

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

KIRILL and ALEXANDRA  
KICHATOV,

Plaintiffs,

v.

NATIONSTAR MORTGAGE, INC.,  
and MORTGAGE ELECTRONIC  
REGISTRATION, INC. (MERS),

Defendants.

KIRILL KICHATOV  
ALEXANDRA KICHATOV  
10065 S.W. 148<sup>th</sup> Ave  
Beaverton, OR 97007  
(503) 524-1828

Plaintiffs, *Pro Se*

DAVID A. WEIBEL  
KATIE A. AXTELL  
Bishop, White and Marshall, P.S.  
720 Olive Way, Suite #1201  
Seattle, WA 98101  
(206) 622-5306

Attorneys for Defendants

1 - OPINION AND ORDER

3:13-CV-00103-BR

OPINION AND ORDER

**BROWN, Judge.**

This matter comes before the Court on Defendants' Motion (#25) to Dismiss and Plaintiffs' Motion (#2) to Quiet Title. For the reasons that follow, the Court **GRANTS** Defendants' Motion and **DENIES** Plaintiffs' Motion, and **GRANTS** Plaintiff leave to file an amended complaint as explained at the end of this Opinion and Order.

#### BACKGROUND

The following facts are taken from the Complaint and documents referenced therein:

On September 20, 2007, Plaintiffs Kirill and Aleksandra Kichatov entered into a Note with Pacific Residential Mortgage, LLC, secured by property located at 10065 S.W. 148<sup>th</sup> Ave., Beaverton, Oregon. Plaintiffs also entered into a Trust Deed as to that property with Plaintiff as grantor; First American Title Company as Trustee; and Mortgage Electronic Registration System (MERS) solely as nominee for the lender, Pacific Residential Mortgage.

The Trust Deed was recorded in Washington County, Oregon, on September 27, 2007.

At some point, the Note and/or Trust Deed was sold to Defendant Nationstar Mortgage, Inc. Although Plaintiffs do not allege in their Complaint that this transfer occurred, various

other facts alleged in the Complaint suggest the transfer of the Note and/or Trust Deed occurred before Fall 2010.

Plaintiffs allege they sought and applied for a loan modification<sup>1</sup> in Fall 2010. Plaintiffs allege they returned the application for the loan modification together with the necessary information and were advised their application would take three months to process.

"As time passed," Plaintiffs called to inquire about the status of their loan modification and were advised their application had not yet been processed. They were asked to resubmit various documents "numerous times."

In Fall 2011 Plaintiffs called "the company's" refinance department and were offered the option to refinance their home.

On October 10, 2011, Nationstar sent Plaintiffs a loan-modification application pursuant to the Making Home Affordable Modification Program (HAMP). Plaintiffs submitted the HAMP application to Nationstar.

On December 9, 2011, Nationstar sent Plaintiffs a letter in which it approved Plaintiffs for a trial-period plan under HAMP. The letter advised Plaintiffs:

To accept this offer, you must make new monthly "trial period payments" in place of your normal monthly mortgage payment.

---

<sup>1</sup> Plaintiffs do not identify the entity from which they sought the loan modification.

\* \* \*

After all trial period payments are timely made and you have submitted all the required documents, your mortgage would then be permanently modified. (Your existing loan and loan requirements remain in effect and unchanged during the trial period.) **If each payment is not received by Nationstar Mortgage LLC in the month in which it is due, this offer will end and your loan will not be modified under the Making Home Affordable program.**

\* \* \*

Once we confirm you are eligible for a Home Affordable Modification and you make all your trial period payments on time, we will send you a modification agreement detailing the terms of the modified loan.

Decl. of A.J. Loll, Ex. D at 1, 2 (emphasis in original).

Plaintiffs allege they made their mortgage payments during the trial period on time and in the amount requested. Plaintiffs allege throughout the trial period they received statements and telephone calls advising them that their payments were past due. Plaintiff spoke with Muthuraj Srinivasan and other Nationstar "agents" throughout the trial period and informed them that they were receiving these notices. Plaintiffs were repeatedly advised not to be concerned about the statements and telephone calls because Plaintiffs were in the trial period.

