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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

CARLOS DEARAUJO,  
  
Plaintiff,  
  
v.  
  
PNC BANK, NATIONAL ASSOCIATION;  
PNC MORTGAGE, A DIVISION OF PNC  
BANK, et al.,  
  
Defendants.

Case No. 2:12-cv-00981-MMD-PAL

ORDER  
(Def's' Motion to Dismiss – dkt. no. 8)

**I. SUMMARY**

Before the Court is Defendants PNC Bank and PNC Mortgage’s (collectively “Defendants”) Motion to Dismiss Plaintiff’s Complaint for failure to state a claim. (Dkt. no. 8.) For the reasons discussed below, the Motion is granted.

**II. BACKGROUND**

This case arises out of an alleged failure to modify a home loan. In December 2003, Plaintiff executed a Note secured by a Deed of Trust in favor of National City Mortgage (“Loan Agreement”) for the real property located at 11585 Caldicot Drive, Las Vegas, Nevada 89138 (“the Property”). Thereafter, PNC National Bank Association (“PNC”) acquired National City Mortgage and PNC acquired ownership of Plaintiff’s Note and Deed of Trust.

1 In March 2009, the US Department of Treasury, on behalf of the federal  
2 government, introduced a loan modification program, commonly known as the “Home  
3 Affordable Modification Program” or HAMP. PNC was a HAMP participant and agreed  
4 with the Treasury to modify the mortgages of HAMP qualified consumers.

5 In late 2010, Plaintiff requested a loan modification. On January 30, 2011, PNC  
6 Mortgage (the internal administrative organization that services PNC loans) denied the  
7 request based on the determination that Plaintiff was an ineligible borrower due to  
8 income. Plaintiff, who was still current on his mortgage payments, resubmitted the  
9 modification request. On August 30, 2011, PNC again denied the requested  
10 modification asserting Plaintiff was an ineligible borrower based on a different income  
11 based standard. Plaintiff’s representative found that PNC had incorrectly calculated  
12 Plaintiff’s income under HAMP guidelines, and again requested reconsideration. On  
13 September 22, 2011, PNC again denied the request asserting that the modification  
14 would require excessive forbearance. Plaintiff was then at risk for losing the Property to  
15 a foreclosure sale.

16 Plaintiff asserts claims for breach of contract, breach of covenant of good faith  
17 and fair dealing and negligence. Defendants seek to dismiss the Complaint for failure to  
18 state a claim. Plaintiff opposed the Motion and sought leave to amend in the alternative.

### 19 **III. DISCUSSION**

#### 20 **A. Legal Standard**

##### 21 **1. Rule 12(b)(6)**

22 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which  
23 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide  
24 “a short and plain statement of the claim showing that the pleader is entitled to relief.”  
25 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While  
26 Rule 8 does not require detailed factual allegations, it demands “more than labels and  
27 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Twombly*,  
28 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Factual allegations

1 must be enough to rise above the speculative level.” *Id.* Thus, to survive a motion to  
2 dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that  
3 is plausible on its face.” *Id.* at 570.

4 In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified the two-step  
5 approach district courts are to apply when considering motions to dismiss. First, a  
6 district court must accept as true all well-pled factual allegations in the complaint;  
7 however, legal conclusions are not entitled to the assumption of truth. *Id.* at 679. Mere  
8 recitals of the elements of a cause of action, supported only by conclusory statements,  
9 do not suffice. *Id.* at 678. Second, a district court must consider whether the factual  
10 allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is  
11 facially plausible when the plaintiff’s complaint alleges facts that allow the court to draw a  
12 reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.  
13 Where the complaint does not permit the court to infer more than the mere possibility of  
14 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to  
15 relief.” *Id.* at 679 (internal quotation marks omitted). When the claims in a complaint  
16 have not crossed the line from conceivable to plausible, plaintiff’s complaint must be  
17 dismissed. *Twombly*, 550 U.S. at 570.

18 A complaint must contain either direct or inferential allegations concerning “all the  
19 material elements necessary to sustain recovery under *some* viable legal theory.”  
20 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,  
21 1106 (7th Cir. 1989) (emphasis in original)).

22 “In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look  
23 beyond the complaint to a plaintiff’s moving papers, such as a memorandum in  
24 opposition to a defendant’s motion to dismiss.” *Schneider v. Cal. Dep’t. of Corr.*, 151  
25 F.3d 1194, 1197 n. 1 (9th Cir. 1998).

## 26 2. Leave to Amend

27 After the time for amendment as a matter of course has expired, a party may  
28 amend its complaint only by leave of the court or by the adverse party’s written consent.

