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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD G. WARD and CARRIE LYNN
CARLILE-WARD,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., and DOES
1-20

Defendants.

1:11-cv-0515 OWW SMS

ORDER RE MOTION TO DISMISS
COMPLAINT (DOC. 5)

I. INTRODUCTION.

This diversity action is before the court on defendant Wells Fargo Bank, N.A.'s ("Wells Fargo") motion to dismiss plaintiffs Donald G. Ward's and Carrie Lynn Carile-Wards's ("Plaintiffs") complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). No opposition was filed.

II. BACKGROUND

Plaintiffs, husband and wife, are owners and current residents of the real property, 560 N. McClure Road, Modesto, CA 95357 (the "Property"). (Doc. 1, Ex. A. at ¶ 1.) In April 2005, Wells Fargo extended Plaintiffs a \$328,000 secured by a deed of

1 trust on that Property. (Id. at ¶ 7.) The initial lender was
2 World Savings Bank, N.A., the predecessor in interest to
3 defendant Wells Fargo.¹ (See Doc. 6.)

4 On or about March 4, 2009, the United States Department of
5 Treasury issued a government program, including guidelines known
6 as the Home Affordable Modification Program ("HAMP" or "HAMP
7 agreement"). (Doc 1, Ex. A at ¶ 10.) The HAMP agreement provides
8 incentives to loan servicers, lenders, and investors to modify
9 first lien home loans that: originated before January 1, 2009, do
10 not exceed \$729,750, and are owner-occupied. Plaintiffs assert
11 they qualify for a HAMP modification. (Id.)

12 On or around January 1, 2009, Plaintiffs' income was
13 substantially decreased due to the economic downturn. (Id. at ¶
14 11.) As a result, they began experiencing financial hardship.
15 (Id.) On or around February 2009, Plaintiffs made their last
16 payment on the Loan. (Id. at ¶ 13.)

17 On or around December 14, 2009, Plaintiffs applied for a
18 loan modification with Wells Fargo and requested that they be
19 considered for the HAMP program. (Id. at ¶ 14) Since December
20 2009, Plaintiffs have made several requests for a HAMP
21 modification. (Id. at ¶¶ 15.) A modification has not been
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26 ¹ World Savings Bank, FSB, is a federal savings bank. (Doc. 6, Ex. A.) On
27 November 19, 2007, World Savings Bank, FSB was authorized by the Office of
28 Thrift Supervision, Department of the Treasury to change its name to Wachovia
Mortgage, FSB. (Id. at Ex. B.) Effective November 1, 2009, Wachovia Mortgage,
FSB converted to Wells Fargo Bank Southwest, N.A., which then merged with and
into Wells Fargo Bank, N.A. (Id. at Ex. D.)

1 granted. (Id. at ¶ 15.) On September 22, 2010 Wells Fargo mailed
2 Plaintiffs a letter notifying them of its intent to foreclose on
3 Plaintiffs' property. (Id. at ¶ 16.)

4 Plaintiffs allege that Wells Fargo breached the HAMP
5 "agreement" and the accompanying implied covenant of good faith
6 and fair dealing by refusing to modify Plaintiffs' loan. (Id. at
7 ¶¶ 21-29.) Plaintiffs also seek a declaration that Wells Fargo
8 breached the HAMP agreement. (Id. at ¶¶ 30-34.) Wells Fargo
9 removed the action to federal court and now moves to dismiss it
10 under Federal Rule of Civil Procedure 12(b)(6). (Doc. 1, 5.)

