IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

NICHOLE WILLIAMS, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 09-CV-1959 ADM JJG
	)	
TIMOTHY F. GEITHNER, et al.	)	
	)	
Defendants.	)	

BRIEF OF DEFENDANTS FEDERAL NATIONAL MORTGAGE ASSOCIATION (d/b/a FANNIE MAE) AND FEDERAL HOME LOAN MORTGAGE CORPORATION (d/b/a FREDDIE MAC) IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") have a public mission to support liquidity and stability in the secondary mortgage market, ensuring in these troubled economic times that individuals still have access to the mortgage credit needed to purchase homes. In accordance with this mission, both companies have engaged in significant efforts to keep people in their homes and prevent foreclosures. One of the ways in which Fannie Mae and Freddie Mac are pursuing these efforts is through the Home Affordable Modification Program ("HAMP"). Under HAMP, participating private mortgage servicers acting pursuant to contract modify the terms of qualifying mortgage loans under specified guidelines, thereby making repayment of the mortgage loans sustainable and affordable for the homeowner. In its first six months, HAMP is off to a successful start. Offers for more than 570,000 trial modifications have been made, with more than 360,000 of those trials underway. The Treasury Department estimates that "HAMP has already been more successful than any previous similar program in modifying mortgages for at risk borrowers to sustainably affordable levels, and helping to avoid preventable foreclosures."[1]

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1 Declaration of Noah A. Levine ("Levine Decl.") Ex. 7 (Testimony of Michael S. Barr, Assistant Secretary for Financial Institutions, Department of Treasury, before House Financial Services Committee, Subcommittee on Housing & Community Opportunity on Stabilizing the Housing Market (Sept. 9, 2009) ("Barr Testimony")).

Plaintiffs are four Minnesota homeowners who, having breached the terms of their private mortgage loan agreements by failing to make required monthly payments, assert that the private servicers of their mortgage loans wrongly denied them participation in HAMP, despite Plaintiffs' alleged eligibility for the program. They seek through this litigation not simply to gain the advantages they say they were wrongly denied, but also to change in a fundamental way HAMP's entire operation. Invoking the Due Process Clause and class-action procedures, Plaintiffs ask this Court to impose upon Defendants a constitutionalized system of intricate procedures for servicers' HAMP eligibility determinations, including highly detailed notices of denial and opportunities to appeal any such denials to neutral decisionmakers.

Plaintiffs' theory, if credited, would revolutionize constitutional law. Plaintiffs' grievance is with determinations made by private mortgage servicers, yet they invoke the Due Process Clause, which prohibits the government—but not private parties—from depriving persons of property without due process of law. And Plaintiffs seek the Due Process Clause's protection without any grounds for asserting that they have a legally enforceable property interest in HAMP modifications in the first instance.

At the same time, Plaintiffs' proposed injunction would seriously threaten HAMP's effectiveness. As a practical matter, the imposition of elaborate, costly, and burdensome procedures would both divert financial resources from HAMP modifications, and potentially drive voluntary participants from the program altogether. Either result (and worse, both) would curtail homeowners' access to HAMP, undermining the program's important goals.

For these reasons, and those below, Defendants respectfully request denial of Plaintiffs' motion for preliminary injunction.

STATEMENT

I. FANNIE MAE AND FREDDIE MAC

Fannie Mae and Freddie Mac are private companies chartered by Congress, often referred to as government-sponsored enterprises ("GSEs"). The two companies support the secondary mortgage market by purchasing residential mortgages from private mortgage lenders in arm's length transactions. They then hold the mortgages in their own investment portfolios or securitize them by combining them into pools and selling interests in the pools to investors. For securitized mortgages, Fannie Mae and Freddie Mac are obligated to pay the principal and interest on the mortgages to investors regardless of whether the borrowers make such payments. The two companies contract with private mortgage servicers to collect payments from borrowers, pay real estate taxes and insurance, and handle other administrative details for the loans they have purchased.[2]

On September 6, 2008, pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1367(a)(1), 122 Stat. 2654, the Director of the Federal Housing Finance Authority ("FHFA") appointed FHFA as conservator of Fannie Mae and Freddie Mac. HERA authorizes the conservator to undertake actions to preserve and conserve Fannie Mae and Freddie Mac's assets and property and to restore the two

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[2] *See generally* Levine Decl. Ex. 5 (Fannie Mae 10-Q Report, Second Quarter 2009 ("Fannie Mae 10-Q")), at 1, 151; Declaration of Michael J. Ciatti ("Ciatti Decl.") Ex. 2 (Freddie Mac 10-Q Report, Second Quarter 2009 ("Freddie Mac 10-Q")), at 1, 112.

companies to a sound and solvent condition. *See* 12 U.S.C. § 4617. The conservator has delegated authority to the management of Fannie Mae and Freddie Mac to conduct the day-to-day operations of the two companies, and the stock of the two companies continues to be publicly traded.[3]

II. THE HOME AFFORDABLE MODIFICATION PROGRAM

A. The Emergency Economic Stabilization Act

On October 3, 2008, Congress passed the Emergency Economic Stabilization Act ("EESA"), Pub. L. No. 110-343, § 101, 122 Stat. 3765, authorizing the Secretary of the Treasury to purchase up to $700 billion in "troubled assets" to stabilize credit markets. Sections 109 and 110 further provide for the Secretary and certain federal agencies, including FHFA in its role as conservator for Fannie Mae and Freddie Mac, to engage in foreclosure mitigation efforts. EESA requires the Secretary and FHFA to implement plans "that seek[] to maximize assistance for homeowners" and to use their authority "to encourage the servicers of the underlying mortgages, considering net present value to the taxpayer, to take advantage of … available programs to minimize foreclosures." *Id.* §§ 109(a) (Secretary), 110(b)(1) (FHFA). Section 110 also provides that loan modifications carried out under any FHFA plan "may include" a "reduction in interest rates," a "reduction of loan principal," or "other similar modifications." *Id.* § 110(b)(2).

Apart from these general aspirational goals, EESA leaves to the Secretary and FHFA all decisions regarding the homeowner-assistance plans—*i.e.*, precisely how to

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3 *See generally* Levine Decl. Ex. 8 (FHFA, Fact Sheet: Questions and Answers on Conservatorship (Sept. 7, 2008) ("*Conservatorship Q&A*")).

"seek to" assist homeowners, "encourage" servicers to participate in foreclosure mitigation efforts, or "consider[] net present value to the taxpayer." Congress did not require that the plans benefit any identified category of borrowers or loans, nor that the plans utilize any specific forms of assistance. EESA instead accords the Secretary and FHFA full discretion to structure foreclosure mitigation initiatives, including their size, duration, and scope.

B. The Home Affordable Modification Program

The Treasury Department, FHFA, Fannie Mae, and Freddie Mac unveiled HAMP in February and March 2009. Unlike the farm-loan cases on which Plaintiffs rely so heavily, HAMP does not involve direct loans or payments to mortgage borrowers. Instead, HAMP works by providing financial incentives to mortgage servicers to modify the terms of private mortgages where foreclosure may be avoidable (*i.e.*, because monthly payments can be reduced to an affordable level—specifically, 31% of gross monthly income—without having to forgive principal).

HAMP has two primary components. *First*, the Treasury Department uses EESA funds to offer financial incentives to private mortgage servicers to modify qualifying mortgage loans that are not owned, securitized, or guaranteed by Fannie Mae or Freddie Mac ("non-GSE loans"). *Second*, at the direction of FHFA in its role as conservator, Fannie Mae and Freddie Mac each have instructed their servicers to modify qualifying loans that Fannie Mae and Freddie Mac own, securitize, or guarantee ("GSE loans"), also in exchange for incentive payments.

The Treasury Department HAMP program for non-GSE loans operates on a voluntary basis. Servicers who choose to participate enter into contracts with the government—Servicer Participation Agreements ("SPAs")—under which they commit to perform loan modifications pursuant to Treasury Department guidelines incorporated into the contracts.[4] The guidelines contain initial eligibility criteria, prescribe factors that servicers must consider to determine whether a modification is available, and set forth the steps the servicer must take to determine the terms of any such modification.[5] The Treasury Department has contracted with Fannie Mae and Freddie Mac to perform certain functions as part of the non-GSE program—Fannie Mae enters into the SPAs with the servicers on Treasury's behalf and Freddie Mac conducts auditing and compliance functions.

Fannie Mae and Freddie Mac also operate their own HAMP programs related to their own loans. Each of the companies has directed its servicers to modify qualifying loans according to guidelines (collectively, "GSE Guidelines"), which the companies have incorporated into their respective general servicing guidelines and contracts.[6] Like

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4 *See* Levine Decl. Ex. 3 (Template Commitment to Purchase Financial Instrument and Servicer Participation Agreement ("SPA")).

