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

W & L VENTURES, INC. and	§	
TEXAS 1st PRIORITIES, INC.	§	
Plaintiffs,	§	
	§	
	§	C.A. NO 4:13-cv-00754
	§	
EAST WEST BANK	§	
Defendant.	§	

East West Bank's
(1) Amended Motion to Dismiss Plaintiffs' Claims for Declaratory Judgment, Wrongful Foreclosure, and Fraud Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b); and
(2) Amended Motion for Partial Summary Judgment as to Plaintiffs' Claims for Consequential Damages Claims Under Negligent Misrepresentation and Promissory Estoppel

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To the Honorable Lee H. Rosenthal, United States District Judge:

Pursuant to Fed. R. Civ. P. 15(a)(3), and in response to Plaintiffs' First Amended Complaint (Doc. 17, filed April 8, 2013) ("Am. Complt."), East West Bank ("the Bank") (1) moves this Court to dismiss the claims of W&L Ventures and Texas 1st Priorities, Inc. of Declaratory Judgment, Wrongful Foreclosure, and Fraud Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b); and (2) moves this Court to grant partial summary judgment as to Plaintiffs' claims for consequential damages under their counts alleging negligent misrepresentation and promissory estoppel. The Bank respectfully shows the Court as follows:

1.
Jurisdiction

This Court has diversity jurisdiction over the parties in this case pursuant to §§ 1332 and 1441 of Title 28, United State Code. The Bank timely removed this case on March 17, 2013.

2.
Nature and Stage of the Proceedings

This case arises out of a post-bankruptcy foreclosure sale by the Bank. Plaintiffs ask the Court to unwind a foreclosure sale of one property in which Plaintiffs had no legal or equitable interest (the so-called "Riverstone Tract") and another property in which Plaintiffs held liens subordinate to the Bank's (the "Beasley Tract"). Plaintiffs did not own fee-simple title to either tract and were not borrowers or guarantors on the notes securing the Bank's senior liens. Plaintiffs do not allege lack of notice of the foreclosure sales, and Plaintiffs have failed to tender the amounts due on the Bank's notes that were secured by the properties subject to the foreclosure sales.

Plaintiffs' Amended Complaint contains numerous fatal defects, including the following:

- Plaintiffs had junior liens in the "Beasley Tract," and no security interest in the "Riverstone Tract." With at most junior lien interests in the properties at issue, Plaintiffs were not entitled to any notice of the foreclosure on the "Riverstone Tract" under the Chapter 51 of the Texas Property Code.

- Plaintiffs impermissibly seek both damages and rescission. These are inconsistent remedies; rescission is an equitable remedy used as a substitute for monetary damages when such damages are inadequate. Plaintiffs do not, and cannot, allege an inadequate claim, at law, for damages; thus, the Court must dismiss their rescission remedy.

- Plaintiffs fail to state a claim for rescission (or any other unwinding or undoing) of the foreclosure sales because Plaintiffs failed to "do equity" by making an unconditional tender, in cash, to undo the sales.

- Plaintiffs admit the sales took place at the correct location listed in the notices: "401 Jackson Street… ***or such other area designated by the Fort Bend County Commissioner Court as the area where non-judicial foreclosures shall take place."*** Ex. 1, at 2 (emphasis added). The county commissioners of Fort Bend County have designated 1418 Eugene Heimann Circle, Richmond, Texas as the place where foreclosure sales are to take place, and Plaintiffs do not dispute that the sales took place there.

- Plaintiffs allege that the foreclosure sales were flawed because the Trustee met with interested bidders for 15 minutes before the time that one of the sales was to occur. But they do not allege that they were ready, willing, and able to tender cash for any of the properties or that they were misled by the Trustee's actions and kept from bidding.

- Plaintiffs carelessly allege that the "Riverstone Tract" consisted of a 112-acre tract. In fact, the only "Riverstone Tract" sold in the January 1, 2013 sale was a 33-acre tract (known in the bankruptcy as the "Riverstone Two" Tract), which the Trustee sold to Perry Homes, LLC at the foreclosure. Plaintiffs actively participated in the bankruptcy of the borrower, GBI Group, LLC, and had actual notice that all that was left of Riverstone was the 33-acre "Riverstone Two" Tract.

- Plaintiffs' Amended Complaint alleges that the Riverstone tracts were sold by the Trustee for a grossly inadequate sales price to Perry Homes, LLC, $1,700,000, but were worth as much as two times the sales price. Plaintiffs do not explain that the Bank filed two appraisals in the bankruptcy, valuing the "Riverstone Two" Tract between $1.74 million and $1.83 million, which Plaintiffs never contested.

In short, nothing in Plaintiffs' Amended Complaint, or the documents that the Court should consider with it, gives rise to a cause of action voiding the sale, or for wrongful foreclosure, or fraud. In addition, the Bank asks that the Court grant partial summary judgment on Plaintiffs' claims for consequential damages (e.g., lost profits or benefit-of-the-bargain damages) arising from their claims for negligent misrepresentation and promissory estoppel.

