UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALIN DRAGOIU and
MONIQUE DRAGOIU,

Plaintiffs,

v.

Case No. 2:10-cv-11896
HON. DAVID M. LAWSON
MAGISTRATE JUDGE MONA K. MAJZOUB

THE UNITED STATES OF AMERICA,

Defendant.

_____/

DEFENDANT'S MOTION TO DISMISS
THE THIRD AMENDED COMPLAINT

Defendant, the United States of America, by and through its attorneys, Barbara L. McQuade, United States Attorney for the Eastern District of Michigan, and Lynn M. Dodge, Assistant United States Attorney, moves to dismiss the complaint pursuant to Fed. R.Civ.P.12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim. The grounds for this motion are set forth more specifically in the attached supporting brief.

Pursuant to L.R. 7.1, the undersigned contacted Plaintiffs' counsel on February 9, 2012, to seek his concurrence in this motion, explaining the nature of the motion. Plaintiff did not concur in the motion.

Respectfully submitted,

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Dated: February 14, 2012

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BRIEF IN SUPPORT OF
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I. BACKGROUND

The United States brings this motion to dismiss based on the Court's lack of subject matter jurisdiction over the claim in Count I of the Third Amended Complaint, and the failure to state of cause of action in Counts II and III of the Third Amended Complaint. The gist of the Third Amended Complaint is that Plaintiffs -- a purchaser of property and his wife – claim that the home that they purchased from the Department of Housing and Urban Development (HUD) had previously incurred a basement flood, that there was subsequent mold in the home from the basement flooding, and that this was not disclosed to them by HUD. Based on this, Plaintiffs seek to revoke the contract, declare the contract null and void, require Defendant to satisfy the mortgage and second mortgage on the Property, require Defendant to reimburse Plaintiffs for money spent to improve the Property, and pay Plaintiffs for the diminution in value to the Property. Plaintiffs also seek compensation for personal injury, emotional distress, loss of consortium, and costs and attorney fees. Plaintiffs bring the action under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq*., alleging that the United States was negligent by failing to inform, making affirmative misrepresentations, failing to provide notice or information regarding remediation work by HUD, and failing to remediate the property. (See Third Amended Complaint Paragraph 43).

II. STATEMENT OF FACTS

This case is based upon the purchase of property by Plaintiff Alin Dragoiu at 2361 Marwood, Waterford, Michigan ("the Property") from HUD. HUD acquired the Property on July 26, 2004, as a result of the default of the mortgagor on the HUD-insured mortgage, the subsequent foreclosure by the mortgagee, Shore Mortgage, and conveyance of the Property to HUD by Shore Mortgage and its nominee, MERS, in exchange for an insurance claim payment. (Walker Declaration at ¶ 15). The next day, HUD assigned the Property to Michaelson, Connor and Boul ("MCB") for management, marketing, and

disposition. (Walker Declaration at ¶ 16). MCB selected the listing broker, Future Real Estate ("Future"), who listed the property on August 6, 2004, with the following remarks:

> HOME SOLD AS IS. HUD WILL MAKE NO REPAIRS. . . . MCB & FUTURE MAKES NO WARRANTY AS TO THE EXISTENCE OF MOLD IN THIS PROP & IS NOT LIABLE FOR HARMFUL EFFECTS.

(Walker Declaration ¶ 19).

On August 11, 2004, MCB received bids on the Property from Plaintiff Alin Dragoiu and from Cathy H.T. Brown. (Walker Declaration at ¶ 20 and Exhibit L). MCB accepted the bid of $140,000.00 from Brown. (Walker Declaration at ¶ 20). Brown then requested that the bid be cancelled after an inspection found that water sat in the basement and that all wood and drywall had to be removed. (Walker Declaration at ¶ 21). MCB cancelled the bid and relisted the Property for $130,000.00. (Walker Declaration at ¶ 21-22).

On August 29, 2004, Plaintiff Alin Dragoiu signed a purchase agreement, and on August 30, 2004, MCB provisionally accepted the bid of $138,000.00 from Plaintiff Alin Dragoiu. (Walker Declaration at ¶ 23). Alin Dragoiu also signed and executed the Radon Gas and Mold Notice and Release Agreement ("release agreement") on August 29, 2004, which provides:

> **PURCHASERS ARE HEREBY NOTIFIED AND UNDERSTAND THAT RADON GAS AND SOME MOLDS HAVE THE POTENTIAL TO CAUSE SERIOUS HEALTH PROBLEMS.**
>
> Purchaser acknowledges and accepts that the HUD-owned property described above (the "Property") is being offered for sale '**AS IS'** with no representations as to the condition of the Property. The Secretary of the U.S. Department of Housing and Urban Development, his/her officers, employees, agents, successors and assignee (the "Seller") and Michaelson, Connor & Boul, Inc. an independent management and marketing contractor ("M&M Contractor") to the Seller, have no knowledge of radon or mold in, on, or around the Property other than what may have already been described on the web site of the Seller or M & M Contractor or otherwise made available to Purchaser by the Seller or M & M Contractor.

. . .

> Purchaser represents and warrants that Purchaser has not relied on the accuracy or completeness of any representations that have been made by the Seller and/or M & M Contractor as to the presence of radon or mold and that the Purchaser has not relied on the Seller's or M & M Contractor's failure to provide information regarding the presence or effects of any radon or mold found on the Property.
>
> Real Estate Brokers and Agents are not generally qualified to advise purchasers on radon or mold treatment or its health and safety risks. **PURCHASERS ARE ENCOURAGED TO OBTAIN THE SERVICES OF A QUALIFIED AND EXPERIENCED PROFESSIONAL TO CONDUCT INSPECTIONS AND TESTS REGARDING RADON AND MOLD PRIOR TO CLOSING.** Purchasers are hereby notified and agree that they are solely responsible for any required remediation and/or resulting damages, including, but not limited to, any effects on health, due to radon or mold in, on or around the property.
>
> In consideration of the sale of the Property to the undersigned Purchaser, Purchaser does hereby release, indemnify, hold harmless and forever discharge the Seller, as owner of the Property and separately, M & M Contractor, as the independent contractor responsible for maintaining and marketing the Property, and its officers, employees, agents, successors and assigns, from any and all claims, liabilities, or causes of action of any kind that the Purchaser may now have or at any time in the future may have against the Seller and/or M & M Contractor resulting from the presence of radon or mold in, on or around the Property.
>
> Purchaser has been given the opportunity to review this Release Agreement with Purchaser's attorney or other representatives of Purchaser's choosing, and hereby acknowledges reading and understanding this Release. Purchaser also understands that the promises, representations and warranties made by Purchaser in this Release are a material inducement for Seller entering into the contract to sell the Property to Purchaser.