5 The current Treasury Guidelines are found in Supplemental Directive 09-01 ("SD09-01") (Apr. 6, 2009), which is available at https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0901.pdf and as Exhibit 3 to the First Amended Complaint.

6 *See* Levine Decl. Ex. 6 (Fannie Mae Announcement 09-05R (Apr. 21, 2009) ("FaM09-05R")); Ciatti Decl. Ex. 3 (Freddie Mac Single-Family Seller/Servicer Guide Bulletin 2009-10 (Apr. 21, 2009)).

the Treasury Guidelines, the GSE Guidelines set forth the basic eligibility criteria, the conditions for modification availability, and the specific modification protocols. The GSE Guidelines are generally consistent with the Treasury Guidelines, but differ in certain limited respects owing primarily to the fact that, as the owners of the covered mortgage loans, Fannie Mae and Freddie Mac can authorize modifications that a servicer may not have authority to approve.

C. HAMP's Operation

The Treasury Guidelines and SPAs. The Treasury Guidelines set forth several initial eligibility criteria, including

- The loan is a first-lien mortgage loan;
- The loan was originated on or before January 1, 2009;
- The loan is secured by a one-to-four unit property, one unit of which is the borrower's principal residence;
- The property has not been abandoned or condemned;
- The current unpaid principal balance is no greater than specified limits ($729,750 for a one-unit property);
- The loan is delinquent or an imminent default is reasonably foreseeable;
- The loan has not previously been modified under HAMP;
- The borrower has a monthly mortgage payment greater than 31 percent of monthly income, and has insufficient assets to make the payment; and
- The borrower documents a financial hardship.

SD09-01, at 2-3. Servicers may make "imminent default" determinations according to their own internal standards. *Id.* at 4.

Eligibility for participation does not automatically qualify a borrower for a HAMP modification. As Plaintiffs acknowledge (First Amended Complaint ("FAC") ¶132), the above criteria determine only "[i]nitial eligibility." The Treasury Guidelines then outline additional conditions that determine whether a HAMP modification must be offered. Specifically, the Guidelines do not require a modification where:

- one is prohibited by an investor servicing agreement, and the servicer's reasonable efforts to lift the prohibition are unsuccessful. Likewise, modification is not required where the servicer is unable to obtain any other third-party consents, waivers, or delegations required by contract or law. *See* SD09-01, at 1; SPA ¶2.B.

- the projected net present value ("NPV") of the borrower's loan payments, if the loan were modified, would be less than the projected NPV if the loan were not modified (an "NPV-negative" result). Servicers with sufficiently large books of business may employ NPV models using their own loan experience. *See* SD09-01, at 4-5.

- application of a required modification "waterfall" will not achieve the targeted monthly mortgage payment of 31% of the borrower's gross monthly income. The waterfall sequence provides for servicers to capitalize accrued interest and certain other fees and amounts, and then to undertake a series of ordered steps to seek to reach the 31% target: (1) reduce the interest rate in increments down to a 2.0 percent floor; (2) extend the term of the loan by up to 40 years from the modification date and reamortize; and (3) forbear (but not forgive) a portion of the principal, transforming it into a non-interest-bearing balloon payment due on maturity or payoff. If these steps cannot achieve the 31% target, then modification is not required. *See* SD09-01, at 8-10.

If the loan qualifies for modification after these factors, the servicer must provide a Trial Period Plan, under which the borrower must make monthly payments on the modified loan, generally for three months. If the borrower remains current throughout the trial period and has provided all required documentation, and the servicer verifies the borrower's eligibility based on the documentation, only then must the servicer provide a permanent modification. *See* SD09-01, at 14-15, 17-18.

The SPAs and the Treasury Guidelines incorporated therein govern the obligations of the servicer to the Treasury Department (through Treasury's agent, Fannie Mae). Nothing in the SPA provides for the servicer's obligations to run to a potentially eligible borrower, or otherwise indicates that a borrower should be considered an intended beneficiary of the contract with a right to enforce it and the guidelines against the servicer. To the contrary, where the SPA addresses beneficiaries, it indicates only that the SPA "shall inure to the benefit of and be binding upon the parties to the Agreement and their permitted successors-in-interest." SPA ¶11.E. If a servicer fails to comply with the SPA and the incorporated guidelines, Fannie Mae as Treasury's agent may withhold or recoup incentive payments from the servicer and impose additional oversight. *Id.* ¶6.B.

The Fannie Mae and Freddie Mac HAMP Guidelines and Servicing Contracts. The GSE Guidelines generally employ the same initial eligibility criteria. *See* FaM09-05R, at 2-3; Ciatti Decl. Ex. 1 (Freddie Mac Single-Family Seller/Servicer Guide ("FrMGuide")), at Ch. C65.4. As with the Treasury Guidelines, initial eligibility for participation in the Fannie Mae and Freddie Mac HAMP programs is not the same as qualification for a HAMP modification. *First*, if application of the modification waterfall cannot achieve the 31% target monthly payment, then no modification is provided. *See* FaM09-05R, at 10-11; FrMGuide, at Ch. C65.6(b). *Second*, although modifications are provided for some NPV-negative loans, no modification is allowed where the remaining interest-bearing portion of the loan after forbearance of principal would be less than the value of the home securing the mortgage. *See* FaM09-05R, at 11; FrMGuide, at C65.6(a) (NPV test). *Finally*, borrowers are required to complete a trial period to receive a permanent modification. *See* FaM09-05R, at 16-17, 20-21; FrMGuide, at C65.7(a).

The GSE Guidelines are implemented pursuant to Fannie Mae and Freddie Mac's pre-existing seller and servicing contracts, which provide the two companies with discretion to revise their instructions to their servicers over time. *See* Levine Decl. Ex. 1 (Fannie Mae Mortgage Selling & Servicing Contract ("Fannie Mae Servicer Contract")) § I.C (incorporating by reference Fannie Mae-issued Guides to Lenders, including subsequent amendments at Fannie Mae's discretion); FrMGuide, at Ch. 1.2(a) (incorporating any amendment to Volume 2 of the Guide, which encompasses HAMP activities, into Freddie Mac's master servicer contract). Nothing in the two companies' servicer contracts or servicing guidelines evidences any intent to allow borrowers to enforce them against the servicers. To the contrary, the Fannie Mae Servicer Contract states that "[t]hese rights and remedies are for our benefit and that of our successors and assigns" (§ XIV), and its Servicing Guide disclaims any intent to create third-party beneficiary rights, *see* Levine Decl. Ex. 2 (Fannie Mae 2006 Servicing Guide § 1-201) ("No borrower or other third party is intended to be a legal beneficiary of the Mortgage Selling and Servicing Contract or to obtain any such rights or entitlements through our lender communications," including "*Guides, Announcements*, and letters to lenders"); *see also* FrMGuide, Ch. 1.2(d).

Disputing HAMP Determinations.

The Treasury Department, Fannie Mae, and Freddie Mac all require mortgage servicers to devote sufficient resources to process HAMP applications and to "have procedures and systems in place to be able to respond to inquiries and complaints about [HAMP]," such that "inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution." SD09-01, at 13; FaM09-05R, at 15; FrMGuide, at Ch. C65.14.

In practice, if a borrower is denied a HAMP modification and is concerned that the servicer applied HAMP guidelines incorrectly, the borrower may seek assistance in several ways. Borrowers who call the Homeowner's HOPE Hotline are offered free housing counseling from nonprofit organizations certified by the Department of Housing and Urban Development ("HUD"). Declaration of Don Palumbo ("Palumbo Decl.) ¶2. The Treasury Department and HUD have issued special guidance to those housing counselors to assist them in understanding HAMP. *See* Palumbo Decl. Ex. 1. Counselors who believe that a servicer incorrectly applied HAMP guidelines are directed to elevate their concerns to the servicer's senior management. If that senior-level contact fails to resolve the issue, counselors are instructed to report the issue to the HAMP Support Center (for non-GSE loans), or to Fannie Mae or Freddie Mac (for their loans), for further investigation and resolution. *Id.* at 2-3.

The HAMP Support Center escalates to a specialized team any reports that a servicer may be improperly applying HAMP guidelines to non-GSE loans. Team members research the borrower's concern by collecting information from the borrower, servicer and, if necessary, the investor that owns the loan. The team may then seek to resolve the matter through coordination between the borrower's counselor and the servicer. If, in reviewing the matter, the HAMP Support Center team suspects that a servicer has not complied with HAMP guidelines, it will report the matter to Freddie Mac, in its role as Treasury's HAMP compliance agent. *See* Palumbo Decl. ¶¶3-6.