3.
Background and Plaintiffs' Allegations

This case arises out of an ongoing dispute between a senior lienholder and a junior lienholder over the land of GBI Group LLC, a bankrupt real-estate developer. The Bank held senior liens on all of GBI Group's land. Plaintiffs acknowledge that all of the Bank's liens were cross-collateralized (Am. Complt. ¶ 14 at 6), allowing the Bank the legal right to foreclose even if the borrower/developer defaulted on only one loan.

Plaintiffs W&L Ventures, Inc. and Texas 1st Priorities, Inc. ("Plaintiffs") held the second and third liens in one of the tracts, known as the "Beasley Tract." Am. Complt. ¶ 5, at 2. Plaintiffs' junior status as to only part of the properties subject to the Bank's foreclosure sales created three problems for Plaintiffs. First, the Bank owed no duty to Plaintiffs, as junior lienholders in only one of the tracts, to notify Plaintiffs of the foreclosure sales of any of the tracts. Second, the Bank's senior status allowed the Bank to cut off the junior liens in any foreclosure sale, unless Plaintiffs, as junior lienholders, had paid off the Bank's liens ***before*** the Bank's foreclosure. Third, Plaintiffs' burden to cure the borrower's defaults applied to the Bank's cross-collateralized senior liens on ***all*** of the bankrupt developer/borrower's land. Because of the Bank's cross-collateralization rights, Plaintiffs would need to pay off all the bankrupt developer/borrower's liens, on all of the Bank's loans, not just the debt on the Beasley

Tract in which Plaintiffs held a security interest. Plaintiffs do not challenge the Bank's senior lien status in this suit and did not do so in the bankruptcy. *E.g.*, Ex. 4 (Doc. 314 at ¶ 12).

The borrower/developer, GBI Group, LLC (and related entities) filed a Chapter 11 bankruptcy petition on April 4, 2011 in jointly-administered cases under Case No. 11-32968; *In Re: New Saigon Development, LLC et al*.; Bankr. S.D. Tex. (Judge Karen K. Brown). Plaintiffs, along with the Bank, appeared as creditors in the bankruptcy. The Bankruptcy Court did not confirm a plan. Subsequently, both the Bank and Plaintiffs filed motions, on November 7, 2012, for confirmation of the termination of the automatic stay. Judge Brown granted both motions and signed orders confirming the termination of the stay as to Plaintiffs and the Bank on December 6, 2012. *See generally* Exs. 5, 6 (Docs. 323, 324).

The Bank filed its foreclosure notice at issue in this case in the Fort Bend County Clerk's office on Tuesday, December 11, 2012. Ex. 1. Plaintiffs did not post their second and third liens. This made sense because regardless of whether Plaintiffs foreclosed their liens, foreclosure of the Bank's senior liens would (and did) cut off Plaintiffs' junior interests. The Bank foreclosed on its liens on January 1, 2013. Am. Complt. ¶ 8, at 3.

A summary of the Bank's liens, its foreclosure on its liens, and Plaintiffs' role as a junior lienholder in the "Beasley Tract," appears below.

Tract/acreage	Borrower	1st Lien Holder	2nd/3rd Liens	Top bidder at foreclosure	Bid	Plaintiffs' tender
"Riverstone Two" (33 acres)	GBI Group	Bank (cross-collateralized)	Bank	Perry Homes	$1,700,000	None
Beasley (315 acres)	GBI Group	Bank (cross-collateralized)	Plaintiffs	Bank (credit bid)	1,450,000	None
New Saigon	New Saigon	Bank (cross-collateralized)	None	Bank (credit bid) (Harris County)	3,500,000	None

Plaintiffs allege that the "Riverstone Tract" was sold by the Trustee to the highest bidder at the sale, Perry Homes, for $1,700,000. Am. Complt. ¶¶ 15-16, at 6-7. This allegation blurs the two Riverstone tracts. The "Riverstone One" Tract originally contained 178 lots, but at the time of the bankruptcy, only 44 lots remained. Ex. 3, ¶ 33 & Ex. C to same. During the bankruptcy, all 44 remaining lots in the "Riverstone One" Tract were sold pursuant to Court orders that Plaintiffs received and did not oppose. *E.g.*, Case No. 11-32968, Doc. Nos. 38, 43, & 109. At the time of the foreclosure, all that remained was the 33 acres in the "Riverstone Two" Tract. *E.g.*, Ex. 4, ¶ 18(b), at 2 n.4. Plaintiffs claim that the sales price was grossly inadequate and that the property was worth as much as twice that amount ─ even though Plaintiffs were on notice from the bankruptcy of the Bank's two appraisals appraising the "Riverstone Two" very close to the $1,700,000 bid by Perry Homes.[1] Plaintiffs never contested these facts or these valuations in the bankruptcy.

