No. COA 20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
**********

| | | |
|---|---|---|
| CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, | ) | From Mecklenburg County No. 18-CVS-8266 |
| Appellants, | ) | |
| v. | ) | |
| BANK OF AMERICA, N.A., | ) | |
| Appellee. | ) | |

FILED
2020 MAR -2 P 2:30

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RULE 11(c) SUPLLEMENT to the PRINTED RECORD on APPEAL

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INDEX

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 18-CVS-8266

**NOTICE OF FILING OF NOTICE OF REMOVAL**

To: William C. Robinson
Dorothy M. Gooding
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Raleigh, NC 27612
Attorneys for Plaintiffs

Clerk of Court
Mecklenburg County Superior Court

PLEASE TAKE NOTICE that, on June 4, 2018, Defendant Bank of America, N.A. filed a Notice of Removal of this action to the United States District Court for the Western District of North Carolina. A true and correct copy of the Notice of Removal is attached hereto.

PLEASE TAKE FURTHER NOTICE that the filing of the Notice of Removal in the United States District Court for the Western District of North Carolina and the filing of this Notice effect the removal of this action, and pursuant to 28 U.S.C. § 1446(d), the above-captioned action may proceed no further unless and until the case is remanded.

This the 1st day of June, 2018.

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*Counsel for Defendant*
*Bank of America, N.A.*

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the foregoing **NOTICE OF FILING OF NOTICE OF REMOVAL** on all parties to this cause by depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

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*Bank of America, N.A.*

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**Civil Action No. _____**

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

**NOTICE OF REMOVAL**

PLEASE TAKE NOTICE that Bank of America, N.A. ("Bank of America"), by its undersigned counsel, hereby removes the above-captioned action, styled *Taylor et al. v. Bank of America, N.A.*, No. 18 CVS 8266 (the "*Taylor* Action"), from the Superior Court of the County of Mecklenburg, North Carolina, to the United States District Court for the Western District of North Carolina, pursuant to 28 U.S.C. §§ 1441 and 1446. As grounds for removal, Bank of America states as follows:

1. This Court has original jurisdiction over this action under 28 U.S.C. §§ 1331 and 1332(a) on the basis of federal-question jurisdiction and diversity jurisdiction, such that it may be removed under 28 U.S.C. §§ 1441 and 1446.

**BACKGROUND**

2. On May 1, 2018, the thirteen above-captioned Plaintiffs filed a Complaint and exhibits ("Compl.," attached **as Exhibit A**) in the Superior Court of Mecklenburg County, North

Carolina, asserting grievances about their attempts to obtain mortgage loan modifications from Bank of America under the federal Home Affordable Modification Program ("HAMP"). Plaintiffs each complain that they failed to obtain loan modifications in the 2009-2010 period, and attribute this to various supposed "misrepresentations" made by Bank of America employees.

3. Plaintiffs live all over the country. Mr. Taylor is the only Plaintiff who is alleged to reside in North Carolina. Compl. ¶ 34. Mr. and Mrs. Warlick, Ms. Mendez, Ms. Martinez, and Mr. Peacock live in California. *Id.* at ¶¶ 65, 97, 127, 280. Mr. and Mrs. Aleshire live in Wisconsin. *Id.* at ¶ 160. Ms. Perry lives in Arizona. *Id.* at ¶ 191. Ms. Whiteside lives in Virginia. *Id.* at ¶ 216. Ms. Stephan lives in Michigan. *Id.* at ¶ 248. Mr. McBride lives in Nevada. *Id.* at ¶ 314.

4. Plaintiffs assert claims under the common law of unspecified states for fraud (Count I, ¶¶ 357-73), intentional misrepresentation (Count II, ¶¶ 374-82), promissory estoppel (Count III, ¶¶ 383-86), conversion (Count IV, ¶¶ 387-92), and unjust enrichment (Count V, ¶¶ 394-99). Plaintiffs also assert a statutory claim under the North Carolina Unfair & Deceptive Trade Practices Act, N.C.G.S. § 75-1 *et seq.* (Count VI, ¶¶ 400-14) and a claim for "wanton and reckless conduct" invoking N.C.G.S. § 1D-1 *et seq.* (Count VII, ¶¶ 415-19).

5. Plaintiffs purported to effect service of the complaint by U.S. mail on Bank of America's registered agent for service of process on May 3, 2018. *See* **Exhibit B.**

**REMOVAL IS PROPER UNDER 28 U.S.C. § 1331 (FEDERAL QUESTION)**

6. It is a "longstanding" principle that "federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "The doctrine captures the commonsense notion that a

federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* "The classic example" is where "a state-law claim . . . depends upon the construction or application of federal law." *Id.* at 313 (brackets omitted). That is the situation here, for multiple reasons.

7. Plaintiffs' claims "depend[] upon the construction or application of federal law" because Plaintiffs accuse Bank of America of fraudulent conduct by "refus[ing] to apply [HAMP trial payments] to Plaintiff's account." *E.g.*, Compl. ¶ 41. This conduct is not "fraudulent," because it is mandated by federal law and U.S. Treasury Department guidelines. *See, e.g., Torres v. Bank of Am., N.A.*, 2018 U.S. Dist. LEXIS 12640, at *6-7 (M.D. Fla. Jan. 26, 2018) (holding that "the Treasury Department requires servicers" to post HAMP trial payments to "an unapplied account") (citing, e.g., U.S. DEP'T OF TREASURY, HAMP SUPPLEMENTAL DIRECTIVE 09-01 at 1 (Apr. 6, 2009) (requiring trial payments to be held "as 'unapplied funds'" until "equal to a full [principal, interest, tax, and insurance] payment")). The Treasury Department's guidelines for the treatment of trial payments in this fashion is based on the fact that trial payments are customarily lower than the full contractual payment under a mortgage loan, and thus the disposition of those payments is governed by federal regulations applicable to partial payments. *See* 24 C.F.R. § 203.556(a)-(b) (providing for mortgage servicers to hold partial payments "in a trust account" and apply them to the mortgagor's account when they "aggregate a full monthly installment"). Thus, Plaintiffs claims' based on the allegedly improper application of HAMP trial payments cannot be adjudicated without reference to federal law and federal agency guidelines. *See, e.g., Steltz v. Bank of Am., N.A.*, No. 14-2978, 2015 U.S. Dist. LEXIS 85525, at *13 (D.N.J.

July 1, 2015) (asserting federal-question jurisdiction over HAMP-related claims because they turned "at least in part" on "what obligations . . . HAMP imposed upon Defendant").

8. Additionally, Plaintiffs' claims are based on allegations that Bank of America did not "honor[] its contract with the Federal Government" to process HAMP applications according to federal guidelines. Compl. ¶ 16. It is firmly established that "[f]ederal law controls the interpretation of a contract entered into pursuant to federal law and to which the United States is a party," including, specifically, the HAMP servicer participation agreement invoked by Plaintiffs here. *Phipps v. Wells Fargo Bank, N.A.*, No. 10-2025, 2011 WL 302803, at *6 (E.D. Cal. Jan. 27, 2011); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-1985, 2010 WL 3212131, at *3 (S.D. Cal. Aug. 12, 2010) (same); *Hammonds v. Aurora Loan Serv. LLC*, No. 10-1025, 2010 WL 3859069, at *2 (C.D. Cal. Sept. 27, 2010) ("Federal law controls the interpretation of the HAMP contract"). Thus, as in *Steltz*, the Court must "determine whether Defendant complied with the obligations the federal government imposed" to dispose of Plaintiffs' claims, and this "constitutes a significant federal issue" giving rise to "federal question subject matter jurisdiction over Plaintiffs' [state law] claim[s]." 2015 U.S. Dist. LEXIS 85525, at *14-15.

9. Finally, numerous courts have rejected claims like the Plaintiffs' on the ground that claims "that seek[] the general enforcement of the HAMP guidelines" fail because "Congress created no private right of action for the denial of a HAMP application." *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 775 (4th Cir. 2013). This issue of what rights of action Congress has conferred is naturally an issue of federal law.

**REMOVAL IS PROPER UNDER 28 U.S.C. § 1332(a) (DIVERSITY JURISDICTION)**

10. Removal is proper on grounds of diversity of citizenship under 28 U.S.C. § 1332(a) because the (1) out-of-State Plaintiffs are legally barred from destroying diversity of citizenship through the improper joinder of their claims with those of a single local Plaintiff, and (2) the amount in controversy exceeds $75,000.

11. As a national bank with "its principal place of business" in Charlotte, North Carolina (Compl. ¶ 2), Bank of America is a citizen of North Carolina for purposes of diversity jurisdiction. *See, e.g.*, 28 U.S.C. § 1348; *Wachovia Bank v. Schmidt*, 546 U.S. 303, 307 (2006) ("A national bank, for § 1348 purposes, is a citizen of the State in which its main office, as set forth in its articles of association is located"); *Crouch v. Bank of Am., N.A.*, No. 11-0433, 2011 U.S. Dist. LEXIS 152548, at *8-10 (E.D. Va. Nov. 29, 2011) ("Bank of America, N.A. is a national banking association located in the State of North Carolina") (ellipses and brackets omitted).

12. As noted above, all Plaintiffs except Mr. Taylor reside in states other than North Carolina. Compl. ¶¶ 34, 65, 97, 127, 191, 216, 248, 280, 314. Complete diversity of citizenship would therefore exist for each of these Plaintiffs' claims but for their joinder with Mr. Taylor's. However, Plaintiffs "may not avoid diversity jurisdiction by misjoining their claims. . . . [F]raudulent joinder of plaintiffs is no more an impediment to diversity jurisdiction than fraudulent joinder of defendants." *Grennell v. W. S. Life Ins. Co.*, 298 F. Supp. 2d 390, 395 (S.D. W. Va. 2004).

13. Plaintiffs in this case are improperly joined. Under both the North Carolina Rules of Civil Procedure and the federal rules, joinder of plaintiffs is proper only if, *inter alia*, all of their claims "aris[e] out of the same transaction, occurrence, or series of transactions or

occurrences." N.C. R. CIV. P. 20(a); FED. R. CIV. P. 20(a) (same). Plaintiffs' claims do not qualify. Each Plaintiff complains about his or her individual, separate, and unrelated attempts to obtain mortgage loan modifications and their own separate and unrelated loan defaults and foreclosure cases. Plaintiffs' claims are specifically based on different alleged misrepresentations made separately to each of them by different Bank of America employees in different communications. *Compare*, *e.g.*, Compl. ¶ 39 ("On or about February 1, 2010, BOA loan representative, Michael Sanchez, advised Plaintiff [Mr. Taylor] by phone to refrain from making his regular mortgage payments."), *with* Compl. ¶ 103 ("[O]n or about March 3, 2010, Plaintiff [Ms. Mendez] was falsely informed by BOA employee, Justin Rich, that her documents were 'not current', 'not received', or were 'incomplete.'").

14. In *Grenell*, analogous claims of "misrepresentations . . . by individual [] agents" did not constitute "the same transaction, occurrence, or series of transactions or occurrences" within the meaning of the joinder rules because "the facts that form the bases for those claims are unique to each plaintiff" and "each plaintiff will need to specifically prove reliance on a misrepresentation made by separate [] agents." 298 F. Supp. 2d at 398-99 (citing, *e.g.*, *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 547, 549 (W.D. Wis. 1999) ("The general consensus . . . is that Rule 20 demands more than the bare allegation that all plaintiffs are victims of a fraudulent scheme perpetrated by one or more defendants; there must be some indication that each plaintiff has been induced to act by the same misrepresentation.")). Where "Plaintiffs allege no connection between themselves other than that they were all victims of the fraudulent acts of Defendant, . . . the requirements of Rule 20(a) clearly are not met." *Id.* at 399.

15. Indeed, numerous courts have found improper joinder in cases just like this one where multiple unrelated borrowers have sought to bring similarly theorized, but factually

distinct, claims against mortgage servicers arising from their efforts to obtain loan modifications. *See, e.g., Torres v. Bank of Am., N.A.*, No. 17-1534, ECF No. 19 (M.D. Fla. Oct. 6, 2017) ("Plaintiffs' claims did not arise of the same transaction or occurrence. Rather, the claims arise from different borrowers' loans or loan-modification attempts and necessarily involve different sets of operative facts, even if the claims are pled similarly and present similar legal issues."); *Green v. Citimortgage, Inc.*, 2013 WL 6712482, at *5 (E.D.N.Y. Dec. 18, 2013) ("Inasmuch as each plaintiff's claims appear to arise out of a mortgage-related transaction that is distinct from the transactions on which the other plaintiffs' claims are based, and as each plaintiffs claims implicate distinct loans, locations, dates and personnel, there is no meaningful economy of scale gained by trying the [ ] cases together. There will be little, if any, overlapping discovery and each plaintiff's claims will require distinct witnesses and documentary proof.").

16. In the removal context, "the proper remedy for misjoinder of plaintiffs would be severance of all claims and remand of the nondiverse plaintiffs' claims." *Id.*; *accord* N.C. R. Civ. P. 21; Fed. R. Civ. P. 21; *see generally Grennell*, 298 F. Supp. 2d at 397 ("[T]his Court need not decide whether to apply federal or state law regarding permissive joinder, as the two are identical. . . ."). This Court also has the discretionary power under Rule 21 to sever any claims in the interests of justice or judicial economy even if the requirements for joinder are technically met. Thus, even if this Court does not assert federal jurisdiction over this action in its entirety, it should at least assert federal jurisdiction over the claims of the foreign Plaintiffs after severing their improperly joined claims from Mr. Taylor's.

17. The minimum amount-in-controversy requirement is easily satisfied. Plaintiffs seek punitive damages under N.C.G.S. § 1D-1 *et seq.*, which permits parties to seek punitive damages up to "three times the amount of compensatory damages or two hundred fifty thousand

dollars ($250,000), whichever is greater." N.C.G.S. § 1D-25(b). Plaintiffs each seek judgment "in an amount in excess of $25,000" (Compl. at 98), so the plea for punitive damages puts more than the $75,000 jurisdictional minimum in controversy under either measure. *See generally R.L. Jordan Oil Co. of N.C. v. Boardman Petrol., Inc.*, 23 F. App'x 141, 145 n.3 (4th Cir. 2001) ("When calculating the amount in controversy, the district court should consider any special or punitive damages") (citing *Saval v. BL Ltd.*, 710 F.2d 1027, 1033 (4th Cir. 1983)).

**OTHER PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED**

18. Removal Is Timely. Removal is permitted up to 30 days after service "of the initial pleading setting forth the claim for relief" or any "other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(1), (3). The complaint's purported date of service here was May 3, 2018, and thus removal is timely through June 4, 2018 (because 30 days from May 3 falls on a Sunday).

19. This Is the Proper Court. Pursuant to 28 U.S.C. §§ 1441(a) and 1446(a), this Notice is being filed in the United States District Court for the Western District of North Carolina, which is the district embracing the country where the *Taylor* Action was originally filed.

20. Signature. This Notice is signed pursuant to FED. R. CIV. P. 11. *See* 28 U.S.C. § 1446(a).

21. Copies of Pleadings. Copies of all process, pleadings and orders served upon Defendants in the *Taylor* Action are attached as **Exhibit A**. *See* 28 U.S.C. § 1446(a).

22. Notice of Filing of Notice of Removal. Attached as **Exhibit C** is a copy of the Notice of Filing of Notice of Removal, without exhibits, which will be promptly filed with the

Clerk of the Superior Court of Mecklenburg County, North Carolina and served on Plaintiffs' counsel in compliance with 28 U.S.C. § 1446(d).

23. Bond and Verification. Pursuant to § 1016 of the Judicial Improvements and Access to Justice Act of 1988, no bond or verification is required in connection with this Notice of Removal.

**CONCLUSION**

24. Wherefore, based upon the foregoing, this Court has original jurisdiction over the *Taylor* Action pursuant to 28 U.S.C. §§ 1331 and 1332, and the action is properly removed to this Court under 28 U.S.C. §§ 1441 and 1446 and should proceed in the United States District Court for the Western District of North Carolina.

This the 1st day of June, 2018.

/s/ Bradley R. Kutrow
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*Counsel for Defendant*
*Bank of America, N.A.*

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the foregoing **NOTICE OF REMOVAL** on all parties to this cause by depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

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*Counsel for Defendant*
*Bank of America, N.A.*

EXHIBIT A to Notice of Removal (Summons, Complaint, Service)

Original set forth in its entirety in Record of Appeal pages 3-185

# EXHIBIT B

CT Corporation

**Service of Process Transmittal**
05/03/2018
CT Log Number 533272287

**TO:** CA LegaLit
Bank of America
225 W Hillcrest Drive
Thousand Oaks, CA 91360

**RE:** **Process Served in North Carolina**

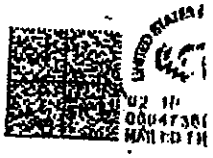
**FOR:** Bank of America, National Association (Domestic State: N/A)

**ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:**

| | |
|---|---|
| **TITLE OF ACTION:** | CHESTER TAYLOR III, RONDA, ET AL., PLTFS. vs. BANK OF AMERICA, N.A., DFTS.<br>*Name discrepancy noted.* |
| **DOCUMENT(S) SERVED:** | Summons, Complaint, Exhibit(s) |
| **COURT/AGENCY:** | Mecklenburg County Superior Court, NC<br>Case # 18CVS8266 |
| **NATURE OF ACTION:** | Foreclosure Litigation - Mortgage - 608 Spencer Farlow Drive, Carolina Beach, North Carolina |
| **ON WHOM PROCESS WAS SERVED:** | CT Corporation System, Raleigh, NC |
| **DATE AND HOUR OF SERVICE:** | By Certified Mail on 05/03/2018 postmarked: "Illegible" |
| **JURISDICTION SERVED :** | North Carolina |
| **APPEARANCE OR ANSWER DUE:** | Within 30 days after you have been served |
| **ATTORNEY(S) / SENDER(S):** | William C. Robinson<br>ROBINSON ELLIOTT& SMITH<br>800 East Boulevard<br>Ste. 100<br>Charlotte, NC 28203<br>704-343-0061 |
| **ACTION ITEMS:** | CT has retained the current log, Retain Date: 05/04/2018, Expected Purge Date: 05/09/2018<br><br>Image SOP<br><br>Email Notification, CA LegaLit calegalit@bankofamerica.com |
| **SIGNED:**<br>**ADDRESS:**<br><br>**TELEPHONE:** | CT Corporation System<br>160 MINE LAKE CT STE 200<br>Raleigh, NC 27615<br>954-473-5503 |



Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

ROBINSON ELLIOTT & SMITH
P.O. Box 36098
Charlotte, NC 28236

Bank of America, N.A. by and through
its Registered Agent
CT Corporation System
160 Mine Lake Ct., Ste. 200
Raleigh, NC 27615-6417

# EXHIBIT C

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 18-CVS-8266

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

**NOTICE OF FILING OF NOTICE OF REMOVAL**

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Attorneys for Plaintiffs

Clerk of Court
Mecklenburg County Superior Court

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This the 1st day of June, 2018.

Bradley R. Kutrow

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*Counsel for Defendant*
*Bank of America, N.A.*

**CERTIFICATE OF SERVICE**

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This the 1st day of June, 2018.

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*Counsel for Defendant*
*Bank of America, N.A.*

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**Civil Action No. 3:18-cv-00288-MOC-DSC**

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

**BANK OF AMERICA, N.A.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SEVER MISJOINED CLAIMS**

Defendant Bank of America, N.A. hereby moves this Court to dismiss Plaintiffs' Complaint (ECF No. 1-1) under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6), or, in the alternative, to sever the individual claims that are misjoined in the Complaint into individual actions under Rules 20 and 21. More specifically, the Defendant shows the Court as follows:

1. The Complaint fails to provide a "short and plain" statement of each Plaintiff's claim, showing that individual Plaintiff is entitled to relief, as required by Rule 8(a);

2. The Complaint fails to plead with particularity the circumstances constituting fraud, as required by Rule 9(b);

3. The Complaint's causes of action are time-barred, and further fail to make plausible allegations sufficient to state a claim upon which relief can be granted;

4. For these reasons, the Complaint should be dismissed under Rule 12(b)(6).

5. In the alternative, because the claims of the eleven individuals and couples who are Plaintiffs do not arise from the same transaction or occurrence, they are misjoined as parties under Rule 20 and their individual claims should be severed pursuant to Rule 21.

Defendant Bank of America, N.A. further relies on the argument and authorities set forth in its Memorandum in Support of Motion to Dismiss or, in the Alternative, to Sever Misjoined Claims.

WHEREFORE, Defendant respectfully requests that the Court dismiss this action under Rules 8(a), 9(b), and 12(b)(6) or, alternatively, sever each individual Plaintiff or Plaintiff couple and require them to proceed in separate actions.

This the 15th day of June, 2018.

/s/ Bradley R. Kutrow
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This the 15th day of June, 2018.

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**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**Civil Action No. 3:18-cv-00288-MOC-DSC**

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

**MEMORANDUM IN SUPPORT OF**
**BANK OF AMERICA, N.A.'S MOTION TO DISMISS**
**OR, IN THE ALTERNATIVE, TO SEVER MISJOINED CLAIMS**

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## INTRODUCTION

This lawsuit improperly joins eleven individuals and couples (thirteen Plaintiffs total) from all over the country, each of whom defaulted on their mortgage loans and sought relief from Bank of America in the form of loan modifications under the federal Home Affordable Modification Program (HAMP). For unspecified reasons that surely vary from case to case, each of them failed to qualify for relief, failed to cure their defaults, and went through foreclosure or bankruptcy. Now, many years later, their names have been plugged into a boilerplate complaint recycled from other, dismissed lawsuits, and they claim to be the victims of fraud.[1] These claims are time-barred, meritless, and misjoined for no proper purpose into this single action.

Plaintiffs contrive their claims out of events alleged to have occurred between 2009 and 2012, and concede they are time-barred unless the statute of limitations is somehow tolled. Their tolling theory was rejected in the prior lawsuit from which their Complaint was copied, *Torres v. Bank of America, N.A.* in the Middle District of Florida. As Judge Richard Lazzara pointed out there, Plaintiffs' argument that the fraud statute of limitations was tolled under the doctrine of fraudulent concealment amounts to arguing that fraud claims can *never* be time-barred. Judge Lazzara also found no reason why the plaintiffs could not have discovered the facts they claim were misrepresented and brought suit when the representations were supposedly made.

But Plaintiffs do not actually plead any misrepresentations. The facts are pled only in the vaguest terms—virtually identical from one Plaintiff to the next—in a transparent effort to justify joining them in one omnibus case. The result of this is a 99-page, 415-paragraph Complaint with the same formulaic allegations reduced to the lowest common denominator, then repeated again

[1] *See, e.g., Torres v. Bank of Am., N.A.*, 2018 WL 573406 (M.D. Fla. Jan. 26, 2018) (dismissed as time-barred); *Paz v. Bank of Am., N.A.*, No. 16-3384, ECF Nos. 1-1, 29 (M.D. Fla.) (dismissed voluntarily after state-court remand denied); *Alonso v. Bank of Am., N.A.*, No. 17-0238, ECF Nos. 1-1, 33 (M.D. Fla.) (same).

and again. None, however, describes any actual fraud. For example, Plaintiffs somehow allege having conveniently identical conversations in which bank employees supposedly "omitted" to tell them how to qualify for HAMP without defaulting on their loans. At least one such conversation could not have happened without a time machine because HAMP didn't exist until a month later. *See* Compl. ¶ 285. Regardless, HAMP's requirements (once they existed) were publicly available, and Plaintiffs cannot, as a matter of law, base a fraud claim on allegations that the Defendant "omitted" to disclose matters of public knowledge when it did not even have any duty to speak. Plaintiffs also fail to plead any *material* omission, as they conspicuously avoid pleading that the allegedly "omitted" method of qualifying for HAMP even applied to them.

Indeed, what is most striking about the Complaint is what Plaintiffs *do not* allege. Plaintiffs accuse Bank of America of a "complex scheme" to defraud literally the whole country (Compl. ¶ 27), yet never actually allege they even qualified for HAMP or were wrongfully denied modifications. Plaintiffs apparently think it is enough to allege that their loans were not modified and therefore they *must* have been the victim of *something*. But their Complaint never rises above mere insinuations to plead plausible facts.

If the Complaint is not dismissed, it should be severed into individual cases. In describing an MDL court's denial of class certification of similar claims, Plaintiffs acknowledge that their claims "rest on so many individual factual questions that they cannot sensibly be adjudicated" in a single case. Compl. ¶ 32. The same individual issues that made class certification inappropriate in the MDL make joinder improper here. Each Plaintiff's claim arises out of his or her own individual course of dealings with Bank of America, not "the same transaction" as Rule 20 requires. Plaintiffs should not be allowed to use the joinder device to make North Carolina's courts a *de facto* MDL venue for untimely HAMP complaints from all over the country, after an

*actual* MDL court already found the requisite common issues lacking.

## BACKGROUND

### A. The Home Affordable Modification Program

HAMP was launched in 2009 by the Treasury Department as part of an initiative to make mortgage payments more affordable for certain at-risk homeowners through a combination of interest-rate reductions, term extensions, and principal forbearance. *See generally In re Bank of Am. HAMP Contract Litig.*, 2013 WL 4759649, at *1–2 (D. Mass. Sept. 4, 2013) (the "HAMP MDL"). The program operated by placing potentially eligible borrowers in trial modification plans, allowing them to benefit from reduced loan payments while the servicer collected documents and financial information from them in order to determine whether they qualified for permanent modifications. *See id.* at *1. HAMP expired at the end of 2016, after Bank of America had modified over 100,000 loans under the program.[2] Over a million borrowers have received modifications under other programs the Bank has offered.

### B. Other Lawsuits

This lawsuit is a spinoff of a series of Florida cases involving some of the same attorneys. On October 28, 2016, a misjoined group of 33 plaintiffs filed the initial complaint in Florida state court from which the Complaint here was copied, and followed that case with an identical complaint misjoining another 46 plaintiffs. *See Paz & Alonso*, *supra* n.1. Bank of America removed those cases to the Middle District of Florida, and the plaintiffs voluntarily dismissed them when their remand motion was denied. *See id.* Then they filed *Torres* on behalf of the original plaintiffs and several dozen more. The *Torres* court severed the misjoined claims, then

[2] *See* U.S. Dep't of Treasury, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT—THIRD QUARTER 2016, available at *https://www.treasury.gov/initiatives/financial-stability/reports/Documents/3Q16%20MHA%20Report%20Final.pdf.*

dismissed the first-named plaintiffs' claims as time-barred. *See Torres*, No. 17-1534, ECF No. 19 (M.D. Fla. Oct. 6, 2017) (severance order; attached as Ex. 1); 2018 WL 573406 (M.D. Fla. Jen. 26, 2018) (dismissal). The severed individual lawsuits are at various procedural postures in the Florida federal courts. *Torres* itself is under appeal.

**C. Allegations of the Complaint**

Although eleven individuals or couples are named in the caption, the Complaint is really only on behalf of ten of them, because Crystal Price is not referenced anywhere else in the document. The other Plaintiffs each allege contacting Bank of America to seek HAMP modifications in 2009 or 2010. Compl. ¶¶ 37, 68, 100, 130, 163, 194, 219, 251, 283, 317. Mr. Peacock implausibly alleges that his call "requesting a HAMP modification" happened on February 8, 2009, even though HAMP was not unveiled until March.[3]

Each Plaintiff except Ms. Mendez alleges being told by some Bank employee that he or she needed to be in default to qualify for HAMP. Plaintiffs allege that "[r]elying on [this] statement," they "remained in default ***and/or*** stopped making regular monthly mortgage payments." Compl. ¶¶ 39, 70, 132, 165, 196, 221, 253, 285, 319 (emphasis added). The intentionally vague "and/or" formulation is then repeated each time: "Plaintiff was told to remain in default ***and/or*** to stop making regular monthly mortgage payments on more than one occasion throughout the application process." *Id.* (emphasis added.)

The reason for the disjunctive language and reluctance to pick a story and stick to it can be traced to the progression of the prior cases cited above. In *Torres* and its various spinoffs, the plaintiffs alleged that they "refrained from making their regular mortgage payment and fell into

[3] *Compare* Compl. ¶¶ 283, 285 *with* Press Release, U.S. Dep't of Treasury, Relief for Responsible Homeowners: Treasury Announces Requirements for the Making Home Affordable Program (Mar. 4, 2009), available at *https://www.treasury.gov/press-center/press-releases/Pages/200934145912322.aspx*.

default status" in reliance on their conversations with Bank employees. *E.g.*, *Torres*, ECF No. 20, ¶ 39; *Carmenates v. Bank of Am., N.A.*, No. 17-2635, ECF No. 1, ¶ 39 (M.D. Fla.). When some of these cases went into discovery, it turned out that the allegation that Plaintiffs "fell into default" in reliance on Bank employees' statements could not possibly be true, because they were already deep in default at the time of those conversations. *See*, *e.g.*, *Carmenates*, ECF No. 33. Thus, in the current Complaint, Plaintiffs make indeterminate allegations that *maybe* they fell into default after talking to Bank employees. Or maybe they didn't. This improperly asks the Court to assume the truth of both mutually contradictory facts in order to sustain their claims.

Plaintiffs next allege that they submitted HAMP applications and were "falsely informed" that their applications were "incomplete" and required more "current" documents. Compl. ¶¶ 44, 75, 103, 137, 170, 201, 230, 258, 295, 328. Plaintiffs eventually submitted the needed documents and got approved for trial plans. *Id.* at ¶¶ 50, 81, 109, 143, 176, 207, 232, 264, 297, 330. Plaintiffs allege that the statements that they were "approved" for trial plans were "false as the application[s] w[ere]n't approved," but they fail to elaborate on this allegation and plead no facts to substantiate their implication that the trial plans weren't real. *Id.*

Plaintiffs each allege they made payments under their trial plans and accuse Bank of America of fraud because it posted those payments "into an unapplied account." *Id.* at ¶¶ 52, 83, 112, 145, 178, 209, 234, 266, 299, 332. Plaintiffs neglect to mention that this is exactly how the Treasury Department required servicers to handle HAMP trial payments. *See* U.S. Dep't of Treasury, HAMP Supp. Directive (SD) 09-01 at 18 (Apr. 6, 2009) (requiring trial payments to be held "as 'unapplied funds'" until "equal to a full [principal and interest] payment"), available at *https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf* (and attached as Ex. 2). Plaintiffs may or may not have made all of their trial payments on time (they refuse to

say) and complied with the other requirements of the trial plans (they refuse to say this, too), but the Complaint implies that they did not receive permanent modifications, for whatever unspecified reason or reasons. Based on this, they allege they were "forc[ed] into foreclosure." Compl. ¶¶ 55, 87, 117, 150, 181, 213, 238, 270, 304, 335. Mr. Taylor and Mr. and Mrs. Warlick filed bankruptcy petitions. Compl. ¶¶ 53, 84.

Separately, and without any apparent connection to Plaintiffs' HAMP claims, Plaintiffs (except for Ms. Perry) complain that the Bank assessed "Property Inspection" fees on their accounts between 2010 and 2012. *Id.* at ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337. Plaintiffs characterize these fees as fraudulent on the asserted ground that the Bank "omitted" to inform them about the fees, but the fact that they are able to identify the exact dates of the challenged fees (*see id.*) is difficult to square with the notion that they were never disclosed.

Based on these allegations, Plaintiffs assert claims under the law of unspecified states for fraud (Count I, ¶¶ 357–73), intentional misrepresentation (Count II, ¶¶ 374–82), promissory estoppel (Count III, ¶¶ 383–86), conversion (Count IV, ¶¶ 387–92), and unjust enrichment (Count V, ¶¶ 394–99). Plaintiffs also assert a claim under North Carolina's Unfair & Deceptive Trade Practices Act, N.C.G.S. § 75-1 *et seq.* (Count VI, ¶¶ 400–414) and seek punitive damages under N.C.G.S. § 1D-1 *et seq.* (Count VII, ¶¶ 415–19).

## LEGAL STANDARD

Rule 8(a)(2) requires a "short and plain statement of the claim," showing the pleader is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "Plain" means more than "unadorned" in this context; it requires straightforward pleading of facts *showing* that the plaintiff's claim warrants relief. A complaint must be dismissed under Rule 12(b)(6) if it fails to "contain sufficient factual matter . . . 'to state a claim to relief that is plausible on its face.'" *Id.* To meet this standard, Plaintiffs must make "allegations plausibly suggesting (not merely

consistent with)" a valid claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Finally, because all of Plaintiffs' claims are predicated on alleged fraud, Rule 9(b) requires them to allege, "at a minimum, [] the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Murphy v. Capella Educ. Co.*, 589 F. App'x 646, 652 (4th Cir. 2014).

Claims are properly joined under Rule 20 only if they "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" and share a common "question of law or fact." FED. R. CIV. P. 20(a)(1). When parties are improperly joined, the Court "possesses broad discretion" to sever or drop the misjoined parties. FED. R. CIV. P. 21; *Hard Drive Prods. v. Does 1–30*, 2011 U.S. Dist. LEXIS 119333, at *6 (E.D. Va. Oct. 17, 2011) (citing *Saaval v. BL, Ltd.*, 710 F.2d 1027, 1031–32 (4th Cir. 1983)).

## ARGUMENT

### I. PLAINTIFFS ARE NOT PROPERLY JOINED IN A SINGLE LAWSUIT.

Joinder of multiple plaintiffs in a single action is proper only if all claims "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences." FED. R. CIV. P. 20(a). This case does not qualify. Each Plaintiff complains about different alleged representations made at different times to each of them by different Bank employees in different communications, responding to different borrower dialogues. Each Plaintiff's eligibility (or lack thereof) for a modification turned on their own circumstances, resources, submissions, and other variables.

After analyzing exactly the same allegations that are made in this Complaint, the *Torres* court severed the plaintiffs who were misjoined there, and whose complaint was cut-and-pasted to create the Complaint here. Judge Lazzara ruled that their claims "did not arise of the same transaction or occurrence. Rather, the claims arise from different borrowers' loans or loan-modification attempts and necessarily involve different sets of operative facts, even if the claims

are pled similarly and present similar legal issues." *Torres*, ECF No. 19 (Ex. 1) at 4. Judge Lazzara relied on *Green v. Citimortgage, Inc.*, 2013 WL 6712482 (E.D.N.Y. Dec. 18, 2013), which likewise severed similar HAMP claims based on "exactly the same theories pursued by Plaintiffs here" on the following ground:

> Inasmuch as each plaintiff's claims appear to arise out of a mortgage-related transaction that is distinct from the transactions on which the other plaintiffs' claims are based, and as each plaintiffs claims implicate distinct loans, locations, dates and personnel, there is no meaningful economy of scale gained by trying the [] cases together. There will be little, if any, overlapping discovery and each plaintiff's claims will require distinct witnesses and documentary proof. The interest in economy is affirmatively disserved by forcing these many parties to attend a common trial at which these separate, unrelated claims would be resolved. Furthermore, settlement of the claims is likely to be facilitated if the claims relating to discrete loan transactions are litigated separately.

*Id.* at *6 (quoted in *Torres*, ECF No. 19 (Ex. 1) at 4).

