IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DOROTHY L. MOORE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:21-cv-02575-SHL-tmp**
	)	**U.S. District Court Judge Sheryl H. Lipman**
	)	
	)	
PHH MORTGAGE CORPORATION; HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR ACE SECURITIES CORP., HOME EQUITY LOAN TRUST, SERIES 2005-HE4; and MACKIE WOLF ZIENTZ & MANN,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF PHH MORTGAGE CORPORATION AND HSBC BANK USA, NATIONAL ASSOCIATION'S MOTION TO DISMISS

Defendants PHH Mortgage Corporation ("PHH") and HSBC Bank USA, National Association, as Trustee for Ace Securities Corp., Home Equity Loan Trust, Series 2005-HE4 ("HSBC Bank") (collectively, the "Moving Defendants"), by and through counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby submit this Memorandum of Law in Support of their Motion to Dismiss the Complaint of Plaintiff, Dorothy L. Moore ("Plaintiff"), for Wrongful Foreclosure, Fraud And To Enjoin Foreclosure Sale (Doc. 1-2, PageID 16–58, referred to as the "Complaint" and cited as "Compl."). In support of their motion to dismiss, Moving Defendants state as follows:

INTRODUCTION

Plaintiff's wrongful foreclosure and fraud claims are due to be dismissed. First, Plaintiff's wrongful foreclosure claims fail since such claims are not ripe, and even if these claims are ripe,

they fail as a matter of law. Specifically, a foreclosure sale has not yet taken place, and thus, the claims lack ripeness. In addition, Plaintiff's wrongful foreclosure claims are frivolous because it is well-settled law that: (1) a substitution of trustee is not required to be recorded prior to a substitute trustee publishing or mailing to a borrower a notice of foreclosure sale; (2) there was no requirement that the notice of acceleration that was sent to Plaintiff notify her of a right to reinstate the loan; and (3) there is no requirement that notices of default and of the foreclosure sale be "delivered" to Plaintiff under the deed of trust or Tennessee law. Therefore, Plaintiff's wrongful foreclosure claims fail as a matter of law.

Second, Plaintiff's fraud claims also fail as a matter of law. Plaintiff's fraud claims are entirely predicated on her receipt of a Form 1099-C cancellation of debt from the Internal Revenue Service ("IRS") which purportedly caused Plaintiff to withhold her monthly mortgage payments based upon her mistaken and unilateral belief that a portion of her debt had been cancelled. Consequently, Plaintiff alleges that the subsequent notices of default, acceleration, and of the foreclosure sale were fraudulent because, despite the alleged cancellation of debt, the notices stated that (1) Plaintiff was in default and (2) that Plaintiff owed an accelerated debt of $399,090.55. Critically, however, a Form 1099-C does not discharge a debt or even represent that a debt has been discharged; rather, a Form 1099-C is merely an informational return made to the IRS for reporting and compliance purposes. Given that receipt of the Form 1099-C is the only factual allegation to support Plaintiff's erroneous contention that her debt was discharged, the subsequent notices cannot support a claim of fraud because the debt had not been discharged. Accordingly, for the reasons stated in this memorandum, this Court should dismiss Plaintiff's claims as lacking ripeness and/or dismiss her claims for failure to state a claim, *with prejudice*.

SUMMARY OF RELEVANT FACTUAL ALLEGATIONS

Plaintiff asserts allegations for wrongful foreclosure and fraud. In doing so, Plaintiff does not allege that the deed of trust, securing the debt owed by her, is invalid or that it does not govern the parties' relationship. Indeed, Plaintiff acknowledges that she executed a Deed of Trust in favor of Carlton W. Orange, Esq. as Trustee for Mortgage Electronic Registration Systems, Inc. ("MERS"), solely as nominee for the Lender, MILA, Inc., a Washington Corporation, and its successors and assigns ("Lender"), in the amount of $342,400.00 ("Deed of Trust"), securing real property located at 8717 Classic Drive, Memphis, Tennessee 38125 (the "Property"). (Compl., ¶ 5.)[1] Thus, Plaintiff does not challenge the validity of the Deed of Trust or the "standing"/right of the current mortgagee, HSBC Bank, to foreclose the Deed of Trust if it is in default. Furthermore, the Plaintiff does not contest the fact that the foreclosure sale originally set for August 24, 2021 did not take place as the Chancery Court entered a temporary restraining order enjoining the sale on August 24, 2021, and extending the temporary restraining order for 30 days after the injunction hearing set for August 23, 2021 (Doc. 1-2, PageID 69–70.)

