

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DOREEN EDWARDS, et al.,

Plaintiffs,

vs.

AURORA LOAN SERVICES, LLC, et al.,

Defendants.

Case No.: 1:09-cv-02100-HHK

**DEFENDANT EDWARD DEMARCO'S
MOTION TO DISMISS THE
PLAINTIFFS' CLASS ACTION
COMPLAINT**

Pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Edward DeMarco hereby moves to dismiss with prejudice the Plaintiffs' Class Action Complaint (Docket No. 1). This motion is supported by an accompanying memorandum of law.

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT EDWARD DEMARCO'S
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INTRODUCTION

Plaintiffs are borrowers who assert claims for breach of contract, violation of due process and breach of the covenant of good faith and fair dealing against the private servicer of their loans, Aurora Loan Services, LLC (“Aurora”). Plaintiffs allege that Aurora failed to provide Plaintiffs with notice and a chance to appeal the denial of a loan modification under the U.S. Department of the Treasury’s Home Affordable Modification Program (“HAMP”). Plaintiffs also bring claims against two officials of the U.S. Department of the Treasury (“Treasury”), Edward DeMarco, the Acting Director of the Federal Housing Finance Agency (“FHFA”), the Federal National Mortgage Association (“Fannie Mae”) and two Fannie Mae officials. Plaintiffs claim that Treasury, FHFA, and the Fannie Mae defendants allegedly deprived Plaintiffs of what they claim to be constitutionally protected property interests in a home loan modification that was denied by their private servicer, Aurora, purportedly without due process of law.

Plaintiffs’ due process claims against FHFA fail as a matter of law. Plaintiffs fail to allege any causal connection between the denial of their loan modification and any conduct by Mr. DeMarco, the Acting Director of FHFA, or FHFA itself. Plaintiffs present only summary allegations that FHFA had a role in developing the policies for the HAMP program. Even then, Plaintiffs fail to acknowledge that FHFA’s role in HAMP is limited to the program as it relates to loans owned, securitized, or guaranteed by Fannie Mae or the Federal Home Loan Mortgage Company (“Freddie Mac”) (hereinafter collectively referred to as the “Enterprises” or the “GSE’s”). Because Plaintiffs’ loans are not owned by either of the Enterprises – and because Plaintiffs fail to allege a causal connection between the denial of a loan modification by the private servicer of their loans and any conduct by FHFA – Plaintiffs lack standing to assert claims against FHFA.

Furthermore, Plaintiffs satisfy neither of the two basic prongs of a due process claim: they fail to show either (1) a constitutionally protected property interest or (2) that their alleged injuries were caused by a state actor. Specifically, Plaintiffs fail to demonstrate that loan modifications under HAMP are constitutionally protected property rights. In fact, as the only federal court that has addressed this issue to date has concluded, HAMP provides Plaintiffs with only an opportunity to apply for modifications that are subject to complex and individualized determinations made by private servicers. Moreover, Plaintiffs point to no alleged state action to deprive them of their alleged rights. Finally, even if loan modifications made by private servicers were constitutionally protected property rights, and even if Plaintiffs could point to some state action depriving them of such supposed rights, HAMP already provides procedures that satisfy due process. For these reasons, Plaintiffs' Class Action Complaint should be dismissed as to FHFA.

BACKGROUND

A. The Role Of FHFA As Conservator Of Fannie Mae And Freddie Mac

On July 30, 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654, thereby creating FHFA as an independent federal agency. Pursuant to HERA, FHFA succeeded to the authorities previously granted to both the Office of Federal Housing Enterprise Oversight ("OFHEO") and the Federal Housing Finance Board ("FHFB"), and the Agency now serves as the sole regulatory and oversight authority for Fannie Mae, the Federal National Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal Home Loan Bank System. *Id.* Among its "principal duties," FHFA is charged with examining the financial safety and soundness and overall risk management practices of Fannie Mae and Freddie Mac in order "to ensure that [] each [Enterprise] operates in a safe and sound manner, including maintenance of adequate capital and internal controls."

