UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STEVEN GEWECKE & TAMARA GEWECKE,

Plaintiffs,

v.

US BANK N.A., AS TRUSTEE FOR CITIGROUP MORTGAGE LOAN TRUST 2007-AMC1; CITIGROUP MORTGAGE LOAN TRUST 2007-AMC1; COUNTRYWIDE HOME LOANS, INC.,

Defendants.

Civil No. 09-CV-1890 (JRT/LIB)

ORDER

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(A), upon the Motion of the Plaintiffs Steven and Tamara Gewecke, to Amend the Complaint. A hearing on the Motion was conducted on March 16, 2011. For reasons outlined below, the Court denies Plaintiffs' Motion to Amend.

I. BACKGROUND

The Geweckes' ("Plaintiffs") Complaint alleges that Defendant's foreclosure practices are wrongful and illegal. (Pl's Third Amended Class Action Complaint [Docket No. 88, Ex. 2], ¶ 1).[1] The Plaintiffs first took out a home equity loan with Argent Mortgage Company. Defendant, CitiGroup Mortgage Loan Trust 2007 AMC1 ("CitiGroup Mortgage Loan Trust"), purports to now own the mortgage and note related to Plaintiffs' property. (Compl. ¶ 5). In turn,

[1] Originally, Plaintiffs asserted their claims on July 17, 2009 against two additional Defendants, ACC Capital Holdings Corporation and Argent Mortgage Company. However, after a Report and Recommendation issued by Chief Magistrate Judge Erickson on June 16, 2010, the Plaintiffs agreed to dismiss all claims against them. (Stipulation [Docket No. 62]).

Defendant ,US Bank, is the trustee for CitiGroup Mortgage Loan Trust 2007-AMC1. Countrywide Home Loans, Inc. ("Countrywide") serviced Plaintiffs' loan.

Plaintiffs bring a number of claims on behalf of themselves individually. In Count IV of their complaint, Plaintiffs seek declaratory and injunctive relief setting aside the previous publication of Defendants' intent to foreclose under Minn. Stat. § 582.25. (Third Amended Compl., ¶¶ 135, 139). According to Plaintiffs, Defendants failed to record all assignments of the mortgage, failed to state the names of one or more of the assignees in their notice of foreclosure, failed to state or incorrectly state the name of the mortgagee or assignee of mortgagee, failed to state the proper amount due, and that the assignment of the mortgage loan is omitted from or misstated in the notice of sale, foreclosure papers, affidavits and/or instruments. (Id., ¶ 137).

Count V asks the Court to provide declaratory relief under Minn. Stat. § 555 stating that the Assignment of the Mortgage was void because Argent did not have any interest to assign at the time of the assignment, no valuable consideration was given to Argent in exchange for the mortgage loan and the Assignment of Mortgage is not endorsed or signed by both parties to the transaction. (Id., ¶¶ 143, 145).

In Count VI, Plaintiffs ask the Court for a declaration that Defendants have not met the pre-requisites to foreclosure by advertisement under Minn. Stat. § 580.02 which requires that before foreclosure can take place without first recording the mortgage and "if it has been assigned that all assignments thereof have been recorded. . ." (Id., ¶ 150). Additionally, Plaintiffs assert a slander of title claim. (Id., ¶¶ 155-171). Lastly, Plaintiffs allege that Defendants violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(e) and Minnesota Mortgage Servicing Statute, Minn. Stat. § 47.205. (Id., ¶¶ 172-188).

Presently before the Court is Plaintiffs' motion to amend the Complaint. Plaintiffs seek to add class action claims on behalf of themselves and a similarly situated class of individuals. As their first class action claim, Plaintiffs claim that Defendants violated RICO, 18 U.S.C. §§ 1961-1968. (Id., ¶¶ 114, 118). Moreover, Plaintiffs request leave to add a class claim that the Court issue a Declaratory Judgment that Defendants engaged in, "the scheme described throughout this Complaint of initiating foreclosure proceedings and foreclosing on properly through the use of invalid, illegal, and/or incorrect assignments of mortgage, including A to D assignments, recorded in the County recorder's offices as well as the use, in the foreclosure process, of other documentation and/or affidavits that contain incorrect and invalid information and or attestations." (Id., ¶ 121). Further, Plaintiffs seek a declaratory judgment as to the class that the scheme and practices of Defendants utilized illegal, invalid, and/or incorrect assignments of mortgage and other similar documents or affidavits, result in depriving homeowners of their property, and that the herein described incorrect and/or invalid assignments, affidavits and similar documentation be declared illegal and of no force. (Id., ¶ 122). Finally, Plaintiffs seek to add a class claim that Defendants breached the contract existing between Plaintiffs and Defendants regarding attorneys' fees, property inspection and valuation fees that were not bona fide and reasonable because they were not for the purpose of protecting the Lender's interest in the Property as required by the contract. (Id., ¶¶ 124-133).

