No. 14-51224

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID A. MCCRAE
Appellant

VERSUS

PHH MORTGAGE and BARRETT BURKE DAFFIN FRAPPIER TURNER AND ENGEL, LLP
Appellees

Appeal From the United States District Court
for the Western District of Texas, Austin Division,
USDC No. 1:14-CV-00733-LY, The Honorable Lee Yeakel, Presiding

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BRIEF ON BEHALF OF APPELLEE PHH MORTGAGE CORPORATION

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case as described by the fourth sentence of Rule 28.2.1. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. David A. McCrae – Appellant

2. PHH Mortgage Corporation – Appellee

3. S. David Smith, Counsel for Appellee, PHH Mortgage Corporation.

4. Nathan T. Anderson, Counsel for Appellee, PHH Mortgage Corporation.

5. McGlinchey Stafford, PLLC, Counsel for Appellee, PHH Mortgage Corporation.

6. Barrett Burke Daffin Frappier Turner & Engel, LLP – Appellee.

7. Coury M. Jacocks, Counsel for Appellee, Barrett Burke Daffin Frappier Turner & Engel, LLP.

SO CERTIFIED, this the 16th day of March, 2015

/s/ Nathan T. Anderson

S. DAVID SMITH
State Bar No. 18682550
NATHAN T. ANDERSON
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ATTORNEYS FOR APPELLEE PHH MORTGAGE CORPORATION

RESTATEMENT OF JURISDICTION

Appellee does not agree with the jurisdictional statement set forth in Appellant's opening brief. Accordingly, pursuant to FED. R. APP. P. 28(b)(1), Appellee sets forth the following statement regarding jurisdiction.

Any state court civil action over which the federal courts would have jurisdiction may be removed from state to federal court.[1] A federal court can have jurisdiction over a claim filed in state court under diversity and/or federal question jurisdiction.[2]

Appellant originally named Appellee only in his state court complaint, and asserted claims for violations of the Real Estate Settlement Procedures Act[3] and the Servicemembers Civil Relief Act[4] (ROA.13-77). The amount in controversy exceeded $75,000.00 and it is undisputed that Appellee is a citizen of New Jersey (ROA.7). Appellant did not challenge the district court's exercise of jurisdiction and does not do so on appeal.

The filing of a notice of appeal must be made within thirty days after the district court's final judgment.[5] On November 4, 2014, the district court entered final judgment in this matter (ROA.592). Appellant timely filed his notice of

[1] *Gasch v. Hartford Accident & Indem. Co.,* 491 F.3d 278, 281 (5th Cir. 2007).

[2] 28 U.S.C. §§ 1331, 1332 *et seq*.

[3] 12 U.S.C. §§ 2601, *et seq.*

[4] 50 U.S.A. App. §§ 501, *et seq*.

[5] 28 U.S.C. § 2107(a).

appeal on November 10, 2014 (ROA.593-95). The Court, therefore, has jurisdiction to hear this appeal.

STATEMENT REGARDING ORAL ARGUMENT

This case involves well-settled standards of review and clear legal principles. Accordingly, Appellee does not believe that oral argument is necessary to the Court's decision-making process. The facts and legal arguments are adequately presented in the briefs and record, and the decision process would not be significantly altered by oral argument. FED. R. APP. P. 34(a)(2)(C).

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STANDARD OF REVIEW

This Court reviews a district court's granting of a motion to dismiss *de novo*.[6] A "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'"[7] However, only facts are entitled to an assumption of truth; legal conclusions unsupported by factual allegations do not suffice.[8] To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[9] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[10]

This Court reviews discovery rulings under an abuse of discretion standard and will not be reversed on appeal unless "arbitrary or clearly unreasonable."[11]

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[6] *Kennedy v. Chase Manhattan Bank USA, N.A.*, 369 F.3d 833, 839 (5th Cir. 2004).

[7] *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)).

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

[10] *Iqbal*, 129 S.Ct. at 1949; *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009).

[11] *McCreary v. Richardson*, 738 F.3d 651, 654 (5th Cir. 2013) (quoting *Williamson v. USDA*, 815 F.2d 368, 383 (5th Cir. 1987)).

