IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DAVID MCCRAE AND BARBARA MCCRAE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 1:14-cv-00733**
	§	
PHH MORTGAGE	§	
	§	
Defendant	§	
	§	

DEFENDANT'S MOTION TO DISMISS

Pursuant to FEDERAL RULES OF CIVIL PROCEDURE 9 and 12(b)(6), PHH Mortgage Corporation, incorrectly named as PHH Mortgage, ("Defendant"), hereby submits its Motion to Dismiss David McCrae and Barbara McCrae (collectively "Plaintiffs")'s Amended Petition for Redress of Wrongful Foreclosure Action (the "Complaint") (Doc. No. 6) and states:

I. FACTUAL BACKGROUND

1. On or about October 30, 2001, David Anthony McCrae, III (the "Plaintiff-Debtor") sought and obtained a loan (the "Loan")[1] to purchase property located at 350 Cee Run, Bertram, Texas 78605 (the "Property"). Defendant acted as the mortgage servicer of the Loan.[2] Defendant posted the Property for a non-judicial foreclosure and in response, Plaintiff-Debtor sought relief under Chapter 13 of the U.S. Bankruptcy Code.

[1] *See* Complaint at pps. 8-9, ¶¶ 42-44.

[2] *See* Complaint at p. 9, ¶ 44.

2. On or about March 1, 2013, Plainitff-Debtor filed a voluntary petition for Chapter 13 Bankruptcy in the U.S. Bankruptcy Court for the Western District of Texas, Austin Division under petition number 13-10386-TMD (the "Bankruptcy").[3]

3. On or about March 15, 2013, Plaintiff-Debtor filed his schedules in the Bankruptcy (the "Schedules")[4]. Plaintiff-Debtor listed Defendant as a secured creditor.[5] Plaintiff-Debtor did not dispute Defendant's status as a secured creditor who held a lien against the Property.[6]

4. On or about June 24, 2013, Defendant filed its proof of claim in the Bankruptcy (the "Claim").[7] Defendant averred its secured claim was in the amount of $9,465.70, of which $1,466.01 was in arrearages, late fees, and charges.[8] Defendant also averred Plaintiff-Debtor made his last payment to Defendant on October 12, 2012.[9] Plaintiff-Debtor did not challenge the

[3] *See* Docket Sheet from the Bankruptcy attached hereto as **Exhibit "A"**. Because Plaintiffs referenced the Bankruptcy in the Complaint, the Court can consider this document without converting Defendant's Motion to Dismiss into a motion for summary judgment. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (noting with approval that various Circuits consider as part of the pleadings documents attached to a Defendant's motion to dismiss that are referred to in the complaint and are central to the Plaintiffs' claims). Additionally, the Court should take judicial notice of this exhibit because it is self-authenticating as a public record filed with the Clerk of the U.S. District Court for the Western District of Texas, Austin Division. *See Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011).

[4] *See* Schedules from the Bankruptcy attached hereto as **Exhibit "B"**. Against, because Plaintiffs' referenced the Bankruptcy in the Complaint, the Court can consider this document without converting this motion into a motion for summary judgment, and the Court should take judicial notice of this exhibit under the authorities set forth in note one above.

[5] *See* **Exhibit "B"** at p. 11.

[6] *See* **Exhibit "B"**.

[7] *See* Claim from the Bankruptcy attached hereto as **Exhibit "C"**. Against, because Plaintiffs' referenced the Bankruptcy in the Complaint, the Court can consider this document without converting this motion into a motion for summary judgment, and the Court should take judicial notice of this exhibit under the authorities set forth in note one above.

[8] *See* **Exhibit "C"** at p. 1.

[9] *See* **Exhibit "C"** at p. 4.

Claim.[10] Plaintiff-Debtor paid all sums Defendant asserted in the Claim and the Bankruptcy was closed on or about June 3, 2014.[11]

5. Plaintiff-Debtor has since paid his Loan in full and Defendant has released its lien upon the Property as of March 10, 2014.[12]

II. STANDARDS FOR DISMISSAL

A. Rule 12(b)(6) Standard.

6. To survive a Rule 12(b)(6) motion, a complaint must plead "enough facts to state a claim to relief that is plausible on its face."[13] In explaining this standard, the Court emphasized that a "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[14] "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[15] Plaintiff must demonstrate more than "a sheer possibility that a defendant has acted unlawfully."[16] Indeed, the "[f]actual allegations must be enough to raise a right to relief above the speculative level."[17] Plaintiffs fall far short of this standard.