Despite the fact that no foreclosure sale has taken place, Plaintiff alleges that the notice of acceleration dated June 22, 2021 ("Notice of Acceleration" attached as Exhibit 2 to the Complaint) was deficient in that it did not notify Plaintiff of her right to reinstate the loan. (Compl., ¶ 10.) Plaintiff also alleges that the notice of foreclosure sale dated June 23, 2021 ("Notice of Foreclosure

[1] Because an incomplete copy of the Deed of Trust is attached to the Complaint, a true and accurate copy of the Deed of Trust is attached as Exhibit "1" hereto. This Court may consider the complete Deed of Trust since Plaintiff refers to it in her Complaint, the Deed of Trust is a public record, and this deed is central to Plaintiff's wrongful foreclosure and fraud claims. Shaughnessy v. Interpublic Grp. of Cos., 506 F. App'x 369, 372 (6th Cir. 2012) ('**[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [her] claim**.') (emphasis added).

Sale" attached as Exhibit 3 to the Complaint) and a notice of default (which Plaintiff does not identify by date or attach to the Complaint) were not "delivered" to her; rather, these notices were allegedly delivered to an unspecified address in her neighborhood and retrieved by Plaintiff. (Id., at ¶ 21.)

Paragraph 22 of the Deed of Trust does not require that a Notice of Acceleration notify Plaintiff of her right to reinstate the loan. (Ex. 1, Sec. 22.) Instead, paragraph 22 states, in relevant part, as follows:

> **22. Acceleration;** Remedies. Lender shall give notice to the Borrower *prior to acceleration* following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 under Applicable Law provides otherwise). . . . The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, the Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law.

(Id. [bolding in original] [italics added].) Thus, it is clear that the Deed of Trust requires that the ***notice of default*** (not the Notice of Acceleration) inform Plaintiff of her right to reinstate after acceleration. (Id.) Notably, Plaintiff does not claim that the notice of default (which Plaintiff does not identify by date or attach to the Complaint) failed to advise her of this right.

Further, contrary to Plaintiff's allegations, Plaintiff is not entitled to "delivery" of notices. Rather, the Deed of Trust only requires that notices be "mailed" to the address of the Property as set forth in the Deed of Trust. (Ex. 1, Sec. 15.) Specifically, paragraph 15 of the Deed of Trust states as follows:

> **15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address

> if sent by other means. . . . The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender.

(Ex. 1, Sec. 15 [bolding in original].) Furthermore, paragraph 22 of the Deed of Trust states as follows:

> If Lender invokes the power of sale, Trustee shall give notice of sale by public advertisement in the county in which the Property is located for the time and in the manner provided by Applicable Law, and Lender or Trustee shall mail a copy of the notice of sale to Borrower in the same manner as provided in Section 15.

(Ex. 1, Sec. 22.)[2] Critically, the "Property Address", as defined by the Deed of Trust, is the same address where the Notice of Acceleration and Notice of Foreclosure Sale were mailed. (Compl., Ex. 2–3.) Further, Plaintiff does not allege that the notice of default was not mailed to the Property Address (she only claims it was not delivered to her) nor does she attach a copy of the notice showing an address different than the Property Address. (Compl., ¶¶ 9–26.) Finally, Plaintiff has not alleged that she requested a substitute address for mailing of the notices as permitted by paragraph 15 of the Deed of Trust.

Plaintiff further alleges that the Notice of Foreclosure Sale is deficient because it declared that the foreclosure sale would be conducted by substitute trustee/co-Defendant Mackie Wolf Zientz & Mann, P.C. ("Mackie") prior to the recording of a substitution of trustee. The Notice of Foreclosure Sale is dated June 23, 2021. (Compl., Ex. 2–3.) The Notice of Foreclosure Sale identified a foreclosure sale date of August 24, 2021. (Id.) On July 12, 2021, prior to the scheduled

[2] Plaintiff argues in her Response to Verified Denial (Doc. 9) that co-Defendant Mackie failed to serve the Notice of Acceleration and Notice of Foreclosure Sale via certified mail, but these allegations have not been made in the Complaint, and in any event, it is clear that certified mail is not required.

sale date, a substitution of trustee was recorded in the Register of Deeds Office for Shelby County, Tennessee as Instrument No. 21086095 (the "Substitution of Trustee").[3]

Finally, Plaintiff alleges that she is not in default based upon her subjective and unilateral belief that the Moving Defendants cancelled a portion the debt. (Id., at ¶¶ 6–8.) Specifically, Plaintiff alleges that starting in January of 2021, she relied upon two Form 1099-Cs "by withholding further mortgage payments upon the belief that no additional money was owed at this time." (Id., at ¶ 26.) Thus, Plaintiff alleges that her default occurred as a result of her withholding these payments in January of 2021. (Id.) However, Plaintiff alleges that the misrepresentations of fact are contained within the aforementioned notice of default, Notice of Acceleration, and Notice of Foreclosure Sale (id.), even though these documents did not represent that Plaintiff's debt had been discharged. Specifically, Plaintiff alleges that Moving Defendants falsely represented that Plaintiff was in default and owed an accelerated debt of $399,090.55 "AFTER the defendants stated to the Internal Revenue Service that approximately $291,000 of [the modified loan balance of $325,375.00] was cancelled" by the Form 1099-Cs. (Compl., ¶¶ 9, 26.) Critically, all of these notices are dated ***after*** the Plaintiff received her first Form 1099-C and started withholding payments, as further evidenced by the dates of the Notice of Acceleration (June 22, 2021) and the Notice of Foreclosure Sale (June 23, 2021). (Compl., Ex. 2–3.) As proven in the Argument section herein, however, since the 1099-Cs did not act to discharge the debt, there were no false representations in any of the aforementioned notices.