STATEMENT OF THE CASE

This case is on appeal from a decision rendered by the U.S. District Court for the Western District of Texas, Austin Division (the "District Court") in case number 1:14-CV-00733-LY, in which the District Court dismissed David A. McCrae ("McCrae")'s claims against PHH Mortgage Corporation, erroneously named PHH Mortgage ("PHH") with prejudice (ROA.589-92). McCrae fails to offer any basis for reversing the District Court's decision. Thus, the grant of the dismissal should be affirmed.

Procedural Posture

McCrae[12] originally brought suit against PHH in the 424th Judicial District Court of Burnett County, Texas on February 21, 2013 (the "State Court Complaint") (ROA.13-77). In his State Court Complaint, McCrae sought to enjoin the foreclosure of the property located at 350 Cee Run, Bertram, Texas 78605 (the "Property") (ROA.13-77). McCrae also purported to assert claims for violations of the Real Estate Settlement Procedures Act, and for violations of the Servicemembers Civil Relief Act (ROA.13-77). McCrae did not seek a specific amount of damages in his State Court Complaint, however he later demanded compensation in the form of 457 "bit-coins" from PHH (ROA.78-82). Service of process was not effectuated upon PHH (ROA.13-82).

[12] Mr. McCrae's wife was identified as a plaintiff in the original petition (ROA.13-77). Ms. McCrae has not appeared in this appeal.

On August 5, 2014, PHH filed its original answer and affirmative defenses to the State Court Complaint (ROA.96-98). Immediately after filing its answer, PHH removed the State Court Complaint to the District Court under both diversity and federal question jurisdictional grounds (ROA.6-89).

On August 11, 2014, McCrae filed his petition for redress of wrongful foreclosure action (the "Amended Complaint") (ROA.103-34). In his Amended Complaint, McCrae asserted claims 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 (the "FDCPA"); and (5) violations of the Texas Debt Collections Act (the "TDCA") (ROA.103-34). McCrae also named Barrett Daffin Frappier Turner & Engel, LLP ("Barrett"), John Does 1-100, and USAA Federal Savings Bank ("USAA") as defendants (ROA.103-34). McCrae also purported to assert claims brought *qui tam* on behalf of the Consumer Financial Protection Bureau (the "CFPB"), as well as members of a proposed class (ROA.103-44).[13]

On August 19, 2014, McCrae filed a "Motion for Discovery and for Temporary Stay Order" (the "First Discovery Motion") (ROA.144-49). McCrae sought to enjoin all foreclosures PHH had pending against all borrowers in the U.S., and discovery of information regarding other PHH customers (ROA.144-49).

[13] On August 20, 2014, McCrae filed a motion for inclusion of the CFPB further expressing his intent to assert claims *qui tam* on behalf of the CFPB (ROA.150-252). PHH responded to such a motion on the same day (ROA.373-77).

On August 20, 2014, McCrae filed a "Motion for Discovery to Department of Justice" (the "Second Discovery Motion") (ROA.260-63). In the Second Discovery Motion, McCrae sought the production of "all complaints to date collected thus far regarding PHH Mortgage, in Texas and in the other 45 states in which PHH Mortgage operates." (ROA.260-63).[14]

On August 20, 2014, PHH filed its motion to dismiss the Amended Complaint (the "12(b) Motion") (ROA.264-366).

On August 26, 2014, McCrae filed his response to PHH's 12(b) Motion (the "Response") (ROA.397-411).

On September 1, 2014, McCrae filed his "Demand for Trial by Jury" (ROA.412-75).

On September 12, 2014, Barrett filed its original answer and verified denial to McCrae's Amended Complaint (ROA.484-88).

On September 9, 2014, PHH filed its reply to McCrae's Response to the 12(b) Motion (ROA.476-79).

On September 15, 2014, McCrae filed his motion for discovery (the "Third Discovery Motion") wherein he sought "specific information detail [sic] supporting [PHH's filings with the Securities and Exchange Commission]"

[14] PHH responded to McCrae's First and Second Discovery Motions on August 20, 2014 (ROA.367-72, 382-87).

