APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
No. 21-5025
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUANNAH L. HARRIS, Plaintiff-Appellant, v. OCWEN LOAN SERVICING, et al., Defendants-Appellees.	)))) On Appeal From) The United States)District Court for)the Western)District of)Tennessee)

ORDER

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

Quannah L. Harris, proceeding pro se, appeals a district court judgment dismissing her civil action asserting claims for fraud under Tennessee law and violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692e. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Harris filed a complaint, through counsel, against Ocwen Loan Servicing, LLC (Ocwen); Bank of New York Mellon Trust Company, National Association (BNYM); and Shapiro and Ingle, LLP (Shapiro). Harris's complaint discussed several prior civil suits that she filed to prevent the foreclosure of her home and a bankruptcy petition that she filed and voluntarily dismissed. She also referred to several exhibits that were not attached to the complaint. The defendants attached

the documents referred to in Harris's complaint to their dispositive motions, and in those documents, together with the complaint, the following history emerges:

In 2006, Harris and her husband, Hanalei Y. Harris, executed a deed of trust in the amount of $600,000 in connection with the purchase of property located at 2480 Lennox Drive in Germantown, Tennessee. The deed of trust identified Decision One Mortgage Company, LLC (Decision One) as the lender and secured a note. In February 2010, the Harrises executed a fixed rate loan modification agreement (First LMA). The First LMA amended and supplemented the original 2006 note secured by the deed of trust and identified GMAC Mortgage, LLC (GMAC) as the lender and the principal balance due as $644,192.10. In May 2010, the Harrises purportedly executed a step rate loan modification agreement (Second LMA). The Second LMA also amended and supplemented the original 2006 note and identified GMAC as the lender but identified a principal balance of $585,308.67 with an $80,000 interest-free deferred principal balance due at maturity or payoff.

In 2011, the Harrises filed a state-court suit to prevent foreclosure. The state court dismissed the suit for insufficient service of process and failure to state a claim for relief. Notably, the state court found that the Harrises defaulted on their loan and that the last loan payment was made on September 9, 2009. The Harrises filed two more lawsuits seeking to prevent foreclosure. Both suits were dismissed.

In 2016, Harris filed a federal civil action, asserting various claims in an effort to prevent foreclosure. The district court dismissed Harris's suit, and we affirmed. *Harris v. Ocwen Loan Servicing, LLC*, No. 17-5399, 2017 WL 8791308 (6th Cir. Nov. 22, 2017).

Harris filed a Chapter 13 bankruptcy petition in 2018. Shapiro filed a proof of claim on behalf of Ocwen, as servicer of Harris's home loan, in the amount of $968,409.17. The proof of claim was supported by the Second LMA, the loan payment history, and other documents. Harris voluntarily dismissed her bankruptcy petition three months after she filed it.

Following the dismissal of her bankruptcy petition, Harris received a collection letter in 2018, advising her that her loan was in default, that the balance due was $974,060.60, and that the debt had been accelerated. When Harris disputed the debt, she received both the first and second LMAs. Harris was also notified that a trustee sale of her property had been scheduled.

Harris then filed this civil action, asserting two causes of action: (1) Ocwen and BNYM engaged in fraud by representing in prior litigation that her home loan was governed by the First LMA, and Shapiro engaged in fraud by representing in her bankruptcy proceeding that a false and forged Second LMA governed her home loan and submitting an incorrect loan payment history; and (2) the defendants violated the FDCPA by using false and misleading representations regarding her home loan and the LMA that applied to her loan in prior civil litigation and her

bankruptcy proceeding. She sought monetary and injunctive relief.

Shapiro filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the complaint for failure to state a claim for relief. Ocwen and BNYM filed a Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings. The district court granted the defendants' motions. The district court concluded that Harris was collaterally estopped from challenging her default on the loan; that she failed to state a claim for fraud under Tennessee law; that the FDCPA does not apply to her claim against Shapiro based on the filing of a proof of claim in bankruptcy court; and that the FDCPA does not apply to her claims against the remaining defendants because she failed to show that they are debt collectors.

Harris filed a timely appeal. She challenges the application of collateral estoppel, the dismissal of her fraud claims, and the dismissal of her FDCPA claim against Shapiro.

We review de novo a district court's dismissal of a complaint under Rule 12(b)(6). *Lumbard v. City of Ann Arbor*, 913 F.3d 585, 588-89 (6th Cir. 2019). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When considering a Rule 12(b)(6) motion, "the court primarily considers the allegations in the complaint, although

matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Meyers v. Cincinnati Bd. of Educ.*, 983 F.3d 873, 880 (6th Cir. 2020) (quoting *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)). The court may consider documents attached to a defendant's motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." *Amini*, 259 F.3d at 502 (quoting *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997)).

We also review de novo a judgment on the pleadings under Rule 12(c), "applying the same standard we apply to review the grant of a motion to dismiss under Rule 12(b)(6)." *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019).

I. COLLATERAL ESTOPPEL

The district court concluded that Harris was collaterally estopped from contesting her default on the loan because that issue was litigated and decided on the merits between the same parties or their privies in the 2011 state-court suit, a final judgment was rendered, and Harris had a full and fair opportunity to litigate the default issue in that suit. *See Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009) (setting forth the elements of collateral estoppel under Tennessee law). The district court rejected Harris's contention that collateral estoppel did not apply because this case concerns the defendants' alleged fraud, not her default on the

loan. The district court explained that collateral estoppel prevented Harris from contesting only her default on the loan but that the alleged fraud issues could proceed.

Harris argues that the district court erroneously concluded that she was collaterally estopped from asserting that the defendants committed fraud. But the district court did not so conclude. Rather, the district court concluded that Harris was collaterally estopped only from contesting her default on the loan, not any alleged fraud issues. Harris concedes that she defaulted on the loan. Because Harris concedes the only issue pertaining to the collateral estoppel ruling, we need not address the propriety of that ruling.

II. FRAUD

Harris's fraud claim, best understood as alleging fraudulent misrepresentation, requires her to prove:

> (1)that the defendant made a representation of a present or past fact;
>
> (2) that the representation was false when it was made;
>
> (3) that the representation involved a material fact;
>
> (4) that the defendant either knew that the representation was false or did not believe it to be true or that the defendant made the representation recklessly without knowing whether it was true or false;
>
> (5) that the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and

(6) that the plaintiff sustained damages as a result of the representation. *Hodge v. Craig*, 382 S.W.3d 325, 343 (Tenn. 2012). A plaintiff alleging fraud must also meet the heightened pleading standard under Federal Rule of Civil Procedure 9(b). *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 403 (6th Cir. 2012); *see Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 751 (6th Cir. 2014) (noting that state law governs the substance of tort claims and Rule 9(b) governs their pleading requirements). Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud." To sufficiently plead fraud with particularity, the plaintiff "must (1) specify the time, place, and content of the alleged misrepresentation, (2) identify the fraudulent scheme and the fraudulent intent of the defendant, and (3) describe the injury resulting from the fraud." *Thompson*, 773 F.3d at 751.

The district court concluded that Harris failed to state a claim for fraud under Tennessee law. The district court determined that Harris's fraud claim was not pleaded with sufficient particularity in that she alleged the time, place, and content of the defendants' alleged misrepresentations but not the defendants' fraudulent intent or her resulting injury. Even if Harris pleaded a fraud claim with particularity, the district court concluded that she failed to state a prima facie fraud claim because she failed to allege materiality and damages, failed to set forth facts that would establish or be helpful in establishing the defendants' fraudulent intent, and failed to describe what she did in reliance or the character of such.