(Walker Declaration at ¶ 30-33, Exhibit V) (bold and capitalization in original).[1]

MCB issued the Owner Occupant Bid Acceptance Notification to Alin Dragoiu's broker on August 30, 2004 and forwarded the sales contract package. (Walker Declaration at ¶ 24). Upon its receipt and

[1] This release also provides a basis for dismissal of the action, although it is more appropriately brought as a summary judgment under Rule 56, and therefore the Defendant does not raise this complete defense at this time.

review of the returned sales contract package, MCB faxed a correction request to the broker on September 2, 2004. (Walker Declaration at ¶ 24).

On September 10, 2004, MCB, on behalf of HUD, and Alin Dragoiu, on behalf of Alin and Monique Dragoiu as joint tenants with rights of survivorship, entered into a sales contract as to the "as is" sale of the 2361 Marwood Street property. (Walker Declaration at ¶ 25, Exhibit U). Paragraph 13 of this Sales Contract states that "[t]his contract is subject to the Conditions of the Sale . . . which are incorporated herein and made part of this contract." (Walker Declaration at ¶ 26, Exhibit U). Paragraph 13(B) of these Conditions of Sale states the following:

> Seller makes no representations or warranties concerning the condition of the property, including but not limited to mechanical systems, dry basement, foundation, structural, or compliance with code, zoning or building requirements and will make no repairs to the property after execution of this contract. Purchaser understands that regardless of whether the property is being financed with an FHA-insured mortgage, Seller does not guarantee or warrant that the property is free of visible or hidden structural defects, termite damage, lead-based paint, or any other condition that may render the property uninhabitable or otherwise unusable. Purchaser acknowledges responsibility for taking such action as it believes necessary to satisfy itself that the property is in a condition acceptable to it, of laws, regulations and ordinances affecting the property, and agrees to accept the property in the condition existing on the date of this contract. It is important for Purchaser to have a home inspection performed on the property in order to identify any possible defects.

(Walker Declaration at ¶ 26, Exhibit U).

Before proceeding to the closing, Plaintiffs hired their own home inspector, Russ Dzierba of Russ's Home Inspection Service, LLC in Waterford, Michigan, to perform a home inspection. (Friedman Declaration, ¶ 3-7). That inspection took place on September 17, 2004, more than one month prior to the October 21, 2004 closing. (Friedman Declaration, ¶ 3-7). According to the bill, Plaintiff's home inspection included a written report and a mold sample. HUD has not been provided with a copy of the Plaintiff's home inspection report or the results of Mr. Dzierba's mold sample.

The closing on the sale of the 2361 Marwood Street property to Alin and Monique Dragoiu occurred on October 21, 2004. (Walker Declaration ¶ 37). After the closing, the Plaintiffs hired an inspector to perform another inspection of the Property, and on December 28, 2004 and January 13, 2005, such results were provided to the Plaintiffs. (D'Arpino Declaration at ¶5(C)). HUD did not receive any complaints regarding the Property from Plaintiffs in the period from the closing date through September 2008. (Walker Declaration at ¶ 40; D'Arpino Declaration at ¶ 5). HUD's property file does include copies of a series of electronic messages from Monique Dragoiu to various HUD employees beginning on October 10, 2008. (Walker Declaration at 41; D'Arpino Declaration at ¶ 5(A) and (B)). These electronic messages include an electronic message dated October 10, 2008, to HUD's CHI Webmanager that was forwarded to the staff at the Real Estate Owned (REO) Division of the Philadelphia Home Ownership Center (HOC) on October 10, 2008, and then internally assigned to Elizabeth Williams on October 14, 2008, and an electronic message dated October 15, 2008, from Monique Dragoiu to Elizabeth Williams forwarding a cover letter dated October 14, 2008, to Warren Friedman, Senior Advisor to the Director of the Office of Healthy Homes and Lead Hazard Control ("OHHLHC") of HUD. (Walker Declaration at ¶ 41; D'Arpino Declaration at ¶ 5). The REO staff retrieved the property file from the FRC upon receipt of these electronic messages, had discussions with the OHHLHC staff, and ultimately deferred to OHHLHC and Warren Friedman for response to the October 2008 electronic messages. (Walker Declaration at ¶ 42; Friedman Declaration at ¶ 2).

Plaintiff Monique Dragoiu claims that she sent a letter of intent to HUD on February 25, 2009, outlining a proposed settlement for $500,000 in damages and requiring Freddie Mac repurchase the house (original Complaint, docket 1 at 16-19 of 50). On March 29, 2009, attorney Christopher Bowman sent a

letter to HUD seeking settlement for $200,000 (original Complaint docket 1 at 7-15 of 50). On May 14, 2009, Plaintiffs filed the Form 95 Administrative Claim (original Complaint, docket 1 at 5-6 of 50).

III. PROCEDURAL HISTORY

On June 25, 2009, Plaintiff filed a complaint in this Court *(Monique Dragoiu v. HUD*, Case No. 2:09-cv-12454). This Court dismissed, based on Plaintiff's failure to exhaust administrative remedies. In essence, this Court found that Plaintiff's February 2009 letter and March 2009 demand letter amounted to a "claim presentment," but that Plaintiff failed to exhaust her administrative remedies with respect to those letters by failing to wait for either the denial of the claim by HUD or the six month period after presentment that would constitute denial for purposes of filing a civil action. Because subject matter jurisdiction was lacking at the time the 2009 complaint was filed, it was dismissed without prejudice. *(Monique Dragoiu v. HUD*, Case No. 2:09-cv-12454 Order of March 29, 2010, at 7, *citing United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 519 (6th Cir. 2009).) At no time in that case did the Plaintiff, Monique Dragoiu, raise the argument that a claim was filed before the February 25, 2009, letter.

On May 10, 2010, Plaintiffs filed the instant action. The initial complaint named HUD as the defendant and claimed that it was liable under the Federal Tort Claims Act (FTCA) based on fraudulent concealment. The United States moved to dismiss the complaint based on the naming of an agency, and not the United States, as the defendant, and based on the misrepresentation exception to the FTCA's waiver of sovereign immunity. The Court did not address the misrepresentation claim, but allowed plaintiff to file an amended complaint naming the United States as the defendant. On May 19, 2011, Plaintiffs filed a Second Amended Complaint, alleging that the United States was liable under the FTCA based on nuisance and trespass, as well as violations of the 5th and 14th Amendments. The United States moved to dismiss the Second Amended Complaint based on Plaintiffs' failure to present an administrative claim

within two years of accrual of the claim, as required by the FTCA, and the Court's lack of subject matter jurisdiction on the Constitutional claims. Plaintiffs obtained counsel, and at a scheduling conference with the Magistrate Judge, the parties withdrew all outstanding pleadings and motions, without prejudice, and Plaintiffs' counsel filed this Third Amended Complaint under the FTCA, alleging negligence, revocation, and declaratory judgment. This motion is to dismiss the Third Amended Complaint.

