NO. 15-50515

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RONALD W. LAWRENCE JR.; JENNIFER J. LAWRENCE,

Plaintiffs-Appellants,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION;
MERSCORP, INCORPORATED; WELLS FARGO BANK, N.A.;
WELLS FARGO HOME MORTGAGE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin

BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

A. Parties:

Plaintiffs-Appellants: Ronald W. Lawrence, Jr., and Jennifer J. Lawrence, individuals residing in Texas.

Defendants-Appellees: Federal Home Loan Mortgage Corporation; Merscorp, Incorporated; Wells Fargo Bank, N.A.; Wells Fargo Home Mortgage.

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ORAL ARGUMENT IS NOT REQUESTED

Oral argument is not necessary because the only issue is whether the record contains certain evidence. The district court granted the appellee lenders' motion for summary judgment based solely on a determination that the appellant borrowers offered insufficient evidence as to damages for their common-law fraud claim. Appellants believe their damages evidence is sufficient to allow them to proceed to trial.

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STATEMENT OF JURISDICTION

Mortgage borrowers Ronald and Jennifer Lawrence appeal an order by the Western District of Texas, Austin Division, granting the appellee mortgage lenders' motion for summary judgment under Fed. R. Civ. P. 56. The District Court dismissed all the Lawrence's claims with prejudice and entered final judgment. This court has jurisdiction pursuant to 28 U.S.C. § 1291, there having been a final order of a U.S. District Court that is properly taken to this Court. This is a federal diversity case in which the Lawrences asserted Texas common-law fraud and other causes of action.

STATEMENT OF ISSUES

ISSUE 1. The Lawrences' deposition testimony and affidavits showed that they spent many months incurring lost time and out-of-pocket expenses and also refraining from selling their home while Wells Fargo strung them along with blatant misrepresentations concerning their loan. Was the Lawrence's evidence sufficient to raise an issue of fact concerning damages for the fraudulent conduct?

ISSUE 2. The Lawrences presented evidence that they repeatedly complied with demands for records and refrained from selling their home because of Wells Fargo's fraudulent statements. Does that evidence raise an issue of fact as to detrimental reliance?

ISSUE 3. Given the egregiousness of the misconduct apparent from the record, combined with the underdeveloped record on damages, should the Lawrences be afforded additional, targeted discovery on damages and an amendment to focus and clarify their fraud claim and the remedies flowing therefrom?

INTRODUCTION

There have been many cases like this one, involving mortgage servicers' unconscionable mistakes in servicing troubled loans. But few such cases survive dispositive motions and proceed to trial. Borrowers face difficulty translating lender misconduct into recognized causes of action. It's the rare case that even makes it past the Rule 12(b)(6) stage. *See, e.g., Martin-Janson v. JP Morgan Chase Bank, N.A.*, 536 F. App'x 394, 395 (5th Cir. 2013) (remanding one claim for discovery). As the magistrate below remarked in his report and recommendation:

> Wells Fargo admits . . . mistakes, untruths, and acts of negligence towards the Plaintiffs. And why not? Wells Fargo can afford to be utterly candid because [it] contends the law does not currently recognize a cause of action that would render their treatment of Plaintiffs unlawful.

ROA.960. The recent *McCaig v. Wells Fargo* case in this Court is significant not only because it made it to trial, but was largely upheld on appeal, vindicating the borrowers' claims that they were damaged by Wells Fargo's mishandling of the loan modification process. *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463 (5th Cir. 2015).

