IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-3019

ANTHONY TAYLOR,

Plaintiff-Appellant,

v.

JPMORGAN CHASE BANK, N.A.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Eastern Division, Hon. Rudy Lozano, presiding, No. 4 : 16-CV-52

DEFENDANT-APPELLEE'S BRIEF

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 17-3029

Short Caption: *Taylor v. JPMorgan Chase Bank, NA*

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

JPMorgan Chase Bank, N.A.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Dykema Gossett PLLC

Seyfarth Shaw LLP

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

JPMorgan Chase Bank, N.A. is a subsidiary of JPMorgan Chase & Co.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

JPMorgan Chase & Co. owns 100% of the stock of JPMorgan Chase Bank, NA

Attorney's Signature: s/Jill M. Wheaton Date: April 22, 2019

Attorney's Printed Name Jill Wheaton (Counsel of Record)

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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JURISDICTIONAL STATEMENT

Pursuant to Seventh Circuit Rule 28(b), Defendant-Appellee states that the jurisdictional statement filed by Plaintiff-Appellant Anthony Taylor is complete and correct.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

I. Whether, in this mortgage case in which Appellant claimed Chase improperly denied him a loan modification, the District Court erred when it entered an Order granting Chase's Motion for Judgment on the Pleadings where:

- The District Court did not err when it determined that Appellant failed to state a claim for breach of contract because the HAMP Trial Period Plan was not an enforceable contract to issue a permanent modification;
- The District Court did not err in dismissing Appellant's promissory estoppel claims as there was no enforceable promise by Chase to modify the loan; any reliance by Appellant would not be reasonable; and there were no actionable damages;
- Plaintiff's claims were time barred; and
- All of Plaintiff's claims were and are moot because he later received a loan modification following the denial under the HAMP Trial Plan at issue before he filed suit?

II. Whether the District Court abused its discretion in denying Appellant's Motion to Amend the Complaint to add claims for fraud and intentional infliction of emotional distress, where the proposed amended claims were futile because they failed to state a claim and were also time barred?

COUNTER-STATEMENT OF THE CASE

I. Loan Transaction

On or about April 15, 1994, Plaintiff-Appellant Anthony Taylor ("Taylor") obtained a $59,650.00 loan (the "Loan"). (Dist. Ct. Dkt. 34-1)[1]. As security for the Loan, he granted Banc One Mortgage Corporation ("Banc One") a mortgage interest (the "Mortgage") on real property located at 1212 S. 21st Street in Lafayette, Indiana (the "Property"). *Id.*

On March 30, 1998, Banc One assigned the Mortgage to Homeside Lending, Inc. (Dist. Ct. Dkt. 34-2). Homeside Lending, Inc. then merged with Washington Mutual

---

[1] Many of the relevant documents were not attached to the Complaint but were attached to Chase's Motion for Judgment on the Pleadings, and properly considered by the District Court in deciding that motion. That is because a court may take into consideration documents incorporated by reference into, but not attached to, the pleadings. The Complaint and proposed Amended Complaint were all about the loan and mortgage and proposed revisions to same. *Gillis v. Meisner*, 525 Fed. Appx. 506, 508-509 (7th Cir. 2013) (internal citations and quotations omitted); *see e.g., R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs, Local Union 150*, 335 F.3d 643, 647 (7th Cir. 2003), *Santana v. Cook Cnty. Bd. of Review*, 679 F.3d 614, 619 (7th Cir. 2012); *Hecker v. Deere & Co.*, 556 F.3d 575, 582-83 (7th Cir. 2009); *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002). Courts may also take "judicial notice of historical documents, documents contained in the public record and state court decisions without converting a motion to dismiss [under Rule 12(c)] into a motion for summary judgment." *520 South Michigan Ave. Associates, Ltd. v. Shannon*, 549 F.3d 1119, 1138 (7th Cir. 2008); *see also Ocasio v. Turner*, 19 F. Supp. 3d 841, 845 (N.D. Ind. 2014) (court may "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. . . . Taking judicial notice of public records does not convert the Rule 12(c) motion into a motion for summary judgment") (internal citations and quotations omitted). In sum, the Complaint referred to the mortgage documents and documents related to a possible modification of same and therefore, even though not attached to the Complaint, certain of the actual documents were properly presented by Chase and properly considered by the District Court.

Bank, F.A., and on January 23, 2008, assigned its interest in the Property to Chase. (Dist. Ct. Dkt. 34-3.) It is undisputed that Chase is the record mortgagee of the Property.

II. Request for Loan Modification

Chase notes that Taylor spends much time talking about the HAMP program, which program documents speak for themselves. However, to the extent Taylor suggests that Chase benefitted from merely providing him with the opportunity to apply for a loan modification, and therefore was not incentivized to actually then give him a permanent modification, he is incorrect. Under HAMP, banks only received Servicer Incentive Payments for "loans that successfully complete trial." https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mha_compensation_matrix.pdf. In other words, Chase would not receive an incentive payment unless and until Taylor obtained a permanent loan modification following a successful trial plan. Also, the Court can take judicial notice of the fact that HAMP expired at the end of 2016 and is therefore no longer in effect. https://www.fhfa.gov/media/PublicAffairs/Pages/Prepared-Remarks-FHFA-Director-at-Greenlining-Institute-22nd-Annual-Economic-Summit.aspx.

After Taylor obtained the Loan, he states he "became delinquent on his mortgage [Loan] payments to [Chase]" (Appellant's Appendix ("Appx."), 16A, Complaint ¶6). This is an understatement. The Court can take judicial notice of the fact that a judgment of foreclosure was entered in favor of Chase, and against Plaintiff, on April 24, 2009. *JP Morgan Chase, NA v. Taylor*, Tippecanoe Superior Court, Case No 79D05-0808. (See Doc. attached as Appendix.) Chase nonetheless did not go forward with a sale of the

property, did not evict Taylor, and, as discussed in the next paragraph, sent him a proposed trial period plan and loan modification application paperwork. (Appx. 28A-35A). Taylor then brought this suit claiming he was wrongly denied a permanent loan modification at that time. (Although he ultimately got one, as discussed below).

