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

DAVID MCCRAE and BARBARA MCCRAE, Plaintiffs, V. PHH MORTGAGE, LLC, AND SUBSTITUTE TRUSTEE BARRETT BURKE DAFFIN FRAPPIER TURNER AND ENGEL, LLP, AND VARIOUS ACTORS AND EMPLOYEES OF DEFENDANTS JOHN DOE 1-100, Defendants.	§ § § § § § § § § § § § § § §	A-14-CV-733 LY

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Before the Court are Defendant's Motion to Dismiss, filed August 20, 2014 (Clerk's Dkt. #14); Reply to PHH's Motion to Dismiss, filed August 26, 2014 (Clerk's Dkt. #22); and Defendant's Reply to Plaintiff's Response to Motion to Dismiss, filed September 3, 2014 (Clerk's Dkt. #24). The matters were referred by United States District Judge Lee Yeakel to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. After reviewing the pleadings, relevant case law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

On February 21, 2013 Plaintiffs David McCrae ("McCrae") and Barbara McCrae filed this action in the 424th Judicial District Court of Burnet County, Texas. They named as sole defendant

PHH Mortgage ("PHH"). PHH removed the action to this court on August 5, 2014. On August 11, 2014, an amended complaint was filed.

By way of the amended complaint, Plaintiffs allege they are the owners of real property located at 350 Cee Run, Bertram, Texas ("the Property"). (Am. Compl. ¶ 41). Plaintiffs further allege they refinanced the Property on October 30, 2001 by way of a loan payable to PHH as lender. They executed a Deed of Trust securing the loan on the same date. (*Id*. ¶¶ 42-43).

According to Plaintiffs, from October 2001 through December 2012 they made "many voluntary and periodic early payments of principal" which "effectively accelerated the mortgage by approximately two years by end of 2012, to mid 2014." (*Id.* ¶ 44(1)).[1] Plaintiffs allege in September 2012 PHH "nevertheless demanded more payments be made, and encouraged Plaintiffs to refinance" their loan. (*Id.* ¶ 45(1)). Plaintiff state they expressed their intent to pay off the loan and asked for payoff amounts as of November 1 and December 1, 2012, but did not receive a definitive response. (*Id*.).

Plaintiffs assert the defendants were apparently pursuing "dual-tracking," that is pretending to negotiate, but at the same time preparing to foreclose. According to Plaintiffs, this conduct violated federal law and debt collection practices. They allege the law firm of Barrett Burke Daffin Frappier Turner and Engel, LLP ("Barrett") was retained by PHH to conduct the foreclosure as substitute trustee. Plaintiffs state Barrett sent notice in January 2013 that a foreclosure sale was scheduled for March 5, 2013.[2] (*Id*. ¶¶ 45(1), 47(1), 44(2))

According to Plaintiffs, to prevent foreclosure McCrae retained an attorney and filed for bankruptcy protection in March 2013 ("Bankruptcy Case"). Plaintiffs allege an agent for Barrett

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[1] Plaintiffs misnumbered the paragraphs in the amended complaint by using numbers 44-47 twice. The undersigned uses (1) to indicate the first use of the paragraph number and (2) to indicate the second use.

[2] Apparently due to a typographical error, Plaintiffs state the notice was sent in January 2012 and the sale was scheduled for March 2012. Documents attached to their original state court pleadings make clear the events took place in 2013.

"prepared a fraudulent Proof of Claim in amount of $9,465, including $1,694 in fraudulent fees" and submitted it to the trustee in the Bankruptcy Case. They state the Proof of Claim was not challenged and was paid in full. As a result of his inaction, counsel for McCrae in the Bankruptcy Case is no longer retained by Plaintiffs. (*Id*. ¶ 45(2)).

According to Plaintiffs, during the bankruptcy they made all periodic payments, which exceeded their obligation. They assert they incurred damages of $14,454 in defense of the wrongful foreclosure action. In addition, Plaintiffs assert they were able to cancel the "force-placed insurance" but the refund of the unused premium has not been returned to them. (*Id*. ¶¶ 46(2)-47(2)). Plaintiffs further allege they have since paid off the loan in full, but overpayments of $1,927.61 and additional escrow and other funds in the amount of $1,920.27 have not been returned to them by Defendants. (*Id*. ¶¶ 46(1), 47(2)). Plaintiffs assert Defendants have engaged in a pattern of wrongful foreclosure actions, including the Property, which Plaintiffs characterize as based on fraudulent documents and in violation of the law. (*Id*. ¶¶ 51-55).

