

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

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Nichole Williams, et al.

Plaintiffs.

Civil: 09-CV-1959 ADM/JJG

Hon. Ann D. Montgomery

Magistrate Judge Jeanne J. Graham

vs.

Timothy F. Geithner, et al.

Defendants.

**REPLY MEMORANDUM IN  
SUPPORT OF PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION**

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The government does not require *any* notice. With five separate memoranda and attachments totaling over 700 pages, Defendants cannot escape that simple fact. Indeed, the Treasury Department (“Treasury”) had to amend its response memorandum, because it erroneously stated that a recent agency guidance did require notice. It is this failure to provide notice that violates procedural due process, and Defendants have not cited a single case where a court has sanctioned a government program that fails to provide any notice whatsoever when an applicant is denied.

As directed by the Emergency Economic Stabilization Act (“EESA”) and with \$50 billion of taxpayer funds, Defendants Treasury and the Federal Housing Finance Agency (both government actors) created the Home Affordable Modification Program (“HAMP”).<sup>1</sup> In doing so, they provided significant benefits for homeowners facing foreclosure. They failed, however, to require notice and an opportunity to be heard. That is all Plaintiffs are ultimately asking for— notice and an opportunity to be heard.

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<sup>1</sup> Excerpts of HAMP legislative and policy background are set forth in the Second Bowman Affidavit.

In the meantime, this Court should maintain the status quo. The government should not be allowed to permit foreclosures in violation of procedural due process. It is critical that homeowners have notice and the ability to correct errors, including errors in the Net Present Value calculation. A minor error in income or home value can be the difference between foreclosure and a sustainable loan modification. *See* Second Ireland Affidavit ¶ 4-9.

**I. HAMP IS GOVERNMENT ACTION SUBJECT TO CONSTITUTIONAL REVIEW.**

Plaintiffs challenge the *process* that the government designed for homeowners to receive HAMP benefits, not any specific determinations made by mortgage servicers. Even if the ultimate decision about a government benefit is made by a private party and Congress provided for limited judicial review, the process prescribed by the government agency related to making that decision is subject to constitutional challenge. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 678 (1986) (rejecting the government's argument that public program policies for private insurers are shielded from procedural due process challenge); *Schweiker v. McClure*, 456 U.S. 188, 192 (1982).

In this case, Plaintiffs have standing to challenge the process. This is not a substantive due process issue related to the final benefits determination. Like *Bowen* and *Schweiker*, HAMP is a partnership between the government, private parties, and consumers. In *Bowen* and *Schweiker*, the government subsidizes a portion of certain costs for Medicare Part B, but private insurance companies make all the claims decisions

and administer the program. In both cases, the Supreme Court held that procedural due process applied to how the private insurance companies determined whether a person's medical costs would be paid with government subsidies.

In this way, Defendants' reliance on *American Manufacturers v. Sullivan* is misplaced. 526 U.S. 40 (1999). *American Manufacturers* involved a state worker's compensation program that was just regulated, but involved no public funds. *Id.* at 56 n.11 ("The security fund is financed entirely through assessments on insurers and receives no financial assistance from the State.")

Although Fannie Mae, Freddie Mac, and the participating servicers could be directly liable for constitutional violations as agents of the government or because they are "inextricably entangled" with the government, this Court does not have to reach the issue of whether they are government actors. These Defendants are necessary parties to ensure that wrongful foreclosures are not permitted through HAMP. *See National Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1344 (9th Cir. 1995) ("A person may be joined as a party for the sole purpose of making it possible to accord complete relief..."). There is little question that Treasury and the Federal Housing Finance Agency are government actors and the other Defendants are necessary parties.

## **II. FAILURE TO PROVIDE FAIR PROCEDURES VIOLATES PROCEDURAL DUE PROCESS.**

There is a two-step analysis for determining whether there is a violation of a person's procedural due process rights. The court must initially determine whether the individual has an actual protected property interest, which includes government benefits. Then, if so, the court determines the amount of process that is due. Defendants here argue that neither element is satisfied, but Defendants' reasoning fails.

