IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Nichole Williams, et al.

On behalf of themselves and all others similarly situated,

Plaintiffs.

vs.

Timothy F. Geithner, as United States Secretary of the Treasury, et al.

Defendants.

Civil: _____

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Johnson Sendolo and Nichole Williams are the types of people that the federal government's foreclosure prevention program was intended to help. Both had good jobs. Mr. Sendolo was a medical coder for a health insurance company, and Ms. Williams was a legal assistant. But, when the economy faltered, they were both laid off. Eventually, after depleting their savings, they fell behind on their monthly mortgage payments. Now, both have managed to get new jobs and have steady income, but they need a loan modification to get current and make their mortgage loans sustainable. They are eligible for the federal government's Home Affordable Modification Program ("HAMP"), but they have both been denied.

Mr. Sendolo applied for the program, and then, without being given any reason or an opportunity to appeal, his application was denied and his house was sold at a Sheriff's Sale. Ms. Williams faxed, emailed, and verbally requested a modification through HAMP with the help of her housing counselor, but Ms. Williams' requests were ignored. Instead, the servicer offered its own non-HAMP three-month payment with no future guarantees. The payment plan does not provide the advantages of a HAMP modification and foreclosure continues to be eminent.

In both cases, Mr. Sendolo and Ms. Williams' Constitutional rights to procedural due process have been violated. The federal government's foreclosure prevention programs cost $75 billion, approximately six times larger than the National School Lunch Program. Both the enabling legislation and the federal government's own implementing guidelines make it clear that eligible and qualified homeowners "shall" receive a loan modification, creating entitlements for thousands of Minnesota homeowners facing foreclosure. Yet, the government has denied Mr. Sendolo, Ms. Williams, and others like them the most fundamental due process protections: notice of the basis for a decision and an opportunity to appeal.

HAMP does not require that homeowners are given any notice of a denial, and for homeowners, like Mr. Sendolo, the notices that happen to be given do not provide any basis for the denial. HAMP is complex, and the lack of transparency prevents Mr. Sendolo and other homeowners from correcting errors or misinformation. The lack of any formal and uniform opportunity to appeal makes it even more difficult to access the

benefits. Now, that Mr. Sendolo's house has been sold, there is also no formal and uniform method to undo the wrongful foreclosure.

In this motion, Plaintiffs seek an injunction of all foreclosures by Defendants in Minnesota. Just as this Court issued a preliminary injunction of all farm foreclosures in 1983, until the government ensured farmers' procedural due process rights were not violated, Plaintiffs similarly ask that this Court to enjoin Defendants from foreclosing or in any other way depriving Plaintiffs of their property until HAMP is constitutionally sound.

Indeed, at Defendant Fannie Mae's own request, a similar injunction was sought and granted by the South Carolina Supreme Court just three months ago. In that matter, the Order granting the injunction summarized the situation:

> "[Fannie Mae] asserts that this injunction is necessary to avoid undue costs if these foreclosure actions are dismissed rather than stayed or postponed based on the fact that the underlying loans may be subject to modification under the Homeowner Affordability and Stability Plan, the Home Affordable Modification Program (HMP), and the United States Treasury Supplemental Directive 09-01. [Fannie Mae] also states that, "absent the injunction, mortgagors eligible for relief under the HMP program could be denied their right to participate because their property was sold at the foreclosure sale. This qualifies as irreparable injury for which the court should provide redress in the form of a temporary injunction."

(Bowman Aff. ¶ 2, Ex. A.)

A report by the General Accountability Office ("GAO"), issued just last Thursday, confirmed that the needed safeguards for homeowners described in the South Carolina motion and the South Carolina Supreme Court's order are still not in place.[1]

Like the homeowners in South Carolina, Mr. Sendolo, Ms. Williams, and other Minnesota homeowners will suffer irreparable injury unless the Defendants are enjoined from initiating foreclosure actions absent the satisfaction of their procedural due process rights. For the reasons stated in detail below, Plaintiffs ask that their motion for a preliminary injunction be granted.

FACTS

I. JOHNSON SENDOLO AND NICHOLE WILLIAMS HAVE BEEN WRONGFULLY DENIED ACCESS TO A HAMP LOAN MODIFICATION.

A. Johnson Sendolo's Denial Of A Loan Modification and Sheriff's Sale Was In Violation Of His Due Process Rights.

Johnson Sendolo came to the United States in the early 1980s, just as the violence began to escalate in his home country of Liberia. (Sendolo Aff. ¶ 1.) In Liberia, he had worked for the government in the labor ministry. *Id.* Once here, he found work in the medical information industry. *Id.* Specifically, Mr. Sendolo worked as a medical record coder. *Id.* In 2003, Mr. Sendolo became a United States citizen.

Eventually, Mr. Sendolo moved to Minnesota with his family, and on September 9, 2005, he purchased his first home in Woodbury, Minnesota. (Sendolo Aff. ¶ 2.) In order to finance the purchase, Mr. Sendolo obtained an 80/20 loan, meaning that he got

[1] General Accountability Office, Troubled Asset Relief Program: Treasury Actions Needed To Make The Home Affordable Modification Program Transparent and Accountable, GAO-09-837 (July 23, 2009).

two loans through Ocwen, which still services both mortgage loans. *Id.* at 3-5. The first mortgage loan was in the amount of $143,137. *Id.* at 3. The second mortgage was for $35,785. *Id.* at 4. His first mortgage loan was an adjustable rate mortgage with an initial rate of approximately 9.6%. *Id.* at 3. The second mortgage had a fixed rate of approximately 7%. *Id.* at 4.

For the first three years, Mr. Sendolo made every loan payment and was careful never to fall behind. (Sendolo Aff. ¶ 6.) Then, in September 2008, Mr. Sendolo lost his job. *Id.* 7. Nonetheless, he continued making payments, and even called Ocwen and told them about his situation and that he needed help. *Id.* at 7, 8. Eventually his savings ran out, and he stopped making mortgage payments in December 2008. *Id.* at 9.

In the meantime, Mr. Sendolo also started working with a mortgage loan counselor at Washington County Housing and Redevelopment Authority, and together they continued to contact Ocwen and obtain help. (Sendolo Aff. ¶ 8.) Ocwen is one of the mortgage loan servicers who agreed to provide loan modifications through and administer HAMP on behalf of the government, as well as abide by all of the government's program requirements. (Ireland Aff. ¶ 2, Ex. A.) At the end of March, Mr. Sendolo submitted paperwork to Ocwen for a HAMP modification of his first and second mortgages. (Sendolo Aff. ¶ 10.)

At that time of his application, Mr. Sendolo began receiving income again. (Sendolo Aff. ¶ 11.) Although he did not get paid as much as he had previously, Mr. Sendolo had found a part-time job for about thirty-two hours per pay period. *Id.* He also

received unemployment, and Mr. Sendolo's son had moved back home and paid a small rental fee. *Id.*

1. Johnson Sendolo Is Eligible For A Loan Modification Through HAMP.

Mr. Sendolo meets all of the eligibility requirements for a loan modification through HAMP. (Sendolo Aff. ¶ 19.) Eligibility for HAMP is determined by five general criteria.[2] First, the home must be the applicants' primary residence. (HAMP non-GSE Servicer Guidelines, found at Bowman Aff. ¶ 3 Ex. B at 2.) Second, the amount owed on the first mortgage must be equal to or less than $729,750. *Id* at 3. Third, a homeowner must be having trouble paying their mortgage. *Id.* This means that the homeowner is delinquent (missed two payments) or default is "imminent" due to the nature of the homeowner's hardship and assets. *Id.* at 3-4. Fourth, the mortgage was originated before January 1, 2009. *Id.* at 2. Fifth, the payment is more than 31% of the homeowner's gross monthly income. *Id.* at 8.