A. Location of Sale

The foreclosure notice described the location as "401 Jackson Street, Richmond, Texas, ***or such other area designated by the Fort Bend County Commissioners Court as the area where non-judicial foreclosure sales shall take place."*** Ex. 1, at 2 (emphasis added). The Fort Bend County Commissioners required foreclosure sales to take place at 1418 Eugene Heimann Circle, Richmond, Texas. The Texas Legislature has eliminated all doubt about the location of a

[1] *Compare* Am. Petition ¶ 16, at 7 (alleging price paid was ***less than 50% of the*** actual fair market value of such tract, ***if not much less***") (emphasis added), *with* Ex. 3 ¶ 33, at 16 (Doc. 188, Bank's 2/26/2012 motion reporting value of Riverstone Two Tract as ***$1,780,000*** based on prior appraisal); Ex. 4, at 4, 7 (Doc. 318, Bank's 11/7/2012 motion confirming termination of automatic stay reporting that "[t]he 'as-is' value of the Riverstone Two Property was ***$1,830,000*** as of April 26, 2012 . . . [and that] ***all of the Riverstone [One] Property was sold*** during the pendency of the Bankruptcy Cases so it is not taken into consideration . . . .") (emphasis added). The foreclosure notice stated that the sale "**shall not cover any part of the Property that had been released from the liens of the Deed of Trust**." *E.g.*, Ex. 1, at 3 (emphasis in original).

foreclosure sale: when the county commissioners designate a location for a foreclosure, the foreclosure trustee ***must*** conduct the sale at that location. *See* Tex. Prop. Code § 51.002(a) and (h). Plaintiffs acknowledge that the sale occurred at the correct location. Am. Complt. ¶ 10, 12 (alleging that Perry Homes purchased the "Riverstone Tract" at 1418 Eugene Heimann Circle).

B. Alleged Pre-Sale Conversation

Plaintiffs allege that the Substitute Trustee spoke with two potential bidders at 401 Jackson Street at 12:45 p.m., thus causing the sale, according to Plaintiffs, to take place earlier than the time, 1:00 p.m., stated in the Notice of Sale. Am. Complt. ¶ 10-12, at 4-5. Plaintiffs do not allege that the Trustee "announced" the sale to begin before 1:00 p.m. Furthermore, Plaintiffs concede two potential bidders appeared and at 1418 Eugene Heimann Circle; these allegations contradict Plaintiffs' claims that the sale was flawed and that the property sold for "grossly inadequate" consideration. Am. Complt. ¶ 16, at 7.

C. The Value of the Riverstone Two Tract

Plaintiffs' claims depend on proof that the 33-acre "Riverstone Two" Tract sold for grossly inadequate consideration. *Id.* Plaintiffs contend that "upon information and belief" that the $1,700,000 sale price to Perry Homes "constitutes less than 50% of the actual fair market value of such tract, if not much less." Am. Complt. ¶ 16, at 7. Plaintiffs omit any reference to the appraisals filed in the bankruptcy valuing the property between $1,780,000 and $1,830,000 – ***not*** the $3,400,000 or more that Plaintiffs claim.

D. Plaintiffs Claim the Bank Fraudulently Failed to Sell the Tracts in Bulk

Plaintiffs also allege fraud, negligent misrepresentation, and promissory estoppel with respect to what Plaintiffs contend were representations by the Bank before the sale. Plaintiffs allege that "possibly" in August or "late 2012" (Plaintiffs fail to say exactly when), Plaintiffs

expressed interest to the Bank (Plaintiffs fail to say exactly to whom) in buying one of the GBI Group's tracts from the Bank before the foreclosure sale. Am. Complt. ¶ 14-15, at 6. Plaintiffs claim that these unnamed representative(s) of the Bank represented or promised to them that Bank would not sell either what Plaintiffs incorrectly call the "Riverstone" Tract or Beasley Tract separately, but would require any buyer to purchase all of the tracts together. *Id.* The Trustee subsequently noticed and sold the tracts separately. Plaintiffs claim that the Bank's separate sale of the so-called "Riverstone" Tract (in reality, the 33-acre "Riverstone Two" Tract) to Perry Homes gives rise to cause of actions fraud, negligent misrepresentation, and promissory estoppel. (Before foreclosure, the Bank held only liens on the subject properties and could only assign the notes and deeds of trust to a potential purchaser.)

4.
Summary of Motions

A. Dismissal of Declaratory Judgment Claims Under Rule 12(b)(6). Plaintiffs' request for a declaratory judgment rescinding the sale of the Riverstone Two tract as "void *ab initio*" fails to state a cause of action because Plaintiffs, as junior lienholders in only the Beasley Tract, and as remote third parties as to the Riverstone Two Tract, had no right to notice of the foreclosure sales under Chapter 51 of the Texas Property Code. Moreover, Plaintiffs fail to allege that they have an inadequate remedy at law for damages, and have failed to make an unconditional cash tender offer to the buyer, Perry Homes, LLC. Plaintiffs' other requests for declaratory relief are nothing more than an artful repleading of their other claims in order to claim attorney's fees and should be dismissed. The Texas Declaratory Judgments Act does not apply in Federal Court in any event. The Federal Act governs and it does not contain the attorney's fee provision that the Texas Act has.

