CASE NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

JAY SANDON COOPER,

Petitioner,

V.

BANK OF NEW YORK MELLON, Trustee, et al.

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Appendix

Volume II

Jay Sandon Cooper

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Plano, Texas 75075

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PETITIONER, PRO SE

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United States Court of Appeals

Fifth Circuit

FILED February 28, 2018

Lyle W. Cayce, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16-11413 Summary Calendar

JAY SANDON COOPER

Plaintiff-Appellant

V.

BANK OF NEW YORK MELLON, Trustee; OCWEN LOAN SERVICING, L.L.C.; JOHN M. LYNCH; J. GARTH FENNEGAN; KRISTINA A. KIIK; MICHAEL R. STEINMARK; SETTLE & POU PROFESSIONAL CORPORATION; DAVID GARVIN; JACK BECKMAN; KELLY GODDARD; GENE ALYEA; DON GWIN; DAVID O'DENS; ROBERT POU; CLIFF A. WADE; MICHAEL P. MENTON; JARED T. S. PACE, Substitute Trustees,

Defendants-Appellees

Appeal from the United States District

Court for the Northern District of Texas

USDC No. 3:14-CV-2795

Before DAVIS, JONES, and OWEN, circuit judges.

PER CURIAM:*

Jay Sandon Cooper moves to proceed in forma pauperis (IFP) on appeal. He seeks to challenge the district court's dismissal of his civil action as barred by res judicata. The district court denied his motion for leave to proceed IFP on appeal and certified that the appeal was not taken in good faith. By moving for IFP status, Cooper is challenging the district court's certification. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

This court reviews de novo a dismissal for failure to state a claim under Rule 12(b)(6). *See Legate v. Livingston*, 822 F.3d 207, 209-10 (5th Cir.), *cert. denied sub nom. Legate v. Collier*, 137 S. Ct. 489 (2016). A complaint fails to state a claim upon which relief may be granted when it does not contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

On appeal, Cooper contends that the defendants waived the affirmative defense of res judicata by not raising it in their first

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

motion to dismiss. Although a defendant should generally raise res judicata in an answer, the defense will not be deemed to have been waived as long as it was asserted "at a pragmatically sufficient time," and the opposing party was not prejudiced in its ability to respond. *United State v. Shanbaum*, 10 F.3d 305, 312 (5th Cir. 1994). Because the defendants raised the defense in their motion to dismiss after being directed to argue the issue by the magistrate judge, and Cooper was not prejudiced in his ability to respond, they did not waive the res judicata defense. *See id.; see also Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 578 (5th Cir. 2009); *Lafreniere Park Foundation v. Brousssard*, 221 F.3d 804, 808 (5th Cir. 2000).

Cooper next contends that the district court did not consider the claims he raised in his amended complaint that were not barred by res judicata. Contrary to Cooper's argument, the record reflects that the district court considered Cooper's amended complaint and compared it to the claims raised in his 2009 and 2013 lawsuits.

Next, Cooper argues that the district court improperly shifted the burden to him by ordering him to produce the records in the prior cases. The district court did not shift the burden of proof to Cooper by directing both parties to present the records of the prior lawsuits.

Because both parties referred to the related cases, the district court had the authority to raise the issue sua sponte in the interest of judicial economy where the previous action was brought before a court in the same district. *See Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 281 (5th Cir. 2001) (citing *Boone v. Kurtz,* 617 F.2d 435, 436 (5th Cir. 1980)); *Nagle v. Lee,* 807 F.2d 435, 438 (5th Cir. 1987). The defendants established that in his 2009 and 2013 lawsuits, Cooper raised numerous claims, challenging the pending foreclosure of his property by the same Lender defendants. Courts of competent jurisdiction dismissed both of these lawsuits with prejudice. Further, all of the defendants in the instant cases were in privity with the defendants in the prior lawsuits. All of Cooper's claims in the prior lawsuits and in the instant lawsuit arose out of his failure to meet his loan obligations and his desire to prevent the Lender defendants from foreclosing on the same property. Therefore, the defendants established that Cooper's current claims were barred by res judicata. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996); *Samuel v. Fed . Home Loan Mortg. Corp.*, 434 S.W.3d 230, 234 (5th Cir. 2014).

According to Cooper, the district court improperly dismissed his complaint with prejudice without a trial on the merits. Contrary to Cooper's argument, the district court's dismissal of his complaint for

failure to state a claim under Rule 12(b)(6) constitutes a judgment on the merits. *See Federal Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981), *see also Plaut v. Spend thrift Farm*, 514 U.S. 211, 228 (1995). The district court did not err in dismissing Cooper's complaint with prejudice for failure to state a claim under Rule 12(b)(6). *See Iqbal* , 556 U.S. at 678; *Legate,* 822 F.3d at 209-10.

Next, Cooper argues that the district court violated Cooper's due process rights by dismissing the case based on res judicata. Cooper's statute of limitations claim could have been raised in his 2009 lawsuit, which was still pending in June 2010, when the limitations period allegedly expired, as well as in his 2013 lawsuit. Because Cooper could have raised the limitations claim in his prior lawsuits, he has not shown that his due process rights were violated because the district court dismissed this claim as barred by res judicata. *See Amstadt,* 919 S.W.2d at 652; *see also Samuel,* 434 S.W.3d at 234.

Finally, Cooper contends that the district court erred in not applying state law concerning the doctrine of res judicata. Because he did not raise this argument in his objections to the magistrate judge's report in the district court, review is limited to plain error. *See Puckett v. United States,* 556 U.S. 129, 135 (2009). Although Cooper is correct that the district court erred in not applying state law on res judicata,

he has not shown that this error affected his substantial rights because federal and Texas law on res judicata are the same. *See Amstadt,* 919 S.W.2d at 652; *Test Masters Educ. Servs., Inc. v. Singh,* 428 F.3d 559, 571 (5th Cir. 2005); *Flippin v. Wilson State Bank* , 780 S.W.2d 457, 459 (Tex. App. 1989). Because Cooper has not argued or shown that under Texas law, the doctrine of res judicata would have been inapplicable to the instant case, he has not shown that the district court's failure to apply Texas law affected his substantial rights. *See Puckett* , 556 U.S. at 135.

Cooper's appeal is not taken in good faith because it lacks arguable merit and is frivolous. *See Howard v. King,* 707 F.2d 215, 220 (5th Cir. 1983). Accordingly, Cooper's IFP motion is DENIED and his appeal is DISMISSED as frivolous. *See Baugh,* 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

Cooper has had several prior actions or appeals dismissed as frivolous or for failure to state a claim. *See Cooper v. Dallas Police Ass'n,* No. 13-11281 (5th Cir. Nov. 14, 2014) (appeal dismissed as frivolous); *Cooper v. Bank of New York,* No. 3:13-CV-1985 (N.D. Tex. Jan. 31, 2014) (dismissal for failure to state a claim); *Cooper v. City of Plano,* No. 4:10-CV-00689 (E.D. Tex. Sept. 13, 2011) (dismissal for failure to state a claim); *Cooper v. Household Financial Services,* No. 4:01-CV-00260 (E.D. Tex. April 1, 2002) (dismissal for failure to state a

claim). Cooper is ADVISED that future frivolous actions or appeals could result in the imposition of sanctions.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

OCWEN LOAN § (BF)

SERVICING, LLC, et al., §

Defendants. §

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has under consideration the Findings, Conclusions, and Recommendation of the United States Magistrate Judge Paul D. Stickney [D.E. 66]. Objections were filed. The District Court has made a *de novo* review of those portions of the proposed Findings, Conclusions, and Recommendation to which objection was made. The objections are overruled.

IT IS THEREFORE ORDERED that Defendants' Motions to Dismiss (D.E. 43, 44, 45] are **GRANTED.**

SO ORDERED this 30th day of December, 2015.

s/ David C. Godbey

DAVID C. GODBEY

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

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IT IS THEREFORE ORDERED that Plaintiffs Motion to Alter or Amend Judgment and Request for Findings [ECF No. 70] is **DENIED.**

SO ORDERED this 22nd day of August, 2016.

s/ David C. Godbey

DAVID C. GODBEY

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

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ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has under consideration the Findings, Conclusions and Recommendation of the United States Magistrate Judge Paul D. Stickney. Objections were filed. The District Court has made a *de novo* review of those portions of the proposed Findings, Conclusions and Recommendation to which objection was made. The objections are overruled.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Proceed In Forma Pauperis [ECF No. 80] is DENIED. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that Plaintiff's appeal is not taken in good faith.