On appeal, Harris argues that the district court erroneously dismissed her fraud claims. She argues that her fraud claims were pleaded with sufficient particularity regarding the defendants' fraudulent intent because Rule 9(b) permits a general allegation of intent and does not require intent to be alleged specifically. She argues that the defendants' alleged misrepresentations were material because they affected her ability to protect her property from foreclosure by unauthorized entities and indicated an incorrect principal balance and interest rate. And she argues that the defendants' alleged misrepresentations caused her damages because continuous litigation has caused her stress as well as "loss, embarrassment, fear and anxiety from the continual capitalistic antics of the mortgage industry."

The district court did not err in finding that Harris failed to meet the heightened pleading standard for her fraud claims because she did not sufficiently allege that the defendants acted with fraudulent intent and that there was a resulting injury.. First, Harris did not sufficiently allege that the defendants acted with fraudulent intent, either generally or specifically. *See id.* Harris merely alleged in a conclusory fashion, devoid of facts, that the defendants intended to defraud her. Nor did Harris sufficiently allege that Shapiro acted with fraudulent intent by merely alleging that Shapiro filed a proof of claim in her bankruptcy proceedings. Harris did not allege that Shapiro prepared the documents for the proof of claim or communicated with her directly at any time. "[A]llegations of fraudulent misrepresentation must be made with sufficient particularity and

with a sufficient factual basis to support an inference that they were knowingly made." *Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir. 1993) (quoting *Ballan v. Upjohn Co.*, 814 F. Supp. 1375, 1385 (W.D. Mich. 1992)).

Second, Harris did not sufficiently allege any resulting injury. Harris admittedly defaulted on her home loan and did not plausibly allege that any misrepresentations by the defendants, rather than that default, resulted in the foreclosure proceedings against her home and her unsuccessful suits to prevent the foreclosure. *See Dauenhauer v. Bank of N.Y. Mellon*, 562 F. App'x 473, 482 (6th Cir. 2014) (per curiam) (holding that borrowers failed to satisfy Rule 9(b)'s heightened pleading standard for their fraud claim where they failed to show that they were not in default and that the note holder had no right to foreclose regardless of any alleged misrepresentations).

Besides the particularity deficiencies, Harris failed to state a fraud claim under Tennessee law because she did not allege the elements of materiality, fraudulent intent, damages, and reliance. *See Hodge*, 382 S.W.3d at 343. Because Harris admittedly defaulted on the loan, she could not plausibly allege that any misrepresentations by the defendants were material. Harris's suggestion that material misrepresentations by the defendants prevented her from knowing the correct entity authorized to initiate foreclosure proceedings is misplaced. The original 2006 deed of trust listed Decision One as the lender, and the First and Second LMAs identified GMAC as the lender associated with Harris's loan. Harris

does not dispute that she executed the First LMA, which identified GMAC as the lender; the Second LMA, which she does dispute, also identified GMAC as the lender. Harris's default on her home loan, not any alleged misrepresentations by the defendants as to which LMA governed, resulted in the foreclosure proceedings. And, in any event, she voluntarily dismissed her bankruptcy petition. Furthermore, Harris failed to allege the elements of fraudulent intent and damages for the same reasons that she failed to plead with particularity fraudulent intent and injury.

As to the reliance element, Harris does not challenge the district court's determination that she failed to sufficiently allege reliance on any alleged misrepresentations by the defendants. "Issues which were raised in the district court, yet not raised on appeal, are considered abandoned and not reviewable on appeal." *Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998). In other words, the "failure to raise an argument in [an] appellate brief [forfeits] the argument on appeal." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005); *see also Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007). Thus, Harris has abandoned appellate review of the reliance element of her fraud claim.

For these reasons, Harris's fraud claims were properly dismissed.

III. FDCPA

The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors . . . ." 15 U.S.C. § 1692(e). An FDCPA claim can be brought only against a debt collector, who is "anyone who 'regularly collects or attempts to collect . . . debts

owed or due . . . another.'" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017) (alterations in original) (quoting 15 U.S.C. § 1692a(6)). In contrast, a debt owner, who seeks to collect a debt for itself, is not a debt collector as defined by the FDCPA. *Id.* at 1721-22. Harris alleged that the defendants violated the provisions of the FDCPA that prohibit debt collectors from falsely representing a debt, communicating false credit information or threatening to do so and failing to communicate that a debt is disputed, and using false representations to attempt a debt collection or obtain consumer information. 15 U.S.C. § 1692e(2), (8), (10).

The district court first concluded that the FDCPA does not apply to Harris's claim against Shapiro based on the filing of a proof of claim in bankruptcy court. In so concluding, the district court relied on *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1415-16 (2017), which held "that filing (in a Chapter 13 bankruptcy proceeding) a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the" FDCPA. The district court also concluded that the FDCPA does not apply to Harris's claim against Ocwen and BNYM because they are not debt collectors within the meaning of the FDCPA.

Harris challenges the district court's reliance on *Midland Funding*. She reiterates arguments that she raised before the district court—that Shapiro submitted a false proof of claim supported by false documentation in her

bankruptcy proceeding. But regardless of whether *Midland Funding* governs here, Harris's FDCPA claim against Shapiro is based only on Shapiro's filing of a proof of claim on Ocwen's behalf in her bankruptcy proceeding, which "cannot form the basis for an FDCPA claim." *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010).

Harris does not challenge the district court's conclusion that Ocwen and BNYM are not debt collectors within the meaning of the FDCPA. Thus, Harris has abandoned appellate review of her FDCPA claim against those defendants. *See Radvansky*, 395 F.3d at 311; *Robinson*, 142 F.3d at 906.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 21-5025
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUANNAH L. HARRIS, Plaintiff-Appellant, v. OCWEN LOAN SERVICING, et al., Defendants-Appellees.	)))) On Appeal From) The United States)District Court for)the Western)District of)Tennessee)

Filed March 28, 2022

ORDER

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

Quannah L. Harris, proceeding pro se, petitions the court to rehear its February 7, 2022, order that affirmed a district court judgment dismissing her civil action asserting claims for fraud under Tennessee law and violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692e.

