UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

KAREN MICHELE SALA MICHAELS Plaintiff, v. WELLS FARGO HOME MORTGAGE, a Division of WELLS FARGO BANK, N.A, Defendant.	)	Civil Action No. 3:10-cv-11471

OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OF WELLS FARGO HOME MORTGAGE, A DIVISION OF WELLS FARGO BANK, N.A.

Plaintiff Karen Michele Sala Michaels ("Plaintiff") seeks a preliminary injunction restraining defendant Wells Fargo Home Mortgage ("Wells Fargo") from foreclosing on her property. Plaintiff brought the underlying action against Wells Fargo" based primarily on the allegation that Wells Fargo violated the provisions of the Home Affordable Modification Program ("HAMP"). In her Complaint, Plaintiff asserts that HAMP obligates Wells Fargo to modify Plaintiff's loan, and that as such she is entitled to declaratory relief, damages for breach of contract, and breach of the covenant of good faith and fair dealing. Plaintiff also appears to argue that the attempts to work toward a loan modification pursuant to HAMP and the Trial Period Plan created a contract between Plaintiff and Wells Fargo, rendering Plaintiff entitled to declaratory relief, damages for breach of contract and breach covenant of good faith and fair dealing. As discussed below, Plaintiff has no likelihood of success on the merits of any of her claims. As such, she has not satisfied her burden in establishing that she is entitled to a preliminary injunction.

Specifically, Plaintiff's claims fail as a matter of law on all theories. It is indisputable that there is no private right of action for alleged violations of HAMP, and courts have recognized that a plaintiff cannot try to "create" a right of action by indirectly asserting HAMP claims disguised as a third party breach of contract claim, a claim for breach of the covenant of good faith and fair dealing, or as a claim for declaratory relief. These claims should be rejected because Congress did not create any private right of action under HAMP.

Further, Plaintiff's breach of contract and violation of the covenant of good faith and fair dealing claims based on the Trial Period Plan letter also fail as a matter of law for a variety of reasons. First, the language of the Trial Period Plan itself plainly informs the Plaintiff that the Trial Period Plan is not a permanent loan modification and that Plaintiff's eligibility for a permanent modification has not yet been determined. Second, under elementary contract principles, the Trial Period Plan does not constitute an offer, no new consideration supported the existence of any alleged contract to modify the loan, and the plan did not contain any of the required definite terms. Lastly, the HAMP supplemental directives themselves state that a servicer's offering of a Trial Period Plan does not obligate it to enter into a permanent loan modification nor entitle the Plaintiff to a permanent loan modification.

In her Memorandum, Plaintiff attempts to confuse the Court with facts not relevant to the critical inquiry: Plaintiff's likelihood of success on the merits. Rather than address this issue, Plaintiff has chosen to presuppose the very point in issue, and attempts to somehow confuse and contort Wells Fargo's offer to re-run Plaintiff for HAMP into wrongdoing on Wells Fargo's part. These allegations are irrelevant to Plaintiff's claims. Plaintiff has not shown a likelihood of success on any of her claims. Therefore her motion must be denied.

FACTS

On May 14, 2004, Plaintiff purchased the real property located at 240 South Silver Lane in Sunderland, Massachusetts ("Property"). Compl. Par. 4. On March 17, 2006, Plaintiff refinanced the loan she had obtained to purchase the Property with Prime Mortgage Financial, Inc. in the amount of $212,000, executing a Note promising to repay this amount ("Note"). Compl. Par. 6. As security for this loan, Plaintiff granted a mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS") which was recorded on with the Franklin County Registry of Deeds in Book 5068 at Page 114 on March 23, 2006. Id. On June 25, 2009, MERS assigned the mortgage to Wells Fargo Bank, N.A. and this assignment was recorded with the Registry of Deeds. Compl. Par. 7.

Plaintiff defaulted on her loan payments and corresponded with Wells Fargo regarding her loan payments in an attempt to avoid foreclosure. Compl. Pars. 10-13. On June 25, 2009, Wells Fargo commenced an action in the Land Court under the Servicemembers Civil Relief Act in order to begin foreclosure proceedings on the Property. Compl. Par. 14. Plaintiff and Wells Fargo continued to correspond regarding the possibility of a loan modification under HAMP. Compl. Par. 15. Plaintiff submitted financial information to Wells Fargo during this process. Compl. Par. 17.

