No. 17-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Anthony G. Taylor,

Plaintiff–Appellant,

v.

J.P. Morgan Chase Bank, N.A., et al.,

Defendants–Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Northern District of Indiana
Case No. 4:16-cv-52, Hon. Rudy Lozano

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-3019

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TABLE OF CONTENTS

Page(s)

Circuit Rule 26.1 Disclosure Statement i

Table of Authorities iv

Introduction 1

Statement of Jurisdiction 2

Issues Presented 3

Statement of the Case 4

I. TARP, HAMP, and their consequences 4

A. The Government creates HAMP to help homeowners. 4

B. How HAMP was supposed to help homeowners. 5

C. Banks get paid; homeowners get denied. 7

II. Factual background 9

A. Chase solicits Taylor to enroll in HAMP. 9

B. Taylor follows Chase's instructions. 11

C. Chase refuses to modify Taylor's mortgage, and Taylor suffers the consequences. 12

III. Proceedings below 13

Summary of Argument 15

Standard of Review 16

Argument 17

I. Taylor alleged that Chase breached its contractual obligation and broke its promise to modify Taylor's mortgage payments. 17

A. Chase breached its contract with Taylor. 17

1. Chase and Taylor contracted to modify Taylor's mortgage payments. 17

2. Chase breached its contract with Taylor when it failed to modify his mortgage payments. 26

3. Taylor suffered damages as a result of Chase's breach. 27

B. Chase should be held to its promise to modify Taylor's mortgage under the promissory-estoppel doctrine. 28

II. Taylor pleaded that Chase committed fraud and intentional infliction of emotional distress. 32
A. Chase committed fraud by lying about the status of Taylor's HAMP modification. 32
B. Chase intentionally inflicted emotional distress on Taylor. 36
Conclusion 40
Certificate of Compliance .....
Attached Appendix .....
Certificate of Circuit Rule 30 Compliance .....
Judgment
August 30, 2017, ECF 76 .....
Opinion and Order of the District Court
August 30, 2017, ECF 75 .....
Certificate of Service .....

TABLE OF AUTHORITIES

Cases **Page(s)**

Ahuja v. Lynco Ltd. Med. Research,
675 N.E.2d 704 (Ind. Ct. App. 1996) 23, 25

AM Gen. LLC v. Armour,
46 N.E.3d 436 (Ind. 2015) 26

Baehl v. Bank of Am.,
No. 3:12-cv-00029, 2013 WL 1319635 (S.D. Ind. Mar. 29, 2013) 26

Bradley v. Hall,
720 N.E.2d 747 (Ind. Ct. App. 1999) 37, 38

Brown v. Indianapolis Hous. Agency,
971 N.E.2d 181 (Ind. Ct. App. 2012) 36, 37, 39

Bushell v. JPMorgan Chase Bank, N.A.,
163 Cal. Rptr. 3d 539 (Ct. App. 2013) 6, 28, 30, 33, 37

Cameron v. Wells Fargo Bank NA,
No. CV-13-01921, 2014 WL 3418466 (D. Ariz. July 14, 2014) 30

Cave v. Saxon Mortg. Servs.,
No. 12-5366, 2013 WL 1915660 (E.D. Pa. May 9, 2013) 30

Comfax Corp. v. N. Am. Van Lines,
587 N.E.2d 118 (Ind. Ct. App. 1992) 34

Conwell v. Gray Loon Outdoor Mktg. Grp.,
906 N.E.2d 805 (Ind. 2009) 17

Corvello v. Wells Fargo Bank, NA,
728 F.3d 878 (9th Cir. 2013) 19, 22

Curry v. Whitaker,
943 N.E.2d 354 (Ind. Ct. App. 2011) 37

Dias v. Fed. Nat. Mortg. Ass'n,
990 F. Supp. 2d 1042 (D. Haw. 2013) 31

DiMizio v. Romo,
756 N.E.2d 1018 (Ind. Ct. App. 2001) 25

Dubois Cty. Mach. Co. v. Blessinger,
274 N.E.2d 279 (1971) 24

Erickson v. Pardus,
551 U.S. 89 (2007) 16

First Nat. Bank of Logansport v. Logan Mfg. Co.,
577 N.E.2d 949 (Ind. 1991) 28, 29, 30

Fisher v. HSBC Bank,
332 F. Supp. 3d 435 (D. Mass. 2018) 31

Foster v. United Home Imp. Co.,
428 N.E.2d 1351 (Ind. Ct. App. 1981) 18

Garwood Packaging v. Allen & Co.,
378 F.3d 698 (7th Cir. 2004) 29

George v. Urban Settlement Servs.,
833 F.3d 1242 (10th Cir. 2016) 30, 33

Harrison v. Thomas,
761 N.E.2d 816 (Ind. 2002) 23

Heckler & Koch v. German Sport Guns GmbH,
71 F. Supp. 3d 866 (S.D. Ind. 2014) 34, 36

Heng v. Heavner, Beyers & Mihlar, LLC,
849 F.3d 348 (7th Cir. 2017) 10, 16

Hrezo v. City of Lawrenceburg,
934 N.E.2d 1221 (Ind. Ct. App. 2010) 31

Ind. State Highway Comm'n v. Curtis,
704 N.E.2d 1015 (Ind. 1998) 22

Jaffri v. JP Morgan Chase Bank, N.A.,
26 N.E.3d 635 (Ind. Ct. App. 2015) 40

Johnson v. Wysocki,
990 N.E.2d 456 (Ind. 2013) 32

In re JPMorgan Chase Mortg. Modification Litig.,
No. 11-md-02290 (D. Mass. May 7, 2014) 13

Kesling v. Hubler Nissan,
997 N.E.2d 327 (Ind. 2013) 32, 34

Knauf Fiber Glass, GmbH v. Stein,
615 N.E.2d 115 (Ind. Ct. App. 1993), *vacated on other grounds*,
622 N.E. 163 (Ind. 1993) 22

Landmark Am. Ins. Co. v. Hilger,
838 F.3d 821 (7th Cir. 2016) 16, 32

Lathrop v. Juneau & Assocs.,
220 F.R.D. 322 (S.D. Ill. 2004) 33

McCart v. Chief Exec. Officer in Charge, Indep. Fed. Credit Union,
652 N.E.2d 80 (Ind. Ct. App. 1995) 23

Merillville Conservancy Dist. ex rel. Bd. of Directors v. Atlas Excavating,
764 N.E.2d 718 (Ind. Ct. App. 2002) 27

Mullen v. Cogdell,
643 N.E.2d 390 (Ind. Ct. App. 1994) 36

N. Ind. Gun & Outdoor Shows v. City of S. Bend,
163 F.3d 449 (7th Cir. 1998) 16

Ohio Farmers Ins. Co. v. Ind. Drywall & Acoustics,
970 N.E.2d 674 (Ind. Ct. App. 2012), *transfer granted, vacated*,
976 N.E.2d 1234 (Ind.) 32, 33

Oskoui v. J.P. Morgan Chase Bank, N.A.,
851 F.3d 851 (9th Cir. 2017) 32, 37

Rodi v. S. N.E. Sch. Of Law,
389 F.3d 5 (1st Cir. 2004) 33

Ryan-Beedy v. Bank of N.Y. Mellon,
293 F. Supp. 3d 1101 (E.D. Cal. 2018) 31

Sand Creek Country Club v. CSO Architects,
582 N.E.2d 872 (Ind. Ct. App. 1991) 23, 24

Topchian v. JPMorgan Chase Bank, N.A.,
760 F.3d 843 (8th Cir. 2014) 23, 37

Turner v. Nationstar Mortg., LLC,
45 N.E.3d 1257 (Ind. Ct. App. 2015) 29, 30

U.S. Valves v. Dray,
190 F.3d 811 (7th Cir. 1999) 17

West v. JPMorgan Chase Bank, N.A.,
154 Cal. Rptr. 3d 285 (Ct. App. 2013) 30, 37

Wigod v. Wells Fargo Bank, N.A.,
673 F.3d 547 (7th Cir. 2012) 1, 5, 7, 9, 18, 20, 21, 22, 26, 27, 28, 29, 30, 31, 33

Williams v. Saxon Mortg. Servs.,
No. 13-10817, 2014 WL 765055 (E.D. Mich. Feb. 26, 2014) 30

Zimmerman v. McColley,
826 N.E.2d 71 (Ind. Ct. App. 2005) 17, 25

Statutes and Rules

12 U.S.C. § 5201 4

12 U.S.C. § 5219a 5

28 U.S.C. § 1291 2

28 U.S.C. § 1332(a)(1) 2

28 U.S.C. § 1441(a) 2

Ind. Code § 32-30-10-8 13

Fed. R. Civ. P. 9(b) 33

Fed. R. Civ. P. 10(c) 16

Other Authorities

5 Williston, Contracts § 666 (3rd ed. 1961) 22

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INTRODUCTION

During the Great Recession, Congress gave banks over $319 billion to prevent their collapse. In exchange, the Government required the banks to reduce mortgage payments for struggling homeowners through the Home Affordable Mortgage Program (HAMP).

Appellee JPMorgan Chase Bank accepted billions of dollars in government aid, requiring it to participate in HAMP. To sweeten the deal, the Government gave Chase additional incentive payments for each homeowner it enrolled in HAMP. Appellant Anthony Taylor was one of the struggling homeowners HAMP was designed to help. Chase, Taylor's mortgage holder, solicited Taylor to participate in HAMP, told him he was accepted, took his HAMP-reduced mortgage payments, and acted as if he was enrolled. But after nine months, Chase reneged on its commitment to permanently reduce Taylor's mortgage payments. Taylor spent the next five years under constant threat of losing his home, which was subject to a standing judgment of foreclosure and was twice scheduled for a sheriff's sale.

Chase now asserts that it never had a contract to modify Taylor's mortgage because, Chase claims, one line in one document required Chase's signature before a contract could be formed. But Chase misreads the document on which it relies, ignores other documents and conduct that created a binding contract, and flouts well-settled contract-law principles. Indeed, following those principles, this Court has already held in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), that

banks cannot use signature requirements to get out of agreements they made with homeowners for HAMP mortgage modifications.

Taylor was one of many homeowners who needed the HAMP lifeline, but because of Chase's misconduct, he never received it. Consistent with *Wigod*, this Court should find that Taylor pleaded that Chase breached its contractual and promissory obligations to modify his mortgage. This Court also should consider the full extent of Chase's deceitful and outrageous behavior, which the district court ignored, and find that Taylor's pleadings stated claims for fraud and intentional infliction of emotional distress.

STATEMENT OF JURISDICTION

The district court had removal jurisdiction based on the parties' diversity. 28 U.S.C. §§ 1332(a)(1), 1441(a). Taylor is a citizen of Indiana. ECF 1, at 2 ¶ 3(a) (Notice of Removal). Chase is a national banking association organized under the laws of the United States, with its principal place of business in Ohio for the purposes of diversity jurisdiction. *Id.* 2 ¶ 3(b). The amount in controversy exceeds $75,000. *Id.* 2 ¶ 4.

