

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:  
BRIAN D. PANNELL  
TERESA W. PANNELL**

**CHAPTER 13  
CASE NO. 1201592EE**

**BRIAN D. PANNELL AND  
TERESA W. PANNELL**

**VS.**

**ADVERSARY NO. 1200073**

**WELLS FARGO BANK, N.A.**

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Edward Ellington, Judge

**MEMORANDUM OPINION  
ON WELLS FARGO BANK N.A.'S  
MOTION FOR SUMMARY JUDGMENT**

**THIS MATTER** came before the Court on *Wells Fargo Bank N.A.'s Motion for Summary Judgment* (Adv. Dkt. #18); *Wells Fargo Bank N.A.'s Supplemental List of Material Facts in Support of Motion for Summary Judgment* (Adv. Dkt. #22); and the *Response to Motion of Defendant for Summary Judgment* (Adv. Dkt. #25) filed by Brian D. Pannell and Teresa W. Pannell.

Having considered same and the respective briefs filed by the parties, the Court finds that summary judgment should be granted in favor of Wells Fargo Bank, N.A.

## **FACTS**

In this adversary proceeding, there are two separate fact scenarios before the Court: the attempts of the Pannells to (1) lower their mortgage payments; and (2) to recover insurance proceeds for repairs to the their home. For clarity purposes, the Court will discuss each fact scenario separately.

### **I. Assistance with Mortgage Payments**

On December 28, 2005, Mr. Pannell obtained a loan from BankPlus for the purchase of a house. He executed a *Note* in the amount of \$131,000.00. To secure the *Note*, Brian D. Pannell and Teresa W. Pannell (Debtors) executed a *Deed of Trust* (Deed of Trust) on December 28, 2005, in favor of BankPlus. The Deed of Trust was assigned to Wells Fargo Bank, N.A.<sup>1</sup> (Wells Fargo). Wells Fargo was also the servicing agent for the Debtors' mortgage loan.

Apparently Mr. Pannell lost his job in October of 2008, and the Debtors began experiencing financial difficulties. They missed mortgage payments to Wells Fargo, but eventually were able to bring their payments current. In December of 2009, the Debtors once again fell behind on their mortgage payments, and they applied for a modification of their mortgage through the Home Affordable Modification Program (HAMP).

While not entirely pertinent to the resolution of this adversary proceeding, a general

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<sup>1</sup>In the pleadings and exhibits, Wells Fargo is identified by several different names: Wells Fargo Bank, N.A.; Wells Fargo Home Mortgage; and Wells Fargo, N.A. Hereinafter, for purposes of this Opinion, the term *Wells Fargo* will be used to collectively refer to all of the Wells Fargo entities involved in this proceeding.

explanation of HAMP is in order. HAMP is a component of the Making Home Affordable Program, an official program of the Department of the Treasury and the Department of Housing and Urban Development, and was created to assist homeowners who have either defaulted on their mortgages or who may be at risk of defaulting on their mortgages. 12 U.S.C. § 5219. Through HAMP, the federal government offers mortgage lenders and/or servicers<sup>2</sup> financial incentives to lower a borrower's monthly mortgage payments to make them more affordable and sustainable over the remaining life of the mortgage. Once a borrower applies for a modification of their mortgage via HAMP, the lender determines if the loan meets the minimum eligibility criteria to be considered for HAMP. In order to determine if the loan can be modified through HAMP, the lender will require the borrower to provide documentation verifying current income, assets and expenses, as well as any specific hardship circumstances which detail why the borrower is unable to make his/her mortgage payments. While the lender is investigating whether the loan qualifies under HAMP for a permanent modification, the borrower is placed on a HAMP Trial Plan. During this HAMP Trial Plan, the borrower's mortgage payment is reduced temporarily.

