SO ORDERED.

SIGNED this 16 day of May,2016.

Stephani W. Humrickhouse

Stephani W. Humrickhouse
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

IN RE:	**CASE NO.**
SOFIA ALVAREZ	**15-03934-5-SWH**
DEBTOR	
SOFIA ALVAREZ and GINA DEAL,	
Plaintiffs,	**ADVERSARY PROCEEDING NO.**
v.	**15-00114-5-SWH-AP**
PNC BANK NATIONAL ASSOCIATION d/b/a PNC MORTGAGE, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,	
Defendants.	

ORDER REGARDING MOTION TO DISMISS

The matter before the court is the defendants' motion to dismiss the plaintiffs' Second Amended Complaint. This action was initially commenced in the Superior Court of Brunswick County, North Carolina, on May 11, 2015, and was subsequently removed to the U.S. District Court for the Eastern District of North Carolina. On July 18, 2015, Sofia Alvarez, the debtor in the

underlying bankruptcy case, filed a petition under chapter 13 of the Bankruptcy Code. The matter was referred to this court on November 12, 2015, and the plaintiffs filed a Second Amended Complaint on March 1, 2016. On March 14, 2016, the defendants filed the motion to dismiss all claims in the Second Amended Complaint. A hearing on the motion to dismiss was held on March 31, 2016, in Raleigh, North Carolina. A short order setting forth the court's ruling on the motion to dismiss was entered by the court on May 5, 2016. This order supplements the May 5, 2016 short order with the court's legal discussion and analysis.

BACKGROUND

The plaintiffs own property located at 734 Windsor Drive SE, Leland, North Carolina, which they purchased in 2007 and refinanced in 2009 pursuant to a mortgage loan originated by RBC Bank (USA), predecessor in interest to defendant PNC Mortgage ("PNC"). A deed of trust to the property was executed to secure the loan. The plaintiffs allege that, at all times relevant, PNC has acted as servicer of the mortgage loan on behalf of Federal National Mortgage Association ("Fannie Mae"), the owner of the loan. Contemporaneously with the execution of the mortgage loan, the plaintiffs executed a Waiver of Escrow whereby they agreed to directly maintain, without the need for an escrow impound, hazard insurance, hail and wind coverage, as well as the necessary taxes on the property.

The plaintiffs maintain that they have always remained current on loan payments and have continuously had the requisite insurance in place on the property. However, they experienced financial difficulty in 2012 and sought mortgage assistance from PNC. The plaintiffs' requests for assistance were denied. The plaintiffs allege that subsequently, beginning with their August 2012 payment, PNC began serially misdirecting their monthly payments. Instead of applying the monthly

payments toward principal and interest, PNC allegedly misdirected payments to a "suspense account." Additionally, the plaintiffs allege that PNC began advancing payment for insurance premiums and tax obligations, and reimbursed itself out of funds from the suspense account in violation of the Waiver of Escrow. The plaintiffs further allege that PNC failed to notify them prior to beginning the escrow advances, failed to perform an escrow analysis prior to establishing the escrow account, failed to apply escrow "advance recovery payments" in equal monthly installments and give the plaintiffs an opportunity to repay the purported escrow deficiency, failed to perform an escrow analysis prior to seeking repayment of a purported deficiency, and failed to give the plaintiffs notice of the revocation of the Escrow Waiver, all in violation of the deed of trust and 12 C.F.R. § 1024.17. In addition to failing to properly establish the purported escrow account, the plaintiffs allege that PNC violated the deed of trust by failing to apply regular and timely payments first to interest, then principal, and then to escrow. The plaintiffs did not receive notice of the imposition of the escrow impound until January 24, 2013. Further, the alleged misapplication of funds created an appearance of default on the loan, which the plaintiffs assert caused PNC to wrongfully assess their account with late fees of five percent in violation of the note, deed of trust and North Carolina usury law. The plaintiffs continued to make monthly payments, even in the disputed amount.

The plaintiffs allege that they made many attempts to obtain corrective action, all to no avail. They sought assistance from personnel at their local PNC branch, a HUD certified housing counselor at Cape Fear CDC, Inc., who contacted PNC on numerous occasions on behalf of the plaintiffs, and finally, they sought legal representation. Counsel for the plaintiffs initially contacted PNC on November 8, 2013, and again on May 2, 2014 and June 24, 2014, via a letter referencing N.C. Gen. Stat. § 45-93 and noticing PNC of the errors and disputes regarding the loan.

