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

REPLY BRIEF FOR APPELLANT ANTHONY TAYLOR

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REPLY BRIEF FOR APPELLANT ANTHONY TAYLOR

Chase's brief makes four main arguments: that (1) the district court properly granted Chase judgment on the pleadings, (2) Taylor's proposed First Amended Complaint was properly denied as futile, (3) Taylor's claims are barred by the statute of limitations, and (4) Taylor's claims are moot. None is correct.

I. Taylor pleaded contract and promissory-estoppel claims.

Chase's response to Taylor's contract and promissory-estoppel claims boils down to the assertion that because Chase offered a conditional agreement, it had unfettered discretion to deny Taylor a permanent loan modification. That argument is directly contradicted by this Court's holding in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

A. Taylor and Chase formed a contract, which Chase breached.

Basic contract law and *Wigod* show why Taylor alleged a breach of contract. The preliminary question is whether a contract existed at all. If so, a HAMP modification proceeds in the two stages outlined in *Wigod*, 673 F.3d at 557: First, the homeowner is enrolled in a trial period in which the homeowner proves that he is qualified and makes an agreed-upon number of modified mortgage payments (in Taylor's case, three). *See id.* Second, if the homeowner makes those payments and remains qualified, the bank then is required to permanently reduce the homeowner's mortgage payments. *See id.* at 557, 561-62. This two-stage process was laid out in Trial Period Plan Agreements (TPPs) that banks sent to homeowners. *See id.*

Under this framework, Taylor has alleged a breach-of-contract claim. As Taylor's opening brief showed, Chase and Taylor formed an oral, written, or implied contract to modify Taylor's mortgage under HAMP. Taylor then successfully completed the HAMP trial period (stage one). He also remained qualified for HAMP. Thus, as in *Wigod*, Chase's refusal to permanently modify Taylor's mortgage under HAMP (stage two) was a breach of contract.

1. Chase and Taylor formed a contract.

A contract is formed when there has been offer, acceptance, intent to contract, and consideration. *See Conwell v. Gray Loon Outdoor Mktg. Grp.*, 906 N.E.2d 805, 812-13 (Ind. 2009). Chase doesn't contest that Taylor pleaded these elements of contract formation. It never mentions them. *See* Chase Br. 16-20.

a. Our opening brief (at 18-19, 23-25) explained that, under Indiana law, Taylor pleaded both an oral contract and an implied contract. Chase advances two passing counter-arguments, which cite no law and impermissibly assume facts in Chase's favor. *See* Chase Br. 16-17.

First, Chase suggests that mortgage contracts are not subject to the law of oral or implied contracts at all. Chase Br. 16. But Chase offers no support for this proposition, and it is wrong. *See Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 883-885 (9th Cir. 2013) (finding an oral contract for a HAMP mortgage modification).

Second, and just as wrong, Chase argues (at 16) that even if Taylor alleged an oral agreement (which he did), that agreement was negated because Chase sent Taylor the TPP *after* Taylor spoke to Chase. Chase fails to cite a single case supporting its

proposition that the mere sending of the TPP—which Chase itself maintains is not a contract—can negate the terms of an oral contract. If Chase's position were correct, any party to an oral contract, seeking ammunition to later renege, could unilaterally undo a binding agreement by sending the other party new, even contradictory, written terms at any time, and then pull out of the contract whenever that is advantageous. That cannot be right, lest no one could reasonably rely on oral contracts.

To be sure, a later written *contract* can alter the terms of an oral contract. But any written document does not suffice. Chase wants to have it both ways. Chase contends that even if there was an oral contract, Taylor was bound to the later written terms of the TPP, which Chase argues was itself *not* a contract. That also cannot be right.[1]

b. Chase's argument that there was no written contract is wrong, too. The crux of Chase's position is that because the TPP included conditional language, the TPP could not be an offer. But Chase fails to answer the relevant legal question: Would a reasonable person view the TPP, taken as a whole, as an offer? *See Wigod*, 673 F.3d at 561-62; *see also Zimmerman v. McColley*, 826 N.E.2d 71, 77 (Ind. Ct. App. 2005). Considering all of Taylor's communications with Chase, especially the TPP's repeated use of the word "offer," the answer is yes. *See* Taylor Br. 19-22.