After receiving the documentation from the borrower, the lender applies a Net Present Value (NPV) calculation to the loan to determine how much the mortgage is worth today. Investors generally prefer an investment with the higher NPV calculation and will chose the option with the higher NPV—either the mortgage with the modification or the original mortgage. If the NPV of the mortgage as modified is higher than the original mortgage, then lender will offer a permanent loan modification to borrower, assuming he or she meets all other criteria. However, if the borrower is

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<sup>2</sup>Hereinafter, for purposes of this Opinion, the term *lender* will be used to collectively refer to the lender and/or loan servicer involved in HAMP.

not eligible for a HAMP modification because of the results of the NPV calculation, the lender may offer the borrower other options.<sup>3</sup>

Turning to the adversary proceeding, on December 18, 2009, the Debtors signed the *Home Affordable Modification Program Loan Trial Period (Step One of Two-Step Documentation Process)* (HAMP Trial Plan). Under the HAMP Trial Plan, the Debtors and Wells Fargo entered into a Trial Period under HAMP wherein their mortgage payments were reduced to \$782.11 per month beginning in January of 2010.

Wells Fargo contends that the Debtors failed to submit all of the necessary documents during the HAMP Trial Plan needed to fully determine if the Debtors qualified for a HAMP modification. However, the Debtors state that they submitted all of the required documents.

On August 6, 2010, Wells Fargo sent the Debtors a letter<sup>4</sup> informing them that their mortgage could not be modified under HAMP because of the results of the NPV calculation. The letter further states that there may be other options available to the Debtors.

The Debtors continued to be in arrears on their mortgage payments. In a letter dated February 23, 2011, the Debtors were informed by Wells Fargo that their home was being published for a foreclosure sale.<sup>5</sup> However, Wells Fargo did not go through with the foreclosure sale.

Instead, in response to the Debtors' requests, Wells Fargo continued to attempt to find

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<sup>3</sup>For example, more information on the various programs offered under the Home Affordable Modification Program can be found at: [www.makinghomeaffordable.gov/programs/lower-payments/pages/hamp.aspx](http://www.makinghomeaffordable.gov/programs/lower-payments/pages/hamp.aspx). See also *United States v. Morrison*, 713 F.3d 271, 274 (5th Cir. 2013).

<sup>4</sup>*Wells Fargo Bank N.A.'s Motion for Summary Judgment*, Exhibit M, *Letter* (#18-14), Adversary No. 12-00073EE, Adv. Dkt. #18, November 30, 2012.

<sup>5</sup>*Id.* at Exhibit P.

assistance for the Debtors with their mortgage payments.<sup>6</sup> Ultimately, Wells Fargo was unable to provide the Debtors with any relief from their mortgage payments.

Shortly thereafter, on August 4, 2011, the Debtors filed a petition for relief under Chapter 13 of the United States Bankruptcy Code (Case No. 11-02720EE). This case was dismissed on March 1, 2012, for failure of the Debtors to make payments to the Chapter 13 Trustee.

On May 13, 2012, the Debtors filed the above-styled petition for relief, again under Chapter 13 of the United States Bankruptcy Code. In their *Summary of Schedules, Schedule D – Creditors Holding Secured Claims* (Schedule D), the Debtors list Wells Fargo Home Mortgage as having a first mortgage on their home in the amount of \$123,921.00. The Chapter 13 Plan (Dkt. # 2) filed by the Debtors shows an arrearage to Wells Fargo in the amount of \$22,165.00. Wells Fargo filed a *Proof of Claim*<sup>7</sup> on June 18, 2012. In its proof of claim, Wells Fargo states that as of the date the case was filed, the amount of its claim was \$150,783.39, of which, \$32,117.92 was arrearage.

