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

ALLISON SLOCUM and GARY SLOCUM,	§	
	§	
	§	CIVIL ACTION NO. 4:18-CV-029-ALM-CAN
Plaintiffs,	§	
	§	
v.	§	
	§	
SEBRING CAPITAL PARTNERS, LP, ET AL.,	§	
	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendants' Renewed Motion to Dismiss [Dkt. 26], and Plaintiffs' Motion to Vacate Foreclosure Sale [Dkt. 33]. Having reviewed the Motions [Dkts. 26, 33], and all other relevant filings, the Court recommends that Defendants' Motion to Dismiss be **GRANTED** and Plaintiffs' Motion to Vacate Foreclosure Sale be **DENIED**.

BACKGROUND

Plaintiffs commenced the instant action in state court to prevent foreclosure of the real property located at 18427 Park Grove Lane, Dallas Texas 75287 (the "Property") against each of Defendants Sebring Capital Partners, LP ("Sebring"); Wells Fargo Bank, N.A., d/b/a America's Servicing Company, a Division of Well Fargo Bank, N.A. ("Wells Fargo"); U.S. Bank, N.A. ("U.S. Bank"); DLJ Mortgage Capital, Inc. ("DLJ"); Mortgage Electronic Registration Systems, Inc. ("MERS"); Credit Suisse First Boston Mortgage Securities Corporation ("Credit Suisse"); and Does 1 through 100. Plaintiffs filed their Original Petition on December 11, 2017, in the 366th District Court, Collin County, Texas, Cause No. 366-05917-2017 (the "State Court Action") [Dkt. 1]. In the state court petition, Plaintiffs allege wrongful foreclosure, unconscionability,

breach of contract, breach of fiduciary duty, quiet title, and slander of title [Dkt. 1]. Plaintiffs also seek declaratory relief and attorneys' fees [Dkt. 1 at 17]. Following removal on February 16, 2018, Plaintiffs amended their complaint; Plaintiffs' First Amended Complaint is the live pleading [Dkt. 19].

Plaintiffs allege they purchased the Property in 2005. Specifically, on May 27, 2005, Plaintiffs entered into a note (the "Note") and a deed of trust (the "Deed of Trust") (collectively, the "Loan") in favor of Sebring Capital Partners[1], and held by MERS [Dkt. 19 at 9-10]. Sebring, through its nominee, MERS, subsequently assigned the Deed of Trust to U.S. Bank, as Trustee for Credit Suisse [Dkt 26-3 at 2]. DLJ is the sponsor[2] of the Home Equity Asset Trust 2005-4 [Dkt. 19 at 3]. Wells Fargo services the Loan [Dkt. 26-4]. Plaintiffs do not dispute that they have failed to make all payments required under the Loan, that they are in default, or that they have not tendered the full amount due under the Note [*see* Dkts. 19 at 10; 27 at 2; 33]. Wells Fargo sold the Property in a foreclosure sale on December 5, 2017 [Dkts. 26 at 5; 26-7].

The Court is quite familiar with the Property at issue, as it has been the subject of two earlier lawsuits here in the Eastern District of Texas. The first suit was filed by Plaintiffs to preclude a scheduled foreclosure sale and was ultimately dismissed without prejudice. *Allison Slocum and Gary Slocum v. U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., Home Equity Asset Trust 2005-4, Home Equity Pass-Through Certificates, Series 2005-4, et al.*, Civil Action No. 4:16-CV-00453-ALM (ECF No. 10).

[1] Named Defendant Sebring was voluntarily dismissed from this lawsuit on May 15, 2018 [Dkt. 37].

[2] The Home Equity Asset Trust 2005-4 owns a pool of residential mortgage loans issuing securities backed by those mortgages. A "sponsor", such as DLJ, sells loans, such as Plaintiffs' mortgage, to the "depositor," here, Credit Suisse, which then creates the trust and conveys the mortgage loans to the trustee, which in the instant case is US Bank [Dkt. 1-3].

The second lawsuit: *Allison Slocum and Gary Slocum v. U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., Home Equity Asset Trust 2005-4, Home Equity Pass-Through Certificates, Series 2005-4, et al.*, Civil Action No. 4:16-CV-00955-RAS-KPJ, 2017 WL 2629147 (E.D. Tex. 2016), was similarly filed by Plaintiffs to preclude a foreclosure sale (the "Second Lawsuit"). Therein, the Court granted U.S. Bank, as Trustee for Credit Suisse, Wells Fargo, America's Servicing Company, and Wells Fargo Home Mortgage's Motion to Dismiss Plaintiffs' claims in the Second Lawsuit and dismissed Plaintiffs' claims for breach of contract, failure of condition precedent, common law fraud, and violations of the Real Estate Practices Act ("RESPA") and Texas Debt Collection Act ("TDCA") with prejudice. *Id.* (ECF No. 25 at 11).

In the instant case (which is Plaintiff's third attempt in the Eastern District of Texas to preclude foreclosure), Defendants filed a Notice of Removal, removing the pending State Court Action to the Eastern District of Texas, Sherman Division [Dkt. 1]. On January 23, 2018, Defendants moved to dismiss Plaintiffs' suit [Dkt. 9]. On February 16, 2018, Plaintiffs filed their First Amended Complaint [Dkt. 19]. Defendants filed the instant Renewed Motion to Dismiss on March 8, 2018 [Dkt. 26]. Plaintiffs filed their Response to Defendants' Renewed Motion to Dismiss on March 21, 2018 [Dkt. 27]. Defendants filed their Reply in Support of their Renewed Motion to Dismiss on March 23, 2018 [Dkt. 34]. On March 22, 2018, Plaintiffs also filed a Motion to Vacate Foreclosure Sale [Dkt. 33]. Defendants filed their Response on March 29, 2018 [Dkt. 35]. The Court finds both the Motion to Dismiss and the Motion to Vacate Foreclosure Sale are now ripe for adjudication.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs' First Amended Complaint must include more than labels and conclusions. A formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). Instead, the complaint must set forth enough facts to state a claim for relief that is plausible on its face. *Id*. at 570. A claim is facially plausible when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1940 (2009). The pleading standard does not require "detailed factual allegations," but it must be more than a series of baseless accusations under the standard established in *Iqbal*.