The natural reading of the conditional language on which Chase relies demonstrates that Chase's offer, like all HAMP contracts, included conditions: *If* the

[1] Relatedly, as Taylor's opening brief explained (at 18), a later writing can outline the agreed-upon terms of an oral contract, *see Forster v. United Home Imp. Co.*, 428 N.E.2d 1351, 1355 (Ind. Ct. App. 1981), as the TPP did here. Chase does not respond to that point.

financial information Taylor sent Chase confirmed that Taylor qualified for HAMP, then Taylor would first be enrolled in the trial period (stage one). Then, *if* Taylor completed the trial period and remained qualified, Chase would be obligated to permanently modify the mortgage (stage two). *See* App. 33A; Taylor Br. 20. Conditions that must be met before additional contract performance is required, like those in the TPP, don't prevent contract formation in the first place; they are a normal part of many contracts. That is, in many contracts, "[t]he duty of immediate performance of a promise may be dependent on the happening of any number of conditions." Restatement (Second) of Contracts § 263(1).

c. Chase focuses on a single term in the TPP: the purported requirement that Chase sign the TPP and return it to Taylor. Chase Br. 17; *see also* App. 33A. Chase highlights that the TPP was signed in *Wigod*, but fails to explain why that difference matters. Chase Br. 17. It doesn't. The signed TPP in *Wigod* was proof of a contract, but nowhere did the Court say—contrary to basic contract law—that the bank's signature was the *only* way to prove a contract. *See* 673 F.3d at 562; *see also Corvello*, 728 F.3d at 880, 885.

As our opening brief explained, the purported signature requirement is most reasonably read as a method of communication, not a prerequisite to any obligation. Taylor Br. 20-22; *see also* App. 33A. What's more, the signature could not be a condition precedent to formation under Indiana law because the TPP did not "explicitly state[]" that Chase's signature was a condition precedent. *See Knauf Fiber Glass, GmbH v. Stein*, 615 N.E.2d 115, 127 (Ind. Ct. App. 1993).

Even if Chase's signature on the TPP were a condition precedent to contract formation, Chase waived the condition. *See* Taylor Br. 23; *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 851 (8th Cir. 2014). Chase argues that *Topchian* is off-point because there Chase accepted ten modified payments (instead of three, as here) *and* told the plaintiff that it "accepted the Agreement and that Chase would not … sign[] and return[]" it, *Topchian*, 760 F.3d at 851. But *Topchian* held that the condition precedent could have been waived "in two ways," *id.*: by Chase taking the plaintiff's modified payments *or* by Chase telling the plaintiff that the TPP had been accepted. *Id.* Taylor's first complaint alleged that Chase accepted his modified payments, App. 17A ¶ 13, and Chase fails to explain why the difference between ten and three payments matters. Moreover, Taylor's proposed first amended complaint alleged *both* acceptance of modified payments *and* that Chase told him "that his HAMP application was approved and being scheduled for closing and that Chase doesn't typically return fully executed TPPs and that it was not necessary to close the permanent modification," *id.* 72A. *See* App. 67A-68A, 70A-73A.[2] Thus, Chase waived any purported signature requirement and formed a contract with Taylor.

2. Taylor completed stage one: the HAMP trial period.

After Chase and Taylor formed a contract, Chase was obligated to enroll Taylor in a HAMP trial period because Taylor sent the required documents and qualified for

[2] Either of these things were alone sufficient to waive a signature requirement, assuming (incorrectly) that the contract imposed one. But even if both were necessary to give rise to a waiver, as indicated, both were pleaded in Taylor's proposed first amended complaint, demonstrating that granting leave to file that complaint would not have been futile.

HAMP. *See* App. 17A ¶¶ 13, 33A, 72A, 74A-76A; *see also Corvello*, 728 F.3d at 884-85. Chase appears to agree. Although Chase disputes there was a contract, Chase does not dispute that it enrolled Taylor in the trial period. Chase Br. 18 n.4, 27. In any event, Taylor's pleadings show that, just like the plaintiff in *Wigod*, *see* 673 F.3d at 561, Taylor was enrolled in a HAMP trial period. "Chase processed the Plaintiff's First TPP payment consistent with the processing guidelines for a HAMP application that was approved and not denied." App. 68A. Chase also took Taylor's two remaining trial-period payments. *Id.* at 17A ¶ 13, 22A ¶ 51, 72A. And Taylor "accepted and trusted the explanation by the Chase representatives that his HAMP application was approved." *Id.* at 72A.