IV. STATUTORY AUTHORITY

The doctrine of sovereign immunity shields the government from suit. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 259 (1999). The doctrine of sovereign immunity is jurisdictional in nature, *United States v. Mitchell*, 463 U.S. 206, 212 (1983); thus, a complaint brought against the United States is subject to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction unless the plaintiff can show a waiver of sovereign immunity. *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995)(the party invoking the jurisdiction of a federal court carries the burden of proving its existence), *cert. denied*, 515 U.S. 1144 (1995).

In order to show such waiver, a plaintiff must identify a specific statutory provision that waives the government's sovereign immunity from suit. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity by the federal government must be "unequivocally expressed" in statutory text and will not be implied. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). Even when Congress enacts a statute that waives federal sovereign immunity in some circumstances, such a waiver must be construed "strictly in favor of the sovereign" and "not enlarge the waiver 'beyond what the language requires'." *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (citation omitted); *see also Lane v. Pena*, 518 U.S. at 192; *United States v. Williams*, 514 U.S. 527, 531 (1995) (when confronted with

a purported waiver of federal sovereign immunity, the court will "construe ambiguities in favor of immunity").

A. Waiver of Sovereign Immunity Under The Tucker Act

A waiver of sovereign immunity for a contract claim is found in the Tucker Act, which consists of two separate statutes, 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1491(a)(1). The Tucker Act does not create any substantive right to recover money from the United States, but is a waiver of sovereign immunity for claims specified in the Act. The Tucker Act grants the United States Court of Federal Claims jurisdiction over contract claims (28 U.S.C. § 1491(a)(1)), and grants the federal district courts concurrent jurisdiction over such claims that do not exceed $10,000.00. 28 U.S.C. § 1346(a)(2).

B. Waiver of Sovereign Immunity Under The Federal Torts Claims Act

The FTCA, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, provides a limited waiver of sovereign immunity in tort, allowing a plaintiff to bring a cause of action:

> against the United States for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

The FTCA imposes two filing deadlines on claimants:

> A tort claim against the United States shall be forever barred unless it is *presented in writing to the appropriate federal agency within two years after such claim accrues* or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (emphasis added). Thus, a plaintiff must file an administrative claim with the appropriate federal agency within two years of the time the claim accrues and begin an action within six

months of the mailing of the notice of final denial of the claim. *Id.* If a plaintiff fails to meet either deadline, the claim "shall be forever barred."

The FTCA waiver of sovereign immunity is limited in scope by definitions and exceptions, three of which apply to this Third Amended Complaint. First, the definition of "employee of the government", which is the term used in 28 U.S.C. § 1346(b)(1) ("... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . ."), is defined as (1) officers or employees of any federal agency . . . . 28 U.S.C. § 2671. The term "Federal Agency" is defined as including:

> the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States.*

28 U.S.C. § 2671 (emphasis added).

The FTCA waiver of sovereign immunity is limited by exceptions, two of which apply to this motion, the discretionary function exception and the misrepresentation exception, which provide:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit,* or interference with contract rights

28 U.S.C. § 2680(a),(h)(emphasis added).

V. ARGUMENT

A. Plaintiffs' Claims Sound In Contract, Over Which This Court Does Not Have Subject Matter Jurisdiction

The Plaintiffs' claims arise out of the purchase of the Property. Aside from this contractual relationship, there is no other relationship between the Plaintiffs and the Defendant, and no duties are owed by the Defendant to the Plaintiffs outside of the contractual relationship. No tort action will lie where fraud and misrepresentation claims essentially restate defendant's alleged contractual obligations and no duty exists that is separate and distinct from the defendant's contractual obligations. *Colombo v. Moore*, 2011 WL 2555394 (Mich. App. June 28, 2011), *citing Fultz v. Union-Commerce Assoc.*, 470 Mich. 460, 467 (2004). While Plaintiffs attempt to style their claims in tort, the naming of the claim does not change a contract claim into a tort claim. Indeed, Counts II and III of the Third Amended Complaint seek contract damages in the form of contract revocation and a declaration that the sale transaction is null and void, remedies that are not available under the FTCA (see discussion *infra*, section F).

Because Plaintiffs seek "an amount in excess of $685,000.00," which is clearly over the $10,000.00 concurrent jurisdiction of this Court, their claims fall under the waiver of sovereign immunity in the Tucker Act, and therefore are within the exclusive jurisdiction of the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). As such, the claims must be dismissed from this Court for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1).

B. If Plaintiffs' Claims Are Found to Be In Tort, the Claims Are Barred by the Misrepresentation Exception to the Federal Tort Claims Act

Even assuming the Plaintiffs' claims can be construed as sounding in tort, the claims are based on an alleged misrepresentation of the condition of the property and, as such, are barred by the misrepresentation exception to the waiver of sovereign immunity under the FTCA. Section 2680(h) of the

FTCA states that the waiver of sovereign immunity in section 1346(b) shall not apply to "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit*, or interference with contract rights." 28 U.S.C. § 2680(h) (emphasis added). If the conduct alleged in the complaint falls within one of these statutory exceptions, the court lacks subject matter jurisdiction over the action. *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

With respect to misrepresentation, the exception includes claims arising out of negligent, as well as willful, misrepresentation. *United States v. Neustadt*, 366 U.S. 696, 702 (1961). It applies equally to affirmative or implied misstatements and negligent omissions. *Green v. United States*, 629 F.2d 581, 584 (9th Cir. 1980). The fact that federal employees may be under a specific statutory or regulatory duty to provide the information does not render the exception inapplicable. *Neustadt*, 366 U.S. at 710-11; *Green,* 629 F.2d at 584. *See, generally*, *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991); *Spiroff v. United States*, 95 F. Supp.2d 673, 678 (E.D. Mich. 2000); *Bruce v. United States Army*, 508 F. Supp. 962, 966 (E.D. Mich. 1981).