On June 26, 2012, the Debtors filed their *Objection to Proof of Claim* (Dkt. #38) (Objection) of Wells Fargo and commenced the above-styled adversary proceeding by filing their *Complaint*. In their Objection, the Debtors request that Wells Fargo's claim be disallowed until the adversary proceeding has been resolved. On August 10, 2012, an *Agreed Order* (Dkt. #55) was entered on the Objection in which the parties agreed that the Chapter 13 Plan could be confirmed under certain conditions. The regular monthly mortgage payments were to be paid by the Chapter 13 Trustee to Wells Fargo, however, any amounts on the arrearage would be held by the Chapter 13 Trustee pending the resolution of this adversary proceeding.

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<sup>6</sup>*Id.* at Exhibits Q & R.

<sup>7</sup>Claim #3-1.

## II. Insurance Proceeds

Shortly after the Debtors entered into the HAMP Trial Plan in December of 2009, the Debtors' home sustained storm damage in January of 2010. The Debtors' home was insured by Alfa Insurance Company (Alfa). To pay for the repairs to the roof of the Debtors' home, Alfa issued a check dated April 16, 2010, in the amount of \$7,965.63 payable to the Debtors and to Wells Fargo. On April 23, 2010, Mrs. Pannell sent the check to Wells Fargo. In her cover letter, Mrs. Pannell requests that Wells Fargo endorse the check and return it to the Debtors.<sup>8</sup>

Attached as exhibits to Wells Fargo's Motion are four separate letters from Wells Fargo to the Debtors (dated May 26, 2010; August 25, 2010; September 15, 2010; & November 30, 2010) which address the repairs on the Debtors' home. *See* Exhibits U, V (2 letters) & W to *Wells Fargo Bank N.A.'s Motion for Summary Judgment*. The Debtors do not deny that they received these letters—instead they state in their brief that the letters “are nothing more than computer generated forms including unsigned computer generated letters.”<sup>9</sup>

The Debtors allege that Wells Fargo told them that the insurance check would not be released until their mortgage was brought current. Other than their allegations, the Debtors have not submitted an email, a fax, a letter or any other correspondence from Wells Fargo that supports a finding that Wells Fargo told them that Wells Fargo was holding the insurance check for this reason.

Wells Fargo, in contrast, states that it is holding the money in a “restricted escrow account pending receipt of required documents from Plaintiffs, including Conditional Waiver of Lien, W-9,

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<sup>8</sup>*Id.* at Exhibit T.

<sup>9</sup>*Plaintiffs' Memorandum in Support of Response to Defendant's Motion for Summary Judgment*, Adversary No. 12-00073EE, Adv. Dkt. #26, unnumbered pages 5-6, January 7, 2013.

and signed contractor's bid." *Wells Fargo Bank, N.A.'s Answer to Complaint*, Adversary No. 12-00073EE, Adv. Dkt. #7, p. 4, August 3, 2012.

### **III. Adversary Proceeding**

As noted above, the Debtors filed the above-styled adversary proceeding on June 26, 2012. In their *Complaint*, the Debtors delineate the above facts regarding their attempts to obtain a modification of their mortgage payments and the check for the insurance proceeds from Wells Fargo in order to repair the roof of their house. The Debtors then list nineteen (19) separate counts for relief. As to the insurance proceeds, in counts 1 through 9 and in count 16, the Debtors basically allege that Wells Fargo is improperly holding the insurance proceeds and has failed to give the Debtors credit for the \$7,965.63. Each count ends with the following language regarding the conduct of Wells Fargo: it was "improper, intentional, inexcusable, repugnant and egregious entitling plaintiffs to a judgment for actual and punitive damages against defendant."<sup>10</sup>

The remaining counts in the *Complaint*, counts 10 through 15, and counts 17 through 19, pertain to the Debtors' attempts at obtaining assistance with their mortgage payments. The Debtors allege that Wells Fargo's denial of the Debtors' application for HAMP, was a "violation of modified contractual obligations and constitutes a breach of contract under the governing deed of trust as modified and Mississippi law."<sup>11</sup> The Debtors again request actual and punitive damages against Wells Fargo for its conduct which they again allege was "improper, intentional, inexcusable, repugnant and egregious entitling plaintiffs to a judgment for actual and punitive damages against

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<sup>10</sup>*Complaint*, Adversary No. 12-00073EE, Adv. Dkt. #1, unnumbered pages 9, 10, 11, and 12, June 26, 2012.