3. Chase breached its contract with Taylor by failing to complete stage two: a permanent mortgage modification.

Wigod requires banks to permanently modify the mortgages of homeowners who have complied with the trial period and remained qualified for HAMP. *Wigod*, 673 F.3d at 562-63; *see also Corvello*, 728 F.3d at 883 (citing *Wigod*, 673 F.3d at 561-62). Taylor pleaded that he kept his end of the bargain by completing the trial period and remaining qualified for HAMP. *See* App. 17A ¶ 13, 74A-77A. Because these plausible factual allegations must be accepted as true, *Wigod*, 673 F.3d at 555, that should end the matter.

Obscuring HAMP's two-stage process, Chase characterizes the TPP as creating a chance to "*possibly* get [a modification] in the future, if one qualifies." Chase Br. 17. So even though Taylor was qualified, Chase argues that because it sent Taylor a letter (wrongly) saying that he was not qualified, Chase had no duty to modify Taylor's

mortgage. *See* Chase Br. 19-20; App. 106A-109A. In other words, Chase contends that even if it had a contractual duty, it satisfied the duty by sending a letter of denial—regardless of the reason for the denial.

That argument cannot be squared with *Wigod*. The TPP's terms are clear enough that Chase was "required to offer *some* sort of good-faith permanent modification … consistent with HAMP guidelines" so long as Taylor completed stage one and remained qualified (which he did). *See Wigod*, 673 F.3d at 565. If Chase could avoid that duty by sending a denial letter, no matter what incorrect conclusion the letter was based on, Chase would have "unbridled discretion," *id.*, to deny mortgage modifications for any reason or no reason at all. But this Court has already refused to countenance such unchecked discretion because it would turn the TPP's "otherwise straightforward offer" of mortgage modification "into an illusion." *Id.* at 563.

Chase cites district-court decisions that are either factually inapt or conflict with *Wigod*. *See* Chase Br. 18-19. Some of those decisions dismissed the plaintiffs' breach-of-contract claims because the plaintiffs had failed to allege completion of the trial period and qualification for HAMP. *See Reitz v. Nationstar Mortg., LLC*, 954 F. Supp. 2d 870, 885-87 (E.D. Mo. 2013); *Bourdelais v. JPMorgan Chase Bank, N.A.*, No. 3:10-cv-670, 2011 WL 1306311 at *16 (E.D. Va. April 11, 2011); *Brown v. Bank of N.Y. Mellon*, No. 1:10-cv-550, 2011 WL 206124 at *3 (W.D. Mich. Jan. 21, 2011). But, as just explained, Taylor has alleged both of those things. *See* App. 17A ¶ 13, 74A-76A.

Other decisions that Chase cites hold that a homeowner's compliance with the trial period and continued HAMP qualification does *not* require a bank to permanently modify a mortgage. *See Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339,

1357 (S.D. Fla. 2011) ("Defendants *may* extend a separate permanent loan modification should they determine that the Plaintiffs qualify." (emphasis added)); *Lonberg v. Freddie Mac*, 776 F. Supp. 2d 1202, 1209-10 (D. Ore. 2011). But this Court held otherwise in *Wigod*, 673 F.3 at 563, and so it should come as no surprise that some of Chase's cases rely on the district-court ruling in *Wigod* that this Court reversed. *See Senter*, 810 F. Supp. 2d at 1351; *Bourdelais,* 2011 WL 1306311, at *16; *see also Reitz*, 954 F. Supp. 2d at 885-87 (citing *Senter*, 810 F. Supp. 2d at 1351).

B. Taylor pleaded promissory estoppel.

In attempting to rid itself of Taylor's promissory-estoppel claim, Chase makes errors nearly identical to those discussed above. Chase argues that a conditional promise is not an enforceable one; it attempts to distinguish binding authority on factual bases lacking legal significance; it premises conclusions on facts contradicted by Taylor's allegations; and it misreads *Wigod* and other key authorities in attacking the elements of the claim.