When ruling on a defendant's motion to dismiss, a judge must assume all well-pleaded allegations in the complaint are true. A "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 555, 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "Two working principles underlie . . . *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. at 1950 (citing *Twombly*, 550 U.S. at 556). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*.

MOTION TO DISMISS

In the Motion to Dismiss, Defendants argue that Plaintiffs' present suit is barred by res judicata, or alternatively that: (1) Plaintiffs have no cause of action based on Defendants' ability to enforce the Deed of Trust; (2) Plaintiffs have no cause of action for wrongful foreclosure; (3) Plaintiffs' claims for unconscionable contract, breach of contract, and breach of fiduciary duty[3] are time-barred; and (4) Plaintiffs' allegations fail to state a claim for quiet title or slander of title [*see* Dkt 26 at 7-25]. Defendants further argue that because Plaintiffs fail to state a cognizable claim, Plaintiffs' requests for declaratory relief and attorneys' fees should likewise be denied [Dkt. 26 at 26].

Res Judicata

As it is dispositive of each of Plaintiffs' claims, save for Plaintiffs' wrongful foreclosure claim, the Court first addresses Defendants' res judicata argument. Notably, Plaintiffs do not dispute that the elements of res judicata are met in the instant case, arguing instead for other reasons discussed *infra* that the Court should not apply res judicata. Notwithstanding that Plaintiffs do not dispute the elements, the Court briefly analyzes the applicability of the doctrine of res judicata to the instant case.

The Fifth Circuit has explained the doctrine of res judicata as follows:

> The term "res judicata" is often used to describe two discrete preclusive doctrines: res judicata and collateral estoppel. These doctrines relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their

[3] Plaintiffs' claim for breach of fiduciary duty focuses entirely on Sebring, which has been dismissed from this matter. Even so, the Court finds that this claim would likely be time-barred as the events complained-of allegedly occurred in 2005 and 2008, well over four years prior to the initiation of the instant suit. Under Texas law, breach of fiduciary duty claims have a four-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(5) (four-year statute of limitations for breach of fiduciary duty claims); *Taylor v. Deutsche Bank AG*, 3:14-CV-0453-N, 2014 WL 12586180, at *6 (N.D. Tex. Nov. 24, 2014) (applying the four-year statute of limitations to a breach of fiduciary duty claim in the mortgage foreclosure context).

> privies based on the same cause of action. The bar prevents relitigation of all issues that were or could have been raised in the previous action.

United States v. Davenport, 484 F.3d 321, 325-26 (5th Cir. 2007) (internal citations, quotations, and alterations omitted). "[R]es judicata is generally 'an affirmative defense that should not be raised as part of 12(b)(6) motion,'" but dismissal under Rule 12(b)(6) may be appropriate on res judicata grounds where "'based on the facts pleaded and judicially noticed, a successful affirmative defense appears.'" *Torello v. Mortg. Elec. Registration Sys., Inc.*, No. 3:12–CV–3726–O–BH, 2013 WL 3289526, at *5 (N.D. Tex. June 28, 2013) (quoting *Hall v. Hodgkins*, 305 F. App'x 224, 227–28 (5th Cir. 2008) (per curiam)); *see also Meador v. Oryx Energy Co.*, 87 F. Supp. 2d 658, 663-67 (E.D. Tex. 2000) (granting 12(b)(6) motion to dismiss because res judicata barred plaintiff's claims); *Cisco Sys., Inc. v. Alcatel USA, Inc.*, 301 F. Supp. 2d 599, 602-06 (granting 12(b)(6) motion to dismiss because res judicata barred counterclaimant's claims).

"Four elements must be met for a claim to be barred by res judicata: '(1) the parties must be identical in the two actions; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same claim or cause of action must be involved in both cases.'" *Sommer v. Wilmington Sav. Fund Soc'y, FSB*, No. 4:17-CV-300-ALM-CAN, 2018 WL 1956466, at *3 (E.D. Tex. Mar. 27, 2018), *report and recommendation adopted,* No. 4:17-CV-300, 2018 WL 1942774 (E.D. Tex. Apr. 25, 2018) (Mazzant, J.) (quoting *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009) (quoting *In re Ark-La-Tex Timber Co.*, 482 F.3d 319, 330 (5th Cir. 2007)); citing *JPMorgan Chase Bank, N.A. v. Shatteen*, 4:12-CV-579, 2015 WL 136629, at *3 (E.D. Tex. Jan. 7, 2015) (Mazzant, J.); *Carrasco v. City of Bryan, Tex.*, No. H–11–662, 2012 WL 950079, at *3 (S.D. Tex. March 19, 2012); *Berkman v. City of Keene*, No. 3:10–CV–2378–B, 2011 WL 3268214 (N.D. Tex. 2011); *Hogue v. Royse City, Tex.*, 939 F.2d 1249, 1252–54 (5th Cir. 1991)). "If these four

conditions are satisfied, res judicata prohibits either party from raising any claim or defense in the later action that was or could have been raised in support of or in opposition to the cause of action asserted in the prior action." *Id.* (quoting *Shatteen*, 2015 WL 136629, at *3 (citing *In re Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990))).

Parties in Privity

Privity is a "legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." *Meza v. Gen. Battery Corp.,* 908 F.2d 1262, 1266–67 (5th Cir. 1990). The Fifth Circuit maintains that privity may be found only in three narrow situations: "(1) where the non-party is the successor in interest to a party's interest in property; (2) where the non-party controlled the prior litigation; and (3) where the non-party's interests were adequately represented by a party to the original suit." *Id.* Notably, courts acknowledge that privity exists between preceding and succeeding owners of property. *See Taylor,* 553 U.S. at 893. Similarly, assignees and servicing agents of a loan are in privity with an original mortgage company. *See McMahan v. First Union Nat. Bank,* No. C.A.SA–01–782 FB NN, 2003 WL 1606084, at *2 (W.D. Tex. Mar. 7, 2003) (citing *Northern Pac. Ry. Co. v. Slaught,* 205 U.S. 122, 128 (1907)); *see also Steele v. Quantum Servicing Corp.,* No. 4:12–CV–344, 2012 WL 4162138, at *4 (E.D. Tex. Aug. 24, 2012) (vacated on other grounds) (finding that an assignment between successive defendants is sufficient to create privity).