In this case, Mr. Sendolo's mortgage relates to his primary residence and the first mortgage is far less than $729,750. (Sendolo Aff. ¶ 2.) Mr. Sendolo is delinquent in the mortgage loan, meaning he owes two or more monthly payments. *Id.* at 9. The mortgage loan was originated before January 1, 2009, and the monthly mortgage payment is more than 31% of his gross income. *Id.* at 19. However, despite satisfying these eligibility criteria, Mr. Sendolo's access to HAMP was denied. *Id.* at 14.

[2] These are the five general criteria, but Fannie Mae and Freddie Mac have identified a few other minor criteria that generally would not apply to most homeowners. For example, in its guidance Fannie Mae prohibits homeowners who have already obtained a modification through HAMP to obtain another one.

2. Mr. Sendolo Was Not Given Adequate Notice Related To His Denial or Opportunity To Appeal The Decision.

After waiting over a month, Mr. Sendolo's mortgage loan counselor was e-mailed a boilerplate letter from Ocwen stating that he was denied a HAMP modification. (Sendolo Aff. ¶ 13.) The letter did not state any reason why Mr. Sendolo had been denied. *Id.* at 14. This confused Mr. Sendolo, because Ocwen had already granted a loan modification of his second mortgage. *Id.* at 15.

The letter also provided no information related to how Mr. Sendolo could appeal the decision or even if Ocwen had any procedures to handle adverse HAMP decisions. (Sendolo Aff. ¶ 14.) The letter also did not describe any information about other loan modification or loss mitigation programs that were offered through Ocwen. *Id.*

If, for whatever reason, a homeowner is denied a HAMP modification, the government requires that all other loan modification or loss mitigation programs be considered for the homeowner *prior* to initiating foreclosure proceedings. (HAMP Non-GSE Guidelines, Fannie Mae HAMP Guidelines, and Freddie Mac HAMP Guidelines, hereinafter "HAMP Servicer Guidelines," found at Bowman Aff. ¶ 3, Ex. B at 15, ¶ 4, Ex. C at 17, ¶ 5, Ex. D at 18). The letter does not provide any indication as to whether such an evaluation ever occurred. (Sendolo Aff. ¶ 14.)

3. Johnson Sendolo's House Was Foreclosed and Sold At A Sheriff's Sale.

On June 25, 2009, Mr. Sendolo's home was sold at a Sheriff's Sale to Ocwen. (Sendolo Aff. ¶ 18.) Under Minnesota law, Mr. Sendolo now has six months to "redeem," meaning that he has an opportunity to pay back the full amount of the

mortgage loan. MINN. STAT. § 581.10 (2008). If Mr. Sendolo fails to redeem, he must leave the property by the end of December. MINN. STAT. § 581.12 (2008). The whole process has been confusing and stressful. (Sendolo Aff. ¶ 20.) He is not sure exactly what he is going to do when he is forced to move out. *Id.* at 21. Mr. Sendolo does not have the money to redeem and he cannot refinance, because the house has lost value. *Id.* at 22. Mr. Sendolo estimates that the total amount of his mortgages is approximately $14,000 more than the house is worth. *Id.*

B. Nichole William's Denial Of A Loan Modification Was In Violation Of Her Due Process Rights.

In 2004, Nichole Williams purchased her first home, and then refinanced the original mortgage loan about a year later. (Williams Aff. ¶ 2.) Ms. Williams had wanted to get a 30-year, fixed-rate mortgage loan. *Id.* at 3. But the mortgage broker used a typical "bait and switch" with a lot of pressure. *Id.* Ms. Williams ended up with an "80/20 loan," meaning that there was a first mortgage loan for 80% of the value and a smaller, second mortgage that was 20% of the value. *Id.*

The first mortgage loan, an ARM, for approximately $232,000 is serviced by Homecomings, a GMAC Company. (Williams Aff. ¶ 4.) The second mortgage loan, approximately $58,000, is serviced by HSBC. *Id.* at 5.

Ms. Williams made payments on the mortgage loans, but on June 20, 2007 she was laid-off and lost her job as a legal assistant (Williams Aff. ¶ 6.) Ms. Williams was unemployed for six months, and she fell behind. *Id.* at 6, 7. Eventually, Ms. Williams

obtained another legal assistant position. *Id.* at 8. After an initial loan modification, she was able to make some payments on the loan. *Id.* at 9.

Meanwhile, Ms. Williams' child support payments stopped causing further financial hardship. (Williams Aff. ¶ 10.) In July 2008, she sought a loan modification from Homecomings, and a few months later, Ms. Williams received an offer from Homecomings. *Id.* 11. This began in on-going struggle to obtain a loan modification. *Id.* at 12 - 27. On multiple occasions, she was given a "temporary" loan modification of two or three months only to have a permanent modification denied for dubious, if not factually wrong reasons, and then offered another temporary modification. *Id.*

1. Nichole Williams Is Eligible For A Loan Modification Through HAMP.

After HAMP was announced by Defendants, Ms. Williams worked with her housing counselor to gain access to the government program. (Williams Aff. ¶ 18, 22.) Homecomings, a subsidiary of GMAC, is one of the mortgage loan servicers who agreed to provide loan modifications through and administer HAMP on behalf of the government, as well as abide by all of the government's program requirements. (Ireland Aff. ¶ 2, Ex. A.)

On multiple occasions Ms. Williams specifically asked for a modification under the HAMP program, and stated that she wanted a modification under HAMP. (Williams Aff. ¶ 18, 22, 25.) She or her housing counselor made these requests to participate in HAMP by facsimile, e-mail, and verbally over the phone. *Id.*

Ms. Williams is eligible for HAMP, because she meets all of the program's eligibility requirements. (Williams Aff. ¶ 28.) First, the mortgage loan relates to her primary residence and it is far less than $729,750. *Id.* Second, the mortgage loan was originated prior to January 1, 2009. *Id.* Third, she is delinquent, approximately four monthly payments are past due. *Id.* Finally, the monthly payments for the mortgage loan are more than 31% of her gross monthly income. *Id.*

2. Nichole Williams Is Effectively Denied Access To A Loan Modification Through HAMP.

Despite Ms. Williams' specific requests, on June 16, 2009, Homecomings did not offer a temporary or permanent loan modification through HAMP. (Williams Aff. ¶ 23.) Instead, the offer was just another temporary Homecomings program similarly to others that she had been offered. *Id.* The temporary program offers none of the benefits or sustainability that is a part of a loan modification through HAMP. *Id.* Specifically, Ms. Williams is to make three monthly payments of $1,582.21 (approximately 37% of her monthly income), and then it is unclear what will happen after the three months . *Id.* at 24.

Ms. Williams knows that she does not have enough money to get current on her mortgage loan, and is fearful that at any moment Homecomings will initiate foreclosure proceedings even though she is eligible for HAMP. (Williams Aff. ¶ 25.)

II. CONGRESS ACTS AND DEFENDANTS CREATE THE MAKING HOME AFFORDABLE HAMP PROGRAM.

What differentiates HAMP from other foreclosure prevention programs is that HAMP is the first government program to address the current foreclosure crisis that was created by legislation, was appropriated significant money by Congress, and resulted in a specific, mandatory uniform loan modification process. Previous programs, like Hope for Homeowners, were voluntary and the government simply played a role in organizing and promoting the program. The history and requirements of HAMP, however, show that Congress intended to provide a specific benefit to homeowners facing foreclosure and Defendants are required to provide that benefit consistent with Constitutional due process requirements.