SO ORDERED this 21st day of October, 2016.

s/ David C. Godbey

DAVID C. GODBEY

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

OCWEN LOAN § (BF)

SERVICING, LLC, et al., §

Defendants. §

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States Magistrate Judge for pretrial management. *See* Order [D.E. 15]. Before the Court are Bank of New York Mellon and Ocwen Loan Servicing, LLC's (collectively, "Lender Defendants") Motion to Dismiss First Amended Complaint [D.E. 43]; John M. Lynch, J. Garth Fennegan, Kristina A. Kiik, Michael R. Steinmark, and Settle & Pou, P.C.'s (collectively, "SettlePou Defendants") Motion to Dismiss First Amended Complaint [D.E. 44]; and David Garvin, Jack Beckman, Kelly Goddard, Gene Alyea, Don Gwin, David O'Dens, Robert Pou, Cliff A. Wade, Michael P. Menton, and Jared T.S. Pace's (collectively, "Substitute Trustee Defendants") Motion to Dismiss First Amended Complaint [D.E. 45].

For the following reasons, the undersigned recommends that the District Court GRANT the motions to dismiss [D.E. 43, 44, 45].

BACKGROUND

This case involves the foreclosure of real property located at 1520 Janwood Drive, Plano, Texas (the "Property"). *See* Original Pet. [D.E. 1-5 at 6]. The Property was sold at a foreclosure sale on August 5, 2014 for $214,000.00. *See* Mot. to Dismiss [D.E. 43 at 7]. On August 4, 2014, Jay Sandon Cooper ("Plaintiff") filed his Original Petition in the 44th Judicial District Court, Dallas County, Texas against the Lender Defendants, the SettlePou Defendants, and the Substitute Trustee Defendants (collectively, "Defendants") alleging wrongful foreclosure and gross negligence, and seeking a temporary restraining order ("TRO"), a temporary injunction, and a declaratory judgment for quiet title. *See* Original Pet. [D.E. 1-5 at 3-6]. The Lender Defendants removed the case to federal court and filed their Notice of Related Case stating that *Cooper v. Bank of New York Mellon,* No. 3:1 3-CV-1985-N, which involved the same plaintiff and arose from a common nucleus of operative fact as the present case was pending before Judge Godbey and asked that the instant case, which was originally assigned to Judge Boyle, be transferred to Judge Godbey. *See* Notice of Removal [D.E. 1]; Notice of Related Case [D.E. 4].

On August 6, 2014, Judge Boyle issued an order denying Plaintiff's requests for a TRO and a temporary injunction and transferred this case to Judge Godbey. *See* Order [D.E. 9]. In that Order, Judge Boyle noted that the similar case brought to the attention of the Court by Defendants, *Cooper v. Bank of New York Mellon,* No. 3:13-CV-1985-N, was dismissed with prejudice and was on appeal. *See id.* [D.E. 9 at 2]. Judge Boyle explained that, having reviewed Plaintiff's application for a TRO and a temporary injunction, and in light of Defendants' arguments, she determined that Plaintiff failed to show a likelihood of success on the merits. *See id.* [D.E. 9 at 2]. Judge Boyle further noted that, as pointed out by Defendants, the requests for injunctive relief were moot at the time she issued her order, because the Property was already sold at a foreclosure sale on August 5, 2014. *See id.* [D.E. 9 at 2].

On August 25, 2014, the District Court referred this case to the undersigned for pretrial management. *See* Order [D.E. 15]. On February 2, 2015, the undersigned recommended that the District Court deny the pending motions to dismiss Plaintiff's Original Petition and give Plaintiff an opportunity to file an amended complaint as he requested in his response to the motions to dismiss. *See* Findings, Conclusions & Recommendation [D.E. 33 at 3]. On that date, the undersigned also directed the parties to file

supplemental briefs discussing the applicability of *res judicata* to this case, in light of Defendants' representation to the Court that Plaintiff has filed multiple lawsuits in connection with the foreclosure of the Property, and Plaintiff's statements in his Original Petition that this case is related to a case previously filed in the 95th Judicial District Court in Dallas County, Texas, and that "[t]he previous case was between the same parties, or others in privity with them, regarding an attempted non-judicial foreclosure of the same real property under a contractual power of sale." *See* Order [D.E. 32 at l]; Original Pet. [D.E. 1-5 at 3]; Mots. to Dismiss [D.E. 8 at 3-5; D.E. 13 at 10-12; D.E. 14 at 11-13]. On February 12, 2015, Defendants filed their supplemental brief arguing that this case should be dismissed on *res judicata* grounds. *See* Defs.' Br. [D.E. 34]. On February 17,2015, Plaintiff filed his response arguing that *res judicata* is not applicable to this case. *See* Pl.'s Resp. [D.E. 37]. On March 2, 2015, the District Court accepted the undersigned's recommendation to deny Defendants' motions to dismiss and allow Plaintiff to file an amended complaint. *See* Order [D.E. 39]. On March 16, 2015, Plaintiff filed his Amended Complaint [D.E. 40]. On March 30, 2015, Defendants filed their motions to dismiss [D.E. 43, 44, 45] the Amended Complaint. On April 20, 2015, Plaintiff filed his response [D.E. 46] to the motions to dismiss. On May 4, 2015, Defendants filed their replies [D.E. 48, 49, 50].

STANDARD OF REVIEW

Rule 12(b)(6)

A court may dismiss a complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6) if the complaint, when viewed in a light most favorable to the plaintiff, fails to state a valid claim for relief. *See Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000). In considering a Rule 12(b)(6) motion to dismiss, the court takes as true all facts pleaded in the complaint, even if they are doubtful in fact. *See id.* A court, at this juncture, does not evaluate a plaintiff's likelihood of success, but only determines whether a plaintiff has stated a legally cognizable claim. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.,* 355 F.3d 370, 376 (5th Cir. 2004). Further, in resolving a Rule 12(b)(6) controversy, a court may examine: (1) the complaint and documents attached to the complaint; (2) documents attached to the motion to dismiss to which the plaintiff refers and are central to the plaintiff's claims; and (3) matters of public record. *See Spivey v. Robertson,* 197 F.3d 772, 774 (5th Cir. 1999); *Collins,* 224 F.3d at 498; *Herrera v. Wells Fargo Bank, N A.,* No. H-13-68, 2013 WL 961511, at *2 (S.D. Tex. Mar. 12, 2013) (citing *Lone Star Fund V (U.S.), L.P. v. Barclays Bank P.L.C.,* 594 F.3d 383, 387 (5th Cir. 2010)). In addition, while courts

liberally construe *pro se* pleadings, *pro se* parties are not exempt from complying with court rules of procedural and substantive law. *Birl v. Estelle,* 660 F.2d 592, 593 (5th Cir. 1981) (citing *Faretta v. California,* 422 U.S. 806, 834 n.46 (1975)).

Res Judicata

"Under the law of this circuit, claim preclusion, or pure *res judicata,* is the venerable legal canon that insures the finality of judgments and thereby conserves judicial resources and protects litigants from multiple lawsuits." *Proctor & Gamble Co.. v. Amway Corp.,* 376 F.3d 496, 499 (5th Cir. 2004) (internal quotations and citation omitted). *"Res judicata* applies where (1) the parties to both actions are identical (or at least in privity); (2) the judgment in the first action is rendered by a court of competent jurisdiction; (3) the first action concluded with a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits." *Id.* (internal quotations and citation omitted). *Res judicata* "precludes the relitigation of claims which have been fully adjudicated or arise from the same subject matter, and that could have been litigated in the prior action." *Palmer v. Fed. Home Loan Mortg. Corp.,* No. 4: 13-CV-430-A, 2013 WL 2367794, at *2 (N.D. Tex. May 30, 2013)(citing *Nilsen v. City of Moss Point,* 701 F.2d 556, 561 (5th Cir.

1983)). A court "may *sua sponte* dismiss an action on *res judicata* grounds when the elements of the defense are apparent on the face of the pleadings." *Kelton v. Deutsche Bank Nat'l Trust Co.,* No. 4:14-CV- 991-A, 2014 WL 7175242, at *1 (N.D. Tex. Dec. 16, 2014) (citing *Kansa Reinsurance Co. v. Congressional Mortg. Corp.,* 20 F.3d 1362, 1366 (5th Cir. 1994)). "In making such a ruling, the court may take judicial notice of the record in a prior related proceeding." *Id.* (citing *Ariz. v. Cal.,* 530 U.S. 392, 412 (2000)).