Indeed, numerous courts have found improper joinder in cases where multiple unrelated borrowers have sought to bring similarly theorized, but factually distinct, claims related to loan modifications and other mortgage-servicing matters.[4] As these cases suggest, Plaintiffs' attempt

[4] *See, e.g., Guzman v. Wells Fargo Bank, N.A.*, No. 16-21423, ECF No. 26, at 1, 3 (S.D. Fla. June 22, 2016) (severing eight plaintiffs' claims because "[t]he fact that each of the Plaintiffs allegedly entered into a loan modification with Defendant at some point in the last two-and-a-half years in no way demonstrates the claims arise from the same series of transactions or occurrences"); *Garner v. Bank of Am. Corp.*, 2014 WL 1945142, at *4 (D. Nev. May 13, 2014) (finding "claims based on distinct loan transactions" misjoined because "Plaintiffs' interactions with Defendants varied"; "While Plaintiffs here allege in some detail an overarching conspiracy and coordinated conduct . . . Plaintiffs' claims nevertheless will entail individualized inquiry, such as what representations were made to them by their respective loan officers and whether each Plaintiff justifiably relied"); *Abraham v. Am. Home Mortg. Servicing, Inc.*, 947 F. Supp. 2d 222, 229 (E.D.N.Y. 2013) ("[C]laims by plaintiffs who engaged in separate loan transactions by the same lender cannot be joined in a single action."); *White v. Greenpoint Mortg. Funding Inc.*, 2014 WL 11370418, at *1-2 (S.D. Fla. June 26, 2014) (severing 24 plaintiffs because their claims arose from separate mortgage loans "and, thus, separate transactions"), *aff'd*, 599 F. App'x 329 (11th Cir. 2015); *Barber v. Am.'s Wholesale Lender*, 289 F.R.D. 364, 367–69 (M.D. Fla. 2013) (severing 18 plaintiffs' claims because each involved "different loan documents, different dates, and different operative factual scenarios" and centered around "the statements made by each Defendant, the knowledge of each Plaintiff, [and] the date of each transaction").

to shoehorn their individual facts into the same vague, formulaic allegations does not somehow make them arise from one "occurrence" or "transaction," as the Rule requires. *See* FED. R. CIV. P. 20(a)(1)(A). Plaintiffs can always *allege* their individualized and separate dialogues with the Bank in similar terms, but a claim that "Michael Sanchez" made a false statement to Mr. Taylor (Compl. ¶¶ 39–40) will require an entirely different evidentiary showing than a claim that "Justin Rich" made a false statement to Ms. Mendez (Compl. ¶¶ 103–04).

Plaintiffs concede this by citing to the denial of class certification of similar claims in the *HAMP MDL*, where the court (Judge Zobel of the District of Massachusetts) ruled that each claim "rest[s] on so many individual factual questions that they cannot sensibly be adjudicated on a classwide basis." Compl. ¶ 32; 2013 WL 4759649, at *14. For example, in order to determine whether any borrower was improperly denied a modification, the court would need to address whether the borrower qualified in the first place, which "depends on a nearly endless series of individual questions." *Id.* at *10. That same "endless series of individual questions" that made classwide treatment impossible in the *HAMP MDL* makes joinder improper here. Joinder under Rule 20 also requires common questions of law and fact and imposes the additional requirement that each plaintiff's claims arise "out of the same transaction"—a requirement not satisfied here. FED. R. CIV. P. 20(a)(1)(A).

The remedy for an improper joinder is to "drop a party" or "sever any claim" by the misjoined plaintiffs. FED. R. CIV. P. 21. This Court's discretion to do so is "virtually unfettered" but generally based on four factors: "(1) whether the issues sought to be severed are significantly different from one another; (2) whether the issues require different witnesses and evidence; (3) whether the party opposing severance will be prejudiced; and (4) whether the party requesting severance will be prejudiced if the claims are not severed." *Cramer v. Walley*, 2015 U.S. Dist.

LEXIS 84400, at *11–12 (D.S.C. June 30, 2015) (internal quotation marks omitted).

These factors support severence here, because Plaintiffs' individual dialogues and decisionmaking will necessarily involve "significantly different" facts with "different witnesses and evidence." *See, e.g., Kalie v. Bank of Am. Corp.*, 297 F.R.D. 552, 559 (S.D.N.Y. 2013) ("Insamuch as each plaintiff's claims appear to arise out of a mortgage-related transaction that is distinct from the transactions on which the other plaintiffs' claims are based, and as each plaintiff's claims implicate distinct loans, locations, dates, and personnel, there is no meaningful economy of scale gained by trying these cases together."); *Barber*, 289 F.R.D. at 368–69. And there is no prejudice to Plaintiffs, who remain free to pursue whatever claims they may have in individual suits—as, indeed, their Florida counterparts are doing following the severance in *Torres*. Meanwhile, there would be manifest prejudice to Bank of America if the claims are *not* severed: "given that each plaintiff's case arises out of a different loan transaction," a "joint trial could lead to confusion of the jury and thereby prejudice defendants." *Kalie*, 297 F.R.D. at 559.

In short, the only thing Plaintiffs' claims have in common is the vague, generic way in which they are pled. That does not support joining them together, even though they all suffer from the same legal defects that warrant dismissal under Rule 12(b)(6), as set forth below.

## II. PLAINTIFFS' CLAIMS ARE TIME-BARRED.

Plaintiffs' claims for fraud/misrepresentation, conversion, and unjust enrichment are subject to a three-year limitations period, while Plaintiffs' claim under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) is subject to a four-year limitations period.[5] Plaintiffs' Complaint doesn't describe a *single* event within the last four years; it complains

[5] N.C.G.S. § 1-52(9); *Johnson v. Household Life Ins. Co.*, 2012 WL 5336959 at *8 (E.D.N.C. Oct. 26, 2012); *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 83 (N.C. App. 2011); *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 85 (N.C. App. 2011); N.C.G.S. § 75-16.2.

exclusively about supposed misrepresentations from 2009 to 2012 and foreclosures from 2010 to January 2014. Plaintiffs thus concede, as they must, that their claims are time-barred unless they can somehow toll the statute of limitations. Compl. ¶ 346. But their tolling allegations fail as a matter of law and conceded fact. Indeed, the arguments Plaintiffs make are the same exact ones Judge Lazzara emphatically rejected in the identical *Torres* case.

### A. Plaintiffs' "Fraudulent Concealment" Allegations Fail as a Matter of Law.

First, Plaintiffs attempt to invoke the "fraudulent concealment" doctrine, alleging that "Defendants, through their affirmative misrepresentations and omissions, actively concealed from Plaintiffs the series of secretive and deceptive acts set forth in this Complaint." *Id.* In rejecting the very same theory, *Torres* held:

> Plaintiffs do not point to any actual allegations of concealment, only to their general fraud claims. The Eleventh Circuit has specifically rejected this tactic as a means of evading the time bar. The Court must agree with Defendant that if the law were otherwise, then the statute of limitations for fraud claims would be rendered a nullity—plaintiffs would simply allege that defendants "concealed" every supposed fraud by not characterizing their own statements as fraudulent.

2018 U.S. Dist. LEXIS 12640, at *11–12 (citations omitted). The law here is no different.[6] The Fourth Circuit has called Plaintiffs' argument "sophistry," explaining that "[t]o permit a claim of fraudulent concealment to rest on no more than an alleged failure to own up to illegal conduct . . . would effectively nullify the statute of limitations. . . . 'Fraudulent concealment' implies conduct more affirmatively directed at deflecting litigation than that alleged here." *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218–19 (4th Cir. 1987).[7]

[6] Nowhere in their Complaint do Plaintiffs specify what states' laws applies to their claims. For purposes of this motion, Bank of America relies primarily on this Circuit's case law. To the extent other states' laws apply to Plaintiffs from different states, they must plead entitlement to tolling under the laws of each of those states. Given their failure to do so, Bank of America does not address here whether and to what extent the laws of each jurisdiction are similar or different.

[7] *See also, e.g., Wilson Land Corp. v. Smith Barney, Inc.*, 1999 U.S. Dist. LEXIS 12879, at *21

Plaintiffs' fraudulent concealment arguments fail for the separate and independent reason that a plaintiff cannot benefit from fraudulent concealment without alleging his or her *own* diligence in investigating and pursuing potential claims. *See, e.g., Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) ("exercise of due diligence on [the plaintiff's] part" is an element of fraudulent concealment). Once again, the very same defect factored in the *Torres* court's rejection of identical concealment allegations. As *Torres* held, "neither the complaint nor Plaintiffs' opposition brief offers a single word about any act of 'diligence' by the Plaintiffs prior to their purported discovery of their claims." 2018 U.S. Dist. LEXIS 12640, at *10. The same is true here. Plaintiffs try to excuse their failure of diligence by contending that "the exercise of reasonable care and due diligence" would not have helped them discover their claims anyway (Compl. ¶ 351), but that conclusory assertion falls short of the legal standard for pleading due diligence. It is also contradicted by Plaintiffs' *other* allegations.

Specifically, Plaintiffs seek to rely on a February 2017 declaration they attribute to a former Bank employee accusing his ex-employer of fraud. *Id.* at ¶ 348. But as Plaintiffs readily admit, this declaration simply regurgitated assertions made in other declarations commissioned by the *HAMP MDL* plaintiffs back in 2013. *See id.* at ¶ 331. To the extent these declarations support Plaintiffs' claims in any way, they were matters of public record in 2013 in a case that received ample media attention, and any exercise of reasonable diligence would have uncovered them. Unsurprisingly, this is why the *Torres* court refused to give them any weight:

> The . . . Declarations that Plaintiffs attach to their [] Complaint, except for one, are [] dated 2013. The exception is the 2017 "Rodrigo Heinle" Declaration, but this Declaration does not offer any new information—it merely makes the same claims as the 2013

(E.D.N.C. May 17, 1999) ("Denying liability does not constitute fraudulent concealment."); *Boland v. Consol. Multiple Listing Serv.*, 868 F. Supp. 2d 506, 518 (D.S.C. 2011) (allegations that "amount to no more than a failure to admit to wrongdoing . . . do[] not suffice" "to state a claim of fraudulent concealment").

> declarations. Plaintiffs will not be permitted to keep the statute of limitations suspended by finding new people to repeat the same information that has been available for more than four years.

2018 U.S. Dist. LEXIS 12640, at *12–13 (citations omitted).

Nevertheless, Plaintiffs assert—with no supporting facts—that they "could not have reasonably discovered the facts that formed the basis of their fraud claims against BOA until they retained their attorneys in this matter," so "the applicable statute of limitations did not begin to run until Plaintiffs retained their attorneys." Compl. ¶ 350. This is yet another argument that, if accepted, would eviscerate the statute of limitations altogether, and courts consistently reject it. *See, e.g.*, *Migliarese v. United States*, 542 F. Supp. 2d 434, 441 & n.5 (M.D.N.C. 2008) ("The fatal flaw in Plaintiff's argument readily reveals itself when one considers that if Plaintiff had not contacted an attorney, under his interpretation, the statute of limitations would still not have expired, nor would it ever."); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 972 (11th Cir. 2016) ("Villarreal is not entitled to equitable tolling because he admitted facts that foreclose a finding of diligence. Specifically, he alleged that he did nothing for more than two years between his initial application and the communication from the lawyer.").

**B. As *Torres* Recognized, Plaintiffs Do Not Even Allege Any Concealment.**

Even setting the above legal defects aside, Plaintiffs' *factual* allegations do not even support their concealment claim at the most fundamental level. Plaintiffs' primary claim is that Bank employees made false representations about the default requirements for HAMP eligibility. Compl. ¶¶ 37, 39, 68, 70, 100, 130, 132, 163, 165, 194, 196, 219, 221, 251, 253, 283, 285, 317, 319. But to the extent those representations were "false" at all, "Plaintiffs could have discovered such through the exercise of reasonable diligence back when the statement was made. HAMP's requirements were freely available and state clearly (on the first page) that HAMP modifications are available to 'at risk homeowners . . . in default and those who are at imminent risk of

default.'" *Torres*, 2018 U.S. Dist. LEXIS 12640, at *5–6.

The same is true about other alleged misrepresentations Plaintiffs complain about. Plaintiffs could have consulted HAMP's publicly posted guidelines at any time and discovered what the Bank purportedly "omitted" to tell them (Compl. ¶¶ 52, 83, 112, 145, 178, 209, 234, 266, 299, 332) about how trial payments are posted. *See Torres*, 2018 U.S. Dist. LEXIS 12640, at *6 ("Plaintiffs also allege that 'BOA employees fraudulently omitted the fact' that HAMP trial payments are posted to 'an unapplied account.' Plaintiffs easily could have discovered this information [] when the offending 'omission' was allegedly made. As Defendant asserts, this is exactly how the Treasury Department requires servicers to handle trial payments.") (brackets and citations omitted).

Similarly, Plaintiffs were in a position to act on any alleged misrepresentation about their application documents (Compl. ¶¶ 44, 75, 103, 137, 170, 201, 226, 258, 290, 324) as soon as the representations were made, because Plaintiffs knew what they submitted. *See Torres*, 2018 U.S. Dist. LEXIS 12640, at *7 ("Plaintiffs next allege being 'falsely informed' in December 2011 that their documents were 'not current.' If this information was false, Plaintiffs were in a position to know that in December 2011.") (citation omitted). And Plaintiffs were in a position to act on any allegedly improper fees charged (Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337) as soon as those fees appeared on their mortgage statements. *See Torres*, 2018 U.S. Dist. LEXIS 12640, at *7 ("Even if Defendant had omitted this fact, Plaintiffs failed to allege that they were not aware of property inspections going on while they 'lived in their home.' If Plaintiffs had somehow been prevented from discovering this information until much later, it was incumbent on them to allege this in their [] Complaint.") (citation omitted).

### C. Plaintiffs' *American Pipe* Tolling Argument Is Baseless.

Separately from their concealment theory, Plaintiffs also attempt to plead tolling under

the *American Pipe* doctrine, under which "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Compl. ¶ 354; *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Plaintiffs do not identify what putative "class action" could have triggered the doctrine here, but class certification was denied in the *HAMP MDL* well over four years ago. *See* 2013 WL 4759649. By Plaintiffs' own admission, any *American Pipe* effect it had has long since ceased. *See* Compl. ¶ 354.

## III. PLAINTIFFS' CLAIMS FAIL ON THE MERITS.

In addition to bringing untimely claims, Plaintiffs fail to plead the essential elements of those claims—either with the particularity required by Rule 9(b), or otherwise.[8]

### A. Plaintiffs Fail to Plead Any Fraud.

To plead a fraud claim, Plaintiffs must plead a "material" misrepresentation, "made with intent to deceive," along with "reliance" by the Plaintiffs and "resulting . . . damage." *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992). Here, Plaintiffs either fail to plead these elements altogether or do so only in conclusory boilerplate.

#### 1. Plaintiffs Plead No Misrepresentations about HAMP's Requirements, nor Any Reliance, nor Any Resulting Harm.

The first alleged "misrepresentations" are the alleged statements that borrowers needed to be in default to qualify for HAMP, which Plaintiffs contend were misleading because "only imminent default was required for HAMP eligibility." E.g., Compl. ¶¶ 39–40. Numerous courts

[8] All Plaintiffs' claims are subject to Rule 9(b), as even the claims not labeled fraud claims incorporate the fraud allegations and are premised on alleged fraudulent statements. *See* Compl. ¶ 383 ("assurances"), ¶ 388 ("false assertions"), ¶ 396 ("false pretenses"); ¶¶ 405–06 ("misrepresentations" and "fraudulent scheme"); *Cozzarelli v. Inspire Pharms. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008) ("Rule 9(b) refers to 'alleging fraud,' not to causes of action or elements of fraud. When a plaintiff makes an allegation that has the substance of fraud, therefore, he cannot escape the requirements of Rule 9(b) by adding a superficial label.").

have rejected identical allegations as insufficient to plead a misrepresentation. *E.g.*, *Currie v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 788, 797 (D. Md. 2013) ("Plaintiffs' allegations do not support a plausible inference that it was untrue, misleading, or deceptive to say that Plaintiffs had to be in default . . . to be considered for a loan modification"); *Farasat v. Wells Fargo Bank, N.A.*, 913 F. Supp. 2d 197, 205 (D. Md. 2012) (no "misrepresentation" when plaintiff "was told that he needed to miss payments, as contemplated by the HAMP guidelines").[9]

Part of Plaintiffs' problem is that they fail to plead there is any functional *difference*, in their particular cases, between default being a prerequisite for HAMP eligibility vs. mere "imminent" default being sufficient. As noted, Plaintiffs cagily refuse to plead whether they were *already* in default when they spoke to Bank of America about HAMP modifications. Compl. ¶¶ 39, 70, 100, 132, 165, 196, 221, 253, 285, 319. If Plaintiffs were already in default, then any omission about the fact that "imminent default" can *also* qualify a borrower for HAMP would have been wholly immaterial to them, and therefore non-actionable.

And if Plaintiffs were *not* already in default, then Plaintiffs' theory is even *more* problematic. Plaintiffs plead that "[r]elying on [Bank of America's statement[s], Plaintiff[s] remained in default and/or stopped making regular monthly mortgage payments." *Id.* This language expressly forecloses any inference that Plaintiffs could have qualified for HAMP on the basis of an imminent default. Instead, Plaintiffs are necessarily alleging that they *could* have made payments on their loans but *chose* not to because they "believ[ed]" default was required for HAMP eligibility. *Id.* at ¶¶ 40, 71, 101, 133, 166, 197, 222, 254, 286, 320. Courts have expressly

[9] *See also Robinson v. Wells Fargo Bank, N.A.*, 576 F. App'x 358, 363 (5th Cir. 2014) ("Nor have [plaintiffs] alleged that Wells Fargo's statement that [plaintiffs] needed to be delinquent in order to qualify . . . was false or that they would have been eligible for HAMP absent default."); *Whatley v. Bank of Am., N.A.*, 2012 WL 5906709, at *3 (E.D. Cal. Nov. 26, 2012) ("Plaintiff again fails to demonstrate that the statement itself was false. In fact, it seems reasonable for Defendants to require delinquency before modifying a loan.").

held that reliance is lacking on these same alleged facts. *E.g.*, *Fevinger v. Bank of Am., N.A.*, 2014 WL 3866077, at *5 (N.D. Cal. Aug. 4, 2014) ("The core of [plaintiff's] pleadings on this cause of action remains the contention that [Bank of America] told her she could obtain a loan modification by going late on her payments. This does not rise above the level of encouragement. The choice to pay or not to pay remained with [plaintiff].") (internal quotation marks omitted).

If Plaintiffs were capable of making their payments, then they were not in an "imminent default" situation and the alleged "omission" was immaterial. Alternatively, if Plaintiffs were *not* capable of making their payments, then neither their defaults nor any harms flowing from their (inevitable) defaults were in "reliance" on anything Bank of America did. Thus, essential elements of Plaintiffs' claims are lacking under *any* of the scenarios the Complaint conveniently tries to leave open.

Even if all these problems could be set aside, Plaintiffs cannot pursue a fraud claim based on any alleged misrepresentation of HAMP's requirements, because HAMP's requirements were readily available to them. The qualification requirements for HAMP were posted by the Treasury Department for anyone interested in a loan modification. See SD 09-01 (Ex. 2) at 1–4. It is impossible, as a matter of law, to sustain a fraud claim as to representations of facts that are just as accessible to the plaintiff as they are to the defendant. *See, e.g.*, *Davis v. Davis*, 256 N.C. 468, 472 (1962); *Persaud Cos. v. IBCS Grp., Inc.*, 426 F. App'x 223, 226 (4th Cir. 2011). A party claiming reliance on a misrepresentation cannot claim reliance when it "could have discovered the truth upon inquiry" in the exercise of reasonable diligence. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999). Indeed, the "representee" has an affirmative "duty . . . to use diligence in respect of representations made to him." *Calloway v. Wyatt*, 246 N.C. 129, 134–35, 97 S.E.2d 881, 885–86 (1957). The same logic applies to

Plaintiffs' other claim of misrepresentations about HAMP's requirements: the theory that "BOA employees fraudulently omitted" to tell them trial payments were posted into "unapplied account[s]." Compl. ¶¶ 52, 83, 112, 145, 178, 209, 234, 266, 299, 332. This was dictated by HAMP's publicly posted guidelines which were just as accessible to Plaintiffs as they were to Bank of America. *See Torres*, 2018 U.S. Dist. LEXIS 12640, at *6–7 (citing SD 09-01 at 18).

These claims also fail because they are based on alleged "omissions," not affirmative representations. *E.g.*, Compl. ¶¶ 40, 52. Omissions are not actionable as fraud unless "there is a duty to speak," which generally requires "a fiduciary relationship." *River's Edge Pharms., LLC v. Gorbec Pharm. Servs.*, 2012 U.S. Dist. LEXIS 57969, at *73 (M.D.N.C. Apr. 25, 2012). "Ordinary borrower-lender transactions" like a mortgage loan "are considered arm's length and do not typically give rise to fiduciary duties." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368 (2014). Plaintiffs were therefore not entitled to rely on Bank of America's employees for advice on how to plan their affairs to take maximum advantage of government programs, especially when the requirements were plainly stated and made universally available by Treasury itself.

**2. Plaintiffs Fail to Plead False Trial Plan Approvals.**

Plaintiffs next accuse Bank of America of making "false" statements that they were "approved" for trial plans, alleging in each case that "[t]his statement was false as the application wasn't approved," and that they relied on the statements by "send[ing] trial payments" to the Bank. Compl. ¶¶ 50–51, 81–82, 109–10, 143–44, 176–77, 207–08, 232–33, 264–65, 297–98, 330–31, 366. Yet Plaintiffs plead no actual facts suggesting the statements were false or supporting their naked claims that their individual trial plans somehow weren't really approved.

Regardless, the elements of the fraud claim are still lacking. "[S]ending trial payments" is not reliance as a matter of law, because Plaintiffs were *already* obligated to make even higher loan payments under the terms of their original loan documents. *See, e.g., Pennington v. HSBC*

*Bank USA, N.A.*, 493 F. App'x 548, 557 (5th Cir. 2012) ("[trial] payments [do not] constitute detrimental reliance because they were just applied to the loan").[10]

Nor do Plaintiffs plead any resulting harm. Allegations of foreclosures (e.g., Compl. ¶ 53) do not describe any harm resulting from any Bank of America misrepresentation. Those are the consequences of Plaintiffs' own defaults. As one court held, rejecting an identical allegation:

> Plaintiff . . . describes his damages as the "loss of the subject property [and] future use and enjoyment of that property. . . ." The problem with these allegations is that, by the time Plaintiff was told he could submit documentation . . . , he had already been in default on his loan payments for many months. . . . As such, it was not the alleged misrepresentation that plausibly led to Plaintiff's damages; it was his own default.

*McReynolds v. HSBC Bank USA*, 2012 WL 5868945, at *4 (N.D. Cal. Nov. 19, 2012).

The only scenario where such damages could *possibly* be attributed to any conduct by Bank of America is if Plaintiffs qualified for permanent loan modifications and were wrongfully denied. Yet Plaintiffs do not make that claim *even in conclusory terms*. Similarly, their theory that they were injured by the costs of "sen[ding] their HAMP application and supporting information via U.S. Mail, fax, and Federal Express" (Compl. ¶ 365) would not have been a detriment at all if Plaintiffs had been able to qualify for HAMP. Such costs thus cannot constitute an injury absent well-pleaded facts *showing* that each individual Plaintiff's failure to qualify was the result of misstatements by Bank of America, as opposed to HAMP's actual requirements.

[10] *See also, e.g., Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1346–48 (S.D. Fla. 2011) (finding HAMP trial payments were "preexisting obligations" under the terms of the original loan, and thus not a legal "detriment"); *Ortiz v. Am.'s Servicing Co.*, 2012 WL 2160953, at *6–7 (C.D. Cal. June 11, 2012) ("making payments . . . is insufficient to establish the required detrimental reliance, because plaintiff was already legally obligated to make payments under the loan"); *Bohnhoff v. Wells Fargo Bank, N.A.*, 853 F. Supp. 2d 849, 857 (D. Minn. 2012) (no detrimental reliance from trial payments because plaintiff "had a legal duty to make payments on the [original] Note"); *Nicdao v. Chase Home Fin.*, 839 F. Supp. 2d 1051, 1071 (D. Alas. 2012) ("Plaintiff was already obligated to pay those amounts (if not more) under the [original] Note."); *Osmond v. Litton Loan Serv., LLC*, 2011 WL 1988403, at *3 (D. Utah May 20, 2011) (no reliance because plaintiff "does not demonstrate that she did something that she would not have done if Defendants had not made a promise").

### 3. Plaintiffs Fail to Plead False Incompleteness Notices.

Finally, Plaintiffs allege that they "were falsely informed by BOA employees that their documents were not received, were incomplete[,] or were not current, causing Plaintiffs to resubmit the information again and again." Compl. ¶ 360. Again, Plaintiffs do not actually plead facts to substantiate their claim that these alleged statements were false, much less with the particularity required by Rule 9(b). For the statement that Plaintiffs' applications "were incomplete or were not current" to be false, Plaintiffs must be able to allege that their applications *were* complete and current. But Plaintiffs do so only in conclusory, rote boilerplate. Compl. ¶¶ 48, 79, 107, 141, 174, 205, 230, 262, 295, 32. Such conclusory allegations—saying nothing about what documents were asked of each individual Plaintiff, what documents each supplied, and when—are not enough to establish the falsity of the statements at issue, much less the other elements of fraud. *See, e.g., Temple v. Bank of Am., N.A.*, 2015 U.S. Dist. LEXIS 1444660, at *6 (N.D. Cal. Oct. 23, 2015) ("The sole fact that defendants asked the [plaintiffs] to resubmit their applications is not enough to plausibly allege that defendants made false representations, knew the representations were false, and intended to deceive.").[11]

Plaintiffs also fail to allege that the purportedly false statements were made with the requisite "intent to deceive." *Rowan, supra*. Plaintiffs simply make a boilerplate allegation that "BOA employees knew these representations were false and this practice was policy and procedure at BOA," citing to the inflammatory 2013 declarations submitted by the plaintiffs in the *HAMP MDL*. *E.g.*, Compl. ¶ 44. Bank of America already established in the *HAMP MDL* that the stories in these declarations were patently false—the declarants didn't even tell the truth

[11] *See also, e.g., U.S. Bank, N.A. v. Flores*, 2014 U.S. Dist. LEXIS 91395, at *14 (S.D. Tex. July 1, 2014) (allegations that plaintiff "would be asked to resubmit the same paperwork for some unknown reason" failed as a fraud claim).

about where they worked (*see* No. 10-2193 (D. Mass.), ECF No. 221 at 10)—but the truth or falsity of those declarations is of course beside the point for purposes of this Rule 12(b)(6) motion. There are two dispositive points for present purposes.

First, Plaintiffs have *no idea* whether any of the allegations they lifted from the MDL plaintiffs' filings are true. "[B]lindly relying" on someone else's investigation does not comport with counsel's pre-filing "duty to conduct a reasonable inquiry to determine that the declarations were 'well grounded in fact.'" *Sec. Farms v. Int'l B'hood of Teamsters*, 124 F.3d 999, 1017 (9th Cir. 1997); *see also, e.g., City of Livonia Emp. Ret. Sys. v. Boeing Co.*, 2011 WL 824604, at *4 (N.D. Ill. Mar. 7, 2011) (refusing to credit so-called "confidential source" where "plaintiffs' counsel relied on [others'] reports," rather than personally investigating claims), *aff'd*, 711 F.3d 754 (7th Cir. 2013). Such allegations "require a heavy discount. The sources may be ill-informed, may be acting from spite rather than knowledge, may be misrepresented, may even be nonexistent." 711 F.3d at 759. Consequently, reliance on allegations from "entirely unrelated legal controversies" is properly treated as an "immaterial and prejudicial" attempt "to 'muddy the waters'" and can be stricken under Rule 12(f). *Glass v. Anne Arundel Cnty.*, 2013 U.S. Dist. LEXIS 36427, at *39 (D. Md. Mar. 14, 2013).

Moreover, there is no alleged connection between the declarations and Plaintiffs' claims. None of the declarants describe any dealings with the Plaintiffs, none of the Plaintiffs describe any dealings with the declarants, and in some cases the claims in the declarations are not even *conceivably* relevant to Plaintiffs' claims given the relative time periods. For example, Plaintiffs try to support their claims about misrepresentations in 2009 and 2010 with a declaration addressing the period "[f]rom December 2011 through September 2012." Compl. Ex. 2. At least one other court has refused to credit these very same declarations on this basis at the Rule

12(b)(6) stage because the plaintiffs pleaded no "causal link between their claims and the statements made by Bank of America employees in other," "entirely unrelated litigation." *Trionfo v. Bank of Am., N.A.*, 2015 U.S. Dist. LEXIS 116888, at *19 (D. Md. Sept. 2, 2015).

**4. Invalid Challenges to Inspection Fees Do Not State a Fraud Claim.**

Finally, all except one of the Plaintiffs try to append to their fraud claims references to property inspection fees allegedly assessed on their accounts. Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337. This claim both fails to satisfy the elements of a fraud claim, and fails more generally to describe any improper conduct. Identically pleaded challenges to inspection fees were dismissed on the merits in many of the cases severed from *Torres*, because "plaintiffs offer no explanation how an inspection fee constitutes a 'statement' or 'omission,' how an inspection fee induces reliance, and how a person reasonably relies on an inspection fee." *E.g.*, *Carmenates v. Bank of Am., N.A.*, 2018 U.S. Dist. LEXIS 16150, at *11 (M.D. Fla. Feb 1, 2018).

Other courts have rejected similar challenges on the ground that such fees are expressly authorized by the mortgages. *E.g.*, *Kirchner v. Ocwen Loan Servicing, LLC*, 2017 U.S. Dist. LEXIS 101258, at *21–24 (S.D. Fla. June 27, 2017) ("[T]here is no question that when a borrower defaults under the terms of the loan, Defendants have discretion to order property inspections and recover the amount of the property inspection fees from their borrowers in Defendants' discretion. And, even if Defendants abuse their discretion, that does not equate to fraud in the absence of an identifiable misrepresentation or omission.").

The inspection-fee allegations in the Complaint here are defective in both respects. In addition to failing to allege the elements of a fraud claim, Plaintiffs fail to allege the fees are impermissible at all. Plaintiffs' only basis for surmising the latter is an oblique reference to "HUD Servicing Guidelines." Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337. Plaintiffs fail to articulate how "HUD Servicing Guidelines" have any pertinence here. These are not laws

broadly applicable to every mortgage loan—they are guidelines for servicing loans insured by the Federal Housing Administration.[12] Plaintiffs do not allege that any of their loans were FHA loans, nor could they consistent with their other allegations, because FHA loans were "excluded" from eligibility for HAMP.[13]

**B. The Other Claims Tacked On to the Complaint Also Fail.**

Plaintiffs argue that their fraud allegations also support claims for intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, and a mysteriously pled purported violation of the North Carolina's UDTPA statute. Compl. ¶¶ 374–414.

The "intentional misrepresentation" claim is redundant of the fraud claim and can be dismissed on the same basis. *See McKinney v. Nationstar Mortg., LLC*, 2016 WL 3659898, at *6 (E.D.N.C. July 1, 2016) (same elements for fraud or intentional misrepresentation).

The promissory estoppel claim can be dismissed for an even more fundamental reason, as "North Carolina . . . does not recognize promissory estoppel as an affirmative cause of action." *Rudolph v. Buncombe Cnty. Gov't*, 846 F. Supp. 2d 461, 477 (W.D.N.C. 2012). Insofar as the claim is based on the law of other unspecified jurisdictions, Plaintiffs fail to plead the requisite reliance for the same reason they failed to do so in the context of their fraud claim: defaulting when default was "imminent" anyway, and "making trial payments" they were already legally obligated to make, are not detriments. *See supra* Part III.A.2. More fundamentally, Plaintiffs also fail to plead what they were "promised" and did not receive.

Similarly, Plaintiffs' "conversion" claim requires "ownership in the plaintiff and wrongful possession or conversion by the defendant," but because Plaintiffs' other claims are

[12] *See generally https://www.hud.gov/program_offices/housing/sfh/lender/servicing.*

[13] *See* HUD Mortgagee Letter 2009-23 (July 30, 2009), available at *https://www.hudexchange.info/resources/documents/FHA-HAMP-Mortgagee-Letter.pdf.*

groundless, there was nothing "wrongful" about the Bank's collection of their trial payments. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012). Plaintiffs' attempt to tie this claim to their inspection-fee grievance by characterizing those fees as "fraudulent" fails, because they were neither fraudulent nor improper. Compl. ¶ 391.

Plaintiffs' unjust enrichment claim requires them to identify a "benefit" conferred on the Bank "that is not justified in the circumstances." *JPMorgan Chase Bank, N.A. v. Browning*, 750 S.E.2d 555, 559 (N.C. Ct. App. 2013). Plaintiffs' trial payments do not qualify. The Bank was fully justified in collecting those payments because Plaintiffs owed even more under the terms of their loans. Plaintiffs also cite the purported "benefit" of "not granting HAMP modifications." Compl. ¶ 398. This, too, was fully justified absent well-pleaded allegations—of which there are none—that Plaintiffs were actually *entitled* to HAMP modifications. Finally, Plaintiffs make a groundless allegation that "BOA was [] unjustly enriched by using Plaintiffs' HAMP application [*sic*] to make false claims for incentive payments to the United States Department of Treasury." Compl. ¶ 397. Plaintiffs' own allegations negate this claim, because HAMP incentive payments are only paid for "completed" permanent modifications, and Plaintiffs expressly allege that their HAMP modifications were "not grant[ed]." *Id.* at ¶ 398; SD 09-01 (Ex. 2) at 23. This inclusion of a manifestly false allegation with no apparent investigation whatsoever into its plausibility is sadly typical of the Complaint.

Finally, Plaintiffs' UDTPA claim falls with its other fraud-based claims. Plaintiffs do not even identify "the provision of th[e] Chapter" they claim was violated. N.C.G.S. § 75-16. Instead, they make a series of non-sequitur allegations about Bank of America's supposedly breaching its "Servicer Participation Agreement" with the federal government and the HAMP program's "directives." *Id.* at ¶¶ 408–410. Plaintiffs have no standing to enforce a contract

between Bank of America and the federal government and no private right of action to enforce HAMP directives. *See, e.g., Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 767, 769 & n.4 (4th Cir. 2013) ("a suit that seeks the general enforcement of the HAMP guidelines must fail"). Plaintiffs cannot manufacture a cause of action they lack by attempting to enforce the HAMP participation agreement in the guise of a UDTPA claim. Alternatively, if Plaintiffs simply mean to hinge their Chapter 75 claim on their fraud allegations, then it fails with their other claims for lack of any actionable misrepresentation, actual or reasonable reliance, or resulting injury. *See generally Solum v. Certainteed Corp.*, 147 F. Supp. 3d 404, 411 (E.D.N.C. 2015) ("When the alleged UDTPA violation is a misrepresentation, a plaintiff must prove detrimental reliance. . . . Under North Carolina law, reliance upon a representation is reasonable only when the recipient of the representation 'uses reasonable care to ascertain the truth of that representation.'") (brackets omitted). Separately, the UDTPA claim must fail at the very least for the out-of-state Plaintiffs (*i.e.*, all Plaintiffs except Mr. Taylor) because the statute requires an "in-state injury." *Ada Liss Group v. Sara Lee Corp.*, 2009 WL 3241821, at *11 (M.D.N.C. Sept. 30, 2009). It does not apply "to a foreign plaintiff suing a resident defendant over alleged foreign injuries." *Id.*

## CONCLUSION

Plaintiffs' claims should be dismissed or, in the alternative, severed for improper joinder.

