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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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8 Lincoln W. Thomasson and Tracy L.)
Thomasson, husband and wife,)

No. CV 10-08192 PCT-MHB

9

Plaintiffs,)

ORDER

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vs.)

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12 First Horizon Home Loans, Metlife Home)
Loans, Loancare, Servicelink, Quality)
13 Loan Service Crop., McCarthy Holthus)
Levine, Federal Home Loan Mortgage)
14 Corporation (Freddie Mac), its assignees)
and/or Successors and Red White and Blue)
15 Enterprises 1-10, inclusive,)

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Defendants.)

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This matter comes before the Court on consideration of a Motion to Dismiss filed by Defendants LoanCare, ServiceLink, Quality Loan Service Corporation, and McCarthy, Holthus & Levine (hereinafter, the “Defendants”) on November 23, 2010 (Doc. 23). Plaintiffs have filed a Response to Defendants Answer and Motion for Judgment on the Pleadings (Doc. 51) and Defendants have filed a Reply (Doc. 54). The request for oral argument will be denied because the parties have fully briefed the issues and oral argument will not aid in the Court’s decision. See Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998); Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp., 933 F.2d 724, 729 (9th Cir. 1991).

1 **BACKGROUND**

2 On October 12, 2010, Plaintiffs filed a 51-page Amended Complaint against Defendants, and
3 other entities (Doc. 3). Defendants seek dismissal of the following causes of action set forth
4 in the Complaint: Count 3, against Defendant Quality Loan Service Corporation for breach
5 of contract (Id., at 29), Count 4, against Defendant LoanCare for breach of contract (Id., at
6 31), Count 5, against Defendant ServiceLink for breach of contract (Id., at 33), Count 6,
7 against Defendant McCarthy Holthus Levine for breach of contract (Id., at 35), Count 11,
8 against Defendant Quality Loan Service Corporation, for beach of the covenant of good faith
9 and fair dealing (Id., at 43), Count 12, against Defendant LoanCare for breach of the
10 covenant of good faith and fair dealing (Id., at 44), and Count 13, against Defendant
11 ServiceLink for breach of covenant of good faith and fair dealing (Id., at 45).

12 Defendant LoanCare is a loan processing company; Defendant ServiceLink is a loan
13 servicing company; Defendant Quality Loan Service Corp., is a foreclosure processing
14 company; and McCarthy Holthus Levine, are attorneys at law, and serves as an agent for
15 Freddie Mac. (Doc. 3, ¶¶ 3-4.)

16 Plaintiffs allege in their complaint, as is pertinent here, that they refinanced the 2001
17 purchase of their residence with a mortgage loan from Horizon Home Loans. (Doc. 3, ¶62.)
18 In November, 2009, Plaintiffs defaulted on their mortgage. (Id., ¶ 65.) In March, 2010, they
19 contacted their mortgage servicer, First Horizon Home Loans/MetLife Home Loans
20 (hereinafter “First Horizon”) to ask for a loan modification. (Id., ¶ 67.) On April 13, 2010,
21 a loan modification packet was received by Defendant LoanCare. (Id., ¶ 68.) Plaintiffs then
22 received a Home Affordable Modification Program (“HAMP”) packet, and were considered
23 by First Horizon for the HAMP program. (Id., ¶¶69-70.) On May 14, 2010, First Horizon
24 advised Plaintiffs that they were being considered for the HAMP program. (Id., ¶ 70.)
25 Although Plaintiff acknowledge that they were never notified of a denial of consideration,
26 Plaintiffs “surmise that they were never considered.” (Id., ¶10, FN2.)

27 As a result of the economic downturn in the United States, and the resulting rise in
28 home foreclosures, HAMP was launched by the Obama Administration, as part of the

1 Troubled Asset Relief Program (“TARP”), to stem the escalating tide of home foreclosures.
2 (Doc. 3, ¶ 5.) On May 5, 2010, First Horizon as a participating servicer with Freddie Mac
3 entered into a HAMP agreement. (Id., ¶ 7.) Plaintiffs allege that they met the HAMP
4 eligibility criteria to have their mortgage reviewed for modification. (Id., ¶ 8) (Id., ¶ 10.a.)

