

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS**

KAREN MICHELE SALA MICHAELS,

Plaintiff,

v.

WELLS FARGO HOME MORTGAGE,
a division of WELLS FARGO BANK, N.A.,

Defendant

Civil Action No. 3:10-cv-11471-MAP

PLAINTIFF'S MEMORANDUM IN SUPPORT
OF
MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND
TO CONTINUE THE HEARING ON THE PLAINTIFF'S MOTION TO DISMISS
REQUEST FOR ORAL ARGUMENT

The plaintiff, Karen Michele Sala Michaels, pursuant to the Order of this Court, dated November 24, 2010, and Federal Rule of Civil Procedure 7(b), hereby request that this Court issue an order (1) compelling an accurate and complete production of documents by the defendant, Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. and (2) postponing the hearing on the plaintiff's motion to dismiss, presently scheduled to be argued on Friday, January 21, 2011, at 2:30 PM, to a later date that would allow counsel to comply with the advice of this Court to "work with vigor and resourcefulness to frame an arrangement that will, if at all possible, permit Plaintiff and her daughter to continue to live in her house." In that Order, of November 24, 2010, this Court wrote:

At the conclusion of the hearing, the court advised counsel to work carefully together to insure an accurate and complete exchange of

documents on both sides. In the event that either side is concerned about the completeness of this discovery, an appropriate motion may be filed.

Because the defendant, Wells Fargo Home Mortgage, has refused to produce any documents whatsoever, the plaintiff has filed a motion to compel the production of those documents.

In addition, because there has not yet been an exchange of documents and consequently there has not yet been an opportunity for counsel to try “to frame an arrangement that will, if at all possible, permit Plaintiff and her daughter to continue to live in her house,” the plaintiff requests that this Court postpone the hearing on the plaintiff’s motion to dismiss, presently scheduled to be argued on Friday, January 21, 2011, to a later date that would allow counsel to comply with the advice of this Court.

In support of her motion, the plaintiff submits this memorandum of law and the affidavit of her attorney, and she relies on the pleadings, affidavits, and exhibits in the record before this Court.

Plaintiff’s Summary of Facts

The plaintiff contends that following financial setbacks affecting both her former husband and herself, she applied to her mortgage lender, Wells Fargo Home Mortgage, for a loan modification. In November, 2009, Defendant, Wells Fargo Home Mortgage, offered plaintiff a temporary loan modification plan. (Michaels Affidavit in Support of Motion for Preliminary Injunction [hereinafter “Michaels Affidavit”] ¶ 15 & Ex. A) Ms. Michaels has fulfilled all of the terms of the offer, including making every one of the modified payments in full and on time. (Michaels Affidavit ¶¶ 18, 32-35 & 37) Ms. Michaels has provided to Wells Fargo Home Mortgage all requested financial information and documentation numerous times. (Michaels Affidavit ¶¶ 9, 11, 14, 18-19

& 23: Morris Affidavit ¶ 14 & Ex. I) Despite unqualified acceptance and full compliance by Ms. Michaels with the plan offered by Wells Fargo Home Mortgage, the defendant still refuses to place her mortgage in permanent modification and persists in its efforts to foreclose on her home mortgage. (Michaels Affidavit ¶ 38)

It seems beyond dispute that Wells Fargo Home Mortgage failed to include Ms. Michaels' self-employment income in its calculation of her gross income. (Morris Affidavit in Support of Motion for Preliminary Injunction ¶ 6 & Ex. H, page 2 of 4; Michaels Affidavit ¶¶ 19-21) It is an error that reduces Ms. Michaels' perceived gross income to a level that will not support a loan modification. This miscalculation has been acknowledged by Wells Fargo Home Mortgage in an e-mail message from one of its attorneys:

My contact at Wells Fargo has . . . reviewed his notes and has confirmed that the issue appears to be that the self employment income was not factored into your client's gross income for the purposes of HAMP calculations. (Morris Affidavit in Support of Motion for Preliminary Injunction ¶ 6 & Ex. H, page 2 of 4)