A. Congressional Authorization and Oversight of the Emergency Economic Stabilization Act of 2008

After Fannie Mae and Freddie Mac were placed under conservatorship by the federal government, the economy and financial markets continued to deteriorate. Congress acted and this time Congress passed the Emergency Economic Stabilization Act of 2008 (the "Act"). The Act was signed on October 3, 2008. 12 U.S.C. § 5201 (2008). The purpose of the Act was to grant the Secretary of the Treasury the authority to restore liquidity and stability to the financial system. *Id.* Congress further required that when such authority was used, it was used, in part, to "preserve homeownership." *Id*.

In addition to allocating $700 billion to the United States Department of the Treasury, the Act also specifically granted the Secretary of the Treasury the authority to

establish the Troubled Asset Relief Program or TARP. 12 U.S.C. §§ 5211, 5225 (2008). When administering TARP, Congress mandated that the Secretary "shall" take into consideration the "need to help families keep their homes and to stabilize communities." 12 U.S.C. § 5213(3) (2008). To that end, Congress further created two specific sections within Title I of the Act related to homeowners. *See Id.*

Section 109 is entitled "Foreclosure Mitigation Efforts." Section 109 specifically states that the Secretary "shall" implement a plan to "maximize assistance for homeowners." 12 U.S.C. § 5219(a) (2008). These efforts must be coordinated with other federal agencies including the Federal Housing Finance Agency, which is the conservator for Fannie Mae and Freddie Mac. *Id.*

The Act further requires the Secretary to consent to any reasonable loan modification offer:

> [T]he Secretary shall consent, where appropriate, and considering net present value to the taxpayer, to reasonable requests for loss mitigation measures, including term extensions, rate reductions, principal write downs, increases in the proportion of loans within a trust or other structure allowed to be modified, or removal of other limitations on modifications.

12 U.S.C. 5219(c) (2008).

Similarly, Section 110 requires the Federal Housing Finance Agency, as conservator for Fannie Mae and Freddie Mac, to create and implement a plan to prevent foreclosures. Specifically, the Act states:

> [T]he Federal property manager [defined, in part, as the Federal Housing Finance Agency] shall implement a plan that seeks to maximize assistance for homeowners and…minimize foreclosures.

12 U.S.C. § 5220(b) (2008). The statutory tools to be used by Fannie Mae and Freddie Mac include reducing interest rates and reducing the principal balance of mortgage loans. *Id.* § 5220(b)(2).

B. The Federal Government Creates the Making Home Affordable Program

Pursuant to that authority, Defendants jointly created and announced the Making Home Affordable Program on February 18, 2009. (HAMP Servicer Guidelines, found at Bowman Aff., ¶¶ 3-5 Ex. B-D.) The Making Home Affordable Program is jointly administered by all of the Defendants. *Id.* As stated above, the program policies and requirements are developed together by Defendants, and then Fannie Mae is the fiscal agent for the entire Making Home Affordable Program and Freddie Mac is responsible for ensuring mortgage loan servicers comply with program requirements and audits mortgage loan servicers. *See* General Accountability Office, Troubled Asset Relief Program: Treasury Actions Needed To Make The Home Affordable Modification Program Transparent and Accountable at 16, GAO-09-837 (July 23, 2009).

As designed by Defendants, the Making Home Affordable program consists of two sub-programs. (Bowman Aff. ¶ 6, Ex. E at 1.) The first sub-program relates to the creation of refinancing products for individuals with minimal or negative equity in their home, which eventually was entitled the Home Affordable Refinance Program or HARP. (Bowman Aff. ¶ 6, Ex. E at 2.) The second sub-program relates to the creation and implementation of a uniform loan modification protocol, which eventually was entitled

the Home Affordable Modification Program or HAMP. (Bowman Aff. ¶ 6, Ex. E at 2.) HAMP is the specific program at issue in this case.

The scope of HAMP is broad; approximately 3 to 4 million homeowners in the United States are potentially eligible for the program. (Bowman Aff. ¶ 3 Ex. B at 1.) The Treasury Department has allocated at least $50 billion of its TARP money to fund the refinance and modification programs and offered an additional $25 billion of non-TARP funds, totaling $75 billion. 12 U.S.C. § 5211(a)(1) (authorizing the Secretary to use TARP funds to purchase assets in accordance with the Emergency Economic Stabilization Act of 2008).

HAMP applies to any mortgage loan owned by Fannie Mae and Freddie Mac, as well as any loans owned by financial companies that accepted other TARP money or companies that volunteer to participate in the program. (*See Generally* HAMP Servicing Guidelines, found at Bowman Aff. ¶¶ 3-5 Ex. B-D.) As of this lawsuit, there are approximately thirty-one servicers voluntarily participating in HAMP in addition to other servicers who manage Fannie Mae and Freddie Mac mortgage loans. (Ireland Aff. 2, Ex. A.)

1. The Treasury Department, Fannie Mae and Freddie Mac Issue Directives Creating A Framework For The Implementation of HAMP.

From March 4, 2009 to present, Defendants have issued a series of directives for the servicers of mortgage loans. (*See Generally* Bowman Aff. HAMP Servicing Guidelines, ¶¶ 3-5 Ex. B-D.) The directives set forth the framework and required protocol to implement HAMP. *Id.* In all cases, HAMP is clearly identified as a program

of the federal government. (*See e.g.* Bowman Aff. ¶ 7, Ex. F at 1.) For example, an introductory letter to homeowners is co-branded with the government's Making Home Affordable and servicer logos, and then begins with the following introduction:

> There is help available if you are having difficulty making your mortgage loan payments. ***You may be eligible for the Home Affordable Modification program, part of the initiative announced by President Obama to help homeowners.***

(Bowman Aff. ¶ 7, Ex. F at 1.) (emphasis added).

HAMP's success is premised on getting a homeowner's monthly payment to 31% of the homeowner's gross monthly income. (Bowman Aff. ¶ 6, Ex. E at 4.) Prior to any foreclosure, the mortgage loan servicers are required to follow three basic steps for all distressed homeowners with the goal of reaching a monthly mortgage payment of 31% of the homeowner's gross monthly income. (*See Generally* HAMP Servicer Guidelines, found at Bowman Aff. ¶¶ 3-5 Ex. B-D.)

The first step is to identify the homeowner's income, (initially the income may be unverified).[3] *Id.* The second step is to calculate the "target payment," which is 31% of the homeowner's gross monthly income. *Id.* The third step is to implement the "loss mitigation waterfall." *Id.* The servicer is required to use each loss mitigation tool within the waterfall, in the correct order, until the servicer reaches the target payment. *Id.*

There are four loss mitigation tools in the waterfall, which must be applied in the following order: (a) capitalizing arrearages, meaning that accrued interest, funds

[3] It should be noted that, as an initial matter, a homeowner's eligibility must be determined, as stated above. The eligibility relates to the five general requirements of the program, such as the mortgage relates to a homeowner's principal residence. Also, once eligible, the Net Present Value calculator plays a role in determining a homeowner's qualification for HAMP. (Bowman Aff. ¶ 8, Ex. G.)

advanced by the servicer, and appropriate foreclosure expenses incurred by the servicer are added to the existing principal balance of the mortgage loan; (b) reducing the interest in increments of .125% until the target payment is reached or the servicer reaches a 2% floor; (c) extending the term of the loan or amortization period by one month increments until the target payment is reached, but the loan schedule cannot exceed 480 months (40 years) from the date of the loan modification; and, finally (d) forbearing a part of the principal balance, meaning that the principal amount of the loan will be reduced in $100 increments until the target payment is reached. (HAMP Servicing Guidelines, found at Bowman Aff. ¶ 3, Ex. B. at 8-10, ¶ 4, Ex. C at 10 -11, ¶ 5, Ex D at 15 – 18.)