Wells Fargo sent Plaintiff a letter, dated November 20, 2009, regarding a possible Trial Period Plan loan modification under HAMP ("Trial Period Plan letter"), attached hereto as **Exhibit A** and attached as Exhibit A to Plaintiff's Memorandum of Law In Support of her Motion for Preliminary Injunction. This letter and accompanying program information states, in pertinent part:

> You may qualify for a Home Affordable Modification Trial Period Plan- a way to make your payment more affordable
> We have enclosed a customized Home Affordable Modification Trial Period Plan ("Trial Period Plan"). If you qualify under the federal government's

> Home Affordable Modification Program and comply with the terms of the Trial Period Plan, we will modify your mortgage loan and you can avoid foreclosure.
> . . .
> The monthly trial period payments are based on the income information that you previously provided to us. They are also our estimate of what your payment will be IF we are able to modify your loan under the terms of the program. (emphasis in original).

Plaintiff made the Trial Period Plan payments of $1,317.50 from January through June. Compl. Par. 20. On or about June 3, 2010, Wells Fargo informed Plaintiff that she did not qualify for a permanent loan modification under HAMP. Compl. Par. 22. According to Plaintiff, Wells Fargo denied her modification because her income was too low, but that she had informed Wells Fargo that the amount of her monthly income was higher. Compl. Par. 24.

ARGUMENT AND AUTHORITIES

I. HAMP BACKGROUND

HAMP is neither statutory nor regulatory. Rather, HAMP is a program created by the United States Treasury in response to, and in conjunction with, the Emergency Economic Stabilization Act of 2008 (the "Act"). See 12 U.S.C. § 5219. The Act largely grants authority to the Secretary of Treasury to acquire troubled assets such as mortgages and mortgage backed securities and to implement a plan to "maximize assistance for homeowners." Section 5219 provides:

> (a) Residential mortgage loan servicing standards.
> (1) 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 [12 USCS § 1715z-23] 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.

12 U.S.C. § 5219(a). On its face, the Act only grants authority to the Secretary "to the extent he acquires the troubled mortgage assets." Id.

The Act does not mention HAMP by name, but reference in the Act to "net present value" is consistent with a key component of HAMP, which is based on a comparison of the mortgagee's expectancies from foreclosure as opposed to the income stream from a modified mortgage.

The Act further provides how the Secretary "may" assist homeowners through loan modification.[1] The Act does not address the Secretary's authority with respect to mortgages that he does not hold, own, or control. In addition, the Act does not explicitly or implicitly create any private rights of action for non-compliance.[2]

The congressional record illustrates Congress' intent and acknowledgement that the Act does not create any private right of action and that there is no private authority to enforce the Act's proposed modification program. Representative Kucinich noted:

> The central flaw of this bill is that ***there are no stronger protections for homeowners and no changes in the language to ensure that the Secretary has the authority to compel mortgage servicers to modify the terms of mortgage***.

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[1] Section 5220 provides:

> (1) In general. To the extent that the Federal property manager holds, owns, or controls mortgages, mortgage backed securities, and other assets secured by residential real estate, including multifamily housing, the Federal property manager shall implement a plan that seeks to maximize assistance for homeowners and use its authority to encourage the servicers of the underlying mortgages, and considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program under section 257 of the National Housing Act [12 USCS § 1715z-23] or other available programs to minimize foreclosures.
> (2) Modifications. In the case of a residential mortgage loan, modifications made under paragraph (1) ***may*** include--
> (A) reduction in interest rates;
> (B) reduction of loan principal; and
> (C) other similar modifications.

12 U.S.C. § 5220 (emphasis added).

[2] Nor does the Act create any actual obligations for privately held and serviced loans.

> And there are no stronger regulatory changes to fix the circumstances that allowed this to happen.

154 Cong. Rec. H 10712, 10766 (statement of Rep. Kucinich, Oct. 3, 2008) (emphasis added). Clearly, Congress realized what it was doing when it chose to leave out any private right of action or regulatory enforcement mechanism from the Act.[3]

Purportedly based on its authority derived from the Act, the United States Treasury created HAMP. See **Exhibit B**, HAMP Supplemental Directive 09-01, Page 1. President Obama announced the new "Homeowner Affordability and Stability Plan" on February 18, 2009 in a purported attempt to help millions restructure their mortgages. Id. The Treasury then sought to apply its newly adopted HAMP not just to those mortgages which it held, owned, or controlled as prescribed by the Act, but also to those privately owned and serviced mortgages where it had no ownership or authority. The Treasury did so by presenting a so-called "Commitment to Purchase Financial Instrument and Servicer Participation Agreement" to loan servicers. See **Exhibit C**, Servicer Participation Agreement. Despite its name, the Secretary did not actually purchase, hold, or control any interest in the privately owned and serviced mortgages that it sought to influence.