1. Element 1: Chase made a promise to Taylor.

Chase first argues that a conditional promise is not sufficiently definite to support a promissory-estoppel claim. But conditions on a promise do not make the promise indefinite, *see* Taylor Br. 29-30, and Chase does not respond to the cases we cite that say so. Chase also overlooks that under the promissory-estoppel doctrine, the terms need not be as precise as with a contractual promise and that Indiana "may go the furthest" in enforcing promises under that doctrine. *Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 702-03 (7th Cir. 2004) (citing *First Nat'l Bank of Logansport v. Logan*

Mfg. Co., 577 N.E.2d 949, 955 (Ind. 1991)). Thus, under Indiana law, the relied-on promise need only be "at least minimally clear," *id.*, and may be "inferred from the words and conduct of the defendant," *Bercoon, Weiner, Glick & Brook v. Mfrs. Hanover Tr. Co.*, 818 F. Supp. 1152, 1160 (N.D. Ill. 1993); *see also Garwood*, 378 F.3d at 702-03. In light of these standards, the statements by Chase's agents, orally and in writing, and Chase's acceptance of Taylor's payments formed a definite promise to modify Taylor's loan once he successfully completed the trial period. *See* App. 16A ¶¶ 10-11, 17A ¶ 12, 20A, 22A, 24A-26A, 66A-72A.

Chase counters with *Garwood*, 378 F.3d at 701, asserting that because the defendant's promise there—that a deal would go through "come hell or high water"—was not definite enough, Chase's promise to Taylor was not definite enough. Chase Br. 22. But in *Garwood* the promise *was* held to be definite enough. *See* 378 F.3d at 704. The decision stands for a different proposition: that it is unreasonable to rely on a promise that the promisor does not have the power to enforce, *id.* at 703-04, which (obviously) is not a problem here.

Chase's last effort to negate its promise is to state, again, that Taylor's reliance on decisions finding an enforceable promise in the TPP's language is "irrelevant" because, Chase asserts, the conditions of the trial period were not met. Chase Br. 22. But, again, at this stage in the litigation, this Court must take as true Taylor's allegations, *see Wigod*, 673 at 555, and Taylor unequivocally alleged that he satisfied these conditions. App. 17A ¶ 13, 28A-32A, 66A-68A, 72A, 75-76A, 106A-109A.

2. Elements 2 & 3: Chase expected that Taylor would rely on the promise, which Taylor reasonably did.

Chase's arguments also fail as to the second and third elements of Taylor's promissory-estoppel claim—that the promisor (Chase) expected the promisee (Taylor) to rely on the promise, and that the promisee reasonably did so.

Chase ignores Taylor's factual allegations that demonstrate Chase expected Taylor's reliance, *see* Taylor Br. 30, and instead argues that *First National Bank of Logansport v. Logan Manufacturing. Co.*, 577 N.E.2d 949 (Ind. 1991), held that a defendant can expect reliance on a promise only if the defendant "participated" in the plaintiff's detrimental change in position. Chase Br. 24. Premised on this assertion about *Logansport*, Chase concludes that because Taylor did not allege "any facts that Chase participated in Taylor['s]" actions in changing his position, his promissory-estoppel claim fails. *Id.*

But Chase's *Logansport*-based premise is wrong. *Logansport* held only that it would be unjust to reject a promissory-estoppel claim where the defendant participated in the plaintiff's detrimental change of position (but did not hold, or even suggest, that the defendant's participation was *required* to state a promissory-estoppel claim). 577 N.E.2d at 955-56. And even if Chase's understanding of *Logansport* were correct, that would not matter here. Chase did, in fact, participate in Taylor's change in position by, among other things, actively soliciting his participation in a trial period and repeatedly requesting documents from him. App. 16A ¶¶ 11-12, 19A-20A, 66A-68A, 71A-72A. That is enough to show that Chase expected Taylor to rely on its promise. Taylor Br. 30.

Chase also argues that Taylor's reliance on Chase's promise was not reasonable because it did not cause "a substantial change in his position." Chase Br. 24 (citing *Weinig v. Weinig*, 674 N.E.2d 991, 997 (Ind. Ct. App. 1996)). But whether there has been a substantial change in the promisee's position goes to the detrimental *effect* of the promisee's reasonable reliance—that is, damages—*not* whether the reliance was reasonable in the first place. *See Weinig*, 674 N.E.2d at 997. Chase nonetheless applies that incorrect standard and then argues that Taylor's reliance was unreasonable because his complaint did not allege that he could have *successfully* pursued bankruptcy in lieu of pursuing a modification. *See* Chase Br. 24. But that proposition runs headlong into *Wigod*: Taylor "allege[d] that [he] relied on that promise to h[is] detriment by foregoing the opportunity to use other remedies to save h[is] home (such as restructuring h[is] debt in bankruptcy)," which "[i]s enough to present a facially plausible claim of promissory estoppel." 673 F.3d at 566.