At a hearing before this Court on November 19, 2010, counsel had the benefit of the Court's advice delivered from the bench. On November 24, 2010, this Court issued an Order in which it included that same advice to counsel. In an effort to comply with this Court's Order and heed its written advice, on December 2, 2010, the plaintiff sent to Attorney Bennett copies of "financial records for the period from approximately the middle of August through the third week in November." (Morris Affidavit in Support of Motion to Compel Production of Documents ¶¶ 2 – 3 & Ex. K) Those financial papers supplemented the documents that were sent to Attorney Patterson on October 19, 2010. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 3 & Ex. K) On December 7, 2010, plaintiff's counsel telephoned Attorney Bennett to ascertain if

she had received the photocopies sent the week before and if the defendant Wells Fargo Home Mortgage required any further information. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 4)

On December 9, 2010, plaintiff's counsel sent a letter to Attorney Bennett in which he requested four sets of documents:

1. All documents showing the components, elements, and calculations used to determine the Trial Period Plan offered by Wells Fargo Home Mortgage to Karen M. S. Michaels on November 20, 2009.
2. All documents showing the components, elements, and calculations used to determine, in May, June or July, 2010, that Karen M. S. Michaels was not able to continue to make the temporary payment plan modified loan payments to Wells Fargo Home Mortgage.
3. All correspondence, including all internal communications, concerning the Wells Fargo Home Mortgage loan (loan number [REDACTED]) during the period from June 1, 2010 until the present.
4. All correspondence, including all internal communications, leading to the e-mail message from Attorney Scott C. Owens stating: "My contact at Wells Fargo . . . has also reviewed his notes and has confirmed that the issue appears to be that the self employment income was not factored into your client's gross income for the purposes of HAMP calculations."

(Morris Affidavit in Support of Motion to Compel Production of Documents ¶¶ 5 – 6 & Ex. L).

In response, on December 10, 2010, Wells Fargo Home Mortgage's counsel wrote a letter to plaintiff's counsel. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M). Instead of agreeing to provide documents to the plaintiff, Wells Fargo Home Mortgage expressed for the first time, "there is currently no HAMP application pending for [the plaintiff]." (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M). Based on the assertion that Wells Fargo Home Mortgage had unilaterally canceled the plaintiff's application for a permanent mortgage loan modification, the letter went on to make a contingent offer:

Accordingly, if [the plaintiff] still wishes to be considered for a HAMP modification, she must complete the enclosed HAMP application and kindly provide the following documents to me within fourteen (14) days from December 13th.

(Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M).

The letter identified (1) “Request for Modification (RMA) and Affidavit (sic),” (2) a “signed and dated copy of the IRS form 4506T,” and (3) “[d]ocumentation to verify *all* of the Plaintiff’s income” (emphasis in the original). Under the category requesting verification of “*all* of Plaintiff’s income,” there were five subcategories most of which had two sub-subcategories. Included with that letter was a Home Affordable Modification Plan Cover Sheet listing five categories of specific documents as well as “Other (Please Describe).” As well, there were a form Request for Modification and Affidavit (RMF) and an IRS Form 4506T-EZ (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M).

Plaintiff’s counsel, responding to that letter, wrote to Attorney Bennett on December 15. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 8 & Ex. N). In that letter, plaintiff’s counsel explained that before he had received Ms. Bennett’s letter of December 10, no attorney for Wells Fargo Home Mortgage had informed either him or the Court that “there is currently no HAMP application pending for [the plaintiff].” (See Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 8 & Ex. N) Moreover, plaintiff’s counsel explained that it has been the plaintiff’s consistent position that she had submitted a proper, complete mortgage loan modification application under the HAMP guidelines and that she had provided Wells Fargo Home Mortgage with all of the documents required or

requested by the defendant. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 8 & Ex. N).

Because Wells Fargo Home Mortgage had, through Attorney Bennett's letter of December 10, asserted new grounds for its denial of the plaintiff's application for a permanent mortgage loan modification, and because the defendant had refused to heed the Court's advice to exchange documents, plaintiff's counsel asked Ms. Bennett to confer with the defendant to see if it would reconsider its position. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 8 & Ex. N).

Subsequently, plaintiff's counsel called Attorney Bennett on December 20. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶¶ 9 – 11) He spoke with Attorney Patterson, Attorney Bennett, and Attorney Clendenen on December 23. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶¶ 13 – 16) On December 28, plaintiff's counsel called Attorney Patterson. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶¶ 17 – 18). All of those telephone discussions were for the purpose of resolving or narrowing the issues between the parties. To date, Wells Fargo Home Mortgage has not changed its position and still refuses to provide any documents to the plaintiff. Today, it confirmed again its refusal. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 19 & Ex. P).