5 On June 17, 2010, Plaintiffs received notification from Defendant Quality Service
6 Corporation that a trustee sale of their home would be conducted, and on July 26, 2010,
7 Plaintiffs received relocation assistance letter from Defendant McCarthy Holthus Levine.
8 (Doc. 3, ¶¶ 71-72.) On August 6, 2010, Plaintiffs received an eviction notice. (Id., ¶ 73.)
9 On August 14, 2010, Plaintiffs were advised by Defendant ServiceLink that it no longer had
10 access to Plaintiffs’ file or information. A forcible detainer action was instituted and on
11 September 10, 2010, the detainer was upheld in the Arizona Superior Court to remove
12 Plaintiffs from their home. (Id., ¶¶ 75-76.)

13 STANDARD OF REVIEW

14 A complaint must contain;

15 “(1) a short and plain statement of the grounds for the court’s jurisdiction,
16 unless the court already has jurisdiction and the claim needs no new
17 jurisdictional support;
18 (2) a short and plain statement of the claim showing that the pleader is entitled
19 to relief; . . .”

Fed. R. Civ. P. 8(a).

“Pleadings must be construed to do justice.” Fed. R. Civ. P. 8(e).

20 These pleading requirements are to be liberally construed. Swierkiewicz v. Sorema,
21 N.A., 534 U.S. 506 (2002). The purpose of notice pleading is to “give the defendant fair
22 notice of what the plaintiff’s claim is and the grounds upon which it rests.” In re Marino, 37
23 F.3d 1354, 1357 (9th Cir. 1994). A Rule 12(b)(6) dismissal for failure to state a claim can be
24 based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support
25 a cognizable legal claim. See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir.
26 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

27 All allegations of material fact are taken as true and construed in the light most
28 favorable to the plaintiff. See Smith v. Jackson Terrier Network of N. Cal. v. Am. Kennel

1 Club, Inc., 507 F.3d 1027, 1035 (9th Cir. 2005). Though the complaint need not contain
2 detailed factual allegations, the factual allegations must be enough to raise the claimed right
3 to relief above the speculative level and to create a reasonable expectation that discovery will
4 reveal evidence to support the claim. Bell Atlantic Corp. v. Twombly 550 U.S. 544 (2007).
5 In addition, the court must assume that all general allegations “embrace whatever specific
6 facts might be necessary to support them.” Pelozza v. Capistrano Unified Sch. Dist., 37 F.3d
7 517, 521 (9th Cir.1994). Similarly, legal conclusions couched as factual allegations are not
8 given a presumption of truthfulness, and “conclusory allegations of law and unwarranted
9 inferences are not sufficient to defeat a motion to dismiss.” Pareto v. F.D.I.C., 139 F.3d 696,
10 699 (9th Cir.1998). To survive a motion to dismiss, a complaint must contain sufficient
11 factual matter, which, if accepted as true, states a claim to relief that is “plausible on its face.”
12 Ashcroft v. Iqbal, —U.S. —, —, 129 S.Ct. 1937, 1949 (2009). The issue is not whether the
13 plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to
14 support the claims. See Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir.
15 1997).

16 **DISCUSSION**

17 Defendants assert that Plaintiffs have no standing to assert the claims against
18 Defendants based upon the “HAMP contract between Defendants First Horizon . . . and
19 Freddie Mac.” (Doc. 3, ¶18.) Defendants argue, that even if such a contract exists, Plaintiffs
20 are not parties to the contract, nor are they third party beneficiaries. (Doc. 23, at 3.)
21 Plaintiffs do not dispute that they are not parties to the contract, but argue that they are
22 “intended third party beneficiar[ies]” to the HAMP agreement. (Doc. 51, at 1.)

23 In order to recover as a third party under a contract, the party must show that the
24 contract was made for its direct benefit, i.e., that it is an intended beneficiary of the contract.
25 Klamath Water Users Protective Ass’n v. Patterson, 204 F.3d 1206 (9th Cir. 2000). In
26 Klamath, the Ninth Circuit defines third party beneficiaries as follows:

27 (1) Unless otherwise agreed between promisor and promisee, a beneficiary of
28 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

1 ... (b) the circumstances indicate that the promisee intends to give the
2 beneficiary the benefit of the promised performance.