11 III. STANDARD OF DECISION

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14 A motion to dismiss brought under Federal Rule of Civil
15 Procedure 12(b)(6) "tests the legal sufficiency of a claim."
16 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). In deciding
17 whether to grant a motion to dismiss, the court "accept[s] all
18 factual allegations of the complaint as true and draw[s] all
19 reasonable inferences" in the light most favorable to the
20 nonmoving party. *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th
21 Cir.2002). To survive a motion to dismiss, a complaint must
22 "contain sufficient factual matter, accepted as true, to 'state a
23 claim to relief that is plausible on its face.'" *Ashcroft v.*
24 *Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting
25 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955,
26 167 L.Ed.2d 929 (2007)).
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1 A claim has facial plausibility when the plaintiff pleads
2 factual content that allows the court to draw the reasonable
3 inference that the defendant is liable for the misconduct
4 alleged. The plausibility standard is not akin to a
5 'probability requirement,' but it asks for more than a sheer
6 possibility that defendant has acted unlawfully. Where a
7 complaint pleads facts that are 'merely consistent with' a
8 defendant's liability, it 'stops short of the line between
9 possibility and plausibility of entitlement to relief.'

10 *Id.* (citing *Twombly*, 550 U.S. 556-57).

11 Nevertheless, the court "need not assume the truth of legal
12 conclusions cast in the form of factual allegations." *United*
13 *States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th
14 Cir. 1986). While the standard does not require detailed factual
15 allegations, "it demands more than an unadorned, the defendant-
16 unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. A
17 pleading is insufficient if it offers mere "labels and
18 conclusions" or "a formulaic recitation of the elements of a
19 cause of action." *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at
20 1950 ("Threadbare recitals of the elements of a cause of action,
21 supported by mere conclusory statements, do not suffice.").

22 In ruling upon a motion to dismiss, the court may consider
23 only the complaint, any exhibits thereto, and matters which may
24 be judicially noticed pursuant to Federal Rule of Evidence 201.
25 See *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir.
26 1988).

27 A. Breach of contract.

28 Plaintiffs' first cause of action asserts breach of

1 contract. Plaintiffs allege Wells Fargo "entered into a contract
2 with the U.S. Treasury Department which obligates defendant[] to
3 modify qualifying loans under HAMP. Plaintiffs are intended
4 third-party beneficiaries [of] these contracts and therefore have
5 standing to bring this action." (Doc. 1, Ex. A, Compl. ¶ 22).

6 Defendant argues that "a borrower does not have standing to sue
7 its lender for a violation of the lender's HAMP agreement." (Doc.
8 5, Def.'s MTD at 3.)

9 "A cause of action for damages for breach of contract is
10 comprised of the following elements: (1) the contract, (2)
11 plaintiff's performance or excuse for nonperformance, (3)
12 defendant's breach, and (4) the resulting damages to plaintiff."
13 *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367, 108
14 Cal. Rptr. 3d 682, 697 (Cal. Ct. App. 2010).

15
16 Before a third party can present a claim for breach of
17 contract, the party must show that the contract was made for the
18 parties' direct benefit; that they are an intended beneficiary of
19 the contract. *Klamath Water Users Protective Ass'n v. Patterson*,
20 204 F.3d 1206, 1208 (9th Cir. 1999) *opinion amended on denial of*
21 *reh'g*, 203 F.3d 1175 (9th Cir. 2000). The Ninth Circuit defines
22 third party beneficiaries as:
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25 (1) Unless otherwise agreed between promisor and promisee, a
26 beneficiary of a promise is an intended beneficiary if
27 recognition of a right to performance in the beneficiary is
28 appropriate to effectuate the intention of the parties and
29 . . .

(b) the circumstances indicate that the promisee intends to

1 give the beneficiary the benefit of the promised
2 performance.

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

5 *Id.* at 1211.

6 The Ninth Circuit has held that parties who benefit from
7 government contracts are generally assumed to be incidental
8 beneficiaries, and may not enforce the contract absent "clear
9 intent" to the contrary. *Id.* at 1210-11; (*citing* Restatement of
10 Contracts § 313 (cmt. a) ("governmental contracts often benefit
11 the public, but individual members of the public are treated as
12 incidental beneficiaries unless a different intention is
13 manifested.").

14 "Clear intent" is not shown "by a contract's recitation of
15 interested constituencies, [v]ague, hortatory pronouncements,
16 statement[s] of purpose, explicit reference to a third party or
17 even a showing that the contract 'operates to the [third
18 parties'] benefit and was entered into with [them] in mind."