12 U.S.C. § 4513(a)(1)(B)(i). Furthermore, Congress granted the Director of FHFA the authority to place the Enterprises into conservatorship or receivership “for the purpose of reorganizing, rehabilitating, or winding up the affairs of [the Enterprises].” *Id.* § 4617(a)(2). On September 7, 2008, pursuant to the authority granted under HERA, and after determining that the Enterprises could not “continue to operate safely and soundly and fulfill their critical public mission,”¹ the Director placed Fannie Mae and Freddie Mac under the conservatorship of FHFA.²

In its capacity as Conservator, FHFA is vested with broad statutory powers to act on behalf of and through the Enterprises. Pursuant to 12 U.S.C. § 4617(b)(2)(A)(i), upon its appointment as Conservator, FHFA “immediately succeed[ed]” to “all rights, titles, powers, and privileges of [the Enterprises], and of any stockholder, officer, or director of [the Enterprises]” In addition, pursuant to 12 U.S.C. § 4617(b)(2)(B)(i), FHFA is empowered as Conservator to:

take over the assets of and operate [the Enterprises] with all the powers of the shareholders, the directors, and the officers of [the Enterprises] and conduct all business of [the Enterprises].

FHFA is entitled to exercise these powers to “preserve and conserve the assets and property of [the Enterprises].” *Id.* § 4617(b)(2)(B)(iv). Furthermore, FHFA is statutorily empowered to:

¹ Statement of FHFA Dir. James B. Lockhart, 5 (Sept. 7, 2008), *available at* <http://www.fhfa.gov/webfiles/23/FHFASStatement9708final.pdf>.

² *Id.* at 5-6. The Director’s actions were widely supported by other senior U.S. officials, including the Treasury Secretary and the Chairman of the Federal Reserve Board, both of whom stated publicly that placing Fannie Mae and Freddie Mac into FHFA Conservatorships was an action necessary to promote stability in the U.S. housing and financial markets. *See* Statement by Sec’y Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2008), *available at* <http://www.treas.gov/press/releases/hp1129.htm>; Statement by Fed. Reserve Bd. Chairman Ben S. Bernanke (Sept. 7, 2008), *available at* <http://www.federalreserve.gov/newsevents/press/other/20080907a.htm>.

- “collect all obligations and money due the [Enterprises],” *id.* § 4617(b)(2)(B)(ii);
- “perform all functions of the [Enterprises],” *id.* § 4617(b)(2)(B)(iii);
- “take any such action as may be [] necessary to put the regulated entity in a sound and solvent condition; and [] appropriate to carry on the business of the [Enterprises] and preserve and conserve the assets and property of the [Enterprises],” *id.* § 4617(b)(2)(D)(i)-(ii);
- “transfer or sell any asset or liability of the [Enterprises] in default, and []do so without any approval, assignment, or consent with respect to such transfer or sale,” *id.* § 4617(b)(2)(G);
- “exercise all powers and authorities specifically granted to conservators . . . and such incidental powers as shall be necessary to carry out such powers,” *id.* § 4617(b)(2)(J)(i); and
- “take any action authorized by this section, which the Agency determines is in the best interests of the [Enterprises] or the Agency,” *id.* § 4617(b)(2)(J)(ii).

To provide the Conservator with the broadest possible latitude to exercise its statutory duties and to preserve and conserve the assets of the Enterprises without interference, Congress expressly prohibited judicial review of the Conservator’s statutorily authorized powers: “[N]o court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator.” *Id.* § 4617(f).

B. HAMP

The Emergency Economic Stabilization Act of 2008 (“EESA”), Pub. L. No. 110-343, 122 Stat. 3765, provides for FHFA, in its role as Conservator for the Enterprises, to seek to assist homeowners to avoid foreclosure. The relevant section reads, in pertinent part:

To the extent that [FHFA, as Conservator for the Enterprises,] holds, owns, or controls mortgages, mortgage backed securities, and other assets secured by residential real estate, including multifamily housing, [FHFA] shall implement a plan *that seeks to* maximize assistance for homeowners

and use its authority to encourage the servicers of the underlying mortgages, and considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program under section 257 of the National Housing Act or other available programs to minimize foreclosures.

12 U.S.C. § 5220(b)(1) (emphasis added). EESA states that “[i]n developing the plan required by this subsection, the Federal property managers [including FHFA] shall consult with one another and, *to the extent possible*, utilize consistent approaches to implement the requirements of this subsection.” 12 U.S.C. § 5220(b)(6) (emphasis added).

With respect to loans not owned by the Enterprises, but in which one of the Enterprises holds an interest in obligations secured by the loans, EESA’s directive requires FHFA to “encourage” modifications by the servicers, but EESA does not *require* such modifications.