In response to the plaintiffs' correspondence, PNC took corrective action in July and August 2014 with respect to the loan by removing the account from foreclosure and waiving and/or backdating applications of payments to foreclosure attorney fees, late charges and other fees, property inspection charges, and reapplying monthly payments at the pre-escrow monthly payment amount. However, the plaintiffs allege that PNC's purported correction was deficient, contained many errors, and left their account in inaccurate standing. They allege that PNC failed to correct the very first misapplied payment, thereby creating a chain of deficiencies. Further, PNC's attempted correction demanded payments in a wrongful amount, and it reversed previously misapplied payments in the wrong amounts, leaving funds unaccounted for. Thereafter, PNC allegedly continued to misapply payments, and then, in September 2014, PNC began to reject the plaintiffs' payments. In light of PNC's alleged wrongful refusal of the payments, the plaintiffs deposited subsequent monthly payments into their counsel's trust account until Ms. Alvarez filed the instant chapter 13 petition, and then made payments to the chapter 13 trustee.

Prior to PNC's alleged corrective action in 2014, the plaintiffs submitted another application for mortgage assistance in 2013, and tendered the first regular payment due during the pendency of the application, but it was rejected. On December 12, 2013, PNC offered the plaintiffs a trial period payment plan, which they accepted. Yet, throughout the trial period, PNC continued to send deficiency notices to the plaintiffs, despite the fact that the plaintiffs continued to make each payment. On March 11, 2014, PNC mailed a proposed permanent modification offer directly to the plaintiffs' home address. However, the package was left by FedEx – without the plaintiffs' signatures – at a rarely used entrance to the plaintiffs' home, and by the time the package was located, the deadline to accept the offer had expired. PNC did not send a copy of the permanent

modification offer to plaintiffs' counsel. Then, via letter dated April 24, 2014, the plaintiffs were informed that their loan had been referred for foreclosure, and their April 2014 payment was returned.

The plaintiffs allege they have suffered damages in the form of a wrongful foreclosure action, distress, embarrassment, and the expenses of defending that proceeding. Additionally, they have suffered credit loss and/or an increased cost of credit, have paid in excess of the amounts contractually owed on the mortgage, and have failed to receive their full mortgage interest tax deductions and quiet enjoyment of their property. The plaintiffs have had to miss work to meet with lawyers and housing counselors, and had to seek financial assistance from family members. They allege to have suffered extreme stress, anxiety, nervousness, sleeplessness, distress, and mental anguish.

On May 11, 2015, the plaintiffs initiated this action in the Superior Court of Brunswick County seeking to enjoin the wrongful foreclosure of their residence, and seeking affirmative relief from the defendants' alleged wrongdoing. The defendants removed the matter to the U.S. District Court for the Eastern District of North Carolina. On July 18, 2015, plaintiff Alvarez filed a petition under chapter 13 of the Bankruptcy Code in light of an impending foreclosure hearing scheduled for July 21, 2015. The matter was referred to the bankruptcy court on November 12, 2015. On March 1, 2016, the plaintiffs filed their Second Amended Complaint asserting nine causes of action: breach of contract; negligence; violation of the North Carolina Mortgage Debt Collection and Servicing Act, N.C. Gen. Stat. § 45-90 *et seq*.; breach of the duty of good faith and fair dealing; violation of the North Carolina Debt Collection Act, N.C. Gen. Stat. § 75-50 *et seq*.; unfair and deceptive trade

practices, N.C. Gen. Stat. § 75-1.1 *et seq*.; violation of N.C. Gen. Stat. § 24-10.1; conversion; and objection to claim.

On March 14, 2016, the defendants filed a motion to dismiss all claims in the Second Amended Complaint. The defendants contend that breach of contract is the only potentially available cause of action because the remainder of the plaintiffs' claims merely parallel and restate the breach of contract claim. However, the defendants maintain even the breach of contract claim must be dismissed, because they acted within the bounds of the loan documents and the law. They assert that PNC rightfully established the escrow account and advanced payments because, in submitting their request for a mortgage modification, the plaintiffs agreed that any prior waiver as to the payment of escrow would be revoked. The plaintiffs' request for mortgage modification included a completed Uniform Borrower Assistance Form, which contains a section entitled "Borrower/Co-Borrower Acknowledgment and Agreement," wherein the plaintiffs allegedly agreed that "any prior waiver as to [their] payment of escrow items to [PNC] in connection with [their] loan has been revoked." Further, the defendants argue that they remedied any and all alleged problems by voluntarily removing the account from foreclosure and waiving foreclosure attorney fees, reapplying payments from August 1, 2012 through March 1, 2013 at the pre-escrow monthly amount, reversing applications of late charges and other fees, removing all negative credit reporting, and reapplying funds to bring the account current through January 2014. As such, the defendants maintain that the plaintiffs cannot show any damages.