As an incentive to entice loan servicers such as Wells Fargo to "voluntarily" enroll in the HAMP servicer participation agreement, the Treasury proposed to compensate servicers

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[3] Representative Kucinich went on to note:

> We should have created a mechanism for our Government to take a controlling interest in mortgage-backed securities and use our power to work out a new deal for the homeowners. We could have done this. We should have done this. But we didn't …
>
> ***It is not as though we had no choice but to pass the bill before us. We could have done this differently. We could have demanded language in the legislation that would have empowered the Treasury to compel mortgage servicers to rework the terms of mortgage loans so homeowners could avoid foreclosure.*** We could have put regulatory structures in place to protect investors. We could have stopped the speculators.

154 Cong. Rec. 10712, 10766 (Statement of Rep. Kucinich, Oct. 3, 2008).

for each loan that they successfully modified. While the compensation terms are not included in the servicer participation agreement, they are set forth in the HAMP Directives. The HAMP Directives provide for servicer "Incentive Compensation." See HAMP Supplemental Directive 09-01. The Directive provides:

> A servicer will receive compensation of $1,000 for each completed modification under the HAMP. In addition, if a borrower was current under the original mortgage loan, a servicer will receive an additional compensation amount of $500 ... If a particular borrower's monthly mortgage payment (principal, interest, taxes, all related property insurance and homeowner's or condominium association fees but excluding mortgage insurance) is reduced by HAMP by more six percent or more, a servicer will also receive an annual "pay for success" fee for a period of three years...

Id. at 23. The servicer is not compensated for loans that it is unable to modify regardless of the reason for the unsuccessful modification, and the servicer is also not compensated if the borrower fails to complete the initial trial loan modification (even though the servicer complied with the program). In short, the servicer is only paid for successful modifications with complete borrower compliance. Since HAMP's inception in early 2009, the Treasury has issued at least 15 supplemental directives consisting of hundreds of pages explaining the intricacies of HAMP including the net present value test, the complicated debt-to-income modification waterfall, and stringent reporting requirements.[4] None of these directives, however, has ever suggested that any private right of action exists under the terms of the program or any supplemental directive.

II. PLAINTIFF HAS NOT CARRIED HER BURDEN OF ESTABLISHING THAT SHE IS ENTITLED TO A PRELIMINARY INJUNCTION

[4] All of the fifteen Directives are available online at: https://www.hmpadmin.com/portal/programs/directives.html#3. On September 22, 2010, the former Supplemental Directives were superseded by the Making Homes Affordable Program Handbook for Servicers of Non-GSE Mortgages, available online at: https://www.hmpadmin.com/portal/programs/hamp/servicer.html. The Handbook, however, does not apply to Plaintiff's claims, as it only took effect on September 22, 2010.

A. Preliminary Injunction Standard

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by *a clear showing*, carries the burden of persuasion." Bear Republic Brewing Co. v. Cent. City Brewing Co., --- F.Supp.2d ---, 2010 WL 2330411, at *4 (D. Mass. 2010) (emphasis in original). As repeatedly noted by the First Circuit, the party seeking an injunction bears the burden of demonstrating each of the four essential elements for a preliminary injunction. See Nieves-Marquez v. Commonwealth of Puerto Rico, 353 F.3d 108, 120 (1st Cir. 2003); Camel Hair & Cashmere Inst. Of Am., Inc. v. Assoc. Dry Goods Corp., 799 F.2d 6, 12 (1st Cir. 1986). The trial court must ask "whether the moving party has established that (1) it has a substantial likelihood of success on the merits, (2) there exists, absent the injunction, a significant risk of irreparable harm, (3) the balance of hardships tilts in its favor, and (4) granting the motion will not negatively affect the public interest. TEC Engineering Corp. v. Budget Molders Supply Inc., 82 F.3d 542, 544 (1st Cir. 1996). The movant's proof on each of these elements must not be doubtful; rather, "[b]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1256 (10th Cir. 2003). Moreover, "[t]he sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." Esso Standard Oil Co. (P.R.) v. Monroid-Zayas, 445 F.3d 13, 17-18 (1st Cir. 2006); Valerio v. U.S. Bank, N.A., --- F. Supp. 2d. ---, 2010 WL 2292471, at *2 (D. Mass. 2010) ("[l]ikelihood of success on the merits is the critical factor in the analysis."). Accordingly, where, as here, Plaintiff cannot satisfy her burden of

demonstrating a likelihood of success on the merits, the Court need look not further and the Plaintiff's motion for a preliminary injunction must be denied.

