IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY SWECKER a/k/a GREGORY R. SWECKER a/k/a GREG SWECKER; BEVERLY SWECKER a/k/a BEVERLY F. SWECKER; SWECKS, INC.; PALISADES COLLECTION, LLC; STATE OF IOWA; GRAND JUNCTION MUNICIPAL UTILITIES; UNIFUND CCR PARTNERS; and MIDLAND POWER COOPERATIVE, Defendants.	*	4:09-cv-00013 ORDER

Before the Court is Plaintiff's Motion to Dismiss Gregory and Beverly Sweckers' Counterclaims ("Motion"), filed October 8, 2015. Clerk's No. 110. The Sweckers filed a resistance on November 24, 2015. Clerk's No. 124. The government replied on December 4, 2015. Clerk's No. 126. The matter is fully submitted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gregory and Beverly Swecker (the "Sweckers") entered into three loan agreements with the Farmers Home Administration ("FmHA"), now the Farm Services Agency ("FSA") of the United States Department of Agriculture ("USDA"), in 1983–84. Compl. ¶¶ 3–6. Each of those loans was either rescheduled or reamortized between 1985 and 1991. *Id.* ¶¶ 7–13. In 1996, as part of servicing provided to financially distressed farmers, FmHA rescheduled the original three loans and wrote-down some of the Sweckers' debt. *Id.* The Sweckers also signed

a Shared Appreciation Agreement ("SAA") with FmHA, which was a promise to repay the FmHA 50% of any positive appreciation in the market value of the property that secured the newly rescheduled loans. *Id*. ¶¶ 14–21. The appraised value of the property was $153,000 at the time the SAA was signed; the appraised value of the property at the time the government initiated this lawsuit was $386,000. *Id*. ¶¶ 17–18. According to the complaint, the Sweckers owe FSA $116,500 under the SAA. *Id*. ¶ 18. On November 14, 2006, the Sweckers were provided notice that the SAA would mature on December 30, 2006; on March 13, 2007, the Sweckers were provided with a second notice that the SAA was due and owing. *Id*. ¶¶ 20–21.

The government filed this lawsuit on January 8, 2009, alleging that the Sweckers failed to make payments due under the rescheduled loans and the SAA. *Id*. ¶¶ 23–25. In total, the government seeks $254,163.29 in principal, and $77,552.59 in interest, continuing interest, and costs. Compl. at 11. The case was stayed until June 18, 2015, while the Sweckers pursued civil rights claims against the USDA with respect to the handling of their loans. *See* Clerk's Nos. 79, 58-1 at 2–11. Those claims were found to be without merit. *See* Clerk's No. 58-1 at 10. After the stay was lifted, the Sweckers filed an answer to the complaint and several counterclaims. In their counterclaims, the Sweckers allege: (1) "Breach of Contract and Statute of Frauds" by the government in connection with the SAA; (2) that FSA violated the Equal Credit Opportunity Act ("ECOA"); (3) that FSA violated Beverly Swecker's rights under the Privacy Act; and (4) violations of the Public Utility Regulatory Policy Act ("PURPA").[1] In total, the Sweckers seek damages of $58,653,387. Clerk's No. 87 at 36.

[1] The Sweckers also attempt to raise a fifth claim in their brief in opposition to the government's Motion. The Sweckers argue that a state FSA form differs from the national version of the same form, and that the state form must be submitted to the USDA for approval. *See* Clerk's No. 124 at 29–30. The Sweckers don't identify any injury they have suffered due to the alleged inconsistency between the two forms, or even allege that the form is material to the

II. LAW AND ANALYSIS

The government brings this motion pursuant to Federal Rule of Civil Procedure 12(b)(1), alleging that the Court lacks subject matter jurisdiction over each of the Sweckers' counterclaims. The government also argues that the Sweckers have failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

A motion to dismiss pursuant to Rule 12(b)(1) may be raised by any party, or the Court by its own initiative, at any stage in the proceeding. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). "[T]he complaint must be successfully challenged on its face or on the factual truthfulness of its averments." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id*. In a factual challenge, the Court may consider "the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

To adequately state a claim upon which relief may be granted, and thereby avoid dismissal under Rule 12(b)(6), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In reviewing a complaint, a court must "accept as true all of the factual allegations contained in the complaint," and must draw "all reasonable inferences . . . in favor of the plaintiff." *Schaaf v. Residential*

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foreclosure action in any way. Even accepting the allegations as true, and treating the allegations as a properly pleaded claim, the Court must conclude that the facts presented do not state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). A viable complaint must include "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 *Twombly*, 550 U.S. at 570). Each of the Sweckers' counterclaims will be addressed individually below.