The district court granted Chase's motion for judgment on the pleadings and entered judgment on August 30, 2017, disposing of all claims of all parties. *See* ECF 75, at 13 (Dist. Ct. Order). Taylor filed a notice of appeal on September 29, 2017. *See* ECF 78. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Taylor alleged that the totality of his interactions with Chase created a contract. And long-settled principles of contract law require looking to all of the communications and conduct between the parties to determine if a contract exists. But the district court examined only one document Chase sent Taylor—the Trial Period Plan Agreement (TPP)—in determining whether Chase was required to modify Taylor's mortgage.

The first issue is whether the district court erred in holding that Taylor failed to state a claim for breach of contract and promissory estoppel and, for the same reason, erred in denying him leave to amend his complaint.

2. Taylor alleged that Chase "knowingly and intentionally, with malice" lied to him to prevent him from benefitting from HAMP. App. 79A-81A. As a result, Taylor spent five years under a standing judgment of foreclosure and suffered the humiliation of his home twice being scheduled for a sheriff's sale. *Id.*

The second issue is whether, in light of all the facts Taylor pleaded in his amended complaint, the district court erred in denying Taylor's motion to amend his complaint on the ground that he failed to state claims for fraud and intentional infliction of emotional distress.

STATEMENT OF THE CASE

Appellees JPMorgan Chase Bank, N.A., and its subsidiary Chase Home Finance, LLC, owned appellant Anthony Taylor's HAMP-eligible mortgage.[1] Chase offered to enroll Taylor in HAMP. But after months of stringing Taylor along, Chase unlawfully refused to modify Taylor's mortgage. We first explain the relevant law, including HAMP. We then describe the facts giving rise to Taylor's claims. Finally, we detail Taylor's suit and the decision below.

I. TARP, HAMP, and their consequences

A. The Government creates HAMP to help homeowners. About a decade ago, this country experienced the "worst financial meltdown since the Great Depression."[2] Unemployment skyrocketed, housing values plummeted, and four million homes fell into foreclosure. Fin. Crisis Report 23, 402.

Congress responded with the Troubled Asset Relief Program (TARP). TARP aimed to restore market stability and preserve homeownership by injecting billions of dollars of federal bailout loans into failing financial institutions. *See* Fin. Crisis Report 371-75, 386; 12 U.S.C. § 5201. As a TARP participant, Chase received $25 billion in initial TARP assistance. Fin. Crisis Report 374.

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[1] Taylor named both Chase Home Finance and JPMorgan Chase as defendants. Chase Home Finance, LLC, was a subsidiary of JPMorgan Chase Bank, N.A., and Chase has referred to itself as one party for the purposes of this case. *See* ECF 1, at 1 (Notice of Removal). This brief refers to both defendants collectively as "Chase."

[2] Fin. Crisis Inquiry Comm'n, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 3-4 (2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (Fin. Crisis Report).

Congress authorized the Secretary of the Treasury to use TARP funds to preserve financial institutions by minimizing their losses from mortgage defaults.[3] Treasury did so through programs like HAMP, which sought to help homeowners avoid foreclosure by subsidizing home-loan modifications meant to reduce monthly payments and interest rates. *See* 12 U.S.C. § 5219a. Some TARP recipients, including Chase, were required to participate in HAMP. Kristopher Gerardi & Wenli Li, *Mortgage Foreclosure Prevention Efforts*, 95 Fed. Reserve Bank Atl. Econ. Rev., No. 2, at 10 (2010).

Under HAMP, and in exchange for additional federal incentive payments, mortgage-loan servicers agreed to modify the loans of homeowners with delinquent mortgages. If these homeowners met certain eligibility criteria (related primarily to income, home size, and outstanding mortgage principal), they could participate in a "trial" loan-modification period with their servicers. *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556-57 (7th Cir. 2012). If they completed the trial successfully, the homeowners would receive a permanent home-loan modification, staving off foreclosure.[4]

B. How HAMP was supposed to help homeowners. Before a servicer could enroll a borrower in HAMP's two phases—the trial period and the permanent loan

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[3] *See* Office Fin. Stability, U.S. Dep't of Treasury, TARP Four-Year Retrospective Report 4 (Mar. 2013), https://www.treasury.gov/initiatives/financial-stability/reports/documents/tarp%20four%20year%20retrospective%20report.pdf (Four-Year Retrospective).

[4] Making Home Affordable Program Admin., HAMP Supplemental Directive 09-01, at 14-15 (Apr. 6, 2009), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf (Supplemental Directive 09-01).

modification—binding federal guidelines required the servicer to prescreen borrowers for potential HAMP eligibility. Servicers were instructed to "proactively solicit for HAMP any borrower whose loan passe[d]" the prescreen.[5] Under the prescreen, the servicer had to make certain threshold eligibility findings, including those related to the borrower's income, home size, and outstanding mortgage principal. Among other eligibility requirements, borrowers' monthly housing expenses had to exceed 31% of their adjusted gross monthly income. HAMP Guidelines 17-18.

Once borrowers passed the prescreen, servicers contacted them to confirm their eligibility for HAMP. Before June 2010, servicers did not need to confirm eligibility through borrower-provided documents. HAMP Guidelines 44. Rather, pre-June 2010, servicers were encouraged to rely on borrowers' oral statements about their income and other eligibility criteria. Supplemental Directive 09-01, at 5.

Applying federal guidelines to the information received from a borrower, a servicer calculated a modified mortgage payment and determined if it would be more profitable for the servicer to modify the loan. If so, the servicer was required to offer a loan-modification trial period. Thus, by the time the servicer offered the trial period, the servicer had effectively determined that the borrower qualified for HAMP. *See Bushell v. JPMorgan Chase Bank, N.A.*, 163 Cal. Rptr. 3d 539, 545-46 (Ct. App. 2013); Supplemental Directive 09-01, at 15, 17-18.

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[5] Making Home Affordable Program Admin., Handbook for Servicers of Non-GSE Mortgages 1.0, at 21 (Aug. 19, 2010), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_10.pdf (HAMP Guidelines).

After a servicer offered a borrower a HAMP trial period, the borrower accepted enrollment in it by submitting documents to confirm eligibility. These documents included tax returns, a hardship affidavit, and a Trial Period Plan Agreement (TPP) describing the terms and conditions of a trial loan modification. After receiving the TPP and supporting documents, servicers were encouraged to "immediately return an executed copy of the [TPP]" or to promptly notify the borrower if the borrower did not qualify. Supplemental Directive 09-01, at 15. Once enrolled in the trial period, the borrower had to make reduced mortgage payments for a defined period and maintain eligibility for HAMP. *Wigod*, 673 F.3d at 557.

After the borrower completed the trial period and met the eligibility requirements, the servicer was required to proceed with step two: the permanent modification. Supplemental Directive 09-01, at 15. The permanent modification would set the borrower's payment and interest at an affordable rate based on a calculation required by HAMP to get the payment as close to 31% of the borrower's income as possible. Gerardi & Li, *Mortgage Foreclosure Prevention Efforts*, 95 Fed. Reserve Bank Atl. Econ. Rev., No. 2, at 11.

C. Banks get paid; homeowners get denied. HAMP was designed to benefit servicers as well as homeowners. Servicers received incentives for participation, including payments for each new borrower enrolled in a trial period and $1,000 for each permanent HAMP modification.[6] In addition, servicers received annual $1,000

[6] Office Inspector Gen. Troubled Asset Relief Program, U.S. Dep't Treasury, SIGTARP Quarterly Report to Congress 89 (Jan. 29, 2014), https://www.sigtarp.gov/Quarterly%20Reports/January_29_2014_Report_to_Congress.pdf (SIGTARP 2014 First Quarter).

"Pay for Success" payments for each borrower who successfully stayed in the program without defaulting, for up to three years.[7] The Special Inspector General for TARP (SIGTARP) reported that the four largest HAMP servicers, Chase among them, received 73% of all incentives paid.[8]

The program did not go nearly as well for homeowners. Although "[s]ecuring a permanent mortgage modification under HAMP [was] one of the last options available to many homeowners trying to save their home," oversight investigations revealed that "distressed homeowners [did] not receive the help they need[ed]." SIGTARP 2014 First Quarter 258. "[E]ligible homeowners" were often denied HAMP assistance "through no fault of their own." SIGTARP 2015 Third Quarter 110.

Federal oversight reports "focused on mortgage servicers' poor treatment of homeowners and serious failures by servicers to follow program rules." SIGTARP 2014 First Quarter 267-68. The three largest servicers—Chase included—were the worst offenders. SIGTARP 2015 Third Quarter 117. For its part, Chase denied 84% of homeowners who applied for HAMP, with most denials resulting from "persistent problems and errors in the application and income calculation process." *Id.* at 107,

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[7] Press Release, U.S. Dep't of Treasury, Home Affordable Modification Program Guidelines 1 (Mar. 4, 2009), https://www.treasury.gov/press-center/press-releases/Documents/modification_program_guidelines.pdf.

[8] Office Inspector Gen. Troubled Asset Relief Program, U.S. Dep't Treasury, SIGTARP Quarterly Report to Congress 173 (July 29, 2015), https://www.sigtarp.gov/Quarterly%20Reports/July_29_2015_Report_to_Congress.pdf (SIGTARP 2015 Third Quarter).

110. As the TARP Special Inspector General put it, "[a]ll cannot be right" when the large servicers' "extremely high denial rates" risked rendering HAMP useless to the homeowners it was intended to help. *Id.* at 117.

The Government took corrective actions against Chase and other major servicers for denying HAMP modifications and improperly foreclosing on borrowers who were, among other things, approved for a HAMP modification, not in default, or protected by other statutory regimes like the Servicemembers Civil Relief Act. *See* ECF 47-1, at 69-78 (Pl. Exs. 49-50).[9] These actions produced consent orders mandating servicers to identify and assist in remedying financial injuries to borrowers harmed during foreclosure. Taylor was among the nearly four million homeowners identified as injured by the servicers. *See* App. 21A-24A ¶¶ 44-60, 83A-85A; ECF 47-1, at 78 (Pl. Ex. 50).

II. Factual background

A. Chase solicits Taylor to enroll in HAMP. This Court must "accept as true all factual allegations in the complaint." *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 555 (7th Cir. 2012). Taylor alleged the following facts.[10]

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[9] The district court sealed the exhibits attached to Taylor's amended complaint because they were not properly redacted. *See* ECF 42. Taylor attached properly redacted versions of the exhibits to his opposition to Chase's motion for judgment on the pleadings and in support of his motion for judgment on the pleadings, and the district court allowed these redacted exhibits to become a part of the record. *See* ECF 47. For the convenience of the Court and the parties, this brief cites the redacted versions.

[10] The district court examined Taylor's complaint and his proposed first amended complaint and granted judgment on the pleadings after determining that granting

Taylor was one of many Americans who fell behind on their mortgage payments during the financial crisis. App. 16A ¶ 6. In August 2009, Chase employee Chris Montgomery called Taylor to sign him up for a HAMP loan modification. *Id.* 16A ¶¶ 10-11, 66A-67A. After confirming that Taylor qualified (his monthly mortgage payment was about 64% of his monthly income), Montgomery offered to enroll Taylor in the first step of HAMP—the three-month trial-period. Taylor agreed. *Id.* 16A-17A ¶¶ 9-13, 66A-67A, 76A.