The Parties in the instant suit and the Second Lawsuit dismissing Plaintiffs' claims with prejudice are the same and/or in privity. Plaintiffs are identical in both cases and U.S. Bank and Wells Fargo were named defendants in the Second Lawsuit. In addition, DLJ,[4] by virtue of the

[4] Notably, aside from naming DLJ as a party to the instant suit, Plaintiffs have failed to assert any express factual allegations or claims for relief against DLJ [*see* Dkt. 19].

assignment of the Deed of Trust, is in privity with both U.S. Bank and Wells Fargo; "it is well accepted that an assignment creates privity" [Dkt. 26-3]. *See Associated Int'l Ins. Co. v. Scottsdale Ins. Co.*, 862 F.3d 508, 511 (5th Cir. 2017); *see also Ernest v. CitiMortgage, Inc.*, No. SA:13-CV-802-DAE, 2014 WL 294544, at *4 (W.D. Tex. Jan. 22, 2014) (finding trust sponsor, depositor, and beneficiary in privity for res judicata purposes). MERS held the Deed of Trust on behalf of Sebring and its successors and assigns, and further assigned the Deed of Trust to US Bank; thus, it is similarly in privity with the Second Lawsuit defendants [Dkt. 26-3]. *See Jackson v. Novastar Mortg., Inc.*, No. CV H-13-1196, 2014 WL 12521697, at *4 (S.D. Tex. Feb. 6, 2014), *aff'd sub nom. Jackson v. Deutsche Bank Tr. Co.*, 583 F. App'x 417 (5th Cir. 2014) ("while Defendants Novastar and Novastar Mortgage Funding Corp. were not named in Plaintiff's 2010 lawsuit, they are in direct privity with Deutsche Bank based on the assignment of the Note and Deed of Trust from Novastar to Deutsche Bank. As for Defendant MERS, it is in privity with Deutsche Bank. The Deed of Trust identifies MERS as nominee for Novastar "and [Novastar's] successors and assigns," which in this instance is Deutsche Bank.") (citing *Maxwell v. U.S. Bank, N.A.*, 544 F. App'x 470, 473 (5th Cir. 2013) (legal relationship between MERS and lender's successor was sufficiently close to find the parties in privity)). Consequently, the parties in the Second Lawsuit and the instant lawsuit are the same or in privity, and the first element of res judicata is met.

Prior Final Judgment Rendered on the Merits

The second and third elements are similarly met. The Eastern District of Texas, Sherman Division District Court had jurisdiction over Second Lawsuit. *See Second Lawsuit* (ECF No. 30). Further in the Second Lawsuit, the Court entered a Memorandum Order and Opinion dismissing the case (and Plaintiff's claims for breach of contract, failure of condition precedent, common law fraud, violations of RESPA and TDCA, as well as Plaintiffs' request for injunctive relief and

attorney fees) with prejudice, which constitutes a final binding judgment on the merits for res judicata purposes. *Fernandez—Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 n. 8 (5th Cir. 1993) (noting that a dismissal designated "with prejudice" is an adjudication on the merits for purposes of res judicata).

Same or Similar Claims

The fourth element of res judicata requires similarity among the claims or causes of action in the case. "In determining whether the fourth element [is] satisfied, the district court [may] app[y] the 'transactional test,' which 'requires that the two actions be based on the same 'nucleus of operative facts.'" *Oreck Direct, LLC*, 560 F.3d at 401–02 (quoting *Ark-La-Tex*, 482 F.3d at 330 (quoting *Eubanks v. FDIC*, 977 F.2d 166, 171 (5th Cir. 1992))). "[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] transaction arose.'" *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir. 2004) (quoting *Petro—Hunt, LLC v. United States*, 365 F.3d 385, 395–96 (5th Cir. 2004)). "What constitutes a 'transaction' or a 'series of transactions' is determined by weighing various factors such as 'whether the facts are related in time, space, origin, or motivation[;] whether they form a convenient trial unit[;] and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Id.* (quoting *Petro—Hunt*, 365 F.3d at 395–96).

Other than Plaintiffs' current claim for wrongful foreclosure, a comparison of the claims and allegations presented in the Second Lawsuit and those presented in the instant suit demonstrate that Plaintiffs' remaining claims are barred by res judicata as they undoubtedly involve the same nucleus of operative facts; in both cases, Plaintiffs challenge the ability of the named defendants to foreclose under the Deed of Trust on the Property. *See Sommer*, 2018 WL 1956466, at *4

(finding plaintiff's claims were barred because "[a]t its heart, Plaintiff['s complaint] seeks to restrain Defendant from dispossessing him of the Property in both suits.") (citing *Mason v. Wells Fargo Bank, N.A.*, 4:16-CV-00699-ALM-CAN, 2016 WL 7664305, at *4 (E.D. Tex. Dec. 13, 2016), *report and recommendation adopted*, 4:16-CV-699, 2017 WL 67943 (E.D. Tex. Jan. 6, 2017) ("[t]he claims derive from the same documents, namely the Conditional Acceptance and Notice of Fault, and the relief sought—restraining Defendant from conducting a foreclosure sale of the Property—is identical but for the foreclosure date."); *see also Millard*, 2013 WL 12120415, at *3 (finding res judicata applied where "[t]he same note and deed of trust [were] at issue"); *Steele v. Quantum Servicing Corp.*, No. 3:12-CV-2897-L, 2012 WL 5987685, at *4–7 (N.D. Tex. Nov. 30, 2012) (same).

More specifically, in the Second Lawsuit, the Court addressed the merits and subsequently dismissed nearly identical allegations and claims as those currently before the Court; namely, Plaintiffs' allegations that Defendants lacked the ability to enforce the Deed of Trust, and Plaintiffs' claims for breach of contract, and fraud.[5] *See Second Lawsuit* (ECF Nos. 25, 30). As to any present claims not expressly raised in the Second Lawsuit (except Plaintiffs' claim for wrongful foreclosure), the Court finds that such claims arise out of the same common nucleus of operative fact: Plaintiffs' challenge of the ability of the named defendants to foreclose under the Deed of Trust on the Property. Accordingly, the final element of res judicata is also met in this action with regard to all of Plaintiffs' claims, except for wrongful foreclosure because such claims either were or could have been asserted in the Second Lawsuit, and are therefore barred by res judicata.

