



dismissal of Kim's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, was filed on August 12, 2016. On September 19, 2016, Kim filed an untimely "General Response" to the Motion to Dismiss, wherein Kim indicated his intent to file an amended complaint. (ECF No. 19.) On September 26, 2016, Wells Fargo replied in opposition to Kim's attempt to amend his complaint. (ECF No. 20.) The court entered an Order to Show Cause on September 28, 2016, directing Kim "to show cause why the court should grant him leave to file an amended complaint[.]" (ECF No. 21 at 3.) On October 7, 2016, Kim filed both a timely response to the Order to Show Cause (ECF No. 22) and his Motion to Amend, which included Kim's proposed Amended Complaint to Restrict and Prohibit Foreclosure, for Damages, and for Legal and Equitable Relief (the "Proposed Amended Complaint") (ECF No. 23-1). Wells Fargo filed a response in opposition to the Motion to Amend on October 21, 2016. (ECF No. 24.)

For the reasons described below, the court GRANTS IN PART and DENIES IN PART the Motion to Dismiss and DENIES the Motion to Amend.

#### **I. BACKGROUND**

This case relates to property located at 2617 Sweet Maple Cove, Germantown, Tennessee 38139 (the "Property"), alleged by

the plaintiff to be subject to a foreclosure sale that has not yet occurred but is currently scheduled for March of 2017. Wells Fargo has attached a Note (ECF No. 12, Ex. A), a Deed of Trust (ECF No. 12, Ex. B), and an Assignment of Deed of Trust (ECF No. 12, Ex. C) to its Motion to Dismiss. Read together, these documents indicate that Wells Fargo is the holder of the beneficial interest (as assigned by Bank of America, N.A., the original lender) in a loan secured by the Property in the amount of \$304,200, obtained by plaintiff Kim on September 8, 2005.<sup>2</sup> On July 13, 2016, Kim filed a Complaint to Restrict and Prohibit Foreclosure, for Damages, and for Legal and Equitable Relief in the Chancery Court of Shelby County, Tennessee, naming Wells Fargo Bank, N.A. and Shapiro & Ingle, LLP as defendants.<sup>3</sup> (See ECF No. 1-1.) That same day, the presiding Chancellor directed the clerk of that court to "issue the temporary restraining order and/or set this matter for a hearing as prayed for by the Plaintiff prohibiting the Defendant from foreclosing" the

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<sup>2</sup>These documents are "referred to in the complaint and are central to the claims contained therein," and thus in this case, the documents are among those the court may consider without converting a motion to dismiss to one for summary judgment. Rondigo, LLC v. Twp. of Richmond, 641 F.3d 673, 681 (6th Cir. 2011) (quoting Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008)).

<sup>3</sup>On September 14, 2016, the court dismissed Shapiro & Ingle, LLC from the case without prejudice in accordance with the parties' joint Stipulation of Dismissal Without Prejudice. (See ECF Nos. 16 and 17.)

Property. (ECF No. 1-1 at 7.) A hearing was set for July 28, 2016. (Id.) However, prior to the scheduled hearing, on July 27, 2016, this case was removed to the United States District Court for the Western District of Tennessee, Western Division. (ECF No. 1.) Liberally construed, Kim's complaint attempts to state various breach of contract claims and fraud claims, and the Proposed Amended Complaint seeks to provide additional factual support for many of Kim's claims, all as described herein.<sup>4</sup>

**A. Breach of Contract**

1. Notices

Kim's complaint alleges: "Plaintiff received ***inadequate and misleading notice*** of the foreclosure. Plaintiff has received notices of foreclosures that did not occur and were never intended to occur." (ECF No. 1-1 at 2 (emphasis in original).)

