

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

**RICK GOBERT,  
Plaintiff,**

v.

**GUILD MORTGAGE COMPANY LLC,  
Defendant.**

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CIVIL ACTION NO. 4:22-cv-00768-ALM-CAN

**DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT  
PURSUANT TO FED. R. CIV. P. 12(B)(6)**

Defendant Guild Mortgage Company LLC files this motion to dismiss Plaintiff Rick Gobert’s Original Petition, Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, and Request for Disclosures (the “Complaint”) for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) and asks the Court to dismiss all of Plaintiffs’ claims against Guild with prejudice.

**I. INTRODUCTION &  
STATEMENT OF ISSUES TO BE DECIDED BY THE COURT**

1. Plaintiff sued Guild for negligence, violation of the Real Estate Settlement Procedures Act (“RESPA”), violation of the Texas Property Code, and breach of contract, seeking actual damages, attorney’s fees, and injunctive relief. Plaintiff asserted these claims to prevent a foreclosure sale of the property located at 2120 Mulberry Drive, Anna, Texas 75409 that was scheduled for September 6, 2022, but did not go forward. According to the vague allegations in the Complaint, Guild “failed to perform its duties as a mortgage servicer”, failed to use reasonable care in communicating loss mitigation options to Plaintiff, and failed to perform actions under the Deed of Trust.

2. Not only do many of Plaintiffs’ claims fail as a matter of law, but Plaintiff also fails

to assert sufficient factual allegations to state a claim upon which relief may be granted as to any of Plaintiff's claims against Guild. Specifically, the Court should dismiss all of Plaintiff's claims with prejudice for the following reasons:

- **Plaintiff's RESPA claim fails because Plaintiff does not allege any facts to support such a claim.**
- **Plaintiff's negligence-based claims fail because (1) they are barred by the economic loss rule; and (2) Guild does not owe Plaintiff a legal duty.**
- **Plaintiff's claim for violation of Chapter 51 of the Texas Property Code fails because (1) Chapter 51 does not create an independent cause of action; (2) Plaintiff fails to identify any action or inaction by Guild that violated a specific provision of Chapter 51; and (3) Plaintiff suffered no damages because the foreclosure sale was cancelled.**
- **Plaintiff's breach of contract claim fails because (1) Plaintiff has not alleged he performed or tendered performance; (2) Plaintiff does not and cannot allege HUD regulations are expressly incorporated into the loan agreement; and (3) Plaintiff fails to identify a specific action by Guild that constitutes a breach.**
- **Plaintiff's request for injunctive relief fails because it is not supported by a viable cause of action.**

## II. STANDARD OF REVIEW

3. This Court has authority to dismiss a suit for failure to state a claim upon which relief can be granted if the plaintiff's factual allegations do not show a right to relief that is plausible and above mere speculation.<sup>1</sup> “[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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. The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully.”<sup>2</sup> “The pleading standard Rule 8

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<sup>1</sup> See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>2</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.<sup>3</sup> To avoid a dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations.<sup>4</sup> The “[f]actual allegations must be enough to raise a right to relief above the speculative level. . . .”<sup>5</sup> The court will not accept as true conclusory allegations or unwarranted deductions of fact.<sup>6</sup>

### III. ARGUMENT & AUTHORITIES

#### A. Plaintiff’s RESPA claim fails because Plaintiff does not allege any facts to support such a claim.

4. Plaintiff makes the conclusory statement that “Plaintiff brings this lawsuit against Defendant alleging . . . violation of RESPA,”<sup>7</sup> but provides zero facts to demonstrate any element of a claim or any act by Guild in violation of RESPA. Thus, Plaintiff fails to satisfy the Rule 8 pleading standard, and this claim should be dismissed.