Plaintiffs allege they received a Loan Modification Agreement on February 9, 2012, signed by Srivisasan, which Plaintiffs signed, notarized, and sent back to Nationstar.

On March 1, 2012, Nationstar sent Kirill Kichatov a letter

advising him that Plaintiffs did not meet the HAMP program eligibility guidelines because:

You have not documented a financial hardship that has reduced your income or increased your expenses, thereby impacting your ability to pay your mortgage as agreed.

You have sufficient net income to pay your current mortgage payment.

You have the ability to pay your current mortgage payment using cash reserves or other assets.

Loll Decl., Ex, E at 1. Nationstar advised Plaintiffs that there were other possible alternatives available, including a loan modification, and that Plaintiffs had

30 calendar days from the date of this notice to contact Nationstar Mortgage to discuss the reason for non-approval for a HAMP modification or to discuss alternative foreclosure prevention options that may be available to you. Your loan may be referred to foreclosure during this time, or any pending foreclosure action may continue. However, **no foreclosure sale will be conducted and you will not lose your home** during this 30-day period (or any longer period required for us to review supplemental material you may provide in response to this Notice.

Loll Decl., Ex. E at 2 (emphasis in original).

Plaintiffs allege they received a letter on April 2, 2012, that contained a denial of the loan-modification program.<sup>2</sup>

Plaintiffs allege they received a telephone call from "Brian from Nationstar" on April 2, 2012, to whom they explained "what

---

<sup>2</sup> Plaintiffs did not provide a copy of the April 2, 2013, letter.

had transpired in regard to the modification." Brian advised Plaintiffs that "managers" would discuss the case during the week, and Plaintiffs should call a direct number on April 5 or 6, 2012, to find out about the decision on the loan modification.

Plaintiffs allege they attempted to call Brian on both dates, but they were unable to reach him and left voicemails.

Plaintiffs allege on April 9, 2012, they received a "Welcome letter" from Nationstar dated March 31, 2012, in which Plaintiffs were advised Nationstar had received Plaintiffs' "completed documentation."

On May 1, 2012, Plaintiffs wired a mortgage payment to Nationstar and were advised through Nationstar's automated telephone system that Plaintiffs were past due on their mortgage. Plaintiffs allege they attempted to speak to a manager at Nationstar several times on May 1 and 2, 2012, without success. Plaintiffs allege they were told by a Nationstar agent that their "trial is void."

Plaintiffs do not allege they have received any notice of intent by Defendants to foreclose or that any foreclosure or sale of the property has occurred.

On January 18, 2013, Plaintiffs filed a Complaint in this Court against Nationstar and MERS alleging Defendants violated "the unfair and Deceptive Acts and Practices." Compl. at 6. In their prayer for relief, Plaintiffs seek: (1) a declaration that

Defendants are required to show original loan documentation, proof of legality of ownership . . . to prove legal standing to foreclose and to show "they abided in following Oregon Real Estate Laws"; (2) compensatory and punitive damages for "Duress committed by Defendants by wrongfully committing the threat of taking Plaintiffs [sic] Property," which "forced Plaintiffs to cease paying" their mortgage; (3) damages for or possibly a declaration that Defendants intentionally misrepresented the facts, "namely to give a Loan Modification, but instead conspiring to take Plaintiff's [sic] Property"; and (4) damages for or possibly a declaration of "Defendant's [sic] intentional unconscionable behavior in creating a contract that was rescinded and continued to treat Plaintiffs unfairly and dishonestly."

Also on January 18, 2013, Plaintiffs filed a Motion to Quiet Title in which they allege "as a result of improper procedures [by Defendants], the true owner of Plaintiff's [sic] mortgage is unclear; and as a result; Plaintiffs . . . have been paying improper entities an excess amount whom question legal standing to their Property."

