NOT FOR PRINTED PUBLICATION

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

CATHERINE WEIDNER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NO. 4:13-CV-263
	§	
NATIONWIDE PROPERTY & CASULATY INSURANCE COMPANY,	§	
	§	
Defendant.	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

On June 9, 2014, the United States Magistrate Judge issued its report and recommendation [Doc. #41], this matter having been referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. The Magistrate Judge recommended that Defendant's Motion for Partial Summary Judgment and for Partial Judgment on the Pleadings [Doc. #20] be granted.

In its report and recommendation, the Magistrate Judge concluded that Plaintiff's extra-contractual claims for violations of the Deceptive Trade Practices Act ("DTPA"), Texas Insurance Code, and breach of the common law duty of good faith and fair dealing should be dismissed. On June 23, 2014, Plaintiff Catherine Weidner and Intervenor-Plaintiff Jerry Dickerson (collectively "Plaintiffs") filed their objections to the report and recommendation of the Magistrate Judge, objecting only to the Magistrate Judge's findings and recommendations on Plaintiffs' insurance code claims [Doc. #48]. Thus, the findings and recommendations of the

Magistrate Judge on Plaintiffs' DTPA and good faith and fair dealing claims are adopted. Defendant filed its response to Plaintiffs' objections on July 3, 2014 [Doc. #51].

Plaintiffs first object to the Magistrate Judge's consideration of Defendant's Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings, arguing that a Rule 12(c) motion may not be made or considered when the facts are in dispute. Plaintiffs contend that "[t]he motion for judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain" [Doc. #48 at 2 (citing *Hebert Abstract Co. v. Touchstone Props., Ltd*., 914 F.2d 74, 76 (5th Cir. 1990))]. Plaintiffs assert that because their claims are "hotly disputed," a Rule 12(c) motion is not appropriate.

This issue was never raised before the Magistrate Judge. In their response to Defendant's Rule 12(c) motion, Plaintiffs argued that Rule 12(c) relief was procedurally improper because Defendant was first required to bring a Rule 12(b)(6) motion to dismiss. The Magistrate Judge considered, and properly rejected, this argument; however, the issue of whether a Rule 12(c) motion is appropriate when certain facts are in dispute was never raised. "The filing of objections is not an opportunity to… present new arguments. Nor is it an opportunity to infer facts or arguments that were not actually present in the pleadings and summary judgment response." *Green v. Bank of America, N.A.*, No. 4:13cv92, 2013 WL 6178499, at *1 (E.D. Tex. Nov. 25, 2013).

As for Plaintiffs' objection, the Fifth Circuit in *Hebert Abstract* noted, "A motion brought pursuant to Fed. R. Civ. P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." 914 F.2d at 76 (citing 5A WRIGHT & MILLER, *Federal Practice & Procedure*, § 1367 at 509-10 (1990)). A 12(b)(6)-type argument may be

made for failure to state a claim, which Rule 12(h) specifically preserves for presentation in a 12(c) motion. 5A WRIGHT & MILLER, *Federal Practice & Procedure*, § 1367 at 509-10; FED. R. CIV. P. 12(h)(2)(b). The problem with Plaintiffs' argument is that there are no disputed facts regarding the claims raised by Defendant's motion. The "hotly disputed" facts alleged by Plaintiffs primarily relate to Plaintiffs' breach of contract claim, which was not at issue in this motion. In fact, the Magistrate Judge found that there were no facts or allegations made in support of Plaintiffs' claims; thus, no facts could possibly be in dispute, particularly in relation to Plaintiffs' insurance code claims. The Magistrate Judge found:

> Plaintiffs' claims arising under the Texas Insurance Code suffer from the same limitations. Plaintiffs assert (merely by stating the statute number) that Nationwide made, issued, or circulated or caused to be made, issued, or circulated an estimate, circular, or statement misrepresenting with respect to a policy issued or to be issued: (A) the terms of the policy; (B) the benefits or advantages promised by the policy; or (C) the dividends or share of the surplus to be received on the policy. TEX. INS. CODE § 541.051(1). There are no facts alleged by the Plaintiffs to plausibly suggest that Nationwide misrepresented the terms of the policy, benefits or advantages of the policy, or dividends to be received under the policy. Plaintiffs also assert that Nationwide used a name or title of a policy or class of policies that misrepresents the true nature of the policy or class of policies. TEX. INS. CODE § 541.051(4). Again, there are no facts alleged to support this assertion. Plaintiffs also contend that Nationwide misrepresented Plaintiffs' insurance policy by "(i) making an untrue statement of material fact. § 541.0060(1); (ii) failing to state a material fact that is necessary to make other statements made not misleading, considering the circumstances under which the statements were made. § 541.060(2); (iii) making a statement in such a manner as to mislead a reasonably prudent person to a false conclusion of a material facts. § 541.060(3)" (Dkt. #5 at ¶ 27; Dkt. #8 at ¶ 28). Plaintiffs fail to allege what misrepresentations or omissions they are referring to, in what manner the statements were made, and in what way Plaintiffs were misled by the statements.

[Doc. #41 at 8-9]. The Magistrate Judge went on to find that in asserting a claim for violation of TEX. INS. CODE § 542.055, "Plaintiffs have not made any allegations to make this claim plausible." *Id*. at 9. Regarding Plaintiffs' claim under TEX. INS. CODE § 542.056, the Magistrate Judge found that "Plaintiffs do not state any facts to make this claim plausible." *Id*.

The same is true for Plaintiff's claims for violations of TEX. INS. CODE § 542.057, about which the Magistrate Judge noted that "Plaintiffs do not allege that Nationwide notified them under Section 542.056 that it was going to pay the claim or part of the claim. Plaintiffs allege the exact opposite – that Nationwide denied the claim." *Id.* at 10. There are simply no material facts in dispute regarding these claims because Plaintiffs failed to allege any. The court finds that it was not procedurally improper to consider the arguments made by Defendant presented in a Rule 12(c) motion. Plaintiffs' objection is overruled.

Plaintiffs next object to the dismissal of their statutory claims due to a lack of evidence. Plaintiffs then recite other possible causes of loss, such as lightning strikes, the CSST gas line that was discovered with holes in it, and the mineral spirits that were found in the home after testing by Defendant's experts. Plaintiffs contend that these "known facts" did not require Defendant to confer with their retained expert prior to making a determination on coverage.

Plaintiffs' evidence, even if accepted as true, is not evidence that Defendant's investigation was unreasonable. This evidence can only show that the experts Defendant relied on in conducting its investigation were wrong about the causation of the fire. Therefore, these facts are inapplicable to the extra-contractual issues that were before the court in Defendant's Rule 12(c) motion, and are only applicable to the ultimate breach of contract dispute between the parties that will be resolved at a later time. This objection is overruled.

Plaintiffs next object to the dismissal of their statutory penalty interest claim under Texas Insurance Code § 542.060. Plaintiffs contend that "an insurance company's good faith assertion of defense does not relieve the insurer of liability for penalties for tardy payment, as long as the insurer is finally judged liable" [Doc. #48 at 7 (citing *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 461 (5th Cir. 1997) (citation omitted))].

The statutory language of Texas Insurance Code § 542.060 states:

> If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

Plaintiffs assert that if Defendant is found to be liable for the claim, even if Defendant denied the claim in good faith, Defendant is still liable for penalties for tardy payment. The problem with this argument is that Plaintiffs ignore the fact that the Magistrate Judge found that Plaintiffs failed to allege sufficient facts to show that Defendant was not in compliance with the insurance code, and recommended dismissal of all of Plaintiffs' claims. Thus, even if Defendant is found to be liable for the claim at trial, there can be no finding that Defendant was not in compliance with the Texas Insurance Code, because Plaintiffs failed to plead sufficient facts establishing such a claim. That is a requirement of the statute, and Plaintiffs' objection is overruled.

The court has conducted a *de novo* review of the objections in relation to the pleadings and applicable law. After careful consideration, the court concludes Plaintiffs' objections are without merit and are, therefore, overruled.

It is therefore **ORDERED** that the Report and Recommendation of United States Magistrate Judge [Doc. #41] is adopted, and Defendant's Motion for Partial Summary Judgment and for Partial Judgment on the Pleadings [Doc. #20] is **GRANTED.** Accordingly, Plaintiffs' extra-contractual claims for violations of the DTPA and Insurance Code and claims for breach of the common law duty of good faith and fair dealing are dismissed.