Documents That Plaintiff Requested Are Focused on and Relevant to the Issue

On December 9, 2010, plaintiff's counsel wrote to counsel for Wells Fargo Home Mortgage and requested, pursuant to the advice of this Court expressed in the Order of

November 24, 2010, four categories of documents. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 6 & Ex. L).

The first request is:

1. All documents showing the components, elements, and calculations used to determine the Trial Period Plan offered by Wells Fargo Home Mortgage to Karen M. S. Michaels on November 20, 2009.

That request is aimed at ascertaining how Wells Fargo Home Mortgage determined that it would offer plaintiff a temporary payment plan, that is, a temporary mortgage loan modification. It seeks to ascertain what documents or information that Wells Fargo Home Mortgage used in calculating the plaintiff's gross income and what it determined would be an appropriate modified monthly mortgage payment. It was the amount that Wells Fargo Home Mortgage set in November, 2009, and it is the amount that Ms. Michaels has paid each month beginning with the payment for January, 2010.

The second request is:

2. All documents showing the components, elements, and calculations used to determine, in May, June or July, 2010, that Karen M. S. Michaels was not able to continue to make the temporary payment plan modified loan payments to Wells Fargo Home Mortgage.

The point of this request is to learn how and why Wells Fargo Home Mortgage came to the conclusion that Ms. Michaels was not eligible for a permanent mortgage loan modification. The requests seek the information and calculations employed by Wells Fargo Home Mortgage to terminate the plaintiff's modified payment plan and proceed to foreclose on her mortgage.

The third request is:

3. All correspondence, including all internal communications, concerning the Wells Fargo Home Mortgage loan (loan number [REDACTED]) during the period from June 1, 2010 until the present.

Through this request, plaintiff's counsel is seeking to learn what internal procedures Wells Fargo Home Mortgage employed and what was its rationale in cancelling the modification process and seek to foreclose on the plaintiff's mortgage. The request is also aimed at determining what information and documentation Wells Fargo Home Mortgage received from Ms. Michaels and how that information and documentation was insufficient to warrant a permanent loan modification.

The fourth request is:

4. All correspondence, including all internal communications, leading to the e-mail message from Attorney Scott C. Owens stating: "My contact at Wells Fargo . . . has also reviewed his notes and has confirmed that the issue appears to be that the self employment income was not factored into your client's gross income for the purposes of HAMP calculations."

At or about the time that Wells Fargo Home Mortgage removed this action from the Massachusetts Superior Court, it seems to have determined that it had miscalculated the plaintiff's gross income. This request is focused on learning who determined that error, how it was determined, and what Wells Fargo Home Mortgage did with that determination.

All four of the categories of documents are narrowly focused. Each is aimed directly at issues that pertain to Ms. Michaels' application for a permanent mortgage loan modification and the documents, information, and calculations that are material to that issue.

Defendant's Demand and Refusal Are Arbitrary

On November 24, 2010, this Court wrote directly and plainly:

At the conclusion of the hearing, the court advised counsel to work carefully together to insure an accurate and complete exchange of documents on both sides. In the event that either side is concerned about the completeness of this discovery, an appropriate motion may be filed.

Wells Fargo Home Mortgage has refused absolutely to produce any documents.

Therefore, its “exchange of documents” is entirely incomplete. Because of its refusal to abide by this Court’s advice, this day the plaintiff has filed a motion to compel the “exchange” of documents by the defendant, and this memorandum is in support of that motion.

1. Arbitrarily Refusing to Provide Documents in Exchange for Plaintiff’s Documents

By refusing to produce any documents to the plaintiff, Wells Fargo Home Mortgage has unilaterally and arbitrarily reneged on its representation to this Court. On November 19, at the conclusion of a hearing, counsel for Wells Fargo Home Mortgage agreed to abide by this Court’s advice for the parties to exchange documents and to work with one another in order to seek a resolution to dispute between them. At no time during that hearing did counsel for Wells Fargo Home Mortgage state that the defendant would not produce any documents to the plaintiff. Not until December 10, 2010, when its counsel wrote to plaintiff’s counsel (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M), did Wells Fargo Home Mortgage express its decision to ignore this Court’s advice and refuse to produce any documents. Today, Wells Fargo Home Mortgage stated that “it would be a waste of time and money and not in compliance with the Court’s direction to spend time gathering documents”

(Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 19 & Ex. P).