(ROA.489-98).[15] PHH filed its response to same on September 15, 2014 (ROA.503-08).

On September 19, 2014, the Honorable Magistrate Judge Mark Lane entered his report and recommendations granting PHH's 12(b) Motion dismissing all of McCrae's claims with prejudice, and denying McCrae's Discovery Motions (the "Magistrate's Report") (ROA.509-27). The Magistrate's Report *sua sponte* recommended dismissal of all claims against the other defendants named in the Amended Complaint (ROA.509-27).

On September 20, 2014, McCrae filed his objections to the Magistrate's Report (the "Objections") (ROA.528-32).

On September 21, 2014, McCrae, without leave of court, filed his "amended complaint for consumer fraud" (the "Second Amended Complaint") (ROA.533-58).

On September 22, 2014, PHH filed its response to McCrae's Objections to the Magistrate's Report (ROA.559-64).

On September 26, 2014, PHH filed its motion to strike McCrae's Second Amended to Complaint (the "Motion to Strike") (ROA.565-71). McCrae responded to PHH's Motion to Strike on October 2, 2014 (ROA.577-82).

[15] The First, Second, and Third Discovery Motions are collectively referred to as the "Discovery Motions".

On November 4, 2014, the District Court adopted the Magistrate's Report in its entirety, and granted in part PHH's Motion to Strike (ROA.589-91). The District Court ordered that McCrae's Second Amended Complaint was deemed stricken from the record in this matter (ROA.589-91).

On November 10, 2014, McCrae filed his notice of appeal (ROA.593-95).

Factual Background

On or about October 29, 2001, McCrae sought and obtained a loan (the "Loan") to purchase the Property (ROA.110-11). PHH acted as the mortgage servicer for the Loan (ROA.111).

McCrae defaulted on the Loan and PHH posted the Property for foreclosure. McCrae then sought relief under Chapter 13 of the U.S. Bankruptcy Code (ROA.264).

On or about March 1, 2013, McCrae 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") (ROA.279-85).

On or about March 15, 2013, McCrae filed his requires schedules in the Bankruptcy (the "Schedules") (ROA.286-325). McCrae listed PHH as a secured creditor in the Schedules, and did not dispute PHH held a lien against the Property (ROA.296).

On or about June 24, 2013, PHH filed its proof of claim (the "Claim") in the Bankruptcy (ROA.326-65). PHH's secured claim was in the amount of $9,465.70, of which $1,466.01 was for arrearages, late fees, and charges (ROA.326). At that time, McCrae last made a payment on the Loan to PHH on October 12, 2012 (ROA.329). McCrae did not challenge PHH's Claim (ROA.114, ¶ 45). McCrae then paid all sums PHH asserted in the Claim and the Bankruptcy was closed on or about June 3, 2014 (ROA.279-85).

McCrae then paid off the remaining amount owed on the Loan in full and PHH released its lien on the Property on March 10, 2014 (ROA.112, ¶ 46).

SUMMARY OF THE ARGUMENT

The Court should affirm the judgment below because McCrae's opening brief does not comply with the FEDERAL RULES OF APPELLATE PROCEDURE. As such, he has waived any issues on appeal.

Notwithstanding, the District Court properly dismissed McCrae's claims under the doctrine of judicial estoppel, and because his claims belong to the bankruptcy estate. In his Bankruptcy, McCrae did not take the position that PHH overcharged him or failed to return monies owed to him. The position he takes in this matter is wholly inconsistent with the prior position he took in the Bankruptcy. Thus, McCrae's claims are barred by judicial estoppel. Furthermore, standing is lacking as McCrae's claims belong to the bankruptcy estate.

The District Court also correctly dismissed McCrae's claims under FED. R. CIV. P. 12(b)(6). First, no foreclosure upon the Property occurred, and as such, McCrae cannot state a claim for wrongful foreclosure. Second, the economic loss doctrine bars McCrae's claim for common law fraud. Third, PHH does not meet the definition of a "debt collector" under the FDCPA. Fourth, a loan transaction secured by real property cannot serve in support of a claim under Section 27.01(a) of the TEXAS BUSINESS AND COMMERCE CODE. Fifth, the TDCA does not prohibit PHH from exercising its contractual right to accelerate and foreclose.