Plaintiffs' complaint alleges that "HUD and its employees and/or agents were negligent and/or committed wrongful conduct and breached their duties to Plaintiffs in one or more of the following ways:

a. Failure to inform Plaintiffs of the water infiltration problem and subsequent finding of mold and mold related issues;

b. Failure to inform Plaintiffs through the website or other means of the water infiltration problem and subsequent finding of mold, structural issues, and mold related issues;

c. Affirmatively stating that HUD had no knowledge of any issues relating to mold or related claims in the closing documents;

d. Failing to provide notice to Plaintiffs of the remediation work performed by HUD and/or its contractors prior to the Property being put up for sale, while it was being put up for sale, and prior to the closing of the Property;

e. Cleaning the Property and removing debris from the Property that acted to hide or otherwise conceal the water infiltration problem from Plaintiffs;

f. Failing to provide notice to Plaintiffs that their contractor informed them that the Property had significant mold or potential mold problems;

g. Failing to remediate the Property to the standards as set forth in HUD's guidelines and procedures for home to be subsequently sold;

h. Failing to provide a property disposition sheet as required through the property disposition insured sales program as required; and

i. Other acts of negligence that become known during discovery."

Third Amended Complaint, at ¶ 43.

In an action on all fours with the case at bar, the United States District Court for the District of Rhode Island found that a negligence claim brought against the United States is essentially a failure to warn claim barred by the misrepresentation exception to the FTCA. In *Wallace v. United States*, 2004 WL 63503 (D.R.I. 2004), the court granted the United States' motion to dismiss the complaint alleging that the United States was negligent in failing to warn the plaintiff of the presence of lead paint in the home. The Court relied on *Mullens v. United States*, 976 F.2d 724 (1st Cir. 1992)(Unpublished Opinion), *aff'g Mullens v. United States*, 785 F. Supp. 216 (D. Me. 1992), in dismissing the action based on the misrepresentation exception. In both *Mullens* and *Wallace*, the plaintiffs filed suit against the United States for negligence and negligent misrepresentation contending that the United States failed to inspect the home, and failed to warn the plaintiffs of the presence of lead paint. In both cases, the complaints were dismissed because the crux of the negligence claims was their reliance on the failure to notify them that the home contained lead-based paint.

Likewise, the crux of Plaintiffs' claim in this action is the alleged reliance on HUD's failure to notify the purchaser that the home may have mold. For the same reasons as in *Mullens* and *Wallace*, this complaint falls within the misrepresentation exception and must be dismissed.

It is well-settled that where, as here, the gravamen of the complaint is a failure to provide information, the case is barred by § 2680(h). *See, e.g.*, *JBP Acquisitions, LP v. United States*, 224 F.3d 1260, 1265-66 (11th Cir. 2000) (explaining that "the failure to communicate, as well as direct communication, is encompassed by the misrepresentation exception"); *Muniz Rivera v. United States*, 204 F. Supp.2d 305, 310-11 (D.P.R. 2002) (the misrepresentation exception "applies to more than mere affirmative statements; a claim based on a failure to warn or to communicate will also be barred."), *aff'd*, 326 F.3d 8 (1st Cir. 2003), *cert. denied*, 540 U.S. 873 (2003).

The gravamen of the complaint alleges misrepresentation by the United States, which falls within the misrepresentation exception to the FTCA. As such, it must be dismissed pursuant to Fed.R.Civ.P. 12(b)(1), as Plaintiffs have failed to allege a waiver of sovereign immunity.

C. Plaintiffs Failed to Bring Their Administrative Action Within Two Years of Accrual of the Claim

Even if Plaintiffs could show that their claims are not within the Tucker Act and are not barred by the FTCA's misrepresentation exception, their Third Amended Complaint would still be barred by their failure to submit a timely administrative claim. Plaintiffs have failed to meet the first filing deadline of the FTCA, that the claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues. See 28 U.S.C. § 2401(b). The purchase agreement was signed on August 29, 2004, Plaintiffs had the home inspected on September 17, 2004, including a mold sample, and the closing occurred on October 21, 2004. The lab reports on which Plaintiffs appear to rely in alleging that they were made aware that there was mold in the home were

provided to Plaintiffs on December 28, 2004, and January 13, 2005. Plaintiffs, however, did not file their Form 95 administrative claim until more than four years later, on May 14, 2009.

Even using the two letters sent in February and March 2009 as the claim presentments, as this Court found in the prior action filed by Plaintiff Monique Dragoiu, these dates were more than four years after the closing on the property and the lab results. Even assuming that the first document presented to the Department of Housing and Urban Development, an email from Monique Dragoiu to CHI Webmanager, Attention Larry Anderson, could constitute a claim presentment,[2] this was on October 10, 2008, still almost four years after the closing and the results of lab reports obtained by Plaintiffs.[3]

Thus, Plaintiffs have failed to present an administrative claim to the agency within the time prescribed by the statute. This requirement is jurisdictional, *Rogers v. United States*, 675 F.2d 123, 124 (6th Cir. 1982). Consequently, the complaint should be dismissed on this ground.

D. This Court Lacks Jurisdiction Over Plaintiffs' Claims Because HUD Delegated Responsibility For Managing, Marketing, And Selling The Property To A Contractor

Even if Plaintiffs could show that their claims are not within the Tucker Act and are not barred by the FTCA's misrepresentation exception and time requirements for claim presentment, they would still be barred by the contractor exception. It is well-established that the United States is not liable for the torts of its contractors. See FTCA, 28 U.S.C. § 2671; *United States v. Orleans*, 425 U.S. 807, 813-16 (1976).

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[2] The United States does not concede that anything prior to the May 14, 2009, administrative claim constitutes a presentment, but for purposes of this motion, views all documents in the light most favorable to the Plaintiff.

[3] There is a portion of a handwritten document (appearing to be the last two pages of a document) within the materials that were sent by Plaintiff to Mr. Friedman. On those two pages is a date of 2/16/05 written in the corner. There is no evidence that this document was sent to HUD, and this document did not appear in any files of HUD independent of the October 2008 documents. (D'Arpino Declaration ¶ 5).

Moreover, "'[t]he law is clear that the government may delegate its safety responsibilities to independent contractors in the absence of federal laws or policies restricting it from doing so.'" *Hall v. United States*, 1998 U.S. App. LEXIS 10762 at *10 (6th Cir. May 27, 1998); *see also Lee v. United States*, 1990 U.S. App. LEXIS 39 at *2 (6th Cir. Jan. 2, 1990) (where independent contractor maintained control and authority over facility, government was not liable for torts committed by the contractor).

