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

SUPERIOR CONSULTING GROUP and KARLTON WOODSON,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	**CIVIL ACTION NO. 4:23-cv-04407**
PHH MORTGAGE CORPORATION, GUILD MORTGAGE COMPANY, fdba CORNERSTONE MORTGAGE COMPANY, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS),	§	
	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants PHH Mortgage Corporation ("***PHH***") and Mortgage Electronic Registration Systems, Inc. ("***MERS***," and together with PHH, the "***Moving Defendants***") move to dismiss the Original Petition filed on August 28, 2023 ("***Complaint***") by Plaintiffs Superior Consulting Group ("***Superior***") and Karlton Woodson ("***Plaintiff Woodson,***" collectively with Superior, the "***Plaintiffs***") for failure to state a plausible claim for relief. In support of this motion, Moving Defendants state:

I. INTRODUCTION

1. This is the second action under the same facts in this Court. On February 21, 2022, Nonparty Tracey Woodson ("***Mrs. Woodson***") and Superior filed a prior lawsuit (the "***Prior Lawsuit***") against Moving Defendants, entitled *Superior Consulting Group and Tracey Woodson v. PHH Mortgage Corporation, Guild Mortgage Company fdba Cornerstone Mortgage Company, and Mortgage Electronic Registration Systems, Inc.* Case No. 4-22-cv-896, asserting

claims for statutory fraud; common law fraud; breach of contract and quiet title.[1] Mrs. Woodson and Superior nonsuited MERS and Guild Mortgage Company from the Prior Lawsuit on March 11, 2022. On May 2, 2023, the Court issued a Memorandum and Order determining that PHH's motion for summary judgment was granted;[2] and on May 8, 2023, the Court entered a final summary judgment order.[3]

2. Plaintiffs' instant lawsuit is a repackage of the same baseless claims that were adjudicated in the Prior Lawsuit, and their claims fare no better this second time around. First, Plaintiffs' claims are barred by res judicata. Approximately one year ago, this Court rendered a final judgment on the merits in PHH's favor on the same claims alleged in this lawsuit. Second, Plaintiffs' claims are defeated by a number of independent grounds that warrant a dismissal of all claims with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

3. On or about December 16, 2009, Mrs. Woodson obtained a mortgage loan (the "***Loan***") in the original principal sum of $112,542.00 from Cornerstone Mortgage Company, which is evidenced by a promissory note (the "***Note***") secured by a deed of trust (the "***Deed of Trust***"),[4] encumbering the real property commonly known as 16107 Sheldon Ridge Way, Houston, TX 77044 (the "***Property***").

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[1] Attached as **Exhibit A** is Plaintiffs' first amended complaint filed in the Prior Lawsuit. The Court should take judicial notice of the Petition filed in the 2011 Lawsuit because it is a matter of public record. *See Funk*, 631 F.3d at 783.

[2] Attached as **Exhibit B** is the May 2, 2023 Memorandum and Opinion issued in the Prior Lawsuit.

[3] Attached as **Exhibit C** is a copy of the May 8, 2023 Final Summary Judgment issued in the Prior Lawsuit.

[4] Attached as **Exhibit F**. The Court may take judicial notice of the Deed of Trust because it was recorded on December 23, 2009 in the Official Public Records of Harris County, Texas under Instrument No. 20090577480. *See Funk v. Stryker*, 631 F.3d 777, 783 (5th Cir. 2011).

4. Plaintiff Woodson is a co-signatory to the Deed of Trust, but is not an obligor under the Note.[5]

5. On January 17, 2013, MERS assigned its interest under the Deed of Trust to GMAC Mortgage, LLC ("First Assignment," attached hereto as **Exhibit D**),[6] that subsequently assigned its rights to Ocwen Loan Servicing, LLC on July 24, 2013 ("Second Assignment," attached hereto as **Exhibit E**).[7]