<sup>11</sup>*Id.* at Count 10, unnumbered page 13.

defendant.”<sup>12</sup>

Wells Fargo filed *Wells Fargo Bank, N.A.’s Answer to Complaint* (Adv. Dkt. #7) on August 3, 2012. Wells Fargo denied that it was in breach of any contract or the Deed of Trust and requests that the adversary proceeding be dismissed with prejudice.

On November 30, 2012, Wells Fargo filed *Wells Fargo Bank N.A.’s Motion for Summary Judgment* (Adv. Dkt. #18) (Motion), and on December 3, 2012, Wells Fargo filed *Wells Fargo Bank N.A.’s Supplemental List of Material Facts in Support of Motion for Summary Judgment* (Adv. Dkt. #22) (Facts). In its Motion and Facts, Wells Fargo states that there are no questions of material fact, and therefore, Wells Fargo is entitled to a judgment as a matter of law dismissing the Debtors’ adversary proceeding.

The Debtors filed their *Response to Motion of Defendant for Summary Judgment* (Adv. Dkt. #25) (Response) on January 7, 2013. The Debtors allege summary judgment should be denied because there are questions of material fact. To support this claim, the Debtors attach to their Response the Debtors’ *Affidavit*, Wells Fargo’s responses to discovery and the two proofs of claim filed by Wells Fargo in the Debtors’ bankruptcy cases: Case Nos. 1102720EE and 1201592EE.

## **CONCLUSIONS OF LAW**

### **I. Jurisdiction**

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(1) and (2)(K).

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<sup>12</sup>*Complaint*, Adversary No. 12-00073EE, Adv. Dkt. #1, unnumbered pages 9, 10, 11, and 12, June 26, 2012.

## II. Summary Judgment Standards

Rule 56 of the Federal Rules of Civil Procedure<sup>13</sup> provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, “the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists, and ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.’ *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).” *Newton v. Bank of America (In re Greene)*, 2011 WL 864971, \*4 (Bankr. E.D. Tenn. March 11, 2011).

“The moving party bears the burden of showing the . . . court that there is an absence of evidence to support the non-moving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).” *Hart v. Hairston*, 343 F. 3d 762, 764 (5th Cir. 2003).

Once a motion for summary judgment is pled and properly supported, the burden shifts to the non-moving party to prove that there are genuine disputes as to material facts by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, . . . admissions, interrogatory answers, or other materials.”<sup>14</sup> Or the non-moving party may “show[ ] that the materials cited do not establish the absence . . . of a genuine dispute.”<sup>15</sup> When proving that there are genuine disputes as to material

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<sup>13</sup>Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

<sup>14</sup>Fed. R. Bankr. P. 7056(c)(1)(A).

<sup>15</sup>Fed. R. Bankr. P. 7056(c)(1)(B).

facts, the non-moving party cannot rely “solely on allegations or denials contained in the pleadings or ‘mere scintilla of evidence in support of the nonmoving party will not be sufficient.’ *Nye v. CSX Transp., Inc.*, 437 F. 3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986).” *Newton*, 2011 WL 864971 at \*4. “[T]he nonmovant must submit or identify evidence in the record to show the existence of a genuine issue of material fact as to each element of the cause of action.” *Malacara v. Garber*, 353 F. 3d 393, 404 (5th Cir. 2003). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 106 S.Ct at 1356 (citations omitted).

When considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan*, 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff’d*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). The court must decide whether “the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d. 202 (1986).