The principal reduction, however, is not forgiven. (Bowman Aff. ¶ 3 Ex. B at 10, ¶ 4, Ex. C at 11, ¶ 5, Ex. D at 17.) It is simply a balloon payment that must be paid at the end of the loan term. *Id.* The principal balance forbearance does not accrue interest or amortize. It is also not included in calculating a monthly payment. *Id.*

2. The government has no specific notification procedures or disclosure requirements for a homeowner that is denied access to HAMP.

There are no requirements that homeowners are told the specific reasons for their denial of a HAMP modification, and, in fact, the government requires no notice at all. (*See Generally* HAMP Servicing Guidelines, found at Bowman Aff. ¶¶ 3-5 Ex. B-D.) There is only one sentence in the entire guidance issued by Defendants that addresses the topic of denial and notice to homeowners. In it, Fannie Mae, Freddie Mac and the Treasury Department simply encourage servicers to communicate in writing, but such communication is not required and the notice does not need to provide any detail.

(HAMP Servicing Guidelines, found at Bowman Aff. ¶ 3, Ex. B at 15, ¶ 4, Ex. C at 17, *See* ¶ 5, Ex. D at 18) ("If the servicer determines that the borrower does not meet the underwriting and eligibility standards of the HMP after the borrower has submitted a signed Trial Period Plan to the servicer, the servicer *should* promptly communicate that determination to the borrower in writing…") Use of the word "should" is permissive. *Id.*

This guidance also assumes that there was a trial period plan, which, as illustrated by Mr. Sendolo, there may not be. There is no guidance or requirements at all related to homeowners who are denied access to the program without being given a trial period modification. *Id.*

In contrast, all HAMP participants have very specific requirements, instructions, and model letters related to homeowners who are accepted into the program. (HAMP Servicing Guidelines, found at Bowman Aff. ¶ 3, Ex. B at 15, ¶ 4, Ex. C at 16, ¶ 5, Ex. D at 4.) For example, Defendants have created model solicitation letters, trial modification offer letters, and trial modification acceptance letters that are each required to be used. *Id.* No such documents exist related to the denial of access to HAMP. *See Id.*

3. The government has no uniform process to correct mistakes or undo a wrongful foreclosure.

As stated above, Defendants have created specific eligibility requirements and procedures that servicers must implement to get the monthly payments of distressed homeowners to the target payment. (HAMP Servicing Guidelines, found at Bowman Aff. ¶ 3, Ex. B. at 8-10, ¶ 4, Ex. C at 10 -11, ¶ 5, Ex D at 15 – 18.) The government has also ordered all Fannie Mae and Freddie Mac mortgage loan servicers and other

participating servicers to suspend foreclosure proceedings for all homeowners until they are determined to be eligible for HAMP or, if not qualified for HAMP, considered for other loss mitigation programs offered by the particular mortgage servicer. (HAMP Servicing Guidelines, found at Bowman Aff. ¶ 3, Ex. B at 14, ¶ 4, Ex. C at 16.); (Bowman Aff. ¶ 9, Ex. H.)

If, however, a homeowner has been wrongfully foreclosed upon in violation of such requirements and mandates, Defendants have no uniform program or procedure to ensure that the homeowner is able to appeal. (*See Generally* HAMP Servicing Guidelines, found at Bowman Aff. ¶¶ 3-5 Ex. B-D.) There is no uniform process for how an appeal is communicated or triggered by the homeowner, nor is there any evaluation criteria that would ensure a fair, timely, and unbiased response to the appeal. *Id.*

III. THOUSANDS OF MINNESOTA HOMEOWNERS ARE AT RISK.

Every day hundreds of foreclosure Sheriff's Sales occur throughout Minnesota. Foreclosures nationwide were up 32% last April compared to a year ago. *See* Adrian Sainz, *April foreclosures up 32% over last year, report says*, USA Today (May 13, 2009). An estimated two million people will lose their homes this year. (Ireland Aff. ¶ 4, Ex. C.) In Minnesota, there were 5,157 foreclosures in the First Quarter of 2009, nearly as high as the *total* number of foreclosures that occurred in all of 2005. (Ireland Aff. ¶ 3, Ex. B.)

Nearly 1,000 public records related to foreclosure Sheriff's Sales have been reviewed pertaining to foreclosures that have occurred in Hennepin and Washington

Counties.[4] Due to the securitization of mortgage loans (converting a pool of mortgage loans into bonds, and selling the income streams to a myriad of investors), it was often difficult to determine the identity of the owner and servicer of the mortgage loans.

However, it was clear that a substantial number of these foreclosures were of Minnesotans who were eligible and potentially entitled for benefits through HAMP. (Ireland Aff. ¶ 5.) It appears that approximately 40% to 60% of the foreclosures were conducted by mortgage loan servicers bound by HAMP requirements. *Id.* Assuming the rate of foreclosure remains consistent in the Second Quarter, approximately 3,000 people have been or will be denied procedural due process. *Id.* at ¶ Ex.

In a report, issued by the General Accountability Office ("GAO") just last Thursday, the GAO confirmed that the procedural safeguards are not in place to protect individual homeowners. The GAO stated:

> [S]ignificant gaps in oversight structure remain, including the lack of a full complement of permanent staff…and the lack of a finalized comprehensive system of internal control for the program, including policies, procedures and guidance for program activities. In addition, it is unclear when comprehensive processes will be in place to address noncompliance among servicers, including processes to ensure that servicers evaluate borrowers in imminent danger of default for HAMP participation. Further, Treasury has not established procedures to consistently evaluate the capacity of participating servicers to fulfill HAMP requirements or to assess any risk that individual servicers may pose to the program during the admission process.

[4] Due to length and size, Plaintiffs did not attach the foreclosure records. Detailed Hennepin County foreclosure records, however, are available at http://www4.co.hennepin.mn.us/webforeclosure/. Detailed Washington County foreclosure records are available at http://www.co.washington.mn.us/info_for_residents/prts/property_tax_and_assessment/foreclosure_data/.

General Accountability Office, *Troubled Asset Relief Program: Treasury Actions Needed To Make The Home Affordable Modification Program Transparent and Accountable* at 16, GAO-09-837 (July 23, 2009).

SUMMARY OF REQUESTED INJUNCTIVE RELIEF

Plaintiffs Nichole Williams and Johnson Sendolo, on behalf of themselves and other similarly situated persons, ("Plaintiffs") submit this Memorandum of Law in support of their Motion for a Preliminary Injunction Against Defendants. Plaintiffs, as individuals, seek a preliminary injunction to prevent the irreparable harm that they and their families will suffer if the Defendants are allowed to continue their practices without protecting their Constitutional right to due process. Plaintiffs further seek a preliminary injunction of foreclosure and eviction after foreclosure on behalf of a class of all Minnesota homeowners who are at risk of losing their homes, are eligible for a loan modification through HAMP, or have similarly been denied procedural due process. The specific terms of the injunction are stated in Plaintiffs' Notice of Motion and Motion as well as Plaintiffs' Proposed Order granting a preliminary injunction.