6. Superior, a sole proprietorship of Plaintiff Woodson, purports to now be the owner of the Property.[8]

7. PHH is in possession of the Note, which is indorsed in blank and is the assignee of record for the Deed of Trust.[9]

8. On March 3, 2017, Mrs. Woodson filed a voluntary petition (the "***2017 Bankruptcy***") for relief under chapter 13 of Title 11 of the United States Code, 11 U.S.C. § 101, *et seq*. (the "***Bankruptcy Code***").[10] Mrs. Woodson filed a chapter 13 plan in the 2017 Bankruptcy in which she proposed to cure the default on the Loan and maintain her ongoing monthly payments under the Loan.[11] The 2017 Bankruptcy was subsequently dismissed on February 13, 2018.[12]

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[5] *See* Ex. B.
[6] The Court may take judicial notice of the First Assignment because it was recorded on January 23, 2013 in the Official Public Records of Harris County, Texas under Instrument No. 20130032332. *See Funk v. Stryker*, 631 F.3d 777, 783 (5th Cir. 2011).
[7] The Court may take judicial notice of the Second Assignment because it was recorded on August 2, 2023 in the Official Public Records of Harris County, Texas under Instrument No. 20130393002. *See Funk v. Stryker*, 631 F.3d 777, 783 (5th Cir. 2011).
[8] *See* Compl. ¶2, 20.
[9] *See* Ex. B.
[10] *Id.*
[11] *Id.*
[12] *Id.*

9. On March 2, 2018, eighteen days after the 2017 Bankruptcy was dismissed, Mrs. Woodson filed a second voluntary petition (the "***2018 Bankruptcy***") for relief under chapter 13 of the Bankruptcy Code.[13] As she did in the 2017 Bankruptcy, Mrs. Woodson filed a chapter 13 plan in the 2018 Bankruptcy in which she proposed to cure the default on the Loan and maintain her ongoing monthly payments under the Loan.[14] The 2018 Bankruptcy was converted to a chapter 7 on March 12, 2019, and Mrs. Woodson received a chapter 7 discharge on June 11, 2019.[15]

10. On June 27, 2019, PHH sent Mrs. Woodson a Notice of Intention to Foreclose (the "***Notice of Intention***") wherein it again notified her of her default on the Loan.[16]

11. Plaintiffs filed the current lawsuit, asserting the same allegations that formed the bases for the claims asserted in the Prior Lawsuit.[17] Plaintiffs further assert the same cause of action in the current lawsuit that were alleged in the Prior Lawsuit in support of the same requested relief.

II. ARGUMENT AND AUTHORITIES

A. Applicable Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[18] "Factual allegations must ... raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true

[13] *Id.*
[14] *Id.*
[15] *See id.*
[16] *Id.*
[17] Compare Doc. 1 with Ex. A.
[18] *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), *cert. denied*, 552 U.S. 1182 (2008)).

(even if doubtful in fact)."[19] While the allegations need not be overly detailed, a plaintiff's pleadings must still provide the grounds of his entitlement to relief, which "requires more than labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do."[20] "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."[21]

Demonstrating the facial plausibility of a claim requires a plaintiff to establish "more than a sheer possibility that a defendant has acted unlawfully."[22] It is not enough that a plaintiff allege the mere possibility of misconduct; it is incumbent to "show that the [plaintiff] is entitled to relief."[23] The court may dismiss a complaint under Rule 12(b)(6) if either the complaint fails to assert a cognizable legal theory or the facts asserted are insufficient to support relief under a cognizable legal theory.[24]

B. Plaintiffs' Claims Are Barred by Res Judicata.

"[W]hile res judicata is generally an affirmative defense to be pleaded in a defendant's answer[,] there are times when it may be raised on a Rule 12(b)(6) motion," such as "when 'the facts are admitted or not controverted or are conclusively established.'"[25] For instance, "[w]hen all relevant facts are shown by the court's own records, of which the court takes notice, the

