UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Nichole Williams,

Johnson Sendolo,

Carey Koppenberg,

Carrie Strohmayer,

On behalf of themselves and all others similarly situated

Plaintiffs.

v.

Timothy F. Geithner, in his official capacity as Secretary of the U.S. Department of the Treasury,

U.S. Department of the Treasury,

The Federal Housing Finance Agency, as conservator for the Federal National Mortgage Association, d/b/a Fannie Mae and the Federal Home Loan Mortgage Corporation, d/b/a Freddie Mac,

Federal National Mortgage Association, d/b/a Fannie Mae,

Federal Home Loan Mortgage Corporation, d/b/a Freddie Mac,

Ocwen Loan Servicing, LLC,

GMAC Mortgage, f/d/b/a Homecomings Financial,

U.S. Bank,

Defendants.

DEFENDANTS SECRETARY TIMOTHY F. GEITHNER'S AND U.S. DEPARTMENT OF THE TREASURY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Case No: 09-CV-1959 ADM JJG

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INTRODUCTION

On February 18, 2009, acting under the authority of the Emergency Economic Stabilization Act ("EESA") and in order to curb the mounting number of home foreclosures in the United States, President Obama and Secretary of the Treasury Geithner announced the formation of the Making Home Affordable Program that would create incentives to encourage mortgage lenders to work with at-risk homeowners to provide loan modifications. Two weeks later, the Department of the Treasury (hereafter "Treasury" or "Treasury Department") issued guidelines for the Home Affordable Mortgage Program ("HAMP"), a comprehensive $75 billion program whose goal is to lower mortgage payments for at-risk borrowers, support loan modifications aimed at providing sustainable, affordable mortgage payments for up four million borrowers, and provide incentives to investor/owners of loans, loan servicers, and homeowners to participate in the program.

Plaintiffs are four Minnesota homeowners, two whose homes have been sold at sheriffs' sales and two whose homes are in pre-foreclosure. Plaintiffs claim to have been eligible for, but failed to receive, HAMP loan modifications, and have filed this class action lawsuit against the Secretary of the Treasury, the Federal National Mortgage Agency ("Fannie Mae"), the Federal National Home Loan Mortgage Corporation ("Freddie Mac"), the Federal Housing Finance Agency, and three loan servicers, based on a theory of a protected property interest in loan modifications. They allege that the Secretary has violated procedural due process, and they seek to enjoin all foreclosures in the State of Minnesota — even as to loans of servicers who are not named defendants in this action, and even for borrowers who do not meet the initial eligibility requirements or who have failed to seek modifications or to provide the necessary information to qualify for loan modifications — until the Secretary issues guidance or regulations requiring servicers to provide written decisions setting forth in detail the reasons for denial and requiring some type of appeal. Plaintiffs seek a preliminary injunction providing them with all the relief they seek at the outset of the litigation. However, as shown below, Plaintiffs cannot satisfy the requirements for obtaining the extraordinary relief they seek.

As a threshold matter, plaintiffs cannot show the requisite likelihood of success on the merits. Their attempt to stop all foreclosures in the State is based on the premise that HAMP promises foreclosure prevention and a protected property right if they meet the initial eligibility requirement for modification; yet, Plaintiffs cannot point to any language in the authorizing statute or the HAMP guidance mandating that the plaintiffs (and every at-risk homeowner in Minnesota and elsewhere) receive a loan modification. Indeed, President Obama expressly noted in his February 18 address that HAMP would not save every home. At most, plaintiffs cite to Treasury guidance that describes an analytic process which a participating servicer is supposed to undertake to determine if an eligible borrower is qualified, and an evaluation process for potential modifications, both of which accord some discretion to the participating servicers and neither of which contains the indicia of entitlement that Plaintiffs claim. Further, even eligible borrowers can claim no right to modification if they fail to provide the information necessary for the servicers to undertake the analysis and evaluation processes, or if the investors who own the loans have refused to allow modification. Thus, nowhere do Plaintiffs specifically articulate a class of persons — including themselves — who are actually *entitled* to a specific modification or a specific type of mortgage.

Even if Plaintiffs could show that HAMP creates a protected property interest in modifications (which they cannot), they could not show that the process accorded them by the Treasury Department is constitutionally insufficient. Plaintiffs fail to credit the many steps that the Treasury Department — with Fannie Mae acting as its fiscal agent, and Freddie Mac acting as its compliance agent — have taken since the inception of the program not only to encourage participation by servicers, investors, and borrowers, but also to insure that both borrowers and servicers understand and comply with the HAMP requirements. From the beginning, Treasury required servicers to notify borrowers facing foreclosure about HAMP and to have procedures in place to respond to inquiries and complaints and give timely and appropriate responses and communicate in writing upon determining that a borrower did not meet the underwriting and eligibility standards of the HAMP. Further, as of July 10, 2009, borrowers have access to the HOPE Hotline Escalation Team which provides an avenue for borrowers to complain about improper denials and receive an explanation for their denial.

Moreover, none of these Plaintiffs can show that the current or potential future harm they allegedly have suffered or will suffer has been caused by Treasury's failure to require the specific, highly detailed written responses or appeal opportunity Plaintiffs seek here. Indeed, Plaintiff Strohmayer has admitted that she was given the reason for her denial, and all of the Plaintiffs now have access to the HOPE Hotline Escalation Team. Nor do Plaintiffs allege that all classes of at-risk homeowners whose foreclosures they also seek to enjoin have suffered any harm at all. They have not alleged that these persons responded to the notices about HAMP, requested modifications, were actually eligible, and provided necessary documentation. Nor do they show that all of the loan servicers in the State failed to provide reasons for denial. Requiring the Secretary to issue further guidance will not preclude foreclosure for those who have not fully complied with HAMP requirements, who have failed to take advantage of the HOPE Hotline, and/or whose loans are not subject to modification due to investor refusal. For similar reasons, Plaintiffs have failed to show irreparable harm.

Moreover, the very broad preliminary injunction Plaintiffs seek — effectively holding all the foreclosures in a state hostage until the Secretary issues the express guidelines Plaintiffs desire — would be contrary to the public interest. Such relief would be inconsistent with HAMP's expectations and goals, would adversely affect third party loan servicers and investors whose due process rights may themselves be violated by such an order, and could lead to participating loan servicers opting out of the program, thus injuring many of those at-risk borrowers whom the program was intended to help.

For all of the reasons set forth herein, Secretary Geithner and the Department of the Treasury request that the Court deny the motion for preliminary injunction.

BACKGROUND

I. THE EMERGENCY ECONOMIC STABILITY ACT OF 2008

On October 3, 2008, Congress enacted the Emergency Economic Stabilization Act of 2008 ("EESA"), P.L. 110-343, 122 Stat. 3765. EESA established the Office of Financial Stability within Treasury and authorized OFS to implement the "Troubled Asset Relief Program," or "TARP." *See* 122 Stat. at 3767. The TARP program has various objectives, including quickly and effectively stabilizing financial markets and reducing systemic risk, supporting the housing market by avoiding preventable foreclosures and supporting mortgage finance, and protecting taxpayers. *See* 122 Stat. at 3765-66, 3770. In attempting to stabilize the economy, Congress also empowered the Secretary of the Treasury to engage in "Foreclosure Mitigation Efforts" as part of Treasury's efforts to preserve financial stability and protect the U.S. economy. *Id.*, § 109 (codified at 12 U.S.C. § 5219).

EESA purposefully allowed for speedy and flexible government intervention in private financial markets.[1] The first requirement of the statute was that the Secretary possess some ownership interest in the property at issue. *See* 12 U.S.C. § 5219(a) (2008). The Secretary was then authorized to implement a plan to "maximize assistance to homeowners" by "encourag[ing] the servicers of the underlying

[1] EESA's discretionary language was the subject of debate in Congress. Congresswoman Sheila Jackson-Lee proposed having the Secretary "requir[e]" servicers to take advantage of programs to minimize foreclosures, but her proposals were rejected. *See* 154 Cong. Rec. H10702-06, 2008 WL 4449105 (2008) (statement of Rep. Jackson-Lee).

mortgages" to modify the loans, but only while "considering net present value to the taxpayer." *Id*. Finally, the Secretary was instructed to consent to modifications, but again only "where appropriate," still protecting the "net present value to the taxpayer" by undertaking "loss mitigation measures" which in any case still needed to be "reasonable." *Id.*, § 5219(c).