A plaintiff cannot avoid the application of *res judicata* through the addition of defendants in subsequent lawsuits, if the subsequent defendants are in privity with defendants in the prior lawsuit. *See Davis v. Dallas Area Rapid Transit,* No. 3:01-CV-2595-M, 2002 WL 172646, at *2 n.10 (N.D. Tex. Feb. 1, 2002) ("Plaintiffs' attempt to name an additional defendant, a supervisor at DART, to avoid the applicability of the doctrine *of res judicata* is unsuccessful because Rodriguez is in privity with DART.") (citing *Lubrizol Corp. v. Exxon Corp.,* 871 F.2d 1279, 1289 (5th Cir. 1989)); *Bond v. Barrett, Daffin, Frappier, Turner & Engel, L.L.P.,* C.A. No. G-12-188, 2013 WL 1619691, at *13 (S.D. Tex. Mar. 22, 2013) ("Plaintiff's claims are barred by *res judicata.* First, in the prior action, Plaintiff named as Defendants

JPMorgan, as the successor of Defendant EMC, as well as Defendant Barrett. . . . These parties are identical or in privity with the Defendants named in this action. Defendant Barrett was named in both actions. Defendants Odom and Bailey are employees of JPMorgan, and to the extent Plaintiff sues them in their capacities as agents, this relationship establishes privity for the purposes of *res judicata.* To the extent Plaintiff sues them in their capacities as agents of Defendant EMC, privity is established because JPMorgan is a mere continuation of Defendant EMC as its successor.") (internal quotations and citations omitted).

"A federal court asked to give *res judicata* effect to a state court judgment must apply the *res judicata* principles of the law of the state whose decision is set up as a bar to further litigation." *Van Duzer v. U.S. Bank Nat'l Ass'n,* 995 F. Supp. 2d 673, 686 (S.D. Tex. 2014) (citing *E.D. Sys. Corp. v. Sw. Bell Tel. Co.,* 674 F.2d 453, 457 (5th Cir. 1982); *Norris v. Hearst Trust,* 500 F.3d 454, 460-61 (5th Cir. 2007); *Rollins v. Dwyer,* 666 F.2d 141, 144 (5th Cir. 1982)) (internal quotations omitted). "In Texas, *res judicata* precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action." *Id.* (citing *Amstadt v. U.S. Brass*

Corp., 919 S.W.2d 644, 652 (Tex. 1996); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992)) (internal quotations and alterations omitted). "The party claiming the defense must prove (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of the parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action." *Id.* (citing *Citizens Ins. Co. of Am. v. Daccach,* 217 S.W.3d 430, 449 (Tex. 2007); *Amstadt,* 919 S.W.2d at 652) (internal quotations omitted).

ANALYSIS

In their motions to dismiss, Defendants argue that the claims in Plaintiff's Amended Complaint fail and also incorporate their arguments made in their supplemental brief regarding the applicability *of res judicata* to this case. *See* Br. [D.E. 34]; Mots. to Dismiss [D.E. 43 at 18; D.E. 44 at 23; D.E. 45 at 22].

Defendants argue that Plaintiff's claims are barred by *res judicata,* because Plaintiff has filed at least two previous lawsuits challenging the foreclosure of the Property and those cases have been dismissed with prejudice. *See* Defs.' Br. [D.E. 34 at 10-12]. Plaintiff filed a first lawsuit in connection with the Property in the 95th Judicial District Court, Dallas County, Texas on June 1, 2009

("First Lawsuit"). *See* Pl.'s Original Pet. [D.E. 35 at 3]. Plaintiff's Amended Complaint involves the same claims that were already brought or claims that could have been brought in the First Lawsuit. *See* Pl.'s 4th Am. Pet. [D.E. 35 at 56-91]; Am. Comp[;. [D.E 40 at 1-11]. On January 21, 2013, the final judgment in favor of Defendants was entered in the First Lawsuit. *See* Final J. [D.E. 35 at 93]. On May 6, 2013, Plaintiff filed another lawsuit in the 14th Judicial District Court in Dallas County, Texas again seeking to prevent the foreclosure of the Property ("Second Lawsuit"). *See* Original Pet. [D.E. 36 at 3-21]. On May 28, 2013, the Lender Defendants removed that case to federal court. *See* Notice of Removal [D.E. 1; No. 3:13-CV-1985-N]. Again, Plaintiff's Amended Complaint involves the same claims that were already brought or claims that could have been brought in the Second Lawsuit. *See* Original Pet. [D.E. 36 at 3-21]; Am. Compl. [D.E 40 at 1-11]. On January 8, 2014, Judge Toliver entered her Findings, Conclusions and Recommendation recommending that the District Court dismiss the Second Lawsuit with prejudice. *See* Findings, Conclusions & Recommendation [D.E. 10; No. 3:13-CV-1985-N]. On January 31, 2014, the District Court entered its Order accepting Judge Toliver's recommendation and entered the Judgment dismissing the Second Lawsuit with prejudice. See Order [D.E. 14;

No. 3:13-CV-1985-N]; J. [D.E. 15; No. 3:13-CV-1985-N]. Plaintiff subsequently appealed the final judgment entered in the Second Lawsuit, and on August 25, 2014, the Fifth Circuit dismissed Plaintiff's appeal for want of prosecution. *See* J. [D.E. 30; No. 3:13-CV-1985-N].

As argued by Defendants, this case should be dismissed on *res judicata* grounds. The parties in the prior lawsuits and the present lawsuit are identical or in privity. Plaintiff's addition of the SettlePou Defendants and the Substitute Trustee Defendants does not preclude the application of *res judicata,* given that they are in privity with the Lender Defendants. *See Davis,* 2002 WL 172646, at *2; *Bond,* 2013 WL 1619691, at *13. In addition, the judgments in the prior lawsuits were rendered by courts of competent jurisdiction, and the claims in the present lawsuit arise from the same subject matter, the Property, which have been or could have been litigated in the prior actions. *See* Pl.' s 4th Am. Pet. [D.E. 35 at 56-91]; Original Pet. [D.E. 36 at 3-21]; Am. Compl. [D.E 40 at 1-11]. Furthermore, the prior lawsuits concluded with final judgments on the merits. *See* Final J. [D.E. 35 at 93]; J. [D.E. 15; No. 3:13-CV-1985-N]. Therefore, *res judicata* precludes Plaintiff from relitigating in this case the same claims that have already been litigated or claims that could have been litigated in the prior lawsuits.[1]

RECOMMENDATION

For the foregoing reasons, the undersigned respectfully recommends that the Court **GRANT** Defendants' motions to dismiss [D.E. 43, 44, 45] and dismiss this case with prejudice.

SO RECOMMENDED, this 25th day of November, 2015.

s/ Paul D. Stickney

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

1. Because Plaintiff's Amended Complaint should be dismissed on *res judicata* grounds, the undersigned pretermits consideration of Defendants' remaining arguments for dismissal.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a true copy of these findings, conclusions, and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(l), any party who desires to object to these findings, conclusions, and recommendation must serve and file written objections within fourteen days after service of the findings, conclusions, and recommendation. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory, or general objections. A party's failure to file such written objections to these proposed findings, conclusions, and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation within fourteen days after service shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415; 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds,* 28 U.S.C. § 636(b)(l) (extending the time to file objections from ten to fourteen days).

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

OCWEN LOAN § (BF)

SERVICING, LLC, et al., §

Defendants. §

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States Magistrate Judge for pretrial management. *See* Order [ECF No. 15]. Before the Court is Jay Sandon Cooper's ("Plaintiff") Motion to Alter or Amend Judgment [and] Request for Findings [ECF No. 70] ("Motion to Alter and Request for Findings") filed on January 27, 2016. Bank of New York Mellon, Ocwen Loan Servicing, LLC, John M. Lynch, J. Garth Fennegan, Kristina A. Kiik, Michael R. Steinmark, Settle & Pou, P.C., David Garvin, Jack Beckman, Kelly Goddard, Gene Alyea, Don Gwin, David O'Dens, Robert Pou, Cliff A. Wade, Michael P. Menton, and Jared T.S. Pace (collectively, "Defendants") filed their Response in Opposition [ECF No. 71] on February 10, 2016. Plaintiff filed his Reply [ECF No. 74] on June 3,

2016 after receiving permission from the Court. For the following reasons, the undersigned respectfully recommends that the District Court **DENY** Plaintiff's Motion to Alter and Request for Findings [ECF No. 70].