On April 26, 2013, Defendants filed a Motion to Dismiss in which they move to dismiss Plaintiffs' Complaint and seek an order releasing the *lis pendens* recorded by Plaintiffs.

The Court heard oral argument on the parties' Motions on June 6, 2013; granted Defendants' Motion to Dismiss; and advised

Plaintiffs that the Court would issue an Opinion and Order setting out the grounds for the decision that the Court announced at oral argument.

#### STANDARDS

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 545 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."

*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 546). When 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." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557).

The pleading standard under Federal Rule of Civil Procedure 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). See also Fed. R. Civ. P. 8(a)(2). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (citing



*Twombly*, 550 U.S. at 555). A complaint also does not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

### DISCUSSION

Defendants moved to dismiss Plaintiffs' Complaint on the grounds that Plaintiffs did not specify a specific state or federal law that they contend Defendants violated. Even though the bases for Plaintiffs' claims are unclear, Defendants addressed several possible claims that Plaintiffs may have been attempting to bring. In particular, Defendants asserted:

(1) Plaintiffs have not established an actual case or controversy exists, (2) there is not any private right of action under HAMP, (3) Plaintiffs fail to establish any fiduciary duty between Defendants and Plaintiffs, (4) Plaintiffs fail to plead fraud with particularity, and (5) Plaintiffs fail to allege facts sufficient to state claims for violation of the Oregon Unlawful Collection Practices Act and/or the FDCPA.

At oral argument it became apparent that Plaintiffs intended to bring claims for declaratory relief and/or for violation of HAMP and/or for breach of contract related to their loan modifications. As the Court advised Plaintiffs at oral argument, they have failed to state facts sufficient to establish that there is an actual case or controversy, and, in addition, there

is not any private right of action under HAMP. Because Plaintiffs are proceeding *pro se* and because the Court grants Plaintiffs leave to amend their Complaint, the Court sets out a more complete analysis of the grounds on which it granted Defendants' Motion to Dismiss and denied Plaintiffs' Motion to Quiet Title as follows.

### **I. Declaratory Relief**

The court's power to grant declaratory relief is limited to "a case of actual controversy." 28 U.S.C. § 2201. See also *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 272-73 (1941); *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9<sup>th</sup> Cir. 2005). "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co.*, 312 U.S. at 273.

Courts in this district have held there is not any case or controversy for purposes of declaratory judgment when, as here, there is not any foreclosure pending. See, e.g., *Magno v. U.S. Bank N.A.*, No. 3:11-cv-00332-MO, 2013 WL 1636074, at \*4 (D. Or. Apr. 16, 2013) (Court held Plaintiff's declaratory-judgment claim was not ripe because "no nonjudicial foreclosure has occurred, and no nonjudicial foreclosure is pending."); *Clow v. Bank of*

Am., Civil No. 10-3093-CL, 2011 WL 7153930, at \*3 (D. Or. Dec. 19, 2011) (Court granted the defendant's motion to dismiss the plaintiffs' complaint for declaratory judgment on the ground that there is not any actual case or controversy between the parties because "no foreclosure proceeding against the property has occurred, nonjudicial or otherwise.").

In addition, Plaintiffs do not allege any facts about MERS's actions towards Plaintiffs. The Complaint includes broad, general allegations related to MERS's securitization of loans and transfers of loans in the national economy, but none of the allegations specifically involve Plaintiffs.

The Court concludes Plaintiffs have not pled facts sufficient to establish that there is a substantial controversy, between themselves and Defendants of sufficient immediacy and reality to warrant declaratory judgment as to the issue of foreclosure. Accordingly, the Court grants Defendants' Motion to Dismiss to the extent that Plaintiffs seek a declaration arising from Defendants' alleged actions related to any foreclosure.