19 *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244

20 (9th Cir. 2009) (internal quotations and citations omitted).

21 Instead, the contract's precise language must demonstrate a clear
22 intent to rebut the presumption that the plaintiff is an
23 incidental beneficiary. *Id.*

24
25 Aside from conclusory statements, Plaintiffs' provide nor
26 plead any showing to rebut the "incidental" presumption.

27 Plaintiffs provide: "[the] program guidelines for HAMP. . .

1 require 'any foreclosure action may be temporarily suspended
2 during trial period, or while borrowers are considered for
3 alternative foreclosure prevention options.'" (Compl. ¶ 19.) This
4 language does not provide that Plaintiffs have a direct contract
5 with Defendant. Numerous federal district courts have found, as
6 to borrowers, the HAMP agreement does not meet the "clear intent"
7 standard. See e.g., *Escobedo*, 2009 WL 4981618; *Burtzos v.*
8 *Countrywide Home Loans*, No. 09-CV-2027W (Wmc), 2010 U.S. Dist.
9 LEXIS 53509 (S.D.Cal. Jun. 1, 2010); *Benito v. Indymac Mortg*, No.
10 2:09-CV-001218-PMP-PAL, 2010 U.S. Dist. LEXIS 51259 (D.Nev. May
11 21, 2010); *Bernice Thoreau del la Salle v. America's Wholesale*
12 *Lender*, No. CIV S-09-2701, 2010 U.S. LEXIS 36319 (E.D.Cal. Apr.
13 13, 2010); *Villa v. Wells Bank, N.A.*, No. 10CV81 DMS (WVG), 2010
14 U.S. Dist. LEXIS 23741 (S.D.Cal. Mar. 15, 2010); *Aleem v. Bank of*
15 *Am.*; No. EDCV 09-01812-VAP (Rzx), 2010 U.S. Dist. LEXIS 11944
16 (C.D.Cal. Feb. 9, 2010); *Marks v. Bank of Am., N.A.*, 03:10-CV-
17 08039PHXJAT, 2010 WL 2572988 (D. Ariz. June 22, 2010). "[T]he
18 language of the [HAMP agreement] does not show that the parties
19 intended to grant qualified borrowers the right to enforce the
20 Agreement. Indeed, the Agreement specifies that it 'shall inure
21 to the benefit of. . . the parties to the Agreement and their
22 permitted successors-in-interest' with no mention of borrowers.
23 *Escobedo*, 2009 WL 4981618, *3 (emphasis in original). "While the
24 intent of the HAMP might be to benefit qualified borrowers,
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1 statements of purpose are not enough to defeat the presumption
2 against intended beneficiaries under government contracts.
3 Rather, Plaintiffs are incidental beneficiaries because there is
4 no clear intent to the contrary." *Marks*, 2010 WL 2572988, *5.

5 Because Plaintiff is not named in or inferentially referred
6 to as a specifically intended beneficiary of the agreement
7 between Wells Fargo and the U.S. Dept. of Treasury, Plaintiffs do
8 not have standing to sue for a breach of contract claim. Wells
9 Fargo's motion to dismiss Plaintiffs' claim for breach of
10 contract is GRANTED WITHOUT LEAVE TO AMEND.

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13 B. Breach of the Covenant of Good Faith

14 Plaintiffs assert "Defendants represented to the U.S.
15 Treasury Department that it would honor the terms of their HAMP
16 contract [with]. . . no intention of doing so." (Compl. ¶ 27.)
17 Defendant opposes, stating "Plaintiffs have no right or standing
18 to enforce the HAMP agreement." (Doc. 5, MTD at 4.)