II. THE HOME AFFORDABLE MODIFICATION PROGRAM

A. The Introduction and Implementation of HAMP

On February 18, 2009, President Obama and Secretary Geithner announced the Making Home Affordable ("MHA") Program. One component of MHA is the subject of this lawsuit, the Home Affordable Modification Program. Declaration of Laurie A. Maggiano (hereafter "Maggiano Decl.") (Exhibit 1), ¶ 1.

Treasury announced HAMP Guidelines on March 4, 2009 which applied both to Government-Sponsored Entity ("GSE") loans, including loans owned by Fannie Mae and Freddie Mac, and to non-GSE loans, including loans owned by private banks or investors. Although the HAMP guidelines for GSE loans were automatically incorporated into existing service agreements that the GSEs maintained with their servicers, the non-GSE loans were structured differently. In order to receive TARP incentive (i.e., HAMP) funds for non-GSE loans, servicers of non-GSE loans had to enter into an agreement with Treasury's financial agent, Fannie Mae. In conjunction with Treasury,[2] Fannie Mae helped draft a Servicer Participation Agreement for non-

[2] To implement HAMP, the Department of the Treasury entered into a Financial Agency Agreement with Fannie Mae to serve as its "financial agent" and a

GSE loans. Maggiano Decl., ¶ 7. Two of the non-GSE servicers who entered into agreements with Fannie Mae to participate in HAMP included Ocwen Financial Corp., Inc. (April 16, 2009) and GMAC Mortgage LLC (April 13, 2009).[3] *See* Maggiano Decl., ¶ 5, Exhibits B, C. As part of the agreements, these servicers agreed to perform loan modifications as described in Treasury's Supplemental Directives. *Id.*, ¶1A. Recognizing the voluntary, rather than mandatory nature of the program, there is an opt-out provision for these servicers with regard to future changes to the program. *Id.*, ¶10C. Since issuing Supplemental Directive 09-01 (hereafter "SD 09-01") on April 6, 2009, Treasury has issued Directives 09-02 through 09-06, on April 21, July 6, July 31, August 13, and Sept 11, clarifying issues ranging from trial period guidance to data collection and reporting requirements.

B. Policy Goals Behind the Supplemental Directives

HAMP is structured with three main goals. The first goal behind HAMP is to encourage (but not require) the mortgage industry to adopt uniform standards for modification, both within and outside of the HAMP program, to ensure that modifications for qualified borrowers are entered into, and that they are, in fact, sustainable. According to HAMP guidelines, although participating servicers

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separate Agreement with Freddie Mac to serve as its "compliance agent." *See* Exhibits 2, 3.

[3] It does not appear that U.S. Bank entered into a Servicer Participation Agreement with Fannie Mae (on behalf of Treasury) to service non-GSE loans. Thus, co-defendants FHFA and Fannie Mae can best address U.S. Bank's obligations with regard to its GSE loans.

should undertake reasonable efforts to obtain consent from investors, servicers are not required to make modifications where they are prohibited from doing so by pooling and servicing agreements. *See generally* Maggiano Decl., ¶¶ 10, 11. Exhibits B, C.

Second, the program is designed to encourage servicers to reduce qualified borrowers' mortgage payments to an affordable level in relation to gross monthly income. *See generally* Maggiano Decl., ¶ 19.

The third key component of HAMP is that it offers "pay for success" incentives. HAMP does not require servicers to abrogate contractual obligations or expect investors to make modification decisions that are not economically viable. Treasury instead encourages voluntary participation by paying financial incentives to borrowers, servicers and investors if they remain committed to "successful" modifications. *See generally* Maggiano Decl., ¶ 18.

C. <u>The Flexibility and Discretion Retained by Non-GSE Servicers under Treasury's Supplemental Directives</u>

From the beginning of HAMP, Treasury's Supplemental Directives have served as general guidelines for loan modifications, rather than as a comprehensive servicing manual, and were never meant to replace a mortgage servicer's entire slate of servicing practices. *See* Maggiano Decl., ¶ 16.

The central inquiry in evaluating whether a borrower would potentially qualify for a HAMP modification is determining if the cash flow of the modified loan would ultimately be greater than the unmodified loan, and hence, the "***net***

present value" to the taxpayer would be positive.[4] Within reason, each private servicer can implement its own method for determining whether the cash flow from the modified loan would be "positive." Under the Supplemental Directives, Treasury has allowed servicers to customize the "base" NPV model to fit their unique portfolio of loans. *See* Exhibit 4 at 1.

Recognizing that EESA permits the Secretary to consent only to "***reasonable requests*** for loss mitigation measures,"[5] the Supplemental Directives acknowledge the servicers' delicate balance in preserving the value of the investment. The Supplemental Directives describe a "loss mitigation waterfall" in which the servicers consider a range of possible ways to modify a loan, while still preserving the "net present value." For example, SD 09-01 acknowledges that there will be circumstances where pre-existing investor servicing agreements prohibit certain types of modification. Exhibit D at 8. The point, of course, is that at a certain point, depending on the value of the loan and value of the property, any type of loan modification may become financially unreasonable.

D. Loan Servicer Participation in HAMP

Treasury, Fannie Mae, and Freddie Mac began working around the clock to implement the HAMP program, providing as much guidance as possible to loan servicers, investors, and homeowners within two weeks of announcement of the program, while recognizing that there would be additional refinement over the

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[4] 12 U.S.C. §§ 5219(a), (c).
[5] 12 U.S.C. § 5219(c).

following several months. This rapid build-up also required participating loan servicers to expand their operations. *See* Maggiano Decl., ¶¶ 21, 22.

HAMP was launched for GSE loans on April 6. On April 13, 2009, the first set of agreements were signed for non-GSE loans. By May 1, 2009, 13 servicers were enrolled in non-GSE agreements. As of September 16, 2009, over forty-five servicers, including the five largest, have signed up for HAMP. More than 85% of loans in the country are now covered by the program, and participating servicers have extended offers on over 609,000 trial modifications, and over 412,000 trial modifications are already underway. *See* Maggiano Decl., ¶ 20.

Despite all of these efforts, both the President and Treasury have reminded the public that HAMP will not prevent all foreclosures.[6] President Obama explained that HAMP would "not rescue the unscrupulous or irresponsible by throwing good taxpayer money after bad loans" and would "not save every home." Assistant Secretary of the Treasury Michael Barr reiterated that "even if HAMP is a total success, we should still expect millions of foreclosures …" Maggiano Decl., ¶ 44; Exhibits H, I.

[6] There are a number of reasons why the HAMP participation rate may be lower than desired including that certain mortgages will not meet the program's basic eligibility requirements, others will be NPV-negative, and others may be subject to agreements that prevent servicers from offering modifications. *See generally* Maggiano Decl., ¶¶ 24, 25.

III. TREASURY'S ONGOING COMPLIANCE EFFORTS AND CURRENT NOTICE AND PROCESS REQUIREMENTS

Since the program's inception, Treasury has made an ongoing, concerted effort to require servicers to notify borrowers about the HAMP program.

1. Websites for Borrowers and Servicers. On March 4, 2009, Treasury launched a new consumer-focused website. The website explains the program in layman's terms, provides self-assessment tools for borrowers, and prominently announces a toll-free phone number where borrowers can seek additional help from HUD-approved housing counselors. Since its launch, the website has had over 34 million page views. Treasury has also established a website for servicers, and engaged in an aggressive in-person marketing and outreach effort to borrowers. *See* Maggiano Decl., ¶¶ 35, 36.