[19] *Twombly*, 550 U.S. at 555 (internal citations omitted).
[20] *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("'naked assertions' devoid of 'further factual enhancement,'" along with "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the presumption of truth).
[21] *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).
[22] *Iqbal*, 556 U.S. 662, 678.
[23] FED. R. CIV. P. 8(a)(2); *see also Iqbal*, 556 U.S. 662, 679.
[24] *See Stewart Glass & Mirror, Inc. v. U.S.A. Glass, Inc.*, 940 F. Supp. 1026, 1030 (E.D. Tex. 1996).
[25] *Meyers v. Textron, Inc.*, 540 F. App'x 408, 410 (5th Cir. 2013) (per curiam) (quoting *Clifton v. Warnaco, Inc.*, 53 F.3d 1280, 1995 WL 295863, at *6 n.13 (5th Cir. 1995) (per curiam; citation omitted).

defense [of res judicata] may be upheld on a Rule 12(b)(6) motion without requiring an answer."[26]

Res Judicata insures the finality of judgments, conserves judicial resources, and protects litigants from multiple lawsuits.[27] It "bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[28] The res judicata doctrine has four elements: "(1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions."[29] The final element extends beyond claims that were actually raised in a prior action and bars all claims that "could have been advanced in support of the cause of action on the occasion of its former adjudication."[30] In this case, all four elements for the application of res judicata are easily satisfied and this case should be dismissed with prejudice.

1. The First Three Elements of Res Judicata Are Easily Established.

Plaintiffs and Moving Defendants are the same parties (or in privity) to the instant lawsuit and the Prior Lawsuit.[31] Plaintiff Woodson is in privity as the husband of Mrs. Woodson, a plaintiff in the Prior Lawsuit.[32] The Prior Lawsuit concluded with a final judgment on the merits by a court of competent jurisdiction.[33]

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[26] *Id.*; *see also Brooks v. Wells Fargo Bank, N.A.*, No. 3:19-cv-00094-M-BN, ECF # 10 (N.D. Tex. May 10, 2019) (recommending that Rule 12(b)(6) motion to dismiss based on res judicata be granted and pro se plaintiff's claim be dismissed with prejudice).
[27] *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 (5th Cir. 2004).
[28] *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005) (emphasis added).
[29] *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 466 (5th Cir. 2013).
[30] *In re Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990).
[31] Compare Ex. A with Doc. 1.
[32] *Id.*
[33] Ex. C.

2. The Prior Lawsuit and the Current Lawsuit are Based on the Same Nucleus of Operative Facts.

"Res judicata prevents the relitigation of claims that have already been finally adjudicated or that *should have been litigated in the prior lawsuit*."[34] Under the Fifth Circuit's "transactional test," a "prior judgment's preclusive effect extends to all rights of the plaintiff with respect to all or any part of the transaction, or series of connected transactions, out of which the original action arose."[35] "The critical issue is whether the two actions are based on the same nucleus of operative facts."[36] To determine whether the same claims or causes of action are brought, the transactional test is applied, in which "all claims arising from a common nucleus of operative facts and could have been brought in the first lawsuit, are barred by res judicata."[37]

Here, Plaintiffs' claims in the instant lawsuit arise from the same common nucleus of operative facts as those alleged in the Prior Lawsuit. The majority of the allegations are the same as those alleged in the Prior Lawsuit, the causes of actions are materially the same, and the relief requested is practically identical.[38]

C. Even if Not Precluded by Res Judicata, Superior Lacks Capacity to Assert Any Claims against Moving Defendants.

Under Texas law, a sole proprietorship has no legal existence apart from its owners.[39] Thus, a sole proprietorship lacks the capacity to sue independent from its sole proprietor.[40] It necessarily follows from these principles that Superior, as a sole proprietorship of Plaintiff Woodson, lacks the capacity to maintain any claims against Moving Defendants.

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[34] *Smith v. Waste Mgmt., Inc.*, 407 F.3d 381, 386 (5th Cir. 2005).
[35] *Singh*, 428 F.3d at 571.
[36] *Id.*
[37] *Id.*; *Petro-Hunt*, 365 F.3d at 395-96.
[38] *Compare* Ex. A, *with* Doc. 1.
[39] *See Brantley v. Kuntz*, 98 F.Supp.3d 884, 887 (W.D. Tex. 2015).
[40] *See Horie v. Law Offices of Art Dula*, 560 S.W.3d 425, 434 (Tex. App.—Houston [14th Dist.] 2018) ("[T]he assumed name of a sole proprietorship is not a separate legal entity or even a different capacity of the individual sole proprietor.").