Construed liberally, Plaintiffs assert claims for wrongful foreclosure, fraud, violation of the Fair Debt Collection Practices Act, violation of the Texas Debt Collection Act and statutory fraud in a real estate transaction. They request injunctive relief, as well as monetary damages. (*Id*. ¶¶ 61-114).

PHH has now filed a motion to dismiss Plaintiffs' claims. The parties have filed responsive pleadings and the motion is ripe for review. In addition, the undersigned will address the viability of Plaintiffs' claims brought on behalf of others, as well as against the remaining defendants.

II. STANDARD OF REVIEW

When evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6) the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S.

163, 164, 113 S. Ct. 1160, 1161 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Although Federal Rule of Civil Procedure 8 mandates only that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 1965-66 (2007). Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, 550 U.S. at 570, 127 S. Ct. at 1974. The Supreme Court has made clear this plausibility standard is not simply a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 456 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). The standard is properly guided by "[t]wo working principles." *Id*. First, although "a court must accept as true all of the allegations contained in a complaint," that tenet is inapplicable to legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*, 556 U.S. at 678, 129 S. Ct. at 1949-50. Second, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*, 556 U.S. at 679, 129 S. Ct. at 1950. Thus, in considering a motion to dismiss, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged–but it has not 'show[n]'–'that the pleader is entitled to relief.'" *Id*., 556 U.S. at 679, 129 S. Ct. at 1950 (quoting FED. R. CIV. P. 8(a)(2)).

III. ANALYSIS

PHH has filed a motion seeking dismissal of all claims raised against it as barred by the

Bankruptcy Case as well as for failing to state an actionable claim. The undersigned will address the issues in turn, as well as Plaintiffs' claims against the other defendants, following a discussion of the capacity of McCrae to assert claims on behalf of Plaintiff Barbara McCrae and others.

A. Capacity to Bring Suit

The original petition in this case, filed in state court, was signed only by David McCrae. Filed with the petition is what appears to be a copy of a page of the passport of Barbara McCrae on which is written "My husband David has legal authority to act in my behalf" followed by what appears to be the signature of Barbara McCrae. The amended complaint filed on August 11, 2014 was also signed only by David McCrae.

A person may represent himself, but the law does not allow him to act as an attorney for others, even under a power of attorney. *See* TEX. GOV'T CODE § 81.102(a) (prohibiting the practice of law in Texas unless the person is a member of the state bar); *United States v. Musgrove*, 109 F.3d 766 (5th Cir. 1997) (table) (power of attorney does not authorize a non-attorney to file legal documents on behalf of others); *Weber v. Garza*, 570 F.2d 511, 514 (5th Cir.1978) (holding "power of attorney" does not entitle plaintiff to engage in unauthorized practice of law on behalf of other plaintiffs by preparing legal papers, filing petitions and briefs, and generally acting as attorney in violation of state and federal provisions).

The undersigned noted this issue in a prior order, dated August 13, 2014. To date, neither of the plaintiffs have corrected the problem or even acknowledged the issue. As David McCrae lacks the capacity to litigate this action on behalf of another, and Barbara McCrae has failed to make an appearance in this action, the undersigned concluded that all claims raised by Barbara McCrae should be dismissed without prejudice.

The undersigned additionally notes the amended complaint appears to assert claims brought qui tam on behalf of the Consumer Financial Protection Bureau, as well as members of

a proposed class similarly situated to Plaintiffs. Because McCrae does not have authority or capacity to represent anyone other than himself, any claims asserted on behalf of members of a proposed class or the Consumer Financial Protection Bureau should also be dismissed without prejudice.

B. Claims Against PHH

PHH contends all claims asserted against it in this action should be dismissed on a number of bases. The undersigned will address each in turn.