BACKGROUND

This case involves the foreclosure of real property located at 1520 Janwood Drive, Plano, Texas (the "Property"). *See* Original Pet. [ECF No.1-5 at 6]. The Property was sold at a foreclosure sale on August 5, 2014 for $214,000.00. *See* Mot. to Dismiss [ECFNo.43 at 7]. On August 4, 2014, Plaintiff filed his Original Petition in the 44th Judicial District Court, Dallas County, Texas against Defendants alleging wrongful foreclosure and gross negligence, and seeking a temporary restraining order ("TRO"), a temporary injunction, and a declaratory judgment for quiet title. *See* Original Pet. [ECF No.1-5 at 3-6]. After removal to federal court, a Notice of Related Case was filed which stated that *Cooper v. Bank of New York Mellon,* No. 3:13-CV-1985-N, a case that involved the same plaintiff and arose from a common nucleus of operative facts as the present case was pending before Judge Godbey, and the Court was asked to transfer the instant case, which was originally assigned to Judge Boyle, to Judge Godbey. *See* Notice of Removal [ECF No. 1]; Notice of Related Case [ECF No. 4].

On August 6, 2014, Judge Boyle issued an order denying Plaintiff's

requests for a TRO and a temporary injunction and transferred this case to Judge Godbey. *See* Order [ECF No. 9]. In that Order, Judge Boyle noted that the similar case brought to the attention of the Court by Defendants, *Cooper v. Bank of New York Mellon,* No. 3:13-CV-1985-N, was dismissed with prejudice and was on appeal. *See id.* [ECF No. 9 at 2]. Judge Boyle explained that, having reviewed Plaintiff's application for a TRO and a temporary injunction, and in light of Defendants' arguments, she determined that Plaintiff failed to show a likelihood of success on the merits. *See id.* [ECF No. 9 at 2]. Judge Boyle further noted that the requests for injunctive relief were moot at the time she issued her order, because the Property was already sold at a foreclosure sale on August 5, 2014. *See id.* [ECF No. 9 at 2].

On August 25, 2014, the District Court referred this case to the undersigned for pretrial management. *See* Order [ECF No. 15]. On February 2, 2015, the undersigned recommended that the District Court deny the then pending motions to dismiss Plaintiff's Original Petition and give Plaintiff an opportunity to file an amended complaint. *See* Findings, Conclusions & Recommendation [ECF No. 33 at 3]. On that date, the undersigned also directed the parties to file supplemental briefs which discuss the applicability of *res judicata* to this case, in light of Defendants' representation to the Court that Plaintiff has filed multiple lawsuits in connection with the foreclosure of the Property, and Plaintiff's statements in

his Original Petition that this case is related to a case previously filed in the 95th Judicial District Court in Dallas County, Texas, and that "[t]he previous case was between the same parties, or others in privity with them, regarding an attempted non-judicial foreclosure of the same real property under a contractual power of sale." *See* Order [ECF No. 32 at 1]; Original Pet. [ECF No. 1-5 at 3]; Mots. to Dismiss [ECF No. 8 at 3-5; ECF No. 13 at 10-12; ECF No. 14 at 11-13].

On February 12, 2015, Defendants filed their supplemental brief arguing that this case should be dismissed on *res judicata* grounds. *See* Defs.' Br. [ECF No. 34]. On March 2, 2015, the District Court accepted the undersigned's recommendation to deny Defendants' motions to dismiss and allow Plaintiff to file an amended complaint. *See* Order [ECF No. 39]. On March 16, 2015, Plaintiff filed his Amended Complaint [ECF No. 40]. On March 30, 2015, Defendants filed their motions to dismiss [ECF Nos. 43, 44, 45] the Amended Complaint. On November 25, 2015, the undersigned entered the Findings, Conclusions, and Recommendation on Defendants' Motions to Dismiss [ECF Nos. 43, 44, 45] which recommended that the District Court grant those motions. *See* Findings, Conclusions, and Recommendation [ECF No. 66]. On December 30, 2015, the District Court adopted the undersigned's Findings, Conclusions, and Recommendation, and entered the Judgment dismissing this case with prejudice. *See* Order [ECF No. 68]; J. [ECF No. 69].

ANALYSIS

Rule 52

Plaintiff seeks to have the Court amend its findings or to make additional findings pursuant to Federal Rule of Civil Procedure ("Rule") 52. *See* Mot. to Alter [ECF No. 70]. Rule 52(b) states as follows: "[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly." FED. R. CIV. P. 52(b). "Rule 52(b)'s purpose is, generally, to correct manifest errors of law or fact." *Cooper v. Dallas. Police Ass'n,* No. 3:05-CV-1778-N (BN), 2013 WL 5786437, at *3 (N.D. Tex. Oct. 28, 2013) *(citing Fontenot v. Mesa Petroleum* Co., 791 F.2d 1207, 1219 (5th Cir. 1986)). "A motion to amend should not be employed to introduce evidence that was available . . . but was not proffered, to re-litigate old issues, to advance new theories, or to secure a rehearing on the merits." *Id.* In order "[t]o prevail on a Rule 52(b) motion to amend the moving party must show that the Court's findings of fact or conclusions of law are not supported by evidence in the record." *Id.*

Defendants argue in their response that the District Court's Order [ECF No. 68] and Judgment [ECF No. 69] both ruled on Defendants' motions to dismiss [ECF Nos. 43, 44, 45], and therefore, no findings or conclusions are required under Rule 52(a)(3). *See* Resp. [ECF No. 71 at 2]. Rule 52(a)(3) states: "[t]he court is not required to state findings or conclusions when

ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." FED. R. CIV. P. 52(a)(3). Because the District Court is not required to state findings or conclusions in connection with Defendants' motions to dismiss [ECF Nos. 43, 44, 45], and because Plaintiff has not shown a valid basis for the Court to amend its findings or to make additional findings, the undersigned recommends that the District Court deny this request.

Rule 59

Plaintiff also asks the Court to alter or amend the Judgment pursuant to Rule 59(e). *See* Mot. to Alter [ECF No. 70 at 1]. In order "[t]o prevail on a motion to alter or amend judgment under Rule 59(e), the moving party must show (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) a manifest error of law or fact." *Tex. Brand Bank v. Luna & Luna, LLP,* No. 3:14-CV-1134-P, 2016 WL 3660579, at *1 (N.D. Tex. Jan. 29, 2016) (citing *Schiller v. Physicians Res. Grp., Inc.,* 342 F.3d 563, 567 (5th Cir. 2003)). "A motion to alter or amend calls into question the correctness of a judgment and is permitted only in narrow situations, 'primarily to correct manifest errors of law or fact or to present newly discovered evidence'" *Reyes v. Julia Place Condos. Homeowners Ass'n, Inc.,* No. 12-2043, 2016 WL 3902606, at *3 (E.D. La. Jul. 19, 2016) (citing *Templet v. HydroChem lnc.,* 367 F.3d 473, 479 (5th Cir. 2004); *Schiller,* 342 F.3d at

567). "Manifest error is defined as '[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, [and] indisputable evidence and self-evidence.'" *Id.* (quoting *In Re Energy Partners, Ltd.,* No. 09-32957-H4-11, 2009 WL 2970393, at *6 (Bankr. S.D. Tex. Sept. 15, 2009)).

A Rule 59(e) motion is "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet,* 367 F.3d at 479 (citing *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir. 1990)). "Nor should it be used to 're-litigate prior matters that . . . simply have been resolved to the movant's dissatisfaction.'" *Reyes,* 2016 WL 3902606, at *3 (quoting *Voisin v. Tetra Techs., Inc.,* No. 08-1302, 2010 WL 3943522, at *2 (E.D. La. Oct. 6, 2010)). "Although courts have 'considerable discretion' to grant or to deny a Rule 59(e) motion, they use the 'extraordinary remedy' under Rule 59(e) 'sparingly.'" *Luna & Luna, LLP,* 2016 WL 3660579, at *1 (citing *Templet,* 367 F.3d at 479, 483). "When considering a motion to alter or amend judgment, '[t]he court must strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts.'" *Id.* (quoting *Edward H. Bohlin Co. v. Banning Co.,* 6 F.3d 350, 355 (5th Cir. 1993)).

Defendants argue that there is no basis to amend here because

there is no manifest error of law, newly discovered evidence or new arguments that Plaintiff could not have made prior to the entry of the Order [ECF No. 68] and Judgment [ECF No. 69]. *See* Resp. [ECF No. 71 at 2]. Defendants argue that Plaintiff's Motion to Alter and Request for Findings solely raises arguments that were or could have been made before the District Court entered its Order [ECF No. 68] and Judgment [ECF No. 69]. *See id.* [ECF No. 71 at 3]. Defendants further argue that Plaintiff merely rehashes arguments he already made in responding to their motions to dismiss. *See id.* [ECF No. 71 at 2-3]. As Defendants argue, because Plaintiff has not raised a valid ground to alter the Judgment in this case, the undersigned recommends that the District Court also deny Plaintiff's request to alter or amend the Judgment.

RECOMMENDATION

For the foregoing reasons, the undersigned respectfully recommends that the Court **DENY** Plaintiff's Motion to Alter and Request for Findings [ECF No. 70].