1 Fed. R. Civ. P. 15(a)(2). The court has discretion to grant leave and should freely do so  
2 “when justice so requires.” *Id.*; see also *Allen v. City of Beverly Hills*, 911 F.2d 367, 373  
3 (9th Cir. 1990). Nonetheless, courts may deny leave to amend if it will cause: (1) undue  
4 delay; (2) undue prejudice to the opposing party; (3) the request is made in bad faith; (4)  
5 the party has repeatedly failed to cure deficiencies; or (5) the amendment would be  
6 futile. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008). Facts  
7 raised for the first time in plaintiff’s opposition papers should be considered by the court  
8 in determining whether to grant leave to amend or to dismiss the complaint with or  
9 without prejudice. *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133,  
10 1137-38 (9th Cir. 2001).

11 A proposed amendment is futile if no set of facts can be proved under the  
12 amendment that would constitute a valid claim or defense. *Farina v. Compuware Corp.*,  
13 256 F.Supp.2d 1033, 1061 (9th Cir. 2003) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845  
14 F.2d 209, 214 (9th Cir. 1988)). The standard of review is akin to that undertaken by a  
15 court in determining the sufficiency of a pleading challenged in a Rule 12(b)(6) motion to  
16 dismiss. *Id.* (quoting *Miller*, 845 F.2d at 214). Under this standard, a district court must  
17 accept as true all well-pled factual allegations in the complaint; however, legal  
18 conclusions are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. When  
19 the claims in a complaint have not crossed the line from conceivable to plausible,  
20 plaintiff’s complaint must be dismissed. *Twombly*, 550 U.S. at 555.

21 Futility alone can justify the denial of a motion for leave to amend. *Nunes v.*  
22 *Ashcroft*, 375 F.3d 805 (9th Cir. 2004). Leave to amend may be denied if a court  
23 determines that “allegation of other facts consistent with the challenged pleading could  
24 not possibly cure the deficiency.” *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733,  
25 742 (9th Cir. 2008) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d  
26 1393, 1401 (9th Cir.1986). “Where no colorable grounds exist to support a claim or  
27 defense, a motion to amend would be futile.” *Hines v. City of Albany*, 542 F. Supp. 2d  
28 218, 224 (N.D.N.Y. 2008). In general, no colorable grounds exist if the amendment is

1 not sufficient to withstand a motion to dismiss or a motion for summary judgment.  
2 *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir.1987); *see also*  
3 *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986) (stating that  
4 an amendment is futile if it “could be defeated on motion for summary judgment”).

5 **B. Analysis**

6 **1. Breach of Contract**

7 A breach of contract claim requires a plaintiff to show: (1) the existence of a valid  
8 contract; (2) a breach by the defendant; and (3) damage because of the breach. *Saini v.*  
9 *Int’l Game Tech.*, 434 F. Supp 2d 913, 919–20 (D. Nev. 2006) (*citing Richardson v.*  
10 *Jones*, 1 Nev. 405, 405 (Nev. 1865). To create an enforceable contract there must be  
11 an “offer, acceptance, meeting of the minds, and consideration.” *May v. Anderson*, 119  
12 P.3d 1254, 1257 (Nev. 2005).

13 Here, dismissal is proper for two reasons. First, Plaintiff’s Complaint amounts to  
14 nothing more than a bare recital of the elements of the claim without any supporting  
15 factual allegations. Second, while Plaintiff’s opposition brief argues that the breached  
16 contract was “the promise that Defendants would consider Plaintiff’s modification in  
17 accord with HAMP guidelines,” Plaintiff’s breach of contract claim in the Complaint refers  
18 exclusively to the “Loan” collectively defined as the “Note and Deed of Trust” and not any  
19 subsequent agreement to modify. The Court cannot look beyond the allegations made  
20 in the Complaint and the Complaint refers exclusively to a different agreement than what  
21 Plaintiff argues in his opposition brief. Plaintiff’s Complaint essentially concedes default  
22 under the Loan Agreement, and thus Plaintiff, not Defendants, breached the Loan  
23 Agreement. Plaintiff’s breach of contract claim is dismissed.

24 **2. Breach of Covenant of the Implied Covenant of Good Faith and**  
25 **Fair Dealing**

26 Plaintiff bases his claim for breach of the implied covenant of good faith and fair  
27 dealing on an alleged breach of duty by Defendants when they failed to modify the loan  
28 and his alleged third-party beneficiary status under the HAMP agreement.

1 To establish a claim for contractual breach of the implied covenant of good faith  
2 and fair dealing, a plaintiff must allege the existence of a valid contract and a breach of  
3 the implied duty of good faith and fair dealing by performing in a manner that was  
4 unfaithful to the purpose of the contract. *Perry v. Jordan*, 900 P.2d 335, 338; *see Hilton*  
5 *Hotels v. Butch Lewis Productions*, 808 P.2d 919, 923 (Nev. 1991). A plaintiff must  
6 establish that the defendant intentionally breaches the intention and spirit of the  
7 agreement. *Morris v. Bank of America*, 886 P.2d 454, 457 (Nev. 1994) (*citing Hilton*  
8 *Hotels v. Butch Lewis Productions*, 808 P.2d 919, 922-23 (Nev. 1991)).