B. Dismissal of Wrongful Foreclosure Claims Under Rule 12(b)(6). Plaintiffs' wrongful foreclosure claims alleging that the sales were flawed do not state a plausible cause of action that any defects existed or that the property was sold for grossly inadequate consideration. Moreover, the price paid by Perry Homes, LLC at the sale of the "Riverstone Two" Tract was consistent with the Bank's appraisals of the property that Plaintiffs failed to contest in the bankruptcy.

C. Dismissal of Fraud Claims Under Rule 12(b)(6). Plaintiffs fail to state a cause of action for fraud because the Bank's alleged insistence that Plaintiffs buy both the Riverstone Two and Beasley tracts in bulk imposed no legal requirement upon the Trustee to foreclose and sell the properties in bulk at the foreclosure sale. The Trustee complied with Texas foreclosure law and practice in conducting the sale on a parcel-by-parcel basis. The undisputed appraisals in the bankruptcy, which are consistent with the foreclosure sale price, negate any scienter as well.

D. Partial Summary Judgment – Lost Profits. The Bank is entitled to summary judgment on Plaintiffs' negligent misrepresentation and promissory estoppel claims for losses other than their out-of-pocket losses. Neither remedy entitles Plaintiffs to benefit-of-the-bargain damages or lost profits.

5.
Motion to Dismiss – Standard of Review

A. Failure to State a Claim. Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is said to be

plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

Plausibility will not be found where the claim alleged in the complaint is based solely on legal conclusions, or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Nor will plausibility be found where the complaint "pleads facts that are merely consistent with a defendant's liability" or where the complaint is made up of "'naked assertions devoid of further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949, quoting *Twombly,* 550 U.S. at 557. Plausibility, not sheer possibility or even conceivability, is required to survive a Rule 12(b)(6) motion to dismiss. *Twombly*, 550 U.S. at 556-57; *Iqbal*, 129 S. Ct. at 1950-51.

The Court of Appeals applies a *de novo* standard of review of a district court's granting a motion to dismiss in the Rule 12(b)(6). *See, e.g., Shipp v. McMahon,* 199 F.3d 256, 260 (5th Cir. 2000).

B. Court's Consideration of Extrinsic Evidence. In deciding a Rule 12(b)(6) motion, the Court may consider documents attached by the defendant that are referred to in the pleadings and central to the claim; "[i]n so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); *see also Hassell v. Bank of America*, Civil Action No. H-12-1530, 2013 U.S. Dist. LEXIS 7623 (S.D. Tex., Jan. 18, 2013) (Werlein, J.) ("[W]hen a plaintiff fails to introduce a pertinent document as part of her pleading . . . [a] defendant may introduce the document as an exhibit to a motion attacking the sufficiency of the pleading; that certainly will be true if the plaintiff has referred to the item in the complaint and it is central to the affirmative case."); *Morlock, L.L.C. v. Bank of New York Mellon*, Civil Action No. 4:12-1798, 2012 U.S. Dist.

LEXIS 167565 *6, n.19 (S.D. Tex., Nov. 27, 2012) (Atlas, J.), citing CHARLES ALAN WRIGHT & ARTHUR B. MILLER, 5B FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004). The Court may also consider items subject to judicial notice and matters of public record as well. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012). The Bank attaches documents Plaintiffs have either referred to in their Amended Complaint or are a matter of public record from the bankruptcy that led to the foreclosure at issue:

Ex.	Date	Bankr. Doc.#	Description
1	12/11/2012	N/A	Notice of Substitute Trustee's Sale re: Riverstone Two Tract (noticing 1/1/2013 sale at "401 Jackson Street, Richmond, Texas, ***or such other area designated by the Fort Bend County Commissioners Court***"
2	12/11/2012	N/A	Notice of Substitute Trustee's Sale re: Beasley Tract (noticing 1/1/2013 sale at "401 Jackson Street, Richmond, Texas, ***or such other area designated by the Fort Bend County Commissioners Court***"
3	2/26/2012	188	Bank's Motion for Relief from Stay (¶ 33 and Ex. C contain references and excerpt of 2011 appraisal of Riverstone Two Tract with as-is value of $1,780,000)
4	11/07/2012	314	Bank's Motion for Order Confirming Termination of Automatic Stay (¶ 18(b) contains reference to 2012 appraisal of Riverstone Two Tract with as-is value of $1,830,000)
5	12/06/2012	323	Order Confirming Termination of Automatic Stay as to East West Bank (notifying Plaintiffs of Bank's right to foreclose)
6	12/06/2012	324	Order Confirming Termination of Automatic Stay as to Plaintiffs (notifying Bank of Plaintiffs' right to foreclose)
7	01/08/2013	N/A	Plaintiffs' demand letter to the Bank, with copy to Perry Homes, demanding "cancellation" of "Riverstone" foreclosure, but failing to tender cash to anyone.
8	01/23/2013	N/A	Bank's letter to Plaintiffs stating that "any transaction related to [the Riverstone Two Tract] would require action by Perry Homes, LLC."