1. Judicial Estoppel

PHH first argues any claims based on McCrae's assertion that PHH prepared a fraudulent Proof of Claim, overcharged him or failed to return monies owed to him are barred by the doctrine of judicial estoppel.

a. Applicable Law

Judicial estoppel is a common law doctrine that precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in a previous proceeding. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814 (2001). Three factors are typically considered to determine whether the doctrine should apply in particular case: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 573–74 (5th Cir. 2011) (en banc). Because the doctrine of judicial estoppel "is intended to protect the judicial system, rather than the litigants, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 2004).

b. Related Facts[3]

On March 1, 2013, McCrae filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of Texas, Austin Division ("Bankruptcy Case"). On March 15, 2013, McCrae filed financial schedules in the Bankruptcy Case. In pertinent part, he listed PHH as a secured creditor in the amount of $9,000.

On June 24, 2013 PHH filed its proof of claim in the Bankruptcy Case. PHH asserted its claim was in the amount of $9,465.70, including arrrearages and late fees. McCrae did not dispute the amount of PHH's claim.

On June 3, 2014, the trustee in the Bankruptcy Case filed her Final Report and Account. The report identified PHH's secured claim in the amount of $9,465.70 as paid. The Bankruptcy Case was closed that same date.

c. Analysis

PHH argues McCrae's identification of PHH as a secured creditor in the Bankruptcy Case, and failure to dispute the amount of the obligation therein, judicially estops him from asserting claims in this action which challenge the amount of the obligation. In response, McCrae states:

> During my bankruptcy I acknowledged and paid the claim, though the amount was inflated by some fees and such. My motive was to pay the claim, pay the fee, and recover damages later. This is later. My counsel at that time advised me that resistance was futile. I dismissed him later, as noted by the record.

(Plf. Reply at 2).

McCrae does not dispute he identified PHH as a creditor in the Bankruptcy Case and paid the claim asserted by PHH in full without challenge. It is thus clear the legal position he asserts herein, that PHH overcharged him, is plainly inconsistent with that taken by him in the Bankruptcy

[3] In deciding a motion to dismiss, courts must consider the complaint as well as "documents incorporated into the complaint by reference and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 2509 (2007). The facts referenced herein are based on the filings made in the Bankruptcy Case, docket no 13-10386.

Case. The position was also accepted by the bankruptcy court, as evidence by the closing of the Bankruptcy Case. Finally, McCrae makes clear he did not, and is not, acting inadvertently in regard to his claim against PHH. Accordingly, the undersigned finds McCrae should be judicially estopped from asserting any claims attacking the amount of obligation owed to PHH on his mortgage loan.

2. Standing

PHH next contends McCrae lacks standing to assert a claim for damages against PHH based on any conduct which occurred prior to the filing of the Bankruptcy Case. PHH maintains any such claim would be the property of the bankruptcy estate and only the bankruptcy trustee would have standing to bring such a claim.

The filing of bankruptcy creates an estate encompassing "all legal or equitable interests of the debtor." 11 U.S.C. § 541(a)(1). "The phrase 'all legal or equitable interests' includes legal claims—whether based on state or federal law." *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 361–62 (5th Cir. 2014). As a general rule, a debtor may not pursue on his own a cause of action belonging to the estate, unless that cause of action has been abandoned by the trustee. *See Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir 2008) (once asset becomes part of bankruptcy estate, "all rights held by the debtor in the asset are extinguished unless the asset is abandoned" by the trustee). Unless a cause of action is either "abandoned" by the trustee "or administered in accordance with the Code," it remains property of the bankruptcy estate and "the debtor has no standing to pursue [it]," even after his debts are discharged and his case is closed. *Drew v. Anderson*, 988 F.2d 1212 (5th Cir. 1993) (table).

As McCrae points out, in his original financial schedules filed in the Bankruptcy Case he asserted a contingent interest in a "Class Action Law Suit against PHH Mortgage" with a value stated as "UNKNOWN." On April 16, 2013 McCrae filed amended financial schedules, and again included his reference to a "Class Action Law Suit against PHH Mortgage" noting "[a]s of April

2013, the Debtor has not joined the Class Action suit."[4] According to McCrae:

> It is the Trustee's choice, but not her obligation, to pursue any gray areas she sees in the estate. She recognized this claim as a gray area, and released it back to me, still UNKNOWN. That is her option.

(Plf. Reply at 2).