9 Plaintiff's claim fails because (1) there was no enforceable contract between the  
10 parties requiring Defendant to modify the loan, (2) there was no duty to modify under the  
11 operative Loan Agreement, and (3) Plaintiff has failed to plead any plausible facts that  
12 Defendants breached the intention and spirit of the Loan Agreement. Plaintiff has not  
13 pled facts showing that Defendants were under any obligation to grant a loan  
14 modification.

15 As for the HAMP contract, Plaintiff is not a third-party beneficiary with standing to  
16 allege breach of the HAMP contract. Nevada courts have consistently rejected the  
17 argument that borrowers are third-party beneficiaries to the HAMP agreement between  
18 the US Treasury and banks. *Tucker v. JPMorgan Chase Bank, N.A.*, no. 2-10-cv-00959-  
19 JCM-LRL, 2011 WL 280962 \*4 (D. Nev. Jan. 25, 2011).

20 Plaintiff cannot plausibly state a claim for a contractual breach of the implied  
21 covenant of good faith and fair dealing. Accordingly, this claim is dismissed.

### 22 3. Negligence

23 To bring a negligence claim in Nevada, a plaintiff must show that: (1) defendant  
24 owed a duty of care to plaintiff; (2) defendant breached that duty; (3) defendant's breach  
25 was the actual and proximate cause of the plaintiff's injuries; and (4) plaintiff was injured.  
26 *Scialabba v. Brandise Constr.*, 921 P.2d 928, 930 (Nev. 1996). Liability based on  
27 negligence does not exist without a breach of a duty. *Bradshaw v. Blystone Equip. Co.*  
28 *of Nev.*, 386 P.2d 396, 397 (Nev. 1963).

1 Here, dismissal is proper for two reasons. First, Plaintiff's Complaint amounts to  
2 nothing more than a bare recital of the elements of the claim without any supporting  
3 factual allegations. Second, Plaintiff claims Defendants owed him a duty to "perform  
4 their professional services in a manner consistent with similarly situated professionals."  
5 However, Plaintiff's Complaint does not allege that Defendants' duty extend beyond their  
6 existing lender-borrower relationship. Plaintiff has not convinced the Court that Nevada  
7 law imposes a duty on lenders to modify a loan or undertake to do anything in response  
8 to a request for a loan modification. Plaintiff thus cannot bring an actionable negligence  
9 claim under Nevada law.

#### 10 **4. Leave to Amend**

11 Plaintiff requests leave to amend the deficient Complaint without identifying which  
12 claims he seeks to amend claims or which additional facts would support the unidentified  
13 claims. The Court denies Plaintiff's request both on procedural and substantive grounds.

14 When seeking leave to amend a pleading, Local Rule 15-1 requires the moving  
15 party to "attach the proposed amended pleading to any motion to amend so that it will be  
16 complete in itself without reference to the superseding pleading." Plaintiff has failed to  
17 attach a proposed amendment, and thus a grant of leave to amend is improper.

18 Moreover, amendment is futile here. As Plaintiff has failed to attach a proposed  
19 amendment, the Court assumes any amendment would be consistent with arguments  
20 made in Plaintiff's opposition and the Court considers factual assertions contained in the  
21 Opposition to determine whether to dismiss the Complaint with or without prejudice  
22 Plaintiff raised the alleged "loan modification consideration" contract for the first time in  
23 his opposition. Plaintiff argues that the parties entered into an enforceable contract  
24 when Defendants offered to consider a loan modification if Plaintiff provided certain  
25 financial documents and other information. Plaintiff allegedly accepted Defendants' offer  
26 and provided consideration by submitting all the financial information requested, which  
27 Plaintiff was not otherwise required to do. Accepting all factual allegations as true,  
28 Plaintiff has failed to show a valid offer and acceptance. If Plaintiff's request for a

1 modification amounts to an offer, Defendants' denial on January 30, 2011, constitutes  
2 rejection rather than acceptance. Similarly, Defendants rejected, rather than accepted,  
3 Plaintiff's second and third requests for modification. The facts show that the parties  
4 never came to an agreement or had a meeting of the minds as to the terms of the loan  
5 modification. Thus, the Court finds Plaintiff cannot establish the existence of a valid  
6 contract to modify Plaintiff's loan. Here, amendment would be futile because Plaintiff  
7 cannot allege any additional facts consistent with the Complaint to cure the deficiencies  
8 discussed above. Accordingly, the Court dismisses all three claims with prejudice.


9 **III. CONCLUSION**

10 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is GRANTED  
11 with prejudice.

12 IT IS FURTHER ORDERED THAT any Lis Pendens recorded by the Plaintiff in  
13 connection with this lawsuit be expunged, extinguished, and/or released.

14 The Clerk of the Court is ordered to close this case.

15 DATED THIS 15<sup>th</sup> day of November 2012.

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20 MIRANDA M. DU  
21 UNITED STATES DISTRICT JUDGE  
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