DISCUSSION

The defendants seek dismissal of the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable

to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012. In reviewing a Rule 12(b)(6) motion, the court must view the pleadings in the light most favorable to the non-moving party and accept all factual allegations as true. See In re Caremerica, Inc., 409 B.R. 737, 747 (Bankr. E.D.N.C. 2009). The Supreme Court has held that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The standard requires more than a plain statement requesting relief; instead, a factual basis for the relief sought must be established. See Twombly, 550 U.S. at 570. Moreover,

> [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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (internal citations omitted) (citing Twombly, 550 U.S. at 556). The court will now consider the separate counts to which the defendants' motion to dismiss is directed.

Count One: Breach of Contract (Count I)

The elements of a breach of contract cause of action under North Carolina law are simple: (1) existence of a valid contract, and (2) breach of the terms of that contract. Becker v. Graber Builders, Inc., 149 N.C. App. 787, 792, 561 S.E.2d 905, 909 (2002). It is well established that promissory notes and deeds of trusts are contracts. Rutledge v. Wells Fargo Bank, N.A. (In re Rutledge), 510 B.R. 491, 500 (Bankr. M.D.N.C. 2014).

The plaintiffs allege that the defendants breached the deed of trust by advancing insurance and tax payments without notice to the plaintiffs and in clear violation of the escrow waiver by:

wrongfully imposing an escrow impound and demanding excessive monthly payments; assessing and collecting amounts from the plaintiffs that were not due and owing, such as amounts to cover a purported escrow shortage, interest, default-related fees and late fees, among others; and failing to accept and properly apply payments. Further, even if PNC was entitled to create an escrow account, the plaintiffs allege that PNC failed to comply with the strict procedures outlined in the deed of trust by: unilaterally withholding payments and misapplying them to recoup unwarranted advances prior to establishing an escrow account; failing to give notice of the establishment of an escrow account or of the revocation of the escrow waiver as provided for in the deed of trust; failing to conduct an escrow analysis prior to any escrow advances; imposing improper repayment terms with regard to the purported escrow shortage and/or deficiency; failing to apply payments first to interest, then to principal, and then to any outstanding escrow items; and wrongfully initiating a foreclosure action. However, the defendants maintain that PNC's conduct was proper and agreed to by the plaintiffs in light of their execution of the Uniform Borrower Assistance Form, and further, that PNC remedied any alleged injury.

The plaintiffs respond by stating that PNC misinterprets the Uniform Borrower Assistance Form, because the paragraph following the alleged provision revoking the prior escrow waiver explicitly provides for the establishment of an escrow account only "*if* [they] qualify for and *enter into* a repayment plan, forbearance plan, and trial period plan." Plaintiffs' Memo. in Opposition to Motion to Dismiss, Doc. No. 33 at 10 (emphasis added). Since they were never offered any assistance from defendants in response to their 2012 application, neither this provision nor the revocation provision went into effect.

The court finds that the factual allegations made by the plaintiffs are more than sufficient to plausibly state a claim for breach of contract. See Rutledge, 510 B.R. at 502 (allegation that creditor held funds in escrow account without applying the sums to the indebtedness in violation of the deed of trust was sufficient to state a claim for breach of contract). Factual issues exist regarding the effect of the Uniform Borrower Assistance Form on the Waiver of Escrow, therefore it would be inappropriate for the court to determine such dispute on a motion to dismiss. The motion to dismiss with respect to Count I is denied.

Count Two: Negligence (Count II)

To survive a motion to dismiss, a claim for negligence must plausibly allege: (1) a legal duty; (2) breach thereof; and (3) injury proximately caused by the breach. Stein v. Asheville City Bd. of Educ., 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). The plaintiffs allege that, as servicer of the loan, PNC had a duty of care to properly accept and apply the plaintiffs' payments, refrain from assessing non-bona fide charges and fees, properly process and acknowledge information and correspondence regarding the loan, and utilize and maintain systems to properly manage loan accounts. In addition to the numerous alleged breaches recounted above, the plaintiffs allege that the defendants breached their duties by failing to impose proper accounting systems, software programs, servicing platforms and other techniques to properly manage the plaintiffs' account, resulting in repeated errors. In response, the defendants assert that the economic loss rule bars recovery in negligence for what they deem to be claims based in contract.

The general rule, referred to as the economic loss rule, is that a breach of contract does not give rise to a cause of action in tort. New Bern Riverfront Dev., LLC v. Weaver Cooke Constr., LLC (In re New Bern Riverfront Dev., LLC), Adv. Pro. No. 10-00023-8-JRL, 2011 WL 5902621, at *4

(Bankr. E.D.N.C. May 24, 2011). The rule encourages contracting parties to allocate risks of economic loss themselves. Id. "Where the loss is already contemplated by the contract, a claim for negligence, arising out of the party's negligent performance of the contract, is surplusage." Id. That is not to say a tort action can never be brought between contracting parties. In fact, courts have routinely found that a duty of care may arise out of a contractual relationship. Toone v. Adams, 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964) ("parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care"). The North Carolina Supreme Court in North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 82, 240 S.E.2d 345, 350-51 (1978), recognized this and clarified four exceptions to the economic loss rule.[1] However, the court made clear that no tort action exists against a promisor for simple failure to perform a contract, even though such failure was due to negligence or lack of skill. Id. at 83, 240 S.E.2d at 351. "It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation." Spillman v. Am. Homes of Mocksville, Inc., 108 N.C. App. 63, 65, 422 S.E.2d 740, 742 (1992). As such, in the absence of a legal duty to exercise due care, the failure to perform a contractual obligation will not constitute actionable negligence. Toone at 407, 499 S.E.2d at 135.