In response, the Defendants oppose the motion to amend solely on the grounds that the named Plaintiffs' underlying claims should be dismissed under Fed. R. Civ. P. 12(b)(6). However, as discussed in the Court's separate Report and Recommendation regarding the motion to dismiss, Defendants' arguments regarding the insufficiency of Plaintiffs' initial complaint under Fed. R. Civ. P. 12(b)(6) have not persuaded the Court, and it will not spend its limited

resources to consider such arguments again. Because the Defendants have not provided any alternative grounds as to why the motion to amend should be denied, the Court must therefore reluctantly undertake its own examination regarding the sufficiency of the allegations set forth in the Plaintiffs' Third Amended Complaint. Accordingly, the Court now turns to an analysis regarding whether the Plaintiffs' motion to allow a Third Amended Complaint should be granted.

II. STANDARD OF REVIEW

Fed. R. Civ. P. Rule 15(a) states that leave to amend should be "freely given when justice so requires." The Supreme Court has explained the purposes of Rule 15(a) as follows:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of such an apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.-the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

Generally, when deciding whether to grant a motion to amend, courts must ask whether "claims created by the amendment would not withstand a Motion to Dismiss for failure to state a claim upon which relief can be granted." DeRoche v. All Am. Bottling Corp., 38 F.Supp.2d 1102, 1106 (D. Minn. 1998); see also Lunsford v. RBC Dain Rauscher, Inc., 590 F.Supp.2d 1153, 1158 (D. Minn. 2008) (stating that a motion to amend is futile if the amended complaint would not survive a motion to dismiss). As such, an amendment to a pleading can be successfully challenged on the grounds of futility, if the claims created by the amendment would not withstand a Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted. See Humphreys v. Roche Biomedical Laboratories, Inc., 990 F.2d 1078, 1082 (8th Cir. 1993). To survive a motion to dismiss, a complaint must contain "enough facts to state a

claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." Id. at 555. In addition, "[r]ule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." Neitzke v. Williams, 490 U.S. 319, 326 (1989). "When reviewing a Rule 12(b)(6) dismissal for failure to state a claim, we look only to the facts alleged in the complaint and construe those facts in the light most favorable to the [nonmoving party]." Riley v. St. Louis County, 153 F.3d 627, 629 (8th Cir. 1998). Moreover, all reasonable inferences from the facts alleged in the complaint must be drawn in favor of the nonmoving party. See Maki v. Allete, Inc., 383 F.3d 740, 742 (8th Cir. 2004)

"Although the Rule 12(b)(6) standard, as employed to determine the futility of a proposed amendment, is not entirely apposite when considering an amendment that seeks to modify the scope of a class of plaintiffs, the tenor of its threshold requirements can be applied, analogically, to the question of whether the Amended Complaint describes a class of Plaintiffs that could be certified under the tenets of [Fed. R. Civ. P.] 23." Brancheau v. Residential Mortg. Group, Inc., 177 F.R.D. 655, 657 (D. Minn. 1997). Other courts have applied the class certification requirements of Rule 23 when deciding whether to grant leave to amend regarding a Complaint defining a proposed class action. See, Henderson v. National R.R. Passenger Corp., 117 F.R.D. 620, 622 (N.D. Ill. 1987) (proposed amended complaint fails to assert sufficient factual basis to establish class action prerequisites); Scarpino v. Grosshiem, 852 F.Supp. 798, 807 (S.D. Iowa 1994) (because Court granted class certification, amendment of Complaint to class action not futile); Nickson v. Schweiker, 98 F.R.D. 656, 657 (E.D. Pa. 1983) (denying leave to amend because atypicality of named Plaintiff's claim, compared with that of class, would make

amendment a futile gesture). However, "the actual question, of whether a proposed class of Plaintiffs should be included in an amended Complaint, is more appropriately addressed in the context of [a Motion] to certify the proposed [class]." Academy of Ambulatory Foot Surgery v. American Podiatry Ass'n, 516 F.Supp. 378, 380 (S.D. N.Y. 1981) (granting leave to amend without considering Defendants' arguments that proposed classes do not meet certification requirements).

