UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Nichole Williams, Johnson Sendolo, Carey Koppenberg, and Carrie Strohmayer
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Timothy F. Geithner, as United States Secretary 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, LLC, f/d/b/a Homecomings Financial, and U.S. Bank,

Defendants.

Civil No. 09-CV-1959 ADM/JJG

DEFENDANT GMAC MORTGAGE, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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I. INTRODUCTION

In this case, Plaintiffs seek to enjoin private loan servicers such as Defendant GMAC Mortgage, LLC ("GMAC") from foreclosing on private mortgages until Plaintiffs can persuade the United States government to create new federal regulations for the Home Affordable Modification Program ("HAMP"), or until they can convince a court to order the United States government to do so. Plaintiffs couch their claims as alleged violations of the Due Process Clause of the Fifth Amendment to the United States Constitution ("Due Process Clause").

Whatever traction Plaintiffs may be able to get against the government, they do not state a claim against GMAC, which holds a valid, unchallenged contractual right to enforce the private remedies Plaintiffs agreed to in their mortgage documents. Plaintiffs do not have a cause of action against GMAC based on its participation in the HAMP under existing regulations. GMAC and the other private servicers are in this action solely to accord a remedy to Plaintiffs pursuant to Rule 19(a) of the Federal Rules of Civil Procedure in the event that the United States government adopts new rules for HAMP.[1]

This Court should dismiss Plaintiffs' action against GMAC for four reasons. *First*, Plaintiffs do not have any statutory or other basis for bringing their claims in federal court, and precedent counsels against judicial creation of a cause of action. *Second*, Plaintiffs' claims fail because their application for a mortgage modification does not transform their request into an "entitlement" or cognizable property interest under the

[1] (*See* Reply Br. in Supp. of Pls.' Mot. for Prelim. Injunction 3.)

Due Process Clause. *Third*, Plaintiffs have not alleged facts sufficient to show that GMAC is a state actor and precedent demonstrates that GMAC's actions do not satisfy the state action requirement for constitutional claims. *Finally*, because Plaintiffs do not have a cause of action against GMAC and because GMAC cannot provide the remedy Plaintiffs seek—the promulgation of new federal regulations—there is no basis to keep GMAC in this action even under Rule 19(a).

For all of these reasons, as set forth more fully below, GMAC respectfully requests that this Court grant its motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs have failed to state a claim against GMAC upon which relief may be granted.

II. BACKGROUND

As it must, GMAC takes the well-pleaded factual allegations of the First Amended Complaint ("Compl.") as true for purposes of this motion, and for no other purpose.

A. THE GMAC PARTIES AND THEIR PRIVATE CONTRACTUAL RELATIONSHIP.

Of the four named plaintiffs, two have a relationship with GMAC, and that relationship is a private, contractual one. Plaintiffs Nichole Williams and Carrie Strohmayer both have first-lien mortgages that GMAC services. (Compl. ¶¶ 57, 86.) Both have fallen behind in their payments. (*See id.* ¶ 60; *see also id.* ¶¶ 83-86.) This lawsuit arises out of their requests to GMAC to modify the terms of their respective contracts under HAMP.

B. THE DESIGN AND PURPOSE OF THE HOME AFFORDABLE MODIFICATION PROGRAM ("HAMP").

HAMP was promulgated in March 2009 by the Secretary of the United States Treasury ("Secretary") under authority given to him by the Emergency Economic Stabilization Act ("EESA"), which also created the $700 billion Troubled Asset Relief Program ("TARP"). *See* Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201, *et seq.* (2009). Through EESA, Congress responded to the financial crisis gripping the United States. EESA's primary stated purpose was "to *immediately* provide authority and facilities that the Secretary can use to restore liquidity and stability to the financial system of the United States." *See id.* § 5201(1) (emphasis added). One way EESA implemented that purpose was to instruct the Secretary to "implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures." *See id.* § 5219(a)(1).

As EESA instructed, the Secretary designed HAMP to provide incentive payments to mortgage servicers to encourage them to modify the terms of existing mortgages. Of the five HAMP subprograms, the first-lien modification program[2] challenged by Plaintiffs is the most developed. This program will use approximately $32.5 billion in TARP funds to encourage modifications of mortgages by 38 participating servicers—including GMAC—for up to 2.6 million eligible borrowers by December 31, 2012. (*See*

[2] For purposes of this brief, "HAMP" will refer specifically to the first-lien modification program. According to the U.S. Government Accountability Office, there will be four other HAMP subprograms, but they are not implicated here. (*See* Compl. Ex. G at 11.)

Compl. Ex. G at 13.)[3] Its goal is to create more affordable first-lien housing payments that are no less than 31 percent of the borrower's gross monthly income. (*See id.* at 16.)

Since March 2009, over 235,000 borrowers have received trial modifications from servicers participating in HAMP. (*See id.* Ex. F.) Of those borrowers, 12,540 received modifications from GMAC. (*Id.*) According to the Making Home Affordable Program's "Servicer Report Through July 2009," GMAC modified loans for 20 percent of its eligible borrowers, performing well above the national rate of 9 percent and ranking it among the three top-performing HAMP servicers. (*See id.* ¶ 162, Ex. F.) Although the U.S. Government Accountability Office believes that the Treasury's estimate that 85 percent of homeowners are eligible for HAMP "may be overstated" (*compare id.* ¶ 111, *with id.* Ex. G at 49), overall, "the first-lien modification program, which has been designed to reduce borrowers' mortgage payments to affordable levels by modifying their loans, does appear to largely meet [EESA's] goals." (*Id.* Ex. G at 48.)