## **II. HAMP Application and Breach of Contract**

### **A. HAMP Generally**

On October 8, 2008, President Bush signed into law the Emergency Economic Stabilization Act of 2008 (EESA), 12 U.S.C. § 5201 *et seq.* EESA required the Secretary of the Treasury to take certain measures in order to encourage and to facilitate

loan modifications. 12 U.S.C. § 5219. EESA, however, did not create any private right of action against loan servicers for grievances relating to the EESA. See *Ramirez v. Litton Loan Serv., LP*, No. CV-09-0319-PHX-GMS, 2009 WL 1750617, \*1 (D. Ariz. June 22, 2009); *Barrey v. Ocwen Loan Serv., LLC*, No. CV-09-00573-PHX-GMS, 2009 WL 1940717, \* 1 (D. Ariz. July 2, 2009). EESA authorized the Secretary of the Treasury, the Federal Housing Finance Agency (FHFA), the Federal National Mortgage Association (Fannie Mae), and the Federal Home Loan Mortgage Corporation (Freddie Mac) to create the Making Home Affordable Program, which consists of two components: (1) the Home Affordable Refinance Program and (2) HAMP. *Marks v. Bank of Am.*, No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988, at \*5 (D. Ariz. June 22, 2010). 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. HAMP provides financial incentives to participating mortgage servicers to modify the terms of eligible loans. On March 4, 2009, the Secretary of the Treasury issued guidelines under HAMP that required lenders to consider borrowers for loan modifications and to suspend foreclosure activities while a borrower is being evaluated for a modification. *Id.*

HAMP requires mortgagees to collect, to retain, and to transmit mortgagor and property data to Freddie Mac in order to

ensure compliance with the program. 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.

The HAMP Guidelines and EESA do not expressly provide for a private right of action. Rather, Congressional intent expressly indicates compliance authority is delegated solely to Freddie Mac. By delegating compliance authority to Freddie Mac, Congress intended not to permit a private cause of action. See *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4<sup>th</sup> Cir. 2001) ("[T]he 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.").

#### **B. Analysis**

A number of courts in the Ninth Circuit have held HAMP does not provide a private right of action against lenders. These courts have dismissed claims for breach of contract, claims involving representations made in HAMP documents, and claims relating to the policies and procedures of HAMP for lack of standing. For example, in *Marks* the plaintiff submitted an application to the defendant bank for a loan modification under HAMP. The defendant advised plaintiff that she qualified for loan assistance and modification of her loan. The plaintiff

accepted the offer and requested the loan-modification paperwork. The plaintiff offered to make a payment, and the defendant sought to obtain the modified payment from the plaintiff but was unable to process the payment. The defendant advised the plaintiff to send her payment with the signed loan-modification documents that she would receive within two weeks. The plaintiff waited for the loan-modification documents for two weeks, at which point the defendant informed the plaintiff that there could be more delay in getting the documents to the plaintiff. During a November 2009 telephone call between the plaintiff and the defendant, the defendant told the plaintiff that the defendant had 45 days to get the paperwork to her. Two weeks after the telephone call, the defendant advised the plaintiff that the foreclosure date had been "pushed back" and that the paperwork delay seemed to be a "bank error" that would be corrected. In January 2010 the defendant foreclosed the plaintiff's property and initiated a Forcible Entry and Detainer action. 2010 WL 2572988, at \*1. The plaintiff brought claims against the defendant for breach of contract, quiet title, and for declaratory and injunctive relief. The defendant moved to dismiss the plaintiff's claims on the grounds that the plaintiff did not have "(1) standing to bring a suit for breach of contract"; (2) there is not any "express, private right of action to sue for a violation of the HAMP"; and (3) there is not "an implied, private right of action to sue for

a violation of the HAMP." *Id.*, at \*2. The court granted the defendant's motion to dismiss on the ground that the plaintiff lacked standing. The court also interpreted the plaintiff's "allegations regarding breach of contract [as] simply an attempt at enforcing a private right of action under HAMP." 2010 WL 2572988, at \*5. The court held HAMP does not expressly permit a private right of action and concluded HAMP also does not contain an implied private right of action reasoning in pertinent part:

"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 (9<sup>th</sup> Cir. 2008). 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 (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 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 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. Allowing the Plaintiff to assert a private cause of action would contravene clear legislative intent.