Wells Fargo behaved as badly in this case as it did in *McCaig*, though this case is unique in its particulars. Here, Wells Fargo kept misrepresenting to the borrowers what *kind* of loan they had, with one corporate division repeatedly offering loan modifications while another would later retract the offer as improper or illegal given the type of loan involved. ROA.636, 802, 943, 958. All the while, however, Wells Fargo was *internally*, for purposes of foreclosing on the loan without a court order, handling it as the correct type. Wells Fargo whipsawed the Lawrences in this way for many months. In the meantime, the Lawrences' loan arrears and late charges kept increasing, making any reinstatement payment that much larger and placing a modification still further out of reach. ROA.644. The Lawrences, hot-boxed in this way, agreed to a 3-year repayment plan with exorbitant payments. ROA.560. When Wells Fargo, under scrutiny from government officials whom the Lawrences had called in, could no longer maintain the fiction that it was powerless to modify the loan, it feigned contrition but simultaneously foreclosed on the next available sale date.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below.

The Lawrences filed a many-faceted lawsuit in Texas state court in September, 2013, involving numerous defendants and claims. ROA.14, 22, 939, 945. Following removal, motions practice winnowed the case down to fewer defendants and claims. ROA.940. Following discovery, the magistrate took up the defendants' comprehensive motion for summary judgment as to all remaining claims for relief. ROA.493 (MSJ), ROA.732 (response). Both parties submitted evidence. ROA.517 *et seq.* (Wells Fargo); ROA.752 *et seq.* (Lawrence). The sole claim that the magistrate recommended proceed to trial was common-law fraud as against Wells Fargo. ROA.965-972.

The Lawrences had also sought, with their response to the motion for summary judgment, a continuance of discovery and leave to amend, but they were denied both. ROA.951, 979. The Lawrences were still working from their removed state-court petition at the time defendants sought summary judgment.

In recommending that the fraud claim go to the jury, the magistrate emphasized Wells Fargo's frank admissions of mistakes in handling the Lawrence's loan, particularly several false statements that were collateral to any contractual representations and therefore actionable as fraud. ROA.958, 965-969. The magistrate was also satisfied that the damages evidence, if not overwhelming, was sufficient in light of the severity of Wells Fargo's misconduct. ROA.750, 972.[1]

Wells Fargo filed objections with the district court concerning two of the magistrate's conclusions. ROA.984-985. The district court agreed that there was insufficient evidence of actual damages. ROA.1171. The district court did not reach Wells Fargo's objections as to the detrimental reliance element of fraud, though it said it didn't find the lenders' arguments convincing. ROA.1172 (footnote). The district court granted the defendants' motion for summary judgment in its entirety and dismissed the Lawrence's lawsuit with prejudice. ROA.1170, 1174. The Lawrence's timely filed a notice of appeal. ROA.1177.

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[1] Modest actual damages can support an award of exemplary damages so long as the exemplary damages are not excessive. *See* Tex. Civ. Pract. & Rems. Code §

Common-law fraud is the sole claim that the Lawrences press in this appeal, implicating solely Wells Fargo.[2] However, Federal Home Loan Mortgage Corporation (Freddie Mac) is the current owner of the subject property, against whom any equitable relief restoring ownership to the Lawrences could ultimately operate. ROA.579, 642-643 (Wells Fargo admission of agreement to rescind). The cited evidence shows that Wells Fargo *asserts* the full authority to rescind on behalf of Freddie Mac.

B. Facts

1. The Lawrences get whipsawed

Wells Fargo's handling of the Lawrences' loan was shocking and unconscionable, but to understand this fully requires some brief background concerning Texas' unique lending laws. Texas regulates mortgage lending in its Constitution, at art. XVI, § 50. Section 50 allows essentially four kinds of mortgage loans:

1. purchase-money mortgages (Section 50(a)(1));
2. home improvement loans (Section 50(a)(5));
3. home equity loans (Section 50(a)(6)); and

[2] There does not appear to be any dispute that Wells Fargo Home Mortgage is part of Wells Fargo Bank, N.A. ROA.42.

4. refinances of the above (Section 50(a)(4), Section 50(e)), though the refinance of a home equity loan always results in another home equity loan. *See* Section 50(f).