Harris's motion does not show that the court overlooked or misapprehended any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

ss/Deborah S. Hunt,

Deborah S. Hunt, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

QUANNAH HARRIS,	)
	)
Plaintiff,	)
v	) Case No.
	)2:18-cv-02597 -)
OCWEN LOAN SERVICING, INC.	) JTF-tmp
BANK OF NEW YORK MELLON	)
TRUST COMPANY,	)
NATIONAL ASSOCIATION f/k/a	)
THE BANK OF NEW YORK	)
TRUST COMPANY, N.A.,	)
as Successor to	)
JP MORGAN CHASE BANK, N.A.,	)
as TRUSTEE FOR RESIDENTIAL	)
ASSET	)
MORTGAGE PRODUCTS, INC.	)
MORTGAGE ASSET-BACKED	)
PASS-THROUGH CERTIFICATES	)
SERIES	)
2006-RZ4 & SHAPIRO & INGLE	)
LLP.	)
Defendants.	)

ORDER GRANTING DEFENDANT SHAPIRO & INGLE LLP'S MOTION TO DISMISS AND DEFENDANTS OCWEN LOAN SERVICING, LLC AND BANK OF NEW YORK MELLON TRUST COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS

Before the Court are Defendant Shapiro & Ingle, LLP's ("S&I") Motion to Dismiss for Failure to State a Claim and Defendants Ocwen Loan Servicing, LLC ("Ocwen") and Bank of New York Mellon Trust Company, N.A. f/k/a The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank, N.A. as

Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass Through Certificates Series 2006-RZ4's ("BNYM") Motion for Judgment on the Pleadings, filed on February 12, 2019 and February 24, 2019, respectively. (ECF Nos. 41 & 43.) Plaintiff Quannah Harris filed Responses in Opposition to both Motions on March 24, 2019. (ECF Nos. 48 & 49.) Defendants Ocwen and BNYM filed a Reply on April 8, 2019. (ECF No. 51.) On May 2, 2019, the Court stayed the case pending a decision on these Motions. (ECF No. 53.) For the reasons that follow, the Court **GRANTS** Defendant S&I's Motion to Dismiss and **GRANTS** Defendants Ocwen and BNYM's Motion for Judgment on the Pleadings.

FACTUAL BACKGROUND

This case is the latest in a series of cases surrounding ownership and possession of Plaintiff and her husband's residence located at 2480 Lennox Drive in Germantown, Tennessee ("the residence"). On June 9, 2006, Plaintiff Quannah Harris and her husband Hanalei Harris executed a Deed of Trust, secured by a promissory note, designating Southern Trust Title Company as Trustee in the amount of $600,000. (ECF Nos. 41-2, 1 & 43-2, 1.)1 The Deed of Trust designated Decision One Mortgage Company, LLC ("Decision One") as the "Lender," with Mortgage Electronic Registration Systems, Inc. ("MERS") serving as the Nominee for Decision One.

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1 The Court notes that while Plaintiff's Complaint refers to attached exhibits, Plaintiff's filed Complaint did not have any attachments or exhibits. (*See* ECF No. 1.) Defendants have attached many of these documents to their Motions. The Court may consider these documents because "they are referred to in the complaint and are central to the claims therein." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680–81 (6th Cir. 2011).

(ECF Nos. 41-2, 1 & 43-2, 1.) On June 15, 2006, the Deed of Trust was recorded in the Shelby County Register's Office as Document 06096076. (ECF No. 1, 11 ¶ 25.) On February 9, 2010, the parties executed a Fixed Rate Loan Modification Agreement ("First Loan Modification Agreement") that was subsequently recorded on March 22, 2010 in the Shelby County Register's Office as Document 100277779. (*Id.* at 5 ¶ 12). The First Loan Modification Agreement designated Plaintiff and her husband as the Borrowers and contained an acknowledgement by Plaintiff that the amount due on the mortgage was $644,192.10. (ECF No. 41-3, 2.) However, the recorded document designated GMAC Mortgage, LLC ("GMAC") as the "Lender" instead of Decision One. (*Id.*)

On May 10, 2010, Plaintiff and her husband purportedly executed a Step Rate Loan Modification Agreement with GMAC, who was again designated as the Lender ("Second Loan Modification Agreement"). (ECF Nos. 1, 4 ¶ 10 & 41-4.) The Second Loan Modification Agreement was not recorded. Notably, the Second Loan Modification Agreement stated that the Borrower acknowledges that GMAC, as the Lender, was the holder of the mortgage. (ECF No. 41-4, 1 & 43-5, 1.)

On March 10, 2011, Plaintiff and her husband, Hanalei Harris, filed a complaint to restrict and prohibit foreclosure, to set aside foreclosure, for damages, and for legal and equitable relief ("First Action") in Shelby County Chancery Court ("Chancery Court") against Decision One, GMAC, and Wilson and Associates, PLLC ("Wilson").[2] (*See* ECF No. 43-7.) Plaintiff and her husband argued, among other things, that

Decision One, GMAC, and Wilson (who was acting as Substitute Trustee for GMAC) were not lawful owners of any mortgage rights. (*Id.* at 3–4.) On January 27, 2012, the Chancery Court dismissed the action with prejudice for improper service of process and failure to state a claim.[3] (ECF No. 43-8.) The Chancellor found that Plaintiff and her husband were in default under the Loan, noting that Plaintiff's last payment was September 2009.[4] (*Id.* at 2.) Plaintiff and her husband subsequently filed several other suits that were similar in nature.[5]

On February 24, 2016, a subsequent case with the same residence and mortgage documents was filed in Chancery Court, and on April 6, 2016, was removed to the District Court for the Western District of Tennessee. The Court

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[2] Case No. CH-11-0434-2.

[3] Regarding Plaintiffs' first claim, Chancellor Goldin held that "Plaintiffs as borrowers were not a party to any assignment and therefore lack standing to challenge the assignment of the Note or Deed of Trust" and that "Plaintiffs have waived any argument that GMAC is not a proper party to enforce the Note and Deed of Trust as evidenced by their acknowledgement in the loan modification agreement that GMAC is the legal owner and holder of the Note and Security Instrument." (ECF No. 43-8, 4.) As to Plaintiffs' second claim, Chancellor Goldin held that as Plaintiff "failed to make any payments after September 9, 2009, Plaintiffs fail to specify what was improper about the notice of foreclosure sale of the property" and that "any TILA claims are barred by the one-year statute of limitations . . . which would have begun to run upon the execution of the Note and Deed of Trust in 2006." (*Id.*) Regarding Plaintiffs' third claim, Chancellor Goldin interpreted "Plaintiffs' allegations as attempting to state a claim for fraud based upon allegations that Defendants made false claims about the amounts owing." (*Id.*) However, Chancellor Goldin concluded (1) Defendants failed to meet the heightened pleading standards under Rule 9.02 for fraud, and (2) "having failed to make any payments after September 9, 2009, Plaintiffs cannot show any damages from their claim that Defendant falsely claimed that certain amounts were due." (*Id.*)

[4] A payment history filed with this Court shows a payment made in May 2010. (ECF No. 17-3.)

[5] On March 19, 2012, Plaintiff and Hanalei Harris filed a *pro se* complaint in the United States District Court for the Western District of Tennessee, Case Number 2:12-cv-02224-SHM-cgc, to restrict and prohibit foreclosure (ECF No. 1, 6 ¶ 13), which was dismissed on March 18, 2015. (*Id.* at 9 ¶ 19.) On June 5, 2012, Plaintiff and Hanalei Harris filed a third action in the Chancery Court, which was removed to the Western District of Tennessee, Case Number 2:12-cv-02460, and later dismissed on October 31, 2012.

dismissed that case with prejudice and barred Plaintiff from filing any further actions in federal court involving the residence, indicating that any future filings would be summarily dismissed.[6] *Harris v. Ocwen Loan Servicing, LLC*, No. 2:16-cv-02224-SHM-cgc, 2017 WL 899943, at *4–5 (W.D. Tenn. Mar. 7, 2017). Plaintiff appealed, and on November 22, 2017, the Sixth Circuit affirmed. *Harris v. Ocwen Loan Servicing, LLC*, No. 17-5399, 2017 WL 8791308, at *4 (6th Cir. Nov. 22, 2017). On or about February 15, 2018, Plaintiff, proceeding *pro se*, filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of Tennessee, Case Number 18-21373 ("Bankruptcy Proceeding"). (ECF No. 1, 3–4 ¶ 8, 12 ¶ 27.) On April 13, 2018, Defendant S&I, acting on behalf of Defendant Ocwen, filed a Proof of Claim in the amount of $968,409.17 in the Bankruptcy Proceeding. (*Id.* at 12 ¶ 28.) In support of the Proof of Claim, Defendant S&I attached various supporting documentation, including the Second Loan Modification Agreement and the loan payment history. (*Id.* at 13 ¶¶ 29–30.) On May 15, 2018, Plaintiff voluntarily dismissed her bankruptcy petition. (*Id.* at ¶ 31.)