A. *Breach of Contract Claim*

The Sweckers claim that FSA breached the terms of the 1996 SAA and the rescheduled loans by changing several contract terms after the agreement was signed. Specifically, the Sweckers seem to argue that (1) the SAA was set to *expire* in 10 years, rather than mature and become due; (2) FSA raised the interest rate on their loan; and (3) the SAA and rescheduled loans were supposed to include a write-off of the prior debt, rather than a write-down. *See* Clerk's No. 124 at 13–15. The Sweckers seek approximately $19,645,200 in damages related to this claim. The government asserts that the counterclaim must be dismissed for two different reasons: (1) pursuant to the Tucker Act, the Sweckers' counterclaim should have been filed in the Court of Federal Claims, and regardless of venue, is barred by the Tucker Act's six-year statute of limitations; and (2) if the claim is construed as a claim for intentional interference with contractual rights, it is barred by both the filing requirements and statute of limitations encompassed by the Federal Tort Claims Act ("FTCA").

To properly assert a claim, or counterclaim in this case, against the United States, the claimant must establish that the United States has unequivocally consented to be sued by waiving sovereign immunity for the type of claim alleged. *Franklin-Mason v. Mabus*, 742 F.3d 1051, 1054 (D.C. Cir. 2014). Here, the Sweckers assert a breach of contract claim against the United States. Pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), the United States has

waived sovereign immunity for suits seeking monetary damages on a claim for breach of an express or implied contract. But importantly, any such claim that seeks in excess of $10,000 in damages, such as the Sweckers' claim here, must be brought in the Court of Federal Claims. 28 U.S.C. § 1346(a)(2). The Court of Federal Claims holds exclusive jurisdiction over contract claims against the United States seeking in excess of $10,000 in damages; the statute of limitations on such claims is six years. 28 U.S.C. § 2501.

Here, the Sweckers' counterclaim seeks monetary damages from the United States based on the alleged breach of a contract, and, thus, plainly falls within the exclusive jurisdiction of the Court of Federal Claims. Furthermore, even if this Court could properly exercise jurisdiction over the claim, it still lies well outside the six-year statute of limitations established by the Tucker Act. The contract in question was signed in 1996, and the SAA matured in 2006, approximately 9 years ago.[2] All of the Sweckers' allegations would have been known to them when they received notification that the SAA matured in late 2006 and early 2007. *See* Clerk's No. 1-2 at 51–52. Accordingly, because the Court lacks jurisdiction over this counterclaim and, even if the Court could establish jurisdiction the applicable statute of limitations has run, it must be dismissed.[3]

B. *ECOA Claim*

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[2] The Sweckers argue that the statute of limitations should be equitably tolled because the United States attempted "to commit fraud in a Mortgage." Clerk's No. 124 at 17. But the basis for the Sweckers' argument seems to be that the Sweckers themselves, rather than the government, provided the Court with a copy of the 1996 agreements at issue in this case. *Id.* The Sweckers fail to acknowledge that all of the relevant agreements were filed by the government with the Complaint in this case. Furthermore, the Sweckers provided no legal citation for their equitable tolling argument, and the Court finds it to be without merit.

[3] The Court does not address the government's alternative argument for dismissal under the FTCA because the Sweckers have not argued that the claim should be construed as one of intentional interference with contractual rights.

The ECOA makes it unlawful "for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)." 15 U.S.C. § 1691(a). A "creditor" includes "any person who regularly extends, renews, or continues credit"; "person" includes any "government or governmental subdivision or agency." 15 U.S.C. § 1691a(e)–(f). The ECOA provides a two-year statute of limitations from the date of the violation, subject to narrow exceptions. 15 U.S.C. § 1691e(f).