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.

*Marks*, 2010 WL 2572988, at \*6-7 (citations omitted) (emphasis in original).

Similarly, in *Manabat v. Sierra Pacific Mortgage Company*, the court concluded HAMP did not provide a private right of action. No. CV F 10-1018 LJO JLT, 2010 WL 2574161, at \*11 (E.D. Cal. June 25, 2010). The court explained Congress demonstrated it "did not intend to create a private right of



action for violation of HAMP against lenders that received HAMP funds" when it specifically provided for private actions against the Secretary of the Treasury but not against others. *Id.*, at \* 11 (internal quotations omitted). The court construed the plaintiff's claim that defendants Chase and MERS wrongfully failed to suspend their foreclosure action to allow the plaintiff to pursue alternatives to foreclosure as a claim for failure to modify the plaintiff's loan in violation of HAMP. The court then dismissed the plaintiff's claim for lack of a private right of action.

In *Hoffman v. Bank of America* the court held "a borrower is not a third party beneficiary[ ]" to a HAMP contract between the lender and the Department of the Treasury. No. C 10-2171 SI, 2010 WL 2635773, at \*3 (N.D. Cal. June 30, 2010). The plaintiff in that case also alleged a breach of contract claim as "a stand alone right to enforce HAMP." *Id.*, at \*5. The court noted: "As previously discussed, lenders are not required to make loan modifications for borrowers that qualify under HAMP nor does the servicer's agreement confer an enforceable right on the borrower." *Id.*

In *Vida v. OneWest Bank, F.S.B.*, the plaintiff applied for loan modification under HAMP after she missed several mortgage payments. The plaintiff made reduced mortgage payments during the trial period of the HAMP application in January,

February, and March 2009. In March 2009 the defendant advised the plaintiff that she did not qualify for loan modification under HAMP because she did not meet the income requirements. On May 6, 2009, a Notice of Default and Election to Sell was recorded as to the plaintiff's property. In June 2009 the plaintiff advised the defendant of a change in her income and was encouraged to reapply for loan modification. The plaintiff submitted a second loan-modification application. In August 2009 the plaintiff was informed the foreclosure of her home was on hold in light of the HAMP trial period. Nonetheless, the plaintiff's home was sold at a trustee's sale on September 9, 2009, as originally scheduled,. On September 20, 2009, the plaintiff contacted the defendant and was told the trial period had been cancelled because the defendant had not received all of the necessary documentation. After investigation, however, the defendant admitted the paperwork was not the issue and that the modification had been cancelled because the plaintiff was not income-eligible. On October 23, 2009, the plaintiff received a letter from the defendant informing her that she was not qualified for modification under HAMP, but "they were willing to work with [her] to determine if there [were] any further alternatives to foreclosure." Civ. No. 10-987-AC, 2010 WL 5148473, at \*1-2 (D. Or. Dec. 13, 2010). The plaintiff filed an action for breach of contract, fraud, and declaratory judgment

reinstating her mortgage. The defendant moved to dismiss the plaintiff's claim for breach of contract on the ground that the plaintiff could not bring a private claim for breach of contract under HAMP. *Id.*, at \*1. The plaintiff asserted her breach-of-contract claim was independent of HAMP and was based on common-law contract principles. The plaintiff attempted to distinguish cases in which courts had concluded HAMP did not provide any private right of action on the ground that the plaintiffs in those cases asserted a right to loan modification arising out of HAMP whereas she asserted the defendant breached an existing agreement to modify her loan. Thus, the plaintiff contended, her interest was not based on an entitlement established by HAMP, but rather on an agreement formed under the common-law principles of offer and acceptance. *Id.*, at \*4. The court noted other courts have held claims disallowed under HAMP may proceed under alternative, separate common-law theories. *Id.* (citing *Aleem v. Bank of Am.*, No. EDCV 09-01812-VAP (RZx), 2010 WL 532330 (C.D. Cal. Feb. 9, 2010)). The court, however, ultimately granted the defendant's motion to dismiss:

The court agrees with the district courts in this circuit that HAMP does not authorize a private right of action against participating lenders. That said, the court does not agree with Defendants' premise that they are wholly immunized for their conduct so long as the subject transaction is associated with HAMP. Even so, the facts and allegations as pleaded in this case are premised chiefly on the terms and procedures set forth via HAMP and are not sufficiently

independent to state a separate state law cause of action for breach of contract.

In setting out her allegations of breach of contract, Vida relies primarily on representations made in uniform HAMP documents. Specifically, Vida refers to the document governing the HAMP trial period ("the Trial Period Plan" or "the Plan") . . . [and] argues, to the extent that she complied with the Plan and made no material misrepresentations, she was entitled to modification of her loan. In other words, this Plan acted as an offer which Vida subsequently accepted by timely complying with all of its requirements. The Plan also states that "the Lender will suspend any scheduled foreclosure sale," so long as Vida complies with the Plan obligations, though it also provides that "any pending foreclosure action will not be dismissed and may be immediately resumed from the point at which it was suspended if this Plan terminates[.]" *Id.* at 2. Vida next cites a letter she received from IndyMac Mortgage Services which confirms its receipt of her "signed modification agreement[.]" and references the upcoming loan modification process. (Complaint, Exhibit 5.) As Vida points out, this document does not refer to HAMP or the Trial Period Plan.

The flaw in Vida's logic is that the alleged offer to modify came about and was made wholly under the rubric of HAMP, as were Vida's alleged actions in acceptance of the offer, *i.e.*, submitting the required documentation, and the alleged consideration, *i.e.*, remitting reduced loan payments. Vida fails to state a cause of action independent of HAMP, for which there is no private right of action.

Vida also contends that, even if the claim arises under HAMP, she was entitled to modification because she met the eligibility requirements under HAMP and accepted OneWest's offer to modify.

\* \* \*

[However,] the Plan states explicitly that modification is not guaranteed until the

modification process is complete, and not at any intermediate point in the modification process. The Trial Period Plan is explicitly not an enforceable offer for loan modification.

\* \* \*

The agreement also provides that if the lender does not furnish the borrower with "a fully executed copy of this Plan and the Modification Agreement[,]" the loan modification will not take place and the lender is entitled to pursue rights and remedies otherwise available under the loan.

*Id.*, at \*4-6.

The Court finds the reasoning of these cases to be persuasive and concludes HAMP does not contain any private right of action. The Court, therefore, also concludes Plaintiffs may not bring a claim for violation of HAMP. In addition, there is not any contract between a loan holder and a borrower until the loan modification is completed. Finally, Plaintiffs' allegations center around the HAMP process and arise out of that process. Plaintiffs, therefore, have not stated a claim for breach of contract that is separate and apart from their HAMP process. Accordingly, the Court granted Defendants' Motion to Dismiss to the extent Plaintiffs assert a claim under HAMP and/or for breach of contract related to their loan modification process.

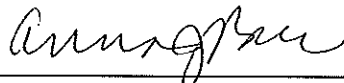
#### CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion (#25) to Dismiss and **DENIES** Plaintiffs' Motion (#2) to Quiet Title.

At oral argument the Court indicated it would allow Plaintiffs to seek *pro bono* counsel through the Court for the limited purposes of (1) assisting Plaintiffs in filing an amended complaint to cure the deficiencies set out herein and (2) conferring with Defendants' counsel to determine whether this matter is presently appropriate for mediation. Plaintiff may file an amended complaint **within thirty (30) days** of appointment of *pro bono* counsel.

IT IS SO ORDERED.

DATED this 14<sup>th</sup> day of June, 2013.



---

ANNA J. BROWN  
United States District Judge