### III. Application to the Case at Bar

#### A. HAMP Trial Plan

As noted, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”<sup>16</sup> The Court finds that there are no facts in dispute with regard to the HAMP Trial Plan which could affect the outcome of the above-styled adversary proceeding. In their *Affidavit*<sup>17</sup> attached as an exhibit to their Response, the Debtors admit that got behind on their mortgage payments to Wells Fargo and that they entered into the HAMP Trial Plan with Wells Fargo.<sup>18</sup> Other than their statements regarding Wells Fargo’s “intentional misrepresentations and tortious actions,”<sup>19</sup> the Debtors do not cite to any specific language in either the Deed of Trust, the Note or the HAMP Trial Plan which they allege that Wells Fargo has breached. Nor do the Debtors cite to a section in the Bankruptcy Code, a section of the Mississippi Code, or any statute for that matter, to support their cause of action. Since the Debtors have not identified the specific cause of action that they are proceeding under, the Court finds that the Debtors have not submitted or identified any evidence “in the record to show the existence of a genuine issue of material fact as to each element of the cause of action.” *Malacara*, 353 F. 3d at 404.

In count 10 of their Complaint, the Debtors allege that in its handling of the Debtors’ HAMP

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<sup>16</sup>*Anderson*, 106 S.Ct. at 2510.

<sup>17</sup>*Response to Motion of Defendant for Summary Judgment*, Exhibit A, *Affidavit*, Adversary No. 12-00073EE, Adv. Dkt. #25, January 7, 2013.

<sup>18</sup>*Id.* at unnumbered pages 2-3.

<sup>19</sup>*Id.* at unnumbered page 2.

Trial Plan, Wells Fargo violated the “modified contractual obligations”<sup>20</sup> of the Debtors. Since the Debtors do not specify exactly what modified contract Wells Fargo has allegedly violated, the Court can only assume that the Debtors are referring to their HAMP Trial Plan. Exhibit I to the Motion is a copy of the HAMP Trial Plan signed by the Debtors. The HAMP Trial Plan signed by the Debtors clearly states that the HAMP Trial Plan is not a permanent modification of the original loan documents:

I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.<sup>21</sup>

Therefore, until the Debtors meet all of the conditions required for a permanent modification of their original Note and Deed of Trust, the original terms of the Note and Deed of Trust signed by the Debtors in 2005 remain in effect. The crux of the Debtors’ cause of action appears to be that Wells Fargo violated the HAMP Trial Plan when Wells Fargo denied their application even though the Debtors were eligible for a HAMP modification. Assuming, without deciding, that a lender has a duty to modify eligible loans, the Court finds that the Debtors have failed to show a genuine issue of material fact regarding the eligibility of their loan for such a HAMP modification.

In order to obtain a HAMP modification, the NPV of the Debtors’ modified mortgage and original mortgage must be calculated. Wells Fargo calculated the Debtors’ NPV and subsequently

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<sup>20</sup>*Complaint*, Adversary No. 12-00073EE, Adv. Dkt. #1, unnumbered page 13, June 26, 2012.

<sup>21</sup>*Wells Fargo Bank N.A.’s Motion for Summary Judgment*, Exhibit I, *Home Affordable Modification Program Loan Trial Period* (#18-9), Adversary No. 12-00073EE, Adv. Dkt. #18, ¶ 2-G, p. 2, November 30, 2012.

informed the Debtors that their mortgage could not be modified permanently based on the results of the Debtors' NPV calculation. Since one of the conditions for a HAMP modification was an acceptable NPV calculation, a calculation that the Debtors' modified mortgage did not "pass",<sup>22</sup> the Debtors did not meet the "conditions required for modification" of the original mortgage loan.