This the 15th day of June, 2018.

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**CERTIFICATE OF SERVICE**

I certify that I filed a true and correct copy of the foregoing document on the Court's CM/ECF system, which will cause a Notice of Electronic Filing to be sent to the following counsel:

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# EXHIBIT 1

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

EDDIE and AWILDA TORRES, *et al.*,

Plaintiffs,

v. CASE NO. 8:17-cv-1534-T-26TBM

BANK OF AMERICA, N.A.,

Defendants.

_____/

**ORDER**

**THIS CAUSE** comes before the Court on Defendant Bank of America, N.A.'s Motion to Dismiss the Amended Complaint, or in the Alternative, to Sever Misjoined Claims (Dkt. 17) and Plaintiffs' Response in Opposition (Dkt. 18). Having carefully considered the parties's submissions, together with the well-pleaded allegations of Plaintiffs' complaint, the Court finds that Defendant's motion is due to be granted to the extent that all claims, other than those alleged by the first-named Plaintiffs, Eddie and Awilda Torres ("the Torreses"), will be severed and dismissed without prejudice to being refiled in separate individual actions and that the Torres' claim will be dismissed without prejudice to being refiled in an amended complaint.

Under Rule 20(a)(1) of the Federal Rules of Civil Procedure, claims are properly joined only if they "aris[e] out of the same transaction, occurrence, or series of

transactions or occurrences" and share a common "question of law or fact." As one court has observed, "Rule 20 refers to the *same* transaction or occurrence not to *similar* transactions or occurrences." Hartley v. Clark, 2010 WL 1187880, at *3 (N.D. Fla. Feb. 12, 2010) (emphasis added), Report and Recommendation adopted at 2010 WL 1187879 (N.D. Fla. March 23, 2010).. When claims are not permissibly joined, a court may drop misjoined parties or sever any claim against a party pursuant to Rule 21 of the Federal Rules of Civil Procedure. Additionally, a court enjoys considerable discretion to do so in the interests of judicial economy even if the technical requirements of Rule 20 are met. See, e.g., Barber v. America's Wholesale Lender, 289 F.R.D. 364, 368 (M.D. Fla. 2013).

The 116 Plaintiffs here (75 if counting co-borrowers as a single Plaintiff) allege that they defaulted on their mortgage loans and sought help from Defendant Bank of America N.A. in the form of loan modifications under the federal Home Affordable Modification Program ("HAMP"). HAMP operated by giving borrowers a trial period to prove they can make sustainable loan payments while the servicer evaluates whether they qualify for permanent relief. Plaintiffs claim that this was an elaborate fraud, the design of which entailed first tricking Plaintiffs into *not* making loan payments, and then tricking them into making loan payments by pretending they were approved for trial modifications. (Dkt. 16, Amended Complaint ("Amd. Cmp."), ¶¶ 37, 44). Plaintiffs failed to qualify for permanent modifications, failed to cure their defaults, and went through foreclosure, and now claim to be the victims of fraud as a result. The facts of

each Plaintiff's dealings with Defendant are alleged in general, boilerplate terms, virtually identical from one Plaintiff to the next so as to justify joining 116 Plaintiffs in any number of different factual circumstances into one omnibus lawsuit. The Court must agree with Defendant that this is not a permissible joinder under Rule 20.

Plaintiffs claims in this case (except for the Torres' claim) are due to be severed based on the reasoning applied by the court in Green v. Citimortgage, Inc., 2013 WL 6712482, at *5 (E.D.N.Y. Dec. 18, 2013), in which the court severed claims of fraudulent misrepresentation stemming from HAMP applications because the case involved at least twenty-six distinct loans attached to twenty-six separate properties and separate applications for HAMP modifications over a five and a half year period. Green involved claims pursuing exactly the same theories pursued by Plaintiffs here (see Dkt. 16, Amd. Cmp., ¶ 37), that the defendants had "a fraudulent loan modification program, purporting to offer the possibility of a loan modification agreement to the Plaintiffs and other homeowners, while driving [them] into default to enable Defendants to pursue foreclosure against those same homeowners[.]" 2013 WL 6712482, at *3. The court found that these transactions did not "arise out of the same 'transaction' or 'occurrence'" because, among other reasons, each plaintiff "separately applied for loan modifications" and the terms of the trial modifications differed from plaintiff to plaintiff. Green, 2013 WL 6712482, at *5. The court concluded, by adopting the rationale of Kalie v. Bank of America Corp., 2013 WL 4044951, at *6 (S.D. New York 2013) in support of its

determination, that allowing joinder of Plaintiffs' claims did not promote the interest of judicial economy:

> Inasmuch as each plaintiff's claims appear to arise out of a mortgage-related transaction that is distinct from the transactions on which the other plaintiffs' claims are based, and as each plaintiffs claims implicate distinct loans, locations, dates and personnel, there is no meaningful economy of scale gained by trying the [ ] cases together. There will be little, if any, overlapping discovery and each plaintiff's claims will require distinct witnesses and documentary proof. The interest in economy is affirmatively disserved by forcing these many parties to attend a common trial at which these separate, unrelated claims would be resolved. Furthermore, settlement of the claims is likely to be facilitated if the claims relating to discrete loan transactions are litigated separately.

Green, 2013 WL 6712482, at *6 (internal brackets, quotation marks, and citations omitted). This Court must likewise find that Plaintiffs' claims did not arise of the same transaction or occurrence. Rather, the claims arise from different borrowers' loans or loan-modification attempts and necessarily involve different sets of operative facts, even if the claims are pled similarly and present similar legal issues.

As Defendant asserts, under these circumstances, even if Plaintiffs had satisfied the joinder requirements of Rule 20, severance would still be proper. Under Rule 21 of the Federal Rules of Civil Procedure, courts look to four factors to determine if claims should be severed: "(1) the interest of avoiding prejudice and delay; (2) ensuring judicial economy; (3) safeguarding principles of fundamental fairness; and (4) whether different witnesses and documentary proof would be required for plaintiffs' claims." Hofmann v. EMI Resorts, Inc., 2010 WL 9034908, at *1 (S.D. Fla. July 21, 2010) (internal quotation

marks and citation omitted). Some of the Plaintiffs have already implicitly indicated in an earlier related case, now dismissed, that there will be no gains in judicial economy from their joinder. The case management report they filed in that case proposed an "Estimated Length of Trial" of "3 Days Per Plaintiff." This would amount to a total of 225 trial days in the current case with 75 Plaintiffs. See Alonso et al. v. Bank of America, N.A., No. 8:17-cv-238-VMC-MAP, Dkt. 20, pg. 2 (M.D. Fla. 2017).

The fact that Plaintiffs' complaint has grown to 332 pages and 1,521 paragraphs only bolsters the Court's conclusion that mass joinder is inappropriate in this case. A complaint of such length is incapable of satisfying the "short and plain statement" requirement of Rule 8(a) of the Federal Rules of Civil Procedure; however, severed individual claims could easily be pled in compliance with this requirement. Therefore, the Court will grant the Alternative Motion to Sever Misjoined Claims with regard to all of the Plaintiffs, except the first-named Plaintiffs, Eddie and Awilda Torres, who shall remain as Plaintiffs in this case.

With regard to the allegations advanced by the Torreses, the Court is not convinced that they have pled their fraud claim with the "particularity" required by Rule 9(b) of the Federal Rules of Civil Procedure. Generally, but with specific focus on paragraphs 39, 40, 41, 42, 44, 50, and 51 of the allegations of the Amended Complaint, the Court concludes that the Torreses have not specified: "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and

(2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making same, and (3) the content of such statements and the manner in which they misled the plaintiff[.]" Brooks v. Blue Cross and Blue Shield of Fla., 116 F. 3d 1364, 1371 (11th Cir. 1997) (citations omitted); accord Azar v. American Home Mtge. Serv., Inc., 2110 WL 5648880, at *4 (M.D. Fla. July 16, 2010) (citing Brooks). They will, however, be afforded an opportunity to replead their claim of fraud against Defendant.

**ACCORDINGLY**, it is **ORDERED AND ADJUDGED** as follows:

1) Defendant's Motion to Sever Misjoined Claims (Dkt. 17) is **GRANTED.** All claims, other than the claim of the Torreses, are severed pursuant to Rule 21 and dismissed without prejudice to commencing separate individual actions. The statute of limitations for any claim asserted in this case is deemed tolled during the pendency of this action and for a period of thirty (30) days from the date of this order.

2) Defendant's Alternative Motion to Dismiss the Amended Complaint (Dkt. 17) is **GRANTED** as to the Torres' claim but without prejudice to filing an amended complaint within fourteen (14) days of this order. Defendant shall file a response to the amended complaint within fourteen (14) days of service of the amended complaint.

**DONE AND ORDERED** at Tampa, Florida, on October 6, 2017.

*s/Richard A. Lazzara*
**RICHARD A. LAZZARA**
**UNITED STATES DISTRICT JUDGE**

**COPIES FURNISHED TO:**
Counsel of Record

# EXHIBIT 2

MAKING HOME AFFORDABLE

# Home Affordable Modification Program

***Supplemental Directive 09-01*** ***April 6, 2009***

## *Introduction of the Home Affordable Modification Program*

### Background

On February 18, 2009, President Obama announced the Homeowner Affordability and Stability Plan to help up to 7 to 9 million families restructure or refinance their mortgages to avoid foreclosure. As part of this plan, the Treasury Department (Treasury) announced a national modification program aimed at helping 3 to 4 million at-risk homeowners – both those who are in default and those who are at imminent risk of default – by reducing monthly payments to sustainable levels. On March 4, 2009, the Treasury issued uniform guidance for loan modifications across the mortgage industry. This Supplemental Directive provides additional guidance to servicers for adoption and implementation of the Home Affordable Modification program (HAMP) for mortgage loans that are not owned or guaranteed by Fannie Mae or Freddie Mac (Non-GSE Mortgages).

Under the HAMP, a servicer will use a uniform loan modification process to provide a borrower with sustainable monthly payments. The guidelines set forth in this document apply to all eligible mortgage loans secured by one- to four-unit owner-occupied single-family properties.

In order for a servicer to participate in the HAMP with respect to Non-GSE Mortgages, the servicer must execute a servicer participation agreement and related documents (Servicer Participation Agreement) with Fannie Mae in its capacity as financial agent for the United States (as designated by Treasury) on or before December 31, 2009. The Servicer Participation Agreement will govern servicer participation in the HAMP program for all Non-GSE Mortgages. Servicers of mortgage loans that are owned or guaranteed by Fannie Mae or Freddie Mac should refer to the HAMP announcement issued by the applicable GSE.

The HAMP reflects usual and customary industry standards for mortgage loan modifications contained in typical servicing agreements, including pooling and servicing agreements (PSAs) governing private label securitizations. As detailed in the Servicer Participation Agreement, participating servicers are required to consider all eligible mortgage loans unless prohibited by the rules of the applicable PSA and/or other investor servicing agreements. Participating servicers are required to use reasonable efforts to remove any prohibitions and obtain waivers or approvals from all necessary parties in order to carry out any modification under the HAMP.

To help servicers implement the HAMP, this Supplemental Directive covers the following topics:

- HAMP Eligibility
- Underwriting
- Modification Process
- Reporting Requirements
- Fees and Compensation
- Compliance

## HAMP Eligibility

A Non-GSE Mortgage is eligible for the HAMP if the servicer verifies that all of the following criteria are met:

- The mortgage loan is a first lien mortgage loan originated on or before January 1, 2009.
- The mortgage loan has not been previously modified under the HAMP.
- The mortgage loan is delinquent or default is reasonably foreseeable; loans currently in foreclosure are eligible.
- The mortgage loan is secured by a one- to four-unit property, one unit of which is the borrower's principal residence. Cooperative share mortgages and mortgage loans secured by condominium units are eligible for the HAMP. Loans secured by manufactured housing units are eligible for the HAMP.
- The property securing the mortgage loan must not be vacant or condemned.
- The borrower documents a financial hardship and represents that (s)he does not have sufficient liquid assets to make the monthly mortgage payments by completing a Home Affordable Modification Program Hardship Affidavit and provides the required income documentation. The documentation supporting income may not be more than 90 days old (as of the date the servicer is determining HAMP eligibility).
- The borrower has a monthly mortgage payment ratio of greater than 31 percent.
- A borrower in active litigation regarding the mortgage loan is eligible for the HAMP.
- The servicer may not require a borrower to waive legal rights as a condition of the HAMP.
- A borrower actively involved in a bankruptcy proceeding is eligible for the HAMP at the servicer's discretion. Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage who did not reaffirm the mortgage debt under applicable law are eligible, provided the Home Affordable Modification Trial Period Plan and Home Affordable Modification Agreement are revised as outlined in the *Acceptable Revisions to HAMP Documents* section of this Supplemental Directive.
- The borrower agrees to set up an escrow account for taxes and hazard and flood insurance prior to the beginning of the trial period if one does not currently exist.
- Borrowers may be accepted into the program if a fully executed Home Affordable Modification Trial Period Plan is in the servicer's possession on December 31, 2012.

- The current unpaid principal balance (UPB) of the mortgage loan prior to capitalization must be no greater than:
  - 1 Unit: $729,750
  - 2 Units: $934,200
  - 3 Units: $1,129,250
  - 4 Units: $1,403,400

Note: Mortgage loans insured, guaranteed or held by a federal government agency (e.g., FHA, HUD, VA and Rural Development) may be eligible for the HAMP, subject to guidance issued by the relevant agency. Further details regarding inclusion of these loans in the HAMP will be provided in a subsequent Supplemental Directive.

The HAMP documents are available through www.financialstability.gov. Documents include the Home Affordable Modification Trial Period Plan (hereinafter referred to as Trial Period Plan), the Home Affordable Modification Agreement (hereinafter referred to as the Agreement), the Home Affordable Modification Program Hardship Affidavit (hereinafter referred to as the Hardship Affidavit) and various cover letters.

## Underwriting

### Hardship Affidavit

Every borrower and co-borrower seeking a modification, whether in default or not, must sign a Hardship Affidavit that attests to and describes one or more of the following types of hardship:

1. A reduction in or loss of income that was supporting the mortgage.
2. A change in household financial circumstances.
3. A recent or upcoming increase in the monthly mortgage payment.
4. An increase in other expenses.
5. A lack of sufficient cash reserves to maintain payment on the mortgage and cover basic living expenses at the same time. Cash reserves include assets such as cash, savings, money market funds, marketable stocks or bonds (excluding retirement accounts and assets that serve as emergency fund – generally equal to three times the borrower's monthly debt payments).
6. Excessive monthly debt payments and overextension with creditors, e.g., the borrower was required to use credit cards, a home equity loan, or other credit to make the mortgage payment.
7. Other reasons for hardship detailed by the borrower.

Note: The borrower is not required to have the Hardship Affidavit notarized.

### Reasonably Foreseeable (Imminent) Default

A borrower that is current or less than 60 days delinquent who contacts the servicer for a modification, appears potentially eligible for a modification, and claims a hardship must

be screened for imminent default. The servicer must make a determination as to whether a payment default is imminent based on the servicer's standards for imminent default and consistent with applicable contractual agreements and accounting standards. If the servicer determines that default is imminent, the servicer must apply the Net Present Value test.

In the process of making its imminent default determination, the servicer must evaluate the borrower's financial condition in light of the borrower's hardship as well as inquire as to the condition of and circumstances affecting the property securing the mortgage loan. The servicer must consider the borrower's financial condition, liquid assets, liabilities, combined monthly income from wages and all other identified sources of income, monthly obligations (including personal debts, revolving accounts, and installment loans), and a reasonable allowance for living expenses such as food, utilities, etc. The hardship and financial condition of the borrower shall be verified through documentation.

***Documenting the Reason for and Timing of Imminent Default***

A servicer must document in its servicing system the basis for its determination that a payment default is imminent and retain all documentation used to reach its conclusion. The servicer's documentation must also include information on the borrower's financial condition as well as the condition and circumstances of the property securing the mortgage loan.

## Net Present Value (NPV) Test

All loans that meet the HAMP eligibility criteria and are either deemed to be in imminent default (as described above) or 60 or more days delinquent must be evaluated using a standardized NPV test that compares the NPV result for a modification to the NPV result for no modification. If the NPV result for the modification scenario is greater than the NPV result for no modification, the result is deemed "positive" and the servicer MUST offer the modification. If the NPV result for no modification is greater than NPV result for the modification scenario, the modification result is deemed "negative" and the servicer has the option of performing the modification in its discretion. For mortgages serviced on behalf of a third party investor for which the modification result is deemed "negative," however, the servicer may not perform the modification without express permission of the investor. If a modification is not pursued when the NPV result is "negative," the servicer must consider the borrower for other foreclosure prevention options, including alternative modification programs, deeds-in-lieu, and preforeclosure sale programs.

Whether or not a modification is pursued, the servicer MUST maintain detailed documentation of the NPV model used, all NPV inputs and assumptions and the NPV results.

Fannie Mae has developed a software application for servicers to submit loan files to the NPV calculator. The software application is available on the Home Affordable

Modification servicer web portal accessible through www.financialstability.gov. On this portal, servicers will have access to the NPV calculator tool as well as detailed guidelines for submitting proposed modification data.

Servicers having at least a $40 billion servicing book will have the option to create a version of the NPV calculator that uses a set of cure rates and redefault rates estimated based on the experience of their own portfolios, taking into consideration, if feasible, current LTV, current monthly mortgage payment, current credit score, delinquency status and other loan or borrower attributes. Detailed guidance on required inputs for custom NPV calculations is forthcoming.

For mortgages serviced on behalf of a third party investor, the servicer must use a discount rate at least as high as the rate used on the servicer's own portfolio, but in no event higher than the maximum rate permitted under the HAMP.

To obtain a property valuation input for the NPV calculator, servicers may use either an automated valuation model (AVM), provided that the AVM renders a reliable confidence score, or a broker's price opinion (BPO). A servicer may use an AVM provided by one of the GSEs. As an alternative, servicers may rely on their internal AVM provided that:

(i) the servicer is subject to supervision by a Federal regulatory agency;
(ii) the servicer's primary Federal regulatory agency has reviewed the model; and
(iii) the AVM renders a reliable confidence score.

If a GSE AVM or the servicer AVM is unable to render a value with a reliable confidence score, the servicer must obtain an assessment of the property value utilizing a BPO or a property valuation method acceptable to the servicer's Federal regulatory supervisor. Such assessment must be rendered in accordance with the Interagency Appraisal and Evaluation Guidelines (as if such guidelines apply to loan modifications). In all cases, the property valuation used cannot be more than 90 days old.

## Verifying Borrower Income and Occupancy Status

Servicers may use recent verbal financial information obtained from the borrower and any co-borrower 90 days or less from the date the servicer is determining HAMP eligibility to assess the borrower's eligibility. The servicer may rely on this information to prepare and send to the borrower a solicitation for the HAMP and an offer of a Trial Period Plan. When the borrower returns the Trial Period Plan and related documents, the servicer must review them to verify the borrower's financial information and eligibility – except that documentation of income may not be more than 90 days old as of the determination of eligibility.

As an alternative, a servicer may require a borrower to submit the required documentation to verify the borrower's eligibility and income prior to preparing a Trial Period Plan. Upon receipt of the documentation and determination of the borrower's

eligibility, a servicer may prepare and send to the borrower a letter indicating that the borrower is eligible for the HAMP together with a Trial Period Plan.

The borrower will only qualify for the HAMP if the verified income documentation confirms that the monthly mortgage payment ratio prior to the modification is greater than 31 percent. The "monthly mortgage payment ratio" is the ratio of the borrower's current monthly mortgage payment to the borrower's monthly gross income (or the borrowers' combined monthly gross income in the case of co-borrowers). The "monthly mortgage payment" includes the monthly payment of principal, interest, property taxes, hazard insurance, flood insurance, condominium association fees and homeowner's association fees, as applicable (including any escrow payment shortage amounts subject to a repayment plan). When determining a borrower's monthly mortgage payment ratio, servicers must adjust the borrower's current mortgage payment to include, as applicable, property taxes, hazard insurance, flood insurance, condominium association fees and homeowner's association fees if these expenses are not already included in the borrower's payment. The monthly mortgage payment does not include mortgage insurance premium payments or payments due to holders of subordinate liens.

With respect to adjustable rate loans where there is a rate reset scheduled within 120 days after the date of the evaluation (a "Reset ARM"), the monthly mortgage payment used to determine eligibility will be the greater of (i) the borrower's current scheduled monthly mortgage payment or (ii) a fully amortizing monthly mortgage payment based on the note reset rate using the index value as of the date of the evaluation (the "Reset Interest Rate"). With respect to adjustable rate loans that reset more than 120 days after the date of the evaluation, the borrower's current scheduled monthly mortgage payment will be used to determine eligibility.

The borrower's "monthly gross income" is the borrower's income amount before any payroll deductions and includes wages and salaries, overtime pay, commissions, fees, tips, bonuses, housing allowances, other compensation for personal services, Social Security payments, including Social Security received by adults on behalf of minors or by minors intended for their own support, and monthly income from annuities, insurance policies, retirement funds, pensions, disability or death benefits, unemployment benefits, rental income and other income. If only net income is available, the servicer must multiply the net income amount by 1.25 to estimate the monthly gross income.

Servicers should include non-borrower household income in monthly gross income if it is voluntarily provided by the borrower and if there is documentary evidence that the income has been, and reasonably can continue to be, relied upon to support the mortgage payment. All non-borrower household income included in monthly gross income must be documented and verified by the servicer using the same standards for verifying a borrower's income.

The servicer may not require a borrower to make an up-front cash contribution (other than the first trial period payment) for the borrower to be considered for the HAMP.

The HAMP documents instruct the borrower (the term "borrower" includes any co-borrower) to provide the following financial information to the servicer:

If the borrower is employed:

- A signed copy of the most recently filed federal income tax return, including all schedules and forms, if available,
- A signed IRS Form 4506-T (Request for Transcript of Tax Return), and
- Copies of the two most recent paystubs indicating year-to-date earnings.
- For additional income such as bonuses, commissions, fees, housing allowances, tips and overtime, a servicer must obtain a letter from the employer or other reliable third-party documentation indicating that the income will in all probability continue.

If the borrower is self-employed:

- A signed copy of the most recent federal income tax return, including all schedules and forms, if available,
- A signed IRS Form 4506-T (Request for Transcript of Tax Return), and
- The most recent quarterly or year-to-date profit and loss statement for each self-employed borrower.
- Other reliable third-party documentation the borrower voluntarily provides.

Note: For both a salaried or a self-employed borrower, if the borrower does not provide a signed copy of the most recently filed federal income tax return, or if the Compliance Agent so requires, the servicer must submit the Form 4506-T to the IRS to request a transcript of the return.

If the borrower elects to use alimony or child support income to qualify, acceptable documentation includes:

- Photocopies of the divorce decree, separation agreement, or other type of legal written agreement or court decree that provides for the payment of alimony or child support and states the amount of the award and the period of time over which it will be received. Servicers must determine that the income will continue for at least three years.
- Documents supplying reasonably reliable evidence of full, regular and timely payments, such as deposit slips, bank statements or signed federal income tax returns.

If the borrower has other income such as social security, disability or death benefits, or a pension:

- Acceptable documentation includes letters, exhibits, a disability policy or benefits statement from the provider that states the amount, frequency, and duration of the benefit. The servicer must determine that the income will continue for at least three years.
- The servicer must obtain copies of signed federal income tax returns, IRS W-2 forms, or copies of the two most recent bank statements.

If the borrower receives public assistance or collects unemployment:

- Acceptable documentation includes letters, exhibits or a benefits statement from the provider that states the amount, frequency, and duration of the benefit. The servicer must determine that the income will continue for at least nine months.

If the borrower has rental income, acceptable documentation includes:

- Copies of all pages from the borrower's most recent two years of signed federal income tax returns and Schedule E – Supplemental Income and Loss. The monthly net rental income to be calculated for HAMP purposes equals 75 percent of the gross rent, with the remaining 25 percent considered vacancy loss and maintenance expense.

A servicer must confirm that the property securing the mortgage loan is the borrower's primary residence as evidenced by the most recent signed federal income tax return (or transcript of tax return obtained from the IRS), a credit report and one other form of documentation that would supply reasonable evidence that the property is the borrower's primary residence (such as utility bills in the borrower's name).

A servicer is not required to modify a mortgage loan if there is reasonable evidence indicating the borrower submitted false or misleading information or otherwise engaged in fraud in connection with the modification.

## Standard Modification Waterfall

Servicers are required to consider a borrower for a refinance through the Hope for Homeowners program when feasible. Consideration for a Hope for Homeowners refinance should not delay eligible borrowers from receiving a modification offer and beginning the trial period. Servicers must use the modification options listed below to begin the HAMP modification and work to complete the Hope for Homeowners refinance during the trial period.

Servicers must apply the modification steps enumerated below in the stated order of succession until the borrower's monthly mortgage payment ratio is reduced as close as possible to 31 percent, without going below 31 percent (the "target monthly mortgage payment ratio"). If the applicable PSA or other investor servicing agreement prohibits the servicer from taking a modification step, the servicer may seek approval for an exception.

Servicers are not precluded under the HAMP from agreeing to a modification that reduces the borrower's monthly mortgage payment ratio below 31% as long as the modification otherwise complies with the HAMP requirements. Similarly and where otherwise permitted by the applicable PSA or other investor servicing contract, servicers are not precluded under the HAMP from agreeing to a modification where the interest rate does not step up after five years, or where additional principal forbearance is substituted for extending the term as needed to achieve the target monthly mortgage payment ratio of 31%, so long as the modification otherwise complies with HAMP

requirements. However, borrower, servicer and investor incentive payments for these modifications will be paid based on modification terms that reflect the target monthly mortgage payment ratio and standard modification terms.

**Note**: If a borrower has an adjustable-rate mortgage (ARM) or interest-only mortgage, the existing interest rate will convert to a fixed interest rate, fully amortizing loan.

**Step 1:** Capitalize accrued interest, out-of-pocket escrow advances to third parties, and any required escrow advances that will be paid to third parties by the servicer during the trial period and servicing advances (costs and expenses incurred in performing its servicing obligation, such as those related to preservation and protection of the security property and the enforcement of the mortgage) paid to third parties in the ordinary course of business and not retained by the servicer, if allowed by state law. The servicer should capitalize only those third party delinquency fees that are reasonable and necessary. Fees permitted by Fannie Mae and Freddie Mac for GSE loans shall be considered evidence of fees that would be reasonable for non-GSE loans. Late fees may not be capitalized and must be waived if the borrower satisfies all conditions of the Trial Period Plan.

**Step 2:** Reduce the interest rate. If the loan is a fixed rate mortgage or an adjustable-rate mortgage, then the starting interest rate is the current interest rate. If the loan is a Reset ARM, the starting interest rate is the Reset Interest Rate.

Reduce the starting interest rate in increments of .125 percent to get as close as possible to the target monthly mortgage payment ratio. The interest rate floor in all cases is 2.0 percent.

- If the resulting rate is below the Interest Rate Cap, this reduced rate will be in effect for the first five years followed by annual increases of one percent per year (or such lesser amount as may be needed) until the interest rate reaches the Interest Rate Cap, at which time it will be fixed for the remaining loan term.
- If the resulting rate exceeds the Interest Rate Cap, then that rate is the permanent rate.

The "Interest Rate Cap" is the Freddie Mac Weekly Primary Mortgage Market Survey (PMMS) Rate for 30-year fixed rate conforming loans, rounded to the nearest 0.125 percent, as of the date that the Agreement is prepared.

**Step 3:** If necessary, extend the term and reamortize the mortgage loan by up to 480 months from the modification effective date (i.e., the first day of the month following the end of the trial period) to achieve the target monthly mortgage payment ratio. If a term extension is not permitted under the applicable PSA or other investor servicing agreement, reamortize the mortgage loan based upon an amortization schedule of up to 480 months with a balloon payment due at maturity. Negative amortization after the effective date of the modification is prohibited.

**Step 4:** If necessary, the servicer must provide for principal forbearance to achieve the target monthly mortgage payment ratio. The principal forbearance amount is non-interest

bearing and non-amortizing. The amount of principal forbearance will result in a balloon payment fully due and payable upon the earliest of the borrower's transfer of the property, payoff of the interest bearing unpaid principal balance, or maturity of the mortgage loan. The modified interest bearing balance (i.e., the unpaid principal balance excluding the deferred principal balloon amount) must create a current mark-to-market LTV (current LTV based upon the new valuation) greater than or equal to 100 percent if the result of the NPV test is negative and the servicer elects to perform the modification.

There is no requirement to forgive principal under the HAMP. However, servicers may forgive principal to achieve the target monthly mortgage payment ratio on a standalone basis or before any step in the standard waterfall process set forth above. If principal is forgiven, subsequent steps in the standard waterfall may not be skipped. If principal is forgiven and the interest rate is not reduced, the existing rate will be fixed and treated as the modified rate for the purposes of the Interest Rate Cap.

## Verifying Monthly Gross Expenses

A servicer must obtain a credit report for each borrower or a joint report for a married couple who are co-borrowers to validate installment debt and other liens. In addition, a servicer must consider information concerning monthly obligations obtained from the borrower either orally or in writing. The "monthly gross expenses" equal the sum of the following monthly charges:

- The monthly mortgage payment, taxes, property insurance, homeowner's or condominium association fee payments and assessments related to the property whether or not they are included in the mortgage payment.
- Any mortgage insurance premiums.
- Monthly payments on all closed-end subordinate mortgages.
- Payments on all installment debts with more than ten months of payments remaining, including debts that are in a period of either deferment or forbearance. When payments on an installment debt are not on the credit report or are listed as deferred, the servicer must obtain documentation to support the payment amount included in the monthly debt payment. If no monthly payment is reported on a student loan that is deferred or is in forbearance, the servicer must obtain documentation verifying the proposed monthly payment amount, or use a minimum of 1.5 percent of the balance.
- Monthly payment on revolving or open-end accounts, regardless of the balance. In the absence of a stated payment, the payment will be calculated by multiplying the outstanding balance by 3 percent.
- Monthly payment on a Home Equity Line of Credit (HELOC) must be included in the payment ratio using the minimum monthly payment reported on the credit report. If the HELOC has a balance but no monthly payment is reported, the servicer must obtain documentation verifying the payment amount, or use a minimum of one percent of the balance.
- Alimony, child support and separate maintenance payments with more than ten months of payments remaining, if supplied by the borrower.

- Car lease payments, regardless of the number of payments remaining.
- Aggregate negative net rental income from all investment properties owned, if supplied by the borrower.
- Monthly mortgage payment for second home (principal, interest, taxes and insurance and, when applicable, leasehold payments, homeowner association dues, condominium unit or cooperative unit maintenance fees (excluding unit utility charges)).

## Total Monthly Debt Ratio

The borrower's total monthly debt ratio ("back-end ratio") is the ratio of the borrower's monthly gross expenses divided by the borrower's monthly gross income. Servicers will be required to send the Home Affordable Modification Program Counseling Letter to borrowers with a post-HAMP modification back-end ratio equal to or greater than 55 percent. The letter states the borrower must work with a HUD-approved housing counselor on a plan to reduce their total indebtedness below 55 percent. The letter also describes the availability and advantages of counseling and provides a list of local HUD-approved housing counseling agencies and directs the borrower to the appropriate HUD website where such information is located. The borrower must represent in writing in the HAMP documents that (s)he will obtain such counseling.

Face-to-face counseling is encouraged; however, telephone counseling is also permitted from HUD-approved housing counselors provided it covers the same topics as face-to-face sessions. Telephone counseling sessions provide flexibility to borrowers who are unable to attend face-to-face sessions or who do not have an eligible provider within their area.

A list of approved housing counseling agencies is available at http://www.hud.gov/offices/hsg/sfh/hcc/fc/ or by calling the toll-free housing counseling telephone referral service at 1-800-569-4287. A servicer must retain in its mortgage files evidence of the borrower notification. There is no charge to either borrowers or servicers for this counseling.

## Mortgages with No Due-on-Sale Provision

If a mortgage that is not subject to a due-on-sale provision receives an HAMP, the borrower agrees that the HAMP will cancel the assumability feature of that mortgage.

## Escrow Accounts

All of the borrower's monthly payments must include a monthly escrow amount unless prohibited by applicable law. The servicer must assume full responsibility for administering the borrower's escrow deposit account in accordance with the mortgage documents and all applicable laws and regulations. If the mortgage loan being considered for the HAMP is a non-escrowed mortgage loan, the servicer must establish an escrow deposit account prior to the beginning of the trial period. Servicers who do not

have this capacity must implement an escrow process within six months of signing the Servicer Participation Agreement. However, the servicer must ensure that the trial payments include escrow amounts and must place the escrow funds into a separate account identified for escrow deposits.

Servicers are encouraged to perform an escrow analysis prior to establishing the trial period payment. When performing an escrow analysis, servicers should take into consideration tax and insurance premiums that may come due during the trial period. When the borrower's escrow account does not have sufficient funds to cover an expense and the servicer advances the funds necessary to pay an expense to a third party, the amount of the servicer advance that is paid to a third party may be capitalized.

In the event the initial escrow analysis identifies a shortage – a deficiency in the escrow deposits needed to pay all future tax and insurance payments – the servicer must take steps to eliminate the shortage. Any actions taken by the servicer to eliminate the escrow shortage must be in compliance with applicable laws, rules and regulations, including, but not limited to, the Real Estate Settlement Procedures Act and the Truth in Lending Act.

## Compliance with Applicable Laws

Each servicer (and any subservicer it uses) must be aware of, and in full compliance with, all federal, state, and local laws (including statutes, regulations, ordinances, administrative rules and orders that have the effect of law, and judicial rulings and opinions) – including, but not limited to, the following laws that apply to any of its practices related to the HAMP:

- Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices.
- The Equal Credit Opportunity Act and the Fair Housing Act, which prohibit discrimination on a prohibited basis in connection with mortgage transactions. Loan modification programs are subject to the fair lending laws, and servicers and lenders should ensure that they do not treat a borrower less favorably than other borrowers on grounds such as race, religion, national origin, sex, marital or familial status, age, handicap, or receipt of public assistance income in connection with any loan modification. These laws also prohibit redlining.
- The Real Estate Settlement Procedures Act, which imposes certain disclosure requirements and restrictions relating to transfers of the servicing of certain loans and escrow accounts.
- The Fair Debt Collection Practices Act, which restricts certain abusive debt collection practices by collectors of debts, other than the creditor, owed or due to another.