3 (2) An incidental beneficiary is a beneficiary who is not an intended
4 beneficiary.

5 Id., at 1211.

6 To establish third party beneficiary rights, a party must show that the contract “reflects the
7 express or implied intention of the parties to the contract to benefit the third party.” Id.

8 The Court, in Hoffman v. Bank of America, 2010 WL 2635773 (N.D.Cal. 2010),
9 specifically found that borrowers are not third party beneficiaries under the HAMP servicers
10 agreement. In that case, the plaintiff had sought a preliminary injunction to enjoin
11 defendants from foreclosing on his residence. The Court cited numerous cases “weighing
12 decisively in favor of defendant,” that held that a borrower is not a third party beneficiary of
13 the HAMP agreement, and also noted that “[a]s many courts have recognized, it would be
14 unreasonable for a qualified borrower seeking a loan modification to rely on the HAMP
15 servicer’s agreement as granting him enforceable rights since the agreement does not actually
16 require that the servicer modify all eligible loans, nor does any of the other language of the
17 contract demonstrate that the borrowers are intended beneficiaries.” Hoffman, 2010 WL *3-
18 4. Accord, Marks v. Bank of America, N.A., 2010 WL 2572988 *5 (D.Ariz. 2010)
19 (“plaintiff’s claim did not meet the requisite ‘clear intent’ standard, and that [w]hile the intent
20 of the HAMP might be to benefit qualified borrowers, statements of purpose are not enough
21 to defeat the presumption against intended beneficiaries under government contracts”);
22 Schwartz v. Chase Home Finance, LLC, et. al., 2010 WL 5151326 *1 (D.Ariz. 2010)
23 (HAMP is a federal law, not a contract between plaintiff and defendant).

24 The Plaintiffs cite one case in support of their position: Marques v. Wells Fargo Home
25 Mortgage, Inc., 2010 WL 3212131 (S.D. Cal. 2010). However, the “vast majority of courts
26 to consider whether borrowers are intended beneficiaries of HAMP have determined that
27 they are not.” Orcilla v. Bank of America, N.A., 2010 WL 5211507 *3 (N.D.Cal. 2010)
28 (recognizing the Court’s disagreement with the Marques conclusion.)

Even if Plaintiffs could establish that they are third-party beneficiaries under the
HAMP contract, the Defendants are not parties to the HAMP agreement. Plaintiffs argue

1 in their Reply that the Defendants nonetheless are liable as “agents” or “subagents” of the
2 parties to the agreement, but provide no authority for that proposition. (Doc. 51, at 6-7.)
3 Because Defendants are not parties to the HAMP agreement, Defendants can not be liable
4 for a breach of the covenant of good faith and fair dealing that may be implied therein .

5 **CONCLUSION**

6 Plaintiffs lack standing to bring a suit for breach of contract or breach of the covenant
7 of good faith and fair dealings against Defendants because Plaintiffs are incidental, not
8 intended beneficiaries of the HAMP agreement, and in any event, Defendants are not liable
9 as they are not parties to the HAMP agreement.

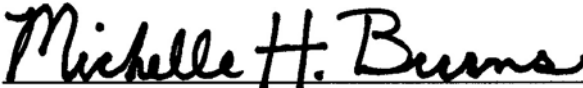
10 **IT IS THEREFORE ORDERED** granting Defendants’ Motion to Dismiss (Doc.
11 23).

12 **IT IS FURTHER ORDERED**, to the extent that Plaintiffs’ Response can be
13 construed as a Motion for Judgment on the Pleadings, denying Plaintiffs’ Response to
14 Defendants Answer and Motion for Judgment on the Pleadings (Doc. 51).

15 **IT IS FURTHER ORDERED** dismissing Counts 3, 4, 5, 6, 11, 12, and 13 from the
16 Complaint.

17 **IT IS FURTHER ORDERED** dismissing LoanCare, ServiceLink, Quality Loan
18 Service Corporation, and McCarthy, Holthus & Levine as Defendants in this action.

19 DATED this 21st day of April, 2011.

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22 Michelle H. Burns
23 United States Magistrate Judge
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