The Sweckers claim that they were subject to marital discrimination under the ECOA when FSA, then FmHA, unlawfully obtained Beverly Swecker's signature "on the operating loans of her spouse, Gregory Swecker." *See* Clerk's No. 87 at 12–24. The Sweckers claim that their farming operation was a sole proprietorship in Gregory Swecker's name alone, that Beverly Swecker has never been certified as "Actively Engaged in Farming" as defined by FSA, and therefore requiring her signature on loan applications was unlawful marital discrimination. Clerk's No. 124 at 19. The Sweckers further argue that FSA "falsely represented/recorded the criteria for eligibility regarding Beverly Swecker," and "intentionally structured its verbal and written communication to married women, including Beverly Swecker in such a way as to deceive and in essence inconceivably, to take advantage of the unwary in order to unconscionably deny married women of their property rights." *Id.*

The government asserts that this claim must be dismissed because it relates to events that occurred well before ECOA's two-year statute of limitations expired, and does not qualify for a statutory extension of the statute of limitations. The Court agrees. The complained-of conduct occurred between 1983 and 1994. Clerk's 87 at 21–24. In limited circumstances, the two-year statute of limitations for ECOA claims may be waived. This waiver provision is

commonly referred to as "Section 741," and was enacted in response to the mismanagement and backlog of discrimination complaints against the USDA in 1999. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, § 741, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-227, 112 Stat. 2681 (Oct. 21, 1998) (codified at 7 U.S.C. § 2279 note). Section 741 states, in relevant part:

> (a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act, shall not be barred by any statute of limitation.
> (b) The complaint may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act . . .
>
> (c) Notwithstanding subsections (a) and (b), if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial . . .
>
> (d) As used in this section, the term 'eligible complaint' means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996–
> (1) In violation of the Equal Credit Opportunity Act (15 U.S.C. § 1691 et. seq.) in administering–
> (A) A farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account.

Id.

Here, the Sweckers argue that the two-year statute of limitations should be equitably tolled because Beverly Swecker filed an ECOA complaint in 2009 alleging marital discrimination. Clerk's No. 124 at 28. But Section 741 provides that only complaints filed

before July 1, 1997, can serve to waive the applicable statute of limitations. Accordingly, the Sweckers' counterclaim must be dismissed.[4]

C. *Privacy Act Claim*

Next, the Sweckers claim that Beverly Swecker's rights were violated under the Privacy Act when joint credit reports including Beverly Swecker's credit information were obtained in connection with loans that were individually applied-for by her husband Gregory Swecker. *See* Clerk's No. 87 at 25. The Sweckers claim that Beverly Swecker was never asked to sign Form FmHA 410-9, "Statement Required by the Privacy Act," and that "there is no 410-9 having to do with Beverly Swecker in the record," despite the fact that "Joint Credit Reports were requested on every application wherein Greg Swecker was the only applicant." *Id*. The government asserts that this claim is barred by the applicable statute of limitations. Again, the Court must agree.

The Privacy Act authorizes the federal government to keep records pertaining to individuals only when the records are "relevant and necessary" to an end "required to be accomplished" by law. 5 U.S.C. § 552a(e)(1). The Act provides four specific situations under which an individual may seek a civil remedy. Of relevance here, the Act provides for a civil remedy whenever "any agency" either "fails to maintain any record concerning any individual

[4] The Court notes that the Sweckers also briefly mention an equal protection violation in connection with the handling of their loan applications. *See* Clerk's No. 124 at 29. This argument was not raised in the counterclaim, but appears only in the Sweckers' brief in opposition to the government's Motion. The only basis for this argument appears to be a finding of marital discrimination that the Department of Justice allegedly made against Countrywide Financial with relation to Countrywide's lending practices. *See* Clerk's No. 124 at 27. Even if true, a finding of discrimination against a different organization in a completely different case alone does not state a viable cause of action, or demand a particular outcome. Thus, to the extent the Sweckers' counterclaim alleges a violation of their equal protection rights, it is dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness . . . and consequently a determination is made which is adverse to the individual" or "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(C), (D). The Privacy Act contains the following statute of limitations:

> An action to enforce any liability created under this section may be brought . . . within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

Id., 552a(g)(5).

In an affidavit attached to the counterclaims, Beverly Swecker asserts that she did not know her rights under the Privacy Act were violated until she hired an expert fact witness to review her case files, that she did not knowingly waive her rights under the Privacy Act, and that she would not have signed the loan documents of her spouse had she been properly informed by FmHA. *See* Clerk's No. 87 at 41.