Kim's Proposed Amended Complaint would add:

[i]n this particular case the Plaintiff has received no fewer than six different foreclosure notices with different dates for a sale. Such correspondence is

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<sup>4</sup>The court notes that the complaint is lacking in that it mostly fails to specify laws, statutes, or particular causes of action. However, "viewing the [c]omplaint in the light most favorable to the [p]laintiff," the court will construe the contentions in the complaint to allege the claims addressed herein, based on the nature of the allegations and what the court can surmise as to Kim's intent. Elmore v. One W. Bank, FSB, No. 2:12-cv-02280-JPM-cgc, 2012 WL 6156035, at \*2 (W.D. Tenn. Dec. 11, 2012) (analyzing similarly deficient complaint in similar manner for purposes of addressing motion to dismiss).

false and misleading as to the date any foreclosure ultimately will occur. All of these disparate notices have been sent out by the Defendant's foreclosure counsel, Shapiro & Ingle, and when confronted with these discrepancies has replied that the sale is now scheduled for March, 2017. No explanation has been given for the earlier or conflicting notices.

(ECF No. 23-1 at 2.) Separately, Kim alleges that he did not receive "proper notices, or notices that explain the loan or the alleged loan default," leaving Kim "with no timetable that is manageable for the reinstatement of his loan." (ECF No. 1-1 at 4.)

## 2. Application of Payments/Management of Escrow Account

Kim alleges that Wells Fargo breached the Deed of Trust in other various ways. Specifically, in Section 6 of Kim's complaint:

Plaintiff alleges that the Defendant has not applied payments as provided for in the Deed of Trust and note since it has received the assignment and ownership of the loan. More specifically, the Defendant has mismanaged the escrow account in relationship to the loan which was supposed to address taxes and insurance. The Defendant has assured a generous profit to itself on the configuration of the escrow, and upon information and belief, has also "forced place" insurance on the property through and [sic] entity or company in which it is a stakeholder.

(ECF No. 1-1 at 3).<sup>5</sup>

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<sup>5</sup>Kim's Proposed Amended Complaint drops certain claims originally asserted in his complaint; namely, that the Deed of Trust is a contract of adhesion and that a foreclosure would violate Kim's due process rights. Because it appears that Kim no longer seeks to assert these claims, the court does not analyze them in full

**B. Fraud**

1. Loan Modification Attempt

Kim asserts that Wells Fargo was misleading and fraudulent in Kim's attempts to work with Wells Fargo on a loan modification and reinstatement. Kim's complaint alleges:

Plaintiff has been confused about his status because the mortgage company has been soliciting payments before, during, and after the now canceled foreclosure. The Plaintiff has been involved with negotiations upon the payments with a view toward a [] complete loan reinstatement or a modification that will act as a reinstatement.

During the life of the mortgage the payments have been less than \$2000.00 per month.

Previously, the Plaintiff's mortgage was supposedly being reviewed for a home modification. Unfortunately, Plaintiff was unable to obtain approval and/or get a confirmation as to the home modification process despite regular daily calls and inquiries.

(ECF No. 1-1 at 2.) Further:

Plaintiff has in good faith tried to contact and discuss this matter with the lender. He has been hampered in this regard because the mortgage department has insufficient employees to review these situations. They tend to ask for information repeatedly, lose information which has been furnished to them, and set unrealistic time periods for loan review while a foreclosure is pending.

(ECF No. 1-1 at 4-5.) Kim's Proposed Amended Complaint seeks to supplement these allegations and clarify that Wells Fargo's

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here and notes only that neither has been stated as a valid claim on these facts. See Elmore, 2012 WL 6156035, at \*4-5.

conduct is alleged to be fraudulent. The Proposed Amended Complaint would add:

[t]he Defendant's home modification process and paperwork is misleading and fraudulent to consumers in that it fails to state that a foreclosure sale is not stalled, stopped, or averted while a modification is sought. The modification process is further misleading and/or fraudulent to consumers in that Defendant fails to disclose that supporting documents for a modification are likely to be required to be sent multiple times to the Defendant and that the Defendant has no dedicated staff for a modification and that a different employee has to be consulted each and every step of the way.

(ECF No. 23-1 at 2-3.)

2. Misrepresentations/Excessive and Duplicative Charges and Fees

Kim alleges that the loan was "abusive and predatory" as originated and as serviced. (ECF No. 1-1 at 3.) Specifically, Kim cites the following as instances of misrepresentation and fraud:

- A) Creation of false escrow charges that enrich the Defendant;
- B) Misapplication of money received under the note and deed of trust such that late charges and fees are paid before actual notes;
- C) The selling and marketing of this loan under an 80/20 loan scheme which abusively does not advise consumers of what the mortgage obligation is and how it is likely to increase;
- D) A fluctuating interest rate and obligation which is not clearly explained;
- E) And, the addition of attorney fees and late charges that are in excess of any actual loss or any actual fee paid.