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[10] *See* Complaint at p. 12, ¶ 45.

[11] *See* **Exhibit "A"**.

[12] *See* Complaint at p. 10, ¶ 46.

[13] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[14] *Id.* at 555.

[15] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557).

[16] *Id.*

[17] *Twombly*, 550 U.S. at 555.

B. Rule 9 Standard.

7. Plaintiffs' fraud claim does not meet the heightened pleading standard under FED. R. CIV. P. 9.[18] Plaintiffs do not identify the "who, what, when, where and how" of the alleged fraudulent acts, nor do they identify with any particularity the circumstances surrounding Defendant's alleged representation or failure to disclose, which they are required to do.[19] Instead, Plaintiffs merely assert:

> [Foreclosure counsel's] system is patently ridiculous, of fraudulent nature and design, and plainly criminal in intent.[20]

Such vague, conclusory statements do not satisfy the heightened pleading requirements under Rule 9(b) and therefore, dismissal of Plaintiffs' fraud claim is appropriate.

III. ARGUMENT AND AUTHORITIES

A. Plaintiffs are Judicially Estopped from Contesting the Amount of the Claim.

8. The doctrine of judicial estoppel is equitable in nature and can be invoked by a court to prevent a party from asserting a position in a legal proceeding inconsistent with a position taken in a previous proceeding.[21] A court should apply judicial estoppel if (1) the position of the party against which estoppel is sought is plainly inconsistent with its prior legal position; (2) the party against which estoppel is sought convinced a court to accept the prior position; and (3) the party did not act inadvertently.[22]

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[18] *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir.1994).

[19] *See U.S. ex rel Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

[20] *See* Complaint at p. 19, ¶ 64.

[21] *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012).

[22] *Vineyard v. BAC Home Loans Servicing, L.P.*, No. A-10-CV-482-Y, 2011 WL 8363481, *3 (W.D. Tex. Dec. 28, 2011) (citing *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005)).

9. The integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets and liabilities.[23] In *Richardson v. CitiMortgage, Inc.*, the Tyler Division of the Eastern District of Texas examined the preclusive effect of a debtor listing a lender as having a secured debt, and then challenging the debtor's capacity to enforce the same through a non-judicial foreclosure.[24]

10. In *Richardson*, the obligor, CitiMortgage, was listed as a secured creditor in the borrower's prior bankruptcy proceeding.[25] CitiMortgage argued that the debtor was judicially estopped from asserting CitiMortgage lacked capacity to foreclose on the subject property because he specifically listed CitiMortgage as a secured creditor in his bankruptcy schedules.[26] In holding that the debtor was judicially estopped from challenging CitiMortgage's capacity to foreclose, the *Richardson* court held:

> The Plaintiffs' position in this lawsuit is the opposite of the representations they made to the Bankruptcy Court, and they should not be allowed to advance such positions. They should not be allowed to "play fast and loose" with the courts in order to avoid foreclosure . . . As a matter of law, the Plaintiffs are judicially estopped from challenging the right of CitiMortgage to foreclose on the loan.[27]

11. In this matter, Defendant filed its Claim on June 24, 2013, and Plaintiff-Debtor did not challenge that Claim.[28] Plaintiff-Debtor also represented, under oath, that Defendant was a secured creditor, and in fact listed the amount of Defendant's secured claim as $9,000.00.[29] The position Plaintiffs now take in this matter – that Defendant "over charged" Plaintiffs – is

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[23] *Love*, 677 F.3d at 261.

[24] *Richardson v. CitiMortgage, Inc.*, No. 6:10-CV-119, 2010 WL 4818556, *5 (E.D. Tex. Nov. 22, 2010)

[25] *Id.* at *4.

[26] *Id.* at *5.

[27] *Id.*

[28] *See* **Exhibit "C"**; *see also* Complaint at p. 12, ¶ 45.