EESA states:

In any case in which a Federal property manager is not the owner of a residential mortgage loan, but holds an interest in obligations or pools of obligations secured by residential mortgage loans, the Federal property manager shall – (1) encourage implementation by the loan servicers of loan modifications developed under subsection (b); and (2) assist in facilitating any such modifications, to the extent possible.

12 U.S.C. § 5220(c).

Further, in the subsection entitled “Limitation,” Congress explicitly limited the effect of EESA on any of FHFA’s existing duties and responsibilities, stating: “[t]he requirements of this section shall not supersede any other duty or requirement imposed on [FHFA] under otherwise applicable law.” 12 U.S.C. § 5220(d). Accordingly, EESA does not supersede any of the duties imposed on FHFA by HERA, including the duty “to preserve and conserve the assets and property of [the Enterprises]” and the other duties enumerated above. Nor does EESA vitiate HERA’s bar on judicial interference with the Conservator’s activities.

On February 18, 2009, President Obama announced the creation of the Homeowner Affordability and Stability Plan, which is designed to help between 7 million and 9 million homeowners avoid foreclosure. *See* Treasury Department, Supplemental Directive 09-01 (Apr. 6, 2009) (Ex. A) (“Supplemental Directive 09-01”). As part of that plan, and pursuant to EESA, Treasury, in conjunction with FHFA and other federal agencies, developed HAMP. HAMP guidelines for loans owned by Fannie Mae (“GSE loans”) were incorporated into Fannie Mae’s agreements with the servicers of their loans. For loans not owned by the Enterprises, servicers of non-GSE loans entered into contracts with Fannie Mae as Treasury’s financial agent in order to be eligible for incentive payments under the program. *See, e.g.*, Complaint ¶ 3. Treasury is responsible for HAMP guidelines for non-GSE loans.³

The loans at issue in the instant case are non-GSE loans and, as such, are not owned, securitized, or guaranteed by either Enterprises or its Conservator, FHFA. Fannie Mae played no role in Aurora’s decision to decline to modify Plaintiff’s mortgages under the HAMP program. The only relationship servicers of non-GSE loans, such as Aurora, had with FHFA or the Enterprises was the contract they entered into with Fannie Mae, as Treasury’s financial agent, to receive incentive payments under the non-GSE component of the HAMP program. *See, e.g.*, Complaint ¶¶ 3-4.

Under the HAMP program, according to the Treasury Guidelines that apply to non-GSE loans, even if borrowers meet the initial eligibility requirements, a modification is not required where: (1) it would be prohibited by an investor servicing agreement or would require other third party consent, *see* Ex. A at 1; (2) The projected net present value (“NPV”) of the borrower’s

³ *See* Conflicts of Interest Mitigation Exhibit to Financial Agency Agreement Between the U.S. Dep’t of Treasury and Fannie Mae), at F-2, (“Treasury is solely responsible for developing the Program Guidelines and both GSEs must follow the Program Guidelines” when carrying out their responsibilities in the non-GSE program) (Ex. B).

modified loan payments, which servicers with sufficiently large books of business may calculate using their own loan experience, would be less than the projected NPV if the loan were not modified (an “NPV-negative” result), *see* Ex. A at 4-5; or (3) applying the modification “waterfall” will not achieve the targeted payment of 31% of the borrower’s gross monthly income. *See* Ex. A at 8-10.

If a borrower (1) meets the initial eligibility requirements and (2) is offered a Trial Period Plan and (3) is determined ineligible for a modification based on verified income levels, servicers are required to provide notice to the borrower. *See* Ex. A at 18 (if, based on verified income, the borrower is not eligible for a modification, “the servicer must notify the borrower of that determination”). Servicers are also required to investigate complaints made by borrowers and to ensure that “complaints are provided fair consideration, and timely and appropriate responses and resolution.” *Id.* at 13. Applicants may seek free housing counseling from certified housing counselors or elevate their concerns to the HAMP Support Center (for non-GSE loans) or to Fannie Mae or Freddie Mac directly (for GSE loans). *See* Home Affordable Modification Program (HAMP) Resources, *available at* <https://www.efanniemae.com/sf/mha/mhamod/pdf/hampressum.pdf>. Furthermore, Treasury requires that servicers provide borrowers with a written notice setting forth the grounds for the denial of a HAMP modification. *See* Complaint ¶ 50; Treasury Supplemental Directive 09-08, *available at* https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0908.pdf.