(ECF No. 1-1 at 3-4.)

Finally, Kim alleges "that the charges and fees which have been run up on the account are excessive, duplicative, and have led to further and additional defaults[.]" (ECF No. 1-1 at 2.) Kim seeks to clarify these allegations in his Proposed Amended Complaint by adding:

Plaintiff has received about a dozen different statements in the last six (6) months, all with different balances and with differing escrow shortages. Plaintiff alleges that these discrepancies are not explained, are false and misleading, and constitute a fraud against him. Plaintiff is unable to ascertain what his balance is on the mortgage from any reasonable interpretation of the statements.

(ECF No. 23-1 at 3.)

## II. ANALYSIS

### A. Standard of Review

Federal Rule of Civil Procedure 15(a)(2) directs courts to freely give a party leave to amend its pleading when justice so requires. Fed R. Civ. P. 15(a)(2). "However, a motion to amend may be denied where there is 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 520 (6th Cir. 2010) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). "A proposed amendment is futile if the amendment could not withstand a Rule



12(b)(6) motion to dismiss.” Rose v. Hartford Underwriters Ins. Co., 203 F.3d 417, 420 (6th Cir. 2000) (citing Thiokol Corp. v. Dep’t of Treasury, State of Mich., Revenue Div., 987 F.2d 376, 382-83 (6th Cir. 1993)). For purposes of judicial economy, the court will determine whether allowing Kim to file the Proposed Amended Complaint would be futile by considering Wells Fargo’s Motion to Dismiss as if it applies to both the original complaint and the complaint as it is proposed to be amended.

In assessing whether the complaint, as proposed to be amended, states a claim upon which relief may be granted, the court applies the standards under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as stated in Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009), and Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). Hill v. Lappin, 630 F.3d 468, 470-71 (6th Cir. 2010). Accordingly, “[a]ccepting all well-pleaded allegations in the complaint as true, the Court ‘consider[s] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.’” Williams v. Curtin, 631 F.3d 380, 383 (6th Cir. 2011) (alterations in original) (quoting Iqbal, 556 U.S. at 681); see also In re Travel Agent Comm’n Antitrust Litig., 583 F.3d 896, 903 (6th Cir. 2009) (stating that the court must “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor

of the plaintiff"). "[P]leadings that . . . are no more than conclusions[] are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 679; see also Twombly, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.").

The court finds no undue delay, bad faith, or dilatory motive on the part of Kim in seeking to amend his complaint.<sup>6</sup> The court further finds that the defendant would not be unduly prejudiced by allowing Kim to amend his complaint. Thus, the court's consideration of the Motion to Amend will focus on whether the amendment would be futile.

## **B. Breach of Contract**

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<sup>6</sup>The court recognizes that there have been delays on the part of Kim, including both late filing of a response to the Motion to Dismiss and also missing his self-imposed seven-day deadline to attempt to amend his complaint after filing his aforementioned response. Kim's attorney asserts that the delays were caused by Kim being out of the country and thus unable to communicate effectively with his counsel. (See ECF No. 22.) However, the court finds that these delays do not constitute the type of "undue delay" that would suggest a denial of the Motion to Amend.

1. Notices

The court construes Kim's complaint, as proposed to be amended, to claim that Wells Fargo has breached a contract with Kim by sending multiple notices of foreclosures that have not occurred and by failing to send notices that explain Kim's alleged default. As to the foreclosure notices, "[u]nder Tennessee law, a foreclosure sale may be set aside where the trustee fails to comply with the notice requirements of the deed of trust." Gibson v. Mortg. Elec. Registration Sys., Inc., No. 11-2173-STA, 2012 WL 1601313, at \*6 (W.D. Tenn. May 7, 2012) (citing Fed. Nat. Mortg. Ass'n v. Robilio, No. W200701758COAR3CV, 2008 WL 2502114, at \*7 (Tenn. Ct. App. June 24, 2008) ("Tennessee law has required the trustee's strict compliance with the advertisement and notice terms as provided in the deed of trust.")). The provision of Kim's Deed of Trust addressing notice of foreclosure provides:

[i]f Lender invokes the power of sale, Trustee shall give notice of sale by public advertisement in the county in which the property is located for the time and in the manner provided by Applicable Law, and Lender or Trustee shall mail a copy of the notice of sale to Borrower in the manner provided in Section 15.

(ECF No. 12-1 at 33 (Deed of Trust § 22).) Pursuant to § 15:

[a]ll notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice given to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail

or when actually delivered to Borrower's notice address if sent by other means.

(ECF No. 12-1 at 30.)

Kim's complaint does not allege that Wells Fargo failed to comply with these provisions. Rather, Kim claims that Wells Fargo's notices have been inadequate because the sales have not occurred as noticed. Kim points to no provision in any referenced contract, or any law, that prohibits Wells Fargo from canceling or postponing a foreclosure sale, and the court has found none.<sup>7</sup> In fact, Kim himself is requesting that the foreclosure sale be postponed or canceled, and he states that (supposedly at or around the time of the canceled sales) he was "involved with negotiations upon the payments with a view toward a complete loan reinstatement or a modification that will act as a reinstatement." (ECF No. 1-1 at 2.) Therefore, even considering the new allegations in his Proposed Amended Complaint, Kim has failed to sufficiently plead a claim related to the foreclosure notices.<sup>8</sup> As to this part of his complaint,

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<sup>7</sup>Section 35-5-101 of the Tennessee Code provides certain conditions that must be met for a foreclosure sale to be adjourned and rescheduled "without additional newspaper publication," which is not the issue alleged here. T.C.A. § 35-5-101(f).

<sup>8</sup>For the same reasons, Kim has failed to state a claim for wrongful foreclosure. "While there are no specific elements for wrongful foreclosure, Tennessee courts generally examine whether contractual or statutory requirements were met in the foreclosure of the property in question." Ringold v. Bank

the Motion to Dismiss is GRANTED and the Motion to Amend is DENIED as futile.

In contrast, Kim alleges a failure to receive "notices that explain the loan or the alleged loan default." (ECF No. 1-1 at 4.) Pursuant to the Deed of Trust:

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.

(ECF No. 12-1 at 32 (Deed of Trust § 22).) Thus, the Deed of Trust contemplates that a notice of default will be sent prior to a foreclosure notice, as discussed above. It is the former notice that Kim appears to allege he did not receive. "In order to state a claim for breach of contract, [plaintiff] must show '(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract.'" Smith v. BAC Home Loans Servicing, LP, 552 F. App'x 473, 478 (6th Cir. 2014)

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of Am. Home Loans, No. 2:12-CV-02344-JPM, 2013 WL 1450929, at \*6 (W.D. Tenn. Apr. 9, 2013). As discussed, Kim has not adequately pled any contractual deficiencies as to the foreclosure notices, and he has not alleged any statutory violations.

(quoting ARC LifeMed, Inc. v. AMC-Tenn., Inc., 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)). Here, the existence of the Deed of Trust as an enforceable contract is not in dispute, and drawing all reasonable inferences in favor of the plaintiff and accepting his alleged facts as true, it is plausible that Wells Fargo breached the Deed of Trust by failing to provide adequate notice of default pursuant to § 22, causing damages. Therefore, on those grounds, the court finds that Kim's complaint plausibly alleges a claim for breach of the Deed of Trust. See Murillo v. Wash. Mut. Bank, F.A., 483 F. App'x 229, 232-33 (6th Cir. 2012) (reversing dismissal of breach of contract claim under Michigan law, when plaintiff alleged that defendant failed to provide documents and notices as required by the mortgage contract, stating "[w]hether Washington Mutual failed to provide required notices and closing documents, and the ramifications of such failure, are questions of fact to be addressed at a later stage of this litigation"). The Motion to Dismiss is DENIED as to the specific claim that Wells Fargo failed to provide notice of default.<sup>9</sup>

## 2. Application of Payments/Management of Escrow Account

As noted, Kim alleges that Wells Fargo engaged in the following conduct:

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<sup>9</sup>This particular claim appears in the original complaint and is not changed or supplemented by the Proposed Amended Complaint.

that the Defendant has not applied payments as provided for in the Deed of Trust and note since it has received the assignment and ownership of the loan. More specifically, the Defendant has mismanaged the escrow account in relationship to the loan which was supposed to address taxes and insurance. The Defendant has assured a generous profit to itself on the configuration of the escrow, and upon information and belief, has also "forced place" insurance on the property through and [sic] entity or company in which it is a stakeholder.

(ECF No. 1-1 at 3.) Construing the complaint in the light most favorable to the plaintiff, the court will consider these allegations as breach of contract claims. Kim's general allegations regarding the alleged misapplication of payments fail to state a claim. See Alshaibani v. Litton Loan Servicing, LP, 528 F. App'x 462, 465 (6th Cir. 2013) (affirming dismissal of breach of contract claim under Ohio law where "the district court correctly determined that Plaintiffs' naked allegation that Litton breached the terms of the Mortgage by, including but not limited to, failing to apply Plaintiff's [p]ayments in accordance with the terms of the [m]ortgage, is simply a legal conclusion couched as a factual allegation" (alterations in original) (internal quotation marks omitted)). Kim relies on conclusory allegations, and he fails to provide any non-conclusory factual support. See Brooks v. Wells Fargo Bank, N.A., No. 3:12-0821, 2014 WL 345737, at \*3 (M.D. Tenn. Jan. 30, 2014) (applying Alshaibani and finding that plaintiff failed to sufficiently plead a Tennessee breach of contract claim because

his allegations that payments were invalidly applied to past due charges were conclusory). For these reasons, Kim does not state a plausible claim as to any alleged misapplication of payments.

Kim also alleges mismanagement of the escrow account, which is governed by the Deed of Trust, § 3. Pursuant to that section, it is the borrower's responsibility to "promptly furnish to Lender all notices of amounts to be paid under this Section." (ECF No. 12-1 at 24.) The only allegation related to the escrow account that arguably rises above a conclusory assertion is that Wells Fargo "forced place" insurance on the Property. However, as Wells Fargo argues in its motion, by the terms of the Deed of Trust, § 5, Wells Fargo has the right in certain circumstances to obtain insurance coverage for the Property. (ECF No. 12-1 at 25 ("If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage.")) Kim has not alleged that the circumstances were such that Wells Fargo was in breach of the contract by exercising this right. Therefore, Kim has not sufficiently pled any plausible claim in relation to management of the escrow account. See Taylor v. JPMorgan Chase Bank, N.A., No. 3:15-cv-509-HBG, 2016 WL 4734644, at \*3 (E.D. Tenn. Sept. 9, 2016) (citing Alshaibani, 528 F. App'x at 465) ("Plaintiff



conclusorily alleges that Chase breached the mortgage contract by misapplying the funds in his escrow account . . . . The Court agrees with the Defendant that Plaintiff's bare allegation of breach of contract, with no supporting factual allegations, fails as a matter of law."). As to the potential claims discussed in this subsection, the Motion to Dismiss is GRANTED.

**C. Fraud**

The elements of a fraud claim in Tennessee are:

(1) an intentional misrepresentation with regard to a material fact; (2) knowledge of the representation falsity—that the representation was made knowingly or without belief in its truth, or recklessly without regard to its truth or falsity; (3) that the plaintiff reasonably relied on the misrepresentation and suffered damage; and (4) that the misrepresentation relates to an existing or past fact, or if the claim is based on promissory fraud, then the misrepresentation must embody a promise of future action without the present intention to carry out the promise.

Stacks v. Saunders, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990) (internal citations and quotation marks omitted).<sup>10</sup> "To make a showing of promissory fraud within this framework, a plaintiff must demonstrate that 'a promise or representation was made with the intent not to perform.'" Shah v. Racetrac Petroleum Co., 338 F.3d 557, 567 (6th Cir. 2003) (quoting Fowler v. Happy Goodman Family, 575 S.W.2d 496, 499 (Tenn. 1978)).

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<sup>10</sup>In Tennessee, "intentional misrepresentation," "fraudulent misrepresentation," and "fraud" are different names for the same cause of action. See Hodge v. Craig, 382 S.W.3d 325, 342 (Tenn. 2012).

Federal Rule of Procedure 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The Sixth Circuit has explained that "to satisfy Rule 9(b), a plaintiff must (1) specify the time, place, and content of the alleged misrepresentation, (2) identify the fraudulent scheme and the fraudulent intent of the defendant, and (3) describe the injury resulting from the fraud." Thompson v. Bank of Am., N.A., 773 F.3d 741, 751 (6th Cir. 2014) (citing U.S. ex rel. SNAPP, Inc. v. Ford Motor Co., 532 F.3d 496, 504 (6th Cir. 2008)). The purposes of the heightened pleading requirement of Rule 9(b) "are (1) to alert defendants to the particulars of the allegations against them so they can intelligently respond; (2) to prevent 'fishing expeditions'; (3) to protect defendants' reputations against fraud allegations; and (4) to whittle down potentially wide-ranging discovery to only relevant matters." Id. (citing Chesbrough v. VPA, P.C., 655 F.3d 461, 466-67 (6th Cir. 2011)).

1. Loan Modification Attempt

Kim alleges that Wells Fargo's conduct was fraudulent in that Kim was unable to obtain a loan modification, Wells Fargo assigned an insufficient number of employees to handle loan modifications, the employees Kim worked with were unorganized and inefficient, and Wells Fargo failed to state that seeking a

modification does not stall foreclosure. These allegations fall short of specifying the content of and injury resulting from misrepresentations as required by Rule 9(b). In Smith, the Sixth Circuit affirmed the district court's Rule 12(b)(6) dismissal of a similar claim:

The Smiths say that Appellees have a fraudulent modification program whereby they pretend to offer the possibility of loan modification while they simultaneously pursue or threaten to foreclose against homeowners.

. . .

Appellants merely say that Appellees had a "fraudulent modification program" without stating any actual misrepresentation made to them. Moreover, the Appellants fail to plead fraud with particularity as required by Rule 9. They do not state who made the misrepresentation or the time, place, and content of the misrepresentation.

552 F. App'x at 478-79 (internal footnotes and citations omitted). As in Smith, Kim fails to state any actual misrepresentation, and further, he fails to specify the time, place, and content of any particular communications. His general allegations regarding his dissatisfaction with Wells Fargo's loan modification process are insufficient to adequately plead a claim for fraud. As to this part of Kim's complaint, the Motion to Dismiss is GRANTED and the Motion to Amend is DENIED as futile.<sup>11</sup>

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<sup>11</sup>The court notes that Kim does not actually allege that Wells Fargo agreed to a modification, orally or otherwise. In fact,

2. Misrepresentations/Excessive and Duplicative Charges and Fees

Kim claims that Wells Fargo has committed fraud both by charging excessive and duplicative fees and also by making certain misrepresentations listed as (A)-(E) in paragraph 7 of his complaint. None of these allegations are stated with particularity as to time, place, and content in a way that satisfies Rule 9(b). While each of the listed misrepresentations could be liberally inferred to allege a fraudulent scheme by the defendant, there is simply no supporting detail that would alert Wells Fargo as to the particular conduct against which it must defend. Kim does not specify any particular "false escrow charges" (ECF No. 1-1 at 3), "misapplication[s] of money received" (id.), or excessive additional attorney fees and late charges (see id. at 4). As to his allegations regarding rising interest rates and obligations, he "does not identify either the mortgage rate, an increase in the rate, or any other factors that would suggest that the . . . mortgage was abusive." Elmore, 2012 WL 6156035, at \*4. Moreover, Kim does not adequately address how certain aspects having to do with the origination of the loan should be

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the basis of his complaint is that he was unable to obtain a modification. For this reason, the court need not analyze Wells Fargo's statute of frauds defenses. (See ECF No. 12-1 at 6-7.)

attributed to Wells Fargo, the later assignee.<sup>12</sup> For these reasons, Kim has failed to state a claim upon which relief may be granted as to his list of alleged fraudulent misrepresentations.