5. Rule 8(a)(2) provides “[a] pleading that states a claim for relief must contain: (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . .”<sup>8</sup> Ultimately, “[f]or a complaint to meet the pleading requirements of Rule 8(a)(2) and to survive a Rule 12(b)(6) motion to dismiss, the following conditions must be met: (1) every element of each cause of action must be supported by specific factual allegations; and (2) the complaint must state a plausible claim for relief.”<sup>9</sup> “Plaintiffs must put defendants on fair notice of the allegations against them, not require defendants to ‘glean’ the factual basis of such allegations from a list of

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<sup>3</sup> *Id.*

<sup>4</sup> *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (quoting *Tuchman v. DSC Commc’ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)).

<sup>5</sup> *Twombly*, 550 U.S. at 555.

<sup>6</sup> *Collins*, 224 F.3d at 498.

<sup>7</sup> See Compl., ¶ 8.

<sup>8</sup> Fed. R. Civ. P. 8(a)(2).

<sup>9</sup> *Ray v. CitiMortgage, Inc.*, No. A-1 1-CA-441-SS, 2011 WL 3269326, at \*1 (W.D. Tex. July 25, 2011).

ambiguous legal conclusions.”<sup>10</sup> To satisfy Rule 8(a)(2), the pleading must contain actual facts beyond “legal conclusions.”<sup>11</sup> A conclusory pleading that merely offers labels and conclusions or a formulaic recitation of the elements of a cause of action is insufficient under Rule 8(a)(2) and must be dismissed.<sup>12</sup>

6. In this case, Plaintiff makes a bare assertion that Guild violated RESPA and states nothing more to support this assertion. Such a conclusory allegation does not meet the threshold requirements of Rule 8—it neither contains factual allegations for the elements of a cause of action nor states a plausible claim for relief. Instead, it leaves Guild and the Court to speculate as to what RESPA provisions Guild allegedly violated and how. As such, Plaintiff’s RESPA claim fails to provide fair notice to Guild for the claims against it and should be dismissed.

**B. Plaintiff’s negligence-based claims fail.**

*i. Plaintiff’s negligence-based claims are barred by the economic loss rule.*

7. Plaintiff fails to state a claim for negligence or negligent misrepresentation because the sole basis for liability, if any, against Guild would be contractual in nature based on the terms of the loan documents. Therefore, Plaintiff’s negligence claims are barred by the economic loss doctrine and must be dismissed.

8. “Texas courts have an established state policy against twisting breach of contract claims into tort claims, i.e., the economic loss doctrine bars tort claims when the parties’ relationship and their attendant duties arise from a contract.”<sup>13</sup> “Thus, the rule restricts contracting parties to contractual remedies for economic losses associated with their relationship, ‘even when

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<sup>10</sup> *TAJ Properties, LLC v. Zurich Am. Ins. Co.*, 2010 WL 4923473, at \*4 (S.D. Tex. Nov. 29, 2010) (citing *Weldon Contractors, Ltd. v. Fireman’s Fund Ins. Co.*, 2009 WL 1437837, \*3–4 (N.D. Tex. May 22, 2009) (holding that the plaintiff’s “legal conclusions couched as factual allegations” do not provide a reasonable possibility of recovery)).

<sup>11</sup> *Fawaz v. Byers*, 2014 WL 1671746, at \*4 (S.D. Tex. Apr. 28, 2014).

<sup>12</sup> *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

<sup>13</sup> *Kiper v. BAC Home Loans Servicing, LP*, 884 F. Supp. 2d 561, 573 (S.D. Tex. 2012), *aff’d sub nom. Kiper v. BAC Home Loans Servicing, L.P.*, 534 F. App’x 266 (5th Cir. 2013).

the breach might be reasonably viewed as a consequence of a contracting party's negligence."<sup>14</sup> The focus of the rule is on determining whether the injury is to the subject to the contract itself."<sup>15</sup> "The burden is on the plaintiff to establish evidence of an independent injury."<sup>16</sup> In the foreclosure context, to recover for claims of fraud or intentional misrepresentation, a plaintiff must show an injury independent from the subject matter of the contract.<sup>17</sup>