Home equity loans are treated very differently than the other types of loans in that they are regulated in extreme detail in the text of the Constitution itself. *See* Section 50(a)(6)(A)-(Q). What makes lenders nervous about these complex home equity provisions is that mistakes in handling such loans can result in forfeiture. *See* Section 50(a)(6)(Q)(x). Wells Fargo knows this only too well. *See, e.g., Wells Fargo Bank, N.A. v. Leath*, 425 S.W.3d 525, 537 (Tex. App.-Dallas 2014, pet. denied) (lender forfeiture).

The Lawrences got not a home equity loan, but a home improvement loan in 2007 that they refinanced in 2008, when they finished building their house. ROA.29, 755, 769, 772.[3] Thus, they ended up with a "refinanced home improvement loan," which doesn't implicate the complex, fraught home equity provisions at all. Indeed, it doesn't even implicate the same terminology, since a home equity loan doesn't have a "deed of trust" as the other types of loans do, but instead a "security instrument." *See Puig v. Citibank, N.A.*, 514 F. App'x 483, 484 (5th Cir. 2013). Texas home

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[3] Payments were $2,616 per month. ROA.550.

equity loan paperwork is easy to spot and differentiate from every other kind of loan because it employs unique forms and nomenclature and is filled with Section 50(a)(6)-specific clauses and disclaimers. *See In re Cadengo*, 370 B.R. 681, 697 (Bankr. S.D. Tex. 2007); *In re Adams*, 307 B.R. 549, 552 (Bankr. N.D. Tex. 2004) (cases where wrong forms were used). Notably, Section 50(a)(6) completely forbids nonjudicial foreclosure of home equity loans. Section 50(a)(6)(D); *see* Tex. R. Civ. P. 736 (procedure for expedited foreclosure court order as authorized by Section 50(r)).

This case stems from Wells Fargo's repeated, false insistence -- over the Lawrences' ignored protests -- that the Lawrences had a home equity loan that couldn't validly be modified. ROA.98, 630. That error led to cycles of modification offers and subsequent retractions of those offers. ROA.943. Yet, directly at odds with Wells Fargo's assertion that the Lawrences had a home equity loan, Wells Fargo was repeatedly initiating *nonjudicial* foreclosure proceedings, an obvious impossibility with a Texas

home equity loan. ROA.944; Section 50(a)(6)(D).[4] Thus, Wells Fargo plainly knew that the Lawrences did not have a home equity loan but kept telling them they did. *E.g.,* ROA.804 ("your loan type was a Texas Cash Out."). The Lawrences felt sure they did not have a home equity loan, however, and they tried to keep the flame alive by convincing Wells Fargo of that. ROA.812. They entered a ruinously expensive repayment plan when that was the sole option Wells Fargo would offer. ROA.802 ("WFHM discussed the only option for retention was a repayment plan."). They kept struggling to meet documentation and proof requirements for a modification that Wells Fargo would over and over deny, a maddening and expensive process all to no purpose except -- as the magistrate concluded and as the Lawrences will contend at trial -- to railroad them into a repayment plan with exorbitant monthly payments. ROA.969.

[4] Wells Fargo was simultaneously arguing in a case where it *had* modified home equity loans that such modifications were entirely legal and proper. ROA.98; *see Hawkins v. Wells Fargo Bank, N.A.*, No. A-11-CV-877 LY, 2012 WL 2376272 (W.D. Tex. 2012).

***Background.* Wells Fargo's conflicted relationship with Section 50(a)(6)**

Some background is necessary as to why Wells Fargo would refuse to modify a Texas home equity loan specifically. In the Great Recession, when HAMP was launched nationally, Wells Fargo and other lenders came to believe (of their own accord, prior to any lawsuits)[5] that in Texas, Section 50(a)(6) forbids adding past-due payments to existing home equity loan notes -- that is, "capitalizing" past-due sums so that the loan can, after a fallow period caused by a default, continue performing again. *See Hawkins v. Wells Fargo Bank, N.A.*, No. A-11-CV-877 LY, 2012 WL 2376272, at *1 (W.D. Tex. 2012) (first case to address issue), *abrogated by Sims, cited below.* The lenders believed that increasing the principal would constitute a new "extension of credit" requiring the origination of an all-new home equity loan complying with all the bells and whistles of Section 50(a)(6)(A)-(Q). But because capitalizing past-due payments into the