2. Servicer's Duty of Notification to Borrowers. From the outset, Treasury has expected servicers to provide appropriate notice to borrowers about why they may not qualify. SD 09-01 states: "[s]ervicers must also have procedures and systems in place to be able to respond to inquiries and complaints about the HMP [and] should ensure that such inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution." Exhibit D at 13. Furthermore, it states that if a servicer determines that a borrower is not eligible for HAMP based on verified income, the servicer must notify the borrower that they are not eligible for HAMP on that basis and explore other foreclosure prevention options prior to proceeding with foreclosure action. *Id.* at

18. On July 9, 2009, Treasury Secretary Geithner and HUD Secretary Donovan wrote a letter expressing their compliance concerns to currently-participating HAMP servicers. Exhibit F. On September 11, 2009, the Secretary issued SD 09-06, which requires servicers to furnish "Not Approved/Not Accepted Reason Codes" to Treasury and Fannie Mae.[7] *See* Maggiano Decl., ¶ 14. The Secretary expects these denial codes to become operational on or about October 1, 2009. Exhibit I.

3. "Second Look" Process. Treasury has made monitoring compliance of participating servicers a priority. On July 28, 2009, Treasury asked Freddie Mac, to develop a program to minimize the likelihood that borrower applications are overlooked or applicants are inadvertently denied a modification. In this "second look" process, Freddie Mac audits a sample of MHA modification applications that have been declined. *See generally* Maggiano Decl., ¶ 31.

4. Hope Hotline Escalation Team. Treasury has been continually improving the process by which borrowers can complain about improper denials and/or receive an explanation for their denial. Since July 2007, Treasury and HUD have publicly endorsed a nationwide foreclosure hotline — known as the "Homeowner's HOPE™ Hotline" (888-995-HOPE). The Secretary took these measures to provide borrowers direct information and to escalate concerns if

[7] At the end of Schedule IV of SD 09-06, Treasury has listed 13 "Not Approved/Not Accepted Reason Codes." *See* Exhibit 5 at 16 (SD 09-06).

borrowers believe their application was denied improperly. *See* Maggiano Decl., ¶ 37.

Treasury instructed Fannie Mae to work with this hotline to address HAMP-specific questions and establish a special team of trained counselors to help borrowers who felt they were not being treated fairly by participating servicers (the "HOPE Hotline Escalation Team"). On July 10, 2009, the HOPE Hotline Escalation Team became fully operational. Borrowers' calls get routed to trained counselors who explain the program requirements and help the borrower determine if the servicer was correctly following the program rules. If the concern or complaint is not resolved, counselors contact the servicer using proprietary points of contact. If the question or concern remains unresolved after discussion with the servicer, the counselor can further escalate the case to a designated team at Fannie Mae. Fannie Mae representatives also have servicer ombudsmen at a more senior level with whom they work to resolve both individual complaints and "policy" or "systemic" problems. *See* Maggiano Decl., ¶ 39.

ARGUMENT

I. LEGAL STANDARD FOR PRELIMINARY INJUNCTIONS

Plaintiffs seek a mandatory preliminary injunction virtually unlimited in the scope of the relief sought and time frame for which the injunction could remain in place, as to both named and unnamed defendants. Specifically, Plaintiffs ask that this Court enjoin all foreclosures in the State of Minnesota until the Secretary issues guidance or regulations that require, as to their sub-class 1, that loan servicers provide not just the reasons for a modification denial and an opportunity to appeal, but also a detailed written decision "stating the reason for the denial, and showing proper application of the loss mitigation waterfall;" opportunity to appeal or give additional information to a neutral decision-maker; "disclosure of the factors and specific formula used to determine a 'positive' or 'negative' result by the Net Present Value calculator;" and "reasonable opportunity for a homeowner to appeal to an unbiased decision-maker." They also seek, as to the sub-class 2, similar requirements, plus: defendants must "identify all Minnesota homeowners who are eligible for HAMP and were foreclosed upon from March 4, 2009, to the present;" and guidance or regulations "that create a process for the foreclosure sale or Sheriff's sale to be avoided, the foreclosure lawsuit or foreclosure action dismissed, and the homeowner's property rights restored," if the homeowner is eligible and qualified for HAMP and chooses to participate. Pl. Mot. at 2-4.

A request for preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (quotations omitted). The Eighth Circuit requires the district court to weigh four factors in deciding whether to grant or deny preliminary injunctive relief including: (1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and (4) the effect on the public interest.

Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 112 (8th Cir. 1981); *see also Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003).

A mandatory injunction is said to "alter the status quo by commanding some positive act." *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). Historically, courts have disfavored such injunctions, and they should be granted ***only*** where the moving party satisfies a heightened burden. *See O Centro Espirita Benficiente Uniao Do Vegetal, Inc. v. Ashcroft*, 389 F.3d 973, 976-980 (10th Cir. 2004) (en banc); *see also SEC v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir. 1990) ("[D]istrict court … should require a more substantial showing of likelihood of success, both as to violation and risk of recurrence, whenever the relief sought is more than preservation of the status quo."). As the Eighth Circuit has stated, the court should be particularly wary when the requirement that defendants take affirmative action is "the same relief [plaintiffs] would obtain after a trial on the merits." *Sanborn Manuf Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 490 (8th Cir. 1993). That is precisely the situation here.

Moreover, where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, there must be much more than a "fair chance" but rather a "substantial likelihood" that the moving party will prevail on the merits. *See Richenberg v. Perry*, 73 F.3d 172 (8th Cir. 1995) (per curiam); *Planned Parenthood v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008) (en banc) (citing *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)). The rationale for this more rigorous standard "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Id.* at 732 (quoting *Able*, 44 F.3d at 131). The burden lies on the moving party. Only ***after*** the moving party makes a threshold showing that he or she is substantially likely to prevail on the merits, may the district court then proceed to weigh the other *Dataphase* factors. *Planned Parenthood*, 530 F.3d at 732. Plaintiffs cannot satisfy their heavy burden here.

II. PLAINTIFFS HAVE SHOWN NO LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs Do Not Have Standing to Obtain the Sweeping Relief They Seek

Plaintiffs do not allege that any applicant was denied a modification unlawfully. Rather, they generally allege that HAMP is "complex," that there is a "lack of transparency," and this "makes it … difficult to assess the benefits." Pl. Br. at 2-3. Plaintiffs' ongoing uncertainty about whether they would personally be "entitled" to a loan modification does not qualify as an "injury-in-fact" that is "fairly trace[able]" to the actions of the Treasury Department which can be "redressed by a favorable decision," of this court enjoining foreclosures and sheriff sales. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

"[A]t an irreducible minimum, Article III requires the party who invokes the court's authority to show that he [or she] personally has suffered some actual or threatened injury ***as a result of the putatively illegal conduct*** of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church and*

State, 454 U.S. 464, 472 (1982) (citation and internal quotation marks omitted) (emphasis added). While the Supreme Court "ha[s] always insisted on strict compliance with this jurisdictional standing requirement," the standing inquiry must be "especially rigorous when," as here, "reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

None of the plaintiffs can show that the current or potential future harm they have allegedly suffered or will suffer has been caused by Treasury's failure to require the specific, detailed written responses or appeal process Plaintiffs seek here. Indeed, Plaintiff Strohmayer has admitted that she was given the reason for her denial, and all of the Plaintiffs now have access to the HOPE Hotline Escalation Team if they have not otherwise been given a reason. Nor do plaintiffs allege that the class of at-risk homeowners whose foreclosures they also seek to enjoin have suffered any harm at all. They have not alleged that all (or even any) of these other borrowers have responded to the notices, requested modifications, were actually eligible, and provided the necessary documentation. Nor do they show that all of the loan servicers for the State failed to provide reasons for denial for those eligible borrowers who did satisfy all their requirements. Further, requiring the Secretary to issue guidance will not preclude foreclosure for those who have not fully complied with HAMP requirements or do not qualify, who have failed to take advantage of the HOPE Hotline, or whose loans are not subject to modification due to investor refusal.