C. THE CLAIMS AGAINST GMAC.

Both Williams and Strohmayer are several months behind in their mortgage payments. (*See id.* ¶¶ 67, 88.) Prior to the announcement of HAMP, GMAC gave Williams several temporary modifications of her mortgage terms. (*Id.* ¶¶ 62-63.) GMAC also considered Williams' application for a HAMP modification. After concluding that

[3] This Court may consider the exhibits attached to the Complaint without converting this motion to a motion for summary judgment because courts may consider material "necessarily embraced by the pleadings" on a motion to dismiss. *Piper Jaffray Cos. v. Nat'l Union Fire Ins. Co.*, 967 F. Supp. 1148, 1152 (D. Minn. 1997).

Williams did not qualify for a modification under HAMP, GMAC offered her a non-HAMP modification in June 2009. (*See id.* ¶ 68.)

Similarly, GMAC considered but ultimately denied Strohmayer's application for a modification under HAMP. (*See id.* ¶ 96.) GMAC informed Strohmayer that her HAMP modification could not be approved because her debt-ratio was too high. (*See id.* ¶¶ 94, 96-97.) GMAC has not commenced foreclosure proceedings against either Williams or Strohmayer. (*See id.* ¶¶ 70, 96-97.)

Plaintiffs' sole claim against GMAC is that it "violated Plaintiff Nichole William [sic] and Plaintiff Carrie Strohmayer's procedural due process rights" by not providing a written explanation of its reasons for denying their requests to modify their loans under HAMP and for not providing them the opportunity to appeal its decisions. (*See id.* ¶ 19.) Plaintiffs ask the Court to enjoin GMAC from exercising its contractual rights to accelerate payments and commence foreclosure until Treasury has promulgated new "regulations, guidelines, or rules" requiring written explanations for the denial of loan modifications and the right to appeal any such denial. (*Id.* ¶ 186.)

III. STANDARD FOR DISMISSAL

Dismissal under Rule 12(b)(6) is a valuable tool that "serves to eliminate actions which are fatally flawed in their legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). Taking the well-pleaded facts alleged in the complaint as true but setting aside conclusory allegations, a court must grant a motion to dismiss when the factual allegations do not "raise a right to relief above the speculative

level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. ---, 129 S. Ct. 1937, 1949-50 (2009); *Sain v. Geske*, No. 07-4203, 2008 WL 2811166, *21 (D. Minn. July 17, 2008) (dismissing a due process claim against private defendants under Rule 12(b)(6) "because there is no federal or state actor acting under color of federal or state law"); *Associated Contract Loggers, Inc. v. U.S. Forest Serv.*, 84 F. Supp. 2d 1029, 1033-34 (D. Minn. 2000) (same).

IV. ARGUMENT

A. PLAINTIFFS DO NOT HAVE A PRIVATE RIGHT OF ACTION TO BRING THEIR DUE PROCESS CLAIMS AGAINST GMAC.

Private litigants cannot bring a lawsuit to vindicate a constitutional claim unless Congress creates a private right of action for the claim or the courts imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). *See Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988). Section 1983 of Title 42 provides a cause of action for constitutional claims against States. 42 U.S.C. § 1983. But no State is a defendant here, and there is no analogous statute generally authorizing constitutional claims against the federal government. *Cf.* 28 U.S.C. § 2671, *et seq.* (providing for limited causes of action under the Federal Tort Claims Act). Congress did not create a specific private right of action under EESA for Plaintiffs' procedural due process claim, and this Court should not imply one. The Court should therefore dismiss Plaintiffs' Complaint for failure to state a claim.

1. EESA Does Not Create A Private Right Of Action In Favor Of Plaintiffs Against Loan Servicers Such As GMAC.

"The ultimate question" in determining whether EESA creates a private right of action "is one of congressional intent." *MM&S Fin., Inc. v. NASD, Inc.*, 364 F.3d 908, 911 (8th Cir. 2004) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979)). As with all other questions of statutory interpretation, this Court begins with the statutory language, and "[i]f the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *DirecTV, Inc. v. Bertram*, 296 F. Supp. 2d 1021, 1024 (D. Minn. 2003) (quoting *Russello v. United States*, 464 U.S. 16, 20 (1983)); *see also Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 522-23 (8th Cir. 2007).

a. EESA's Plain Statutory Language Creates A Limited Private Right Of Action To Challenge The Secretary's Actions Under The APA And Denies The Intent To Create Any Other Right Of Action.

EESA's plain statutory language unambiguously denies the right of action that Plaintiffs seek to assert in this case. EESA addresses judicial review at 12 U.S.C. § 5229. The only private right of action that provision creates is for individuals to bring an action under the Administrative Procedures Act ("APA") to challenge actions taken by the Secretary. The relevant provisions of Section 5229 state as follows:

> (a) Judicial review.
>
> (1) Standard. Actions by the Secretary pursuant to the authority of this Act shall be subject to chapter 7 of title 5, United States Code [5 U.S.C.S. §§ 701 et seq.], including that such final actions shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law.
>
> (2) Limitations on equitable relief.
>
> (A) Injunction. No injunction or other form of equitable relief shall be issued against the Secretary for actions pursuant to . . . [12 U.S.C.S. § 5211, 5212, 5216, and 5219], other than to remedy a violation of the Constitution.