Thus, the appropriate question regarding whether Plaintiffs should be allowed to amend the Complaint to assert a class action is not whether the proposed class actually meets the certification requirements of Rule 23. Instead, the Court "appl[ies] the Rule 23 criteria more loosely, such that [the Court] need only determine whether the proposed class could be certified." Brancheau, 177 F.R.D. at 658; see also Wright v. Green, 910 F.Supp. 510, 515 (D. Colo. 1996) (holding that a motion to amend the complaint is not the appropriate stage to evaluate the merits of a class action claim). "When conducting the analysis, [] courts seem to apply a heightened rule 15 standard, because they incorporate a preliminary rule 23 evaluation into it, and a more lenient rule 23 analysis in assessing the futility of the amendment." Lymon v. Aramark Corp., 2009 WL 520285 at *3 (D. N.M. Dec. 12, 2009). To meet this standard, the plaintiff must allege enough facts from which the court could reasonably infer the mandatory prerequisites of Fed.R.Civ.P. 23(a) have been met. See Smith v. Transworld Systems, Inc., 953 F.2d 1025, 1033 (6th Cir. 1992). Therefore, the Court will analyze each element of Rule 23 to see whether the Plaintiffs have alleged enough facts to demonstrate that a proposed class could be asserted. In addition, the Court will analyze each of Plaintiffs' asserted class claims to determine whether they meet the standards of Rule 12(b)(6). See Lunsford v. RBC Dain

Rauscher, Inc., 590 F.Supp.2d 1153, 1158 (D. Minn. 2008) (stating that a motion to amend is futile if the amended complaint would not survive a motion to dismiss).

III. DISCUSSION

A. Class Action

The proposed class includes:

> All individuals in the United States of America who: (1) have a mortgage loan related to a homestead, residential property, (2) the mortgage loan was securitized, (3) the mortgagee of public record immediately prior to the initiation of foreclosure proceedings was the original ender and the mortgagee of public record was never the Mortgage Electronic Registration Systems, Inc. (4) and the foreclosure action or advertisement was initiated based upon the recorded assignment from the originated lender to the Issuer or Trust.

(Third Amended Complaint, ¶ 102). As mandated by Brancheau, the Court will begin by analyzing whether the proposed class action sets forth enough facts to survive a motion to dismiss through the framework of Fed. R. Civ. P. 23. Brancheau, 177 F.R.D. at 657-58.

> Fed. R. Civ. P. 23, establishes four threshold requirements:
>
> (1) the class is so numerous that joinder of all members is impracticable, [i.e., "numerosity"]; (2) there are questions of law or fact common to the class, [i.e., "commonality"]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [i.e., "typicality"]; (4) the representative parties will fairly and adequately protect the interests of the class [i.e., "adequacy"].

The Court will consider whether the allegations in Plaintiffs' Third Amended Complaint meet each of Rule 23's requirements in turn.

1. Numerosity

In support of their argument that their class action claim satisfies the numerosity requirements, Plaintiffs allege that the Class consists of thousands of homeowners that can be identified in the business records maintained by the Defendants. (Third Amended Complaint, ¶

103). Further, because of the large number of possible plaintiffs, it would be impractical to bring each suit individually. (Third Amended Complaint, ¶ 103).

To certify a class action, a Court must first be satisfied "that the class of plaintiffs is so large that joinder of all members would be impracticable." In re Potash Antitrust Litigation, 159 F.R.D. 682, 689 (D. Minn. 1995). The Eighth Circuit Court of Appeals identified a number of factors relevant to this requirement of Rule 23(a), "the most obvious of which is, of course, the number of persons in the proposed class." Paxton v. Union Nat'l Bank, 688 F.2d, 552, 559 (8th Cir. 1982). There is no mandatory threshold number necessary to sustain a class, however, some showing beyond mere speculation is warranted.[2]

"The putative representative may fail its burden to show numerosity where he or she does not actually identify even the approximate size of the class or demonstrate the impracticability of joinder." Hancock v. Thalacker, 933 F.Supp. 1449, 1467 (N.D. Iowa 1996) (citing Belles v. Schweiker, 720 F.2d 509, 515 (8th Cir. 1983)). Furthermore, a class action will not be certified when the representative fails to to justify his claim of numerosity "with any reliable standards or estimates." Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994).