HAMP is projected to prevent foreclosure of three million to four million homes by reducing monthly mortgage payments. According to the HAMP website, through December 2009, more than 1,164,507 trial modifications have been offered under HAMP, and more than 787,231 trial modifications are underway. *See* Making Home Affordable Program, Servicer

Performance Report Through December 2009, *available at*
<http://financialstability.gov/docs/report.pdf>.

ARGUMENT

As a threshold matter, Plaintiffs fail to satisfy the causal connection or redressability requirements to establish standing. Plaintiffs do not allege any conduct by FHFA that has any causal connection to Plaintiffs' claims, and without a causal connection between the claimed harm and a defendant's alleged actions, there can be no standing. Plaintiffs' summary pleading that FHFA had a role in developing the HAMP program ignores the differences between the program as it relates to non-GSE owned loans – where FHFA has no role – and GSE owned loans, where FHFA played a part in designing the program. Plaintiffs' claims relate only to non-GSE owned loans, and therefore have no connection to FHFA. Similarly, Plaintiffs' alleged claims cannot be redressed by an order directed at FHFA. Thus, Plaintiffs' claims against FHFA must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Boston & Maine Corp. v. Surface Transp. Bd.*, 364 F.3d 318, 319 (D.C. Cir. 2004) (complaint dismissed where plaintiff “lacks standing” because “the court therefore lacks subject-matter jurisdiction over this action”).

Further, Plaintiffs' allegations in their entirety do not “plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). The Complaint does not “nudge [Plaintiffs' due process] claims across the line from conceivable to plausible” by “plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1951, 1949 (quoting in part *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs fail to assert a viable constitutional due process claim because they cannot show either that (1) they have been deprived of a property right or (2) their supposed injuries were caused by a state actor. As one court has already held,

“the HAMP does not provide Plaintiffs with a ‘protected property interest,’ the denial of which must comport with due process protections.” *Williams v. Geithner*, Civ. Action No. 09-1959 ADM/JJG, 2009 WL 3757380 (D. Minn. Nov. 9, 2009). Moreover, HAMP already provides sufficient process to satisfy any alleged due process rights, and in all events the private servicers making the HAMP modification decisions are not state actors for purposes of the due process clause. Therefore, as a matter of law, the Complaint must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. Plaintiffs Lack Standing To Bring Their Claims Against FHFA

Plaintiffs fail to meet their burden to establish that they have standing to bring their claims against FHFA. *See Interstate Natural Gas Ass’n v. Fed. Energy Regulatory Comm’n*, 285 F.3d 18, 45 (D.C. Cir. 2002) (“All parties trying to invoke the jurisdiction of federal courts must satisfy Article III’s requirements of constitutional standing.”). Plaintiffs lack Article III standing because they fail to show “a causal connection between the injury and the conduct complained of” such that the injury is “fairly traceable to the challenged action of the defendant.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (for the court to have Article III standing, “there must be a causal connection between the injury and the conduct complained of-the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant’”); *Crete Carrier Corp. v. Env’tl. Prot. Agency*, 363 F.3d 490, 491 (D.C. Cir. 2004) (“dismissing [plaintiff trucking companies’] petition for lack of standing under Article III of the Constitution of the United States” where petition “failed to show their injury is fairly traceable” to alleged EPA conduct).

In *Gordon v. Biden*, this Court held that a plaintiff’s claims against the Vice President of the United States for unconstitutional vote dilution as a result of the certification of presidential electors from states that use a “winner-take-all” methodology lacked standing. 606 F.Supp.2d 11 (D.D.C. 2009) (Kennedy, J.). The Court stated that “[i]n determining whether a plaintiff has

shown the ‘causation’ or ‘traceability’ element of the showing required to demonstrate standing, the court ‘examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff.’” *Id.* at 14 (quoting *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998)). The Court held that the plaintiff’s “alleged injury is not ‘fairly traceable’ to the Vice President’s actions, which in fact are purely ministerial, but rather is attributable to the actions of third-party states and state officials.” *Id.*