The court finds that the majority of the plaintiffs' allegations concern the same conduct alleged in the breach of contract count, and in fact depend upon duties arising out of the note and

[1]The exceptions to the economic loss rule, as recognized by North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 82, 240 S.E.2d 345, 350-51 (1978), are as follows: (1) injury to person or property of someone other than the promisee; (2) injury to property of the promisee other than property which was the subject of the contract or was personal injury to the promisee; (3) injury to the promisee's property which was the subject of the contract and the promisor had a duty by law to use care; and (4) injury was a willful injury or conversion.

deed of trust. With respect to these allegations, the negligence claim is surplusage "because the parties had a contract between them which dictated the obligations and remedies of the parties in the event of a breach." New Bern Riverfront, 2011 WL 5902621 at *4; see also Ports Authority at 83, 240 S.E.2d at 351. An action in tort is therefore improper.

However, the allegations regarding the defendants' failure to maintain proper systems to accurately manage the loans, taken as true, allege a duty independent from the contractual claims. Based on the allegations in the complaint, the servicing obligations under the loan documents gave rise to a duty of care to maintain systems to properly manage the account. This allegation of duty and breach stems not from the defendants' contractual promises, but from their duty to use reasonable care in affirmatively performing those promises. The plaintiffs have plausibly pleaded that the defendants had contractual duties, including the alleged obligations to properly accept and apply payments and refrain from assessing non bona-fide charges, which gave rise to a duty to exercise reasonable care in performing those obligations. Performance of those duties is achieved through proper systems and procedures. Thus, to the extent the plaintiffs allege that defendants "breached their duties by failing to impose proper accounting systems, software programs, servicing platforms or other techniques to manage [p]laintiffs' account, resulting in repeated errors and overstatements of the amounts due," the court finds that they have plausibly stated a claim for negligence. Accordingly, the motion to dismiss is denied with respect to the allegation that defendants failed to utilize proper accounting systems, software programs, servicing platforms and other techniques, but is granted as to the remaining allegations within Count II.

Count Three: Violation of N.C. Gen. Stat. § 45, Art. 10 (Count III)[2]

The plaintiffs allege that the defendants violated the North Carolina Mortgage Debt Collection and Servicing Act, N.C. Gen. Stat. § 45-90 *et seq*. Specifically, they contend that PNC violated N.C. Gen. Stat. § 45-91(2) by failing to accept and credit, or treat as credited, within one full business day, each full payment received from the plaintiffs, and violated § 45-93(3) by failing to promptly correct errors in allocating payments, statements of account and payoff balances upon notice from the plaintiffs. Pursuant to N.C. Gen. Stat. § 45-94, the plaintiffs assert entitlement to compensation for their actual damages. The defendants argue, however, that this Count must be dismissed because the plaintiffs failed to comply with the statutory prerequisite of notifying PNC in writing of the claimed errors and disputes at least thirty days prior to bringing the action. N.C. Gen. Stat. § 45-94. With regard to notice, § 45-94 provides as follows:

> With the exception of an action by the Commissioner of Banks or the Attorney General, at least 30 days before a borrower or a borrower's representative institutes a civil action for damages against a servicer for a violation of this Article, the borrower or a borrower's representative shall notify the servicer in writing of any claimed errors or disputes regarding the borrower's home loan that forms the basis of the civil action.

§ 45-94. The plaintiffs allege that they provided the statutory notice to PNC on November 8, 2013, yet the defendants maintain that, following the notice, they corrected the alleged errors and remedied the situation. To the extent the correction was erroneous and still constituted a violation, defendants contend that plaintiffs did not allege that they provided PNC with any further notice of such violation. The court disagrees. The plaintiffs sufficiently allege that they provided notice to the defendants. They allege that they provided notice to the defendants of the claimed errors and

[2]The plaintiffs' Second Amended Complaint mistakenly states a violation of N.C. Gen. Stat. § 45, *Art. 3*, instead of Art. 10.

disputes, and that they went uncorrected. The statute provides that the servicer will not be liable if, upon receiving notice, it "correct[s] the error and compensate[s] the borrower for any fees or charges incurred . . . as a result of the violation." § 45-94(2). Liability is not extinguished for servicers that fail to correct or only partially correct or compensate the injured borrower, and thus, it would be nonsensical to interpret § 45-94 as requiring a borrower to provide notice of subsequent failed corrective action. The motion to dismiss as to Count III will be denied.

