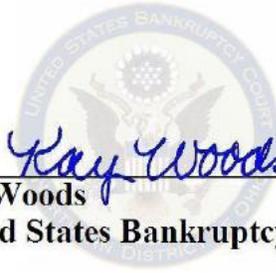


IT IS SO ORDERED.

Dated: December 30, 2011
10:21:55 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JULIE ANN DETCHON and
DEVLIN SCOTT DETCHON,

Debtors.

* * * * *

DEVLIN SCOTT DETCHON and
JULIE ANN DETCHON,

Plaintiffs,

v.

WELLS FARGO BANK, et al.,

Defendants.

CASE NUMBER 11-40172

ADVERSARY NUMBER 11-4160

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION TO DISMISS
OF MIDLAND MORTGAGE CO. AND MIDFIRST BANK

This cause is before the Court on Amended [sic] Defendants
Midland Mortgage Co. and MidFirst Bank's Motion to Dismiss Amended

Adversary Complaint ("Motion to Dismiss") (Doc. # 40) filed by Defendants Midland Mortgage Co. ("Midland") and MidFirst Bank ("MidFirst") (collectively, "Defendants") on October 4, 2011. Plaintiffs/Debtors Devlin Scott Detchon and Julie Ann Detchon filed Plaintiffs' Memorandum in Opposition to Defendants MidFirst Bank & Midland Mortgage Company [sic] Motion to Dismiss Amended Adversary [sic] ("Response") (Doc. # 43) on October 13, 2011. For the reasons set forth herein, the Court will grant the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Bankruptcy Proceeding.

The Plaintiffs filed a voluntary petition pursuant to chapter 13 of Title 11, United States Code, on January 21, 2011 ("Main Case"). On February 24, 2011, MidFirst filed Claim No. 9-1 ("Claim 9"), which asserts a secured claim in the Plaintiffs' real property located at 840 Afton Avenue, Youngstown, Ohio 44512. Claim 9 lists MidFirst as the "[c]reditor" and Midland as the "[n]ame . . . where payment should be sent." (Claim 9 at 1.) Attached to Claim 9 are (i) Statement of Pre-Petition Arrears; and

(ii) Note and Open-End Mortgage ("Mortgage") (together with the Note, "Mortgage Loan"). The Statement of Pre-Petition Arrears also identifies MidFirst as the "[c]reditor." (*Id.* at 2.)

On March 16, 2011, MidFirst filed Objection to Confirmation of Plan ("Objection to Confirmation") (Main Case, Doc. # 17), which objected to the Plaintiffs' proposed chapter 13 plan because it "provid[ed] for an inadequate arrearage amount" with respect to the Mortgage Loan. (Obj. to Confirmation at 1.) MidFirst and the Plaintiffs submitted Agreed Order to Settle Objection to Confirmation of Plan, which the Court entered on April 21, 2011 ("Agreed Order") (Main Case, Doc. # 20). The Agreed Order provided that MidFirst's right to receive payment on the Mortgage Loan through the Plaintiffs' chapter 13 case would be determined through this adversary proceeding.

B. The Amended Complaint.

On September 9, 2011, the Plaintiffs filed Amended Adversary Complaint ("Amended Complaint"),¹ which asserts four causes of action: (i) Claim One: Fraudulent Misrepresentation; (ii) Claim Two: Fair Debt Collection Practices Act; (iii) Claim Three: Breach of Contract; and (iv) objection to proof of claim. The named defendants are Midland, MidFirst and Wells Fargo Bank, N.A. ("Wells Fargo"). The Plaintiffs contend, "At all times referenced in this

¹On June 20, 2011, the Plaintiffs filed Adversary Complaint, which commenced the instant adversary proceeding. Upon the Plaintiffs' motion, on September 8, 2011, the Court entered Order Granting Plaintiffs' Motion for Leave to Amend Adversary Complaint (Doc. # 30), which granted the Plaintiffs five days to file an amended complaint.

complaint, Wells Fargo was acting as the servicing agent for Midfirst bank. As a result, Midfirst bank is vicariously liable for the actions and misconduct of Wells Fargo[.]” (Am. Compl. ¶ 11.)

By way of background, on September 26, 2011, Wells Fargo filed Defendant Wells Fargo Bank, N.A.’s Motion to Dismiss the Plaintiffs’ Amended Adversary Complaint (“Wells Fargo’s Motion to Dismiss”) (Doc. # 37). Following a response by the Plaintiffs and a reply thereto by Wells Fargo, on November 22, 2011, this Court entered Memorandum Opinion Regarding Wells Fargo’s Motion to Dismiss (“Memo Opinion”) (Doc. # 46) and Order Granting Wells Fargo’s Motion to Dismiss (“Dismissal Order”) (Doc. # 47). In the Dismissal Order, the Court (i) found that only Claim One was asserted against Wells Fargo; (ii) found that Claim One failed to state a claim against Wells Fargo; and (iii) granted Wells Fargo’s Motion to Dismiss. The Plaintiffs did not appeal or otherwise challenge the Dismissal Order, which is now a final judgment. As a consequence, only Midland and MidFirst remain as defendants in this proceeding.

1. Claim One: Fraudulent Misrepresentation.

Claim One asserts a claim for fraudulent misrepresentation based upon two alleged acts: (i) Wells Fargo, on behalf of MidFirst, misrepresented that the Mortgage Loan needed to be at least two months in default in order for the Plaintiffs to qualify for the Home Affordable Modification Program (“HAMP”) – *i.e.*, Wells Fargo made an affirmative misrepresentation; and (ii) Wells Fargo, on behalf of MidFirst, failed to disclose to the Plaintiffs several

available loss mitigation options – *i.e.*, Wells Fargo’s omission of information constituted a negative misrepresentation. The Plaintiffs allege, “Because Wells Fargo’s employees told Mr. Detchon that he should fall two months behind on his mortgage payments in order to be considered for HAMP, he did not make his December 2009 or January 2010 mortgage payments.” (Am. Compl. ¶ 26.) With respect to damages as a result thereof, the Plaintiffs state, “Defendants’ actions have caused the Detchons stress, many bouts of crying, anxiety, strain on their spousal relationship, loss of sleep, embarrassment, loss of time in dealing with this situation, humiliation, inconvenience, frustration, anger, mental anguish, and attorneys’ fees and costs.” (*Id.* ¶ 34.)