The principle that the United States is not liable for the torts of independent contractors applies to HUD's contracts with real estate asset management companies. In administering the SFPDP, HUD "relies heavily on contractor-provided services." (Handbook 4310.5, Chapter 1, § 1-7, found at http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4310.5/index.cfm). In particular, HUD's Property Disposition Handbook provides: "Upon acquisition, properties are assigned to property managers, i.e., Real Estate Asset Managers (REAMS) …." Handbook 4310.5, Chapter 1, § 1-4 (A)(3). "Real Estate Asset Managers (REAMs) are responsible for providing day-to-day property management functions and ensuring that properties are maintained in a clean and presentable condition throughout HUD's ownership." *Id*., Chapter 1, § 1-5 (B)(5). In addition to being responsible for day-to-day management, REAMs' responsibilities include the following: "Inspect properties, remove imminent hazards and prepare applicable reports. Secure, preserve and protect property." Handbook, Chapter 1, Matrix of Responsibilities; Chapter 3, § 3-2.

Federal courts have regularly held that the management contractors hired by HUD to maintain, manage, and dispose of properties are independent contractors and that HUD is not liable for its contractors' negligence. In *Tisdale v. United States*, 62 F.3d 1367 (11th Cir. 1995), the plaintiff, whose son was injured when a staircase collapsed at a property owned by HUD and maintained by HUD's contractor, alleged, *inter alia*, that HUD was negligent in maintaining the property. Under the terms of the contract, the

contractor agreed to arrange for and supervise the management, rehabilitation, and maintenance of certain properties acquired by HUD. *Id*. at 1369. The court found that the contractor was an independent contractor because "the very purpose of [a HUD property management contract] is to turn over the day-to-day management, rehabilitation, and supervision of certain properties to [contractors]." *Id*. at 1371. "HUD's primary objective is to dispose of the properties covered by the [property management] contracts; HUD owns far too many of these properties, and it is too insufficiently staffed to properly manage all of them itself." *Id*. Because the contractor had "day-to-day" responsibility for management and was therefore independent, HUD was not responsible for any negligent acts that it may have committed. *Id*. See also, *Martin v. U.S. Department of Housing and Urban Dev'm*, 1996 U.S. Dist. LEXIS 2429 (E.D. La., Feb. 27, 1996)(residents of rental property owned by HUD and managed by HUD's property management contractor alleged that both HUD and the contractor were negligent in failing to prevent carbon monoxide from leaking into their apartment; court looked at the "degree of control retained by the United States."); *Narvaez v. United States, et al.*, 2007 U.S. Dist. LEXIS 4113 (E.D. N.Y. Jan. 18, 2007) (HUD's property management contractor was independent where the contractor had responsibility for day-to-day physical operations, even though government retained the right to inspect and broad supervisory powers to control contractual compliance); *Smith v. Steffens, et al.*, 429 F. Supp.2d 719 (E.D. Pa. 2006) (where HUD's marketing and management contractor was responsible for maintaining the property, claims against the United States were dismissed); *Conner v. United States*, 967 F. Supp. 894, 898 (M.D. La. 1997) (district court agrees with "courts around the country [that] have found [HUD's] property managers, such as [the contractor in this case] were independent contractors under similar circumstances").

Similarly, here the contractor with whom HUD contracted to manage and market the Plaintiffs' property was an independent contractor. Several years before the sale of the property at issue to the

Plaintiffs, HUD entered into a Management and Marketing Services Contract ("MCB Contract") with a firm called Michaelson, Connor and Boul ("MCB") for the management, marketing and disposition of the single-family properties located within the jurisdiction of the Philadelphia Homeownership Center of HUD, which includes Michigan. (Walker Declaration ¶¶ 5-7). Under the MCB Contract, MCB is responsible for, among other things, reviewing and approving preservation and protection requests from insured lenders, inspecting properties, and taking all actions necessary to preserve, protect, and maintain each property in a presentable condition at all times. (Walker Declaration ¶ 8 and its Exhibit A, § C-2, ¶¶ V(A)(1)-(3); V(B)(5); and § C-6). MCB's responsibilities also included, *inter alia*: (1) protecting the property from damage from the elements; (2) removal and proper disposal of all interior and exterior debris; (3) winterization of all operating systems and equipment; (4) correction of any condition which presents an immediate health or safety hazard to the public or to the property within 24 hours of notification or discovery ; and (5) correction of any factors which may cause deterioration of the property. (Walker Declaration Exhibit A § C-2, ¶ V(B)(5)). Pursuant to the MCB Contract, MCB was responsible for all of the day-to-day management matters pertaining to Plaintiffs' property from the time that the insured lender contacted HUD through the sale to the Plaintiffs. (Walker Declaration ¶ 9).

MCB's actions further show that it had day-to-day control over the Plaintiffs' property, that it was an independent contractor, and that it handled all of the tasks relating to the management, marketing and sale of the property. HUD acquired the property at 2361 Marwood Street on July 26, 2004. (Walker Declaration ¶ 15). Upon HUD's acquisition, the property was assigned to MCB for management, marketing and disposition. (Walker Declaration ¶ 16 Exhibit E). MCB arranged for a property appraisal and an initial property inspection. (Walker Declaration ¶ 16, Exhibits F, G). After obtaining the initial property inspection, MCB submitted a work order request to a company called ASD America on July 28, 2004 to

perform various tasks at the 2361 Marwood Street property, including cleaning and winterizing the property and replacing the sump pump. (Walker Declaration ¶ 17). Upon receipt of a Uniform Residential Appraisal Report, which noted that the property had general health and safety deficiencies which prevented it from meeting the FHA's MPS, MCB determined a list price of $130,000 for the property on August 6, 2004 and selected a listing broker, Future Real Estate ("Future"). (Walker Declaration ¶ 18, 19, Exhibits I, J). On August 6, 2004, Future listed the 2361 Marwood Street property with an explicit disclaimer on its own behalf and on behalf of MCB: HOME SOLD AS IS. HUD WILL MAKE NO REPAIRS …. MCB & FUTURE MAKES [SIC] NO WARRANTY AS TO THE EXISTENCE OF MOLD IN THIS PROP & IS NOT LIABLE FOR HARMFUL EFFECTS." (Walker Declaration ¶ 19, Exhibit K). A few days later, on August 11, 2004, MCB provisionally accepted a bid of $140,000 submitted by a prospective purchaser named Cathy H.T. Brown. (Walker Declaration ¶ 20, Exhibits L, M). MCB subsequently cancelled this contract on August 21, 2004 at the request of the purchaser, Ms. Brown, who stated that her inspector had informed her that at least two feet of water had sat in the basement for quite a while and that all wood and drywall needed to be removed. (Walker Declaration ¶ Exhibit N). MCB cancelled Ms. Brown's sales contract, listing the reason for the cancellation as "Purchaser's Request." (Walker Declaration ¶ 21, Exhibit O). On August 27, 2004, MCB re-listed the 2361 Marwood Street property. (Walker Declaration ¶ 22, Exhibit P). Plaintiff Alin Dragoiu submitted a bid on August 29, 2004, and MCB provisionally accepted this bid on August 30, 2004. (Walker Declaration ¶ 23, Exhibits Q, R). MCB then handled all the arrangements concerning the closing of the sale on the 2361 Marwood Street property. (Walker Declaration ¶ 36-38, Exhibits X, Y, Z). Throughout its assignment, MCB did not seek instructions from HUD or approval by HUD on matters relating to the 2361 Marwood Street property. (Walker Declaration ¶ 39).