Chase then reiterates that the "qualifiers" to its promise also made Taylor's reliance unreasonable. Chase Br. 24-25. But "what is a reasonable, and indeed actual, understanding will often depend on the knowledge that the promisee brings to the table." *Garwood*, 378 F.3d at 704. Taylor understood, as any average consumer would (and as many did, *see* Taylor Br. 37 n.15), that so long as he met Chase's stated conditions, Chase could and would fulfill the offer made in the trial period plan agreement. That understanding, and Taylor's reliance on it, was reasonable.

3. Elements 4 & 5: Taylor incurred damages, and injustice would result if Chase is not held to its promise.

In response to Taylor's argument that he alleged damages, Chase asserts that Taylor alleged no more than generalized "financial harm." Chase Br. 25. But Taylor also alleged that he did not seek "other alternatives" including bankruptcy. App. 26A ¶ 76, 77A-78A. And this Court has held that is enough: "[A] lost opportunity," such as the "opportunity to restructur[e] … debt in bankruptcy" is "a sufficient detriment to support a promissory estoppel claim." *Wigod*, 673 F.3d at 566 (citing *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 428 (7th Cir. 1991) (applying Indiana law)).

Finally, the existence of a 2015 modification to Taylor's mortgage (which was *not* a HAMP modification, as Chase asserts here without record support) does not mean that the injustice cannot be remedied. Taylor incurred financial harm by relying on Chase's promise. He does not seek "the benefit of the bargain" or "incidental expenses." Chase Br. 25 (quoting *Spring Hill Developers, Inc. v. Arthur*, 879 N.E.2d 1095, 1103 (Ind. Ct. App. 2008)). Rather, he alleges damages for the injuries suffered in reliance on Chase's broken promise. *See* App. 26A, 86A.

II. Taylor pleaded fraud and intentional infliction of emotional distress.

A. Taylor pleaded that Chase committed fraud because Chase never intended to modify his mortgage.

Taylor alleged that Chase engaged in ongoing deception to induce him to make payments while wrongfully refusing to modify his mortgage. Chase's four responses all fail.

First, Chase says that Taylor's fraud claim was not before the district court, but it doesn't say why. Chase Br. 30. As explained in Taylor's opening brief (at 32-36), Taylor made a claim for fraudulent misrepresentation. App. 82A. And because he was a pro se plaintiff, all of the factual allegations in the amended complaint to support that claim should have been considered by the district court. *See 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, attachments to complaint that contained alleged fraudulent misrepresentations satisfied Rule 9(b)). Chase does not respond to that argument.

Second, Chase says its assurances that Taylor would get a HAMP modification if he qualified were "promises regarding future conduct, which cannot form the basis for a fraud claim." Chase Br. 31. But as Taylor's opening brief explains (at 34), a promise of future conduct is a misrepresentation of existing fact when the defendant never intends to keep the promise. *See Ohio Farmers Ins. Co. v. Ind. Drywall & Acoustics*, 970 N.E.2d 674, 686 (Ind. Ct. App.), *transfer granted*, *vacated*, 976 N.E.2d 1234 (Ind. 2012), *and reinstated*, 981 N.E.2d 548 (Ind. 2013). That is exactly what Taylor alleged in his amended complaint: Chase "knowingly and intentionally, with malice, trained its employees to misinform its customers, including [Taylor], regarding the status of their HAMP applications." App. 79A; *see also* Taylor Br. 34-36. In other words, Chase employees strung Taylor along following official company policy. This conduct falls squarely into the kind of promise-based fraud recognized by *Ohio Farmers*, a case that Chase ignores, *see* Chase Br. 31.

Third, Chase asserts that Taylor never alleged that a Chase employee made a false statement. *See* Chase Br. 30-31. But Taylor alleged myriad false statements, including that Chase would award him a HAMP modification if he met the qualifications (it did not); that Chase had not received his paperwork (it had); that his income was too high to qualify for HAMP (it was not); and that he was approved for a HAMP trial period (though Chase never intended to carry out the HAMP modification). Taylor Br. 35-36; *see also* App. 68A-69A, 71A-77A.