[5] Plaintiffs also alleged a claim for wrongful foreclosure in the Second Lawsuit, which the court dismissed because foreclosure proceedings had not yet begun. Here, the Property was foreclosed on prior to the initiation of suit.

The preclusive effect of res judicata does not extend to Plaintiffs' wrongful foreclosure claim because such claim arises out of or is premised upon actions taken on December 5, 2017 [Dkt. 26 at 5, 26-7], after the entry of final judgment in the Second Lawsuit on June 16, 2017, namely Defendants' sale of the Property at foreclosure. *Second Lawsuit* (ECF No. 30). Numerous courts considering this issue have found res judicata cannot bar a wrongful foreclosure claim which arose from a subsequent foreclosure on the property. *See Mason v. Bank of Am.*, No. 4:13CV738, 2015 WL 1393235, at *5 (E.D. Tex. Mar. 25, 2015) ("the Court finds that all of Plaintiff's claims, with the exception of those relating to the 2013 foreclosure sale, arise from the same set of operative facts and either were litigated or should have been raised in *Mason I.* They are barred by *res judicata*. . . .As those are matters arising after the Court's final judgment in *Mason I*—and the Court deduces were actions taken as a result of the Court's disposition of Plaintiff's claims in *Mason I*—they are not barred by *res judicata*."); *Reeves v. Wells Fargo Bank, N.A.*, No. EP-13-CV-318-DCG, 2014 WL 12492038, at *4 (W.D. Tex. Apr. 14, 2014) (The preclusive effect of *res judicata* does not extend to Plaintiff's claims for intentional infliction of emotional distress or wrongful foreclosure, however, because those claims arise out of actions taken in furtherance of a July 2, 2013, Substitute Trustee's sale of the Property. As such, these claims could not have been brought in Plaintiff's June 28, 2010, suit and are, therefore, not barred by *res judicata.*"); *Riley v. Wells Fargo Bank, N.A.*, No. CV H-15-1415, 2016 WL 6905849, at *1, 3 (S.D. Tex. Apr. 27, 2016), *report and recommendation adopted,* No. 4:15-CV-1415, 2016 WL 6916238 (S.D. Tex. June 8, 2016), *aff'd,* 715 F. App'x 413 (5th Cir. 2018) ("The only claim alleged in Plaintiffs' Second Amended Complaint that is not barred by res judicata is the wrongful foreclosure claim, which arises from the subsequent foreclosure on the property"). Accordingly, because the foreclosure sale took place after the entry of final judgment in the Second Lawsuit, Plaintiffs'

claim for wrongful foreclosure could not have been brought in the Second Lawsuit. Therefore, Plaintiffs' wrongful foreclosure claim is not barred by res judicata.

Effect of Plaintiffs' Failure to Respond to Second Lawsuit's Motion to Dismiss

To reiterate, Plaintiffs have not disputed that the elements of res judicata are met in this case [*see* Dkt. 27 at 5]. Rather, Plaintiffs assert, by and through their current counsel, that the doctrine of res judicata should not be applied in the present case because their counsel in the Second Lawsuit failed to file a "response or make any argument in opposition to Defendants [sic] Motion [to Dismiss], robbing Plaintiffs of a fair hearing, and an opportunity to present their arguments" [Dkt. 27 at 5]. Plaintiffs further argue that the Court should find their claims are not barred because their prior counsel's failure to file a response to the case-dispositive motion to dismiss constituted "ineffective assistance of council [sic]" [Dkt. 27 at 5-6]. Plaintiffs provide no authority in support of their position. Defendants argue in response that a claim of ineffective assistance of counsel cannot be used as a defense in this case[6] and that any error which may have occurred in the Second Lawsuit has no bearing on the application of res judicata in the instant case [Dkt. 34 at 2-3].

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[6] The Fifth Circuit has made it abundantly clear that "there is no constitutional right to effective counsel in the civil context." *See Price v. Plantation Mgmt. Co.*, 433 F. App'x. 264, 265 (5th Cir. 2011); *Wynn v. Dallas Hous. Auth.*, 409 F. App'x. 744, 748 (5th Cir. 2011) ("Mitchell's statement that his trial counsel was 'inaccurate' at trial seems to present a claim of ineffective assistance of counsel. As there is no Sixth Amendment right to counsel in a civil trial, the ineffective assistance claim is not an appealable issue."); *Nicholson v. Spring Sand & Clay LP*, 229 F. App'x. 304, 305 (5th Cir. 2007) ("In addition, to the extent her brief reflects her disappointment with counsel, the Sixth Amendment right to counsel does not apply to civil proceedings."); *F.T.C. v. Assail, Inc.*, 410 F.3d 256, 267 (5th Cir. 2005) (same); *Stiger v. Christus Health ARK-LA-TEX*, 89 F. App'x. 447, 448 (5th Cir. 2004) (same); *Olive v. Gonzalez*, 31 F. App'x. 152 (5th Cir. 2001) ("Because Olive had no constitutional or statutory right to counsel in this civil rights case, he cannot complain about counsel's allegedly deficient performance in this proceeding."). To the extent Plaintiffs intend to assert an ineffective assistance of counsel claim in this civil matter, such allegations fail to state a claim for relief.

The Court finds that the failure of Plaintiffs' previous counsel to file a response in the Second Lawsuit does not prevent the application of res judicata in the instant case. *See Matter of Reed*, 861 F.2d 1381, 1383 (5th Cir. 1988) ("Reed asserts that there should be an equitable exception to the doctrine of res judicata because the failure to comply with discovery orders in the first case was due to the incapacitation of one of counsel's associates. This assertion is without merit."); *see also Lariscey v. Smith*, 66 F.3d 323, at *4 (5th Cir. 1995) ("Lariscey argues that res judicata is improper because he did not have notice or opportunity to respond to the court's earlier Rule 12(b)(6) dismissal, but Lariscey's failure to keep abreast of his litigation is irrelevant to the application of res judicata."); *Benavides v. U.S. Marshals Serv.*, 990 F.2d 625 (5th Cir. 1993) ("The Supreme Court has stated that it does not recognize a general equitable doctrine, or 'simple justice' exception, applicable to the doctrine of res judicata.") (citing *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 399 (1981)). Moreover, the Court did not grant the motion to dismiss in the Second Lawsuit by default, but rather engaged in a lengthy and substantive analysis of each of Plaintiff's claims, the majority of which are merely repeated in the present suit. *See generally the Second Lawsuit* (ECF No. 25). Res judicata "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes." *Sommer*, 2018 WL 1956466, at *3 (citing *Millard*, 2013 WL 12120415, at *3. Allowing Plaintiffs' failure to file a response to the motion to dismiss in the Second Lawsuit, particularly when the Court has already exhaustively considered the merits of Plaintiffs' claims, would frustrate the purpose of res judicata.