Fannie Mae borrowers whose concerns cannot immediately be resolved are referred to a specialized team that investigates the borrower's complaint and communicates with the servicer to investigate the application of HAMP guidelines. If Fannie Mae determines that a servicer did not apply the HAMP criteria correctly, Fannie Mae directs the servicer to do so. If the servicer did apply the HAMP criteria correctly, Fannie Mae reports that conclusion to the borrower. *See* Declaration of Joy Cianci ¶¶2-3.

Freddie Mac has a business unit whose responsibility includes investigating inquiries to Freddie Mac regarding the servicer's application of Freddie Mac's HAMP guidelines to specific Freddie Mac loans (other than basic program questions that can be addressed by Freddie Mac's 1-800-FREDDIE process). *See* Declaration of Ingrid Beckles ¶¶2, 4, 6. This unit is empowered to contact the servicer, investigate the actions at issue, and ensure the servicer's compliance with HAMP guidelines. *Id.* at ¶6. Freddie Mac has recently established an additional group that tracks certain types of inquiries to ensure that the appropriate Freddie Mac department (including the unit described above) or the servicer addresses the inquiry. *Id.* at ¶7. Under both processes, Freddie Mac explains the disposition of the inquiry to the borrower, either directly or through the servicer. *Id.* at ¶¶6-7.

D. HAMP's Continued Evolution

In the six months since the HAMP Guidelines went into effect, over 570,000 trial modifications have been offered and over 360,000 trial modifications have begun. *See* Barr Testimony, *supra* n.1.[7] The Treasury Department continues to undertake efforts to ensure HAMP's success, including

- Working with servicers to expand capacity to accommodate potentially HAMP-eligible borrowers;
- Requiring servicers to report the reason for modification denials (through uniform denial codes) to both the Treasury Department and borrowers, which is expected to be operational by October 1, 2009;
- Developing a centralized point for HAMP modification applications and for borrowers to check on the status of their applications; and
- Asking its compliance agent, Freddie Mac, to undertake a "second look" process "designed to minimize the likelihood that borrower applications are overlooked or that applicants are inadvertently denied a modification," which began on August 3, 2009.

See id.

III. THE FIRST AMENDED COMPLAINT AND REQUEST FOR PRELIMINARY INJUNCTION

Plaintiffs are four Minnesota residents who are behind on their mortgages and assert that they satisfy HAMP's initial eligibility criteria. Plaintiffs Nichole Williams and Johnson Sendolo—the two Plaintiffs who have moved for a preliminary injunction—allege that their loans are subject to the non-GSE modification program. FAC ¶¶26, 57,

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[7] HAMP trial modifications have been commenced on over 2,200 Fannie Mae loans in Minnesota alone, between March 4 and August 31, 2009. *See* Declaration of Laura Kenney ¶2.

120. Plaintiffs Carey Koppenberg and Carrie Strohmayer—who have not joined the motion at issue—allege that Fannie Mae owns their loans. FAC ¶¶76, 84. No Plaintiff asserts that it has a loan owned, securitized, or guaranteed by Freddie Mac.

In the First Amended Complaint, Plaintiffs assert entitlement to HAMP modifications on the sole ground that they satisfy five threshold criteria: they are having trouble repaying their mortgages, the mortgages are secured by their primary residences, the mortgages were originated before January 1, 2009, the mortgages do not exceed $729,750 in principal, and their monthly payments exceed 31% of their gross monthly incomes. FAC ¶38; *see also id.* ¶¶39-42, 67, 77, 88. None of the Plaintiffs allege that they or their loans satisfy, or are likely to satisfy, all the criteria on which qualification for a HAMP modification is determined.

Plaintiffs nonetheless request a broad preliminary injunction prohibiting Defendants and all other servicers participating in HAMP from accelerating mortgage payments, authorizing foreclosures or sheriffs' sales, or otherwise proceeding with foreclosure-related activity against a vaguely-defined class of Minnesota homeowners until HAMP "is constitutionally sound." Notice of Mot. & Mot. for Preliminary Inj. ("PI Mot."), at 2, 3. "Constitutionally sound" is Plaintiffs' shorthand for a long list of elaborate procedures upon which they seek to condition foreclosures:

- Written notification to borrowers of denials to participate in HAMP or other mitigation/modification programs;
- Statement of the reason for the denial and a written demonstration of application of the modification waterfall;
- Statement of the factors and specific formula used in the NPV test;

- An opportunity for borrowers denied a HAMP modification to appeal or provide additional information to a neutral decisionmaker, as well as notice of such an opportunity; and
- Provision of a means to avoid foreclosure and restore rights for class members who have already proceeded to foreclosure without the above procedures.

Id. at 2-4.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 376 (2008); *see also* 11A Wright et al., *Federal Practice & Procedure* § 2942 (2009) (courts usually refuse preliminary injunctions "unless the right to relief is clear"). Such injunctions depend on the balancing of four factors: (1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between the harm to the movant and the harm that the relief would cause to the other litigants; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). Plaintiffs bear "the complete burden" of proving that such an extraordinary remedy should be granted. *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). Their burden is particularly heavy where, as here, they request relief for a class. *See Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992). The burden is also a heavy one where, as here, Plaintiffs request a mandatory injunction on a preliminary basis. Such injunctions "should be granted only in rare instances where the facts and law are clearly in favor of the moving party." *Bricklayers, Masons, Marble & Tile Setters, Protective & Benevolent Union No. 7 v. Lueder Constr. Co.*, 346 F.Supp.

558, 561 (D. Neb. 1972). This is especially true where "the grant of the temporary injunction would in effect give the plaintiff the relief which he seeks in the main case." *Id.*; *see also Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991).

I. PLAINTIFFS' CLAIMS FAIL ON THE MERITS

Plaintiffs' novel and unprecedented theory that the Due Process Clause should require procedural protections around *private* mortgage servicers' determinations made pursuant to guidelines in those servicers' contractual relationships with parties *other than Plaintiffs* lacks merit for several reasons. *First*, the Due Process Clause does not apply to HAMP determinations because neither EESA nor HAMP vests individual homeowners with any legally enforceable property interest in a HAMP modification. (Part I.A.) *Second*, Plaintiffs themselves allege that private mortgage servicers—not any state actors—are responsible for the alleged deprivation at issue. (Part I.B.) *Finally*, even if Plaintiffs could surmount these obstacles, the Due Process Clause would not entitle them to the elaborate process they demand. (Part I.C.)

A. Plaintiffs Have No Cognizable Property Interest For Purposes Of The Due Process Clause

The Due Process Clause safeguards "the security of interests that a person has already acquired in specific [government] benefits," but it does not apply to every prospective advantage potentially afforded by government actions. *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). To constitute a property interest for purposes of the Clause, "a person clearly must have more than an abstract need or desire … [or] a unilateral expectation" of receiving a particular government advantage; "[h]e must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Property interests are not created by the Constitution itself but, "'[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 756 (2005). The question is not simply whether there is an expectation of government treatment, but whether the individual has an enforceable right to that treatment. *E.g.*, *id.* at 757; *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788 n.21 (1980) (whether individual's expectation is "legally enforceable" against government). Even where state or federal law has created an enforceable right, the question whether such interest is "property" for purposes of the Due Process Clause is one of federal constitutional law. *Castle Rock*, 545 U.S. at 756-757.

Plaintiffs offer only two sentences on the legal issue at the root of their complaint—whether there is a constitutionally protected property interest implicated at all. *See* Pl.'s Mem. in Support of Mot. for Preliminary Inj. ("PI Mem."), at 2, 33. Their meager assertions are inadequate and meritless, for at least three reasons.

1. Neither EESA nor HAMP confer any legally enforceable entitlement to a HAMP modification

Plaintiffs claim a property interest stemming from "statutory entitlements" (PI Mem. 33), yet the text of EESA's two foreclosure-mitigation provisions precludes any assertion of a legal entitlement to a loan modification. Sections 109 and 110 use the term "shall," but only to require that the Secretary and FHFA "implement plan[s] *that seek[] to* maximize assistance for homeowners" and use their authority "*to encourage* the servicers of the underlying mortgages … to take advantage of … available programs to minimize foreclosures." EESA §§ 109(a), 110(b) (emphases added). Neither section compels assistance to any identifiable category of borrowers or loans, nor mandates the form or scope of any mitigation measures to be provided. All such issues are left to the discretion of the Secretary and FHFA. That discretion, standing alone, bars any assertion that, for purposes of the Due Process Clause, EESA creates any legal entitlement for borrowers to receive a loan modification. *See, e.g.*, *Castle Rock*, 545 U.S. at 756 ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."). Stated in the simplest terms, EESA is "not worded in such a way that a [borrower] could reasonably expect to enforce [it] against [government] officials." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 464 (1989).