A few days later, Taylor received a package from Chase with a cover page, two copies of a Trial Period Plan Agreement (TPP), a checklist of required financial documents, and a frequently-asked-questions sheet. App. 16A ¶ 11, 28A-35A, 67A. The documents explained that Taylor could enroll in a HAMP trial period and permanently reduce his mortgage payments if he completed the trial period and remained qualified for HAMP. *Id.* 28A-32A. The cover page asked him to "LET US KNOW THAT YOU ACCEPT THIS OFFER." *Id.* 28A. The attached checklist told Taylor that he should "accept this offer." *Id.* 29A. And the cover page told Taylor that he could "take advantage of this offer" by sending Chase an initial modified payment, financial-hardship documents (an affidavit, tax returns, and a financial statement), and a signed TPP. *Id.* 28A.

The TPP also used the word "offer." App. 33A. It provided: "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that

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Taylor leave to amend would be futile. *See Heng v. Heavner, Beyers & Mihlar, LLC*, 849 F.3d 348, 354 (7th Cir. 2017). This brief cites both complaints where applicable.

I do not qualify for the Offer." *Id.* The next sentence explained to Taylor that the HAMP trial period would "not take effect unless and until" Chase confirmed that he qualified by returning a signed copy of the TPP. *Id.* No other documents in this package mentioned that Chase was required to sign the TPP. *See id.* 28A-32A.

B. Taylor follows Chase's instructions. Taylor sent the requested documents to Chase by overnight mail in September 2009, and Taylor confirmed their receipt by Chase through U.S.P.S. tracking. ECF 47-1, at 13 (Pl. Ex. 7); App. 67A. When Taylor called Chase less than a week later, Montgomery told Taylor that Chase had received his documents. App. 67A-68A. Montgomery also told Taylor that he "did not know of any situation in which Chase returns fully executed copies of TPP agreements to customers." *Id.* 68A, 71A. A week later, Taylor called again, and a different Chase employee, Mrs. Anderson, confirmed that Chase had received everything. *Id.* 71A. Chase also accepted Taylor's first trial-period modified payment rather than requesting his normal, full monthly payment. *Id.* 17A ¶ 13, 28A-32A, 68A, 72A.

But in October 2009, Taylor received two letters from Chase, six days apart, stating that his loan modification "offer" was at risk. App. 19A ¶¶ 27-28, 68A, 88A-93A. Chase denied ever receiving Taylor's documents and asked him to send the same information again. *Id.* Taylor did. *Id.* 19A ¶ 29, 69A, 94A-95A, 102A-103A. Again, through tracking, Taylor confirmed that Chase received his package. *Id.* 20A ¶ 33, 69A-70A.

Taylor also sent Chase the other two modified payments required to complete the HAMP trial period. App. 17A ¶ 13, 72A; ECF 47-1, at 14-18 (Pl. Exs. 8-13). Chase again took these modified payments instead of rejecting them or requesting that

Taylor make a full monthly payment. App. 17A ¶ 13, 72A. Taylor called Chase at the beginning of November and was again told, by an employee named Barbara, that Chase had received his documents and that he had been approved for the HAMP trial period. *Id.* 72A.

In the beginning of December, Taylor received two more letters stating that his loan modification was at risk because Chase had not received the documents it requested. App. 19A-20A ¶¶ 30-31, 69A, 96A-101A. Within two weeks of the second letter, Taylor sent Chase the requested documents once more (for the *third time*). *Id.* 20A ¶ 32, 69A-70A, 102A-103A. Taylor also included his own letter to Chase explaining that he had already twice sent in the same information and had been told by three employees (Chris Montgomery, Mrs. Anderson, and Barbara) that Chase had received it. *Id.* 102A-103A. He also requested a copy of the TPP signed by Chase. *Id.* Chase confirmed by letter its receipt of these documents in January 2010, but did not respond to Taylor's letter. *Id.* 20A ¶ 33, 70A, 104A-105A.

C. Chase refuses to modify Taylor's mortgage, and Taylor suffers the consequences. On May 5, 2010, after having taken Taylor's modified mortgage payments, Chase told Taylor by letter that he was ineligible for HAMP because his housing expenses did not exceed 31% of his gross monthly income as required by the program. App. 106A-109A. This statement was false. *Id.* 76A. Before switching to the modified trial-period payments, Taylor's housing expenses were approximately 64% of his gross monthly income. *Id.*

Because Chase did not permanently modify Taylor's mortgage, Taylor was in "a state of limbo" for five years about whether his family would remain in their home.

App. 18A ¶ 18, 81A. During these five years, Chase had a judgment of foreclosure on Taylor's home. *Id.* 22A ¶ 49, 81A. This judgment allowed Chase to schedule a sale of the property by the sheriff at any time. *See* Ind. Code § 32-30-10-8. Taylor's home was scheduled for sheriff's sales twice between 2010 and 2015, although he ultimately remained in his home. App. 18A ¶ 19; ECF 47-1, at 65 (Pl. Ex. 46). Chase also refused to remove negative entries from Taylor's credit report. App. 17A ¶ 16, 78A.

III. Proceedings below

Taylor first participated in a federal class action against Chase, but he opted out. *In re JPMorgan Chase Mortg. Modification Litig.*, No. 11-md-02290 (D. Mass. May 7, 2014), ECF 433 (Ex. 1). Taylor filed the complaint in this case in the Tippecanoe (Indiana) Superior Court on June 8, 2016, bringing common-law claims under Indiana law for breach of contract and promissory estoppel. ECF 2. Chase removed the case to the district court, answered, and then moved for judgment on the pleadings. ECF 37. Shortly after, Taylor moved to amend his complaint and add claims, including fraud and intentional infliction of emotional distress. ECF 38. Chase opposed the amendment. ECF 45. The motion for judgment on the pleadings was referred to a magistrate judge for a report and recommendation. ECF 60.

The magistrate judge found that neither Taylor's complaint nor first amended complaint stated claims on which relief could be granted. App. 1A-14A. Thus, the magistrate judge determined that amending the complaint would be futile and recommended granting Chase's motion for judgment on the pleadings. *Id.*

The magistrate judge found that the "TPP Agreement did not, itself, create a contract" because it included language that conditioned Chase's obligation to modify Taylor's mortgage on Taylor successfully completing the trial period (which he did), Taylor being qualified for HAMP (which he was), and Chase providing a signed copy of the TPP (which it did not). App. 6A. The magistrate judge therefore found that Taylor failed to state a breach-of-contract claim. *Id.* 7A. Similarly, the magistrate judge found that Taylor failed to state a fraud claim because the facts alleged in the particular section of Taylor's complaint labeled "Fraudulent Misrepresentation" focused on Chase's violation of a consent decree that Taylor had no power to enforce. *Id.* 10A-12A. The judge did not address the other allegations in Taylor's complaint, which were incorporated by reference into his fraud claim. *Id.*

The magistrate judge characterized Chase's alleged behavior as no more than a mishandling of Taylor's loan-modification application that did not meet the standard for intentional infliction of emotional distress. App. 9A. Finally, the magistrate judge rejected Taylor's promissory-estoppel claim, finding that even if the TPP was a promise to modify Taylor's mortgage, his reliance on that promise caused only "incidental expenses and inconvenience." *Id.* 12A-13A.

The district court adopted the magistrate's report and recommendation. ECF 75. The court found that the magistrate's opinion was consistent with relevant caselaw and thus dismissed all claims against Chase and denied Taylor's motion to amend the complaint as futile. *Id.* at 1.

SUMMARY OF ARGUMENT

I. Chase breached its contractual obligation and broke its promise to Taylor by failing to permanently modify his mortgage payments under HAMP. Taylor adequately pleaded that he and Chase formed oral, written, and implied contracts. Chase agreed to enroll Taylor in a HAMP trial period and, if Taylor met the conditions of the trial period and remained qualified for HAMP, to permanently modify his mortgage.

Taylor met all of the requirements of the HAMP trial period. Yet Chase never permanently reduced Taylor's mortgage payments under HAMP. Chase thus breached its contract with Taylor, and Taylor suffered damages from its breach. These allegations preclude dismissal of Taylor's contract and promissory-estoppel claims and lay the foundation for his fraud and intentional-infliction-of-emotional-distress claims.

II. Taylor adequately pleaded fraud and intentional infliction of emotional distress. The district court failed to consider all of Taylor's amended complaint before holding that he failed to state a claim for fraud. But taking into account all of its allegations, which must be taken as true, that complaint alleged that Chase knowingly made a false material misrepresentation: Chase would permanently modify his loan if he completed the trial period and met eligibility requirements, when it had no intention of ever doing so. Taylor further alleged that Chase intended to deceive him by training its employees to misinform customers about the status of their applications. Taylor relied on these misstatements to his financial and emotional detriment. Chase's outrageous behavior continued for five years and caused Taylor to suffer severe emotional distress. The district court thus erred when it denied Taylor leave to amend his complaint.

STANDARD OF REVIEW

This Court reviews rulings on a Rule 12(c) motion for judgment on the pleadings de novo. *Landmark Am. Ins. Co. v. Hilger*, 838 F.3d 821, 824 (7th Cir. 2016). As the moving party below, Chase bore the burden of demonstrating that no material issues of fact existed. *Id.* This Court may uphold the lower court's ruling only if the complaint is not facially plausible, that is, "only if it appears beyond doubt that [the plaintiff] cannot prove any facts that would support its claim for relief." *Id.* (quoting *N. Ind. Gun & Outdoor Shows v. City of S. Bend*, 163 F.3d 449, 452 (7th Cir. 1998)).

This Court must construe all facts in the pleadings in the light most favorable to the nonmoving party, Taylor. *See Landmark*, 838 F.3d at 824. The Court must examine the complaint, the answer, and any attached exhibits to determine whether Taylor stated a facially plausible claim that Chase is liable. *See N. Ind. Gun & Outdoor Shows*, 163 F.3d at 452-53; Fed. R. Civ. P. 10(c). Because Taylor was pro se, his pleadings must be "liberally construed" and "held to much less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Although appellate courts review denials of motions for leave to amend for abuse of discretion, review of "futility-based denials … includes de novo review of the legal basis for the futility." *Heng v. Heavner, Beyers & Mihlar, LLC*, 849 F.3d 348, 354 (7th Cir. 2017). Therefore, there is no "practical difference, in terms of review, between a denial of a motion to amend based on futility and the grant of a motion to dismiss for failure to state a claim." *Id.*

ARGUMENT

Through its statements and actions, Chase promised to modify Taylor's mortgage. Instead of providing the loan modification, Chase reneged on its agreement, leaving Taylor to suffer the financial and emotional consequences. Throughout this ordeal, Chase repeatedly lied to Taylor about his enrollment in the trial period and whether it would modify his mortgage. Taylor has stated claims against Chase for breach of contract, promissory estoppel, fraud, and intentional infliction of emotional distress. The lower court erred in holding otherwise and in denying as futile Taylor's motion to amend his complaint. This Court should reverse.

I. Taylor alleged that Chase breached its contractual obligation and broke its promise to modify Taylor's mortgage payments.

A. Chase breached its contract with Taylor.

To plead breach of contract, a plaintiff must allege three things: existence of a contract, breach of the contract, and damages resulting from the breach. *See U.S. Valves v. Dray*, 190 F.3d 811, 814 (7th Cir. 1999) (applying Indiana law). Taylor's complaints alleged all three.