[3] A true and accurate copy of the Substitution of Trustee is attached as Exhibit "2" hereto. The Court may consider the Substitution of Trustee since Plaintiff refers to it in her Complaint, the Substitution of Trustee is a public record, and this instrument is central to Plaintiff's wrongful foreclosure claims. Shaughnessy, 506 F. App'x at 372 ('**[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [her] claim**.') (emphasis added).

STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. To survive a Rule 12(b)(6) motion to dismiss, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations and emphasis omitted). "[T]he court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account . . . . **[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [his or her] claim**." Shaughnessy v. Interpublic Grp. of Cos., 506 F. App'x 369, 372 (6th Cir. 2012) (emphasis added).[4] Relevant to this case in particular, a court may take judicial notice of matters of public record, such as recorded instruments. See Signature Combs, Inc. v. U.S., 253 F.Supp.2d 1028, 1041 (W.D. Tenn. 2003).

Under Rule 12(b)(6), the complaint is viewed in the light most favorable to plaintiffs, the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of plaintiffs. Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008). However, a "legal conclusion couched as a factual allegation," need not be accepted as true. Twombly, 550 U.S. at 555. A plaintiff's obligation to provide the "grounds" for the requested

[4] See also Wiggins v. Ocwen Loan Servicing, LLC, 722 F. App'x 415, 417 n.1 (6th Cir. 2018) ("We draw some of these facts that are outside the four corners of the complaint from documents Ocwen presented to the district court, namely plaintiff's loan modification application and public records regarding her foreclosure. As the district court correctly found (and as uncontested by plaintiff), these documents are ripe for consideration at the motion-to-dismiss stage because they were either (a) public records subject to judicial notice, or (b) referred to in the complaint and central to plaintiff's claims.").

relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id.; see also Ass'n of Cleveland Fire Fighters vs. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007). "[T]hat a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of all the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In short, this Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Id. (internal quotation marks and citation omitted). In the instant action, any allegations that are sufficiently pled, and thus, are to be accepted as true, do not state a claim for relief. Based on the foregoing and the reasons detailed within, Plaintiffs' claims must be dismissed in their entirety.

LAW AND ARGUMENT

I. PLAINTIFF'S WRONGFUL FORECLOSURE CLAIMS ARE NOT RIPE.

Plaintiff's wrongful foreclosure claims are not ripe because the foreclosure sale has not taken place.[5] This Court has dismissed a wrongful foreclosure action for lack of ripeness when "no foreclosure has taken place[.]" Sandlin v. CitiMortgage, Inc., 2021 WL 1581771, at *9 (W.D. Tenn. 2021); see also Mills v. First Horizon Home Loan Corp., 363 S.W.3d 551, 556–57 (Tenn. Ct. App. 2010) ("This issue is not ripe for review where the note is not in default and

[5] To the extent that Plaintiff alleges wrongful foreclosure by reason of fraud, Plaintiff's "fraud" claim also lacks ripeness. See CitiMortage, Inc. v. Drake, 410 S.W.3d 797, 802 (Tenn. Ct. App. 2013) (holding that wrongful foreclosure may be based upon fraud). It is unclear whether Plaintiff is alleging a fraud claim independent of wrongful foreclosure. (Compl., ¶¶ 17–26.) For the purposes of this Motion, the Moving Defendants treat Plaintiff's claims as two substantive claims for relief: (1) wrongful foreclosure by reason of deficient notice; and (2) fraud related to the alleged discharge of the debt. Should this court consider wrongful foreclosure as the only cause of action or to the extent Plaintiff's wrongful foreclosure claim is premised on the alleged fraud, then all of Plaintiff's claims lack ripeness.

no foreclosure or enforcement proceedings have been initiated[.]"). As the Middle District Court has explained:

> Wrongful foreclosure is an equitable remedy to unjust foreclosure. As the parties recognize, Tennessee courts have not announced "specific elements for wrongful foreclosure," but the commonality between all reported and non-reported cases alike is the occurrence of an actual foreclosure on property. Until a foreclosure has occurred, the issue is not ripe for review and the court lacks jurisdiction over it.

