, 322 (6th Cir. 1999)). The complaint must enable the defendant to "'prepare an informed pleading responsive to the specific allegations of fraud.'" *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007) (quoting *Advocacy Org.*, 176 F.3d at 322). "'It is certainly true that allegations of date, place and time fulfill these functions, but nothing in the rule requires them. Plaintiffs

are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'" *Bricker*, 2010 U.S. Dist. LEXIS 99140 at *42-43 (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984) (internal quotation marks omitted)).

In *Pasqualetti v. Kia Motors Am., Inc.*, 663 F. Supp. 2d 586 (N.D. Ohio 2009), the defendant moved to dismiss the plaintiff's fraud claim on the grounds that the plaintiff failed to "name any specific employee who made the alleged fraudulent statements, []or . . . address the particular time, place, and contents of those statements." *Id.* at 600-01. The district court denied the defendant's motion to dismiss because the fraud was pled "with sufficient particularity for purposes of Rule 9(b)." *Id.* at 601. Noting that the "key to the particularity requirement is giving defendants meaningful notice," the district court stated:

> [P]laintiffs are not required to provide evidence, only to allege facts establishing fraud with particularity. [*Michaels Bldg. Co. v. Ameritrust Co., N.A.*,] 848 F.2d [674,] 680 [(6th Cir. 1988)]. The evidence [the defendant] argues is missing from the complaint, moreover, is evidence that is uniquely in [the defendant]'s possession and easily obtainable through discovery. [The defendant] is essentially demanding that plaintiffs take meticulous notes during regular conversations for fear that the other party might be defrauding them. This position misconstrues the particularity requirement, however, and asks the court to incorrectly focus on the complaint's form over substance.

Id.

Like the defendant in *Pasqualetti*, the Defendants move to dismiss Count Nine because the Plaintiffs fail to state, *inter alia*,

who at Wells Fargo made the alleged misrepresentations, to whom the misrepresentations were made, and when the misrepresentations were made. (Memo at 16.) The Defendants also contend Count Nine is "devoid of facts showing any intent by Wells Fargo to defraud Plaintiffs or how or why Wells Fargo would benefit from the alleged misrepresentations." (*Id.*)

The Court finds that the Plaintiffs have provided the Defendants with sufficient notice of the alleged fraud to allow the Defendants to prepare a responsive pleading. In the Complaint, the Plaintiffs expressly allege Wells Fargo, on behalf of FHLB, stated that the Plaintiffs owed improper or previously paid charges and fees. (*See* Compl. ¶ 34 ("On or about February 14, 2008, the Defendant Wells [Fargo] sent a reinstatement breakdown which included $2,889.99 for previous service fees."); *id.* ¶ 96 ("Defendant Wells . . . on or about October of 2007 . . . misrepresented that the [Plaintiffs] were still behind on their [M]ortgage after their [First Case] had been completed.").) Such allegations sufficiently plead when, to whom, and by whom the alleged misrepresentations were made. To demand that the Plaintiffs reconstruct their conversations with Wells Fargo's representatives would impose requirements not required under Rule 9(b). *See Pasqualetti*, 663 F. Supp. 2d at 601. In addition, the Plaintiffs state that the Defendants' intent was to "collect improper, unauthorized and illegal fees from the [Plaintiffs]," which resulted in damages in the form of the Residence being foreclosed upon. (*Id.*

¶ 96.) Accordingly, the Court finds that the Plaintiffs have sufficiently pled a claim for fraud. The Motion to Dismiss will be denied with respect to Count Nine.

I. Judicial Estoppel.

1. Arguments.

Finally, the Defendants contend that the Plaintiffs failed to disclose the pre-petition claims against the Defendants in their bankruptcy schedules and, thus, are now precluded from asserting those claims pursuant to the doctrine of judicial estoppel. (Memo at 17-19.) The Defendants note that the alleged conduct serving as the basis for Counts One, Three, Six, Eight, and Nine occurred pre-petition. (*Id.* at 17-18.) Because the Plaintiffs filed their bankruptcy schedules under oath and penalty of perjury without disclosing any claims against the Defendants, the Defendants argue that the Plaintiffs should be estopped from bringing those claims. (*Id.* at 19.) The Plaintiffs, on the other hand, contend that they were unable to identify the specific claims against the Defendants until they were able to review the Mortgage loan history in December 2009, which was after the Petition Date. (Resp. at 3.) The Plaintiffs also note that they are free to amend their bankruptcy schedules pursuant to Federal Rule of Bankruptcy Procedure 1009(a).[20] (*Id.* at 11.)