Taylor claims that in August 2009, Chase called him "for the purpose of qualifying him for a Trial period HAMP [Home Affordable Modification Program] modification." (Appx. 16A, Complaint ¶10).[2] In a letter to Taylor dated August 20, 2009, Chase enclosed a Home Affordable Modification Trial Period Plan ("TPP"). The cover letter opens, in bold, with the statement "**you may qualify for a Home Affordable Modification Trial Period Plan…."** (Appx. 28A). It then states "[i]f you qualify under the federal government's Home Affordable Modification program ["HAMP"] and comply with the terms of the Trial Period Plan, we will modify your mortgage loan and you can avoid foreclosure." (*Id.*). It goes on to state:

> The monthly trial period payments are based on the income information that you previously provided to us. They are also our estimate of what your payment will be IF we are able to modify your loan under the terms of the program. If your income documentation does not support the income amount that you previously provided in our discussions two scenarios can occur:
>
> 1) Your monthly payment under the Trial Plan may change
> 2) You may not qualify for this loan modification program
>
> If you do not qualify for a loan modification, we will work with you to explore other options….

(*Id,* emphasis in original.)

[2] Taylor states in his brief that Chase confirmed in that conversation that he "qualified" for a loan modification. (Opening Br, p. 10). However, the record evidence he cites to does not support that claim.

It also says:

> **TRIAL PERIOD PLAN/MODIFICATION AGREEMENT**.
> 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 ("Modification Agreement"), which will reflect the terms of your modified loan. In addition to successfully completing the trial period, you will need to sign and promptly return to us both copies of the Modification Agreement or your loan cannot be modified.

(Appx., 30A).

The proposed TPP also stated:

> (F) If prior to the Modification Effective Date, (i) the Lender does not provide a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Payments required…; 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.
> (G) I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.

(Appx., 34A).

It also stated, "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 for the Offer. 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." (Appx., 33A). Although the TPP was apparently signed by Taylor (Appx., 35A), it is undisputed that it was never signed by Chase and returned to Taylor.

Plaintiff alleges that he made the temporary payments and sent copies of the signed TPP and other financial information to Chase, but that Chase repeatedly told him it had not received certain required materials and asked him to resubmit, which he did. His proposed amended complaint attached correspondence to that effect. (Appx., 88A-105A).

On May 5, 2010, Chase sent a letter to Taylor informing him that he did not qualify for a loan modification under HAMP because his housing expenses were less than 31% of his gross monthly income. (Appx., 106A). In other words, based on Chase's review of the financial documents submitted by Taylor, it determined at that time that his income made him ineligible for a loan modification under HAMP, and therefore no modification was made at that time.

Taylor admits in his brief to this Court that his home was never sold at a sheriff's foreclosure sale and discusses his home being in limbo for "five years." (Opening Br, pp. 12-13). What his brief does not tell this Court is that the reason he refers to "five years" is because he was given a permanent loan modification in 2015. Chase made reference to that later modification in its answer, and referred to it in its motion to dismiss (discussed below). However, Chase did not attach the documentation for that modification to its motion to dismiss because that was a Rule 12(c) motion, based on the Complaint and documents incorporated by reference into same, which did not include

the 2015 Modification. Taylor also admitted, in response to Chase's Request to Admit No. 5, that he signed a Modification in 2015. (Dist. Ct. Dkt 66). This Court can take judicial notice of the fact the Indiana state court entered an Order Setting Aside the earlier, April 24, 2009 judgment of foreclosure in Chase's favor, against Plaintiff, on July 21, 2015, after this modification was entered into. (Order attached at Appendix). Nor does Taylor state that he has since remained up to date on his modified loan payments.

III. District Court Proceedings

On June 8, 2016, Taylor, acting *in pro per*, filed this Complaint against Chase in Indiana state court, alleging breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel, seeking damages allegedly resulting from the 2010 decision that he did not qualify for a HAMP modification. (Appx., 15A-27A). Chase removed the case to the U.S. District Court for the Northern District of Indiana. (Dist. Ct. Dkt. 1). On December 21, 2016, Chase filed an Amended Answer to the Complaint. (Dist. Ct. Dkt. 31). In its Affirmative Defenses, Chase stated that Taylor entered into a loan modification in June 2015, which barred his claims. *Id*.

On January 4, 2017, Chase filed a Motion for Judgment on the Pleadings ("Motion") pursuant to Fed. R. Civ. P. 12(c). (Dist. Ct. Dkt. 37). Chase argued, as to the breach of contract claim, that the TPP was not an enforceable contract because it was not signed by Chase, and even if it was, Taylor had not established any breach because he had not alleged that he satisfied all of the requirements for a HAMP modification. (*Id.,* pp. 6-8). As for the claim of breach of duty of good faith and fair dealing, Chase argued that there is no such separate cause of action. (*Id.*, pp. 8-9). And as for the promissory

estoppel claim, Chase argued: there was no promise by Chase to modify the loan, rather, the TPP contained many conditions; there was no claim that Chase expected Taylor to rely on the alleged promise in the TPP; Taylor did not allege reasonable reliance on the alleged promise; Taylor did not allege that the promise was of a definite and substantial nature; and did not allege, and could not allege, that injustice can be avoided only by enforcing the promise, because he did not allege any damages, and "Plaintiff ultimately received a HAMP modification in June 2015." (*Id.*, p. 11). Chase also argued that all of the claims were time barred. The statute of limitations for breach of contract and related claims is 6 years, and the Complaint was for an alleged breach of an August 2009 TPP, which Taylor claimed was a contract. At best, for Taylor, his claims accrued when he was denied a loan modification on May 5, 2010. However, suit was not brought until June 8, 2016, more than six years after that. (*Id.*, pp. 12-13).

Taylor filed a combination response and his own Motion for Judgment on the Pleadings. (Dist. Ct. Dkt. 47). Chase filed a reply. (Dist. Ct. Dkt. 49). After Chase filed its motion, but before Taylor filed his response, Taylor filed a Motion To Amend Complaint and proposed First Amended Complaint. The proposed amended complaint included claims for: (1) breach of contract (Count I); (2) breach of implied covenant of good faith and fair dealing (Count II); (3) intentional and negligent infliction of mental and emotional distress (Count III); (4) fraudulent misrepresentation based on alleged violations by Chase of a consent order in another matter (Count IV); and (5) promissory estoppel (Count V). (Dist. Ct. Dkt. 38).