Harris v. LNV Corporation and its agents: MGC Mortgage, Inc., 2014 WL 12530946, at *9 (M.D. Tenn. 2014). Plaintiff filed her claims seeking to enjoin a sale set to take place on August 24, 2021. (Compl., ¶¶ 27–35.) However, it is indisputable that the foreclosure sale has not occurred and, indeed, has been cancelled, not to mention prohibited by a temporary restraining order prior to removal. (Doc. 1-2, PageID 69–70.); see Sandlin v. CitiMortgage, Inc., 2021 WL 1581771, at *9 (W.D. Tenn. 2021) (holding that wrongful foreclosure claims are moot where a temporary restraining order prevented a foreclosure sale)). Therefore, Plaintiff's wrongful foreclosure claims are not ripe and should be dismissed.

II. PLAINTIFF'S WRONGFUL FORECLOSURE CLAIMS FAIL AS A MATTER OF LAW.

Plaintiff fails to state a claim for wrongful foreclosure based upon deficient notices of default, acceleration, and/or of the foreclosure sale. A wrongful foreclosure action may be asserted "as a primary cause of action when a mortgagor asserts that a foreclosure action is improper under a deed of trust." Garner v. Coffee County Bank, 2015 WL 6445601, at *10 (Tenn. Ct. App. 2015) (citations omitted). Although there are no specific elements of a wrongful foreclosure claim in Tennessee, Plaintiff must allege that a '"legally held, conducted and consummated" foreclosure involved "irregularity, misconduct, fraud, or unfairness on the part of the trustee or the mortgagee that caused or contributed to an inadequate price, for a court of equity to set aside the sale."' Harris v. LNV Corp., 2014 WL 3015293, at *11 (M.D. Tenn. 2014) (quoting CitiMortage, Inc. v. Drake,

410 S.W.3d 797, 802 (Tenn. Ct. App. 2013)). Plaintiff alleges three violations of the foreclosure process, all of which fail under Tennessee law and/or the Deed of Trust. (Compl., ¶ 21.) Specifically, Plaintiff alleges: (1) that Mackie was not the successor trustee at the time of providing the Notice of Foreclosure Sale; (2) that the Notice of Acceleration did not provide the right of reinstatement; and (3) that the notices of default and of foreclosure sale were not delivered to the Plaintiff. (Id., ¶¶ 19–21.)

1. An Appointment Of Successor Trustee Is Not Required To Be Recorded Prior To The Publication Or Mailing Of A Notice Of Foreclosure Sale.

Plaintiff alleges that the Substitution of Trustee is untimely since it was executed and recorded after the Notice of Sale was first published and mailed to Plaintiff on June 23, 2021. (Compl., ¶ 19.) However, a substitution of trustee is not required to be recorded prior to the first date that a notice of foreclosure sale is published or mailed, which is made clear by statute:

> (3)(A) In the event the substitution of trustee is not recorded prior to the first date of publication by the substitute trustee, the beneficiary shall include in the substitution of trustee instrument, which shall be recorded prior to the deed evidencing sale, the following statement:
>
> > Beneficiary has appointed the substitute trustee prior to the first notice of publication as required by T.C.A. § 35-5-101 and ratifies and confirms all actions taken by the substitute trustee subsequent to the date of substitution and prior to the recording of this substitution.
>
> (B) Once a substitution of trustee instrument containing the statement set forth in subdivision (b)(3)(A) is timely recorded, it shall act as conclusive proof as a matter of law that the substitute trustee has been timely appointed and has acted with authority of the beneficiary.

TENN. CODE ANN. § 35-5-114 (2006). When interpreting this statute, this Court has held that "such recording is not required at the time of the Notice of Foreclosure Sale or Notice of Trustee Sale." Berkley v. Deutsche Bank Nat. Trust Co., 2013 WL 6834385, at *5–6 (W.D. Tenn. 2013).

Here, the Substitution of Trustee was recorded on July 15, 2021. (Ex. 2.) The Substitution of Trustee provides:

> Whereas, in the event this Substitution of Trustee has not been recorded prior to the first date of publication as required by T.C.A. § 35-5-101, et. seq., then the undersigned owner of the indebtedness does hereby declare that it did appoint the Substitute Trustee prior to the first notice of publication and does hereby ratify and confirm all actions taken by the Substitute Trustee subsequent to said date of substitution but prior to the recording of this substitution

(Id.) When this language, as required under T.C.A. § 35-5-114, is present, the recording of Substitution of Trustee "is of no consequence, as long as it was recorded prior to the deed evidencing sale[.]" BAC Home Loans Servicing v. Goodson, 2016 WL 3752217, at *8 n.15 (Tenn. Ct. App. 2016). Because the foreclosure sale has not occurred and no foreclosure deed has been executed, the Substitution of Trustee was timely recorded on July 12, 2021. (Ex. 2.)

Further, Plaintiff cannot plausibly argue that the Deed of Trust requires the recordation of the Substitute Trustee prior the first publication and mailing of the Notice of Foreclosure Sale. This Court, when interpreting the same terms under a similar deed of trust, held that the "Deed of Trust contains no requirement as to when the instrument must be recorded[.]" Id. at *5.[6] Therefore, Plaintiff fails to state a claim that the foreclosure is wrongful by reason of recording the Substitute Trustee after the first publication and mailing of the Notice of Foreclosure Sale.

[6] The paragraph at issue is paragraph 24 of the Deed of Trust, which reads as follows:

> **24. Substitution of Trustee.** Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Security Instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

(Ex. 1, Sec. 24 [bolding in original].)

2. The Deed Of Trust Does Not Require A Notice Of Acceleration To Notify Plaintiff Of Her Right To Reinstate The Loan.

Plaintiff cannot claim that the Notice of Acceleration is deficient under paragraph 22 of the Deed of Trust. "Paragraphs 15 & 22 concern how notice is generally provided for under the Agreement and Defendants issuing a notice of default **prior to acceleration**." Sandlin v. Citibank, N.A., 2018 WL 2370769, at *3 (W.D. Tenn. 2018) (emphasis added); see Bank of New York Mellon v. Chamberlain, 2020 WL 563527, at *4 (Tenn. Ct. App. 2020) (assessing whether the "notice of default prior to acceleration as required by paragraph 22 of the deed of trust"); CitiMortgage, Inc. v. Drake, 410 S.W.3d 797, 810 (Tenn. Ct. App. 2013) (evaluating whether the notice of default was sufficient under paragraph 22 of the deed of trust). Here, paragraph 22 of the Deed of Trust requires a notice prior to acceleration (i.e. a notice of default; *not a notice of acceleration*) to notify Plaintiff of her right to reinstate the loan. (Ex. 1, Sec. 22.) Therefore, Plaintiff fails to state a wrongful foreclosure claim based upon an allegation that the Notice of Acceleration is required to notify her of the right to reinstate the loan prior to acceleration. Further, Plaintiff makes no claim that any other document (including a notice of default) failed to satisfy the provisions of the Deed of Trust by providing her the notice at issue.

3. Neither The Deed Of Trust Nor Tennessee Law Requires Delivery Of A Notice Of Default Or Notice Of Foreclosure Sale.

Plaintiff cannot claim that the notices of default and of foreclosure sale were deficient because they were not "delivered" to the Plaintiff. Neither paragraph 15 of the Deed of Trust nor Tennessee law requires actual notice (i.e. delivery). Smith v. Hughes, 2021 WL 1779410, at *7 (Tenn. Ct. App. 2021) ("Notably, however, the statute only provides that the trustee shall 'send' the notice, and '[t]here is no statutory requirement that the notice be received by the debtor."'). Paragraph 15 provides:

> Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. . . . The notice address shall be the Property address unless Borrower has designated a substitute notice address by notice to Lender.

(Ex. 1, Sec. 15.); Davis v. Wells Fargo Home Mortgage, 2018 WL 1560077, at *11 (Tenn. Ct. App. 2018) ("There is no requirement under the deed of trust that the grantor receive notice of the foreclosure."). This paragraph alone demonstrates that Plaintiff fails to state a claim that the notice of default must be "delivered" to her.

With respect to the Notice of Foreclosure Sale, this Court has held that the "publication of the notice [of foreclosure sale is] to follow the statutory publication requirements of § 35-5-101, while the mailed notice [is] governed by Sections 22 and 15[.]" Ford v. Specialized Loan Servicing, LLC, 2017 WL 5069114, at *4–5 (W.D. Tenn. 2017); see also Gibson v. Mortgage Electronic Registration Systems, Inc., 2012 WL 1601313 (W.D. Tenn. 2012) (same). Consistent with the Deed of Trust, Tennessee law only requires that the Notice of Foreclosure Sale be "sent" via registered or certified mail to the Property Address. TENN. CODE ANN. § 35-5-101 (2011); Davis v. Wells Fargo Home Mortgage, 2018 WL 1560077, at *11 (Tenn. Ct. App. 2018) ("There is no statutory requirement that the notice be received by the debtor."); Citizens National Bank v. Mountain Ridge, LLC, 2010 WL 4238479, at *6 (E.D. Tenn. 2010) ("The statute contains no requirement of actual notice[.]").

In the Deed of Trust, the Property Address is defined as 8717 Classic Drive, Memphis, Tennessee 38125, which is the same mailing address specified in the Notice of Foreclosure Sale (as well as the Notice of Acceleration). (Compl., Ex. 2–3); (Ex. 1, Sec. 1.) Therefore, Plaintiff has not and cannot sufficiently allege that the Notice of Foreclosure Sale was not mailed to the Property Address. (Id.) Further, Plaintiff does not allege that the notice of default was not mailed to the

Property Address, Plaintiff has neither attached a copy of the notice of default to the Complaint nor identified the address to which it was mailed, and thus, Plaintiff has failed to plausibly plead wrongful foreclosure based upon this ground. (Compl., ¶ 21.) Likewise, Plaintiff has not alleged that she requested a substitute address for the mailing of notices as permitted by paragraph 15 of the Deed of Trust. Because there is no requirement under the Deed of Trust or Tennessee law that notices of default or of the foreclosure sale be "delivered," Plaintiff fails to state a claim for wrongful foreclosure. Consequently, Plaintiff's wrongful foreclosure claims should be dismissed, *with prejudice*.

III. PLAINTIFF'S FRAUD CLAIMS FAIL AS A MATTER OF LAW.

Plaintiff fails to state the essential elements of fraud. The essential elements of a fraud claim are:

> (1) the defendant made a representation of an existing or past fact; (2) the representation was false when made; (3) the representation was in regard to a material fact; (4) the false representation was made either knowingly or without belief in its truth or recklessly; (5) plaintiff reasonably relied on the misrepresented fact; and (6) plaintiff suffered damage as a result of the misrepresentation.

PNC Multifamily Capital Institutional Fund XXVI Ltd. Partnership v. Bluff City Community Development Corp., 387 S.W.3d 525, 548 (Tenn. Ct. App. 2012). Fraud must be plead with particularity. See Evans v. Pearson Enterprises, Inc., 434 F.3d 839, 852–53 (6th Cir. 2006). Particularity requires the Plaintiff to plead "the time, place, and content of the fraud, the defendant's fraudulent intent; the fraudulent scheme; and the injury resulting from the fraud." Power & Telephone Supply Co., Inc. v. SunTrust Banks, Inc., 447 F.3d 923, 931 (6th Cir. 2006); see Humana Inc. v. Medtronic Sofamor Danek USA, Inc., 133 F.Supp.3d 1068, 1075–77 (W.D. Tenn. 2015). Here, Plaintiff identifies the alleged misrepresentations as the statements in the notices of default, acceleration, and of foreclosure sale that the Plaintiff was in default and owed

an accelerated debt of $399,090.55. (Compl., ¶ 26.) Plaintiff claims no other misrepresentations. Under the facts alleged, however, these statements are not actionable fraud.

1. *First Through Fourth Elements*: Plaintiff Fails To State The Essential Elements Of A Representation Of Past Or Present Fact, That Was False And In Regard To A Material Fact When Made, and That Was Made Knowingly Or Recklessly.

Plaintiff alleges that the statements of default and the amount of the debt in the notice of default, the Notice of Acceleration, and Notice of Foreclosure Sale were misrepresentations in light of the alleged cancellation of debt represented by the Form 1099-Cs. (Compl., ¶ 26.) However, because a Form 1099-C neither operates to discharge a debt nor is an admission that the debt is cancelled, Plaintiff has failed to state "how such statements were false[.]" Humana, 133 F.Supp.3d at 1076. Simply put, Plaintiff fails to "explain why the statements were fraudulent." Frank v. Dana Corp., 547 F.3d 564, 570 (6th Cir. 2008) (quoting Gupta v. Terra Nitrogen Corp., 10 F.Supp.2d 879, 883 (N.D. Ohio 1998)).

Specifically, Plaintiff's fraud claims rely upon a mistaken assumption that the Form 1099-Cs actually cancelled part of her debt. (Compl., ¶ 26.) After all, Plaintiff alleges that Moving Defendants falsely represented in notices of default, acceleration, and of foreclosure sale that Plaintiff was in default and owed an accelerated debt of $399,090.55 "AFTER the defendants stated to the Internal Revenue Service that approximately $291,000 of [the modified loan balance of $325,375.00] was cancelled[.]" (Compl., ¶¶ 9, 26.) Because these alleged misrepresentations in the notices of default, acceleration, and of foreclosure sale occurred after the initial 1099-C, Plaintiff claims that "[t]here can be no doubt that Defendants knew that the representations made in the foreclosure notices were false[.]" (Compl., ¶ 26.)

However, a Form 1099-C is an informational filing that neither cancels the debt nor is an admission that the debt has been or will be cancelled. U.S. v. Reed, 2010 WL 3656001, at *2–3

(E.D. Tenn. 2010) ("[A] Form 1099–C, as a matter of law, does not operate to legally discharge a debtor from liability on the claim that is described in the form."); Information Letters, IRS INFO 2005-0207, 2005 WL 3561135 (December 30, 2005) ("The Internal Revenue Service does not view a Form 1099-C as an admission by the creditor that it has discharged the debt and can no longer pursue collection."); F.D.I.C. v. Cashion, 720 F.3d 169, 179 (4th Cir. 2013) ("We find the IRS's view persuasive because it fully encompasses the purpose of a Form 1099–C as an IRS reporting document and follows the plain language of the relevant regulation."); Capital One, N.A. v. Massey, 2011 WL 3299934, at *3 (S.D. Tex. 2011) ("The IRS does not view a 1099–C as a legal admission that a debtor is absolved from liability for a debt.").

When analyzing allegations similar to this case, one federal court interpreted the federal regulations regarding Form 1099-Cs as follows:

> There are three main takeaways from these regulations: a creditor "must" file a Form 1099–C when one of several events occur; one of those events is an agreement between the parties to discharge the debt at some point in the future; and when a creditor files the form, they are satisfying an IRS reporting obligation, **but they are not necessarily discharging the debt**

Walker v. Ocwen Loan Servicing, LLC, 2017 WL 2957933, at *3 (D.N.J. 2017) (emphasis added) ("Ocwen's Form 1099–C contains neither a misrepresentation nor incorrect statement[.]"). The Fourth Circuit in Cashion also interpreted the following regulation to mean that a Form 1099-C does not a discharge a debt since a discharge may be deemed solely for reporting purposes by virtue of an identifiable event (as defined in subsection (b) of the regulation), regardless of whether the debt was actually cancelled:

> any applicable entity ... that discharges an indebtedness of any person ... must file an information return on Form 1099–C with the Internal Revenue Service. Solely for purposes of the reporting requirements of [the applicable statute and this regulation], a discharge of indebtedness is deemed to have occurred ... if and only if there has occurred an identifiable event described in paragraph (b)(2) of this

> section, *whether or not an actual discharge of* indebtedness has occurred on or before the date on which the identifiable event has occurred.

F.D.I.C. v. Cashion, 720 F.3d 169, 178 (4th Cir. 2013) (quoting 26 C.F.R. § 1.6050P–1(a) (emphasis in original)). The Tennessee Court of Appeals has applied federal case law interpreting these same regulations to hold that an IRS Schedule K-1 (a similar form to a Form 1099-C) cannot be a false representation that a debt was discharged or forgiven, thus dismissing an equitable estoppel claim that required this essential element. Dermon–Warner Properties, LLC v. Warner, 2017 WL 6502887, at *5 (Tenn. Ct. App. 2017). Therefore, under federal law as well as the law of Tennessee, it is clear that a Form 1099-C cannot be a false representation or, as is the case here, be evidence of discharge such that later collection and/or foreclosure efforts would be fraudulent. See id.

Because the original Form 1099-C is the only basis for Plaintiff to claim that the later representations of her default and accelerated debt were false even though this Form 1099-C neither discharged nor represented that her debt was discharged as a matter of law, Plaintiff fails to state a valid claim that the notices of default, acceleration, and of foreclosure sale were false misrepresentations of a material fact that were made knowingly or without belief in its truth or recklessly. Simply put, Plaintiff cannot claim that the statements of default and accelerated debt were false representations of past or present material fact that were knowingly or recklessly made. Since the Form 1099-Cs do not discharge a debt or admit that a debt was discharged, Plaintiff has not and cannot allege that the statements of default or accelerated debt were anything but true. At best, Plaintiff could allege that Moving Defendants "provided inconsistent and inaccurate information" but such an allegation would still be insufficient to support a contention "that [the Moving Defendants] intentionally misrepresented that information" or intended to deceive the Plaintiff. Pugh v. Bank of America, 2013 WL 3349649, at *15 (W.D. Tenn. 2013); see Wigley v.

American Equity Mortgage, 2016 WL 866359, at *5 (W.D. Tenn. 2016) (holding that fraud claims are deficient when failing to allege how the statements were made with knowledge of their falsity or with an intent to deceive). For these reasons, Plaintiff fails to sufficiently allege the first four elements of a fraud claim under Tennessee law. Therefore, this Court should dismiss Plaintiff's fraud claim, *with prejudice*.

2. *Fifth Element*: Plaintiff Fails To State The Essential Element Of Reasonable Reliance.

Critically, Plaintiff must allege how she detrimentally relied upon the alleged misrepresentations by Moving Defendants. Evans, 434 F.3d at 852 ("Conclusory statements of reliance are not sufficient to explain with particularity how she detrimentally relied on the alleged fraud."). However, Plaintiff does not allege that she reasonably relied upon the statements in the (1) the notice of default, (2) the Notice of Acceleration, or (3) the Notice of Foreclosure Sale to her detriment. (Compl., ¶ 26.) Instead, Plaintiff alleges that she reasonably relied upon the Form 1099-Cs, but does not allege that the Form 1099-Cs constitute misrepresentations. (Id.) Indeed, Plaintiff mistakenly believes that the Form 1099-Cs cancelled part of her debt or acts as an admission that the debt was cancelled. (Id.) Therefore, Plaintiff's fraud claims are deficient since she has not alleged that she "reasonably relied on the misrepresented fact[s]" in the notices of default, acceleration, and of foreclosure sale, let alone how she relied upon the alleged misrepresentations to her detriment. PNC, 387 S.W.3d at 548. Consequently, Plaintiff fails to state the fifth element of her fraud claim. Accordingly, Plaintiff's fraud claim should be dismissed, *with prejudice*.

