

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**CRAIG JAMES MYNARD,**

**Plaintiff,**

**v.**

**PENNYMAC LOAN SERVICES, LLC,**

**Defendant.**

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**Civil Action No. 4:23-cv-04622**

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**DEFENDANT’S MOTION TO DISMISS AND BRIEF IN SUPPORT**

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Plaintiff Craig James Mynard (“Mynard”) filed this suit solely to stop Defendant PennyMac Loan Services, LLC (“Pennymac”) from foreclosing on real property located at 21711 East Mulberry Field Circle, Cypress, Texas 77433 (“Property”). Mynard asserts claims for breach of contract, tortious interference with contract, violations of the Texas Debt Collection Act (“TDCA”), and breach of duty of cooperation. Mynard’s claims are premised on “various legal fees and other charges that were not authorized by the Deed of Trust” and “misrepresentations about the information in the Loan.” But Mynard has not identified any unauthorized charges or misrepresentations made by Pennymac. In short, Mynard’s claims fail as a matter of law, and this lawsuit should be dismissed with prejudice.

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## I. FACTUAL BACKGROUND<sup>1</sup>

### *The Mortgage Loan*

On or about July 29, 2015, Mynard obtained a mortgage loan (the “Loan”) in the original principal amount of \$268,000.00 from InterLinc Mortgage Services, LLC (“InterLinc”) that was secured by the Property.<sup>2</sup> Mynard executed a Deed of Trust at the same time he obtained the Loan.<sup>3</sup> Pursuant to the Deed of Trust and Corporate Assignment, InterLinc assigned the Deed of Trust and the Loan to Pennymac.<sup>4</sup> Thus, Pennymac is the mortgagee of the Loan.

According to the Deed of Trust, Mynard agreed to “pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note.”<sup>5</sup> Mynard also agreed to “pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over” the Deed of Trust.<sup>6</sup> However, Mynard defaulted on his payment obligations when he “fell behind on all of his bills, including his mortgage.”<sup>7</sup> Consequently, Pennymac “posted the Property for a foreclosure sale set to occur on December 5, 2023.”<sup>8</sup>

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<sup>1</sup> Although the allegations in the Complaint must be taken as true in this Motion, Pennymac reserves the right to challenge those factual allegations at the appropriate time.

<sup>2</sup> A true and correct copy of the Deed of Trust is attached hereto as Exhibit A and incorporated herein by reference. Pennymac respectfully requests that the Court take judicial notice of the Deed of Trust, which was recorded by the Harris County Clerk in the Official Property Records on July 31, 2015, under File No. 20150343527. *See* FED. R. EVID. 201(b); *see Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (“Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”); *see also Rocha v. U.S. Bank N.A. For Registered Holders of Structured Asset Sec. Corp. Mortg. Pass-Through Certificates Series 2007-TC1*, No. EP-16-CV-00417-DCG, 2017 WL 3723679, at \*2 n.4 (W.D. Tex. Aug. 1, 2017) (taking judicial notice of deed).

<sup>3</sup> Ex. A.

<sup>4</sup> A true and correct copy of the Corporate Assignment of Deed of Trust is attached hereto as Exhibit B and incorporated by reference. Pennymac respectfully requests that the Court take judicial notice of the Corporate Assignment of Deed of Trust, which was recorded by the Harris County Clerk in the Official Property Records on May 4, 2021, under File No. RP-2021-244229. *See* FED. R. EVID. 201(b).

<sup>5</sup> Ex. A ¶ 1.

<sup>6</sup> Ex. A ¶ 4.

<sup>7</sup> Doc. No. 1-4, ¶ 7.

<sup>8</sup> Doc. No. 1-4, ¶ 10.