While at this stage, the Court does not need to analyze Plaintiffs' allegations regarding numerosity with the scrutiny required during class certification, Plaintiffs' Third Amended Complaint consists of no facts so as to even suggest at the potential number of Plaintiffs in the class action let alone provide even an estimate of the approximate size of the class. Nor does Plaintiff's Third Amended Complaint include any allegations that there are in fact any other similarly situated individuals that could be part of the class. The Plaintiffs admitted at oral

[2] Thus, the Eighth Circuit Court of Appeals has held that "seven former employees" is not enough, Tate v. Weyerhauser Co., 723 F.2d 598, 609 (8th Cir. 1983), while 1,685 potential plaintiffs constitutes a sufficiently large number. Arthur Young & Co. v. Reves, 937 F.2d 1310, 1323 (8th Cir. 1991).

argument that they are not aware of even one other person by name or circumstance who is similarly situated to the Plaintiffs. Thus, the Plaintiffs have not presented any facts demonstrating that the class is so numerous that it would be impracticable for class members to bring individual actions.[3]

The instant case parallels Smith v. Transworld Systems, Inc. In Smith, the plaintiff sued the defendant for violations of the Fair Debt Collection Practices Act partly because the defendant sent him two collection letters demanding an amount in excess of the amount actually owed. 952 F.2d at 1027. These letters were generated by a computer. Id. Plaintiff sought to add a class action arguing that since the forms were computer generated: (1) "hundreds, if not thousands" of people received the forms; (2) since the forms all had the same boilerplate language, common questions of law and fact existed; (3) his claims and defenses were typical of the class because the class members all received the same type of correspondence from the Defendant; and (4) he could fairly and adequately protect the class through class counsel. Id. at 1033. Ultimately, the Sixth Circuit refused to grant the amendment because there were not enough facts from which the court could reasonably infer that the mandatory prerequisites of Fed. R. Civ. P. 23 had been met. Id.

Likewise, in the instant case, the Plaintiffs appear to simply assert that because thousands of homeowners' mortgages have been securitized in transactions similar to the one at hand, numerous other potential plaintiffs must presumbly have the same injuries as the Plaintiffs.

[3] The Court finds this omission particularly important when considered in the context of Plaintiffs' specific individual claim that the assignment of the mortgage was not recorded which gives rise to Plaintiffs' class claims. Plaintiffs' claims that actual assignments existed which were not recorded relied heavily on the Pooling and Servicing Agreement and the assignment in blank which provided sufficient facts to survive a motion to dismiss regarding Plaintiffs' claim that actual assignments of their mortgage were not recorded in violation of Minnesota law. However, these facts are unique to the Plaintiffs' personal circumstances of Plaintiffs' individual claims. Therefore, they cannot be used to support claims on the behalf of a multitude of other Plaintiffs.

However, like the plaintiff in Smith, the Plaintiffs here have failed to point to any specific facts showing that these potential plaintiffs in fact exist beyond their conclusory statements.

Without more specific allegations regarding the additional class members Plaintiffs seek to add, the Court finds that Plaintiffs have not demonstrated enough facts from which the Court can reasonably infer that the numerosity requirement of Fed. R. Civ. P. 23 has been met. See Alsup v. Int'l Union of Bricklayers & Allied Craftsmen of Toledo, Ohio, Local Union No. 3, 902 F.2d 1568 (6th Cir. 1990) (upholding district court's decision denying motion to amend to add class in part because the plaintiffs "made no attempt to satisfy their burden of demonstrating the existence of class members other than the named plaintiffs").

2. Commonality

Plaintiffs allege that common questions of law and fact exist including whether Defendants participated in a scheme to defraud or obtain Plaintiffs' and the Plaintiff Class' property by means of false pretenses, representations or promises in violation of 18 U.S.C. § 1341; whether the Defendants constitute an enterprise under RICO that has a pattern of racketeering activity under RICO; whether Defendants have defrauded county recorder's offices, courts, and/or other government agencies in filing false assignments, affidavits or other documents leading to illegal foreclosures; and the amount of damages the Class has sustained as a result of the Defendants' wrongful conduct, and the proper measure of such damages. (Third Amended Complaint, ¶ 104). Plaintiffs contend that liability is common to the class and the common questions will predominate over the individual questions. (Third Amended Complaint, ¶ 112).

Commonality requires significant "common questions of law or fact among the members of the class," even though individual class members do not need to be identically situated.

Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982). "The commonality prerequisite will be satisfied when the legal question linking the class members is substantially related to the resolution of the litigation." DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir. 1995). Rule 23(a)(2) requires that "the course of conduct giving rise to a cause of action affects all class members, and that at least one of the elements of that cause of action is shared by all class members." Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 575 (D. Minn. 1995) (citing Newburg, Class Actions § 3.10, at 3-50 (observing that "[t]he test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative-that is, there need be only a single issue common to all members of the class this requirement is easily met in most cases").