In 2011, the Honorable Sharion Aycock of the United States District Court for the Northern District of Mississippi, issued her *Memorandum Opinion in Poppelreiter v. GMAC Mortgage, LLC*, 2011 WL 6100440 (N.D. Miss. Dec. 7, 2011)<sup>23</sup>—a case analogous to the case at bar. In *Poppelreiter*, the plaintiffs got behind on their mortgage payments to GMAC. The plaintiffs applied for a HAMP modification, and GMAC assisted them in the application process for modifying their mortgage via HAMP and other programs. Ultimately, the plaintiffs did not qualify for a HAMP modification. The plaintiffs then filed suit against GMAC alleging that GMAC made misrepresentations to them regarding the modification of their loan and that GMAC was negligent in servicing their loan.

In granting summary judgment to GMAC, Judge Aycock found that the plaintiffs failed to demonstrate any evidence to show negligent conduct on the part of GMAC or that they suffered any damages as a proximate result of GMAC's conduct. Judge Aycock also found that the plaintiffs failed to produce any evidence showing that they were entitled to a HAMP modification or that GMAC had a duty to provide them with a HAMP modification.

Regarding Plaintiffs' claim that GMAC improperly advised them to make a payment of \$1485.00 in July 2009 instead of the \$3,000 Mrs. Poppelreiter intended to pay (which would not have brought the loan current) and to then make reduced payments as part of a trial modification while they pursued a HAMP modification, the evidence fails to show that such conduct by GMAC was negligent, amounted to a

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<sup>22</sup>*Id.* at Exhibit M.

<sup>23</sup>*See also Montgomery v. CitiMortgage, Inc.*, 2013 WL 3421987 (S.D. Miss. July 8, 2013).

misrepresentation, or damaged the Plaintiffs, as they were already in default and GMAC was at that time entitled to accelerate the entire amount of the loan and foreclose on the property. *Cf. Temple–Inland Mortg. Corp. v. Jones*, 749 So.2d 1161, 1166 (Miss.Ct.App.1999) (“the fact that Temple–Inland tried to work with the Joneses for nearly six months to avoid foreclosure before the Joneses filed this action would seem to indicate that the lender's actions were neither unfair nor uncalled for”).

*Poppelreiter*, 2011 WL 6100440, at \*4.

In the case at bar, the Court finds that the Debtors have likewise not met their summary judgment burden and have failed to show that Wells Fargo’s conduct amounted to a breach of its “modified contractual obligations,” or to a misrepresentation of the HAMP application process or that they were damaged: the Debtors have presented no evidence to show that Wells Fargo was required to give them a permanent HAMP modification nor have they shown that they actually qualified for a permanent HAMP modification. The fact that Wells Fargo worked with the Debtors to get a modification of their loan and that it took over 18 months does not change the terms of the Note and the Deed of Trust. The Debtors have admitted that they were behind on their mortgage payments; therefore, under the terms of the Note and Deed of Trust, Wells Fargo was entitled to accelerate the loan, charge late fees and/or foreclose on the home.

Further, in opposition to the Motion, the Debtors state in their *Affidavit*: “Affiants *state and believe* that they have fully performed all required obligations for their HAMP application; completed and submitted all forms required in connection with the HAMP application; and fully complied with all relevant requirements governing their HAMP application.” *Response to Motion of Defendant for Summary Judgment*, Exhibit A, *Affidavit*, Adversary No. 12-00073EE, Adv. Dkt. #25, unnumbered page 3, January 7, 2013. (emphasis added).

The Court finds that the Debtors’ statement that they *state and believe* is not sufficient to

raise an issue of material fact. “Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial. *Securities & Exch. Comm'n v. Recile*, 10 F.3d 1093, 1097 (5th Cir.1993).” *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002).

Consequently, the Court finds that in considering the record as a whole, it does not find that there is a genuine issue of material fact and that Wells Fargo is entitled to summary judgment as a matter of law as to the HAMP Trial Plan.