***This Instant Action***

On the eve of the sale, Mynard filed his Original Petition and Application for Injunctive Relief (the “Complaint”) in the 334<sup>th</sup> Judicial District Court of Harris County, Texas, in an action styled *Craig James Mynard v. PennyMac Loan Services, LLC*, under Cause No. 2023-83412.<sup>9</sup>

The basis of Mynard’s dispute is that Mynard “fell behind on . . . his mortgage” and applied for a loan modification.<sup>10</sup> Mynard contends that Pennymac denied his loan modification application and noticed a foreclosure sale.<sup>11</sup> Mynard alleges that the Property is currently under contract for sale that is “set to close within the next week or two.”<sup>12</sup> Mynard further alleges that he sent a copy of the sales contract to Pennymac and “requested that the foreclosure sale be cancelled,” but Pennymac “interfere[ed]” with the sales contract and “prevented [Mynard] from paying off the loan in full” by “willfully foreclosing on the Property.”<sup>13</sup> In addition, Mynard contends that Mynard’s mortgage statements “contained various charges and fees that did not look correct to” Mynard, causing him to incur “thousands of dollars in various legal fees and other charges.”<sup>14</sup> Mynard also contends that Pennymac failed to provide him with “information needed to properly perform the obligations of the Loan.”<sup>15</sup>

Based on these allegations, Mynard asserts claims for breach of contract, tortious interference with contract, violations of the Texas Debt Collection Act, and breach of duty of cooperation.<sup>16</sup> Mynard seeks unspecified actual damages, including “all actual direct and indirect economic damages, damages for lost time, damages for mental anguish and emotional distress,

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<sup>9</sup> Doc. No. 1-4.

<sup>10</sup> Doc. No. 1-4, ¶¶ 8–9.

<sup>11</sup> Doc. No. 1-4, ¶¶ 8, 10.

<sup>12</sup> Doc. No. 1-4, ¶ 9.

<sup>13</sup> Doc. No. 1-4, ¶¶ 10–11, 21.

<sup>14</sup> Doc. No. 1-4, ¶ 12.

<sup>15</sup> Doc. No. 1-4, ¶ 32.

<sup>16</sup> Doc. No. 1-4, ¶¶ 14–32.

damages resulting from payment of excess or additional interest, and any consequential damages.”<sup>17</sup> He also seeks exemplary damages, attorneys’ fees, and injunctive relief preventing foreclosure.<sup>18</sup>

The state court issued an *ex parte* temporary restraining order on December 4, 2023.<sup>19</sup> Consequently, the December 5, 2023 foreclosure sale did not occur. On December 12, 2023, Pennymac removed the state court action to this Court.<sup>20</sup>

Pennymac now moves to dismiss this lawsuit with prejudice.

## II. STATEMENT OF THE ISSUES

1. Whether the Court should dismiss Mynard’s breach-of-contract claims because Mynard has not (1) identified the contract or provisions he contends Pennymac has allegedly breached, (2) demonstrated that he has suffered any damages caused by Pennymac’s purported breach, and (3) pled any facts to overcome the statute of frauds.
2. Whether the Court should dismiss Mynard’s tortious-interference-with-contract claim because Mynard has not alleged any of the essential elements necessary to maintain this claim.
3. Whether the Court should dismiss Mynard’s TDCA claims because he has not (1) alleged that Pennymac is a debt collector, (2) identified the prohibited conduct by Pennymac, and (3) described any facts which constitute an attempt to collect a debt.
4. Whether the Court should dismiss Mynard’s claim for breach of duty of cooperation because Mynard does not explain how Pennymac “misled” him or hindered, prevented, or interfered with his ability to make his payment obligations, given that Mynard admits to defaulting on the Loan.
5. Whether the Court should deny all of Mynard’s requests for relief because all his claims fail as a matter of law.

## III. SUMMARY OF THE ARGUMENTS

First, the allegations are wholly inadequate to state a claim. Mynard has not identified which specific provision in the Deed of Trust he contends Pennymac allegedly breached. Nor has

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<sup>17</sup> Doc. No. 1-4, ¶¶ 29, 33.

<sup>18</sup> Doc. No. 1-4, ¶¶ 14, 29, 33, 35–39, Prayer.

<sup>19</sup> Doc. No. 1-5.

<sup>20</sup> Doc. No. 1.

he identified which fees or expenses were unauthorized. And Mynard cannot show that he sustained any damages. Finally, Mynard's claim for breach of contract is barred by the statute of frauds.

Second, Mynard cannot state a claim for tortious interference with contract because he has not adequately pled any of the essential elements.

Third, Mynard cannot satisfy his burden as he has failed to assert any non-conclusory allegations which indicate that Pennymac is a debt collector as defined by the TDCA. In addition, he has not alleged any facts demonstrating that Pennymac engaged in any legally prohibited action in violation of the TDCA or that Pennymac misrepresented the character, extent or amount of a debt owed by Mynard, among other things.