Nor is HAMP itself structured such that a borrower could reasonably expect to enforce it against the government to require the provision of a loan modification. No statute, regulation, or contract requires the government (or Fannie Mae or Freddie Mac, who Plaintiffs try to treat as state actors) to provide the HAMP modifications in question to borrowers. Indeed, HAMP is not built upon any mandatory statutes or regulations at all, but rather has been developed and implemented exclusively by contract. The Treasury Department, Fannie Mae, and Freddie Mac have thus operated essentially as commercial actors by determining in their discretion to effectuate certain loan modifications and then contractually requiring private mortgage servicers to modify loans in those circumstances, in exchange for incentive payments. Those contracts preserve the discretion of the Treasury Department, Fannie Mae, and Freddie Mac to terminate the programs altogether or amend their terms going forward.[8] Moreover, under the agreements, the Treasury Department, Fannie Mae, and Freddie Mac require private mortgage servicers to perform modifications, not vice versa. For all of these reasons, when it comes to the specific property interest to which Plaintiffs assert an entitlement—the provision of a loan modification—no statute, regulation, or contract "purport[s] to limit the Government's right[s]," "define the Government's obligations or limit its powers in any way." *O'Bannon*, 447 U.S. at 785 & n.18. This absence is fatal to Plaintiff's Due Process Clause theory. Ultimately, "[t]he ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the [relevant government] authority." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). Here, there is no such ground.

Furthermore, nothing in the relevant contracts confers any right on borrowers to enforce the contracts against either the government, Fannie Mae, and Freddie Mac—on the one hand—or the servicers—on the other. Notably, Plaintiffs do not claim such a right; for example, they do not maintain that they are third-party beneficiaries of the contracts. Nor could they. To the extent that the contracts address the issue, they expressly disclaim any intent to vest borrowers with enforceable rights or status as third-

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[8] *See* SPA § 6(D), (E) (authorizing termination upon Treasury's direction or HAMP's termination); *id.* § 10 (authorizing amendments that materially impact eligibility requirements, incentives, and servicers' obligations on prospective basis); Fannie Mae Servicer Contract § I.C (incorporating guidelines as they are subsequently amended in Fannie Mae's discretion); FrMGuide, at C1.2(a) (same as to Freddie Mac).

party beneficiaries. *See supra*, Statement, Part II.C. Courts generally have rejected assertions that mortgage servicing guidelines bestow enforceable rights upon affected borrowers, absent some express indication of intent. *See, e.g.*, *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 360-361 (5th Cir. 1977) (HUD servicing handbook for low-income housing assistance program). As to Fannie Mae and Freddie Mac specifically, courts repeatedly have held that the companies' servicing contracts create no third-party beneficiary rights. *See*, *e.g.*, *Thorien v. Baro Enterprises, LLC*, 2008 WL 5683488 (Bankr. D. Idaho Nov. 6, 2008) (Freddie Mac); *Blair v. Source One Mortgage Corp.*, 1997 WL 732407 (E.D. La. Nov. 20, 1997) (Freddie Mac); *Deerman v. Federal Home Loan Mortgage Corp.*, 955 F.Supp. 1393 (N.D. Ala. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998) (table) (Freddie Mac); *Hinton v. Federal Nat'l Mortgage Ass'n*, 945 F.Supp. 1052 (S.D. Tex. 1996), *aff'd*, 137 F.3d 1350 (5th Cir. 1998) (table) (Fannie Mae).

Finally, even if Plaintiffs could (and did) assert a right to enforce the contracts as third-party beneficiaries, any such theory should be rejected as the basis for a constitutionally protected property interest. Even when it comes to parties in direct contractual privity, for instance, federal courts have been reluctant to hold that every government contract gives rise to a protected property interest: "a wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause." *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1398 (3d Cir. 1991). A third-party beneficiary theory would stretch the Constitution even further, locating Plaintiffs' alleged property interest in contracts that the government (and Fannie Mae and Freddie Mac) have entered into with *private parties other than Plaintiffs*.

In this respect, Plaintiffs' theory requires another leap courts have been reluctant to take—recognition of a protected property interest based on an indirect advantage that one would receive by virtue of limitations on the government's actions toward another. *See, e.g.*, *Castle Rock*, 545 U.S. at 766-767 (domestic violence victim's interest in enforcement of protective order against husband too indirect to warrant due process protection); *O'Bannon*, 447 U.S. at 788 & n.21 (distinguishing between individual's assertion of property interest based on "direct relationship" with government, and improper assertion of property interest based on government's relation with another). Plaintiffs' theory would wrongly and exponentially expand the scope of the Due Process Clause, requiring procedural protections to be afforded for the interests of all sorts of asserted third-party beneficiaries of government contracts.

2. Any entitlement to a HAMP modification is too uncertain to constitute a property interest for purposes of the Due Process Clause

The fact that HAMP guidelines condition the receipt of any modification on so many complex factors, as well as the discretion of third parties, also rebuts Plaintiffs' claim to a property interest in HAMP loan modifications. The Due Process Clause extends to certain entitlements "upon which people rely in their daily lives," *Roth*, 408 U.S. at 577, but no reliance interest can exist when the alleged "property" at issue is merely a subjective hope of obtaining a prospective advantage that is uncertain, due to its having been conditioned on either the satisfaction of many complex determinations or the discretion of third parties. *See, e.g.*, *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983) (defining property as "what is securely and durably yours under state (or

… federal) law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain”).

Under both the Treasury Department HAMP program for non-GSE loans and Fannie Mae and Freddie Mac’s programs for their own loans, any alleged entitlement to a modification is too uncertain to qualify for protection under the Due Process Clause. Under the Treasury program, qualification for a modification depends not only upon the voluntary choice of servicers to participate, but also upon the wholly discretionary decisions of investors in the relevant loans to permit the modifications to occur. That discretion alone precludes recognition of a property interest. *See, e.g.*, *Castle Rock*, 545 U.S. at 756. Borrowers with non-GSE loans also may be denied participation in HAMP if their loan is neither delinquent nor subject to “imminent default,” with servicers permitted to make the latter determination under each servicer’s own distinctive internal standards. Servicers also must evaluate several additional criteria to determine whether a non-GSE loan qualifies for modification, including an NPV test (which may be based on a servicer’s unique performance data) and application of the waterfall to determine if the target 31% monthly payment is achievable. Finally, even if these factors yield a qualifying modification, the borrower must successfully complete a trial period before the servicer must offer a permanent HAMP modification. Many of the same uncertainties and complexities are present in Fannie Mae and Freddie Mac’s HAMP programs. *See supra*, Statement, Part II.C.

In short, there is no sense in which potentially eligible borrowers could assert a legitimate claim of expectation of or entitlement to a HAMP modification. To the contrary, any claim to a modification is highly indeterminate. "Such indeterminacy is not the hallmark of a duty that is mandatory." *Castle Rock*, 545 U.S. at 763. Whether borne of discretion or otherwise, that ""“uncertainty” … preclude[s the] existence of a federally protected property interest.'" *Id.* at 764; *see also Greenbriar Village, LLC v. Mountain Brook, City*, 345 F.3d 1258, 1266 (11th Cir. 2003) (uncertainty as to duration of rights precludes claim of entitlement).

3. Plaintiffs, as prospective applicants for HAMP modifications, have no property interest in the modifications

Finally, Supreme Court precedent squarely forecloses Plaintiffs' assertion that, based on their alleged satisfaction of five "[i]nitial eligibility" criteria (FAC ¶132), the Due Process Clause should bar foreclosure on their properties until they have been provided written notice of their HAMP denial and an opportunity to appeal the denial to a neutral decisionmaker. The Supreme Court rejected a similar argument in *American Manufacturers Insurance Co. v. Sullivan*, 526 U.S. 40 (1999). There, the plaintiffs asserted a property interest in workers' compensation benefits under state law and contended that, having shown "eligibility" for the benefits, the Due Process Clause barred deprivation of the benefits absent notice and opportunity to be heard. *Id.* at 47-48. The Court disagreed, holding that no property interest had been established. *Id.* at 59-61. The key distinction between the plaintiff's theory and the Court's due process precedents, the Court observed, was that the plaintiffs were not yet receiving the benefits and thus had not yet established their entitlement to the payments. In contrast, in cases like *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), "an individual's entitlement to benefits had been established, and the question presented was whether predeprivation notice and a hearing were required before the individual's interest in *continued* payment of benefits could be terminated." 526 U.S. at 60. The plaintiffs in *Sullivan* had at best "established their initial *eligibility*," but not their ultimate qualification for or entitlement to the benefits. *Id.* at 61 (emphasis in original). "Consequently, they do not have a property interest." *Id.*

Plaintiffs' argument here fails for the same reason. Plaintiffs have not yet been found to qualify for a HAMP modification, so they do not—and cannot—assert any property interest in the "continued" receipt of such a HAMP modification. *Sullivan*, 526 U.S. at 60; *see also Lyng v. Payne*, 476 U.S. 926, 942 (1986) (rejecting due process claims, and explaining: "[w]e have 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"); *Roth*, 408 U.S. at 576 (Clause protects "interests that a person has already acquired in specific benefits"); *DeJournett v. Block*, 799 F.2d 430, 431 (8th Cir. 1986) ("[N]either the Supreme Court nor this court has held that the filing of a FmHA loan application in itself provides applicants … with a 'legitimate claim of entitlement[.]'"). Plaintiffs allege only initial eligibility and, on that ground, seek to bar foreclosure unless and until they have been provided written notice of HAMP denial and an opportunity to appeal that decision. *Compare* FAC ¶132 ("[i]nitial eligibility") *with Sullivan*, 526 U.S. at 61. *Sullivan* bars that claim.