B. Plaintiff Has Not and Cannot Demonstrate a Likelihood of Success on the Merits of her Claims

Plaintiff has not satisfied her burden of establishing a likelihood of success on any of her claims. First, HAMP does not provide a private cause of action. Second, to the extent Plaintiff claims that any contract arose between her and Wells Fargo based on Wells Fargo's attempts to work with Plaintiff and Plaintiff's Trial Period Plan, those claims likewise fail under traditional contract principles and the plain language of the Trial Period Plan letter.

1. Plaintiff's Claims Fail Because No Private Cause of Action Exists under HAMP

It is indisputable that the Act and HAMP do not provide an express private right of action. In addition, the congressional record expressly refutes any notion that Congress intended an implied private right of action. See infra, p.5-6, Statements of Rep. Kucinich (lamenting that Act did not go far enough because it did not give the Secretary the authority to compel servicers to modify mortgages). Thus, HAMP is best described as an incentive program without an enforceable statutory or regulatory scheme.

The courts that have considered the question of whether HAMP creates a private right of action have agreed that it does not. See e.g., Gallardo v. Wells Fargo Bank, N.A., 2010 WL 434576, at *3 (C.D. Cal. 2010) (no private cause of action under HAMP); Zoher v. Chase Home Financing, 2010 WL 4065798, at *4 (S.D. Fla. Oct. 15, 2010) (same); Watts v. National City Mortgage, Civil Action No. 3:10CV261 (W.D.N.C. September 20, 2010) (Mullen, J.) (holding no private right of action exists under HAMP); Hart v. Countrywide Home Loans, Inc., 2010 WL 3272623 at **5** (E. D. Mich. Aug. 19, 2010) (entering summary judgment for defendant bank, holding HAMP does not compel modification and statute does

not create private right of action); Duggar v. Bank of America/Countrywide Loans, 2010 WL 3258383 at *2 (E.D. Mo. August 16, 2010) (holding no private cause of action under HAMP, TARP or the Emergency Economic Stabilization Act of 2008); Hoffman v. Bank of America, N.A., 2010 WL 2635773 at *5 (N.D. Cal. June 30, 2010) (holding no private right of action to enforce HAMP); Robinson v. Wells Fargo Bank, N.A., 2010 WL 2534192 at *7 (D. Ariz. June 18, 2010) (holding no private cause of action under TARP); Thoreau de la Salle v. America's Wholesale Lender, 2010 U.S. Dist. LEXIS 36319 (E.D. Cal. Apr. 13, 2010) ("To the extent that plaintiff is trying to predicate her due process claims on violations of the Home Affordable Modification Act (HAMP), the Troubled Asset Relief Program (TARP), or the National Housing Act ("NHA"), there is no private right of action afforded under those statutes nor do they create a protected property interest"); Aleem v. Bank of America, 2010 U.S. Dist. LEXIS 11944, *9 (C.D. Cal. Feb. 9, 2010) ("Though Plaintiffs mention the National Housing Act and the HAMP, they fail to allege any elements related to violations of these statutes, nor do they provide a basis for concluding that a private right of action exists under these statutes."); Williams v. Geithner, 2009 U.S. Dist. LEXIS 104096 (D. Minn. Nov. 9, 2009) (finding HAMP did not create a protected property interest and noting "[t]he loan modifications are not an entitlement, but are linked to decisions that result in profits to taxpayers. Congress did not intend to mandate loan modifications."); Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1185 (N.D. Cal. 2009) ("...but nowhere in the judicial review section is there any mention of a right of action against non-governmental entities. Thus, the Court finds that there is no express private right of action against TARP fund recipients.").

Accordingly, here, to the extent Plaintiff is seeking relief based on the assertion that she has a private right of action to enforce Wells Fargo's contract with the federal government under HAMP, these claims fail. Plaintiff's claim for declaratory relief fails to the extent it seeks a declaration that she has "fulfilled all of the criteria to be eligible for a permanent loan modification under HAMP." To the extent Plaintiff is seeking to assert a private right of action for breach of contract or breach of the covenant of good faith and fair dealing based on the HAMP program and her allegation that HAMP provides her with a right to a permanent loan modification, these claims likewise fail and have no likelihood of success.