[5] An open-records request on the Texas Attorney General yields any number of letters from Wells Fargo in the 2010-2012 time frame in which Wells Fargo explains in detail why the Texas Constitution forbids capitalizing past-due loan payments into home equity loans. *See Green v. Wells Fargo Bank, N.A.*, No. 14-10254, ROA.94 (5th Cir. 2014) (authenticated open records).

mortgage note is the cornerstone of HAMP and other modification programs intended to keep struggling borrowers in their homes, lenders began rejecting home equity loan modification applications even for loans they had previously modified. They believed their past conduct had violated Section 50(a)(6) and were trying to avoid future violations.

However, in 2014, the Texas Supreme Court, on certified questions from this Court, approved the practice of "restructuring" home equity loan principal to capitalize past-due sums. *See Sims v. Carrington Mortgage Servs., L.L.C.*, 440 S.W.3d 10 (Tex. 2014). The lenders' fears of penalties for illegal extensions of new credit were not borne out, but in the meantime, the lenders had denied many loan modifications of Texas home equity loans that were in fact legal. *See* Section 50(a)(6)(Q)(x) (penalties). In theory, that would explain why Wells Fargo was telling the Lawrences in 2011 that it could not modify their loan. However, since Wells Fargo was simultaneously pursuing nonjudicial foreclosure, which is not possible with a home equity loan, a jury will ultimately have to divine Wells Fargo's intent.

2. Wells Fargo's convenient excuse for squeezing larger payments from the Lawrences

In summary, then, while repeatedly dangling before the Lawrences the prospect of lower monthly mortgage payments via a loan modification, the evidence suggests that Wells Fargo had no intention of implementing such a modification because it wanted to railroad them into a more lucrative repayment plan using Section 50(a)(6) as a convenient excuse. The Lawrences' repeated attempts to correct Wells Fargo's miscategorization of their loan met with obfuscation and double-speak. ROA.578-580 (letter), 800-805 (letter), 806-827 (affidavits). Wells Fargo's bizarrely inconsistent actions become understandable if its ulterior motive was to get the Lawrences to make exorbitant payments under a repayment plan, involving the regular monthly payment amount *plus* the bloated arrears caused by Wells Fargo's stalling and delays, resulting in three years of payments some $2,000 in excess of the regular monthly payment, far from payment *reduction* of the type contemplated by HAMP. ROA.546, 559-560.

The parties entered into a repayment agreement in April, 2011, and the Lawrences managed to make two payments, but one was late and triggered a default of the agreement. ROA.495, 546. Wells Fargo tried to induce the Lawrences into another repayment plan later, too, after more months of whipsawing them in the modification process had elapsed and generated still larger arrears for them to catch up. ROA.943.

After more than a year of this runaround in the modification process and the Lawrence's last-ditch resort to contacting government officials to intervene on their behalf, ROA.574, Wells Fargo finally had to concede the obvious: that the Lawrences *did not* have a home equity loan and *had been* eligible for HAMP consideration all along, ROA.655, 944.

What happened next puts this case squarely in *McCaig* territory. Instead of trying to remedy its acknowledged misconduct, Wells Fargo set the spring on a foreclosure trap. It accepted the Lawrence's HAMP application on November 14, 2011, a clear indication that it did not intend to foreclose and would suspend foreclosure activity, just as it had done on *four*

prior occasions when it was asserting that the loan could not validly be modified. ROA.579, 944. And indeed, the HAMP program requirements mandate that the lender refrain from foreclosing while processing a request for a modification. ROA.959. What Wells Fargo did instead was summarily sell the property on December 6, 2011, the first available foreclosure date after it admitted it had been misrepresenting that the loan was a home equity loan and, according to Wells Fargo, ineligible for any modification. ROA.944. Freddie Mac purchased the property. ROA.495.