1. Chase and Taylor contracted to modify Taylor's mortgage payments.

An agreement is a legally binding contract when there is an offer, acceptance, intent to contract, and consideration. *See Conwell v. Gray Loon Outdoor Mktg. Grp.*, 906 N.E.2d 805, 812-13 (Ind. 2009); *Zimmerman v. McColley*, 826 N.E.2d 71, 77 (Ind. Ct. App. 2005). The central issue here is whether Chase made Taylor an offer that Taylor

then accepted. We address that issue first, then turn to intent to contract and consideration.

a. Offer and acceptance. An offer is anything that invites another to enter into a bargain. *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 561-62 (7th Cir. 2012); Restatement (Second) of Contracts § 24 (Am. Law Inst. 1981). Courts look to all the circumstances in determining whether an offer has been made. *Zimmerman*, 826 N.E.2d at 77. A party accepts an offer by demonstrating assent to its terms in a way invited or required by the offer itself. Restatement (Second) of Contracts § 50. Taylor alleged that Chase offered him a contract by phone, in writing, and through its actions. In turn, Taylor accepted Chase's offers by agreeing to the HAMP modification on the phone, signing the TPP, and sending Chase the documents it requested. App. 17A ¶ 13, 19A ¶¶ 29-31, 68A, 71A-72A; ECF 47-1, at 13 (Pl. Ex. 7). These facts support three theories of contract formation: oral, written, and implied.

i. Oral Contract. Taylor and Chase formed an oral contract for a mortgage modification even before Chase mailed the TPP. Oral contracts are formed when offer and acceptance are given orally. *See Foster v. United Home Imp. Co.*, 428 N.E.2d 1351, 1355 (Ind. Ct. App. 1981). Of particular relevance here, an oral contract is binding even if both parties refer to a future written document that will articulate the terms to which they agreed orally. *Id.*

The first time Chase called Taylor to discuss HAMP, Chris Montgomery, a Chase employee, offered to enroll Taylor in a HAMP trial period. App. 16A ¶¶ 9-10, 66A-67A. At the time of this call, August 2009, Chase and other HAMP participants were encouraged by the Treasury Department to offer a HAMP trial period by phone to

prequalified homeowners. HAMP Guidelines 21, 44. Chase called Taylor—who prequalified—confirmed his income, and then offered him a trial period. Taylor accepted. App. 16A ¶¶ 9-11, 67A. At that point, Chase and Taylor formed a contract.

A phone agreement to enter a HAMP trial period is a contract for a permanent modification, so long as the borrower meets the conditions of the plan. *Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 883-85 (9th Cir. 2013) (applying this Court's decision in *Wigod*). In *Corvello*, two of the plaintiffs had an oral agreement with Wells Fargo to enter a HAMP trial period, which was not supported by a TPP or any other writing. *Id.* at 881-82. They met the conditions of the trial period but were denied a permanent mortgage modification. *Id.* Applying *Wigod*, the Ninth Circuit held that those plaintiffs had a binding contract with Wells Fargo, and Wells Fargo was required to offer them a permanent modification. *Id.* at 883-85.

By that same logic, Taylor and Chase formed an oral contract as soon as Montgomery made the offer and Taylor accepted. But Taylor's case is even easier: His contract was also supported by a writing, as we now explain.

ii. Written Contract. (a) Even if there had been no oral contract, Chase made Taylor an offer in the first documents it sent him, and Taylor accepted. These documents state repeatedly that Chase was making Taylor an offer. App. 28A-35A. The word "offer" is used three times in the first two pages. *Id.* 28A-29A. Chase's cover page explains that Taylor should "LET US KNOW THAT YOU ACCEPT THIS OFFER," and "accept this offer … [by] send[ing] the 5 items listed below." *Id.* The cover page further assures Taylor that Chase was "ready to help" him make his mortgage payments manageable and allow him to keep his home. *Id.* 28A. The

checklist Chase provided in the same package reiterates that Taylor should "accept this offer." *Id.* 32A. And the one document Chase relied on below—the TPP—uses the term "offer," too. *Id.* 33A. Taylor took Chase at its word and accepted the offer, just as Chase (repeatedly) requested. *Id.* 17A ¶ 13, 19A ¶ 29, 20A ¶ 32, 67A-70A.

Ignoring its repeated use of the word "offer," Chase argues that these documents were *not* an offer because, Chase asserts, one line of the TPP requires Chase's signature: "This Plan will not take effect unless and until both I and the Lender sign it and Lender provides me with a copy of this Plan with the Lender's signature." App. 33A. But Chase's interpretation "turns an otherwise straightforward offer into an illusion." *Wigod*, 673 F.3d at 563. Read along with the adjacent language, this sentence explains only *how* Chase would communicate to Taylor whether he was enrolled in the trial period. The immediately preceding sentence says: "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that I do not qualify." App. 33A. Put simply, the TPP says that, after a borrower accepts the offer, *if* the borrower qualifies, then Chase *will* send a signed copy of the TPP, but if the borrower does *not* qualify, Chase *will* send a notification to that effect. Any reasonable person would read this as a *description* of how Chase would communicate whether Taylor qualified, not, as Chase maintains, a loophole allowing Chase to skirt its commitment by later refusing to sign the TPP for any reason or no reason at all.

In *Wigod*, this Court held that a bank had offered to permanently modify a borrower's mortgage regardless of similar "unless and until" language in a TPP. 673 F.3d at 562. Although the facts in *Wigod* are not identical to the facts here—there, the

bank signed the TPP but did not sign a final modification agreement—the logic of the case controls. Wigod's TPP explained that the bank would "send Wigod a [signed] Modification Agreement if she complied with the requirements of the TPP and if her representations … continue[d] to be true in all material respects." *Id.* at 563. But the TPP also stated that "the Loan Documents will not be modified unless and until … I receive a fully executed copy of the Modification Agreement." *Id.* Wigod completed all of the terms of the trial period, but the bank argued that it was not obligated to permanently modify her mortgage payments because it never sent Wigod a *signed* copy of the Modification Agreement. *Id.* at 562-63.

This Court rejected Wells Fargo's argument, holding that Wigod's TPP was an offer for a permanent mortgage modification and, once she accepted, the bank was bound to permanently modify her loan. *Wigod*, 673 F.3d at 563. Despite the TPP's language regarding Wells Fargo's signature on the permanent-modification agreement, "a reasonable person in Wigod's position would read the TPP as a definite offer to provide a permanent modification that she could accept so long as she satisfied the conditions." *Id.* So too here.

Indeed, Chase made Taylor a contractual offer even more emphatically than did the bank in *Wigod*. In *Wigod*, this Court considered only the TPP. *See* 673 F.3d at 561-61. But here, all of the documents Chase mailed Taylor must be considered in determining whether Taylor pleaded that Chase made him an offer. Restatement (Second) of Contracts § 26(a). The combination of these documents—the TPP and the other materials in Chase's first mailing—were an offer because they "induce[d] a

reasonable belief" that Chase would be bound to enroll Taylor in HAMP or provide notice that he did not qualify. *See Wigod*, 673 F.3d at 562.

In *Corvello*, the Ninth Circuit considered language in a TPP that stated that the bank would sign the document or notify the plaintiffs that they did not qualify for a HAMP trial period. 728 F.3d at 883. Applying the reasoning of *Wigod*, *Corvello* held that the bank made an offer and was bound to modify plaintiffs' mortgages even without the bank's signature on the TPP. *Id.* at 883-84. That was because *Wigod*'s holding did not turn on whether the TPP was signed by the bank. *Id.* at 884. In short, the TPP's supposed signature requirement "cannot convert a purported agreement setting forth clear obligations into a decision left to the unfettered discretion of the loan servicer." *Id.*

(b) Implicit in Chase's reliance on the TPP's supposed signature requirement is the assertion that its signature was a condition precedent to contract formation—that is, something that had to occur before Taylor and Chase could have a binding contract. *See Ind. State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998) (citing Restatement (Second) of Contracts § 224 and 5 Williston, Contracts § 666 (3d ed. 1961)). In Indiana, conditions precedent "are disfavored and must be explicitly stated." *Knauf Fiber Glass, GmbH v. Stein*, 615 N.E.2d 115, 127 (Ind. Ct. App. 1993), *vacated on other grounds*, 622 N.E. 163 (Ind. 1993). And, as explained above (at 20), the language in the TPP is reasonably read simply as an explanation of how Chase would communicate with Taylor. *See* App. 28A-35A. Thus, even if the supposed signature requirement were a condition, it is far from explicitly stated.

Assuming (counterfactually) that Chase's signature was a condition precedent under the TPP, Chase waived it. Conditions precedent may be waived orally or by a party's conduct. *See Harrison v. Thomas*, 761 N.E.2d 816, 820 (Ind. 2002). Chase did both here. In *Topchian v. JPMorgan Chase Bank, N.A.*, the Eighth Circuit held that Chase waived a purported signature requirement in a HAMP trial-plan agreement when one of Chase's representatives orally assured Topchian that the agreement had been accepted, but informed Topchian that Chase would not send proof of this acceptance. *See* 760 F.3d 843, 851 (8th Cir. 2014). Chase also waived the purported requirement "by accepting payments in the amount set forth in the Agreement for ten months because Chase does not accept payments that are less than the amount upon which it has agreed." *Id.*

Just like in *Topchian*, Chase's employee here told Taylor that his documents had been received and processed and that he "did not know of any situation in which Chase returns fully executed copies of TPP agreements." App. 67A-68A, 70A-73A. And as in *Topchian*, Chase also accepted Taylor's second and third modified payments. *Id.* 70A-73A. Thus, if Chase's signature requirement was a condition precedent, this Court should hold, like the Eighth Circuit, that Chase waived the condition.

iii. Implied Contract. A contract also may be implied from the totality of Chase's and Taylor's actions. *See Ahuja v. Lynco Ltd. Med. Research*, 675 N.E.2d 704, 709 (Ind. Ct. App. 1996).[11] Indiana law recognizes implied contracts when the evidence, taken

[11] Indiana courts refer to implied contracts using at least four terms: implied, implied-in-fact, oral, and parol. *See Ahuja*, 675 N.E.2d at 709 ("implied"); *McCart v. Chief Exec. Officer in Charge, Indep. Fed. Credit Union*, 652 N.E.2d 80, 85 (Ind. Ct. App. 1995) ("implied-in-fact"); *Sand Creek Country Club v. CSO Architects*, 582 N.E.2d 872,

as a whole, proves that the two parties had an agreement, even without an express offer and acceptance. *See Ahuja*, 675 N.E.2d at 709. To prove an implied contract, the plaintiff "must show that the parties' actions evidenced a mutual agreement and an intent to promise." *Id.* An implied contract is formed if a writing lays out the terms of a tentative agreement, and the actions of the parties show that they are putting that agreement into effect. *Sand Creek*, 582 N.E.2d at 875.

In *Sand Creek*, a country club and an architectural firm signed a letter clearly describing terms of a potential contract for the firm's services. 582 N.E.2d at 874. The letter explicitly stated that it was not a contract. But the country club orally authorized the firm to begin the work, and it continued to reassure the firm that they had an agreement. *Id.* After the work was substantially completed, the country club refused to pay. *Id.* Because the parties acted as if the agreement existed, the court found an implied contract, and the country club was bound to carry out the terms of the letter. *Id.* at 875.

Here, too, the parties mutually agreed to clear terms: Following the HAMP guidelines, Chase would modify Taylor's mortgage so long as Taylor qualified and kept up with the trial-period payments. *See* App. 16A-17A ¶¶ 8-13, 66A-67A. Montgomery laid out those terms in his phone calls with Taylor, and Taylor agreed to

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875 (Ind. Ct. App. 1991) ("oral"); *Dubois Cty. Mach. Co. v. Blessinger*, 274 N.E.2d 279, 282 (1971) ("parol").

In each of the cases cited in this section, the court found a contract based on actions *and* words or writings. We refer to these as implied contracts and reserve the term "oral contracts" for those in which the offer and acceptance are spoken.

them. And the written documents that Chase sent Taylor reiterated the terms of this agreement. *See id.* 28A-35A.

As in *Sand Creek*, Chase's and Taylor's actions are evidence that Chase and Taylor agreed to those terms. Taylor performed his end of the contract by submitting paperwork (three times), making the modified payments, creating an escrow account, and meeting the income qualifications for a mortgage modification under HAMP. App. 16A-17A ¶¶ 8-13, 66A-68A. Chase expressed its approval by taking Taylor's modified payments and repeatedly telling Taylor that he was acting in accordance with the steps for a HAMP modification and that he had, in fact, been approved. *Id.* 68A, 70A, 72A. And when Taylor asked about the TPP's supposed signature requirement, a Chase employee told Taylor that the employee "did not know of any situation in which Chase returns fully executed copies of TPP agreements to customers." *Id.* 68A-69A, 71A, 72A. If these actions do not show a "mutual agreement and an intent to promise," *Ahuja*, 675 N.E.2d at 709, it is hard to imagine what would.

b. Intent to contract. Intent to contract, or mutual assent, is a straightforward question of whether the parties meant to form an agreement. *See Zimmerman*, 826 N.E.2d at 77. Intent can be shown through speech, writing, or performance. *See id.*; *DiMizio v. Romo*, 756 N.E.2d 1018, 1022 (Ind. Ct. App. 2001); Restatement (Second) of Contracts § 22. Chase demonstrated its intent to form an agreement by calling Taylor to offer a HAMP mortgage modification, sending him documents with trial terms describing that modification, and accepting his modified payments according to those terms. App. 16A-17A ¶¶ 10-12, 28A-35A, 66A-67A. Taylor showed his intent to

contract by sending Chase the documents and payments that Chase requested. *Id.* 17A ¶ 13, 19A ¶ 29, 67A-68A, 71A-72A.[12]

c. Consideration. Chase and Taylor's contract was supported by adequate consideration. "Consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them." *Wigod*, 673 F.3d at 563-64 (applying Illinois law); *see also AM Gen. LLC v. Armour*, 46 N.E.3d 436, 443 (Ind. 2015) (using the same definition of consideration). In *Wigod*, this Court held that there was adequate consideration because Wigod incurred legal detriments such as creating an escrow account and providing and certifying the truth of her financial information. *See* 673 F.3d at 564. Taylor also opened an escrow account and certified the truth of his financial information. App. 17A ¶ 13, 67A, 74A-75A.

2. Chase breached its contract with Taylor when it failed to modify his mortgage payments.

Taylor alleges that he met the terms of the trial period because he qualified for HAMP, provided the documentation Chase requested, and made timely modified payments. App. 17A ¶ 13, 74A-77A. Yet Chase did not permanently modify Taylor's mortgage, as it was obligated to do. *Id.* 17A ¶ 14, 76A-77A. Therefore, like the bank in *Wigod*, Chase breached its contract with Taylor.

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[12] The district court's reliance on *Baehl v. Bank of Am.*, No. 3:12-cv-00029, 2013 WL 1319635, at *1 (S.D. Ind. Mar. 29, 2013), was misguided. *See* App. 6A. *Baehl* rejected the plaintiffs' breach-of-contract claims because, the court concluded, that the plaintiffs failed to accept in the manner that the TPP required. *Baehl*, 2013 WL 1319635, at *11-13. Here, Taylor alleges that he accepted in every way that Chase demanded. App. 17A ¶ 13, 19A ¶ 29, 67A-68A, 71A-72A. So *Baehl* has nothing to do with whether Chase and Taylor formed an agreement.

In *Wigod*, this Court held that the defendant bank breached its contract when it failed to finally modify Wigod's mortgage payments after she complied with all requirements of the HAMP trial period and her financial information remained accurate. *Wigod*, 673 F. 3d at 562-63. Because the contract promised to permanently modify Wigod's loan so long as these conditions were met, the bank breached. *Id.*

Taylor's contract with Chase contained terms nearly identical to the contract in *Wigod*. The TPP Chase sent to Taylor similarly provides that Taylor's mortgage payments *will* be modified if he successfully completes the trial period and otherwise continues to comply with HAMP:

Wigod TPP	Taylor TPP
"If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a [permanent] Loan Modification Agreement."	"If I am in compliance with this Trial Period Plan (the 'Plan') and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement ('Modification Agreement')."

Wigod, 673 F. 3d at 560-61; App. 33A. Because Taylor met the trial-period conditions and qualified for a HAMP modification, Chase was bound to permanently modify Taylor's mortgage payments. Taylor upheld his end of the bargain. Chase did not.

3. Taylor suffered damages as a result of Chase's breach.

Recoverable damages for breach include the actual damages suffered and "reasonable expenses that are a natural consequence of the breach." *Merillville*

Conservancy Dist. ex rel. Bd. of Directors v. Atlas Excavating, 764 N.E.2d 718, 724 (Ind. Ct. App. 2002); *see also* Restatement (Second) of Contracts §§ 347, 351.

Taylor alleges that he suffered damages by not being able to modify his mortgage payments through HAMP (or pursue other legal options to do so), being denied HAMP's annual $1,000 borrower incentive, having to pay late fees, being the subject of adverse credit reports, and having his home twice scheduled for sheriff's sales. App. 17A-18A ¶¶ 15-19, 26A ¶ 76, 77A-78A. These kinds of damages are sufficient to state a claim in HAMP breach-of-contract cases. *See Bushell v. JPMorgan Chase Bank, N.A.*, 163 Cal. Rptr. 3d 539, 549 (Ct. App. 2013); *see also Wigod*, 673 F.3d at 560-61. Taylor alleges that these damages resulted from Chase's breach. App. 77A-78A.

B. Chase should be held to its promise to modify Taylor's mortgage under the promissory-estoppel doctrine.

Promissory estoppel is an alternative basis for contractual relief, protecting "one who acts to his detriment on the faith of a promise." *See First Nat'l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 954 (Ind. 1991). It serves "to aid the law in the administration of justice" where one or more of the elements of contract formation are not satisfied, but "injustice might result" unless parties are held to their promises. *Id.*[13]

[13] Because Taylor has stated a breach-of-contract claim, there is no "gap … for promissory estoppel to fill." *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 566 n.8 (7th Cir. 2012). But Taylor's well-pleaded complaints preserve the promissory-estoppel claim as an alternative theory of recovery if later litigation determines that an enforceable contract did not exist. *See id.*

Taylor alleged the elements of promissory estoppel: (1) a definite promise by the promissor, Chase; (2) made with the expectation that the promisee, Taylor, would rely on it; (3) which induced Taylor's reasonable reliance; (4) of a definite and substantial nature; where (5) injustice can be avoided only by enforcement of Chase's promise. *See Turner v. Nationstar Mortg., LLC*, 45 N.E.3d 1257, 1265 (Ind. Ct. App. 2015). Analysis of a promissory-estoppel claim requires consideration of all facts and communications between the parties. *See Logansport*, 577 N.E.2d at 955-56.

Chase made a definite promise to modify Taylor's loan. App. 24A-25A ¶¶ 61-71, 85A-86A. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2. Chase manifested its intent and committed to modify his loan through both its words and acts of assurance.

Chase's promise to modify Taylor's loan satisfy this element, even though its promise was subject to conditions. *See Garwood Packaging v. Allen & Co.*, 378 F.3d 698, 702-03 (7th Cir. 2004). Taylor alleged that Chase unambiguously promised to "provide [him] with a Home Affordable Modification Agreement" as long as he was "in compliance with this Trial Period Plan and [his] representations … continued to be true." App. 25A ¶ 71, 85A-86A. In *Wigod*, this Court upheld Wigod's promissory-estoppel claim against a bank, where the plaintiff alleged that the bank made an unambiguous promise to offer a HAMP modification if she satisfied certain conditions and relied on that promise to her detriment. 673 F.3d at 566.

Other courts have concluded that "the TPP contract—through which a permanent modification was to be offered if certain conditions were met—meets the element of

a clear and unambiguous promise." *Bushell v. JPMorgan Chase Bank, N.A.*, 163 Cal. Rptr. 3d 539, 550 (Ct. App. 2013) (citing *Wigod*); *see also George v. Urban Settlement Servs.*, 833 F.3d 1242, 1260 (10th Cir. 2016); *Cameron v. Wells Fargo Bank NA*, No. CV-13-01921, 2014 WL 3418466, at *8 (D. Ariz. July 14, 2014); *Williams v. Saxon Mortg. Servs.*, No. 13-10817, 2014 WL 765055, at *18 (E.D. Mich. Feb. 26, 2014); *Cave v. Saxon Mortg. Servs.*, No. 12-5366, 2013 WL 1915660, at *8-9 (E.D. Pa. May 9, 2013); *West v. JPMorgan Chase Bank, N.A.*, 154 Cal. Rptr. 3d 285, 303-04 (Ct. App. 2013).

Taylor also satisfied elements two, three, and four of a promissory-estoppel claim: expectation of reliance, reasonable reliance, and definite and substantial reliance. *See Turner*, 45 N.E.2d at 1265. In *Logansport*, the Indiana Supreme Court upheld a promissory-estoppel claim involving a bank's promise to lend money. *See* 577 N.E.2d at 955. There, a bank employee's multiple representations that a loan would be made—even though the loan needed approval from the bank's loan committee—demonstrated that the bank expected the borrowers to rely on this promise and that it was reasonable for the borrowers to do so. *Id.* The borrowers' reliance, which led them to incur financial losses and to forgo other loans, was sufficiently substantial and definite to support recovery. *Id.*

Like in *Logansport*, Chase expected that Taylor would rely on its promise and Taylor's reliance was reasonable under the circumstances. By repeatedly requesting the documents necessary to verify his TPP eligibility, confirming receipt of these documents, and by taking his TPP payments, Chase indicated to Taylor that it would follow through with its obligations under the TPP. *See* App. 24A-25A ¶¶ 61-71, 28A-33A, 85A-87A, 89A, 91A, 96A, 99A. Thus "it would be unusual for a lender under

these circumstances not to expect or anticipate," *Logansport*, 577 N.E.2d at 955, that Taylor would rely on the bank's promises.

Further, Taylor's reasonable reliance was definite and substantial: As a result of Chase's promises, he incurred financial losses and did not seek alternate procedures for avoiding foreclosure such as bankruptcy or a home-equity loan. App. 17A ¶¶ 13-19, 77A-78A. This "foregone … opportunity" is "reliance enough to support a claim of promissory estoppel." *See Wigod*, 673 F.3d at 566 (citing Indiana law).

Finally, the manifest injustice of Chase's indifference to its promises can be avoided only through judicial enforcement because Taylor's reliance injury is "(1) independent from the benefit of the bargain and the resulting expenses and inconvenience, and (2) so substantial as to constitute an unjust and unconscionable injury," *Hrezo v. City of Lawrenceburg*, 934 N.E.2d 1221, 1231-32 (Ind. Ct. App. 2010). Taylor did not seek bankruptcy relief or alternate loan modifications. App. 26A ¶ 76, 78A, 86A. And this Court has held that these same injuries are both independent from the loan modification bargain and unjust. *See Wigod*, 673 F.3d at 566. Other courts agree. *See Ryan-Beedy v. Bank of N.Y. Mellon*, 293 F. Supp. 3d 1101, 1110-11 (E.D. Cal. 2018) (applying California law); *Fisher v. HSBC Bank*, 332 F. Supp. 3d 435, 442 (D. Mass. 2018) (applying Massachusetts law); *Dias v. Fed. Nat'l Mortg. Ass'n*, 990 F. Supp. 2d 1042, 1057 (D. Haw. 2013) (applying Hawaii law).

II. Taylor pleaded that Chase committed fraud and intentional infliction of emotional distress.

Taylor's amended complaint pleaded claims for fraud and intentional infliction of emotional distress. At this early stage in the litigation, Taylor's claims survive unless "it appears beyond doubt that [he] cannot prove any facts that would support [his] claim[s] for relief." *Landmark Am. Ins. Co. v. Hilger*, 838 F.3d 821, 824 (7th Cir. 2016). Taylor alleges that Chase engaged in ongoing deception to induce Taylor to make payments while wrongfully refusing to modify his mortgage. As a result, Chase outrageously held Taylor in financial limbo for five years, under constant threat of foreclosure, causing him severe emotional distress. App. 81A. Therefore, the district court should have allowed Taylor to amend his complaint and pursue his claims for fraud and intentional infliction of emotional distress.

A. Chase committed fraud by lying about the status of Taylor's HAMP modification.

Taylor's complaint alleges sufficient facts to support a fraud claim.[14] To show fraud, a plaintiff must demonstrate (1) "a false material misrepresentation of past or existing facts," (2) "made with knowledge or reckless ignorance of the falsity," (3) "which causes reliance to the detriment of the person relying on the representation."

[14] We use the term "fraud" to refer to Taylor's fraudulent-misrepresentation claim. Indiana courts use "fraud," "fraudulent misrepresentation," and "actual fraud" interchangeably. *See Kesling v. Hubler Nissan*, 997 N.E.2d 327, 335-36 (Ind. 2013) ("fraud" and "fraudulent misrepresentation"); *Johnson v. Wysocki*, 990 N.E.2d 456, 460 (Ind. 2013) ("fraud" and "fraudulent misrepresentation"); *Ohio Farmers Ins. Co. v. Ind. Drywall & Acoustics*, 970 N.E.2d 674, 683 (Ind. Ct. App. 2012) ("fraud" and "actual fraud"), *transfer granted, vacated*, 976 N.E.2d 1234 (Ind.), *and reinstated*, 981 N.E.2d 548 (Ind. 2013).

Ohio Farmers Ins., 970 N.E.2d at 683. Chase committed fraud by convincing Taylor that if he followed its instructions and made payments, it would modify his mortgage under HAMP, which it never intended to do. This Court and others have upheld claims of fraud for similar behavior by banks in administering HAMP. *See, e.g.*, *Wigod v. Wells Fargo, N.A.*, 673 F.3d 547, 569 (7th Cir. 2012) (Illinois common law); *Bushell v. JPMorgan Chase Bank, N.A.*, 163 Cal. Rptr. 3d 539, 551 (Ct. App. 2013) (California common law); *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 856-57 (9th Cir. 2017) (California statutory law); *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1248-50, 1254-55 (10th Cir. 2016) (federal RICO).

The district court's first error was its failure to consider the totality of Taylor's pleadings, as is required for pro se plaintiffs. To be sure, a plaintiff "must state with particularity the circumstances constituting fraud," alternately described as the "who, what, when, where, and how" of the fraud. *Wigod*, 673 F.3d at 569; *see* Fed. R. Civ. P. 9(b). But even under this heightened pleading standard, "a pro se complaint is held to less stringent standards than formal pleadings drafted by lawyers, and can be dismissed for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lathrop v. Juneau & Assocs.*, 220 F.R.D. 322, 328 (S.D. Ill. 2004); *see also Rodi v. S. N.E. Sch. of Law*, 389 F.3d 5, 15 (1st Cir. 2004) (in case involving pro se plaintiff, "documents affixed to complaint that contained alleged misrepresentations satisfied Rule 9(b)").

The only fraud theory considered by the court below was based on Taylor's claim that Chase committed fraud by violating a consent decree with the United States.

App. 10A-11A. The magistrate judge dismissed this theory of fraud, and Taylor does not press it here. But Taylor's fraud claim also incorporated "each and every" prior allegation in his complaint. *Id.* 82A. Because Taylor is a pro se plaintiff, the court should look to his entire pleading, not just the section labeled "Fraudulent Misrepresentation." *See Lathrop*, 220 F.R.D. at 327-28. Taken as a whole, Taylor's first amended complaint alleged facts sufficient to plead fraud.

1. The first two fraud elements: (a) misrepresentation that is (b) known to be false. First, the defendant's misrepresentation must be false at the time it is made and not just a prediction or promise to take action that is later proved wrong. *Comfax Corp. v. N. Am. Van Lines*, 587 N.E.2d 118, 125 (Ind. Ct. App. 1992). But a promise to take future action *is* a misrepresentation of existing fact if the evidence shows that the defendant never intended to keep the promise. *See Ohio Farmers Ins.*, 970 N.E.2d at 686.

Second, the allegations must "support an inference that the [defendant] knew his statements to be false, but made them anyway with intent to deceive" the plaintiff. *Kesling*, 997 N.E.2d at 336. And when the defendant "knowingly or recklessly makes false representations which [it] knows or should know will induce another to act, the finder of fact may logically infer an intent to deceive." *Heckler & Koch v. German Sport Guns GmbH*, 71 F. Supp. 3d 866, 881 (S.D. Ind. 2014).

These two elements are met here. Taylor alleged that Chase intended to deceive him by "knowingly and intentionally, with malice, train[ing] its employees to misinform its customers, including [Taylor], regarding the status of their HAMP applications." App. 79A. Chase's policy of wrongfully rejecting people in Taylor's

situation was an intentional, duplicitous company policy that made it harder for homeowners to get the loan modifications to which they were entitled. *See id.* Chase employee Chris Montgomery told Taylor that Chase would modify his loan if he qualified and completed the trial period. *Id.* 66A-67A. This statement was a promise that Chase never intended to keep, as shown by its actions and its misrepresentations.

Chase went to great lengths to avoid modifying Taylor's loan. Chase refused to countersign his TPP—though it now argues (incorrectly) that its signature was a precondition for enrollment in the trial period. App. 66A, 102A-103A; ECF 45, at 7-8. Chase destroyed or lost Taylor's documents. App. 79A-80A. It sent him false and conflicting information to confuse him. *See id.* And when, despite all this, Taylor diligently met every condition of the agreement, Chase denied him a modification by falsely claiming that his income was too high to participate in HAMP. *See id.* 75A-76A, 106A-108A.

To further its scheme, Chase made a series of representations that it knew (or had reason to know) were false. Chase sent Taylor several letters saying that it did not have Taylor's paperwork when, in reality, Taylor had sent Chase the paperwork multiple times via tracked mail, and Chase intentionally had not processed it. App. 67A, 88A, 91A, 96A, 99A, 104A. Chase denied Taylor's mortgage modification for the stated reason that Taylor did not meet the income requirement. *Id.* 106A-108A. But Chase had proof that he *did* meet the income requirement. *Id.* 74A-77A. This proof of income was in the paperwork that Chase received. *Id.* 68A-69A, 74A-77A; ECF 47-1, at 41-64 (Pl. Exs. 36-39). And to string him along, Chase employees told Taylor that

he was approved for a HAMP trial period, App. 71A-72A, when Chase never intended to enroll him in the trial period or modify his mortgage.

2. The third element: detrimental reliance. The final element is met if the plaintiff took an action to his detriment or failed to take a beneficial action because he believed the misrepresentation to be true. *Heckler & Koch*, 71 F. Supp. 3d at 883-84. The misrepresentation must cause the damages that plaintiff seeks to recover. *Id.* In addition to financial loss, fraud victims may recover damages for emotional distress. *Mullen v. Cogdell*, 643 N.E.2d 390, 401-02 (Ind. Ct. App. 1994).

Taylor "accepted and trusted the explanation by the Chase representatives that his HAMP application was approved and being scheduled for closing." App. 72A. As a result of his reliance, Taylor chose to forgo bankruptcy, opened an escrow account for his payments, provided and verified detailed financial information, and went through significant stress and hardship because of the uncertainty of his mortgage. *Id.* 77A-78A, 81A. Taylor alleged that Chase's misrepresentations caused him severe emotional distress. *Id.*

B. Chase intentionally inflicted emotional distress on Taylor.

To state a claim for intentional infliction of emotional distress, the plaintiff must plead that the defendant (1) engaged in extreme and outrageous conduct (2) that intentionally or recklessly (3) caused the plaintiff (4) severe emotional distress. *Brown v. Indianapolis Hous. Agency*, 971 N.E.2d 181, 188 (Ind. Ct. App. 2012).

Emotional distress is intentionally inflicted when the "recitation of the facts to an average member of the community would arouse his resentment against the actor, and

lead him to exclaim, 'Outrageous!'" *Bradley v. Hall*, 720 N.E.2d 747, 752-53 (Ind. Ct. App. 1999). Taylor's complaint sets forth facts that incite resentment and invoke outrage, as it describes Chase's intentional scheme to deny Taylor government-mandated relief during the worst economic crisis in more than seventy years. *See* App. 80A-81A; Fin. Crisis Report 4.

Chase's actions "exceed[ed] all bounds typically tolerated by a decent society." *See Brown*, 971 N.E.2d at 188 (*quoting Curry v. Whitaker*, 943 N.E.2d 354, 361 (Ind. Ct. App. 2011)). While the U.S. financial system was crumbling, Chase took billions in government money and promised to help keep people in their homes. App. 65A. Chase readily accepted payments from the struggling homeowners but in return gave them nothing more than false hopes. Ultimately, Chase denied assistance to over 80% of applicants. *See* SIGTARP 2015 Third Quarter 107. These denials aroused resentment, leading to a "constant stream of complaints," and even the federal government's recognition of Chase's "poor treatment of borrowers." *See* SIGTARP 2014 First Quarter Report 267-68. And that is to say nothing of the lawsuits filed by aggrieved homeowners across the country.[15]

Chase's behavior toward HAMP applicants generally was shocking. But the specific allegations in Taylor's complaint show that Chase's treatment of Taylor was

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[15] *See Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843 (8th Cir. 2014); *Bushell v. JPMorgan Chase Bank, N.A.*, 163 Cal. Rptr. 3d 539 (Ct. App. 2013); *West v. JPMorgan Chase Bank, N.A.*, 154 Cal. Rptr. 3d 285 (Ct. App. 2013); *see also Enforceability of Trial Period Plans (TPP) Under the Home Affordable Modification Program (HAMP)*, 88 A.L.R. Fed. 2d 331 (2014) (listing at least thirty-three other TPP lawsuits against Chase, including class actions and multi-district litigation).

even more outrageous. Chase did not process Taylor's HAMP loan modification in good faith. Instead, it prevented Taylor from obtaining relief by intentionally misleading him about the status of his mortgage modification. App. 80A-81A. Chase's actions gave Taylor false hope that he could achieve relief. For months, he was enticed by this "beckoning mirage," but his relief would never come. *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 859 (9th Cir. 2017). And this was not a mistake—it was the result of internal Chase policies guaranteeing that result. App. 79A-82A.

But Chase's misbehavior did not end there. After Chase finally rejected Taylor's loan modification, Chase still had a judgment of foreclosure on his home. For the next five years, while Taylor pursued legal remedies, he lived under the constant threat that he and his family would lose their home whenever Chase decided to kick them out. This was no idle threat: Chase twice scheduled Taylor's home for a public sheriff's sale. Chase's actions left Taylor without options, but with a strained marriage, damaged credit, and intense personal stress. App. 81A; ECF 47-1, at 65 (Pl. Ex. 46).

Indiana courts have found that less-outrageous behavior satisfies the standard for outrageousness. For example, an employee's allegations that her supervisor shouted at her, inquired about her menopause, and asked whether her husband was impotent precluded summary judgment on the issue. *Bradley*, 720 N.E.2d at 753. That case, no doubt, alleged callous conduct and serious harm. But it involved short-term conduct and short-term effects, with minimal financial consequences. If the conduct alleged in *Bradley* was sufficient to support a claim for intentional infliction of emotional distress, then Chase's actions, extending over many years and threatening his family home,

with potentially life-altering financial consequences, are of a sufficient magnitude to support Taylor's claim at the pleadings stage. App. 80A-81A, 83A.

The entire experience caused Taylor "mental distress of a very serious kind," *Brown*, 971 N.E.2d at 188. "A mortgage foreclosure is an economic catastrophe for any individual or family. … The social status accrued as a homeowner is replaced by the humiliation of the exile." David A. Super, *A New New Property*, 113 Colum. L. Rev. 1773, 1847-48 (2013).[16] Foreclosure has been linked to increased rates of major depression and generalized anxiety disorder during the financial crisis, even when controlling for other financial stressors. *See* K.A. McLaughlin et al., *Home foreclosure and risk of psychiatric morbidity during the recent financial crisis*, 42 Psych. Med. 1441 (2012). "Losing one's home can feel like losing one's self. Those being foreclosed upon can feel they have let down their families, that they have been 'exposed' as failures in the eyes of the community … . This perfect storm of lowered self-esteem and perceived loss of face is indeed the growing place for divorce, panic disorder, major depression and stress-related medical conditions like hypertension."[17]

Taylor is all too familiar with these traumatic effects. Because of Chase, he spent years "in a state of limbo," suffering "mental paralysis." App. 81A. Chase's actions

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[16] *See also* Donna M.L. Heretick, *Clinicians' Reports of the Impact of the 2008 Financial Crisis on Mental Health Clients*, 7 J. Soc. Behav. & Health Sci. 1, 11-12 (2013); Lauren M. Ross & Gregory D. Squires, *The Personal Costs of Subprime Lending and the Foreclosure Crisis: A Matter of Trust, Insecurity, and Institutional Deception*, 92 Soc. Sci. Q. 140, 156-57 (2011).

[17] Keith Ablow, *The Emotional Meaning of Home*, Psych Central, https://psychcentral.com/lib/the-emotional-meaning-of-home// (last updated Oct. 8, 2018).

from 2009 to 2015 left him unable to provide a stable home for his family. This caused Taylor "stress and anxiety," strained his marriage, damaged his "self-pride," and cost him the respect of his extended family. *Id.*

Chase may argue that Taylor's claims resemble those dismissed in *Jaffri v. JP Morgan Chase Bank, N.A.*, 26 N.E.3d 635, 640 (Ind. Ct. App. 2015). They do not. In *Jaffri*, the plaintiff asserted that Chase "intentionally mishandled" the HAMP paperwork. *Id.* But what Taylor alleges here goes far beyond mishandling. Taylor alleges a systematic and long-running scheme to mislead him into thinking that relief from his financial desperation was imminent, when, in reality, Chase had no intention of ever modifying his loan. App. 79A-82A.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings on the merits of Taylor's claims.

Respectfully submitted,

/s/ Bradley Girard

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March 7, 2019

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 10,880 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5), the type-style requirements of Rule 32(a)(6), and the requirements of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, set in Garamond font in 14-point type.

/s/ Bradley Girard
Bradley Girard

ATTACHED APPENDIX

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a) and that the separately submitted appendix contains all of the materials required by Circuit Rule 30(b).

/s/ Bradley Girard
Bradley Girard

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Indiana

ANTHONY G. TAYLOR

Plaintiff(s)

v. **Civil Action No. 4:16-CV-52**

JP MORGAN CHASE, CAHSE HOME FINANCE

Defendant(s)

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

☐ the plaintiffs _____ recover from the defendant _____ the amount of _____ $_____, plus post-judgment interest at the rate of _____ %.

☐ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____ recover costs from the plaintiff _____.

X Other: All Claims against Defendant, Chase, are DISMISSED WITH PREJUDICE.

This action was (*check one):*

☐ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

X decided by Judge Rudy Lozano

DATE: 8/30/2017

ROBERT TRGOVICH, CLERK OF COURT

by /s/Jason Schrader

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

ANTHONY G. TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. 4:16-CV-52
	)	
JP MORGAN CHASE, CHASE HOME FINANCE,	)	
	)	
	)	
Defendant.	)	

OPINION AND ORDER

This matter is before the Court on the: (1) Report and Recommendations of Magistrate Judge John E. Martin, filed on June 30, 2017 (DE #67); and (2) the Plaintiff's Objection to Magistrate's Findings, Report and Recommendation, filed by pro se Plaintiff, Anthony G. Taylor, on July 14, 2017 (DE #68). For the reasons set forth below, the objection (DE #68) is **OVERRULED** and the report and recommendation (DE #67) is **ADOPTED**. Accordingly, Defendant's Motion for Judgment on the Pleadings, filed by Defendant, JPMorgan Chase Bank, N.A., on January 4, 2017 (DE #37), is **GRANTED**, and the Clerk is **ORDERED** to **DISMISS** all claims against Defendant, Chase, **WITH PREJUDICE**. Plaintiff's Motion for Judgment on the Pleadings, filed by pro se Plaintiff, Anthony G. Taylor, on January 27, 2017 (DE #46), is **DENIED AS MOOT**.

BACKGROUND

On May 30, 2017, this Court referred Defendant's motion for judgment on the pleadings (DE #37) and Plaintiff's motion for judgment on the pleadings (DE #46) to Magistrate Judge John Martin for report and recommendation. (DE #60.)

On June 30, 2017, Magistrate Judge John Martin issued a Report and Recommendation. (DE #67.) First, Judge Martin denied Plaintiff's motion to amend the complaint (DE #38). Judge Martin also ruled upon Defendant's motion for judgment on the pleadings (DE #37), finding that Taylor's claims fail as a matter of law and Chase was entitled to judgment on the pleadings. (DE #67.) Finally, Judge Martin ruled on Plaintiff's motion for judgment on the pleadings (DE #46), recommending it should be denied as moot because Defendant's motion for judgment on the pleadings was successful. (DE #67.) The facts of the case are fully set forth in Judge Martin's opinion.

Plaintiff filed a timely objection to the Magistrate Judge's rulings on July 14, 2017 (DE #68), and Chase filed a response on July 27, 2017 (DE #69). As such, this matter if fully briefed and ripe for adjudication.

DISCUSSION

This Court's review of the Magistrate Judge's Report and Recommendation is governed by 28 U.S.C. § 636(b)(1)(C). When a

party makes objections to a magistrate judge's recommendations, "[t]he district court is required to conduct a de novo determination of those portions of the magistrate judge's report and recommendations to which objections have been filed." *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995). "[T]he court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b).

First, Plaintiff argues that the Magistrate Judge misapplied the standard of review for the judgment on the pleadings. (DE #68 at 3.) To the contrary, the Magistrate Judge properly evaluated the motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) under the same standard as a motion to dismiss for failure to state a claim under Rule 12(b)(6).

A motion for judgment on the pleadings under Rule 12(c) "is reviewed under the same standard as a motion to dismiss under 12(b); the motion is not granted unless it appears beyond doubt that the plaintiff can prove no facts sufficient to support his claim for relief, and the facts in the complaint are viewed in the light most favorable to the non-moving party." *Flenner v. Sheahan*, 107 F.3d 459, 461 (7th Cir. 1997); *see also Thomason v. Nachtrieb*, 888 F.2d 1202, 1204 (7th Cir. 1989). In order to survive a Rule 12(b)(6) motion, the 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

(2009)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). All well-pleaded facts must be accepted as true, and all reasonable inferences from those facts must be resolved in the plaintiff's favor. *Pugh v. Tribune Co.*, 521 F.3d 686, 692 (7th Cir. 2008). However, pleadings consisting of no more than mere conclusions are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678-79. This includes legal conclusions couched as factual allegations, as well as "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678 (citing *Twombly*, 550 U.S. at 555). Nevertheless, the court must bear in mind that a *pro se* complaint is entitled to liberal construction, "however inartfully pleaded." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Just because Plaintiff included 77 allegations in his complaint does not mean that he has properly pled the parties had an agreement. (DE #68 at 4.) Indeed, the Magistrate Judge analyzed in detail the breach of contract claim and properly determined that no contract existed because, *inter alia*, no offer was made by Chase to Taylor; Chase never returned an executed copy of the TPP, and Taylor's signature on the TPP letter did not bind Chase to its terms. (DE #67 at 5-7.) As such, the Magistrate Judge properly found that Plaintiff could not establish the elements of a breach of contract claim.

Second, Plaintiff contends the Magistrate Judge misapplied the

rationale and holding in *Baehl v. Bank of America, N.A.*, 3:12-cv-00029-RLY-WGH, 2013 WL 1319635 (S.D. Ind. Mar. 29, 2013). (DE #68 at 6.) To the contrary, *Baehl* is directly on point. In that case, like here, the plaintiffs executed and returned a TPP to the bank. *Id.* at *2-3. When the *Baehl* plaintiffs did not obtain a permanent loan modification, they sued the bank for, among other claims, breach of contract. *Id.* at *11. In dismissing the breach of contract claim, the *Baehl* court held that the TPP was not an enforceable contract, because the:

> language of the TPP is clear that the TPP was not an offer by [the bank] to Plaintiffs which Plaintiffs could accept simply by providing further documentation. Instead, it was an invitation for Plaintiffs to apply to the program, which required Plaintiffs' compliance to be considered for the program.

Id. at *12.