Count Four: Breach of Duty of Good Faith and Fair Dealing (Count IV)

The plaintiffs' claim for breach of duty of good faith and fair dealing asserts breach of both the common law and the statutory duty pursuant to the Secure and Fair Enforcement Mortgage Licensing Act, N.C. Gen. Stat. §§ 25-1-304, 53-244.110 and 53-244.111 ("SAFE Act"). The defendants maintain that this cause of action must be dismissed because it cannot stand alone separate and apart from the breach of contract claim.

The common law duty of good faith and fair dealing is an implied covenant, found in every contract, that neither party will do anything to injure the other party's rights to receive the benefits of the agreement. Robinson v. Deutsche Bank Nat'l Trust Co., No. 5:12-CV-590-F, 2013 WL 1452933, at *11 (E.D.N.C. Apr. 9, 2013). It imposes a duty to act in a commercially reasonable manner. Id. at *12. Only a party to, or beneficiary of, a contract may state a valid claim for breach of the covenant. Id. at *11. In the context of mortgage loans, the covenant imposes a duty to service the loan responsibly and with competent personnel. Rutledge v. Wells Fargo Bank, N.A. (In re Rutledge), 510 B.R. 491, 503 (Bankr. M.D.N.C. 2014).

The law in North Carolina is unclear as to whether the SAFE Act affords any private right of action, but evidence of violations of the Act may provide evidence of breach of the implied

covenant. Hinson v. Countrywide Home Loans, Inc. (In re Hinson), 481 B.R. 364, 379-80 (Bankr. E.D.N.C. 2012) (noting conflicting opinions on whether private right of action exists, but stating that violations of SAFE Act may still serve as evidence of breach of the implied duty); see also Rutledge, 510 B.R. at 503 (denying motion to dismiss as to claim for breach of covenant of good faith and fair dealing without distinguishing between the common law claim and the statutory claim); but see Robinson, 2013 WL 1452933, at *13 (no private right of action, declining to rule on whether violations of SAFE Act were relevant to claim for breach of implied covenant). Regardless, the court finds that the plaintiffs' allegations "with regard to a lack of reasonable care in the original mortgage loan servicing" support at least a common law claim for breach of the covenant of good faith and fair dealing. Rutledge, 510 B.R. at 503. Such allegations include PNC's conduct in misrepresenting the amounts due under the loan, refusing to accept payments tendered by the plaintiffs, wrongfully imposing an escrow impound and advancing payments for tax and insurance, wrongfully charging the plaintiffs' account with late fees and other unjustified charges, failing to properly remedy the situation despite notice from the plaintiffs and representing that it made the necessary corrections. The motion to dismiss is denied as to Count IV.

Count Five: Violations of N.C. Gen. Stat. § 75-50 et seq. (Count V)

In Count V, the plaintiffs allege various violations of the North Carolina Debt Collection Act ("NCDCA"). To state a claim under the NCDCA, a plaintiff must plausibly allege that: (1) the obligation is a "debt," (2) the claimant owing the debt is a "consumer," and (3) the party attempting to collect on the debt is a "debt collector." Campbell v. Wells Fargo Bank, N.A., 73 F. Supp. 3d 644, 649 (E.D.N.C. 2014). After satisfying these threshold requirements, the plaintiff must also plausibly allege the general elements of an unfair and deceptive trade practices act ("UDTPA") claim: (1) an

unfair act, (2) in or affecting commerce, and (3) proximately causing injury. Id. The defendants maintain that the plaintiffs failed to plead the requisite elements of a UDTPA claim in that they have not plausibly alleged injury or the existence of an unfair act. Assuming that the plaintiffs have plausibly alleged the remaining elements in their NCDCA claim, the court turns to whether the allegations of injury and unfair act are sufficient to survive dismissal.

First, the court has little trouble finding that the plaintiffs have adequately pleaded facts supporting injury. Not only have they pleaded economic injury resulting from having to consult with attorneys and housing counselors and credit loss, they have pleaded emotional distress, mental anguish, embarrassment and anxiety. See Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 423, 646 S.E.2d 381, 387 (2007) (sufficient showing of actual injury in the form of emotional distress to survive summary judgment).