It only gets worse. Wells Fargo admits it agreed in January, 2010, to rescind the sale and put the Lawrences back on a modification track. ROA.579, 616. The Lawrences, leery at this point, asked Wells Fargo to put that in writing. ROA.810 (¶ 45), 641. Wells Fargo then replied that it was lying when it committed to rescind the sale. ROA.579 (middle ¶ -- "be advised that [the prior] telephone conversation incorrectly stated the foreclosure had been rescinded."). It now asserted that any rescission was

contingent on the Lawrences going through the modification process again. ROA.579.

On the issue of damages, the Lawrences' summary judgment evidence includes letters from Wells Fargo and affidavits by the Lawrences reciting the Lawrences' constant and repeated preparation, collection, and submission via paid faxes at Office Depot and certified and regular U.S. mail of documents, totaling many man-hours plus out-of-pocket expenses. ROA.802-804, 806-827. Wells Fargo submitted the same or similar evidence showing the Lawrences' ongoing time and expense working on documents and errands aimed at meeting the requirements to get a loan modification. ROA.578, 619, 635, 637, 649.

In addition, Wells Fargo's summary judgment evidence included the following unrebutted deposition testimony of Jennifer Lawrence, in which she explains how the year-long, exasperating process with Wells Fargo left them confused about whether to keep trying to get an affordable payment or else get out while they could:

> If they would have done what they you know, the purpose of us going to them was to do a service, give us

> -- tell us whether or not you're going to have a program that is going to modify our loan. If not, let us sell the house. We'll take that money, we'll put it down on something smaller, more affordable to us, have a Christmas, not worry about our children and us getting kicked out prior to then, and everything would have been fine. But yet they delayed. They delayed until the point of where we couldn't get out. We fell further and further behind.

ROA.644.

SUMMARY OF ARGUMENT

From late 2010 to early 2012, the Lawrences suffered unconscionable mistreatment at the hands of Appellant Wells Fargo, which was responsible for the servicing of their mortgage. That much is not disputed. The problem in cases like this is shoehorning lender misconduct into recognized causes of action. This case ultimately comes down to just one claim, common-law fraud. The issue in this appeal is whether the Lawrences' evidence on two of the elements of common-law fraud suffices to allow them to proceed to trial. The magistrate judge thought it did, but the district court thought it didn't owing to insufficient evidence. The district court focused on the damages evidence for

the two varieties of fraud at issue, simple fraud and fraud in the inducement.

As for the damages evidence for simple fraud, the district court failed to take into account the Lawrences' time and money incurred in attempting to satisfy Wells Fargo's demands for information for a loan modification that Wells Fargo never had any intention of agreeing to. While not a king's ransom, those out-of-pocket damages amount to enough to allow a jury to weigh further punitive damages. The district court also gave insufficient weight to deposition testimony establishing that the Lawrences would have sold their house in late 2010 had they been told, straight up, that Wells Fargo was never going to modify their loan. At a minimum, the arrears reflected in an April 2011 repayment plan with exorbitant payments are some measure of the out-of-pocket damages since those arrears would not have arisen had the Lawrences sold their house at the first opportunity after their default.

As for the damages evidence for fraud in the inducement, the payments the Lawrences made under the repayment plan they

entered into are damages since it was Wells Fargo's delays and railroading of the Lawrences into the repayment agreement that caused arrears to build up in the first place. In addition, since a HAMP modification would have resulted in a reduced monthly payment and interest rate as distinct from the exorbitant payments of the repayment plan, another measure of damages is the readily-established payments that a HAMP waterfall calculation would show. But at a minimum, the excess payments of the repayment agreement are a measure of damages since it's certain that a HAMP modification would have had payments no greater than the original note.