## Modification Process

### Borrower Solicitation

Servicers should follow their existing practices, including complying with any express contractual restrictions, with respect to solicitation of borrowers for modifications.

A servicer may receive calls from current or delinquent borrowers directly inquiring about the availability of the HAMP. In that case, the servicer should work with the borrower to obtain the borrower's financial and hardship information and to determine if the HAMP is appropriate. If the servicer concludes a current borrower is in danger of imminent default, the servicer must consider an HAMP modification.

When discussing the HAMP, the servicer should provide the borrower with information designed to help them understand the modification terms that are being offered and the modification process. Such communication should help minimize potential borrower confusion, foster good customer relations, and improve legal compliance and reduce other risks in connection with the transaction. A servicer also must provide a borrower with clear and understandable written information about the material terms, costs, and risks of the modified mortgage loan in a timely manner to enable borrowers to make informed decisions. The servicer should inform the borrower during discussions that the successful completion of a modification under the HAMP will cancel any assumption feature, variable or step-rate feature, or enhanced payment options in the borrower's existing loan, at the time the loan is modified.

Servicers must have adequate staffing, resources, and facilities for receiving and processing the HAMP documents and any requested information that is submitted by borrowers. Servicers must also have procedures and systems in place to be able to respond to inquiries and complaints about the HAMP. Servicers should ensure that such inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution.

### Document Retention

Servicers must retain all documents and information received during the process of determining borrower eligibility, including borrower income verification, total monthly mortgage payment and total monthly gross debt payment calculations, NPV calculations (assumptions, inputs and outputs), evidence of application of each step of the standard waterfall, escrow analysis, escrow advances, and escrow set-up. The servicers must retain all documents and information related to the monthly payments during and after the trial period, as well as incentive payment calculations and such other required documents.

Servicers must retain detailed records of borrower solicitations or borrower-initiated inquiries regarding the HAMP, the outcome of the evaluation for modification under the HAMP and specific justification with supporting details if the request for modification

under the HAMP was denied. Records must also be retained to document the reason(s) for a trial modification failure. If an HAMP modification is not pursued when the NPV result is "negative," the servicer must document its consideration of other foreclosure prevention options. If a borrower under an HAMP modification loses good standing, the servicer must retain documentation of its consideration of the borrower for other loss mitigation alternatives.

Servicers must retain required documents for a period of seven years from the date of the document collection.

## Temporary Suspension of Foreclosure Proceedings

To ensure that a borrower currently at risk of foreclosure has the opportunity to apply for the HAMP, servicers should not proceed with a foreclosure sale until the borrower has been evaluated for the program and, if eligible, an offer to participate in the HAMP has been made. Servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HAMP, including in-person contacts at the servicer's discretion. Servicers must not conduct foreclosure sales on loans previously referred to foreclosure or refer new loans to foreclosure during the 30-day period that the borrower has to submit documents evidencing an intent to accept the Trial Period Plan offer. Except as noted herein, any foreclosure sale will be suspended for the duration of the Trial Period Plan, including any period of time between the borrower's execution of the Trial Period Plan and the Trial Period Plan effective date.

However, borrowers in Georgia, Hawaii, Missouri, and Virginia will be considered to have failed the trial period if they are not current under the terms of the Trial Period Plan as of the date that the foreclosure sale is scheduled. Accordingly, servicers of HAMP loans secured by properties in these states may proceed with the foreclosure sale if the borrower has not made the trial period payments required to be made through the end of the month preceding the month in which the foreclosure sale is scheduled to occur.

## Mortgage Insurer Approval

If applicable, a servicer must obtain mortgage insurer approval for HAMP modifications. Servicers should consult their mortgage insurance providers for specific processes related to the reporting of modified terms, payment of premiums, payment of claims, and other operational matters in connection with mortgage loans modified under the HAMP.

## Executing the HAMP Documents

Servicers must use a two-step process for HAMP modifications. Step one involves providing a Trial Period Plan outlining the terms of the trial period, and step two involves providing the borrower with an Agreement that outlines the terms of the final modification.

In step one, the servicer should instruct the borrower to return the signed Trial Period Plan, together with a signed Hardship Affidavit and income verification documents (if not previously obtained from the borrower), and the first trial period payment (when not using automated drafting arrangements), to the servicer within 30 calendar days after the Trial Period Plan is sent by the servicer. The servicer is encouraged to contact the borrower before the expiration of the 30-day period if the borrower has not yet responded to encourage submission of the material. The servicer may, in its discretion, consider the offer of a Trial Period Plan to have expired at the end of 60 days if the borrower has not submitted both an executed Trial Period Plan and complete documentation as required under the Trial Period Plan. If the borrower's submission is incomplete, the servicer should work with the borrower to complete the Trial Period Plan submission. Note: The borrower is not required to have the Hardship Affidavit notarized.

Upon receipt of the Trial Period Plan from the borrower, the servicer must confirm that the borrower meets the underwriting and eligibility criteria. Once the servicer makes this determination and has received good funds for the first month's trial payment, the servicer should sign and immediately return an executed copy of the Trial Period Plan to the borrower. Payments made by the borrower under the terms of the Trial Period Plan will count toward successful completion irrespective of the date of the executed copy of the Trial Period Plan.

If the servicer determines that the borrower does not meet the underwriting and eligibility standards of the HAMP after the borrower has submitted a signed Trial Period Plan to the servicer, the servicer should promptly communicate that determination to the borrower in writing and consider the borrower for another foreclosure prevention alternative.

In step two, servicers must calculate the terms of the modification using verified income, taking into consideration amounts to be capitalized during the trial period. Servicers are encouraged to wait to send the Agreement to the borrower for execution until after receipt of the second to the last payment under the trial period. Note: the borrower is not required to have the Agreement notarized.

Servicers are reminded that all HAMP documentation must be signed by an authorized representative of the servicer and reflect the actual date of signature by the servicer's representative.

***Acceptable Revisions to HAMP Documents***

Servicers are strongly encouraged to use the HAMP documents available through www.financialstability.gov. Should a servicer decide to revise the HAMP documents or draft its own HAMP documents, it must obtain prior written approval from Treasury or Fannie Mae with the exception of the following circumstances:

- The servicer must revise the HAMP documents as necessary to comply with Federal, State and local law. For example, in the event that the HAMP results in a

principal forbearance, servicers are obligated to modify the uniform instrument to comply with laws and regulations governing balloon disclosures.

- The servicer may include, as necessary, conditional language in HAMP offers and modification agreements indicating that the HAMP will not be implemented unless the servicer receives an acceptable title endorsement, or similar title insurance product, or subordination agreements from other existing lien holders, as necessary, to ensure that the modified mortgage loan retains its first lien position and is fully enforceable.
- If the borrower previously received a Chapter 7 bankruptcy discharge but did not reaffirm the mortgage debt under applicable law, the following language must be inserted in Section 1 of the Trial Period Plan and Section 1 of the Agreement: "I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."
- The servicer may include language in the HAMP cover letter providing instructions for borrowers who elect to use an automated payment method to make the trial period payments.

Unless a borrower or co-borrower is deceased or a borrower and a co-borrower are divorced, all parties who signed the original loan documents or their duly authorized representative(s) must execute the HAMP documents. If a borrower and a co-borrower are divorced and the property has been transferred to one spouse in the divorce decree, the spouse who no longer has an interest in the property is not required to execute the HAMP documents. Servicers may evaluate requests on a case-by-case basis when the borrower is unable to sign due to circumstances such as mental incapacity, military deployment, etc. Furthermore, a borrower may elect to add a new co-borrower.

***Use of Electronic Records***

Electronic records for HAMP are acceptable as long as the electronic record complies with applicable law.

***Assignment to MERS***

If the original mortgage loan was registered with Mortgage Electronic Registration Systems, Inc. (MERS) and the originator elected to name MERS as the original mortgagee of record, solely as nominee for the lender named in the security instrument and the note, the servicer MUST make the following changes to the Agreement:

(a) Insert a new definition under the "Property Address" definition on page 1, which reads as follows:

"MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for lender and lender's successors and assigns. MERS is the mortgagee under the Mortgage. MERS is organized and existing

under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, (888) 679-MERS.

(b) Add as section 4.I.:

That MERS holds only legal title to the interests granted by the borrower in the mortgage, but, if necessary to comply with law or custom, MERS (as nominee for lender and lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of lender including, but not limited to, releasing and canceling the mortgage loan.

(c) MERS must be added to the signature lines at the end of the Agreement, as follows:

_____
Mortgage Electronic Registration
Systems, Inc. – Nominee for Lender

The servicer may execute the Agreement on behalf of MERS and, if applicable, submit it for recordation.

## Trial Payment Period

Servicers may use recent verbal financial information to prepare and offer a Trial Period Plan. Servicers are not required to verify financial information prior to the effective date of the trial period. The servicer must service the mortgage loan during the trial period in the same manner as it would service a loan in forbearance.

The trial period is three months in duration (or longer if necessary to comply with applicable contractual obligations). The borrower must be current under the terms of the Trial Period Plan at the end of the trial period to receive a permanent loan modification. Current in this context is defined as the borrower having made all required trial period payments no later than 30 days from the date the final payment is due.

The effective date of the trial period will be set forth in the Trial Period Plan. In most cases, the effective date is the first day of the month following the servicer's mailing of the offer for the Trial Period Plan. The trial period extends for two (or more if necessary to comply with applicable contractual obligations) additional payments after the effective date.

Servicers are encouraged to require automated payment methods, such as automatic payment drafting. If automatic payment drafting is required, it must be used by all HAMP borrowers, unless a borrower opts out.

If the verified income evidenced by the borrower's documentation exceeds the initial income information used by the servicer to place the borrower in the trial period by more

than 25 percent, the borrower must be reevaluated based on the program eligibility and underwriting requirements. If this reevaluation determines that the borrower is still eligible, new documents must be prepared and the borrower must restart the trial period.

If the verified income evidenced by the borrower's documentation is less than the initial income information used by the servicer to place the borrower in the trial period, or if the verified income exceeds the initial income information by 25 percent or less, and the borrower is still eligible, then the trial period will not restart and the trial period payments will not change; provided, that verified income will be used to calculate the monthly mortgage payment under the Agreement. (If, based on verified income the result of the NPV test is "negative" for modification, the servicer is not obligated to perform the modification.) However, if the servicer determines the borrower is not eligible for the HAMP based on verified income, the servicer must notify the borrower of that determination and that any trial period payments made by the borrower will be applied to the mortgage loan in accordance with the borrower's current loan documents.

If a servicer has information that the borrower does not meet all of the eligibility criteria for the HAMP (e.g., because the borrower has moved out of the house) the servicer should explore other foreclosure prevention alternatives prior to resuming or initiating foreclosure.

Note that under the terms of the Agreement, trial payments should be applied when they equal a full contractual payment (determined as of the time the HAMP is offered).

If the borrower complies with the terms and conditions of the Trial Period Plan, the loan modification will become effective on the first day of the month following the trial period as specified in the Trial Period Plan. However, because the monthly payment under the Agreement will be based on verified income documentation, the monthly payment due under the Agreement may differ from the payment amount due under the Trial Period Plan.

## Use of Suspense Accounts and Application of Payments

If permitted by the applicable loan documents, servicers may accept and hold as "unapplied funds" (held in a T&I custodial account) amounts received which do not constitute a full monthly, contractual principal, interest, tax and insurance (PITI) payment. However, when the total of the reduced payments held as "unapplied funds" is equal to a full PITI payment, the servicer is required to apply all full payments to the mortgage loan.

Any unapplied funds remaining at the end of the trial payment period that do not constitute a full monthly, contractual principal, interest, tax and insurance payment should be applied to reduce any amounts that would otherwise be capitalized onto the principal balance.

If a principal curtailment is received on a loan that has a principal forbearance, servicers are instructed to apply the principal curtailment to the interest bearing UPB. If, however, the principal curtailment amount is greater than or equal to the interest bearing UPB, then the curtailment should be applied to the principal forbearance portion. If the curtailment satisfies the principal forbearance portion, any remaining funds should then be applied to the interest bearing UPB.

## Recording the Modification

For all mortgage loans that are modified pursuant to the HAMP, the servicer must follow investor guidance with respect to ensuring that the modified mortgage loan retains its first lien position and is fully enforceable.

## Monthly Statements

For modifications that include principal forbearance, servicers are encouraged to include the amount of the gross UPB on the borrower's monthly payment statement. In addition, the borrower should receive information on a monthly basis regarding the accrual of "pay for performance" principal balance reduction payments.

## Redefault and Loss of Good Standing

If, following a successful trial period, a borrower defaults on a loan modification executed under the HAMP (three monthly payments are due and unpaid on the last day of the third month), the loan is no longer considered to be in "good standing." Once lost, good standing cannot be restored even if the borrower subsequently cures the default. A loan that is not in good standing is not eligible to receive borrower, servicer or investor incentives and reimbursements and these payments will no longer accrue for that mortgage. Further, the mortgage is not eligible for another HAMP modification.

In the event a borrower defaults, the servicer must work with the borrower to cure the modified loan, or if that is not feasible, evaluate the borrower for any other available loss mitigation alternatives prior to commencing foreclosure proceedings. The servicer must retain documentation of its consideration of the borrower for other loss mitigation alternatives.

## Reporting Requirements

Each servicer will be required to register with Fannie Mae to participate in the HAMP. Fannie Mae will provide an HAMP Registration form to facilitate registration.

Additionally, servicers will be required to provide periodic HAMP loan level data to Fannie Mae. The data must be accurate, complete, and in agreement with the servicer's records. Data should be reported by a servicer at the start of the modification trial period and during the modification trial period, for loan set up of the approved modification, and

monthly after the modification is set up on Fannie Mae's system. Servicers will be required to submit three separate data files as described below.

Note: The following data files can be delivered through a data collection tool on the servicer web portal available through www.financialstability.gov. Detailed guidelines for submitting data files are available at the servicer web portal. For those servicers who cannot use this process, an alternate process to submit data via a spreadsheet will be made available. More information on the alternative process for submitting data in a spreadsheet will be provided in the future.

***Trial Period***

Servicers will be required to provide loan level data in order to establish loans for processing during the HAMP trial period. See Exhibit A for trial period set up attributes.

In addition, servicers will be required to report activity during the HAMP trial period in order to substantiate the receipt of proceeds during the trial period and to record modification details. See Exhibit B for trial period reporting attributes.

***Loan Setup***

A one time loan set up is required to establish the approved modified HAMP loan on Fannie Mae's system. The file layout is the same that is used for establishing loans for processing during the trial period. See Exhibit A for loan set up attributes.

Servicers are required to provide the set up file the business day after the modification closes. The set up file should reflect the status of the loan after the final trial period payment is applied. The set up file will contain data for the current reporting period (e.g., prior month balances).

***Monthly Loan Activity Reporting***

The month after the loan set up file is provided, servicers must begin reporting activity on all HAMP loans on a monthly basis (e.g., loan set up file provided in July, the first loan activity report is due in August for July activity). See Exhibit C for monthly reporting attributes.

The HAMP loan activity report (LAR) is due by the 4th business day each month. Servicers will have until the 15th calendar day of each month to clear up any edits and have a final LAR reported to Fannie Mae. The Fannie Mae system will validate that the borrower payment has been made as expected and that the last paid installment (LPI) date is current before accruing the appropriate monthly compensation due.

If a loan becomes past due (the LPI date does not advance), the monthly compensation on that loan will not be accrued. If the loan is brought current, compensation will not be caught up (e.g., if a loan was two months past due, and then the borrower makes the

payments and brings the loan current, the annual compensation provided would be for ten months. The two months of compensation associated with the period of delinquency is not recoverable).

***Additional Data Requirements***

Additional data elements must be collected and reported as specified in Exhibit D. Some of these elements must be collected for all completed modifications regardless of the date of completion; guidance for collecting these elements will be forthcoming shortly. The requirement to collect these elements for trial modifications and for loans evaluated for a modification will be phased in as specified in Exhibit D.

## Reporting to Mortgage Insurers

Servicers must maintain their mortgage insurance processes and comply with all reporting required by the mortgage insurer for loans modified under the HAMP. Servicers should consult with the mortgage insurer for specific processes related to the reporting of modified terms, payment of premiums, payment of claims, and other operational matters in connection with mortgage loans modified under the HAMP.

Servicers are required to report successful HAMP modifications and the terms of those modifications to the appropriate mortgage insurers, if applicable, within 30 days following the end of the trial period and in accordance with procedures that currently exist or may be agreed to between servicers and the mortgage insurers.

Servicers must include the mortgage insurance premium in the borrower's modified payment, and must ensure that any existing mortgage insurance is maintained. Among other things, the servicer must ensure that the mortgage insurance premium is paid. In addition, servicers must adapt their systems to ensure proper reporting of modified loan terms and avoid impairing coverage for any existing mortgage insurance. For example, in the event that the modification includes principal forbearance, servicers must continue to pay the correct mortgage insurance premiums based on the gross UPB, including any principal forbearance amount, must include the gross UPB in their delinquency reporting to the mortgage insurer, and must ensure any principal forbearance does not erroneously trigger automatic mortgage insurance cancellation or termination.

## Transfers of Servicing

When a transfer of servicing includes mortgages modified under the HAMP, the transferor servicer must provide special notification to the transferee servicer. Specifically, the transferor servicer must advise the transferee servicer that loans modified under the HAMP are part of the portfolio being transferred and must confirm that the transferee servicer is aware of the special requirements for these loans, and agrees to assume the additional responsibilities associated with servicing them. A required form of assignment and assumption agreement must be used and is a part of the Servicer Participation Agreement.

## Credit Bureau Reporting

The servicer should continue to report a "full-file" status report to the four major credit repositories for each loan under the HAMP in accordance with the Fair Credit Reporting Act and credit bureau requirements as provided by the Consumer Data Industry Association (the "CDIA") on the basis of the following: (i) for borrowers who are current when they enter the trial period, the servicer should report the borrower current but on a modified payment if the borrower makes timely payments by the 30th day of each trial period month at the modified amount during the trial period, as well as report the modification when completed, and (ii) for borrowers who are delinquent when they enter the trial period, the servicer should continue to report in such a manner that accurately reflects the borrower's delinquency and workout status following usual and customary reporting standards, as well as report the modification when completed. More detailed guidance on these reporting requirements will be published by the CDIA.

"Full-file" reporting means that the servicer must describe the exact status of each mortgage it is servicing as of the last business day of each month.

## Fees and Compensation

### Late Fees

All late charges, penalties, stop-payment fees, or similar fees must be waived upon successful completion of the trial period.

### Administrative Costs

Servicers may not charge the borrower to cover the administrative processing costs incurred in connection with a HAMP. The servicer must pay any actual out-of-pocket expenses such as any required notary fees, recordation fees, title costs, property valuation fees, credit report fees, or other allowable and documented expenses. Servicers will not be reimbursed for the cost of the credit report(s).

### Incentive Compensation

No incentives of any kind will be paid if (i) the servicer has not executed the Servicer Participation Agreement, or (ii) the borrower's monthly mortgage payment ratio starts below 31 percent prior to the implementation of the HAMP. The calculation and payment of all incentive compensation will be based strictly on the borrower's verified income. Each servicer must promptly apply or remit, as applicable, all borrower and investor compensation it receives with respect to any modified loan.

With respect to payment of any incentive that is predicated on a six percent reduction in the borrower's monthly mortgage payment, the reduction will be calculated by comparing the monthly mortgage payment used to determine eligibility (adjusted as applicable to

include property taxes, hazard insurance, flood insurance, condominium association fees and homeowner's association fees) and the borrower's payment under HAMP.

The amount of funds available to pay servicer, borrower and investor compensation in connection with each servicer's modifications will be capped pursuant to each servicer's Servicer Participation Agreement (Program Participation Cap). Treasury will establish each servicer's initial Program Participation Cap by estimating the number of HAMP modifications expected to be performed by each servicer during the term of the HAMP. The Program Participation Cap could be adjusted based on Treasury's full book analysis of the servicer's loans.

The funds remaining available for a servicer's modifications under that servicer's Program Participation Cap will be reduced by the maximum amount of compensation payments potentially payable with respect to each loan modification upon entering into a trial period. In the event the compensation actually paid with respect to a loan modification is less than the maximum amount of compensation payments potentially payable, the funds remaining available for a servicer's modifications under the HAMP will be increased by the difference between such amounts.

Treasury may, from time to time and in its sole discretion, revise a servicer's Program Participation Cap. Fannie Mae will provide written notification to a servicer of all changes made to the servicer's Program Participation Cap. Once a servicer's Program Participation Cap is reached, a servicer must not enter into any agreements with borrowers intended to result in new loan modifications, and no payments will be made with respect to any new loan modifications.

***Servicer Incentive Compensation***

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. All such servicer incentive compensation shall be earned and payable once the borrower successfully completes the trial payment period, provided that the servicer has signed and delivered to Fannie Mae a Servicer Participation Agreement, any related documentation and any required servicer or loan set up data prior to the effective date of the loan modification.

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 through the HAMP by six percent or more, a servicer will also receive an annual "pay for success" fee for a period of three years. The fee will be equal to the lesser of: (i) $1,000 ($83.33/month), or (ii) one-half of the reduction in the borrower's annualized monthly payment. The "pay for success" fee will be payable annually for each of the first three years after the anniversary of the month in which a Trial Period Plan was executed. If the loan ceases to be in good standing, the servicer will cease to be eligible for any further incentive payments after that time, even if the borrower subsequently cures his or her delinquency.

***Borrower's Incentive Compensation***

To provide an additional incentive for borrowers to keep their modified loan current, borrowers whose monthly mortgage payment (principal, interest, taxes, all related property insurance and homeowner's or condominium association fees but excluding mortgage insurance) is reduced through the HAMP by six percent or more and who make timely monthly payments will earn an annual "pay for performance" principal balance reduction payment equal to the lesser of: (i) $1,000 ($83.33/month), or (ii) one-half of the reduction in the borrower's annualized monthly payment for each month a timely payment is made. A borrower can earn the right to receive a "pay for performance" principal balance reduction payment for payments made during the first five years following execution of the Agreement provided the loan continues to be in good standing as of the date the payment is made. The "pay for performance" principal balance reduction payment will accrue monthly but will be applied annually for each of the five years in which this incentive payment accrues, prior to the first payment due date after the anniversary of the month in which the Trial Period Plan was executed. This payment will be paid to the mortgage servicer to be applied first towards reducing the interest bearing UPB on the mortgage loan and then to any principal forbearance amount (if applicable). Any applicable prepayment penalties on partial principal prepayments made by the government must be waived. Borrower incentive payments do not accrue during the Trial Period; however, on the first month of the modification, the borrower will accrue incentive payments equal to the number of months in the trial period.

If and when the loan ceases to be in good standing, the borrower will cease to be eligible for any further incentive payments after that time, even if the borrower subsequently cures his or her delinquency. The borrower will lose his or her right to any accrued incentive compensation when the loan ceases to be in good standing.

***Investor Payment Reduction Cost Share and Up Front Incentives***

If the target monthly mortgage payment ratio is achieved, investors in Non-GSE Mortgages are entitled to payment reduction cost share compensation. This compensation equals one-half of the dollar difference between the borrower's monthly payment under the modification at the target monthly mortgage payment ratio and the lesser of (i) what the borrower's monthly payment would be at a 38 percent monthly mortgage payment ratio; or (ii) the borrower's pre-modification monthly payment. Payment reduction cost share compensation shall accrue monthly as the borrower makes each payment so long as the loan is in good standing as defined in these guidelines. This compensation will be provided for up to five years or until the loan is paid off, whichever is earlier.

Additionally, investors will receive a one-time incentive of $1,500 for each Agreement executed with a borrower who was current prior to the start of the Trial Period Plan. The one-time incentive is conditional upon at least a six percent reduction in the borrower's monthly mortgage payment.

Neither the payment reduction share nor the up-front incentive shall be payable if the Trial Period Plan is not successfully completed.

## Compliance

Servicers must comply with the HAMP requirements and must document the execution of loan evaluation, loan modification and accounting processes. Servicers must develop and execute a quality assurance program that includes either a statistically based (with a 95 percent confidence level) or a ten percent stratified sample of loans modified, drawn within 30-45 days of final modification and reported on within 30-45 days of review. In addition, a trending analysis must be performed on a rolling 12-month basis.

Treasury has selected Freddie Mac to serve as its compliance agent for the HAMP. In its role as compliance agent, Freddie Mac will utilize Freddie Mac employees and contractors to conduct independent compliance assessments. In addition, loan level data will be reviewed for eligibility and fraud.

The scope of the assessments will include, among other things, an evaluation of documented evidence to confirm adherence (e.g., accuracy and timeliness) to HAMP requirements with respect to the following:

- Evaluation of Borrower and Property Eligibility
- Compliance with Underwriting Guidelines
- Execution of NPV/Waterfall processes
- Completion of Borrower Incentive Payments
- Investor Subsidy Calculations
- Data Integrity

The review will also evaluate the effectiveness of the servicer's quality assurance program; such evaluation will include, without limitation, the timing and size of the sample selection, the scope of the quality assurance reviews, and the reporting and remediation process.

There will be two types of compliance assessments: on-site and remote. Both on-site and remote reviews will consist of the following activities (among others): notification, scheduling, self assessments, documentation submission, interviews, file reviews, and reporting.

For on-site reviews, Freddie Mac will strive to provide the servicer with (i) a 30-day advance notification of a pending review and (ii) subsequent confirmation of the dates of the review. However, Freddie Mac reserves the right to arrive at the servicer's site unannounced. Freddie Mac will request the servicer to make available documentation, including, without limitation, policies and procedures, management reports, loan files and a risk control self assessment ready for review. Additionally, Freddie Mac may request additional loan files during the review. Interviews will usually be conducted in-person.

During the review window, Freddie Mac will review loan files and other requested documentation to evaluate compliance with HAMP terms. Upon the completion of the review, Freddie Mac will conduct an exit interview with the servicer to discuss preliminary assessment results.

For remote reviews, Freddie Mac will request the servicer to send documentation, including, without limitation, policies and procedures, management reports, loan files and a risk control self assessment within 30 days of the request. In addition, time will be scheduled for phone interviews, including a results summary call after the compliance review is completed to discuss preliminary results.

The targeted time frame for publishing the servicer assessment report is 30 days after the completion of the review. Treasury will receive a copy of the report five business days prior to the release of the report to the servicer.

There will be an issue/resolution appeal process for servicer assessments. Servicers will be able to submit concerns or disputes to an independent quality assurance team within Freddie Mac.

A draft rating and implication methodology for the compliance assessments will be published in a subsequent Supplemental Directive and servicer feedback will be solicited prior to the finalization of the methodology.

## Exhibit A: HAMP Trial Modification and Official Modification Loan Setup Data Elements

The following data elements are necessary for the HAMP Loan Setup for Trial Modification and Official Modification transactions.

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period Mandatory / Conditional | Official Modification Mandatory / Conditional |
|---|---|---|---|---|---|
| GSE Servicer Number | The Fannie Mae or Freddie Mac unique Servicer identifier. | Text (30) | | C | C |
| Servicer Loan Number | The unique (for the lender) identifier assigned to the loan by the lender that is servicing the loan. | Text (30) | | M | M |
| HAMP Servicer Number | A unique identifier assigned to each Servicer that is participating in the HAMP program. | Text (30) | | M | M |
| GSE Loan Number | A unique number assigned to each loan by a GSE (Fannie or Freddie) | Text (30) | | C | C |
| Underlying Trust Identifier | This is the CUSIP associated with the security. A unique identification number assigned to a security by CUSIP (Committee on Uniform Security Identification Procedures) for trading. | Text (9) | | C | C |
| Program Type/ Campaign ID | A new program type that will identify campaign types. The unique identifier of a Loan Workout Campaign. | Text (14) | HMP1 - HMP Delinquent, HMP2 - HMP Imminent Default HMP3 - Deed-in-lieu HMP4 - Deed-in-lieu with Jr. Lien HMP5 - Short Sale HMP6 - Short Sale With Jr. Lien | M | M |
| Investor Code | Owner of the mortgage. | Numeric (4,0) | 1 - Fannie Mae 2 - Freddie Mac 3 - Private 4 - Portfolio 5 - GNMA 6 - FHLMC | M | M |
| Borrower First Name | First Name of the Borrower of record | Text (100) | | M | M |
| Borrower Last Name | The last name of the Borrower. This is also known as the family name or surname. | Text (100) | | M | M |
| Borrower Social Security Number | The Social Security Number of the borrower | Numeric (9) | | M | M |
| Co-Borrower First Name | First Name of the co-borrower of record | Text (100) | | C | C |

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period (M = Mandatory, C = Conditional) | Official Modification (M = Mandatory, C = Conditional) |
|---|---|---|---|---|---|
| Co-Borrower Last Name | Last Name of the co- borrower of record | Text (100) | | C | C |
| Co-Borrower Social Security Number | The Social Security Number of the Co-Borrower | Numeric (9) | | O | O |
| Borrower Execution Date | This is the date that the borrower signs the initial documentation for a modification. | Date (CCYY-MM-DD) | | M | M |
| Submission Status | Status of loan data being submitted | Numeric (4,0) | 1-Trial<br>2-Borrower Disqualified<br>3-Official<br>4-Foreclosure Mitigation<br>5-Cancel | M | M |
| Date of Original Note | The date on which the original loan funding was dispersed to the borrower(s). | Date (CCYY-MM-DD) | | M | M |
| Unpaid Principal Balance before modification | The total principal amount outstanding as of the end of the month. The UPB should not reflect any accounting based write-downs and should only be reduced to zero when the loan has been liquidated – either paid-in-full, charged-off, REO sold or Service transferred (before modification) | Currency (20,2) | | M | M |
| Loan Mortgage Type Code | The code that specifies the type of mortgage being applied for or that has been granted. | Numeric (4,0) | 1 - FHA – Loans insured by the Federal Housing Administration<br>2 - VA – Loans insured by the Department of Veteran's Affairs.<br>3 - Conventional with PMI – Non-government insured mortgages insured by a private (non-government) insurer.<br>4 - Conventional w/o PMI – Mortgages with neither government nor private mortgage insurance. | M | M |
| Last Paid Installment Date before modification | The due date of the last paid installment of the loan. | Date (CCYY-MM-DD) | | M | M |
| First Lien Indicator | Indicates if loan is first lien. | Boolean | True/False | M | M |
| Foreclosure Referral Date | The date that the mortgage was referred to an attorney for the purpose of initiating foreclosure proceedings. This date should reflect the referral date of currently active foreclosure process. Loans cured from foreclosure should not have a referral date. | Date (CCYY-MM-DD) | | O | O |

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period (Mandatory/ Conditional) | Official Modification (Mandatory/ Conditional) |
|---|---|---|---|---|---|
| Projected Foreclosure Sale Date | Projected date for foreclosure sale of subject property. | Date (CCYY-MM-DD) | | O | O |
| Hardship Reason Code | Identifies the reason for the borrower's hardship on their mortgage payment obligations. | Numeric (4,0) | 1 - Death of borrower, 2 - Illness of principal borrower, 3 - Illness of borrower family member, 4 - Death of borrower family member, 5 - Martial difficulties, 6 - Curtailment of income, 7 - Excessive obligation, 8 - Abandonment of property, 9 - Distant employment transfer, 10 - Property problem, 11 - Inability to sell property, 12 - Inability to rent property, 13 - Military service, 14 - Other, 15 - Unemployment, 16 - Business failure,17 - Casualty Loss, 18 - Energy environment costs, 19 - Servicing problems, 20 - Payment adjustment, 21 - Payment dispute, 22 - Transfer of ownership pending, 23 - Fraud, 24 - Unable to contact borrower,25 - Incarceration | M | M |
| Monthly Gross Income | Total monthly income in dollars for all borrowers on the loan, This is the gross income for all borrowers. | Currency (20,2) | | M | M |
| Monthly Debt Payments excluding PITIA | Total amount of monthly debt payments excluding Principal, Interest, Taxes, Insurance and Association Dues (PITIA) | Currency (20,2) | | M | M |
| NPV Date | Net Present Value – calculation date | Date (CCYY-MM-DD) | | M | M |

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period - Mandatory / Conditional | Official Modification Mandatory / Conditional |
|---|---|---|---|---|---|
| NPV Model Result Amount Pre-Mod | Net Present Value amount generated from the model before modification | Currency (20,2) | | M | M |
| NPV Model Result Amount Post-Mod | Net Present Value amount generated from the model after modification | Currency (20,2) | | M | M |
| Amortization Term before modification | Represents the number of months on which installment payments are based. Example: Balloon loans have a seven year life (Loan Term = 84) but a 30 year amortization period (Amortization Term = 360). Installment payments are determined based on the 360 month term. | Numeric (4,0) | | M | M |
| Interest Rate before modification | The interest rate in the month prior to loan modification. Please report as rounded to nearest 8th. (e.g. 4.125) | Numeric (6,4) | | M | M |
| Principal and Interest Payment before modification | The scheduled principal and interest amount in the month prior to loan modification. | Currency (20,2) | | M | M |
| Escrow Payment before modification | The escrow amount in the month prior to loan modification. The amount of money that is collected from [added on to] the regular monthly mortgage payment to cover periodic payments of property taxes, private mortgage insurance and hazard insurance by the servicer on behalf of the mortgagee. Depending on the mortgage terms, this amount may or may not be collected. Generally, if the down payment is less than 20%, then these amounts are collected by the servicer. | Currency (20,2) | | C | C |
| Association Dues/ Fees before modification | Existing monthly payment for association dues/fees before modification | Currency (20,2) | | C | C |
| Principal Payment Owed or Not Reported | If borrower has contributed any cash or amounts in suspense | Currency (20,2) | | C | C |
| Other Contributions | If there are any amounts contributed by the borrower due to Hazard Claims | Currency (20,2) | | C | C |
| Attorney Fees Not in Escrow | Estimated legal fee not in escrow for advances capitalization and liquidation expense calculation | Currency (20,2) | | C | C |
| Escrow Shortage for Advances | Any Escrow advance amounts to be capitalized. | Currency (20,2) | | C | C |
| Other Advances | Other advances for advances capitalization other than escrow. Example: Attorney fees, Servicing Fees, etc. | Currency (20,2) | | C | C |
| Borrower Contributions | If the borrower is contributing any amounts, they must be reported here | Currency (20,2) | | C | C |
| Modified Loan Term - Officer Signature Date | Servicer sign off at the officer level for the loan modification. This is the date the servicer's officer approved the loan modification. This column will be populated for modification cases that need reclassification. There is no conversion needed for existing cases | Date (CCYY-MM-DD) | | C | C |