Although McCrae asserts the bankruptcy trustee "released" his claim, he points to nothing in the Bankruptcy Case filings which supports that assertion. Rather, the undersigned notes the June 3, 2014 Final Report and Account filed by the trustee in the Bankruptcy Case specifically identified as "NA" the "assets abandoned by court order." Thus, as the Fifth Circuit recently concluded "the trustee was the only party capable of bringing the claim because it accrued before the filing of [Plaintiffs'] bankruptcy petition in 2008, had never been abandoned by the trustee, and was therefore part of the bankrupt estate." *Carroll v. JP Morgan Chase Bank*, __ F. App'x __, 2014 WL 3361990, at *1 (5th Cir. July 10, 2014) (affirming district court's rejection of claim of breach of contract related to borrowing agreement entered into prior to bankruptcy proceedings based on lack of standing of borrowers to assert claim). Accordingly, McCrae lacks standing to assert any claims against PHH based on conduct prior to the Bankruptcy Case and the motion to dismiss should be granted on this basis.

3. Failure to State a Claim

PHH also contends each of McCrae's claims should be dismissed for failure to state an actionable claim.

a. Wrongful Foreclosure

PHH first argues McCrae has failed to state a claim for wrongful foreclosure. Under Texas law, to establish a claim for wrongful foreclosure, a plaintiff must show: (1) an irregularity in the foreclosure sale; (2) that her home sold for a grossly inadequate selling price and (3) a causal

[4] The undersigned notes McCrae did not identify any other legal claims, contingent or otherwise, in his financial schedules filed in the Bankruptcy Case.

connection between a defect in the foreclosure sale proceedings and the grossly inadequate selling price. *Pollett v. Aurora Loan Servs*., 455 F. App'x 413, 415 (5th Cir. 2011); *Sauceda v. GMAC Mortg. Corp*., 268 S.W.3d 135, 139 (Tex. App.-Corpus Christi 2008, no pet.); *Charter Nat'l Bank—Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.-Houston [14th Dist.] 1989, writ denied). "A foreclosure is to be reviewed with a presumption that all prerequisites to the sale have been performed and that provisions for waiver of notice are valid." *Deposit Ins. Bridge Bank, N.A., Dallas v. McQueen*, 804 S.W.2d 264, 266 (Tex. App.–Houston [1st] 1991, no writ). *See Clark v. F.D.I.C.*, 849 F. Supp. 2d 736, 759-60 (S.D. Tex. 2011) (Substitute Trustee's Deed of Trust, as a matter of law, is prima facie evidence of validity of foreclosure sale).

PHH contends dismissal of this claim is proper for the simple reason that no foreclosure ever occurred. This alone dooms McCrae's claim. *See Port City State Bank v. Leyco Constr. Co., Inc.*, 561 S.W.2d 546, 547 (Tex. Civ. App.–Beaumont 1977, no writ) (no cause of action for wrongful foreclosure where foreclosure did not occur). Moreover, the pleadings make clear McCrae still resides at, and thus is in possession of the Property. Loss of possession of the property in foreclosure is an essential element of a claim for wrongful foreclosure. *See Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App.–San Antonio 1998, no pet.) (recovery on wrongful foreclosure claim conditioned on disturbance of mortgagor's possession). This claim should therefore be dismissed.

b. Fraud

PHH next argues McCrae's common law fraud claim fails because the parties had an existing contractual relationship. 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." *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). However, the economic loss rule "generally precludes recovery in tort for economic losses resulting from the

failure of a party to perform under a contract." *Lamar Homes, Inc. v. Mid–Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007). "In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss. When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract." *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991). *See Smith v. JPMorgan Chase Bank, N.A.*, 519 F. App'x 861, 865 (5th Cir. 2013) (under economic loss rule, plaintiff may not bring 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").

PHH maintains McCrae cannot succeed on any tort claim, including fraud, because such a claim rests on McCrae's assertion of wrongful conduct related to enforcement of his mortgage indebtedness. PHH contends any such claims thus arise from the contractual relationship created by those documents, and the only loss would be solely an economic loss to the subject matter of those contracts. The undersigned agrees. In asserting fraud, McCrae points to nothing beyond his contractual mortgage obligation to PHH. Accordingly, the motion to dismiss should be granted as to McCrae's common law fraud claim.

c. Fair Debt Collection Practices Act

PHH also contends McCrae has failed to state an actionable claim under the Fair Debt Collection Practices Act (FDCPA"). As an initial matter, PHH argues McCrae's FDCPA claims fail because he has not alleged a foreclosure actually occurred. In addition, the undersigned notes McCrae has not identified which provision of the FDCPA he believes was violated. Rather, McCrae simply refers generally to the FDCPA, but provides no facts describing the specific acts he contends were wrongful and how those acts constitute a violation of the FDCPA. His conclusory citation alone is insufficient to state a claim.