McCrae attempts to raise additional claims in his opening brief that were not made in the District Court. Specifically, McCrae seeks recusal of Magistrate Judge Lane, and sanctions against PHH's counsel. McCrae never sought such relief in the District Court and he is prohibited from doing so for the first time on appeal.

McCrae has also abandoned all issues except for the District Court's grant of the 12(b) Motion and the denial of his Discovery Motions by failing to raise any other issues in his opening brief.

ARGUMENT AND AUTHORITIES

I. MCCRAE'S BRIEF DOES NOT COMPLY WITH THE FEDERAL RULES OF APPELLATE PROCEDURE AND THIS APPEAL SHOULD BE DISMISSED.

McCrae's brief is not in compliance with FED. R. APP. P. 28 requiring that all briefs be filed in the specified format.[16] Specifically, McCrae's brief is deficient because it contains no concise statement of facts relevant to the issues submitted for review, a succinct and clear summary of the arguments, nor does it include appropriate references to the District Court record as required under Rule 28(a).[17]

McCrae's brief is not in compliance with Rule 28(a)(4), which requires McCrae's jurisdictional statement in his brief to include: (1) the basis for this Court's appellate jurisdiction and the applicable statutory provisions and relevant facts that establish said jurisdiction; (2) the filing dates establishing timeliness of the appeal; and, (3) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims or information establishing the court of appeals' jurisdiction on some other basis.[18]

Rule 28(a)(9) states that the argument section of an appellant's brief must contain "citations to the authorities and parts of the record on which the appellant

[16] FED. R. APP. P. 28.

[17] FED. R. APP. P. 28(a)(7).

[18] FED. R. APP. P. 28(a)(4).

relies…and, for each issue, a concise statement of the applicable standard of review…."[19] Although courts liberally construe the briefs of *pro se* litigants, *pro se* parties must still brief the issues and comply with the standards of Rule 28.[20] Dismissal of an appeal as frivolous is warranted where an appellant's brief fails to contain citations to the record.[21]

In *Arvie v. Diamond Offshore Drilling, Inc.*, the Court dismissed the appeal due to the appellant's failure to abide by Rule 28.[22] In *Arvie*, the appellant merely asserted, without citation to authorities or to the record, that there was enough evidence for the jury to find in his favor and that, given the evidence, the jury could not have decided in favor of the appellee.[23] This Court held that the *pro se* appellant's brief in support of his appeal failed to comply with the federal rules of appellate procedure and, consequently, dismissal of the appeal was warranted.[24]

Nowhere in McCrae's brief does he cite to the record, nor does McCrae state the applicable standard of review for each issue purportedly appealed. This Court previously held that a *pro se* appellant's failure to comply with the form

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[19] FED. R. APP. P. 28(a)(9); *see also Moore v. FDIC*, 993 F.2d 106, 107 (5th Cir. 1993).

[20] *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995).

[21] *McKenzie v. E O G Resources Inc.*, 340 Fed.Appx. 985 (5th Cir. 2009).

[22] *Arvie v. Diamond Offshore Drilling, Inc.*, 349 Fed.Appx. 868 (5th Cir. 2009).

[23] *Id.*

[24] *Id.*; *Moore*, 993 F.2d at 107.

requirements in the FEDERAL RULES OF APPELLATE PROCEDURE is fatal to the appellant's appeal and that "dismissal of appeal as frivolous is warranted."[25]

In light of the complete disregard for the rules of appellate procedure McCrae has exhibited in his brief, this appeal should be dismissed and the judgment of the District Court affirmed because the procedural defects of McCrae's brief prohibit this Court from properly reviewing the case.

II. MCCRAE'S CLAIMS ARE BARRED BY JUDICIAL ESTOPPEL AND LACK OF STANDING.

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.[26] 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.[27]

The integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets and liabilities.[28] In *Richardson v. CitiMortgage,*

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[25] *McKenzie v. E O G Resources Inc.*, 340 Fed.Appx. 985, 986 (5th Cir. 2009).

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

[27] *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)).