9. The Western District recently analyzed this exact same claim asserted by Plaintiff's counsel on behalf of another plaintiff in *Smith v. U.S. Bank, N.A.* and held the plaintiff's negligence claims were barred by the economic loss rule.<sup>18</sup> Just as in this case, the plaintiff in *Smith* asserted the mortgage servicer was liable for negligence and negligent misrepresentation because the servicer failed to comply with an alleged duty to provide various notices in the deed of trust and failed to use reasonable care in communicating with the plaintiff regarding loss mitigation options.<sup>19</sup> The court held the plaintiff failed to allege any independently recoverable injury outside of economic loss associated with his loan contract.<sup>20</sup> Therefore, the court dismissed the plaintiff's negligence claims as barred by the economic loss doctrine.<sup>21</sup>

10. As further example, in *Law v. Ocwen Loan Servicing, LLC*, the borrower sued his

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<sup>14</sup> *Llanes v. U.S. Bank, Nat. Ass'n*, 2014 WL 2883922, at \*8 (N.D. Tex. Jun. 25, 2014).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (quoting *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 301 (Tex. App.—Dallas 2009, no pet.)).

<sup>17</sup> See *Kiggundu v. Mortg. Elec. Registration Sys., Inc.*, 2011 WL 2606359, at \*7 (S.D. Tex. Jun. 30, 2011) (noting that when the "injury is only the economic loss to the subject matter of a contract itself, the action sounds in contract alone.").

<sup>18</sup> *Smith v. U.S. Bank, N.A. as Tr. NewRez LLC*, 2022 WL 345655, at \*3 (W.D. Tex. Feb. 4, 2022), report and recommendation adopted sub nom. *Smith v. U.S. Bank N.A.*, 2022 WL 1546643 (W.D. Tex. Mar. 3, 2022).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citing *Tyler v. Ocwen Loan Servicing*, No. 3:15-CV-1117-N-BK, 2015 WL 5326195, at \*2 (N.D. Tex. July 30, 2015), report and recommendation adopted, 2015 WL 5398478 (N.D. Tex. Sept. 14, 2015) (holding that economic loss rule applied to plaintiff's fraud claims where claims were based in part on "misleading information in response to her loan modification application"); *Miller v. CitiMortgage, Inc.*, 970 F. Supp. 2d 568, 587 (N.D. Tex. 2013) (finding that home mortgagor's negligent misrepresentation claim against mortgage loan servicer was barred by economic loss rule)).

<sup>21</sup> *Id.*

mortgage servicer for negligence based on allegations similar to those in this case.<sup>22</sup> Specifically, he alleged the mortgage servicer failed to comply with the duty to manage loans properly, send proper foreclosure notices, and work with the borrower to obtain a loan modification.<sup>23</sup> The Fifth Circuit held the plaintiff's negligence claim was barred by the economic loss rule because "Law's complaint asserts no basis for the duties Ocwen owed to Law other than the deed of trust."<sup>24</sup> The Court further held the borrower failed to allege non-economic damages resulting independently of the deed of trust.<sup>25</sup> Therefore, the Court dismissed the borrower's negligence claim as barred by the economic loss doctrine.<sup>26</sup>

11. The Court should reach the exact same conclusion in this case. Here, Plaintiff's basis for his negligence claims is that "Defendant had a duty to Plaintiff to provide notice of any transfer, assignment, or sale of the note, to properly manage the loan and the escrow amount, to comply with the notice provisions contained in the deed of trust before accelerating the note and foreclosing on the property, and, when applying for a mortgage modification, to protect their rights and not mislead them" and Defendant allegedly breached said duties it owed to Plaintiff.<sup>27</sup> By Plaintiff's own allegations in the Complaint, Plaintiff's negligence claims arise out of obligations purportedly in the Deed of Trust. As such, Plaintiff's alleged tort damages are undoubtedly economic and arise from claims completely dependent upon the existence and subject of the contract. Thus, Plaintiff's negligence claims are barred by the economic loss rule and must be dismissed.