Having found that Plaintiffs' claims against Defendants, except for wrongful foreclosure (discussed *supra*), are barred by res judicata, such claims against Defendants should be dismissed.

Wrongful Foreclosure

To establish a claim for wrongful foreclosure, the plaintiff must demonstrate: "(1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price." *Thomas v. Bank of New York Mellon*, No. 3:12-CV-4941-M-BH, 2013 WL 4441568, at *9 (N.D. Tex. Aug. 20, 2013) (quoting *Hurd v. BAC Home Loans Servicing, LP,* 880 F.Supp.2d 747, 766 (N.D. Tex. 2012) (citing *Sauceda v. GMAC Mortg. Corp.,* 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.))). A procedural defect may occur when the foreclosing party either "fails to comply with statutory or contractual terms," or "complies with such terms, yet takes affirmative action that detrimentally affects the fairness of the foreclosure proceedings." *Id.* (quoting *Matthews v. JPMorgan Chase Bank, N.A.,* No. 3:11–CV–00972–M, 2011 WL 3347920, at *2 (N.D. Tex. Aug. 1, 2011)). Apart from their allegation that Defendants lacks authority to foreclose on the Property, Plaintiffs' amended pleading does not state any facts supporting the elements of a wrongful foreclosure action. In addition, Plaintiffs allegedly remain in possession of the Property [Dkts. 19 at 15; 27 at 7-8]. Plaintiffs' possession of the Property is fatal to any wrongful foreclosure claim because recovery for wrongful foreclosure "is based on the mortgagor's [lost] possession." *Thomas*, 2013 WL 4441568, at *9 (quoting *Everhart v. CitiMortgage, Inc.,* No. CIV.A. H–12–1338, 2013 WL 264436, at *7 (S.D. Tex. Jan. 22, 2013) (citing *Petersen v. Black,* 980 S.W.2d 818, 823 (Tex. App.—San Antonio 1998, no pet.) (holding that "[w]here the mortgagor's possession is undisturbed, he has suffered no compensable damage")); *Medrano v. BAC Home Loans Servicing LP.,* No. 3:10–CV–02565–M(BF), 2012 WL 4174890, *3 (N.D. Tex. Aug. 10, 2012) ("An attempted wrongful foreclosure is not an action recognized under Texas law."))). Because Plaintiffs are still in possession of the Property, Plaintiffs' claim for wrongful

foreclosure should be dismissed. Moreover, in their pleadings, Plaintiffs admit that they were/are in default of the Loan and to date, have not tendered the amount due and owing under the Loan [*see* Dkts. 19 at 10, 27 at 2, 33]. *See Second Lawsuit* (ECF No. 25 at 6) ("Plaintiffs concede that they failed to perform their payment obligations as required under the mortgage.").

In sum, Plaintiffs' claims are barred by res judicata, except for the claim for wrongful foreclosure, which should be dismissed for failure to state a claim. The Court nonetheless further considers Defendants' remaining arguments [Dkt. 19].

Unconscionable Contract and Breach of Contract

Plaintiffs' claims for unconscionable contract and breach of contract are each barred by the statute of limitations.[7] "Under Texas law, a four-year statute of limitations applies to claims for breach of contract and unconscionable contract." *Bruning v. Nationstar Mortg., L.L.C.*, No. 3:17-CV-0802-M-BK, 2018 WL 1135417, at *2 (N.D. Tex. Feb. 8, 2018), *report and recommendation adopted sub nom. Bruning v. Nationstar Mortg., L.LC.*, No. 3:17-CV-0802-M, 2018 WL 1083621 (N.D. Tex. Feb. 28, 2018) (citing *Beavers v. Met. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009) (breach of contract); *Dumdei v. Certified Fin. Planner Bd. of Standards, Inc.*, No. 3:98-CV-1938-H, 1999 WL 787402, at *4 (N.D. Tex. Oct. 1, 1999) (unconscionable contract) (citing *Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990))).

"A claim for unconscionable contract accrues at the time the contract is formed." *Id.* (citing *Linder v. Deutsche Bank Nat. Tr. Co.*, No. EP-14-CV-00259-DCG, 2015 WL 12743639, at *5 (W.D. Tex. Jan. 6, 2015) (citing *Wade v. Austin*, 524 S.W.2d 79, 86 (Tex. App.—Texarkana 1975,

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[7] "While a court generally cannot grant a Rule 12(b)(6) motion premised on a statute of limitations argument, it may do so where, as here, 'it is evident from [Plaintiffs'] pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like.'" *Bruning v. Nationstar Mortg., L.L.C.*, No. 3:17-CV-0802-M-BK, 2018 WL 1135417, at *3 (N.D. Tex. Feb. 8, 2018), *report and recommendation adopted sub nom. Bruning v. Nationstar Mortg., L.LC.,* No. 3:17-CV-0802-M, 2018 WL 1083621 (N.D. Tex. Feb. 28, 2018) (quoting *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003) (citations omitted)).

no writ); Tex. Bus. & Com. Code Ann. § 2.302(a))). Plaintiffs concede that the subject contract: the Note and the Deed of Trust, were entered into in May 2005 [Dkt. 1-3 at 8]. But, Plaintiffs did not file this suit until, December 2017—more than twelve years later [Dkt. 1]. Accordingly, Plaintiffs' unconscionable contract claim is time-barred.