[28] *Love* 677 F.3d at 261 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999)).

Inc., 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.[29]

In *Richardson*, the obligor, CitiMortgage, was listed as a secured creditor in the borrower's prior bankruptcy proceeding.[30] 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.[31] 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.[32]

In this matter, PHH filed its Claim on June 24, 2013, and McCrae did not challenge that Claim (ROA.114, ¶ 45, 326-65). McCrae also represented, under oath, that PHH was a secured creditor, and in fact listed the amount of PHH

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

[30] *Id.* at *4.

[31] *Id.* at *5.

[32] *Id.*

secured claim as $9,000.00 (ROA.296). The position McCrae now takes, that PHH "over charged" him, is inconsistent with his position he took in the Bankruptcy. As such, the District Court did not err in dismissing McCrae's claims under the doctrine of judicial estoppel.[33]

A. McCrae Lacks Standing to Assert His Claims as They Are Property of the Bankruptcy Estate.

The District Court also properly dismissed McCrae's claims because the claims he asserts belong to the bankruptcy estate.[34] 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.[35] 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.[36] "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."[37]

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

[34] *Carroll v. JPMorgan Chase Bank*, 575 Fed.Appx. 260 (5th Cir. 2014) (per curiam); *Vineyard*, 2011 WL 8363481, *4.

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

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

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

This Court recently examined such a proposition in the context of a consumer mortgage litigation case in *Carroll v. JPMorgan Chase Bank*.[38] In *Carroll*, the debtor had filed for bankruptcy approximately four years prior to bringing suit against his mortgage servicer for breach of contract.[39] The mortgage servicer prevailed on summary judgment against the debtor because debtor's cause of action belonged to the bankruptcy estate.[40] The debtor appealed the grant of summary judgment against him and this Court affirmed the district court's ruling.[41] In doing so, this Court 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.

The Bankruptcy was dismissed on June 3, 2014 (ROA.279-85). 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 remains the property of the bankruptcy estate.[42] Unless a cause of action is abandoned by the trustee or

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[38] *Carroll*, 575 Fed.Appx. at 261.

[39] *Id.* at 261

[40] *Id.*

[41] *Id.*

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

administered in accordance with the U.S. Bankruptcy Code, it remains the property of the bankruptcy estate and the debtor has no standing to pursue it.[43] Here, McCrae listed a "class action lawsuit" against PHH in his Schedules (ROA.292).

McCrae has not offered any set of facts showing that the bankruptcy trustee has abandoned such a claim. McCrae does not appear in any capacity on behalf of the bankruptcy trustee in this matter. Thus, McCrae's claims remain the property of the bankruptcy estate and he lacks standing to assert his claims.[44] Therefore the District Court did not err in dismissing McCrae's claims given his lack of standing.

III. MCCRAE'S CLAIMS WERE PROPERLY DISMISSED BECAUSE THEY DID NOT SATISFY FED. R. CIV. P. 12(B)(6).

Assuming *arguendo* the District Court erred in dismissing McCrae's claims under judicial estoppel and his lack of standing, the District Court properly dismissed McCrae's claims because he failed to satisfy FED. R. CIV. P. 12(b)(6).

A. McCrae Is Not a Licensed Attorney and Cannot Pursue Claims on Anyone Else's Behalf.[45]

As an initial matter, McCrae continues to attempt to bring *qui tam* claims on behalf of the CFPB, and under an unidentified purported class. A *pro se* plaintiff

[43] *Drew v. Anderson*, 988 F.2d 1212 (5th Cir. 1993) (table).

[44] *Carroll*, 575 Fed.Appx. at 261.

[45] Again, Ms. McCrae is not a party to this appeal. It is therefore unnecessary to address the issue if Mr. McCrae is permitted to represent her.

is prohibited from bringing a *qui tam* action.[46] Nor can a *pro se* plaintiff represent a purported class.[47] The reason for this is strong public policy considerations forbid litigants to be represented by non-lawyers.[48] The right to proceed *pro se* in civil actions is guaranteed by 28 U.S.C. § 1654. This right, however, is limited to appearing on behalf of one's self; one cannot represent another separate legal entity, such as another person, a corporation, or a partnership, *pro se*.[49] McCrae continues to attempt to assert claims on behalf of the CFPB and an unidentified class. Because McCrae is *pro se*, he cannot do so.