2. Claim Three: Breach of Contract.

Claim Three states, in its entirety:

55. Plaintiffs incorporate by reference paragraphs one through the preceding as though fully rewritten herein.
56. The Detchons’ loan is a Federal Housing Administration loan. As such, Midfirst through its agent Wells Fargo was required to abide by the FHA guidelines before foreclosing on Plaintiffs.
57. Wells Fargo, acting on behalf of Midfirst, did not abide by the federal guidelines before foreclosing. Specifically, Wells Fargo did not:
 - a. Hold a face-to-face meeting with the mortgagor or make a reasonable effort to arrange such a meeting before three full monthly installments due on the mortgage were unpaid;
 - b. Make available information regarding the loss mitigation options available to the mortgagor;
 - c. Inform the Detchons that they could participate

in the following alternatives to foreclosure: deed in lieu of foreclosure under 24 CFR §203.357, pre-foreclosure sales under 24 CFR §203.370, partial claims under 24 CFR §203.414, assumptions under 24 CFR §203.512, special forbearance under 24 CFR §203.471 and §203.614, and recasting of mortgages under 24 CFR §203.616.

58. Ohio law has held that failure to adhere to the guidelines is a condition precedent, as such, the Plaintiffs could not be in default.
59. Upon information and belief, neither Midfirst nor Wells Fargo performed the pre-foreclosure review required by 24 CFR §203.606.
60. Upon information and belief, neither Wells Fargo nor Midfirst informed the Detchons about their options because foreclosure is profitable to both Wells Fargo & Midfirst based upon costs and fees it [sic] can charge its [sic] customers. This incentive has caused Midfirst to act in bad faith and breach the implied covenant of good faith and fair dealing.
61. In addition, because the HUD guidelines are a condition precedent to breach then Midfirst wrongfully accelerated the loan in breach of the contract. Moreover, the acceleration led to the excessive charging of fees and costs that were unreasonable and not necessary in violation of the contract.
62. Midfirst's actions caused Plaintiffs economic damages including but not limited to attorneys fees and an amount to be fully determined by a forensic accountant.

(Am. Compl. ¶¶ 55-62.) Title 24, Code of Federal Regulations, is entitled "Housing and Urban Development." The provisions of Title 24 cited by the Plaintiffs in paragraphs 57 and 59 of the Amended Complaint are contained in "Subtitle B - Regulations Relating to Housing and Urban Development." See, e.g., 24 C.F.R. § 203.357 (Westlaw 2011).

3. Objection to Proof of Claim.

The objection to proof of claim states, in its entirety:

- 63. Plaintiffs incorporate by reference paragraphs one through the preceding as though fully rewritten here.
- 64. First, the Plaintiffs object that Midfirst is the true holder of their note and mortgage. The Plaintiffs believe that discovery will illustrate that this loan is held in a securitized trust with the money owed to GNMA.
- 65. The Plaintiffs also object to the proof of claim in its entirety as Midfirst did not meet all conditions precedent before accelerating the loan and therefore, there can be no default.
- 66. Specifically, the Plaintiffs object to the filing fee as the [sic] excessive sine [sic] the filing fee in Mahoning County is only \$200.00. The Plaintiffs also object to the property inspections as unnecessary and unreasonable. The Plaintiffs also object to the escrow shortage as included in the missed payments portion of the POC.
- 67. The Plaintiffs request that the proof of claim be disallowed in its entirety and the plaintiffs be awarded reasonable attorneys fees and costs.

(Am. Compl. ¶¶ 63-67.)

C. The Defendants' Motion to Dismiss.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), "MidFirst Bank requests the Court dismiss Claims One and Three against it and Midland Mortgage Co. requests the Court dismiss all claims against it" (Mot. to Dismiss at 4.)

1. Midland's Arguments.

Midland avers that the Amended Complaint, on its face, does not assert a claim against Midland:

Midland Mortgage Co. is requesting that the entire Amended Complaint be dismissed as to Midland Mortgage Co. as the Debtors have not alleged any claims against Midland Mortgage Co. in the Amended Complaint, and Debtors' Amended Complaint does not assert Midland Mortgage Co. participated in or contributed to any of alleged conduct forming the basis for the complaint against Wells Fargo and MidFirst Bank. Claim One is alleged against Wells Fargo and MidFirst Bank. Claim Two is asserted against MidFirst Bank only. Count [sic] Three is alleged against Wells Fargo and MidFirst Bank. No reference is made in Court [sic] Three to Midland Mortgage Co. The final portion of the Amended Complaint, Objection to Proof of Claim, also only refers to MidFirst Bank. Therefore, Midland Mortgage Co. requests that it be dismissed from the Adversary Proceeding.

(Mot. to Dismiss at 5 (internal citations omitted).) As a result, Midland seeks dismissal of any and all claims asserted against it.

2. MidFirst's Arguments.

MidFirst asserts that Claim One fails to state a claim because (i) any oral representations regarding the Mortgage Loan are barred by the statute of frauds; (ii) MidFirst owed no duty to the Plaintiffs to disclose available loss mitigation options; and (iii) there is no private right of action for alleged violations of HAMP or the FHA regulations (collectively, "Lending Regulations"). In addition, MidFirst states that the Plaintiffs failed to plead fraud with particularity, but MidFirst proffers no case law or argument in support of this position.

MidFirst, which asks the Court to take judicial notice of the Note and the Mortgage, contends that Claim Three fails to state a claim because the Plaintiffs have not alleged non-performance of the Mortgage Loan by MidFirst. MidFirst states:

No portion of the [Mortgage Loan] contains a provision

which requires MidFirst Bank to engage in or offer loss mitigation options prior to declaring a loan in default. The "non-performance" Debtors allege is not a term of the mortgage contract. . . . Debtors are not third-party beneficiaries of any contract between MidFirst Bank and the FHA, as no private right of action exists under these loss mitigation programs. As such, this type of argument may be used defensively in response to a foreclosure action, but no right exists to file a claim for damages.

(Mot. to Dismiss at 10-11.)

Finally, MidFirst argues that, pursuant to Ohio law, "recovery for emotional disturbance under a breach of contract action will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." (*Id.* at 11 (citation omitted).) MidFirst notes that the Plaintiffs do not allege that bodily harm resulted from the purported breach of the Mortgage Loan or that emotional distress was particularly likely to result. MidFirst also emphasizes that the Plaintiffs failed to assert economic damages in the original complaint; instead, the Plaintiffs alleged unspecified economic damages in the Amended Complaint after having the opportunity to review MidFirst's original motion to dismiss. MidFirst argues that the new allegations concerning economic damages "fail[] to elaborate as to what type of economic damages were suffered and call[] into question the veracity of the amendment to this portion of the Complaint." (*Id.* at 11-12.)