Next, the court addresses Kim's assertion that Wells Fargo has committed fraud by charging excessive and duplicative fees that have led to confusing and varying account statements.<sup>13</sup>

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<sup>12</sup>To the extent Kim is attempting to assert a fraudulent inducement claim or some sort of predatory lending claim, he has failed to state a claim upon which relief may be granted. It is undisputed that Wells Fargo was not the originating lender, and Wells Fargo is not alleged to have had anything to do with the loan until the assignment on April 23, 2014, which is more than eight years after the origination of the loan by Bank of America, N.A. See Price v. First Bank Mortg., Inc., No. 2:16-CV-2649-JTF-cgc, 2017 WL 398420, at \*4 (W.D. Tenn. Jan. 30, 2017) (quoting Thompson v. Bank of Am., N.A., 773 F.3d 741, 752 (6th Cir. 2014)) (listing the elements of a fraudulent inducement claim); Porter v. GMAC Mortg., LLC, No. 10-2858-SHM-dkv, 2011 WL 13116675, at \*4 (W.D. Tenn. Sept. 9, 2011) (dismissing claim for "predatory lending" based on origination of the loan when it was clear that defendant was not a party to the original loan); see also Beydoun v. Countrywide Home Loans, Inc., No. 09-10445, 2009 WL 1803198, at \*4 (E.D. Mich. June 23, 2009) (stating, as rationale for dismissing plaintiff's claim for predatory lending that the court construed as arising under federal law, "Plaintiff acknowledges that Defendant played no role in the origination of the mortgage in question . . . . Plaintiff's conclusory statement that Defendant was in a continuing business relationship with the entities responsible for the origination of his mortgage is insufficient.").

<sup>13</sup>Kim appears to consider the alleged excessive and duplicative fees as fraudulent conduct on the part of Wells Fargo. However, the claim would also fail if construed to be a breach of contract claim. See Elmore, 2012 WL 6156035, at \*4 (dismissing nearly identical allegations construed as a breach of contract claim because plaintiff "did not identify a single charge or fee

Even assuming, *arguendo*, that such conduct could constitute acts of fraud, Kim does not specify the date he received any statement or the content of any discrepancy. He also does not allege the date and type or amount of any particular excessive or duplicative fee. For these reasons, under the standards of Rule 9(b), Kim fails to state a claim upon which relief can be granted as to any alleged excessive or duplicative charge. As to the parts of Kim's complaint discussed in this subsection, the Motion to Dismiss is GRANTED and the Motion to Amend is DENIED as futile.<sup>14</sup>

### III. CONCLUSION

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that he paid, let alone a charge or fee that was excessive, duplicative, or abusive in any way").

<sup>14</sup>The parties debate the propriety of Kim's assertion that Wells Fargo "violated the existing consent decree with the Comptroller of the Currency which requires a servicer of a mortgage to seek a reinstatement or a modification before a foreclosure." (ECF No. 1-1 at 2.) Thus, Kim alleges Wells Fargo "has not acted in good faith[.]" (*Id.*) Kim clarifies in his Proposed Amended Complaint that "[w]hile this is not separately alleged to be a source for a private right of action against the Defendant, it is evidence of the false, deceptive, and fraudulent actions of the Defendant with respect to the Plaintiff's loan." (ECF No. 23-1 at 3.) Wells Fargo cites Green v. Bank of Am. Corp., 530 F. App'x 426, 430 (6th Cir. 2013), where the Sixth Circuit questioned the relevance of consent orders to a particular foreclosure challenge when the consent orders addressed general servicing and foreclosure practices, not specific transactions. Kim does not assert that the consent order here relates to his specific loan and thus, his allegations related to the consent decree are, at best, tangential to his claims. Because the court finds that the allegations do not enhance the plausibility of any particular claim, they are not relevant for the purpose of deciding the present motions.

In conclusion, the court finds that Kim's claim that Wells Fargo failed to provide notice of default in violation of its obligations under the Deed of Trust satisfies the Rule 12(b)(6) standard as a breach of contract claim. Accordingly, the Motion to Dismiss is DENIED as to this specific claim, and Wells Fargo is directed to file an answer addressing this claim. The Motion to Dismiss is GRANTED as to all other claims. As the sole remaining claim is sufficiently pled in Kim's original complaint and the court finds the proposed amendments and supplementations to be futile, the Motion to Amend is DENIED.

IT IS SO ORDERED.

s/ Tu M. Pham  
TU M. PHAM  
United States Magistrate Judge

February 28, 2017  
Date