6.
Plaintiffs Fail to State a Plausible Cause of Action for
Declaratory Judgment, Wrongful Foreclosure, and Fraud

A. Plaintiffs Fail to State a Claim for Declaratory Judgment

Plaintiffs seek to have the sale of the allegedly 112-acre "Riverstone Tract" to Perry Homes, LLC, as well as the Bank's purchase of the Beasley Tract (via credit bid) declared void *ab initio*. *See* Am. Complt. ¶ 21, at 8. As discussed above, the public records make clear that there was no sale of a 112-acre Riverstone tract, so only the sale of the "Riverside Two" Tract is addressed here.

1. Plaintiffs' Allegations of Lack of Notice Fail to State a Claim for Declaratory Relief Under Chapter 51 of the Texas Property Code. Plaintiffs were junior lienholders in the Beasley Tract and held no security interest in any "Riverstone" Tract. As such, they were not entitled to notice from the Bank of any of the foreclosure sales at issue in this case. *See, e.g., Jones v. Bank United*, 51 S.W.3d 341, 344 (Tex. App. – Houston [1st Dist.] 2001, pet. denied). Plaintiffs' request for declaratory relief arises out of Chapter 51 of the Texas Property Code. Am. Complt. ¶ 21, at 8. However, Chapter 51 afford Plaintiffs no relief, because it "was enacted to provide a minimum level of protection for the debtor," not junior lienholders or others. *See Pizzini v. Bank of America*, Civil Action No. SA-12-CV-308-XR, 2012 U.S. Dist. LEXIS 69856 *16 (W.D. Tex., May 18, 2012), citing *Hausmann v. Tex. S&L Ass'n*, 585 S.W.2d 796, 799 (Tex. Civ. App. – El Paso 1979, writ ref'd n.r.e.) (holding that because plaintiffs were not debtors on the mortgage, they were not entitled to notice, and mortgagee complied with statute by sending notices to debtors).

2. Plaintiffs Fail to State a Claim for Rescission Because They Have Failed to Allege an Inadequate Remedy at Law. Under Texas law, a party may seek remedy of rescission (in equity) only if that party's remedy of damages at law that is somehow inadequate. *Davis v.*

Estridge, 85 S.W.3d 308, 310 (Tex. App. – Tyler 2001, pet. denied); *Scott v. Sebree*, 986 S.W.2d 364, 368 (Tex. App. – Austin 1999, pet. denied).

Here, Plaintiffs have failed to allege any inadequacy of their remedy at law for damages against the Bank. Plaintiffs do not, and cannot, allege that they need the equitable remedy of rescission to be made whole. *See Scott*, 986 S.W.2d at 968.

3. Plaintiffs Cannot Allege Both Rescission and Damages. Similarly, a party may not seek rescission and damages in the same complaint. The plaintiff must elect one or the other. *See, e.g., Aimis Art Corp. v. Northern Trust Sec.*, 641 F. Supp. 2d 314, 319 (S.D.N.Y. 2004); *Mustang Trac. & Equip. Co.*, Civil Action No. H-91-2523, 1993 U.S. Dist. LEXIS 21277, *21 (S.D. Tex., Oct. 8, 1993) (Rosenthal J.) ("[R]escission restitution are alternatives to money damages; a plaintiff cannot both rescind a transaction and ask for the benefit of the bargain rescinded.), quoting *Quintel Corp. v. Citibank*, 596 F. Supp. 797, 803 (S.D.N.Y. 1984); *Diversified, Inc. v. Gibraltar Sav. Ass'n*, 762 S.W.2d 620, 623 (Tex. App. – Houston [14th Dist.] 1988, writ denied).

Here, Plaintiffs have pled both for rescission and damages. This they cannot do. Because they fail to allege any inadequacy as to their claim at law for damages, the Court must dismiss their claim for rescission and any other request seeking to void, cancel, or undo the sale in any way.

4. Plaintiffs Have Failed to Allege an Unconditional Tender of Cash. Plaintiffs' request for such declaration of rescission of any of the foreclosure sales as void *ab initio* fails to state a claim because Plaintiffs have failed to make an unconditional tender, in cash, for any of the properties sold in the January 1, 2013 foreclosure sales. This is a fatal defect. *See, e.g., Gongora v. Deutsche Bank*, Civil Action No. H-12-0278, 2012 U.S. Dist. LEXIS 155110, *3-4