Here, as in *Gordon*, Plaintiffs fail to establish that their alleged injury is “fairly traceable” to any action, conduct, or policy of FHFA; they make no allegation that FHFA or Fannie Mae owned, securitized, or guaranteed any of Plaintiffs’ loans, or that FHFA had any role in considering Plaintiffs’ applications for a modification. Plaintiffs fail to allege that FHFA had any role in promulgating the guidelines for HAMP as applied to non-GSE loans, such as those at issue here. Rather, “Treasury is solely responsible for developing the Program Guidelines and both GSEs must follow the Program Guidelines” when carrying out their responsibilities in the non-GSE program.⁴ Accordingly, Plaintiffs cannot “fairly trace[]” their alleged injury to any conduct by FHFA such that their alleged injury flows directly from FHFA’s conduct. *See Easter v. American W. Fin.*, 381 F.3d 948, 961-62 (9th Cir. 2004) (“As to those [defendants] which have never held a named plaintiff’s loan, Borrowers cannot allege a traceable injury and lack standing.”).

Furthermore, Plaintiffs’ claims fail to satisfy the redressability requirement for Article III standing. “Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff.” *Microwave*

⁴ *See* Conflicts of Interest Mitigation Exhibit to Financial Agency Agreement Between the U.S. Dep’t of Treasury and Fannie Mae, at F-2, (Ex. B).

Acquisition Corp., 145 F.3d at 1413 (quoting *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (en banc)). In *Microwave Acquisition Corp.*, the D.C. Circuit held that plaintiffs lacked standing to bring claims seeking to vacate an FCC transfer order because the alleged injury – the sale to a third party of an entity that plaintiff had previously contracted with the selling party to buy – occurred as a result of plaintiff’s breach of contract, not as a result of the FCC’s transfer order approving the sale to the third party. *Id.* at 1413 (citing *America West Airlines, Inc. v. Burnley*, 838 F.2d 1343, 1344 (D.C. Cir. 1988) (holding that plaintiff lacked standing because plaintiffs’ alleged injury was “neither caused by the Final Order [of the Department of Transportation] nor redressed by a reversal of that Order.”)). Similarly, here, because Treasury is solely responsible for promulgating Guidelines for the non-GSE component of the HAMP program, the injury alleged by Plaintiffs is not redressable by an order directed at FHFA.

II. Plaintiffs Fail To State A Claim Against FHFA Upon Which Relief May Be Granted

Plaintiffs fail to meet the basic pleading requirements to state a claim against FHFA. Although Plaintiffs allege generally that FHFA had a role in developing policies, procedures, and requirements for the HAMP program, Complaint at ¶ 124, Plaintiffs fail to allege how FHFA’s conduct affected the HAMP program for non-GSE loans, or how any FHFA conduct caused harm to the Plaintiffs. Plaintiffs fail to provide “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555-56. The allegations against FHFA amount to mere recitations of broad statutory provisions that give FHFA a role in certain aspects of the HAMP program unrelated to Plaintiffs’ claims, coupled with allegations that Treasury Guidelines governing private servicers’ participation in HAMP are constitutionally deficient. Accordingly, Plaintiffs’ allegations entirely fail to “to raise a right to

relief above the speculative level” as to FHFA, *id.* at 555, and for this reason alone, Plaintiffs’ Complaint should be dismissed as to FHFA.

A. Plaintiffs Do Not Possess A Constitutionally Protected Property Interest In Loan Modifications

Plaintiffs fail to “demonstrate that they have been deprived of a protected liberty or property interest” that “require[s] some procedural due process protections.” *Tarpeh-Doe v. U.S.*, 904 F.2d 719, 722 (D.C. Cir. 1990). A loan modification under HAMP does not constitute a constitutionally protected property interest because Plaintiffs are not entitled to modifications. *See Williams*, 2009 WL 3757380, at *7 (“Plaintiffs do not have a legitimate claim of entitlement to a loan modification. Thus, the HAMP does not provide Plaintiffs with a ‘protected property interest,’ the denial of which must comport with due process protections.”). A property interest requires “‘more than an abstract need or desire’ and ‘more than a unilateral expectation of [a benefit]. [A person] must, instead, have a legitimate claim of entitlement to it.’” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Further, “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Id.* at 756 (citing *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 462-63 (1989)).