[29] *See* **Exhibit "B"** at p. 11.

inconsistent with the Plaintiff-Debtor's previous position in the Chapter 13 bankruptcy proceeding. As such, the Court can and should dismiss Plaintiffs' claims.[30]

B. Plaintiffs Lack Standing to Assert Their Claims As They Belong to the Bankruptcy Estate.

12. Plaintiffs' claims fail for the additional reason that Plaintiffs are not the proper plaintiff in this litigation as the claims they assert belong to the bankruptcy estate.[31]

13. The U.S. Bankruptcy Code provides that all of the debtor's assets, including causes of action belonging to the debtor at the commencement of the bankruptcy case, vest in the bankruptcy estate upon the filing of the bankruptcy petition.[32] Once an asset becomes part of the bankruptcy estate, all rights held by the debtor in the asset are extinguished unless the asset is "abandoned" by the trustee to the debtor.[33] "Thus, the trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed."[34]

14. A little over one month ago the Fifth Circuit examined such a proposition in the case of *Carroll v. JPMorgan Chase Bank*.[35] In *Carroll*, the debtor had filed for bankruptcy approximately four years prior to bringing suit against his mortgage servicer for breach of contract.[36] The mortgage servicer prevailed on its motion for summary judgment against the debtor because given his prior bankruptcy claim the debtor's cause of action belonged to the

[30] *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384-85 (5th Cir. 2008); *Vineyard*, 2011 WL 8363481, *4.

[31] *Carroll v. JPMorgan Chase Bank*, No. 13-31134, --- Fed.Appx. ---, 2014 WL 3661990, *2 (5th Cir. Jul. 10, 2014); *Vineyard*, 2011 WL 8363481, *4.

[32] *Kane*, 535 F.3d at 385; *see also* 11 U.S.C. § 541(a)(1).

[33] *Kane*, 535 F.3d at 385; *see also* 11 U.S.C. § 554.

[34] *Kane*, 535 F.3d at 385; *see also* 11 U.S.C. §§ 323, 541(a)(1).

[35] *Carroll v. JPMorgan Chase Bank*, No. 13-31134, --- Fed.Appx. ---, 2014 WL 3661990 (5th Cir. Jul. 10, 2014).

[36] *Id.* at 1.

bankruptcy estate.[37] The debtor appealed the grant of summary judgment against him and the Fifth Circuit affirmed the district court's ruling.[38] In doing so, the Fifth Circuit held:

> [T]he district court found that the Plaintiffs lacked standing because they were not the real party in interest to prosecute their claim for breach of contract. The district court reasoned that the trustee was the only party capable of bringing the claim because it accrued before the filing of their bankruptcy petition in 2008, had never been abandoned by the trustee, and was therefore part of the bankruptcy estate . . . we agree with the district court's conclusion and affirm its judgment.

15. Plaintiffs admit, and Defendant has shown, the Bankruptcy has been closed and that Defendant has been paid in full for the amount asserted in the Claim.[39] At the close of a bankruptcy case, property of the estate that is not abandoned by the trustee and that is not administered in the bankruptcy proceedings—including property that was never scheduled—remains the property of the bankruptcy estate.[40] If a debtor fails to schedule an asset, and the trustee later discovers it, the trustee may reopen the bankruptcy case to administer the asset on behalf of the creditors.[41] Thus, even where, as here, the bankruptcy case has been closed, the bankruptcy trustee remains the proper party to prosecute claims on behalf of the estate.[42]

16. Plaintiffs do not appear in any capacity on behalf of the bankruptcy trustee in this matter.[43] The bankruptcy trustee has not filed a motion to be substituted as the proper party in this cause. Unless and until the bankruptcy trustee formally abandons Plaintiffs' legal claims

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[37] *Id.*

[38] *Id.*

[39] *See* Complaint at p. 10, ¶ 46 & p. 11, ¶ 45; *see also* **Exhibit "A"**.

[40] *Kane*, 535 F.3d at 385; *see also* 11 U.S.C. § 554(d).

[41] *Kane*, 535 F.3d at 385; *see also* 11 U.S.C. § 350(b).

[42] *Vineyard*, 2011 WL 8363481, *4.