Fourth, Chase argues that Taylor did not sufficiently plead harm from Chase's fraud because Taylor's amended complaint did not allege the harms described in Taylor's opening brief. Chase Br. 31-32. That is simply wrong. Taylor was harmed because he believed Chase's representations that it would modify his mortgage under HAMP. App. 72A; *see* Taylor Br. 36. As a result, he suffered significant emotional distress, which he pleaded, App. 81A, and was "precluded … from selling or refinancing his property to utilize the equity in his home," App. 78A.

B. Taylor pleaded intentional infliction of emotional distress.

Chase treats the denial of Taylor's HAMP application as the sole factual basis for Taylor's intentional infliction of emotional distress (IIED) claim. *See* Chase Br. 32-34. But Chase's denial of the HAMP modification was just the beginning. After that denial, Chase kept Taylor in limbo for five years. While Taylor sought legal remedies for Chase's wrongful denial of the HAMP modification, Chase held him under a perpetual order of foreclosure and twice scheduled a sheriff's sale on his house. Taylor Br. 38; App. 81A; ECF 47-1, at 65. It was the combination of Chase's initial

lies about the status of Taylor's HAMP modification, the wrongful denial, *and* the subsequent five years of foreclosure that raise Chase's behavior from fraudulent to outrageous. *See* Taylor Br. 37-39.

Chase wrongly compares Taylor's case to *Bledsoe v. Capital One Auto Finance*, No. 1:14-cv-02109, 2016 WL 1270206 at *4 (S.D. Ind. March 31, 2016), and *Jaffri v. JP Morgan Chase Bank, N.A.*, 26 N.E.3d 635, 640 (Ind. Ct. App. 2015). Chase Br. 33-34. *Bledsoe* involved a run-of-the-mill repossession. 2016 WL 1270206 at *4. And, as explained in our opening brief (at 40), the allegation in *Jaffri* was that Chase "intentionally mishandled" the HAMP paperwork. *See* 26 N.E.3d at 640. To call what Chase did here run-of-the-mill or only "intentional mishandling" of an application would be quite an understatement. The additional facts pleaded in Taylor's complaint—the bank's lies, the five years of foreclosure, and the two sheriff's sales scheduled for his family home—distinguish Taylor's case from *Bledsoe* and *Jaffri*.

Chase also asserts that Taylor failed to plead intent, but that is not true. Taylor pleaded that "Chase knowingly and intentionally, with malice, employed policies including lying and deceiving … to frustrate" its customers, including Taylor. App. 80A. Taylor then explained how Chase's intentional actions caused him distress: "The Plaintiff has suffered a degree of stress and anxiety for approximately six (6) years as a result of malice intentional actions and/or inactions of Chase." App. 81. He then requested damages "for the malicious and intentional actions and/or inactions of Chase," referring to the allegations in his claim for IIED. App. 82A.

Finally, Chase warns that if Taylor's IIED claim survives the pleading stage, "the floodgates of litigation would open," allowing every repossession or foreclosure to be

the basis for IIED litigation. Chase Br. 34. Here too Chase pretends that Taylor's case is indistinguishable from a typical foreclosure. The only realistic consequence of permitting Taylor's claim to survive the pleadings is that a bank might face an IIED suit when it (a) engages in a scheme to deny a struggling homeowner a reduction in mortgage payments that he is entitled to under state contract law and a federal program intended to help homeowners; (b) repeatedly lies to him about it; and (c) proceeds to hold his house in foreclosure for years, scheduling multiple sheriff's sales.

III. Taylor's claims are not barred by any statute of limitations.

Chase faults Taylor for not raising Chase's statute-of-limitations defenses. *See* Chase Br. 28. It was not Taylor's burden to raise affirmative defenses for Chase. In any event, these arguments fail for three reasons: First, Taylor sued within the ten-year statute of limitations applicable to his contract and promissory-estoppel claims; second, the remaining limitations questions are fact-bound and not properly before this Court; and third, Chase did not raise any argument about the fraud statute of limitations below, so this Court should not address that issue in the first instance.