2. Arbitrarily Disregarding in Its Files and Requiring New HAMP Application

Arbitrarily, Wells Fargo Home Mortgage has also decided that it would not consider any of the financial information and documentation that Ms. Michaels had submitted over the previous eighteen months. Instead, Wells Fargo Home Mortgage spontaneously set as its condition for considering Ms. Michaels for a mortgage loan modification that “she must complete the enclosed HAMP application and kindly provide the following documents within fourteen (14) days from December 13th” (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M). Wells Fargo Home Mortgage, on the second page of its attorney’s letter listed five subcategories of financial documentation, most of which had two sub-subcategories. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M) Without any valid reason, Wells Fargo Home Mortgage declared that the financial documentation that the plaintiff submitted as late as December 2, 2010, were not “up-to-date financials.”

Moreover, in that letter of December 10, 2010, Wells Fargo Home Mortgage asserted “there is currently no HAMP application pending for [the plaintiff].” Counsel for Wells Fargo Home Mortgage had not informed this Court of that contention at the hearing on November 19. Defendant’s counsel had not explained that “fact” to plaintiff’s counsel when, on October 19, 2010, he produced more of plaintiff’s financial documents on October 19, 2010. (See Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 2 & Ex. K. “These papers supplement the copies that I sent

to Mr. Patterson on October 19.”) Wells Fargo Home Mortgage’s attorneys did not assert that Ms. Michaels no longer had a HAMP application pending when plaintiff’s counsel forwarded her most recent financial documents to defendant’s counsel on December 2. (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 2 & Ex. K) It was not until plaintiff’s counsel requested in writing the production of four categories of documents that Wells Fargo Home Mortgage took the position that it had canceled the plaintiff’s application for mortgage loan modification.

Wells Fargo Home Mortgage did not make any of these points to this Court at the hearing on November 19. The defendant did not say that it would no longer consider Ms. Michaels’ original application for a mortgage loan modification and that she would have to submit a new Request for Modification and Affidavit (RMA). Wells Fargo Home Mortgage did not even suggest to this Court on November 19 that all of the documentation that Ms. Michaels had submitted to it before that date was “stale.” On December 7, defendant’s counsel did not inform Ms. Michaels’ attorney that Wells Fargo Home Mortgage considered the financial documentation that was sent on December 2 to be “stale.”

3. Arbitrarily Setting Standards for Document Submission and Time for Review

Implicit in this Court’s advice to counsel was the condition that both sides act expeditiously. Eight calendar days after this Court’s Order, that is, on December 2, the plaintiff provided her most recent financial documentation to the defendant. Wells Fargo Home Mortgage’s response six days later was not only to reject unequivocally those documents and all previously submitted documents, but also to impose a set of standards

and deadlines that are contrary to the guidelines which govern its contract to service applications for mortgage loan modifications, the HAMP guidelines.

In the letter of December 10, Wells Fargo Home Mortgage arbitrarily established a rule: “under HAMP, this [financial] information cannot be submitted in a piecemeal fashion.” (Morris Affidavit in Support of Motion to Compel Production of Documents ¶¶ 2 & Ex. K) Plaintiff denies that she submitted her information in a “piecemeal fashion.” She completed her HAMP application and submitted all of the required supporting documentation. Wells Fargo Home Mortgage, based upon that application and those documents offered her a Temporary Payment Plan, which she accepted. She complied with her side of the bargain by making all required payments in full and on time as well as providing updated documentation whenever Wells Fargo Home Mortgage requested it.

In any event, defense counsel is incorrect in asserting that “under HAMP, this [financial] information cannot be submitted in a piecemeal fashion.” To the contrary, the Making Home Affordable Program Handbook (Version 3.0, as of December 2, 2010)¹, explains:

¹ Within the Making Home Affordable Program, the Obama Administration has established several sub-programs. Among them is the Home Affordable Modification Program (HAMP). The administration, through the Treasury Department, has issued uniform guidance for loan modifications across the industry. The most recent Handbook, Version 3.0, which will be cited as “Handbook” can be found at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf. Local citations to specific guidance within that Handbook is to the section and the page. Earlier Handbooks express the same guidance. Version 2.0 (as of September 22, 2010), can be found at: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_20.pdf The electronic citation for Version 1.0, which was issued on August 20, 2010, is: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook.pdf

If the documentation is incomplete or insufficient for use in underwriting, the servicer must send the borrower an Incomplete Information Notice in accordance with the guidance set forth in Section 2.3.3.