[43] Although Plaintiffs purport to appear on behalf of a putative class and as representatives of the Consumer Finance Protection Bureau, neither of the Plaintiffs are licensed attorneys are therefore cannot represent any other person or entity other than themselves in a *pro se* capacity. *See Davis v. City of Aransas Pass*, No. 2:13-CV-363, 2014 WL 2112701, *6 (S.D. Tex. May 20, 2014) (citing *Thomas v. Estelle*, 603 F.2d 488, 489 (5th Cir. 1979)); *Nationstar Mortg., LLC v. Washington*, No. 3:13-CV-2640-B, 2013 WL 5812867, *1 n.1 (N.D. Tex. Oct. 29, 2013).

against Defendant, the claims belong to the bankruptcy estate, and the Chapter 13 trustee is the proper party to prosecute these claims before this court.[44]

C. Plaintiffs Have Failed to State Any Claim Upon Which Relief May be Granted.

17. Assuming Plaintiffs' claims are not barred by judicial estoppel or lack of standing, they nonetheless fail to survive dismissal. Although not a model of clarity, Plaintiffs purport to assert causes of action in their Complaint for: (1) wrongful foreclosure; (2) common law fraud; (3) statutory fraud in a real estate transaction; (4) violations of the Fair Debt Collection Practices Act ("FDCPA"); and (5) violations of the Texas Debt Collections Act ("TDCA"). Plaintiffs strangely request injunctive relief to enjoin the foreclosure of the Property although there is no pending foreclosure, and Plaintiffs admit the Loan has been paid in full and Defendant has released its lien interest in the Property.

18. As Defendant will show, Plaintiffs have failed to state any viable claim under these purported causes of action and the Court must dismiss this baseless suit.

1. The wrongful foreclosure claim.

19. The elements of a claim for wrongful foreclosure are: (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price.[45]

20. Plaintiffs' wrongful foreclosure claim must be dismissed because Plaintiffs have not, nor can they, allege any foreclosure upon the Property has occurred. Under Texas law, a claim for wrongful foreclosure is premised upon a debtor's loss in possession of the property.[46]

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[44] *Carroll*, 2014 WL 3661990, *1.

[45] *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App. - Corpus Christi 2008, no pet.).

[46] *Peoples v. BAC Home Loans Servicing, L.P.*, No. 4:10-CV-489-A, 2011 WL 1107211 *4 (N.D. Tex. Mar. 25, 2011) (holding that under Texas law, loss of possession is required to state a claim for wrongful foreclosure); *Thomas v. EMC Mortgage Corp.*, No. 4:10-CV-861-A, 2011 WL 5880988 *5 (N.D. Tex. Nov. 23, 2011) (same).

Recovery under a claim for wrongful foreclosure is based upon the theory that the wrong committed resembles that of a conversion of personal property.[47] "Individuals never losing possession of the property cannot recover on a theory of wrongful foreclosure."[48] A mortgagor has sustained no compensable damage when his possession remains undisturbed.[49]

21. In this matter, Plaintiffs have not lost possession of the Property because no foreclosure has occurred. Indeed, Plaintiffs acknowledge they currently reside in the Property and in seek injunctive relief to enjoin a foreclosure of the Property even though they admit the Loan has been paid in full and Defendant has released any lienholder interest in the Property.[50] Therefore, Plaintiffs' wrongful foreclosure claim must be dismissed.[51]

2. The FDCPA and TDCA claims.

22. Plaintiffs fail to state a claim under the FDCPA for three independent reasons. First, Plaintiffs do not, nor can they, allege Defendant has foreclosed upon the Property. Additionally, Plaintiff-Debtor did not challenge the amount of Defendant's Claim in the Bankruptcy and the Loan has been paid in full. For these reasons alone, Plaintiffs' FDCPA claim must be dismissed.

23. Second, Defendant does not meet the definition of a "debt collector" under the statute. In order to bring a civil action under the FDCPA, Plaintiffs must first establish that Defendant is a "debt collector" as that term is defined by the statute.[52] "[T]he legislative history

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[47] *Owens v. Grimes*, 539 S.W.2d 387, 390 (Tex. App. – Tyler 1975, pet. denied).

[48] *John Hancock Mut. Life Ins. Co. v. Howard*, 85 S.W.2d 986, 988 (Tex. Civ. App. – Waco 1935, writ ref'd); *See Baker v. Countrywide Home Loans, Inc.*, No. 3:08-CV-916, 2009 WL 1810336 *4 (N.D. Tex. Jun. 24, 2009) (citing *Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App. – San Antonio 1998, no pet.)).