Finally, Mynard's claim for breach of duty of cooperation fails as a matter of law because Mynard does not explain how Pennymac "misled" him or hindered, prevented, or interfered with his ability to make his payment obligations.

#### **IV. ARGUMENTS AND AUTHORITIES**

A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The Fifth Circuit has summarized the pleading standard as follows:

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. This includes the basic requirement that the facts plausibly establish each required element for each legal claim. However, a complaint is insufficient if it offers only labels and conclusions, or a formulaic recitation of the elements of a cause of action.

*Coleman v. Sweetin*, 745 F.3d 756, 763–64 (5th Cir. 2014) (internal quotation marks and citations omitted). Rule 12(b)(6) authorizes a party to move for dismissal of claims lacking facial

plausibility. *See* FED. R. CIV. P. 12(b)(6). Such is the case here with respect to all of Mynard's claims alleged against Pennymac.

**A. MYNARD'S BREACH-OF-CONTRACT CLAIMS FAIL AS A MATTER OF LAW**

Mynard asserts that Pennymac breached "the Deed of Trust and the Trial Payment Plan."<sup>21</sup>

Those allegations fail.

1. Deed of Trust

Mynard argues that Pennymac breached the Deed of Trust "by charging [him] fees and expenses that were not authorized by the Deed of Trust."<sup>22</sup> As an initial matter, Mynard has not identified which specific provision in the Deed of Trust he contends Pennymac allegedly breached. The Fifth Circuit has stated that "a claim for breach of a note and deed of trust must identify the specific provision in the contract that was breached." *See Williams v. Wells Fargo Bank, N.A.*, 560 F. App'x 233, 238 (5th Cir. 2014). Here, Mynard has not pled which specific provisions of the Deed of Trust were violated in this case. Nor has he provided a copy of any document from which either Pennymac or the Court could determine the alleged violation.

Additionally, Mynard has not identified which fees or expenses were unauthorized.<sup>23</sup> By borrowing money to purchase the Property and executing the Deed of Trust, Mynard agreed to pay "any prepayment charges," "late charges," "all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over" the Deed of Trust.<sup>24</sup> Thus, in construing the Deed of Trust liberally, it is unclear which provision in the Deed of Trust Pennymac breached or which fees he contends were unauthorized.

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<sup>21</sup> Doc. No. 1-4, ¶ 14(A).

<sup>22</sup> Doc. No. 1-4, ¶ 14(D).

<sup>23</sup> *See generally* Doc. No. 1-4.

<sup>24</sup> Ex. A ¶¶ 1, 4.

Finally, Mynard cannot show that he sustained any damages. The Complaint does not allege any actual damages sustained as a result of the alleged breach of contract by Pennymac.<sup>25</sup> Instead, the Complaint shows that Mynard seeks unspecified damages any factual enhancement to explain how he sustained such damages caused by Pennymac.<sup>26</sup> Mynard’s purported damages are—at best—contingent, speculative, and conjectural, and therefore, Mynard cannot sustain his claim for breach of contract. *See CQ, Inc. v. TXU Min. Co., L.P.*, 565 F.3d 268, 278 (5th Cir. 2009) (“A party may not recover damages for breach of contract if those damages are remote, contingent, speculative, or conjectural”) (citations omitted). And a threat of damages is insufficient to state any claim. *Id.*

For these reasons, the Court should dismiss Mynard’s breach-of-contract claim with prejudice.

## 2. Trial Payment Plan

With respect to the purported Trial Payment Plan, the Complaint does not clearly identify the contract Mynard claims Pennymac allegedly breached. On one hand, Mynard alleges that he applied for “loss mitigation assistance” and “was unable to obtain any sort of relief” from Pennymac.<sup>27</sup> On the other hand, he inconsistently argues that Pennymac breached the “Trial Payment Plan.”<sup>28</sup> Mynard has not adequately pled sufficient facts for the Court to draw the reasonable inference that Pennymac is liable for breaching any purported Trial Payment Plan because the Complaint lacks any reference regarding key facts, such as the date the parties entered into this purported contract and the terms of the agreement.<sup>29</sup> For this reason alone, Mynard has

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<sup>25</sup> Doc. No. 1-4, ¶ 14.