Handbook, Section 4.6, page 58.

Without question, the HAMP guidelines not only contemplate incomplete or insufficient documentation, but they also require that the borrower be notified of such deficiency. Section 2.3.3 instructs:

If the servicer receives an incomplete Initial Package or needs additional documentation to verify the borrower's eligibility and income, the servicer must send the borrower an Incomplete Information Notice that lists the additional documentation that the servicer requires to verify the borrower's eligibility. The Incomplete Information Notice must include a specific date by which the documentation must be received, which must be no less than 30 calendar days from the date of the notice.

Handbook, Section 2.3.3, page 51.

In addition to disregarding the HAMP Guidelines' allowance for "piecemeal" submission of supporting documentation, Wells Fargo Home Mortgage cut the time within which the guidelines permit the homeowner to supplement an earlier document submission from 30 days to 14. In the same spirit, Wells Fargo Home Mortgage allowed itself 45 days to consider Ms. Michaels' new HAMP application and "up-to-date income verification documentation." Forty-five days after December 27, would extend the date for Wells Fargo Home Mortgage to make a decision well beyond the date when its motion to dismiss will be argued to this Court, January 21, 2011.

Each element of Wells Fargo Home Mortgage's position is a rebuke of this Court's advice to counsel. Every condition that Wells Fargo Home Mortgage has imposed, through the letter of December 10, 2010, is a bold attempt to recast the representations that its counsel made to this Court on November 19. Altogether, the position that Wells Fargo Home Mortgage has taken in response to this Court's Order and

to the plaintiff's production of current financial information is nothing less than recalcitrance and an attempt to delay matters, hoping that its motion to dismiss will be heard and allowed.

CONCLUSION

Through her complaint, the plaintiff seeks nothing more than to save her home and to repay her mortgage loan through modified monthly payments. She is asking for no more than an accurate and fair computation of her income and an application of that income to the HAMP Guidelines. Wells Fargo Home Mortgage has done nothing but place impediments in the plaintiff's path, miscalculate the financial data that she provided to it, and avoid every attempt to have its records and its calculations examined openly and objectively. When the Massachusetts Superior Court ordered (1) a halt to the mortgage foreclosure auction and (2) a negotiated resolution to the case, Wells Fargo Home Mortgage removed the action to this Court and filed a motion to dismiss. It then scheduled another foreclosure auction. When this Court order a halt to that auction and advised counsel how to proceed, Wells Fargo Home Mortgage rejected that advice entirely and unilaterally imposed its own set of "next steps to be taken." (Morris Affidavit in Support of Motion to Compel Production of Documents ¶ 7 & Ex. M) None of those steps is aimed at heeding this Court's advice to "work with vigor and resourcefulness to frame an arrangement that will, if at all possible, permit Plaintiff and her daughter to continue to live in her house."

WHEREFORE, plaintiff respectfully requests that this Court enter an order (1) compelling an accurate and complete production of documents by the defendant, Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A., and (2) postponing the

hearing on the plaintiff's motion to dismiss, presently scheduled to be argued on Friday, January 21, 2011, to a later date that would allow counsel to comply with the advice of this Court.

Respectfully submitted
KAREN MICHELE SALA MICHAELS,
Plaintiff,
By her attorney,

/s/ Francis K. Morris
Francis K. Morris (BBO# 355660)
fmorris@wmls.org
Western Massachusetts Legal Services
Suite 400
One Monarch Place
Springfield, Massachusetts 01144
413-781-7814

CERTIFICATE PURSUANT TO LOCAL RULE 7.1(A)(2)

I, Francis K. Morris, hereby certify that, in an effort to resolve or narrow the issue, particularly to have the defendant heed the advice of this Court to make an accurate and complete exchange of documents, on Monday, December 20, I called and spoke with Attorney Heather Bennett, and on Thursday, December 23, I called and spoke with Attorney Jeffrey Patterson, Attorney Heather Bennett, and Attorney Patrick Clendenen, and on Tuesday, December 28, I called and spoke with Attorney Jeffrey Patterson. However, the result of those efforts was that Wells Fargo Home Mortgage refuses to produce any documents to the plaintiff.

January 7, 2011

/s/ Francis K. Morris

CERTIFICATE OF SERVICE

I, Francis K. Morris, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and papers copies will be sent to those indicated as non-registered participants on this date.

January 7, 2011

/s/ Francis K. Morris