Chase responded that the motion for leave to amend should be denied on futility grounds. (Dist. Ct. Dkt. 45). Chase argued that the proposed claim for fraudulent misrepresentation was futile because the District Court did not have jurisdiction over claims arising out of the consent order; there is no third party right to enforce the consent order; and Taylor did not allege the elements of such a claim. (*Id.*, pp. 3-5). Chase argued that the proposed intentional and negligent infliction of emotional distress claim was futile as there were no allegations to support a claim that Chase's behavior was so extreme and outrageous as to go beyond the bounds of decency; and it was time barred under a two year statute of limitations. (*Id.*, pp. 5-7). Chase argued that the proposed revised breach of contract claim failed for all of the same reasons as the existing breach of contract claim, and was also time barred. (*Id.*, pp. 7-8). Likewise, the proposed promissory estoppel claim failed for the same reasons as the existing claim, including the statute of limitations. (*Id.*, pp. 9-11).[3] Both motions were referred to the Magistrate Judge.

The Magistrate issued a 14 page Report and Recommendation ("Report") (Appx. 1A-14A), recommending that Plaintiff's Motion To Amend the Complaint be denied; Chase's Motion for Judgment on the Pleadings be granted; and Plaintiff's Motion for Judgment on the Pleadings be denied as moot. The Report first noted that because Taylor was acting *pro se*, the pleadings would be held to a less stringent standard. (Appx., 4A). It then found that the TPP was not a contract because "the language

[3] Plaintiff also proposed an amended claim for breach of the implied covenant of good faith and fair dealing, to which Chase objected. However, it appears from Taylor's brief on appeal that he has abandoned that potential claim.

throughout the letter is conditional." (Appx., 6A). It distinguished this case from *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), because in that case, the letter to the borrower congratulated her on her approval for a trial modification. The letter in our case did not contain such language. The Report also noted that Chase never returned an executed copy of the TPP to Taylor, and did not promise a loan modification decision by a certain date. (Appx., 7A). The Report then found that there is no separate cause of action for breach of an implied covenant of good faith and fair dealing. (Appx., 8A). As for promissory estoppel, the Report noted that Taylor had to show that any reliance was "independent from the benefit of the bargain" and "so substantial as to constitute an unjust and unconscionable injury." (Appx., 12A-13A) (cites omitted). Taylor had not done so, and could not do so, making not only his stated claim of promissory estoppel subject to dismissal, but also making the proposed amended claim for same futile. (Appx., 13A).

With regards to the other proposed additional claims, the Report concluded that the alleged mishandling of a loan modification application and even the placing of a home under a judgment of foreclosure, "albeit stressful and unfortunate, does not rise to the level" of conduct needed for an emotional distress claim. (Appx., 9A). In addition, the Magistrate noted that Indiana courts have "generally refused to allow" such claims where there has only been an economic loss. (Appx., 10A). As for the proposed fraudulent misrepresentation claim, the Report found that it appeared Taylor was trying to hold Chase liable for failing to comply with a 2011 consent order between Chase and the Comptroller of the Currency. But it agreed with Chase that the court

lacked jurisdiction over that order, and there is no third party right to enforce it; therefore, adding such a claim would be futile. (Appx., 10A-12A). The Magistrate then found that the question of whether the claims were time barred was moot. (Appx., 13A).

Taylor filed Objections to the Report and Recommendations. (Dist. Ct. Dkt. 68). Chase filed a Response. (Dist. Ct. Dkt. 69). On August 30, 2017, the District Court issued a 14 page Opinion and Order, overruling Taylor's Objections and adopting the Magistrate's Report and Recommendation. (Dist. Ct. Dkt. 75, attached to Opening Brief). The court held that "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." (*Id.*, p. 4). The court also noted that there were numerous conditional statements that showed that the TPP "was not an offer that Plaintiff could accept simply by providing further documentation." (*Id.*, p. 7.) It found *Baehl v. Bank of America, N.A.,* 2013 WL 1319635 (S.D. Ind. March 29, 2013), which held that the language in a TPP cover letter was just an invitation to apply for a loan modification program, to be directly on point. "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." (Dkt. 75, p. 6). And the District Court agreed with the Magistrate that *Wigod* was distinguishable because in that case, the bank countersigned the TPP and sent it back with a letter congratulating the borrower on her approval for a modification. In our case, on the other hand, the court noted, Chase never returned a counter-signed TPP to Taylor. The order then cited other cases that have distinguished *Wigod* on this same basis. (*Id.*, pp. 7-9). As for Taylor's claim that Chase did not timely

notify him of its decision, the court agreed with the Magistrate that the TPP does not promise a decision within a certain time. (*Id.*, p. 11).

The court then held that there was no separate cause of action for breach of an implied duty of good faith and fair dealing. (*Id.*, p. 12). And it agreed with the Report's conclusion that the alleged conduct did not rise to the necessary level for a proposed claim of intentional or negligent infliction of emotional distress. (*Id.*, p. 13). Finally, the court also agreed with the Magistrate that because Taylor failed to state a claim, the question of whether the claims were brought within the applicable statutes of limitations was moot. (*Id.*, p. 14.) The court granted Chase's motion to dismiss and denied Taylor's motions.

Taylor then appealed to this Court. (Dist. Ct. Dkt. 70). He applied for *in forma pauperis* status, which the District Court denied on the grounds that the appeal lacked merit. (Dist. Ct. Dkt. 83). This Court then denied the same motion, holding "Appellant…has not raised a good faith issue that the district court erred in granting the defendant's motion for judgment on the pleadings and denying his motion to file an amended complaint." (RE 12). Since then, Taylor has been appointed counsel for this appeal.

SUMMARY OF THE ARGUMENT

Taylor's claims were properly dismissed, and leave to file an amended complaint was properly denied. His Complaint arose out of a request for a permanent loan modification, which Chase considered and denied in May 2010. More than six years later, in June 2016, after he had ultimately been given a loan modification a year before,

Taylor sued, claiming that the 2010 TPP was an enforceable contract for a permanent loan modification.

Taylor's brief on appeal confusingly combines the allegations in the Complaint with those in the proposed Amended Complaint, as if they were one document, which they are not. The issues before this Court are: 1) whether the District Court correctly dismissed the Complaint, which alleged claims for breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel; and 2) whether the District Court abused its discretion in denying Taylor's motion to amend to restate these same claims and add claims for fraud and intentional infliction of emotional distress.