So **ORDERED** and **SIGNED** this **19** day of **August, 2014.**

Ron Clark, United States District Judge

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CATHERINE WEIDNER	§	
	§	
V.	§	CASE NO. 4:13-CV-263
	§	Judge Clark/Judge Mazzant
NATIONWIDE PROPERTY & CASUALTY	§	
INSURANCE COMPANY	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendant's Motion for Partial Summary Judgment and for Partial Judgment on the Pleadings (Dkt. #20). After reviewing the motion, the responses, and the relevant pleadings, the Court recommends that Defendant's motion be granted.

BACKGROUND

This litigation arises out of Plaintiff Catherine Weidner ("Weidner") and Intervenor-Plaintiff Jerry Dickerson's ("Dickerson," collectively "Plaintiffs")[1] loss of their home on April 11, 2011, due to fire. The residence was located at 1608 S. Elm Street, Sherman, Texas 75090, and was covered by a policy of insurance issued by Defendant Nationwide Property & Casualty Insurance Company ("Nationwide") under policy number 78 42 HO 441739 (the "Policy"). Plaintiffs timely filed a claim with Nationwide that same day, April 11, 2011, and sought to recover for the losses sustained as a result of the damage sustained by the insured property. Weidner is a named insured, and Dickerson is defined as an insured under the Policy because he is Weidner's husband. Nationwide subsequently conducted an investigation of the fire claim, but eventually denied the claim on April 27, 2012.

[1] In most instances, Weidner and Dickerson will be referred to as Plaintiffs, since their claims are substantively identical and the motion and response address both Plaintiffs' claims together (*see* Dkts. #5, #8).

Weidner filed the present lawsuit in Grayson County Court on April 8, 2013, and Nationwide timely removed (Dkts. #1, #2). On May 31, 2013, Weidner filed an amended complaint alleging claims for breach of contract, violations of the Deceptive Trade Practices Act ("DTPA") and Insurance Code, and breach of the common law duty of good faith and fair dealing (Dkt. #5). Dickerson intervened in the case on July 24, 2013 (Dkt. #8). On February 5, 2014, Nationwide filed its motion for partial summary judgment and partial judgment on the pleadings, arguing that Plaintiffs' extra-contractual claims should be dismissed (Dkt. #20). Plaintiffs filed their response on March 21, 2014 (Dkt. #29). On March 28, 2014, Nationwide filed its reply (Dkt. #31). In addition, on April 17, 2014, Plaintiffs filed a motion for leave to file new evidence in response to Nationwide's motion for partial summary judgment and partial judgment on the pleadings (Dkt. #35). Nationwide filed a response (Dkt. #38). This motion was granted by the Court on April 18, 2014.

LEGAL STANDARDS

A. Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." "A motion brought pursuant to Fed. R. Civ. P 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (citation omitted); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312-13 (5th Cir. 2002). "The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Hughes v.*

Tobacco Inst., Inc., 278 F.3d 417, 420 (5th Cir. 2001) (citing *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 n.8 (5th Cir. 2000)).

"Pleadings should be construed liberally, and judgment on the pleadings is appropriate only if there are no disputed issues of fact and only questions of law remain." *Great Plains Trust*, 313 F.3d at 312 (quoting *Hughes*, 278 F.3d at 420). The standard applied under Rule 12(c) is the same as that applied under Rule 12(b)(6). *Ackerson v. Bean Dredging, LLC*, 589 F.3d 196, 209 (5th Cir. 2009); *Guidry v. American Public Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007).

Rule 12(b)(6) provides that a party may move for dismissal of an action for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The Court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In deciding a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). Thus, "[t]o 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*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the Court identifies conclusory allegations and proceeds to disregard them, for they are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 681. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id.* "This standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the

necessary claims or elements." *Morgan v. Hubert*, 335 F. App'x 466, 470 (5th Cir. 2009). This evaluation will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

B. Motion for Summary Judgment

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits "[show] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The trial court must resolve all reasonable doubts in favor of the party opposing the motion for summary judgment. *Casey Enters., Inc. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The substantive law identifies which facts are material. *Anderson*, 477 U.S. at 248.

The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* at 247. If the movant bears the burden of proof on a claim or defense on which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure *all* of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). But if the nonmovant bears the burden of proof, the movant may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000). Once the movant has carried its burden, the nonmovant must "respond to the motion for summary

judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers*, 209 F.3d at 424 (citing *Anderson*, 477 U.S. at 248-49). The nonmovant must adduce affirmative evidence. *Anderson*, 477 U.S. at 257. The Court must consider all of the evidence but refrain from making any credibility determinations or weighing the evidence. *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007).

ANALYSIS[2]

As a preliminary matter, Plaintiffs imply in their response that it is improper for Nationwide for file a motion for judgment on the pleadings at this stage in the process (see Dkt. #29 at 8 (stating "[d]iscovery enabled the parties to ferret out evidence that define their respective cases, and Nationwide's rules arguments attempt to ignore the discovery that has taken place."). Plaintiffs also assert that "if Nationwide needed Plaintiffs to clarify their claims or demonstrate their legal viability it should have filed a 12(b)(6) motion, rather than conducting 9-months of discovery." *Id*. at 10. This argument is incorrect and without authority. The only requirement for a 12(c) motion for judgment on the pleadings is that it must be made after the pleadings are closed, but early enough not to delay trial. *See* FED. R. CIV. P. 12(c) ("After the pleadings are closed-but early enough not to delay trial-a party may move for judgment on the pleadings."). The pleadings are closed, and this motion will not delay trial in this case, which is currently set for September of 2014. Thus, Nationwide's motion for judgment on the pleadings is proper, and will be considered by the Court.

Nationwide first assets that Plaintiffs' pleadings fail to satisfy the federal standard as to Plaintiff's DTPA and Insurance Code claims. Nationwide contends that Plaintiffs merely repeat the language of the statute and common law, and at times only list statutory citations without

[2] In its reply, Nationwide objects to all hearsay evidence presented in Plaintiffs' response, and moves the Court to strike all such evidence (*see* Dkt. #31 at 3 n.7). If the Court considers such evidence in deciding the motion for summary judgment, the Court will address the objection at that time.

referring to the legal standard. Plaintiffs contend that their complaints provide fair notice of their claims and set forth facts sufficient to show that those claims are legally plausible on their face.

"A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc*., 528 F.3d 413, 418 (5th Cir. 2008) (citing *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004)). "[T]he central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Id*. (citing *Hughes v. The Tobacco Inst., Inc*., 278 F.3d 417, 420 (5th Cir. 2001)). The Court must accept the factual allegations in the pleadings as true, but a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A complaint must contain "more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Id*. at 545.

Plaintiffs' allegations of wrongful conduct under the DTPA include a list of six provisions of the DTPA by section number, without stating the acts that the statute prohibits. Plaintiffs also allege four additional violations by stating that Nationwide violated the DTPA by (a) "committing false, misleading, or deceptive acts or practices as defined by § 17.46(b)"; (b) "breach of warranty"; (c) "unconscionable action or course of action"; and (d) "use or employment of an act or practice in violation of the Texas Insurance Code Chapter 541.151 et. seq. as described herein" (Dkt. #5 at 4-5; Dkt. #8 at 5-6). The factual allegations in Plaintiffs' complaints are also limited. Plaintiffs assert that on April 11, 2011, there was an explosion, which caused Plaintiffs' residence to burn down (Dkt. #5 at ¶ 5; Dkt. #8 at ¶ 6). Plaintiffs contend that the residence was covered by an insurance policy issued by Nationwide, the insurance premiums were timely paid, and they timely filed a claim with Nationwide (Dkt. #5 at ¶ 4, 6; Dkt. #8 at 5, 7). Plaintiffs allege that Nationwide "promised to pay certain rental fees

from Plaintiff [and Intervenor-Plaintiff's] rental home and furniture and approved of [their] lease agreements" (Dkt. #5 at ¶ 7; Dkt. #8 at ¶ 8). Plaintiffs contend that Nationwide then breached its obligations to pay. Plaintiffs further assert that Nationwide assured Plaintiffs that the losses arising out of the explosion and fire in the home would be paid, but Nationwide denied the claim. Plaintiffs also contend that Nationwide's investigator did not conduct a thorough and complete investigation.

Plaintiffs contend that Nationwide violated the following sections of the DTPA:

> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not; …
>
> (9) advertising goods or services with intent not to sell them as advertised; …
>
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
>
> (13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;…
>
> (20) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve...; …
>
> (24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

TEX. BUS. & COM. CODE § 17.46. Plaintiffs also allege that Nationwide committed false, misleading, or deceptive acts or practices, committed a breach of warranty, undertook an unconscionable action or course of action, and used or employed an act or practice in violation of the Texas Insurance Code. The Court agrees that Plaintiffs' complaints fail to set forth facts sufficient to suggest a plausible claim for relief of these claims. For example, Plaintiffs fail to set out facts that suggest in what way Nationwide violated these provisions. Plaintiffs accuse

Nationwide of "breach of warranty" and "representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve," but do not allege facts of the nature of the warranty, nor where it may be located, nor by what acts Nationwide purportedly breached the warranty. Plaintiffs fail to allege any facts regarding advertising of goods or services by Nationwide, or any false statements made concerning the need for parts, replacement or repair service. In any event, Plaintiffs fail to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The Court recommends that Plaintiffs' claims arising under the Texas DTPA be dismissed.

Plaintiffs' claims arising under the Texas Insurance Code suffer from the same limitations. Plaintiffs assert (merely by stating the statute number) that Nationwide made, issued, or circulated or caused to be made, issued, or circulated an estimate, circular, or statement misrepresenting with respect to a policy issued or to be issued: (A) the terms of the policy; (B) the benefits or advantages promised by the policy; or (C) the dividends or share of the surplus to be received on the policy. TEX. INS. CODE § 541.051(1). There are no facts alleged by the Plaintiffs to plausibly suggest that Nationwide misrepresented the terms of the policy, benefits or advantages of the policy, or dividends to be received under the policy. Plaintiffs also assert that Nationwide used a name or title of a policy or class of policies that misrepresents the true nature of the policy or class of policies. TEX. INS. CODE § 541.051(4). Again, there are no facts alleged to support this assertion. Plaintiffs also contend that Nationwide misrepresented Plaintiffs' insurance policy by "(i) making an untrue statement of material fact. § 541.0060(1); (ii) failing to state a material fact that is necessary to make other statements made not misleading, considering the circumstances under which the statements were made. § 541.060(2); (iii) making a statement in such a manner as to mislead a reasonably prudent person to a false conclusion of a material

facts. § 541.060(3)" (Dkt. #5 at ¶ 27; Dkt. #8 at ¶ 28). Plaintiffs fail to allege what misrepresentations or omissions they are referring to, in what manner the statements were made, and in what way Plaintiffs were misled by the statements. The Court finds that these claims also should be dismissed.[3]

Plaintiffs further argue that Nationwide violated TEX. INS. CODE § 542.055, which requires an insurer to (1) acknowledge receipt of the claim; (2) commence any investigation of the claim; and (3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time will be required from the claimant not later than the 15th day after the date an insurer receives notice of a claim. Plaintiffs have not made any allegations to make this claim plausible. Plaintiffs allege only that the claim was made to Nationwide on April 11, 2011, and fail to make any allegations that indicate that Nationwide did not meet these requirements. This claim should be dismissed.

Plaintiffs allege that Nationwide violated TEX. INS. CODE § 542.056, which states "an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th day after the date the insurer receives all items, statements, and forms required by the insurer." This section also contains some other deadlines if the insurer suspects arson, or is unable to reject the claim within this time period. Plaintiffs do not state any facts to make this claim plausible. Plaintiffs allege only when their claim was denied, in April of 2012, but do not allege that Nationwide had received all the materials required or that it was in excess of the 15 or 30 days allowed by the statute. This claim should be dismissed.

[3] The Court does not recommend dismissal of Plaintiffs' claim for "failing within a reasonable time to: (A) affirm or deny coverage of a claim to a policy holder; or (B) submit a reservation of rights to a policyholder" or "refusing to pay a claim without conducting a reasonable investigation with respect to the claim" for this reason. *See* TEX. INS. CODE § 541.060(4) & (7). In the Court's opinion, Plaintiffs have alleged basic facts to support a claim under these two provisions.

Plaintiffs allege that Nationwide violated TEX. INS. CODE § 542.057, which states "if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made." Plaintiffs do not state any facts to make this claim plausible. In fact, Plaintiffs do not allege that Nationwide notified them under Section 542.056 that it was going to pay the claim or part of the claim. Plaintiffs allege the exact opposite – that Nationwide denied the claim. This claim should be dismissed.

Plaintiffs allege that Nationwide violated TEX. INS. CODE § 542.058, which states, "if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statues do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060." Again, Plaintiffs do not state any facts to make this claim plausible. Plaintiffs never allege that Nationwide received all items, statements, and forms reasonably requested, or that payment was delayed by a period exceeding other applicable statutes or for more than 60 days. This claim should be dismissed.

Nationwide also argues that Plaintiffs' misrepresentation based claims[4] fail to meet the pleading requirements of Federal Rule of Civil Procedure 9(b). To satisfy Rule 9(b), Plaintiffs must "state with particularity the circumstances constituting the fraud." Fed. R. Civ. P. 9(b). "Put simply, Rule 9(b) requires the who, what, when, where, and how to be laid out." *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010). "Although Rule 9(b) effectively modifies the general notice pleading requirements of Rule 8(a)(2), Rule 8(d)(1) still dictates that each averment of a pleading of fraud be 'simple, concise,

[4] Plaintiffs' misrepresentation based claims are Tex. Bus. & Com. Code §§ 17.46(b)(5), (b)(9), (b)(12), (b)(13), (b)(20), and (b)(24), and Tex. Ins. Code §§ 541.051(1) and (4), 541.060(a)(1), and 541.061(1), (2), and (3).

and direct.'" *United States ex rel. v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009). Rule 9(b) applies to more than just claims for fraud. "Claims alleging violations of the Texas Insurance Code and the DTPA and those asserting fraud, fraudulent inducement, fraudulent concealment, and negligent misrepresentation are subject to [Rule 9(b)'s] requirements." *Frith v. Guardian Life Ins. Co. of Am*., 9 F. Supp. 2d 734, 742 (S.D. Tex. 1998) (citing cases); *see also Lone Star Ladies Inv. Club v. Scholtzsky's Inc*., 238 f.3d 363, 368 (5th Cir. 2001) (noting that "Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not."); *Novelli v. Allstate Texas Lloyd's,* No. H-11-2690, 2012 WL 949675 (S.D. Tex. Mar. 19, 2012).

The Court agrees that Plaintiffs' allegations at best set out what misrepresentations were made, specifically that certain rental fees would be paid for a rental home and furniture, and that the claim would be paid. Plaintiffs' complaints fail to state who made the representations, and when, where, and how the misrepresentations were made. These general allegations are not sufficient to satisfy Rule 9(b). Plaintiffs contend that their allegations in the complaint were confirmed through discovery; however, that is not the focus of a 12(c) motion, and the Court does not consider evidence in deciding whether Plaintiffs have met the pleading requirements.[5] Thus, the Court finds that for this reason, Plaintiffs' misrepresentation-based claims should be dismissed as well. [6]

Nationwide also argues that Plaintiffs' claims under the DTPA, Texas Insurance Code, and the common law good faith and fair dealing claim are not plausible unless Plaintiffs have

[5] In determining whether to grant a motion to dismiss, a district court may generally not "go outside the complaint." *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). However, a district court may consider documents attached to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim. *Scanlan*, 343 F.3d at 536.

[6] Nationwide also asserts that Plaintiffs' misrepresentation-based claims be dismissed for failure to plead reasonable reliance; however, because the Court has already recommended dismissal of these claims for multiple reasons, the Court will not address this argument.

alleged damages separate and apart from their alleged contract damages. "Texas law does not, as a general rule, consider a Texas Insurance Code or common-law good faith and fair dealing claim to be viable unless the insured has suffered damages beyond the damages claimed for, or resulting from, breach of the insurance policy contract." *Tracy v. Chubb Lloyds Ins. Co. of Tex*., Nos. 4:12-cv-042-A, 4:12-cv-174-A, 2012 WL 2477706, at *5 (N.D. Tex. June 28, 2012) (citing, *inter alia, Walker v. Federal Kemper Life Assurance Co.*, 828 S.W.2d 442, 454 (Tex. App. – San Antonio 1992, writ denied). A breach of the common law duty of good faith and fair dealing is actionable only if the alleged actions of the carrier proximately caused actual damages to Plaintiff. *See Vaughan v. Hartford Cas. Ins. Co*., 277 F. Supp. 2d 682, 690 (N.D. Tex. 2003) (citing *Aranda v. Ins. Co. of N. Am*., 748 S.W.2d 210, 215 (Tex. 1988)). Alleged violations of Chapter 541 of the Texas Insurance Code and the DTPA are not actionable unless such were the producing cause of damages to the Plaintiff in addition to the policy benefits Plaintiff contends were payable under the contract. *See MacIntire v. Armed Forces Benefit Ass'n*, 27 S.W.3d 85, 92 (Tex. App. – San Antonio, 2000, no pet.) (conduct prohibited by Insurance Code actionable only if plaintiff suffers actual damages resulting from that conduct "beyond denial of benefits."). Plaintiffs do not respond to this argument. The only reasonable interpretation of Plaintiffs' complaint is that the damages referred to by the Plaintiffs are breach of contract damages. They allege that Nationwide's conduct caused stress and anxiety by failing to pay certain payments on time, the residence in question has not been repaired, and Plaintiffs have been forced to retain an attorney. These damages are all related to the alleged breach of contract by Nationwide, and not independently related to any of the extracontractual claims. Thus, the Court finds for this additional reason, Plaintiffs' claims under the DTPA and Chapter 541 of the Insurance Code should be dismissed, as well as the claim for breach of the duty of good faith and fair dealing.

The Court will now turn to Nationwide's summary judgment arguments.[7] Nationwide argues that Plaintiffs have not pleaded and have no evidence that Nationwide committed an independent tort, which is required under Texas law to prove breach of the duty of good faith and fair dealing. "As a general rule, there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995) (collecting cases); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994), *superseded by statute on other grounds as stated in U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118 (Tex. 2012). The Texas Supreme Court stated:

> The threshold of bad faith is reached when a breach of contract is accompanied by an independent tort. Evidence that merely shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith. Nor is bad faith established if the evidence shows the insurer was merely incorrect about the factual basis for its denial of the claim, or about the proper construction of the policy. A simple disagreement among experts about whether the cause of the loss is one covered by the policy will not support a judgment for bad faith. To the contrary, an insured claiming bad faith must prove that the insurer had no reasonable basis for denying or delaying payment of the claim, and that it knew or should have known that fact.

Moriel, 879 S.W.2d at 17-18 (citations omitted).

Plaintiffs argue that "[a]n insurer will not escape liability merely by failing to investigate a claim so that it can contend that liability was never reasonably clear… an insurance company may also breach its duty of good faith and fair dealing by failing to reasonably investigate a claim." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 n.5 (Tex. 1997) (citing *Arnold v. National County Mut. Fire Ins. Co*., 725 S.W.2d 165, 167 (Tex. 1987)). "Thus, an insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual basis for denial." *Douglas v. State Farm Lloyds*, 37 F. Supp. 2d 532, 541 (S.D. Tex.

[7] The Court will not address Nationwide's argument that expert testimony is required to support a claim for "reasonable investigation." The Court has already recommended dismissal of this claim for a failure to plead damages separate from those arising from the breach of contract claim. Thus, the Court will not address this argument.

1999) (citing *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 43 (Tex. 1998); *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997); *Lyons v. Millers Cas. Ins. Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993)). Plaintiffs contend that Nationwide failed to investigate certain facts, and attempted to isolate itself from liability by "engineering a loss investigation with a predetermined outcome" (Dkt. #29 at 13).

Plaintiffs have little evidence to support their contentions. The facts show that Nationwide adjuster Rodney Chapman ("Chapman") discussed the loss by phone with Weidner and met with Plaintiffs the day after the loss occurred at the Property (Dkt. #20 at Ex. C). He made a visual inspection of the Property and noticed indicia of a set fire. *Id*. He retained expert fire inspectors Lone Star Investigations to perform a full cause and origin investigation. *Id*. Two days after the fire, Lone Star investigator Jarrod Eno ("Eno"), accompanied by two other Lone Star investigators and an arson dog handler, inspected the Property. *Id*., *see also* Ex. D. Nationwide also had a plumber on-site to check a gas line leak that Plaintiffs told Nationwide about. Dickerson was present during the inspection. Eno's report stated his conclusion that "[t]he cause of the fire was incendiary, an intentionally set fire" (Dkt. #20, Ex. D). Eno's report notes that laboratory testing revealed potentially ignitable liquids, the fact that the arson dog alerted on a number of areas, and other facts in support of his conclusion. *Id*. The only evidence in support of Plaintiffs' contention that Nationwide failed to consider or investigate certain facts is the expert report of Michael Brady ("Brady") (Dkt. #29 at Ex. I). Brady concluded that the failure by former Fire Marshal Huffman of the Sherman Fire Department and Eno to follow the proper fire investigation methodology and the scientific method resulted in incomplete data collection that led to inaccurate data analysis and a flawed hypothesis. *Id*. at 2. Brady asserted that more data collection is necessary to determine the origin and cause of the fire. *Id*.

This case is not like those cited by Plaintiffs in that Plaintiffs never produced an expert report for Nationwide's review prior to this litigation, and during the investigation period. Nationwide requested that its expert confer with a Lone Star Investigations representative so that Nationwide could consider any additional opinions or data, but that offer was rejected by Plaintiffs' counsel. Thus, Nationwide did not have an opportunity to consider, accept, or reject any alternative theories. There is no indication that Nationwide should have disregarded the opinion of its experts without reason to do so. There is certainly no evidence that Nationwide failed to investigate the loss at all. Further, Plaintiffs fail to suggest any independent tort that is sufficient to support its claim of bad faith.

Finally, Nationwide asserts that a bona fide controversy existed and continues to exist concerning Plaintiffs' entitlement to policy benefits. "Under Texas law, there is a duty on the part of the insurer to deal fairly and in good faith with an insured in the processing of claims." *Higgenbotham v. State Farm Mut. Automobile Ins. Co*., 103 F.3d 456, 459 (5th Cir. 1997) (citation omitted). To prove that an insurer acted in bad faith, an insured must show that the insurer failed to settle the claim even though it "knew or should have known that it was reasonably clear that the claim was covered." *Giles*, 950 S.W.2d at 54-55. Under the bona fide dispute rule, "[e]vidence that only shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith." *United States Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997) (citing *Giles*, 950 S.W.2d 48). In discussing the threshold for bad faith, the Texas Supreme Court stated that bad faith is not established if the evidence shows the insurer was merely incorrect "about the factual basis for its denial of the claim, or about the proper construction of the policy." *Id*. The bona fide dispute rule "is nothing more than a shorthand notation for the observation that the parties to an insurance contract will sometimes

have a good faith disagreement about coverage." *Moriel*, 879 S.W.2d at 18 n.8. Under such circumstances, "the parties may require a court to interpret policy language for them, or a jury to resolve factual disputes" but "[s]imply because the parties go to court does not raise an issue of the insurer's bad faith. *Id*.

This is precisely the situation we have in this case. The Nationwide adjuster identified what he believed were suspicious facts concerning the fire. He retained Lone Star Investigations to conduct an investigation, and Eno, a credentialed fire investigator inspected the Property. Eno obtained the services of an arson detection dog, who alerted on several locations on the Property. Eno further utilized a chemical inspection lab to analyze samples from the Property, which showed the presence of chemicals that are frequently used as accelerants in arson fires. Nationwide also retained a structural engineer to test the gas system, and he determined that there was a leak that had been intentionally and artificially produced. Plaintiffs did not present a alternative theory of causation, and did not allow Nationwide's investigators to speak with Plaintiffs' expert witness to discuss any other causation. Brady's report does not have an alternative causation theory, but only states that Nationwide's investigators failed to follow certain standards. There is no bad faith where there is a bona fide dispute about coverage, which is the case here. Further, the bona fide dispute rule is not an affirmative defense, as Plaintiffs suggest, but rather a threshold for Plaintiffs to meet when establishing a bad faith claim. Plaintiffs have not met this threshold. Therefore, the Court finds for this additional reason, Plaintiffs' claims for breach of the duty of good faith and fair dealing should be dismissed.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the Court recommends that Defendant's Motion for Partial Summary Judgment and for Partial Judgment on the Pleadings (Dkt. #20) be **GRANTED**, and

Plaintiffs' extracontractual claims for violations of the DTAP and Insurance Code, and breach of the common law duty of good faith and fair dealing be dismissed.

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

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

SIGNED this 9th day of June, 2014.

AMOS L. MAZZANT
UNITED STATES MAGISTRATE JUDGE