(S.D. Tex., Oct. 30, 2012) (Rosenthal, J.). In order to plead a claim for rescission, and to obtain a declaration voiding the sale, Plaintiffs must tender, and plead that they have tendered, "an unconditional offer by a debtor or obligor to pay for another, in the current coin of the realm, a sum on a specified debt or obligation." *Fillion v. David Silvers Co.*, 709 S.W.2d 240, 246-47 (Tex. App. ─ Houston [14th Dist.] 1986, writ ref'd n.r.e.), cited in *Gongora*, at *3-4, and quoted in MIKE BAGGETT, TEXAS FORECLOSURE: LAW AND PRACTICE § 2.156, at 226 (2001). A letter of credit or other loan or financing is not sufficient tender for rescission. *Id*. As Judge Keith Ellison recently observed, "in order to be entitled to have a foreclosure sale set aside in Texas, a plaintiff ***must actually tender – not just offer to tender – the full amount owed*** on the note." *Rabinowitz v. Fed. Home Loan Mort. Corp.*, Civil Action No. 12-cv-1869, U.S. Dist. LEXIS 143131 *8 (S.D. Tex., Sept. 25, 2012) (Ellison, J.) (emphasis added).

Here, Plaintiffs' vague assertions that "they were 'willing to offer substantially more than $1.7 million for the Riverstone Tract'" (Am. Complt. ¶ 15, at 6) fail to meet the requirement of an "unconditional offer" in "current coin of the realm" – that is, cash.

5. None of Plaintiffs' Other Claims Are Appropriate for Attorneys' Fees Under the Texas Declaratory Judgments Act. None of the other declarations Plaintiffs seek (e.g., that the foreclosure "failed to comply" with various aspects of Texas law) impose any remedy beyond those sought under its causes of action for wrongful foreclosure, fraud, negligent misrepresentation, and promissory estoppel. Plaintiffs cannot bootstrap a claim under the Texas Declaratory Judgments Act (chapter 37 of the Tex. Civ. Prac. & Rem. Code) into a device to obtain attorneys' fees "in a diversity case because the statute is not substantive law." *Utica Lloyd's Tex. v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998). The Federal Declaratory Judgments Act, 28 U.S.C § 2201, governs; it contains no provision for attorney's fees.

B. Plaintiffs Fail to State a Claim for Wrongful Foreclosure

Plaintiffs allege two defects in the sales: (1) that the Notices of Sale wrongly stated the location where the sales were to take place (hereinafter "the Wrong Address" Claim); and (2) that the Trustee allegedly spoke with interested bidders before the sale actually commenced at 12:45 p.m., instead of the time set forth in the Notice, 1:00 p.m. (hereinafter "the Early Start" Claim). Neither allegation states a claim for wrongful foreclosure for which relief can be granted.

1. Plaintiffs Had No Entitlement to Notice. As explained in section 6(A)(1) above, Plaintiffs were not debtors on any of the notes or deeds of trust at issue in the case, and held only junior liens on one of the foreclosed properties, the Beasley Tract. As such, they fail to state a claim for wrongful foreclosure at law or in equity.

2. Alleged "Wrong Address" in the Notices of Sale Fails to State a Claim. Plaintiffs acknowledge that "the notices of the Bank's January 1, 2013 attempted foreclosure . . . all stated that the sale would occur at 401 Jackson Street, Richmond Texas, ***or such other area designated by the Fort Bend County Commissioners Court*** as the area where non-judicial foreclosure sales shall take place. The earliest time at which the sale will begin is 1:00 o'clock p.m." Am. Complt. ¶ 8, at 3 (emphasis added); *cf.* Exs. 1, 2 at 2 (file-stamped 12/11/2012) (emphasis added).

The Bank's Notices complied with Texas law. The Texas Property Code states that the Commissioners Court "***shall designate***" the area where foreclosure sales occur. Tex. Prop. Code § 51.002(a) (emphasis added). The Code allows the commissioners to designate an area other than the courthouse. *Id.* § 51.002(h). But whatever the place, the sale "must occur" where the Commissioners Court requires. *Id.* § 51.002(a) ("The sale ***must occur*** in the designated area.")

(emphasis added). Plaintiffs' Amended Complaint omits these unambiguous provisions of § 51.002(a). *See* Am. Complt. ¶ 7, at 2-3 (Plaintiffs' incomplete description of statute).

Plaintiffs concede that the Fort Bend County Commissioners Court designated the location for the foreclosure sales to be at 1418 Eugene Heimann Circle, Richmond, Texas. Complt. ¶ 8, at 3. Plaintiffs also acknowledge that the sale occurred at 1418 Eugene Heimann Circle. *See* Am. Complt. ¶ 10-12, at 4-5.

Nothing about Plaintiffs' allegations of "wrong address" raises a plausible claim for wrongful foreclosure. To prevail in a wrongful foreclosure suit, a party must establish (1) a defect in the foreclosure sale proceedings; (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price. *See, e.g., Sauceda v. GMAC Mortgage Corp.*, 268 S.W.3d 135, 139 (Tex. App. – Corpus Christi 2008, no writ).