The District Court did not so err or abuse its discretion. The District Court correctly found that the TPP was not an enforceable contract for a permanent modification, that there were no enforceable promises made by Chase, and that any further proposed claims regarding the 2010 TPP would be futile. While Taylor's brief opens with pages and pages about the purpose of (the now non-existent) HAMP, and the threat of foreclosure to Taylor's home — which never came to pass as his home was never sold at a foreclosure sale — it ignores the fact that Taylor received a permanent loan modification in 2015. That 2015 loan modification also renders his claims moot. And all of his claims accrued more than 6 years ago and are barred by the applicable statutes of limitations. Whether for the reasons given by the District Court, or these alternate grounds for affirmance, the dismissal of the claims, and denial of the motion for leave to amend, were the right result. This Court should affirm in all regards.

STANDARD OF REVIEW

This Court reviews *de novo* an entry of judgment on the pleadings under Rule 12(c). *Buchanan-Moore v. Cty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). A motion for judgment on the pleadings is subject to the same standard as a motion to dismiss under Rule 12(b)(6). *Id.* The court must determine whether the complaint states "a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

This Court reviews the district court's denial of a motion for leave to amend a complaint for an abuse of discretion. *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005). Courts may properly deny leave due to futility of the proposed amendment. *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010). Amendment is futile if the amended pleading could not withstand a Rule 12(b)(6) motion to dismiss. *Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir. 1992). Chase agrees though that this abuse of discretion standard of review includes a *de novo* review of the legal basis of a finding of futility.

ARGUMENT

I. The District Court Did Not Err in Granting Defendant's Motion to Dismiss Plaintiff's Claims.

A. Plaintiff Did Not State a Claim For Breach of Contract.

The District Court correctly held that Taylor failed to state a claim for breach of contract. A breach of contract under Indiana law requires a plaintiff to establish: (1) a contract; (2) that defendant breached; (3) causing plaintiff damages. *See, e.g., Collins v. McKinney*, 871 N.E. 2d 363, 370 (Ind. Ct. App. 2007). Fundamentally, a claim for breach of contract cannot exist without an enforceable contract. As the District Court correctly found, the TPP was not an enforceable contract that could support a claim for breach.

Taylor's claim now (for the first time) that he had an oral contract (Opening Br., p. 18) is unsupported. The Complaint did not allege that Taylor was ever told, before he even received a proposed TPP and modification application in the mail, that he had already been approved for, or qualified for, a loan modification. And even if it had so alleged, such a claim would be belied by the later written documents that make clear, in numerous places, from their plain language, that he was merely being offered the opportunity to apply for a modification, not that he had already been approved for and received one. Taylor cites no cases from this Circuit, or from Indiana state courts, to support his claim of an oral contract under such circumstances. The same is true for his newly stated alleged implied contract based on the totality of the actions. (Opening Brief, p. 24). Taylor cites no governing law from this Court or Indiana courts finding such a contract exists when dealing with a mortgage or modification of same. His

attempts to get around the plain language of the written documents he alleges constitutes a contract fail.

Indeed, it is the plain language of the TPP that is fatal to Taylor's claims. It states "you *may* qualify", "*if* you qualify…we will modify your mortgage loan, and "*if* you don't qualify for the program, we will help you evaluate other options…." (Appx., 28A, emphasis added.) It says the monthly trial payments are an estimate of what the payments will be "IF we are able to modify your loan" (*id.,* emphasis in original), and it says "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…which will reflect the terms of your modified loan.") (Appx., 30A). This language makes clear, again and again, that this was not a permanent, agreed-upon-by-everyone loan modification, but rather, an application to *possibly* get one in the future, if one qualifies.

In addition, the TPP required that it be countersigned and returned by Chase to be effective. The District Court properly analogized our case to *Baehl,* which held there could be no claim for breach of contract because the proposed modification was never signed by the bank. Taylor never alleged, and cannot allege, that Chase countersigned the TPP and returned it to him. And the express language of the TPP, Section 2F, directed to Taylor, states that "if prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of the this Plan and the Modification Agreement. . . the Loan Documents will not be modified and this Plan will terminate." (Appx., 33A). The District Court did not err in holding that because Chase did not sign

the TPP, there could be no enforceable contract breached by Chase. As the *Baehl* court held, the TPP "was an invitation to apply" for the program, not an enforceable contract.

Taylor contends that the District Court misapplied or ignored this Court's ruling in *Wigod*. The District Court did not ignore *Wigod,* it properly found it distinguishable because Chase never signed and returned the TPP to Taylor, whereas in *Wigod,* the bank did return such a signed document to the borrower. Indeed, crucial to this Court's finding in *Wigod* was that the defendant bank *had* countersigned the TPP. The Court found that in that case, the defendant not only countersigned it, but sent plaintiff "a letter congratulating her on her approval for a trial modification. In so doing, [defendant] Wells Fargo 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. Here, by contrast, Chase did not sign the TPP, which Taylor acknowledges, and never told him in writing that he was approved for a modification. [4] To the contrary, he was told in May, 2010 that he did not qualify for a HAMP modification.

Thus, as properly recognized by the District Court, *Wigod* is inapposite. *See also, e.g., Reitz v. Nationstar Mortgage, LLC,* 954 F. Supp. 2d 870, 887 (E.D. Mo. 2013) (TPP was not a binding contract between the parties as compliance with the TPP was not the only

[4] The determination of borrower's lack of qualification for a permanent modification under HAMP was based on evaluation of the financial documentation after the trial plan was started. As *Wigod* states, "[a]t that time, Treasury's original guidelines were still in force, so Wells Fargo could choose whether (A) to offer Wigod a trial modification based on unverified oral representations, or (B) to require her to provide documentary proof of her financial information before commencing the trial plan." 673 F. 3d at 558. Chase chose option B here.

factor in considering a permanent loan modification); *Senter v. JP Morgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1357 (S.D. Fla. 2011) ("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. JP Morgan Chase Bank, N.A.*, U.S. Dist. LEXIS 35507, at * 16-19 (E.D. Va. April 1, 2011); *Lonberg v. Freddie Mac*, 776 F. Supp. 2d 1202 (D. Ore. March 3, 2001) ("plaintiff fail[ed] to allege a breach of any contract where the TPP agreement stated that a binding modification agreement would not result unless the servicer determined that the borrower complied with the TPP agreement and delivered to the borrower a modification agreement signed by borrower and servicer); *Brown v. Bank of New York Mellon*, 2011 U.S. Dist. LEXIS 6006, at * 3 (W.D. Mich. Jan. 21, 2011) (no breach of contract claim because the TPP agreement "did not guarantee that plaintiff's loan documents would be modified").