B. No State Actor—And At A Minimum, Neither Fannie Mae Nor Freddie Mac—Is Responsible For The Deprivation Of Property That Plaintiffs Allege

Plaintiffs' complaint also falters on a separate and independent point. The Fifth Amendment's prohibition on deprivation of property without due process applies only to the federal government, not private parties. *See Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952). As a result, "'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Sullivan*, 526 U.S. at 50. Here, however, Plaintiffs do not charge any state actor with the deprivation of the purported property at issue—*i.e.*, the denial of their HAMP applications. To the contrary, Plaintiffs are quite explicit in alleging that *private* mortgage servicers denied those applications. *See* FAC ¶¶43, 68, 80, 96.

Plaintiffs make only a vague state-action allegation, maintaining that "the actors who made the decisions at issue are the United States Department of the Treasury and [FHFA], as conservator for Fannie Mae and Freddie Mac." PI Mem. 32. But Plaintiffs do not say what "decisions" they refer to, and the contention lacks support in their actual claims. The determination of whether a "state actor" engaged in the relevant "deprivation" begins with the identification of "'the specific conduct of which the plaintiff complains.'" *Sullivan*, 526 U.S. at 51. Here, both the complaint and the workings of the HAMP program leave no doubt that the complained-of conduct is private servicers' denial of Plaintiffs' HAMP applications.

Plaintiffs can fare no better by asserting that a servicer's decision, though not state action itself, should nevertheless be "attributed" to the government by virtue of the governing Treasury or GSE Guidelines. Private companies, even when extensively regulated and operating under government programs, are not deemed government actors for constitutional purposes. *See Sullivan*, 526 U.S. at 52; *see also Rank v. Nimmo*, 677 F.2d 692, 702 (9th Cir. 1982) ("foreclosure by a private lender of a mortgage in a federal mortgage guaranty program does not involve federal action sufficient to invoke the due process clause of the Fifth Amendment"). The decision by a servicer whether to approve a HAMP modification remains, in the end, private conduct.

Moreover, the GSEs' issuance of HAMP guidelines cannot properly be characterized as state action in the first instance. Plaintiffs admit that the federal courts repeatedly have held that Fannie Mae and Freddie Mac are not government actors. *See* PI Mem. 32 (citing cases); *see also Union Nat'l Bank of Little Rock v. Federal Nat'l Mortgage Ass'n*, 860 F.2d 847, 853 n.13 (8th Cir. 1988) (observing that Fannie Mae "is not a governmental entity" but "is essentially a private entity"); *Liberty Mortgage Banking, Ltd. v. Federal Home Loan Mortgage Corp.*, 822 F.Supp. 956, 958-960 (E.D.N.Y. 1993) (Freddie Mac is private corporation, so termination of servicer is not government action).

Plaintiffs dispute the relevance of this uninterrupted series of decisions on the ground that Fannie Mae and Freddie Mac are in conservatorship. That development, however, has no effect on the state-action inquiry for purposes of constitutional claims against the companies. During the conservatorship, the stock of the two companies continues to trade publicly and the companies' officers continue to exercise their normal duties under the delegated authority of the conservator. *See supra* Statement, Part I.

Fannie Mae and Freddie Mac would only be considered governmental entities if the federal government had exercised "*permanent* authority" over the two companies, as opposed to "*temporary* control … as a private corporation whose stock comes into federal ownership might be." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 398, 400 (1995) (emphases added). But FHFA's conservatorship pursuant to statute is the latter—temporary control. The governing statute, HERA, does not contemplate FHFA's permanent control and operation of the two companies in conservatorship. *See* HERA § 1367(a)(2) (conservatorship for "purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity"). Rather, HERA provides several means by which the conservatorship can terminate, including by the appointment of a receiver, *see id.* § 1367(a)(4)(D), together with the transfer of assets to a limited-life regulated entity, *see id.* § 1367(b)(2)(E), or, as FHFA has noted, if "the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully," *Conservatorship Q&A*.

The GSE Guidelines accordingly do not convert the mortgage servicers' private decisions to deny HAMP modifications into state action. The guidelines are themselves private action, and take effect by virtue of their incorporation into Fannie Mae and Freddie Mac's private contracts with their servicers.

As for the Treasury Guidelines applicable to the non-GSE loans, even if those guidelines could be read to convert private servicers' decisions into state action (they do not, for the reasons above), Fannie Mae and Freddie Mac are not alleged to be—and cannot be—responsible for any of the putative state action at issue. The two companies do not make the decisions that deny a borrower's application for a HAMP modification; servicers do. Nor are Fannie Mae or Freddie Mac responsible for the Treasury Guidelines under which the servicers make the HAMP decisions; the Treasury Department is. *See* Levine Decl. Ex. 4, at F-2 (Conflicts of Interest Mitigation Exhibit to Financial Agency Agreement Between the United States Department of Treasury and Fannie Mae) ("Treasury is solely responsible for developing the Program Guidelines and both GSEs must follow the Program Guidelines.").[9] Accordingly, even if Plaintiffs could demonstrate the government's involvement in denials of HAMP modifications for non-GSE loans, they should have no claim against Fannie Mae or Freddie Mac in that context.

C. The Due Process Clause Does Not Entitle Plaintiffs To The Relief They Seek

Finally, even if Plaintiffs had demonstrated that they had been deprived of a protected property interest by government action, Plaintiffs are not likely to succeed on the merits because they seek protections far beyond what the Constitution would require. "[D]ue process is flexible, and calls for such procedural protections as the particular situation demands," depending on the private interest the official action will affect; the risk of an erroneous deprivation and probable value, if any, of additional safeguards; and the government's interest in avoiding related fiscal and administrative burdens. *Mathews*, 424 U.S. at 332, 333-335. Here, Plaintiffs' demands for a complicated form of

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9 The complete Financial Agency Agreement between the Treasury Department and Fannie Mae is available at http://www.financialstability.gov/docs/ContractsAgreements/Fannie%20Mae%20FAA%20021809%20.pdf.

notice and a vague, undefined "appeal" right before a separate decisionmaker cannot be justified under *Mathews*' second and third elements.[10]

At the outset, the four named Plaintiffs' isolated and limited allegations—even if credited—do not establish that the risk of erroneous HAMP denials in general is high. In fact, existing review procedures reduce the risk of erroneous HAMP denials. As discussed *supra*, Statement, Part II.C., borrowers with concerns regarding the application of HAMP guidelines can call the Homeowner's HOPE Hotline to discuss their application with counselors trained in HAMP procedures or, if necessary, senior management of the servicer involved. If this communication fails to resolve the issue, borrowers with GSE loans can speak with specialized Freddie Mac or Fannie Mae teams empowered to investigate and act on HAMP-related complaints. *See id.* Borrowers with non-GSE loans can seek the assistance of a specialized team at the HAMP Support Center. *See id.* In addition to these procedures, the Treasury Department continues to improve HAMP's procedures on several fronts. *See supra*, Statement, Part II.D. Not only do all these combined procedures reduce the risk of erroneous HAMP denials, but Plaintiffs have presented no facts that suggest the intricate procedures they request will significantly increase the reliability of HAMP determinations.

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10 Because the second and third *Mathews* factors demonstrate that Plaintiffs are not entitled to the detailed notice and appeal processes they seek, Fannie Mae and Freddie Mac do not address whether the interests at stake in this matter are equivalent to "subsistence" level benefits that provide them "the very means by which to live." *Goldberg*, 397 U.S. at 264.