Id. These provisions do not create any right of action against private servicers such as GMAC. *See id.*

Apart from the creation of a limited, exclusive cause of action against the Secretary under the APA, the plain text of EESA denies any intent to allow additional suits under the statute: "Any exercise of the authority of the Secretary pursuant to this chapter shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary." *See id.* § 5229(b)(2). The statute thus precludes creation of additional causes of action by precluding claims unless they "otherwise apply." *Id.*;[4] *see also* 154 Cong. Rec. S10250 (daily ed. Oct. 1, 2008) (statement of Sens.

[4] Consistent with EESA, Section 129a of the Truth-in-Lending Act also restricts the judicial remedies available to investors against servicers participating in foreclosure-mitigation programs. The statute governs the "duty of servicers of residential mortgages," and creates a safe harbor for servicers of securitized mortgages to modify loans to maximize net present value. Truth-in-Lending Act Section 129a, 15 U.S.C. § 1639a (2009). By presumptively deeming a servicer to have satisfied its fiduciary duty to investors upon the implementation of a qualified loss-mitigation plan, Section 129a encourages the modification of residential loans. *See id.* Subsection (g) preserves a servicer's liability to abide by predatory-lending laws. *See id.*

Leahy and Dodd) (describing intended judicial review as encompassing already recognized claims under the APA, federal and state statutes, and shareholder actions, and acknowledging EESA's prohibition on "interfering with or impairing in any way the claims or defenses available to any person").

b. Congress's Careful Enactment Of Multiple Layers Of Oversight For EESA Programs Precludes Any Argument That Its Limitation Of Judicial Remedies Was Accidental Or An Oversight.

Congress provided an alternative to private lawsuits as a check on the Secretary's implementation of EESA. It set up no less than four separate systems to monitor the Secretary's implementation of EESA.

First, EESA established the Financial Stability Oversight Board. *See* 12 U.S.C. § 5214. The Oversight Board is charged with reviewing the Secretary's actions, making recommendations to the Secretary, and reporting back to Congress "not less frequently than quarterly" on such matters. *See id.* § 5214(a), (g). The Oversight Board is also charged with "ensur[ing] that the policies implemented by the Secretary are," among other things, "in accordance with the purposes of [EESA]." *Id.* § 5214(e).

Second, EESA also sets up a detailed mandatory reporting system that requires the Secretary to provide information to Congress. *Id.* § 5215. The statute requires monthly reports by the Secretary to Congressional committees. *Id.* § 5215(a). It requires a host of other reporting and submission of reports to the Congressional Oversight Panel. *See id.* § 5215(a)-(d); *see also id.* § 5252 (providing for Office of Management and Budget and Congressional Budget Office reports).

Third, EESA establishes the "Congressional Oversight Panel" that is charged with reviewing the Secretary's actions, analyzing submitted reports, and providing reports of its own. *See id.* § 5233. The Congressional Oversight Panel has the power to hold hearings, hear testimony, and take evidence. *See id.* § 5233(e).

Last, EESA provides for individual review of the statute's implementation. The Comptroller General has oversight responsibilities for several aspects of TARP, including the Secretary's performance in mitigating foreclosures. *See id.* § 5226(a)(1)(A)(i). In addition, EESA establishes an Office of the Special Inspector General for TARP who supervises and coordinates "audits and investigations" of the Secretary's actions. *See id.* § 5231.

This comprehensive and robust system to monitor and report allows for nimble responses to the Secretary's implementation of EESA and the evolving economic situation. Thus, Congress has already designed an administrative and legislative system that can respond to any alleged inadequacies in HAMP, including those alleged by Plaintiffs. It would be contrary to the legislative scheme to determine that an additional, nonstatutory cause of action against GMAC that EESA itself does not provide is warranted under these circumstances. *See Schweiker*, 487 U.S. at 429 ("Whether or not we believe that its response was the best response, Congress is [] charged with making the inevitable compromises required in the design of a massive and complex [] benefits program.").

c. EESA's Legislative History Shows That Congress Rejected Amendments That Would Have Granted A Private Right Of Action.

EESA's legislative history shows that Congress considered granting a private right of action but decided that the public interest in speedily implementing economic recovery programs was better served by not granting such a right. On October 1, 2008, Senator Patrick Leahy addressed the Senate regarding "the intent with which the[se] judicial review provisions were drafted." 154 Cong. Rec. S10279 (daily ed. Oct. 1, 2008) (statement of Sen. Leahy). He stated that the Senate Judiciary Committee responded to the Bush Administration's concerns that

> judges would award injunctions and thwart the emergency actions needed for the Secretary to calm the financial crisis. By agreeing to the administration's request on injunctions, we intend for damages actions to be the avenue of relief for any misconduct, should it occur, on the part of the Secretary.

Id. at S10280; *see also id.* at S10250 (statements of Sens. Leahy and Dodd) (involving a colloquy between Senator Leahy and Senator Christopher Dodd regarding the judicial-review provisions).