[20] Rule 1009(a) provides, in pertinent part, "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." FED. R. BANKR. P. 1009 (West 2010).

2. Legal Analysis.

Judicial estoppel is an equitable doctrine that applies when a party successfully maintains a position in one legal proceeding and attempts to assert a contrary position in a subsequent legal proceeding. *New Hampshire v. Maine*, 532 U.S. 748, 749-51 (2001). That party may be judicially estopped from asserting the inconsistent position. *Id.* at 749; *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598-99 (6th Cir. 1982). "Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled." *Edwards*, 690 F.2d at 599. Because judicial estoppel is intended to prevent improper use of the judicial process, the rule may be "'invoked by a court at its discretion.'" *New Hampshire v. Maine*, 532 U.S. at 750 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

There is no set formula for applying judicial estoppel, but courts typically consider several factors when deciding whether to apply the doctrine: (i) whether a party's position in a later case is "clearly inconsistent" with its earlier position; (ii) whether a party succeeded in persuading a court to accept its earlier position, "so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled;" and (iii) whether allowing a party to assert an inconsistent position would give that party an

"unfair advantage or impose an unfair detriment on the opposing party." *Id.* at 750-51 (internal quotation marks and citations omitted). "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *Id.* (internal quotation marks and citations omitted); *see also Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1249 (2010) (declining to apply judicial estoppel on the grounds that accepting the allegedly inconsistent argument would not create inconsistent court determinations).

The Defendants argue that judicial estoppel should preclude the Plaintiffs from asserting any claims that existed on the Petition Date, but were not disclosed in the Plaintiffs' schedules. The Court finds that the Defendants' argument misconstrues the purpose of judicial estoppel, which is to prevent injustice by allowing a party to maintain conflicting positions in separate proceedings. In the instant case, the Plaintiffs neither asserted a conflicting position in an earlier proceeding nor succeeded in asserting such conflicting position. As stated by the United States Supreme Court, "Absent success in a prior proceeding, a party's later inconsistent position . . . poses little threat to judicial integrity." *New Hampshire v. Maine*, 532 U.S. at 750-51. Furthermore, Rule 1009(a) permits a debtor to amend his or her schedules, and the Plaintiffs, in fact, amended their schedules to include the causes of action set forth in the Complaint. Thus, allowing the Complaint to proceed

does not pose a threat to judicial integrity or create the perception that the Court was misled. Accordingly, the Motion to Dismiss will be denied to the extent it is premised upon judicial estoppel.

IV. CONCLUSION

In Count One, the Plaintiffs allege the Defendants violated the automatic stay in the First Case. However, the automatic stay in § 362(a)(3) terminated when the First Case was closed. Furthermore, a cause of action based on a violation of the automatic stay in the First case should have been filed in the First Case. As a result, Count One will be dismissed to the extent it asserts the Defendants violated the automatic stay in the First Case. The Plaintiffs also allege the Defendants violated the automatic stay in the Second Case, but fail to expressly state which portion of Count One pertains only to the Second Case. As a result, the Plaintiffs will be granted twenty-one days to amend Count One.

This Court previously ruled that a private cause of action is not created by Rule 2016(a), even in conjunction with § 105(a). The Plaintiffs assert no allegations to contradict or distinguish the Court's prior ruling. Accordingly, Count Two will be dismissed for failure to state a claim upon which relief can be granted.

Although § 524 does not contain a private right of action for violations of the discharge injunction, such violations can expose a creditor to sanctions for contempt of court. In Count Three, the Plaintiffs request the Court to sanction the Defendants for

violating the discharge injunction and, thus, state a claim upon which relief can be granted. The Motion to Dismiss will be denied with respect to Count Three.

With certain exceptions, property acquired by a debtor during a chapter 13 case is property of the estate. The RESPA claim serving as the basis for Count Four accrued during the Second Case. Therefore, Count Four is property of the estate and its resolution could conceivably impact the Plaintiffs' rights and the administration of the estate. As a result, the Court has "related to" subject matter jurisdiction over Count Four. The Motion to Dismiss will be denied with respect to Count Four.