Plaintiffs' mere allegations of commonality also fail to suggest that a class action could be certified partly because, as discussed above, the numerosity requirement has not been adequately alleged. Since it is unclear how many potential plaintiffs exist in this case, the Court finds it difficult at best if not impossible for Plaintiffs' to sufficiently allege that any common questions exist beyond mere conclusory allegations. This problem is compounded by Plaintiffs' extraordinarily broad class which does not limit itself only to the Defendants at issue, but instead includes all securitized mortgages for which the mortgagee of public record was never the Mortgage Electronic Registration Systems, Inc. Plaintiffs have made no attempt to allege any facts explaining that every potential plaintiff with a mortgage that meets this definition contains the same deficiencies as the specific mortgage at issue in the named Plaintiffs' case. Like the Plaintiffs' factual allegations in support of numerosity, Plaintiffs' assertions supporting commonality do not set forth any specific facts to support the proposed amendment.

3. Typicality

In support of typicality, Plaintiffs generally assert that they and members of the class have been subjected to the same illegal acts of the Defendants in regard to their properties and Defendants' foreclosure of their property. (Third Amended Complaint, ¶ 105). Plaintiffs' claims are alleged to be typical because of the similarity, uniformity, and common purpose of the unlawful conduct of the Defendants. (Third Amended Complaint, ¶ 105).

"[T]ypicality . . . means that there are other members of the class who have the same or similar grievances as the plaintiff." Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1540 (8th Cir. 1996). The burden of establishing typicality is "fairly easily met so long as other class members have claims similar to the named plaintiff." DeBoer, 64 F.3d at 1174. Typicality "is satisfied when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the class members" Lockwood Motors, Inc., 162 F.R.D. at 575. "Thus a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences" between members of the class. In re Potash Antitrust Litigation, 159 F.R.D. at 689. Since the typicality inquiry often merges with the commonality analysis, the Eighth Circuit has given typicality an "independent meaning" by holding that Rule 23(a)(3) "requires a demonstration that there are other members of the class who have the same or similar grievances as the [class representative]." Paxton, 688 F.2d at 562 (citation omitted).

As already discussed, Plaintiffs have failed to allege sufficient facts to demonstrate that there is anyone, let alone a numerous class of potential plaintiffs, besides themselves who have suffered the same type of harm giving rise to the same claims as Plaintiffs. Furthermore, the Court remains specifically concerned that the proposed class is not limited simply to the Defendants at issue in this case. The potential prospect that members of the putative class would

have been allegedly injured by entities not a party to the present action weighs against satisfaction of the "typicality" factor.

Since the Plaintiffs' proposed amendment failed to allege facts from which the Court could reasonably infer that the mandatory prerequisites of Fed.R.Civ.P. 23(a) could have been met, the Court denies Plaintiffs motion to amend at this time.[4] However, the Court denies Plaintiffs' motion without prejudice. In the event the Plaintiffs can gather enough facts to support their class action claims in the future, the Court will allow them to bring a timely motion to amend.[5]

B. RICO Claim

Plaintiffs seek to add a RICO claim under 18 U.S.C. § 1962(c) because they contend that the Defendants have "conducted, or participated in the conduct of an enterprise through a pattern of racketeering activity and through the use of wire and mail." (Third Amended Complaint, ¶ 115). Plaintiffs also allege that the Defendants violated 18 U.S.C. 1962(d) by conspiring to "violate 18 U.S.C. § 1962(c) by conducting, or participating directly or indirectly in the conduct of the affairs of the Enterprise through a pattern of racketeering activity through the use of wire and mail" (Third Amended Complaint, ¶ 116); Defendant, US Bank, used Citigroup Mortgage Loan Trust 2007-AMC1, Countrywide, and Argent as enterprises to deprive Plaintiffs of money through mail and wire fraud (Third Amended Complaint, ¶ 85); and Defendants executed a scheme to fraudulently foreclose on Plaintiffs by transmitting false, fraudulent and legally

[4] Since the Court declines to allow the Plaintiffs to amend their Complaint to assert a class action at this time, it does not particularly consider the sufficiency Plaintiffs' allegations regarding their claims for a declaratory judgment and alleging breach of contract which were asserted on behalf of the class. Additionally, the Court notes that these claims were asserted in the Second Amended Complaint on behalf of the Geweckes and contained sufficient factual allegations to survive a motion to dismiss as laid out in its Report and Recommendation.