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period Mandatory / Conditional | Official Modification Mandatory / Conditional |
|---|---|---|---|---|---|
| Disbursement Forgiven | If there are any Forgiven disbursement for advances capitalization | Currency (20,2) | | C | C |
| Monthly Housing Expense before modification | The dollar amount per month of the borrower's present housing expense .May be used for their primary or non-primary residence. This must be Principal, Interest, Taxes, Insurance and Association Dues (PITIA). | Currency (20,2) | | M | M |
| Delinquent Interest | Delinquent interest for interest capitalization. It is the amount of delinquent interest from the delinquent loan's LPI date to the workout execution date. | Currency (20,2) | | M | M |
| Interest Owed or Payment Not Reported | If there is Interest owed/received but not reported for interest capitalization, this field must be populated. | Currency (20,2) | | C | C |
| Servicing Fee Percent after modification | Percentage of servicing Fee after loan modification ( e.g. 0.25) | Numeric (4,2) | | M | M |
| Product before Modification | The mortgage product of the loan before the modification. | Numeric (4,0) | 1- ARM, 2 - Fixed Rate, 3 - Step Rate, 4 - One Step Variable, 5 - Two Step Variable, 6 - Three Step Variable, 7 - Four Step Variable, 8 - Five Step Variable,9 - Six Step Variable, 10 - Seven Step Variable,11 - Eight Step Variable, 12 - Nine Step Variable,13 - Ten Step Variable, 14 - Eleven Step Variable, 15 - Twelve Step Variable, 16 - Thirteen Step Variable, 17 - Fourteen | M | M |
| Maturity Date before Modification | The date on which the mortgage obligation is scheduled to be paid off, according to the mortgage note. Maturity Date is commonly called Balloon Date for balloon loans, for which scheduled amortization does not pay off the balance of the loan, so that there is a final, large "balloon" payment at the end. | Date (CCYY-MM-DD) | | M | M |

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period - Mandatory & Conditional | Official Modification Mandatory / Conditional |
|---|---|---|---|---|---|
| Remaining Term before Modification | The number of months until the loan will be paid off, assuming that scheduled payments are made. This will equal lesser of 1. The number of months until the actual balance of the loan will amortize to zero; or 2. the number of months difference between the Loan Extended Term and the number of payments made by the borrower, where number of payments made by the borrower is derived by: Actual Last Paid Installment Date - First Installment Due Date - 1 (in months). | Numeric (4,0) | | M | M |
| Front Ratio before Modification | The refreshed Front-end DTI (Principal, Interest, Taxes, Insurance and Association Dues (PITIA)) housing ratio. | Numeric (4,2) | | M | M |
| Back Ratio before Modification | Percentage of borrower's PITIA plus debts to income ratio. Borrower Total Debt To Income Ratio Percent. The monthly expenses divided by the total monthly income for the Borrower. (e.g. 30.25) | Numeric (4,2) | | M | M |
| Principal and Interest Payment at 31% DTI | Principal and Interest payable for a 31% Debt to Income ratio | Currency (20,2) | | M | M |
| Principal and Interest Payment at 38% DTI | Principal and Interest payable for a 38% Debt to Income ratio | Currency (20,2) | | M | M |
| Property – Number of Units | Number of units in subject property (Valid values are 1, 2, 3 or 4) | Numeric (4,0) | | M | M |
| Property – Street Address | The street address of the subject property | Text (100) | | M | M |
| Property – City | The name of the city where the subject property is located | Text (100) | | M | M |
| Property – State | The 2-character postal abbreviation of the state, province, or region of the subject property. | Text (2) | | M | M |
| Property – Zip Code | The code designated by the postal service to direct the delivery of physical mail or which corresponds to a physical location. In the USA, this can take either a 5 digit form (ZIP Code) or a 9-digit form (ZIP + 4). | Text (9) | | M | M |
| Property Valuation - Method | Type of value analysis. | Numeric (4,0) | 1 - Full appraisal – Prepared by a certified appraiser; 2 - Limited appraisal – Prepared by a certified appraiser; 3 - Broker Price Opinion "BPO" – Prepared by a real estate broker or agent; 4 - Desktop Valuation – Prepared by bank employee; 5 - Automated Valuation Model | M | M |

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period - Mandatory/ Conditional | Official Modification Mandatory / Conditional |
|---|---|---|---|---|---|
| | | | "AVM" 6 - Automated Valuation Model "AVM" - Other | | |
| Property Valuation - Date | Date of the property value analysis | Date (CCYY-MM-DD) | | M | M |
| Property Valuation – As Is Value | Property as-is value determined by the property valuation | Currency (20,2) | | M | M |
| Property Condition Code | A code denoting the condition of the subject property. | Numeric (4,0) | 1 - Excellent 2 - Good, 3 - Fair 4 - Poor 5 - Condemned 6 - Inaccessible | M | M |
| Property Occupancy Status Code | A code identifying the occupancy by the borrower of the subject property. | Numeric (4,0) | 1- Vacant 2 - Borrower Occupied 3 - Tenant Occupied 4 – Unknown 5 - Occupied by Unknown | M | M |
| Property Usage Type Code | A code identifying the intended use by the borrower of the property. | Numeric (4,0) | 1 - Principal Residence 2 - Second or Vacation Home 3 - Investment Property | M | M |
| Modification Effective Date | The date on which the loan terms will be modified. | Date (CCYY-MM-DD) | | M | M |
| Product After Modification | The mortgage product of the loan, after the modification (Fixed or Step). | Numeric (4,0) | 1- ARM, 2 - Fixed Rate, 3 – Step Rate, 4 - One Step Variable, 5 - Two Step Variable, 6 - Three Step Variable. 7 - Four Step Variable, 8 - Five Step Variable,9 - Six Step Variable, 10 - Seven Step Variable.11 - Eight Step Variable, 12 - Nine Step Variable.13 - Ten Step Variable, 14 - Eleven Step Variable, 15 - Twelve Step Variable, 16 - Thirteen Step Variable, 17 - Fourteen | M | M |

| Name | Definition | Data Type | Allowable Values | Loan Setup for Trial Period (M=Mandatory/C=Conditional) | Official Modification (M=Mandatory/C=Conditional) |
|---|---|---|---|---|---|
| Amortization Term after Modification | The number of months used to calculate the periodic payments of both principal and interest that will be sufficient to retire a mortgage obligation. | Numeric (4,0) | | M | M |
| Unpaid Principal Balance after modification | The unpaid principal balance of a loan after the loan modification. The unpaid principal balance after modification excludes any applicable forbearance amount and can also be referred to as Net UPB Amount. | Currency (20,2) | | M | M |
| Last Paid Installment Date after modification | The due date of the last paid installment of the loan. | Date (CCYY-MM-DD) | | M | M |
| Interest Rate after modification | The interest rate in the month after loan modification. | Numeric (6,4) | | M | M |
| Interest Rate Lock Date for Modification | The date that the rate lock was applied - in reference to modification of loan terms | Date (CCYY-MM-DD) | | M | M |
| First Payment Due Date after modification | First payment due date under the modified terms | Date (CCYY-MM-DD) | | M | M |
| Principal and Interest Payment after modification | The P&I amount after modification | Currency (20,2) | | M | M |
| Escrow Payment after modification | Existing monthly payment to escrow-after modification | Currency (20,2) | | M | M |
| Monthly Housing Expense After Modification | The dollar amount per month of the borrowers housing expense after modification .May be used for their primary or non-primary residence. This must be Principal, Interest, Taxes, Insurance and Association Dues (PITIA). | Currency (20,2) | | M | M |
| Maturity Date after modification | The maturity date of the loan after modification | Date (CCYY-MM-DD) | | M | M |
| Principal Forbearance Amount | The total amount in dollars of the principal that was deferred through loss mitigation. | Currency (20,2) | | C | C |
| Term after Modification | For loans where the term of the loan can be extended rather than increasing the principal and interest payment, this is the total term of the loan including any extension. For all non-extendable loans, the extended term defaults to the original term. | Numeric (4,0) | | M | M |
| Front Ratio after modification | Percentage of borrower's PITIA to income ratio | Numeric (4,2) | | M | M |
| Back Ratio after modification | Percentage of borrower's PITIA plus debts to income ratio | Numeric (4,2) | | M | M |
| Principal Write-Down (Forgiveness) | Amount of principal written-down or forgiven | Currency (20,2) | | C | C |
| Paydown or Payoff of Subordinate Liens | Have sub-ordinate liens been paid off or paid down? | Boolean | True/False | C | C |
| Paydown or Payoff of Subordinate | Amount of paydown or payoff of subordinate liens | Currency (20,2) | | C | C |

| Name | Definition | Data Type | Allowable Value | Loan Setup for Trial Period – Mandatory / Conditional | Official Modification Mandatory / Conditional |
|---|---|---|---|---|---|
| Liens Amount | | | | | |
| Max Interest Rate after modification | Interest rate cap for the loan. | Number (6,4) | | M | M |
| Length of Trial Period | The length of the trial period | Numeric (3,0) | | M | M |
| 1st Trial Payment Due Date | The date the 1st payment is due during the trial period | Date (CCYY-MM-DD) | | M | O |
| 1st Trial Payment Posted Date | The date the first payment posted during the Trial period | Date (CCYY-MM-DD) | | M | O |
| 1st Trial Payment Received Amount | This is the actual amount of the Payment received from the Borrower to the Servicer for the 1st Trial payment. | Currency (20,2) | | M | O |
| If the Product Type After Modification is Step Rate then at least one occurrence of the following group of fields must exist. The first occurrence must have a step effective date of 5 years for the first effective due date after modification. | | | | | |
| Step – Interest Rate Step Number | The sequence is used to uniquely identify and order Loan Interest Rate Adjustment schedule records specific to the loan's step rate schedule. | Numeric (4) | | M | M |
| Step – Payment Effective Date | The date the payment will be effective. | Date (CCYY-MM-DD) | | M | M |
| Step – Note Rate | The interest rate in the month after loan modification. | Numeric (6,4) | | M | M |
| Step – New Interest Rate - Step Duration | After modification step duration. If this step is the last step and will be the rate and payment effective for the life of the loan, then duration is not required. | Numeric (4) | | M | M |
| Step – Principal and Interest Payment | P&I Amount - The amount of the principal and/or interest payment due on the loan for each installment, beginning on the effective date. | Currency (20,2) | | M | M |

## Exhibit B: HAMP Monthly Trial Data Collection Elements

The following data elements are necessary for recording borrower payments during the trial period.

| Name | Definition | Data Type | Allowable Values | Mandatory/ Conditional |
|---|---|---|---|---|
| HAMP Servicer Number | A unique identifier assigned to each Servicer that is participating in the HAMP program. | Text (30) | | M |
| Servicer Loan Number | The unique (for the lender) identifier assigned to the loan by the lender that is servicing the loan. | Text (30) | | M |
| GSE Loan Number | A unique number assigned to each loan by a GSE (Fannie or Freddie) | Text (30) | | C |
| GSE Servicer Number | The Fannie Mae or Freddie Mac unique Servicer identifier. | Text (30) | | C |
| Trial Payment Number | The number of the trial payment being reported. The code that is used to define a single payment number that will be one of a series of payments that together will complete a loan trial payment period. | Numeric (4,0) | | M |
| Trial Payment Received Amount | The actual dollar amount of the payment received from the borrower to the servicer for the trial payment. | Currency (20,2) | | M |
| Trial Payment Posted Date | The date the payment was posted during the trial period. | Date (CCYY-MM-DD) | | M |

## Exhibit C: Monthly Loan Activity Records

The following data elements are required for monthly loan activity records (LARs). Step rate attributes (interest rate, rate effective date, P&I payment) will only be reported on the LAR the month before the rate change is effective. The Action Code and Action Date are only reported when a loan is being removed (e.g., payoff, repurchase).

| Name | Definition | Data Type | Allowable Values | Mandatory/ Conditional |
|---|---|---|---|---|
| HAMP Servicer Number | A unique identifier assigned to each Servicer that is participating in the HAMP program. | Text (30) | | M |
| Servicer Loan Number | The unique (for the lender) identifier assigned to the loan by the lender that is servicing the loan. | Text (30) | | M |
| Last Paid Installment Date After Modification | The due date of the last paid installment of the loan. | Date (CCYY-MM-DD) | | M |
| Unpaid Principal Balance After Modification | The unpaid principal balance of a loan after the loan modification. The unpaid principal balance after modification excludes any applicable forbearance amount and can also be referred to as Net UPB Amount. | Currency(20.2) | | M |
| Interest Payment | Interest portion of the P&I remitted | Currency(20.2) | | M |
| Principal Payment | Principal portion of the P&I remitted | Currency(20.2) | | M |
| Step – Payment Effective Date | The date the payment will be effective. | Date (CCYY-MM-DD) | | C |
| Step – Note Rate | The interest rate in the month after loan modification. | Numeric (6,4) | | C |
| Step – Principal and Interest Payment | P&I Amount - The amount of the principal and/or interest payment due on the loan for each installment, beginning on the effective date. | Currency(20.2) | | C |
| Action Code | A code reported by the lender to update the loan that indicates the action that occurred during the reporting period | Numeric | 60 (payoff)<br>65 (repurchase)<br>70 (liquidation held for sale)<br>71 (liquidation 3rd party sale/ condemnation/ assigned to FHA/VA)<br>72 (liquidated – pending conveyance)<br>76 (Deed in Lieu)<br>77 (Deed-in-Lieu with Jr. lien)<br>78 (Short Sale)<br>79 (Short Sale with Jr. Lien) | C |
| Action Code Date | The effective date of the action associated with the action code. The action date is required for certain action codes. | Date (CCYY-MM-DD) | N/A | C |

**Exhibit D**
**HAMP Additional Data Requirements**

Data required to be collected as specified below must be reported on a loan by loan basis starting on October 1, 2009. This document does not describe all of the data that the servicer must retain; it addresses only the data that must be reported.

Must be reported starting October 1, 2009 for transactions occurring before October 1, 2009

- Race, ethnicity, sex of borrower and co-borrower (submission by borrower is voluntary)
- Middle name of borrower and co-borrower
- Date of birth of borrower and co-borrower
- Credit score of borrower and co-borrower
- NPV Model inputs, e.g., discount rate, flag for nonstandard model, non-standard re-default rate, non-standard cure rate
- Selected data on loan, borrower, and property characteristics as of origination, to the extent already required by OCC or OTS to be reported under "Mortgage Metrics"

The above fields must be collected as follows and reported starting October 1, 2009:

- all completed modifications;
- trial modifications commenced on or after July 1, 2009; and
- starting on October 1, 2009, loans evaluated for a modification (to be defined) that do not enter trial modifications.

Must be reported starting October 1, 2009 (detailed definitions to be provided by June 1, 2009)

- Reason loans evaluated for a modification were not modified, or that trial modification was not completed
- Status and disposition of eligible loans not modified, including trial mods not completed
- Status and disposition of loans that were modified but failed to remain in good standing because they became 90 or more days delinquent
- Second liens – flag for presence of a second lien; source of information (e.g., credit report); available terms (e.g., fixed vs. ARM; closed- vs. open-end); owner; and payoff. Continuous tracking of second lien status is not required.
- Purpose of loan (e.g., home purchase, refinance, cash-out refi)
- Information about foreclosure suspension
- Information about reliance on non-borrower household income
- Flag for borrower in bankruptcy at time of modification
- Flag for borrower in loss mitigation prior to modification
- Information about involvement of a third party representing the borrower
- Information about mortgage insurance

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**
**Civil Action No. 18-cv-00288-MOC-DSC**

Chester Taylor III, et al,.

Plaintiffs

v.

Bank of America, N.A.,

Defendant

**PLAINTIFFS' MOTION TO REMAND**

The Plaintiffs respectfully move this Court to Remand this matter back to the Court of original jurisdiction, the Superior Court of the County of Mecklenburg, North Carolina. In support of this Motion, Plaintiffs show the Court:

1. The Plaintiffs' claims do not satisfy the criteria for invoking federal jurisdiction over state law claims, and therefore, this Court lacks §1331 jurisdiction over Plaintiffs' claims.
2. Defendant is a citizen of North Carolina, and therefore, removal pursuant to the Court's diversity jurisdiction is improper due to the forum defendant rule.

Wherefore, the Plaintiffs respectfully request an Order from the Court Remanding this matter back to the Superior Court of the County of Mecklenburg, North Carolina for the foregoing reasons which are further elaborated upon in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion to Remand filed contemporaneously with this Motion.

Date: June 25, 2018

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**CERTIFICATE OF SERVICE**

I certify that on the 25th day of June, 2018, I filed a true and correct copy of the foregoing document on the Court's CM/ECF system, which will cause a Notice of Electronic Filing to be sent to the following counsel:

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**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**
**Civil Action No. 18-cv-00288-MOC-DSC**

| | | |
|---|---|---|
| Chester Taylor III, et al,. | : | |
| Plaintiffs | : | **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND** |
| v. | : | |
| Bank of America, N.A., | : | |
| Defendant | : | |

Plaintiffs filed suit in the Superior Court of the County of Mecklenburg, North Carolina, Case No. 18-CVS-8266, asserting causes of action for fraud, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, a statutory claim brought under the North Carolina Unfair and Deceptive Trade Practices Act, and a claim for "wanton and reckless conduct," pursuant to N.C.G.S. § 1D-1, *et seq*. Defendant, Bank of America (BOA), removed the case to the United States District Court for the Western District of North Carolina arguing that this Court has diversity jurisdiction, despite the fact that Defendant is a North Carolina resident. Defendant further argues that the Court has federal question jurisdiction and does so by referencing claims that simply do not exist in this case. Defendant's removal is nothing more than a delay tactic. Removal was clearly improper and the case should be immediately remanded because Plaintiffs plead only state law causes of action, and the forum defendant rule expressly prohibits removal

pursuant to the Court's diversity jurisdiction. Accordingly, Plaintiffs move for remand of their case to the Superior Court of the County of Mecklenburg, North Carolina.

## I. Background

Defendant has engaged in an ongoing fraudulent scheme that has the effect of depriving countless families of the precious American dream of home ownership—stealing their houses and making them literally homeless. BOA's pernicious foreclosure scheme facilitated the ultimate unjust double-dipping: BOA collected billions of taxpayer dollars earmarked for mortgage relief and simultaneously charged inflated mortgage sums and illegal homeowner fees, all the while fully intending to cast the vast majority of its paying mortgagors to the curb.

In March of 2009, Congress put in place the Home Affordable Modification Program ("HAMP"). HAMP was supposed to be a lifeline to consumers in danger of losing their homes following the financial crash of 2007. HAMP provided for mortgage "modification" in the form of lower interest rates and corresponding payments that would become permanent for mortgagors who made timely monthly payments. BOA determined granting loan modifications pursuant to HAMP would be expensive, costing it millions of dollars. So, instead of using the billions in federal funding it received to help homeowners out of financial difficulty—as it promised to do—BOA implemented a secretive scheme designed to thwart consumers from obtaining HAMP modifications. BOA's covert scheme involved numerous acts intended to fool unsuspecting mortgagors into believing they did not qualify for loan modification or had failed to follow required procedures necessary to obtain a modification. Denied a chance to reduce their mortgage payments, consumers were forced into foreclosure and out of their homes. Each Plaintiff here was a victim of BOA's fraudulent scheme—laid out in detail in the Complaint—and, as a result,

lost their homes and suffered substantial economic losses and have endured extreme emotional distress.

Defendants removed the case from the Superior Court of the County of Mecklenburg, North Carolina to the United States District Court for the Western District of North Carolina, arguing that federal subject-matter jurisdiction exists, and removal is proper under both 28 U.S.C. § 1331 and §1332. For the reasons set forth herein, Plaintiffs assert that the criteria for removal set forth in 28 U.S.C. §1441 have not been met, and the case must be remanded to the Superior Court of the County of Mecklenburg, North Carolina.

## II. Argument

### A. No Federal Question Jurisdiction

Federal question jurisdiction is generally invoked when federal law creates the cause of action. A review of the complaint in this case reveals Plaintiffs assert only state and common law causes of action. Moreover, Plaintiffs and Defendant agree that there is no private right of action under HAMP and Plaintiffs have not attempted to assert one here. Despite that fact, Defendant essentially argues that Plaintiffs are, in fact, attempting to assert a claim under HAMP and that because of that, this Court has federal question jurisdiction. The Court should reject Defendant's tortured reasoning and find that there is no federal question jurisdiction here.

Defendant builds its argument on the narrow premise that "federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). The mere presence of a federal issue in a state law cause of action does not automatically confer federal question jurisdiction. In *Grable*, the Supreme Court recognized that federal courts may exercise §1331 jurisdiction over a narrow category of cases that arise under state law but implicate significant issues of federal law,

if the claims "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power." *Grable*, 545 U.S. at 312; *see also*, *Gunn v. Minton*, 133 S.Ct. 1059, 1064 (2013). The Supreme Court cautions that these types of state law claims are "a special and small category." *Empire Healthchoice Assur. Inc. v. McVeigh*, 547 U.S. 677, 699 (2006).

In *Gunn*, the Supreme Court articulated a four-part test to determine whether claims fall within this "special and small category," stating that federal jurisdiction will only exist over a state law claim that is:

> (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met. . . jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts."

*Gunn v,* 133 S.Ct. at 1064 (citing *Grable*, 545 U.S. at 312) (internal citations omitted).

Defendant submits that this Court has subject-matter jurisdiction over Plaintiffs' state-law claims because adjudicating these claims requires the Court to resolve substantial questions of federal law related to the federal Home Affordable Modification Program ("HAMP"). That is simply not the case.

Federal courts do not have subject matter jurisdiction over state law claims "merely because HAMP is an element of the dispute." *Melton v. Suntrust Bank*, 780 F. Supp. 2d 458, 460 (E.D. Va. 2011). The federal program known as HAMP provides the backdrop of a purely state law dispute. For these claims, "federal law informs the factual background of a state law claim, but in no way interjects itself *legally* into the analysis of that state law claim." *Dean v. BAC Home Loans Servicing, LP*, No. 2:11-CV-785-MEF, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012)

(granting motion to remand for case involving a nearly identical factual background and causes of action for fraudulent misrepresentation, *inter alia*, based on HAMP) (citing *White v. Wells Fargo Home Mortg.*, No. 1:11-cv-408MHT, 2011 WL 3666613, at *2 (M.D. Ala. Aug. 22, 2011) (granting a "nearly identical motion to remand").

In support of its argument, Defendant notes that there is no private right of action for the denial of a HAMP application. Doc. No. 1, at ¶ 9. Plaintiffs agree. However, this argument misconstrues Plaintiffs' claim. Indeed, this argument even undermines Defendant's overall argument in support of federal jurisdiction. Simply put, Plaintiffs have not asserted a private cause of action to enforce a HAMP modification, and this allegation can be found nowhere in the Complaint. The Southern District of Florida stated the following in a case based on nearly identical allegations:

> Defendant mischaracterizes Plaintiff's claim as one to enforce an agreement for a modification under HAMP, as that is not the claim Plaintiff has pled. Rather, the claim alleges that she was never even considered for a HAMP modification, and that BOA repeatedly and intentionally lied to and misled the Plaintiff so as to induce her into default and ultimately into foreclosure.

*Dykes v. Bank of America, N.A.*, 0:17-cv-62412-WPD (denying Defendant Bank of America's Motion to Dismiss) (attached as **Exhibit A**). Although Defendant attempts to recast Plaintiffs' allegations as an enforcement of HAMP, Plaintiffs have asserted no such cause of action.

Further, the lack of a federal private right of action for the enforcement of a HAMP denial is "quite nearly dispositive" on the issue of federal question jurisdiction. *Dean v. BAC Home Loans Servicing, LP*, No. 2:11-CV-785-MEF, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012) (citing *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986) (stating that the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction")). It is well-established that there is no private right of action for the denial of a HAMP modification application. *Spaulding v. Wells Fargo, N.A.*, 714 F.3d 769, 775 (4th Cir. 2013). And,

a "congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow Pharm. Inc.*, 478 U.S. at 815. Indeed, "'it would flout congressional intent' to find federal question jurisdiction based upon an embedded federal issue where Congress has determined that no such federal cause of action should exist." *Dean*, 2012 WL 353766, at *3 (quoting *Merrell Dow Pharm. Inc.*, 478 U.S. at 815).

Further, despite Defendant's argument that federal-question jurisdiction is proper because HAMP "is mandated by federal law and U.S. Treasury Department guidelines" Doc. No. 1, ¶ 7, a wealth of case law exists to conclude otherwise. Courts within this Circuit have repeatedly held that there is no federal question jurisdiction over claims "that merely reference HAMP guidelines and procedures." *Mosley v. Wells Fargo Bank, N.A.*, 802 F. Supp. 2d 695, 699 (E.D. Va. 2011); *see also*, *Asbury v. America's Servicing Co.*, No. 2:11cv99, slip op. at 8, 2011 WL 3555846 (E.D.Va. July 13, 2011) (finding that "no private cause of action exists under HAMP, and congressional intent would be frustrated by this Court exercising federal question jurisdiction"); *Paine v. Wells Fargo Bank*, No. 2:11cv89, slip op. at 11, 2011 WL 3236390 (E.D.Va. July 12, 2011) (finding "that Plaintiffs' right to relief for the state-law claims does not necessarily depend on resolution of a substantial question of federal law, particularly where federal law does not create a private right of action"); *Bottom v. Bailey*, No. 1:12CV97, 2013 WL 431824, at *4 (W.D.N.C. Feb. 4, 2013) (internal citations omitted) ("Congress's determination not to provide a private cause of action under a federal statute is evidence of 'a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal question jurisdiction.'").

Against overwhelming case law rejecting its arguments, Defendant cites a single case in support of its position: *Steltz v. Bank of Am., N.A.*, No. 14-2978, 2015 U.S. Dist. LEXIS 85525, at *13 (D.N.J. July 1, 2015). *Steltz,* however, is unpersuasive and should be rejected by this Court. The *Steltz* Court reviewed a series of a cases involving claims where the Plaintiffs asserted breach of contract claims arguing that they were third party beneficiaries of the contract between banks and the federal government in the HAMP and TARP programs. In each of those cases, *Peralta v. ABN AMRO Mortgage Group, Inc.*, No. Civ A. 2:13-05607 ES, 2014 WL 1673737, *Copeland-Turner v. Wells Fargo Bank, N.A. No. CV-11-37-HZ*, 2011 WL 996706, and *Larsen v. Bank of Am. N.A.*, No. 11-1775, 2011 WL 6065426, the courts reasoned that federal question jurisdiction existed because the Plaintiffs specifically brought a claim—breach of contract as a third party beneficiary—based upon a contract between the financial institution defendants and the United States government. In contrast, here Plaintiffs never once claim be a third-party beneficiary to a contract between the federal government and Defendant. This Court should reject *Steltz* as analogous case law since its reasoning is based entirely on claims for breach of contract as a third-party beneficiary, claims that are not present here.

Finally, Defendant argues that federal jurisdiction is proper because "[f]ederal law controls the interpretation of a contract entered into pursuant to federal law . . ." and thus, the interpretation of the HAMP contract. Doc. No. 1, at ¶ 8 (quoting *Phipps v. Wells Fargo Bank, N.A.*, No. 10-2025, 2011 WL 302803, at *6 (E.D. Cal. Jan. 27, 2011). This argument is without merit, as, again, there is no allegation of a breach of any contract in the Complaint. *See Dykes*, 0:17-cv-62412-WPD (denying Defendant Bank of America's Motion to Dismiss) (attached as **Exhibit A**). Indeed, even with regard to the HAMP modification, Plaintiffs allege they were never actually approved for a HAMP modification.

Treating this case as one that raises a substantial federal question would disturb Congress's intended division of labor between state and federal courts. *Grable*, 545 U.S. at 312. Further, Courts around the country have overwhelmingly concluded that cases such as this one do not satisfy the criteria required for invoking federal jurisdiction over state law claims. Therefore, the Motion to Remand should be granted.

B. The Forum Defendant Rule Prohibits Removal Pursuant to 28 U.S.C. §1332

Defendant also argues that removal is proper on grounds of diversity of citizenship under 28 U.S.C. § 1332(a) because "out-of-State Plaintiffs are legally barred from destroying diversity of citizenship through the improper joinder of their claims with those of a single local Plaintiff ..." Doc. No. 1, at ¶ 10. However, Defendant overlooks—or worse, ignores—the well-established forum defendant rule, which prohibits removal pursuant to § 1332, regardless of the joinder of a local Plaintiff. The forum defendant rule, 28 U.S.C. §1441(b)(2), provides that "a civil action otherwise removable solely on the basis of jurisdiction under §1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which the civil action is brought." Under the forum defendant rule, "a defendant can remove a case based on diversity jurisdiction only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 90 (2005); *Horton v. Conklin*, 431 F.3d 602, 604 (8th Cir. 2005) (internal citations omitted).

In its removal papers, Defendant acknowledges that Bank of America is a citizen of North Carolina, the state in which this civil action was filed in state court. Doc. No. 1, at ¶ 11. Further, Defendant acknowledges that the date of service was May 3, 2018, prior to the date of removal, eliminating any pre-service removal argument. Doc. No. 1, at ¶ 18; *See Almutairi v. Johns Hopkins*

*Health Sys. Corp.*, No. CV ELH-15-2864, 2016 WL 97835, at *2 (D. Md. Jan. 8, 2016) (stating that "[s]ome cases interpreting § 1441(b)(1) apply the statute's plain meaning and permit preservice removal by forum defendants"). Even assuming, *arguendo*, that one or more Plaintiffs are misjoined and that misjoinder can serve as a proper basis for removal—assertions that Plaintiffs vehemently deny—removal is improper because Plaintiffs have sued Defendant in its home state. Therefore, the Court need not reach these issues because the forum defendant rule defeats diversity jurisdiction removal. Because Defendant is admittedly a citizen of North Carolina, removal is prohibited under 28 U.S.C. §1441(b)(2), and the case must be remanded. *See* 28 U.S.C. 1447(c).

**C. Conclusion**

Plaintiffs' claims do not satisfy the criteria for invoking federal jurisdiction over state law claims. Therefore, this Court lacks §1331 jurisdiction over Plaintiffs' claims. Further, because Defendant is a citizen of North Carolina, removal pursuant to the Court's diversity jurisdiction is improper due to the forum defendant rule. Therefore, this case must be remanded to the Superior Court of the County of Mecklenburg, North Carolina.

Date: June 25, 2018

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**CERTIFICATE OF SERVICE**

I certify that on the 25th day of June, 2018, I filed a true and correct copy of the foregoing document on the Court's CM/ECF system, which will cause a Notice of Electronic Filing to be sent to the following counsel:

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**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**Civil Action No. 3:18-cv-00288-MOC-DSC**

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

**BANK OF AMERICA, N.A.'S OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

This lawsuit is a clone of a series of cases proceeding in the Florida federal courts involving some of the same attorneys, following an unsuccessful motion to remand the original complaint to state court and an order from the Middle District of Florida severing the improperly joined claims into numerous individual lawsuits. *See* ECF No. 7 at 3–4 (procedural history). In search of some hook—any hook—for avoiding the same result here, Plaintiffs' counsel took the unusual step of (improperly) joining Plaintiffs from all over the country to sue Bank of America in the county court where its main office is located. Their effort to avoid diversity jurisdiction does nothing, however, to deprive this Court of its federal-question jurisdiction, as set forth in the Notice of Removal. Their motion to remand ("Mot.," ECF No. 10) should therefore be denied.[1]

**ARGUMENT**

Plaintiffs' primary argument is that they "plead only state law causes of action"—which is irrelevant. Mot. at 1. As Plaintiffs concede, the Supreme Court has made clear that "federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." Mot. at 3 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). That is the situation here: Plaintiffs' Complaint expressly "implicate[s] significant federal issues" in no fewer than six separate areas:

[1] The notice of removal also relied on diversity jurisdiction based on Plaintiffs' improper joinder of out-of-state Plaintiffs. Plaintiffs do not contest the showing of improper joinder, but do assert that "the forum defendant rule defeats diversity jurisdiction." Mot. at 9. This is not, in fact, a jurisdictional bar but a waivable "procedural" rule, and so would be no bar to federal jurisdiction if uncontested. *USA Trouser v. Int'l Legwear Grp., Inc.*, 2015 WL 6473252, at *3 (W.D.N.C. Oct. 27, 2015). Given that Plaintiffs *do* presently contest the matter, however, Bank of America does not rely on diversity jurisdiction in opposing Plaintiffs' motion to remand. This Court can (and should) instead exercise jurisdiction based on the numerous federal questions and federal issues expressly pled in the Complaint, as set forth herein and in the initial Notice of Removal.

1) **Plaintiffs' claims are predicated on allegations that Bank of America failed to comply with requirements issued by the U.S. Treasury Department.** *See, e.g.*:

- Compl. ¶¶ 42, 73, 135, 168, 199, 224, 256, 288, 322 ("Plaintiff contacted Defendant repeatedly throughout this process to ensure proper compliance with HAMP's requirements. . . .")

- Compl. ¶ 412 ("[Plaintiffs'] losses were a direct result of BOA's purposeful scheme to deceive the Federal Government in order to increase the BOA's [*sic*] profits by avoiding the directives and requirements of HAMP.")

2) **Plaintiffs' claims are also predicated on allegations that Bank of America breached a contract entered into with the federal government.** *See, e.g.*:

- Compl. ¶ 10 ("BOA . . . signed a 'Servicer Participation Agreement' (the 'Agreement' or 'HAMP' Agreement') with the Federal Government. . . .")

- Compl. ¶ 15 ("Despite signing the Agreement and accepting billions of dollars, BOA knew conforming to the requirements of the Agreement in providing screening for HAMP applications and accepting homeowners who meet the requirements would cost the bank millions of dollars.")

- Compl. ¶ 16 ("[I]nstead of honoring its contract with the Federal Government . . . , [Bank of America] made a calculated decision . . . to create a defense . . . against Federal Government agencies. . . .")

- Compl. ¶¶ 49, 55, 80, 108, 142, 175, 206, 231, 263, 296, 329 ("BOA profited by avoiding the administrative costs of a good faith processing of Plaintiff's modification application as was required under the Agreement the bank executed with the Federal Government."); *see also id.* at ¶¶ 87, 117, 150, 181, 213, 238, 270, 304, 335 (similar)

- Compl. ¶ 408 ("BOA was required to follow the directives under 'Servicer Participation Agreement' which it agreed to and executed with the Federal Government. . . .")

- Compl. ¶ 409 ("BOA . . . instituted a scheme to avoid its responsibilities under the HAMP Agreement. . . .")

- Compl. ¶ 410 (accusing Bank of America of "refusing to follow the directives under the HAMP Agreement")

3) **Plaintiffs expressly accuse Bank of America of a "complex scheme to defraud the Federal Government."** Compl. ¶ 27. *See also, e.g.*:

- Compl. ¶ 64, 96, 126, 159, 190, 215, 247, 279, 313, 344 ("Upon information and belief, BOA further profited by using Plaintiff's HAMP application to

make false claims for incentive payments to the United State [*sic*] Department of Treasury in the amount of $1,000.00 or $2,000.00, effectively using Plaintiff as a pawn to defraud the Federal Government.")

- Compl. ¶ 411(c) ("BOA's methodical scheme of dishonest representations to Plaintiffs concerning their HAMP application, the purpose of which was to deceive the Federal Government. . . .")

- Compl. ¶ 412 ("[Plaintiffs'] losses were a direct result of BOA's purposeful scheme to deceive the Federal Government. . . .")

- Compl. ¶ 22(a) (accusing Bank of America of falsely "report[ing] to the Treasury Department . . . regarding the volume of loans it was successfully modifying")

4) **Plaintiffs' claims are predicated on accusations that Bank of America violated guidelines and regulations issued by the Department of Housing and Urban Development.** *See, e.g.*:

- Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337 ("These inspection fees are impermissible under the *HUD Servicing Guidelines* and are but one example of the fraudulent charges for which [*sic*] BOA applied to Plaintiff's account. . . .")