[49] *Peterson*, 980 S.W.2d at 823.

[50] *See* Complaint at p. 10, ¶ 46.

[51] *Barcenas v. Federal Home Loan Mortg. Corp.*, No. H-12-2466, 2013 WL 286250, at *7 (S.D. Tex. Jan. 24, 2013) (collecting cases).

[52] 15 U.S.C. § 1692k(a).

of [the FDCPA] indicates conclusively that a debt collector does not include the consumer's creditors . . ."[53], which in this case was previously Defendant.[54] Because Defendant is not a debt collector under the statute, Plaintiffs' FDCPA claim must be dismissed.[55]

24. Third, the act of foreclosure does not constitute "debt collection" under the statute. The FDPCA provides that only certain activities constitute debt collection under the statute. As a matter of law, "the activity of foreclosing on a property pursuant to a deed of trust is not the collection of debt within the meaning of the FDCPA."[56] As such, and even assuming the Property was foreclosed upon, Plaintiffs fail to state a claim under the FDCPA.

25. The TDCA also does not prevent a debt collector from "exercising or threatening to exercise a statutory or contractual right of seizure, repossession, or sale that does not require court proceedings."[57] Numerous Federal District Courts in Texas have affirmed this principle.[58]

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[53] *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (emphasis added); *Diessner v. Mortgage Electronic Registration Systems*, 618 F.Supp.2d 1184, 1188–89 (D. Ariz. 2009) (finding that mortgagees and their beneficiaries are not debt collectors subject to the Act); *Radford v. Wells Fargo Bank*, No. 10–00767, 2011 WL 1833020, at *15 (D. Haw. May 13, 2011) (original lender, transferee Wells Fargo, nominee MERS, and mortgage servicer are not "debt collectors" under FDCPA); *Kareem v. American Home Mortgage Servicing, Inc*., No. 3:10-CV-0762-B-BD, 2011 WL 1869419 *2 (N.D. Tex. Apr. 12, 2011); *Boles v. Moss Codillis, LLP*, No. SA-10-CV-1003-XR, 2011 WL 2618791, at *3 (W.D. Tex. Jul. 1, 2011); *Bagwell v. Countrywide Home Loans Servicing, L.P*., No. 3:09-CV-1358-P, 2011 WL 1120261 *3 (N.D. Tex. Mar. 24, 2011); *Shomer v. One West Bank, FSB*, No. 2:11-CV-00546-PMP-LRL, 2011 WL 2119987, at *3 (D. Nev. May 26, 2011).

[54] At no point in their Complaint to Plaintiffs alleged Defendant is not the creditor, and in fact confirmed as such in the Bankruptcy.

[55] *Mason v. Bank of America, N.A.*, No. 4:12-CV-650, 2014 WL 897781, *7 (E.D. Tex. Mar. 4, 2014).

[56] *Bittinger v. Wells Fargo Bank, N.A.*, 744 F.Supp.2d 619, 629 (S.D. Tex. 2010); *See Davis v. Farm Bureau Bank, FSB*, No. SA–07–CA–967–XR, 2008 WL 1924247, at *3 (W.D. Tex. April 30, 2008) (quoting *Williams v. Countrywide Home Loans, Inc.*, 504 F.Supp.2d 176, 190 (S.D. Tex. 2007)).

[57] TEX. FIN. CODE § 392.301(b)(3).

[58] *See e.g.*, *Green v. Bank of America, N.A.*, No. 4:13-CV-92, 2013 WL 6178499, at *8 (E.D. Tex. Nov. 25, 2013); *Simicek v. Wells Fargo Bank, N.A.*, No. H:12-1545, 2013 WL 5425126, at *3 (S.D. Tex. Sept. 26, 2013); *Starling v. JPMorgan Chase Bank, N.A.*, No. 3:13-CV-777-M-BN, 2013 WL 4494525, at *6 (N.D. Tex. Aug. 22, 2013); *Omrazeti v. Aurora Bank, FSB*, No. SA:12-CV-00730-DAE, 2013 WL 3242520, at *18 (W.D. Tex. Jun. 25, 2013); *Richardson v. Wells Fargo Bank, N.A.*, 873 F.Supp.2d 800, 815 (N.D. Tex. 2012) (granting summary judgment because "[f]oreclosure is not an action prohibited by law").

