IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DNM CONTRACTING, INC., on behalf of itself and all others similarly situated Plaintiff, vs. WELLS FARGO BANK, N.A., Defendant.	§ § § § § § § § § § § §	**Civil Action No.: 4:20-cv-01790**

PLAINTIFF'S RESPONSE IN OPPOSITION OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS PLAINTIFF'S COMPLAINT

Plaintiff DNM CONTRACTING (hereinafter "DNM" or "Plaintiff"), files this response to Defendant WELLS FARGO BANK, N.A., ("Wells Fargo" or "Defendant") Rule 12(b)(1) and Rule 12 (b)(6) Motion to Dismiss and Rule 9(b) and Motion to Compel Arbitration, filed on August 28, 2020[1] , and will respectfully show onto the Court as follows:

I. STATEMENT OF THE CASE

1. On April 24, 2020, Plaintiff brought this class action lawsuit, on behalf of themselves, and all others similarly situated, against Defendant Wells Fargo for deceiving and defrauding small business owners in connection with the Paycheck Protection Program ("PPP") administered by the Small Business Administration ("SBA").

[1] This response is timely since it was filed within 21 days of receiving the Motion.

2. Subsequently, after this lawsuit was filed, Wells Fargo began to quickly process applications, in an attempt to make up for the damages Plaintiff lost. At a minimum, it is obvious from the facts and law presented herein that Wells Fargo was not going to follow the PPP regulations and pay on a "first come first serve basis" until after the Plaintiff brought this action and called into light Wells Fargo's wrongful actions.

3. The actions of Wells Fargo by failing to provide funding on a "first come first serve" basis damaged Plaintiff for a period of time until Plaintiff was able mitigate their damages, which provide Plaintiff with factual inferences into the legal base of the claims asserted in Petition. Plaintiffs have accrued damages based on the actions of Wells Fargo, regardless of funding after the fact, which create an actual case or controversy for this Court to exercise jurisdiction over.

4. Plaintiffs assert causes of action against Wells Fargo for (i) fraud and fraud in the inducement, (ii) breach of fiduciary duty, (iii) breach of contract, (iv) negligence and (v) violations of the DTPA.

5. Wells Fargo extensively argues that they are entitled to a dismissal because (i) Plaintiff signed an agreement to be bound to Arbitration; (ii) Plaintiffs' failed to state any claims, which relief could be granted under Rule 12(b)(6); and (iii) Plaintiffs' failed to plead their fraud claims with particularity under Rule 9(b).

6. None of Plaintiff's claims in this action are within the scope of the arbitration provision contained in the Business Account Application's Arbitration Agreement. Plaintiff's claims are wholly independent of the Arbitration Agreement, and do not fall within the scope of the arbitration clause because (i) it does not relate to Plaintiff's use of its Bank deposit account, product, or service, but instead the claims relate to Wells Fargo's misfeasance and their duty to conform to

regulations provided by the Paycheck Protection Program ("PPP") as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 ("CARES Act").

7. Federal Rule of Civil Procedure 8(a)(2) provides that a Complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief. Such a statement must simply give the defendant fair notice of what the Plaintiff's claims are and the grounds upon which it rests. Moreover, the verified Petition contains detailed allegations of the fraud committed by Wells Fargo, appropriately balancing the brevity and specificity required by Rules 8(a) and 9(b).[2] Plaintiff's verified Petition placed Wells Fargo on notice of the causes of action asserted, which remain to be fully revealed during discovery.

8. It is respectfully submitted that Defendant's Motion to Compel Arbitration and Motion to Dismiss should be denied as Plaintiff's verified Petition has sufficiently plead its causes of action and provided clear and sufficient notice to the Defendant of Plaintiff's claims for relief. In the alternative, Plaintiff requests an opportunity to amend its Petition, if needed.