- Compl. ¶ 369 ("the shortest period between inspections authorized by the HUD servicing guidelines is 25 days") (citing "*HUD Servicing Guidelines*")

- Compl. ¶ 370 ("multiple inspections are only allowed when the mortgaged property is vacant") (citing "*HUD Servicing Guidelines*")

- Compl. ¶ 371 ("[U]nder HUD servicing guidelines, the mortgage must be in default, and the mortgagee is required to determine the Plaintiff's home was vacant/abandoned. . . .") (citing "*HUD Servicing Guidelines*")

5) **Plaintiffs attempt to tie their claims into Bank of America's 2008 acceptance of federal TARP funds.** *See, e.g.*:

- Compl. ¶ 7 ("In late 2008 and early 2009, the United States Government provided a total of $45 billion dollars to BOA pursuant to the Troubled Asset Relief Program ('TARP').")

- Compl. ¶ 11 ("BOA signed the Agreement in exchange for a commitment by the Federal Government to provide BOA hundreds of millions of taxpayer dollars for its promise and obligation to comprehensively provide HAMP screening for all homeowners serviced by BOA.")

6) **Plaintiffs attempt to tie their claims into the settlement of a federal *qui tam***

**lawsuit.** *See, e.g.*:

- Compl. ¶ 31 ("In a lawsuit by the Federal Government against BOA in the Eastern District of New York, initiated by a whistleblower, BOA agreed to pay back $1 billion under the Federal False Claims Act.")
- Compl. ¶¶ 64, 96, 126,159, 190, 215, 247, 279, 313, 344 (citing "*U.S. v. Bank of America NA et al.*, case number 1:11-cv-03270, (E.D.N.Y.)" as having some unspecified connection to Plaintiffs' claims that Bank of America made "false claims for incentive payments to the United State [*sic*] Department of Treasury")

All of these allegations implicate significant federal issues. Those issues cannot be adjudicated without reference to, and detailed analysis of, federal law and federal government policy.

**A. Alleged Violations of HAMP Requirements Implicate Significant Federal Issues.**

Plaintiffs argue that there is no federal question because they "plead only state law causes of action" and because their allegations that the bank "avoid[ed] the directives and requirements of HAMP" do not constitute "a claim under HAMP." Opp. at 1, 3; Compl. ¶ 412. As noted above, this is entirely immaterial because "a federal cause of action" is *not* "a condition for exercising federal-question jurisdiction"—all that is necessary is "an issue of federal law" and "a substantial federal interest." *Grable*, 545 U.S. at 311–12. Since the alleged "directives and requirements of HAMP" were nationwide federal directives issued by the United States Treasury Department, the federal question and federal interest are present here.

Other courts have recognized federal-question jurisdiction based on identical allegations of a defendant's failure to comply with the Treasury Department's HAMP requirements. In *Williams v. Wells Fargo Bank, N.A.*, 2012 WL 13014956 (N.D. Ga. Sept. 18, 2012), the court found the requirements for federal-question jurisdiction "easily met" notwithstanding that "plaintiff's claims are couched in terms of state law," because "they depend entirely on defendant's alleged violation of federal law. For example, the basis of plaintiff's breach of contract and negligence claims is that defendant violated several provisions of HAMP and failed

to properly apply the HAMP guidelines. . . . Resolution of these claims will necessarily require the Court to determine plaintiff's rights under HAMP." *Id.* at *2 (citation omitted). Similarly, in *Steltz v. Bank of America, N.A.*, 2015 U.S. Dist. LEXIS 85525 (D.N.J. July 1, 2015), the court denied a motion to remand because:

> Plaintiffs' claim for negligent misrepresentation implicates significant federal issues in an essentially identical manner. Plaintiffs allege that Defendant negligently misrepresented, among other things, that Defendant's "loan modification agreements . . . were in compliance with applicable laws and regulations." To determine whether such statements were, in fact, misrepresentations, the Court must determine whether Defendant complied with the obligations the federal government imposed. . . . For the reasons stated above, Defendant's compliance with these requirements is in actual dispute and constitutes a significant federal issue. The District Court may, therefore, exercise federal question subject matter jurisdiction over Plaintiffs' negligent misrepresentation claim.

2015 U.S. Dist. LEXIS 85525, at *14–15 (citation omitted).

Plaintiffs attempt to distinguish *Steltz* in their remand motion, not by attempting to distinguish *Steltz* itself, but by attempting to distinguish some of the cases *cited* in *Steltz*. Mot. at 7. Specifically, they argue that "[t]he *Steltz* Court reviewed a series of cases involving claims where the Plaintiffs asserted breach of contract claims arguing that they were third party beneficiaries of the contract between banks and the federal government in the HAMP and TARP programs," and the courts found that "federal question jurisdiction existed because the Plaintiffs specifically brought a claim—breach of contract as a third party beneficiary—based upon [the] contract." *Id.* *Steltz* itself, however, did *not* involve any such a claim. The court recognized a federal question given many of the exact same claims Plaintiffs assert here—"common law unjust enrichment," "intentional misrepresentation," and "negligent misrepresentation." *Steltz*, 2015 U.S. Dist. LEXIS 85525, at *13–15.

Plaintiffs attempt to argue that there is "overwhelming case law" rejecting federal-question jurisdiction in similar circumstances. Mot. at 7. Each of the cases cited, however, relied on the lack of a federal cause of action—exactly what *Grable* holds is *not* dispositive. *Id.* at 6;

*see Grable*, 545 U.S. at 311–12. Additionally, Plaintiffs characterize these cases as holding that "there is no federal question jurisdiction over claims 'that merely reference HAMP guidelines and procedures.'" Mot. at 6 (quoting *Mosley v. Wells Fargo Bank, N.A.*, 802 F. Supp. 2d 695, 699 (E.D. Va. 2011)). Unlike *Mosley*, however, *this* case is *not* a case "that merely reference[s] HAMP guidelines." *Mosley* drew a distinction between "cases that merely reference HAMP guidelines" and those that allege "violations of HAMP itself," and acknowledged that federal-question jurisdiction exists for cases in the latter category. 802 F. Supp. 2d at 699; *accord Williams*, *supra* (denying remand of claims that defendant "failed to properly apply the HAMP guidelines"). Here, as in *Williams*, Plaintiffs *do* allege direct violations of HAMP guidelines, and the outcome of their fraud claims necessarily depends on what those guidelines provided and whether Bank of America represented them accurately.

For example, Plaintiffs' primary fraud claim, repeated again and again, is a claim that Bank of America "omitted" to tell them "that only imminent default was required for HAMP eligibility." Compl. ¶¶ 40, 71, 133, 166, 197, 222, 254, 286, 320. As in *Steltz*, "[t]o determine whether such statements were, in fact, misrepresentations," the Court inevitably must consult and interpret the Treasury Department's guidelines for HAMP eligibility. 2015 U.S. Dist. LEXIS 85525, at *15.

Plaintiffs' next theory is that Bank of America defrauded them by placing "trial period payments . . . into an unapplied account." Compl. ¶¶ 52, 83, 112, 145, 178, 209, 266, 299, 332. As set forth in Bank of America's motion to dismiss, however, "this is exactly how the Treasury Department requires servicers to handle trial payments." *Torres v. Bank of Am., N.A.*, 218 U.S. Dist. LEXIS 12640, at *6 (citing MAKING HOME AFFORDABLE PROGRAM HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, v5.1 129 (May 26, 2016); U.S. Dep't of Treasury, HAMP

Supplemental Directive (SD) 09-01, at 18). The Court cannot therefore adjudicate this claim of fraud without determining what, in fact, the Treasury Department required. The federal interest on this issue is actually multiple layers deep, because the Treasury Department's HAMP guidelines merely implement federal regulations concerning the disposition of mortgage payments more generally. Regulation Z requires mortgage servicers to hold payments for less than the full monthly payment due (which includes, but is not limited to, trial loan-modification payments) "in a trust account" and not apply them to the loan until they "aggregate a full monthly installment." 24 C.F.R. § 203.556(a)–(b). There is thus a significant federal interest in how Plaintiffs' claims of misrepresentation and violation of HAMP guidelines are adjudicated.

**B. Alleged Breaches of the Contract Between Bank of America and the Federal Government and an Alleged "Complex Scheme" to Defraud the Federal Government Implicate Significant Federal Issues.**

"Federal law controls the interpretation of a contract entered into pursuant to federal law and to which the United States is a party," including, specifically, the HAMP Servicer Participation Agreement. *Phipps v. Wells Fargo Bank, N.A.*, No. 10-2025, 2011 WL 302803, at *6 (E.D. Cal. Jan. 27, 2011); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09- 1985, 2010 WL 3212131, at *3 (S.D. Cal. Aug. 12, 2010) (same); *Hammonds v. Aurora Loan Serv. LLC*, No. 10-1025, 2010 WL 3859069, at *2 (C.D. Cal. Sept. 27, 2010) ("Federal law controls the interpretation of the HAMP contract [because] [w]hen a contract is entered into under federal law and one party is the United States, federal law applies."). Plaintiffs acknowledge this, but claim that it "is without merit" because (i) "there is no allegation of a breach of any contract in the Complaint," and because (ii) "Plaintiffs never once claim be [*sic*] a third-party beneficiary" to the contract. Mot. at 7. The first argument is completely false; the second is true but irrelevant.

As cited above, *far* from there being "no allegation of a breach of any contract in the Complaint" (*id.*), the Complaint is *replete* with allegations that Bank of America failed to

"honor[] its contract with the Federal Government" (Compl. ¶ 16), failed to give Plaintiffs what "was required under the Agreement" (Compl. ¶¶ 49, 55, 80, 108, 142, 175, 206, 231, 263, 296, 329), failed to "follow" the Agreement (*id.* at ¶ 408), "avoid[ed] its responsibilities under the HAMP Agreement" (*id.* at ¶ 409), and "refus[ed] to follow . . . the HAMP Agreement" (*id.* at ¶ 410). These alleged failures are essential to Plaintiffs' theory of liability.

It is true that Plaintiffs make no claim to be a "third-party beneficiary" to the Agreement. Mot. at 7. But that merely raises the question of how the Agreement relates to their claims in the first place. If Plaintiffs are claiming some harm from a breach of the Agreement, then adjudicating Bank of America's obligations under the agreement is a "substantial" issue that is both "necessarily raised" and "actually disputed" in the case. *See* Mot. at 4 (citing *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013)). If Plaintiffs are *not* claiming any harms from their (repeated) allegations that Bank of America "refus[ed] to follow" the Agreement (Compl. ¶ 410), then that raises the question of what those allegations are doing in the Complaint at all. They are either material to Plaintiffs' claims or they are not, and if immaterial, they should be stricken. *See* FED. R. CIV. P. 12(f). Plaintiffs thus appear to want to have it both ways—claiming to have been harmed by a breach of the Agreement for purposes of recovering damages, but *dis*claiming any right to enforce the Agreement for purposes of avoiding federal jurisdiction.

The logic of the case law finding a federal interest in claims alleging a breach of a federal contract does not, by its terms, hinge on any express claim of being a third-party beneficiary. Express claims to be a third-party-beneficiary claims were of course a factor in the cases where plaintiffs made that claim, but they were not the sole factor. For example, *Copeland-Turner v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 28093 (D. Or. Mar. 17, 2011), stated:

> [T]he issue is whether plaintiff's Complaint alleges that the Contract is between Wells Fargo and the federal government. I find that it does. As Wells Fargo notes, plaintiff

> himself affirmatively alleges that Fannie Mae was a party to the contract as a "federally chartered corporation and financial agent of the United States." Plaintiff alleges that "Wells Fargo is bound by the terms of the Contract with the federal government." He further alleges that the "general purpose and intent of the federal government . . . in entering the Contract with Defendant Wells Fargo was to stabilize . . ." He also reiterates that the contract was "between Defendant Wells Fargo and the federal government[.]"

*Id.* at *14 (ellipses and brackets in original; citations omitted). If "the issue" here is whether the complaint alleges a contract between Bank of America and the federal government, the Complaint amply satisfies that test. Each of the dispositive allegations in *Copeland-Turner* are also made here. *See, e.g.*, Compl. ¶ 10 (alleging contract between Bank of America and "the Federal Government"); ¶¶ 15–16 (alleging Bank of America bounded by the contract), ¶ 9 (alleging that the purpose of the contract was "to assist the millions of American homeowners facing foreclosure").

Similarly, while the plaintiffs in *Peralta v. ABN AMRO Mortg. Grp*, 2014 U.S. Dist. LEXIS 58124 (D.N.J. Jan. 13, 2014), expressly pled third-party-beneficiary status under the HAMP agreement, the court's rationale for finding a federal question did not rest solely on that express pleading. Rather, the court noted that:

> Plaintiffs have alleged that: (1) Defendants entered into TARP/HAMP related contracts with the federal government, and that Plaintiffs were third-party beneficiaries under those contracts; (2) in exchange for Defendants' receipt of federal funds, Defendants were required to undertake certain actions (i.e., modify loans on Plaintiffs' real estate and otherwise use the federal funds for Plaintiffs' benefit); and (3) Defendants failed to satisfy those obligations.

*Id.* at *16. But for the second half of the first sub-part, those are the *exact* claims made by Plaintiffs here. Plaintiffs cannot avoid implicating the federal question simply by disclaiming the *label* of third-party-beneficiary status, while seeking to avail themselves of the benefits of that status regardless.

Indeed, one of the cases cited by *Peralta*, *Baltahazar v. Premium Cap. Funding*, 2011 U.S. Dist. LEXIS 96275, at *5 (D. Ut. Aug. 26, 2011), lacked both a federal cause of action and

an express claim of third-party-beneficiary status, but the court nevertheless found that the *substance* of the plaintiffs' allegations "appear[ed] to allege that Plaintiffs are third-party beneficiaries" of the HAMP Servicer Participation Agreement," and that was enough to "present[] a federal question that was properly subject to removal." *Id.* at *5; *see also, e.g.*, *One & Ken Valley Housing Grp. v. Maine State Housing Auth.*, 2010 WL 4191488, at *9 (D. Me. Oct. 19, 2010) (finding "federal issues . . . embedded in state claims" because they "arise from a federal program and depend on contract language prescribed by the federal government in order to implement that program").

The same logic applies to Plaintiffs' references to a *qui tam* suit "under the Federal False Claims Act," their references to a related settlement and federal consent decree, their allegations of a "complex scheme to defraud the Federal Government," and their references to federal TARP funds. Compl. ¶¶ 7, 11, 27, 31. These federal interests are either material to their claims, or they are not, and if they are not, they have no business being in the Complaint. *See* FED. R. CIV. P. 12(f). Insofar as they are material, the federal interest is clear. For example, part of the alleged "complex scheme to defraud the Federal Government" (Compl. at ¶ 27) appears to involve "claims for incentive payments to the United State [*sic*] Department of Treasury." *Id.* at ¶ 64, 96, 126, 159, 190, 215, 247, 279, 313, 344. In its motion to dismiss, Bank of America showed that this claim was groundless and implausible based on the Treasury Department's guidelines, so its adjudication necessarily rests on federal policy and federal interests. *See* ECF No. 7 at 24.

The repeated allegations that Bank of America had duties to Plaintiffs arising from its acceptance of TARP funds in 2008 are similar, and have been cited by multiple courts in recognizing a federal question. For example, the court denying the remand motion in *Steltz* reasoned:

> Plaintiffs allege that their lawsuit arises, in part, from "Defendant's failure to perform their obligations required upon their acceptance of TARP funds" . . . To resolve whether Defendant was unjustly enriched through its receipt of federal funds, this Court must determine what obligations TARP and HAMP imposed upon Defendant, whether Defendant's rejection of Plaintiffs' loan modification applications was proper under federal guidelines, and how Defendant used the funds designated to help Plaintiffs modify their loans.

*Steltz*, 2015 U.S. Dist. LEXIS 85525, at *12–13; *see also, e.g.*, *Peralta*, 2014 U.S. Dist. LEXIS 56931, at *6 (denying motion to remand because, "[n]otably, Plaintiffs alleged that their action arises from various 'wrongful acts and/or omissions,' including 'Defendants' failure to perform their obligations required upon their acceptance of TARP funds'").

**C. Alleged Violations of HUD Guidelines Implicate Significant Federal Issues.**

Separately from their HAMP-related claims, Plaintiffs also accuse Bank of America of fraudulently charging them property-inspection fees—exclusively by reference to federal law. Their stated theory is that the "inspection fees are impermissible under . . . *Servicing Guidelines*" issued by the U.S. Department of Housing and Urban Development. Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337. They, in turn, accuse Bank of America of fraud by supposedly "omitt[ing]" to disclose the fact that the fees it was charging were "improper" under the HUD guidelines. *Id.* at ¶¶ 58, 90, 120, 153, 184, 241, 273, 307, 338.

Just as the claim that Bank of America violated the Treasury Department's HAMP guidelines cannot be adjudicated without reference to the HAMP guidelines, the claim that Bank of America violated HUD's servicing guidelines cannot be adjudicated without reference to the HUD guidelines and HUD regulations on which those guidelines are based. *Compare, e.g.*, Compl. ¶ 371 (quoting HUD servicing guideline) *with* 24 C.F.R. § 203.377 (original regulatory text). That is sufficient to support federal-question jurisdiction. *See, e.g., Moore v. Ocwen Loan Servicing, LLC*, 2017 WL 8186863, at *1 n.2 (N.D. Ga. Sept. 21, 2017) (in claim alleging that servicer "wrongfully refused to consider [plaintiffs] for loan modification programs and then

wrongfully attempted foreclosure proceedings on their home," asserting federal-question jurisdiction even though "no federal claim" was brought because "Plaintiffs allege that Defendant was contractually obligated to follow certain [HUD] procedures . . . and that Defendant breached these obligations. . . . Whether Plaintiffs' claim may be supported depends, therefore, on the Court's interpretation of the effect *vel non* of these federal regulations").

As set forth in Bank of America's motion to dismiss, Plaintiffs have no valid claim that the HUD guidelines were violated at all. Those guidelines do not even apply to their loans because HUD's guidelines only apply to loans insured by the Federal Housing Administration,. *See* ECF No. 7 at 22–23; 24 C.F.R. § 203.377, *supra* (inspection obligations applicable to "a mortgage insured under this part"). But the interpretation and application of these guidelines is plainly a federal matter, not a matter of state law. The state-law claim rises or falls with the claim that Bank of America violated the *federal* policy and *federal* regulatory requirements. *See generally Pinney v. Nokia, Inc.*, 402 F.3d 430, 449 (4th Cir. 2005) (substantial federal question where state claims "rise or fall on the resolution of a question of federal law").

## CONCLUSION

Plaintiffs, in drafting their Complaint, indisputably made alleged violations of federal requirements and directives the linchpin for all all of their claims against Bank of America and all of their theories of liability. Their claims necessarily raise substantial—and hotly disputed—issues of federal law, which this Court is best-equipped to resolve. The four factors identified in *Grable* are all satisfied here. For these reasons and for those set forth in its Notice of Removal, Bank of America respectfully asks that the Court deny Plaintiffs' motion for remand and allow this case to proceed in this forum.

Respectfully submitted this 9th day of July, 2018,

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**CERTIFICATE OF SERVICE**

I certify that I filed a true and correct copy of the foregoing document on the Court's CM/ECF system, which will cause a Notice of Electronic Filing to be sent to the following counsel:

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**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**
**Civil Action No. 18-cv-00288-MOC-DSC**

Chester Taylor III, et al,

Plaintiffs

v.

Bank of America, N.A.,

Defendant

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REMAND**

This case must be remanded, as removal is not permissible under either 28 U.S.C. § 1331, federal question jurisdiction, or § 1332, diversity jurisdiction. In its response, Defendant does not dispute that the forum defendant rule prohibits removal of this case pursuant to the Court's diversity jurisdiction.[1] Rather, Defendant argues that, although Plaintiffs plead *only* state law causes of action, this Court may exercise federal question jurisdiction, pursuant to the narrow doctrine that confers federal question jurisdiction over state law claims that implicate significant federal issues. Plaintiffs' claims do not fall into the special and small category required to confer federal question jurisdiction over state law claims. Accordingly, for the reasons set forth in the Brief in Support of the Motion to Remand, and the additional reasons set forth herein, Plaintiffs' case must be remanded to the Superior Court of the County of Mecklenburg, North Carolina.

[1] In its response, Defendant notes the futility in continuing to argue removal is proper based on diversity jurisdiction, as a result of the Forum Defendant Rule. However, in abandoning this argument, Defendant incorrectly notes that "Plaintiffs do not contest the showing of improper joinder . . ." This is not true. Plaintiffs very clearly note in their Motion to Remand that any argument based on improper joinder are "assertions that Plaintiffs vehemently deny". *See* Brief at 9.

**Argument**

1. **Plaintiffs' state law claims do not fall within the "special and small category," as defined by the Supreme Court.**

Plaintiffs do not plead any federal causes of action, but contrary to Defendant's argument, Plaintiffs have never claimed that the inquiry ends there. *See* Response at 4. The primary issue before the Court is whether Plaintiffs' state and common law causes of action "implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). The Supreme Court has held that claims fall within this "special and small category" only where a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Each of these requirements must be met in order to confer federal question jurisdiction. *Id.* Plaintiffs' claims do not implicate substantial federal issues, as defined by the Supreme Court. *See Merrill Dow v. Thompson*, 478 U.S. 804 (1986); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); *Gunn*, 568 U.S. at 258.

a. No Federal Issue is Actually Disputed.

To exercise federal question jurisdiction over a state law cause of action, an issue of federal law must be "actually disputed." *Grable*, 545 U.S. at 314.[2] In *Grable*, the parties squarely disputed "whether the federal tax statute required that notice of the tax sale be given by personal service, rather than service by certified mail." *Boyle v. Wells Fargo Bank, N.A.*, 2012 WL 289881, at *3 (S.D. Tex. Jan. 31, 2012) (citing *Grable*, 545 U.S. at 314). In making the determination that federal

[2] Plaintiffs do not dispute that issues of federal law are "necessarily raised." The federal program known as HAMP provides the backdrop of this purely state law dispute. Therefore, while federal issues are necessarily raised, they are not "actually disputed" or "substantial," as discussed below.

question jurisdiction existed in the case, the Court held that "federal jurisdiction demands . . . a contested federal issue." *Grable*, 545 U.S. at 313.

Here, Defendant fails to identify a *dispute* over the meaning of any federal law. The crux of this case is the application of law to disputed facts. Notably, Plaintiffs' complaint does not raise any dispute as to the meaning of a particular statutory text. *See MHA LLC v. HealthFirst, Inc.*, 629 F. App'x 409, 414 (3d Cir. 2015) (remanding the case and finding that the parties failed to identify any dispute over the meaning of a particular statutory text and "any statutory interpretation required by [the] case is incidental to the application of [federal] law to disputed facts"). As noted in the Motion to Remand, Plaintiffs do not allege a private right of action pursuant to HAMP. Further, Defendant argues that it acted according to Treasury Department Guidelines in handling trial payments. *See* Response at 6. The parties do not dispute the requirements regarding trial payments under the Treasury Department guidelines. Plaintiffs, instead, argue that Defendant failed to follow these guidelines. *See Boyle*, 2012 WL 289881, at *3 (remanding the case to state court and finding that defendant, Wells Fargo, failed to "establish[] that the parties genuinely disagree on the meaning or requirements of [HAMP] Guidelines or Agreements, or a loan servicer's obligations under them"). Defendant also claims that the Court must "consult and interpret the Treasury Department's guidelines for HAMP eligibility" in order to determine whether statements regarding HAMP eligibility were, in fact, misrepresentations. *See* Response at 6–7. Defendant, however, fails to note any disagreement amongst the parties about what the Treasury Department guidelines require. Instead, the only disagreement is about what BOA employees told Plaintiffs. Similarly, Defendant claims that Plaintiffs' claims "cannot be adjudicated without reference to the HUD guidelines and HUD regulations . . ." *See* Response at 11. Again, Defendant fails to identify any disagreement amongst the parties on the content of

HUD guidelines or regulations. Defendant has not "shown if or how its obligations as a loan servicer under these guidelines or agreements is 'actually disputed,'" as is required under *Grable*. *See Boyle*, 2012 WL 289881, at *3 (citing *Grable*, 545 U.S. at 314). Because no federal issues are actually disputed, federal question jurisdiction cannot be exercised in this case.

b. The Federal Issues Are Not Substantial.

To fall within the "special and small category" of state law claims over which the Court can exercise federal question jurisdiction, Defendant must also prove that the federal issues implicated are "substantial." *Gunn*, 568 U.S. at 258. Providing guidance on the substantiality inquiry, the Supreme Court stated that "it is not enough that the federal issue be significant to the particular parties in the immediate suit; that will always be true when the state claim 'necessarily raise[s]' a disputed federal issue, as *Grable* separately requires. The substantial inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260. In *Gunn*, the Court identified and discussed two cases reviewed by the Supreme Court in which the substantiality prong of the inquiry was found to have been satisfied, and noted that in both cases, plaintiffs had alleged wrongdoing by the government. *Id.*

In determining the substantiality requirement, courts consider "whether the case includes a federal agency, and particularly, whether that agency's compliance with the federal statute is in dispute." *Sherr v. S.C. Elec. & Gas Co.*, 180 F. Supp. 3d 407, 418 (D.S.C. 2016) (citing *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 570 (6th Cir. 2007)). Defendant argues that "Plaintiffs' claims are predicated on allegations that Bank of America failed to comply with requirements issued by the U.S. Treasury Department" and "the United States Department of Housing and Urban Development." *See* Response at 2–3. Therefore, while federal agency guidelines are involved in Plaintiffs' claims, there is no dispute about a *federal agency's* compliance with the HAMP

guidelines. Indeed, there is no dispute about what the guidelines are at all. Once again, the dispute centers on Bank of America's failure to follow them to Plaintiffs' detriment. Similarly, courts consider "whether a decision on the federal question will resolve the case (i.e., the federal question is not merely incidental to the outcome)." *Sherr*, 180 F. Supp. 3d at 418 (citing *Mikulski*, 501 F.3d at 570). Again, Defendant has not identified any disputed federal issues. However, assuming, *arguendo*, that the Court did need to make a determination of what was required under the HAMP guidelines, the Court would still need to determine if Defendant complied with those guidelines, and thus, no decision on a federal issue will resolve the case, indicating a lack of substantiality. *Id.*

An additional consideration relevant to the "substantial issue" inquiry includes whether Congress created a private right of action in the federal law at issue. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986). As noted in the Motion to Remand, the lack of a private right of action is "quite nearly dispositive" on the issue of federal question jurisdiction. *Dean v. BAC Home Loans Servicing, LP*, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012) (citing *Merrell Dow Pharm. Inc.*, 478 U.S. at 813). Indeed "the congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow Pharm. Inc.*, 478 U.S. at 814. There is no private right of action for the denial of a HAMP modification, and the fact Plaintiffs do not make a claim under HAMP is far from "immaterial," as Defendant suggests. *See* Response at 4. The fact there is no private right of action under HAMP leads to the conclusion that Congress did not intend claims based on violations of HAMP to confer federal jurisdiction. Therefore, Defendant fails to satisfy its burden of demonstrating a "substantial" federal issue is implicated.

c. Remand Would Preserve the State-Federal Balance Intended By Congress.

"Federal jurisdiction over a state law claim will only lie if the federal issues at play are 'capable of resolution in federal court without disrupting the federal-state balance approved by Congress.'" *Sherr*, 180 F. Supp. 3d at 418 (citing *Gunn*, 568 U.S. at 258). The lack of a private right of action, as discussed above with regard to the substantiality factor, is of even greater relevance with regard to the final factor—the state-federal division of labor Congress intended. *Grable*, 545 U.S. at 318. In *Merrell Dow*, the "absence of any federal cause of action" served as "an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331." *Id.* (citing *Merrell Dow Pharm. Inc.*, 478 U.S. at 814–16). According to *Grable*, the *Merrell Dow* Court "saw the missing cause of action . . . as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state [ ] action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." *Id.* Put another way, if the mention of federal agency guidelines "without a federal cause of action could get a state claim into federal court, so could any other [case mentioning federal agency guidelines] without a federal cause of action. And that would [mean] a tremendous number of cases." *Id.* Applying the Supreme Court's guidance to the case before the Court on this Motion to Remand, it is clear that invoking federal question jurisdiction would disrupt the federal-state balance intended by Congress.

**2. Defendant Relies on Unpersuasive, Nonbinding, and Distinguishable Precedent.**

Despite the overwhelming precedent finding in Plaintiffs' favor, Defendant primarily relies on just two unpersuasive, nonbinding, and distinguishable cases. *See Williams v. Wells Fargo Bank, N.A.*, 2012 WL 13014956 (N.D. Ga. Sept. 18, 2012); *see also Steltz v. Bank of America, N.A.*, 2015 U.S. Dist. LEXIS 85525 (D.N.J. July 1, 2015). In *Williams*, the Northern District of

Georgia provides minimal reasoning to support the denial of the motion to remand. *Williams*, 2012 WL at *2. In fact, the case fails to cite to a single other decision regarding claims related to HAMP. *Id.* The most obvious distinguishing factor of the case, however, is that it includes a breach of contract claim, a claim not included Plaintiffs' complaint, despite Defendant's best efforts to argue otherwise. *Id.* In fact, a more diligent review of the case by Defendant would have revealed that, not only does the *Williams* complaint include a Third Party Beneficiary Breach of Contract claim, but it also specifically alleges a "breach of [Wells Fargo's] contract with the United States Department of Treasury . . ." *See Williams*, 2012 WL 1829629, No. 2012-CV-209911, Complaint at 54. *Williams* stands in stark contrast to Plaintiffs' complaint, which includes no third party beneficiary claim and never once alleges a breach of a contract with the federal government, as discussed in Section 3, *infra*.

Defendant also relies heavily on *Steltz*. 2015 U.S. Dist. LEXIS 85525. As Plaintiffs note in their Motion, *Steltz* is based entirely on case law finding federal question jurisdiction in cases involving causes of action for breach of contract as a third-party beneficiary. *Id.; see also* Motion at 7.[3] The fact those claims are not present in *Steltz* itself indicates a flaw in the court's reasoning and minimizes its precedential value. *Id.* To the extent *Steltz* is based on similar claims, it is unpersuasive and should be rejected by this Court. Further, *Steltz* is outweighed by a plethora of additional, more squarely related federal case law.

In responding to the wealth of case law in this circuit, Defendant argues that each of the cases cited by Plaintiffs "relied on the lack of a federal cause of action—exactly what *Grable* holds

[3] Along these lines, Defendant claims that Plaintiffs try to distinguish *Steltz* by attempting to distinguish some of the cases cited in *Steltz*. Brief, at 5 (emphasis added). This is misleading. In reality, every case the *Steltz* case deemed analogous only addressed whether the breach of contract cause of action gave rise to federal jurisdiction. Because the Complaint in *Steltz* did not include a breach of contract claim, its complete reliance on those cases is unsupported.

is *not* dispositive." *See* Response at 5. However, while these courts *considered* the lack of a federal cause of action, they did not rely solely on that factor. The court in *Mosley* also considered the lack of a private right of action under HAMP, stating that "[p]laintiff's right to relief for the state-law claims does not necessarily depend on resolution of a substantial question of federal law, particularly where federal law does not create a private right of action." *Mosley v. Wells Fargo Bank, N.A.*, 802 F. Supp. 2d 695, 699 (E.D. Va. 2011). Similarly, in granting the motion to remand, the court in *Asbury* found that "federal courts have determined that 'it is not necessary for the Court to interpret or apply HAMP in order to evaluate the merits of these common law claims.'" *Asbury v. Am.'s Servicing Co.*, 2011 WL 3555846, at *4 (E.D. Va. July 13, 2011) (citing *Forbes v. Wells Fargo Home Mortg.*, No. 4:10cvl60, slip op. at 7 (E.D. Va. March 18, 2011)). Further, Defendant has failed to distinguish any of the additional cases cited in Plaintiffs' Motion. *See e.g.*, *Paine v. Wells Fargo Bank*, 2011 WL 3236390 (E.D.Va. July 12, 2011); *Bottom v. Bailey*, 2013 WL 431824, at *4 (W.D.N.C. Feb. 4, 2013).

**3. Plaintiffs have alleged no breach of contract claim.**

Finally, Defendant has repeatedly attempted to recast Plaintiffs' claims as one for a breach of contract. There are no claims in Plaintiffs' complaint of being third-party beneficiaries. In a desperate attempt to avoid the glaring problems with this argument, Defendant cites to *Copeland-Turner v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 28093 (D. Or. Mar. 17, 2011). Defendant argues that "[e]xpress claims to be a third-party-beneficiary claims [*sic*] were of course a factor in the cases where plaintiffs made that claim, but they were not the sole factor." *See* Response at 8. In *Copeland-Turner*, the plaintiff brought claims of breach of contract and breach of contract-third party beneficiary. *Copeland-Turner*, 2011 U.S. Dist. LEXIS 28093. Similarly, in *Peralta*, plaintiffs expressly pled a breach of contract claim and expressly pled third-party

beneficiary status under the HAMP agreement, but Defendant attempts to analogize the case by noting similarities that only extend to "the second half of the first sub-part," however minimal that may be. *See* Response at 9. *Peralta v. ABN AMRO Mortg. Grp.*, 2014 U.S. Dist. LEXIS 58124 (D.N.J. Jan. 13, 2014).

Defendant also cites to a District of Utah case that it notes lacks "an express claim of third-party-beneficiary status." *See* Response at 9–10; *Baltazar v. Premium Capital Funding*, 2011 U.S. Dist. LEXIS 96275, at *5 (D. Ut. Aug. 26, 2011). However, *Baltazar* is also easily distinguishable in that it included a breach of contract claim. *Id.* Finally, Defendant's reliance on *One & Ken Valley Hous. Grp. v. Maine State Hous. Auth.* is also misplaced, as that case involves three counts—each one being a claim for breach of contract. 2010 WL 5207601 (D. Me. Dec. 15, 2010). While courts may, indeed, consider other factors, the factor that should be afforded the most weight in determining whether a breach of contract exists is very simple—whether Plaintiffs alleged a breach of contract. Here, they did not.

**Conclusion**

Defendant has failed to carry its burden of demonstrating that federal jurisdiction is proper. Defendant has failed to demonstrate any federal law that is "actually disputed" and has failed to satisfy the substantiality requirement for federal jurisdiction over state law claims. The federal HAMP program provides a backdrop for this purely state and common law dispute, and without demonstrating that a federal issue is "actually disputed" and "substantial," Defendant cannot satisfy its burden. Finally, Defendant has repeatedly attempted to misconstrue Plaintiffs' claims as one for a breach of contract, a claim never mentioned in the complaint. Therefore, federal jurisdiction cannot properly be exercised over this case, and it should be remanded to state court.