Wells Fargo's argument that the Lawrences haven't shown detrimental reliance confuses a showing of reliance with a showing of damages. But in any event, on the simple fraud claim, the Lawrences relied on Wells Fargo's repeated offers of a modification when they expended time and money to comply with information demands. In addition, entering into the repayment plan in lieu of a modification also represents detrimental reliance because the repayment plan payments were so high as compared

to a loan modification or even the original note. As for detrimental reliance on the fraud-in-the-inducement claim, the Lawrences' assent to the plan was itself detrimental since they were foregoing a modification that would have yielded much more favorable repayment terms. In addition, Jennifer Lawrence's testimony establishes that she and her husband would have sold the home at the earliest opportunity had they known that Wells Fargo would not ultimately modify their loan. Thus, they relied to their detriment on ongoing offers of a modification when agreeing to a repayment plan while modification efforts -- which they could not know were actually futile -- continued.

Fairness suggests that a short period of discovery targeted at developing the damages evidence may be warranted upon remand.

ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo,* applying the same standard as the district court. *Langhoff Properties, LLC v. BP Products N. Am. Inc.,* 519 F.3d 256, 260 (5th Cir. 2008). Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Doubts and reasonable inferences are resolved in favor of the nonmoving party. *Langhoff*, *id.*

B. APPLICABLE LAW

The magistrate's report and recommendation accurately summarizes the standards for Texas common law fraud and fraudulent inducement in ways relevant to this case. ROA.965-967. Wells Fargo objected to two of the magistrate's conclusions, concerning (1) damages and (2) detrimental reliance. The district court disposed of the case solely on the damages issue. Wells

Fargo's two objections to the magistrate's report are addressed in turn.

1. The record supports out-of-pocket damages for both fraud and fraudulent inducement

The Lawrences are seeking restitution-type damages for out-of-pocket losses stemming from fraud and potentially rescission of the April 2011 repayment agreement. *See generally Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 775 (Tex. 2009) (types of damages available); *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 346 (Tex. 2011) (damages plus rescission available). The core issue is what actual damages the Lawrences incurred while Wells Fargo strung them along with misrepresentations concerning whether their loan could be modified.

This case involves both a completed contract and several uncompleted contracts during the months Wells Fargo was telling the Lawrences they had a home equity loan that barred any modification. That is why there are both fraudulent inducement (for the completed contract) and bare fraud (related to the uncompleted contracts) aspects to the Lawrences' claims. The

completed contract was the April 2011 repayment plan with very high payments. The uncompleted contracts are the series of modification offers that were supposed to result in a restructured loan with reduced monthly payments. The Lawrences contend that fraudulent misrepresentations concerning the latter railroaded them into agreeing to the former.

a. Damages for fraud related to the loan modification offers

The district court overlooked some damages evidence and undervalued other damages evidence. The year-long loan modification process was a sham that appears to have been designed to make the Lawrences exhaust themselves and their resources and get them to agree to exorbitant repayment plan payments. Wells Fargo repeatedly generated offers to modify the Lawrences loan in the 2010-2012 period and led the Lawrences to expend time and money in a Kafkaesque documentation process -- faxes, mailers, trips to various places to get documents scanned, copied, mailed, etc., plus the associated lost time. The district court did not take note of these losses, which, if not great in magnitude, are real and could be established at trial.