In addition, McCrae fails to allege facts establishing any defendant acted as a debt collector.

The threshold determination under the FDCPA for liability is whether a defendant falls within the statute's definition of a debt collector. *See Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 384 (7th Cir. 2010) (for FDCPA to apply, threshold criteria of whether defendant qualifies as "debt collector" must be met); *Brown v. Morris*, 243 F. App'x 31, 36 (5th Cir. 2007) (referencing issue of whether defendant was debt collector under FDCPA as "threshold determination"); *Montgomery v. Huntington Bank* ,346 F.3d 693, 698 (6th Cir. 2003) (as threshold matter, court must determine whether defendant falls within FDCPA's definition of "debt collector"); *In re Eastman*, 419 B.R. 711, 727 (W.D. Tex. 2009) ("threshold issue" is allegation that defendants are debt collectors under FDCPA). *See also Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995) (addressing application of "debt collector" requirement under FDCPA to lawyers). "Mortgage companies collecting debts are not 'debt collectors'" under the FDCPA. *Williams v. Countrywide Home Loans, Inc.*, 504 F. Supp. 2d 176, 190 (S.D. Tex. 2007) (citing *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985)). *See also Montgomery v. Wells Fargo Bank, N.A.*, 459 F. App'x 424, 2012 WL 265952, at *2 n.1 (5th Cir. Jan. 31, 2012) (FDCPA claim fails because mortgage lenders are not debt collectors under FDCPA). Thus, a number of courts have concluded that "[t]he activity of foreclosing on a property pursuant to a deed of trust is not the collection of debt within the meaning of the FDCPA." *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 626 (S.D. Tex. 2010) (quoting *Williams v. Countrywide Home Loans, Inc.*, 504 F. Supp. 2d 176, 190 (S.D. Tex. 2007). *See Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008) (foreclosing on property pursuant to deed of trust not collection of debt under FDCPA); *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) (same); *Heinemann v. Jim Walter Homes, Inc*., 47 F. Supp. 2d 716 (D.W. Va.1998), *aff'd*, 173 F.3d 850 (4th Cir. 1999) (same). *See also Brown v. Morris*, 243 F. App'x 31, 35 (5th Cir. 2007) (noting prior implicit recognition that foreclosure not per se FDCPA debt collection). Accordingly, the undersigned finds PHH's motion to dismiss any claim McCrae asserts under the FDCPA should be granted.

d. Texas Debt Collection Act

PHH additionally moves to dismiss McCrae's claim of unfair debt collection practices in violation of the Texas Finance Code. In pertinent part, the Texas Debt Collection Act ("TDCA") prohibits a debt collector from "threatening to take an action prohibited by law" and "misrepresenting the character, extent, or amount of a consumer debt, or misrepresenting the consumer debt's status in a judicial or governmental proceeding." TEX. FIN. CODE §§ 392.301(a)(8) & 392.304(a)(8). As set forth above, McCrae generally alleges PHH acted improperly in the course of attempting to foreclose on the Property.

As PHH point out, this claim fails because the conduct underlying the claim occurred during the non-judicial foreclosure process. The TDCA specifically provides that a debt collector is not prevented from "exercising or threatening to exercise a statutory or contractual right of seizure, repossession, or sale that does not require court proceedings." TEX. FIN. CODE § 392.301(b)(3). In other words, the TDCA, by its own terms, expressly allows threats of nonjudicial foreclosure. *See Singha v. BAC Home Loans Servicing, L.P.*, 564 F. App'x 65, 70 (5th Cir. 2014) (threatening foreclosure by mortgagee "is expressly permitted by the TDCA"); *Verdin v. Fed. Nat'l Mortg. Ass'n*, 540 F. App'x 253, 257 (5th Cir. 2013) (noting TDCA does not prohibit creditor from exercising or threatening to exercise contractual right to accelerate and foreclose in non-court proceedings). *See also Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 453 (Tex. App.–Dallas 2002, no pet.) (claim under TDCA fails where plaintiffs presented no evidence about any efforts to collect on debt other than foreclosure on property). Accordingly, McCrae's claim under the TDCA should be dismissed.