Date: July 16, 2018

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**
**CIVIL ACTION NO. 3:18-CV-288-MOC-DSC**

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| **CHESTER TAYLOR III, et al.,** | ) |
| | ) |
| **Plaintiffs,** | ) |
| | ) |
| **v.** | ) |
| | ) |
| **BANK OF AMERICA, N.A.,** | ) |
| | ) |
| **Defendant.** | ) |
| | ) |
| | ) |

**MEMORANDUM AND RECOMMENDATION AND ORDER**

**THIS MATTER** is before the Court on "Plaintiffs' Motion to Remand" (document #9) and the parties' briefs and exhibits.

This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and this Motion is now ripe for the Court's consideration.

Having fully considered the arguments, the record, and the applicable authority, the undersigned respectfully recommends that Plaintiffs' Motion to Remand be granted as discussed below.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Accepting the factual allegations of the Complaint as true, Plaintiffs are victims of Defendant's plan to deny its customers the benefits of home mortgage modifications under the federal Home Affordable Modification Program ("HAMP").

On May 1, 2018, Plaintiffs filed their Complaint in Mecklenburg County Superior Court asserting state law claims for fraud, intentional misrepresentation, promissory estoppel,

conversion, unjust enrichment, unfair and deceptive trade practices, and "wanton and reckless conduct" pursuant to N.C.G.S. § 1D-1, et. seq.

On June 1, 2018, Defendant removed the state court action to the United States District Court for the Western District of North Carolina alleging both federal question and diversity of citizenship jurisdiction.

On June 25, 2018, Plaintiffs filed their Motion to Remand.

In its "Opposition ..." Defendant argues the existence of federal question jurisdiction only. See Document #13.

## II. DISCUSSION

Subject matter jurisdiction is a threshold issue for the Court. When any removed case lacks a proper basis for subject matter jurisdiction, it must be remanded. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 96 (1998); Jones v. American Postal Workers Union, 192 F.3d 417, 422 (4th Cir. 1999); Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999). The requirements are so absolute that "[n]o party need assert [a lack of subject matter jurisdiction]. No party can waive the defect, or consent to jurisdiction. No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own." Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 389 (1998) (internal citations omitted). See also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1945 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt") (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); United States v. Cotton, 535 U.S. 625, 630 (2002)); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

The party asserting federal jurisdiction has the burden of proving that subject matter jurisdiction exists. See, e.g., Lovern v. Edwards, 190 F.3d 648, 654 (4th Cir. 1999); Richmond,

Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991); Norfolk Southern Ry. Co. v. Energy Dev. Corp., 312 F. Supp. 2d 833, 835 (S.D.W.Va. 2004). Any doubts about removal must be resolved in favor of remand. Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994) ("Because removal jurisdiction raises significant federalism concerns, [courts] must strictly construe removal jurisdiction. If federal jurisdiction is doubtful, a remand is necessary") (citations omitted); Griffin v. Holmes, 843 F. Supp. 81, 84 (E.D.N.C. 1993); Storr Office Supply v. Radar Business Systems, 832 F. Supp. 154, 156 (E.D.N.C. 1993).

A defendant may remove a case if the federal district court has original jurisdiction. 28 U.S.C. § 1441; Dixon v. Coburg Dairy, 369 F.3d 811, 816 (4th Cir. 2004). 28 U.S.C. § 1331 provides that district courts have subject matter jurisdiction over every civil action that "arises under the Constitution, laws, or treaties of the United States." "Congress has given the lower federal courts jurisdiction to hear only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Battle v. Seibels Bruce Ins. Co., 288 F.3d 596, 606-07 (4th Cir. 2002) (internal citations omitted).

"Federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (federal courts may exercise §1331 jurisdiction over a narrow category of cases that arise under state law but implicate significant issues of federal law, if the claims "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power"). These types of state law claims comprise "a special and small category." Empire Healthchoice Assur. Inc. v. McVeigh, 547 U.S. 677, 699 (2006); see also, Gunn v. Minton, 133 S.Ct. 1059, 1064 (2013).

In Gunn, the Supreme Court articulated a four-part test to determine whether claims fall within this "special and small category." Federal jurisdiction will exist over a state law claim that is:

> (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met. . . jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Gunn, 133 S.Ct. at 1064 (citing Grable, 545 U.S. at 312) (internal citations omitted).

Federal courts applying this test have concluded that there is no substantial question of federal law to support jurisdiction over state law claims "merely because HAMP is an element of the dispute." Melton v. Suntrust Bank, 780 F. Supp. 2d 458, 460 (E.D. Va. 2011). Where HAMP provides the backdrop of a state law dispute, "federal law informs the factual background of a state law claim, but in no way interjects itself legally into the analysis of that state law claim." Dean v. BAC Home Loans Servicing, LP, No. 2:11-CV-785-MEF, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012) (granting motion to remand in case based on HAMP) (citing White v. Wells Fargo Home Mortg., No. 1:11-cv-408MHT, 2011 WL 3666613, at *2 (M.D. Ala. Aug. 22, 2011) (granting motion to remand).

The parties agree that there is no private right of action resulting from the denial of a HAMP modification application. Spaulding v. Wells Fargo, N.A., 714 F.3d 769, 775 (4th Cir. 2013). The absence of a private right of action is "quite nearly dispositive" on the issue of federal question jurisdiction. Dean, 2012 WL 353766, at *3 (citing Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 813 (1986) (stating that the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction")). A "congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a

congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction." Merrell Dow Pharm. Inc., 478 U.S. at 815. Indeed, "'it would flout congressional intent' to find federal question jurisdiction based upon an embedded federal issue where Congress has determined that no such federal cause of action should exist." Dean, 2012 WL 353766, at *3 (quoting Merrell Dow Pharm. Inc., 478 U.S. at 815).

Courts in this Circuit have held that there is no federal question jurisdiction over claims "that merely reference HAMP guidelines and procedures." Mosley v. Wells Fargo Bank, N.A., 802 F. Supp. 2d 695, 699 (E.D. Va. 2011); Asbury v. America's Servicing Co., No. 2:11cv99, slip op. at 8, 2011 WL 3555846 (E.D. Va. July 13, 2011) (finding that "no private cause of action exists under HAMP, and congressional intent would be frustrated by this Court exercising federal question jurisdiction"); Paine v. Wells Fargo Bank, No. 2:11cv89, slip op. at 11, 2011 WL 3236390 (E.D. Va. July 12, 2011) (finding "that Plaintiffs' right to relief for the state-law claims does not necessarily depend on resolution of a substantial question of federal law, particularly where federal law does not create a private right of action"). See also Bottom v. Bailey, No. 1:12CV97, 2013 WL 431824, at *4 (W.D.N.C. Feb. 4, 2013) (internal citations omitted) (concerning Bank Secrecy Act, 31 U.S.C. §5311 et. seq., "Congress's determination not to provide a private cause of action under a federal statute is evidence of 'a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal question jurisdiction.'")

Applying those legal principles to the facts alleged here, the Court finds no basis for federal question jurisdiction. Plaintiffs' Complaint contains no federal claims. The federal statute referenced in the Complaint provides no private right of action. There is no dispute as to the

meaning or application of any of HAMP's requirements. Assuming arguendo that Plaintiffs are able to establish a HAMP violation, such violation is at most an element of their state law claims. "Most importantly, however, even if the Plaintiffs were to conclusively prove [a federal violation] that would not dispose of the threshold question of whether such violation gives rise to a private cause of action under North Carolina law." Bottom, 2013 WL 431824, at *7 (remanding Complaint containing only state law claims and referencing violation of Bank Secrecy Act as element of those claims). "[I]t is best left to the North Carolina Courts to determine what causes of action are recognized pursuant to North Carolina law." Id.

Accordingly, the undersigned respectfully recommends that Plaintiffs' Motion to Remand be granted.

## III. ORDER

**IT IS HEREBY ORDERED** that all further proceedings in this action, including all discovery, are **STAYED** pending the District Judge's ruling on this Memorandum and Recommendation and Order.

## IV. RECOMMENDATION

**FOR THE FOREGOING REASONS,** the undersigned respectfully recommends that "Plaintiffs' Motion to Remand" (document #9) be **GRANTED** and this matter be **REMANDED** to Mecklenburg County Superior Court.

## V. NOTICE OF APPEAL RIGHTS

The parties are hereby advised that, pursuant to 28 U.S.C. §636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this

Memorandum must be filed within fourteen days after service of same. Failure to file objections to this Memorandum with the Court constitutes a waiver of the right to de novo review by the District Judge. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005); Wells v. Shriners Hosp., 109 F.3d 198, 201 (4th Cir. 1997); Snyder v. Ridenour, 889 F.2d 1363, 1365 (4th Cir. 1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140, 147 (1985); Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Wells, 109 F.3d at 201; Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk is directed to send copies of this Memorandum and Recommendation and Order to the parties' counsel and to the Honorable Max O. Cogburn, Jr.

**SO ORDERED AND RECOMMENDED.**

Signed: July 17, 2018

David S. Cayer
United States Magistrate Judge

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**

**Civil Action No. 3:18-cv-00288-MOC-DSC**

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

**BANK OF AMERICA, N.A.'S OBJECTION TO THE MAGISTRATE REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION TO REMAND**

**ORAL ARGUMENT REQUESTED**

Plaintiffs brought this lawsuit with a complaint copy-pasted from a series of cases proceeding in the Florida federal courts. *See* ECF No. 7 at 3–4 (procedural history). They claim that Bank of America perpetrated a "scheme to deceive the Federal Government" by denying Plaintiffs loan modifications to which they say they were entitled under the Treasury Department's Home Affordable Modification Program (HAMP). Compl. ¶ 412. On June 1, Bank of America removed the case from Mecklenburg County Superior Court to this Court because the alleged violations of federal guidelines and alleged breaches of an agreement Bank of America entered into with the federal government "implicate significant federal issues." *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *see* ECF No. 1.

On July 17, Magistrate Judge Cayer recommended a remand to state court. *See* ECF No. 15. The recommendation is based on three findings—two of which are correct but inconsequential, and the third of which is mistaken. Specifically, Magistrate Judge Cayer stated: "Plaintiffs' Complaint contains no federal claims. The federal statute referenced in the Complaint provides no private right of action. There is no dispute as to the meaning or application of any of HAMP's requirements." *Id.* at 5–6. As to the first two points, it is true that Plaintiffs assert no federal cause of action, but this does not support remand, because *Grable* establishes that "a federal cause of action [is] a *sufficient* condition for federal-question jurisdiction" but not "a *necessary* one." 545 U.S. at 312 (emphasis added). And the Magistrate Judge's finding that "[t]here is no dispute as to the meaning or application of any of HAMP's requirements" appeared to take Plaintiffs' conclusory remand arguments at face value, but Plaintiffs' Complaint says otherwise. The fact is that Plaintiffs raise disputes about the meaning or application of federal requirements (under HAMP and otherwise) *throughout* the Complaint.

For example, one of their main theories of liability is that they were charged "inspection

fees [that] are impermissible under [] HUD Servicing Guidelines." Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337. In its motion to dismiss, Bank of America noted that the HUD Servicing Guidelines are not actually applicable to Plaintiffs' loans (and would not render the challenged fees impermissible even if they were). ECF No. 7 at 22–23. This is plainly a "dispute as to the meaning or application" of federal requirements. The same is true of Plaintiffs' theories that Bank of America violated the Treasury Department's HAMP guidelines. Plaintiffs argue that they were damaged by having trial modification payments posted "into an unapplied account." *Id.* at ¶¶ 52, 83, 112, 145, 178, 209, 234, 266, 299, 332. Bank of America argues that this is exactly how Treasury guidelines and federal regulations require it to post trial payments. ECF No. 7 at 5, 14, 18; ECF No. 1 at 3 (citing, *e.g.*, 24 C.F.R. § 203.556). Plaintiffs also argue that they were "falsely informed" their HAMP applications were incomplete. Compl. ¶ 360. But the truth or falsity of any statement that a HAMP application is incomplete cannot be assessed without establishing what the HAMP guidelines required for an application to be complete.

All of these allegations raise "dispute[s] as to the meaning or application" of federal requirements, which accounts for why multiple other courts faced with similar claims have found the federal-question requirements "easily met" notwithstanding that the "claims are couched in terms of state law." *Williams v. Wells Fargo Bank, N.A.*, 2012 WL 13014956, at *2 (N.D. Ga. Sept. 18, 2012). There, as here, "the basis of plaintiff's breach of contract and negligence claims is that defendant violated several provisions of HAMP and failed to properly apply the HAMP guidelines. . . . Resolution of these claims will necessarily require the Court to determine plaintiff's rights under HAMP." *Id.* at *2. Under such circumstances, Bank of America respectfully submits that Magistrate Judge Cayer's remand recommendation was in error, and this Court should exercise subject-matter jurisdiction under 28 U.S.C. § 1331.

## STANDARD OF REVIEW

The Federal Magistrates Act of 1979, as amended, provides that "a district court shall make a de novo determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *Camby v. Davis*, 718 F.2d 198, 200 (4th Cir.1983). The Court "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." FED. R. CIV. P. 72(a).

## SUMMARY OF OBJECTION

Bank of America objects to (i) the recommendation "that 'Plaintiffs' Motion to Remand' (document #9) be GRANTED and this matter be REMANDED to Mecklenburg County Superior Court," and to (ii) the underlying premise that "[t]here is no dispute as to the meaning or application of any of HAMP's requirements." ECF No. 15 at 5–6. As noted above and set forth in further detail below, there are substantial disputes as to the meaning and application of HAMP and other federal requirements, including, *inter alia*, whether Plaintiffs satisfied Treasury Department requirements for "imminent default" (Compl. ¶¶ 40, 71, 133, 166, 197, 222, 254, 286, 320), whether inspection fees were "impermissible under [] HUD Servicing Guidelines" (*id.* at ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337), whether Plaintiffs' claims that Bank of America "ma[d]e false claims for incentive payments to the United State [*sic*] Department of Treasury" are plausible given the Treasury Department's guidelines (*id.* at ¶¶ 64, 96, 126, 159, 190, 215, 247, 279, 313, 344), whether Plaintiffs' alleged harms "were a direct result" of a "purposeful scheme to deceive the Federal Government" and "avoid[] the directives and requirements of HAMP" (*id.* at ¶ 412), and other matters.

Bank of America does *not* object to the Magistrate Judge's findings that "Plaintiffs' Complaint contains no federal claims" and that "[t]he federal statute referenced in the Complaint

provides no private right of action" to Plaintiffs (ECF No. 15 at 5), but respectfully submits that such findings do not control the jurisdictional question based on the Supreme Court's ruling that "a federal cause of action [is] a *sufficient* condition for federal-question jurisdiction" but not "a *necessary* one." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (emphasis added).

## ARGUMENT

### I. THE ABSENCE OF FEDERAL CAUSES OF ACTION IS IRRELEVANT GIVEN THE SIGNIFICANT FEDERAL ISSUES RAISED BY PLAINTIFFS' CLAIMS.

In moving for remand, Plaintiffs' primary argument was that they "plead only state law causes of action," but this doesn't matter. ECF No. 9 at 1. As Plaintiffs concede, the Supreme Court has made clear that "federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." ECF No. 9 at 3 (quoting *Grable*, 545 U.S. at 312). That is the situation here: Plaintiffs' Complaint expressly "implicate[s] significant federal issues" in no fewer than six separate areas:

1) **Plaintiffs' claims are predicated on allegations that Bank of America failed to comply with requirements issued by the U.S. Treasury Department.** *See, e.g.*:

   - Compl. ¶¶ 42, 73, 135, 168, 199, 224, 256, 288, 322 ("Plaintiff contacted Defendant repeatedly throughout this process to ensure proper compliance with HAMP's requirements. . . .")

   - Compl. ¶ 412 ("[Plaintiffs'] losses were a direct result of BOA's purposeful scheme to deceive the Federal Government in order to increase the BOA's [*sic*] profits by avoiding the directives and requirements of HAMP.")

2) **Plaintiffs' claims are also predicated on allegations that Bank of America breached a contract entered into with the federal government.** *See, e.g.*:

   - Compl. ¶ 10 ("BOA . . . signed a 'Servicer Participation Agreement' (the 'Agreement' or 'HAMP' Agreement') with the Federal Government. . . .")

   - Compl. ¶ 15 ("Despite signing the Agreement and accepting billions of dollars, BOA knew conforming to the requirements of the Agreement in providing screening for HAMP applications and accepting homeowners who

meet the requirements would cost the bank millions of dollars.")

- Compl. ¶ 16 ("[I]nstead of honoring its contract with the Federal Government . . . , [Bank of America] made a calculated decision . . . to create a defense . . . against Federal Government agencies. . . .")

- Compl. ¶¶ 49, 55, 80, 108, 142, 175, 206, 231, 263, 296, 329 ("BOA profited by avoiding the administrative costs of a good faith processing of Plaintiff's modification application as was required under the Agreement the bank executed with the Federal Government."); *see also id.* at ¶¶ 87, 117, 150, 181, 213, 238, 270, 304, 335 (similar)

- Compl. ¶ 408 ("BOA was required to follow the directives under 'Servicer Participation Agreement' which it agreed to and executed with the Federal Government. . . .")

- Compl. ¶ 409 ("BOA . . . instituted a scheme to avoid its responsibilities under the HAMP Agreement. . . .")

- Compl. ¶ 410 (accusing Bank of America of "refusing to follow the directives under the HAMP Agreement")

3) **Plaintiffs expressly accuse Bank of America of a "complex scheme to defraud the Federal Government."** Compl. ¶ 27. *See also, e.g.*:

- Compl. ¶¶ 64, 96, 126, 159, 190, 215, 247, 279, 313, 344 ("Upon information and belief, BOA further profited by using Plaintiff's HAMP application to make false claims for incentive payments to the United State [*sic*] Department of Treasury in the amount of $1,000.00 or $2,000.00, effectively using Plaintiff as a pawn to defraud the Federal Government.")

- Compl. ¶ 411(c) ("BOA's methodical scheme of dishonest representations to Plaintiffs concerning their HAMP application, the purpose of which was to deceive the Federal Government. . . .")

- Compl. ¶ 412 ("[Plaintiffs'] losses were a direct result of BOA's purposeful scheme to deceive the Federal Government. . . .")

- Compl. ¶ 22(a) (accusing Bank of America of falsely "report[ing] to the Treasury Department . . . regarding the volume of loans it was successfully modifying")

4) **Plaintiffs' claims are predicated on accusations that Bank of America violated guidelines and regulations issued by the Department of Housing and Urban Development.** *See, e.g.*:

- Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337 ("These inspection fees

are impermissible under the *HUD Servicing Guidelines* and are but one example of the fraudulent charges for which [*sic*] BOA applied to Plaintiff's account. . . .")

- Compl. ¶ 369 ("the shortest period between inspections authorized by the HUD servicing guidelines is 25 days") (citing "*HUD Servicing Guidelines*")

- Compl. ¶ 370 ("multiple inspections are only allowed when the mortgaged property is vacant") (citing "*HUD Servicing Guidelines*")

- Compl. ¶ 371 ("[U]nder HUD servicing guidelines, the mortgage must be in default, and the mortgagee is required to determine the Plaintiff's home was vacant/abandoned. . . .") (citing "*HUD Servicing Guidelines*")

5) **Plaintiffs attempt to ground their claims on Bank of America's 2008 acceptance of federal TARP funds.** *See, e.g.*:

   - Compl. ¶ 7 ("In late 2008 and early 2009, the United States Government provided a total of $45 billion dollars to BOA pursuant to the Troubled Asset Relief Program ('TARP').")

   - Compl. ¶ 11 ("BOA signed the Agreement in exchange for a commitment by the Federal Government to provide BOA hundreds of millions of taxpayer dollars for its promise and obligation to comprehensively provide HAMP screening for all homeowners serviced by BOA.")

6) **Plaintiffs attempt to ground their claims on the settlement of a federal *qui tam* lawsuit.** *See, e.g.*:

   - Compl. ¶ 31 ("In a lawsuit by the Federal Government against BOA in the Eastern District of New York, initiated by a whistleblower, BOA agreed to pay back $1 billion under the Federal False Claims Act.")

   - Compl. ¶¶ 64, 96, 126,159, 190, 215, 247, 279, 313, 344 (citing "*U.S. v. Bank of America NA et al.*, case number 1:11-cv-03270, (E.D.N.Y.)" as having some unspecified connection to Plaintiffs' claims that Bank of America made "false claims for incentive payments to the United State [*sic*] Department of Treasury")

All of these allegations implicate significant federal issues. Those issues cannot be adjudicated without reference to, and detailed analysis of, federal law and federal policy.

**A. Alleged Violations of HAMP Requirements Implicate Substantial—And Disputed—Federal Issues.**

Multiple courts have recognized federal-question jurisdiction based on identical

allegations of a defendant's failure to comply with the Treasury Department's HAMP requirements. As noted, *Williams* found the requirements for federal-question jurisdiction "easily met" notwithstanding that "plaintiff's claims are couched in terms of state law," because "they depend entirely on defendant's alleged violation of federal law. For example, the basis of plaintiff's breach of contract and negligence claims is that defendant violated several provisions of HAMP and failed to properly apply the HAMP guidelines. . . . Resolution of these claims will necessarily require the Court to determine plaintiff's rights under HAMP." 2012 WL 13014956, at *2 (citation omitted). Similarly, *Steltz v. Bank of America, N.A.*, 2015 U.S. Dist. LEXIS 85525 (D.N.J. July 1, 2015), denied a motion to remand because:

> Plaintiffs' claim for negligent misrepresentation implicates significant federal issues in an essentially identical manner. Plaintiffs allege that Defendant negligently misrepresented, among other things, that Defendant's "loan modification agreements . . . were in compliance with applicable laws and regulations." To determine whether such statements were, in fact, misrepresentations, the Court must determine whether Defendant complied with the obligations the federal government imposed. . . . For the reasons stated above, Defendant's compliance with these requirements is in actual dispute and constitutes a significant federal issue. The District Court may, therefore, exercise federal question subject matter jurisdiction over Plaintiffs' negligent misrepresentation claim.

2015 U.S. Dist. LEXIS 85525, at *14–15 (citation omitted).

Plaintiffs attempted to distinguish *Steltz* in their briefs, not by attempting to distinguish *Steltz* itself, but by attempting to distinguish some of the cases *cited* in *Steltz*. ECF No. 9 at 7. Specifically, they argued that "[t]he *Steltz* Court reviewed a series of cases involving claims where the Plaintiffs asserted breach of contract claims arguing that they were third party beneficiaries of the contract between banks and the federal government in the HAMP and TARP programs," and the courts found that "federal question jurisdiction existed because the Plaintiffs specifically brought a claim—breach of contract as a third party beneficiary—based upon [the] contract." *Id.* *Steltz* itself, however, did *not* involve any such a claim. The court recognized a federal question given many of the exact same claims Plaintiffs assert here—"common law

unjust enrichment," "intentional misrepresentation," and "negligent misrepresentation." *Steltz*, 2015 U.S. Dist. LEXIS 85525, at *13–15.

The Magistrate Judge recommendation relied on cases cited by Plaintiffs rejecting federal-question jurisdiction based on the lack of a federal cause of action, but this was flawed in two respects—first for failing to address cases like *Williams* and *Stelz* that reached the opposite conclusion, and second because the lack of a federal cause of action is exactly what *Grable* holds is "not dispositive." *Grable*, 545 U.S. at 318. Instead, the recommendation cited *Dean v. BAC Home Loans Servicing LP*, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012), for the proposition that "[t]he absence of a private right of action is 'quite nearly dispositive' on the issue of federal question jurisdiction." ECF No. 15 at 4. That view cannot be reconciled with Supreme Court precedent, which "treat[s] the absence of a federal private right of action as evidence relevant to, but not dispositive of," the federal-question inquiry. 545 U.S. at 318 (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986)). The analogy the Court drew was that a federal cause of action is not like a "federal door key," which is "always required" to enter, but like a "welcome mat," whose presence indicates a welcome but whose absence may indicate nothing at all. *Id.*

The Court proceeded to note that the lack of a federal cause of action is relevant when (i) it reflects "Congress's intended division of labor between state and federal courts," and where (ii) declining to grant a federal cause of action reflects a judgment to prevent "a tremendous number of cases" from being adjudicated in federal court. *Id.* at 318–19. But that is decidedly *not* the situation here. Most HAMP lawsuits (thousands) are *already* adjudicated in federal court, just like the Florida cases from which Plaintiffs' Complaint was copy-pasted, because they typically involve diversity claims against out-of-state lenders—or even deliberate attempts to manufacture

federal causes of action, as in *George v. Urban Settlement Services*, No. 13-1819 (D. Colo.), another complaint Plaintiffs copy-pasted allegations from and which sought to turn HAMP-related grievances into federal RICO claims. The only reason it is even necessary to address the federal-question aspect here is on account of Plaintiffs' unique effort to defeat diversity jurisdiction through their improper joinder of out-of-state Plaintiffs to sue Bank of America in its home state. The Court's disposition of the federal-question issue under these circumstances will not have the result of upsetting the traditional "division of labor between state and federal courts" or cause "a tremendous number of cases" alleging HAMP violations to migrate to federal court. *Grable*, *supra*. Indeed, HAMP doesn't even exist anymore, so the HAMP cases that flooded the federal dockets a few years ago are now barely a trickle (and likely to be, like the instant case, time-barred).

The Magistrate Judge's recommendation also relied on language cited by Plaintiffs that "there is no federal question jurisdiction over claims 'that merely reference HAMP guidelines and procedures.'" ECF No. 15 at 5 (quoting *Mosley v. Wells Fargo Bank, N.A.*, 802 F. Supp. 2d 695, 699 (E.D. Va. 2011)). Unlike *Mosley*, however, *this* case is *not* a case "that merely reference[s] HAMP guidelines." Indeed, Plaintiffs' suggestion that a "mere[] reference" is all they have done implies that their repeated claims of HAMP and HUD guideline violations are mere window dressing, inserted in the Complaint for their prejudicial value but not otherwise related to their claims. If these allegations are mere window dressing, they should be stricken. *See* FED. R. CIV. P. 12(f). But if one takes the Complaint at face value, then, as in *Williams*, Plaintiffs *do* allege direct violations of HAMP guidelines, Bank of America has directly challenged those allegations, and the outcome of their fraud claims necessarily depends on what those guidelines provided and whether Bank of America misrepresented them.

For example, Plaintiffs' primary fraud claim is a claim that Bank of America "omitted" to tell them "that only imminent default was required for HAMP eligibility." Compl. ¶¶ 40, 71, 133, 166, 197, 222, 254, 286, 320. As in *Steltz*, "[t]o determine whether such statements were, in fact, misrepresentations," the Court inevitably must consult and interpret the Treasury Department's guidelines for HAMP eligibility. 2015 U.S. Dist. LEXIS 85525, at *15.

Plaintiffs' next theory is that Bank of America defrauded them by placing "trial period payments . . . into an unapplied account." Compl. ¶¶ 52, 83, 112, 145, 178, 209, 266, 299, 332. As set forth in Bank of America's motion to dismiss, however, "this is exactly how the Treasury Department requires servicers to handle trial payments." *Torres v. Bank of Am., N.A.*, 218 U.S. Dist. LEXIS 12640, at *6 (citing MAKING HOME AFFORDABLE PROGRAM HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, v5.1 129 (May 26, 2016); U.S. Dep't of Treasury, HAMP Supplemental Directive (SD) 09-01, at 18). The Court cannot therefore adjudicate this claim of fraud without determining what, in fact, the Treasury Department required. The federal interest on this issue is actually multiple layers deep, because the Treasury Department's HAMP guidelines merely implement federal regulations concerning the disposition of mortgage payments more generally. Regulation Z requires mortgage servicers to hold payments for less than the full monthly payment due (which includes, but is not limited to, trial loan-modification payments) "in a trust account" and not apply them to the loan until they "aggregate a full monthly installment." 24 C.F.R. § 203.556(a)–(b). There is thus a significant federal interest in how Plaintiffs' claims of misrepresentation and violation of HAMP guidelines are adjudicated.

The Magistrate Judge's recommendation underestimated the significance of these disputes by citing *Bottom v. Bailey*, No. 12-0097, 2013 WL 431824, at *7 (W.D.N.C. Feb. 4, 2013), for the proposition that "even if Plaintiffs were to conclusively prove [a federal violation]

that would not dispose of the threshold question of whether such violation gives rise to a private cause of action under North Carolina law." ECF No. 15 at 6 (brackets in original). That much is true. But it is *equally* true that if Bank of America were to *dis*prove the alleged violations of federal law, then that *would* dispose of the threshold question of whether such alleged violations give right to a private cause of action under North Carolina law. Inasmuch as Plaintiffs' claims are based on "losses" alleged to be "a direct result of BOA's . . . avoiding the directives and requirements of HAMP," a showing that Bank of America did *not* avoid the directives and requirements of HAMP will naturally dispose of them. Compl. ¶ 412.

**B. Alleged Breaches of the Contract Between Bank of America and the Federal Government and an Alleged "Complex Scheme" to Defraud the Federal Government Implicate Significant Federal Issues.**

"Federal law controls the interpretation of a contract entered into pursuant to federal law and to which the United States is a party," including, specifically, the HAMP Servicer Participation Agreement. *Phipps v. Wells Fargo Bank, N.A.*, No. 10-2025, 2011 WL 302803, at *6 (E.D. Cal. Jan. 27, 2011); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09- 1985, 2010 WL 3212131, at *3 (S.D. Cal. Aug. 12, 2010) (same); *Hammonds v. Aurora Loan Serv. LLC*, No. 10-1025, 2010 WL 3859069, at *2 (C.D. Cal. Sept. 27, 2010) ("Federal law controls the interpretation of the HAMP contract [because] [w]hen a contract is entered into under federal law and one party is the United States, federal law applies."). The Magistrate Judge recommendation did not address the numerous alleged violations of the HAMP Servicer Participation Agreement in the Complaint or the significance of these allegations to the federal-question issue. Plaintiffs, for their part, acknowledged their repeated references to the federal contract, but argued that they were irrelevant because (i) "there is no allegation of a breach of any contract in the Complaint," and (ii) "Plaintiffs never once claim be [*sic*] a third-party beneficiary" to the contract. ECF No. 9 at 7. The first assertion is completely false; the second is

true but irrelevant.

As cited above, *far* from there being "no allegation of a breach of any contract in the Complaint" (*id.*), the Complaint is *replete* with allegations that Bank of America failed to "honor[] its contract with the Federal Government" (Compl. ¶ 16), failed to give Plaintiffs what "was required under the Agreement" (Compl. ¶¶ 49, 55, 80, 108, 142, 175, 206, 231, 263, 296, 329), failed to "follow" the Agreement (*id.* at ¶ 408), "avoid[ed] its responsibilities under the HAMP Agreement" (*id.* at ¶ 409), and "refus[ed] to follow . . . the HAMP Agreement" (*id.* at ¶ 410). These alleged failures are essential to Plaintiffs' theory of liability, and, as with the case with the Treasury Guidelines, the Court cannot assess the validity of Plaintiffs' allegations without determining what Bank of America's contractual obligations to the federal government were under federal law. *See, e.g., One & Ken Valley Housing Grp. v. Maine State Housing Auth.*, 2010 WL 4191488, at *9 (D. Me. Oct. 19, 2010) (finding "federal issues . . . embedded in state claims" because they "arise from a federal program and depend on contract language prescribed by the federal government in order to implement that program").

It is true that Plaintiffs make no claim to be a "third-party beneficiary" to the Agreement. ECF No. 9 at 7. But that merely raises the question of how the Agreement relates to their claims in the first place. If Plaintiffs are claiming some harm from a breach of the Agreement, then adjudicating Bank of America's obligations under the agreement is a "substantial" issue that is both "necessarily raised" and "actually disputed" in the case. *See* ECF No. 9 at 4 (citing *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013)). Otherwise, Plaintiffs appear to want to have it both ways—claiming to have been harmed by a breach of the Agreement for purposes of recovering damages, but *dis*claiming any right to enforce the Agreement for purposes of avoiding federal jurisdiction. Plaintiffs should not be permitted to avoid federal jurisdiction simply by disclaiming

the *label* of third-party-beneficiary status, while seeking to avail themselves of the benefits of that status regardless.

The same logic applies to Plaintiffs' reliance on a *qui tam* suit "under the Federal False Claims Act," a related settlement and federal consent decree, their allegations of a "complex scheme to defraud the Federal Government," and their references to federal TARP funds. Compl. ¶¶ 7, 11, 27, 31. Part of the alleged "complex scheme to defraud the Federal Government" (Compl. at ¶ 27) appears to involve "claims for incentive payments to the United State [*sic*] Department of Treasury." *Id.* at ¶ 64, 96, 126, 159, 190, 215, 247, 279, 313, 344. In its motion to dismiss, Bank of America showed that this claim was groundless and implausible based on the Treasury Department's guidelines, so its adjudication necessarily rests on federal policy and federal interests. *See* ECF No. 7 at 24.

The repeated allegations that Bank of America had duties to Plaintiffs arising from its acceptance of TARP funds in 2008 are similar, and have been cited by multiple courts in recognizing a federal question. For example, the court denying the remand motion in *Steltz* reasoned:

> Plaintiffs allege that their lawsuit arises, in part, from "Defendant's failure to perform their obligations required upon their acceptance of TARP funds" . . . To resolve whether Defendant was unjustly enriched through its receipt of federal funds, this Court must determine what obligations TARP and HAMP imposed upon Defendant, whether Defendant's rejection of Plaintiffs' loan modification applications was proper under federal guidelines, and how Defendant used the funds designated to help Plaintiffs modify their loans.

*Steltz*, 2015 U.S. Dist. LEXIS 85525, at *12–13; *see also, e.g.*, *Peralta*, 2014 U.S. Dist. LEXIS 56931, at *6 (denying motion to remand because, "[n]otably, Plaintiffs alleged that their action arises from various 'wrongful acts and/or omissions,' including 'Defendants' failure to perform their obligations required upon their acceptance of TARP funds'").

**C. Alleged Violations of HUD Guidelines Implicate Significant Federal Issues.**

Separately from their HAMP-related claims, Plaintiffs also accuse Bank of America of fraudulently charging them property-inspection fees—exclusively by reference to federal law. Their stated theory is that the "inspection fees are impermissible under . . . *Servicing Guidelines*" issued by the U.S. Department of Housing and Urban Development. Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337. They, in turn, accuse Bank of America of fraud by supposedly "omitt[ing]" to disclose the fact that the fees it was charging were "improper" under the HUD guidelines. *Id.* at ¶¶ 58, 90, 120, 153, 184, 241, 273, 307, 338. Again, however, the Magistrate Judge recommendation failed to consider the HUD-related allegations in reaching its conclusion that "[t]here is no dispute as to the meaning or application" of any federal guidelines—had it done so, it surely could not have reached that conclusion, because the dispute about the application of the HUD guidelines is squarely presented in Bank of America's motion to dismiss. ECF No. 7 at 22–23.