On June 14, 2018, Wilson sent Plaintiff—in what Plaintiff characterizes as a "collection letter"—notice of Plaintiff's default under the terms of the Loan. (*Id.* at 14 ¶ 32.) According to Plaintiff, the letter stated the debt had been accelerated and the amount of the Loan was $974,060.60. (*Id.* at ¶ 33.) When Plaintiff "disputed the validity of the debt," she received copies of both the First and Second Loan

[6] Because the Complaint's allegations in the present case concern conduct occurring after the fourth action in 2017, the Court will address Plaintiff's claims.

Modification Agreements. (*Id.*)

On August 7, 2018, a Notice of Trustee Sale of B-9

the residence was allegedly mailed to Plaintiff by Wilson, who was again identified as the Substitute Trustee for the sale. The sale was scheduled to take place on August 31, 2018. (*Id.* at 15 ¶ 36.) On August 30, 2018, Plaintiff commenced this action claiming fraud and violations of the Fair Debt Collection Practices Act. (ECF No. 1.)

LEGAL STANDARDS

The standard of review for a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is the same as the standard of review for a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006). "The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993) (citing *Nishiyama v. Dickson Cty., Tenn.*, 814 F.2d 277, 279 (6th Cir. 1987)). When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must determine whether the complaint contains "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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012) (The court must "construe the complaint in the light most

favorable to the plaintiff and accept all allegations as true."). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In other words, although the complaint need not contain detailed facts, its factual assertions must be substantial enough to raise a right to relief above a speculative level. *Ass'n of Cleveland Fire Fighters v. City of Cleveland,* 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Determining whether a complaint states a plausible claim is "context-specific," requiring the Court to draw upon its experience and common sense. *Iqbal*, 556 U.S. at 679. A heightened standard applies to pleadings of fraud, such that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).

While the Court's decision to grant or deny a motion to dismiss "rests primarily upon the allegations of the complaint, 'matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint [] also may be taken into account.'" *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (quoting *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)). The Court may also consider "exhibits attached to the defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein without converting the motion to one for summary judgment." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680–81 (6th Cir. 2011) (citation omitted).

ANALYSIS

Defendant S&I moves to dismiss Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. (ECF No. 41.) Defendants Ocwen and BNYM challenge Plaintiff's claims through a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. (ECF No. 43.)

Count One of the Complaint, broadly labeled "Fraud," is asserted against Defendants Ocwen, BNYM, and S&I. (ECF No. 1, 16 ¶ 37, 20 ¶ 51.) Plaintiff alleges that (1) from February 9, 2010 through February 15, 2018, Defendants represented that the First Loan Modification Agreement governed Plaintiff's loan; (2) S&I's proof of claim filing in the Bankruptcy Proceeding was fraudulent because the Second Loan Modification Agreement was represented as operative; (3) neither Plaintiff nor her husband signed the Second Modification or presented it to the purported notary, and further, the document did not have an acknowledgement as required by TENN. CODE ANN. § 66-22-107; (4) the purported signature on the Second Modification is a product of forgery; (5) Defendants submitted an inaccurate loan payment history to the Bankruptcy Court; and (6) a July 25, 2018 letter contained fraudulent Monthly Account Statements.[7] (*Id.* at 16 ¶ 37, 17–19 ¶¶ 42–49, 20–21 ¶ 52–54.)

[7] As set forth above, Plaintiff did not include attachments with her Complaint, and it is unclear to the Court which letter Plaintiff is referring to, as Plaintiff's Complaint references a July 25, 2018 letter from Wilson as a "notice of dispute" (ECF No. 1, 20–21 ¶¶ 52–53), while Plaintiff's Response to Motion for Judgment on the Pleadings has attached a July 25, 2018 letter from Ocwen to Plaintiff's counsel, apparently sent in response to an inquiry from Plaintiff's counsel. (ECF No. 49-2.)

Count Two of Plaintiff's Complaint asserts that Defendants Ocwen and S&I are debt collectors who violated the Fair Debt Collection Practices Act ("FDCPA"). (*Id.* at 23 ¶¶ 59–60.) Plaintiff alleges that (1) Defendants made false representations concerning the "character, amount, and legal status 1692e(8) and (10), by asserting different modification of the debt," submitted false documents, and presented false Monthly Statements in connection with the July 25, 2018 letter in violation of 15 U.S.C. § 1692e(2); and (2) Defendants violated 15 U.S.C. § 1692e(8) and (10), by asserting different modification agreements governed the loan.[8] (*Id.*)

Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings

Defendant S&I contends that (1) Plaintiff has not satisfied the heightened pleading standard for fraud pursuant to Fed. R. Civ. P. 9(b) and therefore fails to state a claim upon which relief can be granted, and (2) the Bankruptcy Code displaces any claim under the FDCPA as to S&I. (ECF No. 41-1.) Defendants Ocwen and BNYM contend that (1) Plaintiff's

Complaint does not satisfy the heightened pleading standard for fraud and fails to state a claim upon which relief can be granted, and (2) Plaintiff has failed to state a claim under the FDCPA. (ECF No. 43-1.)

8 The Court notes that Plaintiff's Complaint identifies "15 U.S.C. § 1692(e)(2), (8), (10)," as the statutory bases for Count Two. The Court assumes that Plaintiff refers to 15 U.S.C. § 1692e(2), (8), and (10). (*See* ECF No. 1, 23–24 ¶ 60.)

Count One: Fraud

I. Collateral Estoppel

Defendants Ocwen and BNYM contend that Plaintiff's Complaint should be dismissed in its entirety because of the doctrine of collateral estoppel. (ECF No. 43-1, 7.) They reason that because collateral estoppel results in a determination that Plaintiff has been in default on the Loan continuously, Plaintiff cannot establish materiality or damages necessary to support a claim of fraud. (*Id.* at 7–9.) The Court notes that Plaintiff admits she has made only one payment since the spring of 2010. (*See* ECF Nos. 1 & 17-3.) "Federal courts must give the same preclusive effect to a state-court judgment as that judgment receives in the rendering state." *U.S. ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 414 (6th Cir. 2016). The purpose of collateral estoppel is to "protect[] litigants from the burden of relitigating an identical issue with the same party or his privy" and to "promot[e] judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). To prevail on a collateral estoppel claim, the asserting party must demonstrate that: (1) the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) the judgment in the earlier proceeding has become final, (4) the party against whom collateralestoppel was a party or is in privity with a party to the earlier proceeding, and (5) the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier

proceeding to contest the issue now sought to be precluded. *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009) (citations omitted). Tennessee courts no longer require mutuality for offensive or defensive use of collateral estoppel. *See Bowen ex rel. Doe v. Arnold*, 502 S.W.3d 102, 115 (Tenn. 2016). Tennessee courts use section 29 of the Restatement (Second) of Judgments as a guide in determining whether to apply offensive or defensive collateral estoppel in a particular case. *See id.* at 116.