In sum, HUD relied entirely upon its contractor, MCB, to manage, market, and dispose of the Plaintiffs' property. HUD's policy of retaining an independent contractor to handle such properties under the SFPDP is not subject to a specific and mandatory regulation and, as HUD's Property Disposition Handbook makes clear, is subject to policy considerations, since HUD does not have the resources to itself manage and sell all the properties it acquires through foreclosure on HUD-insured loans. If there was any negligence involved in the sale of Plaintiffs' property, it was MCB's negligence, and the United States is not liable for its independent contractor's actions.[4]

E. This Court Lacks Jurisdiction Over Plaintiffs' Claims Because They Fall Within The Discretionary Function Exception To The FTCA's Limited Waiver Of Sovereign Immunity

Even if Plaintiffs could show that their claims are not within the Tucker Act and are not barred by the FTCA's misrepresentation exception, time requirements for claim presentment, and contractor exception, they would still be barred by the discretionary function exception. The discretionary function exception to the FTCA's waiver of sovereign immunity provides that immunity is retained for:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit . . . ." *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). In other words, the exception is

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[4] Nor may Plaintiffs avoid dismissal by arguing that HUD had a state-law non-delegable duty to supervise its contractor. It is well-settled that delegation of such safety functions to independent contractors is insulated from tort suit by the FTCA's discretionary function exception, discussed *infra*. *See Feyers v. United States*, 749 F.2d 1222, 1226-27 (6th Cir. 1984) and cases cited therein. *Accord In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 995-96 (9th Cir. 1987).

designed to prevent "judicial 'second-guessing'" of policy decisions made in the Executive Branch. *Sharp v. United States*, 401 F.3d 440, 443 (6th Cir. 2005) (*citing Varig Airlines*, 467 U.S. at 814); *Myslakowski v. United States,* 806 F.2d 94, 98 (6th Cir. 1986). The law in this Circuit is that "even the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made." *Myslakowski*, 806 F.2d at 97.

The Supreme Court has outlined a two-part test to determine whether the discretionary function exception applies in a given case. *See, e.g., Berkovitz v. United States*, 486 U.S. at 531, 536-37 (1988). First, to be discretionary within the meaning of the FTCA, the challenged governmental action(s) or omission(s) must involve an element of "judgment or choice." *Id*. at 536. In other words, for the exception to apply, the allegedly negligent act or failure to act must not have been violative of a mandatory statute, regulation, or policy that prescribed a specific course of action for a government employee to follow. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991) (*quoting Berkovitz* at 536); *Montez v. United States*, 359 F.3d 392, 395-96 (6th Cir. 2004). Second, to be protected by the discretionary function, the challenged conduct must be "susceptible to policy analysis." *Gaubert*, 499 U.S. at 322-23, 325. "The focus of [this] inquiry is not on the [government] agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Moreover, "when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Sharp*, 401 F.3d at 443 (quoting Gaubert, 499 U.S. at 324).

1. The HUD Actions At Issue Were Discretionary

In this case, HUD's sale of the single-family home located at 2361 Marwood Street, Waterford, Michigan to the Plaintiffs on or about October 21, 2004 was not subject to a specific and mandatory statute, regulation, or policy that constrained its discretion to sell it "as-is" or its discretion to implement a Mold Notice and Release Agreement advising purchasers that they were responsible for checking property that they intended to purchase for the presence of any harmful mold.

a. HUD Had Discretion To Sell The Property In "As-Is" Condition Without Repairs And Without Federal Mortgage Insurance

Section 204(g) of the National Housing Act ("NHA"), 12 U.S.C. § 1710(g), authorizes the Secretary of HUD to dispose of properties acquired by the Federal Housing Administration ("FHA"), a component agency of HUD, through foreclosure of an insured or Secretary-held mortgage or loan under the NHA. Under this authority, the Secretary has established the Single Family Property Disposition Program ("SFPDP"). Part 291 of Title 24 of the Code of Federal Regulations implements this program.

The purpose of the SFPDP is "to dispose of properties in a manner that expands homeownership opportunities, strengthens neighborhoods and communities, and ensures a maximum return to the mortgage insurance funds." 24 C.F.R. § 291.1(a)(2)(2004). In selling individual properties under the SFPDP, "HUD may, in its *discretion*, on a case-by-case basis or as a regular course of business, choose from among [several] methods of sale[.]" 24 C.F.R. § 291.90 [emphasis added]. One of the methods of sale that HUD has the discretion to use is the "competitive sale[] of individual properties to individual buyers." *Id*. at § 291.90(b). When HUD sells individual properties to individual buyers, the regulations provide that HUD may sell them in "as-is" condition in any one of three different categories: (1) with FHA mortgage insurance available if the property meets the Minimum Property Standards ("MPS") determined by the Secretary; (2) with FHA mortgage insurance available for a property that requires no more than $5,000 for repairs to meet the MPS; or (3) uninsured, where a property fails to meet the MPS and will not

meet the MPS with $5,000 or less spent on repairs. 24 C.F.R. § 291.100(c)(1)-(3). The regulation governing competitive sales of individual properties to individual buyers further permits HUD to "sell the properties on an 'as-is' basis, without repairs or warranties." 24 C.F.R. § 291.205. In sum, the regulations governing HUD's sale of individual properties under the SFPDP clearly accord HUD discretion to: select the method of sale; permit HUD to sell properties without offering federal mortgage insurance when HUD determines that the properties cannot meet the MPS with less than $5,000 in repairs; and enable HUD to sell such properties on an "as-is" basis "without repairs or warranties."

b. In Accordance With Its Discretion To Sell Properties In "As-Is" Condition, HUD Issued A Notice and Release Agreement Advising Prospective Purchasers to Check Properties For The Existence of Mold