B. Plaintiffs Cannot Show that They Have a Protected Property Interest in Loan Modifications

Plaintiffs allege that the HAMP program as administered unlawfully deprives them of a protected property interest in violation of the Fifth Amendment. As the Supreme Court held in *Board of Regents v. Roth*, 408 U.S. 564 (1972), to have a property interest in a benefit, a person must have more than "an abstract need or desire … [or] unilateral expectation," but must instead have "a legitimate claim of entitlement." *Id.* at 577. The *Roth* Court explained that claims of entitlement "are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits," *id.*; however, until those benefits are secured, there can be no claim of entitlement. Here, the "rules or understandings" would include not only the statute, directives issued by the Treasury Department, and contracts signed by Treasury and its agents, but also Minnesota foreclosure law which governs when a previously-held property interest reverts to the mortgagee. Courts have repeatedly looked to both state and federal law in adjudicating this issue. *Compare Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (ultimate issue was "whether what Colorado law has given respondent [in a restraining order issued against her husband] constitutes a property interest for purposes of the Fourteenth Amendment."); *with Am. Manuf. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59-60 (1999) (inquiry into "protected property interest" in worker's compensation scheme required examination of Pennsylvania law); *Hill v. Group Three Housing Development Corp.*, 799 F.2d 385, 390 n. 7 (8th Cir. 1986) ("rules or understandings" in a section 8 housing program case included “the [federal] statute, the regulations, and the HUD handbook.”).

Plaintiffs tellingly point to no federal statutory, regulatory, or contractual benefit that could support their claim of entitlement, nor do they identify any state statute guaranteeing either a loan modification from private lenders or requiring the process they seek here. Plaintiffs instead state only that HAMP is “premised on getting a homeowner’s monthly payment to 31% [of homeowner’s monthly gross income],” and mortgage loan servicers “are required to follow three basic steps for all distressed homeowners” in pursuing this targeted monthly payment. Pl. Br. at 15; *see also* First Am. Compl. at ¶ 126. This assertion is beside the point; it has nothing to say about whether Plaintiffs have a protected property interest in a loan modification. Beyond describing an analytic process a participating servicer is supposed to undertake, *see, e.g.*, Pl. Br. at 15-16, and pointing out that the process is limited to individuals who meet certain eligibility requirements, *see, e.g.*, Pl. Br. at 6, 10, 20, nowhere in Plaintiffs’ Brief or their Amended Complaint do they specifically articulate an individual or class of people who are actually ***entitled*** to a specific modification on a specific mortgage, or the basis for this proffered entitlement. What is more, Plaintiffs do not even claim they were necessarily entitled to HAMP loan modifications. *See generally Roth*, 408 U.S. at 576 (“The Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person has ***already*** acquired in specific benefits.”) (emphasis added). They instead plead that Ms. Williams ***may*** have been entitled to a fifth modification to her loan under the HAMP criteria. With regard to Mr. Sendolo, it appears from the face of the Complaint that he could have been denied a loan modification for a range of lawful reasons. Both Ms. Strohmayer's and Ms. Koppenberg's situations are simply unclear given how few facts Plaintiffs have pled regarding their respective loans and finances.

Plaintiffs' failure to identify a textual basis for their asserted property right to a loan modification is unsurprising, because no such right exists. As explained previously, the HAMP program was created under the authority of section 109 of EESA. In contrast to the earlier HUD-based Hope for Homeowners (*see* Housing and Economic Recovery Act of 2008, P.L. 110-289, §§ 1401-1404, 122 Stat. 2654, 2800-2810 (July 30, 2008)),[8] in which Congress stipulated when and how loans must be modified, EESA has no language which requires a servicer to modify a particular type of loan or grant a particular type of modification. Congress provided only a basic framework for what the Secretary was required to do under EESA. Under this general guidance, Congress directed the Secretary to obtain a financial interest in the property. *See* 12 U.S.C. §§ 5219(a), (b). Second, Congress instructed the Secretary to develop servicing standards for servicers of its own loans to encourage modification of particular classes of loans, but only after consideration of "net present value to the taxpayer." *Id.* Finally, Congress tasked the Secretary with establishing a loss mitigation process for considering what types of modifications to grant. Critically,

[8] Congress provided many more specific requirements in the Hope for Homeowners program, and HUD issued federal regulations implementing these qualifications for a modification. *See* 24 C.F.R. §§ 4001.01, et seq. (2009) (created in part by 73 Fed. Reg. 58420 (Oct. 6, 2008)).

however, Congress did not direct the Secretary to facilitate the modification of ***any*** loan. Rather, EESA requires only the Secretary to consent "where appropriate, and considering net present value to the taxpayer, to reasonable requests for loss mitigation measures." 12 U.S.C. § 5219(c). Only by ignoring this qualifying language and plucking the single word "shall" out of context could Plaintiffs argue that the EESA grants them an entitlement to a loan modification. *Cf. Dubois v. Thomas*, 820 F.2d 943 (8th Cir. 1987) (interpreting "shall" language in Federal Water Pollution Control Act to impose only discretionary, rather than mandatory duty).

The Treasury website belies any claim of entitlement to loan modifications: "If you can no longer afford to make your monthly payments you ***may*** qualify for a loan modification to make your monthly mortgage payments more affordable." (emphasis added). The website also informs homeowners that "[t]his site can help you determine if you are eligible, but only the servicer of your loan can tell you if you qualify." It adds: "to qualify you will generally need to show that you have adequate income to make the reduced payments on an ongoing basis and that modification is an appropriate option given the characteristics of your mortgage and the value of your home."[9] Modification may also be precluded if the investors holding the loan have ordered the servicer not to provide any modification. *See* Maggiano Decl., ¶ 15.[10]

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[9] *See* www.makinghomeaffordable.gov/modification_eligibility.html

[10] *See* http://www.makinghomeaffordable.gov/borrower-faqs.html.

Treasury Department guidance regarding EESA similarly undercuts Plaintiffs' asserted right to loan modifications. Like EESA itself, this guidance recognizes that servicers are only obligated to modify loans in certain circumstances. For loans deemed either in default or at risk of imminent default under HAMP guidelines, the servicer must determine whether the net present value (NPV) of the modified loan exceeds the value of the unmodified loan (i.e., the value of the property if either the borrower "self-cures" or the property is foreclosed and sold). This is not as straightforward as it seems in part because there are administrative costs associated with modification and penalties owed to investors, not to mention the possibility that the borrower may nevertheless default on the loan, even if it is modified. *See generally* Maggiano Decl., ¶¶ 23, 24.

The Secretary has acknowledged that there is no single, across-the-board best way to value loans. Rather than tether servicers to a particular NPV framework, the Secretary has ceded to servicers the authority to choose the NPV model (within certain parameters) that, in the servicer's judgment, best encapsulates the economic reality a particular mortgage owner faces. The Guidance issued by Treasury issued on June 11, 2009 acknowledges that because of customized NPV models, servicer modifications would "likely vary even when borrowers' circumstances appear to be similar" but the result will still be more "accurate" and a better "gauge of appropriate modifications" due to customized models. Exhibit 4, at 3.

Ultimately, Treasury's Supplemental Directives provides discretion to participating servicers who service non-GSE loans. The Eighth Circuit has repeatedly stated that if there is discretion afforded to the government in granting some benefit, or a government policy is for the most part procedural, then no property right attaches. *See Hill v. Group Three Housing Development Corp.*, 799 F.2d 385, 391-93 (8th Cir. 1986) (concluding that the "class of otherwise eligible applicants" was not of "an unmistakably mandatory character," but were instead left to the property owner's "business judgment and discretion," thus preventing applicants from making a "legitimate claim of entitlement")[11]; *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 1999) ("[s]tatutes or policies that are only procedural, or that grant to a decision maker discretionary authority in their implementation … do not create protected property interests."); *Carolan v. City of Kansas City, Missouri*, 813 F.2d 178, 181 (8th Cir. 1986) (no protected property interest in building permit unless municipality lacks discretion and state law requires the issuance of a permit to applicant). Accordingly, neither EESA nor the pertinent Treasury directives nor the servicer agreements support Plaintiffs' assertion that they are entitled to a loan modification.

