

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

**TONY HAWKINS and SHEILA
HAWKINS**

PLAINTIFFS

v.

No. 3:13-cv-210-DPM

BANK OF AMERICA NA

DEFENDANT

ORDER

Motion to dismiss, *No 15*, is granted with leave to amend. The motion to file an amended class-action complaint, *No 18*, is denied without prejudice. The Hawkinses have abandoned their gross-negligence claim from their original complaint. And their claim under the Arkansas Deceptive Trade Practices Act is insufficiently pleaded. As Bank of America points out, the heightened requirement of Federal Rule of Civil Procedure 9(b) applies. “The claim must identify who, what, where, when, and how[,]” *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003), and “the time, place[,] and contents of [the] false representations[.]” *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001). None of these particulars are present.

The proposed class allegations are futile: by their very nature, the ADTPA claim for each homeowner will rise and fall based on the details of the alleged misrepresentations to, and the alleged reliance of, the individual. *In re St. Jude Medical, Inc.*, 522 F.3d 836, 838 (8th Cir. 2008). Common issues would not predominate. And the Court sees no claim under the Home Affordable Modification Program. *Reitz v. Nationstar Mortgage, LLC*, 2013 WL 3282875, at *7 (E.D. Mo. 27 June 2013).

The Court will withhold entry of judgment. The Hawkinses may file another proposed amended complaint that attempts to satisfy Rule 9 on their ADTPA claim, and that omits class allegations, by 7 February 2014. If no such proposed pleading is filed, or if one is filed that does not pass muster, then the Court will enter judgment dismissing the case without prejudice.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

22 January 2014