In addition, Jennifer Lawrence testified that had she and her husband been told, straight up, that Wells Fargo was truly, despite all the modification offers it extended, never going to modify their loan (for whatever reason), the Lawrences would have sold it early on, before arrears mounted and while a sale could still yield cash or otherwise let them escape the foreclosure trap and its associated costs and credit hit. Part of the measure of the damages is the arrears (owing to Wells Fargo's stalling and delays) that the Lawrences paid in the repayment plan, since they did that instead of selling the house. In light of what Wells Fargo put the Lawrences through and the egregious misrepresentations involved, Jennifer Lawrence's testimony is of sufficient weight to let this case get to a jury. The district court was too quick to devalue that evidence in light of all the facts.

b. Damages for fraudulent inducement related to the repayment plan

The district court concluded that under the repayment plan, the Lawrences made payments that they were already obligated to make. Accordingly, those payments would not be damages. What the district court overlooked is that the large arrears arose

as a result of Wells Fargo's misconduct that kept the Lawrences in a futile loan modification process. The Lawrences would not have had such large arrears had Wells Fargo handled the modification process properly, fairly, and honestly beginning in late 2010. A modification could have been completed early in 2011. Instead, in repeatedly offering modifications that Wells Fargo did not intend to complete, Wells Fargo was railroading the Lawrences into arrears and large repayment-plan payments to cure those arrears. A jury could find that some of the amounts required by the repayment plan for some of the months of Wells Fargo's stalling arose because of fraudulent conduct by Wells Fargo.

In addition, the repayment plan required payments according to the original note, whereas a HAMP modification would have restructured the loan according to a formula yielding an affordable payment at a reduced interest rate. *See generally Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012) (summary of HAMP modification methods and payment formulas); U.S. Dep’t of the Treasury, Home Affordable

Modification Program Supplemental Directive 09–01 (Apr. 6, 2009) (program requirements).[6] The favorable difference in loan terms as between the original note and a HAMP-modified note with much lower payments than the original note is in itself sufficient to constitute more than nominal money damages. At a minimum, the Lawrences could present at trial the repayment plan payment they made exceeding the payment amount called for by the note as the minimum amount they were out of pocket, even if discovery has not yielded clear evidence what a HAMP payment would have been under the applicable "waterfall" formulas.

2. The Lawrences detrimentally relied on Wells Fargo's misrepresentations

Wells Fargo makes two arguments challenging whether the Lawrences detrimentally relied on Wells Fargo's misrepresentations. First, it argues that since the Lawrences knew they did not have a home equity loan, they could not have detrimentally relied on Wells Fargo's misrepresentations that

[6] Accessed at: www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf

they did have a home equity loan. Second, Wells Fargo argues that there is no evidence of detrimental reliance.

a. The actionable misrepresentations concern whether the loan -- whatever kind of loan it was -- could be modified

Wells Fargo's misrepresentation concerning the type of loan was certainly egregious and possibly intentional, based on the evidence. The loan documents were plainly not home equity loan documents, as the Lawrences kept telling Wells Fargo to no avail. Yet Wells Fargo was repeatedly foreclosing on the loan nonjudicially, proving without doubt that Wells Fargo subjectively knew that the loan was not a home equity loan.

But the obvious actionable misrepresentation is not what kind of loan the Lawrences had, but Wells Fargo's repeated insistence that Wells Fargo could not -- for whatever reason -- modify the loan. That is why the magistrate specifically identified the three misrepresentations of that kind in his report to the district court. ROA.968. And as the magistrate pointed out, these false statements were calculated to push the Lawrences into a repayment plan for the large arrears created by Wells Fargo's

months of foot-dragging, rather than a HAMP modification that would have been far more favorable. ROA.969. Thus, the false statements concerning the *effect* of the Lawrences' having a home equity loan *induced* the Lawrences into agreeing to a repayment plan that they would not otherwise have agreed to.

b. Wells Fargo's special knowledge makes the false statements about the effect of a home equity loan actionable

Wells Fargo's various statements to the Lawrences were somewhat ambiguous as to *why* a home equity loan could not be modified. To the extent Wells Fargo was offering an opinion about the effect of Texas law or HAMP guidelines or other prerequisites for modification of a loan, Wells Fargo's statements would still be actionable under Texas law:

> There are certain exceptions to the general rule that misrepresentations involving a point of law or the legal effect of a document will not support an action for fraud. These exceptions embody a recognition that in certain circumstances a statement of opinion can rise to the level of fraud. A party having superior knowledge, who takes advantage of another's ignorance of the law to deceive him by studied concealment or misrepresentation, can be held responsible for this conduct.