In addition to having the discretion as to how to dispose of individual properties and the right to sell them in "as-is" condition, HUD was, at the time of sale of the Dragoiu property, not subject to any specific and mandatory statute, regulation, or policy that governed the presence of mold in the houses that it sold. First of all, the regulations governing the SFPDP do not impose any mandatory and specific obligation pertaining to mold. Part 291 states that sales under the SFPDP are subject to certain environmental requirements in 24 C.F.R. Part 50 "as applicable." However, these requirements are not applicable to the sale of the Dragoiu home, because they are limited to HUD affirmative "policy actions" and "project actions" under the National Environmental Policy Act ("NEPA"), 24 C.F.R. § 50.1(d). These requirements impose only limited standards on the subjects of historic preservation, floodplains, and airport runway clearance zones, 24 C.F.R. § 50.4, and, significantly, repairs to existing one-to-four unit residential homes are categorically excluded from the NEPA requirements, 24 C.F.R. § 50.20(a)(2)(I). Moreover, the regulations in Part 50 do not address, in any specific and mandatory regulation, the presence of mold in individual homes. *See* 24 C.F.R. Part 50. HUD's "Property Disposition Handbook," which was issued on May 17,

1994, and which was effective when HUD sold the instant property to Plaintiffs, reiterates that HUD has the authority to sell properties on an uninsured basis when they do not meet either the MPS or the environmental requirements (floodplain or airport clearance restrictions). *See* www.hud.gov/offices/adm/hudclips /handbooks/hsgh /4310.5/index.cfm (Handbook 4310.5) (§ 10-10).

With respect to the subject of mold, several months before HUD closed on the October 2004 sale of the Plaintiffs' property, HUD, acting within its discretion to sell properties in "as-is" condition, issued a "Radon Gas and Mold Notice and Release Agreement" ("Release") which clearly placed the responsibility to check for the existence of mold on the prospective purchasers of HUD properties. *See* Notice: H2004-08 (issued May 28, 2004), Walker Declaration ¶ 34, Exhibit W). The Notice stated that HUD was "requiring that the attached agreement be included with all sales contracts to ensure that all purchasers are aware that radon gas and mold may cause health problems." *Id*. The Release became effective at the end of June 2004, two months before Plaintiffs signed their contract. The release signed by Alin Dragoiu is the same release that is attached to this notice. HUD stated that it had issued the Release for two reasons: first, because it sought to inform "potential purchasers of HUD-acquired single family properties that radon gas and some molds have the potential to cause serious health problems," and, second, to mitigate any potential liability to HUD and its contractors "by ensuring that potential purchasers of HUD-acquired single family properties have received the cautionary information in the release agreement." (Walker Declaration ¶ 34, Exhibit W).

The substance of the Release makes clear that the purchaser, not HUD, is solely responsible for any issues relating to mold. In the very first sentence of the Release, it states: "Purchaser acknowledges and accepts that the HUD-owned property described above (the "Property") is being offered for sale "AS IS" with no representations as to the condition of the Property." (Walker Declaration ¶ 34, Exhibit W). The

Notice further states that HUD and its property management and marketing contractor ("M & M Contractor") "have no knowledge of radon or mold in, on, or around the Property other than what may have already been described on the web site of the Seller or M & M Contractor or otherwise made available to Purchaser by the Seller or M & M Contractor." *Id*. To make it crystal clear that the purchaser may not rely upon any representations by HUD or its contractor regarding mold, the Notice states:

> Purchaser represents and warrants that Purchaser has not relied on the accuracy or completeness of any representation that have been made by the Seller and/or M & M Contractor as to the presence or radon or mold and that the Purchaser has not relied on the Seller's or M & M Contractor's failure to provide information regarding the presence or effects of any radon or mold found on the Property.

Id. The Release goes on to specifically warn, in highlighted language, purchasers that they should retain an experienced professional to inspect the property and test for mold:

> **PURCHASERS ARE ENCOURAGED TO OBTAIN THE SERVICES OF A QUALIFIED AND EXPERIENCED PROFESSIONAL TO CONDUCT INSPECTIONS AND TESTS REGARDING RADON AND MOLD PRIOR TO CLOSING.**

Id. Finally, the Release states that purchasers agree that "they are solely responsible for any required remediation and/or resulting damages, including, but not limited to, any effects on health, due to radon or mold in, on or around the property" and that they release all claims against HUD or its contractor "resulting from the presence of radon or mold in, on or around the Property." *Id*.

> c. The Plaintiffs Have Not Alleged A Mandatory And Specific Requirement That Would Remove HUD's Discretion To Sell The Property In "As-Is" Condition With The Mold Release, And, In Fact, The Plaintiffs Agreed To Purchase Their Home In "As-Is" Condition; They Signed The Mold Release Agreement; And They Proceeded With The Purchase After They Obtained Their Own Home Inspection, Which Included A "Mold Sample"

In this case, the Plaintiffs have not alleged a mandatory and specific requirement that would remove HUD's discretion to sell the property in "as-is" condition and to require the purchasers to sign the mold Release. *See* Plaintiffs' Verified Third Amended Complaint. In particular, while Plaintiffs cite to

HUD's property disposition program under 24 C.F.R. Part 291, they fail to point to any provision from those regulations that would bar HUD from selling individual properties under the SFPDP in "as-is" condition or from requiring purchasers to sign the mold Release. *Id*. at § 8. Indeed, the Plaintiffs' Third Amended Complaint itself makes no reference to the fact that the property was sold in "as-is" condition.

Far from alleging a specific and mandatory requirement that would vitiate HUD's discretion to sell the property "as-is," the documentary record in this case makes manifest that the Plaintiffs agreed to purchase the property "as-is," signed the mold Release, and went ahead with the closing after obtaining their own home inspection that included a test for mold. First, the property was in fact sold in "as-is" condition, and the Plaintiffs accepted it in that condition. The listing agent's listing for the property makes clear that the home was being sold "as-is" and warned about the risk of mold. It stated, *inter alia*: "HOME SOLD AS IS[.] HUD WILL MAKE NO REPAIRS[.] … MCB [HUD's Contractor] and Future [the listing agent] MAKES [sic] NO WARRANTY AS TO THE EXISTENCE OF MOLD IN THIS PROP & IS [sic] NOT LIABLE FOR HARMFUL EFFECTS." (Walker Declaration ¶ 19, Exhibit K). Moreover, the contract which Plaintiffs signed on August 29, 2004 included a statement setting forth the "Conditions of Sale," which reinforced the nature of the "as-is" sale, stating, in pertinent part:

> *Seller makes no representations or warranties concerning the condition of the property, including but not limited to* mechanical systems, *dry basement*, foundation, structural, or compliance with code, zoning or building requirements and will make no repairs to the property after execution of this contract. Purchaser understands that regardless of whether the property is being financed with an FHA-insured mortgage, *Seller does not guarantee or warrant that the property is free of visible or hidden structural defects*, termite damage, lead-based paint, *or any other condition that may render the property uninhabitable or otherwise unusable*. *Purchaser* acknowledges responsibility for taking such action as it believes necessary to satisfy itself that the property is in a condition acceptable to it, of laws, regulations and ordinances affecting the property, and *agrees to accept the property in the condition existing on the date of this contract*. It is important for Purchaser to have a home inspection performed on the property in order to identify any possible defects.