II. STANDARD OF REVIEW

A. Motion to Compel Arbitration Standard

9. A party seeking to compel arbitration bears the burden of establishing (1) the existence of a valid, enforceable arbitration agreement between the parties, and (2) that the claims at issue fall within the scope of that agreement. *G.T. Leach Builders LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 525 (Tex. 2015). Wells Fargo cannot carry this burden because Plaintiff's claims are entirely

[2] Defendant has stated with particularity the circumstances constituting fraud or mistake. "Rule 9(b) supplements but does not supplant Rule 8(a)'s notice pleading," and "does not 'reflect a subscription to fact pleading[.]'" *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009) (citation omitted); see also *U.S. ex rel. Rigsby v. State Farm Fire & Cos. Co.*, 794 F.3d 457, 467 (5th Cir. 2015) ("'Rule 9(b) is not meant to supplant discovery.'" (citation omitted)), aff'd sub nom. *State Farm Fire & Cas. Co. v. US ex rel. Rigsby*, 137 S. Ct. 436 (2016).

independent of, and unrelated to, the Arbitration Agreement, and therefore, do not fall within the scope of its arbitration clause. Accordingly, Wells Fargo's motion to compel should be denied.

B. Rule 12(b)(1) and 12(b)(6) Standard

10. A Plaintiff's complaint must state sufficient facts, which, accepted as true, state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added). A claim is plausible on its face "when the plaintiff pleads factual content that allows for the court to draw the reasonable inference that the defendant is liable for the alleged misconduct alleged." *Id*. at 678. The complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face."' *Id*. *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The Plaintiff must plead factual content that allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged. The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the sufficiency of a complaint, not to decide the merits of the case.

11. "A motion to dismiss under Rule 12(b)(6) of the FRCP "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A & M University System*, 117 F.3d 242, 247 (5th Cir. 1997); *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982). The Fifth Circuit defines this strict standard as, "whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Lowrey*, 117 F.3d at 247.

C. Rule 8(a) and Rule 9(b) Standard

12. Rule 8(a) requires that a complaint contain only a short and plain statement of the claim showing the pleader is entitled to relief. However, Rule 9(b), governing the pleading requirements for "averments of fraud or mistake," provides that "the circumstances constituting fraud or mistake

shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." The relationship between Rules 8(a) and 9(b) is "complimentary ... [the rules] must be read in that fashion, avoiding an exclusive focusing on the requirements of one or the other." *Mitchell Energy Corp. v. Martin*, 616 F. Supp.924, 927 (S.D. Tex. 1985).

13. In applying Rule 9(b), the Fifth Circuit has noted its particularity standard must be interpreted with Rule 8's requirement that the pleading contain a short and plain statement of the claims. *See Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1068 n.4 (5th Cir. 1986). "Although Rule 9(b) calls for fraud to be pleaded with particularity, the allegations must still be as short, plain, simple, direct, and concise as is reasonable under the circumstances. Rule 9(b) should not be read so as to obliterate this basic pleading philosophy." *Id*. (quoting 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1291 (1st ed. 1969)); *Kitchell v. Aspen Exploration, Inc*., 562 F. Supp.2d 843, 847-48 (E.D. Tex. 2007).

14. The enforcement of Rule 9(b) should not become a tool to require Plaintiff repeatedly to redraft pleadings despite Wells Fargo's pre-existing knowledge of the matters which Plaintiff verified Petition addresses. Therefore, if under the circumstances of the case it is apparent that even though Plaintiff's pleadings may be vague, the Defendant Wells Fargo does in fact have notice of the matters of which Plaintiff complains, and a strict application of Rule 9(b) can serve no purpose. The 9(b) attack should be reviewed with those general observations in mind.

III. ARGUMENT

A. Plaintiff's Breach of Contract, Fraud and Misrepresentation claims do not Fall Within the Scope of the Arbitration Agreement.

15. Wells Fargo's motion to compel arbitration is based on the Business Account Application, signed by Plaintiffs in 2015, which included a clause stating:

> The Customer's use of any Bank deposit account, product or service will confirm the Customer's receipt of, and agreement to be bound by, the Bank's applicable fee and information schedule and account agreement that includes the Arbitration Agreement under which any dispute between the Customer and the Bank relating to the Customer's use of any Bank deposit account, product or service will be decided in an arbitration proceeding before a neutral arbitrator as described in the Arbitration Agreement and not by a jury or court trial.