"The accrual of a claim for breach of contract is governed by the 'legal injury' rule, which states that 'a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.'" *Bruning*, 2018 WL 1135417, at *2 (quoting *Smith Int'l, Inc. v. Egle Grp., L.L.C.*, 490 F.3d 380, 387 (5th Cir. 2007) (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996))). "Thus, a claim for breach of contract typically accrues when the contract is breached." *Id.* (citation omitted). Plaintiffs argue that Sebring and MERS breached "the terms of the mortgage contract," "when it sold and relinquished its interest in Plaintiffs' [Property]" and subsequently "failed to satisfy, release and reconvey the security instrument" [Dkt. 19 at 17]. The latest in time action Plaintiffs note with respect to such allegation is: "[o]n June 15, 2011, a second Assignment of Deed of Trust was recorded in the Official Records, Collin County," which "was signed by Scott Heurkins as Assistant Secretary of MERS as nominee for SEBRING CAPITAL PARTNERS, LP" [Dkt. 19 at 11]. Plaintiffs' instant suit was filed well over four years later in December 2017. Accordingly, Plaintiffs' claim for breach of contract is similarly time-barred.

Even were it not, the Court finds that Plaintiffs are foreclosed from pursuing any such claim. As the Court in the Second Lawsuit noted, Plaintiffs do not claim to have complied with their payment obligations and do not contest that they were in default under the Loan, triggering the foreclosure remedy [*see* Dkt. 19 at 8]. *See Second Lawsuit* (ECF No. 25 at 6). As a result, the Court finds as the Court in the Second Lawsuit found, "[b]ecause Plaintiffs failed to perform

their duties under the contract, Plaintiffs are precluded from maintaining a breach of contract claim." *See id.* (citing *Williams v. Wells Fargo Bank, N.A.,* 560 F. App'x. 233, 238 (5th Cir. 2014) (holding that where plaintiffs were delinquent on their loan payments, dismissal of their breach of contract claim was proper)).[8]

Defendants' Enforcement of the Deed of Trust

As previously alleged in the Second Lawsuit, Plaintiffs' live complaint in the instant suit alleges that Defendants have no standing to foreclose on the Property because Defendants are not the holder or the owner of the Note [Dkt. 19 at 12-15].[9] Plaintiffs argue that the assignment by Sebring to MERS was improper because "MERS per its own corporate charter is unauthorized to own, assign, or, [sic] an interest in a Tangible Note debt obligation," and thus, it lacked the authority to assign to future assignees [Dkt. 33 at 3]. However, as the Court previously found in the Second Lawsuit, "Plaintiffs lack standing to challenge the assignment of the Note and the Deed of Trust." *See Second Lawsuit* (ECF No. 25 at 5-6). Plaintiffs lack standing to assert a challenge to the assignment of the Note and the Deed of Trust because Plaintiffs are not parties to the assignment or third-party beneficiaries. *See Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 228 (5th Cir. 2013) ("facially valid assignments cannot be challenged for want of authority"

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[8] Insofar as Plaintiffs premise their breach of contract claims on any alleged failure by Defendants to provide the requisite notices under the Loan before foreclosing on the Property, such claim would not be foreclosed by Plaintiffs' default under the Loan. *See Adams v. U.S. Bank, N.A.*, No. 3:17-CV-723-B-BN, 2018 WL 2164520, at *4 (N.D. Tex. Apr. 18, 2018) (Horan, J), *report and recommendation adopted,* No. 3:17-CV-723-B-BN, 2018 WL 2150960 (N.D. Tex. May 10, 2018). In a recent decision, the Fifth Circuit found "that a lender's agreement in a deed of trust to give notice of foreclosure is independent of a borrower's agreement under the note to make monthly payments because the 'obligation to give notice of foreclosure would not even arise unless and until' a borrower defaults." *Thomas*, 2018 WL 1898455, at *3 (quoting *Williams v. Wells Fargo Bank, N.A.*, 884 F.3d 239, 245 (5th Cir. 2018) (the Fifth Circuit reversed trial court's dismissal of the plaintiffs' breach of contract claim based on the plaintiffs' breach of the deed of trust due to their payment default)).

[9] Additionally, Plaintiffs' "Motion to Vacate Foreclosure Sale" is, in reality, an attempt to combine a Motion to Set Aside Foreclosure Sale with a quiet title action as Plaintiffs' prayer for relief requests that the Court "overturn the foreclosure sale to provide the Plaintiffs with an equitable remedy" in the form of a return of the home to Plaintiffs [Dkt. 33 at 5]. The Court considers Plaintiffs' arguments in their Motion to Vacate Foreclosure both in the instant section and the section *infra* analyzing Plaintiffs' quiet title claims.

except by the assignor); *Sanchez v. Bank of Am., N.A.*, 2013 WL 3097906, at *3 (E.D. Tex. June 18, 2013). Moreover, as the Court previously found in the Second Lawsuit, even if Plaintiffs had standing to contest the assignment, numerous courts in Texas have consistently recognized that, "under Texas law, a mortgagee or mortgage servicer can foreclose under a deed of trust regardless of whether it is a holder or owner of the note." *See Second Lawsuit* (ECF No. 25 at 4) (citing *Martins v. BAC Home Loans Servicing, LP*, 722 F.3d 249, 253-56 (5th Cir. 2013)). Indeed, as the Court also noted in the Second Lawsuit, "[t]he Fifth Circuit rejected the 'show-me-the-note' theory and held the original promissory note need not be possessed or produced to foreclose on the property." *See id*. at 5 (citing *Martins*, 722 F.3d at 255; *Casterline v. OneWest Bank, F.S.B.*, 537 F. App'x 314, 317 (5th Cir. 2013)). Similarly, as the Court formerly pointed out in the Second Lawsuit, "the Fifth Circuit has declared the 'split-the-note' theory—the argument that a note and its security are inseparable—is 'inapplicable' under Texas Law." *See id*. at 5 (citing *Martins*, 722 F.3d at 255). Thus, Plaintiffs' challenge to Defendants' authority to enforce the Deed of Trust should once again be dismissed.