A. Elements of Collateral Estoppel

(i) Identical Issue

Under the Tennessee collateral estoppel doctrine, the B-19 "issue or issues sought to be precluded in the later proceeding must be identical, not merely similar, to the issue or issues decided in the earlier proceeding." *Mullins*, 294 S.W.3d at 536 (Tenn. 2009) (citing *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 787 (Tenn. Ct. App. 2007)). In this case, Defendants Ocwen and BNYM invoke collateral estoppel to establish that Plaintiff was in default of the Loan. (ECF No. 43-1, 6.) Plaintiff has not disputed this issue, but argues that the issue sought to be precluded in this case is not identical to the issue decided in the prior proceedings. (ECF No. 49-1, 8.) Plaintiff reasons that the issue here is whether the Loan Documents and Monthly Statements were fraudulent, not whether Plaintiff was in default of the loan. (*Id.*) However, Defendants do not argue that they seek preclusion of the issue of fraud; rather

Defendants seek to preclude a contest of default. The fact that a finding of default will have an impact on the viability of a fraud claim does not transform the issue for which preclusion is sought.

In dismissing Plaintiff's state court case, the Chancery Court considered only the original Deed of Trust and the First Loan Modification Agreement. (ECF No. 43-8.) The Chancery Court expressly found that Plaintiff and her husband were in default on the Loan. It is interesting to note that the Chancery Court Order Granting GMAC's Motion to Dismiss was entered on January 27, 2012, over a year and a half after the Second Loan Modification Agreement was purportedly executed. (*See* ECF Nos. 17-3 & 29, 3, 8.) However, continuous non-payment of the mortgage, whether pursuant to the original Deed of Trust, the First Loan Modification, or the Second

Loan Modification, would result in default. In the final analysis, the issue of default was litigated and decided in the Chancery Court on January 27, 2012. Accordingly, the first element of collateral estoppel is met.

(ii) Actually Raised, Litigated, and Decided on the Merits

Next, the Court must determine whether the issue of default was actually raised, litigated, and decided on the merits in the First Action. An issue was "actually litigated" when it was "properly raised by the pleadings or otherwise placed in issue and was actually determined in the prior proceeding." *Mullins*, 294 S.W.3d at 536 (citations omitted). The determination of the issue must have been necessary to the

prior judgment to have a preclusive effect. *See id.* at 535 (citation omitted). Plaintiff's Complaint in the First Action in the Chancery Court made default of the loan an issue by alleging the defendants made misrepresentations which led to multiple defaults. (ECF No. 43-7, 4.) The First Action centered around two primary issues: (1) Wilson and/or GMAC's authority to conduct a sale of the residence; and (2) the procedures and practices underlying the foreclosure sale. (*Id.* at 3–4.) Thus, the complaint in the First Action contested default when it placed it in issue and challenged the propriety of the foreclosure. In other words, the Complaint's allegations implicitly raised the issue of default because challenging an assignee's authority to foreclose assumes there has been a default. This is sufficient for placing default in issue. Tennessee courts have applied a similar rationale in other contexts. *See In re Bridgestone/Firestone*, 495 S.W.3d 257, 268 (Tenn. Ct. App. 2015) ("Because the doctrine of forum non conveniens 'presupposes [that] there is at least one [available alternative] forum,' . . . in which plaintiffs may bring their case, the availability of [the alternative forum] is an issue that was 'actually litigated' by necessity . . . ." (quoting *Zurick v. Inman*, 426 S.W.2d 767, 771–72 (Tenn. 1968))).

The Chancery Court, in its January 27, 2012 Order, determined that Plaintiff was in default of the Loan. (ECF No. 43-8, 3.) The same Order granted GMAC's Motion to Dismiss and dismissed Plaintiff's claims with prejudice. (*Id.* at 6.) Clearly, the Chancellor found that because Plaintiff and her husband were in default, they had not provided a basis for finding that the foreclosure sale was otherwise improper and could not show damages for their assertion of fraud in the foreclosure process.

(*Id.* at 5–6.) The finding of default was therefore necessary to establish that the plaintiffs had failed to state an actionable claim. Thus, this issue was actually raised, litigated and decided on the merits.

(iii) Final Judgment

In her Response to Defendant Ocwen and BNYM's Motion, Plaintiff does not contest that the Chancery Court's January 27, 2012 Order was a final judgment. (ECF No. 49-1.)

(iv) Same Party or in Privity with Prior Party

The parties do not contest this element.

(v) Full and Fair Opportunity to Contest the Issue

As indicated above, Plaintiff contends that the issue sought to be precluded is not identical to the issue in this case, reasoning that fraud is the issue in the present case. Thus, Plaintiff argues that because the relevant issue is fraud, Plaintiff did not have a fair and full opportunity to contest the issue "because of the hidden and ongoing actions of fraud." (ECF No. 49-1, 8.) However, as explained above, Defendant Ocwen asserts collateral estoppel to establish that Plaintiff was in default, which is identical to the issue decided in the First Action. (ECF Nos. 43-1, 7 & 43-8, 3.) Fraud is certainly an issue in the present case, but it is not the issue for which preclusion is sought; Plaintiff's default is the finding for which Defendants seek to preclude litigation.

A full and fair opportunity to litigate the issue now sought to be precluded

"rests on considerations of fundamental fairness." *Mullins*, 294 S.W.3d at 538 (Tenn. 2009) (citing *Morris v. Esmark Apparel, Inc.*, 832 S.W.2d 563, 566 (Tenn. Ct. App. 1991)). Where the party against whom collateral estoppel is asserted was a plaintiff in the prior proceeding, courts consider (1) the procedural and substantive limitations placed on the plaintiff in the first proceeding, (2) the plaintiff's incentive to litigate the claim fully in the first proceeding, and (3) the parties' expectation of further litigation following the conclusion of the first proceeding. *Id.* at 538–39. Plaintiff has not asserted any procedural or substantive limitations were present in the First Action. As such, there is nothing to indicate that Plaintiff could not have fully contested whether she and her husband were in default in challenging Wilson and GMAC's authority to foreclose upon the residence. Further, Plaintiff and her husband did assert that subsequent defaults were caused by the conduct of the defendants in the First Action. (ECF No. 43-7, 4.) It is also clear that Plaintiff, in challenging the authority of an assignee to foreclose upon the residence, had a strong incentive to litigate the issue of default in the First Action. If Plaintiff would have proven she was not in default, then any action seeking foreclosure upon the residence would have been negated. The *Mullins* Court, in determining that the fifth element of collateral estoppel was not met, gave weight to the fact that the plaintiff had chosen to sue some defendants in federal court and other defendants in state court, thereby evincing an expectation of further litigation. *Mullins*, 294 S.W.3d at 539. Here, Plaintiff and her husband collectively sued all the defendants

(that is, those who had been a party to the mortgage at that point) in state court. (ECF No. 43-7.) There was no expectation of further litigation on the issue of default. Therefore, the Court finds that Plaintiff had a full and fair opportunity to litigate the issue of default in the First Action.