A claim for wrongful conversion of money arises only when a defendant has an obligation to deliver identical, identifiable funds. The Plaintiffs fail to allege the Defendants had an obligation to credit the exact funds tendered by the Plaintiffs to the Mortgage or that those funds were capable of identification. Accordingly, Count Six will be dismissed.

The Defendants move to partially dismiss Count Seven based on a portion of the relief requested by the Plaintiffs — *i.e.*, damages for filing a false proof of claim. However, the relief requested in an otherwise properly pled cause of action does not provide a basis to dismiss such cause of action. As a result, the Court will deny the Motion to Dismiss with respect to Count Seven.

The Court finds that Count Eight does not include a claim against Wells Fargo. Accordingly, the Court will grant dismissal

of Count Eight with respect to Wells Fargo. The Defendants' contention that Count Eight must be dismissed because the Open-End Mortgage does not impose any duties upon FHLB to subject FHLB to breach of contract is contrary to the express language of the Open-End Mortgage. Thus, the Motion to Dismiss will be denied with respect to Count Eight against FHLB.

The Plaintiffs have pled a claim for fraudulent misrepresentation by stating with sufficient particularity the Defendants' alleged misrepresentations and fraudulent intent and the Plaintiffs' resulting injury. Accordingly, Count Nine is a properly pled fraud claim pursuant to Rule 9(b) and will not be dismissed.

Finally, the Plaintiffs' failure to include the pre-petition claims against the Defendants in their original bankruptcy schedules does not estop the Plaintiffs from presently asserting those claims in this adversary proceeding. Because the Plaintiffs did not assert an inconsistent position in a prior proceeding, the application of judicial estoppel is not warranted. The Motion to Dismiss will be denied to the extent it is based on judicial estoppel.

In conclusion, the Court will: (i) grant the Motion to Dismiss with respect to Counts Two and Six; (ii) partially grant the Motion to Dismiss with respect to Counts One and Eight; (iii) deny the Motion to Dismiss with respect to Counts Three, Four, Seven, and

Nine; and (iv) grant the Plaintiffs twenty-one days to amend Count One.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Kay Woods

Kay Woods
United States Bankruptcy Judge

Dated: December 20, 2010
02:03:21 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
ROBERT E. MILLER, JR. and DENISE E. MILLER,	*	CASE NUMBER 09-40846
Debtors.	*	
* * * * * * * * * * * * * * * *	*	
ROBERT EUGENE MILLER, JR. and DENISE ELIZABETH MILLER,	*	ADVERSARY NUMBER 10-04147
Plaintiffs,	*	
v.	*	
FHLB OF CHICAGO AS TRUSTEE FOR HLBDE-MPF, *et al.*,	*	HONORABLE KAY WOODS
Defendants.	*	

****

ORDER (i) GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS; AND (ii) GRANTING PLAINTIFFS TWENTY-ONE DAYS TO AMEND

****

This cause is before the Court on Motion of Defendants to Dismiss the Complaint Except to the Extent Count Seven Objects to

the Proof of Claim of Wells Fargo Bank, N.A. (Doc. # 13) and Memorandum in Support of Partial Motion to Dismiss (Doc. # 14) (collectively, "Motion to Dismiss") filed by Defendants FHLB of Chicago as Trustee for HLBDE-MPF and Wells Fargo Bank, N.A. on September 21, 2010. On October 25, 2010, Plaintiffs Robert Eugene Miller Jr. and Denise Elizabeth Miller filed Memorandum in Opposition to Defendants [sic] Partial Motion to Dismiss (Doc. # 24).

For the reasons set forth in this Court's Memorandum Opinion Regarding Motion to Dismiss entered on this date:

(i) The Motion to Dismiss is granted with respect to Counts Two and Six;

(ii) The Motion to Dismiss is granted, in part, with respect to Counts One and Eight;

(iii) The Motion to Dismiss is denied with respect to Counts Three, Four, Seven, and Nine; and

(iv) The Plaintiffs are granted twenty-one days to amend Count One with respect to violation of the automatic stay in the Second Case.

IT IS SO ORDERED.

# # #