2. Plaintiff Cannot Rely on a Third-Party Beneficiary Claim

Plaintiff also implicitly relies on a third-party beneficiary theory to support her claim for breach of contract and the covenant of good faith and fair dealing. Specifically, Plaintiff purports to be an intended beneficiary of the Servicer Participation Agreement between Wells Fargo and the U.S. Government such as would create an obligation or duty from Wells Fargo to Plaintiff. While this is merely an improper attempt to circumvent the indisputable lack of private action for HAMP, Plaintiff's theory is quickly defeated by First Circuit case law and the Agreement itself.

The Courts that have considered the issue have outright rejected third-party breach of contract claims for alleged violations of HAMP. See McKensi v. Bank of America, N.A., Civil Action No. 09-11940-JGD (D. Mass. September 22, 2010) (Dein, J.) (holding plaintiff mortgagor not third-party beneficiary); Gallardo, 2010 WL 434576, at *3 (C.D. Cal. 2010) (plaintiff not intended third-party beneficiary under HAMP); Martinez v. Bank of America, N.A., 2010 WL 4290921, at * 10 (borrowers not intended third-party beneficiaries); Zoher, 2010 WL 4065798, at *4 (S.D. Fla. Oct. 15, 2010) (same); Vazquez v. Bank of America

Home Loans, Civil Action No. 2:10-CV—00116-RJJ (D. Nev. August 23, 2010) (Pro, J.) (holding plaintiffs not intended third party beneficiaries of servicer participation agreement/HAMP contract between bank and government); Wright v. Bank of American, N.A., 2010 WL 2889117 at *5 (N.D. Cal. July 22, 2010) (holding plaintiff not third-party beneficiary entitled to assert breach of contract claim based on servicer participation under agreement HAMP and dismissing plaintiff's claim); Hoffman v. Bank of America, N.A., 2010 WL 2635773 at *3-5 (N.D. Cal. 2010) (holding plaintiff not third-party beneficiary under servicer participation agreement under HAMP); Escobedo v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 117017, *7 (S.D. Cal. Dec. 15, 2009) (finding, "[q]ualified borrowers are incidental beneficiaries of the Agreement and do not have enforceable rights under the contract"); see also Villa v. Wells Fargo Bank, N.A., 2010 U.S. Dist. LEXIS 23741, *6-7 (S.D. Cal. March 15, 2010) (rejecting third party beneficiary relying on Escobedo reasoning).

a. Plaintiff's Third-Party Beneficiary Theory Fails Because Plaintiff Is Not An Intended Beneficiary Of The Servicer Participation Agreement under the Law of Contracts.

Since Plaintiff is at best a mere incidental beneficiary, and not an intended beneficiary, she cannot assert a third party breach of contract claim. The servicer agreement, upon which Plaintiff attempts to latch her claims, speaks directly to the question of intended beneficiaries. The agreement provides: "The Agreement shall inure to the benefit of and be binding upon ***the parties to the Agreement*** and their permitted successors-in-interest." See Exhibit C, Page 10. The agreement provides no expressed or implied language to the contrary. The Act could have contemplated protection to individuals, but it did not.

The agreement is governed by Federal law. See Exhibit C, Page, 10, Section 11(A). Federal courts look to the Restatement of Contracts in deciding issues of federal law. See Klamath Water Users Protective Assoc. v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999)

("Federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party."); Massachusetts v. Mylan Laboratories, 357 F. Supp. 2d 314, 326 (D. Mass. 2005) ("A Court applying federal common law may look to the Restatement of Contracts for guidance regarding when a third party beneficiary may sue").[5] With respect to third party beneficiaries, the Restatement of Contracts provides:

> (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 … 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.

Restatement (Second) of Contracts § 302. The Restatement specifically explains third beneficiary rights in the context of government contracts that benefit the general public. Section 312, provides:

> (1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.
> (2) In particular, ***a promissor who contracts with a government or governmental agency to do an act for or render service to the public is not subject to contractual liability to a member of the public*** for consequential damages from performance or failure to perform …

Restatement (Second) of Contracts § 313 (emphasis added). The comments and illustrations further provide, "Government contracts often benefit the public, but individual members of the public are treated as ***incidental beneficiaries*** unless a different intention is manifested. Id. at Comment (a).