The collateral estoppel elements are met and the analysis will proceed taking into account that Plaintiff has been in default since 2010.

B. Exceptions to Collateral Estoppel

In response to Defendants Ocwen and BNYM[9] collateral estoppel argument, Plaintiff argues that collateral estoppel is unavailable "where the basis upon which the claims are adjudicated is based in fraud." (ECF No. 49-1, 7.) Plaintiff appears to merge her claim of fraud with the issue of collateral estoppel invoked by Defendants Ocwen and BNYM.9 Plaintiff argues that Tennessee courts will not enforce a contract produced by fraud. (*Id.*) However, this litigation does not concern the enforceability of any of the agreements entered into by Plaintiff. Rather, this litigation—insofar as it relates to

allegations of fraud—concerns whether Defendants made fraudulent misrepresentations to Plaintiff and the courts in the prior proceedings. (ECF No. 1, 16 ¶ 37, 19 ¶ 48, 20 ¶ 51, 22 ¶ 56.)

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9 Plaintiff cites *SecurAmerica Bus. Credit v. Schledwitz*, W2009-02572-COA-R3-CV, 2011 Tenn. App. LEXIS 462 (Tenn. Ct. App. 2011), *Shelby Elec. Co. v. Forbes*, 205 S.W.3d 448, 455 (Tenn. Ct. App. 2005), and *N.Y. Life Ins. Co. v. Nashville Tr. Co.*, 292 S.W.2d 749, 754 (Tenn. 1956). However, none of these cases involved the issue of collateral estoppel, but rather fraud as it relates to the enforceability of contracts.

II. Sufficiency of Fraud Pleading

As indicated above, in Count One of her Complaint, Plaintiff asserts fraud against Defendants. (ECF No. 1, 16 ¶ 37, 20 ¶ 51.) Because Plaintiff's fraud claim does not invoke a particular doctrine or statute, the Court assumes that Plaintiff asserts a Tennessee common-law fraud claim. (*Id.* at 16–22.) Overall, Plaintiff alleges that, in prior proceedings, Defendants misrepresented to Plaintiff and the courts which documents governed the Loan, which directly resulted in wrongful dismissal of Plaintiff's claims and defenses. (*Id.*)

To establish a *prima facie* fraud claim under Tennessee law, a plaintiff must establish that: (1) the defendant made a representation of a present or past fact; (2) the representation was false when it was made; (3) the representation involved a material fact; (4) the defendant either knew the representation was false, did not believe it to be true, or the defendant made the representation recklessly without knowing whether it was true or false; (5) the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) the plaintiff sustained damages as a result of the representation. *Hodge v. Craig*, 382 S.W.3d 325, 343 (Tenn. 2012) (citing *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008)).

Defendants argue that Plaintiff has failed to plead her fraud claim with the requisite particularity.[10] Rule 9(b) of the Federal Rules of Civil Procedure requires that, "[i]n alleging fraud or mistake, a party must state with particularity the

circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Pleading with particularity "requires allegations of time, place, and content of the alleged misrepresentation, the fraudulent intent of the defendant, and the resulting injury." *Dauenhauer v. Bank of N.Y. Mellon*, 562 F. App'x 473, 481–82 (6th Cir. 2014) (citing *Coffey v. Foamex L.P.*, 2 F.3d 157, 161–62 (6th Cir. 1993)). The purpose of the particularity requirement is to "provide fair notice to Defendants and enable them to 'prepare an informed pleading responsive to the specific allegations of fraud.'" *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007) (quoting *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 322 (6th Cir. 1999)). "Claims of fraud 'raise a high risk of abusive litigation.'" *U.S. ex rel. Marlar v. BWXT Y-12, L.L.C.*, 525 F.3d 439, 445 (6th Cir. 2008) (quoting *Twombly*, 550 U.S. at 569 n.14). While "conditions of a person's mind may be alleged generally" under Fed. R. Civ. P. 9(b), "the plaintiff still must plead facts about the defendant's mental state, which accepted as true, make the state-of-mind allegation 'plausible on its face.'" *See* Fed. R. Civ. P. 9(b); *Republic Bank & Tr. Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678). Plaintiff argues that she has satisfied the pleading standards imposed by Fed. R. Civ. P. 9(b) by setting forth the required time, place, and content of the fraudulent conduct. (ECF No. 50, 14.) Plaintiff has provided the time of the alleged fraud by stating that from February 9, 2010 until

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[10] Defendants Ocwen and BNYM cite Tennessee state court decisions for this proposition. (ECF No. 43-1, 11.) The Court notes that while state law governs the substantive aspects of the fraud claim, Fed. R. Civ. P. 9(b) governs the sufficiency of the pleadings in federal court. *See e.g.*, *Thompson v. Bank of America, N.A.*, 773 F.3d 741, 751 (6th Cir. 2014).

February 15, 2018, Defendants Ocwen and BNYM represented the First Loan Modification as the agreement governing the Loan. (ECF No. 1, 16 ¶ 37.) Similarly, Plaintiff alleges that Defendant S&I's fraudulent conduct occurred when the proof of claim was filed in the Bankruptcy Proceeding. (*Id.* at 17 ¶ 42.) Plaintiff has alleged the place of this conduct as being in the prior proceedings and in communications between Plaintiff and Defendants, and the content as being representations regarding the governing modification agreement. The Court notes that specific instances of such communications to Plaintiff are scarcely set forth in the Complaint.

Plaintiff alleges that from February 9, 2010 until February 15, 2018, Defendants represented that the Loan was governed by the First Loan Modification Agreement. (*Id.* at 16 ¶ 37.) However, in the Bankruptcy Proceeding, Defendant S&I filed a proof of claim, attached to which was the Second Modification Agreement; Defendant S&I represented to the Bankruptcy Court that this modification agreement governed the Loan rather than the First Loan Modification Agreement. (*Id.* at 17 ¶ 42.) Plaintiff alleges neither she nor her husband had ever seen or been presented with the Second Loan Modification Agreement prior to its presentation in the Bankruptcy Proceeding. (*Id.* at 17–18 ¶ 43.) Accordingly, Plaintiff states that she did not sign the Second Modification and that her purported signature was forged. (*Id.* at 18–19 ¶ 47, 21 ¶ 54.)

Plaintiff also asserts that from February 2010 until the submission of the Second Loan Modification Agreement, Plaintiff—in the litigation of her prior claims and defenses—relied upon the representations that the First Loan Modification governed the Loan. (*Id.* at 19 ¶ 48.) Further, Plaintiff alleges that Defendants presented a

fraudulent payment history to the Bankruptcy Court. (*Id.* at 19 ¶ 49.) Finally, Plaintiff alleges that Defendants intended to defraud Plaintiff through the aforementioned actions, which resulted in damages and Plaintiff's previous claims involving the residence being denied. (*Id.* at 20 ¶ 51, 22 ¶¶ 56–57.) Defendants argue that Plaintiff has failed to state a claim for fraud, for several reasons.[11] As noted, Defendants contend that Plaintiff has not satisfied the pleading standard for fraud with regard to the above particularity requirements and the elements of intent, reliance and damages. (ECF Nos. 41-1, 8 & 43-1, 12.)