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[46] *Veal v. Walker*, No. 3:13-CV-155-N-BN, 2013 WL 1386666, *4, n.1 (N.D. Tex. Mar. 6, 2013); *See, e.g., U.S. ex rel. Mergent Servs. et al v. Flaherty,* 540 F.3d 89, 93 (2d Cir. 2008); *Timson v. Sampson,* 518 F.3d 870, 873–74 (11th Cir.2008); *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126–28 (9th Cir.2007); *U.S. ex rel. Lu v. Ou*, 368 F.3d 773, 775–76 (7th Cir. 2004); *U.S. v. Onan*, 190 F.2d 1, 6–7 (8th Cir. 1951); *Jones v. Park at Lakeside Apartments,* Civ. A. No. H–08–0001, 2008 WL 4820083, *2 (S.D. Tex. Nov. 5, 2008); *U.S. ex rel. White v. Apollo Group, Inc.,* No–EP–04–CA–452–DB, 2006 WL 487853, *3 (W.D. Tex. Jan. 6, 2006); *Manning v. Pogo Producing Co.*, H–08–2896, 2008 WL 4889032, *1 (S.D. Tex. Nov. 12, 2008).

[47] *Koym v. Fry's Electronics*, No. A-08-CA-689-LY, 2009 WL 1883763, *11 (W.D. Tex. Jun. 30, 2009) (collecting cases). *See also e.g., Hennessey v. Blalack*, 35 F.3d 561 (5th Cir. 1994) (holding no abuse of discretion where district court concluded plaintiff *pro se* could not adequately represent a putative class).

[48] *U.S. ex rel. White v. The Apollo Group, Inc.*, No. EP-04-CA-452-DB, 2006 WL 487853, *3 (W.D. Tex. Jan. 6, 2006); *U.S. ex rel Hao Liu v. Medical Center of Plano,* No. 4:09-CV-625, 2010 WL 4226766, *3 (E.D. Tex. Sept. 27, 2010).

[49] *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201–02, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993); *See Sw. Express Co. v. Interstate Commerce Comm'n,* 670 F.2d 53, 55 (5th Cir. 1982) (per curiam); *Memon v. Allied Domecq QSR*, 385 F.3d 871, 873 (5th Cir. 2004).

B. The Wrongful Foreclosure Claim Was Properly Dismissed Because No Foreclosure Occurred.

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.[50] McCrae's wrongful foreclosure claim was properly dismissed because McCrae complained of a *threatened* foreclosure, not that a foreclosure *occurred*. Texas does not recognize a claim for attempted wrongful foreclosure.[51] Under Texas law, a claim for wrongful foreclosure is premised upon a debtor's loss in possession of the property.[52]

McCrae acknowledges that he continues to reside in the Property, and does not allege a foreclosure sale occurred. Because no sale occurred, and there has been no loss in McCrae's possession of the Property, the District Court did not err in dismissing the wrongful foreclosure claim.[53]

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

[51] *Daniels v. Ortolani*, No. 3:14-CV-2665-L, 2015 WL 783689, *3 (N.D. Tex. Feb. 24, 2015); *McCall v. JPMorgan Chase Bank, N.A.*, No. 5:14-CV-1008-DAE, 2015 WL 471642, *2 (W.D. Tex. Feb. 4, 2015); *Jackson v. JPMorgan Chase Bank, N.A.*, No. 4:13-CV-727, 2014 WL 6879029, *2 (E.D. Tex. Dec. 5, 2014); *Johnson v. Bank of America, N.A.*, No. H-13-2029, 2014 WL 4923970, *10 (S.D. Tex. Sept. 30, 2014).

[52] *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).