[5] Massachusetts state courts also look to the Restatement of Contracts for third party beneficiary rules. See Public Service Co. of N.H. v. Hudson Light and Power Dept., 938 F.2d 338, 341 (1st Cir. 1991) ("Massachusetts decisional law comports with the third party beneficiary rules in *Restatement (Second) of Contracts § 302..."*)

While "intended beneficiaries" may be allowed in some circumstance to enforce a third party contract, incidental beneficiaries may not. Mylan Indust, at 329 (citing Harvard Law Sch. Coalition for Civil Rights v. President & Fellows of Harvard Coll., 413 Mass. 66 (Mass. 1992) Thus, for the purposes of third party beneficiary claims, distinguishing between intended and incidental beneficiaries is crucial. Since the contract is a government contract, Plaintiff is presumed to be only an incidental beneficiary.

In Escobedo v. Countrywide Home Loans, Inc., plaintiff also attempted to bring a third-party beneficiary breach of contract claim against Countrywide for an alleged breach of its HAMP servicer participation agreement. Escobedo, 2009 U.S. Dist. LEXIS at *4. Relying on the Restatement of Contracts and 9th Circuit precedent,[6] the Court noted that, "Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." In order to permit individual enforcement, the contract must have included an expressed or implied intention to benefit the third party. Id. at *5-6. That agreement, like the one at issue in this case, "did not grant borrowers the right to enforce the Agreement" because it expressly stated that the benefits only inured to the "parties to the Agreement and their permitted successors-in-interest." Id. at *6. In addition, the Court noted that a borrower "would not be reasonable in relying on the Agreement as manifesting an intention to confer a right on him or her because the Agreement does not require that Countrywide modify eligible loans." Indeed, as recently noted by the District Court for the District of Massachusetts, the Agreement only called for servicers to "consider" loans pursuant to guidelines and does not require Countrywide to

[6] Klamath, 204 F.3d 1206, 1211 (9th Cir. 1999) ("To sue as a third-party beneficiary of a contract, the third party must show hat the contract reflects the express or implied intention of the parties to the contract to benefit the third party.")

actually modify loans. Id.; Sankey v. Aurora Loan Servs., LLC, 2010 WL 4450404, at * 2 (D. Mass. Nov. 4, 2010) (denying plaintiff's motion for preliminary injunction concluding no likelihood of success where lender not required to modify all eligible loans under HAMP participation agreement). The court thus granted Countrywide's motion to dismiss, ruling that Plaintiff did not have standing to raise third-party beneficiary breach of contract claims.

Massachusetts decisions comport with the reasoning in Escobedo. Like Escobedo, Massachusetts courts require "special clarity" and look to a "clear indication" to support a finding that a government contract intended to confer a benefit on a third party, particularly so when the third party is an individual member of the general public. See Mylan Laboratories, 357 F. Supp. 2d at 326 (distinguishing state third-party actions as opposed to individual third party actions for government contracts). Courts will not, however, allow a third party beneficiary claim to be used as an end-run on the enabling statutory scheme. Id. at 328.

In this case, there is no expressed intent to create individual contractual enforcement powers in individual borrowers. The Agreement expressly provides that the benefits only inure to the parties to the Agreement. The Agreement is also consistent with the enabling statutory scheme, which also does not intend to provide a private cause of action. Here, Plaintiff merely attempts an end-run on legislative intent by conjuring up a third-party beneficiary theory. Under the Restatement and interpreting case law, however, courts have drawn distinctions between government contracts and third party contracts such that individuals are presumed to be incidental beneficiaries unless some other intent is expressly indicated. No such intended beneficiary status is included in the contract. In this case, there is no expressed or implied intent that Plaintiff be afforded third-party beneficiary status. Moreover, there is nothing in the underlying agreement that guarantees Plaintiff a loan modification. The

Agreement merely contemplates modification attempts and only compensates the servicer when they are successful. Even then, however, that attempt is limited by prohibitions contained in the servicer's underlying servicing agreement with the loan holder. Plaintiff in this case is at best an incidental beneficiary, and therefore she lacks standing to assert a third-party beneficiary breach of contract claim.

b. Even Assuming Arguendo that Plaintiff is an Intended Beneficiary, There is No Obligation to Modify Any Loan

Even if the Plaintiff is permitted to assert a third-party breach of contract action, the Servicer Participation Agreement cannot serve as the basis for any claim that Wells Fargo was "required" to modify a loan. As discussed above, Congress recognized (and in some cases lamented) that neither the Act nor HAMP require servicers to do anything. Indeed, the entire program is voluntary. As the District Court for the District of Massachusetts recently noted, the Servicer Participation Agreement does not require a lender to modify all eligible loans. Sankey, 2010 WL 4450404, at * 2 (D. Mass. Nov. 4, 2010) (denying plaintiff's motion for preliminary injunction concluding no likelihood of success where lender not required to modify all eligible loans under HAMP participation agreement). As a result, there is simply no general "contractual obligation" to modify any loan, and Plaintiff cannot as a third party assert rights which do not exist in the contract.