Amendments were proposed that would have authorized greater enforcement and broad judicial review of EESA programs. Representative Sheila Jackson-Lee introduced several proposed amendments to require servicers to minimize foreclosures and advocated for "greater enforcement" through "rigorous judicial review of the bailout program." 154 Cong. Rec. H10708 (daily ed. Oct. 3, 2008) (statement of Rep. Jackson-Lee); *see also id.* at H10778. As codified, however, Section 5229 does not provide any cause of action or expanded judicial review. *See* 12 U.S.C. § 5229(b)(2). The statute

allows only claims "that would otherwise apply" and preserves all defenses "that would otherwise apply." *See id.*

Because the "unambiguous language of [EESA] limits those against whom a civil right of action lies," and because the legislative history buttresses the unambiguous language, this Court should dismiss Plaintiffs' claims against GMAC under Rule 12(b)(6). *See DirecTV, Inc.*, 296 F. Supp. 2d at 1026; *see also Zajac v. Fed. Land Bank*, 909 F.2d 1181, 1183 (8th Cir. 1990) (declining to imply cause of action under the Agricultural Credit Act of 1987 where agricultural property was foreclosed upon); *Wilson v. Mason State Bank*, 738 F.2d 343, 344-45 (8th Cir. 1984) (declining to imply cause of action under the Emergency Agricultural Credit Act of 1978 where the bank brought writ of replevin action against farmers).

2. This Court Should Not Create A Cause Of Action Under The Constitution Where Congress Denied One.

The Supreme Court has created "*Bivens*" causes of action directly under the Constitution only three times: (1) for Fourth Amendment violations, *see Bivens*, 403 U.S. at 396; (2) for sex-based employment discrimination by a federal official, *see Davis v. Passman*, 442 U.S. 228, 244 (1979); and (3) for Eighth Amendment violations, *see Carlson v. Green*, 446 U.S. 14, 18-23 (1980). Since *Carlson* was decided in 1980, the Court has not created any other *Bivens* causes of action. Instead, it has rejected every purported new *Bivens* claim that has come before it, including those based on the Due Process Clauses of the Fifth and Fourteenth Amendments. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (declining to create cause of action for alleged Eighth

Amendment violation by private operator of prison halfway house); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (declining to create cause of action for alleged due process violation for termination of employment); *Schweiker*, 487 U.S. at 423 (declining to create cause of action for alleged due process violation by government officials that resulted in deprivation of Social Security benefits); *United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (declining to create cause of action for alleged due process violations by military personnel); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (declining to create cause of action for alleged equal protection violations by superior officer in military); *Bush v. Lucas*, 462 U.S. 367, 380 (1983) (declining to create cause of action for alleged First Amendment violation against federal agency employee by superiors).[5]

Just as Congressional intent is the cornerstone of the analysis in examining statutory rights of action, it plays a key role in determining whether courts will create a new *Bivens* action, too. The Supreme Court has held that it will not create causes of actions when there is an "explicit statutory prohibition against the relief sought" or an

[5] The Eighth Circuit's decision in *Arcoren v. Farmers Home Administration*, 770 F.2d 137 (8th Cir. 1985), does not support a claim here. In *Arcoren*, the Court held that an administrative appeals process did not defeat a *Bivens* action for a suit based on the government's repossession of cattle. *Arcoren* is unpersuasive here for two reasons. First, the Eighth Circuit later characterized that decision not as creating a *Bivens* claim but as "remand[ing] *for further consideration* of whether Arcoren could establish a *Bivens* action." *Arcoren v. Peters*, 829 F.2d 671, 673 (8th Cir. 1987) (emphasis added). Second, the precedential value of *Arcoren* has been overridden by the subsequent Supreme Court decisions cited *supra*, including in the context of due process claims, where the Court declined to create causes of action based on the argument that the statutes at issue did not provide any other "equally effective" remedy. *Compare Arcoren*, 770 F.2d at 140, *with Schweiker*, 487 U.S. at 421-22; *see also Wilson*, 738 F.2d at 345 (declining to create cause of action for alleged violation of federal regulations governing loan transaction).

"exclusive statutory alternative remedy." *Schweiker*, 487 U.S. at 421. The Court will also not create causes of action for Constitutional violations when there are any "special factors counseling hesitation." *Id.* "Special factors" include "policy questions in an area that ha[s] received careful attention from Congress." *Id.* at 421, 423; *see also Bush*, 462 U.S. at 379-80. The legislative history and the explicit language of EESA establish that the question of a new private cause of action was carefully discussed and ultimately rejected by Congress.

This Court should not take the extremely rare step of creating a new cause of action directly under the Constitution for Plaintiffs' procedural due process claims because two decisions denying *Bivens* actions for due process claims in analogous contexts—one by the Eighth Circuit and one by the Supreme Court—are controlling here.

First, in *Schweiker v. Chilicky*, the Supreme Court declined to create a new due process cause of action for claimants whose social security disability benefits were terminated but later restored. *See* 487 U.S. at 418. According to the Court, the administrative structure and legislative choices by Congress precluded the judiciary from creating a cause of action. *See id.* at 424-27. *Schweiker* relied heavily on the Court's previous decision in *Bush v. Lucas*, where the Court declined to create a *Bivens* action based on its examination of the relevant statute and its legislative history. *See Bush*, 462 U.S. at 388 (stating that the "policy judgment" of whether a remedy should be created "should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy"). In *Schweiker* and *Bush*, the Court declined to create a cause of action where Congress had

decided not to do so, because the Court was "convinced that Congress is in a better position to decide whether or not the public interest would be served by creating [a cause of action]." *Schweiker*, 487 U.S. at 427 (quoting *Bush*, 462 U.S. at 390) (quotation marks omitted).