The counterclaim and accompanying affidavit do not provide dates for any of the alleged incidents giving rise to the Privacy Act claim, nor is there any indication of when the expert fact witness was retained or why the Sweckers could not have discovered any alleged violation within the statute of limitations period. The most recent loan document signed by Beverly Swecker is dated December 30, 1996, well outside of the two-year statute of limitations. Even assuming Beverly Swecker's affidavit alleges facts that may indicate material and willful misrepresentation on the part of FmHA, which could allow for a tolling of the statute of limitations in some circumstances, her claim is undermined by the fact that the record contains

three FmHA Form 410-9s, all signed by Beverly Swecker. *See* Clerk's No. 113 at 69–71. The forms are dated February 26, 1990, January 17, 1992, and October 19, 1993. *Id*. The Sweckers cannot now claim that Beverly Swecker was uninformed, or misled, about her Privacy Act Rights, when the form containing a statement of the agency's Privacy Act policy was signed by Beverly three separate times. *See id.* Accordingly, even if the counterclaim could somehow be construed as timely, the Court would nonetheless dismiss it for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

D. *PURPA Claim*

The final counterclaim alleges "Violations of Section 210 of the Public Utility Regulatory Policy Act." *See* Clerk's No. 87 at 26. PURPA was passed as part of the National Energy Act in 1978 to encourage the conservation and the development of alternative power supplies. PURPA requires electrical utilities to purchase power from qualifying alternative energy facilities ("QFs") when possible, and to operate with QFs under reasonable terms and conditions. The Sweckers operate a QF wind turbine on their property. The Sweckers have been involved in an ongoing legal dispute with Midland Power Cooperative ("Midland") and the Central Iowa Power Cooperative ("CIPCO") for several years regarding the purchase of power from their wind turbine. It is difficult to determine exactly what legal claims the Sweckers assert under this counterclaim, but, even construing the counterclaim broadly and in the light most favorable to the Sweckers, the claim must be dismissed. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed pro se is to be liberally construed." (internal quotation omitted)).

First, the Sweckers' counterclaim recites factual allegations relating to their ongoing dispute with Midland and CIPCO that has played out in both state and federal courts, before the

Federal Energy Regulatory Commission ("FERC"), and with the USDA civil rights department. *See* Clerk's No. 87 at 26–34; *see also Swecker v. Midland Power Coop.*, No. 14-2186, 2015 WL 5842226 (8th Cir. Oct. 6, 2015); *Swecker v. Midland Power Coop.*, 142 FERC ¶ 61, 207, 2013 WL 1182419 (Mar. 21, 2013); *Swecker v. Midland Power Coop.*, 137 FERC ¶ 61, 200, 2011 WL 6523727 (Dec. 15, 2011); *Windway Techs., Inc. v. Midland Power Coop.*, 696 N.W.2d 303 (Iowa 2005); Clerk's No. 113 at 45 (letter from the USDA to Gregory Swecker explaining that he could not amend his civil rights complaint against Midland because it was closed in 2012). The Sweckers contend that this foreclosure action was filed in retaliation for their claims against Midland before the FERC. *See* Clerk's No. 87 at 35. This allegation was also raised the Sweckers' Motion to Dismiss this case, and was rejected by the Court. *See* Clerk's Nos. 9 at 3, 19 at 12. There, this Court stated that "[w]hile several federal civil rights laws prohibit "retaliation," these laws apply only where a person has taken action to secure rights protected by the civil rights laws and where it can be shown that the alleged retaliatory acts are a deliberate response to the actions." Clerk's No. 19 at 12 (citing *Heymann v. Tetra Plastics Corp.*, 640 F.2d 115, 124 (8th Cir. 1981); 15 U.S.C. § 1691; 42 U.S.C. §§ 2000d, 3605). Filing an action with FERC is not an action protected by any civil rights law, and, thus, cannot form the basis for a retaliation claim.

Next, in their brief, the Sweckers state that their claim "is that the United States of America through Rural Utility Services [("RUS")][5] erected barriers that made it more difficult for Sweckers to obtain the benefit of PURPA by intentionally denying the benefit of three phase electrical service that Sweckers were entitled to." The Sweckers have not shown that the United

[5] RUS is a subdivision of the USDA.