16. By its terms, the clause in the Application applies only to disputes "Customer's use of any Bank deposit account, product or service." In seeking to compel arbitration of claims that are entirely unrelated to the Business Application, Wells Fargo relies on the general presumption in favor of arbitration. While such a presumption exists, it "cannot serve to stretch a contractual clause beyond the scope intended by the parties or allow modification of the plain and unambiguous provisions of an agreement." *Belmont Constructors, Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 356 (Tex. App.— Houston [1st Dist.] 1995, no writ); *see also Smith v. Transport Workers Union of America*, 374 F.3d 372, 375 (5th Cir. 2004).

17. Nevertheless, Wells Fargo asks this Court to stretch the Business Application's vague arbitration clause beyond the scope intended by the parties to cover any and all disputes between Plaintiff and Wells Fargo, as well as a dispute unrelated to a customer's use of their Bank deposit account, product, or service with Wells Fargo, which Plaintiff asserts in its capacity as an assignee. But an arbitration clause must be enforced as written. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration."

18. As written, the Business Application's arbitration clause does not require arbitration of *all* disputes of any kind between the parties, but only those "relating to, Customer's use of any

Bank deposit account, product or service. In the context of arbitration clauses like the one at issue here, governing claims "arising out of or relating to" a contract, Texas courts have made clear that if the facts alleged in support of a claim stand alone, the claim is completely independent of the contract, and the claim could be maintained without reference to the contract, the claim is not subject to arbitration. *Cotton Commercial USA, Inc. v. Clear Creek Indep. Sch. Dist.*, 387 S.W.3d 99, 108 (Tex. App.— Houston [14th Dist.] 2012, no pet.); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 195 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

19. Here, the claims are completely independent of the Business Application, and Plaintiff's use of the Bank deposit account. Where a tort claim could be pursued even in the absence of a breach of contract, the claim is not arbitrable. *See Fridl v. Cook*, 908 S.W.2d 507, 513 (Tex. App.—El Paso 1995, writ dism'd.) (holding that fraud claim did not arise out of or relate to contract between the parties where "the fraud claim may be pursued even if no breach of the [parties'] contract occurred"). And the fact that a tort claim may implicate a contract as a factual matter is immaterial if reference to the contract is not required, as a legal matter, to establish any of the elements of the claim. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250 n.7, 251-52 (5th Cir. 1998).

20. Plaintiff's claims for fraud and fraud in the inducement, breach of fiduciary duty, breach of contract, and negligence during the processing of PPP funds is in no way related to any contractual "business" relationship between Plaintiff and Wells Fargo. Further, even in the absence of an underlying contract, Plaintiff would have relied on CARES Act's representations, through the banks, by processing funds on a "first come first serve" basis, which would have allowed him the proper funds to continue their business. However, Wells Fargo's misfeasance by not processing

funds according to regulations resulted in damages when Plaintiff later discovered that Wells Fargo's representations were false.

21. In light of the foregoing, Plaintiff's claims are completely independent of the Business Application, and the arbitration clause, which could be maintained without reference to the contract, and do not arise from the contractual relationship between Plaintiff and Wells Fargo. As a result, these claims are outside the scope of the Business Application's arbitration clause. *See Leroy*, 105 S.W.3d at 195; *see also Ford*, 141 F.3d at 251-52. Accordingly, Wells Fargo's motion to compel arbitration of these claims must be denied

B. The Court has Subject Matter Jurisdiction over Plaintiff's claims given that Plaintiff filed verified Petition, which Defendant removed to federal court. The claims are not moot because Wells Fargo is still liable for the damages caused in the mishandling of the PPP loan application.

22. The Court has jurisdiction over the parties and subject matter in this suit. The amount in controversy is within the jurisdictional limits of the Court.

23. Plaintiff alleges that there are other small businesses that suffered injuries based on Wells Fargo's handling of the PPP applications. Defendant argues that Plaintiff cannot show harm because they may have received funding. There are still small businesses out there that were affected by the actions recited in the verified Petition.