Second, in *Mehrkens v. Blank*, 556 F.3d 865 (8th Cir. 2009), the Eighth Circuit declined to create a cause of action for a veteran's due process claim related to a delay in his receipt of veteran disability benefits. *Id.* at 867, 871. According to the Eighth Circuit, in determining whether a *Bivens* cause of action is warranted the "real question [is] whether Congress [has] set up a plan after careful attention to conflicting policy considerations. If Congress [has] set up such an elaborate scheme in a particular area, then courts should not augment that scheme by creating a *Bivens* remedy." *Id.* at 869. In *Mehrkens*, "Congress's careful structuring of the [Veterans' Judicial Review Act]" precluded judicial creation of a cause of action. *Id.* at 870.

For the same reasons that the Eighth Circuit and Supreme Court declined to create new *Bivens* actions for due process claims in *Schweiker* and *Mehrkens*, this Court should decline to create a new action here. First, EESA contains an "explicit statutory prohibition against the relief sought" by Plaintiffs: Section 5529(b)(2), which expressly reserves *only* "claims . . . that would otherwise apply" against parties other than the Secretary. *See Schweiker*, 487 U.S. at 421; 12 U.S.C. § 5529(b). EESA also contains an "exclusive statutory alternative remedy" for Plaintiffs' claims: Plaintiffs may bring an action under the APA against the Secretary. *See Schweiker*, 487 U.S. at 421; 12 U.S.C. § 5529(a).

Second, Congress's consideration and rejection of increased judicial review under EESA is a "special factor" that further counsels against creating a cause of action. *See Schweiker*, 487 U.S. at 421; *Bush*, 462 U.S. at 379. Attempts to amend EESA to increase judicial review were unsuccessful. 154 Cong. Rec. H10778 (daily ed. Oct. 3, 2008) (statement of Rep. Jackson-Lee) (stating that "I have worked with leadership to offer . . . amendments, not once but twice unsuccessfully."); *see also id.* at H10708 (statement of Rep. Jackson-Lee). And Congress acknowledged its intent to narrowly circumscribe the types of suits that would be allowed under the statute. 154 Cong. Rec. S10279 (daily ed. Oct. 1, 2008) (statement of Sen. Leahy); *see also* 154 Cong. Rec. S10250 (daily ed. Oct. 1, 2008) (statements of Sens. Leahy and Dodd) (outlining the Congress's intent regarding the lawsuits and defenses allowed under EESA).

Because Congress declined to create a private right of action for Plaintiffs to bring a due process claim against GMAC, this Court should do the same.

B. EESA DOES NOT CREATE AN ENTITLEMENT TO THE MODIFICATION OF EXISTING MORTGAGES.

In order to bring their claims, Plaintiffs must demonstrate a protected property interest encompassed by the Fifth Amendment. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). Not every interest rises to the level of an entitlement protected by the Due Process Clause. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

Plaintiffs cannot demonstrate an entitlement to modification of their existing mortgages under the Due Process Clause for two reasons. First, EESA itself precludes a finding that mortgage modification is an entitlement because, rather than requiring mandatory modification, the statute only "encourage[s]" servicers to modify mortgages. Second, because Plaintiffs' claims are a product of eligibility determinations based on *applications* for benefits that they have never received, Plaintiffs do not have a cause of action under the Due Process Clause. Accordingly, this Court should dismiss Plaintiffs' claims against GMAC as a matter of law.

1. The Language And Legislative History Of EESA Demonstrate That The Statute Does Not Require Individual Mortgage Modifications.

EESA's statutory scheme is permissive in its approach to loan modifications by servicers. *See* 12 U.S.C. § 5201(2)(B). The statutory scheme provides that the Secretary should "*encourage* the servicers of the underlying mortgages to take advantage of . . . available programs to minimize foreclosures." *Id.* § 5219 (emphasis added). The Act does not require servicers to modify mortgages in every instance, and it does not require servicers to cease all foreclosures. Although some members of Congress sought to make the relief provided by EESA mandatory, [6] those efforts failed. The version of the bill

[6] *See* 154 Cong. Rec. H10778 (daily ed. Oct. 3, 2008) (statement of Rep. Jackson-Lee) ("[I]n section 109, which addresses "foreclosure mitigation efforts," the language should be changed from "shall encourage" to "shall require" to provide stronger relief for Americans.") *See also* 154 Cong. Rec. H10766 (daily ed. Oct. 3, 2008) (statement of Rep. Kucinich) ("The central flaw of this bill is that there are no stronger protections for homeowners and no changes in the language to ensure that the secretary has the authority to compel mortgage servicers to modify the terms of mortgages."); *id.* at H10791 (statement of Rep. Udall) ("I believe we could have added provisions that . . . required the government to help responsible homeowners refinance their mortgages . . . ."); *id.* at

enacted by Congress retained the discretionary language that mortgage modifications are "encourage[d]," but not required. *See* 12 U.S.C. § 5219. The fact that individual mortgage modifications are discretionary, not mandatory, dooms Plaintiffs' claim of entitlement to a HAMP loan modification. *Hill v. Group Three Hous. Dev. Corp.*, 799 F.2d 385, 391 (8th Cir. 1986) (describing landlord discretion that remained under a housing statute as precluding a finding of entitlement).[7]

2. Plaintiffs Do Not Have An "Entitlement" Based On Their Application For A Benefit.

Plaintiffs' claims also fail because they have applied for, but have never received, the benefit to which they allege due process rights attach.