While Plaintiff has provided the time, place, and content of the alleged misrepresentations, the Court finds that Plaintiff has not adequately pled the Defendants' fraudulent intent or Plaintiff's resulting injury. As described above, Plaintiff has been in default on the Loan since at least 2010 and has admitted not making any payments since that time. Therefore, the resulting injury cannot be any payments made or foregone in reliance on alleged misrepresentations regarding which Loan Document governed. Similarly, while Plaintiff alleges the resulting injury was the initiation of foreclosure and the denial of Plaintiff's previous claims, Plaintiff provides no facts from which the Court could infer that these outcomes were the product of any alleged misrepresentation. Plaintiff voluntarily dismissed her Bankruptcy Petition and was in default of the Loan regardless of which agreement governed. The default precludes a determination that foreclosure was

[11] Defendants Ocwen and BNYM incorporate by reference the arguments in Defendant S&I's Motion to Dismiss. (ECF No. 43-1, 2.)

improper. The Complaint provides no facts from which the Court could infer that despite Plaintiff's default, she would have succeeded on any previous claims or avoided foreclosure if not for the alleged misrepresentations. Therefore, Plaintiff has failed to allege the resulting injury with particularity.

Plaintiff has also failed to sufficiently allege the Defendants' fraudulent intent. Plaintiff makes no factual allegations that Defendants possessed the requisite intent to defraud Plaintiff beyond the conclusory statement that Defendants "intended to defraud the plaintiff." (*See* ECF No. 1, 20 ¶ 51.) The Complaint alleges no facts sufficient to support this conclusory statement. For the Court to take facts as true, there first must be facts alleged, and the Court may not infer intent based on conclusory allegations. *See Coffey*, 2 F.3d at 162 ("[A]llegations of fraudulent misrepresentation must be made with sufficient particularity and with a sufficient factual basis to support an inference they were knowingly made." (quoting *Ballan v. Upjohn Co.*, 814 F. Supp. 1375, 1385 (W.D. Mich. 1992))). While Plaintiff asserts that there were inconsistencies in representations regarding the governing modification agreement and forgery, this is not enough standing alone, and Plaintiff has not alleged any additional facts supporting the inference that Defendants intended to defraud Plaintiff. This falls short of the pleading requirement. *Pugh v. Bank of Am.*, No. 13-2020, 2013 U.S. Dist. LEXIS 92959, at *40 (W.D. Tenn. July 2, 2013) ("Claiming that information is inconsistent or inaccurate, without more, does not speak with

sufficient particularity 'and with a sufficient factual basis to support an inference' that the information was conveyed with intent to defraud." (quoting *Coffey*, 2 F.3d at 162)). Overall, Plaintiff's Complaint lacks the particularity required to support a claim of fraud. The Sixth Circuit has reached the same conclusion in similar cases. *See Dauenhauer*, 562 F. App'x at 482 ("Borrowers provide no facts to indicate that they were not in default, or that the Note holder did not have the right to initiate foreclosure proceedings.").

Even if Plaintiff's Complaint met the minimum particularity pleading requirements of time, place, content, intent, and resulting injury,

Plaintiff's Complaint does not establish the elements of a *prima facie* fraud case. *See Royal v. Select Portfolio Servicing, Inc.*, No. 11-2214-STA-dkv, 2012 WL 174950, at *7 (W.D. Tenn. Jan. 20, 2012) ("[E]ven if Plaintiff had pleaded . . . with the particularity required by Rule 9(b), Plaintiff would fail to state a claim under 12(b)(6).") The Complaint fails to establish the required materiality element because it does not set forth how the alleged misrepresentations were influential in the prior litigation outcomes. Given that Plaintiff was in default and had not made payments since 2010, a "reasonable person" would not "attach importance" to which Loan document ultimately governed, because some amount of payment was required under any of them. *See Patel v. Bayliff*, 121 S.W.3d 347, 353 (Tenn. Ct. App. 2003) (citing *Lowe v. Gulf Coast*

Dev., Inc., No. 01-A-01-9010-CH-00374, 1991 Tenn. App. LEXIS 860, at *22–23 (Tenn. Ct. App. Nov. 1, 1991)) (defining Tennessee's standard for materiality). Thus, default operates to preclude a finding of materiality. Additionally, and as explained above, Plaintiff has not set forth any facts that, taken as true, would establish or be helpful in establishing Defendants' fraudulent intent. Rather, Plaintiff has provided only the threadbare conclusion that "Defendants intended to defraud Plaintiff," and conclusory statements regarding forgery and authenticity of documents. (*See* ECF No. 1, 20 ¶ 51.) Further, Plaintiff has not alleged how— even if the proof of claim attachments were forgeries—Defendant S&I was involved with such conduct, since the extent of S&I's conduct was the filing of the proof of claim. (See ECF No. 1, 1 ¶ 1, 4–5 ¶¶ 9–11, 12–13 ¶¶ 28–30.) Similarly, Plaintiff has not identified any communications made from S&I to Plaintiff directly. As to damages, Plaintiff has failed to establish that required element for the same reason that she failed to plead with particularity the resulting injury. Because of Plaintiff's default and lack of payment, foreclosure and payments made may not serve as the damages.

Finally, Plaintiff has not provided facts supporting the assertion that she relied on Defendants' alleged misrepresentations. Plaintiff's Complaint mentions reliance twice. First, Plaintiff states simply that she "relied upon the representation" that the First Loan Modification Agreement was operative. (*See* ECF No. 1, 6 ¶ 13.) Second, Plaintiff states that she relied on the alleged

representation that the First Modification governed in conducting the prior litigation. However, Plaintiff does not describe how any alleged representation led Plaintiff to do anything differently from what she would have done absent the representation. Plaintiff clearly did not rely by making payments based on the representations, nor does she indicate that she forewent payment based on the representations. Plaintiff's Complaint simply does not describe what she did in reliance or the character of such; rather, Plaintiff provides only the legal conclusion that she acted in reliance. By failing to describe how the alleged misrepresentations caused her to change her position or take different action, Plaintiff has failed to establish the required reliance element. Therefore, Plaintiff has failed to satisfy the Fed. R. Civ. P. 9(b) pleading requirements and has not established—at a minimum—materiality, intent, reliance, and damages, which are required elements of a Tennessee fraud claim. Accordingly, Plaintiff's fraud claim is without merit and should be **DISMISSED** with prejudice.

Count Two: Fair Debt Collection Practices Act

Count Two of Plaintiff's Complaint alleges that Defendants Ocwen and S&I violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* The FDCPA's purpose is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). Plaintiff's Complaint alleges violations of 15 U.S.C. § 1692e(2), (8), (10). (ECF No. 1, 23–24 ¶¶ 60, 77.) Defendants argue, as set forth

more fully below, that Plaintiff has failed to state a claim upon which relief can be granted under the FDCPA.

To establish a *prima facie* case for an FDCPA violation, four elements are required:

(1) The plaintiff is a natural person who is harmed by violations of the FDCPA, or is a "consumer" within the meaning of 15 U.S.C. §§ 1692a(3), 1692(d) for purposes of a cause of action, 15 U.S.C. § 1692c or 15 U.S.C. § 1692e(11);

(2) The "debt" arises out of a transaction entered primarily for personal, family, or household purposes, 15 U.S.C. § 1692a(5);

(3) The defendant collecting the debt is a "debt collector" within the meaning of 15 U.S.C. § 1692a(6); and

(4) The defendant has violated, by act or omission, a provision of the FDCPA, 15 U.S.C. § 1692a–1692o. *Langley v. Chase Home Fin., LLC*, 1:10-cv-604, 2011 U.S. Dist. LEXIS 32897, at *14 (W.D. Mich. Mar. 11, 2011) (citing *Whittiker v. Deutsche Bank Nat'l Tr. Co.*, 605 F. Supp. 2d 914, 938–39 (N.D. Ohio 2009)).