Yet, on the other side, the interest in avoiding administrative burden strongly militates against granting Plaintiffs' request for detailed notice and an unrestricted appeal right. *See Mathews*, 424 U.S. at 348. Administrative burden is a particularly important consideration where, as here, a program with limited funds seeks to provide modifications to the greatest number of eligible applicants as quickly as possible. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985); *see also* FAC Ex. B (U.S. Treasury, *Making Home Affordable Summary of Guidelines* (March 4, 2009)), at 1 (encouraging servicers to "begin immediately to modify eligible mortgages"); FAC Ex. G, at 3 (stressing prudent use of the $75 billion in HAMP funds because HAMP expenditures "are not investments [and] once made, will not be recouped").

The "notice" Plaintiffs demand would be lengthy, highly individualized, and hypertechnical. Plaintiffs seek notice that not only explains the fact of their rejection from HAMP and the reason, but which also shows "proper application of the 'loss mitigation waterfall'" and discloses "the factors and specific formula used to determine a 'positive' or 'negative' result by the [NPV] calculator." FAC ¶186. HAMP eligibility is a complicated matter itself; it can depend, in part, on a finding of imminent default that relies on a borrower's "financial condition, liquid assets, liabilities, combined monthly income from wages … monthly obligations … and a reasonable allowance for living expenses." SD 09-01, at 4. The NPV calculation can vary from servicer to servicer and turn on unique cure and redefault rates, as well as a borrower's "current LTV, current monthly mortgage payment, current credit score, delinquency status and other loan or borrower attributes." *Id.* at 5.

The Eighth Circuit has rejected requests for the type of detailed and burdensome notice that Plaintiffs demand. *See Walters v. Weiss*, 392 F.3d 306, 315-316 (8th Cir. 2004) (rejecting claim that child support notice required identification of "what information was used to distribute collected child support, how each amount of collected child support has been distributed, and the reason for any failure by the State to distribute to the custodial parent any portion of the collected child support" because the government's interest in avoiding the creation of "individualized notice of several underlying factors in the calculation of the monthly child support distributions" far outweighed "plaintiffs' interest in avoiding the risk of an erroneous deprivation and the probable value of requiring those additional procedures."); *Woodsmall v. Lyng*, 816 F.2d 1241, 1247 (8th Cir. 1987) (rejecting claim by unsuccessful applicant for rural housing loan that rejection notice that stated plaintiffs had an unsatisfactory credit rating was not sufficient; court agreed with Secretary of Agriculture, who explained that "[e]ach loan application presents a different set of financial circumstances, which … must be evaluated on an individual basis," and argued that "an attempt to articulate fully all of the matters considered by a good loan officer would likely produce a mind-boggling regulatory quagmire").

Plaintiffs' demand to an appeal must also fail because "[t]here is, of course, no constitutional right to an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 102-103 (1996) ("the Federal Constitution guarantees no right to appellate review"). The Supreme "Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system." *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *see also id.* at 659-660 (no due process right to judicial review of state welfare agency decision); *Abney v. United States*, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal."). This is true in administrative contexts too. *See, e.g.*, *Loulou v. Ashcroft,* 354 F.3d 706, 708 (8th Cir. 2003) (alien has no due process right to administrative appeal from Board of Immigration Appeals decision); *United States v. Posner*, 424 F.2d 181, 183-184 (9th Cir. 1970) (conscientious objection claimant has no due process right to administrative appeal of adverse classification decision); *Platt v. Brockenborough*, 476 F.Supp. 2d 467, 470 (E.D. Pa. 2007) (prisoner has no due process right to appeal results of disciplinary hearing). As "the right of appeal is not essential to due process of law," *Beck v. Missouri Valley Drainage Dist.*, 46 F.2d 632, 638 (8th Cir. 1931), Plaintiffs claim to a due process appeal right cannot succeed.

As in *Woodsmall* and similar decisions in the Eighth Circuit, Plaintiffs here request burdensome notice and appeal procedures from a program particularly ill-equipped to handle a "'mind-boggling regulatory quagmire.'" HAMP seeks to address the foreclosure crisis by modifying the mortgages of 3 to 4 million borrowers within a very narrow window (by December 31, 2012), and success depends on time-intensive coordination between Treasury, Freddie Mac, Fannie Mae, and dozens of servicers. *See* FAC Ex. G, at 15-16. Whatever resources HAMP spends on the provision of needlessly complex and unnecessary procedures to unqualified applicants will draw resources away from the objective of saving qualified borrowers from foreclosure. *See Mathews*, 424 U.S. at 348 (noting that "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"). The interest of HAMP participants in avoiding this outcome, combined with the low risk of erroneous deprivation and low value of additional process, suggests that even if Plaintiffs could establish a property right to HAMP participation—which they cannot—the Constitution would not require the relief they seek. At a minimum, Plaintiffs have shown no justification for imposing, as a matter of preliminary injunctive relief, these elaborate procedures as preconditions to the broad range of foreclosures covered by their present motion.

II. PLAINTIFFS HAVE NOT SATISFIED THEIR BURDEN ON THE REMAINING INJUNCTIVE RELIEF FACTORS

A. Plaintiffs Have Not Shown Irreparable Injury, Either For Themselves Or The Uncertified Class On Whose Behalf They Seek Relief

1. Plaintiff Williams has not demonstrated irreparable injury

"Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003); *Gelco Corp.*, 811 F.2d at 420 ("Once a court determines that the movant has failed to show irreparable harm absent an injunction, the inquiry is finished and the denial of the injunctive request is warranted."). Vague allegations of speculative irreparable harm at some uncertain point in the future are insufficient. Rather, the harm must be "'certain and great and of such imminence that there is a clear and present need for equitable relief.'" *General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th

Cir. 2009); *see also Local Union No. 884 v. Bridgestone/Firestone, Inc*., 61 F.3d 1347, 1355 (8th Cir. 1995) (preliminary injunction reversed because "the possible harm identified is wholly speculative and because it is, it cannot be called irreparable harm").

One of the two plaintiffs moving for preliminary injunctive relief—Ms. Williams—alleges nothing that remotely approaches irreparable harm. Plaintiffs claim generally that Ms. Williams and the proposed class will be harmed "if the mortgage foreclosure sales of their homes are allowed to proceed" (PI Mem. 28), but Ms. Williams does not say that foreclosure proceedings have been initiated, nor does she submit any other facts showing that foreclosure is imminent. *See* 13 *Moore's Federal Practice* § 65.22 (3d ed. 2009) ("movant must demonstrate that the threatened harm is imminent"). Rather, she states that she first fell behind on payments in 2007 and has received several offers for loan modifications, including one as recently as June 2009. Williams Aff. ¶¶5-6, 23; FAC ¶¶60, 68. She thus does not say that she has exhausted the alternatives to foreclosure. As for her concern that her mortgage loan would be extinguished in the event of a foreclosure, even if a sheriff's sale were someday to be scheduled for her property, a recently enacted Minnesota law provides an opportunity to postpone such sales by five months to permit borrowers more time to bring their mortgages current. *See* Minn. Stat. Ann. § 580.07 (West 2009); H.F. 2088, 2009 Minn. Sess. Law Serv. Ch. 78, art. 8, § 21 (West) (effective June 14, 2009).

2. Plaintiffs have made no showing to support a classwide injunction

More importantly, the two movants have made no showing whatsoever regarding the broad class of Minnesota homeowners for whom they also seek a preliminary injunction. Any "[i]njunctive relief ... must be carefully tailored to remedy the alleged specific harm to the parties involved." *Butler*, 979 F.2d at 674 (denying classwide injunctive relief in absence of properly certified class). A classwide preliminary injunction is therefore inappropriate absent "a foundation from which one could infer that all (or virtually all) members of a group are irreparably harmed." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000).

Plaintiffs have provided the Court with no evidence to show that the putative class members would suffer irreparable harm absent an injunction. Plaintiffs' failure to make that demonstration is particularly serious, given the immense breadth and impact of the classwide injunctive relief they seek (*infra*, Argument Part II.B). The only "evidence" Plaintiffs submit is an affidavit from counsel, stating that he "supervised and helped conduct a review" of unspecified foreclosure data from two of Minnesota's 87 counties, and that he "estimate[s]" that between 40 percent and 60 percent of the reviewed loans were serviced by HAMP participants. Ireland Aff. ¶5. Based on that estimate, and nothing else, Plaintiffs assert in their brief that "a substantial number" of the reviewed foreclosures "were of Minnesotans who were eligible and potentially entitled for benefits through HAMP." PI Mem. 19 (citing Ireland Aff. ¶5). The affidavit, however, shows nothing of the sort. Indeed, Plaintiffs do not even claim that any of the reviewed loans (or corresponding borrowers) satisfy the few eligibility criteria that Plaintiffs say they themselves satisfy. Nor is there any showing of likely qualification for actual HAMP modifications. Thus, Plaintiffs effectively ask this Court to enjoin foreclosures in numerous instances where there is no apparent prospect for a HAMP modification.