Quiet Title

A "suit to quiet title is an equitable action intended to remove a cloud of title on property." *Fricks v. Hancock,* 45 S.W.3d 322, 327 (Tex. App.—Corpus Christi 2001, no pet.). In a suit to quiet title action, a plaintiff 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." *Krishnan v. JP Morgan Chase Bank, N.A.*, No. 4:15-CV-00632-RC-KPJ, 2017 WL 6003105, at *4 (E.D. Tex. Oct. 11, 2017) (Priest-Johnson, J.) (citing *Wagner v. CitiMortgage, Inc.*, 955 F. Supp. 2d 621, 626 (N.D. Tex. 2014) (citing *Vernon v. Perrien*, 390 S.W.3d 47, 61 (Tex. App.—El Paso 2012, pet. denied))). A plaintiff must also prove and

recover on the strength of his own title, not the weakness of his adversary's title. *See Martin v. Amerman,* 133 S.W.3d 262, 265 (Tex. 2004); *Ballard v. Allen,* No. 12-03-00370-CV, 2005 WL 1037514, at *3 (Tex. App.—Tyler May 4, 2005, no pet.); *Warren v. Bank of Am., N.A.*, 566 F. App'x 379, 382 (5th Cir. 2014). Because Plaintiffs rely wholly on Defendants' purportedly weak title and neglect to provide any support for the strength and/or superiority of their own, the Court finds Plaintiffs' quiet title claim must fail. *See Warren*, 566 F. App'x. at 382.

Moreover, "Texas courts have made clear that 'a necessary prerequisite to the ... recovery of title ... is tender of whatever amount is owed on the note." *Thomas v. Wells Fargo Bank, N.A.*, No. 4:17-CV-2070, 2018 WL 1898455, at *3 (S.D. Tex. Apr. 20, 2018) (quoting *Cook–Bell v. Mortg. Elec. Registration Sys., Inc.*, 868 F. Supp. 2d 585, 591 (N.D. Tex. 2012) (quoting *Fillion v. David Silvers Company*, 709 S.W.2d 240, 246 (Tex. App.— Houston [14th Dist.] 1986, writ ref'd n.r.e.))); *see also Stepan v. PNC Bank, N.A.*, No. 4:14-CV-230, 2015 WL 2156704, at *4 (E.D. Tex. May 7, 2015) (Mazzant, J.) ("Plaintiff's failure to show he offered tender of the amount owed under the Note to PNC is independently sufficient to cause his quiet title claim to fail as a matter of law."); *Herrera v. Wells Fargo Bank, N.A.*, No. H-13-68, 2013 WL 961511, at *9 (S.D. Tex. Mar. 12, 2013) (holding a plaintiff failed to state a quiet title claim when he did not deny he fell behind on his mortgage payments). In the instant case, as in *Thomas*, Plaintiffs allege that they have fallen behind on their mortgage payments, but do not allege "any facts to counter the proposition that [Plaintiffs] defaulted on the payment obligations under the note" or allege that they are current in their mortgage payments or that they are "able, or even willing, to tender the balance of their mortgage obligation" [*see* Dkts. 19 at 10, 27 at 2, 33]. *See id*. (dismissing quiet title claim) (citing *Campo v. Bank of Am., N.A.*, No. CV H–15–1091, 2016 WL 1162199, at *5 (S.D. Tex. Mar. 24, 2016), *aff'd*, 678 F. App'x 227 (5th Cir. 2017), *reh'g denied* (Mar. 31, 2017)

(“Campo is in default and has not alleged that he has tendered the balance of his loan. His quiet-title claim is legally insufficient for this additional reason and is dismissed.”); *Galvan v. Centex Home Equity Co., L.L.C.*, No. 04–06–00820–CV, 2008 WL 441773, *4 (Tex. App.—San Antonio Feb. 20, 2008, no pet.) (“Setting aside a trustee sale is an equitable remedy which requires the mortgagor to make a valid tender of the amount due to receive equity.”); *Fillion v. David Silvers Company*, 709 S.W.2d 240, 246 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (“Tender of whatever sum is owed on the mortgage debt is a condition precedent to the mortgagor’s recovery of title from a mortgagee who is in possession and claims title under a void foreclosure sale.”)). Accordingly, Plaintiffs’ quiet title claim should be dismissed.

Slander of Title

To state a slander of title claim under Texas law, Plaintiffs must establish: “(1) the uttering and publishing of disparaging words; (2) that they were false; (3) that they were malicious; (4) that special damages were sustained thereby; (5) that the plaintiff possessed an estate or interest in the property disparaged; and (6) the loss of a specific sale” of the Property due to the uttering and publishing of the allegedly disparaging words. *Emeribe v. Wells Fargo Bank, N.A.*, No. H-12-2545, 2013 WL 140617, at *3 (S.D. Tex. Jan. 10, 2013). Plaintiffs’ slander of title claim fails because Plaintiffs fail to plead the elements of such claim and sufficient facts in support thereof. *See id.* (dismissing slander of title claim for failing to plead the elements of a slander of title claim and facts in support of such elements); *Vickery v. Wells Fargo Bank, N.A.*, No. G-11-0243, 2013 WL 321662, at *7 (S.D. Tex. Jan. 28, 2013); *Garcia v. GMAC Mortg.*, No. H-12-2242, 2013 WL 211121, at *6 (S.D. Tex. Jan. 18, 2013); *Nichamoff v. CitiMortgage, Inc.*, No. H-12-1039, 2012 WL 4388344, at *4 (S.D. Tex. Sept. 25, 2012). Specifically, Plaintiffs do not plead the

following necessary elements: that the assignment at issue constitutes uttering or publishing disparaging words; that any such disparaging words were false or malicious; that any such disparaging words caused them special damages; or that the alleged slander of title caused them to lose a specific sale of the Property. *See, e.g., Vickery*, 2013 WL 321662, at *7; *Garcia v. GMAC Mortgage*, 2013 WL 211121, at *6; *Nichamoff*, 2012 WL 4388344, at *4 (S.D. Tex. Sept. 25, 2012); *Hines*, 2013 WL 5786473, at *8 (dismissing slander of title claim where plaintiff did not state any facts that defendants made any false or malicious statement regarding their authority to foreclose and where plaintiff did not allege she lost a specific sale of her home). Accordingly, Plaintiffs' slander of title claim should be dismissed.[10]

DECLARATORY RELIEF/MOTION TO VACATE

In their First Amended Complaint, Plaintiffs ask the Court for declaratory relief, including vacatur of the foreclosure sale [Dkt. 19 at 21-22]. Plaintiffs' Motion to Vacate Foreclosure Sale similarly requests that the Court "overturn the foreclosure sale to provide the Plaintiffs with an equitable remedy" in the form of a return of Property to Plaintiffs [Dkt. 33 at 5]. Because the Motion to Vacate Foreclosure Sale requests the same or similar declaratory relief as Plaintiffs request in their Amended Complaint, the Court considers such requests together.