Having failed to identify any textual basis in the statute or guidance for their asserted property interest, Plaintiffs seek to identify the source of their alleged

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[11] *Hill* relied heavily upon the Seventh Circuit's decision in *Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984) in which applicants for section 8 housing benefits claimed that HUD's selection criteria did not "apply uniform, ascertainable standards." *Id.* at 454-455. *Edison* concluded that although the HUD handbook did not allow selection of tenants based on "unfettered discretion," it also did not sufficiently constrain the process so as to create a property right. *Id.* at 462.

entitlement in what they term a "remarkably similar" line of cases in which courts enjoined farm foreclosures in the early 1980s under a different statute. Pl. Br. at 22. Plaintiffs' analogy fails: those cases neither support Plaintiffs' assertion that the Secretary has violated the Constitution, nor their claim to the injunctive relief they seek.

Plaintiffs' cited cases undercut their claim to a constitutionally-protected interest in a HAMP loan modification. This Court in *Gamradt v. Block* expressly rejected the argument that FmHA farm loan recipients had a protected property interest to which constitutional due process would apply. 581 F. Supp. 122, 132 (D. Minn. 1983). In *Shick v. Farmers Home Administration*, 748 F.2d 35 (1st Cir. 1984), the court similarly rejected plaintiffs' Fifth Amendment Due Process claim, holding that their constitutional allegations "are no more than conclusory claims that their constitutional rights had been violated by the FmHA." *Id.* at 39. And in *Allison v. Block*, the Eighth Circuit declined to reach the issue of whether the plaintiffs there were entitled to due process under the Fifth Amendment, ruling instead on alternative statutory grounds. 723 F.2d 631, 633 n.1 (8th Cir. 1983).

Plaintiffs fail to mention that the procedural entitlement in the FmHA cases they cite emanated from statute, not the Constitution. The plaintiffs in those cases claimed that the Secretary of Agriculture had violated their statutory and constitutional rights by failing to promulgate adequate procedural and substantive regulations to administer the loan deferral program Congress had contemplated when it amended the Consolidated Farm and Rural Development Act (CFRDA). By failing to implement *any* procedures either to ensure that borrowers were aware of the loan deferral program or administrative procedures through which they could apply for relief and make their eligibility demonstration, the Secretary of Agriculture "completely abdicated" his responsibilities to administer CFRDA. *See Allison*, 723 F.2d at 638 ("[A]t present . . . the Secretary has chosen neither a process of reasoned decision-making to safeguard against an abuse of [CFRDA] discretion nor the publication of uniform regulations to be used as substantive standards to guide the exercise of that discretion."). Like the other cited FmHA cases, then, the *Allison* Court deemed injunctive relief appropriate because the Secretary of Agriculture had failed to implement a loan deferral program in violation of CFRDA.

Similar to the sweeping injunctive relief Plaintiffs seek here, the FmHA plaintiffs sought to enjoin all farm foreclosures until the Secretary of Agriculture promulgated regulations sufficient to ensure that borrowers received notice of the loan deferrals CFRDA contemplated and an opportunity to demonstrate their eligibility for a deferral. In denying that request, the Court in *Coleman v. Block* not only concluded that such regulations were not legally required but also that they were practically unwise. 562 F. Supp. 1353, 1362 (D.N.D. 1983). The Court declined to specify how the Agriculture Secretary should meet his statutory obligations, correctly observing that "[w]hatever means the agency chooses to carry out this task its own business so long as it does so adequately." *Id.* The *Allison* Court similarly declined to issue the requested mandatory injunction, holding that it was the Secretary's prerogative alone to determine whether to establish substantive standards by rulemaking or by adjudication. *Allison*, 723 F.2d at 637-38.

In addition to these separation of powers concerns, the FmHA courts also expressed skepticism regarding the breadth of the requested relief. Recognizing that this sort of mandatory injunctive relief would "in effect bar all foreclosures," the *Coleman* Court declined to enjoin all foreclosures pending the Secretary's issuance of regulations, instead permitting "the agency to carry on with foreclosures so long as the [rights CFRDA confers] are observed." 562 F. Supp. at 1363.

But perhaps the most fundamental and obvious distinction between the FmHA cases Plaintiffs cite and this case are the numerous and substantial procedures the Secretary here has implemented to ensure that borrowers who are denied HAMP loan modifications are given notice of the basis for their denial as well as an avenue to seek recourse. In the FmHA cases, the courts found that the Secretary of Agriculture had not implemented any procedures specific to CFRDA, but instead relied on general loan servicing guidelines ill suited to CFRDA's specific mandates. *See Allison*, 723 F.2d at 636. Here, by contrast, the Secretary has already created and implemented (or is in the process of implementing) extensive procedures specific to HAMP's administration, including procedures that address the putative procedural deficiencies on which this lawsuit is predicated. *Infra*, Treasury Opp. at 38-41. Plaintiffs therefore cannot credibly argue that the Secretary has "completely abdicated" his responsibilities to administer the HAMP program.

And quite apart from the fact that this case could not be more dissimilar to the FmHA cases in terms of statutory implementation, the FmHA cases provide no justification for the sweeping relief Plaintiffs seek. Given that the courts in Plaintiffs' cited FmHA cases were unwilling to enjoin all foreclosures until the Secretary issued appropriate regulations even where the Secretary of Agriculture had "completely abdicated" his statutory obligations, it follows *a fortiorari* that such relief cannot be warranted here even if this Court were *not* to credit any of the numerous safeguards Treasury has implemented.

Plaintiffs' requested relief to enjoin *all* foreclosures in Minnesota is all the more inappropriate in view of the undisputed fact that HAMP was never intended to forestall all foreclosures. *See* Exhibit H, I. Yet Plaintiffs not only want a moratorium on *all* foreclosures — an aspiration even HAMP's framers did not intend — but a judicial declaration that the moratorium will remain in place unless and until the Secretary implements a dizzying array of procedural protections of the sort the FmHA courts refused to order. *See supra* at 25. This Court should decline Plaintiffs' invitation to administer the HAMP program by judicial fiat given the well-established principle that agencies, not judges, have the institutional competence and constitutional authority to implement and administer government programs. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984). For all of these reasons, the FmHA cases simply cannot bear the weight Plaintiffs place on them either in terms of their entitlement to relief or in terms of the relief they seek.[12]

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[12] Plaintiffs argue that that an injunction enjoining all foreclosures is warranted here, (Pl. Br. at 39-40), because a South Carolina court previously entered a statewide injunction to stay foreclosures on loans held by Fannie Mae. *See In Re Federal National Mortgage Association*, 09cv1959 (S.C. S.Ct) (July 28, 2009) (Order). This analogy is inapt. The South Carolina situation involved a request by *Fannie Mae* to enjoin mortgage foreclosures, as Fannie Mae was contractually

At bottom, the controlling federal statute (EESA) has no language which requires a servicer to modify a particular loan or grant a particular type of modification. Nor do the contract or Treasury-issued guidance tell servicers exactly which mortgages must be modified. As the Eighth Circuit explained in *Hill*— which was rooted in a regulatory scheme for the section 8 program with many more stringent requirements— even when applicants present "proof that they satisfy the statutory income and family eligibility requirements," in the absence of definitive requirements for tenant selection, the landlords still retain discretion, so that the applicants do not "acquire a 'legitimate claim of entitlement.'" *Id.* Likewise, in this case, even if the Plaintiffs were able to show that they satisfy the primary residence requirement, the "imminent" default requirement, mortgage amount requirement, date of origination, and income requirement, in the absence of hard-and-fast requirements for modification, the servicers still retain discretion whether to grant a modification, so plaintiffs have not acquired a protected property interest. Accordingly, Plaintiffs' failure to demonstrate that they have a property entitlement is fatal to their Due Process claims, and they therefore cannot demonstrate the requisite likelihood of success on the merits.

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obligated to consider mortgage loans it owned for HAMP modification. To facilitate this consideration, Fannie Mae could either dismiss pending foreclosure proceedings, or freeze existing proceedings via a judicial stay. Either way, foreclosure delays were inevitable. Fannie Mae chose the latter option, requesting an injunction to reduce the administrative burdens and costs for both sides that may have ensued absent the injunction, all in an effort to effect HAMP consideration.