S10258 (daily ed. Oct. 1, 2008) (statement of Sen. Levin) ("I am pleased that this bill, in Sections 109 and 110, requires the Treasury Department to maximize assistance for homeowners and encourage mortgage service providers to minimize foreclosures so as to keep families in their homes . . . [But,] [r]ather than encouraging servicers to modify unaffordable loans, the United States should undertake a systematic effort to minimize foreclosures.").

[7] The HAMP guidelines further limit EESA as it applies directly to GMAC. "The amount of funds available to pay servicer, borrower and investor compensation in connection with each servicer's modifications will be capped pursuant to each servicer's Servicer Participation Agreement (Program Participation Cap)." (Compl. Ex. E at 23.) As one of 38 servicers (*see id.* Ex. F), GMAC may not modify otherwise qualifying mortgage loans once it reaches its Program Participation Cap, even if that event occurs before the termination of HAMP on December 31, 2012. (*See id.* Ex. E at 23 ("Once a servicer's Program Participation Cap is reached, a servicer must not enter into any agreements with borrowers intended to result in new loan modifications, and no payments will be made with respect to any new loan modifications."); *see also id.* Ex. B at 1 (stating that servicers are not required to service eligible loans if prohibited by contract).) The presence of the Program Participation Cap further demonstrates that Plaintiffs cannot establish an entitlement. The cap is a factor, outside of the control of Plaintiffs, that affects whether they may receive any modification of their mortgages. External factors that affect receipt of a sought-after benefit preclude Plaintiffs from establishing an entitlement under the Due Process Clause. *See Hill*, 799 F.2d at 391.

The Supreme Court has drawn a distinction between those who have received government benefits and may have a "legitimate claim of entitlement," and those who have merely applied for benefits and do not have such a claim. *Lyng v. Payne*, 476 U.S. 926, 942 (1986). 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." *Id.*; *see also O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980) ("This case does not involve the withdrawal of direct benefits.").

The Eighth Circuit has not recognized a Due Process claim based on a mere application for benefits either. In *DeJournett v. Block*, 799 F.2d 430 (8th Cir. 1986), the Court noted that, like the Supreme Court, it had never held that the filing of a loan application provided applicants with a property interest cognizable under the Due Process clause.[8] *Id.* at 432 (stating that application did "not transform the DeJournetts' unilateral hope, desire, or abstract need for a FmHA loan into a legitimate claim of entitlement to the loan itself" even where plaintiffs had received FmHA loans in the past); *accord Woodsmall v. Lyng*, 816 F.2d 1241, 1246 (8th Cir. 1987).

The distinction between applicants and those receiving benefits conforms with the discretion allotted to Congress and administrative agencies. The government's decision

[8] For this reason, Plaintiffs cannot rely on the farm foreclosure cases. In those cases, plaintiffs brought suit based on existing FmHA loans. *See Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984); *Shick v. Farmers Home Admin.*, 748 F.2d 35, 37-38 (1st Cir. 1984); *Coleman v. Block*, 562 F. Supp. 1353, 1364 (D.N.D. 1983); (*see also* GMAC's Mem. in Opp'n to Prelim. Injunction 23).

to bestow a benefit to a citizen fixes the person's interest such that an entitlement may be found. *See Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (noting welfare recipient's interest in continuing to receive payments). By contrast, if constitutionally protected rights attached to applications for government benefits, the legislature and agencies implementing a benefits program would be precluded from drawing the necessary lines distinguishing between those who will benefit from enacted laws and those who will not. *See, e.g., Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 61 (1911) (upholding legislative choice distinguishing between beneficiaries so long as it is not purely arbitrary). Moreover, it would limit agencies' ability to react swiftly when conditions change. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984); *see also* 12 U.S.C. § 5201(1) (noting purpose of EESA "to *immediately* provide authority" for the Secretary "to restore liquidity and stability to the financial system of the United States") (emphasis added).

Based on the reasoning of *DeJournett* and *Lyng*, Plaintiffs do not possess an entitlement to any government benefit. This Court should reject Plaintiffs' plea to create a novel Constitutional claim based on a mere application for benefits in a largely discretionary government program. *See Lyng*, 476 U.S. at 942; *DeJournett*, 799 F.2d at 431.

C. PLAINTIFFS CANNOT BRING CONSTITUTIONAL CLAIMS AGAINST NON-STATE ACTORS LIKE GMAC.

The Constitution's protections for individual rights and liberties constrain only government action, not the actions of private entities like GMAC. *See Nat'l Collegiate*

Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (holding that the NCAA was not a state actor). Because Plaintiffs cannot demonstrate that GMAC is a state actor, this Court should dismiss Plaintiffs' claim against it.

