

**United States District Court**  
 For the Northern District of California

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**E-FILED on** 10/01/2010

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

PHU VAN NGUYEN, HAI THAI NGUYEN,  
Husband and Wife,

Plaintiff,

v.

BAC HOME LOAN SERVICES, LP, et al.,

Defendants.

No. C-10-01712 RMW

**ORDER GRANTING MOTIONS TO DISMISS**

**[Re Docket Nos. 15, 19, 29]**

Defendants move to dismiss the Complaint. Plaintiffs have not filed an opposition. For the reasons set forth below, the court grants defendants' motions.

**I. BACKGROUND**

**A. The Home Affordable Modification Program**

On October 3, 2008, Congress passed the Emergency Economic Stabilization Act ("EESA"), Pub. L. No. 110-343, 122 Stat. 3765, authorizing the United States Department of the Treasury (the "Treasury") to purchase \$700 billion in troubled assets to stabilize credit markets. 12 U.S.C. § 5201 (2008). Section 109 of the EESA encourages the Secretary of the Treasury to undertake foreclosure mitigation initiatives:

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Section 109: Foreclosure Mitigation Efforts.

a. RESIDENTIAL MORTGAGE LOAN SERVICING STANDARDS. To the extent that the Secretary acquires mortgages, mortgage backed securities, and other assets secured by residential real estate, including multifamily housing, the Secretary shall implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages, considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program under section 257 of the National Housing Act or other available programs to minimize foreclosures. In addition, the Secretary may use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.

Notably, Congress did not require that the Treasury's plan benefit any identified category of borrowers or loans, or that the plan utilize any specific form of assistance. Instead, EESA provides the Treasury full discretion to structure foreclosure mitigation initiatives, including their size, duration, and scope.

Enabled with this authority, the Treasury unveiled the Home Affordable Modification program (the "HAMP") as the Obama Administration's primary foreclosure prevention program. Compl. ¶¶ 26-27. In simple terms, HAMP provides financial incentives<sup>1</sup> to loan servicers and investors to encourage them to modify the terms of existing private mortgages where foreclosures may be avoidable and modification is in the financial interests of the involved parties. *Id.* ¶ 33. To help administer HAMP, the Treasury has retained the Federal National Mortgage Association ("Fannie Mae") as its financial agent. *Id.* at ¶ 33; *see also* The Financial Agency Agreement between Treasury and Fannie Mae (Dkt. No. 16 Exh. 1).<sup>2</sup> Fannie Mae acts as the HAMP

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<sup>1</sup> Fannie Mae, acting as financial agent of the United States, compensates participating servicers and investors for successful modifications. Participating servicers receive \$1,000 for each completed modification, payable upon the borrower's successful completion of the 90-day trial period. Servicers may also receive additional payments for up to three years provided that they meet additional requirements. Compl. ¶ 33.

<sup>2</sup> Pursuant to Federal Rule of Evidence 201, the court may take judicial notice of adjudicative facts, which are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questions." In addition, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Accordingly, the court considers plaintiffs' loan agreement and Fannie Mae's agreement with the Treasury, as well as the Treasury's Guidelines and Supplemental Directives not submitted by plaintiffs but nevertheless referred to in the Complaint. Moreover, plaintiffs do not contest the

1 administrator, record-keeper, and paying agent, and enters into contracts with private servicers on  
2 the Treasury's behalf. Compl. ¶ 3. But at the same time, Fannie Mae is required by its agreement to  
3 "comply with all lawful instructions or directions received from the Treasury." Dkt. No. 16 Exh. 1,  
4 at 4. Fannie Mae's contract with the Treasury is clear on this point, noting that the "Treasury is  
5 solely responsible for development the Program Guidelines and . . . [Fannie Mae] must follow the  
6 Program Guidelines." *Id.* at F-2.