Fina Supply, Inc. v. Abilene Nat. Bank, 726 S.W.2d 537, 540 (Tex. 1987). It need hardly be stated that Wells Fargo stood in a position of expertise relative to the Lawrences, particularly as regards the complex provisions of Tex. Const. art. XVI, § 50(a)(6), the HAMP program guidelines, and any other loan modification underwriting guidelines that could have been implicated. The record abundantly discloses that the Lawrences were bewildered and confused by Wells Fargo's inconsistent assertions as to why the Lawrences didn't quality for a loan modification. ROA.809-810 (affidavit). Their lender was making emphatic assertions of fact concerning the basis for denial of a modification, and the Lawrences either had no way of disproving these "facts," or, when they did try to disprove them, their protests fell on deaf ears. Wells Fargo had pronounced its verdict and wouldn't be gainsaid.

c. The Lawrences' evidence raises an issue of fact whether they detrimentally relied on Wells Fargo's misrepresentations

Wells Fargo's objections to the magistrate's report confuse evidence as to detrimental reliance with evidence as to damages. ROA.987. The Lawrences have already addressed their evidence

as to damages above, in Section B.1. of this brief. The issue is whether (1) the Lawrences acted on Wells Fargo's misrepresentations, in the case of simple fraud, *see, e.g., Cooper v. Cochran*, 288 S.W.3d 522, 533 (Tex. App.-Dallas 2009, no pet.), or (2) whether they entered into a binding agreement owing to the misrepresentations, in the case of fraud in the inducement, *see Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

For the simple fraud claim that the Lawrences were harmed as a result of Wells Fargo's repeated offers to modify a loan that it had no intent of modifying, the Lawrences have shown that they relied on the modification offers and Wells Fargo's demands for paperwork by undertaking to comply with all of Wells Fargo's demands. In addition, it was detrimental to them to enter into a repayment plan in lieu of a modification given the almost punitive nature of the payments required.

For the fraud in the inducement claim that the Lawrences were railroaded into the repayment plan of April 2011, the evidence shows that it was the false statements concerning the unavailability of a modification that made the Lawrences

"desperate" to save their home and enter the repayment plan. ROA.809. Jennifer Lawrence's testimony likewise establishes that because of Wells Fargo's misrepresentations, the Lawrences refrained from simply getting out from under the property (selling it ASAP) instead of continuing to throw money at it. The repayment plan payments included lender profit (interest) that the Lawrences would not have incurred had they simply sold the property at the first opportunity, in latter 2010. And as already pointed out, the repayment plan payments were premised on payments the Lawrences missed because of Wells Fargo's repeated offers of a modification and advice not to make payments. ROA.808 (¶ 28).

3. Target additional discovery on damages and an amendment as may flow therefrom is warranted

Given the complexity of the facts, the egregiousness of Wells Fargo's misconduct, the lack of full development of the record, and the disparity in the litigants' sophistication and resources, the Court should direct or otherwise leave it open for the district court to permit targeted discovery as to damages or other remedies that the sole remaining claim of fraud supports. In

addition, amendment following such discovery would allow the superseded state-court petition (complaint) to be cut down and focused on fraud and the remedies flowing therefrom, including equitable remedies in addition to damages. *See Italian Cowboys*, 341 S.W.3d at 344 (equitable remedies are available for fraud in addition to money).

PRAYER

For the reasons above, Plaintiffs-Appellants Ronald and Jennifer Lawrence ask this Court to reverse the judgment below and remand the case for further proceedings, including any additional targeted discovery as to damages and remedies, followed by amendment, that the Court deems warranted to level the playing field.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellants has been filed in the office of the Clerk for the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on August 7, 2015.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 5231 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word Mac 2011 in Century Schoolbook 14-point expanded .5 points.

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