e. Statutory Fraud

PHH also maintains McCrae's claim of statutory fraud in a real estate transaction should be dismissed. In pertinent part, Texas law provides:

> Fraud in a transaction involving real estate or stock in a corporation consists of a
>
> (1) false representation of a past or existing material fact, when the false representation is
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> (A) made to a person for the purpose of inducing that person to enter into a contract; and
>
> (B) relied on by that person in entering into that contract

TEX. BUS. & COM. CODE ANN. § 27.01(a). By its own terms, the statute applies only to fraud in real estate or stock transactions. Thus, a loan transaction, even if secured by land, is not considered to come under the statute. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 343 (5th Cir. 2008); *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 611 (Tex. App.–Waco 2000, pet. denied). *See also Greenway Bank & Trust v. Smith*, 679 S.W.2d 592, 596 (Tex. App.–Houston [1st Dist] 1984, writ ref'd n.r.e.) ("The statute makes no mention of any application to guaranty agreements, secured by real estate, or to a party who 'merely' loaned money for the purchase of real estate.").

McCrae does not complain of any conduct on the part of PHH or any other defendant that was not related to his mortgage obligation. His allegations are clearly addressed to a loan transaction, not his original acquisition of the Property. Accordingly, McCrae has failed to state a cognizable claim of statutory fraud under Texas law and the motion to dismiss should be granted as to this claim. *See Massey v. EMC Mortg. Corp.*, 546 F. App'x 477, 482 (5th Cir. 2013) (stating district court correctly dismissed statutory fraud claim against mortgage servicer because statute does not apply to loan transaction).

f. Injunctive Relief

PHH finally argues all claims for injunctive relief against it should be dismissed. PHH correctly points out a request for injunctive relief is simply a remedy and not a free-standing claim. *See Brown v. Ke–Ping Xie*, 260 S.W.3d 118, 122 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (injunction is an equitable remedy, not a cause of action); *See also Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (temporary injunction requires pleading cause of action against

defendant). As the undersigned has concluded McCrae has failed to state an actionable claim against PHH, his requests for injunctive relief cannot stand.

C. Claims Against Other Defendants

As set forth above, McCrae filed an amended complaint in this action on August 11, 2014. In the case caption, as well as the body of the amended complaint, McCrae names as defendants Barrett, as Substitute Trustee, as well as John Does 1-100, in their capacity as actors and employees of the other defendants. Additionally, although not identified in the case caption, McCrae states he is seeking relief against USAA Federal Savings Bank ("USAA").

None of the remaining defendants in this action have moved for dismissal to date. However, the Fifth Circuit has approved sua sponte dismissal under Rule 12(b)(6) "as long as the procedure employed is fair." *Whatley v. Coffin*, 496 F. App'x 414, 415-16 (5th Cir. 2012) (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998). Fairness in this context "requires both notice of the court's intention and an opportunity to respond." *Carroll v. Fort James Corp*., 470 F.3d 1171, 1177 (5th Cir. 2006). As set forth below, a plaintiff is provided the opportunity to file written objections to the undersigned's recommendations in this report. McCrae is thus being afforded the notice and opportunity to respond to satisfy the requisites for sua sponte dismissal of his claims against the remaining defendants.

1. Claims Against Barrett

As set forth above, the doctrine of judicial estoppel bars a litigant from asserting a position in a legal proceeding inconsistent with a position taken in a prior legal proceeding. As a debtor in a bankruptcy proceeding, McCrae was required to disclose all potential claims in his bankruptcy petition. *See In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004) (debtors in bankruptcy have a continuous "express, affirmative duty to disclose all assets"). If the debtor has enough information to suggest he might have a cause of action, then the claim must be disclosed,

even if it is contingent, dependent, or conditional. *In re Coastal Plains, Inc*., 179 F.3d 197, 208 (5th Cir. 2004). When a debtor fails to disclose a pending or potential claim in his bankruptcy petition, he is judicially estopped from bringing that claim later. *Id*. at 210. *See also Jethroe v. Omnova Sol'ns, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) (judicial estoppel particularly appropriate where party "fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset").