3. Plaintiff Has Not and Cannot Demonstrate a Likelihood of Success on Her Claims Based on the Existence of a Contract between Wells Fargo and Plaintiff Arising out of the Trial Period Plan

Plaintiff also appears to also base her claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing on the theory that a contract arose between Plaintiff and Wells Fargo based on the Trial Period Plan. This assertion is belied by the terms of the letter itself, the HAMP guidelines, and the law of contracts.

a. The Plain Language of the Trial Period Plan Letter Demonstrates it is Not a Contract

First, the Letter on which Plaintiff bases her assertion that a contract exists arising out of the Trial Period Plan plainly states:

> *If* you qualify under the federal government's Home Affordable Modification Program *and* comply with the terms of the Trial Period Plan, we will modify your mortgage loan and you can avoid foreclosure. (emphasis added).
> . . .
> The monthly trial period payments are based on the income information that you previously provided to us. They are also our estimate of what your payment will be IF we are able to modify your loan under the terms of the program. (emphasis in original).

Accordingly, on the face of letter itself it is clear that Wells Fargo's offer to allow Plaintiff a Trial Period Plan while it determines whether she actually qualifies for a permanent loan modification under HAMP does not create any binding contractual obligation. This is in accordance with the HAMP supplemental directives themselves which state that once the borrower returns the signed Trial Period Plan, along with the Trial Period Plan payment and income verification documents, then the servicer will determine if the borrower qualifies for a HAMP modification. See Exhibit B, HAMP Supplemental Dir. 9-01, Page 15.

b. Neither the Trial Period Plan Nor Any other Identified Document Meets the Requirements of a Contract under Massachusetts Law

The Trial Period Plan does not meet any of the requirements of an enforceable contract under Massachusetts law. In order to form a valid contract, there must be a definite offer, acceptance, an exchange of consideration, and a meeting of the minds. Vadnais v. NSK Steering Sys. Am., Inc., 675 F. Supp. 2d 205, 207 (D. Mass. 2009). A party's *suggestion* is not an offer if it is reasonably apparent that some further step is necessary to create a contractual relations. Bourque v. FDIC, 42 F.3d 704, 709 (1994). Here, as previously discussed, the plain language of the Trial Period Plan cannot reasonably viewed as a definite

offer for a permanent loan modification because it specifically states that Plaintiff must not only comply with the Trial Period Plan, but also qualify based on income verification documents, in order to obtain a permanent loan modification under HAMP. Accordingly, the conditional language of the Trial Period Plan unmistakably makes clear that the letter does not constitute an offer or a guarantee that Plaintiff is entitled to a permanent loan modification.

Likewise, Plaintiff cannot dispute that she has provided no new consideration for any alleged contract, assuming one exists (which it does not). Namely, it is well-settled that the performance of a pre-existing duty that is neither doubtful nor subject to reasonable dispute is not valid consideration. Sloan v. Burrows, 357 Mass. 412, 415 (1970) ("Since the duty to pay this amount already existed under the agreement" the pre-existing duty to perform the obligation is not sufficient consideration). Here, Plaintiff does not in any way dispute the validity of the Note or Mortgage or that she is obligated to pay the amounts due thereunder. Accordingly, even assuming the existence of a contract, no consideration supports the Trial Period Plan where Plaintiff is already obligated to pay the full amount on the loan.

Moreover, the Trial Period Plan letter cannot constitute a contract because it does not contain the essential terms necessary for such a determination. Under Massachusetts law, "[a] purported contract which is no more than an agreement to agree in the future on essential terms, or one which does not adequately specify essential terms, ordinarily will be unenforceable." Roddy & McNulty Ins. Agency, Inc. v. AA Proctor & Co., Inc., 16 Mass App. Ct. 525, 532 (1983) (quoting Air Tech Corp. v. General Elec. Co., 347 Mass. 613, 626 (1964)). In addition, it is well-settled that the essential terms in a contract to lend money are the applicable rate of interest, when repayment is to begin and end, the amount to be repaid and mode of repayment. Jordan-Milton Mach., Inc. v F/V Teresa Marie II, 978 F.2d 32,35