States has waived sovereign immunity for such a claim. The Sweckers repeatedly cite 16 U.S.C. § 824a-3(b)(2) in their counterclaim, which is the anti-discrimination section of PURPA.[6] Section 824a-3 provides only two grounds for establishing the right to bring suit in federal district court—judicial review of a state regulatory authority proceeding or an action against any utility or QF to enforce implementation of a rule under the section—neither of which apply in this case. *See* 16 U.S.C. § 824a-3(g).

The Sweckers also appear to claim that RUS colluded with Midland to "redact, cover-up and unlawfully conceal information pursuant to Swecker's Freedom of Information Act [("FOIA")] Request." To the extent the Sweckers are attempting to initiate judicial review of a FOIA decision by RUS, the claim must be dismissed because any dispute with an agency's disclosure under FOIA must first be appealed to the agency before judicial review may be obtained. *See* 5 U.S.C. § 552(a)(6)(A)(ii) (providing a statutory process for an administrative appeal under FOIA). The Eighth Circuit requires the exhaustion of "administrative avenues of appeal" as a prerequisite to filing a lawsuit under FOIA. *See Brumley v. U.S. Dep't. of Labor*, 767 F.2d 444, 445 (1985) (per curiam); *see also Hass v. U.S. Air Force*, 848 F. Supp. 926, 929 (1994) (dismissing a pro se plaintiff's FOIA claim because the plaintiff had not followed the administrative appeal process). There is no indication here that the Sweckers have followed the administrative appeal process. Furthermore, the Sweckers have provided no details surrounding their FOIA claim beyond one bare assertion that RUS attempted to "redact, cover-up and unlawfully conceal information." Clerk's No. 87 at 33–34. While "detailed factual

[6] As the government points out, the Sweckers actually reference 16 U.S.C. § 824a-2(b)(2), which does not exist. *See, e.g.*, Clerk's No. 87 at 28. Based on the context of the citations, the Court is confident that any reference to section 824a-2(b)(2) was a typographical error and the correct citation is 16 U.S.C. § 824a-3(b)(2).

allegations are not necessary," the counterclaim must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). The Sweckers provide no dates or background information for the government to determine when the FOIA request was made, what information was actually disseminated by RUS, or what information the Sweckers are alleging was unlawfully concealed. For those reasons, any attempt by the Sweckers to raise a claim under FOIA is both procedurally barred and also fails to state a claim upon which relief can be granted under Rule 12(b)(6).

Finally, the Sweckers allege in their counterclaim, and throughout their filings, that this foreclosure action is improper because it was initiated while the Sweckers had civil rights complaints pending before the USDA. *See* Clerk's No. 87 at 35. This foreclosure action was originally filed on August 1, 2009, but was stayed while the USDA considered the Sweckers' civil rights complaints; the stay was continued several times to allow the USDA to complete its review of the complaints. *See* Clerk's No. 34, 51, 62, 64, 66. On September 16, 2014, USDA civil rights staff mailed a letter to Gregory Swecker that stated he had no open complaints. *See* Clerk's No. 72 at 3. The government filed a Motion to Lift the Stay in this case on May 28, 2015. Clerk's No. 73. Magistrate Judge Stephen Jackson, after conducting a telephone hearing with both parties and reviewing all written submissions, concluded that "the court is satisfied that there are no matters pending before the USDA Office of Civil Rights which prohibit this case from proceeding forward"; accordingly, the Motion to Lift the Stay was granted on June 18, 2015. Clerk's No. 79 at 4. The Court sees no reason to question the conclusion that all of the Sweckers' civil rights claims had been either resolved or rejected. Accordingly, there was no barrier to lifting the stay and continuing these foreclosure proceedings.

III. CONCLUSION

For the reasons stated above, Plaintiff's Motion to Dismiss (Clerk's No. 110) is GRANTED. Each of the Sweckers' counterclaims (Clerk's No. 87) are hereby dismissed.

IT IS SO ORDERED.

Dated this __15th___ day of December, 2015.

Robert W. Pratt

ROBERT W. PRATT, Judge
U.S. DISTRICT COURT