24. However, Defendant is quick to cover their tracks and attempts to fund any new party to this lawsuit, to ultimately moot this lawsuit. Plaintiff's claims are ripe since their application was denied funding. Even if Plaintiff is eventually funded there is still a basis of liability against Wells Fargo. Therefore, Court has subject matter jurisdiction and should deny Defendant's Motion to dismiss for lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(b)(1). At this motion to

dismiss stage, the facts are relatively clear and in favor of the Plaintiff, or at a minimum require a discovery phase to unfold.

C. Plaintiff has pled enough facts to state a claim for relief, therefore, the District Court should DENY Defendant's Motion to Dismiss based on Rule 12(b)(6).

i. Count One Properly Alleges a Claim for Fraud and Fraudulent Inducement under Rule 9(b).

25. Federal Rule of Civil Procedure 9(b) reads as follows: In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

26. The Fifth Circuit has interpreted Rule 9(b) as requiring a Plaintiff to plead the "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what that person obtained thereby." *Williams v. WMX Technologies, Inc*., 112 F.3d 175, 177-78 (5th Cir. 1997) (*quoting Tuchman v. DSC Communications Corp*., 14 F.3d 1061, 1068 (5th Cir. 1994)). No less, but certainly no more.

27. In Texas, a false promise of future performance - including contractual promises - is actionable as a form of common law fraud. *See Tony Gullo Motors I v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006); *Haase v. Glazner*, 62 S.W.3d 795, 899 (Tex. 2001). To plead such a claim, a plaintiff must allege that the defendant made the promise (or entered into the contract) "with no intention of performing." *Tony Gullo Motors I*, 212 S.W.3d at 304.

28. Plaintiffs have alleged precisely such a claim in the case at bar, and with sufficient particularity to satisfy Rule 9(b). In their Complaint, Plaintiffs make the following allegations:

> Defendant led Plaintiffs and Class Members to believe they had the capability to help them, when they could not. Defendant knowingly made false representations to Plaintiffs and Class Members as to material facts. Defendant knew at the onset that they could not handle or process the PPP loans on Plaintiffs' and Class Members' behalf.

> Defendant failed to represent the interests of Plaintiffs and Class Members. Defendant led Plaintiffs and Class Members to believe it had the capability to help them, when it could not. Plaintiffs and Class Members could have explored their options elsewhere, but for representations from Defendant. Plaintiffs and Class Members did not—only to find out later that they would not receive funding and their loans were never actually processed.
>
> Defendant also engaged in fraud by selectively excluding Plaintiffs and Class Members from the application process. Defendant chose select customers among "bigger businesses" and processed those applications over those of Plaintiffs and Class Members. Wells Fargo and its agents had no intention or ability it seems to help smaller businesses—despite representing they would and could. This clearly proved to be a false assertion—a false assertion Defendant knew from the onset.

29. The Statutory Fraud allegations set out in Plaintiffs' verified Petition incorporates the factual statements described above, and is therefore sufficiently particular for the same reasons. This claim also adds the necessary allegations that Wells Fargo's false statements were made with the intent that Plaintiff's applications would get processed on a first come first serve basis, and that Plaintiff's applications did in fact get processed and approved only after Wells Fargo received a second round of funding. Those allegations, while succinct, nevertheless include the particularity required by Rule 9(b).

30. The "Who" or "Which" particularity, as required by Rule 9(b) is clearly identified in the verified Petition. Plaintiffs were victimized by Wells Fargo's fraudulent misrepresentations and non-disclosures. The "How," "Why," or "What" of Wells Fargo's fraudulent misrepresentations to Plaintiff are clearly pled in the verified Petition.

31. Simply put, each of Plaintiff's fraud claims satisfy the Fifth Circuit's pleading requirements because they include the who, what, when, and why of the fraud. *See Williams*, 112 F.3d at 177. Accordingly, Defendants' Motion under Rule 9(b) should be denied.

ii. Count Two Properly Alleges a Claim for Breach of Fiduciary Duty under Rule 8.