LEGAL ARGUMENT

Plaintiffs seek to maintain the status quo---keeping Mr. Sendolo, Ms. Williams and people like them in their homes. The purpose of a preliminary injunction is to allow the status quo to be preserved among the parties so that no irremediable injury may occur before the court can adjudicate the merits of the case. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 n.5 (8th Cir. 1981) (en banc). "Ordinarily, the court in its

discretion may grant a preliminary injunction where it appears that there is a substantial controversy between the parties and that one of them is committing an act or threatening the immediate commission of an act that will cause irreparable injury or destroy the status quo of the controversy before a full hearing can be had on the merits of the case. . . ." *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697 (8th Cir. 1948).

Plaintiffs in this case seek an injunction for just such a purpose; Plaintiffs seek to retain ownership and possession of their homes in light of the threat to take away their rights and evict them through foreclosure proceedings. *See Gray v. Four Oak Court Ass'n, Inc.*, No. 07-4424, 2007 U.S. Dist. LEXIS 88765, at *3 (D. Minn. Nov. 30, 2007) (recognizing that staying the period of redemption arising from a foreclosure sheriff sale was necessary to preserve the status quo).

Per the Eighth Circuit's holding in *Dataphase Sys., Inc. v. CL Sys., Inc*., this Court must consider four factors in determining whether Plaintiffs' requested preliminary injunctive relief should be granted:

(1) the threat of irreparable harm to the movant;
(2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
(3) the probability that movant will succeed on the merits; and
(4) the public interest.

640 F.2d at 114; *see also Doe v. LaDue*, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (explaining that the *Dataphase* factors control the determination of whether to grant a preliminary injunction).

The equitable nature of a preliminary injunction requires that "no single factor [of the *Dataphase* standard] is determinative." *Dataphase*, 640 F.2d at 113. Moreover, the importance of any single factor varies from case to case depending on the consideration of the other factors. *See id*. The Eighth Circuit has made it clear that a preliminary injunction is appropriate even absent the certain merit of the legal claim when the other *Dataphase* factors decidedly favor a plaintiff. *Id*. In this case, however, all of the *Dataphase* factors favor the Plaintiffs and their motion should be granted.

A. The Preliminary Injunction Related To Foreclosures During The 1980s Farm Crisis And Affirmed By The Eighth Circuit Court Of Appeals Provides A Framework For Analyzing This Case And Ultimately Granting Plaintiffs' Motion.

Before each of the *Dataphase* factors are analyzed, Plaintiffs' note the remarkably similar series of cases related to the government's loss mitigation and foreclosure prevention programs during the foreclosure farm crisis in the early 1980s. *See Allison v. Block,* 723 F.2d 631, 636-637 (8th Cir. 1983); *Gamradt v. Block*, 581 F. Supp. 122 (D. Minn. 1983);*Coleman v. Block,* 562 F. Supp. 1353 (D.N.D. 1983)*; Johnson v. U.S. Dep't of Agric*., 734 F.2d 774 (11th Cir. 1984); *See also Shick v. Farmers Home Admin. of the U.S Dep't of Agric.*, 748 F.2d 35, 41 (1st Cir. 1984) (granting injunction of foreclosures on due process grounds).

Although some of the individual claims among the series of farm foreclosure cases were different, the types of class plaintiffs and the procedural posture are analogous to this case. In the earlier cases, the plaintiffs either had a loan owned by the Farmers Home Administration (FmHA) or were eligible to obtain a special loan from FmHA that

would prevent foreclosure of their farm. *See Allison*, 723 F.2d at 636-637; *Gamradt*, 581 F. Supp. at 122; *Coleman*, 562 F. Supp. at 1353; *Johnson*, 734 F.2d at 774. In each case, the court issued a preliminary injunction of foreclosure proceedings, in essence a foreclosure moratorium, until the government promulgated proper procedures making the government's foreclosure prevention program constitutionally sound. *Id.*

In *Allison v. Block*, a farmer sought to enjoin the federal government from foreclosing on his property. *Allison*, 723 F.2d at 633. The Allisons alleged that the Secretary's failure to promulgate adequate procedural and substantive regulations to prevent foreclosure amounted to a denial of equal protection and due process, and constituted an abuse of administrative discretion. *Id.* The district court agreed, and enjoined the foreclosure until the Secretary promulgated the necessary regulations. *Id.*

Although the government argued that the foreclosure programs and the tools suggested by Congress to be a part of the program were discretionary "or placed in the Secretary's 'back pocket' for safekeeping," the Eighth Circuit Court of Appeals rejected that argument. *Id*. Specifically, the Eighth Circuit affirmed the district court's injunction and held:

> Notice to the borrower is therefore indispensable. In like manner, the requirement of a showing of prima facie eligibility is necessarily premised upon the expectation that some procedure will be provided under which the borrower may make the requisite showing. Thus, the rudimentary elements of adequate notice and an opportunity to be heard are embodied in the language of section 1981a.
>
> Furthermore, the legislative history underlying the statute supports the conclusion that the Secretary is required to give notice to defaulting CFRDA borrowers and to create a procedure for asserting section 1981a claims. The precatory language to the House report concerning the 1978

> legislation which included section 1981a stressed that the legislation was aimed at "giving people a chance" and assisting farmers "to remain on the land and carry on sound operations."

Id. at 634-635.

In *Gamradt v. Block*, the class of farmers argued that they were eligible for a statutory deferral program that would help many of them avoid foreclosure. *Gamradt*, 581 F. Supp. at 125. The plaintiffs' major contention was that they were entitled to notice and an opportunity to participate in the deferral program, and many of them were not availed of this opportunity. *Id.*

The class plaintiffs asked the Court to enjoin the government from accelerating indebtedness, foreclosing or liquidating their property until the government promulgated regulations that "satisfy due process," including adequate notice, hearing and appeals procedures, and an opportunity to exhaust their rights. *Id.* at 124. The district court granted the preliminary injunction. *Id.* at 135. The court enjoined foreclosures until the government satisfied procedural due process, including a procedure to provide the farmer a written decision showing the proper application of the program's standards prior to any adverse action. *Id.*

Similarly, in *Coleman v. Block,* the court granted the requested preliminary injunction. *Coleman*, 562 F.Supp. at 1362. The court found that, although the farmer's were not expressly granted the right to notice in the statute, "this still does not take away from the presumption that the Congress acts consistently with the notice of basic fairness." *Id.* Therefore, the court found that the farmers were entitled to an injunction against the government or a foreclosure moratorium until the government provided a

> written decision specifying in some detail why the loan deferral was not granted, this court finds that such a decision is required both to insure that the Secretary gives full consideration to the borrower's request and to give the borrower a basis on which to review the decision.

Id.

Finally, in *Johnson v. U.S. Dep't of Agric.*, a class of farmers whose properties had already been foreclosed upon were seeking an injunction related to the liquidation or transfer of their property because of constitutional procedural due process issues related to FmHA's foreclosure mitigation programs. *Johnson*, 734 F.2d at 775 . Although the farmers were found to have had notice, there was not a meaningful opportunity to appeal a decision of denial to a neutral party. *Id.* Therefore, the temporary injunction was granted:

> The lower court found harm to the defendants if the injunction was granted. However, this court found that the possibility of wrongful eviction from one's home is a serious injury. It is well recognized that real property is unique and not fungible. A person's home has even more intangible value. The whole family is uprooted and displaced. . . We are convinced that the relative harm to the government from granting a preliminary injunction pales when compared to the serious injury class members suffer when they are forced from their homes.

Id. at 788.

