



commonly known as 201 N. Garza Road, Shady Shores, Texas 76208. (ECF No. 1-1.) Plaintiff brought a sole claim for quiet title. (*Id.*)

2. On September 22, 2023, Defendants timely filed their Notice of Removal, causing the State Court Action to be removed to this Court. (ECF No. 1).

3. In response to removal and Defendants' Motion to Dismiss, Plaintiff filed his Amended Complaint on October 12, 2023. (ECF No. 10.) Plaintiff added additional claims for wrongful foreclosure; conflict of interest; conversion; fraud; slander of title; and an accounting. Plaintiff's Amended Complaint also added two new defendants Mortgage Electronic Registration Systems, Inc. ("MERS") and Great Western Financial Services, Inc. ("Great Western").

4. Plaintiff's Amended Complaint fails to state a claim against AVT that does not relate to its involvement as a potential substitute trustee for a scheduled foreclosure. Plaintiff further fails to state a claim against MWZM outside of their status as foreclosure counsel in his Amended Complaint. Accordingly, Plaintiff's claims against MWZM and AVT fail as a matter of law, and they must be dismissed with prejudice.

## II. STANDARD UNDER RULE 12(B)(6)

Under Rule 12(b)(6), a case must be dismissed when the allegations asserted in the complaint "fail[] to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). Under the 12(b)(6) standard, a court cannot look beyond the pleadings. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). Pleadings must show specific, well-pleaded facts, not mere conclusory allegations. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). The court must accept those well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Id.* Although "detailed factual allegations" are not necessary, a plaintiff must provide

“more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555. The alleged facts must “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. In short, a complaint fails to state a claim upon which relief may be granted when it fails to plead “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

### III. ARGUMENT AND AUTHORITIES

#### A. Plaintiff fails to state a claim against Defendant AVT Title Services, LLC.

Plaintiff does not allege any facts in his Amended Complaint against AVT or include any claims against it that do not relate to its involvement as a potential substitute trustee for a scheduled foreclosure sale. (ECF No. 10.) Therefore, Plaintiff’s allegations are insufficient to support claims against AVT that derive from anything other than its acts as a trustee at a foreclosure sale.

It is clear from the Amended Complaint that Plaintiff names AVT solely in its capacity as substitute trustee on behalf of the other named Defendants. (ECF No. 10.) AVT cannot be held liable as an agent in its capacity as foreclosure trustee. Foreclosure trustees are regarded as agents. *See Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ).

Plaintiff does not allege any specific facts against AVT other than in its capacity as foreclosure trustee. (ECF No. 10.) The general factual bases for Plaintiff’s claims in this suit are regarding the servicing of the subject loan. (*Id.*) These claims, even if they were meritorious, could not be imputed to AVT and do not support independent causes of action against it individually. *See Mortberg v. Litton Loan Servicing, LP*, No. 4:10–CV–668, 2011 WL 4431946, at \*4 (E.D. Tex. Aug. 30, 2011) (dismissing claims against a law firm in its capacity as substitute trustee where the plaintiff alleged no specific facts indicating the law firm’s actions could be distinguished from the loan servicer’s actions in foreclosure of the plaintiffs’ home); *see also Schaeffer v. O’Brien*,

39 S.W.3d 719, 721 (Tex. App.—Eastland 2001, pet. denied) (holding that an agent cannot be liable for breach of contract); *see also Mechali v. CTX Mortgage Co., LLC*, No. No. 4:11-CV-114, 2011 WL 2683190, at \*4 (E.D. Tex. June 7, 2011) *citing* Tex. Prop. Code § 51.007(f) (“Trustees are not liable ‘for any good faith error resulting from reliance on any information in law or fact provided by the mortgagor or mortgagee or their respective attorney, agent, or representative or other third party.’”).

Plaintiff fails to state a claim against AVT. Accordingly, Plaintiff’s claims against AVT should be dismissed.

**B. Plaintiff fails to state a claim against MWZM.**

Plaintiff in its Amended Complaint makes no specific allegations against MWZM, and only generally alleges that MWZM is counsel for Fifth Third. (ECF No. 10 at ¶ 5.) Where a party’s sole involvement is to act as an attorney for a mortgage company, the doctrine of attorney immunity applies to protect the public’s “interest in loyal, faithful and aggressive representation by the legal profession.” *Pease v. BAC Home Loans Servicing, et al*, No. A-12-CA-1009-SS (W.D. Tex. Dec. 28, 2011)(citing *Taco Bell Corp. v. Cracken*, 939 F. Supp 528, 532 (N.D. Tex. 1996)).