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

C. The FDCPA and TDCA Claims Were Properly Dismissed.

McCrae alleged PHH's attempted foreclosure constituted violations of the FDCPA and the TDCA (ROA.103-34). McCrae specifically alleged PHH violated Sections 392.301(a)(8) and 392.304 of the TDCA (ROA.120). Both the FDCPA and TDCA claims are premised upon the threatened foreclosure of the Property (ROA.103-34). McCrae, however, did not specify what sections of the FDCPA PHH allegedly violated. McCrae's allegation that PHH violated the FDCPA is a legal conclusion couched as factual assertions which does not state a claim.[54] Notwithstanding, the District Court corrected dismissed McCrae's FDCPA and TDCA claims for multiple reasons.

First, McCrae failed to allege sufficient facts to show PHH is considered a debt collector under the FDCPA. In order to state a claim under the FDCPA, a plaintiff must first establish the defendant is a "debt collector" as that term is defined by the statute.[55] "[T]he legislative history of [the FDCPA] indicates conclusively that a debt collector does not include the consumer's creditors . . ."[56],

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[54] *Brinson v. Universal Am. Mortg. Co.*, No. G-13-463, 2014 WL 4354451, *7 (S.D. Tex. Sept. 2, 2014); *Moore v. State Farm Mut. Auto. Ins. Co.*, No. H-12-1549, 2012 WL 3929930, *4 (S.D. Tex. Sept. 6, 2012)

[55] 15 U.S.C. § 1692k(a).

[56] *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.

which in this case was previously PHH. Indeed, McCrae has never disputed that he obtained the Loan from PHH, or that it has been paid in full. Thus, PHH is not a debt collector under the FDCPA.

Second, the act of foreclosure does not constitute debt collection under the FDCPA. 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."[57] Thus, McCrae failed to allege any facts showing PHH engaged in debt collection under the FDCPA.

Third, a fundamental requirement to show a violation of the TDCA is that a defendant make a misrepresentation to a debtor.[58] As shown in the record, McCrae was seriously delinquent on his Loan payments, and nowhere did he dispute otherwise (ROA.329). Nor did McCrae challenge the PHH's Claim or the amount stated therein (ROA.114, ¶ 45). Thus, McCrae's factual allegations, taken as true,

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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 2118879, at *3 (D. Nev. May 26, 2011).

[57] *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)).

[58] *Kruse v. Bank of New York Mellon*, 936 F.Supp.2d 790, 792 (N.D. Tex. 2013).

could not show PHH made a misrepresentation to him. The District Court did not err in dismissing McCrae's claims under the FDCPA and TDCA.

D. The District Court Properly Dismissed McCrae's Fraud Claims.

McCrae's claim for statutory fraud[59] in a real estate transaction ("statutory fraud" and common law fraud were properly dismissed. 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.[60] Thus, there was no error in dismissing McCrae's statutory fraud claim.[61]

To establish common law fraud under Texas law, a plaintiff 'bears the burden to prove the existence of the following: (1) a material misrepresentation (2) which is false, and (3) which was either known to be false when made or was asserted without knowledge of the truth (4) which was intended to be acted upon (5) which was relied upon (6) which caused injury." McCrae did not state any of these elements in his Amended Complaint, nor did he offer any factual allegations

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[59] TEX. BUS. & COMM. CODE § 27.01(a).

[60] *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).

[61] *Massey v. EMC Mortg. Corp.*, 546 Fed.Appx. 477, 482 (5th Cir. 2013) (affirming dismissal of statutory fraud claim because statute does not apply to loan transactions).

supporting an inference of these elements. Thus, the fraud claim was properly dismissed.

Further, McCrae's fraud claims were premised solely upon the enforcement of the Loan and actions taken in the Bankruptcy. The sole rights, duties, and obligations between McCrae and PHH were the subject of the Loan, *i.e.* a contractual agreement. Because the nature of McCrae's fraud claim is the subject of a contract, it is barred by the economic loss doctrine.

The Texas judiciary has long-enforced a state policy against contorting alleged breach of contract claims into tort claims.[62] 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.[63]

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

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[62] *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.").

[63] *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.").

simultaneously in both."[64] "In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss."[65]

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 subject of a contract."[66] 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."[67] McCrae failed to allege any damages he personally sustained other than those arising from the enforcement of the Loan.[68] Thus, the economic loss doctrine bars McCrae's fraud claim.