1. EESA Does Not Provide An Entitlement

As the court held in *Williams*:

“[EESA] does not create an absolute duty on the part of the Secretary [of the Treasury] to consent to loan modifications; it is not “language of an unmistakably mandatory character.” *Hill v. Group Three Housing Development Corp.*, 799 F.2d 385, 392 ([8th Cir.] 1986) (describing rules or understandings that may create a protected property interest) quoting *Hewitt v. Helms*, 459 U.S. 460 (1983). Notably, the statute provides that loans may be modified “where appropriate” - a phrase that limits the Secretary's obligation and evinces a Congressional intent to afford discretion in the decision whether to modify loans in certain circumstances.

Next, Congress dictated that requests for loan modifications necessarily consider the NPV to the taxpayer. Thus loan modifications are not an entitlement, but are linked to decisions that result in profits to taxpayers. Congress did not intend to mandate loan modifications.

Williams, 2009 WL 3757380, at *5.

The plain language of Section 110 of the EESA clearly does *not* establish an entitlement to a federal benefit. That section states:

To the extent that [FHFA, as Conservator for the Enterprises], holds, owns, or controls mortgages, mortgage backed securities, and other assets secured by residential real estate, including multifamily housing, [FHFA] shall implement a plan that seeks to maximize assistance for homeowners and use its authority *to encourage* the servicers of the underlying mortgages, and *considering net present value to the taxpayer*, to take advantage of the HOPE for Homeowners Program under section 257 of the National Housing Act or other available programs to minimize foreclosures.

12 U.S.C. § 5220(b)(1) (emphasis added); *see also* 12 U.S.C. § 5220(c) (encouraging modifications by servicers where loans not owned by Fannie Mae or Freddie Mac).

The statute directs FHFA to “encourage the servicers” and consider “net present value to the taxpayer,” leaving the government with ample discretion regarding the contours of the program and the criteria for loan modifications. The law requires the federal government to establish a program but does not require it to make any determinations or to guarantee benefits to any class of persons. Accordingly, an entitlement to benefits cannot possibly be read into EESA.

The text and legislative history of EESA further demonstrate that Congress did not intend to require the federal government to provide modifications. Legislative history reveals that Congress intended that EESA should *not* require any particular loan modification, and, in fact,

rejected such an approach. For example, Congress turned back the efforts on one representative to adopt language that would mandate loan modifications.⁵

2. Treasury Directives Are Not An Entitlement To Benefits

Plaintiffs' allegations that the guidelines for HAMP modifications create an entitlement also fail as a matter of law. Under the Supplemental Directives issued by Treasury, there are numerous complex factors that could cause a borrower to be ineligible for a HAMP modification. The only other federal court to have addressed this issue held:

regulations promulgated by Treasury for administering the HAMP clearly demonstrate that the Secretary allowed the exercise of some discretion, including calculation of the NPV, to the servicers. The calculation of the NPV is obviously not left to the servicers' unfettered discretion; the Treasury Guidelines' language circumscribing the extent of the servicers' discretion to define some elements of the NPV calculation is not alone sufficient to create a property interest in light of the broad discretion afforded to servicers in the modification process.

Williams, 2009 WL 3757380, at *5 (citations omitted).

As the *Williams* court noted, under the Treasury Directives, servicers with large servicing books are permitted to customize their determination of whether the "net present value" of the modified loan would be positive for the taxpayer. Ex. A at 4. Furthermore, the Supplemental Directives acknowledge that servicer modifications will "likely vary even when borrowers'

⁵ Congresswoman Jackson-Lee stated:

[I]n Section 109, which addresses "foreclosure mitigation efforts," the language should be changed from "shall encourage" to "shall require" to provide stronger relief for Americans. Specifically, current section 109(a) states in pertinent part that "the Secretary shall implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages . . . to minimize foreclosures." I believe if the true intent is to bailout "Main Street," the Secretary should be *required* to minimize foreclosures.

154 Cong. Rec. H10702-06 (2008), 2008 WL 4449105, at *H10708. Congress refused to adopt Representative Jackson-Lee's proposal to use mandatory language. *See also id.* at H10712-02, 2008 WL 4449108, at *H10791 (statement of Rep. Udall) ("I believe we *could* have added provisions that . . . *required* the government to help responsible homeowners refinance their mortgages . . .") (emphasis added); *Williams*, 2009 WL 3757380, at *6 n5.

circumstances appear to be similar.” See Home Affordable Modification Program Net Present Value (NPV) Model Specifications (June 11, 2009) at 3, (Ex. C). Because modification determinations are complex, individualized, and vary from servicer to servicer, HAMP is not an entitlement. *Town of Castle Rock, Colo.*, 545 U.S. at 756 (“[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”).