C. Plaintiffs Have Not Shown That The Initiation of Pre-Foreclosure Proceedings by Private Servicers and/or Sheriff Sales Are a Result of Action Taken by the Federal Government

It is axiomatic that the Fifth Amendment Due Process Clause applies only to the federal government and not to private parties. *See, e.g.*, *Public Utilities Commission v. Pollak*, 343 U.S. 451, 461 (1952).[13] Plaintiffs Johnson Sendolo and Nichole Williams allege that they were unlawfully denied loan modifications by Ocwen and GMAC, respectively. *See* Pl. Br. at 4-10. More precisely, Plaintiffs further allege that they were not given the requisite notice of the basis for their denials or an opportunity to appeal these denials in violation of the Fifth Amendment. But because "private action, no matter how egregious, can not violate the equal protection or due process guarantees of the United States Constitution," *Medical Institute of Minnesota v. National Ass'n of Trade and Technical Schools*, 817 F.2d 1310, 1312 (8th Cir. 1987), Plaintiffs' claims for relief necessarily fail unless they can show that the harm they seek to remedy is attributable to Treasury. As explained below, Plaintiffs stumble on this threshold showing.

Plaintiffs bear the burden to demonstrate a "sufficiently close nexus between the [Government] and the challenged action of the entity so that that the action of the latter 'may be fairly treated as that of the [Government] itself.'"

[13] The standard for finding federal government action under the Fifth Amendment is the same as that for finding state action under the Fourteenth Amendment. *Warren v. Government Nat. Mortg. Ass'n.*, 611 F.2d 1229, 1232 (8th Cir. 1980).

Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974)).[14] In this respect, the "mere fact that a business is subject to [governmental] regulation does not by itself convert its action into that of the [Government for Due Process purposes]." *Blum*, 457 U.S. at 1004; *accord Am. Manuf.*, 526 U.S. at 52. Rather, Due Process strictures apply to the conduct of private parties "only when it can be said that the [Government] is *responsible* for the specific conduct of which the Plaintiff complains." *Blum*, 457 U.S. at 1004 (emphasis in original). "[R]esponsibility," the Supreme Court has made, clear, requires more than "[m]ere approval of or acquiescence in the initiatives of a private party." *Id.* To the contrary, the Government can be held responsible for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [Government]." *Id.* The purpose behind this requirement is to preserve "individual freedom" by limiting the reach of federal judicial power and avoid imposing on the government "responsibility for conduct for which [it] cannot fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

Plaintiffs first argue that the requisite governmental nexus exists because HAMP involves "contracts between the government actors and mortgage loan servicers in which the government actors dictate the terms of the relationship and

[14] *See also Gomez v. North Dakota Rural Dev. Corp.*, 704 F.2d 1056, 1058 (8th Cir. 1983) (holding that "extensive government regulation does not compel a finding of federal action.") (citing *Blum*, 457 U.S. at 1004).

rules that must be followed when administering the program." Pl. Br. at 33. However, neither the Financial Agency Agreement between Treasury and Fannie Mae nor the Servicer Participation Agreements between Fannie Mae and the named servicers demonstrate that the government has "exercised coercive power" or "provided such significant encouragement" such that the alleged misconduct by the servicer can "be deemed to be that of the State." *Am. Manuf.*, 526 U.S. at 52 (citing *Blum*, 457 U.S. at 1004-05).[15]

Regardless of whether or not Fannie Mae, as Treasury's financial agent, or Freddie Mac, as Treasury's compliance agent, may have potential contractual remedies against the private servicers based on purported violations of the servicer agreements, the private servicers' decision to foreclose on borrowers who have defaulted on their loans through power of sale agreements are "not in and of themselves powers of a governmental nature." *Warren v. Gov't Nat'l Mortgage Ass'n*, 611 F.2d 1229, 1234 (8th Cir. 1980). The U.S. Department of the Treasury plays an indirect role, at best, having contracted with Fannie Mae as a financial agent, who has, in turn, contracted with private servicers and required the servicers, by the terms of the contract, to follow the Supplemental Directives. Not

[15] Plaintiffs also refer to Congress' decision to place Fannie Mae and Freddie Mac under FHFA's conservatorship as somehow abrogating their respective status as non-governmental entities. Pl. Br. at 33. This argument misapprehends FHFA's stewardship role over Fannie and Freddie (which is akin to the FDIC's temporary conservatorship of failed banks). FHFA, Fannie Mae, and Freddie Mac are in best position to explain their current status under the Housing Economic Recovery Act of 2008 ("HERA") and their obligations under section 110 of EESA.

finding government action in this case is in keeping with the idea that foreclosures of even government-owned properties are not necessarily subject to heightened scrutiny due to action taken by the "government." *See Warren*, 611 F.2d at 1234 (affirming district court decision that plaintiff had no Fifth Amendment due process right to notice and hearing prior to her foreclosure sale despite the fact that her note was owned by the Government National Mortgage Association, which at the time of the suit, was a corporate entity wholly-owned by the federal government and under the management and control of the Secretary of HUD).

But even assuming *arguendo* that Fannie Mae and Freddie Mac are government actors for purposes of HAMP administration, what Plaintiffs fail to explain is why the putative harm (e.g., the alleged denial of due process with respect to loan modification denials) is attributable to Fannie Mae or Freddie Mac. *See Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) (government action requires a "'close nexus' not merely between the state and the private party, but between the state and the alleged deprivation itself"). It is not enough to say that Government actors "dictate the terms of the relationship." The Loan Servicer Agreement was never intended to supplant loan servicers' business practices; it makes clear that loan servicers do not have to modify any loan if doing so would contravene its business practices, or would otherwise be financially imprudent. *See* Maggiano Decl., ¶ 8. In any case, SD 09-01 makes clear that "[s]ervicers must also have procedures and systems in place to be able to respond to inquiries and complaints about the HMP [and] should ensure that such inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution." Exhibit D at 13. In short, to the extent the ***government*** has mandated anything, it has mandated that servicers have greater, rather than fewer, procedural protections.

Second, plaintiffs contend that government action is present because this case involves the administration of "a $50 to $75 billion federal entitlement program." Pl. Br. at 33. To begin with, this is argument by assertion, not analysis: Plaintiffs simply assume their conclusion that HAMP created a property interest to which Plaintiffs were entitled. As explained *supra* at 18-28, this is incorrect. In any case, Plaintiffs' assertion that government action must be present apparently by virtue of the sheer size of the HAMP program is plainly wrong. Both the Supreme Court and the Eighth Circuit have rejected the argument that receipt of public funds necessarily transforms private action into government action. *See Blum*, 457 U.S. at 1010-1011; *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982); *Gomez*, 704 F.2d at 1058 (all holding that receipt of public funding does not make a program's administrative decisions acts of the state). In *Rendell-Baker*, for instance, discharged teachers argued that the manner in which they were dismissed unlawfully deprived them of due process. In support of their claim that their former employer, a school, was a state actor, the teachers noted that the school received virtually all of its funds from the state of Massachusetts. The Supreme Court rejected this argument, holding that that the school's receipt of public funds "does not make the discharge decisions acts of the State." *Rendell-*

Baker, 457 U.S. at 840. Analogizing the school to "private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government," the Supreme Court reasoned that such private contractors "do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 840-41. So too here. Unlike the school in *Rendell-Baker* deemed not to be a state actor, the loan servicers here presumably receive only a small fraction of their total revenue from their participation in the HAMP program.

Nor could Plaintiffs claim that mortgage lending has been the "exclusive prerogative" of the Government. *Rendell-Baker*, 457 U.S. at 842. Although Plaintiffs can perhaps point to the government's role in "creating, supervising, and setting standards" thus "encouraging" loan modifications, plaintiffs have failed to show how this is an "exclusive" function of the federal government. In fact, one could argue that Treasury simply authorized what the servicers "would tend to do, even in the absence of such authorization," i.e., make available loan modifications where it was in the servicers' (and their investors') financial interest. *See Am. Manuf.*, 526 U.S. at 55-57. Accordingly, Plaintiffs' argument that the size of the HAMP program compels the conclusion that the harm they suffered was attributable to the Secretary is unfounded. Under Plaintiffs' expansive theory of government action, the actions of any private parties — no matter how attenuated from the Government — would constitute action of the Government itself in any program in which the Government was involved in some way, provided that the dollar expenditure of the program exceeded some unspecified quantitative threshold. Tellingly, Plaintiffs cite not a single case in which the financial scope of a program is even relevant to — let alone dispositive of — the question of whether actions taken by a private party in conjunction with that program (here, the denial of loan modifications) is in fact attributable to the Government itself.