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<sup>22</sup> *Law v. Ocwen Loan Servicing, L.L.C.*, 587 Fed. Appx. 790, 796 (5th Cir. 2014).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Compl., ¶ 11.

**ii. Guild does not owe Plaintiff a legal duty.**

12. “Duty is the threshold inquiry in negligence . . . claims.”<sup>28</sup> “If there is no legal duty, liability for negligence cannot exist.”<sup>29</sup> In the mortgage context, there is no special relationship between a mortgagor and a mortgagee, or between a servicer and a borrower, that would impose an independent common law duty under a negligence theory.<sup>30</sup> Numerous courts in Texas have dismissed negligence claims brought by a borrower against a mortgagor or mortgage servicer because no legal duty existed.<sup>31</sup> In this case, Plaintiff has pled no facts to establish Guild owed him an independent common law duty under a negligence theory; therefore, the Court should dismiss Plaintiff’s negligence claims for this reason as well.

**C. Plaintiff’s claim for violation of Chapter 51 of the Texas Property Code fails.**

**i. Chapter 51 does not create an independent cause of action.**

13. Plaintiff alleges in his Complaint that Guild failed to comply with the notice requirements set forth in Chapter 51 of the Texas Property Code regarding the foreclosure sale that was set for September 6, 2022, but that did not go forward.<sup>32</sup> As an initial matter, federal courts in Texas have consistently held that Chapter 51 of the Texas Property Code does not grant a private right of action to a mortgagor.<sup>33</sup> Therefore, Plaintiff’s claim for violation of Chapter 51 of the

<sup>28</sup> *Miller v. CitiMortgage, Inc.*, 970 F. Supp. 2d 568, 585 (N.D. Tex. 2013) (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *RT Realty, L.P. v. Tex. Utilities Elec. Co.*, 181 S.W.3d 905, 914 (Tex. App.—Dallas 2006, no pet.) (“The threshold inquiry regarding a gross negligence claim is whether a legal duty existed.”)).

<sup>29</sup> *Id.* (citing *Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex. 1999)).

<sup>30</sup> *UMLIC VP LLC v. T & M Sales & Envtl. Sys., Inc.*, 176 S.W.3d 595, 613–15 (Tex. App.—Corpus Christi 2005, pet. denied) (holding mortgagor did not owe mortgagee a duty in negligence for conduct relating to the foreclosure sale because the deed of trust governs the duties of the parties); *Coleman v. Bank of America, N.A.*, 2011 WL 2516169 \*1 (N.D. Tex. 2011) (holding that Texas does not “recognize a common law duty of good faith and fair dealing in transactions between a mortgagee and mortgagor, absent a special relationship marked by shared trust or an imbalance in bargaining power”).

<sup>31</sup> *Id.*

<sup>32</sup> Complaint at ¶¶ 18–22.

<sup>33</sup> *Carey v. Fargo*, 2016 WL 4246997, at \*3 (S.D. Tex. Aug. 11, 2016) (stating that section 51.002 “does not provide Plaintiffs with a private right of action”); *Recio-Garcia v. Ditech Fin. LLC*, 2018 WL 4688758, at \*3 (W.D. Tex. June 6, 2018) (stating that “[a]n alleged violation of § 51.002(d) does not create an independent cause of action and instead must be brought as a wrongful foreclosure action”), report and recommendation adopted, 2018 WL 4701819 (W.D.

Texas Property Code fails for this reason alone.

**ii. Plaintiff fails to identify any action or inaction by Guild that violated a specific provision of Chapter 51.**

14. Moreover, even if an independent cause of action existed under Chapter 51 (which it does not), Plaintiff fails to allege any action or inaction by Guild that violated a specific provision of Chapter 51. In the Complaint, Plaintiff cites to the notice requirements of Tex. Prop. Code § 51.002(b)(3) and (d), but then alleges he “raise[d] issues regarding his loan and payment history and pending loan workout alternatives” and “any notice to post his property for sale would be premature.”<sup>34</sup> These vague allegations fail to state a violation of the statute.