7 Servicer participation in HAMP is completely voluntary. However, servicers of loans  
8 guaranteed or owned by government sponsored entities (GSEs) such as the Federal Home Loan  
9 Mortgage Corporation ("Freddie Mac") or Fannie Mae are required to participate in HAMP. Compl.  
10 ¶ 3. Those servicers who elect to participate enter into contracts—known as Servicer Participation  
11 Agreements ("SPAs")— with Fannie Mae as the financial agent of the Treasury. Under the SPAs,  
12 servicers commit to perform loan modification pursuant to the Program Guidelines ("Guidelines").  
13 *Id.* The Guidelines establish a number of initial criteria for a loan to be eligible for HAMP  
14 modification, including:

- 15 (1) the borrower's mortgage is a first lien originated before January 1, 2009;
- 16 (2) the mortgage has not been previously modified under HAMP;
- 17 (3) the loan is delinquent or an imminent default is reasonably foreseeable;
- 18 (4) the mortgage is secured by a property that is the borrowers' principal residence;
- 19 (5) the borrower's monthly mortgage payment is greater than 31% of the borrower's gross  
20 monthly income;
- 21 (6) the borrower has experienced financial hardship;
- 22 (7) the borrower lacks the liquid assets to meet the monthly mortgage payments; and
- 23 (8) the unpaid principal balance on the mortgage is less than or equal to \$729,750 for one  
24 unit.

25 *Id.* ¶ 35.

26 But these initial eligibility requirements do not automatically qualify a borrower for HAMP  
27 modification. After a servicer verifies initial eligibility, the Guidelines further require the servicer to

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authenticity of these documents.

1 evaluate the loan to determine whether a HAMP modification is required *See* Supplemental  
2 Directive 09-01 (Dkt. No. 16 Exh. 3). Modification is not required in several circumstances:

- 3 (1) Where the projected net present value ("NPV") of the borrower's modified loan  
4 payments would be less than the projected NPV if the loan were not modified (a  
5 negative NPV result). Compl. ¶ 36.<sup>3</sup> Servicers with sufficiently large books of  
6 business are permitted to customize the NPV model to fit their unique loan portfolios.  
7 *See* Dkt. No. 16 Exh. 3, at 4-5. However, any proprietary NPV model must adhere to  
8 the guidelines and framework outlined in the Treasury's model. Compl. ¶ 93.
- 9 (2) Where the application of a modification "waterfall" (specified reduction in interest  
10 rate, extensions of loan terms, and forbearance of principal) will not achieve a  
11 targeted monthly payment of 31% of the borrower's gross monthly income. Compl. ¶  
12 37.
- 13 (3) Where a non-GSE loan is investor-owned under terms that would prohibit loan  
14 modification absent investor approval, and the servicer's reasonable efforts to lift the  
15 prohibition are unsuccessful. *Id.* ¶ 40.

16 If the loan qualifies under HAMP, the servicer first offers a 90 trial modification period where the  
17 borrower must make payments based on the standard modification waterfall calculation. Compl. ¶  
18 41. Under the Guidelines, the servicer "must not conduct foreclosure sales on loans previously  
19 referred to foreclosure or refer new loans to foreclosure during the 30-day trial period that the  
20 borrower has to submit documents evidencing an intent to accept the Trial Period Plan offer. Dkt.  
21 No. 16 Exh. 3, at 14; Compl. ¶ 46. Even if a borrower is denied HAMP modification, the servicer  
22 must consider "other foreclosure prevention alternatives, including alternative modification  
23 programs, deed-in-lieu and short sale programs." Dkt. No. 16 Exh. 3, at 3; Compl. ¶ 46. Upon  
24 successfully completing the trial period, the modification becomes permanent. Compl. ¶ 41.

25 Between September and November 2009, the Treasury issued additional guidelines requiring  
26 participating servicers to communicate directly with borrowers and Fannie Mae regarding HAMP  
27 denials. Compl. ¶ 100. For example, Supplemental Directive 09-06 enumerates 13 reasons for a  
28 loan modification denial. Each reason corresponds to a code that specifies why a borrower was not  
offered or accepted into a trial plan. *Id.* Moreover, Supplemental Directive 09-08 requires  
participating servicers to provide borrowers with a written notice setting forth in detail some, but not

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<sup>3</sup> "The NPV test compares the net present value of cash flow from the borrower's loan if modified under HAMP to the net present value of cash flow without modification. In other words, the test looks to see if a loan as modified yields a more positive financial outcome to the investor or other holder of the note secured by the mortgage than a foreclosure on the property would yield." Compl. ¶ 36.