Article III of the Constitution limits the jurisdiction of federal courts to cases and controversies.[41] "One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue."[42] This requirement, like other jurisdictional requirements, is not subject to waiver and demands strict compliance.[43] To meet the standing requirement, Superior must show: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the Moving Defendants; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[44]

Here, Superior lacks standing to assert claims against Moving Defendants relating to Loan because it is not a party to the loan. This Court has already found that Plaintiff is not a signatory to or borrower under Loan.[45] Plaintiffs do not allege that Superior is a party to the note or obligated thereunder and therefore lack standing to assert any claims against Moving Defendants relating to Loan. All claims in this lawsuit that Superior assert relating to Loan fail as a matter of law and should be dismissed with prejudice.

D. Even if Not Precluded, Plaintiffs Lack Standing to Challenge the Assignments.

Plaintiffs claim that "the chain of title is broken from the original lender, due to an invalid and void assignment of mortgage and that Defendants lack any standing to foreclose."[46] Plaintiffs lack standing to challenge the First Assignment or Second Assignment because as held by the Fifth Circuit in *Reinagel v. Deutsche Bank National Trust Co.*, 735 F.3d 220, 228 (5th Cir. 2013), "under Texas law, facially valid assignments cannot be challenged for want of authority

[41] *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980).
[42] *Raines v. Byrd*, 521 U.S. 811, 818 (1997).
[43] *Id*. at 819; *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996).
[44] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Consol. Cos., Inc. v. Union Pac. R.R. Co.*, 499 F.3d 382, 385 (5th Cir. 2007).
[45] Ex. B.
[46] Compl. ¶ 18.

except by the defrauded assignor." Thus, under *Reinagel*, Plaintiffs lack standing to challenge the First Assignment, Second Assignment and PHH's standing to foreclose, as neither are a party to either assignment. *See* Ex. D, E. To the extent that Plaintiffs are alleging that MERS fraudulently assigned the lien, MERS assignments are valid in Texas. The Fifth Circuit has repeatedly upheld MERS assignments because MERS qualifies as a mortgagee under the Texas Property Code.[47] Here, the First Assignment executed by MERS is facially valid and properly notarized, and Plaintiffs are not a party to the First Assignment.[48]

Furthermore, PHH has standing to foreclose because in Texas, a mortgagee or mortgage servicer is permitted to foreclose under the power of sale conferred by a deed of trust, and the public record establishes that PHH is the assignee of the Deed of Trust with the right to foreclose.[49] For these reasons, the Court should find that Plaintiffs lack standing to challenge the First Assignment or Second Assignment and dismiss, with prejudice, each of Plaintiffs' title related claims based on these challenges.

E. Even if Not Precluded, Plaintiffs' Fraud and Title Based Claims are Barred by the Statute of Limitations.

Plaintiffs' claims for fraud and quiet title are all subject to a four-year statute of limitations.[50] Because each of these claims fundamentally stem from Plaintiffs' challenge to the First Assignment which was recorded on January 23, 2013; thus, their claims which are predicated on the First Assignment expired at the latest on January 23, 2017. Ex. D. Similarly, the Second Assignment was recorded on August 2, 2013, and any claims premised on the Second Assignment should have been asserted no later than August 2, 2017. Ex. E. Because Plaintiffs

[47] *Martins v. BAC Home Loans Servicing, L.P.,* 722 F.3d 249, 255 (5th Cir. 2013); *Van Duzer v. U.S. Bank Nat'l Ass'n,* 582 Fed. App'x 279, 282 (5th Cir. 2014)(per curiam).
[48] *See* Ex. C.
[49] *See* Ex. B; *See also Epstein v. U.S. Bank Nat. Ass'n,* 540 F. App'x 354, 356 (5th Cir. 2013); *Martins*, 722 F.3d at 255.
[50] *See* TEX. CIV. PRAC. & REM. CODE § 16.004(A)(4) as to fraud claim; *Poag v. Flories,* 317 S.W.3d 820, 825 (Tex. App.—Fort Worth, 2010) as to quiet title claim.

did not file their claims against Moving Defendants until August 28, 2023, the four-year statutes of limitations applicable to the title related claims for fraud and quiet title bar these claims as a matter of law.