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[10] Plaintiffs also list "fraud in the concealment" and "fraud in the inducement" in the title of their live pleading. However, the live complaint does not include an express fraud claim or facts in support of a fraud claim. As the Court in the Second Lawsuit noted, "Plaintiffs fail to meet the heightened pleading standards required under Rule 9(b)," and because "Plaintiffs' allegations of loss pursuant to the fraud claims are directly related to the Loan," Plaintiffs' fraud claim is barred by the economic loss rule." *See Second Lawsuit* (ECF No. 25 at 7). Insofar as Plaintiffs intend to assert a fraud claim, it should be dismissed. *See Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 206–07 (5th Cir. 2009) ("Rule 9(b) states that 'in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.' This Circuit's precedent interprets Rule 9(b) strictly, requiring the plaintiff to 'specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.'") (quoting Fed. R. Civ. P. 9(b); *Williams v. WMX Techs., Inc.,* 112 F.3d 175, 177 (5th Cir. 1997); *Nathenson v. Zonagen, Inc.,* 267 F.3d 400, 412 (5th Cir. 2001)).

As an initial matter, Plaintiffs' declaratory judgment claim should be dismissed, because Plaintiffs have failed to state a claim for relief. "Entitlement to declaratory relief is dependent upon the plaintiff first pleading a viable underlying cause of action." *Endsley v. Green Tree Servicing LLC*, No. 5:15CV151-RWS-CMC, 2017 WL 1856281, at *11 (E.D. Tex. Feb. 8, 2017), *report and recommendation adopted,* No. 5:15-CV-151-RWS-CMC, 2017 WL 1862191 (E.D. Tex. May 8, 2017) (citing *Collin County, Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170-171 (5th Cir. 1990) (federal declaratory judgment act is remedial only; it is the defendant's underlying cause of action against the plaintiff that is litigated in a suit under the act)); s*ee also Abruzzo v. PNC Bank, N.A.*, No. 4:11-CV-735-Y, 2012 WL 3200871, at *3 (N.D. Tex. July 30, 2012) ("Likewise, because Plaintiffs' claims under the Texas declaratory-judgment act are remedial or dependent on their other claims, it is not an independent cause of action."). "Where all the substantive, underlying claims are subject to dismissal, a claim for declaratory relief cannot survive." *Id*. (citing *Walls v. JPMorgan Chase Bank, NA*, No. 4:13-cv-402, 2013 WL 5782999, at *4 (E.D. Tex. Oct. 25, 2013)). Because all of Plaintiffs' underlying claims fail, Defendants are entitled to judgment as a matter of law on Plaintiffs' declaratory judgment claim.

Even were this not the case, to the extent Plaintiffs seek injunctive or other relief from this Court to undo the foreclosure sale and/or preclude their later eviction from the Property, federal courts are statutorily prohibited from enjoining state court proceedings under the Anti-Injunction Act, except in very limited circumstances. *Mesa v. Wells Fargo Bank, N.A.*, No. 4:17-CV-532, 2017 WL 3940534, at *1 (E.D. Tex. Sept. 8, 2017) (denying plaintiff's request for injunctive relief related to pending eviction from residence pursuant to the Anti-Injunction Act); s*ee also* 28 U.S.C. § 2283. Specifically, the Anti-Injunction Act provides that: "[a] court of the United States may

not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id*. (quoting 28 U.S.C. § 2283). Indeed, numerous cases in the Fifth Circuit have previously rejected attempts by borrowers to seek injunctive relief in federal court in opposition to state court eviction proceedings, on the basis of the Anti-Injunction Act. *See, e.g., Knoles v. Wells Fargo Bank, N.A.*, 513 F. App'x 414 (5th Cir. 2013) (per curiam) (affirming district court's denial of a temporary restraining order seeking to preclude eviction because "[t]he [injunctive] relief sought, in practical effect, would enjoin [the defendant] from enforcing a valid extant judgment of a Texas court. The district court is denied jurisdiction to grant such relief by the Anti-Injunction Act"); *Taylor v. Wells Fargo Bank N.A.*, No. 1:14-cv00084-LY-ML (W.D. Tex. March 4, 2014) (following *Knoles* and holding that the court lacked authority to enjoin the state court judgment awarding possession in forcible detainer action pursuant to the Anti-Injunction Act); *Greene v. Bank of America N.A.*, No. H-13-1092, 2013 WL 2417916, at *2 (S.D. Tex. Jun. 4, 2013) (denying similar request for temporary restraining order seeking to enjoin state court eviction proceeding pursuant to the Anti-Injunction Act). None of the enumerated exceptions to the Anti-Injunction Act are present in this case and importantly Plaintiffs do not allege otherwise.

Moreover, each of Plaintiffs' arguments in support of their request to vacate the foreclosure sale – (1) failure to properly assign, (2) lack of authority to assign, (3) subsequent assignments are defective, (4) no defendant has standing, and (5) no purchaser for value – lack merit. Plaintiffs' request to vacate foreclosure is founded primarily on their already rejected challenges to the enforcement of and/or the assignments of the Deed of Trust.[11] This matter should be dismissed in its entirety.

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[11] As the Court in the Second Lawsuit concluded, "Plaintiffs' request for attorney's fees is barred because Plaintiffs have not pleaded any viable causes of action that would allow for recovery of attorney's fees. *See Second Lawsuit*

CONCLUSION AND RECOMMENDATION

Based on the foregoing, the Court recommends that Defendants' Motion to Dismiss [Dkt. 26] be **GRANTED**. Furthermore, the Court recommends that Plaintiffs' Motion to Vacate Foreclosure Sale [Dkt. 33] be **DENIED**. Plaintiffs' suit should be dismissed with prejudice.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), superseded by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 27th day of June, 2018.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

(ECF No. 25 at 11) (citing *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)). "Thus, Plaintiffs' request for attorney's fee[s] should be denied." *See id.*