Just like the plaintiffs in *Allison, Gamradt, Coleman,* and *Johnson*, the government has created a program to prevent foreclosure. Just like the plaintiffs in *Allison, Gamradt, Coleman,* and *Johnson*, Plaintiffs in this case have been foreclosed upon or they are in imminent risk of foreclosure. Just like the plaintiffs in *Allison, Gamradt, Coleman,* and *Johnson,* access to the program could prevent foreclosure but the government has failed to promulgate regulations or protocols that require written

notification related to any adverse decision and an opportunity to appeal to a neutral party. And, just like the plaintiffs in *Allison, Gamradt, Coleman,* and *Johnson,* this Court should issue a preliminary injunction until the government cures the foreclosure prevention program's procedural deficiencies. The government should not allow the loan servicers to proceed with a foreclosure until Plaintiffs have been properly evaluated for HAMP, as provided by both the statute and Constitution.

B. The *Dataphase* Factors Support Issuance of an Injunction To Keep Mr. Sendolo, Ms. Williams and Similar Homeowners In Their Homes.

Each of the *Dataphase* factors here weighs heavily in favor of granting the Plaintiffs' requests for injunctive relief.

1. Plaintiffs Will Suffer Irreparable Harm Without an Injunction.

First, *Dataphase* requires a court to consider whether the movants will suffer irreparable harm if the injunction does not issue. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). Irreparable harm is imminent and certain harm cannot be compensated by money damages. *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). Foreclosure on the Plaintiffs' home mortgages results in irreparable harm both because of the special nature of real property and the substantial disruption and harm caused by loss of title and an eventual eviction.

It is well established that "monetary relief fails to provide adequate relief for an interest in real property, which by its very nature is considered unique." *O'Hagan v. United States*, 86 F.3d 776, 783 (8th Cir. 1996) (enjoining sale of homestead property applying Minnesota law); *see also Johnson v. Dep't of Agric.*, 734 F.2d 774, 788-89

(11th Cir. 1984) ("real property is unique and not fungible"); *Phleger v. Countrywide Home Loans, Inc.*, No. 07-1686, 2007 U.S. Dist. LEXIS 86413, at *16-19 (N.D. Cal. Nov. 16, 2007) ("The Court is therefore persuaded that [plaintiff] will be irreparably harmed by the foreclosure of her home.") (citing additional cases that hold foreclosure creates irreparable harm); *Strangis v. Metro. Bank*, 385 N.W.2d 47, 48 (Minn. App. 1986) ("[r]eal property is unique, which money damages may not adequately compensate").

Accordingly, no adequate remedy exists when a wrongful foreclosure occurs. *See Johnson*, 734 F.2d at 788-89 (enjoining foreclosures on a class-wide basis); *Ekeberg v. MacKay*, 131 N.W. 787, 789-90 (Minn. 1911) (enjoining foreclosure where it was alleged that mortgagee sought "improper use of the statutory [foreclosure] proceeding").

Moreover, this Court has repeatedly and specifically held that, "[i]f denying an injunction results in eviction, then the irreparable harm element is likely met." *Saygnarath v. BNC Mortgage Inc.*, No. 06-3465, 2007 U.S. Dist. LEXIS 28457, at *9 (D. Minn. April 17, 2007) (citing *Higbee v. Starr*, 698 F.2d 945, 947 (8th Cir. 1983) (eviction depriving movant of place to live constitutes irreparable harm)); *see also Rimstad v. Wells Fargo Bank, N.A.*, No. 07-2582, 2007 U.S. Dist. LEXIS 43933, at *12-13 (D. Minn. June 15, 2007); *Hruby v. Larsen*, No. 05-894, 2005 U.S. Dist. LEXIS 42285, at *14 (D. Minn. June 30, 2005). It cannot be disputed that eviction "substantially disrupt[s]" lives. *Hruby*, 2005 U.S. Dist. LEXIS 42285, at *14.

Thus, even in cases where movants facing eviction have not specifically shown how their lives will be disrupted or why replacement housing is not adequate, this Court

recognizes that the adverse effects flowing from loss of housing favor movants facing eviction. *See Saygnarath*, 2007 U.S. Dist. LEXIS 28457, at *9. Similarly, courts have found this element favors prevention of eviction even when plaintiffs have not been expeditious in bringing their claims and stopped making payments on their home. *See Rimstad*, 2007 U.S. Dist. LEXIS 43933, at *12-13 (plaintiffs waited until the "last hour" to take action and had not made payments on their home in almost two years).

Each of two Plaintiff subclasses faces specific irreparable harm. Ms. Williams and Plaintiffs in subclass (1) will be irreparably harmed through the loss of important rights and benefits if the mortgage foreclosure sales of their homes are allowed to proceed because *the sale extinguishes the mortgage. Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270, 276 (8th Cir. 1983). For example, in Minnesota, up until the sale, the homeowner has a right to reinstate his or her mortgage by paying the arrears plus certain fees and costs incurred by the mortgagee to institute foreclosure proceedings. *See* MINN. STAT. § 582.30 (2008). After the sale, however, a homeowner retains only the right of redemption for what is typically a six-month period. *See* MINN. STAT. § 580.23 (2008).

To redeem, the homeowner must pay the full amount that was still owing on the mortgage at the time of the sale (the entire principal), plus interest and fees accruing after the sale. *Id*. As a consequence, the sale eliminates the borrower's ability to "catch up" on payments or to negotiate with the owner of the mortgage for modification of the loan terms. That right is particularly important today when the Defendants have repeatedly touted their willingness and ability to modify a mortgage to avoid foreclosure under HAMP. (Bowman Aff., ¶¶ 3–5, Ex. B -E.) In addition, courts have held that the

mortgage foreclosure sale extinguishes certain legal remedies the borrower may have, such as rescission of the loan under the Truth in Lending Act, which can serve as a defense to foreclosure actions. *See Saygnarath*, 2007 U.S. Dist. LEXIS 28457, at *7-8.

For Mr. Sendolo and those Plaintiffs in Subclass (2), whose homes have already been sold at a foreclosure sale but who retained the right to redeem when this action was commenced, only an order of this Court precluding the Defendants from evicting them or from selling their homes (by conveying the Sheriff's Certificate of Sale) to another party can prevent irreparable harm. Money damages will not be enough to compensate for loss of the real property itself, much less the psychic injury of being torn from their homes and communities because of Defendants' unconstitutional practices. *See, e.g.*, *Saygnarath*, 2007 U.S. Dist. LEXIS 28457, at *9-10; *Rimstad*, 2007 U.S. Dist. LEXIS 43933, at *12-14; *Hruby*, 2005 U.S. Dist. LEXIS 42285, at *14; *Strangis*, 385 N.W.2d at 48.

Both Ms. Williams and Mr. Sendolo are under stress due to their failure to gain access to HAMP benefits. (Williams Aff. ¶ 25.); (Sendolo Aff. ¶ 20, 21.) Forcing them to move will cause the same type of substantial injury as articulated by the courts above. Accordingly, it is clear that Plaintiffs have established that irreparable harm will occur absent this Court's issuance of the requested injunctive relief.

2. The Balance of Harms Unquestionably Favors Issuance of an Injunction To Protect Plaintiffs From Substantial and Irreparable Injury.

Second, *Dataphase* requires the balancing of the harms. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). Here, as shown above, Plaintiffs will be irreparably harmed by the loss of their homes and the displacement of their families, while the creditors who own the mortgages will, at most, experience a loss of interest income from the foreclosure delay even if they ultimately prevail on the merits. Because the debts owed to them are secured by the mortgaged properties, the primary loss to the creditors will be their inability to collect interest on the debt owed to them for a temporary period. *See Gamradt v. Block,* 581 F. Supp. 122, 124 (D. Minn. 1983). In Minnesota, if the homeowners ultimately redeem, the creditors are entitled to interest (at the same rate specified in the mortgage documents) that accrued after the sale. *See* MINN. STAT. § 580.23, subdiv. 1 (2008). But given the realities of the current economy and average time that a bank-owned house sits on the market, this interest on the debt is likely not immediately being collected anyway.