### **B. Insurance Proceeds**

With regard to the insurance proceeds, the Court finds that there are likewise no disputed facts which might affect the outcome of the underlying suit and thereby preclude the entry of summary judgment in favor of Wells Fargo. As to insurance proceeds, the Deed of Trust states in pertinent part:

Unless Lender and Borrower otherwise agree in writing, any insurance proceeds . . . shall be applied to restoration or repair of the Property. . . . During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender’s satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. . . . If the restoration or repair is not economically feasible or Lender’s security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to the Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.<sup>24</sup>

Attached as exhibits<sup>25</sup> to its Motion are letters Wells Fargo states that it sent to the Debtors in an attempt to obtain information from the Debtors regarding the repairs to the roof of their house.

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<sup>24</sup>*Id.* at Exhibit A, ¶ 5, unnumbered page 5-6.

<sup>25</sup>*Id.* at Exhibits U, V, and W.

In their *Affidavit*, the Debtors do not state that they did not receive the letters from Wells Fargo.<sup>26</sup>

Rather, the Debtors state in their *Affidavit* that “they have fully performed all obligations required of them under the relevant and governing contracts.”<sup>27</sup> However, other than this conclusory statement, the Debtors have not presented the Court with any evidence to back up this claim: the Court has not been given a copy of a signed contract for the repairs, the insurance adjuster worksheet, or any of the other documents requested by Wells Fargo.

Exhibit W to the Motion states that once the Debtors submitted the *Completion of Repairs* form, Wells Fargo would schedule an inspection of the property and release the insurance funds it was holding. The Debtors state in their *Affidavit* that the repairs to their home have not been completed. The Deed of Trust clearly entitles Wells Fargo to hold the insurance funds until the repair work is completed. Further, the Debtors do not state what contract Wells Fargo has supposedly breached nor do they point the Court to any language in the Deed of Trust or Note which supports their position that Wells Fargo has breached its contractual obligations.

The Court finds that as to the insurance proceeds, the Debtors have not submitted or identified any evidence “in the record to show the existence of a genuine issue of material fact as to each element of the cause of action.” *Malacara*, 353 F. 3d at 404. Consequently, the Court finds that in Wells Fargo’s handling of the insurance proceeds, the Debtors have not demonstrated that a genuine dispute of material fact exists to show that they submitted the required paperwork on the

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<sup>26</sup>The only reference the Debtors make in regard to these letters is that the letters “are nothing more than computer generated forms including unsigned computer generated letters.” *Plaintiffs’ Memorandum in Support of Response to Defendant’s Motion for Summary Judgment*, Adversary No. 12-00073EE, Adv. Dkt. #26, unnumbered pages 5-6, January 7, 2013.

<sup>27</sup>*Response to Motion of Defendant for Summary Judgment*, Exhibit A, *Affidavit* (#25-1), Adversary No. 12-00073EE, Adv. Dkt. #25, unnumbered page 2, January 7, 2013.

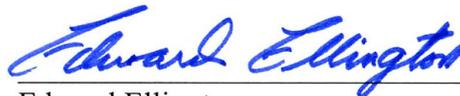
repairs to Wells Fargo and that Wells Fargo breached any of its duties and obligations under the Deed of Trust or any other contract. Therefore, Wells Fargo is entitled to summary judgment as a matter of law.

### CONCLUSION

In order to defeat a motion for summary judgment, the Debtors had to “submit or identify evidence in the record to show the existence of a genuine issue of material fact as to each element of the cause of action.” *Malacara*, 353 F.3d at 404. The Debtors have not shown the existence of any “disputes over facts that might affect the outcome of the suit under the governing law [in order to] properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. Applying these summary judgment standards as established by the United States Supreme Court, the Court finds that the Debtors have not shown a genuine dispute as to any material fact which would allow a “reasonable jury [to] return a verdict for the non-moving party.” *Id.*

Consequently, the Court finds that as a matter of law summary judgment should be granted and the above-styled adversary proceeding should be dismissed.

A separate judgment consistent with this opinion will be entered in accordance with Rule 7054 of the Federal Rules of Bankruptcy Procedure.



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Edward Ellington  
United States Bankruptcy Judge

Dated: August 23, 2013