19 The elements of a claim for breach of the covenant are: (1)
20 the existence of a contract; (2) the plaintiff did all, or
21 substantially all, of the significant things the contract
22 required; (3) the conditions required for the defendant's
23 performance had occurred; (4) the defendant unfairly interfered
24 with the plaintiff's *right to receive the benefits of the*
25 *contract*; and (5) the plaintiff was harmed by the defendant's
26 conduct. *Trinity Hotel Inv., LLC v. Sunstone OP Props., LLC*, 2009
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1 U.S. Dist. LEXIS 13692 (C.D. Cal. Feb. 5, 2009) (emphasis added);
2 *Carma Developers, Inc. v. Marathon Development Calif., Inc.*, 2
3 Cal. 4th 342, 371-375 (1992).

4 "To establish a breach of an implied covenant of good faith
5 and fair dealing, a plaintiff must establish the existence of a
6 contractual obligation, along with conduct that frustrates the
7 other party's rights to benefit from the contract." *Fortaleza v.*
8 *PNC Fin. Servs. Group, Inc.*, 642 F. Supp. 2d 1012, 1021-22 (N.D.
9 Cal. 2009). The "implied covenant of good faith and fair dealing
10 is limited to assuring compliance with the express terms of the
11 contract, and cannot be extended to create obligations not
12 contemplated by the contract." *Pasadena Live, LLC v. City of*
13 *Pasadena*, 114 Cal. App. 4th 1089, 1093-1094 (2004).
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16 Plaintiffs have no special relationship with the lender.
17 "Absent 'special circumstances' a loan transaction is 'at arms-
18 length' and there is no fiduciary relationship between the
19 borrower and lender." *Spencer v. DHI Mortg. Co., Ltd.*, 642 F.
20 Supp. 2d 1153, 1162 (E.D. Cal. 2009) (citing *Oaks Mgmt. Corp. v.*
21 *Superior Court*, 145 Cal. App. 4th 453, 51 Cal. Rptr. 3d 561 (Cal.
22 Ct. App. 2006). Plaintiffs do not invoke the exception to the
23 general rule. There is no claim for tortious breach of contract.
24

25 As incidental third parties to the HAMP agreement,
26 Plaintiffs lack standing to sue for breach of the implied
27 covenant of good faith and fair dealing. *County of Santa Clara*,
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1 588 F.3d at 1244. Wells Fargo's motion to dismiss the bad faith
2 breach of contract claim is GRANTED WITHOUT LEAVE TO AMEND.²

3
4 C. Declaratory Relief

5 Plaintiff asserts "Defendants are obligated to perform a
6 good faith review of Plaintiffs' loan under the HAMP guidelines"
7 and modify their loan. (Compl. ¶¶ 22, 31.) Defendant contends
8 that Plaintiffs' request for declaratory relief must fail as
9 "Plaintiffs have no standing to sue for benefits under a HAMP
10 agreement." Further, declaratory relief is "not an independent
11 cause of action." (Doc. 5, MTD at 7.)

12
13 Plaintiffs' third "claim" purports to state a cause of
14 action for declaratory relief. Declaratory relief is not an
15 independent claim, rather it is a form of relief. *Lane v. Vitek*
16 *Real Estate Indus. Group*, 713 F. Supp. 2d 1092, 1104 (E.D. Cal.
17 2010) (*citing McDowell v. Watson*, 59 Cal.App.4th 1155, 1159, 69
18 Cal.Rptr.2d 692 (1997) ("Injunctive relief is a remedy and not,
19 in itself a cause of action." (internal quotation marks
20 omitted))).

21
22 Since Plaintiffs' other claims have been dismissed and
23 declaratory relief is not a cause of action in and of itself,
24 there is no basis for declaratory relief. Well Fargo's motion to
25 dismiss Plaintiffs' third "cause of action" is GRANTED WITHOUT
26 LEAVE TO AMEND.

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28 ² Because dismissal is granted on Wells Fargo's standing argument, Defendant's
preemption argument will not be addressed.

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IV. CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss all claims is GRANTED WITHOUT LEAVE TO AMEND.

IT IS SO ORDERED.

Dated: June 16, 2011

/s/ Oliver W. Wanger

Oliver W. Wanger
United States District Judge