Rather, the TDCA prohibits a debt collector from "threatening to take an action prohibited by law."[59]

26. As set forth above, Defendant's Claim showed Plaintiff-Debtor was seriously delinquent on the Loan, and Plaintiff-Debtor failed to challenge this assertion in the Bankruptcy.[60] Because of this, Defendant was contractually authorized under the loan agreements to post the Property for foreclosure.[61] Moreover, no foreclosure occurred, and Plaintiffs admit the Loan has been paid in full and that Defendants have released any lienholder interest in the Property. Therefore, Plaintiffs have failed to state a claim under the TDCA.

3. The statutory fraud claim.

27. Plaintiffs' statutory fraud claim must be dismissed because, as a matter of law, misrepresentations made merely in connection with a loan, even one secured by real property, do not give rise to a statutory fraud claim.[62] Plaintiffs' statutory fraud claim is based solely on the creation and servicing of the Loan. Accordingly, the Court must dismiss Plaintiffs' claim.

4. The common law fraud claims.

28. Assuming *arguendo* Plaintiffs have satisfied Rule 9's heightened pleading requirement, their common law fraud claims must still be dismissed. The economic loss doctrine

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[59] TEX. FIN. CODE § 392.301(a)(8).

[60] *See* **Exhibit "C"**.

[61] *Mann v. Bank of America, N.A.*, No. 4-12-CV-2618, 2013 WL 5231482, at *5 (S.D. Tex. Sept. 16, 2013); *May v. Wells Fargo Bank, N.A.*, No. 4:11-CV-3516, 2013 WL 4647673, at *4 (S.D. Tex. Aug, 29, 2013); *Starling*, 2013 WL 4494525, at *6; *Jones v. Wells Fargo Bank, N.A.*, No. 4:12-CV-446, 2013 WL 4414321, at *12 (E.D. Tex. Aug. 13, 2013); *Voth v. Fed. Nat'l Morg. Ass'n*, No. 3-10-CV-2116-G-BD, 2011 WL 1897759, *4 (N.D. Tex. Apr. 22, 2011).

[62] *Massey v. JPMorgan Chase Bank, N.A.*, No. 4:12–CV–154–A, 2012 WL 3743493, at *8 (N.D. Tex. Aug. 29, 2012) ("Texas courts have determined that [the statutory fraud] statute applies only to real estate or stock transactions, not loan transactions or modifications."); *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 611 (Tex. App.-Waco 2000, pet. denied.) (construing TEX. BUS. & COM. CODE § 27.01). ("A loan transaction, even if secured by land, is not considered to come under the statute."); *Greenway Bank & Trust v. Smith*, 679 S.W.2d 592, 596 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Tex. Commerce Bank v. Lebco Constructors, Inc*., 865 S.W.2d 68, 82 (Tex. App.—Corpus Christi 1993, writ denied), overruled on unrelated grounds by *Johnson & Higgins, Inc. v. Kenneco Energy*, 962 S.W.2d 507 (Tex. 1998).

bars Plaintiffs' fraud claim because the sole rights, duties, and obligations between Plaintiffs and Defendant were the subject of contractual agreements between the parties.

29. The Texas judiciary has long-enforced a state policy against contorting alleged breach of contract claims into tort claims.[63] This policy, known as the economic loss doctrine, has been applied consistently to bar tort claims when the parties' relationship and their attendant duties arise from a contract.[64]

30. A contractual relationship "may create duties under both contract and tort law," and "[t]he acts of a party may breach duties in tort or contract alone or simultaneously in both."[65] "In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss."[66] In this matter, Plaintiffs' fraud claim is premised solely upon Defendant's performance of the rights, duties, and obligations under the terms of the loan agreements between the parties.