1. GMAC Is Not A State Actor Under Controlling Precedent.

GMAC's actions must be "properly attributable" to the federal government in order for GMAC to be held liable in an action raising constitutional claims. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (describing the state-actor question as whether private person's action "may be fairly treated as that of the State itself"). The Supreme Court has yet to articulate a comprehensive definition of state action. *See Jackson*, 419 U.S. at 349-50 (stating that "whether particular conduct is 'private,' on the one hand or 'state action,' on the other, frequently admits of no easy answer"); *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). Thus, state action is best determined by examining the instances in which it has, and has not, been found. GMAC's actions do not fall within any of the recognized categories where private parties' actions are attributable to the government for constitutional purposes.

First, GMAC's servicing of mortgages is not a traditional public function. It is not at all like the traditional public functions that have warranted the finding of state action, such as running a municipality or administering an election. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55-56 (1999); *Flagg Bros., Inc.*, 436 U.S. at 158-59; *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Jackson v. Metropolitan Edison Co.*, for instance, the

Supreme Court held that a private utility company could terminate a customer's service without running afoul of the Due Process Clause of the Fourteenth Amendment because running a utility is "not traditionally the exclusive prerogative of the State." 419 U.S. at 353. Servicing loans, which traditionally has been performed by private entities, is not a traditional public function, much less the "exclusive prerogative of the State" as required by *Jackson*. Indeed, in *Flagg Brothers, Inc. v. Brooks*, the Supreme Court stated that finding state action in "private commercial transactions" would be "particularly inappropriate." 436 U.S. at 163.

Second, GMAC cannot fairly be viewed as engaged in a "conspiracy" with the federal government. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *see also Carlson v. Roetzel & Andress*, 552 F.3d 648, 651 (8th Cir. 2008). Nor does GMAC's conduct meet the criteria for "joint action," which requires the engagement of public officials with private actors, such as in the seizure of goods. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) (describing joint participation as present when private actors "invok[ed] the aid of state officials to take advantage of state-created attachment procedures"); *see also Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 422 (8th Cir. 2007). GMAC's actions also do not involve the use of "coercive power," *see Wickersham v. City of Columbia*, 481 F.3d 591, 598 (8th Cir. 2007) (describing police involvement in enforcement of restrictions on speech activities as "entwinement" sufficient to find state action), or "control" by the state or federal government that would support a finding of state action. *Brentwood*

Acad., 531 U.S. at 296 (citing *Pennsylvania v. Bd. of Dirs. of City Trusts of the City of Phila.*, 353 U.S. 230 (1957)).

Third, Plaintiffs have not pleaded that the federal government provided such "significant encouragement, either overt or covert, that [GMAC's] choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Rather, this case is similar to *Blum v. Yaretsky*, where the Supreme Court found no state action when nursing home residents sued based on a lack of notice informing them of decisions to transfer them to other facilities. *Id.* at 1005. Federal regulations had set up an administration scheme requiring nursing homes to establish a "utilization review committee" ("URC") to assess whether patients were receiving an appropriate level of care. *Id.* at 994-95. When the URC determined that patients were not receiving appropriate care, it notified the responsible state agency, but not the nursing home residents subject to the transfer decisions. *Id.* at 995-96. The Supreme Court explained that even "extensively regulated" entities are not necessarily state actors and declined to hold the state responsible for URC actions under the "encouragement" doctrine. *Id.* at 1004-05.

Fourth, GMAC's receipt of HAMP funds does not render it a state actor for Constitutional purposes. Longstanding precedent establishes that the receipt of federal funding is insufficient to create state action, *see id.* at 1011 (declining to hold state action was present even though nursing home received state subsidies and more than 90 percent of medical expense payments from the state), and even entities subject to extensive regulation by the government are not deemed to be state actors on that basis. *See Am.*

Mfrs., 526 U.S. at 52; *Blum*, 457 U.S. at 1011; *Jackson*, 419 U.S. at 350 ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."); *Sinn v. The Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987).

Finally, GMAC is not properly viewed as "entangled" or "entwined" with the federal government. GMAC's voluntary contractual relationship with the Treasury, constituting only a small portion of its operations, is nothing like an organization that is comprised almost entirely of state entities. *See Brentwood Acad.*, 531 U.S. at 298; *see also id.* at 296 (describing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995), as holding that Amtrak was a state actor because it was "organized under federal law to attain governmental objectives and was directed and controlled by federal appointees").

2. The Regulations And Contractual Relationship Are Insufficient To Establish That GMAC Is A State Actor.

The regulatory framework and contractual relationship between GMAC and the federal government under HAMP are insufficient to transform GMAC into a state actor for purposes of Plaintiffs' claims.

Any lack of federal regulations governing post-denial procedures is not attributable to GMAC. Rather, this case is similar to *Flagg Brothers*, in which the plaintiffs brought claims against a warehouseman for selling their goods pursuant to a state law that authorized the action. *See* 436 U.S. at 152-52. The Supreme Court distinguished between state action that compels a private act and "mere acquiescence in a

private action." *Id.* at 164. It held that no state action was present, viewing the state statute as "merely announc[ing] the circumstances under which its courts will not interfere with a private sale." *Id.* at 166; *see also id.* at 165 ("It is quite immaterial that the State has embodied its decision not to act in statutory form."). Similarly, the Secretary's decision not to provide the types of procedures suggested by Plaintiffs under HAMP does not transform GMAC's conduct into state action for Constitutional purposes. *See also Am. Mfrs.*, 526 U.S. at 53 ("The State's decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary.").