In June 2015, the Texas Supreme Court unequivocally held that an attorney is immune from civil liability to non-clients when the attorney is acting within the scope of his or her representation. *Cantey Hanger, LLP v. Byrd*, 467 S.W. 3d 477, 481 (Tex. 2015). District courts in this Circuit have followed the *Cantey Hanger* holding in finding improper joinder of bank counsel or in granting summary judgments in favor of bank counsel. *McGee v. CTX Mortg. Co., LLC*, 2015 U.S. Dist. LEXIS 154850, \*4 (N.D. Tex. Nov. 16, 2015); *Smith v. Bank of Am. Corp.*,

2016 U.S. Dist. LEXIS 81, \*18 (W.D. Tex. Jan. 4, 2016); *Williamson v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 74059, \*5 (E.D. Tex. Apr. 28, 2016).

The decision by the Court in *Cantey Hanger* forecloses the exact result entertained by the Plaintiff in this case: joining a law firm to a suit by simply basing a cause of action against an attorney for none other than advocating for their client against the complaining party. The doctrine of attorney immunity provides attorneys an opportunity to practice their profession, without a conflict between advocating zealously for their clients' best interests as deemed necessary and proper and their own personal exposure to liability from non-parties in the discharge of their duties within the scope of their client's representation. *Campbell v Mortgage Electronic Registration Systems Inc.* No. 03-11-00429-CV, 2012 Tex. App. LEXIS 4030 \*6 (Tex. App.—Austin May 18, 2012, pet. denied) (mem.op.) (Attorneys hired to assist a mortgage beneficiary in the non-judicial foreclosure of real property were immune from the borrowers' suit for wrongful foreclosure.)

The allegations in the Amended Complaint do not support an independent cause of action against MWZM. Defendant MWZM was at all times acting as counsel for Fifth Third and cannot, as a matter of law, be held liable in that capacity. *See Williamson v. Wells Fargo Bank, N.A.*, Case No. 6:16-CV-200-MHS-JDL, 2016 U.S. Dist. LEXIS 74059 (E.D. Tex. Apr. 28, 2016) (attorneys assisting in a non-judicial foreclosure were immune from liability from the borrower for allegedly not providing an accounting of foreclosure costs and fees and engaging in a conspiracy prohibiting the borrower from reinstating the mortgage); *Wyles v. Cenlar FSB*, 7-15-CV-155-DAE, 2016 U.S. Dist. LEXIS 52795 (W.D. Tex. Apr. 20, 2016)(attorney immunity applied when law firm sent foreclosure notices to the borrower, posted notice of the foreclosure sale, and represented the loan servicer in the sale proceedings); *see also McGee v. CTX Mortg.*

*Co., LLC*, Civil Action No. 3:15-CV-1746-L, 2015 U.S. Dist. LEXIS 154850 (N.D. Tex. Nov. 16, 2015) (attorney immunity applied when law firm assisted its client in initiating foreclosure proceedings). Accordingly, Plaintiff's claims against MWZM should be dismissed.

**C. There is no private right of action for "Conflict of Interest" therefore, this claim should be dismissed.**

Plaintiff brings a claim for conflict of interest, alleging that AVT and MWZM are one entity; therefore, AVT was unable to be an unbiased trustee for the September 5, 2023 foreclosure sale. (ECF No. 10 at ¶¶ 56-63.)

Conflict of interest, an alleged violation of the Texas Disciplinary Rules of Professional Conduct, does not provide a private right of action. *Home Advantage v. Ronald J. Shaw, Bailey & Shaw, P.C.*, NO. 07-97-0309-CV, 1998 Tex. App. LEXIS 5116, at \*8 (Tex. App. Aug. 19, 1998) (citing Tex. Disciplinary R. Prof. Conduct Preamble P 15(1991)) ("Attorneys are prohibited from representing conflicting interests under Rules 1.06-09 of the Texas Disciplinary Rules of Professional Conduct. However, these rules state unequivocally that "violation of a rule *does not give rise to a private cause of action* nor does it create any presumption that a legal duty to a client has been breached.") Therefore, Plaintiff's conflict of interest claim fails and must be dismissed.

**WHEREFORE, PREMISES CONSIDERED,** Defendants pray that their Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) be granted, that each of Plaintiffs' claims as set forth above and in their Amended Complaint be dismissed with prejudice, and that Defendants be awarded all other relief to which they may be entitled.

Respectfully submitted,

By: /s/ Cheyenne D. Haley

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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 26, 2023, a true and correct copy of the foregoing was served in the manner described below on the following:

***Via ECF Notification:***

Zachary Wayne White

201 N. Garza Road

Shady Shores, Texas 76208

*Pro-Se Plaintiff*

/s/ Cheyenne D. Haley

**CHEYENNE D. HALEY**