"A practice is unfair when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." Walker v. Branch Banking & Trust Co., 133 N.C. App. 580, 583, 515 S.E.2d 727, 729 (1999). In the context of debt collection, "unfair acts" have been held to include the use of threats, coercion, harassment, unreasonable publication of the consumer's debt, deceptive representations, and unconscionable means. Fritz v. Duke Energy Carolinas, LLC, No. 5:13-CV-724-D, 2014 WL 3721373, at *3 (E.D.N.C. July 24, 2014) (citing N.C. Gen. Stat. §§ 75-51 to 75-55). Although a plaintiff need not allege "deliberate acts of deceit or bad faith," it must plausibly allege that "the act complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." Id. at *4 (quoting Forsyth Mem'l Hosp., Inc. v. Contreras, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169-70 (1992)). A claim based upon breach of contract, "such as a disagreement with a loan servicer over

terms and payments of a mortgage," must allege aggravating circumstances. Rutledge, 510 B.R. at 508.

The plaintiffs have provided specific allegations of wrongful applications of payments and denial of payments by PNC despite repeated notices from the plaintiffs, ultimately culminating in alleged account delinquencies and a wrongful foreclosure action. The plaintiffs allege that PNC wrongfully placed charges onto the plaintiffs' account, and despite reversing some of its wrongful actions, failed to completely resolve the issues and continued committing errors, ultimately culminating in a foreclosure action. Further, plaintiffs have pleaded the existence of aggravating circumstances beyond mere breach of contract. As the court found in Hester v. JPMorgan Chase Bank (In re Hester), Case No. 11-04375-8-DMW, 2015 WL 6125308, at *3 (Bankr. E.D.N.C. Oct. 16, 2015), Count V does not merely allege disagreement over the calculations of amounts due under the loan, but instead, it "sufficiently alleges repeated collections measures taken by the [PNC] – including the assessment of late fees and charges, the threat of foreclosure," and multiple communications informing the plaintiffs of their alleged delinquency. 2015 WL 6125308, at *3. The acts which PNC is accused of committing were unilateral in nature and continued for years despite repeated notices from the plaintiffs and their counsel. See id. at *4.

Accordingly, the plaintiffs' pleading of PNC's alleged actions in repeatedly attempting to wrongfully collect are sufficient to plausibly state a claim for unfair acts. See id. at *2 (denying motion to dismiss because plaintiffs sufficiently plead aggravating circumstances beyond mere breach of contract; plaintiffs alleged that defendant's consistent communications asserted incorrect amounts due and delinquency, along with notices of late fees and intent to foreclose, despite plaintiffs being current on all payments); Nance v. Citimortgage, Inc., No. 1:13CV1062, 2014 WL

3882081, at *4 (M.D.N.C. Aug. 7, 2014) (NCDCA claim survived motion to dismiss in light of plaintiffs' allegations of dozens of harassing and threatening communications, despite repeated notices to defendants that their account was not delinquent, defendants force placing insurance on their home when their insurance had not lapsed, and wrongfully initiating foreclosure proceedings). The motion to dismiss is denied as to Count V.

Count Six: Unfair and Deceptive Acts and Practices, N.C. Gen. Stat. § 75-1.1 et seq. (Count VI)

The defendants argue that Count VI must be dismissed for the same reasons enumerated with regard to Count V. The same analysis applies, and the court incorporates the discussion in Count V. The motion to dismiss is denied as to Count VI.

Count Seven: Violation of N.C. Gen. Stat. 24-10.1 (Count VII)

Pursuant to N.C. Gen. Stat. § 24-10.1, no lender may charge a late payment charge in excess of four percent of the amount of the payment past due. The plaintiffs allege that the defendants routinely assessed plaintiffs' account for late fees of five percent. The defendants maintain, however, that following revocation of the escrow waiver, PNC properly increased plaintiffs' payments to fund the escrow account, and that based on this increased monthly payment, the late fees assessed were not in violation of § 24-10.1. Further, PNC waived all late charges assessed prior to August 2014, and any late charges assessed thereafter, defendants allege, were proper because the plaintiffs were on notice of the escrow payments.

The court finds that the plaintiffs have sufficiently pleaded that the defendants improperly demanded sums in excess of the actual monthly payments due on the loan, and that the late fees imposed were in excess of four percent of the amount actually due and owing. The defendants' assertion that the late fees charged were four percent of the increased amount of the payment is not

persuasive; if the defendants wrongfully increased the amount of the payment, then the late fees charged based on that amount clearly would have been in excess of four percent of the true amount of the payment. The motion to dismiss as to Count VII is denied.

Count Eight: Conversion (Count VIII)

The plaintiffs maintain that PNC wrongfully, willfully, wantonly and maliciously diverted their payments, intended for principal and interest, to repay itself for unwarranted escrow advances and corporate advances, including foreclosure-related expenses. In response, defendants first maintain that the plaintiffs have not alleged any ownership interest in the allegedly converted funds, nor any wrongful possession or conversion by PNC, and finally, that the allegations fail to identify the money allegedly converted.