As the District Court held, simply claiming compliance with the terms set forth in a TPP does not create an enforceable contract, for a permanent loan modification. Taylor's reliance on *Corvello v. Wells Fargo Bank, NA,* 728 F.3d 878 (9th Cir. 2013) (Opening Br., p. 22) is misplaced, as that case found that *Wigod* turned on the fact that the bank did not inform the borrowers that they did not qualify for a modification, and the same was true in *Corvello*. Indeed, *Corvello* expressly noted that "*Wigod's* holding…does not turn on that fact [whether the borrower received a signed copy of the TPP], but instead on the bank's failure to tell the borrowers that they did not qualify.

The TPP gives the bank a chance, after borrowers submit the completed TPP, to notify them if they do not qualify." 728 F. 3d at 884. That failure to notify the borrowers that they did qualify was the problem in *Corvello* as well, where the bank "neither offered [plaintiffs] a permanent modification, nor alerted them that they were ineligible for a modification. Instead, Wells Fargo foreclosed on their home and sold it." *Id.* at 882. And that was the problem in *Bushell v. JP Morgan Chase Bank, NA*, 220 Cal. App. 4th 915 (2013), also cited by Taylor (Opening Brief, p. 6). There, the borrower was not told that he had not qualified for a modification. By contrast, Chase *did* inform Taylor that it found he did not qualify under HAMP, and did not sell his home without notice.

Topchian v. JP Morgan Chase Bank, N.A., 760 F3d 843 (8th Cir. 2014), also cited by Taylor (Opening Brief, p. 23) is also inapposite. There, the court found that Chase waived the condition precedent that it countersign and return the TPP by allegedly telling the borrower that he had been approved for a modification, and accepting 10 months worth of reduced payments. In our case, on the other hand, Taylor only alleges that he sent, and Chase accepted, three reduced payments under the TPP. More importantly, the Complaint does not allege that he was ever told his application for a permanent modification had been approved. Rather, in support of this argument, Plaintiff cites to allegations in the proposed Amended Complaint, and in any event, those allegations are only that he was told his materials had been received by Chase and were being forwarded for processing. (Appx., 71A-72A). None of these cases are factually on point with our case, and none require reversal.

The District Court properly dismissed the breach of contract claim.

B. Plaintiff Did Not State A Claim for Promissory Estoppel

The District Court also properly dismissed the claim for promissory estoppel. In order to establish a promissory estoppel claim under Indiana law, a plaintiff must properly allege:

> (1) a promise by the promissor (2) made with the expectation that the promisee will rely thereon (3) which induces reasonable reliance by the promisee (4) of a definite and substantial nature and (5) injustice can be avoided only by enforcement of the promise . . . Thus, a promissor who induces a substantial change of position by the promisee in reliance upon the promise is estopped to deny enforceability of the promise.

Weinig v. Weinig, 674 N.E.2d 991, 997 (Ind. App. 1996). Indiana law limits damages to only reliance damages rather than the benefit of the bargain. *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 122 (Ind. 1994).

The Complaint failed to allege facts to establish these necessary elements. As it is with the breach of contract claim, the plain language of the TPP is fatal to Taylor's promissory estoppel claim. As shown above, the TPP is full of "ifs" and "mays", says this is the "first step" in a two-step process, and that another agreement will be sent if Taylor is found to have qualified for a modification. These words are in boldface ('**you may qualify**"), and in all capitals ("IF we are able to modify your loan…"). The list could go on. These are anything but a "promise to modify Taylor's loan", as he claims. (Opening Br., p. 29). Rather, they are a laundry list of qualifiers, and conditions precedent that must be met before a modification will be given.

Taylor cites *Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698 (7th Cir. 2004), to argue that a conditional promise can support a claim for promissory estoppel. In *Garwood*, the defendant's employee stated that "he would see that the deal went through 'come hell or high water.'" *Id*. at 701. (Opening Br., p. 29). The Court affirmed the dismissal of the promissory estoppel claim because it determined that "the essence of the doctrine of promissory estoppel is not that the plaintiff has reasonably relied on the defendant's promise, but that he has reasonably relied on its being a promise in the sense of a legal commitment, and not a mere prediction or aspiration." 378 F.3d at 705. Here, the alleged promise is not nearly as definite as what was promised in *Garwood*, where even that was not enough.

Plaintiff also cites *Bushell* and numerous other out-of-jurisdiction cases for the concept that a TTP that, in his words, offers a permanent modification "if certain conditions were met", constitutes an enforceable promise. (Opening Brief, pp. 29-30). That is irrelevant because here, the conditions were not met. Taylor acts as if simply submitting the application and required documentation, and making the temporary payments, was all he had to do to get a guaranteed modification. Not so. As the TPP makes clear, over and over, that application and documentation (which Taylor notably did not make a part of the record) must establish that the applicant qualified for a HAMP modification. (Appx., 28A – "IF we are able to modify your loan under the terms of the program", "If you qualify under [HAMP]"; Appx., 30A – "Once we are able to confirm your income and eligibility for the program…", Appx., 32A – "Please note… that your modification will not be effective unless you meet all the applicable

conditions, ….”; Appx., 34A – “I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification….”)

As this Court noted in *Wigod,* lenders under HAMP had two modification options – offer a modification based on oral representations by the borrower, or require further information in writing for a possible later modification. Chase did the latter. And after it received that information, Chase found that the conditions were not met and Taylor did not, at that time, qualify for a HAMP modification. Under the language used in the TTP, and the procedure followed by Chase in this case (unlike the actions taken in *Wigod, Bushell,* and *Corvello*) there is no enforceable promise in the TPP to issue a permanent modification.[5]

Nor did the Complaint allege any facts to support the second element — that Chase made a promise with the expectation that Taylor would rely thereon. Taylor cites *First Nat'l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949 (Ind. Sup. Ct. 1991.) (Opening Br., p. 29-30). There, the plaintiffs were interested in purchasing a company in Michigan and sought a loan from the defendant bank. The bank determined it would get involved with financing the business if plaintiffs moved the business to Logansport, Indiana. Plaintiffs were given an initial loan of $100,000 and all parties knew that additional large sums would be necessary to move and operate the business. *Id*. The court determined that the borrower's reliance on the alleged promise regarding a loan

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[5] In addition *Bushell* involved a foreclosure in 2011 after a 2009 trial plan under which many payments were made, unlike our case.

was reasonable because “[plaintiffs] began making arrangements and spending money on moving the business to Logansport expecting that the additional money needed would be made available.” *Id*. at 956. The court also ruled that “an injustice would result if [plaintiffs] were penalized for relying on the representations made by the bank's loan officer when the loan officer was aware of and participated in the actions” of plaintiffs. *Id*. In short, the bank there was aware of the plaintiff‘s reliance on their alleged promise because it was participating in the borrower’s actions to move the business. Here the Complaint does not allege any facts that Chase “participated” in Taylor taking actions which led to damages.