A. Chase applies the wrong limitations period to Taylor's contract and promissory-estoppel claims.

The statute of limitations would not bar Taylor's contract and promissory-estoppel claims because a ten-year period applies, not, as Chase contends, a six-year period. Before turning to this question, we note that, under Indiana law, when there is a dispute about whether one of two possible statutes of limitations applies, "any doubt should be resolved in favor of applying the longer limitation." *INS Investigations Bureau, Inc. v. Lee*, 709 N.E.2d 736, 743 (Ind. Ct. App. 1999) (quoting *Wells v. Stone City Bank*,

691 N.E.2d 1246, 1249 (Ind. Ct. App. 1998)). Therefore, any ambiguity must be resolved in Taylor's favor.

But this Court need not rely on ambiguity. A ten-year limitations period applies to "contracts in writing other than those for the payment of money, and including all mortgages … ." *See* Ind. Code § 34-11-2-11. When a contract concerns "the terms of the mortgage itself," the ten-year statute of limitations applies. *Cf. Jacobs v. Ocwen Fed. Bank, FSB*, 311 F. Supp. 2d 766, 771 (N.D. Ind. 2004) (two-year negligence limitations period, instead of ten, applied when plaintiffs' claims were not grounded in terms of mortgage contract). Because the oral or written agreement at issue here concerns the terms of Taylor's mortgage—after all, the whole purpose of HAMP was to modify the terms of *mortgages*—the ten-year statute of limitations applies to his contract claim.

In contrast, a six-year limitations period applies to actions for claims on contracts concerning the payment of money, like "promissory notes" or "bills of exchange." *See* Ind. Code § 34-11-2-9. It applies only when the contract "strictly" concerns the payment of money from one party to another. *See Folkening v. Van Petten*, 22 N.E.3d 818, 822 (Ind. Ct. App. 2014). In *Folkening*, the court held that the six-year limitations period did not apply to a contract to pay money that also included stock transfer, release, indemnification, and non-disparagement agreements, "because the Agreement concern[ed] more than just the payment of money." *Id.* Other Indiana cases found that similar contracts involving both the payment of money and other terms—such as those exchanging money for life insurance—fell within the ten-year statute of limitations for breach of a written contract. *See Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 687 (Ind. Ct. App. 2006); *First Nat'l Bank & Trust v. Indianapolis Pub.*

Housing Agency, 864 N.E.2d 340, 343 (Ind. Ct. App. 2007). Here too the agreement between Chase and Taylor required more than the payment of money. Rather, the agreement required Chase to modify the terms of Taylor's mortgage. *See* App. 33A-35A. And it required Taylor to open an escrow account, provide financial information to Chase, and meet other eligibility requirements. *Id.* at 16A-17A ¶¶ 8-13, 28A-31A, 66A-67A.

The ten-year statute also applies to Taylor's promissory-estoppel claim. The applicable limitations period for a promissory-estoppel claim is determined by "the nature of the alleged harm," *Meisenhelder v. Zipp Exp., Inc.*, 788 N.E.2d 924, 932 (Ind. Ct. App. 2003). And so the statute of limitations for a promissory-estoppel claim mirrors the statute of limitations for the corresponding contract claim. *See id.* Because Taylor's promissory-estoppel claim is premised on "a promise embodied in the written" modification contract subject to Section 34-11-2-11, his "claim is essentially one for the breach of the contractual promise" subject to the same limitations period. *Id.*

The district court did not decide when Taylor's breach-of-contract and promissory-estoppel claims accrued. But even if this Court assumes that they accrued as early as May 2010 (as Chase maintains)—when Taylor had completed the trial period but was finally denied a loan modification—Taylor had until May 2020 to file his complaint. Taylor filed this suit against Chase in June 2016, so Taylor's breach-of-contract and promissory-estoppel claims are timely. *See* App. 15A.

B. Chase's remaining statute-of-limitations defenses, which the district court did not decide, are not properly before this Court.

Statutes of limitations do not provide any basis for affirming the district court because the issues are fact-bound and not properly before this Court.