### **A. HAMP Creates A Protected Property Interest.**

HAMP provides two primary benefits. The first is a temporary suspension of foreclosure while a homeowner's HAMP application is pending. This benefit is automatic. Under HAMP's program guidelines, foreclosure cannot occur while an application is pending, regardless of whether or not the applicant ultimately receives a modification.

The second benefit is the right to receive a loan modification. There are, like every government program, qualification requirements for homeowners seeking a HAMP modification. *See, e.g. Oldham v. Ehrlich*, 617 F.2d 163, 165 (8<sup>th</sup> Cir. 1980) (asset maximum for welfare, dispute regarding car value). If the homeowner satisfies HAMP's objective criteria, however, a mortgage loan servicer "shall" provide a loan modification. As stated by Michael Barr, Assistant Treasury Secretary, "mortgage servicers are prevented from 'cherry-picking' which loans to modify."

**B. Servicers Have No Discretion To Deny HAMP Loan Modifications To Qualified Homeowners**

Defendants' suggestion that providing a modification is completely within the discretion of a mortgage servicer contravenes every written document and public statement Treasury has issued. In *Hill v. Group Three Dev. Corp.*, the Eighth Circuit held a Section 8 program participant did not have a property interest in living in a particular apartment complex because it was within a private landlord's discretion whether to rent to the applicant. 799 F.2d 385, 391 (8<sup>th</sup> Cir. 1986).

Defendants point to the "Net Present Value" calculator in a strained attempt to make servicers appear like the landlord in *Hill*. This comparison is flawed. There is a significant difference between a *subjective* checklist of factors, which may or may not even be written down, that the *Hill* landlord used to select a tenant and the *objective* mathematical formula that servicers must use to determine whether a particular loan modification has a "positive" or "negative" net present value. *See e.g.* FDIC NPV Calculator, Ireland Aff. Exs. 1-3.

Unlike the landlord's "exclusive responsibility for tenant selection" in *Hill*, mortgage servicers are not free to create whatever Net Present Value calculator they desire. The servicers may only change certain elements of the calculator within a specific range allowed by Treasury. The landlord in *Hill* also had the discretion to choose any or none of the Section 8 applicants. *Id.* at 391. Such discretion does not exist in HAMP.

**C. HAMP Benefits Are Non-Discretionary And Are Currently Being Received.**

Defendants take the radical position that, as a matter of law, no applicant for any benefit program has a right to procedural due process. The Eighth Circuit has recognized otherwise, “[a]pplicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause.” *Daniels v Woodbury Cnty., Iowa*, 742 F.2d 1128 (8<sup>th</sup> Cir. 1984). One very recent appellate decision rejecting Defendants’ position is *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (C.A. Fed. 2009). *Cushman* aptly summarizes the current state of the law and held that an applicant for disability benefits had procedural due process rights.

Again, even if homeowners who applied for HAMP were considered mere “applicants” for a government program, they would be entitled to procedural due process because the benefit is non-discretionary. Defendants’ argument also fails because homeowners who apply for HAMP are currently receiving a benefit: suspension of foreclosure pending review. Therefore, the discredited applicant/recipient analysis that Defendants urge this Court to adopt is not even applicable.

**D. The Scope of the Injunction Protects The Status Quo.**

Naturally, the Court can adopt whatever preliminary injunctive relief it sees fit. Plaintiffs seek to avoid the irreparable harm of foreclosure and keep people in their homes. A suspension of foreclosures is something that Defendants have routinely done over the past four years. *See* Hawkins Affidavit at ¶ 9-21. On the other hand, any preliminary injunctive relief would be lifted if the government stopped permitting

foreclosures without notice and an opportunity to be heard. Providing notice is routinely done. *Id.* It is the government's constitutional obligation to provide notice. *See Coleman v. Block*, 580 F. Supp. 194 (D.N.D. 1984). It is impermissible to shift the burden to obtain information onto the benefit recipient. *Id.* That is why the government's 1-800 number is totally inadequate as a matter of law.

Dated: September 25, 2009

/s/ Mark Ireland

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