15. Plaintiff’s counsel made this exact same factual assertion in *Smith v. U.S. Bank, N.A.* and the Court held this assertion did not state a claim for violation of sections 51.002(b) and (d) of the Property Code.<sup>35</sup> The Court dismissed the plaintiff’s claim under the property code in *Smith*, and the Court should reach the exact same conclusion in this case.

**iii. Plaintiff suffered no damages.**

16. Lastly, the foreclosure sale indisputably did not take place. Therefore, any claim by Plaintiff that Guild failed to comply with section 51.002 are moot.<sup>36</sup>

**D. Plaintiff’s breach of contract claim fails.**

17. Plaintiff alleges Guild is liable for breach of contract because Guild purportedly “failed to comply with HUD regulations outlining procedures that must be followed prior to

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Tex. July 10, 2018); *Ashton v. BAC Home Loan Servicing, L.P.*, 2013 WL 3807756, at \*4 (S.D. Tex. Jul. 19, 2013) (“This Court has not found any cases that interpret section 51.002 to establish an independent right of action for damages. The section also does not contain its own enforcement mechanism.”).

<sup>34</sup> Compl., ¶ 20.

<sup>35</sup> *Smith v. U.S. Bank, N.A. as Tr. NewRez LLC*, 2022 WL 345655, at \*3 (W.D. Tex. Feb. 4, 2022), report and recommendation adopted sub nom. *Smith v. U.S. Bank N.A.*, 2022 WL 1546643 (W.D. Tex. Mar. 3, 2022).

<sup>36</sup> See *Cyrilien v. Wells Fargo Bank, N.A.*, 2012 WL 2133551, \*3 (S.D. Tex. June 11, 2012) (holding the plaintiff failed to state a claim for violation of Tex. Prop. Code § 51.002 because plaintiff failed to identify what provisions Wells Fargo failed to comply with and, since the foreclosure sale never took place, the claim was moot); see *Jameel v. Flagstar Bank, FSB*, 2012 WL 5384177, at \*7 (S.D. Tex. Nov. 2, 2012).



accelerating and foreclosing a loan subject to the FHA,” breached “paragraphs 16, 19, 20, and 22,” and wrongfully applied “charges over and above Plaintiff’s principal loan balance.”<sup>37</sup> Plaintiff’s breach of contract claim fails for several reasons.

***i. Plaintiff has not alleged he performed or tendered performance under the contract.***

18. First, Plaintiff’s claim fails because Plaintiff has not alleged that he performed or tendered performance under the loan agreement. To prevail on a breach of contract claim, a plaintiff must show: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach.<sup>38</sup> It is a fundamental principle of contract law that “a party to a contract who is in default cannot maintain a suit for breach of contract.”<sup>39</sup> Texas courts have consistently extended this maxim to bar claims for breach of contract by borrowers who are in default of their contractual mortgage payments.<sup>40</sup>

19. Plaintiff in this case has not alleged he is current on the loan. The court analyzed this exact issue in *Smith* and held, “Smith states no facts to support the second element of his breach of contract claim; he alleges neither that he fully performed his obligations under the Loan Contract or tendered past due payments to cure his default. Accordingly, Smith’s breach of contract claim should be dismissed for failure to state a claim.”<sup>41</sup> Plaintiff’s Complaint in this case suffers

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<sup>37</sup> Compl., ¶¶ 24, 25, 28.

<sup>38</sup> *Bejjani v. Wilmington Tr. Co.*, 2011 WL 3667569, at \*3 (S.D. Tex. Aug. 22, 2011) (citing *Valero Mtkg. & Supply Co. v. Kalama Int’l*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (internal citation and emphasis omitted)).