[5] Because the Plaintiffs insufficient factual allegations as to the first three requirements of the Fed. R. Civ. P. 23(a) analysis are fatal to Plaintiffs' motion to amend to add a class action, the Court declines to further ruminate on whether the Plaintiffs have met the additional requirements of Fed. R. Civ. P. 23(a) and (b) regarding the adequacy of representation, whether common questions of law or fact predominate, and whether a class action is superior to other available methods.

fraudulent documents through the mail and over wire. (Third Amended Complaint, ¶¶ 94. 95). In addition, Plaintiffs purport to cite specific instances of fraud. As one example, Plaintiffs state that on August 9, 2008, Countrywide contacted its attorneys and directed its attorneys to draft a false assignment to foreclose on the Plaintiffs (Third Amended Complaint, ¶ 96), and that these acts were intentional and used to deceive Plaintiffs and the Class. (Third Amended Complaint, ¶ 99). Plaintiffs assert that the alleged racketeering activity is part of a pattern that began in 2004 and still continues. (Third Amended Complaint, ¶ 101).[6]

1. 18 U.S.C. 1962(c)

RICO states that,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity of collection of unlawful debt.

18 U.S.C. § 1962(c). Civil remedies are available to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore . . . and shall recover threefold damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).

To demonstrate a violation of RICO, a plaintiff must establish "(1) the existence of an enterprise; (2) defendant's association with the enterprise; (3) defendant's participation in predicate acts of racketeering; and (4) defendant's actions constitute a pattern of racketeering activity." Sinclair v. Hawke, 314 F.3d 934, 943 (8th Cir. 2003).

[6] As with the class action claims, Defendants offer no independent opposition against the Plaintiffs attempt to amend their complaint to assert a RICO claim. Defendants do not allege that the Plaintiffs inadequately pled their RICO claims. Rather, Defendants merely contend that if the other parts of the Third Amended Complaint are dismissed pursuant to Defendants Rule 12(b)(6) motion, then the motion to amend to assert the RICO claim should also be dismissed as futile because the Defendants' actions can no longer be illegal as a matter of law. (Def.'s Mem., p. 24). However, since in its earlier Report and Recommendation, the Court denied Defendants' motion to dismiss Plaintiffs' Complaint, the Court finds the Defendants' arguments need not be further addressed here.

a. Enterprise

A RICO enterprise consists of "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity ." 18 U.S.C. § 1961(4). An enterprise includes "a group of persons associated together for a common purpose of engaging in a course of conduct." Boyle v. United States, 129 S.Ct. 2237, 2243 (2009). An association-in-fact enterprise need only have "three structural features: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose." Id. at 2244.

Here, Plaintiff alleges that the enterprises worked to deprive Plaintiffs of money through mail and wire fraud. (Third Amended Complaint, ¶ 85). Plaintiffs contend that the Defendants worked:

> together for years for the common lawful purpose of servicing mortgage loans and initiating mortgage foreclosures. Unfortunately, the three Defendants have also used this arrangement to deviate into the common purpose of initiating foreclosure proceedings through false assignments and obtaining fees and money that they are not entitled to through such foreclosure proceedings, described herein [throughout the complaint].

Id. at ¶ 86. Furthermore, Plaintiffs lay out specific facts detailing the participation in the enterprise by each of the Defendants. For instance, the Plaintiffs assert that Defendant, US Bank, as trustee for CitiGroup Mortgage Loan Trust 2007-AMC1, "directed and authorized the trust to foreclose against unwitting victims, such as Plaintiffs, through improper means . . . U.S. Bank also directed Countrywide, as servicer of the loans, to impose and collect improper fees with the false foreclosures. U.S. Bank itself was responsible for filing the false mortgage papers to effect the false foreclosures and directed Argent to falsely assign mortgage rights it did not have." Id. at ¶ 88. Plaintiffs have asserted sufficient facts in support of their motion to amend

regarding the existence of an "enterprise" including US Bank, Citigroup Mortgage Loan Trust 2007-AMC1, and Countrywide.

b. Predicate Acts

Plaintiffs asserting RICO claims based on the predicate acts of mail and wire fraud are required to plead facts with the particularity required by Rule 9(b) of the Fed. R. Civ. P. Nitro Distributions, Inc. v. Alticor, Inc., 565 F.3d 417, 428 (8th Cir. 2009). Thus, plaintiffs must "state with particularity the circumstances constituting a fraud or mistake." Fed. R. Civ. P. 9(b). A party alleging fraud must typically identify the "who, what, where, when, and how" of the alleged fraud. United States ex rel. Costner v. URS Consultants, Inc., 317 F.3d 883, 888 (8th Cir. 2003). Generally, a plaintiff must plead "'such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.'" Abels v. Farmers Commodities Corp., 259 F.3d 910, 920 (quoting Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982)). However, "[a]llegations of a fraudulent scheme involving a course of conduct for an extended period of time, or a series of transactions, need not recite the fact of each transaction in detail." Trooien v. Imeson, 2009 WL 1921685 at *2 (D. Minn. July 1, 2009) (citing Bale v. Dean Witter Reynolds, Inc., 627 F.Supp. 650, 652 (D. Minn. 1986)).