<sup>26</sup> Doc. No. 1-4, ¶ 14(E).

<sup>27</sup> Doc. No. 1-4, ¶ 8.

<sup>28</sup> Doc. No. 1-4, ¶ 14(A).

<sup>29</sup> *See generally* Doc. No. 1-4.

not stated a claim for breach of contract because he has not alleged any definitive, material terms of this alleged Trial Payment Plan. *See King v. Baylor Univ.*, 46 F.4th 344, 357 (5th Cir. 2022) (citing *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016)) (“To be enforceable, a contract must address all of its essential and material terms with a reasonable degree of certainty and definiteness.”).

In addition, Mynard is also required to identify the specific provision in the contract that was breached. *See Williams*, 560 F. App’x at 238. Mynard has failed to identify which contract or provision of such contract he claims Pennymac allegedly breached. *See id.* Consequently, this Court should dismiss the breach-of-contract claim with prejudice.

To the extent that Mynard implies that Pennymac orally agreed to provide Mynard with a Trial Payment Plan, such claims is barred by the statute of frauds. Under Texas law, the statute of frauds applies to loan agreements for amounts exceeding \$50,000.00 and requires that they be in writing and signed by the party to be bound in order to be enforceable. TEX. BUS. & COM. CODE § 26.02(b). The statute defines “loan agreement” to include promises, promissory notes, and deeds of trust. *See id.* § 26.02(a)(2). Because the Loan involves more than \$50,000, it is subject to the statute of frauds.<sup>30</sup> If the underlying loan is subject to the statute of frauds, then an agreement to modify the loan is subject to the statute of frauds as well. *See, e.g., Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 256 (5th Cir. 2013).

Because Mynard has not alleged that any Trial Payment Plan was memorialized as a written agreement, his breach-of-contract claim is barred by the statute of frauds.

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<sup>30</sup> Ex. A (stating that the Loan involves \$268,000.00).

**B. MYNARD’S CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT FAILS AS A MATTER OF LAW**

Mynard contends that Pennymac is liable for tortiously interfering with an “existing sales contract . . . between [Mynard] and Seller for which [Pennymac] has knowledge and yet is willfully foreclosing on the Property, thereby preventing the sales contract from being able to be completed.”<sup>31</sup> Mynard appears to suggest that Pennymac allegedly interfered with some purported sales contract when it enforced its foreclosure rights. However, such act is not tortious.<sup>32</sup>

Under Texas law, the elements of tortious interference with contract are (1) a contract subject to interference; (2) a willful and intentional act of interference (3) that was a proximate cause of the plaintiff’s damages; and (4) actual damage. *See Nix v. MLB*, 62 F.4th 920, 934 (5th Cir. 2023), *cert. denied sub nom. Nix v. MLB*, No. 22-7810, 2023 WL 6378365 (U.S. Oct. 2, 2023). “[A] breach must result from the defendant’s conduct in order for the plaintiff to prevail.” *WickFire, L.L.C. v. Laura Woodruff; TriMax Media, L.L.C.*, 989 F.3d 343, 353 (5th Cir. 2021). Here, Mynard’s allegations are insufficient to state a claim for tortious interference with an existing contract for several reasons.

While Mynard alleges in a formulaic manner that he “entered into a one to four family residential contract for the sale of the Property to be purchased by a third party” and sent a “copy of the Sales Contract . . . to [Pennymac],” he has not alleged any facts that would support that conclusory allegation.<sup>33</sup> In particular, Mynard has not alleged that the sale to the third party would occur prior to the foreclosure sale.<sup>34</sup> In other words, Mynard fails to allege facts describing how Pennymac allegedly unlawfully interfered with the purported sales contract, how any alleged act

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<sup>31</sup> Doc. No. 1-4, ¶ 21.

<sup>32</sup> *See* Doc. No. 1-4, ¶ 21.

<sup>33</sup> Doc. No. 1-4, ¶¶ 9–10.