SO RECOMMENDED, this 29th day of July, 2016.

s/ Paul D. Stickney

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a true copy of these findings, conclusions, and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(l), any party who desires to object to these findings, conclusions, and recommendation must serve and file written objections within fourteen days after service of the findings, conclusions, and recommendation. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory, or general objections. A party's failure to file such written objections to these proposed findings, conclusions, and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation within fourteen days after service shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds,* 28 U.S.C. § 636(b)(l) (extending the time to file objections from ten to fourteen days).

September 30, 2016

CLERK U.S. DISTRICT COURT By

s/

Deputy

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

OCWEN LOAN § (BF)

SERVICING, LLC, et al., §

Defendants. §

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States Magistrate Judge for pretrial management. Order, ECF No. 15. Before the Court is Jay Sandon Cooper's ("Plaintiff") Motion to Proceed In Forma Pauperis [ECF No. 80]. For the reasons stated below, the undersigned respectfully recommends that the District Court DENY Plaintiff's motion [ECF No. 80].

BACKGROUND

This case involves the foreclosure of real property located at 1520 Janwood Drive, Plano, Texas (the "Property"). Original Pet. 5, ECF No.1-5. The Property was sold at a foreclosure sale on August 5, 2014 for $214,000.00. *See* Mot. to Dismiss 7, ECF No.43. On August 4, 2014, Plaintiff filed his Original Petition in the 44th Judicial District Court, Dallas County, Texas

against Defendants alleging wrongful foreclosure and gross negligence, and seeking a temporary restraining order ("TRO"), a temporary injunction, and a declaratory judgment for quiet title. Original Pet. 2-5, ECF No.1-5. After removal to federal court, a Notice of Related Case was filed which stated that *Cooper v. Bank of New York Mellon,* No. 3: 13-CV-1985-N, a case that involved the same plaintiff and arose from a common nucleus of operative facts as the present case was pending before Judge Godbey, and the Court was asked to transfer the instant case, which was originally assigned to Judge Boyle, to Judge Godbey. Notice of Removal, ECF No. 1; Notice of Related Case, ECF No. 4.

On August 6, 2014, Judge Boyle issued an order denying Plaintiff's requests for a TRO and a temporary injunction and transferred this case to Judge Godbey. Order, ECF No. 9. In that Order, Judge Boyle noted that the similar case brought to the attention of the Court by Defendants, *Cooper Bank of New York Mellon,* No. 3:13-CV-1985-N, was dismissed with prejudice and was on appeal. *Id.* at 2, ECF No. 9. Judge Boyle explained that, having reviewed Plaintiff's application for a TRO and a temporary injunction, and in light of Defendants' arguments, she determined that Plaintiff failed to show a likelihood of success on the merits. *Id.,* ECF No. 9. Judge Boyle further noted that the requests for injunctive relief were moot at the time she issued her order, because the Property was already sold at a foreclosure sale on August 5, 2014. *Id.,* ECF No. 9.

On August 25, 2014, the District Court referred this case to the undersigned for pretrial management. Order, ECF No. 15. On February 2, 2015, the undersigned recommended that the District Court deny the then pending motions to dismiss Plaintiff's Original Petition and give Plaintiff an opportunity to file an amended complaint. Findings, Conclusions, &

Recommendation 3, ECF No. 33. On that date, the undersigned also directed the parties to file supplemental briefs which discuss the applicability of *res judicata* to this case, in light of Defendants' representation to the Court that Plaintiff has filed multiple lawsuits in connection with the foreclosure of the property and Plaintiff's statement in his Original Petition that this case is related to a case previously filed in the 95th Judicial District Court in Dallas County, Texas, and that "[t]he previous case was between the same parties, or others in privity with them, regarding an attempted non-judicial foreclosure of the same real property under a contractual power of sale." Order. ECF No. 32; Original Pet. 2, ECF No. 1-5; Mot. to Dismiss 3-5, ECF No. 8; Mot. to Dismiss 10-12, ECF No. 13; Mot. to Dismiss 11-13, ECF No. 14.

On February 12, 2015, Defendants filed their supplemental brief arguing that this case should be dismissed on *res judicata* grounds. Defs.' Br., ECF No. 34. On March 2, 2015, the District Court accepted the undersigned's recommendation to deny Defendants' motions to dismiss and allow Plaintiff to file an amended complaint. *See* Order, ECF No. 39. On March 16, 2015, Plaintiff filed his Amended Complaint, ECF No. 40. On March 30, 2015, Defendants filed their motions to dismiss [ECF Nos. 43, 44, 45] the Amended Complaint. On November 25, 2015, the undersigned entered the Findings, Conclusions, and Recommendation [ECF No. 66] on Defendants' Motions to Dismiss [ECF Nos., 43, 44, 45] which recommended that the District Court grant those motions. On December 30, 2015, the District Court adopted the undersigned's Findings, Conclusions, and Recommendation, and entered the Judgment dismissing this case with prejudice. Order, ECF No. 68; J., ECF No. 69. On January 27, 2016, Plaintiff filed his Motion to Alter or Amend Judgment [and] Request for Findings [ECF No. 70]. Because Plaintiff did not raised a valid ground to alter the Judgment in this case, the undersigned

recommended that the District Court also deny that motion. Findings, Conclusions, & Recommendation, ECF No. 75. The District Court adopted those findings on August 22, 2016. Order, ECF No. 78.

ANALYSIS

In the Motion to Proceed In Forma Pauperis, Plaintiff seeks "leave to proceed on appeal without payment of fees, costs, or security." Mot. 1, ECF No. 80. "As to determination of a motion for leave to proceed IFP on appeal, 28 U.S.C. § 1915(a)(3) and Federal Rule of Appellate Procedure 24(a) govern." *Johnson* v. *Citimortgage, Inc.,* No. 3: 15-CV-2707-B (BN), 2016 WL 4444336, at *1 (N.D. Tex. June 28, 2016) (citing *Taylor v. Dretke,* No. 4:02-CV-1017-Y, 2003 WL 22121296, at *1 (N.D. Tex. Sept. 12, 2003)). "Section 1915(a)(3) provides that '[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." *Id.* Furthermore, Rule 24(a) states as follows:

> (1) Motion in the District Court.
>
> Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:
>
> > (A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;
> >
> > (B) claims an entitlement to redress; and
> >
> > (C) states the issues that the party intends to present on appeal.
>
> (2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or

> giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

FED. R. APP. P. 24(a). "An appeal is taken in good faith under Section 1915(a)(3) if a litigant seeks appellate review of any issue that is not frivolous." *Johnson,* 2016 WL 4444336, at *2 (citing *Coppedge v. United States,* 369 U.S. 438, 445 (1962)). "Therefore, in addition to demonstrating that h[is] financial condition qualifies h[im] to proceed under the IFP statute, '[a] movant who seeks authorization to proceed IFP on appeal [also] must demonstrate that [his] appeal involves nonfrivolous issues.'" *Id.* (quoting *Amir-Sharif v. Dallas Cnty.,* 269 F. App'x 525, 526 (5th Cir. 2008); citing *Carson v. Polley,* 689 F.2d 562, 586 (5th Cir. 1982)). "An appellant's good faith subjective motivation for appealing is not relevant, but rather whether, objectively speaking, there is any non-frivolous issue to be litigated on appeal." *Id.* (internal quotation marks, citations, and alteration omitted).

Although Plaintiff seeks here to proceed on appeal without paying the associated fees and costs, the financial information Plaintiff provided to the Court fails to support a conclusion that he qualifies as a pauper. *See* Decl. 1, ECF No. 80 at 7 (reflecting that Plaintiff receives $2,665.00 in monthly income). In addition, Plaintiff has not shown that his appeal raises non-frivolous issues.

Therefore, even if Plaintiff were to qualify as a pauper, because he has failed to provide a proper basis for his appeal of the District Court's Order, the District Court should find and certify that his appeal is not taken in good faith.

RECOMMENDATION

The undersigned respectfully recommends that the District Court deny

Plaintiff's Motion to Proceed In Forma Pauperis [ECF No. 80] and certify, pursuant to 28 U.S.C. § 1915(a)(3), that Plaintiff's appeal is not taken in good faith.

SO RECOMMENDED, this 30 day of September, 2016.

s/ Paul D. Stickney

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a true copy of these findings, conclusions, and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(l), any party who desires to object to these findings, conclusions, and recommendation must serve and file written objections within fourteen days after service of the findings, conclusions, and recommendation. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory, or general objections. A party's failure to file such written objections to these proposed findings, conclusions, and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation within fourteen days after service shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n,*

79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds,* 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

OCWEN LOAN § (BF)

SERVICING, LLC, et al., §

Defendants. §

JUDGMENT

The Court has entered its Order Accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge. Accordingly, Defendants' Motions to Dismiss [D.E. 43, 44, 45] are **GRANTED.**

IT IS ORDERED, ADJUDGED, AND DECREED that this case is dismissed with prejudice.