F. Plaintiffs' Fraud-Based Claims Fail as a Matter of Law.

In addition to be precluded by the doctrine of res judicata, Plaintiffs' fraud-based claims do not meet the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. Under Texas law, the elements of a claim for fraud (or fraudulent misrepresentation) are: (1) a material misrepresentation; (2) that was false when made; (3) the defendant either knew the representation was false or asserted it without knowledge of its truth; (4) the defendant intended that the representation be acted upon; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff was injured as a result.[51] "The elements of statutory fraud are the same as common law fraud except in the case of statutory fraud, it is not necessary to prove that the speaker acted with knowledge or recklessness."[52] Rule 9 of the Federal Rules of Civil Procedure provides that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[53] The Rule 9(b) standard requires "specificity as to the statements (or omissions) considered to be fraudulent, the speaker, when and why the statements were made, and an explanation of why they were fraudulent."[54] "Where [] fraud is alleged against a corporate defendant, the plaintiff must allege that the individual corporate officer making the statement had the requisite level of knowledge and intent."[55]

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[51] *Malacara v. Garber,* 353 F.3d 393, 403-04 (5th Cir. 2003) (citing *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998)).
[52] *Elbezre v. PNC Mortg. a Div. of PNC Bank*, 2011 WL 13250764, at *10-11 (S.D. Tex. 2011) (citing *Bush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 726 (Tex. App. 1998)) (internal quotations omitted).
[53] FED. R CIV. P. 9(b).
[54] *Plotkin v. IP Axess, Inc.,* 407 F.3d 690, 696 (5th Cir. 2005).
[55] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F.Supp.2d 504, 555 (S.D. Tex. 2011) (citation omitted).

Plaintiffs' first and second claims for statutory fraud and common law fraud are insufficiently pled. In fact, the claims consist of little more than a recitation of the elements of statutory and common law fraud claims. Indeed, in support of their statutory fraud claim, Plaintiffs allege that "Defendants" made a false representation of fact during a real estate transaction.[56] They do not specify which of the original defendants to the Amended Petition made this allegedly false representation, let alone identify the individual corporate officer who made the representation. Moreover, Plaintiffs do not identify the specific representation they contend was false. Nor do they identify any "real estate transaction" that they entered into with PHH. The only potential real estate transaction alleged in the Complaint is the Loan, which was originated in December 2009, more than twelve years before Plaintiffs commenced this action. Any fraud claim based on the original Loan transaction is decidedly time-barred.[57]

Similarly, Plaintiffs' claim for common law fraud is premised on their allegation that "Defendants' representatives made false and material representations to Plaintiff [*sic*] when informing Plaintiffs that they were delinquent in making mortgage loan payments."[58] However, Plaintiffs again fail to differentiate between the original defendant or identify any specific representative of Moving Defendants who made the purportedly false statement. The Complaint likewise fails to allege non-conclusory facts to establish the remaining elements of claims for statutory and common law fraud. Ultimately, as constituted, Plaintiffs' statutory and common law fraud claims are insufficient to state claims as a matter of law. This alone warrants dismissal of Plaintiffs' fraud based claims.

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[56] Compl. ¶ 22.
[57] *See R&L Inv. Prop., LLC v. Hamm*, 2011 WL 2462102, at *3 (N.D. Tex. 2011) (noting that statutory and common law fraud claims are subject to a four-year statute of limitations in Texas) (citing TEX. CIV. PRAC. & REM. CODE § 16.004(a)(4)).
[58] Compl., ¶ 25.