31. The Texas Supreme Court has suggested claims of fraud and fraudulent inducement may not be barred "even when the claimant suffered only economic losses to the

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[63] *Quintinalla v. K-Bin, Inc.*, 993 F. Supp. 560, 563 (S.D. Tex. 1998); *see also Heller Fin., Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518, 527 (5th Cir. 1996) ("[a]s a general rule, 'the failure to perform the terms of a contract is a breach of contract, not a tort."') (quoting *Schindler v. Austwell Farmers Co-op*, 829 S.W.2d 283, 289 (Tex. App.—Corpus Christi 1992, writ granted), *aff'd as modified*, 841 S.W.2d 853 (Tex. 1992)); *Ortega v. City Nat'l Bank*, 97 S.W.3d 765, 777 (Tex. App.—Corpus Christi 2003, no pet.) ("[a]s a prerequisite to asserting a claim of negligence, there must be a violation of a duty imposed by law independent of any contract.").

[64] *See Kiggundu v. Mortgage Electronic Registration Systems, Inc.*, No. 4:11-1068, 2011 WL 2606359, at *7 (S.D. Tex. Jun. 30, 2011) *aff'd* 469 Fed.Appx. 330 (5th Cir. 2012) *cert. denied* 133 S.Ct. 210 (2012) (citing *Wismer Distributing Co. v. Brink's, Inc.*, 202 F. App'x 729, 731 (5th Cir. 2006)) ("[T]he injury alleged by Plaintiff in connection with his fraud claims is economic loss related to two contracts: the Note and the Deed of Trust. "It is well-settled under Texas law ... that, '[w]hen the injury is only the economic loss to the subject matter of a contract itself, the action sounds in contract alone.' For this additional reason, summary judgment is appropriate for Defendants on Plaintiff's fraud claims.").

[65] *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).

[66] *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991); *Smith v. JPMorgan Chase Bank, N.A.*, 2013 WL 1165218, at *3 (5th Cir. Mar. 22, 2013) (under economic loss rule, a plaintiff may not bring a tort claim unless "plaintiff can establish that he suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim.")

subject of a contract."[67] However, the relevant distinction is whether "the plaintiff sought damages for a breach of a duty created under contract, as opposed to a duty imposed by law."[68] Plaintiffs have alleged no duties owed to them which existed outside of the loan agreements between the parties. Thus, the economic loss doctrine bars Plaintiffs' fraud claim.

32. Plaintiffs' fraud claim also fails because they have not pleaded the elements of the claim. In Texas, the elements of common-law fraud are: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, the defendant knew it was false or made the representation recklessly and without knowledge of its truth; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff injury.[69]

33. Plaintiffs have not pleaded any of these elements, let alone offer any factual allegations in support of them. Because of this they have not satisfied the *Iqbal* and *Twombly* standards and their claim must be dismissed.

D. An Injunction is a Remedy, Not a Cause of Action.

34. Plaintiffs' request for injunctive relief must be dismissed because Plaintiffs' have not, nor can they, allege the Property is pending a foreclosure sale. Again, Plaintiffs admit the Loan has been paid in full and that Defendant has released its lien on the Property. For this reason alone, Plaintiffs' request for injunctive relief must be dismissed.

[67] *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 417 (Tex. 2011).

[68] *Id.*

[69] *McIntosh v. Bank of America, N.A.*, No. 3:12–CV–4336–BH, 2013 WL 3866619, *5 (N.D. Tex. July 26, 2013) (citing *Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter*, 607 F.3d 1029, 1032–33 (5th Cir. 2010).

35. Second, under Texas law, a request for injunctive relief absent a cause of action supporting entry of a judgment is fatally defective and does not state a claim.[70] As set forth above, Plaintiffs have stated no claims which survive dismissal. Thus, Plaintiffs' request for injunctive relief must also be dismissed.

For these reasons, Defendant respectfully requests that the Court grant its Motion to Dismiss and dismiss all claims against it in Plaintiffs' Complaint with prejudice to refiling same.

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[70] *Butanaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002).

CERTIFICATE OF SERVICE

I certify that on August 20, 2014, I filed the foregoing with the Clerk of the Court via the CM/ECF filing system who will send a copy of same to the following registered CM/ECF users:

David McCrae
Barbara McCrae
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Plaintiffs Pro Se

I further certify that a true and correct copy of the foregoing was also served upon Plaintiffs *pro se* via U.S. Certified Mail, Return Request No. 7196 9008 9111 2892 6991, on August 20, 2014.

/s/ Nathan T. Anderson
Nathan T. Anderson