The Complaint also failed to allege any facts of reasonable reliance. Taylor did not allege any facts to establish that he was induced into “a substantial change of position…in reliance upon the promise.” *Weinig,* 674 N.E.2d at 997. The Complaint only alleged that the porported promised modification “prevented him from seeking other alternatives including reorganization under the bankruptcy code.” (Appx., 26A, Complaint ¶76.) This is a conclusory allegation with no factual support. The Complaint also failed to explain why this allegation was relevant. For example, there are no facts to show he was eligible to file a bankruptcy petition before he was sent the TPP but not eligible after the HAMP modification was denied. Simply put, there were no facts alleged showing Taylor was induced by any statements by Chase to cause a substantial change in his position. Taylor’s reliance on the alleged promise was also unreasonable because of all of the qualifiers in the express language of the TPP and related

documents which made clear, again and again, that he was not automatically eligible for a HAMP permanent modification.

The promissory estoppel claim also failed for a lack of damages. The Complaint failed to allege what damages Taylor suffered as a result of the alleged promise (other than generally alleging "financial harm"). The reliance injury "must be not only (1) independent from the benefit of the bargain and resulting incidental expenses and inconvenience, but also (2) so substantial as to constitute an unjust and unconscionable injury." *Spring Hill Developers, Inc. v. Arthur*, 879 N.E.2d 1095, 1103 (Ind. Ct. App. 2008) (internal citations omitted) (finding no valid claim for promissory estoppel because the injuries failed to meet the two prong test). Importantly, expectancy damages are excluded from the reliance analysis. *Id*. The Magistrate's Report noted that the only reliance injury Taylor could have suffered was his "inability to seek other loan modification options while he was waiting" to hear from Chase. (Appx., 13A). It found this to be not "so substantial and independent as to constitute an unjust and unconscionable injury and loss." (*Id.*) Plaintiff has not shown how this was error.

Finally, Taylor could not establish that injustice can be avoided only by enforcing the promise. As Chase pointed out in the District Court, Taylor *obtained a permanent loan modification under HAMP in June 2015*. Thus, any alleged harm was dissipated by the later offer and acceptance of a permanent modification. This also bars a promissory

estoppel claim (and renders his claims moot, as discussed below). For all of these reasons, the trial court did not err in dismissing the promissory estoppel claim. [6]

C. Plaintiff's Claims Are Barred by the Statutes of Limitations

Chase argued below that Taylor's claims were also barred by the applicable statutes of limitations, but the District Court did not find it necessary to reach that argument. However, it serves as an alternate ground for affirmance of dismissal of both claims.

Under Indiana law, claims arising from written contracts for the payment of money must be brought within six years after the action accrues. Ind. Code § 34-11-2-9. A "cause of action for breach of contract accrues at the time the breach occurs, and the statute of limitations begins to run from that date." *Northeastern Rural Elec. Mbrshp. Corp. v. Wabash Valley Power Ass'n*, 56 N.E.3d 38, 44 (Ind. Ct. App. 2016) (internal citations omitted).

[6] Taylor does not argue that the District Court erred in dismissing his claim for breach of implied covenant of fair dealing. Failure to raise an issue on appeal results in waiver of that issue. *Landstrom v. Illinois Department of Children & Family Services*, 892 F.2d 670, 678 (7th Cir. 1990). However, even if this issue had not been waived, the claim was properly dismissed by the District Court. Taylor's claim of breach of duty of good faith and fair dealing failed as a matter of law because Chase owes him no such duty. There was no enforceable contract between the parties, and Taylor cites no case law establishing a duty given the relationship between the parties. In addition, in *Amaya v. Brater*, 981 N.E.2d 1235, 1239 (Ind. Ct. App. 2013), the court refused to recoginize a separate cause of action for breach of good faith and fair dealing to a breach of contract action. It held there was no separate cause of action for breach of good faith and fair dealing absent claims arising under the Uniform Commercial Code or in the context of insurance contracts. *Id*. The District Court properly held that because Plaintiff's Complaint was not based on an insurance contract, and did not arise under the Uniform Commercial Code, and a mortgage does not create fiduciary responsibilities, there was no implied duty of good faith and fair dealing and therefore no claim for breach of same. (Dist. Ct. Dkt. 75, p. 12).

Here, Taylor's breach of contract claim accrued when Chase allegedly improperly failed to convert his TPP to a permanent modification by the expiration of the trial period, which according to the Complaint, was after he made three successful monthly payments. (Appx., 17A, ¶¶ 13-14.) Specifically, Taylor alleged he submitted the necessary documents on or about September 3, 2009 and then made three successful payments. (Appx., 17A, ¶ 13; 19A ¶ 27.) The denial letter was sent to him on May 10, 2010. (Appx., 106A-109A.) It is that denial which he claims is the breach. Thus, his claims accrued no later than May 10, 2010, and he was required to file his Complaint by May 10, 2016. Yet Taylor did not file his cause of action until June 8, 2016, which is more than six years after the cause of action accrued. Therefore, any claim for breach of contract is barred by the statute of limitations.

Similarly, Taylor's promissory estoppel claim relied on the same injuries as his breach of contract claim, and therefore was also time barred as it was brought more than six years after the cause of action accrued. *Meisenhelder v. Zipp Express, Inc.*, 788 N.E.2d 924, 932 (Ind. Ct. App. 2003). The Indiana Court of Appeals applied the 6 year statute of limitations to bar a bank's complaint alleging breach of a promissory note secured by a motor vehicle in *Imbody v. Fifth Third Bank*, 12 N.E. 3d 943, 944 (Ind. Ct. App. 2014). Here, the TPP was, per Taylor's theory, a written contract intended to modify the amounts due under the promissory note; thus, the six year statute of limitations applies.

Taylor alleged he submitted the necessary documents on September 3, 2009 (Appx., 19A). And he alleged that Chase breached its promise when it failed to either

grant or deny his permanent modification request within 30 days of his submitting the required documents, which would be on or about October 3, 2009. In any event, as with the breach of contract claim, the latest date that a claim for promissory estoppel could have accrued was May 10, 2010, when he was notified he was not approved for a modification. Because he did not file his cause of action until June 2016, which is more than six years after his claim accrued, the count for promissory estoppel is also time barred.