Conversion under North Carolina law is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition *or the exclusion of an owner's rights*." Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 414, 537 S.E.2d 248, 264 (2000) (quoting Spinks v. Taylor, 303 N.C. 256, 264, 278 S.E.2d 501, 506 (1981)). The tort boils down to two essential elements: (1) ownership in the subject chattel by the plaintiff, and (2) wrongful possession or conversion. Campbell v. CitiMortgage, Inc., No. 1:11CV1017, 2014 WL 4924251, at *9 (M.D.N.C. Sept. 30, 2014). Although the general rule is that money may be the subject of a conversion action only "when it is capable or being identified or described," funds transferred electronically may be sufficiently identified through evidence of the specific source, amount and destination. Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 365 N.C. 520, 528-29, 723 S.E.2d 744, 750-51 (2012); but see Wake Cty. v. Hotels.com, LP, No. 06CVS16256, 2012 WL 6673127, at *18 (N.C. Super. Ct. Dec. 19, 2012) (dismissing claim for

conversion because plaintiffs could not identify funds with any degree of particularity, and only alleged that they had not been paid what they were owed). When the allegedly converted funds were voluntarily paid to the defendant, the plaintiff must allege that it first made a demand for return of the money. Progress Point One-B Condo. Ass'n, Inc. v. Progress Point One Prop. Owners Ass'n, Inc., No. 14CVS467, 2015 WL 859833, at *3-4 (N.C. Super. Ct. Mar. 2, 2015).

The court has found several cases, albeit outside of this jurisdiction, dealing with similar facts to this case. In Moore v. Caliber Home Loans, Inc., 2015 WL 516482 (S.D. Ohio Sept. 3, 2015), the court rejected the defendants' arguments that once the plaintiffs made payments to the loan servicer, they no longer retained an ownership interest in the funds and could not sustain a cause of action for conversion. 2015 WL 516482, at *9. Rather, the court accepted as true the plaintiffs' allegations that they tendered monthly payments to the loan servicer, and that ownership was not relinquished until the payments were turned over to the holder of the loan. Id.; see also Anderson v. Barclays Capital Real Estate, Inc., Case No. 3:09CV2335, 2010 WL 2541807, at *4 (N.D. Ohio June 18, 2010) (plaintiff's payment of funds to loan servicer did not transfer her ownership interest; ownership does not transfer until the funds are remitted to the lender). The plaintiffs in Moore plausibly stated a claim for conversion because they alleged that the servicer failed to properly apply funds earmarked for the monthly mortgage payment, and rather, demanded incorrect amounts and misapplied payments toward amounts not owing. Moore, 2015 WL 516482, at *9; see also Redman v. Fed. Nat'l Mortg. Ass'n, Civil Action No. 3:14CV00006, 2015 WL 149833, at *4 (W.D. Va. Jan. 12, 2015) (plaintiffs alleged that defendants took possession of their mortgage payments and failed to credit them to the outstanding loan balance); Anderson, 2010 WL 2541807, at *4 (allegation that servicer misapplied payments and failed to account for certain payments sufficiently alleged

conversion); Johnson v. Citimortgage, Inc., 351 F. Supp. 2d 1368, 1372 (N.D. Ga. 2004) (plaintiff plausibly alleged claim for conversion by alleging that defendant failed to apply funds to plaintiff's account). A loan servicer's alleged failure to correctly apply funds to an account "amounts to an act of dominion . . . that is wrongfully asserted, even though [it] came into lawful possession" of the funds. Johnson, 351 F. Supp. 2d at 1372.

Viewing the factual allegations in the light most favorable to the plaintiffs, the court finds that the Second Amended Complaint plausibly states a claim for conversion. The court can infer from the detailed allegations surrounding the servicing agreement between the defendants that the plaintiff retained an ownership interest in the funds until they reached Fannie Mae. Further, there are numerous allegations that the plaintiffs demanded that PNC properly apply the funds, which it failed to do, sufficiently alleging wrongful dominion. Additionally, for purposes of a motion to dismiss, the court finds that the plaintiffs have adequately identified the monies allegedly converted, as the Second Amended Complaint contains detailed allegations regarding the dates and amounts of funds. The motion to dismiss is denied as to Count VIII.

Count Nine: Objection to Claim (Count IX)

The last of the plaintiffs' causes of action is an objection to the defendants' proof of claim filed in the underlying bankruptcy case. An objection to claim may be brought in the form of an adversary proceeding. Fed. R. Bankr. P. 3007(b). The plaintiffs maintain that the defendants' claim should be stricken because it incorporates all of the improper accounting and crediting of the plaintiffs' payments, as recited in detail in the Second Amended Complaint. The court finds that this claim is dependent on the outcome of the other causes of action, and thus will defer ruling on the motion to dismiss as to Count IX pending resolution of this adversary proceeding.