Assuming Plaintiffs' fraud claims are premised on their contentions that PHH failed to satisfy the pre-foreclosure notice provisions under the Deed of Trust and Texas law, and/or that PHH lacks standing to enforce the Deed of Trust, the Court has already adjudicated these claims and MERS was not involved with any foreclosure of the Property, given the fact that it assigned its interests in the Deed of Trust to GMAC on or around January 17, 2013. Ex. D. More specifically, the Court found that Mrs. Woodson was given notice of her default on the Loan in the form of the Default Notice and Notice of Intention.[59] Both of these notices satisfied the requirements under Texas law as they: (a) were sent to Mrs. Woodson by certified mail; (b) notified Mrs. Woodson that she was in default under the Loan; and (c) gave her at least 20 days to cure her default.[60] PHH has not taken any other steps in furtherance of foreclosure under the Deed of Trust.[61] In short, PHH's evidence demonstrates that it provided Woodson with the default notice required by Texas law.

PHH's evidence likewise demonstrates that it has the authority to enforce the Deed of Trust, notwithstanding Plaintiffs' contentions to the contrary in the Amended Petition. Under Texas law, "a party has standing to initiate a nonjudicial foreclosure sale if the party is a mortgagee."[62] A mortgagee includes the grantee, beneficiary, owner, or holder of a security instrument, such as a deed of trust, or "if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record."[63] Texas courts recognize

[59] *See* Ex. B. While Woodson subsequently filed the 2017 Bankruptcy and 2018 Bankruptcy through which she sought to cure her default on the Loan, she never completed a chapter 13 plan in either case. Her invocation of the cure and maintenance provisions of section 1322(b)(5) of the Bankruptcy Code did not result in an actual cure of her default. *See e.g., In re Seaberry*, 2019 WL 1590536, at *13 (Bankr. S.D. Miss. 2019); *see also In re Tudor*, 342 B.R. 540, 566 (Bankr. S.D. Ohio 2005).
[60] *Id.*; TEX. PROP. CODE § 51.002(d).
[61] Ex. B
[62] *EverBank, N.A. v. Seedergy Ventures, Inc.*, 499 S.W.3d 534, 538 (Tex. App. 2016).
[63] TEX. PROP. CODE § 51.0001(4).

that the holder or owner of a promissory note secured by a deed of trust qualifies as a mortgagee due to the maxim that "the mortgage follows the note."[64]

It is indisputable that PHH qualifies as a "mortgagee" and therefore has standing to enforce the Deed of Trust. Indeed, the record establishes that PHH is in possession of the Note, which is indorsed in blank.[65] As the entity in possession of the indorsed in blank Note, PHH qualifies as the "holder" of the Note and therefore has the right to enforce both the Note and Deed of Trust.[66] The record also establishes that PHH is the last person to whom the Deed of Trust has been assigned of record.[67] This serves as an independent basis for finding that PHH has standing to enforce the Deed of Trust under Texas law.[68] While Plaintiffs allege that the assignments to PHH are "void," they offer no factual support for the allegation. Absent facts demonstrating that the assignments are, in fact, void, Plaintiffs lack standing to challenge the assignments.[69] In sum, there is no merit to the two principal theories underlying Plaintiffs' claims; namely, the theories that PHH failed to provide Mrs. Woodson with notice of her default on the Loan and that PHH lacks the authority to foreclose. For all the foregoing reasons, Plaintiffs' claims for statutory and common law fraud should be dismissed in their entirety with prejudice.

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[64] *EverBank*, 499 S.W.3d at 538.
[65] Ex. B.
[66] *See EverBank*, 499 S.W.3d at 543 (concluding that the entity in possession of an indorsed in blank note had standing to foreclose).
[67] Ex. B.
[68] *See* TEX. PROP. CODE § 51.0001(4).
[69] *Ferguson v. Bank of N.Y. Mellon Corp.*, 802 F.3d 777, 7801-81 (5th Cir. 2015) (recognizing that a borrower has standing to challenge an assignment only on a ground that would render the assignment void, as opposed to merely voidable).