Having failed to make any showing that the putative class members (or some substantial portion thereof) in fact qualify, or are likely to qualify, for a HAMP modification, Plaintiffs cannot establish irreparable harm on behalf of the putative class. This is important, as a legal matter, because it means that Plaintiffs have not shown that the injunctive relief they seek would do anything more than "delay the inevitable." *Tuepker v. Farmers Home Admin.*, 525 F.Supp. 237, 239 (W.D. Mo. 1981).[11] Yet, if that is all that the injunction can achieve, the extraordinary equitable relief is not justified. Injunctive relief is appropriate only where the moving party can show that the conduct to be enjoined—here, denial of a HAMP modification absent written notice and an opportunity to appeal—is the actual cause in fact of the moving party's alleged injury—here, foreclosure and eviction. *See Association of Flight Attendants v. PBGC*, 372 F.Supp.2d 91, 102 (D.D.C. 2005) (claimed injury must be "traceable to the actions sought to be enjoined"); *Stand Together Against Neighborhood Decay, Inc. v. Board of Estimate*,

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11 Some courts do not treat the inevitability of the asserted harm as relevant to the irreparable harm factor, but instead find that the inevitability is a separate reason to deny a request for injunctive relief. *See, e.g.*, *Watson v. MTC Fin., Inc.*, 2009 WL 2151782, at *4 (E.D. Cal. July 17, 2009) ("no justification in delaying that harm where, although irreparable, it is also inevitable"); *Schumacher v. ContiMortgage Corp.*, 2000 WL 34030847, at *4 (N.D. Iowa June 21, 2000).

690 F.Supp. 1192, 1200 (E.D.N.Y. 1988) (plaintiffs must establish "causal link between the act sought to be enjoined and the irreparable harm alleged"). Although it is their burden to do so, *Gelco Corp.*, 811 F.2d at 418, Plaintiffs have made no such showing about the class. They have not demonstrated that with the additional procedures erected around servicers' HAMP determinations, putative class members would be likely to qualify for a HAMP modification and thereby avoid foreclosure.

Finally, apart from the HAMP eligibility issues, Plaintiffs' extrapolations based on foreclosure rates prior to the time HAMP was implemented are inadequate to support their assertions that putative class members are in imminent danger of wrongful foreclosures and evictions. Nor do Plaintiffs account for the numerous other mortgage assistance programs that may nevertheless be available to those who do not qualify for HAMP.[12]

Given Plaintiffs' slim showing in support of classwide injunctive relief, their request that the Court "enjoin all foreclosures in Minnesota until [HAMP] is constitutionally sound" (PI Mot. 2) is both extraordinary and unjustified, and should be denied. *See, e.g.*, *Masterman v. Goodno*, 2004 WL 51271, at *13-14 (D. Minn. Jan. 8, 2004) (refusing to "enjoin[] changes to a program serving thousands of individuals, based

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12 Alternatives include the HOPE for Homeowners Program, for homeowners with mortgage balances greater than the value of their homes, and HomeSaver Forbearance (for Fannie Mae loans), for borrowers who do not qualify for HAMP but can make reduced monthly payments of one-half their contractual payment for a six-month trial period. Servicers also may implement temporary workout programs, culminating in a more permanent foreclosure prevention alternative if necessary. *See* FaM09-05R, at 34; FrMGuide, at Ch. B65.1.

on the circumstances of the three plaintiffs," and entering injunction covering only named plaintiffs); *cf. Doe v. Miller*, 418 F.3d 950, 952-953 (8th Cir. 2005) (denying stay because plaintiffs failed to show classwide irreparable harm when they "provide[d] no basis in the record for us to determine how many members of the plaintiff class would be impacted, and the measure of the potential harm [wa]s largely speculative").

B. The Injunction Would Impose Substantial Hardship On Fannie Mae And Freddie Mac, And Would Disserve The Public Interest

Plaintiffs' motion also should be denied because of the concrete, significant hardships that the proposed injunction would inflict on Fannie Mae and Freddie Mac. *See Dataphase*, 640 F.2d at 113.

Contrary to Plaintiffs' suggestion (PI Mem. 30-31), a delay in foreclosure or in the sale of a foreclosed property is not without cost. When issuing mortgage-backed securities ("MBS"), Fannie Mae and Freddie Mac guarantee to the MBS trusts that they will pay principal and interest on the mortgages "irrespective of the cash flows received from borrowers." Fannie Mae 10-Q, at 151; *see also* Freddie Mac 10-Q, at 112. Under tax and accounting rules, the two companies may also be required to purchase delinquent loans out of securitization trusts. Yet, if unable to foreclose or sell foreclosed properties, Fannie Mae and Freddie Mac cannot recover the value of the underlying collateral, requiring them to make up the shortfall of such purchases. *See* Fannie Mae 10-Q, at 39-40; Freddie Mac 10-Q, at 77. And once Fannie Mae and Freddie Mac are able to foreclose or sell foreclosed properties, after the expiration of any classwide injunction entered at Plaintiffs' behest, continuing home price declines would likely lead to substantial losses on the properties.

Plaintiffs seek to impose these costs as to virtually all foreclosures to which Defendants have some connection, yet Plaintiffs have made no showing that any of the putative class members on whose behalf they seek such relief (much less some substantial number of them) are either in imminent danger of irreparable harm or would qualify for a HAMP modification. *See supra*, Argument, Part II.A.2. The balance of hardships accordingly weighs against any classwide injunction.[13]

For much the same reasons, the proposed preliminary injunction would disserve the public interest. HAMP operates by assisting individual homeowners, but the program is designed broadly to stabilize home prices in areas hardest hit by foreclosures. *See* Bowman Aff. Ex. E (U.S. Dep't of Treasury, *Making Home Affordable Updated Detailed Program Description* (Mar. 4, 2009)), at 3. Plaintiffs' proposed injunction would

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13 Plaintiffs are incorrect in asserting (PI Mem. 39-40) that Fannie Mae's previous request for an injunction to stay foreclosures in South Carolina, soon after HAMP's commencement, supports entry of a classwide injunction here. The South Carolina request concerned a situation where, in order for borrowers to be considered for HAMP at all, foreclosures would have to be delayed, either by a stay or dismissing the proceedings altogether. Fannie Mae requested the injunction to reduce the burdens for both sides that may have ensued absent the injunction—either homeowners losing the opportunity to be considered for a HAMP modification or Fannie Mae needing to dismiss foreclosure actions to allow such consideration. Fannie Mae's motion thus sought to "avoid undue costs if these foreclosure actions are dismissed rather than stayed or postponed." Bowman Aff. Ex. A, at 1. Here, in contrast, no delay in foreclosures is necessary for borrowers to be considered for HAMP. The program has been in effect for more than six months and Plaintiffs seek a stay so that the consideration of borrowers for HAMP can either be re-started with, or substantially complicated by, new procedural protections.

undermine that goal by limiting the reach of the program and delaying the modifications necessary to arrest the decline in home prices.

Implementing the procedures demanded by the proposed injunction would likely mean that fewer borrowers could benefit from access to HAMP modifications. The combination of HAMP's complex requirements and the large volume of borrowers seeking modifications already has placed an overwhelming burden on servicers. *See, e.g.*, Mollenkamp & Ng, *Mortgage Firms Struggle to Redo Hard-Hit Loans*, Wall St. J., July 16, 2009, at A1 (describing servicer efforts to hire contract employees, retrain staff, add late shifts, and invest in new technology to implement HAMP's "time-consuming process with many steps"). If the procedural burdens of participating in HAMP were to increase further—and exponentially, as Plaintiffs request—servicers who currently partake voluntarily in the program may simply leave the program. For non-GSE loans, the SPAs allow servicers to opt out of the program if "any modification to the Program Documentation … materially impacts … the rights, duties, or obligations of Participating Servicers." SPA ¶10.C. Fannie Mae and Freddie Mac's servicers likewise could withdraw by terminating their servicing agreements with the two companies. *See* Fannie Mae Servicing Contract, §IX(B); FrMGuide, at Ch. 5.3.1. With fewer participating servicers, many borrowers could be cut off from access to a HAMP modification. Moreover, even if servicers continued to participate, adding additional layers of elaborate procedures would likely divert the program's limited resources from performing modifications to the costly new procedures.