Here, Plaintiffs' "wrong address" claim fails to adequately plead any of the elements of wrongful foreclosure. The Notices of Sale correctly stated the place that the sales would take place. Plaintiffs do not allege that they were ready, willing, and able to bid at the sales and were prevented from doing so because of the alleged defect in the Notices of Sale, which led to the grossly inadequate sales price. Plaintiffs thus fail to state a claim that these alleged defects caused any injury to them.

3. Alleged "Early Start" to Foreclosure Sale Fails to State a Claim. Plaintiffs also allege that the foreclosure sale for the Riverstone Tract began at 12:45 p.m., instead of the 1:00 p.m. start time in the Notice of Sale. Am. Complt. ¶ 11, at 5 ("[T]he Bank's Substitute Trustee apparently met with two interested bidders at 401 Jackson Street . . . at 12:45 p.m., for a total of 15 minutes *before* the sale was supposed to start.") (emphasis in original). Mere conversations between Trustee and prospective bidders before the commencement of the sale do not state a

plausible claim of any irregularity. Plaintiffs do not allege that the Trustee "announced" the sale before 1:00 p.m. Plaintiffs do not allege that these conversations were inappropriate or somehow chilled the sale. Plaintiffs do not allege that they intended to bid but were misled by the Trustees conduct. The Court should dismiss Plaintiffs' claims.

C. Plaintiffs Fail to State a Claim for Fraud

Plaintiffs allege that the Bank committed fraud by representing to them that it would only sell the properties in bulk and would not sell them separately. Am. Complt. ¶ 14, at 6. The fraud, according to Plaintiffs, occurred when the Trustee sold the so-called "Riverstone Tract" separately at the foreclosure sale. Am. Complt. ¶¶ 14-15, at 6. Plaintiffs' fraud claims contain at least four defects: (1) nothing about the alleged statements amount to misrepresentations given the Bank's cross-collateralization rights that Plaintiffs admit the Bank had; (2) Texas law required the Bank in the foreclosure to sell the tracts separately, as opposed to in bulk, further negating any scienter; (3) the Bank's sale of the Riverstone Two tract for $1,700,000 was consistent with the uncontested appraisals filed in the bankruptcy, further negating any scienter; and (4) Plaintiffs' failure to bid at the sale or tender cash after the sale precludes any reliance or causation.

In Texas, the elements of a claim of fraud by misrepresentation are: (1) a misrepresentation that (2) the speaker knew to be false or made recklessly (3) with the intention to induce the plaintiff's reliance, followed by (4) actual and justifiable reliance (5) causing injury. *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 620 F.3d 465, 468 (5th Cir. 2010).

Under Fed. R. Civ. P. 9(b), Plaintiffs must plead their allegations of fraud with particularity. Plaintiff must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were

fraudulent." *Sullivan v. Leor Energy LLC*, 600 F.3d 542, 551 (5th Cir. 2010). A dismissal for failure to comply with Rule 9(b) is a dismissal on the pleading for failure to state a claim. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F. 3d 304, 308 (5th Cir. 1999).

"To plead scienter adequately, a plaintiff must set forth specific facts that support an inference of fraud." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994). In *Bittinger v. Wells Fargo Bank*, Civil Action No. H-10-1745, 2011 U.S. Dist LEXIS 90631, *17 (S.D. Tex., Aug. 15, 2011) (Rosenthal, J.), this Court addressed the issue of pleading fraud in a foreclosure lawsuit. Just as in any other fraud case, Plaintiffs here must specify the statement contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent. *Id.*, citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997); *see also Askanase v. Fatjo*, 148 F.R.D. 570, 574 (S.D. Tex. 1993) ("The allegation should allege the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants."). A plaintiff should be denied leave to amend if the court determines that amendment would be futile. *E.g., Bittinger*, 2011 U.S. Dist. LEXIS 90631, *8 (citations and quotations omitted).

Here, Plaintiffs' fraud claim fails the pleading requirements in four separate ways that no repleading can fix.

First, Plaintiffs' allegation that the Bank represented before the sale that it would only sell all of the tracts together and refused to sell Plaintiffs the "Riverstone Tract" separately indicates that Plaintiffs do not understand a lender's rights before foreclosure. Prior to the sale, the Bank held only liens on the Riverstone Two and other tracts. Accordingly, the Bank had only the right to assign the notes and deeds of trust; it did not have actual title to the tracts. The tracts were cross-collateralized, one to another. The Bank could determine on what basis it

would assign the notes and deeds of trust. It could refuse assign the notes separately. However, once the foreclosure process began, the Trustee could determine to post the tracts separately for sale. Once the Notices of Sale were posted, Plaintiffs had legal notice of the sale of tracts on an individual basis and could have placed bid on the Riverstone Two tract if they had so desired. They did not. Hence, nothing the Bank said or didn't say about selling the tracts before foreclosure could have resulted in damages to Plaintiffs.