In some cases, the Defendants will be benefitted by having a homeowner reside in the property during the pendency of the litigation. Should the preliminary injunction not be issued, homeowners will be evicted from their homes. A Notice of *Lis Pendens* or the down real estate market will keep buyers at bay.

Accordingly, this Court has recognized that a homeowner facing a potentially wrongful foreclosure faces a more severe harm than the creditor: "[L]osing a basic

necessity such as shelter is a greater harm to an individual couple than a company's temporary loss of income." *Saygnarath*, 2007 U.S. Dist. LEXIS 28457, at *11; *see also Gamradt*, 581 F. Supp. at 124; *Rimstad*, 2007 U.S. Dist. LEXIS 43933, at *12-14; *Medin v. Liberty State Bank*, No. C7-90-1549, 1990 Minn. App. LEXIS 994, at *3 (Minn. App. Oct. 16, 1990) (unpublished) ("Liberty State argues it will be prejudiced because a delay in the foreclosure of its mortgage will increase its costs and cause it to lose interest on the mortgage, which did not begin to accumulate until the foreclosure sale. When weighed against Medin's claim of irreparable loss of her homestead, however, Liberty State's claim of economic loss appears insubstantial.").

Therefore, the balance of the harms strongly favors Plaintiffs. Losing a home and having "lives substantially disrupted" through foreclosure and eviction significantly tilts the balance in favor of the Plaintiffs when compared to the loss of income to the mortgagee while the matter is pending. *Hruby*, 2005 U.S. Dist. LEXIS 42285, at *14.

3. Plaintiffs Are Likely to Prevail on the Merits.

Third, *Dataphase* requires this court to examine the probability that the movants will succeed on the merits. *See Dataphase*, 640 F.2d at 114. Established federal law indicates that the Plaintiffs will succeed on the merits.

a. The Actions of Defendants constitute government action for the purposes of Due Process Analysis.

The Making Home Affordable Program, including HAMP, is a $50 to $75 billion government program authorized by Congress and jointly created by the Department of Treasury, Fannie Mae and Freddie Mac. 12 U.S.C. § 5201 (2008). In order to determine

whether or not there has been government action and the program creates an entitlement, the first inquiry is to whether the actors "who make a particular decision are government actors or private actors" and whether there is a governmental rule implicated. Lawrence Tribe, *American Constitutional Law*, § 18-3 at 1699-1700 (2d ed. 1988).

In this case, the actors who made the decisions at issue are the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator for Fannie Mae and Freddie Mac. 12 U.S.C. § 5201 (2008). Both the Department of the Treasury and the Federal Housing Finance Agency are government actors. They are not private actors, and both the Department of the Treasury and the Federal Housing Finance Agency are the Defendants in this case.

There is also a governmental rule implicated and at issue in this case, and that is the administration of Sections 109 and 110 of the Emergency Economic Stabilization Act of 2008. 12 U.S.C. § 5201 (2008). The authority to take certain actions, including the creation of HAMP, is defined and derived from these statutory provisions. *Id.*

HAMP and the conduct at issue in this case is about government actors implementing a federal law with federally appropriated funds. It is not an issue of private actors making private decisions. Therefore, Plaintiffs satisfy the government action requirement for bringing a constitutional claim.

It should be noted that there are several cases in which Fannie Mae and Freddie Mac are found *not* to be government actors for constitutional purposes. *See Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1409 (9th Cir. 1996) (holding that extensive regulation does not automatically create a state actor); *Northrip v.*

Fed. Nat'l Mortgage Ass'n, 527 F.2d 23 (6th Cir. 1975) (holding that mere foreclosure does not create a state action). These cases, however, are easily distinguishable.

First, these cases were decided before the Federal Housing Finance Agency placed Fannie Mae and Freddie Mac under conservatorship, dissolved their boards, and fired their CEOs. Second, none of these cases involved the administration of a $50 to $75 billion federal program. Third, none of these cases involved a direct partnership with the Department of Treasury, including co-branded documents, correspondence, and contracts between the government actors and mortgage loan servicers in which the government actors dictate the terms of the relationship and rules that must be followed when administering the program.

b. The Current Administration of HAMP violates essential elements of procedural due process.

Plaintiffs are entitled to due process in the administration of a federal entitlement program, and HAMP is a $50 to $75 billion federal entitlement program. The Fifth Amendment to the United States Constitution provides that the federal government provide "due process of law" before any person can be "deprived of life, liberty, or property." U.S. CONST. AMEND. V.

The concept of property includes statutory entitlements, which are derived from an "independent source" as well as government-fostered expectations. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Once a property interest in a statutory entitlement is identified, a person is entitled to notice, an opportunity to be heard, and reasonably accurate process for determining eligibility. *See*

Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (requiring an evidentiary hearing prior to termination of public assistance payments); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (requiring hearing for driver's license revocation); *Specht v. Patterson*, 386 U.S. 605 (1967) (commitment proceedings subject to due process).

As stated by the Eighth Circuit in approving a preliminary injunction on behalf of a farmer facing foreclosure, notice is "indispensible." *Allison*, 723 F.2d at 634-635; *See also Coleman* ,562 F.Supp. at 1361(holding that notice is an issue of "fundamental fairness."). The procedural due process protections sought by Plaintiffs also ensure that the government and the many mortgage loan servicers that are tasked with administering HAMP make an accurate decision. *See Heller v. Doe*, 509 U.S. 312, 332; 113 S. Ct. 2637, 2649; 125 L. Ed. 2d 257, 278 (1993)("At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him.").

In this case, Defendants have no requirements or specific procedures to provide Plaintiffs notice of a denial. The lack of procedure is evidenced by the experiences of Ms. Williams and Mr. Sendolo. Ms. Williams who met all of the eligibility requirements and requested by fax, email, and verbally to be a part of HAMP, received no notice at all. (Williams Aff. ¶ 28, 25, 27.) Instead, her request was apparently ignored and she was given yet another temporary loan modification. (Williams Aff. ¶ 23.)

Mr. Sendolo received a denial letter, via email from Ocwen to his housing counselor, but the letter contained no information related how the decision was made or the specific reasons for the denial. (Sendolo Aff. ¶ 13, 14.) Mr. Sendolo has multiple

sources of income, including unemployment, an hourly wage through a part-time job, and monthly rental payments from his adult son. (Sendolo Aff. ¶ 11.) The notice does not state which of these income streams and how much income, if any, were used in calculating Mr. Sendolo's gross monthly income. (Sendolo Aff. ¶ 14.)

The notice also does not contain any information related to the current value of Mr. Sendolo's property. (Sendolo Aff. ¶ 14.) Mr. Sendolo believes that the property is worth approximately $14,000 less than the total principal balance of his first and second mortgages. (Sendolo Aff. ¶ 22.) Mr. Sendolo does not know if Ocwen used the principal balance, the tax assessed value, or another appraisal in determining his home's present value or what that value was. (Sendolo Aff. ¶ 14.)

The notice also does not identify the amount of fees or other charges that would be required to be capitalized, nor the specific application of any of the other stages of the loss mitigation waterfall. (Sendolo Aff. ¶ 14.)