Taylor does not address the statutes of limitations anywhere in his brief, despite this being an argument made by Chase in the District Court. There, in response to Chase's motion, Taylor improperly attempted to couch his claims as relating to more than payments of money because the payments were allegedly made in exchange for waiver of late fees, specific dates and other obligations, including a modification of his loan. Taylor relied on *Folkening v. Petten*, 22 N.E.3d 818 (Ind. Ct. App. 2014), but the contract in that case involved conveyance of property to a third party, a release, and indemnification. *Id*. at 822. Here, there was no conveyance of property, goods, stock or shares; *Folkening* simply does not apply. Taylor can point to no authority to suggest that a longer statute of limitations applies.

The District Court correctly dismissed the complaint for these reasons as well.

II. The District Court Did Not Abuse Its Discretion in Denying Appellant's Motion for Leave to file an Amended Complaint as the Proposed Claims Were Futile.

Taylor also argues that the District Court abused its discretion in denying his motion for leave to amend the Complaint to add claims for fraudulent

misrepresentation and intentional infliction of emotional distress. He does not meet the high standard for reversal.

A. *It Was Not An Abuse of Discretion to Deny Plaintiff's Motion to Amend the Complaint to Add A Claim for Fraudulent Misrepresentation As Futile.*[7]

The District Court did not abuse its discretion in denying the motion to amend the complaint to add a claim for fraudulent misrepresentation. As an initial matter, in Indiana, fraud claims are also subject to a 6 year statute of limitations. Ind. Code § 34-11-2-7. Because all of the statements Taylor wanted to allege were fraudulent were about the possible 2009 loan modification, they necessarily pre-dated May 2010. Thus, the proposed fraud claims were untimely as any cause of action expired in May 2016.

In any event, Taylor failed to allege a claim for fraud in the proposed amended complaint. Under Indiana law, to prove an actual fraud claim, a plaintiff must demonstrate: "(1) a material misrepresentation of past or existing fact which (2) was untrue, (3) was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately caused the injury or damage complained of." *Lawyers Title Ins. Corp. v. Pokraka,* 595 N.E.2d 244, 249 (Ind. 1992), quoted in *Lycan v. Walters,* 904 F. Supp. 884, 897 (S.D. Ind. 1995). "Actual fraud may not be based on representations regarding future conduct, or on broken promises, unfulfilled predictions or statements

[7] Taylor's proposed First Amended Complaint failed to comply with the Federal Rules of Civil Procedure and the Local Rules of the Northern District of Indiana. Specifically, the proposed Amended Complaint failed to plead his claims in numbered paragraphs as required by Fed. R. Civ. P. 10(b) and N.D. Ind. L.R. 5-4(6). In any event, even if the proposed pleading complied with these rules, the Court was still correct to deny the motion for the reasons set forth below.

of existing intent which are not executed." *Lycan,* 904 F. Supp. at 897, citing *Biberstine v. New York Blower Co.,* 625 N.E.2d 1308, 1315 (Ind. Ct. App. 1993).

Taylor's proposed fraud claim only alleged improper acts in connection with the Independent Foreclosure Review process that was part of consent orders Chase entered into with the Office of the Comptroller of the Currency. (Appx., 82A-85A). The District Court correctly held that it did not have jurisdiction over claims arising out of the consent orders. The governing statute provides that, "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 1818(i)(1); *see also Anderson v. Deutsche Bank Nat'l Trust Co.,* 2014 U.S. Dist. LEXIS 32550, at *13 (E.D. Mich. Mar. 13, 2014). Thus, it was not an abuse of discretion to deny leave to amend to add a fraud claim.

In addition, the District Court did not abuse its discretion in finding that Taylor did not have standing to assert violations of the consent orders. As the operative documents stated, "nothing in this Stipulation and Consent Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under the Stipulation and Consent or this Order." (Dist. Ct. Dkt 45-1, 45-2, 45-3.) Given this, it simply cannot be said that the District Court abused its discretion in finding the proposed fraud claim to be futile.

Apparently realizing this, Taylor now tries new argue a new, broader, potential fraud claim. (Opening Brief, pp. 34.) That is improper. The question before this Court is

whether the District Court abused its discretion in denying leave to amend the complaint to add the proposed claim before it. In any event, the newly proposed fraud claim would also be futile.

Taylor now claims "Chase intended to deceive him by knowingly and intentionally, with malice, training its employees to misinform its customers…regarding the status of their HAMP applications." (Opening Br., p. 34). He also alleges that a Chase employee told him "Chase would modify his loan if he qualified and completed the trial plan." (*Id.*, p. 35). But these alleged statements relate to promises regarding future conduct, which cannot form the basis for a fraud claim. *Lycan*, 904 F. Supp. at 897; *Biberstine*. Nor does Taylor claim that a Chase employee made a knowingly false statement.

Moreover, in order to plead fraud, the circumstances surrounding the alleged fraud must be plead with particularity, pursuant to Fed. R. Civ. P 9(b). *See e.g., Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 776-77 (7th Cir. 1994). This includes the element of detrimental reliance – "that is, whether anyone actually relied on the alleged misrepresentations, and if so, who, and whether any Plaintiff who so relied on the statements was actually harmed by this reliance." *Carrel v. George Weston Bakeries Distrib., Inc.*, 2006 U.S. Dist. LEXIS 19262, *4,. (S.D. Ind. April 13, 2006). Yet the proposed claim failed to plead facts of detrimental reliance with the required particularity. In his Brief to this Court, Taylor alleges he chose to "forgoe bankruptcy, opened an escrow account for his payments, provided and verified financial information and went through significant stress and hardship." (Opening Br., p. 36). However, these

allegations are absent from the amended complaint. Moreover, Taylor does not allege facts to explain how these allegations establish detrimental reliance or how he was harmed.

For all of these reasons, Taylor has not shown that the District Court abused its discretion in denying him leave to amend the complaint to add a claim for fraud.

B. It Was Not An Abuse of Discretion to Deny Plaintiff's Motion to Amend the Complaint to Add A Claim for Intentional Infliction of Emotional Distress As Futile.