Second, Texas law required the Bank to sell the tracts off separately, as opposed to a bulk, status. *See Stanglin v. Keda Dev. Corp.,* 713 S.W.2d 94, 95 (Tex. 1986) (holding that execution sale of three tracts in bulk was irregularity that caused grossly inadequate consideration because market value of one lot, or two lots at the most, might have satisfied the underlying indebtedness); *see also* BAGGETT § 2.84 at 153 ("Best practice is to offer the sale in parcels first and then determine if a bulk sale will fully satisfy the debt or will exceed the cumulative price for the individual proceeds."). A bulk sale in the foreclosure would have risked a wrongful foreclosure claim by the debtor, GBI Group, under cases like *Stanglin*. Indeed, as stated above, the Bank had no obligation to give notice of the foreclosure to Plaintiffs, as junior lienholders; it was the debtors, not junior lienholders or remote third parties, for whom the Texas Legislature enacted the remedies under Chapter 51 of the Texas Property Code. *See generally Jones v. Bank United*, 51 S.W.3d at 344; *Pizzini*, 2012 U.S. Dist. LEXIS 69856 *15-16. Under Texas law and practice, Plaintiffs' allegation that a parcel-by-parcel sale at foreclosure was fraudulent is simply not plausible; it is not indicative of any misrepresentation, let alone one with plausible scienter, as required under Rule 9(b) and *Twombly/Iqbal*.

Third, Plaintiffs allege that the Bank defrauded them by allowing the Trustee to sell the property for grossly inadequate consideration of $1,700,000 based "upon information and

belief." Am. Complt. ¶ 16, at 5. But, when, as here, Plaintiffs had the ability to appraise the property throughout the bankruptcy and to scrutinize the Bank's two appraisals, Plaintiffs must do more than speculate to properly plead and maintain an adequate fraud claim. *See Tuchman*, 14 F.3d at 1068 (allowing pleading "on information and belief" only when facts pleaded "are peculiarly within an opposing party's knowledge."). Moreover, Plaintiffs' allegation fails because the Riverstone Two Tract was sold for the same basic value represented in the bankruptcy, further negating any scienter. The Bank's appraisals of the property valued the Riverstone Two tract at **$1,780,000** in 2011 (Ex. 3 ¶ 33, at 16 & Ex. C, Doc. 188) to **$1,830,000** in 2012 (Ex. 4 ¶ 18(b), at 7, Doc. 314). Plaintiffs did not dispute these valuations in the bankruptcy proceeding, and given these values in relation to the foreclosure price, Plaintiffs fail to state a plausible claim of scienter.

Fourth, Plaintiffs contend that but for the alleged flaws in the Notice of Sale, the Riverstone Two Tract may be worth as much as $3,400,000 (*see* Am. Complt. ¶ 16). This allegation is equally without merit. As discussed above, there were no flaws in the Notice. Moreover, Plaintiffs' failure to bid at the sale or tender the amount necessary to support a claim for rescission, in cash, negates any reliance or causation as to this aspect of their fraud claim.

7.

Motion for Partial Summary Judgment – Standard of Review

A party may file a motion for summary judgment at any point in the case until 30 days after the close of discovery. Fed. R. Civ. P. 56(b). Summary judgment is appropriate where the movant shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Prison Legal News v. Livingston*, 683 F.3d 201, 211 (5th Cir. 2012), citing Fed. R. Civ. P. 56(a). In making this determination, all inferences are drawn in

favor of the non-movant. *Id*. at 211. The court of appeals reviews the district court's grant of summary judgment *de novo*, applying the same standards as the district court. *Id.*

8.
Motion for Partial Summary Judgment as to Plaintiffs' Claims for Consequential Damages for Promissory Estoppel and Negligent Misrepresentation

In addition to their claims above, Plaintiffs seek "consequential damages" under theories of promissory estoppel and negligent misrepresentation. *See* Am. Complt., at 12 (prayer). However, Texas law limits relief available under each cause of action to out-of-pocket damages and forbids "consequential damages" such as lost profits or benefit-of-the-bargain damages. *Fretz Constr. Co. v. Southern Nat'l Bank*, 626 S.W.2d 478, 483 (Tex. 1981) (promissory estoppel); *Fed. Land Bank v. Sloan,* 825 S.W.2d 439, 442 (Tex. 1991) (negligent misrepresentation).

Therefore, the Court should rule as a matter of law denying Plaintiffs' claims for "consequential damages" under their causes of action for promissory estoppel and negligent misrepresentation and limiting those causes of action, at most, to Plaintiffs' out-of-pocket expenses, if any.

9.
Conclusion

Based on the foregoing, East West Bank respectfully requests the Court to (a) grant its motion to dismiss Plaintiffs' claims for declaratory judgment, wrongful foreclosure, and fraud; and (b) to grant its motion for partial summary judgment on Plaintiffs' claims for benefit-of-the-bargain, consequential, or lost-profits damages arising out of their causes of action for negligent misrepresentation and promissory estoppel.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this pleading was served on the following parties via facsimile, electronic filing, and hand-delivery on this the 22nd day of April, 2013.

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