Joint and Several Liability of Fannie Mae

The defendants also object to the plaintiffs' claims to the extent that they allege liability on behalf of Fannie Mae. Each of the claims for relief recite simply that "PNC was acting as an agent of Fannie Mae such that Fannie Mae is jointly and severally liable with PNC." In support of Fannie Mae's liability, the Second Amended Complaint contains a section entitled, "General Allegations Regarding Servicing." Therein, the plaintiffs allege that Fannie Mae controls PNC's servicing of the loan through a complex contractual arrangement known as the Fannie Mae Servicing Guide and a Mortgage Selling and Servicing Contract. According to the Servicing Guide, Fannie Mae's servicers are allegedly subject to "routine evaluations of every aspect of the servicing process," as well as requirements as to reporting, quality control, timeliness and inspections. The Servicing Guide also requires servicers to document compliance with all Fannie Mae policies and procedures. The General Allegations Regarding Servicing is the only place in the Second Amended Complaint that contains any allegations specific to Fannie Mae; the remaining allegations all pertain to conduct taken by PNC.

Under North Carolina law, to establish an agency relationship, "[t]he principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." Green v. Freeman, 233 N.C. App. 109, 112, 756 S.E.2d 368, 372 (2014) (quoting Ellison v. Hunsinger, 237 N.C. 619, 628, 75 S.E.2d 884, 891 (1953)). Further, a principal can be vicariously liable for torts committed by the agent while acting within the scope of its duty. Id. at 112-13, 756 S.E.2d at 373. The vital test for determining the existence of an agency relationship is whether the principal has

retained the right of control over the details of the agent's performance. Hylton v. Koontz, 138 N.C. App. 629, 636, 532 S.E.2d 252, 257 (2000).

Courts have generally found that "a mortgage servicer acts as the agent of the mortgagee to effect collection of payments on the mortgage loan." R.G. Fin. Corp. v. Vergara-Nunez, 446 F.3d 178, 187 (1st Cir. 2006) (for purposes of claim preclusion); Buzzell v. JP Morgan Chase Bank, Civil Action No. 3:13-CV-668, 2014 WL 3767118, at *6 (E.D. Va. July 31, 2014) (quoting Vergara-Nunez, at id.; claim preclusion); Yarney v. Ocwen Loan Servicing, LLC, 929 F. Supp. 2d 569, 581 (W.D. Va. 2013) (granting summary judgment to plaintiff on claim against mortgagee due to actions of its servicer; quoting Vergara-Nunez); Allen v. Bank of Am. Corp., Civil No. CCB-11-33, 2011 WL 3654451, at *4 n.5 (D. Md. Aug. 18, 2011) (claims against mortgagee and servicer survived motion to dismiss on agency grounds; quoting Vergara-Nunez); Jones v. First Franklin Loan Servs., No. 3:10-cv-360-FDW-DSC, 2011 WL 972518, at *5 (W.D.N.C. Mar. 15, 2011) (quoting Vergara-Nunez). The situation presented to the court in Allen was similar to the one at issue. On a motion to dismiss filed by the mortgagee and the loan servicer, the court found that because the plaintiffs stated plausible claims against the servicer, the claims could proceed as against Fannie Mae as well. Allen, 2011 WL 3654451, at *4 n.5 (quoting Vergara-Nunez). Similarly, as another court determined in ruling on a motion to dismiss,

> Viewing the facts in the [plaintiffs'] favor, Fannie Mae owns the mortgage and, as such, has the authority to service the mortgage. It delegated that authority to GMAC. GMAC consented to act on behalf of Fannie Mae by entering into the servicing contract. Fannie Mae's liability is not imposed because it is the investor and owner of the mortgage. Rather, it is imposed based on the authorized conduct of GMAC, as the designated servicer and agent of Fannie Mae.

Charest v. Fed. Nat'l Mortg. Ass'n, 9 F. Supp. 3d 114, 127 (D. Mass. 2014). Additionally, the court found sufficient allegations in the complaint, including quotes from the servicing contract, and a recitation of the basic rules governing servicing and the servicer's duties. Id. at 128.

The court finds that the plaintiffs have adequately alleged the existence of an agency relationship between the defendants by detailing the Servicing Guide, and pertinent portions of it relating to Fannie Mae's control over PNC. Accordingly, the motion to dismiss is denied as to the claims against Fannie Mae.

CONCLUSION

For the reasons set forth above, the motion to dismiss is denied as to Counts I, III, IV, V, VI, VII and VIII. With respect to Count II, the motion to dismiss is denied as to the allegation that defendants failed to utilize proper accounting systems, software programs, servicing platforms and other techniques, but is granted as to the remaining allegations. The court reserves ruling on the motion to dismiss as to Count IX pending conclusion of this adversary proceeding. Accordingly, the defendants' motion to dismiss is hereby **DENIED IN PART** and **GRANTED IN PART**.

END OF DOCUMENT