<sup>34</sup> *See generally* Doc. No. 1-4.

of interference was willful and intentional, how that act proximately caused him damage, and the actual damage or loss suffered. *Caine v. Wells Fargo Bank, N.A.*, No. CV H-17-2046, 2018 WL 3195102, at \*6 (S.D. Tex. June 8, 2018), *report and recommendation adopted*, No. 4:17-CV-02046, 2018 WL 3159783 (S.D. Tex. June 28, 2018).

Mynard also fails to allege that Pennymac's knowing, willful, and intentional acts of interference *induced* "Seller" to breach its obligations. *See Amigo Broad., LP v. Spanish Broad. Sys., Inc.*, 521 F.3d 472, 493 (5th Cir. 2008) ("Merely entering into a contract with a party with the knowledge of that party's contractual obligations to someone else is not the same as inducing a breach."). The Complaint does not allege any facts suggesting that the unidentified seller breached its obligations to Mynard. Rather, Mynard states that the "Sales Contract is set to close within the next week or two." Put simply, Mynard's own allegations refute his claim.

Furthermore, Mynard fails to allege facts showing that the alleged willful and intentional acts of interference caused injury or actual damage or loss. *See M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 775 (S.D. Tex. 2010). Indeed, Mynard has not suffered any damage because the state court entered an *ex parte* temporary restraining order, thwarting the foreclosure sale.<sup>35</sup>

Finally, there is no liability for tortious interference with an existing contract when the alleged tortfeasor's conduct was engaged in pursuant to a legal right, even if the elements of the torts are otherwise satisfied. *Wardlaw v. Inland Container Corp.*, 76 F.3d 1372, 1378–79 (5th Cir. 1996) (acknowledging that Texas law grants a party the privileged to interfere with another's contract if it is done in bona fide exercise of its own rights, or if it has equal or superior right in subject matter to that of other party). Here, Pennymac was justified in posting the Property for foreclosure because Mynard admits that he defaulted on the Loan when he "fell behind on all of

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<sup>35</sup> Doc. No. 1-5.

his bills, including his mortgage.”<sup>36</sup> According to the Deed of Trust, Mynard promised to “pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note.”<sup>37</sup> By virtue of executing the Deed of Trust, Mynard consented to foreclosure as a remedy in the event of any default and granted Pennymac the right to invoke its power of sale to collect monies owed on the Loan.<sup>38</sup> Accordingly, Mynard’s tortious-interference claim fails. Any interference by Pennymac with any purported sales contract between Mynard and an unidentified “Seller” was justified, given that Pennymac merely acted in good faith to exercise its contractual rights to foreclose on the Property. *Pers. Preference Video, Inc. v. Home Box Office, Inc.*, 986 F.2d 110, 115 (5th Cir. 1993).

Therefore, Mynard’s tortious-interference-with-contract claim fails as a matter of law, and the Court should dismiss it with prejudice.

**C. MYNARD’S TDCA CLAIMS FAIL AS A MATTER OF LAW**

Mynard alleges that Pennymac violated the TDCA by purportedly making “significant types of misrepresentations to Plaintiffs [sic] about the status of the loan and its own services.”<sup>39</sup> Based on this allegation, Mynard makes the misplaced determination that Pennymac violated Sections 392.304(a)(8), (19), and (14) of the Texas Finance Code.<sup>40</sup>

The TDCA prohibits debt collectors from using fraudulent, deceptive, or misleading representations in the collection of consumer debts. *See* TEX. FIN. CODE § 392.304(a). In order to state a claim under the TDCA, Mynard must state that: (1) the debt at issue is a consumer debt; (2) Pennymac is a debt collector within the meaning of the TDCA; (3) Pennymac committed a

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<sup>36</sup> Doc. No. 1-4, ¶¶ 7, 10.

<sup>37</sup> Ex. A ¶ 1.

<sup>38</sup> Ex. A, ¶ 22.

<sup>39</sup> Doc. No. 1-4, ¶ 27.

<sup>40</sup> Doc. No. 1-4, ¶ 27.

wrongful act in violation of the TDCA; (4) the wrongful act was committed against Mynard; and (5) Mynard was injured as result of Pennymac’s wrongful act. *See* TEX. FIN. CODE §§ 392.001 *et. seq.* Notably, the TDCA does not prevent a debt collector from “exercising or threatening to exercise a statutory or contractual right of seizure, repossession, or sale that does not require court proceedings.” *See* TEX. FIN. CODE § 392.301(b)(3); *see also* *McCaig v. Wells Fargo Bank (Tex.), N.A.*, 788 F.3d 463, 475 (5th Cir. 2015) (“Indeed, the TDCA contemplates that there will often be contractual duties running between a consumer and debt collector, and a debt collector’s otherwise wrongful conduct may be permissible if authorized by contract.”).

1. Mynard has not alleged facts demonstrating that Pennymac is a “Debt Collector,” as defined by the TDCA

As a threshold matter, before Mynard can allege violations under the TDCA, he must first demonstrate that Pennymac is a “debt collector” as defined by the TDCA. *See* TEX. FIN. CODE § 392.001(6) (defining for “debt collector”). Here, Mynard cannot satisfy his burden as he has failed to assert any non-conclusory allegations which indicate that Pennymac is a debt collector as defined by the TDCA. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (noting that conclusory statements are not entitled to the presumption of truth). Rather, Mynard sets forth a “threadbare recital” of the definition of a debt collector under the TDCA, but fails to assert any facts showing that Pennymac actually fits within the definition in the context Mynard has pled.<sup>41</sup> In fact, Mynard’s allegations regarding Pennymac center on alleged discussions about his application for loss mitigation assistance and a potential sale of the Property, which do not involve debt collection activity.<sup>42</sup> Thus, Mynard’s sparse and conclusory allegations regarding Pennymac’s status as a debt collector under the TDCA are insufficient to support Mynard’s TDCA claim, and

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<sup>41</sup> Doc. No. 1-4, ¶¶ 22–29.

<sup>42</sup> Doc. No. 1-4, ¶¶ 8–10.

it fails as a matter of law. *See Blackburn*, 42 F.3d at 931 (noting that, “conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss”).

2. Mynard fails to adequately plead his claim for violation of the TDCA

Regardless, the Complaint is devoid of factual allegations which satisfy the elements of a TDCA claim for violation of the statutory provisions Mynard identifies. Particularly, it fails to assert any non-conclusory allegations that describe: any legally prohibited action taken by Pennymac in violation of the TDCA; how Pennymac misrepresented the character, extent or amount of a debt owed by Mynard; or how Pennymac misrepresented a consumer debt’s status in a judicial or governmental proceeding.<sup>43</sup> Because Mynard has failed to plead any allegations indicating that Pennymac engaged in conduct prohibited by the TDCA, his claim should be dismissed with prejudice. *See Douglas v. Wells Fargo Bank, N.A.*, 992 F.3d 367, 376–77 (5th Cir. 2021) (affirming dismissal of TDCA claims).

3. Mynard has not alleged facts which constitute an attempt to collect a debt

Mynard has not alleged facts which support his TDCA claim because he has not alleged that Pennymac has made any misrepresentations. The Complaint only addresses two communications: (1) Pennymac told Mynard to apply for “loss mitigation assistance” and (2) Pennymac told Mynard that it would not cancel the foreclosure sale when he was not approved.<sup>44</sup> It is unclear if Mynard contends that these statements are the purported misrepresentations Pennymac made to him. Assuming *arguendo* that Mynard could establish misrepresentations were made in the context of their loan modification discussions with Pennymac (which he cannot), such representations are not actionable under the TDCA. Recognizing this, the court in *Eskridge*

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<sup>43</sup> Doc. No. 1-4, ¶¶ 22–29.

<sup>44</sup> Doc. No. 1-4, ¶¶ 8, 10.

dismissed a TDCA claim similar to Plaintiffs', holding:

[Plaintiff] has alleged no facts which would constitute the attempt to collect a debt. Taking advantage of available remedies, whether contractual or statutory, in order to collect a debt that is owed is not a violation of the [TDCA] unless the creditor resorts to using false representations or other deceptive means to collect the debt. In the present case, the "misrepresentations" Plaintiff identifies were not made in an attempt to collect a debt, but were made at the request of the Plaintiff in trying to correct the arrears in her mortgage.