SO ORDERED this 30th day of December, 2015.

s/ David C. Godbey

DAVID C. GODBEY

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

BANK OF NEW YORK § (BF)

MELLON, et al., §

Defendants. §

ORDER

Before the Court are Plaintiff's Request for Clarification [D.E. 10], Motion to Recuse [D.E. 11], and Motion to Strike [D.E. 22]. This case has been referred to United States Magistrate Judge for pretrial management. *See* Order of Reference [D.E. 15]. In the Request for Clarification, Plaintiff asks the Court to clarify whether the Court will construe Defendants' Motion to Dismiss [D.E. 8] as a motion to dismiss or a summary judgment motion. *See* Request for Clarification [D.E. 10 at 1- 2]. The Request for Clarification [D.E. 10] is **GRANTED.** The Court will construe Defendants' Motion to Dismiss [D.E. 8] as a motion to dismiss. In the Motion to Recuse, Plaintiff seeks to have Judge Godbey recused from this case. *See* Mot. to Recuse [D.E. 11 at 1-2]. Having considered Plaintiff's arguments in his Motion to Recuse [D.E. 11], the

motion is **DENIED.** In the Motion to Strike, Plaintiff seeks to strike two of the motions to dismiss filed in this case, because he contends that the rules only allow the filing of one motion to dismiss, not three. *See* Mot. to Strike [D.E. 22 at 1]. Because each defendant is permitted to file a motion to dismiss, Plaintiff's Motion to Strike [D.E. 22] is **DENIED.**

SO ORDERED, December 22, 2014.

s/ Paul D. Stickney

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

BANK OF NEW YORK § (BF)

MELLON, et al., §

Defendants. §

ORDER DIRECTING FILING OF BRIEFS

This case has been referred to the United States Magistrate Judge for pretrial management. *See* Order of Reference [D.E. 15]. Defendants represent to the Court in their briefs for their motions to dismiss that Plaintiff has filed multiple state court petitions and bankruptcy cases in connection with the foreclosure of the property at issue in this lawsuit. *See* Mots. to Dismiss [D.E. 8 at 3-5; D.E. 13 at 10-12; D.E. 14 at 11-13]. Plaintiff also states the following in the Original Petition filed in the 44th Judicial District Court, Dallas County, Texas which was subsequently removed to this Court by Defendants, "This case is related to a trial previously held by the Honorable Judge Ken Molberg, 95th District Court of Dallas County, Texas, styled Jay Sandon Cooper, Plaintiff v. The Bank of New York Mellon Trust Company, National Association, Defendant, assigned to

Case No. 09-06869." *See* Original Pet. [D.E. 1-5 at 2). Plaintiff goes on to explain that "[t]he previous case was between the same parties, or others in privity with them, regarding an attempted non-judicial foreclosure of the same real property under a contractual power of sale." *See id.* [D.E. 1-5 at 3).

"Under the law of this circuit, claim preclusion, or pure *res judicata,* is the venerable legal canon that insures the finality of judgments and thereby conserves judicial resources and protects litigants from multiple lawsuits." *Proctor & Gamble Co. v. Amway Corp.,* 376 F.3d 496, 499 (5th Cir. 2004) (internal quotations and citation omitted). *Res judicata* "precludes the relitigation of claims which have been fully adjudicated or arise from the same subject matter, and that could have been litigated in the prior action." *Palmer v. Fed. Home Loan Mortg. Corp.,* No. 4:13- CV-430-A, 2013 WL 2367794, at *2 (N.D. Tex. May 30, 2013) (citing *Nilsen v. City of Moss Point,* 701 F.2d 556, 561 (5th Cir. 1983)). *"Res judicata* applies where (1) the parties to both actions are identical (or at least in privity); (2) the judgment in the first action is rendered by a court of competent jurisdiction; (3) the first action concluded with a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits." *Proctor & Gamble Co.,* 376 F.3d at 499 (internal quotations and citation omitted). The Court "may *sua sponte* dismiss an action on *res judicata* grounds when the elements of the

defense are apparent on the face of the pleadings." *Kelton v. Deutsche Bank Nat'l Trust Co,* No. 4:14-CV-991-A, 2014 WL 7175242, at *1 (N.D. Tex. Dec. 16, 2014) (citing *Kansa Reinsurance Co. v. Congressional Mortg. Corp.,* 20 F.3d 1362, 1366 (5th Cir. 1994)). "In making such a ruling, the court may take judicial notice of the record in a prior related proceeding." Id.(citing *Ariz. v. Cal.,* 530 U.S. 392, 412 (2000)).

"A federal court asked to give *res judicata* effect to a state court judgment must apply the *res judicata* principles of the law of the state whose decision is set up as a bar to further litigation." *Van Duzer v. U.S. Bank Nat 'l Ass'n,* 995 F. Supp. 2d 673, 686 (S.D. Tex. 2014) (citing *E.D. Sys. Corp. v. Sw. Bell Tel. Co.,* 674 F.2d 453, 457 (5th Cir. 1982); *Norris v. Hearst Trust,* 500 F.3d 454, 460-61 (5th Cir. 2007); *Rollins v. Dwyer,* 666 F.2d 141, 144 (5th Cir. 1982)) (internal quotations omitted). "In Texas, *res judicata* precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action." *Id.* (citing *Amstadt v. U.S. Brass Corp.,* 919 S.W.2d 644, 652 (Tex. 1996); *Barr v. Resolution Trust Corp.,* 837 S.W.2d 627, 628 (Tex. 1992)) (internal quotations and alterations omitted). "The party claiming the defense must prove (I) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of the parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first

action." *Id.* (citing *Citizens Ins. Co. of Am. v. Daccach,* 217 S.W.3d 430, 449 (Tex. 2007); *Amstadt,* 919 S.W.2d at 652) (internal quotations omitted).

The parties are hereby ordered to file briefs discussing whether *res judicata* precludes this litigation within two weeks of the entry of this order. In connection with the filings, the parties shall submit as exhibits the complaints and final judgments disposing of the previous litigation discussed by the parties.

SO ORDERED, this 2nd day of February, 2015 .

s/ Paul D. Stickney

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JAY SANDON COOPER, §

Plaintiff, §

v. § No. 3:14-CV-2795-N

BANK OF NEW YORK § (BF)

MELLON, et al., §

Defendants. §

F1NDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States Magistrate Judge for pretrial management. *See* Order of Reference [D.E. 15]. Before the Court are motions to dismiss [D.E. 8, 13, 14] filed by Defendants Bank of New York Mellon, Ocwen Loan Servicing, L.L.C., John M Lynch, J. Garth Fennegan, Kristina A. Kiik, Michael R. Steinmark, Settle & Pou, P.C. d/b/a SettlePou, David Garvin, Jack Beckman, Kelly Goddard, Gene Alyea, Don Gwin, David O'Dens, Robert Pou, Cliff A. Wade, Michael P. Menton , and Jared T.S. Pace (collectively, "Defendants"). For the following reasons, the undersigned recommends that the Court DENY Defendants' motions to dismiss [D.E. 8, 13, 14] and direct Plaintiff to re-plead his complaint.

BACKGROUND

This case involves the foreclosure of real property located at 1520 Janwood Drive, Plano, Texas 75075 (the "Property"). *See* Original Pet. [D.E. 1-5 at 6]. On August 4, 2014, Plaintiff filed his Original Petition in the 44th Judicial District Court, Dallas County, Texas seeking a temporary restraining order, temporary injunction, declaratory judgment, and quiet title, and alleging wrongful foreclosure and gross negligence. *See id.* [D.E. 1-5 at 6]. Plaintiff argues that "Defendants have advertised the foreclosure sale on August 5, 2014 of Plaintiff's homestead more than 8 years after accelerating the underlying mortgage, without ever pursuing a judicial foreclosure." *See id.* [D.E. 1-5 at 4]. Defendants removed this action to this Court on August 4, 2014. *See* Notice of Removal [D.E. 1]. The Property was sold at a foreclosure sale on August 5, 2014. *See* Trustee's Deed [D.E. 8-1]. Therefore, Plaintiff's request for injunctive relief was denied as moot. *See* Order [D.E. 9 at 2-3]. Defendants have subsequently filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). *See* Mots. to Dismiss [D.E. 8, 13, 14]. In the motions to dismiss, Defendants contend that Plaintiff has been filing numerous state court petitions and bankruptcy proceedings since 2007 in order to delay the eventual foreclosure sale of his Property. *See id.* [D.E. 8 at 3-4; D.E. 13 at 10-12; D.E. 14 at 11-13].