Contractual relationships with the government are also insufficient to transform private actors into state actors for constitutional purposes. *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (determining that a "school's fiscal relationship with the State is not different from that of many contractors performing services for the government" where state action is not found). As the Eighth Circuit explained in its en banc opinion in *Arcoren v. Peters*, even a "wholly-owned government agency can enforce a valid contractual provision for foreclosure without running afoul of the constraints of the Fifth Amendment." 829 F.2d 671, 675 (8th Cir. 1987); *see also Warren v. Gov't Nat'l Mortgage Ass'n*, 611 F.2d 1229, 1233 (8th Cir. 1980) (holding that no state action was present where the plaintiff brought due process claims stemming from a home foreclosure by the Government National Mortgage Association, an entity that was "wholly-owned by the federal government" and that operated "under federal government authority").

The purely private contractual relationship between GMAC and mortgagees makes GMAC a private actor. Like relationships between private insurance companies and policy-holders, *Am. Mfrs.*, 526 U.S. at 51; lawyers and their clients, *Polk County v. Dodson*, 454 U.S. 312, 318 (1981); and schools and their teachers, *Rendell-Baker*, 457 U.S. at 841; the relationship between a mortgage servicer and mortgagees is a private one. Accordingly, GMAC's actions as a mortgage servicer fall outside the reach of the Due Process Clause. *See Am. Mfrs.*, 526 U.S. at 52 ("Faithful application of the state-action requirement in these cases ensures that the prerogative of regulating private business remains with the states and the representative branches, not the courts.").

Plaintiffs' prayer for relief confirms that GMAC is a private actor. Plaintiffs seek the promulgation of additional regulations, guidelines, and rules to govern the modification of mortgages under HAMP. (*See* Compl. ¶¶ 186-87.) Yet GMAC, is incapable of providing such relief.

Given Supreme Court and Eighth Circuit precedent, and GMAC's inability to furnish Plaintiffs' requested relief, GMAC cannot be considered a state actor for purposes of this litigation.

D. GMAC IS NOT A NECESSARY PARTY UNDER RULE 19(a).

In their Reply Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs suggest that they need not actually possess a cause of action against servicers like GMAC because "[t]hese Defendants are necessary parties to ensure that wrongful foreclosures are not permitted through HAMP." (Reply Br. 3 (citing *Nat'l*

Wildlife Fed'n v. Espy, 45 F.3d 1337, 1344 (9th Cir. 1995)). Although Rule 19(a)[9] of the Federal Rules of Civil Procedure provides for the joinder of necessary parties, "it does not create a cause of action against them." *Davenport v. International Bhd. of Teamsters*, 166 F.3d 356, 366 (D.C. Cir. 1999). "It is implicit in Rule 19(a) . . . that before a party . . . will be joined as a defendant the plaintiff must have a cause of action against it." *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989).

Plaintiffs cite a Ninth Circuit case in support of their assertion that they can sue GMAC as a "necessary party" without having a viable legal claim against GMAC. (*See* Reply Br. 3 (citing *Nat'l Wildlife Fed'n*, 45 F.3d at 1344).) Although the Ninth Circuit has permitted environmental groups to join as defendants private parties against whom they have no cause of action, *see, e.g.*, *id.* at 1344, the Ninth Circuit recently reined itself in to comport with the Fifth Circuit's holding in *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown* and the D.C. Circuit's holding in *Davenport v.*

[9] Rule 19(a)(1) provides for joinder of a person if

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

International Brotherhood of Teamsters. *See EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 782 (9th Cir. 2005).

In reconciling its cases with *Vieux Carre* and *Davenport*, the Ninth Circuit drew a distinction between plaintiffs who are "not seeking any affirmative relief directly from" the party against whom they have no claim, and the plaintiffs in *Vieux Carre* and *Davenport*, who "sought injunctions against the party sought to be joined." *Id.* at 782. In other words, the Ninth Circuit held that a defendant against whom no claim exists can be joined under Rule 19(a) only if "[the] plaintiff[] seek[s] no affirmative relief" against that defendant. *Id.* at 781-82. Because Plaintiffs seek affirmative injunctive relief against GMAC and other private servicers against whom they have no cause of action, Plaintiffs' apparent reliance on the Ninth Circuit's *National Wildlife Federation v. Espy* decision is misplaced.

There is no basis for joinder under Rule 19(a). Plaintiffs have no claim against GMAC. Further, GMAC's absence from this case will not affect the Court's ability to consider the relief that Plaintiffs seek: a change in the rules governing HAMP. Finally, it is not necessary to keep GMAC in this case because GMAC will abide by the law, including any new regulations approved by the Treasury, without need for a court order against it.

V. CONCLUSION

Plaintiffs may wish that Congress had passed a different bill or that the Secretary had issued different regulations. Their displeasure with Congress's response to the economic crisis, however, does not correct the fatal deficiencies in their claims. Plaintiffs

do not have any statutory or other basis for bringing their claims, and precedent counsels against implying a cause of action in these circumstances. Plaintiffs also cannot claim an entitlement to a mortgage modification under the Due Process Clause, or establish that GMAC is a state actor. Finally, because Plaintiffs do not have a cause of action against GMAC, and because GMAC cannot provide the remedy that Plaintiffs seek, there is no justification to keep GMAC in this action even under Fed. R. Civ. P. 19(a).

For all of these reasons, GMAC respectfully requests that this Court grant its Motion to Dismiss.

Respectfully submitted,

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