G. Even if Not Precluded, Plaintiffs' Breach of Contract Claim Fails as a Matter of Law.

The elements of a breach of contract claim are "(1) a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach."[70] "To plead a breach of contract claim, a plaintiff must identify a specific provision of the contract that was allegedly breached."[71] A breach occurs when a party fails or refuses to do something he has promised to do.[72]

Like their fraud claims, Plaintiffs' claim for breach of contract consists of mere threadbare recitals of the elements of a claim for breach of contract.[73] They do not even specify what contract Moving Defendants are alleged to have breached, much less identify the provision of the contract that was allegedly breached. As is the case with their fraud claims, Plaintiffs also fail to differentiate between the originally named defendants within the context of their breach of contract claim. Plainly stated, Plaintiffs have pled insufficient facts to state a viable claim for breach of contract, and this Court should dismiss it with prejudice.

H. Even if Not Precluded, The Court Should Deny Plaintiffs' Request for Quiet Title.

"A suit to quiet title is an equitable action in which the plaintiff seeks to remove from his title a cloud created by an allegedly invalid claim."[74] The plaintiff in a quiet title action must show: "(1) an interest in a specific property; (2) title to the property is affected by a claim by the defendant; and (3) the claim, although facially valid, is invalid or unenforceable."[75] "A plaintiff

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[70] *McLaughlin, Inc. v. Northstar Drilling Techs., Inc.,* 138 S.W.3d 24, 27 (Tex. App. 2004) (citation and internal quotations omitted).
[71] *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Georgia, Inc.*, 995 F. Supp. 2d 587, 602 (N.D. Tex. 2014) (citations omitted).
[72] *Townewest Homeowners Ass'n, Inc. v. Warner Commc'n Inc.,* 826 S.W.2d 638, 640 (Tex. App. 1992).
[73] Compl. ¶ 27.
[74] *Svoboda v. Bank of Am., N.A.*, 964 F. Supp. 2d 659, 672 (W.D. Tex. 2013).
[75] *Id.* at 763 (citation omitted).

has the burden of supplying the proof necessary to establish superior equity and right to relief."[76] "[T]he plaintiff must recover on the strength of his own title, not the weakness of his adversary's title."[77]

Plaintiffs' quiet title claim is premised on their contention that PHH did not receive a valid assignment of the Deed of Trust.[78] They specifically allege that the assignment was wrongful and that none of the defendants[79] to this action is "a real party in interest with standing to foreclose under Texas statutes, common law, and the Deed of Trust."[80] There is no merit to either of these contentions. As previously discussed, PHH qualifies as a "mortgagee" under Texas law by virtue of its status as the holder of the Note and last assignee of record of the Deed of Trust. While Plaintiffs attempt to challenge the validity of either assignment, they have not alleged any facts to establish that the First or Second Assignments are void, as is necessary for them to have standing to challenge either assignment. The validity of the Second Assignment is otherwise irrelevant in light of PHH's status as the holder of the Note – i.e., PHH qualifies as a "mortgagee" regardless of whether the First or Second Assignment are valid.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs have failed to state any claim for relief against Moving Defendants upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6), and Moving Defendants respectfully request that the Court dismiss Plaintiffs' claims with prejudice and for all relief at law or equity to which Moving Defendants have shown themselves entitled.

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[76] *Ocwen Loan Serv., LLC v. Gonzalez Fin. Holdings, Inc.*, 77 F. Supp. 3d 584, 588 (S.D. Tex. 2015).
[77] *Jaimes v. Fed. Nat. Mortg. Ass'n*, 930 F. Supp. 2d 692, 698 (W.D. Tex. 2013) (citation omitted).
[78] *See* Compl., ¶¶ 30-31.
[79] Although Plaintiffs make no specific allegations against MERS except for listing it in the caption of the case, MERS does not assert title in the and the public records do not demonstrate that MERS has title to the Property. Because MERS does not have title in the Property, there is no basis for Plaintiffs to request that the Court quiet title as to MERS. Accordingly, Plaintiff's claim for quiet title is woefully inadequate as to MERS and should be dismissed.
[80] *See id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2024, a copy of the above and foregoing was filed electronically with the Clerk of Court. Notice of this filing has been forwarded to all parties via email and first class mail.

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