"To establish mail fraud, the plaintiff must show the existence of a plan or scheme to defraud, that it was foreseeable that the defendant's scheme would cause the mails to be used, and that the use of the mails was for the purpose of carrying out the fraudulent scheme." Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989). "[T]he term 'scheme to defraud' connotes some degree of planning by the perpetrator, [and] it is essential that the

evidence show the defendant entertained an intent to defraud." Atlas Pile Driving, 886 F.2d at 991 (quoting United States v. McNeive, 536 F.2d 1245, 1247 (8th Cir. 1976)).

The "intent to defraud" required for a violation of federal mail and wire fraud statutes can be satisfied by a showing that the defendant acted with intention or with reckless disregard to the interest of the plaintiff. See United States v. DeRosier, 501 F.3d 888, 898 (8th Cir. 2007) (affirming the use of a wire fraud instruction that used the phrase "in reckless disregard of the interest of" because "the 'reckless disregard' standard is an acceptable specification of the term 'intent to defraud'"). "No single fact need demonstrate the defendant's intent; rather, intent to defraud can be discerned by examining the totality of the circumstances surrounding the defendant's activities." Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 768 (8th Cir. 1992). Fraud allegations "giv[e] rise to a strong inference of scienter [if] defendants published statements when they knew facts or had access to information suggesting that their public statements were materially inaccurate." Fla. State Bd. of Admin. v. Green Tree Financial Corp., 270 F.3d 645, 661 (8th Cir. 2001). Furthermore, assertions showing that the defendant had both motive and opportunity to derive a concrete benefit from the alleged fraud can support an inference that a defendant had the requisite scienter for fraud. See In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 894 (8th Cir. 2002) (holding that where an individual will benefit to an unusual degree, the heightened pleading standard for motive in a securities fraud action is sufficiently pled).

The present case shares similarities with Young v. Wells Fargo & Co., 671 F.Supp.2d 1006 (S.D. Iowa 2009), where the Court found that the allegations in the complaint supporting the plaintiff's RICO claim stated enough facts to survive a motion to dismiss. There, the plaintiffs pled that the defendant engaged in a systematic course of conduct to defraud mortgage borrowers. The plaintiffs' claims in Young relied on allegations that the defendant charged

excessive late fees, costs, and fees for property inspection that were not "reasonably necessary" as required by the mortgage contract language. Id. at 1034-35. In Young, the Court found the plaintiff's allegations sufficient when facts stated that:

> . . .their mortgage contracts set forth the terms by which Wells Fargo could charge them property inspection and late fees. They also cite multiple instances when Wells Fargo charged them fees that they contend violate the terms of their agreement.

Id. at 1038.

Like in Young, in the present case, Plaintiffs have alleged enough facts demonstrating a scheme to defraud exists. In particular, Plaintiffs assert that the Defendants "placed or caused to be placed in post offices and/or in authorized repositories matter and things to be sent or delivered by the Postal Service, caused matter and things to be delivered by commercial interstate carrier, and received matter and things from the Postal Service or commercial and interstate carriers, including but not limited to falsified, fraudulent, and legally defective documents." (Third Amended Complaint, ¶ 94). Based on the complaint, these legally defective documents include documents initiating foreclosure proceedings and charging unreasonable fees relating to foreclosure which were based on false and invalid assignments. Plaintiffs provide specific examples when Defendants used the mail to defraud Plaintiffs. Id. at ¶ 96. They also provide the terms of the contract allowing Defendants to charge property inspection and late fees. Id. at ¶ 127. Moreover, they cite examples of when such fees were charged in violation of the contract. Id. at ¶ 96. Furthermore, the extensive facts laid out in Plaintiffs' complaint "explain with particularity how [Defendants] executed the alleged scheme to charge excessive servicing fees, as well as how [Defendants] regularly used the mail to send out mortgage statements in carrying out the fraudulent scheme." Young, 671 F.Supp.2d at 1036.

Furthermore, the facts alleged by the Plaintiffs support a reasonable inference that the Defendants acted with the requisite intent for a mail or wire fraud violation. In Young, the Court noted that:

> for purposes of the Motion to Dismiss that Wells Fargo knew the contract terms regarding mortgage servicing fees, yet systematically charged borrowers fees that did not comply with their mortgage contracts. . . Though it is possible the over-billing derived from a mistake, the Court finds it reasonable to infer that Wells Fargo acted with reckless disregard or intention when it designed the Fidelity MSP system [a computer program that automatically charged homeowners fees and costs]. . . Wells Fargo had reason to know that some of the fees it was charged were not permissible under the borrowers' mortgage contracts. . . Plaintiffs have also pleaded facts supporting a motive for Wells Fargo's alleged scheme. Plaintiffs note that Wells Fargo's business of servicing home mortgages generates hundreds of millions of dollars in revenues, explain that Wells Fargo earns revenue from its mortgage servicing in three ways.