D. The Plaintiffs' Response.

1. Dismissal of Midland.

The Plaintiffs assert that dismissal of Midland is not proper

because the Plaintiffs have objected to Claim 9. In particular, the Plaintiffs state:

Midland Mortgage Company should not be dismissed from the Adversary Proceeding since the Plaintiffs are objecting to MidFirst and Midland Mortgage Company's Proof of Claim. On February 24, 2011 Mid First [sic] and Midland Mortgage Company filed a proof of claim in Plaintiffs [sic] Chapter 13 Bankruptcy. Midland Mortgage Company is listed as the entity where payments should be sent. Plaintiffs then filed a claim objecting to the fees that Midland Mortgage Company believed it should receive payment for. . . . In addition, Midland Mortgage Company continues service [sic] the loan and request payments from the Plaintiffs. Therefore, in light of all the facts, there is no justification to dismiss Midland Mortgage Company from this Adversary Proceeding.

(Resp. at 17 (footnote 4 omitted).)

2. Claim One: Fraudulent Misrepresentation.

The Plaintiffs do not dispute that there is no private right of action for alleged violations of the Lending Regulations. Instead, throughout the Response, the Plaintiffs contend that they "are not attempting to bring a cause of action under HAMP or the FHA. . . . Rather, the Court is faced with Plaintiffs' claim for affirmative misrepresentations against MidFirst, a state law claim."

(Resp. at 2.) Stated differently, "[T]he Plaintiffs [sic] fraud claim is not predicated on MidFirst's compliance with the guidelines; rather, the claim is centered on affirmative misrepresentations." (*Id.* at 5.)

With respect to the affirmative misrepresentation portion of Claim One, the Plaintiffs claim that the statute of frauds is not applicable because the Plaintiffs are not seeking to enforce the terms of an oral agreement that contradicts the Mortgage Loan.

Regarding the negative misrepresentation portion of Claim One, the Plaintiffs argue that MidFirst had a duty to disclose available loss mitigation options under four distinct theories: (i) FHA-insured mortgage lenders must comply with the Lending Regulations, to which the Plaintiffs are third-party beneficiaries; (ii) the duty of good faith and fair dealing; (iii) the law of deceit; and (iv) the existence of a *de facto* fiduciary relationship.

3. Claim Three: Breach of Contract.

In support of Claim Three, the Plaintiffs state, "It is well established in Ohio that FHA-insured mortgage lenders must comply with applicable servicing regulations before commencing foreclosure proceedings. . . . Accordingly, the party holding the note and mortgage must also establish that it **sufficiently complied with the FHA guidelines as a condition precedent to the contract.**" (Resp. at 12-13 (emphasis in original) (citations omitted).) The Plaintiffs assert, "MidFirst breached the [Mortgage Loan] by accelerating the Plaintiffs' loan and foreclosing because they [sic] failed to fulfill a condition precedent to acceleration." (*Id.* at 13.) The Plaintiffs also contend that MidFirst breached the duty of good faith and fair dealing because MidFirst did not "even attempt to comply with FHA guidelines." (*Id.* at 14.)

In opposition to MidFirst's contention that the Plaintiffs have not alleged recoverable damages, the Plaintiffs argue:

Plaintiffs [sic] claim states that MidFirst's actions caused Plaintiffs economic damages including but not limited to attorneys fees and an amount to be fully

determined by a forensic accountant. Plaintiffs [sic] economic damages include actual damages; such as, attorney fees and actual cost [sic] incurred by the breach of contract. Here, Plaintiffs have incurred attorney fees, damage to their credit and substantial time. Also, MidFirst seeks to recover fees and cost based on its breach.

(*Id.* at 16 (internal citation omitted).) The Plaintiffs further contend that disallowing emotional distress damages "would unfairly expose innocent consumers (like the Plaintiffs) to harm that Defendants have no incentive to avoid or mitigate." (*Id.* at 17.)

II. STANDARD FOR REVIEW AND LEGAL STANDARD

A. Failure to State a Claim.

Federal Rule of Civil Procedure 12(b)(6), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), requires that a pleading containing a claim for relief be dismissed if it fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2011); FED. R. BANKR. P. 7012 (West 2011). A claim will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (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*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556). A claim does not need to contain "'detailed factual allegations,'" but it must contain more than mere "'labels and conclusions'" or "'a formulaic recitation of the elements of a cause

of action.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). As a consequence, a claim "'must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory.'" *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) (quoting *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)).

In determining whether a claim alleges enough facts to survive a motion to dismiss, 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." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); see also *Twombly*, 550 U.S. at 555. Although the court "must accept all well-pleaded factual allegations in the complaint as true, [it] need not 'accept as true a legal conclusion couched as a factual allegation.'" *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555).

B. Fraudulent Misrepresentation.

To establish a claim for fraudulent misrepresentation,² also known as intentional misrepresentation/fraud, the plaintiff must demonstrate:

- (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and

²Although neither party expressly addresses the issue, the parties appear to agree that Ohio law applies in this proceeding. (See Resp. at 6 ("To establish a claim for intentional misrepresentation/fraud under Ohio law,"); Mot. to Dismiss at 6 ("In order to prove fraudulent misrepresentation in Ohio,"))

recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Andersons, Inc. v. Consol, Inc., 348 F.3d 496, 505 (6th Cir. 2003) (quoting *Carpenter v. Scherer-Mountain Ins. Agency*, 733 N.E.2d 1196, 1204 (Ohio Ct. App. 1999)).

"An action for fraud/intentional misrepresentation may lie 'not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction . . . fully [to] disclose facts of a material nature where there exists a duty to speak.'" *Id.* (quoting *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 684 N.E.2d 1261, 1269 (Ohio Ct. App. 1996)). "[A] duty to disclose arises primarily in a situation involving a fiduciary or other similar relationship of trust and confidence.'" *Id.* at 509 (quoting *Federated Mgmt., Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 855 (Ohio Ct. App. 2000)).

C. Breach of Contract.

To establish a claim for breach of contract, the plaintiff must establish: (i) a contract existed; (ii) the non-breaching party fulfilled its contractual obligations; (iii) the breaching party unlawfully failed to fulfill its contractual obligations; and (iv) the non-breaching party suffered damages as a result of the breach. *See Hitachi Med. Sys. Am., Inc. v. Choe*, 2011 U.S. Dist. LEXIS 113183, *25 (N.D. Ohio Sept. 30, 2011). In addition, "Ohio

law . . . imposes an implied duty of good faith on parties to any contract." *Wendy's Int'l, Inc. v. Saverin*, 337 Fed. Appx. 471, 476 (6th Cir. 2009) (unpublished) (citing *Ed Schory & Sons, Inc. v. Francis*, 662 N.E.2d 1074, 1082-83 (Ohio 1996)). "But the duty [of good faith] does not create an independent basis for a cause of action." *Id.* (citing *Thomasville Furniture Indus., Inc. v. JGR Inc.*, 3 Fed. Appx. 467, 472 (6th Cir. 2001)); see also *Northeast Ohio Coll. of Massotherapy v. Burek*, 759 N.E.2d 869, 875 (Ohio Ct. App. 2001) (internal quotation marks and citation omitted) ("[G]ood faith is part of a contract claim and does not stand alone.")

III. ANALYSIS

A. Dismissal of Midland.

Despite the Plaintiffs' contention otherwise, Midland did not file Claim 9. Rather, both Claim 9 and the Statement of Pre-Petition Arrears attached thereto identify MidFirst as the creditor to whom the Mortgage Loan debt is owed. Midland is identified solely as the "[n]ame . . . where payments should be sent." (Claim 9 at 1.) In addition, MidFirst filed the Objection to Confirmation, which sought to recover the Mortgage Loan arrearage listed in Claim 9, and submitted the Agreed Order that resolved the Objection to Confirmation. Most importantly, the allegations contained in the objection to proof of claim portion of the Amended Complaint do not reference Midland. Although the Plaintiffs state, in the Response, that Midland continues to service the Mortgage Loan, the Plaintiffs expressly state, in the Amended Complaint, "At

all times referenced in this complaint, Wells Fargo was acting as the servicing agent for Midfirst bank." (Am. Compl. ¶ 11.)

Based upon these facts, the Court finds that the Plaintiffs have not asserted any claim in the Amended Complaint against Midland. The Motion to Dismiss will be granted with respect to Midland.

B. Claim One: Fraudulent Misrepresentation.

Claim One is based upon the alleged conduct of Wells Fargo, as the purported servicing agent of MidFirst. (See Am. Compl. ¶ 36 ("The Defendant Wells Fargo, on behalf of Midfirst Bank, made several false misrepresentations to the Plaintiffs[.]"); *id.* ¶ 11 ("Midfirst bank is vicariously liable for the actions and misconduct of Wells Fargo, including but not limited to the fraudulent misrepresentations made by Wells Fargo.)) In Claim One, the Plaintiffs do not assert a claim against MidFirst independent of MidFirst's vicarious liability for the conduct of Wells Fargo.

The arguments requesting dismissal of Claim One made by MidFirst are substantively identical to the arguments Wells Fargo made in Wells Fargo's Motion to Dismiss. The only argument advanced by MidFirst that was not raised by Wells Fargo is the Plaintiffs' alleged failure to plead fraud with particularity. Furthermore, the Plaintiffs' arguments opposing dismissal of Claim One are nearly identical to those raised in response to Wells Fargo's Motion to Dismiss. The only argument not previously raised by the Plaintiffs is that MidFirst owed the Plaintiffs a duty to disclose available

loss mitigation options because the Plaintiffs "can be third party beneficiaries to loss mitigation guidelines." (Resp. at 11.) Because the remaining arguments of MidFirst and the Plaintiffs were previously addressed by this Court in the Memo Opinion and the Dismissal Order entered in the instant proceeding, the Court hereby incorporates by reference the Memo Opinion and the Dismissal Order and the findings of fact and the conclusions of law contained therein.

1. Private Right of Action.

It is well-settled, and not disputed by the Plaintiffs that there is no private right of action for alleged violations of the Lending Regulations – *i.e.*, HAMP or the FHA regulations. (See Mem. Op. at 11-14.) The Plaintiffs, however, argue that Claim One is not based on the Lending Regulations but, rather, is a state law claim for fraudulent misrepresentation.

As this Court concluded in the Memo Opinion, despite being pled as a state law claim, Claim One is clearly an attempt to hold MidFirst liable for Wells Fargo's alleged failure to comply with the Lending Regulations. (See *id.* at 14.) For example, the damages stated in Claim One were purportedly incurred "[a]s a result of Wells Fargo's fraudulent failure to relay information and false information related to HAMP, FHA, and loss mitigation options." (Am. Compl. ¶ 44.) Because there is no private right of action under the Lending Regulations, Claim One fails to state a claim upon which relief can be granted. Accordingly, the Court will grant

MidFirst's Motion to Dismiss with respect to Claim One.

2. Elements of Fraudulent Misrepresentation.

Even if there were a private right of action based upon alleged violations of the Lending Regulations, Claim One fails to plead the elements of fraudulent misrepresentation under Ohio law. (See Mem. Op. at 14-25.) Specifically, the negative misrepresentation portion of Claim One fails to state a claim because the Plaintiffs have not demonstrated that MidFirst owed a duty to the Plaintiffs to disclose available loss mitigation options. (See *id.* at 15-21.) Likewise, the affirmative misrepresentation portion of Claim One fails to state a claim because the Plaintiffs have not asserted facts sufficient to establish that the Plaintiffs justifiably relied upon the alleged misrepresentations of Wells Fargo, on behalf of MidFirst, or that such reliance proximately caused injury to the Plaintiffs. (See *id.* at 21-25.)

a. Duty to Disclose.

A claim for negative misrepresentation is viable only where there exists a duty to speak. See *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 505 (6th Cir. 2003). This Court previously addressed, and rejected, the Plaintiffs' arguments that Wells Fargo, on behalf of MidFirst, was required to disclose available loss mitigation options under any of the following four legal theories: (i) the obligation of FHA-insured mortgage lenders to comply with applicable servicing regulations; (ii) the duty of good faith and fair dealing;

(iii) the law of deceit; and (iv) the existence of a *de facto* fiduciary relationship. (See Mem. Op. at 15-21.) The Court hereby incorporates that analysis and holding.

The Plaintiffs now argue, in the Response, that MidFirst was required to disclose available loss mitigation options because the Plaintiffs are third-party beneficiaries to the Lending Regulations. The Plaintiffs cite *Marques v. Wells Fargo Home Mortg., Inc.*, 2010 U.S. Dist. LEXIS 81879 (S.D. Cal. Aug. 12, 2010), in which the mortgagor asserted that his mortgage servicer breached its HAMP servicer participation agreement with Fannie Mae. The District Court for the Southern District of California concluded that the mortgagor "may be able to state a claim against Defendant as an intended beneficiary of the Agreement. . . . Plaintiff at the very least had a right to have his loan considered for modification." *Id.* at *19.

However, in *Nafso v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 44654 (E.D. Mich. Apr. 26, 2011), the District Court for the Eastern District of Michigan reached the opposition conclusion. In *Nafso*, the mortgagor asserted a claim against his mortgage servicer for alleged violations of HAMP. The mortgagor, citing *Marques*, argued that he could assert a claim for an alleged violation of HAMP, despite the lack of a private right of action, as a third-party beneficiary to the HAMP agreement. The court noted that "[t]he holding in *Marques* has been rejected by several courts," *id.* at 12 (citations omitted), and stated:

In the context of government contracts, such as HAMP, there is a presumption that any beneficiaries are only incidental beneficiaries. . . .

Nafso has not overcome the presumption that he is an incidental beneficiary of the contract between Wells Fargo and the government. Even though the contract does benefit homeowners such as Nafso, the contract lacks the required clear intention. Other courts have concluded the same. See Hoffman [sic] v. Bank of America, No. CV 10-2171, 2010 U.S. Dist. LEXIS 70455, 2010 WL 2635773 (N.D. Cal. June 30, 2010) (“[T]he existing case law weighs decisively in favor of defendant: numerous district courts have interpreted identical HAMP agreements and have come to the conclusion that a borrower is not [an intended] third party beneficiary.”). Accordingly, Nafso’s HAMP claims . . . must be dismissed.

Id. at *13-14; see also *Cade v. BAC Home Loans Serv’g, LP*, 2011 U.S. Dist. LEXIS 65045, *7, *10 (S.D. Tex. June 20, 2011) (citations omitted) (finding that the majority of courts have “rejected the theory that borrowers are intended third-party beneficiaries of the HAMP Servicer Participation Agreement” and noting that “the case on which the *Marques* court relied has since been reversed by the Supreme Court of the United States”).

In the instant proceeding, the Plaintiffs fail to identify the contract to which they are third-party beneficiaries or state that MidFirst or Wells Fargo executed such contract. Instead, the Plaintiffs summarily state that they “can be” third-party beneficiaries to “loss mitigation guidelines” and cite *Marques* in support of their position. (Resp. at 11.) The Court is persuaded by the reasoning of the district courts in *Nafso* and *Cade* and concludes that the Plaintiffs are not third-party beneficiaries to the HAMP servicer participation agreement or the Lending

Regulations.

The Plaintiffs have failed to allege any legal theory or set of facts under which MidFirst or Wells Fargo, on behalf of MidFirst, was required to disclose available loan modification options to the Plaintiffs. Therefore, pursuant to Ohio law, the negative misrepresentation portion of Claim One fails to state a claim upon which relief can be granted.

b. Justifiable Reliance and Resulting Injury.

In the Memo Opinion, this Court concluded, "[T]he Plaintiffs have not asserted facts sufficient to support a claim for fraudulent misrepresentation under Ohio law. In particular, the Plaintiffs have not demonstrated that they justifiably relied upon the alleged misrepresentations of Wells Fargo or that such reliance proximately caused injury to the Plaintiffs." (Mem. Op. at 21 (citation omitted).) Specifically, the Court found: (i) the Plaintiffs did not claim that they were able to make, or would have made, their Mortgage Loan payments "but for" the alleged misrepresentations; (ii) the Plaintiffs did not assert that they were eligible for HAMP or entitled to a HAMP modification; (iii) the damages alleged by the Plaintiffs, except for fees and costs incurred as a result of this proceeding, were entirely non-economic; and (iv) the Plaintiffs' blanket allegations were not sufficient to support a claim for non-economic damages. (See *id.* at 21-25.)

As stated above, Claim One is asserted against MidFirst based entirely upon its alleged principal-agent relationship with Wells

Fargo. As a consequence, the analysis and findings in the Memo Opinion concerning Claim One are equally applicable to this Motion to Dismiss. Because the Plaintiffs have offered no new arguments in support of Claim One that affect the Court's prior findings of fact or conclusions of law, the Court finds that Claim One fails to state a claim, pursuant to Ohio law, upon which relief can be granted. The Court will grant the Motion to Dismiss with respect to Claim One.³

C. Claim Three: Breach of Contract.

To survive the Motion to Dismiss, Claim Three must contain plausible allegations that (i) a contract existed; (ii) the Plaintiffs fulfilled their contractual obligations; (iii) MidFirst unlawfully failed to fulfill its contractual obligations; and (iv) the Plaintiffs suffered damages as a result of the breach. See *Hitachi Med. Sys. Am., Inc. v. Choe*, 2011 U.S. Dist. LEXIS 113183, *25 (N.D. Ohio Sep. 30, 2011). The first element is established because MidFirst "does not deny the existence of the mortgage contract." (Mot. to Dismiss at 10.) The Court will address the remaining three elements of a breach of contract action below.

1. Provisions of the Mortgage Loan.

MidFirst argues, "No portion of the contract contains a provision which requires MidFirst Bank to engage in or offer loss mitigation options prior to declaring a loan in default. . . . As

³Because the Court concludes that Claim One fails to state a claim upon which relief can be granted, the Court will not address MidFirst's contention that the Plaintiffs failed to plead fraud with particularity.

such, Debtors' Amended Complaint fails to allege the elements of a breach of contract claim." (Mot. to Dismiss at 10-11.)

The Note and the Mortgage are attached to Claim 9 and, thus, are part of the record in the Main Case. The Court hereby takes judicial notice of the Note and the Mortgage. Despite MidFirst's arguments otherwise, both the Note and the Mortgage contain provisions referencing and incorporating the HUD regulations. Specifically, paragraph 6(B) of the Note states:

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(Note ¶ 6(B) (emphasis added).) Similarly, paragraph 9 of the Mortgage states, in pertinent part:

9. Grounds for Acceleration of Debt.

(a) Default. Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

(i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or

* * *

* * *

(d) Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

(Mortg. ¶ 9 (emphasis added).)

Based upon the provisions of the Note and the Mortgage quoted above, the Court finds that the Mortgage Loan required MidFirst to comply with the HUD regulations prior to accelerating the Mortgage Loan or initiating a foreclosure action.

2. Non-Performance by MidFirst.

In *U.S. Bank, N.A. v. Detweiler*, 946 N.E.2d 777 (Ohio Ct. App. 2010), an Ohio appellate court addressed a note provision identical to paragraph 6(b) of the Note in this proceeding. In *Detweiler*, the mortgagors argued that (i) the mortgagee failed to comply with HUD regulations prior to filing its complaint in foreclosure; and (ii) such regulations were a condition precedent. The mortgagee, on the other hand, contended that the HUD regulations were merely an affirmative defense to foreclosure.

The court agreed with the mortgagors and stated, "It has been held that a term in a mortgage such as one requiring prior notice of a default and/or acceleration to the mortgagor, is not an affirmative defense but rather a condition precedent." *Id.* at 783 (citing *LaSalle Bank v. Kelly*, 2010 Ohio 2668, *13 (Ohio Ct. App. 2010)). The court concluded that the mortgagee failed to establish that it had complied with all conditions precedent to the

mortgage loan and stated:

We find that the mortgage loan in this case is federally insured and by the terms in the Note and Mortgage, it is subject to HUD regulations in the case of default and/or acceleration. The HUD regulations, incorporated within the terms of the default and/or acceleration provisions, include those requirements found in 24 CFR § 203.602 and 24 CFR § 203.604, as stated above. Those requirements, therefore, are conditions precedent.

Id. at 783; see also *Kelly*, 2010 Ohio 2668 at *13 (quotation marks and citations omitted) ("Where prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent[.]")

Pursuant to the express terms of the Note and the Mortgage, quoted *supra* at 23-24, it is apparent that MidFirst was required to comply with the HUD regulations prior to accelerating the Mortgage Loan or initiating a foreclosure action. This Court agrees with the reasoning of the Ohio appellate courts in *Detweiler* and *Kelly* and finds that (i) the HUD regulations are incorporated into the Note and the Mortgage pursuant to the terms of each; and (ii) compliance with HUD regulations is a condition precedent to acceleration and foreclosure.

In the Amended Complaint, the Plaintiffs aver, "Wells Fargo, acting on behalf of Midfirst, did not abide by the federal guidelines before foreclosing. . . . [B]ecause the HUD guidelines are a condition precedent to breach then Midfirst wrongfully accelerated the loan in breach of the contract." (Am. Compl. ¶¶ 57, 61.) As a consequence, the Court finds that the Plaintiffs have alleged facts sufficient to state a plausible claim that

MidFirst failed to fulfill its contractual obligations.

3. Non-Performance by the Plaintiffs.

"Generally, a material breach of contract will entitle a party to stop performance. A 'material breach of contract' is a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform." *Hitachi Med. Sys. Am., Inc. v. Choe*, 2011 U.S. Dist. LEXIS 113183, *25-26 (N.D. Ohio Sep. 30, 2011) (quotation marks and citations omitted). As a result, to prevail on Claim Three, the Plaintiffs must demonstrate that they fulfilled their obligations under the Mortgage Loan.

Although neither party directly addresses this issue, the Plaintiffs admit that they defaulted on the Mortgage Loan. (See Am. Compl. ¶ 25 ("[P]reviously [the Plaintiffs] had already been in default, but by the grace of family members and friends, they were [sic] to catch up."); *id.* ¶ 26 ("[Mr. Detchon] did not make his December 2009 or January 2010 mortgage payments [sic].")) Furthermore, in Schedule D, the Plaintiffs state that the Mortgage Loan was "[l]ast [a]ctive 11/01/09." (Sch. D at 1.) Thus, it appears that the Plaintiffs did not make any Mortgage Loan payments for more than a year - from November 2009 through the January 21, 2011 petition date. The Defendants allege, and the Plaintiffs do not dispute, that the Mortgage Loan "went into default in 2009 and the loan was accelerated" and a foreclosure action "was filed on

February 26, 2010." (Mot. to Dismiss at 3.) Because the Plaintiffs defaulted on the Mortgage Loan prior to acceleration of the Mortgage Loan and initiation of the foreclosure proceeding, the Court must determine whether Plaintiffs' default was a material breach that relieved MidFirst of its obligations under the Mortgage Loan.

In *Kersey v. PHH Mortg. Corp.*, 682 F. Supp. 2d 588 (E.D. Va. 2010), the District Court for the Eastern District of Virginia addressed whether defaulting on a mortgage loan that incorporated the Lending Regulations was a material breach.⁴ In *dicta*, the court stated:

Indeed, the fact that the contract specifically contemplates the [mortgagor] falling into arrears by imposing obligations on the [mortgagee] to do certain things in the event of arrearage prior to commencing foreclosure - such as having a face-to-face meeting with the mortgagor - suggests that simply falling into arrears on the note is not a material breach. Of course, as neither party has asked the Court to decide this issue, the Court will not reach it.

Id. at 597.

The analysis in *Kersey* was adopted by the District Court for the Southern District of Ohio in *Sinclair v. Donovan*, 2011 U.S. Dist. LEXIS 128220 (S.D. Ohio Nov. 4, 2011). In *Sinclair*, the defendants argued that, because the plaintiffs failed to timely make their mortgage payments, the plaintiffs were precluded from bringing a breach of contract claim against the defendants. The district

⁴The holding in *Kersey* is of limited precedential value because, in a later opinion, the court determined that it lacked federal question subject matter jurisdiction over the proceeding. See *Kersey v. PHH Mortg. Corp.*, 2010 U.S. Dist. LEXIS 82802, *1 (E.D. Va. Aug. 13, 2010) ("For the reasons set forth herein, the Court finds that it lacks subject matter jurisdiction and remands the action to the Circuit Court of the City of Richmond, Virginia.")

court concluded that the plaintiffs were not in material breach of their mortgage loans and stated:

As the Plaintiff Homeowners contend, it indeed would be an absurd result if the Lender Defendants were allowed to ignore the contract terms drafted to govern their post-default conduct on the grounds that the mortgagors have defaulted. We find that the HUD-FHA regulations concerning loss mitigation are enforceable terms of the mortgage contract between the parties and that Plaintiffs cannot be denied the benefit of these provisions by virtue of the fact of simple default.

Id. at *27 (internal citation omitted). In a footnote, the court further stated, "The FHA regulations at issue are triggered only upon default, so, under [the defendants'] analysis, a breach of contract claim never would survive a motion to dismiss. . . . [W]e consider this result untenable as it allows a mortgagor no direct recourse against its lender." *Id.* at *26 n.7.

This Court is not persuaded by the non-binding analyses of the *Kersey* and *Sinclair* courts and finds that the Plaintiffs were in material breach of the Mortgage Loan when they defaulted. Instead, the Court agrees with the Court of Common Pleas of Butler County, Ohio, which concluded in *BAC Home Loans Serv'g, LP v. Karner*, Case No. CV 2010 02 0931 (Court of Common Pleas, Butler Cty., Ohio May 5, 2011) (unpublished), that defaulting on a mortgage loan constitutes a material breach. In *Karner*, the state court first concluded that the Lending Regulations were incorporated into the mortgage loan at issue⁵ and, thus, the lack of a private right of action for alleged

⁵The note and mortgage at issue in *Karner* contained the exact provisions contained in paragraph 6(b) of the Note and paragraph 9 of the Mortgage quoted *supra* at 23-24.

violations of the Lending Regulations did not preclude the mortgagor's breach of contract claim. However, the court expressly rejected the holding in *Kersey* and found that the mortgagor failed to plead a claim for breach of contract because the mortgagor had defaulted on the mortgage loan. The court stated:

This court can not [sic] conceive of any more material or fundamental obligation of a borrower/mortgagor under a note and mortgage than payment of the monthly amount due pursuant to the terms of the contract. The failure to make the agreed upon payments when due is not a "mere nominal, trifling, or technical departure[]" but, instead, is at the very heart of the purpose of the contract.

. . . However, this court disagrees with that conclusion [reached in *Kersey*]. If payment is not the most essential term or condition of a note and mortgage, what is? A lender only loans money if it has the expectation that the borrower will make payments in return.

Id. at *9-10.

The court in *Karner* also rejected the notion that, if default was considered a material breach, the obligations imposed upon a lender prior to acceleration and foreclosure would be meaningless. The court noted that the Lending Regulations impose other obligations upon lenders that are not rendered meaningless if default constitutes a material breach. More importantly, the court stated, "If, as [the mortgagor] asserts, BAC did not offer or engage in these loss mitigation alternatives before filing this foreclosure action, then she clearly has a valid affirmative defense to BAC's claims. While she is prohibited from using FHA-HAMP affirmatively, she is not prohibited from using FHA-HAMP defensively." *Id.* at *11.

In the instant proceeding, the facts establish that the Plaintiffs defaulted on the Mortgage Loan prior to MidFirst accelerating the Mortgage Loan or initiating the foreclosure action. The Court hereby finds that the Plaintiffs' failure to timely make payments pursuant to the terms of the Mortgage Loan constituted a material breach. This Court agrees with the state court in *Karner* that there is no more material or fundamental obligation imposed upon a mortgagor under the terms of a note and accompanying mortgage than repayment of the monthly amount due. By failing to fulfill this fundamental obligation, the Plaintiffs defeated the essential purpose of the Mortgage Loan and committed a material breach. Because the Plaintiffs were in material breach of the Mortgage Loan prior to the alleged breach by MidFirst, the Plaintiffs have failed to state facts sufficient to sustain a claim for breach of contract. This Court's holding does not preclude the Plaintiffs from raising MidFirst's alleged failure to comply with the Lending Regulations in defense to a foreclosure proceeding. Thus, the Lending Regulations are not rendered meaningless by the Court's holding.

4. Resulting Damages.

To state a claim for breach of contract, the Plaintiffs must also demonstrate that they suffered damages due to MidFirst's alleged breach of the Mortgage Loan. The Plaintiffs contend that "the acceleration led to the excessive charging of fees and costs that were unreasonable and not necessary in violation of the contract." (Am. Compl. ¶ 61.) In the Response, the Plaintiffs

summarily state that they suffered other economic damages, such as "attorney fees, damage to their credit and substantial time." (Resp. at 16.) The Plaintiffs also seek to recover non-economic, emotional distress damages.

Even if the Plaintiffs have suffered economic damages, the Plaintiffs do not set forth facts sufficient to establish that those damages were caused by MidFirst's purported failure to comply with the Lending Regulations in breach of the Mortgage Loan. The Plaintiffs do not contend that, had MidFirst adhered to the Lending Regulations and not breached the Mortgage Loan, the Plaintiffs could have brought their Mortgage Loan payments current or otherwise avoided foreclosure and the costs related thereto. Furthermore, as this Court found in the Memo Opinion, the Plaintiffs do not allege that they qualified for available loss mitigation options or were entitled to participate in such programs. The Plaintiffs simply fail to claim that any economic damages – e.g., attorneys' fees and costs – were incurred as a result of MidFirst's alleged failure to comply with the terms of the Mortgage Loan. Accordingly, the Court finds that the Plaintiffs have not asserted facts sufficient to establish that they suffered economic damages as a consequence of MidFirst's alleged breach of the Mortgage Loan.

In breach of contract actions, "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."

Kishmarton v. William Bailey Constr., Inc., 754 N.E.2d 785, 788 (Ohio 2001) (quoting 3 Restatement of the Law 2d, Contracts 149, § 353 (1981)). Emotional distress damages have been permitted in breach of contract actions in extremely limited circumstances. See *Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 665 (6th Cir. 2005) (citation and parenthetical omitted) ("The Ohio Supreme Court's decision in *Kishmarton* is indeed limited; the court's holding is expressly limited to allowing emotional distress damages in contract cases involving transactions between vendees and builder-vendors.")

The Plaintiffs do not allege that they suffered bodily harm as a result of MidFirst's alleged breach of the Mortgage Loan. Nor do the Plaintiffs contend that the Mortgage Loan or the alleged breach thereof was such that serious emotional disturbance was particularly likely to result. In fact, the Plaintiffs do not assert that they suffered "serious" emotional disturbance but, instead, summarily state that MidFirst's conduct caused the Plaintiffs "stress, many bouts of crying, anxiety, strain on their spousal relationship, loss of sleep, embarrassment, . . . humiliation, inconvenience, frustration, anger, [and] mental anguish" (Am. Compl. ¶ 34.) As a result, the Court finds that the Plaintiffs have not alleged facts sufficient to support non-economic damages.

For the reasons set forth above, the Court finds that the Plaintiffs have failed to allege facts sufficient to demonstrate that they suffered damages, either economic or non-economic, as a

result of MidFirst's purported breach of the Mortgage Loan.

Because Plaintiffs have failed to establish two of the four elements necessary for a breach of contract action - *i.e.*, Plaintiffs fulfilled their contractual obligations and Plaintiffs suffered damages as a result of the breach - Claim Three fails to state a cause of action against MidFirst. Accordingly, the Court will grant the Motion to Dismiss with respect to Claim Three.

5. Duty of Good Faith and Fair Dealing.

"[T]he duty [of good faith] does not create an independent basis for a cause of action." *Wendy's Int'l, Inc. v. Saverin*, 337 Fed. Appx. 471, 476 (6th Cir. 2009) (unpublished) (citing *Thomasville Furniture Indus., Inc. v. JGR Inc.*, 3 Fed. Appx. 467, 472 (6th Cir. 2001)). "Rather, 'good faith is part of a contract claim and does not stand alone.'" *Northeast Ohio State Coll. of Massotherapy v. Burek*, 759 N.E.2d 869, 875 (Ohio Ct. App. 2001) (quoting *Lakota Loc. School Dist. v. Brickner*, 671 N.E.2d 578, 584 (Ohio Ct. App. 1996)).