3. *Sixth Element*: Plaintiff Fails To State The Essential Element Of Damage As A Result Of The Misrepresentation.

Plaintiff must plead with particularity "the injury resulting from the fraud." Power & Telephone Supply Co., Inc. v. SunTrust Banks, Inc., 447 F.3d 923, 931 (6th Cir. 2006). Here, Plaintiff has not identified an injury other than the threat of foreclosure. (Compl., Damages ¶ 20.) Not only does this display a lack of ripeness, but also this threat of foreclosure is insufficient to constitute an injury resulting from fraud as such injury (the foreclosure sale) has not yet occurred. Otherwise, Plaintiff fails to identify what damages she has suffered incidental to the foreclosure proceedings. (Id.) Therefore, Plaintiff's fraud claims should be dismissed, *with prejudice*.

IV. PLAINTIFF'S DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF CLAIMS ARE DUE TO BE DISMISSED.

Because declaratory and injunctive relief require an actionable claim (i.e. an independent basis for relief), which Plaintiff has not stated here, Plaintiff's Declaratory Judgment and Injunctive Relief counts are due to be dismissed. Plaintiff's causes of action for Declaratory Judgment and Injunctive Relief are remedies, not claims. Madej v. Maiden, 951 F.3d 364, 369 (6th Cir. 2020) ("[A]n injunction is a remedy, not a claim. If [Plaintiff] cannot show 'actual success' on their claims, [Plaintiff] cannot obtain a permanent injunction."); Nationwide Affinity Insurance Company of America v. Richards, 439 F.Supp.3d 1026, 1031 (W.D. Tenn. 2020) (holding the declaratory judgment act only authorizes a district court to award a remedy of declaratory relief); Duncan v. Tennessee Valley Authority Retirement System, 123 F.Supp.3d 972, 982 (M.D. Tenn. 2015) ("Declaratory judgment, however, is not a cause of action, but a specific type of relief. In order for the plaintiffs to be entitled to declaratory judgment, they must first succeed on a cognizable cause of action."); Safeco Ins. Co. of America v. City of White House, Tennessee, 133 F.Supp.2d 621, 631 (M.D. Tenn. 2000) ("[T]he award of declaratory judgment is a discretionary

remedy"); State ex rel. Moore & Associates, Inc. v. West, 246 S.W.3d 569, 581 (Tenn. Ct. App. 2005) ("A declaratory judgment action is merely a procedural device for asserting various types of substantive claims.").

As stated above, Plaintiff fails to state an actionable claim for wrongful foreclosure and fraud. In similar wrongful foreclosure cases, this Court dismissed claims for declaratory judgment and injunctive relief when a plaintiff failed to state an actionable claim, that is, an independent basis for relief. Sandlin v. CitiMortgage, Inc., 2021 WL 1581771, at *15 (W.D. Tenn. 2021); Brown v. U.S. Bank National Association, 2013 WL 12049109, at *7 (W.D. Tenn. 2013). Because Plaintiff has failed to state actionable claims to support her remedies of declaratory judgment and injunctive relief, Plaintiff's Declaratory Judgment and Injunctive Relief counts should be dismissed, *with prejudice*.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Moving Defendants respectfully request this Honorable Court to dismiss the claims against them, *with prejudice*.

Respectfully submitted,

/s/ Joseph V. Ronderos

Shaun K. Ramey
Joseph V. Ronderos
McGlinchey Stafford
424 Church St., Suite 2000
Nashville, TN 37219
(615) 762-9044 (telephone)
(615) 523-1725 (facsimile)
sramey@mcglinchey.com
jronderos@mcglinchey.com
Attorneys for PHH Mortgage Corporation and HSBC Bank USA, National Association, as Trustee for Ace Securities Corp., Home Equity Loan Trust, Series 2005-HE4

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this day, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send a notification of such filing to the following:

Curtis D. Johnson, Jr.
Johnson & Johnson Attorneys at Law
1407 Union Avenue, Suite 1002
Memphis, Tennessee 38104
Tel: (901) 725-7520
cjohnson@johnsonandjohnsonattys.com
Attorney for Plaintiff

Rob T. Lieber Jr.
Mackie Wolf Zientz & Mann, P.C.
7100 Commerce Way, Suite 273
Brentwood, Tennessee 37027
Tel: (615) 238-3630
Email: rliebert@mwzmlaw.com
Attorneys for Mackie Wolf Zientz & Mann

THIS, the 17th day of September, 2021.

/s/ Joseph V. Ronderos
Joseph V. Ronderos