A. FDCPA's Applicability to Proof of Claim Filings in Bankruptcy Proceedings

Defendant S&I contends that Plaintiff's FDCPA claim against S&I fails to state a claim due to the interplay between the Bankruptcy Code and the FDCPA. (ECF No. 41-1, 10.) The Supreme Court has recently addressed this issue. In *Midland Funding, LLC v. Johnson*, the plaintiff filed suit against a debt collector, alleging that the debt collector's filing of a time-barred proof of claim in a previous Chapter 13 bankruptcy proceeding violated the FDCPA. 137 S. Ct. 1407, 1411 (2017). The

Court held that because the debt collector's proof of claim fell within the Bankruptcy Code's definition of "claim," the proof of claim could not have been "false, deceptive, misleading, unfair, or unconscionable."[12] *Id.* at 1415–16. Ultimately, the Court concluded that the FDCPA was inapplicable to the proof of claim filing, finding no "good reason to believe that Congress intended an ordinary court applying the [FDCPA] to determine answers to these bankruptcy-related questions," and accordingly, dismissed the plaintiff's FDCPA claim. *Id.* at 1415. The essence of the holding is that in such a situation, the Bankruptcy Code

It is clear that Plaintiff cannot present an actionable claim upon which relief can be granted under the FDCPA as to Defendant S&I. As in *Midland Funding*, Plaintiff's FDCPA claim against Defendant S&I arises entirely from S&I's filing of the proof of claim.[13] The proof of claim was filed in the Bankruptcy Proceeding and without question concerned a right to payment arising from the Loan. *See* 15 U.S.C. § 101(5)(A). The fact that Plaintiff alleges that the proof of claim was false does not change the result. *See e.g.*, *Barkley v. Santander Consumer USA Inc.*, 617 B.R. 866, 878 (Bankr. S.D. Miss. 2020) ("[A] proof of claim that on its face is false because the

[12] In *Midland Funding*, the Court noted that "[a] claim is a right to payment," 11 U.S.C. § 101(5)(A), which is defined by state law. *Midland Funding*, 137 S. Ct. at 1411. Because the claim at issue in *Midland Funding* was time-barred, the Court resorted to the applicable state law definition to determine—while the remedy for the claim was nonetheless barred—whether a right to payment survived the expiration of the statute of limitations. *Id.* The Court further indicated that a right to payment does not refer merely to enforceable claims. *Id.* at 1412. This Court need not determine the applicable Tennessee definition of a right to payment because the proof of claim at issue in this case was not time-barred.

[13] In her Complaint, Plaintiff alleges that from 2010 through 2018, Defendant S&I made representations to Plaintiff and prior courts regarding the governing modification. (ECF No. 1, 24 ¶¶ 77–78.) However, the Complaint is devoid of facts supporting the assertion that S&I communicated with Plaintiff directly. The Court also notes that S&I was not involved in any of the prior litigation aside from the Bankruptcy Proceeding.

underlying debt is extinguished will not violate [15 U.S.C.] § 1692e any more than did the proof of claim in *Midland Funding* that on its face was time-barred."). Accordingly, Plaintiff's claim under the FDCPA as to Defendant S&I fails because the FDCPA is inapplicable to Defendant S&I's proof of claim filing. Plaintiff's FDCPA claim is **DISMISSED** as to Defendant S&I.

B. Definition of "Debt Collector" under FDCPA

Plaintiff alleges that Defendants Ocwen and S&I are debt collectors pursuant to 15 U.S.C. § 1692a(6). (ECF No. 1, 23 ¶ 59.) In response, Defendants Ocwen and BNYM contend that they are not "debt collectors," citing the Supreme Court's recent holding in *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019). (ECF No. 51, 2–4.) In *Obduskey*, the Court held that enforcers of security interests are within the FDCPA's definition of "debt collector" only for the purposes of 15 U.S.C. § 1692f(6). *Obduskey*, 139 S. Ct. at 1037–38.

Because Plaintiff brings suit under 15 U.S.C. § 1692e, Plaintiff must establish that Defendants Ocwen and S&I fall within the FDCPA's "primary definition" of "debt collector." *Id.* Therein, a "debt collector" is defined as "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6); *Obduskey*, 139 S. Ct. at 1037–38.

Ultimately, Plaintiff's Complaint has not established the *prima facie*

elements of an FDCPA claim, which requires factual allegations regarding Defendants' status as debt collectors. Plaintiff has failed to do this. The Complaint makes only the conclusory allegation that "Ocwen Loan Servicing and Shapiro and Ingle, LLP are debt collectors as that term is defined pursuant to [15 U.S.C. § 1692]." (ECF No. 1, 23 ¶ 59.) Pleadings that "are no more than conclusions are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. The FDCPA's primary definition refers "not to what the defendant specifically did in a given case, but to what the defendant generally does." *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480–81 (6th Cir. 2020) (citing *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 411 (6th Cir. 1998)). Glaringly absent from Plaintiff's Complaint are any such allegations. As a result, Plaintiff has failed to plausibly show that Defendants are debt collectors as required for her § 1692e claim. *See id.* at 481.

Accordingly, Plaintiff cannot meet the *prima facie* requirements for an FDCPA claim. Plaintiff's FDCPA claim is **DISMISSED**.

CONCLUSION

For the foregoing reasons, Defendant S&I's Motion to Dismiss Plaintiff's Complaint is **GRANTED**, and Defendants Ocwen and BNYM's Motion for Judgment on the Pleadings is **GRANTED**. Accordingly, Defendants S&I, Ocwen, and BNYM are dismissed from this case. Plaintiff's Complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED on this 7th day of December, 2020.

ss/ John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

QUANNAH HARRIS,
Plaintiff,

v. Case No. 2:18-cv-02597-JTF-tmp

OCWEN LOAN SERVICING, INC.,
BANK OF NEW YORK MELLON
TRUST COMPANY,
NATIONAL ASSOCIATION f/k/a
THE BANK OF NEW YORK
TRUST COMPANY, N.A., as successor to
JP MORGAN CHASE BANK, N.A., as
TRUSTEE FOR RESIDENTIAL ASSET
MORTGAGE PRODUCTS, INC.
MORTGAGE ASSET-BACKED
PASS-THROUGH CERTIFICATES SERIES
2006-RZ4 & SHAPIRO & INGLE LLP,
Defendants.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Order Granting Defendant Shapiro & Ingle LLP's Motion to Dismiss and Defendants Ocwen Loan Servicing, LLC and Bank of New York Mellon Trust Company's Motion for Judgment on the Pleadings and Dismissing Case with Prejudice, entered on December 7, 2020 (ECF No. 54.)

APPROVED:

ss/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES
DISTRICT JUDGE

THOMAS M. GOULD
CLERK

December 7, 2020
DATE

Cory A. Chitwood
(By) LAW CLERK