Except in rare circumstances, courts do not dismiss claims under Rule 12(b)(6) on statute-of-limitations grounds. *Chicago Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 613 (7th Cir. 2014). That is because "these defenses typically turn on facts not before the court" at this early stage of the litigation. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012). And "a plaintiff is not required to negate an affirmative defense, such as the statute of limitations, in his complaint." *Clark v. City of Braidwood*, 318 F.3d 764, 767 (7th Cir. 2003). To be sure, "a plaintiff can plead himself out of court if he alleges facts that affirmatively show that his suit is time-barred" but "at this stage, the question is only whether there is *any* set of facts that if proven would establish a defense to the statute of limitations." *Id.* at 767-68. There are.[3]

1. Taylor's proposed amended complaint alleges that he was a named plaintiff in a class action against Chase. App. 84A. As a result, Taylor contends that his contract, promissory-estoppel, and fraud claims now raised in this individual suit were tolled during the pendency of the class action under the class-action tolling rule of *American*

[3] Taylor's proposed first amended complaint was rejected as futile, and so the statute-of-limitations analysis here must be resolved under the same standards as apply under Rule 12(b)(6). *See* Taylor Br. 16. Similarly, dismissal on a Rule 12(c) motion on the pleadings—the ground for dismissal of Taylor's first complaint—is appropriate only "when the material facts are not in dispute between the parties." Charles Wright et al., Federal Practice & Procedure § 1367 (3d ed. 2019).

Pipe & Construction Co. v. Utah, 414 U.S. 538, 555 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353 (1983). That rule tolls the limitations periods on an individual class member's claims between the filing of the class action and the order certifying the class. *Ling v. Webb*, 834 N.E.2d 1137, 1142 (Ind. Ct. App. 2005). In the district court, Taylor would show that there were at least three years between when he joined the class, *see* Second Amended Complaint at 1, *Turbeville v. JPMorgan Chase Bank N A*, No. 10-cv-01464 (C.D. Cal. May 2, 2011), ECF 45, and when the class was certified for settlement, *see* Final Approval Order, Final Judgment, and Order of Dismissal With Prejudice, Exh. 1 at 4, *In re JPMorgan Chase Mortg. Modification Litig.*, No. 11-md-02290 (D. Mass. May 7, 2014), ECF 433. So, even if the six-year statute of limitations applied, and assuming Chase's accrual date is correct, the claims would have been alive until 2019, making Taylor's 2016 individual suit timely.

Taylor had no responsibility to raise these issues. And because Chase never answered Taylor's amended complaint, the facts on which tolling would be based were never before the district court. As a result, the district court had no reason to pass on the tolling question. Neither does this Court.

2. Similarly, further factual development would be required before a court could resolve whether the statute of limitations bars Taylor's IIED claim. That is because an IIED claim is fact-intensive, *see* Taylor Br. 36-37, and when Taylor's IIED claim accrued would demand a showing about the timing of Chase's intentional conduct and Taylor's emotional distress. Taylor alleged that Chase's intentional actions and the immediately resulting emotional distress continued into 2015. *See* Taylor Br. at 32, 36-40. Under the two-year statute of limitations for IIED, Taylor could have sued until

sometime in 2017. Chase disputes (or ignores) these factual allegations and urges this Court to conclude that the claim was untimely. But, again, that kind of factual determination is improper before Chase has even filed an answer to the amended complaint.

3. As for Taylor's fraud claim, Chase did not raise a statute-of-limitations defense in arguing that allowing Taylor's proposed amended complaint would be futile. ECF 45. If this Court agrees with Taylor that the amended complaint should be allowed, *see* Taylor Br. 17, the district court should take up the question whether Taylor's fraud claim is timely in the first instance, just as it should do with respect to class-action tolling.

IV. Chase's mootness argument is frivolous.

Taylor did not receive the HAMP modification in 2009 that Chase promised him and to which he was legally entitled, yet Chase contends that Taylor's claims are moot because Chase modified his mortgage in 2015. Chase's references to the 2015 loan modification, Chase Br. 7-9, 25, 35, are outside of the record, factually wrong, and legal red herrings. Taylor's 2015 mortgage modification was not a HAMP modification. So Chase seems to be saying that if one breaches a contract but later offers a similar-but-inferior deal, any claim over the breach is somehow mooted. But even if Chase's factual contentions were true (they aren't) and in the record (they aren't), this point would still fail: Taylor seeks damages caused by Chase's past actions, and it is axiomatic that a claim for damages is "not moot even if the underlying

misconduct that caused the injury has ceased." *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 596 (7th Cir. 2006).

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,

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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 5,950 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/ Brian Wolfman
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CERTIFICATE OF SERVICE

I certify that, on May 13, 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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