

**UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

BRUCE R. WENNER, et al.)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 08-2269-CM
)	
BANK OF AMERICA, NA)	
)	
Defendant.)	

**MEMORANDUM IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS**

I INTRODUCTION

Defendant Bank of America ("BOA") seeks dismissal of plaintiffs' case by downplaying, some would say distorting, significant facts alleged by plaintiffs. The factual linchpin of plaintiffs' claims is this: They closed their BOA checking account. BOA therefore no longer had any right to debit anything to the checking account. BOA consequently had no right to charge any overdrafts to plaintiffs' BOA credit card account. And BOA certainly had no right to report plaintiffs to the credit bureau as delinquent on their BOA credit card account for refusing to pay the unauthorized charges BOA made to that account. Finally, BOA had no right to inflict grief, frustration and distress on plaintiffs by bouncing them between its banking and credit card divisions while plaintiffs sought in vain to get BOA to end the Kafkaesque nightmare.

BOA acknowledges that plaintiffs closed their BOA checking account before BOA debited the account for the disputed amounts. But BOA buries this acknowledgement in a footnote, as opposed to placing it between paragraphs 6 and 7 of BOA's chronology of events at pages 9 and 10 of its Memorandum, where it belongs.¹ Just as BOA slants the facts about

¹ BOA's Memorandum, Doc. #54, p. 11, n. 2.

plaintiffs' BOA checking account, it does the same respecting their BOA credit card account. At page 10, paragraph 5, of its Memorandum, BOA claims "the Weners' FIA account" was established as early as February 6, 2005, citing Exhibit 4 attached to its Memorandum. However, Exhibit 4 is plaintiffs' January 6, 2006, BOA credit card statement that evidences BOA's December 28 charge to plaintiffs' BOA credit card for the "overdraft" resulting from BOA's unauthorized debit to plaintiffs' non-existent BOA checking account. There is no mention at all of FIA anywhere in the statement. The only entity mentioned is BOA. Significantly, on the second page of the statement (BW0849), it says "WE MAY REPORT INFORMATION ABOUT YOUR ACCOUNT TO CREDIT BUREAUS. LATE PAYMENTS, MISSED PAYMENTS OR OTHER DEFAULTS ON YOUR ACCOUNT MAY BE REFLECTED IN YOUR CREDIT REPORT."

It is clear that plaintiffs have alleged sufficient facts about the ordeal BOA put them through to state claims against BOA for ruining their credit standing and attempting, by deceptive and unconscionable acts and conduct, to avoid responsibility for its actions and, indeed, to continue with that same course of conduct even into this litigation. BOA's Memorandum serves only to highlight its astonishing refusal to shoulder any responsibility for its actions.

In resolving BOA's motion to dismiss, the plaintiffs' allegations in their pleadings are to be assumed true and are construed in their favor. *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). To prevail, BOA must establish that plaintiffs cannot prove facts that would entitle them to relief. *Id.* "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is

legally sufficient to state a claim for which relief may be granted.” *Id.*² Well-pleaded facts are to be taken as true and any reasonable inferences are construed in the plaintiffs' favor. *Gilbert v. Steed*, 2008 WL 4826142 (D.Kan. 2008). The question is not whether plaintiffs will ultimately prevail, but whether they are entitled to bring forth evidence in support of their claims. *Id.* The facts alleged will be judged sufficient if they state a plausible claim. *Id.* [citing *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F.Supp.2d 1214, 1216 (D.Kan.2008)].

Plaintiffs in their pleadings paint the classic picture of a company that makes things appear one way when trying to acquire customers, e.g., "branding" plaintiffs' credit card as a BOA credit card and linking it to plaintiffs' BOA checking account, but then, after the relationship sours, attempts to escape responsibility for the harm it caused by claiming that BOA had no connection to the card account. Although plaintiffs' BOA checking account was linked by BOA to plaintiffs' BOA credit card and this was done at BOA's State Line Branch, BOA disclaims responsibility for damaging plaintiffs based on BOA's *allegations* in its Answer (Doc. #5); its Corporate Disclosure Statement setting forth a welter of interwoven BOA entities (Doc. # 34); and its reference to BOA investor information on the internet.³ But such allegations are not properly considered in resolving a Rule 12(b)(6) motion. If they were, one would then have to consider the representations BOA aims at consumers, as opposed to those it aims at investors.⁴

Indeed, BOA's Memorandum in Support is full of *allegations* made by BOA and arguments based on those allegations. It is only plaintiffs' allegations in their pending Complaint and,

² To the extent that BOA's motion could be taken as converted to one for summary judgment by BOA's reference to matters outside the pleadings, plaintiffs respectfully request notice and an opportunity to respond pursuant to the procedure under Rule 56, including the opportunity to first pursue discovery on the issues raised in the motion.

³ BOA's Memorandum, pp. 13-14.

⁴ See <http://www.bankofamerica.com/creditcards/> where, at the bottom of the page is "Bank of America, N.A. Member FDIC." Click on "Popular Credit Cards" in the menu on the left, which brings up this BOA tout: "Cards for every passion. Choose from *our* most popular cards." (Emphasis added). Click on "View All Credit Cards", which brings up this similar BOA tout: "A wealth of choice. Choose from all *our* available cards."

respecting BOA's attempt to say amendment would be futile, their proposed Second Amended Complaint (Doc. # 42-2), that are properly considered.⁵

Plaintiffs had an existing Bank of America ("BOA") credit card when they opened a BOA checking account. The checking account came with an automatic bill-pay feature and an overdraft feature tied to plaintiff's BOA credit card. One of the bills to be paid out of it was plaintiffs' monthly mortgage payment to Chase Home Finance ("Chase").

As pointed out above, BOA grudgingly acknowledges that plaintiffs closed the checking account on December 16, 2005. Despite the fact that plaintiffs had closed the account and had made their December mortgage payment on their own, BOA on December 28, 2005, debited the closed checking account in the amount of the mortgage payment. As the closed checking account had no funds in it, BOA charged the "overdraft" it created by its unauthorized debit to the non-existent checking account to plaintiffs' BOA credit card.⁶

When plaintiffs learned of this unauthorized charge on their BOA credit card, they contacted the BOA's State Line branch bank to complain. They reconfirmed that their BOA checking account was closed and were told to contact "BOA's credit card division" to get the unauthorized charge removed.⁷ When they contacted BOA's credit card division, they were told to contact BOA's banking division about the problem.⁸ This they did, only to again be told the matter was the credit card division's responsibility.⁹

⁵ Defendant's inappropriate use of documents in a 12(b)(6) motion. At p. 7, defendant attempts to justify its use of voluminous documents. However, defendant's reliance on *Kestrel Holdings* omits an important part of the rule. The document must be **referenced** in plaintiffs' Complaint and be **central** to the claim. Defendant inappropriately uses documents not referenced or not central to plaintiffs' claims, in an effort to convince this court to give summary judgment on the issue of whether BOA and FIA acted in concert. This is an inappropriate use of documents in this motion and should be rejected.

⁶ Complaint, Doc. #1, ¶ 9.

⁷ *Id.*, ¶ 11.

⁸ *Id.*, ¶ 12.

In the month that followed, despite the fact that plaintiffs had twice closed the BOA checking account and had lodged multiple complaints with BOA's banking and credit card divisions, they were subjected to another round of ping-pong by BOA after BOA debited yet another unauthorized \$2,600.00 overdraft to the closed checking account and charged it to plaintiffs' BOA credit card.¹⁰

For a year plaintiffs were bounced back and forth between BOA divisions and dunned by BOA for the charges it placed on their BOA credit card. So plaintiffs tried to go to the top, lodging a dispute with BOA's CEO, Kenneth D. Lewis, who promptly handed them off to BOA Executive Relations Officer, Tyson Price. Although plaintiffs furnished Price copies of their monthly statements from Chase, which showed only one mortgage payment being credited each of the two months in question, as well as their Capitol Savings checking account records showing their payments to Chase, Tyson insisted it was up to the plaintiffs to track down the funds BOA said it had sent to Chase.

Although plaintiffs' statements from Chase contained no indication that Chase had the payments, as it later turned out Chase did in fact receive them, but did not notify plaintiffs when it received them and just placed them in a suspense account. When plaintiffs subsequently learned that Chase did get the funds, they immediately directed Chase to return the funds to BOA, consistent with plaintiffs having never authorized BOA to send Chase those funds in the first place.

Because BOA never should have sent the funds to Chase, it never should have charged plaintiffs' BOA credit card for them and should never have reported plaintiffs as delinquent on

⁹ *Id.*, ¶ 13.

¹⁰ *Id.*, ¶¶ 15-18.

their BOA credit card account. But it did. Plaintiffs therefore have asserted valid and subsisting claims against BOA for which relief can be granted. BOA's motion to dismiss should therefore be denied and, because BOA claims its affiliate, FIA, is to blame for reporting plaintiffs to the credit bureau, plaintiffs' motion for leave to amend should be granted in order to prevent BOA from escaping liability via a corporate shell game.

I. ALLOWING PLAINTIFFS TO AMEND THEIR COMPLAINT TO ASSERT THEIR KCPA CLAIM WOULD BE FAR FROM FUTILE

A. Plaintiffs Allegations Concerning Their Kansas Consumer Protection Act ("KCPA") Claim.

Plaintiffs allege in more than sufficient detail the unfair, unconscionable and deceptive acts and conduct of BOA and its affiliated corporation, FIA.¹¹ While BOA would portray BOA's and FIA's actions in this matter as "run-of-the-mill commercial transactions", if that is so, corporate arrogance and unjust, unreasonable, unconscionable and deceptive treatment of customers has become the acceptable norm. In a continuation of their 2006 conduct, defendant BOA and its credit card affiliate continue to deny responsibility for the unauthorized overdrafts and resulting charges to plaintiffs' credit card. In their view plaintiffs should just pay and go away.

BOA's brochures and service agreements promised "0" liability in the event of an unauthorized transfer on the "bill pay" account. BOA further promised that closing the checking account would deactivate the bill pay feature, that any claim of unauthorized transfer would be investigated, and, if true, remedied with "0" liability. Doc.42-2, ¶s 8,11,12 48.

¹¹ Plaintiffs allege in their proposed Second Amended Complaint that BOA and FIA acted in concert. Any references to BOA herein are meant to include, and should be taken to include, FIA.

Although BOA at one place claims the checking account was not closed until February 24, 2006 (Memorandum, p. 10, ¶5), BOA admits, as pointed out above, that plaintiffs had closed the account twice before BOA finally drove a stake through its heart. Plaintiffs had every right to expect no further bill pay transactions would flow from the closed account. They accordingly made their mortgage payments to Chase out of their checking account at another institution.

When they complained about the unauthorized charges to BOA, plaintiffs had a right to expect that BOA would investigate and find that the checking account had been closed and that plaintiffs had not authorized or initiated transfers. Instead, BOA stonewalled the plaintiffs, bouncing them back and forth between its banking and credit card divisions. So much for the guarantee of “0” liability.

B. KCPA Case Law Supporting Liability

Unconscionability under the KCPA is a question of law for the trial court. *Swanston v. McConnell Air Force Base Federal Credit Union*, 661 P.2d 826 (Kan.App. 1983). “Generally, whether an action is unconscionable under the KCPA is a question of law subject to unlimited review. However the determination of unconscionability depends on the facts in a given case. Thus, to great extent, the determination is left to the sound discretion of the trial court...Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court.” [*State ex rel. Stovall v. DVM Enterprises, Inc.*, 275 Kan. 243, 248-49, 62 P.3d 653 \(2003\)](#)

At issue in *Swanston* was the defendant credit union's publications and solicitations that led customers to believe that they would automatically have credit life insurance on their loan accounts, which was not true. Although the court in *Swanston*, under *DVM Enterprises'* discretionary standard, affirmed the trial court's finding that the defendant's conduct was not unconscionable, implicitly, it also would have upheld the trial judge, had he found the conduct

unconscionable, unless no reasonable person could have so found. Notably, the *Swanson* court also held that there was a jury issue on whether the unfulfilled promise of credit life insurance was deceptive and reversed the trial court's ruling to the contrary on this issue. *Id.*, 830-31.

In this case at bar, the unconscionable conduct occurred with the BOA's failure to close down the bill pay account. Rather than admit error and make good on its "0" liability promise, BOA just bounced them back and forth, making no effort at all to rectify the problem it had brought about. BOA never performed the simple and easy (and promised) investigation that would have shown the plaintiffs did not cause the transfers and that the transfers were caused by BOA's failure to close the bill pay account, as directed by the plaintiffs. Even if BOA's failure to close the account was but a reckless error, BOA's treatment of the plaintiffs thereafter cannot be reasonably characterized as anything other than unconscionable and deceptive.

Willman v. Ewen, 627 P.2d 1190 (Kan.App. 1981), involved a similar situation. Ewen agreed to sell Willman an Indianapolis Pace Car, a special limited product. Willman made a down payment of \$1,000. The next day the salesman learned the car had been sold to someone else two weeks earlier. Rather than admit his mistake, he resolved to find another pace car, all the while promising the plaintiff the car she ordered was en route and that the dealer was going to keep it on display until Memorial Day. When it turned out that pace cars were going for several thousand dollars over list price, the dealer simply returned plaintiff's down payment after holding onto it for three months. The trial court found against the plaintiff, but was reversed on appeal. Finding the dealer's conduct both deceptive and unconscionable under the KCPA, the court distinguished UCC unconscionability from KCPA unconscionability, holding that whereas the UCC only applies to conduct at the time of the sale, the KCPA, by its express terms, covers conduct " 'before, during or after' the transaction." *Id.* at 1193.

Plaintiffs submit that the behavior of BOA in refusing to investigate and make good on the promise of “0” liability, all the while bouncing plaintiffs back and forth between its banking and credit card divisions, was unconscionable, misleading and deceptive. BOA knew plaintiffs had *twice* closed the checking account and that BOA had twice failed to shut down the bill machinery attached to the account. BOA knew that plaintiffs had not logged on and made the transfers. BOA's credit card division needed BOA banking division's information to see that the transfers were unauthorized. BOA has **nothing** to show that it performed any investigation or shared any information between its banking and credit card divisions. Nor has any information surfaced to show that BOA's credit card division (now, but not then, known as FIA), ever asked BOA's banking division anything as to the validity of the debt caused by unauthorized checking account debits and corresponding credit card charges. This is the kind of behavior that *Ewen* had no trouble labeling deceptive and unconscionable. So, irrespective of any credit reporting issue in the case, BOA's obdurate refusal to look into plaintiffs' legitimate dispute, especially when viewed against BOA's promised “0” liability for unauthorized transactions, was, and continues to be, deceptive and unconscionable.

Unconscionable and/or deceptive debt collection practices are actionable under the KCPA. *Caputo v. Professional Recovery Services*, 261 F.Supp.2d 1249, 1259-1263 (D.KS. 2003); *Lowe v. Surpas*, 253 F.Supp.2d 1209, 1225-1231 (D.KS. 2003). BOA may claim that they did not know the checking account and credit card debits were unauthorized so that their collection efforts were not unconscionable or deceptive. However, knowledge and reckless disregard can be inferred from consciously avoiding knowing that the debt was not valid. “To consciously ignore or deliberately close one's eyes to a manifest danger is recklessness, a mental state that the law commonly substitutes for intent or actual knowledge.” *Board of County*

Commissioners of Bryan County, Okl. v. Brown, 117 S.Ct. 1382, 1395 (1997). In *Akagli v. NationsCredit Financial*, 196 F.Supp.2d 1186, 1195 (D.KS. 2002), this Court opined that consciously avoiding knowing can provide proof of knowledge and conscious disregard for the rights of others. The hounding collection activities directed at the plaintiffs over these unauthorized transactions are actionable under the KCPA. BOA should have known the transfers were unauthorized, but deliberately closed their eyes.

Even though BOA would disclaim responsibility for actions of FIA, its sister corporation, it was BOA's deliberate refusal to investigate and find "0" liability of the plaintiffs that, at the very least, contributed to cause the unlawful collection activity. Plaintiffs allege that FIA and BOA acted in concert to provide the bill pay service and the "0" liability guarantee. ¶ 5, 10 and 11, Doc. 42-2. They worked together to the profit of their mutual master, Bank of America Corporation. BOA's motion to dismiss is not the proper vehicle for determining whether or not BOA is responsible for the collection or credit reporting activities of FIA.

Certainly, whether or not BOA is ultimately responsible for FIA collection activity, it is still responsible for its own deceptive and unconscionable behavior involving the worthless promise of "0" liability and the resulting ordeal it put plaintiffs through, and continues to put them through.

C. No Preemption of or Immunity from KCPA Claims

Plaintiffs' KCPA claims against BOA are not preempted by the Fair Credit Reporting Act. BOA's behavior as outlined above was and is unconscionable and deceptive and has caused and continues to cause plaintiffs distress without reference to the subsequent bad credit reports. The FCRA only preempts state law to the extent that the state law is inconsistent with the FCRA, and then, only to the extent of the inconsistency. 15 U.S.C. § 1681t(a); *Millet v. Ford Motor*

Credit Co., 2006 WL 1301160, p. 4 (D.Kan. 2006). Notably, in *Millet*, the claim that was preempted was a claim to enjoin defendant from credit reporting. Likewise in *Cox v. Beneficial Kansas, Inc.*, 2005 WL 627974 (D.KS 2005), the FCRA did not preempt a KCPA claim independent of credit reporting. p. 5-6.

Both *Millet and Holland v. GMAC Mortgage Corporation*, 2006 WL 1133224 (D.Kan. 2006) were decided by this Court. *Holland* held that FCRA preempted defamation of credit claims. *Id.*, 11-12. *Holland* also involved a state law invasion of privacy claim based on GMAC's collection efforts that did not involve credit reporting. That claim was not preempted. *Id.*, 13-14. Similarly, in this case plaintiffs have claims for unfair and deceptive treatment that do not involve credit reporting, but rather BOA's failure to investigate and consequent refusal to deliver on its "0" liability promise for unauthorized transactions. Also entirely separate from credit reporting, BOA's unfair, deceptive and unconscionable conduct caused it to appear that plaintiffs owed money to FIA and plaintiffs were damaged by FIA's collection activities on the unauthorized debt. BOA caused those collection activities. As in *Holland*, liability for such collection activity is not preempted, whether it is labeled an "invasion of privacy", as in *Holland*, or a KCPA violation, as in this case. The collection attempts, on an alleged debt that BOA willfully refuses to recognize as unfounded, directly result from BOA's deceptive and unconscionable acts and conduct.

Lowe v. Surpas, 253 F.Supp.2d 1209 (D.Kan. 2003) supports plaintiffs, in that it recognizes that unfair collection activities on debt involving a consumer transaction can violate the KCPA. *Id.*, 1225-1232. The *Lowe* court also held that the bank there could not be held liable for the acts of its independent contractor debt collector and was not liable under the KCPA for misrepresenting the validity of the credit card charges to the debt collectors, reasoning that any

deception was not in connection with a consumer transaction but was made in a non-consumer, commercial transaction. *Id.*, 1231-1235. But the court made no analysis of whether the upsetting collection activity was proximately caused by the unconscionable and deceptive conduct of the bank. Was it reasonably foreseeable that BOA's refusal to honor the "0" liability guarantee to plaintiff would cause plaintiff to be dunned by debt collectors? Or, stated differently, did BOA's (and FIA's) refusal to honor the guarantee of no liability for unauthorized charges cause or contribute to cause plaintiffs' damages from the debt collection activity? Plaintiff respectfully suggests the court in *Lowe* court was not asked to answer this question.

Unlike plaintiff in *Lowe*, plaintiffs here are not challenging the unfairness of the debt collector's activity and claiming that BOA should be held vicariously liable. Plaintiffs allege that there would have been no debt to collect absent BOA's (and FIA's) unconscionable and deceptive activity. But for BOA's refusal to honor its guarantee, the upsetting collection activity would not have occurred. What made the activities of FIA and the bill collectors so aggravating was the simple fact that the Wenners never authorized the debt and did not owe it.

Kansas courts analyze causation by asking "but for" the defendant's conduct, would the plaintiff have been damaged? *Quandt v. IBP*, 173 P.3d 1149, 1155 (Kan.App. 2008). Stated another way, did defendants' conduct cause or contribute to cause the damages? *Hammig v. Ford*, 785 P.2d 977, 979 (Kan. 1990); *Hogan v. Santa Fe Trail Transp. Co.*, 85 P.2d 28, 31 (Kan. 1938). "Proximate cause is defined as that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred, the injury being the natural and probable consequence of the wrongful act." *Idbeis v. Wichita Surgical Specialists, P.A.*, 173 P.3d 642, 652 (Kan. 2007). Plaintiff suggests that there is no "efficient intervening cause" between the BOA's and FIA's KCPA

violation and the collection activity. Telling a collector a debt is owed, without mentioning that the checking account overdraft and consequent credit card charge were unauthorized, would make the resulting collection activity the natural and probable consequence of the unauthorized conduct that underlay the alleged debt. There can be no doubt that when BOA closed its ears to plaintiffs' plea that the transfer was unauthorized, they could anticipate that plaintiffs would be pursued for collection on the alleged debt.

In sum, plaintiffs emphasize that they suffered damage compensable under the KCPA as a result of BOA's conduct independent of any credit reporting activities or collection activities. Plaintiffs' point is that the KCPA violations were the proximate cause of the upsetting collection activities, whether or not the collection activities were, in and of themselves, unconscionable or deceptive. Unlike *Lowe*, in this case plaintiffs do not allege that an independent contractor employed unconscionable collection techniques. BOA is therefore not insulated from liability on that basis. Here, the KCPA violations were and are the direct and proximate cause of the collection activities which damaged plaintiffs.

BOA never mentions in its memorandum plaintiffs' allegation that BOA and FIA bundled banking and credit card services to them and that such bundling constitutes a joint venture. Doc. #42-2, ¶ 5, Plaintiffs also alleged that both defendants promised them a "Total Security Package" to protect them from unauthorized transactions. Doc. #42-2 ¶ 11, BOA and FIA, in concert, caused the unauthorized credit card charges and unauthorized overdraft attending the unauthorized transfer of funds to Chase. Doc. 42-2 ¶ 14. As BOA acknowledges, plaintiffs' allegations are deemed to be true for purposes of BOA's motion Doc. #54, p. 11, fn. 2.

Under these allegations, BOA's banking and credit card divisions, however denominated, had a duty to interact to provide the promised "0" liability. BOA has come up with nothing to

contradict plaintiffs' allegations of being bounced back and forth, with neither BOA's banking or credit card division bothering to look into the matter, instead simply pointing the finger back and forth at one another. The lack of investigatory interaction demonstrates deliberately closed eyes of both BOA organizations.

D. Continuing Deceptive Practices

As mentioned above, BOA has carried on with its deceptive practices into this litigation. BOA provided its counsel with a document which supposedly "proved" that the plaintiffs had logged on and actually themselves authorized the disputed transfers to Chase. See Exhibit1, attached. This document purportedly shows that the Chase payment was *not* set up as an automatically "recurring" transaction. Thus, BOA contended, the plaintiffs would have had to have logged on to manually trigger the payments to Chase. Based on this document, defense counsel met with plaintiffs' counsel and urged them to withdraw plaintiffs' claims.

Long after that meeting, plaintiffs received documentation from defendant consistent with plaintiffs' claim that the transfer was the result of BOA's failure to shut down the automatic payment account as directed and that the plaintiffs in fact did nothing themselves to trigger any payments afterwards. The payment to Chase was set up on November 30, 2005, to be an automatically recurring payment. Plaintiffs closed the account on December 16, 2005. Plaintiffs' last login to the account was on December 12, 2005. They did not attempt to log on again until February 2007, long after the two transfers were made, and then only in wondering what had happened on the account. But by then it had finally been closed by BOA and so was inaccessible.

BOA had ready access to the account log when plaintiffs were complaining in January 2006 about the unauthorized transfers. BOA could have easily seen that the transfers were

BOA's error and not authorized by the plaintiffs. Such information could have been easily been provided to Chase and BOA's credit card division. But BOA chose to be deliberately ignore the facts and to be deliberately indifferent to plaintiffs' plight.

CONCLUSION

Plaintiffs respectfully submit that amending to plead a claim under the KCPA and to join FIA as a defendant would not be futile, by any stretch of the imagination.

II. PLAINTIFFS' FCRA CLAIMS AGAINST JOINT VENTURERS/PARTNERS BOA AND FIA

BOA and FIA are ultimately responsible to BOA Corporation to make profit. As described in the part of the brief concerning FIA's KCPA liability, plaintiffs alleged a bundling of services between BOA affiliates. BOA did not link its services to just any credit card, and FIA did not link its services to just any bank. Plaintiffs allege a joint venture and/or partnership agreement to provide "0" liability for unauthorized transactions. As described above, also, in the event of disputes, the cooperation of both entities would be essential to provide the promised services. Assuming the truth of the allegation of joint venture, defendant BOA could be liable for the FCRA failures of FIA.

Defendant BOA, at pp. 27-8 of its Memorandum, argues that FIA has no FCRA liability. Defendant BOA claims that FIA is not liable for an FCRA violation because plaintiffs allege a violation of §1681-2(a), citing Doc. 42-2, ¶ 37. That allegation reads: "Defendants violated the FCRA, 15 U.S.C. §1681s-2(b) by continuing to report the plaintiffs as delinquent...without also informing them that the transfer to Chase Bank was unauthorized and that the debt was disputed and not owed, and further..." (emphasis added). By referring to 1681s-2(b) and saying "continuing to", plaintiffs are alleging post-CRA-dispute FCRA violations. Plaintiffs are not

basing their FCRA claim upon a violation of 1681s-2(a). Plaintiffs do not understand how BOA can in good faith so interpret plaintiffs' pleading.

FIA thus can clearly have FCRA liability, as can defendant BOA, based on its joint venture or partnership with FIA. A joint venture can impose vicarious liability on BOA for FIA's FCRA failures. *Lightner v. Frank*, 727 P.2d 430, 433 (Kan. 1986). And BOA can, of course, be charged with FCRA liability for its own wrongful reports to the credit bureaus, reports BOA threatened in its monthly credit card statements to make should plaintiffs miss a payment. *See* BOA's Memorandum, Exhibit 4.

III. SUPPOSED JURY WAIVER

BOA claims plaintiffs are not entitled to a jury trial. The effect of the jury trial waiver BOA claims cannot be determined on its Motion to Dismiss. Aside from the fact that the alleged waiver comes from a Deposit Agreement dated several months after plaintiffs opened the checking account,¹² questions as to whether the waiver was ever seen or brought to the plaintiffs' attention or knowledge and whether any such waiver was knowing, voluntary and intentional would have to be resolved.

As one court has aptly summarized in addressing the cherished Seventh Amendment right to a jury trial, it is a right that is integral to our justice system and carefully guarded by the courts, so that any waiver must be found to have been knowing and intentional, with every reasonable presumption indulged against waiver. *Dreiling v. Peugeot Motors of America, Inc.*, 539 F.Supp. 402, 403 (D.Colo. 1982) ("A constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision on the twentieth page of a twenty-two page standardized form contract."). Defendant's waiver argument was

¹² Plaintiffs opened the account on June 30, 2005, according to BOA. *See* Memorandum Exhibit 1, in which the date appearing in the lower left corner of the page bearing BOA Bates Stamp 243 is "06/30/2005". The Deposit Agreement BOA attaches to its Memorandum as Exhibit 2 has on the first page "Effective December 1, 2005."

rejected for defendant's failure to present any evidence that the waiver provision was a bargained-for term or was even mentioned in negotiations. *Id.*

The jury waiver provision BOA trumpets at page 10 of its Memorandum is buried at page 78 of its 81 page Deposit Agreement. Unsurprisingly, then, BOA does not assert that plaintiffs made a knowing, voluntary and intentional waiver of their right to jury trial. There is thus no foundation for finding they did.

IV. CHASE'S RETURN OF THE FUNDS TO BOA AS DIRECTED BY PLAINTIFFS

Plaintiffs have alleged their original honest belief that BOA did not actually make the two transfers to Chase. Indeed, so far as they knew at the time, this was the case. They showed BOA their statements from Chase, which only reflected the payments plaintiffs made from their Capitol Federal account, and presented the cancelled checks. Doc. 42-2, ¶ 27. They honestly believed that BOA had not transferred the funds that it charged to their credit card. It was only after filing suit that their counsel discovered that the funds had in fact been sent to Chase, but were never applied to reduce the principal of plaintiffs' mortgage balance. Because plaintiffs had never authorized BOA to transfer the payments to Chase and the funds truly were not theirs, plaintiffs had Chase return them to BOA.

BOA castigates plaintiffs as litigious people who “refused these funds in order to continue this lawsuit that they hope will result in riches exponentially greater than the two transactions giving rise to the dispute.” BOA's Memorandum, p. 4. Hurling such an insult at decent people like the plaintiffs simply goes beyond the pale. This is especially so when one considers, as BOA admits, that plaintiffs closed the checking account before BOA went into it and triggered not one, but two, unauthorized overdrafts, each a month apart, charging each to plaintiffs' BOA credit card. One might excuse all this as the bungling of a bank whose right

hand knew not what its left hand was about, but for the fact that by the second transfer BOA, under any circumstance, indisputably knew its bill pay service was running amok. But, much like Dr. Strangelove, BOA was unable to control itself. And even if BOA's demonstrated inability to control itself could somehow be forgiven, it would only be forgivable if BOA cleaned up its mess and asked for forgiveness. This BOA did not do. Instead of taking responsibility for its own actions, it tried to shift the blame to plaintiffs. That it now has the unmitigated gall to castigate the plaintiffs as money-hungry litigants only serves to show the level to which a once-vaunted financial institution has sunk to these days.

Plaintiffs only want what they have always said they wanted. They want the unauthorized transactions reversed. It is still plaintiffs' hope that the funds will be applied to eradicate the unauthorized debt that BOA created. Their hope is also that the return of the money to BOA will, eventually, motivate defendants BOA and FIA to remove all negative information from their credit reports, as should have occurred long ago. They want to have their good names cleared and, yes, they justifiably want compensation for being put through credit hell by BOA. But they don't want, and never have wanted, the funds BOA conjured up out of unauthorized overdrafts and charged to their credit card. Those funds were, and remain, BOA's.

V. DEFAMATION

BOA argues all of plaintiffs' defamation claims must be dismissed, irrespective of the pleading in which asserted. BOA claims preemption or immunity respecting the defamation claims due to FCRA provisions; claims that BOA made no false statements; claims that BOA cannot be responsible for FIA's false statements; and argues insufficient detail in plaintiffs' pleadings regarding the defamatory words, to whom made, the time and place; the truth of the reports; and the bar of the statute of limitations.

A. BOA's Significant Omissions Regarding Plaintiffs' Complaint

BOA never mentions that plaintiffs claim that BOA's defamations were willful and malicious. Doc. 42-2, ¶ 43. Neither does it mention plaintiffs' allegations of concert of action between FIA and BOA in providing the "0" liability guarantee. And BOA never mentions plaintiffs' claim that publishing the debt to the debt collector, AMP, was defamation. Consideration of all of these omitted allegations are important for the determination of BOA's motion to dismiss the defamation claims.

B. State of the Law in this District Regarding FCRA Immunity Provisions

Plaintiffs admit that they disputed these transactions with both BOA and FIA's alleged predecessor in early 2006 long before any bad credit reports were made.

Plaintiffs read *Holland v. GMAC Corp.*, 2006 WL 1133224, p. 10-13 (D.KS. 2006), to hold that defendants are immune from defamation claims regarding *reports to CRAs* made after the consumer has made any dispute of the transaction. This immunity is pursuant to 15 U.S.C. §1681t(b)(1)(F). Under that reasoning defendants would be immune from all of plaintiffs' claims of defamation, except the defamation by publication to the debt collector, AMP. That publication had nothing to do with defendants' credit reporting responsibilities under the FCRA. The *Holland* holding is strictly limited to reports to CRAs: "Accordingly, defendant received notice of Bryan Holland's dispute on April 23, 2001, and, pursuant to §1681t(b)(1)(F), defendant is absolutely immune from Bryan Holland's defamation of credit claim **predicated on defendant furnishing inaccurate information about his credit to the CRAs after** April 23, 2001." *Holland*, p. 13 (emphasis added). *Holland* would immunize defendants for the credit reports, but not the false statements to AMP.

Plaintiffs respectfully suggest that the “dispute” that triggers the absolute immunity of §1681t(b)(1)(F) is the dispute, provided for in the FCRA, that the consumer lodges with the CRA. Plaintiffs submit that this correct interpretation of the absolute immunity was the basis of the decision in *Aklagi v. NationsCredit Financial*, 196 F.Supp2d 1186, 1195 (D.KS. 2002), holding that the immunity from the state law defamation claim is triggered by the dispute to the CRA. Other courts have agreed. *Vasquez-Garcia v. TransUnion de Puerto Rico*, 222 F.Supp.2d 150, 162 (D.P.R. 2002).

From the standpoint of public policy and the intended reforms by the FCRA, the reasoning of *Aklagi* makes much greater sense, harmonizing the qualified immunity of 1681h(e) with the absolute immunity of 1681t(b)(1)(F). Consumers should absolutely be encouraged to directly approach creditors about erroneous bills in an attempt to correct them before the damage is done. If a creditor is advised of serious questions regarding the validity of the debt but ingores the information and reports the consumer as a “deadbeat” – the defamation issue is covered only by the qualified immunity of 1681h(e) and would be ruled by the determination of whether the creditor’s action was with malice or willful intent to injure. Such malice could be proven by the conscious refusal to hear the consumer’s legitimate complaints.

To hold otherwise and grant creditors absolute immunity at that early stage of “dispute” only encourages creditors to ignore consumers, if the creditor is absolutely immune from damages for making a deliberate and willfully false credit report. Such a creditor would be free, as in this case, to threaten ruin of the customer’s creditworthiness with impunity, a threat that would cause consumers to pay debts they do not owe.

The holding of *Aklagi*, on the other hand, is consistent with the intent and policies of the FCRA. The FCRA specifically only preempts state law to the extent it is inconsistent with the

FCRA, and then only to the extent of the inconsistency. 15 U.S.C. § 1681t(a); *Millett v. Ford Motor Credit Company*, 2006 WL 1301160, p. 4 (D.Ks. 2006).

In *Millett* the court held that the FCRA created no duty on the furnisher to investigate a dispute before receiving notice of a dispute from the CRA. However, there is a duty under the common law not to defame a customer's creditworthiness. And, upon notice of a dispute by a customer, there is a common law duty not to be deliberately indifferent to the customer's right to a good name. The FCRA allows such a "pre-CRA notice-of-dispute-duty" to survive, giving it only qualified immunity. §1681h(e). In this respect *Aklagi* is consistent with the purpose of the FCRA and *Holland* is not.

Plaintiffs submit they have a claim of defamation for deliberately indifferent or malicious defamatory credit report made under § 1681s-2(a). This Court previously refused to rule out such a claim. *Holland*, p. 11, citing *Aklagi*, supra, and *Millett v. Ford Motor Credit Co.*, 2005 U.S. Dist. LEXIS 8806 (D.Kan. April 20, 2005). However, *Holland* and *Millett* gave immunity to defendant if the alleged debtor did the right thing and protested to the creditor. It seems obvious that a creditor who deliberately ignores a legitimate dispute and makes a false report deserves less immunity than one never given that opportunity. That is the very purpose of the qualified immunity of § 1681h(e). It leaves the maliciously indifferent furnisher to face a defamation suit.

The reasoning of *Aklagi* is also consistent with the purposes of the FCRA and is good public policy for another reason. Congress tried to strike a reasonable balance between the right of consumers not to be facing false credit reports and the right of the credit reporting and commercial groups, when participating in *mandatory*, FCRA-*required* reporting, to face only the remedies of the FCRA.

The pre-CRA-dispute report a furnisher makes to a CRA is not *required* by the FCRA and there is no FCRA liability for those reports. Before the FCRA, creditors could face liability for negligently or intentionally injuring a consumer's creditworthiness, based upon common law claims and/or state Fair Credit Reporting Acts. The FCRA, §1681h(e), preempted those claims and extended to furnishers a qualified immunity, i.e., immunity from claims in the nature of defamation, invasion of privacy, or negligence regarding reports to CRAs, "except as to false information furnished with malice or willful intent."

Once a consumer disputes a furnisher's report with the CRA, FCRA *mandated* investigation and reporting are required. Because they are mandatory, the FCRA grants absolute immunity, except for FCRA liability. This view of the FCRA immunity provision gives life to both immunity provisions, while giving no shield to those who egregiously ignore their customers' protests and thereafter file false credit reports to force payment of invalid debts.

Plaintiffs submit that *Aklagi* makes sense. However, the meaning of the two immunities is still not clear in the case law. And, the two views of *Holland* and *Aklagi* are not the only two views. Plaintiffs do not wish to forego the possibility that the Courts will eventually adopt a view even more helpful to plaintiffs' defamation claims.

C. A Different View of Preemption – The “Statutory” Approach

Some courts have harmonized §1681h(e) with 1681t(b)1 by holding that the latter preempts only state credit reporting statutes, not common law claims. They reach this conclusion, in part, because §1681t expressly mentions and does not preempt California's and Massachusetts' Credit Reporting Acts and because the statute specifically refers to the "laws of any state" and says "no requirement or prohibition may be imposed under the laws of any State..."

Under this line of cases, the Kansas Fair Credit Reporting Act, K.S.A 50-701, et seq. might be preempted, but not a common law defamation claim. Defamation, even after the CRA dispute, would be judged under §1681h(e)'s standard of malice or willful intent. This view is consistent with the Supreme Court's opinion that "law or regulation" in an express preemption clause refers only to positive state enactments, and not to state common law tort claims. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62 (2002), interpreting the Federal Boat Safety Act.

In *Beuster v. Equifax Information Services*, 435 F.Supp.2d 471 (D.Md. 2006), the court considered Chase Bank's motion to dismiss the plaintiffs' defamation claim in a credit reporting case. The court made a thorough analysis of three different approaches to understanding FCRA preemptions: 1) "Total" Preemption; 2) "Temporal Approach"; and 3) "Statutory" Approach. *Id.*, at 474-479. It adopted the "statutory" approach holding that common law defamation clearly was not preempted. *Id.*, at 479.

