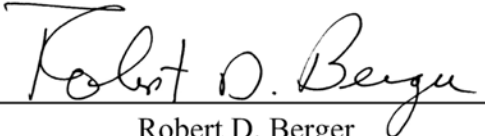




**The relief described hereinbelow is SO ORDERED.**

**SIGNED this 19th day of July, 2012.**

  
Robert D. Berger  
United States Bankruptcy Judge

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**PAUL NELSON and  
CASSANDRA FORD-NELSON,  
Debtors.**

**Case No. 11-20848  
Chapter 13**

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**PAUL NELSON, et al.,  
Plaintiffs,**

**v.**

**Adv. No. 12-6016**

**WELLS FARGO HOME MORTGAGE, et al.,  
Defendants.**

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**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS  
BUT GRANTING PLAINTIFFS LEAVE TO AMEND**

Defendants Wells Fargo Home Mortgage and Federal Home Loan Bank of Chicago (FHLB) move to dismiss Debtors' complaint which alleges the mortgagee and servicer engaged in fraudulent or negligent conduct in its negotiations with Debtors regarding their defaulted home loan. Defendants' motion is granted because Debtors fail to state a claim for relief.

### Factual Allegations Accepted as True

Debtors borrowed \$169,100.00 in 2003 to finance their home. FHLB has an interest in the note, and Wells Fargo services the note and mortgage. In 2006, Debtors defaulted on the note. In 2008, FHLB obtained a foreclosure judgment.<sup>1</sup> Thereafter, Debtors contacted Wells Fargo about what they could do to keep their home. On March 17, 2009, Wells Fargo sent Debtors a letter describing some of the options available under Wells Fargo's Borrower Counseling Program. The letter listed loan modification as one of several options. Wells Fargo described its loan modification as a program which adds the delinquency to the unpaid principal balance to bring the loan current, extending the repayment of the arrearage over the remaining term of the loan.<sup>2</sup> The letter does not offer Debtors the option to reduce their interest rate or lengthen the term of their loan or reduce the principal, and Debtors do not so allege. The March 17 letter also states: "We recognize that you have been discharged from personal liability for this mortgage loan; however, Wells Fargo Bank, NA retains a valid and enforceable lien against the property and we will enforce these rights while the loan is in default."<sup>3</sup>

Debtors decided to apply for the Borrower Counseling Program. Over the next several months, Debtors compiled and submitted requested paperwork. By December 2009, Debtors were discouraged and their home was scheduled for a sheriff's sale. On December 31, 2009, Wells Fargo emailed Debtors' agent,

Unfortunately, we will not be able to post-pone the foreclosure sale. This investor does not participate in modifications, which the borrower should know already because he previously had a modification denied by the investor for this

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<sup>1</sup> Defendants state the state court judgment needs to be transferred to Wells Fargo because it services the note and mortgage, and FHLB holds an investor's interest in the note.

<sup>2</sup> Doc. No. 1, Exhibit 1.

<sup>3</sup> *Id.* Debtors discharged their personal liability on the note after a 2005 bankruptcy.

reason on 06/30. HAMP was also denied on 08/03.

Also, the foreclosure sale has already been post-poned 3 times. The dates are 01/13/09, 04/14/09 and 05/12/09. The borrower had also been put on two plans, but broke both. Those plans were on 08/28/09 and 10/14/09. I'm sorry.<sup>4</sup>

However, the fourth foreclosure sale was postponed, and Wells Fargo sent an email to Debtors' agent days later stating:

This loan is now being worked here by the Office of the President because it has been escalated. That department has called the borrower to ask for an updated workout packet. This investor is a bit strict, and so there is some extra information needed when it comes to employment in order for us to do a modification.<sup>5</sup>

The information requested was primarily proof of income and expenses.

During 2010, Debtors continued to submit information to Wells Fargo. A March 23, 2011, Wells Fargo letter to Debtors states,

We're responding to your request for mortgage payment assistance and the options that may be available to help you. . . . We carefully reviewed the information you sent us and explored a number of mortgage assistance options. At this time, you are not eligible because:

You have not been approved for a mortgage loan modification because we were unable to get you to a modified payment amount that you could afford . . . .

The letter continues with other options available to the Debtors.<sup>6</sup> A foreclosure sale was scheduled for April 5, 2011, but Debtors filed for bankruptcy on March 31, 2011.

Post-petition, Debtors again sought a loan modification from Wells Fargo, but Wells Fargo denied the request because "**PER INVESTOR GUIDELINES NO RETENTION**

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<sup>4</sup> Doc. No. 1, Exhibit 3. HAMP is the Home Affordable Modification Program, the government's response to the foreclosure crisis. HAMP is a voluntary program. Investors and servicers are not required to participate.

<sup>5</sup> Doc. No. 1, Exhibit 4.

<sup>6</sup> Doc. No. 1, Exhibit 5.

**OPTION AVAILABLE AT THIS TIME.”**<sup>7</sup> Debtors renewed their request and on January 12, 2012, Wells Fargo wrote back,

**DENIED  
INVESTOR DOES NOT ALLOW RATE CHANGES  
OR PERMANENT LOAN MODIFICATIONS  
THE ONLY OPTION IS A REPAYMENT PLAN BUT BORROWER  
IS ON CHAPTER 13 REPAYMENT ALREADY AND HAMP IS NOT AN  
OPTION  
OFFER BY INVESTOR.**<sup>8</sup>

Debtors allege this last denial gives rise to fraudulent or negligent misrepresentation claims because if FHLB did not allow rate changes or permanent loan modifications in 2012, then all the options offered and requests for information made by Wells Fargo between 2009 and 2012 were based on false information about Debtors’ ability to modify their note. Debtors assert Defendants strung them along for three years to increase the amount of Debtors’ debt against their home.

## Discussion

### A. Pleading Standards

In considering a motion to dismiss, the court accepts all well-pleaded factual allegations, as opposed to conclusory legal allegations, as true and construes them in the light most favorable to the plaintiff.<sup>9</sup> A complaint must contain sufficient factual allegations to state a plausible claim to relief.<sup>10</sup> A claim is plausible when plaintiff pleads sufficient facts to allow the court to reasonably infer the defendant is liable for the alleged misconduct. Mere recitation of the

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<sup>7</sup> Doc. No. 1, Exhibit 6. Bold in original.

<sup>8</sup> Doc. No. 1, Exhibit 7. Bold in original.

<sup>9</sup> *Lawrence Nat’l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991).

<sup>10</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

elements of a cause of action is insufficient. The conclusory “the defendant unlawfully harmed me” accusation is insufficient. Still, the complaint need not contain detailed factual allegations; the allegations must be enough to raise a right to relief above the speculative level. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.<sup>11</sup> In determining whether facts are sufficiently pled, the court may consider exhibits attached to the complaint.<sup>12</sup> “[A]n exhibit to a pleading is a part of the pleading for all purposes.”<sup>13</sup>

Complaints for fraud have heightened pleading requirements under Fed R. Bankr. P. 7009. Alleging fraud with Rule 9’s required particularity means (1) identifying who made the misrepresentation; (2) stating the time, place and content of the misrepresentation; and (3) describing how the misrepresentation was communicated and its consequences.<sup>14</sup> Rule 7009 requires simple, concise, and direct averments which are construed so as to do substantial justice.<sup>15</sup> The result should allow the defendant fair and reasonable notice of plaintiff’s claims and the factual grounds upon which the claims are based.<sup>16</sup>

#### **B. First Cause of Action for Fraudulent Misrepresentation**

In order to state a claim for fraudulent misrepresentation, the plaintiff must allege the time, place, and content of the false representation; the identity of the person making the representation; and the harm caused by the plaintiff’s reliance on the false representation.<sup>17</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001).

<sup>13</sup> FED. R. BANKR. P. 7010.

<sup>14</sup> *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000).

<sup>15</sup> *In re Panem*, 352 B.R. 269, 281 (Bankr. D. Colo. 2006).

<sup>16</sup> *Id.*

<sup>17</sup> *Universal Premium Acceptance Corp. v. Oxford Bank & Trust*, 277 F. Supp. 2d 1120, 1131 (D. Kan. 2003).

Debtors fail to state a plausible claim for relief or plead fraud with particularity. Debtors allege Defendants misrepresented a permanent loan modification was an option to Debtors' detrimental reliance. However, the complaint fails to allege either Defendant made an unqualified offer for a permanent loan modification or a rate change between 2009 and 2012. Debtors vaguely allege the Defendants offered a loan modification, but the only definition of loan modification alleged in the complaint is Wells Fargo's program which adds the delinquency to the unpaid principal balance to bring the loan current, extending the repayment of the arrearage over the remaining term of the loan. Thus, Debtors allege Wells Fargo offered them a different repayment plan, not a rate change. The only place in the complaint a permanent loan modification is mentioned by Wells Fargo is in an October 9, 2009, email in which Wells Fargo requests proof of income and a budget "so [it] can see about permanent modifications options."<sup>18</sup> But by December 31, 2009, Wells Fargo advises Debtors' agent, "This investor does not participate in modifications, which the borrower should know already because he previously had a modification denied by the investor for this reason on 06/30. HAMP was also denied on 08/03."<sup>19</sup> Debtors do not place much emphasis on this information, nor do they allege additional facts about the denied modification requests to explain their continued reliance on Wells Fargo and why they expected something other than another repayment plan.

Debtors' allegations are not substantively set out in the complaint, but are primarily attached as exhibits in the form of incomplete copies of correspondence and snippets of email strings. As cherry-picked as the correspondence is, Debtors' exhibits nonetheless show Wells Fargo offered Debtors a repayment plan option, which, also according to Debtors' own exhibits,

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<sup>18</sup> Doc. No. 1, Exhibit 2.

<sup>19</sup> Doc. No. 1, Exhibit 3.

Debtors either broke or for which Debtors did not later qualify. Debtors do not allege Wells Fargo or FHLB represented they would refrain from enforcing their lien rights while Debtors' loan remained in default. Debtors do not allege they relied on Wells Fargo's application process as debt forgiveness or forbearance. Debtors do not allege Defendants advised Debtors to take a particular course of action. Debtors do not allege FHLB communicated with them at all. Wells Fargo is the only party which communicated with Debtors. In whole, Debtors' complaint is they feel vaguely harmed by their inability to get a rate change from a lender who never offered it. These allegations do not state a claim for relief.

### **C. Second Cause of Action for Negligent Misrepresentation**

To state a claim for negligent misrepresentation, a plaintiff must allege (1) the defendant made a false statement regarding a transaction in which it had a pecuniary interest; (2) the defendant failed to exercise reasonable care to ascertain or communicate the accuracy of the statement; (3) the plaintiff justifiably relied on the defendant's statement; and (4) the plaintiff suffered a loss as a result.<sup>20</sup> Under Kansas law, a person cannot negligently misrepresent a present intent to perform in the future.<sup>21</sup>

According to Debtors' complaint, the false information Defendants provided is the possibility of a rate change or other permanent loan modification, but Debtors fail to allege either Wells Fargo or FHLB offered a rate change or a permanent loan modification as an option. The only loan modification offered to Debtors, according to their complaint, is a repayment plan which would add their delinquency to the principal of the loan. Unlike *Bryant Manor*, Debtors

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<sup>20</sup> *In re Bryant Manor, LLC*, 434 B.R. 629, 636 (Bankr. D. Kan. 2010) (citing *Evolution, Inc. v. SunTrust Bank*, 342 F. Supp. 2d 964, 971 (D. Kan.2004)).

<sup>21</sup> *Bittel v. Farm Credit Servs. of Cent. Kansas*, 265 Kan. 651, 665 (1998); *Near v. Crivello*, 673 F. Supp. 2d 1265, 1279-80 (D. Kan. 2009).

do not allege Wells Fargo counseled Debtors to take a particular course of action such as defaulting on their loan in order to transfer their account to the workout department. Debtors' allegations state Wells Fargo offered to explore their options but also state Wells Fargo would continue to enforce its rights while the note remained in default. Debtors allege Wells Fargo communicated to Debtors in terms of their future options, which can not support a negligent misrepresentation cause of action. All the communications attached to Debtors' complaint are couched in terms of future possibilities, but a rate change is not mentioned by Wells Fargo as an option for Debtors. The complaint does not contain an allegation about false information provided to Debtors.

**D. Third Cause of Action for Breach of Duty of Good Faith and Fair Dealing**

The duty of good faith and fair dealing implied in all contracts prohibits parties from intentionally and purposely preventing the other party from carrying out his part of the agreement or otherwise destroying the right of the other party to receive the benefits of the contract.<sup>22</sup> Plaintiffs must (1) plead a cause of action for breach of contract, not a separate cause of action for breach of duty of good faith, and (2) point to a term of the contract which the defendant allegedly violated by failure to abide by the good faith spirit of that term.<sup>23</sup> The duty of good faith is based on a preexisting contract right; it does not create a new one.<sup>24</sup>

Debtors came to Wells Fargo having already defaulted under the note and mortgage.

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<sup>22</sup> *Kansas Penn Gaming, LLC v. HV Prop. of Kan., LLC*, 727 F. Supp. 2d 1100, 1111 (D. Kan. 2010) (citing *Daniels v. Army Nat'l Bank*, 249 Kan. 654 (1991)).

<sup>23</sup> *Terra Venture, Inc. v. JDN Real Estate-Overland Park, L.P.*, 340 F. Supp. 2d 1189, 1201 (D. Kan. 2004).

<sup>24</sup> *Id.*; see, e.g., *Venture Commercial Mortg., LLC v. F.D.I.C.*, not reported in F. Supp. 2d, 2010 WL 820711, at \*10 (D. Kan. 2010) (dismissing a claim for a creditor's alleged breached duty of good faith and fair dealing and noting the absence of cases where a party in default successfully alleged such a cause of action against a creditor exercising its contractual remedies).



Debtors do not allege Defendants caused Debtors to default, nor do Debtors allege Defendants breached the agreements while the parties discussed workout options.

**E. Fourth Cause of Action for Violation of the Kansas Consumer Protection Act**

The Kansas Consumer Protection Act prohibits lenders from engaging in any deceptive act or practice in connection with a consumer loan.<sup>25</sup>

Debtors have failed to allege a deceptive act or practice. Debtors' allegations incorporate the same allegations which fail to give rise to either a fraudulent or negligent misrepresentation claim.

**F. Fifth Cause of Action for Sanctions and Attorney Fees**

Debtors remaining cause of action similarly fails because it is predicated, in part, upon succeeding on at least one of the first through fourth causes of action. Debtors also raise the issue FHLB and not Wells Fargo obtained the state court foreclosure judgment. The issue of which Defendant is the real party in interest in the state court proceeding is not sanctionable at this time. Wells Fargo may yet ratify, join, or be substituted into the action, at which point the action proceeds as if it had been originally commenced by the real party in interest.<sup>26</sup> Debtors do not allege they filed an objection in the state court proceeding or incurred any damages as a result of the named plaintiff in state court.

**Conclusion**

IT IS ORDERED Defendants' Motion to Dismiss is GRANTED without prejudice. Debtors have 14 days from the date of this order to file an amended complaint if they can plead fraud with the requisite particularity. Otherwise, this order becomes final and this adversary

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<sup>25</sup> K.S.A. §50-626.

<sup>26</sup> K.S.A. §60-217(a)(3).

shall be dismissed.

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ROBERT D. BERGER  
U.S. BANKRUPTCY JUDGE  
DISTRICT OF KANSAS