McCrae's allegations make clear he is seeking relief from Barrett based on its conduct as substitute trustee in setting the Property for a foreclosure sale and sending him notice of that sale in January 2013. (Am. Compl. ¶¶ 17, 47(1), 44(2)). As detailed above, McCrae filed for bankruptcy protection in March 2013. Absent from any of his bankruptcy filings is any reference to a claim against Barrett. As with his claims against PHH, the undersigned concludes judicial estoppel bars McCrae from asserting claims against Barrett for conduct occurring prior to his filing for bankruptcy protection. *See Love v. Tyson Foods, Inc.*, 677 F.3d 258, 263 (5th Cir. 2012) (upholding application of judicial estoppel to claim of employment discrimination not disclosed in bankruptcy filings made after termination of employment giving rise to discrimination claim). The claims against Barrett should, therefore, be dismissed.

2. Claims Against John Does 1-100

McCrae has also named John Does 1-100 as defendants in this action. He identifies those defendants further as "various actors and employees" of PHH and Barrett. (Am. Compl. ¶¶ 13, 18). As set forth above, the undersigned has concluded all of McCrae's claims against PHH and Barrett should be dismissed. For the same reasons, any claims McCrae asserts against persons acting on behalf of PHH and Barrett should be dismissed.

3. Claims Against USAA

As noted above, although McCrae does not include USAA in the case caption, he indicates

in the introductory paragraph to the amended complaint that he is seeking relief from USAA. (Am. Compl. at 2). McCrae does not, however, allege any actions by USAA. He does refer to PHH as both the assignee and mortgage servicer of USAA, but also notes "the business arrangement between USAA and PHH remains unclear at this point. (*Id*. ¶¶ 42(1), 43(1)).

The Fifth Circuit has repeatedly stated courts need not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions in reviewing a motion to dismiss under Rule 12(b)(6). *See, e.g., Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2006) (conclusory allegations will not suffice to prevent motion to dismiss); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006) (plaintiff must plead specific facts, not conclusory allegations, to avoid dismissal); *Drs. Bethea, Moustoukas v. St. Paul Guardian Ins.*, 376 F.3d 399, 403 (5th Cir. 2004) (conclusory allegations or legal conclusions masquerading as factual conclusions not sufficient to prevent dismissal); *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (court does not accept conclusory allegations, unwarranted deductions, or legal conclusions); *Jones v. Alcoa Inc.*, 339 F.3d 359, 363 n.4 (5th Cir. 2003) ("conclusory allegations or unwarranted deductions of fact" not accepted as true); *Kane Enters. v. MacGregor (USA)*, 322 F.3d 371, 374 (5th Cir. 2003) (same); *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (conclusory allegations or legal conclusions masquerading as factual conclusions not sufficient to prevent dismissal); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) (same). Where a complaint does not contain a short and plain statement of the claim, only legal conclusions of such generality as to fail to give fair notice to defendants of the claims against them, the complaint is subject to dismissal. *Vulcan Materials*, 238 F.3d at 387 (recitation of legal standard, without supporting facts, insufficient to withstand motion to dismiss).

McCrae has wholly failed to meet his burden in stating any claim against USAA. His amended complaint contains no allegations setting forth any facts regarding the conduct of USAA. At best, he suggests USAA should be responsible for the conduct of PHH through some

unidentified legal relationship. However, the undersigned has concluded McCrae's claims against PHH are all subject to dismissal. Accordingly, USAA is entitled to dismissal of all claims against it for failure to state an actionable claim.

IV. RECOMMENDATION

The undersigned **RECOMMENDS** all claims asserted by Plaintiff Barbara McCrae, or any behalf of any person other than David McCrae should be dismissed without prejudice. The undersigned **FURTHER RECOMMENDS** that the District Court **GRANT** Defendant's Motion to Dismiss (Clerk's Dkt. #14) and dismiss all claims brought by David McCrae against Defendant PHH Mortgage LLC with prejudice. The undersigned **FURTHER RECOMMENDS** that the District Court **DISMISS** the claims brought by David McCrae against all other defendants with prejudice sua sponte for failure to state a claim. The undersigned **FINALLY RECOMMENDS** that the District Court **DISMISS** all other pending motions.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996)

(en banc).

To the extent that a party has not been served by the Clerk with this Report and Recommendation electronically, pursuant to the CM/ECF procedures of this District, the Clerk is ORDERED to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED on September 19, 2014.

MARK LANE
UNITED STATES MAGISTRATE JUDGE