DISCUSSION

Federal Rule of Civil Procedure 8(a)(2) ("Rule 8(a)(2)") provides that "[a] pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief." According to the United States Supreme Court, Rule 8(a)(2) requires a pleading to have "facial plausibility." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). The Court must be able to draw the reasonable inference from the pleading that Defendants are liable for the misconduct alleged. *Ashcroft* , 556 U.S. at 678 (citing *Twombly,* 550 U.S. at 556). Defendants may seek dismissal under Rule 12(b)(6) if the pleading fails to establish facial plausibility. *See* FED. R. CIV. P. 12(b)(6); *Ashcroft* , 556 U.S. at 678. However, the Court should allow Plaintiff at least one opportunity to cure pleading deficiencies before dismissing the case, unless the defects are clearly incurable or Plaintiff advises the Court that he is unwilling or unable to amend the pleading in a manner that will avoid dismissal. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.,* 313 F.3d 305, 329 (5th Cir. 2002). Here, Plaintiff seeks to amend his complaint. *See* Resp. [D.E. 16 at 2]. While the undersigned sees merit in the arguments raised in Defendants' motions to dismiss, out of an abundance of caution, the Plaintiff should be given an opportunity to cure the pleading deficiencies prior to the dismissal of his case. Therefore, the undersigned

recommends that the Court deny Defendants' motions to dismiss and direct Plaintiff to file an amended complaint.

RECOMMENDATION

For the foregoing reasons, the undersigned respectfully recommends that the Court DENY Defendants' motion to dismiss [D.E. 8, 13, 14] and order Plaintiff to file an amended complaint.

SO RECOMMENDED, this 2nd day of February, 2015.

s/ Paul D. Stickney

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a true copy of these findings, conclusions, and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions, and recommendation must serve and file written objections within fourteen days after service of the findings, conclusions, and recommendation. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory, or general objections. A party's failure to file such

written objections to these proposed findings, conclusions, and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation within fourteen days after service shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

EOD

12/17/2013

A True Copy I Certify

Jeanne Henderson, Clerk

U.S. Bankruptcy Court

By: s/ Maria Shepperd

Deputy

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

IN RE: §

JAY SANDON COOPER § **Case No. 13-42695**

Debtor § **(Chapter 13)**

ORDER DENYING MOTION FOR CONTINUATION (OR IMPOSITION) OF THE AUTOMATIC STAY

(Dkt No. 20)

The debtor, Jay Sandon Cooper, initiated this case on November 5, 2013, by filing a petition for relief under Chapter 13 of the Bankruptcy Code. Forty one (41) days after initiating his present bankruptcy case, at approximately 12:49 p.m. on Monday, December 16, 2013, the Debtor filed a MOTION FOR CONTINUATION (OR IMPOSITION) OF AUTOMATIC STAY [Dkt. #20] (the "Continuation Motion"). The debtor states in his Continuation Motion that his prior Chapter 13 case was

dismissed on August 19, 2013 because Debtor was deemed to be ineligible to be a debtor.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 significantly changed the application of the automatic stay to debtors who have more than one bankruptcy case pending within a one-year period. Under §362(c)(3)(A), if a debtor has had a bankruptcy case pending and dismissed within one year of filing the present case, "the stay . .. shall terminate with respect to the debtor on the 30th day after the filing of the case." The Court may continue or impose the stay upon a motion of the debtor and "after notice and hearing completed before the expiration of the 30-day period." 11 U.S.C. §362(c)(3)(B). The Court does not have authority under §362(c)(3)(B) to continue or impose the automatic stay if a hearing on a motion for continuance or imposition is not completed before the thirtieth day after the filing of the case.

Here, the debtor failed to file his Continuation Motion prior to the expiration of the thirty-day stay period. Since the debtor's thirty-day period prescribed in §362(c)(3)(B) expired on December 5, 2013, *see* FED. R. BANKR. P. 9006(a), the Court concludes that the relief requested by the debtor in his Continuation Motion must be denied.

IT IS THEREFORE ORDERED that the MOTION FOR CONTINUATION OF THE AUTOMATIC STAY (Dkt. #20) shall be, and

is hereby, **DENIED**.

Signed on 12/17/2013

s/ Brenda T. Rhoades SD

HONORABLE BRENDA T. RHOADES,

CHIEF UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court

Eastern District of Texas

In re: Case No. 13-42695-btr

Jay Sandon Cooper Chapter 13

Debtor

CERTIFICATE OF NOTICE

District/off: 050-4 User: leeb Page 1 of 1

Date Rcvd: Dec 17, 2013

Form ID: pdf400 Total Noticed: 11

Notice by first class mail was sent to the following persons/entities by the Bankruptcy Noticing Center on Dec 19, 2013.

db Jay Sandon Cooper, 1520 Janwood Dr., Plano, TX 75075-7233

cr +OCWEN LOAN SERVICING, LLC, Stephen Wu, Mackie, Wolf, Zientz and Mann, 14160 North Dallas Parkway, Suite 900, Dallas, TX 75254-4314

6642875 City of Plano, Texas, 1520 Ave. K, Plano, Texas 75074

6642874 +Dallas Police Association / Glenn White, Lyon, Gorsky, Gilbert & Livingston, 12001 North Central Expwy., suite 650, Dallas, Texas 75243-3795

6657789 +Jefferson Capital Systems LLC, PO BOX 7999, SAINT CLOUD

MN 56302-7999

6642877 +Michael B. Suffness,

2419 Coit Rd. , Suite A,

Plano, Texas 75075-3731

6642872 Ocwen Loan Servicing, LLC,

P.O. Box 24646,

West Palm Beach, FL 33416-4646

6642878 +Select Portfolio Servicing, Inc.,

Individually, and as Mortgage Servicesfor,

DLJ Mortgage Capital, Inc.,

3815 South West Temple,

Salt Lake City, Utah 84115-4412

6642876 William B. Cochran,

P. Michael Hufstedler,

1401 Elm St., Suite 3404,

Dallas, Texas 75202

Notice by electronic transmission was sent to the following persons/entities by the Bankruptcy Noticing Center.

6642873 E-mail/Text : cio.bncmail@irs.gov

Dec 18 2013 02:00:53

Internal Revenue Service,

PO Box 105416,

Atlanta, GA 30348-5416

6659491 E-mail/Text: cio.bncmail@irs.gov

Dec 182013 02:00:53

Internal RevenueService,

P.O. Box 7346,

Philadelphia, PA 19101-7346

TOTAL: 2

***** BYPASSED RECIPIENTS *****

NONE. TOTAL: 0

Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.

USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that It is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(l), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Dec 19. 2013

Signature:

/s/Joseph Speetiens

CAUSE NO. CV-09-06869-D

JAY SANDON	§ IN THE DISTRICT COURT
COOPER	§
Plaintiff	§
	§ 95th JUDICIAL DISTRICT
THE BANK OF NEW YORK MELLON TRUST	
COMPANY	§
Defendant	§ DALLAS COUNTY, TEXAS

FINAL JUDGMENT

On the 30th day of July, 2012, the above-styled and numbered cause came on for trial before the Court without a jury. Plaintiff Jay Sandon Cooper ("Plaintiff") appeared in person and announced ready. Defendant The Bank of New York Mellon Trust Company ("Defendant") appeared in person and through counsel and announced ready. After considering the pleadings, the evidence presented and the arguments of the parties, this Court is of the opinion that Plaintiff should take nothing on his claims against Defendant.

IT IS THEREFORE ORDERED that Defendant is awarded a take nothing judgment.

IT IS FURTHER ORDERED that any claims, or prayers for relief, pleaded by Plaintiff or Defendant which are not expressly addressed or disposed of by this judgment are hereby dismissed with prejudice. This

judgment is intended to, and does, dispose of all claims against all parties, and is intended to be, and is, a final judgment for all purposes, including appeal.