(Walker Declaration ¶ 26, Exhibit U) (emphasis added). The Plaintiffs signed this attachment to their Contract, thereby agreeing to these Conditions of Sale. *Id*.

Second, the Plaintiffs signed the Radon Gas and Mold Notice and Release Agreement on August 29, 2004, the same day that they signed the contract to purchase the property. (Walker Declaration ¶ 29, Exhibit V). As noted earlier, the Release makes clear that HUD "makes no representations as to the condition of the Property" and the purchasers "agree that they are solely responsible for any required remediation and/or resulting damages, including, but not limited to, any effects on health, due to radon or mold in, on or around the property." *Id*.

Third, just as HUD's Release agreement advised them, the Plaintiffs actually did get their own home inspection before they closed on the purchase. On September 17, 2004, approximately three weeks after they signed the purchase contract and more than a month before the October 21, 2004 closing, Plaintiffs hired inspector Russ Dzierba of Russ's Home Inspection Service, LLC to perform an inspection of the property at 2361 Marwood Drive. (Friedman Declaration ¶¶ 2-6, Exhibit A). Mr. Dzierba's invoice to the Plaintiffs explicitly states that his inspection included a "mold sample," and the invoice lists the cost for the "mold sample" as being $50.00. *Id*. HUD does not have a copy of either Mr. Dzierba's inspection report to the Plaintiffs or the results of his "mold sample," but the important point is that, whatever the report said and the mold sample results were, the Plaintiffs did their own inspection, just as HUD's Release advised them to do, and then proceeded to close on the purchase of their home. Here, there was no mandatory and specific statute, regulation, or policy that would have removed HUD's discretion to sell the Plaintiffs' home in "as-is" condition and subject to the mold Release. Consequently, the first part of the FTCA's discretionary function analysis is satisfied in favor of the United States.

2. HUD's Decision To Sell The Plaintiffs' Property In "As-Is" Condition And To Place the Responsibility To Check For Mold Upon The Purchaser By Requiring The Mold Release Are Susceptible To Policy Analysis

Under the second part of the FTCA discretionary function analysis, the agency action(s) at issue must be "susceptible to policy analysis." *See, e.g., Gaubert*, 499 U.S. at 324-25. Under this prong, courts look "to see whether the conduct is 'of the kind that the discretionary function exception was designed to shield.'" *Sharp*, 401 F.3d at 441 (*quoting Gaubert*, 499 U.S. at 322-33). In looking at the nature of the conduct at issue, courts "keep in mind that 'the discretionary function exception was designed to prevent' courts from being required to 'second guess' the political, social, and economic judgments of an agency exercising its regulatory function." *Sharp*, 401 F.3d at 443 (*quoting Varig Airlines*, 467 U.S. at 820). Further, when the government is acting pursuant to a discretionary statute, regulation or guidelines under the first part of the test, there is a strong presumption that the conduct is grounded in the policies of that provision under the second part of the test. *Gaubert*, 499 U.S. at 324-25.

In this case, as noted earlier, the regulations in 24 C.F.R. Part 291 explicitly give HUD "discretion" to make a policy decision as to how to sell individual properties under the SFPDP. 24 C.F.R. § 291.90. One of the methods of sale that HUD has the discretion to use is the "competitive sale[] of individual properties to individual buyers." *Id*. at § 291.90(b). Moreover, when HUD chooses to sell individual properties to individual buyers, it has the authority to sell them on an "as-is" basis, and, in the case of properties which cannot meet the MPS without more than $5,000 being spent in repairs, it may sell them without provision for FHA insurance. 24 C.F.R. § 291.100(c)(1)-(3). Thus, under *Gaubert*, it must be presumed that HUD's acts are grounded in policy when exercising its discretion as to how to sell property. This conclusion is consistent with the goals of the SFPDP, which include "dispos[ing] of properties in a

manner that expands homeownership opportunities" and "ensur[ing] a maximum return to the mortgage insurance funds." 24 C.F.R. § 291.1(a)(2)(2004).

Moreover, in this Circuit, courts have made clear that decisions by the United States concerning the sale of property on an "as-is" basis are discretionary, and, more generally, that "[d]ecisions concerning the proper response to hazards are protected from tort liability by the discretionary function exception." *See Myslakowski*, 806 F.2d at 97; *Rosebush v. United States*, 119 F.3d 438, 443 (6th Cir. 1997). it is clear that HUD's decisions to sell the Plaintiffs' property in "as-is" condition and to place the responsibility for checking for mold upon purchasers are protected by the discretionary function exception.

F. Counts II and III of the Third Amended Complaint For Revocation and Declaratory Judgment Do Not State Causes of Action

Count II of the Third Amended Complaint asks this Court to issue an order permitting Plaintiffs to revoke the sale transaction and requiring Defendants to satisfy the mortgage and second mortgage on the Property and to compensate the Plaintiffs for the monies that they have spent attempt[ing] to correct the deficiencies in the Property and provide improvement to the property. This count is a request for relief from a contract claim, and is not a viable claim for relief under the FTCA, which is limited to money damages. *See* 28 U.S.C. § 1346(b). Likewise, Count III of the Third Amended Complaint seeks a declaratory judgment that "the sale transaction is null and void and require Defendants to satisfy the mortgage and second mortgage on the property and to compensate the Plaintiffs for the monies that they have spent attempt[ing] to correct the deficiencies in the property and provide improvement to the property." The FTCA is a waiver of sovereign immunity only for "money damages," and where Plaintiffs seek other types of relief, this Court lacks jurisdiction to accord it. *Talbert v. United States*, 932 F.2d 1064 (4th Cir. 1991). Thus, Counts II and III do not state claims for relief and, as such, should be dismissed.

VI. CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court dismiss the Third Amended Complaint.

Respectfully submitted,
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Dated: February 14, 2012

CERTIFICATION OF SERVICE

I hereby certify that on February 14, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Greg Meihn
gmeihn@foleymansfield.com

I further certify that I have mailed by U.S. mail, certified and return receipt requested, the paper to the following non-ECF participants:

none

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