Just as the claim that Bank of America violated the Treasury Department's HAMP guidelines cannot be adjudicated without reference to the HAMP guidelines, the claim that Bank of America violated HUD's servicing guidelines cannot be adjudicated without reference to the HUD guidelines and HUD regulations on which those guidelines are based. *Compare, e.g.*, Compl. ¶ 371 (quoting HUD servicing guideline) *with* 24 C.F.R. § 203.377 (original regulatory text). That is sufficient to support federal-question jurisdiction. *See, e.g., Moore v. Ocwen Loan Servicing, LLC*, 2017 WL 8186863, at *1 n.2 (N.D. Ga. Sept. 21, 2017) (in claim alleging that servicer "wrongfully refused to consider [plaintiffs] for loan modification programs," recognizing federal-question jurisdiction even though "no federal claim" was brought because "Plaintiffs allege that Defendant was contractually obligated to follow certain [HUD]

procedures . . . and that Defendant breached these obligations. . . . Whether Plaintiffs' claim may be supported depends, therefore, on the Court's interpretation of the effect *vel non* of these federal regulations").

As set forth in Bank of America's motion to dismiss, Plaintiffs have no valid claim that the HUD guidelines were violated at all. Those guidelines do not even apply to their loans because HUD's guidelines only apply to loans insured by the Federal Housing Administration,. *See* ECF No. 7 at 22–23; 24 C.F.R. § 203.377, *supra* (inspection obligations applicable to "a mortgage insured under this part"). But the interpretation and application of these guidelines is plainly a federal matter, not a matter of state law. The state-law claim rises or falls with the claim that Bank of America violated the *federal* policy and *federal* regulatory requirements. *See generally Pinney v. Nokia, Inc.*, 402 F.3d 430, 449 (4th Cir. 2005) (substantial federal question where state claims "rise or fall on the resolution of a question of federal law").

**II. THE FEDERAL DISPUTES SATISFY THE *GUNN* TEST.**

Magistrate Judge Cayer's recommendation correctly invoked, but incorrectly applied, a legal standard spelled out in *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013), for determining whether federal jurisdiction lies over a state-law claim. The recommendation recognizes that "[f]ederal jurisdiction will exist over a state law claim that is":

> (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met. . . jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

ECF No. 15 at 4; *Gunn*, 133 S. Ct. at 1064. Each of these criteria is satisfied here.

**The federal issues are "necessarily raised" in the Complaint.** Plaintiffs have conceded this. *See* ECF No. 14 at 2 n.2 ("Plaintiffs do not dispute that issues of federal law are 'necessarily

raised.'"). Indeed, claims that Bank of America "avoid[ed] the directives and requirements of HAMP" (Compl. ¶ 412) cannot be adjudicated without determining what those requirements were. *See Williams*, 2012 WL 13014956, at *2. Claims that Bank of America "refus[ed] to follow the directives under the HAMP Agreement" "executed with the Federal Government" (Compl. ¶¶ 408, 410) cannot be adjudicated without determining what those directives required. Claims that Bank of America charged fees "impermissible under the *HUD Servicing Guidelines*" (Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337) cannot be adjudicated without determining whether the guidelines even apply and whether they actually prohibited the fees. *See Moore*, 2017 WL 8186863, at *1 n.2.

**These and other federal issues are "actually disputed."** It should hardly even be necessary to spell this out, but when a complaint relies on incendiary claims of a "purposeful scheme to deceive the Federal Government," *of course* those claims will be disputed. More specifically, there are many "actual[] dispute[s]" already raised in Bank of America's motion to dismiss and more such disputes will arise if the case somehow proceeds past the pleading stage. To cite an obvious one, Plaintiffs argue that inspection fees are "impermissible under the *HUD Servicing Guidelines*" (Compl. ¶¶ 57, 89, 119, 152, 183, 240, 272, 306, 337), while Bank of America argues that the *HUD Servicing Guidelines* do not even apply and that the fees aren't impermissible under those guidelines at all. ECF No. 7 at 22–23. Thus, Plaintiffs' statement in their reply brief that "Defendant fails to identify any disagreement amongst the parties on the content of HUD guidelines or regulations" (ECF No. 14 at 3–4) is extremely off-point—the "content" may not be disputed, but their *application* surely is.

The same applies to the various HAMP guidelines referenced in the Complaint. It is not true, as Plaintiffs argued, that "Defendant . . . fails to note any disagreement amongst the parties

about what the Treasury Department guidelines require." ECF No. 14 at 3. Plaintiffs accuse Bank of America of making "false claims for incentive payments to the United State [*sic*] Department of Treasury." Compl. ¶¶ 64, 96, 126, 159, 190, 215, 247, 279, 313, 344, 412. Bank of America showed in its motion to dismiss that Treasury's incentive-payment requirements preclude this claim. ECF No. 7 at 24. Plaintiffs challenge Bank of America's posting trial payments "in an unapplied account" and claim they "suffered damages" from this. Compl. ¶ 54, 86, 116, 149, 180, 212, 237, 269, 303, 334. Bank of America countered in its motion to dismiss that this treatment was *required by federal law*. ECF No. 13 at 6–7; ECF No. 7 at 5, 18. If Plaintiffs do not "dispute" this, then their claim to damages is frivolous.

And their attempt to evade such disputes by contending that "the only disagreement is about what BOA employees told Plaintiffs" (ECF No. 14 at 3) is false and misleading. Plaintiffs' challenge to "what BOA employees told Plaintiffs" is based on allegations that Bank of America "omitted" to disclose it was violating federal law, so of course this "disagreement" cannot be resolved without interpreting federal law. Compl. ¶¶ 58, 90, 120, 153, 184, 241, 273, 307, 338 (alleging that "BOA employees omitted the fact that the bank was conducting unnecessary and improper inspections"). And the alleged falsehood and materiality of Plaintiffs' allegations that Bank of America "omitted" to disclose that an imminent default could qualify them for HAMP (Compl. ¶¶ 40, 71, 133, 166, 197, 222, 254, 286, 320) cannot be assessed without determining whether Plaintiffs actually met Treasury's imminent-default standards (and what those standards mean).

**The federal issues are "substantial."** Federal issues can be substantial by being "important" in terms of federal interests generally and by being important to the case itself. *See Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 570 (6th Cir. 2007) (listing substantiality

factors, including "whether a decision on the federal question will resolve the case (i.e., the federal question is not merely incidental to the outcome)"); *Benjamin v. S.C. Elc. & Gas. Co.*, 2016 U.S. Dist. LEXIS 74439, at *20 (D.S.C. June 8, 2016) (citing *Mikulski*). The federal issues here are substantial in both respects. There is no question that at least some of the federal issues raised here are case-dispositive. (If, for example, Bank of America is right about the application of the HUD guidelines, then Plaintiffs lose on their inspection-fee claims.) And there is an obvious federal interest in claims alleging a "purposeful scheme to deceive the Federal Government" and "false claims for incentive payments to the United State [*sic*] Department of Treasury in the amount of $1,000.00 or $2,000.00 per loan, effectively using Plaintiff[s] as a pawn to defraud the Federal Government." Compl. ¶¶ 64, 96, 126, 159, 190, 215, 247, 279, 313, 344, 412. One would ordinarily regard the federal government's interest in not being defrauded as a substantial interest.

**The federal issues are "capable of resolution in federal court without disrupting the federal-state balance approved by Congress."** As discussed above, the federal courts have handled thousands of HAMP-related lawsuits predicated on federal claims (*e.g.*, *George*, *supra*) or simple diversity jurisdiction. The complaints the instant Complaint is *copied* from are all from actions proceeding (or dismissed) in federal court. *See* ECF No. 7 at 3–4.

What's more, Plaintiffs cite a Multi-District Litigation in the federal District of Massachusetts aggregating HAMP-related "cases from across the country" as their motivation for filing the instant lawsuit. Compl. ¶ 32. There was manifestly no disruption to the "federal-state balance" by having HAMP-related "cases from across the country" litigated in a federal Multi-District Litigation. To the contrary, if anything is likely to disrupt the "federal-state balance" here, it is the potential *remand*, which would have the effect of burdening North

Carolina's court system with Plaintiffs' own HAMP-related "cases from across the country." Plaintiffs' claims originate not only from North Carolina (Compl. ¶ 34) but from Wisconsin (*id.* at ¶ 160), Arizona (*id.* at ¶ 191), Michigan (*id.* at ¶ 248), Nevada (*id.* at ¶ 314), and, mainly, California (*id.* at ¶¶ 65, 97, 127, 280). North Carolina's interest in adjudicating these claims does not weigh heavily in the traditional "federal-state balance." Indeed, if remanded, Plaintiffs are likely to burden the Superior Court with the adjudication of multiple disputes about the interpretation of federal statutes and regulations that this Court is better equipped to handle. The litigation of HAMP claims in federal court has not "disrupt[ed] the federal-state balance" before, did not disrupt the federal-state balance in the MDL, and is not disrupting the federal-state balance when it comes to the hundred-plus predecessors of this case still festering in the Florida federal courts. It will not do so here, either.

## CONCLUSION

Plaintiffs, in drafting their Complaint, indisputably made alleged violations of federal requirements and directives the linchpin for all of their claims against Bank of America and all of their theories of liability. Their claims necessarily raise substantial—and hotly disputed—issues of federal law, which this Court is best-equipped to resolve. The factors identified in *Grable* and *Gunn* are all satisfied here. For these reasons and for those set forth in its Notice of Removal and prior briefing, Bank of America respectfully asks that the Court reject the Magistrate Judge recommendation and exercise its federal-question jurisdiction over this lawsuit.

Bank of America respectfully requests that the Court hear oral argument on this Objection.

Respectfully submitted this 30th day of July, 2018,

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**CERTIFICATE OF SERVICE**

I certify that I filed a true and correct copy of the foregoing document on the Court's CM/ECF system, which will cause a Notice of Electronic Filing to be sent to the following counsel:

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**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**
**Civil Action No. 18-cv-00288-MOC-DSC**

Chester Taylor III, et al,.

Plaintiffs

v.

Bank of America, N.A.,

Defendant

**PLAINTIFFS' REPLY TO DEFENDANT'S OBJECTION TO THE MAGISTRATE REPORT AND RECOMMENDATION**

Plaintiffs filed their Complaint on May 1, 2018, in Mecklenburg County Superior Court pleading state law causes of action as a result of Defendant's fraud, orchestrated under the guise of the Home Affordable Modification Program ("HAMP"). On June 1, 2018, Defendant removed the action to the United States District Court for the Western District of North Carolina alleging both federal question and diversity of citizenship jurisdiction. On June 25, 2018, Plaintiffs filed the Motion to Remand, and on July 9, 2018, Defendant filed its Opposition to Plaintiffs' Motion to Remand.

Magistrate Judge Cayer appropriately and thoroughly recommended remand to state court. ECF No. 15. As pointed out in Judge Cayer's recommendation, (1) "Plaintiffs' Complaint contains no federal claims", (2) "[HAMP] provides no private right of action", and (3) "[t]here is no dispute as to the meaning or application of any of HAMP's requirements." *See* Recommendation 5-6. Further, Judge Cayer's recommendation appropriately considered and determined that Plaintiffs'

claims do not fall into the special and small category required to confer federal question jurisdiction over state law claims. Notably, Defendant's objection to the recommendation is nothing more than a regurgitation of the same arguments addressed in the Defendant's Response to the Motion to Remand and in the Report and Recommendation. Accordingly, for the reasons set forth in the Motion to Remand and accompanying Brief, the Reply to Defendant's Opposition, and the additional reasons set forth herein, Plaintiffs respectfully request that the Court adopt Magistrate Judge Cayer's Report and Recommendation and grant Plaintiffs' Motion to Remand to the Superior Court of the County of Mecklenburg, North Carolina.

**Argument**

In its Objection, Defendant fails to present any new or novel arguments in support of their position that removal on the basis of federal question is appropriate. Each of Defendant's arguments were already addressed and rejected by Magistrate Judge Cayer in his Report and Recommendation.

1. **Plaintiffs' state law claims do not fall within the "special and small category," as defined by the Supreme Court.**

As detailed in the Magistrate Judge's Recommendation, the primary issue before the Court is whether Plaintiffs' state and common law causes of action "implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). As Judge Cayer's Report and Recommendation described in sufficient detail, Plaintiffs' claims do not implicate substantial federal issues, as defined by the Supreme Court. *See Merrill Dow v. Thompson*, 478 U.S. 804 (1986); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); *Gunn*, 568 U.S. at 258.

a. No Federal Issue is Actually Disputed.

As previously noted, Defendant fails to identify any actual *dispute* over the meaning of any federal law. The crux of this case is the application of law to disputed facts. As it did in its filings, Defendant again asserts that Plaintiffs' claims "cannot be adjudicated without determining" what the HAMP requirements were. *See* Obj. at 16. However, Plaintiffs' complaint does not raise any disputes as to the meaning of a particular statutory text. *See MHA LLC v. HealthFirst, Inc.*, 629 F. App'x 409, 414 (3d Cir. 2015) (remanding the case and finding that the parties failed to identify any dispute over the meaning of a particular statutory text and "any statutory interpretation required by [the] case is incidental to the application of [federal] law to disputed facts"). As noted in the Motion to Remand and subsequent briefing, Plaintiffs do not allege a private right of action pursuant to HAMP.

Further, Defendant again recycles its argument that it acted according to Treasury Department Guidelines in handling trial payments. *See* Objection at 15-16. The parties do not dispute the requirements regarding trial payments under the Treasury Department guidelines. The issue is that Defendant failed to follow these guidelines. *See Boyle*, 2012 WL 289881, at *3 (remanding the case to state court and finding that defendant, Wells Fargo, failed to "establish[] that the parties genuinely disagree on the meaning or requirements of [HAMP] Guidelines or Agreements, or a loan servicer's obligations under them"). Defendant also claims that the Court must "consult and interpret the Treasury Department's guidelines for HAMP eligibility" in order to determine whether statements regarding HAMP eligibility were, in fact, misrepresentations. *See* Obj. 10. Defendant, however, fails to note any disagreement amongst the parties about what the Treasury Department guidelines require. Again, the only disagreement is about what BOA employees told Plaintiffs. Defendant fails to identify any disagreement amongst the parties on the

content of HUD guidelines or regulations. Defendant has not "shown if or how its obligations as a loan servicer under these guidelines or agreements is 'actually disputed,'" as is required under *Grable*. *See Boyle*, 2012 WL 289881, at *3 (citing *Grable*, 545 U.S. at 314). Because no federal issues are actually disputed, federal question jurisdiction cannot be exercised in this case.

b. The Federal Issues Are Not Substantial.

Again, Defendant has not identified any disputed federal issues. As previously noted, courts consider "whether a decision on the federal question will resolve the case (i.e., the federal question is not merely incidental to the outcome)." *Sherr*, 180 F. Supp. 3d at 418 (citing *Mikulski*, 501 F.3d at 570). Assuming, *arguendo*, that the Court did need to make a determination of what was required under the HAMP guidelines, the Court would still need to determine if Defendant complied with those guidelines, and thus, no decision on a federal issue will resolve the case, indicating a lack of substantiality. *Id.* In other words, resolution of the HAMP guideline question would not be dispositive of any claim. Instead, the violation of the guideline would still merely serve as a backdrop for whether the defendant violated a state common law claim.

Moreover, the Magistrate Judge's Recommendation stated that:

> Federal courts applying this test have concluded that there is no substantial question of federal law to support jurisdiction over state law claims "merely because HAMP is an element of the dispute." Melton v. Suntrust Bank, 780 F. Supp. 2d 458, 460 (E.D. Va. 2011). Where HAMP provides the backdrop of a state law dispute, "federal law informs the factual background of a state law claim, but in no way interjects itself legally into the analysis of that state law claim." Dean v. BAC Home Loans Servicing, LP, No. 2:11-CV-785-MEF, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012) (granting motion to remand in case based on HAMP) (citing White v. Wells Fargo Home Mortg., No. 1:11-cv-408MHT, 2011 WL 3666613, at *2 (M.D. Ala. Aug. 22, 2011) (granting motion to remand).

*See* Magistrate's Recommendation 4.

An additional consideration relevant to the "substantial issue" inquiry includes whether Congress created a private right of action in the federal law at issue. *Merrell Dow Pharm. Inc. v.*

*Thompson*, 478 U.S. 804, 813 (1986). As noted in Magistrate Judge Cayer's Report and Recommendation, the lack of a private right of action is "quite nearly dispositive" on the issue of federal question jurisdiction. *Dean v. BAC Home Loans Servicing, LP*, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012) (citing *Merrell Dow Pharm. Inc.*, 478 U.S. at 813). Indeed "the congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow Pharm. Inc.*, 478 U.S. at 814. The fact there is no private right of action under HAMP leads to the conclusion that Congress did not intend claims based on violations of HAMP to confer federal jurisdiction. *See* Magistrate's Recommendation; *Bottom v. Bailey*, No. 1:12CV97, 2013 WL 431824, at *4 (W.D.N.C. Feb. 4, 2013) (internal citations omitted) (concerning Bank Secrecy Act, 31 U.S.C. §5311 et. seq., "Congress's determination not to provide a private cause of action under a federal statute is evidence of 'a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal question jurisdiction.'").

Defendant responds to the Magistrate's appropriate reliance on *Bailey* by claiming that it could dispose of the threshold state law question if it were to *dis*prove the alleged violations of federal law. Obj., at 11, emphasis *sic*. This is irrelevant and misleading. Even a cursory review of the Complaint shows it is grounded in claims such as Plaintiffs' reliance on misleading and fraudulent statements and the Defendant's refusal to process a customer's modification application in order to keep trial payments and take the Plaintiffs' homes through state law foreclosure processes. It is not clear how the HAMP backdrop is central to, much less dispositive of, such facts central to typical state common law claims.

Defendant's arguments also run afoul of *Merrell Dow*, where the Plaintiff alleged the federal misbranding of a pharmaceutical represented a rebuttable presumption of state law negligence. *Merrell Dow Pharm. Inc.*, 478 U.S. at 813. The Court noted that even if a federal statutory violation is an element of a state cause of action, the case still does not arise under the laws of the United States if there is no private federal cause of action. *Id.* At best for Defendants, that is what Plaintiffs claim here. Even if there is a violation of HAMP, a jury must still decide whether Defendant violated a state law cause of action.

A closer look at Defendant's reliance on *Grable, supra* (Obj., at 8–9) reveals the case as the prototypical extreme outlier for which removal may be appropriate even when Plaintiff pleads no federal cause of action. The federal tax question was "dispositive" as to resolution of the case (*id.*, at 319) (and not merely a non-dispositive backdrop or element of a state law cause of action, as in the case *sub judice*). The *Grable* Court also noted that it is the rare state law quiet title case that concerns a federal question. *Id.*, at 320. In turn, Defendant asserts a federal interest in "determining what, in fact, the Treasury Department required." Obj., at 10. Defendant cites no case to support its claim that such an interest, standing alone, turns a garden variety state law case into the rare case supporting federal question jurisdiction. The speculative nature of this claim is further bolstered by Defendant's own emphasis (obj., at 9) that HAMP is no longer in effect. Therefore, Defendant fails to satisfy its burden of demonstrating a "substantial" federal issue is implicated.

c. Remand Would Preserve the State-Federal Balance Intended By Congress.

According to *Grable*, the *Merrell Dow* Court "saw the missing cause of action . . . as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state [ ] action would have attracted a horde of original filings and removal cases raising other state

claims with embedded federal issues." *Id.* Put another way, if the mention of federal agency guidelines "without a federal cause of action could get a state claim into federal court, so could any other [case mentioning federal agency guidelines] without a federal cause of action. And that would [mean] a tremendous number of cases." *Id.* Applying the Supreme Court's guidance to the case before the Court on this Motion to Remand, it is clear that invoking federal question jurisdiction would disrupt the federal-state balance intended by Congress. Defendant's claim that cases like Plaintiffs are "barely a trickle" (Obj. at 9), is belied by the sheer volume of similar state law claims against Defendant, not to mention other banks, citing HAMP violations as a backdrop.

**2. Defendant reliance on *Williams* and *Steltz***

In its Objection, Defendant argues that Magistrate Judge Cayer's recommendation's reliance on cases cited by Plaintiffs was flawed (1) for failing to address *Williams* and *Steltz*—both cases surrounding a breach of contract claim, a claim not plead in the present action—and (2) "because the lack of a federal cause of action is exactly what *Grable* holds is 'not dispositive.'" *See* Obj. at 8; *see also Williams v. Wells Fargo Bank, N.A.*, 2012 WL 13014956 (N.D. Ga. Sept. 18, 2012); *see also Steltz v. Bank of America, N.A.*, 2015 U.S. Dist. LEXIS 85525 (D.N.J. July 1, 2015). Defendant's arguments were, again, regurgitations of arguments raised in its Reponses to the Motion to Remand.

First, there is no requirement that a Magistrate Judge address each case cited by the parties. Second, Magistrate Judge Cayer appropriately dismissed these cases in the recommendation as unpersuasive, nonbinding, and distinguishable cases about breach of contract claims. As detailed in Plaintiffs' prior briefing, the Northern District of Georgia provides minimal reasoning to support the denial of the motion to remand in *Williams*. *Williams*, 2012 WL at *2. Notably, *Williams* stands in stark contrast to Plaintiffs' complaint, which includes no third-party beneficiary claim and never

once alleges a breach of a contract with the federal government. *See Williams*, 2012 WL 1829629, No. 2012-CV-209911, Complaint at 54. (alleging specifically a "breach of [Wells Fargo's] contract with the United States Department of Treasury . . .").

Defendant also places heavy, yet misplaced, reliance on *Steltz*. 2015 U.S. Dist. LEXIS 85525. As Plaintiffs note in previous briefing already considered by Magistrate Judge Cayer, *Steltz* is based entirely on case law finding federal question jurisdiction in cases involving causes of action for breach of contract as a third-party beneficiary. *Id.; see also*, Motion at 7[1]. The fact those claims are not present in *Steltz* itself indicates a flaw in the court's reasoning and minimizes its precedential value. *Id.* To the extent *Steltz* is based on similar claims, Magistrate Judge Cayer appropriately rejected it as unpersuasive. Further, *Steltz* is outweighed by a plethora of additional, more squarely related federal case law. Defendant again ignores the overwhelming precedent finding in Plaintiffs' favor.

Defendant further argues that Magistrate Judge Cayer's recommendation "was flawed because the lack of a federal cause of action is exactly what *Grable* holds is not dispositive." *See* Obj. at 8. However, while these courts *considered* the lack of a federal cause of action, they did not rely solely on that factor. The court in *Mosley* also considered the lack of a private right of action under HAMP, stating that "[p]laintiff's right to relief for the state-law claims does not necessarily depend on resolution of a substantial question of federal law, particularly where federal law does not create a private right of action." *Mosley v. Wells Fargo Bank, N.A.*, 802 F. Supp. 2d 695, 699 (E.D. Va. 2011). Similarly, in granting the motion to remand, the court in *Asbury* found

[1] Along these lines, Defendant claims that Plaintiffs try to distinguish *Steltz* by attempting to distinguish *some* of the cases cited in *Steltz*. Obj., at 7 (emphasis added). This is misleading. In reality, *every* case the *Steltz* case deemed analogous *only* addressed whether the breach of contract cause of action gave rise to federal jurisdiction. Because the Complaint in *Steltz* did not include a breach of contract claim, its complete reliance on those cases is not supportable.

that "federal courts have determined that 'it is not necessary for the Court to interpret or apply HAMP in order to evaluate the merits of these common law claims.'" *Asbury v. Am.'s Servicing Co.*, 2011 WL 3555846, at *4 (E.D. Va. July 13, 2011) (citing *Forbes v. Wells Fargo Home Mortg.*, No. 4:10cv160, slip op. at 7 (E.D. Va. March 18, 2011)).

**Conclusion**

Defendant has failed to carry its burden of demonstrating that federal jurisdiction is proper, and as such, this case should be remanded to state court. Defendant has failed to demonstrate any federal law that is "actually disputed" and has failed to satisfy the substantiality requirement for federal jurisdiction over state law claims. The federal HAMP program provides a backdrop for this purely state and common law dispute, and without demonstrating that a federal issue is "actually disputed" and "substantial," Defendant cannot satisfy its burden. Therefore, for the reasons set forth herein and in Plaintiffs' Motion to Remand and subsequent briefing, Plaintiffs respectfully ask that the Court adopt Magistrate Judge Cayer's Report and Recommendation and remand this case to Mecklenburg County Superior Court.

Date: August 13, 2018

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**CERTIFICATE OF SERVICE**

I certify that I filed a true and correct copy of the foregoing document on the Court's CM/ECF system, which will cause a Notice of Electronic Filing to be sent to the following counsel:

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*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
DOCKET NO. 3:18-cv-00288-MOC-DSC

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| **CHESTER TAYLOR III, et al.,** | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| Vs. | ) | ORDER |
| | ) | |
| **BANK OF AMERICA, N.A.,** | ) | |
| | ) | |
| Defendant. | ) | |

**THIS MATTER** is before the Court on review of a Memorandum and Recommendation issued in this matter. In the Memorandum and Recommendation (#15), the magistrate judge advised the parties of the right to file objections within 14 days, all in accordance with 28 U.S.C. § 636(b)(1)(c). Objections have been filed within the time allowed.

## FINDINGS AND CONCLUSIONS

### I. Background

Plaintiffs filed their Complaint (#1-1) on May 1, 2018 in Mecklenburg County Superior Court. On June 1, 2018, defendant removed the action to the United States District Court for the Western District of North Carolina alleging both federal question and diversity of citizenship jurisdiction. On June 25, 2018, plaintiffs filed their Motion to Remand (#9) and on July 9, 2018, defendant filed its Opposition to Plaintiffs' Motion to Remand (#13). The Honorable David S. Cayer, United States Magistrate Judge, entered the Memorandum and Recommendation (#15) recommending that the Court grant plaintiffs' motion and that it remand this matter to Mecklenburg County Superior Court.

## II. Applicable Standard

The *Federal Magistrates Act of 1979*, as amended, provides that "a district court shall make a *de novo* determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Camby v. Davis, 718 F.2d 198, 200 (4th Cir.1983). However, "when objections to strictly legal issues are raised and no factual issues are challenged, *de novo* review of the record may be dispensed with." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir.1982). Similarly, *de novo* review is not required by the statute "when a party makes general or conclusory objections that do not direct the court to a specific error in the magistrate judge's proposed findings and recommendations." Id. Moreover, the statute does not on its face require any review at all of issues that are not the subject of an objection. Thomas v. Arn, 474 U.S. 140, 149 (1985); Camby, 718 F.2d at 200. Nonetheless, a district judge is responsible for the final determination and outcome of the case, and accordingly the Court has conducted a careful review of the magistrate judge's recommendation.

## III. Discussion

The Court has given careful consideration to each Objection and conducted a *de novo* review as warranted. Defendant has filed an "Objection to the Magistrate Report and Recommendation on Plaintiffs' Motion to Remand." (#16). Plaintiff has filed a "Reply to Defendant's Objection to the Magistrate Report and Recommendation." (#18).

First and foremost, defendant does not object to the Magistrate Judge's findings that "[p]laintiffs' Complaint contains no federal claims" and that "[t]he federal statute referenced in the Complaint provides no private right of action" to plaintiffs. (#15, p. 5). However, defendant argues that such findings do not control the jurisdictional question based on the fact that "a federal cause of action [is] a sufficient condition for federal-question jurisdiction" but not "a necessary

one." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005). Further, defendant argues that there are areas in which Plaintiffs' Complaint implicates "significant federal issues" and thus the absence of federal causes of action is irrelevant.

Even though a federal cause of action is not dispositive, it is nevertheless a relevant consideration in determining whether federal question jurisdiction exists. The Supreme Court, in Grable, held that federal courts may exercise jurisdiction over a narrow category of cases that arise under state law, but implicate significant issues of federal law, if the claims "necessarily raise a stated federal issue, actually disputed, and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power." Grable, 545 U.S. at 314. These types of state law claims compromise "a special and small category." Empire Healthchoice Assur. Inc. v. McVeigh, 547 U.S. 677, 699 (2006); see also Gunn v. Minton, 568 U.S. 251, 256-57 (2013). In Gunn, the Supreme Court articulated a four-part test to determine whether claims fall within this "special and small category." Federal jurisdiction will exist over a state law claim that is:

> (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met. . . jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Gunn, 568 U.S. at 258 (citing Grable, 545 U.S. at 313-14) (citations omitted). The Court will discuss each Gunn element in turn.

**A. Necessarily Raised**

Here, as defendant notes, plaintiffs' claims do in fact "necessarily rais[e]" a federal issue." Gunn, 568 U.S. at 258. (#14, p. 2) (plaintiffs state that they "do not dispute that issues of federal law are 'necessarily raised'"). As such, plaintiffs' claims meet the first element of the Gunn test.

**B. Actually Disputed**

The Court cannot find that here is a federal issue that is "actually disputed." Gunn, 568 U.S. at 258. Defendant argues that the claims are "actually disputed" because the plaintiffs' claims cannot be adjudicated without determining what the Home Affordable Modification Program ("HAMP") requirements and the Treasure Department Guidelines are. However, this is not the case because plaintiffs' Complaint does not raise any disputes as to the meaning of a particular statutory text. See MHA LLC v. HealthFirst, Inc., 629 F. App' x 409, 414 (3d Cir. 2015) (remanding the case and finding that the parties failed to identify any dispute over the meaning of a particular statutory text and "any statutory interpretation required by [the] case is incidental to the application of [federal] law to disputed facts"). Additionally, the parties do not dispute the requirements regarding trial payments under the Treasure Department Guidelines. Rather, the issue is whether defendant failed to follow the guidelines. Indeed, there is no dispute amongst the parties as to what the HAMP requirements or the Treasury Department Guidelines actually require. As such, there is no federal issue "actually disputed." Gunn, 568 U.S. at 258.

**C. Substantial**

Because the claims are not "actually disputed," this action does not fall under the narrow category of cases that arise under state law but implicate significant issues of federal law. Id. Thus, Gunn cannot be met as all four requirements must be met. However, in the interests of thoroughness, the Court will consider the last two Gunn elements.

Turning to the third element, there are no "substantial" federal issues arising from plaintiffs' claims. Id. Defendant argues the federal issues are "substantial," because some of the federal claims here are case-dispositive, such as the HAMP guidelines and the Treasury Department Guidelines. However, even assuming that the Court did need to make a determination

of what was required under the HAMP guidelines and the Treasury Department Guidelines, the Court would still need to determine whether defendant complied with those guidelines. Thus, no decision on a federal issue will resolve the case, indicating that the federal claim is not case-dispositive. Instead, HAMP guidelines serve as a backdrop for plaintiffs' claims, but there is not a resolution of a question of federal law that is case-dispositive. Melton v. Suntrust Bank, 780 F. Supp. 2d 458, 460 (E.D. Va. 2011) (explaining there is no substantial question of federal law to support jurisdiction over state law claims "merely because HAMP is an element of the dispute"); see also Mosley v. Wells Fargo Bank, N.A., 802 F. Supp. 2d 695, 699 (E.D. Va. 2011) (finding that there is no federal question jurisdiction over claims "that merely reference HAMP guidelines and procedures").

An additional consideration relevant to the "substantial" federal issue inquiry is whether Congress created a private right of action in the federal law at issue. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 813 (1986). The lack of a private right of action is "quite nearly dispositive" on the issue of federal question jurisdiction. Dean v. BAC Home Loans Servicing, LP, 2012 WL 353766, at *3 (M.D. Ala. Feb. 3, 2012) (citing Merrell Dow Pharm. Inc., 478 U.S. at 813) (stating that the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"). A "congressional determination that there should be no federal remedy for the violation of [a] federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction." Merrell Dow Pharm. Inc., 478 U.S. at 815. While defendant does not object to there being no private right of action included in HAMP, (#15, p. 5), this is still a relevant consideration to the "substantial" federal issue analysis. The fact that there is no private right of action under HAMP leads to the conclusion

that Congress did not intend claims based on violations of HAMP to confer federal jurisdiction. See Bottom v. Bailey, 2013 WL 431824, at *4 (W.D.N.C. Feb. 4, 2013). As such, this does not constitute a "substantial" federal issue. Gunn, 568 U.S. at 258.

**D. Capable of resolution in federal court and the federal-state balance**

The last Gunn element is whether "a federal forum may entertain the claims without disturbing any congressionally approved balance of federal and state power." Id. Defendant argues that if anything is likely to disrupt the federal-state balance here, it is the potential for remand, which would burden North Carolina's court system with plaintiffs' HAMP-related claims. According to Grable, the Merrel Dow Court "saw the missing cause of action. . . as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state [] action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." Id. at 318 (discussing Merrell Dow, 478 U.S. 804). In other words, if the mention of a federal agency guidelines "without a federal cause of action could get a state claim into federal court, so could any other [case mentioning federal agency guidelines] without a federal cause of action[, a]nd that would mean a tremendous number of cases." Id. Thus, invoking federal question jurisdiction in the present action would disrupt the federal-state balance intended by Congress. Additionally, the Court sees no reason why remand would burden North Carolina's court system because of plaintiffs' HAMP-related claims.

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As such, the four Gunn requirements are not met and federal question jurisdiction is thus improper, as plaintiffs' claims do not fall into that "special and small category." Gunn, 568 U.S. at 256-58; Empire Healthchoice Assur. Inc., 547 U.S. at 699; see also Grable, 545 U.S. at 313-14.

## IV. Conclusion

As plaintiffs' claims do not qualify for the "special and small category" of federal question jurisdiction, the Court finds that this matter may not be heard here. Id. The Court also notes that, in matters where there are doubts over whether removal is appropriate, any such doubts must be resolved in favor of remand. Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994) (explaining that "[b]ecause removal jurisdiction raises significant federalism concerns, [courts] must strictly construe removal jurisdiction. . . [and] if federal jurisdiction is doubtful, a remand is necessary") (citations omitted). As such, defendant's objections that the magistrate judge wrongly recommended remand are overruled.

After such careful review, the Court determines that the recommendation of the magistrate judge is fully consistent with and supported by current law. Further, the factual background and recitation of issues is supported by the applicable pleadings. Based on such determinations, the Court will fully affirm the Memorandum and Recommendation and grant relief in accordance therewith.

## ORDER

**IT IS, THEREFORE, ORDERED** that the Memorandum and Recommendation (#15) is **AFFIRMED,** plaintiffs' Motion to Remand (#9) is **GRANTED,** and this action is hereby **REMANDED** to the North Carolina General Court of Justice, for Mecklenburg County, Superior Court Division, for further proceedings.

Signed: August 29, 2018

Max O. Cogburn Jr
United States District Judge

# United States District Court
# Western District of North Carolina
# Charlotte Division

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| Chester Taylor III, et al | ) | JUDGMENT IN CASE |
| | ) | |
| Plaintiff(s), | ) | 3:18-cv-00288-MOC-DSC |
| | ) | |
| vs. | ) | |
| | ) | |
| Bank of America, N.A., | ) | |
| Defendant(s). | ) | |

DECISION BY COURT. This action having come before the Court and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's August 29, 2018 Order.

August 29, 2018

Frank G. Johns, Clerk
United States District Court

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing Final Rule 11(c) Supplement to the Printed Record on Appeal upon all other parties to this cause as indicated below by mailing to the opposing party's counsel by depositing said document, enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the USPO for mailing via first class mail and electronic mail:

Date: 2/28/2020

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