1 all, of the grounds for the denial of HAMP modifications. *Id.* ¶ 50. The Treasury has also created a  
2 toll-free HOPE hotline which allows borrowers to get more information about the HAMP process.  
3 *Id.*

4 **B. The Parties**

5 On October 26, 2005, plaintiffs Phu Van Nguyen and Hai Thi Nguyen entered into a  
6 \$600,000 mortgage loan to refinance their home. Dkt. No. 31 Exh. A. Bank of America Home  
7 Loan Servicing, LP ("BACHL") is the servicer on plaintiffs' mortgage loan. Compl. ¶ 53. Between  
8 September 2009 and February 2010, plaintiffs contacted BACHL on multiple occasions, each time  
9 requesting a HAMP loan modification. *Id.* ¶ 64. Those requests were either denied or alternatively,  
10 not evaluated. *Id.* ¶ 64, ¶¶ 52-53. Plaintiffs allege that even though they meet the minimum HAMP  
11 eligibility requirements, BACHL has nevertheless refused to apply the waterfall calculation or the  
12 NPV test to their mortgage. *Id.* ¶ 53. Additionally, plaintiffs allege that BACHL has erroneously  
13 asserted that the plaintiffs' mortgage is not eligible for HAMP modification because the mortgage is  
14 not owned or guaranteed by Fannie Mae or Freddie Mac. *Id.* ¶ 55. In December 2009, the Trustee  
15 under the Deed of Trust filed a Notice of Default, initiating foreclosure proceedings on plaintiffs'  
16 mortgage. *Id.* ¶ 64.

17 **C. Plaintiffs' Claims**

18 Plaintiffs originally filed their action<sup>4</sup> in the Superior Court of California for the County of  
19 Santa Clara on March 18, 2010. Because the action arises under federal law, defendants removed  
20 the action to this court pursuant to 28 U.S.C. § 1441.

21 In Count 1, plaintiffs allege that BACHL breached its SPA with Fannie Mae. Plaintiffs claim  
22 that they are third party beneficiaries of the contract and accordingly have proper standing to bring a  
23 claim of breach against BACHL. Compl. ¶¶ 104-111. In Count 2, plaintiffs allege that BACHL  
24 violated their constitutional due process rights under the 5th Amendment by failing to provide  
25 meaningful written notice regarding its decision to grant or deny to plaintiffs' and other class  
26 members' request for HAMP modifications. Plaintiffs further allege that their due process rights  
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28 <sup>4</sup> Defendant BACHL notes that the Complaint appears to be a cut-and-past copy of a complaint in a  
previously filed class action. *See* Dkt. No. 31 Exh. D.

1 were further violated because BACHL has failed to provide a procedure to challenge and correct an  
2 erroneous decision to deny a mortgage modification under HAMP. *Id.* ¶¶ 111-118. In Count 3,  
3 plaintiffs allege that Timothy Geithner (in his capacity as Secretary of the Treasury), Henry Allison  
4 (in his capacity as Assistant Secretary for Financial Stability), Edward DeMarco (in his capacity as  
5 Acting Director of the Federal Housing Finance Agency ("FHFA")), Fannie Mae, Michael Williams  
6 (in his capacity as president and CEO of Fannie Mae), and Eric Schuppenhauer (in his capacity as  
7 senior vice president at Fannie Mae) similarly violated plaintiffs due process rights under the 5th  
8 Amendment. *Id.* ¶¶ 119-126. In Count 4, plaintiffs allege that BACHL breached an implied  
9 covenant of good faith and fair dealing when it failed to give borrowers meaningful notice of their  
10 HAMP eligibility, as well as provide borrowers a procedure to challenge erroneous determinations.

11 Defendants Timothy Geithner and Henry Allison have been dismissed from this action. The  
12 remaining defendants have moved to dismiss all claims under Federal Rules of Civil Procedure  
13 12(b)(1) and (12)(b)(6). Their motions are unopposed.

## 14 II. ANALYSIS

### 15 A. Count 1: Breach of Contract

16 In Count 1, plaintiffs allege that BACHL breached its contract with Fannie Mae when it  
17 failed to properly determine plaintiffs' HAMP eligibility. Despite the fact that plaintiffs are not  
18 parties to the SPA between BACHL and Fannie Mae, plaintiffs allege that they have standing to  
19 assert their claim as third party beneficiaries.