Young v. Wells Fargo & Co., at 1038.

Likewise, here, the Court assumes for the purposes of the motion to amend that the Defendants knew the contract terms regarding mortgage servicing fees and reasonably should have known that the assignments were invalid. Thus, the facts in the Complaint are sufficient to demonstrate that Defendants acted in reckless disregard by charging unreasonable fees and by taking steps to initiate foreclosure when they lacked the authority. Furthermore, a motive is also present in this case because the Defendants derive income form the fees and costs charged to foreclosed homeowners. Based on these allegations, it is plausible that the Defendants acted with knowing intent when they charged unreasonable fees to the Plaintiffs and engaged in foreclosure proceedings against the Plaintiffs. Thus, the Court finds that looking at the Complaint as a whole and taking inferences in the light most favorable to the Plaintiffs, the Plaintiffs have alleged enough facts demonstrating a plausible scheme to defraud for purposes of their motion to amend.

c. Pattern of Racketeering Activities

"[T]o prove a pattern of racketeering activity a plaintiff ... must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." Craig Outdoor Adver., Inc., v. Viacom Outdoor, Inc., 528 F.3d 1001, 1028 (8th Cir. 2008) (citations omitted) (emphasis in original). A pattern is shown through two or more related acts of racketeering activity that "amount to or pose a threat of continued criminal activity." Wisdom v. First Midwest Bank, 167 F.3d 402, (8th Cir. 1999) (quoting United HealthCare Corp., v. Am. Trade Ins. Co., 88 F.3d 563, 571 (8th Cir. 1996)). To do this "a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time (closed-end continuity) or evidence that the allege predicate acts threaten to extend into the future (open-ended continuity)." Craig Outdoor Adver., 528 F.3d at 1028. "Because misrepresentations of fact are not necessary to the offense, it follows that no misrepresentations need be transmitted by mail or wire: even routine business communications in these media may suffice to make a scheme of false dealing into a federal offense." Abels v. Farmers Commodities Corp., 259 F.3d 910, 918 (8th Cir. 2001); see also Atlas Pile Driving, 886 F.2d at 992 ("a mailing [that serves as an element of mail fraud] may be a routine mailing or even one that is sent for a legitimate business purpose so long as it assists in carrying out the fraud").

In the present case, the Plaintiffs allege that the Defendants have participated in the alleged scheme since 2004 and that the practice continues. (Third Amended Complaint, ¶ 101). Thus, Plaintiffs demonstrate that the Defendants actions are more than just "isolated events." Abels, 886 F.2d at 993. Moreover, Plaintiffs provide examples of the Defendants' many different uses of the mail over a period of time to perpetuate the alleged fraud. Id. at ¶ 96. Even though the examples by Plaintiff may also constitute routine business communications, they still help the Defendants in perpetuating what Plaintiffs contend is fraud, and therefore, the factual

allegations by Plaintiffs are sufficient to demonstrate that a pattern of racketeering exists for the purposes of their motion to amend.

2. 18 U.S.C. 1962(d)

Under RICO, it is also "unlawful for any person to conspire to violate" § 1962(c). 18 U.S.C. § 1962(d). In order to assert a RICO conspiracy in violation of § 1962(d), a plaintiff "must present evidence beyond that required to establish a right to relief under § 1962(c). The additional evidence required to show a RICO conspiracy 'need only establish a tacit understanding between the parties, and ... may be shown wholly through the circumstantial evidence of [each defendant's] actions.'" United States v. Kehoe, 310 F.3d 579, 587 (8th Cir. 2002) (alterations in original) (citation omitted) (quoting Handeen v. Lemaire, 112 F.3d 1339,1355 (8th Cir. 1997); see United States v. Darden, 70 F.3d 1507, 1518 (8th Cir. 1995) (stating that "[p]roof of an express agreement is not required").

In combination with the alleged facts already discussed above in support of Plaintiffs' § 1962(c) claim, Plaintiffs have alleged sufficient facts to support their motion to amend to a conspiracy claim under § 1962(d).

IV. CONCLUSION

NOW, THEREFORE, It is –

ORDERED:

1. That consistent with the analysis above the Plaintiff's Motion to Alter/Amend/Supplement Pleadings [Docket No. 88] is GRANTED in part, and DENIED in part without prejudice.

BY THE COURT:

Dated: June 6, 2011

s/Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE