THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes, Special Referee

Case No. 2008-CP-39-2120

JPMorgan Chase Bank, National Association, Respondent,

v.

Vanessa Y. Bradley,

Appellant.

APPENDIX TO RECORD ON APPEAL

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PLEADINGS

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CERTIFICATE OF COUNSEL 354

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2012 SEP 21 A 10: 38

STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS — Case No. 2008-CP-39-2120

JP Morgan Chase Bank, National Association,

Plaintiff,

vs.

Vanessa Y. Bradley,

Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE SALE

JPMorgan Chase Bank, National Association ("Plaintiff") submits this memorandum in opposition to Vanessa Y. Bradley's ("Defendant") Motion to Set Aside Sale, filed on September 20, 2010. This memorandum is supported by the Affidavit of Charles Herndon, dated March 10, 2011.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff commenced this action on December 30, 2008, for the purpose of collecting a residential mortgage loan given to Defendant on January 30, 2001, which is secured by a mortgage encumbering real property located in Pickens County, South Carolina (the "Property"). The Defendant failed to respond to Plaintiff's Complaint, and after a hearing on March 12, 2009, a Judgment of Foreclosure and Sale was issued on March 17, 2009. A foreclosure sale was scheduled to occur on April 6, 2009.

Prior to the scheduled foreclosure sale, Chase Home Finance, LLC ("Chase"), the servicer of Defendant's loan, was contacted by a representative of the Defendant who

requested a loan modification on the Defendant's behalf and requested that the foreclosure sale scheduled for April 6, 2009, be postponed. (Herndon Aff. ¶¶ 8-9.) Plaintiff agreed to postpone the foreclosure sale, and to assist the Defendant, Chase extended a trial period plan ("Trial Plan"), under the Making Home Affordable Home Affordable Modification Program ("HAMP"), in which Chase is a participant. (*Id.* ¶ 10.)[1] Defendant accepted the terms of the Trial Plan, and made the first and second payments due under the Trial Plan. (*Id.* ¶ 11.) However, Defendant failed to submit the full balance owed for the third payment due on September 1, 2009. (*Id.*) Defendant submitted a partial payment of the third Trial Plan payment on September 22, 2009, but did not submit the remainder due until October 19, 2009. (*Id.*)

On March 4, 2010, Plaintiff notified Defendant that her loan was not eligible for a modification because the net present value of her loan did not meet HAMP guidelines for a modification. (*Id.* ¶ 12.). Plaintiff's counsel served and filed an Affidavit concerning the Defendant's non-eligibility for a modification under HAMP on May 17, 2010. A copy of the HAMP affidavit is attached hereto as **Exhibit 1,** and its terms are incorporated herein by reference.

From May to July 2010, Chase continued to work with the Defendant to attempt to reach a workout agreement concerning the Defendant's loan, but due to the Borrower's lack of income, Chase was unable to offer the Defendant any type of loss mitigation workout. (Herndon Aff. ¶ 13.) As a result, Plaintiff instructed its attorneys to move forward with the foreclosure sale. (*Id.* ¶ 14.) Counsel for Plaintiff filed an Affidavit in Support of Supplemental Judgment dated June 21, 2010, referencing Plaintiff's loss

[1] Chase agreed to postpone the foreclosure sale even before the Supreme Court's orders concerning HAMP were issued on May 4, 2009, and May 22, 2009, respectively.

mitigation efforts, and detailing the interest and fees that had been accrued since the original foreclosure order was entered in March 2009. A copy of the June 21, 2010, affidavit is attached hereto as **Exhibit 2,** and its terms are incorporated herein by reference. A second foreclosure sale was scheduled for August 2, 2010.

Immediately prior to the second scheduled foreclosure sale, at the Defendant's request, Plaintiff again agreed to postpone the sale and to negotiate with the Defendant for a possible workout of her loan. (Herndon Aff. ¶¶ 14-15.) However, Chase and Defendant were unable to agree upon a workout, and on August 19, 2010, Plaintiff notified Defendant that she had again been denied a modification under HAMP due to the net present value of her loan. (*Id.* ¶ 15.) Plaintiff later provided Defendant with additional and detailed information about the net present value calculations that were used in determining that her loan was not eligible for a loan modification. (*Id.* ¶ 21.)

After notifying Defendant that she was ineligible for a loan modification, Plaintiff instructed its attorneys to move forward with the foreclosure sale. (*Id.* ¶ 16.) Plaintiff's counsel filed an Affidavit in Support of Second Supplemental Judgment on August 20, 2010, again referencing Plaintiff's loss mitigation efforts, and detailing the interest and fees that had been accrued since the supplemental foreclosure order was entered in June 2010. A copy of the August 20, 2010, affidavit is attached hereto as **Exhibit 3,** and its terms are incorporated herein by reference. A third sale of the Property was scheduled for September 7, 2010.

Prior to the third scheduled foreclosure sale, the Defendant against requested that Chase reconsider her for a loan modification. (Herndon Aff. ¶ 17.) Between August 25, 2010, and August 31, 2010, Chase communicated with the Defendant concerning her

request and informed her that it needed certain updated financial information in order to consider her for a modification. (*Id.*) Chase specifically informed the Defendant that it would not request that the foreclosure sale be postponed until all of the required information had been received to consider the modification request. (*Id.*)

On September 1, 2010—four business days prior to the third scheduled foreclosure sale on September 7, 2010—Defendant provided Chase with the missing documentation required to consider her request for a loan modification. (*Id.*) The following day, on September 2, 2010, Chase advised Defendant that her request for a modification was under review and that it would request that the foreclosure sale be postponed. (*Id.* ¶ 18.) However, any postponement of the foreclosure action required approval from the Federal National Mortgage Association, the investor on the loan. (*Id.*) On September 4, 2010, Defendant contacted Chase to learn of the status of her modification request, and was specifically informed that the modification request was under review, but that the foreclosure sale had not been postponed. (*Id.*) The foreclosure sale occurred as scheduled, and the Property was sold on September 7, 2010. (*Id.* ¶ 19.) Chase ultimately informed Defendant that her loan was not eligible for a modification under HAMP because Defendant had failed to complete a HAMP Trial Plan. (*Id.* ¶ 20.)

Defendant alleges that Plaintiff failed to comply with the South Carolina Supreme Court's Administrative Order filed May 22, 2009, and that her loan should have been permanently modified based on the Trial Plan, despite the fact that Defendant failed to make all the payments due under the Trial Plan. Defendant also claims that Plaintiff should have stopped the third and final foreclosure sale while considering Defendant for a modification pursuant to HAMP guidelines, despite the fact that Plaintiff had already

postponed two prior foreclosure sales and already considered Defendant for multiple loan modifications. As explained below, HAMP does not require lenders to modify a borrower's loan, and the HAMP guidelines do not provide a basis to set aside the foreclosure sale or any of the prior orders entered in this case. Moreover, neither Plaintiff nor Chase made any representations to the Defendant that the sale had been postponed. As a result, there is no evidence of fraud and no basis to set aside the foreclosure sale or any prior orders entered in this case, and unwind the foreclosure to allow the Defendant leave to file an answer and counterclaim.

ARGUMENT

I. Plaintiff has complied with the Supreme Court's Temporary Restraining Order Concerning HAMP.

Defendant alleges that Plaintiff failed to comply with the Supreme Court's May 22, 2009, Order concerning HAMP. The Order simply requires that for mortgages involving residential property, a lender must state in an affidavit "that the loan is subject to modification under the HMP or that the requirements of the HMP have not been met." (Admin. Order. at 2.) Once a plaintiff in a foreclosure action serves an affidavit concerning HAMP, any other party to the action has ten days to serve a counter affidavit.

In this case, the Court has already ruled that Plaintiff complied with the Supreme Court's Order. In its Supplemental Order Post Judgment dated June 23, 2010, the Court held:

> Pursuant to an Administrative Order of the South Carolina Supreme Court dated May 22, 2009, the Plaitniff has set forth its belief in its Complaint or by Affidavit, which is already of record in this case, that the mortgage loan that is the subject of this foreclosure action is not eligible for modification pursuant to the terms of the Home Affordable Modification Program (HMP), and therefore Plaintiff has fully complied with said Order, and the foreclosure may proceed. Also, Plaitniff called attention that pursuant to Administrative Order of the South Carolina Court dated

> May 22, 2009, Plaintiff's attorney has not received a counter affidavit from the Defendant(s).

(Supp. Order at 2.) As explained by the Court, Plaintiff complied with the Supreme Court's Order by filing the May 17, 2010, affidavit, and Defendant failed to file any counter affidavit refuting Plaintiff's affidavit. Defendant's claim is simply without merit.

II. Plaintiff is not required to modify Defendant's Loan.

Defendant claims that her trial modification should have been permanent pursuant to HAMP's guidelines and regulations, and that as a result, the foreclosure action should be set aside, and she should be granted leave to file an answer and counterclaim. However, there is no evidence to support Defendant's claim that she is entitled to a modification under the HAMP guidelines, and even if there was, there is no private right of action under HAMP by which to force a lender to modify a borrower's loan or to justify setting aside a foreclosure order and sale.

a. There is no private right of action under HAMP.

The case law from around the nation is clear that there is no private right action for an alleged violation of HAMP.

In *Marks v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 61489 (D. Az. June 22, 2010), a copy of which is attached hereto as **Exhibit 4**, Bank of America approved the borrower for a loan modification under HAMP. *Id.* at *2. However, the bank experienced a delay in providing the loan modification agreement, and even though the bank advised the borrower that the foreclosure date had been "pushed back," the bank completed the foreclosure. *Id.* at *3. As a result, the borrower filed suit alleging that the bank breached its contractual obligations under HAMP, and the bank moved to dismiss the complaint. *Id.* at *1.

The court granted the bank's motion to dismiss because no express or implied private right of action exists under HAMP. The court first noted that "Plaintiff's allegations regarding breach of contract are simply an attempt at enforcing a private right of action under HAMP." *Id.* at *13. In determining that HAMP does not authorize an express private right of action, the court stated:

> Nowhere in the HAMP Guidelines, nor in the [Emergency Economic Stabilization Act of 2008], does it expressly provide for a private right of action. Rather, Congressional intent expressly indicates that compliance authority was delegated solely to Freddie Mac. By delegating compliance authority to one entity, Freddie Mac, *Congress intended that a private cause of action was not permitted.*

Id. at *16 (internal citations omitted) (emphasis added).

In rejecting the argument that HAMP created an implied private right of action, the court similarly stated, in pertinent part:

> First, Plaintiff is not one of the class for whose "especial benefit" the HAMP was enacted. While Plaintiff may be a part of a class of homeowners whom EESA and HAMP are *intended to benefit*, the statute sweeps much more broadly than their "especial benefit." These statutes are addressed to large-scale economic phenomena affecting not only distressed homeowners, but also financial institutions and homeowners at large.
>
> Second, legislative intent does not create a cause of action under the HAMP . . . In addition, legislative history indicates that the right to initiate a cause of action lies with the Secretary via the Administrative Procedures Act. Allowing the Plaintiff to assert a private cause of action would contravene clear legislative intent.

Id. at *17-18 (emphasis in original).

Courts across the nation have followed the holding in *Marks* that there is no private right of action under HAMP. *See Singh v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS 3563 at *23 (E.D. Ca. Jan. 7, 2011) ("However, it is well established that there is no private cause of action under HAMP."); *Zeller v. Aurora Loan Servs., LLC*, 2010 U.S.

Dist. LEXIS 80449 at *2 (W.D. Va. Aug. 10, 2010) ("However, 'nowhere in the HAMP Guidelines, nor in the [legislation authorizing the creation of HAMP], does it expressly provide for a private right of action.'"). *Accord Shurtliff v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 117962 (D. Utah Nov. 5, 2010); *Zoher v. Chase Home Fin.*, 2010 U.S. Dist. LEXIS 109936 (S.D. Fla. Oct. 14, 2010).

It is clear from the case law discussed above that HAMP does not afford Defendant any rights which would entitle her to have the foreclosure order and sale set aside, or any good faith basis for the counterclaim that she seeks to bring. She is not entitled to a modification under HAMP, and there is no private right of action under HAMP by which she could enforce such a right. Thus, the Defendant's attempts to manipulate HAMP to force Plaintiff to modify Defendant's contractual obligations must fail.

b. Defendant lacks standing to attempt to force the Plaintiff to modify Defendant's Loan under HAMP.

Defendant claims that Plaintiff is "obligated under its Participant Agreement and U.S. Treasury Supplemental Directives to offer a permanent modification or communicate to the borrower specifically why the trial modification cannot become permanent." (Motion at 3.) Because she bases her claims on allegations that Plaintiff improperly denied her application for a loan modification under HAMP, Defendant is actually suing on the servicing agreement between Chase, the servicer of the loan, and the U.S. Department of Treasury as a third-party beneficiary. However, the case law is clear that the participating loan servicers and the Treasury Department did not intend to create a direct benefit on potentially affected borrowers, such as Defendant:

> Under the HAMP, a qualified borrower would not be reasonable in relying on an agreement between a participating servicer and the U.S. Department

of Treasury in manifesting an intention to confer a right on the borrower because the agreement does not *require* that the participating servicer modify eligible loans. Even Fannie Mae, which has rights under the Agreement, cannot force a participating servicer to make a particular loan modification. Thus, a borrower could not require the servicer to make any particular loan modification under the HAMP Agreement.

Marks v. Bank of Am., N.A., 2010 U.S. Dist. LEXIS 61489, at *8 (D. Az. June 22, 2010) (emphasis in original) (internal citations omitted).

Accordingly, the district court held that because the bank was not obligated to modify the plaintiff's loan, the plaintiff did not have the right to enforce the HAMP participation agreement. *Id.* at *11. The district court also held that the plaintiff could not have reasonably believed the bank had an obligation to modify the loan because HAMP only requires a servicer to consider a modification. *Id.* The district court further recognized that if it "were to grant Plaintiff third-party beneficiary status, the Court would be opening the door to potentially 3-4 million homeowners filing individual claims," which would "clearly contravene[ ] the purpose of the HAMP as an administrative tool to effectuate the goals of the [Emergency Economic Stabilization Act]." *Id.* at *11-12 (citations omitted). Thus, the plaintiff was "an incidental beneficiary to a governmental contract between [the bank] and the U.S. Treasury." *Id.* For these same reasons, Defendant lacks standing to require Plaintiff to use HAMP as a basis to set aside a foreclosure action or to allege a counterclaim against Plaintiff.

III. Plaintiff properly and timely notified Defendant of her ineligibility under HAMP.

Defendant claims that Defendant was not notified why her loan was not eligible for a modification under HAMP. (Motion at 2-3.) This statement is patently false, as demonstrated by the Affidavit of Charles Herndon. After Plaintiff agreed to postpone the

first foreclosure sale of the Property and completed an analysis of the Defendant's loan, Plaintiff notified Defendant by letter dated March 4, 2010, that her loan was not eligible for a modification because the net present value of her loan did not meet HAMP guidelines. (Herndon Aff. ¶ 12, Exh. 2; *see also id.* at Exh. 5 (letter providing Defendant with specific net present value data inputs that were used to determine that she was not eligible for a loan modification).) After Plaintiff agreed to postpone the second foreclosure and again consider the Defendant's loan for a modification, Plaintiff notified the Defendant by letter dated August 19, 2010, that her loan was not eligible for a modification because the net present value of her loan did not meet HAMP guidelines. (*Id.* ¶ 15, Exh. 3.) Finally, after Plaintiff reconsidered the Defendant for a modification in September 2010, Plaintiff notified Defendant that her loan was still ineligible for a modification under HAMP. (*Id.* ¶ 20, Exh. 4.) The evidence present clearly shows that Plaintiff effectively and regularly communicated with the Defendant concerning her eligibility under HAMP.

IV. Plaintiff properly determined that Defendant was not eligible for a modification under HAMP.

Even if Defendant had enforceable rights and standing under HAMP, the evidence shows that Plaintiff already determined that Defendant was not eligible for a modification under HAMP pursuant to HAMP guidelines.

a. The Net Present Value of Defendant's loan was insufficient to be eligible for a loan modification under HAMP.

In order to be eligible for a modification under HAMP, applicable guidelines provide that all loans must be evaluated using a standardized net present value ("NPV") calculation that compares the NPV result for a modification to the NPV result for no modification. *See* Making Home Affordable Program, *Handbook for Servicers of Non-*

GSE Mortgages, Version 3.0, p. 73 (as of Dec. 2, 2010), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf (emphasis added). A servicer is only required to offer a loan modification based on the NPV of a loan if the NPV is deemed "positive," meaning that the NPV result for a modification scenario is greater than the NPV result for no modification. In the case of the Defendant's Loan, the NPV was deemed insufficient under HAMP guidelines, and thus Plaintiff was not required to modify the Loan. (Herndon Aff. ¶¶ 12, 15.) As a result, Defendant was not eligible for a loan modification under HAMP.

b. The Defendant is ineligible for a HAMP modification because she failed to perform under the terms of the Trial Plan.

As set forth by Mr. Herndon, shortly after Plaintiff postponed the first scheduled foreclosure sale, it extended Defendant the Trial Plan. (Herndon Aff. ¶ 10.) Under the applicable guidelines, if a Defendant fails to make "current trial period payments," then the Defendant is not eligible for a permanent modification. *See* Making Home Affordable Program, *Handbook for Servicers of Non-GSE Mortgages*, Version 3.0, p. 78 (as of Dec. 2, 2010), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf. Defendant failed to submit the full balance of the third Trial Plan payment by September 2009, the month in which it was due, and thus, Defendant is ineligible for a modification under HAMP because she failed to meet the requirements of the Trial Plan.

V. Plaintiff was not required to postpone the September 7, 2010, foreclosure sale.

Regardless of Defendant's standing or other rights under HAMP, Plaintiff complied with the applicable guidelines concerning when a lender must suspend a scheduled foreclosure sale. HAMP guidelines provide:

> 3.3 Suspension of Scheduled Foreclosure Sale
>
> When a borrower submits a request for HAMP consideration after a foreclosure sale date has been scheduled and the request is received no later than midnight of the seventh business day prior to the foreclosure sale date (Deadline), the servicer must suspend the sale as necessary to evaluate the borrower for HAMP. **Servicers are not required to suspend a foreclosure sale when (1) a request for HAMP consideration is received after the Deadline; (2) a borrower received a permanent modification and lost good standing (as described in Section 9.4); (3) a borrower received a [Trial Period Plan] offer and failed to make one or more payments under the [Trial Period Plan] by the last day of the month in which it was due; or (4) a borrower was evaluated based on an Initial Package and determined to be ineligible under HAMP requirements.**

See Making Home Affordable Program, *Handbook for Servicers of Non-GSE Mortgages*, Version 3.0, p. 53 (as of Dec. 2, 2010), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf (emphasis added). Of the four reasons a servicer may refuse to postpone a sale, three are applicable in this case.

First, Defendant failed to submit a completed request for a loan modification at least seven business days prior to the third scheduled foreclosure sale. After the third foreclosure sale had been scheduled for September 7, 2010, Defendant against requested a loan modification. (Herndon Aff. ¶ 17.) Defendant's request for a modification was not considered complete until September 1, 2010, when Chase received all of the documents necessary to process her request for a loan modification, which was only four business days before the scheduled foreclosure sale. (*Id.* ¶ 17.) Because Chase received her request less than seven days before the scheduled foreclosure sale, Plaintiff was not required to suspend the foreclosure sale.

Second, Defendant failed to complete the Trial Plan offered to her by Chase, and thus, under the guidelines, Plaintiff was not required to suspend the scheduled foreclosure action. (*Id.* ¶ 11.) Third and finally, Chase had already considered the Defendant for a modification twice before, and had already postponed two prior foreclosure sales. (*Id.* ¶¶ 12-15.) Because Defendant had already been evaluated under HAMP and determined to be ineligible, Plaintiff was not required to suspend the final foreclosure sale.

VI. There is no evidence of fraud to warrant vacating the foreclosure orders and the foreclosure sale.

Defendant requests an Order setting aside the foreclosure sale and prior foreclosure orders on the basis of fraud, claiming that Plaintiff "represented to the Defendant in writing" and by telephone that the foreclosure sale scheduled for September 7, 2010, had been postponed. (Motion at 2.) However, Defendant failed to file an affidavit or any evidence in support of her motion and there is no factual evidence to support her claims. In contrast, Mr. Herndon's affidavit clearly explains the representations made to the Defendant by Chase, the servicer, concerning the September 7, 2010, sale. Once Chase had received a completed application for a loan modification, Chase informed the Defendant that it would <u>request</u> that the foreclosure sale be postponed. (Herndon Aff. ¶ 18.) Two days later, but still three days prior to the foreclosure sale, Chase informed Defendant that the foreclosure sale <u>had not</u> been postponed. (*Id.*) Thus, the evidence before the Court shows that Chase made no misrepresentations to the Defendant that the foreclosure sale had been postponed.

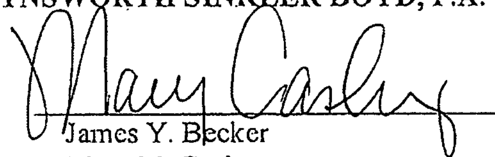
Moreover, the statements on which the Defendant relies could not be the basis for fraud. Statements concerning a future event—such as the postponement of a future event—cannot form the basis of fraud. Under South Carolina law, an allegedly

fraudulent representation "must relate to a **present or pre-existing fact** and it cannot ordinarily be based upon an unfulfilled promise to perform in the future or statements as to future events." *Bishop Logging Co. v. John Deer Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (1995) (emphasis added). "As a general rule, fraud cannot be predicated on a statement that constitutes an expression of an intention." *Osborn v. Univ. Med. Assocs.*, 278 F. Supp. 2d 720, 732 (D.S.C. 2003). Even if Defendant could prove that any representatives of Chase or Plaintiff promised her that the foreclosure sale would be postponed, such statements concern an intent or a future event, and are not fraud. Thus, the alleged misrepresentations cannot be the basis to set aside the foreclosure sale or prior orders.

CONCLUSION

Based on the foregoing, Plaintiff requests that the Court issue an order denying Defendant's motion and all of the relief she requests therein, and for such other relief as the Court finds just and proper.

HAYNSWORTH SINKLER BOYD, P.A.



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Attorneys for Plaintiff

March 14, 2011

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	DOCKET NO. 08-CP-39-2120
JPMorgan Chase Bank, National Association, Plaintiff, v. Vanessa Y. Bradley; Defendant(s).	AFFIDAVIT Deficiency Judgment Waived

(011671-01281)

To all Defendants: pursuant S.C. Supreme Court Order 2009-05-22-01, if you contest this affidavit, you have 10 days to serve a Counter-affidavit on Plaintiff s Counsel.

PERSONALLY appeared before me, the undersigned, who being duly sworn, states:

1. My name is Barbara Hindman. I am Vice President for the Plaintiff in the above-captioned case. I have personal knowledge of the facts set forth in this affidavit and am authorized to execute it on Plaintiff s behalf.

2. I have reviewed the Administrative Order of the South Carolina Supreme Court (2009-05-22-01) dated May 22, 2009.

3. The Plaintiff s servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program, but the subject loan is not eligible for modification because the HMP modification process has been completed without a modification.

4. Therefore, no mortgagor in this action is entitled to relief under the said Order.

Barbara Hindman (signature)
Barbara Hindman (print name)
As Vice President (title)

SWORN to before me this
12 day of May, 2010
Rose Hunter
Notary Public for the State of Florida
My Commission expires: ______________

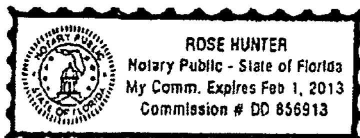
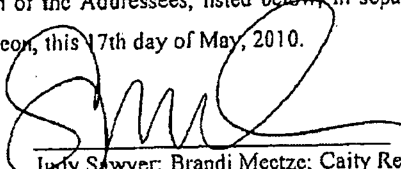

ROSE HUNTER
Notary Public - State of Florida
My Comm. Expires Feb 1, 2013
Commission # DD 856913

EXHIBIT 1

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	DOCKET NO. 08-CP-39-2120
JPMorgan Chase Bank, National Association, Plaintiff,	CERTIFICATE OF MAILING Deficiency Judgment Waived
v.	
Vanessa Y. Bradley; Defendant(s).	

(011671-01281)

I am an employee of the law offices of Rogers Townsend and Thomas, PC, attorneys for Plaintiff. I do hereby certify that I have mailed a copy of the Plaintiff's Affidavit for the Home Affordable Modification Program, which is attached hereto and incorporated herein by reference, dated May 12, 2010 and in connection with the above-referenced case, by mailing a copy of the same by United States mail, postage prepaid, to each of the Addressees, listed below, in separate envelopes, at each of their respective addresses shown thereon, this 17th day of May, 2010.



Judy Sawyer; Brandi Meetze; Caity Reichman;
Jennifer Edwards; Frankie Holmes-Able;
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Heather Cannon

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STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

JPMorgan Chase Bank, National Association,

Plaintiff,

v.

Vanessa Y. Bradley;

Defendant(s).

(011671-01281)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-39-2120

AFFIDAVIT IN SUPPORT OF SUPPLEMENTAL JUDGMENT
Deficiency Judgment Waived

Personally appeared, the undersigned, who being duly sworn, deposes and says:

I am one of the attorneys for the Plaintiff in the above captioned action. On March 17, 2009, a Judgment of Foreclosure and Sale was issued. Prior to the scheduled sales date, the Plaintiff began negotiations for a potential loss mitigation workout with the Defendants, Vanessa Y. Bradley. Unfortunately, the loss mitigation workout did not occur, and the Plaintiff wishes to proceed with the foreclosure and sale and to supplement the previous Judgment of Foreclosure and Sale to reflect the amount of payments, if any, made.

The following principal, interest and escrow/corporate advances which are secured by the mortgage being foreclosed, have been incurred to the date of hearing shown herein below (see also attached, as Exhibit "A", the itemized debt printout from the Plaintiff):

1. Amended judgment debt is as follows:

(a) Principal now due.. $94,185.23

(b) Interest from October 1, 2008 through June 30, 2010 at 6.875% per annum $11,331.60

(c) Advances (Escrow Advances, Corporate Charges including attorney fees, costs, and other charges previously paid).. $410.97

(d) Late Charges $0.00

(e) Additional Costs of collection since previous hearing.. $25.00

(f) Attorney's Fees.. $3,555.00

EXHIBIT 2

NEW TOTAL DEBT now secured by Note and Mortgage
including interest to date shown.. $109,507.80

The new total debt shall accrue interest hereafter at the rate of 6.875% per annum.

2. An affidavit asserting HMP non-eligibility was served on May 17, 2010. No counter affidavits have been received by Plaintiff's counsel in the above-captioned action.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

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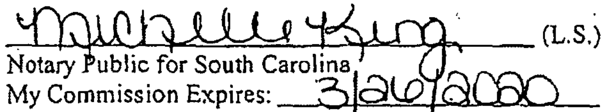
Kelsey K. Brockbank (SC Bar # 77519)
Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina

Sworn to before me this 21 day of June, 2010.



_______________ (L.S.)
Notary Public for South Carolina
My Commission Expires: 3/26/2020

PAY4 AS-OF 06/30/10 PAYOFF CALCULATION TOTALS 06/01/10 12:34:08

NAME VY BRADLEY CONTACT NAME VANESSA Y BRADLEY

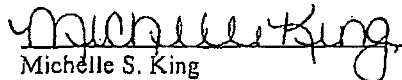
			----------- RATE CHANGES ----------		
PRINCIPAL BALANCE	94,185.23				
INTEREST 06/30/10	11,331.60	CALC	INT FROM	RATE	AMOUNT
PRO RATA MIP/PMI	.00		10/01/08	6.87500	11,331.60
ESCROW ADVANCE	1,301.72		07/01/10		
ESCROW BALANCE	.00				
SUSPENSE BALANCE	3,252.50-				
HUD BALANCE	.00				
REPLACEMENT RESERVE	.00				
RESTRICTED ESCROW	.00				
TOTAL-FEES	35.00				
ACCUM LATE CHARGES	.00				
ACCUM NSF CHARGES	.00				
OTHER FEES DUE	77.90				
PENALTY INTEREST	.00				
FLAT/OTHER PENALTY FEE	.00		TOTAL INTEREST		11,331.60
CR LIFE/ORIG FEE RBATE	.00		TOTAL TO PAYOFF		105,962.80
RECOVERABLE BALANCE	2,283.85	NUMBER OF COPIES: 1		PRESS PF1 TO PRINT	

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	DOCKET NO. 08-CP-39-2120
JPMorgan Chase Bank, National Association,	
Plaintiff,	CERTIFICATE OF MAILING Deficiency Judgment Waived
v.	
Vanessa Y. Bradley;	
Defendant(s).	

(011671-01281)

I, Michelle S. King, an employee of the law offices of Rogers Townsend and Thomas, PC, attorneys for Plaintiff, do hereby certify that I have served a copy of the Supplemental Order Post Judgment, which is attached hereto and incorporated herein by reference, dated June 17, 2010 and in connection with the above-referenced case, by mailing a copy of the same by United States mail, postage prepaid, to the below-listed parties in separate envelopes, at each of their respective addresses shown thereon, this 22 day of June, 2010.

Persons Served:
Vanessa Y. Bradley
454 Johnson Road
Central, SC 29630



Michelle S. King

STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS | CASE NO. 08-CP-39-2120

MOTION INFORMATION FORM AND COVER SHEET

JPMorgan Chase Bank, National Association ☑ Plaintiff
v.
Vanessa Y. Bradley; ☐ Defendant

Check box above indicating submitting party

name, S.C.Bar no. and address of plaintiff's attorney	name, S.C.Bar no. and address of Defendant's attorney
Samuel C. Waters (SC Bar #5958), Cheryl H. Fisher (SC Bar #15213), Reginald P. Corley (SC Bar #69453), Jennifer W. Rubin (SC Bar #16727), Ellie C. Floyd (SC Bar # 68635), Michael P. Morris (SC Bar #73560), Eve Moredock Stacey (SC Bar # 5300), Mary R. Powers (SC Bar #16534), Robert P. Davis (SC Bar # 74030), William S. Koehler (SC Bar# 74935); Kevin T. Hardy (SC Bar #76015); Benjamin J. Powell (SC Bar #77205); John P. Fetner (SC Bar # 77460); Kelsey K. Brockbank (SC Bar # 77519) 220 Executive Center Drive, Suite 109, Columbia, SC 29210 telephone: 803-744-4444 fax: 803-343-7013	telephone: fax: email: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☑ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPROSED ORDER/CONSENT ORDER (Complete SECTIONS II and III)**

SECTION I: Hearing Information

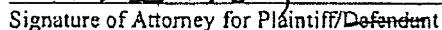
Nature of Motion: ____________________
Estimated Time Needed: Court Reporter Needed: YES/NO

SECTION II: Motion Fee

☑ PAID —AMOUNT: $ 25.00
☐ EXEMPT:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: ____________________
- ☐ Other:

SECTION III: Motion Type

☐ Written motion attached
☑ Form Motion —
I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for Plaintiff/~~Defendant~~ | June 17, 2010
Date submitted

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other

JUDGE
CODE: ____________ Date: ____________

CLERK'S VERIFICATION

Date Filed:

Collected by: ____________________
(print name)

☐ MOTION FEE COLLECTED: ____________________
☐ CONTESTED—AMOUNT DUE: ____________________

SCCA/233 (11/2003) 011671-01281

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

JPMorgan Chase Bank, National Association,

Plaintiff,

v.

Vanessa Y. Bradley;

Defendant(s).

(011671-01281)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-39-2120

AFFIDAVIT IN SUPPORT OF SECOND SUPPLEMENTAL JUDGMENT
Deficiency Judgment Waived

2010 AUG 20 A 8:56
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Personally appeared, the undersigned, who being duly sworn, deposes and says:

I am one of the attorneys for the Plaintiff in the above captioned action. On March 17, 2009, a Judgment of Foreclosure and Sale was issued. Prior to the scheduled sales date, the Plaintiff began negotiations for a potential loss mitigation workout with the Defendant, Vanessa Y. Bradley. A loss mitigation workout did not occur and a Supplemental Order Post Judgment was filed on June 29, 2010. Prior to the scheduled sales date, the Plaintiff entered into a forbearance agreement with the Defendant, Vanessa Y. Bradley. The defendant has now defaulted on the terms of the forbearance agreement, and thus the Plaintiff wishes to proceed with the foreclosure and sale and to supplement the previous Judgment of Foreclosure and Sale to reflect the amount of payments, if any, made.

The following principal, interest and escrow/corporate advances which are secured by the mortgage being foreclosed, have been incurred to the date of hearing shown herein below (see also attached, as Exhibit "A", the itemized debt printout from the Plaintiff):

1. Amended judgment debt is as follows:

(a) Principal now due $94,185.23

(b) Interest from October 1, 2008 through August 31, 2010 at 6.875% per annum $12,410.80

(c) Advances (Escrow Advances, Corporate Charges including attorney fees, costs, and other charges previously paid) $804.30

(d) Allowable Late Charges $0.00

(e) Additional Costs of collection since previous hearing $25.00

(f) Attorney's Fees $3,385.00

EXHIBIT 3

NEW TOTAL DEBT now secured by Note and Mortgage
including interest to date shown.. $110,810.33

The new total debt shall accrue interest hereafter at the rate of 6.875% per annum.

2. An affidavit asserting HMP non-eligibility was served on May 17, 2010. No counter affidavits have been received by Plaintiff's counsel in the above-captioned action.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635) Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey(SC Bar # 5300)Mary R. Powers (SC Bar#16534)
Robert P. Davis (SC Bar # 74030) Shawn R. Willis (SC Bar # 71155)
William S. Koehler (SC Bar# 74935) Kevin T. Hardy (SC Bar #76015)
Benjamin J. Powell (SC Bar #77205) John P. Fetner (SC Bar # 77460)
Kelsey K. Brockbank (SC Bar # 77519)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

Columbia, South Carolina

Sworn to before me this 11 day of August, 2010.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 3/20/2020

PAY4 AS-OF 08/31/10 PAYOFF CALCULATION TOTALS 08/09/10 12:57:28

NAME VY BRADLEY CONTACT NAME VANESSA Y BRADLEY

			----------- RATE CHANGES ----------		
PRINCIPAL BALANCE	94,185.23				
INTEREST 08/31/10	12,410.80	CALC	INT FROM	RATE	AMOUNT
PRO RATA MIP/PMI	.00		10/01/08	6.87500	12,410.80
ESCROW ADVANCE	1,301.72		09/01/10		
ESCROW BALANCE	.00				
SUSPENSE BALANCE	3,252.50-				
HUD BALANCE	.00				
REPLACEMENT RESERVE	.00				
RESTRICTED ESCROW	.00				
TOTAL-FEES	95.00				
ACCUM LATE CHARGES	.00				
ACCUM NSF CHARGES	.00				
OTHER FEES DUE	77.90				
PENALTY INTEREST	.00				
FLAT/OTHER PENALTY FEE	.00		TOTAL INTEREST		12,410.80
CR LIFE/ORIG FEE RBATE	.00		TOTAL TO PAYOFF		107,495.33
RECOVERABLE BALANCE	2,677.18	NUMBER OF COPIES: 1		PRESS PF1 TO PRINT	

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

JPMorgan Chase Bank, National Association,

Plaintiff,

v.

Vanessa Y. Bradley;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-39-2120

CERTIFICATE OF MAILING
Deficiency Judgment Waived

(011671-01281)

I, Michelle S. King, an employee of the law offices of Rogers Townsend and Thomas, PC, attorneys for Plaintiff, do hereby certify that I have served a copy of the Supplemental Order Post Judgment, which is attached hereto and incorporated herein by reference, dated August 11, 2010 and in connection with the above-referenced case, by mailing a copy of the same by United States mail, postage prepaid, to the below-listed parties in separate envelopes, at each of their respective addresses shown thereon, this 13 day of August, 2010.

Persons Served:
Vanessa Y. Bradley
454 Johnson Road
Central, SC 29630

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2010 AUG 20 A 8: 56

Michelle S. King

LEXSEE 2010 U.S. DIST. LEXIS 61489

Andrea Marks, Plaintiff, vs. BANK OF AMERICA, N.A.; a foreign corporation, FEDERAL NATIONAL MORTGAGE ASSOCIATION dba Fannie Mae, a Federally Chartered Corporation, Black Corporations 1-5, White Partnerships 1-5, John Does 1-5 and Jane Does 1-5, Defendant.

No. 03:10-cv-08039-PHX-JAT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2010 U.S. Dist. LEXIS 61489

June 21, 2010, Decided
June 22, 2010, Filed

COUNSEL: [*1] For Andrea Marks, a single woman, Plaintiff: Lisa Jeanette Counters, The Counters Firm, Maricopa, AZ.

For Bank of America, N.A., a foreign corporation, Federal National Mortgage Association, a Federally Chartered Corporation doing business as Fannie Mae, Defendants: Ann-Martha Andrews, David Winthrop Cowles, Emily Snow Cates, Lewis & Roca LLP, Phoenix, AZ.

JUDGES: James A. Teilborg, United States District Judge.

OPINION BY: James A. Teilborg

OPINION

ORDER

Plaintiff Andrea Marks argues that Defendant Bank of America N.A. ("Defendant") breached an agreement with the U.S. Treasury in which she was a third-party beneficiary. Plaintiff argues that Defendant did not fulfill contractual obligations per the Home Affordable Modification Program ("HAMP") Guidelines. As such, Plaintiff maintains that a suspension of any foreclosure or trustee's sale pending disposition of her request is mandated. (Pl. Amended Complaint P 21). Pending before the Court is Defendant's Rule 12(b)(6) Motion to Dismiss. (Doc. # 15). For the reasons that follow, the Court dismisses Plaintiff's complaint with prejudice.

I. Background

Plaintiff's property ("the Property") is located in Prescott Valley, Arizona. (Pl. Amended Complaint P 1). Plaintiff financed [*2] the purchase of the Property with funds underwritten or otherwise backed by Defendant Fannie Mae. (Pl. Amended Complaint P 2). Defendant Bank of America N.A. ("Defendant") is now servicing loans formerly owned by Countrywide Mortgage as a result of Defendant's acquisition of Countrywide Mortgage. (Pl. Amended Complaint P 6).

On August 17, 2009, Plaintiff retained New York Financial to assist her in submitting an application to Defendant for a loan modification under HAMP. (Pl. Amended Complaint P 8). Plaintiff submitted her application on October 2, 2009. (Pl. Amended Complaint P 9). Defendant advised her that Plaintiff qualified for assistance and modification of her loan. (*Id.*). Defendant informed Plaintiff that her mortgage payment would be reduced by almost fifty percent. (*Id.*). Plaintiff accepted the offer and requested the loan modification paperwork. (*Id.*). Plaintiff offered to make a payment and Defendant sought to obtain the modified payment from Plaintiff; however, Defendant was unable to process the payment. (*Id.*). Defendant advised her to send the payment with the signed loan modification documents she would receive within two weeks. (*Id.*).

Plaintiff waited for loan documents [*3] for two weeks. (Pl. Amended Complaint P 11). Defendant then informed Plaintiff that "there could be more delay in getting the paper work for her signature." (*Id.*). During a November 2009 call between Plaintiff and Defendant, Defendant told Plaintiff it had "45 days to get the paper-

work" to her. (Pl. Amended Complaint P 12). Two weeks later, Defendant advised Plaintiff that the foreclosure date had been "pushed back" and that the paperwork delay seemed to be some sort of a "bank error" that would be corrected. (Pl. Amended Complaint P 12-13).

In January 2010, Defendant foreclosed the Property and initiated a Forcible Entry and Detainer action. (Pl. Amended Complaint P 16).

II. Legal Standard

To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the requirements of *Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2)* requires a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the defendant has a "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).*

Although a complaint attacked for failure [*4] to state a claim does not need detailed factual allegations, the pleader's obligation to provide the grounds for relief requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal citations omitted). The factual allegations of the complaint must be sufficient to raise a right to relief above a speculative level. *Id. Rule 8(a)(2)* "requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, pp. 94, 95 (3d ed. 2004)).

The Rule 8 pleading standard demands more than "an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 555*). A complaint that offers nothing more than naked assertions will not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, if accepted [*5] as true, states a claim to relief that is "plausible on its face." *Iqbal, 129 S.Ct. at 1949.* Facial plausibility exists if the pleader pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Plausibility does not equal "probability," but plausibility requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citing *Twombly, 550 U.S. at 557*).

In deciding a motion to dismiss under *Rule 12(b)(6)*, the Court must construe the facts alleged in the complaint in the light most favorable to the drafter [1] of the complaint and the Court must accept all well-pleaded factual allegations as true. *See Schwarz v. U.S., 234 F.3d 428, 435 (9th Cir. 2000).*

> 1 Given the procedural posture of the case and the pending Motion, the Court must construe the facts alleged in the Amended Complaint in the light most favorable to Plaintiff.

III. Analysis

In support of Defendant's Motion to Dismiss, Defendant argues that Plaintiff [*6] does not have: (1) standing to bring a suit for breach of contract; (2) an express, private right of action to sue for a violation of the HAMP; and (3) an implied, private right of action to sue for a violation of the HAMP. Based on the following reasons, the Court grants Defendant's Motion to dismiss with prejudice.

A. No Standing to State a Claim for Breach of Contract

Plaintiff attempts to sue on an agreement between Defendant and the U.S. Department of Treasury as a third-party beneficiary. [2] (Doc. # 1-2, p. 5-6). Defendant maintains that Plaintiff lacks standing to make a breach of contract claim because Plaintiff is not an intended beneficiary. (Doc. # 15, p.1, 4-6). The Court agrees with Defendant and finds that Plaintiff lacks standing to bring suit for breach of contract because Plaintiff is, at most, an incidental beneficiary.

> 2 Plaintiff has not provided the Court with a copy of the agreement referred to in Plaintiff's Amended Complaint (Doc. # 1-2) or in Plaintiff's Response to Defendant's Motion to Dismiss (Doc. # 23).

In order to present a claim for breach of contract, a plaintiff must allege the formation of a contract, its breach, and damages. *E.g., Chartone, Inc. v. Bernini, 207 Ariz. 162, 83 P.3d 1103, 1111 (Ariz. App. 2004).* [*7] Before a third party can present a claim for breach of contract, they must show that the contract was made for their direct benefit--that they are an intended beneficiary of the contract. *Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 2000).* The Ninth Circuit defines third party beneficiaries as:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Id at 1211. (citing the *RESTATEMENT (SECOND) OF CONTRACTS § 302* (1979)). "To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Klamath, 204 F.3d at 1211.*

"One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention [*8] to confer a right on him or her." *Id.* (citing RESTATEMENT OF CONTRACTS § 302(1)(b) cmt. d.). Under the HAMP, a qualified borrower would not be reasonable in relying on an agreement between a participating servicer and the U.S. Department of Treasury as manifesting an intention to confer a right on the borrower because the agreement does not *require* that the participating servicer modify eligible loans. [3] *Escobedo, 2009 U.S. Dist. LEXIS 117017, 2009 WL 4981618, *3.* Even Fannie Mae, which has rights under the Agreement, cannot force a participating servicer to make a particular loan modification. *Id.* Fannie Mae can take steps against a participating servicer, but cannot impose a modification. *Id.* Thus, a borrower could not require the servicer to make any particular loan modification under the HAMP Agreement.

> 3 The agreement in *Escobedo* set forth Home Affordable Modification Program Guidelines. The Guidelines set forth eligibility requirements and state: "[P]articipating servicers are required to consider all eligible loans under the program guidelines unless prohibited by the rules of the applicable PSA and/or other investor servicing agreements." *Escobedo v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 117017, 2009 WL 4981618, at *3 (S.D. Cal. 2009).*

Furthermore, [*9] the Ninth Circuit has held that parties who benefit from government contracts are generally assumed to be incidental beneficiaries, and may not enforce the contract absent *clear intent* to the contrary. *Klamath, 204 F.3d 1206, 1210-11 (9th Cir. 2000)* (emphasis added). *See* RESTATEMENT OF CONTRACTS § 313(cmt. a) ("governmental contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested."). *See also County of Santa Clara v. Astra USA, Inc., 588 F.3d 1237, 1244 (9th Cir. 2009)* (outlining the difficulty of demonstrating third-party beneficiary status in the context of government contracts).

"Clear intent" is not shown "by a contract's recitation of interested constituencies, [v]ague, hortatory pronouncements, statement[s] of purpose, explicit reference to a third party or even a showing that the contract 'operates to the [third parties'] benefit and was entered into with [them] in mind." *County of Santa Clara, 588 F.3d at 1244* (internal quotations and citations omitted). Instead, the contract's precise language must demonstrate a clear intent to rebut the presumption that the plaintiff is an incidental [*10] beneficiary. *Id.*

For example, in *Klamath* the Ninth Circuit held that although a contract between the United States and a dam operator operated to the irrigators' benefit and was "undoubtedly entered into with the irrigators in mind," nothing in the contract evinced an intention of the parties to the contract to grant the irrigators enforceable rights. *204 F.3d at 1211-12.* As the Ninth Circuit explained, "[T]o allow them intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract." *Id. at 1212.*

By applying the *Klamath* reasoning, the *Escobedo* court found that the Plaintiff was an incidental beneficiary of the HAMP agreement. *Escobedo, 2009 U.S. Dist. LEXIS 117017, WL 4981618, at *2-3.* As such, the court denied plaintiffs' cause of action for breach of contract under the HAMP agreement. *Id.* The court reasoned that the agreement between Countrywide Home Loans and the U.S. Treasury was entered into in part for the benefit of qualified borrowers, but the language of the contract does not show that the parties intended to grant qualified borrowers the right to enforce the agreement. *2009 U.S. Dist. LEXIS 117017, [WL] at *2. See Villa v. Wells Fargo Bank N.A., 2010 U.S. Dist. LEXIS 23741, 2010 WL 935680, at *3 (S.D. Cal. 2010).*

Even [*11] though one District Court in California allowed Plaintiff to proceed with a breach of contract claim, that Plaintiff had plead sufficient facts to plausibly support his third-party beneficiary theory by identifying the contract at issue and attaching a copy of the contract to his complaint. *Reyes v. Saxon Mortgage Servs., 2009 U.S. Dist. LEXIS 125235, 2009 WL 3738177 (S.D. Cal. 2009).* However, another District Court recently noted that, "although the overall HAMP program undoubtably

has a goal of assisting homeowners, the HAMP Agreement *does not express any intent to grant borrowers a right to enforce the HAMP contract* between the government and loan servicer." *Benito v. Indymac Mortgage Serv., 2010 U.S. Dist. LEXIS 51259, 2010 WL 2130648, *7 (D. Nev. 2010)* (emphasis added).

Here, Defendant was not obligated to modify Plaintiff's loan. As a result, the Agreement does not grant Plaintiff the *right* to enforce the provisions of the agreement. Because Defendant was not required to admit or deny Plaintiff's loan, only to *consider*, Plaintiff could not have been reasonably believed that Defendant was obligated to modify her loan.

In addition, Plaintiff is not an intended beneficiary. If the Court were to grant Plaintiff third-party beneficiary status, [*12] the Court would be opening the door to potentially 3-4 million homeowners filing individual claims. *See Villa, 2010 U.S. Dist. LEXIS 23741, 2010 WL 935680, at *1* (stating that the breadth and indefiniteness of a class of beneficiaries is entitled to some weight in negating the inference of intended beneficiary status). Allowing such a large number of potential plaintiffs clearly contravenes the purpose of the HAMP as an administrative tool to effectuate the goals of the EESA. *Williams v. Geithner, 2009 U.S. Dist. LEXIS 104096, 2009 WL 3757370, *2 (D. Minn. 2009)*. Also, permitting these individual claims would undermine Freddie Mac's role as the compliance officer for the HAMP. U.S. Dep't of Treasury, Supplemental Directive 2009-08, at 4 (Nov. 3, 2009). [4]

4 For further discussion, see *infra* II.B.

As in *Klamath* and *Escobedo*, Plaintiff is an incidental beneficiary to a governmental contract between Defendant and the U.S. Treasury. Plaintiff claims that the contract was intended to benefit homeowners like her. However, Plaintiff's claim does not plausibly meet the requisite "clear intent" standard. While the intent of the HAMP might be to benefit qualified borrowers, statements of purpose are not enough to defeat the presumption against intended [*13] beneficiaries under government contracts. Rather, Plaintiff is an incidental beneficiary because there is no clear intent to the contrary.

Because Plaintiff is not an intended beneficiary of the agreement between Defendant and the U.S. Dept. of Treasury, Plaintiff does not have standing to sue for a breach of contract claim. As such, the Court grants Defendant's Motion to Dismiss.

B. No Express Private Right of Action Exists Under HAMP.

Furthermore, Plaintiff's allegations regarding breach of contract are simply an attempt at enforcing a private right of action under HAMP. *See Aleem v. Bank of Am., N.A., 2010 U.S. Dist. LEXIS 11944, 2010 WL 532330, *4 (C.D. Cal. 2010)*. *See also Ung v. GMAC Mortg., 2009 U.S. Dist. LEXIS 115900, 2009 WL 2902434, *9-11 (C.D. Cal. 2009)* (dismissing, with prejudice, TARP-based claims pled as the basis for state law claims). Plaintiff's arguments under HAMP refer to recently enacted and rapidly evolving areas of legislative and administrative action. Below, the Court provides the requisite history to explain that an express right to sue fund recipients, like Defendant, does not exist under the HAMP. *See id.*

On October 8, 2008, President Bush signed into law the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 [*14] (codified *12 U.S.C. § 5201 et seq.*) ("EESA"). Section 109 required the Secretary of the Treasury ("the Secretary") to take certain measures in order to encourage and facilitate loan modifications. *12 U.S.C. § 5219*. However, Section 109 did not create any private right of action against servicers for grievances relating to the EESA. *Ramirez v. Litton Loan Serv., LP, 2009 U.S. Dist. LEXIS 52484, 2009 WL 1750617, *1 (D. Ariz. 2009)*; *Barrey v. Ocwen Loan Serv., LLC, 2009 U.S. Dist. LEXIS 109848, 2009 WL 1940717, *1 (D. Ariz. 2009)*.

The EESA authorizied the Secretary of the Treasury, FHFA, Fannie Mae, and Freddie Mac to create the Making Home Affordable Program on February 18, 2009, which consists of two componets: (1) the Home Affordable Refinance Program, and (2) the HAMP. *Williams, 2009 U.S. Dist. LEXIS 104096, 2009 WL 3757370, *2*. The HAMP aims to financially assist three to four million homeowners who have defaulted on their mortgages or who are in imminent risk of default by reducing monthly payments to sustainable levels.

The HAMP works by providing financial incentives to participating mortgage servicers to modify the terms of eligible loans. On March 4, 2009, the Secretary issued guidelines under the HAMP requiring lenders to consider borrowers for loan modifications [*15] and suspend foreclosure activities while a given borrower was being evaluated for a modification. U.S. Dep't of the Treasury, Home Affordable Modification Program Guidelines (Mar. 4, 2009). [5]

5 The HAMP guidelines are available at http://www.ustreas.gov/press/releases/reports/modification_program_guidelines.pdf (last visited on June 15, 2010).

Per designation by the Secretary, Freddie Mac serves as compliance officer for the HAMP. U.S. Dep't of Treasury, Supplemental Directive 2009-08, at 4 (Nov. 3, 2009). [6] The HAMP requires mortgagees to collect,

retain, and transmit mortgagor and property data to Freddie Mac in order to ensure compliance with the program. *See* Supplemental Directive 2009-01, at 13-14, 19-21 (Apr. 6, 2009); Supplemental Directive 2009-06 (Sept. 11, 2009). As the compliance agent, Freddie Mac is charged with conducting "independent compliance assessments" including "evaluation of documented evidence to confirm adherence . . . to HAMP requirements" such as the evaluation of borrower eligibility. Supplemental Directive 2009-01, at 25-26.

6 Supplemental Directives cited herein are available at www.hmpadmin.com/portal/programs/hamp/servicer.html [*16] (last visited on June 15, 2010).

Nowhere in the HAMP Guidelines, nor in the EESA, does it expressly provide for a private right of action. Rather, Congressional intent expressly indicates that compliance authority was delegated solely to Freddie Mac. By delegating compliance authority to one entity, Freddie Mac, Congress intended that a private cause of action was not permitted. *See Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 865 (4th Cir. 2001).* (reiterating that "the doctrine of *expressio unis est exclusio alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded.").

Because Plaintiff is precluded from asserting a private cause of action under the HAMP, even disguised as a breach of contract claim, Defendant's Motion to Dismiss is warranted.

2. No Implied Right of Action under the HAMP

In addition to not expressly intending a private cause of action, the Court will not imply a right of action under the HAMP either.

"In the absence of clear evidence of congressional intent, [a court] may not usurp the legislative power by unilaterally creating a cause of action." *In re Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1230-31 (9th Cir. 2008).* [*17] Thus, to determine whether a federal statute was intended to create a private cause of action, the Supreme Court requires consideration of the following four factors: (1) whether the plaintiff is "one of the class for whose especial benefit the statute was enacted--that is, [whether] the statute create[s] a federal right in favor of the plaintiff"; (2) whether "there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether the cause of action is "consistent with the underlying purposes of the legislative scheme"; and (4) whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* (quoting *Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)).*

First, Plaintiff is not one of the class for whose "especial benefit" the HAMP was enacted. While Plaintiff may be a part of a class of homeowners whom EESA and HAMP are *intended to benefit*, the statute sweeps much more broadly than their "especial benefit." These statutes are addressed to large-scale economic phenomena affecting not only [*18] distressed homeowners, but also financial institutions and homeowners at large. The statutes alter the mechanics of home foreclosure in an effort to stem the downward spiral of home prices as a national phenomenon. The economic stimulus effort attempts to promote the welfare of foreclosure parties generally, but it does not connote the power to delay foreclosures.

Second, legislative intent does not create a cause of action under the HAMP. The HAMP eases restrictions on lenders and servicers and encourages loan modifications. *12 U.S.C. § 5219.* Specifically, the HAMP was intended to effectuate the goals of the EESA. *Williams, 2009 U.S. Dist. LEXIS 104096, 2009 WL 3757370, *2.* In addition, legislative history indicates that the right to initiate a cause of action lies with the Secretary via the Administrative Procedure Act. 7 Allowing the Plaintiff to assert a private cause of action would contravene clear legislative intent. *See Alexander v. Sandoval, 532 U.S. 275, 290, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)* (stating that the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others).

7 Under the Administrative Procedure Act ("APA"), any judicial review would be limited due to the strictures [*19] of the delegating statute, the EESA, in addition to rule and adjudication guidelines set forth under the APA. *See 12 U.S.C. § 5229(a); 5 U.S.C. §§ 553, 554, 556,* and *706.*

Next, Plaintiff's proposed cause of action would not further the underlying legislative scheme. As previously mentioned, Freddie Mac was designated as the compliance officer. As such, the enforcement of the modification program is contemplated only from the top down. Furthermore, the HAMP Guidelines already impose extensive data reporting requirements on servicers. *See* Supplemental Directive 2009-01, at 13-14, 19-21. Plaintiff's cause of action would not further the legislative intent because the HAMP Guidelines already designated a scheme to correct for any mortgagee wrongdoing.

Last, loan modification requirements for pending foreclosure proceedings, are generally relegated to state

law. Real property interests and contract rights are paradigms of state law concern. In Arizona, the courts have already expressly rejected the suggestion that EESA creates a private right of action against lenders. *See Ramirez, 2009 U.S. Dist. LEXIS 52484, 2009 WL 1750617, at *1*; *Barrey, 2009 U.S. Dist. LEXIS 109848, 2009 WL 1940717, at *1*. Because the HAMP is the *administrative* program to accomplish [*20] the EESA's goals, a private right of action is clearly precluded.

Because Plaintiff's claim fails to meet the requisite four factors to allow for an implied private right of action, the Court finds that Defendant's Motion to Dismiss with prejudice is further warranted.

C. Quiet Title

Plaintiff's quiet title claim is based on the claim for breach of contract as explained above. Since that claim fails, Plaintiff's quiet title claim also fails.

D. Declaratory and Injunctive Relief

Plaintiff's claim for declaratory and injunctive relief is also based on the claim for breach of contract. Again, since the claim for breach of contract fails, Plaintiff's claim for declaratory and injunctive relief also fails.

IV. Conclusion

Because Plaintiff is an incidental and not an intended beneficiary, Plaintiff lacks standing to bring a suit for breach of contract. Furthermore, Plaintiff does not have an express or implied private right of action to sue for violations of the HAMP.

Accordingly,

IT IS ORDERED that Defendant's 12(b)(6) Motion to Dismiss (Doc. # 15) is granted with prejudice.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly and close this case.

DATED this 21st day [*21] of June, 2010.

/s/ James A. Teilborg

James A. Teilborg

United States District Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes, Special Referee

Case No. 2008-CP-39-2120

JPMorgan Chase Bank, National Association, Respondent,

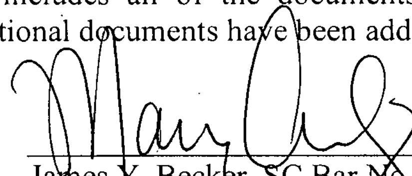
v.

Vanessa Y. Bradley,

Appellant.

CERTIFICATE OF COUNSEL

As Legal Counsel for the Respondent, I do hereby certify that the Appendix to Record on Appeal includes all of the documents agreed to be included by the parties and no additional documents have been added.



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September 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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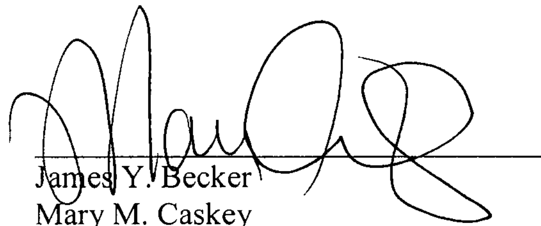
PROOF OF SERVICE

I, Mary M. Caskey, an attorney with Haynsworth Sinkler Boyd, P.A., counsel for Respondent JPMorgan Chase Bank, National Association, hereby certify that on September 27, 2012, I served the Appendix to Record on Appeal in the above-referenced matter on the Appellant, Vanessa Y. Bradley, by mailing a copy of the same, by United States Mail, postage prepaid, and addressed to counsel of record as follows:

Susan Ingles, Esq.
South Carolina Legal Services
701 South Main St.
Greenville, SC 29601

[signatures on following page]



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September 27, 2012