Nor did the District Court abuse its discretion in denying the Motion to Amend to add a claim for intentional infliction of emotional distress ("IIED"). Such a claim is subject to an extremely rigorous standard. *Lachenman v. Stice*, 838 N.E.2d 451, 456-57 (Ind. Ct. App. 2005). Under Indiana law, a plaintiff must establish: (1) the defendant engaged in extreme and outrageous conduct (2) which intentionally or recklessly (3) caused (4) severe emotional distress to another. *Id.; see also Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 523 (Ind. Ct. App. 2001).

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which 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!"

Lachenman, 838 N.E.2d at 456-57 (internal citations omitted). Here, it cannot be said that the District Court abused its discretion in holding that Taylor suffering distress when he was waiting to hear about whether he could refinance his home in 2009-2010 "albeit

stressful and unfortunate, does not rise to the level of being atrocious and utterly intolerable." (Appx., 9A).

Taylor tries to downplay the dispositive decision in *Jaffri v. JPMorgan Chase Bank, N.A.*, 26 N.E.3d 635, 640 (Ind. Ct. App. 2015), in which the court determined that an IIED claim does not apply to circumstances like ours. In *Jaffri*, the court held that even if "Chase intentionally mishandled [the plaintiff's] HAMP applications and thereby caused her emotional distress—such facts would not establish an IIED claim." *Id*. The court further found that "[t]he unfortunate fact is that losing one's job and then facing foreclosure is stressful no matter the circumstances.... We are hard-pressed to say that any mishandling of this new program—even if intentional—constitutes the type of beyond-the-pale, 'outrageous' conduct that may be covered by an IIED claim." *Id*.

Here, like in *Jaffri*, there are no allegations to support a claim that Chase's behavior was so extreme and outrageous as to go "beyond all possible bounds of decency." Moreover, there were no allegations to establish that Chase intended to cause Taylor emotional distress, and intent is another element of the claim. Taylor alleges that Chase repeatedly and wrongfully asked him to re-submit documents he claims he already sent, and that Chase ultimately wrongfully denied his loan modification. Nothing about this is either intentional or outrageous.

In *Bledsoe v. Capital One Auto Fin.*, 2016 U.S. Dist. LEXIS 43850 (S.D. Ind. March 31, 2016) *14, the plaintiff alleged that Capital One wrongfully failed to renegotiate her auto loan and repossessed her vehicle. The court found that "those acts cannot be regarded as 'atrocious' or 'utterly intolerable in a civilized community.'" *Id*. And that is

the only ruling that makes sense – if one was allowed to bring an IIED claim whenever an item was repossessed, or a home foreclosed, or a loan modification application denied, the floodgates of litigation would open.

Taylor's reliance on *Bradley v. Hall*, 720 N.E.2d 747 (Ind. App. 1999) (Opening Brief, p. 3) is misplaced. There, the harassing conduct spanned 20 years and involved abusive language and statements related to plaintiff's menopause and her husband's impotence. Those are far different from the facts here, in which the time frame was only months not years, and more importantly, did not involve Chase personnel berating or harassing Taylor regarding personal issues.

Finally, an IIED claim would be time barred. Actions for injury to character must be brought within two years after the claim accrues. Ind. Code 34-11-2-4. The proposed amended complaint essentially alleged that the denial of the permanent modification in 2010 embarrassed Taylor, harmed his pride, and caused him marital stress. (81A). Yet all of this occurred when his modification was denied in May 2010. Therefore, the claim would need to be brought by May 2012, but it was not.[8]

III. The Appeal is Moot.

"When the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case is (or the claims are) moot and must be dismissed for lack of jurisdiction." *St. John's United Church of Christ v. City of Chi.*, 502

[8] Taylor does not argue that the District Court erred in denying his request to add a claim for negligent infliction of emotional distress, therefore, this argument is waived. Even if it wasn't waived, Taylor's proposed claim did not allege that he suffered any direct physical impact as a result of the alleged negligent actions by Chase, which is required under Indiana law for such a claim. *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 997 (Ind. 2006).

F.3d 616, 626 (7th Cir. 2006). A federal court "does not have jurisdiction to give opinions upon moot questions." *Tate v. Univ. Med. Ctr.*, 606 F.3d 631, 634 (9th Cir. 2010). "If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction." *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999).

Here, as discussed above, there is no dispute that Taylor received a permanent loan modification in 2015. Thus, even if Taylor was correct that the TPP was a valid contract, the issue is now moot because it was superseded by the 2015 Modification. The gravamen of Taylor's Complaint and proposed amended complaint were that he should have gotten a permanent loan modification. He did get one. Strangely, he got it before he filed this entire lawsuit, acting as his own counsel. Therefore, there is no controversy. The Indiana state and federal courts have spent enough time on this matter, and it should end.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's dismissal of the Complaint and denial of Plaintiff's motion for leave to amend same.

Dated: April 22, 2019

Respectfully submitted,

DYKEMA GOSSETT PLLC

/s/ Jill M. Wheaton

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TYPE VOLUME CERTIFICATION

In accordance with Fed. R. App. P. 32(a)(7)(c), I, Jill M. Wheaton, certify that this brief meets the type-volume limitation in that it contains 10,045 words according to the word-counting feature of Microsoft Word, the program used to produce it.

/s/ Jill M. Wheaton

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on April 22, 2019, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Jill M. Wheaton

APPENDIX

STATE OF INDIANA) IN THE TIPPECANOE SUPERIOR COURT
)SS:
COUNTY OF TIPPECANOE) CAUSE NO. 79D01-0808-MF-00010

FILED

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

vs.

ANTHONY G. TAYLOR, THE TAYLOR FAMILY TRUST, RICHARD HABY and STEVEN D. HABY,

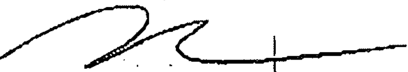
Defendants.

ORDER SETTING ASIDE JUDGMENT AND DECREE OF FORECLOSURE AND OF DISMISSAL

This matter came before the Court on the Motion of the Plaintiff, JPMorgan Chase Bank, N.A., to set aside its Judgment and Decree of Foreclosure and to Dismiss Plaintiff's Complaint, and the Court, having reviewed same and being duly advised in the premises, now finds that the above-referenced Motion should be granted; accordingly it is:

ORDERED, ADJUDGED AND DECREED that the Judgment and Decree of Foreclosure, entered April 24, 2009, is hereby set aside, and Plaintiff's Complaint to Foreclose Mortgage filed May 8, 2008, is hereby dismissed without prejudice.

All of which is ordered this 21 day of July, 2015.



JUDGE, TIPPECANOE SUPERIOR COURT

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