(1st Cir. 1992). Here, it is plain that the Trial Period Plan letter does not contain any of the essential or definite terms required for an enforceable contract. The only information provided in the letter is the monthly Trial Period Plan payment amount, and it does not identify any new applicable rate of interest, whether such interest rate is fixed, the duration of payments under any allege permanent modification, nor the principal amounts owed, whether interest has been capitalized, or any escrow amounts. This is true even though all of these items may be modified under HAMP. See Supplemental Directive 09-01, pages 9-10. In short, Plaintiff has not and cannot sustain her burden of establishing a likelihood of success on the merits on her claims based on the alleged existence of a contract.

C. The Balance of Harms Disfavors the Requested Injunctive Relief

In light of Plaintiff's inability to satisfy her burden of establishing a likelihood of success on the merits, the balance of harms therefore favors Wells Fargo. "In the ordinary course, plaintiffs who are unable to convince the trial court that they will probably succeed on the merits will not obtain interim injunctive relief." Weaver v. Henderson, 984 F. 2d 11, 12 (1st Cir. 1993) (citing LeBeau v. Spirito, 703 F. 2d 639, 645 (1st Cir. 1983)) (affirming denial of preliminary injunction and ending inquiry after concluding plaintiffs were unlikely to prevail on the merits). Accordingly, because Plaintiff has completely failed to satisfy her burden, the balance of harms favors Wells Fargo.

D. The Injunctive Relief Sought Would Disserve the Public Interest

Contrary to Plaintiff's assertions, the public interest favors efficient enforcement of a creditor's security rights in property. See Perry v. Nat's Default Serv. Corp., 2010 WL 3325623, at *6 (N.D. Cal. 2010) ("public interest would not be served by prohibiting [defendant] from proceeding with foreclosure sale, as it is entitled to do"); Bray v. Bank of

Amer., 2010 WL 749789, at *3 (D. N.D. 2010) ("public interest favors timely enforcement of creditor rights subject to the ability of borrowers to argue legitimate defenses"); Labossiere v. GMAC Mortgage, 2010 WL 2836107, at *4 (D. Idaho 2010) ("public interest in efficient resolution of non-judicial foreclosures also weighs in favor of [defendants]."). [7] Plaintiff has not alleged any legitimate defense to foreclosure. As such, there is no public interest served in granting Plaintiff's motion and prolonging the already extended foreclosure process in this case.

III. IF THE COURT GRANTS PLAINTIFF'S MOTION PLAINTIFF SHOULD BE REQUIRED TO POST A BOND

In the event that the Court is inclined to grant Plaintiff's motion, the Court should also order Plaintiff to post a bond or make security payments into an escrow account or with the Court in an amount sufficient to cover Plaintiff's modified monthly mortgage payments.

CONCLUSION

Plaintiff has failed to satisfy her burden of establishing the "sine qua non" of establishing entitlement to a preliminary injunction; namely, she has failed to establish a likelihood of success on the merits. This Court should therefore deny Plaintiff's Motion for a Preliminary Injunction.

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[7] In addition, analysts and governmental officials have recently recognized that delaying foreclosures will actually impede the economic recovery and prevent the reemergence of a stable real estate market. See Courts Add to Foreclosure Delay, Wall Street Journal, Oct. 11, 2010, *available at* http://online.wsj.com/article/SB10001424052748703358504575544342488365152.html (recognizing that experts believe that real estate price is closely correlated to the duration of time that properties are in foreclosure); Foreclosure Flaws May Slow Home Price Fall, Delay Recovery, Bloomberg, Sept. 27, 2010, *available at* http://www.bloomberg.com/news/2010-09-27/foreclosure-flaws-may-delay-u-s-recovery-by-slowing-drop-in-home-prices.html (delays caused by legal proceedings postpones end of declining real estate market); Obama Administration Sings New Tune on Foreclosures, Nov. 2, 2010, CNNMoney.com, *available at* http://money.cnn.com/2010/11/02/real_estate/obama_administration_foreclosure_shift/index.htm (Robert Gibbs, White House Press Secretary states that without sales of homes in distressed areas, the "recovery in the housing market stops . . . That obviously can have – we believe and others believe – a very negative and detrimental impact to our economic recovery efforts and the housing markets").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Heather L. Bennett, hereby certify that this document has been filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this date.

Date: November 17, 2010 */s/ Heather L. Bennett*