All of these facts are critically important, because they are elements used in determining whether Mr. Sendolo's HAMP modification has a "positive" Net Present Value determination. A positive Net Present Value determination means that a loan modification is better for investors than allowing the mortgage to go into foreclosure. It is presumed, although Mr. Sendolo has not been told, that the basis for the denial was a "negative" Net Present Value determination. In order for Mr. Sendolo to evaluate whether that determination was in error, he first needs to have notice that that was the basis for the denial. Then, Mr. Sendolo needs to know the information above as well as how the specific Net Present Value formula was calculated.

The failure by Defendants to require and articulate an appeals process is a further violation of Plaintiffs' procedural due process rights. Notice without a right to appeal to a neutral party renders the notice meaningless. *Johnson*, 734 F.2d at 775; *Fuentes v. Shevin*, 407 U.S. 67, 80 (U.S. 1972). For Ms. Williams and Mr. Sendolo, even if they had received the perfect notice, the failure by the government to require and articulate a uniform and unbiased appeals process undermines the purpose of any notice. To have procedural due process, there must be both notice and a right to appeal. In this case, the government requires neither.

4. Granting the Requested Injunctive Relief Serves the Public Interest.

Finally, *Dataphase* requires this Court to determine whether the relief requested is in the public interest. *See Dataphase*, 640 F.2d at 114. Here, the public has a strong interest in: (1) preventing unnecessary foreclosures and evictions, and (2) maintaining homeownership for its citizens.

First, there is no better testament to the public interest than the legislation itself. When enacting the Emergency Economic Stabilization Act of 2008, Congress set forth the important public interest that necessitated the legislation and the need to "preserve homeownership." 12 U.S.C. § 5201 (2008). This public purpose is further underscored by the sheer size of the Making Home Affordable Program and HAMP. The $50 to $75

billion program is approximately six times larger than the National School Lunch Program.[5]

The Center for Responsible Lending ("CRL"), which closely tracks the costs of foreclosures, has also estimated that foreclosures in the coming years will cost billions of dollars in lost property tax value and home equity. (Ireland Aff. ¶ 4, Ex. C.) The foreclosure "spillover" effect will cause 69.5 million neighboring homes to experience a devaluation of approximately $501.9 billion. *Id.*

The adverse impact of foreclosures, as well as the benefits of homeownership, demonstrate the public's strong interest in preventing foreclosures and mitigates in favor of granting Plaintiffs' requested injunctive relief. Accordingly, the federal courts have repeatedly found that the public interest weighs "in favor of protecting people who are threatened with eviction as a result of potentially unlawful transactions." *Hruby*, 2005 U.S. Dist. LEXIS 42285, at *16; *see also Hershey v. Deutsche Bank Nat'l Trust Co.*, No. 05-1081, 2005 WL 1384573, at *2 (D. Minn. June 9, 2005) (finding public interest was served by enjoining foreclosure).

C. No Bond Should be Required.

Well-settled law supports that granting Plaintiffs' injunction without requiring a bond is consistent with Federal Rule of Civil Procedure 65(c). *See* Fed. R. Civ. P. 65(c) (2008) (stating that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant. . .") Several courts have refused to require a

[5] The National School Lunch Program has an annual budget of approximately $8.7 billion. *See* United States Department of Agriculture, National School Lunch Program Fact Sheet http://www.fns.usda.gov/cnd/Lunch/AboutLunch/NSLPFactSheet.pdf. The Making Home Affordable Program has a budget of between $50 billion and $75 billion.

bond from mortgagors seeking to enjoin foreclosure because the mortgage on the property already provides adequate security for the mortgagee. *See, e.g.*, *Phleger, Phleger v. Countrywide Home Loans, Inc.*, No. 07-1686, 2007 U.S. Dist. LEXIS 86413, at *16-19 (N.D. Cal. Nov. 16, 2007); *Thomas v. F.F. Fin. Inc*., No. 88-7178, 1989 WL 37658, at *1 (S.D.N.Y. Apr. 12, 1989); *Medin v. Liberty State Bank*, No. C7-90-1549, 1990 Minn. App. LEXIS 994, at *4-5 (Minn. App. Oct. 16, 1990) .

Furthermore, courts have wide discretion to waive the bond requirement in certain circumstances. *See Doyne v. Saettele*, 112 F.2d 155, 161 (8th Cir. 1940); *Wayne Chem., Inc., v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (waiving bond because of plaintiff's indigence); *Little Earth of United Tribes Inc., v. U.S. Dep't of Housing & Urban Dev*., 584 F. Supp. 1301, 1303-04 (D. Minn. 1983) (waiving bond requirement). Waiver of a bond is especially appropriate when applicants are indigent or would deny judicial review. *See Bass v. Richardson*, 338 F. Supp. 478, 489-91 (S.D.N.Y. 1991) (holding that "indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)").

Because the properties in foreclosure provide adequate security to protect the mortgagee, a bond is not required here. Moreover, the named Plaintiffs here are individuals who, due to their limited income, qualify for services from non-profit housing agencies, such as the Housing Preservation Project and are unable to post a bond. Thus, requiring the named Plaintiffs to post a bond would effectively deny them access to judicial review. For all of the above reasons, Plaintiffs request that the Court waive a bond requirement in this case.

D. Class-Wide Injunctions To Prevent Foreclosure Or The Loss Of A Home Are Appropriate And Have Been Granted By This Court In The Past.

A class-wide preliminary injunction is appropriate in this case, because the Defendants are systematically failing to adhere to legal requirements.

> Preliminary injunctive relief on behalf of a class is freely awarded on a classwide basis. The court may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons.

3 Newberg on Class Actions § 9.45 at 413 (footnotes omitted); *See, e.g*., *Thomas v. Johnston*, 557 F. Supp. 879, 916 n.29 (W.D. Tex. 1983); *Howe v. Varity Corp.*, No. 88-1598-E, 1989 U.S. Dist. LEXIS 17521, at *39-40, 66-69, n.34 (S.D. Iowa July 14, 1989), *and Hess v. Hughes*, 500 F. Supp. 1054 (D. Md. 1980).

In that respect, the Supreme Court of South Carolina recently enjoined Fannie Mae from conducting foreclosure sales as a state-wide level. (Bowman Aff. ¶ 2 Ex. A.) Specifically, on May 4, 2009 the Supreme Court of South Carolina granted a temporary restraining order "preventing the foreclosure sale of any property arising out of a loan owned or guaranteed by petitioner or Freddie Mac or held by a servicer who has signed an agreement to participate in the HAMP. If a sale has already taken place . . . this TRO shall stay . . . any further action to complete the sale." (Bowman Aff. ¶ 2 Ex. A at 1.)

The Supreme Court of South Carolina further ordered that Fannie Mae and Freddie Mac to evaluate each mortgage loan for HAMP eligibility:

> shall serve on all other parties to the action . . . an affidavit setting forth its belief whether the loan is subject to modification under the MHP [Making

> Home Affordable Program]. If the affidavit indicated that the loan is subject to modification under the MHP, the foreclosure shall be stayed pending a determination if the loan will be modified. If the loan is modified, the foreclosure action shall be dismissed. If the loan is not modified, the foreclosure may proceed.

(Bowman Aff. ¶ 2 Ex. A at 1-2.) Therefore, a class-wide injunction is appropriate and has already been done by Defendants in South Carolina.

CONCLUSION

For the foregoing reasons, Plaintiffs' requested class-wide relief should be granted.

Dated: July 28, 2009

_/s/ Mark Ireland_____
Mark Ireland (303690)
Jane Bowman (388598)
Timothy Thompson (0109447)
Attorneys for Plaintiff

Foreclosure Relief Law Project, a program of the Housing Preservation Project
570 Asbury Street, 105
St. Paul, MN 55104
651.642.0102
651.642.0051 fax