The Plaintiffs have failed to state a claim for breach of contract. Because a claim for breach of the duty of good faith and fair dealing cannot be brought independent of a breach of contract claim, the good faith and fair dealing portion of Claim Three does not state a claim upon which relief can be granted.

IV. CONCLUSION

The Plaintiffs concede that the only claim against Midland is contained in the objection to proof of claim portion of the Amended

Complaint. However, the objection to proof of claim makes no reference to Midland. Furthermore, Midland did not file Claim 9 and Midland does not purport to be a creditor of the Plaintiffs. As a consequence, the Amended Complaint fails to state a claim against Midland. The Motion to Dismiss will be granted with respect to Midland.

There is no private right of action based upon a mortgagee's failure to comply with the Lending Regulations - *i.e.*, HAMP or the FHA regulations. Thus, the Plaintiffs have failed to state a claim for fraudulent misrepresentation because Claim One is, in actuality, based upon the alleged failure of Wells Fargo, on behalf of MidFirst, to comply with the Lending Regulations.

In order to prevail on the negative misrepresentation portion of Claim One - *i.e.*, the allegations that Wells Fargo, on behalf of MidFirst, concealed available loss mitigation options - the Plaintiffs were required to establish that MidFirst had a duty to disclose available loss mitigation options. Neither MidFirst nor Wells Fargo was acting in a fiduciary capacity and the facts contained in the Amended Complaint and the Response are insufficient to demonstrate the existence of a *de facto* fiduciary relationship. Moreover, the Lending Regulations cannot serve as the basis for the negative misrepresentation claim because there is no private right of action under the Lending Regulations and the Plaintiffs are not third-party beneficiaries to the Lending Regulations. Because MidFirst was not required to disclose available loss mitigation

options to the Plaintiffs, MidFirst cannot be liable to the Plaintiffs for fraud based upon negative misrepresentation.

The Plaintiffs have also failed to assert facts sufficient to establish that they justifiably relied upon Wells Fargo's alleged misrepresentations, on behalf of MidFirst, or were proximately injured as a result thereof. The Plaintiffs do not contend that they were capable of making their Mortgage Loan payments or that they were entitled to participate in any loss mitigation program. Furthermore, the alleged conduct of Wells Fargo, on behalf of MidFirst, does not warrant the imposition of non-economic damages. For the reasons set forth above, the Court finds that Claim One fails to state a claim upon which relief can be granted. The Motion to Dismiss will be granted with respect thereto.

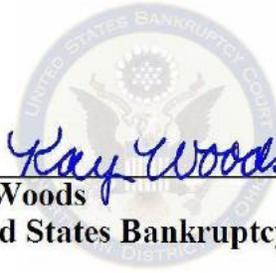
It is not disputed that a contract exists between the Plaintiffs and MidFirst - *i.e.*, the Mortgage Loan. The Plaintiffs have also alleged facts sufficient to demonstrate a plausible claim that MidFirst failed to fulfill its contractual obligations prior to accelerating the Mortgage Loan and foreclosing. However, the Plaintiffs were the first party to materially breach the Mortgage Loan when the Plaintiffs defaulted. Furthermore, the Plaintiffs have not stated facts sufficient to establish that they suffered actual damages, either economic or non-economic, as a result of MidFirst's alleged breach of the Mortgage Loan. Accordingly, the Court finds that Claim Three fails to state a claim upon which relief can be granted. Claim Three will be dismissed.

For the reasons set forth above, the Court finds that (i) the Plaintiffs have not stated a claim against Midland; and (ii) Claims One and Three fail to state a claim against MidFirst. As a consequence, the Court will grant the Motion to Dismiss. An appropriate order will follow.

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IT IS SO ORDERED.

Dated: December 30, 2011
10:21:54 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JULIE ANN DETCHON and
DEVLIN SCOTT DETCHON,

Debtors.

* * * * *

DEVLIN SCOTT DETCHON and
JULIE ANN DETCHON,

Plaintiffs,

v.

WELLS FARGO BANK, et al.,

Defendants.

CASE NUMBER 11-40172

ADVERSARY NUMBER 11-4160

HONORABLE KAY WOODS

ORDER GRANTING MOTION TO DISMISS
OF MIDLAND MORTGAGE CO. AND MIDFIRST BANK

This cause is before the Court on Amended [sic] Defendants
Midland Mortgage Co. and MidFirst Bank's Motion to Dismiss Amended

Adversary Complaint ("Motion to Dismiss") (Doc. # 40) filed by Defendants Midland Mortgage Co. ("Midland") and MidFirst Bank ("MidFirst") on October 4, 2011. Plaintiffs/Debtors Devlin Scott Detchon and Julie Ann Detchon filed Plaintiffs' Memorandum in Opposition to Defendants MidFirst Bank & Midland Mortgage Company [sic] Motion to Dismiss Amended Adversary ("Response") (Doc. # 43) on October 13, 2011.

For the reasons set forth in this Court's Memorandum Opinion Regarding Motion to Dismiss of Midland Mortgage Co. and MidFirst Bank entered on this date, the Court hereby finds:

- (1) The Plaintiffs' sole claim against Midland is contained in the objection to proof of claim portion of the Amended Complaint;
- (2) The objection to proof of claim fails to state a claim against Midland upon which relief can be granted;
- (3) There is no private right of action pursuant to HAMP or the FHA regulations;
- (4) Because Claim One is based upon the alleged failure of Wells Fargo, on behalf of MidFirst, to comply with HAMP and the FHA regulations, Claim One fails to state a claim upon which relief can be granted;
- (5) Because MidFirst owed no duty to the Plaintiffs to disclose all available loss mitigation options, the negative misrepresentation portion of Claim One fails to state a claim upon which relief can be granted;

- (6) The Plaintiffs fail to state facts sufficient to demonstrate that the Plaintiffs ceased making their Mortgage Loan payments in justifiable reliance upon Wells Fargo's representations, on behalf of MidFirst;
- (7) The Plaintiffs fail to state facts sufficient to demonstrate that the Plaintiffs suffered injury as a proximate result of Wells Fargo's representations, on behalf of MidFirst;
- (8) Claim One fails to state a claim upon which relief can be granted pursuant to Ohio law;
- (9) The Plaintiffs materially breached the Mortgage Loan when they defaulted in making their mortgage payments;
- (10) The Plaintiffs fail to state facts sufficient to demonstrate that they suffered damages as a result of MidFirst's alleged breach of the Mortgage Loan; and
- (11) Claim Three fails to state a claim upon which relief can be granted.

Based upon the foregoing findings of fact and conclusions of law, the Motion to Dismiss is hereby granted in its entirety.

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