More broadly, implementing the procedures demanded by the proposed injunction may well hinder HAMP's goal of stabilizing the housing market. Policymakers have consistently emphasized the importance of modifying loans as quickly as possible to both help homeowners and stabilize home prices. To that end, the Treasury Department has in recent months focused servicers on shortening borrower wait times and response times for completed applications.[14] The procedures that Plaintiffs demand are directly contrary to those goals. Devoting limited resources to those additional procedures, and adding an appeal layer, will likely further delay the processing of HAMP applications, hindering efforts to quickly stabilize the housing market and allowing home prices to continue to slide.

C. Plaintiffs Are Not Entitled To Mandatory Affirmative Relief In Advance Of A Ruling On The Merits

Finally, Plaintiffs' proposed preliminary injunction should be denied because it is effectively an improper request for a mandatory injunction on a preliminary basis. Such injunctions "should be granted only in rare instances where the facts and law are clearly in favor of the moving party, especially if the grant of the temporary injunction would in effect give the plaintiff the relief which he seeks in the main case." *Bricklayers v. Lueder*

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14 *See, e.g.*, Press Release, *Administration, Servicers Commit to Faster Relief for Struggling Homeowners through Loan Modifications* (July 28, 2009) (Treasury Secretary identifying need to "accelerate the program and bring relief faster"), *available at* http://www.hud.gov/content/releases/pr2009-07-28.cfm.

Constr. Co., 346 F.Supp. at 561.[15] Though phrased in negative terms—as prohibiting foreclosures and property sales—the proposed injunction in fact requires affirmative action by Defendants, prohibiting the foreclosure-related activity "unless and until" they establish the series of elaborate procedures that Plaintiffs say the Constitution requires. PI Mot. ¶¶1(i)-(v), 2(ii)-(vii). The consequence of refusing to take the affirmative steps—a statewide moratorium on foreclosures and sales of foreclosed properties—is so dramatic that the proposed injunction effectively requires Defendants to alter the status quo. *See Rittmiller v. Blex Oil, Inc*., 624 F.2d 857, 860-861 (8th Cir. 1980) (affirming denial of preliminary injunctive relief when "the injunctive request was in terms prohibitory, [but] as a practical matter plaintiffs were seeking more than maintenance of the status quo"). Requiring Defendants effectively to engage in affirmative conduct before a decision on the merits "goes beyond the purpose of a *preliminary* injunction." *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co*., 997 F.2d 484, 490 (8th Cir. 1993). The proposed injunction is particularly inappropriate here because it would grant the very relief that Plaintiffs would obtain if they were ultimately successful on the

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15 *See also Schrier v. University of Colo.,* 427 F.3d 1253, 1258-1259 (10th Cir. 2005) ("mandatory preliminary injunctions … 'must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course'"); *Stanley v. University of S. Cal*., 13 F.3d 1313, 1320 (9th Cir. 1994) (mandatory preliminary injunctions should be denied "'unless the facts and law clearly favor the moving party'"); *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) ("[m]andatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances"); *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) ("Only in rare instances is the issuance of a mandatory preliminary injunction proper.").

merits. *See, e.g.*, *Dakota Indus.*, 944 F.2d at 440 (movant bears heavier burden in such circumstances). Indeed, the proposed injunction is in all relevant respects identical to the final relief that Plaintiffs request in the complaint. *Compare* PI Mot. ¶¶1-2 to FAC ¶¶186(B), 187(B). Plaintiffs have not made the substantial showing necessary to effectively decide this case and grant them final relief before the case even begins.

III. PLAINTIFF'S FARM FORECLOSURE CASES ARE INAPPOSITE

Plaintiffs' reliance (PI Mem. 22-26) on cases involving farm foreclosures is inapt because the circumstances differ entirely from the present case both as to the claims asserted and the procedural posture. The farm cases involved indisputable claims of state action because they involved direct loans from the federal government. Moreover, the decisions focused on whether the Agriculture Secretary had failed to provide farmers notice of his authority to forbear on foreclosure or to promulgate standards for implementing such authority. The courts concluded that the Secretary's statutory violations had effectively denied farmers an opportunity to apply for assistance at all, not whether the Constitution imposes procedural requirements around denial decisions made by private parties. *See Allison v. Block*, 723 F.2d 631 (8th Cir. 1983); *Shick v. Farmers Home Admin.*, 748 F.2d 35 (1st Cir. 1984); *Coleman v. Block*, 562 F.Supp. 1353 (D.N.D. 1983); *Gamradt v. Block*, 581 F.Supp. 122 (D. Minn. 1983). Indeed, to the extent that the plaintiffs in the farm cases attempted to raise constitutional claims based on the failure to follow the statute, the courts did not reach those allegations. *See Allison*, 723 F.2d at 633 n.1; *Gamradt*, 581 F.Supp. at 131. The single case cited by plaintiffs granting a classwide injunction on constitutional grounds is inapposite, as it focused on whether the federal government may pursue nonjudicial foreclosures at all. *See Johnson v. United States Dep't of Ag.*, 734 F. 2d 774 (11th Cir. 1984).

As to procedural posture, the two decisions from district courts in this Circuit granting classwide preliminary injunctions relied on statutory claims and were issued only after factual development and following motions for summary judgment. *See Coleman*, 562 F.Supp. at 1367; *Gamradt*, 581 F.Supp. at 124; *cf. Allison*, 723 F.2d at 633; *Allison v. Block*, 556 F.Supp. 400 (W.D. Mo. 1982) (involving a permanent injunction issued only as to individual plaintiff after consideration of motion to dismiss and for summary judgment). Plaintiffs have not even attempted to make such a showing here.

IV. PLAINTIFFS' CLAIMS AGAINST FREDDIE MAC FAIL BECAUSE PLAINTIFFS LACK STANDING

Finally, Plaintiffs lack standing as to Freddie Mac—they do not allege that Freddie Mac owns or guarantees their mortgage loans and, as a result, Plaintiffs cannot establish any injury traceable to Freddie Mac's conduct. *See Buetow v. A.L.S. Enters., Inc.*, 564 F.Supp.2d 1038, 1044-1046 (D. Minn. 2008); *Easter v. American West Fin.*, 381 F.3d 948, 961-962 (9th Cir. 2004). Plaintiffs do not acquire standing by virtue of bringing their claim as a class action. *See Mull v. Alliance Mortgage Banking Corp.*, 219 F.Supp.2d 895, 908-909 (W.D. Tenn. 2002); *Canady v. Allstate Ins. Co.*, 1997 WL 33384270, at *8 (W.D. Mo. June 19, 1997).

CONCLUSION

For the foregoing reasons, Fannie Mae and Freddie Mac respectfully request that the Plaintiffs' Motion for Preliminary Injunction be denied.

Respectfully submitted,

September 16, 2009

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

NICHOLE WILLIAMS, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 09-CV-1959 ADM / JJG
	)	
TIMOTHY F. GEITHNER, et al.	)	
	)	
Defendants.	)	

LOCAL RULE 7.1(C) WORD COUNT COMPLIANCE CERTIFICATE REGARDING BRIEF OF DEFENDANTS FEDERAL NATIONAL MORTGAGE ASSOCIATION (d/b/a FANNIE MAE) AND FEDERAL HOME LOAN MORTGAGE CORPORATION (d/b/a FREDDIE MAC) IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Patrick S. Williams, certify that Brief Of Defendants Federal National Mortgage Association (d/b/a/ Fannie Mae) And Federal Home Loan Mortgage Corporation (d/b/a Freddie Mac) In Opposition To Plaintiffs' Motion For A Preliminary Injunction complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2003, Version SP2, 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 11,816 words.

Dated: September 16, 2009

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Nichole Williams, et al.,

Plaintiffs,

v.

Timothy F. Geithner, et al.,

Defendants.

Court File No. 09-CV-1959 ADM/JJG

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2009, I caused the following documents:

Brief of Defendants Federal National Mortgage Association (d/b/a Fannie Mae) and Federal Home Loan Mortgage Corporation (d/b/a Freddie Mac) in Opposition to Plaintiffs' Motion for a Preliminary Injunction;

Declaration of Don Palumbo with Exhibit;

Declaration of Joy Cianci;

Declaration of Laura Kenney;

Declaration of Noah A. Levine in Support of Brief of Defendants Federal National Mortgage Association (d/b/a Fannie Mae) and Federal Home Loan Mortgage Corporation (d/b/a Freddie Mac) in Opposition to Plaintiffs' Motion for a Preliminary Injunction with Exhibits; and

LR 7.1(c) Word Count Compliance Certificate

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing per the electronic mail notice list. I also caused a copy of the foregoing document to be sent by email or first class mail to non-ECF participants:

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