Importantly also, the *Beuster* court was very critical of a temporal approach that would immunize furnishers who have notice of a dispute. "As a practical matter, it is difficult to allege that a furnisher of information entertained doubts as to the truth of a publication such that it acted with regardless disregard of the truth – i.e. with malice – before receiving notice of a dispute" *Id.*, at 477, citing *Aklagi*. Plaintiffs submit that this rationale is logical and persuasive and that none of plaintiffs' common law defamation allegations are preempted, whether before or after notice of dispute.

CONCLUSION

For the foregoing legal reasons plaintiffs submit that their defamation claims concerning the false credit reports made to the CRA's are actionable under § 1681h(e). In the alternative,

under *Aklagi*, the claims are actionable until defendants are responding to disputes made with a CRA.

D. Statutes of Limitation – Defamation

(1) **BOA and FIA under *Aklagi's* Rationale.** Plaintiffs do not know the date that BOA and FIA received the dispute(s) from the CRA's. BOA and FIA, to plaintiffs' understanding, republish the defamation monthly. The burden is on defendants to show that their last defamation prior to notice of the CRA dispute was more than one year before plaintiffs filed suit on June 11, 2008. While it may be that the last defamation before the immunization of the CRA credit dispute occurred more than one year before June 11, 2008, this remains to be seen and remains to be proven by defendants.

(2) **BOA and FIA under the "Statutory" Approach to Preemption.** Under this approach, upon belief, defendants have continued to republish the defamation all the way up to suit being filed and beyond. Without the preemption caused by notice of dispute, plaintiffs' defamation claims are not barred by the statute of limitation.

(3) **AMP.** Plaintiffs first knew about their new creditor, AMP, within a year of filing their suit. They received first notice in a letter dated August 8, 2007. They do not know the date that defendants misrepresented the debt to the debt buyer/collector. However, with regard to this type of publication, the statute of limitation runs from discovery of the publication. *McKown v. Dun & Bradstreet, Inc.*, 744 F.Supp. 1046, 1049-1050 (D.KS. 1990). The statute of limitations has not run on the publication to AMP.

VI. RULE 9 FOR DEFAMATION AND KCPA CLAIMS

A. Defamation

Plaintiffs' claims of defamation are based upon BOA's and FIA's credit reports of delinquent debt to BOA and their representation to AMP that the debt was a valid debt that plaintiffs had not paid. Plaintiffs believe, but do not know, that the bad credit reports are republished monthly by defendants. But, the particulars of who, what, when and where are not known to plaintiffs. Those particulars are known to defendants, but not known to plaintiffs.

This case is about defaming creditworthiness. By definition, the statements are not made publicly and defendants do not notify plaintiffs when they publish defamatory credit reports. Defendants have banking services spread throughout the country. Plaintiffs do not know from whence the bad reports came or who authored them. They are more than likely entered once into a computer and then automatically resent monthly. In order to be more specific, plaintiffs need discovery from defendants. Thus far, BOA has refused to provide any information on these subjects and has led plaintiffs believe they need FIA in the case before the answers can be found.

Plaintiffs have pled that the defaming remarks are in the credit reports. Defendants made those reports and know the content, time and place. Defendants also know that the reports continued to the time that plaintiffs filed the suit. Thus, to the extent that time and place are essential for statute of limitation reasons, defendants have the information.

Further, if BOA is correct in its assertion that plaintiffs' claims are preempted from the date of plaintiffs' disputing the transfers and credit card debt, plaintiffs' pleading supplies the dates of their first disputes, January, 2006. This allowed BOA to plead the effect of the statute of limitation.

As set out in the brief above concerning defamation and statute of limitation, plaintiffs do not know the date of BOA's publication of the bad credit report prior to plaintiffs' CRA dispute

mailed on May 27, 2007. That date would be known to defendant. It matters only if the court holds that the CRA dispute triggers FCRA immunity from defamation.

Finally, if the “statutory” analysis of preemption/immunity is the standard, the statute of limitation is superfluous because defendants have continued the defamation up until suit was filed and, upon belief, they continue to do so.

The claim being discussed is defamation. Thus 9(b) does not apply. However, even under 9(b), if fraud is by a corporation, such that the specific person, date, time, and place would be known to the corporation, but not the plaintiff, the rule of specificity is relaxed. *U.S. ex rel. Schwartz v. Coastal Healthcare Group*, 232 F.3d 902, p. 3 (10th Cir. 2000). Plaintiffs’ petition must still set out the factual basis for plaintiffs’ belief that the fraud occurred. *Id.*, at 3-4; *see also Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998).

In plaintiffs’ Second Amended Complaint, plaintiffs provide defendants an adequate statement of facts so that defendants can know exactly wherein and how plaintiffs were defamed: 1) the defamation is in false reports to CRAs that plaintiffs were delinquent debtors, Doc. 42-2 ¶ 1, ¶ 31; 2), the false reports went to plaintiffs’ prospective creditors, Doc. 42-2 ¶ 41; and 3) defendant published the delinquent debt to AMP, the debt collector, Doc. 42-2 ¶ 42.

BOA has full knowledge of all the foregoing publications with the possible exception of the bad reports being furnished to plaintiffs’ prospective creditors. Plaintiffs can gather information on that from the CRAs by discovery and from the credit reports obtained by plaintiffs. Plaintiffs have previously furnished all credit reports in their possession to BOA.

Plaintiffs submit that the purpose of 9(f)’s time and place requirement has been met. BOA knows time frames and content of the defamations and is able to formulate its defenses. Plaintiffs are willing to stipulate that the only publications to potential creditors at issue are those

that were made within one year of the filing of the suit. The purpose of particularity requirement is to allow the defendant to prepare an adequate responsive pleading. *VNA Plus, Inc. v. Apria Healthcare Group*, 29 F.Supp.2d 1253, 1263 (D.KS. 1998); *Fisherman Surgical Instruments, LLC v. Tri-Anim Health Services, Inc.*, 2007 WL 201935, p. 2 (D.KS. 2007). That purpose is met by plaintiffs' Complaint.

B. KCPA

1. Assuming Rule 9(b) Applies to the KCPA Claim

Defendant equates all of plaintiffs' KCPA claims with fraud and asks that Rule 9(b) applied to require more specificity. To the extent that the KCPA claim is equated to fraud, plaintiffs' submit that the principles stated above concerning corporate fraud, in which the defendant would know the details, but plaintiff would not, apply. "The stringent pleading requirements of Rule 9(b) must be harmonized with the liberal notice pleading of Rule 8...In the final analysis, the pleading rules are designed to provide fair notice of the substance of the claim to the defendant so that the defendant may prepare a responsive pleading. *In Re Catfish Antitrust Litigation*, 826 F.Supp. 1019, 1029 (N.D.Miss. 1993). Rule 9(b) identifies fraud as a claim requiring particularized pleading. Rule 9(b) is relaxed where the essential facts are within the defendant's control." *Truck Components Inc. v. Beatrice Company*, 1994 WL 520939, p. 11 (N.D.Ill. 1994).

The Tenth Circuit has acknowledged that Rule 9(b)'s requirements can be relaxed because information is exclusively within the control of the defendant, though the complaint should still state enough to set forth a factual basis for the claims and the basis for them. *U.S. ex rel. Sikkenga v. Regence Blue Cross Blue-shield of Utah*, 472 F.3d 702, 728 (10th Cir. 2006). The Seventh Circuit has noted on a number of occasions that the particularity requirement of

Rule 9(b) should be relaxed where the plaintiff lacks access to all the facts necessary to detail his claim...” *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1051 (7th Cir. 1998). The Tenth Circuit has also recognized that 9(b)’s requirement of particularity can be excessively harsh and that the trial court has discretion to allow further discovery and amendment in cases in which the particularity of 9(b) is not met. *Cayman Exploration Corporation v. United Gas Pipeline Company*, 873 F.2d 1357, 1362-1363 (10th Cir. 1989).

In *Fisherman Surgical Instruments, LLC v. Tri-Anim Health Services, Inc.*, 2007 WL 2010935 (D.KS. 2007), Judge Vratil concurred in Magistrate O’Hara’s ruling allowing the defendants to amend their fraud counterclaim. “The court must read Rule 9(b) in harmony with the simplified notice pleading provisions of Rule 8...To plead a fraud claim, plaintiff must provide the circumstances of the fraud, i.e. the time, place and content of the false representation; the identity of the person making the representation; and the harm caused by plaintiff’s reliance on the false representation...In other words, plaintiff must set forth the who, what, where, when and how of the alleged fraud...These requirements may be somewhat relaxed where numerous representations are involved or where the responding party clearly is provided notice of the circumstances of the alleged fraud. See *VNA Plus, Inc. v. Apria Healthcare Group*, 29 F.Supp.2d 1253 at 1263.” *Fisherman Surgical*, p. 2. Although the defendant had not specified the time and place of the statements, the specific individuals who made the statements or the specific contents of the statements, the court held that the defendant had sufficiently narrowed the time and individuals involved, so that based on the context of the parties’ business relationship, plaintiff is on notice of the alleged fraud and the place of the alleged fraud.

Plaintiffs submit that in the context of a customer/bank relationship, plaintiffs’ allegations either make very clear the source and timing of the deceptive and unconscionable acts and

behavior, or that the information is known to defendants but not to plaintiffs. It is appropriate to allow discovery to further flesh out particulars. In *Gonzalez v. Pepsico, Inc.*, 489 F.Supp.2d 1233, 1247 (D.KS. 2007), Judge Vratil ruled that plaintiffs' KCPA complaint satisfied Rule 9(b) because it alleged the time frame of the conduct, the place of the conduct, the substance of the alleged fraudulent conduct, the identities of the defendants, and plaintiffs' injuries. Plaintiffs here submit that a cursory reading of their Second Amended Complaint shows that it measures up to the standard of *Pepsico* and fails, if at all, only to the extent that defendants have the information and plaintiffs do not.¹³

2. Rule 9 Should Not Apply to Plaintiff's Claim of Unconscionable Conduct

Defendant cites *Jamieson v. Vatterott Educ. Ctr., Inc.*, 473 F.Supp.2d 1153, 1156 (D.KS. 2007) and *Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515, 1524 (D.KS. 1995) to the effect that all KCPA complaints must satisfy Rule 9(b) governing fraud. Plaintiffs note that Judge Brown had ruled similarly in *Thompson v. Jiffy Lube Intern.*, 505 F.Supp.2d 907, 930-933 (D.KS. 2007). However, Judge Brown in *Jiffy Lube* did not rule that all KCPA claims are covered by Rule 9(b). Rule 9(b) applies to all cases "where the gravamen of the complaint is fraud, even though the theory supporting the claim is not technically termed fraud." In *Jiffy Lube*, Judge Brown analyzed that plaintiffs' claim to see if the gravamen of plaintiffs' claims of fraudulent concealment did trigger the application of Rule 9(b). He also recognized that all KCPA claims do not involve fraud. In fact, with regard to unconscionable acts or practices, six of seven examples in KSA 50-267(b) do not involve misrepresentations or fraud. *Jiffy Lube*, 932.

¹³ Plaintiffs realize defendants have argued preemption of credit reporting conduct and damages caused by credit reporting conduct. Plaintiffs have made their arguments concerning preemption. However that is sorted out, plaintiffs still have damages caused by the unconscionable and deceptive behavior of defendants separate and apart from credit reporting activities.

In *Jamierson v. Vatterott*, the KCPA claim was that Vatterott made representations to induce plaintiffs into entering into Enrollment Agreements. So, Judge Brown found that the gravamen of the KCPA claims mirrored fraud. *Id.*, at 1155-1156.

Defendant claims that plaintiffs have blown a mere breach of contract out of proportion into plaintiffs' KCPA claim. However, it is abundantly clear that deceptive and unconscionable conduct that occurs after a contract (formed without fraud) violates the KCPA. One great example of this is cited in Section I, above, *William v. Ewen*.

As explained in Section I above, defendants' deceptive and unconscionable acts began after the bank had failed to close the bill pay account. Under K.S.A. 50-627, to determine the unconscionability of defendants' act or practice the court may rely on the following factors (and others not listed) which, as stated in *Jiffy Lube*, do not involve fraud:

(1) the supplier took advantage of the inability of the consumer reasonably to protect the consumer's interest because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor;... and

(3) the consumer was unable to receive a material benefit from the subject of the transaction.

While plaintiffs are not physically infirm, ignorant or illiterate, the similar factor is the gross disparity of bargaining power between defendants and their consumers. Plaintiffs went from the State Line Branch officers all the way to the very top of this corporation and were unable to get anyone to listen to act upon their complaints that they had closed this account and yet unauthorized transactions were made thereafter. In spite of a clear duty to conduct an investigation, no one would do so. Defendants had a duty under the contract to conduct such investigations. But, all the way to the top, plaintiffs were refused any relief. The credit card debt

was there and it was going to stay or defendants would ruin plaintiffs' credit. This abuse of power is what the KCPA addresses in K.S.A. 50-627(b)(1). As a result of this abuse of power, the consumer was unable to receive a material benefit from the subject of the transaction. K.S.A. 50-267(b)(3). The material benefits not received were the zero liability for unauthorized transactions, the investigation of claims of unauthorized transactions and the report regarding the same, all promised to plaintiffs – none delivered. These allegations and the proof thereof do not involve fraud, according to Judge Brown in *Jiffy Lube*.

Oppressive practices, overreaching, and misuse of superior bargaining power is evidence of unconscionability and it can be proved without involving fraud. *Jiffy Lube*, supra, and see *State ex rel. Stovall v. DVM Enterprises, Inc.*, 62 P.3d 653, 654 (Kan. 2003).

In *Wille v. Southwestern Bell Tel Company*, 549 P.2d 903, 906-907 (Kan. 1976) the Supreme Court identified ten factors that should be considered in the determination of whether an act is unconscionable under the KCPA. Of those ten, several factors are indicated in this case: 3) the denial of basic rights and remedies to a buyer of consumer goods; 8) an overall imbalance in the obligations and rights imposed by the bargain; and 10) inequality of bargaining or economic power. In this case, defendants have used their superior bargaining power as oppressive and overreaching tools in an attempt to force the Wenners to pay a bill whether it was owed or not. KCPA unconscionability provisions are designed to remedy such conduct.

Many courts have held that breaches of contract involving unconscionable behavior violate state consumer protection acts. In *Commercial Union Ins. Co. v. Seven Provinces Ins. Co., Ltd.*, 217 F.3d 33, 40 (1st Cir. 2000), the Court opined that the conduct in question must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of the commercial marketplace; or have an extortionate quality that gives it the rancid

flavor of unfairness; or be immoral, unethical, oppressive or unscrupulous. At p. 41 the “evasiveness and obstructionism” of defendant was cited as a basis for defendant’s liability.

In *Gray v. North Carolina Ins. Underwriting Ass’n*, 529 S.E.2d 676 (N.C. 2000), the defendant did not attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability was reasonably clear. p. 684. The court held that a practice is unfair when it offends established public policy as well as when it is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Moreover, where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice. p. 681.

The District Court in Massachusetts considered whether breach of contract was an unfair practice under the Massachusetts’ unfair and deceptive practices statute. “A breach of contract alone does not amount to an unfair act or practice...A further showing of an immoral, unethical, oppressive or unscrupulous quality remains necessary.” *Sorenson v. H&R Block, Inc.*, 2002 WL 31194868, p. 20 (D.Mass. 2002). The Court went on to hold that Block’s disclosing suspected fraud to the IRS was not wrong, but Block’s failure to disclose its breach of its obligation of confidentiality while continuing services to plaintiff was an unfair act or practice. *id.*

While the KCPA does not use the word “unfair” practice, the dictionary definition of “unconscionable” is “not in accordance with what is just or reasonable.” *Link v. Wirtz*, 638 P.2d 985, 990 (Kan.App. 1982). Black’s Law Dictionary, (8th Ed. 2004) 1561, defines “unconscionable” as “affronting the sense of justice, decency, or reasonableness.” Plaintiffs respectfully suggest that the unfair practices as defined in other states are instructive and persuasive regarding how Kansas courts would define unconscionability, especially as it relates

to contractual relations that are unconscionable due to one party's oppressive use of its power and position to deny rights and place roadblocks in front of another.

The gravamen of plaintiffs' KCPA claims involves unconscionable treatment of them after they reported the unauthorized transfers, the oppressive and overreaching abuse of power to deny plaintiffs' rights and remedies. The gravamen, as described by Judge Brown in *Jiffy Lube*, is not lying to customers to sell a product or service, fraud-like conduct.

3. Rule 9(b) Policies. The policies behind Rule 9(b)'s requirements are not served by applying them to this case. The general purposes for the heightened pleading requirement in Rule 9(b) is to enable defendants to prepare meaningful responses, to preclude the use of a groundless fraud claim as a pretext to discover a wrong, and to safeguard defendants from lightly made charges which might damage their reputations. *Jiffy Lube*, supra, at 931.

In this case, plaintiffs do not plead that BOA defrauded them by promising "0" liability knowing that it was a false promise. Such an allegation would be scandalous and could be "lightly made" in an effort to discover a wrong. It was in the execution of the promise that defendants misdirected plaintiffs and unconscionably denied them their rights. The conduct covers up failures by employees and grows into oppressive overreaching and arrogant abuse of power. And, very importantly, it is alleged in adequate detail that defendants know what it is that they must defend against. Rule 9(b) should not be applied, but if it is, plaintiffs' Second Amended Complaint serves all the purposes of 9(b).

4. 9(b)'s Conflict with Liberal Construction of the KCPA and Conflicting Court Opinions

The legislature clearly intended to increase the protections afforded consumers under the KCPA. The word fraud does not appear in the Act. It does not mention the common law

elements of scienter, reasonable reliance, material fact, and resulting damage, except within a few per se violations. The KCPA is to be liberally interpreted. *Ray v. Ponca/Universal Holdings, Inc.*, 913 P.2d 209, 212 (Kan.App. 1995). The act is remedial and is to be liberally construed. *Johnsmeyer v. Hanover Development Co. II*, 120 P.3d 808, p. 3 (Kan.App. 2005); *Alexander v. Certified Master Builder Corp.*, 43 F.Supp.2d 1242, 1249 (D.KS. 1999).

To require injured plaintiffs to be able to identify, before filing suit, the who, what, when and where of every statement or act in the course of a deceptive or unconscionable consumer transaction by a far flung corporation such as BOA, greatly limits the availability of the relief and is a cramped and not liberal construction of the KCPA.

Counsel has found no Kansas case that has applied K.S.A. 60-209, the Kansas equivalent of Rule 9(b) to KCPA actions. Further, other federal courts, recognizing the remedial nature of state consumer laws and the consequent liberality of construction have refused to apply Rule 9(b).

In *U.S. ex rel. Polied Environmental Services, Inc. v. Incor Group*, 238 F.Supp.2d 456, 463 (D.Conn. 2002), the Court held that claims under the Connecticut Unfair Trade Practices Act did not have to be pled with the particularity required by Rule 9(b), since fraud is not a necessary element of a state CUTPA claim. The court held that that procedural requirement does not apply in federal court and relied upon Rule 8(a)'s "short and plain statement of the claim showing the pleader is entitled to relief". In a case involving both allegations of deception and unfair practices under the Illinois Consumer Fraud Act, the court refused to apply Rule 9(b) to the claims. *Gaddy v. Galarza Motor Sport Ltd.*, 2000 WL 1364451, p. 4 (N.D.Ill. 2000). The court's reasoning was that the Illinois Consumer Fraud Act prohibits not only fraud, but a broad array of unfair practices. In *Hedaya Brothers, Inc. v. Federal Ins. Co.*, 799 F.Supp. 13, 15

(E.D.N.Y. 1992), the court held that under New York's law prohibiting deceptive acts and practices, Rule 9(b) is not applicable because allegations of fraud are not required in such actions.

CONCLUSION

For all the foregoing reasons, defendant's Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2009, I electronically filed the above and foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of the electronic filing to the following:

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Toby's Notes 9/4/08

Fred

CheckFree

Subscriber Search | Case Search | Add Enrollment | Logout

Name: **BRUCE WENNER**
 Status: Inactive(I)
 Subscriber Type: Individual(R)
 Subscriber ID: 40020599026
 External ID: 40020599026(E)
 Sponsor: 8207 BOFA MIDWEST
 Client Spec: INTEROP
 Descriptor: PLUS BOTH
 Due Date Driven(DURSDATE)

- Account Transfers
- Account
- Add Cases
- Banking Transactions
- Billing Profile
- Business Users
- Communications
- Co-Subscribers
- E-Bill Services
- E-Mail Addresses
- EPS Nicknames
- Non-processed Payments
- Payee / Billing List
- Payments History
- Pending Payments
- Product Access
- Promotional Credits
- Received Payments
- Recurring Models
- Request Money
- Services
- Service Fees
- Session Summary

Pending Payments Maintenance Log

Show Details

Payee Detail

Payee ID: 5
 Payee Name: Chase Home Finance
 Payee Nickname: Mortgage
 Account Number: 1978808674
 Remit Acct Number: 1978809574
 Client App: Recurring:
 E-Bill Enabled: Yes
 Add Method: **SSSR**
 Reminder Amount: \$0.00
 Reminder Due Date:
 Reminder Frequency:
 Reminder Start: 00 days prior

Standard ID: 000001037
 Status: Inactive(I)
 Payee Type: Freeform(F)
 Lead day: 2
 AutoDebit: Not Applicable
 Chgs. Propagated?: Yes
 E-Bill Active: No Service(N)

Not set up as recurring

Subscriber (Wenners) added Chase

Address 1: PO Box 830016
 Address 2:
 Address 3:
 City: Baltimore
 State: Maryland(MD)
 Country: USA
 Zip Code: 21283 - 0016 -
 Province:

https://www.sponsorcare.com/sponsorcare/spc/rq=PayeeDetail&SubrPayeeNum=000000000000005&RecurL... 7/29/2008

Means that customer must sign on into online banking to execute desired payments.

EX 1

CheckFree Corp 7/15/2008 5:22:43 PM PAGE 2/003 Fax Server



July 15, 2008

Dear Bruce Wenner,

This letter is in reference to your request to have payment history for your bill pay. The next pages will show all your payment history for your payee. These payments were processed with the correct sign in ID and password to be processed for this bill pay.

If you have any questions or require additional information, please feel free to contact us at the number listed below and reference case number 34781612.

Sincerely,

Bank of America
Online Banking Bill Pay
800.278.6302

CheckFree Corp

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Payment Date	Payee Name	Account#(Masked)	Payment Amount
10/18/2005	BANK OF AMERICA-KANSAS CITY	.6276	\$308.49
11/30/2005	POWE	.9314	\$121.56
11/30/2005	TIME WARNER KANS	.6402	\$151.38
12/28/2005	CHASE HOME MORTG	.9574	\$2,564.63
1/27/2006	CHASE HOME MORTG	.9574	\$2,564.63