20 In contrast, defendant BACHL argues that plaintiffs are not parties to the contract and  
21 therefore, plaintiffs lack standing to bring a breach of contract claim. BACHL points out that  
22 because government contracts often benefit the public at large, members of the public are generally  
23 assumed to be incidental beneficiaries, rather than intended beneficiaries, and do not obtain third  
24 party beneficiary rights. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210  
25 (9th Cir. 2000). In fact, numerous courts have considered claims similar to plaintiffs' in this case  
26 and concluded that mortgage loan borrowers do not have standing as "intended beneficiaries" of  
27 HAMP SPAs. *See e.g. Escobedo v. Countrywide*, No. 09-CV-1557, 2009 WL 4981618 at \*3 (S.D.  
28 Cal. Dec. 15, 2009) (dismissing breach of contract claim brought by borrower for defendant's

1 alleged breach of HAMP SPA because plaintiff was not an intended beneficiary under the SPA, and  
2 therefore lacked standing to enforce it); *Villa v. Wells Fargo Bank*, No. 10CV81, 2010 WL 935680,  
3 at \*3 (S. D. Cal. March 15, 2010) (same); *Zendejas v. GMAC Wholesale Mortg. Corp.*, No. 1:10-  
4 CV-00184, 2010 U.S. Dist. LEXIS 59793 (E.D. Cal. Jun. 16, 2010) (same). The court in *Escobedo*  
5 further held that "a qualified borrower would not be reasonable in relying on the [HAMP]  
6 Agreement as manifesting an intention to confer a right on him or her because the [HAMP]  
7 Agreement does not require that a [loan servicer] modify eligible loans." *Escobedo*, 2009 WL  
8 4981618 at \*3. Defendant BACHL argues that like the plaintiff in *Escobedo*, plaintiffs in this case  
9 could not reasonably rely on the SPA as manifesting an intent to modify plaintiffs' loan and in any  
10 event, HAMP does not require loan servicers to modify loans.

11 In light of the cases cited, BACHL's arguments appear to have merit. What's more,  
12 BACHL's argument is unopposed. Accordingly, the court dismisses Count 1.

13 **B. Count 2: Violation of Due Process by BACHL**

14 In Count 2, plaintiffs allege that BACHL violated their constitutional due process rights by  
15 failing to provide meaningful notice regarding its decision to grant or deny a borrower's request for  
16 HAMP modification, or establish procedures to appeal a HAMP modification denial.

17 On the other hand, BACHL argues that Count 2 fails as a matter of law because BACHL is  
18 not a state actor and because HAMP does not afford plaintiffs a protected property interest. First,  
19 BACHL asserts that participation in a program sponsored by the federal government is not enough  
20 to constitute action under the color of federal law. *See Bank v. Nimmo*, 677 F.2d 692, 702 (9th Cir.  
21 1982) ("Although a federal home loan guaranty program, this, alone, in our view, is insufficient to  
22 convert the actions of the private lender into governmental action."). Second, BACHL points out  
23 that HAMP does not confer a "protected property interest." *See Board of Regents of State Colleges*  
24 *v. Roth*, 408 U.S. 564, 570 (1972). Specifically, BACHL argues that HAMP grants the decision  
25 maker discretionary authority in its implementation and therefore, cannot establish a protected  
26 property interest.

27 BACHL's arguments appear to have merit. *See Huxtable v. Geithner*, 2010 U.S. Dist. LEXIS  
28 91382, No. 09cv1846 BTM (WVG), at \* 4 ("Congress did not intend to create an entitlement or

1 protected property interest in HAMP modifications"); *Williams v. Geithner*, No. 09-1959, 2009 WL  
2 3757380, at \*6-7 (D. Minn. Nov. 9, 2009) (HAMP regulations "did not intend to create a property  
3 interest in loan modification for mortgages in default."). As a result, the court dismisses Count 2.