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

[65] *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.")

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

[67] *Id.*

[68] McCrae did seek damages on behalf of a putative class and in his attempt to represent the CFPB in a *qui tam* claim (ROA.127-29). As set forth above, given McCrae is appearing pro se, he cannot represent the interests of anyone other than himself.

IV. MCCRAE HAS WAIVED ANY POINTS OF ERROR OTHER THAN THE GRANT OF THE RULE 12(B) MOTION AND THE DENIAL OF HIS DISCOVERY MOTIONS.

McCrae only challenges the denial of his Discovery Motions and the grant of PHH's 12(b) Motion. By not challenging the District Court's ruling on any other motions, McCrae has waived any perceived errors on appeal.[69] In any event, PHH will show the District Court did not abuse its discretion in denying McCrae's Discovery Motions.

FED. R. CIV. P. 26(f) requires parties to hold a Rule 26(f) conference no later than twenty-one days before a scheduling conference is held under FED. R. CIV. P. 16(b).[70] W.D. Local Rule CV-16 requires parties to submit a proposed scheduling order to the court not later than sixty days after any appearance of any defendant.[71] PHH made its appearance in the District Court on August 5, 2014 (ROA.6-89). Thus, under the Western District of Texas Local Rules, the parties were required to submit a proposed scheduling order by October 5, 2014.[72] Therefore the parties were to have held their 26(f) conference by September 15, 2014. The Magistrate's Report was entered on September 19, 2014 (ROA.509-27).

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[69] *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994).

[70] FED. R. CIV. P. 26(f)(1).

[71] W.D. L.R. CV-16(c).

[72] Sixty days from the date PHH appeared in the District Court fell on Sunday, October 4, 2014. Thus, the next business day, October 5, 2014, was the deadline to submit a proposed scheduling order.

In his Discovery Motions, McCrae sought information pertaining to loan records of other PHH customers in Texas and other states, "complaints" against PHH lodged with the U.S. Department of Justice, and "specific information" supporting PHH's filings with the U.S. Securities and Exchange Commission (ROA.144-49, 260-63, 489-98). Notably, McCrae did not seek any information regarding his Loan.

By McCrae's estimation, he sought information regarding 60,000 other accounts and mortgages PHH services (ROA.144-49, 260-63, 489-98). As set forth above, as a *pro se* litigant, McCrae is prohibited from representing any other interest other than his own. Moreover, PHH is prohibited from sharing any information regarding its account holders to other parties.[73]

Given that McCrae sought information that he was not permitted to obtain, that he failed to request any information regarding his Loan specifically, and that the Magistrate's Report was issued a little over one month after PHH removed this matter, the District Court did not abuse its discretion in denying McCrae's Discovery Motions.

[73] *See e.g.* 12 U.S.C. § 3401, *et seq.* & TEX. FIN. CODE §§ 31.304-.306.

V. MCCRAE IMPERMISSIBLY ATTEMPTS TO RAISE ADDITIONAL CLAIMS FOR THE FIRST TIME IN HIS OPENING BRIEF.

In his opening brief, the McCrae attempts to additional claims which were not made in the District Court Specifically, McCrae avers:

- Magistrate Judge Mark Lane should have recused himself;
- Sanctions against PHH's counsel are appropriate; and
- The grant of the Rule 12(b) Motion violated his constitutional right to a jury trial.

These assertions were not made in the District Court and cannot be made for the first time on appeal.[74]

CONCLUSION

For these reasons, the Court should affirm the judgment of the District Court.

[74] *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

This Court has held that dismissal of a plaintiff's claims pursuant to a valid Rule 12(b)(6) motion in the context of consumer mortgage litigation does not violate a right to a jury trial under the Seventh Amendment to the U.S. Constitution. *Haase v. Countrywide Home Loans, Inc.*, 748 F.3d 624, 631 n.1 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 754 (2014).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED R. APP. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), it contains 6,288 words.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface, including serifs, using Microsoft Word 2010, in Times New Roman 14-point font, except for the footnotes, which are in proportionally-spaced typeface, including serifs, using Microsoft Word 2010 in Times New Roman 12-point font.

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