<sup>39</sup> *Sproul v. Sasser*, No. 05-08-00502-CV, 2009 WL 2232240, at \*3 (Tex. App.—Dallas Jul. 28, 2009, no pet.); *RE/MAX of Tex., Inc. v. Katar Corp.*, 989 S.W.2d 363, 365 n. 4 (Tex. 1999) (quoting *Gulf Pipe Line Co. v. Nearen*, 138 S.W.2d 1065, 1068 (Tex. 1940) (“It is also elementary that a party to a contract who is himself in default cannot maintain a suit for its breach.”); *D.E.W., Inc. v. Depco Forms, Inc.*, 827 S.W.2d 379, 382 (Tex. App.—San Antonio 1992, no writ) (holding party in breach could not maintain suit for breach of contract)).

<sup>40</sup> *See Owens v. Bank of Am., N.A.*, 2012 WL 912721, at \*4 (S.D. Tex. Mar. 16, 2012); *Wilkerson v. Citimortgage, Inc.*, 2011 WL 6937382, at \*2 (N.D. Tex. Oct. 24, 2011); *Cole v. Bank of America, N.A.*, 2012 WL 465190, at \*2 (S.D. Tex. Feb. 13, 2012).

<sup>41</sup> *Smith*, 2022 WL 345655, at \*3.

from these exact same deficiencies; therefore, dismissal of Plaintiff's breach of contract claim is similarly warranted for this reason.

- ii. HUD regulations cannot form the basis of Plaintiff's breach of contract claim because Plaintiff has not and cannot allege these regulations are expressly incorporated into the loan agreement.**

20. Plaintiff alleges Guild breached the Deed of Trust and Note by purportedly failing to comply with HUD regulations.<sup>42</sup> HUD regulations cannot form the basis of Plaintiff's breach of contract claim, however, because Plaintiff has not and cannot allege these regulations are expressly incorporated into the loan agreement.

21. The Fifth Circuit and federal district courts throughout Texas have consistently held that "HUD regulations do not give the borrower a private cause of action unless the regulations are expressly incorporated into the lender-borrower agreement."<sup>43</sup> Courts have further held that, if the HUD regulations are expressly incorporated into the loan agreement, then the regulations *may* create a private cause of action for breach of contract *only*.<sup>44</sup> The reasoning behind these consistent holdings is that "[HUD regulations] deal only with the relations between the mortgagee and the government, and give the mortgagor no claim to duty owed nor remedy for failure to follow."<sup>45</sup>

22. Plaintiff in this case alleges Guild "failed to comply with HUD regulations outlining procedures that must be followed prior to accelerating and foreclosing a loan subject to the FHA."<sup>46</sup> Plaintiff, however, does not and cannot identify a provision in the Deed of Trust that

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<sup>42</sup> Compl., ¶ 24.

<sup>43</sup> *Johnson v. World All. Fin. Corp.*, 830 F.3d 192, 196 (5th Cir. 2016) (citing *Smith v. JPMorgan Chase Bank, N.A.*, 519 Fed. App'x. 861, 864 (5th Cir. 2013) (holding that federal statutes and regulations can form the basis of a breach of contract claim if expressly incorporated into the contract); *Anderson v. Compass Bank*, 2014 WL 5468132, at \*5 (S.D. Tex. Oct. 28, 2014) (determining that a "general reference to 'federal laws' in a Deed of Trust, on which plaintiff rely, is insufficient to support their breach of contract claim.")).

<sup>44</sup> *Bassie v. Bank of Am., N.A.*, 2012 WL 6530482, at \*4 (S.D. Tex. Dec. 13, 2012).

<sup>45</sup> See *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 357 (5th Cir. 1977).