4 **C. Count 3: Violation of Due Process by DeMarco, Fannie Mae, Williams, and**  
5 **Schuppenhauer**

6 Plaintiffs' Count 3 contains allegations similar to Count 2. Here, plaintiffs assert that  
7 DeMarco, Fannie Mae, Williams, and Schuppenhauer violated plaintiffs' due process rights because  
8 they failed to require adequate notice to borrowers regarding HAMP eligibility or denial.  
9 Specifically, plaintiffs allege that until the issuance Supplemental Directives 09-07 and 09-08,  
10 HAMP directives failed to require service providers to issue a written statement stating the reasons  
11 why HAMP benefits were denied.. Compl. ¶ 126. What's more, plaintiffs' note that HAMP  
12 guidelines still fail to establish or require a procedure by which borrowers can challenge an  
13 erroneous denial of modification. *Id.*

14 Defendants, however, argue that plaintiffs lack standing to bring a claims against DeMarco,  
15 Fannie Mae, Williams, and Schuppenhauer because the alleged harm is not fairly traceable to any  
16 action taken by those parties. *See Monsanto Co. v. Greeston Seed Farms*, 130 S. Ct. 2743 (2010).  
17 In other words, plaintiffs HAMP denial is traceable only to BACHL's refusal to modify the loan, not  
18 the other defendants. To be sure, plaintiffs assert that Fannie Mae is required to implement an  
19 appeals procedure for HAMP denials, regardless of the servicer involved. But defendants note that  
20 they are bound to act within the Treasury Guidelines and those Guidelines do not provide an appeals  
21 process. Like BACHL, the remaining defendants also argue that the Complaint does not adequately  
22 allege a deprivation of a protected property interest because the prospective advantage is too  
23 uncertain.

24 The defendants' arguments appear to have merit. *See, e.g., Easter v. Am. W. Fin.*, 381 F.3d  
25 948, 961-962 (9th Cir. 2004) (dismissing defendants who did not own named plaintiffs' loans  
26 because imposition of usurious interest rates could only be traced to lenders that owned named  
27 plaintiffs' loans); *Williams*, 2009 WL 3757380 (noting the "broad discretion afforded to servicers in  
28 the modification process" and holding that a putative class of HAMP-eligible borrowers could not  
demonstrate "a legitimate claim of entitlement to a loan modification"). Again, defendants'



1 arguments are unopposed. For these reasons and the reasons stated with respect to Count 2, the  
2 court dismisses Count 3.

3 **D. Count 4: Breach of the Covenant of Good Faith and Fair Dealing by BACHL**

4 In Count 4, plaintiffs allege that "[i]nherent in the contractual covenant to engage in good  
5 faith and fair dealing is [BACHL]'s obligation to give borrowers meaningful notice of its  
6 determination of their HAMP eligibility and the fact underlying that decision, as well as to provide  
7 borrowers meaningful access to a procedure by which borrowers can challenge an erroneous  
8 decision. Neither notice nor a means of redress was provided by [BACHL]." Compl. ¶ 129.

9 But BACHL notes that "[g]enerally, no cause of action for the tortious breach of the implied  
10 covenant of good faith and fair dealing can arise unless the parties are in a 'special relationship' with  
11 'fiduciary characteristics.'" *Pension Trust Fund v. Federal Ins. Co.*, 307 F.3d 944, 955 (9th Cir.  
12 2002). BACHL argues that neither the loan nor the SPA create a special relationship with fiduciary  
13 characteristics. Further, BACHL points out that the "implied covenant of good faith and fair dealing  
14 is limited to assuring compliance with the express terms of the contract." *Pasadena Live, LLC v.*  
15 *City of Pasadena*, 114 Cal. App. 4th 1089, 1093-94 (2004). In this case, BACHL asserts that it  
16 could not have violated any implied duties where plaintiffs fail to allege that BACHL has not acted  
17 in accordance with the express terms of the loan agreement. Although plaintiffs also allege violation  
18 of the SPA, BACHL argues that plaintiffs are not intended beneficiaries of that agreement and  
19 therefore lack standing to bring a claim.

20 BACHL's arguments appear to have merit. *See Nymark v. Heart Fed. Sav. & Loan Ass'n*,  
21 231 Cal. App. 3d 1089, 1093 n.1 (1991) ("The relationship between a lending institution and its  
22 borrower-client is not fiduciary in nature."). Accordingly, Count 4 is dismissed.

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**III. ORDER**

Defendants' arguments appear to have merit and are unopposed. For the foregoing reasons, the court dismisses all claims with leave to amend within 20 days. The court also hereby resets the Case Management Conference to November 19, 2010 at 10:30 am.

DATED: 10/01/2010



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RONALD M. WHYTE  
United States District Judge