*Eskridge v. Fed. Home Loan Mortgage Corp. et al.*, No. W-10-CA-285, 2011 WL 2163989, at \*4 (W.D. Tex. Feb. 24, 2011). Accordingly, any alleged representation by Pennymac regarding the status of Mynard's application for a loan modification or its effect on Myanrd's mortgage payments was made in the course of Pennymac's review of Mynard's requested loan modification application, and cannot be used to save Mynard's meritless TDCA claim from dismissal. In light of the foregoing, because Mynard's TDCA claims are wholly premised on his allegations regarding his purported loan modification discussions with Pennymac, Myanrd's TDCA claims fails.

**D. MYNARD'S CLAIM FOR BREACH OF DUTY OF COOPERATION FAILS AS A MATTER OF LAW**

Mynard argues that Pennymac is liable for breaching a "duty of cooperation" because Pennymac "misled [Mynard] with oral and written representations regarding the Loan" and "did not provide [Mynard] with the information needed to properly perform the obligations of the Loan."<sup>45</sup> These allegations, however, are insufficient to state a claim for breach of duty of cooperation.

"Implied covenants are not favored in Texas law." *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 770 (Tex. App.—Dallas 2005, pet. denied). "A duty to cooperate is implied in every contract in which cooperation is necessary for performance of the contract." *Id.*

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<sup>45</sup> Doc. No. 1-4, ¶ 32.

Essentially, this implied duty “requires that a party to a contract may not hinder, prevent, or interfere with another party’s ability to perform its duties under the contract.” *Id.*

Here, Mynard does not explain how Pennymac “misled” him or hindered, prevented, or interfered with his ability to make his payment obligations. Mynard does not allege that he ever attempted to perform these duties, i.e., to make a full and timely payment. Instead, Mynard admits that he “suffered a catastrophic accident,” “fell into financial distress,” and “fell behind on all of his bills, including his mortgage.”<sup>46</sup> Thus, Mynard has not—and cannot—state a claim for a breach of the duty to cooperate, and the Court should dismiss this claim with prejudice. *Mass v. Wells Fargo Bank, N.A.*, No. CV H-21-2962, 2022 WL 61161, at \*5 (S.D. Tex. Jan. 6, 2022).

**E. THE REQUESTED INJUNCTIVE RELIEF SHOULD BE DENIED**

Mynard asks this Court to grant him with injunctive relief precluding Pennymac from foreclosing on the Property.<sup>47</sup> The request for injunctive relief, however, should be denied. A request for injunctive relief is not a cause of action itself, but is dependent on an underlying cause of action. *See Cook v. Wells Fargo Bank, N.A.*, No. 3:10-CV-592-D, 2010 WL 2772445, at \*4 (N.D. Tex. July 12, 2010). Because he has not asserted any viable claims in this lawsuit as a matter of law, Mynard is not entitled to injunctive relief.

**F. THE REQUESTS FOR DAMAGES, ATTORNEY’S FEES, AND OTHER RELIEF SHOULD BE DENIED**

Similarly, Mynard is not entitled to recover damages, attorney’s fees, or other relief because he has neither pled any damages, as the *ex parte* TRO stopped the foreclosure sale, nor asserted any plausible claims against Pennymac. *See Douglas v. Wells Fargo Bank, N.A.*, 992 F.3d 367, 377 (5th Cir. 2021) (affirming district court’s judgment denying attorney’s fees where

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<sup>46</sup> Doc. No. 1-4, ¶ 7.

<sup>47</sup> Doc. No. 1-4, ¶¶ 35–39, Prayer.

recovery of fees were premised on an unviable claim); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) (noting that attorney's fees may only be recovered if a party "(1) prevail[s] on a cause of action for which attorney's fees are recoverable, and (2) recover[s] damages").

For these reasons, the Court should dismiss Mynard's claims for damages, attorney's fees, and all other relief he seeks.

## V. CONCLUSION

Put simply, Mynard cannot meet his burden to obtain the damages or injunctive relief he seeks because his claims fail as a matter of law. Accordingly, Pennymac respectfully requests that the Court grant the Motion to Dismiss and dismiss Mynard's claims against Pennymac with prejudice. Pennymac additionally requests such other and further relief to which it is entitled.

Respectfully submitted,

*/s/ Helen O. Turner* \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 20, 2023, a true and correct copy of the foregoing document was delivered to the following counsel of record *via CM/ECF and/or email* consistent with the Federal Rules of Civil Procedure.

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