That cannot be and is not the law. As the Eighth Circuit has insisted, "the one unyielding requirement is that there must be a 'close nexus' not just between the state and the private party, but between the state and the alleged deprivation itself." *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007); also *cf. Rendell-Baker*, 457 U.S. at 840-41 (private contractors' actions "do not become acts of the government by reason of their significant or even total engagement in performing public contracts"). A contrary result would effectively constitutionalize all of government contract law. For all of these reasons, Plaintiffs have failed to demonstrate the requisite nexus between the Secretary and private loan servicers' alleged denial of procedural protections needed to trigger Fifth Amendment protections, and therefore cannot show that they are likely to prevail on the merits of their Due Process claim.

D. Plaintiffs Have Failed to Show That the Process Afforded Them Violated Procedural Due Process

Plaintiffs argue that, to the extent that they are denied a loan modification, due process requires not only that they receive notice of the basis for the denial, as well as an opportunity for recourse, but a level of specificity and other protections far beyond that which is constitutionally required. Assuming *arguendo* that Plaintiffs are correct in their assertion that some process is in fact due, the dispositive question then becomes whether the processes already in place pass constitutional muster. Both the Supreme Court and the Eighth Circuit have instructed that "due process is a flexible concept which requires procedural protections suited to the particular situation." *Collins v. Hoke*, 705 F.2d 959, 963 (8th Cir. 1983) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)); *Stanley v. Illinois*, 405 U.S. 645, 650-651 (1972) ("very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"). Under these precedents, "the specific dictates of due process generally require[] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1133 (8th Cir. 1984) (quoting *Mathews*, 424 U.S. at 335).

With respect to the value of additional safeguards, the Supreme Court has recognized that due process does not require that "the procedures used to guard against an erroneous deprivation be so comprehensive as to preclude any possibility of error." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S.

305, 320 (1985) (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)). Relatedly, the third and final factor under the *Matthews* balancing test is the cost to the Government that additional process would entail. In this respect, the Supreme Court has made clear that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." *Walters*, 473 U.S. at 320-21; *accord Mathews*, 424 U.S. at 348 ("conserving scarce fiscal and administrative resources is a factor that must be weighed" in due process analysis). Significantly, this cost-benefit analysis further takes account of the practical reality that "the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." *Mathews*, 424 U.S. at 348.

This balancing analysis, applied here, leaves no doubt that the procedures the Secretary has established regarding the administration of the HAMP loan modification program exceed the constitutional minimum.[16]

[16] No Plaintiff actually received a loan modification; none has ever received the benefits to which each claims he or she is entitled. This distinction is significant for due process purposes, as the Supreme Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986). Although the Supreme Court has never squarely addressed the issue of whether applicants for government benefits come within the ambit of the Due Process Clause, the Supreme Court's reticence to agree that applicants are due *any* process certainly suggests that even if *some* process is due, the process which the Secretary has already established far

SD 09-01 makes clear that "[s]ervicers must also have procedures and systems in place to be able to respond to inquiries and complaints about the HMP [and] should ensure that such inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution." Exhibit D at 13. Furthermore, it also states that servicers should issue denial letters to any borrower whom the servicer deemed ineligible for a HAMP loan modification, and determine whether other loan modifications might be feasible. *See* Maggiano Decl., ¶ 12; Exhibit D at 18 (SD 09-01). To the extent that servicers failed to give the requisite notice in accordance with SD 09-01, that failure does not give rise to a claim against the *Secretary*.

Because "[t]here is, of course, no constitutional right to an appeal," Plaintiffs' assertion that they are constitutionally entitled to challenge a loan modification denial fails outright. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Plaintiffs' vague assertion that Treasury's appeal process is "constitutionally [un]sound," Pl. Br. at 3, is further undercut by the considerable precautions Treasury has already instituted to increase HAMP's effectiveness. Throughout HAMP's short existence, Treasury has attempted to provide recourse for borrowers who believe that they were wrongly denied a loan modification under HAMP. Since July 2007, Treasury and HUD have publicly endorsed a nationwide foreclosure hotline — known as the "Homeowner's HOPE™ Hotline" (888-995-

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exceed whatever threshold the Constitution might require under such circumstances.

HOPE) — operated by the nonprofit Homeownership Preservation Foundation ("HPF"). The Secretary's purpose in establishing this hotline was to allow borrowers to receive direct information and assistance in applying for the HAMP program, and to escalate concerns if borrowers believe their application was denied improperly. *Id.* HPF was chosen because of its status as a respected, independent nonprofit with experienced HUD-approved housing counselors. *See generally* Maggiano Decl., ¶ 37.

On July 10, 2009, the hotline became fully operational. Since that time, borrowers who have questions about MHA and HAMP generally, or who have concerns or complaints regarding how a particular servicer handled their individual case, have been able to call the Homeowner's HOPE hotline and ask for the HOPE Hotline Escalation Team. If the borrowers' question or concern remains unresolved after discussion with the servicer, the counselor can further escalate the case to a designated team at Fannie Mae. Fannie Mae representatives also have servicer ombudsmen at a more senior level who they work with to resolve both individual complaints and "policy" or "systemic" problems. *See generally* Maggiano Decl., ¶ 39.

After meeting with Treasury officials on July 28, 2009, participating loan servicers agreed to report the reasons for modification denials, both to Treasury and to borrowers, the reason for modification denials, in the form of so-called "denial codes." Exhibit I. This would at once enhance a denied loan applicant's understanding of the basis for the denial as well as Treasury's ability to evaluate the overall program effectiveness. This requirement that servicers furnish "Not Approved/Not Accepted Reason Codes" was memorialized in Supplemental Directive 09-06. *See* Exhibit 5. Servicers are also currently streamlining HAMP loan application documents and developing a web portal, which can serve as a centralized information repository for borrowers about the status of their loan modification application. Maggiano Decl., ¶ 29.

In addition to the HOPE hotline, Treasury has also directed Freddie Mac to play a prominent role as compliance agent in trying to ensure that borrower applications are not overlooked and/or that applicants are inadvertently denied a modification. In this "second look" process, which began on August 3, 2009, Freddie Mac audits a sample of MHA modification applications that have been declined. See Maggiano Decl., ¶ 31; *supra* at 12.

In view of all of these various safeguards that have already been or will soon be implemented, Plaintiffs' argument that the Secretary has somehow failed to provide HAMP loan modification applicants with constitutionally adequate process is unfounded.

In this respect, the Eighth Circuit's opinion in *Woodsmall v. Lyng* is instructive. 816 F.2d 1241 (8th Cir. 1987). The plaintiffs in *Woodsmall* alleged that FmHA's failure to promulgate adequate standards for evaluating loan creditworthiness ran afoul of the Constitution. The Court assumed without deciding that the Woodsmalls had a protected property interest in the establishment of creditworthiness standards, but noted that this property interest was not "as vital as is the interest of an eligible welfare claimant in receiving benefits." *Id.* at 1247. Contrasting housing loans with welfare entitlement programs, the *Woodsmall* Court conceded that "[t]he rural housing loan program addresses a basic need, but it is not the subsistence level need involved in welfare benefit programs." *Id.*

In rejecting plaintiffs' claims that the Constitution required additional procedural safeguards, the Eighth Circuit noted that *Woodsmall* was "not a case where the Secretary has refused to implement a loan program altogether." *Id.* at 1247. Rather, "the Secretary ha[d] promulgated regulations that should address some of the concerns of borrowers whose creditworthiness places their loan applications in jeopardy." *Id.* at 1247-48. "Requiring more standards, the Court held, "would result in undue administrative burdens" and was therefore unwarranted under *Matthews* balancing analysis. *Id.* at 1248. Plaintiffs claim for additional procedural safeguards is even weaker here than in *Woodsmall*, in view of the much greater procedural protections that the Secretary has already implemented or is in the process of implementing to ensure that Plaintiffs who are denied loan modifications are given explanations why as well as an opportunity to seek recourse. Accordingly, even if Plaintiffs' have a valid Fifth Amendment entitlement to due process, the procedures the Secretary has implemented satisfy the constitutional requirements.

III. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE HARM

None of the four named plaintiffs in this case are threatened with irreparable harm. The Eighth Circuit requires as a threshold matter that the moving party establish that the harm is both certain and imminent. *See Iowa Utils. Bd. v. Fed. Commc'ns Comm'n,* 109 F.3d 418, 425 (8th Cir.1996) ("[A] party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.").

The harm to plaintiffs is uncertain because their claims are largely procedural, and they have been unable to show that even if they were re-evaluated for a HAMP modification, that they would actually qualify for a loan modification which would allow them to avoid foreclosure. *See generally Rector v. City and County of Denver*, 348 F.3d 935, 943 (10th Cir. 2003) ("[T]he Constitution does not protect procedure for procedure's sake."). As to claims of procedural injury, Ms. Strohmayer, in fact, acknowledges that she did receive from the servicer the reason for her denial, Pl. First Am. Compl., ¶ 97. As to the other plaintiffs, they had and still have access to the Homeowners HOPE hotline, but there is no showing that they have used it. As for the imminence of the injury, two of the named plaintiffs, Nichole Williams and Carrie Strohmayer, are still living in their homes and will continue to do so, for at least another six months, since they have not actually been foreclosed upon or had their homes sold.

Plaintiffs have made absolutely no showing that their two sub-classes would suffer harm in the absence of a preliminary injunction. *See Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992) (denying injunctive relief to broader class prior to certification). Plaintiffs submitted an affidavit from counsel, which includes the list of participating HAMP servicers and the numbers of foreclosures in Minnesota by county, Ireland Aff., ¶ 5, Exhibits A, B, but has failed to connect the dots in explaining which, if any, members of either putative sub-class would actually be eligible or qualify for a HAMP modification. Injunctive relief is only appropriate where the conduct enjoined (foreclosure or sheriffs' sales) would be clearly attributable to Defendants' violation of law (alleged due process violations). Plaintiffs simply cannot show that classwide relief is appropriate under these circumstance and their proposed sub-classes should be rejected. *See, e.g.*, *Masterman v. Goodno*, 2004 WL 51271, at *13-14 (D. Minn. Jan. 8, 2004) (refusing to issue an injunction stopping a program serving thousands of individuals, based on the circumstances of the three plaintiffs, and instead entering injunction covering only named plaintiffs).

IV. A PRELIMINARY INJUNCTION WOULD SUBSTANTIALLY INJURE OTHER INTERESTED PARTIES, INCLUDING NON-NAMED SERVICERS AND INVESTORS, AND WOULD BE ADVERSE TO THE PUBLIC INTEREST

The Court should deny the broad preliminary injunction because Plaintiffs have failed to meet their burden of showing this injunction will not cause great harm to the defendants, third parties, and/or the public interest. "[E]ven where denial of a preliminary injunction will harm the plaintiff, the injunction should not be issued where it would work a great and potentially irreparable harm to the party enjoined." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969); c*f. Internet Inc. v. Tensar Polytechnologies, Inc.*, Civ. No. 05-317, 2005 WL 2453170, at *7 (D. Minn. Oct 3, 2005) (denying preliminary injunction where broad and far-reaching injunctive relief sought by plaintiff "outweighs any harm that [plaintiff] may suffer without an injunction."). The relief Plaintiffs seek, if granted, would not just injure the named defendants, but other non-named interested parties, including loan servicers and investors who have ownership stakes in Minnesota mortgages.

More fundamentally, the proposed relief would cut deeply against the strong public interest in making affordable home loan modifications widely available, not to mention the public's interest in having ultimate policy decisions behind HAMP's careful balancing rest with Congress' legislative vision and Treasury's implementation. *See generally Baker Elec. Co-op. v. Chaske*, 28 F.3d 1466, 1474 (8th Cir. 1994) (Public interest factor includes "reference to the purposes and interests any underlying legislation was intended to serve …[and] public's interest in minimizing unnecessary costs to be met from public coffers.") (internal quotations and citations omitted).

In passing EESA, Congress sought to provide authority to the Secretary to "maximize assistance for homeowners" while still having the Secretary consider the financial impact on taxpayers. The Secretary was asked to implement a plan to "encourage" servicers, rather than force them to abrogate pre-existing contractual arrangements. Congress wanted the Secretary to consent to loan modifications, but only "where appropriate" through "reasonable requests." This made sense given that in the very same legislation, Congress was authorizing vast purchases of troubled assets; thus, there were tremendous economic implications for the taxpayer and the government's ever-growing portfolio of mortgages. Not only that, the Secretary had to take into account the interests of private servicers and investors who could only be brought into the program through private contracts in which they agreed to certain loan modification conditions. Thus, the Secretary had to formulate the proper balance of incentives to appeal to the GSEs, private mortgage servicers, private investors, bondholders, banks, and homeowners in a way which would cover the broadest range of homeowners facing imminent default and give these borrowers an opportunity to modify their loans before the property was foreclosed and sold.

This court should not grant a preliminary injunction, which would impose requirements on servicers that could adversely affect not only their interests and the interests of their investors, thereby jeopardizing servicers' willingness to participate and thus the HAMP program as a whole. The design and implementation of HAMP reflects the Secretary's considered judgment about how best to balance the myriad of competing and sometimes conflicting incentives in a manner that would best effectuate Congress's goals. Unhappy with the balance Treasury has struck in administering HAMP, Plaintiffs now invite this Court to strike an entirely new balance. This is precisely the sort of "wholesale [programmatic] improvement by court decree" that the Supreme Court has deemed inappropriate, observing that unlike the elected branches of government, courts "lack both expertise and information to resolve" these sorts of competing policy considerations. *Norton v. Utah Wilderness Alliance*, 542 U.S. 55, 64, 66 (2004). This Court should therefore decline Plaintiffs' invitation to remake HAMP.

HAMP faithfully reflects Congress's design. Congress envisioned that HAMP would assist homeowners facing imminent default and sale of their primary residence. Early evidence is promising. The sheer number of applications processed and modifications now entered into demonstrate HAMP's increasing success (this is evidenced by the fact that participating servicers have extended offers on over 609,000 trial modifications. *See supra* at 10.

Yet, as Congress also recognized and intended, HAMP has not been able to prevent all foreclosures. Plaintiffs' situations are concededly unfortunate, but the fact that they are dissatisfied with HAMP, or that Congress could have designed HAMP in a manner more to their liking, does not somehow elevate their upset into a constitutional violation. Having worked tirelessly to put the architecture of this program in place (and now seeing measurable, positive results), it would be counterproductive in the extreme to have this Court issue a broad injunction just as the program is starting to flourish, particularly given that much of what Plaintiffs seek — from the notification of borrowers as to why they were denied to some means of recourse for resolving complaints — has already been implemented. The public as a whole therefore would be best served by this Court's denial of Plaintiffs' Motion for a Preliminary Injunction.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion for a Preliminary Injunction.

Dated: September 22, 2009

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Nichole Williams, et. al.

On behalf of themselves and all others similarly situated

Plaintiffs.

v.

Case No: 09-CV-1959 ADM JJG

Timothy F. Geithner, in his official capacity as Secretary of the U.S. Department of the Treasury, et al.

Defendants.

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT OF L.R. 7.1(c)

I, **__Bradley H. Cohen__**, certify that Defendants **__Secretary Timothy F. Geithner and U.S. Department of the Treasury's__________** Opposition to Plaintiffs' Motion for Preliminary Injunction complies with Local Rule 7.1(c).

I certify that, in preparation of this memorandum, I used Microsoft Word 2003, Version 11.8, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains **_11,936_** words.

s/ *Bradley H. Cohen*________________

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2009, a copy of the foregoing pleading, together with exhibits, was filed electronically via the Court's ECF system, through which a notice of the filing will be sent to:

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