SIGNED on the 21st day of January, 2013.

s/ Ken Molberg

KEN MOLBERG

JUDGE PRESIDING

06869-D

JAY SANDON, § IN THE DISTRICT COURT

COOPER §

Plaintiff, §

v. § 95th JUDICIAL DISTRICT

THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCI ATION and GREG BERTRAND, KEITH SMILEY and R.H. PATTON, Substitute Trustees, §

Defendants. § DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 31, 2012 and August 1, 2012, this case came on for trial before the Court without a jury. Plaintiff Jay Sandon Cooper ("Cooper") appeared, announced ready and presented evidence. Defendant The Bank of New York Mellon Trust Company, National Association, as trustee ("BONY") appeared, announced ready and presented evidence. Upon considering the pleadings then on file with the Court, the evidence presented during trial and the arguments of counsel and pro se parties, this Court entered judgment that Cooper take nothing on his claims. Upon the request of Cooper, the Court makes its findings of fact and conclusions of law as follows:

I. FINDINGS OF FACT

1. On October 30, 1998, Cooper, along with his then- wife, Linda Joy Cooper, executed a Deed of Trust granting a first lien against the property

located at 1520 Janwood Drive, Plano, Texas 75075 (the "Property ").

2. The Deed of Trust secured an Adjustable Rate Note (the "Note") executed by Cooper on October 30, 1998, wherein Cooper promised to repay the original principal amount of $140,000.00 plus interest.

3. The Note required Cooper to make regular monthly payments of principal and interest beginning on December 1, 1998 and continuing on the first day of each month thereafter until November 1, 2028.

4. The Deed of Trust required Cooper to, among other things, pay the taxes assessed against the Property and insure the Property against loss by hazards.

5. When Cooper executed the Deed of Trust, he understood and agreed it authorized enforcement by non- judicial foreclosure.

6. Litton Loan Servicing, LP ("Litton") began servicing the Note and Deed of Trust (collectively "Loan") on behalf of Credit Based Asset Servicing and Securitization, LLC in January 2000.

7. Effective May 1, 2004, Credit Based Asset Servicing and Securitization, LLC conveyed the Loan into the C-BASS 2004-RPl Trust (the "Trust')

8. When the Trust was created, the trustee of the Trust was JPMorgan Chase Bank, National Association ("JPMorgan Chase").

9. After the Loan was conveyed into the Trust, Litton remained the mortgage servicer of the Loan.

10. Cooper failed to make all of the payments due under the Loan in the time and manner required.

11. The Loan is currently due for the payment due February 1, 2006.

12. On April 11, 2006, Litton, as mortgage servicer for the Trust, served Cooper with notice the Loan was in default, notice he had forty-five days to cure the default and notice that, if the default was not cured within forty-five days, the maturity of the Loan would be accelerated.

13. The April 11, 2006 letter was mailed to Cooper via certified mail at the Property address.

14. The default described in the April 11, 2006 letter was not cured by Cooper.

15. On June 9, 2006, Litton, as mortgage servicer for the Trust, served Cooper with notice the maturity of the Loan had been accelerated.

16. The June 9, 2006 letter was mailed to Cooper via certified mail at the Property address.

17. Cooper has not tendered any amount of money to Litton since June 2006 nor has he paid any real property taxes assessed against the Property or insured the Property against loss by hazards.

18. On February 5, 2006, Cooper filed a lawsuit in the 116th District Court of Dallas County, Texas assigned Cause NO. 07-01020 and styled: "Jay Sandon Cooper v. Barrett Burke Wilson Castle Daffin & Frappier, LLP, Litton Loan Servicing, LP, JPMorgan Chase Bank, National Association, as

trustee formerly known as JPMorgan Chase Bank, as trustee under the Pooling and Servicing Agreement dated as of May l, 2004, among Credit-Based Asset Servicing and Securitization, LLC, C-BASS ABS, LLC, Litton Loan Servicing, LP and JPMorgan Chase Bank, C- BASS Mortgage Loan Asset Backed Certificates, Series 2004-RPl , Greg Bertrand, Keith Smiley and R.H . Patterson, Substitute Trustees" (the "2007 Lawsuit").

19. In the 2007 Lawsuit, Cooper brought claims against Litton as "mortgage servicing agent for JPMorgan Chase Bank, N.A." and JPMorgan Chase for declaratory relief, breach of contract, usury, violation of the Truth in Lending Act, breach of good faith and fair dealing, fraud and intentional infliction of emotional distress related to the declaration of default of the Loan and acceleration of the maturity of the Loan, including alleged servicing errors Cooper claims caused the declaration of default and the actual service of notice of the default and the notice of acceleration.

20. The 2007 Lawsuit was removed the United States District Court for the Northern District of Texas, Dallas Division and assigned Civil Action No. 3:07cv-0427-G.

21. On April 22, 2008, the United States District Court for the Northern District of Texas, Dallas Division, dismissed Cooper's claim for violation of the Truth-in- Lending Act against Litton and JPMorgan Chase in the 2007 Lawsuit, as well as his claims against the other defendants named in the 2007 Lawsuit, and remanded Cooper's remaining claims against Litton and

JPMorgan Chase in t he 2007 Lawsuit to the 116th District Court of Dallas County, Texas.

22. On June 10, 2008, the 116th District Court of Dallas County, Texas entered a Final Summary Judgment granting Litton and JPMorgan Chase judgment on Cooper's remaining claims in the 2007 Lawsuit.

23. Cooper appealed the Final Summary Judgment entered in the 2007 Lawsuit to the Dallas Court of Appeals.

24. On July 22, 2010, the Dallas Court of Appeals affirmed the Final Summary Judgment entered in t he 2007 Lawsuit.

25. Cooper petitioned the Supreme Court of Texas to review the decision of the Dallas Court of Appeals.

26. On March 18, 2011, the Supreme Court of Texas denied Cooper's petition for review.

27. Effective January 1, 2009, the trustee of the Trust changed from JPMorgan Chase t o BONY.

28. Litton remained the mortgage servicer of the Loan on behalf of the Trust.

29. Cooper did not complete and submit to Litton a complete application for a loan modification under the Home Affordable Modification Program (''HAMP'').

30. On May 12, 2009, Litton, as mortgage servicer for the Trust, served Cooper with a Notice of Substitute Trustee's Sale scheduling a foreclosure

sale of the Property for June 2, 2009.

31. On May 12, 2009, a copy of the Notice of Substitute Trustee's Sale was filed in the office of the Collin County Clerk and posted at the Collin County Courthouse.

32. The foreclosure sale of the Property scheduled for June 2, 2009 did not occur.

33. Cooper has not suffered any damage as a result of any act or omission of BONY or BONY 's agents, including Litton.

34. The factual bases for Cooper's request for cancelation of the Loan are the same factual bases upon which he based the 2007 Lawsuit.

35. After becoming aware of the factual bases for his request for cancelation, Cooper has remained in possession of the Property.

36. After becoming aware of the factual bases for his request for cancelation, Cooper has never offered to surrender possession or title to the Property.

37. After becoming aware of the factual bases for his request for cancellation, Cooper has never offer to return any of the proceeds of the Loan.

38. Any Conclusion of Law which is more appropriately designated a Finding of Fact is deemed such.

II CONCLUSIONS OF LAW

1. The Loan was in default and accelerated prior to the filing of the 2007 Lawsuit and has remained accelerated.

2. Cooper's complaints regarding the declaration of default of the loan and the acceleration of the maturity of the Loan, including alleged serving errors Cooper claims caused the declaration of default and the actual service of notice of the default and the notice of acceleration, are barred by res judicata.

3. The change of BONY as trustee of the Trust in place of JPMorgan Chase did not constitute a change of the owner and holder of the Loan; the Trust remained the owner and holder of the Loan.

4. The change of BONY as trustee of the Trust in place of JPMorgan Chase did not constitute a change of the mortgage servicer of the Loan; Litton remained the mortgage servicer of the Loan.

5. BONY was not required to notify Cooper when it became the trustee of the Trust.

6. Litton was authorized to conduct the foreclosure sale of the Property scheduled to occur on June 2, 2009 as the mortgage servicer of the Loan for the Trust.

7. The Notice of Substitute Trustee's Sale for the foreclosure sale of the Property scheduled to occur on June 2, 2009 was properly served on Cooper, filed of record in the office of the Collin County Clerk and posted at the Collin County Courthouse.

8. Neither BONY nor its agents, including Litton, violated the Texas Property Code.

9. Neither BONY nor its agents, including Litton, breached a contract with Cooper.

10. Cooper is not entitled to cancel or rescind the Loan.

11. Neither BONY nor its agents, including Litton, violated any provision of HAMP.

12. Cooper does not have a private right of action to enforce any requirement of HAMP.

13. Cooper is not entitled to reform the Deed of Trust to require enforcement by judicial foreclosure.

14. Cooper is not entitled to declaratory relief.

15. Cooper is not entitled to an award of damages.

16. BONY is entitled to a judgment Cooper take nothing on his claims.

17. Any Finding of Fact which is more appropriately designated a Conclusion of Law is deemed such.

SIGNED on the 14th day of February, 2013.

s/ Ken Molberg

KEN MOLBERG JUDGE PRESIDING