Taylor claims *Baehl* is factually distinguishable because the plaintiffs in that case never provided all of the required paperwork to the bank. While the complaint in this case alleges that Taylor did submit, repeatedly, all of the necessary documents, the complaint also includes assertions that Chase sent Taylor letters on October 3, 2009, October 9, 2009, and December 3, 2009, informing Taylor that his application was at risk because he had not submitted the required documents. (DE #2 at ¶¶ 27, 28, 30.) The Court in *Baehl* reasoned that the plaintiff's reliance on *Wigod* was misplaced because:

> Although the same loan language is present in the modification here, a critical distinction exists - the servicer in *Wigod* countersigned the Plan and mailed a copy back to the borrower with a letter congratulating her on her approval for a trial modification. *Wigod*, 673 F.3d at 562. The Court further explained that these actions "communicated to [the borrower] that she qualified for HAMP and would receive a permanent 'Loan Modification Agreement' after the trial period," provided she met the listed conditions. *Id.*

Baehl, 2013 WL 1319635, at *12. The *Baehl* court went on to find that because the bank found the plaintiffs failed to provide sufficient documentation necessary to complete the modification review, and denied the application, "no contract was formed." *Id.* at *13. Taking Plaintiff's allegations as true, as the Court must at this stage of the proceedings, that he did provide all of the necessary documentation, the Magistrate Judge still properly found that there was no enforceable contract as "Chase never returned an executed copy of the TPP, and Taylor's signature on the TPP letter did not bind Chase to its terms." (DE #67 at 7.)

In this case, like in *Baehl*, the language of the TPP is clear that it is not an offer that Taylor could have accepted simply by providing further documentation. Moreover, the conditional language in the TPP that "if you qualify under the federal government's Home Affordable modification program and comply with the terms of the Trial Period Plan, we will modify your mortgage loan and you can avoid foreclosure" (DE #2 at 14) and "[i]f prior to the Modification Effective date, (i) the Lender does not provide

me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; or (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate" (DE #2 at 20) and "the Trial Period Plan is the first step. Once we are able to confirm your income and eligibility for the program, we will finalize your modified loan terms and send you a loan modification agreement . . . " (DE #2 at 16) shows, like in *Baehl*, that the TPP was not an offer that Plaintiff could accept simply by providing further documentation.

Taylor also contends the Magistrate failed to follow controlling precedent in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 563 (7th Cir. 2012). (DE #68 at 7-9.) The Magistrate Judge did address this case in his opinion, noting it was dissimilar because in *Wigod*, the court found there was a breach of contract claim where the bank countersigned the TPP Agreement and mailed a copy back to the Plaintiff "with a letter congratulating her on her approval for a trial modification. In so doing, [the bank] communicated to Wigod that she qualified for HAMP and would receive a permanent 'Loan Modification Agreement' after the trial period." *Wigod*, 673 F.3d at 562. In contrast, here, Plaintiff does not allege that Chase ever returned a countersigned TPP to Plaintiff.

The Court in *Golbeck v. Johnson Blumberg & Assocs., LLC.*, No. 16-cv-6788, 2017 WL 3070868, at *7 (N.D. Ill. July 19, 2017) (citations omitted), recently similarly distinguished *Wigod*:

> But *Wigod* is no help to Plaintiff because the defendant in *Wigod* "countersigned" the trial payment plan "and mailed a copy to [plaintiff] with a letter congratulating her on her approval for a trial modification." *Wigod*, 673 F.3d at 562. The Seventh Circuit explained that "when [defendant] executed the [trial period plan or 'TPP'], its terms included a unilateral offer to modify [plaintiff's] loan conditioned on her compliance with the stated terms of the bargain." *Id.* Thus, it was the lender's signature that made the TPP a binding offer that could be accepted through performance. That is because "when the promisor conditions a promise on *his own* future action or approval, there is no binding offer," but "when the promise is conditioned on the performance of some act *by the promisee* or a third party, there can be a valid offer." *Id.* at 561.

In finding no contract was formed in that case where the bank did not sign the contract and return it, the *Golbeck* court went on to note that other courts around the country are in accord. *See, e.g., Pennington v. HSBC Bank USA, N.A.*, 493 Fed. Appx. 548, 554 (5th Cir. 2012) ("[Plaintiff's] contract contained the . . . language . . . that the TPP does not take effect until the borrower and the lender sign it and the lender provides the borrower a signed copy. . . . [Plaintiffs'] made regular TPP payments, but they neither produced such a signed contract nor allege such a signed contract exists. . . . The complaint therefore does not demonstrate that the [Plaintiffs'] TPP ever took effect, so there

could be no contract for the bank to breach."); *McGann v. PNC Bank, Nat. Ass'n*, No. 11-cv-06894, 2013 WL 1337204, at *6 (N.D. Ill. Mar. 29, 2013) ("Here, the plain language of the TPP Agreement states [defendant] is not obligated to provide a HAMP loan modification until both parties execute the TPP Agreement . . . Pursuant to the TPP Agreement's own terms, [defendant's] failure to sign the agreement evidences that it had no obligation to offer [plaintiff] a HAMP loan modification."); *Avevedo v. CitiMortgage, Inc.*, No. 11 C 4877, 2012 WL 3134222, at *8 (N.D. Ill. July 25, 2012) ("The court agrees with [defendant] that the fact that it did not execute the TTP associated with the plaintiffs' loan and return that document to them is fatal to the plaintiffs' breach of contract claim."); *Rummell v. Vantium Capital, Inc.*, No. 12-10952, 2012 WL 2564846, at *6 (E.D. Mich. July 2, 2012) ("[T]he TPP is only a proposal, and it does not create a binding contract when only one party has signed it."); *Lonberg v. Freddie Mac*, 776 F.Supp.2d 1202, 1209 (D. Or. 2011) ("[E]very court that has reviewed this issue has unanimously agreed that a defendant's failure to provide a permanent loan modification solely on the basis of the existence of a TPP does not sufficiently state a breach of contract claim.").

This Court concurs with the logic in *Golbeck* and the cases cited therein, finding that because Chase was required to execute the TPP but did not, no contract was formed. Therefore, there is no viable breach of contract claim. *See, e.g., Senter v. JPMorgan*

Chase Bank, N.A., 810 F.Supp.2d 1339, 1357 (S.D. Fla. 2011) (holding "the TPP Agreements are not agreements to provide the Plaintiffs with a loan at a specified date, but rather, an agreement governing obligations of both the Plaintiffs and the Defendants over a trial period after which the Defendants may extend a separate permanent loan modification should they determine that the Plaintiffs qualify."); *Bourdelais v. JPMorgan Chase Bank, N.A.*, No. 3:10 cv 670-HEH, 2011 WL 1306311, at *5 (E.D. Va. Apr. 1, 2011).

While it is true that the dicta in *Wigod* states that a reading that the obligation to send a permanent Modification Agreement only if and when it actually sent one would render the agreement illusory, it also noted that a more natural interpretation would be to read it that the bank had an "obligation to *offer* Wigod a permanent modification once she satisfied all her obligations under the agreement." *Wigod*, 673 F.3d at 563 (emphasis in original). In that case, "[o]nce [the bank] signed the TPP Agreement and returned it to Wigod, an objectively reasonable person would construe it as an offer to provide a permanent modification agreement if she fulfilled its conditions." *Id.* In this case, because Chase never signed and returned the agreement, there was no offer, and no contract was ever created.

Next, Taylor contends the Magistrate Judge's finding "that Chase did not agree to a timely decision is erroneous and contrary"

to law. (DE #68 at 10-12.) However, the Magistrate Judge properly determined that the express language of the TPP document does not specify the exact timing of the modification decision. (DE #67 at 7.) The TPP provides that, "[i]t may take up to 30 days for us to receive and review your documents. We will process your modification request as quickly as possible. Please note, however, that your modification will not be effective unless you meet all of the applicable conditions." *Id.* The TPP does not promise a decision within 30 days, or that Taylor would receive any documents relating to the decision prior to the Modification Effective Date. As such, this case is different than *Wigod*, where a counter-signed TPP was returned to Plaintiff, and it is also factually distinguishable from the other non-controlling cases from other circuits cited by Taylor. *See Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 228-35 (1st Cir. 2013) (holding mortgagor stated a claim under Massachusetts contract law where Plaintiff was incorrectly sent a denial letter, then eventually received a permanent loan modification, but for a higher payment); *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878, 882 (9th Cir. 2013) (the bank never told the plaintiffs they were ineligible for a modification), *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780 (4th Dist. 2013) (the defendant agreed there was a contract and the only issue was whether it was breached). In contrast, in this case, the parties dispute whether a contract was made, and Chase did ultimately tell

Taylor he did not satisfy the income requirements for a HAMP loan modification, resulting in a denial of his modification request. (DE #34-5.)

Taylor also argues that the Magistrate Judge's finding that he failed to state a claim for breach of the implied covenant of good faith and fair dealing is erroneous. (DE #68 at 12-13.) However, Taylor does not contest the well settled law cited by Magistrate Judge Martin that there is no separate cause of action in this case for breach of an implied covenant of good faith and fair dealing: the alleged contract is not for sale of goods, governed by the Uniform Commercial Code, it does not involve a contract for insurance, and no fiduciary or other special relationship is created by a mortgage. *Baehl*, 2013 WL 1319635, at *9; *see also Ray Skillman Oldsmobile & GMC Truck, Inc. v. Gen. Motors Corp.*, No. 1:05-CV-0204-DFH-WTL, 2006 WL 694561, at *6 (S.D. Ind. Mar. 14, 2006) ("Neither Indiana nor Michigan recognizes an independent tort action for breach of an implied contractual covenant of good faith."). Taylor's insistence that he included allegations in his complaint in paragraphs 20-32 to allege this cause of action (DE #68 at 13) does not save these claims as they are not recognized as an independent tort.

Taylor next contends the Magistrate Judge's finding that "Chase only mishandled the HAMP process is erroneous." (DE #67 at 9; DE #68 at 13.) This misconstrues the Magistrate Judge's proper

finding, which was in finding the proposed amendment futile for intentional and negligent infliction of emotional distress, he noted that even if Chase had mishandled the process, that would still not give rise to the necessary level of being atrocious and utterly intolerable for these claims. *See Jaffri v. JPMorgan Chase Bank, N.A.*, 26 N.E.3d 635, 640 (Ind. Ct. App. 2015).

Finally, Taylor argues the Magistrate Judge's finding is erroneous in recommending the denial of Plaintiff's motion for judgment on the pleadings as moot. (DE #68 at 14.) The parties disagree as to what statute of limitations is applicable for the breach of contract and promissory estoppel claims. However, because the Magistrate Judge properly found that Taylor has not stated a claim for breach of contract or promissory estoppel, and amendment of the claims would be futile, the questions of whether Taylor brought his claims within the applicable statute of limitations is moot.

CONCLUSION

For the reasons set forth below, the objection (DE #68) is **OVERRULED** and the report and recommendation (DE #67) is **ADOPTED**. Accordingly, Defendant's Motion for Judgment on the Pleadings, filed by Defendant, JPMorgan Chase Bank, N.A., on January 4, 2017 (DE #37), is **GRANTED**, and the Clerk is **ORDERED** to **DISMISS** all claims against Defendant, Chase, **WITH PREJUDICE**. Plaintiff's

Motion for Judgment on the Pleadings, filed by pro se Plaintiff, Anthony G. Taylor, on January 27, 2017 (DE #46), is **DENIED AS MOOT**.

DATED: August 30, 2017

/s/ RUDY LOZANO, Judge
United States District Court

CERTIFICATE OF SERVICE

I certify that on March 7, 2019 this brief was filed using the Court's CM/ECF system. Appellee JPMorgan Chase's attorney, listed below, is a registered CM/ECF user and will be served electronically via that system.

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