B. The Procedures Already In Place Satisfy Due Process Under *Mathews*

Assuming *arguendo* that Plaintiffs are entitled to some degree of notice in connection with a denial of their application for a loan modification, the procedures already in place in the HAMP program are more than constitutionally sufficient. The legal framework established to test the sufficiency of the process due in a given situation requires consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The requirements of due process are “flexible and call[] for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Plaintiffs’ Complaint fails to demonstrate that the process Plaintiffs demand is required under *Mathews*. Plaintiffs assert that they are entitled to notice of the basis for a decision and an opportunity to appeal. See, e.g., Complaint ¶¶ 7-9, 117-18, 163, 170-72, 179-81. But the procedures *already in place* under HAMP to protect against an erroneous deprivation of property are sufficient as a matter of law. Directives already instruct private servicers to provide borrowers with written notice if borrowers who qualify for a Trial Period Plan are determined to

be ineligible due to income verification. *See* Ex. A at 18. Furthermore, Plaintiffs admit that “participating servicers are now required to report denial codes to Fannie Mae and to provide written notice to Borrowers setting forth some of the grounds for their denial.” Complaint. at ¶ 149. Plaintiffs’ demand for a right to appeal also fails because “[t]here is, of course, no constitutional right to an appeal.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

The Supreme Court has acknowledged that “the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard.” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320-21 (1985). Plaintiffs’ limited allegations demonstrate no significant risk of erroneous denials under HAMP. However, as noted above, it is nearly certain that the additional procedures that Plaintiffs seek will entail an enormous cost to society. HAMP is working to address the foreclosure crisis by modifying the mortgages of *3 million to 4 million* borrowers by December 31, 2012. There is a significant possibility that the burdensome and unnecessary procedures demanded by Plaintiffs will ultimately cause *more* foreclosures by drastically impeding the application process.

C. Plaintiffs Fail To Allege That FHFA, Or Any Government Actor, Deprived Them Of Property

The Fifth Amendment applies to and restricts “only the Federal Government and not private persons.” *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 461 (1952). Accordingly, in situations of purely private conduct, the Constitution provides no due process protection, “no matter how unfair that conduct may be.” *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988) (applying due process clause of the Fourteenth Amendment). Thus, to state a claim upon which relief can be granted, Plaintiffs must show “a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter

may be fairly treated as that of the [government] itself.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

Plaintiffs fail to allege that any government actor deprived them of their alleged property interest in a HAMP modification. Plaintiffs admit that private servicers make the determinations regarding Plaintiffs’ applications for HAMP modifications, *see, e.g.*, Complaint ¶¶ 36-41, and that private mortgage servicers denied Plaintiffs’ applications for modifications, *see* Complaint ¶¶ 62, 73, 90, 104. Because private actors, and not any state actor, make the determinations that allegedly deprived Plaintiffs of their supposed property interest in a HAMP modification, constitutional due process is not required. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (“[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor”); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (focusing analysis of state action on “the specific conduct of which the plaintiff complains”).

The Supreme Court has held that the government is “responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Blum*, 457 U.S. at 1004. Plaintiffs make no allegation whatsoever that FHFA or Treasury exercise coercive power over the servicers in individual HAMP modification determinations, or otherwise act in such a way as to provide encouragement that dictates a choice in favor or against any individual HAMP modification.

Because Plaintiffs fail to allege that any government actor had any role in determinations denying their applications for HAMP modifications, they fail to satisfy the “state actor” requirement for an actionable constitutional due process claim.

CERTIFICATE OF SERVICE
No. 1:09-cv-02100-HHK

I hereby certify that, on January 25, 2010, I electronically filed the foregoing MOTION OF EDWARD DEMARCO TO DISMISS THE PLAINTIFF'S CLASS ACTION COMPLAINT via the Court's CM/ECF system. Pursuant to LCvR 5.4(d)(1), participants in the case who are registered CM/ECF users will be served by the Court's CM/ECF system.

DATED: January 25, 2010

ARNOLD & PORTER LLP

By: /s/ David D. Fauvre
DAVID D. FAUVRE

*Attorney for Edward DeMarco, in his
capacity as Acting Director,
Federal Housing Finance Agency*