32. In Texas, the common law duty of good faith and fair dealing arises only by express contractual language or when there is a special relationship of trust and confidence between the parties. *Bass v. Hendrix*, 931 F. Supp. 523, 534 (S.D. Tex. 1996) (citing, among other cases, *Jhaver v. Zapata Off-Shore Co*., 903 F.2d 381, 385 (5th Cir.1990)); *see also Timely Int., Inc. v. S.S.I. Plastics*, No. EP-09-CV-285-PRM, 2011 WL 3666877, at *2 (W.D. Tex. March 10, 2011).

33. A special relationship is an extra-contractual relationship, generally recognized in two circumstances. *K3C Inc. v. Bank of Am. N.A*., 2004 F. App'x 455, 461 (5th Cir.2006) (citation omitted); *Natividad v. Alexis, Inc*., 875 S.W.2d 695, 697 (Tex.1994). One type of special relationship exists where there is an unequal bargaining position between the parties where one party can easily take advantage of the other party. *Bass*, 931 F.Supp. at 534 (citations omitted). A special relationship also may arise if a recognized fiduciary relationship or a "formal relationship" requires trust and confidence. Bass, 931 F.Supp. at 534 (citation omitted). This second category of special relationship is sometimes referred to as a "confidential relationship." *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp*., 823 S.W.2d 591, 594 (Tex. 1992).

34. Wells Fargo focuses on the second type of special relationship ("confidential relationship"), but ignore the first--a relationship where there is an unequal bargaining position between the parties where one party can easily take advantage of the other party. This is precisely what happened in this case as stated in the verified Petition.

> Defendant had a fiduciary relationship with Plaintiff and Class Members as its banking customers—owing Plaintiff and Class Members advice and proper representations. Defendant failed to do so.
>
> Defendant breached its fiduciary duty by making false representations of fact and by intentionally failing to process Plaintiff's and Class Members' applications. Defendant chose

> favorites and "bigger businesses" to receive funding and *actually* process their applications—to the detriment of Plaintiffs and Class Members.
>
> Defendant failed to adequately and properly submit Plaintiff's and Class Members' applications, without notifying Plaintiff and Class Members of its intention not to do so and/or failed to inform Plaintiffs and Class Members of their inability to process their applications.

35. Plaintiff, therefore, properly pleads her breach of the duty of good faith and fair dealing claim based on the Parties' unequal bargaining position.

iii. Count Three Properly Alleges a Claim for Breach of Contract under Rule 8.

36. A careful review of the verified Petition it confirms that Plaintiff alleges it entered into a valid contract with Defendant Wells Fargo, under which Plaintiff entrusted Wells Fargo to properly manage their PPP application. As part of the contract, Defendant also expressly and/or impliedly promised that applicants will be approved on a first come first serve basis.

37. Plaintiff further alleges that while they lived up to all of her obligations under the contract, Wells Fargo failed to do so and, in fact, breached the contract by, when it failed to process and submit Plaintiff's and Class Members applications after agreeing to do so.

38. Plaintiff pled all of the elements of a valid contract and that Wells Fargo breached it. Plaintiffs lived up to all of their obligations under the contract by believing Wells Fargo misrepresentations. The contract in no way relates to a business application between Wells Fargo and Plaintiff, but instead a new contract was breached when Wells Fargo accepted the duty to provide funding under the CARES Act.

iv. Count Four Properly Alleges a Claim for Negligence under Rule 8.

39. Plaintiffs' pleadings have provided Wells Fargo with sufficient facts – i.e. fair notice – of the negligence claim against it. The facts alleged are: Wells Fargo mishandled the loan

process—that the federal government is paying them to do with taxpayer dollars—and just couldn't do it for Plaintiff and Class Members.

40. Wells Fargo owed a duty of care to Plaintiff and Class Members but breached that duty and made negligent misrepresentations. Defendant's breaches of their duties owed to Plaintiff and Class Members proximately caused their damages, which are within the jurisdictional limits of the Court.

41. These are enough facts to raise a reasonable expectation that discovery will reveal evidence of Wells Fargo's liability, and to survive the harsh consequences of an outright dismissal.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant's Motion to Compel Arbitration and Motion to Dismiss based on Rule 9(b), 12(b)(1), and 12(b)(6) be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the interested parties listed below in accordance with the Texas Rules of Civil Procedure via ECF online filing indicated below on September 17, 2020.

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