<sup>46</sup> Compl., ¶ 24.

specifically incorporates the HUD regulations vaguely referenced by Plaintiff in the Complaint. Therefore, because Plaintiff's claim for breach of contract is premised on Guild's purported failure to comply with HUD regulations, and HUD regulations cannot form the basis of any of Plaintiff's claims based on long-standing caselaw, Plaintiff's breach of contract claim fails.

**iii. Plaintiff fails to identify a specific action by Guild that constitutes a breach.**

23. Moreover, even if the HUD regulations were expressly incorporated into the loan agreement, Plaintiff fails to identify with any particularity which HUD regulation Guild purportedly violated. Plaintiff's overly broad reference to HUD regulations fails to satisfy the Rule 8 pleading standard, which requires more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

24. Plaintiff also alleges Guild is liable for breach of contract because Guild purportedly breached "paragraphs 16, 19, 20, and 22" and wrongfully applied "charges over and above Plaintiff's principal loan balance." Assuming the paragraphs identified are referencing paragraphs in the Deed of Trust, Plaintiff fails to explain what actions Guild took in violation of any of these paragraphs. Moreover, these paragraphs govern a wide variety of obligations between Plaintiff and Guild, including, but not limited to, the law governing the Deed of Trust, the rules of construction of the contract, the borrower's right to reinstate after acceleration, the sale of the note, the change of the loan servicer, notifications of grievances, and remedies upon acceleration.<sup>47</sup> Plaintiff fails to explain which of these provisions Guild violated or what actions Guild took that violated these provisions. Plaintiff also fails to identify what charges Guild allegedly improperly

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<sup>47</sup> See **Exhibit A**: Deed of Trust. Guild requests the Court consider the Deed of Trust as part of the pleadings because Plaintiff refers to it throughout his Complaint, and it is central to Plaintiff's claims. See *Casey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (holding "[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") (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000) ("In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated."))).

applied “over and above Plaintiff’s principal loan balance.”

25. The Court analyzed similarly deficient pleadings in *Obumseli v. Citimorgage, Inc.*, in which the plaintiff alleged the mortgage servicer breached the deed of trust by “failing to fulfill conditions in the contract” and “engaging in false accounting practices.”<sup>48</sup> The Court held these allegations were insufficient and they did not go beyond mere “labels and conclusions” because they did not identify the provisions breached or the alleged false accounting practices that were vaguely referenced.<sup>49</sup> Therefore, the Court dismissed the plaintiff’s breach of contract claim. For these same reasons, Plaintiff’s breach of contract claim in this case fails.

**E. Plaintiff’s request for injunctive relief fails because it is not supported by a viable cause of action.**

26. Lastly, Plaintiff seeks injunctive relief preventing foreclosure of the property.<sup>50</sup> A request for injunctive relief, absent a cause of action supporting entry of a judgment, is fatally defective and does not state a claim, however.<sup>51</sup> Here, because all of Plaintiff’s claims against Guild fail to state a claim upon which relief may be granted for the reasons set forth above, Plaintiff’s request for injunctive relief fails as well and should be dismissed.

#### **IV. CONCLUSION**

For these reasons, Plaintiff fails to state a claim upon which relief may be granted against Guild. Therefore, Guild respectfully requests the Court grant this motion, dismiss Plaintiff’s claims in their entirety with prejudice, and grant all further relief to which Guild is justly entitled.

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<sup>48</sup> No. 4:12CV706, 2013 WL 3197911, at \*2 (E.D. Tex. June 21, 2013), report and recommendation adopted, No. 4:12CV706, 2013 WL 12153579 (E.D. Tex. Aug. 23, 2013).

<sup>49</sup> *Id.*

<sup>50</sup> Compl., ¶¶ 25–27.

<sup>51</sup> *Butanaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002).

Respectfully submitted,

By: /s/ Valerie Henderson

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**ATTORNEYS FOR DEFENDANT  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record via electronic service pursuant to the Federal Rules of Civil Procedure on September 14, 2022.

/s/ Valerie Henderson

Valerie Henderson